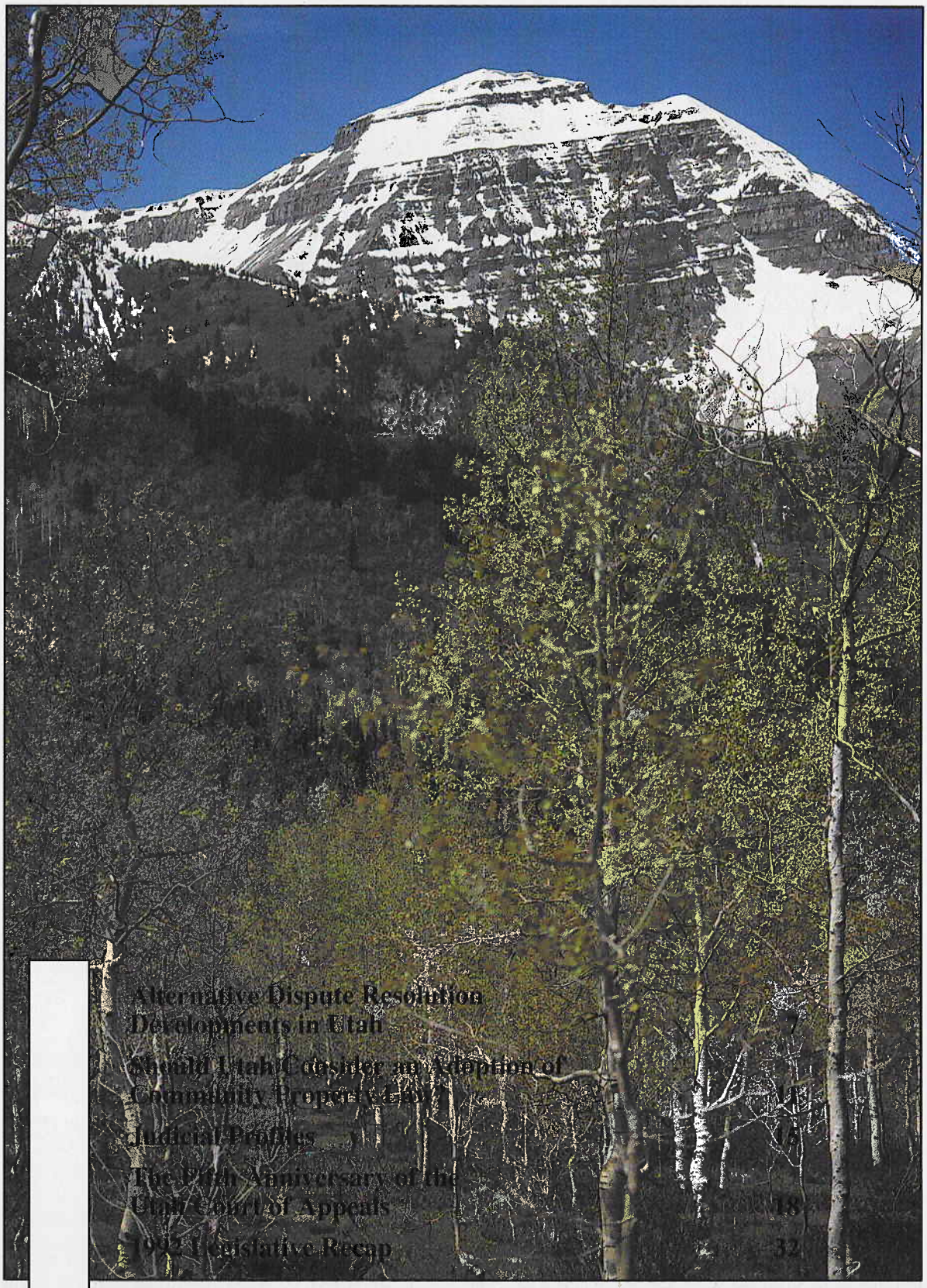
UTAH BAR JOURNAL

Vol. 5 No. 4 April 1992



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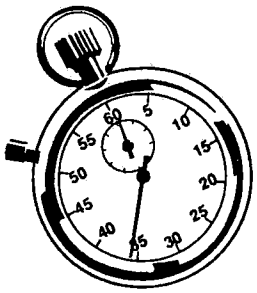

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COVER: Mount Timpanogos in Springtime, by Harry Caston, Esq., Shareholder, McKay, Burton & Thurman, P.C.

Members of the Utah Bar who are interested in having their photographs published 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, Utah 84111, 532-5200. Send both the slide (or the transparency) and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

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

LETTERS

Dear Editor:

I would like to correct some misinformation which led Bar Commissioner Snyder, in his report published in the *Bar Journal*, (January, 1992) to question the qualifications and background of the Court Commissioner from the Fifth District.

First, let me address the issue of background. I am a native of Utah with roots which reach past the pioneers. My degrees in Sociology and Law were earned with some distinction at the University of Utah. My children were raised in Utah where I practiced law for fourteen years.

In 1988, I was hired and met all of the qualifications of R.J.A. 3-201 in effect at that time. The many officials involved in the hiring process were aware of my intention to live in Nevada. It should be noted that even as a resident of Nevada I was physically closer to the St. George Court than was either the District Court or the Juvenile Court Judges whom I served. In addition, I paid Utah State taxes while a resident of Nevada.

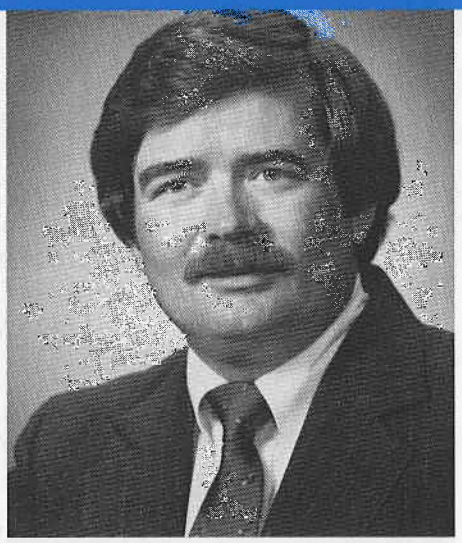
In 1990, U.C.A. § 78-3-21 was passed which added a residency requirement to the commissioner rule and allowed two years to comply.

In November, 1991, in anticipation of full-time employment, I moved to St. George at considerable personal expense. In addition, I have met all of the necessary requirements of residency. A little research, or at the least a phone call, could have avoided the dissemination of false information to my colleagues.

I would like to invite anyone interested in observing a fully consolidated court, which includes a court commissioner, to visit the Fifth District. We welcome informed constructive criticism.

Sincerely,

Marlynn B. Lema
Fifth District Court Commissioner



Too Many Lawyers?

By J. Michael Hansen

In early winter of 1976, during my first year of law school, in the midst of putting in eighteen hour days, *TIME* magazine ran a cover story the substance of which was that America was drowning in a sea of lawyers and taking American business down with it. That was just what I needed on the eve of my civil procedure final. The *TIME* magazine story was not the first, nor was it the last, criticism of the number of lawyers. From Shakespeare's comment in *Richard III* to the effect that "first, let's kill all the lawyers," through Brigham Young counseling members of the L.D.S. Church to avoid lawyers and the legal profession, through *TIME* magazine and other popular mass media, the legal profession has taken its hits. It is popular to lambaste lawyers. Politicians of all stripes have intermittently taken a swipe at the legal profession, including the recent jabs from "great house, nobody home" Quayle. Like the rising and falling of the tides, or as surely as day follows night, we can expect lawyer jokes and periodic attacks on the legal profession.

On February 6, 1992, on what must have been a very slow news day or an attempt to boost circulation, the *Salt Lake Tribune* ran a front page story (which would have been more appropriate on the editorial page), under the headline "More Lawyers Becoming Utah's Law of the Land." The *Tribune*, noted that "last year the University of Utah cranked out 130 new graduates. The J. Reuben Clark Law School at Brigham Law University unleashed 152 graduates" (emphasis added). The *Tribune* quoted "statistics", source unknown, which stated that "in 1980 there were 2,938 practicing attorneys in Utah — one for every 502 Utahns. Now there are about 5,600 — one for every 299 Utah residents."

John Baldwin, our ever "Johnny-on-the-Spot" Executive Director, after reading the *Tribune* article, reviewed the records of the Bar and compiled the following statistics:

Active Licensed Resident Lawyers	3,857
Active Licensed Non-Resident Lawyers	371
Total Active Licensed Lawyers	4,228
Inactive Licensed Lawyers	345
Inactive Licensed Non-Resident Lawyers	780
Total Inactive Licensed Lawyers	1,125
Total Active and Inactive Lawyers	5,353

In short, there were 3,857 active licensed resident lawyers in the State of Utah for a population of approximately 1,750,000 people, or 1 attorney for every 454 residents. In 1989 the national average was 360 residents per attorney.

In contrast to the *Salt Lake Tribune* article, on February 4, 1992, The *Wall Street Journal* published a chart showing the ratios of attorneys in private practice to the potential "client base." The *Wall Street Journal* ranked Utah 37th out of 50 states in the number of lawyers in private practice in relation to the potential client base, basing that calculation on an American Bar Foundation report showing 1 Utah lawyer for every 621 "potential clients." The national average was 1 lawyer for every 473 people. While some undoubtedly think that even one lawyer is one too many, the statistics do not support a conclusion that Utah has more than its share of lawyers.

There is, however, no doubt that the legal community in Utah is growing. The increase in the number of attorneys puts added pressure on the Bar with respect to both admissions and discipline. While no formal study has been undertaken by the Bar, it is the general consensus that the "hungry" lawyer is more prone to skirt the edge when it comes to complying with the profession's ethical standards.

Are there too many lawyers in Utah? To the recent law school graduate who is finding it difficult to be hired by a large law firm, the answer may well be "Yes." The lawyer who finds himself without a

job in one of the intermittent law firm shake-ups may well answer "Yes." Undoubtedly, the unsuccessful litigant in civil action would resoundingly answer "Yes." On the other hand, the average wage earner seeking a lawyer and can find no one to take his case for less than $50.00 to $60.00 an hour may feel that if there were more lawyers in the marketplace, there would be more price competition resulting in more readily affordable legal services. Furthermore, not every law school graduate must land a job in private practice. Historically, a law degree has proven invaluable to individuals who, rather than wishing to practice law, desire to go into business.

Even if it were determined that there were too many lawyers, what could the Bar do about it? Artificially limit the number of applicants able to take the Bar examination? Put pressure on the University of Utah or Brigham Young University to close down their law schools? Tell the young people of the State of Utah that if they desire to go into the legal profession, they need not apply? Clearly none of these alternatives is acceptable. The marketplace itself must regulate the number of attorneys who practice. All that the Bar can do is to insure that attorneys who practice in Utah have a certain minimal competency and, if ethical violations are found, vigorously prosecute the unethical lawyer.

The canard that there are too many lawyers will, from time to time, reappear. When it does, I remember what my torts professor, Wayne Thode, said in response to the *TIME* magazine article. He told of a meeting he had attended in which the participants were doctors and lawyers. After listening to one physician speaker bemoan the legal profession, Professor Thode stood and reminded those in attendance that at the same time a collection of people had gathered, the great majority of whom were lawyers, to draft the Constitution of the United States, one of the greatest and most enlightened documents in the history of man, the medical profession was curing disease by the methodical and conscientious application of leeches.

Enough said.

The Law-Related Education and Law Day Committee of the Utah State Bar extends to you a special invitation to attend the second annual Law Day Awards Ceremony. This year's theme is "Struggle for Justice" in celebration of the Bicentennial of the Bill of Rights. There will be various presentations, displays, and awards recognizing participants and winners in the various Law Day activities. Please join us in celebrating Law Day 1992.

LAW DAY AWARDS CEREMONY

May 1, 1992
12:00 Noon
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Distinguished Guest: ***James Madison***

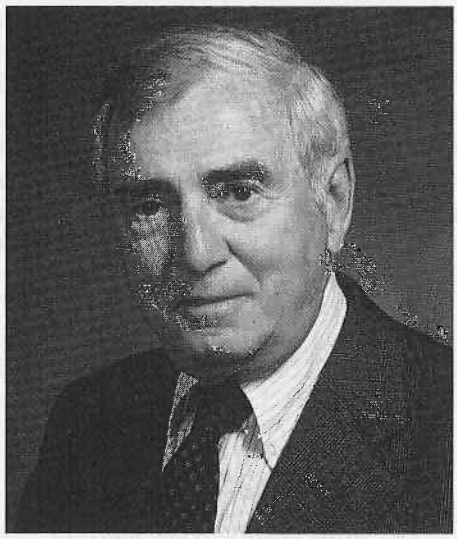
Alternative Dispute Resolution Developments in Utah

By Peter W. Billings, Sr.

Alternative dispute resolution ("ADR") includes a myriad of ways to resolve disputes as alternatives to litigation, and even some as an adjunct to litigation. Perhaps the best known is arbitration. Arbitration is a dispute resolution process that may be ordered by a Court or conducted pursuant to the agreement of the parties. The arbitrator is a neutral third party, who hears both sides of the case, usually with relaxed rules of evidence and renders a written decision known as an "award." Agreements to arbitrate present or future disputes may include such provisions as the locale, the applicable law, the number and source of arbitrators, such procedural rules as the parties may agree on, such as the American Arbitration Association Construction Industry Rules or the American Arbitration Association Commercial Arbitration Rules, and the binding effect of the award.

Mediation is a process where an impartial third party assists the parties in reaching a mutually agreeable resolution to the dispute. Mediators do not make decisions and have no binding authority. Like arbitration, mediation may come from an agreement of the parties or as an adjunct to litigation by Court rule or statutory requirement.

ADR has also developed other procedures to promote settlement of disputes already in litigation. One is mini-trials. A mini-trial is a non-binding process that combines elements of negotiation, mediation and adjudication. The parties voluntarily agree to trial their case in summary fashion before a neutral advisor. At the conclusion of the trial, the advisor presents his or her views on the likely outcome of trial and, based upon this assessment, the parties attempt to negotiate a settlement. Mini-trials are frequently used in complex litigation matters pursuant to an order of the judge to whom the case has been assigned. The neutral advisor, in such cases, is usually a judge other than the one to whom the case has been assigned for trial.



PETER W. BILLINGS, SR., the author of this article, is a 1941 graduate of Harvard Law School and has been a member of the Salt Lake City law firm of Fabian & Clendenin since 1946. He is Chairman of the Utah Advisory Council for the American Arbitration Association and served in 1990-91 as Chairman of the Access to the Courts Subcommittee of the Utah Commission on Justice for the Twenty-first Century and as Chairman of the Supreme Court's special Task Force on the Governance of the Practice of Law. He is also a member of the United States District Court for Utah Subcommittee on ADR. The views expressed in this article, while derived from those experiences, are his own.

Another procedure is "summary jury proceedings." A summary jury proceeding is a non-binding process where counsel make summary presentations of their case to a mock jury selected from a regular jury pool. The trial is conducted by a judge who instructs the jury, which then returns a consensus verdict. The lawyers may question the jurors about their deliberations and verdict. The parties then attempt to negotiate a settlement.

Some federal courts have adopted a new ADR phrase — "early neutral evaluation." Under this procedure, a neutral party, sometimes a specialist in the factual issues, conducts a summary arbitration hearing with relaxed rules of evidence and renders an award as in arbitration, which award is non-binding but encourages the parties to settle or resort to mediation.

Agreements to resolve disputes by arbitration, whether existing or future, met with hostile reception in 17th Century English courts. They refused to enforce such agreements as against public policy. That doctrine had its origin in the system of payment of the English judges. Those judges did not receive a salary, but only earned fees for cases tried. Thus, those judges held that the courts should not be ousted of their jurisdiction by an agreement between the disputants.

That common law doctrine was carried over to the American courts in the 19th Century and was explained as "any contract tending to wholly oust the court's jurisdiction violates the spirit of the laws creating the courts in that it is not competent for private persons either to increase or diminish the statutory juridical power." In a case decided after Congress enacted the Federal Arbitration Act ("FAA") in 1925, the Court of Appeals for the Second Circuit referred to that justification of the hostility to agreements to arbitrate as "quaint" and concluded that by reason of the enactment of the FAA "it is our obligation to shake off the old judicial hostility to arbitration."

The public policy issues had not reached the Utah Supreme Court when the Utah legislature, in 1927, adopted the then

model arbitration act. It was codified in 1943 as Sections 104-36-1 et seq. and in 1953 as Sections 78-31-1 et seq. That Act made agreements to arbitrate existing disputes "valid and enforceable." The Act made no reference to agreements to arbitrate future disputes.

In *Johnson v. Brinkerhoff*, the Utah Supreme Court in 1936 recognized the Utah 1927 statute with respect to existing disputes, but adopted the rule that an agreement to arbitrate future disputes will not be enforced by the courts on public policy and statutory interpretation grounds. Relying on that case, the Utah Supreme Court in 1945 declined to enforce a labor contract for arbitration of future disputes. *Latter v. Holsum Bread Co.* In 1965, in *Barnhart v. Civil Service Employees Insurance Co.*, the court applied the same rule to an insurance contract. The court rejected the argument that public policy had changed since 1936 and the statute should be interpreted to include agreements to arbitrate future disputes. Relying on Article I, Section 11 of the Utah Constitution, the majority opinion stated:

> It is thus to be seen that covenants which prevent a party from having access to court runs counter to both the express purpose and the spirit of our system of justice.

The court also stated that binding arbitration cuts into procedural safeguards such as the right to a trial by jury and the right of review on appeal. Chief Justice Henriod and Justice McDonough concurred in the result, but suggested as had Justices Wolfe and McDonough in the *Holsum Bread* case that the Utah legislature, described as "the legislative fountain of wisdom," "take another look at 78-31."

Thirty-two years after the suggestion was first made in the *Holsum Bread* case, the Utah legislature, in 1977, amended Section 78-31-1 to include "any controversy which may arise in the future."

In 1981, in *Lindon City v. Engineers Construction Co.,* the constitutional attack on Section 78-31-1, suggested in the Barnhart majority opinion of Justice Crockett, came before the court. In a unanimous decision, written by Chief Justice Hall, the court held Section 78-31-1, as amended in 1977, to be constitutional under both Sections 7, and 11, of Article I of the Utah Constitution.

With the constitutional issues resolved, the Utah legislature, in 1985, adopted a new model Arbitration Act as Chapter 31a of Title 78. Section 31a-3 of that new statute reads as follows:

> A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, except upon grounds existing at law or equity to set aside the agreement, or when fraud is alleged as provided in the Utah Rules of Civil Procedure.

In 1986, the legislature repealed the old Chapter 31.

In 1925 Congress enacted the Federal Arbitration Act ("FAA") now codified as Title 9 of the U.S. Code. Its provisions are similar to the 1927 Act adopted in Utah and amended in 1977, but limit its application to "a contract evidencing a transaction involving commerce."

"[T]he Federal Arbitration Act. . . had a rocky road as to what claims were subject to arbitration. . ."

For many years the FAA has been applied to contracts in the securities industry and more recently has been used in California in contracts between California banks and their suppliers, borrowers (including guarantors) and other customers.

The FAA early had a rocky road as to what claims were subject to arbitration under the Act. However, the United States Supreme Court, beginning the 1980s, adopted the concept that the Act manifests a liberal federal policy favoring arbitration. This approach culminated in a 1991 decision in *Gilmer v. Interstate/Johnson Lane,* concluding that most statutory claims are subject to arbitration under an appropriate contract on the basis that "having made the bargain to arbitrate, the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."

In *Gilmer* the Court noted that such challenges to the adequacy of arbitration procedures are limited discovery, limited judicial review, lump sum awards and the inherent privacy of arbitration proceedings "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law would-be complainants, and as such, they are far out of step with our current strong endorsement of the federal statute favoring this method of resolving disputes."

The 1985 Utah statute (§§ 78-31a-14 and 15) and the Federal Arbitration Act (9 U.S.C. §§ 10 and 11) have similar provisions for limited judicial review of an arbitrator's award. Under those statutory provisions, a court may only modify or vacate an award on the limited grounds specified in the statute.

In 1983, the United States Supreme Court held the FAA to manifest "a liberal federal policy favoring arbitration agreements" and that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."

Following that mandate and the Supreme Court's earlier pronouncement that "arbitrators have no obligation to the Court to give their reasons for the award," the federal courts have generally refused to modify or vacate an award of a lump sum made without any findings or other expression of the reasoning behind it. The basis for such decisions is that requiring such an explication would unjustifiably undermine the purposes of arbitration — a speedy, efficient and low-cost resolution of claims. The Courts have also held, on the same reasoning, that the limited statutory grounds for review do not allow a court to substitute its own judgment for that of the arbitrator and that a party seeking to vacate or modify an award may not proceed by merely objecting to the result of an unexplained lump sum award.

In reaching such results, some courts have reflected the old hostility to arbitration by stating that the parties, having agreed to arbitration, should have known that there was less opportunity for judicial review of the result than if they had stuck with the old style litigation. In effect, the price for a low cost, speedy and private resolution of a dispute is the minimal opportunity for judicial review of the award. Unless required by the arbitration agreement, or applicable statute, experienced arbitrators do not give any explanation for their award, as to do so

would merely open the award to some sort of attack by the losing party.

That rationale was expressed in a recent decision of the Eleventh Circuit, where the Court stated that recommitting cases to the arbitration panel for explanations would "defeat the policy in favor or expeditious arbitration. When the parties agree to submit to arbitration, they also agree to accept whatever reasonable uncertainties might arise from the process."

To date, efforts in the Utah courts by losing parties to an unexplained lump sum award to require the arbitrator to testify about his reasoning for the award or supplement the award by filing Findings of Fact and Conclusions of Law or otherwise explain to the Court the reasons for the decision have not gone beyond the district court level. In such cases, the American Arbitration Association has sought to preserve the integrity of the ADR process by opposing such efforts.

In 1980, Judge David K. Winder of the United States District Court for Utah found that the statutory grounds for vacating an arbitrator's award were basically the same as a common law, that "a mistake of law or fact is not a basis for disturbing an arbitrator's award" and affirmed an award which read only "DECISION — this grievance is denied."

In 1988, recognizing the increased interest in alternatives to litigation as a means of resolving disputes, the American Arbitration Association opened an office in the Law and Justice Center in Salt Lake City as a branch of its Denver Regional Office. The American Arbitration Association is a national non-profit organization, founded in 1926, that provides a variety of alternative dispute resolution ("ADR") services, including not only arbitration, but mediation, mini-trials and settlement conferences. It conducts educational programs for industry and commerce, employers and labor, legislators and community leaders, and the legal profession. It also trains lawyers and the general public to act as qualified arbitrators or mediators.

The increase in the use of ADR in Utah since 1988 has been such that the Salt Lake City branch has been made a regional office and its head, Kimberly L. Curtis, is now a Regional Vice President of the American Arbitration Association. Her educational efforts have promoted use of ADR provisions in contracts in the insurance, real estate and banking businesses in Utah. ADR agreements have long been used in the construction industry and in labor-management collective bargaining contracts. Use of arbitration in commercial disputes in Utah has nearly tripled since the American Arbitration Association Salt Lake City office was opened.

There has been an increased interest in the use of ADR to resolve disputes involving complex factual and legal issues. That interest has been based, in part, on the privacy aspects of ADR proceedings and the more expeditious resolution afforded under ADR procedures. To meet his need, the Salt Lake City Regional Office of the American Arbitration Association has initiated a judicial arbiter panel to handle such cases through mediation, settlement conferences or arbitration procedures. The panel is composed of former or retired Utah judges and a former United States bankruptcy judge. The program has been developed with the advice and assistance of former Utah Supreme Court Justice D. Frank Wilkins, who also serves as a panel member.

"There has been an increased interest in the use of ADR to resolve [complex] disputes. . ."

One aspect of the delays incident to litigation in court is the discovery efforts of both sides. These discovery efforts include written interrogatories, requests for production of documents and taking the oral testimony of potential witnesses. The criticized delays result from the efforts of one side to overwhelm the other with those procedures and the efforts of the other side to produce as little information as possible.

As a remedy for such delays in arbitration cases, the American Arbitration Association is experimenting with a process of "mandatory disclosure" whereby each side, under the supervision of the arbitrator, discloses to the other the evidence it has. The sanctions for failure to disclose include prohibition of using any evidence not disclosed. Such procedures not only speed up the process of final determination of the dispute, but also promote opportunities for settlement or mediation conferences.

Because of the very nature of ADR programs, the legal profession has been actively involved in Utah. The current President of the Utah State Bar, James Z. Davis, has rejuvenated the Bar's ADR committee. Chaired by Hardin A. Whitney, the committee has established two subcommittees, one to study and make recommendations as to the certification or qualification of ADR providers and the other to make recommendations as to ADR referrals by the courts and its implementation by appropriate rules of court.

Active interest of the Utah State Bar in ADR was part of the program to construct the Law and Justice Center in Salt Lake City. Under the leadership of its then President, Stephen H. Anderson, now a judge in the United States Court of Appeals for the Tenth Circuit, funds were raised by donations from various charitable foundations and members of the Bar to finance the construction of the building, which was designed not only to house offices for the Bar, but also to provide facilities for ADR proceedings.

In 1990, the Utah Commission on Justice for the Twenty-first Century appointed a subcommittee to study ways of improving "access to the courts." That committee construed its charge to include use of ADR. The committee's recommendations, adopted by the Commission in 1991, include:

1. An experimental program for mandatory court annexed arbitration or mediation in health care professional malpractice actions and malpractice actions involving other professions such as lawyers, accountants, architects, engineers and appraisers. With respect to health care professionals, that recommendation antedated a similar proposal by the Bush administration seeking to reduce the cost of medical care.

2. Use of mediation in family law matters such as custody, child support, alimony and division of marital property.

3. Promotion of neighborhood mediation programs to resolve landlord/tenant disputes, barking dog complaints, minor traffic violations and similar controversies rather than resort to litigation.

In 1988 a special Task Force created by the State Judicial Council to study and

make recommendations as to the use of ADR in the state courts made a similar recommendation with respect to the use of court annexed mediation in domestic relations matters and the promotion of neighborhood mediation programs. That report also recommended that Utah trial courts implement the use of such ADR procedures as summary jury proceedings and mini-trials to encourage the parties to reach a settlement of their dispute at the earliest practical stage and not on the eve of trial.

The Supreme Court's special Task Force on the Governance of the Practice of Law, in its 1991 report to the Court, has recommended that the governing body of the Bar be charged with the education of its members on ADR procedures and to promote the use of the Law and Justice Center for ADR hearings. It has suggested that the use of mandatory dues of Bar members to promote public service programs, such as information about ADR, should be approved by the Supreme Court.

The divided views of Utah lawyers with respect to ADR were disclosed in a 1990 poll of members of the Bar taken by Dan Jones & Associates for the Commission on Justice. That poll showed 41% favored mandatory arbitration in certain classes of cases, but 54% opposed such a proposal. Yet the same group listed cost and delays as a major criticism of the judicial system. A contemporaneous Dan Jones poll of "decision-makers" showed 99% favored increased use of ADR and 89% approved mandatory arbitration. A similar poll of the general public taken by Dan Jones showed 87% in favor of increased use of ADR and 78% favored mandatory arbitration. Eighty-six percent (86%) of that group also listed cost and delays as major problems with the judicial system.

Those polls would indicate that education about use of ADR should be directed to the legal profession and that community leaders and the general public are already convinced of the benefit of ADR procedures.

The increased interest in ADR is not confined to its use in the state judicial system. Congress, in the Civil Justice Reform Act of 1990, directed each U.S. District Court to formulate a plan for guidelines for litigation management and cost and delay reduction. In addition, the District of Utah Federal Court was designated as one of ten federal district courts to establish a program for use of voluntary arbitration under court referral.

The Utah plan will apply to civil cases where fact issues predominate over legal issues and do not involve alleged violations of United States constitutional rights. It would include such government cases as suits under the Federal Tort Claims Act.

Encouraged by the successful use of ADR provisions in their contracts by the Bank of America and other major California banks, Zions First National Bank in Salt Lake City has recently instituted a similar program. To ensure the favorable treatment of ADR agreements under the FAA, Zions' contractual provisions, like those used in California, provide that the arbitration shall be conducted in accordance with the FAA and under the Commercial Arbitration Rules of the American Arbitration Association.

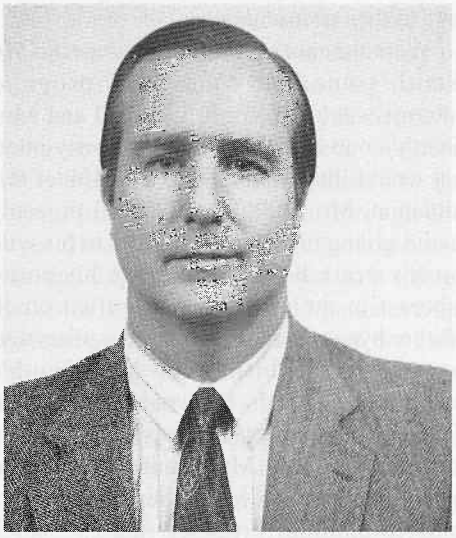
It must be concluded that what was against public policy in the eyes of the courts in Utah from 1936 to 1981 is now an accepted part of our system of justice. ADR's virtues of expedition, fairness, justice, independence and low cost meet the "just, speedy and inexpensive" criteria of Rule 1 of the Utah Rules of Civil Procedure. What must be added are the private nature of its procedures and its aim of amicable as well as just results.

Should Utah Consider Adoption of Community Property Law?

By Timothy Lewis

Currently there are only nine community property states.[1] Community property law has its origins in Spanish law.[2] This explains why most of the states that have adopted it are in the west where the Spanish influence was most pronounced.

Recently Wisconsin adopted the community property form of property law.[3] Why would a state without Spanish influence like Wisconsin make such a change? This article will highlight some of the main advantages of community property law over Utah's current common law approach to property law. Perhaps Utah should follow Wisconsin's lead and join neighboring states Nevada, Idaho, Arizona and New Mexico as a community property state.



TIMOTHY B. LEWIS, B.S. Degree in Accounting, cum laude, BYU, 1976 J.D. Degree, cum laude, BYU, 1979 Bar Memberships: California and Idaho Current Position: Associate Professor of Business Southern Utah University

FEDERAL TAXATION

Under the community property concept, each spouse is considered the owner of one-half of all income earned by both spouses. Prior to the advent of the joint tax return filing status, this treatment allowed an obvious benefit to families in community property states over those in common law states. Since families at that time usually only had one wage earner and tax rates were heavily graduated in nature, the common law family making $30,000 using just one rate table (if the wife did not earn any income, she did not file a return) was in a higher marginal tax bracket than the community property family making a similar $30,000 but by filing two separate tax returns, each spouse declared only $15,000.

Because of this disparity, some states converted to community property, but then reverted to their original common law approach after congress changed the tax code to allow the joint filing status.[4]

Although the above described tax benefits were nullified, there remain some substantial tax benefits associated with community property that should be considered. To illustrate these benefits, assume the Smiths are a ranching family in Utah with a net worth of $1,200,000. Assume their only asset is the ranch itself and the Smiths are a "traditional" family where the husband works the ranch and the wife manages the home. All of the property is in Mr. Smith's name and has been accumulated as the fruits of his individual labors. His income tax basis (cost basis plus and/or minus adjustments for improvements, depreciation, etc.) in his property is only $100,000. For simplicity of comparison, assume (1) there is no difference between the value of his property as a ranch and its best alternative use; (2) the Smiths have made no prior taxable gifts, (3) there are no valuation changes in the assets until some time after the last to die of Mr. and Mrs. Smith, and (4) ignore all other deductions available on death except the marital deduction.

In these circumstances, the order of death would become critical in determining the estate tax bill for the family. In order to understand why this is so, one has to understand something about the estate tax format.

Under current federal estate tax law, every individual is given what is called the "unified credit" when he or she dies. In effect, this credit allows up to $600,000 worth of property to pass from one's estate to any heir without incurring federal estate tax.[5] In addition to this credit, one is allowed to transfer on death unlimited amounts of property to one's spouse without incurring estate tax. This latter benefit is implemented through the "marital deduction".[6] Since the unified credit can be used to protect the transfer of property to any heir whereas the marital deduction can only be used to protect the transfer of property to a surviving spouse, it is common estate planning practice to first maximize the use of the unified credit and then use the marital deduction as needed to protect the passage of property that could not be protected by the unified credit (i.e. net property values in excess of $600,000.)

If Mr. Smith's will incorporates the above-described estate planning strategy, and he dies first, the family should not incur any estate taxes. Of the estate, $600,000, would probably go into some sort of unified credit shelter trust providing Mrs. Smith some limited benefits during her life, and the unconsumed portion thereof would then pass to their children upon her death. The property in this trust would not be included in Mrs. Smith's estate when she dies. The balance of Mr. Smith's estate would pass to Mrs. Smith estate tax-free through the marital deduction. On Mrs. Smith's death, the unconsumed portion of the property pass-

ing to her from her husband under the marital deduction will now be included in her estate, but there will be no estate taxes because her own unified credit will protect the transfer from estate taxation.

Under Section 1014 of the Internal Revenue Code, at Mrs. Smith's death, the children would own the ranch at an income tax basis of $1,200,000. This code section generally provides for a step-up in basis to fair market value at time of death. Thus, the children could sell the ranch for $1,200,000 and incur no income tax obligation.

So if Mr. Smith dies first, at least from an estate planning standpoint, everything is fine. But if Mrs. Smith dies first, the ending is not so happy. Since she would not be the recognized owner of any property, her estate would be empty and thus unable to utilize any of her unified credit. Although this would not result in any estate tax at her death, it would cause a substantial tax bill on Mr. Smith's death. On Mr. Smith's death his estate would be $1,200,000, but he would be able to use the unified credit to protect the passage of only $600,000 worth of property free of estate tax. Since he has no surviving spouse, he cannot use the marital deduction to protect the rest. This resulting $600,000 taxable estate would prompt a $192,800 federal estate tax bill for the children.[7]

The income tax picture between the first and second deaths would differ substantially. Under the first case where Mr. Smith died first, the portion passing under the unified credit would get a step-up in basis equal to its fair market value (i.e. $600,000).[8] The part passing under the marital deduction would also get a stepped-up basis (i.e. $600,000).[9] So Mrs. Smith's adjusted basis for the ranch would be $1,200,000. Were she to sell the ranch during this interim period she would report to taxable gain ($1,200,000 minus the $1,200,000 adjusted basis equals zero gain).

In contrast to this, under the second case where Mrs. Smith dies first, since she owned no property[10] at her death, no step-up in basis occurs at that point. Were Mr. Smith to sell the ranch before his death, he would have a $1,100,000 ($1,200,000 minus the $100,000 adjusted basis) taxable gain to deal with. In this latter case however, were Mr. Smith to hold the ranch until his death, the children's adjusted basis in the ranch would be the same as in the first case, namely, $1,200,000.

In contrast to the tax sensitivity associated with the order of deaths in the common law states, had the ranch been community property, the Smiths' order of deaths would be inconsequential. Community property states also recognize "separate property" consisting mainly of property acquired prior to marriage or through gift or inheritance.[11] Separate property would also be tax sensitive to the order of deaths.

Were the ranch community property, Mr. Smith's one-half community property interest would be worth $600,000 and Mrs. Smith's one-half community property interest would likewise be $600,000. Under this situation, Mr. Smith's will would probably avoid giving his interest outright to his wife on his death but instead place his entire interest in the ranch into a unified credit shelter bypass trust as described earlier, thus avoiding its inclusion into Mrs. Smith's estate on her death. He would use his unified credit to protect the transfer from estate taxation. Then on Mrs. Smith's death, her estate would include only her original one-half community property interest which would pass estate tax-free to the children by using her own unified credit.

". . . the community property format automatically provides for the maximization of benefit. . ."

Since each spouse would own a one-half vested interest in the ranch and Mrs. Smith's will would contain dispositive provisions identical to Mr. Smith's, the order of deaths would be irrelevant in determining estate taxation. Despite who dies first, no estate taxes would result (again assuming no combined appreciation above the $1,200,000 value).

Concerning the income tax basis of the property after the first death, the community property format automatically provides for the maximization of benefit regardless of the order of deaths. Section 1014 ((b) (6) provides that both halves of the community property get a step-up in basis upon the first death. So regardless of who dies first, the surviving spouse's one half community property interest gets a step-up in basis as does the descendent's one-half community property interest that passed into the bypass trust. Thus, in our case, the ranch's income tax basis would be $1,200,000 upon the first death allowing the surviving spouse to sell the ranch without any taxable gain.

What if the Smiths' ranch was only worth $200,000, would there still be any tax advantages to living in a community property state? Although under this assumption it would not matter which state one lived concerning the ability to avoid estate taxes (either spouse's unified credit would protect the entire amount), there is still the potential difference in income tax basis between the first and second deaths. In a community property state, the surviving spouse would have an income tax basis of $200,000 in the ranch regardless of who died first. In a common law state, only if Mr. Smith died first would we have a similar result. If Mrs. Smith died first, Mr. Smith's basis in the ranch would still be the original $100,000 basis resulting in a $100,000 taxable gain ($200,000 sales price minus his $100,000 basis) in the event he sold the ranch during his lifetime.

What about the modern trend of both spouses being in the workforce — would these families be on an equivalent estate planning level as that provided by community property states? Assume the Smiths have always been in the workforce earning about the same amounts from year to year with each owning $250,000 worth of property with income tax bases of $60,000 each. Although the order of deaths will not make any difference in being able to avoid all estate taxes (either spouse's unified credit could protect the combined estates), community property states still provide their residents an advantage over common law states when it comes to the income tax basis between the first and second deaths.

Had the Smiths owned their properties as community property, regardless of which spouse died first, the income tax basis in the property between the first and second death would be $500,000 allowing sales without any income tax gain between the first and second deaths. In a common

law state like ours, regardless of the order of deaths, the income tax basis in the property between the first and second deaths would be only $310,000 resulting in a $190,000 taxable gain were the properties to be sold between the first and second deaths. This $310,000 basis would result from the fact that the decedent's property ($250,000) would get a step-up in basis while the surviving spouse's basis in his or her own property would remain the same ($60,000).

So even relatively small estates and families with two earning spouses could benefit taxwise from community property law.

ADVANTAGE OF FAIRNESS

I believe the community property law is fundamentally more fair than the common law approach to property rights. Husbands and wives have common family goals the realization of which usually requires the assumption of differing roles and duties. In the traditional family setting, the husband worked outside the home to provide the funds needed to support the family while the wife stayed home and managed it and the children. Although a modern trend has developed where both spouses work outside the home, whatever the respective roles of the spouses are, each spouse's efforts on behalf of the family are considered necessary and basically co-equal in importance.

The advantage of the community property form of property ownership is that it implicitly recognizes the co-equivalency of the differing family roles by automatically granting each spouse a vested one-half interest in the wealth accumulations resulting from the spousal team efforts during marriage. Even if a wife for example does not earn a dime outside the home, she owns one-half of her husband's earnings and property acquisitions after marriage in recognition of her non-economic contributions to the family's welfare.

Assume again the "traditional" family where the husband earns all of the income and owns all of the property. Do our current divorce and inheritance laws adequately protect the non-owner wife's rights? I do not think so.

Under our current body of law, the non-owner wife would only have power to control some of her husband's property by either divorcing him or surviving his death.[12] In the divorce setting she would have a right to an equitable property settlement[13] (probably around one-half) which in effect puts an economic price tag on her past contributions to the marriage. When her husband dies, even if he tried to disinherit her, she would have a statutorily protected elective share against his estate amounting to at least one-half of the whole.[14] Again this implicitly recognizes the value of her non-economic contributions to the marriage.

So in the divorce and survival settings, her interests are protected, but there may be other settings where she has legitimate interests to protect but no legal means of doing so. Take for example the situation where the wife brings step-children into the current marriage. If she went through life never divorcing her current husband and was unlucky enough to be the first one to die, there is no way she could guarantee the continued economic well-being of her children from the prior marriage. Her former husband may have some residual child support obligations but beyond that is free to totally disinherit his children. Maybe she still has something left from any property settlement she obtained from that divorce which she can direct toward these children but on the other hand maybe her former husband never accumulated enough property during their marriage to produce a meaningful property settlement. Her current husband is likewise free to totally disinherit his step-children. In fact, unless he specifically provides for them in his will or otherwise, our state intestacy laws automatically disinherit step-children.[15] Since she owns no property herself[16] any attempt to provide for these children through her own will would be useless.

In contrast to this situation, were she and her current husband are continual residents of a community property state, she would have a vested one-half interest in all of her current husband's earnings during marriage and all property acquisitions related thereto.[17] This would give her dispositive power over this one-half interest which she could effectively direct through her will to provide for these children without having to rely upon the good graces of husbands past and present.

CONCLUSION

It is hoped that this article will generate discussion within the legal community concerning the desirability of making a substantive change in our property law. I have only considered the fairness issue and a few tax issues. There may be other important considerations that I have not discussed. I am in favor of Utah joining its neighbors to the North, West and South as a community property state, but would like to hear the opinions of other interested parties. Members of the Bar should always be seeking to examine our laws and ways to make them better serve the needs of the people.

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[11]WARDLE, supra note 1; Greene, supra note 2, at 72.

[12]Greene, supra note 2, at 111.

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[14]U.C.A. Sec. 75-2-102 ( ).

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[16]WARDLE, supra note 1; Greene, supra note 2, at 87, 111.

[17]Greene, supra note 2, at 73.

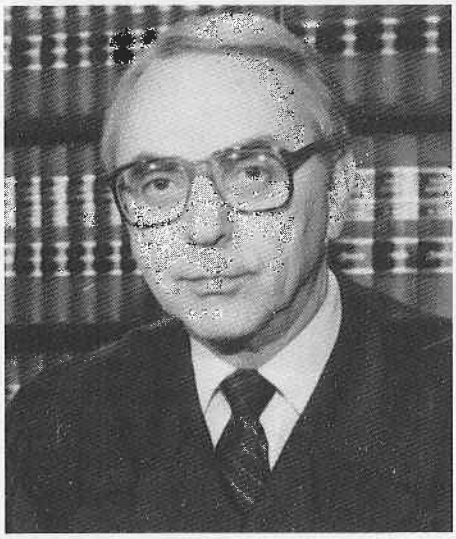
Profile of Honorable Regnal W. Garff

By Terry E. Welch

BACKGROUND

Judge Garff graduated from the University of Utah with a degree in psychology. He then served a mission to Holland for the L.D.S. Church. Upon his return he deliberated on possible career directions and concluded that there was a need for juvenile court judges with a background in behavioral sciences. Thus, rather than deciding he wanted to go to law school to practice law, and later become a judge when and if the opportunity arose, Garff determined that he wanted to become a juvenile court judge and therefore that he should go to law school. "The system simply needed some change," Garff states.

Change has always followed Judge Garff. After law school, Garff obtained a graduate certificate in social work and practiced law with Frank Matheson, currently a juvenile court judge in the Third District, under the firm name of Matheson and Garff. He also served as an intern to Judge Rulon Clark at the juvenile court in Salt Lake City. Four years later, at age 31, Judge Clark retired and Judge Garff was appointed as his replacement in 1959. At that time, the juvenile court was administered by the State Welfare Commission under the control of the Executive Branch. It was obvious that the system was drastically wrong and needed change. Garff resolved to assist in bringing about such change. After much work and active campaigning by the Utah State Bar, the College of Law and others, the juvenile court eventually was "emancipated" from the Welfare Commission with the passage of the 1965 Juvenile Court Act, and the court became a part of the Judicial Branch. Garff spent nearly 28 years as a juvenile court judge. He found the opportunity to work with the community in developing treatment resources for juvenile offenders among the most rewarding aspects of that job. Judge Garff particularly is proud of the direction the juvenile justice system has followed, moving away from institutionalization and toward community based treatment programs. In addition, there has been a dramatic change in the development of constitutional safeguards for children in the juvenile court.



Honorable Regnal W. Garff
Utah Court of Appeals

Appointed:	1987, after more than 27 years on the juvenile court bench. Presiding judge of Utah Court of Appeals from its inception in 1987 until January 1, 1989.
Law Degree:	University of Utah, 1955.
Law Related Activities:	Private practice in Salt Lake City for four years; Adjunct Professor, University of Utah, College of Law. Appellate Court Judge of Year 1989; Outstanding Judge of Year, July 1976; Honorary Member, Order of the Coif, 1978; Member, National Council of Juvenile and Family Court Judges; Faculty, Institute for Court Management, Denver, Colorado; Judicial Article Revision Task Force.

Judge Garff was a member of the Task Force in the Revision of Utah's Judicial Article that recommended creation of the Utah Court of Appeals. Garff — once again beckoning change — was appointed from the juvenile court directly to the newly created appellate court in 1987, and served as its presiding judge from inception until January, 1989.

VIEWS OF LEGAL SYSTEM

Judge Garff believes that Utah's juvenile court system currently is among the finest in the country in terms of reputation, philosophy, and its treatment and rehabilitation of juveniles. When Garff left the juvenile court in 1987, the recidivism rate for juveniles who had been through the system in Utah was 30%, as compared with a 70% recidivism rate nationally.

As for the Utah Court of Appeals, Judge Garff is quite proud of its accomplishments since its inception in 1987. His pride is both understandable and warranted. When it was created, the Court of Appeals was given 500 cases immediately. At that time, the expected period for a decision from the Utah Supreme Court was 3-5 years. The new judges on the Court of Appeals set a goal to have a one-year turnaround average within four years. Within 3 1/2 years of its creation, the average wait for a decision from the Court of Appeals — from filing to final decision — was a mere nine months for criminal cases, and eleven months for civil cases. Last year, the turnaround had improved to eight months for criminal, and nine months for civil cases. Garff attributes much of the court's success to the dedication and hard work of its seven judges and staff members. Each judge on the court, he states assuredly, is professional and dedicated. In addition, while they often disagree — all of the judges get along. Most, if not all, disagreements concerning particular cases are discussed openly in each judge's office long before written dissents are circulated. Such an "open-door" policy among all of the judges facilitates the court's efficient track record. Garff states that "communication is great, but the judges are totally independent."

Judge Garff thoroughly enjoys interaction with his clerks and other judges. Discussing the issues and theories of a

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Profile of Judge Anne M. Stirba

By Elizabeth Dolan Winter

BACKGROUND

Judge Stirba was a philosophy major at the College of Wooster in Wooster, Ohio, when she heard the law calling her name. Actually, she and her husband graduated from college during the Watergate hearings, and real life in the working world did not look so great. Judge Stirba decided to go to law school partly, she says, "to put off deciding what I wanted to be when I grew up." Sounds familiar.

Judge Stirba did join the "real world" of law by clerking for the Utah Supreme Court with Justice Stewart. She says she learned from that experience to appreciate good written work and effective advocacy, and saw what a difference those strengths make to the court.

Stirba's legal practice before coming on the bench was very diverse. She practiced natural resources law as an Assistant Attorney General working with Richard Dewsnup and Dallin Jensen, Utah's first and second Solicitor Generals, respectively. Later on at the Attorney General's Office Judge Stirba represented the Utah Energy Office in extensive "co-generation" hearings involving predicting capacity needs for the generation of power to supply future power demand needs, and then determining how much public utilities should pay non-traditional energy producers for services they could provide at some future date. She enjoyed this. Really. At the conclusion of these hearings the Public Service Commission invited Stirba to become an Administrative Law Judge for the PSC, where she had the opportunity, again, of seeing legal practice with a view from the bench.

Four years prior to her appointment to the District Court, Judge Stirba worked as an Assistant United States Attorney in the Department of Justice where she defended medical malpractice cases; tried cases involving the Federal Tort Claims Act; and prosecuted civil forfeitures of illegally gained assets, criminal matters, among other things. She says she loved being in the courtroom — she knew she wanted to be a trial judge so she could be involved in the "most exciting part of the case," which is the litigation in court.

Judge Anne M. Stirba
Third District Court

Appointed:	March 1991, Governor Norman Bangerter
Law Degree:	University of Utah, 1978
Experience:	Assistant Attorney General, 1980-86; Administrative Law Judge, 1986-87; Assistant U.S. Attorney, 1986-91.
Law Related Activities:	Member of Masters Bench, American Inns of Court, 1991 to present; Council on U.S. Constitution and Bill of Rights, 1988-91; Outstanding Young Lawyer of the Year, 1987; First woman elected to the Utah State Bar Commission, 1984-90.

VIEWS OF THE LEGAL PROFESSION

Judge Stirba believes that while our judicial system works well, problems in it exist that need to be handled better. She emphasizes that at least with our current court system, "people can settle disputes in a civilized manner without resorting to fighting in the streets." She places some responsibility of the staggering costs of litigation on modern discovery practices which generate tremendous paperwork but do not focus on the issues that are truly in dispute. She favors, for example, more specific limits on discovery, i.e., a limit on the number of interrogatories parties may send and the number of documents requests in our civil rules of procedure.

Stirba strongly supports mediation. Supervised mediation, she notes, encourages people to focus on the issues that will lead to resolving their problem. Particularly in domestic relations cases, Stirba thinks there is often better compliance if people feel like they have participated in the decision affecting their case.

STRATEGY FOR SUCCESS BEFORE JUDGE STIRBA

If you think it takes a few years before judges decide what they like and what they don't like in the way lawyers practice before them, you're wrong. Judge Stirba is very specific about some issues, so pay attention.

Judge Stirba places great importance on starting on time. Because of the sheer number of cases before her, if a lawyer is late, it impacts every other item scheduled for that day.

Next, never file a notice of withdrawal if there is a motion pending or certification of readiness for trial filed. Judge Stirba is sensitive to the fact that once attorneys get involved in a case they may want to withdraw for a variety of reasons, including because of a non-paying client. The problem, she says, is that Rule 4-506 specifically precludes attorneys from withdrawing when "(a) a motion has been filed and is pending before the Court, or (b) a certificate of readiness for trial has been filed" except upon motion and order of the court. If attorneys do not follow Rule 4-506, considerable confusion, delay and unnecessary expense can result.

Judge Stirba says that attorneys also need to be aware of the substantial changes to Rule 65A of the Utah Rules of Civil Procedure, the rule dealing with temporary restraining orders. This rule was substantially changed effective September 1, 1991. She says trial judges receive frequent requests for TRO's, and many of those requests are denied because the lawyer fails to follow the requirements of the rule.

Judge Stirba enjoys motion hearings and reads all memoranda before each hearing. She says she tends to select areas that most concern her about the motion

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particular case can be stimulating and enjoyable. He states that had anyone told him prior to becoming an appellate judge that he would enjoy doing the requisite homework as much as he does, he would not have believed it.

While Judge Garff believes our adversary system is a good one, he notes that many issues could be resolved more efficiently — and just as effectively — through other methods. He believes we must continue to think creatively about alternative dispute resolution options and utilize them where feasible. Whatever means are available to allow the parties to resolve the problem in an acceptable manner up front — and then move on — should be pursued.

TIPS FOR SUCCESS BEFORE JUDGE GARFF— COURT OF APPEALS

- BE PREPARED. Know the rules, including procedural, evidence and appellate.
- FOCUS on principal issues, simplify others where possible. Don't create a "smoke screen" by snowing the other side, or the court, with paper.
- Don't spend too much time reviewing facts. Argue law and legal theories. Argue policy when there is no clear law in Utah.
- RESPOND to questions.
- Concede weak arguments and move on.
- NEVER MISREPRESENT facts, law, or proceedings below.
- KNOW THE STANDARD OF REVIEW. It is usually more complex than simply "a question of law" (no deference) or a "question of fact" (limited review).

OUTSIDE INTERESTS

Judge Garff normally begins each day with 30 minutes of aerobic exercise at approximately 6:00 a.m. During oral arguments, he often reads briefs late into the night and early in the morning — leaving little time for other activities. When he finds time, Garff enjoys tennis and golf. He enjoys gardening, as he states, "Mostly when it's done and I can see the end result." Garff also enjoys doing construction or remodeling work with its accompanying sense of accomplishment. Garff reads a lot, both for enjoyment and to get his mind off work. He often reads during lunch, and likes such authors as Robert Ludlum, Tony Hillerman, and James Mitchener.

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and directs the parties to focus on those concerns. When she does that, lawyers can save time by not having to start from the very beginning and go through a full factual recitation.

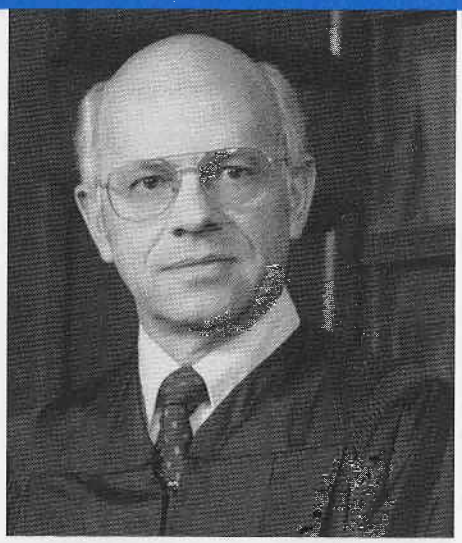
Stirba appreciates lawyers who are "resolution oriented." From time to time she discourages continuances by requiring clients themselves to sign a request for a continuance.

OUTSIDE INTERESTS

Judge Stirba likes to ski, play tennis and ride horses. Judge Stirba is married to Peter Stirba, who is himself a litigator with Stirba & Hathaway. They have two daughters, 6 and 10 years old, respectively. Judge Stirba recently wondered whether there might be a tad too much dinner table discussion about legal matters when her 6 year old put Judge Stirba "under arrest," and proceeded to read Stirba her Miranda rights. "You have the right to remain silent," her daughter said, "anything you say can and may be used against you in a court of law, and you have the right to have your mother present at all stages of the proceeding . . ."

Judge Stirba sees the strains of lawyers overworking themselves. She says that while it is difficult for lawyers to get off the daily treadmill, it is essential to health that lawyers take care of their physical and emotional well-being. She encourages lawyers to achieve a healthy balance in their lives.

Judge Stirba's dedication to public service is obvious.



The Fifth Anniversary of the Utah Court of Appeals

By Norman H. Jackson

NORMAN H. JACKSON was appointed to the Utah Court of Appeals in 1987 by Gov. Norman H. Bangerter. He graduated from the University of Utah School of Law and was a practicing attorney for twenty-five years. He has Masters and Bachelors Degrees in Economics from BYU.

Formerly, he served on the Utah State Bar Commission, Utah Legal Services Board, Board of Visitors J. Reuben Clark School of Law, and the Utah Air Travel Commission. Presently, he serves on the Board of Appellate Judges, as President of American Inn of Court I and as President of the Utah Bar Foundation.

In 1984, the citizens of Utah approved a revision of the judicial article of the Utah Constitution, taking the first step toward initiating a State Court of Appeals. Governor Norman H. Bangerter then appointed a task force on the judicial article to identify major problems facing the judiciary and to recommend solutions. The task force identified three major areas demanding action: 1) burden of appellate delay; 2) lack of multi-judge review of circuit court decisions; and 3) organization and operation of judicial administration. In response to the first two problems above, the task force decided to create a Court of Appeals. They considered three alternatives to a Court of Appeals: 1) expanding the Utah Supreme Court; 2) expanding the Supreme Court to sit in panels; or 3) creating an "appellate" division of district courts comprised of panels of district judges. After considering the alternatives, the task force favored creation of the Court of Appeals. Utah thus became the thirty-seventh state to create an intermediate appellate court.

The growing popularity of appellate courts does not mean that they are a panacea for all appellate ills. In fact, some studies suggest that appellate courts are only a "temporary solution" to appellate backlog. But, wisely, the task force recommended creation of a hybrid model which has proved to be successful in managing the appellate case load of the state.

As a hybrid, the Utah Court of Appeals is neither a pure pour-over jurisdictional model nor a pure specified jurisdiction model. It is not a pure pour-over jurisdiction model because the Supreme Court and Court of Appeals each has specified jurisdiction. Nor is it a pure specified jurisdictional model because the Supreme Court has discretion to transfer cases to the Court of Appeals and to issue writs of certiorari to review Court of Appeals decisions. In addition, the Court of Appeals can transfer cases to the Supreme Court on its own motion by a majority vote of the judges.

The seven judges of the Court of Appeals hear cases in panels of three judges. One judge is assigned to chair each panel and one is assigned to author the opinion. A total of thirty-five different panel configurations is possible. At three-month intervals, panels are reconfigured by random computer assignment. The judges cannot hear any cases en banc. When inconsistent panel decisions occur, the Supreme Court may resolve the inconsistencies. Judges also take turns sitting on the law and motion panel in six-month intervals.

Governor Bangerter was required to appoint the seven members of the new Court of Appeals simultaneously. Accordingly, the nominating commission was required to send the names of twenty-one nominees to the Governor (three for each vacancy). In the final months of 1986, Governor Bangerter appointed Russell W. Bench, Supreme Court staff attorney;

Judith J. Billings, Third District Judge; Richard C. Davidson, Seventh District Judge; Regnal W. Garff, Third District Juvenile Judge; Pamela T. Greenwood, General Counsel First Interstate Bank; Norman H. Jackson, senior partner, Jackson, McIff & Mower; and Gregory K. Orme, partner, VanCott, Bagley, Cornwall & McCarthy, to be the founding judges of the new Court. The judges met early in December and elected Regnal W. Garff as the first Presiding Judge, Richard C. Davidson as the Associate Presiding Judge, and Gregory K. Orme as the Court's representative on the Utah Judicial Council. At ceremonies in the capitol building rotunda on January 17, 1987, each of the judges took the Oath of Office and responded with brief remarks.

On January 28, 1987, Judges Norman H. Jackson and Russell W. Bench conducted the Court's first hearing, which involved a stay of imprisonment while a criminal defendant pursued an appeal.[1] On February 3, 1987, the Court officially opened its doors on the fourth floor of the Midtown Office Plaza at 230 South 500 East in Salt Lake City. Tim Shea served as the first Clerk of the Court and was succeeded by Mary T. Noonan on July 4, 1988. The staff consisted of two staff attorneys, three deputy clerks, three secretaries, and seven law clerks. The first oral argument calendar of the Court was heard in March of 1987. A dedication ceremony was held in the new Court of Appeals courtroom on May 1, 1987, followed by an open house with Court tours and refreshments.

Although the Court of Appeals is headquartered in Salt Lake City, it has statutory authorization to hear cases on circuit throughout Utah. The Court's policy is to schedule four circuit court hearings annually in four geographic areas of Utah.[2] The first circuit was held in Richfield on June 26, 1987. The panel was composed of Judges Norman H. Jackson as chair, Russell W. Bench, and Gregory K. Orme, with Annina Mitchell as courtroom clerk. The Supreme Court initially transferred 364 cases to the Court of Appeals. New filings and additional transfers provided the Court with 582 cases by June 1, 1987.

The statute which created the Court also created a Board of Appellate Judges.[3] The membership of the Board consists of all the justices of the Utah Supreme Court and all the judges of the Court of Appeals. The Board meets four times annually to administer the appellate case load of the state, maintain a proper balance of cases handled at each court, and consider legislative initiatives, budgeting matters, and other issues of common concern. At the present time, through appellate court direct jurisdiction and Supreme Court pour-over jurisdiction, the Utah Court of Appeals can receive and dispose of virtually all types of cases except those involving capital murder. Additionally, as recusals occur on cases at the Supreme Court, judges from the Court of Appeals take turns sitting as replacements. On one occasion, all five Supreme Court justices recused and five judges from the Court of Appeals heard the case.[4] In 1990, the Board appointed an executive committee to provide an ongoing liaison between the appellate courts, to provide interim direction between meetings, and to prepare meeting agendas. The present members of the Executive Committee of the Board are: Justices Christine M. Durham, Richard C. Howe, I. Daniel Stewart, and Judges Russell W. Bench, Judith M. Billings, and Regnal W. Garff.

Presiding Judge Richard C. Davidson resigned from the Court in August of 1990, creating a vacancy that was not filled for four months. Thus, during the last one-third of 1990, the Court functioned with only six judges. Governor Bangerter appointed Third District Judge Leonard H. Russon to fill the vacancy. He assumed his position on December 26, 1990. Presently, Russell W. Bench is serving as Presiding Judge with Judith M. Billings as Associate Presiding Judge. The Court has received outside assistance from numerous sources. Several senior state judges have served on panels of the Court. In addition, third-year law students from the University of Utah School of Law and first-year law students from the J. Reuben Clark School of Law have provided intern and extern service. In 1991, the Utah Legislature approved funding for a second law clerk for each judge. Those clerks came on board in January of 1992.

During the past five years, the Court of Appeals has received and disposed of the following number of cases:

	1987	1988	1989	1990	1991
New appeals filed	636	716	764	629	753
Total dispositions	541	611	785	691	725

The Utah Supreme Court has acted upon Writs of Certiorari from the Court of Appeals as follows:

Writs filed:	32	46	68	96	62
Writs granted:	5	8	19	20	5

The Court of Appeals has decided a number of issues of first impression in Utah, including:

Whether a professional degree is marital property;[5]

Whether a pretext vehicle stop is unconstitutional;[6]

Whether conditional pleas are available in criminal cases;[7]

Whether a roadblock stop is an unconstitutional seizure;[8]

Whether a nude painting on a sheet violates an obscenity ordinance;[9]

Whether due process requires a local administrative body to consider legal issues raised by a party in a fact-finding hearing;[10] and

Whether the Utah Dramshop Act applies in a noncommercial social setting.[11]

When the Court of Appeals was created, the Utah Supreme Court had a backlog of about 1,000 cases, of which about 500 were poured over to the Court of Appeals during 1987. The initial goal for the Court of Appeals was to dispose of those cases in two years. The Court was able to work through them in eighteen months. In 1986, before the Court of Appeals was created, cases could have remained pending at the Supreme Court for up to seven years. Currently, the average time for dispositions at the Supreme Court is fourteen months. At the Court of Appeals, civil cases are being handled in eleven months and criminal cases in nine months. Since the initial goal of the Court of Appeals was to dispose of appeals within one year, the judges are pleased to have exceeded that goal.

[1] *City of West Jordan v. Robert Newton*, No. 870031 (Utah App. Jan. 28, 1987).

[2] See generally *State v. Hagen*, 802 P.2d 745, 746 n.1 (Utah App. 1990), *cert. granted*, 815 P.2d 241 (Utah 1991).

[3] Utah Code Ann. §§ 78-2a-1 to 78-2a-5 (1986).

[4] *In re Pace McConkie*, No. 870416 (Utah Feb. 11, 1988).

[5] *Petersen v. Petersen*, 737 P.2d 237 (Utah App. 1987).

[6] *State v. Sierra*, 754 P.2d 972 (Utah App. 1988).

[7] *State v. Sery*, 758 P.2d 935 (Utah App. 1988).

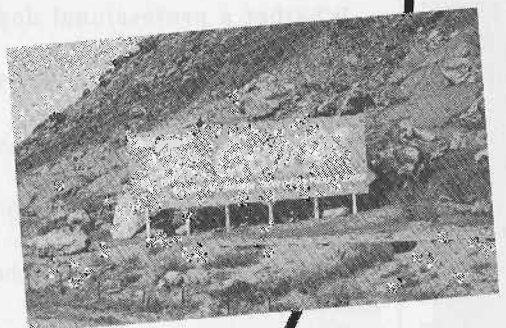
[8] *State v. Sims*, 808 P.2d 141 (Utah App.), *cert. denied*, 171 Utah Adv. Rep. 67 (Utah 1991).

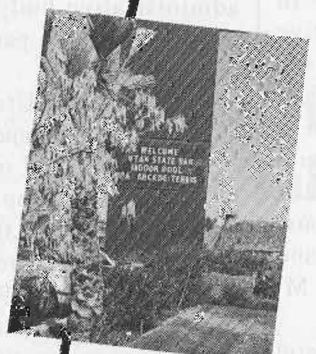
[9] *City of St. George v. Turner*, 813 P.2d 118 (Utah App.), *cert. granted*, 171 Utah Adv. Rep. 67 (Utah 1991).

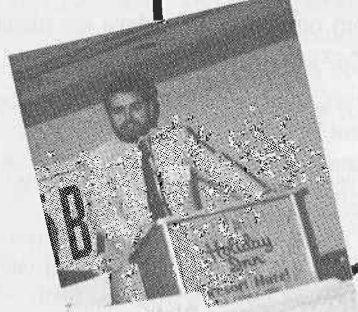
[10] *Tolman v. Salt Lake County Attorney*, 818 P.2d 23 (Utah App. 1991).

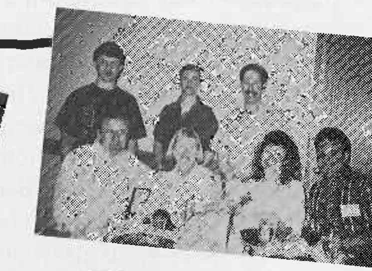
[11] *Sneddon v. Graham*, 175 Utah Adv. Rep. 13 (Utah App. 1991).

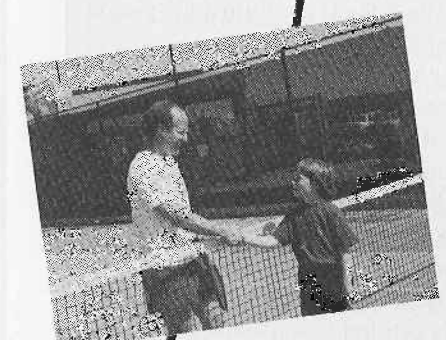
People and Sights at the Mid-Year Meeting, St. George

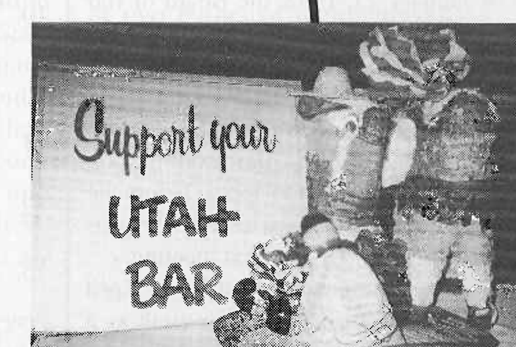












Photos By: Patricia Thorpe
Paula Carr
Joann Florence

Commission Highlights

During a special meeting on January 10, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Darla Murphy, Admissions Administrator, reported that on November 27, 1991, the Admissions Committee, consisting of Curtis Nesset, Tom Billings, Bar Examiners Review Committee Chair, and Elliott Williams, Character & Fitness Committee Chair, reviewed seven July Bar Examination appeal petitions. She distributed proposed Findings of Fact and Recommendations. The Board voted to adopt the Findings of Facts and Conclusions of the Admissions Committee and deny all petitions.
2. The Board reviewed the Court Reorganization Bill Legislation. David Bird, Legislative Affairs Committee Chair, Bill Bohling, Tim Shea of the Court Administrator's Office, Judge Michael Murphy, and Hal Christensen appeared.
3. The Board voted to accept the Legislative Affairs Committee's recommendation to endorse the Court Reorganization bill subject to redrafting to reflect the intent of Utah Code Annotated 78-3-29 6(c) (i) et seq., and that David Bird, Mike Hansen and Jim Davis should review the final draft.
4. The Board voted to accept the recommendation of the Legislation Affairs Committee to oppose SB36 and refer it to the Rules of Evidence Committee for further review.
5. John Baldwin distributed the new price list for mailing list and label orders.

During its regularly scheduled meeting of January 23, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the Commission meeting of December 13, 1991 were approved.
2. After considering a Bar Examination petitioner's request to appear before the Board, the Board voted to invite the petitioner to come to the next meeting.
3. The Board discussed revisiting its April 1991 decision to allow English as a second language to be a disability for purposes of Bar Examination special accommodations and agreed to resolve the issue at next month's meeting. To supplement discussion, Jim Davis requested the Admissions Administrator to research other bar jurisdictions and distribute all pertinent background information to Commissioners well before the February meeting to allow sufficient review time.
4. The Board reviewed, item by item, its position on the Final report of the Utah Supreme Court Task Force on the Management and Regulation of the Practice of Law.
5. Davis reported that the Bar has put together a ten-year budget projection with assumptions based on expenses increasing 5% per year and revenue staying the same.
6. John Baldwin was asked to explore organizations or persons who could provide long-term planning assistance. Baldwin planned to do some preliminary investigating during the upcoming ABA Dallas meeting. The Board also asked Baldwin to propose a strategic plan for appointing a long-range planning committee, cost projections, and how we do it.
7. Miller, on behalf of the Diversity in the Legal Profession Committee of the Young Lawyers Section, requested Board approval to solicit funds from law firms, especially domestic relations firms, for the Domestic Violence Victim Outreach Project. The Board voted to approve solicitation of funds for the project.
8. Hardin Whitney, Chair of the Alternative Dispute Resolution Committee, was invited to share his views on the Court Annexed ADR Bill.
9. The Board discussed ways to enhance communications between the Commission and the Judicial Council.
10. The Board voted to accept the Legislative Affairs Committee's recommendation to favor the Court Fees bill structure but take no position on fee amounts.
11. John Baldwin referred to his written Executive Director's report.
12. John Baldwin referred to his written Budget & Finance report.
13. Steve Trost presented a motion to disaffirm the findings, conclusions and recommendations of a hearing panel according to Rule XII (e). The Board considered the Respondent's Motion to Strike, denied the same and ordered the respondent to file a responsive pleading within 10 (ten) days. The Rule XII (e) motion will be decided on February 20, 1992.
14. Trost reported that the renewal application for the Bar's errors and omissions insurance coverage has been completed and filed.
15. Trost also reported that the real property taxes were paid under protest on January 14, 1992, and just recently a response has been received on the Bar's exemption petition request; there is a very good chance that 25 percent of the taxes paid as well as penalties could be recouped. Bar Counsel hopes to have a final accounting by next meeting.
16. A Bar examination applicant's attorney appeared before the Board to request a hearing for his client before the full Commission and to explain his position.
17. The Board voted to grant a hearing to the petitioner to comply with the order of the court.
18. The Board voted to reject a bar applicant's petition to waive his MPRE and MBE requirement.

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

Free Wills and Estate Planning CLE To Be Given in St. George

Utah Legal Services will be sponsoring a CLE seminar in wills and estate planning to be given at the St. George Hilton on June 19, 1992, from 9 a.m. to 4 p.m. The program will include fundamentals of wills and estate planning including relevant Medicaid concepts for estate planning. Speakers will be announced in the next issue. The seminar will carry six hours of CLE credit and there will be no charge.

Discipline Corner

ADMONITION

1. On February 14, 1992 an attorney was Admonished and made restitution of $500.00 for violation of Rule 1.14(d): DECLINING OR TERMINATING REPRESENTATION, of the Rules of Professional Conduct of the Utah State Bar. In September 1988 the attorney accepted $1,000.00 to represent an inmate at the Utah State Prison. Approximately one week later, after the attorney had performed research in the case, the attorney learned that other counsel had been retained and, consequently, took no further action in the case. Thereafter, the attorney took no action to provide the client file to the new attorney or refund the unearned portion of the fee. The attorney states the client file was not sent to the new attorney because it was not requested. Rule 1.14(b) places an affirmative duty on an attorney to surrender the client file to the client or new counsel when representation has been terminated in an ongoing case.

SUSPENSIONS

2. On January 28, 1992, Jerry Thorn was suspended from the practice of law for a period of six (6) months and one day pursuant to Rule XVIII of the Procedures of Discipline of the Utah State Bar for violating Rule 1.4(a): COMMUNICATION and Rule 1.13(b): SAFEKEEPING OF PROPERTY of the Rules of Professional Conduct of the Utah State Bar. In July 1986, Mr. Thorn accepted a sum of $3,000.00 retainer fee to provide legal representation. Shortly thereafter, Mr. Thorn accepted a government post and left the State of Utah. Mr. Thorn turned the matter over to an associate without making any mention of the retainer fee and without notifying his client. In December of 1987 Mr. Thorn returned $1,000.00 of the original $3,000.00 retainer to his former client. The client's numerous attempts to retrieve the balance of the retainer have been unsuccessful. One of the preconditions to Mr. Thorn's return to the practice of law is that he makes full restitution to his former client.

3. On February 13, 1992, Richard C. Landerman was suspended from the practice of law until further order of the court due to his conviction for a crime involving moral turpitude. On February 21, 1991, Mr. Landerman was convicted and received a two (2) year sentence for filing false tax returns and aiding others in preparation of false tax returns. Mr. Landerman's conduct constitutes a crime involving moral turpitude and pursuant to Rule VII(b) (1) of the Procedures of Discipline of the Utah State Bar and he will remain suspended pending the outcome of his appeal.

RESIGNATION WITH DISCIPLINE PENDING

4. On February 7, 1992, Douglas B. Wade's Resignation with Discipline Pending was accepted by the Supreme Court. Mr. Wade entered into a Discipline by Consent wherein fifteen Formal Complaints were consolidated and wherein it was stipulated that he violated Rule 1.3: DILIGENCE, Rule 1.4(a) & (b): COMMUNICATION, Rule 1.13(b): SAFEKEEPING OF PROPERTY, Rule 1.14(d): DECLINING OR TERMINATING REPRESENTATION, Rule 8.1(b): BAR ADMISSION AND DISCIPLINARY MATTERS, and Rule 8.4(c): MISCONDUCT, of the Rules of Professional Conduct of the Utah State Bar. The complaints followed similar patterns in that Mr. Wade accepted fees for which he performed little or no meaningful legal services; he failed to represent his clients with reasonable diligence; failed to keep them informed as to the status of the cases; failed to respond to phone calls or requests for information; failed to refund unearned fees; failed to return files to clients after he had ceased to function as their counsel; and failed to respond to requests from the Bar for information concerning these complaints. Mr. Wade was also ordered to make restitution to his former clients in the amount of $12,322.00.

Scott M. Matheson Award

Last year, the Law-Related Education and Law Day Committee of the Utah State Bar was proud to present the first annual Scott M. Matheson Award to Greg Skordas and the law firm of Van Cott, Bagley, Cornwall & McCarthy. Currently, the committee is accepting applications and nominations for the second annual Scott M. Matheson Award to be presented on Law Day, May 1, 1992.

PURPOSE: To recognize those lawyers and law firms who have made an outstanding contribution to law-related education in the State of Utah.

CRITERIA: Nominations and applications will be accepted on behalf of individuals or law firms who have:

1. Made significant contributions to law-related education in the State of Utah which are recognized at local and/or state levels.
2. Voluntarily given their time and resources in support of law-related education, such as serving on planning committees, reviewing or participating in the development of materials and programs and participating in law-related education programs such as the Mentor/Mid-Mentor Program, Mock Trial Program, Volunteer Outreach, Judge for a Day, or other court or classroom programs.
3. Participated in activities which encourage effective law-related education programs in Utah schools and communities and which have increased communication and understanding between students, educators, and those involved professionally in the legal system.

APPLICATION PROCESS: Applications and/or nominations may be submitted to the:

Scott M. Matheson Award
Law-Related Education Committee
Utah Law and Justice Center
Box S-3
645 South 200 East
Salt Lake City, UT 84111

Included in the nomination should be a cover letter, a one page resume and a one page summary of the nominee's law-related activities. The nominee may also submit other related materials which demonstrate the nominee's contributions in the law-related education field. These materials may include a bibliography of law-related education materials written by the nominee, copies of news items, resolutions, or other citations which document the nominee's contribution or a maximum of two letters of recommendation. All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Nominations must be postmarked no later than April 15, 1992.

Changes in Court Jurisdiction

By Timothy M. Shea

The 1992 General Session of the Utah State Legislature passed HB 394, sponsored by Rep. Jerrold S. Jensen, to make some small but nevertheless critical changes to trial and appellate court jurisdiction.

The bill amends §78-2-2 Utah Code Annotated, 1953 as amended and other appropriate sections to give the Supreme Court discretion to transfer to the Court of Appeals appeals from the adjudicative hearings of the Tax Commission, the Public Service Commission, the Board of Oil, Gas, and Mining, the Board of State Lands, and the state engineer. Historically the appellate judicial review of these agencies' actions was reserved to the Supreme Court. The changes will permit the Supreme Court to screen the appeals from the formal adjudicative proceedings of these agencies, or appeal from the district court review of informal adjudicative proceedings, to determine which raise issues of significant public policy or issues in developing areas of the law. The Supreme Court can then retain such cases for its full consideration and transfer to the Court of Appeals those cases that raise principally issues of well settled law or error correction. This is discretion that the Supreme Court has exercised since the creation of the Court of Appeals in almost all other facts of its jurisdiction. It will assist the Court in its ability to better control the appellate process.

In the May issue of the Bar Journal, the Supreme Court will publish an announcement inviting recommendations for guidelines in exercising its transfer discretion. Comments should be made in writing to the Clerk of the Supreme Court.

Another change of significance brought about in HB 394 is the elimination of the tax division of the district court and the responsibilities of the Third District Court formerly found in §59-1-601 et. seq. Utah Code Annotated, 1953 as amended. The district court retains jurisdiction of tax cases and the Third District Court retains venue of cases involving taxpayers with taxes assessed on a statewide basis. The bill eliminates the tax division of the district court. The bill also eliminates the requirement that Third District Court (a) have at least one judge permanently assigned to its tax division, (b) publish its tax decisions, and (c) assign the tax judge to determine cases in other judicial districts at the request of the taxpayer.

These changes are of particular significance to the Third District Court. The Third District Court has never been able to meet the strict requirements of the law with a permanently assigned tax judge. The tax assignment has been the responsibility of four different judges over the past several years. The duration of that assignment has been getting shorter. The court will assign tax cases randomly to each of the judges as is now done with all other types of cases.

HB 394 makes changes in circuit court jurisdiction also. HB 394 amends §78-4-7 and §78-6-1 Utah Code Annotated, 1953 as amended, to clarify that the $20,000 jurisdictional limit of circuit court does not include costs, interest, or attorney fees. That is, costs, interest, and attorney fees can be prayed for in addition to a claim of damages of $20,000 or less. In the small claims division, the statute is different. In small claims, the $2,000 jurisdictional limit does not include costs and interest but does include attorney fees. That is, costs and interest can be prayed for in addition to a claim of damages of $2,000 or less, but a claim for attorney fees cannot take the prayer or the award of damages beyond $2,000.

In other changes HB 394:

- Clarifies the authority of the district court to review the bail decision of the circuit court.
- Directs the appeal of the denial of bail to the Supreme Court.
- Provides for the biannual review of the jurisdictional limit of small claims.
- Extends the life of a judgment in small claims to eight years, the same as for all judgments.
- Prohibits a small claims judgment from operating as a lien upon real property unless it is abstracted into the district court.

These changes become effective April 27, 1992.

Bob Miller Memorial Law Day Run

The 1992 Bob Miller Memorial Law Day Run is scheduled to commence Saturday morning, April 25, 1992 at 10:00 a.m. As always, the race will begin at the Pioneer Trail State Park "This is the Place" monument. The 5-Kilometer race will finish at the University of Utah College of Law parking lot. Registration will take place at the Rice Stadium west parking lot adjacent to the law school prior to the race. All law firms are encouraged to field teams and to enjoy the comraderie of the race. Information about the race can be obtained from Charles Loyd at the Salt Lake Legal Defender Association, 532-5444.

Mid-Year Meeting Sponsors

Many thanks to our sponsors for helping to make the 1992 Mid-Year Meeting a success!

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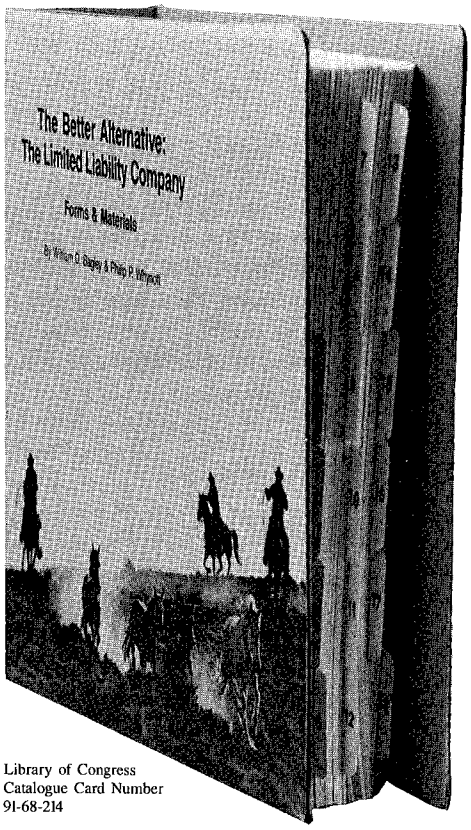
THE LIMITED LIABILITY COMPANY

By William D. Bagley and Phillip P. Whynott



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(FORMS AND MATERIALS)

SUMMARY TABLE OF CONTENTS

1.400

Utah, in 1991 (Utah Code Ann. §§ 48-2b-101 to 156), along with Wyoming, in 1977, and seven other states have **adopted the Limited Liability Company Act**. This new statutory entity is **a better alternative** to limited partnerships, partnerships, close corporations and "S" corporations.

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Commission's Response to Special Task Forces' Final Report

On January 23, 1992, the Board of Bar Commissioners reviewed the Final Report of the Utah Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law. The following represents the Commission's response to that report.

UTAH STATE BAR COMMISSION RESPONSE TO FINAL REPORT of the Utah Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law

Recommendation No. 1: The Bar Should Remain Integrated

The Court should require all lawyers to be members of the Bar.

COMMISSION RESPONSE: The Commission supports this recommendation together with the "philosophical issue" expressed in Alternative I adopted by the Task Force to the effect that the Bar has an ongoing responsibility to the public.

Recommendation No. 2: Education on the Mission of the Bar and Lawyers

The Commission should be charged with the responsibility of developing commitment by Bar members to the mission of the Bar and lawyers in society.

COMMISSION RESPONSE: The Commission supports this recommendation. The Bar has developed preliminary financial projections for the next 10 years, a committee of the Commission chaired by Commissioner Dragoo has prepared a report suggesting methodologies for enhancing communication with members and the public, and the Commission has directed the appointment of a long range planning committee to focus on policy and program issues. Of course, the Commission believes that use of mandatory dues for these purposes is appropriate.

Recommendation No. 3: Delegation of Administration of the Practice of Law to the Bar

The Court should delegate to the Bar, subject to its final determination:
(1) the administration of admission to the Bar;
(2) the administration of discipline of Bar members, for breaches of professional ethics, malpractice, breaches of the rules as to advertising by Bar members and other violations of applicable laws, rules and regulations;
(3) the enforcement of laws and regulations pertaining to the unauthorized practice of law;
(4) authority to impose annual mandatory dues in amounts approved by the Court;
(5) the administration of the MCLE program in accordance with rules established by the Court; and
(6) the administration of programs for ADR determination of fee disputes and a client security fund.

COMMISSION RESPONSE: With one exception, the Commission supports this recommendation. While the Commission is very much concerned about malpractice as evidenced by such things as its admissions and CLE functions, the Commission does not believe that malpractice is the appropriate subject matter of discipline unless a violation of the Code of Professional Responsibility occurs in connection therewith.

Recommendation No. 4: Essential Programs Supported by Mandatory Dues

The following programs and services should be maintained whether or not they are financially self-supporting: discipline, admissions, bar management, ULJC operations, public service programs under criteria established by Court rule, legislative activities conducted under criteria established by Court rule, fee dispute arbitration, client security fund, bar directory, Bar Journal and annual meetings.

COMMISSION RESPONSE: The Commission supports this recommendation and believes that the same should include Bar functions and member communication as well as programs and services in order to be consistent with Recommendation Nos. 2 and 7. In addition, the recommendation should include, without limitation, the Young Lawyers Section and the Lawyer Referral Program.

Recommendation No. 5: Annual Meetings

Annual meetings shall, insofar as practicable, be self-supporting. The Executive Director shall prepare separate budgets relating thereto and attempt to make the meetings attractive and affordable for all Bar members. An annual income and expense statement relating to the annual meeting shall be prepared and submitted to Bar membership in some general communication.

COMMISSION RESPONSE: Although the annual meeting is just one of many legitimate Bar programs, services, and functions, the Commission has no objection to this recommendation, as the same is generally consistent with current practice.

Recommendation No. 6: Justification of Other Programs

All programs or services not included in Recommendation No. 4 should be justified to the Court and Bar members.

COMMISSION RESPONSE: The meaning and scope of this recommendation is unclear; and, therefore, the Commission does not take a position thereon one way or another.

Recommendation No. 7: Bar Reports to Members and Court

The Commission shall report to the Bar members and the Court at least annually:
(1) the Bar's financial condition, including a justification of the costs of administration;
(2) proposed changes in the rules of integration and the Bar's Articles of Incorporation and Bylaws;
(3) the Commission's efforts to increase the use of the ULJC and to reduce its operating deficit; and
(4) the Commission's efforts to improve membership knowledge of, and participation in, Bar programs and functions.

COMMISSION RESPONSE: The Commission has no objection to this recommendation, although it believes that, should the Court consider adopting the same, use of mandatory dues revenues should be specifically authorized.

Recommendation No. 8: Matters Subject to Report and Review

The following shall be disclosed to Bar members, and review by the Court shall occur only upon petition:
(1) the Bar's annual budget;

(2) the amount of annual mandatory dues;
(3) the establishment of new programs or functions that are to be supported, in whole or in part, by the mandatory dues of Bar members;
(4) changes in the Bar's Articles of Incorporation and Bylaws; and
(5) the incurrence of any debt or obligation of $50,000 or more for a period longer than the fiscal year in which the debt or obligation is incurred.

COMMISSION RESPONSE: The Commission has no objection to this recommendation.

Recommendation No. 9: Policy Role of Commission — Administrative Role of Executive Director

The Commission should act as corporate board of directors, making policy. The Bar's Executive Director should act as a corporate chief operating officer under policies established by the Commission.

COMMISSION RESPONSE: The Commission has no objection to this recommendation, but believes that it should be expanded to provide that the President of the Bar act as Chief Executive Officer of the Bar.

Recommendation No. 10: Implementation of Specific Management Guidelines

A management consultant should be retained, at the discretion of the Commission, to provide specific structural and procedural guidelines to implement the relationship and roles between the Commission and the Executive Director. The consultant should then periodically review the guidelines and propose changes as necessary.

COMMISSION RESPONSE: The Bar is always striving to improve management and to use the most effective ways of carrying out the mission of the Bar. While the Bar does not object to the concept of using the services of a management consulting, that should be only one of a number of options open to the Bar as it strives to improve. The Commission feels that it should be given flexibility in its efforts to adopt specific procedural guidelines for defining the relationship and roles between the Commission and the Executive Director.

Recommendation No. 11: Composition of Commission

The present composition of the Commission should be retained with the addition of one non-lawyer appointed by the Court. Such additional member shall have the power to vote on all matters coming before the Commission, but shall not be eligible to serve as a Bar officer. An advisory group should be created with both lawyer and non-lawyer membership to voice the concerns of various segments of the Bar and the public interest. The selection of the advisory group and its relationship to the Commission is left to the discretion of the Commission.

COMMISSION RESPONSE: The Commission has no objection to the addition of a non-voting lay member to the Commission subject to a review of the methodology of selection. Currently, only those Commission members who are directly elected by the active members of the Bar can vote. For example, the Chair of the young Lawyers Section is not a voting member of the Bar Commission even though that person is elected by a constituency of lawyers. Of course, none of the other ex-officio members of the Commission have a vote.

The Commission believes that the establishment of an advisory group is ill-conceived at this time. Currently, the Bar has numerous sections together with standing and ad hoc committees with non-lawyer members, all of which are relied upon by Bar management and leadership for advice. The Commission would prefer, at the outset, to form an "advisory committee" consisting of the chairs of each section and committee, said "advisory committee" to meet at both the annual and mid-year meetings.

Recommendation No. 12: Selection of President-elect

The president-elect shall be selected by the Commission; provided, however, that the name of the president-elect shall be submitted to the membership at large on the retention ballot. In the event that 20% or more of the licensed active lawyers vote to reject the president-elect, the procedure shall be repeated until such time as a president-elect is not rejected.

COMMISSION RESPONSE: The Commission opposes this recommendation, except to the extent that it provides for selection of the president-elect by the Bar Commission.

The Commission supports, however, further study of some sort of recall procedure.

Recommendation No. 13: Establishment of Review Board

A separate Review Board shall be created consisting of both licensed lawyers and members of the public. Members of the Review Board shall be nominated by the Commission, but appointed by the Court.

COMMISSION RESPONSE: The Commission opposes this recommendation for the reasons that there is broad support for public discipline being administered by the District Courts, and there is no way to accurately estimate the cost in dollars, process time, and staff time by the creation of a separate level of bureaucracy. The Utah Supreme Court Advisory Committee on the Rules of Discipline has adopted the District Court model, and an initial draft of the proposed rules has been prepared by the Committee.

Recommendation No. 14: Jurisdiction of Review Board

The Review Board shall hear appeals from Bar administered procedures covering:
(1) dues suspensions;
(2) character and fitness determinations;
(3) discipline decisions;
(4) admissions challenges;
(5) client security awards;
(6) administrative grievances; and
(7) MCLE suspensions.

COMMISSION RESPONSE: The Commission opposes this recommendation. If public discipline is, in effect, moved from the Bar Commission to the District Courts, there is no need for a separate board in other areas.

Recommendation No. 15: Administrative Remedies for Bar Grievances

By rule, the Court should establish procedures whereby no action may be brought against the Bar or any of its officers, Commissioners or employees challenging any decision, action or non-action of the Bar until the complainant's administrative remedies have been exhausted before the Review Board.

COMMISSION RESPONSE: The Commission supports this recommendation, and believes that claims against the Bar should be addressed first to the Bar, then to the Utah Court of Appeals as a prerequisite to commencement of litigation. The Bar has already had prepared a rough draft of such a procedure.

Recommendation No. 16: Appeal from Review Board

A right of direct appeal to the Court shall exist from Review Board rulings relating to disbarment or suspension. All other decisions of the Review Board shall be final unless the Court grants discretionary review of the same. The complainant, disciplinary counsel and affected lawyer shall all have equal rights of appeal.

COMMISSION RESPONSE: The Commission opposes this recommendation for the reasons hereinbefore set out in response to Recommendation Nos. 13 and 14 relative to the necessity and expense of an appeal board. The Commission has no objection to the review of its actions or those of the District Court by the Supreme Court, and supports the development of a methodology therefor.

Recommendation No. 17: Continuing ULJC Operations

The ULJC should continue to be operated as a Bar function.

a. The servicing of long-term debt and deficits from ULJC operations shall be paid from mandatory dues.

b. No remodeling shall be done on the ULJC to meet the needs of new tenants unless the same is approved by both the ULJC Board of Trustees and the Commission.

COMMISSION RESPONSE: The Commission supports this recommendation, and believes the Court should authorize the use of mandatory dues rather than mandate the use of mandatory dues as suggested in the recommendation.

Recommendation No 18: The Governing Body of the ULJCI

The Bar's Executive Director and Commission members shall not serve as members of the ULJCI Board of Trustees. The Bylaws of the ULJCI should be amended to provide that Trustees shall be elected by members of the Bar on staggered terms, as is now done for the Utah Bar Foundation.

COMMISSION RESPONSE: The first part of this recommendation has already been implemented. The Commission opposes the second part of the recommendation, believing that the Court should deal with the Bar and the Bar, in turn, should deal with the Utah Law and Justice Center, Inc. Consistent with the original objectives of the Bar and Law and Justice Center, Inc., the relationship between the entities was structured in a way to encourage cooperation and pursuit of common goals.

Recommendation No. 19: Promotion of the ULJC Operations

The Commission shall take active steps to promote use of the ULJC:

(1) for ADR programs and functions;
(2) by Bar sections and committees;
(3) for disciplinary hearings;
(4) by Bar members located outside of the Salt Lake City area; and
(5) by law related organizations.

COMMISSION RESPONSE: The Commission has no objection to the concept embodied in this recommendation, but believes that use of mandatory dues should be authorized, not mandated, and that inconsistencies with Recommendation No. 20 should be resolved.

Recommendation 20: Study of Elimination of Separate ULJCI Entity

Further research should be undertaken to establish a basis that would eliminate joint operation, inter-entity accounting and the cost of an independent audit, which would continue emphasis on use of the ULJC as established by the Articles of Incorporation of the ULJCI and in the solicitation of contributions for its establishment.

COMMISSION RESPONSE: The Bar is currently studying methods to reduce costs associated with the existence of the Utah Law and Justice Center as a separate entity. The Commission opposes, however, the elimination of that entity because of the adverse tax consequences.

Recommendation No. 21: Revision of the Rules of Integration

The rules of integration should specify that conflicting statutory provisions are subordinate to them pursuant to Article VIII of the Constitution of Utah.

COMMISSION RESPONSE: The Commission supports this recommendation.

Judicial Vacancies Announced

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for judicial vacancies in the Second, Third and Fourth District Courts. Second District serves Weber, Davis and Morgan counties, Third District serves Salt Lake, Summit, and Tooele counties, and Fourth District serves Juab, Millard, Utah, and Wasatch counties. Applications must be received by the Administrative Office of the Courts no later than 5:00 p.m. April 24, 1992.

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.

Article VIII of the Utah Constitution and state law provides that the Nominating Commission shall submit to the Governor three to five nominees within 45 days of its first meeting. The Governor must make his selection within 30 days of receipt of the names and the Senate must confirm or reject the Governor's selection within 30 days. The judiciary has adopted procedural guidelines for nominating commissions, copies of which may be obtained from the Human Resources Division, by calling (801) 533-6371.

The Nominating Commission is chaired by Chief Justice Hall, or his designee from the Supreme Court, and is composed of two members appointed by the state bar and four non-lawyers appointed by the Governor. At the first meeting of each nominating commission, a portion of the agenda is dedicated to a review of meeting procedures, time schedules and a review of written public comments. This portion of the meeting is open to the public. Those individuals wishing to provide written public comments on the challenges facing Utah's courts in general, or the Second and Third District Courts in particular, must submit written testimony no later than May 1, 1992, to the Office of the Court Administrator, Attn: Judicial Nominating Commission. No comments on present or past sitting judges or current applicants for judicial positions will be considered.

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact the Human Resources Division in the Court Administrator's Office, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102 (801) 533-6371. Application packets will then be forwarded to prospective candidates and must be returned completed to the Administrative Offices no later than 5:00 p.m., April 24, 1992.

CLAIM OF THE MONTH

Lawyers Professional Liability

Alleged Error or Omission

The Insured allegedly failed to properly pursue a medical malpractice action.

Resume of Claim

In the underlying medical malpractice action, plaintiff's decedent was hospitalized for treatment of patient's disease, which caused patient's lower intestine to deteriorate. While recovering from a colostomy, patient became depressed and began to speak about suicide to family and the hospital staff. The hospital called in a psychiatrist who spoke with the patient a few times, noted the depression on the chart, but did nothing else. A few days after the patient's last session with the psychiatrist, the patient asked a nurse to open the window in his room — then patient jumped out. Patient was found by the hospital staff who then tried to treat the injuries sustained in the all. Patient lingered for a few hours, during which time patient allegedly told spouse that life was worth living.

The Insured was retained by the spouse to bring a medical malpractice claim against the culpable parties. Although a notice of claim was originally filed against the hospital and the psychiatrist, the summons and complaint only named the hospital. Suit was never brought against the psychiatrist or the treating doctor. The Insured never consulted an expert witness even though he was statutorily required to name an expert. This failure to name an expert eventually resulted in a court order to dismiss without prejudice. Nothing was done to revive the case and eventually the statute of limitations ran.

How Claim May Have Been Avoided

This claim might have been avoided if the Insured had done some rudimentary investigation as soon as he was retained. Legal research would have revealed the need to sue all culpable parties and the requirement that an expert be appointed. A discussion with a medical expert would have told the Insured who were the culpable parties. Alternatively, the Insured could have consulted with, or referred the case to, an attorney who had more experience in medical malpractice.

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

CASE SUMMARIES

By Clark R. Nielsen

MAGISTRATES, BIND-OVER ORDERS

The criminal bind over by a circuit court "Magistrate" circuit court is reviewable by the district court judge. The Utah Supreme Court reversed the Utah Court of Appeals, 794 P.2d 496. Recent statutory and constitutional modifications do not deprive the district court of its jurisdiction to quash bind-over orders. Attack on a magistrate's bind-over order is not an "appeal," subject only to review by the court of appeals. The district court maintains inherent authority to determine whether its original jurisdiction has been properly invoked. The trial court need not defer to the magistrate's legal conclusion and may conduct its own review of the bind-over order. Under Utah Rules of Criminal Procedure 12 and 25, reviews the bind-over order as a review of its own original jurisdiction.

A preliminary hearing is not a trial. A magistrate does not sit as a judge of a court or exercise the power of a judge. A circuit judge, sitting as a magistrate, has the duties and powers of a magistrate and not of the circuit court. The magistrate only determines probable cause. That determination is not an appealable order because the magistrate has not exercised an adjudicatory function. When the district court refuses to quash a bind over order, its ruling may then become subject to interlocutory appeal.

State v. Humphrey, 176 Utah Adv. Rep. 8 (Dec. 18, 1991) (J. Durham).

JURY INSTRUCTIONS, CLEAR ERROR

The failure of the trial court to give a jury instruction on the elements of the crime is clear error. The defendant did not waive the defect by failing to object thereto at trial. Defendant's conviction was reversed and remanded for a new trial.

State v. Jones, 177 Utah Adv. Rep. 3 (Dec. 31, 1991) (J. Stewart).

LIMITATIONS OF ACTION, DISCOVERY

The Supreme Court affirmed the summary judgment dismissal of a products liability action wherein plaintiff alleged he had been injured by the accidental discharge of his pistol. The discovery rule to extend a statute of limitations will not apply when plaintiff became aware of his injuries and damages, and their cause, several months before the statute expired.

Atwood v. Sturm, Ruger & Co., 177 Utah Adv. Rep. 14 (Jan. 7, 1992) (J. Howe).

DRUG MONEY FORFEITURE

A district court judgment of forfeiture was reversed for insufficient evidence that the money had come from or was intended to be used in a drug transaction. There was no evidence of any involvement with controlled substances and no drugs were found in connection with the seizure of the money hidden in an automobile stopped on the freeway. Utah Code Ann. § 58-37-13(1) requires that the property forfeited have been used in violation of the Controlled Substances Act statutes.

In Re $102,000, 177 Utah Adv. Rep. 15 (J. Howe).

MALPRACTICE ACT PANEL REVIEW, LIMITATION OF ACTIONS

The Utah Supreme Court affirmed the dismissal and summary judgment for the defendants in a malpractice action because the action was not filed within the two-year statute of limitations. (U.C.A. § 78-14-4) Under the Malpractice Act, plaintiff is required to file a notice of intent to sue and request a hearing before a prelitigation panel. The panel's review is informal and non-binding, but its review is a compulsory condition precedent to litigation.

Plaintiff alleged that defendants improperly diagnosed the treatment for plaintiff's infected toe. She filed a notice of intent to sue and a request for a prelitigation panel review within six months. Panel review was denied when plaintiff failed to submit proof of service on defendants.

Plaintiff's first action was not filed until more than two and one-half years after the claimed injury. That action was dismissed for failing to complete the prelitigation hearing process. After filing and completing a third request for prelitigation panel review, the plaintiff again filed a complaint nearly four years after the injury. The Supreme Court affirmed the dismissal of that action, holding that her request for prelitigation panel review had not tolled the statute of limitations. The court refused to consider plaintiff's tolling argument because the issue had been determined in her first complaint, from which no appeal was taken. In total, over three years passed from plaintiff's injury until the filing of the second complaint. Even if the statute of limitations had been tolled while the prelitigation panel held jurisdiction over her request for review, the complaint was still untimely.

Malone v. Parker, 178 Utah Adv. Rep. 12 (Jan. 23, 1992) (J. Zimmerman).

THEFT BY DECEPTION, THE ELEMENT OF GULLIBILITY

The crime of theft by deception, Utah Code Ann. § 76-6-405 (1990) requires that the victim rely upon the defendant's deception, although the element is not expressly so provided in the statute. The deception must be a significant factor in the transaction and the victim must to some extent believe the deception to be true. However, the deception need not be the only or even a controlling factor in the victim's decision to part with the stolen property. Defendant's misrepresentation need only constitute a "substantial causal influence" upon the victim's decision.

Concurring only in the result, Judge Bench viewed as creating only a "likely reliance" test rather than an "actual" reliance test, i.e., that the deception is "likely to affect" the judgment of another in the transaction.

State v. Lefevre, 178 Utah Adv. Rep. 15 (Utah App. Ct.) (Jan. 15, 1992) (J. Orme).

HABEAS CORPUS RELIEF

Plaintiff was a prisoner at the Utah State Prison and had unsuccessfully petitioned the district court for a writ of habeas corpus following rescission of his original parole date. During the pendency of the habeas corpus proceedings, the defendant was paroled while the appeal was pending. The court of appeals panel (Judges Bench, Billings and Garff)

observed that the purpose of habeas corpus relief under Rule 65(b) is to test the lawfulness of imprisonment and that because no "collateral legal consequences" were alleged to result from the defendant's conviction. His release from parole rendered his appeal moot. The recent Utah Supreme Court case of *Foote v. Utah Board of Pardons*, 808 P.2d 734 (1991) does not require judicial review of a Board of Pardons decision when the appellant was afforded full procedural due process and appellant challenged only the reasonableness of the Board's decision not to originally grant him parole. In the absence of a showing of a due process violation, habeas corpus is not available as a post-release remedy to modify the release date ordered by the Board. *Northern v. Barns*, Utah App. Ct. 900566-CA (Jan. 24, 1992).

Further in *Foote v. Board of Pardons*, the Court of Appeals has also held that in habeas corpus proceedings under Rule 65(b), U.R.C.P., the Board of Pardons is a necessary party to the proceedings, as well as the petitioner's physical custodian (the prison warden). Both parties must be named as respondents in a habeas corpus petition. It is the Board that determines whether or not the petitioner shall obtain release. The warden has no power to unilaterally grant the relief requested in the petition. In this instance, petitioner argued he was unlawfully incarcerated because the Board of Pardons had violated his due process protections based upon *Foote*. Therefore, the Board of Pardons should have been named a party respondent. Dismissal for failure to join the Board was affirmed.

Estes v. VanDerVeur, Utah App. Ct. 910613-CA (Jan. 27, 1992) (J. Russon, J. Bench and J. Greenwood on Law and Motion).

SEARCH AND SEIZURE REASONABLE SUSPICION, TAINTED CONSENT

An appeals court panel affirmed the district court's order suppressing evidence seized in an automobile search and seizure on Interstate 70. Even though the initial stop was justified when the driver's conduct suggested the possibility of intoxication, the further detention for investigative questioning was not justified because the officer had no reasonable suspicion of any other serious criminal activity. The Court of Appeals affirmed the trial court's finding that there were no facts to support a reasonable suspicion of such activity and specifically observed that the defendant's nervousness did not raise such suspicion. A deputy's "hunch" ultimately proved to be correct but, without more, would not raise a reasonable, articulable suspicion regardless of the final result. Moreover, the defendants' alleged consent and invitation to search was tainted by the illegality of the continued detention.

State of Utah v. O'Dena-Luna, Utah App. Ct. 900567-CA (Jan. 3, 1992) (J. Garff, J. Billings and J. Russon).

SEARCH AND SEIZURE, ILLEGALITY AND TAINTED CONSENT

In a fact-intensive analysis of a vehicle search and seizure, the Court of Appeals upheld the denial of a motion to supress evidence. Defendant's vehicle was stopped when the officer observed defendant's speeding, and observed their furtive movements in the back of the automobile. The officer exceeded the scope of the original stop for speeding when he requested to compare the VIN numbers in the vehicle. He was later given permission to search the car, finding contraband. However, that later search was pursuant to voluntary consent, which was not attenuated to the request to search for the VIN number. Applying *State v. Arroyo*, 796 P.2d 684, the later consent was sufficiently voluntary and removed in time to dissipate any taint of illegality.

State v. Castner, Utah Ct. App., 910275-CA (Jan. 24, 1992) (J. Jackson).

INDUSTRIAL COMM., TIMELINESS OF APPEAL

A Petition to review a worker's compensation decision of the Industrial Commission was dismissed when the petition was filed 31 days after the decision "issued". "Issue," as used in the U.A.P. Act has finally been expressly held to be "the date the agency action is properly mailed, as accurately evidenced by the certificate of mailing", or personally served. The statutory requirement of "Issuance" is distinguished from "entry" of a civil judgment. The time in which to file a petition for review commences to run on the date that the agency decision is "issued" (e.g. mailed), and not when received by the petitioner in the mail.

Wiggins v. Board of Review, 178 Utah Adv. Rep. 29 (Per Curiam).

ADOPTION; SET ASIDE DEFAULT JUDGMENT

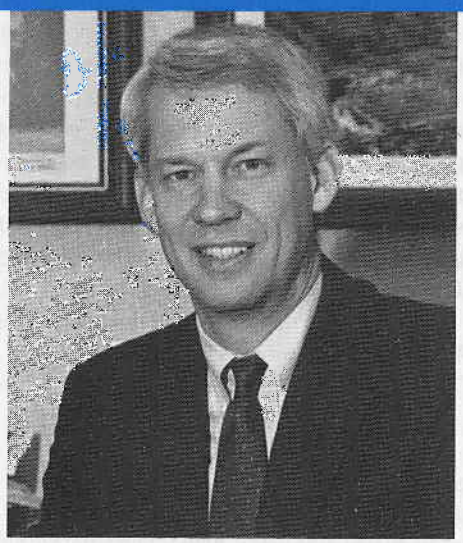
The Court of Appeals affirmed the default judgment that vacated a step-mother's adoption of her husband's child. The child was returned to the natural mother. Brocksmith received custody of his son when he divorced plaintiff, the child's mother. Brocksmith later married defendant. The Brocksmiths then moved to Utah from Illinois without informing the child's mother of their whereabouts. Four years later, the new Mrs. Brocksmith sought judicial adoption of her step-son, alleging that the natural mother had abandoned him and had made no effort to maintain a parental relationship. The petition was granted.

Meanwhile, the child's mother searched extensively for him, finally locating him in Logan, Utah. Upon learning of the adoption decree, the mother filed a petition to set the adoption aside, alleging the decree had been obtained by fraud. The defendants failed to answer and their defaults were entered. Mrs. Brocksmith moved to set aside the default, claiming excusable neglect in failing to answer the complaint. The adoption was annulled and the mother was allowed custody of the child on a "visitation basis".

Mrs. Brocksmith alleged excusable neglect on the basis of assurances from her attorney that her interests were being protected. She "understood" her husband had arranged for an attorney to answer the complaint but despite such assurances, an attorney never responded. While reliance on an attorney's assurances could in some cases be "excusable neglect", it is not here. The alleged attorney never testified and there was no other evidence that he had been retained or had agreed to act. The trial court also found Mrs. Brocksmith was not credible as a witness.

The natural mother had also obtained a writ of habeas corpus to produce the child. While the trial court has a discretion to make the writ returnable at any time, including immediately upon issuance, it may not offend traditional notions of due process. A parent is entitled to due process protection when the custody of his or her child is at issue.

Miller v. Brocksmith, 178 Utah Adv. Rep. 25 (Jan. 22, 1992) (J. Russon).



1992 Legislative Recap

By John T. Nielsen

On February 26, the General Session of Utah State Legislation concluded business. In so doing, considered 716 pieces of legislation excluding resolutions of which 312 passed and 204 failed.

Other than hoards of leather-jacketed motorcycle club members who descended on the Capitol to protest the proposed helmet law, this session had all of the excitement and interest of cream of wheat. To be sure, there were some selected issues that generated concern for special interests, but there were no issues that really captured the attention of the public in general, or for that matter, our profession. There was a certain amount of posturing by those considering future political office, but this session considered fewer bills than most in recent memory and generated little controversy.

As in the past, the Bar had a presence at the Legislature in monitoring legislation and to assist in facilitating communication between the Legislative Affairs Committee, the Bar Commission and the Legislature.

The Bar Commission considered a number of legislative matters that were recommended to it by the Legislative Affairs Committee. The Commission was careful to stay within the direction of the Utah Supreme Court respecting its activities at the Legislature. It took positions on matters of general concern to the profession and the public's access to the courts.

The Bar Commission took a position in opposition to the following legislation:

SB36 – Judicial Notice of Proclamation and Rules. This act requires courts to take judicial notice of administrative code proclamations issued by the Division of Wildlife Resources. It was opposed by the Bar Commission as an incursion into the legitimate prerogatives of the Supreme Court Advisory Committee on evidence. The Bill passed both Houses.

HB347 – Lawyer Advertising. The Commission opposed this bill for similar reasons as SB36 in that the bill attempts, by statute, to regulate advertising which should be done by Supreme Court Rule. This bill died in Senate Rules.

HJR26 – Rules of Criminal Procedure Jury Information Resolution. This bill would have required the judge to instruct the jury that it must use its own judgment in determining guilt irrespective of the law of the case with affirmative directions that it may disregard the law if it believes the law to be unjust or inapplicable to the situation at hand. This bill died in House Rules.

HB363 – Payment of Medical Malpractice Legal Fees. This bill would have required the plaintiff to pay attorneys fees when the defendant prevails. It was opposed by the Commission as an access to the court's issue, and was tabled in Committee.

The Bar Commission took a position in support of the following legislation:

HB394 – Court Jurisdiction. This bill made specific changes in the jurisdiction of the Appellate and Trial Courts and permitted a pourover of agency appeals in the Supreme Court to the Court of Appeals. It also removed the requirement the District Court maintain a tax division and clarified the jurisdictional limit of the circuit court and the effect of small-claims court judgments. This bill passed both Houses.

SB196 – Court Administration Amendments. This bill made several changes in the administration of the courts and granted court commissioners the authority to perform marriages and amended the authority of the presiding judges and clarified the authority of magistrates. It also increased the ability of the courts to impose a fine for contempt to not exceed $1,000 and that of a justice court or court commissioner not to exceed the $500. The Bar Commission recommended support with no position on the amount of fine for contempt. The bill failed in the House.

SB197 – Court Fees. This bill adjusted civil filing fees, increasing some and decreasing various fines and eliminating others. The bill made remaining fees uniform between levels of courts and judicial districts. The Bar Commission took position in support, however, with no position on the actual amount of fees. The bill passed both Houses.

SB198 – Jury Use and Management Act. This bill changed the responsibility for jury lists from the County Clerk to the Judicial Counsel. It simplified the fee payment process and incorporated many of the ABA standards on jury management. This bill passed both Houses.

SJR7 – Corporation Article Revision. This resolution clarified certain portions of the Corporation Article including antitrust provisions. The resolution passed both Houses.

The Bar Commission also supported the recommendation for judicial compensation which was approved by the Legislature in a modified fashion. Nonetheless, judges did receive an increase in their compensation.

There were a number of other bills which were considered by title by the Legislative Affairs Committee but were not deemed sufficiently relevant for further consideration by the Committee nor recommendation to the Bar Commission. Many of those provisions were seemingly controversial, were narrowly related to a specific area of practice or were beyond the scope of permissible Legislative activity by the Bar. Nonetheless, there are a number of enactments which are of importance to lawyers, and they are included below by title and brief description.

HB50 – Utah Revised Business Corporation Act — This was a large comprehensive rewrite of the body of corporation law for the state of Utah. It was supported by the Corporate Section of the Utah State Bar.

HB72 – Civil Public Nuisance and Eviction — Expands the definition of nuisance to include drug houses and provides for abatement by eviction of period. The bill also provides for Private Right of Action.

HB73 – Capital Offense Penalty Amendment — Provides for the penalty for life imprisonment without parole for capital offenses.

HB78 – Mandatory Education Course on Children's Needs for Divorcing Parents — Requires attendance of both divorcing parents at a mandatory course designed to sensitize divorcing parents as to their children's needs.

HB79 – Mediation Pilot Program/Child Custody or Visitation. Establishes a mandatory mediation pilot program and defines circumstances where mediation is to be required.

HB112 – Hate Crime Penalties — Civil Rights Violation — Provides enhanced penalties for crimes directed at certain populations.

HB126 – Administrative Rule Making — Makes technical amendments in the manner in which state agencies promulgate rules.

HB135 – Lobbyist Disclosure — Clarified reporting requirements and other technical matters relating to appearances before agencies or departments of state government.

HB152 – Expungement Amendments — Requires notification of the victim of an expungement request and makes further technical amendments.

HB225 – Grandparents Rights Extended — Extends a cause of action for visitation to grandparents.

HB255 – Probate Code Amendment — Made several technical amendments to the probate code.

HB270 – Disclosure of Address of Custodial Parent — Repealed the statutory provision requiring disclosure of the address of custodial parent by the office of recovery services.

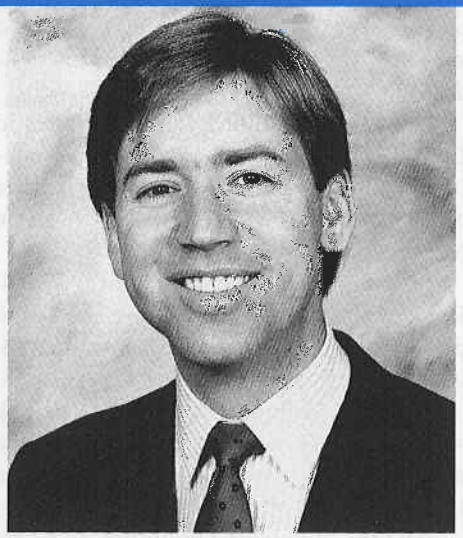
HB400 – Information Access Amendments — provides for government record access and classifications of records.

SB116 – Underground Storage Tank Amendments — Made certain technical amendments to the previously enacted legislation on underground storage tanks and establishes a liability scheme for responsible parties.

SB25 – Hazardous and Solid Waste Amendment — Made several changes in the fee structure for the importation of solid and hazardous waste.

As of the date of this article, there have been no Gubernatorial vetoes nor does it appear that the Governor will see a need to call a special session of the Legislature this Spring.

The work of the interim committees will start in April, and the reader is referred to SJR18, Master Study Resolution, for matters that will be considered during the interim period.



Law Day 1992: The Struggle for Justice

By Keith A. Kelly
President-elect, Utah Young Lawyers Section
Shareholder, Ray Quinney & Nebeker

May 1st is Law Day. This year's national Law Day theme is "Struggle for Justice." As initiated by a 1958 presidential proclamation and affirmed by a 1961 congressional resolution, Law Day provides "an occasion for rededication to the ideals of equality and justice under laws."

In Utah, Law Day means public service. The Bar, especially through the Young Lawyers Section ("YLS"), provides a wide range of service opportunities, many requiring minimal time commitment. Some of these are:

Staffing Law-Day Mall Booths. For the past several years, the Bar has sponsored booths at the major malls throughout the state on Law Day. The booths are stocked with pamphlets and other materials informing people about the law and their legal rights. Attorneys staffing the booths answer general questions about the law, and give questioners advice about where to go to get further legal help. Typically, attorney-volunteers sign up to staff the booths for one to two hour periods. If you are interested in volunteering, call David Zimmerman at 532-1234.

Judging Mock Trial Competition. The Bar and Utah State Office of Education sponsor a mock trial program for secondary students. Many attorneys have already volunteered time to coach the mock trial teams. In April, attorneys are needed to judge in the mock trial competition. If you are interested, call Kim Luhn at 532-6996.

Tuesday Night Bar. Each Tuesday night at the Law and Justice Center (and on different nights elsewhere in the state), the YLS sponsors the "Tuesday Night Bar." Attorney-volunteers spend a few hours seeing people who show up to receive general legal information and to learn about where they can go to get legal help. If you are interested in participating, call the YLS Pro Bono Committee Chair, Kristin Brewer at 532-1036.

Other Service Programs. The YLS offers a wide range of law-related community service programs for such diverse groups as senior citizens, children, and those infected with the HIV virus. Call any YLS officer for information. (Charlotte L. Miller, 530-0404; Keith A. Kelly, 532-1500; Mark S. Webber, 532-1234; James C. Hyde, 532-1234.) In addition, opportunities for pro bono work are available through the Utah Volunteer Lawyers Project of Utah Legal Services, 328-8891 (Salt Lake), and the Salt Lake County Pro Bono Project of the Legal Aid Society, 328-8849.

Law Day will also involve celebration. The Law Day Run is set for Saturday, April 25th. (Time and place to be announced.) In addition, on May 1st a noon awards ceremony will be held at the State Capitol. That morning at 9:30 a Bill or Rights fair will be held for high school students at the Capitol.

As young lawyers, we must play a key role in the struggle for justice in our society. Struggling for justice means not only working to improve our laws and legal system, but also volunteering our time on worthwhile projects that help individuals obtain fairness and equity.

Young Lawyers Elections Changed to Coincide With Bar Commission Elections

This year the balloting for Officers of the Young Lawyers Section of the Utah State Bar will be combined with balloting for state bar commissioners. Instead of receiving separately mailed ballots for both elections, members of the Young Lawyers Section will receive the two ballots together. The only change likely to result from the new format is that the ballots may take somewhat longer to count and therefore the announcement of the new offices may occur later than it has in previous years.

YLS Brown Bag Announced

Young Lawyers are pleased to announce that the Honorable Dee Benson will be the featured speaker at the May Brown Bag.

DATE: May 29, 1992
TIME: 12:00 noon
PLACE: Judge Benson's courtroom, Frank E. Moss Federal Courthouse, 350 South Main
TOPIC: "Trial and Error, Courtroom Practice"

Plan to attend. One hour of CLE credit given to all attendees at no charge.

HIV Subcommittee Receives YLS/ABA Subgrants

The Young Lawyer's Division of the American Bar Association has awarded the HIV subcommittee of the Young Lawyer's Division of the Utah State Bar two grants totaling $1,600.

A $1,000 grant has been awarded for the production of a Handbook for Persons Living with HIV. The handbook will help educate infected individuals and their friends and families about legal issues relating to HIV and AIDS.

The second grant, for $600 is to finance a "Town Hall" meeting which will provide a public forum for a discussion of legal issues relating to HIV and AIDS.

Classified Ads

For information regarding classified advertising, please contact Leslee Ron at 531-9077.

CAVEAT — The deadline for classified advertisement is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment which is not received with the advertisement will not be published. No exceptions!

BOOKS FOR SALE

USED LAW BOOKS — Bought, sold and appraised. Save on all your law book and library needs. Complete Law Library acquisition and liquidation service. John C. Teskey, Law Books/Library Services. Portland (503) 644-8481, Denver (303) 825-0826 or Seattle (206) 325-1331.

INFORMATION REQUESTED

WANTED — Any information regarding the preparation of a Last Will and Testament and/or trust documents and/or any other estate planning documents prepared for or at the request of **Harmon Foster Meinhart**. Please contact Wynn Bartholomew at 566-3688 with any information.

OFFICE SHARING/SPACE AVAILABLE

Choice office sharing space available for 1 to 2 attorneys with established law firm. Downtown location near courthouse with free parking. Complete facilities, including conference room, reception room, library, kitchen, telephone fax, copier etc. Secretarial services and word processing are available, or space for your own secretary. Please call (801) 355-2886.

Professional office suites available with shared secretarial, reception, telephone services. Roomy window offices, great for individual practice, with view of Avenues or Salt Lake Valley. Prestigious South Temple location is convenient to courts. All office equipment and services in place. Free covered parking. Contact Karen or Francine, (801) 359-0052.

ATTRACTIVE OFFICE SPACE available in Union Park area (1200 East 7000 South) next to the Holiday Spa. Office sharing with five other attorneys. Window and/or interior office is complete with secretarial and word processing services or space for your own secretary, reception area, copier, telephone. FAX machine and conference room. Close freeway access to all parts of the valley. Please contact Wynn (801) 566-3688 or David (801) 268-9868.

POSITIONS SOUGHT

Young attorney, licensed in Utah seeks Associate or office sharing with spillover, etc. Past judicial clerk with excellent writing, research, and interpersonal skills. For a copy of resumé or interview call 562-8802 and/or leave message.

MISCELLANEOUS

European Defendant? We assist all phases of trial preparation, tracing assets, execution of judgments against European defendants. Dennis Campbell, Member Iowa and New York Bars, 15 years practice Europe, active 16 European jurisdictions. Salzburg, Austria. Facsimile 43 (662) 432628. Available consultation Salt Lake City, 28-29 May 1992, Marriott Hotel (801) 531-0800.

Legal Center for People with Disabilites

I.O.L.T.A. 1991 Recipient

The Legal Center for People with Disabilities is a private non-profit organization, independent of all government agencies, which is federally mandated to provide advocacy services to eligible clients with disabilities. Eligibility for advocacy services is governed by the Developmental Disabilities Act, the Protection and Advocacy for Mentally Ill Individuals Act, and the Client Assistance Program created by the Rehabilitation Act.

The Center is dedicated to advocating for and protecting the legal, civil and human rights of Utahns with disabilities. As a statewide advocacy organization, it is the responsibility of the Legal Center to examine issues and services through the eyes of the client, speak on his/her behalf and plead his/her cause.

In addition to direct service to clients and systems advocacy, staff of the Legal Center are involved in a wide variety of efforts which promote the individual rights of all people with disabilities throughout Utah.

To help those people capable of resolving their own problems, the Center provided individuals, their families and service agencies with information, technical assistance, and referral to appropriate resources. Last year the Legal Center staff responded to 1910 statewide requests for information about vocational rehabilitation, independent living, mental health, supported employment, financial entitlements, special education guardianship, sterilization, transportation, housing, job discrimination and architectural barriers.

Phyllis Geldzahler

In an effort to create an informed consumer who will be knowledgeable about his/her rights and how to assert these rights, the Center has provided education and training activities in such areas as educational rights, effective advocacy strategies, public entitlements, rights in institutions, guardianship and services under the Rehabilitation Act.

During 1991, publications were distributed statewide, including the Legal Rights Handbook, the Mental Health Consumer in Utah, the Consumer Handbook for clients of Vocational Rehabilitation and Independent Living, a quarterly newsletter, and other miscellaneous information.

The Legal Center also participates with other community agencies on committees, advisory councils, task forces and in informal meetings.

During the past year, the grant from the Utah Bar Foundation has been used to supplement the salary for an attorney to advocate in guardianship proceedings, and to expand the Legal Center's services in Northern Utah.

Many of the individuals for whom guardianship is sought are people with disabilities. Utah law requires that the potential ward be represented at guardianship hearings. This past year the Legal Center received over 100 calls requesting representation for an individual with a disability. As a result of the Legal Center's intervention, many of the guardianships ended up as limited rather than plenary and individuals who once had guardianships are now their own guardian. Without IOLTA funds, the additional attorney needed to represent these individuals would not have been feasible.

In October 1991, the Legal Center opened an office in Logan. The advocates presence in that community is meeting the needs of a previously underserved population. IOLTA funds are being used to supplement maintenance of that office.

Although IOLTA funds represent a small percentage of the Legal Center's funding, it has allowed the Legal Center for People with Disabilities to better serve a very vulnerable population in need of legal advocacy.

Seated left to right:
Nancy Friel – CAP Coordinator
Rob Denton – Senior Staff Attorney

Seated left to right:
Mary Rudolph – PAIMI Coordinator
Phyllis Geldzahler – Executive Director
Susan Gorey Deisley – PADD Coordinator

Notice of Acceptance of Grant Applications

The Utah Bar Foundation is now accepting applications for grants for the following purposes:

1. To promote legal education and increase knowledge and awareness of the law in the community.
2. To assist in providing legal services to the disadvantaged.
3. To improve the administration of justice.
4. To serve other worthwhile law-related public purposes.

For grant application forms or additional information, contact Zoe Brown (531-9077). All grant applications must be received by the Foundation before 5:00 p.m. May 29, 1992, at the Foundation's office at 645 South 200 East, Salt Lake City, Utah 84111.

CLE CALENDAR

BANKRUPTCY AND OTHER NON-ACCORD LEGAL OPINIONS

A live via satellite seminar. This seminar will focus on the status of the law regarding legal opinions not covered by the ABA Legal Opinion Accord. The major emphasis will be on bankruptcy opinions, why they are needed, how they are given, and what they mean.

CLE Credit: 4 hours
Date: April 2, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 9:30 a.m. to 1:30 p.m.

FRANCHISING

A live via satellite seminar. A distinguished panel of federal and state franchise regulators and franchise law practitioners will address an array of introductory and intermediate concerns. This program is intended for attorneys representing franchisors and franchisees; for attorneys whose clients may or must turn to franchising; and attorneys whose clients need to be conversant with franchising techniques.

CLE Credit: 6.5 hours
Date: April 7, 1992
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

EVIDENTIARY FOUNDATIONS WITH DEMONSTRATIONS

A live via satellite seminar. How to get your evidence in! This program is to familiarize the novice to intermediate-level trial lawyer with the basic elements of each of the most common foundations required to provide evidence pursuant to the Federal Rules of Evidence.

CLE Credit: 6.5 hours
Date: April 8, 1992
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

ENVIRONMENTAL REPORTING

Presented by the Energy, Natural Resources and Environmental Law Section, this seminar will examine the methods for reporting compliance on environmental regulations. Proper methods and the liability of following them will be discussed. If you have clients with any type of environmental reporting requirements, this seminar is a must for you.

CLE Credit: 4 hours
Date: call
Place: Utah Law & Justice Center
Fee: call
Time: 8:00 a.m. to 12:00 p.m.
Note: This seminar is being rescheduled

FAMILY LAW SECTION LUNCHEON

Tentatively scheduled for this date.

CLE Credit: 1 hour
Date: April 10, 1992
Place: Utah Law & Justice Center
Fee: call
Time: 12:00 noon to 1:00 p.m.

VACUUM EXTRACTION AND BIOVENTING: USES AND APPLICATIONS

CLE Credit: 4 hours
Date: April 15, 1992
Place: Utah Law & Justice Center
Fee: $140 (plus $6 MCLE fee)
Time: 9:00 a.m. to 1:15 p.m.

CIVIL LITIGATION I — WORKSHOP

This is another workshop in the New Lawyer CLE program series designed to build practice skills with a "nuts and Bolts" approach. Civil Litigation I is the first part of a three part sub-series. It will cover Pre-Action Investigation, Pleading and Discovery.

CLE Credit: 3 hours
Date: April 16, 1992
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

THE RULES BEHIND THE RULES — BANKRUPTCY SEMINAR

This seminar is another in the series offered by the Bankruptcy Section. This program will consist of a panel of the presents clerks for the Utah Bankruptcy Judges. More information on the topic will be forthcoming.

CLE Credit: 2 hours
Date: April 23, 1992
Place: Utah Law & Justice Center
Fee: $25
Time: 12:00 noon to 2:00 p.m.

ANNUAL SPRING PENSION LAW AND PRACTICE UPDATE

A live via satellite seminar. This seminar presents concise, condensed

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 Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

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 lease 48 hours in advance. Returned checks will be charged a $15.00 service charge

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

discussions of selected current topics that concern tax attorneys as well as CPAs, actuaries and other professionals who are experienced in the design, drafting, or administration of pension and profit-sharing plans.
CLE Credit: 4 hours
Date: April 23, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

PRACTICAL ADVICE FOR COUNSELING CLIENTS WHO DEVELOP, MARKET OR USE COMPUTERS

A live via satellite seminar. This seminar will address timely topics ranging from new developments in computer technology to the legal issues they raise and practical approaches to dealing with questions that the law doesn't always answer.
CLE Credit: 6.5 hours
Date: April 28, 1992
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

LAWYERS AND NON-LAWYERS IN BUSINESS

This is a Young Lawyers Section brown-bag CLE.
CLE Credit: 1 hour in ETHICS
Date: April 29, 1992
Place: Utah Law & Justice Center
Fee: Brown Bag
Time: 12:00 noon to 1:00 p.m.

UNDERSTANDING FINANCIAL STATEMENTS: ACCOUNTING FOR LAWYERS

A live via satellite seminar.
CLE Credit: 4 hours
Date: April 30, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

5th ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

CLE Credit: 14 hours
Date: May 7 & 8, 1992
Place: Utah Law & Justice Center
Fee: $195
Time: 8:00 a.m. to 5:00 p.m.

THE SINGLE EUROPEAN MARKET AND ITS IMPACT ON THE UNITED STATES

CLE Credit: 4 hours
Date: May 12, 1992
Place: Utah Law & Justice Center
Fee: call
Time: 8:00 a.m. to 12:00 p.m.

HAZARDOUS WASTE AND SUPERFUND 1992: THE LATEST DIRECTIONS AT EPA

A tape-delay presentation of this annual seminar.
CLE Credit: 4 hours
Date: May 14, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

1992 PENSION PRACTICE UPDATE AND REVIEW OF CURRENT REGULATIONS

A live via satellite seminar.
CLE Credit: 4 hours
Date: May 14, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

FAMILY LAW SECTION ANNUAL SEMINAR

This is the annual seminar produced by the Family Law Section. The program will include case law and legislative updates, along with ethics as it applies to the practice of family law. This is a popular seminar, so sign up early.
CLE Credit: Approx. 7 hours (with 1 in Ethics)
Date: May 15, 1992
Place: Utah Law & Justice Center
Fee: Call
Time: 8:00 a.m. to 5:00 p.m.

CURRENT DIRECTIONS AND CHALLENGES FOR THE ADVANCED ESTATE PLANNER

A live via satellite seminar. This program is designed to benefit experienced estate planning practitioners in their continuing quest to understand what is on the "cutting edge" of estate planning.
CLE Credit: 6.5 hours
Date: May 20, 1992
Place: Utah Law & Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

ANNUAL CORPORATE COUNSEL SECTION SEMINAR

CLE Credit: 4 hours
Date: May 21, 1992
Place: Utah Law & Justice Center
Fee: call
Time: 7:30 a.m. to 12:00 p.m.

SUING AND DEFENDING BANKS: THEORIES AND TACTICS FOR THE 1990'S

A live via satellite seminar.
CLE Credit: 4 hours
Date: May 21, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

CIVIL LITIGATION II — WORKSHOP

This seminar is a continuation of the civil litigation series that is part of the new lawyer CLE program. This portion of the series will cover evidence at trial. Judge Michael Murphy of the Third District Court will be presenting. This is an excellent opportunity to review basic evidence practice.
CLE Credit: 3 hours
Date: May 21, 1992
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

AMERICANS WITH DISABILITIES ACT: ASSURING COMPLIANCE — CONTROLLING LITIGATION

CLE Credit: 4 hours
Date: May 27, 1992 (resch from April 16, 1992)
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 9:30 a.m. to 1:30 p.m.

DIRECTORS' AND OFFICERS' LIABILITY

A live via satellite seminar.
CLE Credit: 4 hours
Date: June 4, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

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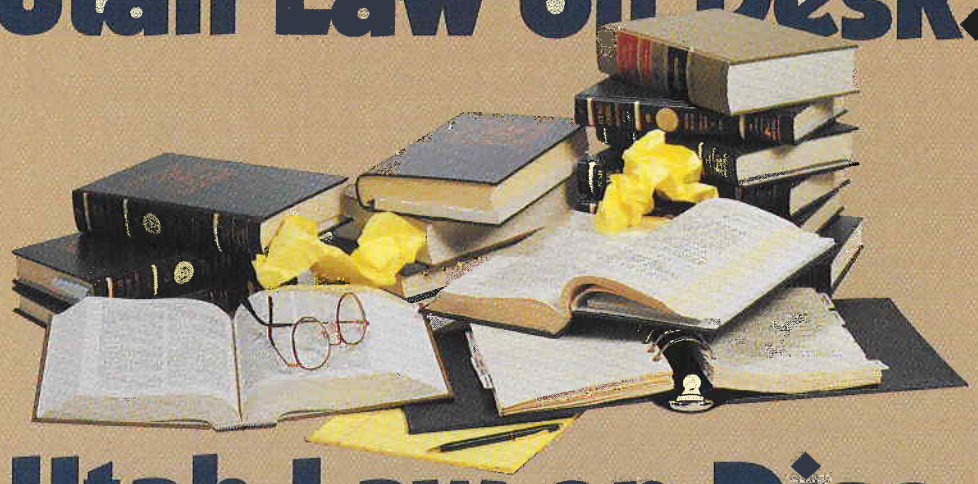

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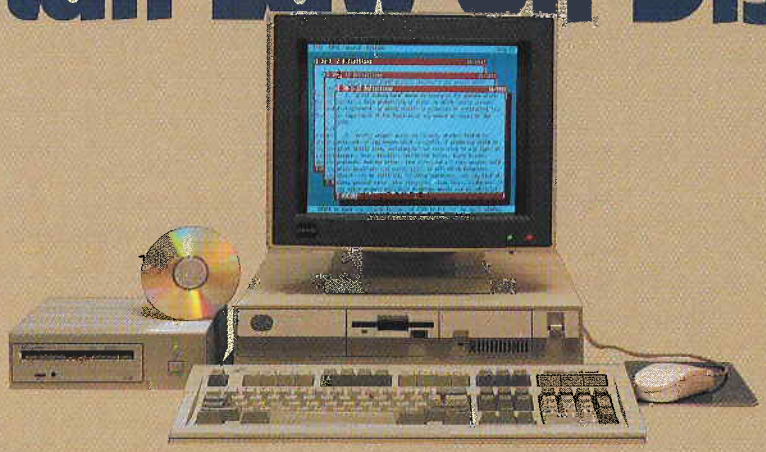

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