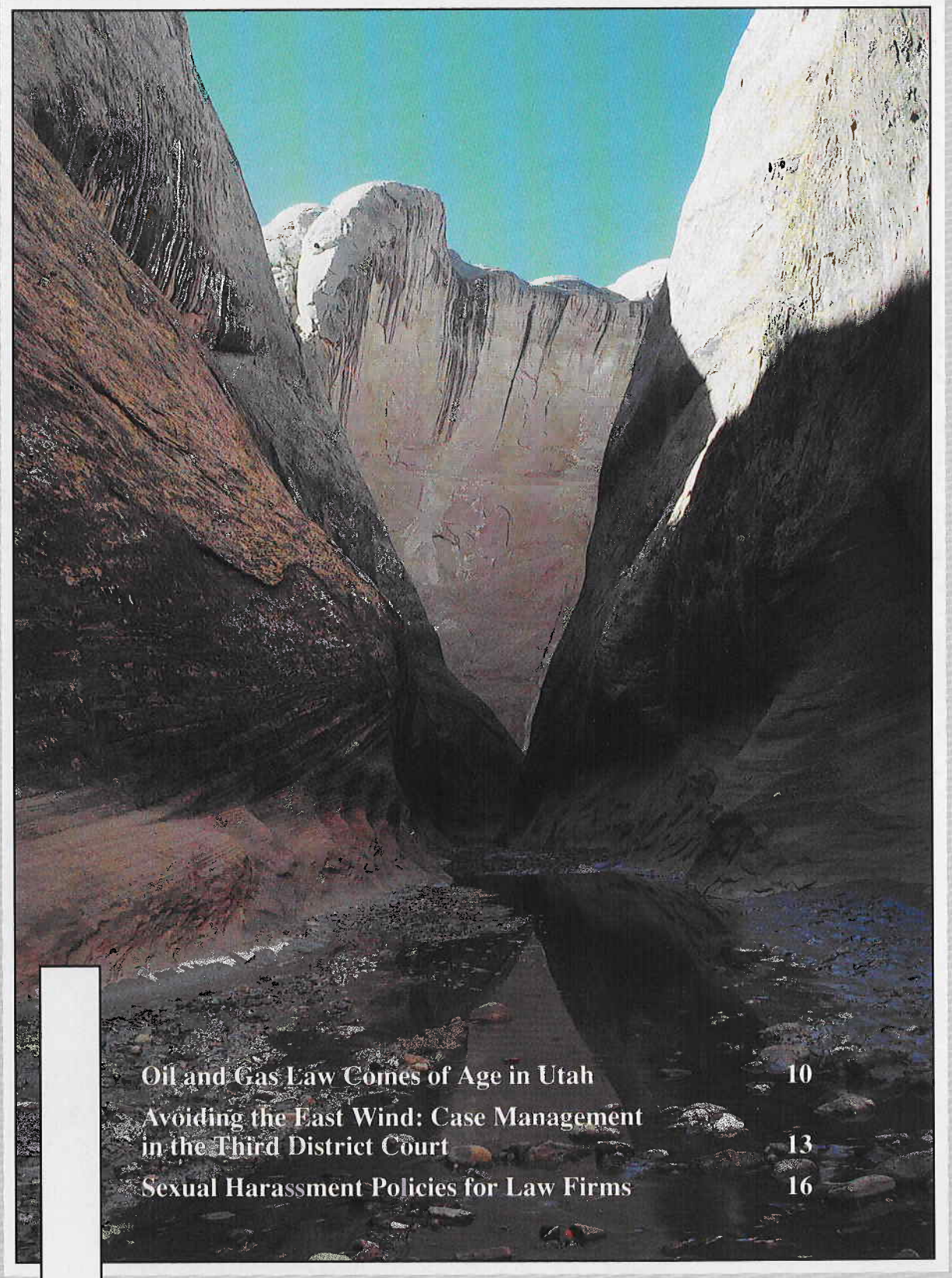
# UTAH BAR JOURNAL

Vol. 5 No. 9 November 1992



# WESTLAW TAKES THE WRAPS OFF A REVOLUTIONARY NEW LEGAL RESEARCH METHOD THAT UNDERSTANDS ENGLISH.

Finding the precise case law you need has never been faster, easier, or more natural.

All because of an amazing technological breakthrough aptly named WIN for *"WESTLAW IS NATURAL."* It's an entirely new, natural language method of computer research available exclusively from WESTLAW.

WIN™

Simply enter your issue in plain English and WESTLAW does the rest with results that are remarkably thorough and dependable.

WIN is the perfect choice for the new or occasional researcher.

But, even experts who want to go the extra mile will find that WIN can retrieve cases that most Boolean queries miss*.

With WIN, there's no computer language to learn. No need to enter root expanders, proximity connectors, or the other items required by other computer research services.

Just write naturally.

WIN makes WESTLAW the natural choice because it's the only CALR service that offers a choice.

Boolean searching for those who perform computer research every day.

And easy-to-use WIN searching on WESTLAW for everyone else.

Now that it's no longer under wraps, call to learn more about how easy and effective your case law research can be with the amazing new WIN method from WESTLAW.

**Toll-free 1-800-688-6363.**

**UNTIL NOW THIS IS THE ONLY LANGUAGE YOU COULD USE TO COMPOSE A CASE LAW WORD SEARCH REQUEST ONLINE.**

(travel w/15 agen! or guide or brochure or literature) w/50 (injur! or accident or death) w/50 (tourist or traveler)

**IT'S CALLED BOOLEAN.**

**THIS IS THE LANGUAGE YOU NOW HAVE THE CHOICE OF USING FOR THE SAME RESEARCH ON WESTLAW.**

Can a travel agency or book publisher be held liable for injuries sustained by a tourist while visiting a recommended place?

**IT'S CALLED ENGLISH.**

*Results may vary with the composition quality of the query.


WESTLAW®

*More ways to win*

Utah BJ

**Published by The Utah State Bar**
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077



# UTAH BAR JOURNAL

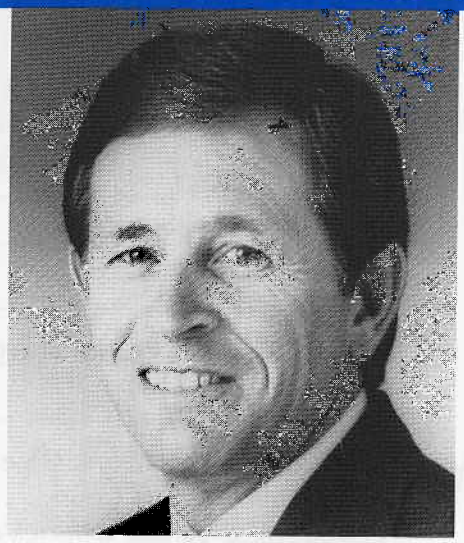
Vol. 5 No. 9 November 1992



COVER: Capitol Reef National Park, taken by Kent M. Barry, Esq., Assistant Attorney General, Education Division.

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.



# Utah's Legal Flashpoints of the 90's – ADR, Legal Services to the Poor, Increasing Attorney Population and the Unethical Lawyer

*By Randy L. Dryer*

As I have immersed myself in the first three months of my term as President and as I have discussed the issues facing our profession with Bar leaders from other states, I have reached two conclusions:

First, the problems which have faced practitioners and the organized bar in Utah in recent years have not been as serious and pervasive as those faced in other states; and

Second, our turn is coming!

As we prepare to meet the challenges which have plagued other more populous and less economically prosperous states, I hope we can be proactive, and not reactionary, and make informed and deliberate decisions rather than be overrun by circumstances or outside pressures. As a profession, we need to control our own destiny and not be dictated to by others, be they legislators, members of the executive branch, or even judges.

Controlling our own destiny means anticipating and responding to problems before they become of crisis proportions. In no particular order of importance or timing, I believe there are four flashpoints which the Bar must and will confront, either by our own volition or by outside forces, within the next three to five years. These flashpoints have become conflagrations in several states and have prompted drastic action in response. We can learn from those who have preceded us. I express no viewpoint on how these flashpoints will or should be dealt with. I merely raise them to alert us to the fact that we need to begin thinking about them now and not wait until someone else frames the issues for us which may predetermine the outcome.

### FLASHPOINT ONE — THE EMERGENCE OF ALTERNATIVE DISPUTE RESOLUTION.

The skyrocketing cost of litigation has fueled the search for less expensive ways of resolving legal disputes. Various forms of ADR, primarily from private providers, have flourished in many areas of the country. ADR is in its infancy in Utah and primarily has been left to private market forces for its development. The Bar has no formal policy on the subject and Utah practitioners, to the extent they utilize ADR, do so in a limited fashion. ADR is undoubtedly the wave of the future and the move to better and more frequently invoke the various forms of ADR in an institutional manner is and will be driven by client and legislative pressures. Businesses throughout the country are signing pledges to turn first to ADR techniques before filing lawsuits against other businesses. Over 60% of the Fortune 500 companies have already subscribed to such pledges.

Each year, ADR legislation has been introduced in the legislature and each new bill is more and more comprehensive and sweeping in its intrusion into the traditional litigation arena.

The legal profession is just beginning to react to this grassroots movement toward ADR. In some states, firms have established arbitration or mediation sections or departments and actively marketed this service to the public. The organized bars generally are behind the curve on ADR, but soon will be forced to catch up.

Colorado, for example, has recently jumped into the arena with both feet. The

Colorado Bar determined, as a matter of policy, that it would aggressively promote ADR. Toward that end, the Colorado Bar took three decisive actions.

First, it affirmatively encouraged Colorado businesses to sign an ADR pledge. The bar drafted, publicized, and circulated the pledge and urged all attorneys to encourage their clients to subscribe.

Second, the bar participated in the drafting and lobbying of a statute in the 1992 Colorado legislative session which empowers a judge to order arbitration or mediation and refer a suit to a court run ADR program.

Third, the bar recommended to the Colorado Supreme Court, and the Supreme Court adopted, an amendment to Rule 2.1 of the Colorado Rules of Professional Conduct to affirmatively require that when an attorney is advising a client whether to commence litigation he or she should advise the client of all forms of alternative dispute resolution prior to filing suit.

ADR is controversial, not only in terms of whether it truly does work and is more efficient and less costly, but also in terms of its potential competitive threat to many practitioners, particularly the rural or solo practitioner. The system sores which spawned ADR-cost and delay-will continue to fester and we need to determine what the appropriate policy posture as a bar should be with respect to ADR. Should we embrace ADR, fight it or ignore it? The Bar's ADR committee, chaired by Dian Whitney, will be considering these questions over the next few months and I would encourage each of you to call in with your thoughts or views.

**FLASHPOINT TWO — UNMET LEGAL NEEDS OF THE INDIGENT.**

The Utah Commission on Justice in the Twenty-First Century, in its recently completed report, noted that despite the "impressive amounts" of pro bono work done by Utah lawyers individually and through the Bar's Tuesday Night Bar program, increasing numbers of Utahns are being denied access to legal services. The Commission recommended that a special task force of lawyers, legislators and lay members be created to determine how best to address this growing problem. Budgetary pressures are such that government subsidized legal services probably will never adequately address the need. Legal insurance, for a variety of reasons, has never gotten off the ground. The most likely place to turn for a solution is to the bar — through pro bono service.

How to provide pro bono services to the indigent is an issue the bar ultimately will be forced to confront by outside pressures if it does not address the subject on its own volition.

The state of Florida has adopted the most aggressive approach to date in providing legal services to the indigent — an approach many Florida lawyers are not happy with. In September of this year, the Supreme Court of Florida issued for public comment a set of far reaching rules requiring every attorney in Florida to render pro bono legal service. The rules recognize that every lawyer licensed in the state is an officer of the court and, as such, has a professional responsibility to provide pro bono legal services to the poor. The rules allow an attorney to discharge that professional responsibility by (a) annually providing 20 hours of defined pro bono legal services; or (b) making an annual contribution of $350 to a recognized civil legal aid organization. The rules require, as a condition of licensure, each lawyer to file a report certifying he or she has satisfied his or her pro bono obligation. The Florida rules are the end result of a series of decisions by the Florida Supreme Court beginning in 1979 where the court recognized that Florida attorneys have an ethical obligation to provide pro bono legal services. As one might expect, the pro bono issue in Florida and the Supreme Court's chosen way to address the state's admittedly very serious problem, have been immensely controversial and divisive amongst the membership. These rules were imposed upon the bar membership by a Supreme Court who felt the bar's previous response to the problem was inadequate.

**FLASHPOINT THREE — THE GROWTH OF ATTORNEYS IN UTAH.**

For the past several years, the lawyer population in Utah has increased at a rate greater than the general adult population. Each year the bar realizes a net gain of between 200-250 attorneys. More and more attorneys from other jurisdictions are moving to Utah. Application to our two law schools are increasing and the number of applicants admitted continues to rise. More and more graduates are opting to seek employment within the state. The growing number of attorneys in Utah obviously is an issue that not only poses competitive concerns, but also concerns about how our state and the bar can absorb, support and regulate this growing number. The public in general certainly holds the view that we have too many lawyers already and that many of society's ills are a result of this oversupply. Should the marketplace deal with this situation or is it appropriate for the bar to take steps to curtail membership growth? Other states have examined the possibility of limiting enrollment at law schools within the state. Still others have responded by raising admission standards such as increasing the scores necessary for passing the bar examination. In Utah, the pass rate has risen steadily the last several years to the point where the pass rate reached 90% this past June. Still other jurisdictions have tightened up on the qualifications and conditions for out of state attorneys to practice in their state or to gain admittance. Obviously, the issue and the possible ways to address the issue are exceedingly complex, have legal implications and may or may not be appropriate issues for an integrated bar to address. Each year the number of persons sitting for the bar is greater than the last. Whether or not the organized bar decides to tackle this issue, we should act or not act through calculated decision and not by default or in response to others.

**FLASHPOINT FOUR — THE UNETHICAL LAWYER.**

Although the subject of unethical lawyers is certainly not new, it will continue to be a problem and is a growing one in Utah. The number of complaints made against Utah attorneys continues to rise each year. The Office of Bar Counsel received approximately 641 verified complaints against Utah attorneys in 1990. In 1991, the number increased to 692. For the first six months of 1992, the number has already reached 459. The burgeoning case load necessitated hiring of a third disciplinary attorney. Given the growth of the bar, the public's hostility toward lawyers and an increased readiness to blame one's counsel for an unhappy result, it is not reasonable to believe that this upward spiral will continue in the near future. There always will be those who call for state regulation of the disciplinary process with its empty promise of more vigorous enforce-

ment. Can we continue to adequately respond? Our current disciplinary system and procedures certainly have felt the strain of this increased caseload. In response to this growing pressure and other concerns with lawyer discipline, the Utah Supreme Court established a Committee on Discipline and asked it to analyze the system and completely overhaul the process if necessary. That committee has concluded its evaluation, and has recommended, in the form of revised Rules of Discipline, many significant changes. Foremost among the changes is the removal of the Board of Bar Commissioners from the disciplinary process and having trials of disciplinary complaints heard not by a panel of lawyers and lay persons, but by district court judges. This is obviously a major change in our present system and, incidentally, one which the Bar Commission supports. How we deal with the unethical lawyer in the next few years (or at least until fevered lawyer bashing subsides), will be closely watched by the public, the Supreme Court and the legislature.

Another related program that will require our close inspection is the Client Security Fund. Under our existing rule, the Client Security Fund is a source of monies available to reimburse clients who lose monies by virtue of attorney theft or other dishonesty. Our existing rule places a $10,000 limit on the amount any particular client may recover. Obviously, this amount is grossly inadequate in many of today's legal transactions where tens or hundreds of thousands, if not millions of dollars, are run through lawyer's trust accounts or otherwise held by the lawyer as a fiduciary. Most other states have significantly higher limits in their client security programs and Utah will face growing pressure to do the same. Florida recently imposed a $100 per lawyer surcharge to fund its Client Security Program. Florida has over 36,000 lawyers! Similarly, the issue of mandatory professional liability insurance will also need to be addressed as a possible means of protecting the public from the unethical lawyer.

Each of these four flashpoints inevitably will be ignited here as they have been elsewhere. Whether we are consumed by a conflagration or whether we can manage the fire as a controlled burn, will be up to us as a profession. If we do not respond in a responsible and satisfactory manner, others will step in and try to force feed us a solution, a solution undoubtedly not to our liking.

# Mini-Breakfast Seminar Series

**FREE OF CHARGE/SPONSORED BY THE UTAH STATE BAR**

- 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.

# A Noble and True Profession

*By Jeff R. Thorne*

For many years, and particularly now that I am a Bar Commissioner, I am a big booster of lawyers and the legal profession.

It stems from my vision of what a lawyer is supposed to be: an ethical, skilled practitioner of a noble profession intended to help individuals resolve their disputes fairly and equitably, consistent with the facts, the law, and the lawyer's obligation to the courts and to the administration of justice. Some may say this is an outdated or romanticized view, but those senior attorneys who practiced when I began my career seemed to fit that ideal.

As lawyers acting for clients, they seemed to be aggressive, skillful and effective, always keeping the client's interest paramount. They acted fairly in their dealings with opposing counsel and with the courts, and showed great sensitivity to their ethical obligations.

I was privileged to practice law with one of those models, Walter G. Mann, who passed on earlier this year.

Walt had been a past president of the Utah State Bar, and had been a renowned trial attorney in Northern Utah for over 40 years. As the senior attorney in our law firm, he encouraged each of us to become involved in Bar and community service.

We learned many gems of wisdom from Walt, such as: "it's a pretty thin dime that doesn't have two sides"; "no man goes broke taking a profit on each transaction"; "preparation is always more important than inspiration in a lawsuit"; "when you get into a pissing contest with a skunk, you're gonna stink"; "in life, as in football, you won't go far unless you know where the goal posts are."

Walt also had a keen sense of justice and fairness. Once when a deputy sheriff had a judgment entered against him for failure to winterize a vehicle that was repossessed, Walt paid the judgment out of his own funds. On another occasion, he represented the City dog catcher who had been wrongfully terminated, and after successfully winning the case, waived his fees. Walt enjoyed the "big cases", but he really loved "righting a wrong", even in little matters. He was willing to represent the unpopular client or fight City Hall when the cause was just.

Walt also had a great sense of humor. During a break in depositions, an associate at a large Salt Lake City law firm asked me whether certain stories he had heard about Walt Mann were true. I said, "Well what have you heard about him?" He said, "I understand there is an ice cream dish named for him in Brigham City, and that he once caught a prominent attorney trying to sell him a defective stallion, and that in his younger days as a member of the National Guard he used to volunteer to serve on the firing squad at the State Prison."

I replied that, "yes there is an ice cream dish known as the 'Walt Mann Special' at Peach City Ice Cream Company." Secondly, "the story about the horse is also true." After concluding a case against a prominent defense attorney from Salt Lake, the defense attorney took him out to his ranch to try to sell Walt a stallion. Walt had long been a horse trader, and when he heard the price and looked at the stallion, he felt something was wrong. After circling the horse once, he reached under and thrust up his hands and said, "Mr. _____, you SOB, this horse only has one testicle."

I did not know the answer about the firing squad so at another break I asked Walt whether he had ever volunteered to serve on the firing squad. He said, "Why do you ask that question?" I stated that the opposing counsel had asked me about it. He paused for a long period of time and then said, "No, I never served on a firing squad, but if it makes this case easier to settle, let him think I did."

The case was settled.

Walt was a grand old attorney, a true professional by any definition.

As one grows older, more and more of the grand old practitioners are passing from our midst. Many of you have had the privilege of working with them.

I would hope that when the time comes for our generation of attorneys to pass, that the next generation could look back at us with the same respect we have for those attorneys who preceeded us. I would hope that the next generation could say that we, also, were true professionals.

# Oil and Gas Law Comes of Age in Utah

*By Rosemary J. Beless*

Over the years, Utah has had few oil and gas cases that the Utah practitioner could use for guidance in interpreting Utah oil and gas statutes and the pooling agreements and orders affecting the owners of interests in Utah oil and gas wells. When a Utah case could not be found, Oklahoma oil and gas case law was often cited and used by analogy in construing Utah oil and gas statutory provisions on the pooling of Utah oil and gas interests and the protection of owners' correlative rights.

During the past year, that situation has changed. Utah oil and gas law has come of age. On a number of major oil and gas issues, the Utah practitioner can now look to 1991 decisions of the Utah Supreme Court.

In three landmark cases decided in 1991, the Utah Supreme Court addressed pivotal issues of oil and gas law: the timing (the prospective or retroactive effect) of voluntary or involuntary arrangements for the sharing (or "pooling") of oil and gas production among interest owners. Because an oil or gas well produces over a finite period of time and production may vary substantially during that period, the prospective or retroactive effect of any pooling arrangement has a dramatic impact upon each owner's share of production in a well.

In addressing the prospective or retroactive effect of a voluntary or involuntary pooling arrangement among interest owners in an oil or gas well, the Utah Supreme Court utilized the basic concepts of the rule of capture, correlative rights, the spacing order, and the pooling order, as defined below.

**1. Rule of Capture.** The rule of capture is a common-law right which provides that: (1) a landowner may drill a well on his property at whatever location he chooses, and (2) the landowner is not liable to the adjacent landowners whose lands are drained as the result of production from his well. The rule of capture applies in all jurisdictions, unless and to the extent it is modified by state law. 1 Williams & Meyers, *Oil and Gas Law* § 204.4 (1986).

*ROSEMARY J. BELESS received her Ph.D. (1976) and J.D. (1980) degrees from the University of Utah, where she served as Senior Editor of the Utah Law Review. Ms. Beless is a shareholder in the Salt Lake City law firm of Fabian & Clendenin. She has practiced natural resources and environmental law for the past 12 years, focusing on water, oil and gas, mining, real property, and environmental law. She was named Lawyer of the Year by the Energy, Natural Resources and Environmental Section of the Utah State Bar in 1990, and she is currently serving as Treasurer of the Energy, Natural Resource and Environmental Section. Ms. Beless represented the plaintiffs-respondents in Cowling v. Board of Oil, Gas & Mining, one of the 1991 Utah oil and gas cases discussed in her article.*

**2. Correlative Rights.** A landowner's "correlative rights" are his rights to his proportionate share of the oil and gas produced from a well, as determined in direct proportion to his ownership of the area drained by the well. *Utah Code Ann.* § 40-6-2(2) (1992). The area drained by the well (the "drilling unit") is established by the spacing order. *Id.* § 40-6-6.

**3. Spacing Order.** A drilling and spacing unit order (the "spacing order") is an order, issued by the Utah Board of Oil, Gas & Mining ("the Board") and based upon the geologic evidence for the specific real property, that determines the size and shape of the area (the "drilling unit") drained by one well and establishes the correlative rights of the landowners in the area drained by the well to the oil and gas produced from the well. *Id.* § 40-6-6. The Board has statutory authority to modify its spacing order to increase or decrease the size of the area drained by the well as additional technical information relating to the yield and geographical extent of the reservoir becomes available. *Id.* § 40-6-6(6).

**4. Pooling Order.** By means of a compulsory pooling order, the Board directs owners to share in production from a well in proportion to their ownership of the area drained by the well (the "drilling unit") as established by the applicable spacing order. *Id.* 40-6-6.5(2) (a).

***In re SAM Oil, Inc.***

The first of the three 1991 oil and gas cases addresses a straightforward timing issue: should a working interest owner pay a risk penalty when he joins an existing voluntary unit agreement and unit operating agreement *after* the successful completion of a well in the unit. *In re SAM Oil, Inc.*, 817 P.2d 299 (Utah 1991). Working interest owners who joined the unit operating agreement *prior* to the drilling of the well, had two choices under the terms of the agreement: (1) they could pay their proportionate share of the expenses for drilling the well and take the risk that the well might be a dry hole, or (2) they could choose not to pay for the drilling of the well and if the well were successfully completed, their share of expenses for the well — plus a 300% risk

penalty — would be deducted from their proportionate share of production.

In this case, the well had been successfully completed when the working interest owner, SAM Oil, offered to pay, out of its proceeds of production, its proportionate share of the expenses to join the operating and unit agreements. However, SAM Oil objected to payment of the risk penalty on the basis that it had not been a party to the agreements at the time of drilling and, therefore, had no opportunity to voluntarily participate in the drilling expenses prior to completion of the well.

The Utah Supreme Court held that, under the circumstances of this case, the requirement of risk compensation should not be affected by the fact that the well was in existence when SAM Oil joined the agreements. SAM Oil had known that the well would be drilled and the timing of its joinder was due to its own delay. *Id.* at 303.

The Court stated that SAM Oil should not be able to acquire the benefits of ownership without first compensating the existing working interest owners for the risk they took in drilling the well. If the well had been unsuccessful, a party subsequently joining the unit agreements would not have had to absorb any of the costs of drilling. It would unfairly injure participating working interest owners to require them to absorb all the losses from the well but force them to share all of the profits with non-participating working interest owners. Such a result would encourage owners not to contribute to the costs of a well until the results of drilling were known, in order to obtain the benefits of the well without the risks. *Id.* at 304.

In this case, the working interest owner's timing (joining the agreement after completion of the well) subjected the owner to the risk penalty for non-participation in the well drilled prior to the owner's joinder.

***Bennion v. ANR Production Co.***

The second Utah oil and gas case of 1991 is a case of first impression on the rights of a nonconsenting interest owner under the forced pooling provisions of the Utah Oil and Gas Act. *Bennion v. ANR Production Co.*, 819 P.2d 343 (Utah 1991). The case raises the question of whether an existing forced pooling order can be modified by the Board to increase the number of wells in a drilling unit and impose a 175% risk penalty upon interest owners who do not agree to pay their share ("non-consenting owners") of the expenses of drilling the additional well.

To arguments that this risk penalty ("nonconsent penalty") is an unconstitutional taking of property, the Court stated that any right a nonconsenting working interest owner has to his statutory share of production is subject to the payment of his share of costs and expenses, including his share of risk compensation that results from his election not to contribute to the drilling costs. Moreover, a serious constitutional problem would arise if the Board simply compelled participation by all working interest owners in a speculative venture. *Id.* at 348 n.8; 5 W. Summers, *Oil and Gas* ch. 29, § 975 at 128 (1966) (hereinafter "Summers").

*"Utah oil and gas law has come of age. On a number of major oil and gas issues, the Utah practitioner can now look to 1991 decisions of the Utah Supreme Court."*

Where, as in this case, the nonconsenting party is not only given a royalty from production but is also given the opportunity to elect to participate in the drilling, the subsequent imposition of a nonconsent penalty constitutes a valid exercise of the police power. 819 P.2d at 348; *See* 5 Summers, ch. 29, § 977 at 136.

Perhaps the most important concept concerning timing in the *Bennion* case is the Court's statement that the Board's pooling orders are *prospective* and subject to *future* change:

> [U]nlike the judgments of courts dealing with claims fixed by past events which are res judicata, [orders of oil and gas regulatory agencies] are prospective, subject to change, and fundamentally designed to prevent waste and protect correlative rights, with effects upon private property when they occur only incidental to these two police power purposes.

819 P.2d at 348, quoting from 5 Summers, ch. 29, § 977 at 136.

Although the Utah Oil and Gas Act does not explicitly authorize the Board to modify a pooling order to accommodate the drilling of additional wells in a drilling unit, such authorization is implied in the statute's grant of authority to the Board to modify spacing orders to that effect. *See Utah Code Ann.* § 40-6-6(6) (1992). When a modified spacing order results in the drilling of an additional well in a drilling unit, the pooling order must be modified to the extent necessary to fix the amount of drilling and operational costs for the second well.

In the *Bennion* case, the anticipated drilling of an additional well in the drilling unit caused the original pooling order to become inadequate to define the relationships among the owners in the drilling unit. Because the modification of the pooling order promoted policies and goals of the Utah Oil and Gas Act to increase production and prevent waste, without compromising interest owners' correlative rights, the Court held that the amendment of the pooling order was proper. 819 P.2d at 350.

***Cowling v. Board of Oil, Gas & Mining***

The final Utah oil and gas case for 1991 is also a case of first impression for the Utah court. It considers whether a pooling order, issued almost two years after completion of the subject well, can relate back to the date of first production from the well. *Cowling v. Board of Oil, Gas & Mining*, 830 P.2d 220 (Utah 1991). In an earlier case, the Court had sustained an adjoining working interest owner's rights in first production when the entry of the applicable spacing order preceded the date of first production. In other words, the Court had applied the pooling order retroactively to all production up to the date of the applicable spacing order. *Bennion v. Utah State Board of Oil, Gas & Mining*. 675 P.2d 1124 (Utah 1983). However, in *Cowling*, production began almost two years before either the applicable spacing order or pooling order was entered.

In considering the retroactive effect of a compulsory pooling order, the Court in *Cowling* framed the issue as "where the law of capture ends and the law of correlative rights begins." *Cowling*, 830 P.2d at 224. The Court defined this point as the entry of the spacing order and held that a

pooling order should be effective no earlier than the date of the spacing order, unless there are special circumstances that would make it more equitable for an order to be retroactive to protect correlative rights from overreaching conduct. *Id.* at 229. The Court's ruling follows the majority of decisions from other jurisdictions and creates an orderly transition from the common-law rule of capture to the statutory premise of correlative rights.

Under the rule of capture, a landowner may drill a well anywhere upon his property and claim ownership of any oil and gas produced from that well even if the oil and gas have migrated from formations in adjoining lands. The landowner is not liable for causing oil or gas to migrate across property lines and need not compensate adjoining landowners for the drainage of oil and gas from under their lands. *Thompson v. Consol. Gas Util. Corp.*, 300 U.S. 55, 68 (1936); *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 233 (1931); *Brown v. Spillman*, 155 U.S. 665, 669-70 (1895); 1 Williams & Meyers, *Oil and Gas Law* § 204.4 at 55-57 [hereinafter William & Meyers]. The rule of capture applies in all jurisdictions, unless it is modified by state law. 1 Williams & Meyers at 55-56.

The legislature's enactment of the Utah Oil and Gas Act, *Utah Code Ann.* § 40-6-1 through -18, did not abrogate the rule of capture; these statutes are not self-executing. The Utah Oil and Gas Act merely empowers the Board to modify and limit the rule of capture and establish correlative rights through its rules and orders. *Cf. Carter Oil Co. v. State*, 205 Okla. 541, 240 P.2d 787, 790 (1951) (Oklahoma statutes similar to the Utah statutes are not self-executing but authorize administrative boards to modify the rule of capture). The rule of capture is applicable to all production in Utah until the Board issues an order under the Utah Oil and Gas Act to modify or limit the rule in any area.

On September 8, 1955, the Board, pursuant to its authority to adopt general rules and regulations for the oil and gas industry under the Utah Oil and Gas Conservation Act of 1955 (predecessor to the Utah Oil and Gas Act), adopted Rule C-3(b), which limited the *location* of wells in areas not covered by a specific spacing order. This general statewide well location rule (now R615-3-2(1)) modifies the rule of capture in that the landowner can no longer drill a well on his property at whatever location he chooses. He must locate the well within the parameters of the rule or obtain an exception or modification of the rule from the Board. However, the remainder of the rule of capture pertaining to production continues in effect, i.e., the landowner is not liable to adjacent landowners for drainage from his well. The general well location rule does not determine the drainage area of the well and does not establish the correlative rights of adjoining landowners. Only through a specific spacing order is the rule of capture abrogated as to the landowner's liability for drainage from a well.

***"The legislature's enactment of the Utah Oil and Gas Act. . . did not abrogate the rule of capture; these statutes are not self-executing."***

A specific spacing order for an area is based upon geological evidence as to the drainage area of each well. *Utah Code Ann.* § 40-6-6(5) (b) provides that "An order of the board that establishes drilling units for a pool shall include all lands determined by the Board to overlay the pool." It is the specific order issued by the Board for a specific area which determines drainage and changes the property rights of landowners from the modified rule of capture (i.e., all production landowners can capture from wells located pursuant to the general well location rule without liability for drainage) to the establishment of correlative rights. Thus, under a spacing order, all landowners within the specified area share in production, and the producing landowner is liable for drainage of adjoining landowners.

The Court's ruling in *Cowling* creates a stable, reliable means by which to define the real property interests in the area drained by the well. Unfortunately, geology is not an exact science. The estimation of the size of the area drained by one well is constantly subject to revision — depending upon the geologists' and reservoir engineers' increasing knowledge of the area through additional exploration. For example, in *Cowling*, the April 1983 voluntary Declaration of Pooling defined the area drained by the well to include only 100.14 acres. As of the March 1985 spacing order, the Board determined the area drained by the well to include 300.14 acres, but this spacing order was modified by the Board's order in June 1985, so that the drained area was reduced to 200.14 acres. As experts in reservoir analysis gather more data, their estimation of the area drained by the well may change again.

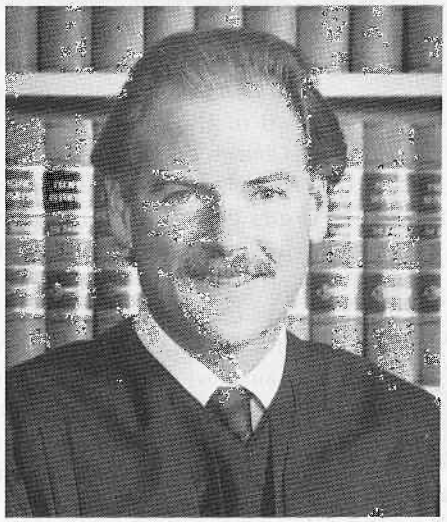
The Board has statutory authority to modify its spacing order to increase or decrease the size of the area drained by one well (a drilling unit) as new information becomes available. *Utah Code Ann.* § 40-6-6(6) (c). Each modification of the area drained by one well changes the correlative rights of the landowners and necessitates a change in the pooling order. If each pooling for a well were made effective back to the date of first production and prior to the date of the applicable spacing order, the landowners' prior rights to production from the well would be constantly subject to change. Consequently, the royalty payments that landowners have received would be subject to recalculation because of potential future changes in the estimation of the area drained by the well. Under this approach, a landowner would never feel free to spend a royalty payment.

A spacing order is not a final pronouncement; it is always subject to modification. In order to be a valuable, alienable real property interest, a landowner's royalty interest must be a definite amount, specifically quantifiable on any given date. To provide this type of definition to a royalty interest, the pooling order can be retroactive only to the date of the applicable spacing order establishing the size of the drained area and the landowners' correlative rights. A pooling order effective prior to the date of the applicable spacing order creates past royalty interests which can never be defined with any finality.

Fortunately, the Utah Supreme Court concluded a banner year in Utah oil and gas law by ruling, on December 31, 1991, that a pooling order could be retroactive only to the date of its applicable spacing order, absent special circumstances which would make this rule inequitable.

# Avoiding the East Wind: Case Management in the Third District Court

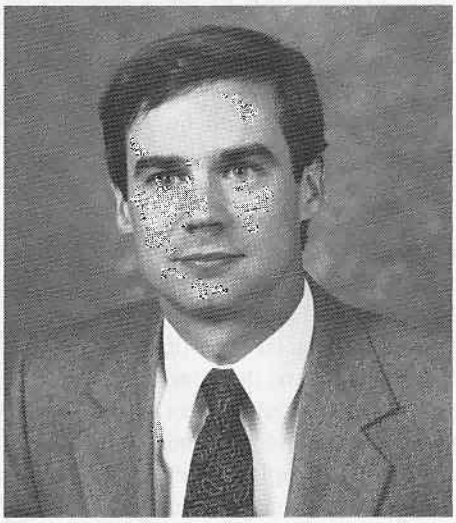
*By Judge J. Dennis Frederick and Timothy Shea*



*JUDGE J. DENNIS FREDERICK received his Bachelor of Science degree in psychology in 1964, and his Juris Doctor degree in 1966 from the University of Utah College of Law. He was appointed to the Third District Court bench in 1982 by Governor Scott Matheson after sixteen years as a trial lawyer and prosecutor serving as deputy district attorney.*

*After his appointment to the bench he has continued to serve on and chair numerous bar and judiciary committees, and is a member of the Board of Trustees of the University of Utah College of Law Alumni Association. Judge Frederick has been since 1986 a member of the Utah Judicial Council of which he is vice-chair, and a member of the Executive Committee.*

*In 1987 Judge Frederick received the first Utah Bar Foundation Achievement Award and in 1988 he was named the District Court Judge of the Year by the Utah State Bar.*



*TIMOTHY M. SHEA is a 1981 graduate of the University of Oregon School of Law and is admitted to the bar in Oregon, New York and Utah. Currently, Mr. Shea is senior legal counsel at the Administrative Office of the Courts. He was appointed to this position in March 1992 after four years as the trial court executive of the District and Circuit Courts of the Third Judicial District. He served as staff attorney to the Governor's Task Force on Implementation of the Judicial Article and as clerk of the Utah Court of Appeals.*

One genre of modern literature, film and television, from a Perry Mason rerun to a Scott Turow thriller, represents the lawyer as protagonist. The case, almost always a criminal prosecution, is wrapped up in an hour or two or at most within a few hundred pages. The grand old Dickens novel, *Bleak House*, is not so kind to our profession. In the novel, the bar is "mistily engaged in one of the ten thousand stages of an endless cause." The court so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give — who does not often give — the warning, 'Suffer any wrong that can be done you, rather than come here.'

In the most endless cause of all, Jarndyce and Jarndyce, parties, witnesses, barristers, solicitors and hangers-on argue, contend, posture and generally ruin their lives for generations. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliri-

ously found themselves made parties in Jarndyce and Jarndyce, without knowing why; whole families have inherited legendary hatreds with the suit.

This case in the High Court of Chancery is concluded only when fees and costs have eroded the monetary value of the estate to nothing. The novel's legal culture stands in awe of the case. Not so its author.

*Bleak House* has no doubt contributed to the publicly held cynical view of the pace and effectiveness of litigating in our courts. This view is illustrated by observations such as the old Gypsy curse: "May you be involved in a lawsuit, and be right;" or "Litigation is the pathology of the law;" or "He who seeks revenge in court shall dig two graves." And as observed by no less than Learned Hand: "Before starting litigation, please execute a will."

If ever there was a time when the court could afford to accept the glacial pace of litigation decried in *Bleak House*, that time has passed. The court is expected to meet the standards of the society it serves, and our society is accelerated. People expect expedition. Global communication and computer processing are measured in microseconds; travel, even war, measured in hours. With this as the environment of their daily lives, people have little patience for years of meetings, phone calls, faxes, depositions, interrogatories, motions, conferences and hearings in a case that will likely be resolved by settlement.

The judicial branch of government is sometimes referred to as the passive branch. That is, the court does not seek out cases; cases are presented to the court. This pillar of jurisprudence is sound with respect to the limitation upon the court not to fashion a remedy or establish a precedent where no controversy exists. But the principle does not hold with respect to the management of those cases that are presented to the court. The court cannot afford to be passive, to wait for reluctant litigators to set the pace of litigation. The workload of the judge does not permit it. Court rules do not permit it. Simple courtesy to the parties, witnesses and lawyers does not permit it.

In order to ensure the timely disposition of cases, the Third District Court, indeed most courts of the state, have implemented procedures for calendar and case management. This has brought some criticism from the bar because lawyers, perhaps not used to the increased pace of litigation, feel its effects. Our objective is not haste, but timeliness. Our goal is to maintain a deliberative process without permitting a ponderous process.

The court is asking nothing of the bar that it does not impose upon itself. The design of the Utah court system creates a self-interest in the judge to dispose of each case in a fair, just and timely manner. The effort of the judge and staff is to allocate to each case the amount of time necessary for proper disposition, but no more.

*"The court is asking nothing of the bar that it does not impose upon itself. The design of the Utah court system creates a self-interest in the judge to dispose of each case in a fair, just and timely manner."*

The methodology is multi-faceted. The Third District Court pioneered the use in Utah of individual calendaring, where each judge is personally responsible for his or her cases from filing to disposition. Peers and practitioners evaluate judges biannually. The Judicial Council has adopted standards for the timely final disposition of cases, which is one component of the judicial evaluation process. Statutorily, judges are required to dispose of a matter under advisement within 60 days; the failure to do so also is part of judicial evaluation.

Most cases are resolved without trial. Probably 95% or more of civil complaints are resolved without trial. Given that fact, the management of a case by the court facilitates settlement earlier rather than later in the court process. The cumulative cost savings from hearings not scheduled and rescheduled, motions not filed and argued, and rulings not reconsidered inures to the benefit of all: court; counsel; and parties. Case management permits the court to more intensively schedule its time for those cases that do require the full panoply of court process for a just resolution, resulting in the earlier disposition of even the most difficult cases.

Case management techniques take several forms across the country. Some courts hold a conference very early in the case at which the judge and litigants establish deadlines for discovery, motions, readiness for trial, etc. Some courts have established criteria for automatically assigning cases to predetermined tracks, each with its own set of deadlines. Failure of the litigants to meet these deadlines, whether set by negotiation or automation, can result in sanctions.

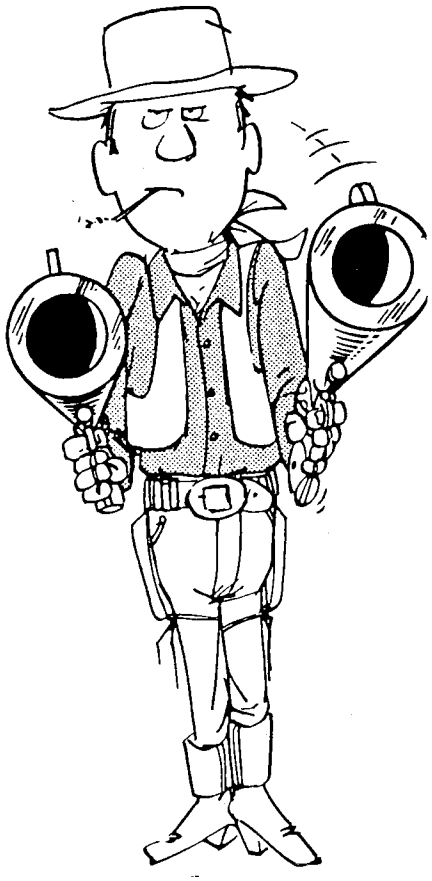
The practice in the Third District Court is similar to the latter model. All or nearly all of the judges of the Third District Court rely upon a periodic survey of their individual caseload. The computer generates this survey or report, which shows the age and status of the case. If a case has not progressed in accordance with the deadlines established by rules, the plaintiff or plaintiff's attorney is ordered to show cause why the case should not be dismissed for lack of prosecution. The judges also routinely require that a case not be adjourned without the next action and deadline established.

In *Bleak House*, an east wind is to be avoided. A strong easterly is the symbol of indignation, irritation and outrage by John Jarndyce, a principal character in the novel. To ensure that the wind remains due west with the judges of the Third District Court, lawyers are encouraged to monitor and assist the progress of their cases. Do not let deadlines pass without action. The court is doing all it can to ensure that dates for trials, hearings and conferences are firm. Use the hearings and procedures of the court for realistic settlement opportunities, not for delay. Be realistic in requesting extensions. If the response to a motion cannot be completed in a week, don't represent that it will. If discovery can be accomplished in one month, don't request two. Cooperate with the court and opposing counsel to resolve the litigation. One can cooperate without compromising one's client.

The just resolution of litigation in the courts is not a race. There is no prize to the judge who disposes of cases most quickly. Deliberation takes time. The court has not lost sight of its primary goal of the just adjudication of cases. However, we have added as an important secondary goal the expeditious adjudication of cases.

# It's Your Last Chance, Partners.

Members of the Utah State Bar
who were admitted in 1990.



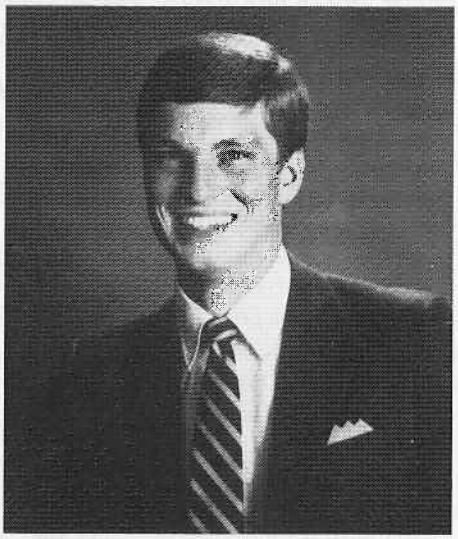
The deadline for completing your MCLE requirements is December 31, 1992, and it's coming on as fast as a buffalo stampede. Those of you who were admitted as a result of the February & July 1990 Bar exam, are required to complete 27 hours of continuing legal education (CLE), including 3 hours of ethics credit by December 31, 1992. If you wait until the last minute to get your credits, you might find yourself hogtied by scheduling or registration limitations. Don't get caught in a shoot out at the MCLE corral – be a credit packin' lawyer!

A MCLE form is included in this issue of the *Bar Journal.* Call Sydnie Kuhre, 531-9077 for information.

# Sexual Harassment Policies for Law Firms

*By Mary Anne Q. Wood and Wayne W. Williams*

*MARY ANNE Q. WOOD is a partner with the firm of Wood and Wood and a visiting professor of law at the J. Reuben Clark Law School. Her practice includes advising clients on employment issues and representing them in employment litigation.*



*WAYNE W. WILLIAMS is an associate in the Employment Department of Sherman & Howard's Colorado Springs office. Mr. Williams was formerly an associate with the Salt Lake office of Holme Roberts & Owen. He is a 1989 graduate of the University of Virginia School of Law.*

## INTRODUCTION

The questions raised during the confirmation hearings of Justice Thomas concerning his alleged harassment of a subordinate, Anita Hill, have renewed concerns about sexual harassment in the workplace. These concerns have spawned a plethora of articles in the press and seminars to provide guidance to employers about eliminating sexual harassment in the workplace.

Many law firms are involved in assisting clients in developing and implementing sexual harassment policies. However, the statistics would indicate that law firms themselves are slow in promulgating effective sexual harassment policies. For a variety of reasons law firms may not have implemented effective sexual harassment policies. Firms may believe that sexual harassment is limited to blue collar jobs. However, a survey by the National Law Journal and West Publishing Company revealed that 60% of the 900 female lawyers surveyed reported that they had experienced some form of sexual harassment in the workplace.[1]

Many law firms are too small to be covered by the provisions of Title VII and consequently may believe that they are not at risk for sexual harassment claims. However, even law firms that are too small to be covered by the provisions of Title VII may still be liable for sexual harassment if they are a federal contractor or if they practice in a state with a state law which prohibits sexual harassment. In addition, all employers are subject to exposure for potential tort claims such as intentional infliction of emotional distress.

## DEFINING SEXUAL HARASSMENT

In 1980, the EEOC first issued guidelines declaring sexual harassment to be a violation of Title VII. According to the EEOC:

> Unwelcome sexual advances, requests for sexual favors, and other verbal[2] or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 CFR § 1604.11(a) (1991).[3]

The Supreme Court adopted the guidelines' definition of sexual harassment in

*Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986), and held that a plaintiff may establish a violation of Title VII by "proving that discrimination based on sex has created a hostile or abusive work environment." *Id.* at 2405.

While adopting the EEOC definitions of sexual harassment, the Supreme Court declined the parties' invitation to issue a definitive rule on when employers are liable for the harassing conduct of their employee supervisors. *Id.* at 2407-08. The district court had held that the bank was without notice of the supervisor's alleged conduct and consequently could not be held liable for the supervisor's actions. *Id.* at 2403. The Court of Appeals, on the other hand, concluded that the employer was strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer did not know of the misconduct. *Id.*

Rather than adopt either of the lower courts' bright line rules, the Supreme Court agreed with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. *Id.* at 2408. The Court also concluded that the absence of notice to an employer does not necessarily insulate that employer from liability. *Id.* Furthermore, the Supreme Court rejected the employer's assertion that the mere existence of a grievance procedure and a general policy against discrimination, coupled with a plaintiff's failure to invoke that procedure insulates the employer from liability. *Id.* The Supreme Court, however, signaled that employers may be able to insulate themselves from liability if they have effective procedures in place that are calculated to encourage victims of harassment to come forward. *Id.*

The Supreme Court indicated that the employer's policy in *Meritor* was insufficient because it did not address sexual harassment in particular and it did not "alert employees to their employer's interest in correcting that form of discrimination." *Id.* Moreover, the bank's grievance procedure required a complaining employee to first complain to her supervisor. In *Meritor*, the supervisor was the harassing party. Consequently, it was not surprising that the plaintiff failed to invoke the procedure. *Id.*

## PURPOSE OF A SEXUAL HARASSMENT POLICY

Under the principals enunciated in *Meritor*, there are three primary reasons why every employer, including all law firms, should implement an effective sexual harassment policy. First, an effective policy can prevent sexual harassment from ever occurring. By teaching each partner[4] and employee what types of conduct are prohibited, many individuals will avoid sexually harassing conduct. When a specific complaint is received, management can work with the offending individual to ensure the harassment ends.

*"In a society that is preoccupied with sex, it is difficult to make the workplace a sanctuary. It is the responsibility of the employer, however, to eliminate unwelcome conduct from the workplace."*

Second, an effective sexual harassment policy can immunize the employer from liability for some of the harassment that does occur. One of the agency principles under which an employer can be held liable for the actions of its employees is "apparent authority." Under this doctrine, "employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management. This apparent authority arises from their power over their employees, including the power to make or substantially influence [employment] decisions."[5] According to the EEOC, "an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure." *Id.*[6]

However, an employer generally cannot avoid liability for quid pro quo harassment. In *Meritor*, the Supreme Court cited with favor the EEOC's position that "where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them." 106 S.Ct. at 2407-08. Moreover, because of the different agency principles which govern general partnerships, it may be difficult to insulate a firm from liability for harassment by partners, even when the harassment is based on the creation of a hostile environment rather than quid pro quo.

Finally, a policy that effectively solves complaints of sexual harassment internally will often deter the filing of claims against the employer with government agencies and in court. As noted by Lynn Hecht Schafran, a lawyer with the National Organization for Women's Legal Defense and Education Fund, most women "don't even want to see the guy punished, . . . [a]ll they want is for [the harassment] to stop and to make sure they're not going to get a bad evaluation.[7] Promptly resolving complaints internally can accomplish these goals confidentially and cost effectively.

## ELEMENTS OF A SUCCESSFUL SEXUAL HARASSMENT POLICY

In order to be successful, a sexual harassment policy must (1) convey to all employees that sexual harassment is a serious violation of firm policy; (2) train both partners and employees in avoiding actions which may be considered sexual harassment; (3) provide an effective means of resolving complaints including encouragement to report incidents; and (4) accurately assess the presence of sexual harassment in the workplace.

**Adoption and Dissemination of Policy.** The firm must prepare a strongly stated policy that defines and condemns sexual harassment and identifies the internal means the firm has provided to resolve problems of harassment. The firm should define sexual harassment broadly to include all unwelcome conduct of a sexual nature including, but not limited to, physical contact, lewd or sexually suggestive comments, off-color language or jokes of a sexual nature, slurs and other verbal, written, pictorial or physical conduct relating to an individual's sex or sexual conduct.

The unwelcome nature of the conduct is the key. In a society that is preoccupied with sex, it is difficult to make the workplace a sanctuary. It is the responsibility of the employer, however, to eliminate

unwelcome conduct from the workplace. The Eleventh Circuit has defined unwelcome conduct as conduct which is "unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.' *Henson v. City of Dundee*, 582 F.2d 897, 903 (11th Cir. 1982) (relied on by EEOC in Policy Guidance at 3270).

While participation by the employee in the conduct generally gives rise to a presumption that the conduct was not unwelcome,[8] the employee may also notify the harasser that the conduct is not welcome even if the employee previously encouraged such conduct. Therefore, the firm's sexual harassment policy should encourage employees to immediately tell harassers when their conduct is unwelcome. All employees should be instructed to immediately stop conduct when they are told it is unwelcome. In addition, they should be told that an attempt by an employee to change the subject or a failure to join in the conduct are also signals that the conduct is unwelcome.

The policy should note that it is in effect at all times and in all places. Firm parties and other events away from the office often pose the greatest likelihood of sexually harassing conduct arising. A number of law clerks, associates, and other law firm employees have related examples of sexually harassing parties or other activities at various firms.[9]

The policy should state that appropriate action, up to and including termination, will be taken against sexual harassers, and the firm's commitment to this policy should be emphasized, perhaps by having the Executive Committee, Board of Directors, or Managing Partner sign the policy. A written copy of this policy should be given to every partner and employee at the time of hire and on an annual basis thereafter. In addition, a copy should be posted with the other required notices regarding employment and included within the employee handbook.[10] If regular meetings of partners or employees are held, the policy should be emphasized orally on an annual basis as well.

## TRAINING

In addition to condemning sexual harassment, a firm should also train its partners and employees what conduct may be considered sexually harassing. Many individuals are unaware of the broad range of conduct prohibited as sexual harassment, and if such conduct is to be eliminated, they need to be taught what can and cannot be said and done in a forum that allows for free discussion.

Healthy work environment training should encourage free discussions by all involved. Because of the sensitivity many employees have in approaching management directly about such problems, it is often useful to have the training conducting by someone from outside the firm.

*"Firm parties and other events away from the office often pose the greatest likelihood of sexually harassing conduct arising."*

In the training of partners and employees, it should be emphasized that it is the perception of the individual who is harassed that governs and that these perceptions vary between men and women. Thus, a number of courts have held that the presence of sexual harassment is determined by whether "a reasonable woman would consider [the conduct] sufficiently severe or pervasive . . . to create an abusive working environment." *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991). *Accord, Robinson*, 760 F. Supp. at 1524. A useful guideline to teach employees is to have them ask if they would conduct themselves in the same manner if a spouse or mother were present or if they knew the conduct was being videotaped and would be broadcast that night on the evening news.

**Problem Resolution.** No matter how many hours of training are conducted, sexual harassment can still occur. It is therefore imperative that the sexual harassment policy provide a means whereby an individual who believes he or she is the victim of harassment can have the harassment eliminated. The Tenth Circuit has held that an effective sexual harassment grievance policy may absolve an employer from liability.[11] In structuring a proper grievance procedure, several factors must be considered.

First, the policy should encourage individuals to come forward when they first feel they are sexually harassed. The policy should allow both oral and written grievances,[12] and several individuals should be designated to receive grievances.[13] As illustrated in *Meritor*,[14] a policy that requires that an employee first complain to a particular supervisor will not be considered to be effective if the supervisor has participated in the harassment. Further, those individuals designated to review grievances must have the authority and the time to resolve them. The cases are full of instances where plaintiffs complained to individuals without the power or interest to resolve the problem. In a law firm setting, reporting sexual harassment to an office manager, personnel director, or recruiting coordinator is probably not sufficient. Only a partner will have sufficient clout to resolve many allegations of sexual harassment.

Second, the procedure should address the confidentiality concerns of both the grievant and the accused. As plainly demonstrated during the Thomas confirmation hearing, accusations of sexual harassment are generally embarrassing for both the accused and the accuser. Accordingly, the procedure should provide for the investigation to be handled confidentially with information disseminated on a strict need to know basis.

Third, the procedure should assure the grievant that he or she is protected both by law and by company policy from retaliation for complaints made in good faith. Both state and federal law forbid retaliation against employees who complain of harassment.

Fourth, the procedure should provide that the firm will promptly and thoroughly investigate all complaints. The grievant, the accused, and any potential witnesses will be interviewed. Information that is disclosed to potential witnesses should be limited to what is needed to obtain the information they have. In most cases, a full explanation of the charge will not be necessary. Everyone contacted should be informed of the need to preserve the confidentiality of the information they receive.

Fifth, the procedure should provide that if it is determined that sexual harassment occurred, the firm will take immediate and appropriate action by doing whatever is necessary to end the harassment, make the

victims whole by restoring lost employment benefits or opportunities, providing counseling or other assistance, and prevent the misconduct from recurring.

Sixth, the procedure should provide that appropriate disciplinary action against the offender will be taken. Appropriate disciplinary action may range from a reprimand to termination, depending on the severity of the conduct and on what action is necessary to stop the harassment from occurring. Effective discipline in the law firm setting may pose significant problems. Many partnership agreements place restrictions on the firm's ability to discipline or terminate a partner. Such provisions may need to be altered to increase the flexibility of the partnership to deal with claims of harassment by partners.

Throughout the process, the grievant should be kept informed of the progress of the investigation. In addition, the grievant should be informed of the proposed corrective action management plans to take with regard to the offender.[15] After the investigation, management should review the situation with the grievant to ensure that the firm's actions were successful in stopping the sexual harassment.

## ASSESSING THE PRESENCE OF SEXUAL HARASSMENT

An employer is liable when it fails "'to remedy or prevent a hostile or offensive work environment of which management-level employees knew or in the exercise of reasonable care *should have known.*'" *Birshfeld,* 916 F.2d at 577 (quoting *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1516 (9th Cir. 1989) (emphasis added). Particularly when subjective supervisory evaluations determine such factors as advancement and other employment benefits, individuals may be hesitant to come forth with complaints of sexual harassment. Thus, while observation and effective complaint procedures are two ways to learn of the existence of such harassment, a prudent employer may want to use other methods as well, including questionnaires and interviews. The use of these methods may enable a firm to eliminate harassment before it reaches the point where an employee wants to sue. Questionnaires and interviews generally obtain more complete responses when conducted anonymously or by someone from outside the firm.

## CONCLUSION

The Civil Rights Act of 1991 made damages for pain and suffering and punitive damages available to victims of sexual harassment, thus greatly enhancing the available damages. In addition, the Act made recovery by plaintiffs easier by allowing disputes of fact (which are very common in harassment cases) to be resolved by the jury. The adoption of a "reasonable woman" standard by some courts has further eased the burden on plaintiffs to prove their cases. Finally, the confirmation hearings of Justice Clarence Thomas vastly increased the awareness of sexual harassment for both employees and jurors. Under these circumstances, it is imperative that every law firm implement an effective sexual harassment policy, and law firms that already have such a policy must ensure that it is effective in preventing harassment.

[1]*See Curbing Sexual Harassment in the Legal World*, N.Y. Times, November 9, 1990, at B11.

[2]The Supreme Court's recent decision limiting the power of governments to restrict "hate speech" may give some defendants added ammunition in their argument that the prohibition on sexually harassing communication violates the First Amendment. *See R.A.V. v. City of St. Paul*, 60 U.S. Law Week 4667 (1992). Even prior to *R.A.V.*, some defendants argued that they could not be liable for sexual harassment that was limited to speech. *See Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1534-37 (M.D. Fla. 1991) (rejecting arguments based on First Amendment), *appeal pending*. As illustrated by *Robinson*, however, this position has generally been rejected by courts.

[3]In general, the first two categories are known as "quid pro quo" harassment while the latter category is referred to as "abusive environment" or "hostile environment" harassment.

[4]The use of the word "partner" includes shareholders of professional corporations, members of limited liability companies, and othe similar positions.

[5]EEOC, Policy Guidance on Current Issues of Sexual Harassment, (March 19, 1990) *in* EEOC Compliance Manual (CCE 1990) 3267, 3280 ("Policy Guidance").

[6]However "the mere existence of a grievance procedure and a policy against discrimination [generally], coupled with [the victim's] failure to invoke the procedure" is "not necessarily dispositive" although it is "plainly relevant." *Vinson* at 2408-09. As noted by the Court, the employer's argument that the victim's failure to complain insulated it from liability "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Id.* at 2409.

[7]*Curbing Sexual Harassment in the Legal World*, at B11.

[8]*See* EEOC Decision 84-1, 52 U.S.L.W. 2349 (1983), and Policy Guidance at 3271 n.10. Under some circumstances conduct may be still be deemed unwelcome, *see Wyerick v. Bayou Steel Corp.*, 51 FEP Cases 491 (5th Cir. 1989) (plaintiff's responses in kind on three occasions were not enough to justify summary judgment for employer), and Policy Guidance at 3271-72 (verbal comments by complainant do not indicate that "more extreme and abusive or persistent comments or a physical assault" are welcome.

[9]*See, e.g., Broderick v. Ruder*, 685 F. Supp. 1269, 1273 (D.D.C. 1988) (plaintiff kissed at farewell party for fellow employee).

[10]In addition, if the employee's handbook generally discusses prohibited conduct or describes the firm's discipline procedure, specific mention of sexual harassment should be included.

[11]*Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 577-78 (10th Cir. 1990).

[12]Although written grievances should not be required, the firm should provide forms for this purpose.

[13]Each of these individuals should be trained in the proper way to receive grievances and on the necessity of prompt action when a complaint is received.

[14]*See Meritor* at 2403.

[15]One factor that deters some individuals from complaining about sexual harassment is the fear that the harasser will be terminated. By providing that the firm will review proposed corrective action with the grievant before implementing it, management may alleviate this fear, thus encouraging harassed individuals to grieve promptly.

## Commission Highlights

During its regularly scheduled meeting of October 1, 1992 at the Vernal City Council Chambers the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the August 20, 1992 Commission meeting minutes were adopted with minor modifications.
2. Reed Martineau, the Bar's representative to the American Bar Association, reported on the ABA's Annual Meeting in San Francisco. He noted that the ABA was addressing several controversial issues, and that they had reversed their previous positions on ancillary business practices, and on the abortion/choice issue.
3. The Board approved the list of applicants passing the July Bar Examination and requested the Admissions Committee to examine the upward trend in passing rates experienced during the last several examinations.
4. The Board discussed its previous decision to only allow the transfer of Multistate Bar Examination scores when that examination has been taken concurrent with the Utah State Bar Exam and requested Bar Counsel Steve Trost to modify his petition to the Court to reflect that reaffirmation.
5. Keith Kelly, President of the Young Lawyers Section, reported on activities to create a senior citizens legal information video, and the recent work of the HIV Legal Issues Committee.
6. The Board reviewed the dates for the 1993 and 1994 Annual Meetings and confirmed that the 1993 meeting would be held in Sun Valley from June 30 through July 3, and the 1994 Annual Meeting would be held in Sun Valley from June 29 through July 2.
7. Randy Dryer reported on his appearances before the Legislature's Interim Judiciary Committee and the Utah Judicial Council to present the Bar's proposed amendments to the draft Court Commissioner Authority Rules.
8. Dryer reported on his attendance at the Colorado, Washington and New Mexico state bar meetings. He indicated that Colorado was aggressively undertaking the promotion of alternative dispute resolution among its members, that Washington was facing severe budget problems and proposing a substantial dues increase, and that New Mexico was soon to begin construction on a new bar center.
9. The Commission reviewed correspondence from Ogden attorney, Mark Gould, and the Bar's malpractice insurance brokers, Rollins Burdick Hunter, and discussed the availability and affordability of malpractice insurance and reaffirmed its policy to require insurance for panel members of the Lawyer Referral Service.
10. Dryer reported on the debate between the candidates for the Office of Attorney General and on the up-coming gubernatorial debate which are being co-sponsored by the Bar and the Salt Lake County Bar.
11. The Board discussed the recent Judicial Council's recertification of judges to stand for retention elections. The Board resolved that Dryer should express the Board's concern about the current implementation of the judicial retention process, and requested Dryer, Reed Martineau and Craig Snyder meet with the Judicial Council to represent that position.
12. The Board appointed Stephen Henriod and Lynn Larsen as the Democratic and Republican alternates on the Appellate Court Judicial Nominating Commission.
13. The Board voted to ratify the action of the Executive Committee to join in an amicus brief in a Massachusetts IOLTA lawsuit.
14. The Board voted to appropriate $4,000 from the Contingency Fund to the Bar's Future's Commission for purposes of compiling statistics and performing analysis of bar demographics and trends.
15. The Board voted to propose David Watkiss to replace Leslie Francis on the Judicial Council's Ethics Advisory Committee.
16. The Board voted to propose amended rules for New Lawyer Continuing Legal Education.
17. The Board voted to approve bylaws for the newly formed Constitutional Law Section.
18. The Board discussed and approved proposed changes to the Rules For Integration relating to the relationship between the Bar and the Supreme Court which would appropriately clarify roles and responsibilities. Denise Dragoo was requested to revise the previous draft to reflect the actions of the Board and Dryer was authorized to present the changes to the Court.
19. All staff and ex-officio members were excused and all discipline was acted upon.
20. Paul Moxley and Steve Trost reported on their review of the amendments to the Code of Judicial Administration. Randy Dryer was requested to send a letter to the Judicial Council expressing the Commission's concerns.
21. The Board received the 1991-92 audit prepared by Deloitte & Touche, and reviewed the August financial statements.

The minutes of this and other meetings of the Bar Commission are available for inspection at the office of the Executive Director.

## Mark Your Calendars

The Young Lawyer's Section is sponsoring the following free CLE Brown Bag Luncheon: Wednesday, November 18, 1992, 12:00 noon at the Law and Justice Center, 645 South 200 East, Salt Lake City, Utah. Topic will be "Representation of 1983 Actions in Federal Court". The speakers will be Magistrate Ronald N. Boyce and Magistrate Samuel Alba. This has been approved for 1 hour general CLE credit.

# Utah State Bar
# Ethics Advisory Opinion Committee
# Opinion #116

**ISSUE**

Under what circumstances may an attorney represent both parties in a divorce?

**OPINION**

An attorney may not concurrently represent both parties in a divorce under any circumstances.

**ANALYSIS**

**1. Discussion of the Rules of Professional Conduct.**

Rule 1.7(a) of the Utah Rules of Professional Conduct prohibits concurrent representation of clients with directly adverse interests. The rule establishes an exception when the attorney reasonably believes that the representation of one client will not adversely affect "the relationship" with the other client. Utah R. Prof. Conduct 1.7(a) (1) (1991). This phrase, "the relationship", establishes a broader scope for possible conflicts than if the rule applied only to the clients' adversely affected interests. 1 G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, § 1.7:202-203 (Prentice Hall 2d ed.) (hereinafter Hazard & Hodes). Under Rule 1.7(a), the attorney's reasonable belief may be created by the client's statements. Id. at §1.7:305. Only after his reasonable belief is established may the attorney consult with both clients and obtain their consent to the dual representation.

Rule 1.7(b) prohibits representation of a client where other responsibilities limit the attorney's ability to adequately represent that client. This rule focuses on the quality of the attorney's representation rather than on the quality of the lawyer-client relationship. The rule requires the attorney to judge for himself the adequacy of his representation of both parties to a divorce. When applied by a conscientious lawyer, this rule should be interpreted more stringently than Rule 1.7(a) because it relies entirely on self-examination rather than the clients' statements. *Id.* at §1.7:305.

Rule 2.2 provides that a lawyer may assume the role as an intermediary between clients. Under this rule, the lawyer is representing neither party separately but each party as part of a group. The rule implies that the parties have a common interest which overrides their separate interests. In addition to the requirements of Rule 1.7, this rule requires that there be "little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful." Utah R. Prof. Conduct 2.2(a) (2) (1991). The provisions of Rule 2.2 with respect to an intermediary are to be distinguished from the occasion when the lawyer acts as an arbitrator or mediator. As stated in the Comment to Rule 2.2 this "Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are *not* clients of the lawyer." (Emphasis supplied.)

In the divorce context Rule 2.2 is difficult to satisfy, since any unsuccessful efforts as intermediary will require the intermediary attorney to withdraw from representation of both parties. Utah R. Prof. Conduct 2.2(c) (1991). *Margulies v. Upchurch*, 696 P. 2d 1195, 1202-3 (Utah 1985). In divorce, with its special flavor of personal fault, the risk of failure as an intermediary is particularly great. With failure comes the cost of obtaining separate counsel, adding that expense to the expense of the failed intermediation. Further, the failure of intermediation may create additional acrimony between the parties, putting the parties in a worse situation than they originally occupied. Hazard & Hodes at §2.2:202.

**2. Arguments Favoring Dual Representation in Divorce.**

Divorcing spouses usually seek dual representation because of financial considerations. This is a special problem for indigent spouses, whose only source of representation may be Legal Aid. Where Legal Aid offices are small, the only solution may be for the court to appoint attorneys to represent the spouse who is not represented by Legal Aid. In an amicable divorce, such an appointment should not be too great a burden. Breger, *Disqualification for Conflicts of Interest and the Legal Aid Attorney*, 62 B.U.L. Rev. 1115 (1982).

Dual representation is promoted as a way to facilitate the court's disposition of uncontested divorces. One attorney acting as a representative for both parties may present the court with a *fait accompli*. This argument is of small value since a truly uncontested divorce takes up little of the court's time in any case.

The final reason advanced in favor of dual representation is that the parties should be allowed to waive their right to separate representation. This argument assumes that both parties are equally informed of the disadvantages of dual representation. That assumption is not valid when one party dominates to the extent that (s)he controls the other party's power to decide and to participate in disclosure of potential conflicts. Such dominance is often the case in dissolving marriages and may not be apparent to the attorney who only sees both parties when they are together. *Blum v. Blum*, 477 A.2d 289 (Md. Ct. Spec. App. 1984) (dominant husband imposes unfair settlement on wife in dual representation divorce.) The putatively amicable divorce could be replete with undisclosed conflicts.

**3. Arguments Opposing Dual Representation.**

Allowing dual representation tends to erode confidence in the courts as a tool for equitable resolution of disputes. The risk of the appearance of impropriety is great in divorce cases where the inherent adversity of the parties is so obvious. *Blum*, 477 A. 2d at 296. Furthermore, the court is presented with only one view of the facts in the divorce, substantially reducing the court's ability to protect both parties.

Besides an appearance of impropriety, dual representation can foster actual impropriety by facilitating a fraud on the court, either with or without the attorney's collusion. *Liles v. Liles*, 711 S.W. 2d 447 (Ark. 1986) (attorney colludes with hus-

band to defraud wife); *Hilt v. Bernstein*, 707 P.2d 88 (Or. Ct. App. 1985), *cert. denied*, 715 P.2d 92 (Or. 1986) (attorney unwittingly prepares documents enabling husband to defraud wife). The potential for fraud enlarges when one spouse dominates in the marriage. *Blum*, 477 A. 2d at 294.

Additionally, the attorney representing both parties has a financial disincentive to inquire too closely into the details of the property settlement he is arranging, because he must withdraw from the case entirely if he discovers a conflict. *Margulies*, 696 P. 2d at 1202-3. Failure to scrutinize the transaction may allow a defrauding party to conceal assets which a separately represented spouse would have discovered. *Marriage of Eltzroth*, 679 P. 2d 1369 (Or. Ct. App. 1984) (husband conceals assets from wife and attorney for both parties in "amicable" divorce.) Financial incentives and time pressure magnify the understandable tendency to accept a divorce as "amicable" and conduct only a superficial inquiry.

Even in the absence of fraud, dual representation discourages full disclosure. If the attorney's questioning reveals that one party has some slight advantage over the other in the property settlement, pointing out this advantage may cause the parties to become adversarial. The attorney then would be required to withdraw from representation of either party.

Additionally, unforeseeable conflicts may arise between the divorcing spouses during or long after the dissolution of the marriage. For instance, one spouse may change his or her mind after obtaining dual representation. *The Florida Bar v. Ethier*, 261 So. 2d 817 (Fla. 1972); *Board of Overseers v. Dineen*, 500 A. 2d 262 (Me. 1985), *cert. denied*, 476 U.S. 1141 (1986); *Welker v. Welker*, 680 S.W. 2d 282 (Mo. Ct. App. 1984). Unforeseen difficulties also arise when one of the spouses gains a financial advantage after the divorce, because of occurrences during the marriage. *Columbus Bar Ass'n v. Grelle*, 237 N.E. 2d 298 (Ohio 1968) (later events force the parties to become adversarial despite adequate disclosure by the attorney.) Because hindsight is always perfect, the unforeseen event may give rise to recriminations between the parties and a malpractice action against the lawyer.

**4. Analysis of Utah Precedent.**

As the Utah Supreme Court has noted, "[t]here [are] relatively few reported [Utah] decisions . . . applicable to professional conduct . . ." *Margulies v. Upchurch*, 696 P. 2d 1195, 1199 (Utah 1985). In fact, there appear to be only two reported Utah cases which deal with concurrent representation. *See id.* and *In Re Hansen*, 586 P. 2d 413, 415 (Utah 1978).

In *Margulies*, Jones, Waldo, Holbrook & McDonough ("Jones, Waldo") undertook representation of plaintiff Jason Margulies ("Margulies") in a medical malpractice action in October of 1982.[1] *Id.* at 1198. The malpractice defendants in that case were three doctors, Upchurch, Woolsey and Chichester, and St. Marks Hospital. *See id.* "In approximately September 1983, David Sundstrom, a co-general partner . . . of Diversified Energy [Intermountain Capital Private Drilling Fund 1981-A ("Diversified Energy")] retained Jones, Waldo as counsel for [Diversified Energy]." *Id.* Woolsey and Chichester were limited partners of Diversified Energy, and Upchurch was a "stockholder, former officer, and director of Intermountain Capital, a corporation that [was a] co-general partner in Diversified Energy." *Id.* As a result, as of September 1983, Jones, Waldo was representing Margulies against Upchurch, Woolsey and Chichester and, arguably, by representing Diversified Energy, was also representing Upchurch, Woolsey and Chichester.

Based on Jones, Waldo's concurrent representation of Margulies and Diversified Energy, Upchurch, Woolsey and Chichester filed a motion to disqualify Jones, Waldo in the malpractice action. The trial court found that "Jones, Waldo had a conflict of interest in violation of the Utah Rules of Professional conduct in undertaking its representation in both cases."[2] *Id.* at 1199. Nevertheless, citing "great inconvenience and problems of delay," the trial court refused to disqualify Jones, Waldo. *See id.* On appeal, the Utah Supreme Court upheld the trial court's finding that a conflict of interest existed and, further, held that Jones, Waldo, in fact, should be disqualified. *See id.* at 1200.

In holding that Jones, Waldo should be disqualified, the court initially addressed Jones, Waldo's assertion that it did not have an attorney-client relationship with Upchurch, Woolsey and Chichester.[3] *See id.* Upon deciding that an attorney-client relationship, in fact, existed, the court went on to address the question whether concurrent representation of Margulies and Upchurch, Woolsey and Chichester created an impermissible conflict of interest. *See id.* 1201-02. As stated above, the trial court had held that a conflict of interest existed. *See id.* at 1200. The Utah Supreme Court not only affirmed the trial court's holding regarding the existence of the conflict of interest, the court also reiterated the trial court's pronouncement that "[t]he law has long recognized that an attorney is held to the highest duty of fidelity, honor, fair dealing and full disclosure to a client." *Id.* at 1201. On that basis, citing cannons 4, 5 and 9 of the Code, the Utah Supreme Court found that Jones, Waldo had not fulfilled its obligations to Upchurch, Woolsey and Chichester. *See id.* 1202-05.

The court focused on the obligations created by Canon 5; specifically, Disciplinary Rule 5-105,[4] which the court quoted in part as follows:

> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).
>
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients *if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.*

*Id.* at 1203 (quoting Utah Code of Professional Responsibility, DR 5-105(B), (C) (1977)) (emphasis added by the court).

According to the court, "[t]he first requirement of DR 5-105(C) is that it be 'obvious' that the attorney [is] able to represent both clients adequately." *Id.* at 1203. In this case, Jones, Waldo had obtained important financial information regarding Upchurch, Woolsey and Chichester. *See id.* This fact alone, the court noted, "should have raised some doubt in the minds of firm members as to the propriety of undertaking [representation of Diversified Energy]." *Id.* Accordingly, the court found that "[t]he readily apparent nature of the problem indicates that it was not 'obvious' that the firm could represent

both clients adequately." *Id.* (citing Utah Code of Professional Responsibility, at DR 5-105(C) and *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F. 2d 1384, 1387 (2d Cir. 1976)).

The court went on to note that "[t]he second requirement of DR 5-105(C) is that the attorney obtain consent to the dual representation after '*full disclosure of the possible effect* of such representation.'"[5] *Id.* (quoting Utah Code of Professional Responsibility, at DR 5-105(C)) (emphasis added by the court). Jones, Waldo argued that it essentially obtained the requisite consent when the co-general partner of Diversified Energy, who had been informed of the malpractice action, retained Jones, Waldo. *See id.* However, the court found that such consent was not valid because

> [f]or client consent to be adequate in a conflict of interest situation, the attorney must not only inform both parties that he is undertaking to represent them, but must also explain the nature and implications of the conflict in enough detail so that the parties can understand why independent counsel may be desirable. *Id.* at 1203-04.

As additional support in holding that Jones, Waldo should be disqualified, the court also referred to Canon 9 of the Code. *See id.* at 1204. Canon 9 prohibits lawyers from engaging in practices which may appear to be unethical, specifically providing that "[a] lawyer should avoid even the appearance of professional impropriety." *See id.* On this point, the court noted that "[l]itigants are highly unlikely to be able to maintain . . . confidence [in the integrity of the legal system] if their attorney in one matter is allowed simultaneously to sue them in another." *Id.*

In conclusion, the court in *Margulies* noted that *Hansen* established "the principle that an attorney should become identified solely with the rights of his client and [should] not use, or appear to use, his position to take advantage of his client's confidence." *See id.* This appears to be the essential principle of *Margulies* and also of *Hansen*.

As has been noted above, and to summarize the existing Utah precedent, there are no reported Utah cases which directly address the issues created by concurrent representation in the context of divorce. Nevertheless, under *Margulies*, prior to representing both parties in a divorce, a lawyer would be required (1) to determine that it was "obvious" that the lawyer could "represent both clients adequately," and (2) to obtain both clients consent "after 'full disclosure of the possible effect of such [dual] representation.'" *See id.* at 1203. Of course, "full disclosure" would require the lawyer "not only [to] inform both parties that he is undertaking to represent them, but [the lawyer] must also explain the nature and implications of the conflict in enough detail so that the parties can understand why independent counsel may be desirable." *Id.* at 1203-04 (citing *In re Boivin*, 533 P. 2d 171, 174 (Or. 1975)).

The Utah requirements for concurrent representation outlined in *Margulies* are based, as noted above, on the requirements contained in Canon 5 of the Code. The Code, however, is no longer applicable under Utah law. The Rules were adopted by the Utah Supreme Court, effective January 1, 1988. Accordingly, it is not clear that the requirements outlined in *Margulies* are presently applicable. Given this, it is likely that the Utah Supreme Court would reformulate its analysis to reflect the requirements regarding concurrent representation contained in the Rules. In any event, however, the court certainly will require lawyers to adhere to the highest standards "of fidelity, honor, fair dealing and full disclosure to . . . client[s]." *See id.* at 1201.

## CONCLUSION

The concurrent representation of both parties in a divorce is an ethically unacceptable practice. There is a substantial danger of improper influence exercised by a dominant spouse to prevent adequate disclosure of conflicts. The practice lends itself to both the appearance and the fact of impropriety. There is an enhanced opportunity for attorneys to participate in fraud and a financial incentive to blind themselves to possible conflicts. The danger to the parties and the courts outweighs the advantages of cost and convenience advanced as reasons for adoption of a rule allowing dual representation.

[1]The malpractice action was filed in October 1982 and was scheduled for trial in March 1984. *Margulies*, 696 P.2d at 1198.

[2]The court appears to have mistakenly referred to the Rules of Professional Conduct (the "Rules") instead of the Code. In fact, the Rules were not applicable at the time the trial court issued its decision. Accordingly, it is likely that the court meant the "Code of Professional Responsibility."

[3]On this point, Jones, Waldo asserted "that a personal request for legal services or advice by the client and an acceptance by the attorney [are] necessary for an attorney-client relationship to be formed." *See Margulies*, 696 P.2d at 1200. The Utah Supreme Court, however, upheld the trial court's finding that an attorney-client relationship existed without such a request and acceptance. *See id.* In fact, the court found that "circumstances may give rise to an implied professional relationship or a fiduciary duty toward the client." *See id.*

[4]In *Hansen*, the Utah Supreme Court also focused on Disciplinary Rule 5-105. *See* 586 P.2d at 415. In that case, the primary issue was whether or not the client had consented to concurrent representation. *See id.*

[5]"[T]he burden of showing full disclosure rests upon the attorney undertaking adverse employment." *Margulies*, 696 P.2d at 1203 (citing *Hansen*, 586 P.2d at 415).

# Ethics Advisory Opinion #118

## ISSUES

The Utah State Bar Ethics Advisory Opinion Committee has been asked for an opinion regarding the following closely-related matters:

1. Is new rule 1.13(a) intended to eliminate the historic distinction (previously stated in DR-9-102(a)) between payments advanced by a client for professional legal fees, and payments advanced by a client for costs?

2. If Rule 1.13(a) does eliminate the distinction, how must the lawyer treat funds advanced by the client for payment of either professional legal fees or costs? Specifically, must monies advanced by a client for payment of costs be deposited into a trust account? May such funds be transferred into a non-trust account (business account) after the attorney has incurred the costs? Must monies advanced by a client for attorney's fees be deposited into a trust account? Must these funded be transferred by the attorney into a non-trust account when the fees have been earned?

## OPINION

Rule 1.13(a) is intended to eliminate the distinction between funds advanced by the client for costs and funds advanced by the client for the payment of attorney's fees. All advanced funds are the property of the client and must be deposited in a separate trust account maintained by the attorney for clients. Funds may be transferred out of the trust account only in accord with the requirements of Rule 1.13 and the procedures disclosed to the client and included in the attorney-client retainer agreement. When reimbursed costs or earned fees are owed to the lawyers, the funds must be transferred out of the trust account after a proper accounting to the client as described below.

## RATIONALE

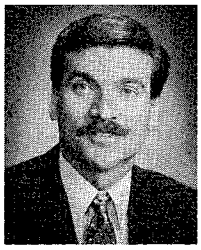
Utah Rule 1.13 requires that a lawyer must hold property that belongs to a client separate from the lawyer's own property. Funds "shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client . . ." There is no distinction in the Rule or in the Comment between funds advanced for payment of costs and funds advanced for payment of attorney's fees. Consequently, the standards of Rule 1.13 apply equally to monies advanced by a client for fees and monies advanced to cover costs (deposition transcriptions, copying costs, court costs, expert witness fees, or other costs).

Rule 1.13 requires the lawyer to keep the property of clients — including all client's funds no matter what their purpose — and third parties absolutely separated from the lawyer's own property. The Rule imposes strict accounting and fiduciary requirements on the lawyer with respect to the property of others. As the Comment to Rule 1.13 makes clear, "A lawyer should hold property of others with the care required of a proper fiduciary." Consequently, client funds of any sort can only be disbursed with a proper accounting to the client. The relevant portion of Rule 1.13 declares:

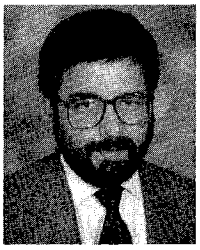
When, in the course of representation, a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of interests." (Rule 1.13(c)).

The Utah Rules of Professional Conduct require that, when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, within a reasonable time after the representation has begun. (Rule 1.5(b)). It is the height of prudence for all Utah attorneys to reduce to writing their negotiated arrangements with respect to advanced funds, either for fees or for costs, in a manner that complies with Rule 1.13. When there is no special written retainer agreement between lawyer and client, the lawyer must hold all client funds in the trust account until the client has been provided with an accounting of how the funds have been incurred for costs or earned as fees. After the client has been afforded an opportunity to receive and review the accounting, fund transfers may take place as appropriate. Funds that are owed to the lawyer as reimbursement for costs or as earned fees must be transferred out of the trust account at this time. When flexibility is crucial, because large costs may be incurred and quick fund transfers are necessary to pay these costs, arrangements for handling these contingencies may be set out in the retainer agreement between attorney and client. At all times, however, Rule 1.13 holds the lawyer to strict fiduciary standards in dealing with the property of clients.

# First Mini-Breakfast Seminar Held



*Greg Skordas*



*G. Fred Metos*

The October 21, 1992 program, "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!", presented by G. Fred Metos, Criminal Defense Practitioner and Gregory G. Skordas of the Salt Lake County Attorneys Office was the first of the Utah State Bar's free of charge Mini-Breakfast Seminar series. Mr. Metos and Mr. Skordas provided useful and important information on how to handle situations involving criminal matters. The following outlines some of the information presented.

There are several categories of emergency calls that lawyers receive from people involved in the criminal justice system. First, there are the calls from people who are in the process of being arrested. Second, there are calls from people who are the subjects of searches. Finally, there are calls from people who are in custody. A lawyer's primary object after receiving a call under any of these circumstances ought to be damage control. The secondary goal should be to obtain sufficient information to get the person out of custody.

There are several aspects of this initial damage control. Potential defendants need to be informed that they do not have any obligation to help the police make a case. An arrestee needs to be expressly told not to speak about the case either to the authorities or to other inmates in the jail. He or she should also be instructed that if the police request an interrogation the appropriate response is, "I want to talk to an attorney." This question should be rehearsed several times to be sure that there will be an appropriate answer. If the arresting or investigating officers are available at the time of such a conversation they should be told that an attorney must be present for any questioning. The names and badge numbers of the officers should be noted in case there is subsequent questioning.

If the officers are attempting to conduct a search, several alternative forms of advice may be given. If the officers have a search warrant and the address is correct on the warrant, the subject will not have any legal grounds to prevent the search. A person who tries to prevent the execution of a lawful search warrant may also be subject to other charges. However, if officers are merely requesting a subject's consent to search, that person should just say, "no". This advice is not contingent on whether the subject believes that evidence will be discovered and seized. This is because clients generally are very poor judges of what may or may not constitute evidence that can be used against them.

When a person is either in custody or in the process of being arrested, information about the case needs to be obtained. That information should include: where that person is or will be in custody, who is the arresting agency, what is the amount of bail, what are the nature of the charges, what is the case number and whether the arrest was made with or without a warrant. It is also important to get information to be used in setting or reducing bail. That information includes: the length of time in the community, marital or family ties, employment history and prior criminal record. The prior criminal record should include arrests, convictions and whether the individual is currently on probation or parole. The final type of information that needs to be obtained relates to the person's financial status. That would include whether friends or family are available to provide financial assistance. That information, in conjunction with the nature of the charges, will indicate whether it is worth a big initial effort to get bail set or reduced. That information will also let you know whether counsel can be retained or if a public defender needs to be appointed.

By the time that the authorities are arresting, searching or questioning a person, he or she is in deep trouble. Generally, the best that can be done is to prevent further damage. The worst thing to do, as a non-criminal defense attorney, is to get in over your head in a case where a person may go to prison. To prevent that situation find an experienced defense counsel either to assist with the case or to take it over completely.

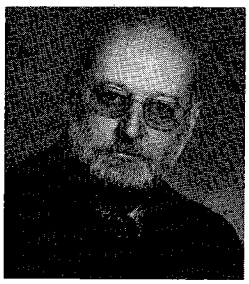
The next one hour program in this series, "Reporting on the Law, the Courts and the Legal Profession — A Candid Discussion with Salt Lake's Courts Reporters, or Why Do Lawyers Get Such a Bum Rap from the Media?", will be held November 18, 1992 from 8:00 a.m. until 9:00 a.m. at the Utah Law and Justice Center. Mark your calendars NOW to attend this interesting and informative discussion.

# Issues of Past Bar Journals on Sale

There are a large number of Utah Bar Journals left from previous months. If you are desirous of completing your set, or just want a spare copy, you may obtain them by placing your request in writing along with a check or money order for $2.00 per issue made payable to Utah State Bar, ATTN: Leslee Ron, 645 South 200 East #310, Salt Lake City, Utah 84111. The months that remain are as follows:

August/September 1988
October 1988
November 1988
January 1989
April 1989
May 1989
June 1989
August/September 1989
October 1989
February 1990
March 1990
May 1990
June/July 1990
November 1990
December 1990
January 1991
February 1991
March 1991
April 1991
May 1991
June/July 1991
August/September 1991
October 1991
November 1991
December 1991
January 1992
February 1992
March 1992
April 1992

# David Roth Named to Arbitration Panel



Judge David E. Roth, former Second District Court Judge, has joined the American Arbitration Association's Judicial Panel of Arbitrators. Roth joins a 10-member panel of former and retired judges who provide private judicial services through the Salt Lake Regional Office of the American Arbitration Association (AAA).

Roth was a Second District Court Judge from 1984 to 1992. He was named District Court Judge of the Year by the Utah State Bar Association in 1990. Prior to his district court appointment he served as a judge in the Third Circuit Court from 1978 to 1984 and an Ogden City Judge from 1974 to 1978. Admitted to the Utah State Bar in 1969, Roth received his law degree from the University of Utah College of Law.

The Utah Judicial Panel Program was developed to meet the AAA's growing need for highly qualified decision makers experienced in handling complex factual and legal matters. The goal of the Judicial Panel is to serve the legal, commercial, business and labor communities, as well as the public court system, by providing professional, cost-effective, private judicial services such as settlement conferences, arbitration, mediation and other voluntary procedures.

# Bankruptcy Judge Vacancy

The U.S. Court of Appeals, Tenth Circuit, seeks applications from highly qualified applicants for a newly created Bankruptcy Judgeship position for the District of Colorado, commencing when funding is allocated by Congress. Appointment is for a 14-year term. Current annual salary is $119,140.00. Full public notice is posted in the offices of the Clerks of U.S. District and Bankruptcy Courts for the District of Colorado, and the U.S. Court of Appeals Clerk's Office. For further information and application forms, contact Eugene J. Murret, Circuit Executive, U.S. Tenth Circuit, 999 – 18th Street, Suite 1175, One Denver Place, North Tower, Box 352, Denver, Colorado 80202, (303) 391-6103. Applications may also be obtained from the Clerk's Offices of the District and Bankruptcy Courts and U.S. Court of Appeals in Denver, Colorado. Deadline for receipt of applications is November 30, 1992.

# Salt Lake Lawyers Honored By Bar's Environmental Section

The Energy, Natural Resources, and Environmental Law Section of the Utah State Bar honored three of its members at the section's annual meeting. Clayton J. Parr was honored for distinguished service to the section, H. Michael Keller was named Natural Resource Lawyer of the Year, and Jody Williams was honored as outgoing section chair.

In making the presentation, Section Chair David W. Tundermann said Mr. Keller earned the recognition for his tireless contributions to the profession and the community. He called Mr. Parr a "Blue Ribbon" natural resources attorney who led the profession in many capacities throughout his career.

Mr. Keller practices environmental law with the Salt Lake City law firm of Van Cott, Bagley, Cornwall & McCarthy. He served as chairman of the section in 1990-91, and was a secretary-treasurer of the Utah Bar Foundation. He is currently vice president of the Legal Aid Society. He holds a masters degree in geology from Dartmouth College and received his juris doctor from Duke Law School in 1988.

Mr. Parr is a member of the Salt Lake City law firm of Kimball Brown Parr Waddoups & Gee where his practice focuses on mining, oil and gas, and water law. He served as chair of the Natural Resources section in 1978-79 and president of the Long Range Planning Committee for the Rocky Mountain Mineral Law Foundation. He is a graduate in geology from the University of Utah and received his juris doctor from the University's College of Law in 1969.

More than 200 Utah attorneys are members of the section which provides a forum for discussion of developments and trends in the areas of natural resource and environmental law.

# United States District Court For the District of Utah

**NOTICE TO THE BAR AND THE PUBLIC**

The Judges of the United States District Court for the District of Utah are considering significant amendments and additions to the District Court Rules of Practice, changes that are being recommended by its Advisory Committee on Revisions to the Local Rules of Practice. The amendments anticipate significant changes to the Court's current discovery process and include other, more technical changes to other rules. The additions include a proposed rule establishing a court-annexed alternative dispute resolution program with voluntary arbitration and mediation as alternatives to traditional trial-oriented litigation. The Clerk of Court has transmitted the proposed amendments and additions to state and local bar associations, to the law schools, to the public libraries, and to a number of law firms for review and comment. Members of the bar and the public are invited to submit their comments in writing to the Clerk by the deadline and at the address listed below.

The comment period officially concludes on Friday, December 4, 1992, on which date the Court has scheduled an en banc public hearing for the purpose of receiving oral comment from interested members of the bar and the public. The hearing will commence at 12:15 p.m. in Courtroom 246 on that day.

Those who have questions or need additional information should contact Markus B. Zimmer, Clerk of Court, or Louise S. York, Chief Deputy Clerk, at (801) 524-5160.

Office of the Clerk
ATTN: Rule Changes Comments
Frank E. Moss United States Courthouse
350 South Main Street, Suite 120
Salt Lake City, Utah 84101

# UTAH STATE BAR

## Management's Comments Regarding Financial Statements
## Year Ended June 30, 1992

**To All Bar Members:**

The following pages summarize the financial results for the Utah State Bar (the Bar), the Client Security Fund, and the Bar Sections for the year ended June 30, 1992. The Bar's financial statements were audited by the national accounting firm, Deloitte and Touche, and a complete copy of the audit report is available upon written request. Please direct these to the attention of Arnold Birrell. The 1991 results and 1993 budget figures are provided for informational and comparison purposes only.

The statements provided include a Balance Sheet and Statement of Revenue and Expenses. To help you better understand the information being reported, included below are notes of explanation on certain items within the reports. Should you have other questions, please feel free to contact Arnold Birrell or John Baldwin.

### CASH AND OTHER CURRENT ASSETS

The Bar's cash position is much stronger than one year ago. The bottom portion of the Statement of Revenues and Expenses provides an explanation of how this money is to be used. After allowing for payment of Current Liabilities and providing certain reserves, the Bar's unrestricted cash balance is $83,821 at June 30, 1992 and projected to be $134,417 at June 30, 1993.

### NET RECEIVABLE FROM THE LAW AND JUSTICE CENTER

During the year ended June 30, 1992, the additions and deductions to the receivable from the Utah Law and Justice Center were as follows:

| | |
|---|---|
| **Receivable at July 1, 1991** | $331,450 |
| **Additions:** | |
| Other direct operating expenses paid by the Bar | 145,303 |
| Payments for room rental and catering | 66,454 |
| **Deductions:** | |
| Fees charged for room rental and catering | (69,575) |
| Cash received | (128,528) |
| **Receivable at June 30, 1992** | $345,104 |

Because the Bar does not expect to collect the receivable from the Center during the 1993 fiscal year, the receivable has been classified as long-term. The collectibility of this receivable is not presently determinable, and no provision has been made in the financial statements for any loss than may result if the receivable is ultimately determined to be uncollectible.

### PAYMENT OF DEBT

As of June 30, 1992, with the exception of the mortgage on the Utah Law and Justice Center, all of the Bar's debt was paid off. Monies belonging to the Client Security Fund and Bar Sections have been physically segregated to separate restricted bank accounts which are unavailable for Bar operations. During the 1992 fiscal year, the Bar made three principal pre-payments on the mortgage. As a result, the mortgage balance was reduced by $431,187. Additional payments will be made as funds permit and upon approval of the Bar's Board of Commissioners.

### DEFERRED INCOME

As of June 30, 1992, the Bar had collected $543,782 in 1993 Licensing Fees and Section Membership Fees. These fees have been classified as Deferred Income since they pertain to the 1993 fiscal year.

### REVENUE OVER EXPENSES

The Revenue Over Expenses in the actual amount of $593,168 for 1992 and the budgeted amount of $313,932 for 1993 are due to increased revenues and cost cutting measures instituted by the Bar's Board of Commissioners and current management. Current plans are to continue the present policies to provide the funds necessary for debt retirement, to make necessary capital expenditures, provide replacement and contingency reserves, which were previously not budgeted for, and to maintain a reasonable fund balance.

### SUMMARY

In summary, the Bar has made substantial progress financially during 1992. The new computer system is on line and being used to produce accurate and timely monthly financial information. The new membership portion of the system is on line. We are now able to provide you with information on a consistently timely basis.

# UTAH STATE BAR

## BALANCE SHEET

As of June 30, 1992 (with 1991 totals for comparison only)

| ASSETS | 1991 | 1992 |
|---|---|---|
| **CURRENT ASSETS:** | | |
| Cash and short term investments | $ 854,663 | $ 1,166,406 |
| Receivables | 58,238 | 43,669 |
| Prepaid expenses | 15,383 | 16,707 |
| Total current assets | 928,284 | 1,226,782 |
| **NET RECEIVABLE FROM LAW AND JUSTICE CENTER** | 331,450 | 345,104 |
| **PROPERTY:** | | |
| Land | 316,571 | 316,571 |
| Building and improvements | 1,320,777 | 1,321,620 |
| Office furniture and fixtures | 318,419 | 330,211 |
| Computer and computer software | 256,092 | 146,249 |
| Total property | 2,211,859 | 2,114,651 |
| Less accumulated depreciation | (710,836) | (595,848) |
| Net property | 1,501,023 | 1,518,803 |
| **TOTAL ASSETS** | $ 2,760,757 | $ 3,090,689 |
| **LIABILITIES AND FUND BALANCES** | | |
| **CURRENT LIABILITIES:** | | |
| Accounts payable and accrued liabilities | 240,933 | $ 180,307 |
| Deferred income | 315,205 | 543,782 |
| Long-term debt--current portion | 40,496 | 90,861 |
| Total current liabilities | $596,634 | $814,950 |
| **LONG-TERM DEBT** | 1,390,188 | 908,636 |
| Total liabilities | 1,986,822 | 1,723,586 |
| **FUND BALANCES:** | | |
| Unrestricted | 573,172 | 1,126,336 |
| Restricted: | | |
| Client Security | 77,576 | 88,785 |
| Other | 123,187 | 151,982 |
| Total fund balances | 773,935 | 1,367,103 |
| **TOTAL LIABILITIES AND FUND BALANCES** | $ 2,760,757 | $ 3,090,689 |

## STATEMENT OF REVENUES AND EXPENSES

For the year ended June 30, 1992 (1991 actual and 1993 budgeted for comparison only)

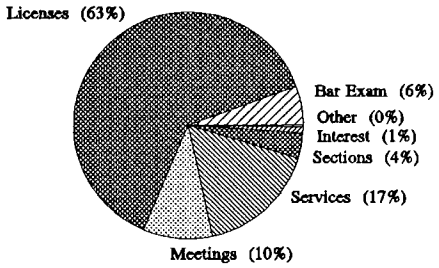
| | 1991 | 1992 | 1993 Budget |
|---|---|---|---|
| **REVENUE:** | | | |
| Bar examination fees | $ 121,915 | $ 159,288 | $ 124,113 |
| License fees | 1,351,288 | 1,435,832 | 1,457,114 |
| Meetings | 210,861 | 190,314 | 179,475 |
| Services and programs | 360,784 | 423,215 | 372,229 |
| Section fees | 75,933 | 187,820 | 13,000 |
| Interest income | 19,778 | 43,329 | 42,963 |
| Other | 4,481 | 106,259 | 99,132 |
| Total revenue | $ 2,145,040 | $ 2,546,057 | $ 2,288,026 |
| **EXPENSES:** | | | |
| Bar examination | $ 1,135,220 | $ 92,743 | 114,814 |
| Licensing | 54,558 | 61,029 | 58,573 |
| Meetings | 174,669 | 150,510 | 188,875 |
| Services and programs | 453,590 | 487,165 | 522,860 |
| Sections | 133,498 | 139,233 | 37,720 |
| Office of Bar Counsel | 298,364 | 408,794 | 500,079 |
| General and administrative | 507,354 | 560,461 | 551,173 |
| Other | 25,271 | 52,954 | |
| Total Expenses | 1,760,524 | 1,952,889 | 1,974,094 |
| **REVENUE OVER EXPENSES** | $ 384,516 | $ 593,168 | $ 313,932 |
| Add Non-Cash Expenses Depreciation | 171,272 | 102,194 | 104,823 |
| Cash from operations | 555,788 | 695,362 | 418,755 |
| **ACTUAL AND PLANNED USES OF CASH** | | | |
| Mortgage Payments | $ (74,682) | $ (431,187) | $ (211,217) |
| Payment on Line of Credit | (170,200) | | |
| Capital Expenditures | (31,907) | (119,974) | (23,000) |
| Change in A/P | 129,032 | (60,626) | |
| Change in A/R | 1,585 | 915 | |
| Change in PPD Expenses | 11,729 | (1,324) | |
| Change in Deferred Income | 315,205 | 228,577 | |
| Bar's Support of LJC | | | (56,627) |
| **INCREASE IN CASH** | 736,550 | 311,743 | 127,911 |
| **BEGINNING CASH** | 118,113 | 854,663 | 1,166,406 |
| **ENDING CASH - TOTAL** | 854,663 | 1,166,406 | 1,294,417 |
| **DEDUCT:** | | | |
| Deferred Income | (315,205) | (543,782) | (545,000) |
| Restricted Fund Cash | (208,095) | (238,803) | (265,000) |
| Reserves | | (300,000) | (300,000) |
| **UNRESTRICTED CASH AT JUNE 30** | $ 331,363 | $ 83,821 | $ 184,417 |

# UTAH STATE BAR

Financial Results and Projections

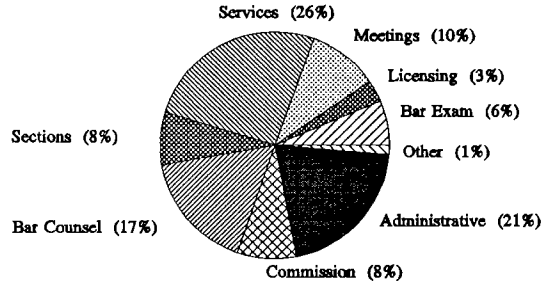
## REVENUES BY SOURCE

For the Year Ended June 30, 1991



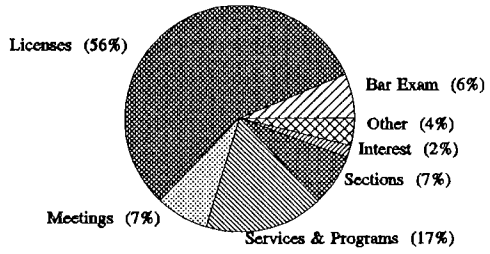

## EXPENSES BY CATEGORY

For the Year Ended June 30, 1991



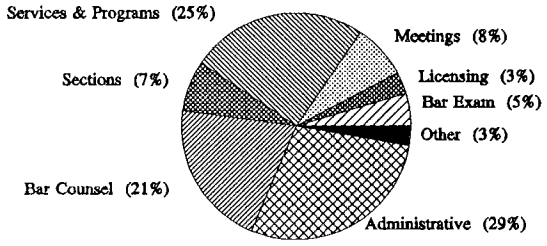

## REVENUES BY SOURCE

For the Year Ended June 30, 1992



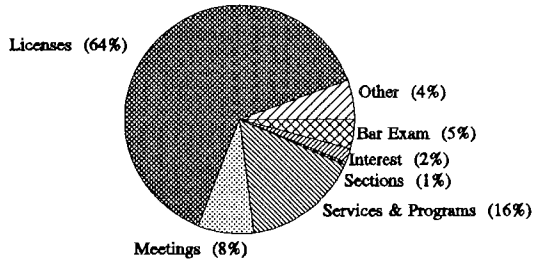

## EXPENSES BY CATEGORY

For the Year Ended June 30, 1992



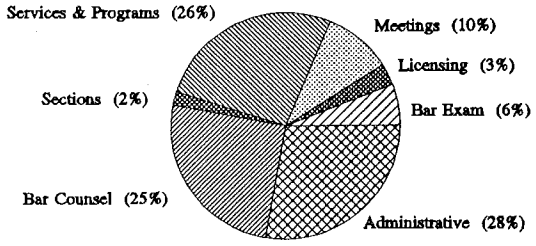

## REVENUES BY SOURCE

Estimated for 1993




## EXPENSES BY CATEGORY

Estimated for 1993



# Pro Bono Programs: Democracy's Guarantor

*By Barbara Jordan*

*Editor's Note: This is the reprinted text of a speech that Barbara Jordan gave during the closing luncheon at the 1992 Pro Bono Conference in Austin, Texas.*

I am most pleased that you are having this conference in Austin, Texas. We have here viable *pro bono* projects and take seriously the need for those who "have-not" to have access to quality legal services. When I first went to visit the nation's capital, one of the prime sites on my agenda was the Supreme Court building. I stood on the street and looked up — somewhat awestruck. I was too young to be jaded. I was 16. The words etched onto the face of the building *loomed.* "Equality Before The Law." Equality before the law. These were the words I saw. They made me tremble with pride. You see, I was going to become a lawyer and help to transform those words into reality. I had no comprehension of how difficult such a task would be. However, had I known I would still have made the commitment. Those words represented the goal and promise of this country and I am a born believer.

As we have grown, developed and matured as a people and as a nation, we have not become more simple and less complicated. Quite the contrary. We are maturing in an information-saturated, technocratic, bureaucratic, industrialized cynicism.

Relationships destabilize and disputes break out. A traumatic search ensues for an island of calm and rationalism. Into this sea of misunderstanding steps the lawyer. Why the lawyer? Because the lawyer knows that if this experiment in democracy is going to work it will be the result of open dialogue and free debate and reasonable people deciding to be reasonable. The lawyer also knows that this process of open inquiry and debate must be open to all or a claim of fairness cannot be justified.

That is why I call *pro bono* programs democracies' guarantor. Democracy requires a universality. There are several tenets of democracy. Education is one. Justice is another. An American's entitlement to justice must not be a function of income, class or status. Every living, breathing individual who becomes involved in an entanglement which needs legal resolution is entitled to the best quality of representation available — instead of treating a person who is poverty-stricken as a pariah, let us remember that people are entitled to have their dignity respected.

*BARBARA JORDAN is a professor at the Lyndon B. Johnson School of Public Affairs.*

There are a large number of poor people in Texas and everywhere. Poverty statistics can be misleading. One may work full-time, all year, receive the minimum wage of $4.25 per hour, total — $8,840, thereby remaining poor by income definition. The 1992 federal poverty level is $11,570. Would one seriously question the working poor's entitlement to representation? In my view that is a minimal requirement for us. Adam Smith, sometimes called the father of capitalism, said some 200 years ago: "the custom of the country renders it indecent for creditable people, even of the lowest order, to be without."

We are lawyers. We would not subscribe to that which is indecent. Nonrepresentation of those too poor to pay is indecent. We believe that all people have rights both implied and explicit. We celebrate people in their sovereignty. Such is the promise of democracy . . .

As lawyers we are not only democracy's guarantor, we are also its bulwark — a linchpin. The lawyer with his devotion to the rule of law — not just to statutes and codes but that glue which adheres order to chaos and insists on civilizing.

John Adams, a lawyer, and the second president of the United States is credited with the statement, "a government of laws and not of men." The phrase is also found in the first constitution of the state of Massachusetts, a government of laws and not of men is actualized in the behavior of those who govern here. If that phrase were not a reality for us, Ronald Reagan might still be president and Oliver North might be Secretary of Defense.

The rule of law, the law and lawyers keep us from behaving as if we were a banana republic. Our system seeks to guarantee that each citizen gets justice and that justice is denied to no one. What is justice? Justice is fairness. It is the first virtue of all human institutions. It is an endemic value in our democracy. Justice. Alan Dershowitz tells the story of a lawyer who had just won an important case. The lawyer rushed to the telephone to send a wire to his client. The wire stated, "Justice Prevailed." The client wired back, "Appeal Immediately." Justice sometimes means different things to different people.

In 1831, Alexis de Tocqueville toured America with his friend Beaumont. They were ostensibly here to inspect prisons in this country. In truth de Tocqueville was struck by the form of government and wrote a seminal work, *Democracy in America.* Under a section subtitled, "The Profession of the Law serves to Counterpose the Democracy," de Tocqueville wrote, "In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the government is the most powerful existing security against the excess of democracy."

We are protectors and defenders of American faith. We are trustees. We are pragmatists and idealists. We are proud and we are humble. We believe in people. All people and in their capacity to do the right and the good. Trust us. You see we are lawyers. *That's right, lawyers all.*

I know there are those who feel the American dream has soured; that instead

of being *one* nation husbanded in the common band of humanity we have become a nation of separatists highlighting our ethnic differences. I don't share the latter view. Maybe I'm naive but I still believe in the American dream.

I am not ready to give up on our experiment in democracy. It was and continues to be a bold experiment. I believe the motto "From many one" is more than empty, vacuous rhetoric. Arthur Schlesinger, Jr., has written a book entitled *The Disuniting of America; Reflection on a Multicultural Society*. In the foreward Schlesinger quotes de Tocqueville: "A society formed of all the nations of the world . . . people having different languages, beliefs, opinions; in a word, a society without roots, without memories, without prejudices, without routines, without common ideas, without a national character, yet a hundred times happier than our own. What alchemy could make this miscellany into a single society?" The answer, de Tocqueville concluded, lay in the commitment of Americans to democracy and self-government. Civic participation, de Tocqueville argued in *Democracy in America*, was the great educator and the unifier.

Schlesinger wrote:

> America increasingly sees itself as composed of groups more or less ineradicable in their ethnic character . . . Will the center hold? Or will the melting pot give way to the Tower of Babel?

We are lawyers. We believe in "Justice for All." It is the power of that belief which will guarantee that the center will hold.

The apostle Paul said to Timothy: "The law is good, if a man use it lawfully . . ." That is why bar association *pro bono* programs make such good sense for this Democratic Republic.

# Young Lawyers Section Kicks Off New Year

The Young Lawyers Section kicked off its new year with a retreat for Section officers and committee chairpersons on Saturday, September 12, 1992 at the law offices of Parsons Behle & Latimer. With each new year there comes new faces and new ideas. The retreat provided Section officers and committee chairpersons an opportunity to become acquainted and to brainstorm about how the Section can serve the legal needs of the community. The Section worked on organizing its committees and discussed its programs for the coming year.

H. James Clegg, president-elect of the Utah State Bar, addressed those in attendance. He discussed the history of the Bar and compared the structure of the Utah State Bar with the structure of Bars of other states. He congratulated the Young Lawyers on their outstanding service to the Bar and to the community, and confirmed the Bar's financial support to the Section.

The Section announced the beginning of a new committee called Consumer Credit Counseling. This committee will provide consumer credit counseling to needy individuals who have financially over extended themselves. The Consumer Credit Counseling committee will become the fourteenth committee in the Section.

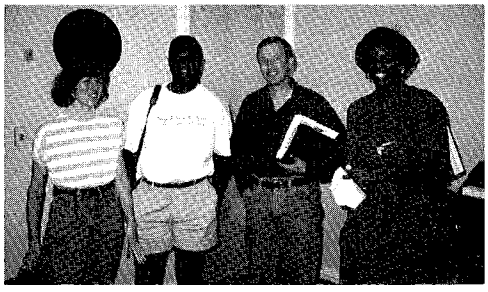
The committees in the Section are outlined below.

**COMMUNITY SERVICES COMMITTEE**

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

**DIVERSITY IN THE LEGAL PROFESSION COMMITTEE**

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



**LAW DAY COMMITTEE**

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

**LAW RELATED EDUCATION COMMITTEE**

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

**MEMBERSHIP SUPPORT NETWORK COMMITTEE (MSN)**

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

**NEEDS OF THE CHILDREN COMMITTEE**

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

**NEEDS OF THE ELDERLY COMMITTEE**

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

**PRO BONO COMMITTEE**

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

**HIV LEGAL ISSUES**

This Committee assists HIV victims by providing them with legal services.

**BAR JOURNAL COMMITTEE**

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

**RAPE CRISIS PROGRAM**

It is a program to provide assistance for rape victims.

**NEW LAWYER CONTINUING LEGAL EDUCATION COMMITTEE**

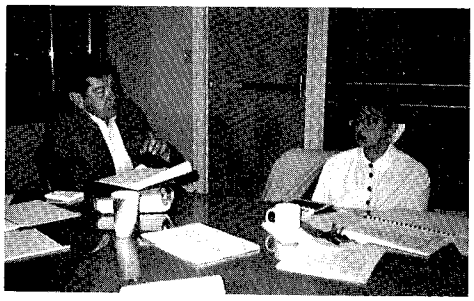
This Committee will organize monthly speakers to provide new lawyers practical guidance in various practice areas. Attendance at 10 of the 18 meetings is mandatory for new lawyers, and continuing legal education credit will be available.

**CONSUMER CREDIT COUNSELING COMMITTEE**

This Committee will provide consumer credit counseling to needy people who have financially over extended themselves.

**AWARDS COMMITTEE**

It is responsible for choosing the recipients of the Liberty Bell and Young Lawyer of the Year awards.



The Section encourages all young lawyers to get involved by signing up for the committee of their interest. Since most committees have several programs they are undertaking, there is great need for help on the committees. Working on a committee can be a fun and rewarding experience. It provides young lawyers with an opportunity not only to give service to the community, but also to become acquainted with other young lawyers. To participate, contact an officer, an executive committee member, or fill out the following form and send it to the Law and Justice Center.

**OFFICERS**

Keith Kelly
President
532-1500

Mark Webber
President-Elect
532-1234

Charlotte Miller
Past-President
530-0404

Leshia Lee Dixon
Secretary
532-5444

Glinda Ware Langston
Treasurer
963-1456

**EXECUTIVE COMMITTEE MEMBERS**

Bobby Wright
Law Related Education
531-1777

John McKinley
Needs of Elderly
531-1777

Hakeem Ishola
Bar Journal
355-0320

Mark Bettilyon
New Lawyer CLE
532-1234

Jan Bergeson
Consumer Credit Counseling
530-7300

Shannon Clark
Pro Bono
521-6383

Greg Skabelund
Northern Utah Representative
752-9437

Brian King
MSN
261-0888

Harry Caston
Community Services
521-4135

Joy Douglas
Diversity in the Legal Profession
328-1162

Kristin Brewer
New Lawyer CLE
532-1036

Beth Lindlsey
Rape Crisis
265-5938

Trisha Judge
Ogden Representative
621-5640

Michael Day
Southern Utah Representative
673-4892

Coleen Larkin Bell
Needs of Children
534-5021

Victor Gordon
Bar Journal
975-0269

David Steffansen
Law Day
521-9000

Scott Monson
HIV Legal Issues
534-1576

Lorrie Lima
Awards
265-5520

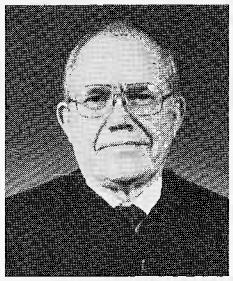
Linda Jones
Provo Representative
373-0276

# TRIBUTE TO RETIRING JUDGES

Judge Robert J. Sumsion in the Fourth Circuit Court will retire in November of this year. Judge Sumsion began serving on the Circuit Court as one of the original Judges appointed in 1978 when the Circuit Court Act became effective. He was appointed to the bench by Governor Scott Matheson.

While Judge Sumsion has enjoyed immensely his career as a practicing attorney and as a Judge, upon retirement he intends to go on to a new chapter in his life. He looks forward to "going fishing".

Judge Sumsion graduated from the University of Utah College of Law in 1955. After graduation, he moved to North Dakota where he worked for a Texas corporation in their land department. He returned to Utah to Springville where he began private practice with his father. After his father died, Judge Sumsion formed a partnership with Boyd Park and continued in private practice until his appointment in 1978.

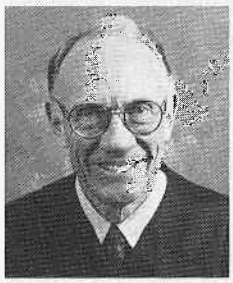


Robert J. Sumsion
Utah State District Judge
Fourth Circuit Court

Judge Sumsion notes that during his career in the law he has noticed that attorneys are not as considerate or cordial with one another as they once were. He would like to see attorneys treating each other with more professional respect and courtesy. He also observed that it was more difficult to be a good attorney than it was to be a good Judge. Judges receive assistance from the attorneys to aid them in making a decision, whereas the attorney is obligated to do the best job of preparing and presenting one side of the case in the most persuasive manner.

Judge Sumsion was appointed to the bench after approximately twenty years in private practice. He enjoyed the opportunity to make a career change while remaining in the law after twenty years. He noted that for the first time in a long time he was "glad to get up in the morning" and go to work.

Judge Sumsion has been a decisive and experienced Judge in the Fourth Circuit. His absence upon retirement will no doubt be felt.



Judge George Ballif
Utah State District Judge
Fourth District Court

Judge George Ballif retired from the Fourth District Court in July of 1992, after having served in the Fourth District Court since May of 1971. He was appointed to the bench by Governor Calvin Rampton. He has provided judicial service for over 21 years and in the process become a valued and familiar face to the attorneys practicing in his district.

Judge Ballif received his law degree from the University of Utah in 1954. Upon graduation he went into private practice in the Provo law firm of Ballif & Ballif. While he remained with the firm until 1971, he also was appointed and served as a Provo City Attorney from 1956 until 1961. He became the prosecutor for Utah County in 1962 through 1966. In 1966 he became the State of Utah Assistant District Attorney.

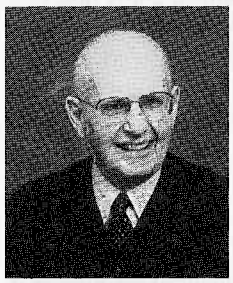
Judge Ballif has been the president of the District Judges Association, a member of the State Judicial Counsel, a member of the Committee Writing the Rules of Practice, and the Presiding Judge for the Fourth District Court. He was asked to participate in the original pilot Inn of Court program. He made valuable contributions to the first Inn of Court, a program that has now become national.

Judge Ballif's even temperament and judicial demeanor were recognized and appreciated by the members of the bar who practiced before him. Judge Ballif earned not only the respect, but the friendship of many of the attorneys who practiced before him. His absence after more than 21 years will certainly be felt.

Judge Ballif intends to work on his golf game in retirement, and to fish.

When retiring Fourth District Court Judge Cullen Y. Christensen was president of the Utah State Bar Association in 1966-67, he thought he knew every lawyer practicing in the State of Utah at the time. By contrast, he observes that today there are attorneys in his own county with whom he is not acquainted.

Since graduating from the George Washington University School of Law in 1948, Judge Christensen has seen many changes in the practice of law in the State of Utah. He began in private practice in Provo, Utah after graduation. Originally in practice with his father and brothers, he remained in practice until his appointment to the bench. He was appointed in 1983 by Governor Scott Matheson to be a District Court Judge.



Judge Cullen Y. Christensen
Utah State District Judge
Fourth District Court

Judge Christensen will be leaving the bench this year for retirement, and does not intend to practice law. He may take senior judge status and provide additional service in the future as a senior judge. Judge Christensen's career on the bench has been notable in his nine years of service. He was awarded the Distinguished Jurist Award in 1987 by the Judicial Council, and he was named Judge of the Year by the Utah State Bar in 1991. Judge Christensen has enjoyed his work on the bench and the opportunity it has afforded him to associate with the practicing attorneys. In particular, Judge Christensen commends the District Court's support personnel and clerks for their exceptional performance and service with him while a Judge.

He also gives the Utah State Bar high marks for the quality of practice in his courtroom. He observed, however, that lawyers do not talk to each other now as much as they once did, and as a result there is a waning civility between opposing attorneys. He would encourage opposing lawyers to be more civil to one another and to remember that the dispute is between their clients and not between themselves.

*EDITORS NOTE: About a year after the Clarence Thomas (and some would add Anita Hill) hearings, two books dealing with that event, one directly and solely and the other as part of an historical account of the U.S. Senate's role in Supreme Court nominations, have been published and are reviewed here by two members of the Utah Bar Journal's Editorial Board.*

# Capitol Games

*By Timothy M. Phelps and Helen Winternitz*
*Published by Hyperion, 433 pages*

*Reviewed by Betsy L. Ross*

In stark contrast to the expression of the ideal in politics in the September issue's reviewed book, *Summer Meditations* by Vaclav Havel, is *Capitol Games*. The political arena in all its sordid splendor is portrayed by the authors, Newsday reporter Timothy Phelps and award-winning journalist Helen Winternitz. To their credit, they have written an account stripped of most bias. The authors captured the division of the country concerning whom to believe, Anita Hill or Clarence Thomas — yet did not pick a side themselves. As they describe the schism:

> In the eyes of conservatives and believers in Justice Thomas, Hill was the epitome of all that had gone wrong, an error in the process, an unfair blemish on the reputation of an upstanding man; in the eyes of liberals and believers in women's rights, Hill was an emblem of the future, a beacon in the murk of a political system founded on chauvinism, run by men and oblivious to basic human decency.

This book does not resolve this chasm, but exposes it in all its lurid regalia. Also exposed in the process is the medieval state of attitude toward sexual harassment.

The story they tell is one known by most Americans, except those too sickened by the process to have followed it. Who after the Clarence Thomas/Anita Hill hearings is not familiar with "Long Dong Silver?" Who after the hearings does not inspect closely each and every Coke can before imbibing? And who after the hearings would not have suggested Orrin Hatch as leading actor for Exorcist III?

The entire behind the scenes story had yet to be told prior to *Capitol Games*. The book begins with the decision to nominate Thomas — the first stop on the yellow brick road of political antics and disingenuity leading to the Supreme Court. President Bush's statement that Justice Thomas was not chosen because he was black, but because he was the "best man for the job" was the first of many succeeding political panegyrics.

A good third of the book sets the scenario for Thomas' confirmation hearings. This portion of the book delves into Thomas' background and documents his swing from the radical left (a supporter of Malcolm X's philosophy) to the far right (Reagan appointee to the Equal Employment Opportunity Commission). The judgment as to whether this metamorphosis was a result of a maturation of ideology or political expediency is left to the reader.

Nevertheless, a portrait is drawn of our newest Supreme Court justice that reveals a rebel and a iconoclast. The authors quote Thomas regarding his life in Washington:

> I don't fit in with whites, and I don't fit in with blacks. We're in a mixed-up generation, those of us who were sent out to integrate society . . . If it were not for the few friends I have who do not give a damn about this stuff, this place could drive me insane.

They note that Thomas would go to church any day but Sunday, explaining that he said: "I don't like people that much. God is all right. It's the people I don't like."

The authors' description of the hearings themselves is eye-opening. Those parts of the process that disgusted the general public are mild in relation to what we, the general public, did not see — indeed, what was orchestratedly kept from us, including witnesses to corroborate Anita Hill's experiences with Justice Thomas.

An explanation of what we did see is offered by the authors — the exploitation of race, the old boys' club approach to sexual harassment, the timidity and fear of the democrats coupled with the feigned righteousness of the republicans. What the authors did not point out that I desperately wanted to hear was the irony of the spectacle. The very statements being made about sexual harassment — like Orrin Hatch's rhetorical question, are we to believe that a man in America wanting to impress a woman would say such vile things to her, and the questions asked Anita Hill concerning why she didn't press charges ten years ago — underscore the reasons Ms. Hill did not bring this up earlier, and why it was obvious no serious investigation into sexual harassment was being conducted here. The country saw that sexual harassment did not exist in the senators' minds, but that the words "sexual harassment" were dangerous ones to be paid lip service and to provide a forum for political bartering.

The real tragedy of the hearings, one comes to believe after reading this book, is the politicization of the Supreme Court of the United States of America and the insincerity displayed and mockery made of sexual harassment in the workplace.

# Advise and Consent

*By Senator Paul Simon*
*Published by National Press Books, 328 pages*

*Reviewed by Hakeem Ishola*

Paul Simon, soon to be the senior United States Senator from Illinois, is a member of the Senate Judiciary Committee and a professional journalist. In *Advise and Consent*, his thirteenth book, Simon provides a historical account of the role of the Senate in Supreme Court nomination battles.

In one section of the book, Simon traces the methodology by which Justices were nominated. Beginning with George Washington, and perhaps because of the relative infancy of the nation in the eighteenth century, geographic diversity "dominated the choice of Justices as much or more than political philosophy." Next to diversity was early American leaders' concern for a judiciary that would be truly independent from the executive and legislative branches. Based on the assumption that the President will abide by the unwritten methodology, nominees often were not required to testify before the Senate. The methodology experienced a change early in the twentieth century, however, as political considerations took precedence over diversity.

That is not to say that confrontation and politicking were never a part of the confirmation process in the early years of the nation. For example, in another section of the book, Simon recalls how George Washington's attempt to get John Rutledge confirmed as Chief Justice in 1795 sparked a controversy as lively as the Bork and Thomas confirmation battles. Shortly before his nomination, Rutledge had made an "inflammatory" and "intemperate" speech against the Senate that just ratified the famous Jay Treaty. The Senate eventually rejected Rutledge by a vote of 14-10. Twelve days later, Rutledge attempted to commit suicide by drowning, only to be saved by a group of African-American men on the deck of a nearby vessel.

Another section of *Advise and Consent* gives prominence to the contemporary Bork and Thomas confirmation hearings, revealing in vivid detail some of the hidden politics that go on behind the proverbial smoke-filled room. For example, Justice Rehnquist once complained to the White House during his confirmation hearing for Chief Justiceship that he was getting fed up with Senator Alan Specter's "wordy, convoluted questions." Thereafter, nominee Judge Bork similarly complained to the White House that he was having a difficult time "understanding where [Specter]'s coming from."

Simon then devotes considerable pages of *Advise and Consent* to analyzing the Thomas-Hill spectacle. Although, a majority of people believed that Thomas told the truth, Simon concluded, as did overwhelming numbers of surveyed state and federal trial judges, the Anita Hill was more believable.

*Advise and Consent* is informative as well as entertaining; it provides the reader with serious and — particularly for the lawyer-reader — much-needed light reading. Simon takes the reader through detailed stories about the characters of Supreme Court Justices and the nature of interpersonal relationships on the Court. Take for example the story of Justice James Wilson who,

> [b]eginning in the fall of 1796, . . . lived in constant fear of arrest because of angry creditors. After attending the February, 1797 term of the Supreme Court, he went into hiding in Bethlehem, Pennsylvania . . . By September a creditor had caught up with [him], and [he was] imprisoned in Burlington, New Jersey . . .

James McReynolds was another colorful Supreme Court Justice. A President Wilson nominee, McReynolds was prejudiced against Jews, Blacks, women and a host of others. He was known for walking out whenever women attorneys argued before the Court. For years, he refused to speak to Justice Brandeis, the first Jew on the Court. Indeed, Chief Justice Taft "cancelled the annual photograph of the Court in 1924 when McReynolds refused to sit next to Brandeis for the picture." Brandeis, considered by many as an intellectual and one of the best Supreme Court Justices, described McReynolds as "lazy" and moved by the "irrational impulses of savage."

Although written by a partisan Democrat, Advise and Consent is professionally done and non-partisan. Simon, for example, does not shy away from criticizing FDR's and Bush's court-packing plans. He also gave deserved credit to Republicans Eisenhower, Nixon and Ford who nominated Democrats to the Court and made conscious efforts to provide it with philosophical balance. Simon then made a number of recommendations to improve the constitutionally required process of "advise and consent", including, among others, nominating outstanding jurists without regard to political and/or philosophical leaning.

At a time when at least two vacancies on the Supreme Court may open up within the next few months — because of the rumored retirement of Rehnquist and Blackmun — and therefore raising the specter of another stormy confirmation process, Senator Simon's book makes a compelling reading for all those interested in having a Judiciary that is truly independent.

# Lawyer's Ancillary Business Activities

*By David B. Hartvigsen*

"Can law firms engage in business activities not related to the practice of law?" This was the lead-off question for the Legal Profession Study Group's discussion on the ancillary business activities of lawyers.[1] Participants agreed that aside from a possible clause in an agreement with a lawyer's firm or organization which contractually prohibit such activities, a lawyer may individually engage in non-law related enterprises such as writing a novel or owning and operating a business. A lawyer may also engage in non-law related business activities with others when the lawyer is clearly not acting as a lawyer.

Problems and concerns become prevalent, however, as soon as lawyers or law firms intertwine the providing of legal services with business activities ancillary to the practice of law. First, there is concern in the legal community over the blurring effect that such intertwined activities may have on the identity of the lawyer. It is often difficult to ascertain whether a lawyer is acting as a legal advisor, a business manager, or both. These distinctions become crucial in matters such as determining whether the attorney-client privilege applies to financial information obtained by a JD-CPA who is representing a client on both legal and accounting issues. Many lawyers also believe that a lawyer's independent legal judgment may be lost or compromised whenever a lawyer has a financial stake in an enterprise he or she is also representing.

Similarly, there is concern over the effect the non-lawyers may have on lawyers if they are permitted to be partners or principals in a firm which provides both legal and non-legal services. Presumably, such non-lawyer partners might make financially rather than legally expedient decisions, thus impinging upon the firm's lawyers' independent legal judgment and the quality of legal services being provided.

Limitations upon the extent to which lawyers and law firms may engage in ancillary business activities and upon the involvement of non-lawyers in the ownership and management of law firms are primarily contained in the professional ethics rules adopted in the various jurisdictions.[2] Such limitations, however, can also be found in other less obvious places as well. For example, Section 8 of Utah's Professional Corporation Act (UCA § 16-11-8) states:

> No person may be an officer, director, or shareholder of a professional corporation who is not an individual duly licensed to render the same specific professional services as those for which the corporation was organized; provided, however, a nonlicensed person may serve as secretary or treasurer.

The debate over the extent to which lawyers and law firms should be allowed to engage in ancillary business activities and whether non-lawyers may have equity positions or managerial authority has been ongoing for years. This issue came to the forefront in the early 1980's. The Special Committee on Evaluation of Professional Standards (popularly referred to as the "Kutak Commission" after its chairman, Robert J. Kutak) had presented its findings and recommendations from a five-year study on professional ethics to the ABA House of Delegates at the Annual Meeting in August of 1982. The Kutak Commission did not bind itself to the traditional assumptions that involvement of non-lawyers would compromise a lawyer's independent judgment. Therefore, under its proposed Rule 5.4(b) on the professional independence of a lawyer, non-lawyers would have been allowed for the first time to have an ownership interest and/or managerial authority in law firms presumably engaging in ancillary business activities, if specific conditions were met.[3]

The Kutak Commission's proposed rules were tabled by the ABA House of Delegates until the following Midyear Meeting in February of 1983 where the debate over ancillary business activities raged on until a lawyer stood and asked: "Does this rule mean Sears & Roebuck will be able to open a law office?" When an affirmative response was given, a "fear of Sears" immediately arose, quelled the debate, and ultimately assured the rejection of the proposed rule. However, the issue has refused to die. Two jurisdictions, the District of Columbia and the State of North Dakota, have since considered rules which allow ancillary business activities within limits. The District of Columbia's rule was ultimately adopted and became effective on January 1, 1991.

The issue surfaced again at last year's ABA Midyear and Annual meetings where a new ethics rule specifically addressing ancillary business activities was being considered. The Standing Committee on Ethics and Professional Responsibility presented its findings and recommendations on the issue of ancillary business activities. It found that: (1) there is no substantive evidence of actual harm to clients, the public, or the legal profession as a result of the rendering of ancillary business services; (2) a lawyer's independent legal judgment is not compromised when a client is referred to a separate entity for ancillary services; and (3) an outright ban on rendering ancillary services is of "questionable constitutionality."[4] The ethics committee, like the Kutak Commission, recommended acceptance of ancillary business activities. However, the ethics committee's proposed Rule 5.7 was a detailed and complex "regulatory" scheme.

A simpler but more "prohibitory" Rule 5.7 was proposed by the ABA's Litigation Section. The Litigation Section was concerned that law firms would be able to operate ancillary businesses free from regulatory control of the Bar and its rules of ethics unless each law firm providing ancillary services were required to provide such services: (1) in-house; (2) in conjunction with legal representation; and (3) under the direct supervision of lawyers. Therefore, under the Litigation Section's proposal, ancillary business activities would only be allowed if the above three

requirements were met. Concerns were immediately voiced that such a restrictive rule would prohibit even the long-standing custom of law firms providing trust services, title insurance, patent consulting, and other similar services. After assuring delegates that its proposed rule would not apply to such traditional ancillary business activities, the Litigation Section's proposed Rule 5.7 was adopted instead of the ethics committee's proposal by a surprisingly narrow 11 vote margin. The vote was 197 to 186.[5]

At the recently concluded 1992 ABA Annual Meeting, six ABA Sections and two other entities submitted a joint report on the new Rule 5.7. The report stated:

> Lawyers all over the country, both in urban and rural areas from New England to Nebraska, for generations have been providing trust, real estate, title, abstract and a variety of other services to both clients and non-clients. Many lawyers in small towns and rural areas have depended on ancillary business activities for economic survival since long before large firms in metropolitan areas established affiliated business ventures. As the current Vice-Chair of the General Practice Section commented in 1990, "there has never been a time when lawyers in the United States were not engaged in ancillary business activities . . . [T]o assume a time when lawyers only practice law is to ignore the facts of American legal history." If Rule 5.7 of the Model Rules of Professional Conduct were adopted at the state level, lawyers would be severely restricted from having any interest in a wide variety of traditional activities they have conducted as adjuncts to or separate from their law practices, including *but not limited to* trust services; title insurance; real estate; financial planning services; general insurance; joint ventures with other professionals in connection with personal injury practice, family law practice, and environmental consulting; accountancy; and legislative lobbying.[6]

The various entities submitting this joint report agreed that the Model Rules already contain adequate regulations for the governing of traditional ancillary business activities, specifically Rule 1.6, Rule 1.7, Rule 1.8(a), Rule 1.8(b), and Rule 7.1.[7] The joint recommendation to the House of Delegates was: "Rule 5.7 which brands ancillary business as unethical and unprofessional should be deleted from the Model Rules."[8] The ABA House of Delegates voted to repeal Rule 5.7 and no substitute rule was adopted.

The trend is clearly towards expansion and general acceptance of ancillary business activities in the legal profession. In fact, a recent survey by Phyllis Weiss Haserot, President of New York' Practice Development Counsel, has identified at least 85 ancillary businesses operated by law firms.[9] According to Ms. Haserot's survey, the more common types of services being provided by these ancillary businesses include:

| | |
|---|---|
| 15 firms | Lobbying, Legislative Services, Government Relations |
| 13 firms | Tax, Investment, Financial Consulting |
| 13 firms | International Trade |
| 4 firms | Environmental Consulting |
| 4 firms | Real Estate Brokerage and Development |
| 4 firms | Labor Relations |
| 3 firms | Economic Research |
| 3 firms | Public Affairs |
| 2 firms | Media Relations |

*"The trend is clearly towards expansion and general acceptance of ancillary business activities in the legal profession."*

Although most of the above services have some relationship to legal services, some firms are branching out into fields as unrelated to law as art galleries. Another finding of Ms. Haserot's survey is that this is not just a District of Columbia or East Coast trend. There are at least 14 law firms with ancillary businesses in the Western United States.[10] Therefore, the debate is no longer academic. The prominence of ancillary business activities will be a way of life rather than an anomaly sooner than most of us expect.

The transition will not be without its difficulties, however. For example, a potentially serious dilemma presently exists with respect to non-lawyers participating in the ownership or management of law firms. The ABA ethics committee recently considered the situation where a lawyer is licensed in both the District of Columbia, which allows non-lawyers to be partners, and in any other jurisdiction, none of which allows non-lawyers to be partners. In a formal opinion, the ethics committee found that in order to recognize the policies and legitimate governmental interests of both jurisdictions in which the lawyer is licensed, the lawyer must be deemed subject to the applicable rules for the jurisdiction in which he or she is actually practicing law. Therefore, a lawyer practicing in D.C. may be a member of a law firm with non-lawyer partners "without fear of invoking State X's disciplinary authority." That same lawyer may also practice in State X if "no part of the lawyer's State X practice is conducted through a firm with a non-lawyer partner or principal."[11] The effect of this formal ethics opinion is to prohibit every D.C. law firm with a non-lawyer partner from having *any* attorney(s) practicing offices outside of the District until state bars follow the D.C. Bar's lead on allowing non-lawyers to be partners.

The Legal Profession Study Group looked at the reasons behind the trend towards providing non-legal services and the concerns being expressed by experts and leaders in the profession. The most commonly cited reason is one-stop shopping or single-source solutions for clients. The attractiveness of one-stop shopping to clients is great. Clients want and need timely solutions to their problems and do not care to be burdened with academic issues of professional segregation. If a single organization in D.C. or in another state can provide a total package solution, jurisdictional and geographic boundaries become meaningless to clients. Local firms will not be able to compete because even if they attempt to hire non-lawyer experts and professionals to provide such single-source solutions, the local firms will not be able to retain the non-lawyer professionals unless those professionals can also have a piece of the pie.

One author, L. Harold Levinson, Pro-

fessor of Law at Vanderbilt University, advanced five reasons for the attractiveness of ancillary businesses to law firms:

> These include (1) the convenience of one-stop shopping, (2) the intellectual benefit of an ongoing relationship between the lawyers and nonlawyer experts in the firm, (3) the ease and speed in selecting nonlaw experts, (4) the possible fee savings if nonlaw experts provide brief consultations without having to be called in from the outside, and (5) the possible fee savings and maximization of quality resulting from the operation of a freely competitive market.[12]

The Study Group noted that while each of these factors yields a benefit to a law firm's clients, most of them also result in direct economic benefits to the firm. The participants therefore suggested that the primary motivation for engaging in ancillary business is profit. Profit is obviously the primary motivation where the ancillary business is completely unrelated to the providing of legal services. Declining profits, increasing competition, and other such market forces are driving this evolution. In fact, in a total free market, vertical and horizontal integration of services are fundamental goals of any business. The general consensus of the Study Group was that even where the ancillary business activities were clearly designed to serve clients better, the profit motive was still the underlying factor, especially in today's tight marketplace where the firm's survival may be on the line.

One might ask: So what is all of the debate about, if *both* the client and the firm benefit from such ancillary business activities? Is it resistance to change, the protection of an elitist image, the "fear of Sears," or are there fundamental aspects of the legal profession at risk of being destroyed? The ABA Litigation Section listed the following five ethical and professional concerns repeatedly raised by legal scholars and commentators in the Executive Summary of its "1990 Recommendation and Report to the House of Delegates on Ancillary Business Activities of Lawyers:"

> (1) the provision of both legal and non-legal services though a law firm or an affiliate may compromise the independent professional judgment of lawyers, and otherwise cause harm to clients (*e.g.*, creating conflicts of interest, jeopardizing clients' expectations of confidentiality and causing confusion on the part of the clients); (2) lawyers engaged in providing non-legal services may be unable to fulfill their obligations to clients, their profession and society; (3) financial failures or scandals relating to ancillary businesses may distract lawyers from their legal work and further tarnish the reputation of the legal profession; (4) diversified law firms may engage in overreaching or improper solicitation; and (5) lawyers' increasing involvement in business activities, at the expense of public service, could lead to the revocation of the bar's professional privileges, which prerogatives provide benefits to society as well as to lawyers.

*"In actuality, lawyers are not who they think they are or what they think they are. This is a very traumatic concept, but lawyers must recognize and accept this fact and adjust their attitudes and thinking accordingly."*

One Study Group suggested that many, if not all, of these concerns could be overcome by the adoption of appropriate rules, as is being attempted by the District of Columbia Bar. The concern that a non-lawyer is not subject to the Bar's rules of professional conduct or the Bar's jurisdiction is easily corrected by having the non-lawyer consent to being subject to the Bar's rules and jurisdiction. Another participant suggested that non-lawyer partners and managers should even be subject to the CLE requirements to sensitize them to relevant legal and ethical issues. Alternatively, agreements between the Bar and the regulatory entities of the other professions could be executed whereby non-lawyer professionals who have agreed to comply with the Bar's rules in connection with acquiring equity or managerial positions in a law firm are subject to disciplinary action by their own profession's regulatory entity for any violations of the Bar's rules.

One participant suggested that other concerns may be resolved simply by a change in the elitist attitude of lawyers. In actuality, lawyers are not *who* they think they are or *what* they think they are. This is a very traumatic concept, but lawyers must recognize and accept this fact and adjust their attitudes and thinking accordingly. Similarly, lawyers must determine whether the practice of law is really a business in and of itself or is some sort of a "guild" with a higher calling. If it is ultimately a business only, then there is no logical reason to prohibit its expansion into ancillary business activities.

There is a substantial basis, however, for treating the practice of law as something more than "merely a business." Lawyers, unlike businessmen or members of other professions, are seen as fiduciaries of our society's legal system of justice. A lawyer's obligation goes *beyond* economic profits. It also includes maintaining and preserving the time-honored legal system and making it available to each and every member of society. This obligation requires an independence from others who are neither concerned with, nor subject to, those fiduciary-like responsibilities.

Therefore, some members of the legal profession feel that no matter what measures were taken, the ancillary business activities of lawyers would still compromise the legal profession's independence. One such person is Prof. Levinson. In his essay entitled "Independent Law Firms that Practice Law Only: Society's Need, the Legal Profession's Responsibility,"[13] Prof. Levinson presents his theory that our legal system is fundamentally dependent upon the preservation and maintenance of law firms which render legal services exclusively. Apparently conceding that the proliferation of ancillary business activities is inevitable, he concludes that there must still be two classes of law firms: the independent law firms and those engaging in ancillary business activities. Levinson believes that as long as there is a significant number of independent law firms, "the entire profession is likely to maintain a reasonable level of independence."[14]

If the legal profession does develop this

dichotomy, the independent law firms will resemble the blindfolded *Lady Justice* holding up the scales of justice. The other firms will likewise be holding the scales of justice in one hand and juggling the balls of ancillary businesses with the other hand. Inevitably, a few balls will be dropped. The questions to be answered are how many balls will be dropped, will the scales remain reasonably steady, and will the economic prowess of one class dwarf the other.

## APPENDIX A
## SELECTED ETHICS RULES ON ANCILLARY BUSINESS ACTIVITIES

**D.C. Rules of Professional Conduct, Rule 5.4(b):**

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients;

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;

(3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1 ["Responsibilities of a Partner or Supervisory Lawyer"];

(4) The foregoing conditions are set forth in writing.

(This Rule became effective January 1, 1991.)

**Kutak Commission's Proposed Rule 5.4:**

A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if:

(a) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

(b) Information relating to representation of a client is protected as required by Rule 1.6 ["Confidentiality of Information"];

(c) The organization does not engage in advertising or personal contact with prospective clients if a lawyer employed by the organization would be prohibited from doing so by Rule 7.2 ["Advertising"] or Rule 7.3 ["Personal Contact with Prospective Clients"]; and

(d) The arrangement does not result in charging a fee which violates Rule 1.5 ["Fees"].

(This proposed Rule was rejected in 1983 in favor of the ABA's existing Rule 5.4.)

**Utah's Rule of Professional Conduct, Rule 5.4:**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative if the estate if a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer may practice in a non-profit corporation which is established to serve the public interest provided the nonlawyer directors and officers of such corporation do not interfere with the independent professional judgment of the lawyer.

(Effective January 1, 1988; nearly identical to the ABA Model Rule 5.4, except for the addition of paragraph (e). The ABA Model Rule 5.4 was originally adopted in 1969 and was slightly amended in 1983.)

**ABA's Model Rules of Professional Conduct, Rule 5.7 ("Provision of Ancillary Services"):**

(a) A lawyer shall not practice law in a law firm which owns a controlling interest in, or operates, an entity which provides non-legal services which are ancillary to the practice of law, or otherwise provides ancillary non-legal services, except as provided in paragraph (b).

(b) A lawyer may practice law in a law firm which provides non-legal services which are ancillary to the practice of law if:

(1) The ancillary services are provided solely to clients of the law firm and are incidental to, in connection with and concurrent to, the provision of legal services by the law firm to such clients;

(2) Such ancillary services are provided solely by employees of the law firm itself and not by a subsidiary or other affiliate of the law firm;

(3) The law firm makes appropriate disclosure in writing to its clients; and

(4) The law firm does not hold itself out as engaging in any non-legal activities except in conjunction with the provision of legal services, as provided in this rule.

(c) One or more lawyers who engage in the practice of law in a law firm shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services, except that their firms may provide such services as provided in paragraph (b).

(d) Two or more lawyers who engage in the practice of law in separate law firms shall neither own a controlling interest in, nor operate, an entity which provides non-legal services which are ancillary to the practice of law, nor otherwise provide such ancillary non-legal services.

(Adopted in August, 1991, *REPEALED* in August 1992)

## APPENDIX B
## SELECTED READING MATERIALS


1. Stephanie B. Goldberg, "More than the Law — Ancillary Business Growth Continues," March 1992 **ABA Journal**, 54-57
2. L. Stanley Chauvin Jr., "A Conscientious Conclusion — Ancillary Businesses Too Risky for Clients and Lawyers," March 1990 **ABA Journal**, 8
3. Thomas F. Gibbons, "Branching Out," November 1989 ABA Journal, 70-75
4. Marjorie Meeks, "Altering People's Perceptions: The Challenge Facing Advocates of Ancillary Business Practices," 66 **Indiana Law Journal**, 1031-1057 (1991)
5. L. Harold Levinson, "Independent Law Firms That Practice Law Only: Society's Need, The Legal Profession's Responsibility," 51 **Ohio State Law Journal**, 229-262 (1990)
6. ABA Litigation Section, "Recommendation and Report to the House of Delegates on Ancillary Business Activities of Lawyers" (1990 Annual Meeting)
7. Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association (the "Stanley Report"), reprinted in 112 F.R.D. 243, 280-281 (1986)
8. Report of the Special Committee on Evaluation of Professional Standards (the "Kutak Commission") 107 Reports of the ABA 828, 886-887 (1982)
9. ABA Model Rules of Professional Conduct, New Rule 5.7 with explanatory comments, *ABA/BNA Lawyers' Manual on Professional Conduct*, Model Standards, 01:163-01:168 (1991)
10. "ABA Considers Ethics Rules on Ancillary Businesses," *ABA/BNA Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 7, 28-33 (1991)
11. "Partnership with Non-Lawyers," ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 91-360, 7/11/91, *ABA/BNA Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 7, 252-253 (1991)
12. "ABA Rejects Ancillary Businesses" *ABA/BNA Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 7, 256-258 (1991)


[1]This is the third report in a series of reports on the Legal Profession Study Group which was organized by Professor Edward D. Spurgeon, University of Utah College of Law, and Karen McCreary, Esq. of the Utah Attorney General's Office, to review and analyze significant issues affecting the practice of law.

[2]*See* Appendix A for the text of four selected rules, including: Rule 5.4(b) of the D.C. Rules of Professional Conduct (the most liberal rule in allowing ancillary business activities); Rule 5.4 as proposed in 1982 to the ABA House of Delegates by the Special Committee on Evaluation of Professional Standards (this liberal proposed rule was not adopted by the ABA House of Delegates); Rule 5.4 of the Utah Rules of Professional Conduct; and the short-lived Rule 5.7 of the ABA's Model Rules of Professional Conduct.

[3]*See* Appendix A.

[4]"ABA Rejects Ancillary Businesses" *ABA/BNA Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 7, 257 (1991).

[5]*Id.*

[6]Report submitted by the Sections of Real Property, Probate and Trust Law; Business Law; General Practice; Law Practice Management; Patent, Trademark and Copyright Law; and Taxation; the Standing Committee on Lawyers Title Guaranty Funds; and the Illinois State Bar Association, August 1990, page 1 (citations omitted). A copy of this report was provided to the author by Reed L. Martineau, one of Utah's delegates to the House of Delegates, and is available upon request.

[7]*Id.*, page 6.

[8]*Id.*, page 7.

[9]Stephanie B. Goldberg, "More than the Law — Ancillary Business Growth Continues," March 1992 **ABA Journal**, 54, at 55.

[10]*Id.*

[11]"Partnership with Non-Lawyers," ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 91-360, 7/11/91, *ABA/BNA Lawyers' Manual on Professional Conduct*, Current Reports, Vol. 7, 252-253 (1991).

[12]L. Harold Levinson, "Independent Law Firms That Practice Law Only: Society's Need, The Legal Profession's Responsibility," 51 **Ohio State Law Journal**, 229, at 242 (1990).

[13]*Id.*

[14]*Id.*

# Trust Accounts

## What Every Attorney Should Know

Nearly every attorney's practice will at some time involve a trust account. The rules concerning trust accounts are set up to help protect attorneys from breaching their fiduciary duties. See Rules of Professional Conduct adopted by the Utah Supreme Court, effective January 1, 1988 — Rule 1.13 Safekeeping Property.

A trust account should be used whenever an attorney holds money which wholly or partly belongs to a client. This would include funds for unearned legal fees, settlements, estate funds, funds relating to client's real estate transactions, insurance proceeds from a client's injury or any other reason.

An attorney should open a separate bank account for the client so that interest can be paid to the client whenever a large amount is being held or when money will be held for a substantial period of time. The determination of when the amount is large enough or when it will be held long enough is up to the attorney. Generally this determination is made by looking to see if the costs of keeping the separate account and accounting for it are outweighed by the interest it will earn. A trust account should be set up at a financial institution and be specifically labeled as a Trust Account.

All trust funds may be commingled in one account, but lawyer's funds must not be commingled with client trust funds. However, a strict accounting of what money in the trust account belongs to which client is essential. When fees are earned by the attorney, they should be taken out of the trust fund.

In a trust account, records are very important. The rule requires that records be kept and maintained for five (5) years after work ceases. It is important to remember the following guidelines in maintaining your trust account:

1) The trust account is a separate account which is identified as a Trust Account.
2) The trust account checks are easily identifiable. It would be helpful if the checks are a different color than the firm account, and/or from a separate institution than the general firm account.
3) The account is in Utah unless otherwise agreed upon by the client.
4) The trust account contains only client funds.
5) All interest bearing trust accounts are affiliated with IOLTA or the interest must be distributed to the clients.
6) All property received belonging to a client is promptly identified and labeled as the client's.
7) Property is placed in "safekeeping" as soon as possible.
8) The client is promptly notified of receipt of property.
9) A journal, file of receipts, file of deposit slips or checkbook stubs which list the source, client and date of receipt of all trust funds is kept.
10) Duplicate deposit slips or other records sufficiently detailed are kept to show the identity of the money deposited.
11) A journal showing check number, date, amount disbursed, to whom paid, client balance against which each instrument is drawn is kept.
12) Checks paid to the attorney for services show clearly to which attorney they are paid.
13) A separate ledger for each client and a record of activities for each client is kept. At the end of representation, the account should be zeroed out and excess funds returned immediately to the client.
14) Trust accounts are balanced monthly.

# Interest on Lawyers Trust Accounts (IOLTA)

## It's Easy to Participate

The Utah Bar Foundation welcomes your participation in the IOLTA Program approved by the Utah Supreme Court in 1983. In the past, trust accounts which were either nominal or short-term have typically been placed in a non-interest bearing account. However, the IOLTA Program makes it possible to pool these funds in an interest bearing account with the interest channeled to the Utah Bar Foundation.

The funds collected under the IOLTA Program are used for a variety of purposes. Since the inception of the program in 1984, the Board of Trustees of the Foundation has awarded over $1 million in grants to various organizations for such purposes as providing legal services to the disadvantaged, promoting law-related education in the public schools and community, administration of justice and other worthwhile law-related projects.

To participate in this program, notify the Foundation office of your interest and you will receive an enrollment form to complete and return. The Bar Foundation will send that authorization to the financial institution to change your trust account to an interest-bearing one with the interest payable to the Bar Foundation.

If additional information is needed regarding trust accounts or the IOLTA Program, call Zoe Brown at the Utah Bar Foundation (531-9077).

# CLE CALENDAR

### THIRD ANNUAL LAWYERS & COURT PERSONNEL FOOD & WINTER CLOTHING DRIVE FOR THE HOMELESS

Just a reminder that the Third Annual Food and Clothing Drive is coming up. Plan on dropping off your donations at the Law & Justice Center on December 18th. Watch for our flyer listing much needed items for local shelters. Please call Toby at the Bar with any questions.

### AN EVENING WITH THE THIRD DISTRICT COURT

Spend an evening gaining helpful insights into practice before the Third District Court. A panel of judges from this court, along with some prominent practitioners will explore the common issues and pitfalls one faces when appearing in this court.

CLE Credit: 3 hours
Date: November 4, 1992
Place: Utah Law & Justice Center
Fee: Call
Time: 5:30 p.m. to 8:30 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.

### ISSUES IN ORGANIZING AND OPERATING A BUSINESS

The topic for this evening in the series is, "Employment Law: ADA, Update on Title 7."

CLE Credit: 3 hours
Date: November 5, 1992
Place: Utah Law & Justice Center
Fee: $50
Time: 6:00 p.m. to 9:00 p.m.

### YEAR-END TAX PLANNING — ESTATE PLANNING SECTION LUNCHEON

CLE Credit: 1 hour
Date: November 10, 1992
Place: Utah Law & Justice Center
Fee: $9 — Call to RSVP
Time: 12:00 noon to 1:00 p.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.

### VIEW FROM THE BENCH

This is part of the continuing series of luncheon seminars offered by the Bankruptcy Section. Judge Dee V. Benson of the U.S. District Court for Utah will address Bankruptcy issues as they relate to the District Court.

CLE Credit: 2 hours
Date: November 17, 1992
Place: Utah Law & Justice Center
Fee: $25
Time: 12:00 noon to 2:00 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 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.

**ISSUES IN ORGANIZING AND OPERATING A BUSINESS**

The topic for this evening in the series is, "Environmental Law: RECRA, CERCLA."

CLE Credit: 3 hours
Date: November 19, 1992
Place: Utah Law & Justice Center
Fee: $50
Time: 6:00 p.m. to 9:00 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; Ethics: Professionalism in the Courtroom; 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, with 3 in Ethics
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

**TITLE INSURANCE IN UTAH**

This program is being presented free, courtesy of First American Title of Utah and First American Title Insurance Company. Oscar H. Beasley, of Santa Ana California, will be coming into town to share his expertise and national perspective on title insurance issues for Utah. This program is an excellent opportunity to get a jump on your CLE credit, for FREE.

CLE Credit: 7.5 hours
Date: December 3, 1992
Place: Utah Law & Justice Center
Fee: FREE
Time: 8:30 a.m. to 4:30 p.m.

**ISSUES IN ORGANIZING AND OPERATING A BUSINESS**

The topic for this evening in the series is, "Securities Law: What is a Security?, Federal & State Securities Law' Issuing Stock, Limited Stock, Limited Partnerships, Debt Ventures."

CLE Credit: 3 hours
Date: December 3, 1992
Place: Utah Law & Justice Center
Fee: $50
Time: 6:00 p.m. to 9:00 p.m.

**ISSUES IN ORGANIZING AND OPERATING A BUSINESS**

The topic for this evening in the series is, "Financially Troubled Business: Creditors, Alternatives, Bankruptcy."

CLE Credit: 3 hours
Date: December 10, 1992
Place: Utah Law & Justice Center
Fee: $50
Time: 6:00 p.m. to 9:00 p.m.

**ISSUES IN ORGANIZING AND OPERATING A BUSINESS**

The topic for this evening in the series is, "Litigation: Avoiding, Preparing, Alternatives, Pre-Trial Preparation."

CLE Credit: 3 hours
Date: December 17, 1992
Place: Utah Law & Justice Center
Fee: $50
Time: 6:00 p.m. to 9:00 p.m.

# MCLE Reminder 60 Days Remain

For those who were admitted as a result of the February & July 1990 Bar Exam.

On Nov. 1, 1992, there will remain 60 days to meet your Mandatory Continuing Legal Education requirements for the second reporting period. In general the MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a 27 hour total. Be advised that attorneys are required to maintain their own records as to the number of hours accumulated. The second reporting period ends December 31, 1992, at which time each attorney must file a Certificate of Compliance with the Utah State Board of CLE. Your Certificate of Compliance should list programs you have attended to meet the requirements, unless you are exempt from MCLE requirements. Following is a Certificate of Compliance form for your use. If you have questions concerning the MCLE requirements please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

# 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.

USED LAW BOOKS FOR SALE–ALR 2nd through 5th. Please contact Wendy Lloyd at (801) 524-2758.

Collier Bankruptcy Cases, Second Series. Complete and up-to-date with update service through October 1992. $600.00. Please call (801) 359-9216.

**INFORMATION WANTED**

Attorneys with clients investigated by I.S.A.T. or filing suits against I.S.A.T. Please contact Alberta Hallett at (801) 531-0494 or (801) 963-5835.

**OFFICE SHARING/SPACE AVAILABLE**

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.

Office space available in Brickyard area. Free parking. Receptionist, copier, facsimile, and conference room available. Will be willing to trade office space for legal work. Call Mary at (801) 484-3000.

Deluxe building with beautiful view, centrally located, in Brickyard Tower, 1245 East 3120 South. Plenty of free parking. Close to freeway and 700 East, just ten minutes to Court. Share complete facilities with four established attorneys. Reception, library, telephone, fax, copier, file room, etc. Space for your secretary. Call Geniel at (801) 484-2111.

**POSITIONS AVAILABLE**

Snow, Nuffer, Engstrom & Drake will hire an associate for its St. George office to begin early 1993. 2-3 years experience preferred. Please send resume, writing sample, and letter outlining qualifications to P.O. Box 400, St. George, Utah 84771-0440.

Small Office Practitioner to represent out of state finance company with Domestication of Judgments and execution of debtors assets. Reply Managing Partner, Box 2524, Bala Cynwyd, PA 19004.

**POSITIONS SOUGHT**

Seeking administrative position with law firm. Accountant (Master's) with nine years combined experience in management, accounting and administration. Skilled in various aspects of small business management, including overhead analysis and financial statement preparation, as well as job costing and payroll. Excellent verbal, writing and editing skills. Proficient in a variety of computer software. For interview-resume, telephone (801) 272-9867.

Experienced professional secretary looking for part-time legal work. Preferably evening hours after 4:00 p.m. Please contact Joan after 5:00 p.m. (MST) at (801) 288-2833 or during office hours between 7:00 a.m. and 4:00 p.m. at (801) 251-2120.

**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.

Experienced trust attorney available to custom draft and print Living Trusts and related documents for your clients, delivered to you. Package of documents are bound in looseleaf "Estate Planning Portfolio" with tabs and explanations. Call (801) 273-3963 or 1-800-489-8311.

Northern Utah Career Rehabilitation (David H. Monobe, Ph.D., C.R.C.) Complete rehabilitation case management provided for legal firms and insurance companies. 3544 Lincoln Avenue #8, Ogden, Utah 84401 or call (801) 625-0535.

**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.

Toner Cartridge Recycling. Free pick-up and delivery from Ogden to Orem/Provo area. Now only $39.95 plus tax. TONER TECHNOLOGIES is Utah's oldest and most reliable laser printer recharger and is the second company in the world to enter the industry. We have long-time satisfied customers all over the world. Satisfaction Guaranteed. Contact Toner Technologies at 545 North Main #4, P.O. Box 407, Kaysville, Utah 84037; or call (801) 547-9736. (Mention this ad for a $5.00 discount.)

**CONTINUING LEGAL EDUCATION**

Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

CERTIFICATE OF COMPLIANCE
For Years 19_____ and 19 _____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

**Professional Responsibility and Ethics*** **(Required: 3 hours)**

1. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

2. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

3. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

**Continuing Legal Education*** **(Required 24 hours) (See Reverse)**

1. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

2. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

3. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

4. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

* Attach additional sheets if needed.

** (A) audio/video tapes; (B) writing and publishing an article; (C) lecturing; (D) law school faculty teaching or lecturing outside your school at an approved CLE program; (E) CLE program – list each course, workshop or seminar separately. NOTE: No credit is allowed for self-study programs.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulation 5-103 (1) and the other information set forth on the reverse.

Date: _____ _____
(signature)

Regulation 5-103(1) Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the board upon written request.

**EXPLANATION OF TYPE OF ACTIVITY**

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through study with audio and video tapes. See Regulation 4(d)-101(a)

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. See Regulation 4(d)-101(b)

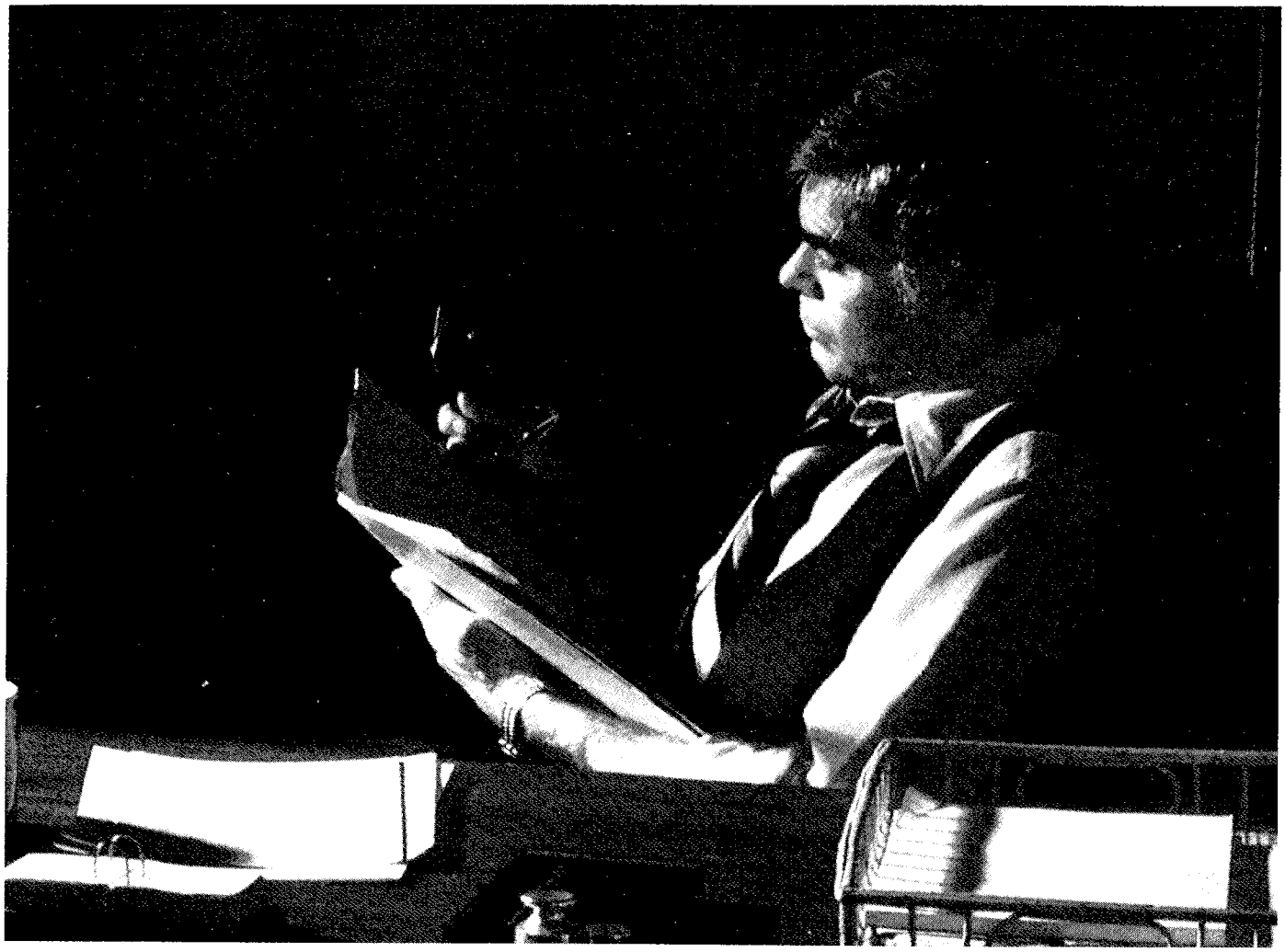
C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c)

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 8-101 — Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5 at the time of filing the statement with the Board.

# We put our entire corporation behind your client's personal trust



When your client names First Security's Trust Division, they invest in the strength and stability of the First Security Corporation. Their trust is in the hands of experienced administrators, backed by First Security's resources and experience in serving customers throughout the Intermountain West.

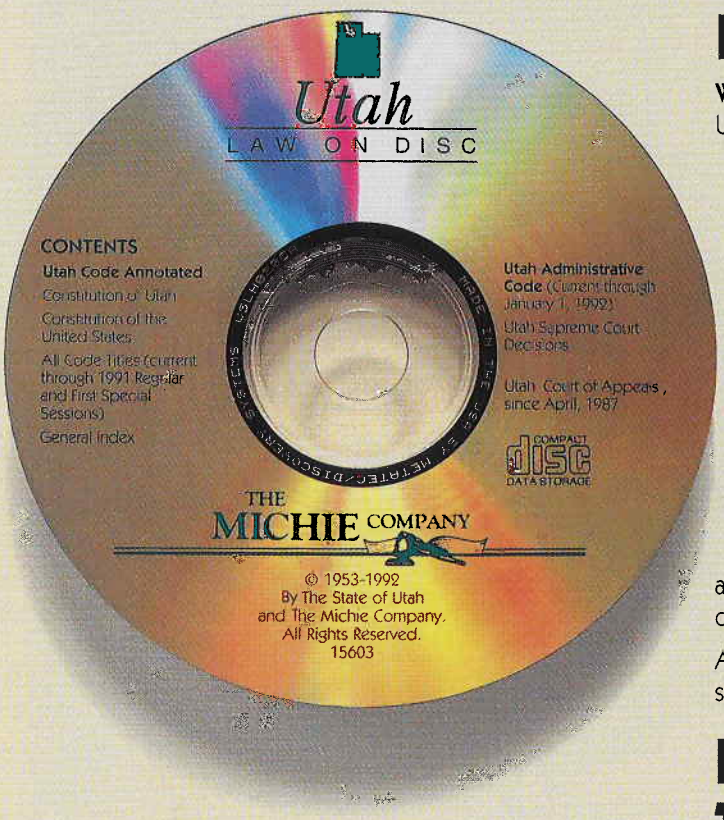
We offer a complete range of trust services including personal, corporate, and testamentary trustee, custodian or agent and personal representative. For professional trust services of the largest trust department in Utah, we're right where you want us to be.

**First Security Trust Division**

We're right where you want us to be

| Salt Lake Trust Department | Provo Trust Department | Ogden Trust Department | St. George Trust Department |
|---|---|---|---|
| David Halladay | Jeff Kahn | Charles B. Hewett | Gary Cutler |
| 350-5859 | 379-2105 | 626-9523 | 628-2831 |

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




## FIRST, THE GOOD NEWS.

**We've added court rules and 30 years of case law.** Now, Utah's official CD-ROM legal database is more comprehensive than ever. **Utah Law on Disc's** database of full-text decisions from the Utah Supreme Court and Utah Court of Appeals now dates back to 1945.

We've also added state and local federal court rules to Michie's *Utah Code Annotated* and *Utah Administrative Code*. Now, one disc contains the authoritative statutes, rules of evidence and procedure, and annotations found in your hardbound Michie code set—searchable in seconds with **Utah Law on Disc**.

## NOW, THE BAD NEWS.

Judges, state's attorneys, and private practitioners across the state are already using **Utah Law on Disc** to cut hours of legal research down to seconds. What are you waiting for?

A CD drive? A free trial period? No obligation to buy if you don't see results immediately?

## NOW, MORE GOOD NEWS: THE THIRTY-DAY FREE SPIN.

**Call for a Thirty-Day Free Spin.** You'll have the use of **Utah Law on Disc**, a CD drive, a training session, and toll-free support for thirty days. No charge. No obligation.

But call today. The Thirty-Day Free Spin ends soon.

For a free demonstration and a Thirty-Day Free Spin, call RANDY WORKMAN **800/942-5775** or **801/771-8708.**

Or call The Michie Company toll-free at **800/562-1215.**

THE MICHIE COMPANY

**For 39 Years, Utah's Code Publisher.**

---

**Utah State Bar**
**645 South 200 East**
**Salt Lake City, Utah 84111**

CAR-RT-SORT **CR01
37*
201 [illegible] Main Street #1800
P.O. Box 11898
Salt Lake City UT 84147

BULK RATE
U.S. POSTAGE
**PAID**
SALT LAKE CITY, UT
PERMIT NO. 844