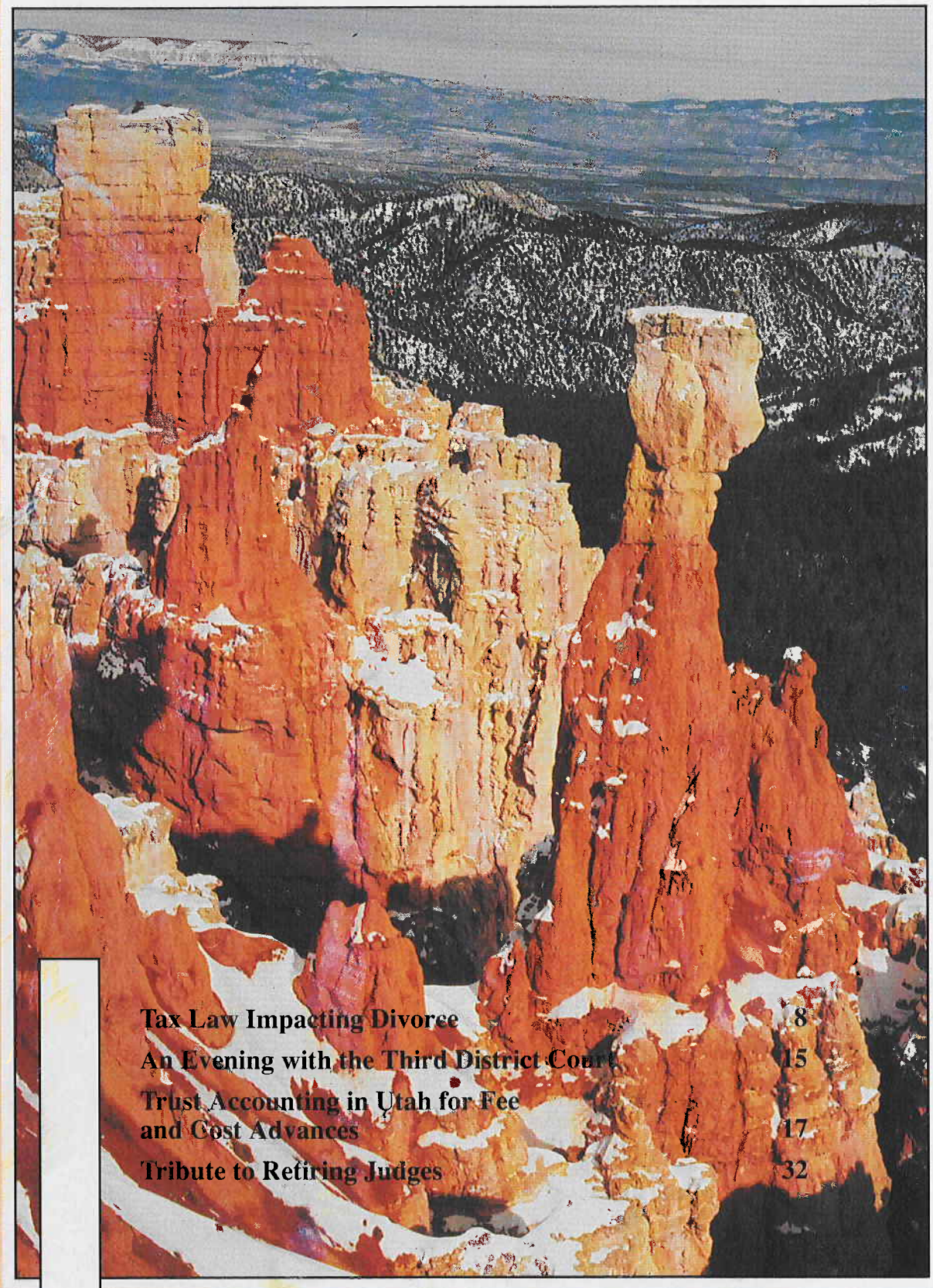
UTAH BAR JOURNAL

Vol. 5 No. 10 December 1992



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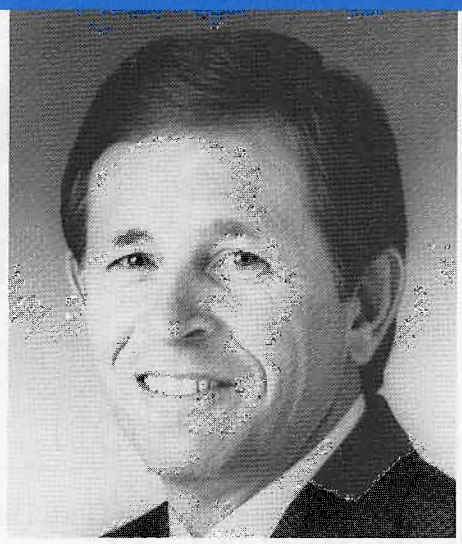
COVER: Bryce Canyon in Winter, taken by Brian D. Kelm, Esq., Salt Lake City, Utah .

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.



Should Utah's Judiciary Require all Court Filings to be Made on Recycled Paper?

By Randy L. Dryer

An estimated 14 million pieces of paper were filed in Utah's courts during fiscal year 1992, according to the Administrative Office of the Courts. These filings were generated by 655,318 new cases filed during this same time period. If one considers the papers filed in those cases disposed of in FY92, the number grows even larger. This veritable avalanche of paper raises the obvious question of whether the Utah judicial should encourage, or even require, the filing of court documents on recycled paper. Recycling and the use of recycled products is widespread throughout private industry and in many states. Although numerous states have legislatively required the executive and legislative branches to purchase and use recycled paper, very few state judiciaries have moved in this direction. In fact, only Florida presently mandates the use of recycled paper for court filings, although several state judiciaries are considering such a requirement.

THE FLORIDA RULE

Beginning January 1, 1993, the Florida Rules of Judicial Administration will require all filings to be on paper that contains at least 50% waste paper. The rule allows lawyers one year to phase out old paper supplies.

In a unanimous per curiam opinion adopting the new rule on October 8, 1992, the Florida Supreme Court noted that the Florida State Legislature requires the use of recycled paper by all state agencies and subdivisions that receive state funds. Florida lawmakers have legislatively set a goal to reduce waste going to landfills by 30% by 1994. The Board of Governors of the Florida Bar opposed the proposal because it was yet another mandatory regulation on lawyers and would be difficult to enforce. The court rejected the bar's arguments, noting as follows:

> Because the legislature has expressly established a policy for governmental entities of this state to use recycled paper and to promote the development of markets for recycled papers, we conclude that we should follow that policy unless we can show its implementation would have adverse effect.

The court also noted that the new rule "places the judicial branch in a position consistent with the other branches of state government" and that opponents to the rule failed to demonstrate any adverse impact from adoption. The court found that recycled paper is readily available in Florida, is of the same quality as non-recycled paper, and that the cost seldom varies more than 10% from non-recycled paper.

UTAH'S LEGISLATIVE POLICY

In 1990, the Utah legislature enacted Section 63-56-20.7 entitled "Preference for Recycled Paper and Paper Products." This provision requires every "public procurement unit" to give preference to purchasing recycled paper (defined as paper which has a total weight of not less than 50% of secondary waste paper material) unless the price for the recycled paper exceeds by more than 5% the cost of non-recycled paper or there is no recycled paper reasonably available of the quality needed. The act also requires at least 10% of the annual paper purchases by each public agency to be recycled paper and increases the percentage requirement 5% each year until the minimum purchase requirement reaches 50%. Thus, by 1998, at least half of the paper products purchased by state government will be recycled products. The Administrative Office of the Courts, most court clerk's

office and several law firms (my own included) recycle used paper and purchase recycled paper products. Very few court documents, however, are filed on recycled paper.

Utah's court rules are silent on the issue of recycled paper. Rule 10 of the Utah Rules of Civil Procedure merely requires all pleadings and other papers filed with the court to be on "good, white, unglazed paper." Rule 27 of the Utah Rules of Appellate Procedure requires all briefs to be filed on "opaque, unglazed white paper."

SHOULD THE USE OF RECYCLED PAPER IN COURT FILINGS BE MANDATORY?

The use of recycled paper is clearly a laudable goal and would demonstrate to the public that the legal profession wants to be part of the solution to a known environmental problem, rather than be a contributing factor. Although Utah's 14-15 million pages of filings each year pale in comparison to the estimated 100 million pages filed each year in the Florida system, everyone must do their part and, as the same goes, every little bit helps. The use of recycled paper products is pervasive in our society today. Our grocery sacks, our egg cartons, our cereal boxes and even our checks used to buy our groceries are made of recycled paper. Why not court documents?

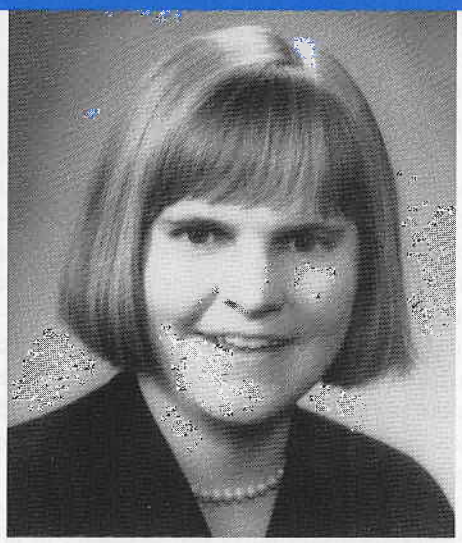
The real issue is not whether lawyers should recycle and use recycled paper for court filings, but whether the use of recycled paper should be mandatory. Setting aside the philosophical issue of whether we have enough mandatory regulations governing our practice lives already, there are two significant questions which must be answered affirmatively before one could readily embrace the required use of recycled paper for court filings.

First, is recycled paper, of a quality necessary for filing purposes, available in all parts of the state, including rural regions? Rural practitioners already have enough practical difficulties which their urban colleagues do not face without adding another burden.

Second, is the cost of recycled paper substantially the same as non-recycled paper and is the cost substantially the same throughout the state? Many lawyers, particularly solo practitioners, are struggling economically and an added cost will not be welcome. Over 50% of Utah's bar are in solo practice or practice in a firm of three or fewer attorneys. Given the recent dues increase, the imposition of MCLE fees and other administrative costs associated with practice, any significantly increased cost to such a key element of practice as paper, will impose a heavy burden on the trial practitioner. Nonetheless, if the answer to these two questions is yes, perhaps the time is now ripe for Utah's judiciary to follow Florida's lead and join with Utah's executive and legislative branches in promoting the use of recycled paper. Let me, or any commissioner, know what you think.

"Post Script:

Since submitting this article to the *Journal*, I have learned that due to the good work of attorney Brian Barnard the Utah Supreme Court, the Court of Appeals and the U.S. District Court for the district of Utah now accept court filings on recycled paper. The practice is not uniform throughout the state district and circuit courts, however."



The Role of the Public on the Bar Commission

By Denise A. Dragoo

In an effort to improve communication between lawyers and the public, the Utah Supreme Court proposes to reshape the Board of Bar Commissioners. At the recommendation of the Special Task Force on the Management and Regulation of the Practice of Law, the Court intends to appoint a non-lawyer public representative as a voting member of the Board. The Bar Commission welcomes appointment of a public member, but requests that the representative be ex-officio and non-voting. The Commission's perspective on voting members should not simply be rejected as "impolitically incorrect." This issue relates directly to the mission of the Bar and accountability of Commissioners to the lawyers which elect them. The issue also involves the best mechanism for involvement of the public in the affairs of the Bar.

ACCOUNTABILITY

After much debate and introspection, the Board recently defined it's mission:

> To represent lawyers in Utah; to serve the public and the profession by promoting justice, professional excellence and respect for the law.

As reflected in this statement, the Bar represents its lawyer members. The Rules of Integration require Bar membership as a condition to practicing law in Utah. Accountability of the Bar to member lawyers, is provided by the election of eleven lawyer representatives from the eight judicial districts. Currently, only elected Commissioner's have a vote in determining Bar policy.

Ex-officio, non-voting members serve in an advisory capacity and include the dean's of both law schools, the chair of the Young Lawyers Section, two representatives of the American Bar Association and the immediate past Bar president. The chair of the Minority Bar Association was recently added as an ex-officio member of the Commission. Ex-officio members provide a diversity of perspectives to Board deliberations and a public representative will enhance this diversity. However, if all advisory members voted, the vote of elected members would be diluted. Activities of a large Commission could also become unweildy. Finally, a public representative appointed by the Supreme Court is however, not accountable to lawyer members and, in the Board's view, should not vote on Bar policy.

PUBLIC INVOLVEMENT

In addition to advising the Bar on policy matters, public representatives play an increasing role on Bar sections and committees. The public is directly involved in the disciplinary process with 8 public members on disciplinary hearing panels and 14 on the Fee Arbitration Committee. The Alternative Dispute Resolution Committee has 4 public members and is seeking to encourage arbitration and mediation alternatives. The Law Related Education Committee has 6 public members and a non-lawyer executive director. This Committee combines lawyer and non-lawyer jurists to officiate at student mock trials throughout the state. The Needs of Children Committee has both lawyer and non-lawyer co-chairs. Nearly all Bar standing committees have at least one public representative.

The Bar also reaches out to the public with a variety of services. The Bar Lawyer Referral Service provides the public with lawyer referrals and an opportunity for an initial low-cost consultation regarding their legal needs. Pro-bono services are provided by the Young Lawyers Section through the Tuesday Night Bar Program. This program was recently expanded in Utah County to include law students from Brigham Young University. The Business Law Section and the Corporate Counsel Section have combined forces with United Way of the Greater Salt Lake Area. A series of workshops will advise board members and officers of charitable organi-

zations regarding their fiduciary and legal obligations. The Utah Dispute Resolution Project is being partially funded by the Bar and corporate contributions to provide neighborhood mediation services.

PUBLIC AWARENESS

Finally, the Bar has encouraged media coverage to increase public awareness of its services and functions. The press is following the disciplinary process and publishing articles regarding suspensions and disbarment with greater regularity. Bar Commission meetings are now held throughout the state. Press attendance at the October meeting in Ogden, Utah resulted in several articles concerning issues pending before the Bar. The media is also covering the Bar's Mini-Breakfast Series of CLE programs.

In sum, the public clearly has much to contribute to the activities of the Bar. Public involvement is crucial to the disciplinary process and helps diminish the "fox in the hen house" perception of lawyer regulation. Public participation in Bar activities also improves public knowledge of and respect for the judicial system. The participation of the public is essential in the delivery of pro-bono legal services. However, the public's role must be balanced with the fact that the Bar is an integrated, mandatory association of lawyers. Although the public should have an advisory role in Bar management, the Bar's policies should be set by lawyers accountable to the lawyers which elect them.

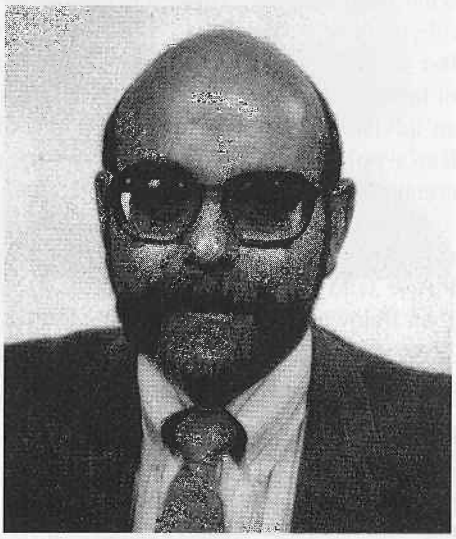
Your suggestions regarding the public's role in bar management are welcome. Please send any comments/suggestions c/o John Baldwin, Utah Law & Justice Center.

Tax Law Impacting Divorce

By David S. Dolowitz

The following is part 1 of a two-part article on "Tax Law Impacting Divorce".

There are certain areas where tax law impacting divorce can produce results which are different than those anticipated by lawyers following and utilizing state divorce statutes and decisions. Lawyers handling divorce cases encountering these problems can find themselves mislead and their clients harmed if proper recognition is not given to the problems. To assist in recognizing some of these problems and adjusting to them, the following description and analysis is presented.



DAVID S. DOLOWITZ is a member of the Board of Directors of Cohne, Rappaport & Segal; Fellow, American Academy of Matrimonial Layers; Past President and Member of the Executive Committee, Family Law Section, Utah State Bar Association; Family Law Section, Utah State Bar's "Lawyer of the Year"; Chairman, Utah Supreme Chourt, Advisory Committee for Juvenile Court Rules of Procedure.

DEFINITION OF INCOME

State law requires that income be determined to set both alimony and child support.

The Utah Supreme Court has declared that the purpose of alimony is to maintain the standard of living of the recipient spouse as nearly as possible to that maintained during the marriage and to prevent the recipient from becoming a public charge. In order to effect this result, the trial court must consider the income produced by the payor, the needs of the payee and the income-earning potential of the payee. The court has also indicated that the income of the parties may properly be divided equally between them to effect these goals. *Gardner v. Gardner*, 748 P.2d 1076 (Utah 1988).

The Uniform Child Support Guidelines require as their first step in establishing child support that the income of each parent be determined. The amount of support is the adjusted gross income of each parent. Utah Code Ann. § 78-45-7.5 (1992).

Thus, when determining either child support or alimony, the practitioner finds that the first step is to define and establish income. Where all of the income earned by the obligor comes from W-2 earnings or 1099 interest or dividends, the inquiry is easy. However, the question is often not that simple.

The first inquiry is establishing the time frame of the income. The Utah Court of Appeals in *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991) *cert. denied,* 817 P.2d 327 (Utah 1991) ruled that to set alimony, the income being used should be that earned as of the date of trial. This is also the date upon which the determination of need and the recipient's ability to earn should be established. The same test was mandated in child support in *Thronson v. Thronson*, 810 P.2d 428 (Utah App. 1991) *cert. denied,* 826 P.2d 651 (Utah 1991).

The second area of inquiry is that of defining income. The courts and legislature in Utah have had to examine the concept of "income" to define precisely what it was or is. In *Jones v. Jones*, 700 P.2d 1072 (Utah 1985), the court confronted the situation where Mr. Jones operated a business. The business had a net profit of $90,000.00 per year. Mr. Jones took $45,000.00 of that profit each year as his income and reinvested $45,000.00 into expansion of the business. The trial court determined for support purposes that Mr. Jones had an income of $45,000.00 per year, precisely what was declared on his tax return. The Utah Supreme Court ruled that was not a correct determination of income. The court ruled that, as Mr. Jones was the sole proprietor of the business, he was in a position to determine how much income he would take and his true income was $90,000.00 per year for the purpose of determining his support obligation, not $45,000.00. The case was remanded to the district court to re-examine the level of alimony that should be set based upon Mr. Jones' real income.

Examination of Mr. Jones' tax returns would have revealed an income of $45,000.00 per year. Examination of his business return was required in order to find out his true income. In terms of tax law it is important to note that if Mr. Jones had operated his business as a proprietorship, the income of $90,000.00 would have appeared on Schedule C of his tax return. If he had operated the business as either a partnership or a Sub "S" Corporation, the full income of $90,000.00 would have appeared on Schedule E of his tax return. It is only if he conducts his business as a "C" corporation, that Mr. Jones can keep the business income off his tax return. Each of these methods of conducting business and reporting income for tax purposes is legal and appropriate. Consequently, if you are working in a case where an owner or substantial shareholder of a "C" corporation is involved, simply accepting the W-2 and/or 1099 issued by the "C" corporation will not provide conclusive information as to all the available income. At the same time, a Sub "S" or partnership carry through may overstate or

understate actual income.

It must be recognized that what occurs in this area is not illegal. It is completely in accord with tax and business law. Each form has legitimate tax and business reasons for being utilized. The lawyer handling the divorce must simply be aware of the situation, inquire into it, and respond accordingly.

Examples of cases coping with these problems will illustrate the issues being examined.

In the Utah Supreme Court decision of *Christiansen v. Christiansen*, 667 P.2d 592 (Utah 1983), the Defendant switched his form of doing business after entry of the Decree of Divorce from a sole Proprietorship, which is reported on Schedule C, to a professional corporation, a "C" corporation. He represented to the trial court that his income was the salary paid to him by the professional corporation. The trial court found that the professional corporation had substantial income which it utilized to pay expenses which benefitted Dr. Christiansen personally. It paid a car allowance. It provided interest income to him. It provided various employee benefits. The court determined these benefits had a value of $19,000.00 and based on this determination, the court found that his income had increased since the time of the divorce. His request that alimony be reduced was denied.

"Effective reading of the tax returns in inquiry into the actual circumstances will produce the truth."

On the other hand, the fact that a partnership or Sub-"S" corporation will produce income which appears on the Schedule E and line 18, on page 1 of the individual tax return of the 1040 can produce an indication of income that is not actual spendable income. This was the situation confronted by the Court of Appeals for Ohio, Jackson County in the case of *Riepenhoff v. Riepenhoff*, 64 Ohio App. 3d 135, 580 N.E. 2d 846 (Ohio App. 1990). Mr. Riepenhoff was the president and chief executive officer of a Sub "S" corporation. He received a salary from the corporation and as a shareholder in the corporation was required to recognize and report a portion of the earnings of the company based on his stock ownership percentage. Each year those earnings appeared on his tax returns based on Schedule E. However, they were not paid to him. The were retained in the corporation and used for corporate purposes. Mr. Riepenhoff was a forty-seven (47%) percent owner of the company and could not by himself determine whether or not the earnings would be distributed. Each year they were not. The trial court examining the tax return of Mr. Riepenhoff after the divorce, modified his child support obligation by including his salary and one-half of the Sub "S" corporation earnings attributable to him. The trial court then applied the Ohio guidelines to order child support.

The Court of Appeals reversed this decision. It pointed out that the trial court failed to consider the fact that the retained earnings were not distributed to Mr. Riepenhoff even though they appeared as earnings on his income tax return and were earnings on which he had to pay taxes. The appellate court noted that the money was retained in the corporation and was not available to the payor merely upon request. They found there had been no attempt to shelter the retained earnings or to reduce the alimony or child support. The court went on to note that the corporate decision to retain the earnings while the corporate shareholders were required to include those earnings as part of their taxable income, resulted in decreased income to Mr. Riepenhoff, since he had to pay taxes on income he did not receive. As a result, the child support had to be readjusted based on actual income which was different than the income shown on the tax return. The matter was remanded to the trial court to recalculate based on the real income of Mr. Riepenhoff.

For the reverse of this decision there is the case of *Kenfield v. United States*, 783 2d 966 (10th Cir. 1986) where Mr. Kenfield was permitted to deduct from his taxable income partnership income which was reflected in his Schedule E. Neither husband nor wife received the cash. The husband deducted one-half of the Schedule E partnership attributed income. The Internal Revenue Service objected claiming it was the husband's income. The federal courts ruled that the husband could deduct, and by

implication, the wife must report and pay tax on one half of the partnership income based on a decree of divorce which awarded her half of her ex-husband's partnership income. This was the result though no income was actually paid to either husband or wife. It was retained in the partnership for business purposes.

Whenever a lawyer handling a divorce encounters Sub "S" income, or Schedule E income, that is, income coming from partnerships or Sub "S" corporations, an inquiry must be made to determine whether there is actual income received by the recipient and that evidence must be presented to the trial court so that a true level of income can be set. This is one instance where the tax law obscures rather than aids in providing evidence of true income. Effective reading of the tax returns and inquiry into the actual circumstances will produce the truth.

Another area in which tax returns do not accurately reveal income is illustrated in the decision of the Utah Court of Appeals in *Rasband v. Rasband*, 752 P.2d 1331 (Utah App. 1988). Not explained in the Statement of Facts in the appellate decision, but present in the case, was the fact that Mr. Rasband operated an insurance business. He reported it on his Schedule C as a sole proprietorship. He spent money properly deducted from his income for business expenses to support his automobile, for insurance, for meals, for travel and for entertainment. All of these expenditures were legitimate business expenses. The business also paid personal expenses for him and enhanced his lifestyle. The trial court found that while he reported $2,000.00 per month as income from his business, his real income, when the court included the effect on his personal life of the paid business expenses, raised the real income from $2,000.00 per month to pretax income of $3,800.00 per month. The alimony and child support awarded by the court was based on the real income rather than the income shown on the tax returns. In making this determination, there was no illegality or impropriety in Mr. Rasband's reporting of his income, but his net taxable income was not his true income. The trial court determined his true income for the purposes of awarding support. It was not the income shown on the tax return, though the tax return provided the infor-

mation from which the true income was determined.

The Utah Court of Appeals declared in *Allred v. Allred*, 797 P.2d 1108 (Utah App. 1990) that trial courts in Utah must apply the child support guidelines or explain carefully why they declined to do so. On one occasion where an obligor was in prison and would not have had any income as defined in the Internal Revenue Code, the Utah Court of Appeals upheld the decision of the trial court to award to the custodial parent the equity that the obligor owned in the marital home to pay his child support obligation. *Proctor v. Proctor*, 773 P.2d 1389 (Utah App. 1989). Examination of Mr. Proctor's tax returns would have revealed no income: The approach taken by the courts indicates that even under this circumstance, use of assets may be defined as income which can be utilized to pay the support obligation. This information, will not appear on the tax return but it is a demonstration of how an I.R.S. definition of taxable income is not the sole inquiry in obtaining support.

A final problem which should be examined is that of imputation of income. Where the court determines that the actual income is not the appropriate figure to use in determining child support (Utah Code Annotated § 78-45-7.5(7) provides the standards for imputing income.) In *Cummings v. Cummings*, 821 P.2d 472 (Utah App. 1991) the Court of Appeals determined imputation of income should be used when the statute so provides. Prior to the decision in *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991) *cert. denied* 817 P.2d 327 (1991), the Utah courts had looked to historical income to determine the appropriate income to be used in setting support, e.g., *Davis v. Davis*, 777 P. 2d 518 (Utah App. 1989); *Kiesel v. Kiesel*, 619 P.2d 1374 (Utah 1980); *Auerbach v. Auerbach*, 571 P.2d 1349 (Utah 1977).

"A final problem . . . is that of imputation of income."

When imputing income, the court is using a definition of income other than that which is contained within the Internal Revenue Code. If we recognize that is what we are doing, on occasion using income as defined in the Internal Revenue Code and on occasion using other definitions of income, we can see how the Internal Revenue Code fits into the determination of income for support. Just as the definition of alimony under Section 30-3-5 of the Utah Code may agree with, or disagree with, the definition of alimony as contained within Section 71 and Section 215 of the Internal Revenue Code, Title 26, United States Code, the definition of income for support may agree with or be in conflict with or different from that of taxable income as defined in the Internal Revenue Code. It is important to note which definition we are considering when we are looking at the particular question we face in the divorce. When defining income, sometimes the tax code helps and sometimes it obfuscates what we are seeking.

DIVISION OF ASSETS

When Congress enacted the law which was codified as Section 1041[1] it appeared that the tax difficulties created by the decision of the U.S. Supreme Court in *U.S. v. Davis*, 370 U.S. 65, 82 S. Ct. 1190, 8 L.Ed 2d 335 (1962), *rehearing denied* 371 U.S. 354, 83 S. Ct. 14, 9 L.Ed 2d 92 (1962) had been resolved and the division of property would be free of major tax considerations. This has not turned out to be quite as simple as anticipated.

In general, Section 1041 provides that when an interest in property is transferred incident to a divorce, there is no tax to either the transferor or the transferee. The transferee takes the property with the same basis that it had for tax purposes prior to the transfer. Even if its present market value is higher than its basis, there is no tax arising from this transfer, provided that it is incident to the divorce.

When Section 1041 was enacted (1984), interest expense could be deducted by the payor and recognized as income by the recipient. However, the law regarding interest was changed in 1986 with no adjustment in Section 1041 which has had an impact on Section 1041 transfers.

Frequently, one part is awarded property and the other is awarded either judgment to equalize the property payment. Or an order is entered requiring

payments to be made by one party to the other to balance the property distribution. If any portion of those payments are considered interest, under present law they would be taxable income to the recipient, but they are no longer deductible to the payor. Section 163(h). This has produced a problem upon which the Internal Revenue Service has not yet taken a formal position. It is believed that if the equalizing payments make no mention of interest, all of the payments will be considered Section 1041 payments and will not be tax deductible to the payor or taxable to the payee. This can be effected by including the interest in the payments to be made but not labeling them as interest or labeling the payments as supplemental 1041 payments.

If interest is being awarded, it is suggested that it be calculated and simply included in the principal amounts. If it is designated specifically as interest, it will be taxable income to the recipient. If not, since this is personal interest, it will not be deductible to the payor under Section 163(h). This treatment is detrimental to both parties. Avoid it.

One way the parties can award "interest" in a 1041 situation, is to make it an alimony payment as defined in Section 71, Alimony is tax deductible to the payor and taxable to the payee. Do this separate and apart from the property transfer provisions. Needless to say, both parties must agree to this treatment. It would be appropriate to use it, where an alimony obligation, for example, is going to be delineated and then eliminated by the transfer of property. This is using the tax law to help effect an equitable result. It is beneficial to both parties, and consistent both with their goals and with state equitable division laws.

Another approach that has been suggested is to indicate that the payments which would otherwise be interest are simply additional payments made under Section 1041 because the principal sum cannot be paid at one time.

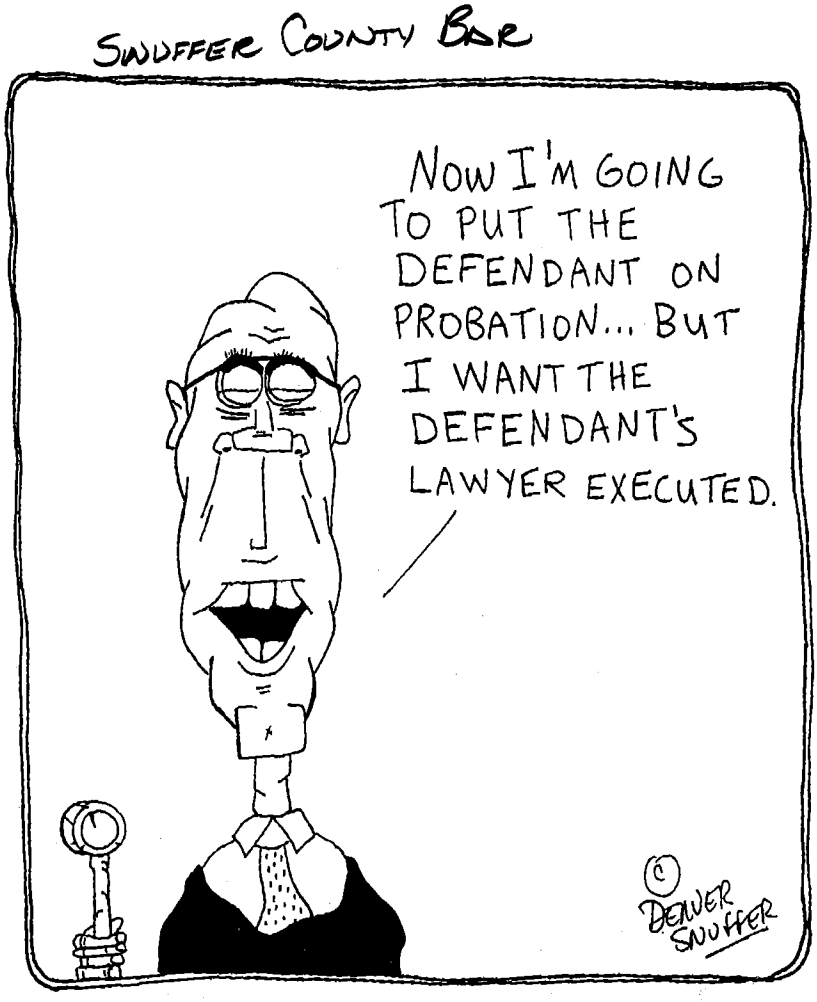
Unfortunately, since the regulations under section 1041 do not deal with this particular problem, there is no guaranteed safe harbor. The attorney simply must recognize that there is a problem which must be handled in the most tax conscious way possible. The only specific question that has been answered by the Internal Revenue Service is in Revenue Ruling 88-74, in that ruling I.R.S. stated that if money is borrowed from a third party (e.g. a bank) to acquire a spouse's interest in an asset and it is qualified either as residential interest under Section 163, or investment interest under Section 163, the interest payments will qualify for deduction to the payor and neither party need worry about the issue of how the interest will be treated. The specific question addressed was borrowing the money to buy the spouse out of the marital residence.

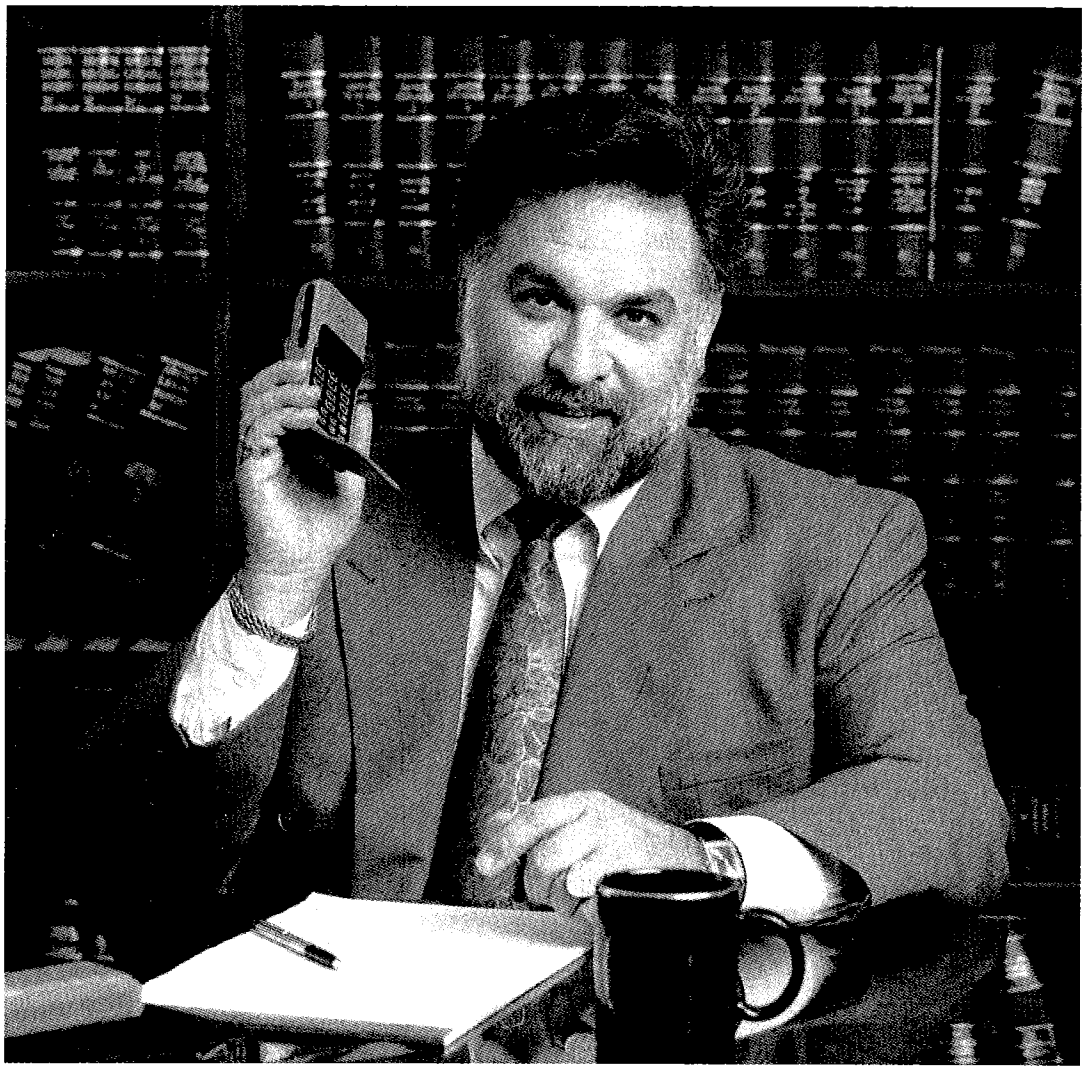
Since a Section 1041 property transfer between husband and wife incident to a divorce transfers the property with the same basis for tax purposes it had prior to the transfer, there is a risk that what appears to be an equal division of assets is really unequal. Example: The parties own stock worth $300,000.00. The securities are owned in two companies and each block of stock is worth $150,000.00. The tax basis of one block is $50,000.00 and the tax basis of the second block is $100,000.00. If half of each block goes to each person, there is no problem. If all of one block goes to one spouse while all of the other block goes to the second spouse, one will in fact have a $50,000.00 higher

tax basis and upon sale will have $100,000.00 in capital gains, while the other upon sale would have a capital gain of only $50,000.00. The result if an unequal distribution by operation of tax law, which is not apparent on the face of the distribution itself.

A problem faced by lawyers dealing with potential tax problems is that Utah courts, as in many other states, refuse to speculate on taxes. Thus, when you, as a family lawyer presenting the divorce evidence, try to introduce evidence of the possible tax ramifications, the trial court is free to disregard it as speculative. *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991) *cert. denied* 817 P.2d 327 (Utah 1991), *Alexander v. Alexander*, 737 P. 2d 221 (Utah 1987). Looking back to our example, only if the stock has been sold and the gain must be recognized, is the court required to make appropriate adjustments in the award. *Morgan v. Morgan*, 795 P.2d 684 (Utah App. 1990). Or, if the parties, relying on tax law, have entered into a stipulation, and to permit any change from the stipulation would be unfair because of the tax law, then the change may not be allowed. *Horne v. Horne*, 737 P.2d 244 (Utah App. 1987).

[1]All Internal Revenue Code citations will be abbreviated to just the section number. Fully cited they are to the Internal Revenue Code, Title 26 of the United States Code.





Steve Kaufman, Utah State Bar Commissioner

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An Evening With the Third District Court

By Victoria K. Kidman

Nearly 300 Bar members heard a variety of opinions dealing with the entire process of civil litigation at the November 4, 1992, CLE program "An Evening With the Third District Court." A question and answer format was led by moderators William Bohling and John Young. Distinguished judicial panelists included Third District Court Judges Michael R. Murphy, Timothy R. Hanson, Leslie A. Lewis and Anne M. Stirba. Anne Swensen and W. Cullen Battle provided insight to the panel as civil litigators.

Some tidbits of advice are set forth below:

PRE-TRIAL

Rules of Civility

The judges agreed that rules of civility make a difference at all states of litigation. According to Judge Murphy "civility" should be shown to all individuals in the courthouse from clerks and bailiffs to witnesses, jurors and even opposing counsel. Judge Hansen advised that attorneys and witnesses should be addressed by their surnames (as opposed to given names).

Unavailability of Assigned Judge

The Third District has a rule which governs the situation when the judge assigned to a case is "truly" not available. The attorney must first attempt to find a judge on the same floor or building as the unavailable judge. If no judges are available on the same floor then any judge is "fair game," according to Judge Hanson. Judge Hanson advised that the attorney should be prepared to bring the new judge up to date and inform the judge as to why the attorney is unable to contact the assigned judge.

Dress Code

Judge Hanson, aka "the Hon. Clothes Police," rendered advisory opinions as to the dress code which should be followed by male and female attorneys. Judge Hanson simply advised that men should at all times have a coat and tie. Judge Hanson had a more difficult time defining the dress code for women and stated that it needs to be professional, relying upon the ever pervasive standard — "you know it when you see it."

TROs and PIs

Judge Stirba advised attorneys about the new requirements for temporary restraining orders and preliminary injunctions. She advised the new rule is more stringent and in non-domestic cases Judge Stirba will make a finding as to each and every element. She reminded attorneys to comply with the mandatory certification requirement of Rule 65A(b).

Discovery Warfare

The court is not "off limits" for legitimate discovery disputes, according to Judge Lewis. However, the court can best assist the attorneys in discovery warfare if the judge is called in advance and has the file to review. Judge Lewis recommended that counsel attempt to meet with the judge in person rather than call the judge during the heat of battle.

Time Processing Standards

Imposing time processing standards on judge certification was unanimously opposed by the panel. A proposed standard would require trial judges to dispense with civil cases within one year from the date of filing. The judges didn't oppose the present case processing standard whereby the judge must report any case under advisement for more than 60 days. Judge Stirba believes that the new standard is not realistic or practicable and promotes "microwave justice."

Pre-Trial Conferences

Judge Lewis expects that the time set aside by the court for pre-trial conferences is used productively, meaning that the attorneys should be prepared and be knowledgeable about the case. Partners should not use new attorneys who know nothing about the case to attend the pre-trial, if this occurs the unsuspecting new attorney may end up a sacrificial lamb. Efforts should be made to settle the case and authority should be available by phone. Judge Lewis also uses the pretrial conference as a time to rule on tough evidentiary matters.

In cases involving jury trials of two or more days Judge Stirba requires a stipulated pre-trial order which is similar to that required in the federal courts. None of the other judges on the panel require a pretrial order unless the case is extremely complicated or lengthy.

Motions in Limine

Judge Murphy advised that motions in limine should be brought as early as possible and certainly before the final pretrial. Judge Hanson, however, believes that motions in limine should be brought immediately before trial starts. If the motion is brought too early Judge Hanson believes that the attorney may be seeking an advisory ruling.

Code of Judicial Administration

Judge Hanson advised that as a practical matter attorneys should ask for oral arguments on all major motions. If the opposing party has already asked for oral argument then it is not necessary for the other side to also ask for argument. The only method which puts the matter before the judge is through the filing of a Notice to Submit for a Decision. Absent the Notice the court may never have occasion to know the matter is ready for argument and/or a ruling.

The judges recognized that even when a Notice to Submit has been filed that on "rare" occasions the matter may not be timely addressed. In those "rare" instances the judges welcome a phone call to their clerk concerning the status of the matter. As a rule of thumb, wait 45 days before reminding Judge Hanson.

Settlement Efforts

The judges recommended that during bench trials it is helpful to separate the

trial judge from the settlement negotiations. Judge Lewis advised that attorneys should not hesitate to suggest the trial judge ask another judge to trade calendars for settlement purposes. The judges also recommended that counsel should explore the option of having a retired judge serve as a mediator to facilitate settlement.

TRIAL

Trial Briefs

The judges concurred that the use of trial briefs can be overdone. Trial briefs are helpful in complex cases but are worthless in simple negligence cases tried before a jury. Typically trial briefs only need to be filed in bench trials and should be submitted with copies of the cited cases.

Jury Selection

The judges agreed that the judge is the proper source of the jury questions. Judge Murphy quipped that judge conducted voir dire is conducive to the principle as to the shortness of life. Judge Lewis is amenable to opening the door further by allowing the attorneys to play a greater role in jury selection. Judge Hanson, however, was hesitant and feared that attorneys would attempt to try their case through jury voir dire.

Brevity in the Course of Trial

"Blessed is the snappy and concise lawyer," advised Judge Stirba. The benefits of brevity were recognized by all the judges. Attorneys that "over do it" indicate to Judge Murphy that the attorney does not know as much about the case as the attorney thought he did which effect the attorney's credibility with the judge and the jury.

In oral arguments on motions Judge Lewis advised against a verbatim recussitation of the arguments contained in the written pleadings. Attorneys should summarize the arguments and only hit the high points of the written materials. Contrary to popular belief, all the judges claim that they read the materials before the time of argument, even if it is a cursory reading.

Experts

Judge Murphy advised against the use of repetitive expert testimony. He recognized that the quantity of evidence can get the attorney into more trouble than if the attorney uses quality testimony. Judge Hanson recognized that attorneys are tending to overdo experts and as such advised that experts should only be used if they have a definite area of expertise. An expert testifying as to the proper method of stacking toilet paper would sure to be wiped off a witness list in a case heard before Judge Hanson.

Objections

The judges agreed that all objections should be timely, succinct and appropriate. If an objection is made as to foundation, the attorney should state what is missing from the foundation. Judge Lewis cautioned against arguing with the judge when, and if, an unfavorable ruling is ever given in her courtroom.

Findings of Fact

The findings of fact should be carefully prepared. The findings must be complete as possible in order to assist the ruling to stand up on appeal. The prevailing party should prepare findings of fact supportive of their position even if the court does not specifically delineate the basis for the ruling. However, Judge Hanson cautioned the prevailing attorney against making things up, but rather the attorney should include all the grounds addressed in the brief.

Trust Accounting in Utah for Fee and Cost Advances

By Anthony J. Frates
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In few businesses does such careful scrutiny need to be given to incoming customer payments as in the legal business. While it is a basic aspect of the financial management of any business enterprise to identify what a customer or client is paying for upon the receipt of such a payment, law firms generally have the burdensome duty of physically separating and accounting for certain kinds of client-related payments. A recent ethics advisory opinion prepared for the Utah State Bar makes it clear that all fee and cost advances made to Utah attorneys must be placed into trust accounts. Further, the opinion helps to clarify the circumstances under which fee and cost advances can later be withdrawn from trust accounts.

Under the "old" model rules of professional conduct in effect in Utah until January 1, 1988, it was clear that at least advances for costs and expenses could be properly deposited into a non-trust bank account. Prior Model Rule DR-9-102(A) specified that, "all funds of clients paid to a lawyer or law firm, **other than advances for costs and expenses . . .** were to be deposited in one or more identifiable bank accounts." But new Rule 1.13(a) is silent as to whether client cost advance payments can be deposited into a non-trust account. Was it the intention of the new rule to eliminate any distinction between whether a client advances funds for fees or costs?

The answer is "yes" pursuant to Ethics Advisory Opinion #118, which was accepted by the Board of Bar Commissioners on August 18, 1992 (and was published in the November issue of the *Utah Bar Journal*). The opinion states that, "All advanced funds are the property of the client and most be deposited in a separate trust account maintained by the attorney for clients."

ANTHONY J. FRATES is the administrator for the law firm of Trask, Britt & Rossa. He graduated from the University of Utah in 1977, magna cum laude, with a B.S. in Business Finance. Mr. Frates has been a law firm manager since 1978 and is a past president of the Beehive Chapter of the Association of Legal Administrators (ALA). Currently he is the Beehive Chapter's Bar Liaison.

This could alter the day-to-day practice that heretofore has been taking place in Utah law firms. It is not uncommon to ask a client to advance the amount of an airline ticket, filing fee or some other cost in the course of handling a matter. It is clear now that any such advance as well as any advance that might be paid to cover future legal fees must be placed into a trust account.

The opinion does not specifically define what constitutes an advance even though this is critical for proper handling of client payments. Implicit in the idea of an advance is that at least some or all of the fees are unearned and/or costs unpaid for which the advance is intended and that a future action on the part of the attorney or firm receiving the payment will be necessary to fully earn the amount being paid. An advance payment could therefore be defined as any payment made in whole or in part for legal services which have not yet been actually rendered or completed or for costs which have not yet been incurred or paid (the performance or payment of which may be conditional on receipt of the advance payment).

A specific example may help to clarify the implications of the opinion. Suppose your client gives you or your firm a company or personal check for $500, $200 of which is for a filing fee that you will soon need to pay in connection with the client's case (the remaining $300 of which is for future fees). Clearly, the $500 must be deposited into your trust account. (Had the client only advanced $200 for the cost amount, that too would need to be deposited into your trust account.) When it comes time to pay the filing fee, you would have two choices. First, you could pay it out of your trust account. This creates somewhat of a dilemma if there hasn't been time for the check to have cleared the bank; if it hasn't, you will have used $200 of another client's funds (since you can't keep your own funds in the trust account other than for anticipated bank charges) and you will obviously need to immediately cover the client's check out of your funds if the check doesn't clear.

In fact, the Utah Bar Foundation's "Trust Account and IOLTA Guidelines" pamphlet goes one step further:

> A check must clear the bank before money is disbursed from the trust account; otherwise the disbursement is taking money from other clients who have money in the trust account.

So, the first option may not be a practical alternative when the funds aren't received in the form of a cashier's check or the equivalent and they need to be disbursed very quickly.

Second, you could simply pay the filing fee out of your general operating or business account. This would show up on your next bill to the client and would more clearly itemize costs incurred from a billing standpoint rather than paying it out of trust. But, as soon as you pay the $200 filing fee, may you transfer $200 in the trust account to your operating account out of which the filing fee was actually paid?

Prior Rule DR-9-102(A) (2) stated that, ". . . The portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client . . ." New Rule 1.13(c), which is said to be similar to prior Rule DR-9-102(A) (2) in the code comparison comments printed with the Utah *Rules of Professional Conduct*, indicates that "the property shall be kept separate by the lawyer until there is any accounting and severance of their interests." The recently-released opinion reads:

> 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.

(It's unfortunate that the opinion uses the word "retainer" as more fully discussed later in this article. In the context of the opinion, however, it seems apparent that "retainer" means the retaining or employing of the attorney or law firm and does not mean that a "retainer" payment is involved.)

Clearly then, absent representation or "retainer" agreement language to the contrary, the $200 amount could not be transferred until after a billing or some other "accounting" had been rendered and after the client had received and reviewed the billing. The opinion provides no guidance as to how long an attorney or law firm should wait to allow for the receipt and review of the accounting, but goes on to state that the funds need to be transferred at *that* time presumably to avoid what might be described as a reverse or passive commingling of funds. Passive commingling allows funds that originally belonged to the client and that have since become the property of the attorney to remain with those of other clients. This is as opposed to mixing client funds with attorney funds which is the way that commingling of funds is usually thought of, going back to at least 1908 when the legal profession adopted the Canons of Professional Ethics.

For internal policy purposes, the review and receipt period creates somewhat of an administrative policy problem. Review and receipt should occur immediately if a billing is hand-delivered to a client. If mailed to an overseas client, several weeks could be needed. If sent to a client who is known to be on an extended vacation, a month may be insufficient. It is presumed, however, that a week to ten days following mailing would be sufficient in most cases.

"Utah now . . . require[s] some form of client consent before legal fee advances can . . . be withdrawn from a trust account."

It is, in any event, clear that the practice of simply applying client monies in trust to a billing before that billing is even mailed is not considered ethical in Utah unless specifically permitted in the language of the client representation agreement. Utah now joins the majority of states which require some form of client consent before legal fee advances can actually be withdrawn from a trust account.

Like so many things in life, timing is everything when considering whether an advance payment has been made. An accounting is generally required for funds to be withdrawn from a trust account, but what if the services have been rendered and/or costs paid or incurred at the time payment is received but before a billing has been prepared? This situation would not fit the definition of an advance as outlined earlier in this article. Assuming the payment does not include any portion other than for what has been earned or incurred, deposit into trust would appear improper. Often however firms deposit client payments into trust whenever a prior billing relating to that payment does not yet exist; the existence of a prior billing however is not alone the critical factor. What if payment is delivered on the same day that services will be rendered or costs paid? If the attorney or firm hasn't actually fully completed the service or incurred the cost, technically this would be an advance. But if the work is completed and/or costs incurred simultaneously upon receipt of the payment, i.e. on the same day, then handling the payment as an advance may not be necessary nor appropriate.

What if a check that would otherwise constitute an advance when received is held and not deposited for several days until the work is actually performed and/or costs incurred? Opinion #118 states that advanced funds are client property and must be deposited into a trust account so this does not appear to be an available option.

What if a payment is made in response to a billing that includes services that have been performed but the firm hasn't actually paid for some or all of the billed costs? If the firm is liable for the costs at the time the client payment is received, i.e. the firm will eventually be required to pay the costs regardless of whether a client reimbursement is made, then the payment is not an advance in accordance with the definition suggested earlier; otherwise it is. The bar's ethics advisory committee currently is studying issues relating to what extent an attorney is a guarantor of certain kinds of client related costs the opinions related to which may provide further guidance in this area in the future.

Frequently, clients are asked to bring past-due balances current and provide additional funds for new work that may be required in an ongoing matter. If the client pays $5,000, $3,000 for existing balance and $2,000 for new work, the full $5,000 must be deposited in trust and the $3,000 transferred as soon as the original check has been collected by the bank. To avoid the administrative inconvenience, an alternative would be to ask the client to provide separate checks for existing balances versus advanced amounts. Clients may not understand or appreciate such a request however and usually collected funds can be obtained within a few days.

In a recent article in the ABA's *Law Practice Management* publication, it was contended that an advance payment for a flat fee service (as compared to a service to be billed on an hourly basis) does not have to be deposited into trust. This notion appears to be without merit, at least in Utah. The key question is whether the firm has performed/completed the service. If at the point of payment the firm has fully provided the service (whether it is a one-shot office conference, a flat fee charge for a completed will or an hourly-based service that has been performed), then deposit into trust is not appropriate. But flat fee or not, until the service is performed and/or cost paid or incurred, the client has a potential right to all or a portion of the funds advanced (however small).

Not answered by the opinion is whether an advance payment can ever be characterized as non-refundable and therefore earned upon receipt and deposited into a non-trust account. The Utah Bar Foundation's trust pamphlet makes a specific distinction between a true retainer and an advance payment and specifically indicates that a client payment could be non-refundable. There are further, certainly historical, precedents in other jurisdictions that distinguish between advance payments and retainers. In an article written by ethics counsel for the ABA's Center for Professional Responsibility which appeared in the April 1990 issue of the *ABA Journal*, it is, however, stated that:

> The existence of specific ethics code provisions requiring the return of any unused portion of a fee, such as DR-2-110(A) (3) of the former Model Code of Professional Responsibility, has been interpreted to indicate that no fee advanced by a client can ever be truly non-refundable.

In new Rule 1.14(d), a similar provision is included. The *ABA Journal* article goes on further to say that even with the client's written approval, an advance cannot be handled as if it were a non-refundable retainer, because there is no such thing. Currently before the ethics advisory committee is a request for clarification as to whether or not non-refundable retainers exist in Utah, which will hopefully help settle the question here.

In light of the recently-released opinion, all Utah law firms need to review their client representation agreements and ensure that language is contained in the agreements that clearly indicates at what point advance payments can be withdrawn to cover costs incurred and fees earned. Further, all firms should update (or establish as necessary) written trust account handling policies which are communicated to and followed by all firm employees. These internal guidelines should document all pertinent firm policies including:

1. How funds are identified as being trust funds and specific steps that must be followed concerning how the check is deposited, who deposits it, what happens when the check is made payable to both the client and the firm or attorney, what accounting entries are made, etc.

(Identification of trust funds should include a further determination as to whether any portion of the amount will ultimately be paid to the firm or whether the amount is strictly an escrow-type receipt. This may be especially important for proper input into the firm's time and billing system and may also be a factor in the determination of the next item below. The person that accounts for and/or deposits the funds should be someone other than the person who opens the mail, if possible.)

2. The circumstances under which funds should be deposited into a separate, interest-bearing account which benefits the client rather than in the firm's general trust account; who is responsible for opening separate accounts.

3. The period of time that must pass before trust disbursements can be made on a trust deposit.

4. How trust disbursements are requested, approved and processed, including what accounting entries are made.

5. Procedures relating to reconciliation of accounts and billing.

6. The time at which advance payments can be transferred or withdrawn to pay fees earned or costs incurred.

7. Other procedures including client notification, safeguarding of client property, etc. to ensure overall compliance with Rule 1.13.

8. Information relating to income tax and government reporting requirements. As usually cash-basis taxpayers, incoming advances will usually be taxable income to the law firm upon receipt even though deposited initially into trust (this may best be handled on a year-end review basis rather than on a check-by-check basis). Further, disbursements made out of trust accounts are not immune to 1099 reporting requirements.

Through the use of written policies, skilled staff and ongoing education and monitoring, Utah law firms can not only help ensure that they meet their ethical obligations with respect to trust accounting for fee and cost advances but can also help maintain the trust of their greatest asset: their clients.

Seasons Greetings!

from the
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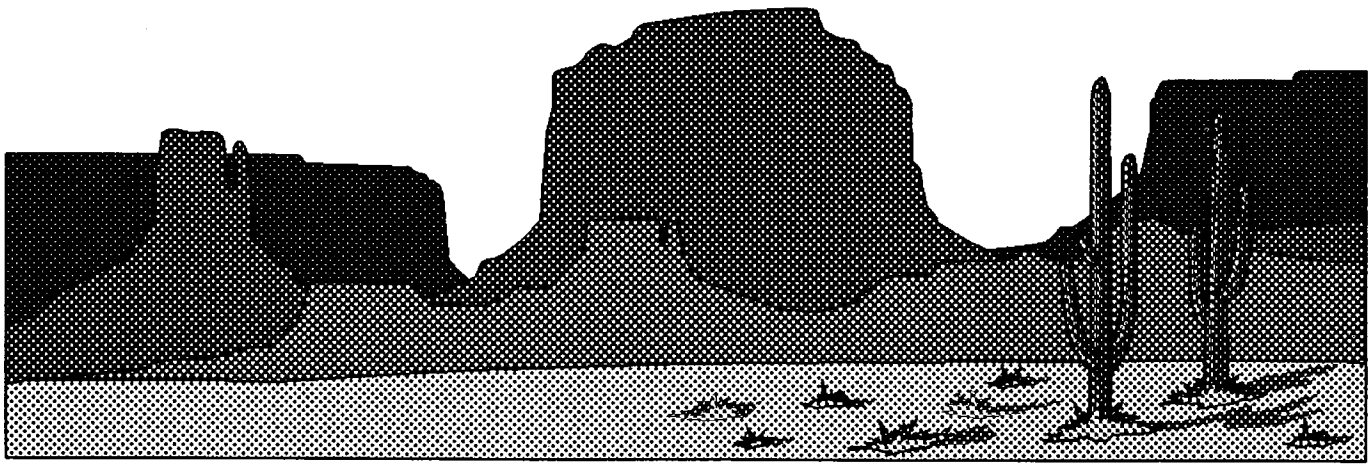


Mini-Breakfast Seminar Series

FREE OF CHARGE/SPONSORED BY THE UTAH STATE BAR

- 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.

Commission Highlights

During its regularly scheduled meeting of October 29, 1992, which was held in Ogden, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Stephen Trost reported on General Counsel matters and noted that twelve cases are under review with the Unauthorized Practice of Law Committee.
2. The minutes of the October 1, 1992 Commission meeting were adopted with some minor corrections.
3. Trost also reported that he and Randy Dryer appeared before the Supreme Court Committee on Discipline to propose the Bar Commission's position on standards.
4. Dryer reported on his appearance before the Legislature's Judiciary Interim Committee and Supreme Court Advisory Committee on Professional Conduct.
5. Dryer reported that he proposed adding two voting members appointed by the Bar to the Judicial Council for three-year terms so that the Bar could provide more input to reflect lawyers' interests and provide accountability.
6. The Board voted to authorize the Executive Committee to seek two voting attorney positions on the Judicial Council.
7. Dryer reported that the gubernatorial debates sponsored by the State Bar and the Salt Lake County Bar went very well and that about 160 people were in attendance.
8. Dryer reported that about 70 lawyers attended the first Mini-Breakfast Seminar on October 21, 1992 and that presenters, Fred Metos and Greg Skordas, did an excellent job.
9. Dryer reported that 204 new attorneys were sworn in to the Bar on October 27, 1992. He noted that about 20% of the admittees were women and that 43 different law schools were represented.
10. Dryer reported that Jim Davis has been appointed to replace Dennis Haslam as the President's Representative to the Judicial Council. The Board expressed its appreciation for Haslam's work on the Judicial Council.
11. Dryer reported that he met with Judge David Young, Judge Michael Hutchings and Mike Phillips of the Administrative Office of the Courts to create a draft instrument to survey judges regarding lawyers.
12. Dryer reported that he, Jim Lee, Lee Teitelbaum and Lisa (Elizabeth M.) Peck appeared on KSL-TV's Focus Program on October 26, 1992. Their appearances provided some positive exposure and some insight into what law school is like, and what it takes to pass the Bar, and how the profession is today.
13. Dryer related that he met with the Executive Committee of the Women Lawyers of Utah and discussed ways the Bar Commission could be more responsive to their needs.
14. Dryer asked Mike Hansen, Denise Dragoo and Paul Moxley to review the proposed modifications to the Code of Judicial Conduct and report on recommendations at the December 3, 1992 Commission meeting.
15. Alternative Dispute Resolution Committee Chair, Din Whitney, Chair, reviewed a proposed Educational ADR Program. The Board authorized the ADR Committee to (1) undertake a program of systematic evaluation of various legislation and other programs in alternative dispute resolution; (2) undertake a program of education of the Bar members as to the benefits of ADR; and (3) ask the Bar to defer taking any public action involving ADR legislation until such evaluation is complete.
16. The Board reappointed Mary S. Tucker and James H. Backman and appointed Mark E. Kleinfield to the Board of Directors of Utah Legal Services, Inc.
17. James Backman of the Delivery of Legal Services Committee, reported that the Committee was given the charge to explore and make recommendations for appropriate means of legal representation for law income and indigent people and that they would like to propose that the Bar's two delegates to the American Bar Association support that ABA's model rule for pro bono service requirements.
    Dryer asked that the issue be studied further at the December meeting and that the Committee provide a copy of the full ABA rule proposal as well as statistics on unmet needs and why they are not being met in Utah.
18. The Board met with the Weber County Bar during lunch. Short reports and questions and answers were exchanged.
19. Client Security Fund Committee Chair, David Hamilton, reported that checks had been distributed totaling $12,230 for claims approved at the August 20, 1992 Commission Meeting leaving a balance of $87,376 in the Client Security Fund.
    Hamilton pointed out that due to the large volume of claims to be reviewed by the Committee two panels convened on September 18 — one chaired by himself and one chaired by Miles P. Jensen. Hamilton summarized the two panel reports and recommendations and answered the Board's questions. The Board approved the disbursement of $21,700.
20. Executive Director, John C. Baldwin, referred to his Executive Director's written report and the Bar's Department Activity summary. He specifically noted increased Bar Committee activities and the support and servicing by Richard Dibblee. He also noted that as of October 27, 1992 the Tuesday Night Bar program has now expanded to Utah County.
21. Baldwin noted that on October 8, 1992 a New Commissioner Orientation was held with Steve Kaufman to answer some of his questions about Bar organization, activities and management. Kaufman expressed thanks and appreciation for Baldwin and Bar staff spending time with him.
22. Budget & Finance Committee Chair, Mike Hansen, referred to the September financial statements.
23. James Z. Davis distributed his memo to the Bar Commission summarizing the October 26, 1992 Judicial Council meeting.

Discipline Corner

ADMONITIONS

On September 24, 1992, an attorney was Admonished by a Screening Panel for failing to exercise reasonable diligence in the handling of a personal injury case. The attorney was retained in February 1990. Thereafter, the attorney failed to obtain the necessary documentation to prosecute the case, failed to take action to settle the case or file suit until discharged by the client in March 1992. During this period of time the attorney failed to return phone calls or keep the client informed as to the status of the case.

On August 18, 1992, an attorney consented to an Admonition for failing to exercise reasonable diligence and failure to keep the client reasonably informed as to the status of the client's case. The attorney was retained in October 1990 in a domestic relations matter. The attorney was making some progress on the client's case, however, the client was not informed of the progress and had to make repeated requests for copies of documents. It often took several months to obtain a copy of a document requested from the attorney.

On October 22, 1992, a Screening Panel voted to Admonish an attorney for failing to exercise reasonable diligence and failure to keep the client reasonably informed as to the status of the client's bankruptcy case. The attorney was retained on or about November 1991. Between that date and July 1992, the attorney failed to return phone calls, failed to keep an appointment and failed to take action to recover approximately $750.00 in wages belonging to the client that were improperly garnished by a creditor.

On October 22, 1992, a Screening Panel voted to Admonish an attorney for failing to exercise reasonable diligence, failure to keep the client reasonably informed as to the status of the case, and for charging a fee in excess of the value of the work performed. The attorney was retained in August 1991 to represent the client in a domestic relations matter. The attorney failed to take action to prosecute the divorce, failed to return phone calls or keep the client informed as to the status of the case. In May 1992, the client met with the opposing counsel and the opposing party and negotiated a settlement to the case. The attorney was new to the practice of law and this was the attorney's first divorce case. The attorney agreed to make full restitution of the fee.

PRIVATE REPRIMANDS

On October 1, 1992, the Board of Bar Commissioners approved a Private Reprimand recommended by a Screening Panel of the Ethics and Discipline Committee regarding an attorney who violated Rule 1.1, COMPETENCE, Rule 1.3, DILIGENCE, and Rule 1.14(a), COMMUNICATION, of the Rules of Professional Conduct. The attorney was retained on or about November 1990, to represent a client in a domestic relations matter. On or about July 1991, a hearing was held before a Commissioner. The attorney never submitted the proposed Order until on or about November 1991 and then failed to attach a child support work sheet, a Statement of Compliance, defendant's current earnings, and copies of tax returns. Consequently, the Order was returned to the attorney unsigned. The attorney failed to obtain the necessary documents and resubmit the proposed Order until on or about January 1992. Between July 1991 and February 1992 the attorney failed to return the client's phone calls or keep the client informed as to the status of the case. The attorney took no action on the case between July 1991 and February 1992 because the client had not paid all of the fee. The Screening Panel determined that the attorney had a duty to either take action on the case or withdraw.

On October 1, 1992, the Board of Bar Commissioners approved a Private Reprimand for an attorney who violated Rule 1.3, DILIGENCE, Rule 1.4(a), COMMUNICATION, Rule 3.2, EXPEDITING LITIGATION, and Rule 8.4(c) (d) MISCONDUCT, of the Rules of Professional Conduct in connection with the handling of a domestic relations case. The attorney was retained on or about April 1988 and was advised by the client that it was important that the divorce be obtained as quickly as possible. The attorney failed to obtain a trial date until February 1989, failed to appear at a hearing in May 1989 until called by the client from the court house. The parties reached an agreement in May 1989, however, the attorney failed to draft and file the proposed Order until July 1989. The attorney also failed to return phone calls and misrepresented to the client that a trial date had been set.

An attorney received a Private Reprimand for violating Rules 1.4, Communication and 1.3, Diligence of the Rules of Professional Conduct of the Utah State Bar. The attorney was retained on February 19, 1990 and shortly thereafter filed a complaint for divorce. On March 20, 1990 he appeared at a hearing for temporary relief. Thereafter the attorney failed to make any meaningful progress in the case culminating on October 18, 1991 in a court initiated Order to Show Cause why this case should not be dismissed for failure to prosecute. Further the attorney failed to communicate with the client subsequent to the March 20, 1990 hearing. In mitigation the attorney forgave the unpaid balance on the client's account.

On October 8, 1992, the Board of Bar Commissioners approved a Private Reprimand recommended by a Screening Panel of the Ethics and Discipline Committee against an attorney for violating Rule 1.4, COMMUNICATION, and Rule 8.4(c), MISCONDUCT, of the Rules of Professional Conduct. The attorney was retained in the summer of 1989 to represent a client in connection with a workers compensation matter. Between the summer of 1989 and November 1990, the attorney failed to respond to numerous requests for information made by the client about the status of the case. In November 1990 the attorney filed an Application for Hearing and a hearing was set for April 1991 which was cancelled in March 1991 to allow an independent medical examination of the client. Based on that medical examination the defendants agreed that the client was permanently and totally disabled. The attorney failed to notify the client of this determination. In October 1991, the client contacted the Worker's Compensation fund and learned that settlement of the claim had been reached. The client terminated the employment of the attorney and completed the matter pro se.

PUBLIC REPRIMAND

On October 2, 1992, the Utah Supreme Court publicly reprimanded and imposed a two year unsupervised probation on Dan Adamson for violating Rule 1.3, Neglect. Mr. Adamson represented a high volume collection agency when the complainant retained Mr. Adamson to represent her collection agency as well. The complainant experienced excessive delays in

the filing and prosecution of her cases due to Mr. Adamson's inadequate staff, equipment, software, office space and working capital.

SUSPENSIONS

On October 14, 1992, Richard J. Culbertson was placed on suspension for a period of one (1) year commencing November 15, 1992. The suspension stemmed from Mr. Culbertson's failure to comply with the terms and conditions of his probation. On March 19, 1992, Mr. Culbertson received a Private Reprimand, was ordered to make restitution and was placed on a one (1) year supervised probation for commingling funds, failure to communicate and writing checks on an account with insufficient funds. While on probation, he agreed to represent a client in a collection matter and upon collecting approximately $2,365.00, he failed to promptly deliver the funds to his client and misrepresented the whereabouts of the funds. Mr. Culbertson was charged with the violation of Rules 1.13(b), Safekeeping Property and 8.4(b) & (c), Misconduct of the Rules of Professional Conduct of the Utah State Bar.

On September 28, 1992, the Utah Supreme Court entered an Order of Interim Suspension temporarily suspending Gary J. Anderson from the practice of law pending the resolution of approximately 22 Formal Complaints under consideration by a Hearing Panel of the Ethics and Discipline Committee. Mr. Anderson stipulated to the Interim Suspension.

DISBARMENT

On October 14, 1992, the Supreme Court disbarred Jerald N. Engstrom pursuant to Rule 23 of the Rules for Integration and Management of the Utah State Bar based upon his felony conviction of five counts of Misapplication of Funds by a Bank Officer on January 31, 1991, in the United States District Court, Central Division, District of Utah. The conviction was affirmed by the Tenth Circuit Court of Appeals on May 22, 1992. The events giving rise to this conviction occurred in 1984 when Mr. Engstrom was Vice President, Corporate Secretary, and General Counsel to a bank. He became financially involved with persons who sought to obtain financial assistance from his bank for a business venture. In order to keep this venture viable Mr. Engstrom certified to a bankruptcy trustee that the persons with whom he was involved had deposited $256,712.67 for which no funds had been deposited. Following this, four other misapplications of bank funds occurred when Mr. Engstrom sent drafts on his bank to other banks totaling $1,815,000.00. These drafts were based on checks deposited in his bank from his business associates which he knew would not be honored when presented for payment. Upon denial of his appeal Mr. Engstrom stipulated to disbarment.

ANNOUNCEMENT
of
JUDICIAL VACANCY

Announcing:

The opening of the application period for a judicial vacancy, serving the First District Court, encompassing Rich, Cache and Box Elder counties. The position results from the retirement of Judge Franklin Gunnell.

Applications must be received by the Administrative Office of the Courts no later than December 15, 1992.

Eligibility Requirements:

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

Selection Process:

Article VIII of the Utah Constitution and state law provides that the Nominating Commission for the district where the vacancy occurs shall submit to the Governor three to five nominees within 45 days of its first meeting. The Governor must make his selection within 30 days. The judiciary has adopted procedural guidelines for nominating commissions, copies of which may be obtained from the Human Resources Division, by calling (801) 578-3800.

Each Nominating Commission is chaired by the Chief Justice, or his designee from the Supreme Court, and is composed of two members appointed by the state bar, and four non-lawyers appointed by the Governor. All appointed members must reside in the district where the vacancy occurs. At the first meeting of each nominating commission, a portion of the agenda is dedicated to a review of meeting procedures, time schedules, and a review of written public comments. This portion of the meeting is open to the public. Those individuals wishing to provide written public comments on the challenges facing Utah's courts in general, or the First District in particular, must submit written testimony no later than December 22, 1992, to the Administrative Office of the Courts, Attention: Judicial Nominating Commission. No comments on present or past sitting judges or current application for judicial positions will be considered.

ADMINISTRATIVE OFFICE OF THE COURTS
230 SOUTH 800 EAST, SUITE 300
SALT LAKE CITY, UTAH 84102
(801) 578-3800

PASS LIST

February 1992 Examination

Leon W. Abadie
Joseph A. Alldredge
Samuel M. Barker
Richard A. Bednar
Stephen G. Bennett
Richard W. Black
Ted A. Bullock
Paul G. Cassell
Cameron T. Chandler
Gretchen Cole
Chou C. Collins
Paul E. Cooper
Marlin G. Criddle
Scott N. Cunningham
Matthew W. Driggs
Alan L. Edwards
Donald G. Ezzell
Karen Flynn
Brett L. Foster
David C. Frankel
James D. Garrett
Margaret K. Gentles
Mark A. Glick
Todd J. Godfrey
Albert W. Gray
Jonathan O. Hafen
Link K. Hall
Melinda C. Hibbert
Brent M. Hill
Jeffrie L. Hollingworth
Rick V. Hosler
Cynthia D. Jensen
Kenneth O. Kemp
Julie A. Klauck
Matthew L. Lalli
N. Todd Leishman
Robert A. Lonergan
Joseph W. Long
Ted H. Luymes
Robert C. Martin
Mary J. Marineau
Clark A. McClellan
Richard A. McFarlane
Jerry K. Miles
Gregory A. Miles
Lewis E. Miller
James L. Mouritsen
Charles Nagel
Susan C. Noyce
Janice R. Olson
David L. Ostler
Tani L. Pack
Edward (Ted) Paulsen
Kenneth J. Peterson
Peggy E. Peterson
Richard E. Pierce, Jr.
Norman E. Plate
Mark D. Ramey
Korey D. Rasmussen
Valerie A. Rich
Tiffany M. Romney
Brent D. Rose
Sara J. Ryan
David L. Sanders
Eric D. Schifferli
Brook J. Sessions
Alan B. Sevison
James K. Slavens
Nena W. Slighting
Marianne G. Sorensen
Clay W. Stucki
Karen O. Studley
Scott H. Sweat
Dana Swenson
Lonny E. Townsend
J. Benjamin Tyler
Mark T. Urban
Rebecca D. Waldron
Allan O. Walsh
Harold O. Welch
Gregory L. Wilde
Marshall S. Witt
Michael W. Wright

PASS LIST

July 1992 Examination

Gregory J. Adams
John L. Adams
Catherine Agnoli
Kenneth Allen
Kimberly Allred
Rob M. Alston
Lisa A. Altman
Daniel G. Anderson
James E. Anderson
Marci A. Anderson
Lucy K. Andre
Kelly J. Applegate
Randy T. Austin
Brian J. Babcock
H. Deloyd Bailey
Hal D. Baird
Diane R. Balmain
David T. Barton
Keith L. Barton
Emilie Bean
Brock R. Belnap
Leslee B. Bennett
Edward A. Berkovich
J. David Billeter
Guy L. Black
Rosemond V. Blakelock
Alan R. Blank
Scott T. Blotter
Craig J. Bott
Elliot L. Bressloer
Douglas R. Brewer
David R. Brickey
David N. Brizzee
David F. Brown
J. Scott Brown
Michelle Bush
Dianna Cannon
Michael J. Cappelli
Patrick F. Carley
Earl C. Cates, Jr.
Scott D. Cheney
David L. Clark
David M. Cole
Loretta Crane
Sandra L. Crosland
Clare R. Davis
Bruce L. Dawson
Lance E. Dean
Bel-Ami J. deMontreux
Bradley K. DeSandro
Jeffery J. Davashrayee

Peter G. Diamandis
Alan S. Drage
Randon H. Draper
Jonathan K. Driggs
Matthew M. Durham
Nancy G. Edwards
Sergio A. Elizalde
Michele L. Engel
Paul S. Evans
Scott T. Evans
Rodney R. Farnsworth
York M. Faulkner
Michael H. Finley
David N. Fogg
David B. Fonda
David J. Friel
Jaqualin Friend
Kelly S. Frye
Robert B. Funk
Kevin S. Gardner
Julie George
Anthony C. Goodall
Robert D. Grant
Christopher D. Greenwood
Daniel J. Greenwood
Christopher M. Greer
John M. Guynn
Benjamin A. Hamilton
Preston L. Handy
Craige F. Harrison
Matthew R. Harrison
Kent R. Hart
G. Troy Hatch
Randy L. Havlicak
Graeme S. Henderson
Rebecca L. Hill
Patrick F. Holden
Thomas Horgas
Stephen P. Horvat
Julia M. Houser
Craig E. Hughes
Lori D. Huntington
Clinton D. Jensen
Michael E. Jewell
Barry N. Johnson
Stuwert B. Johnson
David M. Jones
Daniel A. Kaplan
Carol L. Keating
Helene Kepas-Brown
Quinn M. Kofford

Michael S. Kottler
John E. Laherty
Jay R. Larsen
Kevin B. Laurence
Chelom E. Leavitt
Michael R. Leonard
Sharon K. Letham
Robert C. Loftis
Jonathan W. Lysenko
Alan T. Macdonald
Robert E. Mansfield
Pamela Martinson
Craig W. McArthur
Daniel P. McCarthy
David M. McGrath
Heidi J. McIntosh
Thomas H. McWhorter
Charlotte H. Meacham
Angela M. Micklos
Tony B. Miles
Joseph E. Minnock
J. Grant Moddy
William R. Morse
Robert C. Morton
Jeffrey M. Moss
D. Gregory Mulligan
Duncan T. Murray
Blake A. Nakamura
Kenneth E. Nease
Douglas L. Neeley
Julie L. Nelson
Lori W. Nelson
Timothy D. Neville
Dao V. Nguyen
Lisa L. Olpin
Margaret H. Olson
Jeffrey A. Orr
Duane D. Ostler
Robert C. Ozer
Anthony S. Parise
S. Blake Parrish
Kirk J. Partridge
A. John Pate
Elizabeth M. Peck
Eric D. Pennington
Alex G. Peterson
Mark E. Peterson
Susan B. Peterson
Whitney E. Peterson
John Petrak, Jr.
Randall G. Phillips

Gary D. Pierce
Michael E. Postma
Mark L. Preslar
Jeffery R. Price
Irene Rees
Preston C. Regehr
James R. Richards
Val D. Ricks
Rodney W. Rivers
J. Wesley Robinson
Michael A. Royal
Carol Salem
L. Dean Saunders
Lisa R. Schlottman
James J. Schollian
Jeanette J. Secor
Laura K. Sensenig
Ruthi P. Seshachari
Steven G. Shapiro
Ryan C. Shaw
Eric J. Smith
Othal Smith, Jr.
Kent E. Snider
Terry R. Spencer
Daniel L. Steele
Ellyn L. Sternfield
Carolyn P. Stevens
William J. Stilling
Steven C. Strong
Kevin L. Sundwall
Scott A. Swain
Dana L. Tangren
E. Russell Tarleton
Edward A. Tellechea
Jim E. Thatcher
Karen M. Thomas
Marsha C. Thomas
Bryan B. Todd
Michael J. Tomko
Richard L. Tretheway
Adam F. Trupp
Mark A. Wagner
Todd D. Wakefield
Kevin R. Watkins
Todd E. Wendel
Nelson J. Werner
Andrew S. Williams
Dale L. Williams
Sheri A. Williams
Margaret E. Wilson
Abigail W. Wright

Mini Breakfast Seminar — Lawyers Dealing with the Media and Vice-Versa

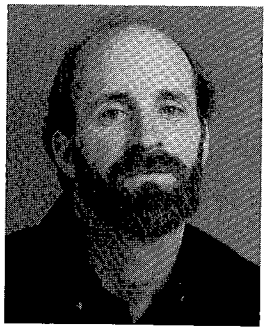
For the second seminar of the Utah State Bar's free mini-breakfast seminar series, four television and newspaper reporters on the courts beat fielded questions from a room of lawyers — a possible fertile setting for those frustrated at the media to turn the table. But KTVX News reporter Paul Murphy seemed to sum up best the hour's discussion: "We thought you'd beat up on us more."

The seminar, entitled "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?," featured Ted Cilwick from the Salt Lake Tribune, Jack Ford, formerly with KSL News, Marnie Funk from the Deseret News, and Paul Murphy from KTVX News. It was held at the Law and Justice Center on November 18.

The Utah Bar Journal asked Marnie Funk for an article on the topic. She graciously responded with the following:

The media and attorneys would get along great if attorneys would just give the media all the information we want when we want it and the way we want it.

Any questions?



Ted Cilwick

Seriously, the two professions do have an uneasy relationship. Those in the media may be surprised (I was!) to know that lawyers perceive the media as giving them "a bum rap." But we realize attorneys and journalists often misunderstand each other.

A quick survey of several reporters in both print and television identified some points of friction. This article identifies why we do some of the things we do in

Jack Ford

hopes of (a) being less than 1,000 words and (b) clearing up some of the misunderstandings between reporters and attorneys.

After reading this, you may not like us any better, but maybe we'll make a little more sense to you.

• When reporters call attorneys, anything the lawyer says is on the record unless the lawyer specifies otherwise. When journalists contact citizens who don't have much experience with the media, we explain that this is an interview and what they say will be quoted, etc. However, journalists assume lawyers are — as one reporter would put it — "professional, savvy and sophisticated enough to know this." Consider it both a compliment and an advisory.

Few journalists object if an attorney wants to go off record at some point in a conversation. But reporters balk if an attorney gives a lengthy interview and at the end announces, "of course, this was all off record."

If is a widely recognized rule of journalism: We only respect "off the record" before a revelation, not as postscript.

• He who doesn't return reporters' phone calls can't complain about how the story turned out. Reporters often gripe that attorneys don't return phone calls. But we recognize that if an attorney doesn't want to talk, that is probably as effective a way of not talking as any other.

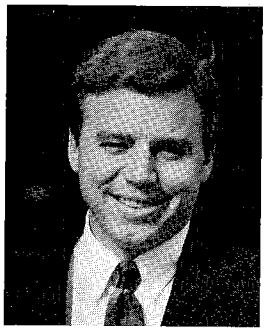
What baffles us is when a lawyer ignores several phone messages, then calls after a story has aired or appeared in print to say a story was inaccurate or incomplete.

We seek your input because we believe what you have to say is essential to a complete story. Talking to us — even if you decline to answer certain questions — is the best way to ensure that a story on your case is complete and accurate.

• Refusing to talk to a reporter doesn't mean a reporter won't do a story about your case or your client. They will simply get the information elsewhere. Sometimes attorneys mistakenly assume that be declining to talk to the press they keep their client or case out of the paper. If it is a case of public interest, we can respect your reticence, but we are still obligated to cover it.

• TV reporters ask you to go on camera to provide tape for the story, not to extract information not provided in court. "All I need is six seconds with a lawyer on tape," said Paul Murphy, court reporter for KTVX. "We can't take television cameras into the courtroom, so sometimes we need a lawyer interview to break up all the still pictures or the tape of someone just walking with their hands cuffed."

Judges often allow still cameras into the courtrooms now. Agreeing to allow your client to be photographed may improve the public's perspective of him. "If a lawyer decides he doesn't want his client's picture taken inside the courtroom, then we have to show what is usually an ugly shot of him at the time he is arrested or a shot of him walking around with handcuffs behind his back. That's not fair to him or to the public," Murphy said.



Paul Murphy

• Reporters often seek surprisingly basic and simple information. Remember the who, where what and how questions you've heard associated with journalism. That's still what we are after.

Frequently, lawyers — including government prosecutors — don't know the slightest biographical thing about their clients or, in the case of prosecutors, the people they are indicting, said Ted Cilwick, reporter for the Salt Lake Tribune.

A plaintiff's attorney will tell you he spent weeks and months both researching and agonizing over filing a big lawsuit. Then, you ask the attorney things like how old the client is, where he/she works, etc. and he doesn't know, said Cilwick, who has reported for "Texas Lawyer," "The ABA Journal" and "The National Law Journal."

Lawyers can help journalists take some of the legal starch out of their stories and put some human interest by helping us depict clients as humans. That includes providing some biographical information.

• Attorneys sometimes worry needlessly about the information we are seeking. Most seasoned reporters know about local rule 313 or the Utah State Bar's rules of professional conduct. (I have enough copies of rule 313 to paper an office. Murphy carries a copy of the relevant passages of the bar code — pages 27-28 — in his pocket.) We know what questions you can appropriately answer and which questions you can't.

"The rules say attorneys can always talk about the general nature of a claim or offense, " Murphy said. "They can talk about the information contained in the public record. And for the most part, that's all I need."

To put it directly: we recognize when an attorney is using court and bar rules as an excuse and not a valid reason. Just so you know that we know . . .

• Reporters are driven by deadlines. All those TV commercials about the urgency of gathering the news are overblown and obnoxious, but generally true. Attorneys have often called me back two or three days after I called them and where unhappy to find that a story on their case has already run in the paper. We know you are busy and it can be difficult to return phone calls promptly, but we usually have one day to do a story, something we're not always happy about either.

• Reporters really try to be decent human beings. Sometimes we are terse, abrupt, curt (a good reporter is never without synonyms) because we are racing to meet a deadline. But we believe we try hard to be gentle with the people must hurt by a situation: a victim, the victim's family, a defendant's family. Yes, sometimes we have to talk to them when, given our own personal preference, we'd rather leave them alone. But that's part of our job and if we don't do it. our bosses will find someone who will.

"I treat people how I would want to be treated in their case," Murphy said. "But I find that even when I do that, sometimes the defense attorney feels it's his right to attack me personally just because I have a job to do and that job is to tell people what is happening to their client."

"When we make mistakes, we really do want to hear about it. Tell us!

The third free seminar in the mini-breakfast series will be at 8:00 a.m. at the Utah Law and Justice Center, 645 South 200 East, on December 16, 1992. The seminar, "State Legislative Issues Affecting the Legal Profession, or What Are My Lawyer Legislators Doing for Me Anyway?," will be presented by attorneys who are also members of the Utah Legislature. Please R.S.V.P. by calling 531-9095 at least one day in advance of the seminar if you wish to attend.

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, 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
May 1992
August/Septmeber 1992
October 1992
November 1992

Available – Utah Corporation and Business Laws

The Department of Commerce, Division of Corporations and Uniform Commercial Code now has available for $5.00 a copy the Utah Corporation and Business Laws – 1992 Edition (with annotations). The publication includes the revised statutes pertaining to:

Collection Agencies
Corporations
Partnerships
Limited Liability Companies
Trademarks and Tradenames

Midyear Meeting Writing Workshop

The bar is presenting a writing workshop as part of the Midyear Meeting in March 1993, which will focus on writing for the courts. Participants who wish to take advantage of an opportunity for feedback from the panel of judges and to have their writing individually critiqued will be required to submit writing samples prior to the meetings. Please contact Kaesi G. Johansen at the Utah State Bar, 531-9077 no later than January 4, 1993, if you plan to participate and for more details.

Administrative Law Advisory Committee Established

Attorney General Paul Van Dam has established an Administrative Law Advisory Committee to review concerns and suggestions about the Utah Administrative Procedures Act. The Committee invites public comments and suggestions. Interested persons may give comments at a Committee scoping meeting on December 15, 1992, at 4:30 p.m. in Room 303 of the Capitol, or may send written comments to:

Laura Lockhart
Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114-0811

What Image Do We Deserve?

By Leshia Lee-Dixon
Secretary, Young Lawyers Section

Recently the Young Lawyer's Section of the Bar had a retreat, to organize for the upcoming year. The speaker discussed the organization of the Utah Bar and our ethical responsibilities as attorneys. It was significant to note that there are many who lose sight of our true purpose. Positive images of lawyers — never dominant in the public's mind — have faded further within the headlines of the last few months. The result is that the image of lawyers today ranges somewhere between "poor" and "not much worse than before".

Stories of law firms and lawyers span a wide range of areas. Law firms are created, grow, merge, then break up at an alarming rate. While there are lawyers who taunt and defy the judicial system and earn a following in their communities. Others view these lawyers as self-promoting charlatans advancing their own goals rather than those of their clients. These stories and many more like them depict many of "us" as greedy, manipulative and amoral. The result is a public image of lawyers interested mainly in profit and not in saving the interests of justice.

Is the image that we take advantage of clients, are rather in accessible, and make far too much money founded? If it is founded, how do we as Young Lawyers work to change that image? School programs and an intense study of professionalism deal with only one aspect of the problem. We as Young Lawyers are the foundation of the profession. Like a house who's foundation is weak, it will take more than a coat of paint to build strength. Our foundation is not rotting, but there are definitely weak spots.

We as Young Lawyers must look toward creating a better image and rely on concrete actions. Some examples are: looking for ways to speed up trials, pushing harder for cheaper ways of settling disputes (i.e. arbitration), finding the most inexpensive way to handle routine transactions, and increasing pro bono work without being forced to by the courts. The image of lawyers will not improve overnight, but the effort to make a change now will benefit not only the image of lawyers, but in the long run will better serve the public.

Young Lawyer Section – Utah State Bar Annual "Sub-For-Santa" Project

For the 15th consecutive year, the Utah State Bar Young Lawyer Section will participate in The Salt Lake Tribune "Sub-for-Santa" program. "We should share with those less fortunate," declares Salt Lake attorney and Project Coordinator Joseph Joyce. "Our law firm has sponsored several families over the last few years and have enjoyed the experience," he said.

Acting as a clearinghouse, The Tribune program matches those willing to share at Christmas time with families needing help. The Tribune has thus been serving needy children in the Salt Lake area at Christmas time for almost 60 years. "Salt

Lake area attorneys have supported the Sub-for-Santa program for many years," explains Mr. Joyce. The Sub-for-Santa program "provides an avenue for law firms and individual attorneys to become directly involved with families in need. After all, that is really what Christmas is all about."

Interested law firms should appoint a person to coordinate the project and work with the Young Lawyer Section and The Tribune to select a family, purchase gifts and groceries and deliver them before Christmas.

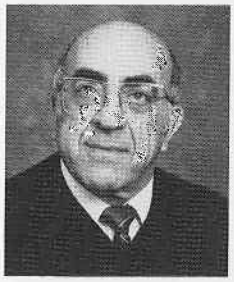
Mr. Joyce proudly notes that last year, several firms directly sponsored three or four families. Lawyers unable to support an entire family, may still help by contributing funds payable to "Sub-for-Santa," to the Young Lawyer Section, Attn: Joseph J. Joyce, Strong & Hanni, 6th Floor, Boston Building, Salt Lake City, Utah 84111.

The Young Lawyers Section will answer questions regarding the program, and encourage them to call The Tribune Sub-for-Santa program (237-2830). Questions regarding the Young Lawyer Section project may be referred directly to Mr. Joyce.

"Last year, The Tribune helped more than two thousand children enjoy Christmas. This year, with the help and generosity of the legal community, we hope to reach even more children and families. You just can't imagine the great feeling you get from helping a neighbor at Christmas time," says Mr. Joyce.

TRIBUTE TO RETIRING JUDGES

Judge James S. Sawaya received his law degree from the University of Utah in 1954 and was admitted to the Bar in 1955. He was in private practice from 1955 until his appointment to the Murray City Circuit Court, where he served from 1959 to 1970. Sawaya has also served on the bench in Third District Court since 1970 when he was appointed by Governor Calvin Rampton. He is the current chairman of the Board of District Court Judges. Sawaya will be retiring in mid-December of this year.

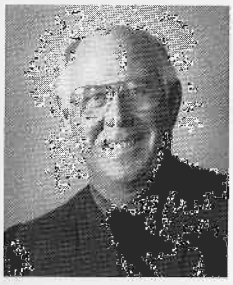


Judge James S. Sawaya
Utah State District Judge
Third District Court

Sawaya is known for being a very considerate and fair-minded judge. He is always willing to listen to attorneys in and out of his chambers, because he didn't presume to know more about a case than the attorneys.

Born in Kemmerer, Wyoming, Sawaya and his wife Joyce have seven children. His hobbies include golf and cooking.

After retiring, Sawaya plans to be active as a senior judge and be available to fill in when needed. He would also like to participate in arbitration and mediation. He also plans to keep up his golf game and do a lot of traveling.



Judge Maurice D. Jones
Utah State District Judge
Third Circuit Court

Judge Maurice D. Jones served on the bench beginning 1958, when he was appointed to the Salt Lake City court. He also served as a presiding judge in the city court. When the city court system changed, Jones moved to the Third Circuit Court where he was also a presiding judge. He retired in late June of this year.

Jones attended East High School and continued his education at the University of Utah where he received both his bachelor's and law degrees. He was admitted to the Bar in 1954.

Jones was known for being a strict judge, having a great knowledge of the law and procedure. He was instrumental in beginning the Adult Probation & Parole Volunteers Program and also the Pretrial Services. He also contributed to initiating and advancing the Senior Citizens Defensive Driving Course.

Jones and his wife Mary Ella have seven children. Following his retirement, Jones has continued to live in Salt Lake City, and has been able to focus on some of his many hobbies, including golfing, fishing, game hunting, and tending his grandchildren.

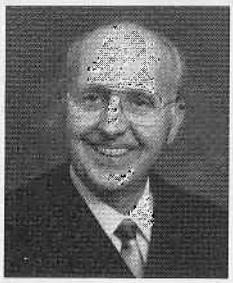
Judge Eleanor VanSciver was appointed by Governor Scott M. Matheson to the Third Circuit Court bench in July of 1978, and became the presiding judge in 1982. She retired from the bench in July of this year. Born in Salt Lake City, VanSciver attended Bountiful High School and the University of Utah. She received her law degree in 1967 from the University of Utah and was admitted to the Bar in 1968. VanSciver is married to attorney Robert VanSciver and they have one child.

VanSciver has been a member of various associations including the National Association of Women Judges and the Circuit Judges Association. She served on the Board of Directors of Parents United, and also served with the Governor's Commission of the Status of Women. She is on the list of Who's Who of American Women.

Eleanor Vansciver
Utah State District Judge
Third Circuit Court

A former criminal defense attorney, VanSciver's judicial style has been described as being firm but always having an open mind towards prosecutors, defense attorneys and defendants. She recommended that attorneys research points of law before making motions.

After retiring in mid-July of this year, VanSciver moved to Mexico with her husband with the hope of opening up a restaurant and possibly going to a culinary school.



Judge Floyd H. Gowans
Utah State District Judge
Third Circuit Court

Judge Gowans attended Brigham Young University and received his bachelor's degree in Political Science in 1953. He then attended the University of Utah where he received his law degree in 1956 and was admitted to the Bar in 1957. Before his appointment to the bench, Gowans was in general practice and thereafter served as a Salt Lake City Prosecutor from 1958 to 1969. He was appointed to the Salt Lake City Court by Mayor J. Bracken Lee in 1969 and served there until 1978. He was then appointed to the Circuit Court in 1978 by Governor Scott M. Matheson. Gowans retired from the bench in August of this year.

Gowans served on the Uniform Bail Committee, Judicial Court and the Board of Circuit Court Judges. In 1987, he was named the Circuit Judge of the Year and received the Distinguished Jurist Award in 1990.

Gowans has a reputation as a compassionate judge, who always went out of his way to deal fairly with everyone who appeared in his court. He had respect for attorneys and their clients. As a result, Gowans commanded the respect of the general public. An ardent football supporter, off the bench, he was never too busy to discuss the upcoming Utah-BYU football or basketball game.

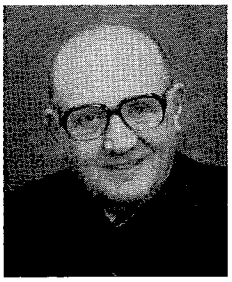
Gowans was born in Tooele, Utah, in 1929. He and his wife, Shannon, are presently serving an LDS mission in New Zealand.

Judge Paul G. Grant retired from the bench in mid-July of this year, after serving as a Circuit Court judge since 1978. Grant attended the University of Utah Law School from 1954 to 1962. He was admitted to the Bar in 1962. Before being appointed to the bench, Grant was in private practice for seven and a half years and then became an Assistant City Attorney for Salt Lake City. Grant was elected to the Salt Lake City Court in January of 1970, where he served until his appointment to the Fifth Circuit Court in 1978.

Judge Paul G. Grant
Utah State District Judge
Fourth Circuit Court

Grant was known as a judge who was always changing things for the better and implementing new programs. He served concurrently on the Judicial Council and Board of Circuit Court Judges from 1985 to 1988. Grant was particularly known for being compassionate towards criminal defendants, tailoring his structure of sentence in appropriate and flexible ways.

Although born in Salt Lake City, after retiring, Judge Grant moved to Jackson Hole, Wyoming. However, he continues to teach part-time at the University of Utah in the business law department.



Judge Merrill L. Hermansen
Utah State District Judge
Fourth District Juvenile Court

Judge Merrill L. Hermansen is retiring from the Fourth District Juvenile Court in Provo, Utah. He has served as a Juvenile Court Judge since 1969, and was the presiding Judge in 1974 through 1976.

Judge Hermansen graduated from Snow College, and the University of Utah, later attending the University of Utah Law School. He graduated from law school in 1953.

After law school he practiced law in Ephraim, Utah. While in law practice he represented the Cities of Manti, Redmond, Centerfield, Salina and Ephraim. He was also legal counsel for the Orem Industrial Development Corporation.

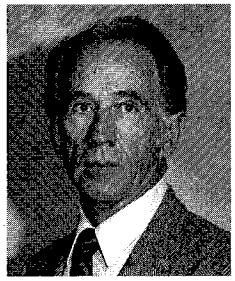
In addition to his tenure as a Third District Court Juvenile Judge, he also served as a Juvenile Court Judge in Manti, and as an Orem City Court Judge.

Judge Hermansen has devoted his career to the protection of children. To that end, he served as a member of the Utah State Advisory Council on child abuse and neglect from 1980 through the present. He was the past chairman of the Utah State Advisory Council on Child Abuse and Neglect, and was appointed by the Secretary for Health and Human Services as a member of the National Advisory Council on Child Abuse and Neglect. Judge Hermansen has been a member of the coordinating council to coordinate common activities of the United States Department of Justice and the United States Department of Health and Human Services, and was appointed by Margaret Heckler, Secretary for Health and Human Services to the Advisory Council. He has been a member of the Utah State Bar Committee for protecting and furthering the rights of children. He also received an award for "professional excellence" by the Utah Chapter of the National Committee for the Prevention of Child Abuse in 1986.

After a law career of almost forty years, Judge Hermansen looks forward to fishing and hunting.

Judge Boyd Bunnell is retiring from the Seventh District Court where he has served as a District Court Judge since 1977.

Judge Bunnell received his law degree in 1949 from the University of Utah and was admitted to practice in 1950. He practiced law in Price, Utah for only three years before being appointed a Judge of the Price City Court. After four years as a Judge in the City Court, he became the District Attorney for the Seventh Judicial District, a position he occupied for the next fourteen years. He left that position to become the Deputy Carbon County Attorney for two years, then returned to private practice as a sole practitioner for five years. In 1977, he was appointed to the Seventh District Court.



Judge Boyd Bunnell
Utah State District Judge
Seventh District Court

In addition to his service on the bench, Judge Bunnell has taught Business Law at the College of Eastern Utah and Criminal Law and Evidence for Weber State College. He has been the past president of the Utah District Judges Association, and a member of the Judicial Council. For six years, he served as a Utah Bar Examiner and for two of those years was the Chairman of the Utah Bar Examiners. He has been a guest lecturer at the University of Utah and has served on the Advisory Committee to the Supreme Court on Rules of Civil Procedure.

Judge Bunnell has also been active in the Jaycees. He was the past State President of the Utah Jaycees, and past National Director of the U.S. Jaycees. In 1988 he received an Honorary Degree from the College of Eastern Utah.

Judge Bunnell leaves the bench this year, and looks forward to retirement after his long, busy career in the law.

Judge Robert W. Daines is retiring as a First District Court Judge. Judge Daines received his law degree in 1957 from the American University of Washington, D.C. Upon graduation he served as a clerk to Utah Supreme Court Justice Worthen. After his judicial clerkship, he began a general law practice in Brigham City, Utah.

While in private practice he was the City Attorney for Brigham City and later the District Attorney for the First District which included Box Elder, Cache and Rich Counties.

Judge Robert W. Daines
Utah State District Judge
First District Court

Judge Daines was appointed by the Mayor and City Council of Brigham City to be a Court Judge in 1969. While a Court Judge he was the President of the City Judge's Association for two years. He has been a member of the American Judges Association, and has been continuously a member of the Utah State Bar Association since his admission to the Bar in 1957.

Judge Daines will be leaving the bench this year and looks forward to retirement after many years of services as District Court Judge.

CASE SUMMARIES

By Clark R. Nielsen

LOSS OF CONSORTIUM, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The Supreme Court refused to adopt a cause of action for loss of filial consortium and affirmed the denial of the plaintiff for negligent infliction of emotional distress in the crippling of an eight year old son during his hospitalization. Utah does not allow the recovery for negligent infliction of emotional distress and the plaintiffs do not claim that they were within a zone of danger created by the defendant's negligence. The Court rejected plaintiff's suggestion that Utah should abandon the zone of danger rule and adopt the more expansive California approach. Because the Blouchers did not allege they were within the zone of danger, they could not show any claim for negligent infliction of emotional distress

The precedence of *Hackford v. Utah Power & Light* and Utah Code Ann. § 30-2-4 persuaded the court that there should be no claim for loss of consortium of an emancipated child.

Justice Stewart dissented and argued that a parent's loss of an unemancipated child's companionship should be cognizable. The parents' claim for the loss of companionship, society and affection of a child as a result of a wrongful death has been deemed so important in Utah that it is protected by constitution and by statute. Therefore, injury short of death should also be recompensable. There should be a claim for filial consortium where a child survives an injury but is so badly injured that the basis for normal filial companionship and society between parent and child is destroyed. Justice Stewart would remand for a determination as to whether the injured son was unemancipated or not.

The majority distinguished wrongful death cases from consortium cases. In wrongful death cases, the party that suffers the actual physical injury has no cause of action and the legislature has prescribed the parties have a right to recover for the loss of the deceased's society and affection. (This is the general theory under wrongful death cases.)

Bloucher v. Dixie Medical Center, 194 Utah Adv. Rep. 3, filed August 21, 1992 (Utah S. Ct.) (Chief Justice Hall)

EMPLOYMENT, WRONGFUL TERMINATION

The Utah Supreme Court affirmed a jury's verdict and awarded damages for the plaintiff for his wrongful termination of employment but reversed the jury's failure to award consequential damages and the dismissal of plaintiff's public policy claims. Stating the facts in the light most favorable to the jury's verdict, the court recounted a concerted and ongoing course of conduct by the defendant bank employees to terminate the plaintiff from his employment. The defendant appealed the jury's verdict in the plaintiff's favor for wrongful termination.

The court held that *Berube v. Fashion Centre Ltd.*, 771 P.2d 1033 (Utah 1989) could be applied retroactively as an exception to the employment-at-will doctrine. *Berube* works no substantial injustice by requiring employers to expressly or impliedly promise employment to stand by that promise. The facts demonstrated that the bank's termination was not for cause. Also, the statute of frauds did not apply to an oral employment agreement that plaintiff would be employed until retirement unless the bank terminated him for cause. The fact that the plaintiff expected his career to last until age 65 did not mean that the parties could not perform the contract within one year.

Under *Peterson v. Browning*, 187 Utah Adv. Rep. 3 (May 11, 1992) the court recognized the plaintiff's claim that his termination violated the public policy. In his employment plaintiff had alleged violation of clear, substantial and significant public policies by the bank in failing to adhere to Utah Code Ann. § 7-1-318 regulating financial institutions. These reporting requirements of the Act promote a substantial and clear public policy of accountability of financial institutions. Plaintiff's termination and difficulties with the bank's management were founded upon his vocal insistence on adherence to the Act and refusing to agree to a long term solution to an accrual accounting problem. The trial court improperly granted the motion for directed verdict on this issue on the basis that the evidence did not support a claim that the plaintiff's termination violated public policy. The court failed to assess the facts in the light most favorable to the plaintiff and reasonable minds could have differed on whether public policy was a substantial factor in Heslop's termination, thereby creating a jury question.

Other contentions by the defendant on appeal were also rejected by the court. The evidence when properly marshaled was sufficient to support the verdict. Any other objected to statements by counsel were harmless and would have had little effect on the trial's outcome.

The court did reverse the trial court's refusal to allow jury instructions regarding the award of consequential damages including the attorney's fees allowed incurred in the action. Under *Berube,* the plaintiff who prevails in employment cases may recover consequential damages resulting from the breach of his employment contract. *Beck v. Farmers Insurance Exchange* also envisions a broad range of recoverable damages for breach of a covenant of good faith and fair dealings in a first party insurance contract. Under *Canyon Country Store v. Bracy*, consequential damages may include attorney's fees in such cases. Terminated employees, like injured insurance claimants, find themselves in a particularly vulnerable position once the employer breaches the employment agreement. Employers can reasonably foresee that wrongfully terminated employees will be forced to file suit to enforce their employment contracts and will incur attorney's fees. Under *Berube* and *Beck* the trial court erred in refusing to instruct the jury on the availability of consequential damages, including attorney's fees for the wrongful termination.

Heslop v. Bank of Utah, 194 Utah Adv. Rep. 20 (September 4, 1992) (Chief Justice Hall)

MINIMUM CONTACTS, PERSONAL JURISDICTION

A Texas industrial company lacked sufficient minimum contacts with the State of Utah necessary to assert jurisdiction for the purposes of a plaintiff's personal injury claim.

When a pre-trial jurisdictional decision

is made on documentary evidence only, an appeal from that decision presents only legal questions reviewed for correctness. Essentially, the facts of the complaint and any other submitted affidavits are taken as true, insofar as they are not contradictory. The plaintiff claimed that he was injured by an unreasonably dangerous condition on the machine. The machine had been put into interstate commerce by the defendant over fifteen years earlier. The trial court granted the defendant's motion to dismiss for lack of personal jurisdiction. The plaintiff argued that the placement of the stream into interstate commerce establishes sufficient minimum contact with Utah and that industrial had sufficient contacts by virtue of having come to Utah to view the machines five years prior to injury.

Personal jurisdiction is broken down into the categories of general jurisdiction (jurisdiction over a defendant without regard to the subject of the claim or verdict) and specific jurisdiction (jurisdiction over defendant only with respect to the claims arising out of the particular activities of the defendant in the forum state). Defendant industrial did not do business in this state to the extent that the court could exercise general jurisdiction over it. Neither was its contacts with the State in this case sufficient to allow the exercise of specific personal jurisdiction with respect to the claims arising out of the use of its machine in this state.

Whether or not a defendant has met sufficient minimum contacts to exercise jurisdiction may be viewed either the "arising out of" test or the "stream of commerce" test. Minimum contacts is not satisfied by the quantity of contacts with the state, but rather on the quality and nature of the contacts and their relationship to the claim asserted.

The "arising out of" principle is demonstrated by *Synergetics*, 701 P.2d 1106 (Utah 1985) and *Rothkelly*, 610 P.2d 1307. The defendant's contacts in Utah were wholly unrelated to the plaintiff's claim asserted against it. The claim did not arise out of industrial contacts.

"The stream of commerce" theory the defendant could not reasonably foresee that it would be subject to the jurisdiction of the court in Utah simply by placing its machine in commerce when it sold the machine in California. One who puts a product into the stream of commerce in such a fashion as to reasonably foresee its sale in a certain jurisdiction cannot complain having to defend in that jurisdiction against claims arising out of the product. The court agreed that the machine never entered the stream of commerce because it was sold to an ultimate buyer. Resale of the machine in Utah was wholly unforeseeable. Defendant Industrial would not have foreseen that it would be subject to suit in Utah involving a finger jointing machine sold in California.

Arguello v. Industrial Woodworking Machine Co., 196 Utah Adv. Rep. 3 (September 21, 1992) (Justice Zimmerman).

MEDICAL MALPRACTICE, PRELITIGATION REVIEW, JURISDICTION

The failure to initiate a prelitigation review within 60 days of filing a notice of intent to sue is not a jurisdictional bar to the subsequent commencement of the malpractice action. The 60 day notice requirement is imposed by Utah Code Ann. § 78-14-12(2), and requires that party initiating a medical malpractice action to file a request for prelitigation review within 60 days of any notice of claim. The plaintiff's request was filed 68 days after service of her first notice of the claim. To hold the 60 day deadline to be jurisdictional and cut off any further judicial claim would be contrary to the statutory scheme and the purpose for which prelitigation review was established.

Gramlich v. Munsey, 196 Utah Adv. Rep. 6 (September 23, 1992) (Justice Durham, with Justice Zimmerman dissenting without opinion).

GOVERNMENTAL IMMUNITY, NOTICE OF CLAIM

The Supreme Court also affirmed the dismissal of plaintiff's complaint for failure to file a notice of claim within one year of the date the claim arose, as required by the Governmental Immunity Act, § 63-30-11 and 63-30-13. Plaintiff asserted a claim against Provo City relating to an airplane crash injuring the plaintiff and his family. The notice of claim against Provo City was not filed until 18 months after the crash, alleging that Provo City failed to enforce its ordinance regulating flying clubs. The plaintiff did not allege any facts to show that he reasonably relied upon any representation by Provo City that presented the filing of a claim. Nor were there any other exceptional circumstances in this case to apply the "discovery rule." There were insufficient facts in the record to defeat the defendant's motion for summary judgment which the Supreme Court affirmed.

Warren v. Provo City Corp., 196 Utah Adv. Rep. 8 (September 23, 1992) (Chief Justice Hall).

TRUST DEED FORECLOSURE, DEFICIENCY JUDGMENT

Applying its decision in *City Consumer Services, Inc. v. Peters*, 815 P.2d 234 (Utah 1991), the Utah court allowed defendant's creditors to collect their deficiency judgment against the plaintiff after defendant's lien had been extinguished by the foreclosure of a prior trust deed on the lien property. When the prior trust deed was foreclosed, defendant's second trust deed was extinguished and defendants were allowed to collect their judgment on the promissory note from plaintiff's other assets.

Sanders v. Ovard, 196 Utah Adv. Rep. 11 (September 25, 1992) (Per Curiam).

TRANSFER TO DEFRAUD CREDITORS

A debtor's transfer of real and personal property into a trust while an underlying suit was pending was void as to a judgment creditor. The trial court invalidated the trust as to the personal property only, but upheld the trust with regard to the transferred real property. The Supreme Court reversed in part, holding that the transfer of real property also was invalid and that under Utah Code Ann. § 25-1-11, there was no distinction between real and personal property. The court disavowed any contrary dictum in *Geary v. Cain*, 9 P.2d 396 (Utah 1932), where the Utah court interpreted the predecessor statute to apply only to personal property. Under § 25-1-11, all deeds and conveyances of any property in trust for the use of the person making the same are void as against existing creditors. The statute does not provide any basis to distinguish between real and personal property.

McGoldrick v. Walker, 196 Utah Adv. Rep. 17 (September 30, 1992) (Justice Durham).

Thanks to Financial Institutions

The Utah Bar Foundation expresses its thanks to the Bankers in the State of Utah for their cooperation and assistance in making the Interest on Lawyers' Trust Accounts (IOLTA) a reality. When the Utah Supreme Court rendered a decision allowing Utah lawyers to transfer their non-interest bearing trust accounts to interest bearing accounts with the interest paid to the Utah Bar Foundation, Utah was a leader in the IOLTA program. Today there are IOTA programs in 49 states.

The IOLTA program has provided a unique opportunity for lawyers and banks to work together to improve the lives of the people in the State of Utah. IOLTA is an easy way for banks to show that they are going the extra mile to help the people of Utah.

As a result, the Bar Foundation has been able to distribute funds to many agencies, including support for legal services to Utah Legal Services, Legal Aid Society, Catholic Community Services, Law Center for People with Disabilities; educational aid to Law Related Education Project, Utah Children; and other miscellaneous worthwhile projects.

PARTICIPATING IOLTA FINANCIAL INSTITUTIONS

Bank of Utah
Brighton Bank
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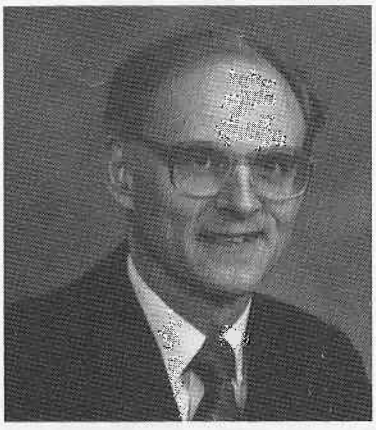
First Utah Bank
First Western National Bank
Guardian State Bank
Hercules Credit Union
Key Bank
Olympus Bank
State Bank of Southern Utah
United Savings Bank
Universal Campus Federal Credit Union
University of Utah Credit Union
Valley Bank
West One Bank
Zions National Bank

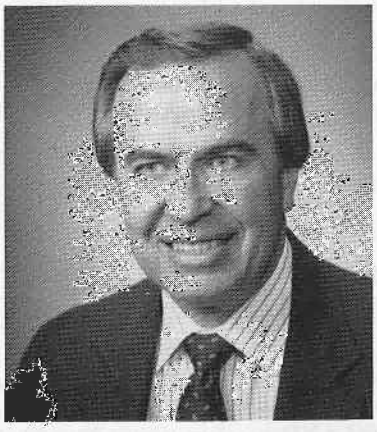
In Appreciation

The Board of Trustees takes this opportunity to thank two members of the community for sharing their expertise and assistance with the Finance Committee of the Utah Bar Foundation. In the spring of 1991, Max D. Eliason and J. Chad Hamilton were invited to join committee members Richard C. Cahoon, James B. Lee and Carman E. Kipp to monitor investment and productivity of the Foundation's funds. The group meets quarterly to evaluate the financial condition of the Foundation and to advise concerning investment methods that will yield the best return. We appreciate the beneficial service they have rendered.



J. Chad Hamilton

J. Chad Hamilton presently is Senior Vice President and Trust Officer at Zions First National Bank and heads the investment section in the Trust Department with responsibility for approximately $375 million of discretionary assets. He received his Banking and Finance degree from the University of Utah and has been in banking for thirty years. He also serves as Treasurer and Board Member of the Salt Lake Education Foundation.



Max D. Eliason

Max D. Eliason is a Financial Consultant with Shearson Lehman Brothers and has training and registration to deal in all types of securities. He received a J.D. degree from the University of Utah, a Liberal Arts and Economics degree from Columbia University and is a member of the American and Utah Bar Associations. He has more than 27 years experience as a corporate executive and practicing attorney.

CLE CALENDAR

THANK YOU

A special thank you to all of the presenters and planners who helped the CLE Department over the past year. In this time of thanks and cheer we wanted to take a minute to express our appreciation for all of those who volunteered their time in preparing and presenting CLE programs. You made the difference in putting together high quality CLE programs for the Bar. We wish you well in the coming year.

Monica, Melissa and Toby

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.

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.

COMPUTERIZATION OF ESTATE PLANNING PRACTICE — ESTATE SECTION LUNCHEON

CLE Credit: 1 hour
Date: January 12, 1993
Place: Utah Law & Justice Center
Fee: $11 — Call to RSVP
Time: 12:00 noon to 1:00 p.m.

ADR AND EFFECTIVE NEGOTIATIONS — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills.

CLE Credit: 3 hours
Date: January 21, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

ETHICS IN THE ESTATE PLANNING PRACTICE — ESTATE SECTION LUNCHEON

CLE Credit: 1 hour
Date: February 9, 1993
Place: Utah Law & Justice Center
Fee: $10 — Call to RSVP
Time: 12:00 noon to 1:00 p.m.

UPDATE: IMPLEMENTING THE 1990 CLEAN AIR ACT

CLE Credit: 4 hours
Date: February 11, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

EFFECTIVE LAW OFFICE MANAGEMENT — NLCLE WORKSHOP

CLE Credit: 3 hours
Date: February 18, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

NEW SECTION 401(a)(4) NONDISCRIMINATION REGULATIONS

CLE Credit: 4 hours
Date: February 25, 1993
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

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

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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.

1993 MID-YEAR MEETING

CLE Credit: 8 hours
Date: March 11-12, 1993
Place: Utah Law & Justice Center
Fee: Call
Time: Call

1993 UTAH LEGISLATIVE CHANGES AFFECTING ESTATE PLANNING ATTORNEYS — ESTATE SECTION LUNCHEON

CLE Credit: 1 hour
Date: March 16, 1993
Place: Utah Law & Justice Center
Fee: $11 — Call to RSVP
Time: 12:00 noon to 1:00 p.m.

REAL PROPERTY PRACTICE — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills.

CLE Credit: 3 hours
Date: March 18, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

BANKRUPTCY PRACTICE — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills.

CLE Credit: 3 hours
Date: April 14, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

THE NUTS AND BOLTS OF CHANGES TO UTAH PROBATE LAW

CLE Credit: 4 hours
Date: April 23, 1993
Place: Utah Law & Justice Center
Fee: TBD
Time: 8:00 a.m. to 12:00 p.m.

PROBATE — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills.

CLE Credit: 3 hours
Date: May 20, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

JOINT TRUSTS VS. SEPARATE TRUSTS

CLE Credit: 1 hour
Date: May 11, 1993
Place: Utah Law & Justice Center
Fee: $7 — Call to RSVP
Time: 12:00 noon to 1:00 p.m.

MCLE Reminder 30 Days Remain

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

On Dec. 1, 1992, there will remain 31 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 call 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!

INFORMATION SOUGHT

INFORMATION SOUGHT REGARDING GEM INSURANCE. Information regarding Gem Insurance's alleged breach of contract, bad faith, fraudulent denial of claims, and related matters is sought. Contact Roger H. Hoole, 2040 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111.

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.

CORPUS JURIS SECUNDUM and UTAH CODE ANNOTATED. Both complete current sets with all Supps and Updates. For more information please call (801) 531-8300.

FOR SALE: Two complete up to date sets of Utah Code Annotated; up to date set of the Pacific Reporter 2d Edition; up to date set of Shepard's Citations. Call George Harmond (801) 637-1542.

OFFICE SHARING/SPACE AVAILABLE

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.

Kearns Building sublease ideal for small law office. 2300 sq. ft. prime seven room suite with reception area. Second floor Main Street frontage. Renovated with tradition decor. Present lessee willing to assist with rent subsidy. 34 months left on lease. Call (801) 322-1373.

Do overflow work in exchange for your rent. First class office space at 215 South State. Room for one attorney and staff. Possible partnership/association with established practitioner. Contact L. Zane Gill at (801) 355-2600.

Attractive office space is available at prime downtown location, in the McIntyre Building at 68 South Main Street. Single offices complete with reception service, conference room, telephone, parking, fax machine, copier, library and word processing available. For more information please call (801) 531-8300.

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

POSITIONS AVAILABLE

Small, established AV rated Salt Lake law firm has available office space for one attorney. Looking for attorney with at least three years experience, good people skills and pleasant personality. Free parking. Happy, clean work environment. Possible association with firm. Send resume to Utah State Bar, Box J-10, 645 South 200 East #310, Salt Lake City, Utah 84111.

Salt Lake City Firm seeking recent graduate, preferably with a Marketing background and Tax courses or experience. Send resume to Utah State Bar, Box B-10, 645 South 200 East #310, Salt Lake City, Utah 84111.

SERVICES

CASES READY FOR TRIAL SOUGHT — Got a plaintiff's case in which discovery is complete (or nearly complete) and you don't want to take it to trial? No need to worry. I will try the case and may even advance trial costs. Call Mike at (801) 359-0833.

Washington attorney with emphasis in land use, real estate and environmental law available on a contract basis (hourly rate or flat fee) in the Salt Lake area. Exceptional research and writing skills. Call Penelope S. Buell (801) 531-1057.

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.

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.

CONTINUING LEGAL EDUCATION

Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX 9801) 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)

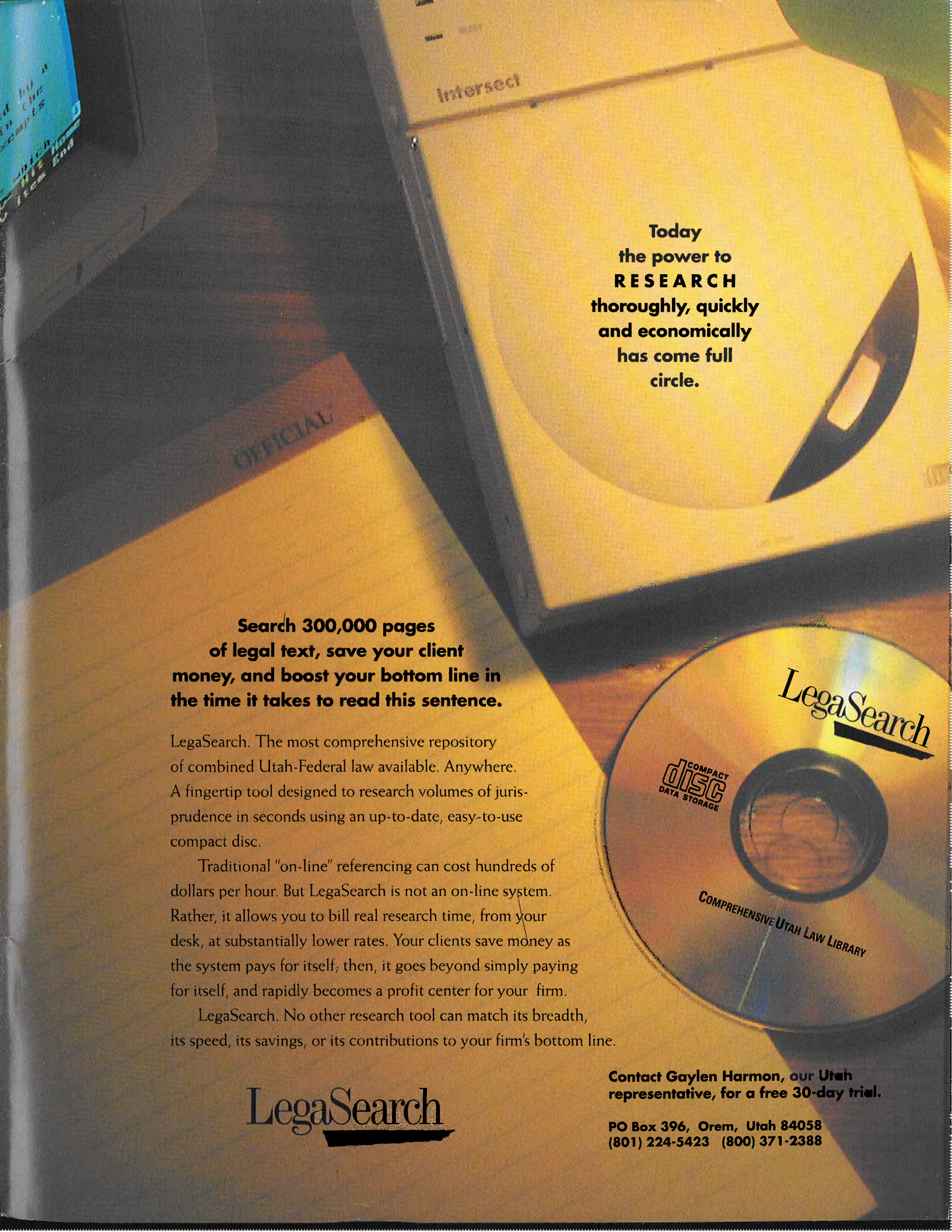
B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half 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.



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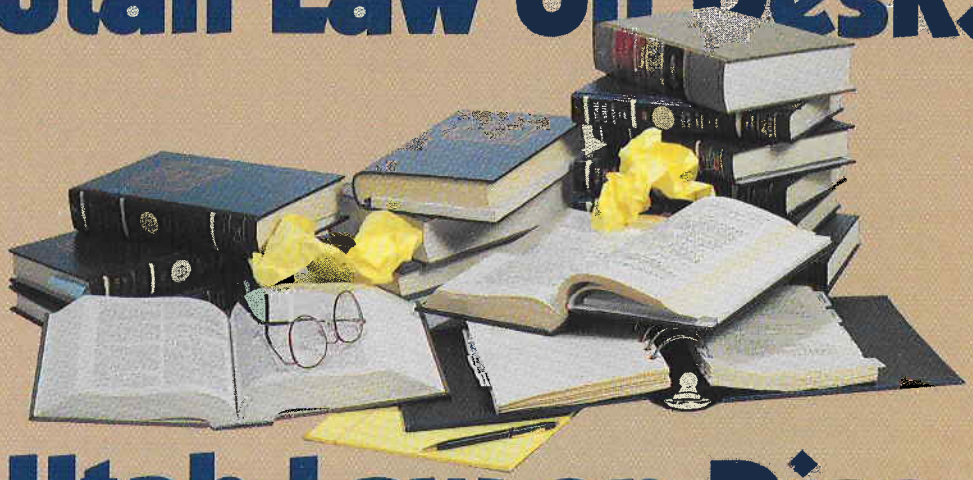
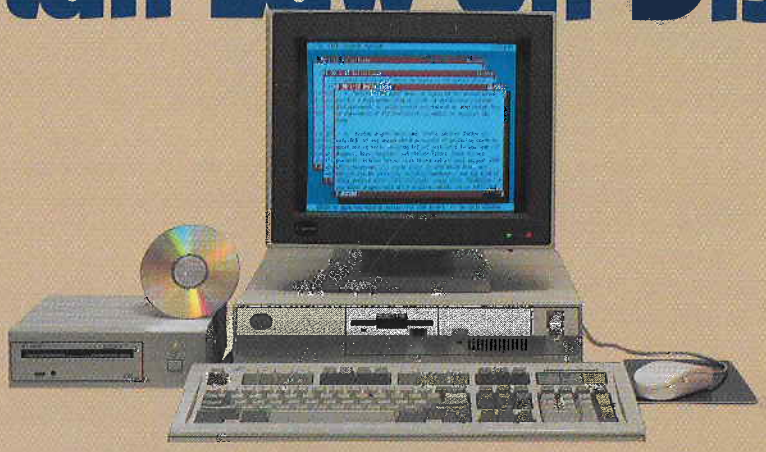


Utah Law on Disc.



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