UTAH BAR JOURNAL

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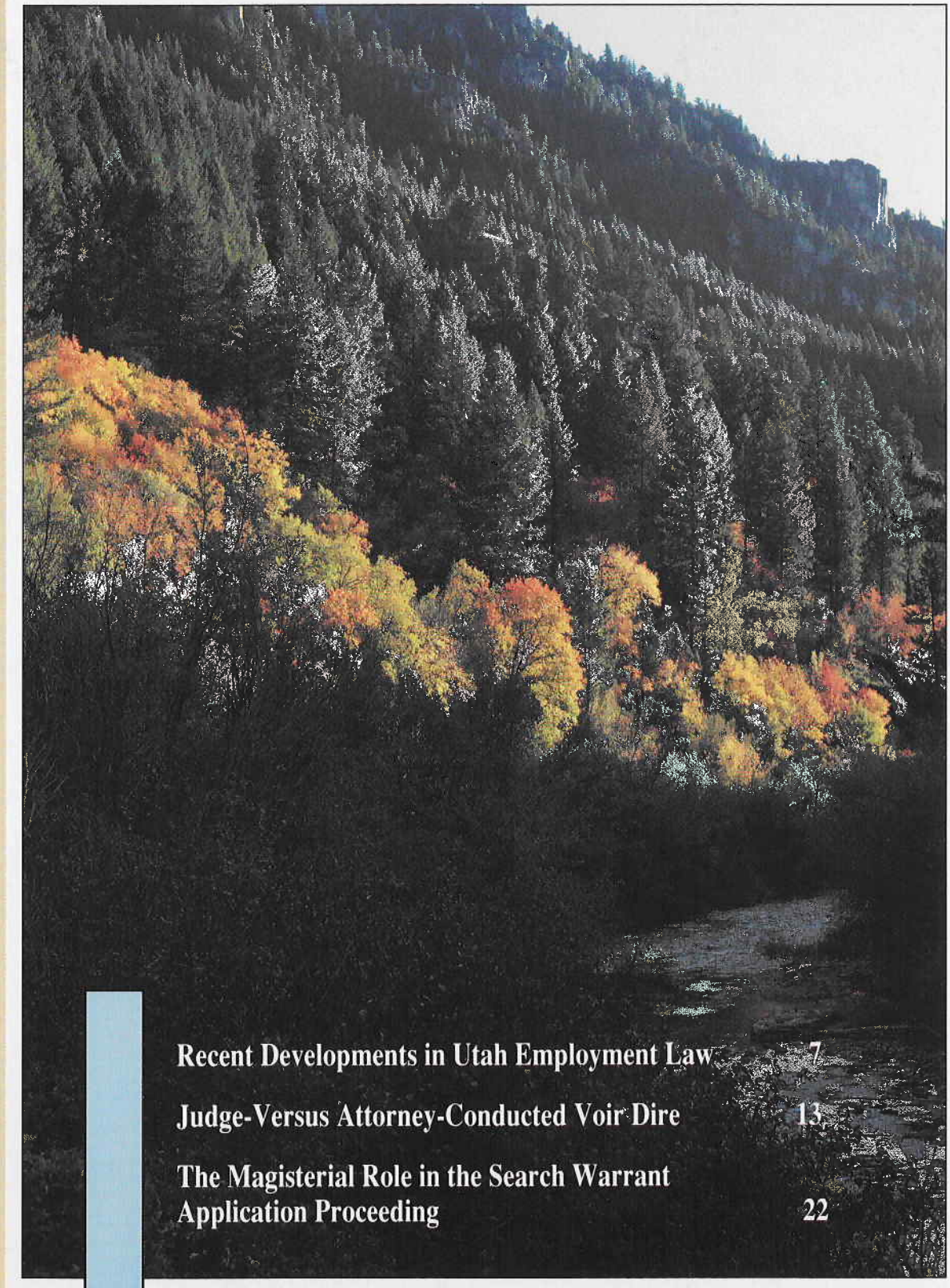

HOULIHAN VALUATION ADVISORS

Salt Lake City • Las Vegas • Orange County • Los Angeles • San Francisco • San Carlos

Specialists in providing valuation opinions ...

BONNEVILLE PACIFIC CORPORATION

has acquired 80% of the common stock of

RECOMP, INC.

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

HOULIHAN VALUATION ADVISORS

THE BONNEVILLE PACIFIC CORPORATION
Employee Stock Ownership Plan

purchased common shares of

BONNEVILLE PACIFIC CORPORATION

in a leveraged ESOP transaction

We rendered a fairness opinion to the Board of Directors of Bonneville Pacific Corporation as to the value of common shares purchased by The Bonneville Pacific Corporation Employee Stock Ownership Plan.

HOULIHAN VALUATION ADVISORS

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

has purchased common shares of

QUESTAR CORPORATION

in a leveraged ESOP transaction

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

HOULIHAN VALUATION ADVISORS

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

has merged with

PACIFIC SILVER CORPORATION

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

HOULIHAN VALUATION ADVISORS

NRS ASSOCIATES and SMG INCORPORATED

the general partners in several limited partnerships containing franchised restaurant operations including:
Sizzler — 11 Restaurants
Tony Roma's — 2 Restaurants
Viva La Pasta — 1 Restaurant

have completed

PARTNERSHIP VALUATIONS

We rendered a valuation opinion to Ronald J. Ockey, Attorney at Law with the firm of Jones, Waldo, Holbrook & McDonough, counsel to NRS Associates and SMG Incorporated, as to the cumulative fair market value of the above listed entities.

HOULIHAN VALUATION ADVISORS

BRIAN HEAD ENTERPRISES, INC.

the owner and operator of a Southern Utah ski resort, has received confirmation of its

REORGANIZATION PLAN

and has been dismissed from its

CHAPTER 11 BANKRUPTCY CASE

We rendered a valuation opinion to the Trustee of Brian Head Enterprises, Inc. as to the value of the ski resort assets.

HOULIHAN VALUATION ADVISORS

HENDSUB DOD, INC.

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

DOD ELECTRONICS

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

HOULIHAN VALUATION ADVISORS

TL ENTERPRISES, INC.

has acquired through a merger

GCI INDUSTRIES, INC.

and its wholly-owned subsidiary

GOLF CARD INTERNATIONAL CORP.

We rendered a fairness opinion to the Board of Directors of GCI Industries, Inc. as to the value of the common stock of GCI Industries, Inc.

HOULIHAN VALUATION ADVISORS

TERRA TEK, INC.
Employee Stock Ownership Plan
("ESOP")

has completed its annual ESOP valuation of

TERRA TEK, INC.

We rendered an independent opinion as to the fair market value of the Terra Tek, Inc. common stock.

HOULIHAN VALUATION ADVISORS

The Shareholders/Managers of
HILLSIDE VILLA HEALTH CARE CENTER

has completed a valuation of their Covenant not to Compete in connection with the acquisition of the center

by

MISSION HEALTH SERVICES

We rendered an independent opinion as to the value of the Covenant not to Compete.

HOULIHAN VALUATION ADVISORS

THE MONROC, INC.
Employee Stock Ownership Plan
("ESOP")

has completed its annual ESOP valuation of

MONROC, INC.

We rendered an independent opinion as to the fair market value of Monroc Inc.common stock.

HOULIHAN VALUATION ADVISORS

ALLIED CLINICAL LABORATORIES, INC.

issued

INCENTIVE STOCK OPTIONS (ISOs)

to certain key employees.

We rendered an independent opinion as to the fair market value of the optioned common stock of Allied Clinical Laboratories, Inc. on a minority interest basis.

HOULIHAN VALUATION ADVISORS

Contact: Fred Jones or Dave Dorton • (801) 322-3300

SALT LAKE CITY OFFICE: 136 East South Temple • Suite 1530 • Salt Lake City, UT 84111

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COVER: Logan Canyon, Utah, by Harry Caston of McKay, Burton & Thurman.

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.

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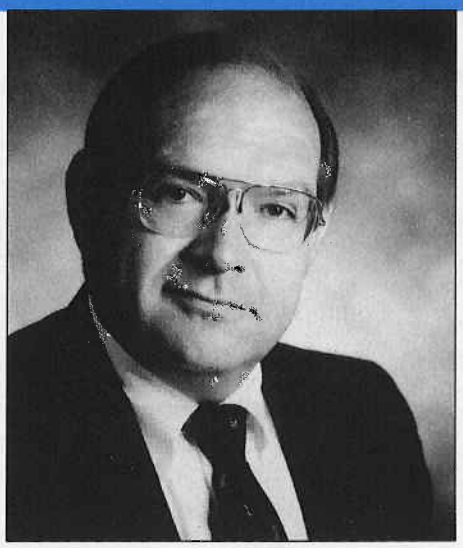


The "Business End" of the Bar

By James Z. Davis

During the proceedings of the Utah Supreme Court Special Task Force on the Management and Regulation of the Practice of Law, much of the criticism leveled at the Bar came from lawyers employed in the public sector, sometimes known as government lawyers.

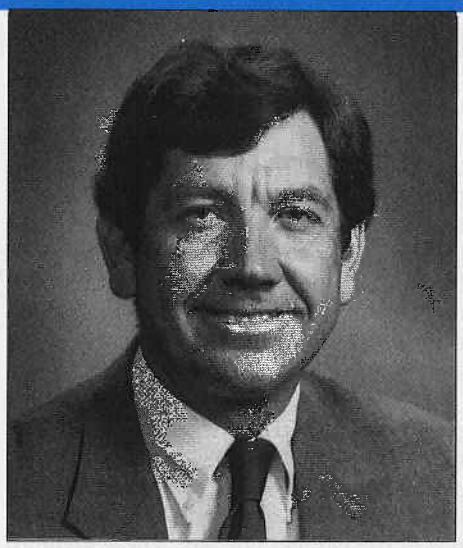
While the harshness of that criticism bore a direct relationship to whether the government lawyer was responsible for paying his or her own Bar dues, it seemed to center primarily on the notion that, since the Bar does nothing for government lawyers, there is really very little point in government lawyers having to be members of the Bar. I should hasten to add, that this attitude is not unique to "traditional" government lawyers, but includes many other public and private sector lawyers who are not engaged in the day-to-day business of lawyering.

As I have said, although the financial commitment looms large in the attitude of public lawyers, public lawyers seem to feel that Bar membership holds nothing for them; and, as a group, public lawyers tend to be less involved in Bar activities. According to Frederick "Fritz" Aspey, in his March 1991 President's Message to the Arizona Bar, this attitude seems to be nationwide. I share his puzzlement over the importance of Bar dues since many private lawyers in Utah earn much less than public lawyers. Although I am unaware of any current survey figures in Utah, a recent survey in Colorado revealed that Colorado lawyers have an average annual salary of $40,000—exactly the same as in 1982. I suspect that the Utah experience would be similar to that of Colorado. I also suspect that public lawyers, as a group, are making more money than they did in 1982, and that many, if not most, public lawyers in Utah make more than $40,000 a year.

I am confident that every public lawyer in Utah has chosen a career in public service because of a sense of dedication to society and a desire to contribute to the well-being of all citizens even though employment in the private sector may, under some circumstances, be more lucrative. This same attitude, if carried over to the Bar, could make a significant difference in public lawyer participation in and perception of the Bar.

The notion expressed by the public lawyers to the effect that the Bar does nothing for them, is totally misplaced. The Bar *is* its members, sections and committees. The administration of the Bar is there to serve the needs of the members, sections and committees which are charged with carrying out both traditional regulatory and public service functions. The Bar has long had a Government Law Section, by and through which the needs of public lawyers can be addressed, and the contributions of public lawyers can be channeled. If the Government Law Section is not doing what public lawyers think it should do, perhaps more involvement by public lawyers would be appropriate. In addition, the existence, mission and functioning of Bar sections and committees are not chipped in stone. If the needs and obligations of public sector lawyers are not being adequately addressed, the Bar Commission needs to know and needs to be provided the information necessary to address those matters.

The Bar exists to provide the machinery and a forum for all lawyers to address and serve the needs of the profession, the public, and the judicial branch of government. The "business end" of the Bar is not its administration and officers, but its members, sections and committees. The scope and depth of activities of committees and sections are driven by their members, not by the Bar.



Thoughts on the Supreme Court's Special Task Force on the Management and Regulation of The Practice of Law

By H. James Clegg

I would like to discuss my thoughts concerning the Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law. The members of that group deserve purple hearts for devotion to duty, patience and dedication. Interim reports were distributed at the Bar Convention in Sun Valley. Those reports were put together hastily, without benefit of the minutes of the final meeting, and admittedly contain errors; meeting with local bars have since been held at which many of you have been addressed by a representative of the Task Force to provide further insight into the process and deliberations.

As you probably know, before the Task Force began the Supreme Court had employed the management/consulting firm Grant Thornton to study the Bar's past performance in the light of the petition for dues increase. Perhaps I am being thin-skinned but, as a sitting Commissioner, the most humiliating part of the interim report is the suggestion that Grant Thornton "discovered" financial problems in the Bar. All the problems were, even in hindsight, fully and accurately "discovered" by the Commission and staff. To my information, the Court retained Grant Thornton to check our judgment that the requested dues increase was (1) necessary, and (2) in the right amount.

INTEGRATION

The Task Force spent many hours studying the issue of whether the Bar should remain integrated (mandatory) or whether there should be a schism, with "essential" matters such as discipline and admissions handled by the State and social and societal functions handled by a new, voluntary organization. At the inception many, perhaps a majority, leaned toward this two-organization idea. The issue of integration was studied in great depth, obtaining the experience of numerous other bars of differing persuasions, with the result that the vote to remain integrated was unanimous.

BAR PROGRAMS

Similarly, and perhaps to the Court's surprise, the Task Force wants us to keep and even to expand all programs. The members, and perhaps especially the lay members, believe strongly that the Bar and its individual members have a strong duty *pro bono publico*; sponsoring and financing programs such as Tuesday Night Bar provides a framework by which practitioners can readily and efficiently reach out to the public. Those who decline to do so at least participate financially to make the outreach possible.

PUBLIC RELATIONS COSTS

The Task Force generated mixed opinions on the need and value of retaining expert assistance in public- and press-relations. Lawyers, by the very nature of the calling, engender a negative press and hostility on the part of unwilling participants in the legal process. Some of the Task Force members feel we do too little in public communications and p.r.; others feel that a profession has no business spending money, particularly dues funds, to enhance its own perception with the public. My own attitude is that no one else is going to do it for us and the good we do for the public and the system should at least be entitled to equal time with the press we get for ruining the entire American civilization. As an example, two of the four August issues of *Time* were largely devoted to lawyer-bashing.

LAW & JUSTICE CENTER

Keeping the building may, in hindsight, have been a foregone conclusion, considering the investment, its ownership and possible loss-on-sale. Nevertheless, the matter was well-considered and the is-

sue was approached from fresh perspectives of business folks and lawyers who were not burdened with historical perspective.

The Task Force actually came up with some excellent, new ideas on building ownership and management. Din Whitney and Lyle Campbell were convinced that the present arrangement (co-tenancy by the Utah State Bar and the Law and Justice Center, Inc.) is neither useful nor efficient. They proposed to merge the Utah Law and Justice Center, Inc. into the Bar, but Ned Spurgeon advised this would be unwieldy from a tax perspective. They then proposed that the Utah Law and Justice Center, Inc. lease its asset to the Bar on a triple-net arrangement, doing away with the paper debits, credits and balances which are so difficult to deal with. Further, the cost of auditing the Utah Law and Justice Center, Inc. would be drastically reduced.

INCORPORATION

Further, for good or ill, the Bar Commission has incorporated the Bar as a nonprofit corporation as the Task Force suggested. Most state bars, even the integrated ones, are not incorporated but are *sui generis*. We could not learn, or verbalize, good reasons for being *sui generis*, however; on balance, the Commission and the Task Force feel it wise to incorporate.

APPOINTED APPEALS BOARD

A majority of the Task Force believes that a separate board, appointed by the Supreme Court, should be appointed to hear all bar appeals, such as those involving discipline, admissions and MCLE. The feeling was that the perception, particularly the public's, might be enhanced if the "Bar" were not its own policeman. There was unanimous (I believe) opposition to turning these tasks over to arms of the administrative branch; rather, they should remain part of the judicial function. The issue is whether they should be delegated, as at present, to the elected representatives of the Bar or should be given "independence" by making direct judicial appointments.

There are advantages and disadvantages to both systems; even sitting commissioners have differing opinions as to which would be "best", recognizing there are trade-offs. As commissioners, we are sensitive to any proposal which will increase costs of Bar governance and any new body or layer is likely to do so. On the other hand, perhaps matters which would otherwise result in litigation may be diverted into an ADR function of the new board, reducing both out-of-pocket costs and overhead; certainly, if better results can be obtained for the parties and the Bar, that alone might justify any higher costs.

STRUCTURE

Retaining a commission-form of government was a tight issue, with a considerable number favoring a parliamentary/prime minister form. Here, however, rather than an either/or decision, like the integration and building questions, there was a lot of compromising and trading off, to yield the present recommendation, which may well not be entirely palatable to anyone.

Those who favor a large group of policy-makers believe that involvement of more people necessarily results in better communication, better understanding and more sympathy to the public responsibilities of the bar and lawyers. These assumptions are probably correct, but they are costly in both money and efficiency. It is our experience that many lawyers do not wish to do bar work, at least at all phases of their lives, preferring other callings such as church work, serving in state and local government positions, politics, and a multitude of other worthwhile endeavors for which lawyers are well-suited. Many of these would make excellent bar officials but believe they are more needed elsewhere in our communities. The number of lawyers already serving is quite large, when you add up the section officers, committee members and local bar officers.

Lawyers are divided on the issue of lay representation on the Bar Commission. Certainly they provide wonderful insight and make great contributions in our discipline system and have provided great service in special projects, including the committees associated with the building financing, construction and uses. Whether they will make the governance of the practice appreciably better remains to be seen.

To our surprise, Ray Westergard of Grant Thornton spoke very strongly against tampering with the present commission structure. He said that the structure didn't cause the Bar's problems and it has reacted well to solve them.

The issue of more or fewer rural commissioners remains a hard one, and there is no clear answer. Certainly a commissioner from Vernal won't be well-known in Cedar. However, he might be just as well known as a Salt Laker is to his or her constituents.

The present division boundaries are synonymous with the judicial districts, except that the Fifth-Eighth Judicial Districts are combined into the Fifth Division. Each commissioner from the Third Division represents 450 lawyers; the commissioner from the Fourth represents 342; the Second, 326; the First, 70 and the Fifth, 183. Under the Task Force's proposal, two additional rural commissioners will be added, so that each represents an average of 61 lawyers. Just where is the "perfect" balance between the principle of one-man/one-vote and adequate rural representation?

Additionally, the Task Force proposes that the Supreme Court have discretion to appoint up to six additional commissioners, up to four of whom shall be lawyers. Of those, consideration would be given to appointments of women lawyers, minority lawyers, government lawyers and public interest lawyers. Of the up-to-two non-lawyers, one should be a representative of the general public and the other should be from a law-related group, such as paralegals' association or the police. These are (presumably) voting members and are in addition to the present non-voting (ex-officio) members, consisting of the two law-school deans and young lawyers' president. Nothing was said about the state's two ABA delegates who have also been serving in an ex-officio capacity.

CONSULTANT

The Task Force recommends that the Bar retain, on a continuing basis, a professional to advise on ways to achieve better governance and communication. This does not contemplate a *financial* advisor; it is more of a human-relations professional who can show us how to like each other more. Maybe that is needed but, again, there is a budget factor to be considered. I am probably too close to the trees to see the forest, but I really question whether this is necessary; perhaps my questioning it proves that it is.

Even if all members of the Task Force are not in sympathy with all the recommendations (and they are not), nevertheless the effort expended and good will shown have been great; study of bar philosophy (and competing philosophies) has been helpful to understanding our institution and how to maximize its usefulness to our society, our courts and our membership.

We anticipate that the Supreme Court will invite your comments on the final report of the Task Force. We urge you to become interested and involved in the process rather than watching passively and then complaining about the result. We will all have to live with it and should try to

Recent Developments in Utah Employment Law

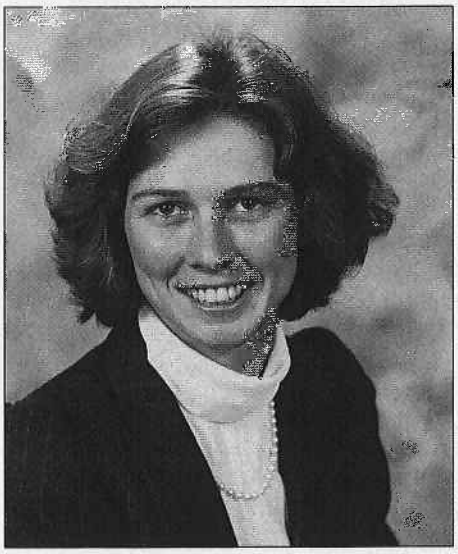
By Charlotte L. Miller

The following article is taken from portions of a presentation given in May by Charlotte L. Miller at the Utah State Bar Annual Corporate Counsel Section Seminar. The Seminar included presentations on litigation management; securities; trademark portfolios; and recent developments in employment law, which was the topic of Ms. Miller's presentation. The comments that follow are limited to recent Utah Supreme Court cases impacting employment law. Preparing for the implementation of the federal Americans with Disabilities Act and responding to the enactment of the federal Older Workers Benefit & Protection Act were also discussed at the presentation.

During April and May of this year, the Utah Supreme Court issued its decisions in two long-pending employment-related cases: *Hodges v. Gibson Products Co.*, 811 P.2d 151 (Utah 1991) and *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991). These cases address legal issues that impact such practical aspects of the workplace as language in handbooks, criminal claims against employees, and advising others of the reasons for an employee's termination.

I. HODGES V. GIBSON PRODUCTS COMPANY

Shauna Hodges was a bookkeeper at Gibson's Discount Center. In September 1981, the store manager, Chad Crosgrove, confronted Hodges and accused her of stealing $580 that had been placed routinely in a cash register money bag at the end of a previous business day. Hodges was suspended from work on September 8, 1981, after she refused to resign. Hodges also refused to pay Gibson the



Share holder at Watkiss & Saperstein; President, Young Lawyers Section, Utah State Bar; ProBono attorney of the year, 1990; Adjunct professor University of Utah College of Law.

$580. Crosgrove along with Gibson's auditor and general manager made an accusation of theft against Hodges to the police on September 9. Hodges was arrested and charged with theft. The case was bound over after a preliminary hearing and a trial was scheduled for May 12, 1982. Gibson did not investigate the possibility that the money was stolen by Crosgrove rather than Hodges, even though Crosgrove had access to the cash and had made inconsistent statements about the missing cash. Prior to Hodges' trial, Gibson discovered that Crosgrove had been stealing both money and merchandise from Gibson; however, Gibson did not inform the prosecuting attorney in Hodges' criminal case of Crosgrove's thefts until the evening before the scheduled trial, almost two months after Gibson learned of Crosgrove's thefts. The prosecution dismissed the theft charges against Hodges; however, Gibson fired Hodges stating that she "failed to follow proper procedures." *811 p.2d* at 154-55.

Hodges sued Gibson and Crosgrove for malicious prosecution and intentional infliction of emotional distress and sued Gibson for wrongful termination. The jury found Gibson and Crosgrove liable for malicious prosecution and Gibson liable for wrongful termination but found no liability for intentional infliction of emotional distress. The jury awarded Hodges $70,000 in compensatory damages and $7,000 in punitive damages against Gibson, and $10,000 in compensatory damages and $1,000 in punitive damages against Crosgrove. *Id.* at 155.

Gibson and Crosgrove appealed claiming that the evidence was insufficient to support the malicious prosecution claim. Also, Gibson claimed that the jury instructions were erroneous with respect to the malicious prosecution and wrongful termination claims and the damages. *Id.* at 155. The opinion is written by Justice Stewart with Justice Durham concurring. Justice Howe in a separate opinion concurs with certain portions of Stewart's opinion. In his own separate opinion, Justice Zimmerman joined by Justice Hall also concurs with only certain sections of Stewart's opinion. The opinions address issues that are of concern to both employers and employees.

CRIMINAL ACTION BY AN EMPLOYER AGAINST AN EMPLOYEE

The Utah Supreme Court affirmed the jury's verdict on the malicious prosecution claim. The two elements of malicious prosecution[1] reviewed most closely by the Court were whether the defendants had probable cause to initiate the criminal proceedings and whether the defendants used the criminal proceedings for an improper purpose. The improper purpose of Crosgrove was to cover up his own theft. The Court indicated that the jury could have concluded that the improper purpose of Gibson was to obtain the missing money from Hodges. The Court held that an employer's use of criminal prosecution to coerce payment of missing funds was an improper purpose which could render the employer liable for malicious prosecution. The Court states:

> The only proper purpose for initiating criminal proceedings is to bring an offender to justice . . . . To use criminal proceedings to force another to pay money is unjustifiable, and that is *so even if the accused lawfully owes the money to the accuser*.

Id. at 161 (emphasis added).[2] In a footnote to the paragraph in which the above comment appears the Court says that an employer may give an employee the choice of returning stolen money or facing criminal charges, if the employer is correct about the employee's guilt:

> We do not mean to imply that an employer may not present an employee who is factually guilty of theft the choice of returning stolen property or being subjected to a criminal prosecution. But an employer, or someone else in a similar position, must be correct on the issue of guilt. Ordinarily, one who seeks to recover property improperly obtained or detained must resort to civil process, and that is especially true when there is some legitimate issue as to whether the one in possession has lawful possession or when the payment of a debt is the issue. Clearly, use of the criminal law, or threat of this use, is inappropriate in such cases.

Id. Such a choice, no matter how artfully phrased, is using criminal proceedings to force an employee to pay money to the employer, which in the main text of the opinion the Court says is unjustifiable. If the Court is making a distinction between threatening to initiate criminal proceedings and actually initiating criminal proceedings, an employee may make the threat as long as the employer never carries out the threat. Then, there is no malicious prosecution. However, as the Court states at the end of the opinion, the criminal statutes for false criminal accusations and theft by extortion may apply. *Id.* at 168.

The evidence the Court cites in support of Gibson's improper purpose is that "a Gibson's official told Hodges that Gibson would not prosecute her if she would pay the missing $580" and "**when Hodges refused to pay, Gibson presented its accusation to the police the next day.**" *Id.* at 161. The Court may have been influenced by Gibson's treatment of Hodges after the criminal proceedings were initiated. The Court takes care to cite the following facts in the same paragraph:

> The day after the prosecutor dismissed the criminal case against Hodges and six weeks after Crosgrove's defalcations came to light, Gibson fired her "for not following proper procedures" not only did Gibson use the threat of a criminal prosecution in an extortionary fashion, but even after Gibson had clear notice that Crosgrove might well have been the responsible person, it still left Hodges to live with the embarrassment, dread, and expense of a criminal trial for a lengthy time.

Id. Gibson's treatment of Hodges after the criminal proceedings were initiated is not evidence of Gibson's improper purpose of forcing Hodges to pay the $580. These facts may be evidence that Gibson lacked probable cause in allowing the criminal proceeding to continue against Hodges or that Gibson acted in bad faith or with malice. However, based on the Court's broad language, the bad faith or good faith of Gibson was not relevant. Even if Gibson had performed an exhaustive investigation and found no evidence of Crosgrove's misdeeds, Gibson would not have been correct about Hodges' guilt and Gibson would have been using criminal proceedings to force Hodges to pay money. If Gibson had reported the additional facts to the prosecutor immediately, Gibson's overall conduct would not appear so egregious, and the jury and the Supreme Court may have been more willing to consider Gibson's good faith.

An employer must be cautious in relying on criminal prosecution to address possible employee misconduct. Although an employer may report to the proper police or prosecution agency the facts which may lead to criminal prosecution, an employer must be cautious to report all facts and to avoid becoming overzealous about the criminal prosecution or involved in such a manner that results in seeking vengeance. If an employer purports to have performed an investigation, then the investigation should be thorough.

The employer's responsibility to investigate and report all the facts in a criminal prosecution is supported by the Court's finding that the jury in *Hodges* was entitled to believe that Gibson did not adequately investigate the facts and failed to present all of the facts to the prosecutor. In determining the sufficiency of Gibson's probable cause, the Court specifically reviewed a jury instruction regarding Gibson's duty to investigate which stated:

> The officers and agents of Gibson Products Co. should have been entirely familiar with the facts and circumstances surrounding the allegations they made to the West Valley police concerning the plaintiff. They were required to be sufficiently informed of the facts to initiate the criminal proceedings without any further investigation.

Id. at 160. The Court agreed that the first sentence was "inappropriately absolute," but the second sentence adequately modified the instruction to prevent reversible error. The Court stated that the jury reasonably could have believed that given the inconsistent and suspicious statements of Crosgrove and Crosgrove's access to the money, that Gibson should have taken more efforts to investigate Crosgrove and should have been less likely to act on Crosgrove's recommendations. There was sufficient probable cause for a prosecutor to succeed at a preliminary hearing. Such probable cause was not helpful in Gibson's defenses because it was Gibson who had given the police and prosecutor incomplete information about the theft. Gibson's mistake was not only in performing a poor investigation, but in giving the police only partial information.

If the employer must be correct about the guilt of the employee before presenting an employee with the choice of returning stolen property or being subject to criminal prosecution, the employer has a high duty to perform a thorough investigation of the improper conduct. However, even if an employer performs an exhaustive investigation and believes in good faith that an employee is guilty, if the employer is wrong, the employer risks being accused of malicious prosecution.

The question for employers is what course of action to take when cash is missing. The options available to the employer are:

1. Terminate the employee
2. Request the return of the money
3. Initiate a civil action
4. Report the incident to the police for a criminal investigation

Combining the second and fourth alternatives is not advisable. The employer should choose between requesting the money and pursuing criminal action unless the two can be sufficiently separate in time or other manner to prevent even the appearance of a threat or improper purpose. An employer who is concerned about bringing an employee to justice in order to prevent the employee from damaging others should consider foregoing asking for the return of money or delaying such request until at least after reporting the facts to the authorities. Any presentation to the authorities should be complete and even handed.

Employers whose employees have consistent access to cash should establish and enforce clear and precise written cash procedures. Then, the employer can focus on whether cash procedures have been followed rather than on criminal guilt. If the procedures are not followed, the employer may terminate the employee. To obtain any missing cash, the employer may decide to file a civil action against the former employee.

Employers and employees both are probably best served by keeping separate the criminal and civil aspects of any disputes. Employers should focus on whether the employee has violated the policies, procedures, and rules of the employer rather than whether the employee has violated a criminal statute.

PUNITIVE DAMAGES AND VICARIOUS LIABILITY

The jury awarded punitive damages to Hodges both from Crosgrove and Gibson. The full Court affirmed the punitive damages award based on Crosgrove's managerial capacity and the scope of his employment pursuant to *Restatement (Second) of Torts*, ~909 which states:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Justices Stewart, Durham and Howe also found punitive damages appropriate by imputing Crosgrove's malice to Gibson, but Justices Zimmerman and Hall specifically do not join in that portion of the opinion. *Id.* at 159, 168. Imputing Crosgrove's knowledge to Gibson was also a basis on which Justices Stewart, Durham, and Howe affirmed the malicious prosecution verdict, relying on *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989).

WRONGFUL DISCHARGE: TORT OR CONTRACT?

The jury in *Hodges* awarded punitive damages, but it was not clear whether those punitive damages were awarded for the wrongful discharge claim or for the malicious prosecution claim. The Court upheld the punitive damage award in connection with the malicious prosecution claim without specifically addressing whether wrongful discharge is a tort or contract claim. Justice Stewart stated:

> We do not address the issue of whether the public policy exception to the employment-at-will doctrine sounds in tort or contract, because that issue was not raised in either the trial court or this Court. A decision on that issue should await a proper presentation of the issue. Nevertheless, the answer to that question would, of course, ordinarily determine whether punitive damages may be awarded in an employment termination case based on an exception to the at-will doctrine.

Id. at 164. Justices Zimmerman, Hall and Howe joined in the part of the opinion that upholds the punitive damages award on the grounds that the jury was permitted to render a general verdict and as long as the verdict was appropriate under one of the plaintiff's theories, the verdict should stand. *Id.* at 168.

On May 7, 1991, the Utah Supreme Court heard argument in *Peterson v. Browning*, Case No. 400401. The Honorable Thomas Greene of the U.S. District Court for the District of Utah had certified the following question to the Utah Supreme Court:

> Does an action for termination of employment based upon the public policy exception to the employment-at-will doctrine for violation of or refusal to violate federal, other state or Utah law sound in tort or contract?

The Court's decision in *Peterson* should provide guidance to employees and employers about the availability of punitive damages and the appropriate defenses in employment cases.

PUBLIC POLICY EXCEPTION TO AT-WILL DOCTRINE

Justice Stewart indicates that *Hodges* is the first case in which the Court has sustained a public policy limitation to the employment at-will doctrine. 811 P.2d at 166. As a result, Justice Stewart, with the concurrence of Justice Durham, addresses the appropriateness of the jury instruction applicable to that issue. However, Justices Zimmerman and Hall specifically do not concur with Justice Stewart's discussion in that section and Justice Howe concurs only in the result.

The purpose of the public policy exception to the at-will doctrine is set forth in Section IV of the opinion:

> It is not the purpose of public policy restrictions on the at-will employment doctrine to deprive employers of all discretion in discharging an indefinite-term employee. At this point, it is sufficient to declare that the public policy that may be the basis for a wrongful discharge action should be defined in the first instance by legislative enactments and constitutional standards which "protect the public or promote public interest." *Berube*, 771 P.2d at 1043. In addition, relevant public policy may also be found in judicial decision. *See Id.*
>
> Most criminal statutory prohibitions provide narrow and clear-cut definitions of a specific public policy designed to protect both society at large and specific individuals from antisocial acts. The law ought not to allow those prohibitions to be circumvented by employers who seek to secure an objective prohibited by the criminal law while avoiding a technical violation of the law because of the means used. When the means used to accomplish a prohibited end, that is, the discharge of an employee, runs counter to public policy, an action for wrongful discharge is an appropriate way to protect both the public interest and the employee from

an employer's oppressive use of power.

Id. at 165-66. The public policy violated in *Hodges* arose from the criminal statutes for false criminal accusation and theft by extortion. Employers should take note of Justice Stewart's reiteration in this portion of the opinion of the importance of using criminal proceedings only for a proper purpose.

II. BREHANY V. NORDSTROM, INC.

Brehany v. Nordstrom, 812 P.2d 49 (Utah 1991), is a unanimous decision that summarizes the employment-at-will opinions issued by the Utah Supreme Court. Reading the first few pages of the opinion will help bring a practitioner up to date on the current state of employment-at-will in Utah.

Dennis Knapp, Barbara Knapp, and Cathy Brehany were employees of Nordstrom for several years. Following an investigation by Nordstrom of drug use by its employees, Nordstrom told Dennis Knapp that he was fired for using drugs, Barbara Knapp that she was fired because she was Dennis Knapp's wife, and Cathy Brehany that she was fired for supplying drugs to employees.

Plaintiffs filed claims of wrongful discharge, breach of contract of employment, intentional infliction of emotional distress, and defamation against Nordstrom. The trial court dismissed the claims for wrongful discharge and intentional infliction of emotional distress prior to trial. After hearing the evidence at trial, the trial court granted a directed verdict for Nordstrom for the defamation claims and the breach of contract claim. However, the trial court allowed the jury to determine if Nordstrom breached an implied-in-law covenant of good faith and fair dealing.

The jury awarded a judgment for $285,000 in favor of plaintiffs for wrongful termination of employment based on a breach of an implied-in-law covenant of good faith and fair dealing. Nordstrom appealed the judgment and plaintiffs appealed the dismissal of the claims of breach of contract and defamation.

CONTRACT CLAIMS

The Court reaffirmed its holding in *Berube v. Fashion Center Unlimited*, 771 P.2d 1033 (Utah 1989), and subsequent cases, that an employer may limit its right to discharge by the terms of its employment manual. The Court reiterated that whether the terms of an employment manual become implied terms of a contract with employees is primarily a factual issue, but may be decided as a matter of law when it is plain that a manual does not limit the right to discharge at will.

The Nordstrom employee manual was titled, *Nordstrom History, Policy & Regulations*. The manual was signed by each plaintiff and contained the following statement:

> I have read and understand the preceding pages of the Nordstrom Policy and Regulation manual. I understand that my continued employment is contingent upon my adhering to the policies stated therein.

The manual stated that certain offenses could result in discharge after written warning was given to an employee. For other offenses, immediate termination could result without written warning. Some of the offenses for which an employee could be immediately terminated without written warning included unbecoming conduct bringing criticism upon Nordstrom, violation of criminal law, and introduction, possession or use of habit-forming drugs.

Implementation of Policies, Procedures and Rules will be the key to preventing lawsuits.

The Court does not address the sufficiency of Nordstrom's investigation of drug use even though that issue was briefed by the parties and there was evidence that Nordstrom's investigation was superficial. If Nordstrom had referred the drug use to the police, the investigation process may have been examined, but Nordstrom handled the matter internally. Also, the Knapps, but not Brehany, admitted to some drug use. Otherwise, Nordstrom's investigation would be relevant to only a breach of good faith.[3]

Because the evidence showed that the Knapps had used drugs while on buying trips for Nordstrom,[4] the Court found that they were justifiably terminated under the terms of the employment manual. It was not clear whether Brehany had violated the provisions of the manual which would entitle Nordstrom to discharge her. Therefore, the Court remanded Brehany's breach of contract claim.

The Court reversed the judgments for breach of implied-in-law covenant of good faith and fair dealing and held that although contracts generally are subject to an implied covenant of good faith, the purpose and function of that implied covenant generally differs from the purpose and function of the so-called covenant of good faith and fair dealing in employment contracts. A covenant of good faith cannot be construed to establish new independent rights or duties not agreed upon by the parties nor can it be used to nullify a right granted by a contract to one of the parties. The Court stated:

> The covenant of good faith . . . cannot be construed to change an indefinite-term, at-will employment contract into a contract that requires an employer to have good cause to justify a discharge. Ordinarily, the at-will doctrine is not made a substantive term of an employment contract which the parties specifically agree to. Absent such an explicit term, an indefinite-term employment contract raises only a presumption that the employment is at will, as *Berube* held. Of course the at-will doctrine may be altered by terms contained in an employment manual. **Citations omitted.** However, in the absence of express terms limiting the right of an employer to discharge for any or no reason and in the absence of provisions establishing procedures by which a discharge should be effectuated, it would be inconsistent to hold that an employer, on the basis of the implied covenant of good faith, is bound to a substantive limitation on the employer's right to discharge.

Id. at 55. Thus, an employer retains a right to discharge at will unless it contracts away that right.

In order to prevail under a breach of contract theory, a plaintiff must show that (1) a provision limits or modifies the employer's right to discharge its employees and (2) the employer violated the provision. When it is plain that a manual does not limit the right to discharge at will, the case does not need to go to a jury. However, if the manual purports to limit an employer's powers of discharge, a factual question exists as to whether the terms of

the manual become implied terms of a contract of employment. Evidence that is relevant to determine the factual issue includes the language of the manual, the employer's course of conduct, and pertinent oral representations. *Id.* at 57.

Because the Knapps violated conduct specifically stated in the employment manual, the Court did not have difficulty finding that their terminations were justified. However, because the Nordstrom manual was ambiguous regarding whether infractions other than those listed could result in termination, the Court could not rule on Brehany's discharge. Rather, the Utah Supreme Court indicated that the trial court would first have to determine whether the Nordstrom rules were exclusive or if other possible grounds for discharge existed. Then the trial court may need to determine whether Brehany violated one of the listed rules. Depending on the trial court's findings on those issues, Brehany may have been entitled to a prior written warning before discharge.

The *Brehany* case causes employers and employees to continue to review their employment manuals and personnel handbooks to determine the purpose of those handbooks.[5] Employers began using handbooks for the purpose of advising their employees of appropriate expectations; policies of the employer; the rules and procedures of the workplace; and various information relative to employment. Some employers have been revising their handbooks for use in defending litigation. However, in litigation what will be relevant is the expectations of and representations made to employees through the handbook and other communications. Therefore, employers should continue to view handbooks primarily as a management tool rather than a litigation tool. Employers must decide whether they want to manage as an at-will employer, whether written warnings are appropriate for some offenses, and other issues that go beyond the realm of litigation and into the realm of employee morale, management-employee relations, productivity, and employee turnover. In addition to an employee handbook, an employer must determine how reliable supervisors are in evaluating, training and assisting employees in improving performance or changing behavior. The implementation of its policies, procedures, and rules will be the key to preventing lawsuits. For an employer, preventing a lawsuit is usually more valuable than winning a lawsuit; just as for an employee continued employment is usually more valuable than a lawsuit.

DEFAMATION

Nordstrom advised its managers and buyers that the plaintiffs' terminations were related to drugs. Since the Knapps admitted that they used illegal drugs while engaged in their employment duties at Nordstrom, the Court agreed with the trial court that truth was an absolute defense to the Knapps' defamation claims.

The Court held that Brehany's defamation claim was barred as a matter of law under the defense of a conditional or qualified privilege. To rebut the privilege, Brehany would have to prove malice or excessive publication by Nordstrom. Brehany did not assert malice by Nordstrom so the court did not address malice, except to provide an appropriate definition.

The Court identified three circumstances that can give rise to a qualified or conditional privilege:

1. The statement is made to protect a legitimate interest of the publisher.

2. The statement protects a legitimate interest of a recipient of the publication or a third person.

3. The statement advances a legitimate common interest between the publisher and recipient of the statement.

Communication to employees and to other interested parties concerning the reasons of an employee's termination falls within the qualified privilege.

The trial court found that the statements about Brehany's terminations were made only to management-level employees. Justification offered by the Court for Nordstrom's statements was to deter drug use and advise employees that the policy to terminate employees for drug use was going to be enforced.[6]

The qualified privilege may be a broad defense for employers in providing information about former employees, not only to current employees but to other employers. However, there is probably a more compelling interest for an employer to preserve employee morale and deter internal drug use than to warn future employers about possible drug use by clothing salespersons. If a former employee presents a danger to others, such as a school teacher who allegedly molests children or a transportation employee who allegedly uses drugs on the job, the former employer may assert a legitimate interest in warning potential employers. Such an interest also may exist in embezzlement cases. Also, in those situations an employer may need to weigh the risk of being liable to a subsequent employer or an injured third party against the risk of being liable to a former employee.

An employer must remember that, while truth is an absolute defense to defamation, a qualified privilege can be overcome. Employers should carefully consider their motives in passing on information about former employees, the audience, the precise language used, the potential harm to the former employee, and the factual basis for the statement.

To avoid litigating those issues, the trend has been to give almost no information about former employees. This approach may work for potential new employers but the work force from which the employee was terminated is not so easily quieted. Employees need to know whether their own jobs are at risk through layoffs, arbitrary firings or other problems. If not, employee morale and productivity could seriously injure the employer and employees. Legal analysis may not be helpful in solving those practical concerns but only in advising employers of potential risks. Good management and knowledge about the specific work force is still the most useful tool to solve the practical problems and prevent them from becoming lawsuits.

[1]The four elements of malicious prosection are (1) defendant initiated or procured initiation of criminal proceedings against an innocent plaintiff; (2) defendant did not have probable cause to initiate the prosecution; (3) defendant initiated the proceedings primarily for a purpose other than that of bringing an offender to justice, and (4) the criminal proceedings terminated in favor of the accused.

[2]The Court makes this same statement again in Section IV, Wrongful Termination, in the discussion of the crime of theft by extortion. *Id.* at 167.

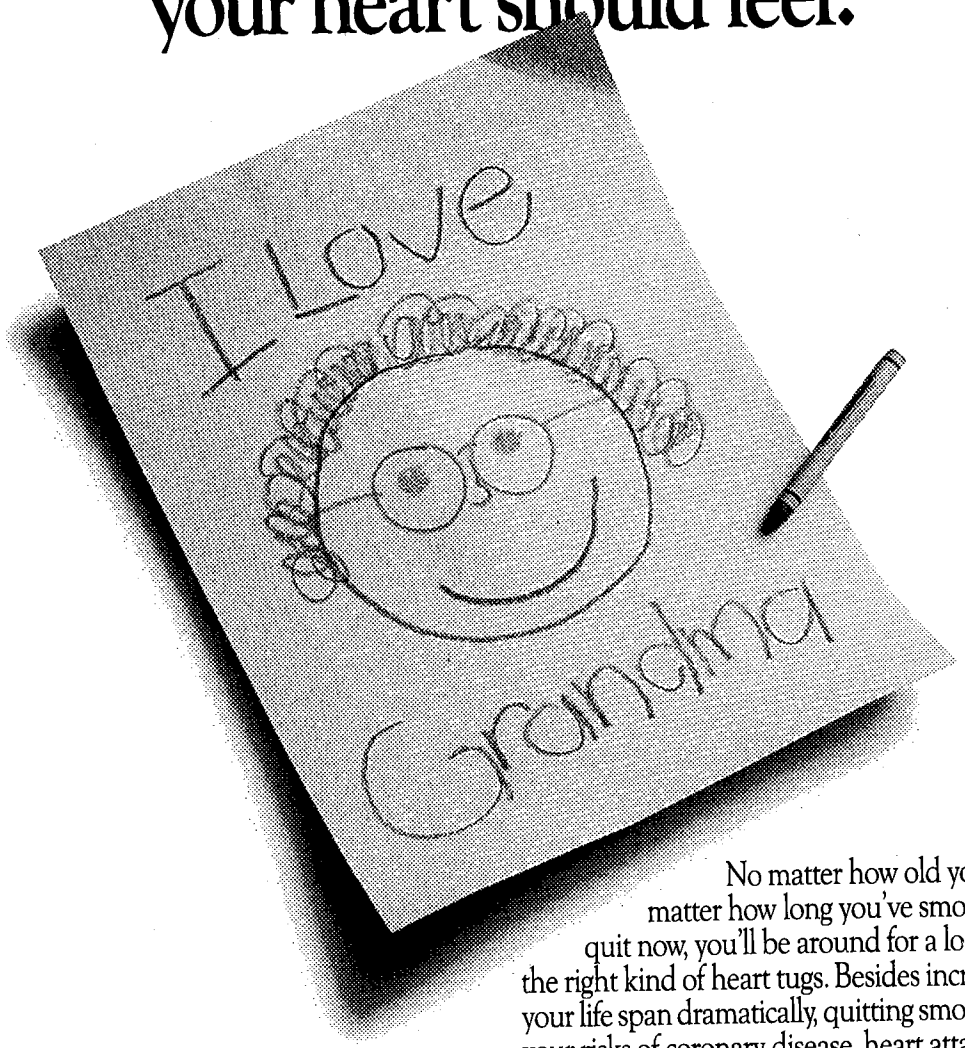
[3]An argument could be made that the damage resulting from loss of employment could be equally or more devastating than a first-time conviction of drug use. On that basis, an employer's investigation should be thorough and based on first-hand knowledge whether the result is termination or criminal charges.

[4]There is no discussion in the opinion of the timing of the drug use by the Knapps, which may have occurred several years earlier when Dennis Knapp had a different position with Nordstrom. Because the court did not address that issue it is not clear how far back in time an employer may reach to identify misconduct that justifies a discharge. The length of time between the infraction and the discharge could be evidence of pretext in discrimination cases. In wrongful termination cases, it may be evidence that the employers' rules are not enforced and are therefore not truly the rules of the workplace. In *Brehany*, the Court does not address whether failure to enforce the rules on a consistent basis impacts the employer's defense to a wrongful termination claim.

[5]Employers also should review *Johnson v. Morton Thiokol, Inc.*, Utah Supreme Court, September 5, 1991, No. 801315. In *Johnson*, the Court affirms summary judgment for the employer on the basis that the employment relationship was at-will and it was not diminished by the employer's compliance with the disciplinary procedures of warnings, suspension and dismissal in the handbook. The handbook also contained language disclaiming any contractual relationship.

[6]Although Nordstrom was successful on appeal, employers should be aware of the cost in time, money and energy of an eight-week jury trial and a six-year appeal process. Employers may want to consider less expensive methods to deter drug use, such as individualized warnings about suspected drug use, suspensions, and oral emphasis of written rules.

This is the only tug your heart should feel.



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U.S. Department of Health & Human Services

Judge-Versus Attorney-Conducted Voir Dire[1]

By Fred D. Howard

Not long ago I watched the jury selection for a trial proceeding. The prospective jurors were asked the standard litany of questions and at the end, whether they had any adverse feeling for any of the litigants or their attorneys. The reverie was interrupted as one of the prospective jurors stood and said, pointing, "I do. I was involved in a legal dispute in which the other side was represented by that lawyer, and I don't care for that lawyer there." The lawyer was obviously surprised and scrambling to recollect who the individual was while the court dismissed the prospective juror for cause. Law can be a hard business. There are a lot of things that can threaten disaster at any turn: vital witness may die, clients fail to follow examination questions, experts waffle in their opinions, records are lost or destroyed by agencies, opposing counsel fail to ask proper questions, and judges don't always read the law. One of the worst threats is to try a case to people with adverse feelings and attitudes which are masked from litigants. Voir dire is designed to prevent that problem, but of practice and habit we now find that it is a procedure whose effectiveness has seriously eroded. The loss has occurred with the conducting of voir dire by the judiciary, something good lawyers know can be the loss of a case before it begins.

Voir dire, a questioning and selection of prospective jurors, is a critical part of every jury trial. In fact, if asked what part of the jury trial is most important, experienced trial lawyers usually respond: "the voir dire." The sixth and 14th amendments to the U.S. Constitution guarantee criminal defendants the right to a fair and impartial jury of one's peers. Whether a criminal or civil case, however, the court's burden is the same, to ensure that justice is served. Voir dire plays a big part in meeting that burden.

FRED D. HOWARD is a partner of the law firm of Howard, Lewis & Petersen, of Provo, Utah. Prior to his current position, he practiced civil law in Price, Utah, and from 1979 to 1983 he served as a deputy county prosecutor for Carbon County. He received his law degree in 1979 from the J. Reuben Clark Law School, Brigham Young University.

Literally translated, *voir dire* means "to speak the truth,"[2] or as some scholars have maintained, "to see them talk."[3] The prospective jurors are questioned to discover conscious or subconscious bias and prejudice, and after exercise of challenges, a jury is selected by a process of elimination. The ultimate aim is to weed out the bad apples by probing the jurors' minds to discover preconceptions which would keep a juror from being objective in viewing and weighing the evidence. Any limitation of that process then is a concern for all in the judicial system: the judges, the attorneys and the litigants.

Unfortunately, in all too many cases, voir dire is conducted in a perfunctory and hurried fashion with a desire to get the trial started. Too often the judiciary approaches it with the attitude of "let's get it over with and get on to the evidence." This desire for speed results in an inadequate examination. Perfunctory questioning of the occupation, marital status, children, residence, employment, relationship, belief in concepts of innocent until proven guilty, etc. of jurors may be conducted en masse to determine if the juror satisfies statutory requirements for serving; but little personalized questioning occurs by which attorneys obtain information to intelligently exercise the peremptory challenge. This cursory group examination is superficial and with limited discussion, lawyers do not hear the jurors "speak the truth." In too many cases, beyond the identifying questions of name and employment, they don't hear them speak at all. Answers then become mechanical, detached, neutral responses. It takes a terribly honest and vocal juror to respond negatively to a trial judge's question of whether he or she can serve fairly and impartially.

In my own experience, I requested a specific question be asked in voir dire during one trial proceeding. The judge refused to ask the question. At the conclusion of the general voir dire examination, a prospective juror stood and acknowledged his personal adverse feelings regarding the proceedings. This prompted

further in camera examination which revealed a specific prejudice—one which the requested voir dire question would have revealed. The juror was dismissed for cause. Still, the judge refused to ask other prospective jurors the question.

On another occasion, in discussing the matter of voir dire with a Utah district court judge, I asked him his feelings about voir dire and how it should be conducted. To my surprise, he candidly admitted to me that he generally limited voir dire and opposed lawyer participation, frankly stating that "his interest was to get the jury impaneled and the case started." A judge's focus is simply not always the focus of the advocates.

Not so many years ago, as can be described by our senior colleagues, the lawyers to the litigation typically conducted the entire voir dire examination, and often on a more relaxed and personal level. Today in Utah, as in most other states in the Union, attorneys are sometimes given the opportunity to personally conduct a portion of the voir dire process; but our state has also followed the national trend toward severely limiting attorney participation in the examination.[4] In this preference for judge-conducted voir dire, our court system has lost an important aspect of the adversarial system. The most often cited reasons for judge-conducted voir dire—conservation of time and money, inability of attorneys to empanel an impartial jury, and prevention of attorney melodramatics—all sink under careful scrutiny, and in the wake the court system is left with many instances of injustice rather than efficiency. The right of the litigants to voir dire the jurors is, however, clearly preserved by our rules of practice under Rule 47(a), URCP, which states:

> *Examination of jurors.* The Court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as is material and proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as is material and proper.

Though the rule specifically provides that the parties or their attorneys may be permitted to conduct the examination, most courts utilize the alternative procedure. Generally, the judge conducts all of the voir dire ostensibly to save time by eliminating possible "irrelevant" questions. While saving time for the court and litigants sounds like a praiseworthy effort, and one having an almost universal appeal, a superficial questioning will fail to ferret out the bias of prospective jurors. When we think of the time consideration, we sometimes envision a lawyer abusing voir dire by excluding whole lists of prospective jurors through hour upon hour examination. Quite surprisingly, however, the comparative time of the judge versus attorney questioning is relatively short. In one study, the average total examination time of court-conducted voir dire required 64 minutes, as compared to counsel-conducted voir dire of 111 minutes.[5] Arguably, a 47-minute average time differential is an insignificant cost to safeguard impartiality. The urge for efficiency then, can detract from our ability to effect justice, contrary to the whole underlying objective of our judicial system.

The key question becomes, who can best conduct the inquiry. It is the lawyers. It is the lawyers who are best acquainted with the details of the case, its history, its litigants and the law. It is the court's task in voir dire, as in other areas affecting the proceeding to simply control counsel's inquiry. While I have never known a judge who had any intention other than to impanel an impartial jury, by personally conducting voir dire, the judiciary presumes unto itself the role of the advocate. This is a role it cannot perform since it is the lawyers who represent the clients and who instinctively sense the presence of bias or prejudice to the case.

A meaningful voir dire is dependent upon several factors including who conducts the examination and its scope. In making decisions concerning who should conduct voir dire and its scope, recognition must be given to the characteristics of human nature and the following principles.

ONLY DIALOGUE REVEALS JUROR ATTITUDES.

Whatever the particular court routine, the Utah Supreme Court has recognized the need to allow latitude in the questioning of prospective jurors, stating that asking shallow questions suggests "an unwarranted naivety regarding human nature."[6] The Court explained.

> The most characteristic feature of prejudice is its inability to recognize itself. It is unrealistic to expect that any but the most sensitive and thoughtful jurors (frequently those least likely to be biased) will have the personal insight, candor, and openness to raise their hands in court and declare themselves biased. Voir dire is intended to provide a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether bias and prejudice, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves in it.[7]

If the central focus of the voir dire is to examine jurors and satisfy the court and counsel that they are able to impartially consider the facts of the case, that concept has little value without substantive communication. A simple, perfunctory examination without direct, focused questions will not reveal preconceptions or unconscious bias. Dialogue is imperative for the detection of the thoughts and attitudes of the jurors. Further, time is not an issue. If the trial courts religiously followed the standards set by the Utah Supreme Court and allowed or performed extensive questioning of jurors, such an examination by the judge should consume essentially the same amount of time as if it were conducted by the attorneys. Thus, the claim that judge-conducted voir dire saves time and resources would no longer be valid.

SILENCE ERODES THE VALUE OF PEREMPTORY CHALLENGE.

Probably one of the most important rights which is yielded by the voir dire silence created by the limited questioning trend is its effect on the litigants' peremptory challenge. An effective voir dire affords the attorneys an opportunity to discover juror attitudes toward the litigants, counsel for both sides, and the legal and factual issues which are relevant to the case—all of which are vital to an intelligent use of the peremptory challenge. The Nevada Supreme Court noted the reality of this important trial aspect, stating that many trial attorneys are able to develop a "sense of discernment from participation in voir dire that often reveals favor or antagonism among prospective jurors."[8] The Court noted that the lack of dialogue between counsel and the individuals who may ultimately judge the merits of the case severely diminishes the likelihood that the attorney will be able to perceive such attitudes. Our own Supreme Court has stated that "when a party is not permitted to gather sufficient information from prospective jurors to exercise his peremptory rights intelligently, the efficiency of such peremptory challenges is necessarily destroyed."[9] The peremptory challenge is a valuable tool and a claimant should not be required to use it to exclude from a panel

those persons who should be excused for cause. The "voir dire has as one of its purposes the detection of bias sufficient to challenge a prospective juror for cause."[10] Therefore, when a party is unable to secure adequate information to exercise the peremptory right intelligently, then the value of the challenge is diminished.[11] "Accordingly, the trial judge should liberally allow questions 'designed to discover attitudes and biases, both conscious and subconscious,' even though such questions go beyond that needed for challenges for cause."[12]

IT MAKES A DIFFERENCE WHO EXAMINES THE PROSPECTIVE JURORS.

Many advocates of judge-conducted voir dire claim that even with extensive questioning, the judge should be the one to pose the questions to the prospective jurors. Those who propound this method believe that judges elicit greater juror candor; an expectation, however, that has failed under specific testing. Sociologists have discovered that during judge-conducted voir dire, jurors attempted to report not what they truly thought or felt about an issue, but what they believed the judge wanted to hear. Conversely, during the interactions with the attorneys, the jurors were put more at ease and were subsequently more comfortable with their opinions.

Legal psychologist Neal Bush, in *The Case for Expansive Voir Dire*, has postulated that since jurors look upon the judge as an important authority figure, they are reluctant to displease him and therefore tend to respond to his questions with less candor than if the questions were posed by counsel.[13] Further jurors are made up of people from all walks of life, with differing sensitivities, consciousness and perceptions. People vary in their abilities for introspection as the court held in *United States v. Dellinger:* "We do not believe that a prospective juror is so alert to his own prejudices. Thus, it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias or cause."[14]

A limited, formal voir dire of lukewarm questions rarely discloses important non-verbal communication such as anxiety, belligerence, or indifference; signals which have tremendous import about a person's decision-making posture. Generally, the emotional reactions and body language of prospective jurors is more revealed when the questions are asked by the advocates rather than by the non-partisan judge.[15] Judge Donald P. Lay described this important lawyer-juror interaction:

> Experienced counsel observed that it is more important to listen to the way jurors respond to their questions, to hear the tone of their voices, to observe their facial expressions and to follow their overall reaction to the lawyer's examination than to rely on the content of their answers. This opportunity for observation is lost when the neutral judge asks neutral questions.[16]

Besides eliciting greater juror candor, it has been found that attorneys are simply in a better position to conduct the voir dire because of the very nature of the adversary process. In *Whitlock v. Salmon*,[17] the Nevada Supreme Court held that:

> Usually, trial counsel are more familiar with the facts and nuances of a case and the personalities involved than the trial judge. Therefore, they are often more able to probe delicate areas in which prejudice may exist or pursue answers that reveal a possibility of prejudice. Moreover, while we do not doubt the ability of trial judges to conduct voir dire, there is concern that on occasion jurors may be less candid when responding with personal disclosures to a presiding judicial officer. Finally, many trial attorneys develop a sense of discernment from participation in voir dire that often reveals favor or antagonism among prospective jurors. The likelihood of perceiving such attitudes is greatly attenuated by a lack of dialogue between counsel and the individuals who may ultimately judge the merits of the case.[18]

'If asked what part of the jury trial is most important, experienced trial lawyers usually respond: 'the voir dire.'"

As advocates, lawyers must acquire a thorough working knowledge of the details of the case, and, therefore, they are in a better position to ascertain what questions should be posed to the prospective jurors and are better equipped and more likely to follow the initial responses of the prospective juror with the individual scrutiny needed to expose prejudices.[19]

VOIR DIRE MAY PROPERLY BE CONTROVERSIAL.

We live in a complex world of varying and cosmopolitan attitudes. Controversy abounds. Oddly enough, however, controversial subjects often appear prejudicial when they are not. In many cases they are real and important concerns of our lives. In an effort to select an impartial jury, the judiciary may seek to prevent the seeming prejudice by avoiding the controversial subject. The easiest way is not to ask the question. Again, however, the resulting silence will not reveal prejudice or bias, which is destructive to the ultimate aim of the voir dire. An illustration of this was experienced during trial by Judge Lay who relates:

> In my own practice, a federal trial judge erroneously refused to ask the jury my written question on voir dire as to whether anyone would be prejudiced by reason of the fact that the plaintiff was a Mexican itinerant worker. The judge told me that he felt the question insulted the jury as well as my client. The verdict awarded was about one-half of what it should have been. Afterward, the jury foreman told me they would have awarded him more money but, "after all, the fellow was just a poor Mexican."[20]

It seems an oddity that we sometimes try to avoid controversy when the judicial system is the very forum designed to hear controversy. It is the object of the examination not to impanel ignorant jurors but those who are unbiased and able to withhold judgment while sifting through difficult subjects. "It is not necessary for parties to show that members of the jury were in fact prejudiced. The focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present."[21]

LAWYER THEATRICS.

While attorneys are in a better position to "ferret out" the potential bias of a juror, the concern still remains that they will engage in the fabled theatrical antics. This complaint often centers around the advo-

cate's unfair attempt to persuade jurors before the facts of the case are presented. While judge-conducted voir dire will completely eliminate that kind of attempt to ingratiate and indoctrinate the prospective jurors, there are less restrictive means which still preserve the important right to attorney-conducted voir dire. Utah, by Rule 47(a), has recognized the right of the parties or their attorneys to conduct the examination and has tempered that right by giving the court considerable latitude in the manner and form in which the examination is conducted.[22] Total elimination of the lawyer's right of examination is not the answer for effective voir dire. At minimum, if a judge chooses to conduct the examination, he should either allow the attorneys to supplement questions on their own or he must ask the material and proper questions submitted by the parties.

CONCLUSION.

There are many facets that make up a trial. Voir dire is one of them. The propriety and materiality of the questions to be asked must be considered with two essential objectives. First, the prospective juror must be questioned to determine his or her ability to impartially decide the issues of the case based on the law and the evidence as presented at trial. Second, voir dire provides attorneys with a procedure by which they may obtain information to exercise the peremptory challenges intelligently.[23] With that in mind, the trial judge should liberally allow questions "designed to discover attitudes and biases, both conscious and subconscious."[24] This rule applies even when the questions go beyond those designed to challenge for "cause."[25] Some states, including Nevada, which has the same rule, have recognized that "a complete denial of attorney-conducted voir dire cannot be construed as a reasonable restriction."[26] Voir dire examination by the lawyers gives the advocates a more meaningful feel for the prospective jurors—something which is lost by judge-conducted voir dire. The importance of the subject cannot be overstated. After enormous effort and cost by the client and his lawyer in preparation, a fair trial of the client's claim can simply be lost before the opening statement if bias is present. What makes a proper juror or an improper juror may often be revealed in a word. Lawyers are professionals, hired for a variety of skills and talents. Experienced trial lawyers know prejudice. They can smell it. A few minutes to listen to the way jurors respond to the lawyer's focused questions, to hear the tone of their voices, to observe their facial expressions and to follow their overall reaction to the examination is vital to the process.[27] Lawyers should not be stifled with a segregated voir dire process; nor should their client's right be abrogated by impanelling biased jurors who would be excluded by meaningful voir dire.

[1]Susan E. Jones, "Judge- Versus Attorney-Conducted Voir Dire," *Law and Human Behavior*, 131 (No. 2 1987).
[2]*Black's Law Dictionary*, 1746 (Revised 4th Edition, 1968).
[3]David Suggs, Bruce Sales, "Juror Self-Disclosure in the Voir Dire:" A Social Science Analysis, 56 *Indiana Law Journal*, 245 (1981).
[4]Leonard M. Ring, "Judge Conducted Voir Dire—is Justice Lost in the Shuffle?", *Trial Diplomacy Journal*, at 3 (Fall 1984).
[5]*State v. Ball*, 685 P.2d 1055, 1058 (Utah 1980).
[6]*Ball*, 685 P.2d, at 1058.
[7]*Ball*, 685 P.2d, at 1058.
[8]*Whitlock v. Salmon*, 752 P.2d 210, 212-213 (Nev. 1988).
[9]*Ball*, 685 P.2d at 1058.
[10]*Hornsby v. Corp. of the Presiding Bishopric of the Church of Jesus Christ of Latter-day Saints*, 758 P.2d 929, 932 (Utah Ct. App. 1988).
[11]*Ball*, 685 P.2d, at 1058.
[12]*Doe v. Hafen*, 772 P.2d 456, 457 (Utah Ct. App. 1989).
[13]Neal Bush, "The Case for Expansive Voir Dire," 12 *Law and Psychology Review* (1975).
[14]*United States v. Dellinger*, 472 F.2d 340, 368 (7th Cir. 1972).
[15]Bush, *supra* note 13, at 17.
[16]Judge Donald P. Lay, "In a Fair Adversary System the Lawyer Should Conduct the Voir Dire Examination of the Jury," 12 *Judges Journal*, 63.
[17]*Whitlock v. Salmon*, 752 P.2d at 210, 212-213 (Nev. 1988).
[18]*Whitlock*, 752 P.2d, at 212-213.
[19]Bush, *supra* note 13, at 172.
[20]Judge Donald P. Lay, "In a Fair Adversary System the Lawyer Should Conduct the Voir Dire Examination of the Jury," 12 *Judges Journal*, 63.
[21]*U.S. v. Dellinger*, 472 F.2d at 367.
[22]*Utah State Road Commission v. Mariott*, 21 Utah 2d 238, 444 P.2d 57, 58 (1968).
[23]Suggs and Sales, *supra* note 3, at 248.
[24]*Doe v. Hafen*, 772 P.2d 456, 457 (Utah Ct. App. 1989).
[25]*Hafen*, 772 P.2d, at 457.
[26]*Whitlock*, 752 P.2d, at 212-213.
[27]Judge Donald P. Lay, "In a Fair Adversary System the Lawyer Should Conduct the Voir Dire Examination of the Jury," 12 *Judges Journal*, 63.

Utah B.J.

Commission Highlights

During its regularly scheduled meeting of August 2, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the Commission meetings of May 31, 1991, June 21, 1991, and July 3, 1991, were approved.
2. Jim Davis reviewed the status of the petition to the Supreme Court regarding the continuation of non-regulatory non self-sufficient programs and services. He distributed an Amended Minute Entry and a summary of the meeting held by the Executive Committee with the Court.
3. Mike Hansen and Paul Moxley were appointed to the Judicial Conduct Commission. Dennis Haslam was appointed as the President's representative to the Judicial Council.
4. Bill Fowler was reappointed and Roland Uresk was appointed to fill the vacancy created by Harry Souval on the Board of Utah Legal Services.
5. Jim Davis reported that Brian R. Florence, Hans Q. Chamberlain, Hon. Pamela T. Greenwood and Stuart W. Hinckley had been elected as members of the new Board of Trustees to the Utah Law and Justice Center, Inc.
6. Mr. Davis requested suggestions from the Commission for non-lawyer appointments to the various Bar committees.
7. The schedule of Bar Commission meetings was reviewed and discussed by the Commission. Due to conflicts with some of the proposed dates, the Commission decided to move the meetings to the fourth Thursday of each month, with the exceptions of December 1991, February and March 1992.
8. The Board directed staff to assure that the licensing funds were protected pursuant to the policies and procedures as soon as possible, upon the advice of the Budget and Finance Committee and to allow the deposit of excess funds into a higher-interest bearing 30-day account that could fit within Bar policies and procedures. The Commission also requested that the Budget and Finance Committee make recommendations to the Bar Commission with regard to investing funds pursuant to the Bar's policies and procedures.
9. Mr. Baldwin indicated that a letter will be sent out to all active Utah residents stating that the LRS program could be discontinued if there is not a sufficient number who enroll. The Board voted to allocate $10,000 of the contingency fund to maintain the LRS for the quarter as an unforeseen expenditure.
10. Mr. Birrell also reported that the Executive Committee had recommended identifying sources of income which were not derived from mandatory dues, like the Annual and Midyear Meetings, Member Benefits and CLE programs.
11. The Board determined to reconsider its options for the FY91 cash surplus in October. The Executive Committee was also reported to have indicated that they were reluctant to make substantial payments on the mortgage until a decision has been made by the Supreme Court regarding the Task Force report.
12. Steve Trost informed the Board that Ralph Adams, Assistant Bar Counsel, had resigned. He reported that Wendell Smith had been hired to fill the position.
13. The Board reviewed and discussed the Litigation report.
14. The Board voted to reject a Bar exam appeal based upon an applicant's claim that he was misinformed regarding whether he had to retake both parts of the February 1991 Bar Examination or just one part.
15. John Baldwin distributed a report of the July 1991 Bar Department Activities for the Board's review. He reported that the computer hardware was being installed and the software is still being developed on schedule.
16. Mr. Baldwin indicated that the auditors are presently conducting the audit and that the year-end financial section statements are being prepared to send out to each section chair. He indicated that the audited year-end financial statements will be printed in the *November Bar Journal.*
17. Mr. Baldwin introduced his new Executive Secretary, Mary Munzert, who will be assisting him in Commission duties. He also reported that Kelli Suitter, Bar Programs Administrator had resigned.

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.

Utah Supreme Court Decision on Petition of KLS TV et al for Modification of Canon 3 (A)(7) and (8) of the Utah Code of Judicial Conduct—

"Cameras in the Courtroom"

MINUTE ENTRY

August 30, 1991

Having considered the petition to modify Canon 3(A)(7) and (8) of the Utah Code of Judicial Conduct, the Court hereby grants that portion of the petition wherein electronic media coverage in the Utah Supreme Court was sought, and makes permanent the authorization granted in this court's prior docket number 20269, 727 P2d 198, dated October 8, 1986, subject to the same conditions and guidelines announced therein.

A condition precedent to the exercise of this authority will be the permanent installation of all necessary wiring and all other electrical facilities needed to permit the use of television cameras in the courtroom. Such installation shall be done in a manner so as to be unobtrusive and require no compromise of court security or the solemnity of court proceedings. Such installations shall be to the court's satisfaction and at the petitioners' expense.

That part of the petition requesting permission to utilize electronic media coverage in the Utah Court of Appeals remains under advisement.

The portion of the petition requesting a one-year experiment allowing electronic media coverage in the district and circuit trial courts in the State of Utah is hereby denied.

Justice Durham dissents from the decision of the Court denying the one-year experiment with electronic media coverage in the district and circuit trial courts.

Discipline Corner

ADMONITIONS

An attorney was admonished for violating Rule 1.4. The attorney accepted representation of client who was injured in an automobile accident in 1988 and the attorney failed to file a complaint until February 1991—the date of the client's complaint with the Bar. Further, the attorney failed to respond to client's inquiries regarding the progress of her case.

PRIVATE REPRIMANDS

1. An attorney was privately reprimanded for violating Rule 1.14 of the Rules of Professional Conduct for terminating representation without the Court's approval and to the client's detriment.

2. An attorney was privately reprimanded for violating Rule 1.7(b) of the Rules of Professional Conduct by simultaneously representing clients with adverse interest without making full disclosure to the Court and obtaining the consent of the parties.

3. An attorney was privately reprimanded for violating Rule 1.3 of the Rules of Professional Conduct by failing to exercise reasonable diligence in his preparation of a Will and Trust. The attorney was retained in July 1988 to prepare the Trust and Will and failed to do so until October 26, 1990.

4. An attorney was privately reprimanded for violating Rules 1.3 and 1.4 of the Rules of Professional Conduct by failing to act diligently in representing the client and by failing to keep the client reasonably informed as to the status of the case. The attorney was hired in May of 1984 to represent the client in a joint venture dispute concerning a real property development. The attorney filed the complaint in April 1985, which complaint was dismissed in January 1987 for failure to prosecute. In December of 1987, the attorney filed a motion to have the dismissal set aside and the motion was denied resulting in the client's loss of the cause of action. The attorney executed a promissory note in favor of the client in the amount of $7,000 as consideration for the loss and subsequently defaulted on the note.

5. An attorney was privately reprimanded for violating Rules 1.3 and 1.4(a) by failing to exercise reasonable diligence in representing the client in a civil suit. The attorney was hired in February of 1986 and as of March of 1990, the time of the filing of the complaint with the Bar, the attorney had not obtained the information necessary to move the case forward. The attorney had no reasonable explanation for the delay and for the failure to respond to the client's request regarding the status of the action.

6. An attorney was privately reprimanded for violating Rules 1.3 and 1.4(a) and (b) of the Rules of Professional Conduct by failing to exercise reasonable diligence in investigation and filing of the medical malpractice suit and thereafter failing to conduct any discovery from March 1986 till April 1988. Subsequent to filing of the complaint the attorney failed to keep the client informed as to the status of the case, and failed to inform the client of the September 1987 pre-litigation hearing panel's findings of a non-meritorious cause of action, and further failed to provide the client with sufficient information enabling the client to make informed decisions.

7. An attorney was privately reprimanded for violating Rule 1.3 of the Rules of Professional Conduct by failing to timely file the client's appeal resulting in dismissal of the appeal. The Board of Commissioners considered the attorney's refunding of the retainer fee and other mitigating factors in its decision to impose discipline.

8. An attorney was privately reprimanded for violating Rule 1.3 of the Rules of Professional Conduct by failing, even with the granting of the additional time, to file a response to a magistrate's recommendation of dismissal as instructed by the client.

9. An attorney was privately reprimanded for violating Rules 1.3 and 1.4(a) and 1.14(d) of the Rules of Professional Conduct. From December 1987 to June 14, 1990, the attorney failed to communicate with the client regarding the status of the case and failed to exercise reasonable diligence in taking appropriate depositions or otherwise moving the case forward.

SUSPENSION

On June 11, 1991, Bruce Udall was suspended from practice of law for a period of two years for failing to prevent the conversion by co-counsel of certain funds recovered in a personal injury action. The suspension was stayed pending the successful completion of a twenty-four (24) months' probation. To successfully complete his probation, Mr. Udall must perform at least eighty (80) hours of pro bono work for the Salt Lake County Bar and/or Legal Aid. In addition and prior to the expiration of the probationary period, Mr. Udall is required to make restitution to the client.

DISBARMENT

On July 30, 1991, Brad L. Swaner was disbarred for conversion of trust funds and neglecting other legal matters. Any attempt to be readmitted shall be conditioned upon his making restitution to all clients, and his full compliance with Rule XVIII, Procedures of Discipline.

CLAIM OF THE MONTH
Lawyers Professional Liability

Alleged Error or Omission

Insured allegedly prepared an erroneous tax opinion for a limited partnership offering.

Resumé of Claim

The Insured shared office space and letterhead with several other attorneys, none of whom were in partnership with him. One of the other attorneys, without the Insured's knowledge or authorization, took a tax opinion which the Insured had written in reference to a totally unrelated limited partnership offering and used it for the subject investment with only very modest modification to the facts of that offering. The opinion as to the facts of that offering proved to be erroneous as a result of subsequent changes in the tax law. The Insured was sued with reference to both the tax opinion and securities work which was done by the other attorney. The other attorney testified that the Insured was not a partner and had no involvement whatsoever with the subject offering. Nonetheless, the Insured has exposure as a result of the shared letterhead in the event such an entity is found to exist as a partnership and, as an individual in his capacity, as an "ostensible partner" who is subject to vicarious liability.

How Claim May Have Been Avoided

The Insured could have avoided this situation in all likelihood by not agreeing to a common letterhead with the three attorneys with whom he shared office space. Moreover, he should have had a totally secured area for his own work product. Keep in mind that securing work product includes instructing support staff to maintain separate files and restrict file access to client's counsel. Such would have prevented the other attorney from using the tax opinion. Even if the Insured were willing to give the opinion to this other attorney as a form of guidance, he would have cautioned the attorney on the appropriateness of a near verbatim use of the opinion and could have reserved the right to see the final product of the other attorney, which was based on his sample opinion.

"Claim of the Month" is furnished by Rollins Burdick Hunter of Utah, Administrator of the Bar Sponsored Lawyers' Professional Liability Insurance Program.

1991 Directory of Special Information Resources in Utah

The 1991 Directory of Special Information Resources in Utah is just off the press. The Directory was compiled by the ULA Special Library Section to make special information resources throughout the State of Utah as accessible as possible. Reference librarians will find it a valuable tool to help them find answers to specialized questions.

This third edition has 86 pages and contains 251 entries, including such resources as the Salt Lake Arts Council, various law firms, Shared Ministry of Utah, Browning Arms Company Library, family history centers, and the Middle East Library at the University of Utah. Each entry gives address, telephone and FAX numbers, names of contact persons, collection emphases, and access and loan policies. For quick reference, it includes three indexes: subject, personal name and type of library. The Directory may be picked up or ordered from the following address:

Documents Division Marriott Library
University of Utah
Salt Lake City, UT 84112
ATTN: Maxine Haggerty
Make check payable to: Utah Library Association
PRICE: ULA Individual Member:
$2.50 + $1.50 Postage = $4.00
Libraries: $5.00 + $1.50 Postage = $6.50

Notice of Judicial Vacancy

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for a judicial vacancy in the Seventh District Juvenile Court, headquartered in Price, Utah. The Seventh District includes Carbon, Emery, Grand and San Juan counties. This position results from the retirement of Judge Paul C. Keller. [Applications must be received no later than 5:00 p.m., October 10, 1991,] at the Office of the Court Administrator, 230 S. 500 E., Suite 300, Salt Lake City, UT 84102.

Applicants must be 25 years of age or older, U.S. citizens, Utah residents for three years prior to selection and admitted to practice law in Utah. In addition, judges must be willing to reside within the geographic jurisdiction of the court.

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact Juan J. Benavidez, Personnel Manager, Office of the Court Administrator, 230 S. 500 E., Suite 300, Salt Lake City, UT 84102, (801) 533-6371. Application packets will then be forwarded to prospective candidates and must be received no later than 5:00 p.m., October 10, 1991.

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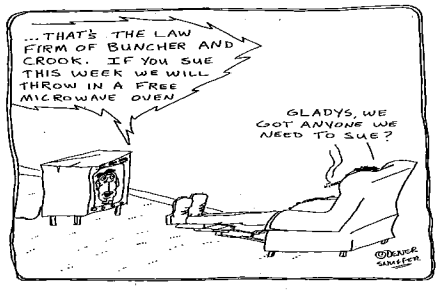
United States Magistrate Judge Announces Retirement

Calvin Gould, United States Magistrate Judge, has announced his retirement effective January 3, 1992, from the United States District Court for the District of Utah. He was appointed as a magistrate judge by the Court on December 27, 1983, and entered on duty on January 3, 1984, for an eight-year term of service. In acknowledging his pending retirement, Chief District Judge Bruce S. Jenkins noted that Judge Gould, as the District of Utah's only full-time magistrate judge, has served the Court in exemplary fashion and, in recent years, has competently managed an increasingly burdensome work load as the Court's caseload has grown. Prior to his appointment, Magistrate Judge Gould served for 14 years as a 2nd District Court Judge for the State of Utah. He served in the United States Navy during World War II, after which he earned his undergraduate and law degrees from the University of Utah. From 1969-1970 he served as a member of the Utah House of Representatives. In 1973, he was named by the Utah State Bar as the Outstanding Judge of the Year.

Chief Judge Jenkins, with the concurrence of the other judges of the court, has appointed a seven-person selection panel of attorneys to assist the Court in identifying the most promising candidates for appointment to the position that Magistrate Judge Gould will vacate. Chairing the panel is Herschel J. Saperstein. Members include Stewart M. Hanson Jr., LaVar E. Stark, Jerome H. Mooney, Mary Ann Wood, Stephen B. Nebeker and Kevin E. Anderson. Under the supervision of the Court, the panel will evaluate the qualifications of all applicants in confidence and, where appropriate, conduct interviews and contact references. Due consideration will be given to all qualified candidates, including women and members of minority groups.

Chief Judge Jenkins has noted that the court plans an extensive search to ensure that the position is filled by a highly qualified attorney with broad experience in civil and criminal litigation. An announcement describing the position and its varied responsibilities will be published shortly. Current salary for the position is $115,092 per annum. Prospective applicants interested in being considered are required to complete an application form, copies of which are available from the Clerk of Court during the hours of 8:00 a.m. to 4:30 p.m., Monday through Friday, at the U.S. Courthouse. Completed applications and supporting documents should be submitted to the Clerk of Court no later than the close of business on September 27, 1991. Applications prepared and submitted as nominations by a party other than the applicant will not be considered. Finalists for the position will be required to undergo a background investigation conducted by the Federal Bureau of Investigation and an IRS tax check prior to appointment.



Rent Irving Younger for a Week

Get those last few CLE credits by borrowing video and audio tapes from the Litigation Section library. In addition to Irving Younger on Evidence, the library contains the NITA "Winning at Trial" and "Mastering the Art of Cross-Examination" series.

For Section members, tape rental is free. Other Bar members will be charged a nominal fee. To qualify for CLE credit, view or listen to the tapes at the Utah Law & Justice Center or with two or more Bar members at the location of your choice. For more details, contact Toby Brown at 531-9095.

SALT LAKE LEGAL SECRETARIES HONOR

Legal Secretary of the Year

Cathy M. Winkelman, PLS, Sandy, Utah, has been honored as the 1990-1991 LEGAL SECRETARY OF THE YEAR. Ms. Winkelman is employed by the law firm of Giauque, Crockett & Bendinger and is secretary to Stephen T. Hard and Daniel D. James. She has been a legal secretary for 23 years and a member of the Salt Lake Legal Secretaries Association since 1986. Ms. Winkelman was certified as a Professional Legal Secretary (PLS) in April 1990 and has served as chair and member of various committees on behalf of the association. She currently serves as chair of the Legal Secretarial Certification Committee and has recently been elected as the First Vice President of the Salt Lake Legal Secretaries Association for 1991-1992.

The Magisterial Role in the Search Warrant Application Proceeding

By Judge Lynn W. Davis

PREFACE

A paper of this length cannot possibly be comprehensive. There has been no attempt, for example, to address applications for telephonic intervention (line tapping/pen registers), warrants for bodily intrusions, applications for seizure of obscene materials, problems arising with respect to the seizure of electronically maintained, computerized business records and data or to extensively treat telephonic search warrants. Each of these areas poses unique problems and challenges and requires deliberate and enhanced scrutiny and in some instances "scrupulous exactitude." Nor has there been an attempt to present exhaustive case law. The primary focus of this paper is to suggest issues of concern and areas of caution. The suggestions have particular applicability in the standard, run-of-the-mill search warrant application setting. Admittedly, these observations benefit both from judicial hindsight and appellate review.

I
CONSTITUTIONAL AND STATUTORY CONSIDERATIONS

The Fourth Amendment to the U.S. Constitution provides:

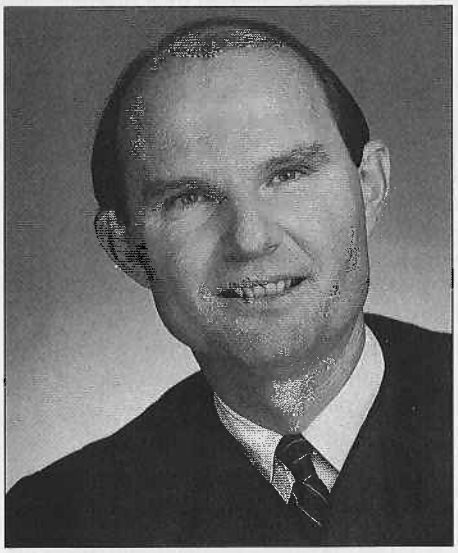
The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person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

Article I, §14 of the Utah Constitution parallels the language of the Fourth Amendment, providing:

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

Whether protections afforded under Article I, §14 expand beyond those afforded under the Fourth Amendment is subject to considerable debate and is the focus of emerging and developing case law[1].

The Utah Code of Criminal Procedure describes, with some particularity, the process of search warrant issuance, restricting issuance exclusively to magistrates.[2] Unfortunately, the search warrant procedure has rarely been an integral part of judicial training and in-depth judicial discussion. Utah's statutory guidelines are limited in scope and a magistrate is well-served to keep abreast of developing case law for additional instruction and direction.



JUDGE LYNN W. DAVIS serves as a Fourth Circuit Judge in Provo, Utah. He is a member of the Utah Supreme Court Advisory Committee on the Code of Professional Responsibility, chairs the Criminal Section of the Utah State Bar Examiner Committee, and chairs the State Court's Interpreter and Translation Committee. He is a frequent contributor of articles to legal periodicals. He claims to have one of the largest collections of judicial cartoons in the State. He graduated from the J. Reuben Clark Law School in 1976.

II
THE ROLE AND DUTY OF THE MAGISTRATE

A. The Role and Duty

The duty of the magistrate is to independently determine whether the bases relied upon by law enforcement in the application seeking authority to search, as well as the scope and the nature of the search, meet constitutional and statutory requirements. The magistrate must be neutral, detached and impartial in this process. It is ex parte in nature and there is no room for the magistrate to assume an adversarial or partisan role. The magistrate should take all reasonable measures to preserve impartiality.

The purpose of the warrant requirement is to prevent police from hasty, ill-advised, or unreasonable actions in the often competitive and ever-difficult enterprise of ferreting out crime.[3] In that respect, the search warrant proceeding is a preventive measure. But there is danger if it becomes over-preventive. As one scholar has noted, the process requires a reconciliation of two potentially conflicting elements: "providing a warrant proceeding that protects citizens from illegal searches and seizures, while keeping the proceedings speedy and flexible enough to induce police officers to seek warrants."[4]

B. Grounds for issuance

Chapter 23 of Title 77 of the Utah Code embodies the requirements and restrictions of the constitution. Utah Code Ann. §77-23-2, specifically provides that property or evidence can only be seized

pursuant to a search warrant if there is probable cause to believe that the item to be seized:

(1) Was unlawfully acquired or is unlawfully possessed;

(2) Has been used or is possessed for the purpose of being used to commit or conceal the commission of an offense; or

(3) Is evidence of illegal conduct.

In addition, the Utah Code sets forth conditions precedent to issuance in §77-23-3:

Conditions precedent to issuance.

(1) A search warrant shall not issue except upon probable cause supported by oath or affirmation particularly describing the person or place to be searched and the person, property or evidence to be seized.

(2) If the item sought to be seized is evidence of illegal conduct and is in the possession of a person or entity for which there is insufficient probable cause shown to the magistrate to believe that such person or entity is a party to the alleged illegal conduct, no search warrant shall issue except upon a finding by the magistrate that the evidence sought to be seized would be concealed, destroyed, damaged, or altered if sought by subpoena. If such a finding is made and a search warrant issued, the magistrate shall direct upon warrant such conditions that reasonably afford protection of the following interests of the person or entity in possession of such evidence:

(a) Protection against unreasonable interference with normal business; or

(b) Protection against the loss or disclosure of protected confidential sources of information; or

(c) Protection against prior or direct restraints on constitutionally protected rights.

C. Application of statutory and constitutional requirements

The search warrant process first requires a finding of extant particularized illegal activity, i.e., there must be an independent judicial determination that the property has been possessed, acquired, used or will be used for illegal activity or is evidence of illegal conduct. Without that finding, the inquiry is over. Next, there must then be a judicial appraisal of the sufficiency of the supporting affidavit for probable cause. That necessarily requires an independent judicial determination of the credibility of the information and an assessment of the reliability of the police affiant, the citizen informant, or the confidential police informant. Lastly, the magistrate must examine the scope and the nature of the search.

D. The Independent judicial determination of the probable cause

1. The probable cause standard

The finding of probable cause requires a determination, given all of the information in the supporting affidavit, that there is a fair probability that contraband or evidence of a crime will be found in a particular case.[5] In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court established a "totality of the circumstances" test for determining probable cause. The Court stated that "probable cause is a fluid concept turning on the assessment of probabilities in particular factual contexts." *Gates*, 462 U.S., at 232.

The determination of probable cause is based upon a common sense, nontechnical, practical assessment of the affidavit and the warrant. That determination, by definition, involves the discretionary appraisal of the issuing magistrate. The Utah Supreme Court addressed this very issue in the case of *State v. Babbell*, 770 P.2d 987 (Utah 1989), where it concluded:

> The Fourth Amendment requires that when a search warrant is issued on the basis of an affidavit, that affidavit must contain specific facts sufficient to support a determination by a neutral magistrate that probable cause exists. *State v. Nielsen*, 727 P.2d 188, 190 (Utah 1986), cert. denied, 480 U.S. 930, 107 S. Ct. 1565, 94 L.Ed.2d 758 (1987). The affiant must articulate particularized facts and circumstances leading to a conclusion that probable cause exists. Mere conclusory statements will not suffice. *Illinois v. Gates*, 462 U.S. 213, 239, 103 S.Ct. 2317, 2333, 76, L.Ed.2d 527 reh'g denied, 463 U.S. 1237, 194 S.Ct. 33, 77 L.Ed. 2d 1453 (1983). The magistrate's task is to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*, at 238, 103 S.Ct. at 2332; see *State v. Espinoza*, 723 P.2d 420, 421 (Utah 1986).

2. Judicial Inquiry

Does judicial duty require passivity in this process? Is judicial inquiry allowed? Utah law, case law and statutory, does not preclude legitimate magisterial inquiry. Nor does it specifically allow or encourage such activity. Utah case law has never addressed the issue and the statutes governing the issuance of search warrants are silent on this issue except for a brief reference in U.C.A. §77-23-4(2) (a). But the Supreme Court has addressed this issue. In the case of *Franks v. Delaware*, 438 U.S. 154, 168-169 (1978), the Court declared that a magistrate is allowed "to conduct a. . .vigorous hearing" including "an extended independent examination of the affiant and other witnesses." The Court similarly concluded in *Gates*, at 241, that "magistrates remain perfectly free to exact such assurances as they deem necessary. . .in making probable cause determinations." The Federal Rules of Criminal Procedure 41(c) likewise allow for examination of the affiant or witnesses.

Some scholars suggest that "the judicial officer has an obligation to investigate those areas of the affidavit that are vague, ambiguous, couched in conclusory terms or suggestive of alternative, non-criminal interpretations."[6] Frankly, if the warrant is that deficient, the magistrate should not hesitate to decline to issue. Certainly there is danger with inquiry; it may lead to judicial overreaching from a neutral, detached and objective role to that of advocate.

If a judge conducts extensive inquiry as to probable cause is he still neutral or is he aiding the police in justifying the warrant? "There is . . . a thin line between clarifying ambiguities in the affidavit, testing the credibility of government witnesses, and otherwise assessing probable cause on the one hand, and setting out to develop information that will establish probable cause on the other. This line should not be crossed lest the judicial officer becomes an 'adjunct to . . . law enforcement.'"[7] *United States v. Leon*, 468 U.S. 897. But again, how far should a magistrate go in ferreting out unarticulated facts and assertions?

While a magistrate may have the authority to conduct a very vigorous inquiry, the closer a judge moves toward eliciting facts and details the further she moves from a neutral "review" role and toward the role of developing probable cause. To the extent that the inquiry serves to create probable cause, it is impermissible and breaches the magistrate's "review" role. To the extent that the inquiry merely clarifies an ambiguity and/or corroborates facts which have already formed the basis of the probable cause, it is sanctioned.

3. Particularized Facts

"The judicial officer is required to look to the factual assertions and to assess whether they amount to probable cause to search; and, in so doing, must ignore conclusory statements or phrases and embellishments. A properly drafted affidavit leaves the significant inference-drawing to the magistrate."[8] The problem arises in that frequently the affiant is not able to distinguish between conclusory statements and particularized facts. These particularized facts and details may be comprised of "the factual and practical considerations of everyday life on which reasonable men, not legal technicians, act."[9]

Probable cause cannot be determined without sufficient particularized facts and detail being set forth in the affidavit. It is clear from recent Utah cases that mere conclusionary statements are insufficient to support probable cause and the constitution requires that the affiant articulate particularized facts and circumstances leading to a conclusion that probable cause exists.[10] The Supreme Court, in *Illinois v. Gates*, 462 U.S. 239 (1983), similarly held that a warrant cannot issue solely upon the strength of "a mere conclusionary statement that gives the magistrate virtually no basis at all for making a judgment regarding probable cause."

The Fourth Amendment requires particularity in the description of the place to be searched, particularity in the description of the persons to be seized, and particularity in the description of the property to be seized. *State v. Gallegos*, 712 P.2d 207 (Utah 1985); *State v. Anderson*, 701 P.2d 1099 (Utah 1985). "Particularity" continues to be a critical concern throughout the entire review.

III
JUDICIAL REVIEW

A "totality of the circumstances"—"substantial basis"—great deference"—"non de novo"—*Illinois v. Gates*, standard of review.

The Utah Supreme Court, in *State v. Babbell*, 770 P.2d 987 (Utah 1989), succinctly summarized the standard of review where the sufficiency of the warrant and affidavit is challenged.[11] Consider the following lengthy excerpt:

> When a search warrant is challenged as having been issued without an adequate showing of probable cause, the Fourth Amendment does not require that the reviewing court conduct a de novo review of the magistrate's probable cause determination; instead, it requires only that the reviewing court conclude "that the magistrate had a substantial basis for . . . determining that probable cause existed." *Illinois v. Gates*, 462 U.S. at 238-29, 103 S.Ct., at 2332 (quoting *Jones v. United States*, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed. 2d 697 (1960)); see *State v. Romero*, 660 P.2d 715, 719 (Utah 1983); *see generally* 1 LaFave, *Search and Seizure*, §3.1(c) (2d ed. 1989) hereinafter LaFave. The reviewing court, in conducting that examination, should consider a search warrant affidavit "in its entirety and in a common-sense fashion." *State v. Anderson*, 701 P.2d 1099, 1102 (Utah 1985); *see also State v. Hansen*, 732 P.2d 127, 129-30 (Utah 1987) (per curiam) (applying this standard of review).

"It is imperative to constrain law enforcement zeal within constitutionally and statutorily permissible guidelines and to preserve impartiality."

> Finally, the reviewing court should pay "great deference" to the magistrate's decision. *Gates*, 462 U.S. at 236, 103 S.Ct., at 2331 (quoting *Spinelli v. United States*, 393 U.S. 410, 419, 89 S.Ct. 485, 590, 21 L.Ed.2d 637 (1969)).

That "great deference" standard was most recently recognized in the case of *State v. Collard*, 159 Utah Adv. Rep. 30 (Utah Ct. App. 1991). In *Collard*, the Utah Court of Appeals upheld the validity of the search and found a "substantial basis" for trial court's finding of probable cause, despite the existence of an ambiguity in the affidavit.

The determination of probable cause will not pass appellate scrutiny, even under a "great deference" standard, where the affidavit is (1) "so lacking in indicia or probable cause as to render official belief in its existence wholly unreasonable" or (2) when the warrant was "so facially deficient . . . that the executing officers cannot reasonably presume it to be valid" or (3) when the issuing magistrate "wholly abandoned his judicial role."[12] The Court may look to the procedure to determine if responsible inquiry has been conducted.

Of unique concern to a circuit court judge is the question of proper jurisdictional tier for judicial review where the issuing magistrate is also a circuit court judge. In what court should a challenge to the sufficiency of the affidavit lie? If the execution of the warrant results in felony charges, the appropriate judicial review would occur at the district court level as would all other motions to suppress. But if the execution merely results in the filing of misdemeanor charges, the answer is not so clear.

There appears to be no statutory provision that would bar a circuit court judge from hearing a motion to suppress in a misdemeanor case where the sufficiency of the supporting affidavit is challenged and where another circuit court judge has issued the warrant. Certainly the issuing magistrate would be precluded from hearing argument on a warrant she issues. But the conflict is eliminated when a non-issuing judge conducts the review.

IV
OBSERVATIONS WHICH MAY REDUCE APPELLATE REVERSAL OF SEARCH WARRANTS

A. Knowledge of substantive law

There is no substitute for an understanding of the substantive law in the ever-expanding field of search and seizure jurisprudence. Chapter 23 of Title 77 of the Utah Code, which directs the issuance of search warrants, is fairly bare-boned and it is without significant illuminating case law. Specific areas of concern should be researched thoroughly[13] and that research must include Utah Appellate Court cases, the plethora of federal cases and a scrutiny of the slow-developing state constitutional jurisprudence under Article I, §14 of the Utah Constitution.

The doctrine of severability is recognized in numerous jurisdictions. That doctrine, basically, is that items which are seized under invalid parts of the warrant are inadmissible, but that evidence seized under valid portions of the warrant remain admissible. *See United States v. Christine*, 687 F.2d 749, 754, 758 (3rd Cir. 1982); 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 4.6 (f) at 258-59 (2d ed. 1987). The offensive portion of the warrant is "severable" from the non-offensive portion. But certainly no magistrate should be smug in her reliance upon some anticipated application of the

doctrine of severability and, therefore, be less than thorough in her constitutional check of police power. If there are recognized deficiencies in the affidavit or warrant, they should be cured prior to issuance.

Magistrates must familiarize themselves with the "substantial basis" standard of review where the sufficiency of the affidavit is challenged.[14] But they must not harbor any great expectations of appellate court deference unless there has been a legitimate judicial inquiry. Abrogation of magisterial duty at the search warrant application level invites appellate court security, and rightly so.

B. The magistrate must carefully read the affidavit in support of the warrant

This author is informed that some judges do not thoroughly scrutinize the affidavit and, alarmingly, an isolated few do not even take the time to read the affidavit before issuing the warrant.[15] That is judicially heretical. Pressing calendars and other judicial concerns, admittedly, do not always allow the luxury of time. But a slow, careful reading is essential. Speed and expediency often result in errors. The more careless the magistrate, the more careless law enforcement will become. If a magistrate takes the duty of "independent judicial determination" seriously, then, concomitantly law enforcement will take the probable cause requirement more seriously, and this trend will positively affect the quality of future search warrant applications and ultimately reduce unconstitutional intrusions.

C. The magisterial duty when additional information is presented in the review process

Inquiry may lead to other important information. Likewise, while the magistrate is examining the affidavit and the warrant, the officer frequently engages in a colloquy which addresses additional facts and information not contained within the affidavit. If that information is critical to the determination of threshold probable cause, and/or could form the independent supporting factual basis for the scope of the warrant ("no knock," nighttime search, etc.), the magistrate has several options to consider:

1. If those additional facts are limited, then prior to the administration of the oath the judge should allow an interlineation. The changes should be uniformly made on all copies of the affidavit and the warrant if necessary.
2. If the supplemental information is extensive and time is not of the essence, then the magistrate should decline to issue and refer the affiant back to the office for redrafting.
3. If circumstances prohibit time delays associated with redrafting and the supplemental information is extensive, then a magistrate may take that information under oath and on the record. Those additional facts are required to be recorded or transcribed, and thus become a part of the affidavit. Utah Code Ann. §77-23-4 (1). A magistrate should note on the bottom of the affidavit that a supplemental record has been made.

As previously noted, an appellate court inquires whether the evidence viewed as a whole provides a "substantial basis" for a finding of probable cause. Unless the supplemental information is transcribed, recorded, or facially interlineated, it is not evidence and cannot be relied upon by the magistrate to support probable cause or the scope of the warrant and cannot, therefore, be considered in any appellate review.[16]

D. Reliability concerns and the confidential informant

In the process of determining probable cause, the magistrate must assess the reliability of the information presented in the affidavit. This duty of assessment is particularly keen where the applicant for the warrant is relying in whole or in part upon the assertions of a confidential informant to the affiant. Courts have long recognized that citizen informants are usually reliable in the absence of circumstances or motives that indicate the contrary.[17] Confidential police informants enjoy no such presumption. Not infrequently, police confidential informants are part of the criminal underworld. They cannot be presumed reliable. One seasoned police officer defined a "confidential informant" as a "junkie with the heat on." Where a confidential informant is relied upon, then the magistrate must be provided with some factual basis to gauge the credibility-reliability of that person. A conclusionary statement that the affiant believes the informant to be reliable is simply insufficient.

The reliability of statements made by a confidential informant is bolstered where there is independent corroboration and verification of the significant facts of the informant's statements prior to the application for the warrant. Reliability is also bolstered where the informant has previously provided truthful and reliable information and also where there is an inclusion of detail. *State v. Anderson*, 701 P.2d 1099 (Utah 1985). The Utah Supreme Court opined in *State v. Bailey*, 675 P.2d 1023 (Utah 1984), that veracity is also boosted where the informant is disinterested, identifies himself, and where information is volunteered.[18]

The establishment of reliability of the information is requisite to the issuance of the warrant. Inquiry is necessary where information is secondary and where a confidential informant is involved.

E. The inherent problems with affidavits where multiple locations are to be searched

Very often in a drug operation, there are multiple locations to be searched. The officer presents a "shotgun" affidavit attempting to "cover" all locations to be searched. Simply by virtue of the nature of drug operations, the affidavit contains recitals respecting various premises and suspects. These assertions are sometimes indistinguishably commingled and it is difficult for the magistrate to determine what drug-related activity occurred at which, of several, premises. These types of warrant applications pose unique challenges to the magistrate.[19]

The magistrate must determine whether there is sufficient probable cause as to each location. That task requires significant mental gymnastics. Occasionally an outline of the players and the places may be necessary. The magistrate must assess the information in each statement in the affidavit and determine, cumulatively, how it relates to each suspect and location.

A magistrate may consider having the officer segregate all assertions that relate to each location. In the alternative, consideration may be given in complex cases to requiring a separate affidavit for each location. Law enforcement may argue that such a requirement is not practicable because an assertion may refer to several suspects or locations and that the requirement is burdensome. As pointed out in *Collard*[20], in the long run more professionally prepared affidavits will "ensure protection of the accused's constitutional rights while saving a substantial amount of time for the courts and the parties." The "burden" is greatly reduced with the advent of the word processor. It may also be argued that separate affidavits allow appellate courts to affirm or reverse as to one defendant instead of a total reversal.

If reviewed as presented, then the magistrate must scrutinize the "mix and match" informational assertions in the affidavit and singularly determine threshold probable cause as to each suspect or location listed. Such a case requires the exercise of exceptional caution. One wonders whether this is really the role of the neutral, detached magistrate?

But magistrates must remember that affidavits are generally drafted by non-lawyers. They are frequently drafted under exigent circumstances or intense pressure, with the officer wondering all the while whether the evidence will disappear prior to issuance and execution. The sufficiency of the affidavit and warrant rarely turns on the absence or existence of grammatical or spelling errors. Some affidavits are well-organized, and written well, and easily demonstrate facts requisite for issuance. Others are nightmares of disorganization. It is the duty of the magistrate to take the facts as presented and make a decision based upon applicable law.

F. "No-knock" and nighttime searches and the necessity for a particularized showing in the affidavit

1. *"No-Knock"* warrants are governed by Utah Code Ann. 77-23-10(2) which provides, in pertinent part, that an officer executing the warrant may use such force as is reasonably necessary to enter:

> Without notice of his authority and purpose, if the magistrate issuing the warrant directs in the warrant that the officer need not give notice. The magistrate shall so direct only upon proof, under oath that the object of the search may be quickly destroyed, disposed of, or secreted, or that physical harm may result to any person if notice were given.

In a recent case, *State v. Rowe*, 154 Utah Adv. Rep. 12 (Utah Ct. App. 1991)[21], the Court disapproved of simple "fill-in-the-blank" sections for no-knock authorization. *Rowe* ought to be read carefully. Questions respecting restrictions on the permissible scope of the search must be dealt with prior to issuance.

The Court recognized that a small amount of drugs ordinarily found in a residential setting could easily and quickly be destroyed with even the briefest notice. The Court therefore concluded that the issuance of a no-knock warrant is justified if the affidavit establishes these facts. But the court further suggested that a more particularized showing would be required if, for example, a large quantity of drugs is sought. "In such cases, as where the affiant has information of the ongoing cultivation or manufacture of drugs, the exigency of ready destructibility, inherent with small quantities of drugs, may not be present."[22]

2. Justification of Nighttime Searches

The question of whether a warrant may be executed at night is governed by statute. The supporting affidavit must provide sufficient factual information to support a nighttime search. Utah Code Ann. §77-23-5(1) provides in pertinent part:

> The magistrate must insert a direction in the warrant that it be served in the daytime, unless the affidavits or oral testimony state a reasonable cause to believe a search is necessary in the night to seize the property prior to it being concealed, destroyed, damaged or altered, or for other good reason; in which case he may insert a direction that it be served any time of the day or night.

As discussed in *State v. Rowe*, the magistrate must be presented with specific, objectively articulated facts which suggest a true necessity for nighttime searches. Nighttime service may be justified when the evidence is on the verge of destruction.

Rowe does not define factual situations which would justify the issuance of a nighttime warrant based upon "other good reason" but does offer guidance in dicta.[23]

G. AFFIDAVIT-WARRANT COMPARISON FOR CONTENT UNIFORMITY

The law is clear that the warrant cannot exceed the probable cause information presented to the magistrate. According to a Tenth Circuit opinion, *U.S. v. Leary*, 846 F.2d 601-06 (Tenth Cir. 1988), a search warrant must contain limiting features and must be as narrow as the government's knowledge will allow. Variances between the affidavit and the warrant may prove fatal.

A magistrate must examine the search warrant and the affidavit for identical content consistency. There must be an integrity of content as to the places, objects or persons to be searched and the property to be seized. The search warrant must be examined with as much scrutiny as the affidavit. A close comparative reading can discover errors or misdescriptions and ambiguities and eliminate warrants which are facially overbroad.

H. MISCELLANEOUS OBSERVATIONS

1.Informal Prosecutorial Review

Many authorities suggest that the search warrant should be approved by a prosecutor prior to presentment to the magistrate.[24] They suggest further that judicial officers should encourage law enforcement officers to secure prior approval or concurrence of the prosecutor.[25] While such a review may reduce ambiguity and hopefully increase the probability of finding probable cause, there is some concern. In a recent U.S. District Court memorandum decision in a civil case,[26] Judge David Winder opined that a prosecutor may lose absolute immunity and enjoy only qualified immunity where the prosecutor engages in police-related functions. A review of a search warrant application was listed as one of those functions. Informal review by a prosecutor prior to presentment should be left to the sole discretion of the affiant.

2. Telephonic Search Warrants

Telephonic search warrants are allowed by statute, but require special attention and conditions. Utah Code Ann. 77-23-4. There is a suggestion in *State v. Hygh*[27] that a telephonic search warrant can be obtained with ease. That comment is quoted in *State v. Larocco*,[28] with approval. Judges and officers who have participated in a telephonic search warrant application may strenuously disagree. The very same scrutiny, inquiry and evaluation and assessment must be present in the telephonic search warrant application as in a warrant application supported by written affidavit. This judge would submit that the tasks of determining probable cause, evaluating information reliability, determining assertion-warrant consistency and scope, and assessing the reliability of the confidential informant are made considerably more difficult in a telephonic setting. In addition, the magistrate must observe procedural requirements *unique* to the telephonic search warrant application in order to ensure a proper record.[29]

Even a casual review of those procedural requirements underscores the added complexities inherent in a telephonic search warrant application process. The governing statute was introduced as a mechanism to reduce constitutionally impermissible intrusions by accommodating magistrates and the law enforcement community. Its procedural exactitudes, ironically, may have produced just the opposite result.[30]

3. Boilerplate Affidavits and Warrants

So-called boilerplate, preprinted affidavits and "fill-in-the-blank" warrants are categorically suspect. The magistrate should be presented with specific facts related to the particular search. On the other hand, that presentment does not have to belabor the obvious in order to be valid. The Utah Court of Appeals has recently recognized that "(w)hile a detailed and factually specific affidavit is commendable and may facilitate subsequent review by an appellate court, it is not strictly necessary for the officer to elaborate on the obvious in the affidavit."[31]

4. The Form of the Warrant

Search warrants come in a variety of forms, and in all cases, content must take precedence over form. One commonly used form requires that the magistrate initial each finding. While this may not constitute a judicial factual finding for the purpose of appellate review, it may serve a very worthy purpose. The categorical breakdown may serve as a reminder to the magistrate that there must be sufficiently detailed and factually specific information to support both the issuance and the scope of the warrant.

5. Issuance

A magistrate may issue the warrant, upon oath, after finding requisite illegal activity, verifying the affidavit-warrant for comparative content integrity, determining the reliability of the information, finding that the scope of the search is constitutionally permissible and that all special conditions have been independently supported, and finally, determining the sufficiency of the affidavit for probable cause.

The original and all copies should be signed, and all interlineations should be initialed by the magistrate and the affiant. In addition where possible, all magistrate signatures should bear a court seal.

V
CONCLUSION

A magistrate should proceed cautiously and deliberately in the search warrant application process. It is the magisterial duty to assure that Fourth Amendment protections of the United States Constitution as well as Article I, §14 protections of the Utah Constitution have been considered. That affirmative duty cannot be taken lightly. It is imperative to constrain law enforcement zeal within constitutionally and statutorily permissible guidelines and to preserve impartiality. On the other hand, due process certainly does not require "the police officer to keep presenting affidavits until he hits the mark or the contraband sought disappears." *Albitex v. Beto*, 465 F.2d 954, 956 (5th Cir. 1972).[32] The goal is to constrain extra-constitutional activity, not to quash constitutionally sanctioned searches.

This paper does not attempt to address some thorny problems that frequently arise, e.g.: What standard is applied in determining the breadth of authorization to search persons at the place to be searched? Does a magistrate who declines to issue a search warrant have a duty to inform the applicant of the reasons for disapproving the application? These issues, together with numerous others, point out the critical need for continuing judicial education in this area. The search warrant review process is an extremely important judicial function. The lack of judicial education in this important area is disheartening and the need for training is obvious, particularly with the advent of our reorganization.[33] We ought never to condone trial and error jurisprudence.

"Case law tends to define Fourth Amendment restrictions in largely negative terms. Decisions stating what is impermissible are difficult for police officers to understand and for magistrates to apply."[34] The Criminal Justice Section of the ABA has attempted to fill this void and has recently published *Guidelines For The Issuance Of Search Warrants*.[35] The comprehensive guidelines were produced by a consortium of lawyers, judges and law professors. *Guidelines* is worthy of review by judges, prosecutors, the defense bar and the law enforcement community, despite the fact that some guidelines are not applicable in Utah.

The implementation of the suggestions in this paper should enhance the reliability of the search warrant application process, hopefully preserve magisterial impartiality, and, thereby, safeguard citizens from impermissible intrusions. Reduced appellate reversals would also be a favorable byproduct. At the very least, it is hoped that these observations might promote judicial dialogue and research.

[1] For an excellent discussion of this issue, see Wallentine, *Heeding the Call: Search & Seizure Jurisprudence Under the Utah Constitution*, Article I, §14, 17 Utah J. Contemp. L. (1991); *State v. Rowe*, 154 Utah Adv. Rep. 12 (Utah Ct. App. 1991); *State v. Sims*, 156 Adv. Rep. 8 (Utah Ct. App. 1991).

[2] U.C.S. §77-23-1 *et seq. State v. Van Dyke*, 589 P.2d 764 (Utah 1978) (court ruled that a search warrant obtained from a non-law-trained justice of the peace was not rendered defective.)

[3] *Keller v. State*, 543 P.2d 1211 (Alaska 1975).

[4] Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. Re. 117 (1987).

[5] *Illinois v. Gates*, 462 U.S. 213, 238; *State v. Espinoza*, 723 P.2d 420, 421 (Utah 1986); *State v. Babbell*, 770 P.2d 987, 990-991, (Utah 1989) (quoting *Gates*, 462 U.S. at 239). Magistrates must be willing to debunk the false notion that probable cause considerations in the search warrant proceeding are not worthy of serious scrutiny. The issues are becoming increasingly complex and technical.

[6] C.F. Cantrell, Search Warrants: A View of the Process, 14 Okla City U.L. Rev. 1, 13-14 (1989). Cited in *Guidelines For The Issuance of Search Warrants*, ABA, p. 4 (1990).

[7] *Guidelines For the Issuance of Search Warrants*, ABA p.4 (1990).

[8] *Id.*, at 12.

[9] *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

[10] *State v. Nielsen*, 727 P.2d 188, 190 (Utah 1986), *cert. den.*, 480 U.S. 930 (1987).

[11] Besides the cases cited in the *Babbell* at 923 see *Massachusetts v. Upton*, 466 U.S. 727, 232-33 (1984); *United States v. Harris*, 903 F.2d 770, 774 (10th Cir. 1990).

[12] *U.S. v. Leon*, 468 U.S. 897, 923 (1984).

[13] Searches and seizures of obscene materials, for example, require heightened scrutiny. "The constitutional requirement that warrants must particularly describe 'the things to be seized' is to be accorded the *most scrupulous exactitude* when the 'things' are books, and the basis for their seizure is the ideas which they contain." *Stanford v. Texas*, 379 U.S. 476 (1965) (emphasis added).

Likewise, troubling problems arise with the seizure of business records which are computerized. The courts have not adequately articulated the parameters of the particularity of description requirement as applied to computerized data.

There are other areas which raise legitimate concern and which ought to be the subject of judicial education.

[14] The "substantial basis" standard was announced in *Illinois v. Gates*, 462 U.S., at 238-39; and was adopted by Utah in *State v. Babbell*, 770 P.2d 987 (Utah 1989).

[15] See *State v. Collard*, 159 Utah Adv. Rep. 30, 32, n.3. As pointed out in the American Bar Associations publication, *Guidelines For the Issuance of Search Warrants*, (1990) pg. 2, this problem has national proportions. Consider the following excerpt:

Though deciding whether to issue a search warrant is an important judicial function, empirical studies of the warrant process have uncovered unsettling facts. An American Bar Foundation Study concluded that "the trial judiciary does not always take seriously its commitment to make a 'neutral and detached' decision as to whether there exist grounds for a search." L. Tiffany, D. McIntyre & D. Rottenberg, *Detection of crime* 120 (1967). More recently, an examination of seven jurisdictions, conducted by the National Center for State Courts, similarly found that "the use of boilerplate language **by the applicants** and the brevity of magisterial review is more suggestive of a routinized administrative procedure rather than a constitutional check on police power." R. Van Duizend, L. Sutton & C. Carter, *The Search Warrant Process* 87 (1984).

[16] The court noted in *Whiteley v. Warden*, 401 U.S. 560, 565 n.8 (1971), that an "otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant' at the time of the application but which is not disclosed to the magistrate. The propriety of a magistrate taking supplemental testimony under oath is treated in *State v. Crane*, 296 S.C. 336, 372 S.E. 2d 587-588 (1988).

[17] See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 46-47 (1970).

[18] Supreme Court concluded in *United States v. Harris*, 403 U.S. 573 (1971), that a confidential police informant who provides self-incriminating information is likely telling the truth.

[19] This may have been a problem in *State v. Collard*, 159 Utah Adv. Rep. 30 (Utah Ct. App. 1991).

[20] *Id.*, at 33 n.3.

[21] *State v. Rowe*, 154 Utah Adv. Rep. 12 (Utah Ct. App. 1991).

[22] *Id.*

[23] *Id.* "It has been held that a statute requiring 'good cause' invests the issuing magistrate with a broader discretion to direct a nighttime search than would be allowed under a requirement that the affidavits be positive." 68 Am Jur 2d §110, p.765; *Galena v. Municipal Court for Oakland-Piedmont Judicial Dist.* 237 Cal App. 2d 581, 47 Cal Rptr 88.

[24] cf. ABA Criminal Justice Section, *Guidelines For the Issuance of Search Warrants* (1990).

[25] *Id.*

[26] *Naugle v. Orem City, Utah County, et al.*, U.S. District Court for Utah, Central Division, Civil No. 89-C-372W pp. 36-41. It is well to note that the prosecutors joined in this action were involved more than in a mere review capacity. There is some question whether review, alone, would defeat absolute immunity.

[27] 711 P.2d, at 272. In order to facilitate telephonic warrants, recording equipment and a cellular phone would need to be standard equipment in every law enforcement vehicle.

[28] 794 P.2d, at 470; *See State v. Lopez*, 676 P.2d 393 (Utah 1981).

[29] Utah Code Ann. §77-23-4 specifically authorizes telephonic search warrants in Utah and sets forth some requirements necessary to make a record. A group of scholars has suggested the following list of legal requirements for judicial consideration:

1) The judicial officer should determine whether the applicant has discussed the application with the prosecutor prior to contacting the judicial officer. Prior communication between the prosecutor and police officer concerning what is to be related to the judicial officer is likely to make for a more focused and comprehensible presentation. Where practicable, a prosecutor should be included in the telephone conversation along with the applicant and the judicial officer.

2) The judicial officer should determine whether the recording or transcribing equipment is operating properly. It is essential that an accurate and usable record be made of the proceeding. If the application is presented over the telephone, the recording equipment should be tested to ensure that it audibly records the voices of all parties to the conversation including the affiant, the reviewing magistrate, the prosecutor, and any other individual who may be on the line. (The use of a telephonic recording device is not essential. Unless contrary to local rules, a verbatim handwritten transcript will suffice. The procedure that is likely to produce the most accurate and audible record is the preferred one.)

3) The judicial officer should avoid engaging in any preliminary unrecorded and unsworn conversation with the affiant or prosecutor regarding the substance of the application. Such comments may cause confusion in the minds of the parties as to what facts were stated on or off the record.

4) Prior to initiating the formal application process, all parties should identify themselves on the record and state the date and time that the formal application process begins.

5) The judicial officer should administer an oath to all parties who will be providing information concerning the issuance of the warrant. If more than one police officer and/or a prosecutor is on the telephone line, then all parties should be placed under oath to avoid the possibility that the judicial officer relied upon unsworn information.

6) If the statute or rule governing the issuance of a warrant upon telephonic or oral testimony requires a showing of need before the procedure can be used, the judicial officer should inquire, at the outset of the application process, why presenting a written affidavit is impracticable.

7) The affiant should identify himself, state the authority to make the application, and provide any information concerning his background, training and experience that may be pertinent to the finding of probable cause.

8) The affiant should describe with sufficient particularity the premises, vehicle, or person for whom search authority is being sought.

9) The affiant should describe with appropriate particularity the items to be seized.

10) The affiant should detail all the facts and circumstances that the affiant wishes the judicial officer to consider in determining whether probable cause exists. Because the presentation of an oral application is less

structured than a written affidavit, the judicial officer must be particularly attentive as to whether the communication provides a basis for issuance of a search warrant. The judicial officer should not hesitate to solicit additional information or clarification of ambiguities in the presentation.

11) If the affiant is requesting authority to serve the warrant at night or to make a forcible "no-knock" entry, the judicial officer should determine whether the affiant has provided the required justification.

12) After the affiant has concluded the presentation and requested a warrant, the judicial officer should state on the record whether probable cause to support the request for a search warrant exists. The judicial officer should restate specifically what premises or persons the affiant is authorized to search, and highlight any differences between the authority requested and that which was granted. The judicial officer should similarly identify what items the affiant may search for, and indicate whether the affiant's request has been modified or limited. If the judicial officer is authorizing nighttime entry and/or "no-knock" entry, that authorization should also be clearly stated in the record. Finally, the judicial officer should specify the time period within which the warrant must be served.

13) After the judicial officer has specified the applicant's authority (where the search may be conducted and what may be seized), the judicial officer should instruct the applicant to fill out a duplicate search warrant describing the location to be searched and the items to be seized, and to sign the judicial officer's name on the duplicate warrant—which the applicant will then use as authority to conduct the search. The judicial officer should fill out a duplicate copy of the same document. The judicial officer's name and the date and time of the authorization should appear on both copies. As a double-check, the affiant should read the search warrant back to the judicial officer. If any changes are necessary, both the original and the duplicate warrant must be modified identically.

14) The recording or transcription should conclude with the date and time that the formal application process terminated.

15) If there has been any break in the tape recording during the course of the application process, the judicial officer should so indicate, so that the record is clear that the recording does represent a complete record of what transpired.

16) The judicial officer should ensure that the voice recording or stenographic record is transcribed, certify the accuracy of the transcription, and file a copy of both the original record and the transcription with the clerk of the court. (It is preferable that the actual preparation of the verbatim record be performed by the police or prosecution rather than the judicial officer or staff.)

ABA Criminal Justice Section, *Guidelines for the Issuance of Search Warrants*, pp. 73-76 (1990).

[30] It is doubtful that a *Leon*-type, "good faith" would apply to the telephonic search warrant. Recorder malfunctions, improper identification of documents and other defects have resulted in lost evidence and dismissals.

This frustration has caused one prosecutor to observe:

"While many of the steps enumerated in the telephonic search warrant process are also required for obtaining any warrant, the telephonic search warrant process is little more than a maze of potential mistake and blunder. It may be different in the more rural parts of the state where judges can be located only at great distances from where search warrants are being prepared and served. But certainly along the Wasatch Front it is far simpler to roust a judge out of bed or chase a judge down on the fishing stream to obtain a signature than to try and comply with the convoluted and error prone process outlined in the telephonic search warrant statute."

This frustration, in my opinion, stresses the need for training, both of magistrates and the law enforcement community. We must all become more familiar with the procedural exactitudes of the statute if it is to become a tool to accommodate both the judiciary and law enforcement.

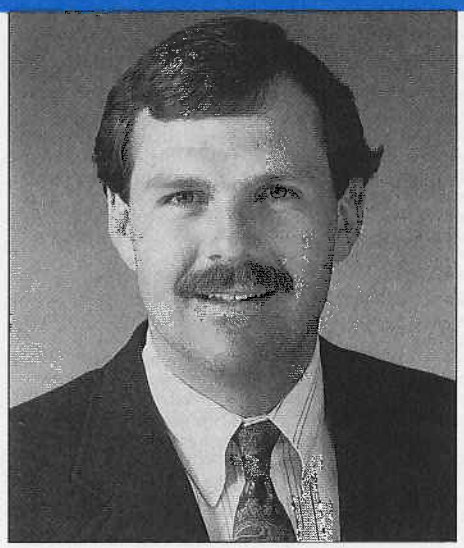
[31] *State v. Rowe*, 154 Adv. Rep. 12, 13 (Utah Ct. App. 1991).

[32] ABA Criminal Justice Section, *Guidelines For the Issuance of Search Warrants*, p. 6 (1990). If the judicial officer does not advise the affiant of the nature of the deficiency, then law enforcement is left in a quandary. There is danger with non-involvement; the officer does not know whether the declination is based upon a typographical error, problems with syntax, some innuendo, personal predilection of the judicial officer, or a genuine substantive concern. A non-involvement, laissez faire, posture, in the opinion of this author, is untenable. On the other hand, if the magistrate speaks to the deficiencies in detail, then he essentially directs the redrafting of the affidavit for future presentment and becomes an adjunct on the subject of probable cause. That pedagogical role is likewise unsanctioned. This is yet another area ripe for judicial discussion.

[33] *C.f.* House Bill 436 (1991), the Court Organization and Jurisdiction Bill. Statewide and local transition teams have been established to plan the implementation of the Bill. It is unclear under court reorganization what level of court will handle search warrant applications. When that determination is ultimately made, additional training may be merited.

[34] *Guidelines, Id.* at i.

[35] *Id.* Copies of *Guidelines* can be ordered at nominal cost through the American Bar Association, Section of Criminal Justice by contacting the ABA's Order Fulfillment Department at (312) 988-5000. When ordering, please refer to product service code 509-0046. (Single copy $7.50 ea., 2-5 copies $6.00 ea., and 6-20 copies $5.00 ea.).



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By Mark S. Webber
Secretary, Young Lawyers Section

Providing a needy child with a Christmas, speaking on public radio during Law Week and feeding the hungry at a homeless shelter are just a few of the many activities in which members of the Young Lawyers Section of the Bar will be involved during the coming year. The 1991-1992 year for the Young Lawyers Section began Saturday, August 24, when James Z. Davis, President of the Bar, and the Young Lawyers Executive Committee met at the Law and Justice Center. Committees and programs for the upcoming year were the central topic. Mr. Davis congratulated the Young Lawyers on their outstanding service to the Bar and the community, and confirmed the Bar's financial support to the Section. Charlotte Miller, President of the Section, also reported that the Section has been awarded substantial grants to assist in the preparation of brochures for the Bill of Rights, videotapes on domestic violence, videotapes on probate planning and handbooks on child abuse. With fifteen committees undertaking over forty different programs in the coming year, we encourage all young lawyers to participate. Working on a committee can be rewarding, and requires only as much time as you're able to offer.

To help you in selecting the committee in which you would like to be involved for the coming year, the committees are outlined as follows:

BILL OF RIGHTS COMMEMORATION COMMITTEE:

This Committee is involved in commemorating the Bicentennial of the Bill of Rights by printing professional quality pamphlets and distributing them to high school students. The Committee provides lawyers to speak at high schools about the Bill of Rights. It also is working with the Utah Symphony on a celebration of the Bill of Rights in December, 1991.

COMMUNITY SERVICES COMMITTEE:

It is designed to give service to the community with activities ranging from blood drives to providing and serving dinner at the homeless shelter. It assists with the Sub-for-Santa program, as well as gives lectures on drug/substance abuse to many high schools.

DIVERSITY IN THE LEGAL PROFESSION COMMITTEE:

This Committee focuses on increasing diversity in Bar leadership. One of its projects is the spouse abuse informational videotape.

LAW DAY COMMITTEE:

It is responsible for Law Day related activities like the Law Day Fair in Logan, St. George, Provo, Ogden and Salt Lake City. It participates in public television and radio programs during Law Week, as well as school lectures and presentations.

LAW RELATED EDUCATION COMMITTEE:

It conducts the Law School for Non-Lawyers program (a library lecture series in Salt Lake, Ogden and Provo); a high school lecture program (various law-related lectures in high schools in Utah, Salt Lake, Davis and Weber Counties); and the People's Law program (part of the Salt Lake community education program).

LEGAL BRIEFS COMMITTEE:

This Committee is responsible for a bi-weekly radio program on KSL addressing current legal issues.

MEMBERSHIP SUPPORT NETWORK COMMITTEE (MSN):

It sponsors the brown bag luncheons, the Law Student/Law Firm Employment Fair, and the Law Student Mock Interview program. It also is in charge of some of the CLEs at the midyear and the Annual State Bar meetings.

NEEDS OF THE CHILDREN COMMITTEE:

It focuses on programs such as educational teachings about child abuse.

NEEDS OF THE ELDERLY COMMITTEE:

This Committee is designed to aid the elderly by educating them on their legal rights. This is done through presentations in senior citizen centers, handbooks, informational videotapes, and columns in senior citizen newsletters.

PRO BONO COMMITTEE:

It organized and continues to run the Tuesday Night Bar Legal Intake Services in Salt Lake City and Ogden. It also is involved in a Legal Services fundraiser and the downwinder informational program.

NEEDS OF THE HEALTH IMPAIRED COMMITTEE:

This Committee assists individuals with health-related impairments, and this year is focusing on HIV victims by providing them with legal services.

PUBLICATIONS/PUBLICITY COMMITTEE:

It is responsible for the Barrister segment in the Utah Bar Journal, along with press releases and publicity for special events and projects.

SERVICES TO RAPE VICTIMS COMMITTEE:

It is initiating a program to provide clothing for victims of rape.

NEW LAWYER CONTINUING EDUCATION COMMITTEE:

This Committee will organize monthly speakers to provide new lawyers practical guidance in various practice areas. Attendance at 10 of the 18 meetings is mandatory for new lawyers, and continuing legal education credit will be available.

As you can see, there are projects for all young lawyers. Get involved by signing up for the committee of your interest. Realize the rewards of participation while not only giving service to the community, but also becoming acquainted with other young lawyers. To participate, contact an officer, an executive committee member, or fill out the following form and send it to the Law and Justice Center.

OFFICERS

Charlotte L. Miller
President
363-3300

Keith A Kelly
President-Elect
532-1500

Mark S Webber
Secretary
532-1234

James C. Hyde
Treasurer
532-1234

Richard A. Van Wagoner
Past-President
521-9000

EXECUTIVE COMMITTEE MEMBERS

Gordon K. Jensen
964-8228

David J. Crapo
521-5800

M. Joy Douglas
532-2668

Brent D. Wride
532-1500

David W. Steffensen
521-9000

Harry Caston
521-4135

Greg N. Skabelund
752-9437

Linda J. Barclay
373-6345

Mary J. Woodhead
363-3300

Glenda Ware Langston
963-1456

David W. Zimmerman
532-1234

Leisha Lee Dixon
532-5125

Lorrie Lima
265-5520

Steven T. McMaster
532-3200

Michael A. Day
673-4892

Katherine Dean Kendall
394-5783

Lisa J. Watts
538-1032

Mark M. Bettilyon
532-1234

Joann Shields
537-5555

Kristin G. Brewer
532-1036

Scott G. Monson
534-1576

Larry R. Laycock
533-9800

Kimberly K. Hornak
363-7900

If you are interested in serving on a Committee of the Young Lawyers Section, check the areas of interest and send to:
Young Lawyers Section
UTAH STATE BAR
645 South 200 East
Salt Lake City, Utah 84111-3834

____ New Lawyer Continuing Legal Education
____ Bar Member Support
____ Community Services
____ Pro Bono Committee
____ Publications and Publicity
____ KSL Legal Briefs
____ Needs of the Health Impaired Committee
____ Services to Rape Victims Committee
____ Law Related Education
____ Law Day
____ Needs of Children
____ Needs of Elderly
____ Bill of Rights
____ Rocky Mountain Program
____ Diversity in the Legal Profession

Name: _____
Address: _____
_____
Telephone: _____

Report of Independent Certified Public Accountants

Board of Trustees
Utah Bar Foundation

We have audited the accompanying balance sheets of the Utah Bar Foundation (the Foundation) as of December 31, 1990 and 1989, and the related statements of revenues and support, expenses, and changes in fund balance and of changes in financial position for the years then ended. These financial statements are the responsibility of the Foundation's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Utah Bar Foundation as of December 31, 1990 and 1989, and the results of its operations and changes in its financial position for the years then ended, in conformity with generally accepted accounting principles.

Our audit for the year ended December 31, 1990, was made for the purpose of forming an opinion on the basic financial statements of the Foundation taken as a whole. The supplemental information presented on pages 12 and 13 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the audit procedures applied in the audit of the basic financial statements and, in our opinion is fairly stated, in all material respects, in relation to the basic financial statements taken as a whole.

Grant Thornton
Salt Lake City, Utah
April 30, 1991

Balance Sheets

December 31

ASSETS

	1990	1989
Cash	$316,166	$252,325
Time certificates of deposit (Note B)	233,138	212,936
IOLTA receivable	6,477	11,018
Accrued interest receivable	4,502	5,842
Member contributions receivable	—	1,989
Furniture and equipment, net of accumulated depreciation of $4,494 in 1990 and $2,355 in 1989	6,202	8,341
Land held for resale	2,770	2,770
Marketable securities	3,031	3,031
	$572,286	$498,252

LIABILITIES AND FUND BALANCE

Accounts payable	$246	$1,081
Commitments (Notes D and E)	—	—
Fund balance	572,040	497,171
	$572,286	$498,252

The accompanying notes are an integral part of these statements.

Statements of Revenues and Support, Expenses, and Changes in Fund Balance

Year ended December 31

	1990	1989
Revenues and support		
Interest on lawyers' trust accounts	$234,689	$224,053
Interest and dividend income	37,448	22,426
Member contributions	1,144	2,036
Other contributions	—	2,647
Proceeds from liquidation of Prepaid Legal Services Corporation (Note F)	—	115,993
	273,281	367,155
Expenses		
Awards of IOLTA funds (Note C)	162,874	126,164
Postage and printing	2,737	2,875
Wages	8,413	10,895
Travel	1,159	701
Office and administrative	7,325	3,646
Rent (Note E)	4,755	4,755
Membership dues	450	150
Depreciation expense	2,139	1,940
Public relations	6,060	2,151
Refund	2,500	—
	198,412	153,277
Excess of revenue and support over expenses	74,869	213,878
Fund balance at beginning of year	497,171	283,293
Fund balance at end of year	$572,040	$497,171

The accompanying notes are an integral part of these statements.

Statements of Changes in Financial Position

Year ended December 31

	1990	1989
Sources of cash:		
From operations:		
Excess of revenue and support over expenses	$74,869	$213,878
Add depreciation not requiring cash	2,139	1,940
Cash provided by operations	77,008	215,818
Decrease in IOLTA receivable	4,541	—
Decrease in acrrued interest receivable	1,340	—
Decrease in member contributions receivable	1,989	142
Total sources of cash	84,878	215,960
Uses of cash:		
Decrease in accounts payable and accrued liabilities	835	108
Increase in IOLTA receivable	—	6,083
Increase in accrued interest receivable	–	4,249
Additions to furniture and equipment	–	2,396
Total uses of cash	835	12,836
Increase in cash	84,043	203,124
Cash at beginning of year	465,261	262,137
Cash at end of year	$549,304	465,261
Shown on balance sheet as:		
Cash	$316,166	$252,325
Time certificates of deposit	233,138	212,936
	$549,304	$465,261

The accompanying notes are an integral part of these statements.

Notes to Financial Statements

December 31, 1990 and 1989

NOTE A—SUMMARY OF ACCOUNTING POLICIES

A summary of the significant accounting policies consistently applied in the preparation of the accompanying financial statements follows.

1. Activity

The Utah Bar Foundation (Foundation) was organized in 1963 as a non-profit corporation to advance the science of jurisprudence, to promote improvements in the administration of justice and uniformity of judicial proceeding and decisions, to provide training courses for lawyers, to elevate judicial standards, to advance professional ethics, to improve relations between members of the Utah State Bar Association (Bar), the judiciary and the public, and the preservation of the American constitutional form of government, exclusively through education, research and publicity.

Under the interest on lawyers' trust accounts (IOLTA) program, implemented in 1984, the Foundation receives interest on member lawyers' trust accounts from the deposit of client funds that are nominal in amount or that are expected to be held for only a short period of time. The Foundation awards grants of these funds to promote legal education and increase knowledge and awareness of the law in the community, to assist in providing legal services to the disadvantaged, to improve the administration of justice, and to serve other worthwhile, law-related public purposes.

2. Furniture and equipment

Certain items of furniture and equipment have been received by the Foundation as donations. Donated furniture and equipment have been recorded at their fair market value at the date of the gift. Depreciation is provided over the estimated useful lives of five years on a stright-line basis.

3. Income taxes

The Foundation is a non-profit organization and is exempt from income taxes under §501(c)(3) of the Internal Revenue Code.

4. Fund accounting

The accounts of the Foundation are maintained in six self-balancing funds according to their nature and purpose as follows:

IOLTA FUND—The IOLTA Fund is used to account for interest received on member lawyers' trust accounts and the awarding of grants of these funds.

JUDICIAL HISTORY FUND—The Judicial History Fund is used to account for donations and expenses relating to the judicial history of the State of Utah.

OFFICE FURNITURE AND EQUIPMENT FUND—The Office Furniture and Equipment Fund is used to account for fixed assets owned by the Foundation.

ADMINISTRATIVE FUND—The Administrative Fund is used to receive 5 percent of the annual IOLTA funds, the interest on the IOLTA funds prior to allocation, and to pay the general and administrative expenditures.

PERPETUAL ENDOWMENT FUND—IOLTA—The Perpetual Endowment Fund is used to receive 10 percent of the annual IOLTA funds in order to accumulate a reserve to be held for future projects consistent with the purposes specified in the IOLTA program.

PERPETUAL ENDOWMENT FUND—NON-IOLTA—This fund is used to receive all non-IOLTA contributions and interest earned on those funds to be held for future projects consistent with the purposes specified in the Articles of Incorporation.

NOTE B—TIME CERTIFICATES OF DEPOSIT

At December 31, 1990, the Foundation holds eight time certificates of deposit as follows:

Amount	Interest Rate	Maturity Date
$22,449	7.40%	January 27, 1991
19,739	7.45	March 5, 1991
5,644	7.35	April 30, 1991
24,037	7.70	May 18, 1991
69,798	7.30	June 2, 1991
37,370	6.70	June 13, 1991
8,161	7.30	June 26, 1991
45,940	7.70	August 25, 1991
$233,138		

NOTE C—AWARDS OF IOLTA FUNDS

IOLTA funds were used for grants to:

	1990	1989
Utah Legal Services, Inc.	$42,500	$12,500
Legal Aid Society	40,000	$40,000
Law-Related Education	26,800	25,000
Utah Law and Justice Center (Alternative Dispute Resolution)	20,845	21,800
Legal Center for People with Disabilities	12,000	-
Law and Justice Center (usage study)	8,000	-
Legal Center for the Handicapped	5,000	5,000
Utah Law-Related and Citizenship Education Project	5,000	8,333
Law-Related Education (rent)	1,481	-
American Inns of Court	600	-
National Pro Bono Conference	500	-
Brigham Young University Law School Award	148	131
Administrative Offices of the Court	-	5,000
Young Lawyers Pamphlet	-	4,000
Utah Children	-	2,900
Snow College—Criminal Law Library	-	1,500
	$162,874	$126,164

NOTE D—COMMITMENTS

As of December 31, 1990, the Board of Trustees has approved awards for the following beneficiaries which have not been disbursed:

Inns of Court	$300
Law-Related Education (building improvements)	20,000
Utah State Bar-Young Lawyers Bill of Rights	10,000
Administrative Offices of the Court	7,500
	$37,800

NOTE E—RENT

In October 1988, the Foundation began renting office space in the Law and Justice Center under an operating lease with monthly payments of $396. During 1990, the Foundation exercised its option to renew the lease for another three-year term to end in September 1994. The future minimum lease payments associated with this lease are as follows:

1991	$4,755
1992	4,755
1993	4,755
1994	3,564
	$17,829

NOTE F—PROCEEDS FROM LIQUIDATION OF PREPAID LEGAL SERVICES CORPORATION

During 1989, the Utah Bar Foundation received $115,993 from the liquidation of Prepaid Legal Services Corporation (a non-profit corporation). All non-profit corporations name a beneficiary in the event of liquidation. Prepaid Legal Services Corporation provided liability insurance to lawyers. Utah law was changed which disallowed this type of operation. The Foundation, being the named beneficiary, received the net assets in liquidation.

Supplementary Balance Sheet by Fund

December 31, 1990

ASSETS

	IOLTA Fund	Judicial History Fund
Cash and cash equivalents	$132,482	$5,343
Time certificates of deposit	113,920	5,644
IOLTA receivable	6,477	-
Accrued interest receivable	3,049	-
Furniture and equipment, net of accumulated depreciation of $2,355	-	-
Land held for resale	-	-
Marketable securities	-	3,031
	$255,928	$14,018

LIABILITIES AND FUND BALANCE

Accounts payable	$-	$-
Fund balance	$255,928	$14,018
	255,928	$14,018

Office Furniture and Equipment Fund	Administrative Fund	Perpetual Endowment Fund—IOLTA	Perpetual Endowment Fund—Non IOLTA	Total All Funds
$-	$13,486	$46,509	$118,346	$316,166
-	-	89,537	24,037	233,138
-	-	-	-	6,477
-	-	1,453	-	4,502
6,202	-	-	-	6,202
-	-	-2,770	2,770	
-	-	-	-	3,031
$6,202	$13,486	$137,499	$145,153	$572,286
$-	$246	$-	$-	$246
6,202	13,240	137,499	145,153	572,040
$6,202	$13,486	$137,499	$145,153	$572,286

Supplementary Statement of Revenues and Support, Expenses, and Changes in Fund Balance by Fund

Year ended December 31, 1990

	IOLTA Fund	Judicial History Fund
Revenues and support		
Interest on lawyers' trust accounts	$234,689	$-
Interest and dividend income	-	1,110
Member contributions	-	-
	234,689	1,110
Expenses		
Awards of IOLTA funds	162,874	-
Postage and printing	-	-
Wages	-	800
Travel	-	-
Office and administrative	-	-
Rent	-	-
Membership dues	-	-
Depreciation expense	-	-
Public relations	-	-
Refund	-	2,500
	162,874	3,300
Excess (deficit) of revenue and support over expenses	71,815	(2,190)
Fund balance at beginning of year	186,151	16,208
Add transfers in	34,000	-
Deduct transfers out	(36,038)	-
Fund balance at end of year	$255,928	$14,018

Office Furniture and Equipment Fund	Administrative Fund	Perpetual Endowment Fund—IOLTA	Perpetual Endowment Fund—Non IOLTA	Total All Funds
$-	$-	$-	$-	$234,689
-	15,395	7,950	12,993	37,448
-	-	-	1,14	1,144
-	15,395	7,950	14,137	273,281
-	-	-	-	162,874
-	2,737	-	-	2,737
-	7,613	-	-	8,413
-	1,159	-	-	1,159
-	7,325	-	-	7,325
-	4,755	-	-	4,755
-	450	-	-	450
2,139	-	-	-	2,139
-	6,060	-	-	6,060
-	-	-	-	2,500
2,139	30,099	-	-	198,412
(2,139)	(14,704)	7,950	14,137	74,869
8,341	15,375	106,080	165,016	497,171
-	12,569	23,469	-	70,038
-	-	-(34,000)	(70,038)	
$6,202	$13,240	$137,499	$145,153	$572,040

CLE CALENDAR

CLE CALENDAR
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: 6 hours
DATE: October 9, 1991
PLACE: Salt Lake Community College Campus
FEE: Call for this
TIME: 8:00 a.m. to 2:30 p.m.

PRE-TRIAL SETTLEMENT CONFERENCES

A Family Law Section Luncheon.

CLE Credit: 1 hour
DATE: October 11, 1991
PLACE: Utah Law & Justice Center
FEE: Call for reservations
TIME: 12:00 noon to 1:00 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 integrates the sophisticated approach of neurolinguistic programming and brings it into the legal arena.

CLE Credit: 6.5 hours
DATE: October 15, 1991
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

TAX CONSEQUENCES OF WORKOUTS AND BANKRUPTCY

A live via satellite seminar presented by the A.B.A. A distinguished faculty will thoroughly examine major taxation topics highlighting significant changes in the Code and Regulations. The program will be of interest to corporate, real estate and tax practitioners. This seminar will alert tax practitioners to the consequences of workouts and bankruptcies.

CLE Credit: 4 hours
DATE: October 16, 1991
PLACE: Utah Law & Justice Center
FEE: $150 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

BANKRUPTCY SEMINAR-LITIGATION STRATEGIES

This seminar is part of the continuing series offered by the Bankruptcy section. This program will be presented by David Leta of Hansen, Jones & Leta and will provide valuable information for the Bankruptcy Practitioner.

CLE Credit: 2 hours
DATE: October 17, 1991
PLACE: Utah Law & Justice Center
FEE: $25
TIME: 12:00 noon to 2:00 p.m.

THE BASICS OF WILLS AND TRUSTS

This program is an excellent opportunity for the attorneys to expand their practice or brush up on this area of law. This half-day seminar is an introduction to and a refresher course in the basics of wills and trusts. The basic elements of wills and trusts will be examined and then the two will be contrasted to learn when the use of each or both is appropriate. Common mistakes encountered will also be discussed.

CLE Credit: 4 hours
DATE: October 18, 1991
PLACE: Utah Law & Justice Center
FEE: $45
TIME: 8:00 a.m. to 12:00 noon

ASSET PROTECTION PLANNING

A live via satellite seminar. Any successful business owner is potentially at risk and therefore, planning in advance for the protection of hard-earned assets is becoming more common practice. This seminar will look at planning techniques which give maximum protection but minimal disruption of control and enjoyment of family assets.

CLE Credit: 6.5 hours
DATE: October 22, 1991
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

FAMILY LAW BASICS

This seminar will examine the basic issues an attorney would encounter when representing a client in a divorce. Most attorneys are approached at one time or another with questions regarding a friend's or current client's divorce. This seminar will give the attorney the information they need to possibly take the client's case or to assist them as needed. The result could be an expanded base of practice for an attorney. More information will be forthcoming on this seminar.

CLE Credit: 4 hours
DATE: October 25, 1991
PLACE: Utah Law & Justice Center
FEE: $40
TIME: 8:00 a.m. to 12:00 noon

ESTATE PLANNING FOR THE 90'S—THE FOURTH ANNUAL SALT LAKE ESTATE PLANNING COUNCIL FALL INSTITUTE

This institute includes professional with both tax and legal expertise. Topics to be covered include: Recognizing and Avoiding Fiduciary Liability, New Chapter 14, Estate Planning for the Elderly, Update of Life Insurance Products, Dealing with the IRS, and Planning for Generation Skipping. Bring your estate planning practice up-to-date with this informative seminar.

CLE Credit: 8 hours
DATE: October 25, 1991
PLACE: Marriott Hotel in Salt Lake
TIME: 8:00 a.m. to 5:00 p.m.

RICO: A PRACTICAL SEMINAR

A live via satellite seminar. This seminar explains the fundamentals of RICO, both civil and criminal, and explores how this statute, designed for a specific law enforcement purpose, has altered the legal landscape and changed the practice of law. The speakers will provide a general overview and a more in-depth explanation of how RICO has impacted specific practice areas.

CLE Credit: 6.5 hours
DATE: November 5, 1991
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 9:00 p.m.

THE MILD TO MODERATE BRAIN INJURY CASE: WHAT THE ATTORNEY NEEDS TO KNOW

This seminar is designed to provide basic, but critically important, medical and psychological information necessary to understand and prepare a mild to moderate brain injury case. Plaintiff's attorneys sometimes fail to recognize the seriousness of the minor to mild brain injury case, or do not have the tools to adequately evaluate it. Defense counsel, on the other hand, may be unable to differentiate the legitimate case from the exaggerated one. The information presented in this seminar will help attorneys better prepare their cases so that the legitimate needs of the head-injured will be advanced.

CLE Credit: 16 hours
DATE: November 7-8, 1991
PLACE: Utah Law & Justice Center
FEE: $295
TIME: 8:00 a.m. to 5:00 p.m. each day

SECTION 401(a)(4), 401 (K) AND 401 (M) FINAL REGULATIONS

A live via satellite seminar. This seminar anticipates the release of the final regulations package under Internal Revenue Code Section 401(a)(4). If released, they will be the focus of this program, featuring a discussion on qualified pension and profit-sharing plans.

CLE Credit: 4 hours
DATE: November 12, 1991
PLACE: Utah Law & Justice Center
FEE: $150 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

ETHICS: CRIMINAL INVESTIGATIONS AND THE CIVIL PRACTITIONER

This seminar, cosponsored by the Utah Association of Criminal Defense Lawyers, will involve a panel discussion of issues related to criminal investigations of corporate clients and clients involved in civil litigation. Some of the issues to be addressed include assertions of privileges and conflicts of interest. Panelists will include state and federal prosecutors, criminal defense attorneys and civil practitioners.

CLE Credit: 3 ETHICS hours
DATE: November 13, 1991
PLACE: University Park Hotel
FEE: To be determined
TIME: 6:00 p.m. to 9:00 p.m.

EMPLOYMENT LAW I

This is a New Lawyer CLE workshop and is open to general registrations on a space available basis. This workshop will cover basic employment law issues.

CLE Credit: 3 hours
DATE: November 18, 1991
PLACE: Utah Law & Justice Center
FEE: Call for this
TIME: 5:30 p.m. to 8:30 p.m.

PRACTICING ADMINISTRATIVE LAW IN UTAH— Five Years Since UAPA

This seminar is being cosponsored with the Western Conference on Administrative Law and the Administrative Practice Section of the Bar. This conference deals with five years of agency, private practice and judicial experience in Utah dealing with the Utah Administrative Procedures Act and applying the new law to practicing administrative law in Utah. This is a practical "nuts and bolts" conference useful to every lawyer and state agency in Utah.

CLE Credit: 7 hours
DATE: November 21, 1991
PLACE: Utah Law & Justice Center
FEE: $120
TIME: 8:00 a.m. to 5:00 p.m.

LEGAL ASSISTANTS ASSOCIATION OF UTAH/UTAH STATE BAR ANNUAL SEMINAR

This is the annual presentation cosponsored by LAAU and the Utah State Bar each year. More information will be available on this seminar at a later date.

DATE: November 22, 1991
PLACE: Utah Law & Justice Center

APPELLATE PRACTICE ISSUES

A Family Law Section luncheon.

CLE Credit:1 hour
DATE: November 22, 1991
PLACE: Utah Law & Justice Center
FEE: Call for reservations
TIME: 12:00 to 1:00 p.m.

CLE FOR THE GENERAL PRACTITIONER

A one and one-half day CLE Institute geared to the needs of sole practitioners and attorneys in small offices will be cosponsored by Westminster College and the Utah State Bar. The Institute offers 12 CLE credits (3 of these in ethics) in one Friday afternoon and all day Saturday sessions. Other topics include appellate procedures; attorney's title guaranty fund; limited liability companies; juvenile, employment, family and collections law; and, implementing computers in the law office. Call 488-4159 for registration information.

CLE Credit:12 hours (3 in ETHICS)
DATE: December 6 & 7, 1991

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____
2. _____ _____

_____

Make all checks payable to the Utah State Bar/CLE — Total Due

Name — Phone

Address — City, State, ZIP

Bar Number — American Express/MasterCard/VISA — Exp. Date

Signature

Please send in your registration with payment to: Utah State Bar, CLE Department, 645 S. 200 E., Salt Lake City, UT 84111.

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1991. Watch for future mailings.

Registration and Cancellation Policies: Please register in advance, as registrations are taken on a space-available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. No refunds will be made for live programs unless notification of cancellation is received at least 48 hours in advance.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the two-year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

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

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