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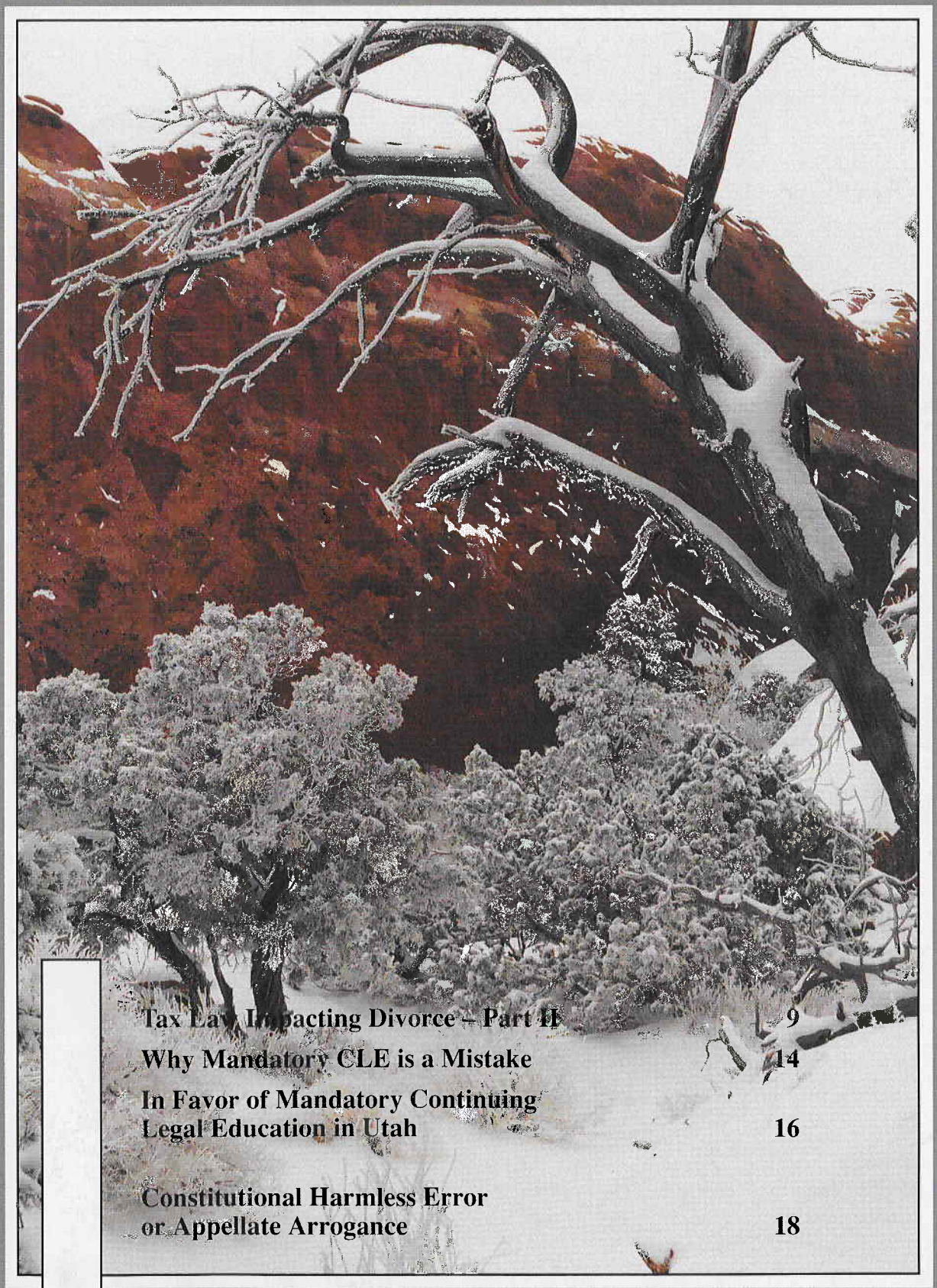

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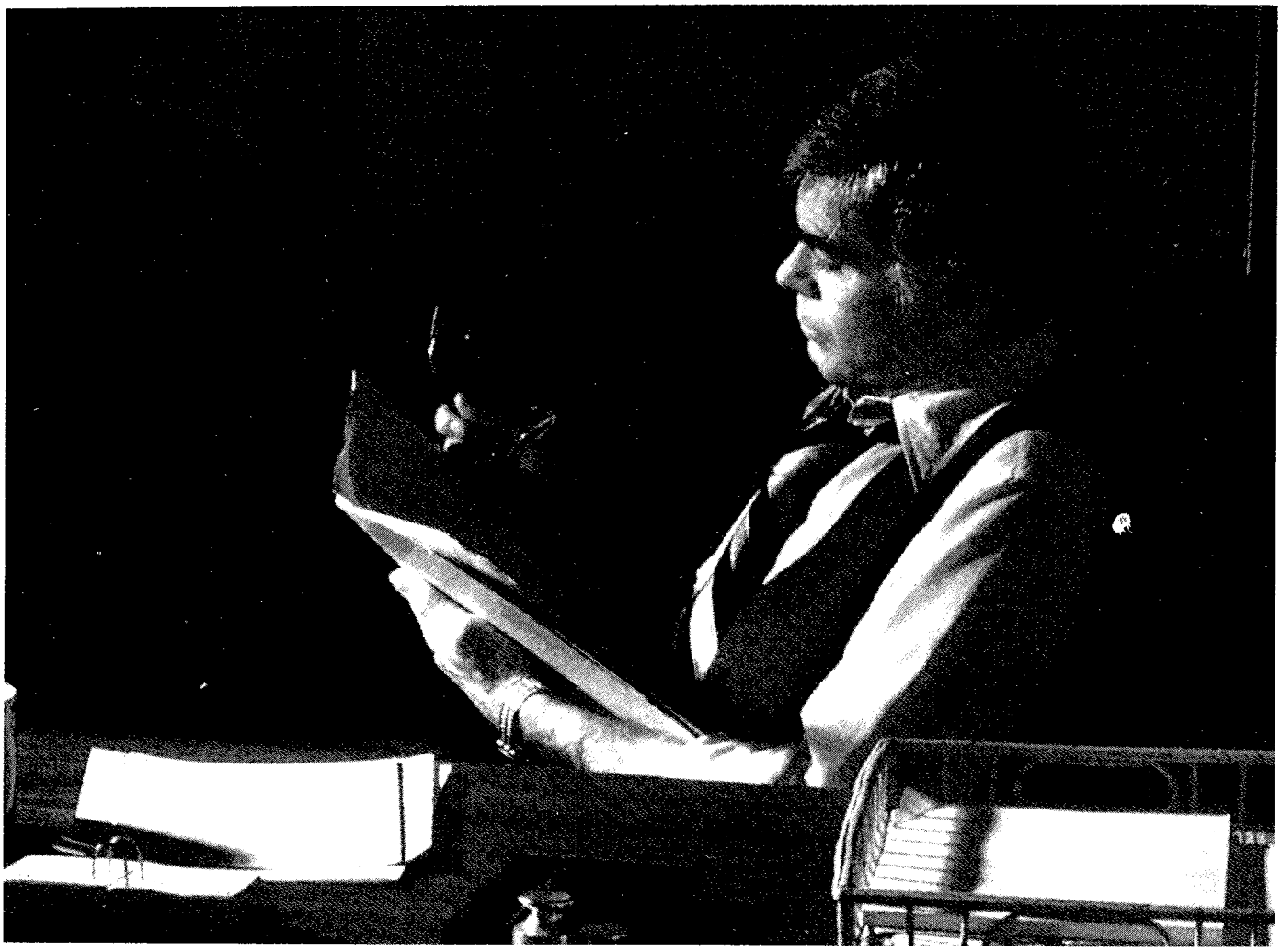

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Utah Bar Journal

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COVER: Snow in Devil's Garden, Arches National Park, taken by Professor David A. Thomas, J. Reuben Clark Law School, Brigham Young University.

Members of the Utah Bar who are interested in having their photographs published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah, 84111, 532-5200. Send both the slide (or the transparency) and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

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

LETTERS

Editor's Note by Victoria Kidman, Letters Editor

Whether or not you have noticed a section of the *Bar Journal* is set aside for Letters to the Editor. However, since inception of the "new" *Bar Journal*, very few letters have been received for publication and those that have been received have usually been too long for publication. In an effort to generate more letters, the *Bar Journal* has instituted a new format for the letters section.

The new format requests responses from members of the Bar on various topical issues. In conjunction with the new format, the Bar Commissioners have approved a change in the 200 word limitation to 300 words per letter submitted. Letters can still be submitted on topics of general interest. The general letter submission guidelines appear below.

The *Bar Journal* welcomes any suggestions on issues for discussion in the "letters" section.The issue and question for which your views are sought at this time are as follows:

ISSUE:
Two articles appear in this issue of the *Bar Journal* relating to Mandatory Continuing Legal Education (MCLE). Nearly three-quarters of a select number of members of the Bar surveyed favor retaining Continuing Legal Education (CLE) as a mandatory condition for holding an active license. Some opponents to MCLE believe that the requirement should only be placed upon younger members of the Bar.

QUESTION:
Should CLE be required of all members of the Bar as a mandatory condition for holding an active license?

Letter Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

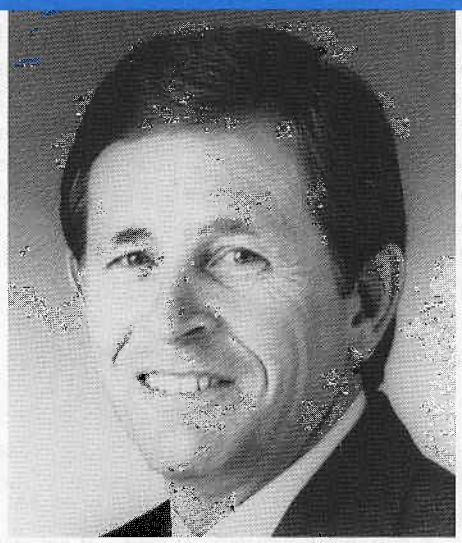
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) which violates the Code of Professional Conduct or (c) which otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the editor shall be made without regard to the content of the letter or to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Executive Director, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected and shall set forth the reasons for the rejection.



Musings on Miscellaneous Matters

By Randy L. Dryer

By the time your read this article, most Utah trial judges will have completed a comprehensive survey sponsored by the Bar and administered by the Administrative Office of the Courts assessing the characteristics and attitudes of lawyers who regularly appear in Utah's state courts. The purpose of the survey is threefold: (1) to test the validity of many stereotyped perceptions about lawyers; (2) to determine if these perceptions have changed during the last five years; and (3) to provide the Bar with information useful for developing future CLE programs. I expect the results will debunk many myths about lawyers, such as all lawyers are abusive, patronizing, condescending and place too great an emphasis on winning at all costs. They survey also will assess whether the bench believes most lawyers are well prepared when appearing in court, are honest in their representations to the court and are courteous to each other and court personnel. Thanks to Judges David Young of the Third District, Michael Hutchings of the Third Circuit, Dean Lee Teitelbaum and Michael Phillips of the Court Administrator's Office for their assistance in developing the survey. The survey results will be made public and discussed in a future *Bar Journal* article.

CENTRAL AND EAST EUROPEAN LAW INITIATIVE

The American Bar Association has established a project to support the process of law reform underway in Central and Eastern Europe and the new independent states of the former Soviet Union. Called "The Central and East European Law Initiative" (CEELI), the project makes available U.S. legal expertise and assistance to countries that are in the process of modifying or restructuring their laws or legal systems.

Utilizing a variety of formats, CEELI has initiated a number of different programs such as the following:

1. **Technical Assistance Workshops.** Held in a requesting country, these workshops typically focuses on a particular substantive area of the law and involve the participation of 4-6 experience lawyers or judges, usually including one from a civil law country. Workshops, which are usually one week in length, facilitate extended dialogue among participants, discussion of legal traditions of various countries, presentation of case studies, assistance in drafting, and systematic follow up.
2. **Legal Assessments.** Where the urgency of a request for assistance precludes a full planning workshop, CEELI has offered immediate assistance either with a visit by a small delegation of legal experts or by circulating draft legislation within the United States for comments. CEELI has provided expert assistance on more than 100 draft laws, including the proposed constitutions of Albania, Bulgaria, Lithuania, Poland, Romania and Ukraine.
3. **Resident Liaisons and Specialists.** CEELI proves lawyer liaisons who reside in the host country for a period of six months to one year. These liaisons work with the host country to identify legal reform priorities and coordinates CEELI's assistance.
4. **Sister Law Schools.** Under this program, each law school in Central and Eastern Europe will be paired with at least three American law schools with which they will work on a continuing basis. To date, 126 U.S. and 41 Central and East European law schools have participated in the program. The University of Utah College of Law has a sister school relationship with the law school at the University of Split in Croatia. Dean Ante Caric recently visited Salt Lake for meetings with

Utah College of Law faculty and administration.

CEELI is a public service project and is not a device for client development business opportunities. Accordingly, CEELI has adopted specific conflict of interest guidelines to assure that technical advice offered by CEELI participants is neutral and that conflicts of interest or appearance of conflicts are avoided to the maximum extent possible.

Given the Utah Bar membership's extensive foreign language capabilities, this program could be of great interest to Utah lawyers. If you are interested in providing legal assistance to the countries of Eastern Europe and the former Soviet union more information can be obtained by writing or calling Mark S. Ellis, Executive Director, American Bar Association, 1800 M Street, N.W., Suite 200 South, Washington, D.C. 20036-5886, (202) 331-2619.

NEW BAR COMMISSIONER APPOINTED

Charles R. Brown, a tax lawyer with the two person firm of Hunter & Brown, was recently selected to fill the Third District Commissioner vacancy created by the resignation of Jan Graham, newly elected State Attorney General. The Commission received 34 applications for the vacancy! The Commission believed Mr. Brown brought to the position a new perspective and background of experience not previously represented on the Commission. Thanks to all who submitted applications. There were many qualified candidates to choose from and this decision was a difficult one.

WACKY LAWSUITS

If you think people are suing each other for stranger reasons than ever, here's all the proof you need.

A new book entitled "World's Wackiest Lawsuits," has now been published by Sterling Publishing Company. The paperback, written by K.R. Hobbie, is full of the weird, the wacky and the frivolous lawsuits that have been filed across the nation. A few examples:

. . . There's the case of the couple who raised a wild boar and won their suit against the city that accused them of raising a wild animal. He wasn't wild, they successfully argued, because he ate chocolate and drank beer with them.

. . . Then there's the family who bought a house that turned out to be haunted. Give them back their down payment the Judge ruled; there's no way they could have known about the ghost before they bought the home.

. . . And tune in to the psychic who claimed she lost her aura after a brain scan.

. . . And how about the embarrassed church going woman whose photo appeared in the local paper with her skirt windblown in a Marilyn Monroe-like photo?

Maybe U.S. Representative Karen Shepherd has a cause of action. Her picture was recently shown on a local TV news broadcast during a story about accused felon Keith Shepherd!

The 128 page book can be ordered for $5.95 at Sam Wellers.

First, Let's Kiss All the Lawyers

By Steven M. Kaufman

So I took a little Shakespeare and changed a few L's to S's. So what? I got your attention, didn't I? As your newest Bar Commissioner, I need all the attention I can muster. When I was asked to put together an article, I thought of all the subjects this lawyer had anything worthwhile to write or speak about, and I figured there was obviously somebody amongst our great Bar who knew more than I on just about every subject.

Then I thought back over the more than fifteen years I have been honored to be a member of our Bar, and it struck me! I am one of the lucky ones who loves what he does. I get the opportunity to work with, at least in my humble opinion, the best. Sure, there are a few lawyers we could all do without, but for my money, dollar for dollar and retainer fee for retainer fee, the lawyers I deal with day to day, and I am talking twelve hour days, are interesting, fun, and caring.

Collegiality is not well defined in the dictionary I use, but I know what it means to me and that is "getting along and belonging." Sometimes we spend too much time as attorneys trying to do anything but that. We work our legal minds to the bone to do the best work we can for our clients, and sometimes that interferes with our ability to get along in our adversarial workplace.

Being an adversary, worthy or otherwise, does not require one to be obnoxious, overzealous, cranky, pushy, or just plain irritating. I have often told my clients that the best lawyers I know have a certain ability to settle cases rather than always try them, and I think it may take more skill to settle a case fairly than it might to take the case to court.

I have found that I have a much better chance of settling a case if I can get along with my "adversary" by being friendly, courteous, and kind. Sound like the Boy Scout motto? I am not trying to be trite, but I honestly believe with all my heart that to really get the most out of our profession, one needs to learn to get along. I do not believe that one will compromise one's client or case by trying to be a friend to the attorney on the other side. Those of you who know me, I hope, think I practice what I preach.

I walk down the halls of a courthouse almost every working day, like most of you, since it is where I do business. I see and talk with many lawyers every day, and I try to make a new friend, or rekindle an old friendship every day. There is no need to start up old heartburn on a new case. Rather, try to do the best we can do with our clients and their cases, but do it without killing yourself or your friendly opponent.

When I began as a young lawyer, which is not to say I am an old lawyer, in spite of more than my share of well-earned grey hairs. I was awestruck by the lawyers I first worked with, against, and for. That initial awe changed to respect. Respect for the judges, the lawyers, and the law I would learn to utilize. But I can guarantee all of you who have taken a few minutes to read this article that I, for one, would not have continued to love my job if it were not for the people I work with day in and day out, the screamers, the smilers, the smart ones, the angry ones, and the happy ones like me, all members of this wonderful profession.

I hear lawyers complaining about workload, clients, the telephone, money (lots of money), court decisions, peers, life, spouses, kids, the weather, and just about anything else one could complain about, and to all of that I say I guarantee if you sit back and really think about being a lawyer, it cannot be as bad as all that. Outlook is an important factor in one's view of the practice of law, and I make reference to the actual day to day practice of law, dealing with lawyers and judges and clients, and not just digging into the books and codes and writing briefs.

The best part of practicing law, for me,

is the attorney contact. As I was writing the rough draft of this article someone in the peanut gallery suggested that the best part was the money, and I stopped and laughed for a moment. But, I can assure you that all the money I might possibly make pursuing my life's profession would not make up for a bad day of practicing law with or against a cranky, "I hate practicing law," lawyer, who repeatedly tells that our profession is boring or not exciting. I say to those who may really feel that way to try something else, and get out of the way of those of us who love what we do. It just makes the rest of us grumpy and there is no place for that in my world of law.

The old cliche that suggests that this is one of the best professions to follow is not an old cliche for me. If it is for you, I suggest you sit down and rethink that position and try to get on track. It's not worth spending one's life mad about choices such as picking law as one's job. Not only does an unhappy lawyer make for a grumpy lawyer, but that type of negative attitude can have a domino effect, and I, for one, do not have the time or inclination to put up with those type of negative attitudes. They rub off on other lawyers that I have to talk to or work with daily, and I am not interested in that type of attitude. Life is too short. That may sound trite, but I don't think so. I have discussed this subject with my lawyer friends over many years, and I have really never heard someone disagree that getting along was trite.

As the new year starts, I hope to take this opportunity to say hello to all my old friends and pleased to meet you to all my new friends, lawyers, judges, court personnel, and anyone else I chance to meet in my day to day endeavors as a lawyer on the go.

I have been very active in both local and state Bar affairs over the years, and I think there is no better way to make new friends and really feel a sense of collegiality; if you have never heard the word take my word for the fact that it means to get along and belong, in my lawyer frame of mind. It can only make the practice of what we practice best, easier.

Yes, let's kiss all the lawyers instead of killing them as Will Shakespeare once suggested. Why not? What have we got to lose? At worst, you may catch a cold, and at best, you may make a friend.

Tax Law Impacting Divorce – Part II

By David S. Dolowitz

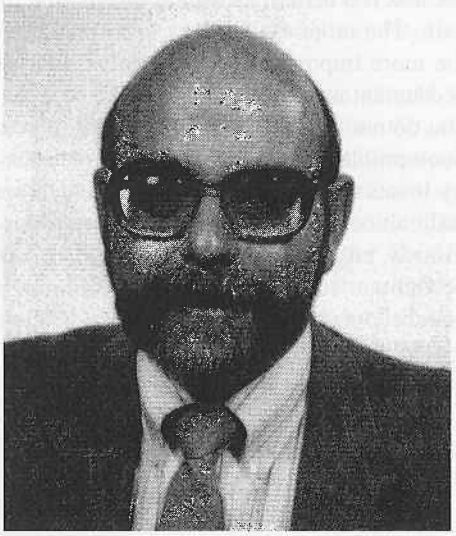
The following is Part II of the article on "Tax Law Impacting Divorce". Part I appeared in the December 1992 issue.

THE HOME

The tax situation in dealing with the marital home presents a sensitive and painful problem. Taxes can be deferred on the sale of a principal residence if, within two years, a new principal residence is purchased under Section 1034. This presents two problems with which we must deal.

First, under Section 1034, the provision which permits the deferral, the home must have been the principal place of residence at the time that it is sold. In most divorces, one party has moved from the home by the time of its sale. This means that only one of the two parties can take advantage of the Section 1034 rollover. Congress is considering the unfairness of this situation and did pass a statute which amended Section 1034 to allow the rollover in case of the divorce where a spouse had moved out incident to the divorce. This was part of an overall tax bill which was vetoed by President Bush, hence it is not law. It is part of the present tax law on which Congress is working (H. R. 11), but at this time it does not exist. Consequently, residence in the home is the first problem with which family lawyers have to deal, unless H. R. 11 becomes law with the changes to Section 1034 intact.

In a case which the author has handled, facts permitted Section 1034 benefits be available to both parties. Initially the husband moved from the home. The wife, while residing in the marital home during the pendency of the action, identified a home that she wished to buy prior to the sale of the marital home. She purchased it and moved from the marital home to her new home. The husband then moved back into the marital home, sold the marital home, and moved to another home. Under the terms of Section 1034 this allowed each spouse to enjoy the benefits available under Section 1034.



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 Court, Advisory Committee for Juvenile Court Rules of Procedure.

There is, however, an additional problem that arises under Section 1034. Assuming that both spouses can meet the test that the home was their residence at the time they bought their roll-over residence, the sale of the original marital home is the sale of property subject to capital gain. The problem is best illustrated by the recent decision of the Court of Appeal for the Second District in California in *Harrington v. Harrington*, 8 Cal. Rptr. 2d 631 (Cal. App. 2 Dist. 1992). The parties had, after a long term marriage, a substantial gain in their property — a profit of $480,000.00. The parties agreed to divide it equally. Each of them bought another residence. The husband bought a residence for $251,250.00, which meant that he had rolled over and did not have to recognize any gain. It was deferred under Section 1034. Within the same two year period, the wife purchased a condominium for $120,000.00 and invested $5,000.00 in improvements. Thus, she sheltered only $125,000.00 of the $240,000.00 gain. The wife faced a capital gain tax of $52,000.00.

There are two tax problems arising from these facts. The *Harrington* court faced one of these, which was, who should pay what in terms of the tax on the gain. This can arise in two different ways. One is where the parties file separate tax returns and the question must be answered immediately. The second is when the parties file a joint tax return and must revisit the problem one or two years later. When the parties file a joint tax in the year they sold their original home, they are jointly liable for any tax due.

In *Harrington*, while the evidence was in dispute as to whether or not the husband advised the wife about the need for a roll over, the family accountant indicated that she was aware of her obligation for her share of the $240,000.00 gain. Even though the husband had no tax due on his portion of the capital gain, the wife did. She brought the matter back to the trial court insisting that the husband should pay one-half of the $52,000.00 tax. The husband took the position that he had fully sheltered his half of the gain and should not pay or owe any tax on the wife's half of the gain. Since the parties had filed a joint tax return in the year of the sale of the home, they were both liable for the taxes and one or both of them were going to have to pay the tax due.

The California Courts determined that either party could have deferred capital gains taxes. What they did was based on factors totally unrelated to the division of their community property. The argument of the wife that the husband could afford a more expensive home than she, was rejected. The Court of Appeals noted that the deferral or postponement provisions of

the Federal and State tax laws make it obviously impossible to gauge what the ultimate tax liability will be because the parties are free, with successive purchase and sales of replacement residences to defer the capital gains for an indeterminate period of time. The trial court simply cannot realistically apportion tax liability. Accordingly, the Appellate Court ruled that each of the parties should be required to be liable for that one-half of the gain which they incurred. Thus, the wife was ordered to pay her own capital gain; the full $52,000.00. The husband, who was determined to have appropriately sheltered his half of the gain, was not ordered to pay any of the tax. This underlines the two problems that we face:
(1) do we have our clients file separate returns and immediately face the issue of who will pay the tax on any gain or (2) file a joint return and later face the issue of joint liability or tax obligation that is in reality only the responsibility of one party. *Harrington* resolved the later situation by requiring Mrs. Harrington to pay all the tax as it was her action, the court determined, that resulted in the tax being due.

Since either party can shelter $125,000.00 worth of their gain if they are over 55 years of age and file a joint return, or, $67,500.00 if they file separately, the matter can become even more complicated. The rationale of the Second District Court of Appeal in California in *Harrington*, adopts the rational of the decisions of the Utah Supreme Court in *Alexander* and the Court of Appeals in *Howell* cited above. Thus, while Utah has no rule directly on point, the *Harrington* approach would be a good approach to adopt; that is that each is responsible for their own portion of the gain.

However, there is the second problem arising from the sale of the home. Remember that if the parties filed a joint tax return, the Internal Revenue Service is not bound by their decision. Thus, the matter could readily be litigated in more than one forum.

As a final note, when dividing property, there may be hidden tax advantages as well as tax liabilities. Thus, for example, if a parcel of real property has declined in value, there is a loss which can be recognized when it is sold. On the face of the transaction this would seem to be an asset over which the parties would not disagree. In reality, they might strenuously disagree because the loss that would be recognized could be used to offset other gains and thus provide a tax benefit. The example of the securities with unequal basis demonstrated how property divisions could be made unequal because of differences in cost basis. This can occur not only in securities, but in other property as well. It can occur where a tax loss is a benefit as well as differential on gain. The more we face tax loss "benefits", the more important it is to involve both an accountant and tax lawyer to make sure that you do not create a problem for your client. Such problems can arise from passive activity losses or non-operating losses which are difficult concepts. It is suggested you immediately engage a tax lawyer and/or tax accountant to deal with those problems if you discover they exist.

". . . immediately engage a tax lawyer. . . or tax accountant. . ."

SUPPORT

Support which has not been allocated, that is, an order which directs that an obligor pay support for a spouse and children, is alimony only if it meets all of the other criteria of Section 71. If you are presenting a request for temporary support to the court, it is suggested that you also present the tax consequences of that support award. (Thus, when requesting alimony, be aware that the normal requirements of Section 71 do not apply to a temporary support order. This means that an alimony award, unless otherwise specified, will be taxable to the recipient and taxable to the payor.) If support is not differentiated, it will all be alimony. You should include the tax payments in the budget or you are not making a request that fully reflects the needs of the recipient spouse. In addition, you must advise the recipient spouse that quarterly estimated taxes must be paid on the alimony received or your client might be subjected to tax penalties and interest problems.

You must also be aware that an informal agreement to pay support will not give rise to a tax deductible alimony payment. To be deductible, even on a temporary basis, there must be a written agreement or order under Section 71 or the alimony is not tax deductible to the payor or taxable to the payee.

Marjorie O'Connell has described the proper way of handling alimony to make it tax deductible to the payor and taxable to the payee. There must be compliance with the seven "D's" of Section 71. These are:

1. Document (it must be in writing.)
2. Dollars (it must be in cash).
3. Distance (the parties must live apart).
4. Death (payments must end on recipient's death).
5. Dumping (recapture if less than three years).
6. Dependents (not child support).
7. Designation (not excluded from recipient's income).

RETIREMENT PROGRAMS

To divide retirement plans or benefits without triggering taxes is a benefit to both parties. Individual retirement accounts (IRA's) can be divided simply under Section 408(d) (6). If you provide in the Decree of Divorce that you are dividing the individual retirement accounts, the combination of Section 408(d) (6) and Section 1041 permit division of the IRA's without triggering a tax on the transfer. This is important because if the IRA is considered cashed in, not only must the full contents of the IRA be considered as taxable income, but a sur tax of ten percent is imposed unless the person receiving it has attained the age of fifty-nine and one-half or met certain other special conditions.

To divide other retirement benefits (except a Section 457 annuity, which simply cannot be divided) a qualified domestic relations order[1] is required under Section 414(p). To be a QDRO, the order must be issued by a state domestic relations court under that state's domestic relations law, Section 414(p) (1) (B) (ii), and it must relate to alimony, property rights, or child support. Section 414(p) (1) (B) (i). Note that since the QDRO must relate to alimony, property rights or child support, this does give rise, in combination with Section 72(p), of the possibility of withdrawing funds from retirement accounts as part of a divorce as long as a proper QDRO has been prepared that will not be subject to the excise tax (10%). The funds can be paid as alimony or child support or property, if needed.

The QDRO must benefit an alternate payee who may be a spouse, former spouse, or dependent of the participant in the retirement plan, Section 414(p) (8). This allows you to make child support payments from a retirement account in appropriate circumstances without triggering a penalty beyond the normal income tax that has to be recognized upon the receipt of this taxable income.

To effect these results, the QDRO itself must specify:

1. The amount to be paid either by a specific amount or contain a formula which declares the amount or percentage of benefits. Section 414(p) (2) (B).

2. The time period over which the benefits will be paid, which must be stated either in the number of payments, or the length of time in which the payments are to be made; this may be measured by the life of the alternate payee, or the participant. Section 414(p) (2) (C).

3. The QDRO must provide that the alternate payee will be paid in a benefit form which is provided under the retirement plan or that the alternate payee can choose among benefit alternatives offered by the plan, Section 414(p) (3) (A), and cannot order payment of benefits to alternate payee in excess of the actuarial value of the participant's benefits, Section 414(p) (3) (B).

4. The QDRO can only effect benefits that are not subject to a prior QDRO. Thus the QDRO's are not in their chronological order, but in the order that they have been approved by the plan administrator of any particular plan, Section 414(p) (3) (C).

5. The QDRO must correctly identify the plan by its name. Section 414(p) (2) (D) of the Internal Revenue Code.

6. The QDRO must state the names and mailing addresses of the participant and the alternate payee, Section 414(p) (2) (A).

The benefits can begin for an alternate payee at a number of different times even though they cannot provide a payment form or benefit which is an option otherwise not available under the plan. However, the alternate payee can start payments to himself or herself at the earliest retirement age even while the participant continues employment, Section 414(p) (4) (A). Note that this means that the plan administrator can simply roll over the principal amount that is covered by the qualified domestic relation order or maintain it as a separate account payable when the participant leaves, retires, or could have retired. A QDRO can provide that the alternate payee is to be treated as the participant's surviving spouse which would qualify the alternate payee as qualified for a retirement survivor annuity or joint and survivor annuity or both, depending on the terms of the plan, Section 414(p) (5).

These provisions also cover Section 403(p) tax deferred annuities, Section 414(p) (9).

For general information we should be aware that under Section 402(a) (9), the alternate payee is taxed on distributions pursuant to a QDRO and the plan administrator may be required to withhold income taxes from the payments. While under Section 402(a) (6) (F) distribution under a QDRO may be rolled over into an IRA by the alternate payee, that rollover is only available to the spouse or ex-spouse, because a non-spouse alternate payee would not be taxable on the QDRO distribution. Thus, an alternate payee receiving a roll over can only be a spouse or former spouse.

"A question frequently arises when the parties decide to file separate returns."

In summary, to be effective a qualified domestic relations order must be a domestic relations order relating to child support, alimony or payment of marital property rights. It must be made pursuant to a state domestic relations order. It must contain the name and last known mailing address of the participant and the alternate payee. It should include the social security numbers of both the payee and the alternate payee. It must include the amount or percentage of the participant's benefits to be paid by the plan to the alternate payee, or the manner in which the amount or percentage is to be determined e.g., *Woodward v. Woodward*, 656 P. 2d 431 (Utah 1982). The number of payments which are to be made and the plan to which it applies must also be provided. If all these elements are not present, it is not a valid order.

It is strongly suggested that prior to submitting any qualified domestic relations order to the court, a copy be transmitted to the plan administrator with the request that it be determined whether or not it qualifies. It can be very embarrassing submitting an amended, a seconded amended, a third amended, etc. qualified domestic relations order to a plan administrator who keeps rejecting it.

TAX STATUS

We frequently find ourselves disputing who will be entitled to the exemption for children. *Allred v. Allred*, 188 Utah Adv. Rep. 47, ___P. 2d ___ (Utah App. 1992), *Motes v. Motes*, 786 P. 2d 232 (Utah App. 1989) *cert. denied* 795 P. 2d 1138 (Utah 1990). However, there are times where this is an exercise in futility. Recent changes in the tax laws phase out the dependency exception (including for oneself) at certain income levels. If the parties are filing a joint return, the phase out starts at $150,000.00. If one party is filing as head of household, it starts at $125,000.00. When filing as single, the phase out commences at $100,000.00. Finally, if one is filing married, filing separately, the phase out begins at $75,000.00. All of these phase out levels are based on adjusted gross income. Once the phase out starts, it decreases by two percent of the exemption for every $2,500.00 in increased income except for married filing separately, who lose two percent for ever $1,250.00.

A question frequently arises when the parties decide to file separate returns. It appears whether the decision is a joint decision or because one party refuses to file with the other. This question is the determination of the marital status. It is governed by the provisions of Section 7703(a) (1). The determination of whether an individual is married is made at the end of the year unless one's spouse dies during the year.

Thus, a joint return may not be filed by parties whose divorce is final by year end. That means, as you move later into the year, tax consultants should also be involved in determining the date of finalization of a decree or the parties may needlessly pay additional taxes.

Those parties who are not divorced at year end but are in the process of divorce should examine Section 7703(b). It provides that where parties have been

separated for more than half of the year and one of them furnishes over one-half the cost of maintaining the household which does not include the spouse and is the principal abode for a child or children, the custodial parent may file as head of household rather than married filing separately. It is not only in the "phase out" that head of household is a preferred category, it is in tax rates as well. If a joint return is not to be filed and the parties have been separated more than six (6) months with one of them providing a home for the parties' child or children, head of household status is available if filing separate tax returns. A tax advisor should be consulted to decide how much advantage there is to filing a joint return verses separate returns with the custodial parent filing as head of household.

ATTORNEY'S FEES

As a final note, clients are always much happier if they find that they can at least deduct from their income taxes a portion of their attorney's fees. Under Section 212 of the Internal Revenue Code, attorney's fees in divorce proceedings can be deductible to the person who pays them when they are incurred for the production or collection of income, or for tax advice and the payment or collection of taxes. The allocation of these fees can only be done by the attorney. Attorneys fees may also qualify for additions to basis for capital assets under Sections 1012 and 1016 of the Internal Revenue Code. These are tax benefits which attorneys can make available to clients if they properly keep track of their time and write appropriate letters to their clients so the clients can support either additions to basis or deductions. However, the attorney must maintain appropriate records to be able to justify the opinions stated as sanctions are available not only against the client, but also the attorney, if they are not proper.

[1]QDRO - Qualified Domestic Relations Order.

Mini-Breakfast Seminar Series

FREE OF CHARGE/SPONSORED BY THE UTAH STATE BAR

- 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.

What Are My Lawyer Legislators Doing for Me Anyway?

By Report on the Third Mini-Breakfast Seminar
By John Steiger

For the third seminar of the Utah State Bar's free mini-breakfast seminar series, Utah legislators who are also attorneys discussed their views on the issues affecting the legal profession that will be addressed by the legislature in the upcoming legislative session. The panel discussion, held on December 16th, was moderated by the Bar's Legislative Affairs Committee Chair, David R. Bird and the Legislative Relations' Director John T. Nielsen.

This year's Senate and House has nine members who have attended law school; five of them made up the morning's panel: Sen. Lyle H. Hillyard, Rep. Frank Pignanelli, Rep. Filia H. Uipi, Rep. John L. Valentine, and Sen. David Watson. After Bar President Randy Dryer introduced the panel, each legislator talked about the issues that he thought would draw the most attention.

Sen. Hillyard said that there would be a "real push" to amend the tax code to tax services, as well as goods, in recognition of the fact that Utah is becoming increasingly a service-based rather than production-based society. He also identified medical malpractice reform as a hot area, but noted that the federal government may act before the state could adopt a reform package.

Rep. Valentine said that the state budget would draw the most attention because next year's revenue forecast was "significantly" under budget. Consequently, there will be strong pressure to find new sources of taxes. Another key issue affecting the legal community revolves around the court consolidation effort, soon to begin along the Wasatch Front. Valentine said that there is considerable pressure to amend the 1991 legislation consolidating the district and circuit courts. The consolidation is scheduled to be completed by 1996-1998. A third area that might see action is the prelitigation review panel process in the medical malpractice area. He said that both plaintiff's and defense lawyers have expressed frustration with this process. Some view these panels as being biased toward the medical community, whereas others say that the process gives a prospective plaintiff an unfair advantage should the case go to court.

Rep. Pignanelli predicted legislation creating a legislative Judicial Rules Review Committee. The committee, which probably would be made up of three members of the House and three members of the Senate, would review all proposed court rules and recommend to the Supreme Court and Judicial Council any appropriate changes. Such legislation is needed, Pignanelli said, because the current rule-making procedure does not allow for sufficient public scrutiny. Pignanelli also said to expect "major changes" in the area of family law. For example, one proposal is to streamline the process for the automatic withdrawal of child support from paychecks of the contributing spouse. Another bill to expect is a tax on hospital services. The tax would be collected to help fund Medicaid. Pignanelli and Valentine said that this latter proposal appears to have bipartisan support.

Sen. Watson identified two tax-related initiatives he would like to see come out of the upcoming legislative session. First, something needs to be done about the out-of-state taxation of retired residents' pension income. Watson commented that Nevada already has a law protecting this type of income from out-of-state taxation, and that such a law should be passed here. Second, Utah is losing significant tax revenue by failing to collect sales tax on catalogue sales. Consequently, Watson concluded, a new tax bill remedying this situation is warranted.

Rep. Uipi agreed with Sen. Hillyard that the court consolidation legislation would be revisited because there have been many complaints about it. Another issue that needs to be addressed, said Uipi, is the current split in jurisdiction regarding custody and divorce. Custody is typically resolved in juvenile courts and divorce in district court. In the dissolution of a family due to divorce, this often results in confusion among the parties as to the appropriate court. Uipi believes that one judge should be involved in making the necessary determinations regarding both issues.

In sum, the morning's discussion suggested the breadth and complexity of the law-related issues facing the 1993 Legislature. If there are any questions on the issues described above or any other comments, the attending legislators said they would be happy to listen to your concerns.

The fourth 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 January 20, 1993. The upcoming seminar, "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?," will be presented by Vicki Cummings, Marketing Director at Parsons, Behle & Latimer, and Lindsey Ferrari, Practice Development Consultant at Fabian & Clendenin.

Please R.S.V.P. by calling 531-9095 at least one day in advance of the seminar if you wish to attend. The seminar will end promptly at 9:00 a.m. No CLE credit is available.

Why Mandatory CLE is a Mistake

By David A. Thomas

In January 1990, Utah lawyers holding active licenses were placed under mandatory continuing legal education (CLE) requirements as a condition of retaining their licenses to practice. I served on the various committees of the Bar that reviewed and recommended mandatory CLE, and I continue to serve on the Continuing Legal Education Committee that has recently assessed the results of the first two-year cycle under the mandatory regime. In terms of committee work I am probably the sole link between the pre-mandatory and post-mandatory eras.

Despite that history of involvement, I have always been and remain adamantly opposed to "mandatory" CLE. I am not opposed to CLE; I am simply opposed to making participation in CLE a condition of maintaining one's license to practice law. I am opposed because there is not a single good reason why CLE should be mandatory. The reasons that were raised for the adoption of mandatory CLE were subjective and speculative. Now, after almost three years' experience with a mandatory system, nothing has changed.

I believe the benefits of CLE can and should be realized by letting CLE sustain itself in the free marketplace of ideas and of competition for professional time and money. To impose CLE participation as a condition of maintaining a license to practice law in Utah should be done only for the most compelling reasons. As I intend to demonstrate in this brief essay, there are no such compelling reasons.

Neither in the committee nor in the application to the Utah Supreme Court was there advanced any one argument in favor of mandatory CLE that alone was sufficient to justify making CLE mandatory.[1] Several factors of varying persuasiveness were raised during the committee study, and the aggregate impact of these seems to have carried the day for the committee. In the committee discussions, the principal points in favor of making CLE mandatory were that it (1) would improve lawyer competence, (2) would make an important statement for public relations purposes, and (3) would enrich professional life through improved interaction with colleagues. Underlying these premises was (4) an assumption that Utah lawyers who most needed CLE or would most benefit from it might be among those least likely to participate, if left with a choice. Also influential was (5) the fact that numerous states had already adopted some form of mandatory CLE.[2]

DAVID A. THOMAS is an active member of the Utah Bar and has been professor of law at Brigham Young University since 1974. He currently is a member of the Continuing Legal Education Committee and the Bar Examination Committee. He served on the committee that prepared the recent comprehensive revision of Utah's corporations code.

A brief comment on each of these points follows:

(1) **Mandatory CLE and lawyer competence:** Participation in CLE ought to improve the participant's competence, but there is not a shred of objective evidence that it actually does. Making CLE participation mandatory changes nothing on this point. Participants ought to, but are not required to, earn CLE hours in their areas of primary interest. Therefore, there is no assurance that any number of CLE hours will strengthen a lawyer's competence in anything. No one has determined whether there is a correlation between CLE participation and the incidence of lawyer misconduct claims, either at the individual level or for the active Bar generally.

A more serious problem is yet to be addressed in CLE program planning, generally. Once lawyers have passed through the formative phase of their professional lives, it is difficult to provide CLE programs that go beyond the experienced lawyers' own expertise. For many mature practitioners, therefore, it is often difficult to justify even *voluntary* CLE, and almost impossible to justify *mandatory* CLE.

(2) **MCLE as a public relations gesture:** Because law as the classic example of a profession, is self-governing, the bar is sometimes viewed with skepticism by a public that constantly asks if any such group can competently police itself. It is easy to grasp for any symbol such as MCLE that will show we are serious about self-improvement and self-regulation. But there is no way of demonstrating that the symbol really means anything to the public; quite likely the general public neither knows nor cares that Utah lawyers require CLE participation of themselves. Thus, any public relations value that we have obtained so far from mandatory versus voluntary CLE is purely speculative and probably nonexistent. Public relations value seems to be an especially flimsy hook on which to hang *mandatory* CLE. One could just as easily and effectively proclaim to the public that Utah lawyers *voluntarily* participated in x-thousands of CLE hours in the most recent calendar year.

(3) **Professional enrichment through CLE:** That professional life may be enriched by CLE participation is really an argument for CLE, but not for making it mandatory. If anything, making CLE

mandatory could cast a pall over the experience of those who wished they didn't *have* to be there.

(4) **MCLE for the unwilling and the inept:** If the argument for mandatory CLE is that less responsible or less experienced lawyers are indeed less likely to participate in CLE, and therefore CLE should be mandatory *for all*, the point has never been substantiated or even fully articulated. In fact, the sophistication level of most CLE programs is more responsive to younger practitioners than to those who are more experienced.[3] Not a single study anywhere can document or account for the supposed inordinate reluctance of incompetent or inexperienced lawyers to participate in CLE.[4] It is given, of course, that younger and less affluent lawyers might be less willing or less able to participate, but the solution to that problem is to offer a wide range of low-cost CLE programs, rather than making participation mandatory for all. To make CLE mandatory for *all* because of the belief that *some* who really need it won't do it voluntarily is irrational. From this perspective, *mandatory* CLE could be justified only by showing that large numbers of lawyers would discredit themselves and the Bar — and threaten the public — unless forced into a series of professional self-improvement courses.

(5) **MCLE because it's the thing to do:** Before mandatory CLE was recommended to the Utah Supreme Court by the Bar, the Bar's study committee reviewed the experiences from other states with mandatory programs. That review failed to find any justification for making CLE mandatory other than those just described. Thus the experience in these states in adopting CLE has probably been similar to Utah's: somebody thought it was a good idea, and others were doing it, so why not? Such a summary of so much solemn committee deliberation is not specious; it is an accurate description of what occurred.

There are no justifications for mandatory CLE that are anything more than arguments in favor of CLE itself. If CLE is such a good idea, then the better programs will win adherents and sustain themselves, and the unworthy ones will fall aside. Mispriced programs will quickly disappear, and the good bargains — the programs with substance and reasonable fees — will return and will multiply.

These natural selective forces are severely restrained in a mandatory system. Moreover, with a captive audience, bar administrators face persistent temptations to make CLE a profit point that helps bail out other aspects of bar operations; this could place a premium on high-priced, high-profit programs rather than on those programs that are cost-efficient but with only moderate profits. The bar is in fact obligated to make its CLE programs financially self-supporting, but when CLE is mandatory, the bar should be precluded from earning inordinate profits; otherwise, it is indirectly and illicitly raising the license fee.[5] If CLE were voluntary, providers of truly good programs could properly charge what the market would bear and reap an appropriate reward for their efforts.

Typical of any true profession, the bar has several barriers to entry, including obtaining a professional education, passing the bar examination, and paying license fees. All of these are potentially discriminatory against the less affluent and disadvantaged. To add another barrier compounds that particular problem in addition to striking at the basic liberties of all Utah lawyers to practice their profession and pursue their livelihoods. No such barrier or restraint should be added to those already in place without the most weighty of justifications. To make continuing legal education participation mandatory in Utah has not been so justified and cannot be. It is a cloud upon the naturally positive features of CLE and should be removed without delay.

[1]In its petition to the Utah Supreme Court requesting adoption of mandatory CLE, the Utah State Bar stated that MCLE should "substantially follow the models" in exhibits, one of which was the proposed MCLE rules. Rule 1, "Purpose," stated, "By continuing their legal education throughout their period of practice, attorneys can better fulfill their obligation competently to serve their clients." This was the only attempt at stating any sort of justification for mandatory CLE, and it obviously only offers support for CLE generally, but not for mandatory CLE.

[2]Other states continue to join the ranks of states with mandatory CLE, including — most recently — California.

[3]As stated earlier, one of the crises now facing state bar CLE programs all over the country is what to do for those lawyers who have already taken the standard fare of program offerings and are ready for more advanced work. Often the numbers of such participants cannot justify or sustain a full range of CLE offerings for their level of expertise.

[4]To the contrary, the survey conducted in 1992 by the Utah bar's Continuing Legal Education Committee indicated that the younger members of the bar were more supportive of continuing legal education than any other group in the random survey sample. According to that survey, 91% of bar members with five or fewer years of experience believe that CLE improves their competence significantly or somewhat, while only 43% of the oldest members of the bar hold that opinion.

[5]Recent recommendations from the CLE Committee and the Bar Commission have re-emphasized the need to provide a wide range of low-cost programs.

In Favor of Mandatory Continuing Legal Education in Utah

By Brent V. Manning

Upon completion of the first two year cycle of Mandatory Continuing Legal Education ("MCLE") the Continuing Legal Education Committee of the Utah State Bar surveyed active Utah license holders to learn their opinions of Continuing Legal Education in Utah. Some of the highlights of that survey follow:

1. 71% of the surveyed members of the Bar favor retaining Continuing Legal Education ("CLE") as a mandatory condition for holding an active license.

2. 78% of the respondents believed that their participation in CLE activities helped improve their professional competence either significantly or somewhat.

3. A significant majority, 62%, believed that a separate ethics requirement is beneficial.

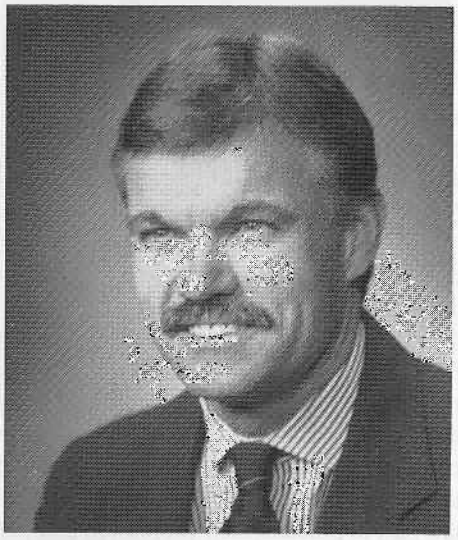
4. 82% of respondents found it convenient or at least not difficult to have access to an adequate number of CLE offerings.

5. Younger members of the Bar tended to be more favorable to mandatory CLE and more likely to believe that CLE improved their professional competence.

As a Co-Chair of the CLE Committee when the Supreme Court adopted the MCLE rule, I was gratified that MCLE appears to have been favorably received in Utah. Although, a large majority of the Bar favors retention of MCLE, in conducting the survey I learned first hand that those who oppose MCLE feel very strongly about their position. I will address some of the reasons I believe CLE should be required and respond to some of the arguments against it.

CLE INCREASES PROFESSIONAL COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Rule 1.1 — Rules of Professional Conduct



BRENT V. MANNING is a partner in the Salt Lake City Office of Holme Roberts & Owen. He is head of the Litigation Department in Salt Lake City and concentratres his practice in commercial litigation. He is a 1975 graduate of Harvard Law School.

Professional competence cannot be assured by attending a CLE program. However, the overwhelming majority of respondents, 78%, believed that CLE activities improved their professional competence significantly or somewhat. I have now practiced law for nearly 20 years and have yet to find a subject about which I know everything. No CLE program will provide the individualized knowledge one needs to competently handle a case, however, every program I have attended has at least alerted me to an issue about which I needed to be concerned.

We almost universally accept classroom teaching as a reliable method for learning the law. It is inconceivable to me that that same method of instruction loses its value once one graduates from law school. Because the law continues to change after law school graduation our professional education must also continue. The MCLE requirement assures that legal education continues for all active lawyers.

WHY MUST CONTINUING LEGAL EDUCATION BE MANDATORY?

Those who oppose MCLE typically do not oppose CLE rather they complain that it ought not be mandatory. They argue that one cannot mandate professional competence and thus those who do not provide competent representation will likely not do so because of a CLE requirement. For the vast majority of lawyers obtaining CLE credit is a productive and useful activity. If one accepts that premise, as 80% of the Bar reports, why require attendance since most lawyers will do things they regard as useful?

Making CLE mandatory raises its priority in a busy practice. If one is obligated to obtain a certain level of CLE credit, CLE cannot become one of those important things that somehow slips by. A majority of respondents reported that they would have participated in CLE activities at a lower level were it not mandatory. Because each lawyer must obtain CLE credit, more attention is given to identifying and attending useful programs.

In addition, the number and quality of offerings has improved dramatically since CLE became mandatory. Although I do not have precise figures on this point, in my experience it is much easier to find useful programs in Utah since CLE became mandatory and the overall quality of programs has increased. Thus, for the vast majority of Utah lawyers CLE activity is a good experience. Making CLE mandatory (1) has caused there to be more CLE activity and more CLE programs and (2) assured that all lawyers make minimal

efforts at maintaining competence.

WHAT ABOUT THE ETHICS REQUIREMENT?

Surprisingly, retention of the ethics requirement was less favored than was retention of MCLE (62% to 71%). Unfortunately in our busy practices, we often spend little time thinking about the ethical obligations we undertake when we become lawyers. In my opinion lawyers who are intent on violating ethical rules will do so notwithstanding being required to attend an ethics program. However, quality ethics programs have the useful function of alerting the vast majority of lawyers to ethical considerations they may not otherwise consider, thus averting inadvertent violations. More significant to me is the notion that for at least 1 1/2 hours every year each lawyer must consider topics such as what it means to provide competent representation to a client, to act diligently in the client's behalf, to maintain confidences, to avoid conflicts of interests, to be truthful to the tribunal, to be fair to opposing parties and counsel, and to improve the system of justice. The ethics requirement reduces the possibility that these admonitions remain hidden in an unopened book.

CLE PROVIDES ENHANCED OPPORTUNITIES FOR PROFESSIONAL INTERACTION AND DEVELOPMENT

Since MCLE has increased the level of involvement in educational activities there are now more opportunities to speak before and meet with other lawyers with similar interests. I am always impressed by the thoughtfulness of questions I hear at CLE programs. I almost uniformly meet someone at CLE programs who is thereafter a useful resource in my practice. MCLE increases the number of such opportunities. MCLE makes it more likely that lawyers who might not otherwise attend CLE opportunities to share their experiences and knowledge with other members of the Bar. The CLE Committee of the Bar has adopted a resolution encouraging all Bar sponsored CLE programs to include women and minorities as presentors at CLE programs. Thus CLE can assist in improving the intergration and professional opportunities of all Bar members.

HOW CAN OUR PROGRAM BE IMPROVED?

Although Utah's CLE program is overwhelmingly supported, there are changes I would like to see made.

First, there should be more flexibility in the program so that individual lawyers can design programs more suited to their individual needs. For example, if a lawyer has chosen to specialize his or her practice in a narrow area and agrees to confine his or her practice to that area we ought not require that lawyer to accumulate CLE credits in unrelated programs. I would allow this flexibility to those who specialize or otherwise limit their practice.

"Although Utah's CLE program is overwhelmingly supported, there are changes I would like to see made."

Second, their ought to be more flexibility in reporting. For example, unused CLE credits obtained in the last part of a reporting period, should be available for credit in the subsequent period.

Third, I would like to see increased availability of self-study as a means of obtaining CLE credit. I believe that most lawyers are honest and can be relied upon to accurately report self-study credits. This has the additional benefit of making CLE credit easier for those in rural areas and for those to whom access if otherwise difficult.

CONCLUSION

As evidenced by the survey results, Utah's CLE program has been well received and successful in meeting the objectives identified when the MCLE rules were adopted. I look forward to its continued success and wide participation by all members of the Bar.

Constitutional Harmless Error or Appellate Arrogance[1]

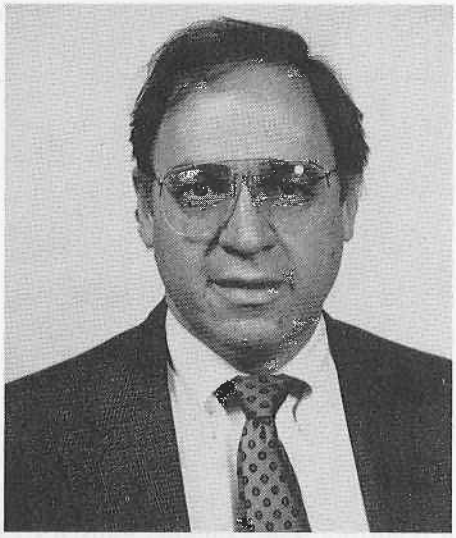
By Kenneth R. Brown

Sometime ago, while attending a function designed, at least for me, to acquire a certain number of mandatory legal education hours, I was privileged to hear learned discussions by members of the Bench & Bar on the concept of harmless error. One participant in the panel discussion was an Associate Justice of the Utah Supreme Court. At the end of the panel discussion, or at least at the question and answer period, I asked this esteemed jurist whether or not the harmless error analysis was not "result oriented." As I recall the response, it was that by necessity, it is result-oriented because of the analysis involved in arriving at a conclusion that the error complained of on appeal was harmless.

Appellate courts are relying more and more on the doctrine of harmless error to sidestep important constitutional issues raised on appeal. This trend is wrong and is an example of "the end justifies the means" mentality, which tolerates unreasonable searches and seizures because large quantities of drugs were found, allows coerced confessions to be used to convict because the guy was obviously guilty, overlooks prosecutors commenting on defendants' rights to remain silent because the proof of guilt was strong, and a myriad of other examples of judicial abuses tolerated on appeal in the name of harmless error.[2]

When I first began practicing law, I had the simplistic notion that if an important error occurred at trial I received a new trial. I soon learned that nothing could be further from the truth.

In 1967, the United States Supreme Court decided *Chapman v. California*, 386 U.S. 18 (1967). In *Chapman*, Ms. Chapman and her co-defendant were convicted in the California State Court on charges of robbery, kidnapping and murder. They chose not to testify at trial. The record of the proceedings in that case disclosed numerous comments by the prosecutor regarding the defendant's failure to testify. The Supreme Court of California concluded that error had occurred, but concluded that the error was harmless. On certiorari to the United States Supreme Court, the case was reversed. A seven member majority of the court, led by Justice Black, held that before an error involving the denial of Federal constitutional rights can be harmless in State criminal cases, the reviewing court must be satisfied *beyond a reasonable doubt* that the error did not contribute to the defendant's conviction.



KENNETH R. BROWN graduated from law school in 1977. Since that time he has practiced in the area of criminal defense. He is a member of the National Association of Criminal Defense Lawyers, and a Director of the Utah Association of Criminal Defense Lawyers. He currently serves on the Utah Supreme Court Advisory Committee on the Rules of Evidence.

Since *Chapman* was decided, the Supreme Court has applied the doctrine of harmless constitutional error to such issues as: (1) the failure to permit cross-examination concerning witness bias; (2) denial of right to be present at trial; (3) improper comment on defendant's failure to testify; (4) admission of witness identification obtained in violation of right to counsel; and (5) admission of evidence obtained in violation of the Fourth Amendment. These issues and the various formulations of the harmless constitutional error rule are developed fully in *Rose v. Clark*, 478 U.S. 570, 576-577 (1986).

The *Chapman* court told lower courts to tolerate constitutional violations if they were "harmless", except in three particular instances: (1) use of coerced confession; (2) deprivation of a right to an attorney; and (3) trial before a biased tribunal.

For years these "fundamental" rights were thought, at least by this author, to be of the variety to which the doctrine of constitutional harmless error could never apply. How could anyone think that a tribunal presided over by a biased judge could ever be considered to be harmless error, or a trial in which the police beat a confession out of a defendant could ever be considered subject to harmless error analysis, or a trial in which the defendant was not afforded an attorney, regardless of the overwhelming proof, ever be deemed subject to harmless error analysis.

That position remained essentially intact until the United States Supreme Court's decision in *Arizona v. Fulminante*, 111 S.Ct. 1246 (1991). Fulminante was tried for murdering his 11 year-old stepdaughter. At trial, his confession was introduced against him. The Arizona Supreme Court found that the confession was, in fact, coerced, and reversed the conviction. On Writ of Certiorari, the United States Supreme Court affirmed. In the process, however, the majority held that coerced confessions are subject to

harmless error analysis. With one fell swoop, the Rehnquist majority reached into that "cluster" of rights which were thought to be a safe haven, and selected at least one of those rights to be subject to the "constitutional harmless error" analysis. It is not hard to imagine that those other rights may fall, since the court that decided *Fulminante* has moved considerably to the right since that decision. After all, if a coerced confession can be used to convict a defendant, it doesn't take much imagination to conclude that since the evidence of guilt is so overwhelming, it wouldn't matter if Clarence Darrow were seated at the seat next to the defendant, or the trial judge was conspiring with the defendant's ex-lover. After all, the evidence of guilt is overwhelming, regardless of who represents the accused or who presides over the proceedings. The harmless constitutional error doctrine is yet another example of our judicial system moving from a system in which the integrity of a constitutional system of justice is protected, to one in which the war on drugs, or the prevention of child abuse, (or any other socially desirable goal) will justify many judicial indiscretions, or the "end justifies the means" mentality.

My experience with the harmless error analysis has been less than settling. In 1984, I defended Wesley Allen Tuttle against charges that he killed a woman on Parley's Summit. The only witness to identify my client at trial, was a person who could not identify him prior to being hypnotized. The Utah Supreme Court held that it was error to offer into evidence post-hypnotic recall, but that the error was harmless because of "other evidence" of his guilt. The court further concluded that since the introduction of the post-hypnotic recall was harmless, Mr. Tuttle's efforts to call expert witnesses to explain the effect of hypnosis on memory and the unreliability of hypnotically refreshed testimony, which the trial court prevented was also harmless. Reasoning, I assume, that since the jury, as a matter of law, did not rely upon the hypnotized witness in order to convict, the defendant, therefore, had no right to explain how that witness was able to identify him, and why the witness seemed so certain in that identification. What the Supreme Court said in *Tuttle*, is that he did not have the right to explain to the jury the most damaging piece of evidence against him. By anyone's calculation, the most damaging evidence was this witness's testimony. Isn't that breathlessly close to one of those "cluster" of rights to "put on a defense" and to call witnesses?

The appellate court, regardless of their wisdom in the law, is in no position to decide the prejudicial effect of error of constitutional dimension. The following observation is appropriate in Goldberg "Harmless Error: Constitutional Sneak Thief", 71 North Western University Journal of Criminal Law and Criminology, 421, 430 (1980):

> Appellate courts are, by their position as dispassionate and removed arbiters of the law, extremely poor finders of fact. Appellate courts' deference to trial court fact finding is not a matter of accident. A cold record, assuming that it is accurate, cannot substitute for a trial. Every trial lawyer knows that the "facts" of demeanor are at least as important as the "facts" of testimony. An appellate court reading a record in its entirety knows nothing of the unreasonable pause, the inappropriate smile, the sarcasm that changes a "sure" which means "yes" to a "sure" which means "I don't believe that" or "I don't agree." Appropriately, every trial court instructs the jury that it is the sole judge of witness credibility. Rule 52's admonition that appellate courts in civil cases shall give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses" is no accident. *One of the problems with appellate fact finding is that the appellate court is likely to be wrong.*
> (Emphasis Added)

"The harmless constitutional error doctrine is yet another example of . . . the 'end justifies the means' mentality."

The appellate court for Wesley Allen Tuttle did not sit in a quiet courtroom in Coalville, Utah, as the following questions were asked to a prior hypnotized witness:

> Q: Did the male individual, (name omitted), that you observed driving the black truck and observed walking back to the Datsun, is he present today in the courtroom?
> A: Yes, sir.
> Q: Would you identify him, please?
> A: In between these two gentlemen at the desk here (indicating).
> Q: The gentleman in the beige sweater?
> A: Yes.
> MR. CHRISTIANSEN: May the record reflect that the witness has identified the defendant, Wesley Allen Tuttle?
> THE COURT: It may.

The cold record does not capture the certainty with which the witness identified Tuttle — certainty bore exclusively of the hypnotic process.

The Appellate Court, with all its wisdom and long hours of training in the law was not present in that same courtroom, where prior to trial, the prosecutors fought tooth and nail to allow the post-hypnotic evidence in. Seasoned prosecutors know that one positive identification is worth a thousand pieces of a circumstantial puzzle. Yet, according to that same appellate panel, the evidence they sought and fought so desperately to provide to this jury was meaningless anyway, as was Mr. Tuttle's efforts to disprove and to cast doubt on the positive nature of the identification.

A cold, calculated review of the record in its entirety could not and *cannot* capture the impact that particular piece of evidence had in connection with the Wesley Allen Tuttle trial. Days of painstaking preparation and hours of cross-examination attempted to dispel the certainty with which this witness identified my client as the killer. But the jury that convicted Wesley Tuttle was never permitted to hear an expert witness explain the effect of hypnosis on a witness's "memory" and the "hardening" of the "recollection" as a result of the hypnosis. That same jury heard nothing of "confabulation" or the filling in of memory blanks with external information. Yet, the Appellate Court, by reviewing a cold record, "determined" that "beyond a reasonable doubt" it could have no effect on the outcome. The pauses, the hesitations, the inflection of the voice, the glaring eyes, none of those are captured in

the appellate record, yet the appellate judges are able to substitute "their judgment" for that of the jury's. By not allowing Wesley Allen Tuttle to explain to a jury in Coalville, Utah, how that particular witness arrived at that conclusion is to deny all defendants the right to a fair trial and an opportunity to put on a defense. If the appellate gurus can substitute their judgment for that of a jury based on a cold record and their analysis of the convincing nature of the "other" evidence, then we have no "cluster" or rights, the violation of which buys a ticket to a new trial in Utah.[3]

The Harmless Constitutional Error Doctrine is bad because it allows decisions to be made by persons who are in the worst possible position to make those decisions — appellate courts. We, as practitioners, must press for elimination of this doctrine at every opportunity and expand, not contract, the list of errors not subject to harmless error analysis in order to give substance to the Sixth Amendment right to jury trial, and the right to due process in Utah.

Those of us who regularly try cases to a jury have heard good trial judges say privately, or on the record, though they may have decided the case differently had they been the *finder of fact*, that they had to give deference to the finding of a jury, who was the *finder of fact*. Apparently, those same rules do not apply to those who are wiser and sit on appellate courts, because they are able to divine what evidence affected a jury based upon a cold record and conclude what most good trial judges will not conclude. Most trial judges will not substitute their judgment for that of the jury's because of respect for and deference to the integrity of the fact finding process. Yet, appellate courts in the name of harmless error have no hesitation in trampling that fact finding process to reach a result they consider correct, regardless of the right affected.

As practitioners, it is absolutely essential that we understand the Constitutional Harmless Error Doctrine. It is not enough to establish error involving a constitutional issue. We must prove to the reviewing court the prejudicial harm caused by the error. It is not enough that the confession was beat out of your client, we must be prepared to answer the "so what" question.

"Most trial judges will not substitute their judgment for that of the jury's. . ."

IT CAN MAKE A DIFFERENCE

There are those who say that it really won't make a difference if the case is reversed and remanded for a new trial, the result will be the same. This has not been my experience. In another first degree murder case I defended, the Utah Supreme Court concluded that the error complained of was not harmless, but prejudicial, by a three/two vote. Two of the Supreme Court justices concluded beyond a reasonable doubt that the error was harmless.[4] However, at a new trial, the defendant was acquitted of a first or second degree murder and was convicted of manslaughter, the crime we believe he actually committed. This provides additional support for the view that appellate courts cannot judge the harmfulness of the error. A jury of twelve disagreed with the dissenting two. Our greatest battles are reserved for juries to determine. Today, we must be prepared to convince the reviewing court of the harmfulness of the error complained of in order to preserve the fact finding process. Appellate courts must be convinced of the utility and importance of the fact finding process. What may seem clear to the appellate courts may not be so clear in the real world of trial, with a real jury and real witnesses. If appellate courts recognize this, they should be less likely to conclude the case on harmless error grounds.

[1]This article purports to deal with harmless constitutional error, as opposed to harmless non-constitutional error. This distinction is important in classifying the error and determining its treatment for appellate review.

[2]*California v. Chapman*, 386 U.S. 18 (1967).

[3]After dictation of this article, Federal Magistrate Judge Ronald N. Boyce issued a 57 page report and recommendation granting Tuttle's Federal Writ on the basis that the Trial Court's ruling prohibiting expert testimony on the effect of hypnosis violated Tuttle's federal rights to compulsory process and due process.

[4]*State v. Mitchell*, 779 P.2d 1116 (Utah 1989).

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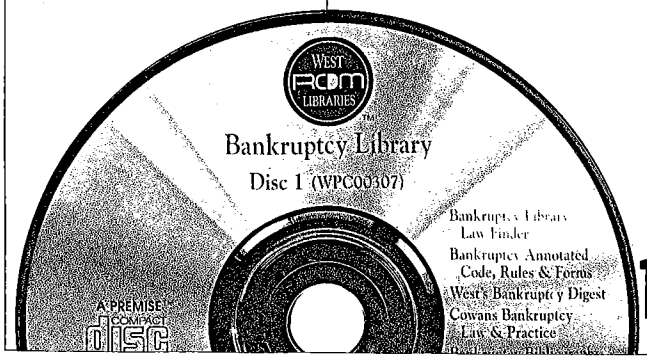

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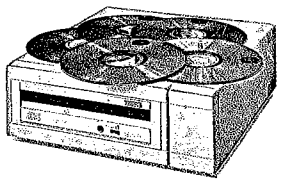

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Discipline Corner

PRIVATE REPRIMANDS

An attorney was privately reprimanded in September of 1992 for violating Rule 1.3, Diligence, and Rule 5.5(b), Assisting in the Unauthorized Practice of Law. The attorney was retained in June 1987 to represent a client in a bankruptcy matter. The client went to the attorney's office and met with a nonlawyer assistant who interviewed the client, took the information relating to the bankruptcy, advised the client as to the nature of the bankruptcy to be filed, and prepared the bankruptcy schedules. The client informed the nonlawyer assistant of a student loan and provided the assistant with the loan information. The assistant informed the client that a hardship petition to discharge the loan would be filed. The attorney did not meet with the client until the time of the first meeting of creditors, did not review the petition with the client prior to its being filed and did not prepare a hardship petition to discharge the student loan. In March of 1991, the client learned that the hardship petition had not been filed when the IRS attached the client's income tax return to satisfy the student loan. The client, believing the loan had been discharged, did not make payments.

An attorney was privately reprimanded on November 13, 1992, for violating Rule 1.3, Diligence, and Rule 1.4(a), Communication. The attorney was retained in December of 1988 to represent a client in a civil matter. The attorney filed a complaint in January of 1990, interrogatories in March of 1990, a Motion to Compel Discovery in July of 1990, a request for scheduling conference in March of 1991, and a notice to appoint counsel or appear in person in December of 1991. Thereafter, no meaningful legal services were provided. During this entire time period the attorney failed to return phone calls or keep the client informed as to the status of the case. The complaint was filed with the Utah State Bar in February of 1992 and as of the date of filing the attorney had not yet concluded the matter for which the attorney was retained in December of 1988.

An attorney was privately reprimanded on October 7, 1992 for violating Rule 3.4(b), Fairness to Opposing Party and Counsel, and Rule 5.3(b) & (c) (1), Responsibilities Regarding Nonlawyer Assistants. The attorney represents a collection agency and on March 21, 1991, served a Summons and Complaint on the complainant and his former wife for collection of debts incurred by the former wife in 1989-90. The parties had been divorced since 1979. On March 17, 1992, the court dismissed the claims against the complainant and entered a judgment in favor of the collection agency and against the former wife. Respondent prepared the Order. Thereafter, on April 15, 1992, the attorney sent a notice of judgment to the complainant demanding payment. The attorney's defense was that his secretary failed to update the record in the file. The attorney had previously been cautioned for similar conduct and a similar defense.

SUSPENSION

On November 3, 1992, the Supreme Court suspended Harold R. Stephens for one year and imposed two years of supervised probation commencing upon the expiration of the suspension period. In addition, Mr. Stephens was ordered to pay restitution to two complainants totalling $8,467.90.

Mr. Stephens violated Rule 1.3, Diligence, by failing to file a responsive pleading to a complaint wherein $149,000.00 was alleged to be additionally owed to the lender following the foreclosure and sale of the property in question. A default judgment was entered on February 23, 1990 for the amount of the deficiency. Mr. Stephens and the complainant were served with an order for supplemental proceedings and failed to appear on two occasions resulting in the issuance of a bench warrant against the complainant. On November 30, 1990 Mr. Stephens filed a Rule 60(b) Motion to Set Aside the default judgment which was denied by the trial court for lack of timeliness and affirmed by the Utah Court of Appeals on September 23, 1992 in *Lincoln Benefit Life Ins. Co. set al. v. D.T. Southern Properties; James E. Hogle, Jr.; and Cornelius Versteeg*, Case No. 910366-CA.

Two other cases of less serious neglect were consolidated for the purpose of imposing a single sanction.

RESIGNATION WITH DISCIPLINE PENDING

On November 5, 1992, the Supreme Court entered an Order of Discipline accepting the Resignation of Sumner J. Hatch with Discipline Pending. Mr. Hatch was retained in 1977 to probate the decedent's estate who had died the previous year. After being retained Mr. Hatch failed to complete the probate of the estate, failed to account to the beneficiaries for assets received from the sale of real property, failed to account for other assets of the estate, and failed to keep his clients informed as to the status of the probate proceeding. The Supreme Court accepted Mr. Hatch's Petition for Resignation with Discipline Pending due to his deteriorated health and mental condition which prevented him from participating further in the pending disciplinary proceedings.

ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Porter Administration Bldg.
7039 East 18th Ave.
Denver, CO 80220
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PRESS RELEASE

Special Institutes
on

ENVIRONMENTAL REGULATION OF THE OIL AND GAS INDUSTRY

CORPORATE ENVIRONMENTAL MANAGEMENT

Denver, Colorado
February 4 & 5, 1993

The Rocky Mountain Mineral Law Foundation is sponsoring two environmental conferences in Denver, Colorado, on February 4 & 5, 1993.

Environmental Regulation of the Oil and Gas Industry (Feb. 4) will examine the environmental laws that regulate oil and gas exploration, drilling, production, and abandonment operations on federal, state, tribal, and private lands in the United States. The program will analyze the environmental laws in a **chronological operations context**. The Institute is designed for all persons who must deal with environmental consequences of oil and gas operations. Registrants will be "walked through" the development process and instructed on the environmental requirements along the way. The instructors also will discuss how persons involved in oil and gas operations can effectively manage their environmental obligations and liabilities.

Corporate Environmental Management (Feb. 5) is a practical program aimed at those who need to find realistic management solutions to actual corporate environmental problems. In natural resources and other areas, large and small corporations face difficult tasks and hard choices as they attempt to comply with ever-expanding and more complex environmental regulation. Defining goals, organizing a management team, choosing staff, and motivating everyone within the corporation to address environmental concerns are formidable tasks. This Institute will examine these concerns in detail.

As a nonprofit educational organization, the Foundation would appreciate any publicity you can provide for these Institutes, including notices in magazines, professional journals, newsletters, and calendars of events. A brochure is attached for your convenience. For additional information, contact the Foundation at (303) 321-8100. Thank you.

United States Bankruptcy Court District of Utah

Position Announcement

Position: Law Clerk to the Honorable Judith A. Boulden, United States Bankruptcy Judge

Starting Salary: $26,798 to $75,335, depending on experience

Starting Date: August 23, 1993

Applications Deadline: February 26, 1993

Experience: One year's experience in the practice of law, in legal research, legal administration, or equivalent experience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation.

Substitution: A law graduate is eligible as Associate Law Clerk provided the applicant has:

1) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or

2) served on the editorial board of the law review of such a school or other comparable academic achievement.

Appointment: The selection and appointment will be made by the United States Bankruptcy Judge.

Send Resume To:

Judge Judith A. Boulden
United States Bankruptcy Court
350 South Main Street, Room 330
Salt Lake City, Utah 84101

Equal Opportunity Employer

BENEFITS SUMMARY

Employees under the Judicial Salary Plan are entitled to:

- Annual grade or within-grade increases in salary, depending on performance, tenure and job assignment.
- Up to 13 days of paid vacation per year for the first three years of employment. Thereafter, increasing with tenure, up to 26 days per year.
- Choice of federal health insurance programs.
- Paid sick leave of up to 13 days per year.
- Ten paid holidays per year.
- Credit in the computation of benefits for prior civilian or military service.

EQUAL EMPLOYMENT OPPORTUNITY

The court provides equal opportunity to all persons regardless of their race, sex, color, national origin, religion, age or handicap.

ABOUT THE COURT

The United States Bankruptcy Court, District of Utah, is a separately-administered unit of the United States District Court. The court is comprised of three bankruptcy judges and serves the entire state of Utah. The Clerk's office provides clerical and administrative support for the court, which conducts hearings daily in Salt Lake City and weekly in Ogden.

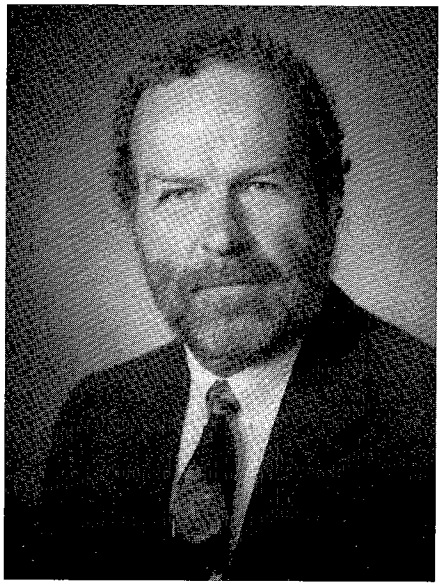
Legal Aid Society Invites You to Comedy Night

The Legal Aid Society will host its first comedy night on Saturday, March 6. Tickets for the evening will be $30 per person, and will include hors d'oeuvres, buffet dinner, the comedy show, and dancing afterwards. The event is co-sponsored by the Salt Lake County Bar Association, and masters of ceremonies for the evening will be Salt Lake attorneys Ed Havas and Richard Burbidge. The show will cover the spectrum from stand-up comedy to satire. Proceeds from the evening will benefit Legal Aid Society programs. For ticket information or group reservations call 578-1204.

Judicial Code of Conduct Changes Announced

The Judicial Council's Ethics Advisory Committee has proposed several important changes to the Code of Judicial Conduct. The proposals have been distributed to all judges for a comment period which expires January 15, 1993. You may obtain a copy of the proposed Code, for the purpose of submitting comments, by calling Colin Winchester at 578-3800.

Charles R. Brown Appointed Bar Commissioner



Charles R. Brown, a tax attorney practicing in the two-man Salt Lake City Firm of Hunter & Brown has been appointed to the Utah State Bar Board of Bar Commissioners, replacing Jan Graham who resigned following her election as Utah's new Attorney General. Mr. Brown was appointed by the Bar Commission to represent the lawyers in the Bar's Third Division, consisting of Salt Lake, Tooele and Summit Counties. His appointment runs until the next election of Bar Commissioners in June of 1993.

Mr. Brown received his law degree from the University of Utah in 1971, and also studied at Georgetown and George Washington University Law Schools. He has worked as a trial attorney in the Office of Chief Counsel of the Internal Revenue Service, and is admitted to practice before the Utah and U.S. Tax Courts, the United States Claims Court, and Court of Appeals for the District of Columbia Circuit, the U.S. District Court of Utah, the U.S. Court of Appeals for the Tenth Circuit and the United States Supreme Court. Mr. Brown is a member of the Salt Lake County Bar Association and the American Bar Association, and chaired the Utah State Bar Tax Section in 1981-82.

Mr. Brown also serves as Vice Chair of the Utah State Bar Special Task Force on Solo and Small Firm Practitioners.

To Members of the Tenth Circuit Judicial Conference Notice of Cancellation of 1993 Judicial Conference

Due to recent severe cutbacks by Congress in providing necessary funding to all circuit judicial conferences, it is with regret that the scheduled Tenth Circuit Judicial Conference, August 11-13, 1993, in Mescalero, New Mexico, has been cancelled.

The Congressional Conference Committee on Appropriations has indicated that all circuits should now hold them biennially and for that reason the conference scheduled for August 8-13, 1994, in Denver, Colorado, will take place as planned.

You may contact the office of Circuit Executive, 999 18th Street, One Denver Place, North Tower, Denver, CO 80202, or call 303-391-6100, if you desire more information.

Please keep the Circuit Executive apprised of any changes of address so that the membership roll may be maintained. Thank You.

ADR Committee to Offer Seminars to Local Bar Associations

The Alternative Dispute Resolution Committee of the Bar, chaired by Hardin A. Whitney, has developed a 2-hour CLE luncheon program on ADR which it will present to each local Bar association between January and June of 1993.

ADR encompasses all forms of alternative dispute resolution services, including binding and non-binding arbitration, mediation, mini-trial and early neutral evaluation. Once parties have determined to utilize a form of ADR, either in place of judicial litigation or as an adjunct to it, they must select the ADR process which best suits their needs and goals. There are substantial, substantive differences between the various ADR options available, and this seminar is designed to give Bar members a clearer understanding of the practical and theoretical differences between ADR methods such as arbitration and medication and between ADR in general and conventional litigation.

The program is also designed to open a dialogue about the court-annexed ADR programs currently being developed in the federal and state courts. The programs scheduled for the month of January are:

Tooele County Bar Association
January 7, 1993

Box Elder and Cache County Bar Associations
January 22, 1993

Notice of New Rules

The United States Court of Appeals for the Tenth Circuit adopted new rules of practice, effective January 1, 1993. Pamphlet copies of the new rules may be purchased from the Clerk, Room C-404 United States Courthouse, Denver, CO 80294, for $5.00, paid in advance.

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 the 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
June/July 1992
August/September 1992
October 1992
November 1992

CLAIM OF THE MONTH

Lawyers Professional Liability

Alleged Error or Omission

The Insured allegedly failed to file suit within statutory period.

Resume of Claim

Plaintiff was rendered a "soft" quadriplegic as a result of an automobile accident. She was an employee/passenger in a truck which jack-knifed while she was in the sleeping compartment.

Shortly after the accident occurred, plaintiff contacted the Insured. The Insured met with plaintiff on an informal basis at her home and discussed the possible causes of action with her. Thereafter, the Insured did not contact her or take any steps and the statute of limitation on any cause of action (except against the manufacturer of the safety harnesses) had expired. The attorney handling the legal malpractice action against this Insured also prosecuted the action against the safety harness manufacturer and was able to obtain a $1 million settlement in that action.

Plaintiff's counsel substantiated compensatory and special damages in excess of $6 million. Nonetheless, based on various defenses and extensive negotiation, the Insured's Counsel was able to settle this matter for a total of $400,000.

How Claim May Have Been Avoided

If the Insured felt that the case was not meritorious, he could have avoided this claim by sending a letter to the plaintiff explaining his evaluation of the matter.

Alternatively, he could have filed suit against all potentially liable parties and sought to withdraw as counsel of record thereafter and finding a substitute counsel to prosecute the case.

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

. . . And Justice For All?

By Glinda Ware Langston
Young Lawyers Section Treasurer

The acquittal of the Los Angeles police officers who brutally assaulted Rodney King was a startling reminder that racism continues to burden our judicial system. Moreover, the verdict touched off a growing national debate about the state of race relations in this country. Will America ever realize its utopian ideals of justice for all?

Imagine this scenario. You were transposed over to China or Tibet and you hit somebody in your car and you are now sitting in their court. How do you feel? Do you feel frightened. or at least apprehensive in a culture where you are so obviously different.?

Cornelius Pitts, a Detroit lawyer, told a similar story to a Wall Street Journal reporter to convey how an African American person accused of a crime or involved in a civil proceeding feels in a typical American courtroom where the judge, prosecutor, defense attorney, clerk, stenographer, bailiff and jurors overwhelmingly are white.

Now, ponder these questions. Do white judges ever reflect on why there are so many African American defendants in criminal cases? Do white judges ever wonder about why there are so few African American lawyers appearing before them? Do they ever inquire about the history of bar associations that used to exclude African Americans? Do they ever ponder aloud or in silence the reasons that there are so few African American judges?

It's doubtful, says Judge Bruce Wright, author of *Black Robes White Justice*. Wright comments that the average white judge, no matter how decent his intentions, cannot possibly understand where the African American criminal is coming from. He hasn't experienced the environment, the frustration and the humiliation that goes with being African American in white America.

Hence, the real key to courtroom fairness is the seating of more African American judges. In 1991, African Americans comprised only 4.3 percent of 837 federal judges and 3.9 percent of full-time state court judges. No African American sits on six federal appeals courts that have jurisdiction of 24 states. Furthermore, of American's 729,000 lawyers in 1990, only 3.2 percent were African American according to the U.S. Bureau of Labor Statistics. Consequently, as one Florida study reported, "The underrepresentation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies, unfair and insensitive to people of color."

It is imperative that America take concrete steps to remove race discrimination from our legal system. Including people of color in the legal system and taking other steps to promote color-blind justice will help to ensure that equal justice for all is a reality not just a "Great American Myth."

Activities of the Law Related Education Committee

By Robert G. Wright

The Law Related Education Committee of the Young Lawyers section is and has been a very active committee which provides a source for the Salt Lake City and other community members to improve their knowledge and awareness of the Utah and National Legal Systems and of these individuals' legal rights and duties. The committee also provides young Utah lawyers an opportunity to provide community and public service.

The Committee is currently involved in several projects which will promote education about the legal system. The People's Law Seminar consists of a number of seminars held over a six-week period in the fall and spring to inform members of the public of their rights and duties in specific areas of the law including the judicial system, consumer credit, wills and estates, business organizations, landlord tenant law and domestic law.

The Committee will also continue with its "Law School for Non-Lawyers" Program. This program consists of a series of lectures held at the Salt Lake Community, Granger, and this year, at the Sandy Community Public Library. This will be the fifth year for the program.

The Committee hopes to continue working with the public libraries in the Provo/Orem area as well as the Ogden area. These programs in all libraries will consist of five to six lectures monthly opened to the public. The program consists of inviting lawyers to speak at the programs on such topics as employment law, domestic law, criminal law, consumer law, and wills and estates.

The High School Guest Lecture Program is a very well received project which the Committee is continuing. The program initially targeted High Schools in the Salt Lake City area. However, the committee has now expanded the program to cover schools in the Ogden through Provo area.

Last year, committee members were able to make several visits to several schools and talk about the Bill of Rights. The members hope to expand the lecture series this year to include the Constitution and any other areas of law which may be very applicable. One such area this year may be sexual harassment or other such employment related areas.

Finally, the committee will continue distributing its "On Your Own" pamphlet to High School graduating Seniors. The committee has received a favorable response from School Districts which have distributed the pamphlets last year and in previous years.

CASE SUMMARIES

By Clark R. Nielsen

CHILD SUPPORT

A divorce decree providing that future child support would be automatically adjusted by the parties to reflect changes in the father's income, whether up or down, directly contravenes Utah Code Ann. § 78-45-7(1) (1992). A child support order should only be modified based upon a showing of material change in circumstances. Such a provision disregards other dispositive factors, including the parties' living expenses. The decree provision was in error.

Judge Orme, concurring in the result, opines that this case is different than a stipulated arrangement whereby support might increase in accordance with a fixed percentage, the consumer price index, or a proportion of the adjusted gross income. In his view, such arrangements ought to be permitted. He concurs in the result in this case because the language and stipulation also permitted a decrease as well as an increase.

Grover v. Grover, 198 Utah Adv. Rep. ___ (Appeals Ct. October 15, 1992). (Judge Russon, with Judge Garff concurring, Judge Orme concurring in the result.)

STANDARD OF REVIEW, ADMINISTRATIVE PROCEEDINGS, STATUTORY INTERPRETATION

A Court of Appeals panel, Judges Billings, Greenwood and Bench, more clearly focuses upon a growing disagreement in the Court of Appeals regarding standards of review in various types of cases. In the instant case, the majority opinion applies *Morton International, Inc. v. Auditing Div.*, 814 P.2d 581 (Utah 1991) to review the administrative law judge's interpretation of Utah Code Ann. § 35-2-14 regarding exposure to injurious amounts of asbestos. The court did not find an implicit grant of discretion to the administrative agency in the statute and therefore did not allow deference to the agency's decision and reviewed the interpretation of the statute under a correction of error standard. The court then reviewed the statute and discussed at length various relevant principles to statutory interpretation and determination of legislative intent. The court held that the statute is ambiguous in some aspects, but its plain language did not allow for the "quantitative or temporal requirements" added in the ALJ's definition. Determining that the ALJ had erred in interpreting the requirements of the asbestos injury statutes, the panel remanded to the commission for reconsideration of the facts in light of the panel's interpretation of the statutes established in the opinion.

The dissent, by Judge Bench, criticized the majority's expansive articulation of the standard of review and statutory interpretation in resolving ambiguity. Judge Bench would find that the statute is not ambiguous. The dissenting opinion claims that while attempting to set forth the standard of review in the *Morton* case the majority does not follow the dictates of *Morton* in applying the standard. According to the dissent, the commission found that the decedent's exposure to asbestos while employed by the respondent was not a contributing cause of the disease. The petitioner had failed to show any likelihood of a different result on remand and any erroneous interpretation of the statute was harmless error. Therefore, if there was any erroneous interpretation of the statute by the ALJ, the petitioner was not prejudiced thereby. In essence, the dissent contends that the majority opinion fails to defer to the ALJ's factual determinations or the application of the facts involved.

Luckau v. Board of Review, 197 Utah Adv. Rep. ___ (Appeals Ct. October 16, 1992) (Judge Greenwood, with Judge Billings concurring. Dissenting opinion by Judge Bench).

STANDARD OF REVIEW, REASONABLE SUSPICION AND VOLUNTARINESS OF CONSENT

Writing the main opinion for the panel in this case, Judge Greenwood applies a standard of review rejected by other panel members. The basic issue was whether the police officer's stop of the defendant was based upon reasonable, articulable suspicion. Judge Greenwood concluded that it was not and that "the facts do not support a reasonable suspicion that defendant was engaged in criminal activities" when she was stopped by the officer and arrested on outstanding warrants. The main opinion applies a standard of review that the trial court's determination of reasonable suspicion should not be overturned unless clearly erroneous, relying upon *State v. Mendoza*, 748 P.2d 191 (Utah 1987). However, Justice Greenwood also recognized the "two-step analysis" in *State v. Ramirez*, 817 P.2d 774, 782 (Utah 1991). Although Judge Greenwood preferred to apply the two-step analysis of *Ramirez*, she concluded that the "clearly erroneous" standard in *Mendoza* was the Supreme Court's most recent pronouncement. Although the trial court did not enter written findings of fact, there was a "de facto finding" of reasonable suspicion inherent in the court's denial of the motion to suppress. Judge Greenwood concluded that that "de facto finding" was "clearly erroneous."

Judge Jackson joined in Judge Greenwood's conclusion that there was no reasonable suspicion to stop the defendant based upon the objective facts, suggesting that the defendant might be involved in criminal activity. However, his concurring opinion discusses a growing divergence among the court's panels as to the interpretation and application of standards of review in voluntariness, consent, probable cause, and reasonable suspicion cases. Judge Jackson opines that some panels apply the standards of *Ramirez* while other panels apply more simple standards of clearly erroneous or interpretation of law standards. He believes that *Ramirez* seems to hold that all rulings regarding admission of evidence are questions of law and must be reviewed for correctness. Judge Jackson suggests this is a serious erosion of the trial court's discretion traditionally exercised in trial procedures and admissibility of evidence.

Furthermore, other appellate panels have labelled motions to suppress as mixed questions of law and fact and applied the "two-step" approach contrary to the *Mendoza* standard. The voluntariness of consent should be considered wholly a question of fact because voluntariness involves an inquiry into a person's subjective state of mind. The trial court is better situated to establish those facts. Judge Jackson criticized *State v. Vigil*, 815

P.2d 1296 (Utah Ct. App. 1991) as offering little rationale as to why voluntariness of consent is a mixed question of law and fact as opposed to simply defining the fact. This concurring opinion also suggests that the Utah Supreme Court should recognize the growing disagreement between opinions on these issues and should try to bring consensus to the issue of appellate review.

In his dissenting opinion, Judge Bench criticizes the panel majority for failing to actually apply the standard of review that the trial court's findings should not be reversed unless "clearly erroneous". Judge Bench argues that the majority, in effect, gives lip service to the standard but then sweeps the trial court determination under without giving it any deference whatever and without explaining why the "de facto findings" are clearly erroneous.

State v. Sykes, 198 Utah Adv. Rep. ___ (Appeals Ct. October 19, 1992) (Judge Greenwood; concurring opinion by Judge Jackson; dissenting opinion by Judge Bench)

UNLAWFUL DETAINER, SERVICE OF SUMMONS

Under Utah Code Ann. § 78-36-8 a served summons in a claim for unlawful detainer must contain an endorsement by the issuing court stating the number of days in which the defendant had to appear and defend the action. The court held that the defendant's failure to assert this defense prior to entering an appearance and admitting liability in the case waived any possible objection to the sufficiency of the service of process. Because the defendant did not timely raise the issue by motion or answer, and had answered the amended complaint without raising the defense, the defense was waived under Utah R. Civ. P. 12(h). Therefore, the trial court erred in refusing to grant the plaintiff's motion to treble damages for unlawful detainer.

Fowler v. Seiter, 196 Utah Adv. Rep. 26 (Appeals Ct. September 23, 1992) (Judge Russon with Judges Billings and Orme)

Stevens v. Collard, 194 Utah Adv. Rep. 60 (Utah App. 1992) —

In *Stevens v. Collard*, the Court of Appeals explained the consequences of being defaulted for failure to answer a complaint or petition.

Appellee filed a petition to modify a divorce decree nearly six years after she and appellant were divorced, seeking to have sole permanent custody of their minor child transferred from appellant to herself. The appellant failed to respond, and his default was entered. The trial judge determined, based solely on appellant's default, that there was a substantial change in circumstances that justified reopening the question of custody. After a hearing on the question of parental fitness, the trial judge transferred custody of the minor child to appellee.

On appeal, the court held that default itself constitutes only an admission that the facts alleged in the complaint (or petition) are true, not that they state a claim for relief. The court examined the allegations of the petition and concluded that they were insufficient alone to justify reopening the question of custody. Only two of the allegations concerned material changes, and those allegations were not sufficiently described to permit a conclusion that the custody issue should be revisited. The court remanded to the trial court for an evidentiary hearing to determine whether the two possible material changes in circumstances had a negative effect on the best interests of the child.

State v. Cummins, 194 Utah Adv. Rep. 48 (Utah App. 1992)

In *State vs. Cummins*, the Court of Appeals held that a criminal defense attorney's failure to meet an important time deadline constituted ineffective assistance of counsel.

Appellant was convicted of second degree murder based on the beating death of a co-worker at the Western Brine Shrimp Company on the northwest shore of the Great Salt Lake. The evidence showed the defendant had been severely intoxicated at the time of the alleged offense.

Appellant's attorney decided to introduce evidence of appellant's level of intoxication in support of a defense that he was unable to form the intent necessary for second degree murder. However, the attorney failed to timely file the required notices of the intent to assert a mental state defense. As a result, defendant was precluded from arguing to the jury that he was too intoxicated to form the intent to kill. On appeal, appellant claimed, *inter alia*, ineffective assistance of counsel.

The rule in Utah for ineffective assistance of counsel in a criminal case is that the defendant must show (1) his counsel's performance was outside the wide range of professionally competent assistance, and therefore, "objectively deficient," and (2) there exists a reasonable probability that, absent the deficient conduct, the verdict would have been more favorable to the defendant."

The court held that defense counsel's failure to timely file the notices constituted objectively deficient representation. The court remanded for an evidentiary hearing, pursuant to Utah Rule of Appellate Procedure 23B, on the issue of prejudice.

State v. Kavmark, 195 Utah Adv. Rep. 7 (Ct. App. 1992)

In *State v. Kavmark*, the Court of Appeals explained the standard in determining whether a juror should be excused for bias.

Defendants were charged with unlawful use of a financial transaction card. After a jury trial, they were convicted. The Court of Appeals reversed because of the trial court's failure to excuse two jurors.

In Utah, once a juror in a criminal case makes a statement facially demonstrating bias or prejudice, the juror must be excused unless further questioning satisfies the court that the initial inference of bias has been rebutted. The inference of bias is rebutted if further questioning shows that the initial statement was merely the "product of a light impression" that would not "close the mind against the testimony that may be offered in opposition."

In *Kavmark*, one of the jurors complained that he believed guilty defendants sometimes were acquitted because of "technicalities." He stated he believed the guilty should come forth, admit their guilt and accept the punishment. Upon questioning by the judge, he conceded that everyone was entitled to a day in court and that persons who are not guilty are, of course, justified in contesting prosecutions against them. But he reiterated his frustration with "technicalities." He also stated that he believed criminal defense lawyers occasionally worked injustice by successfully defending persons who were guilty of serious crimes.

A second juror stated that she would tend to believe a person in authority over a person not in authority. She would give a

police officer, for example, a greater degree of credibility.

The Court of Appeals held that both of these prospective jurors should have been excused for cause by the trial court, and that the trial court's failure to grant defense counsel's challenge for cause constituted an abuse of discretion. The conviction was reversed and the case remanded for a new trial.

Christiansen v. Holiday Rent-a-Car, 193 Utah Adv. Rep. 11 (Ct. App. 1992)

In *Christiansen v. Holiday Rent-a-Car*, a personal injury plaintiff discovered one of the potential pitfalls in making separate settlements with defendants.

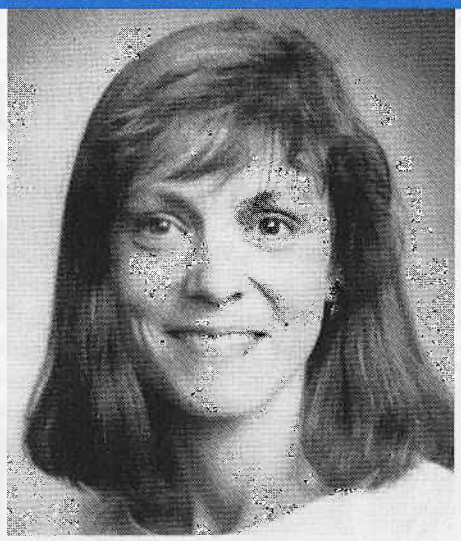
Third party defendant Airport Shuttle Parking ("Airport") leased a parcel of property and buildings near Salt Lake International Airport in 1979. Airport sublet part of the building space to defendant Holiday Rent-a-Car ("Holiday"). As part of the sublease arrangement, Airport apparently agreed to obtain liability insurance that would cover Holiday. Consequently, shortly after moving into its building, Holiday cancelled its existing liability policy.

Shortly after taking possession of the premises, Holiday employees removed the cover from a manhole located near the building. The plaintiff, Christiansen, fell into the open manhole and injured her back. Christiansen later filed suit alleging negligence on the part of Holiday's employees. Holiday tendered its defense to Airport based on the agreement to provide insurance. Airport forwarded the letter to its insurer, which agreed to defend Airport, but not Holiday. Holiday then filed a third party complaint against Airport for breach of the sublease agreement to obtain liability insurance.

Christiansen and Holiday then reached a settlement under which Holiday agreed to pay Christiansen $15,000.00 and assigned to her Holiday's claims against Airport and Airport's insurer, and in return, Christiansen agreed not to seek any further recovery from Holiday. Holiday and Christiansen also submitted the issue of damages for a "conditional determination." Damages where thereby determined to be $246,033.88. Airport appeared at the hearing to protest, but did not participate. Airport's insurer was not represented at the hearing.

It was subsequently determined that Airport did, in fact, breach its sublease agreement to obtain liability insurance for Holiday. However, the trial court determined that Holiday's only damage from the breach was the $15,000.00 Holiday had paid to appellant.

On appeal, the Court of Appeals held first that the trial court had correctly determined that Holiday was not covered by Airport's insurance policy. On the issue of damages, the court held that Airport was liable to Holiday for any amount that Airport's insurer would have been obligated to pay on behalf of Holiday under the terms of the policy which should have been procured by Airport. The court then held that because Holiday actually only had to pay Christiansen $15,000.00, Holiday's recovery from Airport for breach of contract could be no more than that $15,000.00. The end result was that the original plaintiff, Christiansen, recovered a total of $30,000.00 for her injuries despite the fact that her actual damages arguably were as high as $246,033.88.



The Autobiography of Malcolm X

As Told to Alex Haley
Ballantine Books, 460 pages

Reviewed by Betsy L. Ross

Malcolm X has, in the past, been identified with hate. In his autobiography as told to Alex Haley over a period of time in 1963 and 1964, he predicted this:

> I want you to just watch and see if I'm not right in what I say: that the white man, in his press, is going to identify me with "hate." He will make use of me dead, as he has made use of me alive, as a convenient symbol of "hatred" — and that will help him to escape facing the truth that all I have been doing is holding up a mirror to reflect, to show, the history of unspeakable crimes that his race has committed against my race.

And in the past, the largely white-controlled press and white-washed history have relegated Malcolm X to the edges of societal memory. There are reasons for this reaction to Malcolm X. Malcolm purposely made statements to alienate the white man. As he admitted to Alex Haley once:

> You know. . . why I have been able to have some affect is because I make a study of the weaknesses of this country and because the more the white man yelps, the more I know I have struck a nerve.

At the core of this approach was Malcolm's belief that progress could not be made in cooperation with the white man, that blacks had to learn to do for themselves — that any union with a white man was a union with the devil himself, with the very people who brought the black man to his dilemma. Thus, Malcolm X was much less palatable to white society that was Martin Luther King, who was willing to work within the white system.

It is this Malcolm X, the Malcolm X who is reported as saying, "We don't want to have anything to do with any race of dogs," referring to whites, that elicits the reaction from my friend who, upon learning that I was reading the autobiography and that I had seen the Spike Lee movie about Malcolm X, stated that he had made a conscious determination not to read the book or see the movie. Why, after all, he questioned, should he subject himself to hatred aimed at him for something he didn't do — the very sentiment that fuels the debate today concerning affirmative action.

Spike Lee, in his movie about Malcolm X, also poignantly revealed why whites may have misgiving about Malcolm X. It was a moment in the film of harshness and indictment of white liberal naivete. As Malcolm enters a college classroom to discuss his religion and politics, a blond-haired, blue-eyed young co-ed rushes up to him and with adoration and embarrassing innocence, attempts to distance herself from her culpable progenitors asking what she can do to help Malcolm's cause. Malcolm's reply was brief and blunt — nothing. With that answer, the arrow of impotence hit home; just as blacks had no influence or input into white society, so now do whites have no influence over the course of black nationalism.

Malcolm X has indeed, however, come to the fore in the last few years — becoming almost an historical fad. (Witness the proliferation of books published about his life in the past three years, including *By Any Means Necessary: The Trials and Tribulations of the Making of Malcolm X* by Spike Lee with Ralph Wiley (Hyperion 1992); *Malcolm X: In Our Own Image*, ed. by Joe Wood (St. Martin's, 1992); *Malcolm X: Speeches at Harvard*, ed. by

Archie Epps (Paragon House, 1991); *The Assassination of Malcolm X,* by Breitman, Porter and Smith (Pathfinder Press, 3d ed. 1991); *Malcolm X: the FBI File*, by Clayborne Carson (Carroll & Graf, 1991); and *Malcolm X: The Last Speeches,* ed. by Bruce Perry (Pathfinder, 1989), and the black and white teenagers wearing Malcolm X baseball caps.)

This phenomenon may be due to blacks playing more of a role in defining history. It may also be due to the fact that Malcolm's political stands the last year of his life seem to have ameliorated some, and focus on these creates a Malcolm whites need not fear. For example, after his trip to Mecca, Alex Haley reports Malcolm's statement to reporters:

> "My trip to Mecca has opened my eyes. I no longer subscribe to racism. I have adjusted my thinking to the point where I believe that whites are human beings" — a significant pause — "as long as this is borne out by their humane attitude toward Negroes."

Spike Lee, whose films in the past have exhibited a strong streak of black nationalism of his own, even appears to get into the thick of "de-demonizing" Malcolm. Macolm's autobiography, however, belies any complete metamorphosis. To the end of his autobiography, which, of course, ends prior to his violent death in 1965, Malcolm is still speaking in generalizations about whites:

> You see, most whites, even when they credit a Negro with some intelligence, will still feel that all he can talk about is the race issue; most whites never feel that Negroes can contribute anything to other areas of thought, and ideas.

It is difficult to know who the "real" Malcolm was toward the end of his life. One is very aware in reading his autobiography that he was guiding, forming, even creating in order to leave the message he intended. What is more difficult is to get a sense of what that message was. And that, perhaps, bespeaks of his humanness.

What is not real, but what is easier to grasp, is the characterization of the evil, hateful Malcolm X — the enemy of the whites, or the super-powerful black supremacist Malcolm X who would save his people. We grasp those powerful images because the are so accessible; they require so little thought and understanding. We can dismiss Malcolm X as evil or embrace him as a saviour. Neither requires that we understand him. The truth that emerges between the lines in this autobiography, is that he was a man who changed his mind about people and ideas, who evolved and who died precipitously, before time had the chance to ferment his apparently changing ideology. Interesting that Malcolm himself considered time so important:

> I have less patience with someone who doesn't wear a watch than with anyone else, for this type is not time-conscious. . . In all our deeds, the proper value and respect for time determines success or failure.

As much is revealed in the epilogue to the autobiography as in the main text. Alex Haley obtained an agreement from Malcolm that he, Alex Haley, could write an epilogue, and that Malcolm would have no editing prerogative. It is in the epilogue that the hewn rough edges in the main text are exposed, and an un-self-edited Malcolm appears. For example, Malcolm's criticisms and skepticism of women:

> "You can never fully trust any woman," he said. "I've got the only one I ever met whom I would trust seventy-five percent. . . I've told her like I tell you I've seen too many men destroyed by their wives, or their women."

The historical version of Malcolm is changing. Whatever else he is, "devil," "racist," "black supremacist," Malcolm appears in the autobiography as a man whose importance to the movement of black nationalism cannot be understated. Perhaps he should have the last words:

> Yes, I have cherished my "demagogue" role. I know that societies often have killed the people who have helped to change those societies. And if I can die having brought any light, having exposed any meaningful truth that will help to destroy the racist cancer that is malignant in the body of America — then, all of the credit is due to Allah. Only the mistakes have been mine.

Annual Founders' Day Luncheon

Hon. Norman H. Jackson, President of the Utah State Bar Foundation, presenting 1992 IOLTA grant award to Teresa Hensley, Immigration Services Program Director, Catholic Community Services of Utah, at the Foundation's Annual Founders' Day Luncheon.

Photo credit: Robert L. Schmid

The Utah Bar Foundation held it's annual Founders' Day Luncheon Meeting on December 7th at the Law & Justice Center. Guests included Bar commissioners and officials, previous Foundation trustees, Supreme Court justices, grant and award recipients, and representatives from participating banks and credit unions.

Hon. Norman H. Jackson, President, conducted the program and recounted the development of the Foundation. Former Trustee Bert L. Dart was presented with a plaque for his years of service to the Bar Foundation. Law school students Cathleen Clark (University of Utah) and Christine Jepsen (Brigham Young University) were recognized as the recipients of the Foundation's 1992 Community Scholarship recipients. Law school students Stephen H. Urquhart (Brigham Young University) and Rashelle Perry (University of Utah) were recognized as the recipients of the Foundation's 1992 Ethics Awards.

Teresa Hensley, Program Director at the Catholic Community Services of Utah, explained how Foundation funds were used to assist the agency's immigration program. Lee E. Teitelbaum, Dean of the College of Law at the University of Utah, reported on the progress of the Public Service Loan Repayment Assistance Program for recent graduates, which is supported by a Foundation grant.

Richard C. Cahoon, Foundation Trustee, explained that the grant awards are made possible through the cooperation of participating lawyers and law firms, banks and credit unions and expressed special thanks to the participating financial institutions. Peter K. Ellison, Executive Vice President and Senior Trust Officer at Zions First National Bank, representing the banking community, and Ross E. Kendell, President at Key Bank, and Chairman of the Board of Directors of the Utah Bankers Association, made brief remarks accepting the appreciation of the Board of Trustees.

The Utah Bar Foundation was organized in 1963 as a non-profit charitable Utah corporation. All active members of the Utah Bar are members and can make direct contributions and/or voluntarily participate in the IOLTA program which generates funds for grants. Since 1983, when the Utah Supreme Court approved the petition of the Utah Bar Foundation to initiate the Interest on Lawyers' Trust Accounts (IOLTA) Program, the Foundation has provided over $1 million in grants to support legal aid to the disadvantaged and disabled, the administration of justice, legal education and other law-related programs and projects. The Board of Trustees consider grant applications annually and awards grants for worthwhile law-related purposes.

The 1992-93 Board of Trustees and officers are Hon. Norman H. Jackson (President), Ellen M. Maycock (Vice-President), James B. Lee (Secretary-Treasurer), Richard C. Cahoon, Stephen B. Nebeker, Carman E. Kipp, and Jane A. Marquardt.

CLE CALENDAR

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.

THE NEW EXECUTIVE COMPENSATION DISCLOSURE REQUIREMENTS plus SECTION 16 DEVELOPMENTS

CLE Credit: For information call the Bar at 531-9095
Date: January 14 & 15, 1993
Place: Utah Law & Justice Center
Fee: $345 both days plus $24 MCLE fee
$195 for one day plus $12 MCLE Fee
Time: 9:00 a.m. to 5:00 p.m. both days

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.

NEW DIRECTIONS IN FEDERAL CIVIL PRACTICE AND PROCEDURE

CLE Credit: 4.5 hours
Date: January 21, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6.75 MCLE Fee
Time: 10:00 a.m. to 2:30 p.m.

A PRACTICAL GUIDE TO BANKRUPTCY LITIGATION FOR COMMERCIAL LITIGATORS

CLE Credit: 4 hours
Date: January 28, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 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.

INNOVATIVE THERMAL TREATMENT TECHNOLOGIES IN HAZARDOUS WASTE REMEDIATION OPERATIONS: PART 1, THERMALLY ENHANCED VOLATILIZATION

CLE Credit: 4 hours
Date: February 18, 1993
Place: Utah Law & Justice Center
Fee: Preregistration – $150 plus $6 MCLE Fee
Day of telecast – $185 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.

1993 MID-YEAR MEETING

CLE Credit: 8 hours
Date: March 11-13, 1993
Place: St. George, Utah
Fee: Call
Time: Call

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

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

Name Phone

Address City, State, ZIP

Bar Number American Express/MasterCard/VISA Exp. Date

Signature

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

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

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

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.

HOW TO TAKE EFFECTIVE DEPOSITIONS

CLE Credit: 4 hours
Date: March 16, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 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.

INNOVATIVE THERMAL TREATMENT TECHNOLOGIES IN HAZARDOUS WASTE REMEDIATION OPERATIONS: PART 2, CHANGING MOLECULAR STRUCTURE/PHYSICAL STATES

CLE Credit: 4 hours
Date: March 18, 1993
Place: Utah Law & Justice Center
Fee: Preregistration – $150 plus $6 MCLE Fee
Day of telecast – $185 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

CLASSIFIED ADS

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

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

BOOKS FOR SALE

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

For Sale, the 1991 & 1992 edition of Martindale-Hubble Law Directory. Open to any reasonable offer. Please call Flanders and Associates at (801) 355-3839.

OFFICE SHARING/SPACE AVAILABLE

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 traditional decor. Present lessee willing to assist with rent subsidy. 34 months left on lease. Call (801) 322-1373.

Deluxe office space at 7821 South 700 East, Sandy. Space for two (2) attorneys and staff. Includes two spacious offices, large reception area, conference room/library, file storage, convenient parking adjacent to building. Call (801) 272-1013.

Office sharing available at 7050 South Union Park Avenue (next to the Holiday Spa) with five other attorneys. Window office with secretarial services or space for your own secretary, reception area, copier, telephone, fax machine and conference room. Close freeway access to entire valley. Contact Wynn at (801) 566-3688.

Professional office space available for one or two attorneys. Located at 261 East 300 South, #300. The space includes private offices, reception area, conference room, library, file storage and more. Convenient parking immediately adjacent to the building for both clients and staff. Call (801) 532-1601.

POSITIONS SOUGHT

Experienced construction Attorney seeks position, preferably with construction company. Utah licensed, 8+ years experience, 6+ years in construction with reputable local law firm. Construction background, general practice with emphasis in construction litigation, federal and state government claims. For resume or interview, call (801) 942-2773, or P. O. Box 17822, Salt Lake City, Utah 84117.

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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.

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.

Part-time/contract work in writing/research sought by attorney with excellent credentials (Moot Court, law review, Coif, Phi Kappa Phi) and background in civil litigation and civil/criminal appellate work. For discovery, motions, research (including computer), brief writing, call M. Boudreau at (801) 466-6531.

Need extra secretarial help? Legal Secretary with 5 years experience. Type 90 wpm. Notary Public. Does work at home. Have Word Perfect 5.1 and billing program. Will pick up and deliver documents. Fast turn around time. Call Laura Gallagher (801) 255-6065.

Legal Secretary/Paralegal — Need help with those extra large projects or the little things taking up your time? Call Laurie (801) 964-1659. Type 100+ wpm, litigation, personal injury, bankruptcy, divorce, wills, contracts, etc. Notary Public. Fast and efficient. Pick up and delivery. Reasonable rates.

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.

Listing of Articles Published in 1992

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)

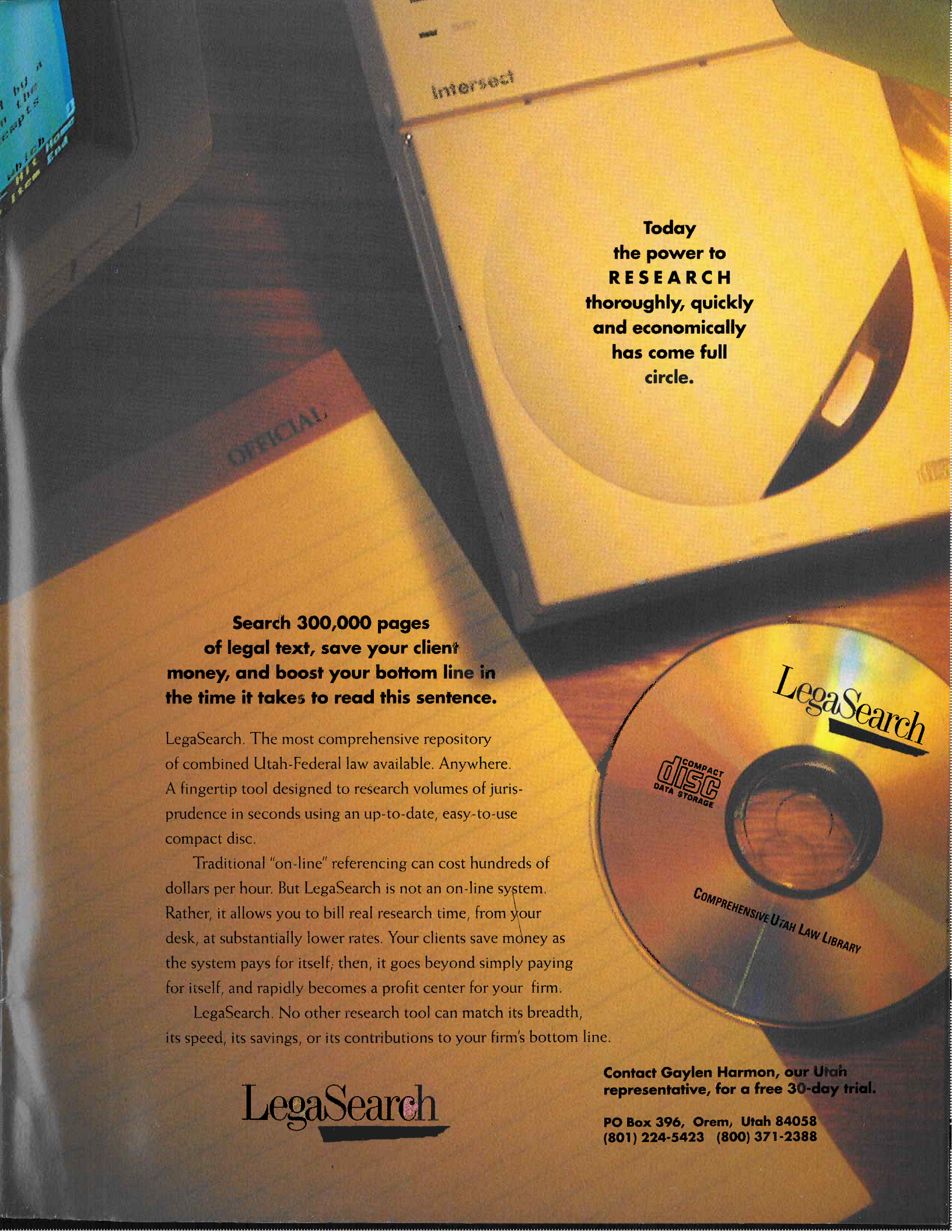
B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than one-half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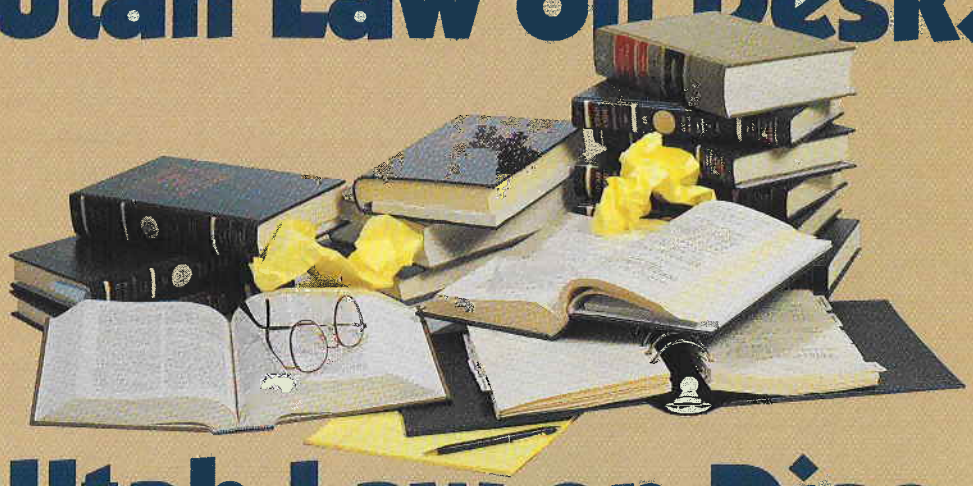

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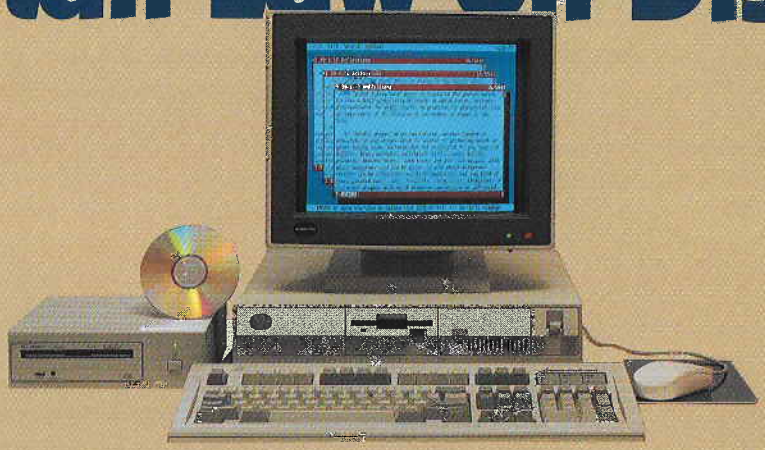

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