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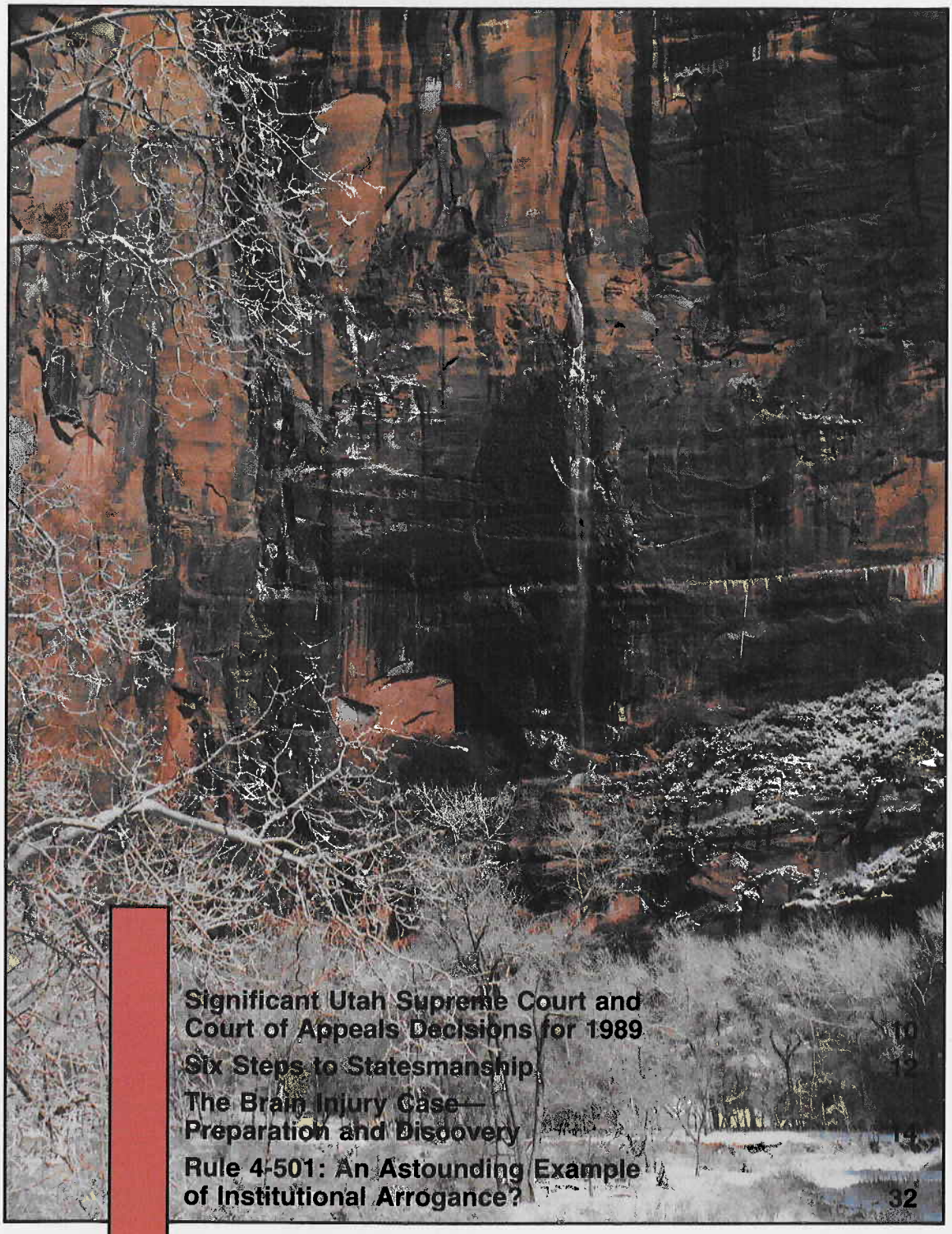

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COVER: Our thanks to Anthony W. Schofield of Ray, Quinney & Nebeker for the cover photograph of Zion National Park, taken March 3, 1989.

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

LETTERS

Editor's Note: Following are two additional letters received in response to former Colorado Governor Lamm's comments about the legal system and lawyers, published in the November 1989 issue of the *Journal.*

Dear Editor:

I share Richard Lamm's concern about our overly litigious society and the impact this may have on the United States' ability to compete in the international marketplace. However, I do not share his optimism about solutions.

Lamm suggests that if we modify some of our present rules of litigation, we can bring the U.S. in line with Western Europe and Japan and be competitive and efficient. In my view, however, the primary cause of our litigiousness is not the rules we employ but the character of our society. Our justice system is no more litigious than our society and lawyers are no more adversarial than their clients.

In contrast to the other industrialized nations, the U.S. is young, heterogeneous and strongly emphasizes individualism over collective or social consciousness. Regardless of the rules governing conflicts, our national character traits will continue to produce more disputes and fewer amicable solutions. Our record on crime and violence and inability to implement meaningful gun control underscores this fact.

However, this is not to say that Lamm's suggested solutions should be rejected. We may adopt them while recognizing they are palliatives not panaceas.

For example, a prevailing party attorneys' fee provision is a good idea. It ups the stakes for clients and should discourage cases which are litigated primarily because of a party's wealth as opposed to the merits of the action. Clients may give greater attention to pre-litigation settlement or to using less adversarial methods of dispute resolution such as mediation.

Lamm suggests that damage awards be restricted. I would eliminate punitive damages and eliminate or greatly restrict damages for pain and suffering. Such changes might reduce the "lottery" effect of our judicial system and might encourage earlier settlements by reducing the uncertainty about potential recovery.

Another positive change would occur if judges and legislatures curbed their tendencies to create new causes of action for individuals. The statement that "hard facts make bad law" continues to prove true. Too often legislators or judges presented with a set of particularly sympathetic facts will create a right of action designed to solve that particular problem. Overlooked, however, are the consequences that new right will have for persons whom the legislature or court did not have in mind. As an attorney who represents employers, I have observed this phenomenon on many occasions. Influenced largely by isolated cases involving egregious conduct by a few employers, implied contract and tort causes of action have sprung up all over the country, seriously eroding, if not altogether eliminating, the traditional "at will" doctrine. State and federal legislatures have also joined in this activity by creating numerous statutory causes of action for employees.

No doubt justice has been done in individual cases such as where an employee successfully sues his employer after being fired for refusing to commit a crime at his boss's behest. However, causes of action which enable such an employee to seek justice also have the effect of increasing the cost of enforcing discipline in the workplace. California employers have suffered greatly from the existence of the many common law and statutory rights available to California employees who disagree with their managers' decisions. My experience suggests that most employers are rational profit maximizers, meaning they usually fire bad employees not good ones. As a result, it most often is the inefficient or unproductive employee who asserts these new rights and who contributes most substantially to the increased cost of managing a workforce and making it competitive.

No doubt the solutions advocated by Lamm will result in some injustice at the margins of our society. Some people will be wronged without having an adequate remedy. Nevertheless, I think we have tended in the U.S. to overemphasize the margins without giving adequate attention to what is between them, i.e., the vast majority of Americans who, for example, are much less likely to be hurt by an arbitrary employer who fires them for no cause, than by a sharp decline in their standard of living or job loss resulting from our country's inability to compete for goods and services in the international marketplace.

Some may think these suggestions draconian and that they will accelerate the "rich get richer" trend of the Reagan era. However, as often as not, the person or party at the margin aided by the court or legislature's creativity is not part of society's underprivileged or underrepresented class. Rather, they are persons of status or circumstances with whom middle-class judges and legislators most easily identify, e.g., discharged corporate executives as opposed to minimum wage workers. Also, the people benefiting most from the creation of new causes of action and expansion in available damages are lawyers—a group which, if overly blamed for society's ills, is hardly underprivileged or underrepresented.

In short, with the frontier conquered, and with the demise of imperialism and colonialism, it now may be time for our society in general and our legal system in particular to change their basis for decision-making. We need to place more emphasis on utilitarian ideals of maximizing the greatest good for the greatest number of persons and less on upholding the rights of the individual without regard to cost or consequence.

Jathan W. Ganove

Dear Editors:

Former Colorado Governor Richard Lamm, in his editorial, laments that the U.S. legal system (and litigation in particular) "is a form of economic cancer." Moreover, he asserts that the "legal system is draining talent from our society that is desperately needed elsewhere."

It must be remembered that former Governor Lamm has a penchant for publicly espousing unorthodox views on controversial current issues. You may recall public outrage several years ago at his statement that older people have a duty to die.

Actually, I wholeheartedly endorse most of his recommended solutions. They would improve our legal system and reduce economic costs to society. The problem is that the solutions he recommends do not seem to be related to the problems he describes—that of too many lawyers.

In fact, the entire editorial is full of unsubstantiated claims, false premises and illogical reasoning. For example:

1. He points out that the U.S. has 2½ times as many lawyers per capita as Britain and 25 times as many as Japan. I suspect that these ratios are not substantially different than 20 years ago or 40 years ago—when the U.S. was the sole economic power in the world. Our higher percentage of lawyers then did not create economic catastrophe—so why does he think it will now? If his objective was to demonstrate that lawyers were destroying the economy, he would need to show a relationship over time; that over 20 or 40 years, the percentage of U.S. lawyers increased faster than other countries *and* that those countries developed better economics*and* that the large number of lawyers in the U.S. was responsible for our poor economics.

He has failed to demonstrate any causal relationship—nor can he.

2. The editorial wants us to believe that the fact that the U.S. has 25 times as many lawyers per capita as Japan is proof that lawyers are the cause of U.S. economic ills (rather than the deficit, savings rates, aging factories, etc.). If the high percentage of lawyers is truly the cause of economic problems, then Ethiopia, Bangladesh, Cambodia, Nepal and Albania must all be world economic powers because I imagine they have similar percentages of lawyers as Japan—perhaps fewer.

3. The fact that with 5 percent of the world's population, we have 70 percent of the world's lawyers is urged as proof that we have economic cancer. I am sorry, but I fail to see the connection. We also have 70 percent of the McDonald's restaurants and 70 percent of the Domino's Pizza outlets. Why aren't they also proof of the economic cancer.

4. The editorial opens with wonderful praise of efficient economics and competitiveness; hallmarks of our free enterprise system. He goes on to say the legal system is draining talent from society that is needed elsewhere.

I don't understand. I thought our free enterprise, capitalistic system was based on the premise that, because of the law of supply and demand, people would be induced into all needed sectors of our society. But now, Lamm says the talent is needed elsewhere. If the economy needed that talent elsewhere (demand), would not salaries rise until a sufficient number of employees responded (supply)? Why is he advocating artificial intervention in the economy to keep it free and competitive?

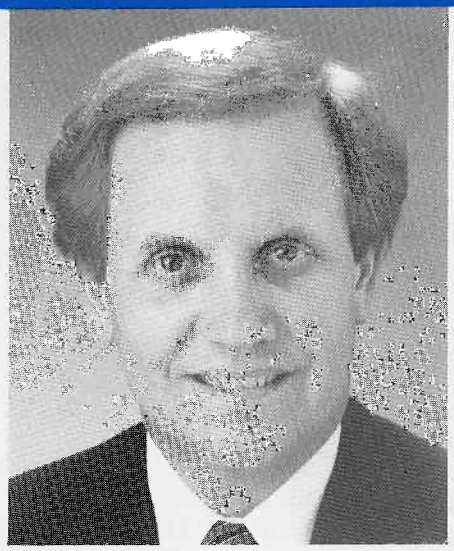
5. Mr. Lamm avers that the growth of lawyers threatens capitalism and democracy. He goes on to explain that wealth will not flow to the nation with the most lawyers.

These claims lack any substantiation or logic. Over the past 40 years, the U.S. has been the unquestioned leader in wealth, capitalism and democracy. At the same time, the U.S. has had the greatest number of lawyers. I fail to understand how Lamm suddenly wants to blame lawyers for all of our economic ills.

Despite these flaws in analysis and logic, former Governor Lamm may have actually proved his point. He argues that there are too many lawyers. If we, as lawyers, cannot prove our views by logic, verifiable facts and compelling persuasion, our clients are not well served. Such lawyers are not fulfilling their duties toward their clients. Some of these should not be lawyers.

Governor Lamm, if you feel there are too many lawyers and that this is the cause of our economic ills, you should demonstrate the strength of your convictions by surrendering your law license. As for me, I will work to ensure that the laws are enforced, that citizens have an adequate system of dispute resolution that they do trust and that improvements are made in the system. But, I will not do away with the system.

Wayne Klein
Boise, Idaho



Lawyer Discipline in Utah—How it Compares With Discipline Imposed on Other Professions

By Hans Q. Chamberlain

Lawyer discipline is always a source of conversation and inquiry. Lawyers and non-lawyers often fail to understand the system itself, and also fail to realize the amount of discipline processed by the Office of Bar Counsel.

Back in 1984, the Honorable Stephen H. Anderson, then President of the Bar, presented a summary of lawyer discipline for the previous 20 years, and compared it with the amount of discipline imposed by the Department of Business Regulation who licensed doctors and CPAs. Expressed in ratio, his 1984 comparison between doctors and lawyers showed lawyers being disciplined by their own ranks at a rate 25 times greater than discipline imposed on doctors by the Department of Business Regulation.

I thought it appropriate to obtain current data and provide you with a summary of what the statistics show from 1984 through 1989. Before I give you my findings, it should be noted that in 1989, there were approximately 5,000 lawyers licensed in Utah, 4,575 physicians and 2,238 accountants. Based on figures I have been able to obtain from past years, the difference in number of members in each profession has remained fairly constant.

Based on the information provided to me by the Department of Commerce, Division of Occupational and Professional Licensing and the Office of Bar Counsel, the following statistics are interesting:

1984 through 1989

Profession	Total Number Disciplined
Lawyers	360
Physicians	69
Accountants	16

By way of comparison, for the 10-year period 1971 through 1980, 236 lawyers were disciplined, 19 physicians and 17 accountants.

The recent figures compiled since 1984 confirm the statement made by President Stephen Anderson in his 1984 message:

> "These figures confirm a high level of disciplinary oversight activity where lawyers are concerned, and suggest that discipline administered through another regulatory authority would not be as effective as the present system."

I don't mean to imply that the disciplinary system should not be carefully scrutinized with appropriate changes made when needed. The Supreme Court Advisory Committee on the Rules of Professional Conduct, currently chaired by Darwin Hansen, is in the process of making recommendations to the Supreme Court for changes it deems necessary based on its ongoing study and evaluation.

On a national level, the Commission on Evaluation of Disciplinary Enforcement was established at the American Bar Association 1989 Mid-Year Meeting to undertake a comprehensive, nationwide re-evaluation of lawyer disciplinary enforcement systems. That Commission is conducting surveys, researching existing materials, planning for regional public hearings and is soliciting lawyer and non-lawyer views about deficiencies and strengths in the existing disciplinary procedures and recommendations for improvement. Written comments to the ABA Committee are welcomed and you may even request a personal appearance at one of the public hearings. If you are interested, please contact Charlotte (Becky) Stretch, Special Counsel to the Commission, ABA Commission on Evaluation of Disciplinary Enforcement, 750 N. Lake Shore Drive, Chicago, IL 60611, telephone (312) 988-5297.

The disciplinary process of the Utah State Bar is not without significant cost. The budget for the Office of Bar Counsel for fiscal year 1989-90 is $207,560. This figure does not include expense for office space, accounting services and other indirect costs provided separately by the Bar. By way of comparison, discipline in 1960 cost the Bar

$13,452 and $95,728 for fiscal year 1982-83. As the Utah Bar continues to grow, we must expect that additional financial demands will be made on Bar resources to support an effective disciplinary system. As an example, in September 1989, the Bar hired a third full-time lawyer to assist in the increasing demands on Bar Counsel and staff.

The cost to operate the Bar's disciplinary system would be increased by at least $200,000 annually if it were not for the thousands of hours contributed by lawyers and non-lawyer members of the community. Bar staff estimates that lawyers contribute approximately 250 hours per month on screening and disciplinary panels. Calculated at the modest rate of $75 per hour, this totals $225,000 per year. Furthermore, it does not include any figure for time spent by non-lawyer volunteers who sit on the screening and disciplinary hearing panels.

The Bar's disciplinary system is a system that works. Safeguards are in place to make appropriate changes as needed. I tip my hat to both lawyers and non-lawyers who serve on screening and disciplinary panels for their commitment and valuable contribution in performing this significant public service.

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

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

'The Federal Judiciary In Utah'

by Clifford Ashton

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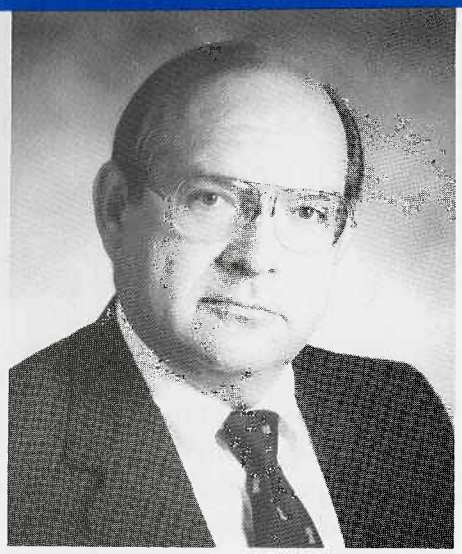
COMMISSIONER'S REPORT



By James Z. Davis

Dear Colleague:

The Bar Commission and staff have received numerous inquiries concerning the financial condition of the Bar, the proposed change in the dues collection cycle (which is currently before the Supreme Court) and projected requirements necessary to maintain a healthy, viable association. Unfortunately, some of the information heretofore provided has been inadequate. Members of the Bar Commission and Bar staff have spent many hours studying the financial status of the Bar from both a historical and current perspective, and are in the process of making plans for the future. The Commission's preliminary conclusion is that current Bar revenue is inadequate to cover future Bar expenses and programs at present or even reduced levels. In addition, the Bar is faced with its share of the mortgage obligation on the Law and Justice Center.

As a result of the foregoing difficulties, the Bar Commission has considered two proposals to meet the present and future obligations of the Bar. First, as you know, the Bar has petitioned the Supreme Court to coordinate the dues collection cycle with the fiscal year of the Bar by accelerating the dues cycle by six months. This will enable the Bar to avoid short-term borrowing and will improve fiscal control and accountability. Secondly, the Commission is considering a petition to the Supreme Court requesting a dues increase.

While these proposals may be somewhat controversial, the Commission is persuaded that they are necessary. Of course, before the Court approves either one or both of the foregoing proposals, all of our members will have an opportunity to provide input to both the Bar Commision and the Court.

Historically, the Bar has had a licensing cycle based on the calendar year and an operating cycle based on a fiscal year beginning July 1. The effect has been that dues are collected halfway through the operating year for which such dues are budgeted. Dues account for approximately 90 percent of Bar revenues. In recent years, the Bar has borrowed increasing amounts of money each year to fund operations until dues revenues were received. This occurred as the Bar invested its reserves in the Law and Justice Center and when expenses exceeded available revenues. For example, during fiscal year 1989-90, the Bar borrowed over $500,000 for this purpose (approximately one-half of its annual operating expense). To correct the problem, the Bar Commission has proposed changing the dues and licensing cycle to coincide with the Bar's fiscal year which will enable the Bar to avoid short-term borrowing to fund current programs and operations. The Bar's accounting staff estimated that the change will not only result in the elimination of the aforesaid operating deficit, but will generate approximately $40,000 in additional operating funds represented by interest savings on borrowed funds and interest income on funds available for investment. Obviously, this change would require payment of Bar dues twice in the 1990 calendar year only; however, each cycle's revenue will be used to fund only one year of Bar operations.

The Commission is also analyzing the impact of the proposed recycling on existing rules, statutes and practices, new members of the Bar, those changing membership status and other potential ramifications, and will recommend adjustments where they appear appropriate. The Commission will provide you and the Supreme Court with the results of that analysis.

While the Commission believes a change to coordinate fiscal and operational years is necessary to provide better financial control and savings to the Bar, it will not address the ongoing financial needs of the Bar. The Utah State Bar has experienced dramatic growth in programs and services as well as regulatory activities since 1985, in both numbers and scope. Sections have increased in numbers from 17 to 22, and membership has increased from 3,200 to 4,600. Committees have increased from 27 to 37, with nearly 100 more Bar members serving on them. Bar programs and services have broadened, both in regulatory and in service areas. Other programs and publications have been substantially upgraded. In addition to numerical increases, we have observed significant growth in the scope and complexity of issues and programs addressed by Bar entities and members, reflective of the interests and needs of both Bar members and the larger community.

Bar staff members have increased from 16

full-time and two part-time to 20 full-time and six part-time employees. Those numbers do not, however, adequately address the increase in services rendered by the Bar. For example, most staff are carrying a 30 to 40 percent greater workload than they were two years ago. While some of the increased burden is related to demands of the Law and Justice Center, most is directly tied to increased demands of Bar programs and services, particularly in regulatory and financial areas.

Bar budgets over the last several years were based on projections and assumptions that have proven to be inaccurate in some respects. For example, the growth rate of Bar membership has decreased since the early 1980s, resulting in a proportionate decrease in anticipated dues revenue. Also, fundraising for the Law and Justice Center was not as successful as hoped, resulting in a greater ownership interest in the Bar together with a commensurate greater obligation of the Bar for the cost of the Center. Notwithstanding that, the Center has and will continue to prove a sound investment of Bar funds, particularly when compared with the cost of leasing space for Bar operation in a convenient Salt Lake City location. The Bar is now obligated, together with the Law and Justice entity, for the payment of approximately $1.5 million secured by the Center over the next 13 years. Beginning in July 1990, monthly payments necessary to amortize that obligation must be paid out of the annual budgets of the Bar. Other increased expenses include the cost to maintain discipline and other regulatory functions and litigation defense costs, as are periodically detailed in the *Bar Journal.* Much of the foregoing information became available only after completion of the Center and as costs of maintaining and operating the building developed a reliable history. As that information became available, the Bar Commission cut proposed expenditures from the 1989-90 budget by $80,000 in order to achieve a balanced operating budget. However, that budget did not include debt service, reserves, nor a depreciation account.

At the Commission's direction, Bar staff is currently preparing several different projected zero deficit budgets for future years based on various assumptions concerning specific levels of dues increases or no increases and resulting designated cuts in Bar programs at every level. When these proposals are completed, they will be available to all interested Bar members. In that regard, the Commission has adopted policies to make members more aware of the budget process and encourage their participation. As always, the Bar Commission and staff invite your questions, observations and suggestions.

The Utah State Bar is one of the most highly regarded and innovative bar associations in the United States, regardless of size. Notwithstanding growth and other projections made several years ago that turned out to be erroneous, Bar funds have been wisely and judiciously invested and expended, and will inure to the long-term benefit of the Bar. In the meantime, as the Bar addresses the problems discussed herein, the ongoing support of its members is more critical than ever.

Significant Utah Supreme Court and Court of Appeals Decisions for 1989

Remarks of Justice Michael Zimmerman, Utah Supreme Court, and Judge Gregory Orme, Utah Court of Appeals, given at the January 1990 Salt Lake County Bar Luncheon
Reported by Clark R. Nielsen

Over 400 attorneys gathered at the January Salt Lake County Bar Luncheon to hear two prominent judges, Justice Michael Zimmerman, Utah Supreme Court, and Judge Greg Orme, Utah Court of Appeals, review significant 1989 appellate decisions. The Marriott Hotel's banquet facilities were packed not only because of the vital topics discussed, but also because of the advent of mandatory CLE as a January 1, 1990 (lawyers in attendance received one hour of CLE credit).

Justice Zimmerman and Judge Orme were introduced by Salt Lake County Bar President Judith M. Billings, also an appeals court judge. With a smile, she cautioned Bar practitioners that the holding in opinions by Justice Zimmerman are most likely found in his footnotes. Justice Zimmerman and Judge Orme spent the next hour discussing 1989 cases felt by their courts to be the most significant. Other cases were identified in handouts, but were not discussed because of time limitations.

In a preface to his case comments, Justice Zimmerman added that 1989 was a busy year in the Supreme Court's effort to cut delay and the number of cases under submission. "Things are getting better," he said. "We are now more selective of our cases in areas we want to write in."

In 1989, Supreme Court cases selected by the Justices and compiled by Justice Zimmerman in general areas of law are:

COMMERCIAL LAW

Cottam v. Heppner, 777 P.2d 468 (availability of deficiency judgment after an article 9 sale of secured property).

Guardian State Bank v. Stangl, 778 P.2d 1 (liability on promissory note).

CONSTITUTIONAL LAW

These cases indicate a continuing trend by the court to apply constitutional provisions to resolve issues arising out of "economic legislation." Justice Zimmerman observed that when a fundamental right is affronted, the burden of persuasion is on the legislation proponent and not its challenger. Our Utah equal protection test, as applied in these cases, appears more stringent than federal criteria.

Blue Cross and Blue Shield v. State, 779 P.2d 634 (constitutionality of premium tax).

Condemarin v. University Hospital, 779 P.2d 348 (constitutionality of recovery limits statutes).

Horton v. Goldminer's Daughter, 118 Utah Adv. Rep. 37. *Valley Water Beds v. Herm Hughes & Sons,* 118 Utah Adv. Rep. 37 (constitutionality of architect's and builder's statute of repose).

CONTRACT

Allen Steele v. Crossroads Plaza, 119 Utah Adv. Rep. 6 (breach of warranty involving "design/build" contract).

Slusher v. Ospital, 777 P.2d 437 ("Mary Carter agreements"—although in this case such an agreement was not involved).

CRIMINAL LAW

Hurst v. Cook, 777 P.2d 1029 (habeas corpus).

State v. Albretsen, 120 Utah Adv. Rep. 16 (admission of mug shots into evidence).

State v. Bell, 122 Utah Adv. Rep. 7 (mens rea in second degree felony murder).

State v. Bruce, 779 P.2d 646 (Utah Rule of Evidence 609(a), applied to settle some disagreement in the Court of Appeals as to what was a crime of dishonest or false statement).

State v. Bullock, 119 Utah Adv. Rep. 32 (admission of child sex abuse victim's out of court statements).

State v. Cantu, 778 P.2d 517 (discriminatory use of pre-emptory challenge).

State v. Copeland, 765 P.2d 1266 (equal protection challenge to child sex abuse statute).

State v. Featherson, 781 P.2d 424 (admission of prior bad conduct evidence).

State v. Florez, 777 P.2d 452 (bifurcated trial for consideration of evaluation of second to first degree murder); *see also State v. James,* 767 P.2d 549; *State v. Gardner,* 101 Utah Adv. Rep. 3.

State v. Lenaburg, 781 P.2d 432 (admission of videotaped testimony under §76-5-422 of the Utah Code).

State v. Nelson, 777 P.2d 479 (statement eligible for admission under Utah Rule of Evidence 803(24)).

State v. Schlosser, 774 P.2d 254 (mens rea for second degree murder).

State v. Strain, 779 P.2d 221 (voluntariness of guilty plea).

State v. Thomas, 777 P.2d 445 (excited utterance exception to hearsay rule).

State v. Verde, 770 P.2d 116 (definition of "harmful error"). More attorneys need to address the issue of whether an alleged error is or is not harmless or plain error. "Manifest injustice" equates to "plain error".

State v. Tuttle, 780 P.2d 1023 (admission of hypnotically enhanced testimony).

State v. Rimmasch, 775 P.2d 388 (admission of expert witness testimony in child abuse case). The implication to civil cases is that under Rule 702, the *Frye* test has not been abolished but the testimony must ring inherently reliable. In distinguishing between "hard scientific" evidence and social scientific opinion, a foundation of evidence should consider: Is the opinion adequately supported by science? By credibility? The court feels that attorneys should become more knowledgeable in scientific and pseudo scientific fields.

EMPLOYMENT LAW

Berube v. Fashion Centre, Ltd., 771 P.2d 1033; *Caldwell v. Ford, Bacon & Davis Utah, Inc.,* 777 P.2d 483; *Lowe v. Sorenson,* 779 P.2d 669 (wrongful discharge).

Pate v. Marathon Steel, 777 P.2d 428 (civil claim versus workers' compensation). Compare with *Lantz v. Nat'l. Semiconductor,* 775 P.2d 937 (Utah Ct. App. 1989).

FAMILY LAW

Elmer v. Elmer, 776 P.2d 559 (changed circumstances test for child custody). *See*

also Maughn v. Maughn, 770 P.2d 156 (Utah Ct. App. 1989) for a discussion of the "bifurcated test" for modification of custody.

GOVERNMENTAL IMMUNITY

Branam v. Provo School Dist., 780 P.2d 810 (governmental immunity for management of flood waters).

Gillman v. Dept. of Fin. Inst., 782 P.2d 506 (governmental immunity for negligent supervision).

Rocky Mountain Thrift Stores v. Salt Lake City Corp., 123 Utah Adv. Rep. 17 (governmental immunity for flooding).

Williams v. Carbon County Bd. of Educ., 780 P.2d 816 (governmental immunity for flooding).

PROCEDURE

Madsen v. Prudential Fed. Sav. & Loan Ass'n, 767 P.2d 538 (Rule 63(b)—disqualification of trial judge). The issue was not "promptly" raised and timeliness is essential; the judges can't tell you, abstractly, what is a "prompt" objection.

Parry v. Ernst Home Center, 779 P.2d 659 (state jurisdiction over Japanese manufacturer).

PROPERTY LAW

Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618 (determination of whether covenant to make payments to surface owner is personal or one that runs with the land).

Reid v. Mutual of Omaha, 776 P.2d 896 (requirement that landlord mitigate damages). Court adopted a commercial characterization of a lease. It is a contractual relationship and not a conveyancy of property interest.

Staker v. Ainsworth, No. 870166 (filed January 8, 1990) (boundary by acquiescence). Overruling *Halliday v. Cluff* by disregarding the "objective uncertainty" element. *Halliday* has been informally criticized.

REAL ESTATE LAW

McBride v. Carter, 122 Utah Adv. Rep. 3 (per curiam) (interpretation of Real Estate Recovery Fund statute).

Mickelson v. Craigco, 767 P.2d 561 (requirements for verification of notice of mechanic's lien).

First Security v. Banberry Crossing, k 118 Utah Adv. Rep. 47 (trustee's fiduciary duty).

TORT LAW

Birkner v. Salt Lake County, 771 P.2d 1053 (scope of employment, negligent supervision).

Crawford v. Tilley, 780 P.2d 1248 (interpretation of Utah Limitation of Landlord Liability Act).

Feree v. State, 123 Utah Adv. Rep. 3 (state corrections' officers duty of care).

Owens v. Garfield, No. 870026 (Dec. 29, 1989) (state duty of care to unlicensed day care providers).

WATER LAW

Bonham v. Morgan, 102 Utah Adv. Rep. 8 (per curiam) (interpretation of permanent change application statute).

In reviewing his selected Court of Appeals decisions, Judge Orme cautioned that he merely suggested a summarization of the case. His comments are not a definitive statement of the court's holding nor can they substitute for a reading of the opinion. Unfortunately, Judge Orme did not editorialize his views or the views of other court members, but only related the objective factors of each case.

CIVIL

Merkley v. Beaslin, 778 P.2d 16 (Ct. App. 1989). In legal malpractice, the statute of limitations and discovery of a claim.

Sheldon L. Pollack Corp. v. Heritage Mountain Dev. Co., 123 Utah Adv. Rep. 23 (Utah Ct. App. 1989). An architect's mechanic's lien attaches when there is visible, on-site work commenced. A key concern in the issue of material abandonment of a project is whether third parties would be on notice that work on the initial project had ceased.

Webb v. R.O.A. General, Inc., 773 P.2d 834 (Ct. App.), *cert. denied*, 781 P.2d 878 (Utah 1989). Minority shareholder's right to inspect corporate books and records under utah Code Ann. §16-10-47(b) (1987).

Taylor v. Estate of Taylor, 770 P.2d 163 (Utah Ct. App. 1989). Utah Rule of Civil Procedure 11, as amended, supports imposition of sanction, in form of attorney fee award, where plaintiff's attorney failed to investigate validity of a will. Judge Orme cautioned all attorneys to study this decision.

Lantz v. National Semiconductor Corp., 775 P.2d 937 (Utah Ct. App. 1989). Workers' compenstation remedy is exclusive remedy against employer for employees injured at work absent actual intent to injure on part of employer.

Mountain States Broadcasting Co. v. Neale, 776 P.2d 643 (Utah Ct. App. 1989). Who is "prevailing party" in multiple issue litigation for award attorney fees.

Martindale v. Adams, 777 P.2d 514 (Utah Ct. App. 1989). Reduction of uncontroverted reasonable attorney fee.

Zions First National Bank v. Barbara Jensen Interiors, Inc., 781 P.2d 478 (Utah Ct. App. 1989). Sufficiently proved settlement agreement may be enforced, even though not written, unless subject to the statute of frauds.

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Law Offices v. Board of Review, 778 P.2d 21 (Utah Ct. App. 1989). Discharged for "just cause."

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Pro-Benefit Staffing, Inc. v. Board of Review, 775 P.2d 439 (Utah Ct. App. 1989); *Grace Drilling Co. v. Board of Review*, 776 P.2d 63 (Utah Ct. App. 1989). Standards of appellate review under the Utah Administrative Procedures Act ("UAPA").

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CRIMINAL

In re N.H.B., 769 P.2d 844 (Utah Ct. App. 1989). Media's standing to challenge hearing closure but no first amendment right of access to juvenile proceedings.

In re N.H.B., 777 P.2d 487 (Ct. App.), *cert. denied*, 124 Utah Adv. Rep. 68 (1989). Attempt to "recall" juvenile court jurisdiction. *See also State v. Bell*, 122 Utah Adv. Rep. 7 (Nov. 28, 1989); *State in re R.D.S.*, 777 P.2d 532 (Ct. App.), *cert. filed*, 118

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State v. Marshall, 124 Utah Adv. Rep. 60, (Ct. App. 1989). Stopping vehicle for safety violation is not a pretext stop.

State v. One 1979 Pontiac Trans Am, 771 P.2d 682 (Ct. App. 1989). Criminal forfeiture of a vehicle subject to unperfected security interest.

State v. Moritzsky, 771 P.2d 688 (Utah Ct. App. 1989). First Utah appellate case reversing a criminal conviction on ground of ineffective assistance of counsel. *See also, State v. Crestani,* 771 P.2d 1085 (Utah Ct. App. 1989).

Six Steps to Statesmanship

Remarks of Brent D. Ward
to a Luncheon of the Utah Chapter
of the Federal Bar Association
and the Litigation Section
of the Utah State Bar
January 31, 1990

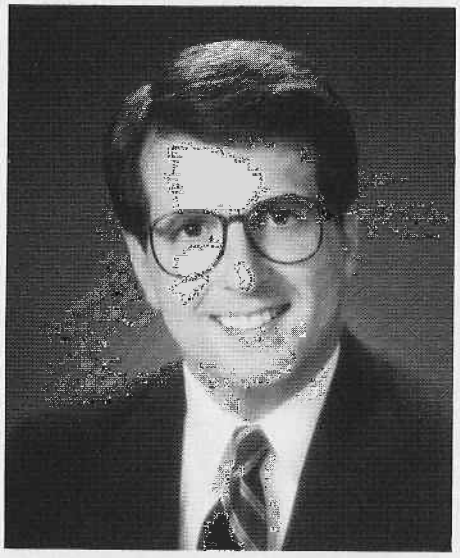
I would like to take this opportunity not to highlight anything we did during my years as U.S. Attorney, but to speak for a few minutes on the subject of public service.

I do so with some trepidation, because I am no authority on the subject. But my experience with some of you, who are true public servants, together with the chance to reflect on the subject during the past year since leaving public office, have given me some thoughts that I would like to share with you.

May I suggest six qualities of the ideal public servant. I call them "Six Steps to Statesmanship." These qualities are rarely found all in one person. They distinguish the ideal public servant from the ordinary public servant. They should be highly prized by us as we choose our leaders in all three branches of government.

1. *Idealism.* In the past, idealism has been the embodiment of the American attitude—the engine that has driven the American experiment. And it has worked! For two centuries, America has been the "land of opportunity." From the four corners of the globe, the restless, the tired, the hungry, the poor came here to begin anew. And many of them found the American dream to be a reality.

Lately, some of the lustre has begun to wear off. In fact, as Ronald Reagan came to the presidency, a rising tide of pessimism was sweeping the country. Whatever shortcomings he may have had, Ronald Reagan was able to galvanize American sentiment in a wave of optimism that gave us some sense of rebirth. Sure, some of this optimism has proved to be unrealistic, but in the words of George Will, perhaps "Reagan's greatest gift to his country has been his soaring sense of possibilities." This is one quality of true statesmanship and an example for all people in public service to follow.



BRENT D. WARD is Senior Vice President and General Counsel for Huntsman Chemical Corporation in Salt Lake City, Utah. From 1981 until February 1989, he served as United States Attorney for Utah with responsibility to enforce federal criminal law and represent agencies of the United States government in court.

Mr. Ward was raised in Salt Lake City, graduating from Highland High School and the University of Utah. At the University of Utah College of Law he earned a scholarship and was Associate Editor of the Utah Law Review.

Mr. Ward currently serves as a member of several statewide task forces and boards working to improve the criminal justice system and give added protection to children. He has published articles in several legal journals.

Brent and his wife, Esther Jane, are the parents of seven children. Among his other interests are the piano and playing the game of squash.

2. *Moral Initiative.* In his book, *Self-Renewal,* John Gardner decried the "'scientific' neutrality or agnosticism with respect to values" that has characterized the twentieth century. He wrote:

> "Many moderns would rather walk barefoot over hot coals then utter an outright expression of moral concern. They have to say it obliquely, mix it with skepticism or humor, or smother it with pessimism. But embarrassment about the expression of moral seriousness is a disease of people far gone in affectation and oversophistication. Unaffected people will regard it as normal to consult their deepest values and to exhibit an allegiance to those values."

The true statesman does not maintain the position of an interested observer when it comes to moral values—a sort of moral *laissez faire.* The real public servant believes in certain moral values, makes moral judgments about events over which he or she has influence, takes a position on those issues in public debate and seeks by word or deed to bring new meaning and vitality to moral striving.

3. *Ambition.* Early in President Reagan's first term his Associate Director of the Office of Personnel Management urged in a news-

paper article that "government should be contect to hire competent people, not the best and the most talented people."

Some members of the business community subscribe to this view on the theory that the abler the government official, the more he will seek to enlarge the sphere of government at the expense of the private sector. To prevent this, they want the machinery of government placed in the hands of unambitious functionaries who will keep the wheels turning, but not interfere with the important work of business.

In response, Elliot L. Richardson, former cabinet member and ambassador, wrote:

> "This simplistic view is diametrically opposed to the interests of business itself. Mere competence will not ensure that government programs fulfill their purposes with the least possible encroachment on the private sector.
>
> "Today's challenge...is to keep the federal government from being totally overwhelmed by the additional tasks that no other level of government is equipped to perform. Among these new demands are cleaning up toxic wastes, ensuring air safety, deterring insider trading, containing terrorism, holding down the escalation of health-care costs, combating the AIDS [epidemic], promoting competitiveness, and fighting drug abuse.
>
> "This is why our nation now needs better motivated, better trained [and] better qualified...public servants than ever before."

This means people of ambition. While it is true that ambition—especially blind ambition—can get in the way of public duties, ambition of the right kind, properly motivated for the public good, wsill serve all of us far better than mere competence. We should seek public servants with high ambition.

4. *Courage of Convictions.* While there are examples of this in our history, they are not plentiful. The common assumption is that, especially among bureaucrats and elected officials, true courage of convictions is rare. I don't know whether this is true or not and I hesitate to judge. It could be that opportunities to exercise this type of courage in matters of consequence are also rare.

One such opportunity came to Senator Edmund Ross of Kansas during the impeachment trial of President Andrew Johnson. When the time came for Ross to vote—a time when his vote was crucial to the outcome—he voted against impeachment, even though his dislike of Johnson was intense. His reason was his sense that more important than the fate of Andrew Johnson was the fate of an independent Chief Executive, which he felt would be irreparably damaged by impeachment based on what he considered insufficient evidence.

Nevertheless, he later wrote that as he cast his vote, he felt as if he were looking down into his open grave, which was hardly an exaggeration. As John F. Kennedy recounted in his book, *Profiles in Courage,* Ross' vote unleashed a firestorm of political abuse the likes of which have rarely been seen in the annals of American politics. For example, a Justice of the Kansas Supreme Court telegraphed him saying "the rope with which Judas Iscariot hanged himself is lost, but Jim Lane's pistol is at your service."

His political career ruined, Edmund Ross returned to Kansas, where he and his family suffered social ostracism, physical attack, and near poverty.

The courage I am talking about is the strength to cast a vote, make a decision, take a stand or speak out inspired by personal conviction knowing that the animosity of enemies, public ignorance and even criticism from friends might make life miserable. It is worth remembering the following statement by Emerson:

> "[W]hen you have chosen your part, abide by it, and do not weakly try to reconcile yourself with the world...If you would serve your brother, because it is fit for you to serve him, do not take back your words when you find that prudent people do not commend you. Adhere to your own act, and congratulate yourself if you have done something strange and extravagant and broken the monotony of a decorous age. It was a high counsel that I once heard given to a young person, 'Always do what you are afraid to do.'"

5. *Respect for the Individual.* This is the ultimate form of self-restraint for a rising star in government who is full of his own authority and determined to make a name for himself.

There is a tendency now that the events that gave birth to our nation have faded from memory and our central government has taken on a life of its own to forget that to be strictly just the authority of government must have the sanction and consent of the governed.

Henry Thoreau wrote that government:

> "Can have no pure right over my person and property but what I concede to it. The progress from an absolute to a limited monarchy, from a limited monarchy to a democracy, is a progress toward a true respect for the individual....There will never be a really free and enlightened State until the State comes to recognize the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly."

And why not? Does not the state exist to serve the individual, rather than the individual serve the state?

6. *Sacrifice.* There must be some noticeable sacrifice involved in taking on public responsibilities or else would be no real statesmen. Sacrifice may come in the form of foregoing other employment opportunities or a cut in pay or other comforts of life. Or it may come in the form of limiting associations and activities. If there is no pain for the servant, there is no gain for the public he or she serves. A certain amount of sacrifice signals a worthiness to receive the public trust that is at the heart of public service. Sacrifice cleanses and consecrates that service. It removes enough self-interest to inspire public confidence.

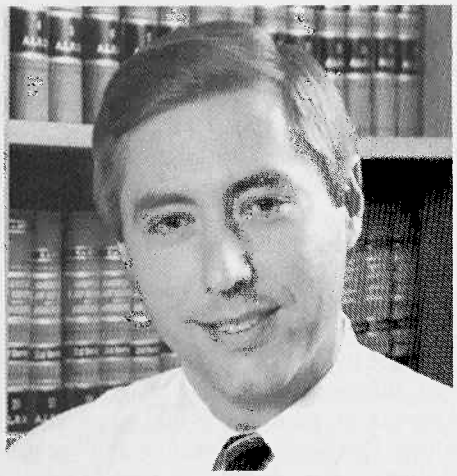
To paraphrase John Gardner, our society "is not like a machine that is created at some point in time and then maintained with a minimum of effort [and sacrifice]." To prosper, our society must continually be recreated through effort and sacrifice by true statesmen. This may strike some as a burdensome responsibility, but it will summon others to greatness.

I hope these "Six Steps to Statemanship" will summon many men and women in America to greatness in the years ahead, which I believe will present the greatest challenges our country has ever faced.

Thank you.

The Brain Injury Case
Preparation and Discovery

By Robert B. Sykes and James D. Vilos



ROBERT B. SYKES, ESQ., is a shareholder in the Salt Lake law firm of Sykes & Vilos, P.C., which handles many plaintiffs' brain injury cases. Mr. Sykes is a member of the Board of Trustees of the Utah Head Injury Association. He served six years in the Utah Legislature.

JAMES D. VILOS, ESQ., is a graduate of the Brigham Young University Law School and currently a shareholder in the Salt Lake law firm of Sykes & Vilos, P.C., which concentrates in personal injury emphasizing brain and spinal cord injury cases. He is licensed to practice in Utah and Alabama.

I. THE STORY

Your client's wife struggles to hold back the tears. She is trying to explain what her husband has been through during the past two years. It's a heart-rending story.

The client, formerly a computer programmer, was on his way to work one morning. Another driver, trying to beat the light, suddenly turned left in front of him. Unable to stop, he broadsided the other vehicle, violently striking his head on the windshield and severely wrenching his neck. The client was unconscious for 7 to 9 minutes and remembers a jostling sensation as the paramedics extricated him from the car. He doesn't remember the impact; he only remembers leaving for work. The past two years have been a nightmare for the client and his family. The story continues.

The ambulance took him to the emergency room of a major hospital in Salt Lake County where he saw a doctor of emergency medicine. The doctor took the client's vital signs and performed a brief physical examination which included a bedside neurological exam. The doctor noted in the chart that the patient was oriented to person, time and place. He noted no signs of "lateralization," or neurological deficits that appear on only one side of the body. The client seemed shaken. Consequently, the doctor asked him to stay in the emergency room for a couple of hours to see how he felt. Later, the client regained his composure somewhat and his wife picked him up. He was discharged from the emergency room about 3 hours and 30 minutes after the accident with instructions to call the doctor if he noted worsening of any symptoms. The client went home and spent the weekend in bed with an extremely sore neck.

The client's medical treatment was frustrating. He eventually got back to work, but was diagnosed as having a C4-5 bulging or herniated disc. The doctors focused their treatment on this problem. His charts did not reflect the client's complaints about classic symptoms of brain injury except for the report of headaches, which the orthopedic surgeon said were a result of the neck injury.

The puzzling part comes with the wife's account of significant changes in her husband since the accident that do not seem to relate to a neck injury. For example, she has noticed serious personality changes with increased irritability, temper control problems, wide mood swings, apathy and depression. A fellow employee and close friend reported numerous job deficiencies that arose after the accident. He seemed, uncharacteristically, unable to "get up and get going" or to organize his day. This eventually resulted in his termination.

Close friends and associates say that the client is not as "sharp" after the accident. His thinking seems slower; he has memory problems; his thinking is inflexible and shallow; he cannot tolerate ordinary family noise; his attention and concentration are shot; and he is often confused. Only dramatic intervention by family and friends has saved the marriage.

The client visited a neurologist, at the request of the insurance company. The doctor performed CT and MRI scans, which were normal. He also visited an orthopedic surgeon in the south part of the valley, at the request of the insurance company. After a cursory 7 to 8 minute examination by the doctor, the client was told his major problem was failure to get enough exercise. The doctor assured him he would have no permanent impairment if he would only follow a proper physical-fitness regimen.

The client and his wife cannot articulate what has happened to them; they simply know that their lives have changed dramatically. These are rather typical complaints in a mild to moderate "closed-head injury" case.[1]

This article identifies some important considerations in handling the typical brain injury case prior to trial. A discussion of trial techniques is reserved for a future article. Our firm does primarily plaintiff's work, so the presentation is substantially from that point of view. However, we hope defense counsel will be able to better understand and evaluate the legitimate brain injury case to the end that justice will be served.

II. UNDERSTANDING BRAIN INJURY: MECHANISM AND SEQUELAE

Brain injury litigation is more complex and detailed than many other types of personal injury litigation. One must, therefore,

have a basic understanding of the mechanism of a brain injury during a traffic accident. Space does not permit a detailed, scientific explanation, but there are a few principles that are helpful to keep in mind.

A. *Sudden Deceleration.* Virtually every traumatic brain injury ("TBI") is a result of sudden deceleration of the head. Impact with a hard object usually, but not always, occurs. Typically, the client's vehicle comes to a sudden stop due to impact, but the body continues to have forward momentum. The head may strike some part of the interior of the car, causing it to stop suddenly. However, the brain inside the skull has momentum of its own. It is surrounded by cerebral spinal fluid which acts as a buffer. On significant impact, the moving mass of the brain pushes the cerebral spinal fluid out of the way, causing the brain to strike the inside of the skull. The process is similar in a rear-end collision except that the brain is static. An object in the car, usually a car seat or head rest, strikes the skull, causing it to accelerate suddenly against the surface of the brain.

Brain tissue is very delicate and easily damaged. Drawings showing the brain standing upright without the support of the skull are misleading. In actuality, brain tissue is a soft mass which neurosurgeons describe as having a consistency like gelatin. At room temperature, and not treated with chemicals, it would partially collapse and mold to a flat surface, not having the traditional shape we think about.

The surface of the upper two halves or lobes of the brain is called the cerebral cortex. This part of the brain is primarily made up of "gray matter" and is responsible for most higher level cognitive functions. Long brain cell nerve fibers known as "axons" connect the gray matter to the brain stem and spinal cord. These cells lie deep within the middle of the brain. Together with other areas of the brain, they make up the "white matter." Scientists believe that the cells of the cerebral cortex communicate with each other and send messages to the spinal cord through the nerve axons of the white matter. Mild and moderate brain injuries often involve microscopic damage to both the cerebral cortex (the gray matter) and the nerve axons in the white matter.

During sudden deceleration or acceleration, forces are exerted upon brain tissue from different directions or angles. For example, in a front-end collision, the head moves in the direction the car was moving until another force acts on it. That other force may come from a seat belt or from striking the steering wheel. As the head catapults forward, it tends to rotate around a point located near the base of the neck. An instant before impact, the person may have rotated his head to the left or to the right. Thus, violent and sudden forces in different planes are exerted upon impact. These planes of forces converge at some point in brain tissue, causing microscopic tears in the tissue. These "shearing forces" can produce extensive axonal tearing in the internal white matter even though there may be little noticeable damage on the surface of the brain. This type of injury almost never shows up as positive on a CT or MRI scan because it is microscopic in nature and far below the sensitivity of those machines (3 to 5mm on average).

It is not always possible to predict accurately the type of injury received in a given accident, even when the location of the blow is known. This is because of the "contra coup" or ricochet effect of the brain in the skull on impact. The brain, with its own momentum, strikes one part of the skull and ricochets back, according to Newton's laws of motion. It then may strike another portion of the skull in a slightly different location and ricochet again. Because of its location, the ricochet injury may be more serious than the initial injury, located in another part of the brain.

> "Brain injury litigation is more complex and detailed than many other types of personal injury litigation."

B. *Types of Damage.* On impact, the brain can receive two basic types of injury: "focal" or "diffuse." Focal damage is a bruise (or a "contusion"). The damage is usually microscopic hemorrhage in the area of impact. This causes rather predictable types of consequences, such as one limb being weaker than the other or a drooping eyelid on one side.

Impact injury may also be "diffuse." Brain cells in the cortex or gray matter of the brain are responsible for the higher cognitive functions such as thinking, processing, concentration, etc. These cells make connections through the "white matter," or the inner portion of the brain. The connecting cells are axons and the connecting points are synapses. In "diffuse axonal injury" (in the literature, "DAI"), the impact is of such force that it damages the axonal connections that allow impulses to travel through the white matter. Disturbance of synaptic connections on a significant basis impairs the higher cognitive processes. It is somewhat like taking a cotton ball and partially, not completely, pulling it apart. You can push the two puffs back together, and the untrained eye would not even notice the difference. Many of the fibers, however, are broken and no longer connect as before. The type of damage described above is classified as "primary" brain damage.

Like most other body tissues, injured brain tissue tends to swell. Microscopic hemorrhages cause this swelling. Additional brain damage resulting from swelling is called "secondary" brain damage. Bleeding in the cranium ("hematoma"), even a small amount, is very serious because the blood has nowhere to go. As mentioned, brain tissue is relatively incompressible. The expansion caused by bleeding crushes surrounding brain tissue, which causes constriction of very small, microscopic vessels. Two important things can occur. As the small (or larger) vessels constrict, the supply of oxygen and glucose to brain tissue is reduced or eliminated. Glucose is the brain's food supply, and brain tissue can exist only a few seconds absent glucose without severe compromise. Oxygen is the brain's "water," and tissue can exist 4 to 6 minutes before the occurrence of cell death. This process was described by Jennett and Teasdale as follows:

> The brain's ability to store glucose is very limited and its store of oxygen is sufficient for only a few seconds' needs; therefore, an incessant supply of both is essential for the continuing function of the brain. Three factors govern the delivery of metabolic substrates to the brain: those factors that determine their concentration in the blood; the rate of cerebral blood flow; and, for glucose at least, the rate of its facilitated diffusion across the blood-brain barrier. After head injury the brain is more likely to suffer from a lack of oxygen than a shortage of glucose. Oxygen supply to the tissues may be restricted as a result of a shortage of glucose. Oxygen supply to the tissues may be restricted as a result of a fall in the flood oxygen content (hypoxemia) or because of impaired tissue prefusion (ischemia), which in turn may be diffuse or focal; often there is a combination of both factors.

Bryan Jennett, M.D., Graham Teasdale, M.R.C.P., *Management of Head Injuries,* University of Glasgow, Scotland, F.A. Davis Co., Philadelphia, 1981, at 45-46.

A second factor causing secondary brain damage is low blood pressure due to traumatic injury, resulting in reduced blood flow to the brain. A third factor might be some type

of obstruction, blocking blood flow to the brain. In either case, the supply of oxygen and glucose is reduced, compromising brain activity and, in some cases, permanently damaging brain tissue.

C. *Determining Deficits.* The attorney should know something about the kinds of problems expected with a brain-injured individual. This helps in evaluating the quality of the case and eventually assessing damages. The deficits sustained by a brain-injured person are called "sequelae." They vary in every case, but often seem to fall in several broad categories. Some deficits frequently seen are:

1. *Physical:* headache, dizziness, balance problems, blurred vision, tinnitus (ringing in the ears), fatigue, etc.
2. *Cognitive problems:* impaired consciousness (either outright loss of consciousness or lowered level of consciousness, i.e., stunned, confused, etc.), memory problems, post-traumatic amnesia (period of incomplete memory for events from time of impact to time of restoration of continuous memory), shortened attention span; concentration problems, mental slowness, etc.
3. *Personality/social problems:* personality changes, wide mood swings, anger, depression, irritability, impulsivity, carelessness, apathy, rigidity, suspiciousness, deterioration of personal grooming and cleanliness, executive function problems (capacity to organize oneself and engage in independent, purposive, self-serving behavior successfully), loss of sense of self, heightened or reduced libido, etc.

In the initial interview and history, you should be able to pick out several of these problems if you have a legitimate brain injury case.

III. EVALUATION OF THE CASE

Brain injury cases are complex, expensive and emotionally draining. You can't help a client who doesn't have a good case. You don't want to make the financial commitment to a questionable case. This section will focus on evaluation techniques that apply primarily in TBI cases.

A. *The Client Interview.* Ask certain, specific, pointed questions in the initial client interview of a potential brain injury case. Determine the mechanism by which a brain injury could occur. Carefully examine the client and witnesses about speed, seat belts and what happened on impact. Oftentimes, you will have to piece this together from police reports, witness statements, etc., because the client won't remember the actual impact (see discussion below).

Ask the client and the client's spouse careful and pointed questions about sequelae (see Part II C above). Every case is different, but there are 3 to 4 frequently seen signs that will help you screen cases. The most commonly reported problem in TBI cases handled by our firm is short-term memory loss. The client has very good memory for events that happened years ago. However, he has a tough time remembering what he went to the store to get. People who know the client well, particularly the spouse, will have noticed these problems. The client will complain about it, and often sees it as *the* major problem.

Headaches are a frequently observed symptom after head trauma. Cervical trauma may also cause headaches. It may be initially impossible for many doctors to differentiate the two types of headaches. However, headaches resulting from central nervous system trauma follow distinct patterns, and will often persist long after ordinary headaches should disappear. Closely aligned with the headaches is the frequent complaint of "tinnitus" or ringing in the ears. These sequelae are two of the most commonly heard physical complaints.

> "The deficits sustained by a brain-injured person are called 'sequelae.' "

An initial, valuable screening device is a set of questions directed toward "post-traumatic amnesia." Typically, the client has no recollection of the actual impact. His or her last recollection before the impact is "driving down the street," with no memory for some time after the impact. You can be assured that your client has sustained some degree of brain damage. Loss of memory for the period prior to impact is "retrograde amnesia." "Anterograde amnesia" is loss of memory for a period after impact. Together, they comprise what is known as post-traumatic amnesia ("PTA"). PTA is a sure and reliable sign of brain injury and the length of PTA aids in assessing the severity of the injury.

Invariably, those close to TBI victims complain of personality changes in the client. Victims are often described as far "more emotional" than before the accident. Irritability is another frequent complaint. A devastating, yet hard to assess, problem is damage to the executive functions, i.e., the capacity to organize one's life and engage in independent purposive activity. Often, a boss or co-worker describes the client as no longer having the "ability to get things done."

B. *The Retainer Agreement.* The attorney should execute a written retainer agreement with the client. Dealing with the brain-injured requires great care because of lack-of-capacity and memory problems. The client may misunderstand things you are telling him or read overly optimistic messages into simple statements.

It is frequently advisable to make further investigation before you irrevocably agree to take on the case. Therefore, the retainer agreement should give you the option of investigating the case and withdrawing if you later determine that it is not meritorious. It should spell out specifically how a fee will be determined if the settlement is structured (which they frequently are in TBI cases).

A careful description of the chance of success should be clearly stated. Types of costs charged in addition to the fee need to be carefully defined. Counsel's responsibility to appeal if the case is tried and lost requires explanation. It should delineate whether or not counsel is also agreeing to pursue Social Security and workers' compensation claims. In short, the agreement should spell out every detail which could be a possible source of confusion or dispute in the TBI case.

C. *Preliminary Investigation.* A careful medical history of the client is extremely important. The client himself may not be, and probably isn't, the best person from whom to get this information. The typical brain-injured client, except in the mildest of cases, has poor insight and organizational abilities. Therefore, without help, the client cannot provide the information in the form in which you need it. We highly recommend that you develop or obtain a detailed client history form. There are several samples in the major treatises on personal injury. You should at least get the name, address and phone number of every medical doctor the client has seen from childhood forward. This is a lot of work, but the defense will likely get the information eventually, and scour it for some evidence of a "pre-existing problem." It is better you get it first and evaluate it.

The medical history should obviously include disclosure of all past health problems. This is very relevant in TBI cases. The form should also require all information pertinent to the client's current condition and problems. Normally the spouse, or some other individual who knows the client well, should provide this information since brain-injured individuals have notoriously poor insight

into their own problems.

D. *Probable Diagnosis.* Oftentimes, the attorney will be able to discern a probable diagnosis by reviewing what limited medical records may be initially available. Although emergency room doctors, internists and family practitioners are notoriously poor diagnosticians on brain injury, they may have charted numerous sequelae (perhaps not recognizing their significance) which can be useful in the screening stage. The client may also see a psychologist, some of whom are very skilled at recognizing and diagnosing TBI.

After completing the above steps, the attorney should be ready to make an initial assessment whether he should take the case and pursue it further. You should obtain all of the medical records before making a final decision to pursue the case with full resources.

IV. ORGANIZING THE FILE AND MEDICAL RECORDS

A. *The File.* Obtaining all the medical, education and employment records is the first order of business in a TBI case. Usually the medical records alone are voluminous. It therefore behooves the attorney to first organize his or her files before they start arriving. Otherwise, these records will quickly overwhelm you and you won't be able to find anything when you need it. As they arrive, you must also be planning to organize them and send them to various experts whom you may be using at a later time.

Very few plaintiffs' attorneys try as many cases as defense counsel. Consequently, defense attorneys generally become more knowledgeable and skilled in many aspects of trial practice. However, plaintiff's counsel can usually spend more time preparing the case, somewhat equalizing the playing field. There is no reason why a properly prepared plaintiff's attorney cannot out-prepare a defense attorney in the average case. Proper organization of the file helps plaintiff's counsel understand the case better. It helps counsel access information more quickly, which is an important arrow in the plaintiff's quiver.

We recommend a pouch system of file organization with pouches labeled essentially as follows:

I. Administrative
II. Pleadings
III. Medical Records and Expert Witness Reports
IV. Plaintiff Witnesses—Medical and Expert
V. Plaintiff Witnesses—General
VI. Defense Witnesses—Medical and Expert
VII. Defense Witnesses—General
VIII. Exhibits—Medical
IX. Exhibits—Non-Medical
X. Medical/Technical Research
XI. Legal Research

Correspondence, accounting materials, releases, notes, etc., go into the Administrative pouch. The Pleadings pouch should have separate files for discovery, as well as certain other types of pleadings. This will depend upon your own personal preference. However, we highly recommend having at least a few categories so you can easily access what you need. This is particularly important for discovery. You will always be able to find these important documents quickly if they are segregated. We also recommend a separate file for "Designations of Witnesses and Exhibits" to provide easy access.

Pouches III, IV and V are critical for accessing important medical and other witness information. As the medical records come in, assign each provider, whether an institution or an individual, a separate file in Pouch III. This file becomes the permanent home for that particular provider's records, and any updates are easily added. If you need to access this information, you know exactly where to go. Don't put any personal notes or "marked-up copies" in these files. They go into Pouch IV or somewhere else. If you have a document production, or if you are comparing records with defense counsel, you can easily determine what each side has. If the records are initially filed correctly, you could allow opposing counsel to examine it at a document production, without a time-consuming prior review by your staff. You won't have to worry about removing notes, correspondence with experts, etc.

> "An important part of your proof in a [traumatic brain injury] case is the difference in the client before and after the injury."

Pouch IV likewise serves a very important role in the preparation of plaintiff's case. This is your medical and expert witness pouch. The separate files in this pouch contain a complete record of all of your dealings with that particular medical provider. Let's say your client has a treating neurologist whose testimony will be critical in the case. He, of course, has medical records (which are in Pouch III). You have also undoubtedly corresponded with him and had several telephone conversations, of which you made extensive notes. Obviously, defendant's counsel is not entitled to any of this. The contacts with this particular witness may have spanned eighteen months or two years by the time trial comes around. You may also have an expert witness report which you underlined extensively. All of this information can be accessed in an instant by pulling the expert's Pouch IV file.

The Pouch V files provide a home for any record of written or oral contact with lay witnesses, who are crucial in brain injury cases. An important part of your proof in a TBI case is the difference in the client before and after the injury. The testimony of several key "neighbor/friend" witnesses proves these crucial differences. The status of your contact with these witnesses is accessed immediately by keeping notes of conversations with them in "their file" in Pouch V. It is the place to keep correspondence with them, notes from depositions, interviews from investigators, deposition digests, etc.

As a general principal, you should have a separate file for any person or provider, whether or not an expert, who may be important for your case. File everything unique to that witness in that folder. Before we started keeping files in this manner, we would often search for correspondence with that particular individual in a two-inch thick correspondence file, which had been put together over eighteen months. It is not only time consuming, but you risk forgetting or missing important information.

Medical exhibit files (Pouch VIII) are very important for the TBI case. It's a good place to collect and segregate critical items like medical bills, ambulance records, paramedic records, deposition exhibits for medical witnesses, etc. Pouch IX is likewise particularly significant in a TBI case. Here you set up multiple files for such items as the accident report, photographs, school records, tax records, employment records, insurance policies, etc. School records, for example, may be pivotal in showing important aspects of the client's pre-morbid condition, such as absence of learning disabilities. Frequently, the defense gloms onto some obscure aspect of the plaintiff's background and miscontrues it to account for current problems. Having these background records allows you to show the true context and provides grist for rebuttal.

Lost earning capacity is frequently at issue. The tax returns are relevant, and should have a separate home. Likewise, the client may have applied for, and been granted, Social Security disability status. You probably have photographs of the scene, the vehicle, etc. Employment records can be an important method of showing some

aspects of pre-morbid condition. All of these types of "non-medical" records deserve separate homes so you can locate them quickly.

B. *Obtaining Medical Records.* Obtaining medical records in the brain injury case is not much different from the average personal injury case. However, there are some important aspects of emphasis and caution. First, the records in the brain injury case are generally far more voluminous. Not only is the client's entire health history at issue, but the client has usually undergone a greater variety and extent of treatment. That's why organization and accessibility are so important.

Releases should be more descriptive than simply an "all medical records" release. Believe it or not, many health care providers don't read "all medical records" as *all* records. Most providers, for example, will *not send* psychiatric or psychological records unless you provide a specific request and authorization. Some will not send lab records (often kept at a separate location) unless a specific request is made. Medical bills are never sent without a specific request directed to the medical billing office.

It is very important that your release and accompanying letter specify that you want *records generated by other providers* or facilities. For example, the client's chart at a major hospital may include consultation reports from various doctors, some of whom may not be on staff. One of the staff doctors may have requested that some other institution send records, and these become an important part of the client's chart. However, be warned that at least one major chain of health care providers in Utah will *not provide* the records of any other health care provider, if generated outside of the hospital owned by that facility, even if your release *or subpoena* specifies "all" records. Worse yet, when you get your client's records, even in response to a subpoena, there is generally no notification that some documents were withheld. Therefore, you may unknowingly assume that you received all the records, when in reality there are important documents still in the files of that particular hospital. This could severely impair your case or defense.[2]

Because of the extensive records in most brain injury cases, those copying the records often take shortcuts. Then there is always the problem of some originals which are "front and back" in the original chart. A 5 to 10 minute check of a large chart can often disclose obvious omissions which can be further investigated and corrected.

C. *Exhibit Notebook.* A mainstay of pretrial preparation in a brain injury case is a good "exhibit notebook." We usually get a three-ring binder with 2½" capacity. Numbered index dividers are available at any office supply house. We then divide the notebook into three or four parts as follows:

Part I Medical and Other Experts
Part II Medical Records—Pre-Accident
Part III Other Historical Records
Part IV Witness Questionnaires/ Letters

We put the important medical records and expert witness reports into Part I, starting with the EMT Incident Report, followed by ambulance reports, the accident report, ER records, etc. An expert witness evaluation goes in Part I of the notebook under a separate tab. Important school records, employment records and the like go in Part III. Part IV contains witness statements, letters, etc. As you prepare the notebook, leave out records that are unlikely to be introduced, or that don't make any difference, such as, perhaps, lab reports, nursing notes, etc. We copy everything in the notebook double-sided to save space, thereby, hopefully avoiding the appearance of a second notebook.

This notebook is slightly duplicative of your Pouch III and IV files (see above), but not really. The notebook should contain only the *important* records, i.e., those that may ultimately be introduced as evidence, or which may contain important opinions of the doctors. Defense IME evaluations also go in the notebook. It should contain your "mark-up" copies of records. It's what you reach for to find out important facts about the case. If properly prepared, it becomes a powerful tool for the brain-injured client.

"Most providers . . . *will not send* psychiatric or psychological records . . . ."

V. EXPERT WITNESSES

In most TBI cases, you will have to locate doctors and psychologists who can treat and evaluate your client. Unfortunately, many physicians and psychologists have not read the latest literature about brain injury. Most doctors recognize obvious brain injury symptoms like coma, paralysis, aphasia, but are not trained to recognize, evaluate or treat more subtle, yet serious, sequelae of TBI. World-renowned experts Bryan Jennett, M.D., and Graham Teasdale, M.R.C.P.T., the developers of the widely used Glasgow Coma Scale, have written about the treating physician who does not understand TBI:

> Our conclusion is that the damage done by, and the symptoms subsequently suffered after, *mild* head injuries are frequently underestimated. Several factors contribute to this. *One is that many of the hospital doctors who deal with mildly injured patients are unfamiliar with recent work in this field, and in any event are not used to dealing with the largely subjective complaints that are the feature of these patients' persisting disability.* On the other hand, those who are accustomed to dealing with severe head injuries are apt to view the mildly concussed patient as fortunate to have escaped serious brain damage—a comparison of little significance to the patient. (Emphasis added).

Jennett and Teasdale, *Management of Head Injuries,* University of Glasgow, Scotland, F.A. Davis & Co., Philadelphia, Pennsylvania, 1981, p. 263.

A. *Where to Get Experts.* There are several simple ways to find experts to help you with your brain injury case. These include doctors and other lawyers; reading books and medical journal articles on brain injury; and attending brain injury seminars.

In Utah there are several hospitals and rehabilitation centers which specialize in treating victims of mild and moderate brain injury. Most of these facilities have intake personnel who can direct you to the right people.

Another way to find experts is to ask other attorneys who have handled brain injury cases. They will not only be able to tell you how knowledgeable an expert is about brain injuries, but they can tell you whether the expert makes a good impression as a witness. A good practitioner is not always an effective witness.

You can also get a good referral from a doctor you know and trust. Your client's treating physician, though perhaps not having expertise in TBI issues, may know another physician or psychologist who does have the necessary expertise.

Another good, though expensive, source of referrals is out-of-state experts who publish or lecture about brain injuries. Reading the head injury literature will help you discover the experts who are top in the field. Retaining such an individual makes a lot of sense if you have a very good case with significant damages. It will also intimidate the defense. If you go this route, be prepared to spend a lot of money going to out-of-state depositions.

In recent years, there have been several seminars for trial lawyers who handle brain

injury cases. Utah had such a seminar in November 1989, sponsored jointly by the Utah Head Injury Association and Utah State Bar. Colorado also had one in April 1989. Another yearly seminar sponsored by the National Head Injury Foundation was scheduled for February 1990 in Scottsdale, Arizona. Many of the speakers at such conferences are potential expert witnesses.

B. *Screening the Witness.* TBI cases are big, expensive cases. You must find out whether your expert witness (who may be the treating doctor) thoroughly understands the field of brain injury. That sounds simple, and you are tempted to say that should be self-evident. It is not. Question the potential expert witness carefully about his understanding of "closed-head organic brain injury." One local neurologist deposed by us a few years ago did not know the significance of Glasgow, Scotland, in the development of research on closed-head organic brain injury.[3]

Your potential expert must understand that it is possible for your client to have permanent disability as a result of a mild or moderate brain injury. Contrary to the vast weight of scientific opinion, some doctors, primarily the older psychiatrists and neurologists, do not believe that mild to moderate brain injury can be permanently disabling. Many of these well-meaning, but uninformed, doctors will refer to mild brain injury as "post concussion syndrome" and state that the effects, though real, are transient and resolve in a few months without permanent damage. These doctors believe that if symptoms persist past six months, the cause is psychological, not organic.

Another area of ignorance among medical professionals, most of whom should know better, concerns the permanency of damage where the CT, MRI and EEG are negative. There are many physicians, generally from among the older school of neurologists and psychiatrists, as well as less informed internists, emergency room doctors and family practitioners, who believe there can be no permanent injury, or that the client simply is not brain-injured, if these so-called "objective tests" are negative. Once again, the notion is false and contrary to the great weight of medical authority on the issue. In fact, there is no credible medical evidence to support those notions. Yet, you will still find learned and respected local doctors who believe them.

C. *The Neuropsychologist.* A neuropsychologist is a clinical psychologist who is trained to find and understand the effects of organic brain damage. Absent positive findings on the MRI or CT scan, neuropsychological testing is usually the only way to pinpoint the location and extent of brain injury. A physician's neurological exam will usually only reveal severe brain damage. In contrast, a neuropsychological test battery consists of several sensitive psychological tests designed to detect subtle abnormalities in brain function. There are built-in cross checks to rule out malingering. In most cases of mild or moderate brain injury, a medical doctor will not be able to diagnose a brain injury without the help of a neuropsychologist.

Generally, every TBI case will require a minimum of one medical doctor, who thoroughly understands brain injuries, and one neuropsychologist. The medical doctor explains the mechanism of TBI, but also, very importantly, validates the importance of the neuropsychologist. Most defense attorneys will attack your neuropsychologist's credentials by getting an admission during cross-examination that he or she is "not a medical doctor." You will eliminate the effect of such cross-examination by having your medical doctor testify that he relies on a neuropsychologist in cases of mild and moderate brain injury.

Traumatic brain injury "cases are big, expensive cases."

VI. BARRIERS IN A MILD OR MODERATE BRAIN INJURY CASE

In every mild or moderate injury case, you must overcome several barriers to achieve a fair settlement or verdict for your client. Space limitations permit only a brief description of some of the important barriers.

A. *"Mr. 'T' Stereotype."* In every TBI case, you deal with the "Mr. 'T' stereotype." Unfortunately for brain-injured plaintiffs, television and movies have mentally programmed the American public, including doctors, lawyers, insurance adjusters and prospective jurors, to believe that a person can be repeatedly knocked unconscious and never suffer permanent disability. For example, if you watch "The A-Team" on television, you know that "B.A.," played by Mr. "T," has a deathly fear of airplanes. Every time the A-Team needs to fly him somewhere, they hit him on the head and knock him out. He usually wakes up in the jungles of South America when the plane is on the ground, ready to "rock and roll." Even though he is knocked unconscious for hours in every other episode, he never suffers a permanent injury. Roy Rogers, John Wayne, Clint Eastwood and other movie heros have also created a stereotype in jurors' minds that the effects of being knocked out are never permanent. Your medical and psychological experts must explain why this stereotype is not accurate.

B. *Looks Normal—"The Walking Wounded."* A person with a seriously-disabling brain injury may look entirely normal to the untrained eye. For this reason, the medical professionals who work with the brain-injured sometimes refer to them as the "walking wounded." Your experts must explain how your client can look so good and yet be so disabled.

Thoroughly and graphically delineate the "abnormal" aspects of the client's condition. Particularly, show how the problems affect the client's day-to-day functioning. Call as witnesses various therapists who have treated the client. Frequently, for example, occupational and speech therapists can provide dramatic testimony on the client's functioning. This can help make theoretical testimony on the mechanics of brain injury come to life by showing how it so adversely and profoundly affects a person's functioning.

C. *No Objective Evidence.* How many times have you heard a defense attorney in a soft-tissue case ask your expert to admit on cross-examination that there is "no objective evidence of injury?" Brain tissue is soft tissue. Only the most severe brain injuries will show up on a CT or MRI. The defense attorney will argue that your neuropsychological testing is subjective in nature and absent MRI or CT evidence you have no objective evidence of injury. Your experts can rebut such claims by explaining the many cross checks in the neuropsychological test battery and how it would be impossible for your client to feign brain injury.

D. *Pre-existing Psychological Problems.* The defense will often attribute your client's problems to pre-existing psychological conditions, or the plaintiff's own inability to cope. Our office frequently encounters a notorious duo of defense experts consisting of a psychiatrist and psychologist who use the MMPI (Minnesota Multiphasic Personality Inventory) to support their argument that the plaintiff's problems are "long standing" and probably pre-existed the accident. This defense team often blatantly ignores evidence on the test that suggests that the client has organic brain damage. You must thoroughly educate yourself about the MMPI and other psychological tests. If you have retained competent experts, they will help you rebut attempts by the defense to use

incomplete information to draw conclusions harmful to your client's case.

E. *The Terms "Mild" and "Minor" "Head" Injury.* Unfortunately for the client, the terms used to classify brain injuries were not chosen with litigation in mind. Most of the medical literature classifies these injuries as severe, moderate and mild (or minor) head injuries. These terms tend to suggest that the injuries are less severe and disabling than they truly are. Your client may be totally disabled as a result of a mild or minor brain injury. Unfortunately, the words "mild" and "minor" will be written all over his medical records giving insurance adjusters, attorneys, jurors and judges the impression that the effects of the injury were mild or minor. Your experts must prepared to explain that "mild head injury" is like a "mild nuclear war:" If only New York and Los Angeles were destroyed in a nuclear war, it would have a profound and devastating effect on the rest of the country because of the financial and communication networks established there. The client's situation is analogous. Although many parts of his brain are spared, important parts are damaged and the whole person is greatly and profoundly affected. Similarly, the term "head" instead of "brain" connotes that the skull rather than the brain was injured. Your experts need to deal with the medical profession's poor choice of words. Otherwise, your verdicts and settlements will always be inadequate.

F. *No Loss of Consciousness.* Frequently, clients have either not lost consciousness or have an ambivalent history of loss of consciousness. Their emergency room records will contain the notations "no LOC" (no loss of consciousness) or "?LOC" (questionable loss of consciousness). Many doctors from the older school claim failure to lose consciousness precludes brain injury. Although loss of consciousness is a frequent finding in brain injury cases, it is not necessary. Jennett and Teasdale have stated:

> *The most consistent characteristic of the brain damage that results from acceleration/deceleration trauma is altered consciousness.* Half a century ago, Symonds suggested that the duration of unconsciousness might be used as a measure of cerebral damage after closed head injuries. Subsequent studies have confirmed that the degree and duration of coma does indeed provide a reliable guide to the severity of the *diffuse* [emphasis in original] brain damage sustained. However, local [emphasis in original] injury *can be extensive and cause focal neurological dysfunction, without there being any loss of consciousness;* the most obvious example is where there is a compound depressed fracture. (Emphasis added except where noted; references omitted).

Jennett and Teasdale at 77.

G. *Low Impact Accident.* Your medical experts need to explain the biomechanics of brain injury. Frequently, the defense will try to show that the accident was a "low impact" accident, a "mere ticking" or "fender bender," etc. Knowledgeable medical professionals will be able to explain "diffuse axonal injury" and how it can occur in a sudden deceleration of a vehicle, even from 10 or 20 mph.

H. *Low Special Damages.* The medical specials in the case may be fairly low. Your experts should be able to explain how low specials have no relevance to the extent of injury sustained, or on the economic impact on your client.[4]

I. *Normal I.Q.* The client may have a "normal" I.Q., and the defense will imply that it indicates no damage to the client. Since most members of a jury are familiar with I.Q., they may tend to equate it as a measure of brain damage. The expert needs to rebut this notion. The plaintiff may have gone back to work or school. The expert needs to detail the limitations and differences that still persist.

"Your client may be totally disabled as a result of a mild or minor brain injury."

J. *Personality Changes.* Damage to personality is "soft," and hard to prove. However, do not overlook the importance of evidence of change in personality. Damage to personality is a persistent problem reported by victims of head injury. The learned literature discusses it extensively. For example, Dr. Harvey Levin, sometimes referred to as the founding father of neuropsychology, indicated one possible physiologic case of mood problems triggered by brain injury:

> Studies of neurochemical alterations following closed head injury suggest that disruption of brain catecholaminergic and cholinergic metabolism by the injury may trigger the onset of marked affective [i.e., mood] symptoms. (References omitted; parenthetical added).

Harvey S. Levin, Ph.D.; Arthur L. Benton, Ph.D.; Robert G. Grossman, M.D., *Neurobehavioral Consequences of Closed Head Injury,* Oxford University Press, 1982, at 177. Jennett and Teasdale also summarize the significance of personality changes, pointing out they are frequently missed by treating doctors:

> More frequent than altered intellectual function are changes in personality; although less readily recorded or measured, these *can be at least as disabling.*
>
> In its more subtle form this may be noticeable only to relatives or close associates, and *unless they are questioned systematically, the doctor may believe that the patient has made a complete recovery.* (Emphasis added).

Jennett and Teasdale, supra at 289, 294. Prove the changes by calling witnesses who knew the client before and after the accident.

VII. SUMMARY

Thorough preparation and planning are crucial for handling of traumatic brain injury cases. If properly prepared, the attorney will either settle the case fairly, or try it effectively if no settlement can be reached. Organization and preparation are the key factors in this process.

[1] The scientific literature on the subject speaks of "head injury" but really means "brain injury," so the later term will be used in this article.

[2] We recently had a pediatric head injury case where a valid release was sent to a major hospital. Since we had taken the deposition of the doctor, we knew of the existence of many additional records. The doctor originally agreed to provide all the records in the file at a later date, some of which were generated by other providers. When we received them, we noted numerous omissions. Defense counsel had sent a subpoena and the important records generated by other providers were also withheld. Had we not taken the deposition, both counsel would have probably missed some important documents. We called the doctor and she referred us to the hospital's attorney, who cited some arcane theory of privacy (even though a signed release for all records was sent). Hospital counsel informed us that he would be happy to provide the names of the other providers, stating "you can get them from those providers if you want them." Plaintiff's and defense counsel joined in an Order to Show Cause against the hospital and the doctor in that case, which got the hospital's attention. Ultimately, the matter was worked out with a lot of extra time and effort, on what should have been a simple process, regarding which the legal rights were clearly spelled out under law. Nevertheless, the policy still exists. Be forewarned.

[3] The world-famous neurosurgeons Bryan Jennett and Graham Teasdale from Glasgow, Scotland, developed, among other things, the Glasgow Coma Scale ("GCS"). The GCS is in use worldwide as a screening device to determine the initial extent of brain injury. Glasgow is a major research center on brain injury.

[4] A concert pianist might sustain a permanent soft tissue injury to a hand and have virtually no medical specials. Yet, it could cause permanent loss of his or her career.

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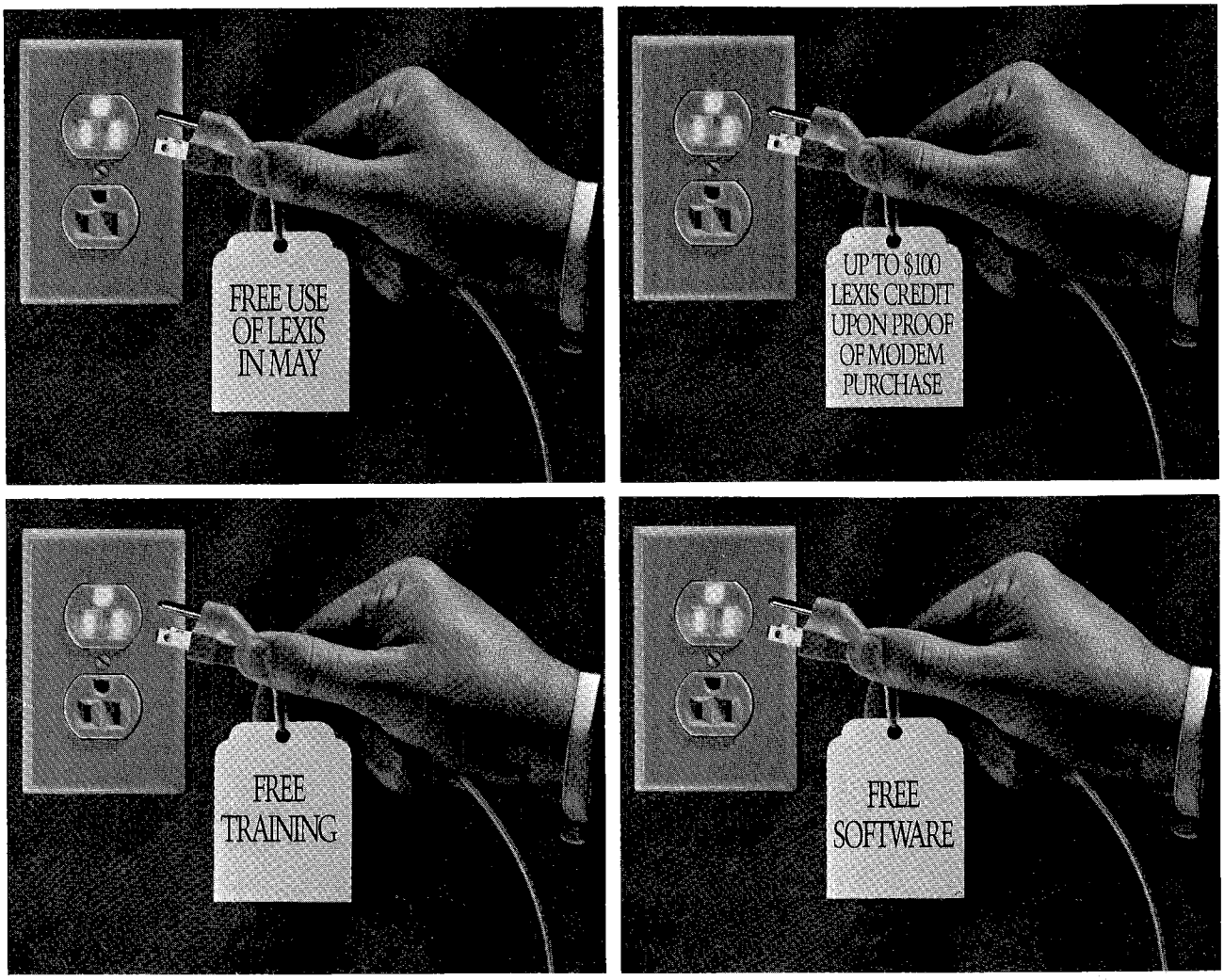

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Bar Commission Highlights

At the regularly scheduled meetings of the Board of Bar Commissioners on December 15 and January 26, the following reports were received and actions taken:

DECEMBER 15, 1989

1. Met with Lawyer Legislators and discussed the upcoming legislative session.

2. Approved the minutes of the November 17 meeting.

3. Received the Executive Committee report and scheduled a special Bar Commission meeting for January 17 to interview final applicants for the position of Bar Counsel.

4. Received the Legislative Affairs Committee report (a separate article setting forth the legislative activity of the Bar will be published in the May issue of the *Bar Journal* along with an application for partial dues rebate).

5. Approved awards to be given at the Mid-Year Meeting.

6. Discussed the financial circumstances of the Bar and the proposals to change the dues cycle.

7. Received report and proposal from Wallace Associates regarding the planning for further subdivision of the remaining undeveloped space in the Law and Justice Center.

8. Received the Executive Director's report on a budget analysis and development process undertaken by a staff task force.

9. Received a report on the upcoming Mid-Year Meeting and discussed future convention sites.

10. Received report from the liaison to the Judicial Council, including a discussion of the judicial compensation legislation and the judicial performance evaluation system. Discussed a proposal for pre-emptory challenge rule.

11. Received the monthly Admissions report, approving the reinstatement of H. Wayne Green and routine MPRE waivers. Appointed James R. Soper to the Bar Examiners Committee to replace Ralph L. Jerman who had resigned from the committee. Considered proposed changes to the rules of admissions.

12. Received the monthly report of the Office of Bar Counsel, approving or otherwise reviewing disciplinary matters as are reported in the *Bar Journal*. Discussed research to be done on a possible attorney's fees and costs rule. Acknowledged the tenure and service of Christine Burdick upon her resignation as Bar Counsel.

13. Received a report and appearance by Michael Martinez for discussion of various concerns of minority lawyers and the need for greater opportunities for Bar involvement by minority lawyers.

14. Received a monthly Budget and Finance report.

15. Discussed pending litigation with counsel.

16. Received the Young Lawyers Section report authorizing fund-raising activities by the section to fund special pamphlets for high school seniors and noting the participation of the section in the Tuesday Night Bar program.

JANUARY 26, 1990

1. Approved with amendments the minutes of the December 15 meeting and a special meeting of the Commission on January 17 called for the purpose of final interviews for Bar Counsel and the hiring of Bar Counsel.

2. Accepted a report on the proposed co-location of the courts and voted to conceptually support co-location of the courts as described in the study.

3. Directed the mailing of notice to Bar members concerning the Bar Commission vacancy for purposes of soliciting applications for appointment to the Bar Commission.

4. Received Executive Committee report including various administrative matters.

5. Received the Executive Director's report with further information on the budget development process and comment period for the dues cycle change petition. Report included information on the ABA and AMA President's participation in the Mid-Year and developments of a doctor-lawyer drug prevention education project. Appointed Gordon Roberts to the Unauthorized Practice of Law Committee.

6. Received a report on the Internal Operations, including further development on future conventions and various departmental reports.

7. Received a report of the Legislative Affairs Committee, taking action on various committee recommendations as will be reported in a future *Bar Journal* article. Directed the Litigation Section to study and

develop recommendations for the Bar Commission on the issue of pre-emptory challenge rule options. Matter also referred to the Courts and Judges Committee.

8. Received the monthly Admissions report, approved the reinstatement petition of Daniel Stringham, denying a petition to transfer an MBE score for lack of authority, approving February Bar examination applicants and approving Character and Fitness report. Received an appeal and appointed a panel to hear the appeal of an applicant. Appointed a committee to draft policies for the implementation of the proposed amendments to the admission rules. Approved final changes in the proposed admission rules for submission to the Supreme Court. Voted to request that the judicial council appoint a committee of appropriate persons to study whether the pro hav vice rule should be revised. Referred the issue of foreign attorney admission rule proposal to the Admission Rules Committee for study.

9. Received a report and appearance on behalf of Utah Legal Services by Anne Milne and Ken Bresin. Approved nominations to the Legal Services Board and approved a process by which future nominations might be more efficiently determined.

10. Received the monthly report of the Office of Bar Counsel, approving or reviewing disciplinary matters as are otherwise reported in the *Bar Journal*. Received and approved an annual discipline report and approved the filing of an annual discipline report with the Utah Supreme Court.

11. Received a report and appearance on behalf of the Lawyer Referral Service by Marcella Keck. Reviewed the purposes and operations of the Lawyer Referral Service and requested specific programmatic recommendations from the committee for future consideration.

12. Received a monthly Budget and Finance report. Approved amendments to the FY90 budget. Discussed FY91-94 projections. Authorized Budget and Finance Committee to finalize dues increase proposals for review at the next meeting. Authorized a letter to be sent to the Bar members to provide current information of the financial status of the Bar.

13. Received a report on the upcoming ABA Mid-Year meeting from State Bar Delegate Reed Martineau.

14. Discussed pending litigation matters with counsel.

15. Received report of the Young Lawyers Section including an invitation to the Legal Information Fair and approving an authorization for the section's solicitation of funds for dinner for the homeless.

16. Received an Unauthorized Practice of Law Committee report and authorized the filing of a lawsuit.

A full copy of the minutes of these and other meetings of the Board of Bar Commissioners is available for inspection by the members of the Bar and the public.

Discipline Corner

ADMONITION

1. An attorney was admonished for violating Rule 1.4(a) for failing to communicate with his client. The attorney was retained in May 1987 and the attorney/client relationship ended in 1989. No written correspondence was indicated by the file.

SUSPENSION

1. On January 4, 1990, Douglas M. Brady was suspended from the practice of law for two years with eighteen months stayed pending successful completion of a two-year period of probation. Mr. Brady violated Rules 1.13(b), 8.4(b) and 8.4(c) of the Rules of Professional Conduct of the Utah State Bar by converting funds from his client's trust account to his own use. The sanction was mitigated by Mr. Brady's cooperation with the Lawyers Helping Lawyers Committee and that committee's recommendation of Mr. Brady's likelihood of rehabilitation. The sanction was aggravated by Mr. Brady's prior disciplinary history, the fact that the trust account monies were not repaid until after the discipline proceedings began and Mr. Brady's failure to comply with a previous disciplinary order.

Notice to Bar Members

FIRST AND THIRD DIVISIONS

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for three members from the Third Division and one member from the First Division. Two three-year terms and one one-year term are to be filled in the Third Division. The nominee receiving the third highest number of votes in the Third Division election shall be the commissioner with the one-year term, with those receiving the highest and second highest numbers of votes being commissioners with three-year terms.

Applicants must be nominated by written petition of 10 or more members of the State Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar Office on or after March 15 and completed petitions must be received no later than April 12. Ballots will be mailed on or about May 3 with balloting to be completed and ballots received by the Bar Office by 5:00 p.m. on May 31.

If you have questions concerning this procedure, please contact Barbara Bassett, Associate Director, at the Bar Office (531-9077).

Utah State Bar Presents Five Awards At 1990 Mid-Year Meeting in Salt Lake City

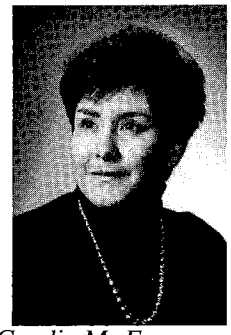
The Utah State Bar annually recognizes distinguished service by individuals, sections and committees at the Mid-Year Meeting. These awards are presented by Bar President Hans Q. Chamberlain on behalf of the entire Bar membership. Recipients are selected on the basis of achievement; professional service to clients, the public, courts and the Bar; and exemplification of the highest stantards of professionalism.

DISTINGUISHED LAWYER EMERITUS AWARD

Calvin L. Rampton

Calvin L. Rampton is President and Chairman of the Board of Jones, Waldo, Holbrook & McDonough, a law firm with headquarters in Salt Lake City. He received his J.D. degree from the University of Utah College of Law in 1940 and joined the Utah State Bar the same year. From 1964 to 1976, he served as Governor of the State of Utah. During that time, he was Chairman of the National Governors Conference and President of the Council of State Governments.

DISTINGUISHED LAWYER IN PUBLIC SERVICE AWARD



Cecelia M. Espenoza

Cecelia M. Espenoza is City Prosecutor/ Special Assistant in the U.S. Attorney Office where she advises city agencies on appropriate legal action and also represents state and federal governments in obscenity cases. Prior to joining the U.S. Attorney in 1986, she was a law professor at Arizona State University. She graduated from the University of Utah College of Law in 1982 and was a Leary Scholar. Ms. Espenoza has been President of the Young Lawyers Section and the Utah Hispanic Bar Association.

DISTINGUISHED NON-LAWYER AWARD FOR SERVICE TO THE BAR

KSL AM Radio

KSL AM Radio's Doug Wright has been hosting "Legal Briefs" since the station changed its format to news and information over a year ago. The one-hour weekly program features Utah attorneys who present information on general topics and resond to callers' questions. Host Doug Wright and Producer Tina Moulton have covered a range of topics from estate planning and consumer warranties to employment discrimination and jury duty. More than 150 attorneys have been Monday morning guests on "Legal Briefs."

DISTINGUISHED SECTION AWARD

Litigation Section

The Litigation Section of the Bar has endeavored to provide section members, as well as all members of the Bar, with educational tools to enhance their capabilities as advocates. To this end, the section maintains an extensive library of video and audio tapes to keep lawyers apprised of changing techniques and laws. The section also is revising Jury Instructions for Utah. Chair of the section is John L. Young, a partner in the firm of Richards, Brandt, Miller & Nelson. He is a graduate of the University of Utah College of Law.

DISTINGUISHED COMMITTEE AWARD

Bar Examiners Committee

The 54 members of Bar Examiners Committee volunteer hundreds of hours writing and grading essay Bar Examination questions. Under the chairmanship of the Honorable David K. Winder, United States District Judge, the committee has produced high quality questions, model answers and graded the examinations of approximately 300 applicants annually. Judge Winder was a member of Bar Examiners Review Committee from 1975 to 1979, and has chaired it since 1984.

Claim of the Month

ALLEGED ERRORS AND OMISSIONS

Insured attorney purportedly negligently represented the claimant during a trial and permitted a conflict of interest to exist.

RESUME OF CLAIM

The insured had initially been retained to represent an officer (hereafter "officer") of a bank in a shareholders derivative suit. The bank had "collapsed" and serious allegations of security law violations were made against the "officer." At the request of the "officer," the insured also agreed to represent another director of the bank who was related to the "officer."

The insured agreed to represent both parties throughout trial and substantial judgments were awarded against both of them.

The second of the clients, obviously distressed by the large verdict, sued the insured alleging an improper conflict of interest which resulted in a defense which fell below the appropriate standard.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

When counsel agreed to represent both parties, it was done mainly as a favor to the insured's first client and no conflict was readily apparent. However, the result caused the individual involved to review the matter with the benefit of hindsight and allege serious deficiencies in the quality of representation. It cannot be overstressed, that, no matter how long counsel has represented an individual or his family or how remote the conflict in representation may appear, it is always necessary to fully explain the possible ramifications of representation of two or more individuals in the same or related matters. Thereafter, the clients' consent to the dual representation must be secured *in writing* in a document which *clearly* outlines the potential areas of conflict.

Claim of the Month is furnished by Rollins Burdick Hunter of Utah, Inc., Administrator for the Utah State Bar Sponsored Professional Liability Program.

Federal Bar Association Civil Practice Seminar March 23, 1990

Time	Seminar Topic	Participants/Presenters
8:30 a.m.	Registration	
9:00-9:05 a.m.	Opening remarks	Kevin Egan Anderson
9:05-10:00 a.m.	Combined Session: Round table discussion including District Court Judges concerning practice in the Federal District Courts. This will include comments concerning motion practice, discovery, courtroom decorum, etc.	District Court Judges
10:00 a.m.	Break-out Sessions:	
	A. Evidence	Prof. Ronald N. Boyce
	B. Civil Rights Litigation	Brian Barnard and Jody Burnett
11:00 a.m.	Break-out Sessions:	
	A. Securities Litigation	Kit Burton and Jennifer Ausenbaugh
	B. Injunctions/Temporary Restraining Orders	Kent Murdock
Lunch	Luncheon Speaker	Dean Ned Spurgeon, University of Utah College of Law
1:30 p.m.	Combined Session: Tenth Circuit Update	Judges McKay and Anderson
2:30 p.m.	Break-out Sessions:	
	A. Employment Litigation in Federal Court	Chris Wangsgard and David Anderson
	B. RICO Litigation	Prof. Michael Goldsmith
3:30 p.m.	Break-out Sessions:	
	A. Environmental/Hazardous Waste Litigation	John A. Davis, Larry Stevens and Constance Lundberg
	B. Federal Tort Claims Litigation	Honorable Wayne Owens, United States Representative

CLE approval is being sought.

To be held at the Law and Justice Center, 645 S. 200 E., Salt Lake City, Utah. For further information on registration, call Kevin Anderson at 537-5555 or Samuel Alba at 524-1000.

THE LAW FIRM OF

JARDINE, LINEBAUGH, BROWN & DUNN

A PROFESSIONAL CORPORATION

IS PLEASED TO ANNOUNCE

THAT

WM. SHANE TOPHAM

HAS BECOME A SHAREHOLDER AND

DIRECTOR OF THE FIRM

AND THAT

JENNIE B. HUGGINS

HAS BECOME ASSOCIATED WITH THE FIRM

JANUARY 1, 1990

JARDINE, LINEBAUGH, BROWN & DUNN

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ATTORNEYS AT LAW

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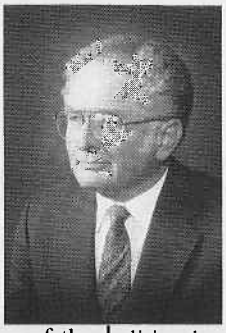
JAMES R. BROWN	JOHN S. BRADLEY
JAMES M. DUNN	HAROLD L. REISER
RICHARD H. THORNTON	LAURIE S. HART
WILLIAM G. MARSDEN	GARY G. KUHLMANN*
MICHAEL N. ZUNDEL	JENNIE B. HUGGINS

*ALSO ADMITTED IN ARIZONA

Kipp Named State Chairman of College of Trial Lawyers



Carman E. Kipp, founding partner of the Salt Lake City law firm of Kipp and Christian, has been selected to serve as state chairman for 1990 of the American College of Trial Lawyers.

The announcement was made by immediate past State Chairman Glen Hanni of Strong and Hanni.

Membership to the college is limited to one percent of the lawyers in each state and limited to lawyers principally involved in trial practice with "outstanding skills and integrity." In addition, membership requirements say lawyers must be engaged in private practice with their principal activity being litigation for the past 15 years.

Utah has 40 members in the American College of Trial Lawyers.

Mr. Kipp was founder of the law firm of Kipp and Charlier, predecessor to the present Kipp and Christian, in 1950. He has served as director of the Utah State Bar and was president of the Utah State Bar in 1980-81.

He is a graduate of the University of Utah and a native of Salt Lake City. In 1987, he was selected as Distinguished Lawyer of the Year for the Utah State Bar.

Kipp and Christian is engaged principally in civil litigation, business and commercial law.

1990 Annual Meeting Awards

The Board of Bar Commissioners is seeking nominations for the 1990 Annual Meeting Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Paige Stevens, Bar Programs Administrator, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, no later than March 31, 1990. The award categories include:

1. Judges of the Year for each of the appellate, district, circuit and juvenile court levels.
2. Distinguished Lawyer for Service to the Bar.
3. Lawyer of the Year for exemplary achievement and in recognition of one whose professionalism and lawyering skills are outstanding.
4. Pro Bono Lawyer of the Year.
5. Pro Bono Law Firm of the Year.

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.

The Cat and the Mouse

By James W. McElhaney

Professor McElhaney will present "Evidence for Advocates: The Law You Need to Know to Prove Your Case" Friday, March 30, 1990, at the Marriott Hotel. For registration information, call Tobin Brown, Utah State Bar, 531-9077.

JAMES W. McELHANEY is the Joseph C. Hostetler Professor of Trial Practice and Advocacy at Case Western Reserve University School of Law. He is a Senior Editor of Litigation, *the Journal of the ABA Section of Litigation, and is the author of the regular column, "Trial Notebook."*

The young lawyer was right in the middle of final argument when he had one of those awful moments of self-awareness, and wondered if he would be able to finish what he was saying. Everything had been going along just fine when all of a sudden he felt the rush of blood to his face and became exquisitely aware that he was standing in front of the jury, talking to them, and that they were listenting to what he had to say.

That is when he started listening to his own words. He knew they made sense, but he worried that they might actually be hurting the case instead of helping it.

The young lawyer was right to be concerned. He was representing the defendant in a criminal case, and he was suddenly caught in the Venus Flytrap of the law—proof beyond a reasonable doubt. You can look at it, you can circle it, you can describe it, you can crawl all over the outside of it. But once you settle on it and rely on it for your defense, if you are not careful, it can eat you alive.

Wait a minute, you say. Proof beyond a reasonable doubt is a heavy burden that the prosecution has to bear throughout the entire case. It is designed to protect the defendant, to guard the possibility of the innocent being convicted. How can it be a trap for the defense?

The answer lies in the role of lawyers and the logic of argument.

TAKE MY WORD

Whenever you represent a client—whether it is in a civil or a criminal case—you are literally standing up for that person. It is strictly forbidden to say it out loud, but your very presence says, "I have investigated this case. I know the facts and I understand how they relate to the law. You can take my word for it; justice is on my client's side."

Jurors understand the implication of your presence, even if they do not know that it would violate both the law and the code of professional responsibility for you to voice your personal belief in the justice of your client's cause. (See *State v. Miller,* 157 S.E.2d 335 (N.C. 1967); *ABA Code of Professional Responsibility* EC 7-24). Jurors are also suspicious of lawyers; they feel that what we say and do does not represent all that we know about the case.

So instinctively they watch us to see what our unconscious conduct reveals. And because of that, it is a terrible mistake to send the signal that you actually think your client is guilty.

How might you do that?

One way is to depend too heavily on the burden of proof. To see how this works, step outside the law for just a minute. Go to a school yard and see if you can take sides in an argument just on the basis of what two young boys are saying to each other. There are two cases. In each one the dispute is the same. One boy says the other has his baseball glove. The only difference is in how the accused responds.

Case one:

"That's my baseball glove."

"No, it's not. Yours has a broken lace."

What do you have? A factual dispute. If you can choose between the two just on what they said, you either have an unusual gift, or you are prone to jumping to conclusions. You need more than these words just to lean one way or the other in this case, much less take sides. But consider case two:

"That's my baseball glove."

"You can't prove it."

If you are as fairminded as you would like to be, you will want to have more evidence in this case, too. But if you are suspicious of the one who says, "You can't prove it," that attitude may color your view of the rest of the

case. The words are not exactly an admission, but they have a strangely guilty ring.

Now we are ready to go back to the law. When you tell the jury that there is a "heavy burden protecting the defendant, and he is presumed to be not guilty unless and until he is proven guilty beyond a reasonable doubt," there is the risk that the jury may translate what you say into a concession that, "Maybe the defendant *is* guilty, but the prosecution hasn't proved it well enough."

Like case two, talking about the heavy burden can seem almost like an admission, but why?

Proof beyond a reasonable doubt recognizes three different categories:

We are certain he is guilty.

We do no know.

We are certain he is innocent.

The law makes the middle ground—we do not know—a buffer. It gives the defendant the benefit of the doubt. But telling the jury to give the defendant that benefit of the doubt implies he needs its protection—and that suggests he might well be guilty. So if the jury is listening carefully to see if you will give some sign of what you secretly know, the argument that the case is not proven may sound like you are admitting the possibility of guilt and hiding behind a technicality.

THE PROPER EMPHASIS

Does that mean you should not argue reasonable doubt when you are for the defense?

Hardly. But it does suggest that if you have facts of your own to prove, emphasizing them may be more effective than being too defensive. It also suggests that you ought to be careful in how you present your argument on reasonable doubt.

There are lots of ways to talk about the burden of proof without admitting the possibility of guilt, but you have to think them through before you use them. You cannot simply tell the jury not to take your argument the wrong way. Here is an argument worth thinking about. It was used by Peter de Manio of Sarasota, Fla., in a demonstration at the National Institute for Trial Advocacy. Remember that de Manio is for the defense, because his introduction may surprise you.

"Is it possible for the government to prove guilt beyond a reasonable doubt, just on circumstantial evidence, without any eyewitness testimony?

"Of course. Take a simple example. Suppose that you take a mouse and put him in a box. Now take a cat and put him in the box with the mouse. Then take the lid and cover the box. Now tie up the box with a string so the lid can't come off.

"Leave the room for half an hour. When you come back, untie the string, take off the lid and look inside. There is no mouse, but there is one happy cat.

"Do you *know* what happened? You weren't there, there are no eyewitnesses. All you have is circumstantial evidence. But you *know* beyond any reasonable doubt what happened to that mouse.

"Let's do that again. Put the mouse in the box. Put the cat in the box with the mouse. Put on the lid. Tie it down. Leave the room for half an hour. Come back into the room. Untie the string. Take off the lid, look inside.

"There is the cat. No mouse.

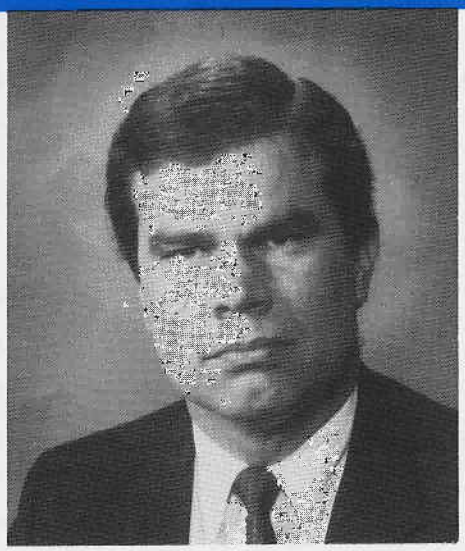
"But look—back there in the corner of the box. There is a hole, just mouse size.

"That hole is a reasonable doubt. Now let's look at the holes in the prosecution's case."

Then by implication, every problem in the government's case is not just a hole, it is a reasonable doubt.

Another nice thing about this argument is the way that it draws on our subliminal values. From the first Mickey Mouse production to the Mighty Mouse cartoons at the neighborhood theater to the Tom and Jerry re-runs on Saturday morning television, we have been rooting for the mouse—which is just what Peter de Manio wants us to do.

CASE SUMMARIES



By Clark Nielsen

GOVERNMENT IMMUNITY—WATER AND FLOOD CONTROL

In *Rocky Mountain Thrift Stores v. S.L.C. Corp.* (J. Howe) and *Irvine v. S.L. Co.*, (J. Stewart), plaintiffs sought damages for alleged negligence in 1983 spring runoff control activities. The court held that the 1984 amendment of U.C.A. §63-30-3(2), retaining governmental immunity for management of flood waters, would not be applied retroactively to 1983 flood control events. Because the pre-1984 statute applied, the government defendants were immune only if the activity was governmental in nature and immunity had not elsewhere been waived.

In *Irvine*, Justice Stewart's elementary analysis held that any negligence of county employees was not immunized because their work was not a discretionary function under §63-30-10(1)(a). The alleged negligent dredging of Utah Cottonwood Creek to increase creekbed capacity was not an essential governmental activity, did not require a basic policy evaluation, and did not arise out of any exercise of a discretionary evaluation of basic policy. Consequently, a creekside homeowner's action to recover the negligent cleaning of the creek was not barred by the governmental immunity act. The summary judgment for the defendant was reversed and remanded for trial.

Similarly, the court in *Rocky Mountain* (J. Howe) refused to apply the 1984 amendment to Salt Lake City's handling of the City Creek drainage in 1983. Plaintiffs alleged that the city negligently failed to take adequate precautions to avoid City Creek runoff damage and to properly clean the North Temple drainage culvert, and actually clogged the culvert in its efforts. Agreeing with the trial judge, the court held that the design, capacity, and construction of the drainage system involved basic governmental policy-making to protect life and property of the public. "Defendants' acts and decisions in these regards required the exercise of basic policy evaluation, judgment and expertise." Governmental immunity is not waived under §63-30-10(1)(a) for the exercise of discretion in a purely governmental function. The decision distinguishes the necessary governmental activities in flood and water control from the maintenance of a municipal sewage system which has been held to be non-governmental in nature. The four-part test in *Little v. Utah State*, 667 P.2d 49, 51 (Utah, 1983), was applied to determine whether the city's governmental activities were discretionary or were operational and perfunctory. Governmental immunity was affirmed as to certain city actions.

However, the court also held that the city's alleged negligent attempts to maintain the culvert so as to avoid drainage problems could not be clearly determined to be discretionary policy-making matters or merely operational decisions and conduct. The summary judgment below prevented the development of an adequate record to determine whether these activities were also immune as part of a broader discretionary decision-making of a governmental function. The summary judgment was reversed in this limited part. The appellate court also denied a claim of an unconstitutional comdemnation because no governmental "taking" of plaintiffs' property had occurred.

Irvine v. Salt Lake County, 123 Ut. Adv. Rpt. 11, Utah Sup. Ct. (Dec. 11, 1989) (J. Stewart).

Rocky Mountain Thrift Stores v. Salt Lake City Corp., 123 Ut. Adv. Rpt. 17, Utah Sup. Ct. (Dec. 1989) (J. Howe).

JOINDER OF NON-PARTY—INTERVENTION

Higham v. 350 Main Street Assoc. examples the delay consequences to clients when a case has not been appropriately postured for the relief granted by the trial court. Plaintiff

recovered a sizable personal injury award against a drunk driver. Plaintiff settled her claims against the drinking establishments frequented by the driver. She then deposited $35,000 of the settlement into the trial court in an effort to resolve the subrogation claim of her auto insurer, who had paid her benefits under her uninsured motorist/personal injury policy provisions. The insurer was not a party to plaintiff's action and had attempted unsuccessfully at plaintiff's trial to contest her proof of injuries.

After depositing the settlement fund, plaintiff sought a post-trial "summary judgment" against her insurer on its subrogation right. Still a non-party, the insurer also moved for release of the funds to it, and filed a motion to intervene which was clearly inadequate under Utah R. Civ. P. 24. The trial judge denied the insurer's motion to intervene, but then proceeded to release the deposited funds to the insurer, even though a non-party.

The Court of Appeals (J. Jackson) vacated the insurer's award because a court may not grant affirmative relief to a non-party. The case was remanded to the court to reconsider the proper joinder of the insurer and the respective claims after they have been properly presented.

Higham v. 350 Main Street Assoc., Utah Ct. Appeals, Case No. 890290-CA (Nov. 28, 1989) (J. Jackson). (*Note:* This opinion was "unpublished" and is therefore inappropriate to cite as precedent. It is discussed here only for its educational value.)

COMPARATIVE NEGLIGENCE AND WRONGFUL DEATH

The heirs of a decedent who bring a wrongful death action against an alleged tortfeasor are subject to the defense of comparative negligence. *In Kelson v. Salt Lake County* (J. Zimmerman), plaintiff was the father of a motorcyclist killed in a high-speed chase with sheriff's deputies. The jury was properly instructed that it should compare the negligence of the decedent with that of the defendant's officers. Comparative negligence is as applicable to present wrongful death actions as the bar of contributory negligence was prior to 1973. Before the 1973 comparative negligence statute, a finding of contributory negligence of the decedent would bar the heirs from a wrongful death recovery. By enactment of comparative negligence, the state legislature did not mean to alter the concept that the heirs of a decedent were bound by the effect of the decedent's own negligent conduct resulting in his death.

The Utah Supreme Court also held that, albeit arguably inequitable, the term "heirs" in the wrongful death statute should be held to its usual legal meaning as defined in the Uniform Probate Code. "The fact that the result in some circumstances may be to unreasonably restrict the class of persons who can bring a wrongful death action is an argument for amendment of the statute, not for ignoring its words."

Kelson v. Salt Lake County, 123 Ut. Adv. Rpt. 13, Utah Sup. Ct. (Dec., 12, 1989) (J. Zimmerman).

SUMMARY DISPOSITION ON APPEAL

The court of appeals law and motion panel expounded on the process of considering summary disposition in criminal matters. Whether on a party's motion or sua sponte, summary disposition under Rule 10, R. Utah Ct. App. is not granted without first reviewing the record, including designated trial or hearing transcripts. The court will generally await the filing of a transcript if its preparation on filing has been delayed. This *per curiam* opinion underscores the commitment of this appellate court to utilize Rule 10 to its farthest extent. Attorneys should adopt the salutory practice of attaching copies of the record pertinent to the issues when filing Rule 10 motions so as to facilitate the court's considerations.

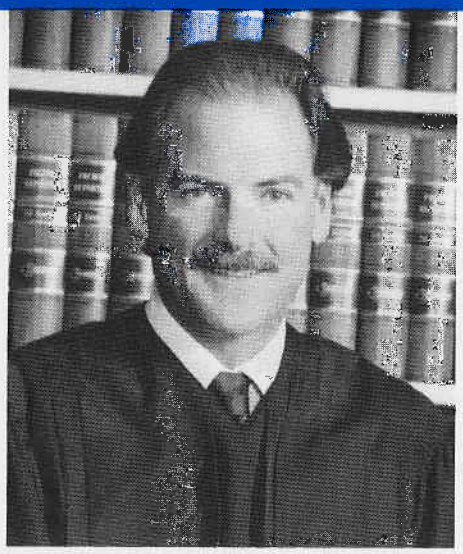
State v. Palmer, 126 Utah Adv. Rep. 5 Utah Ct. Appeals (Jan. 1990).

NEGLIGENT MISREPRESENTATION

In a Utah version of "Room With a View," the Court of Appeals reversed a summary judgment that absolved defendants from any liability for negligent misrepresentation. Before buying a residential building lot overlooking the Great Salt Lake, plaintiffs sought and received verbal assurances that the subdivision developer would not obstruct their view of the lake. However, after plaintiffs' house was built, defendants constructed a "barn-like structure with one little window," obstructing plaintiffs' scenic view. The trial court granted defendants' summary judgment because any alleged misrepresentation was not actionable.

The Court of Appeals (J. Jackson) held that plaintiffs' sworn allegations of defendants' promises stated a claim for negligent misrepresentation. Negligent misrepresentation results when a person has a superior position to know material facts, has a financial interest in the transaction, and negligently makes a careless, false representation while expecting the other party to rely and act thereon. *See Dugan v. Jones*, 615 P.2d 1239 (Utah 1980). Viewing the depositions and other evidentiary material in plaintiffs' favor, the court concluded that plaintiffs could show a prima facie case. The case was remanded for trial.

Evans v. Lakeview Heights Homeowners Assoc., Utah Ct. Appeals, Case No. 880465 (Dec. 29, 1989).



Rule 4-501: An Astounding Example of Institutional Arrogance?

By Judge J. Dennis Frederick with the able assistance of Carlie Christensen, General Counsel, Administrative Office of the Courts (of whom there are no known photographs extant)

"IT MUST BE REMEMBERED THAT THERE IS NOTHING MORE DIFFICULT TO PLAN, MORE DOUBTFUL OF SUCCESS, MORE DANGEROUS TO MANAGE, THAN THE CREATION OF A NEW SYSTEM. FOR THE INITIATOR HAS THE ENMITY OF ALL WHO WOULD PROFIT BY THE PRESERVATION OF THE OLD INSTITUTIONS AND MERELY LUKEWARM DEFENDERS IN THOSE WHO WOULD GAIN BY THE NEW ONES."

—MACHIAVELLI
1513 A.D.

It is fair to say that no action (with one exception) by the Judicial Council has generated any more controversy than the adoption of the "dreaded" Rule 4-501, Code of Judicial Administration. It has been observed that the Council's motive in adopting the Rule was akin to the same fine, noble intentions from which the Spanish Inquisition flowed. However, the Council's action was not, as some may believe, just another astounding example of institutional arrogance.

In the limited space available, it is my intent to explain the rationale behind 4-501 and some of the reasons for its adoption.

Article VIII, §12, Constitution of Utah (the so-called "Judicial Article") revised in 1985, created and gave constitutional status to the Judicial Council. It mandates that the Judicial Council "shall adopt rules for the administration of the courts of the state." This language has been interpreted as direction to the Judicial Council to develop a more efficient and effective judicial system. Since statehood various levels of courts and various courts within the same level have promulgated an incredible hodgepodge of general orders, administrative rules, rules of practice, supplemental rules of practice, local rules of practice and minute entry orders totaling approximately one thousand in number, purporting to govern court practice and procedures.

In an effort to eliminate the confusion (or at least, minimize it) the Judicial Council recognized the need for uniformity of administrative rules within levels of court and where possible between various levels of court. That effort of compiling, reviewing, amending and consolidating the myriad of administrative and local rules, consumed a period of approximately two years, culminating in the publication in October 1988 of the Code of Judicial Administration. The adoption of the Code was intended to ensure that the rules of practice were adopted and applied on a uniform basis statewide.

Rule 4-501, Code of Judicial Administration (in its predecessor form as Rule 2.8, Rules of Practice in the District Courts and Circuit Courts) existed in the district and circuit courts of this state, excepting the Third District, since 1975.

JUDGE J. DENNIS FREDERICK received his Bachelor of Science degree in psychology in 1964 from the University of Utah, and his Juris Doctor degree in 1966 from the University of Utah College of Law. He was appointed to the Third District Court bench in 1982 by Governor Scott Matheson after some 16 years as a trial lawyer and prosecutor serving as deputy district attorney.

At the time of his appointment to the bench, he was a director and officer of Kipp and Christian where he practiced from 1966 through 1982. He has served on numerous Salt Lake County and Utah State Bar committees, including the Salt Lake County Bar Executive Committee from 1980 through 1983. After his appointment to the bench, he has continued to serve on and chair numerous Bar and judiciary committees. Judge Frederick is and has been since 1986 a member of the Utah Judicial Council.

In 1987, Judge Frederick received the first Utah Bar Foundation Achievement Award and in 1988 he was named the District Court Judge of the Year by the Utah State Bar.

The Council's effort to minimize confusion and standardize practice and procedure throughout the state was bolstered by the growing size of law and motion calendars in the Third District. These calendars developed an ever-increasing percentage of motions directed to discovery and scheduling disputes dealing with what many considered frivolous or at best routine matters. For example, one dispute dealt with an argument about who would sit where for the taking of a deposition, prompting a colleague to opine that we were serving not as judges, but as maitre d's. This type of frivolous argument gave impetus to the move to adopt Rule 4-501 in the Third District. The rationale being that if the matter is serious enough to argue about, it is serious enough to write a brief memorandum about. My own experience has been that most of the frivolous or routine matters have been eliminated, giving the judges more time to devote to the serious issues that do arise.

The procedure delineated in Rule 4-501, as to non-dispositive issues, has the advantage from the judge's perspective, of enabling him or her to rule on the motion when it is ready and has been read once. The prior procedure required reading the motion, hearing arguments, then ruling, unless the matter was continued at the last minute by a call to the clerk (frequently without notice to opposing counsel) thereby starting the process all over again. The Rule has the advantage from the lawyer's perspective of eliminating the last-minute notice for hearing on a date one or more of the lawyers involved is unavailable and the consequent flurry of activity in preparing motions for protective orders, continuances, sanctions, orders to shorten time for hearing, etc. The Rule is designed to eliminate the untimely last-minute brief which was all too frequently filed the morning of the hearing. Furthermore, when the matter was finally scheduled, lawyers frequently were required to sit in the courtroom two to three hours waiting to be heard (the "cattle call" calendar). The Rule has the further advantage of encouraging lawyers to communicate and attempt to resolve routine (sometimes frivolous) matters regarding scheduling and discovery. The net effect has been reduction in the numbers of such matters being filed with the courts. This advantage applies both to the lawyers and their clients by eliminating unnecessary court appearances. If a serious non-dispositive motion should be heard, the Rule does not preclude counsel from requesting oral argument. Whether the request is granted is, however, discretionary with the court. Moreover, if the judge is not clear as to the motion or relief sought, he or she may schedule oral argument with or without request.

Rule 4-501 allows for more reflection and uninterrupted deliberation by the court (which may or may not, it has been argued, be reflected in the quality of the ruling). The effect of the application of Rule 4-501 has been to provide for a more orderly decision-making process according to my own experience and that of many, if not all, of my colleagues. Lastly, it standardizes and makes uniform the motion practice throughout the District and Circuit Courts statewide, the lack of which prompted frequent complaints from members of the Bar.

Since the adoption of Rule 4-501 in the Third District, many interested individuals and groups including the Supreme Court's Advisory Committee on the Rules of Civil Procedure, the Litigation Section of the State Bar, and the Courts and Judges Committee of the State Bar, to name a few, have submitted constructive suggestions for modification of the Rule. The most frequent request has been to allow either party to seek a hearing on dispositive motions. That request after being considered at length was approved in the amended version of Rule 4-501, which took effect January 15, 1990. I point this fact out so you will know that the Judicial Council and those of us who serve on the Council do indeed listen to your suggestions and comments. You are not like the man who went to the psychiatrist and complained, "No one will listen to me." The psychiatrist looked at him and said, "Next."

> "...if the matter is serious enough to argue about, it is serious enough to write a brief memorandum about."

Based upon input from various sources, the changes to Rule 4-501, effective January 15, 1990, are primarily as follows:

1. The Rule excludes from its application proceedings before court commissioners (not to be confused with objections to commissioner's recommendation), small claims proceedings, petitions for habeas corpus and other applications for extraordinary relief.

2. Supporting documents, such as depositions or exhibits, must now be referenced by page number to their relevant portions.

3. The page length for supporting memoranda has been increased from 5 pages to 10 pages.

4. The "Notice to Submit for Decision" must be filed as a separate pleading and appropriately captioned. If neither party files a "Notice to Submit," the matter will not be submitted for decision. In the past, notices to submit for decision were prepared as correspondence to the court or appended to the end of a lengthy document where they were frequently overlooked by the clerk's office. The requirement that the notice be filed as a separate pleading will ensure that motions are promptly submitted to the court for disposition.

5. Material facts set forth in the movant's statement must now be properly supported by an accurate reference to the record in order to be deemed admitted for the purpose of summary judgment.

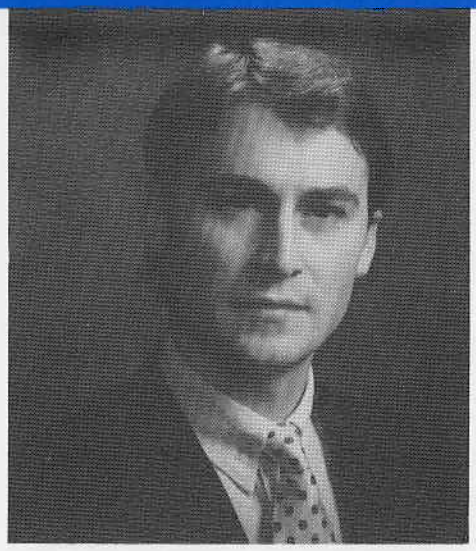
6. Decisions on motions will still be rendered without a hearing unless the motion is dispositive of the action or any issues in the action. The rule, however, now provides that either party may request a hearing on a dispositive motion, but that the hearing must be requested, in writing, at the time the principal memorandum is filed. If a request is not made at that time, a hearing on the motion is deemed waived.

7. A request for a hearing will be granted unless the court finds that the motion is frivolous or that the dispositive issues have been authoritatively decided.

8. When a request for hearing is granted, courtesy copies must still be delivered to the judge at least two working days prior to the hearing. The rule now requires that courtesy copies be clearly marked as such and specify the date and time of the hearing.

9. The court may grant a request for an expedited disposition of a motion in cases where time is of the essence and compliance with the provisions of the rule would not be practical or where the motion does not raise significant legal issues and can be resolved summarily.

Hopefully, the foregoing will dissuade some of those who believe that Rule 4-501 typifies what H.L. Mencken was referring to when he observed: "For every complex problem there is a solution that is simple, neat and wrong." I affirm to you that the motivation behind adoption of Rule 4-501 was salutary and intended to simplify and streamline not only your practice in the courts of this state, but to improve the quality and timeliness of the rulings you receive.



President-Elect's Message

By Richard A. Van Wagoner

In my last Message (November 1989), I touched on a point that I believe needs further discussion, that of the interplay of roles, values and responsibility in the legal profession. In my view, the most significant questions that young lawyers should address relate to how and with that attitude we will recognize and confront the moral questions that arise in our practice. This Message does not explain how we should resolve any specific moral issue but suggests a general point of view or attitude that may assist us in recognizing and resolving ethical conflicts.

It is my belief that, with very few exceptions, attorneys are daily confronted with ethical questions, many of which we do not recognize as such. The reason we easily overlook the moral implications of some of the issues that confront us is because we attempt to justify, even subconsciously, certain conduct or decisions by passing responsibility for them to a role: "that's what lawyers do"; "an advocate behaves this way"; "that's what is expected of an attorney"; "that's part of the legal system"; "as a judge, I am bound by another's decision; I have no discretion in the matter"; "as an associate, I have to do what the partner says." To what extent do we allow ourselves to be seduced into accepting a lower moral standard because we believe the role we assume maintains or requires such a standard? Do we deceive ourselves into belief that our conduct reflects only on the role we have assumed and not on us personally? Do we really believe that we personally are not responsible for our conduct, because we act under the auspices of a role? Can we really convince ourselves and others that we are someone other than the person hiding behind the role? True, it may seem easier not to have to think about difficult issues; but I believe we have a duty to ourselves and the profession to think about and deal with them in a responsible manner.

In my view, we are directly responsible and accountable for the values extant in the roles we assume. By this, I suggest that we purportedly make some of our moral choices simply by choosing to assume a role. This is something I hope we seriously considered before we made the decision to enter the legal profession. I believe, however, that it goes well beyond the simple assumption that, having made the choice to be a lawyer, we are morally bound by some notion of role definition. We have and should exercise tremendous discretion in determining what the values of the role are. By accepting responsibility for the values of the roles we assume, we become considerably more than heirs to a legal system or profession; we become responsible for it, its image to the public, its focus and direction, its goals and accomplishments. With this understanding, we then are free to build upon and internalize the quality choices made by our predecessors and contemporaries, but are not bound to live the same mistakes. The standards by which we conduct our professional lives will not and should not differ much from who we are as human beings.

I have been accused of maintaining "unrealistic law school idealism," and told that eventually it will diminish so that I can "join the real world." I believe that this point of view dangerously and inaccurately accepts the status quo as a necessary conclusion, and attempts to place responsibility where it does not exist; it suggests that we are products of a system over which we have no control. As a lawyer, I have as much responsibility as anyone to determine what the "real world" (profession) is or should be.

What does it mean to be responsible for the values of our roles and for the legal system? I do not presume to have a complete answer, but I have a few ideas. First, I believe that we would scrutinize what we do more carefully to assure that our conduct and demeanor are in line with our personal values. Second, I think we would develop a perspective beyond our immediate wants or needs and those of our clients. Third, we might become involved in setting the direction and goals of the profession, again, in line with our own values. Fourth, we would probably be very concerned about the image of the profession and would do what we can to improve it. Fifth, we might involve ourselves in related programs that offer public assistance and improve the image of the profession. Sixth, we would probably have a greater sense of the public trust under which we act in behalf of others and would use the power as carefully and responsibly as possible.

By accepting responsibility personally for each decision we make, we would realize that the moral implications of our conduct are more within our control. However, it becomes clear that much more of our conduct has moral implications.

Law Day Fairs, 1990

Sponsored by the Young Lawyers Section of the Utah State Bar

The Young Lawyers Section of the Utah State Bar is sponsoring the Law Day Fairs for 1990. The Law Day Fairs are designed to offer advice and general information to the public about any personal legal concerns. Young Lawyers will be offering free information at booths which are set up in shopping malls throughout the state. These booths will be found in mall locations from Logan to St. George. If you would like to volunteer to spend one to two hours at a booth, please contact the person identified below for the location and date you prefer. You will also receive information about what sort of questions you might face and the degree of counseling you should give. Your help is needed in making the Law Day Fairs successful.

Date of Fair	Location	Contact
April 27, 1990 Friday	Crossroads Mall SLC	Jim Hyde 532-1234
April 28, 1990 Saturday	Fashion Place Mall SLC	Jim Hyde 532-1234
April 28, 1990 Saturday	University Mall Provo	Wayne Riches 374-6766
April 28, 1990 Saturday	Ogden City Mall Ogden	Ted Godfrey 394-5526
April 28, 1990 Saturday	Cache Valley Mall Logan	Greg Skabelund 752-9437
April 28, 1990 Saturday	Phoenix Plaza St. George	Mike Shaw 628-1627

Young Lawyer Named Most Valuable Prosecutor of the Year 1989 at the Salt Lake County Attorney's Office

Gregory G. Skordas, Deputy County Attorney, was named The Most Valuable Prosecutor of the Year 1989 at the Salt Lake County Attorney's Office on January 10, 1990.

David E. Yocom, Salt Lake County Attorney, stated, "Greg has handled 46 percent of the total felony cases which are handled by his prosecution team. He is part of the 'major offender team' which prosecutes cases involving repeat offenders and serious felonies." According to Yocom, "Greg is among the four top trial lawyers in the office." Skordas was also named to the "All-Star Team" as Yocom calls it. Other members on the All-Star Team are James M. Cope, Ernest W. Jones, and Martin Verhoef, all seasoned deputy county attorneys.

Skordas is a graduate of the University of Utah with a bachelor's degree in metallurgical engineering in 1979. He received his juris doctor degree from the University of Utah in 1982. He worked in private practice at Barber, Verhoef & Yocom from 1982-84, at the Salt Lake Legal Defenders Office from 1984-87, and at the Salt Lake County Attorney's Office from 1987 to present.

Skordas is the Chairperson of the Lawyers Compensation Committee of the Young Lawyers Section of the Utah State Bar.

Kevin Bennett Receives Meritorious Service Medal

Kevin R. Bennett, a Utah Young Lawyer, recently was awarded the Meritorious Service Medal, the highest peace time honor available to Army attorneys. Mr. Bennett completed a four-year tour of duty with the U.S. Army at Ford Ord, California, where he served in various positions as a military attorney in the rank of captain.

Mr. Bennett was honored and recognized for his "superior and varied service," which included positions as Legal Assistance Officer, Installation Tax Officer, Chief of Legal Assistance, Administrative Law Officer and Magistrate Court Prosecutor.

Mr. Bennett has returned to Utah and is practicing law in American Fork.

Award Nominees Sought

The Young Lawyers Section of the Utah State Bar is soliciting nominations for recipients for the Liberty Bell Award and the Young Lawyer of the Year Award. Nominations for either award should be directed to Ryan E. Tibbitts at Snow Christensen & Martineau, 10 Exchange Place, Eleventh Floor, P.O. Box 45000, Salt Lake City, UT 84145.

The Liberty Bell Award is presented to a non-lawyer whose efforts assist the public in gaining a better understanding of the Constitution and the Bill of Rights, stimulates a deeper sense of individual responsibility by encouraging citizens to recognize their duties as well as their rights, contributes to the effective functioning of government and fosters a better understanding and appreciation of our laws. This award will be presented on Law Day in May 1990. Nominations should be received by the first week of April 1990.

The Young Lawyer of the Year Award will be presented to a young lawyer (less than 36 years of age, or in practice in Utah five years or less) who has achieved a commendable degree of professional competence and ability, has demonstrated professional integrity and high ethical standards, has been involved in significant service to the profession, including involvement in Bar activities, and who is involved in community service, both as a lawyer and as a citizen. This award will be presented at the Annual Meeting of the Utah State Bar in June 1990. Nominations should be received by the last week in May 1990.

Salt Lake Tribune Reports on Emergency Grant to Legal Aid Society

Salt Lake Tribune, *Sunday, December 24, 1989, 4B*
By Paul Rolly
Tribune *Staff Writer*

Utah's 5,000-plus lawyers gave the state's poor and downtrodden a Christmas gift this year—a $15,000 emergency award to the organization that helps the disadvantaged with divorces and other domestic problems.

The Utah Bar Foundation, a non-profit organization comprised of the members of the Utah State Bar, beat Santa Claus to the punch this year with the $15,000 gift to the Legal Aid Society of Utah, whose money for certain programs had run out.

"This will get us through the month and maybe longer, while we attempt to raise more money to keep us going," said Rex Olson of the Legal Aid Society. "Without the emergency gift, we would have had to lay off an attorney and cut back on our services, probably by 20 percent," he said.

The Legal Aid Society is a private, non-profit organization that provides domestic legal services for lower income people, mostly single mothers seeking a divorce, child-custody protection or other bad-marriage remedies.

The Society also has an emergency spouse-abuse and victims program, where it seeks to obtain protective orders for adult victims of domestic violence who need the law to keep abusers away from them.

"We had about 700 cases [of domestic-violence victims] together, including all the services we provide, we saw about 2,600 clients this year," he added.

The Legal Aid Society has a $370,000 annual budget, including grants from United Way, the Utah Bar Foundation and the Victims Reparations Commission of the State of Utah for its work on behalf of domestic-violence victims.

But its budget ran into trouble this year when the National Legal Services Corp., which receives money from Congress to help with various legal services programs for low-income people, did not renew its annual $28,000 grant to the University of Utah Law School for clinics for their second and third year law students.

The money has been used in the past to put law students in the offices of the Utah Legal Aid Society and Utah Legal Services to help with certain services, said Mr. Olson.

The National Legal Service's board of directors has been making attempts to cut back on that organization's budget and there has been a trend in the organization toward an attitude in opposition to spending federal government money for legal services for poor people.

David Wilkinson, Utah's conservative former attorney general, was recently hired as solicitor general for the National Legal Services Corp.

"Without that $28,000, we were looking at having to lay off one full-time attorney—or 20 percent of our legal staff," said Mr. Olson. "The $15,000 gift will keep us going."

He said the five attorneys in the office have a waiting list of about 900 low-income people seeking domestic legal services. Laying off one of the attorneys would have increased that waiting list dramatically, he said.

The Bar Foundation has its own board of directors who make grant decisions independent of the Bar, said Mike Keller, a member of the board of the Utah Bar Foundation. The Foundation donated $143,000 to various causes last year. The causes go to help law-related programs.

The grant money comes from donations from individual lawyers and law firms as well as from trust accounts. "Lawyers cannot earn interest on their clients' accounts, and the accounts are usually so small that it is not cost-effective to do the paperwork necessary to send the interest to the individual clients, so they have an option to enroll in the IOLTA program which allows the bank to send the interest to the Utah Bar Foundation to be used to fund law-related grants," Mr. Keller said.

The Foundation already gave the Legal Aid Society $25,000 this year, but decided to allocate the emergency $15,000 in December to keep the program going, said Mr. Keller.

U. Law School's Annual Fordham Forum to Focus on Reproductive and Parental Rights

The sixth annual Jefferson B. Fordham Forum, sponsored by the University of Utah College of Law and the Journal Alumni Association, will be held Wednesday, March 7, 1990, with a reception beginning at 5:30 p.m. in the College of Law lobby. The actual debate will commence at 6:15 p.m. in the Sutherland Moot Courtroom. The topic for this year's forum is "BE IT RESOLVED: That the state of Utah should license and regulate reproductive and parental rights."

College of Law Professor Terry S. Kogan will moderate the discussion. Panelists will include:

Margaret Batten
Professor, University of Utah Philosophy Department

Sandra Bagley
Director, Wasatch Women's Center

Joy Beech
Families Alert

Russ Fericks, Esq.
Attorney, Richards, Brandt, Miller & Nelson

Reverend Thomas Goldsmith
First Unitarian Church

Neil K. Kochenour, M.D.
University of Utah Department of Obstetrics and Gynecology

David Littlefield, Esq.
Attorney, Littlefield & Peterson

Frank Susman, Esq.
Attorney, Susman, Schermer, Rimmel & Shifrin, St. Louis, Missouri
(He argued the Webster case before the U.S. Supreme Court)

Lee E. Teitelbaum
Associate Dean and Professor of Law, University of Utah College of Law

Rabbi Frederick L. Wenger
Congregation Kol Ami

The debate is named for Jefferson B. Fordham, Distinguished Professor of Law at the University of Utah. Professor Fordham joined the Utah law faculty in 1972 after teaching and practicing law for more than 40 years, including service as a professor of law and dean at the University of Pennsylvania and Ohio State University. He is noted for his work in legal education, municipal government and civil liberties law.

For more information, contact Amy L. McDevitt, Director, Alumni Relations and Communications, (801) 581-4640. Tom Melton, Esq., Prince, Yeates & Geldzahler, (801) 524-1000.

Recipients Named for Two New Professorships at U. Law School

Ronald N. Boyce and Edwin B. Firmage, both distinguished and longtime law school professors at the University of Utah, have been named, respectively, the first Alfred C. Emery Professor of Law and the first Samuel D. Thurman Professor of Law, according to Edward D. Spurgeon, dean of the University of Utah College of Law.

The professorships were created last spring to honor Professors Emeritus Alfred C. Emery and Samuel D. Thurman. Professor Emery, who retired from the law faculty last July, has served in numerous University of Utah positions, including acting dean of the College of Law from 1961-1962, vice president for academic affairs from 1965-1967, provost from 1967-1969 and president from 1971-1973. Professor Thurman, who was awarded an honorary Doctor of Laws degree from the U. in June 1988, served as dean and professor of law at the U. law school from 1962-1975.

The criteria for the Emery Professorship are excellence in teaching, scholarship and service, with a special emphasis on what is described generally as academic leadership. "Emery Professor of Law Ronald N. Boyce has for many years been one of the law school's finest teachers and is a nationally recognized scholar in criminal law, evidence and trial practice," said Dean Spurgeon. "Professor Boyce has also performed outstanding service over many years to the organized bar and the judiciary in Utah, and his academic leadership has taken many forms." In addition to creating and offering numerous courses for law students and practicing lawyers and judges, Professor Boyce, who also serves as U.S. Magistrate for the District of Utah, has been a leader in the creation of Utah's federal and state court rules for trial and appellate civil and criminal practice, as well as a participant in the development of the state's corrections system. He has also helped spearhead the movement toward law practice specialization in Utah and is a member of the committee that developed standards for and oversees mandatory continuing legal education for the Utah State Bar.

A 1955 graduate of the University of Utah College of Law, Professor Boyce is the author of many books and articles on criminal law and procedure, including the *Utah Prosecutor Handbook* and *Criminal Law and Procedure* (co-authored with Rollin M. Perkins). In 1986, he was the first recipient of the Burlington Resources Foundation Faculty Achievement Award for outstanding teaching at the U. law school.

The criteria for the Thurman Professorship are excellence in teaching, scholarship and service. "Thurman Professor of Law Edwin B. Firmage is an outstanding teacher and scholar in the areas of constitutional law, law and religion and international law," Dean Spurgeon said. His scholarship is prolific and has recently included two nationally acclaimed books, *To Chain the Dog of War: The War Power of Congress in History and Law* (co-authored with Francis Wormuth) and *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830-1900* (co-authored with R. Collin Mangrum). "Professor Firmage's service is also well known, as he is one of the state's most active speakers on a variety of important topics, including constitutional law and law and religion," Dean Spurgeon said.

Professor Firmage earned a J.D. in 1963, an LL.M. and an S.J.D. in 1964 from the University of Chicago Law School. A former White House Fellow working with Vice President Hubert Humphrey, he has also served as an International Affairs Fellow with the Council on Foreign Relations, a Fellow in Law and Humanities at Harvard Law School and a Senior Fellow at Keynes College, University of Kent in Canterbury, England.

Professor Firmage was recently selected to receive the Governor's Award in the Humanities, which is presented annually to a person in Utah who has made an outstanding contribution to public understanding and appreciation for the humanities through his or her academic discipline and through intellectual, writing and teaching skills. His book, *Zion in the Courts*, recently received a best book award from Alpha Sigma Nu, the national Jesuit organization.

"The University and the College of Law are fortunate to have two colleagues the stature of Professors Boyce and Firmage to be the first holders of these important new professorships," U. Provost James L. Clayton said. "Although both Professor Boyce and Professor Firmage have already served the University and the College with distinction for many years, they will be productive teachers and scholars for years to come."

For more information, contact Amy L. McDevitt, Director, Alumni Relations and Communications, (801) 581-4640.

1990 Membership Directory Deadline, April 2

Address Changes

The deadline for address changes for the 1990 Membership Directory is April 2, 1990. Check your *Bar Journal* address label to confirm that your current address is correct. If it is not, or if you will be moving between now and the April, please fill out a copy of the form below and send it to the bar office before the April 2, 1990 deadline.

FAX Numbers

FAX numbers can be included in the individual listings in the 1990 Membership Directory. If you want to list your FAX number, please fill out a copy of this form and send it to the bar office prior to the April 2, 1990 deadline.

1990 Membership Directory Information

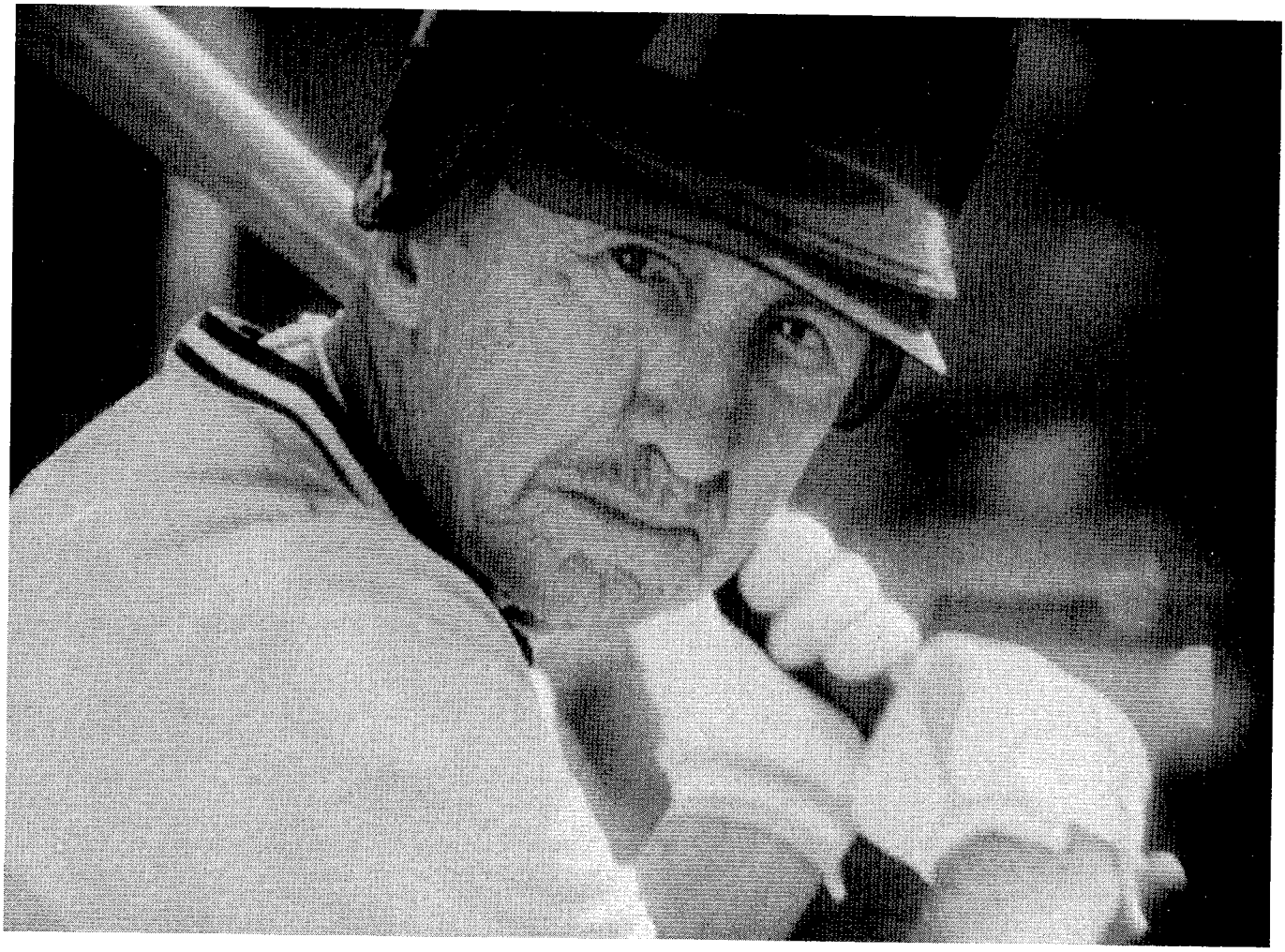
Name	Bar Number
FAX Number	Phone Number
Firm or Company Name (if any)	
Business Address	
City, State, Zip	

Check **all** applicable boxes

- ❑ This is a new address, effective on _____(date)
- ❑ This is a new telephone number, effective on _____(date)
- ❑ Add FAX number to Membership Directory listing
- ❑ Apply this change or addition to all USB members in the firm or company named above (list attached, including names and bar numbers)

Return this form to Utah State Bar, 645 So. 200 E. Salt Lake City, Utah 84111 or FAX to (801) 531-0660, by **April 2, 1990.**

$500,000,000 OF RESEARCH HELPED CLIFF SHAW PLAY BASEBALL AT AGE 85.



In November 1973, Cliff Shaw was stricken with cancer.

Fortunately, it was detected early enough. And with surgery, Cliff was able to continue living a healthy, active life.

There was a time when such a diagnosis was virtually hopeless.

But today, cancer is being beaten. Over the years, we've spent $500,000,000 in research. And we've made great strides against many forms of cancer.

With early detection and treatment, the survival rate for colon and rectal cancer can be as high as 75%. Hodgkin's disease, as high as 74%. Breast cancer, as high as 90%.

Today, one out of two people who get cancer gets well. It's a whole new ball game.

AMERICAN CANCER SOCIETY®

Help us keep winning.

CLE CALENDAR

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 use to minimize tax consequences. Designed for estate planners, corporate and tax practitioners, and counsel for closely held corporations, this timely program covers recent IRS guidance, practical approaches to client problems and legislative developments.

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 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.

CLE Credit: 4 hours
Date: March 1, 1990
Place: Utah Law and Justice Center
Fee: $135 + $12 MCLE Fee
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.

CLE Credit: 3 hours
Date: March 5, 1990
Place: Utah Law and Justice Center
Fee: $55
Time: 12:00 to 5:00 p.m.

CRIMINAL LAW SECTION DINNER

Judge Gregory Orme of the Utah Court of Appeals will be speaking at the March 7, 1990, meeting of the Criminal Law Section of the Utah State Bar. The subject of Judge Orme's address will be preserving an appellate record in a criminal case. Please RSVP with the Utah State Bar at (801) 531-9095.

CLE Credit: 1 hour
Date: March 7, 1990
Place: Port O'Call Banquet Room, 78 W. 400 S., SLC
Fee: None
Time: 5:30 to 6:30 p.m.

CONTROLLING RETIREE AND EMPLOYEE BENEFIT COSTS: CURRENT TRENDS IN EMPLOYEE BENEFITS

A live via satellite seminar. The exponential increase in the cost to employers of providing health and welfare benefits to current employees, future retirees and current retirees has made cost cutting while still providing legally mandated or competitive benefits the central issue in designing current benefit plans. The faculty, composed of attorneys and others with extensive experience in plan design, will examine the current benefit options available and their advantages and pitfalls. A representative of the Congressional Joint Committee on Taxation will discuss pending and potential legislative and regulatory actions.

This program will be of interest to attorneys, in-house counsel, corporate personnel and benefits officers and those involved in planning and implementing the funding and providing of health and welfare benefits to employees and retirees.

CLE Credit: 6.5 hours
Date: March 13, 1990
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

ENERGY AND NATURAL RESOURCE CLE LUNCHEON

The purpose of this seminar is to review the significant court decisions of the 1980s and evaluate their impact upon the development of Indian Law in the 1990s. Particular emphasis will be placed upon those decisions that impact energy and natural resource development within the exterior boundaries of the Indian reservations.

CLE Credit: 1 hour
Date: March 14, 1990
Place: Utah Law and Justice Center
Fee: None (cost of lunch), RSVP to 531-9095
Time: 12:00 to 1:00 p.m.

ISSUES ON CHILD SEXUAL ABUSE

Members of the Bar are invited to attend a seminar on the investigation, assessment, prosecution, treatment options and false reporting of child sexual abuse sponsored by the Family and Criminal Law Sections. Speakers will include professionals from the Division of Family Services, Salt Lake County Attorney's Office, Adult Probation and Parole, and treatment agencies specializing in assessing and treating sexual abuse.

CLE Credit: 3 hours
Date: March 15, 1990
Place: Utah Law and Justice Center
Fee: $20
Time: 4:00 to 7:00 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? What can you do to make your case more memorable? This program will explore these issues and others and should enhance the trial advocate's ability to communicate with the jury.

The program will provide you 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 A.B.A.'s Section of Litigation. The program organizers have assembled an extremely well-qualified faculty for this program. The faculty includes judges, trial lawyers and psychologists, all of whom were involved directly in either supervising or conducting this pioneering study of jury comprehension in complex cases.

CLE Credit: 4 hours
Date: March 22, 1990
Place: Utah Law and Justice Center
Fee: $135 + $12 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

MANAGING AND MOTIVATING LAWYERS

A live via satellite seminar. As a "reward" for being successful, lawyers find themselves with management responsibilities as managing partners, department chairs, members of the Executive Committee or other law firm committees. If you are a lawyer with management responsibility, this seminar will help you understand: how to focus management on client needs; the role of the lawyer in law firm management; the differences between management and administration; the responsibilities of firm and department managers; and how best to motivate lawyers and hold them accountable. We will help you learn how to manage your time so that you can fulfill your management responsibilities while you practice law.

CLE Credit: 6.5 hours
Date: March 27, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 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, the 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: $130 for Litigation Section members, $140 for non-members, add $20 for day of registration
Time: 8:00 a.m. to 6:00 p.m.

ESTATE PLANNING OPPORTUNITIES FOR THE 1990s

A live via satellite seminar. Over the last 13 years we have had tax acts of every form, all of which have impacted dramatically on the rules and options regarding the availability of estate planning. This program will focus on the myriad of estate, gift and generation skipping transfer tax changes enacted in recent years. The speakers will explore the remaining tax planning options and techniques available as we start the 1990s.

CLE Credit: 6.5 hours
Date: April 3, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 p.m.

C CORPORATE TAXATION

A live via satellite seminar. This program will provide a thorough discussion and analysis of the considerations involved in operating a business as a corporation. The initial part of the program is devoted to an analysis of the issues concerning choice of entity, i.e., whether to operate as a partnership or a corporation and if the decision is made to operate as a corporation, whether to elect Subchapter S status. Further, consideration is given to the capitalization of a new corporation as well as the various means of transferring assets to the corporation without the recognition of gain or loss. The session will conclude with a question and answer period.

CLE Credit: 6.5 hours
Date: April 4, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 p.m.

BANKING AND FINANCE SECTION OF THE UTAH STATE BAR

A four-hour continuing legal education program will be sponsored by the Banking & Finance Section of the Bar the morning of April 9, 1990 at Stein Eriksen's Lodge at Deer Valley Utah. Speakers will include Phillip Jeffrey North, Deputy Regional Counsel, Resolution Trust Corporation; Ralph R. Mabey, former United States Bankruptcy Judge for the District of Utah; and Scott H. Clark of the firm of Ray, Quinney & Nebeker. The tentative program will include four one-hour sessions, including current regulation of financial institutions, bankruptcy issues relating to financial institutions and an overview of current legal developments both legislative and judicial.

CLE Credit: 4 hours
Date: April 9, 1990
Place: Stein Erikson Lodge at Deer Valley
Fee: TBA
Time: TBA

BANKRUPTCY SECTION LUNCHEON

Barbara Richmond, the standing Chapter 13 Trustee for Utah, will be presenting on, "Chapter 13 Administration from a Debtors Point of View."

CLE Credit: 2 hours
Date: April 19, 1990
Place: Utah Law and Justice Center
Fee: $30
Time: 12:00 to 2:00 p.m.

CARGO LOSS AND DAMAGE CLAIMS

A live via satellite seminar. What law governs your cargo loss or damage case? The advent of multimodal transportation has blurred the edges of what was previously discrete bodies of law governing maritime, overland and air transportation. Practitioners must now be ready to advise their clients in each of these areas of American Law as well as the applicable international law. This course will teach you the latest legal developments in each area of law and how to determine which law applies. If you represent any one who ships, carries, packs, handles or arranges for transportation of goods, you will benefit from this program.

CLE Credit: 6.5 hours
Date: April 24, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 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.

CRIMINAL LAW SECTION SEMINAR

The Criminal Law Section of the Utah State Bar will be sponsoring a seminar May 4 and 5, 1990. On May 4, the program will involve three hours of criminal law issues. There will be presentations relating to search and seizure, confessions and sentencing. The focus will be to update criminal tactics and procedures. On May 5, there will be a six-hour trial practice program. Subjects will include: developing a theory of the case, new developments in evidence, using demonstrative evidence, preparation of and cross examination for expert witnesses, opening and closing arguments, and creative ways to present your case to a jury.

The trial practice seminar is intended to be applicable to both civil and criminal litigation. Registrants may enroll in the criminal law or trial practice programs separately. Discounted registration fees will be available to public defenders, attorneys who have local public defender contracts and prosecutors including city attorneys, deputy county attorneys, assistant attorney generals and assistant United States attorneys. Discounted room rates at the Cliff Lodge are available for all registrants.

CLE Credit: 9 hours
Date: May 4 and 5, 1990
Place: Cliff Lodge at Snowbird
Fee: Standard: full package—$155, Friday—$70, Saturday—$120.
Discount: full package—$140, Friday—$60, Saturday—$110.
Friday Evening Meal—$20.
Time: May 4, 1:30 to 4:30 p.m. May 5, 9:00 a.m. to 4:30 p.m.

ENERGY, NATURAL RESOURCES AND ENVIRONMENTAL LAW SECTION'S ANNUAL UPDATE LUNCHEON

CLE Credit: 1 hour
Date: May 16, 1990
Place: Utah Law and Justice Center
Fee: None (only cost of lunch)
Time: 12:00 to 1:30 p.m.

January 29, 1990

Hon. Christine M. Durham
332 State Capitol
Salt Lake City, UT 84114

Dear Justice Durham:

On behalf of the Mid-Year Meeting Committee and the Utah State Bar, let me express our sincere gratitude for your participation in our convention.

Thanks to your time and effort, your presentation and the entire convention was a success. Volunteer efforts like this ensure quality meetings and CLE events for the Bar membership, which in turn increases the effectiveness of attorneys in our state.

If you are a member of the Utah State Bar claiming Utah CLE credit for this meeting, here are some guidelines for you. You can claim the regular convention hours for the portions you attended, as you were given a complimentary registration. There were five hours total for the Scottsdale portion of the meeting, two of which were ethics credit. Also note that 50 minutes counts as one hour. You will claim these hours on the form you submit to the Utah MCLE board at the end of the first two-year reporting period. If you have any further questions regarding this, feel free to contact me.

If there were any areas where we may have provided more or better assistance to you, we would appreciate hearing about them. Once again, thank you for taking part in our Mid-Year Meeting. We look forward to working with you in the future.

Sincerely,

Tobin J. Brown
CLE Administrator

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ March 1	Estate Planning for Family Businesses and Non-Business Property after IRC §2036(c) or Its Successor	L & J Center	$147
☐ March 5	Professional Liability Loss Control Seminar	L & J Center	$55
☐ March 13	Controlling Retiree and Employee Benefit Costs	L & J Center	$160
☐ March 15	Issues on Child Sexual Abuse	L & J Center	$20
☐ March 22	Jury Comprehension in Complex Cases	L & J Center	$147
☐ March 27	Managing and Motivating Lawyers	L & J Center	$175
☐ March 30	Evidence for Advocates	Marriott Hotel	$130/$140
☐ April 3	Estate Planning Opportunities for the 1990s	L & J Center	$175
☐ April 4	C Corporate Taxation	L & J Center	$175
☐ April 9	Banking and Finance Seminar	Stein Erikson Lodge	TBA
☐ April 19	Bankruptcy Section Luncheon	L & J Center	$30
☐ April 24	Cargo Loss and Damage Claims	L & J Center	$175
☐ April 25	Environmental and Natural Resource Issues in Commercial Transactions	L & J Center	TBA
☐ May 4-5	Criminal Law Section Seminar	Cliff Lodge	$155
☐ May 16	Energy and Natural Resources Lunch	L & J Center	None

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 $ _____
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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 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.

Office in the JCPenney building is available for rent from medium-sized law firm. Facilities include receptionist, copier, telephone, FAX, conference rooms and library. There is secretarial space included with this rental. For more information, call Shannon at 521-6383.

OFFICE SHARE ASSOCIATE: Established firm overlooking Sugarhouse Park. Excellent freeway access. Attractive suite, large individual office with fine view. Call 486-3751.

Office space is available at historic Arrow Press Square. Single offices or multi-office suites. Services include receptionist, telephone, copy machine, FAX and conference room. Office package beginning at $125 per month. For more information, please call (801) 531-9700.

FOR LEASE. Spacious office. 10-foot high windows. All office amenities. Close to courts. Looking for established attorney with litigation practice. Very reasonable overhead. Call 322-5556.

POSITIONS AVAILABLE

The Salt Lake office of LeBouef, Lamb, Leiby & MacRae is seeking a mid to senior level associate with experience in commercial litigation. Experience in Utah courts and Utah Bar membership preferred. Send resumé to David M. Connors, LeBouef, Lamb, Leiby & MacRae, 136 S. Main Street, Suite 1000, Salt Lake City, UT 84101.

LITIGATORS. Relocate to the sun belt city with the highest growth rate in the country. The Las Vegas office of one of Nevada's largest and most prestigious law firms has immediate openings for FIVE litigators. Two to five years' experience is required. Excellent communications skills and the ability to work independently on large, complex cases is a must. Successful applicants must be admitted to practice in Nevada or have a willingness to become eligible for admission in the fall of 1990. Products Liability, Automotive Litigation, Insurance Defense, Commercial Litigation, Construction Litigation, Bond/Surety Law. Please send resumé along with salary history to: Richard P. McCann, J.D., % Beckley, Singleton, DeLanoy Jemison & List, Chtd., 411 E. Bonneville Avenue, Las Vegas, NV 89101. All responses will be held in strict confidence.

UNIQUE OPPORTUNITY FOR ASSOCIATES: Established Salt Lake City AV rated litigation firm is seeking two associates with two to five years' experience to assist in the representation of a broad-range of local and national clients. Strong academic background and work ethic required.

Competitive salary and benefit package offered. Send resumé with references to: Utah State Bar, Box M, 645 S. 200 E., Salt Lake City, UT 84111-3834.

POSITION SOUGHT

Member of Utah Bar with 10 years' experience and excellent legal writing and editing skills seeks affiliation with litigation firm. Affiliation can be flexible and can be adapted to accommodate firm's needs. Would be willing to associate with respect to individual projects and would be willing to accept work on hourly or per diem basis. Have strong background in civil litigation as well as oil, gas and mining law. Have experience with exceptionally large projects, involving organization and management of extensive documentation. Excellent typist with access to word processor; able to prepare pleadings in final form without secretarial assistance.

SERVICES AVAILABLE

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

Don't lose that valuable case because of shoddy research! We conduct timely and on-point legal research on nearly all issues, federal and local; prepare memoranda, case briefs, etc., to your specifications. Best of all, our charge for this professional-quality research service is only $23 an hour plus costs and mailing. To place your order today, call or write: PREMIER RESEARCHES, "Serving the Utah Legal Community," Oquirrh Place, Suite 305, 350 S. 400 E., Salt Lake City, UT 84111. (801) 355-2400.

BOOKS FOR SALE

FOR SALE: Utah Code, Annotated, Michie edition, up-to-date with pocket parts and pamphlets, $300. Located in Ogden. Call Erol Benson, (801) 393-7876.

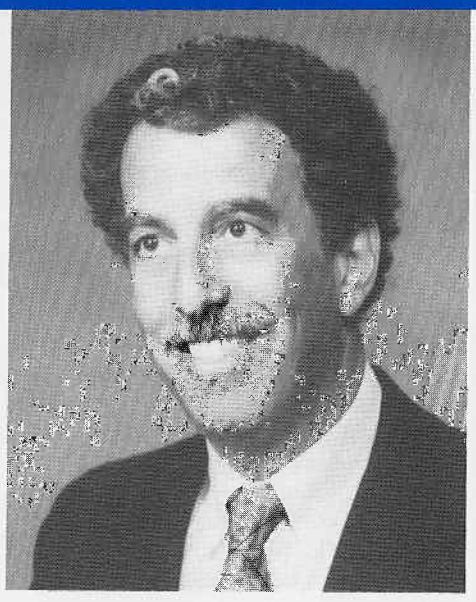
BANKRUPTCY SERVICE Lawyer's Edition, published by Bancroft Whitney. Thirteen books current to 1987. Also included: ALERT Binder and 1988 Bankruptcy Code, Rules and Official Forms. VERY GOOD condition. $150. Contact Joan, (801) 533-0222.

Complete updated sets of Utah Code Annotated available for one-half the cost of new ones. Contact Salt Lake Legal Defender Association, Beth Pope, 532-5444.

EQUIPMENT FOR SALE

Used 286 PC clone with three terminals and networking software—$2,500. Call (307) 789-7887.

For information concerning classified ads, please call Paige Stevens at the Utah State Bar, 531-9077.



A Sport on the Law

By Tom Zlaket
President State Bar of Arizona

OUT OF THE FRYING PAN

Four plumbers showed up at my house the other day to fix a leak under my sink. I asked where my old plumber was, the fellow with whom I had done business for years. He retired, they said, and the business was in the hands of new owners. Tired of emptying the drip pan, I invited them in and showed them the leak. I laughingly remarked that whoever sent all of them to my home must have misunderstood my phone call, since the job was so small. I almost felt apologetic. No problem, their leader replied. They always worked as a team. It was more efficient that way. He assured me I would be taken care of.

One of the younger fellows was given the job of making the hole in the wall. It seemed to me much bigger than was needed, but what did I know? They indicated it would look good as new after the hole was patched up. I started to watch Ted Turner's version of the "Wizard of Oz," in which the Kansas scenes have been colorized and the rest of the film is black and white.

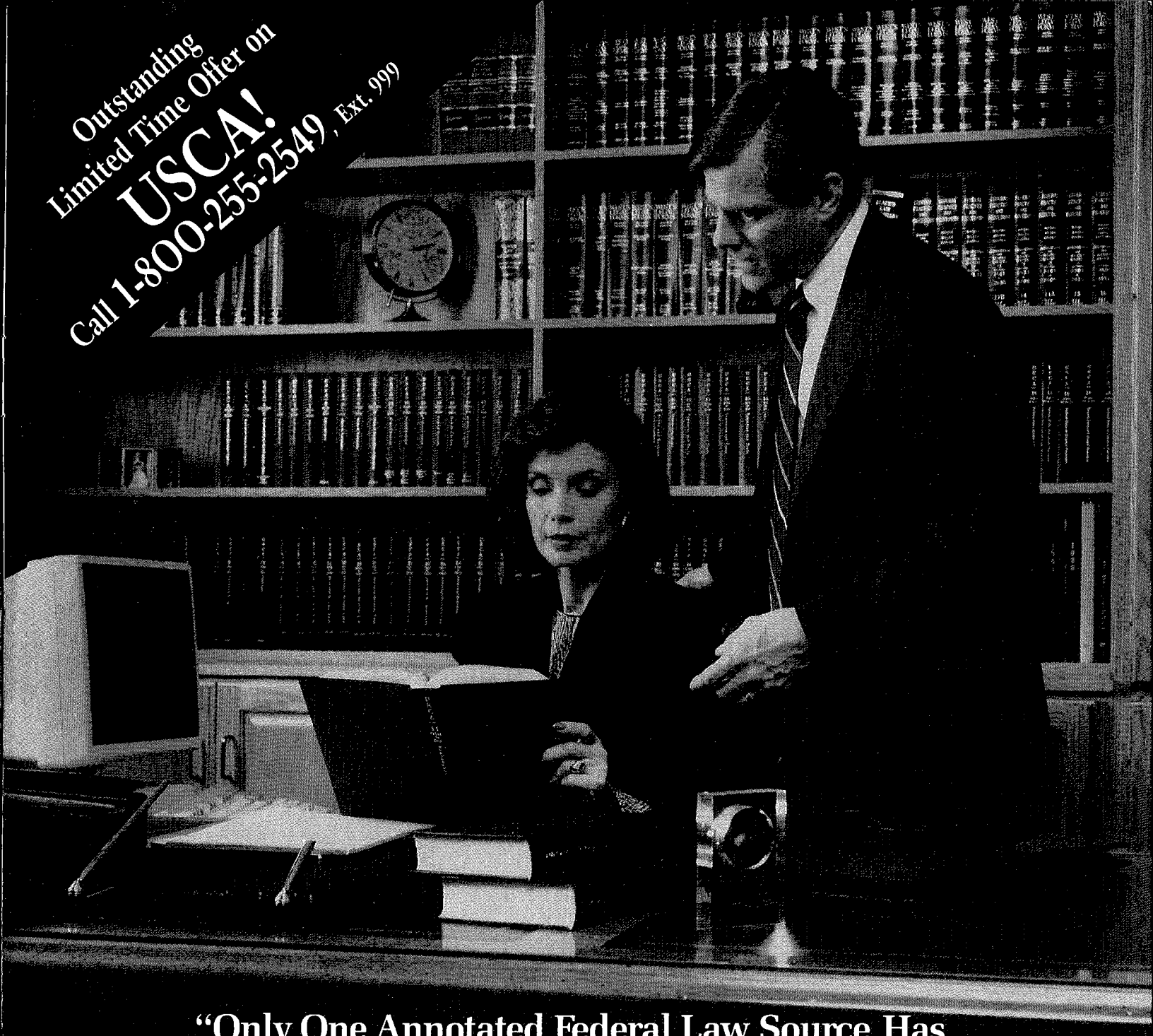
Finally, the job was done. The leak was gone. The men left, and the leader told me a bill would be sent by the bookkeeping department. (My old plumber's bookkeeping department was in the glove compartment of his truck.)

The computerized statement, which finally came yesterday, reads as follows:

Review and examine leaking pipe ... 0.3 hours	
Planning conference:	
Journeyman	0.2
Apprentices (3)	0.3
Preparation for, and removal of, leaking pipe	0.4
Receipt and review leaking pipe	0.4
Research parts manual	0.4
Preparation for, and creation of, opening in partition:	
Journeyman supervision	0.5
Apprentices	1.5
Preparation for, and installment of, replacement pipe	0.5
Preparation for, and closure of, opening in partition:	
Journeyman supervision	0.5
Apprentices	1.5
Final conference by journeyman with apprentices	0.3
Final conference by apprentices with journeyman	0.9
Emissions (leak) check	0.2
Premises restoration (clean up):	
Apprentices	0.3
Conferences with customer	0.3
Total journeyman time ($50 per hour)	$185.00
Total apprentice time ($30 per hour)	153.00
Parts and materials	12.50
Total	$350.50

I won't stand for this. It's an outrage. I'm not going to pay. They can sue me. In fact, I've already been to a law firm downtown. The offices were bright and shiny. Everything was orderly. I met my lawyer and his three young associates. He assured me I would be taken care of.

(Reprinted with permission from the February issue of Arizona Attorney.*)*



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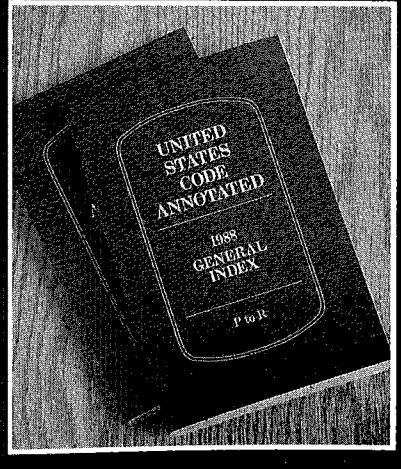

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