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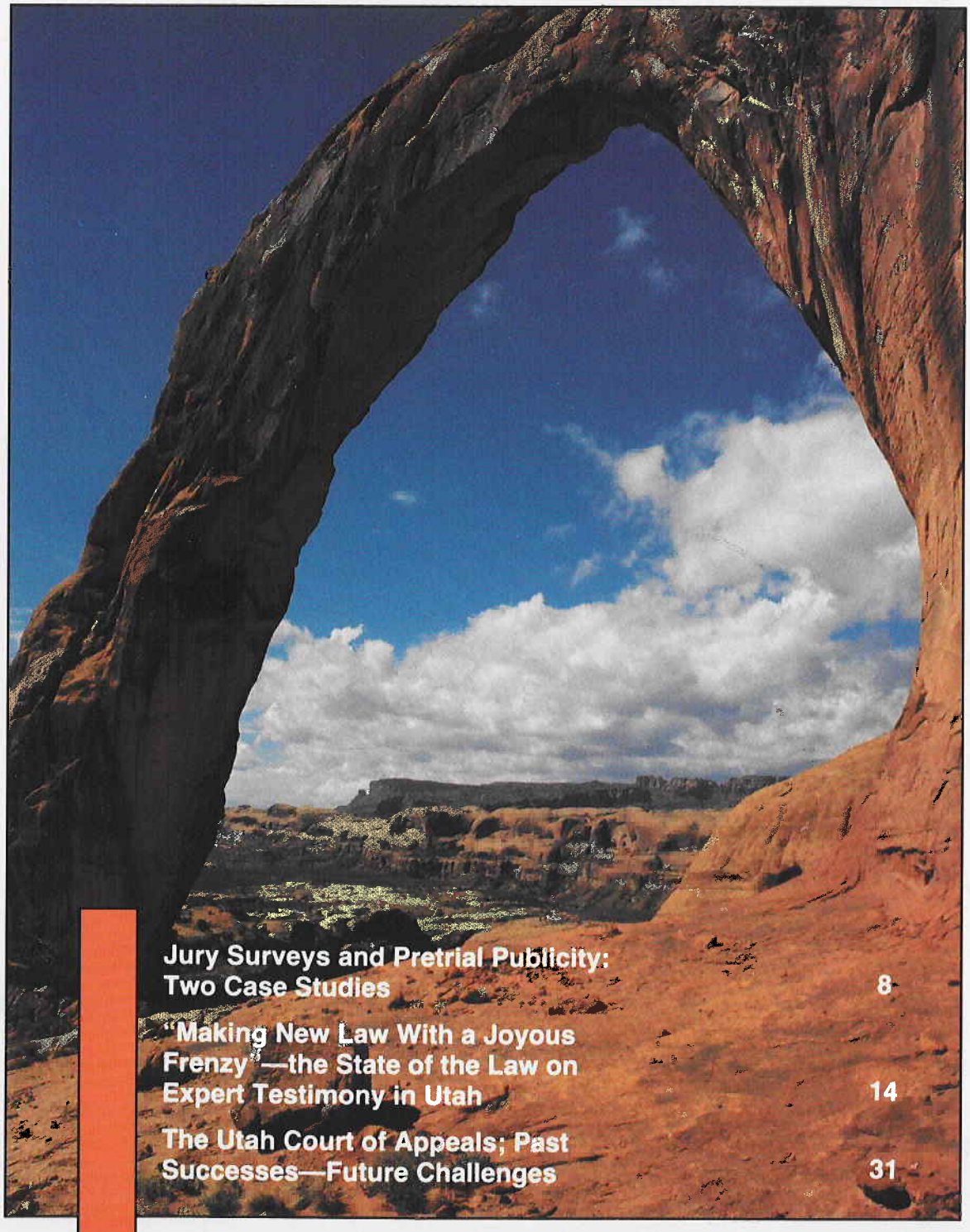

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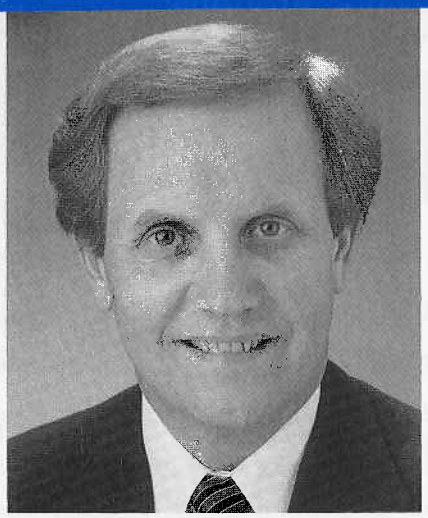


A Dickens Tale Come True

By Hans Q. Chamberlain

"It was the best of times, it was the worst of times..." This famous quote by Charles Dickens in 1859 in many ways summarizes my year as President. Let me explain.

THE WORST OF TIMES

The Bar's financial situation has been the primary focus for my entire year. Because finances have been so much in the forefront, it seems that I have not had time to do many of the constructive things I wanted to do as President. However, in retrospect, I am now grateful that we have gone through the difficult process of defining what the Bar does for its members, and the financial impact of the same.

When I began my year the Bar was already experiencing deficit spending partly because of the prior use of existing reserves to help in the construction of the Law and Justice Center, and partly because Bar revenues were not increasing as expected. Since 1986, growth in Utah Bar membership has leveled off resulting in less revenue than anticipated, however, expenses have not been so gracious. There have also been significant litigation costs and the increasing need to provide adequate service to the members in response to the demands of a full service Bar.

One of the first actions taken by the Bar Commission during this fiscal year was to adopt a zero deficit budget. That required an immediate cut in excess of $80,000 from the proposed budget (the Bar operates on a budget of approximately $1,100,000 per year). From the very first meeting of my term, the Bar Commission has continued to explore ways to cut spending in hopes of eliminating the need to seek a substantial dues increase. As the year progressed, it became painfully clear that we would not meet our goal of a zero deficit budget for fiscal year 1990, that expenses would exceed revenues, and in spite of continued cuts in spending, a dues increase was necessary. No one likes to increase the dues Bar members pay, but until the Bar gets back on a sound financial basis, fiscal responsibility mandated the decision to seek a dues increase. It simply costs the Bar more to operate on a year to year basis, just like any other business, including the average law office.

I am writing this final message approximately 40 days in advance of its publication date because the *Bar Journal* requires approximately that much lead time before actual publication. By the time this message is published, the court will have likely ruled on the dues petition. Regardless of what the court does, I am confident that future Bar presidents and commissions will make every effort to establish a sound financial basis for the Bar, even if it takes a major overhaul of existing Bar programs and services. In an effort to fine tune the budgeting process, the Budget and Finance Committee has been completely revamped to include members with considerable financial experience. Pete Ellison, of Zion First National Bank, will chair the Committee and will be assisted by Bob Graham, Jon Butler, Stuart Hinckley, and two members from the Bar Commission, one of which will be the President or President-Elect.

Concerning how the Law and Justice Center is managed, the Bar Foundation awarded an $8,000 grant to the Bar to fund a study concerning the utilization of the Law and Justice Center, meeting room costs, marketing of available space, and overall strategy to make the Center operated on a cost effective basis. This study is currently under way, and should provide some valuable information to the Bar for many years to come. My thanks to the Bar Foundation for its support of this worthwhile study.

The resignation of Steve Hutchinson as Executive Director of the Bar in late May created additional challenges for me. Steve served the Bar well since his selection in 1985 and I thank him for his efforts. While Steve served as Executive Director, the Bar has dramatically expanded its array of programs and services to Bar members and the public. We have completed the Law and Justice Center and initiated the Tuesday Night Bar Outreach Program, both of which have received national recognition. As you know, the Bar has implemented mandatory continuing legal education and this coming fall, the Bar will initiate an extensive skills development program for new lawyers.

The Bar will continue to face many challenges in future years. Hopefully, all of these problems will not surface at one time, as it has sometimes appeared to be the case this year. Whatever the problems, I have great confidence in your new President, the Honorable Pam Greenwood, and the Bar Commissioners who are not only dedicated public servants, but also most capable of dealing with existing problems.

THE BEST OF TIMES

In spite of the problems the Bar has faced this year, it has been a great honor to have served as President of the Bar. I have acquired a deep commitment to the legal profession, a better understanding of the Bar's strengths and weaknesses, and a firm resolution to make things better for Bar members and those we serve.

have been on the Bar Commission since 1982, and by reason of that longevity, I have formed many friendships that are very meaningful to me. Because of the existing problems (both financial and otherwise), I have seen Bar Commissioners excel in trying to solve the many issues facing the Bar. To each of them, I convey my sincere thanks. I have learned much from them.

Most of my time as President has been "defense" oriented and I have learned to appreciate the term "crisis management." In spite of these facts, the Sections and Committees of the Bar continue to perform in outstanding fashion. Space does not permit me to specify all of their many accomplishments, but undoubtedly, the public has been well served this past year by the volunteer efforts of Utah lawyers. In the area of volunteerism, lawyers don't have to take a backseat to anyone.

As I have met with other Bar leaders this past year, I have found the Utah Bar to be on the cutting edge in the programs and services it provides to its members. While that is commendable in many ways, perhaps it has not been the most healthy approach, at least from a financial standpoint. Most likely, you will see changes in how the Bar operates in the future in both service and programs.

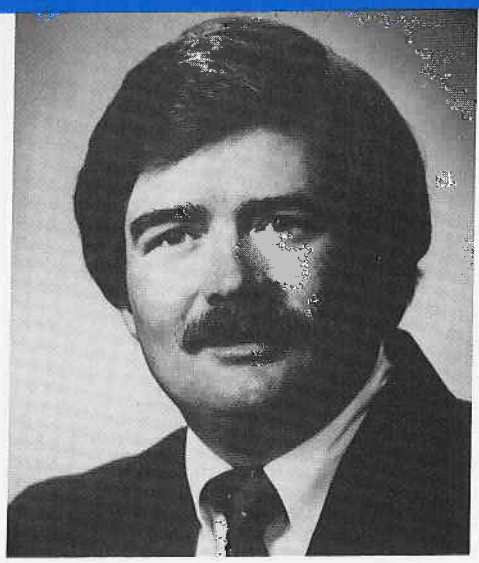
This was the first full year of operation for the Law and Justice Center. While it remains controversial and has had a financial impact on Bar operations, it has served as a gathering place for many notable events and CLE functions. In spite of its critics, it has created a positive image in the eyes of the community and has provided meeting space that did not otherwise exist to promote quality public service to those in need. Just look at the success of the Tuesday Night Bar where over 100 volunteers give of their time. I am not sure the Tuesday Night Bar, as well as many other programs, would have been as successful as they have been without the availability of the Law and Justice Center. Sure it has been at some cost to the members, but in my opinion, well worth the cost and effort.

When it appeared that I had a chance to become the first Bar President from southern Utah in over 20 years, the members I represent graciously allowed me the opportunity to serve a third term on the Bar Commission. At that time, I committed to them that I would resign after my year as President to allow someone else to serve the last year of my 3 year term, recognizing, of course, that I would remain on the Commission as Past President in an ex-officio capacity. I will therefore be resigning as a voting member of the Bar after the Annual Meeting and would encourage those in my district to seek the vacancy that now exists.

Although this has been a difficult year, in final analysis, and in spite of all the problems, I can easily say that "the best of times" still far outweigh "the worst of times."

In conclusion, a public thanks is only appropriate to the Bar staff and my own firm and staff for their support this past year. Most of all, my love and thanks to my wife, Mary, and my four daughters, Stacy, Shauna, Marni and Heather.

Thanks for a memorable year.



Inappropriate Gender-Related Behavior

By J. Michael Hansen

On April 23, 1990, the Utah Task Force on Gender and Justice, after a three year study, released its findings and recommendations at the April Session of the Utah Judicial Council. The Task Force, chaired by Aileen H. Clyde, included judges from each level of the Utah court system, lawyers, court personnel and community leaders. The Task Force was established in November 1986 by the Judicial Council to inquire into the nature, extent and consequences of gender bias as it might exist within the Utah court system. In conducting its inquiry, and making concrete recommendations for reform where necessary, the Task Force utilized various methods of data collection including statewide public hearings, statewide confidential hearings, a written survey of 2,000 Utah attorneys, a telephone survey of Utah's County Attorney Offices, statewide employee focus groups and personnel data from the Administrative Office of the Courts.

In conducting its work, the Task Force utilized the following definition of gender bias:

> Gender bias encompasses society's perception of the value of work assigned to each sex, the myths and misconceptions about the social and economic realities of people's lives, and the stereotypes that society has assigned to the behavior of men and women.

The primary goal of the Task Force was to increase awareness of the ways in which inappropriate gender-related attitudes and behaviors can influence the mission of the courts. The five areas investigated by the Task Force were Domestic Relations, Domestic Violence, Judicial Selection, Court Employment and Courtroom Interaction. While each of the areas of the Task Force's study is important, the day-to-day conduct of attorneys in the office and courtroom setting is the area in which we, as a Bar, can have the most impact.

The significance of the problem is best illustrated by the fact that when the data on courtroom interaction was sorted by gender, the responses to every question produced statistically significant differences. A majority of male and female attorneys, irrespective of age or the location of their practice, perceived differently how men and women are treated in the courtroom. As the Report states:

> While persons may reasonably perceive the world differently, their perceptions become problematic when those who do not perceive a problem dismiss the concerns of those who do. Such attitudes contribute to communication barriers, resulting in unwillingness to discuss the issues and hostility toward those who raise them. That so many men are oblivious to what is real to so many women is part of the problem of gender bias and is one of the reasons that it is so difficult to confront, discuss, and deal with in a productive fashion.

The Task Force states that a common misunderstanding is that persons who engage in gender bias necessarily intend to discriminate. The Task Force notes that "many persons who exhibit inappropriate gender-related attitudes and behaviors may have no intent to discriminate, no intent to stereotype men or women, no intent to generalize about appropriate roles or behaviors for men or women."

Women who responded to the Task Force Survey, and who participated in the public and confidential hearings, noted that while the attitude of the judiciary towards women has generally improved, the same cannot be said of the behavior of male attorneys. This gender bias appeared in many forms. Female survey respondents repeatedly stated that male lawyers address them by first names or in terms of endearment while addressing male lawyers by title or surname. Female respondents also noted that male attorneys made comments about their

physical or sexual attributes or appearance. Over 65 percent of the female survey respondents reported these behaviors occurring "sometimes" or more often, and 30 percent of male respondents agreed. Women lawyers reported that women lawyers, litigants and witnesses are interrupted by judges more frequently than male lawyers, litigants and witnesses. They further stated that deferential treatment accorded to women in court by men is demeaning and undermines their credibility and that women lawyers receive lower fee awards for similar work.

The Task Force recommended that the Utah Bar Association:

1. Amend the Rules of Professional Conduct to prohibit attorneys from engaging in inappropriate gender-related conduct.

2. Insure that continuing legal education programs include a component directed to gender fairness in court and professional interactions.

3. Improve continuing legal education programs by:

(a) Developing a policy that expressly prohibits inappropriate gender-related conduct in Bar-sponsored education programs;

(b) Screening potential continuing legal education faculty members for gender issue awareness;

(c) Include in program evaluations questions that address the gender fairness of both the substantive program and the faculty member's presentation; and

(d) Recruit qualified women as faculty in continuing legal education programs and as panelists at conferences and seminars.

4. Communicate the results of the Task Force's Attorney Survey to all members of the Utah State Bar.

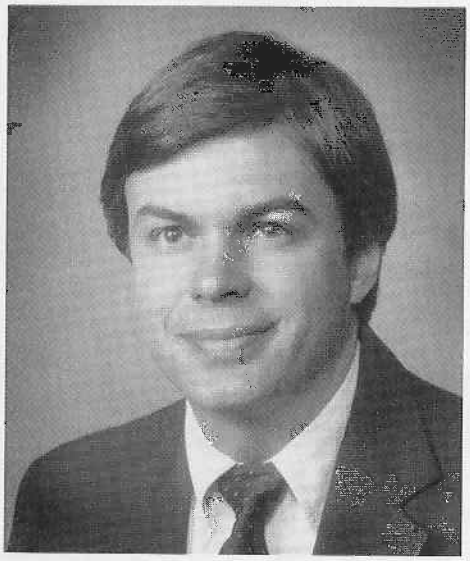
5. Insure that all Bar publications and communications are gender neutral.

The Bar Commission is reviewing the Task Force Report. As noted by the Report, "a fair justice system must include equitable treatment of all persons in the system, regardless of individual differences, and without bias that is either intentional or unintentional, benevolent or malevolent."

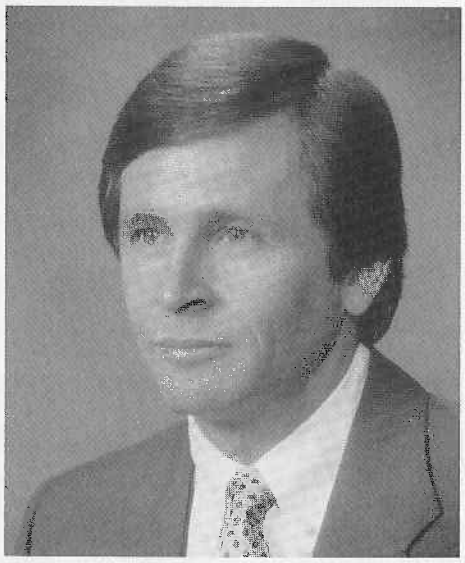
I strongly recommend that all attorneys familiarize themselves with the Task Force Report. Copies of the Report can be obtained through the Administrative Office of the Courts, 230 S. 500 E., Suite 300, in Salt Lake City.

Jury Surveys and Pretrial Publicity: Two Case Studies

By Scott M. Matheson Jr. and Randy L. Dryer***



**MR. MATHESON is a faculty member at the University of Utah College of Law. This past year he has served as Visiting Associate Professor in the Frank Stanton Chair on the First Amendment at Harvard University's Shorenstein Center in the John F. Kennedy School of Government.*



***MR. DRYER is a shareholder in the law firm of Parsons, Behle & Latimer and specializes in media law. He serves on the Board of Bar Commissioners.*

I. INTRODUCTION

During the 1980s the nation witnessed an increasing number of lengthy and highly publicized criminal trials that were preceded by intense and protracted pretrial press coverage. Utah had its share of high profile cases during this period, beginning with the state prosecution of Joseph Paul Franklin for a racially motivated murder to the recent federal criminal fraud trial of prominent Salt Lake businessman Gary Sheets.

Although the highly publicized case may offer exposure to the ambitious prosecutor or the flamboyant defense counsel and may help satiate the public's seemingly ingly endless appetite for the sensational, it presents difficult challenges to the judicial system in balancing the fair trial rights of the accused and the constitutional protection for a free press. The principal challenge is securing an impartial jury.

In determining whether pretrial publicity will prevent a prospective juror from serving as an impartial factfinder, a series of questions must be answered: whether the juror was exposed to prejudicial publicity, whether the juror recalls the publicity, whether the publicity has affected the juror's opinion on guilt or innocence, and whether—in spite of any such opinion the juror can decide the case impartially based solely on evidence presented at trial.[1]

In recent years, more attorneys and judges have employed detailed and comprehensive written jury questionnaires to obtain information about prospective jurors, including the impact of pretrial publicity. Members of the jury venire are asked to complete the surveys during the jury selection process and before completion of oral jury voir dire. Federal and state courts in Utah have followed this course in high-profile criminal prosecutions. This practice should produce significant data about a variety of jury issues.

To demonstrate the potential of this information, we have analyzed the responses to jury surveys used in two high-profile criminal cases tried in Utah to determine whether the data shed light on the fair trial and free press issue. *United States v. Affleck* involved a multimillion dollar investment fraud. *State of Utah v. McCovey* concerned a killing of a pregnancy mother. In both cases there was extensive press coverage, and in both the defense moved unsuccessfully for a change of venue based on prejudicial pretrial publicity.[2]

Our analysis of the jury survey data supports the trial courts' denial of the change of venue motions.[3] The surveys also add to the growing evidence that concern about pretrial publicity, even in the relatively few high-profile cases, should not be overstated.[4] Finally, the *McCovey* data suggests that a possibly effective voir dire question to screen out bias based on pretrial publicity is to ask whether the prospective juror thinks that most press accounts are true and accurate. We caution that written survey responses from two jury venires hardly constitute a basis for general conclusions, but they may suggest some tendencies and underscore the potential value of this data source.

II. THE CASES

The first case was a federal prosecution against Grant C. Affleck.[5] Following a six-week trial before a 12-person jury, he was convicted on eight counts of securities fraud, one count of causing a person to travel in interstate commerce to execute a fraudulent scheme, and one count of bankruptcy fraud. He was acquitted of 10 counts of mail fraud and on one count of bankruptcy fraud. The case involved Affleck's business transactions as owner/manager of AFCO Enterprises, a real estate development company operating in the Salt Lake area.

Mounting cash flow problems led AFCO and Affleck in 1981 to seek alternative sources of capital by convincing homeowners to obtain second mortgages on their homes and then loaning the money received to AFCO in return for a high-interest promissory note. Affleck gained access to many individuals and their funds through his Mormon Church connections and promises of a fail-safe investment. However, rather than using the funds for further real estate investment, the money was used to meet AFCO's existing debts, and the investors were promised many bogus benefits. AFCO filed for Chapter 11 bankruptcy in the spring of 1982, and Affleck was indicted in November 1983. Approximately 650 investors lost about $20 million as a result of these transactions.

The second case was a state prosecution for first degree homicide and aggravated robbery against Charles K. McCovey.[6] He was convicted in January 1989 by an eight-member jury of second degree homicide and aggravated robbery. The homicide victim, Anna Holmes, was located at the Video Voyager Store in the Salt Lake Valley on April 22, 1988, with her three daughters and several of their friends. While Mrs. Holmes was near the cash register, McCovey approached her, drew a small caliber revolver, put the gun to the back of her head, and announced he was robbing the store. After receiving money from the store clerk, McCovey fired the gun into Mrs. Holmes' skull and caused her death. She was pregnant at the time. Her baby daughter was delivered prematurely and survived, but she suffered brain damage. One of the victim's daughters witnessed the shooting. In addition to raising three young children, Mrs. Holmes was a savings and loan branch manager, was active in the Mormon Church, was an officer in her local chamber of commerce and a member of her town council, and was active in a variety of other community affairs. McCovey was apprehended on April 25. A preliminary hearing was held on June 2, at which time McCovey was bound over for trial in state district court.

III. PRESS COVERAGE

Both cases received substantial press coverage from the primary news outlets in Salt Lake City: two daily newspapers, three network-affiliated television stations, and several radio stations.

In court papers filed in November 1983 setting forth the factual basis for a change of venue motion, Affleck's counsel attached copies of 29 Salt Lake newspaper articles, a *Forbes* magazine article, and radio wire copy. The news accounts reported AFCO's financial problems and bankruptcy proceedings, investor lawsuits against AFCO and Affleck, and state and federal regulatory and prosecutorial action taken against AFCO and Affleck between February 1982 and September 1983. In an August 1984 motion to reconsider the federal court's denial of a change of venue, Affleck's counsel attached copies of two *Utah Holiday* magazine articles that attempted an overview of the financial and legal history of AFCO and Affleck and copies of 20 newspaper articles reporting mainly about federal trial proceedings in investor suits against AFCO and Affleck. To support both attempts at change of venue, Affleck's attorneys also contended that there was extensive television and radio coverage but did not compile logs or statistics on times and frequency.

"Analysis of jury survey data supports the court's denial of the change of venue motions."

Press coverage also was extensive on the Anna Holmes killing. Between the shooting on April 22, 1988 and shortly after the preliminary hearing in June, the daily newspapers each carried 14 stories, almost always running on the front or the metro or local section of the paper. The three television stations broadcast at least 24, 16, and 15 stories respectively.[7] The coverage included details about the incident, the investigation leading to the arrest of McCovey, McCovey's criminal history, the victim's funeral, profiles on Mrs. Holmes and her family, and court proceedings. The latter included evidence presented at the preliminary hearing, which revealed incriminating statements attributed to the accused.[8]

IV. THE SURVEYS

In both cases the trial courts employed lengthy juror questionnaires before oral jury voir dire. There were 116 questions in the *Affleck* survey, which was 44 pages in length. The *McCovey* survey was 38 pages and contained 311 questions. The completion and analysis of the questionnaires occupied at least a full day of the proceedings.[9] The trial judge and counsel had an opportunity to study the completed questionnaires before oral voir dire and to consider challenges for cause. In reviewing the surveys, the trial participants knew the identity of each respondent.

We were interested in obtaining survey responses concerning demographic information (age, education, etc.), news viewing and reading habits, knowledge about the specific case, and attitudes toward the criminal justice system and the defendant. Although they shared common questions, the survey differed in many respects due to the differences in the crimes charged. The *McCovey* survey was more searching and comprehensive on the issue of press coverage and also elicited more meaningful demographic data.

In *McCovey,* 100 persons on the venire filled out the questionnaire, and we tabulated data from each of these surveys. In *Affleck,* 77 persons were available for individual oral jury voir dire. We tabulated data from the 73 survey questionnaires relating to this group that could be located in the case file. Accordingly, we had data from all or virtually all of the prospective jurors who were available for oral voir dire.[10]

The data was cross-tabulated to determine how respondents who answered in a particular way to one question responded to other questions. Nonetheless, because the number of respondents was small in subcategories based on age, gender, education, religion, or press viewing habits, any interpretation of the data must be regarded with caution. Indeed, some subgroups were too small to attempt any interpretation. For example, nine of 100 prospective jurors were aware of statements made by defendant McCovey, but breaking down the nine by age, education, and other characteristics could not yield meaningful inferences. This problem is inherent in any analysis of juror survey data from a single

case.

Before examining the survey materials, we consulted the trial judge in each case, who was assured that this project was concerned with statistical information only and had no interest in the identity of any juror or prospective juror. Procedures were followed carefully to preserve the confidentiality of each survey respondent, and the surveys remain in the custody of the respective courts. We did not seek and do not know the identity of any juror or prospective juror related to that person's survey responses. We are convinced that such safeguards are necessary for this type of research to continue and reach its full potential.[11]

V. SURVEY RESULTS

A. *Affleck*

1. **Respondents**—The 73 respondents represented five age categories: six in their 20s (18-29), 10 in the 30s, 22 in their 40s, 21 in their 50s, and 14 in their 60s (up to 72). Twenty-six (36%) had graduated from high school, and 14 (19%) had graduated from college. Fifty-four (74%) were Mormons.

2. **News Viewing Habits**—Fifty-three (73%) respondents reported that they regularly watched or listened to news programs on television or radio. Forty-three (57%) said they read the morning Salt Lake daily paper, and 23 (30%) said they read the afternoon Salt Lake paper. When asked for their primary news source, 51 (70%) said television, 18 (25%) said radio, and 26 (36%) said newspaper.

3.**Knowledge and Attitude About Cases**—Twenty-seven (37%) respondents reported having knowledge about AFCO or Affleck. The percentage was almost twice as high among the college graduates.

Television accounted for at least a little more than half the respondents' knowledge about the case.[12]

When asked what they know about the matter, less than half could specify the nature of the charges, with six (22%) mentioning mortgage fraud and six simply stating fraud. Five (19%) recognized only the defendant's name and no details, six said they did not know or remember what they had heard, and four (15%) answered cryptically that they knew what they saw, heard, or read. Four (4) respondents recalled having read a magazine article about the case. As a result of information received from the press or otherwise, only one of 73 respondents reported having formed an opinion or impression on whether Affleck was guilty of criminal fraud.

4. **The Petit Jury**—The *Affleck* case file organized the completed questionnaires according to whether the respondent had been selected to serve as one of the 12 jurors or two alternates. The average age of these 14 individuals was 48; only three were under 40 and only one under 30. Of the 12 who responded to the religion question, nine stated they were Mormons.[13] Nine of the 14 were regular television and radio news consumers, which was comparable to the oral voir dire venire as a whole. Three jurors were college graduates. Four jurors had heard about AFCO or Affleck, but none could report knowledge of the charges or any other information other than one juror commenting about having "heard the name and some comments." None of the 14 reported having formed any opinion or impression on the issue of guilt.

"Twenty-one of the prospective jurors had formed an opinion whether the defendant was guilty."

B. *McCovey*

1. **Respondents**—The 100 respondents neatly divided into five age categories. There were 25 in their 20s (19-29), 26 in their 30s, 25 in their 40s, 12 in their 50s, and 12 in their 60s (up to 71). There were 48 males and 52 females. Eighty-seven were high school graduates, 58 had attended college, and 23 were college graduates. Sixty-two were Mormons; 43 active Mormons. A higher percentage of the women were Mormons (75%) and active Mormons (52%) than were the men (48% and 33%).

2. **News Viewing and Reading Habits and Attitudes**—Eighty-five of the 100 respondents reported reading the newspaper, 50 on a daily basis and 35 occasionally. Seventy-two said they read about local or regional news, and 45 said they rely primarily on the newspaper for news reports. Ninety-three said they listen to the radio; 44 rely mainly on the radio for news. Eighty-one rely largely on television for news reports. Sixty-four thought that most newspaper accounts are true, and 69 thought most television and radio news reports are accurate.

3. **Knowledge About Case**—Ninety-one of the venire had heard news reports about the Anna Holmes shooting, 20 had heard about the preliminary hearing, and nine were familiar with statements allegedly made by McCovey. Sixteen of the 20 who had heard about the preliminary hearing discussed the incident with someone at the time the shooting occurred. Ninety-eight percent of the active Mormons had heard about the shooting. Fifty-two said they had read an article about the incident, but the survey did not otherwise ask for the source of the respondents' information, and the cross-tabulations do not yield a clear answer. Sixty respondents had discussed the incident with someone else at the time it had occurred, and 20 had discussed it with someone since.

4. **Attitudes About Defendant and the Criminal Justice System**—Twenty one of the prospective jurors had expressed an opinion to someone else about McCovey's guilt or innocence, and 23 said that someone had expressed an opinion on this issue to them. As a result of what they had heard, read or seen, 21 had formed an opinion about whether McCovey was guilty. In this group of 21, 90% thought courts are too "soft" on those charged with and/or convicted of crimes, 81% thought McCovey had the burden to prove his innocence, and 76% thought McCovey was guilty because he was charged. In a question appearing later in the survey, 29 said McCovey was more likely than not guilty. Twenty-two thought McCovey was guilty as charged because he had been charged, and 29 thought he was more likely than not guilty (of something) because he was charged with a crime.

Of the 21 and 29 mentioned above who had formed an opinion on guilt, a high percentage of them (83% to 93%, depending on the question) thought that newspaper, television, and radio news accounts generally are accurate. This confidence in the accuracy of the press among those who were predisposed to guilt was higher than that of the venire of 100 (64% to 69%).[14] This pattern of relative confidence in the press continued among the 22 who thought McCovey was probably guilty as charged because charges were filed. Twenty percent of the venire had discussed the incident with someone after it had occurred, but 57% of the 21 who had formed an opinion on guilt based on what they had heard had discussed the incident after it had occurred, and 55% of the 22 who thought McCovey guilty because he was charged had discussed the incident after its occurrence.

Thirty-seven said they presumed McCovey innocent of the crimes charged. Although 51 thought he should have the burden to prove his innocence, 89 said they promised to place no burden on McCovey to prove his innocence. Thirty-three reported having negative feelings about a person as a result of press coverage of the incident.[15] Only four prospective jurors had negative feelings toward the legal system, the participants, the witnesses, or the press as a result of news coverage of the shooting incident.

5. **Other Cross-Tabulation Results**—Of the 64 who agreed that most newspaper reports are true and accurate, 58% were men and 42% were women. Two-thirds of the 32 who disagreed with this statement were women. Similar figures of trust and distrust of television and radio reporting reflected the same gender distinction. Viewed from a different angle, 77% of the men versus 52% of the women thought most newspaper reports are true. The percentages for television and radio were 75% and 63%, respectively. All of the women had heard of the Anna Holmes shooting, but 19% of the men had not or did not know if they had heard. Seventy-three percent of the women as opposed to 46% of the men discussed the incident with someone at the time it occurred. On the question where 22 said they though McCovey was guilty as charged because allegations had been filed against him, 55% of those respondents were men and 45% women.

On most questions, including press reading and viewing habits and knowledge of the case, age levels did not produce notable differences, with two exceptions. First, of the 20 prospective jurors who had heard about the preliminary hearing, one person out of 25 in the 19-29 age range had heard about this proceeding. Second, the proportion of jurors who thought McCovey had the burden to prove his innocence increased progressively with age, with 40% of the 19-29 year-olds and 83% of those who were 60-71 taking this position.

The cross-tabulations with educational level suggest that those who had reached a higher education level not only were relatively better informed but also more impartial.[16] First, 30% of the college graduates thought McCovey had the burden to prove his innocence compared with 57% of those who were not college graduates and 77% of those who did not graduate from high school. Second, of the 22 who thought McCovey was guilty of something simply because he had been charged, 41% had attended college and 59% had not. Of the 29 who thought McCovey more likely than not was guilty, the percentage breakdown was the same. From another vantage, 21% of the 58 who had attended college thought McCovey was probably guilty, whereas 40% of the 42 who had not attended college thought he was probably guilty.

There were some interesting differences based on religion. Of the 29 who thought McCovey probably was guilty, 76% were Mormons and 24% were not. Thirty-five percent of the Mormons and 42% of the active Mormons compared with 19% of the remaining venire thought McCovey probably was guilty. Of the 29 who thought that most television and radio reporting is not accurate, only 24% were active Mormons, who also constituted 34% of the 32 who distrusted newspapers. Seventy-six percent of the Mormons discussed the incident with someone at the time it occurred compared with 32% of the non-Mormons who discussed it.

"A high portion of those with an opinion about the defendant's guilt placed high credibility on news accounts."

VI. DISCUSSIONS

Although a slightly higher portion of respondents in *McCovey* than in *Affleck* said they obtained information from press sources, in both cases reliance on television for news was twice as high as for radio or newspapers. In *Affleck,* television accounted for more than half of those who had some knowledge of AFCO or Affleck. The most significant difference between the two cases was the percentage of respondents who had heard anything about each case: 37% in *Affleck* and 91% in *McCovey*. Although the jury pool in the former was drawn statewide and the latter was from Salt Lake County, the three television stations broadcast throughout the state with significant competition in news reporting from other broadcast channels. We think the data confirm the conventional view that news about violent crime attracts greater attention than news about property crime, even when the latter concerns numerous victims and large sums.[17]

In spite of the numbers in both cases who had heard something about each matter, in *Affleck* the parties could choose from 46 (73%) who said they had never heard of the defendant or his business and from 72 (99%) who had formed no opinion on guilt. Although only nine prospective jurors in *McCovey* had not heard about the shooting incident, at least 71 prospective jurors reported having never formed an opinion or impression on McCovey's guilt or innocence.[18]

A relatively high portion of those who had an opinion about McCovey's guilt placed high credibility on news accounts from all major press sources, which suggests that those who are more skeptical of the press may be less biased as jurors or more accepting of the presumption of innocence. Another fact related to pretrial publicity is that those who formed an opinion on guilt based on what they had heard represented a relatively high proportion of those who had discussed the incident after it occurred, suggesting that those who engaged in dialogue about the case were more inclined to guilt.

The data in both cases indicated that despite widespread and prejudicial pretrial press coverage, there were many prospective jurors (1) who had not heard any information about the case (or had forgotten whatever information they once had) or (2) had not formed any opinion about the guilt of the accused. The data do not support a change of venue. The survey results further suggest that those who have heard about a case are more impartial if they express skepticism about press accuracy generally.

The foregoing ties into other characteristics of prospective jurors. Men tended to be more trusting of the press than women, although significant gender differences did not arise among those who had formed an opinion on guilt. College-educated members of the venire were more likely to have read an article about the incident and constituted a smaller portion of those who thought McCovey was guilty than their percentage in the overall venire. Finally, active Mormons constituted a relatively small percentage of those who distrusted the press and a relatively high percentage (62%) of those who thought McCovey was guilty.

VII. CONCLUSION

The above comparisons do not permit confident conclusions about the impact of pretrial publicity on juror attitude because of the small subgroup sizes and the overlap of gender, education, and religion. More important, data from more than two cases

need to be compared and analyzed. Nonetheless, it appears from the *McCovey* data that the composite juror least likely to have been adversely affected by the pretrial publicity *in that case* would have been a non-Mormon woman in her 20s who was a college graduate and who did not think the press is accurate in its news reports most of the time.[19] We were unable to deduce a hypothetical "untainted" juror from the *Affleck* jury survey.

Written surveys for jury venire are not new, but they are being used more frequently. We think they can be a fertile source to learn more about a variety of jury issues, including the fair trial and free press question. To reach this potential, federal and state judicial administrative bodies such as the Judicial Conference and the Federal Judicial Center as well as state court administrator offices should become involved, with the consent of all relevant parties, in the survey design and data compilation process.

	Affleck	McCovey
Heard about case	37% (27 of 73)	91% (91 of 100)
	Affleck	McCovey
Formed opinion on guilt	1% (1 of 73)	21-29% (21 or 29 of 100)
	Press generally accurate	
McCovey probably guilty (21-29)	83-93%	
No opinion on guilt (71-79)	55-62%	

We wish to thank Dan Jones and Dan Jones and Associates for performing computer calculations with the data collected for this study.

[1] The constitutional right to a fair trial does not require that all jurors be totally ignorant of pretrial publicity about the case. The fair trial right can be met if jurors exposed to pretrial publicity satisfy the court that they can be impartial and decide the case based solely upon evidence presented at trial. *See Murphy v. Florida*, 421 U.S. 794 (1975).

[2] We also reviewed uncompleted jury survey forms used in the state and federal prosecutions of the Swapp and Singer families in connection with the shooting death of a Utah police officer. Unfortunately, many of the completed surveys were destroyed following the respective trials and thus we were unable to compile a data base for analysis.

[3] Although change of venue motions in high profile cases are often made, they are rarely granted. Moreover, although appeals based on denial of change of venue motions are frequently taken, there has never been an instance where the Utah Supreme Court has reversed a conviction because of a trial court's refusal to grant a change of venue based on pretrial publicity. The court has, however, on an interlocutory appeal before trial, overturned a trial court's refusal to grant a change of venue in the case of *State v. James*, 767 P.2d 549 (Utah 1989).

[4] *See, e.g.*, Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 Judicature 162 (Oct.-Nov. 1988) (estimating that press-induced bias would occur in one of every 10,000 cases); Spencer, *The So-Called Problem of Prejudicial Publicity Is a Red Herring*, Comm. Law., Spring, 1984, at 11 (finding that of 63,000 appeals in criminal cases to highest state appellate courts during 1976-1980, 368 claimed that news coverage prejudiced the outcome of trial, and reversals based on the publicity were ordered in only 18).

[5] *See United States v. Affleck*, 776 F.2d 1451 (10th Cir. 1985).

[6] *State v. McCovey*, CR 88-845 (3d Dist. Ct., Utah).

[7] This data was submitted in support of the defendant's motion for a change of venue and was uncontroverted.

[8] The Utah Supreme Court has recognized a constitutional right of access to preliminary hearings by the public and press under both the state and federal constitutions. *Kearns-Tribune Corp. v. Lewis*, 485 P.2d 515 (Utah 1984). *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (recognizing first amendment right of access to California preliminary hearing). As a consequence, preliminary hearings are rarely closed to the public, although defense counsel routinely seek closure in the notorious case.

[9] We have found that some judges and attorneys balk at the use of extensive juror questionnaires not only because they doubt the usefulness of the information obtained, but also because survey impose an additional administrative burden on the court, the attorneys, and the jurors. Nonetheless, the use of questionnaires in the high profile case is becoming the rule rather than the exception.

[10] There is some confusion about the exact number of persons who filled out the *Affleck* questionnaire. The Tenth Circuit's opinion states that "a 44-page questionnaire was submitted to 116 potential jurors," *Affleck*, 776 F.2d at 1455. Documents in the trial court record indicate up to 131 may have filled it out. There is no indication in the trial court record we obtained from the Federal Records Center in Denver, Colorado, that any portion of the record was missing. Because of the filling labeling used by the trial court, we are certain that we reviewed the questionnaires of the 14 persons selected for the jury and as alternates and that we reviewed the questionnaires filled out by 73 or the 77 persons who were subject to individual jury voir dire. If, in fact, more than 73 persons filled out jury surveys, the interpretation and conclusions reached here are subject to qualification. However, that is unlikely based on our interviews the trial participants, which revealed that the number of persons excused from jury duty before individual jury voir dire based on pretrial publicity concerns was nominal and the percentage having any knowledge of the case was small. Most were excused due to scheduling conflicts. We also note the court transcripts reflect that the court and counsel relied extensively on the juror questionnaires to conduct individual jury voir dire.

[11] Indeed, concern for jury venire privacy hampered our efforts to secure the survey results in the 1988 state and federal prosecutions in Utah involving the Singer and Swapp defendants. Once the surveys are accessible and the data is coded, this research is not difficult to do. However, we learned that despite the generous cooperation of judges and court personnel, gaining access to jury survey data can be difficult. Our experience suggests that courts employing jury questionnaires should address the research value of this process and adopt policies to facilitate access and data collection.

[12] The source of that knowledge broke down as follows: television (9/33%) newspaper (2/7%); radio (2/7%);newspaper and television (4/15%); newspaper, radio, and television (2.7%); television and radio (1/4%); unspecified new media (3/11%); and no specification (4/15%).

[13] The two who did not answer were the only ones of the 73 respondents who did not reveal a religious preference.

[14] This in turn was higher than the confidence expressed by those who had not formed an opinion on guilt (55%-62%).

[15] The person most likely is McCovey, but the question did not specify anyone in particular. This is just one example where inartful drafting of the survey questionnaire produced ambiguous results. If the surveys prove useful in jury selection and in jury research, courts and counsel should seek greater assistance from experts in survey design. Perhaps such agencies as the office of Court Administrator in Utah could facilitate juror survey formulation.

[16] College graduates relied slightly more on newspapers and less on television and radio for news reports than those who had not graduated from college. Of the 23 college graduates, 70% had read an article about the shooting; 52% of those who were not college graduates had not read an article.

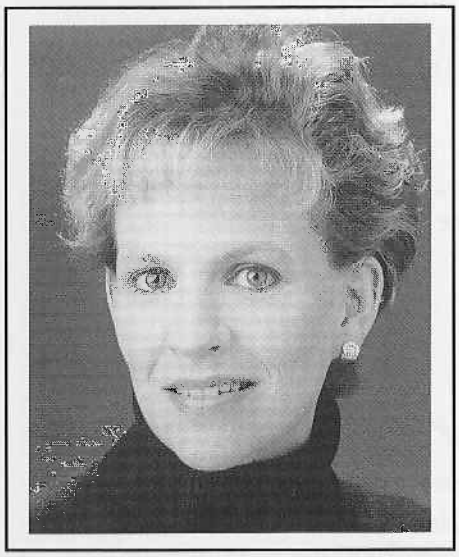
[17] Another possible explanation for the disparity in juror awareness may be that people tend to remember violent street crime to a greater extent than white collar crime.

[18] However, these numbers may be the result of jurors saying what they thought they were supposed to say, perhaps in an effort to hide their knowledge of the case or their notions of guilt. On the other hand, prospective jurors may be more forthcoming in a written survey than responding orally in front of others in open court.

[19] This profile is subject to all the limitations on data interpretation previously noted. We disclaim any intimation that it should serve as a formula for jury selection in any case, including *McCovey*.

"Making New Law With a Joyous Frenzy"[1]— The State of the Law on Expert Testimony in Utah

By Leslie A. Lewis and Karen Knight-Eagan



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Commencing in approximately 1980, significant case law addressing the issue of expert testimony, in the context of child abuse litigation, began to emerge nationally. In the state of Utah, the majority of the relevant cases in this area have been handed down in the last six years. The Utah Supreme Court's serious consideration of expert testimony culminated with the ruling in *State v. Rimmasch*,[2] which dramatically changed the law on use of expert testimony. This case and its progeny has been the subject of great controversy and concern among lawyers, members of the judiciary, child advocates and the public in general. This article contains an overview of the recent cases and a practical guide for trial lawyers attempting to apply these decisions.

THE RULES OF EVIDENCE GOVERNING EXPERT TESTIMONY

In 1983, after considerable committee study[3], the Utah Supreme Court, pursuant to their constitutional power to enact rules of evidence and procedure[4], promulgated the new Utah Rules of Evidence. Utah's rules were patterned substantially after the Federal Rules of Evidence enacted by Congress in 1975 to govern proceedings in federal court.

Historically, the law of evidence, the legal regulation of the proof used to persuade on factual issues during litigation, consisted almost entirely of common law or decisional law. Recently, it has been increasingly codified by statute and court rule. By far the most influential codification of evidence law has been the Federal Rules of Evidence[5]. A large number of states have patterned their codes or rules of evidence after the Federal Rules. Even in jurisdictions which have not undertaken comprehensive revisions of their evidence law since 1975, state courts tend to rely on the body of federal evidence case law in shaping their common law of evidence.

The rules governing opinion and expert testimony are found in the 700 series of both the Federal and Utah Rules of Evidence. Rule 702 is the Rule of Evidence which governs the admissibility of expert testimony.[6] Rule 703[7] places certain limitations upon the underlying bases of expert opinion evidence. Rule 704[8] provides that expert testimony is not objectionable because it embraces, in the form of an opinion or by inference, the ultimate issue to be decided by the trier of fact. Utah Rules of Evidence 702 and 703 are identical to Federal Rules 702 and 703. Rule 704 of the Utah Rules of Evidence is identical to the Federal Rule which existed at the time the Utah Rules were adopted.

Committee commentaries to both the Federal Rules and the Utah Rules of Evidence note that the intent of those drafting the rules on expert testimony was to broaden the scope of admissible expert testimony[9], to enlarge the concept of rele-

vancy and to lessen the historic restrictions which had been placed on this type of evidence consistent with the general purpose of the Rules set forth in Rule 102, "that the truth may be ascertained and proceedings justly determined." The rules, taken as a whole, express a preference for the admissibility of evidence, preferring to allow triers of fact to appropriately judge the weight and credibility of evidence rather than to exclude it from consideration altogether[10]. The standard set forth in Rule 702, that expert testimony must simply be of such a character that it will "assist the trier of fact to understand the evidence or to determine a fact in issue," is intended to encompass a fairly broad range of opinion testimony.

Despite the clear language of the evidence rules and the intention of the drafters, the Utah Supreme Court in *State v. Rimmasch* and in subsequent opinions addressing the admissibility of expert testimony, has taken a very restrictive, intellectual, and hypertechnical position on the admissibility of such evidence.

AN ANALYSIS OF CASE LAW ON EXPERT TESTIMONY

Because child victimization typically occurs behind closed doors where the child victim is the only eye witness, and, in the vast majority of cases, does not result in physical evidence of any kind, the prosecution of child sexual abuse cases is exceedingly difficult. Convictions require the most skilled of prosecutors and appropriate expert testimony. Despite the increasing sensitivity of the public to the plight of child witnesses and the legislative attempts to ameliorate the onerous burden of prosecuting offenders, child abuse cases seem likely to remain the most challenging for prosecutors and defense attorneys alike. As Professor John E. Myers wrote in a recently published article on expert testimony in the *Nebraska Law Review*, "the problems engendered by ineffective testimony and lack of eye witnesses are compounded by the paucity of physical evidence in many child sexual abuse cases. Faced with a vacuum of evidence, attorneys increasingly turn to physicians, psychiatrists, social workers, and psychologists to provide expert testimony regarding child sexual abuse."[11]

The seminal "expert" case in Utah and the source of much controversy, *State v. Rimmasch*, was tried in the spring of 1985 and reversed by the Utah Supreme Court in May 1989, approximately four years later. Most of the other relevant "expert testimony" cases alluded to herein were tried during this four-year interim.[12] The defendant, Phillip Rimmasch, was charged and convicted after a bench trial of forcible sexual abuse, rape, forcible sodomy and incest of his adopted daughter.[13] At the trial the prosecution elicited testimony from Mr. Rimmasch's daughter and four expert witnesses. On appeal, the Supreme Court determined that: (1) it was error to admit expert opinion on abuse based upon the "purported scientific appraisal of the daughter's truthfulness" and; (2) inadequate foundation was laid to establish the reliability of a psychological profile of a typical victim. The Court reversed and remanded for a new trial.

The Supreme Court in *Rimmasch* concluded that at least one of the four experts testifying in this case had expressed an impermissible direct opinion on whether the child witness was truthful on a particular occasion. The Court, in looking at this issue, does acknowledge that determining whether an expert has commented directly on a witness' credibility and whether the expert's opinion "runs afoul" of Rule 608(a) can be a "subtle business."[14]

Clearly, Rule 702 allows a qualified expert to give an opinion. In *Rimmasch*, one of the experts testified as to her opinion that the victim had been sexually abused and went on to testify as to the basis of her opinion. In conjunction with her explanation of the multiple bases for her opinion, the expert volunteered that "if you would consider the alternative that (the daughter) is not telling the truth, then you would have to look at the consequences of the lie and what—why she would lie . . . I don't know what she would have to gain."[15] The testimony of the other three experts was not deemed to be a direct comment on credibility and appears to have been acceptable to the Court. Hence, the expert's elaboration on the basis for her opinion, elicited to enable the trier of fact to better understand the expert's conclusion, led to the problematic comment on credibility in the Supreme Court's perception. While it is not totally clear whether the Supreme Court would have accepted the expert testimony regarding the existence of sexual abuse absent this comment, it appears possible. Under the Rules of Evidence, an expert testifying to an opinion need not articulate the basis for the opinion. This non-elaboration of the basis of opinion may be a "safer" approach.

The Supreme Court in *Rimmasch* also concluded that the trial court's admission of expert opinion testimony that the daughter was the victim of sexual abuse based "largely upon comparisons" of her characteristics with those of the "typical abused child" was error. The Court concluded that certain foundation for the scientific basis and reliability of this "profiling testimony" should have been offered. In doing this, the Court concluded that this expert testimony involved "novel scientific principles" and that the Utah test, set forth by the Court in *Phillips v. Jackson*,[16] and imposing an "inherent reliability threshold standard for admissibility," had not been met.

The so-called *Frye* standard set forth in *Frye v. United States*[17] requires that, "in addition to satisfying the traditional standards of relevancy and helpfulness to the trier of fact, the proponent must show general acceptance of the principle or technique (upon which the testimony is based) in the scientific community."[18] The *Frye* standard has been rejected by a number of courts since the adoption of the Federal Rules. *United States v. Downing*, 753 F.2d 1224, 1237-39 (3d Cir. 1985) is a leading federal case rejecting the *Frye* standard as unduly rigid and restrictive. The Utah Court in *Phillips v. Jackson* also abandoned exclusive reliance on *Frye*. The Court held that in a case involving novel scientific evidence, "inherent reliability" of the scientific principles of techniques must be established before such evidence would be admitted. However, the *Phillips* test continues to rely on *Frye* in that the Court recognized that a showing of general acceptance in the scientific community would generally establish inherent reliability. In *Kofford v. Flora*, 744 P.2d 1343 (Utah 1987), involving the admissibility of HLA blood test evidence in a paternity case, the Utah Court upheld the admissibility of the evidence, finding that it had gained general acceptance in the scientific community. The Court held that because the scientific principles underlying HLA evidence met the *Frye/Phillips* standards of general acceptance and inherent reliability, such evidence was the proper subject of judicial notice under Rule 201 and could heretofore be admitted without production of foundational evidence.

The *Frye* standard allows expert testimony based upon novel scientific principles or techniques to be admitted only if, in addition to satisfying the traditional requirements of relevance and helpfulness to the trier of fact, the proponent establishes that the scientific principles have gained general acceptance in the scientific community. The standard is deemed problematic in that it does not permit evidence of newly discovered scientific principles. Perfectly valid principles can take a considerable period of time to achieve general acceptance.

In *Rimmasch*, the Court equates the standard of admissibility of expert testimony under Rule 702 with the standard required

for judicially noticed facts set forth in Rule 201: that it not be subject to reasonable dispute and be capable of accurate or ready determination by resort to sources whose accuracy cannot reasonably be questioned.[19] Surely there should be a vast difference between the two.

State v. Bates[20] relied on *Rimmasch* and took the law of expert testimony even further from Rule 702. The Supreme Court reversed Bates' jury conviction of two counts of rape of his minor daughter and remanded for a new trial after finding that it was error for the expert to give her opinion that the child had been sexually abused by her father. The Court indicated that "the State had made no effort to show that the experts were capable of reliably determining whether the victim was telling the truth . . . . " The Court held that the State did not qualify their expert, as an "expert on discerning the truth" and that this was necessary since the expert had attested that, in her opinion, the victim was not "making up" the abuse. The Court determined this was an appraisal of the veracity of the child. In concluding that the expert did "not possess any expert qualifications for ascertaining truth" the Court may be setting up an impossible standard.

Justice Durham's concurring opinions in both *Rimmasch* and *Bates* provide considerable guidance for trial attorneys in the use of expert testimony. If one can assume her comments reflect an approach the majority of the Court would accept, one can benefit greatly from a careful review of her concurring opinions. Justice Durham's concurring opinion, in *Rimmasch* provides assistance to attorneys and experts in determining what constitutes a "direct" versus an "indirect" comment on the truthfulness of a child witness. Additionally, Justice Durham indicates that, "Professor David McCord's 'four-factor balancing test,' which takes into consideration the unique characteristics of psychological testimony, would lend coherence to our inherent reliability analysis."[21] Her explanation of how the McCord test operates provides real guidance to trial judges and practitioners.

The recent case of *State v. Braun*[22] makes it clear that if an opponent fails to raise the appropriate objection to the admission of expert testimony, the plain error doctrine is not a sufficient basis for reversal. Further, in *Braun*, the Utah Court of Appeals, in examining the testimony of one of the two testifying experts, concluded that the expert did not offer an opinion on the child's credibility where he merely testified that what he observed (in his physical examination of the child) was "consistent with" what the child told him and where he did not offer an opinion on whether the child had been sexually abused. This appears to be a viable approach.

Another important case to consider in connection with expert testimony is the recent Utah Court of Appeals case, *Ostler v. Albina Transfer Co.*,[23] wherein the Court held that expert testimony in a civil case regarding the "moth phenomena," offered to explain why a driver veered off the highway and struck a parked truck, was properly excluded for lack of foundation. In that case, the Court of Appeals indicated, "it is within the discretion of the trial court to determine the suitability of expert testimony in a case and the qualifications of the proposed expert."[24] The Court went on to say that although such testimony might be relevant, it also might be excluded if the Court determines its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[25] The Court cited *Rimmasch*, in its discussion of these issues and the requirements of inherent reliability.

A CRITICISM OF RIMMASCH

It has been the conclusion of many lawyers and scholars, like Professor Ronald N. Boyce, that with the *Rimmasch* decision and its progeny, the Supreme Court has created insurmountable problems for trial judges and practitioners. The *Rimmasch* opinion, it has been suggested, seems to be premised on a fundamental error. Scientific expert opinion is neither scientific nor novel.[26] It is difficult to comprehend how the same court that decided *Rimmasch* earlier reversed a criminal defendant's conviction on the grounds that the trial court should have permitted a psychologist to testify to the defendant's "Walter Mitty" personality.[27]

Expert testimony is not the type of evidence so inherently persuasive that jurors cannot properly assess it and put it in perspective. It is not akin to character evidence or polygraph tests in that respect. It does not hold the same dangers. The Court's paternalism and protectiveness is not justified. It appears that it may be the Utah Supreme Court, rather than trial judges and juries, which attributes undue proportion to expert testimony. It is an axiom among trial lawyers that the provision in Rule 703 that the facts or data which underlie expert opinion evidence need not be admissible, at least to the extent that this Rule is construed to permit evidence of expert opinion unaccompanied by testimony from the expert as to the basis of her opinion, is best ignored in the trial of cases. Trial lawyers know that jurors are not persuaded by mere opinions. Expert testimony is only persuasive to the extent that the listener perceives it to be sound and well-reasoned. The soundness of expert opinion is measured by the jury's ever-present yardstick of common sense. The goal of a trial lawyer in the presentation of expert opinion is to provide the jury with sufficient information and knowledge that, based upon the facts and circumstances of a case, they independently arrive at the same conclusion the expert expresses.

Professor Boyce, commenting on the *Bates* decision, indicates that this decision "continues to mangle" the Utah Rules of Evidence. Professor Boyce notes that an expert in forming an opinion often makes an assessment of the credibility of the information underlying the expert's opinion and that to say that one needs to be "qualified as an expert on discerning the truth" does not make sense.[28]

Experts in child abuse cases provide jurors with valuable additional knowledge which assists jurors in performing their difficult task. The Rule 702 standard of "assistance" seems significant in this context. In our experience, jurors and judges do not accept expert testimony as unquestionably true. Additionally, one of the primary purposes of expert testimony in child abuse cases lies in fulfilling the jurors' expectations. Generally, people have an idea that when a child reports that she has been sexually abused, the child is taken to some type of medical or mental health professional to be evaluated, diagnosed and treated. This is what the average juror expects to hear about in a trial. Failing to fulfill the expectations of the average person sitting on a jury is one of the surest ways to fail to meet one's burden of proof.

As Professor Meyers points out in his article, *Expert Testimony in Child Sexual Abuse Litigation*, "the law in this area is in a formative stage of development and coherent theoretical framework for decision-making has yet to emerge."[29] The phenomenon of child sexual abuse is exceedingly complex. Expert testimony regarding such abuse is equally complicated.

A SUGGESTED APPROACH

The practical question raised in the aftermath of *Rimmasch* is, in what way, both substantively and procedurally, can the trial attorney safely use expert testimony?

Clearly, trial attorneys and members of the judiciary who undertake to handle cases involving expert testimony, particularly in the child abuse area, must become experts

in the field themselves. They should seek out and read the constantly accumulating literature. Trial attorneys ought to be prepared to submit literature supporting their positions to the bench on both the issues of judicial notice and "inherent reliability." The literature ought to be admissible, over hearsay objections, under Rule 104, as preliminary to the question of admissibility, wherein the Court is not bound by the rules of evidence.

In child abuse cases, it has long been recognized that hearsay statements may be relied upon by the expert in forming an opinion. Hearsay statements of children are substantively admissible under 76-5-411, Utah Code Ann., 1953, as amended, assuming the requisite findings are made by the trial judge before admitting the statements and the other statutory conditions are met. There is considerable value in using the testimony of an expert merely to introduce the admissible hearsay statements of their clients.

A mental health expert may also be a valuable witness to describe the behaviors exhibited by the child patient. Observations, unlinked to an opinion as to what conclusions may be drawn therefrom, are safely admissible assuming that relevancy is established.

Additionally, the authors suggest the following approaches in dealing with expert testimony:

1. Practitioners should be extremely cautious. They must approach the use of "scientific" expert testimony in both civil and criminal cases heretofore with great care. Practitioners need to lay foundation carefully and approach the use of experts as if the *Frye* standard still applied. Attorneys should accept the need to establish general scientific acceptance rather than some lesser standard of "helpfulness" to the trier of fact.

2. Practitioners should object to all unfavorable expert testimony from the opposition. This, at a minimum, creates a strong appellate issue.

3. Lawyers should consider the issue of jury instructions. It may be, in future, that the Court will require, as a matter of law, in all child sexual abuse cases that a jury instruction be given, that sets forth the factual "scientific" propositions which the Court is prepared to accept. Such an instruction would serve to educate the jury. This would be no less than what the Court has required in all eyewitness identification cases. In the case of *State v. Long*[30], the Court held that due process required that such an instruction be given. The instruction required in that situation is a lengthy one consisting of numerous physiological and social science findings based upon the research of Dr. Elizabeth Loftus and others. The giving of a similar instruction in child abuse cases would resolve a number of problems generated by the Supreme Court's recent rulings. If the Supreme Court took responsibility for drafting such an instruction, it would assist in fairly addressing the situation.

The social issue involved is of such magnitude that the Court could direct its Advisory Committee on Evidence to study and suggest a rule outlining a standard and mandatory jury instruction on child sexual abuse.

4. Attorneys and legislators should consider mandating that child abuse trials in the State of Utah be videotaped. A visual and audible record of the proceedings as part of the record of every case considered on appeal would enhance a fair review of child abuse cases. Perhaps the Court is simply too far removed from the reality of a courtroom to understand *why* juries and judges decide cases the way they do. Perhaps the paper record is simply too theoretical and cold. If the Supreme Court Justices could see and hear child victims testify, they might be in a better position to assess whether any perceived errors were harmless. The likelihood would increase that the Court would recognize what a fallacy it is to say that an expert's sometimes nebulous testimony, considered so pivotal by the Court, had as great an impact on a judge or jury's decision-making process as the child victim's testimony.

5. Prosecutors, trying child abuse cases, need to consider the following "tips":

(A) Carefully "prepare" your expert-advising him/her to omit all direct references to a child's credibility or motivation in disclosing the abuse.

(B) Stop short of eliciting an opinion on whether the child has been sexually abused.

(C) Avoid eliciting "profiling" testimony (the majority of the Supreme Court seems to find the term and concept highly distasteful).

(D) Consider limiting the use of the expert to describing the victim's affect and demeanor and to relating the victim's statements and possibly to discussing those behaviors accepted as specifically "consistent with" child abuse. Avoid having the expert make the comparison of the specific child victim's behaviors with behaviors documented in other abused children and leave that comparison to the finder of fact.

(E) Thoroughly familiarize yourself with all of the current scholarly, legal and psychological literature regarding child sexual abuse (and keep updating it). Know the "specific" observable characteristics of an abused child, versus the "non-specific" characteristics.

(F) Lay foundation in the manner suggested by Professor David McCord on: (1) necessity, (2) reliability, (3) understandability and (4) importance, as to the expert testimony.

(G) Finally, hope for a future where the Courts take a "kinder and gentler" view of both the imperfection of trial lawyers and a more respectful view of the truly assertive and involved decision-making process employed by triers of fact.[31]

SUMMARY

Our collective experience of approximately 17 years as prosecutors, which suggests to some a highly masochistic nature, has taught us that child abuse cases are among the most difficult, if not *the* most difficult cases, to prosecute. Our experience in this area began when the use and acceptance of young children as competent witnesses and use of expert witnesses in these cases was still extremely novel. Child abuse prosecution was a new frontier. Now, with the *State v. Rimmasch* and *State v. Bates* decisions, as well as a plethora of cases in other jurisdictions addressing expert testimony, it has become easier to predict what courts expect in terms of permissible expert testimony. While we are not suggesting that there is any truly clear viable course that has been accepted by the majority of the Supreme Court, at least we have excellent direction in Justice Durham's concurring opinion. Also, the literature in this field continues to grow. Hopefully, prosecutors who deal daily with the reality of child victimization will continue to file child abuse cases and utilize expert testimony.

[1] Grant Gilmore, in his book, The Ages of American Law, speaking of a period in the development of the English common law, observed " . . . the judges were quite consciously aware of what they were doing; they were making law, new law, with a joyous sort of 'frenzy.' " As quoted by Professor Ronald N. Boyce, University of Utah College of Law, in the Intermountain Commercial Record, Friday May 26, 1989, Page B15 in his commentary on the case of *State v. Rimmasch*, 775 P.2d 388, (Ut. 1989)

[2] 775 P.2d 388 (Utah 1989). The profession and the public have struggled to understand the *Rimmasch* decision. The case and the series of subsequent decisions citing *Rimmasch* have been the subject of significant media attention as well as numerous CLE seminars aimed at alerting the public and practitioners that the area of admissible expert testimony in Utah has changed.

[3] The Committee was established in 1977 by the Utah State Bar Commission at the request of the Utah Supreme Court.

[4] The power to promulgate rules was considered within the general Judicial powers conferred by then Article VII, ~1 of the Utah State Constitution. In 1985, the Judicial Article of the State Constitution was amended giving the Utah Supreme Court express rule making powers.

[5] *Rothstein's Evidence in a Nutshell: State and Federal Rules* (2nd Ed. 1981).

[6] Rule 702: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

[7] Rule 703: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

[8] Rule 704: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

[9] The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but to all specialized knowledge. Fed. R. Evid. 702 advisory committee's note.

[10] Rule 402 states that "all relevant evidence is admissible, except as otherwise provided . . . " This is a general rule of inclusion rather than inclusion of relevant evidence.

Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The terms "any tendency" and "any fact of consequence" are broadly phrased and deliberately chosen by the drafters.

Rule 403 may operate to significantly curtail the admissibility of relevant evidence. It provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . . " To the extent that Rule 403 requires that the prejudicial impact of the otherwise relevant evidence *substantially* outweigh the probative value of the relevant evidence, this Rule continues the theme of preference for admissibility of relevant evidence.

[11] Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 4 (1989).

[12] The authors are concerned about the effect the Utah Supreme Court's delayed decision-making in *Rimmasch* has had on other child abuse cases, tried without the benefit of the Court's guidance.

[13] One of the authors, Leslie A. Lewis, prosecuted the *Rimmasch* case. She tried the case to the bench after the defendant waived his right to a jury trial. The Honorable James S. Sawaya, of the Third Judicial District, heard the case.

[14] Rule 608(a) provides that, "the credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

[15] *State v. Rimmasch*, 775 P.2d 388, 393 (Utah 1989).

[16] 615 P.2d 1228, 1233 (Utah 1980).

[17] 293 F. 1013 (D.C. Cir. 1923).

[18] McCormick, *McCormick on Evidence*, §203, at 605 (3d Ed. 1984).

[19] Rule 201 governs judicially noticed facts, alleviating from the proponent the burden of proving that which is widely known and essentially indisputable.

[20] 114 Utah Adv. Rep. 28 (Utah 1989).

[21] *Rimmasch*, 775 P.2d at 410. Justice Durham refers to David L. McCord's article, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. Crim. Law & Criminology 1 (1986). This article suggests that there are Four Factors: necessity, reliability, understandability and importance, which should be considered in connection with the admission of expert testimony under the "inherent reliability" standard.

[22] 787 P.2d 1336 (Utah App. 1990).

[23] 781 P.2d 445 (Utah App. 1989).

[24] 781 P.2d at 447 (quoting *State v. Clayton*, 46 P.2d 723, 726 (Utah 1982)).

[25] 781 P.2d at 447.

[26] Boyce, Intermountain Commercial Record, May 26, 1989, at B15.

[27] See *State of Utah v. Miller*, 677 P.2d 1129 (Utah Intermountain Commercial Record, August 1989, Page B20.

[29] Myers et al., *supra* note 11, at 5.

[30] 721 P.2d 483 (Utah 1986).

[31] The Supreme Court used to evince a greater understanding of the fact finder's importance. See *State v. Clayton*, 646 P.2d 723 (Utah 1982) wherein the Court disagreed with a decision from another jurisdiction finding that scientific statistical probability evidence should not have been admitted, noting "This Court does not share that philosophy, having a higher opinion of a jury's ability to weigh the credibility of such figures when properly presented and challenged, and accord this type of testimony the weight it deserves." *Id.* at 727, note 1.

Commission Highlights

During its regularly scheduled meeting of April 27 the Board of Bar Commissioners received the following reports and took the actions indicated:

1. Received a report on the Utah Law and Justice Center Programs and Policies Committee and the Utah State Bar ADR Committee. Urged the Law and Justice Center to proceed with a funding efforts for ADR projects.
2. Approved the minutes of the March 16 and March 23 Commission meetings.
3. Received the Budget and Finance Committee report including a preliminary audit report. Approved the proposed restructuring of the Budget and Finance Committee.
4. Discussed the status of pending litigation.
5. Received a report of the Executive Director regarding various administrative and management activities. Noted the activity of the dues petition and comment period. Discussed the preliminary implementation of the New Lawyer CLE program. Reviewed the participation of Bar leaders and the ABA Pro Bono Conference.
6. Received a report on Internal Operations from Associate Director. This included a confirmation of the election of Commissioner Thorne who is unopposed for re-election, a status report on the upcoming Annual Meeting, and a status report on the space utilization study being undertaken by an outside consultant.
7. Received the Admissions Report, acting on routine petitions.
8. Received the Discipline Report, acting on pending public and private discipline matters as reported elsewhere in this issue.
9. Received a report from the Young Lawyers Section, including an election of officers for 1990-91, report on Law Day activities and an update on the section's Bill of Rights project. Authorized the section to seek funding for certain publications and for a special project for the homeless.
10. Reviewed in detail, letter and pleadings submitted in conjunction with the comment period for the petition for dues increase.

At its May 18 meeting the Board of Bar Commissioners received the following reports and took the actions indicated:

1. Approved appointments to a restructured Budget and Finance Committee as reported elsewhere in this issue. Reviewed financial reports for the current budget year. Acknowledged the award of a grant by the Utah Bar Foundation to the Utah Law and Justice Center.
2. Received a report on the Judicial Performance Evaluation project from the Oversight Committee, including a detailed briefing on the function and activities of the committee on the evaluation process.
3. Received a report of the Lawyer Benefits Committee, including discussion of the current insurance programs and other member benefit programs. The committee recommendation for two additional member benefit programs was taken under advisement pending further information to be provided.
4. Received a report from the Securities Section requesting authorization to participate in the filing of an amicus curiae brief. The matter was taken under advisement pending further information from the section.
5. Approved the minutes of the April 27 Commission Meeting.
6. Received the Discipline Report, acting on pending public and private discipline matters as reported elsewhere in this issue. Reviewed the caseload of the Office of Bar Counsel and pending general counsel matters. Approved a special Bar Counsel appointment and a process to enlist additional special Bar Counsel.
7. Received a supplemental report from the Awards Committee and approved nominations from the committee for Annual Meeting awards.
8. Reviewed the status of pending litigation and approved publication of a period litigation summary in the September issue of the *Bar Journal.*
9. Received the Executive Director's report, including a discussion on pending grants and policy questions. Approved rebate under the Bar lobbying policies. Referred a CLE fee proposal to the CLE Committee for study and recommendation.
10. Received Associate Director's report on Internal Operations. Reviewed the status of the Annual Meeting plans, schedule of Bar Commission meetings and other incidental administrative items.
11. Received the Admissions report, acting on routine petitions and policy considerations related to the implementation of new admissions rules. Approved minor additional modifications to the rules for submission to the Supreme Court.
12. Received the Young Lawyers Section report, including a review of achievements for the year. Special recognition was given to the section and to section President Jonathan Butler for an outstanding year of achievement and service.
13. Reviewed correspondence concerning the lack of appointments of women and criminal defense lawyers to the bench. Authorized President Chamberlain to communicate concerns to the Governor's Office.

The full text of the minutes of these and other meetings of the Bar Commission are available for inspection at the office of the Executive Director.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 4.3(a) and 4.3(b) by speaking with a party regarding pending litigation and failing to disclose to that party that he represented the opposing party.

2. An attorney was admonished for violating Rule 1.4(b) for failing to inform his client of the status of the case by failing to ensure that a settlement proposal from opposing counsel reached his client for a period of four months.

PRIVATE REPRIMANDS

1. For violating Canon 1, DR 1-102(A)(4) and Canon 1, DR 1-102(A)(6), an attorney was privately reprimanded for maintaining a private practice while acting as a county attorney without first obtaining a waiver from the county attorney's office. The sanction was mitigated by a lack of prior disciplinary history and by a lack of injury to the clients.

PUBLIC REPRIMANDS

1. On April 4, 1990, Craig S. Cummings was publicly reprimanded for violating Canon 6, DR 6-101(A)(3) by neglecting two separate matters regarding representation of clients in disputes with the IRS. Mr. Cummings accepted a retainer in 1983, and subsequently failed to pursue the client's remedies for the next four years. Mr. Cummings had made several attempts to communicate with the client, by telephone and by letter, advising the client of a recommended course of action. Mr. Cummings agreed to represent a second client against the IRS in 1985, and subsequently failed to move forward on that client's action, whereupon the client began dealing with the IRS pro se. The sanction was mitigated by a lack of prior disciplinary history and the fact that the attorney/client relationship was never clearly formalized between the second client and Mr. Cummings.

2. On April 4, 1990, David O. Black was publicly reprimanded for violating Canon 1, DR 1-102(A)(4) and Canon 1, DR 1-102(A)(6). Mr. Black associated with an outside attorney in several lawsuits while employed by a law firm. Mr. Black personally received a division of the litigants' recovery on a contingent fee basis for services performed while not on the law firm's time, but failed to disclose to the law firm that he was personally receiving compensation from these cases. The sanction was mitigated by a lack of disciplinary history, by Mr. Black's belief that he maintained an independent status with the firm, by conflicting evidence from the law firm and Mr. Black as to the status of Respondent's employment with the firm, and by the fact that the clients suffered no injury. The sanction was aggravated in that the arrangement should have been fully disclosed and discussed with the law firm.

3. On April 17, 1990, George S. Diumenti and William H. Lindsley were publicly reprimanded for violating Canon 1, DR 1-102(A)(5) and Canon 5, DR 1-105(A)(b) and (d). Messrs. Diumenti and Lindsley, while law partners, were contacted by and accepted representation of both the alleged perpetrator and the minor victim of sexual abuse. Messrs. Diumenti and Lindsley never requested nor received informed consent for the representation of the minor from her natural mother, her court appointed guardian ad litem, or her court appointed custodians. Pursuant to the representation of the alleged perpetrator, Messrs. Diumenti and Lindsley caused the felony charges to be reduced to misdemeanor charges, while at the same time attempting to represent the interest of the victim. The sanction was aggravated by Messrs. Diumenti's and Lindsley's failure to acknowledge the wrongfulness of their representation of both the victim and the perpetrator, by the vulnerability of the minor victim and by their substantial experience in the practice of law. The sanction was mitigated in that Mr. Lindsley took the appropriate steps to bring the minor victim into the protection of the juvenile court and that Messrs. Diumenti and Lindsley did not attempt to hide their representation of both parties from the juvenile court or the prosecuting attorney.

SUSPENSIONS

1. On March 26, 1990, Boyd Fullmer was suspended for two months for violating Canon 9, DR 9-102 (B)(3) and Canon 9, DR 9-102(B)(4). Mr. Fullmer was to receive a one-third (⅓) contingent fee of all sums collected on behalf of his client. Mr. Fullmer received thereafter monthly payments, and remitted to his client two-thirds (⅔) of each of the first seven payments, but failed to forward any monies to the client after the first seven payments. He received $1,900, for which he failed to account. The sanction was aggravated by Mr. Fullmer's failure to resolve the situation prior to the disciplinary process despite opportunities to do so, by Mr. Fullmer's prior disciplinary history and by his substantial experience in the practice of law. The sanction was mitigated by Mr. Fullmer's efforts to curtail his practice in an attempt to resolve this type of problem.

2. On March 30, 1990, Douglas E. Wahlquist was suspended for six months and one day for violating Canon 1, DR 1-102(A)(4), Canon 6, DR 6-101(A)(3), Canon 7, DR 7-101(A)(1), Canon 7, DR 7-101(A)(3) and Rule 1.3, Rule 1.4(a) and Rule 8.4(c). Mr. Wahlquist agreed to represent his client in 1986 on a contingent fee basis and agreed to advance certain costs. Mr. Wahlquist promised to file the client's lawsuit in the Federal District Court within the time frame established by Order of the Federal Appeal Board and later assured the client that the lawsuit had been filed. For a period of approximately one month his client attempted to contact Mr. Wahlquist on numerous occasions without success. Mr. Wahlquist finally admitted that he had failed to file the lawsuit. The opportunity to file the lawsuit is now barred. The sanction was aggravated by Mr. Wahlquist's prior disciplinary history, by his failure to respond to the discipline process, by the vulnerability of the victim, by Mr. Wahlquist's substantial experience in the practice of law and by the client's injury caused by Mr. Walquist's failure to file the lawsuit.

3. On April 6, 1990, Blaine P. McBride was suspended for six months for violating Canon 6, DR 6-101(A)(3), Canon 9, DR 9-102(B)(3), Canon 9, DR 9-102(B)(4) and Rule 1.3, Rule 1.13(b) and Rule 1.4. The suspension was stayed for twenty-four (24) months pending successful completion of probation. The suspension was imposed pursuant to three separate complaints. In representing one client on several different matters, Mr. McBride failed to inform the client adequately that he did not intend to move forward with the client's action until further payment was received, failed to issue and serve a Summons resulting in a dismissal without prejudice, failed to prosecute a case resulting in efforts on the part of the opposing counsel to have cause dismissed for lack of prosecution, and failed to provide adequate status reports to the client. In representing a separate corporate client, Mr. McBride believed that he represented the past president personally and therefore refused to return files to the current president. Pursuant to a complaint by the current president, a Screening Panel of the Ethics Discipline Committee determined that Mr. McBride served as counsel for the corporation rather than the president individually. Mr. McBride subsequently failed to respond to any and all requests by the Screening Panel to return the files to the proper party. Mr. McBride failed to respond to the Office of Bar Counsel and the Screening Panel of Ethics and Discipline Committee throughout the disciplinary process regarding a complaint filed in the Office of Bar Counsel by a separate client. The sanction was aggravated by Mr. McBride's failure to respond to the disciplinary process, but mitigated in that Mr. McBride was suffering from a dysthymic disorder during the period of misconduct, and that he has accepted professional assistance in an attempt to resolve the difficulties.

4. On March 28, 1990, Richard B. Johnson was suspended for six months for violation of the terms of his probation pursuant to a prior disciplinary order by failing to return telephone calls and written correspondence from his clients, failing to appear at court hearings, and failing to provide monthly status reports to the clients.

Executive Director Resigns

Stephen F. Hutchinson, Executive Director of the Utah State Bar, has resigned his position effective June 30, 1990. The announcement was made by Bar President Hans Q. Chamberlain and Mr. Hutchinson.

Mr. Chamberlain wished Mr. Hutchinson well, and said during his service as Executive Director, the Utah State Bar has dramatically expanded its array of programs and services to Bar members and the public. Highlights include the completion of the Utah Law and Justice Center project, and the Tuesday Night Bar outreach program, both of which have received national acclaim. Also, the Bar has implemented a mandatory continuing legal education program and will initiate an extensive skills development program for new lawyers next fall. Lawyer participation in Bar volunteer activities and programs is at an all-time high.

Mr. Chamberlain said the Executive Committee of the Board of Bar Commissioners will oversee the operations of the Bar until a new director is named. The Utah State Bar is currently inviting applicants for the position of Executive Director to fill the vacancy created by the resignation of Mr. Hutchinson. Bar President Chamberlain said all inquiries should be directed to the Search Committee of the Bar at the Law and Justice Center. They will be kept in strict confidence.

The Executive Director is the chief administrative officer of the Bar. The director is responsible to the respective Boards for the overall management and operations, their programs, services and staff. The director oversees the budgeting process and is responsible for the financial affairs of the Bar.

Applicants must possess proven management ability, and strong financial and communication skills. A college degree is required and a law degree is preferred. Starting salary will be commensurate with experience and qualifications.

Applications should be received at the Bar by July 31 1990. Additional information is available from the Bar Office. The Bar is an equal opportunity employer.

Utah Bar Examination and Admission Rules Get a New Look

The Utah Supreme Court has approved revised rules for admission to the Utah State Bar effective August 1, 1990. The revisions include significant changes in the admission process and in the Bar examinations required to practice law in Utah. The changes include shortening the Utah Bar Examination from a three-day to a two-day examination. The two-day examination will consist of the Multistate Bar Examination, a multiple choice exam, and one day of essay questions. The Utah Attorney Examination will be offered concurrently with the Utah Bar Examination in February and July rather than quarterly. Under the new rules the Bar Examination will be scored on a point scale and passage will be based on achievement of a combined examination scaled score of 130.

In an ongoing effort to ensure the character and fitness of all applicants to the Bar, investigation efforts will be intensified based on the character and fitness standards published in the new rules.

The Court ordered a 30-day comment period, beginning March 29, 1990, to allow local law students and Bar members an opportunity to review and respond to the revised rules. A public forum was held April 16, 1990, at 12:00 p.m. at the University of Utah law school. Representatives of the Admission Committee and Bar staff briefly outlined implementation of the revised admission rules and New Lawyer Continuing Legal Education and responded to questions.

Copies of the revised rules are available at the Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111. You may request a copy by calling Michele Roberts, 531-9077. Upon receipt of the $15 initial processing fee, applications are mailed to all student and attorney applicants.

The Honorable Pamela T. Greenwood Will Be President of the Utah State Bar

The Utah Supreme Court issued an opinion stating Judge Pamela T. Greenwood may serve as president of the Utah State Bar.

Judge Greenwood said she is pleased with the Court's decision. "I hope my leadership of the Bar will encourage renewed cooperation between attorneys and the judiciary," she said. "The Supreme Court, through this decision, has paved the way for the Bar and the Courts to jointly promote improvements in Utah's legal system, by providing competent legal assistance to all in need, and fair, timely resolution of legal disputes," she added.

Judge Greenwood, a member of the Utah Court of Appeals, will begin a one-year term as president of the Utah State Bar at the Bar's Annual Meeting the end of June. She was elected a commissioner of the Bar in 1986. Judge Greenwood is the first woman to be elected president of the Utah State Bar, but she is not the first judge to lead this organization which represents more than 5,000 members licensed to practice law in the State of Utah.

Judicial Nominating Commission Applicants Sought

The Board of Bar Commissioners is seeking applications from Bar members for the two Bar appointments to the Appellate Courts Judicial Nominating Commission. Bar appointees must be of different political parties. This nominating commission is for the Supreme Court and the Court of Appeals.

Bar members who wish to be considered for this appointment must submit a letter of application, including resume and designation of political affiliation. Applications are to be mailed to Barbara R. Bassett, Associate Director, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, and must be received no later than 5:00 p.m. on July 20, 1990.

Stephen A. Trost Appointed Bar Counsel

The Utah State Bar has appointed Stephen A. Trost to the position of Bar Counsel. The announcement was made by Bar President Hans Q. Chamberlain.

"The Bar is fortunate to have an attorney in the position of Bar Counsel with such a strong background in both law and business administration," Mr. Chamberlain said. "He has had hands-on experience in the defense of civil litigation, supervising outside counsel, and staff management, all which are aspects of the position of Bar Counsel," Mr. Chamberlain concluded.

Mr. Trost received his Juris Doctorate from DePaul College of Law in Chicago. His bachelor of arts degree was earned at the University of Notre Dame.

Prior to joining the Office of Bar Counsel, Mr. Trost was in the private practice of law. For nine years he was general counsel and chief financial officer for Hi Tech Natural Resources, Inc., a Utah manufacturer of solid fuel propellants and electronic instrumentation.

The Office of Bar Counsel is responsible for dealing with the disciplinary functions of the Utah State Bar when complaints are filed against Utah attorneys. In these matters, the Office works in conjunction with the Bar and the Utah Supreme Court. In addition to prosecuting all disciplinary cases, Mr. Trost serves as general counsel to the Bar.

Court Says Client Security Fund Wasn't Misused or Mismanaged

The Utah Supreme Court has rejected attorney Brian Barnard's assertion that the State Bar's Client Security Fund—$100,000 to pay claims against dishonest lawyers--has been misused and mismanaged.

Chief Justice Gordon R. Hall said that upon examination of Mr. Barnard's complaint and the Bar's response, "we are satisfied that the Bar has not engaged in any improprieties concerning the fund."

Bar President Hans Q. Chamberlain submitted a 13-page response to the allegations, saying, "No ethical or legal improprieties of any nature whatsoever concerning the management of the fund have occurred."

According to Mr. Chamberlain, the fund was established by appropriation from the Bar operating budget in 1977 and that the money was placed with Bar reserves and operating funds in investment accounts to qualify for higher interest on secure investments.

"The so-called 'loans' from the fund to the operating account of the Bar were not 'loans' in the sense of monies being transferred from one account to another," Mr. Chamberlain said. "Every penny properly attributable to the fund and to the furtherance of its purposes has been accounted for."

Even before the dispute reached the Supreme Court, the Bar Commission had directed the staff to segregate the funds by March 1, which has been done. Mr. Barnard asked for a court directive in spite of the change.

Justice Hall said it appears that the fund "has been fully accounted for and managed and administered so as to fulfill its purposes and objectives, the most basic of which is to protect the interests of all eligible claimants and thus to provide a most important public service."

1990 Bob Miller Memorial Day Run T-shirts are available at the Law and Justice Center reception desk, 645 S. 200 E. Salt Lake City, Utah. 100% cotton. Small, medium and large. $6.00

The Bar Meeting Your CLE Needs

By Tobin J. Brown, Continuing Legal Education Administrator, Utah State Bar

This article will outline how the Utah State Bar is working to help its members meet the new CLE requirements. The Bar has taken the challenge to be the low-cost CLE provider in Utah. Each portion of this article looks at particular types of CLE credit available under the new mandatory CLE Rules and Regulations, then describes the ways the Bar is working to provide CLE under each type.

The Utah State Bar was granted Presumptive Provider Status by the State Board of Continuing Legal Education or the MCLE Board, "the Board." This means that Bar CLE programs are "presumed" approved unless otherwise noted by the Bar. All live seminars put on by the Bar are approved. Also the Bar can approve videotapes in its possession under this status. It should be noted that the Bar does not approve other providers programs, that is the function of the MCLE Board. However, the Bar's presumptive status extends to its sections working with the Bar so that most Bar-related CLE activities can be approved for CLE credit.

LIVE SEMINARS

At least one-half of your CLE credit must come from live seminars, therefore the Bar concentrates on providing a full range of these. Each section of the Bar needs to be involved in one major CLE event per year. Some of these will be part of the Bar conventions (Mid-Year and Annual Meetings) others may be cosponsored with outside organizations and still others may be "stand-alone" programs. These seminars will generally be on topics related to the sections' specialties, but should also be directed to general practice. These seminars are advertised through brochure and postcard mailings and are listed in the CLE Calendar near the back of each *Bar Journal*. Look to this CLE Calendar for a good source of upcoming CLE activities. This Calendar should improve with time also, as sections become accustomed to putting on programs.

Sections are also working to have their luncheon meetings CLE approved when appropriate. These are an excellent source of low or no cost CLE. As more notice is provided on these lunches, they will be listed in the CLE Calendar in the *Bar Journal*, as well as advertised by post card to section members.

The Bar cosponsors satellite seminars with national providers. This presents an opportunity to receive live seminar credit from nationally known experts while viewing it locally. These programs are listed in the CLE Calendar and are advertised through brochures sent out by the national providers. You can register by sending in the brochure or by mailing the form from the CLE Calendar directly to the Bar offices. These programs are viewed at the Law and Justice Center.

Also the Bar directly cosponsors programs with reputable outside providers. One example is the Corporate Mergers and Acquisitions seminar sponsored in conjunction with ALI-ABA being held in March of 1991 in Park City. Once again these programs are listed in the CLE Calendar.

Finally, the Bar is working to provide a full range of CLE at each Mid-Year and Annual Meeting. We are also working to format these in such a way that by attending any two, one could meet their entire CLE requirements. So watch for the brochure mailings on these Bar conventions.

At all Bar CLE programs you will receive a Certificate of Attendance. *These certificates are for your records only.* The Bar automatically reports attendance off of the registration lists. So when you attend a program, make sure you check in and pick up your materials at the registration desk.

ETHICS CREDIT

The CLE Committee of the Bar is working to provide one general ethics credit seminar each year. This year's seminar will be held in November so watch for announcements on it. Sections will include ethics portions in their seminars whenever possible, so check those advertisements. Also each Mid-Year and Annual Meeting will include an ethics portion. And finally there are videotapes with ethics credit available (see Videotape Credit below).

VIDEOTAPE CREDIT

The Bar has a full range of subjects in its Video Library. And these tapes are approved unless specifically noted. Included in the library are tapes of all live Bar seminars that are possible to tape, including Bar conventions. These tapes can be rented by the week for $30, with a $25 deposit. Per the MCLE requirements, three Bar members must be in attendance for credit or the tape must be viewed at the Law and Justice Center.

The Bar is willing to work with local bar associations to bring the required three people together in more remote areas, so contact your local associations or contact me at the Bar and I will aid you in making the arrangements. Also I can help make arrangements for viewing these tapes at the Law and Justice Center. As the first MCLE reporting deadline approaches we will likely be showing for-credit video programs at the Law and Justice Center as 11th hour CLE. These will of course be advertised.

LECTURING CREDIT

We work to format Bar CLE programs so that Bar member presenters can receive lecturing credit. A presentation must be a solo presentation lasting 50 minutes to qualify for this credit. When that requirement is met, the presenter can receive three times the credit. Sometimes program formats will not allow for lecturing credit, such as panel presentations. Even in these cases speakers are given complimentary registrations to the program so they can receive attendance credit either way.

PUBLISHING CREDIT

The *Bar Journal* encourages well-written articles on legal topics. Since the *Bar Journal* is an appropriate publication format for credit, application can be made for credit after publishing. Refer to the MCLE Rules and Regulations for specific requirements on this.

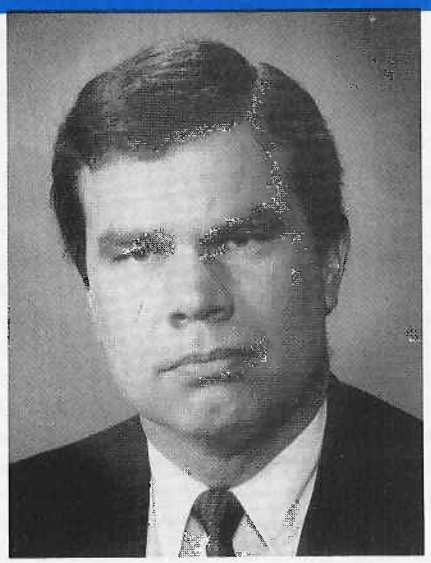
RURAL AREAS

The Bar is working to bring CLE to all parts of the State. Initially we will be watching for programs or portions of programs to take "on the road." We are also looking into a microwave technology for transmitting interactive video presentations that will qualify for live credit. We are willing to work with any local bar association to do whatever we can to aid in putting together programs. If you have questions or suggestions on this, do not hesitate to call me at the Bar offices.

SUMMARY

The Utah State Bar is working to provide a full range of CLE in a variety of manners at the lowest cost possible. As time progresses we will look for ways to further improve CLE in Utah and increase its availability. If Bar members have suggestions for specific programs or program ideas or just general comments, please let us know. You can contact me at the Law and Justice Center at 645 S. 200 E., Salt Lake City, UT 84111, or call me at (801) 531-9095.

CASE SUMMARIES



By Clark Nielsen

A consequence inherent in clearing up appellate "backlog" is finding the time to read the burgeoning opinions. Since my last article I've had a difficult time keeping up with the reading of the numerous decisions. For example, over 60 opinions, published and unpublished, were issued by the Utah Supreme Court and the Court of Appeals during March 1990. I present as many decisions as possible here with a brief summary of the result. Although many decisions are unpublished and not valid precedent, they can have educational value to attorneys.

JURISDICTION OVER APPEALS FROM THE JUSTICE COURTS

The Utah Supreme Court upheld Utah Criminal Rule 26(13)(a) which limits a criminal appeal from justice court to a trial de novo in the circuit court, unless the constitutionality or validity of a statute or ordinance has been properly challenged. The rule was challenged as a deprivation of the constitutional right of appeal. *City of Monticello v. Christensen*, 129 Utah Adv. Rep. 5 (March 2, 1990) (J. Zimmerman). *Also State v. Gonzales*, Utah Ct. App., 890202-CA (April 5, 1990) (per curiam, unpublished); *State v. Novosel*, Utah Ct. App., 890143-CA (March 23, 1990) (J. Orme, unpublished); and *State v. Matus*, 131 Utah Adv. Rep. 27 (March 20, 1990) (J. Jackson).

ATTORNEY/CLIENT

Evidence was sufficient to sustain a jury's malpractice verdict that the plaintiff client was equally negligent with the defendant law firm in failing to perfect a security interest in a debtor's accounts receivable. Defendant could not recover its litigation costs and fees under Utah Business Corporation Act, Utah Code Ann. §§16-10-1 to -140 because defendant law firm was merely plaintiff's agent and not corporate personnel who exercised management discretion and had authority to bind the corporation. *Western Fiberglass v. Kirton, McConkie & Bushnell*, Utah Ct. App., 890407-CA (March 2, 1990) (J. Jackson).

A provision of an attorney/client contingency fee agreement giving the attorney "absolute" control over the settlement of the client's underlying claim is void and unenforceable. Such a provision may, or may not, be severable from the remainder of the fee agreement. *Parents Against Drunk Drivers v. Graystone Pines Homeowners' Assoc.*, 129 Utah Adv. Rep. 45 (March 7, 1990) (J. Billings).

Summary judgment against the client was affirmed in his attorney malpractice action. The malpractice of his attorney was not the cause of the client's damage because the underlying claim on a multiparty bank certificate would not have succeeded on the merits. *Youd v. Johnson*, Utah Ct. App., 880431-CA (March 29, 1990) (J. Jackson).

PROCEDURE

A party who seeks to admit at trial a witness's deposition bears the burden to show its admissibility under Rule 32(a). The trial court abused its discretion by refusing to allow appellants to introduce the deposition of a non-resident witness, unavailable at trial, to support its construction contract claims. Although the witness was appellant's corporate officer there was no showing that appellants procured or was responsible for his absence. *Marshall v. Van Gerven*, 131 Utah Adv. Rep. (March 23, 1990) (J. Bench).

The sanction of a default judgment against plaintiff for her failure to respond to discovery was not an abuse of discretion, considering the procedural history of the litigation, even though no prior order compelling discovery had been sought or obtained that would give plaintiff an opportunity to cure the default. *Schoney v. Memorial Estates, Inc.*, 132 Utah Adv. Rep. 22 (April 6, 1990) (J. Orme).

The failure of a defendant to plead a defense in its answer is a waiver of that defense. A defense waived cannot later be a proper basis for summary judgment *unless* an opposing party fails to object to the waived issue being raised on summary judgment. In essence, a party may "waive" the right to object to a "waived" issue being raised, thereby legitimizing the issue. *Golding v. Ashley Central Irrig. Co.*, Utah Sup. Ct., 880025 (April 23, 1990) (J. Zimmerman).

"RIPPER" CLAUSE—ART. VI, §28, UTAH CONSTITUTION

The Utah Supreme Court affirmed the

P.S.C.'s denial of a permit to allow an association of municipalities to construct an intrastate power transmission line. The plaintiff association claimed that the statutory required P.S.C. approval to construct the power line contravened Utah State Constitution Article VI, §28 ("The Ripper Clause") which prohibits the delegation of authority over "municipal functions" to a "special Commission." The court noted the presumption of constitutional validity accorded economic legislation. Although the Public Service Commission was indeed a "special commission," the construction of the power line was "sufficiently infused with a state, as opposed to an exclusively local, interest to escape characterization as (a) 'municipal function.'" The P.S.C. regulation does not intrude upon municipalities' ability to control their "substantive" policies. *Utah Assoc. Municipal Power Systems v. Public Service Commission*, 130 Utah Adv. Rep. 8 (March 20, 1990) (J. Zimmerman).

DEFAMATION

The Utah Supreme Court affirmed a summary judgment for KTVX against a plaintiff police officer who claimed defamation by a KTVX news report of a shooting. Without deciding whether all police officers are "public officials," this plaintiff officer was a "public official" by virtue of the facts and circumstances surrounding the shooting. Because plaintiff was a "public official," defendant was entitled to the "qualified privilege" defense. *Madsen v. United Television, Inc.*, 131 Utah Adv. Rep. 3 (March 27, 1990) (C.J. Hall).

Communications between entities sharing a common interest are qualifiedly privileged and not libelous in the absence of malice. Dismissal of plaintiff's claim of defamation was affirmed even though derogatory statements from fellow employees were shared by the employer league of cities and towns with its Board of Directors. These statements were garnered after plaintiff's demand for specific facts supporting her termination. Unable to present evidence of malice, plaintiff could not defeat defendants' summary judgment motion. *Alford v. The Utah League of Cities and Towns*, 131 Utah Adv. Rep. 34 (March 23, 1990) (J. Billings).

ADMINISTRATIVE REVIEW

The Court of Appeals held that the Industrial Commission erroneously interpreted the commission's enabling statute by giving credit to an employer for amounts received by an injured employee from a no-fault insurer. This conclusion is not so troubling as the court's articulation of its standard of review. According to the court panel, under U.A.P.A., Utah Code Ann. §63-46b-16(4)(d), an agency's interpretation of its statutorily granted powers and authority is a question of law with no deference accorded to the agency's interpretation. *But see* §63- 46b-16(4)(h)(1). In postulating the standard of review, the panel relied upon the pre-U.A.P.A. case, *Utah Dept. of Admin. Services v. Public Service Commiss'n*, 658 P.2d 501, 608 (Utah 1983). However, the court ignored the "intermediate level of review" on questions of "special law"—i.e. an agency's "interpretations of the operative provisions of the statutory law it is empowered to administer, especially those generalized terms that bespeak a legislative intent to delegate their interpretation to the responsible agency." 658 P.2d at 610. Does U.A.P.A. still apply that "time honored rule of law . . . that the construction of statutes by governmental agencies charged with their administration should be given considerable weight . . . ?" *Id.* This case should have, but did not, properly address that question. *Bevans v. Industrial Commission*, Utah Ct. App., 890402-CA (April 4, 1990) (J. Jackson).

Failure to participate in administrative hearings and proceedings waives the opportunity of an interested party to seek judicial review of the administrative ruling. The owner assigned his certain water rights to the I.P.A. for a price based upon the volume of water to be approved by the state engineer. The owner failed to participate in the I.P.A.'s change application and protest hearings conducted by the state engineer. Therefore, the owner could not properly seek district court review of the state engineer's decision. *S & G, Inc. v. Morgan*, Utah Sup. Ct., 860055 (May 1, 1990) (J. Howe).

Upon review of the facts before the administrative agency, revocation of a broker's real estate license was not unduly harsh. Although the misconduct occurred in 1982, administrative discipline was not forestalled by the catch-all statute of limitation §78-12-25, which is inapplicable to administrative hearings. *Rogers v. Div. of Real Estate*, 131 Utah Adv. Rep. 78 (Utah Ct. App., March 30, 1990) (J. Greenwood).

REAL PROPERTY

The four-year limitations statute, §78-12-5.1, does not protect a tax title holder who fails to pay the assessed taxes and then repurchases the property at the resulting tax sale. Also, a tax deed on real property mining improvements is insufficient to vest tax title to the underlying mineral interests. *Marchant v. Park City*, 130 Utah Adv. Rep. 9 (March 5, 1990) (C.J. Hall).

A "discovery rule" applies to the commencement of the limitations statute, §78-

12-25, in an action for a surveyor's negligence. The limitations period does not begin to run until the plaintiff "learns of or in the exercise of reasonable diligence should have learned of the facts which give rise to the claim. *Klinger v. Knightly*, 130 Utah Adv. Rep. 12 (March 22, 1990) (C.J. Hall).

Giving effect to the apparent intent of "exception" language in a warranty deed, the court reversed a trial court judgment. The phrase "subject to fence line encroachment . . . " was properly an "exception" from warranty and was not a "reservation" by which the grantor retained an interest in the land strip. The words "subject to" are commonly associated with giving notice of an encumbrance and excepting that encumbrance from any covenant. *Hancock v. Planned Devel. Comp.*, 131 Utah Adv. Rep. 5 (March 30, 1990) (C.J. Hall).

An attempt by parents to regain fee title to their home from their daughter was rejected for lack of evidence sufficient to reform the quit claim deed. Parents were granted a life estate, and the daughter, a remainder interest in the property. The evidence was sufficient to establish that the daughter had contributed an amount of the purchase price sufficient to purchase a remainder interest in the home. *Opheikens v. Sheron*, Utah Ct. App., 890069-CA (March 21, 1990) (J. Jackson) (unpublished).

The obligations of the parties to a coal lease assignment are contractual under the assignment. The assignment is not a "sublease" subject to landlord-tenant concepts. Defendant assignee's cessation of coal mining did not breach an implied covenant of good faith. Defendant assignee was not obligated by the assignment to continually mine coal nor did it breach an implied covenant of good faith when it ceased mining. *Heiner v. S.J. Groves and Sons Co.*, 131 Utah Adv. Rep. 69 (Utah App., March 30, 1990) (J. Billings).

The trustee under a trust deed may not pursue and complete a trustee's sale of the property and then, later, claim the sale invalid because of procedural irregularities created by the trustee. *Occidental/Nebraska Fed. Savings Bank v. Mehr*, 132 Utah Adv. Rep. (Utah Ct. App., Apr. 19, 1990) (J. Jackson).

Evidence was "clear and convincing" that a family deed from husband to wife was materially altered subsequent to its execution, when their children were also added as grantees. "Clear and convincing" evidence not only has the power to persuade as to the probable truth but "has the element of clinching such truth or correctness" as to what might be otherwise only probable to the mind. *Foote v. Smith*, Utah Ct. App., 890277-CA (May 17, 1990) (unpublished).

MEDICAL MALPRACTICE

Summary judgment was affirmed when plaintiff lacked evidence of causation by defendant. Expert medical testimony of the physician's standard of care and that the breach of that standard caused injury must be proffered by expert medical testimony. While defendant's treatment may have been deficient, it was not the proximate cause of the child's death. *Butterfield v. Okubo*, 131 Utah Adv. Rep. 66 (March 28, 1990) (J. Larson,).

However, failure to produce an expert witness to testify on causation of plaintiff's injuries does not necessarily defeat a *res ipsa loquitor* malpractice claim. This opinion discusses the "*res ipsa* doctrine" in medical malpractice where a plaintiff must prove a standard of care, its breach, proximate causation and damages. *Res ipsa loquitor* is an evidentiary doctrine created to help a plaintiff establish a prima facie case of negligence using circumstantial evidence. The doctrine infers causation by the defendants. *Dalley v. Utah Valley Reg. Med. Center*, 132 Utah Adv. Rep. 17 (April 19, 1990) (C.J. Hall).

FAMILY AND DIVORCE

A father's appeal to define and declare his rights to an unborn child, after it had been clinically aborted, was dismissed as moot. *Reynolds v. Reynolds*, 129 Utah Adv. Rep. 32 (Utah Ct. App., March 6, 1990) (J. Bench).

Mother's failure to request or act for over seven years to obtain support from the father of her illegitimate child, coupled with her public declarations that she didn't want anything to do with the father, estopped her from collecting back child support. *Burrows v. Vrontikis*, 129 Utah Adv. Rep. 44 (Utah Ct. App., March 7, 1990) (J. Garff).

The interrelationship between the Federal Parental Kidnapping Prevention Act (28 U.S.C. §1738A(1989)) and the Uniform Child Custody Jurisdiction Act was analyzed and the PKPA held applicable when the father retained the children in Mississippi in violation of the Utah Custody decree. The Utah court retained its jurisdiction over the children and Mississippi never acquired jurisdiction. Because subject matter jurisdiction cannot be conferred upon a court by consent or waiver, the mother did not legitimize the Mississippi proceedings by litigating the father's custody petition there. *Curtis v. Curtis*, 131 Utah Adv. Rep. 60 (Utah Ct. App., March 27, 1990) (J. Orme).

The trial court's treatment of household property and termination of alimony for cohabitation was affirmed as based on sufficient evidence. Improvements by a "husband-to-be" before the marriage did not become the wife's separate property. The appeals court assessed double costs for a frivolous appeal. *Barker v. Barker*, Utah Ct. App. 880615-CA (May 14, 1990) (J. Davison).

A Pennsylvania order under the Revised Uniform Reciprocal Enforcement of Support Act did not alter, supercede, or nullify the husband's support obligation under a prior Utah divorce decree. *Kammersell v. Kammersell*, Utah Ct. App., 890238-CA (May 18, 1990) (J. Jackson).

Under a proceeding under the Uniform Reciprocal Enforcement of Support Act, no issue other than support may be considered. Visitation interference is not a defense to an action for support under the act. California is able to enforce defendant's support obligations in Utah and obtain reimbursement for public support provided his children, even though the obligation for support was conditioned upon affording visitation rights. *Charlesworth v. State of Calif.*, Utah Ct. App., 890297-CA (May 18, 1990) (J. Greenwood).

A custody decreed, which is predicated on established facts, is res judicata and will not be modified in the absence of material changes of circumstance. The doctrine of res judicata applies when a substantial change of circumstances cannot be shown. But, in a change of custody proceedings, the court may also consider evidence surrounding the original decree, in the best interests of the child, when the original custody decision was not litigated. Interference in visitation is a factor to be considered in determining either change of custody or the best interests of the child. *Smith v. Smith*, Utah Ct. App., 890246-CA (May 18, 1990) (J. Greenwood).

Legislation Affecting Children: An Overview

*By the Needs of Children Committee of the Utah State Bar**

The 1990 general session of the Utah State Legislature was touted in the press as the "year for education." Although Utah's children will undoubtedly benefit from increased support of education and teachers, the legislature considered relatively few items of proposed legislation addressing the legal needs of children. Legislation related to children's issues was concentrated in the areas of child support, adoption, and juvenile court procedures. Except as otherwise noted, the effective date of the legislation was April 23, 1990.

CHILD SUPPORT

In 1987, the Utah Judicial Council created the Child Support Guideline Task force.[1] In June 1988, the Council adopted presumptive child support guidelines promulgated by its task force, pursuant to legislation authorizing the Council to establish guidelines. The Interim Judiciary Committee of the Utah Legislature subsequently requested that implementation be delayed, or that the guidelines be made advisory only, to allow further legislative study. The child support guidelines were implemented by judicial rule as advisory, effective November 1, 1988. In October, 1988, the federal Family Support Act was passed, requiring states to implement presumptive guidelines by October 1989. In its 1989 general session, the Utah Legislature repealed language delegating responsibility for development of child support guidelines to the Judicial Council and adopted presumptive guidelines that were codified at Utah Code Ann. §78- 45-7.3 to 7.18. The legislation also created the Child Support Advisory Committee. In 1990, the Utah Legislature passed seven bills amending the child support statutes. In addition, the general study resolution recommends further legislative study of visitation and its relation to child support.

H.B. 148—OBTAINING SOCIAL SECURITY NUMBERS

This act requires, in accordance with the Family Support Act, that the social security number of both parents be obtained and provided to the state registrar at the time of the birth of a child. (Utah Code §26-2-5.5.)

H.B. 149—IMMEDIATE INCOME WITHHOLDING

To comply with the Family Support Act, this act authorizes immediate income withholding for *child support orders that are entered or modified after October 13, 1990, and are subject to enforcement by the Office of Recovery Services* (ORS). The obligor's income is subject to automatic income withholding, regardless of whether a deficiency exists, unless the court or administrative agency that entered the order finds there is "good cause" not to require immediate income withholding or a written agreement is executed by the parties to the effect that immediate income withholding is not needed. "Good cause" means "that damage to the obligor caused by immediate income withholding substantially outweighs the benefit to the child" or ORS. The act provides that the good cause exception includes a situation where there is no past deficiency, the obligor has made arrangements to guarantee support payments for at least two months, and child support payments will be deposited directly to the obligee's bank account. An exception from immediate automatic income withholding must be included in the child support order. With regard to *any child support order entered after October 13, 1990*, an obligee may seek income withholding in the appropriate court, whenever a delinquency occurs, whether or not the order includes authorization for income withholding. *Child support orders issued prior to October 13, 1990, and not otherwise modified after that date*, are also subject to immediate income withholding, pursuant to Utah Code §62A-11-404.5(5), or if a delinquency occurs. (Utah Code §§62-11-403 to 408.)

H.B. 150—REVIEW AND MODIFICATION OF CHILD SUPPORT ORDERS

This act authorizes modification of existing child support orders to conform with the presumptive child support guidelines, effective October 13, 1990. The act provides that "a difference of at least 25 percent between a child support order and the child support guidelines shall be considered a substantial or material change of circumstance, and may be used as a basis for seeking modification of the order." Modification of a child support award can be sought no more often than once every three years. The Family Support Act requires ORS to review all orders under its jurisdiction every three years to determine whether an adjustment is necessary to be consistent with the child support guidelines. (Utah Code §§78-45-7.2 and 62A-11-320.5.)

H.B. 106—CHILD SUPPORT GUIDELINES AMENDMENTS

The child support guidelines, as enacted, provided that extraordinary medical expenses would be shared equally by the parents. This act deletes those provisions and provides that such costs are to be allocated in a ratio determined by the court or administrative agency making the allocation. A requirement that the federal child care

tax credit be subtracted before the allocation of work-related child care expenses has been removed from the guidelines; however, a provision requiring work-related child care expenses to be shared equally by the parents, regardless of their respective incomes, remains. The table for computing the child support award has been extended to cover up to 10 children. "Natural or adopted children of either parent who live in the home of that parent and are not children in common to both parties" may be considered in setting or modifying a child support award "to mitigate an increase in the award." A child support award entered in an uncontested proceeding, or based on stipulation, shall include a written statement indicating whether the amount of child support requested is consistent with the guidelines. (Utah Code §§78-45-7.2 to 7.18.)

H.B. 349—HEALTH INSURANCE FOR DEPENDENT CHILDREN

This act authorizes ORS to enforce orders requiring parents and legal guardians of dependent children to provide health insurance coverage and allows wage withholding to pay for the cost of insurance. (Utah Code §§62a-11-326.1 and 326.2.)

H.B. 352—LIABILITY FOR MEDICAL EXPENSES FOR CHILDREN

This act provides for the determination of a parent's liability for uninsured medical and dental expenses and clarifies language requiring parents to obtain health insurance. (Utah Code §§62A-11-326 and 326.1; Utah Code §§78-45-7.1 and 7.19.)

ADOPTION
H.B. 56— ADOPTION ACT AMENDMENTS

Most notably, this legislation repeals Utah Code §78-30-12 and Utah Code §78-30-4, both relating to the rights of the fathers of illegitimate children, and enacts new statutory procedures for determination of those rights. Utah Code §78-30-4.1(d) requires that a consent to adoption must be obtained from "the biological father of an adoptee born outside of marriage who, in a contested hearing pursuant to §78-30-4.10, "proves facts including that he has developed a "substantial relationship with the adoptee" *and* has "demonstrated a full commitment to the responsibilities of parenthood by participating in raising the adoptee" *or* has "received the adoptee into his home, openly held out the adoptee as his own child, and otherwise treated the child as if it were his legitimate child."[2]

Section 78-30-4.7 requires notice of an adoption petition to be given to any person who has filed a notice of paternity with the state registrar of vital statistics. The purpose of such notice "is to enable the person served to present evidence to the court relating to the best interests of the child, and regarding whether that person's consent to the adoption is required." Section 78-30-4.8 details the procedures for filing a notice of paternity, which "may be filed prior to the birth of the child but must be filed prior to the time the child is relinquished to a licensed child placing agency or prior to the filing of a petition by a person with whom the mother has placed the child for adoption." A putative father failing to file the notice of paternity is barred from bringing an action to assert an interest in the child unless he proves, by clear and convincing evidence, that: (a) it was not possible for him to file a notice of paternity prior to the time specified in subsection (2); (b) his failure to file a notice of paternity was through no fault of his own; and (c) he filed a notice of paternity within 10 days after it becomes possible for him to file. Section 78-30-4.8 appears to be an attempt to both codify and restrict the case law developed under former Utah Code §78-30- 4.[3]

Section 78-30-4.10 requires that a person who receives notice of the adoption proceeding must file a motion to contest the

adoption within 30 days of service, which motion shall be heard within 21 days of service of the motion. Among the determinations to be made by the court is whether the moving party's consent to the adoption is required, and whether a putative father is excluded or included as a possible biological father by "HLA, or white blood cell, testing." The court hearing evidence at the contested hearing shall dismiss the adoption proceeding if it finds that the adoption is not in the best interest of the adoptee or a petitioner or his home is not suitable for the adoptee; if a petitioner is not capable of adopting the adoptee; or if a necessary consent or relinquishment is invalid. A putative father who has not timely filed a notice of paternity and seeks to validate the filing as provided in §78-30-4.8 or a putative father who has acknowledged his child as provided in §78-30-4.1 must establish the requisite facts by clear and convincing evidence. All other facts at a contested hearing must be shown by a preponderance of the evidence. The provisions of this legislation will be subject to review by the courts, in appropriate cases, to determine whether the constitutional guarantees of due process and equal protection to putative fathers have been satisfied.

Other significant provisions of the act detail the requirements for a valid consent to an adoption, including a requirement that a birth mother may not consent to the adoption of her child until at least 24 hours after the birth of her child. Utah Code §78-30-15.5 requires the adoption petition to contain a statement of compliance with the Interstate Compact on Placement of Children. (Utah Code §§30-1-17.2, 76-7-203, 78-30-1.1, 78-30-1.5, 78-30-4.1 to 4.10, 78-30-7, 78-30-9, 78-30-10, 78-30-11, 78- 30-14, 78-30-14.5, 78-30-15.5, 78-45a-1, 78-45a-2.)

S.B. 14—ADOPTION RECODIFICATION ACT

This act creates a rebuttable presumption that a parent has failed to maintain a parental relationship with a child if the parent has not supported and communicated with the child for one year or longer. A child may be adopted without the consent of a parent who, without good cause, his failed to maintain a parental relationship. (Utah Code §78-30-1 to 6.)

H.B. 55—ITEMIZATION OF FEES FOR ADOPTION

An itemization of adoption fees and expenses is required before the court may enter a final decree of adoption. The adoptive parent(s) and the agency or person placing the child must provide an affidavit itemizing all fees paid, items exchanged, and services rendered in connection with the adoption. (Utah Code §78-30-15.5.)

JUVENILE COURT PROCEDURES S.B. 47—JUVENILE COURT FILING AMENDMENTS

This act modifies the procedures for recall to juvenile court of a case directly filed in district court. The direct file provisions were available under prior law for the offenses of criminal homicide, attempted criminal homicide, aggravated robbery, forcible sodomy, aggravated arson, aggravated sexual abuse of a child, aggravated sexual assault, aggravated burglary or aggravated kidnapping. As amended, the statute encompasses all capital and first degree felonies. The act also limits the juvenile court's discretion in applying the recall provisions to consideration of chronological age, legal record and seriousness of the offense.[4] (Utah Code §78-30-25.)

H.B. 146—JUVENILE PROTECTIVE ORDERS

The act makes technical changes in the procedures for obtaining a protective order in the juvenile court. A juvenile court protective order allows the child to remain in the home while the adult who may be abusing the child is removed from the home. The more common response to an abuse allegation has been to remove the child. The legislation extends the duration of a protective order to 90 days, rather than

60 days. The time for hearing an ex parte protective order can be extended for good cause to 20 days (or more with the defendant's consent). (Utah Code §§78-3a-20.5, 78-30-20.6, and 78-30-20.8.)

H.B. 199—CHILD GUARDIAN AD LITEM APPOINTMENT

This act extends appointment of guardians ad litem to dependency cases, as opposed to only abuse or neglect cases. The fiscal note was reduced during the legislative session and this lack of support will hamper a very effective program which provides protection for high risk children at very little cost. (Utah Code §78-3a-63.)

H.B. 244—JUVENILE TRAFFIC OFFENSES AMENDMENT

This act makes changes in the jurisdiction of traffic offenses committed by juveniles. (Utah Code §§78-3a-16 and 78-4-5.)

MISCELLANEOUS PROVISIONS H.B. 145—PRIVILEGED COMMUNICATIONS AMENDMENTS

This legislation establishes that spousal privileged communication does not extend to any civil or criminal proceeding for abuse or neglect committed against the child of either spouse. (Utah Code §78-24-8.)

S.B. 207—UNIFORM CHILD CUSTODY JURISDICTION ACT AMENDMENTS

This act amends the Uniform Child Custody Jurisdiction Act to clarify the grounds for asserting jurisdiction where Utah was the most recent domicile of the mother prior to birth of the child. (Utah Code §78-45c-3.)

H.B. 288—JOINT CUSTODY AMENDMENTS

This act eliminates the rebuttal presumption that joint legal custody is in the best interest of the child. The court may order joint custody if it determines that joint custody is in the best interest of the child *and* both parents agree to the order *or* the parents appear capable of implementing joint legal custody. (Utah Code §§30-3-10.2 and 10.4.)

H.B. 304—OFFICE OF CHILD CARE

This act establishes the Office of Child Care within the Department of Community and Economic Development and a Child Care Advisory Committee composed of nine members to be appointed by the Governor. (Utah Code §§63-33-101 to 105.)

H.B. 335—CHILD ABUSE AMENDMENTS

This act requires each person providing licensed day care services to submit information, including fingerprints, to the Department of Social Services. The Bureau of Criminal Identification shall process the information to screen out any person convicted of a felony. The Department of Social Services has discretion whether or not to license a person convicted of a misdemeanor. (Utah Code §62A-4-514.)

S.B. 160—UAPA AMENDMENTS REGARDING CHILD PLACEMENT

The act amends §63-46b-15 of the Utah Administrative Procedures Act to provide that the juvenile court has jurisdiction to review all state agency actions relating to removal or placement of children in state custody. (Utah Code §63-46b-15.)

AGENDA FOR THE FUTURE?

Issues related to the commitment of minors to psychiatric facilities have been before the Utah Legislature in each of the past two general sessions. H.B. No. 134 would have required a neutral fact finder to give a second opinion on the necessity for admission of a minor over age 13 to a psychiatric hospital if the minor objects to such admission. The bill went beyond the minimum constitutional requirements established by the United States Supreme Court by prohibiting the neutral fact finder from being affiliated with the proposed treatment facility.[5]

A resolution was introduced calling for a constitutional amendment to permit charging of school fees in elementary grades. A bill to prohibit corporal punishment in public schools, which had broad-based support, was not enacted. Both issues are likely to surface in future sessions.

A significant failure of the 1990 legislature was failure to fund early intervention programs for disabled children. In addition, badly needed increases in assistance grants and foster care payments were not funded.

The Needs of Children Committee strongly supports the initiation of programs and changes in law that address the legal needs of children. Any attorney interested in these issues is encouraged to join the Needs of Children Committee in the coming year.

NOTES

*The Needs of Children Committee of the Utah State Bar is a voluntary committee of attorneys and community representatives. Committee members lending their expertise to this project were: Jane R. Conard, Rosalind McGee (citizen member), Mary T. Noonan, Karen S. Thompson, and Louise York (Chair). Karen S. Thompson, who served as principal editor of this article, is also a staff member of the *Utah Bar Journal*.

1. An extensive discussion of the process leading to the adoption of uniform child support guidelines in Utah appears in Billings, *From Guesswork to Guidelines—the Adoption of Uniform Child Support Guidelines in Utah*, 1989 Utah L. Rev. 859 (1989). The Honorable Judith M. Billings served as chair of the Utah Judicial Council's Task Force on Child Support Guidelines.

2. This provision appears to be a legislative attempt to address the situation presented in *In re: T.R.F.*, 760 P.2d 906 (Utah Ct. App. 1988), which harmonized the provisions of Utah Code §78-30-4 and Utah Code §78-30-12, now repealed.

3. *See, e.g., Ellis v. Social Services Dept.*, 615 P.2d 1250 (Utah 1980); *Sanchez v. LDS Social Services*, 680 P.2d 753 (Utah 1984); *Wells v. Children's Aid Society*, 681 P.2d 199 (Utah 1984); *In re Adoption of Baby Boy Doe*, 717 P.2d 686 (Utah 1986); *In re K.B.E.*, 740 P.2d 292 (Utah Ct. App. 1987); *Swayne v. LDS Social Services*, 761 P.2d 932 (Utah Ct. App. 1988), *cert. granted*, 102 Utah Adv. Rep. 3 (1989).

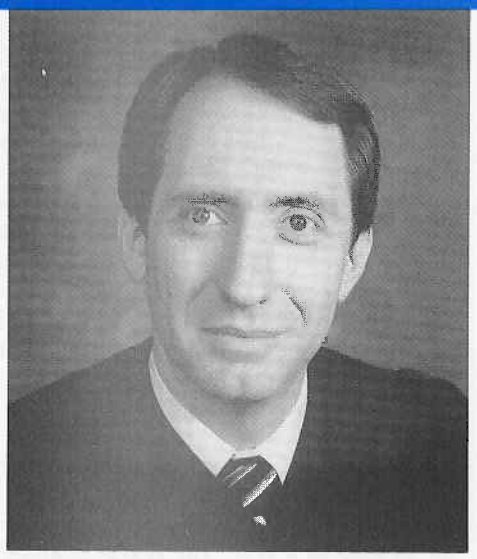
4. This amendment is consistent with the Utah Court of Appeals case of *In re N.H.B.*, 777 P.2d 487 (Utah Ct. App. 1989), *cert. denied*, 124 Utah Adv. Rep. 26 (1989) and *In re: R.D.S.*, 777 P.2d 532 (Utah Ct. App. 1989), *cert. pending*, 118 Utah Adv. Rep. (1989).

5. *See Parham v. J.R.*, 442 U.S. 584 (1979).

MESSAGE TO THE BAR

From the Clerk of the Utah Court of Appeals: Because one set of appellate rules now encompasses procedures for appeals in both the Utah Supreme Court and the Utah Court of Appeals, counsel should read, interpret and apply the appellate rules in light of the specific court in which the appeal is pending.

When an appeal is pending in one appellate court, attorneys are *not* required (under Utah R. App. P. 9(a), 10(b), 23(d), or 26(b)) to file copies of documents, such as briefs or motions, in the other appellate court. Similarly, when the appeal is pending in the Utah Court of Appeals, attorneys should file documents only in the court of appeals and not also in the Supreme Court.



THE UTAH COURT OF APPEALS: Past Successes—Future Challenges

By Associate Presiding Judge Russell W. Bench

The Utah Court of Appeals has now been in operation for over three years. Together with our Supreme Court, we have enjoyed considerable success in processing the ever-growing appellate case load. In the paragraphs that follow, I will highlight some of our accomplishments and challenges.

I attribute much of our initial success to design. Our panel system has worked out very well in providing an efficient multi-judge review of trial court and agency decisions. Panels are randomly assigned, such that each judge regularly sits with every other member of the court. We also rotate the responsibility of chairing the various panels. Ours is truly a collegial court.[1]

One of our panels is designated the law and motion panel. This panel works closely with our three staff attorneys and clerk of court. The chair of the law and motion panel rules on extensions and most other non-dispositional matters. The entire panel rules on motions for summary disposition, and issues "per curiam" decisions in fully briefed cases where oral argument is deemed unnecessary. The law and motion panel also hears most of the cases designated for expedited disposition under Utah R. App. P. 31.[2]

All members of the court sit on panels assigned to hear our regular calendar. Typically, each judge hears 12 cases each month on the regular calendar, four of which he or she will author. Immediately after oral argument, the panel meets and outlines a tentative disposition. The judge assigned to write the opinion works toward the panel's tentative vote, but may change direction during the research and drafting process. Once a draft is completed, it is circulated to the other panel members, who have one week to vote. At this point, there is usually considerable give and take among the panel members. Informal discussions are had and suggestions are made as to how the opinion might be improved. A concurrence might be conditioned on the author making certain changes. If disagreements cannot be resolved, the dissenting or concurring judge has an additional two weeks to prepare a supplemental opinion. Once the votes are finalized, the opinion is distributed internally to the entire court for information and comment. One week later, after final editing has been completed, the opinion is filed and sent to the parties. Publication is decided by majority vote of the panel.

One of our biggest challenges has been, and continues to be, how to increase dispositions without compromising the quality of justice. The following summarizes our new appeals filed and total dispositions over the past three years:

	1987	1988	1989
New Appeals Filed	636	716	743
Total Dispositions	541	611	803

We anticipate that the number of new appeals filed in our court will continue to increase annually at about 10 percent. We believe that our dispositions are now at the maximum level, given present resources and procedures.

Because we are a new court, we have not been bound by tradition and have been quite flexible in trying new ideas to meet our challenges. For the past year and a half, we have invited senior judges to sit with us in an effort to increase regular calendar dispositions. We have increased our rule 31 dispositions and have also explored

RUSSELL W. BENCH received his B.A. and J.D. from the University of Utah and his M.P.A. from Brigham Young University. He has served the Utah Supreme Court as a central staff attorney and as a law clerk for Chief Justices F. Henri Henriod and Gordon R. Hall. He also has worked on the legal staff of the Utah Attorney General. He was appointed to the Utah Court of Appeals in January 1987, and currently serves as that court's associate presiding judge.

Judge Bench is a member of the executive committee of the Board of Appellate Court Judges. He chairs the Judicial Council's standing committee on information, automation, and records, and is a member of the Council's ethics advisory committee. He also serves on the executive council of the administrative practice section of the Utah State Bar.

the possibility of using settlement .[3]

The Court of Appeals, like all other courts throughout the state, will soon have in place time standards against which we will be measured individually and as a court. The time from notice of appeal to disposition in our court now averages about 400 days. The American Bar Association standard for appellate courts is that all cases should be decided within 280 days of the notice of appeal. Although Utah has not yet adopted the A.B.A. standards, it is clear that there will be continuing pressure to reduce the time span from notice of appeal to decision.

As I see it, delays in our court occur at three stages:

1. *The time from filing of a notice of appeal to completion of briefing.*

Delays at this stage are attributable primarily to attorneys and court reporters. In the past, extensions were quite freely granted but, recently, we have been less willing to grant extensions. Since the A.B.A. standards allow for no extensions, it is probable that any extensions in the future will be granted only for extreme emergencies.

2. The time from completion of briefing to hearing.

Currently, we are able to hear all appeals within about 240 days after briefing. While that is a vast improvement over a few years ago, the court will be looking at shortening this time in the future. The A.B.A. standard is that appeals should be heard within 60 days after briefing. The only way to further shorten this time frame is to increase dispositions, at least in the short term. As we feel we are currently operating at maximum capacity, this will probably mean the addition of staff and, ultimately, judges.

3. The time from hearing to disposition.

This is an area over which we have direct control. Over the past three years, the average case was under advisement for about 80 days, but some cases were held for as long as a year. The A.B.A. standard is that all cases should issue within 120 days. In order to meet that standard, it may be necessary to decrease the number of cases heard each month, which is not a good alternative because of the effect that would have on cases awaiting hearing.

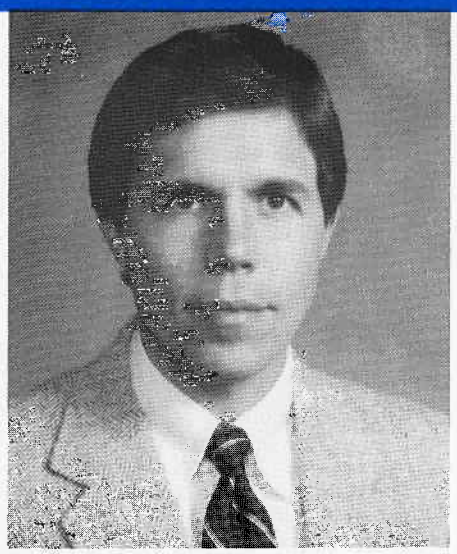
Many of our problems and challenges are shared with the Supreme Court. We meet together regularly to address these mutual concerns. In addition, members of our court meet monthly in a business meeting. We also meet monthly with our staff to exchange information and to solicit input on various administrative concerns. Much of our success is attributable to our dedicated court employees.

We believe we have fulfilled many of the mandates we were given when we commenced operations in 1987. There is much more, however, that must be done in coming years to meet new challenges and to improve the administration of justice in this state. We are committed to do our part in that process.

[1] A collegial court is "marked by power or authority vested equally in each of a number of colleagues." *See* Webster's Third New International Dictionary 445 (Merriam-Webster 1986).

[2] Rule 31 allows for an expedited decision where appeals may be decided by a short, written order. Appeals that qualify for such treatment include cases "involving uncomplicated factual issues based primarily on documents, summary judgments, dismissals for failure to state a claim, dismissals for lack of personal or subject matter jurisdiction, and judgments or orders based on uncomplicated issues of law." Utah R. App. P. 31(b).

[3] Other states have experienced some success in settlement conferences for certain types of cases, such as money judgments. Successful settlement programs seem to depend upon early intervention (immediately after the docketing statement is filed). Conferences are typically conducted by a respected member of the judiciary, often a retired appellate judge.



President's Message

A Year of Growth and a Year of Challenge

By Jonathan K. Butler, President

It is my pleasure to thank and congratulate all who contributed to the Young Lawyer's Section's programs and activities during the 1989-1990 bar year.

THANKS TO COMMITTEES AND COMMITTEE MEMBERS

The Section's 15 committees and more than 200 committee members provided thousands of hours to implement the Section's pro bono and public education programs. Faced with significant budget cutbacks over the past three years, the Young Lawyer's Section this year planned, developed and implemented several new programs and projects that required little or no funding.

THANKS TO SPONSORS

Unlike other sections of the State Bar, the Young Lawyer's Section receives no dues from its members. This year the Section's new programs and projects and the expansion of existing projects were implemented at no cost or were funded by outside sources. Many individual lawyers, law firms and foundations graciously contributed thousands of dollars and many hours of service to these new and expanded programs and projects.

THANKS TO THE BAR COMMISSION AND BAR STAFF

The Utah State Bar Commission was very supportive of the Young Lawyers Section this year. Each time the Section came to the Commission for approval of new or expansion of existing public service and public education programs, the Commission consistently endorsed the Section's proposals. Having served this year as an ex officio member of the Bar Commission, I have come to admire the Commissioners for their dedication to the profession and to the public. Each month Commission members spend many hours dealing with the challenges faced by the Bar and in administering the Bar's programs and activities.

As always the Bar staff has provided tremendous support to the Young Lawyers Section in training and assisting Section members to implement effective public service, public education and bar service programs.

NEW AND EXPANDED PROGRAMS AND PROJECTS

The Section organized and implemented over 50 public service and public education programs during the year. A few of the new and expanded programs and projects are:

- Publication of a pamphlet on legal issues for the clergy;
- Publication of the Young Lawyer's Section, Salt Lake County Bar Domestic Relations Program Handbook;
- Preparation of dinners at the Salt Lake Homeless Shelter;
- Presentation of a series of public service announcements for commercial television and radio, the costs of which were born by KSL Radio and Television; these public service announcements provided information to the public concerning the availability of legal public service and legal public education programs;
- Expansion of the Tuesday Night Bar to Ogden;
- Organization of a legal employment fair where law firms and law students were able to meet outside the traditional interviewing process;
- Expansion of monthly brown bag luncheons to provide continuing legal education credit to Section members at no cost;
- Preparation of a CLE program for Bar members at the annual state bar meeting in Beaver Creek, Colorado;
- Creation of a substance abuse public education program in the public schools in Salt Lake, Davis and Weber counties;
- Expansion of the Section's People's Law community education program to Highland High School;
- Organization of receptions for Judges, new bar admittees and their families;

- Preparation of a new pamphlet concerning rights and responsibilities of teachers with respect to child abuse;
- Organization of a reception held in conjunction with the National Child Abuse Conference;
- Presentation of mock interview programs for law students at the University of Utah and Brigham Young University;
- Organization of a fund-raising program for the second printing of the "Stepping Out" pamphlet for high school seniors; and
- Organization of a comprehensive statewide program for the commemoration of the Bicentennial of the Bill of Rights.

FUTURE OF THE SECTION

The Young Lawyer's Section is dedicated to providing public service, public education and service to the members of the Bar. The Section's programs and projects have a substantial positive impact upon the public and the profession. The continued future success of the Section depends on the participation of Section members. I encourage members of the Section to demonstrate their commitment to the public and to the profession by taking time from their practice to provide service to the public and to the profession.

Successful Tuesday Night Bar Program Opens in Ogden

Beginning July 19, 1990, the Successful Tuesday Night Bar Program held in Salt Lake City at the Law and Justice Center will also be held in Ogden. The program will be held every third Thursday of the month at the YCC Center, located at the corner of 23rd Street and Adams Street in Ogden. We encourage all Ogden-area attorneys to participate in this successful, fulfilling volunteer program. Please contact Kathryn Kendell at 532-3333 or 394-5783 for more information.

Law Day Fairs Successful Throughout the State

The Young Lawyers Section of the Utah State Bar again sponsored the Law Day Fairs for Law Day 1990. According to Jim Hyde, Chairperson for Law Day, over 60 Young Lawyers participated in answering legal questions of people from Logan to St. George at information booths in shopping malls. Informative young lawyers were armed with pamphlets on legal subjects from A to Z, brimming with helpful, general information on the law. "I found it rewarding to be able to answer simple questions which might otherwise require payment of a fee if asked in the law office context. This is a great program!" one Young Lawyer stated.

L.K. Abbott Recipient of the 1990 Liberty Bell Award

On May 1, 1990 (National Law Day), the Young Lawyers Section of the Utah State Bar presented the 1990 Liberty Bell Award to Mr. L.K. Abbott. Each year, the YLS presents the Liberty Bell Award to a deserving nonlawyer whose efforts benefit the public and our community by increasing the public's understanding of the American legal system, the United States Constitution, and the Bill of Rights.

L.K. Abbott, this year's recipient, has served as a Vice President of KSL as the Director of Asian Affairs and Special Projects for Bonneville International. Currently Abbott is the Director of the Utah Chapter of the National Conference of Christians and Jews. He has spent over 50 years in public service which has often focused on educating children about the Bill of Rights. Abbott received the award at the Law Day Luncheon held on May 1, 1990 at the Law and Justice Center. James C. Hyde, YLS Chairperson for Law Day, who presented the award, stated, "Mr. Abbott is a most deserving recipient."

Young Lawyers Use Putters to Raise Money for Utah Legal Services and Legal Aid Society

On April 11, 1990, the Pro Bono Committee of the Young Lawyers Section of the Utah State Bar and the Student Bar Association of the University of Utah cosponsored a "Golf-a-thon" to raise funds for Utah Legal Services and the Legal Aid Society. Approximately 40 golfers met at the 49th Street Galleria in the evening. Nine teams participated, and together, they raised approximately $2,000.

Those teams who participated included one firm team, Fabian & Clendenin; four government/judicial teams, Utah Legal Services, The Legal Aid Society, the Utah Court of Appeals, and the Utah Supreme Court; one general attorney team, trial advocacy instructors; and one child team. The University of Utah provided 20 students who volunteered to play or to help in obtaining pledges. Unfortunately, law students at J. Reuben Clark Law School at BYU were taking final exams at the time.

Betsy Ross Fetzer, vice-chair of the Pro Bono Committee, said the "Golf-a-thon" will be an annual event.

"It laid the groundwork for more successful miniature golf fundraisers in future years. It is important to involve the universities in pro bono work so that students will learn to give community service at an early stage in their careers so they will later be involved in such activities as Young Lawyers and as attorneys in general," she stated.

Historically, a federal start-up grant of $20,000 was given to Utah Legal Services for a Domestic Relations Clinic with the stipulation that funds in the future would be generated by the local community. The "Golf-a-thon" was designed to replenish that fund.

Participants received prizes and distinctions for participation and law scores. They also received free pizza and soft drinks. Special thanks goes to the following business sponsors: Wasatch Touring, Village Limited, The King's English, Ruby's Catering, Pro Golf Discount, Under Par Golf, The Tie Guy, and Salt Lake Roasting Company.

Mock Trial Finalists Named at Law Day Luncheon

The Utah State Bar Law Related Education Committee organized and sponsored a mock trial program for junior high and high school students. Seventy-one high school and junior high school teams participated with the help of teacher advisor(s) and a legal advisor. The students prepared legal oral arguments on the issue of an employer's right to discharge an employee carrying the AIDS virus.

Logan Senior High School took first place again statewide in the senior high division, repeating their first place standing in 1989. Mr. Troy Blauer was the teacher advisor, and Marlin J. Grant was the attorney advisor. The students on the winning team were Sun An, Greg Bair, Rebecca Bishop, Joey Blanch, Matt Godfrey, Jennifer Jones, Melissa Meng, Amanda Oberg, Holly Stokes, Megan Wanlass and Amy Waters. Logan Senior High School has made outstanding showings in years past, reaching the semi-final round in 1988 and winning first place in 1987.

St. Vincent School took first place in the middle school division, also repeating a first place standing from last year. Teacher advisors were Suzanne Razzeka, Dianna Pugh and Charlene Furano. Paul Gotay was the attorney advisor. The students on the first place team were Natalie Divino, Aimee LeDuc, Annie Phillips, John Platner, David Ravarino, Brian Stanga and Amy Stuyvesant.

Many thanks to Nancy N. Mathews, Project Director, and to all those attorneys and teachers who so generously gave of their time and talents.

Brian Barnard Agrees With Ronald Reagan

Former President Ronald Reagan wants Americans to donate blood. "I wanted to do whatever I could for the American Red Cross," the former president said last month after recording a public service announcement seeking blood donors. In the announcement, he said: "When you give blood, you give another birthday party. Another wedding anniversary. Another day at the beach. Another walk across a field. Another night under the stars. When you give blood, you give another holiday with the family. Another drive after supper. Another talk with a friend. Another laugh. Another cry. Another hug. Another chance."

Salt Lake Attorney Brian M. Barnard says for once he and the former President are in agreement. Chair of the Young Lawyer Section Blood Bank, Barnard recently announced the annual Blood Drive will be held during the week of July 15 to 22, 1990. "That week, we want the legal community out in full force with their sleeves rolled up."

"Vacations, travel and other activities during the summer cause people to forget their regular donations. During the months July through September each year there is a shortage of blood, but the need is as high as ever," said Barnard.

Donations should be made during that week at the blood resource centers at LDS Hospital, Holy Cross Hospital, the University of Utah and Cottonwood Hospital in Salt Lake City, and at most hospitals throughout the state. "Call the hospital nearest you and for the times that donations can be made," stated Barnard.

For more information call, Brian M. Barnard, Chair, Young Lawyer Section Blood Drive, 328-9532.

Young Lawyers Express Appreciation for Brown Bag Participation

The Membership Support Committee of the Utah Bar's Young Lawyers Section wishes to express appreciation to members of the bar and, in particular to the guest speakers, for their support and participation at brown bag functions which have been conducted during the past six months. This year, the Young Lawyers Section has sponsored brown bag luncheons featuring U.S. District Court Judge J. Thomas Greene, Messrs. Kay Cornaby and Byron Harward of the Utah State Legislature, Justice Christine Durham of the Utah Supreme Court and Mr. Paul Warner of the U.S. Attorney's Office. These luncheons have been very well received and have provided attendees with valuable insight into a broad range of legal topics. Continuing legal education credit has been and will continue to be available at these functions.

The Young Lawyers Section also wishes to invite and encourage members of the bar to attend and participate in the Utah State Bar's annual meeting, commencing June 27, 1990 in Beaver Creek, Colorado. The Membership Support Committee will be sponsoring a special session titled "Taking and Defending Depositions." This program promises to have wide appeal to all members of the bar and will provide an excellent review of deposition strategy and technique.

Finally, the Young Lawyers Section is looking forward to sponsoring a Continuing Legal Education seminar in the fall on the subject of professional ethics. More detailed information concerning this program will be provided in the next edition of the *Utah Bar Journal.*

Worthy of Note: *Reach for the Rainbow*

Reviewed by Lynne D. Finney
Karen S. Thompson

Reach for the Rainbow: Advanced Healing for Survivors of Sexual Abuse by "survivor and therapist" Lynne D. Finney chronicles her experiences as a sexually abused child. Finney could not remember her own childhood until, through therapy, she discovered that she had been raped, beaten and tortured by her father, a well-known screenwriter and novelist. While describing her own experiences as a victim, Finney uses her training as a lawyer turned psychotherapist to produce an informative and practical guide to recovery for other victims.

By any traditional measure, Lynne Finney was a "success" by the time she reached her 30s. Her list of academic and professional accomplishments was extensive. Graduating magna cum laude from Loyola University Law School in 1967, she received the faculty's award for most outstanding student. In the following years, she combined a career as a corporate litigator with prestigious academic positions. As a partner in a Washington, D.C. law firm, she won a landmark case against the Federal Home Loan Bank Board, which led to a White House appointment as director of the Office of Industry Development, a policy-making department of the Federal Home Loan Bank Board. From 1981 to 1984, she was attorney and policy advisor for the Agency for International Development of the State Department.

Yet while amassing stunning professional credentials, Finney tells her readers "inwardly, I was a failure." While her career flourished, Finney participated in almost eight years of therapy trying to resolve personal problems that included violent mood swings, insecurity, recurrent nightmares, and an inability to recall the events of the first 11 years of her life. After taking a year off to sort things out, Finney moved to Park City, Utah.

In Utah, a gynecologist treating her for excessive pain and bleeding referred her to a hypnotherapist to control the pain. It was in the course of hypnotherapy that Finney first recalled that she had been raped, beaten and tortured by her father from the time she was almost 4 years old until she was almost 8. She relates:

Unable to cope with the violent emotions of terror, helplessness, grief, anger, hate and pain engendered by my abuse, my mind split the emotions and memories into separate pockets, which are called ego states, and stored them away, out of my consciousness. I had ego states for hate, pain, anger, sadness and others which held individual sadness and others which held individual memories of hideous events. Most of the latter were based on my experience at a particular age so that I had my two-year-old ego state, my four-year-old, my five-year-old and so on. It seemed almost like filling a computer floppy disk; once a portion of my mind was saturated with pain, it created a new disk. When one of my child ego states spoke through me under hyponsis, each spoke and thought like a child at that age. It was as if parts of me had been frozen in time and had never grown up.

The process of dealing with the horrors of her own early childhood led Finney to a new career as a writer and therapist. She later graduated with a Masters Degree in social work and has since become a therapist for victims of sexual abuse.

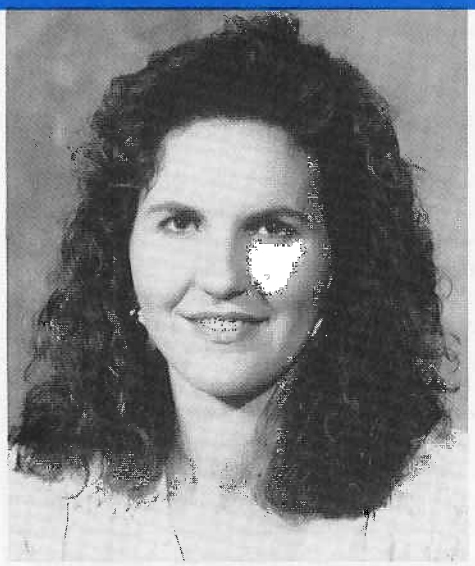
Reach for the Rainbow, subtitled "Advanced Healing for Survivors of Sexual Abuse," is principally designed as a guide or survivors of sexual abuse. A unique question and answer format utilized in the middle section of the book, titled "Survivors Questions," makes the information articularly accessible. Throughout the book, Finney provides surprisingly candid and graphic information about her own experiences as a victim of abuse. It is thus not surprising that she encourages victims to talk openly about the abuse, urging her readers that "the things you hide will al-

ways haunt you." It is this commitment to candor and frankness that is apparent when she responds to such difficult questions as: "What if I had an orgasm?" "Will I ever be able to enjoy sex?" and "Do I have to forgive my abuser?" Of particular interest to attorneys is the section captioned, "Can I sue my abuser?" This section is a concise discussion of practical considerations, such as legal impediments to intra-family suits, statutes of limitation, and litigation costs, as well as more personal considerations of the "emotional investment" and potential value resulting from such litigation.

The last two sections of the book focus on therapeutic options. Part IV contains a victim's guide to choosing a therapist and selecting a theory of therapy. In contrast, Part V describes various self-help techniques that have been tested by abuse victims and found to be effective.

Why should lawyers read this book? Finney herself notes that the book "provides psychological information, statistics, and references which would be valuable to attorneys preparing for both civil and criminal abuse cases." Beyond that pragmatic concern, she notes that statistics suggest that "between 25 percent and 33 1/3 percent of the population has been sexually abused under the age of 18." The need to understand such a statistically significant social phenomena should concern us all. Even the casual browser of *Reach for the Rainbow* will be struck by the pervasive effect of sexual abuse on every aspect of a victim's life. The style and format of the book is straight- forward, descriptive, frank and accessible. The absence of clinical terms (unless accompanied by a "plain english" definition) is readily apparent. This book brings the issue of sexual abuse, which has recently received so much attention in the abstract, down to a personal level. Most significantly, Finney speaks as a survivor, who generously shares her own struggles and triumphs in overcoming the impact of sexual abuse and adds an element that is not so common in treatments of this topic--optimism.

Karen S. Thompson is a Central Staff Attorney at the Utah State Court of Appeals. She is a member of the Utah State Bar's Committee on the Needs of Children and the Bar Journal Committee.



Utah Bar Foundation Presents 1990 Ethics Award

Melinda Checketts

The Utah Bar Foundation in cooperation with the J. Reuben Clark School of Law has established an Ethics Award to promote high ethical standards in new members of the Bar. The rules of professional conduct adopted by the Utah State Bar establish ethical standards for Utah lawyers, but encourage lawyers to strive for even higher ethical and professional excellence. As stated in the preamble to the Utah Rules of Professional Conduct:

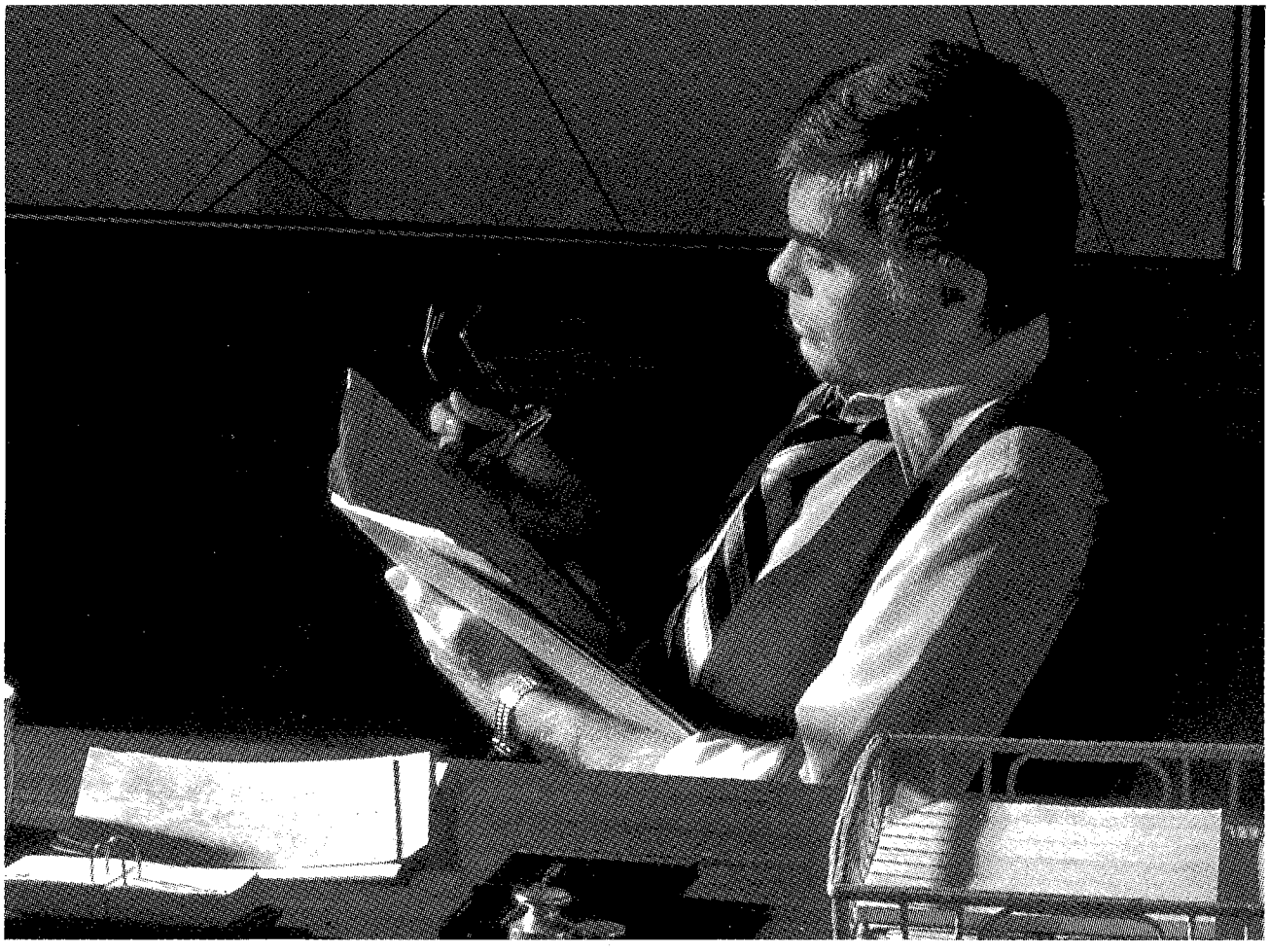
> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal professional ideal of public service.

In an effort to promote and encourage new members of the Bar to have high ethical standards the Utah Bar Foundation in cooperation with the J. Reuben Clark Law School established the ethics award. The J. Reuben Clark School of Law annually selects a graduating senior who exemplifies the high ethical standards expected of all attorneys.

The Foundation's 1990 Ethics Award was recently presented by the Honorable Norman H. Jackson, Vice President of the Utah Bar Foundation, to Melinda Checketts. Ms. Checketts has served as Editor of the BYU Journal of Public Law, Member of the Moot Court Board of Advocates, and received a three-year merit tuition scholarship. While in law school Ms. Checketts interned with Utah Legal Services, Inc. and held summer associate positions with Quinn, Emanual & Urquhart; Bronson, Bronson & McKinnon; and Beus, Gilbert & Morrill.

The Utah Bar Foundation congratulates Melinda Checketts for her outstanding accomplishments and high ethical standards during law school and looks forward to continued ethics excellence from her as she enters the legal profession.

We put our entire corporation behind your client's personal trust



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We offer a complete range of trust services including personal, corporate, and testamentary trustee, custodian or agent and personal representative. For professional trust services of the largest trust department in Utah, we're right where you want us to be.

First Security Trust Division

We're right where you want us to be

Salt Lake Trust Department	Provo Trust Department	Ogden Trust Department
David Halladay	Jeff Kahn	Charles B. Hewlett
350-5859	379-2105	626-9523

CLE CLENDAR

KEY CASES UNDER THE UCC— THE WHITE AND CLARK ANNUAL REVIEW

Take two nationally known law professors who have some 50 years of teaching experience in commercial and banking law between them, add to that the rapidly changing laws involving UCC Articles 3, 4 and 9, mix in a critical need for commercial lawyers, bankers and litigators to be aware of what is happening now and what is about to happen in commercial legislation, and you have the ingredients for the White and Clark Annual Review.

Jim White is a masterful teacher. He will take you quickly and succinctly through fraud cases in the payment system, new Article 4A provisions and he will cover proposed amendments to Articles 3 and 4 on fraud and forgery. He will also cover Article 2A on leases and the International Sale of Goods Convention. Barkley Clark, now a partner in a major law firm after a long and productive teaching career, will brief you on the key cases on Article 9, bank collection cases under Article 4 and Regulation CC, and Letter of Credit Cases.

CLE Credit: 6.5 hours
Date: July 17, 1990
Place: Utah Law and Justice Center
Fee: $165 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

GOVERNMENT LAW SEMINAR

Watch for mailings with more information on this seminar.

CLE Credit: 4 hours
Date: August 10, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: TBA

CHAPTER 11–THE PROCESS AND THE PLAYERS

More cases are being filed in bankruptcy court than ever before. These cases can be incredibly complex as the representatives from many constituencies perform their varied roles.

CHAPTER 11—THE PROCESS AND THE PLAYERS can help you unravel and understand these complexities. This practice-oriented program brings you many necessary insights of the Chapter 11 process as faculty members, each representing a constituency in a Chapter 11, discuss their role, function, responsibility and relationship with the particular other constituencies.

Through this unprecedented assembly of experience and knowledge, you will readily understand the Chapter 11 process and how the parties in interest participate in the case from beginning to end. This program is designed for attorneys who represent debtors, committees of secured and unsecured creditors, debenture holders, and equity security holders and creditors with special statutory rights and remedies. Experienced bankruptcy attorneys or those new to the field, as well as bankruptcy trustees, all will benefit from this program.

CLE Credit: 6.5 hours
Date: August 14, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

BANKRUPTCY SEMINAR

This program will consist of a panel of the Chapter 7 Trustees.

CLE Credit: 2 hours
Date: August 16, 1990
Place: Utah Law and Justice Center
Fee: $30 (includes lunch)
Time: 12:00 to 2:00 p.m.

IMMIGRATION LAW SEMINAR

The Immigration Reform Control Act of 1986 imposes upon employers civil and criminal sanctions for hiring individuals not authorized to be employed in the United States. Employers must maintain certain paperwork to verify the immigration status of employees. The Act also contains provisions to prevent discrimination against U.S. workers of foreign appearance.

The CLE will review the employer's obligation to complete and maintain the I-9 Form, the employer's responsibilities when faced the an I-9 audit by the Immigration Service, the scope of the government's investigation powers, the nature of the administrative procedures to enforce the Act, the antidiscrimination provisions of the Act, the criteria for assessment of penalties, and the employer's defenses.

CLE Credit: 3 hours
Date: September 12, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: 4:00 to 7:00 p.m.

ELDERLY LAW SEMINAR

This program is sponsored by the Probate and Estate Planning Section and the Needs of the Elderly Committee of the Bar. It will address probate, trusts, wills, and other issues as they pertain to the elderly.

CLE Credit: 3 hours
Date: September 20, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: 4:00 to 7:00 p.m.

STRUCTURING AND RESTRUCTURING C CORPORATIONS

A tape-delay presentation. More information will be forthcoming on this seminar as it is available.

CLE Credit: 6.5 hours
Date: October 9, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 p.m.

TAX ASPECTS OF DIAGNOSING, FINANCING, AND OPERATING FINANCIALLY TROUBLED BUSINESSES

A tape-delay presentation. More information will be forthcoming on this seminar as it is available.

CLE Credit: 6.5 hours
Date: October 10, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 p.m.

WATER LAW SEMINAR

This seminar will cover basic water law topics and their applications in Utah. It will also discuss current issues and cover a case law update.

CLE Credit: 8 hours
Date: October 10, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: 8:00 a.m. to 4:30 p.m.

BANKRUPTCY SEMINAR

CLE Credit: 2 hours
Date: October 11, 1990
Place: Utah Law and Justice Center
Fee: $30
Time: 12:00 to 2:00 p.m.

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CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
July 17	Big Cases Under the UCC	L&J Center	$175
Aug. 10	Government Law Seminar	L&J Center	TBA
Aug. 14	Chapter 11–Process and Players	L&J Center	$141
Aug. 16	Bankruptcy Seminar	L&J Center	$30
Sept. 12	Immigration Law Seminar	L&J Center	TBA
Sept. 20	Elderly Law Seminar	L&J Center	TBA
Oct. 9	Structuring and Restructuring C Corporations	L&J Center	$175
Oct. 10	Tax Aspects of...Financially Troubled Businesses	L&J Center	$175
Oct. 10	Water Law Seminar	L&J Center	TBA
Oct. 11	Bankruptcy Seminar	L&J Center	$30

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

Registration and Cancellation Policies: Please register in advance. Those who register at the door are always welcome but cannot always be guaranteed complete materials on seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. For most seminars refunds can be arranged if you cancel at least 24 hours in advance. No refunds can be made for live programs unless notification of cancellation is received at least 48 hours in advance.

Total fee(s) enclosed $_____

Make all checks payable to the Utah State Bar/CLE

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

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POSITIONS AVAILABLE

JARDINE, LINEBAUGH, BROWN & DUNN is seeking an associate with one to three years' experience in commercial litigation. Bankruptcy experience preferred. Strong academic credentials, demonstrated writing ability and Utah Bar membership required. Send resume to Wm. Shane Topham, Jardine, Linebaugh, Brown & Dunn, 370 E. South Temple, 4th Floor, Salt Lake City, UT 84111.

State Farm Insurance Company seeks a qualified attorney for the position of managing attorney for the Claim Litigation Counsel operation located in the Murray area. Applicants must be admitted to the Utah State Bar. Ten plus years of litigation experience is preferred. Litigation experience in insurance defense matters is highly desirable. Send resume and salary requirements by July 31, 1990, to Courtney Berg, Personnel Office, 3001 Eighth Avenue, Greeley, CO 80631. EOE/M/F.

CORPORATE CLAIM ATTORNEY. Major insurance company seeks qualified attorney for Claim Attorney position in Sandy, Utah, area. Three to five years and litigation experience preferred, insurance and claim knowledge highly desirable. Send resume and salary requirements as soon as possible to: Personnel, 3001 Eighth Avenue, Greeley, CO 80631. EOE.

Staff Attorney to assist individuals who are disabled in resolving complaints concerning violation of rights. Experience in public interest law preferred. Submit resume and brief narrative of motivation for seeking the position to: Legal Center for People with Disabilities, 455 E. 400 S., Suite 201, Salt Lake City, UT 84111. An Equal Opportunity Employer.

HALFTIME/FLEXTIME JUDICIAL CLERKSHIP POSITION AVAILABLE.

Judge Stephen Anderson, Tenth Circuit Court of Appeals. Qualifications: Excellent law school grades; law review or other comparable writing experience; references. Contact Dixie Huefner or Lydia Berggren at 524-6950 for further information.

POSITION SOUGHT

Mature four-year member of Utah Bar, focusing on General Practice, seeks full-time associate position with firm. Extensive litigation and collection experience; excellent client interrelation, research and writing skills. Please reply to Utah State Bar, Box C, 645 S. 200 E., Salt Lake City, UT 84111.

SERVICES AVAILABLE

Do you need Legal Secretarial work done and don't have a full-time secretary? Let me help you. I am expert on WordPerfect 5.0, have IBM compatible computer equipment with Laser printer, and FAX capabilities to make it easier to communicate. I work out of my home, so your hours are my hours, including evenings and weekends, etc., along with pickup and delivery services within Salt Lake County; and for clients outside of the Salt Lake area, will Federal Express or mail final draft at a minimal charge to alleviate any transportation problems. Call Jacque Taylor at (801) 268-2937.

NOTICE

The children of Paul Caine Moore are looking for his last will and testament. This could have been written in 1976 after the death of his wife, Elaine Harvey Moore. If you have any information regarding this matter, please contact his daughter, Rebekah Moore Plumb, at (801) 583-7187 or his son, David J. Moore, at (801) 583-5312.

For information regarding classified ads, contact Kelli Suitter or Paige Stevens at the Utah State Bar Offices, 531-9095.

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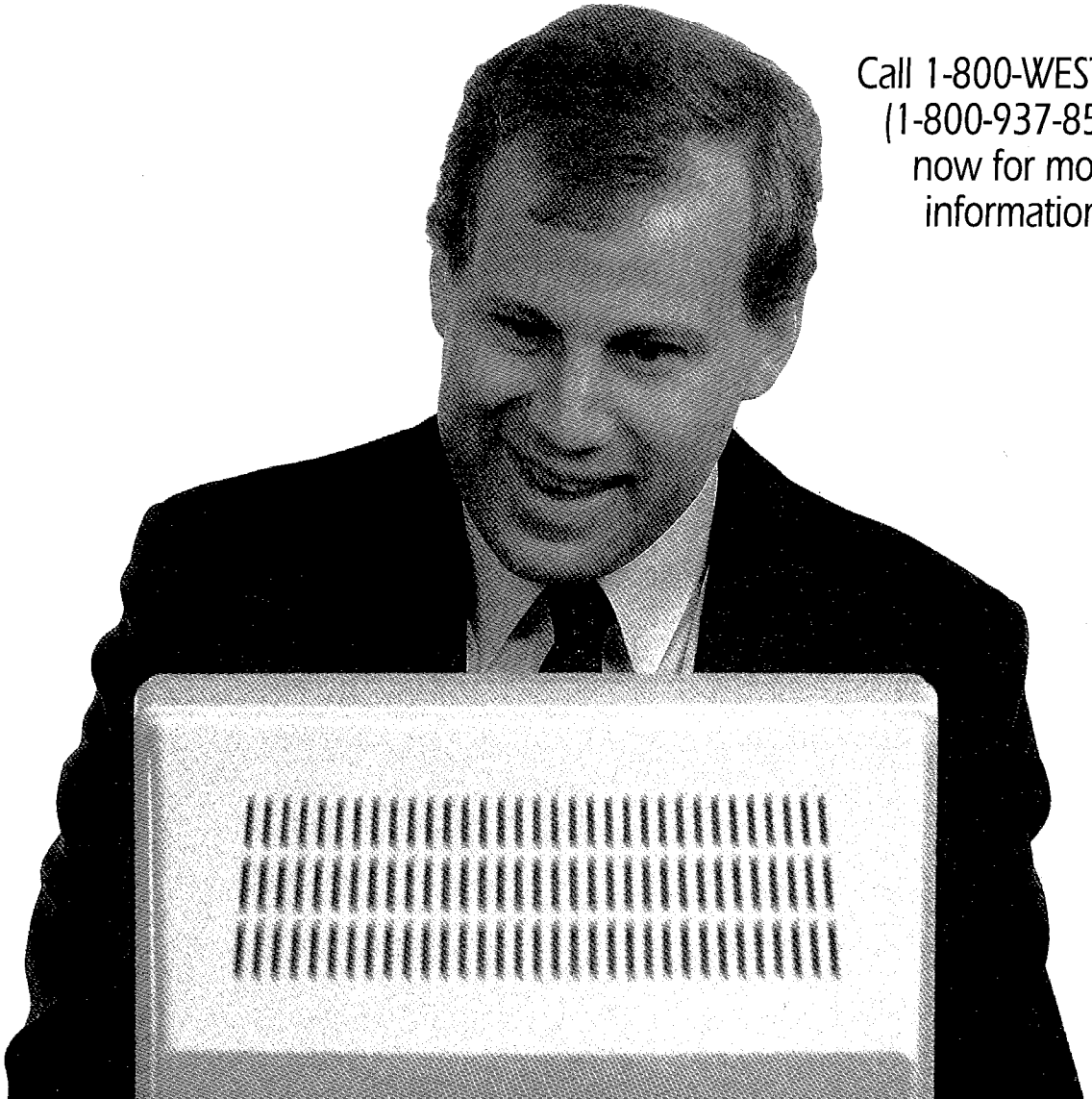

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