UTAH BAR JOURNAL

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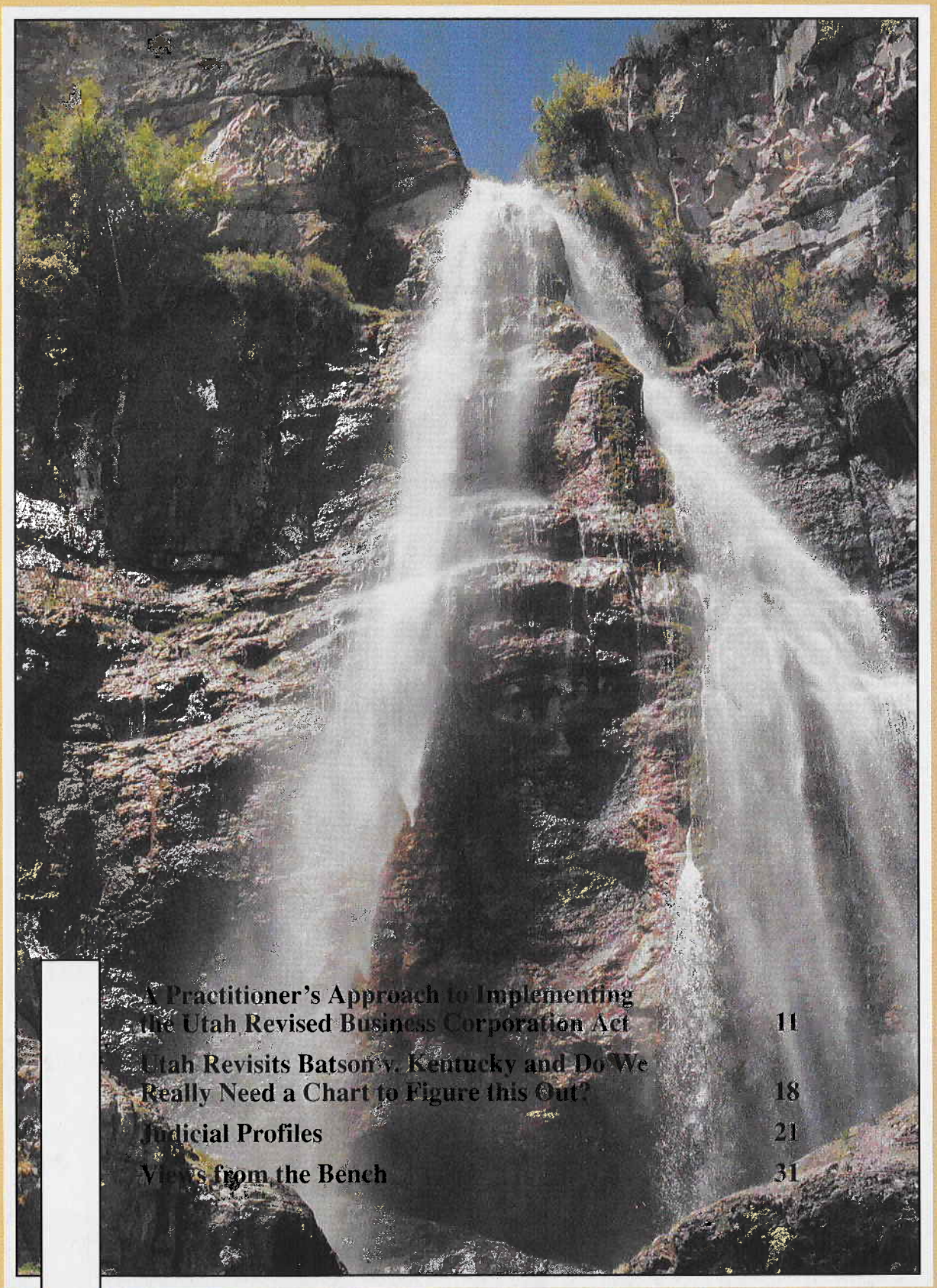

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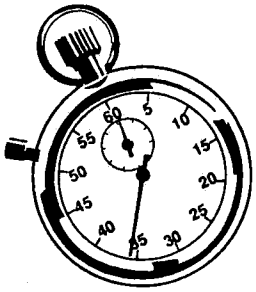

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COVER: Stewart Falls, Mount Timpanogos, Utah County, Utah, Taken by Professor David A. Thomas, J. Reuben Clark Law School, Brigham Young University..

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

Editor,

I read with interest the article by Timothy Lewis, "Should Utah Consider Adoption of Community Property Law?", which appeared in the April, 1992, *Utah Bar Journal*.

Having recently moved to Utah from the State of Washington, where I practiced law for 13 years, it is my opinion that the community property laws as applied in Washington State afford the residents and the legal counsel many benefits. Among those:

1. A truly equitable procedure for division of real and personal property accumulated during marriage and divided at the time of dissolution of marriage. RCW 26.09 *et. seq.*
2. A predictable procedure for the disbursement of the assets in both testate and intestate estates. RCW 11.02.070 and 11.04 *et. seq.*
3. A procedure for avoidance of probate and administration on the first death between husband and wife by use of a statutory community property agreement. RCW 26.16.120.
4. A statutory right to retain separate property. Separate property being defined as all real and personal property acquired through the efforts of one spouse prior to marriage together with any gifts, inheritance or bequest acquired by one spouse during the marriage together with all rents, issues and profits from any of the foregoing. RCW 26.15. *et. seq.*
5. The right to contractually exclude a spouse from any entitlement to separate property by use of a prenuptial agreement.

Obviously I am biased in favor of adopting community property laws. Having practiced law in a state that followed these principles, I found the laws to be a practical, equitable and predictable method of acquisition of property, division of assets upon dissolution and transfer of assets upon death.

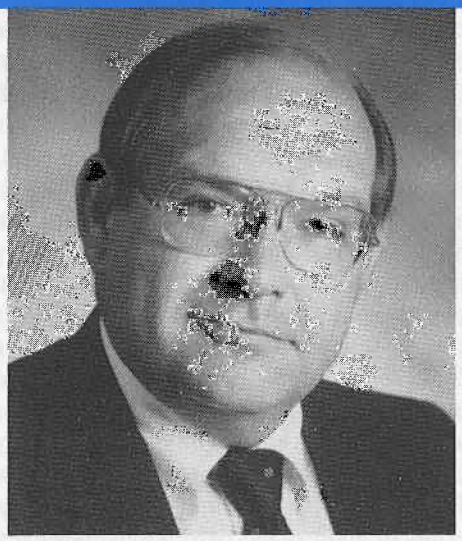
For further information on the community property issue, the reader may wish to refer to Washington's Revised Code, Chapter 26 et. seq., together with the following:

1. 15A Am. Jur 2d Community Property;
2. *Symposium: The Continuing Evolution of American Community Property Law.* 1990 Wis. L. Rev. 583-879 '90;
3. *Community Property and the Problem of Migration.* 66 Wash U L Q 773-85 '88.
4. *Community Property Law – it's Advantages and Disadvantages.* G. Templar J.B.A. Kan 16:195-202 N '47; and
5. *The Community Property Trend.* W.Q. De Funiak Notre Dame Law 23:293-8 Mr. '48.

Thank you for your informative articles.

Sincerely yours,

Donald A. O'Neill
Attorney at Law



It Was a Very Good Year

By James Z. Davis

As the Bar's fiscal year draws to a close, it has become customary for the outgoing President to report to members on the accomplishments of the Bar during that year. Some of the matters that we concluded in FY 1992 had their genesis in Hans Chamberlain's and/or Pam Greenwood's administrations. All that we have accomplished would not have occurred but for the foundations built by Hans, Pam and their predecessors. In an effort to make my "final report" to you more readable, I have attempted to categorize our activities into several broad groups.

FINANCE

The Bar's Finance Department has continued its ongoing improvement under the able leadership of Arnold Birrell. The installation of new computer software has enabled us to adopt a new chart of accounts which we have utilized throughout the year. As you are already aware, the budgeting process for FY-93 has begun. That process has been substantially simplified by the new chart of accounts, enabling us to quickly and easily spot trends and make appropriate adjustments. The Finance Department is now capable of providing the Bar Commission virtually "instant" financial information, together with accurate financial projections, putting the Commission in a position to make more meaningful policy decisions not only on a day to day basis, but for the future. This year, we also established contingent reserve and replacement reserve funds in accordance with generally accepted accounting principles. I am happy to report that, based upon current projections, those funds will be intact as FY-93 begins on July 1, 1992. Finally, the FY-91 audit for the year ending June 30, 1991, was completed August 1991, and published in the Bar Journal.

UTAH LAW & JUSTICE CENTER

Thanks in no small part to the efforts of Kaesi Johansen and now, Richard Dibblee, use of the Utah Law & Justice Center is at an all time high. A new marketing strategy (complete with brochure) has been adopted, and aggressive marketing of the facility is proceeding. As of this writing, there has been no need for Bar financial support to the Law & Justice Center. Most of you know that the Utah Law & Justice Center is a non-profit corporation; and during the year, bylaws were adopted and a new Board of Trustees was selected. Pam Greenwood is the chair, and Stewart Hinckley, Hans Chamberlain, Brian Florence and Norm Johnson are members of the board.

Perhaps the best news relating to the Utah Law & Justice Center is the fact that the principal indebtedness on the Law & Justice Center was reduced by $381,967 leaving a principal balance secured by the facility as of June 30, 1992, of $1,049,497. In addition to the aforesaid principal reduction, all accrued interest through June 30, 1992, will have been paid.

SUPREME COURT ORDER AUGUST 10, 1990

On August 10, 1990, the Utah Supreme Court ordered the Bar to take certain steps to address financial concerns of the Bar and appointed the Grant Thornton company to conduct periodic reviews. All of the directives in the Supreme Court order have been accomplished, and Grant Thornton filed its final report last fall. In that report, Grant Thornton gave the Bar high marks for what it had accomplished and recommended no structural changes.

THE TASK FORCE

The Supreme Court Task Force on the Management and Regulation of the Practice of Law in Utah completed its study and deliberations in October 1991, and filed its report with the Supreme Court in November 1991. In November 1992, the members of the Task Force met with the Supreme Court to discuss the report and answer any questions the Court might

have. All of you should have received a copy of the Task Force report directly from the Court. Prior to the end of the comment period established by the Court, the Bar Commission prepared its response to the report. That response was published in the April 1992 edition of the *Utah Bar Journal*. On April 3, 1992, the Bar Commission met with the Supreme Court to discuss the report and respond to any questions the Court might have. The Court recently reached certain conclusions regarding the recommendations and its final decision should be published soon.

Although participation in the Task Force was generally a positive experience, the herculean effort put forth by Bar leadership and staff, especially during Pam's administration, must be credited in no small way for the quality of the outcome.

RELATIONSHIP WITH THE SUPREME COURT

Regular communication on administrative matters has been established between the Bar and the Supreme Court. In addition, the Court has requested that the Bar work closely with it and the Judicial Council to assist the Court in implementing court consolidation. The Bar has appointed a committee consisting of Dennis Haslam, Bill Bohling, Debra Moore, Helen Christian and Gil Athay to spearhead that effort.

DISCIPLINE

Notwithstanding the fact that the Utah State Bar has an impeccable record of carrying out its delegated discipline function, perceptions persist that self-regulation is somehow inappropriate. Various schemes for dealing with the perception abound, and include, but are not limited to such things as setting up an entire new bureaucracy thereby moving the perception of incest from the Bar to the Supreme Court. In an effort to address the perceptions, however, last fall the Commission requested that Steve Trost, Bar Counsel, study further the possibility of utilizing the District Courts for public discipline matters. The screening panels, including both attorney and lay members, would continue their function, and the Bar Commission would have no further role in the procedure. This approach has been recommended to the Supreme Court by the Bar Commission and is currently under study by the Supreme Court's own committee on discipline. Perhaps the most significant impact of utilizing the District Courts for public discipline is procedural, in that it will allow Bar Counsel to much more expeditiously dispose of cases since it will no longer be necessary to coordinate and convene hearing panels.

In recognition of the importance of the performance of the discipline function, together with the enhanced role of Bar Counsel's office in matters relating to the unauthorized practice of law, admissions and other areas, Bar Counsel's office has been substantially beefed up during the last year. By the time you read this, a new computer system for Bar Counsel's office will have been installed and a new attorney hired.

The Bar has also been working closely with the leadership of the Legal Assistants Association of Utah to address the complex issues relating to the status of paralegals in Utah.

MEMBERSHIP COMMUNICATION

The Bar is making every effort to keep its members informed of its activities and solicit membership input. In virtually all of the President's Messages I have written this year, I have requested comment and input. Notices and requests for input are always published in the Bar Journal when that can be accomplished in a timely manner. Separate mailings to Bar members have been utilized where necessary on more urgent matters. Cognizant of the cost of separate, direct mailings, every effort has been made by the Bar to combine mailings wherever possible.

During the year, the Commission has met with the Southern Utah Bar, Weber County Bar and Utah County Bar. In addition, the Commission has participated in functions with the Salt Lake County Bar and lawyer legislators. Of course, all Bar members have and remain welcome to participate in Bar Commission meetings.

ORGANIZATION

Under Executive Director John Baldwin's leadership, the organization of the Bar has been better defined and strengthened. Job descriptions have been developed and employee files reorganized. John has begun the task of integrating policies and procedures with bylaws as well as updating the Bar's policies and procedures. Personnel manuals have been updated; and, as most of you know, the Bar has become a Utah non-profit corporation.

CLE

Under the able leadership of Toby Brown, the Bar has provided its members a broad array of CLE opportunities. Most of you know that the MCLE Board, chaired by Bob Merrill, is not connected with the Bar, although the Bar has provided support in monitoring compliance with MCLE requirements. As the first two-year compliance period approached on December 31, 1991, Toby went the extra mile to provide even more CLE opportunities to enable members to complete their requirements on time. Thanks in no small part to Toby's efforts, the first two-year reporting period ended without fanfare and, as I understand it, the MCLE Board continues to study programs, requirements and procedures.

ACTIVITIES AND PROGRAMS

Last fall, the Bar conducted a Bar Leadership workshop for section and community leaders modeled in some ways after the Bar Leadership Institute sponsored annually by the ABA. Randy Dryer, our President-Elect, John and myself together with other staff and Commission members participated in the program, and received a great deal of positive feedback. Staff support to committees and sections has been augmented by the hiring of Richard Dibblee who is committed to enabling sections and committees to carry out the important work of the Bar.

During the year, the Executive Committee and Executive Director met with several media editorial boards in an effort to open up communication, give the media a better idea what we are about and provide resources when issues involving the Bar come up. All of the local media are now receiving complimentary copies of the Bar Journal.

In addition to establishing committee files and charges for the first time, we are trying a new system for soliciting interest in the committees by attempting to identify members who are truly interested in participating and weeding out those who are not. Randy has advised me that the initial response to this effort has been very positive.

Most of you are aware that we have been seeing record attendance at both mid-year and annual meetings. Attendance has been heavy not only at CLE functions, but also at the business meetings held in connection therewith. The Bar continues to conduct location analysis for both annual and mid-year meetings. The support you have given the Bar in this regard is very much appreciated.

The Tuesday Night Bar and Lawyer Referral programs continue to thrive; and, hopefully, a restructuring of the Lawyer Referral program to make it more attractive to our members will make it self-supporting next year. In addition to the foregoing, John and his staff have been participating in the oversight of a Utah Dispute Resolution grant.

New computer systems have been installed in the administrative offices of the Bar. We have changed to a PC network and liquidated our old mainframe system. The Client Security Fund paid claimants $12,682 upon recommendation of the Client Security Fund Committee and approval of the Bar Commission. The Bar is conducting a retreat on June 11 and 12 to conduct, partly in conjunction with the Supreme Court, long range planning. Ten year budget projections have already been developed. Bar staff and leadership have also conducted law student orientations at the law schools.

Of course, the Young Lawyers Section, chaired this year by Charlotte Miller, continues among our shining stars. In addition to the Section's many other activities, another successful Law Day program was completed on May 1, 1992.

THE FUTURE

It is a testimony to Bar members, leadership and staff that the Bar has continued to perform its important functions, programs and activities under serious financial and other pressures from various sources while going through a process of what amounted to significant internal reorganization.

The need for a strong Bar has never been greater. There is simply no other organization that is in a position to effectively assist all branches of state government where matters relating to the justice system are concerned.

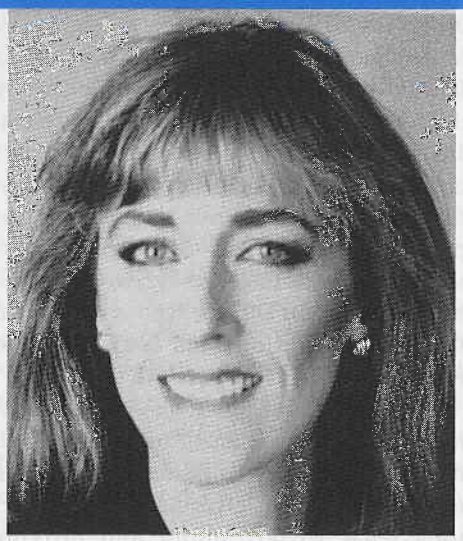
Unauthorized practice of law complaints are at an all time high and the Bar is responding vigorously.

The concept of access to justice remains as elusive as ever. The Bar provides a forum to make policy decisions, focus on dispute resolution providers and the impact on the system.

Your continued support is critical.

The Bar is strong. The Bar is healthy. The Bar is you.

Thanks for giving me an opportunity to serve — it was a very good year.



What They Don't Know

By Jan Graham

I'm worried about the public's understanding and acceptance of our legal system, and I'll bet maybe you are too.

This worry comes and goes: its on the front burner now because of the verdict in the Rodney King case in Los Angeles. Most of us, because we're lawyers, have been asked by family and friends to explain the verdict, i.e., to give a lawyer's answer to the question "how was the verdict possible?" What could the jury have seen or heard during the presentation of evidence that could have contradicted the clear impact of the famous and indisputable videotape?

I don't know how you handle the question. For my part, I ramble about the unpredictability and danger which law officers face in any arrest situation, the need to be ready for violent and unpredictable reactions from those who may be under the influence of mind-altering and strength-inducing chemicals, and the need to hold police officers to a reasonable, not perfect, standard of conduct given all the circumstances.

The response? Eyes glaze and no one is satisfied, least of all me. A big part of my current job is defending the actions of police officers to maintain criminal convictions on appeal. No group in Utah is more concerned about the black mark on law enforcement from the Rodney King incident than Utah law enforcement. One Salt Lake City representative of police officers told me that in his view the Rodney King incident was the biggest setback in the public image and public morale of law officers in decades. And this was *before* the verdict.

Utah law enforcement has worked hard in recent years to modify practices that fuel the negative stereotypes of abuse of police power — an evil that we all agree must be eliminated. There has been a consensus acknowledgement by Utah's law enforcement leaders that the cold, macho, symbols of power (black boots, reflector sunglasses, etc.) have done much to fuel the public's negative view of law officers as uncompassionate "power freaks" who are less than human in some respects. Right thinking leadership in law enforcement has gotten the message and is leading the way to a more accessible, human image for police officers. As a result, much progress has been made in that all-important area: public relations.

Then came the Rodney King videotape. All the destructive stereotypes about law enforcement were back on the table, unraveling years of progress in Utah. We will never know to what extent the Utah public assumes the "Los Angeles Model" of police response is operative in Utah. Do Utahns assume that Utah law officers would behave in similar fashion as Laurence Powell and his three colleagues? Or do most Utahns assume that the response was unusual or at least unique to Los Angeles with its high degree of racial tensions and its controversial administration under Chief Darrell Gates? I wish I knew.

After months of public discussion, the entire dilemma was entrusted to a small group of people in Los Angeles: the jury. As lawyers, we've all been trained to honor and respect the jury system. After all, the Sixth Amendment right to a jury is fundamental to our system of criminal justice.

The public is stunned at the verdict and its unanimity (the jury was only hung on the count of excessive force — a misdemeanor — against Powell). We are all uncomfortable about the absence of blacks from the jury — which was all white except one hispanic and one Asian. The late breaking story is that the hispanic juror now says she prayed that other jurors would come around to reach at least one guilty verdict, but that their "minds were made up before they entered the jury room". The ugly lurking fear is that the racism that seemed to underlie the Rodney King beating also defined the jury verdict.

Can the public realistically be expected to understand, and more importantly,

accept the system as it worked in the Rodney King case?

Our standard answer as lawyers has always been that because we are schooled in the learned treatises of the law, we of course understand that the jury system, and in fact all elements of our justice system, are to be praised and accepted. After all, particular cases may be botched, but "the system" works. That answer may be just a tad arrogant. Who cares if the system works, if one person's case *didn't* work. Too often lawyers defend our legal system with all its mysteries, unfathomable language, and inexplicable results against public attack as though we know more than they do. We don't. The public has a right to expect the legal process to make sense, and when it doesn't, high toned defenses of "the system" don't do much good.

One of my primary frustrations as a private litigator was the refusal by judges to explain their rulings. I don't know about you, but my clients were never very happy after months of work and thousands of dollars in legal fees, to hear the words "motion denied" — with no explanation. Some judges — in my view the better ones — understood the tremendous investment of the parties and the lawyers, and would take the time to explain the reasons for the rulings. But many judges would not — even if pressed. I will never forget particular cases I handled where I received an adverse ruling from the bench, and knowing the anguish of my client at losing, I respectfully asked the Court to explain the basis of the ruling. The response from the judge would be something like: "All I am required to say is 'motion denied' — I do not have to provide my reasons".

And it was true. In addition, we all know that trial judges are sometimes reluctant to offer grounds for a ruling, because there may be other grounds which would support the ruling on appeal — even if the judge hasn't thought of them yet. This strikes me as incredibly cynical and a hard pill to swallow for those people for whom our legal system should work: the non-lawyer! Surely the least that citizens should be able to expect from our legal system is some explanation of why they won or lost. Yet our "insider" attitude as judges and lawyers is that protecting the system — as baffling as it is to the public — is more important. In other words, what they don't know won't hurt them, literally.

I think that's wrong. What the public doesn't know, can't understand, and won't accept about our legal system *will* hurt them. And that's a problem that we, as lawyers, need to think about solving.

NASAA

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Luncheon Speaker
John C. Baldwin, Executive Director, Utah State Bar, former Director, Utah Securities Division, and former President, North American Securities Administrators Association.

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o Questions regarding the conference should be directed to Ann Marie DiPasquale at the NASAA Corporate Office, 202/737-0900.

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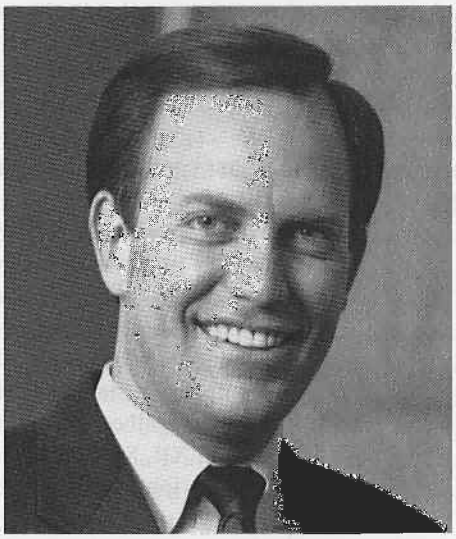
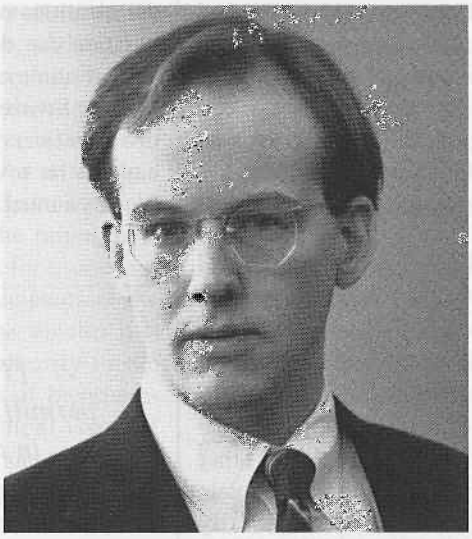
A Practitioner's Approach to Implementing the Utah Revised Business Corporation Act

Part I. Corporate Formation

By James E. Gleason and Jeffrey N. Walker





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JEFFREY N. WALKER is an attorney in the law firm of Jones, Waldo, Holbrook and McDonough, where he practices in the areas of corporate, securities, antitrust and environmental law. Mr. Walker received his B.A. in political science from Western Michigan University, where he graduated Magna Cum Laude with High Honors from the Honors College. He obtained his J.D. from BYU, where he graduated Cum Laude and was a Note & Comment Editor of the Law Review. He is a member of the State Bar of California and the Utah State Bar.

With this year's adoption of the Utah Revised Business Corporation Act (the "Revised Act"), to become effective July 1, 1992, questions abound as to the practical effects of the Revised Act on Utah corporate practice. A mere conceptual awareness that the Revised Act has modernized the corporate law of the State of Utah is insufficient. The corporate practitioner will be required to develop a working knowledge of how to implement the new provisions of the Act in order to better meet his or her clients' needs. This first article of a two part series addresses corporate formation, how the basic form of Articles of Incorporation has been changed by the Revised Act and, therefore, what advice clients should now receive. To assist in this discussion, we have prepared sample Articles of Incorporation that reflect the streamlining available under the Revised Act.

A. Commentary to INTRODUCTION and ARTICLE I of the Sample Articles of Incorporation

Utah's prior Business Corporation Act (the "Prior Act") required three or more natural persons 18 years or older to act as incorporators for the establishment of a domestic corporation. In contrast, the Revised Act now requires only one incorporator and permits the incorporator to be either a natural person or a legal entity.

Thus, a parent company may now act as the incorporator of its own subsidiaries. The Revised Act has, however, retained the requirement that a natural person who acts as an incorporator must be at least 18 years old.

While the Prior Act granted no express powers to the incorporator other than to sign and deliver the Articles of Incorporation and call the organizational meeting of the initial directors, the Revised Act gives the incorporator the express authority to complete the organizational process, thereby permitting greater flexibility in the formation of the corporation. In routine incorporations, for example, it may at times be appropriate and expedient for counsel to act as both the incorporator and the registered agent. After preparing and signing the Articles, counsel could readily complete the organizational process pursuant to the client's instructions by executing a written organizational action by incorporator (as permitted under the Revised Act in lieu of a meeting of incorporators), by which he or she could adopt bylaws, elect directors and officers, authorize the opening of bank accounts and the initial issuance of stock and take all other actions "necessary and proper to complete the organization of the corporation." By this method, properly prepared counsel could, where appropriate and with the approval of the client, deliver a "turn-key" corporation, fully organized according to the specifications of the client, within hours after obtaining the organizational data from the client. Due to the newly established ability of entities other than natural persons to act as incorporators under the Revised Act, we may in the future see corporation services companies such as CT Corporation or Prentice-Hall offering such complete incorporation services to out-of-state attorneys.

Naturally, where the client is inexperienced in corporate matters, an initial meeting of counsel with the officers and directors is in order, to explain what has been done and how to proceed. In more complex situations, where one or more of the substantive decisions remain to be made by the board, the incorporator could do as little as appointing the initial board of directors by written action (or naming them in the Articles of Incorporation if confidentiality is not an issue) and then allow all other organizational action to be taken by the board in the traditional manner.

In addition, under the Prior Act the initial directors were required to be named in the Articles of Incorporation. The Revised Act has done away with this requirement and allows the organization to proceed prior to the election of directors. This change recognizes the reality that often, for reasons of either convenience or confidentiality, initial directors named in Articles have been mere nominees, without either a financial interest in the corporation or any decision-making authority. Under the Revised Act, clients who wish to preserve the confidentiality of the identities of participants in the new corporation can do so without resorting to the ruse of nominee directors. Utah has not just become Switzerland, however, so the identities of officers and directors will eventually have to be revealed when the corporation files its annual report with the Division.

". . . [T]he Revised Act . . . permit[s] greater flexibility in the formation of the corporation."

Concerning Article I, specifying the name of the corporation, the essential provisions of the Prior Act remain unchanged, since the Prior Act was updated in this regard in 1990. The requirement to include a word indicating "corporateness" has been retained and is only satisfied by the words "corporation," "incorporated" or "company" or the abbreviations "corp.," "inc." or "co." or words or abbreviations of like import in another language. Ironically, "company" and "co." could just as easily indicate a limited liability company, a general or limited partnership or a sole proprietorship, which continues to undercut the significance of this statutory requirement.

The careful draftsman will bear in mind, however, that while the Revised Act requires only that the choice of name be "distinguishable upon the records of the Division" from the names of other entities as well as existing trademarks and service marks (and specifically recognizes a distinction if the name contains as little as one or more different letters or numerals, a different sequence of letters or numerals or a plural rather than a singular form of a word), the Revised Act specifically acknowledges that it does not "abrogate or limit the law governing unfair competition or unfair trade practices." Thus, it will always continue to be appropriate to evaluate whether or not a proposed corporate name is "deceptively similar" to the name, trademark or service mark which is already in use, to protect the client against possible future challenge by the present holder of the similar name.

B. Commentary to ARTICLE II of the Sample Articles of Incorporation

The Revised Act makes clear that only the general statement of purpose set forth in our sample Articles of Incorporation is required. This should put an end to the practice on the part of many Utah attorneys of using several paragraphs to assure themselves that the corporation would enjoy the broadest possible latitude in conducting its business. While some sought to eliminate the statement of purpose requirement altogether, the Utah Constitution (at Article XII, Section 10) mandates that "no corporation shall engage in any business other than that expressly authorized in its charter, or Articles of Incorporation." Thus, the Revised Act retains the statutory requirement that the Articles of Incorporation include a statement of the purpose or purposes for which the corporation is organized.

On the other hand, the needs of a client may be better served by including one or more narrowing limitations in situations where one of the participants prefers to retain a check on the scope of business of the corporation. More specific purposes provisions will also be called for at times in connection with licensing of the corporation or qualification to do business in certain states.

Finally, the Revised Act does away altogether with the archaic requirement to state the period of duration of the corporation.

C. Commentary to ARTICLE III of the Sample Articles of Incorporation

An initial reading of our sample Article III reveals that two formerly important items are missing: (i) a reference to par value and (ii) specific designation of "common" or "preferred" stock. One of

the more sweeping simplifications of the Revised Act is the elimination of both of these requirements.

The traditional concepts of "par value," "stated capital," "capital surplus" and "earned surplus" are not used in the Revised Act. The statutory structure embodied in these terms was not only complex and confusing but had also failed in its original purpose of protecting creditors and senior security holders. Indeed, to the extent security holders were led to believe that the old structure ever provided such protection, the use of such terms was misleading. Instead, the Revised Act addresses the need for these protections more directly with provisions covering: (i) the conditions upon which shares may be issued, (ii) limitations on distributions in all forms by corporations, and (iii) the elimination of the concept of treasury shares. These topics will be addressed in Part II of this series, *Corporate Governance*.

With regard to designation of common or preferred shares, these terms remain optional but are not required, reflecting the trend in recent years toward recognizing that historically significant distinctions between the two have become blurred in practice. Today, corporations may create "common" shares that have significant preferential rights and "preferred" shares that are actually subordinate in all material economic aspects. Therefore, while the Revised Act permits something as simple as our sample Article III (and in such cases imposes a presumption that the "stock" has both unlimited voting rights and all rights to receive the net proceeds of any liquidation of the corporation), it also grants to the creative draftsman the latitude to establish in the Articles of Incorporation any number of classes of stock, and of series within those classes, and to call them anything the client wishes, provided only that (i) every class and series within a class must have its own designation and the preferences, limitations and relative rights of each such class or series must be spelled out in the Articles of Incorporation (either initially or by amendment), and (ii) one or more classes must possess in the aggregate the two fundamental characteristics of unlimited voting rights and the right to receive the net assets of the corporation upon its dissolution (although even these two characteristics may be divided between different classes as needed), and shares which singly or in the aggregate possess these rights must be outstanding at all times. Thus, while our streamlined sample will fill the bill for many simple "Mom and Pop" corporations, the Revised Act essentially gives the more sophisticated client and his or her counsel a completely blank canvas on which to create customized, innovative securities.

One important note for counsel representing clients who may wish in the future to adopt or modify a more sophisticated capital structure is that the board may amend the Articles of Incorporation for this purpose on its own initiative, without the requirement of a shareholder vote, *provided* the Articles of Incorporation themselves so provide. Avoiding the delays inherent in calling a shareholder meeting or arranging a written consent of shareholders can occasionally become critical to the timing of a financing transaction. Therefore, counsel should consult with the participants at the time of formation to determine whether it is appropriate to cede such authority to the board in the original Articles of Incorporation (this highlights the ethical issue of always having a clear understanding of who is really your client in a corporate transaction, but that subject is beyond the scope of this article).

"[T]he Revised Act essentially gives the more sophisticated client . . . a completely blank canvas on which to create customized, innovative securities."

D. Commentary to ARTICLE IV of the Sample Articles of Incorporation

Like the Prior Act, the Revised Act continues to require that the street address of the corporation's initial registered office (which must be in the state) and the name of its initial registered agent be included. A mailing address consisting only of a post office box remains insufficient. The Revised Act also expressly provides that these items may later be deleted by an amendment to the Articles of Incorporation adopted by the board without shareholder approval (presumably only after the current registered agent and registered office have been made a matter of public record by the filing of an annual report with the Division).

As a side note, the Revised Act also does away with the burdensome and often ineffectual role of the Division as the default agent for service of process when a registered agent cannot be found. The Revised Act now provides that in such instances service on the corporation may be perfected by registered or certified mail addressed to the principal office of the corporation as shown on its most recent annual report. If actual service fails, the date of service will be five days after deposit in the United States mail, properly addressed, first class postage prepaid.

E. Commentary to ARTICLE V of the Sample of Articles of Incorporation

Finally, the Revised Act requires that the name and address of each incorporator be noted in the Articles of Incorporation.

F. Elimination of Need for Acknowledgements or Verification

The Revised Act eliminates the requirements found in the Prior Act that the Articles of Incorporation must be acknowledged or verified. The drafters determined that the requirements of acknowledgement or verification serve little purpose in connection with documents filed under corporate statutes. Thus, the Revised Act provides that the execution of a document constitutes an affirmation or acknowledgement, under penalty of perjury, that the document is the signer's act and deed.

G. Optional Provisions that Must be Inserted in the Articles of Incorporation if They are to Be Effective

The foregoing discussion highlights the minimum requirements to draft statutorily complete Articles of Incorporation under the Revised Act. Naturally, there are many optional provisions that may be appropriate and should be considered when drafting Articles of Incorporation. In fact, some of these optional provisions can only be elected in the Articles of Incorporation. A few significant optional provisions are noted below for your consideration in advising clients.

1. **Optional Provisions Affecting Directors**

• Unless otherwise provided in the Articles of Incorporation, directors are elected by a plurality of the votes cast in the election of directors at a meeting at which a quorum is present. A plurality effectively means that the individuals with the largest number of votes are elected as directors up to the maximum number of directors to be chosen at the meeting. In some situations, it may be appropriate to change this default method of electing directors. The Revised Act provides that failure to specify an alternative method in the Articles of Incorporation precludes such changes in voting procedure. One common alternative voting method is the use of cumulative voting. This alternative method can be adopted simply by inserting a statement that "all directors are elected by cumulative voting" or "holders of class XYZ shares are entitled to accumulate their votes" or words of similar import. Such a statement automatically makes applicable the provisions of the Revised Act that describe the method and mechanics of cumulative voting. Alternatively, the Articles of Incorporation can require that the election of directors be made by certain classes of shareholders. This approach is widely used in closely-held corporations to protect an agreed-upon allocation of control.

• The Revised Act provides that directors can be removed without cause. The Articles of Incorporation can be altered to restrict the method for removal of directors. This may include provisions that provide for removal only for cause or by judicial proceeding. Such restrictions are often appropriate in closely-held corporations where the agreed-upon allocation of control prior to their formation requires that the directors have some immunity from removal.

• In the event that a director may only be removed for cause, it may be appropriate to stagger the directors' terms of office. This can serve both as part of a takeover defense strategy and as a way to protect generally against sudden changes in the management of the corporation. The use of staggered terms also dilutes the impact of cumulative voting since a greater number of votes is required to fill any particular seat on the board if the terms are staggered than is required if the entire board is elected at a general meeting.

• One of the substantive changes in the Revised Act is the greater delineation of indemnification rights for directors. Bearing in mind that a corporation is often composed of multiple constituent stakeholders, the participants may conclude that they do not wish to go as far as the Revised Act does in providing indemnification to a director out of their collective corporate treasury. Therefore, if it is deemed desirable by the client to narrow the scope or extent of indemnification, any such limitations should find their way into the Articles of Incorporation.

2. **Optional Provisions Affecting Shareholders**

• Under the Revised Act, the concept of "voting groups" is introduced, permitting the corporation to band together the holders of certain classes or series of stock for specific voting purposes while causing them to vote separately or generally for other purposes. These provisions, which introduce great potential for flexibility and segmentation in the management of a corporation, will be addressed in Part II of this series, Corporate Governance. Nevertheless, implementation of any such voting structure must be accomplished through modifications to the Articles of Incorporation. The Articles of Incorporation can also be drafted to increase the quorum voting requirements to any extent desired up to and including unanimity or to decrease the quorum requirements, as desired.

• The rights afforded to present shareholders to participate in future sales of securities by the corporation (so-called preemtive rights) are afforded to shareholders only to the extent specified in the Articles of Incorporation. In contrast, the Prior Act granted preemptive rights by default unless such rights were specifically limited or denied in the Articles of Incorporation. In this way, the drafters of the Revised Act elected an "opt-in" rather than an "opt-out" approach. In order to avoid a shareholder's loss of such rights without notice or an opportunity to vote, simply by reason of the adoption of the Revised Act, the Revised Act provides that existing preemptive rights are specifically protected.

3. **Optional Miscellaneous Provisions**

While the above-mentioned optional

provisions must be incorporated in the Articles of Incorporation to be effective, there are still other optional provisions that may either be elected in the Articles of Incorporation or in the Bylaws. Such optional provisions are only limited to the creativity and corresponding needs of the client and the draftsman, but they can include, without limitation, the following types of provisions:

- Provisions eliminating or limiting the liability of directors to the corporation or to the shareholders for monetary damages, providing in this instance that if the provisions are made a part of the Bylaws they must be approved by the same vote of shareholders as would be required to include the provisions in the Articles of Incorporation.
- The number of directors may be fixed or changed within limits.
- Qualifications for the directors may be prescribed.
- The authority to compensate directors may be restricted or eliminated.
- Notice of regular or special meetings of the board of directors may be prescribed.
- The authority of the board of directors to act without meeting may be restricted.
- The quorum requirement for meetings of the board of directors may be increased or decreased (for example, down to 1/3 from a majority).
- Action at a meeting of the board of directors may require a greater than majority vote.
- The statutory right of directors to participate in board meetings without being physically present may be eliminated.
- The board of directors may create committees and specify their powers.
- The authority of the board of directors to amend the Bylaws may be restricted.
- Issuance of shares without certificates may be authorized.
- Procedures for treating a beneficial owner of "street name" shares as the record owner may be presribed.
- The transferability of shares may be restricted.

H. Summary.

The Revised Utah Business Corporation Act creates excellent opportunitites for counsel to tailor the foundational corporate documents to the needs of the business client. Much of this can be accomplished at the time of formation, but flexibility is provided in the Revised Act to allow, for instance, the board of directors to make meaningful changes in the Articles of Incorporation without shareholder approval. We urge all Utah attorneys who have occasion to form corporations to familiarize themselves with the Revised Act so as to be able to responsibly prepare those organizational documents. Counsel should also be alert to opportunities to restate Articles of Incorporation filed under the Prior Act to bring them into line with the provisions of the Revised Act.

SAMPLE ARTICLES OF INCORPORATION

The undersigned person[s] [if a natural person, must state that the person is eighteen (18) years or more], acting as incorporator[s] under the provisions of Utah's Revised Business Corporation Act (hereinafter referred to as the "Act") adopt[s] the following Articles of Incorporation:

ARTICLE I

The name of this corporation is _____ (the "Corporation").

ARTICLE II

The Corporation is organized to engage in any lawful act or activity for which corporations may be organized under the Act.

ARTICLE III

The aggregate number of shares which the Corporation shall have authority to issue is _____ (___) shares of stock.

ARTICLE IV

The address of the initial registered office of the Corporation is _____, Salt Lake City, Utah. The name of the initial registered agent of the Corporation at that address is _____.

ARTICLE V

The names and address of the incorporator[s] of the Corporation is [are] as follows:

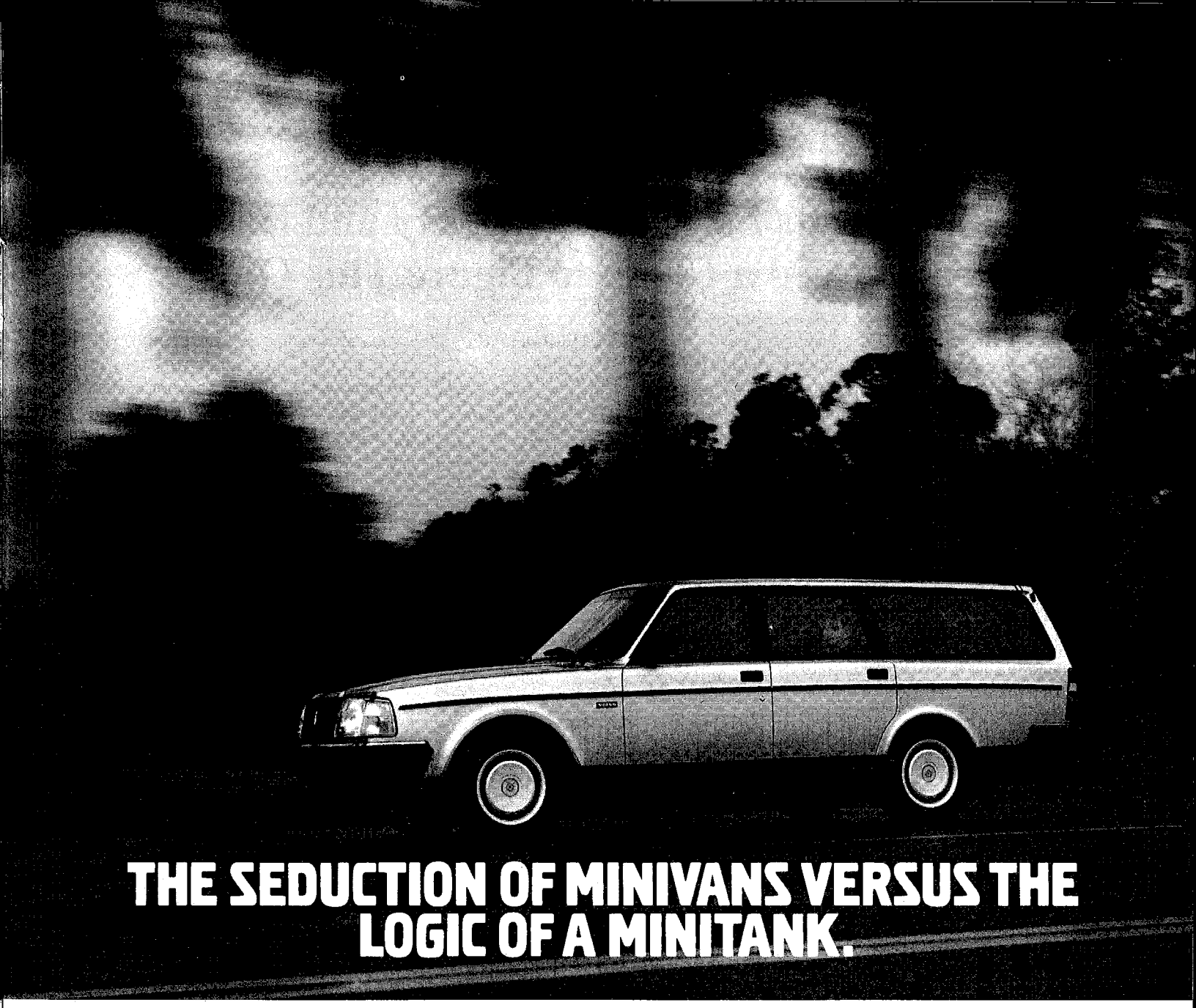
_____
_____
_____

IN WITNESS WHEREOF, the undersigned, being the incorporator[s] of the Corporation, execute[s] these Articles of Incorporation and certif[ies] to the truth of the facts herein stated, this _____ day of _____, 199__.

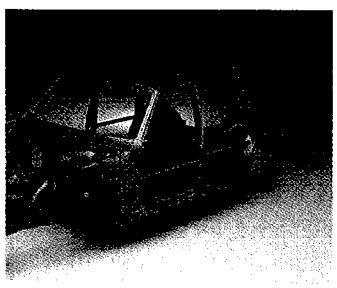
_____
Incorporator

The appointment of the undersigned as the initial registered agent of the Corporation is hereby accepted.

_____
Registered Agent



THE SEDUCTION OF MINIVANS VERSUS THE LOGIC OF A MINITANK.



Volvo station wagons offer cupholders only as an option.

Volvos do offer as standard equipment reinforced steel passenger cages, energy-absorbing structures, driver's side air bags and anti-lock brakes.

You can't fit an entire soccer team in a Volvo wagon.

But for the five people and all the stuff they want to bring along, there's the security of knowing this is a vehicle designed with safety in mind from the very start. Not as an add-on or an afterthought.

The Insurance Institute for Highway Safety studies the fatality rates in accidents for most cars sold in the U.S. Since they began publishing reports, Volvos have been at or near the top in each of their respective model categories.

Which may be a good reason for Jill Wieder, mother of two, owning a Volvo. Wieder is a member of a Los Angeles, California car pool where she says four out of five families drive Volvo wagons.

Cecily Heavenridge is another person with a compelling argument for driving a Volvo. Two years ago, her husband Keith was in a serious accident in a Volvo and walked away. Since then, they've bought a new Volvo sedan and a wagon, which Cecily affectionately calls, "the tank."

Which is something we take as a compliment.

Drive safely. **VOLVO**

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Utah Revisits *Batson v. Kentucky* and Do We Really Need a Chart to Figure This Out?

By Michael D. Wims

The Supreme Court of Utah recently decided the case of *State v. Span*[1]. In *Span*, the Court faced the issue of whether the prosecutor had improperly used a peremptory challenge against Mr. Phung, a Vietnamese, who had been on the venire. One of the more crucial issues in the opinion was whether Mr. Phung's race constituted a "cognizable minority group." The decision was a natural result of a 1986 United States Supreme Court opinion, *Batson v. Kentucky*[2]. In order for us to understand how we, in Twentieth Century America, have come to the point of litigating human pedigrees, it is necessary to begin at the beginning.

Attacks on the racial make-up of grand juries, venires, and petit juries have existed since shortly after the American Civil War[3]. West Virginia had a statute that qualified only white people for jury duty. In *Strauder v. West Virginia*[4], the Supreme Court of the United States ruled that a black person was not necessarily entitled to have another black person on the petit jury, but that a black person was entitled not to have members of his race systematically excluded from the venire. It is important to note that the decision was based on the then recently adopted "equal protection" portion of the 14th Amendment to the federal constitution.

Let's now move forward 85 years in time to 1965. Because of the 14th Amendment, it had been clearly unlawful since 1880 to exclude black people from the venire. In *Swain v. Alabama*[5] black people had not been excluded from Swain's venire. In fact, eight black people were present as members of Swain's venire. Yet, no blacks ended up on Swain's petit jury, and none had succeeded in serving on a petit jury in that county for at least 15 years. Swain claimed that the 14th Amendment's equal protection clause should condemn such a practice. In rejecting Swain's argument, the Supreme Court ruled that Swain would have to shoulder the burden of showing the State had engaged in a systematic pattern of discrimination in order to prevail. Swain had failed in that he had not shown that the State was the party that challenged all the black persons for the past 15 years. Also, Swain had failed to prove ill motives by the prosecutor.

MICHAEL D. WIMS is a 1970 graduate of the University of Texas School of Law. He is an Assistant Attorney General for the State of Utah in the Criminal Enforcement Division. He is admitted to practice in Utah, Colorado, and Texas. The views expressed in this article are his own. Mr. Wims expresses his appreciation to his law clerk, Marvin Santamaria, for his assistance in preparation of the article.

Before we turn to *Batson*, the case of *Taylor v. Louisiana*[6] merits attention. Louisiana had a state law that provided for no females being on the jury without written consent. Taylor, a male, had no females on his venire. The Supreme Court ruled that Taylor did not have to be a member of the excluded class to make a valid Sixth Amendment claim to a venire consisting of a "fair cross section of the community."

Now we turn to *Batson*. Batson, a black man, was tried for burglary. Four blacks were present on his venire, so there was no violation of the 14th Amendment's (and *Strauder v. West Virginia*) requirement not to systematically exclude black persons from the venire. Still, the prosecutor did peremptorily challenge all four blacks from sitting on Batson's petit jury. Batson was now faced with how best to frame the issue on appeal. Presumably his counsel has read how Swain lost by framing a petit jury claim under the 14th Amendment, and how Taylor prevailed by framing his venire claim in Sixth Amendment terms. If Batson makes a claim under the 14th Amendment's equal protection clause, presumably, like Swain, he will be told that he'd have to shoulder the burden of showing an established pattern of discrimination, and proving ill-motives by the prosecutor. The choice seems clear. The best tactic for Batson will be to take the sixth amendment's right to a "fair cross section of the community" and claim application of that right not just to the venire, as in *Taylor v. Louisiana*, but also to the petit jury.

Obviously, if we were Batson's counsel, we'd seek to avoid presenting this as a 14th Amendment, equal protection, claim in order to avoid the result that Swain suffered. We don't want to be told that we failed to show an established pattern of discrimination by presenting just this one instance, and that we also failed to show ill motives by the prosecutor. No, we stand a much better chance of success if we reject the 14th Amendment's equal protection claim, but instead analogize this to Taylor's Sixth Amendment claim to a "fair cross section of the community." That is exactly how Batson's counsel framed the issue. He went to great lengths

to distinguish Batson's claim from a 14th Amendment equal protection claim. He presented the issue as a pure Sixth Amendment claim to an impartial petit jury consisting of a fair cross section of the community. He succeeded in getting this carefully crafted issue before the Supreme Court.

The Supreme Court of the United States granted certiorari on the issue, "Was petitioner tried in violation of constitutional provision guaranteeing the defendant an impartial jury *composed of persons representing a fair cross section of the community?*" (emphasis added). Batson's counsel filed a brief that had an entire section devoted to the irrelevance of the *Swain* (14th Amendment's equal protection) analysis. The brief relied solely on the Sixth Amendment analysis such as *Taylor v. Louisiana*. Here are excerpts from the oral argument:

Q. Mr. Niehaus, Swain was an equal protection challenge, was it not?
A. Yes.
Q. Your claim here is based solely on the Sixth Amendment?
A. Yes.
Q. You are not asking for a reconsideration of *Swain*, and you are making no equal protection claim here. Is that correct?
A. We have not made an equal protection claim. . . . We have not made a specific argument in the briefs that have been filed either in the Supreme Court of Kentucky or in this Court saying that we are attacking *Swain* . . .

On April 30, 1986, Mr. Justice Powell delivered the opinion of the Court. The opinion began:

> This case requires us to reexamine that portion of Swain v. Alabama 380 U.S. 202 (1965), concerning the evidentiary burden placed on a criminal defendant **who claims that he has been denied equal protection** through the State's use of peremptory challenges to exclude member of his race from the petit jury. (emphasis added).

What did *Batson* hold? It held that if the defendant is a member of a racial group capable of being singled out for differential treatment, that is, "a member of a cognizable racial group," and the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race, then the burden shifts to the state to explain in race neutral terms the reason for the peremptory challenge. The trial court may consider all relevant factors including, for example, a pattern of strikes.

Batson, then, by its own language requires us to classify persons into racial grouping so that we may determine if the venire contains persons belonging to the same racial grouping. Predictably, courts began to struggle with the issue of what is a "cognizable racial group"?[7]

We now come to *Holland v. Illinois*[8]. Daniel Holland was a white defendant faced with a prosecutor who struck the only two blacks on the venire. Holland's defense counsel, presumably having read the Supreme Court cases, knew that Holland could not succeed on 14th Amendment grounds. He knew the 14th Amendment decision, Batson, applied only when the stricken veniremen are "members of the defendant's race." So Holland complained under the sixth amendment's right to a fair cross section of the community. Holland, like Batson, attempted to extend this right from the venire to the petit jury.

"Should the race of the defendant make a difference in the American criminal justice system?"

Holland lost. In *Holland* the Supreme court finally addressed racial make-up of petit juries **under the Sixth Amendment**. The Court held that a "fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does). Justice Scalia noted that " . . . (W)e hold . . . that he does not have a valid constitutional challenge *based on the Sixth Amendment* . . ." Justice Stevens contended that, like Batson, even though the Sixth Amendment was the question raised, the case should be decided on the 14th Amendment equal protection grounds. Justice Scalia, ironically noted, "it is almost unprecedented to accept certiorari on a question involving one constitutional provision and then to decide the case under a different constitutional provision neither presented, briefed, nor argued."

Holland and *Batson* were almost identical. Both had prosecutors who challenged all blacks off the venire. Both cited, briefed and argued their Sixth Amendment claims. The difference was the color of the defendant's skin.[9]

Batson required us to examine human racial groupings. *Holland* did nothing to change that direction. The premise seemed to be that all citizens should enjoy the equal protection of the law. The goal was that the race of a person should not determine constitutional, political, or judicial rights. After *Holland*, it is possible to conclude (indeed, one would almost be compelled to conclude) that in order to attain the goal, the judicial branch of government had required us to classify our citizens into various racial groupings. That branch then extended one result to defendant Batson and another result to defendant Holland — such a disparity being caused solely by the racial classification of the defendant. That certainly raised the question: Should the race of the defendant make a difference in the American criminal justice system? Is that not the evil that we are seeking to avoid?

Should Holland, a white, be permitted to require the prosecutor to explain the two peremptory challenges to the blacks on the jury? Or, alternatively, should we apply Batson to require the prosecutor to explain all peremptory challenges to "members of the defendant's racial group," that is all whites? Or if one's race constitutes a majority of the population (in an unspecified geographic area), is that particular race then not "cognizable?" Let us now turn to how issues dealing with the racial make-up of juries have been dealt with in Utah.

In 1987, the Supreme Court of Utah in *State v. Tillman*[10] held that "a prima facie violation of the fair cross-section guarantee is established where a defendant shows: . . . 'that the group alleged to be excluded is a "distinctive" group in the community. . . .'" The *Tillman* Court relied on the United States Supreme Court's decision in *Duren v. Missouri*[11]. The *Tillman* Court ruled that one component in deciding whether the **venire** represented a fair cross-section of the community is whether the excluded group is a "distinctive group in the community."

So, in Utah, is there a different test if the "cognizable group" is kept from the **petit jury**, as opposed to the venire? The Supreme Court of Utah faced this issue and apparently the answer is, "yes."

In *State v. Span*, the Supreme Court held, The requirements for proving a cognizable group with respect to the selection of a jury venire and peremptory challenges do appear to be different." When confronted directly with the question in the *Batson* (14th Amendment) context, the Court . . . stated, "Hispanics or Spanish-surnamed persons are a 'cognizable racial group' for purposes of equal protection . . . However, the *Fields* case[12] . . . specifically adopted the sixth amendment fair cross-section standard for determining cognizability . . . that 'a group is legally cognizable if it is defined on the basis of race, national origin, religion or sex.'"

The Court went on to note that the conflict between equal protection and fair cross-section standards of cognizability had been brought into sharp focus. The Court also noted that in a Batson challenge, that is, an equal protection challenge, the test for determining cognizability was set out by the U.S. Supreme Court in *Castaneda v. Partida*[13]. The *Castaneda* test is "a recognizable, distinct class," singled out for different treatment under the laws, as written or as applied. The Utah Supreme Court, quoting from *United States v. Biaggi*[14], noted: "Because the guarantee against discrimination through peremptory challenges requires a showing of purpose, 'cognizable racial groups' may be defined less rigidly, for it is precisely the evidence of intentional exclusion of the group that helps to identify the group." The Court goes on to observe that the *Batson/Castaneda* test is less restrictive than the Sixth Amendment/ *Duren* test. The Court stated that "The *Duren* test, which analyzes the distinctiveness of the group within the community, is appropriate when a challenge is being made to the selection of the venire from which the petit jury is chosen . . . However, the *(Castaneda)* test, which focuses on the intentional exclusion of an individual on the basis of membership in a group, is more appropriate to the Batson peremptory challenge case."

The Supreme Court of Utah remanded the case of *State v. Span* in order that the trial court could determine if Mr. Phung was a member of a cognizable group, and, if so, if he was stricken due to a race-neutral reason[15].

So here is where we now appear to be:

Venire	Petit jury
6th Amendment	14th Amendment
"fair cross section"	"equal protection"
Duren test	*Castaneda* test

All of this litigation produces some provoking questions. If it is invidious for the State or the State's prosecutors to challenge members of "cognizable racial groups" simply because of their membership in the group, then what about cognizable religious groups? Should the government start determining which religions are cognizable by the government, and which religions the government declines to recognize? What about challenges due solely to the sex of the challenged member? Are racial groupings that constitute the majority in a given area "cognizable?" What standards should be used to classify human races[16]? I predict we are due for a great deal more litigation before these issues are laid to rest.

[1]819 P.2d 329 (Utah 1991).

[2]476 U.S. 79 (1986).

[3]Also known as the "War Between the States" in some parts of the country.

[4]100 U.S. 303 (1880).

[5]380 U.S. 202 (1965).

[6]419 U.S. 522 (1975).

[7]For example, in *United States v. Santiago-Davila*, 26 M.J. 380 (C.M.A. 1988), the Court of Military Appeals struggled with whether Puerto Ricans were a cognizable racial group, and, if so, whether a challenge to one of the two Hispanics on the venire (who may or may not have been Puerto Rican) would cause Baton to apply.

[8]110 S.Ct. 803 (1990).

[9]Five members of the court, Kennedy, Marshall, Brennan, Blackmun and Stevens, stated that a white defendant would have standing under the 14th Amendment's equal protection clause to raise a claim of discriminatory peremptory challenges. The Utah Court of Appeals has held that any defendant regardless of race has standing to raise a *Batson* 14th Amendment challenge. *State v. Harrison*, 805 P.2d 769 (Utah Ct. App. 1991). See also, *Powers v. Ohio*, 111 S.Ct. 1364 (1991).

[10]750 P.2d 546 (Utah 1987).

[11]438 U.S. 357 (1979)

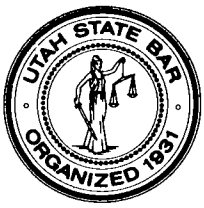
[12]*Fields v. People*, 732 P.2d 1145 (Colo. 1987).

[13]430 U.S. 482 (1977).

[14]673 F.Supp. 96 (E.D.N.Y. 1987), *aff'd*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989).

[15]At trial, the prosecutor explained the peremptory challenge to Mr. Phung by stating: "It has nothing to do with his — in fact, I didn't even think about a study that says they are more likely to be (more favorably disposed toward the defendant) — I think perhaps he has been around long enough, and perhaps I can speculate. He's been through enough, having come from Viet Nam, that I think that the study would be different with Mr. Phung. But he was just one I had a question about initially, and so he ended up being the one that I — had to take someone off, and I took him. It was not directed at him as a minority."

[16]It is worthy of mention that humans can have parents of differing racial groups. Further, racial membership may not be evident from simple observation. In one case a conviction was reversed based on an assumption that no blacks were on the jury. After the appellate court's decision, one of the jurors called the press to note that she was on the jury and she was black. *See* 71 A.B.A. Journal 22 (Nov. 1985). Speaking of "cognizable racial groups" should we continue down this path, it is impossible to predict how many cognizable racial groups America will end up having recognized. The Republic of South Africa recognizes four official racial groups.



Profile of Judge Kenneth Rigtrup

By Elizabeth Dolan Winter

BACKGROUND

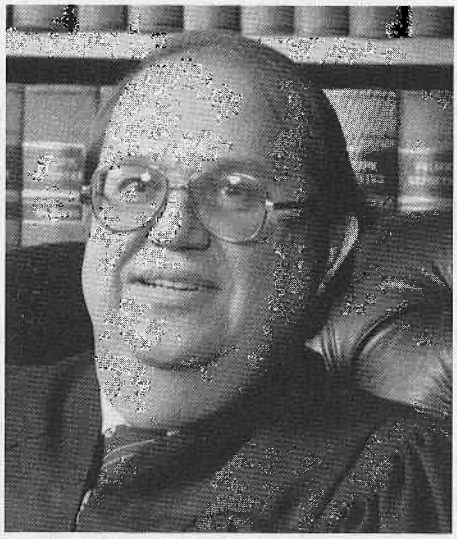
In the eighth grade, while studying world history, Judge Rigtrup got his first taste of "justice." His teacher in Burley, Idaho handled discipline with a "class court." Judge Rigtrup was the judge for the year. His friend was the prosecutor. He also became a lawyer. Another kid was the "executioner." No one knows what became of him. Judge Rigtrup's role was to determine how many "stripes" the executioner should lay on the backside of the accused, depending on the severity of the infraction. He soon learned the advantages to imposing, rather than receiving, punishment.

In college, the Veterans Administration insisted he be an accountant. Rigtrup wanted to be a lawyer. He finally convinced his counselor that he was meant to analyze legal theories, not crunch numbers, and he attended the University of Utah College of Law.

Rigtrup practiced as an administrative law judge for the Utah State Industrial Commission, and later was appointed to serve as the Public Service Commissioner. Rigtrup was one of few Public Service Commissioner to dissent from Commission decisions and a Commission decision with one of his dissents was the only published opinion from Utah to appear in the *Public Utility Reporter*. His dissents were common during his brief tenure on the Commission, adding to that turbulent period of the Commission's history.

VIEWS ON LEGAL SYSTEM

Judge Rigtrup says that he has a good feel for how juries might respond in most cases. He strongly feels he has an "obligation to get cases concluded." To this end, if he feels a jury has returned an unsupportable verdict, he will conditionally grant a new trial, i.e., impose an appropriate additur or remittitur which the parties find acceptable, or retry the case. "The integrity of the judicial system is too important," says Rigtrup, "to ignore my responsibility to help parties resolve their disputes." This effort on his part, he says, most often appeals and helps the parties get on with their lives.



Judge Kenneth Rigtrup
Third District Court

Appointed:	January 1980 by Scott M. Matheson
Law Degree:	University of Utah 1962
Practice:	Private Practice in Salt Lake City, 1962 to 1972; Administrative Law Judge for Utah State Industrial Commission, 1972 to 1977; Utah Public Service Commissioner, 1977 to 1980
Judicial Activities:	Member, Supreme Court Advisory Committee on Juvenile Procedure; Member, Executive Commitee of the Family Law Section and Lawyers Helping Lawyers Committee, Utah State Bar; and, Member, American Judges Association

Regarding the appellate process, Rigtrup finds interesting the wide degree of discretion the appellate courts give to juries' findings. "Trial judges are fact finders every day," he says, yet the insight they have as fact finders is frequently scrutinized more closely by the appellate courts. Rigtrup finds this feature of our legal system very curious.

Judge Rigtrup feels an obligation toward children in domestic cases. Although parents are represented by paid advocates, he says the kids sometimes get lost in the system. Judge Rigtrup interviews children in domestic cases. He asks them enough open-ended questions to get a sense of what kind of custody situation will be most successful for them.

"There is commonly a disparity between what cases are represented as meaning, as opposed to what they really say," says Rigtrup, so he advises lawyers to concisely make their point in a brief, cite the case supporting their position, and then attach copies of the significant cases to the brief. Rigtrup says it is even better if you "highlight the portions of your cases relevant to your position" so he can quickly review the case on the asserted propositions. The same goes for the fine print in leases or contracts. "When you're old enough to wear bifocals or even trifocals," says Rigtrup, "you appreciate a road map through the fine print." Judge Rigtrup reads the cases lawyers cite, and says "there is a sometimes a gap between what might be persuasive versus what is binding on a trial court."

Rigtrup sees himself as a "service provider." He knows the court is "a stressful kind of place," so he tries to maintain a more relaxed atmosphere in his courtroom. If he is more relaxed during a trial, he hopes the parties, attorneys and juries will feel more at ease as well.

"One of the roles of trial judges is to ensure the reliability, trustworthiness and authenticity of evidence." Rigtrup acknowledges that he has to make many quick judgment calls regarding whether certain types of evidence should be allowed. New attorneys sometimes get completely rattled when their opponents' objections are being sustained and their evidence is not being received. In Judge Rigtrup's courtroom, ask to approach the bench and inquire what the problem is. "Attorneys can't always be expected to read the court's mind as to what the

continued on page 22

continued from page 21

court's problem is with particular offered evidence."

OUTSIDE INTERESTS

Judge Rigtrup enjoys his family, church and community involvement. He says he has a passion for spectator sports — particularly University of Utah basketball games. After the Special Event Center opened, Rigtrup was determined to attend every game. He reluctantly missed one game five years later to attend the birth of his daughter. To date, he admits that he has missed ten to fifteen games in the last twenty years. This is a serious fan! I hope his wife likes basketball. (HOW 'BOUT THEM JAZZ!!!!)

Plea For Pro Bono Service

By Waine Riches
Managing Attorney
Utah Legal Services, Inc.

I read with great interest the President's Message in the May issue of the *Bar Journal* entitled: "Pro Bono — Is an Institutional Approach Necessary in Utah?" Like President Davis, I believe that attorneys as a whole are deeply involved in community activity, and that much of this community activity is done for free. Without a doubt this is commendable. However, I feel that President Davis' comments do not address the real issue with regards to pro bono service.

The push for mandatory pro bono activity comes from a critical need by a large segment of our population to obtain access to our legal system which they do not presently have. This is a nation of laws. Laws govern virtually every activity of ours from birth to death. There are so many laws, in fact that even those of us making a living with our knowledge of the laws no longer have a good grasp beyond our particular area of expertise. What is worse, the legal system itself is so complex that virtually no one can use it without formal training. In addition, very few can afford the $125 an hour attorneys fees that we charge to help them through the system. A few of those who are below poverty may be lucky enough to have a legal defender or legal services attorney assist them. The rest of the poor and middle class simply can't afford us.

We, and more importantly, this nation, run a grave risk if something is not done to immediately begin providing access to our legal system. There are not enough police, courts, attorneys or prisons to force everyone to follow the laws. Our legal system is a successful governing tool and problem resolution tool only to the extent that the vast majority of our fellow citizens voluntarily adhere to the laws. There seems to be little rationale in adhering to laws when you do not have access to the system designed to enforce them.

I believe that we are fully capable of resolving the access problem. First, the Bar needs to take a strong and active leadership role in creating courts that are "user friendly" for pro se litigants. Small claims courts only provide *"monetary"* relief up to $2000. There is a critical need for pro se litigants to have access to a court system to resolve other problems, such as domestic disputes and landlord/tenant disputes. This could be provided by judges and court personnel trained to handle and assist pro se litigants Even the creation of packets for such things as divorces, and enforcement of domestic orders would go a long way. The legislature took a small step in this direction with the creation of the adult and child protective order system that pro sse litigants could use. Unfortunately, even on these cases, the court system currently in place has been cumbersome to use resulting in an inability to obtain relief by many who need it.

Second. the Bar needs to take a strong leadership role in creating a system to provide actual representation for every citizen currently denied access because they cannot afford an attorney. This includes many middle income citizens in addition to those below the federal poverty level. No matter how user friendly the courts become, some citizens who cannot afford attorneys are simply going to have to have them. The bar must find a way for these citizens to obtain representation.

I remember an ABA seminar on pro bono involvement that I attended a few years ago. Directors from pro bono projects in other areas of the country had achieved virtually 100% participation from their local private bar. The secret seemed to be in creating local advisory committees using private attorneys to come up with ideas on how to involve their fellow private practitioners in pro bono work and fundraising. The private bar works closely with their local Legal Services office or Legal Aid office which have expertise in poverty law and a process to screen cases. They found that by involving the local bar directly, most private attorneys were willing to both provide representation and financial support for Legal Services and Legal Aid programs.

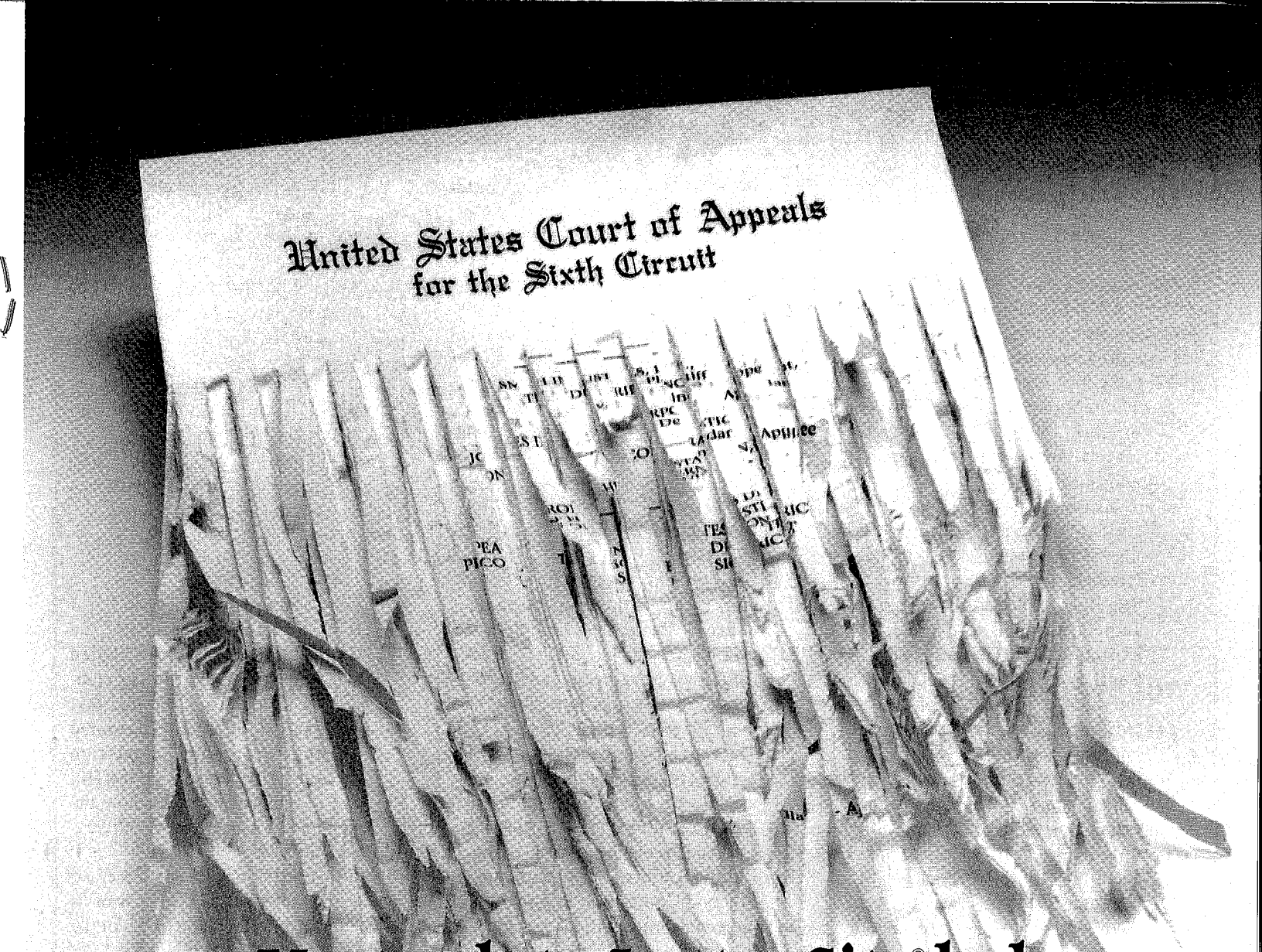
Third, the Bar should take a strong position on restoring and even expanding funding to Legal Services and Legal Aid programs. These programs are eager to help increase access to the courts but have such restricted budgets that presently, they are only able to assist a small fraction of those truly impoverished citizens in need of their services.

It seems to me that resolving the problem of access to the courts is our responsibility. No one knows the system better than we do. Consequently, no one knows the reasons for the system's failures better than we do. Most importantly, however, no one can resolve the flaws in the system better than we can. Whatever solutions we find, we must find them soon or face the possibility of having a less desirable and less workable solution imposed on us. The need for access to the court will simply not go away by defining pro bono services in terms of broader community activity.

Understanding Mandatory Divorce Education

This seminar is the first in a series to be offered by the Needs of Children Committee. The seminar will provide an overview of the procedural and substantive aspects of new legislation which mandates an Educational Course on Children's Needs for Divorcing Parents in the third and fourth judicial districts.

CLE Credit:	1 hour
Date:	September 15, 1992
Place:	Utah Law & Justice Center
Fee:	For lunch reservation, call 531-9077, ask for Teri
Time:	12:00 noon to 1:00 p.m.



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Commission Highlights

During its regularly scheduled meeting of March 12, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the Commission meeting of February 20, 1992 were reviewed approved with several revisions.
2. The Board discussed the court consolidation process and reviewed the existing vacancies due to early retirement.
3. The Board voted to encourage the Judicial Council to exercise the existing statutory requirements of Section 20-1-7(c) and make a threshold determination of District Court needs and convene the appropriate Judicial Nominating Commissions as soon as possible.
4. The Commission established Friday, April 3, 1992, from 12:00 noon until 2:00 p.m. to discuss its response to the report of the Supreme Court's Task Force on the Management and Regulation of the Practice of Law.
5. The Board determined that it would have a one-day retreat, under the direction of an outside discussion leader to focus on short-range Commission goals and relationships, and then have a second day retreat to meet jointly with the Supreme Court members in a format under the leadership of Isaiah Zimmermann to discuss the relationship between the Supreme Court and the Commission and focus on establishing a long-range procedure for use on a continuous basis.
6. The Commission adjourned to a joint luncheon with the Southern Utah Bar.
7. Baldwin referred to his monthly activity report and made special notice of the success accomplished by Richard Dibblee in paying attention and providing services to Committees which previously had not been given staff support.
8. The Commission voted to renew its Errors & Omissions insurance with the Home Insurance Company through Rollins Burdick Hunter of Utah and to continue current coverage.
9. Baldwin referred to the Budget & Finance Committee Report which indicated projected cash, reviewed the proforma ten-year cashflow projections, and identified assumptions made.
10. After discussion of cash on hand and projections of available cash at the end of the year, the Commission voted to authorize the President with the Executive Director to pay approximately $125,000 on the mortgage to principle if possible or to interest and then principle with at least $50,000 being paid to principle.
11. Wendell Smith reported on the increasing volume of unauthorized practice of law complaints coming in to the Office of Bar Counsel.

During a special meeting on March 13, 1992, the Board of Bar Commissioners received the following report.

1. Legislative Affairs Chairman, David Bird, and John T. Nielsen, the Bar's Representative distributed and reviewed a report of the committee's activities in the last session. Bird and Nielsen answered questions from the Commission regarding effectiveness on the Hill and recommendations for how the Commission can improve services to them.

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.

Utah Supreme Court Seeks Recommendations Regarding the Transfer of Cases to the Court of Appeals

The 1992 general session of the Utah Legislature passed into law HB 394, Court Jurisdiction. That bill gives the Supreme Court the discretion to transfer to the Court of Appeals, appeals from the Tax Commission, Public Service Commission, Board of Oil, Gas and Mining, Board of State Lands, and the State Engineer.

To ensure a sound transfer process, the Supreme Court announces a public hearing for the purpose of obtaining suggestions and recommendations regarding guidelines by which the Court will exercise its transfer discretion.

The Supreme Court will hold a session on July 13, 1992 at 10:00 to 11:00 a.m. in order to accept written and oral proposals. To be considered, written proposals must be postmarked no later than July 13. Requests to make an oral presentation must be accompanied by the written proposal and be received by the Court no later than June 30. Oral presentations will be limited to 5 minutes per person.

Retirement Open House for Third Circuit Court Judges

A retirement open house will be held in the City Council Chambers, 451 South State Street, 3rd Floor, on June 15, 1992 from 4:00-6:00 p.m. The open house will honor four distinguished judges. They are: Judge Maurice Jones with 34 years, Judge Floyd Gowans with 23 years, Judge Paul Grant with 22 years, and Judge Eleanor Van Sciver with 14 years of service.

Discipline Corner

PUBLIC REPRIMANDS

On March 26, 1992, the Supreme Court entered an Order Publicly Reprimanding Lorin Pace and ordering him to make restitution to his client in the amount of $700.00. This Order was based upon a Discipline by Consent signed by mr. Pace on February 11, 1992, wherein he stipulated that he had violated Rule 1.4(a), COMMUNICATION, by failing to return phone calls or answer his client's letters for a period of about five months; that he had violated Rule 1.7(a), CONFLICT OF INTEREST, by simultaneously representing clients with conflicting interests in a dispute over the ownership of cattle without obtaining the consent of the clients; and that he violated Rule 1.14(d), DECLINING OR TERMINATING REPRESENTATION, of the Rules of Professional Conduct of the Utah State Bar by failing to return the unearned portion of the fee when we withdrew from the case.

On April 2, 1992, Mark A. Besendorfer was Publicly reprimanded pursuant to the terms of a Discipline by Consent for violation of Rule 1.3, DILIGENCE, of the Rules of Professional Conduct. Mr. Besendorfer was retained in October 1986 to represent a client in connection with a child custody matter. No action was taken on the case for a period of about seven months and the client, who resided out of state, received no correspondence from Mr. Besendorfer during this time. Upon learning of the complaint filed against him the the Bar Mr. Besendorfer promptly filed pleadings and attended hearings to rectify the problem. He performed services in excess of the fee paid and was also candid with the Bar in acknowledging his failure to diligently pursue the matter.

SUSPENSION/PROBATION/ REINSTATEMENT

On April 2, 1992 the Supreme Court entered an Order reinstating Robert A. Bentley to practice law upon the condition that he be placed on probation for a period of two years. During this time Mr. Bentley will be supervised by another attorney who will be required to make periodic reports to the Bar to confirm Mr. Bentley's compliance with the terms of his probation. Mr. Bentley has been suspended from the practice of law since March 21, 1991 for accepting fees but failing to provide meaningful legal services.

Judicial Vacancy in the Eighth District Court

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for a judicial vacancy in the Eighth District Court. Eighth District serves Daggett, Duchesne, and Uintah counties. This position results from the death of Judge Dennis L. Draney. Applications must be received by the Administrative Office of the Courts no later than 5:00 p.m., June 15, 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 Eighth District Court in particular, must submit written testimony no later than June 22, 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, telephone: (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., June 15, 1992.

Farewell Dinner for Douglas L. Cornaby

The Davis County Bar Association announces a farewell dinner event, honoring Douglas L. Cornaby, Second District Court Judge, who will be retiring after 31 years of service in the City, Circuit and District Courts of Davis County.

A buffet dinner will be held at Oakridge Country Club, Farmington, Utah, on Thursday, July 9, 1992, at 7:00 p.m. The cost will be $22.50 per person. Spouses or invited guests are welcome.

Advance reservations are required and may be made by sending your check to the Davis County Bar Association, D. Michael Nielsen, President, 505 South Main Street, Bountiful, Utah 84010, Telephone: 292-1818.

Litigation Report and Update

April 15, 1992

The January 1991 issue of the Utah State Bar Journal contained a Litigation Report published for the purpose of informing our members as to what litigation had been filed against your Association, its staff, officers and Commissioners. Your Bar Commission believes it to be most important to keep members informed of the status of any such pending litigation. The following information is intended to update you as to additional developments which have occurred in relation to individual cases and to inform you of new litigation filed against the Bar. Similar updated reports using the same format will periodically appear in future issues of the Utah Bar Journal.

PLAINTIFF (COUNSEL) AND DATE OF FILING	CAUSE OF ACTION	COURT/JUDGE	COUNSEL FOR BAR	CURRENT STATUS
1. Brian Barnard (pro se) 2/19/91.	Action for injunctive and declaratory relief to prevent the Plaintiff from being disciplined for "aiding the unauthorized practice of law" alleging the "practice of law" is unconstitutionally vague.	Third Dist. Ct. J. Moffat C-910901201CV	R. Burbidge	6/21/91 Defendant's Motion to Dismiss and for Rule 11 Sanctions granted. 3/15/92 Appellant's Brief filed. Appellee's brief due 5/15/92.
2. Ernest and Sharon Bailey (S. Rowe) 12/16/87.	USB's alleged breach of fiduciary duty for failure to discipline Richard Calder seeking Writ of Mandamus and $800,000 in damages, a "state agency" declaration, attorney's fees and costs.	Third Dist. Ct. J. Wilkinson, C-87-8124	C. Kipp, R. Rees	ORAL ARGUMENT heard by Ut. S. Ct. on 7/15/91. Awaiting decision.
3. L.R.T. (real name not disclosed) (Brian Barnard) 12/8/88.	A 1983 civil rights action alleging deprivation of substantive and procedural due process in USB's 1986 denial of admission to practice law resulting from P's felony conviction.	U.S. Dist. Ct. J. Jenkins, 88-C-1141W	C. Kipp, R. Rees, S. Trost	4/15/92 Plaintiff indicates he's dismissing suit at a pre-trial conference.
4. Brian Barnard (pro se) Fld. 8/2/89.	Action for injunctive relief against Toni M. Sutliff, Assoc. Bar Counsel, to enjoin disciplinary process for failure to provide P with certain requested information prior to the time such information was available to Assoc. Bar Counsel for release to P.	Third Dist. Ct. J. Hansen 890904670	C. Kipp, R. Rees, S. Trost	D's award of Rule 11 Sanctions briefed & oral arguments heard before S. Ct. on 11/6/91. Awaiting decision.
5. Legal Access adv. USB, Trost, Davis pro se Filed 5/20/91.	Counter claim filed on 4/9/92 after Legal Access was sued by USB for the unauthorized practice of law. Counter claim alleges USB unlawfully restrains trade, i.e. legal services.	Third Dist. Ct. J. Sawaya 92-0901597 CV	Brent Manning	Motion to Dismiss in draft.
6. Richard Calder	A 242 page 1983 Civil Rights Action alleging a conspiracy among the Bar Commissioners & multiple individuals involved in his disbarment proceedings.	U.S. Dist. Ct. J. Brimmer 91-C-1244CB	C. Kipp, R. Rees	2/14/92 Defendant filed Motion to Dismiss based upon immunity, statute of limitations, etc. Awaiting decision

New Civil Filing Fee Schedule

By Timothy M. Shea

Since October 1991, representatives of the courts have been working with the Bar to develop a civil filing fee schedule that is clear, easy to apply and administer, and revenue neutral for the General Fund. That task has not been a simple one, yet the goals have been achieved. The result of these efforts is SB 197, Court Fees. The legislation, which creates a new filing fee schedule for all of the courts goes into effect July 1, 1992.

For the last few years, the courts have received complaints from practitioners as well as court clerks concerning the current civil filing fee schedule. Some of the complaints raised issues particular to one group or the other; several were common to both.

Under the current fee schedule there is a multiplicity of minor fees for some pleadings, yet not for others. For example, currently there is a $5 fee for probate notices only. There is no fee for any other notice provided by the court. There is a $5 fee for each of the several motions specified by statute. Sections 78-3-16.5 and 78-4-24. Yet there is no fee for any of the other motions commonly filed in court.

These lesser fees are costly for the courts. The court expends considerable clerical time collecting, processing, accounting, and auditing these fees.

Neither are the fees uniform from one jurisdictional level to another. The $5 fee for a writ of garnishment in district court is only $2.50 in circuit court. If the case happens to be in the small claims division of circuit court, the cost again rises to $5. The cost of a petition for an original writ is $100 in the appellate courts and $75 in the district court. The fee for a notice of appeal is the same in the Supreme Court and Court of Appeals, but the cost is $30 in the district court and $25 in the circuit court. The demand for a jury is $50 in district court and $25 in Circuit court, yet neither fee approximates the cost of assembling a jury panel. It is a simple matter to justify lower initial filing fees for complaints claiming lower damages. It is more difficult to deter-

continued on page 28

mine the justification for a distinction in the fee for a writ of garnishment.

Even when the fees are uniform between court levels, the fee for one pleading may be significantly different from the fee for a similar pleading. For example, the fee to file the abstract or transcript of judgment of another court in the state is $5. The fee to file the order or decree of an administrative agency is $10.

The current fees retain some of the vestiges of the days when the counties and municipalities were responsible for the district and circuit courts. Filing an appeal under current law requires two fees, one paid to the trial court and one paid to the appellate court. Even the trial de novo of a small claims case, which never leaves the circuit court, has two fees. Some courts are charging the fee to transfer a case between counties or between jurisdictional levels at both the sending and receiving court. When different government entities each received a portion of the fee, multiple fees for a single service could be defended. Under our current structure, multiple fees mean only that the payor must write two checks. All of the money is deposited with the state.

The current fee schedule does not reflect much of the business that the court does. The filing of an award of arbitration, increasingly a more common practice, has no fee. Filing a notice of deposition in a foreign action has no fee. Recording testimony in a foreign adoption has no fee. As a result, some courts have developed their own miscellaneous fees which vary from county to county.

These are some of the problems the new filing fee schedule attempts to address. The legislation repeals the statutory sections creating separate fee schedules for the Supreme Court, Court of Appeals, district court, juvenile court, and circuit court and establishes a new code section (§21-1-5) that sets the fees for all of the courts of record. This should firmly establish the goal of uniformity of fees. Fees will be uniform between:

- appellate and trial courts
- district, juvenile, and circuit court, and
- districts 5 through 8, which are consolidated districts, and districts 1 through 4, which are not.

Uniformity results in some fees being raised and others being reduced. Justice court fees are established by §78-6-14, which contains a cross reference to §21-1-5. Justice court civil jurisdiction is limited to small claims cases. The fee paid to the Supreme Court for admittance to the practice of law continues to be found in §21-1-4.

The bill establishes one fee for a pleading or service to be paid at the time of filing the pleading or requesting the service.

SB 197 repeals not all, but many, of the minor fees. Not to be found in the new fee schedule, with their former costs, are:

- probate notices, $5,
- orders supplemental to judgment, $2.50 to $5,
- orders to show cause, $2.50 to $5,
- orders of sale, $2.50 to $5,
- removal to federal court, $20,
- transfer to another court level, $40,
- change of venue, $10 to $20,
- divorce with custody of minor children, $5 surcharge,
- seal divorce record, $5 and
- motions, $5.

The revenue from these fees is considerable. In order to produce a revenue neutral schedule, the cost of the major fees had to be increased, generally by $5. In this fashion, the court will be able to provide many services and permit the filing of many pleadings without charge after the filing of the initial complaint.

The new law retains the provision exempting government agencies from payment of the filing fee at the time of filing the pleading. The fee is collected as part of the judgment.

The following fee schedule will go into effect for all courts July 1, 1992:

CIVIL FILING FEES

Established by §21-1-5 Effective July 1, 1992	**Fee**
Original complaint not otherwise specified	$80
Complaint or affidavit: $2,000 or less	$20
Greater than $2,000 and less than $10,000	$40
$10,000 or more	$80
Counterclaim, cross claim, etc.: $2,000 or less	$15
Greater than $2,000 and less than $10,000	$30
$10,000 or more	$60
Deposit funds under §57-1-29: $2,000 or less	$20
Greater than $2,000 and less than $10,000	$40
$10,000 or more	$80
Trial de novo from Justice Court or Small Claims	$50
Notice of Appeal, Interlocutory Appeal, Certiorari	$160
Cohabitant abuse petition	$25
Petition for expungement	$50
Judgment of court of another state or United States	$25
Probate or child custody documents of another state	$25
Judgment of court or agency of Utah or subdivision	$10
Judgment by confession	$25
Award of arbitration not associated with pending case	$25
Petition to modify divorce decree	$30
Accounting	$80
Demand for civil jury	$50
Notice of deposition in foreign action	$25
Judicial approval of documents not part of pending case	$25
Petition to open sealed record	$25
Writ of replevin, attachment, execution or garnishment	$5
Certified copies plus $.50 per page	$2
Exemplified copies plus $.50 per page	$4
Copy fee per page set by Judicial Council rule	$.50
Fee for forms set by Council rule varies by form	
Vital statistics fee set by §26-2-25	$2

Annual Mock Trial Competition Held

Was Cory Mitchell driving under the influence of alcohol on February 8, 1992 when Pat Wong was struck by a red Mustang convertible? Or was Chris Hernandez driving? Did Officer Toni Sindell have probable cause to arrest Mitchell pursuant to a DUI profile stop?

More than one hundred eighty (180) judges, attorneys and community representatives, volunteered to hear the evidence and decide these issues in ninety-two (92) mock trials presented by forty-two (42) high school (grades 10-12) and thirty-nine (39) junior high (grades 7-9) mock trial teams. The Thirteenth Annual Mock Trial Competition was sponsored by the Utah State Bar, the Utah State Office of Education and the Albert and Elaine Borchard Foundation.

Teams consisting of eight to twelve students performed as prosecution and defense attorneys and witnesses in actual courtrooms throughout the state from March 30 to April 29. Teams ranging from Cedar City, Price, Vernal, Logan, Garfield, Grantsville, Delta and points between were coached by sixty-eight (68) members of the Utah State Bar. The Mock Trial Competition culminated with the Law Day Fair and Award Ceremony held Friday, May 1 at the Utah State Capitol.

The Law-Related Education and Law Day Committee of the Utah State Bar salutes all schools, teachers, attorneys, judges and members of the public who participated in this successful public service endeavor.

Members of the Bar may volunteer to participate in the 1993 Mock Trial Program by completing and returning the mock trial judge scheduling form to be published in the February 1993 issue of the Utah Bar Journal.

Proposals Sought

The Utah Association of Realtors is establishing a statewide legal hot line to provide "on the spot" answers to members' questions which arise relating to transactions in the course of their brokerage activity. The legal hotline shall consist of a statewide "900" line with rates established to cover all program costs and with charges billed directly to users by the "900" line service provider. The hotline shall be available for use seven days a week, from 7:00 a.m. to 11:00 p.m. The Association is therefore soliciting proposals from law firms and attorneys throughout the state who are interested in being engaged to provide such a service. Among the considerations which should be addressed are: (1) mechanics of communication, (2) staffing and qualifications, (3) reporting, accountability, and follow-up, (4) cost, (5) length of engagement, and (6) commencement date. Please submit all proposals in writing for receipt no later than 5:00 p.m., 2 July 1992, Utah Association of Realtors, Attention: Risk Reduction Committee (K. Merrill), 5710 S. Green Street, Murray, UT 84123.

Fourth District Court Announces Law and Motion Calendar

The following is the law and motion calendar that will begin July 1, 1992, in the Fourth District Court, Utah County.

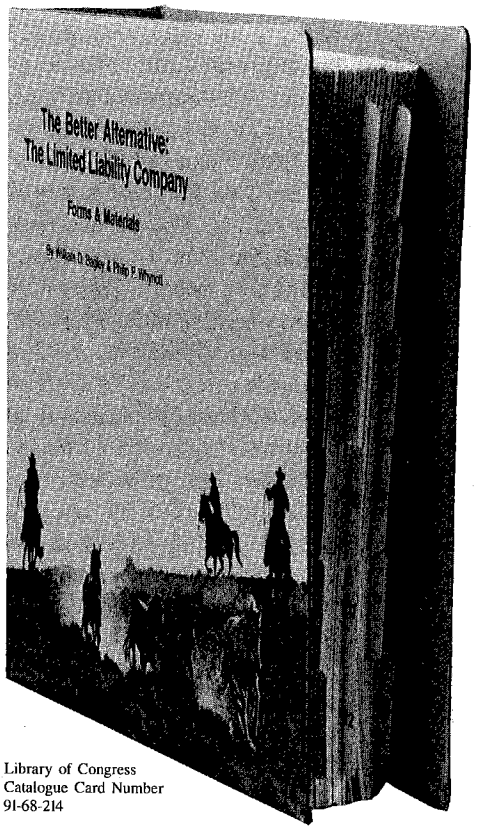
	Criminal Calendar 8:00-10:00 a.m.	**Civil Calendar 8:00-10:00 a.m.** **OSCs 9:00 a.m.**
		Mon.-Thurs.
Mon	Division I	Division III
Tues	Division III	Division I
Wed		Division IV
Thur	Division IV	
Fri	Probate 8:00 a.m. Abstracts 8:30 Guard. Ad Litem 9:00	
	Division II 10:00 a.m.-noon	Division II 1:00-3:00 p.m.
Daily	Except on days when criminal or civil law and motion is scheduled, the hours of 8:00-10:00 a.m. will be used for pre-trials, scheduling conferences, office time, etc.	
	10:00 a.m. — trials begin	

Judicial Conference Announced

Register now for the 1992 Judicial Conference of the Tenth Circuit, July 22-24, Tamarron Resort, Durango, Colorado. Bring your family. Cool off and enjoy spectacular and relaxing mountain scenery. Youngsters will participate in special legal learning. Spouses will hear the spicy history of the area at a breakfast. Earn 12 CLE credit hours (including 1 hour ethics). Hear Justice Byron White on recent Supreme Court cases, and Circuit Judges on recent Tenth Circuit cases. Attend a breakout session on criminal; or business, commercial, bankruptcy, environmental; or civil rights, employment discrimination; or jurisdiction, procedure, sanctions. Listen to nationally outstanding attorneys and consultants on emerging issues of the '90s: Dr. Robert Cook-Deegan on cutting-edge genetics research; gender related concerns in the legal profession; AIDS and its myriad legal concerns. Conclude with outdoor barbecue dinner, dance and the humor of Will Rogers. For more information, call Circuit Executive, telephone 303/844-4118.

THE LIMITED LIABILITY COMPANY

By William D. Bagley and Phillip P. Whynott



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THE LIMITED LIABILITY COMPANY: THE BETTER ALTERNATIVE
(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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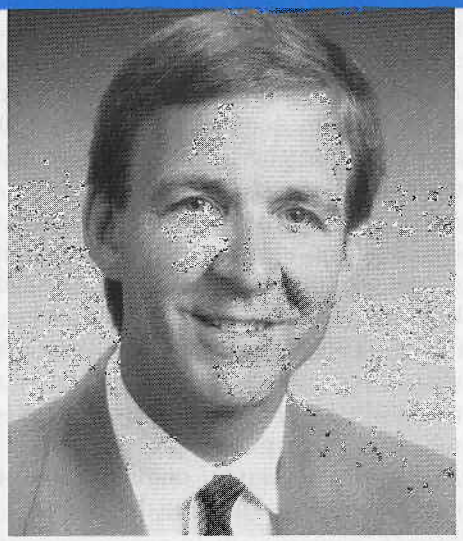

Initial Impressions

By Judge Dee V. Benson

(Disclaimer — At the time of the writing of this article the author had been a federal district judge for a grand total of six months. With the possible exception of the quote from Oliver Wendell Holmes (see no. 8 below), nothing that follows should be mistaken as the voice of experience.)

Impression No. 1 — Facts are important. It has been gratifying to realize that what I and all other trial lawyers have been telling clients for years — namely, that no matter how good the lawyer, lawsuits are won or lost on the facts — is, in fact, true. Litigation was never intended to be a level playing field like, say, football or backgammon or, for that matter, bungee jumping, where everyone gets the same amount of bungee cord. Facts control cases, assuming of course that the facts are 1) known to the lawyer and 2) communicated to the court, which brings us to . . .

Impression No. 2 — The best performer in oral argument doesn't always win. This is primarily true because of Impression No. 1 above. It has been interesting for me to note this phenomenon from the other side of the bench. Based on my personal poll, my guess is that the more skillful oral advocate loses his or her motion before the court roughly 30 to 40 percent of the time. The percentage would be higher but for the existence of Impression No. 3.

Impression No. 3 — The better lawyers tend to be better in the three areas that matter most: 1) learning the facts, 2) learning the law, and 3) persuading the court. There is a correlation between the overall skill of the lawyer and the outcome of the case.

(Clarifying comment: Although at first glance it may seem so, there is no inconsistency between the above impressions. Even though facts ultimately determine the success or failure of a lawsuit, no matter how good the lawyer, it is also true that the better the lawyer, the more likely he or she is to thoroughly prepare and present the facts.)

Impression No. 4 — We live within the geographical boundaries of the Tenth Circuit Court of Appeals. Utah's federal judges have a passing curiosity with what judges in the 3rd or 8th or 11th Circuits are saying, but it is nothing compared to the sit-up-and-take-notice attention given to the decisions of the 10th Circuit. *Stare decisis* being what it is, coupled with the fact that the only thing worse than handling some of these dispositive motions once would be to handle them twice, I tend to really focus on the wisdom of the circuit THAT HAS THE POWER TO REVERSE ME. For the same reason, opinions of the United States Supreme Court are greatly appreciated.

Impression No. 5 — Judicial Activism doesn't always mean what I thought it meant. I used to think a judicial activist was a judge who reached a decision based on his or her own feelings of justice, regardless of the law. Now, after laboring over a few decisions myself, I think it is a

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JUDGE DEE BENSON has served as a Federal District Judge in Utah since November 1991. He formerly served as U.S. Attorney for Utah between 1989 and 1991 and as Associate Deputy Attorney General of the United States in 1988 and 1989. He formerly served on the staff of Senator Orrin Hatch and as Legal Counsel to the Senate Judiciary Committee and the Iran-Contra Congressional Investigating Committee.

Judge Benson is a graduate of the J. Reuben Clark Law School's Charter class of 1976. During law school, he served as an Editor of the Brigham Young University Law Review. After graduation, he began law practice and later became a partner in the firm of Snow, Christensen and Martineau. He also played professional soccer with the Utah Golden Spikers of the American Soccer League. He is married to Patti Brown Benson and is the father of four children.

term of art utilized exclusively by the losing party.

Impression No. 6 — Federal district judges hear appeals from the bankruptcy courts. Upon learning this fact, I inquired briefly into the possibility of an annulment. I fully anticipated tax cases, patent cases, prisoner habeas corpus petitions and the federal sentencing guidelines, but nobody ever mentioned bankruptcy.

Impression No. 7 — There are 63 numbered rules of evidence in the federal courts. The most important are 104, 403, 404, 405, 608, 609, 611, 701, 702, the hearsay rules (801-804) and 1101. That doesn't mean the others aren't important, but those listed will keep you out of more trouble than the rest combined. I think.

Impression No. 8 — Fairness and justice are often mistaken for the law, and vice versa. The story is told of a conversation between Oliver Wendell Holmes and Judge Learned Hand. As Holmes was leaving, Hand (referring to Holmes' work as a Supreme Court Justice) said: "Make certain that you do justice," to which Holmes replied, "That is not my job. It is my job to apply the law."

Impression No. 9 — If the past six months are any indication, the quality of the bar in this state is very high. With a few exceptions, I have been extremely impressed by the counsel that have appeared in my courtroom. Their level of commitment has been uniformly high and most are well prepared.

Impression No. 10 — If I have one negative comment, it would be that too often counsel take their cases too personally and themselves too seriously. It is understandable if parties to a lawsuit dislike each other, it is even expected, but that doesn't mean their lawyers have to share such feelings of contempt for the other side. Litigation is stressful enough without unnecessary discord between the lawyers.

CASE SUMMARIES

By Clark R. Nielsen

INTESTACY INHERITANCE, SURVIVING SPOUSE

The Court of Appeals affirmed the district court's refusal to find a divorce between the plaintiff and her deceased husband when a final divorce decree had never been entered. The deceased and the plaintiff agreed to terminate their marriage and the deceased filed a consent and waiver, stipulating to entry of a default divorce. He then moved to Alaska. While in Alaska, he was killed in a fishing accident before the final default decree of divorce was obtained by the plaintiff. After his death, but before the plaintiff was informed of his death, a default divorce decree was obtained. The divorce decree was thereafter vacated when his death was discovered.

The plaintiff sought to inherit as the decedent's surviving spouse. The decedent's children claimed that plaintiff was not a surviving spouse because she had filed for divorce and he had consented and stipulated that the divorce decree be entered before his death. They argued that the entry of a final decree was merely a ministerial step that had not yet been taken, and, for all practical purposes, the divorce status had been obtained by the parties.

The appeals court held that under Utah Code Ann. § 75-2-80(2)(a), plaintiff was still the surviving spouse of the decedent because there had never been a decree or order, final or interlocutory, terminating the marriage before decedent's death. The mere filing of a complaint for divorce, stipulation as to its entry, waiver, and consent do not equate to obtaining a court's order terminating marriage, interlocutory or otherwise. The divorce decree entered after death was void because a decree of divorce cannot be entered against a dead person.

Farrell v. Porter, Utah Court of Appeals, No. 910463-CA (April 9, 1992) (Judge Billings, with Judges Jackson and Russon).

DIVORCE, MARITAL PROPERTY DIVISION

The trial court did not abuse its discretion when it awarded to the husband a one-half interest in ranch property which he had conveyed to Mrs. Hogue shortly prior to their marriage as an agreed means to protect the property from the husband's judgment creditors. During the marriage (which was the parties' second marriage), they jointly purchased other personal property for use on the ranch, including vehicles, trailers, horses and training equipment, ranch equipment, and household furnishings.

The trial court did not misunderstand or misapply the law resulting in a substantial or prejudicial error that was contrary to a preponderance of the findings. Marital property encompasses all the assets of every nature possessed by the parties, whenever obtained and from whatever source derived. The trial court may in its broad discretion divide the property equitably, regardless of its source or time of acquisition. The specific findings of the trial court supported the equal division of the ranch. *Hogue v. Hogue*, Utah Court of Appeals, No. 900593-CA (April 9, 1992) (Judge Russon, with Judges Bench and Billings).

NEWLY DISCOVERED EVIDENCE, HABEAS CORPUS

The petition of Dail Ray Stewart for a writ of habeas corpus was granted by the trial court and affirmed on appeal. Petitioner was convicted of second degree murder in the 1986 stabbing death of a prison inmate (729 P.2d 610). In his petition for habeas corpus, Stewart asserted that witnesses at his trial had improperly testified and that there was newly discovered evidence and witnesses would testify of Stewart's innocence. One witness testified that he had omitted important evidence at the trial and the second witness had not been available at the trial. The district court found that there was a substantial likelihood that had the evidence been available to Stewart at his trial, a different verdict would have resulted. Stewart's petition was granted.

The court of appeals concluded that the petitioner carries the burden of showing that the trial proceedings were in error. Reviewing Utah Supreme Court decisions regarding the standard of review, the panel concluded that the proper review standard is no different than any other appeal, (e.g., no difference is accorded to the trial court's conclusions of law, but its findings of fact will not be disturbed unless clearly erroneous). The appeals court held that the trial court properly applied the legal standard that in order to justify a release of a person under a writ of habeas corpus the evidence of his innocence must be stronger than would have been necessary to support a motion for a new trial. In this case the evidence showed an obvious injustice or a substantial and prejudicial denial of due process. Although past opinions have used different language in reviewing habeas corpus petitions, the standard of review remains constant.

Stewart v. State, Utah Court of Appeals, No. 910566-CA (April 9, 1992) (Judge Jackson, with Judges Billings and Russon).

EXPERT TESTIMONY, EXCLUSION OF TRIAL TESTIMONY

Plaintiff sued the railroad for damages, alleging that the railroad had caused the Thistle mud slide resulting in the destruction of plaintiff's property in Spanish Fork Canyon. Plaintiff claimed that the landslide was caused by defendant's rail construction activities, negligently undercutting the mountainside so as to result in the massive slide. At trial, plaintiff was precluded from calling a witness that had not been designated until shortly before trial. The appeals court held that the trial court abused its discretion in refusing to allow the expert witness to testify. Absent an order that judicially imposes a specific deadline, a trial court may not sanction a party for failing to timely disclose a witness by excluding that witness under Utah R. Civ. P. 37(b) (2).

The trial court has broad discretion in case management decisions. However, excluding a witness from testifying is extreme in nature and should be employed with caution and restraint. In reviewing defendant's claim that the plaintiff's expert was not timely disclosed prior to trial, the appellate panel noted an apparent attitude of uncooperation between counsel in the discovery process. The record was

also ambiguous as to a deadline to disclose witnesses. The court pointed to indicia in the record that conflicting dates were set for the final disclosure of witnesses. Because the record was not clear and did not add, there was no clear and unequivocal, judicially imposed deadline. The trial court abused its discretion in refusing to allow the expert witness to testify.

Also, plaintiff was not precluded from raising the issue on appeal because plaintiff challenged a case management decision of the trial court and was not required to proffer at trial the substance of the witness's testimony. Any proffer of the substance of the testimony would not have benefitted the trial court or given it cause to correct its decision under Utah Rule of Evidence 103(1) (2).

The erroneous exclusion of the expert's testimony was prejudicial and not harmless. His credentials and expertise with regard to the Spanish Fork Canyon and Thistle slide area indicated that the testimony would have been helpful to plaintiff's case in a "battle of expert witnesses".

Judge Jackson dissented, arguing that the plaintiff had not established a reasonable likelihood that the result would have been any different at trial had his testimony been allowed.

The case was remanded for a new trial. *Berret v. Denver & Rio Grande R.R.*, Utah Court of Appeals, No. 910215-CA (April 3, 1992) (Judge Bench, with Judges Garff and Jackson).

APPEAL, TIMELY NOTICE, POST JUDGMENT MOTION

The Court of Appeals dismissed the appeal of plaintiff Robert DeBry because his notice of appeal was filed before and not after the disposition of a tolling post-judgment motion.

After the judgment had been entered, plaintiffs filed a document entitled "Plaintiff's Objections and Additions to Proposed Findings of Fact and Conclusions of Law." Before disposition of that "objection", plaintiffs also filed a notice of appeal from the summary judgment. When a subsequent order was entered denying plaintiff's objections and construing the objections as a Rule 52(b) post-judgment motion, plaintiffs did not thereafter file a new notice of appeal. The court affirmed the trial court's characterization of DeBry's "objections" as a Rule 52(b) post-judgment motion. Rejecting the argument that plaintiff's "objections" were not the same as a Rule 52 motion, the Appellate Court properly looked to the substance of the plaintiff's contentions and not to the document's title. A notice of appeal filed before the disposition of a post-judgment motion is ineffective to confer jurisdiction upon the Appellate Court. The appeal was dismissed for lack of jurisdiction.

DeBry v. Fidelity National Title Insurance Co., Utah Court of Appeals No. 910329-CA (March 18, 1992).

INSURANCE, POLICY/ CONTRACT INTERPRETATION

The Court of Appeals affirmed insurance coverage for the plaintiff gasoline station owner who claimed costs of cleanup of a gasoline spill resulting from a clean break in an underground fuel storage pipe. The policy coverage applied only if the loss of gasoline was due to a sudden and accidental discharge from the pipe. Interpreting the policy language, the Court held that "sudden" related to an abrupt occurrence. The mere fact that the spill continued over a period of time before it was discovered did not affect the suddenness of the initial spill. The trial court's interpretation of the policy was affirmed.

Gridley Assoc., Ltd v. TransAmerica Ins. Co., Utah Court of Appeals, No. 910121-CA (March 18, 1992) (Judge Russon with Judges Greenwood and Garff).

LIFE INSURANCE COVERAGE, REJECTION

The defendant insurance company received a life insurance application and premium from plaintiff's deceased husband prior to his death. The trial court's determination was affirmed that the applicant never received written notice of termination of rejection of his temporary insurance. A claimed rejection of coverage was ineffective. Communications between the insurance company and its agents were insufficient to show that the rejection of the application had been sufficiently communicated to the applicant before his death. Furthermore, the premium had never been returned to him. In Utah, a contract of temporary insurance is effectively terminated only when the application is rejected and the applicant is given adequate notice of the rejection. The court relied upon California authority that rejection requires an appropriate notice, communicated to the insured, and a refund of the premium paid. Notice must be definite, certain, and leave no doubt that the rejection of insurance is effective upon receipt of the notice. A telephone call by the applicant to an unknown employee of the agent was inadequate notice of rejection.

Stevenson v. First Colony Life Ins. Co., Utah Court of Appeals, No. 910561-CA (March 3, 1992) (Judge Jackson, with Judges Billings and Russon).

RULE 60(b) MOTION, REASONABLENESS, ADOPTIONS

The district court refused to set aside an adoption decree. On appeal, the plaintiff's natural mother claimed that the district court had lacked jurisdiction to grant the adoption, arguing the adoption was prematurely granted because the child had not lived in the home of the adopting parent for six months as required by Utah Code Ann., §78-30-14(7) (1987). The Court of Appeals affirmed the trial court but declined to address the "in home" requirement. Instead, the Court held that the plaintiff's request under Rule 60(b) for relief from the adoption decree was not brought within a reasonable time after the adoption. The child's need for a stable home/parental environment creates a special need for finality in adoption proceedings. Over six months following the grant of the adoption decree was not reasonable under the circumstances.

Maertz v. Maertz, 181 Utah Adv. Rep. 28 (Utah App., February 25, 1992) (Judge Jackson, with Judges Billings and Russon).

LIMITATION OF ACTIONS, SAVINGS STATUTE ON COUNTERCLAIM

A savings statute which operates to extend the Statute of Limitations as to a plaintiff's complaint will also extend the Statute of Limitations with respect to the defendant's counterclaim when both arise from the same incident. Therefore, a counterclaim which is time-barred is preserved when it arises from the same incident which creates the claim in the complaint. Plaintiffs filed their Complaint which was dismissed for a procedural defect. Utah Code Annotated § 78-12-40 extended the statute of limitations for an additional year after its dismissal. Consequently, the savings statute also acted to extend the

defendant's counterclaim, which otherwise would have expired under its statute of limitations. The failure to evenhandedly apply the statute would force reluctant litigants to initiate litigation themselves or risk losing the ability to raise later their claims or defenses as counterclaims if necessary.

Moffit v. Barr, Utah Court of Appeals, No. 910290-CA (March 4, 1992) (Judge Orme, with Judges Garff and Jackson).

ATTORNEY FEES, DAMAGES

Interpreting a settlement agreement of prior litigation, the trial court held that the defendant breached its settlement agreement with the plaintiff involving various partnership dealings. The Court of Appeals held that the trial court had properly interpreted the settlement agreement. Without extensive explanation or analysis, the Court found no error in the trial court's construction of the settlement provisions of the agreement.

As to attorney's fees, the trial court improperly awarded fees because there was no such provision in the settlement agreement. No contract or statute authorized the award. Attorney's fees incurred in litigation between contracting parties are not recoverable as damages by the non-breaching party. The Court held that such fees were not a direct consequential damage flowing from the breach of the settlement agreement. The Court distinguished this case from Canyon Country *Store v. Bracey*, 791 P.2d 414 (Utah 1989) in which the Supreme Court allowed a "non-traditional recovery of attorney's fees as consequential damages". *Bracey* involved only insurance contracts and therefore the award of attorney's fees as consequently damages, outside the context of statutory and contractual authorization, should be limited to insurance contracts and third-party exceptions. The interpretation of the settlement agreement was affirmed and the attorney fee award was reversed.

Collier v. Heinz, Utah Court of Appeals, No. 900138-CA, (March 18, 1992) (Judge Orme, with Judges Bench and Jackson).

SEARCH AND SEIZURE — PRETEXT STOP

Having entered a conditional guilty plea preserving his right of appeal, defendant appealed denial of his motion to suppress evidence obtained in a search incident to his arrest. Defendant was stopped by a police officer for jaywalking and was ticketed. Upon checking defendant's identity because of lack of a driver's license, the officer discovered an outstanding warrant against the defendant. Defendant was then arrested on the warrant and a search of his person disclosed a controlled substance.

Defendant argued that his stop for jaywalking was a mere pretext to conduct the search. The issue of whether the officer's stop of defendant was a pretext was rejected by the entire panel, although the panel did not agree on the applicable legal analysis. Judge Russon concluded that a traffic stop and issuance of a citation is always justified when an officer observes a statute being violated. It is the officer's duty to uphold all laws, and the officer has no discretion as to which laws would be reasonable to enforce. Enforcement is appropriate whenever an officer suspects that the driver is violating an applicable traffic regulation. Judge Russon further argues that a police officer cannot be expected to make a snap legal determination as to whether or not a "reasonable officer would arrest a violator." Judge Russon strongly disagrees with the approach of *State v. Sierra*, 754 P.2d 972 (Utah App. 1988), disavowed on other grounds, *State v. Arroyo*, 796 P.2d 684 (Utah 1990).

Concurring, Judge Orme and Judge Billings agreed that the conviction should be affirmed because the conduct of the officer was reasonable. However, their analysis adheres to their views in *State v. Lopez* and *Sierra* that the reasonableness of the officer's stop must objectively be viewed. Judges Billings and Orme held that the pretext question does not turn on an arresting officer's subjective motivation, although such motivation is a factor to be considered. And, where the police officer's actions are consistent with a "legitimate course of conduct adopted after specific observations or experiences have brought valid concerns to the officer's attention, we believe the officer's uncontroverted subjective motivation should be afforded particular significance" in determining the objective reasonableness of his conduct. In this case the officer had witnessed potential dangers of jaywalking firsthand and in the past had attempted to reduce jaywalking on State Street prior to his encounter with defendant.

State v. Figueroa-Solorio, Utah Court of Appeals, No. 910170-CA (March 19, 1992) (Judge Russon, with Judges Orme and Billings).

UTAH SUPREME COURT CASES

JUDICIAL CONFLICT OF INTEREST

Plaintiff recovered from the defendant on a breach of a non-competition clause in defendant's employment agreement. The Court of Appeals reversed and remanded for determination. On certiorari to the Supreme Court, the Supreme Court vacated the decision of the Court of Appeals and remanded to the appellate court to rehear the substantive issues on appeal because of the participation by a court of appeals judge with an ostensible conflict of interest. The Supreme Court held that the judge's familial relationships to the partners in the firm of appellee's counsel was a sufficient conflict of interest and contrary to the Code of Judicial Conduct to require the vacation of the appeals court decision.

Utah Code of Judicial Conduct, Canon 3(c) (1) requires disqualification of a judge in a case in which the judge's relatives, within the third degree of relationship, have an interest that would be affected by the outcome. (Canon 3 is based upon the ABA model code (1972) adopted in 47 states.) The issue discussed by the Supreme Court was whether the related partners in the law firm held an "interest that might be sufficiently affected by the outcome to warrant disqualification". The fact that a party's lawyer is affiliated with a law firm with which a relative of the judge may be affiliated does not, of itself, disqualify the judge. Financial remuneration of the judge's relative is of primary concern.

Closely related are non-pecuniary benefits to the firm, such as enhanced reputation and good will that indirectly benefit the relative. Judges must disqualify themselves from presiding over a case if one or more of the lawyers on the case belongs to the law firm in which the judge's relative is a partner. This recognizes an appearance of impropriety in situations where the judge can control the amount of money the judge's relative will receive as a result of distribution of fees within the firm as a result of the law suit.

This appearance of impropriety is not limited to contingent fee arrangements. Even in other appealing situations can be affected by the outcome of the case. The court adopts a bright line proscription that includes every situation where a judge sits on a case in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party. This position proscribes judicial conduct that might give rise to any legitimate claim of appearance of impropriety based on benefit to the lawyer relative. It provides all parties with a clear rule that avoids a detailed examination of the billing and compensation practices of the law firm.

In addition to the direct pecuniary benefit, there are circumstances in which an affiliated law firm may receive sufficient non-pecuniary benefits to create an appearance of impropriety requiring disqualification, such as good will and reputation. In order to create such a benefit from enhanced reputation and good will to the firm sufficient to cause disqualification, the case before the judge-relative must be one which will greatly affect the firm's reputation.

This "bright line" proscription drawn by the court does not necessarily apply to non-equity associates of a law firm to the degree that a significant portion of an associate's compensation may depend upon factors analogous to those used in fixing partner or shareholder compensation. Similar ethical inquiries must be applied.

The court's strong position on the judicial inquiry and conflict is taken even though the appellate did not raise the issue before the court of appeal or well until after certiorari had been sought in the Supreme Court. Appellant claims he was unaware of the relationship between the appeals court judge and Fabian & Clendenin even though the briefs and other documents filed clearly showed the relationship between plaintiff's counsel and the law firm. The court rejected the idea that the burden to disqualify the judge was upon appellant or his attorney. It is the judge's responsibility to identify any relationship and take appropriate measures to recuse himself or herself from participating in a decision. The court reviews any requirement that counsel show by an actual bias or prejudice before setting aside the decision was rejected.

Justice Howe dissented, arguing that appellant had not shown that an objection was timely made and that a mere failure of the appeals judge to recuse herself should not set aside a decision under the time panel. The dissent argues that the relationship between the judge and the appellee's law firm in the court of appeals was clearly apparent and no objection was timely raised when the case was orally argued before that court. A failing to seek to disqualify the judge within a timely manner after the relationship had become apparent, the appellant had waived any claim of any conflict.

The court of appeals judge should have been allowed an opportunity to be heard before the Supreme Court's ipso facto determination was made that she had violated a canon of judicial ethics. Even assuming that a judicial ethic canon had been violated, it should not automatically result in a setting aside of a decision by an entire panel and, finally, a more concrete establishment of bias and prejudice should be required before setting aside the court decision so that a mere complaint that a judge has violated a judicial canon. Windfall relief should not be granted automatically in what may be otherwise a proper decision.

Justice Stewart concurred in the dissenting opinion of Associate Chief Justice Howe.

Regional Sales Agency, Inc. v. Reichert, 183 Utah Adv. Rep. 3 (March 24, 1992) (Justice Zimmerman).

On certiorari to the court of appeals, the Supreme Court reversed a court of appeals decision with regard to the valuation of the husband's dental practice and reinstated a $2,000 attorney fee award, but otherwise affirmed the lower court's decision. In a split decision, the court held that good will is not divisible marital property and should not be considered in valuation of a dental practice.

At trial the court valued the defendant's dental practice at $100,000, over 60 percent of which represented the value of defendant's good will with his patients and the public. The instant matter was sufficiently distinguished from *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988) wherein there were 23 positions in a clinic. In the instant matter only defendant's reputation was involved. There was no good will separate and apart from defendant's practice. There was no actual sale of defendant's practice and defendant continued his practice following the divorce. Therefore, it was not equitable to require him to pay his wife part of the good will value of his practice, because such good will is nothing more than his or her reputation for competency. The court recognized that professional reputation can be valued and can be sold together with tangible assets of a practice when a professional retires. However, unless the professional retires and his practice is sold, his reputation should not be treated differently from a professional degree or advanced degree. Both simply enhance the earning ability of the holder. The court did not decide that in the event the practitioner retired and the practice was sold for an amount over and above the tangible assets that the full amount should be viewed as marital property. That issue is reserved for another day.

An advanced or professional degree is not marital property to be valued and divided between the spouses, as it merely enhances the professional's earning capacity. An enhanced earning capacity should be reflected in the level of child support and alimony to be determined in light of his earnings. Requiring a defendant to divide with his spouse the value of his professional reputation would not be an equitable division, but would constitute double counting. By allowing the valuation of the good will and reputation of the dental practice, the court of appeals in effect equated reputation and good will with future earning capacity. According to the Supreme Court, the two cannot be separated. Future earning capacity comes in large part from good will and reputation. To demonstrate the inequity in considering defendant's good will and earning capacity, the majority pointed to his wife's master's degree and yet that asset was not considered marital property by the trial court.

The majority rejected appellant's contention that accounts receivable of his dental practice should not have been included in the valuation of the practice, because they represent deferred income from which he must pay child support and alimony, where accounts receivable must also be offset by accounts payable in determining the value of the asset being divided.

Justice Durham sharply dissented, arguing that the issue on appeal was merely one of proof and sufficiency of evidence. The issue to Justice Durham was

not whether good will of a solo professional practice can be a marital asset. Rather, the issue was whether the wife presented sufficient evidence to present a finding of value consistent with her theory that her husband's solo professional practice had a value of $100,000. Justice Durham believed that if the evidence so showed, the appellate court should uphold that specific value, whether it included good will or not. She would hold that good will constitutes a marital property "to the extent that market data establishes a value for it independent of the value of spousal earning capacity, spousal skills, and post-marital spousal labor". A blank prohibition of any consideration of good will as divisible property under any circumstance is overkill. Justice Zimmerman concurs in the dissenting opinion of Justice Durham.

Sorenson v. Sorenson, 183 Utah Adv. Rep. 13 (March 30, 1992) (Assoc. C. J. Howe).

NONCOMPETITION COVENANT, INJUNCTION AGAINST NON PARTY

In an action for injunctive relief and damages to enforce a covenant not to compete contained in an employment contract, a third party to the contract (e.g. spouse or relative) may be enjoined if shown to be knowingly aiding or assisting the covenantor in violating the noncompetition agreement.

Kasco Services v. Benson, 183 Utah Adv. Rep. 27 (Mar. 13, 1992) (Assoc. C. J. Howe).

UTAH SUPREME COURT APPEAL, ADMINISTRATIVE PROCEEDINGS

A deed of sale to public property, a certification of sale, and a declination of a request for board review of the sale are not final orders in a formal administrative proceeding such as to vest appellate jurisdiction in the Utah Supreme Court under Utah Code Ann. § 78-2-2(3) (e) (3) (i), regarding the Board of State Lands and Forestry. A final order or decree appealable to the Supreme Court must be entered in a formal adjudicative proceeding.

Southern Utah Wilderness Alliance v. Board of State Lands and Forestry, 181 Utah Adv. Rep. 7 (February 27, 1992) (Justice Durham).

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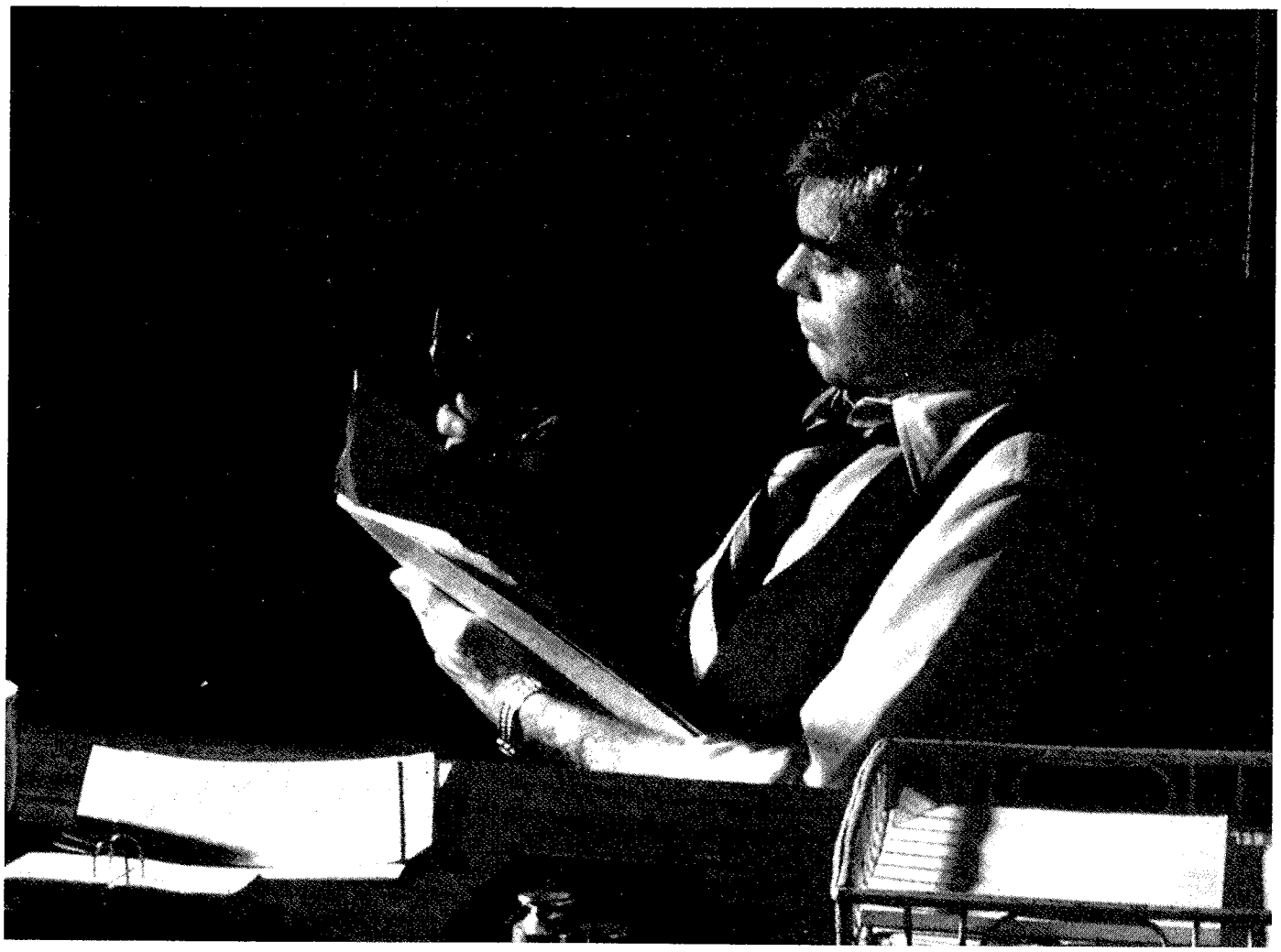

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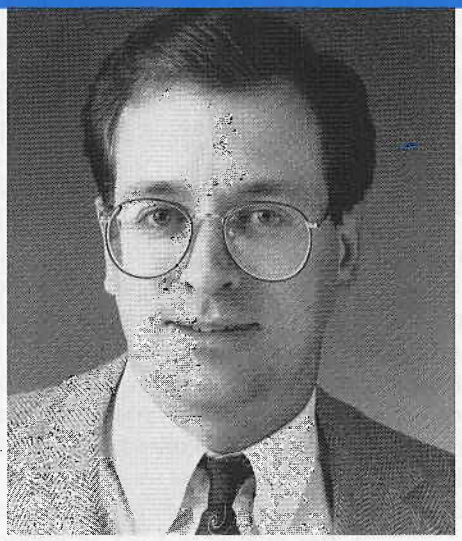


Law Day 1992

By David W. Zimmerman

This year the Young Lawyer's Section again participated in or sponsored various activities in conjunction with Law Day.

Law Day Fairs.

The Young Lawyers Section of the Utah State Bar sponsored Law Day Fairs for Law Day 1992. Young Lawyers across the state answered legal questions and distributed pamphlets at malls in Logan, Ogden, Salt Lake City, Holladay, West Valley City, Orem, and St. George. The pamphlets which were distributed covered a broad range of legal subjects designed to provide a general understanding of various aspects of the law, when and how to hire a lawyer, how to respond to certain legal procedures without a lawyer and how to resolve disputes through the small claims courts. The Law Day Committee Co-Chairs express their appreciation to the following Young Lawyers who were responsible for conducting the fairs in various communities: Greg Skabelund, Ted Godfrey, James J. Lund, Glinda Ware Langston, Linda Barclay and Michael A. Day.

1992 Liberty Bell Award.

On May 1, 1992 (National Law Day), Charlotte Miller presented the 1992 Liberty Bell Award to Ben Barr on behalf of the Young Lawyer's Section. Each year the YLS presents the Liberty Bell Award to a non-lawyer whose efforts stimulate a deeper sense of individual rights by fostering the public's understanding of and respect for the rights of individuals.

Mr. Barr has been involved in the grassroots AIDS education and services movement since 1985. He has served as a hospice volunteer, client advocate, fundraiser, Assistant Director and Executive Director of various AIDS organizations. He now directs a team of 14 employees and 200 volunteers at the Utah AIDS Foundation. The Foundation serves over 25,000 people each year through the education programs and now serves a client caseload of 450.

Law Day Fair — Capitol Rotunda.

The YLS participated in the Utah State Bar/Law Related Education Committee's sponsorship of a Law Day Fair at the Utah State Capitol Rotunda. In addition to generally assisting this effort, the YLS sponsored a booth to answer high school and junior high school students' questions about the law. Gordon Jensen also conducted quiz competitions between students concerning various aspects of the law from the Bill of Rights to personal injury.

1992 Community Service Scholarships

Cathleen Clark **Christine Jepsen**

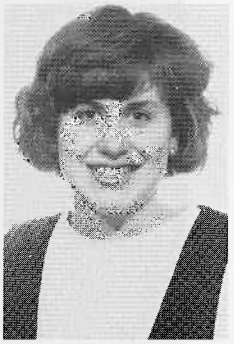
The Utah Bar Foundation has established two Community Service Scholarships to recognize students who have participated in and made a significant contribution to the community by performing pro bono services in public service. A $3,000 award will be given to a student at both the University of Utah College of Law and the Brigham Young University Law School. These awards recognize service but also bring attention to the fact that public service is an important part of the legal profession.

Cathleen Clark will be given the University of Utah College of Law Award. Ms. Clark has served as President of the Board of Trustees of the Utah Heritage Foundation, board member on the Cystic Fibrosis Foundation, member on the Caring Committee of Youth Village, Vice-President over community services in Lambda Delta Sigma, has volunteered to help several other local groups including the elderly and handicapped, and has served breakfast to the homeless under the viaduct. She hopes to be able to help disadvantaged people who are unable to afford legal counsel.

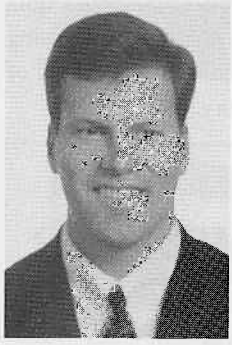
Christine Jepsen will receive the Brigham Young University Law School Award. Ms. Jepsen is President of the National Association of Public Interest Law at BYU, and has established the first public interest organization at the BYU Law School. She is working to obtain funding for public interest summer grants and increase exposure of public service at the law school. She is Student Representative for the Public Service Involvement Committee to increase public interest and has researched pro bono requirements and career incentives for students entering public service. Her goal is to work in public service, help reform inadequate laws and work for the rights of disadvantaged people.

The Board of Trustees of the Utah Bar Foundation congratulates these law students for their outstanding accomplishments and hopes that their interest in community service will continue. These scholarships reward students who have shown interest and participation in community service and encourage other students to do likewise

Cathleen Clark



Christine Jepsen



Stephen H. Urquhart

Rashelle Perry

Utah Bar Foundation Presents 1992 Ethics Awards

Stephen H. Urquhart **Rashelle Perry**

The Board of Trustees of the Utah Bar Foundation, in cooperation with the J. Reuben Clark Law School and the University of Utah College of Law, has established an annual Ethics Award. Each law school selects a graduating senior who embodies high ethical standards to receive this award. The Rules of Professional Conduct adopted by the Utah State Bar established ethical standards for Utah lawyers, but encourage lawyers to strive for even higher ethical and professional excellence.

One of the Foundation's 1992 Ethics Awards was recently presented by the Hon. Norman H. Jackson, President of the Utah Bar Foundation, to Stephen H. Urquhart at the Brigham Young University Awards Assembly. Mr. Urquhart, April graduate, served on the Law Review and was President/Editor-in-Chief of the Environmental Law Forum. He has served as a Law Clerk at Morrison & Foerster in Irvine, California; at O'Melveny & Myers in Los Angeles, and at Parsons, Behle & Latimer in Salt Lake City. He has also published poetry and has taught basic reading skills to adults.

Trustee Stephen B. Nebeker (Ray, Quinney & Nebeker) presented the 1992 Ethics Award to Rashelle Perry at the University of Utah. Ms. Perry, member of Phi Beta Kappa and Phi Kappa Phi, was Managing Editor of the Journal of Contemporary Law/Journal of Energy 1991-92 and authored an article regarding the free exercise clause. She has served a judicial externship with U.S. Magistrate Judge Ronald N. Boyce, was a legal intern at the Legal Aid Society, and assisted Professor Leslie Francis by researching and writing on legal ethics and professional responsibility.

The Utah Bar Foundation congratulates Stephen H. Urquhart and Rashelle Perry for their outstanding accomplishments and high ethical standards during law school.

Donations to the Community By Way of the Utah Bar Foundation

The primary funding source of the Utah Bar Foundation is the IOLTA program, where lawyers authorize their financial institution to send interest from their trust accounts to the Foundation. The Foundation is also supported by donations. You can contribute to the community (legal services to the disadvantaged, education, administration of justice, and other law related needs) by including a donation to the Utah Bar Foundation when you send your annual license dues to the State Bar.

CLE CALENDAR

DOMESTIC VIOLENCE CONFERENCE

This seminar is being sponsored by the Prosecution Council and cosponsored by the Bar.

CLE Credit: Approx. 14 hours
Date: June 25 & 26, 1992
Place: Red Lion Hotel, Salt Lake City
Fee: to Register call 533-3243
Time: 8:00 a.m. to 5:00 p.m.

1992 UTAH STATE BAR ANNUAL MEETING

CLE Credit: 14.5 hours w/3 in ethics
Date: July 1 – 4, 1992
Place: Sun Valley Resort, ID
See the brochure for details on meetings and activities or call (801) 531-9077 for more information.

LAW OFFICE AUTOMATION ESSENTIALS WITH WORDPERFECT 5.1

A live via satellite seminar. This seminar focuses on the essential components necessary to build a law office automation system. Planned automation ensures consistency throughout the office, increased productivity, timely document production and higher volumes of work being processed. This program will help you determine what steps are right for your firm.

CLE Credit: 6.5 hours
Date: July 14, 1992
Place: Utah Law & Justice Center
Fee: $99 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

ADVANCED COMMERCIAL REAL ESTATE

Sponsored by the State Bar of Nevada and co-sponsored by the Utah State Bar.

CLE Credit: Approx. 18 hours
Date: August 12-14, 1992
Place: Embassy Suites Resort, Lake Tahoe
Fee: call
Time: 8:00 a.m. to 5:00 p.m.

15TH ANNUAL SECURITIES SECTION WORKSHOP

This is the annual presentation of this workshop. This year's locale will be Jackson Hole. Look for a lively program with many discussions on current securities law topics. Come up and enjoy the scenery and update your securities practice skills.

CLE Credit: 8 hours w/1 in ethics
Date: August 28 & 29, 1992
Place: Jackson Hole, WY
Fee: call
Time: 8:00 a.m. to 1:00 p.m. each day

UNDERSTANDING BUSINESS BANKRUPTCY: HOW TO HANDLE EVERYDAY PROBLEMS

A live via satellite seminar.

CLE Credit: 4 hours
Date: September 17, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

ADVANCED BANKING LAW

Sponsored by the State Bar of Nevada and co-sponsored by the Utah State Bar.

CLE Credit: Approx. 12 hours
Date: August 17-18, 1992
Place: Embassy Suites Resort, Lake Tahoe
Fee: call
Time: 8:00 a.m. to 5:00 p.m.

2ND ANNUAL ETHICS AND GOLF TOURNAMENT — PROFESSIONALISM MADE PRACTICAL

This new annual program stresses professional behavior in practical situations. The idea is to present ethics topics that have direct practice implications. This year breakout sessions are planned to address different practice areas even more directly. Also look forward to the golf tournament this year at beautiful Park Meadows. Take this opportunity to get ethics training on a useful, practical level, while enjoying the surroundings of Park City.

CLE Credit: 3 hours in Ethics
Date: September 19, 1992
Place: Olympia Hotel, Park City
Fee: call
Time: 9:00 a.m. to 12:00 noon — Seminar
1:00 p.m. — Golf Tournament

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

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2. _____ _____

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Bar Number American Express/MasterCard/VISA Exp. Date

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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.

CLASSIFIED ADS

For rates or information regarding classified advertising, please contact Leslee Ron at (801) 531-9077.

CAVEAT — The deadline for classified advertisements 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.

CCH Federal Tax, CCH Fed. Estate-Gift Tas, CCH Fed. Securities Rptr. RIA Pension Coord., BNA Tax Man. Portfolios, U.S. Code Annotated and U.S. Tax Cases (CCH). Contact Kristen (801) 355-9333.

BOOKS REQUESTED

The Salt Lake County Jail needs law books for the inmates' library. If you would like to donate some books, please contact Captain Dan Ipson at (801) 974-7702.

EQUIPMENT FOR SALE

Law Office equipment and furniture: Xerox 1050, automatic feed, stapler, enlarge and reduce, excellent condition. Typewriters, reception desk, conference room table with 8 chairs, two secretary desks, numerous office chairs. Two (2) study carrels for work stations, 1 man's desk chair, 4 office chairs, small refrigerator, 1 silk tree, miscellaneous items (waste baskets, bulletin board, etc.) Call Aloa at (801) 532-1900.

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Deluxe office space for one attorney and secretary. 4212 Highland Drive. Office share with two other attorneys. Facilities include professionally decorated reception area and common areas, conference room, limited library. Entire space finished in oak. Convenient parking immediately adjacent to building for both clients and staff. Call (801) 272-1013.

OFFICE SPACE AVAILABLE in St. George. Large office in suite occupied by group of sole practitioners. Library, conference room, telephone system, office machinery, office maintenance, telephone answering and reception service provided, with private secretarial office available. Centrally located in close proximity to the Courts, city and county offices. Inquiries should be directed to Office Manager, P.O. Box 749, St. George, Utah 84771, or by telephone at (801) 628-2676.

ATTRACTIVE OFFICE SPACE available in the 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 at (801) 566-3688 or David at (801) 268-9868.

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Conveniently located next door to Bar Office. Ground floor office and reception area. Parking and utilities furnished; some furniture optional. 655 South 200 East, or call (801) 532-1150. Reasonably priced.

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Established firm in Sugarhouse area has office available. Excellent view, parking and freeway access. For inquiry, call (801) 486-3751.

POSITIONS AVAILABLE

Salt Lake City full service law firm is seeking an experienced and self sufficient patent attorney to work with our corporate clients. Candidates should have a minimum of 5 years patent experience, excellent written and verbal communications skills, a strong technical background with experience in patent application and prosecution. Must be a highly motivated self-started who can work independently but willing to assist other attorneys. Must be admitted to practice before the U.S. Patent and Trademark Office. Salary and benefits are competitive and based upon qualifications. Submit resume and writing sample in confidence to: Utah State Bar, Box P-6, 645 South 200 East #310, Salt Lake City, Utah 84111.

Salt Lake Firm seeking full time Tax Attorney. LLM preferred but not required. Send resume to Utah State Bar, Box B-6, 645 South 200 East #310, Salt Lake City, Utah 84111.

Salt Lake City is actively recruiting to fill one of the positions below. Graduation from an accredited college of law with a JD or LLB degree is required for each position. Experience required varies with each position. Must be a member in good standing with the Utah Bar Association. Desire experience in both private and public sector regarding aviation law and/or previous experience in the aviation industry. For more information please call (800) 535-7900. Apply: Human Resource Division, 451 South State, Room 404, Salt Lake City, Utah, 84111. Closing Date: June 30, 1992. Salt Lake City is a equal opportunity employer.

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SALT LAKE LEGAL DEFENDER ASSOCIATION is currently accepting resumes to update its applicant attorney roster. Interested attorneys should submit their application to F. John Hill, Director, 424 East 500 South #300, Salt Lake City, Utah 84111, prior to July 1, 1992. Telephone (801) 532-5444.

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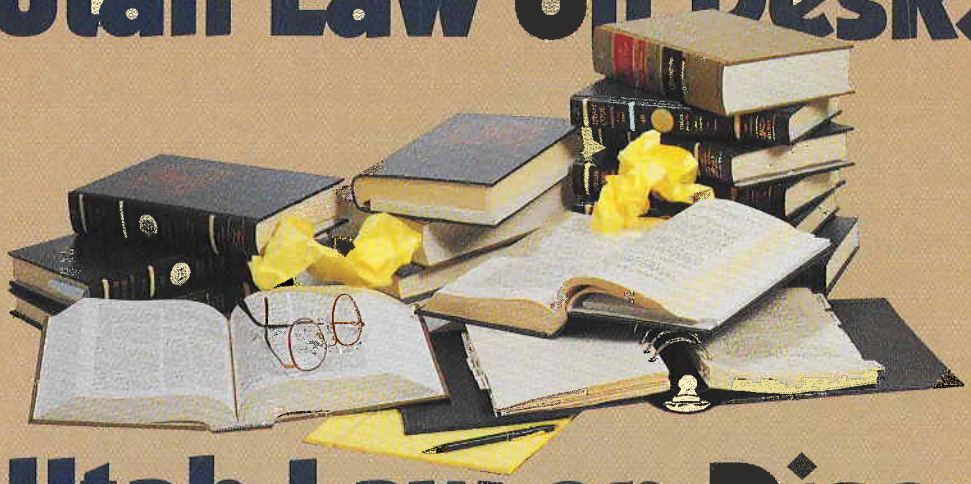

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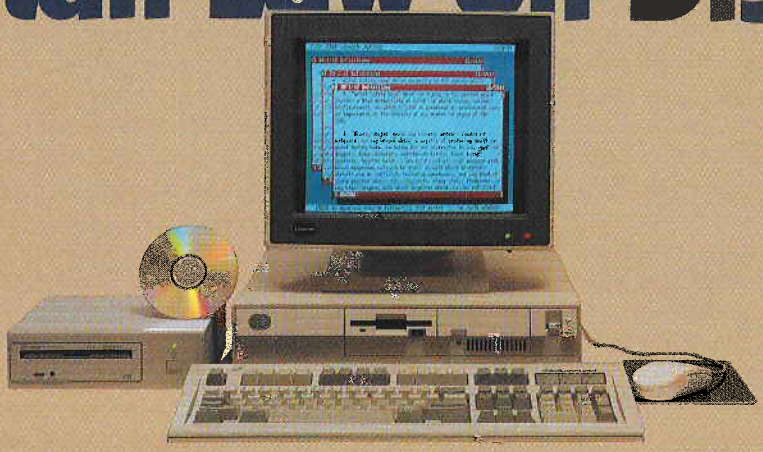

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