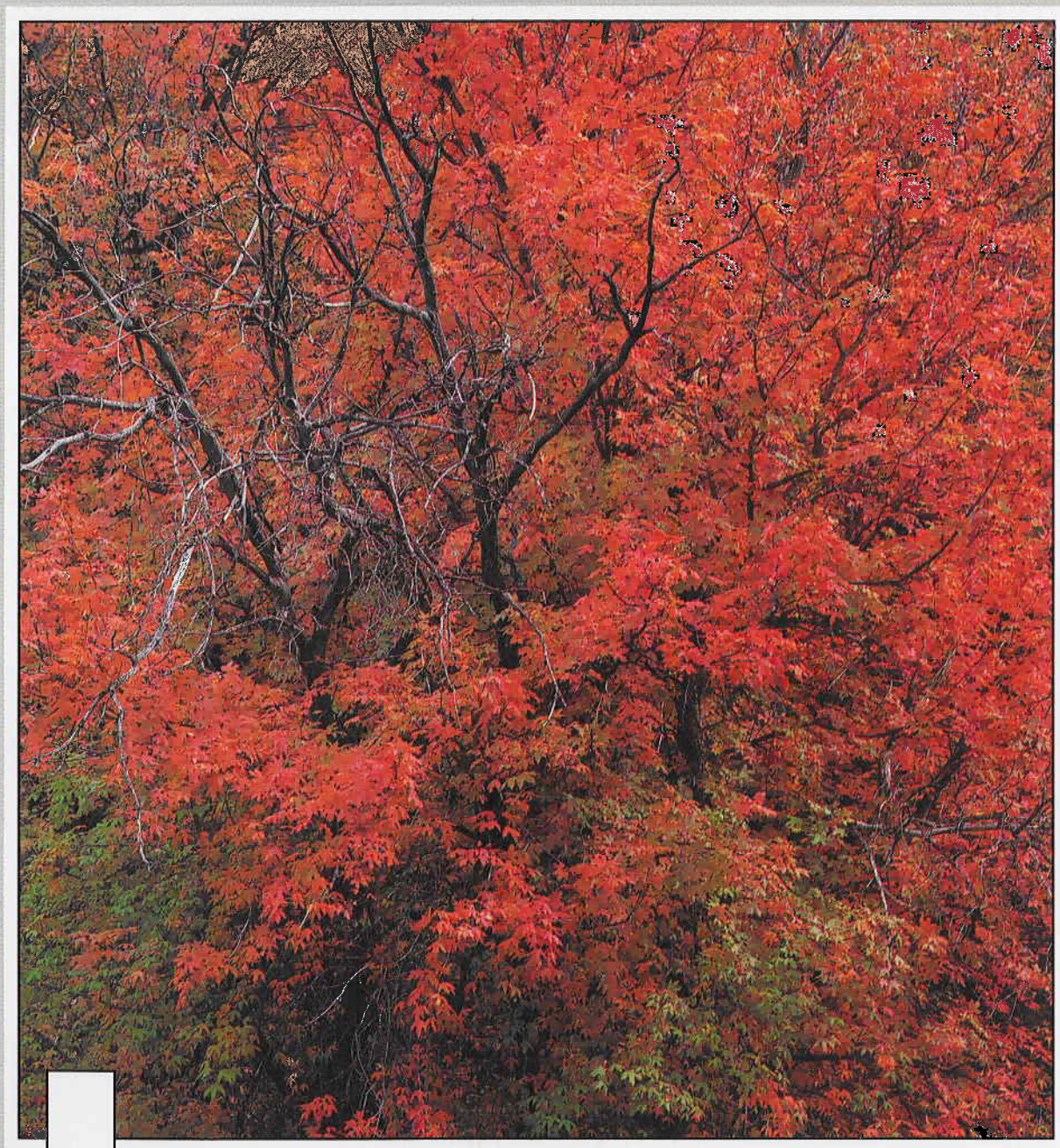
UTAH BAR JOURNAL

Vol. 5 No. 8 October 1992



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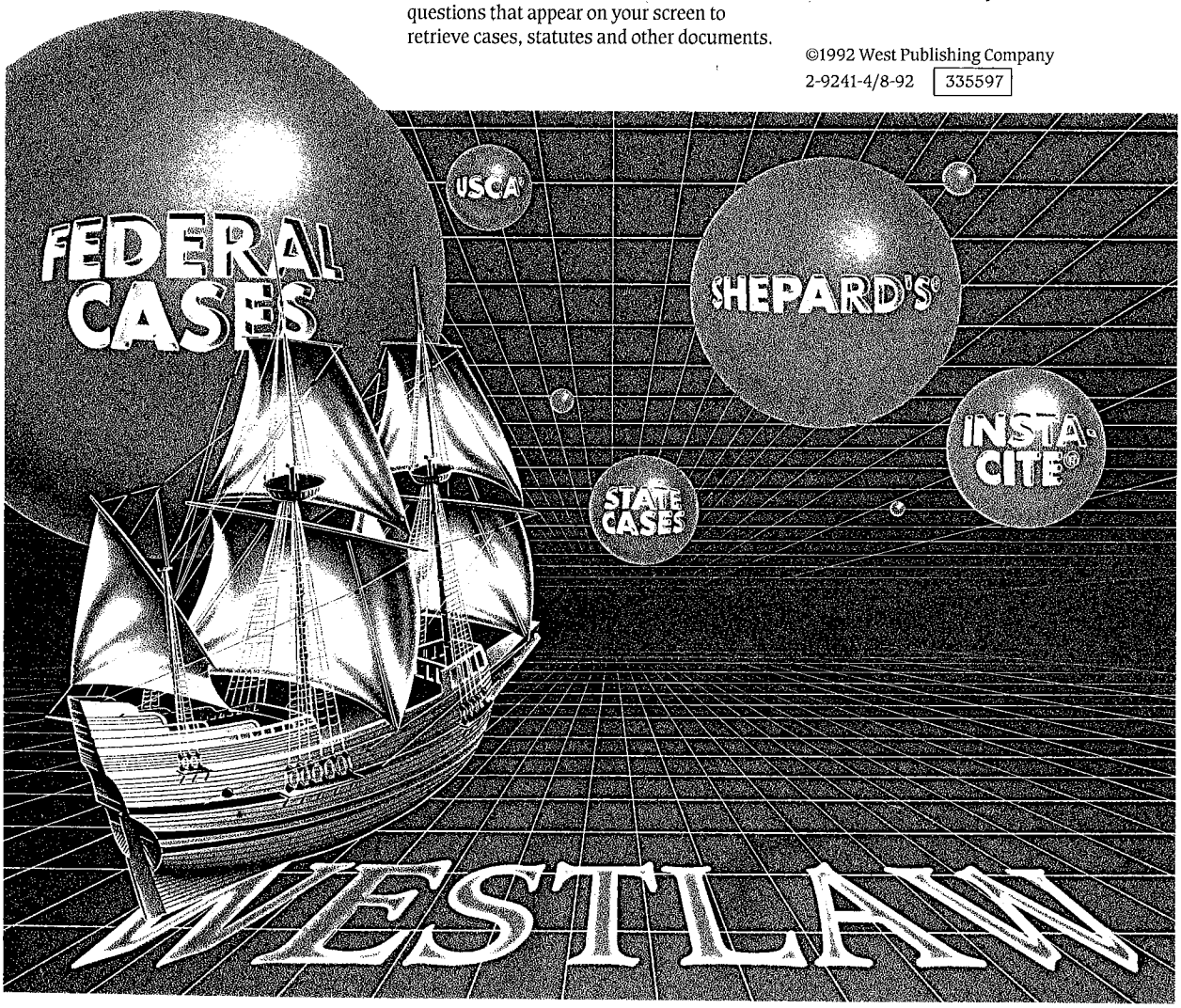

Utah BJ

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COVER: Manti LaSal National Forest, taken by Chris Wangsgard, Esq., shareholder, Parsons, Behle & Latimer.

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

Utah State Bar Association

Gentlemen:

I recently paid the Utah State Bar two checks, one for my License Fee for 1992/1993 membership and one for the Client Security Fund. I feel compelled to again observe at this juncture, the Bar's disgusting practice in billing me for a fund to pay the client of dishonest attorneys. There is no other professional organization which bills its member for the thievery of other members.

It is absurd and unfair to charge me for the derelictions of my competitors. Every attorney should be required to carry malpractice insurance. I do, and my costs as opposed to the non-coverage carrying attorney are much higher. This gives the dishonest and non-covered lawyer a competitive advantage over me already. Thus, that dishonest and non-covered lawyer is better able to market his services at a lower price and under the Bar's plan requiring me to reimburse his or her clients for his or her theft, I am forced to directly subsidize the thief's practice. Only in an organization such as the Utah State Bar would the paranoia of the heads of the organization require this absurd and feeble effort to improve their image.

If the Bar had the integrity, it would require malpractice insurance at a minimum dollar amount for every person admitted. No person under any circumstances should be allowed to conduct a legal practice without sufficient capacity to reimburse those whom he offends or injures out of negligence. And as a certainty he should not be able to steal from them without coverage for his theft. I suggest that the Bar take this issue before the governing committees and deal maturely and responsibly with it. The way to protect the public is to require attorneys to have a minimum capacity to respond for their defalcations – not to bill me for them

Yours very truly,

J. Franklin Allred
Attorney at Law

Dear Editor:

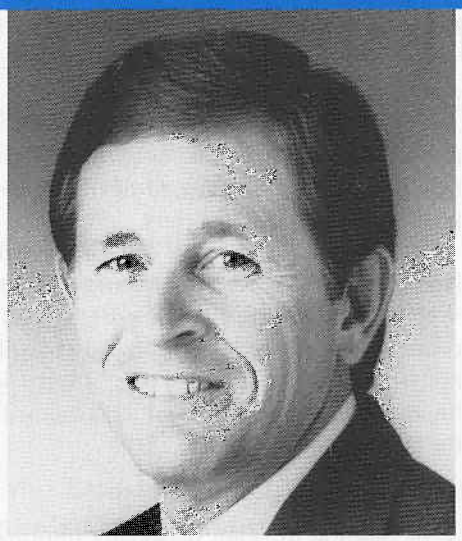
Brian M. Barnard recently resigned as Chair of the Young Lawyers Section "Sub-for-Santa" program after serving in that position continuously since 1978. He also recently left his position as Chair of the Section's Blood Bank and Blood Drive after overseeing that program since its inception in 1979.

While many of Mr. Barnard's activities with the Utah State Bar receive wide publicity, his tireless efforts on behalf of the Young Lawyers Section (whose membership qualifications have technically excluded him for roughly a decade) have gone largely unacknowledged. Recognition of Mr. Barnard as "Young Lawyer Emeritus" would seem appropriate.

Sincerely,

Anne Milne

M. David Eckersley



The Solo Practitioner – The Forgotten Lawyer?

By Randy L. Dryer

One of my primary goals this year as president is to address the concerns and needs of those Bar members who, as a group, historically have felt outside the mainstream of the organized Bar's activities and structure. The largest group of attorneys that fall in this category are sole practitioners and those who practice in firms of five or less attorneys.

MOST UTAH LAWYERS ARE SOLO PRACTITIONERS

I suspect most Utahns today believe that all lawyers work for large firms, earn six figure incomes, represent major corporations, win enormous jury awards, charge hefty fees, and do not have to work hard. Of course, we all know too well that this is not true. Most lawyers in Utah practice alone or in small firms. These lawyers represent and meet the day-to-day legal needs of average individual citizens and small businesses. According to figures published by Martindale-Hubbell in 1988 (the latest figures currently available), 57.7% of all attorneys in Utah practice alone or in firms of five persons or less. 41% are solo practitioners. The percentage of solo practitioners who are 40 years of age or older increases dramatically to 53%. The solo practice figure rises even further to 57.4% when applied only to female attorneys. Clearly, the solo/small firm practitioner is a significant portion of our membership.

THE NEGLECTED & FORGOTTEN LAWYER?

Despite their numerical superiority, the solo/small firm practitioner is often the forgotten, or at least less visible, element of our bar. The organized Bar has insufficiently acknowledged the major contributions to our citizenry by this group of lawyers. Moreover, the Bar has not adequately focused on the unique, and often difficult practice circumstances of the small firm practitioner which require different types of support than large firm lawyers. Although I believe the perception that the organized Bar is dominated by and caters to large law firms is grossly exaggerated, there is no doubt that large law firms have greater resources and that lawyers in a large firm generally have a greater ability to provide their time, effort and talent. As one solo practitioner told me when explaining why he does not serve on any Bar committees, "If I'm out of the office working on a Bar project, my office is basically shut down. Every hour I spend on a Bar committee is money out of my pocket."

SPECIAL TASK FORCE ON SOLO PRACTICE

During my term as President I hope to identify and address the special needs of the solo practitioners, recognize their contribution to the Bar and our community and provide the opportunity for those who wish to participate in Bar activities a realistic opportunity to do so. Toward that end, I have undertaken two programs.

The first is the creation of a special Task Force on Solo and Small Firm Practice. This task force is chaired by Richard Burbidge, a partner in a four-person firm. It will meet over the next ten months to assess and study the unique practice circumstances and needs of the solo and small firm practitioner. The task force is being modeled after a similar task force created by the New York State Bar Association. It is my hope that the Burbidge task force will give us solid information about the solo practitioner, his or her practice and provide the Bar commission with specific recommendations as to what the Bar may do to meet the needs of this important segment of our Bar.

INFORMATIONAL LUNCHEONS

To help me personally better understand the nature and challenges of a small

firm practice, I have been holding a series of informal luncheon meetings during the past month with groups of three to four solo practitioners. For someone who has practiced in a large firm my entire legal career, the sessions were eye-opening to say the least. At least among this group of approximately 50 solo and small firm practitioners I have concluded the following:

1. There is a general feeling of disenfranchisement from the organized bar. One attorney told me I was the only Bar president he had ever spoken with during his 30 years of practice.

2. The present legal market is extremely tight and many small firm practitioners are struggling to just survive.

3. Solo practitioners are feeling the pinch of the market efforts of large law firms.

4. Inadequate support systems and practice management assistance are two of the greatest concerns of the solo practitioner.

5. There is growing encroachment on much of the small firm's practice areas from collection agencies, title companies, public adjustors, alternative dispute resolution programs and increased usage of small claim courts due to higher jurisdictional limits.

The plight of the solo practitioner is not all bleak, however. I also learned that:

1. Most solo practitioners have intentionally chosen not to associate with a larger firm because of the increased flexibility and freedom a solo practice offers.

2. There is a deep sense of professionalism and pride in what the solo lawyer does.

3. Most solo practitioners are genuinely concerned about the profession and are willing to do their part, if asked, to assist in improving the profession and its image with the public.

NEW IDEAS

In addition to being personally informative, these meetings have spawned several new ideas, some of which have already been implemented. For example, as a direct result of a suggestion at one of the luncheons, the Office of Bar Counsel has changed its internal procedures for handling disciplinary complaints when the complaint is received during the pendency of a case and is made by an opposing party. In addition, a proposed change to the rule of civil procedure dealing with garnishments has been proposed and referred to the newly created collections law section for review and recommendation to the full commission for further action. In addition, as a direct result of the needs expressed during these luncheons, the Bar will be sponsoring a free breakfast mini-seminar this coming January which focuses on practice development and marketing tips for the solo practitioner.

These efforts are obviously meager in and of themselves, but hopefully will mark a new beginning for some very significant, ongoing work on behalf of the solo and small firm practitioner by the organized Bar. It is time the solo and small firm practitioner receives appropriate recognition for the significant contribution he or she makes to our Bar and the state.

Mini-Breakfast Seminar Series

FREE OF CHARGE/SPONSORED BY THE UTAH STATE BAR

October 21, 1992

What Every Civil Lawyer Should Know About the Criminal Justice System, or What to do When Your Friend, Neighbor or Child Calls at 1:00 a.m. and Says, "Help, I'm in Jail!"

G. Fred Metos, Criminal Defense Practitioner
Gregory G. Skordas, Salt Lake County Attorneys Office

November 18, 1992

Reporting on the Law, the Courts and the Legal Profession -- A Candid Discussion with Salt Lake's Courts Reporters, or Why Do Lawyers Get Such a Bum Rap from the Media?

Ted Cilwick, Salt Lake Tribune
Jack Ford, KSL News
Marnie Funk, Deseret News
Paul Murphy, KTVX News

December 16, 1992

State Legislative Issues Affecting the Legal Profession, or What are My Lawyer Legislators Doing for Me Anyway?

Utah's Lawyer Legislators

January 20, 1993

Ten Practical Pointers on Practice Development and Marketing for the Small Firm Practitioner, or How Do I Compete with the Big Firms without Busting the Budget?

Vicki Cummings, Marketing Director, Parsons Behle & Latimer
Lindsey Ferrari, Practice Development Consultant, Fabian & Clendenin

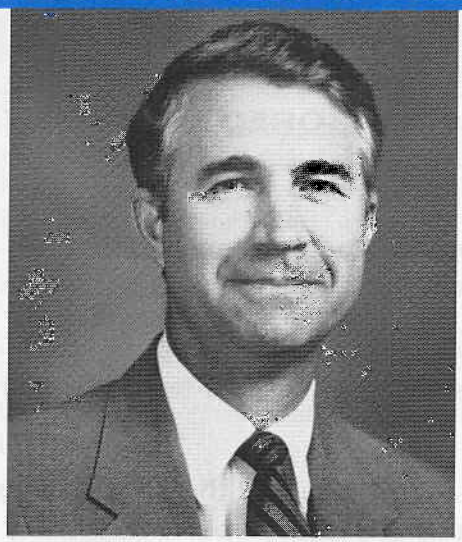
February 25, 1993

The Inner Workings of the Utah Court of Appeals, or How are Decisions Made up there Anyway?

Hon. Pamela T. Greenwood, Utah Court of Appeals
Mary T. Noonan, Clerk of Court, Utah Court of Appeals

ALL SESSIONS ARE OFFERED FREE OF CHARGE TO UTAH STATE BAR MEMBERS and will be held at the Utah Law & Justice Center, 645 South 200 East. Each session will begin at 8:00 a.m. and end promptly at 9:00 a.m. These are intended to provide useful and hopefully interesting information for lawyers but are not meant to be CLE offerings. A continental breakfast will be provided.

Please R.S.V.P. by calling 531-9095 at least one day in advance of the seminar you wish to attend.



Change in the Practice of Law

By Gayle F. McKeachnie

A few days before my article for the *Bar Journal* was due to be submitted for publication, John Baldwin, Executive Director of the Utah State Bar, faxed to me a copy of the article entitled "Law Practice Looking For Mr. Good Lawyer, What Clients Want" from the September issue of the *American Bar Association Journal*. I read the article and began to think about how the practice of law has changed since I graduated from law school and was admitted to practice. As I began to work at practicing law, I felt that my law school education had prepared me quite well to do most of the things I was assigned to do as a beginning lawyer in a well-established law firm. I had been taught how to do research, read cases, write briefs, analyze legal problems and prepare pleadings. As I embraced that work with enthusiasm, I gained self confidence and believed that I was contributing at least my share to the well-being and financial success of the law firm.

As I look back over the past 22 years since I was admitted to practice, I realize that while those skills are important and are not to be minimized in today's world, they are not necessarily the things that contribute most to the health and well-being in today's law practice. I realize that legal assistants, clerks, and in some cases beginning lawyers continue to do the things I did and once thought were so important and beneficial. In the changing environment of the legal profession, as in any other profession, it is important to manage change effectively. Perhaps one of the most important means of managing change is to accurately evaluate the needs of your clients, the driving force of the legal profession, for without them, there would be little need for lawyers.

WHAT DO CLIENTS LOOK FOR IN AN ATTORNEY?

Over the past year or two, I have spent some time thinking about what it is that lawyers really do and what clients look for in a lawyer. The American Bar Association article sent to me by John was written by Alan Levine, a marketing consultant with Hildebrandt, Inc. Mr Levine lists 14 things clients look for in a lawyer. All of those are worth being reminded of and should be reviewed by each of us from time to time. Prior to reading the article, I had concluded in my mind that what people hire us for as lawyers might be summarized as our *judgement and influence*. Admittedly, skills, and our license, which is the key to the court house, is involved. However, I believe that ultimately those things can be subsumed in either our judgment or our influence. I disagree with those who say a lawyer sells only his or her time. If we are selling only our time and not our judgment and influence, we are not performing our highest calling.

OUR MOST VALUABLE ASSET

It has been suggested that the most valuable asset any lawyer or law firm has is our clients or our client base. I have heard it argued that there are some things more important than clients such as lawyers, staff, library, physical plant, and other things. I am not persuaded. Without clients none of those things have much value. I now realize that my law school education did very little to focus my attention on the creation or maintenance of this most important asset of any attorney. In other words, not much time was spent in learning what clients want in a lawyer. I have talked to recruiters and young law students seeking employment or simply preparing to enter the practice of law on their own. More and more the focus has switched from what was your grade point average, were you on law review, were you elected to Order of the Coif, what are

your writing and reading skills to such things as how well does he or she get along with people, does he or she inspire confidence in clients, how much time is he or she willing to spend in service outside the law practice which generates confidence in his or her or our firm's judgment and influence.

DEVELOPMENT AND RETENTION

Ironically today, we have many lawyers who seem not to be able to make a living practicing law, while at the same time, a tremendous body of the populous is unable to find or afford satisfactory legal services. I think, in part, this phenomenon may be attributable to an unwillingness on our part to market ourselves and our services. The 14 things listed in the *ABA Journal* article and in most of the literature can be summarized in the simple word "attitude". Are we client-oriented or are we lawyer-oriented? In my mind marketing is not advertising; marketing is not preparation of brochures, newsletter or other such literature. Those things may play a role in a marketing plan. Marketing, in my mind however, is simply client development and retention and doing those things that make that client like us and allow the public to call upon the lawyer for his or her judgment and influence.

In most law firms today the question of whether a particular lawyer "kills more than he eats" is the key to whether one becomes a partner or a shareholder. In other words, most law firms now realize preparing the documents, giving legal advice and doing research, or in other words handling a client's case with proficiency and expertise is not enough to justify one to become an owner of the law firm business. The lawyer generally must be able to attract enough business for him or herself plus supply work for several more attorneys, legal assistants, etc. In other words, clients must like the lawyer. An attorney found lacking in this area is viewed as unworthy to be called a partner, shareholder, or owner of the firm. This harsh fact simply is a manifestation of the recognition that those traditional law school-taught skills are not the most important skills when one views the most important asset of a lawyer or law firm to be the client base.

Unlike 22 years ago, there is a great amount of literature on this subject. I list here just a few things found in my file and library, for any reader who wishes to pursue these ideas a little further. I have been told that the American Bar Association's best selling book ever is the book "How To Build A Law Practice" by Jay G. Foonberg. He has also written a book entitled "How to Get And Keep Good Clients". The old section of Economics of Law Practice of the American Bar Association published a booklet by Austin G. Anderson entitled "Marketing Your Law Practice; A Practical Guide to Client Development". Numerous law management consulting firms have published and sell books and pamphlets on this subject. Included in my library is the book entitled "The Successful Law Firm; New Approaches To Structure And Management" Second Edition by Bradford W. Hildebrandt and Jack Kaufman, published by Prentice Hall and "The Rainmaking Machine; Marketing, Planning, Strategies, and Management For Law Firms", by Phyllis Weiss Haserot, Garland Law Publishing.

In recent years there has been formed the National Association of Law Firm Marketing Administrators with headquarters in North Brook, Illinois. Newsletters, books, literature, speakers, etc., are available through that association. One of the best resources which I have looked to for years and I find to be the most valuable publication of the American Bar Association is the bi-monthly magazine "Law Practice Management" published by the Section Of Law Practice Management. There are many others.

Time and energy spent changing ourselves, our attitudes, and our focus, may be of more ultimate value to us and the well-being of our practices than single minded concentration on the traditional legal skills.

Let's Take Discipline Out of the Closet

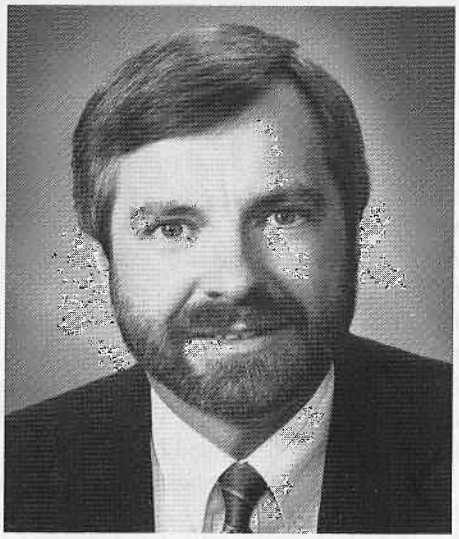
By Stephen A. Trost

In 1989 the American Bar Association appointed the Commission on the Evaluation of Disciplinary Enforcement ("McKay Commission") to study how effective the Bar has been in achieving the three stated goals of lawyer discipline, namely, protecting the public, promoting the administration of justice and promoting the standards of professional conduct.[1] About this same time the Utah Supreme Court appointed the Supreme Court Advisory Committee on Discipline with similar goals. The McKay Commission conducted public hearings throughout the country,[2] surveyed all Bar Counsels, the justices of the highest court in each state, as well as non-lawyer participants. The *Washington Post* summarized the findings of the Commission by describing the present disciplining of lawyers as "too slow, too secret, too soft and too self regulated."[3] As a result of this study, 22 formal recommendations were proposed by the Commission[4] and accepted by the American Bar Association's House of Delegates.

The appearance of a conflict of interest inherent in the self regulation of the Bar was repeatedly raised by the public at these hearings. To overcome this appearance of the "fox guarding the hen house", the Commission's very first recommendation was that *"Regulation of lawyer conduct must be exercised by the judiciary and not the organized bar."*[5] (emphasis added)

The Utah Committee has responded to this Recommendation with two proposed rule changes. First, the Bar Commission has been removed from its present position of reviewing cases prior to the Supreme Court, and second, the district courts are proposed as the trial court to hear the most serious disciplinary cases rather than the present hearing panels.[6]

The removal of the Bar Commission as an intermediate appellate body will expedite the procedure and answer, in part, the public charge of "too self regulated" as well as the perception by some members of the Bar of favoritism toward the Office of Bar Counsel in as much as the Commission hires Bar Counsel.



STEPHEN A. TROST was appointed Utah State Bar Counsel on February 1, 1990. Prior to his appointment he was General Counsel for a propellant manufacturer, engaged in the private practice of law in Salt Lake City and Chicago, was the Managing Attorney for the Southern Cook County Public Defenders Office and was an attorney for the Department of Justice responsible for the defense of the U.S. Postal Service for actions filed under the Federal Tort Claims Act. Mr. Trost graduated from the University of Notre Dame in 1970 and the DePaul College of Law in 1974.

The use of the district courts is based, in part, on perception, but also is grounded in 1) professionalism, 2) scheduling, and 3) efficiency.

PERCEPTION

The perception of the public, that in a system where lawyers were judging lawyers favoritism would abound, resulted in the present three member hearing panel consisting of two lawyers and one lay person. Presumably the lay person acted as a check on the perceived potential of the two lawyer members sharing a bias in favor of the accused lawyer. In fact, this perception was found not to be well founded as noted in affidavits from the four lay members of the hearing panels submitted in support of the proposed rules substitution of the district courts for the present hearing panels. Typical was Father Gerald Merrill's statement that, "Although I felt that having a lay person on hearing panels was a good gesture to assure fairness for the parties, I don't feel that it was or is necessary."[7] Compounding this perception of good ole boys taking care of their own was the setting of the trials in the privately owned Bar facilities which tended to discourage public access, notwithstanding the provision in the present rules to the contrary.[8]

We all are painfully reminded, almost daily, that as a profession, the practice of law is under relentless attack. And although the perceptions discussed above are in opposition to reality, nonetheless we must do all that we can to combat even baseless perceptions. The use of the district court effectively dispels the perceptions related to self-regulation with no loss of rights for the parties. Screening Panels will continue in their present role hearing all initial complaints, imposing private discipline (private reprimands, probation, etc.) and determining whether the charges of misconduct are serious enough to warrant a formal complaint[9] which would then be filed with the clerk of the respective district court. Thus, Screening Panels will continue to conduct these proceedings confidentially and thereby protect the accused lawyer from defamation based upon a malicious and unfounded complaint. It should also be noted that approximately 75% of all cases are disposed of by the Screening Panels.

PROFESSIONALISM

Providing professional adjudicators will dramatically enhance respect for the disciplinary system both from the public and the parties. Thirteen other jurisdictions have jettisoned volunteer adjudicators for some form of judicialization.[10] Many noted authorities have publicly stated that "having professional full-time judges in the lawyer discipline system is now a definite trend in the nation."[11] District court judges are trained (by the Judicial College and ongoing seminars), experienced, and well paid professional adjudicators. Hearing Panel members are lawyers in private practice serving their profession. Although well intentioned, dedicated and competent, they lack judicial training and the demands of their practice must be considered in scheduling hearings.

SCHEDULING

Presently, one full-time staff person dedicates approximately half of her time to scheduling hearing panels. Frequently, cases are continued due to a scheduling conflict with a hearing panel member. Frequently a trial begins on a date certain, and when the trial lasts longer than anticipated, continued to a future date, and when not concluded at that time, continued again. Compounding the problem is that on more than one occasion, lay members have simply "forgotten" to show up. Commenting on scheduling difficulties and other inefficiencies in the present system, Ms. Ron, as Clerk of the Hearing Panels states in her affidavit:

Utilizing the district courts will eliminate these ambiguities and associated inefficiencies.

3. *Major problems* have exhibited themselves *as a result of the current process* of setting hearings.
4. *The process of setting hearings is very slow.* Schedules between attorneys and non-attorney members currently serving on the panels must be coordinated. . .
5. The cost of copying and sending files to members of the panels has increased dramatically. The entire contents of each file must be transmitted to three panel members on each case.
6. On occasion, room availability has been severely limited leaving larger gaps between hearing dates.[12] (emphasis added)

Further, the lay members of the Hearing Panels are greatly disadvantaged under the present system, as noted by Stanford Darger. In his affidavit in support of eliminating Hearing Panels he stated, "the rules of evidence were too technical for me to grasp and formulate an opinion during deliberations."[13]

EFFICIENCY

In addition to the inefficiencies related to the scheduling problems discussed above, unnecessary lawyer time and delays are expended explaining the "Court" (i.e. "Before the Board of Bar

Commissioners, Hearing Panel") and its "subpoenas" issued under the signature of John Baldwin, Executive Director, and embossed with the seal of the "Utah State Bar" to third parties, particularly employers when employees require time off to testify or documents are requested. Utilizing the district courts will eliminate these ambiguities and associated inefficiencies.

Finality of the judgments also will greatly expedite the process and has been successfully implemented in other jurisdiction.[14] Little is to be gained by the routine review of disciplinary cases where neither party has raised as an issue error in the proceedings, inadequate proof or a disproportionate sanction. As presently proposed the district court would enter and order imposing discipline subject to appeal to the Utah Supreme Court upon either party filing a Notice of Appeal. Enforcement of the judgment would be stayed as per Rule 62(d) U.R.C.P. Arguably, the Supreme Court and the Board of Bar Commissioners acted as a "Board of Equalization" to assure that Respondents were receiving similar sanctions for similar conduct when no error was alleged by either party. However, under the proposed rules Sanctions are specifically standardized based on the mental state and harm involved. Thus, a district court judge will be able to make a finding with regard to these elements and by referring to the proposed Standards for Imposing Lawyer Sanction, Rules 1-6, impose the appropriate discipline. Accordingly, there should be little variance in sanctions from one district court judge to another and with the proposed standards a good basis upon which an aggrieved party can claim error in an appropriate appeal.

Presently, neither the Bar as a whole nor the public have a grasp of the procedural rules controlling discipline and consequently are viewed with suspicion by both. More frequently than not, original pleadings are "filed" with the Office of Bar Counsel rather than the Clerk of the Court who, according to the rules, is the Executive Director of the Bar. Even those Respondent's and Respondent's Counsel who are sufficiently acumen to consult the rules as published in Michie's Utah Court Rules will fail to find even a single case annotating the Rules. In contrast, by adopting the district court model and attendant rules of civil procedure and evidence, all the players will have a long and familiar history of procedure and a body of law to consult and rely upon.

Perhaps the most frequently heard objection to judicializing the process as proposed is the perception that a lawyer may face discipline before a judge that he/she has in the past had either 1) personal difficulties with, or 2) has taken professional exception to, or 3) lacks confidence in. Since all the Rules of Civil Procedure would apply a lawyer could move for assignment of another judge by relying on Rule 63 U.R.C.P. to show prejudice, or Rule 63A U.R.C.P. without an affidavit of prejudice by consent of the parties. The Board of Bar Commissioners has extended these provisions by proposing an amendment providing for the removal of the assigned judge and reassignment to a judge outside the district where the lawyer practices *without a showing of prejudice or the consent of the other party*. The Office of Bar Counsel supports this amendment. With these available options this objection should be abated.

In short, formal discipline has outgrown an inefficient system of volunteer adjudicators, with parties laboring under a labyrinth of unfamiliar procedural rules wholly lacking in judicial interpretation and perceived by the public as a good ole boy network inaccessible for all practical purposes.

[1]Proposed Procedures of Lawyer Discipline and Disability, Rule 1; Report of the Commission Evaluation of Disciplinary Enforcement, A.B.A., May 1991; p. 97.

[2]Los Angeles, New York, New Orleans, Chicago, Portland.

[3]*Washington Post*, Commentary by Mary Collins, January 28, 1992.

[4]Report of the Commission Evaluation of Disciplinary Enforcement, *Supra* note 1.

[5]*Id.* at p. IV and P. 1.

[6]Rule 11, proposed Rules of Lawyer Discipline and Disability.

[7]Affidavit of Father Gerald Merrill, dated November 26, 1991.

[8]Rules XII(h), Procedures of Discipline of the Utah State Bar, July 1, 1987.

[9]Rule 3, proposed Rules of Lawyer Discipline and Disability.

[10]Arkansas, California, Connecticut, Washington D.C., Florida, Illinois, Iowa, Maine, Tennessee, Texas, Virginia, Wisconsin, and Wyoming.

[11]*American Bar Association Lawyer Manual on Professional Conduct*, Report on National Organization of Bar Counsel Proceedings, February 9, 1991, p. 39.

[12]Affidavit of Leslee A. Ron, dated March 30, 1992.

[13]Affidavit of Stanford Darger, dated November 25, 1991.

[14]California has had finality in the form of Rule 954 since 1990 with excellent results recording to Stuart Forsyth, Chief Administrator.

Life Without Possiblity of Parole – A New Sentencing Option in Capital Cases

By Crieghton C. Horton II

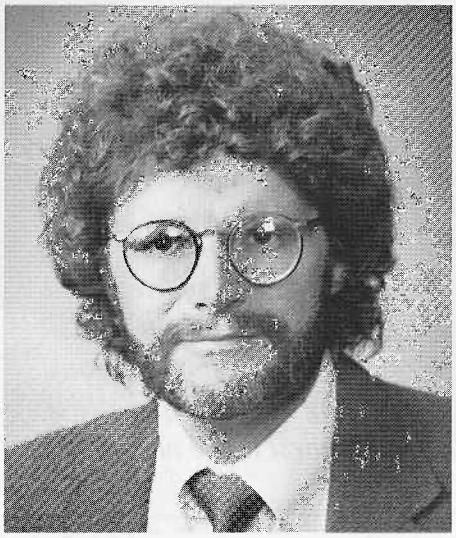
During the 1992 General Session of the Legislature, major changes to Utah's death penalty statutes were enacted through the passage of H.B. 68 (Limitation on Board of Pardons' Power to Commute the Death Sentence) and H.B. 73 (Capital Offenses Penalty Amendment).

H.B. 68 provides that the Board of Pardons may not, in commutation hearings, review legal issues which already have been the subject of judicial review, or which should have been raised during the judicial process.[1] It seemed an anomaly that previously-existing law empowered the Board to revisit legal and constitutional issues which already had been decided in the courts, especially since Board members are not judges and need not be lawyers.

The other major change contained in H.B. 68 is that, should the Board grant commutation to an offender who has been sentenced to death, it may only commute the sentence to life in prison without parole. That is an option which did not exist prior to the amendment.

While H.B. 68 deals with the Board of Pardons' commutation power and procedures, H.B. 73 pertains to the trial level and provides for the newly-created capital sentencing option of life in prison without parole.[2] Previously, only two sentencing options were recognized in Utah law, death or life imprisonment.[3] Although not generally understood by either juries or the public in general, a sentence of life imprisonment did not preclude the possibility of parole by the Board of Pardons.

The new law retains both death and life imprisonment as sentencing options, adding life without parole as an intermediate sentencing alternative. The procedure is that the jury first considers whether the death penalty should be imposed. If the jury is not unanimous in favor of death, it then considers life without parole. If not unanimous in favor of life without parole, the jury is discharged and the judge imposes the sentence of life imprisonment under Utah Code Ann. §76-3-207.



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The views expressed in the article are the author's and not necessarily those of the Attorney General's Office.

H.B. 73 provides that the sentencing option of life without parole "has no effect on sentences imposed in capital cases prior to April 27, 1992." The law does allow a defendant who commits a capital offense prior to the effective date but whose sentencing falls thereafter to elect whether to proceed under the old law or the new. This allows a defendant to determine to what extent he believes the new sentencing option may be of benefit to him, consistent with the principle that, where the legislature amends a criminal statute which lowers the penalty for the offense is entitled to the benefit of the reduced penalty.[4] The new law gives the defendant the choice because in context of a capital case, the question of whether the new sentencing option benefits or disadvantages the defendant is not readily apparent, as it is impossible to know which of the other alternatives the judge or jury might choose if life without parole is not given as an option.

To illustrate, if the jury is not given the option of choosing life without parole and a death verdict is returned, the defendant can argue that he should have had the benefit of the less severe life without parole option, which the jury might have chosen instead of death. On the other hand, if the jury is given the choice of life without parole and chooses it, the defendant can argue that, since a death verdict was not returned, the jury did not find it to be an appropriate penalty in the case. Consequently, but for the new sentencing option, he would have received the less stringent penalty of life imprisonment with the possibility of parole.

The choice of sentencing options is only given to those defendants who committed capital murder before April 27, 1992, but who will be sentenced thereafter. Those who commit capital murder after the effective date of the legislation will be subject to the three-option statutory scheme.

While many other states have had life without parole as a sentencing option for many years, previous efforts to amend Utah's capital statutes had failed. In 1990, then Senator Frances Farley introduced a bill which would have repealed the death penalty and replaced it with life without parole. The bill did pass in the Senate after it was amended to retain the death penalty

option. At that time, only one prosecutor, the Millard County Attorney Warren Peterson, spoke in support of the legislation, seeing it as a way to bridge the large gap which existed between the two available sentencing options. Still, many who supported the bill, including criminal defense attorneys, were perceived as principally interested in making inroads against the death penalty. Those who opposed it characterized a vote in favor of the bill as a vote against capital punishment, and it was defeated in the House of Representatives.

This year, H.B. 68 and H.B. 73 were sponsored by Rep. Merrill F. Nelson and supported by the Statewide Association of Prosecutors (SWAP) and the Attorney General's Office. Those supporting the bills were not perceived as being "soft" on capital punishment, and the bills were presented as public safety legislation designed to strengthen the life imprisonment option, not to weaken the death penalty.

One of the reasons that many prosecutors supported the change to life without parole is that Utah's standard for imposing the death penalty is the highest in the nation, resulting in relatively few death verdicts compared to the number of capital convictions. Consequently, a number of murderers whom most people would agree should never be paroled back into society have not received the death penalty and have been eligible for parole consideration.

Utah statutes and case law require all of the following before a death verdict can be returned:

a. A finding of an intentional or knowing killing *plus* one or more aggravating circumstances established beyond a reasonable doubt at the guilt phase of the trial;[5] and

b. A finding at the penalty phase that the aggravating circumstances outweigh the mitigating circumstances established beyond a reasonable doubt, *plus* an additional finding, beyond a reasonable doubt, the the death penalty is justified and appropriate in the circumstances.[6]

Further, all twelve jurors must unanimously agree on a death verdict. If one juror does not agree, the court must impose the sentence of life imprisonment.[7]

Perhaps the most persuasive argument in favor of adding life without parole option is one based on Utah's actual experience. The Legislature was presented with case histories of some of this state's most notorious cold-blooded killers who had benefitted from Utah's all-or-nothing sentencing approach. These included serial killer Joseph Paul Franklin, multiple murderers Norman Newsted and Douglas Kay, double murderer Michael Moore, double and child murderers Julio Gary Valdez and Dan Lafferty, sex murderer Ronald Kelly, and torture murderer Lance Wood. All were sentenced to life imprisonment. Although the Board of Pardons is not likely to release any of the convicted murderers listed above any time soon, the life sentences they received allow for parole consideration.

One of the reasons that many prosecutors supported the change to life without parole is that Utah's standard for imposing the death penalty is the highest in the nation. . .

The new law has attractive aspects to prosecutors and criminal defense attorneys alike. For a prosecutor and a victim's family, it provides an option which satisfies the need for public safety in cases where death verdicts are not returned, but where the jury unanimously agrees that the offender should never be released from prison. The new sentencing option will also provide a victim's family with a greater sense of closure and finality since the family will not have to appear at parole hearings or undergo the renewed publicity associated with parole consideration.

On the defense side, attorneys can now argue that concern for the possibility of parole should not influence the jury in its decision whether the ultimate penalty of death should be imposed. Another potential benefit is that the new law will provide both the prosecution and the defense with another option to consider should they be inclined to negotiate a capital case.

Given the nature of capital litigation, it is virtually impossible to significantly change the death penalty statutes without creating the potential for controversy. During July, Utah's new laws drew nationwide attention when convicted "Hi Fi" killer William Andrews attempted to derive some benefit from the new laws, although this certainly was not the Legislature's intention.

Andrews' attorneys petitioned the Board of Pardons to grant a second commutation hearing to consider whether the new life without parole alternative should be applied to his case. The petition raised the question of whether the new laws created any "new and substantial issue" within the meaning of the Board's regulation, which would serve as the basis for a second commutation hearing. Andrews had hoped that the Board might be willing to commute his death sentence to life without parole even though it was not willing to commute his sentence at a previous hearing when life without parole was not available as a commutation option. The Board of Pardons denied Andrews' request for a second commutation hearing.[8] Despite several last minute appeals and efforts by Andrews' attorneys to postpone the scheduled execution, Andrews was put to death on July 30, 1992.[9]

At the trial level, it is impossible to predict to what extent the new option may result in a sentencing decision of life without parole where the death penalty might otherwise have been imposed. But given Utah's experience and its high standard for imposing the death penalty, it seems likely that most cases will fall the other way; that is, a significant number of offenders who might have been sentenced to life imprisonment under the old law will now receive life without parole.

And for those cases which most persuasively call for the ultimate sanction allowed by law, the death penalty will remain a viable sentencing option in Utah.

[1]H.B. 68 was enacted as Utah Code Ann. §77-5-5.5.

[2]H.B. 73 was enacted as Utah Code Ann. §76-3-207.5 and amended Utah Code Ann. §76-3-201, 76-3-206, 76-3-207 and 77-27-9.

[3]Utah Code Ann. §76-3-206 (1991).

[4]*Belt v. Turner*, 483 P.2d 425 (Utah 1971).

[5]Utah Code Ann. §76-5-202.

[6]*State v. Wood*, 648 P.2d 71 (Utah 1981).

[7]Utah Code Ann. §76-3-207.

[8]*See, Andrews v. Utah Bd. of Pardons*, 192 Utah Adv. Rep. 8, 9-10 (Aug. 11, 1992) (per curiam); *Andrews v. Utah Bd. of Pardons*, 192 Utah Adv. Rep. 10, 11-12 (Aug. 11, 1992) (supplemental opinion).

[9]*See generally, State v. Andrews*, 191 Utah Adv. Rep. 30, 31 (July 28, 1992). Justice Christine M. Durham's dissenting opinion provides extensive discussion of the constitutional impact of the new sentencing statute. *Id.* at 38-39 (Durham J. dissenting).

Utah Employment Law Since *Berube*

*By Janet Hugie Smith and Lisa A. Yerkovich**

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Since its ground-breaking decision in *Berube v. Fashion Centre Ltd.*, 771 P.2d 1033 (Utah 1989), the Utah Supreme Court has expanded the list and application of exceptions to the employment at-will doctrine in Utah. The result has been a steady tightening of restrictions on Utah employers' absolute right to terminate employees. This article will discuss the limitations to Utah's at-will employment doctrine and other recent developments in Utah employment law.

*Special thanks to Robert O. Rice, a third year law student at the University of Utah, for his assistance on the first section of this article, and to Robert Wilde for his contribution of the final section entitled Employers' Torts.

BERUBE

Before *Berube*, the at-will employment rule in Utah was that, in the absence of an agreement to the contrary, an employment contract for an indefinite time could be terminated at the will of either party.[1] The *Berube* court modified that rule, holding that the employment-at-will doctrine amounted to only a rebuttable presumption that an employer could terminate an employee at any time. Thus, under *Berube*, if the presumption of an at-will employment contract could be defeated, an employee could have a cause of action for wrongful discharge.

The *Berube* opinion, written by Justice Durham, identified three exceptions under which the presumption of a valid at-will employment contract could be defeated. The three exceptions were (1) an exception based on implied-in-fact contractual terms, (2) a public policy exception, and (3) an exception founded upon an implied-in-law covenant of good faith and fair dealing.

A majority of the *Berube* court, however, adopted only the implied-in-fact exception.[2] Under that exception, the *Berube* court found that language in an employment manual may constitute implied-in-fact contractual terms that restrict the absolute right of an employer to terminate an employee.[3] Accordingly, the *Berube* court found that the employer's termination of an employee without cause violated implied-in-fact contract terms that only allowed termination for cause.

LOCATING IMPLIED-IN-FACT CONTRACT TERMS

Since *Berube*, Utah courts have recognized some additional sources from which implied-in-fact contract terms may arise, thus creating an exception to at-will employment. Each source conforms to the *Berube* court's recognition that implied-in-fact contract terms may arise from "the conduct of the parties, announced personnel policies, [and] practices of that particular trade or industry. . ." *Id.* at 1044.

Progressive discipline procedures may give rise to implied-in-fact contract terms that limit an employer's ability to immediately discharge an employee. For example, in *Arnold v. B.J. Titan Services Co.*, 783 P.2d 541 (Utah 1989), the Utah Supreme Court held that a manual describing detailed discipline procedures created an implied-in-fact contract requiring that an employee not be discharged except in compliance with those procedures.

Bulletins distributed to employees may also serve as a basis for limiting an employer's ability to discharge an employee. In *Howcroft v. Mountain States Tel. and Tel. Co.*, 712 F. Supp. 1514 (D. Utah 1989), the court held that a "Management Bulletin" distributed to the employee ten years after he was hired and stating that certain employees would not be discharged if alternative employment within the company was available could be used as evidence of an implied-in-fact contract. *Id.* at 1519.

Similarly, the Supreme Court of Utah concluded in *Caldwell v. Ford, Bacon & Davis Utah, Inc.*, 777 P.2d 483 (Utah 1989), that an"Employee Operations Bulletin" contained in an employee manual offered evidence that an implied-in-fact contract was present. In *Caldwell* the court upheld summary judgment for the employer because the employer followed the procedures outlined in the employment manual regarding termination without cause.

Utah courts continue to recognize that employment manuals, first addressed in *Berube*, may create an implied-in-fact contract barring an employee's termination without cause. The Utah Court of Appeals did so in *Gilmore v. Community Action Program*, 775 P.2d 940 (Utah Ct. App. 1989), when it ruled that summary judgment was inappropriate where the employee could show that the employer's policy manual altered his status as an at will employee. The *Gilmore* court held that evidence of an implied-in-fact employment contract may also be derived from oral agreements. Thus, discipline procedures and other employee requirements that are communicated orally may give rise to implied-in-fact contract terms. Additionally, in *Lowe v. Sorenson Research Co., Inc.*, 779 P.2d 668 (Utah 1989), the Utah Supreme Court held that an employee, who was injured and was receiving substantial benefits from her employer's insurance company when she was terminated, was discharged in violation of implied-in-fact contract terms contained in the company manual.

Progressive discipline procedures may give rise to implied-in-fact contract terms that limit an employer's ability to immediately discharge an employee.

EMPLOYER'S DISCLAIMERS MAY PRESERVE AT-WILL STATUS

Employer's disclaimers found in employee manuals may prevent discharged employees from bringing actions for termination in violation of implied-in-fact contract terms. In *Johnson v. Morton Thiokol, Inc.*, 818 P.2d 997 (Utah 1991), the Utah Supreme Court held that a clear and conspicuous disclaimer prevents employee manuals from rising to the level of an implied contract. The *Johnson* court recognized that although an employee manual or other document may modify an at-will relationship between the employee and employer, a disclaimer in the employee handbook which expressly denied altering the at-will employment relationship reserved the employer's right to discharge the employee at will. Note, however that two concurring justices wrote that an employer's course of conduct or de facto policies may negate the effect of written disclaimers and assertions that an employment contract will remain at-will. *See Id.* at 1004 (Stewart, J., concurring, joined by Durham, J.)

THE PUBLIC POLICY EXCEPTION TO THE AT-WILL DOCTRINE

In addition to adopting the implied-in-fact contract exception to Utah's at-will employment doctrine, the Utah Supreme Court now recognizes a public policy exception to at-will employment. This innovation began in *Berube*, where the Court commented favorably on a public policy exception to at-will employment but failed to agree on the scope of such an exception. *Compare Berube*, 771 P.2d at 1042-43 (Durham, J., joined by Stewart, J.) *with* 771 P.2d at 1051 (Zimmerman, J., concurring in the result).

The Utah Supreme Court revisited the issue of whether a public policy exception to Utah's at-will employment doctrine should be recognized in *Hodges v. Gibson Product Co.*, 811 P.2d 151 (Utah 1991). *Hodges* involved an employee who was discharged after being falsely accused of stealing company funds. Later, the employee's manager admitted to stealing company funds. The employee sued the employer and the manager for wrongful discharge and malicious prosecution. The *Hodges* court found that the evidence supported a verdict against the employer and manager on the malicious prosecution charge. Additionally, the court found that the employer was liable for the manager's tort of malicious prosecution because the manager was acting to further the employer's interest in regaining the stolen money.

A majority of the *Hodges* court, however, refused to join the lead opinion that discussed in dictum the public policy exception to at-will employment. *Id.* at 165-66 (opinion of Durham, J.); at 168 (Howe, J., concurring); at 168 (Zimmerman, J., concurring in the result, joined by Hall, C.J.). Justice Stewart, author of the lead opinion in *Hodges*, wrote that public policy may be the basis for a wrongful discharge action. Relevant public policy, Justice Stewart found, may be located in state constitutional provisions, statutes and judicial decisions. Relying on Utah's false accusation statute, Justice Stewart argued that the plaintiff employee was wrongfully discharged in violation of a public policy barring termination because of a false accusation. A majority of Justice Stewart's colleagues, however, did not join in his position.

While the public policy exception did not muster a majority in *Hodges*, it did

win over the court in the recent case of *Peterson v. Browning*, 187 Utah Adv. Rep. 3 (Utah 1992). In Peterson, the United States District Court for the District of Utah certified to the Supreme Court of Utah the following question: "Does an action for termination of employment based upon the public policy exception to the employment-at-will doctrine for violation of or refusal to violate federal, other state, or Utah law sound in tort or contract?" *Id.* Justice Durham, writing for the majority, divided the certified question in two: Does the public policy exception encompass federal and Utah law as well as laws of other states and does that exception sound in tort or contract? *Id.*

Answering the first question, the *Peterson* court held that a discharge in violation of public policy is actionable under Utah law. The *Peterson* court went on to identify the Utah constitution and Utah statutes as sources of public policy, as long as those sources invoke public policy concerns that are clear and substantial.[4] *Id.* at 4-5. Additionally, the *Peterson* court found that federal and other states' laws may provide the basis for an action under the public policy exception as long as a violation of a state or federal law contravenes the clear and substantial public policy of Utah. *Id.* at 4.

It is worth noting that the Utah Supreme Court will likely narrowly apply the public policy exception to at-will employment. Associate Chief Justice Howe emphasized as much in a concurring opinion in *Peterson*. "Accordingly," Associate Chief Justice Howe wrote, "I do not contemplate that the exception will be frequently invoked. . ."

TORT OR CONTRACT DAMAGES

Answering the second question identified by Justice Durham, the *Peterson* court agreed with the "overwhelming majority" of courts recognizing the public policy exception and found that an employee's discharge in violation of public policy sounds in tort rather than in contract. *Id.* at 5. The court relied on several grounds for coming to such a conclusion. First, the court found that an employer's liability stems from a violation of a legal duty, as opposed to a contractual one, to refrain from discharging an employee in violation of public policy. Further, the court found that bringing an action for discharge in violation of public policy in tort makes available punitive damages that "will exert a valuable deterrent effect on employers. . ." who might otherwise terminate employees in violation of public policy. *Id.* at 6.

The *Peterson* court's holding that an action for discharge in violation of public policy lies in tort prompted a vigorous dissent from Justice Zimmerman, joined by Chief Justice Hall. Instead of placing the action in tort, Justice Zimmerman advocated a two-layered system of recovery in contract for the employee discharged in violation of public policy. *Id.* at 8 (Zimmerman, J., dissenting). The first layer would allow recovery of contract damages. The second layer would allow the pursuit of traditional tort remedies, including punitive damages, if the employee could prove an independent tort, such as intentional infliction of emotional distress.

It is worth noting that the Utah Supreme Court will likely narrowly apply the public policy exception to at-will employment.

Justice Zimmerman opposed placing an action for discharge in violation of public policy in tort for several reasons. First, Justice Zimmerman argued that his two-layered system of recovery would provide the same deterrent effect provided by the availability of punitive damages in the tort action supported by the majority. That deterrent effect would be available under the two-layered recovery system because punitive damages would be available in an independent tort action. In support of his assertion, Justice Zimmerman noted that in *Hodges*, the plaintiff recovered under the two-layered system contract damages for wrongful discharge and punitive damages in a tort action for malicious prosecution.

Justice Zimmerman also argued that his two-layered recovery system, unlike the majority's system of recovery in tort, would avoid the negative effects of "open-ended" damage awards on pervasive employment contracts. Justice Zimmerman argued that allowing a wrongful discharge action to sound in tort would "increase the uncertainty for the employer attempting to appraise its risk and adjust its conduct to avoid that liability." *Id.* at 11. On the other hand, the two-layered system, Justice Zimmerman wrote, "would increase the certainty of the available damages, thus decreasing the indeterminacy of the law and reducing the breadth of the unintended swath our decision will cut in this sensitive area." *Id.*

THE IMPLIED COVENANT OF GOOD FAITH EXCEPTION TO THE AT-WILL DOCTRINE

The final exception to Utah's at-will doctrine addressed in *Berube*, the exception founded upon an implied-in-law covenant of good faith and fair dealing, has not been adopted in Utah. The Supreme Court of Utah recently dealt with the implied covenant of good faith in *Brehany v. Nordstrom, Inc.*, 812 P.2d 49 (Utah 1991). In that case, the court held that every contract is subject to an implied covenant of good faith. However, the *Brehany* court found that such a covenant cannot be construed to change an indefinite-term, at-will employment contract into one requiring good cause to justify a discharge or requiring that certain procedures be followed in effectuating a discharge.[5] Nevertheless, the *Brehany* court held that there was a triable factual issue regarding whether the employee was discharged in violation of implied-in-fact contractual procedures in the employer's manual. Accordingly, the court remanded plaintiff's claim for breach of contract to the trial court.

In summary, the Supreme Court of Utah has opened wider the court room door to plaintiffs with wrongful discharge actions. Such actions may now be maintained under a broadened implied-in-fact contract theory limiting an employer's right to discharge an employee without cause. Still, employers may protect themselves by publishing in their policy manuals, and acting according to, concise disclaimers that state their intent to maintain at-will relationships. Additionally, plaintiffs may now bring actions for wrongful discharge under the public policy exception to at-will employment. For employers, actions under the public policy exception carry with them the specter of large punitive damages awards. Employers

may, however, receive some solace from Associate Chief Justice Howe's concurring opinion in *Peterson*:

> The public policy exception is narrow enough in its scope and application to be no threat to employers who operate within the mandates of the law and clearly established public policy as set out in the duly adopted laws. Such employers will never be troubled by the public policy exception because their operations and practices will not violate public policy.

187 Utah Adv. Rep. at 6 (quoting *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 878 (Mo. Ct. App. 1985).

SCOPE OF EMPLOYMENT

In recent decisions the Utah Supreme Court has also explored the contours of scope of employment. For example, in *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989), the court re-emphasized the three criteria that determine whether an employee's acts are within the scope of employment. An employee's conduct is within the scope of conduct if the employee's conduct:

> (1) is of the general kind the employee is retained to perform,
>
> (2) is motivated by the purpose of serving the employer's interest, and
>
> (3) occurs within the hours of the employee's work and the ordinary spatial boundaries of the employment.

Id. at 1056-57. Applying those factors, the *Birkner* court found that a therapist for Salt Lake County who engaged in sexual conduct with a patient did so outside his scope of employment because the sexual conduct was not the general kind of activity that the therapist was employed to perform and was not intended to advance any interest of the employer. Nevertheless, the *Birkner* court found that the county could be liable for the therapist's acts on a theory of negligent supervision.

In the next case discussing scope of employment, *Clover v. Snowbird Ski Resort*, 808 P.2d 1037 (Utah 1991), the court employed the *Birkner* test. The *Clover* court concluded that there was sufficient evidence for a jury to conclude that a ski area employee who was skiing both for pleasure and for work purposes was within the scope of employment when he collided with another skier, injuring the other skier. Even though the employee had taken several ski runs before returning to work at the ski area, the court found there was enough evidence for a jury to conclude that the employee had resumed employment at the time of the collision or that the deviation of taking several ski runs was not so substantial as to constitute a total abandonment of employment.

The Utah Supreme Court appears willing to apply the Birkner test somewhat broadly for determining scope of employment. Thus, employers whose employees are moderately deviating from normal work activities, as was the case in *Clover*, may still be found liable for their employee's negligence.

EMPLOYERS' TORTS

On occasion employees attempt to sue their employers for damages arising from the tortious actions of fellow employees. In *Mounteer v. Utah Power and Light Co.*, 176 Utah Adv. Rep. 11 (Utah 1991), the plaintiff claimed damages arising from, among other things, slander and intentional infliction of emotional distress. In addressing the intentional infliction of emotional distress issue, the Supreme Court reaffirmed its holding in *Bryan v. Utah International*, 533 P.2d 892 (Utah 1975) that an employer is protected by the exclusivity provisions of the Workers' Compensation Act unless the employer "intended or directed" the tortious act.

In addressing the slander claim the court examined the Workers' Compensation Act in more detail and held that the act dealt with types of damages rather than types of claims. According to the court the damages generally addressed under the Workers' Compensation Act include those for personal and emotional injuries but not those to reputation. Since damage to reputation was not covered by the act the plaintiff was allowed to pursue his slander claim.

INFORMAL DISCOVERY BY EMPLOYEES

In *Bouge v. Smiths Management Corporation*, 312 F.R.D. 560 (D. Utah 1990) United States Magistrate, Ronald Boyce, addressed the question, "May counsel for an Employee/Plaintiff conduct ex parte interviews with employees of the corporate defendant?" The Court addressed this issue in light of the considerations raised by Rule 4.2 of the Rules of Professional Conduct.[6]

After discussing the history of the Rules of Professional Conduct and the Code of Professional Responsibility, the Court concluded that contact with interviewing a fact witness who was also an employee of a corporate party was appropriate provided the fact witness was not a person from whom the interviewing party could obtain an admission under the rules of evidence.[7] As a result of this ruling such employee fact witnesses may be interviewed by counsel, paralegals, or investigators without the expense of subpoenaing the witness for a deposition.

[1] *See Bihlmaier v. Carson*, 603 P.2d 790, 792 (Utah 1979) (holding that employee hired for indefinite term holds no right of action against employer for at-will discharge).

[2] *Berube*, 771 P.2d at 1049 (opinion of Durham, J., joined by Stewart, J.); *id.* at 1052-1053 (Zimmerman, J., concurring in the result); *id.* at 1050 (Howe, J., concurring, joined by Hall, C.J.).

[3] *See also Palmer v. City of Monticello*, 731 F. Supp. 1503 (D. Utah 1990) (applying *Berube* rule regarding implied-in-fact contract).

[4] Justice Zimmerman, in his dissent in *Peterson*, defined a "substantial" public policy as one "that is of sufficient importance to the public, as opposed to the parties only, that it should constitute an uncompromising bar to discharge[.]" 187 Utah Adv. Rep. at 8.

[5] *See also Maxfield v. North American Phillips Consumer Electronics Corp.*, 724 F. Supp. 840 (D. Utah 1989) (declining to recognize claim of breach of implied covenant of good faith and fair dealing in employment contract).

[6] In representing a client, a lawyer shall not communicate about the subject of the representation with the party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

[7] Rule 801(d) (2) (D) provides "The statement is not hearsay if the statement is offered against party and is a statement by his agent or servant, concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

Are Taxes Dischargeable in Bankruptcy?

By Rex B. Bushman

I started focusing my practice on the discharge of federal and state income taxes in bankruptcy due to my interest in tax law and perceived it to be a unique ability that would improve my effectiveness as a bankruptcy attorney. Having had the experience of preparing and filing Chapter 7 and Chapter 13 bankruptcy petitions, I was able to incorporate rules which I had discovered, offering relief that many clients don't know is available.

It was easy to recognize the potential that the dischargeability of income taxes would have as a means to rehabilitate the estates of taxpayers that would otherwise never again experience financial security. With the burden of accruing interest, many taxpayers fall further behind under payment plans which are acceptable to the taxing authorities.

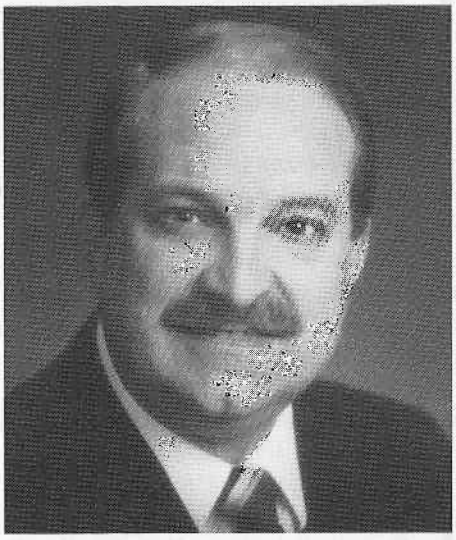
A new perspective on the treatment of income taxes as a priority may be taken with the use of applicable statutes. Some taxes have priority status and some are unsecured, dischargeable debt.

The answer to the question, "are taxes dischargeable in bankruptcy?" is yes, but under certain limited conditions.

Initially, there are a few guidelines to apply to the client's factual setting in order to determine whether outstanding income taxes are dischargeable at that time. Given proper tax planning, a substantial amount of income taxes, if not all that are owing, will qualify at some point. The rules of law are fairly simple to learn. They must be applied with an eye toward the other rules of the bankruptcy code.

First, an income tax return must be filed with the taxing authority.[1] The IRS may prepare a return for the taxpayer with information submitted by an employer but such a return will not suffice to qualify the taxpayer for discharge of the taxes.

Second, if the income tax return is filed timely, there must be at least three years from the filing date to the date of the bankruptcy petition.[2]



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Third, if the return is filed late, there should be at least two years from filing of the return to the date of the petition.[3] On a calendar year basis, if the return is filed after April 15, it is considered late unless extension has been requested whereupon the return may be timely unless filed after the extension period.[4]

Fourth, if there is an assessment by the taxing authority, by audit or self-assessment (i.e. amended return), the taxpayer should allow 240 days before filing a bankruptcy petition to allow for collection of the assessment.[5]

Fifth, a fraudulent return willfully evading taxes is not dischargeable.[6] Such a return should, however, be amended.

The foregoing rules will apply to both federal and state taxing authorities (see former citations). Taxes may be submitted for discharge as unsecured debt in both Chapter 7 and Chapter 13 forums. Taxes that do not qualify for discharge at the time of filing may rightfully be considered priority taxes. Payroll taxes are not included in the foregoing provisions.[7]

Complications rise in obtaining the desired relief where the taxing entity has placed a lien upon the real and personal property of the estate of the debtor. Another pitfall occurs when the debtor has substantial equity in his estate. This problem is a typical bankruptcy dilemma which often keeps debtors from discharging their unsecured debts without losing their valued interests.

If a taxpayer cannot pay his taxes, often the status of his estate will allow a complete discharge without great loss. For instance if a taxpayer has no security upon which the taxing authority may place a lien, then the lien amount will be discharged as unsecured debt along with remaining unsecured taxes in a Chapter 7 bankruptcy.[8] The amount or value of taxes equal to that of the assets set forth in the Chapter 7 petition will not, however, receive discharge in spite of the exempt status of the assets. The value of the exempted assets secures the taxing authorities' prior lien to that amount.[9]

The next question may be what the value of the exemptions of the taxpayer really are. If the taxing entity wants further proof than is set forth in the bankruptcy petition, this could be a question for resolution in an applicable court. Most likely with a proffer of value, a negotiated settlement will determine the extent of effect the taxing entity's lien will have on the dischargeability of the total tax debt. The tax lien cannot be effective against security that does not exist and will be released to the extent it is unsecured.[10]

The taxing entity does not always know what equity of the taxpayer is available to secure its lien when it is levied against the taxpayer. It is routine, therefore, to have it released, all or in part, based upon the

actual facts of the debtor's estate once they come to light.

The taxing authorities have the power to audit a return during the interim of the bankruptcy.[11] The time limitation on qualifying for discharge as unsecured debt may start a new 240 day waiting period and worse, the audit may occur while the debtor is attempting relief afforded once in six years. Since a new assessment may not be dischargeable, the remedy to this situation would be a conservative declaration in the subject return as the taxes initially declared will receive discharge if they otherwise qualify.

Upon occasion I have interviews with clients having tax problems, who have also been through bankruptcy where they may have qualified for disharge of some or all of their taxes if they had been characterized as unsecured debt. Several reasons account for this mostly having to do with misconceptions of the law on the part of the public and sometimes on the part of attorneys.

I know of no greater benefit to provide a client than saving his future from financial insecurity brought about by the temporary or untimely inability to pay income taxes.

[1]Section 523 (a) (1) (B) (i) Bankruptcy Code.
[2]Section 523 (a) (7) (B) Bankruptcy Code.
[3]Section 523 (a) (1) (B) (ii) Bankruptcy Code.
[4]Section 523 (a) (1) (B) (ii) Bankruptcy Code.
[5]Section 523 (a) (1) (A) and Section 507 (a) (7) (A) (ii) Bankruptcy Code.
[6]Section 523 (a) (1) (C) Bankruptcy Code.
[7]Section 523 (a) (1) (A) and Section 507 (a) (7) (A) Bankruptcy Code.
[8]Section 502 (b) (3) and Section 506 (a) Bankruptcy Code.
[9]Section 522 (c) (2) (B) Bankruptcy Code.
[10]Section 502 (b) (3) and Section 506 (a) Bankruptcy Code.
[11]Section 362 (b) (9) Bankruptcy Code.

Editor's Note: Beginning with this issue of the *Bar Journal*, Bar Commission minutes will be published for one-month earlier Bar Commission meetings, without the delays of the past.

Commission Highlights

During its regularly scheduled meeting of June 25, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the Commission of May 28, 1992 were approved with some minor corrections.
2. MCLE Board Chair, Robert D. Merrill, appeared before the Commission and requested that the Bar establish an "Emeritus" member status for senior members who are exempt from paying dues, and to distinguish between those within the status who are "Active" and thereby obligated to satisfy MCLE requirements, and those who are "Inactive" and not required to obtain CLE hours.
3. The Board voted to appoint Denise Dragoo to the Judicial Conduct Commission.
4. The Board voted to approve the request of the Patent Trademark and Copyright Section to change its name to the Intellectual Property Section.
5. The Board voted to approve Sun Valley and St. George as meeting sites for the 1994 Annual and Midyear meetings, respectively, and directed staff to explore three possible alternate sites for the 1995 Annual Meeting.
6. Mike Hansen and Denise Dragoo volunteered to work with John Baldwin and Randy Dryer in preparing a draft proposal to outline the Supreme Court/Bar Commission lines of authority in Bar management and roles and relationships. The Board planned to discuss the draft with the Supreme Court on August 3, 1992.
7. Davis reported to the Board that the Executive Committee had met with the Law & Justice Center Board of Trustees regarding a proposal by the trustees to convey the Law & Justice Center corporation's interest in the Law & Justice Center to the Bar. The Board voted that John Baldwin notify the Board of Trustees of the Utah Law & Justice Center, Inc. that the proposal was favorably received.
8. Kathryn Kendell and Jerry Mooney appeared before the Board to propose the creation of a Civil Rights Section of the Bar. They noted that the purpose of the new section would be to open up a forum for an interchange of ideas and proposed calling the section the Constitutional Law Section. The Board asked for more clarification and invited Kendell and Mooney to next month's meeting for further discussions.
9. Carman Kipp and Robert Reese appeared to review the Unauthorized Practice of Law Committee recommendations for proposed action related to complaints from lawyers about public adjusters' activity believed to be unauthorized practice of law. The Board voted to adopt the recommendation of the Committee as outlined in Kipp's 6/19/92 letter.
10. The Board unanimously passed a resolution recognizing Pamela T. Greenwood's last year on the Bar Commission.
11. Baldwin referred to the proposed 1992-93 Commission meeting schedule and the Section/Committee liaison appointments. He noted that the President-elect had made committee appointments and that over 600 individualized committee assignment letters had been mailed.
12. The Board voted to adopt the Character & Fitness Committee's recommendations for the July Bar examination applicants.
13. Baldwin reported on the Bar Commission election results, noting that there had been a 42.2% response rate and that the three incumbents in the Third Division were re-elected. Of the 2,965 Third Division ballots mailed to active members, 1,253 ballots were returned. Members could vote for 0-3 candidates. The vote break-down was as follows:
    Irshad A. Aadil – 303
    Denise A. Dragoo – 807
    Written-in Candidates – 9
    J. Michael Hansen – 864
    Paul T. Moxley – 890
14. Baldwin reminded the Commissioners that the Bar Leadership Orientation meeting was planned for July 16, 1992.
15. The Board voted to authorize Jim Davis to write a letter to Robert D. Merrill conveying the Bar's concerns and recommendation that group discounts for MCLE seminars by private providers be encouraged so that solo practitioners or any group of attorneys registering together could also have that benefit.
16. The Board voted to adopt the 1992-93 budget as final and noted that two lawyers had taken the opportunity to request review of the proposed 1992-93 budget.
17. All staff and ex-officio members were excused and all discipline was acted upon.
18. Trost noted that a substantial equivalency rule for admission of graduates of non-ABA approved law schools may be created and noted he will keep the Commission informed.

During its regularly scheduled meeting of July 1, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Jim Davis welcomed the commissioners and guests to the Annual Meeting and briefly reviewed the schedule of events.
2. The Board voted to accept the nomination of H. James Clegg as Utah State Bar President-Elect for the 1992-93 year.
3. The Board voted to appoint the following as ex-officio members of the Bar Commission for the up-coming year: The Dean of the University of Utah Law School; the Dean of the BYU Law School; The Bar Com-

mission's representative to the ABA House of Delegates; The Utah American Bar Association Delegation's Delegate to the ABA House of Delegates; The Young Lawyers' Section President; The Past President of the Bar; and a Representative from the Minority Bar Association.

4. John Baldwin reported on his research on the recommendation of the MCLE Board to create some type of inactive status for Bar members who are exempt from paying dues.
5. The Board voted to approve the recommendation that the Bar members who are "dues exempt" have their status on the membership records modified from "Exempt" to "Emeritus" and that the emeritus status be divided into "Emeritus-Active" and "Emeritus-Inactive." Technically, members within that status would be either active or inactive according to the Rules for Integration, but would be on Emeritus status as a title which identifies them as being dues exempt.
6. Emeritus-Active members would be dues exempt but would be required to pay the Client Security Fund assessment as well as satisfy MCLE requirements. Emeritus-Inactive members would be exempt from dues, Client Security Fund assessments and exempt from satisfying MCLE requirements.
7. The Board voted to authorize by resolution Randy L. Dryer, H. James Clegg, J. Michael Hansen, John C. Baldwin and Arnold Birrell to sign checks on behalf of the the Bar and perform other necessary services pursuant to the written corporate account authorization form presented.
8. The Board voted that the contract of John Baldwin be renewed.
9. Jim Davis presented plaques to Paul Moxley, Mike Hansen and Denise Dragoo, to recognize that their terms had expired, thanked them for their years of service to the Bar, and congratulated them on their re-election.
10. Randy Dryer commended and thanked Jim Davis on behalf of the Commission for completing a successful year and providing enthusiasm and leadership. Dryer presented Davis with plaques commemorating his year as Bar President and recognizing his successfully completing another three-year term on the Bar Commission.

During its regularly scheduled meeting of July 30, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the Commission meetings of June 2, 1992 and July 1, 1992 were approved with some minor corrections.
2. Dryer reviewed the status of the Solo Practitioner/Small Firm and Futures Task Forces. He noted that the Futures Task Force would focus on two tasks: (1) preparation of statistics and demographic profile of the composition of the Bar and, (2) a study of the existing legal market in Utah and the users of legal services. He reported that the Futures Task Force will use this information to prepare a ten-year forecast of the legal arena and submit a written report to the Supreme Court in May 1993.
   Dryer also noted that Richard D. Burbidge has agreed to be the chair of Solo Practitioner/Small Firm Task Force.
3. Dryer mentioned some favorable comments he had received on the Bar Leadership Orientation meeting and noted that the condensed three-hour format appeared to be an appropriate length of time to exchange information and answer questions.
4. The Board voted to authorize the Executive Committee to approve the minutes summary publication in the Bar Journal and that the formal minutes would continue to be subject to final review by the Commission.
5. Dryer indicated that he had been contacted by the Administrative Office of the courts regarding the creation of a new Commissioner Conduct Commission to investigate misconduct claims against commissioners and that two lawyers would be included on the committee. The Board voted to submit the names of Frederick N. Green and Suzanne Marelius of Salt Lake, Phil Patterson of Ogden, Miles P. Jensen of Logan, Barbara A. Wyly of Layton, Brent H. Bartholomew and R. Clayton Huntsman for consideration.
6. Dryer reported that due to increased responsibilities, he was resigning as a member of the Judicial Performance Evaluation Committee and that the Bar Commission needed to appoint a replacement. The Board voted to appoint Thorne to the Judicial Performance Evaluation Committee.
7. Utah Dispute Resolution co-grantee, Dr. Marlene Lehtinen, and former Executive Director, Steve Hutchinson, who was also involved in the project's grant request, appeared to outline a request for the Bar to fund the project at current levels for the third trimester of this fiscal year. Dryer reported that the Bar Foundation had rejected their request for IOLTA funds.
   After reviewing the written report and discussing concerns, the Board voted to fund the project with the requested $8,500, conditioned upon the project securing funding from another source for the next fiscal year and the approval of the Supreme Court for the allocation of mandatory dues for this program.
8. The Board voted to adopt the following statement as its official mission statement.
   To represent member lawyers in Utah; to serve the public and the profession by promoting justice professional excellence and respect for the law.
9. Timothy M. Shea and Hal Christensen appeared before the Board to outline the status of proposed rule changes to provide the authority of court commissioners. The Board expressed some reservations and suggested some wording revisions and asked Hansen, Snyder, Davis and Haslam to work with Tim Shea on specific language.
10. John Baldwin reviewed his Executive Director's report and specifically noted that the letter outlining the new "Emeritus" status had gone out to all senior members of the Bar who have been members for 50 years or more or who are over 75 years of age.
11. The Board voted to pass a resolution in support in S.2870 which reauthorizes the Legal Services Corporation for five years.

12. The Board voted to approve the request of the Legal/Medical Committee to change its name to the Legal/Health Care Committee.
13. The Board voted to approve committee charges and the Intellectual Property and Litigation section Bylaws with the provision that the Office of Bar Council approve all section Bylaws and that in the event of conflict or inconsistency, the Utah State Bar Bylaws would govern.
14. Baldwin referred to the written Budget & Finance Committee Report and noted that the Finance Committee had met on July 28 and reviewed all items in the financial reports. Baldwin reported that the Deloitte & Touche auditors would begin their audit review on August 4, 1992.
15. All staff and ex-officio members were excused and all discipline was acted upon.
16. Trost reported that the Supreme Court had issued an order to permit a petitioner who had not graduated from an ABA approved law school to take the Bar examination.
17. Trost also reported that proposed New Disciplinary Rules changes were available.
18. Keith Kelly, Young Lawyers' Section President, reported that the Utah Bar Foundation approved a grant request of $2,500 for a rape crisis program. He also noted that section representatives have been invited to the ABA Young Lawyer Division to make a presentation at their Fall '92 meeting in Cleveland on awareness of legal issues for HIV patients.
20. A.O. (Bud) Headman, Jr., Immediate Past Chair of the Continuing Legal Education Committee; Brent V. Manning, Committee member; and Toby Brown, CLE Administrator, appeared before the Board to review the CLE Committee's Survey Results on mandatory Continuing Legal Education.

    Manning and Headman outlined a list of recommendations in the report which included a need for guidelines for high-quality CLE programs; flexibility in the reporting cycle and carryover of credits; requirement of self-study revised to include self-monitoring; more short, inexpensive, Bar-sponsored programs; etc. Dryer requested this issue be placed on next month's agenda for further discussion and Board action.
21. The Board voted to authorize the formation of a Constitutional Law Section of the Bar and directed the section immediately draft and submit Bylaws for approval of Bar Counsel and the Board at next month's meeting.

During its regularly scheduled meeting of August 20, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. After concluding discipline matters, all staff and ex-officio members rejoined the meeting and Steve Trost introduced Gary Ferrero, new Assistant Bar Counsel.
2. The Board voted to adopt Ethics Advisory Opinion #118 which interprets Rule 1.13 (a) as intending to eliminate the distinction between funds advanced to a client for costs and funds advanced by the client for the payment of attorney fees, and thereby clarifies that all funds advanced by the client are the property of the client and must be deposited in a separate trust account and transferred out only in accord with the requirements of the rule and the procedures disclosed to the client in the retainer agreement as proposed by the Ethics Advisory Opinion Committee.
3. The Board reviewed the Proposed Rules of Discipline and voted to support the Rules, as proposed, with the following exceptions: (1) oppose the recommendation of Rule 4(a) for appointment of disciplinary counsel by the Supreme Court; (2) oppose changing the name from Bar Counsel to Disciplinary Counsel; (3) oppose the recommendation to divide responsibilities between disciplinary counsel and general counsel and to advocate the economies implicit in shared office space, computers, and other fixed overhead costs; (4) recommend that either party may unilaterally and without cause shown disqualify the first judge assigned and have the matter heard by a district judge outside the district where the complaint is filed; (5) oppose Rule 5 which provides that the Bar would pay all costs of disciplinary counsel hired and directed by the Supreme Court; (6) propose replacing the words "Supreme Court" with "Bar Commission" throughout Rule 3, so that the Ethics and Discipline Committee would continue to be appointed by the Commission; (7) change the "clear and convincing" standard to "a preponderance of the evidence" so that the standard would be "preponderance" consistently throughout the process; and (8) authorize Randy Dryer to communicate with the Court indicating that the Bar supports the Proposed Rules of Discipline with the exceptions mentioned.
4. The minutes of the Commission meeting of July 30, 1992 were approved with a minor revision.
5. Young Lawyer's Section Chair, Keith Kelly, reported that the Young Lawyers' Section legal issues program on AIDS was very successful. He also noted that the Section will be directing efforts once again to the domestic violence video project.
6. Randy Dryer reported on his recent lunch meetings with small groups of 4-5 solo and small firm practitioners. He noted that this group of lawyers has offered several valuable and useful suggestions, some of which are now being implemented.
7. The Board voted to adopt the recommendation of the CLE Committee that (1) the ethics requirement be retained; (2) the Bar assures that all programs are high quality; (3) the MCLE Board permits that CLE credit hours which are obtained in the fourth quarter of a reporting period in excess of the MCLE requirement may be carried over to the next reporting period; (4) the MCLE Board examine further the issue of self-study for CLE credit hours; (5) the CLE Committee and staff make CLE seminars more accessible to outlying areas, and to evaluate the possibility of planning programs on Saturdays so that Bar members would miss less work time; (6) CLE seminar costs should be as low as possible while satisfying the mandate that the programs remain self-sufficient; and (8) the

CLE committee explore the issue of providing CLE credit to law professors, state and federal legislators, and others to reflect their involvement in legal education.

The Board rejected the recommendation that MCLE be waived for part-time practitioners.

8. Randy Dryer made a President's Report as follows: (a) he had received favorable comments on his recent special mailing to Bar members on judicial vacancies and Proposed Rules for Court Commissioners and believes it cost-justified; (b) the Admission Committee was reviewing the requirement that applicants must have graduated from an ABA-accredited law school and that the committee would provide their proposed rule recommendations following any next meeting; (c) he and the Legal/Health Care Committee Co-chair, Penny Brooke, had recently met with the Executive Board of the Utah Medical Association and that the Medical Association would be willing to cooperate in rewriting the code guidelines for attorneys and doctors to work with each other in taking depositions. A sub-committee has been formed to propose language; (d) he had met with the President of the Utah Association of CPA's, and that the Association has agreed to work with the Bar's Business Law Section to prepare a handbook on rights and responsibilities of lay persons serving on community boards; (e) he attended the National Conference of Bar Presidents meeting and specifically noted that mandatory pro-bono work seems to be a "hot" topic and that the Florida State Bar has passed a mandatory rule; and (f) he described the Mini-Breakfast Seminars program and highlighted meeting topics, noting that the seminars would be provided once a month, would last no more than one hour, would include a light breakfast and would be free of charge to all Bar members, but the sessions would not be aimed at satisfying CLE requirements.
9. The Board voted to propose several modifications to the Proposed Court Commissioner Rules. Copies of the proposed modifications may be obtained from John Baldwin at the Bar Offices.
10. The Board adopted a Continuing Legal Education Professionalism Policy which would affirm the Bar's policy of fostering and promoting professionalism by mandating that, unless unique circumstances require otherwise, all Bar CLE seminars include a professionalism component. The component would address issues and situations relevant to the substantive area of law being addressed and provide suggestions on how an attorney can deal with difficult issues and situations in a way that is courteous, straight-forward and respectful, while still representing the client's best interests.
11. The Board proposed a similar policy to the MCLE Board requiring that in-state seminars, wherever practicable, also address the issue of professionalism in order to be certified for MCLE credit.
12. The Board voted to accept the recommendations of the Client Security Fund Committee and approved disbursement totalling $10,905.
13. The Board briefly reviewed the proposed revisions to the Rules for Integration.
14. John Baldwin referred to his written report and indicated that approval of the Constitutional Law Section Bylaws would be addressed at the October meeting.
15. Budget & Finance Committee Chair J. Michael Hansen distributed the financial reports. He noted that the Deloitte & Touche auditors would not be suggesting any bottom-line changes. Hansen distributed the licensing revenue report and noted that 93% of licensing fees have been collected and that this figure is currently about 95% of budget.
16. Hansen indicated that Baldwin had been asked to research the cost of bonding members of the staff who deal with Bar funds and would report back to the Executive Committee on costs and coverages.
17. Dennis Haslam noted that the Judicial Council would be convening for three days for its annual planning meeting this week.
18. The Board discussed the roles of Court Commissioners and came to the consensus that they should be specialized to the extent practicable in each district.
19. Randy Dryer confirmed that the next meeting would be October 1st in Vernal, Utah.

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.

United States Tenth Circuit Advisory Committee

If you have concerns or suggestions about the practices and procedures of the United States Court of Appeals for the Tenth Circuit, you may refer these to Stephen B. Nebeker. Mr. Nebeker is Utah's attorney representative on the Tenth Circuit Advisory Committee. Communications may be directed to him at Deseret Building, Post Office Box 45385, Salt Lake City, Utah 84145-0385, (801) 532-1500; FAX (801) 532-7543.

The ten member committee is chaired by Circuit Judge Bobby R. Baldock of New Mexico. In addition to one attorney representative from each of the six states of the circuit, members include one representative each for federal district judges, united states attorneys and federal public defenders. The committee serves as a conduit between the Bar, the public and the court regarding procedural matters and suggestions for changes. The committee also welcomes your suggestions for programs at the annual circuit judicial conference and on any matter affecting the administration of the courts within the Tenth Circuit.

Discipline Corner

INTERIM SUSPENSION

On August 3, 1992, the Utah Supreme Court ordered the Interim Suspension from all Appellate Practice of D. John Musselman pursuant to a Stipulation entered into between the Office of Bar Counsel and Mr. Musselman's counsel following the filing by the Office of Bar Counsel of a Petition for Interim Suspension from Appellate Practice alleging eight (8) neglected appeals during a two year period.

PRIVATE REPRIMANDS

An attorney received a Private Reprimand for signing a Satisfaction of Judgment prematurely in a collection matter in September of 1989. In October of 1990, the attorney collected the funds from the debtor. However, the attorney failed to deliver the collected funds to his client until December of 1991, three months (3) after the complaint was filed with the Bar. The Screening Panel of the Ethics and Discipline Committee of the Utah State Bar found that the attorney violated Rule 1.1 (Competence) of the Utah Rules of Professional Conduct by signing the Satisfaction of Judgment prematurely. The Panel also found that the attorney violated Rule 1.3 (Diligence) and Rule 1.4 (Communication) of the rules.

An attorney consented to a private reprimand and agreed to make restitution to the client in the amount of $3,500 for violating Rule 1.3 (Diligence), Rule 1.4(a) (Communication) and Rule 8.1(b) (Bar Admissions and Disciplinary Matters). In or around July 1987, the attorney represented his client in a tax matter. A judgment was entered against his client and the attorney agreed to appeal the decision in or around June 1989, the attorney also agreed to represent the client with regard to the collection of the judgment by the IRS. From in or around June 1989 through in or around December 1989, the attorney failed to respond to the client's request for information regarding the status of the appeal. On or about October 17, 1989, the Office of Bar Counsel requested the attorney respond to his client's letter of complaint; the attorney failed to respond. On or about December 11, 1989, the Office of Bar Counsel issued a Notice of Complaint based on the allegations contained in the client's original letter of complaint; the attorney again failed to respond. On or about August 2, 1990, the attorney appeared before the Screening Panel of the Ethics and Discipline Committee of the Utah State Bar and provided an oral response to the allegations of misconduct. The mitigating circumstances included the fact that the attorney sought and received assistance from Lawyers Helping Lawyers and is undergoing therapy and the attorney agreed to make restitution for damages to his client.

An attorney consented to a private reprimand for violating Cannon 3, DR 3-102(A) (Dividing Legal Fees with a Non-Lawyer) of the Code of Professional Conduct. On or about August 26, 1986, the client paid $100.00 as a retainer to a legal assistant with the belief that the legal assistant was an attorney and would be representing her in the divorce. On or about September 4, 1986, the client paid the legal assistant an additional $160.00 for legal services. A Complaint for Divorce was filed on or about September 5, 1986, in the Third District Court in the State of Utah. The attorney is named as the attorney on the pleading. On or about mid September 1986, the legal assistant informed the client that a hearing was set for October 9, 1986. Upon arriving at the courthouse for the hearing, the client met the attorney for the first time and learned that she would be represented by him. The fees paid to the legal assistant were split with the attorney.

An attorney consented to a private reprimand for violating Rule 1.13(a) (Safekeeping Property) of the Rules of Professional Conduct. From in or around July, 1987 until in or around April 1989, the attorney used his client trust account to conduct personal business with and on behalf of corporation and related entities. Funds from investors were provided to the corporation and related entities and were transferred to the attorney's trust account. These monies were transferred back and forth between these companies and the attorney's trust account for various business purposes. Funds were also transferred from the corporation and related entities to the attorney's trust account and then to various creditors of the business. No client funds were involved.

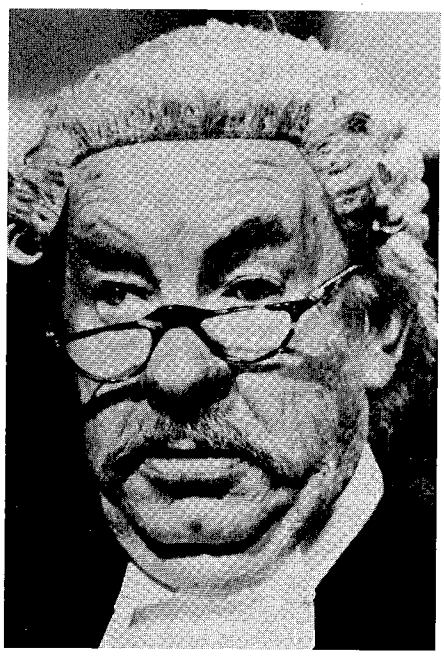
ADMONITIONS

An attorney was admonished for violating Rule 1.4 (Communication) in failing to return telephone calls. The attorney was retained in or around February 1990 to reopen a bankruptcy and add a creditor not included in the bankruptcy discharged sometime in 1986. The client and the creditor were in litigation at the time of the bankruptcy and the creditor obtained a summary judgment against the client. Six months after the attorney accepted the case, he acquired contradictory information and requested, through his secretary, that his client meet with him face to face. The client was unable to meet with him personally, but tried to contact the attorney by telephone from in or around June 1991 to in or around January 1992, and was unsuccessful. The attorney failed to return phone calls or to correspondence with his client and the client was not informed about the status of his case.

An attorney was admonished for violating Rule 1.4 (Communication). The attorney was retained in or around March, 1990 to represent a client in a divorce. The issues of property and debt distribution were stipulated to and heard before a Domestic Relations Commissioner on or about June 1991. In December 1991, the decree had still not been executed. The attorney failed to return phone calls to his client requesting information on the status of the Divorce Decree from in or around July 1991 to in or around December, 1991.

An attorney was admonished for charging the client for services rendered by his in-house investigative staff in a personal injury action. The attorney had entered into a contingent fee agreement which failed to clearly state that investigatory expenses would include in-house personnel as well as retained experts and outside investigators. Further the agreement failed to clearly state that costs were to be paid by the client regardless of recovery. The Screening Panel of the Ethics and Discipline Committee of the Utah State Bar recommended that the language of the contingent fee agreement used by the attorney be revised in order to fully comply with Rule 1.5(c) (Contingent Fee Agreement) of the Utah Rules of Professional Conduct.

Rumpole's Back in Court



Horace Rumpole, one of the most popular and beloved TV characters of the last 20 years, will be back in **London's central criminal court, "The Old Bailey,"** with more of ***Rumpole of The Bailey*** on **KUED 7** starting on Thursday, October 22, at 8:00 p.m., and continuing as a weekly series for one year.

The series will feature all of the great *Rumpole* episodes over the last 12 years and will be combined with another great favorite on the *MYSTERY* series, *Murder Most English.*

The *Rumpole* series is made possible through generous grants from the law firm of **Campbell Maack & Sessions** of Salt Lake City and the **Dean Witter Financial Group** of Utah.

Notice of Availability of Membership List

Current Bar policies and procedures provide that the Bar's membership list may be sold to third parties who wish to communicate via mail with members of the Bar about products, services, causes or other matters. Any Bar members may have his or her name removed from the membership list which is sold to third parties, by submitting a **written request** to John C. Baldwin, Executive Director, 645 South 200 East #310, Salt Lake City, UT 84111.

Judicial Openings

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for two judicial vacancies. The first position serves the Third District Court, encompassing Salt Lake, Summit, and Tooele counties. This position results from the retirement of Judge James S. Sawaya.

The second position serves the Seventh District Court, including Carbon, Emery, Grand, and San Juan counties. This position results from the retirement of Judge Boyd Bunnell.

Applications for both positions must be received by the Administrative Office of the Courts no later than 5:00 p.m., November 13, 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) 578-3800.

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 Third and Seventh Districts in particular, must submit written testimony no later than November 20, 1992, to the Administrative Office of the Courts, Attention: 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 Administrative Office of the Courts, 230 So. 500 East, Suite 300, Salt Lake City, Utah, 84102. Telephone: (801) 578-3800. Application packets will be forwarded to prospective candidates.

Public Defender Contract

Tooele County is seeking bids from licensed attorneys to provide part-time legal defense services when the County's two full-time public defenders are not able to represent indigent defendants because of conflicts of interest.

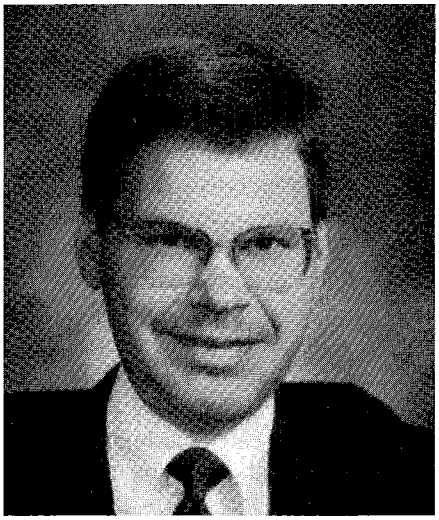
Bids stating a yearly fixed retainer or an hourly rate to perform these services, accompanied by a resume of experience, must be submitted to the Tooele County Commission, 47 South Main Street, Tooele, Utah 84074, prior to 3:00 p.m. on October 16, 1992. Tooele County reserves the right to reject any or all bids or award the contract to a qualified attorney who has not submitted the lowest bid.

Additional information may be obtained by calling 882-9150.

Justice Durham to Discuss Public Policy Wrongful Discharge

On October 30, 1992, Justice Christine Durham of the Utah Supreme Court will speak on public policy wrongful discharge and other current issues in Utah employment law. Justice Durham's talk is sponsored by the Labor and Employment Section of the Utah State Bar. Justice Durham authored the majority opinion in *Peterson v. Browning* (1992), in which the Court for the first time recognized a cause of action for public policy wrongful discharge. Justice Durham's talk will be at noon, and lunch will be provided. Cost is $15.00. Reservations must be made in advance by calling the Utah State Bar at 531-9077. One hour of CLE credit.

National Personal Achievement Award



J. Stephen Mikita, Assistant Attorney General, was named the 1992 National Personal Achievement Award winner by the Muscular Dystrophy Association during its Labor Day telethon in Las Vegas, Nevada.

Mr. Mikita was selected from a group of five national finalists. Besides becoming a national spokesperson for the Muscular Dystrophy Association as a result of the award, Mr. Mikita is active in numerous community and professional organizations. He is a frequent lecturer to business groups and trade associations on the Americans with Disabilities Act of 1990 and is a motivational speaker for national conventions.

Mr. Mikita chairs the Lawyers Helping Lawyers committee of the Utah State Bar.

Opening for Court Commissioner

The Court Commissioner is a quasi-judicial officer as provided by the Utah Code and the rules of the Judicial Council. Initially, this position will assist primarily the Circuit Court under the direction of the Presiding Judge and will perform duties as permitted by statute and rule of the Judicial Council.

The Commissioner may assist the District Court with domestic matters and mental competency examination hearings and may be required to assist the Juvenile Court as permitted by rule of the Judicial Council.

Some travel may be required to various court locations. Duties may vary as outlined by the Judicial Council.

REQUIRED QUALIFICATIONS

A Court Commissioner must be at least 25 years of age, a citizen of the United States, a resident of Utah for three years preceding appointment, a resident of Utah while serving as Commissioner, and a member of the Utah State Bar. Preference will be given to those applicants demonstrating broad experience with District and Circuit Court matters.

The position requires adherence to the Code of Judicial Conduct.

COMPENSATION AND CONDITIONS

Starting Salary:	$60,000 to $66,500
Location:	Third Judicial District
Merit Status:	Exempt position

APPLICATION PROCEDURE

Applications may be obtained at: Human Resources Division, Administrative Office of the Courts, 230 So. 500 E., Suite 300, Salt Lake City, UT 84111. Completed applications including the standard form and a resume, should be returned to the same location.

The closing date for application is Friday, October 30, 1992 at 5:00 p.m.

Applicants Sought for Bar Appointments to Utah Legal Services Board of Directors

The Board of Bar Commissioners is seeking applications from Bar members for appointments to serve two-year terms on the Board of Directors of Utah Legal Services, Inc. The Board sets policies and establishes budgets for Utah Legal Services, which is a state-wide provider of legal representation to low income people in civil judicial matters.

Applications for Board representation from rural districts outside the Wasatch front are particularly encouraged. Bar members who wish to be considered for appointment must submit a letter of application including a resume. Applications are to be mailed to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East #310, Salt Lake City, UT 84111, and must be received no later than 5:00 p.m., on October 28, 1992.

NOTICE: Creation of a Constitutional Law Section

On July 30, 1992, the Board of Bar Commissioners accepted a petition to create a Constitutional Law Section of the Utah State Bar. The section was created with the purpose of seeking the participation of all interested members of the Bar in order to benefit such members by providing the opportunity and forum for the interchange of ideas in the area of constitutional law and civil rights law; by initiating and implementing common projects; and to undertake such other services as may be of benefit to the members, the legal profession and the public.

Any member in good standing of the Bar may join the section by the payment of annual dues in the amount of $15.00. If you have any questions, please contact Kathryn D. Kendell, 9 Exchange Place #419, Salt Lake City, UT 84111, telephone 521-9863, or Jerome H. Mooney at 236 South 300 East, Salt Lake City, UT 84111, telephone 364-5635.

Tribute to Retiring Judges

Judge Douglas L. Cornaby has served on the bench since 1961 when he was appointed to the Layton City Court. In 1978 he became a judge in the second Circuit Court when the city court system changed. Gov. Scott M. Matheson appointed him to the Second District Court in 1981. He received his law degree from the University of Utah College of Law in 1960 and was in private practice until his appointment to the bench.

Judge Cornaby has served in many leadership positions. He is a member of the Advisory Committee for Child Support Enforcement. He was President of the Utah Association of City Court Judges and President of the District Court Judges Association. He has also been very active in his community. He served as Layton City's Civil Defense Director and as the President of the Boy Scouts of America's Lake Bonneville Council.

Judge Douglas L. Cornaby
Utah State District Judge
Second District Court

Judge Cornaby retired from the bench in July and in August, he left with his wife, Etholene, to serve an LDS mission in Ireland. When he returns, he will become a senior judge overseeing trials on a case-by-case basis.

Judge Cornaby is known for his stern demeanor, his sense of humor and his efficiency on the bench. He and Judge Rodney S. Page carry the highest district case loads in Utah averaging 1161 cases per year.

Judge Ronald O. Hyde
Utah State District Judge
Second District Court

Judge Ronald O. Hyde received his law degree from the University of Utah College of Law in 1952 and was in private practice until his appointment to the bench. He was appointed to the Ogden City Court in 1957. He returned to private practice in 1965 until he was appointed to the Second District Court in 1970 by Gov. Calvin L. Rampton.

He has served as the presiding Judge of the Second District Court and for five years as a member of the Board of District Court Judges.

Hyde's judicial style has been described as calm, laid back, never at a loss for words and unflappable. He admits, however, that retirement is a major adjustment and that he is still learning to relax.

Hyde will continue to serve on the bench as a senior judge presiding over trials on a case-by-case basis. He will miss the work and his associates but looks forward to spending time with his family and taking it easy.

Hyde describes his time on the bench as enjoyable and a great learning experience with a great deal of variety.

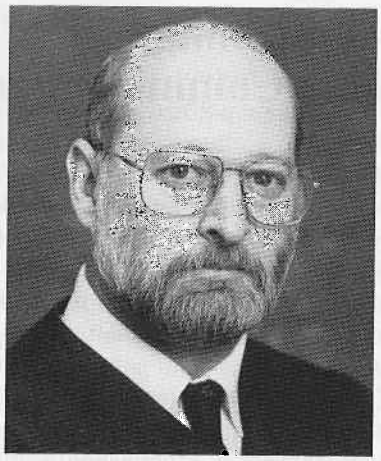
He recommends that attorneys be prepared when they go to court. As a whole, he feels the Bar has done a competent and good job over the years.

Judge David E. Roth graduated from the University of Utah College of Law in 1969. He worked for the Internal Revenue Service for a year as an estate tax attorney and then became a Deputy County Attorney for Weber County. He served as Chief Deputy County Attorney until 1974 when he was appointed to the Ogden City Court. Gov. Scott M. Matheson appointed him to the 3rd Circuit Court in 1978 and to the 2nd District Court in 1984. Roth has served on the Ethics Advisory Committee, the Rules of Practice Committee, and served as chairman for the Judicial Resources Committee.

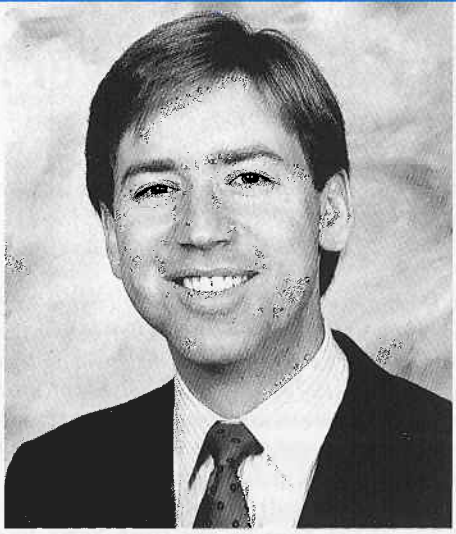
Roth is concerned about the proliferation of lawyers and feels that it has contributed to the inflexibility between lawyers and the increase in cases with questionable merit. He also cites technology like word processors that allow extensive discovery and contribute to the overwhelming cost of litigation.

In his court room, Roth was known for his serious manner and his intimidating presence and intellect. Outside the court room he is described as lighthearted and genial with a down to earth quality.

Roth has been appointed as a senior judge and will hear cases on a case-by-case basis. He will continue to pursue his hobbies such as canoeing, motorcycling and cross-country skiing.



Judge David E. Roth
Utah State District Judge
Second District Court



Achieving Quality of Life Despite a Fast Moving Career

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

Practicing law is taxing. In my litigation practice, client calls, motions, depositions, and trial dates all demand my time. Urgent tasks and deadlines seem to be continually calling for my attention. My wife Kathy has observed that, when I am in trial, I seem to swallowed up in my case — with all of my energies devoted to it.

But my career is not my whole life. I find myself constantly struggling to balance the demands of my career with other aspects of my life. Perhaps the key is make time for things that Stephen R. Covey calls "important but not urgent."[1] To me, the most important but not often urgent need for my time is my family.

In a recent issue of the ABA Young Lawyers Division publication *The Affiliate*, Assistant Editor Stuart Dorsett made two thoughtful suggestions abut how to balance time to develop quality relationships.[2] Both impressed me so much that I wanted to share them.

TREATING FAMILY ACTIVITIES LIKE A CLIENT'S PROJECT

First, Dorsett suggests that young lawyers should treat family activities like a client's project. He points out that we will go to great lengths to serve our clients, even when our schedule is already full. Dorsett cites Dr. Charles Petty, a North Carolina family counselor, who "suggests that young professionals begin treating family activities (like baseball games and piano recitals) as inviolable commitments as client conferences or professional or civic activities. In other words, family activities should be scheduled around, not treated as free time to be sacrificed to the next work or volunteer project."[3]

SERVING AS A MENTOR TO YOUR CHILDREN

Second, Dorsett offers the suggestion of Leland Malchow, president of the Georgia Younger Lawyers Section. Malchow "points out that lawyers spend innumerable hours serving as mentors to younger associates, yet often fail to spend time serving as a mentor to their own children."[4] Dorsett adds: "Malchow's comment suggests that some lawyers subconsciously make the value judgment that it's more important to teach their associates how to litigate successfully than it is to teach their children how to live successfully. Few, if any lawyers would consciously make that value judgment, but often lawyers don't stop to consider the issue."[5]

In my view, balancing time is never easy when a demanding career is tipping one side of the scales. But the difficulty of the task simply means that the effort to achieve a balanced life demands our attention.

[1] *See* Stephen R. Covey, *The Seven habits of Highly Effective People* 150-162 (1989).

[2] Stuart B. Dorsett, *Make Time for Your Family: Young Lawyers Insist on Balanced Lives*, 17 The Affiliate 9-10 (July/Aug 1991).

[3] *Id.* at 9.

[4] *Id.*

[5] *Id.*

Why Be a Lawyer?

By David K. Winder
(Comments taken from an address to new admittees to the Utah State Bar on October 2, 1991)

Fellow judges and justices, members of the bar and distinguished guests. On behalf of the federal judiciary, I welcome you admittees to the practice of law in the federal court for the District of Utah. Our congratulations to you and to your families on this achievement.

Embarking as you are today upon your legal careers, I believe it may be a good time to ask yourself, "Why am I doing this?" "What is there in the life of the lawyer to justify the practice of law?" These are difficult questions. Yet they are questions worth asking because the profession you enter upon today is very demanding and is becoming more so. The practice of law will draw heavily upon all of your resources. But will it also replenish those resources? While I don't pretend to have definitive answers to those questions, I would like to discuss them with you for seven or eight minutes here today. My aim in these remarks is to encourage each of you to question your assumptions for becoming a lawyer.

I believe that the opportunity for material wealth or prestige — an ignoble reason, yet perhaps the most honest one given for becoming a lawyer — is unsatisfactory. It is ultimately an unfulfilling reason to enter this profession. At the same time, I believe that becoming a lawyer solely out of a desire to serve the public good can be equally unsatisfactory and unfulfilling as a justification.

I believe these two motivations fail because they approach the practice of law solely in instrumental terms, as a means toward an end — as a tactic to gain greater personal wealth or social and political prestige or change. This instrumental approach does not adequately consider the ways in which the practice of law can shape and mold one's character and personality.

The practice of law, I believe you will discover, is a character-defining activity. If this is so, new lawyers such as yourselves, have good reason to be concerned about the intrinsic as well as the extrinsic, or instrumental, value of that activity. What kind of person will you become through the practice of law? Is this the person you want to be? The instrumental view is deficient because it fails to consider these questions.

So one is left with the question. If wealth and prestige won't sustain you in the practice of law, and public service, while a noble goal, is still largely of only extrinsic value, what is it about legal practice that makes it a worthwhile endeavor? An answer, I believe, can be found by looking at the effect law practice has on human character, on the kind of person it can cause you to become.

What attributes of character are demanded and displayed by the good lawyer? The cynic might answer ruthlessness, deceit, duplicity and guile, for starters. I believe the cynic is wrong. Although these character traits too often are exposed by the practice of law, they are not ingredients for success in the profession. I believe success in the practice of law, requires honesty, civility and, perhaps above all, good judgment. Let us, very briefly, consider, in turn, each of these aspects of character.

A. HONESTY

Sometime during the last three years you've probably been asked something like this, "Why don't you find an honest career instead of becoming a lawyer?" Many claim the honest lawyer will fail. The truth is, honesty is essential to your success as a lawyer. Lawyers who are dishonest, or who shade the truth or mislead in their dealings with clients, the court or other lawyers, do not last long in practice. The importance of dealing honestly and forthrightly with others may seem self evident. Too often, it is not. Clients require honest evaluations of their options. The court requires honest information from you and so do other lawyers. To be successful in the practice therefore, requires honesty.

B. CIVILITY

Another aspect of character displayed by successful practitioners is civility. Visit court someday and watch the lawyers. You will see that the best among them vigorously advocate their causes but rarely, if ever, are they discourteous. Good lawyering, you will find, means treating everyone with whom you deal — clients, judges and particularly fellow lawyers — with courtesy, civility and respect. Or, as Thomas Jefferson expressed it — with "Ethical Decorum." Too often lawyers conduct themselves as if the practice of law was a license to act uncivilly. These lawyers never rise above journeymen in the art.

C. JUDGMENT

Finally, the successful practice of law demands and nurtures good judgment. The highest compliment one lawyer can pay another is to say that lawyer has good judgment. Doctrinal knowledge, breadth of intellect, cunning, cleverness, skill —

JUDGE DAVID R. WINDER is completing his 13th year as a Federal District Judge for the District of Utah. He also served two years (1977-1979) as a Third District Court Judge. Before assuming the bench, he served as a trial lawyer with the firm of Strong & Hanni in Salt Lake City.

In 1978, he was chosen as Outstanding Judge of the Year by the Utah State Bar Association. In 1983, he was named Best Judge in the Tenth Circuit by American Lawyer Magazine.

Judge Winder received his law degree in 1958 from Stanford Law School. He served in the U.S. Airforce in 1951 & 52 and received a BA degree in 1955 from the University of Utah.

Judge Winder has also been active in service for many years to the Bar as Chairman of the Bar Examiner's Committee.

they all count. But it is sound judgment that distinguishes the truly great practitioners.

By judgment I mean the capacity to deliberate about and decide problems. Good judgment is characterized by an ability to entertain alternative, often contradictory claims, sympathetically while also maintaining a certain detachment from the points of view. Exercising good judgment, therefore, requires both sympathy and detachment.

Professor Anthony Kronman of Yale Law School observes that when we call a personal decision wise or say it exhibits good judgment, what we mean is that it promotes integrity by increasing the chances the person who made the decision will be able to live with himself amicably.[1] So it is, too, with moral, legal and political decisions. Exercising good judgment in these areas promotes integrity within them. When this process of deliberation becomes habitual in a person, it becomes a trait of character.

In conclusion then, each of these aspects of character — honesty, civility and good judgment — I suggest are required of the successful practitioner in law. Determining the value and appeal of the lawyer's life in these attributes of character, a lawyer may derive intrinsic value from one's career regardless of the extrinsic reasons one may have for practicing law. Viewing your legal career in such a way, I propose, will bring you personal and professional fulfillment that you cannot attain from a purely instrumental view of your career.

To choose the practice of law then is to choose a way of life and type of character that have value in their own right. This realization should give you satisfaction about your career, your life and yourself.

Thank you, my colleagues. I look forward to seeing you in federal court.

Judge Winder gratefully acknowledges the assistance of his then law clerk, Mr. Jeffrey J. Hunt, in preparing these remarks.

[1] *See* Kronman, Living in the Law, 54 *U. Chi. L. Rev.* 835, 856 (1987).

CASE SUMMARIES

HIGHLIGHTS OF THE U.S. SUPREME COURT'S 1991-92 TERM

CASE	DECIDED	APPEAL FROM	AUTHOR, VOTE	HOLDING
		ATTORNEYS		
Ardestani v. INS, 91 Dialy Journal D.A.R. 15063	Dec. 10	11th Circuit	O'Connor, 6-2	Immigration lawyers who win deportation claims are not entitled to attorney fees under the Equal Access to Justice Act.
Willy v. Coastal Corp., 92 Daily Journal D.A.R. 2850	March 3	5th Circuit, affirmed	Rehnquist, 9-0	Federal judges may sanction lawyers and their clients for Rule 11 violations during case removals, even if the don't have the subject matter jurisdiction to hearth e underlying dispute leading to the offensive court findings.
City of Burlington v. Dague, 92 Daily Journal D.A.R. 8664	June 24	2nd Circuit, reversed	White, 6-3	Attorneys who win U.S. Civil rights and environmental law cases brought under statutes with fee-shifting provisions may not seek "lodestar" enhancements to compensate for risk in taking such cases on contingency.
		BUSINESS AND TAXATION		
INDOPCO v. Commissioner, 92 Daily Journal D.A.R. 2556	Feb. 26	2rd Circuit, affirmed	Blackmun, 9-0	Investment expenses stemming from a friendly takeover must be capitalized rather than deducted, because the tax law does not expressly provide for deductibility.
United States v. Burke, 92 Daily Journal D.A.R. 7085	May 26	6th Circuit, reversed	Blackmun, 7-2	Back pay awards in federal job bias cases must be included in income for tax purposes.
Quill V. North Dakota, 92 Daily Journal D.A.R. 7142	May 26	North Dakota Supreme Court, reversed	Stevens, 9-0	States may not tax mail-order sales unless the catalog company has a physical presence in the state to satisfy Interstate Commerce Clause requirements.
Eastman Kodak v. Image Technical Services, 92 Daily Journal D.A.R. 7688	June 8	9th Circuit, affirmed	Blackmun, 6-3	Federal antitrust law does not allow manufacturers, as a matter of law, to refuse to sell replacement parts to independent service organizations, or directly to customers who would use such independents to do the work.
Two Pesos Inc., v. Taco Cabana International Inc., 92 Daily Journal D.A.R. 8910	June 26	5th Circuit, affirmed	White, 9-0	Trade dress that is inherently distinctive does not have to have acquired secondary meaning to be protectable under Section 43(a) of the Lanham Act.
		CIVIL RIGHTS AND INDIVIDUAL LIBERTIES		
Hafer V. Melo, 91 Daily Journal D.A.R. 13658	Nov. 5	3rd Circuit	O'Connor, 8-0	State officer may be held personally liable for damages under 42 U.S.C. 1983 based upon actions taken in their official capacities.
Rufo v. Inmates of Suffolk County, 92 Daily Journal D.A.R. 711	Jan. 15	1st Circuit, vacated	White, 8-0	Parties seeding to modify a consent decree must establish that a significant change in fact or law warrants revision of the decree and that the proposed modification is suitably tailored to the changing circumstances.
Presley v. Etowah County Commission, 92 Daily Journal D.A.R. 1247	Jan. 27	USDO Alabama, affirmed	Kennedy, 6-3	Internal changes made by county commissioners regarding duties and distribution of power are not subject to preclearance under Section 5 of the Voting Rights Act of 1965.
Hudson v. McMillian, 92 Daily Journal D.A.R. 2479	Feb. 25	5th Circuit, reversed	O'Connor, 8-1	The use of excessive force against a prisoner may constitute cruel and unusual punishment even though the inmate does not suffer serious injury.

Franklin v. Gwinnett County, 92 Daily Journal D.A.R. 2551	Feb. 26	11th Circuit, reversed	White, 9-0	A damages remedy is available for school students alleging sexual harassment against school personnel under Title IX of the Education Amendments of 1972.
Freeman v. Pitts, 92 Daily Journal D.A. R. 4284	March 31	11th Circuit reversed	Kennedy, 8-0	While supervising a desegregation plan, U.S. district courts have the authority to relinquish supervision and a school system in incremental stages, before full compliance has been achieved in every area of school operations, and may, while retaining jurisdiction, determine that it will not order further remedies in areas where the school district is in compliance with the decree.
Lujan v. Defenders of Wildflie, 92 Daily Journal D.A.R. 7876	June 12	8th Circuit, reversed	Scalia, 6-3	Affidavits by environmental groups alleging two if its members visited a foreign country to view endangered species and intended to return for the same person is not a sufficient "injury in fact" to confer standing to challenge administrative rulings under the Endangered Species Act.
Planned Parenthood of Pennsylvania v. Casey, 92 Daily Journal D.A.R. 8982	June 29	3rd Circuit, reverse	O'Connor-Kennedy-Souter, 5-4	States may not criminalize abortion, but may regulate it as long as the regulations do not unduly burden the decision, as would a spousal-notification requirement. The trimester approach is abandoned.
CRIMINAL LAW AND PROCEDURE				
Dawson v. Delaware, 92 Daily Journal D.A.R. 3101	March 9	Deleware Supreme Court, vacated	Rehnquist, 8-1	The admission at capital sentencing of a defendant's membership in a white supremacist organization, which was irrelevant because it was tied to the crime charged, violated the defendant's first Amendment rights.
United States v. Williams, 92 Daily Journal D.A.R. 5871	May 4	10th Circuit, reversed	Scalia, 5-4	Federal grand jury indictments may not be thrown out because the prosecution withheld exculpatory evidence from the grand jury.
Wade v. United States, 92 Daily Journal, D.A.R. 6642	May 18	4th Circuit, affirmed	Souter, 9-0	Federal judges have the power to issue "downward departures" from federal sentencing guidelines when a defendant cooperates with the authorities, even if the prosecution does not ask the court to do so.
United States v. Alvares-Machain, 92 Daily Journal D.A.R. 7984	June 15	9th Circuit, reversed	Rehnquist, 6-3	Forcible abduction by U.S. government of a Mexican citizen in mexico does not deprive U.S. courts of jurisdiction to try a citizen for violating U.S. laws.
Georgia V. McCollum, 92 Daily Journal D.A.R. 8178	June 18	Georgia Supreme Court, reversed	Blackmun, 7-2	The Equal protection Clause prohibits criminal defendants, as well as prosecutors from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges.
ECONOMIC RIGHTS				
General Motors Corp. v. Romein, 92 Daily Journal D.A.R. 3082	March 11	Michigan Supreme Court, reversed	O'Connor, 9-0	A retroactive Michigan worker's compensation law requiring the payment of benefits to a certain class of workers does not "impair" General Motors' union contract with its employees in a way that violates Contracts Clause.
Yee v. Escondido, 92 Daily Journal D.A.R. 4358	April 1	4th District Court of Appeal	O'Connor, 9-0	The Takings Clause is limited to actual physical takings, not takings of incorporeal property interests.
Nordinger v. Hahn, 92 Daily Journal D.A.R. 8196	June 18	2nd District Court of Appeal, affirmed	Stevens, 8-1	California Proposition 13's method of reassessing property values upon sale does not violate the Equal Protection Clause, even though it may result in similarly situated property owners paying vastly different property taxes.

Lucas v. South Carolina Coastal Commission, 92 Daily Journal D.A.R. 9030	June 29	South Carolina Supreme Court reversed	Scalia, 6-2	States may not pass laws that deprive property owners of "all economically viable use" of their land without having the particular power to do so under the state's common law of nuisance.
FEDERALISM AND GOVERNMENT LAW				
INS v. National Center for Immigrants' Rights, 91 Daily Journal D.A.R. 15426	Dec. 16	9th Circuit, reversed	Stevens, 9-0	U.S. regulations preventing aliens from holding a job while challenging deportation orders are within scope of INS' regulatory power.
Robertson v. Seattle Audubon Society, 92 Daily Journal D.A.R. 4004	March 25	9th Circuit, reversed	Thomas, 9-0	Congressional act temporarily barring pending lawsuit challenging Pacific Northwest logging as threat to endangered spotted owl does not violate separation of powers doctrine as interference with judicial power.
Fort Gratiot Sanitary Landfill v. Michigan Department of natural Resources, 92 Daily Journal D.A.R. 7283	June 1	6th Circuit, reversed	Stevens, 9-0	Interstate Commerce Clause prevents states from passing laws flatly banning the disposal of out-of-state solid waste within their borders.
Department of Energy v. Ohio, 92 Daily Journal D.A.R. 5271	June 7	6th Circuit, reversed	Souter, 9-0	States may not sue the federal government – the country's largest polluter – for violating U.S. pollution standards.
New York v. United States, 92 Daily Journal D.A.R. 8784	June 19	2nd Circuit, reversed	O'Connor, 6-3	Under the 10th Amendment, Congress exceeded its constitutional power when it enacted a key portion of a law aimed at forcing states to dispose of low-level radioactive waste generated within their borders.
Cipollone v. Liggett Group Inc., 92 Daily Journal D.A.R. 8688	June 24	3rd Circuit, reversed	Stevens, 7-2	Federal laws requiring tobacco companies to inform consumers of the dangers of smoking do not pre-empt state common law products liability claims, but do pre-empt state law claims based on fraudulent misrepresentation or failure to warn.
FIRST AMENDMENT				
Simon & Schuster v. New York State Crime Victims Board, 91 Daily Journal D.A.R. 15069	Dec. 10	2nd Circuit, reversed	O'Connor, 8-0	The First Amendment does not permit states to pass laws preventing criminals from pocketing the profits from stories about their crimes.
Forsythe County v. Nationalist Movement, 92 Dailly Journal D.A.R. 8312	June 19	11th Circuit, affirmed	Blackmun, 5-4	Parade permit laws may not give local governments power to charge more than a nominal fee for using public forums for public speech purposes.
R.A.V. v. City of St. Paul, 92 Daily Journal D.A.R. 8395	June 22	Minnesota Supreme Court, reversed	Scalia, 9-0	State and local governments may not enact laws that prohibit speech on the basis of content.
Lee v. Weisman, 92 Daily Journal D.A.R. 8669	June 24	1st Circuit, affirmed	Kennedy, 5-4	Prayers at public school graduations violate the Establishment Clause of the First Amendment.
ISKCON v. Lee, 92 Daily Journal D.A.R. 8871	June 26	2nd Circuit, reversed	Rehnquist, 5-4	Airport terminals are not public forums that trigger heightened judicial scrutiny for regulations that affect speech there; thus, airport authorities may ban solicitations by religious and political groups, but not the distribution of leaflets.

Utah Bar Foundation –

Welcomes New Trustee Jane A. Marquardt

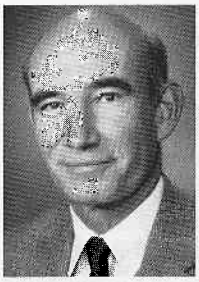
Jane A. Marquardt was recently elected to the Board of Trustees of the Bar Foundation for a three-year term and will be serving as a member on the Recruitment Committee. Ms. Marquardt, partner in the Ogden law firm Marquardt, Hasenyager & Custen, has been involved in many Bar association activities and is currently Secretary of the Bar's Estate Planning Section. At present, she is a member of the Board of Directors of the Management and Training Corporation, Board of Directors of the Eccles Art Center in Ogden and Fundraising Co-Chair of the Ogden River Parkway Committee. She has been President of the Weber County Bar Association, a member of the Weber State Institutional Council and the Weber State University Business Advisory Council.

Congratulates Stephen B. Nebeker

Stephen B. Nebeker has been reelected to the Board of Trustees for another three-year term. Mr. Nebeker, Director of the firm, Ray Quinney & Nebeker, has served on the Salt Lake County Bar, International Association of Insurance Counsel, American Board of Trial Advocates, Federal of Insurance Counsel, and as Chairman of the Bar's Litigation Section. He has been Regent of the American College of Trial Lawyers.

Mr. Nebeker joined the Board of Trustees in 1988. He has served as a member of the Recruitment Committee, and will now serve as Chair to the Foundation's Recruitment Committee.

Says Goodbye to Bert L. Dart



Bert L. Dart has stepped down after a very successful term as Trustee and Chairman of the Foundation's Recruitment Committee. Mr. Dart was elected to the Board in 1989 and has spearheaded the Foundation's recruitment effort to encourage other lawyers to join the IOLTA program. The Foundation thanks him for his loyal and dedicated service as a Trustee. He will continue service as a member of the Recruitment Committee.

Congratulations to Board Officers

The Utah Bar Foundation Board of Trustees has reelected its present officers to serve for another year. Hon. Norman H. Jackson will continue as President, Ellen M. Maycock will stay as Vice-President, and James B. Lee will again be Secretary Treasurer. Following is the current roster of Board of Trustees.

1992-1993 Board of Trustees

Hon. Norman H. Jackson, President
Ellen M. Maycock, Vice-President
James B. Lee, Secretary/Treasurer
Richard C. Cahoon
Stephen B. Nebeker
Carman E. Kipp
Jane A. Marquardt

Utah Bar Foundation/Historical Society Publishing Project

There is still time to let us know of your intent to submit articles, photos, anecdotes, courthouse events, characters, cases or claims to be included in the Foundation's issue of the Utah Historical Society Quarterly. Even if your material is not drafted by the first cut-off date (October 15), contact the Bar Foundation office (531-9077) and tell us of your interest. Remember — cash prizes and awards for submissions printed ($1,000, $500, $250).

Law firm of Evans & Evans, Attorneys (1910-15)

Photo credit: Utah State Historical Society Collection

CLE CALENDAR

ULTIMATE TRIAL NOTEBOOK

Sponsored by the State Bar of Nevada and cosponsored by the Utah State Bar.

CLE Credit: Approx. 12 hours
Date: October 8-9, 1992
Place: Lake Tahoe
Fee: call
Time: 8:00 a.m. to 5:00 p.m.

BUSINESS ASSOCIATIONS — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. This particular program will discuss the nuts and bolts of forming and maintaining various forms of business associations

CLE Credit: 3 hours
Date: October 14, 1992
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

1992 FALL ESTATE PLANNING INSTITUTE

For more information and to register for this, contact David Castleton at 521-9000.

CLE Credit: Approx. 7 hours
Date: October 30, 1992
Place: Little America Hotel, Salt Lake
Fee: $100.00 (plus MCLE fee)
Time: 8:00 a.m. to 5:00 p.m.

PRISONERS' RIGHTS LITIGATION — INCLUDING TIPS FOR COURT APPOINTED COUNSEL

This program is the premiere seminar of the new Constitutional Law Section. Presenters for this program include Ross C. (Rocky) Anderson and Brian M. Barnard. The program will focus on the issues faced when representing prisoners in civil rights litigation. Special emphasis will be directed towards those attorneys whom are appointed by the courts. This program is cosponsored by the American Civil Liberties Union of Utah.

CLE Credit: 2 hours
Date: November 5, 1992
Place: Utah Law & Justice Center
Fee: call
Time: 9:00 a.m. to 11:00 a.m.

LITIGATING THE HEAD INJURY CASE IN THE 90s

This is the annual presentation of this excellent program. Watch for the brochure mailing on this seminar and sign up early.

CLE Credit: 16 hours with 2 in Ethics
Date: November 12 & 13, 1992
Place: Utah Law & Justice Center
Fee: Call
Time: 8:00 a.m. to 5:00 p.m.

DOMESTIC RELATIONS — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. This particular program will discuss the nuts and bolts of family law practice, including divorce, custody, child support, visitation and alimony.

CLE Credit: 3 hours
Date: November 18, 1992
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

LITIGATING BREAST IMPLANT CASES

A tape-delay presentation of a live via satellite seminar. This program will examine the current status of the significant liability and causation issues surrounding breast implant litigation from the medical and legal perspectives.

CLE Credit: 4 hours
Date: November 18, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

CLE FOR THE GENERAL PRACTITIONER

Westminster College CLE Institute — Give us a day and a half; we'll provide half your biannual CLE! Topics include: Employment update: ADA Civil Rights, Wrongful Discharge; Billing Practices: What's Fair and What's Profitable; Computers: Networks and Legal Software; Personal Injury Suits Against the Feds And More. Geared to the needs of the general practitioner. For information call 488-4159.

CLE Credit: 12 hours
Date: November 20 & 21, 1992
Place: Westminster College
Time: 12:30 p.m. to 5:30 p.m. on the 20th
9:00 a.m. to 4:30 p.m. on the 21st

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____

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

Name — Phone

Address — City, State, ZIP

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

Signature

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

Registration and Cancellation Policies: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. No refunds will be made for live programs unless notification of cancellation is received at lease 48 hours in advance. Returned checks will be charged a $15.00 service charge

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

CLASSIFIED ADS

For information regarding classified advertising, please contact Leslee Ron at (801) 531-9077. Rates for advertising are as follows: 1-50 words — $10.00; 51-100 words — $20.00; confidential box numbers for positions available $10.00 in addition to advertisement. 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.

Federal Procedure — current through May 1992, $1,275 or best offer; Utah Code — current through June 1992, $450 or best offer. All books are in good condition. Contact Marie Mecham at (801) 963-3236.

OFFICE SHARING/SPACE AVAILABLE

Newly finished, deluxe, professional office space for two attorneys and staff. Approximately 1,300 sq. ft. 7821 South 700 East. Space includes two private offices, reception area, conference room, library, file storage, and much more. Convenient parking immediately adjacent to building for both clients and staff. Call (801) 272-1013.

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

Established firm, next to Sugarhouse Park, excellent view, parking and freeway access, general practice, seeks attorney for office sharing. Call (801) 486-3751.

Office space available for lease in Legal Arts Building in Ogden. Reception and secretarial space available. Great location next to courthouse. Call (801) 399-4191 for showing.

Office sharing available for one attorney. Fort Union area. Full or partial support services and equipment depending upon your needs and budget. Low overhead. Referral/overflow available. Call Jim at (801) 944-0990.

Deluxe office space available for one attorney and secretary in Kearns Building. Office shared with four attorneys. Space includes reception area, conference room, receptionist services, and other office support. Parking adjacent to building for staff and clients. Call (801) 532-7858 for information.

Law office space available (or join firm) in a choice suite to share with five other attorneys. Excellent downtown location (660 South 200 East in the Mountain America building), near courts and freeway. Plenty of free covered parking for attorneys and clients. Complete facilities, including reception area, conference room, FAX machine, copiers, refrigerator and microwave, file storage, secretarial space, and more. Overflow work. Friendly atmosphere. Please call (801) 532-6200.

The Newhouse Building has space available for full-service leasing, including 2,500 square feet on the sixth floor to be built to tenant specifications. Also available are four unique offices and a reception area (1,381 sq. ft. total) offering ground floor access with sixteen foot windows overlooking a brick plaza. Located in Salt Lake's historic financial district, the Newhouse Building offers a downtown location without retail congestion and heavy traffic. Convenient access to Federal Courts, State Offices and freeway. Fully secured reserved parking with 24-hour access is available at the Exchange Place garage. Call (801) 322-9301 for information on availability and rates.

POSITIONS AVAILABLE

Small Grand Junction law firm seeks full-time associate with 1-3 years experience for general practice with emphasis on tort and insurance law. Send resume, law school grades, and writing sample to: Doehling & Slater, P.C., 744 Horizon Court #360, Grand Junction, CO 81501.

Winder & Haslam, P.C. is seeking a full-time attorney with 2-3 years experience to handle general litigation and commercial transactions. Send resumes to Winder & Haslam, P.C., ATTN: S. Edwards, Office Administrator, P. O. Box 2668, Salt Lake City, Utah 84110-2668.

The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 1993. To qualify each application must consist of two or more individuals. Should you and your associate have extensive experience in criminal law and wish to submit an application, please contact F. John Hill, Director of Salt Lake Legal Defender Association at (801) 532-5444.

Salt Lake City firm seeking recent graduate, preferably with a marketing background and tax courses or experience. Send resume to Utah State Bar, Box M-8, 645 South 200 East #310, Salt Lake City, Utah 84111.

ATTORNEY POSITION, Denver. Large Denver-based law firm with established natural resources practice seeks attorney with 1-3 years experience in public lands/natural resources law. Competitive compensation package and ample opportunities for professional growth. Excellent academic credentials and references required. Send resume, law school transcript and writing sample to Mary Pat Wilson, Recruiting Manager, David, Graham & Stubbs, P. O. Box 185, Denver, CO 80201-0185.

POSITIONS SOUGHT

Attorney looking for work on contract basis. Licensed in Texas and Utah. Graduate of University of Texas School of Law; received Honor Award for Outstanding Legal Research and Writing; Salt Lake area; low rates. Call Peg at (801) 363-0496.

Attorney with Masters in Tax and Big Six accounting firm experience seeks position in law firm with a practice in the tax and/or estate planning area. Admitted in Utah and California. Call Brent at (801) 392-6046.

SERVICES

ATTENTION ATTORNEYS! Do you need help with voluminous medical records? Would you like the most current standards of care on your case? Do you have immediate access to Expert Witnesses in all fields? A Legal Nurse Consultant can help you save time and money. Call SHOAF AND ASSOCIATES at (801) 944-4232.

LegalEdge offers state of the art legal case management software. Its relational database foundation gives you all the standard elements you would expect from a full featured package plus unique capabilities: add your own case types with unlimited user-defined variables per type; add unlimited ticklers; add any number of reports, or change the standard set, powerful ad-hoc reporting lets you get data out any way

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MISCELLANEOUS

Buying rare coin collections and estates. If you are selling rare coins, call me! Should you have a large collection, we can be at your office anywhere in the U.S. within 24 hours. HOWARD MARKHAM RARE COINS, 1540 Barton Road #259, Redlands, CA 92373, telephone (714) 370-3027. Leave message as I frequently travel.

GUBERNATORIAL DEBATE

with

Candidates for the Office of Governor

Merrill Cook, Stewart Hansen, Michael Leavitt

When: 12:00 Noon, October 14, 1992
Where: Marriott Hotel
Cost: $15.00, payable to Salt Lake County

Moderator: Jack Ford, KSL – TV
News Courts Reporter

R.S.V.P. to Marie Evans at 532-3333, ext. 314 no later than October 9, 1992.

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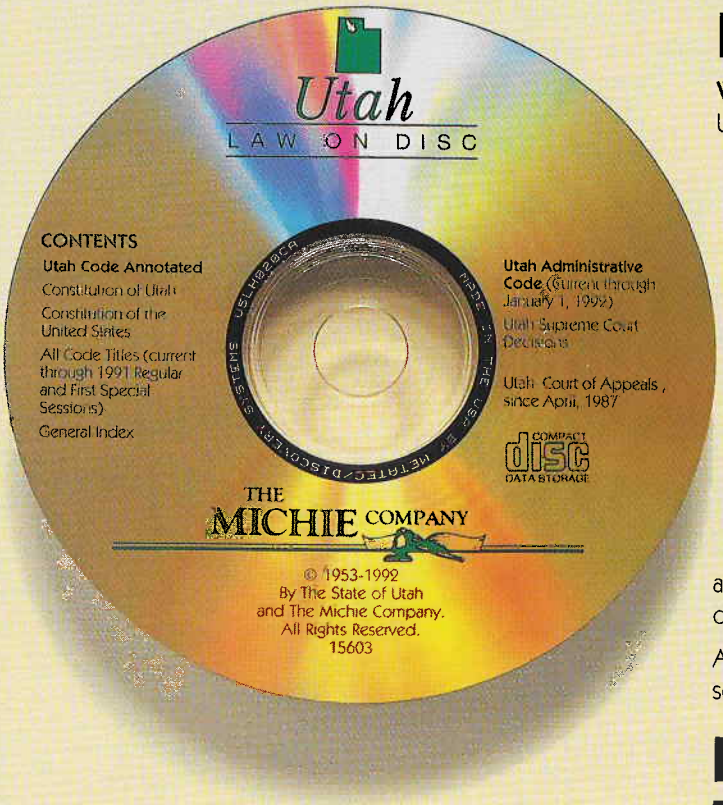
GOOD NEWS, BAD NEWS, AND GOOD NEWS FROM UTAH LAW ON DISC.



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