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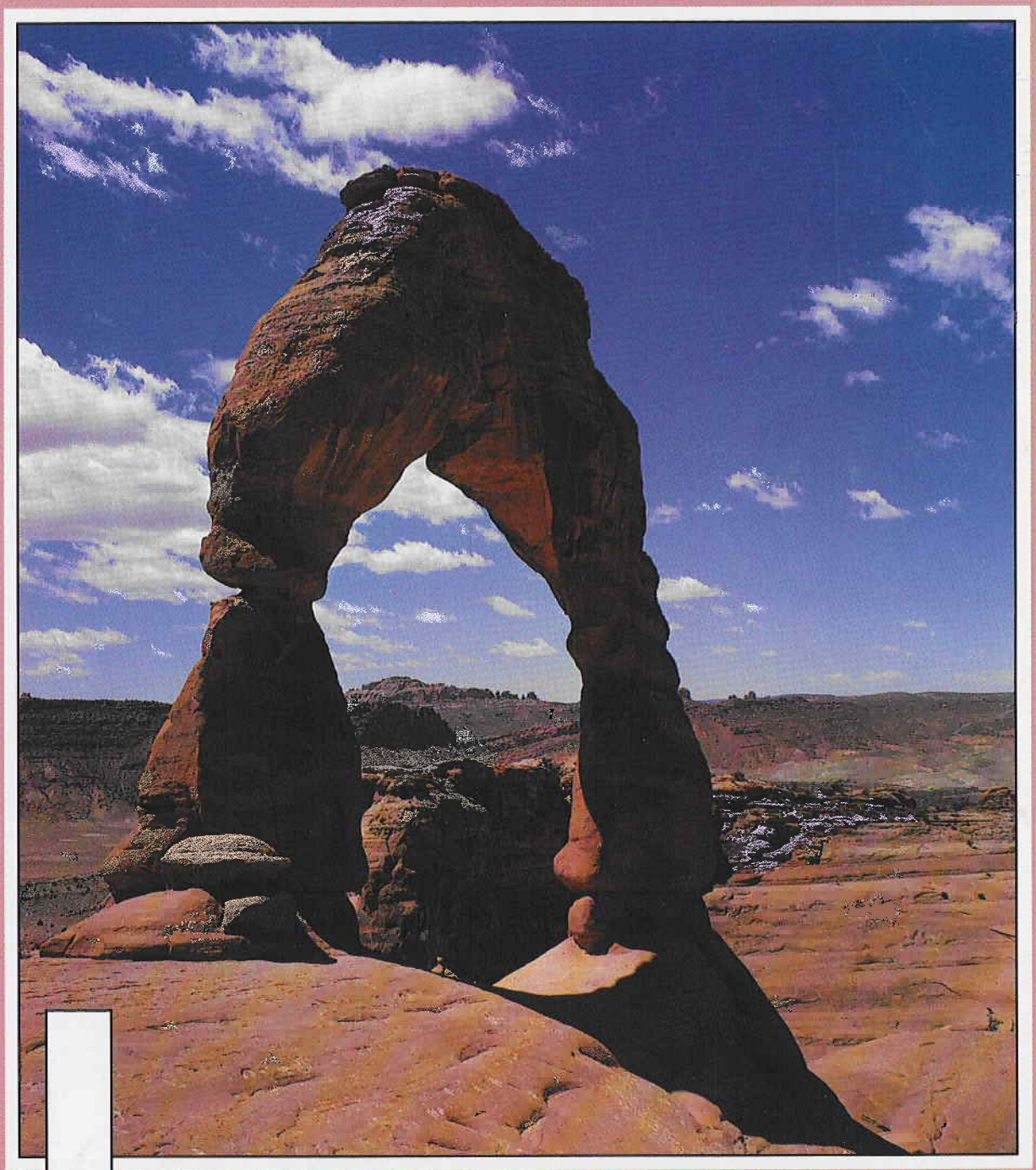

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COVER: Delicate Arch, Moab, Utah, taken by Randy L. Dryer, a partner in Parsons, Behle & Latimer.

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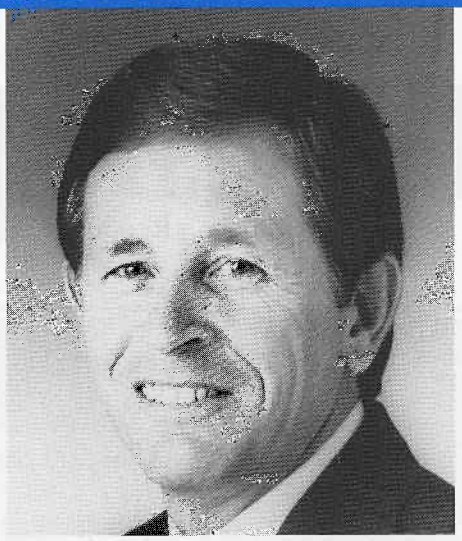


Justice For All and All For Justice — A Call to Action

By Randy L. Dryer

We recently celebrated Law Day with a series of day long activities sponsored by the Bar's Law Day/Law Related Education Committees. Although the inclement weather had an adverse impact on the attendance, the activities were excellent and the organizers are to be commended. As part of the celebration, I had the opportunity to give an address which was published in the Intermountain Commercial Record. The subject bears repeating in this space.

Law Day is a time to pay tribute to our Constitution and our system of justice. A constitution and system which is unparalleled in human existence in its recognition and protection of individual freedoms and liberties. Law Day is also a time to pause and reflect on whether our justice system is still, after 200 years, fulfilling the greatest constitutional principle — equal justice for all. From this observer's perspective, the answer to this latter inquiry is a qualified yes; qualified by the concern that the ever growing pressures on the justice system, perhaps felt greater elsewhere than in Utah, threaten to render equal justice for all a hollow principle.

OUR ENDURING CONSTITUTION

Few things endure 200 plus years. No other Constitution has lasted as long as ours. Nearly two-thirds of the worlds 160 nation constitutions have been adopted or revised since 1970 and only 14 pre-date World War II. It has been calculated that 53% of the independent states of the world have been under more than one constitution since the second world war. The average nation has had two constitutions since 1945 and two states, Syria and Thailand, have each had nine constitutions over the past 40 years. These figures dramatically illustrate the precarious existence of any constitution. By these standards, the Constitution of the United States has proven remarkably durable. The genius of the United States Constitution lies not in its eloquent description of fundamental principles, such as due process, freedom of speech and equal justice for all, but in its creation of the machinery to translate these constitutional principles into constitutional reality. At the heart of that machinery is our justice system. It is our justice system, in general, and judges and lawyers, in particular, which protects and preserves our cherished freedoms and affords a forum for the peaceful resolution of conflict.

THE PROMISE OF JUSTICE FOR ALL

The concept of "justice for all" permeates virtually every significant early legal document — from the Constitution to the Pledge of Allegiance. The preamble to the Constitution cites the establishment of justice as one of the major purposes for the formation of a new national government. The Fourteenth Amendment guarantees equal protection of the laws. And generations of Americans have begun their school day standing to recite the Pledge of Allegiance which concludes by promising "justice for all."

In an effort to guarantee justice for all, our nation has created an ever expanding system of laws and rights for the enjoyment of society. To ensure the protection of these liberties from an over zealous government and from each other and to assure the ability to redress any encroachment of one's rights, we have created a system of justice that mandates fairness and impartial hearing. As our population expanded, our justice system expanded as well, adding jurisdictions at the federal,

state, county and local levels. Today, each of the numerous jurisdictions contain many elements, including courts, law enforcement, public defenders, civil legal services, prosecutors, corrections and guardian *ad litem* programs.

By most objective standards, America's effort to establish justice for all has been a success. Our justice system has protected society against lawlessness and chaos; extended the rights and guarantees of the Constitution and Bill of Rights to those previously excluded because of race, religion or gender; and, provided a system allowing the free exercise of commerce without unfair burdens. Other nations have viewed our justice system with considerable envy. We see the newly emerging democracies of central and eastern Europe looking to our system as a model to ensure fairness and due process in their now open societies. Indeed, our Constitution has become our most significant export. As Venezuelan Ambassador Eurique Tejera Paris once remarked, "In a dogmatic world, the U.S. Constitution [and by implication its justice system] is still regarded as the greatest of dogmas".

THE JUSTICE SYSTEM UNDER SIEGE

Unfortunately, the American justice system is today under siege and its very existence is threatened as never before. This threat arises not from a foreign power nor through an authoritarian domestic regime. The justice system, and the notion of "justice for all" is threatened on a variety of fronts.

First, the dramatic increase in the number of criminal cases being processed through the system, particularly drug prosecutions, has strained available resources almost to a breaking point. The flood of criminal prosecutions has resulted in a virtual shut down of the civil justice system in many jurisdictions. In 1992, the civil jury system was actually shut down for all or part of the year in ten states. The delay for a civil trial in certain metropolitan areas like Philadelphia and Los Angeles is now 5 years. In three of the four divisions in the Northern District of Florida, not a single civil case has been tried before a jury since May 1989. Stepped-up enforcement efforts in the war on drugs, new legislation and an increasingly complicated regulatory environment all result in more cases to be processed through the system. A single example illustrates the problem. Congress, in response to the public cry for tougher sentences for criminals, greatly reduced the sentencing discretion of federal judges and required the imposition of minimum — mandatory sentences for certain types of crimes. One unanticipated result has been that more and more cases are being tried and not resolved by plea bargain since much of the incentive for a plea has now been eliminated.

Second, the increased workload on the state justice system has been met not with a concomitant increase in resources, but with a dramatic decrease in funding as more and more states experience budgetary shortfalls. In 1991-1992, 35 states cut their budget for the judiciary despite the increased pressures on the system. The crisis in funding became so severe in nine states that litigation was commenced to address the lack of funding. The most celebrated action involved the state of New York, where the chief justice of the state sued Governor Cuomo and the legislature over cuts in the budget for the courts. The lawsuit was eventually settled out of court with substantial funds being restored to the judiciary's budget. Fortunately, the Utah legislature has been more responsive to the funding needs of our state courts, but the judiciary has not gone untouched by budgetary pressures. For example, the Judiciary requested funding for 18 additional juvenile probation officers due to the dramatic increase in the number of juvenile offenders. The legislature appropriated no funds. The Judiciary also sought $1.4 million to increase courtroom security and received no funds. On the federal level, the situation is only slightly better. The total budget for the federal court system is less than 1/10 of 1% of the federal budget.

Last fall, Congress allocated 13% less in funds to the judicial branch than the Judicial Conference of the United States had requested for fiscal year 1993. The budget cuts threaten funding for many areas and programs, including counsel for indigent parties and civil jury trials.

Third, the increasing cost of litigation has denied effective access to the indigent and much of middle America. Studies demonstrate that little more than 20% of the legal needs of the poor are met each year. The American Lawyer magazine recently devoted an entire issue to a special report documenting the lack of criminal representation for indigents. The high costs of litigation burden everyone. Our businesses spend too much on legal expenses at a time when they are confronted with increasingly intense global competition. Business passes on these costs to consumers, who then pay unnecessarily high prices for the products and services they buy. Even for those who can afford litigation the delay alone can have tremendous adverse consequences.

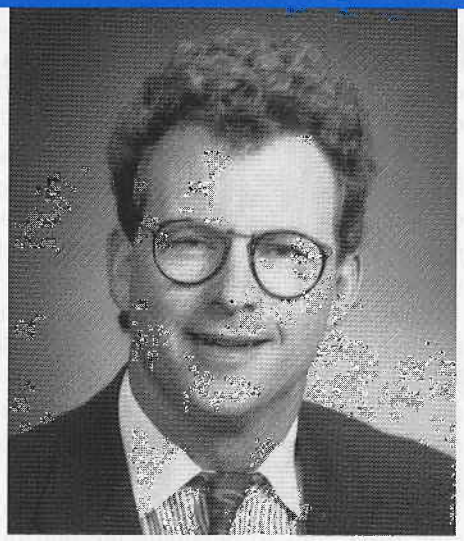
ABA President Michael McWilliams recently stated that, "America is in the throes of a justice deficit — because ours has become a system of justice without equal access to it; without adequate representation within it; and without sufficient and balanced funding for it." While President McWilliams' statement may seem somewhat overstated to those of us in Utah where the system is relatively healthy, it unfortunately portrays an accurate picture in many parts of the country.

A CALL TO ACTION

Who is responsible for the current crisis in our justice system? Is it lawyers who file too many frivolous claims and prolong litigation once commenced? Is it legislators who pass too many new laws, demand tougher prosecution for crime and then underfund the system? Is it runaway juries who grant mega verdicts to plaintiffs which in turn encourages the general public to seek litigation as the first and not the last resort? Or is it a system that places too much emphasis on rights and not enough on responsibilities? Who is to blame is not really important and now is not the time for finger pointing. What is important is that we, as a nation, deal with this serious crisis in the third branch of government. Justice for all is not merely the responsibility of lawyers or judges or of congress or state legislators. All Americans lawyer and non-lawyer alike, have the responsibility of fulfilling this constitutional promise. Unfortunately, we can no longer have justice for all in this country until we have all for justice. Until we have a broad base, national commitment to adequately fund the justice system, the promise of justice for all in our Pledge of Allegiance will ring hollow for our children and future generations. Fortunately, there are signs that the crisis is being addressed. The American Bar Association has designated its theme for 1993 as "Justice for All

— All for Justice". The rhetoric of lawyer bashing so prominent during the Bush administration has now subsided with the change in power in the executive branch. Finger pointing has lessened and efforts are underway to constructively address the situation. Special government and citizen task forces throughout the country such as the Brookings Institute and others have been formed to find solutions. The movement toward meaningful procedural reform in our civil system has gained steam and the next few years will see significant revisions in our judicial procedures and policies. We are now beginning to see the fruits of the Civil Justice Reform Act, enacted in 1990, which requires federal district courts to implement specific expense and delay reduction plans by the end of 1993. More and more companies and individuals are turning toward alternative dispute resolution methods of solving conflicts such as arbitration, conciliation and mediation. Utah's Federal Court has implemented a court run ADR program to give parties a quicker and less expensive alternative to traditional legislation. Nationwide, the movement to establish ADR programs has become a veritable avalanche.

George Will said that the business of America is neither business nor war. The business of America is justice and securing the blessings of liberty. All of us need to make that business of America our personal business. Every American must be persuaded that the justice system is theirs, that it protects their lives from injury, their rights from violation and their property from harm. We must encourage and convince all Americans from all walks of life to join in this effort to support our justice system so as to ensure that the liberties and benefits we have enjoyed for over 200 years continue for our children. We simply cannot let "justice for all" become an eloquent, but empty phrase.



What You Have Learned in Four Sentences or Fewer

By Paul T. Moxley

Charles A. Beard, an American historian, was once asked by a student if he could sum up in five minutes everything he had learned in a half century of teaching and writing. Professor Beard said he could do better than that; he could sum up everything he had learned in four sentences:

1. The bee that robs the flower also fertilizes it.

2. When it is dark enough you can see the stars.

3. Whom the gods would destroy, they first make mad with power.

4. The mills of the gods grind slowly but they grind exceedingly well.

The student's question and Dr. Beard's reply served as the basis for the *Saturday Review* series, "What I Have Learned." But sometimes, after the fashion of Dr. Beard, it would take the form of pithy sentences. Here are some that stick in the mind.

Dr. Albert Schweitzer said the one thing he had learned in his life was that he had learned nothing. Then he asked if he could think further on the question. The next morning, he said he thought he had perhaps learned a few things after all. He leaned forward and ticked them off on his fingers:

1. If you have something difficult to do, don't expect people to roll stones out of your way.

2. It is not necessary to go off on a tour of great cathedrals in order to find the Deity.

3. Reverence for life is where religion and philosophy can meet and where society must try to go.

4. The misery I have seen gives me strength, and faith in my fellow man supports my confidence in the future.

In 1959, Jawaharlal Nehru said he was inclined to agree with Albert Schweitzer's first response to the question. He said he believed he had learned very little, and doubted he would change his mind. More than a year later, however, he said he found his mind reverting to such speculations. Surely, he told himself, there was something he had learned worth passing along. Some things came to mind. He had learned from Mahatma Gandhi that in undertaking a journey it is important not to lose sight of one's destination. "There will be many turnings along the way," Gandhi had said. "It will be easy to get lost on attractive bypaths that lead nowhere. Resist deflections."

Nehru said he had also learned that genuine friendships are rare, and "they must be cherished and nurtured."

Yet another lesson: "People in politics must make known their gratitude to others for any generosity, however small. But they make a great mistake if they expect others to make known any gratitude for generosity to them, however large."

"The higher the office and the greater the responsibility the greater the loneliness."

John F. Kennedy (April 1963): "I need a lot of time to think about the question. Maybe a year or two. Right now, I like to believe that people can be trusted to make the right choices — given enough time and enough facts. One of the difficulties of being in a position of leadership is that there is seldom enough time, never enough facts."

Robert F. Kennedy: "If I had to pick one thing I think I have learned it is that the greatest privilege anyone with high responsibilities can have is to be able to call on those who really know and whose honesty he respects."

Albert Einstein said he felt challenged by Professor Beard's pithy aphorisms. He wanted to submit three items for himself:

1. Pay close attention to the curiosities of a child; this is where the search for knowledge is freshest and most valuable.

2. The advent of nuclear energy has changed everything about the world except our way of looking at it.

3. My ideas caused people to reexamine Newtonian physics. It is inevitable that my own ideas will be reexamined and supplanted. If they are not, there will have been a gross failure somewhere.

One of the most quoted aphorisms in literature is Alexander Pope's, "A little learning is a dangerous thing." T. H. Huxley pondered its implications. "Where is the person," he asked, "who has enough of it to be out of danger?"

William James: "That whole drift of my education goes to persuade me that the world of our present consciousness is only one of many worlds of consciousness that exist."

Any life worth living, said Keats, is a continual allegory, "and very few eyes can see the mystery of that life." But we need not be diminished by mystery. Some things we can see, or attempt to see. We can see that it is not the answers but the mystery that leads us on. We can see large possibilities and purposes and attempt to connect the two. We may not know all there is to know about ourselves and others but we know the meaning of mutual dependence. We need not wait until the nature of evil is fully fathomed before it can be confronted. "I have tried," said St. Augustine, "to locate the source of evil and I have failed."

Dr. Bernard Lown, the famed Boston cardiologist, once quoted T.S. Eliot as asking: "Where is the wisdom we lost in knowledge? Where is the knowledge we lost in information?"

The sequence is carried even further in the comment by Samuel Johnson: "Knowledge without integrity is dangerous and dreadful." Or Plato: "Knowledge apart from justice is not knowledge but cunning."

One of the benefits of practicing law is that we have a great deal of opportunity to learn. Frequently, we are exposed to different industries and technologies and to situations where people must perform under difficult circumstances. We often feel as though we know little, because we absorb facts for a case just so we can present our positive points favorably. When the case is over, we let the water out of the tub, and forget everything so we can be ready for the next case.

In many respects we are professional learners. We live comfortably with the notion that we can't possibly know everything (but just ask our spouses or children whether we think we do). We feel no shame about the fact that we may be uninformed about a given subject, because we have substantial access to an answer if we really need it, and we can evaluate the answer. We know what a blind alley looks like, and we don't clutter ourselves with facts beyond our needs.

Part of the confusion concerning whether we really know anything is attributable to our legal education which was in large measure a series of rhetorical questions. Comparing what I have learned in my twenty years of law practice may seem presumptuous, but the following comes to mind:

1. We have a government of men and not laws, because men interpret the law. That is a graceful way a saying the finder of fact has a big advantage.

2. It is better to be lucky than good, and there is no substitute for good timing.

3. A good sense of humor is invaluable.

4. Distinguishing between form and substance can be difficult.

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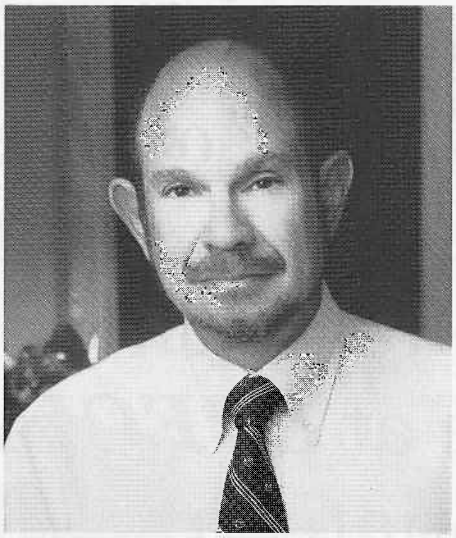
The Living Trust in Utah — Boon or Boondoggle

By Bruce G. Cohne and Martha S. Stonebrook



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INTRODUCTION

In our practice, we have found a host of misconceptions exist concerning the use of a living trust in estate planning. Primary among these misconceptions is the notion that a living trust is the panacea for all estate planning concerns. We, do not subscribe to this notion. Rather, we feel that although the living trust can be a valuable estate planning tool when properly used, it is not a substitute for a will nor is it always a preferable alternative to probate. The living trust should be used only where facts and circumstances warrant and it should be carefully tailored to meet the client's specific needs.

BACKGROUND

Much has been written about the revocable living trust since it first came into prominence in the early 1960's. Its popularity can be traced to an article published by Professor A. James Casner of Harvard Law School in the 1960 Columbia Law Review entitled "Estate Planning — Avoidance of Probate."[1] Professor Casner used the term "probate avoidance" throughout his article. This term became the watch-word for those touting the intervivos (living) trust as the ultimate probate avoidance weapon. However, when dealing with the Living Trust or any estate planning instrument, we, as practitioners, should heed the cautionary language of Professor Casner: "As in so many areas of estate planning, there is no one answer that will apply to all cases. Each case must be examined in the light of all the relevant circumstances, and the decision should be reached as to the best course of action to follow in that particular case."[2]

LIVING TRUSTS TODAY

Today, there are still people who sell and market living trusts as alternatives to wills by preying upon the public's fear of probate. Although the above statement may seem harsh and may be taken by some as a criticism of certain practitioners, the statement is made as a reminder that the living trust is not always a preferable alternative to probate nor is it a substitute for a will. Probate, in most instances, is not the costly nightmare it is so often portrayed to be. To the contrary, for the majority of estates, informal probate of a will is less costly and more efficient for the client than a living trust would be.

The living trust is often sold and marketed in a way that only the positive aspects of living trusts are emphasized. The negative aspects of the living trust

are, for the most part, swept under the rug. The living trust is not for everyone. Ethically, we have an obligation to our clients to fashion estate plans that meet the client's needs and goals. In most instances, and in most estates, living trusts are both unnecessary and unwise. Most estates do not require costly, extensive planning and are not of such size and complexity to warrant an estate plan that encompasses multiple instruments.

RESPONSE TO COMMON CLAIMS

Numerous claims have been made about the living trust and why it is the best vehicle to achieve estate planning goals. From our perspective, these common claims do not, for the most part, withstand scrutiny.

Claim: A living trust allows for the private, confidential handling of an estate.

Although it is true that a living trust instrument generally is not filed as a public document with the court, privacy is not a guaranteed by-product of a living trust. The privacy of a living trust can be illusory. For instance, if there is any litigation concerning the trust, a court will take jurisdiction of the trust and it will become part of the public court record. Likewise, when opening a trust bank account, making trust investments, transferring life insurance policies to the trust or in the general administration of the trust instrument, many individuals, other than the grantor, may directly or indirectly view the contents of a living trust thereby compromising its privacy.

". . . the living trust is not always a preferable alternative to probate. . . ."

On the other hand, the informal probate of a will can provide private treatment of an estate despite the fact that the will is filed with the court. Because very few wills are contested, the number of individuals who actually read a will once it is submitted to the court remain small. Moreover, a will does remain private during the testator's lifetime.

Claim: A living trust provides for a simple, quick transfer of assets upon death.

This is only true to the extent assets have been properly transferred into the trust and the trust has been maintained during the life of the grantor. Normally, when a living trust is created, the grantor's assets are transferred into the trust. Once the trust is created, the grantor must then carefully monitor the trust, usually with the aid of the grantor's accountant and attorney, to ensure that all after-acquired assets are properly transferred to the trust. Unfortunately, these crucial transfers often are not made or are made improperly or incompletely. Assets not properly transferred thus become probatable assets. Improper funding of a living trust defeats the quick, simple death transfer that the grantor was promised at the time the trust was created.

Claim: A living trust avoids probate and probate costs.

This claim is true where the grantor's estate consists only of assets that can be held in trust and all of those assets have been properly transferred to the trust. Otherwise, this claim falters. Assets not transferred to a trust or held in joint tenancy are probatable assets. A client may have a "pour-over" will in place to deal with any non-trust assets. Nevertheless, probate of the pour-over will may be required and probate costs, may be incurred. The much denounced probate costs escalate further when no will is in place to cure the flaws of an improperly funded or maintained trust.

Often clients are not counseled as to the comparative cost of a living trust, including the possible cost of probate incident thereto. The cost of creating and maintaining a living trust is a subject that is seldom mentioned in the numerous seminars and sales treatises on living trusts. Living trusts are, in fact, costly to create and maintain. The total cost associated with a living trust may far exceed the cost of probate.

Claim: The living trust can protect your estate creditors.

In Utah this statement is misleading, at best. In *Leach v. Anderson*, 535 P.2d 1241 (Utah 1975), the court held that a trust which is created for the use and benefit of the trustor during the trustor's lifetime was void as against a judgment creditor.[3] The court noted that whether the trust should be regarded as one created for the use and benefit of the trustor is to be determined by what the trustor has a right to take during the trustor's lifetime, not by what the trustor actually takes from the trust.[4] Thus, under *Leach v. Anderson*, 535 P.2d 1241 (Utah 1975), the living trust provides questionable protection from judgment creditors. Alternatively, the Utah Uniform Probate Code provides a relatively short time frame for presentment of claims before the claims are time barred.[5]

LIVING TRUSTS AREN'T ALL BAD

The living trust can be quite advantageous in specific situations. A living trust can be a useful planning tool for clients who have property holdings in multiple jurisdictions. These multi-state properties can all be transferred into a revocable trust to be governed by the laws of one state. This eliminates the need for ancillary probates in multiple jurisdictions and allows for a choice of law under which the properties will be administered. Used for this purpose, the living trust allows the grantor to manage and continue the operation of far-flung real estate holdings with the knowledge that upon his or her death, the estate will continue to be managed in a consolidated form without bifurcating the estate through costly and often lengthy ancillary probates.

Living trusts can be used as a mechanism to fund a client's financial obligations resulting from a divorce or separation. For example, a properly funded revocable trust can be created to provide for child support and the educational needs of the client's children. Once the children reach the age wherein the client's financial obligations under the property settlement agreement cease, the client can then revoke the trust and regain any remaining trust assets. The use of a living trust in this manner is beneficial, simple and effective.

A living trust may be useful in circumstances where the transfer of management of a family business is the client's goal. A person who has developed a business and wants to set up a mechanism to transfer control and management of that business may use the revocable trust as a repository for control of the business. This allows the trustor to groom his or her children or spouse to manage the business while still retaining the ability to terminate the trust should he/she feel uncomfortable with the management program. Not every type of business, however, warrants a living trust. Professional corporations and Sub Chapter S corporations should not be used as trust assets.

When a client's goal is to provide for an infirmed or handicapped individual, a living trust can be created to achieve that goal. For instance, in the case of a chronically ill or disabled child, sibling, spouse or other relative, a revocable trust can be established to provide for the benefit and maintenance of the disabled individual during that person's lifetime. Upon the death of the grantor, the trust becomes irrevocable and inure to the benefit of the disabled individual during his or her lifetime. Using the living trust in this manner can provide piece of mind for those clients who have an ill or disabled loved one for whom they want to provide.

The living trust, however, may be overrated and over recommended as a device to protect the client in the event he or she becomes incompetent. A living trust offers no greater protection in this regard than a durable power of attorney. If the client's only estate planning concern is that he or she be provided for in the event he or she becomes incompetent, the living trust is in most cases a needless expense for the client to bear.

CONCLUSION

"Is a living trust good or bad?" may not be the proper question. The proper questions are "What estate plan is best for the client under the circumstances?" and "What documents will meet the needs of the client?" We believe that every basic estate plan should include a will, a durable power of attorney and a medical directive or living will. These three documents make up the foundation of a sound estate plan. Once these documents are in place, the attorney and the client can then evaluate whether other estate planning documents such as a living trust should be utilized to meet the client's goals and objectives.

The living trust can be a boon to both client and attorney when utilized in circumstances that warrant its use. However, a living trust is not for everyone. Improvident use of the living trust may create a financial boondoggle for the client. We, as practitioners, should be cognizant of the client's goals and needs in tailoring any estate plan and avoid over use of the living trust.

[1]Casner, *'Estate Planning – Avoidance of Probate'*; 1960 Columbia L. Rev 108.

[2]*Id.*

[3]535 P.2d at 1244.

[4]535 P.2d at 1243.

[5]Utah Code Ann. §75-3-801 et seq.

Extraordinary Collection Procedures — Part I

By Bryan W. Cannon

Editor's Note: The following article is Part I of a two part series. Part II will be published in a future issue of the Utah Bar Journal.

The topic of collections commonly brings to mind thoughts of garnishments, executions and foreclosures. Few involved in collections have not been involved in efforts to discover assets through issuance of subpoenas and attendance at hearings with the debtors (Motion and Order in Supplemental Proceedings, Order to Show Cause and Bench Warrants). However, there are other areas that a collection attorney must become familiar with that may not be in the ordinary course of her practice. This article examines some of the extraordinary collection topics encountered by collection attorneys. Actually, these extraordinary collection procedures may become ordinary in the practice of some lawyers. This article is not intended to be exhaustive on the subjects listed, but is an overview. Stan Fitts of Beesley, Fairclough, Cannon & Fitts assisted in the preparation of the construction law portion of this article.

BRYAN W. CANNON graduated from University of Utah College of Law in 1975. He practices primarily in the areas of commercial and business law, real property, collections, title insurance and creditor's rights in bankruptcy with Beesley, Fairclough, Cannon & Fitts in Salt Lake City. Mr. Cannon received the designation of Utah Registered Abstractor in 1979 and is a title insurance agent for Stewart Title Guaranty Company. He has presented seminars for attorneys on various subjects of collection practice.

THIRD PARTY COLLECTIONS IN CONSTRUCTION INDUSTRY

Utah Mechanics Lien Law

The Utah Mechanics' Lien statute is found at Utah Code Annotated §38-1-1, *et seq.* The Mechanics' Lien statute does not apply to any public building, structure or improvement. §38-1-3 contains the provisions which specify those entitled to a lien and what property may be attached.

The purpose of the Mechanics' Lien Statute is to prevent the owner of land from benefiting from improvements on his property without paying for the labor and material provided by contractors and subcontractors. *Bailey v. Call*, 767 P.2d 138 (Utah Ct. App., *cert denied*, 773, P.2d 45 (Utah 1989)).

A lien can be asserted against property occupied by a lessee of the owner. Whether or not the lien attaches to the owner's interest or the lessee's leasehold interest depends upon the circumstances of the case. See *Interiors Contracting, Inc. v. Navako*, 648 P.2d 1382 (Utah 1982).

For the services or work performed to give rise to lien rights under §38-1-1 *et seq.* depends on whether or not the work constitutes an "improvement". See *E.G. Rotta v. Hawk*, 756 P.2d 713 (Utah Ct. App. 1988) (holding that the clearing of brush and removal of dirt from land involved in the work project for purpose of providing fill on another project was not an improvement under the section because the work did not benefit the project).

Under §38-1-5, a mechanics' lien relates back and is effective as of the time of commencement to do work or furnish materials on the property for the structure or improvement. A mechanic's lien relates back to the first work performed by any lien claimant. Therefore, if a project is commenced and the first work is on January 1, 1992, a lien claimant furnishing work in July 1992 and filing a lien in July 1992, obtains a lien which relates back to January 1, 1992. A mechanic's lien has priority over any lien, mortgage or other encumbrance which arises subsequent to the time when the building improvement or structure was commenced, work began or first material was furnished on the ground. §38-1-5 also provides that the lien has priority over any other unrecorded lien or encumbrance when the lien holder had no notice of the encumbrance at the time work was commenced on the project. While preliminary off site architectural work is a lienable service, it does not constitute commencement of work on the property for priority purposes under §38-1-5. *Ketchum, Konkel, Barrett, Nichel & Austin, Inc. v. Heritage Mt. Dev. Co.*, 784 P.2d 1217 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990)). (Holding that surveying, staking and soil testing do not constitute visible on site improvements for priority under this section).

For priority of a mechanics' lien to arise under §38-1-1 *et seq.* the work must have a continuity of purpose such that a reasonable observer of the site would be put on notice that the work was under way. *Nu-trend Elec., Inc. v. Deseret Fed. Sav. & Loan Assoc.*, 786 P.2d 1369 (Utah Ct. Appl. 1990).

One of the most important provisions for lien claimants is §38-1-7 (regarding the notice of claim and requirements for claiming a lien). Section 38-1-7 states:

(1) each contractor or other person who claims the benefit of this chapter within 80 days after substantial completion of the project or improvement shall file for record with the County Recorder of the County which the property, or some part of the property, is situated, a written notice to hold and claim a lien.

(2) this notice shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the equipment or materials;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent and an acknowledgement or certificate as required under Chapter 3, Title 57. No acknowledgement or certificate is required for any notice filed after April 29, 1985, and before April 24, 1989.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last known address of the record owner, using the names and addresses appearing on the last completed real property assessment roles of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys fees against the reputed owner or record owner in an action to enforce the lien.

This includes a change from the former law that gave original contractors 100 days to file their lien claim.

Section 38-1-8 states that liens on separate properties can be included in one claim if the properties are owned by the same person. In such case, however, the person filing the claim must designate the amount claimed to be due on each of the buildings or other improvements.

Under §38-1-10, liens for work and labor or material furnished by different lien claimants are on an equal priority footing regardless of the date of filing the notice of lien and regardless of the time such work, labor or materials were performed or furnished. All liens relate back to the date of first work on the project site or the furnishing of materials to the site. *First of Denver Mtg. Investors v. CN Zundle & Assoc.*, 600 P.2d 521 (Utah 1979).

An action to enforce a lien filed under the mechanics' lien statute must be commenced within 12 months after completion

of the original contract, or suspension of the work for a period of 30 days. Within the same 12 month period, the lien claimant must file and record a lis pendens with the county recorder of each county in which the property is located pursuant to §78-40-2. Failure to record a lis pendens renders the lien void except as to persons who have been made parties to the action and persons having actual notice of the commencement of the action. If a lis pendens is not filed, the lien claimant has the burden of proving that someone had actual notice of the lien claim (§38-1-11).

The effect of failing to file an action within the 12 month period is jurisdictional and is not subject to waiver or estoppel. *AAA Fenching Co. v. Raintree Dev. & Energy Co.*, 714 P.2d 289 (Utah 1986). The lien claimant initiating an action should join all other lien claimants who recorded liens as well as others that have recorded encumbrances against the property. Section 38-1-13 provides that lien claimants not contesting the claims of one another may join together as plaintiffs in an action. The same section provides that separate actions commenced by lien claimants on the same property may be consolidated. Section 38-1-13 also explains that those claiming liens who refused to participate as plaintiffs may be named as defendant and anyone not made a party may intervene at any time prior to the final hearing.

Section 38-1-14 sets the order of satisfaction of claims as follows:

(1) Subcontractors who are laborers or mechanics working by the day or piece, but without furnishing materials therefor;

(2) All other subcontractors and materialmen;

(3) The original contractors.

The sale of real property in order to satisfy the liens and costs shall proceed in the same fashion as in the foreclosure of mortgages, including the same rights of redemption. If the proceeds of the sale after the payment of costs are insufficient to satisfy the total amount of liens claimed, then the proceeds from the sale are disbursed pursuant to §38-1-14. Any remaining amount for the claims of claimants in a single class is applied on a pro rata basis. After satisfaction of lien claims and costs, excess funds are paid to the owner of the property. In the event that the lien claimant's claim is not fully satisfied with the proceeds of the sale, the lien claimant may have a judgment docketed for the unpaid balance and then pursue execution against judgment debtor personally (See U.C.A., §§38-1-15 and 38-1-16). The deficiency judgment is not necessarily against the owner of the property, but may be against the part contractually liable for payment to the lien claimant.

Section 38-1-17 contains the formula for division of costs between the owner and contractor. Each subcontractor claiming a lien shall have his costs awarded to him, including the costs of preparing the notice of claim and reasonable attorney's fees in preparing the notice of claim and reasonable attorney's fees in preparing and recording the Notice of Claim of Lien. Attorney's fees are awarded the successful party in an action brought to enforce a lien pursuant to §38-1-18.

"An action to enforce a [mechanic's] lien must be commenced within 12 months. . . ."

No payment by an owner to the original contractor and no alteration of any contract with the owner shall have the effect of impairing or defeating the claim of a subcontractor who has actually begun to furnish labor and materials for which he is entitled to a lien (§38-1-19).

A preliminary notice is to be filed pursuant to §38-1-27 on certain projects in order to perfect a lien claim. This provision is important because it requires a notice to be filed prior to the time for filing the notice of lien claim under §38-1-3. The preliminary notice requirement does not apply to residential construction or work performed on subdivisions. Residential construction is defined as single family housing and multifamily housing (including up to fourplexes). Residential construction also includes rental housing. The preliminary notice requirements does not apply to subcontractors in privity of contract with the original contractor and also do not apply to persons performing labor for wages.

Generally, subject to the above exceptions, persons claiming a lien for labor, service, equipment or material must provide a preliminary notice to the original contractor. Any person who then fails to make a preliminary notices loses the right to claim a mechanics' lien.

The preliminary notice must be in writing and may be given at any time during the course of the project or improvement. If labor, service, equipment or material is furnished on the project pursuant to contracts with more than one subcontractor or contractor, the notice requirements must be met with respect to each subcontractor or contractor. Although the preliminary notice can be given at any time during the course of the project, the lien claimant is precluded from making claim for any labor, service, equipment or material more than 45 days prior to the date the preliminary notice was given. The preliminary notice must precede the recording of a notice of lien with the county recorder pursuant to §38-1-7.

A preliminary notice should include the following:

1. The name, address and telephone number of the person furnishing the labor, service, equipment or material;

2. The name and address of the person who contracted for the furnishing of the labor, service, equipment, or material; and

3. The address of the project or improvement or a drawing sufficient to identify the location of the project or improvement.

The preliminary notice may be served by depositing the notice in the United States mail by either certified or registered mail, return receipt requested, postage prepaid. Service is complete upon deposit in the mail. The preliminary notice is sufficient if it is addressed to the original contractor at his place of business or address shown on a notice of commencement recorded with the county recorder as required by §38-1-27(10). The provisions regarding the preliminary notice may not be varied by agreement.

Section 38-1-27(10) describes a defense for failure to comply with the preliminary notice requirements. The notice is void unless the original contractor records a notice of commencement of the project with the county recorder where the project is located. The notice of commencement of the project must be filed within 30 days before commencement of

the project and shall state the following:

1. The name and address of the owner of the project or improvement;

2. The name and address of the original contractor;

3. The name and address of the surety providing any payment bond for the project or improvement, or if none exists, a statement that a payment bond was not required for the work being performed;

4. The name and address of the project; and

5. A legal description of the property on which the project is located.

PAYMENT BONDS

1. PAYMENT BONDS ON PRIVATE CONSTRUCTION PROJECTS.

Utah Code Annotated §14-2-1 *et seq.* (1987) contains provisions requiring payment bonds on private construction projects. Section 14-2-1 requires the owner (defined as: "anyone contracting for construction, alteration or repair of any building, structure or improvement upon land") to obtain a payment bond before awarding any contract for construction exceeding $2,000 in amount. The payment bond is required to be with a surety company or other surety satisfactory to the owner for the protection of all persons supplying labor, services, equipment or material and the completion of the work provided for in the contract in a sum equal to the contract price. Any owner who fails to obtain a payment bond is liable to each person who performed labor, services, equipment or materials under the contract for the reasonable value of such labor, services, material or equipment, up to, but not exceeding the contract price. Such a cause of action against the owner, however, is limited to actions commenced within one year after the last labor or service was performed or equipment or materials supplied (§14-2-2).

Under §14-2-1(4), a person furnishing labor, services, equipment, or material under the contract for which the payment bond is furnished, has a right of action upon the payment bond if he has not been fully paid within 90 days after the last day he performed labor or services or supplied equipment or material. An action under §14-2-1 is to be brought in a court of competent jurisdiction in the county where the contract was to be performed within one year after the last day labor or services were performed or equipment or materials supplied with respect to which the claim is based. Claims can be brought directly against the bonding company. The obligee named in the bond may not be joined as a party.

In an action on a bond, Section 14-2-1 states that "the court may award reasonable attorney's fees to the prevailing party, which fees shall be taxed as costs in the action." The provision appears to be discretionary by the use of the term "may". However, §14-2-1(7) declares that "in any suit upon a payment bond under this chapter, the court *shall* award reasonable attorney's fees to the prevailing party." (emphasis added)

The requirement of a payment bond on private construction projects is also subject to a preliminary notice requirement. Section 14-2-5 states that a preliminary notice must be provided to the payment bond principal. The preliminary notice is the same as that prescribed under the mechanics' lien statute (§38-1-27). Similarly, the preliminary notice requirement

does not apply to subcontractors in privity of contract with the payment bond principal and does not apply to persons performing labor for wages. Any person failing to provide the preliminary notice is barred from making a payment bond claim and the preliminary notice must be provided prior to commencement of any action on the payment bond.

2. UTAH PROCUREMENT CODE PROVISIONS FOR PAYMENT BONDS ON PUBLIC CONSTRUCTION PROJECTS.

Under Utah Code Annotated §63-56-38, when a public construction contract is awarded by a municipality in the State of Utah, the contractor is required to deliver a payment bond satisfactory to the State in an amount equal to 100% of the contract price. The bond must be executed by a surety company authorized to do business in the State of Utah or in any other form satisfactory to the State, for the protection of each person supplying labor, service, equipment, or material for the performance of the work provided for in the contract.

Section 63-56-38(3) states that one furnishing labor, service, equipment or material for the work under the contract who has not been paid within 90 days after the last such labor, service, equipment or material has a right of action on the payment bond. An action on the payment bond must be brought in the county where the construction contract was performed. Section 63-56-38(4) also explains that an action on a bond must be brought within one year after the last day on which the claimant performed the labor, services or supplied the equipment or materials upon which his claim is based. The obligee named in the bond need not be joined as a party.

"[The] Utah Code. . . contains provisions requiring payment bonds on private construction projects. . . ."

Similar to private contracts, §63-56-38(5) pronounces that in any suit upon a payment bond, "the court shall award reasonable attorney's fees to the prevailing party, which fees shall be taxed as costs in the action."

Section 63-56-38.1 requires a preliminary notice identical to that under §14-2-2 (claims on payment bonds on private construction projects). The preliminary notice requirement does not apply to subcontractors in privity of contract with the payment bond principal and does not apply to persons performing labor for wages.

The preliminary notice must be provided prior to commencement of any action on the payment bond. Failure to provide the preliminary notice bars a payment bond claim.

The Utah Supreme Court has held that coverage of the Utah Procurement Code provisions regarding payment bonds only applies to contractors, their subcontractors and the next tier of suppliers. *Western Coding, Inc. v. Gibbons & Reid Co.*, 788 P.2d 503 (Utah 1990). The right of a claim on a payment bond on a public construction project, therefore, is only available to contractors, subcontractors and second-tier sub-contractors. Remote sub-contractors (i.e., sub-sub-sub-contractors and below) are not entitled to assert claims on public construction project payment bonds.

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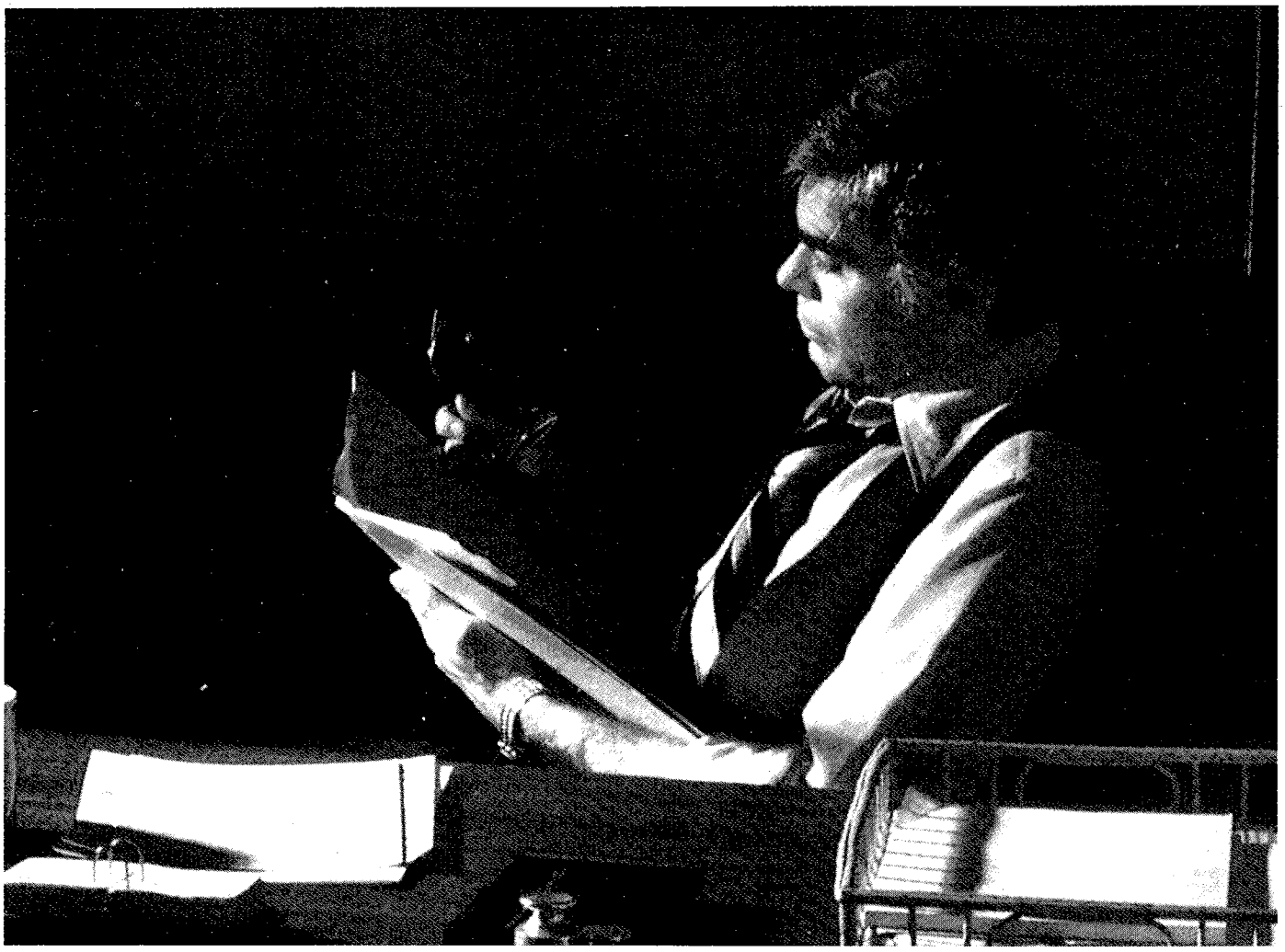

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Mediation and Dispute Resolution:
Time for a Chiropractic Adjustment to Professional Bias

By David W. Slaughter, Esq.

Abraham Lincoln offered the following counsel to aspiring attorneys nearly a century and a half ago:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough.

Although the American legal system remains centered in state and federal courthouses, the movement to resolve disputes outside these structures is gathering increased momentum, legitimizing and advancing the challenge extended to our profession by then-Chief Justice Warren Burger more than a decade ago, to "find a better way[1]".

The impact of ADR on our own practices is becoming as evident as it has been inevitable. As one of ten pilot courts charged with accelerated implementation of the Civil Justice Reform Act (CJRA) of 1990[2], the U.S. District Court for the District of Utah adopted a "Civil Justice Expense and Delay Reduction Plan" in 1991, pursuant to which, and under the newly-adopted Local Rule 212 (effective March 1, 1993), it has established a program of court-annexed arbitration and mediation as structured alternatives to the traditional civil litigation process.

While the broad topic of ADR is worthy of continuing comment and professional introspection, the purpose of this article is to focus specifically on mediation — an ADR process with which the general public and many practitioners are only passively acquainted, despite its economy and established efficiency.[3]

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BACKGROUND

Mediation has a centuries-long record as an effective tool of dispute resolution, widely used and publicized in addressing disputes ranging from neighborhood quarrels to international disputes. Despite its rich tradition, however, mediation has been largely ignored in the traditional Anglo-American system of adversary jurisprudence, with its philosophical preference for resolving disagreements between neighbors, businesses or nations with hired champions in the courtroom arena. Since long before the days of Perry Mason, media glorification of the American judicial system has resulted in a public seemingly mesmerized by an almost Darwinian process which ultimately and typically permit but a single survivor in each dispute and grant enormous power to a judge or jury, on whose decision, verdict or potential whim a party simply wins or loses.

Although strict evidentiary and procedural rules are inarguably necessary to an ordered and governable judicial process, the resulting mechanism is not inherently friendly to the education of judge and jury.[4] It is thus interesting that the traditional system relies so fundamentally on transferring decision-making powers *from* the parties, whose rights and economic future typically hang in the balance, *to* individuals (judge or jury) whose lives will typically be unaffected by the decision, and who, for all their effort and attention, will never know the facts as well as the parties themselves do. By contrast, mediation offers the parties a structured means of resolving the dispute themselves.

Another reason for the renewed popularity, if not renaissance, of mediation as an alternative to the laws of "natural [judicial] selection" is its sheer cost-effectiveness, both for the legal system and for the disputants — a quality that breaks with the growing and destructive public perceptions of dispute resolution in terms of dollars thrown to the legal profession.

Well developed in some areas, medication remains an infant in others. Virtually any dispute can be effectively mediated, however, and many have turned to mediation of disputes ranging from construction, labor, and real estate to insurance claims, products liability, fraud, personal injury and even bankruptcy.

"TURBO NEGOTIATION"

As a form of ADR, mediation is more closely akin to negotiation than it is to arbitration. However, mediation should not be confused with what many of us experience as "ordinary" settlement discussions, typified by a couple of telephone

calls or letters exchanged between counsel required as a "good faith" attempt at settlement before certifying readiness for trial, and seldom involving the actual parties in more than passive roles.

While the adversary system may enjoy a statistical advantage to mediation, in that it certainly and eventually resolves every dispute, its polarizing structure often discourages realistic settlement discussions until the eve of trial – with an enormous expenditure of time and judicial resources in the meanwhile. By encouraging the active participation of parties and their attorneys in an atmosphere conducive to settlement, mediation works to overcome the structure, formality, stress and other qualities of the adversary system which often impede settlement by promoting confrontation at the expense of resolution. Mediation offers neutral ground out of the public eye — a form of peace tent on the battlefield — designed from the beginning to promote a common goal of settlement.

In mediation, control is surrendered to no one, discovery frustrations are reduced, costs are minimized, risks of litigation and trial are eliminated, and lawyers are spared having to explain why the judge or jury did not see the perfect case that had been represented to the client. As a bonus, the system itself benefits: cases scheduled to tie up a courtroom for several days or even weeks may often be settled in a single day — at a greatly reduced administrative expense.

There is no magic to the timing of a mediation. So long as there is a dispute, there is no time at which mediation is either "too early" or "too late." It can occur before or at nearly any stage of litigation — at trial or at the appellate level. At any given time, most litigators have several cases appropriate for mediation, and many cases are certainly ripe for mediation even before the litigation process begins.

THE MEDIATION PROCESS

Although structured mediations differ somewhat from mediator to mediator, most follow at least a typical pattern, often outlined in written guidelines furnished by the mediator in advance of the settlement sessions. If not announced in advance, ground rules are established in an opening or introductory session with all parties and their counsel, where the mediator (with or without the benefit of prior written statements) may question the parties or hear brief explanations of their positions, in an effort to identify areas of specific agreement or disagreement.[5]

Following the initial session, the mediator will generally separate the parties and will shuttle between and caucus with each separately, brokering information, communicating proposals, buffering emotions and using other methods to ascertaining the parties' true interests and to bring them closer together. By agreeing not to reveal information to other participants without specific authorization, the effective mediator promotes a level of candor and disclosure which may in turn lead to increased and improved communications between the parties and often opens the way to compromise and settlement.

"[T]he effective mediator promotes a level of candor and disclosure. . . ."

As facilitators, mediators do not impose their judgment on the issues. Unlike judges or even arbitrators, they make no rulings; there is no attempt to determine what "really" occurred, who is telling the truth, or who is at fault. Ideally, mediators act simply as catalysts for the parties' own resolution of their dispute by contributing to the definition of issues, attempting to dissolve obstacles to communication, exploring alternatives, suggesting new perspectives and encouraging the parties toward a resolution that is at least mutually palatable. The process is designed to create consensus and reconciliation. If there is no agreement there is no imposed resolution, and the parties are typically free to resort to more traditional methods (hopefully exclusive of hand-to-hand combat). Even when mediation does not result in a desired settlement, the modest expenses associated therewith — especially in comparison to equivalent expenditures in litigation — usually bears at least some strategic fruit. Aside from forcing attorneys (sometimes for the first time) to look a their cases objectively, and exposing clients to the strengths of the other side's position and to potential weaknesses or unrealistic expectations in their own case, the process may often reveal important bits of the opposition strategy and other information which may not be available through traditional discovery.[6]

SELECTING A MEDIATOR

Although an individual need not be an attorney to mediate a dispute, an attorney's familiarity and experience with legal processes and theories may be advantageous in selecting a mediator. In many communities including our own, former or retired judges also offer mediation services, lending a measure of name recognition and perhaps a greater degree of legitimacy to the settlement process. While ex-judiciary are effective mediators in many instances, the roles of judge and mediator are very different and should not be equated. Mediation requires a different set of tools than deciding who's right and who's wrong, granting or denying motions, or soliciting and encouraging contrary positions to ferret out the truth. A good judge therefore may or may not also be an effective mediator. Mediators by definition seek a middle ground; they do not seek a winner but an agreement. They attempt to draw the parties together instead of supervising battle in the adversarial arena. They make no rulings or awards.

Whether judge, attorney or one from outside the profession, it may be helpful to identify a mediator who has experience in the particular area in dispute. One article suggests the following characteristics as a measure of a particular mediator's potential effectiveness: "[A] mediator must be neutral, impartial, objective, flexible, intelligent, patient, persistent, empathetic, effective as a listener, imaginative, respected in the community, honest, reliable, nondefensive, persevering, persuasive, forceful, and optimistic," capable of "chairing the discussion; clarifying communication; educating the parties, translating proposals and discussions into nonpolarizing terms; expanding resources available for settlement; testing the reality of proposed solutions; ensuring the proposed solutions are capable of being complied with; serving as a scapegoat for the parties' vehemence or frustrations; and protecting the integrity of the mediation process."[7]

Parties may be unable to find a Solomon figure, but may certainly be selective among the alternatives. In partic-

ularly complex matters or disputes involving several parties, co-mediation may also be appropriate, involving the services of two or more mediators, coordinating the mediation process between or among them.

BUT WHAT ABOUT MY LIVELIHOOD?

The very concept of a prompt, effective, economic and final resolution outside the courtroom is like fingernails on a chalkboard to many litigators, who entertain (and perhaps nourish) a perception that a reduction in the number of necessary trials will necessarily threaten their livelihood. Ironically, that concern may stand as a practical and powerful endorsement of mediation's general effectiveness.

Where mediation is common, settlement rates may exceed 80%, including cases in which the parties and their attorneys are firmly convinced that settlement is impossible. The process works in complicated multi-party cases as well as in smaller, less complicated matters. Its success is not dependent on whether or not a court's docket is crowded, or whether or not the parties have been prompted to turn to litigation to avoid having to respond to extensive written interrogatories or other discovery.

The legal climate is not what it was even a decade ago, and most lawyers — including the most ardent litigators — come to a realization sooner or later that their ultimate goal must be to satisfy their clients. Most cases settle anyway; it's just the question of when. A win-win resolution is generally more conducive to party satisfaction that a win-lose result typical to most litigation, and a satisfied client (especially one who is saved time and expense) is usually a return client.

There is also the fact that mediation does not work in every case and certainly will not replace the adversarial legal system or eliminate the need for litigation counsel. The common law is too tightly woven into the fabric of our society to ever become an endangered species. It "has provided us with an irreplaceable heritage of legal precedent upon which to make considered judgments,"[8] often to the point that common sense bears no weight at all unless itself supported by a written court decision. Courts remain open and full-scaled litigation must remain an option. It should not be the only option, however. For the experienced and skilled lawyer and litigator, mediation is simply another tool to help protect the client's interests, which may mean keeping him or her *away* from the courthouse.

The wide range of dispute resolution processes that make up our legal and social systems do not threaten the status of the lawyer as the pre-eminent professional conflict manager, unless, of course, the lawyer chooses to ignore some of these processes. The growing ADR movement both permits and challenges attorneys to better define their roles as counselors and problem solvers with increased capacity and interest in delivering or obtaining prompt and affordable justice.

One author has observed that as law firms develop experience and specialties in alternative forms of dispute resolution, they can "offer more services to existing clients and may be able to attract a new group of clients – those who will not litigate their cases."[9] Mediation may tend to expand the need for attorneys rather than to shrink it.

CONCLUSION

There have been repeated and significant waves of legal reform in this country, resulting in innovations such as family and juvenile courts, mandatory collective bargaining, and the growth of small claims tribunals. No wave, however, has had the scope, power, financing and leadership of that behind Alternative Dispute Resolution, including mediation.

If mediation can be effectively used (as it has been historically) to help resolve wars, prevent riots, and even settle disputes over the backyard fence between feuding neighbors, it can certainly be utilized to solve the more commonplace disputes that lawyers are asked to manage and help resolve. With the minimal risks involved, the process simply makes sense. Attorneys, judges, individuals and businesses who take advantage of the mediation process are generally converted to it. It works, it serves our clients, and it is an important key to unclogging an overburdened judicial system, permitting that system to direct its efforts to cases requiring judicial intervention.

When used and viewed properly, mediation may enhance nearly every law practice and can effect an necessary and valuable chiropractic adjustment to a system that many feel is slowly slipping out of joint.

[1]State of the Judiciary speech at the American Bar Association's 1982 midyear meeting. Along similar lines, Justice Sandra Day O'Connor has suggested that "all courts should be viewed as last resorts." [Address to National Consumer Conference, January 1983.]

[2]The CJRA required that all federal district courts, with the recommendations of a specially-convened advisory group for each court, consider recommendations for the reduction of excessive costs and delays in the civil litigation process, and develop and plan to that end.

[3]The American Arbitration Association reports that over 85% of the business cases it mediates conclude with a settlement.

[4]"It is the premise of our legal order that its own complicated arrangements, although subject to evolutionary change, are more important than any momentary objective." — Alexander Bickel

[5]The ground rules may include the following: (1) the purpose of the session is to mediate disputes, not to designate one party or the other as a winner; (2) all sessions are informal, confidential and are to be considered for settlement purposes; (3) the mediator is to have unrestricted power to meet with persons, parties and their counsel separately, jointly or in any combination; (4) any settlement proposals advanced by the mediator will be non-binding and not disclosed to any person not directly involved in the process.

[6]This is not to encourage the use of mediation as an additional form of discovery, but simply to emphasize that there is no significant downside in any case to a mediation attempt.

[7]Stulberg and Montgomery, *Design Requirement for Mediator Development Program*, 15 Hofstra L. Rev. 499, 504-05 (1987).

[8]Gilkey, *Alternative Dispute Resolution: Hazardous or Helpful?*, 36 Emery L.J. 575-76 (1987).

[9]Ray, *Emerging Options and Dispute Resolution*, 75 ABA Journal 66, 68 (June 1989).

The Utah Senior Lawyer Volunteer Project

By Edward D. Spurgeon and Mary Jane Ciccarello

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MARY JANE CICCARELLO is a third year law student at the University of Utah and Professor Spurgeon's research assistant. She has assisted in the creation of this project and also interns at Utah Legal Services. Ms. Ciccarello did her undergraduate work at Barnard College and graduate work at Columbia University, and taught Italian at Barnard College and Wellesley College before starting law school.

INTRODUCTION

The Utah Senior Lawyer Volunteer Project opened its doors to the public in April 1993. The project is an estate planning pro bono legal services program for low-income Salt Lake County residents that is staffed by volunteer senior Utah lawyers. The primary goal of the project is to utilize the skills of retired and semi-retired lawyers in order to provide free wills and estate planning services to socially and economically needy clients in an effort to help address unmet legal needs. This article examines the development and structure of the project so that it may serve as a resource for other programs interested in establishing a senior attorney project.

The Utah project is unique in several ways: while maintaining a close affiliation with Utah Legal Services ("ULS") and the Utah Senior Citizens Law Center ("SCLC"), the project was developed and is staffed almost exclusively by senior volunteer attorneys; the initial funding comes from private sources; and it is not a simple wills panel consisting of pro bono lawyers to whom clients are referred. Rather, it is an independent project providing simple estate planning services to a population that should otherwise not have access to such legal services.

THE UNMET LEGAL NEEDS OF THE ELDERLY

The main focus of the project is to serve low-income senior residents of Salt Lake County, even though the project has no set age criterion for its clients. As in the rest of the country, the elderly population in Utah continues to grow and to grow older. Persons sixty-five years or older represent 12.5% of the U.S. population. By the year 2000, persons sixty-five and over are expected to represent 13% of the population, and perhaps as much as 21.8% by 2030.[1] In 1989, 8.6% of the population in Utah was sixty-five or older. The percentage increase in population sixty-five and older between 1980 and

1989 in Utah was 34.1%, one of the highest increases in the nation.[2]

Along with population growth comes an increase in the demand for services, including legal services. The elderly, as a distinct group in our society, have legal needs that go unmet. The Utah Senior Lawyer Volunteer Project was developed to help meet those needs by utilizing the talents of lawyers who are themselves elderly.

The elderly encounter many of the same types of legal problems that the rest of the population does. However, they also confront legal problems that are particularly the concern of the elderly. Examples are Social Security, SSI, Medicare, Medicaid, pensions, taxes, wills, probate, housing, nursing homes, guardianships, and age discrimination. Unfortunately many older Americans of all backgrounds simply do not receive the legal advice and representation they need. Some lack the physical ability to get to available sources of legal help, while some are not aware of or may not know how to avail themselves of existing resources.[3]

The Older Americans Act (42 U.S.C.A. §3001 et seq.) specifically includes legal services as a social service eligible for funding under Title III of the Act, and local agencies decide how to allocate the federal funds to the various services available to the elderly. However, the available federal funding for legal services to the elderly is limited, and Title III agencies have had to select and prioritize their legal services to best serve their elderly population in the context of budget restraints. Moreover, while many low- and moderate-income seniors do not qualify for free legal services under the Act, they still cannot afford to hire a private attorney.

The lack of adequate legal-needs surveys makes it difficult to know which legal needs are unmet. To date, the only statewide legal-needs study of low-income seniors is the 1988 Wisconsin survey, whose results came out in 1991.[4] That study found that the legal profession handles only 18% of the legal problems of low-income seniors.[5] And as Wayne Moore points out in a recent article analyzing the delivery of legal services to the elderly, "several other recent legal-need studies of low-income people support the Wisconsin study, although they do not focus specifically on the elderly: in Massachusetts, only 15% of the demand for legal services was satisfied; in Illinois, 20%; in New York, 14%, and in Maine, 23%,"[6]

"The elderly . . . have legal needs that go unmet."

In seeming contradiction to these results, legal-need telephone surveys conducted by the American Association of Retired Persons ("AARP") in 1987, 1989, and 1990, showed that about 90% of the legal problems of people sixty years and older were being addressed, while for low-income people, this figure dropped to around 57%.[7]

The results from the AARP surveys may not be different from those of the other surveys. Wayne Moore explains that the apparently different results depend on how legal problems are measured: "One school of thought holds that a true measure of legal needs must include both those problems perceived by an individual as requiring legal help (perceived legal needs) and those problems where the individual does not perceive the need for legal help, but would benefit from legal assistance (unperceived legal needs). The AARP surveys only captured perceived legal needs, while the other surveys captured both perceived and unperceived needs."[8]

The 1990 AARP telephone survey did produce significant results: 26% of those age sixty-five and older do not have a will; 77% do not have a durable power of attorney for financial matters; 84% do not have a health care power of attorney; 77% do not have a living will; and 78% do not have a living trust. Moreover, seniors with incomes above $25,000 are more likely to have the above-mentioned documents than are those below this income level.[9]

Moore also compares AARP Hotline calls by category with the Wisconsin Survey. In both situations, the category receiving the greatest percentage of calls was "wills, estate planning, protective services and probate."[10] Therefore, however one interprets the results of these surveys, low-income seniors clearly have many legal problems for which they do not

receive legal assistance. Moreover, many seniors want legal assistance in understanding the legal issues involved with wills, living trusts, probate, guardianships, and health-care planning.[11]

There are no needs assessment surveys in Utah of the unmet legal needs of either the poor in general or the elderly in particular. However, a review of the aging network in Utah and the legal services available to low-income elderly shows that this group wants and needs more legal guidance in the area of wills and estate planning.

THE AGING NETWORK IN UTAH

In Utah, the Senior Citizens Law Center ("SCLC") in the Salt Lake City office of Utah Legal Services ("ULS") provides a substantial portion of the free legal assistance that is available in the state for eligible low-income seniors. State and local agencies that deal with the elderly, such as the State Division of Aging and Adult Services, direct senior citizens with potential legal problems to SCLC. ULS also contracts with several agencies around the state to provide legal services to the elderly outside the Salt Lake area. The SCLC in Salt Lake has a regular staff of two full-time attorneys, three senior paralegals, and several law clerks and clinical legal interns from the state's two law schools. The state legal services developer for the elderly also has her office in the Salt Lake office.

The SCLC will take as a client any person who is at least sixty years old or older regardless of income if the client's problem concerns public benefits, health programs, housing problems, adult protective services, consumer problems, or property law. However, the SCLC does not do any estate planning or wills, even though it does help clients with advance health-care directives including living wills and health-care powers of attorney. The Senior Volunteer Lawyer Project is critically needed because ULS and the SCLC currently lack sufficient resources to provide assistance with wills, trusts and related estate planning services to those Salt Lake County residents who are otherwise eligible. The SCLC does provide such services in other parts of the state, but 42% of the state's population resides in Salt Lake County. In 1991 alone, ULS's Salt Lake office received more than 500 inquiries about will and trust matters. In a few instances, callers are referred to ULS pro bono panel lawyers, but most are told that ULS can not help them, leaving them with the unsatisfactory alternatives of either writing a holographic will or foregoing a will and hoping that the state's intestacy laws will satisfactorily distribute their property among their heirs.

DEVELOPMENT OF THE UTAH PROJECT

The Senior Volunteer Lawyer Project came about through the combined efforts of many people during the spring and summer of 1992, Edward D. Spurgeon, Leary Professor of Law and Policy at the University of Utah and former Dean of the College, together with his research assistant, Mary Jane Ciccarello, and Judith Mayorga, the state legal services developer for the elderly, examined the feasibility of developing a program that would use volunteer senior attorneys to

write simple wills for low-income seniors, as well as provide them with small estate planning advice. They concluded that such a project would be feasible if it could be affiliated with ULS. Ms. Mayorga approached Anne Milne, Executive Director of ULS, and the two SCLC lawyers, Paul Wharton and Ken Bresin, with the idea. Under Professor Spurgeon's leadership, the group decided to go ahead with the project by housing it in the ULS office. With the help of senior lawyer Professor Emeritus Robert Schmid of the University of Utah College of Law, several senior attorneys in the Salt Lake area were contacted about possibly volunteering for the project. Ultimately, nine retired or semi-retired attorneys agreed to participate. The attorneys, eight men and one woman who come from varied legal backgrounds, are over sixty-five and were chosen to participate in the project because of their reputations in the community and their willingness to participate in a pro bono project.

In order to involve the volunteer and ULS lawyers from the outset in determining the project's structure and content, Professor Spurgeon divided them into four working groups to iron out the details of client eligibility; scope of services; outreach; and organization staffing and start-up. All the participants made final determinations about the project at general meetings held throughout the winter of 1992-93. Professor Spurgeon obtained $40,000 in initial funding for the project from two private foundations. In March 1993, the office was set up and the project hired Mel Jones, a paralegal, to act as project coordinator.

Following here is a description of the various organizational aspects of the project, as well as a discussion of the reasons behind these decisions.

A. The Project's Physical Location

The project is housed in an office suite on the floor directly below Utah Legal Service's office in downtown Salt Lake City. This space is well suited for this program and contains a reception area, three offices and a large rear room that can be used for files, library materials and a copy machine. The office is convenient to the building elevator and access to disabled persons. The office furniture has been arranged to best accommodate older and/or disabled persons. The project uses ULS's law library, the part-time services of a ULS secretary, and is also tied into the existing ULS telephone and computer networks.

The decision to be housed in the same building as ULS was the result of lucky happenstance: the space simply was available at the right moment. However, the project had already decided for many reasons to affiliate itself with ULS. ULS is the largest provider of legal services to the poor in Utah; the Senior Citizens Law Center is part of the ULS office, and the legal services developer is also in that office. Thus, the ULS office affords a great deal of relevant in-house legal expertise. In addition, ULS is part of Utah's aging network. The County Aging office works closely with ULS and SCLC and refers any potential client to that office. ULS does outreach in the state by going to senior centers and nursing homes. Therefore, there is already a referral system in place. Moreover, the project is able to connect to the computer and telephone systems of ULS as well as depend upon the technical expertise of ULS attorney, Ken Bresin.

". . . [M]ost are told that Utah Legal Services cannot help them, leaving them with . . . unsatisfactory alternatives. . . ."

One other option may have been to set up an office in the Law and Justice Center of the Utah State Bar. However, because the initial funding came from private sources and not the Bar, the project decided to stay close to the aging and legal networks available to it at ULS. The various sections of the Bar which may in the future provide assistance and support are not now in a position to provide the same level of assistance to the project that ULS is.

B. Project Staffing

The initial group of project professionals includes nine distinguished senior members (age sixty-five or older) of the Utah State Bar who are semi-retired or fully retired from practice or law teaching but who wish to remain active on a part-time basis and have both the ability and interest to staff this program. They are joined by one paid paralegal/coordinator responsible for case telephone screening, initial client intake, general office and financial management, and project coordination.

The project members recognized the need for a coordinator, either a paralegal or an attorney, who would be a paid and permanent employee of the project and should maintain continuity and organization. Most projects around the country that have been successful utilize such a coordinator.[12] Nonetheless, the modus operandi of the project requires direct involvement of the volunteers themselves, which helps assure that the project will remain a truly volunteer one, utilizing the expertise and energy of its members.

Additional help is provided by a ULS secretary who will devote approximately five hours a week to the project. In the future, law student interns from the University of Utah may possibly assist. Professional liability coverage is provided to the project volunteers under ULS's policy. However, the Bar status of the senior attorney volunteers is one aspect of the project that has not yet been entirely settled. The Utah State Bar requires any attorney practicing law in the state to be an active member by paying annual bar dues and by keeping current with the required Continuing Legal Education ("CLE") credits. At this point, all volunteers are active members of the Bar. However, the project would like to see the Bar waive dues for volunteers who are inactive except for their participation in the project. As discussed below, the project is providing CLE credit through educational sessions presented at the project's office.

C. Scope of Services

The group developed a scope of services blueprint. This blueprint will be regularly reviewed by the group and amended when necessary. Telephone inquiries about wills and estate planning that come into the main ULS office are informed of the project. Potential clients may then call the project number and leave a message on the answering machine. These messages and other inquiries are monitored by the paralegal, who contacts the potential clients and does an initial telephone screening for eligibility. The paralegal then arranges an appointment for the client with a volunteer attorney and sends the client an estate planning questionnaire to be completed

and brought to the appointment.

The lawyer meets with the client for an initial interview in the project's office or, in exceptional cases, at a Salt Lake senior citizens' center. Then the lawyer drafts the documents for review by the client and meets again with the client to go over and execute the documents. The project retains copies of the documents in its files but turns the originals over to the client, encouraging the client to deposit an original will for safekeeping in the probate department of the Salt Lake County Clerk's office, as authorized by law.

A client intake form, an estate planning questionnaire, and simple will and trust forms have been developed and are available in both software a hard copy for use by the lawyers involved. Services include simple wills, wills with straightforward testamentary trust provisions, and simple living trusts and pour over wills. Lawyers also help with related necessary title changes and with asset transfers most often tied to medicaid issues and to the funding of living trusts. Although living trusts are sometimes used to protect against incapacity and to avoid probate, the project does not provide for corporate trustees. Also, the project will not do any tax-planning wills and trusts or any post-mortem estate administration (except in the case of a surviving spouse where the project did the estate plan, the spouse meets the eligibility criteria, and the estate goes to the spouse).

The attorneys and the paralegal coordinate client meetings. When possible, for convenience and organizational purposes, the client meetings take place in the project office. Perhaps at a later date the project will be able to regularly provide home visits, including visits to nursing homes.

D. Client Eligibility

The project accepts clients who meet each of three eligibility criteria relating to income, assets and the ability to afford a lawyer. The eligibility criteria were reached after a long series of discussions. Since the primary goal is to serve economically needy persons, the criteria for income and assets were loosely based on the existing medicaid eligibility criteria. The third "reasonableness" criteria was added in order to provide the individual lawyer with some leeway to be certain that the client needs pro bono services.

Specific details of the the eligibility criteria follow:

a. Income: The monthly income ceiling is 125% of poverty. However, the project will accept clients on an individual basis whose monthly income might rise to a maximum of 188% of poverty if they have unusually high medical expenses or other financial burdens. In determining income eligibility, the project considers families as being comprised of either a husband and wife, or an adult with legal dependents. Unrelated individuals living together must each meet the eligibility standards on an individual basis.

b. Assets: Dependents are not included in determining asset eligibility. Exempt assets include:

— liquid assets up to $10,000 for a single person; $15,000 for a married couple

— one house and the attendant land, not to exceed $100,000 in equity value

— personal effects

— one auto, not to exceed $7,500 in value
— irrevocable burial or funeral plans
— burial plot
— up to $10,000 equity in income earning non-liquid assets
— assets necessary (e.g., trade implements) to earn a living

c. "Reasonably able to afford": The project will accept clients who are not otherwise able to reasonably afford an attorney.

Furthermore, the project serves only residents of Salt Lake County and does not set any age criterion.

E. Continuing Legal Education

The project also provides its volunteers with an educational component To date, there have been two training sessions, each conducted by project members. One session was a basic review of the Utah Code provisions concerning intestacy, wills and living trusts; the second was on medicaid eligibility standards and the effect of property transfers on medicaid eligibility. These training sessions are videotaped for future reference. They are also open to any member of the Utah State Bar for continuing legal education credit. The project will continue to present educational sessions for its own volunteers and as part of an ongoing effort to reach out to the legal community. The project will also enable ULS and the volunteers to create and distribute new topical educational programs about estate planning related topics for existing and prospective clients and their service providers network.

F. Community Support and Outreach

To succeed, the project needs assistance and support of important local institutions, including the University of Utah College of Law and the Utah State Bar. The program has been discussed with the Bar's Estate Planning Section and contact will be maintained with that Section and the sections on the Delivery of Legal Services and the Needs of the Elderly. Collaboration with the private bar can be extremely useful in educating Bar members about changing aspects of estate planning devices and the needs of the elderly.

G. Funding

The project has initial funding of $40,000 for 1993. Two $20,000 grants were obtained from private foundations. The first year's budget includes approximately $15,000 in one time start-up expenses and capital costs. Projected expenses include rent; the cost of office furniture and furnishings (used office furniture was purchased for $1,992); telephone equipment and charges; a copier; computer hardware and software; and the paralegal's compensation. The project recognizes the need to develop long-term funding sources, and during 1993, future operating funds will be sought from both public and private federal and Utah sources, including the national Legal Services Corporation, United Way, the Utah State Bar Foundation, Salt Lake County's Division on Aging, and Utah's lawyers. The program's effectiveness will be systematically evaluated throughout 1993, and appropriate reports and articles will be published.

"To succeed, the project needs assistance and support of important local institutions. . . ."

The major reason initial private funding was sought was to allow the project to develop its own eligibility criteria without being constrained by federal funding guidelines such as those set forth by Title III under the OAA. Private funding also enabled the project to determine its own scope of services without having to prioritize services in the manner required by the OAA and other governmental funding sources. Furthermore, private funding allowed the project to move along quickly because the funding was readily available at the initial stage.

COMPARISON TO OTHER PRO BONO PROJECTS

A. Pro Bono Senior Attorney Projects

Pro Bono projects using senior attorneys exist in various locations throughout the US. Four legal service programs that make extensive use of senior attorneys are: Legal Services of Eastern Missouri[13]; Legal Counsel for the Elderly in Washington, D.C.[14]; Legal Services of Middle Tennessee[15]; and Georgia Legal Services Programs[16]. These four projects, similar to the one in Utah, are joint undertakings with the legal services office that houses them. However, these projects are different from the Utah one in that the senior volunteers are basically a pool of lawyers to whom legal cases coming into the legal services office are assigned. The volunteer lawyers deal with several different types of legal issues.

The Utah project decided to be closely affiliated with Utah Legal Services in order to take advantage of the aging network and legal expertise already in place there. However, the Utah project is different from those listed above in that it is a specialized simple wills and estate planning project run by the volunteers themselves. The project fills a critical void in the services that ULS and the Utah legal community currently provide Salt Lake county's poor, including many elderly and disabled citizens.

B. Wills Panels

There are also several wills panels projects throughout the country; three notable ones are the Sixty Plus Legal Program in Maryland,[17] The New York City Bar Pro Bono Wills Project,[18] and the No Fee Wills Panel of Senior Adults Legal Assistance in San Jose, California.[19] These projects are affiliated with either a legal services organization or private bar committees that provide the initial intake and screening of clients. Eligible clients are then referred to a panel of volunteer lawyers who draft simple wills, or in the case of the Maryland project, provide other estate planning services. While the California and New York projects offer free services, the Maryland project charges reduced fees. Similar to most will panels projects, these three are staffed by active attorneys who are willing to provide pro bono services.

The Utah project decided against the wills panel model because it wanted to make use of the untapped resource of senior lawyers, and because it was more efficient for the project to be housed in a central office connected to ULS, where the volunteers could work. Utah has a relatively small population and limited resources. The idea was to maximize use of already existing resources while maintaining an independent project with the possibility of future expansion. The Utah project as it now stands provides a very comprehensive level of service by providing free legal consultation, advice, and any necessary document preparation.

CONCLUSION

The Senior Lawyer Volunteer Project is one of the first model programs nationally to both serve the need for expanded pro bono legal services and allow active, highly experienced and competent professionals to remain involved and make a unique contribution. A future goal is for the project to expand its capacity to deliver first-rate services in related areas now maintained by SCLC, namely advance medical directives, planning for incapacity, guardianship and conservatorship, and title to property. The unique aspects of the Utah project's development and structure may be of interest to other groups attempting to start their own senior attorney pro bono projects.[20]

[1] *A Profile of Older Americans: 1990*, prepared by the Program Resources Dept., AARP and the Administration on Aging, U.S. Dept. of Health and Human Services, p.2.

[2] *Ibid.*, p. 8.

[3] See, generally, *The Law and Aging Resource Guide*, compiled by the ABA Commission on Legal Problems of the Elderly, July, 1985.

[4] See, generally, Amy Salomon, "ABA Completes Elder Civil Legal Needs Study in Wisconsin," *Bifocal*, Summer 1991, Vol. 12, No. 2, p. 2.

[5] Wayne Moore, "New Findings on Unmet Legal Needs," *Elder L. F.* (Legal Counsel for the Elderly Newsletter), May/June 1989, p. 5.

[6] Wayne Moore, "Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach," 41 *Emory Law Journal* 805 (1992).

[7] *Ibid.*, p. 806.

[8] *Ibid.*, pp. 806-7.

[9] *Ibid.*, p. 812.

[10] *Ibid.*, p. 818. In the AARP survey, the category received 29% to 37% of the callers. In the Wisconsin survey, 28% of the callers fell into this category.

[11] See, generally, Joan E. Fairbanks, "Estate Planning and Small Estates Probate for the Elderly: A New Role for the Private Bar," *Bifocal*, Vol. 9 No. 4, Winter 1988, p.1; Charles Sabatino, "More Than a Will: Pro Bono and Reduced-Fee Lifetime Planning for the Elderly," *Bifocal*, Fall 1987, p. 3, and "Bar Committees on the Elderly: Responding to the Facts of Life," *The Affiliate*, Vol. 11, Nos. 4 and 5 (1986), p. 1.

[12] *Pro Bono Seniorium: Volunteer Lawyers Projects for the Elderly*, ABA Commission on Legal Problems of the Elderly and the Private Bar Involvement Project, 1987, pp. 9-11.

[13] Legal Services of Eastern Missouri, Inc., St. Louis, Mo. (314) 454-6940. Richard Teitelman, Executive Director; John R. Essner, Senior Attorney Project.

[14] Legal Counsel for the Elderly, Washington, D.C., (202) 434-2170. Wayne Moore, Executive Director; Jan May, Senior Attorney Project.

[15] Legal Services of Middle Tennessee, Inc., Nashville, TN. (615) 244-6610. Ashley Wiltshire, Executive Director; Drake Holliday, Senior Attorney Project.

[16] Georgia Legal Services Programs, Inc., Savannah, GA, (912) 651-2180. Phillis Holmen, Executive Director; Bill Broker, Senior Attorney Project.

[17] Sixty Plus Legal Program, Maryland State Bar Association, Baltimore, MD, 1-800-492-1964.

[18] Pro Bono Wills Project, The Association of the Bar of the City of NY, NY, (212) 382-6600.

[19] No Fee Wills Panel, Senior Adults Legal Assistance, San Jose, CA, (405) 295-5991. Georgia Bacil, Directing Attorney; Camille Klameck, Coordinator.

[20] For more information, contact:
Senior Lawyer Volunteer Project
124 South 400 East, Suite 300
Salt Lake City, Utah 84111
(801) 328-0618

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Discipline Corner

ADMONITION:

On April 8, 1993, a Screening Panel of the Ethics and Discipline Committee voted to Admonish an attorney who was convicted of the misdemeanor of obstructing a public official. The attorney blocked or attempted to block a public official's vehicle as the official was exiting a narrow roadway near the attorney's property in the course of his official duties. It was also the decision of the Screening Panel that the attorney attend the Utah State Bar Ethics School which is a one day course in ethics taught by the Office of Bar Counsel.

PUBLIC REPRIMAND:

On April 9, 1993, the Utah Supreme Court entered an Order of Public Reprimand pursuant to a Discipline by Consent reached between the Office of Bar Counsel and attorney Loren Martin for violation of Rules 5.3(c), Responsibilities Regarding Nonlawyer Assistants; 5.5(b), Unauthorized Practice of Law; and 7.3, Direct Contact with Prospective Clients. In 1991, Mr. Martin consented to the use of his name in promotional materials prepared and disseminated by an organization titled "Plan Master" subsequently changed to "Plan Right" concerning estate planning and preparation of living trusts. Mr. Martin's association with these organizations continued until February 1992. In March 1992 the Screening Panel of the Ethics and Discipline Committee voted that a Formal Complaint be issued and served on Mr. Martin. Thereafter, Mr. Martin consented to a Public Reprimand. In mitigation, the Bar Counsel considered the confusion created by a 1989 letter of dismissal sent to Mr. Martin by the Office of Bar Counsel for substantially related conduct.

SUSPENSION/PROBATION:

1. On April 9, 1993, the Utah Supreme Court entered an Order placing attorney Kirk C. Bennett on Disability Suspension for a minimum period of two (2) years for violating Rules 1.3, Diligence; 1.4(a), Communication; and 1.5(a), Fees. Mr. Bennett suffers from chronic depression aggravated by Post Traumatic Stress Syndrome incident to his combat service in Vietnam. His inability to practice law was brought to the Bar Counsel's attention in three (3) separate complaints filed with the Office of Bar Counsel in 1992. In all three instances, Mr. Bennett, after receiving a retainer and accepting representation, failed to communicate with his clients, to provide any meaningful legal service or, in the alternative, refund the retainer fees.

As a condition precedent to his reinstatement, Mr. Bennett is required to make restitution payments to his former clients in the amount of $15,000.00.

2. On April 27, 1993, the Utah Supreme Court entered an Order suspending attorney Gerald R. Hansen from the practice of law for a period of one (1) year for violating Rules 1.3, Diligence; 1.4(a), Communications; and 8.4(c), Misconduct in two matters entrusted to him. In the first case Mr. Hansen was retained in April 1987 to represent a client in an adversary proceeding before the Bankruptcy Court. Mr. Hansen filed an answer and subsequently appeared at hearing for summary judgment filed by the adversary, however he failed to file a memorandum or an affidavit in response to the motion. In the second case Mr. Hansen accepted $180.00 as a retainer to file a petition for a guardianship for the mentally disabled child of the client. Thereafter, he failed to file the guardianship petition, failed to communicate with his client and failed to refund the retainer fee. Subsequently, the client obtained a judgment through the Small Claims Court for the $180.00 plus interest and costs but has been unable to satisfy the judgment.

The Court stayed the entire period of suspension on the condition that Mr. Hansen, within thirty (30) days from the effective date of the Order, associate with another attorney who would agree to act as the supervising attorney and who will accept the responsibility for the delivery of legal service to the clients for whom Mr. Hansen performs legal services. Further, Mr. Hansen was ordered to file monthly reports with the Office of Bar Counsel detailing the nature of the work performed, the type and extent of supervision being given. Mr. Hansen was also ordered to make restitution payments in the amount of $219.00 to his former client and reimburse the Office of Bar Counsel for its costs.

DISBARMENTS:

1. On April 21, 1993, the Utah Supreme Court disbarred Galen J. Ross based on his conviction on May 28, 1987, in the United States District Court for the District of Wyoming, of mail fraud and conspiracy to commit mail fraud.

Following his conviction Mr. Ross was placed on interim suspension from the practice of law pending the appeal of his conviction. On July 30, 1992, Respondent's appeal of his criminal conviction was upheld by the Tenth Circuit Court of Appeals.

The mail fraud and conspiracy convictions were based upon a Notice of Stockholders Meeting that was executed by Mr. Ross on behalf of Classic Mining Corporation and mailed to the shareholders of that corporation. A second count was based upon a letter from Classic Mining Corporation signed by Mr. Ross to shareholders of that corporation which discussed that additional drilling was going to take place in the Overland Oil Field. The jury in the United States District Court found that the contents of these letters, although not false or containing any factual misrepresentations, contained certain material omissions that had the effect of lulling the shareholders into inaction. The overt acts of signing and mailing these deficient letters constituted mail fraud.

Mail fraud is a crime involving moral turpitude. Rule 23 of the Rules for Integration and Management of the Utah State Bar provides that, except for good cause shown, upon conviction of a crime involving moral turpitude by any court, the Utah Supreme Court will enter Judgment of Disbarment.

2. On April 22, 1993, the Utah Supreme Court disbarred Douglas E. Wahlquist for misappropriation of $22,500.00 he held in trust for his client's insurance company. Mr. Wahlquist's client was involved in an auto accident in 1988. In or about February 1989, Mr. Wahlquist settled the personal injury case for $75,000.00. Of this amount $25,000.00 went to Mr. Wahlquist's client, $25,000.00 went to

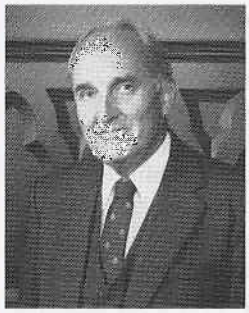
Wahlquist for attorney's fees, and $25,000.00 was to go the client's insurance company as reimbursement for medical expenses. Mr. Wahlquist paid the insurance company $2,500.00, however, the check written on his trust account for the balance was returned for insufficient funds. The funds have not yet been paid to the insurance company. A Hearing Panel of the Ethics and Discipline Committee recommended that Mr. Wahlquist be suspended for a period of two years. However, the Board of Bar Commissioners and the Utah Supreme Court determined that disbarment was appropriate due to Mr. Wahlquist's prior disciplinary record which included suspension from the practice of law in 1989 for six months for commingling funds from his trust account. On the prior occasion he put approximately $14,000.00 from his trust account into a personal savings account to use as collateral for a home loan. These funds were repaid approximately 21 months later. Additionally, Mr. Wahlquist was ordered to make restitution and he is currently paying $100.00/month to meet this obligation.

MCLE Reminder

Attorneys who are required to comply with the odd year compliance cycle, will be required to submit a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by December 31, 1993. In general the MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a combined 27 hour total. Be advised that attorneys are required to maintain their own records as the the number of hours accumulated. Your "Certificate of Compliance" should list all programs that you have attended that satisfy the CLE requirements, unless you are exempt from MCLE requirements. A Certificate of Compliance for your use is included in this issue. If you have any questions concerning the MCLE requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

Sidney G. Baucom Named U. College of Law Alumnus of the Year

Mary Jane Carter Due also Honored at Annual Alumni Event



Sidney G. Baucom, retired executive vice president and general counsel of Utah Power and Light, was named the University of Utah College of Law Alumnus of the Year. Mary Jane Carter Due, a U. law school alum and noted Utah political activist before her death, was posthumously honored along with Mr. Baucom at the Thirteenth Annual College of Law Alumni Event held April 29 at the Marriott Hotel.

The Alumnus of the Year award is presented annually to a respected and distinguished graduate of the College of Law whose support of the law school's programs and students brings honor to the school. Mr Baucom, a former alumni trustee of the College of Law, "has been an enthusiastic supporter of and participant in the law school's programs. In particular, Sid has served as a student mentor and Legal Career Services student advisor, providing an informed and insightful perspective to students interested in a corporate counsel career," said Anne Milne, president of the College of Law Alumni Board of Trustees.

Mr. Baucom earned his J.D. degree from the University of Utah College of Law in 1953. He was employed by Utah Power and Light for thirty three years. Since retiring from U P & L in 1989, Mr. Baucom has been of counsel with the law firm of Jones, Waldo, Holbrook and McDonough and is active in several professional and civic organizations.

Ms. Due in whose memory the law school donated aspen trees to the Mary Jane C. Due Memorial Aspen Grove at the Wasatch Hollow Park, began taking classes at the U. College of Law in 1952 at night and during her lunch hours while working as a secretary for the federal district court in Salt Lake. After she received her law degree in 1956, she spent 10 years as an attorney-advisor for the Office of the Regional Solicitor, U. S. Department of the Interior before she moved to Washington D.C. to become counsel and chief clerk for the Senate Committee on Aeronautical and Space Sciences. She retired in 1987 after working for Senators Moss and Metzenbaum and was active in civic and democratic organizations after her retirement until she died in October 1991.

"Mary Jane was a source of enduring support, good judgment, and integrity. Despite her Washington connections, she retained her strong local political and social connections and was an emeritus member of our Alumni Board of Trustees," said Lee Teitelbaum, dean of the College of Law.

NOTICE OF CORRECTION:

It has recently been brought to the attention of the Utah Bar Journal by Mr. James E. Ellsworth that the article "Suing the Sovereign", published in the December 1990 issue of the Utah Bar Journal (Vol 3, No. 10), did not include a citation to United States Claims Court, A Deskbook for Practitioners (1987) (published by the Claims Court Bar Association), an important resource to Mr. Ellsworth's article. Although the Utah Bar Journal believed that there was no legal reason to publish a notice of correction at this time, Mr. Ellsworth desired that credit be given where it may be due and therefore requested that this notice be printed.

Non-Profit Organization Advisory Council Co-sponsored by Corporate Counsel Section and Business Law Sections

By Colleen L. Bell

United Way agencies in Utah touch the lives of many of the state's residents. Fortunately, when United Way agencies need assistance, people respond. The Utah State Bar was pleased to help Utah's United Way agencies in a profound way.

In early September 1992, John C. Baldwin, Executive Director of the Utah State Bar, and John Becker, Public Relations Coordinator for the Utah State Bar, asked the Corporate Counsel Section and the Business Law Section of the Utah State Bar to consider undertaking a project to educate United Way agency volunteers. The proposal was to gather together members of both sections who had expertise in issues facing non-profit organizations. In particular, John Becker wanted attorneys to make a formal presentation on a range of legal topics of interest to United Way agencies. The Utah State Bar's presentation would be part of a series of presentations to United Way agencies, sponsored by the Junior League. At the time, both sections were busy with their own agendas for the year and the proposal seemed somewhat overwhelming.

The section officers for each section met several times to discuss the logistics of putting together such a program. The officers decided that an effective presentation would require 1) knowledgeable attorneys to present a variety of legal issues; and 2) a packet of relevant information to distribute to non-profit organizations.

In December, the section officers mailed a recruiting letter to all members of both sections describing the "Public Relations Project for Non-Profit Organizations." More than 20 interested attorneys responded to our initial request. Encouraged by this genuine interest from qualified attorneys in both sections, the section officers promptly held additional organizational meetings before inviting the "volunteer" attorneys to a general meeting. We divided the general topic of "Legal Issues Facing Non-Profit Organizations" into four specific issues 1) Avoiding Legal Entanglements; 2) Officer and Director Liabilities and Duties; 3) Federal and State Tax Issues and 4) Insurance and Risk Management. We held a general meeting on February 18, 1993, inviting the volunteer attorneys. The turnout and participation was again encouraging. We named our new committee the "Non-Profit Organization Advisory Council." The volunteers divided into four groups, with each group assigned to one of the four areas. We also designated certain section officers to act as liaisons for each group. Each group also chose a "team leader" to facilitate the delegation of assignments within the group.

By the beginning of April, we had a sophisticated packet of materials ready for distribution to the United Way agencies. On April 15, the volunteer attorneys and two insurance brokers, made four presentations, lasting approximately one hour each, to a "full house" consisting of representatives from approximately seven United Way agencies such as Catholic Community Services, the Indian Walk-In Center, the Community Services Council, the Counseling Institute of Park City, Utah Independent Living, Opportunities Industrialization Council and the New Hope Multicultural Center, at the Junior League offices. The questions prompted lively discussions and the presentation was well-received.

Now that the Non-Profit Organization Advisory Council has been formed and has passed its first test with flying colors, the Corporate Counsel Section and the Business Law Section plan to continue co-sponsoring it and hope to facilitate more presentations for other non-profit organizations throughout the state. The Council has already fulfilled its mission of educating and promoting good will. We look forward to the Council's continued success.

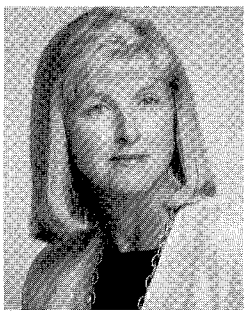
Race Results of the Eleventh Annual Bob Miller Memorial Law Day Run Announced

The Eleventh Annual Bob Miller Memorial Law Day Run was held on Saturday, April 24, 1993, with an enthusiastic group of 230 runners outlasting a poorly-timed rain storm. The 5 kilometer course descended from Red Butte Gardens, through Fort Douglas, around the University of Utah Golf Course, and down South Campus Drive to the University of Utah College of Law parking area. This year's men's overall winner was Frank Mylar, with a time of 16 minutes, 12 seconds. He was followed by Kevin Murphy (16:44) and Tony Kuch (17:08). Victoria Kidman was the women's overall winner, finishing in a time of 19 minutes and 31 seconds, followed by Carline Carson (20:12) and Jill Bedford (21:23). The three-men, two-women team race was won by Snow, Christensen & Martineau, with the Attorney General's Office in second, and Holmes, Roberts & Owens in third. VanCott, Bagley, Cornwall & McCarthy was awarded the prize for the best firm t-shirt. For those of you with a busy running schedule, next year's race is tentatively scheduled for April 30, 1994.

Free LEXIS®-NEXIS® Services Available

Mead Data Central, providers of the LEXIS®-NEXIS® services, is extending the use of our on-line CAREER library, at no charge, to all unemployed Utah law school graduates who are seeking employment. Please contact your LEXIS Educational Representative, Marie Vanderheiden at (800) 325-8227 for access information and a CAREER library ID number, or the Career Services Office at your law school. This service will be available through August 31, 1993.

Judge Pamela Greenwood Named Woman Lawyer of the Year



Women Lawyers of Utah announced today that Judge Pamela T. Greenwood has been selected as the 1993 Woman Lawyer of the Year. Judge Greenwood was appointed to the Utah Court of Appeals in 1987, and has been active in the Utah State Bar, the Salt Lake County Bar Association, and the Legal Aid Society, having served as President of all three organizations. She was a member of the first Executive Committee of Women Lawyers of Utah, and served on the Judicial Council Task Force on Gender and Justice. Judge Greenwood earned her law degree in 1972 from the University of Utah College of Law, where she was a member of the Utah Law Review.

"Judge Greenwood richly deserves to be recognized as the Woman Lawyer of the Year," states Kate Lahey, President of Women Lawyers. "Few attorneys — male or female — have contributed so unstintingly to Utah's legal community, and we are delighted to honor Judge Greenwood's achievements."

Women Lawyers of Utah is a professional organization of women and men dedicated to supporting the contributions of Utah's women attorneys. Past recipients of the Woman Lawyer of the Year Award have included:

- Justice Christine M. Durham of the Utah Supreme Court (1986)
- Jan Graham, Utah Attorney General (1987)
- Brooke Wells of the Salt Lake Legal Defenders' Office (1988)
- Jane Marquardt of the Ogden law firm of Marquardt, Hasenyager & Custen (1989)
- Judge Judith M. Billings of the Utah Court of Appeals (1990)
- Anne Milne of Utah Legal Services, Inc. (1991)
- Patricia W. Christensen of the Salt Lake law firm of Kimball, Parr, Waddoups, Brown & Gee (1992).

ATTENTION: New CLE Tracking Procedure!

Beginning April 1, 1993, and on a monthly basis thereafter, the Utah State Bar will be printing CLE information on the mailing labels affixed to the Bar Journals. The Utah State Bar and the Utah State Board of Continuing Legal Education will track CLE hours for programs which have been previously approved and reported to the Utah State Board of CLE. This information will also be accessible by contacting the Utah State Board of CLE, which is located in the Utah Law & Justice Center. **Each attorney will still be required to keep track of his or her CLE hours. This service is being provided as a courtesy to Bar members and doesn't release them of their responsibility to keep records of their own.** Regulation 5-103 (1) of the Utah State Board of Continuing Legal Education states the following: 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.

Postjudgment Interest Rate Change

Senate Bill 279, effective May 3, 1993, has amended Utah Code Ann. §15-1-4 relative to postjudgment interest rates. Any judgment rendered on a contract will still bear the interest agreed upon by the parties. However, other judgments will no longer bear interest at 12% per annum, but rather will bear interest at the "federal postjudgment interest rate" (as defined in 28 U.S.C. §1961) plus 2%. The current interest rate, which will be applied to non-contract judgments rendered between May 3, 1993 and December 31, 1993 is 5.72%

NOTICE:
of Creation of Law and Technology Committee

At the April 27, 1993, Bar Commission meeting, the Board approved the creation of a Law and Technology Committee of the Utah State Bar. Jeffrey N. Walker, from Jones, Waldo, Holbrook & McDonough, has been appointed by Randy Dryer as Chair of this newly created Bar Committee. The purpose of this Committee will be to assist in and evaluate the implementation of technology currently found throughout the Bar and actively participating with companies involved in the creation of technologies that have application to the legal profession. Anyone interested in joining the Committee should contact Jeff Walker at 521-3200.

New Legal/Medical Interprofessional Code

The Bar's Legal-Health Care Committee has joined with the Utah Medical Association to revise and update *The Legal/Medical Interprofessional Code* for Utah. The Code deals with issues relating to interprofessional relationships concerning clients/patients and describes how physicians and attorneys should relate in resolving issues which involve patient care. Both physicians representing the medical profession and lawyers representing plaintiffs and defendants in their practices participated in producing this update. The Code was first published in 1971 and revised in 1982. Free copies of the revised *Interprofessional Code* are available at the Bar Office, c/o Kim Williams, 645 South 200 East, Salt Lake City, UT 84111-3834.

NOTICE
Final Report of the Futures Commission Available

The Bar's Future Commission will be making its final report at the upcoming Annual Meeting in Sun Valley. James B. Lee, of Parsons Behle & Latimer, has chaired this Special Commission which was charged with (1) ascertaining in detail the present demographic composition of the Bar and describing the existing market for legal services in Utah and (2) forecasting these areas to the year 2002.

Copies of the Futures Commission Final Report will be distributed during the Annual Meeting and will be available at the Bar Office after July 1st for any Bar members who would like a copy.

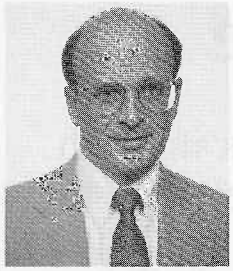
NOTICE
Final Report of the Task Force on Solo and Small Firm Practitioners Available

The Task Force on Solo and Small Firm Practitioners will be making its final report at the upcoming Annual Meeting in Sun Valley. Chair Richard D. Burbidge, of Burbidge & Mitchell, and Vice-Chair Charles R. Brown, of Hunter & Brown, have headed up this special task force which was charged with identifying the unique role, needs and problems of the solo and small firm practitioners in the state and making recommendations to the Bar Commission and the Utah Supreme Court for specific actions, programs or services the Bar and the judiciary should take or provide.

Copies of the Task Force's Final Report will be distributed the Annual Meeting and will be available at the Bar Office after July 1st for any Bar members who would like a copy.

BAR COMMISSION CANDIDATES

First Division Candidate



James C. Jenkins

JAMES C. JENKINS

I am seeking election to represent attorneys of the First District on the Bar Commission. My sole purpose in doing so is to provide a service to my associates and members of the profession. I have been practicing in the First District for nearly seventeen years. Because of my experience and general practice both in private and public matters, I believe I am sensitive to the concerns and needs of all lawyers in our District. I have previously served as Secretary-Treasurer for the Cache County Bar (1978-81); Lawyer Benefit Committee (1978-80); Law Day Committee (1984-86); Courts and Judges Committee (1989-90); Ethics and Discipline Committee (1992-95) of the Utah Bar; and Litigation Section, Trial Practice Committee (1986-present) of the American Bar Association.

My objectives while serving on the Bar Commission would be:

1. To increase public awareness of the valuable service provided by the profession, and to improve public opinion of lawyers.
2. To urge less regulation of the profession by encouraging increased self commitment to professional and ethical service.
3. To encourage the continued fellowship of attorneys in the First District.
4. To improve the practice of law.

Uncontested Elections. . .

According to the Utah State Bar Bylaws "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected.

James C. Jenkins is running uncontested in the First Division and will therefore be declared elected.

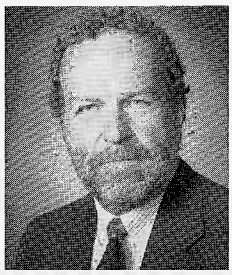
Third Division Candidates

CHARLES R. BROWN

Members of the Third District Bar:

As you know from the letter included with your ballot, I am Charles R. Brown, a tax attorney with the firm of Hunter & Brown. I was appointed to fill the vacancy on the Commission occurring upon Jan Graham's resignation, and I am running for reelection to a full term.

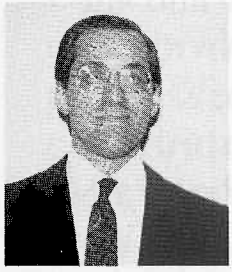
I believe the Commission should reflect the views and concerns of all members. As a business attorney I believe I can offer a fresh view and analysis of the business and organizational issues faced by the Bar.



Charles R. Brown

As a small firm practitioner I understand the unique needs of those not practicing in the larger organizations. Through my work on the Commission and the Small Firm Task Force it is my hope to increase the utility of the Bar to all members. If the organized Bar can assist all practitioners in reducing the administrative burdens of practice, we may, as a group, improve the availability of quality legal representation to all segments of society.

I am willing to devote the necessary time and effort and would very much appreciate your vote and continued support in accomplishing these goals. Thank You.



Robert P. Faust

ROBERT P. FAUST

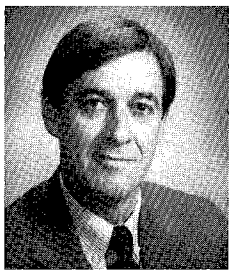
I am the third generation of lawyers in my family, which gives me a strong tradition in the law. My grandfather was a lawyer and judge, my father was a lawyer and President of the State Bar, and all of my brothers are lawyers. Through my family, the law has been a dominant influence in my life, creating a strong sense of responsibility to provide service. To me, the practice of law is a service profession, not just a business.

I practiced for approximately four years in a three-man law office in Vernal, Utah, and for six years in a Salt Lake City law firm. Therefore, as our profession changes, I understand the issues and concerns facing all lawyers, from the single practitioner to practitioners with larger firms. I am a fiscal conservative.

I will encourage effective use of our bar dues for the services rendered from the State Bar. I desire to render service to my profession and to the public. I am committed to make a difference in our profession.

DENNIS V. HASLAM

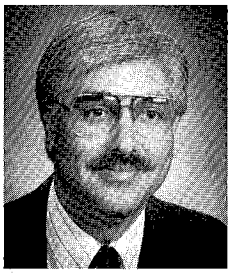
While serving as a commissioner for the Third Division during the last three years, I have gained valuable insight and experience in the organization and conduct of the Utah Bar. I have been actively involved in restructuring its finances and operations in light of the recommendations of the Supreme Court's Task Force on the Management of the Bar. We've come a long way in the last three years. However, there is still much which can be done to improve operations and continue to deliver



Dennis V. Haslam

important services to Bar members and the public.

In order to adequately serve and meet the needs of the public and the members of the Bar, we must look continuously at the application and admission processes, the provision of continuing legal education programs, the delivery of legal services to those in need, the discipline process, and the accommodation of the needs of government and corporate lawyers, women and minorities. I am committed to promoting integrity and competence in our profession and believe that my experience can assist in accomplishing these goals.



Michael N. Martinez

MICHAEL N. MARTINEZ

My name is Mike Martinez, I am 42 years old, married and have three children. I am seeking the office of Bar Commissioner in the Third District.

I have been an active participant in Bar activities for most of my 16 year legal career. The Bar is an important institution and, wisely governed, is beneficial to attorneys and the public. But, sometimes institutions lose sight of their primary goal. The Bar is a membership organization. The mission of the Bar is to "represent" the member lawyers. I believe representation includes providing services and information which enhance our ability to provide legal services. Given a budget of over Two Million Dollars I believe that staff time can and should be devoted to assisting the membership. Given our numbers we should, for example, be able to purchase low cost insurance for our family and affordable malpractice insurance to protect our livelihood. There is no reason for judicial and administrative law judge vacancies to be closed before notice is given in the *Bar Journal*. Also, no rule of law or procedure should be effective until it has first been published for comment in the *Bar Journal* and the final rule should be published prior to effective date.

I have worked for government, practiced with a small firm, and now, a sole practitioner, I believe that no matter what type of law we practice we are very much alike. Being a lawyer transcends our differences and a service to one is a benefit to all.

CHARLOTTE L. MILLER

Background
Native of St. Louis, Missouri
Resident of Salt Lake City since 1979

Central Missouri State University
Warrensburg, Missouri
University of Utah College of Law
Salt Lake City, Utah

Employment
Vice President and General Counsel, JB's Restaurants, Inc.

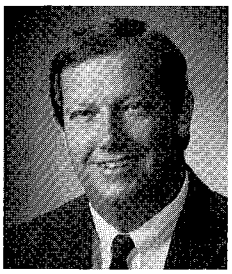
Past employment
Utah Supreme Court Clerk
Moyle & Draper
Watkiss & Saperstein
Janove & Miller

Activities
- Tuesday Night Bar

Charlotte L. Miller

- Legal Services/ Legal Aid Pro Bono Project
- Young Lawyers President
- Pro Bono Attorney of the Year
- Chair, Utah State Bar Annual Meeting
- Big Brothers-Big Sisters
- University of Utah Alumni Board of Trustees
- Speaker, National Association for Health Care Recruitment
- Advisory Board, Legal Assistants Association of Utah

I can contribute to the Bar Commission the perspective of an employee, volunteer and organizer of several projects and organizations. Volunteering in the Tuesday Night Bar made me a better Young Lawyer President; volunteering in Big Brothers-Big Sisters – a better parent; working as a legal secretary and assistant – a better lawyer; working as a cashier at Jack-In-The-Box when I was 16 – a better employer. My experience in large firms, small firms, and now as general counsel in a company where I am the only attorney and have the roles of client, lawyer, business person, employer and administrator will be a benefit to the Bar Commission and the members of the Utah State Bar.



Brad H. Parker

BRAD H. PARKER

I have been a member of the Bar and have enjoyed the benefits of Bar membership since I began the practice of law as a new law graduate in 1978. Though I value my Bar membership, I have not always found myself in agreement with the positions and policies asserted by the Bar. I have been a strong supporter of membership in the Bar, for example, but have been vocal in the assertion that Bar membership should be voluntary and not mandatory. Likewise, I believe strongly in CLE but have been a vocal advocate that CLE should not be mandatory.

I have also been concerned on occasion about how our Bar dues are expended. As a partial result of my involvement in this area, Bar members may now receive a rebate for that portion of their dues expended on lobbying efforts with which they do not agree.

As a Bar commissioner I believe that you would find me open minded and assertive. I also believe that you would find me responsive to your concerns.

D. FRANK WILKINS

D. Frank Wilkins

Formerly he was a Utah Supreme Court Justice; Chief Judge, District Courts of Utah; Chairman of the Judicial Council; and Third District Court Judge. He also received the Outstanding Judge of the Year Award from the Utah State Bar and the Amicus Curiae Award from the Utah Judiciary. Additionally he served as a Public Service Commissioner for Utah.

He was a bar examiner for the Utah State Bar, a member of a special committee of the Utah State Bar to consider whether the Federal Rules of Evidence should be adopted for State Courts of Utah; and a member of the Civil Justice Reform Act Advisory Committee, U.S. District Court (Utah).

He took undergraduate studies at the University of Utah and received his Bachelor of Laws degree from George Washington University. Presently he is of counsel to the firm of Berman, Gaufin & Tomsic in Salt Lake City and concentrates on civil litigation and alternate dispute resolution (ADR). He is currently a member of the ADR Committee of the Utah State Bar; Chair for the Judicial Panel in Utah for American Arbitration Association; and a member of the Court Panel of Arbitrators for the United States District Court of Utah.

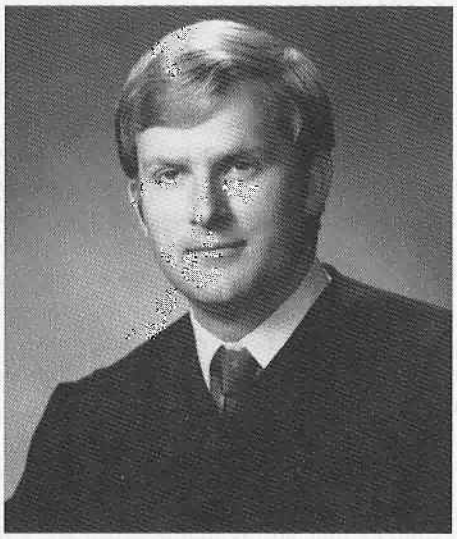
Decade of Change in Utah's Judiciary

By Judge Michael L. Hutchings

On July 1st, I will be celebrating the ten year anniversary of assuming office as a Circuit Court Judge. The past decade has been a very enlightening and interesting period of time in my life. This upcoming ten year anniversary has caused me to look back upon the past decade in which I have served. During this review, I am amazed at the number of significant changes which have taken place in the judiciary. I point out, parenthetically, that the judicial branch of government is really quite different than it was ten years ago. We have taken a number of great strides forward to strengthen the judicial branch of government. I will outline a few the changes which I have observed.

Judicial Turnover. Over 70% of the current state court judges were not serving ten years ago. We have seen, accordingly, a tremendous change in judicial personnel. There are some judicial districts where all of the judges serving have less than 10 years of judicial experience. We basically have a younger, fresher judiciary that in my estimation is very well trained and highly motivated in the right directions. In essence, there are alot of new, fresh faces in the judiciary.

Creation of a Court of Appeals. When I took the bench in 1983, there was a serious backlog of appellate cases before the state Supreme Court. The Constitution at that time required that the Supreme Court hear all appeals from the trial court of record, and this caused considerable difficulty for our five Supreme Court justices. They performed an extraordinary work in dealing with the strenuous caseload. It became increasingly obvious that an intermediate Court of Appeals should be created. The Constitution was amended in 1985. In 1986, the legislature passed House Bill 100 creating a seven member Court of Appeals to begin operation in January 1987. That court has substantially reduced appellate backlog and delay, and has put us in a very favorable situation regarding quick and speedy resolution of appellate cases. While I do not agree with every decision, I am impressed with the quality of the opinions and caselaw established by our appellate judges.



MICHAEL L. HUTCHINGS was appointed to the Third Circuit Court bench by Governor Scott M. Matheson. He began this service on July 1, 1983, at the age of 30. He previously had served as an associate attorney with the Salt Lake law firm of Senior & Senior, and in 1983 became City Attorney/Prosecutor with West Valley City Municipal Corporation. He currently serves on the Board of Editors of the Utah Bar Journal, *the State Bar Fee Arbitration Committee, the Board of Directors of the BYU Law School Alumni Association, a trustee with the Ensign Peak Foundation and as Vice Chair of the Utah Tomorrow Justice Committee. He also serves on the Statewide Transition Committee for Consolidation of the Courts. He also serves as a Master of the Bench for the A. Sherman Christensen American Inn of Court I. He has previously served on the State Judicial Council and on the Board of Circuit Court Judges. In 1988, he was honored by the State Bar as Circuit Court Judge of the Year, and in 1989, as BYU Law School Alumnus of the Year.*

Judicial Retention Elections. Article VIII of the Utah Constitution, which became effective in 1985, instilled the requirement that all state judges would be subject to uncontested retention elections. Previously, contested judicial elections put judges in a very difficult position every six years, or in case of Supreme Court justices, every ten years. The difficulties included in the ethically uncomfortable positions of raising substantial amounts of money and of campaigning and politicking in a way incompatible with the independence expected in the office of a judge. In order to ensure a independent judiciary not controlled by politics, the judicial retention election concept was adopted in the Constitution.

Judicial Accountability. Even though contested judicial retention elections ended, there are and have been other ways in which judges have been held accountable for their actions on the bench. For example, a Judicial Conduct Commission was created by the same constitutional article which ended contested elections. This commission has a constitutional mandate to review ethics complaints against judges and to mete out appropriate discipline reviewable by our Supreme Court.

Additionally, the Judicial Council has established a Judicial Performance Evaluation Program designed to perform two functions: (1) evaluate judges before the judge's name is placed on the ballot for retention election, and (2) provide a means to give feedback to judges regarding their performance. The Judicial Performance Evaluation Program is comprised of a detailed evaluation by attorneys who practice regularly before the judge, as well as an evaluation of the judge's attendance at continuing legal education programs, and the judge's past history regarding discipline meted out by the Conduct Commission. The Judicial Council analyzes all the data provided in determining whether the judge has met the minimum performance criteria established by the Council. A new law requires that the standards set by the Council and the individual

performance data for each judge on the ballot be published in the voter information pamphlet and in the newspapers of general circulation between one and four weeks before the election.

It is my impression that this judicial performance evaluation is working well. It has been the subject of some controversy in the judiciary where, frankly, a few judges have not wanted to receive any feedback regarding their performance. Other judges welcome the feedback. The performance evaluation provides judges with an opportunity to evaluate their own performance and make any adjustments which appear to be appropriate. This process, in my opinion, has improved the judiciary and preserved accountability. It also gives the public some important information about individual judges before the retention elections.

Ethics Advisory Committee. The Judicial Council has established an Ethics Advisory Committee which can provide guidance to judges who want advisory opinions regarding ethical matters. When ethical questions arise, this committee is the forum for judges to receive guidance. The opinions of the committee are not binding. However, if the opinions are followed, the judge is protected from discipline in that particular matter. The Ethics Advisory Committee is a very important and useful tool to the judge who is trying to steer clear of any ethical violations of the Code of Judicial Conduct. Many of these questions arise in gray areas where the judge needs particular advice. A number of judges now are utilizing this service and it is one of the more important behind-the-scenes services which has strengthened the judiciary.

"The performance evaluation provides judges with an opportunity to evaluate their own performance. . . ."

Judicial Education. In 1986, a judicial education director was hired in the Administrative Office and directed to prepare and administer a program for the education, of judges and court employees. The quality of those educational programs has increased dramatically. Utah now has one of the best judicial education programs in the country and this has had an important, positive effect on the judges who are more informed and better trained. There is a noticeable difference between the early years when I was on the bench with the lack of judicial education resources and the judicial education resources that are available now. We still have some improvements to make in the future, but we have made dramatic improvements during the past decade.

A Strong Judicial Council. The new constitutional article also requires that a Judicial Council be organized with the Chief Justice serving as the presiding officer. The Judicial Council now represents more equally than in the past, all of the courts of the state. The Judicial Council now is comprised of two Supreme Court Justices, one Appellate Court Judge, three District Court Judges, two Circuit Court Judges, two Juvenile Court Judges, two Justice Court Judges, and an attorney appointed by the Bar Commission. The Judicial Council is responsible to implement rules of administration and procedure governing the judiciary, as well as represent the interests of the judiciary before the legislative and executive branches of government and others.

Uniform Rules of Administration and Procedure. There has been quite a strong effort during the past ten years to make as uniform as possible court rules of administrative and procedure. Ten years ago, all judicial districts had their own rules of administration and procedure. There has been a major scaling back of these local rules of administration and procedure, and these rules are now established in a more uniform pattern as promulgated by the Judicial Council. Currently, these rules are encompassed in the Utah Code of Judicial Administration.

Court Technology. When I took the bench ten years ago, the computers were not utilized in courtrooms. All court files reflected the individual handwriting of court clerks. Today 99% of all court records are kept on computer, and the computer system is accessible to attorneys and others in the criminal and civil justice fields. We are making great strides in court technology and presently are testing in a few courts the keeping of a video record as well as a computer-aided transcription method for certified court

reporters. Obviously, court technology is another area where we will see great changes in the future. However, we have come a long way in the past ten years.

Streamlining Judicial Districts. Ten years ago, the Circuit Court had different judicial district boundaries than the District Court. The Juvenile Court also had different judicial boundaries. All of these boundary differences have been eliminated, and all of the trial courts now have the same boundaries. This has been one of the preliminary steps toward a consolidation of the courts.

Judicial Nominating Commissions. The Judicial Nominating Commissions were also established to be the same for all levels of court. For example, the Circuit Court Nomination Commissions was composed of different members than the District Nomination Commission, and the Juvenile Court Nomination Commission was quite different. Now, the same commissioners serve for the District, Circuit, and Juvenile Courts in each judicial district. There has also been a training program and a manual to provide guidance to members of nomination commissions.

Judicial Compensation. During the last ten years, great strides have been accomplished in improving judicial compensation. Not only has the salary of judges improved, but retirement benefits also. However, obtaining adequate judicial compensation is always a challenge. For example, in this last legislative session we were only able to obtain a 1 1/2% salary increase when all other state employees received approximately 3%. It is a continual challenge to keep judicial salaries competitive and fair.

The Administrative Office of the Courts. The Administrative Office of the Courts has grown with the increased challenges and responsibility being placed upon the judiciary. Three court administrators have served during the past decade: Dick Peay, Bill Vickrey, and Ron Gibson. Each was talented in his own way. Bill Vickrey served during seven of the last ten years. He was a man of great vision and had the ability to bring diverse opinions and people together to accomplish some very important goals. The judiciary is much stronger because of the influence of Bill Vickrey. Ron Gibson is our new Court Administrator and he has been serving over a year. Ron has brought a lot of credibility to the job as he served for seven years as Bill Vickrey's chief deputy. The Office of the Court Administrator is much stronger than it was ten years ago. The staff is larger, better trained, and has much more responsibility.

Task Forces and Committees. There are numerous task forces and committees which have been studying ways to improve the judicial branch of government. One significant task force was the Task Force For Justice In The 21st Century which was a futures committee designed to implement goals and make recommendations regarding the future of the judiciary. There have also been other committees that have impacted the judiciary including the Gender and Justice Committee, the Child Support Guidelines Committee, and the Alternative Dispute Resolution Committee. There has also been major media coverage by KSL TV and the Deseret News entitled "Doing Utah Justice".

Individual Calendaring. Ten years ago, most courts followed a master calendaring approach to case management. However, the number of courts following a master or shared calendar has significantly diminished. In the metropolitan areas, particularly, judges now have individually assigned caseloads for which each judge is individually accountable. This increased accountability in case management significantly reduced trial court delay in many judicial districts and has improved judicial performance.

State Funded Courts. In 1983, the Circuit Court became a fully funded state court. Previously, it had been partially funded by the state and funded by cities. This created management problems. This duality of masters – state vs. cities – ended with full state funding of the Circuit Court. A few years later, the District Court became a fully state funded court. Now, all trial courts of record – District, Circuit, and Juvenile, as well as the Supreme Court and the Court of Appeals are administered under one roof with one centralized system of administration.

Court Consolidation. The legislature has approved the eventual and complete consolidation of the District and Circuit Courts into one court, which will be the District Court. Consolidation has already been accomplished in Districts 5, 6, 7, & 8 and will be accomplished in Districts 1, 2, 3, & 4 by 1998. There is also some discussion about having an earlier consolidation. Consolidation has been controversial and many affected parties share strong opinions. I believe that consolidation will eventually mean a more efficient and flexible judiciary with an administrative staff able to meet the needs presented to the judiciary in the 21st century.

CONCLUSION

Looking back upon the past ten years, I see great changes in the judiciary. I am pleased to have been part that change. The judiciary has been significantly strengthened and has acquired many important and necessary tools to perform its important functions.

Looking ahead ten years, it is difficult to predict all of the changes. I am committed to work to improve the judiciary and make it even stronger than it is today.

Join us for the 1993 Utah State Bar Annual Meeting June 30 - July 3 in Sun Valley, Idaho

In addition to 35 informative and varied breakout session topics, numerous exciting sporting and social events for attorneys, children, spouses and guests alike, visiting with good friends and meeting new faces, we will also be privileged to hear from the following intriguing keynote speakers:

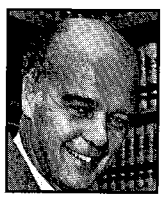
THURSDAY, JULY 1, 1993 AT 12:00 NOON

Charles J. Ogletree, Jr., Harvard Law School professor and prominent legal theorist, has made a reputation in taking a hard look at complex constitutional issues of law and in working to secure the rights guaranteed by the Constitution for everyone equally under the law. Professor Ogletree is the newest moderator of producer Fred Friendly's "Ethics in America" series (aired on PBS in 1989) and "Hard Drugs, Hard Choices," (aired in 1990), in which he uses the forum of a fictitious criminal case to probe questions of ethics and law. Professor Ogletree was formerly a partner in the Washington, D.C. firm of Jessamy, Fort & Ogletree. Beginning as a staff attorney in the District of Columbia Public Defender Service, he served as Training Director, Trial Chief, and Deputy Director of the Service before entering private practice in 1985. A contributor to the Harvard Law Review, among other publications, he holds a J.D. from Harvard Law School and an M.A. and B.A. in Political Science from Stanford University, where he was Phi Beta Kappa. Photo credit Bradford F. Herzog.

FRIDAY, JULY 2, 1993 AT 7:00 P.M.

Justice Byron R. White, Associate Justice of the Supreme Court of the United States, graduated from the University of Colorado in 1938 with a B.A. degree. He was elected a member of the All-American Football Team in 1937 and in 1954 was named to the National Football Hall of Fame. In December 1937, he was selected as a Rhodes Scholar and attended Oxford University, Oxford, England, from January 1939 until October 1939. He attended Yale Law School for two years prior to World War II, completing his studies there after the war and receiving his LL.B degree magna cum laude in 1946. He served as law clerk to the Chief Justice of the United States Supreme Court. In 1947, he joined the law firm of Lewis, Grant, Newton, Davis and Henry (now Davis, Graham and Stubbs), Denver, Colorado. He became a partner and remained with this firm until January 1961, when he was appointed Deputy Attorney General of the United States. He was nominated by President John F. Kennedy as Associate Justice of the Supreme Court of the United States. He is the first Coloradan to serve on the Supreme Court.

SATURDAY, JULY 3, 1993 FROM 9:30 A.M. TO 12:20 P.M.



James J. Brosnahan is a senior partner with Morrison & Foerster. Mr. Brosnahan received his B.S.B.A. degree in 1956 from Boston College and went on to attend Harvard Law School, earning his LL.B. degree in 1959. In 1961, his post-law school career led to five years as an Assistant United States Attorney prosecuting federal cases in Phoenix, Arizona and in San Francisco, California. Mr. Brosnahan has served as special counsel to the California Legislature's Joint Subcommittee on Crude Oil Pricing, he was the lawyers' representative to the Ninth Circuit Judicial Conference and Chair of the Delegation, and president of the Bar Association of San Francisco. He is a member of the American College of Trial Lawyers, the American Board of Trial Advocates, the International Academy of Trial Lawyers, the International Society of Barristers, the American Law Institute, and the American Board of Criminal Lawyers Association. Mr. Brosnahan also serves as Master Advocate on the faculty of the National Institute for Trial Lawyers.

We are in need of assistance at the Thursday evening Family Picnic and Carnival. If you have any teenagers that would be interested in assisting, please have them call Kaesi Johansen at 531-9077 before June 20.

FRIDAY, JULY 2, 1993 AT 8:15 A.M.

An insider's look at the Supreme Court selection process, including whether the process works and what to expect in the future. Lawyers and their guests will want to hear this panel of distinguished speakers provide insight on a timely topic.

Michael J. Gerhardt, Professor at Marshall-Wythe School of Law, the College of William and Mary and Special Consultant to the National Commission on Judicial Discipline and Removal. Professor Gerhardt received his B.A., Cum Laude, from Yale, his M.Sc. from the London School of Economics, and his J.D., cum laude, from the University of Chicago. He has published over a dozen law review articles, focusing in part on judicial selection and discipline. During the summer and fall of 1992, he volunteered as a member of the Clinton-Gore campaign's Judiciary and Justice Working Group and as its surrogate in Virginia on judicial and health car issues.

Sandy Gilmour, NBC News Correspondent, Washington, D.C. Bureau. Mr. Gilmour handles the daily reports on major national stories for NBC's 200-plus affiliates for air on their local daytime and evening newscasts. He has covered the White House during the entire Gulf crisis and war, major debates in Congress, the Clarence Thomas hearings, Washington summits, and Supreme Court decisions. He graduated from Downing College in Cambridge, England in 1968 and has worked as an investigative reporter for Salt Lake City stations KCPX (now KTVX) and KUTV where he was host of Take Two. He has reported for the NBC Houston, Beijing, London and Moscow bureaus before joining the Washington, D.C. Bureau.

Senator Orrin G. Hatch, Utah Senator who serves as the ranking republican on the Senate Judiciary Committee. The Committee's initiatives have included constitutional amendments for silent prayer in school and for a balanced budget. He also takes an active part in the confirmation of all judicial nominations, a process he believes should be open and fair. Senator Hatch is a member of the Labor and Human Resources Committee which oversees more than 2,000 programs and activities at the Department of Labor, the Department of Health and Human Services, and the Department of Education. He also serves on the Senate Finance Committee. He received a B.S. degree in history from Brigham Young University in 1959, and received his Juris Doctor degree in 1962 from the University of Pittsburgh Law School.

R. William Ide III, President-Elect of the American Bar Association. Mr. Ide is a cum laude graduate of Washington & Lee University and received his law degree from the University of Virginia, where he served on the Law Review. He holds an M.B.A. from Georgia State University. In his service to the ABA he has held numerous positions, including: member of the Special Advisory Committee on International Activities; Chair, Special Committee on the Drug Crisis; and member of the Long Range Program and Financial Planning Committee. He has also served on the Georgia Bar Board of Governors (1974-88). He is a partner in the law firm of Long, Aldridge & Norman. His major area of practice is municipal finance.

Kristine Strachan, Dean, San Diego School of Law will serve as moderator. She received a bachelor's degree from the University of Southern California in 1965 and a law degree from the University of California at Berkeley in 1968, where she was an editor of the Law Review. She practiced corporate and banking law in New York City with the law firm of Sullivan & Cromwell and international law with the Office of the Legal Advisor in the Department of State, Washington, D.C. She was a faculty member at the University of Utah College of Law from 1973 to 1989. She also served as a Deputy County Attorney in Salt Lake, specializing in homicide and major fraud prosecutions. She is vice-chair of the California Judicial Council's Select Committee on Judicial Retirement and a member of the San Diego Federal Court's Advisory Committee on the Civil Justice Reform Act of 1990.

Mental Illnesses and Incarceration — Lack of Facilities and Bed Space

By Leisha Lee Dixon
Secretary, Young Lawyers Section

Last year a client of mine was diagnosed as having an organic brain disorder. She also had a chronic problem with alcohol, which may have contributed in part to the disorder. After having accumulated several criminal convictions for intoxication, the possibility of treatment was explored. We contacted the State Hospital, the University of Utah, and other facilities designed for in-patient care for persons with mental illnesses. Many of these options eventually were not successful, due to a lack of bed space, lack of identification, and the inability to have the client civilly committed. In the meantime, she was held in jail while we waited and hoped that some facility would be willing to accept one more patient. When it became apparent that no facility was available, we contacted family members who reside out of state. The client eventually was able to go home, without treatment to take care of her disorder, but at least the family is there to help provide the care she needs.

There has been an increasing problem, especially within the last ten years, with incarceration of persons with mental illnesses as well as a lack of funding for additional bed space in facilities designed to care for those with mental illnesses. Budgets, as well as funds for psychiatric treatment continue to decrease while costs for medical care and medication are on the rise. Where is the compromise?

The criminal justice system is indeed "clogged" with jails which are becoming more and more overcrowded. Many of those persons who are incarcerated have mental illnesses. Unfortunately, more often than not, jail has become the answer when a person has been convicted of offenses which are closely related to an underlying problem, such as a mental illness which may or may not be related to a chemical dependency.

For example, an individual, who at the time of arrest is out of control and may possibly be an acute risk or danger to society, calms down with the aid of medication. This medication is administered in the controlled setting of the jail, but it is clear that the medication is advantageous to that individual. In order for that individual to try to prevent the possibility of this occurring in the future there needs to be a) treatment administered in a controlled environment to allow the individual to stabilize before he/she can go back into society; b) a willingness from the individual to want the treatment program; and c) a place for that individual to go to obtain the treatment in order to be in control, the individual needs the medication to stabilize, as well as an environment conducive to treatment, i.e., a facility. When a facility is not willing or cannot take more patients, the individual is not going to get the treatment he/she needs.

Even if the client is able to enter a facility, obtaining the treatment may still be a problem. In light of *Woodland v. Angus*, a Memorandum Decision issued March 15, 1993, by the Honorable David K. Winder, United States District Judge for the District of Utah, the ability for the state to force medicate any person is severely limited. In *Woodland*, the Plaintiff (Woodland) was determined to be incompetent not only to stand trial, but also incompetent to give an informed consent or refusal to treatment. Treatment was ordered for Woodland, and he was committed to the State Hospital. Mr. Woodland then refused to take any medication for diagnosed behaviors. After

hearings to determine whether to force medicate Mr. Woodland, and a change in policy for the State Hospital, Mr. Woodland was forced to take medication.

Judge Winder held that the interest of the individual is paramount, and the decision whether to voluntarily take medication should be left to either the individual or the individual's guardian. Even with concerns regarding what is best for the individual, the liberty interests that each individual has cannot be ignored.[1] Therefore, even if the client is deemed incompetent, the best option we have as counselors to our clients, is to find an individual who can best make that decision — a guardian.

Persons with mental illnesses comprise about one percent of the population. The number of facilities with enough bed space to accommodate these individuals is inadequate. The proposals to expand existing facilities have been faced with budgetary cutbacks and a lack of funding from the Legislature. The question, then, is, What can we, as Young Lawyers do, to change this problem in the future?

There are four things which we, as Young Lawyers, can do to change a system which has become a trap for persons with mental illnesses. First, contact members of the Legislature to voice concerns regarding the lack of budgeting to increase bed space and care for those with mental illnesses. Second, become more aware of what the client wants. Work with the client or the guardian to actively seek treatment in a facility which will help the client to become a better member of society — one who will be able to function once released from the facility. Third, remember that incarceration is not the answer for all persons with mental illnesses. Housing without the proper treatment or care may result in a person being released and committing another offense. Incarceration was designed as a deterrent and punishment for criminals — not for those persons with mental illnesses. Finally, consider what would be the benefit to society as a whole. Many who are in the criminal system have mental illnesses and are homeless. Quality of life should be more important than any compensation for services rendered. Gaining the proper perspective of your clients results in better representation. Wouldn't society benefit if the proper treatment were available when the problem is at its worst?

The end goal for any client who has a mental illness is not what the short-term gains will be, but what would be better for the client in the long-run. We must do what we can do to ensure that the avenue of treatment is open for clients who really need treatment. This, in turn, coincides with the goal we all have as Young Lawyers — effective counseling of clients.

[1]The court looked to *In re Roe*, 421 N.E.2d 40 (Mass. 1981), for guidance. The court in *Roe* considered the circumstances under which a ward of would exercise the right to refuse medical treatment where the ward was incapable of exercising the right personally because of incompetence. There, the court held that the individual or his/her guardian should decide whether to accept/reject medication. Denying the right to choose to those who are incapable of exercising it "degrades those whose disabilities make them wholly reliant on other, more fortunate, individuals."

CASE SUMMARIES

By Clark R. Nielsen

PROCEDURE AND REVIEW, DIRECTED VERDICT; EVIDENCE

The trial court erred in granting a directed verdict and in preventing plaintiff's products liability and negligence claims to go before the jury. A directed verdict will be reversed when the evidence taken in a light most favorable to the appellant is sufficient to permit a reasonable jury to find for the appellant.

The plaintiff's decedent was killed when his General Motors truck crashed in Salina Canyon. Plaintiffs alleged the truck had an unreasonably dangerous design and manufacturing defect that caused the accident. At trial, experts testified regarding the cause of the accident and the alleged design defects in the steering and underside of the truck. However, the trial court refused to admit evidence of the recall and re-design of a separate model vehicle. The Court directed a verdict in favor of the defendants without allowing the jury to consider the defect allegations.

The Utah Supreme Court viewed little real probative value in the evidence of the recall and re-design of an entirely different vehicle with a different steering gear layout. The minimal value of such evidence could not outweigh the substantial risk of unfair prejudice by leading jurors to conclude that since General Motors had remedied a possible steering gear layout design in one model that it should have done so in an entirely different model with an entirely different layout. Because of this imbalance, the court was unable to conclude that the exclusion of evidence was beyond the bounds of reasonability. The evidence ruling was affirmed.

However, because plaintiff's expert testified that at the time the truck was sold it had a defect or defective condition which made it unreasonably dangerous to the user, the trial court erred in granting directed verdict and taking the decision away from the jury. A directed verdict will be reviewed similarly to a summary judgment as set forth in *Butterfield v. Okubo*, 831 P.2d 97 (Utah 1992).

Nay v. General Motors Corp., 210 Utah Adv. Rep. 3 (J. Zimmerman)

GOVERNMENTAL IMMUNITY, DUTY

The Supreme Court affirmed the summary judgment in favor of the defendants financial commissioners in their personal capacity. Plaintiff had claimed that defendants were grossly negligent in carrying out their statutory duties in regulating and monitoring Grove Finance. To hold a government agent personally liable for gross negligence, a plaintiff cannot recover for the breach of a duty owed to the general public. The plaintiff must show that a specific duty is owed to the plaintiff individually. As a depositor, the plaintiff must establish the existence of a special relationship that imposes a specific duty of care on the state commissioner for plaintiff's benefit. Plaintiffs were unable to establish such a specific duty under the state banking laws, the UCCC protections, or statutes regarding supervised lendors. Although the UCCC is design to protect particular classes of persons, e.g. consumer buyers and debtors, from unfair credit practices, the court did not decide whether such a special relationship would impose a duty because the plaintiffs were not within these classes of persons. As only depositors in the failed institution, plaintiffs were not members of the class which the statutes and regulations are intended to protect. Therefore, plaintiffs were unable to show that the defendant owed a specific duty to plaintiffs as individuals.

Madsen v. Borthick, 210 Utah Adv. Rep. 5 (April 5, 1993) (J. Stewart)

GOVERNMENTAL IMMUNITY, GOVERNMENTAL FUNCTIONS

Governmental immunity insulates negligent school personnel who fail to assure a child's safety at school and prevents the child's parents from suing the school district and employees. Under the Utah Governmental Immunity Act, Utah Code Ann. §63-30-10(2), the school is immunized from a suit arising out of an assault and battery to a student. The student had complained to the school principal that he had been assaulted several times. However, the principal took no action to reasonably assure that the assaults would not continue. A subsequent beating resulted in serious injuries to the student. The student's action against the school district and principal for negligence in failing to supervise the physical education class was dismissed under the Governmental Immunity Act. The operation of a school by the government is a government function. Governmental immunity is waived for injury caused by negligence of a government employee, unless the injury arises out of an assault or battery. Therefore, plaintiff's injury has not been waived by the Governmental Immunity Act. A remedy against a school district requires legislative action.

Ledfors v. Emery County School District, 209 Utah Adv. Rep. 3 (Mar. 19, 1993) (J. Zimmerman) (J. Stewart concurs in result)

GOVERNMENTAL IMMUNITY, STATUTES OF LIMITATIONS; GOVERNMENTAL FUNCTION

Dr. Atiya (a county employee) filed a claim against Salt Lake County for reimbursement for legal expenses incurred in Dr. Atiya's defense of a federal civil rights case against the doctor and others. Because the doctor did not commence her claim within one year from the county's denial of her claims for indemnification of attorney's fees, her claims were barred under Utah Code Ann. §17-15-12.

Her claim against the county for intentional infliction of emotional distress is also barred by Utah Code Ann. §63-30-10(2) (Supp. 1992). The county's failure to indemnify Dr. Atiya for the expense in defending an action arising from acts or omissions incurred while employed by the county is plainly a governmental function. Utah law does not expressly waive the county's immunity for exercise of that governmental function.

Atiya v. Salt Lake County, 210 Utah Adv. Rep. 44 (Ct. App. April 5, 1993) (J. Russon, with Js. Billings and Greenwood)

EASEMENTS, MUTUAL MISTAKE, BURDEN; FINDINGS OF FACT

Defendants claimed an easement by implication and by necessity over the road traversing the plaintiff's property. On

appellate review, the Supreme Court reminds us that it will disregard the labels attached to findings and conclusions and look to the substance of the trial court's language ("Form follows function."). Therefore, that which the trial court labels a "finding" may actually be a conclusion of law, and is reviewed for correctness.

The court reversed the trial court's refusal to review and correct a 1981 decree misdescribing the defendant's easement. The trial court should have granted the relief to alter or amend the easement under Rule 60(b)(7). According to the evidence at trial, a mutual mistake occurred in the drafting of the original decree because false assumptions were made at that time. A determination that the 1981 trial court did not intend to provide the defendants with access over the plaintiff's ground is correct, but that intent was founded on misinformation as to other facts. Any prejudice from delay in seeking the correction was outweighed by the error preventing access to defendant's lands. The case was remanded with instructions to correct the easement description under Rule 60(b) to allow the defendants access to the eastern portions of their property.

Remand is also necessary to determine whether the use of the road by hunters, hunting with plaintiff's permission, places a different or greater burden on the servient estate. If no greater or different burden is created, then defendants may not interfere with that use of the easement.

Gillmore v. Wright, 209 Utah Adv. Rep. 6 (Mar. 22, 1993) (J. Howe)

PUNITIVE DAMAGES; RELEASE OF FRAUD

In the trial of a claim for punitive damages, evidence of wealth is not admissible until plaintiff has made a prima facie showing of liability for punitive damages.

A release given of all claims, known and unknown, will not release the defendant from later discovered claims of fraudulent concealment in the purchase and sale of real property and improvements. When a fiduciary relationship exists, a partner's silence as to a material matter may constitute fraud.

Ong International v. Eleventh Avenue Corp., 210 Utah Adv. Rep. 9 (April 6, 1993) (Chief Justice Hall)

MEDICAID BENEFITS

An applicant for Medicaid is not allowed to "spend down his assets" on medical bills in order to reduce his non-exempt assets to under $3,000.00 and thereby qualify for Medicaid. The federal program does not require such a "spend down" policy. While such a practice is permissible in other states, it is not mandated by the federal Medicaid program and the Utah legislature is not obligated to permit such a spend down program. Utah's state plan that does not allow such "spend down" of resources is not unreasonable. The legislature has properly allowed the Department of Health broad discretion to set eligibility standards consistent with federal requirements. The Department's refusal to permit "spend down" is not unreasonable.

Allen v. Utah Dept. of Health, 210 Utah Adv. Rep. 23 (April 8, 1993) (Chief Justice Hall)

TRUST DEED, DEFICIENCY ACTION, ONE-ACTION-RULE

Utah's one action rule does not bar a junior lienor from pursuing a deficiency judgment after the security has been sold by the holder of a senior trust deed. When the first deed of trust was foreclosed, the plaintiff Associates Financial purchased the property at the trust deed sale. However, the property was then redeemed by the Internal Revenue Service for its taxes and the plaintiff received only $5,700.00, leaving an unpaid balance on its note of $26,000.00.

The Utah Supreme Court affirmed the trial court's judgment for a $26,000.00 deficiency plus interest and attorney's fees. Because the defendant debtor had not defaulted on the mortgage, the one action rule of Utah Code Ann. §57-1-32 and §78-37-1 did not apply. The Court declined to opine how the statutes would apply when the junior lienor purchases property and the debtor has defaulted on the junior's mortgage.

Associates Financial v. Slaugh, 210 Utah Adv. Rep. 26 (April 12, 1993) (Justice Durham)

DUI, PHYSICAL CONTROL

In a detailed analysis as to the factors employed in considering the totality of circumstances, the Court of Appeals affirmed the finding of actual physical control of a vehicle by defendant while under the influence of alcohol, in violation of Utah Code Ann. §41-6-44(1). The defendant was in actual physical control when he was found sitting upright in the driver's seat with the keys in the ignition. The car was not running and the engine was cold. Defendant was either sleeping or unconscious at the time he was found. When defendant had driven his girl friend to the store he was not under the influence of alcohol but had ingested the alcohol while waiting in the parking lot for her. Defendant's girl friend was inside the store at the time defendant was discovered. The evidence was also undisputed that defendant did not intend to drive the car away from the store.

Because the trial court had applied the proper legal guidelines and had considered the elements in *Richfield City v. Walker*, 790 P.2d 87 the findings and legal conclusion would not be disturbed. The trial court's ruling was consistent with the public policy goal of preventing an intoxicated person from causing physical harm with a vehicle.

State of Utah v. Barnhart, 210 Utah Adv. Rep. 34 (Ct. App. March 31, 1993) (J. Bench, with Js. Garff and Jackson)

SEARCH WARRANT, PROBABLE CAUSE, HEARSAY

The Appeals Court panel reaffirmed that hearsay evidence may establish probable cause if the hearsay is reliable, there is a substantial basis for giving it credence, and it supports issuance of the warrant. A search warrant affidavit is interpreted on appeal in a common sense fashion with deference to the magistrate's decision. A warrant will be invalid only if the magistrate, given the totality of the circumstances, lacks a substantial basis for determining the existence of probable cause.

State v. Vlaha, Utah Ct. App. No. 920328-CA (April 20, 1993) (J. Garff, with Js. Greenwood and Orme)

Wallace Stegner: A Tribute

By Betsy L. Ross

Wallace Stegner, a substantially home-grown product, author of numerous fiction and non-fiction works, including the Pulitzer Prize-winning novel *Angle of Repose*, died recently at the age of 84 from injuries suffered in a car crash.

Although actually born in Iowa, Stegner's family moved to Salt Lake City when he was 12 years old, where he attended East High School, and then the University of Utah. Stegner could be considered a voice for the West, many of his works dealing with themes and experiences shared by those whose lives were shaped and drawn simply by living their formative years west of the Mississippi.

Although familiar with some of Stegner's works, I took this time to read a couple I had neglected — *Spectator Bird* and *Crossing to Safety*. Reacquainting myself with Stegner (it had been a few years since reading *Angle of Repose*) was a pure joy. It is the exception to find an author who speaks so personally and so authentically to you. (Perhaps I have absorbed enough of the West over the past ten years to subdue the southern drawl still, I believe, lurking somewhere in my soul.) I found myself, pen in one hand, book in the other, marking every tenth page as some epiphanic lyricism jumped out at me, marvelling at Stegner's gift of expressing and capturing so poetically and yet simply philosophical conundrums alongside simple pleasures of life. For example, Stegner expresses the simplicity of love: "We talked, we made love, we talked some more, finally we wore out. Now it is the next day." And, of the mystery of talent, Stegner wrote: "Talent lies around in us like kindling waiting for a match, but some people, just as gifted as others, are less lucky. Fate never drops a match on them." (Both quotes from *Crossing to Safety*.)

Oh, for an author who can ask the simple questions that for most of us have lost the interrogative lustre. Stegner asks, for example, "Why is it so important for us to be safe?" a question that would pass by innocuously were it not for the double punctuation of the prose — the exclamation point placed by the response to this question: "He must hear something scornful in my voice, because he looks at me sharply, starts to reply, changes his mind, and says something obviously different from what he has intended." In this reaction we know the question is poignant indeed, and the title to the book from which it comes, *Crossing to Safety*, is underlined in our minds.

Safety is something Stegner takes up again in *Spectator Bird*. (Or rather, that Stegner practices upon in *Spectator Bird*, which was written in 1976, 11 years before *Crossing to Safety* was published.) Stegner begins developing and exploring questions of identity — Who am I? Where do I feel comfortable? Unlike some other later 20th Century authors, the search for the true self is not a selfish one. Safety seems to be found in a relationship or relationships with others where one may even have to "compromise" self in order for the relationship to survive. So, for example, in *Spectator Bird*, the main character, a man of seventy who has been reviewing his life over the course of the book (much of Stegner's work occurs in present and past simultaneously), in response to musings over having chosen his then-wife over a woman with whom he once fell in love, remarks:

> What was it? Did I feel cheated? Did I look back and feel that I had given up my chance for what they call fulfillment? Did I count the mountain peas of my life and find every one a knoll? Was I that fellow whose mother loved him, but she died; whose son had been a tragedy to both his parents and himself; whose wife up to the age of twenty had been a nice girl and since the age of twenty a nice woman? Whose profession was something he did not

choose, but fell into, and which he practiced with intelligence but without joy? Had I gone through my adult life glancing desperately sidelong in hope of diversion, rescue, transfiguration?

Stegner's answer to these questions is to choose something other than Blake or other modern authors might have chosen. He says to his wife:

> If I'd played the game the way people seem to expect, and jumped into the Baltic, all for love and the world well lost, and cut myself off from you and what you and I have had together, I couldn't have forgotten you that way. I'd have regretted you the rest of my life.

To capture in a phrase, very simplistically, what Stegner spends so much time eloquently expounding upon, life is about relationships, not about the isolated individual. Stegner hints that it is so perhaps because it is only through relationships that the individual is truly revealed:

> Plato's cave, with aqua-therapy. I was reminded of a remark of Willa Cather's, that you can't paint sunlight, you can only paint what it does with shadows on a wall. If you examine a life, as Socrates has been so tediously advising us to do for so many centuries, do you really examine the life, or do you examine the shadows it casts on other lives? Entity or relationships? Objective reality or the vanishing point of a multiple perspective exercise?

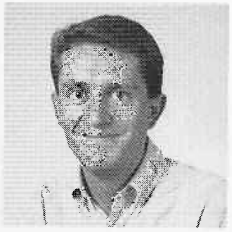
This philosophy may have been compelled by Stegner's western roots. In fact, it may be labeled a western view. The West is a place where interrelatedness is vital to existence. Where existence is coexistence. Where although open spaces allow privacy, the very openness of the spaces, the rawness of nature, beckons the individual to consider the effects of nature on him or her, and concomitantly, the effects of the individual on nature.

The very western theme of the role of nature in our lives is a large part of Stegner's works. He refers to the aphorism that chaos is the law of the universe, while order is the dream of man. Dreams, Stegner portrays, are not always attained. He suggests that safety may be the embracing of chaos, rather than fear of it — i.e. chaos as an ally. So, in *Crossing to Safety*, Stegner's character speaks of his wife's crippling as "a rueful blessing. It has made her more than she was; it has let her give me more than she would ever have been able to give me healthy; it has taught me at least the alphabet of gratitude." Here Stegner suggests that of chaos be invited into the dream — remaking the dream; deepening it; enriching it.

This is just a glimpse into a rich world Stegner invites us all to share with him. And one needn't be a "Westerner" to enjoy it. Even this poor, benighted southern girl has fallen in love with the world he describes. It is a world of poetry, of questions, of insights, and of correlativity. It is a world of beauty, not a Pollyanna's playhouse, but a land whose beauty is all the more piquant for its acceptance of the pains, the difficulties, and improvisations — the chaos.

1993 Community Service Scholarships

Duane Carling German T. Flores

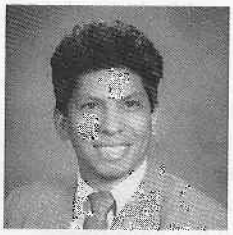


Duane Carling

The Utah Bar Foundation has established annual Community Service Scholarships to recognize law students who have participated in and made a significant contribution to the community by performing pro bono services in public service. The 1993 Community Service Awards will be given to Duane Carling (University of Utah College of Law) and to German T. Flores (Brigham Young University Law School). These awards recognize and reward students who have shown the participation in community service is an important part of the legal profession.

Duane Carling, first-year student at the University of Utah College of Law, will receive an Honors B.A. Degree in Classic Greek this June. He is a member of Phi Beta Kappa, Phi Kappa Phi, Mortarboard, and the Beehive Honor Society. His contribution of volunteer work has been at the Lowell Bennion Community Service Center directing student volunteers at the Crossroads Urban Center, coordinating student-run projects with the Literacy Action Center, Friends for Refugees, the Quadalupe Center, the Odyssey House and Shriner's Hospital as well as tutoring Russian and Vietnamese refugee children in English at the New Hope Refugee Center.

German T. Flores will receive the Community Service Scholarship for the Brigham Young University Law School. Mr. Flores



German T. Flores

received his Master of Business Administration degree in April, is a member of Beta Gamma Sigma and the Dean's List, and will receive his J.D. degree in December 1993. He has performed approximately 700 hours of pro bono services for Utah Legal Services where he helped develop the Domestic Relations Project, Central Utah Bar Association where he helped recruit attorneys to perform pro bono work, assisted United Way translating documentation from English into Spanish, helped develop and supervise LAWHELP projects, and co-founded the Utah County Latino Council.

1993 Ethics Awards

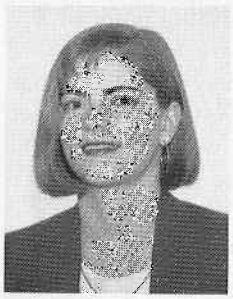
Laura A. Kirwan Andrea Nuffer

Laura A. Kirwan

The Board of Trustees of the Utah Bar Foundation, in cooperation with the J. Reuben Clark Law School and the University of Utah College of Law, has established an annual Ethics Award. Each law school selects a graduating senior who demonstrates high ethical standards to receive this award. The Rules of Professional Conduct adopted by the Utah State Bar not only establish ethical standards for Utah lawyers, but encourage lawyers to strive for even higher ethical and professional excellence.

One of the Foundation's 1993 Ethics Awards was recently presented by Vice President Ellen M. Maycock to Andrea Nuffer at the Brigham Young University Awards Program. Ms. Nuffer served as Lead Articles Editor of the *Brigham Young University Law Review* 92-3, Vice-President of the *International and Comparative Law Society* 91-2, and was selected for membership in the A Sherman Christensen American Inn of Court. As a law clerk in the Utah Attorney General's office she has performed extensive research and written numerous memoranda in criminal law and has drafted briefs submitted to the Utah Supreme Court and the Utah Court of Appeals.

Trustee Stephen B. Nebeker presented the 1993 Ethics Award to Laura A. Kirwan in a ceremony at the University of Utah College of Law. Ms. Kirwan served as Executive Editor of the *Journal of Contemporary Law* 92-3 and received the Albert &



Andrea Nuffer

Elaine Borchard Scholarship 91-2. She has participated in the Traynor Moot Court Competition, Natural Resources Law Forum, Women's Law Caucus, and Public Interest Law Organization. As a law clerk and intern at the Attorney General's Office and DNA-Peoples Law Services at the Navajo Nation in Window Rock, Arizona, she has researched and drafted legal documents in a variety of natural resource areas and Indian law.

The Utah Bar Foundation congratulates Andrea Nuffer and Laura A. Kirwan for their accomplishments and personification of high ethical standards.

CLE CALENDAR

FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA

CLE Credit: 4 hours
Date: June 3, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

FINANCING LONG-TERM CARE FOR THE ELDERLY

CLE Credit: 4 hours
Date: June 10, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

CRIMINAL LAW — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: June 17, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

THE 63RD UTAH STATE BAR ANNUAL MEETING

This program will include a speech by retiring U.S. Supreme Court Associate Justice **Byron R. White**. Other featured speakers include: Charles J. Ogletree, Jr., James J. Brosnahan, Michael J. Gerhardt, Senator Orrin G. Hatch, Dean Kristine Strachan, R. William Ide III, Sandy Gilmour and A. Richard Barros. With thirty-five (35!) breakout sessions planned, there is something for every practice of law. Don't miss out on the fun, debates, discussions or Fred & Toby's famous *"Fourth Annual Walking Bar Tour"* of Ketchum, Idaho. This year's *Tour* theme: "What's the House Shooter?" Please note that the *Tour* is NOT a Bar sponsored activity and may not be suitable for all members of the family or Bar.

CLE Credit: 14 hours with 2 hours in ETHICS
Date: June 30 through July 3, 1993
Place: Sun Valley Resort, Sun Valley, Idaho
Fee: Early registration $195 by June 11, 1993. $225 after June 11, 1993.

For more information on meetings and activities watch for your brochure arriving in the mail very soon, or call (801) 531-9077 for more information. (Attention: 1993 is a CLE reporting year.)

REAL PROPERTY — NLCLE WORKSHOP, Rescheduled date!

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: August 19, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

CIVIL LITIGATION I: PRE-ACTION INVESTIGATION, PLEADING & DISCOVERY — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: September 16, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

_____

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

_____

Name Phone

_____

Address City, State, ZIP

_____ _____

Bar Number American Express/MasterCard/VISA Exp. Date

_____

Signature

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

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

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

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!

OFFICE SHARING/SPACE AVAILABLE

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

ATTRACTIVE OFFICE SPACE — Union Park area (1200 East 7000 South), next to Holiday Spa. Office sharing with five other attorneys. Secretarial or word-processing services available, or space for your own secretary. Copier, telephone, fax and conference room. Close freeway access to entire valley. Contact Wynn at (801) 566-3688.

OFFICE SHARING/SPACE AVAILABLE. Attractive downtown office space available next to Federal Court. Four spacious offices, shared reception, library and conference areas. Westlaw, secretarial, facsimile, and copier services available. Terms negotiable. Please contact Kim L. Fisher at (801) 532-3555.

POSITIONS AVAILABLE

LAW SCHOOL SEEKS TWO ATTORNEYS to work half-time as adjunct professors in first-year legal writing program. (Applications for full-time positions considered, but preference given to applicants willing to work part-time.) Applicants must have excellent academic credentials with strong writing, analytical, administrative, and interpersonal skills. Compensation includes salary and benefits. Submit resume and writing sample to Kathleen Pardee, University of Utah College of Law, Salt Lake City, Utah 84112 by **July 1, 1993**. The University of Utah is an AA/EO employer that encourages applications from women and minorities and provides reasonable accommodations to the known disabilities of applicants and employees.

Regional environmental law center seeks Senior Attorney/Coordinator of Legal Services. Responsible for Pro Bono Program, which delivers free legal services to environmental organizations in seven-state area. Also manages Water and Toxics Program, a regional initiative focusing on environmental problems impacting low income individuals. 7+ years experience, including extensive litigation work and good people skills required. Management experience, knowledge of environmental law/issues strong pluses. $40-50K per year. Send letter, resume and references to Kay Hutchinson, LAW Fund, 2260 Baseline #200, Boulder Colorado 803. Application deadline: **June 28, 1993**. EOE.

C.R. England, a nationwide trucking firm seeks corporate counsel with at least 10 years experience. Expertise required in auto liability and worker's compensation, as well as employee issues and general corporate law. Send resumes to Dan England, P.O. Box 27728, Salt Lake City, Utah 84127-0728.

Small, established Ogden firm, with branch office in Layton, concentration in personal injury plaintiff representation, domestic relations and criminal law, seeking associate attorney with a minimum of four years experience in domestic relations. Salary negotiable based on background and experience. Reply to Gridley, Ward, Hamilton & Shaw, 635 – 25th Street, Ogden, Utah 84401.

POSITIONS SOUGHT

Legal Assistant with B.S. degree seeking employment with small to medium size law firm. 10+ years secretarial experience, type 80+ w.p.m. Reply to Utah State Bar, Box L-6, 645 South 200 East, Salt Lake City, Utah 84111. All replies will be answered.

Attorney with Law Review, Moot Court, Masters in Tax and Big Six accounting firm experience seeks position in a law firm with a practice in the tax or business and estate planning areas. Admitted in Utah and California. Call Brent at (801) 392-6046.

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CONTINUING LEGAL EDUCATION

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

CERTIFICATE OF COMPLIANCE
For Years 19 _____ and 19 _____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

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

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

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

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

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

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

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

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

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

* Attach additional sheets if needed.

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

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

Date: _____ _____
(signature)

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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