UTAH BAR JOURNAL

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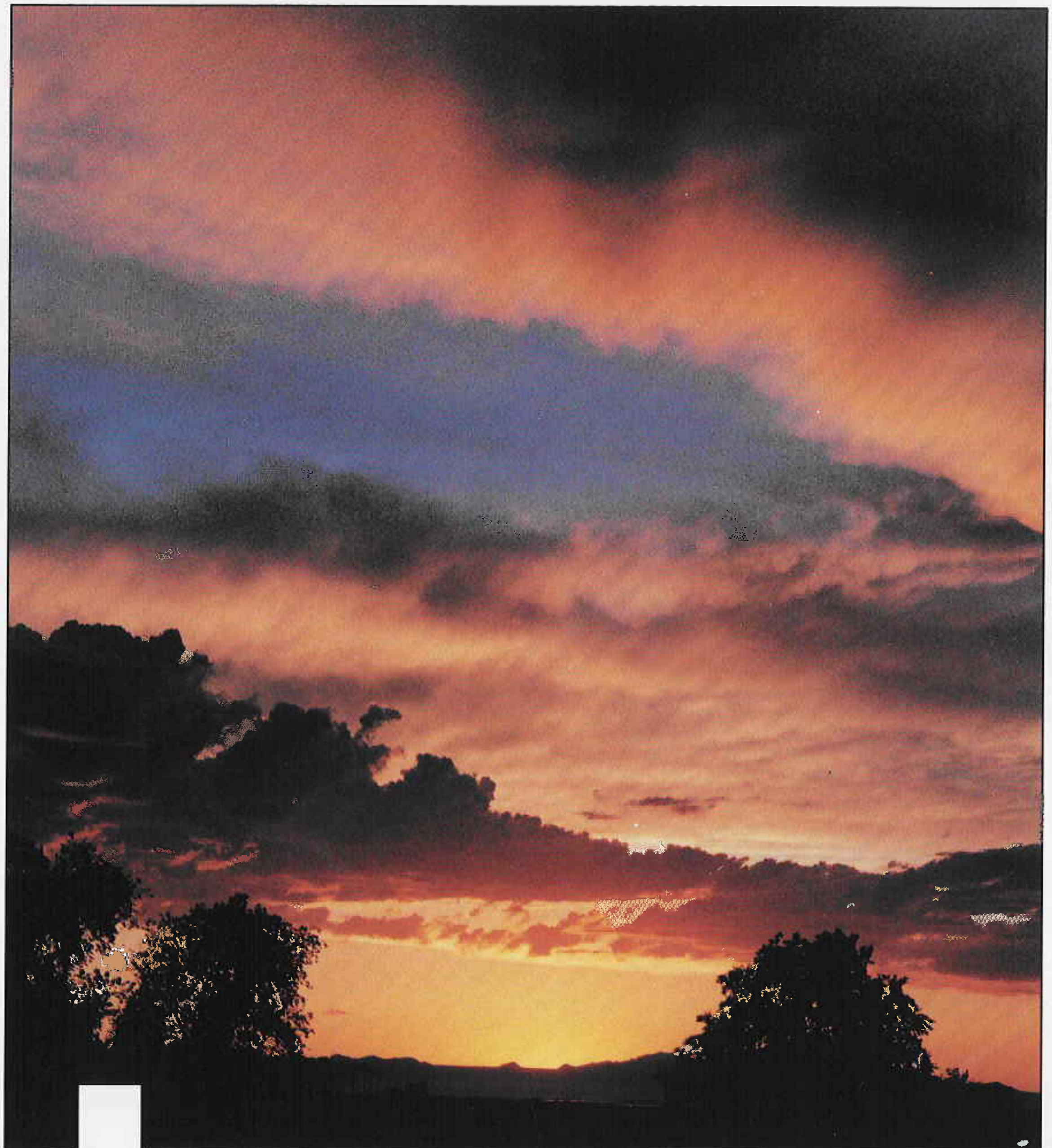

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COVER: Sunset over Great Salt Lake, by Professor David A. Thomas, J. Reuben Clark Law School.

Members of the Utah Bar who are interested in having their photographs on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, UT 84111, 532-5200. Send both the transparency and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $25; single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

Dear Editor:

I was distressed to read reported in the April issue of the *Utah Bar Journal* that I had left my position as Associate Bar Counsel to take a higher paying position with Northwest Pipeline Corporation, implying that I left the Office of Bar Counsel purely for financial reasons.

It is true that my position at Northwest Pipeline is better compensated. This should be no surprise to anyone who has some understanding of non-profit organizations and salaries. Increased pay for the Bar's professional staff is warranted, but money alone is not what maintains the dedicated staff who work for the Bar. The membership of the Bar should be proud of the extremely competent job the Bar staff does under very trying circumstances. Bar positions are not, however, career positions. Even though there have been some long-term employees, the majority have moved on to other positions. In my case, an opportunity arose that matched my career goals, was located in Salt Lake City, and, yes, did offer a better compensation package.

I enjoyed my two and one-half years as Associate Bar Counsel, and I hope that the Bar benefitted from my presence as much as I benefitted from the experience.

Sincerely,

Toni

Toni Marie Sutliff

"What is the Bar?"

By James Z. Davis

In connection with his service on the Utah Supreme Court Task Force on the Management and Regulation of the Practice of Law, David Nuffer, one of our members from St. George, developed the following analysis:

> Law is the societal structure which governs the relationship between people and the form of their government. Law is of the highest public interest because it preserves order and reflects consensus public values. Law effects equality because it reduces the collateral effects of economic, racial, gender, educational and other distinctions.
>
> Lawyers are trained in the use of law. Because law is in the public domain, lawyers have a social responsibility that extends beyond the commerce of legal service. Lawyers have a duty to see that law fulfills its mission of preserving and developing social order, on an equal field. Lawyers should see that law results in justice. The legal system must respond to (and at the same time control) our changing and diverse society. The training lawyers have in the public sphere of law imposes upon them a public responsibility. Their participation is required in the process of delivering law to the public and developing law for the public.
>
> The Bar is traditionally the aggregation of those qualified to practice law. All who are recognized as having the skills to assist the public are licensed. The Bar, as a group, holds public trust, just as lawyers do. The Bar can serve as an organization to further the fulfillment of the public trust.With consideration for the abilities of lawyers to bear collective burden, while engaged in individual efforts to deliver and develop legal services, as well as in the maintenance of their own employment and practice, the Bar must do more than license and discipline lawyers. It is not enough to provide qualified practitioners to the market. The Bar should also promote the delivery of legal services to the public and the development of law consistent with social evolution. Therefore mandatory Bar association membership is required.

The Utah Supreme Court in *Barnard v. Utah State Bar*, 158 Utah Adv. Rep. 3 (1991), characterized the Bar as a private organization assisting the court in the performance of its regulatory functions. "In addition, the Bar exists to promote the administration of justice in a variety of ways and to enhance professional competence through the dissemination of knowledge of legal principles. It also provides a number of services to the public and practicing lawyers." *Barnard*, 158 Utah Adv. Rep., at 5.

The Rules for Integration and Management of the Utah State Bar provide that, in addition to regulating admissions and discipline, it is the responsibility of the Bar:

> to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service, and high standards of conduct, to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform, to carry on a continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereon, to encourage practices that will advance and improve the honor and dignity of the legal profession; and to the

end that the responsibility of the legal profession and the individual members thereof may be more effectively and efficiently discharged in the public interest . . . . "

Rules for Integration and Management of the Utah State Bar, as amended September 25, 1985.

During the last decade, the Utah State Bar not only experienced rapid growth and completed construction of the Utah Law and Justice Center, but gained a much deserved reputation as one of if not the finest bar organization of its size in the United States. That reputation was earned while carrying out the mandate of the Supreme Court set out in the Rules of Integration. Even after it became apparent that a dues increase was necessary to amortize the remaining debt on the Law and Justice Center and continue to fund Bar operations, only a small fraction of the Bar's approximately 5,200 members criticized that need.

In spite of the heavy burdens placed upon Bar leadership by the demands of the Task Force appointed by the Supreme Court, much has been accomplished in the past two years including identification and analysis of internal needs, complete reorganization of the finance department, installation of new management, installation of new computer software, and significant augmentation in the Office of Bar Counsel. As a result of much of the foregoing, the Bar Commission now has at its disposal accurate, current financial information upon which to base ongoing management decisions. Indeed, the Bar is financially healthy for the foreseeable future, and the Commission is hopeful of building adequate depreciation reserves and amortizing the remaining debt on the building more quickly than currently scheduled.

During this difficult period, many hundreds of Bar members registered their votes and comments with their actions and labors; and it is a tribute to the dedication of those members that the broad functions performed by the Bar consistent with the aforesaid rules, decisions and philosophies continue intact

. Your elected leaders remain dedicated to the principles and goals set out in those rules, decisions and philosophies, to-wit, service to the public, service to lawyers, and service to the judicial branch of government.

It is my view that the vast majority of our members are desirous of the maintenance of a strong Bar capable of responding in meaningful and timely fashion to the needs of the public, its members and the courts. Be assured that your leaders, together with the dedicated and able assistance of Bar staff, will continue to pursue those goals.

Utah BJ

Most Frequently Asked Questions About the State Bar

By Jeff R. Thorne

I have been a Bar Commissioner for nearly three years. During that time I have been greatly impressed with the dedication of the many volunteers who serve the Bar. I have had the privilege of serving under the leadership of four Bar presidents: Kent M. Kasting, Hans Q. Chamberlain, Pamela T. Greenwood, and James Z. Davis. Each of these has done a great job and each has served faithfully as well.

As I meet fellow attorneys the questions most frequently asked center on the Law and Justice Center, the Bar's financial position, the operation of the Commission and why anyone would want to be a Commissioner.

I have chosen to answer these four questions.

1. **What should the Utah State Bar do with the Law and Justice Center?** The simple answer is, utilize it! The question of what to do with the Law and Justice Center has been studied by various groups—the Bar Commissioners, the Supreme Court Task Force, auditors appointed by the Utah Supreme Court and auditors appointed by the State Bar. Uniformly and independently each group has determined that the Law and Justice Center is a valuable resource and the Bar should continue owning and operating the facility. The facility continues to serve both the public and the lawyers of Utah.

Reports from July, 1990, through June, 1991, a total of 833 meetings (401/internal or 48 percent and 432/external or 52 percent), were held at the Center, 23,014 persons attended meetings during that time and the Law and Justice Center received $113,879.24 in gross revenue.

2. **How is the Utah State Bar doing financially?** The easy answer is much, much better. Preliminary financial statements for fiscal year ending June 30, 1991, show that the Bar is doing very well financially. All short-term debt has been paid and it appears the Bar will have approximately a $150,000 unrestricted cash balance surplus at the end of the fiscal year.

With the funds from the recent dues increase, the financial commitments of the Bar have been met. The payment of the mortgage balance on the Law and Justice Center is a No. 1 priority for the Bar and it appears that prepayments will substantially reduce the mortgage term.

3. **Do the Salt Lake attorneys control the Utah Bar?** The simple and honest answer is no. Each commissioner has his or her own personal philosophies and principles and each stands by them. No one group "controls" the Bar Commission. I can assure you the Bar Commission is not a group of big-firm lawyers or a bunch of "good 'ole' boys and girls." Nor have I seen any particular evidence of any urban versus rural "factions" or "agendas." It is my opinion that the Commissioners vote their conscience and try do to what they believe is best for the Utah Bar. I have found no evidence that Salt Lake City lawyers, as a block, attempt to or do control the Bar Commission.

4. **Why does anyone want to be a Commissioner?** I believe the primary reason attorneys want to be Commissioners is each believes he or she can act for the benefit of the Utah lawyers and the public at large. Every Commissioner I know has sacrificed substantial time and money to serve as a Commissioner and no one has demonstrated any selfish interest in doing so. People who serve as commissioners do so out of their desire to assist and solve problems and be involved in the decision-making processes. The following quote by Mahatma Ghandi seems to summarize the motives for serving:

> "It's not the critic who counts. Nor the man who points out how the strongman stumbles, or where the doer of deeds could have done better. The credit belongs to the man who is actually in the arena; whose face is marred by dust and sweat; who strives valiantly, who errs and may fail again . . . And who at the worst if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory or defeat."

Serving as a Bar Commissioner has been challenging, tiring, but great fun and worth the effort. I would certainly encourage anyone who has an inclination to run for the Commission to do it.

Utah BJ

The Impact of Tax Laws on Divorce

By David S. Dolowitz

INTRODUCTION

A lawyer representing a client in a marriage termination action in a no-fault jurisdiction will recognize that there are three major areas of concern: division of property, support and custody of children. For example, in the state of Utah, §30-3-5(1) of the Utah Code provides, in relevant part:

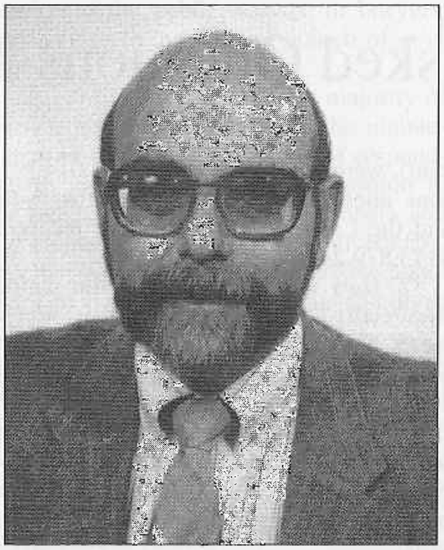
> When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, and parties.

This statute has been interpreted by the Utah Supreme Court to require an equitable division of marital property. As the Utah Supreme Court has declared:

> There is no fixed formula upon which to determine a division of properties, it is a prerogative of the court to make whatever disposition of property as it deems fair, equitable, and necessary for the protection and welfare of the parties.

Fletcher v. Fletcher, 615 P.2d 1218, 1222 (Utah 1980).

Consequently, a lawyer conducting a divorce action will seek to effect that property division which will be most equitable and protect the welfare of the client within the parameters of equitable distribution. If the lawyer is conversant with general principles of Utah law, she will recognize that the court will generally take the position that the property should be valued and divided equally. Consequently, the initial focus of counsel will be to determine what is in the marital estate and to value it, then will turn to seeking a division which will best serve the interests of her client.



Member of Board of Directors of Cohne, Rappaport & Segal; Fellow, American Academy of Matrimonial Lawyers: Past President and Member of the Executive Committee, Family Law Section, Utah State Bar Association; Family Law Section, Utah State Bar's "Lawyer of the Year"; Chairman, Utah Supreme Court, Advisory Committee for Juvenile Court Rules of Procedure.

In terms of alimony, the Utah Supreme Court has articulated:

> An alimony award should, . . . to the extent possible, equalize the parties' respective standards of living and maintain them at a level as close as possible to that standard enjoyed during the marriage.

Gardner v. Gardner, 748 P.2d 1076, 1081 (Utah 1988).

In *Jones v. Jones*, 700 P.2d 1072, 1075 (Utah 1985), the court enumerated three factors which are to be considered in setting an alimony award: (1) the financial conditions and needs of the obligee spouse; (2) the ability of each spouse to produce sufficient income to pay living expenses; and, (3) the ability of the obligor spouse to provide support. *Jones*, 700 P.2d at 1075; *see also Gardner*, 748 P.2d at 1081. With these factors in mind, counsel will focus on establishing the standard of living enjoyed by the parties during the marriage and securing or limiting the alimony award to maintain her client at that level as nearly as possible.

In terms of child support, the state of Utah, like most other states, has adopted a guideline system. *See* Utah Code §§78-45-7 to -7.19 (1990). The Utah Uniform Child Support Guidelines are mandatory, unless the court determines there is sufficient evidence to rebut application of the guidelines. If application is rebutted, then the court will consider:

> All relevant factors including, but not limited to:
>
> (a) the standard of living and situation of the parties;
>
> (b) the relative wealth and income of the parties;
>
> (c) the ability of the obligor to earn;
>
> (d) the ability of the obligee to earn;
>
> (e) the needs of the obligee, obligor and the child;
>
> (f) the ages of the parties; and
>
> (g) the responsibilities of the obligor and the obligee for the support of others.

Utah Code §78-45-7(3) (1990).

Finally, counsel will note that custody of a child is awarded in the best interest of the child based on function-related factors revolving around who has been the primary caretaker parent. *Pusey v. Pusey*, 728 P.2d 117, 120 (Utah 1986).

In planning and preparing a case for a divorce client, the family lawyer will seek to identify and value the assets of the parties, discern the income and cost of living factors necessary to provide appropriate levels of support in terms of alimony and child support and evaluate the child custody factors. If the lawyer consider taxes in any respect, he might be aware of the general articulations of the Utah Supreme Court in *Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983), or the Utah Court of Appeals in *Alexander v. Alexander*, 737 P.2d 221, 224 (Utah App. 1987), where the court affirmed the trial court's refusal to determine the tax consequences of its proposed order until they actually occurred. The rationale behind each decision was the fact that the trial court maintains continuing jurisdiction to make equitable adjustments if tax consequences produce a material result. As the Utah Court of Appeals stated:

> We do not think the trial court's refusal to speculate about hypothetical future consequences was an abuse of discretion.

Alexander, 737 P.2d at 224.

Those who have considered the question of whether taxes should have an impact on divorce would, however, have been aware of the decision of the Utah Court of Appeals in *Horne v. Horne*, 737 P.2d 244 (Utah App. 1987), where the court reversed a trial court order that had a significant impact only because of a change in tax law. In the *Horne* decision, the Court of Appeals (for the first time in Utah), recognized the impact that tax law can have on a divorce and in doing so, placed upon counsel the responsibility of bringing to the attention of the trial court the impact of tax law on either the agreement of the parties or the decision of the court.

In the recent decision of *Morgan v. Morgan*, 795 P.2d 684 (Utah App. 1990), the Utah Court of Appeals ruled that where evidence that an immediate tax impact would occur was presented to the trial court, the court must recognize that effect in its decision. Competent representation of a client in a divorce requires counsel to be aware of the tax implications arising from a divorce.

There are many esoteric twists and turns that can occur in a case which produce tax results which greatly change the apparent income or property award. Thus, the more complex the case, the greater the need for expert tax analysis. Counsel should also be aware that bankruptcy can follow a divorce and planning for this problem, not explored in this article, is also vital in protecting a client's interests. The tax problems that will be discussed in this article are those that do arise in most divorces and can be managed by the family law practitioner. They are legal, not accounting, problems which must be recognized and dealt with by the lawyer handling the divorce if competent representation of the client is to be effected.

In an extremely complex marital estate, it is recommended that a tax lawyer be brought in to deal with the problems. Those types of problems, however, are not what will be addressed in this discussion, which will address the types of problems which would ordinarily be encountered by a lawyer handling a divorce.

I. TAX CONSIDERATIONS WITH ALIMONY AND CHILD SUPPORT

Alimony comes in many forms but there are three basic structures that have evolved over the years in the state of Utah:
(1) Rehabilitative alimony, that is, a set amount of alimony paid over a given period of time to permit the payee time to become self-supporting. *See, e.g., Smith v. Smith*, 751 P.2d 1149 (Utah App. 1988);
(2) Support alimony, that is, an amount that is ordered paid by the obligor to the obligee for an indefinite period of time to realign the disparity in the parties' standards of living. *See e.g., Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988); *Paffel v. Paffel*, 732 P.2d 96 (Utah 1986); *Rasband v. Rasband*, 752 P.2d 1331 (Utah App. 1988); and
(3) Equitable restitution, that is, alimony paid to produce an equitable balancing of property and income that cannot be otherwise effected. *Martinez v. Martinez*, 754 P.2d 69 (Utah App. 1988); *Petersen v. Petersen*, 737 P.2d 237 (Utah App. 1987).

In representing a client in need of alimony, a family lawyer would seek, pursuant to the directives of the statute and declarations of the Utah appellate courts, alimony at a level that would allow his client to be maintained as nearly as possible to the standard of living enjoyed during the marriage and to equalize the standard of living of the parties. *See Jones*, 700 P.2d at 1075. In seeking a permanent alimony award, adjustment of the living standard of each of the parties considering their income and property would be necessary. In those cases where a rehabilitative award is sought, the amount and duration of any award would be built upon rehabilitative necessity. In seeking an equitable restitution award, an analysis of the significant efforts and sacrifices made to enable the other spouse to greatly increase his or her income would be involved. All of these factors would be addressed in terms of applicable state law. The tax problems the family lawyer faces arise because the Internal Revenue Code is focused on tax and revenue issues, while alimony awards are made under state law by state courts effecting state policies. Both areas of law have different criteria and different impacts upon a family.

It is generally understood that under the Internal Revenue Code alimony is tax deductible to the payor and taxable to the payee. Unfortunately, it is not that simple. The Internal Revenue Code has its own requirements which must be met. These are set forth in §71 of the Internal Revenue Code (Title 26 of the United States Code, hereinafter referred to as I.R.C.). If all of the requirements of §71 I.R.C. are met, then under §215 I.R.C., the payor may deduct and the payee must include as income all sums paid as alimony. If those requirements are not met, the payments are not deductible to the payor nor includible in the income of the payee. This occurs even if the intent of the parties or the court was to make the alimony award tax deductible to the payor and taxable to the payee. In other words, the state laws of alimony are governed by support considerations and I.R.C. laws are governed by technical internal revenue tests which must be met. *cf. Federal Land Bank v. Bd. of County Com'rs*, 788 F. 2d 1440, 1441 (10th Cir. 1986) ("The general rule is that property rights are created and defined by state law.") (Citing *Kenfield v. United States*, 783 F.2d 966, 968 (10th Cir. 1986). They are not the same. The lawyer who focuses exclusively upon state law requirements to the exclusion of the I.R.C. may produce an acceptable state court result, but an unacceptable or unintended I.R.C. result.

A. §71 REQUIREMENTS

Section 71 has certain requirements which must be met. The first is §71(b)(1)(A) which mandates that the payment must be pursuant to a divorce or separation instrument. In simple terms, it must be in writing. This would not seem to present any particular problems in handling a divorce case but it does. How many times have you, as a lawyer handling a divorce, had one of the marital partners come to you where they have already separated and support is being paid without a written order or agreement? In the typical case, the husband is paying the wife a given amount of money for her support and for support of the children. Possibly he is also making the house payment. If those payments are to be deductible to him as alimony (assuming a decision is made to file separate tax returns rather than a joint tax return at year end or the parties are divorced by year end), they must be made pursuant to a written agreement. Unless a formalized written agreement is executed or a court order is entered directing that temporary support be paid, these payments do not meet the test of §71(b)(1)(A). At the time that your client prepares his tax returns he will learn that the money he has paid for support is not deductible which will not be pleasant information to receive on top of the emotional and fiscal impact of the divorce itself.

This is an area where the tax code presents the family law practitioner with a dilemma. If the parties have worked out a satisfactory temporary support arrangement, it is probably done without any tax consideration. The wife has not included in her budget an amount for paying taxes on what she has been paid. The husband probably assumes (if he thought about it) that he can deduct these payments. You do not want to upset the existing situation which is minimizing the animosity of the parties; or, your client may instruct you to leave the status quo alone while negotiating or litigating the case; or, you may believe that your client will suffer a worse result at a court hearing. Yet, by the time the divorce is over, the husband is going to want to deduct those payments and, the wife will not want to recognize these payments as taxable income. Absent agreement or court order, the payments are not alimony as that is defined in §71. It is therefore important for you to recognize this problem and raise it with your client as soon as possible.

The decision may be made by the client that the tax ramifications are far outweighed by the desire to keep the divorce process as friendly and low-key as possible, in which case, no effort will be undertaken to make the payments deductible and the matter will be passed. If not, you should act to formalize the agreement in writing, and, in an extreme case, advise the client to stop making payments until there is a written agreement or court decision. The writing may be as simple as a counter-signed letter, but it must exist in writing if payments are to meet the §71 test.

A second requirement of §71 is contained in subsection (b)(1)(B) which requires that the written instrument must designate the payments as being included in gross income of the payee. Problems which can arise in regard to this provision are that house, car, furniture or insurance payments, can be tax deductible or not tax deductible depending on the agreement or order. They may be considered alimony under §71 if they are cash payments (the requirement of cash is set forth in §71(b)(1)) and the parties agree they are to be treated as §71 payments. If the written agreement or order does not specifically describe these as alimony payments, then they will probably not meet the §71 test to be deductible under §215 and as to the home mortgage interest may or may not be deductible to the spouse who has moved out under §163 of the I.R.C. A court order meets the tests of being in writing and requiring the payments, but does not necessarily designate them as alimony. In fact, a house payment could turn out to be fully non-deductible under these circumstances if it was considered as protecting the ownership interest of the spouse who has moved out and is making the payments yet fails to qualify as qualified interest and property tax payments. This particular problem is discussed further, later in this article. It is mentioned now to point out the interrelationship of these problems under the technical requirements of the I.R.C. verses the everyday problems confronting the lawyer handling a divorce.

In most cases where these temporary agreements are being negotiated between parties these issues must be addressed or they will go by default. If they go by default, the obligor will not be entitled to the deductions and a tax-planning opportunity that could benefit both parties will be lost. The obligor could still have some compensation if there is qualified home interest and taxes due, if the §163 requirements are met. However, under certain circumstances, such as where the debt is not in the name of the obligor, even that opportunity can be lost as from the date he moves out the home is not his principal residence. This can be a subject of painful discussion when it arises if it was not recognized and the opportunity for tax planning is lost.

A third requirement under §71(b)(1)(C) is that the obligor and the payee may not be members of the same household. This appears simple and straightforward, but there are a number of times where the husband or wife will simply move to another part of the same house. They do not conduct themselves as members of the same household, yet still have the same address. If that circumstance arises, further research into the impact of this particular subsection must be undertaken if alimony payments are to be tax deductible. While this may not be a frequent occurrence, it does occur and absent planning and proper adjustments, a tax-planning opportunity will be lost.

A fourth requirement of §71 is contained in subsection (b)(1)(D) which requires that the payments must end on death of the payee. Returning to the three general types of alimony described, the problems emerge. If a rehabilitative award has been established as a sum certain, for example, a $50,000 payable over five years at a rate of $833.33 per month, the award will not end upon death and may not end upon remarriage. The award would not be tax deductible under §§71 and 215 of the I.R.C. unless a provision that the alimony payments will end on death or remarriage is specifically added to the agreement or the decree. Reg. 1. 71-1T, Q-11.

Section 30-3-5(5) Utah Code (1953, as amended) mandates the termination of alimony (unless the decree otherwise provides) on remarriage. The question of termination upon death remains unanswered. Examination of the decisions of the Utah Supreme Court in *Colombo v. Walker Bank & Trust Co.*, 489 P.2d 998 (Utah 1971) and *Murphy v. Moyle*, 17 Utah 113, 53 P. 1010 (Utah 1898), reveal that a claim for support may be made against the estate of a deceased obligor if that is a possible interpretation of the decree. While those cases dealt with child support, the question is not resolved regarding alimony. If, for example, a decree provides for a set amount of alimony payable over a five-year period and the obligee dies after three years, the executor of the estate would have a claim against the obligor for an additional two years worth of payments. The alimony would then not end on death, would not have been tax deductible to the obligor, or taxable income to the obligee. If the award were a set amount for an indefinite period of time, it would probably have been considered an award for support and would end on the obligee's death. Because of these two decisions, it is not clear under existing statutes and court decisions if a set sum alimony award would end on death.

If these were not problems enough with which to have to cope, there are two additional problem areas presented under §71. One arises from the commonly understood general rule that while alimony is tax deductible to the obligor if all §71 tests are met, child support is not taxable income to the obligee. This distinction, while clear under state family law, is not so clear under §71. Section 71(c) provides that payments which are made as alimony are not considered alimony and tax deductible to the obligor if in fact, they are payable for the support of children. This part of §71 was written specifically to overturn the decision of the U.S. Supreme Court in *Commissioner v. Lester*, 366 U.S. 299 (1961) where the court ruled that sums which were designated as alimony and met the §71 test were alimony, even though it was possible to discern that the real purpose of the payments was child support. Section 71 was amended in 1984 so that if alimony is reduced based upon contingencies involving a child, the alimony payment can suddenly be designated as a child support and not be tax deductible to the obligor or taxable to the obligee, even when the result is unintentional and simply the result of operation of law. This may occur even in the scenario of the hypothetical $50,000 payable over five years. Even though the intent of the court or parties was clearly to provide alimony for a specified period of time, the payments could well fall within the definition of the child support because of other child-related events such as the attainment of majority.

The specific provisions of §71(c) being discussed are:

(1) **In general.** Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

(2) **Treatment of certain reductions related to contingencies involving child.** For purposes of paragraph (1), if any amount specified in the instrument will be reduced—

(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor's spouse.

Where alimony is being paid for a specified period of time, the family lawyer must examine the termination date of the alimony and compare it with the termination dates for child support because of specified events such as age, marriage, leaving school or some other contingency. The statute is actually much simpler than the implementing regulation, which declares that the tests are:

(1) Does the reduction occur within six months of the child's 18th or 21st birthday; or

(2) are the payments (on behalf of different children) to be reduced on two or more occasions that occur not more than one year before or after a different child of the obligor, attains a certain age between 18 and 24. Reg. §1.71-1T(c), Q-18.

The regulation also provides that the presumption is rebutted if you can show that there was another purpose for the reduction or termination of alimony. For example, that the alimony reduction was based upon a rehabilitation period or to pay a specified amount within a specified period of time as an equitable adjustment in the divorce. If so, the nature and basis for the reduction or termination of alimony should be clearly described to avoid the trap of §71(c).

In Utah there is a tradition of large families. That means there will be numerous children spanning a number of years, often fairly close together in age. This family structure results in a series of land mines under §71(c). This problem can best be dealt with by recognizing that it exists and using specific language in the agreement or decree to state clearly the other (e.g. rehabilitation) purpose for the reduction or termination of the alimony payments.

Consequently, whenever you have alimony that is going to be reduced or terminated in a specified period of time, it is necessary to examine the child support provisions to see if child support will cease or reduce within that same time frame. If so, it is a warning that you must examine the impact of §71(c). Something which could catch any lawyer is the unexpected child marriage, as emancipation occurs upon marriage. *See* Utah Code §15-2-1 (1953, as amended) but you can plan for known child support termination or reduction dates. If you are confronted with this type of problem, I would recommend a careful reading of Marjorie O'Connell's treatise, *Divorce Taxation* ¶ 4001A, 4004 and 4101-4105 (P-H 1990). Marjorie provides useful assistance in graphing and charting the various contingencies with which you have to deal and suggests language which you can place in the instrument to help meet the rebuttable presumption test.

If a lawyer thinks that he will never have to cope with this problem, I will simply point out that this problem frequently arises in a typical case involving a 5-year rehabilitative alimony award where there is a 12- or 13-year-old child. Thus, awareness that it exists is important. You can usually meet this problem by pointing out the tax issues to the parties, opposing counsel and, if necessary to the court. If you adjust the agreement or decree language, you can articulate an explanation of the payments or adjust the dates to meet the technical requirements of the Internal Revenue Code.

The last surprise in §71 is in subsection (f), "recomputation where excess front loading of alimony payments" occurs. If you trigger this trap, alimony which has been deducted will be recomputed, that is, added back into the income of the obligor as not having been properly deducted. The key to this problem is a reduction of alimony of more than $15,000 in year two or year three of payment. In any case where the alimony award is less than $1,250 per month, the problem will not arise as there is a safe harbor provision in §71(f) of $15,000. If the alimony payments are $15,000 per year or less, this problem will not be confronted. If payments have been greater than $15,000 per year, the risk exists.

To restate the rule, alimony paid in the second year that exceeds what has been paid in the third year by more than $15,000 is recomputed, as is alimony paid in the first year, which exceeds the average of the second- and third-year payments by $15,000. If you encounter this problem, I would strongly recommend having an accountant or tax lawyer work out the full consequences for you and your client. If you decide to work it out, I direct your attention once again to *Divorce Taxation* at ¶ 2008, 3002 and 3601. Under §71(f), there is an escape hatch if payments are to go on for more than three years, or do not decline more than $15,000 in year two or year three of the payment term.

There are three circumstances in which the recomputation problem will not occur:
1) if either spouse dies or remarries;
2) the payments are made under a temporary order; or,
3) the payments are based on a fixed percentage of income from a business, property award or compensation. However, in this third situation, the liability to pay must continue for at least three full years.

In determining whether you will face a recomputation problem, remember that payments other than support can qualify as alimony if they meet §71 tests. Thus payments such as school tuition, books, insurance, house payments, car payments, and other parts of a rehabilitative alimony award, as well as the support payment itself, can qualify. These payments may terminate within the three-year period raising a recapture problem.

An additional problem can occur because the client decides that he (following traditional pattern) wants to terminate alimony because his ex-wife has taken up residence with another man and is now cohabiting. This is permitted under Utah Code §30-3-5(6) (1953, as amended). If you bring the action to terminate alimony and are successful, you may trigger a recapture problem. Cohabitation is not remarriage. Thus when you are contacted about seeking to terminate alimony based on cohabitation, one of your first steps, if you believe a case exists, should be to determine whether you will really save money for your client or may in fact cost additional sums because of a recapture problem resulting from the termination of alimony in less than three years.

In computing alimony for recapture, you use the calendar year. Thus, you can actually benefit from this provision if additional alimony is required in the first year which would be available for payment of attorney's fees, provided the clients realize this has an impact on payments due in year two and year three.

B. REQUIREMENTS OF CHILD EXEMPTION §§151 AND 152

A parent is allowed the personal exemption from income tax for a child under §151 of I.R.C. who meets the tests set out in §152(e) of I.R.C. Where there is high income, that is where income exceeds the amounts specified in §1(g) I.R.C., consideration of this particular deduction is not worth a great deal as the personal exemption is phased out. If dealing with this type of case, it is recommended that language be drafted which provides that the higher income taxpayer will surrender the exemption (if he or she would otherwise desire to be awarded or use the personal exemptions) to the lower income taxpayer who can make use of it.

Section 152(e) was amended in 1984 and 1986 to express the desire of the Internal Revenue Service not to be involved in disputes between parents as to which parent was to have the exemption for the children. The revised statutes provide that the custodial parent gets the exemption unless that right has been surrendered or has been given to the other parent. Around the country, at last count, 22 state courts have ruled that trial courts have the power to award the exemption as part of the overall settling of rights and responsibility for the parties, while eight have ruled they do not. *Divorce Taxation*, at I 4204. Utah courts examined this question and initially ruled that the custodial parent would automatically be entitled to the exemption, *Martinez*, 754 P.2d at 72; *Fullmer v. Fullmer*, 761 P.2d 942, 949-50 (Utah App. 1988), but determined on reexamination to join the majority of state courts which have ruled that this question is to be resolved by the trial court in the exercise of its sound discretion. *Motes v. Motes* 786 P.2d 232, 235-40 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

The criteria applied by trial courts in the state of Utah for allocating the available exemption to achieve the greatest economic benefit for the family are:

> Thus, use of the power to order a custodial parent to execute a §152 declaration should not be used to evenly or otherwise divide the available exemptions without regard to the particular economic realities. On the contrary, it should be

> limited to those situations where the non-custodial parent has the higher income and provides the majority of support for the child or children whose exemption is claimed—support at a level which can be increased as a result of a reduction in his or her tax burdens. Indeed, it would be an abuse of discretion for a divorce court to order a custodial parent to sign the declaration in the absence of appropriately supported findings to that effect or demonstrating other exceptional circumstances making it in the best interest of the parties and their children that the declarations be signed. The declarations are not to be used as a kind of "consolation prize" for parents who are losing daily association with their children. Moreover, by ordering the custodial parent to execute the declaration, the court actually gives the custodial parent a tool to compel timely support payments. The court's order should provide that the duty to execute the declaration at the end of each year is contingent on the non-custodial parent being current in support payments.

Motes, 786 P.2d at 239.

Thus, in seeking in the tax exemption for the non-custodial parent, the lawyer should utilize the stated criteria as part of his litigation strategy, as well as part of an overall tax plan in handling the case. It is recommended that as part of the preparation for and presentation of evidence at the trial, an accountant should be involved to present to the court in exhibit and testimony format the taxable income of the parties, the anticipated tax effect of various alternative alimony and child support awards and who will in fact have what income after the award if the court follows the position being presented. Knowledge of the technical legal requirements for alimony and child support are the basis of this preparation and presentation.

¶. TAX CONSIDERATIONS IN THE DIVISION OF PROPERTY

In *Horne v. Horne*, 737 P.2d 244 (Utah App. 1987), the court dealt with the problem of the triggering of a taxable event created by the transfer of marital property as imposed by the decision of the U.S. Supreme Court in *United States v. Davis*, 370 U.S. 65, 82 S. Ct. 1190, 8 L. Ed. 2d 335 (1962). This problem was substantially alleviated by adoption on July 18, 1984, of the Tax Reform Act of 1984, Pub. L. No. 90-369. The provision impacting on the *Davis* rule was codified as §1041 of the I.R.C. it provides:

> (a) **General Rule.** No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of)
> (1) a spouse, or
> (2) a former spouse, but only if the transfer is incident to the divorce.

The statute goes on to provide in subsection (b) that a transfer between spouses is to be treated like a gift and the party who received the property transfer will take it with the basis which it held prior to the transfer. The phrase "incident to the divorce" is defined in subsection (c) as occurring within one year after the date on which the marriage ceases or is related to the cessation of the marriage. As a family lawyer dealing with this statutory scheme, tax planning is an integral part of the division of property. The fact that generally it will not be a taxable transfer, does not end our work, though it has greatly simplified it.

First, you must warn your client that he or she takes the property with its prior basis. While there is no step-up in basis which clears the *Davis* problem (a transfer being taxable as a result of the divorce), problems arise from the fact that the basis is maintained and that trial courts are not to consider hypothetical tax problems but only actual tax problems. *Savage v. Savage*, 658 P.2d 1201, 1204 (Utah 1983); *Alexander v. Alexander*, 737 P.2d 221, 224 (Utah App. 1987); *Morgan v. Morgan*, 795 P.2d 684, 689 (Utah App. 1990).

Consider, for example, a situation involving a marital estate having two blocks of stock, each block with a fair market value of $300,000, but one block having a basis of $100,000 and the other a basis of $250,000. Suppose that each party is awarded one block of stock, if the stock or any part of it is going to be sold in the near future, one party is going to receive stock that is worth $300,000 minus the tax on the gain of $50,000. The other is going to receive the stock at $300,000 minus the tax on a gain of $200,000. Thus, while the equitable division of property gives each party property worth $300,000 and is appropriate under state law, an equitable distribution has not been effected in light of the after tax consequences. It is the job of the lawyer to recognize and attempt to resolve this problem in the property distribution.

An additional problem is exposed by the decision of the United States Court of Appeals for the 10th Circuit in *Kenfield v. United States*, 783 F.2d 966 (10th Cir. 1986). Mr. and Mrs. Kenfield were divorced in Colorado. Mrs. Kenfield was awarded a portion of Mr. Kenfield's interest in a partnership. Immediately after the divorce, the decision was made by the partners to stop paying any of the profits of the partnerships to the partners. All profits were to be reinvested in further business activities. The result to Mrs. Kenfield was that she received from the partnership each year a statement of earnings (K-1), but no money with which to pay the taxes on the income attributed to her from the partnership. She had received an equitable division of the marital assets, but the partnership interest was, in effect, being used as a tool to punish her as she received constructive income every year, but no money with which to pay the taxes on that income.

Mrs. Kenfield went to both the Colorado courts and the federal courts to try to deal with the situation. The Colorado courts determined that the partnership was being appropriately managed and could provide no relief. The federal courts determined that the tax laws were being appropriately applied and they could provide no relief. Both expressed sympathy, but provided no help. Before requesting any portion of a limited partnership, or the similar entity, the Sub S Corporation, beware of the problems highlighted by the *Kenfield* case. They could appear at any time. This is not something you would anticipate in the normal course of events, but it is a result produced by application of the tax law to the property distribution.

A positive use of §1041 can occur when you are dividing property under circumstances where there are insufficient funds with which to pay for the transfer. This can be effected where one spouse wants to buy the other out of the business but does not have the income with which to do it. A properly worded stipulation and divorce decree can provide that the buy-out will occur incident to the divorce when the necessary funds can be accumulated. This may be more than one year after the decree, but by careful wording, you can provide that it will be incident to divorce and preserve 1041 treatment for the transaction.

Another potential trap exists because of §1041(e). If a transfer is made in trust, and the liability on the asset exceeds its basis, a tax consequence will occur. For the family lawyer involved in a divorce, the warning in this area should be triggered if the present market value is below the tax basis in the asset and the debt on the asset exceeds its market value. With the decline in value of real estate, this is a real problem which can slip up on any of us. If you encounter that situation, it is strongly suggested that an accountant or tax lawyer be consulted to assist in the proper method of dealing with the situation.

Two major assets must be dealt with in resolving most divorces. The family home and retirement accounts. As a general rule, retirement accounts can be divided between the parties pursuant to a qualified domestic relations order (QDRO). Prior to the enactment of the Fair Equity Retirement Act of 1984, retirement accounts could not be divided. In Utah, the Utah Supreme Court announced in *Englert v. Englert*, 576 P.2d 1274 (Utah 1978) that it was necessary to include retirement accounts accumulated during marriage as part of the marital estate. However, under the then existing Internal Revenue Code and Department of Labor Statutes, the retirement accounts themselves could not be divided. Federal law was changed in 1984 with further modifications in 1986. Based on these changes, most retirement accounts can be divided by a qualified domestic relations order.

There are generally three kinds of retirement plans with which the family lawyer will have to cope. The first is a defined benefit plan; the second is a defined contribution plan; and the third is an IRA. All three may be divided pursuant to a qualified Domestic Relations Order (QDRO) under the Retirement Equity Act of 1984, Pub. L. No. 98-397.* While the statute does not make it necessary that the order be separate from the decree, it is the recommendation of the author that QDROs always be separate from the decree. A QDRO must be accepted by the plan administrator and more than one draft of the order has proved necessary on occasion. In order not to have to keep revising the decree of divorce, a separate order is highly recommended.

Drafting of a QDRO is outside the scope of this article, but it is discussed in *Divorce Taxation*, at §§10001-10016. The provisions of the order must only contain the present address of the parties, the Social Security number of each party, reference to domestic relations order and the method or percentages by which the plan interest is to be divided. However, far more information becomes necessary in the actual drafting as plan administrators generally desire orders to be very specific and tailored to their particular plan in order to effect the division.

While normally the general question is the simple division of a plan on an equal basis between the parties, that does not always occur, nor is it always equitable. Where you are dealing with a plan accumulated in part prior to marriage, a formula for division must be affected. The Utah Supreme Court articulated the formula for Utah courts in *Woodward v. Woodward*, 656 P.2d 431, 433-34 (Utah 1982) when it was not possible to prepare a QDRO. The formula is most simply described as awarding to the spouse who has not accumulated the retirement account one-half of the amount accumulated during the years of the marriage, divided by the total number of years that the plan participant has participated in the account. This division of retirement accounts' can be affected as well for civil service employees, 5 U.S.C.S. §8345 (Law. Co. op. 1987), and the former spouses of military personnel, 10 U.S.C.S. §1408 (Law. Co. op. 1986 and Supp. 1990). Another approach to valuation and division exists. It is to value the pension at the time of the marriage and again at the divorce. The difference is marital property. While each division methodology may present problems, "critical pension valuations and solutions," Long and Dunham, (FAIR$SHARE) *Fairshare*, Vol. ¶, No. 2, February 1991, pp. 7-9, division itself must be effected by an appropriate QDRO to avoid triggering taxes on the division of this marital asset.

As a result of the Retirement Equity Act of 1984, the distribution of a retirement account is generally not a taxable event. The tax-deferred aspects of a retirement account are maintained as long as the requirements of the Retirement Equity Act are met. However, something that must be recognized, is that the provisions of the Retirement Equity Act do not effect state and local retirement systems.

In Utah, State Retirement Board officials had to advise attorneys of this effect and found that they were frequently unsuccessful in convincing counsel (without great effort) that they were not subject to qualified domestic relations orders. If you are dealing with a state or local government employee, do not assume that a QDRO can be effected. You must contact the state employment system itself to determine the appropriate method of securing a division there. As a result of action by the Utah Legislature in 1990 there can now be a division of Utah State Retirement funds. Utah Code §49-1-609(3) (1953, as amended).

The remaining primary tax questions which the family lawyer must face involve the family home. Under §1034 of the I.R.C., a couple may sell their home and not have to recognize a taxable gain if they reinvest in another home within two years. In addition, there is a one-time credit of $125,000 which can be utilized by the couple or an individual on the sale of the primary residence provided all the technical requirements necessary to receive that credit are met. Section 121 I.R.C. The problem occurs when there is a divorce and planning is not made for the tax treatment of the house. BNA has published a two-part monograph in the *Family Law Reporter* carefully analyzing all aspects of this problem. The first part was published on January 2, 1990 (Vol. 16, No. 8). The second was published February 20, 1990 (Vol. 16, No. 15).

A lawyer handling a divorce will know the general pattern is where the husband has moved out and the wife is awarded use of the home either because the husband has been ordered to move out of the house or because he has voluntarily done so. This situation raises two different tax problems which are analyzed in great detail in the *Family Law Reporter* releases cited above. The first is the immediate income tax problem. Payment for the house, mortgage and taxes can be treated as alimony if the parties agree. If they do not agree, the spouse who has moved out may still be able to deduct part or all of the interest and taxes paid if the home remains his qualified residence under §163 of the I.R.C.

The second problem is the tax consequences of transfer of the ownership interest in the home. If the home is awarded to the wife and there are sufficient assets to justify an award of all the equity to her in the equitable division of assets, it will be a §1041 transfer. When she sells the home she will, if she has lived in the home three years, be entitled to the tax benefit provisions of §121 and 1034 of the I.R.C. If the home is awarded to her subject to a lien in favor of the husband, that is payable on the death, remarriage, cohabitation, cessation of the use of the home as primary residence, or the youngest child attaining majority, the husband must actually pay the mortgage interest and property tax deductions, or be able to show that his money was used to pay them to preserve his right (in our example) to claim these tax deductions. Usually, the situation is clouded and there is difficulty in dealing with the roll-over right of the husband under §1034 I.R.C. and the interest and tax deductions pursuant to §163 I.R.C.

To qualify for roll-over treatment under §1034, each spouse must purchase his/her own replacement residence within the required replacement period. The replacement period begins two years before and ends two years after the sale of the principal residence. If only one of the spouses purchases a replacement residence within the required period, only that spouse's share of the gain is eligible for nonrecognition treatment, even if the cost of the replacement residence exceeds the entire sales price of the formal residence. If the parties filed a joint return in the year the home was sold, and only one spouse purchases a replacement home, both will remain liable for tax on any portion of the gain that does not qualify for sheltering under §1034. If one of the spouses attains the age of 55, they can make use of §121 for the one time $125,000 non-recognition of gain. However, if they are married at the time of the sale, each is eligible only for one-half of that amount.

If the home is not sold permitting the husband and wife, respectively, to invoke §§121, 1034 or 1041, a more difficult situation arises. The spouse who has moved out of the home no longer uses this home as his principal residence, thus, on the subsequent sale of the home, or payout of his interest if he has been awarded a lien against the home, he may no longer be eligible to use the tax relief provisions of §§121 and 1034 and may have to report the entire gain realized on the sale of his interest in the home. This is a hidden impact. A truly equitable result would be the insertion of a clause in the agreement or the decree of divorce that requires an equal division of the after tax proceeds of sale. In other words, the spouse who has moved out and must pay tax on his or her share of the proceeds as of the later sale (occurring as a result of remarriage, cohabitation, death—dealing with the estate, ceasing to use the home as a principal residence, or the youngest child attaining majority), should receive his share after the taxes have been paid on his interest in the house.

In a state such as Utah, where generally there is no evidence of after tax impact presented as part of the trial of divorce cases, this has not been part of the ordinary court order, nor has it been presented as part of the negotiations. A truly equitable adjustment for the impact of tax law resulting on this "equitable division of property should require this adjustment be recognized and utilized. There are opportunities for tax planning by using alimony and interest plus tax deductions on the home to provide benefit to both the parties, if properly utilized. Most of the time these opportunities are lost through a failure to recognize that they exist. These arise from the general situation where the spouse living in the house will be entitled to the interest and property tax deductions (following our example) if she pays them. In turn, the husband will be entitled to deduct alimony. Properly utilized, both parties may have more after tax income from these deductions. However, this is not necessarily true and both parties will benefit from tax planning if, for example, the husband pays more alimony (tax deductible to him) which becomes not taxable (in effect) to the wife with use by her of the interest and property tax deductions under §163 I.R.C., the children as her tax dependents under §152 I.R.C. and her personal exemptions.

I. ATTORNEY'S FEES

As a general rule, an attorney handling a divorce will seek attorney's fees. These are awarded in part or in whole by the court from the spouse most able to pay them, generally the husband, to the spouse who is in need of that assistance, generally the wife. In Utah, this result occurs pursuant to the provisions of §30-3-3 of the Utah Code (1953, as amended). The problem in terms of tax law, is that this produces the worst possible result. Any part of the wife's attorney's fee paid by a husband is not tax deductible to him. Attorney's fees paid on behalf of the wife, are not tax deductible to her. As a result, neither party secures tax deductions which they might otherwise obtain if there were planning and cooperation in how this was effected. Clients will be happier about paying their attorneys if they determine that a portion of the fees are tax deductible. Under the tax code, a fee paid to an attorney or expert witness for their services in a divorce is generally considered to be a §262 I.R.C. personal expense and not deductible. There are exceptions. Where an issue is presented as to whether or not alimony will be paid, the person who received the alimony can deduct under §212 I.R.C. those fees and costs that have been incurred for the production of taxable income (alimony). The attorney who handles that case, however, must be able to give the client a statement which separates those fees and costs which have been incurred for production of income from the other fees and costs. In addition, any fees or costs which have been incurred for tax advice and the production of other taxable income are deductible if segregated and designated under §212 of the I.R.C. However, these expenses are subject to the 2 percent floor rule of §67 of the I.R.C. Those costs which have been incurred for the preservation, production of, or creation of interests in property can be capitalized and added to the tax basis in property under §§1012 and 1016 of the I.R.C. These also must be separately designated by the attorney if they are to qualify for this tax treatment. A discussion of these questions can be found in *Divorce Taxation*, at ¶ 17001-17,105 and a detailed explanation as to how these can be achieved is contained in ¶ 20, 631-20, 639 of *Divorce Taxation*.

CONCLUSION

Divorce lawyers have an opportunity to help both parties if they are aware of the tax problems that are incident to the divorce process. If they are not aware of them, as has been briefly discussed in this article, they can hurt their clients. It is therefore vital that the attorney handling a divorce be familiar with those areas of tax law which will directly effect the client he or she is representing, and if not able to fully cope with the problem presented, to secure necessary additional help to properly manage the problem. As the amount of property and income involved in a particular action increases, so does the necessity for tax planning. But even where the divorce estate does not involve substantial alimony or property awards, knowledge of tax planning and the tax impact of divorce is necessary if a lawyer is to effectively and properly handle the client's matter.

*If you do encounter a retirement plan that cannot be divided by a QDRO (such as a §457 Plan), actuarial accounting will be required to determine present value and securing the transfer of other assets in place of dividing this asset.

Utah B.J

Injunctions Under Revised Utah Rule of Civil Procedure 65A

By Mark W. Dykes

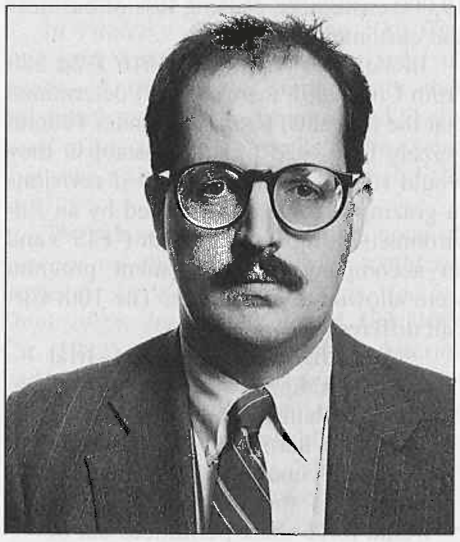
I. INTRODUCTION

On September 1, 1991, a substantially revised version of Utah Rule of Civil Procedure 65A, governing injunction practice, will become effective.[1] This article will discuss the new Rule 65A, with a specific focus on the standards set forth in the new Rule for granting preliminary injunctive relief, and the relevant case law thereunder.

II. 10TH CIRCUIT LAW WILL BE THE GUIDE; THE CRITERIA IN CURRENT RULE 65A REPLACED BY THE CRITERIA OF THE CASE LAW

Subpart (e) of the new Rule 65A largely abandons the former standards for granting temporary or preliminary injunctive relief under that subpart, and replaces them with the classic four factors found in 10th Circuit and other federal decisional law for determining whether such relief should issue. As the Committee note states,

> *Paragraph (e)*. This paragraph completely revises the corresponding paragraph of the former rule. The committee sought to modernize the grounds for the issuance of injunction orders by incorporating standards consistent with national trends. There is little case law in Utah interpreting the grounds for injunctive orders, and the committee was divided as to whether the development of grounds should be left entirely to the courts. A majority of the committee believed, however, that courts and litigants would benefit from explicit standards drawn from sound authority.



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The standards set forth in paragraph (e) are derived from *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986), and *Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d 275, 278 (10th Cir. 1981). Federal courts require proof of compliance with each of the four standards, but the weight given to each standard may vary. The substantial body of federal case authority in this area should assist the Utah courts in developing the law under paragraph (e).

A. *The Nature and Purpose of Preliminary Injunctive Relief.*

Concerning the nature of the preliminary injunction, the 10th Circuit has stated:

> A preliminary injunction is an extraordinary remedy; it is the exception rather than the rule. In determining whether a preliminary injunction is warranted, a court must be guided by normal equitable principles and must weigh the practicalities of the situation.[2]

Similarly, the purpose of preliminary injunctive relief:

> The main purpose of a preliminary injunction is simply to preserve the status quo pending the outcome of the case. In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits.[3]

B. *The Four Factors and the Movant's Burden.*

Subpart (e) of Rule 65A states:

> (e) *Grounds*. A restraining order or preliminary injunction may issue only upon a showing by the applicant that:
>
> (1) The applicant will suffer irreparable harm unless the order or injunction issues;
>
> (2) The threatened injury to the applicant outweighs whatever damage the proposed order or injunction may cause the party restrained or enjoined;

> (3) The order or injunction, if issued, would not be adverse to the public interest; and
> (4) There is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further litigation.

These factors are discussed *seriatim* below.

1. *Irreparable Injury.*

a. *The Standard.*

The 10th Circuit is not normally shy about upholding findings of irreparable harm.[4] Several cases are helpful.

In *Tri-State Generation v. Shoshone River Power*, the court found the trial judge had not erred in determining that the movant, an electricity generating and transmitting cooperative, would suffer irreparable harm if the sale of assets by one of its member utilities to a private utility were not enjoined. Concerning the issue of irreparable harm in general, the court stated:

> In federal courts, the moving party must show irreparable injury in order to obtain a preliminary injunction. Injury is generally not irreparable if compensatory relief would be adequate. Thus, Tri-State must show not only that it is injured by the failure to issue the preliminary injunction, but also that damages are not adequate to compensate that injury.
>
> . . . .
>
> Difficulty in collecting a damage judgment may support a claim of irreparable injury. If Tri-State cannot collect a money judgment, then failure to enter the preliminary injunction would irreparably harm it.
>
> . . . .
>
> A threat to trade or business viability may constitute irreparable harm . . . . . If a preliminary injunction is not issued, Shoshone will almost assuredly sell its assets. Furthermore, Tri-State has presented evidence which shows that other member cooperatives are also currently planning to sell their assets so as to avoid long-term requirements contracts.
>
> . . . .
>
> If the preliminary injunction does not issue, Tri-State has no protection against the loss of its business while the litigation progresses. Rather, it would perhaps be left after a trial on the merits with an empty victory. Shoshone may be found to have breached its contract with Tri-State, but in the meantime Tri-State would have ceased to exist. Tri-State has adequately shown that without the preliminary injunction, it will suffer irreparable harm.

805 F.2d at 355-56 (citations omitted).[5]

In *Otero Savings & Loan Ass'n v. Federal Reserve Bank of Kansas City*, the movants secured from the trial court a preliminary injunction ordering the Federal Reserve to continue processing checks drawn on the movants' banks. The court found a possibility of irreparable injury in that interruption of the movants' check-processing system would disrupt service to 19,000 customers, causing loss of business and customer goodwill.[6]

In *Valdez v. Applegate*, 616 F.2d 570 (10th Cir. 1980), the trial court determined that the movants, permittees under Federal grazing laws, had failed to establish they would suffer irreparable harm if revisions in grazing permits as mandated by an Environmental Impact Statement ("EIS") and an accompanying management program were allowed to take effect. The 10th Circuit differed:

> We disagree with the trial court's findings and conclusions that the plaintiffs have not shown irreparable harm. The BLM District Manager conceded that the EIS stated that the grazing decisions would force some permittees out of business and that the combined allotments would adversely affect breeding programs, cause weight loss, and require more time in moving cattle from one pasture to another. The trial court assumed that the Management Program will achieve its purposes. Plaintiffs challenge the assumption. The court ignored the possibility that some plaintiffs might not remain in the ranching business to reap the expected benefits. For the purposes of a motion for preliminary injunction the plaintiffs sufficiently established irreparable harm.

616 F.2d at 572.

In *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310 (10th Cir. 1985), however, the 10th Circuit reversed a finding of irreparable harm made by the trial court. In *City of Chanute*, three cities requested their utility company to "wheel" or transmit to the cities power purchased from a separate utility. The first utility agreed to do so only on the condition that the cities cancel power contracts with the utility which were favorable to the cities. The cities then filed suit under the Sherman and Clayton Acts, and sought a preliminary injunction forcing the utility to wheel the power pending determination of the claims. The trial court granted the injunction for all three cities. The 10th Circuit then reversed as to one of the cities on the issue of irreparable harm: that city, Fredonia, had a separate ultimate supplier of the power to be wheeled, and under its contract with this supplier, Fredonia simply had to pay for the power regardless of whether wheeled or not. The other two cities had contracts with a separate supplier, under which contract the right to use the power would be lost if not taken advantage of. Concerning Fredonia, the court stated:

> Fredonia is in a different position, however. Its right to power from the Nearman Creek Project was not contingent on the issuance of the injunction. Absent the injunction, it would merely be forced to pay for power it would not receive. This injury can be measured and compensated in dollars.

754 F.2d at 313. Although the trial court had recognized this point, it believed the facts behind all three cities' claims were similar enough to warrant equal treatment, and was concerned that the ultimate harm to Fredonia were the injunction not to issue would be borne by the public. The 10th Circuit was unsympathetic:

> The trial court provides no authority for its approach to this issue . . . . Fredonia's injunction must stand or fall on its own merits; it cannot rely upon injury to the public at large. *See Holly Sugar v. Goshen County Co-op Beet Growers*, 725 F.2d 564, 570 (10th Cir. 1984).[7]

754 F.2d at 313.

b. *The Critical Element of Time: She Who Delays is Ignored.*

Be warned: delay in seeking relief destroys the most strident claim of irreparable injury. In *GTE Corporation v. Williams*, 731 F.2d 676 (10th Cir. 1984), the court considered precisely this issue.

In *GTE Corporation*, GTE sued Williams for trademark infringement, claiming Williams was using GTE's trademarked name, "General Telephone," in his business. The trial court enjoined Williams from using the name during the resolution of the litigation. The 10th Circuit reversed, finding that because GTE had known about Williams' use of the name since 1979, the claim of irreparable harm was belied by its tardiness, and this even though the standard of irreparable injury in a trademark case is normally met simply by showing infringement:

> Delay in seeking relief . . . undercuts any presumption that infringement alone has caused irreparable harm *pendente lite*; therefore, such delay may justify denial of a preliminary injunction for trademark infringement.

731 F.2d at 678.[8] Once put on notice that her trade secrets are being pilfered, or an ex-employee competing, the victim should immediately seek an injunction, or else risk a finding that it really cannot be all that bad.[9]

2. *The Balance of Hardships.*

Before it issues a preliminary injunction, the court must find that the harm to the movant should the injunction not be granted outweighs the harm that would befall the non-movant were the injunction granted. The extent to which this factor is given more than lip-service is questionable; certainly the cases give it short shrift, and seem to bend over backward to tilt the balance of hardships in favor of the movant.[10]

3. *Likelihood of Success on the Merits.*

In addition to showing irreparable harm and the benefit of the balance of hardships, the movant for a preliminary injunction must show a likelihood of prevailing on the merits of the case. On the point of how likely this success must be, the circuits are split. In the 10th, the standard is not stringent, and is molded toward achieving a resolution on the merits of issues for which there is genuine doubt:

> The 10th Circuit has adopted the Second Circuit's liberal definition of the "probability of success" requirement. When the other three requirements for a preliminary injunction are satisfied, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."

Otero Savings and Loan, 665 F.2d at 278 (quoting *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964), in turn citing *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (Second Cir. 1953)).[11]

True to its word, the 10th Circuit is not demanding on the point of likelihood of success:

> While we may not supplant the trial court and comment on the merits of either side's position, we do conclude that Tri-State's arguments are clearly not frivolous. It is sufficient to note that the unique factual circumstances and history of this case make the resolution of the final question of law a genuinely debatable issue. Tri-State has raised questions going to the merits that are serious, substantial, difficult and doubtful. These questions are fair grounds for litigation, and the status quo should be maintained until a decision on the merits can be reached.

Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d at 359-60.[12]

In *Valdez v. Applegate*, the 10th Circuit paid scant attention to the factor of likelihood of success, stating only that "plaintiffs sufficiently demonstrated likelihood of success on the merits to the extent that such a showing is required." 616 F.2d at 572.

The relaxed standard for likelihood of success on the merits is not toothless, however. In *Kenai Oil & Gas, Inc. v. Dept. of the Interior*, 671 F.2d 383 (10th Cir. 1982), the Secretary of the Interior had refused to approve an agreement proposed by the plaintiff, an oil company, for a continuation of leases held by the company on Indian land. The company brought suit and, because the current leases would soon expire, sought injunctive relief keeping the leases in place. The trial court denied injunctive relief. Although it had established the other factors for entitlement to injunctive relief, the company's likelihood of success on the merits was slim: under the Administrative Procedure Act, the Secretary was vested with so much discretion as to render his decision unreviewable, and, if review was unobtainable, *a fortiori*, so was relief.

While the 10th Circuit found the Secretary's decision reviewable under the "arbitrary, capricious, or abuse of discretion" standard, the court could find no indication under this extremely liberal standard that the Secretary had erred. The court thus upheld the district court's ruling on likelihood of success and denial of the injunction, even though the results were harsh:

> We are aware that denial of injunctive relief will cause the leases to expire, and thus will moot some of the issues involved in this case. However, the merits of the lessees' claim are so doubtful that further interim relief, which would undoubtedly injure the tribal lessors, is unwarranted.

671 F.2d at 388.

Kenai Oil is of course an unusual case, since it was not the substantive law which did the lessee in, but the standard of review.

4. *The Injunction Cannot be Adverse to the Public Interest.*

Although this test is always included in the statement of the standard, it is rarely given serious attention. *See, e.g., City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, 312 (10th Cir. 1985) (test is not whether the injunction would benefit the public, but whether injunction would harm the public).

C. *SCFC ILC, Inc. v. VISA USA, Inc.: A Tightening of the Standards, or Just Special Facts?*

On June 18, 1991, the 10th Circuit handed down SCFC ILC, Inc. v. VISA USA, Inc. (available at 1991 U.S. App. Lexis 12346), reversing the entry of a preliminary injunction by the district court. While the facts of *SCFC* are peculiar, the opinion raises the issue of whether the 10th Circuit is now taking a more restrictive view of when preliminary injunctive relief is proper.

In *SCFC*, VISA refused to issue credit cards to MountainWest after it learned that MountainWest had been purchased by Sears. On motion of SCFC, the district court entered a preliminary injunction forcing VISA to issue the cards. VISA appealed the issuance of the injunction to the 10th Circuit, where the district court's order was stayed and then reversed.

> The 10th Circuit first noted that: the following types of injunctions are disfavored and they require that the movant satisfy an even heavier burden of showing that the four factors listed above weigh heavily and compellingly in movant's favor before such an injunction may be issued: (1) a preliminary injunction that disturbs the status quo; (2) a preliminary injunction that is mandatory as opposed to prohibitory; and (3) a preliminary injunction that affords the movant substantially all the relief he may recover at the conclusion of a full trial on the merits.

The court then explained its distaste for the above injunctions:

A preliminary injunction that alters the status quo goes beyond the traditional purpose for preliminary injunctions, which is only to preserve the status quo until a trial on the merits may be had. Mandatory injunctions are more burdensome than prohibitory injunctions because they affirmatively require the non-movant to act in a particular way, and as a result they place the issuing court in a position where it may have to provide ongoing supervision to assure that the non-movant is abiding by the injunction. Finally, a preliminary injunction that awards the movant substantially all the relief he may be entitled to if he succeeds on the merits is similar to the "Sentence First—Verdict Afterward" type of procedure parodied in Alice in Wonderland, which is anathema to our system of jurisprudence.

(Citations and footnote omitted).

The court then found that the district court's injunction did indeed alter the status quo, and that SCFC had fallen far short of carrying its burden of justifying the injunction. Concerning the former issue, the court noted that under the status quo when the injunction was issued, MountainWest wanted the cards and VISA was refusing to issue them. While MountainWest argued that it was legally entitled to the cards, the court found legal entitlements irrelevant to the status quo issue:

> The status quo is not defined by the parties' existing legal rights; it is defined by the reality of the existing status and relationships between the parties, regardless of whether the existing status and relationships may ultimately be found to be in accord or not in accord with the parties' legal rights.

(Footnote omitted).

Turning to the four factors, the court found that MountainWest had failed to meet its heavy burden of proof on each one. For its claim of irreparable injury, MountainWest "offered only generalities and business speculations" concerning how it would lose its opportunity to establish its credit card program without the injunction. Addressing the balance of hardships to the parties, the court noted that "irreparable injury is frequently presumed where a trademark is wrongfully appropriated by another," and concluded from this that VISA would be injured if MountainWest lost on the merits, because MountainWest would then have improperly availed itself of VISA's cards and good name. Not surprisingly, the court found the public interest factor "indecisive." Finally, on the issue of success on the merits, the court (somewhat inconsistently) found that while the case was complex and would require much development before a meaningful prediction could be made of the strength of MountainWest's claims, Mountainwest had failed to prove a substantial likelihood of success on the merits. Concerning the success factor, the court added a footnote:

> We have no finding from the district court on this factor. It erroneously concluded that it did not need to address this factor because it had found the other three factors in favor of MountainWest. Although there may be occasions when this factor may be de-emphasized because of a particularly compelling showing on the other three factors, it ordinarily deserves some attention.

In contrast to its earlier statements about how the success on the merits factor may be satisfied with relative ease,[13] the court here seems to breathe new life into the success factor, even in cases not involving the class of suspect injunctions.

SCFC thus presents interesting questions. While the case may turn on its peculiar facts, *SCFC* also at least appears to mark a change in the thinking of the 10th Circuit on the standards for securing preliminary injunctive relief.[14]

[1] The intended changes in Rule 65A were published on March 5, 1990 by the Utah Supreme Court's Advisory Committee for The Utah Rules of Civil Procedure. According to the clerk of the Utah Supreme Court, the Michie Company is scheduled to publish a pocket part addition to the Utah Rules of Civil Procedure on August 15, 1991.

[2] *GTE Corporation v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984) (citations omitted).

[3] *Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d at 355 (citations omitted). *See also Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d at 277 (primary purpose is to preserve the status quo pending a final determination of parties' rights).

The determination of a motion for preliminary injunctive relief is not a decision on the merits of the case. *Valdez v. Applegate*, 616 F.2d 570, 572 (10th Cir. 1980).

[4] Of course, the appellate court's task is to determine whether the trial court overstepped its discretion, not to determine the issue of irreparable harm *de novo*. *Otero Savings & Loan Ass'n v. Federal Reserve Bank*, 665 F.2d at 277-78.

[5] For another case on a finding of irreparable harm based on the inability of a potential judgment debtor to pay, see *Anthony v. Texaco, Inc.*, 803 F.2d 593, 599-600 (10th Cir. 1986) (citing "complexity of the corporate structure," "questionable financial dealings," and "past irresponsibilities" of corporate officers).

[6] 665 F.2d at 278.

[7] *Holly Sugar* states here: "A plaintiff's claim for relief absent a statutory provision or judicially created exception cannot be based on allegations of injury to third parties."

[8] The court did leave open the possibility that the movant would still be entitled to an injunction if the movant could show specific harm aside from the harm presumed in a tradename infringement case:

> "We hold that when movant shows no specific harm other than the harm that is presumed to exist when there is a likelihood of confusion, movant's delay in bringing suit is an important factor in determining irreparable harm."

731 F.2d at 679.

The court also found that if he lost the use of the General Telephone name pending resolution of the merits, Williams would be unlikely to change the name back to General Telephone even if he prevailed. The court used this finding to note that:

> "the burden on the party seeking a preliminary injunction is especially heavy when the relief sought would in effect grant plaintiff a substantial part of the relief it would obtain after a trial on the merits."

731 F.2d at 679.

[9] On this point, the cases are legion. *See, e.g., Advisory Information and Management Systems v. Prime Computer, Inc.*, 598 F. Supp. 76, 89 (M.D. Tenn. 1984) (delay of one and a half years in seeking injunction "belies . . . claim to irreparable harm"); *Skehan v. Board of Trustees of Bloomsburg State College*, 353 F.Supp. 542, 543 (M.D. Pa. 1973) (delay in seeking preliminary injunction indicates absence of irreparable injury); *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc.*, 335 F. Supp. 278, 280 (S.D. N.Y. 1971) (equities against plaintiff because of delay in seeking injunction; need for relief undercut by slow pace in seeking it); *Klauber Brothers, Inc. v. Lady Marlene Brassier Corp.*, 285 F. Supp. 806, 808 (S.D. N.Y. 1968) (delay of one year in filing suit and seeking preliminary injunction "disentitles party from the drastic threshold remedy it seeks:); *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 268 F.Supp. 711, 714 (S.D. N.Y. 1967) (plaintiff's motion "defeated by its tardiness; or adequate explanation for the delay"); *Gillette Co. v. Ed Pinaud, Inc.*, 178 F.Supp. 618, 622 (S.D. N.Y. 1959) (by sleeping on rights, party shows preliminary injunction unwarranted).

[10] *See, e.g., Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d at 357 (even if agreement to sell assets of utility company evaporates during pendency of injunction enjoining sale, assets themselves remain for sale to another purchaser; given sheer complexity of case, case should wait for full resolution).

[11] The *Hamilton Watch* case contains an unusually florid speech on the purpose of the preliminary injunction:

> "The judge's legal conclusions, like his fact-findings, are subject to change after a full hearing and the opportunity for more mature deliberation. For a preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness. It serves as an equitable policing measure to prevent the parties from harming one another during the litigation; to keep the parties, while the suit goes on, as far as possible in the respective positions they occupied when the suit began."

Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 742 (2d Cir. 1953).

[12] In *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981), however, the court seemed to hark back to the classic standard of likelihood of success, albeit in the context of a federally created injunctive remedy under the Railroad Revitalization and Regulatory Reform Act of 1976:

> "It is not necessary that plaintiffs show positively that they will prevail on the merits before a preliminary injunction may be granted . . . . It is only necessary that plaintiffs establish a reasonable probability of success, and not an "overwhelming" likelihood of success, in order for a preliminary injunction to issue."

640 F.2d at 261.

The 10th Circuit has also produced yet another variant of its standard:

> "Where the plaintiff has adequately established irreparable harm and the balance of hardships tips in his favor, the probability of success requirement can be relaxed. In these circumstances it is "enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation."

Anthony v. Texaco, Inc., 803 F.2d 593, 599 (10th Cir. 1986) (quoting *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1375-76 (10th Cir. 1981)).

[13] See the discussion, *supra*, of *Otero Savings and Loan*, *Tri-State Generation*, and *Valdez v. Applegate*.

[14] Nonetheless, in its conclusion the court held that "to the extent the injunction alters the status quo by requiring VISA to approve the issuance of . . . cards to MountainWest, it is improper." It is unclear from this statement whether the court believed SCFC had made an adequate showing for an injunction of some kind under the normal, rather than heightened, burden of proof.

Utah B.J

Commission Highlights

During its regularly scheduled meeting of May 17, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the April 26, 1991, meeting were reviewed and approved with minor changes.
2. President Pamela Greenwood reported on the most recent Task Force meetings. She informed the Commission that the Task Force voted unanimously to retain the integrated Bar and to retain the Law and Justice Center.
3. The Board voted to delete the statement of confidentiality in the Bar Examiners Grading Handbook and Rule 4.1 and to refer those items to the Bar Examiners Committee for revision.
4. President-Elect James Davis distributed the current budget worksheet and explained the format to the Commission. He indicated that the Budget and Finance Committee has reviewed the figures and had recommended approval.
5. The Board voted to adopt the budget as a "preliminary budget" and authorize availability to Bar members.
6. Bar Counsel Steve Trost and Commissioner James Clegg reviewed and discussed the current Litigation Report with the Commission.
7. Executive Director John Baldwin informed the Commission that two Bar applicants have requested a waiver of the MPRE. After discussing the specific requests, the Commission voted unanimously to decline any waivers.
8. The Commission discussed matters brought forth in the luncheon meeting with the Supreme Court Justices. The Board voted to prepare a draft of proposed protocols to formalize appropriate interaction between the Bar Commission and the Supreme Court.

During a special meeting on May 31, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board reviewed and discussed comments made by Bar members in 90 letters submitted to Mr. Baldwin by Bar members regarding the Board's Petition to the Supreme Court to allow the continuation of non-regulatory, non-self-sufficient Bar programs. After discussing the comments and suggestions made by members, the following action was taken:
   A. The Board voted unanimously to subsidize one Utah State Bar Delegate to the ABA.
   B. The Board voted unanimously to retain the Tuesday Night Bar Program and discussed the option of extending the program to the local bar associations.
   C. The Board voted to retain the Public Information Program and have the outside public relations consultant assist staff to make the program more self-supporting on a long term basis.
   D. The Board voted to retain the Legislative Information Program.
   E. The Board voted to retain the subsidy to the Young Lawyers Section.
   F. The Board voted to continue the 1992 Annual Meeting at the budgeted cost.
   G. The Board voted to subsidize the cost of the Bar Directory, due to the fact that it was available to all members and provided additional information where the recently studied private directories did not go to all members and could not include additional Bar-related information. A suggestion was also made to sell advertising to cover the cost of producing the Directory.
   H. The Board voted to petition the Supreme Court to retain all remaining Committees that provide non-regulatory, non-self-supporting services for Bar Members.
   I. The Board voted to retain the Lawyer Referral Service on a non-subsidy basis.
   J. The Board voted to retain the *Bar Journal* in the present format.
2. The Commission considered the possibility of creating an Appellate Adjudicatory Board to handle discipline matters and discussed the qualifications of those who should sit on the Board.
3. Scott Groene was appointed to the DNA People's Legal Services Board.

During its regularly scheduled meeting of June 21, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the May 17, 1991, meeting were adopted.
2. President Pamela Greenwood informed the Commission that the Petition to continue non-regulatory, non-self-supporting programs and services was filed with the Supreme Court on June 5. She also indicated that copies of the comment letters received by Bar members were also filed with the petition.
3. President Greenwood updated the Commission on recent Task Force meetings and distributed copies of several Task Force meeting minutes for review.
4. The Board approved a proposed amendment to the Rules of Integration regarding the rebate policy in light of the *Keller* decision which would provide that rebates would be available from the expenses associated with both the legislative information program and for the delegate to the ABA and include an appeals system designed to contest the calculation of the rebate.
5. Mr. Baldwin reported that the licensing department has received a large amount of Bar dues since the statement was mailed and that Bar dues are still being received at a steady pace. He also informed the Commission that the new accounting software has been installed.
6. Mr. Baldwin also gave a report of the Annual Meeting budget and indicated that there are currently 512 people registered.
7. Young Lawyers Section President-Elect, Charlotte Miller, reported on current Section activities and subcommittee projects. She indicated that the Young Lawyers Section will be hosting a regional conference in Park City, April 3-5, 1992.
8. David Hamilton, Client Security Fund Committee Chair, reviewed the current status of the Client Security fund account and all matters recommended for Commission approval. After reviewing the Committee's recommendations of claims, the Commission approved payments of four claims, totaling $2,350.

9. The Board voted to approve the list of applicants to sit for the July Bar Exam.
10. Darla Murphy, Admissions Administrator, distributed a letter from Thomas T. Billings, Character and Fitness Committee Chair, requesting the Commission to approve the Committee's recommendations that if an applicant who passes the Bar Exam prior to completion of the Character and Fitness review and subsequently fails to receive Committee approval, the applicant's passing score should be valid for a period of two years. During which time, the applicant may reapply with the Character and Fitness Committee and may later receive approval for admittance to the Bar. After reviewing the recommendations made by the Character and Fitness Committee, the Commission voted to ask the Committee to draft the rules incorporating the specific recommendations.
11. Bar Counsel Steve Trost reported that Nayer Honarvar has been hired as a staff attorney for the Office of Bar Counsel.
12. Mr. Trost reported that 501C-6 incorporation papers have been prepared and that an informational tax return should be filed each year. The Board voted to file the necessary documents. President Greenwood and John Baldwin signed the incorporation papers.
13. Mr. Trost indicated that the Office of Bar Counsel will require seven appointees to screening panels by July 1, 1991.
14. The Commission reviewed the current Litigation Report. After discussing the matter of paralegals practicing law, the Commission voted to appoint a subcommittee of the Unauthorized Practice of Law Committee.
15. The Board voted to return the interest from the segregated section account to the Bar to cover administrative costs and to review the decision the next fiscal year.
16. The Board voted to have Mr. Baldwin and Financial Administrator Arnold Birrell evaluate the cash available at the end of FY-91 after payment of all fiscal year debts and then vote at an appropriate time regarding applying any surplus to the mortgage.
17. The Board discussed the possibility of consolidating the Utah State Bar and the Utah Law and Justice Center into one entity. The Board voted to research drafting a long-term agreement where the Utah Law and Justice Center would pay a $1/year lease to the Utah State Bar, unless such action would cause adverse tax or other legal impediments. Commissioner Howard also included that the Executive Committee of the Utah State Bar and the Board of Trustees of the Utah Law and Justice Center should review the agreement before taking such action.
18. The Board voted to accept Mr. Baldwin's recommendations on staff salary adjustments.
19. The Board voted to approve the final draft of the proposed FY-92 budget.

During the Reorganizational Meeting of July 3, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Commission discussed the most recent Supreme Court Task Force report to be presented at the Annual Meeting.
2. President Greenwood reported on the Supreme Court Minute Entry regarding the Commission's Petition for support of certain programs and services.
3. Randy Dryer was elected President-Elect by consensus.
4. President Greenwood presented plaques to those Commissioners whose terms had expired and thanked them for their years of service to the Bar.
5. President Greenwood expressed her thanks to the Commission as a whole for their service and for her association with each individual. The Commission commended and thanked President Greenwood for completing a successful year and doing such a wonderful job as President.

A 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 Rules 1.3 (Diligence) and 1.4(a) (Communication). The attorney accepted a retainer fee on May 7, 1990, and subsequently failed to respond to numerous requests for information from the client. In October 1990, the client called the court and discovered that the case against him had been dismissed on July 2, 1990.

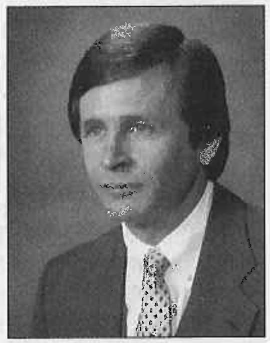
2. An attorney was admonished for violating Rule 3.5(a) (Decorum). The attorney recorded a telephone conversation between himself and a judge without the judge's knowledge or consent. The discipline was mitigated in that the attorney acknowledged the misconduct and apologized to the judge prior to the issuance of discipline.

PUBLIC REPRIMAND

On June 21, 1991, Samuel J. Conklin was publicly reprimanded for violating Canon 6, DR6-101(a)(3) (Competency); Canon 7, DR7-101(a)(2) (neglect); Rule 1.3 (Diligence), and Rule 1.4(a) (Communication). Mr. Conklin was also ordered to pay restitution in the amount of $1,500. In August of 1986, Mr. Conklin agreed to represent his client in a matter regarding an industrial accident. Mr. Conklin and his client entered into a written fee agreement in August of 1986. Mr. Conklin thereafter failed to perform any legal services on his client's behalf. In addition, Mr. Conklin failed to contact his client with regard to the status of the action and failed to respond to his client's repeated requests for information. The sanction was aggravated by Mr. Conklin's failure to respond to repeated inquiries from the Office of Bar Counsel. The Hearing Panel found the sanction should be mitigated by Mr. Conklin's willingness to provide restitution and that his practice was affected by difficulties in his private life.

James Z. Davis Elected President of the Utah State Bar

James Z. Davis



Randy Dryer

The Utah State Bar has elected Ogden attorney James Z. Davis president of the organization which represents more than 5,200 attorneys admitted to practice law in Utah. Salt Lake City attorney Randy L. Dryer is president-elect.

Mr. Davis is a shareholder and director in the firm of Ray, Quinney & Nebeker in the Ogden office. He was Deputy Weber County Attorney from 1973 to 1982, and served as president of the Weber County Bar Association in 1978. Mr. Davis received his juris doctor from the University of Utah College of Law in 1968, where he was a member of the board of editors of the *Utah Law Review*. He was elected to his first term as Bar Commissioner in 1985. Mr. Davis is a member of the American Bar Association and the American Trial Lawyers Association.

Mr. Dryer is a shareholder in the Salt Lake City law firm of Parsons, Behle & Latimer where his practice focuses on media law. He received his juris doctor from the University of Utah College of Law in 1976, where he was editor of the *Utah Law Review*. He is active in community affairs and presently serves as a member of the University of Utah Hospital Board of Trustees.

Other Bar Commissioners are: Hon. Pamela T. Greenwood, Immediate Past-president, Salt Lake City; H. James Clegg, Salt Lake City; Denise A. Dragoo, Salt Lake City; Jan Graham, Salt Lake City; J. Michael Hansen, Salt Lake City; Dennis V. Haslam, Salt Lake City; Paul T. Moxley, Salt Lake City; Craig M. Snyder, Provo; Gayle F. McKeachnie, Vernal; and Jeff R. Thorne, Logan.

Notice to Bar Members Regarding Lawyer Referral Service

The recent billing notice included a statement that the Lawyer Referral Service will be continued only if enough lawyers sign up to make it financially self-supporting, and that lawyers who wish to participate in the service will be charged an annual sign-up fee of $150, and will no longer be required to remit to the Bar the $15 consultation fee received from the client. It also stated that if an insufficient number of lawyers sign up, the service will be discontinued and the $150 sign-up fee will be refunded.

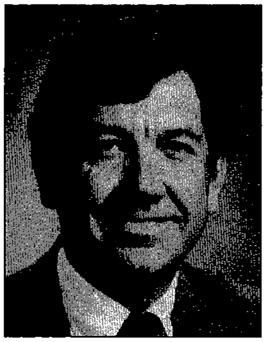
The Bar has received startlingly few fees for the Lawyer Referral Service from the Bar dues collections which we have received to date. The Board of Commissioners wants the members to know that if we do not see a rapid increase in the rate of sign-ups in the final weeks of the billing period, that the service will be discontinued on October 1, 1991.

The Lawyer Referral service has been a great source of client diversity and has provided years of opportunities to lawyers. We are trying to make it profitable for the members who sign up and at the same time we are attempting to cover our cost of administration. We are dangerously close to losing the program unless we see more lawyers sign up.

Notice of Legislative Rebate

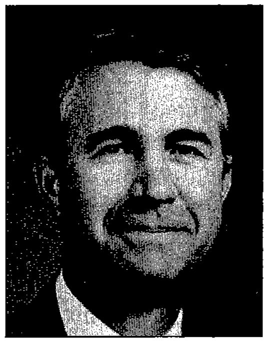
Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director, John Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

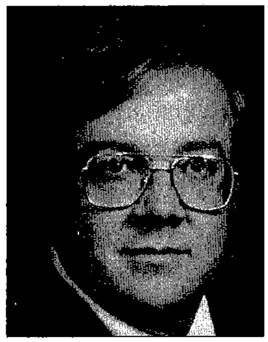
Utah State Bar Elects Commissioners


H. James Clegg


Denise A. Dragoo


Jan Graham


Gayle McKeachnie


Craig Snyder

The members of the Utah State Bar have elected five Utah attorneys to be Bar Commissioners. They are: H. James Clegg, Denise A. Dragoo, Jan Graham, Gayle F. McKeachnie and Craig M. Snyder.

Mr. Clegg is elected to a three-year term representing the Third Division. He is a shareholder in the Salt Lake City law firm of Snow, Christensen & Martineau. He was president of the Salt Lake County Bar in 1982, and first elected as a Bar Commissioner in 1988.

Ms. Dragoo is elected to a one-year term representing the Third Division. She is a shareholder in the Salt Lake City law firm of Fabian & Clendenin. She is immediate past president of Women Lawyers of Utah and co-chair of the Continuing Education Committee of the Bar.

Ms. Graham is elected to a three year term representing the Third Division. She is Solicitor General for the Utah Attorney General. Prior to accepting this appointment last year, she was a shareholder in the Salt Lake City law firm of Jones, Waldo, Holbrook & McDonough.

Mr. McKeachnie is elected to a three-year term representing the Fifth Division. He is a partner in the law firm of McKeachnie & Allred with offices in Vernal and Roosevelt. He served as a member of the Utah House of Representatives from 1978 to 1986. He is chairman of the Utah Constitutional Revision Commission.

Mr. Snyder is elected to a three-year term representing the Fourth Division. He is a shareholder in the Provo law firm of Howard, Lewis & Petersen. He has been president of the Central Utah Bar Association and chairman of the Association of Insurance Defense Attorneys.

The Commissioners will serve on the 11-member Bar Commission which licenses, regulates and provides continuing legal educational programs for Utah's 5,200 attorneys.

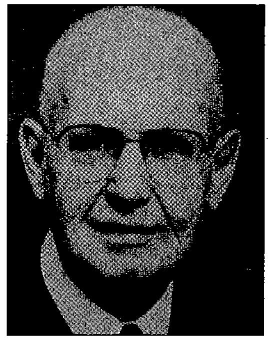
The Bill Of Rights Seminar

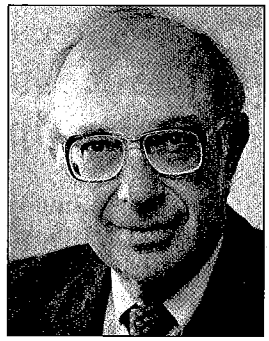
J. Reuben Clark Law Society and BYU Law School Alumni Association are sponsoring "The Bill of Rights" Seminar to be held on Friday, September 27, 1991. **CLE CREDIT WILL BE AVAILABLE.** Featured speakers include: Rex E. Lee, President of BYU; The Honorable Monroe G. McKay, Chief Judge of the 10th Circuit Court of Appeals; and on Saturday morning at 8:30 a.m., NFL Commissioner Paul Tagliebu will speak on Sports Law. The featured luncheon speaker will be Professor James D. Gordon who will address the subject of "An Unofficial Guide to the Bill of Rights." The morning session will begin at 9:00 a.m. in the Wilkinson Center Varsity Theater and the afternoon session will be held from 1:30 to 6:00 p.m. (Afternoon session location to be announced.) Lunch will be held in the Wilkinson Center.

Law School Alumni reunions for classes of 1976-1986 begin at 10:00 a.m. on Saturday, September 28. Tickets to BYU/Air Force football game will be available on a first-come basis. A block of rooms has been reserved at the Provo Excelsior Hotel, call 1-800-824-3676 or 1-800-824-4139 in Utah. **YOU MUST MAKE YOUR OWN RESERVATIONS.**

The registration fee is $25, lunch is $7 and the Alumni Banquet is $25 per person. For further information and registration forms, please contact Carolyn Stewart, 348 JRCB, Brigham Young University, Provo, UT 84602, (801) 378-4274.

Utah State Bar Presents Awards At 1991 Annual Meeting

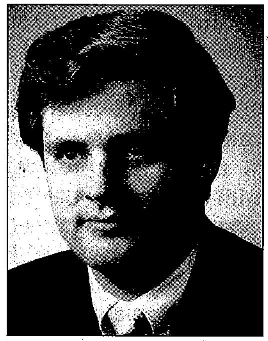

Cullen Y. Christensen

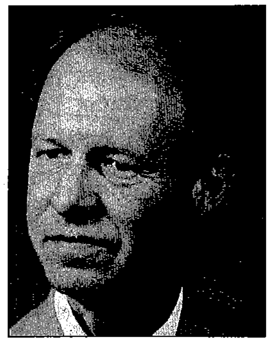

Herschel J. Saperstein

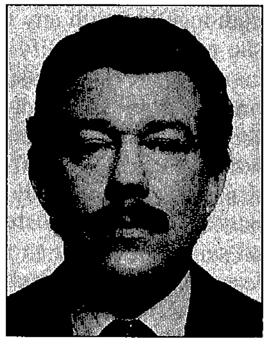

Elizabeth A. Dalton


Norma Matheson


James R. Haisley


Roger A. Moffitt


Gordon L. Roberts


Thomas N. Arnett

The Utah State Bar annually recognizes distinguished service by individuals, sections, and committees at the Annual Meeting. These awards were presented by Bar President Pamela T. Greenwood on behalf of the entire Bar membership to recipients selected on the basis of achievement; professional service to clients, the public, courts, and the Bar; and exemplification of the highest standards of professionalism.

Judge of the Year—Hon. Cullen Y. Christensen

Judge Christensen was appointed to the Fourth Judicial District Court in 1983. He received his law degree from George Washington University and was admitted to the Utah State Bar in 1949. From then until his appointment to the Bench, he practiced law in Provo. He has served as president of the Utah County Bar Association, president of the Utah State bar, and as a member of the Supreme Court Advisory Committee. He is a charter member of the American Inns of Court I and has served as its president.

Distinguished Lawyer of the Year—Herschel J. Saperstein

Mr. Saperstein is a senior shareholder and chairman of the board of the Salt Lake City law firm of Watkiss & Saperstein. He received his law degree from the University of Utah College of Law in 1952. He has served on various Bar Committees, including Advisory Committee on Bankruptcy Rules. He was president and board member of Utah Legal Services and a member of the 10th Circuit Court of Appeals Advisory Committee. Mr. Saperstein was president last year of the American Inn of Court VII.

Distinguished Young Lawyer of the Year—Elizabeth A. Dalton

Ms. Dalton is an associate with the Salt Lake City law firm of Callister, Duncan & Nebeker where her practice is dedicated to divorce mediation and family law. She received her law degree from the University of Utah College of Law in 1987 where she was an editor of the *Utah Law Review.* She is a Practitioner Member of the National Academy of Family Mediators. In 1990, she assisted in founding the Utah Association of Family Mediators.

Distinguished Section/Committee Award—Family Law Section

The Family Law Section of the Utah State Bar has sponsored monthly continuing education programs for its members during the past year. Many of its 200 members have voluntarily assisted the Young Lawyers Pro Bono Law Project to provide legal expertise to people in need. Thomas N. Arnett, Jr. is chairman of the section. He is a domestic relations commissioner for the Third District Court. Mr. Arnett received his juris doctor from the University of Utah College of Law. He is a member of the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct.

Distinguished Non-Lawyer Award for Service to the Profession—Norma Matheson

Mrs. Matheson has participated in numerous community service programs and for more than 20 years has worked with the legal and educational communities to bring law-related education to public schools throughout Utah. As First Lady of the State of Utah from 1977-1985, she focused her attention on the needs of children. She is past president of the League of Women Voters and the Utah State Bar Auxiliary. She currently serves on the Boards of Utah Children, Utah Symphony and Holy Cross Hospital Foundation.

Distinguished Pro Bono Lawyers of the Year—Roger A. Moffitt and James R. Haisley

Two attorneys share this award in recognition of many hours of dedicated service at a Salt Lake homeless shelter. For the past two years, Mr. Moffitt and Mr. Haisley have provided pro bono legal counsel and advice every Monday evening to those at the homeless shelter. Mr. Moffitt is an associate with the law firm of Kimball, Parr, Waddoups, Brown & Gee. He received his juris doctor from the University of Chicago where he was awarded the Joseph Beale Prize. Mr. Haisley is an associate with the Salt Lake City office of Davis, Graham & Stubbs. He graduated with honors from Tulane Law School. While in law school, Mr. Haisley completed an internship with the Sierra Club Legal Defense Fund.

Utah Trial Lawyer of the Year—Gordon L. Roberts

The American Board of Trial Advocates presents an annual award to the Utah Trial Lawyer of the Year. The award for 1991 is presented to Gordon L. Roberts, a trial lawyer in the Salt Lake City law firm of Parsons, Behle & Latimer. He received his juris doctor from the University of Utah College of Law in 1965. Mr. Roberts is a fellow in the American College of Trial Lawyers. He served as president of the Salt Lake County Bar Association and as Commissioner of the Utah State Bar. He is listed in "The Best Lawyers of America" in three categories.

Changes in the Procedures of Discipline

Rule VIII
COMPLAINT OF UNPROFESSIONAL CONDUCT

(h) Pattern of Misconduct. If the attorney has received three disciplinary sanctions consisting of public reprimands, probation, suspension or disbarment within any consecutive 5-year period, the Committee may initiate a Formal Committee complaint under these rules for the disbarment or suspensions of such attorney from the practice of law.

Rule IX
PROCEEDINGS BEFORE ETHICS AND DISCIPLINE COMMITTEE AND ITS PANELS

(b) Attorney's Appearance. Before any action is taken which may result in the recommendation of a private reprimand or the filing of a Formal Committee Complaint, the panel shall afford the accused attorney an opportunity to appear before the panel and testify under oath together with any witnesses that he or she may call to testify and present an oral argument with respect to the complaint. All testimony shall be recorded and preserved by the Chair of the Panel for not less than six months following the hearing.

(c) Complainant's Appearance. A complainant shall have the right to appear before the panel personally and testify under oath together with any witnesses that he or she may call to testify with respect to the complaint or in opposition to the matters presented by the attorney against whom this complaint has been made. This shall not include direct confrontation of the parties unless specifically authorized by the panel. All testimony shall be recorded and preserved by the Chair of the Panel for not less than six months following the hearing. The complainant may be represented by counsel or some other personal representative.

(2) In determining an appropriate sanction and only after having found unethical conduct, the panel may consider private reprimands and/or greater discipline within the five years immediately preceding the alleged offense.

Rule X
PRIVATE REPRIMAND

(a) Within 10 days after notice of the Committee recommendation to the Board of a private reprimand, the attorney in question may file with Bar Counsel an exception to the Committee recommendation and may also, if desired, request a hearing. If a request for a hearing is made the Board shall proceed to hear the matter or cause the same to be heard by a hearing committee in an expeditious manner, with Bar Counsel and the attorney in question having the opportunity to be present. The complainant's testimony may be read into the record. The complainant need not appear personally unless called by the Respondent as an adverse witness for purposes of cross-examination. The attorney shall have the burden of proof of showing that the Committee recommendation is unreasonable, unsupported by substantial evidence, arbitrary, capricious or otherwise clearly erroneous.

Rule XII
DISCIPLINARY HEARING BEFORE BOARD

(a) Hearing Committee Panel. All Formal Committee complaints will be submitted to and heard before a committee of two members of the Bar selected by the Board and one public member appointed by the Supreme Court. The Board shall appoint 24 members of the Bar to act on the Hearing Committee Panel, consisting of 4 attorneys from the first and second divisions, 4 attorneys from the fourth and fifth divisions, 12 attorneys from the third division and four at-large attorneys from any divisions. In addition, 12 public members of the Hearing Committee Panel shall be appointed by the Supreme Court. All regular terms shall be three years, and no member shall serve more than two consecutive three-year terms. Provided, however, for the initial appointments to the Hearing Committee Panel, one member of the Bar from the first and second divisions shall be appointed for one year, and one shall be appointed for three years; one member of the Bar from the fourth and fifth divisions shall be appointed for two years and one for three years; two members of the Bar from the third division shall be appointed for one year, two shall be appointed for two years and two shall be appointed for three years and the public members shall be appointed one for one year, two for two years and two for three years. Subsequent appointments shall be for three years. The President of the Bar shall assign a hearing committee to a particular case and shall name a hearing committee chairman from the Committee in each case.

MCLE CORNER

Alteration of Regulation 4(d)-101(a)(iv)

No more than one-half of the credit hour requirement may be obtained through study with audio and video tapes pursuant to this Subsection (A), unless the presentation is made under the direction of a recognized Local Bar Association, using a video tape of a previously accredited Continuing Legal Education course, with a designated qualified commentator present to field questions.

This would enable the attorneys in more rural areas of the state to obtain their CLE credit without the necessity of travel to Salt Lake City.

MCLE Providers

The following are accredited presumptive providers:

ALI/ABA
Association of Trial Lawyers of America
American Inn of Court
A. Sherman Christensen Inn of Court
Southerland Inn of Court
Airforce Judge Advocate General School
American Society of Law & Medicine
Center for Litigation Risk Analysis
Center for Trial & Appellate Advocacy Hastings College for the Law
Commercial Law League of America
Council on Education in Management
CLESN
Department of Justice, Office of Legal Education
Defense Research Institute
Executive Enterprises, Inc.
Federal Energy Bar Association
Federal Publications Inc.
Government Institutes Inc.
Information Forcast Inc.
Intellectual Property Owners, Inc.
Lorman Business Center, Inc.
Legal Education Institute, Inc.
Mead Data/Lexis
National Institute for Trial Advocacy
National Association of Bond Lawyers
National Business Institute
National College of District Attorneys
National Association of Protection and Advocacy Service
National Association of Attorneys General
National Association of Railroad Trial Counsel
National Health Lawyers Association
Naval Justice School
Organization Management, Inc.
Pension Publications of Denver, Inc.
Professional Education Systems, Inc.
Prentice Hall Law & Business
Rocky Mountain Mineral Law Foundation
Southwestern Legal Foundation
SWAP/Prosecution Council
Salt Lake County Bar Association
Utah Trial Lawyers Association
University of Utah College of Law Alumni Association
Utah State Bar
Utah Legal Services, Inc.
Washington School of Law (Masters in Taxation **only**)
Westlaw

Phone Conferences

By Judge J. Philip Eves

There is a view of judicial history held by many that modern court proceedings are only a civilized substitute for the ancient practice of trial by combat. Many in the legal profession share that view, including many of those who sit on the bench.

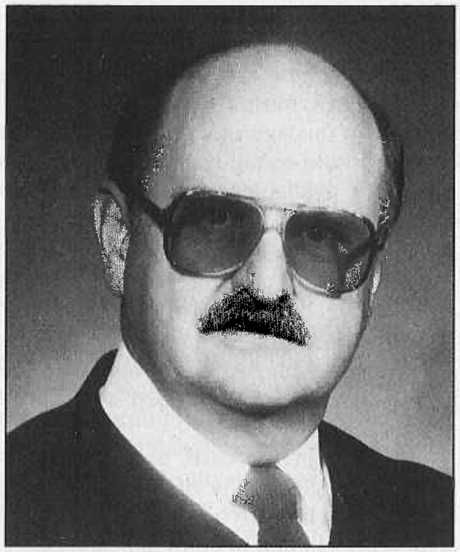
HISTORICAL PERSPECTIVE

Under the Rules of Chivalry, one accused of wrongdoing had the right to test the truth of the accusation on the field of honor. The accused and his accuser would appear at the appointed place at the prearranged hour and settle their differences very decisively with lance, sword and axe. There were few appeals from such encounters as the loser was usually not capable of complaint.

Because of the obvious hazards, it became fashionable, even desirable, to appoint a champion for one's cause and to let the champion settle the matter, usually against a champion for the other side. (From this practice comes the widely held belief that the first lawyers were called knights.)

Under this system of justice, when the antagonists met, they relied on their skill with their weapons to prove the truth. They came dressed for battle. A king or lesser noble would observe the fight to ensure that the rules of engagement were followed. The public was also invited, for it did little good to win if the public did not know that your cause had prevailed. At the signal from the king the combatants would charge onto the field and the issue would be decided by brute force, superior skill, blind luck or a combination of those factors.

Our court proceedings follow the same sort of form and use many of the same procedures. A judge makes sure the fight is fair. The lawyers are the champions for the litigants. For weapons we use words, ideas and evidence. The law provides the rules for the engagement. The public and the press are involved to witness that the fight is fair and the outcome just. We require the principals to assemble at one place at a given time to settle their disputes, or at least we did until recently.



J. PHILIP EVES is currently serving as a Utah District Judge for the Fifth District, which serves Iron, Washington and Beaver counties. He is currently a member of the Judicial Council. He was appointed to the Ninth Circuit Court on November 20, 1985, and to the district bench on April 15, 1987, by Gov. Bangerter.

Judge Eves was born in American Fork, Utah, but attended high school in Los Angeles County, California, after his family moved there. He graduated from California State University, Los Angeles, with a Bachelor of Science in Administration of Justice. While attending college he worked as a police officer for the City of Arcadia, Calif., for five years. He graduated from law school at the University of California, Davis, in 1973. Thereafter he prosecuted criminal cases as a Ventura County Deputy District Attorney for five years before returning to Utah to establish a private law practice. His practice in Iron County included prosecuting and defending criminal cases, working as a city attorney for several towns and cities, and a general civil practice.

RECENT CHANGES

Somewhere along the way we entered the age of technology. Travel and communication became easier. The lawyers became able to champion causes over ever-increasing distances. In fact, they became so involved in settling far-flung disputes that they found it almost impossible to be in all the right places at the required times. So was born the idea of easing the burden of appearing on the field of honor. Two recent rules in our state make it possible for the combatants to participate in the contest without actually being present. The problem is that this practice seems to do injury to the widely held historical view of justice and fair play which so many in our profession treasure.

Rule 4-106, UCJA provides:

"Judges of courts of record and not of record are authorized to use conference calls in lieu of personal appearances by counsel in appropriate cases."

Rule 4-501 (5) provides:

"The Court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel."

JUDICIAL CONCERNS

I confess that I have been troubled in trying to decide when these rules should come into play. I have had the feeling that there is something inherently wrong with allowing the combatants to do battle without requiring them to dress for the fight and assemble on the field of honor. Lawyers can now mail their weapons to the court under Rule 4-501 and then, by telephone, tell the judge how to use the weapons to settle the issues.

I am not alone in my uneasiness with this concept of arguing over the telephone. I recently spoke to 10 district court judges and two commissioners about their use of telephone conferences. I found that phone conferences were not favored in most cases, and have not been allowed or used except in certain limited types of hearings.

I also found that none of the judicial officers to whom I spoke were anymore successful than I had been in pinpointing exactly why the concept of phone conferences causes uneasiness. No two of the judicial officers contacted are using phone conferences in the same way and most share an uneasiness about broadening the use of the telephone.

It appears that most judges allow phone conferences for scheduling conferences, emergency informal communications which do not require a record and to involve the other lawyer in discussion of ex parte motions brought to the court. Some judges are allowing pretrial conferences over the telephone, with or without a record. Only two judges to whom I spoke are allowing phone argument on substantive motions, on the record.

One judge allows wide use of the phone in his rural court for all types of matters. In fact he carries a speaker phone as he travels from courthouse to courthouse and has phone jacks on all his benches. He sometimes calls absent lawyers from the bench while court is in progress and in the hearing of all present asks for the attorney's argument on the matter being heard. The judge says this procedure has resulted in some startled lawyers and some rather disjointed argument, but it only happens to most lawyers once.

Most judges are cautious about allowing argument over the phone, however. The judicial officers to whom I spoke felt the problems with phone conferences were:

1. Poor quality record. This may be due to poor equipment, lack of a speaker phone or the inability of the reporter to hear the phone discussion and properly identify the speaker, especially where more than two lawyers are involved.

2. Informality. Phone conferences tend to be less formal and less restrained than court appearances. The participants tend to interrupt one another and to talk simultaneously on occasion. The judge may have difficulty controlling the situation, especially if tempers flair or there is a pro se litigant involved.

3. Poor preparation. Participants in phone conferences seem less prepared and less focused on the matter than do those appearing in court.

4. Scheduling problems. Sometimes the participants are hard to assemble on the phone, they are not available when the court is or they don't call at the prearranged time.

5. Loss of non-verbal communication. Judges receive messages in court from body language, facial expressions and hand motions. It is also difficult to coordinate review of documents.

6. Diminished settlement discussion. Phone conferences don't permit the same degree of meaningful settlement discussion which often occurs when the parties find themselves together at the courthouse, face to face.

7. Inability to take evidence. None of the judicial officers to whom I spoke would allow the presentation of evidence over the telephone, even by proffer.

PRACTICAL SUGGESTIONS

These concerns are substantial and legitimate, but it does appear that with a little advance planning and an agreed-upon set of procedures, most can be overcome adequately. In this age of exploding litigation costs, it would certainly seem important to use every available means to curtail the expense of justice. Some of the listed concerns might actually be secondary to the greater need to save the litigants useless expense.

With that thought in mind, here are some practice suggestions which might be useful in arranging expanded availability of phone conferences:

1. Early in the case, assess the economics and geography of the participants and decide whether you want to use phone conferences in lieu of court appearances.

2. Contact the other participants and discuss the matter with them. If you can arrive at some sort of stipulation as to when and to what extent you will handle the case by telephone, you will make the court's decision easier. If you cannot reach an agreement, you may still want to approach the court yourself, especially if your client is likely to be greatly impacted by travel costs.

3. File a motion, with or without an agreement, asking for an order regarding the use of phone conferences. Ask the court to decide in advance whether phone conferences will be allowed at all, and if so, in what kinds of hearings and with what ground rules. You will want to support your motion with affidavits as to factual matters, such as the number and location of the attorneys and their clients, the costs of traveling to the court, and so forth. You will certainly want to file a memorandum citing the two rules allowing phone conferences, explaining why they should be allowed in your case, and how you would like to use phone conferences.

4. Include in your motion a plan for setting up phone calls and offer to take that responsibility rather than placing it on court personnel.

5. If the court allows phone conferences, use good judgment and courtroom demeanor during the calls, i.e.: don't speak informally or use inappropriate humor, don't interrupt others, stick to the point of the conference, be prepared and treat the call as seriously as you would a court appearance. To create a good record, identify yourself at the beginning of each comment so the reporter can tell who is talking.

6. Make your calls at the appointed hour and don't keep the court and others waiting. Nothing will end the use of phone conferences quicker than keeping the court waiting when other business is pressing, or interrupting court proceedings with a call at a time other than the one arranged.

7. Be thoughtful in asking for phone conferences and only ask when you need the consideration. Remember that there are legitimate concerns in the minds of judges about the use of the phone. Don't abuse the practice by asking to use the phone in situations where it is just not practical or logical, i.e.: to hear evidence or to discuss documents which the court does not have before it.

SUMMARY

Most requests for phone conferences now coming to a judge are rushed attempts to talk to the judge, with several attorneys on the line, about a matter which has just arisen. In such situations the court is at a great disadvantage. Your case is probably not on the calendar, the court may not have the matter in mind, may not have had a chance to review the file and may have little idea what the case is about. Under those circumstances it is only natural for the judge to be reluctant to handle the matter by phone and to insist that you file a motion in the traditional way. Broaching the subject of phone conferences in advance may improve your chances of being heard over the phone, even in pressing circumstances.

The time may come when the practice of law is mostly done over the telephone. Someday we may be able to see each other as we speak and the phone itself will create a clear record of the conversation. We don't yet enjoy that technology, however. Until we do, remember that there are some real concerns and some historical prejudices which favor requiring the litigants and their lawyers to assemble on the field of battle to settle their differences. If you want to use phone conferences, you will be well-advised to allow the court to weigh the competing issues in advance and to supply the court with some solutions to the problems that phone conferences present. Utah BJ

CASE SUMMARIES

Wrongful Termination, Employment At-Will, Good Faith and Fair Dealing

By Clark R. Nielsen

An implied covenant of good faith and fair dealing in employment contracts may not be used to restrict an employer's right to terminate an employee who is employed by an at-will, indefinite-term agreement. Three Nordstrom, Inc. employees were terminated by Nordstrom for drug-related conduct. The employees' conduct was clearly proscribed in the employment policy manual. The employees sued Nordstrom for breach of contract, wrongful termination, defamation and intentional infliction of emotional distress. The trial court dismissed plaintiffs' claims for defamation and wrongful discharge but allowed the jury to consider whether plaintiffs' termination breached the implied covenant of good faith and fair dealing in the employment. The jury found that plaintiffs were terminated in "bad faith" and that defendant breached that implied good faith covenant.

On appeal, the Utah Supreme Court (J. Stewart) reviewed the Utah's employment-at-will doctrine, recently culminating in *Berube*, 771 P.2d 1033 (Utah 1989), *Lowe*, 779 P.2d 668 (Utah 1989) and *Caldwell*, 777 P.2d 483 (Utah 1989). Although sharply divided in *Berube*, the majority there did agree that an indefinite term employment contract creates a rebuttable presumption of an at-will employment but that provisions of an employment manual may modify the at-will employment terms and restrict the employer's right to terminate the indefinite-term employee at will.

A unanimous court agreed that the implied covenant of good faith and fair dealing generally recognized in all contracts is different from the covenant of good faith and fair-dealing implied in employment contracts. An implied covenant in the employment context cannot change an at-will employment arrangement to first require "good cause" before termination. An obligation will not be "implied" when it is inconsistent with the other terms of the contract. Accordingly, there was no basis for the jury to conclude that plaintiffs' termination breached any implied covenant of good faith and fair dealing. The jury instruction to that effect was erroneous.

However, under *Berube*, the terms of Nordstrom's employment manual can rebut an inference of the presumed right to discharge at-will. The trial court also erred in refusing consideration of plaintiffs' theory that the employment manual provisions limited Nordstrom's right of termination. The jury should have been allowed to consider whether any manual provisions were implied terms of employment and limited Nordstrom's right to terminate plaintiffs. However, because two plaintiffs' admitted drug use was, under the manual, a ground for immediate dismissal, the error was harmless as to them. The judgment for damages against Nordstrom was reversed. Remand was ordered to consider whether the third employee was subject to termination at will or under some "implied" term of her employment, if applicable.

The court affirmed the dismissal of the employees' defamation claims. Truth was a defense as to the two plaintiffs who admitted drug use. As against the third plaintiff, Nordstrom's statements concerning the reasons for her discharge were qualifiedly privileged if made to protect the legitimate interest of the employer. Therefore, plaintiff had the burden to prove malice or the absence of the privilege. Plaintiff failed to raise or assert before the trial court any malice by Nordstrom and was, thereby, deemed to have waived the issue.

Behaney v. Nordstrom, Inc., Utah Supreme Court, No. 20590 (May 16, 1991) (J. Stewart).

IMPLIED COVENANT OF GOOD FAITH, FAIR DEALING; INTERFERENCE WITH ECONOMIC RELATIONSHIPS

The Utah Supreme Court unanimously reversed the dismissal of a development company's breach of contract claim against a hospital. The plaintiff leased property from St. Benedict's Hospital and built and leased professional medical offices. Subsequently, the hospital leased other property to another developer to construct a third medical office building, thereby resulting in lost tenants and rents to plaintiff. Plaintiff sued for an injunction, for breach of express and implied contract covenants, breach of an implied covenant of good faith and fair dealing, and for tortious interference with economic relationships.

The court (J. Durham) found that the language of the contract between the plaintiff and the hospital did not prevent the hospital from constructing and operating a new medical office building. Nor did the contract give plaintiff a first right of refusal in future development. However, there was implied in the agreements a covenant of good faith and fair dealing, which covenant may have been breached by the hospital. Plaintiff's complaint properly stated a claim for breach of both this implied covenant of good faith and fair dealing and of express contract provisions that defendant would assist plaintiff in keeping its office building occupied. The trial court improperly dismissed the complaint for failure to state a claim.

Under good faith and fair dealing, each party impliedly covenants not to purposely destroy or injure the other party's right to receive the benefits of the contract. Each party's actions must be consistent, in good faith, with the agreed common purposes and reasonably justified expectations of the other party, based upon the contract language and their course of dealing with each other.

Plaintiff's third-party interference claim was properly dismissed because plaintiff failed to show that defendants' interference with plaintiff's economic relationships was for an improper purpose or motive. There was no claim that defendants' maintained a desire to harm plaintiff and that that desire predominated over a legitimate economic motive. *See Leigh Furniture v. Isom*, 657 P.2d 293 (Utah 1982) for Utah's adoption and articulation of the tort of interference with present and prospective economic relations.

St. Benedict's Development v. St. Benedict's Hospital, 160 Utah Adv. Rep. 11 (May 6, 1991) (J. Durham).

STRICT PRODUCT LIABILITY, "UNAVOIDABLY UNSAFE" DRUGS

Adopting an expanded view of a restatement comment, the Utah Supreme Court held that all prescription drugs, when FDA approved, shall be considered "unavoidably unsafe" by their nature, and are not "defective" in the absence of improper packaging or use instructions. In such cases, a manufacturer/distributor cannot be held strictly liable for damages caused by the drug's use.

Restatement (Second) of Torts, §402a imposes strict liability upon one who sells a product "in a defective condition unreasonably dangerous to the user," regardless of all possible care given to the product's preparation and sale. Adopted by the court, comment k to §402a excepts from strict liability any product, such as a medical drug, which, by its nature, carries a high risk of serious or damaging consequences. "Such a product, properly prepared, and accompanied by proper directions and warnings, is not defective, nor is it *unreasonably* dangerous." In essence, the comment suggests that any risk of injury, albeit serious, is not unreasonable as compared to the benefits derived by the product's use or the dangers posed by its non-use. There is no liability protection for a manufacturing flaw or improper warning on the drug's packaging.

The court rejected the old California and the Idaho approaches that determined, on a case-by-case basis, whether a particular drug qualified as an "unavoidably unsafe product." A drug need not provide an "exceptionally important benefit," and yet pose a substantial, unavoidable risk, to be exempt from strict liability. Nor is a potential disparate "risk/benefit" comparison on a case-by-case basis necessary.

The Utah court follows a new California approach, articulated in *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470 (1988), that broadens the application of comment k to all FDA-approved prescription drugs. This expanded interpretation of comment k is designed to encourage the development and marketing of new drugs and is consistent with public policy considerations in pharmaceutical product design.

> "The. . .Court held that all prescription drugs, when FDA approved, shall be considered 'unavoidably unsafe' by their nature, and are not defective in the absence of improper packaging or use instructions."

"Despite inherent risks, and in contrast to any other product, society has determined that prescription medications provide a unique benefit and so should be available to physicians with appropriate warnings and guidance as to use. The federal government has established an elaborate regulatory system, overseen by the FDA, to control the approval and distribution of these drugs." (slip op. at 11)

According to the court, this extensive FDA regulatory scheme is capable of conducting its own "risk-benefit" analysis and making such determinations. The FDA may properly consider the interrelationships of all possible consequences in the approval or disapproval of a drug "design." Such an expansive role is unfitted for the courts. Consequently, if a prescription product complies with FDA standards, the product is presumed *not* defective, albeit "unavoidably unsafe." However, a defendant may still be liable for a manufacturing or packaging flaw, for misrepresentation, or if defendant knew or should have known of a specific unreasonable risk associated with the product's use.

The dissenting opinions of Justices Stewart and Howe argue that an exemption of drugs from strict liability should be limited to a literal interpretation of comment k, e.g. drugs which have "life-saving potential." Justice Howe would accord all other prescription drugs merely a rebuttable presumption of a safe design. Justice Stewart argues that comment k requires a "risk-benefit" comparison for those products that are incapable under present knowledge of being made "safe" for their intended use. The risk-benefit analysis should compare, case-by-case, whether a drug's social utility outweighs its apparent risks. Otherwise, drugs which are not at the "cutting edge" of development and not intended by the comment to be protected, are exonorated from liability.

Grundberg v. The UpJohn Co., 160 Utah Adv. Rep. 20 (May 14, 1991) (J. Durham).

OWNER'S LIABILITY FOR INJURY TO BUSINESS INVITEE

The owner/management of a retail jewelry store is not an "insurer" of the safety of business customers on the premises. Although an owner must exercise "due care and prudence for the safety of business invitees," he or she is ordinarily under no duty to prevent or warn of the acts of others until the owner knows or has reason to know that such acts are, or are about to occur. *See* Restatement (Second) of Torts ~344 (1965). The plaintiff, injured by the robber in the course of the jewelry store robbery, could not recover from the store when alleged facts failed to establish the requisite level of foreseeability. As a matter of law, a robbery five years earlier was insufficient to create a duty upon the jeweler to prevent the robbery during which plaintiff was injured. Summary judgment for defendant was affirmed.

Dwiggins v. Morgan Jewelers, 159 Utah Adv. Rep. 22 (Apr. 30, 1991) (J. Durham)

REAL PROPERTY, ONE-ACTION RULE, TRUST DEEDS

A debtor may not invoke the "one-action rule" (Utah Code Ann. §78-37-1) to prevent a junior lienholder from collecting its note after foreclosure of the note's security by the senior lienholder. Because the secured interest of the junior lienholder has been "sold-out," that creditor is no longer a "secured creditor" and may proceed on the promissory note. Under the "one-action rule," a creditor must first foreclose the mortgage security and have a deficiency judicially determined before proceeding against the debtor personally.

In *City Consumer Services, Inc. v. Peters*, defendant's successor defaulted on his property payments. The first mortgagee foreclosed. Plaintiff City Consumer did not bid at the foreclosure sale and its junior mortgagee status was "sold-out." The mortgage sale by the senior mortgage terminated all junior liens. City then proceeded against the defendant personally to satisfy defendant's note. The Utah Supreme Court (J. Howe) reaffirmed a 1936 decision that the "one-action rule" does not apply to "sold-out" junior mortgagee "where the security has been lost through no-fault of the mortgagee." Once the senior had "exhausted" the security, the junior was forced to proceed on its note. The junior is not required by the one-action rule to preserve its mortgage interest by purchasing the property at the senior mortgagee's sale. City was no longer a secured party subject to the one-action rule.

The Trust Deed deficiency statute also does not apply to City's action on its note because City is unsecured. Utah Code Ann. 57-1-32, limits a trust deed deficiency to the difference between the fair market value and the amount bid at the trust deed sale. However, because City is unsecured, its action is not for a deficiency under 57-1-32. Summary judgment for City Consumer was affirmed.

City Consumer Services, Inc. v. Peters, 160 Utah Adv. Rep. 16 (May 8, 1991) (Assoc. Chief J. Howe) (This opinion replaces the *Per Curiam* decision appearing at 133 Utah Adv. Rep. 12).

PETITION FOR WRIT OF CERTIORARI, JURISDICTION

The timely filing in the Utah Supreme Court of a petition for certiorari is jurisdictional under former Rule 45, Rules of the Utah Supreme Court. That rule is identical to the current Rule 48, Utah R. App. P. Although the court was unanimous in dismissing the certiorari petition, a majority of the justices declined to subscribe to the main opinion dictum suggesting that the petitioner could again challenge his conviction by habeas corpus petition.

Earle v. Warden of Utah State Prison, 159 Utah Adv. Rep. 17 (Apr. 23, 1991) (J. Durham, with J. Stewart concurring; concurring opinion by Assoc. C.J. Howe; opinion concurring in result by J. Zimmerman, with C.J. Hall concurring.)

DRAM SHOP—COMPARATIVE NEGLIGENCE; EVIDENCE OF LIABILITY INSURANCE SETTLEMENTS

Defendant dram shop was entitled to a jury instruction to compare the respective negligence of the plaintiff's deceased party and the drunk driver in plaintiff's suit based on the dram shop act. Justice Howe, with J. Durham, concurred in the majority's discussion of the dram shop "strict liability" but strongly dissented from the application of "comparative negligence" to reduce defendant's liability.

The trial court also erred when it allowed the mention of insurance during the opening argument and the presentation of evidence. Although many courts are no longer as particular about the mention of insurance, the potential for abuse and influence in jury trials is still prohibitively high.

Reeves v. Gentile, 161 Utah Adv. Rep. (May 17, 1991) (Chief J. Hall)

TRUST DEED DEFICIENCY—SAVINGS STATUTE

The "savings" statute, U.C.A. §78-12-40, applies to permit refiling of a trust deed deficiency action within one year of dismissal for failure to timely issue summons under Utah R. Civ. P. 4 (b).

Standard Federal Savings and Loan v. Kirkbridge, 161 Utah Adv. Rep. (May 17, 1991) (J. Zimmerman)

DUI, INDEPENDENT ALCOHOL TEST

Although a police officer may not hinder or impede an independent blood alcohol content test, a police officer does not have a statutory or constitutional duty to affirmatively assist a DUI suspect in obtaining any independent test. The suspect is personally responsible to obtain any independent, potentially exculpatory test permitted by law.

Provo City Corp. v. Werner, 158 Utah Adv. Rep. 62 (Ut. Court of Appeals, April 11, 1991) (J. Bench, with J.'s Jackson and Russon).

MALICIOUS PROSECUTION, WRONGFUL TERMINATION, PROFESSIONAL DUTY

In a split decision, the Utah Supreme Court affirmed the damage award against an employer who wrongfully terminated the plaintiff-employee and subjected her to malicious criminal prosecution. Plaintiff was accused by her immediate supervisor of stealing from her employer. Later, it was determined that the supervisor was guilty of the thefts. Criminal charges against plaintiff were dismissed but not until significantly later and just before a criminal trial. The defendant-employer later fired plaintiff after discovering that she was innocent of any wrongdoing. The appellate court held the evidence was sufficient to sustain a jury verdict of malicious prosecution: e.g. that the employer initiated a criminal proceeding against the innocent plaintiff without probable cause and for an improper purpose. Employer could not insulate itself from the actions of its supervisor nor could it hide behind the discretion of the government prosecutor in deciding to prosecute.

This opinion should be read carefully in its entirety to analyze the positions of each justice regarding the different sections of the main opinion. Space does not allow a detailed discussion of this case and its ramifications.

Note that the court finds a "professional duty" for an attorney to properly comply with certain procedural rules of appellate review—marshaling and detailing the evidence with citations to the record. Failure to comply with these rules may subject an attorney to sanctions under Utah R. App. P.40 and/or provide a basis to claim a breach of the attorney's professional responsibility to provide competent representation to the client under R. Prof. Conduct 1.1.

Hodges v. Gibson Products Co., 158 Utah Adv. Rep. 6 (April 3, 1991) (J. Stewart, with J. Durham concurring; concurring opinion by Assoc. C.J. Howe; opinion concurring in result by J. Zimmerman, with C.J. Hall concurring.)

ADMINISTRATIVE WARRANTLESS SEARCH AND SEIZURE

The third district court's administrative order requiring screening and search before entering the courthouse was an order for an administrative search. The order and the search of defendant, albeit warrantless, were reasonably necessary to narrowly accomplish the legitimate regulatory purpose to maintain security and the safety of those in the courthouse.

State v. Cornwall, 158 Utah Adv. Rep. 72 (Utah Ct. App., Apr. 19, 1991) (J. Bench, with J.'s Jackson and Orme).

Young Lawyers Plan

1991-92 PROJECTS

The Young Lawyers Section of the Utah State Bar is planning its projects for the 1991-1992 year. During the past two months, the Section has contacted numerous new attorneys to increase the diversity of representation on the Executive Committee. The Section has received substantial grants to prepare videotapes on domestic violence, handbooks on child abuse, videotapes on probate planning and materials for the Bill of Rights commemoration. Some new projects are planned for this year, including implementing the New Lawyer Continuing Legal Education and planning the Rocky Mountain Young Lawyers Program which will be attended by lawyers throughout the West. We are looking forward to a successful year.

There are projects for lawyers of all interests. To participate, please contact an officer, an executive committee member, or fill out the following form and send it to the Law & Justice Center.

Lawyers who are 36 years of age or younger, or who have been Bar members for five years or less are automatically members of the Young Lawyers Section. Please make an effort to become an active member.

Check all areas of interest and send to:
Young Lawyers Section, UTAH STATE BAR, 645 South 200 East, Salt Lake City, UT 84111-3834

__ New Lawyer Continuing Legal Education
__ Bar Member Support
__ Community Services
__ Pro Bono Committee
__ Publications and Publicity
__ KSL Legal Briefs Program
__ AIDS Commmittee
__ Law Related Education
__ LawDay
__ Needs of Children
__ Needs of Elderly
__ Bill of Rights
__ Rocky Mountain Program
__ Diversity in the Legal Profession

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537-5555
Kristin G. Brewer
532-1036
Scott C. Monson
534-1576
Larry R. Laycock
533-9800

New Lawyer Continuing Legal Education

This fall the New Lawyer Continuing Legal Education Program (NLCLE) will begin for all lawyers admitted to practice after July 31, 1991. Designed to ease the transition into practice, the NLCLE will consist of a two-day seminar to be held in October and monthly workshops in various areas of the law. The three-hour workshops will be "nuts and bolts" guides to practice, and the presenters will be highly experienced in their subjects. The presenters will focus on practical problems rather than on legal theory and will provide attendees with written materials and forms.

A new lawyer must attend 10 of the 13 workshops within an 18-month period. The NLCLE credit for the workshops will satisfy a new lawyer's mandatory CLE (MCLE) requirements for the first two years of admission. Other members at the Bar have expressed interest in the workshops. MCLE credit is available for other members of the Bar who are welcome to attend the workshops.

The following is a tentative schedule for the workshops:

November 1991
Employment and Workplace I: Termination, Discrimination, Title VII
January 1991
Employment and Workplace II: Workers' Compensation, Employment Security, Social Security
February 1992
Bankruptcy: Practice and Effects
March 1992
Probate and Estate Planning
April 1992
Criminal Procedure
May 1992
Civil Litigation I: Pre-action Investigation, Pleading and Discovery
June 1992
Civil Litigation II: Evidence at Trial
October 1992
Civil Litigation III: Enforcement of Judgments
November 1992
Business Association: Formation, Management and Dissolution
January 1993
Domestic Relations
February 1993
ADR and Effective Negotiation
March 1993
Effective Law Office Management
April 1993
Real Property

Further information on registration and faculty will be available in the near future. Questions may be addressed to Toby Brown at 531-9077, Mark Bettilyon at 532-1234, or Joann Shields at 537-5555.

Three Young Utah Lawyers Take National Leadership Roles

The American Bar Association's Young Lawyer Division will begin the 1991-92 year with leadership by three Utah attorneys. The division oversees activities of the nation's lawyers who are under age 36 and have practiced for fewer than three years.

Kimberly K. Hornak, a prosecutor on the Special Victim Team in the Salt Lake County Attorney's Office, has been appointed a Director of the Young Lawyer Division. She is the first Utahn to become a director. Ms. Hornak served on the Executive Council last year, and is currently chair of the ABA Membership Support Network.

She has been on the executive committee of the Utah Young Lawyers Section for four years, serving as secretary in 1987-88, and chair of the Community Service Committee and Child Advocacy Committee.

Ms. Hornak received her juris doctor from Gonzaga University in 1983.


Kimberly K. Hornak


Ryan Tibbits

Ryan Tibbits , a shareholder in the Salt Lake City law firm of Snow, Christensen & Martineau, has been selected by the ABA to be a member of the Conferences Team for the Young Lawyers Division. In this position, he will oversee two public service conferences. Mr. Tibbits was treasurer of the Utah Young Lawyers Section in 1987-88, and has co-chaired the Special Projects Committee.

Mr. Tibbits graduated from the J. Rueben Clark School of Law at Brigham Young University in 1984.

Jerry Fenn , also a shareholder in the firm of Snow, Christensen & Martineau, has been appointed vice chairman of the National Bar Leadership Committee for the Young Lawyers. This new ABA committee will train young lawyers to be leaders in the legal profession and professional organizations. They will sponsor a national bar leadership conference in February.


Jerry Fenn

Mr. Fenn served as president of the Utah Young Lawyers Section in 1989, and has been active in the ABA, serving on several national committees. This year, he is chairman of the ABA Affiliated Assistance Program. He will chair the Utah State Bar's Annual Meeting Committee this year. He is a 1983 graduate of the J. Reuben Clark School of Law, Brigham Young University.

Utah State Bar President James Z. Davis said these appointments to ABA positions recognize the leadership talent and expertise of Utah young lawyers. "Our attorneys are innovative and resourceful, and have been selected by the American Bar Association to lead them into the next decade. We are especially pleased to have three members of the Utah State Bar appointed to these prestigious, high profile national positions which many attorneys seek," Mr. Davis said.

Election of Trustees

Ellen M. Maycock and **Carman E. Kipp** were recently elected to the Board of Trustees of the Utah Bar Foundation.

Ms. Maycock has served as a Trustee on the Foundation's Board since 1987 and as Secretary-Treasurer for one year. She is a partner in the law firm of KRUSE LANDA & MAYCOCK, and has been active in national, state and local bar associations. Among her many accomplishments, she was presented the 1988 Distinguished Lawyer for Service to the Bar Award and serves as a member of the Board of Directors of the Alumni Association for the University of Utah.

Ellen M. Maycock

Carman E. Kipp

Mr. Kipp was announced as a Trustee of the Foundation at the Annual Meeting. He is a partner in the law firm of KIPP & CHRISTIAN, has been a member of the Utah State Bar Commission and President of the Utah State Bar. Among his many accomplishments, he is State Chairman of the American College of Trial Lawyers, and Founder, Secretary, Director and General Counsel of the Capital City Bank.

The Foundation expresses its appreciation to David S. Kunz for his many years of service to the Board and the Foundation. We are pleased that Ellen Maycock will continue her involvement on the Board and welcome Carman Kipp as a new Trustee.

Utah Bar Foundation 1991 Grant Awards

Legal Aid Society of Salt Lake—*$50,000.* The Legal Aid Society provides legal counsel to indigent members of the community who, by reason of their poverty, are unable to employ an attorney to assist them. The services provided by Legal Aid relate exclusively to domestic relations and domestic violence. Grant funds will be used for salaries for Legal Aid employees.

Utah Legal Services—*$35,000.* Utah Legal Services provides civil services to low-income clients statewide, specializing in assisting persons who have problems with "safety net" programs which provide their only income and health care, as well as landlord/tenant, family law and consumer problems. During 1990 ULS provided legal services to more than 11,000 low-income clients.

This grant award will be used (1) to continue the paralegal position located in Price serving low-income persons living in Carbon, Emery and Grand counties, (2) to conclude legal assistance in immigration cases, and (3) for publication of a revised landlord/tenant handbook to explain the rights and responsibilities involved in the rental of property.

American Inns of Court—*$1,500.* The American Inns of Court are organized to improve the skills, professionalism and legal ethics of the Bench and Bar by presenting programmed demonstrations designed to teach and refine an important skill or skills in trial or appellate advocacy. The emphasis is placed on ethics and professionalism.

The grant award for American Inn of Court I will be used to fund the national dues of 25 student members. The American Inn of Court VII award will be used to supplement revenues received from dues and other sources to help defray the cost of increased national foundation dues and the cost of travel.

Law Related Education Project, Inc.—*$30,000.* The Utah Law Related Education Project was created to provide students with the knowledge and skills necessary to make them more active, concerned and contributing citizens. The Project has broadened its scope to include values, ethics and citizenship education, emphasizing the importance of responsible citizenship. Grant funds will be used to cover the needed salaries and operating expenses necessary to continue to provide program activities.

Catholic Community Services of Utah—*$15,000.* Catholic Community Services, the Social Services agency of the Catholic Diocese of Salt Lake City, was established to serve the needs of the people of Utah in programs for children, the elderly, the homeless, refugees and aliens. The program is to provide free or low-cost information, assistance and advocacy to those eligible for immigration benefits, primarily with accurate current information regarding immigration benefits and strong advocacy and representation to prevent the separation of families. Grant funds will be used for general operating expenses and the statewide outreach program.

Utah Law & Justice Center—*$20,245.* Grant funds for the Utah Law & Justice Center will be used to assist the Alternate Dispute Resolution (A.D.R.) Program.

Legal Center for People with Disabilities—*$10,000.* The mission of the Legal Center is to provide a full range of advocacy services including legal, administrative and other appropriate remedies to protect the rights of individuals with disabilities. The program is threefold: Protection and Advocacy for People with Disabilities, Client Assistance Program, and Protection and Advocacy for Mentally Ill Individuals. This grant will provide funds to continue the service of a part-time attorney for guardianship procedures and to fund an advocate to expand services in Northern Utah.

Women Lawyers of Utah Committee on Implementation of the Recommendations of the Utah Task Force on Gender and Justice—*$12,000.* Women Lawyers of Utah, Inc. is a voluntary association of approximately 300 Utah Lawyers (both male and female). This grant will provide funds for the production of two informational videotapes which will be made available to victims of domestic violence.

American Fork Jr. High School—*$250.* This grant is to supplement funding to assist students to attend the National History Fair Competition.

West High School—*$2,500.* This grant will assist students with travel expenses to the National History Fair after winning first place at West High School, State and Regional levels.

CLE CALENDAR

NOTE: For those interested in Ethics credit hours, the following are upcoming Fall programs available to meet your ethics requirements: September 28, Ethics and Golf—The Professional Attitude; November 13, Ethics—Criminal Investigations and the Civil Practitioner, December 6-7, CLE for the General Practitioner. These are three excellent programs which will meet the entire ethics requirement of 3 hours. Also note some other programs have ethics components.

EDUCATION LAW SEMINAR

The Education Law Section extends an invitation to interested members of the Bar to attend its second annual CLE seminar. Program topics include: Performances Evaluators of Educators, "GRAMA" (Gov't Records Access & Management Act), Residential Issues Affecting Utah Institutions serving Out-of-state Youth, and Management Trust Lands. Come up to Park City for this informative seminar.

CLE Credit: 4 hours
Date: September 14, 1991
Place: Olympia Hotel, Park City
Fee: $30.00
Time: 9:00 a.m. to 1:00 p.m.

SECTION 401 (a) (4) NON-DISCRIMINATION REGULATIONS, SINGLE LINE OF BUSINESS RULES, AND RELATED PENSIONS ISSUES

A live via satellite seminar.

CLE Credit: 4 hours
Date: September 19, 1991
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

SUCCESSION PLANNING FOR THE FAMILY BUSINESS

A live via satellite seminar. A panel of nationally known experts will address introductory concerns such as entity formation, through new problems and solutions under Chapter 14 and planning techniques not governed by Chapter 14, and, finally, how to sell planning techniques to the family members and making it work.

CLE Credit: 6.5 hours
Date: September 24, 1991
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

THE SEXUAL ABUSE CASE

Utah County Attorneys, don't miss this opportunity to obtain CLE credit close to home. This informative seminar will examine the sex abuse case from all the different angles, from identifying one, to prosecuting and defending one, to the Judges perspective. In addition a one hour video ethics presentation will follow the program. This will enable attorneys to meet a portion of their ethics credit too.

CLE Credit: 4 hours (plus 1 video ethics)
Date: September 24, 1991
Place: Excelsior Hotel, Provo
Fee: $50
Time: 8:00 a.m. to 1:00 p.m.

AUTOMATING THE DRAFTING OF WILLS AND TRUST AGREEMENTS

A live via satellite seminar. This program is designed for estate planning lawyers and for non-lawyers who have the responsibility of designing systems for the preparation of wills and trust agreements. It should benefit those who are just beginning with manual systems, up to those who are ready to move into the sophistication of document assembly engines.

CLE Credit: 6.5 hours
Date: September 25, 1991
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

HOW TO HANDLE BASIC COPYRIGHT AND TRADEMARK PROBLEMS

A live via satellite seminar. This seminar is designed as an introduction for attorneys with limited experience in copyright and trademark and as a review and update for those who need reacquaintance with intellectual property practice and procedure.

CLE Credit: 4 hours
Date: September 26, 1991
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

ETHICS AND GOLF: THE PROFESSIONAL ATTITUDE *AND* THE FIRST ANNUAL ETHICS GOLF TOURNAMENT

Here is a fun opportunity to meet your ethics requirement, enjoy the beauty of Park City and have some fun playing golf. The seminar will examine professional behavior beyond ethical standards. Presenters will start with common ethical violations and then discuss methods that will help attorneys avoid ethical violations and also to be more professional in the practice. The intended result will be skills for attorneys to avoid ethical problems and attract and keep clients.

CLE Credit: 3 hours in ETHICS
Date: September 28, 1991
Place: Olympia Hotel, Park City
Fee: Call for these
Time: 9:00 a.m. to 12:00 Noon—Seminar 1:00 p.m.—Golf Tournament

TRADING IN CLAIMS IN BANKRUPTCY PROCEEDINGS

A live via satellite seminar presented by the Commercial Law League. This seminar brings together professionals from the bankruptcy, tax and investment communities. This practice-oriented program will be of use to attorneys representing debtors, stockholders, creditor committees and investment bankers wishing to explore claims trading in Chapter 11 companies.

CLE Credit: 6.5 hours
Date: October 8, 1991
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

EXPORTING FOR PROFIT

This is the second annual presentation of this seminar, in conjunction with Salt Lake Community College. This program looks at exporting opportunities for your clients and how they should be carried out. This year's target countries are: Korea, Germany, Mexico and Canada. Call for more information regarding this conference.

CLE Credit: Call for this.
Date: October 9, 1991
Place: Salt Lake Community College Campus
Fee: Call for this
Time: 8:00 a.m. to 2:30 p.m.

ENHANCING LAWYERING SKILLS—A CRITICAL PATH TO BUILDING YOUR PRACTICE AND CLIENT RELATIONS

A live via satellite seminar. This program presents the basic components for each lawyering skill; interviewing, negotiating and counseling. The novelty lies in the emphasis on creating effective client relations. The material integrate the sophisticated approach of neurolinguistic programming and brings it into the legal arena.

CLASSIFIED ADS

For information regarding classified advertising, please contact Mary Munzert at 531-9095.

BOOKS FOR SALE

West's Bankruptcy Reporter and Digest, Am. Jur 2nd, Am. Jur Legal Forms 2d, Am. Jur Pleading and Practice Forms. All current. Please contact Kim at (801) 521-4135.

Law library for sale. For more information, please contact Jackie Cleminson at 521-6500.

Treatise on Environmental Law, Matthew Bender, five-volume set with all updates and supplements. Excellent condition. $300. Please contact Joyce at (801) 584-1341.

EQUIPMENT FOR SALE

IBM SYS/36 5362-A03 and 6157 streaming tape drive, purchased new 1986. One CPT mid dot matrix printer with wide carriage and computer paper feeder. Capable of doing letter quality, plus five different fonts. Operating manual. Please call (801) 532-7080. On IBM equipment ask for Norma, on CPT equipment ask for Bev.

Scanner—CompuScan PCS Optical Scanner. Great for scanning those long documents. It saves secretarial typing. Original cost $3,200. We will sell for $1,400. Call us at (801) 531-6600 after 1:00 p.m. and ask for Mark.

WANG OIS 60 Computer System with 6529 tape drive, 3 PCPK-6 monitors, 3 LPS-8-9 laser printers, 1 XAPC-52, additional pieces. Call 350-3055 for additional information.

OFFICE SHARING/SPACE AVAILABLE

Attractive office space is available at prime downtown location, in the McIntrye Building at 68 South 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.

Choice office sharing space for rent in beautiful, historic building in Ogden, Utah. Several offices available. For information, please contact (801) 621-1384.

Newly completed, deluxe office space for two attorneys and staff. 7821 South 700 East location. Approximately 1,200 square feet, includes two private offices, large reception area, spacious library/conference room, file room, convenient parking. Call (801) 272-1013.

Executive or professional offices for lease in one of Salt Lake's premier office buildings, available individually or as a suite with secretarial stations, elegant shared boardroom, conference room and reception. Telephone and secretarial services available. Immediate occupancy. $500 to $2,500. Call Lisa at (801) 366-6064.

Office sharing space available in downtown Ogden. Some office equipment available. Location excellent to District, Circuit and Federal Courts. Referrals available. Call (801) 621-4430.

Deluxe office space for one attorney and secretary. 4212 Highland Drive. Office shared with two other attorneys. Conference room and limited library. Convenient parking. Call (801) 272-1013.

Share office and phone with semiretired attorney. $150. Close to courts with free parking. Call (801) 364-4711.

Need a deposition facility or an office on a short-term basis in Salt Lake? Elegant executive offices, deposition facilities and conference/meeting rooms available in premier office building in Salt Lake City. Arrangements for secretarial services if needed. Call Lisa at (801) 366-6064.

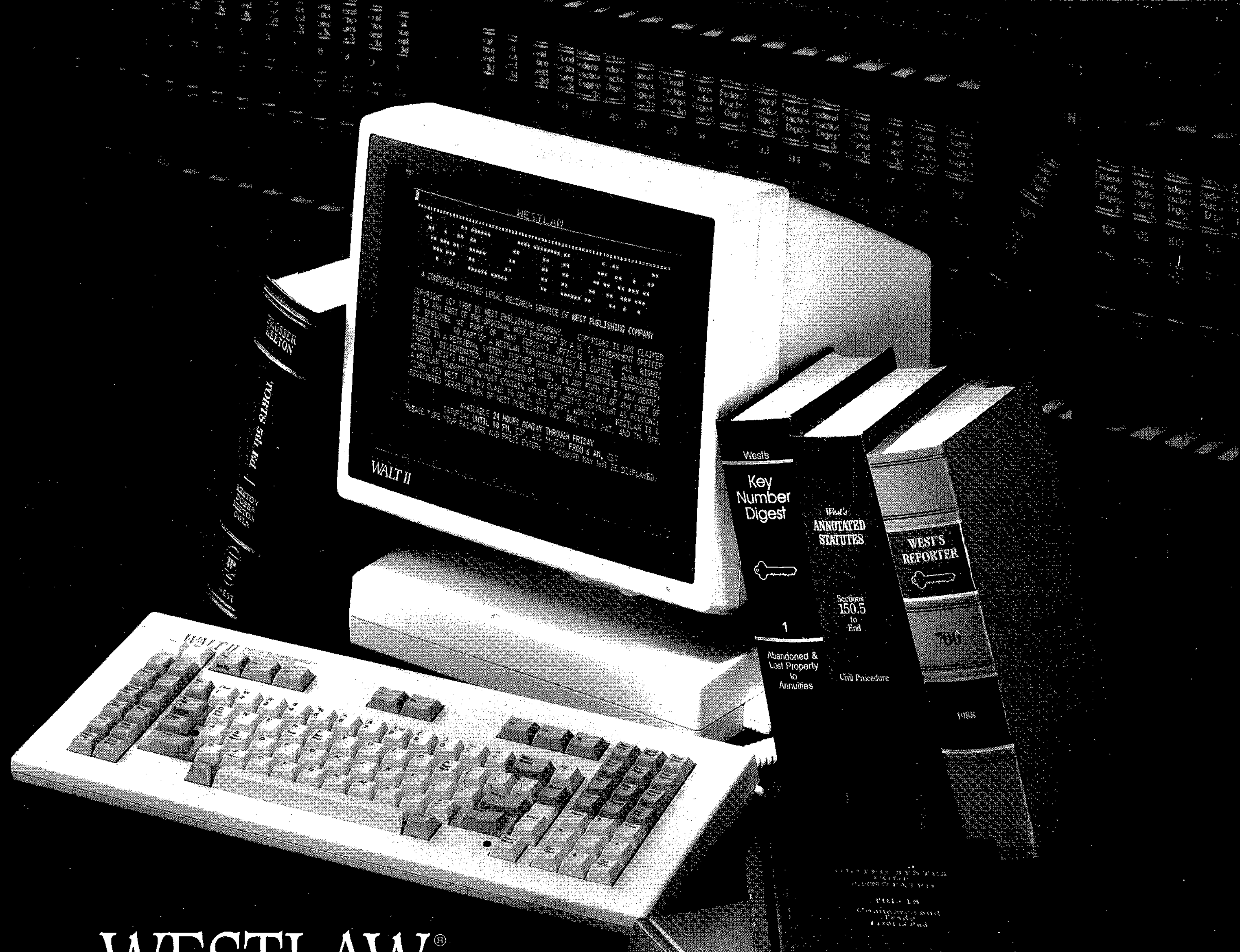
POSITIONS AVAILABLE

Local, small but well-established law firm needs one or two lawyers experienced in the general practice of law. Applicants should have a minimum of three years trial experience in civil law. Would prefer applicants to have some business of their own but not absolutely essential. This is an opportunity to build a practice. Salary and benefits negotiable based upon background and experience, and whether applicant has own clientele. Future will be based on performance. Start immediately, if qualified. Reply to Utah State Bar, Box C, 645 South 200 East, Salt Lake City, UT 84111.

Two attorney positions will be filled at the Industrial Commission of Utah—one at the Grade 31 level ($34,900 annually) and one at the Grade 29 level ($31,400 annually). The Grade 29 position may be underfilled at the Grade 27 level. Benefits include paid health, dental and life insurance. Duties involve, among others, civil trial and appellate practice, administrative practice in OSHA, wage claims, anti-discrimination and industrial injuries. For more information, call Ben Sims, legal counsel, at (801) 530-6957.

MISCELLANEOUS

Tired of law? Are you seriously interested in an alternative that pays at least as well and doesn't have the headaches and hassles? Would you like to know of a way within the next three to nine months to at least replace and probably exceed your current income? Would you like to be able to earn money while you sleep? Contact Randy Klimt at (801) 582-1728.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1
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