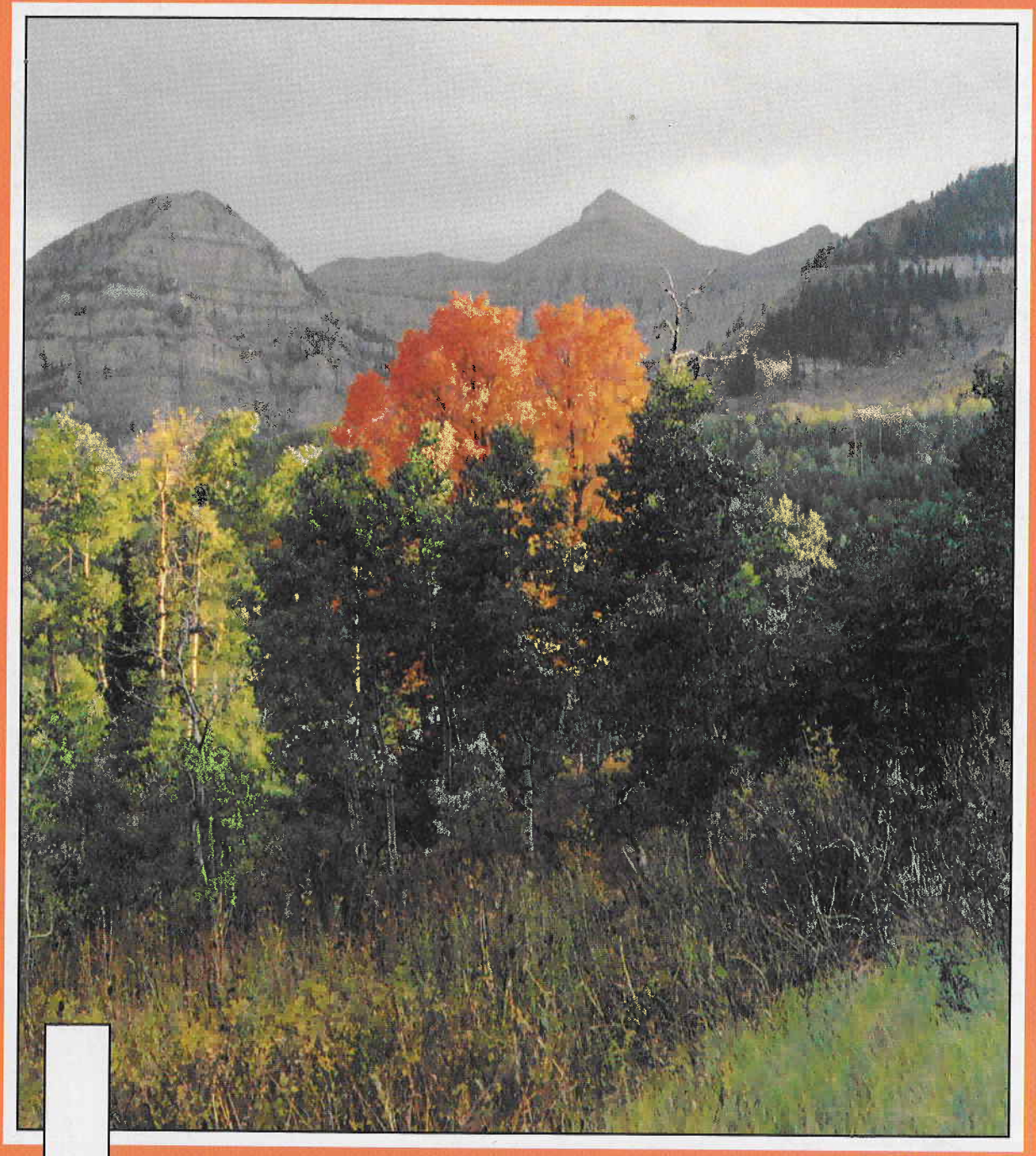
UTAH BAR JOURNAL

Vol. 6 No. 8 October 1993



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COVER: East Slope, Mount Timpanogos, taken by Prof. David A. Thomas, J. Reuben Clark Law School, Brigham Young University.

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

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $30; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

Editor's Note

Utah Bar Journal Cover Photos

The editors of the *Utah Bar Journal* would like to express sincere appreciation to the following members of the Utah State Bar who have contributed photographs of Utah scenes for covers of the *Utah Bar Journal*. Of the 41 photographs of Utah scenes, 23 were taken in the northern half of the state and 18 were taken in the southern half. The *Journal* has received frequent praise for its beautiful covers.

Chris Wangsgaard	(10)
Joanne C. Slotnik	
Hon. Robert T. Braithwaite	(2)
Harry Caston	(8)
Anthony M. Schofield	
Kent M. Barry	(3)
Robert B. Lence	
Reid Tateoka	(3)
Prof. David A. Thomas	(7)
Brian D. Kelm	(2)
A. Dennis Norton	(2)
Randy L. Dryer	

Attorneys are encouraged to submit photographs of Utah scenes. Send both the slide (or the transparency) and a print of each photograph to be considered to Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah 84111.

Letters

Editor:

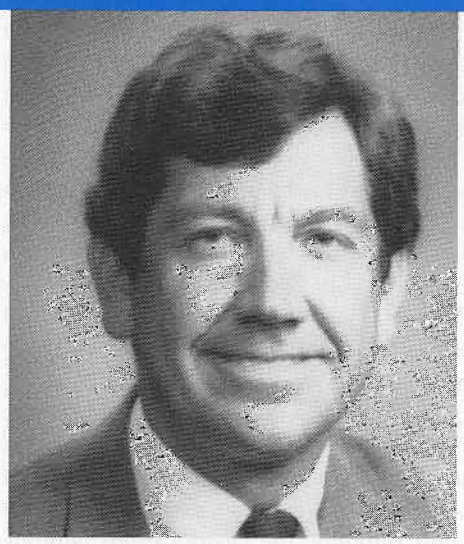
In the same month in which I was required to pay my substantially increased mandatory dues to be a compulsory member of the Utah State Bar, I noticed a bold half page advertisement in the *Deseret News* and *The Salt Lake Tribune*. The paid advertisement touted the virtues of the recipients of various awards given this year at the State Bar's Annual Meeting.

The Utah State Bar paid more than two thousand seven hundred dollars ($2,700.00+) for those July 18, 1993 ads.

With all due respect to the winners of those awards, whose good qualities and service deserve recognition, the Utah State Bar Commission does not display sound common sense in spending such money. There are more important matters at hand, like paying the mortgage, enforcing discipline and lowering bar dues.

Brian M. Barnard
Attorney at Law

PRESIDENT'S MESSAGE



Things Needing Attention

By H. James Clegg

As these lines are penned September 1, we are two months into the new fiscal year. Perhaps some observations in newsletter format will be illuminating:

NEW COMMISSION

We have three new elected commissioners, Frank Wilkins and Charlotte Miller from Salt Lake and Jim Jenkins from Logan. We miss Jeff Thorne and Charles R. Brown, but the new folks add different perspectives and will fit in well from all appearances.

In addition, the Supreme Court appointed two lay commissioners, John Florez and Ray Westergard. Ray has significant Bar background already as he handled the Grant Thornton review of the Bar at the Court's request a few years ago. With his accounting expertise, he is a natural to help the Finance Committee and our accounting staff. We look forward to seeing his report published in these pages.

John has an extensive background in university-level teaching of social work and a stellar background in government service on national, state and local levels.

With this remarkable background and education, John is a natural to assist with the restructuring of our Lawyers-Helping-Lawyers Committee, chaired by Jim Gilson and assisted by its founder, Steve Mikita. They are trying to extend the scope of the committee, both for lawyers who voluntarily seek help and for those who can be assisted by a diversionary program from the disciplinary system.

In addition to these voting commissioners, we have as ex-officio members the deans of the University of Utah and BYU Law Schools, the two ABA delegates, representatives of the Minority Bar, Women Lawyers of Utah and Young Lawyer Division. While this makes the Commission meetings unusually large, so far the size has not been unwieldy and everyone is progressive and cooperative.

BAR DISCIPLINE

We are now in the discovery phase for cases transferred from the Hearing Panels to the District Courts. Whether the court system will be harder, softer, or about the same remains to be seen. We do hope for better public perception, however. Screening panels will continue to determine whether probable cause is present for a formal complaint and to recommend lesser or no sanctions in appropriate cases. We thank Dale Kimball and his committee for their continuing work and dedication to this cause.

Determining lawyer competence continues to be a bugaboo. A task force of the western region will meet in Jackson in October to try to come up with new ideas and to share present success stories. President-elect Paul Moxley and Chief Disciplinary Counsel Steve Trost will represent the Commission. Chief Justice Hall and ABA delegates, Norm Johnson, Reed Martineau, Dean Lee Teitelbaum and Dean Reese Hansen also have been invited. The scope of the conference has been broadened to include admissions controversies as well.

While incompetence may be difficult for clients to recognize and for the Bar to prosecute, if all lawyers would be careful and honest with trust funds, provide service where contracted and paid for and communicate regularly with clients, probably 75% of our profession's problems would evaporate. It's often the simplest things that go unperformed and cause the problems.

GOVERNMENT LAWYERS

Lawyers employed by various government agencies are often critical of the Bar because they are required to pay dues but feel they receive little in return. It is true that they require little of the disciplinary system, one of the large cost-items of the Bar and often the excellent voluntary associations, such as the Federal Bar Asso-

ciation, meet their CLE and social needs.

In an effort to reach out, the Commission invites their suggestions as to ways the Bar can be more relevant and helpful to them. At Dick Fox's suggestion, we co-sponsored a very well-attended luncheon with Senator Robert Bennett in August. Between the Federal Bar Association and the Governmental Law Section, there is excellent leadership and structure to provide money's worth to our members in the public sector, if only reasonable effort and communication occurs.

ISSUES

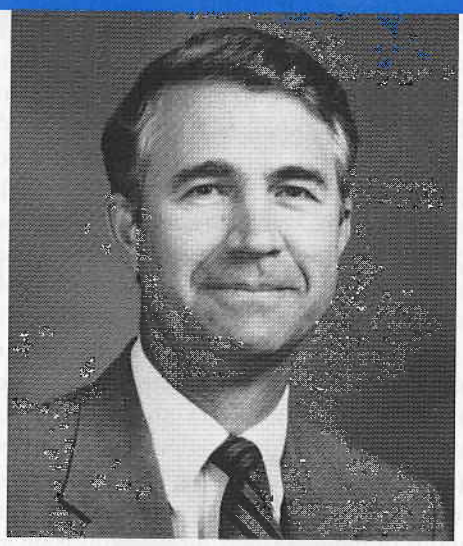
This year's two most pressing issues which are beyond our control but perhaps within our sphere of influence are the consolidation of courts and funding for the Courts Complex. Consolidation continues on or ahead of schedule, but there are growing pains which must be addressed. Market pressure (revenues from fines and forfeitures, municipalities' desire to use existing courtrooms and convenience for municipal prosecutors and police officers) puts pressures, perhaps unexpected, to revert back to the City Court system which predated the Circuit Courts.

As you observe problems with the consolidated courts and impetus to broaden existing municipal justice courts or create new ones, please comment to the co-chairs of the Courts & Judges Committee, Phil Fishler and Scott Daniels, or to President-elect Paul Moxley, all of whom are trying to identify problems and assist in finding solutions.

Housing for the courts in Salt Lake County becomes more critical. Some of the juvenile courts are now held in trailers; Salt Lake City has other uses for the Circuit Court Building; the District Court building is owned by Salt Lake County, not the State of Utah, and is in disrepair; the Court of Appeals and the State Court Administrator's Office are housed in rented facilities.

Land has been purchased for a State Court Complex immediately west of the City & County Building and it is time to move into the design phase. State funding is necessary and it is likely that some court-raised revenue will be necessary on a participation basis with bond funding. This translates to higher filing fees, some sort of user fees, or a combination of both. This is a sticky problem for the Bar and for practicing lawyers; we do not want our system of justice to be inaccessible or only marginally accessible. On the other hand, facilities for delivering justice are indispensable to the system's functioning. With the increased demands of a larger population, the depreciation of older facilities, and the need to provide better security for all concerned, it is imperative that we move ahead with the Complex with all deliberate speed.

That's plenty for this issue. As you can see, there's plenty to be done by all of us.



Public Perception of Lawyers

By Gayle F. McKeachnie

I have recently read information about the American Bar Association Comprehensive Survey of Public Attitudes Toward the Standing of Lawyers in the United States. The survey was performed in January of this year among a representative sample of adults. The demographic and geographic distribution of the persons interviewed in the survey corresponds to that found in the 1990 census. The surveyed participants were from all walks of life and represent every age group, occupation, race, religion, and income level. According to the survey experts, statistically the margin of error is within 3 percentage points with a 95% level of confidence. Some additional follow-up work, focus groups, and panels were done in March and April of this year to try to help understand the "whys" and the "wherefores" of the survey results.

I take seriously the information gleaned from the survey. I pass on some of the information for those of you who may not have seen it. For a more complete report, see the September 1993 issue of the *ABA Journal.*

Interestingly, of all the factors that affect attitudes toward lawyers, nothing has as strong an impact as the amount of interaction the individual has had with the lawyer. Particularly disappointing is the finding that those who deal with lawyers more regularly, tend to have the most negative perceptions of the legal profession. The more contact the person has had with lawyers, the less favorably inclined that person is to feel good about it. People ages 45-59, those who know a lot about the legal system, the upper middle class, high income, and the highly educated seem to be the most likely persons to have negative feelings toward lawyers.

The reverse seems also to be true. Those who have the least contact and interaction with lawyers have the highest favorable opinion of them. Those people being minorities, the unemployed, members of low income households, and adults under 30.

The survey compared the public's overall view of the legal profession with its view of teachers, pharmacists, police officers, doctors, accountants, bankers, stock brokers, and politicians. The only professions in the survey that tested with less than a majority favorable feelings were lawyers, stock brokers, and politicians.

Public complaints about lawyers can in general be placed in four areas.

1. A perception that lawyers lack caring and compassion.

The majority of those surveyed indicated that compared to lawyers in the past, today's attorney is less caring and compassionate. They indicate that the lawyer is no longer a leader in the community, a defender of the underdog, and a seeker of justice. Fewer than 1 in 5 felt that the phrase "caring and compassionate" describes lawyers while 46% said that it does not describe them. One writer analyzing the survey said that the survey shows that public perception of the profession has become at worst contentious and at best indifferent to the people it seeks to serve. He concluded that apparently too many surveyed have been exposed to that segment of lawyers whose desk side manner smacks of arrogance.

2. A perception of poor ethical standards and enforcement.

In the area of ethics, almost half of those surveyed said that a significant portion of lawyers lack the ethical standards necessary to serve the public. The rating for lawyers far exceeds the proportion who feel dishonesty is a problem for accountants, doctors, or bankers. About 40% of those surveyed said that the phrase "honest and ethical" does not apply to the legal profession.

3. A perception that lawyers are greedy.

In the public's mind, most lawyers are motivated by money. Sixty-three percent (63%) said lawyers make too much

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money, 59% said lawyers are greedy, and 55% said it is fair to say that most lawyers charge excessive fees. When asked in the survey interview to volunteer in their own words what they like and dislike about lawyers, 56% volunteered at least one negative comment compared to 38% who praised lawyers. Two complaints which stood out were "too expensive" and "greedy or money hungry". Those two unfavorable impressions came up more than any other single complaint.

The debate among lawyers about the degree to which emphasis should be placed on more billable hours and profits has eroded the traditional notions and ideals of professionalism and has obviously found its way into public perception, being costly in terms of public respect for the profession as a whole.

4. The public distaste for lawyer advertising.

The survey might be interpreted to show only limited public objection to lawyer advertising. 57% agreed that lawyers should be able to advertise in newspapers and 48% said lawyers should be able to advertise on television. But, many also see advertising as just another way for lawyers to generate more law suits and, therefore, more fees. They relate it to the greed factor. The majority of those interviewed said that it is a fair criticism applicable to most lawyers to say that they "file too many lawsuits and tie up the court system". The follow up sessions which were held after the survey revealed that participants believe that the motivation of lawyers who advertise is greed and the effect of advertising is to generate lawsuits from people who would not otherwise bring suit. The argument can be made as a result of the survey and follow up that lawyer advertising on television may be the most significant contributor to the public derision toward lawyers.

A separate set of surveys or polls might be of interest. In 1973, the percentage of Americans with great confidence in law firms was 24% according to pollster Lou Harris. Five years later in 1978 another Harris Poll indicated that this level of great confidence had dropped to 18%. In 1988, a Harris Poll showed that the level had eroded even further to 14%. This year according to the Peter Hart Survey, the survey by the American Bar Association, only 8% of Americans had a great deal of confidence in law firms.

It is interesting that people who report positive feelings toward lawyers are slightly more likely than average to think of them in a criminal justice setting while those with negative feelings toward lawyers are far less likely to associate them primarily with the criminal justice system.

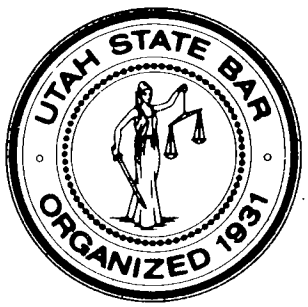
The results of this and other surveys are sobering. The American Bar Association and state and local bar associations across the country are planning how to improve the public image of lawyers. Obviously, part of the problem is a matter of public misunderstanding of the role of the legal profession. On the other hand, when those who use the system most and have the most contact with it are those who have the most unfavorable perceptions, we must look to ourselves for possibly needed changes on an individual and law firm basis.

While those who are part of the legal profession will probably never be the most popular people in town, it would be a mistake to lay all the blame for our bad public image on others.

I end with two quotes I have written in my book of values. The first by Robert J. McCracken,

"Get to know two things about a man, how he earns his money and how he spends it — and you have the clue to his character. You will know all you need to know about his standards, his motives, his driving desires and his real religion".

The other from George Eliot, "May every soul that touches mine — be it the slightest contact — get therefrom some good, some little grace, one kindly thought, to make this life worth while".



Proposed Federal Rule Disclosure Requirements vs. Attorney/Client Confidentiality

By Brett L. Foster

Like many of my fellow practitioners, I wonder about the impact of the proposed Federal Rules. Frankly, I am most concerned about the disclosure requirements of Rule 26 and suspect many of my fellow practitioners have the same sinking feeling that preparing such a disclosure statement will require us to do something which is contrary to the basic principles of our *adversary* system.

Before I explain my concerns in more detail, let me identify myself. I am one of the mass of lawyers in Utah who does nothing other than practice law. I am not a leader in the legal community. I am not a committee member. Finally, I am not a "letter writer." I am the guy who waits until other people commit their time to join the committees, draft the rules and do all the other things necessary to make our judicial system work. In that sense, I am reluctant to write an article like this. Why should I have the right to express my concern if I have not participated more actively to formulate the rules of procedure by which we operate? That is a valid criticism, and I accept it.

On the other hand, I suspect many other lawyers are like me. We work hard. We follow the rules. We have respect for the system. We have respect and appreciation for those who commit their time and energy to make our system as good as it possibly can be. We are content to operate within the rules without having a hand in forming them. Content that is, until now.

My concern started growing several months ago when I attended a seminar which included a program on the proposed changes to the Rules of Federal Procedure. The proposed rules include a disclosure procedure similar to that which was adopted in Arizona in July 1992. (At that time, I was practicing in Phoenix, Arizona.) The speaker began his program by reading a hypothetical exchange or correspondence between the president of a company and a lawyer retained to defend a new lawsuit that had been filed under the proposed Federal Rules. I think I can paraphrase the gist of the exchange:

BRETT L. FOSTER, born Medicine Hat, Alberta, Canada, June 5, 1961; admitted to bar, 1990, Arizona and U.S. District Court, District of Arizona; 1992, Utah and U.S. District Court, District of Utah. EDUCATION: Dixie College (Assoc. A., with honors, 1984); University of Utah (B.S., 1984); Brigham Young University, J. Reuben Clark Law School (J.D., cum laude, 1990). Student Body President, Dixie College, 1983-84. Recipient, Dixie College Outstanding Student Award, 1984. Student Bar President, J. Reuben Clark Law School, 1989-90. MEMBER; Journal of Public Law, *J. Reuben Clark Law School, 1988-90 (interrupted). Author: "Personal Jurisdiction: Flowing from Asahi's Stream-of-Commerce," first place,* Journal of Public Law, *J. Reuben Clark Law School, 1989 writing contest: Commentary, "The Proposed Federal Rules of Civil Procedure,"* Utah Bar Journal, *1993. Member: State Bar of Arizona; Utah State Bar. Concentration: Intellectual Property Law; Technology Law; General Civil Litigation; Appellate Law.*

> Dear Jack,
>
> Please find enclosed a new lawsuit which has been filed in Federal Court and just served against our company. Please initiate an aggressive defense of this lawsuit. We would request that you send out detailed interrogatories which address all aspects of this claim and that you depose all witnesses who have knowledge of material facts. We trust that, as our counsel, you will act as our advocate and zealously protect our interests in this litigation.
>
> Very truly yours,
> Jill
> President of Acme Corp.

The lawyer responded:

> Dear Jill:
>
> Thank you for the reference of this new piece of litigation. We note your request that we issue detailed interrogatories and depose all material witnesses. Apparently, you were not aware of the new rules of Federal Procedure.
>
> In lieu of proceeding with these traditional discovery techniques, it is now the obligation of each party to disclose to the other party all facts which are material to the claim. Accordingly, we should schedule a meeting at the earliest possible opportunity, at which time you should be prepared to provide an outline, which I will immediately

provide to plaintiff's attorney, of all facts which tend to support the claims for relief which the plaintiff has set forth in the complaint. Further, if the plaintiff has failed to pursue any appropriate claims against your company, we should also gather and pass on to plaintiff's counsel all facts which he would want to know about in order that he might amend his claim to pursue any additional theories of relief against your company.

Additionally, if you or your employees are aware of any facts which would support a claim for punitive damages, please organize all that information in a format which will be easily understood by plaintiff's counsel. Although no theories claiming punitive damages have been pled, the plaintiff's attorney would assuredly be interested in learning any facts which would justify a punitive claim, and I am certain he would be anxious to amend the complaint to include such a prayer for relief. It is our obligation to exercise our best efforts to collect the appropriate data which the plaintiff's attorney would want to learn about, and I am sure punitive damages would be high on his list.

Finally, in order for me to establish to the court that I have fulfilled my obligation of due diligence, I would like to make arrangements to have members of our office interview employees at your companies that are scattered in your branch offices in all fifty states. It is possible that your employees have knowledge which the plaintiff's attorney would find helpful in asserting his claim against your company, and it is my obligation to exercise reasonable diligence to collect that data.

I remain your zealous advocate, to the extent allowed by the new rules.

Very truly yours,
Jack

When the speaker finished reading his letter, the entire audience spontaneously burst into laughter. Everyone, that is, except me. Listening to the speaker read from that supposedly absurd, hypothetical letter triggered a surge of thoughts about

what my responsibilities had traditionally been as an advocate for my clients compared with the responsibilities I will shortly assume by virtue of the proposed new disclosure rules.

Whether we agree or disagree with the proposed rules, I believe most knowledgeable lawyers are proud of the effort that has been made within our judicial system over the years to streamline our court system and to move cases through the court system efficiently, but fairly as well.

In the mid '60's, lawyers were required to respond to Judge Ritter's "cattle call", when every attorney on Judge Ritter's motion-calendar (perhaps 200 attorneys) would be ordered to the court house at the same time for consecutive hearings on motions; sometimes attorneys would wait one or two days before their case was called. Fortunately, the system has improved. The changes in the proposed rules will be accommodated and adapted to, as with many other changes in the procedural rules that have taken place in our system. We will adapt to the limitations regarding interrogatories, the number of depositions, and all the other specifics; however, I cannot get over the nagging feeling that to accommodate the disclosure requirements in proposed Rule 26 necessarily compels me to depart from my job as an advocate and become somewhat of an agent for the other side. Is that to be my job?

The preamble to the Rules of Professional Conduct state that "as *advocate*, a lawyer *zealously asserts the client's position* under the rules of the adversary system." The comments to Ethical Rule 3.4 indicate:

> The procedure of the *adversary system* contemplates that *evidence in a case is to be marshalled* ***competitively*** by the contending parties.

"Doesn't the proposed Federal disclosure rule provide a subtle motivation to hire the less industrious lawyer?

I cannot reconcile the adversary system, the competitive marshalling of evidence and the zealous representation of my client with the new disclosure requirements of the proposed Federal disclosure rule. I am concerned that the requirements of disclosure mitigate against good lawyering, and put at risk, if not destroy, long standing attorney/client relationships.

Clients will be reluctant to hire a lawyer who has represented their business before, lest the lawyer know too much that he is forced to disclose to the other side. When choosing between lawyers who are equally good in terms of appearance, competence, and speaking ability, there is going to be a subtle motivation to hire the lawyer who has a more relaxed work ethic as opposed to the lawyer who is industrious and will dig vigorously through the company's records uncovering facts and diligently turn those facts over to the plaintiff's attorney. Doesn't the proposed Federal disclosure rule provide a subtle motivation to hire the less industrious lawyer?

I have not yet heard any satisfactory answers to questions asking what has happened to the attorney/client privilege, the work product privilege and what has happened to the attorney's role as advocate for his client. I am not persuaded or pla-

cated by the assurances being given at seminars wherein the speakers indicate that the attorney/client privilege is still intact and "after all, you're not obligated to disclose anything which your client would not otherwise be obligated to answer if the question had been directed during discovery by the opposing party." That position begs the question. The role of attorneys in our system is to act as advocates for *their client.* Sure, the client has to respond honestly to the discovery, but at least the attorney for the other side should do his job as an advocate for his client and ask the right questions. Shouldn't the obligation to prove each party's case remain vested in the attorney representing each party?

The new disclosure rule, it seems to me, creates an ethical dilemma for the attorney (and the client) that can never be resolved. DR 9-102, Code of Professional Responsibility, states that it is the "duty and obligation" of a lawyer "to maintain inviolate the *confidences* and preserve the secrets of a client." That rule is not talking about trade secrets. The rule is talking about the inviolate privilege of a lawyer to sit down with his client and have a frank, candid discussion concerning the facts of a lawsuit without the "chilling" effect that every word which is spoken might have to be disclosed to the opposition, to the great detriment of the client's case. The Comments to Ethical Rule 1.6 state:

> A fundamental principle in the client/lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Doesn't the proposed disclosure rule dispense with this "fundamental principle"? Will it irreparably damage the client's confidence in the lawyer, his former advocate? Is the client put in the ethical dilemma of making its own determinations as to what are the material and relevant facts which the lawyer ought to know about? Is the lawyer who disagrees with his client as to whether something is relevant or irrelevant to the case obliged to withdraw from representation if the client directs the lawyer to assume the position that the information is not relevant to the case? Is the lawyer who decides to remain in the case going to be subject to court-imposed sanctions that the lawyer himself must pay for failing to make disclosure when the attorney is operating under his client's direction?

I am not comforted at all by the assurances that the ethical dilemma of disclosure will be resolved on a case by case basis in an evenhanded manner by the members of our trial judiciary. Although I have great respect for our Federal Judges, each case from each judge will result in different opinions as to what the ethics of disclosure are. The disclosure rule creates a potential ethical problem of disclosure in every single case a litigation lawyer will handle. Under our present adversary system, which has been time tested, no such ethical problem exists. One lawyer, as an advocate for his client, asks the questions he wishes to ask. The opposing lawyer, acting as advocate for his client, objects if there is an appropriate objection, such as privilege. The party to whom the question is addressed answers the question honestly. It works. In Utah, it works very

well. (In Arizona, it worked very well prior to the rule changes.) It is not broken, why fix it? Why create an ethical dilemma for every lawyer in every case when it is not necessary? The practice of law is a rewarding profession, but it is hard work as well. We do not need more rules that impose ethical dilemmas upon each of us in our everyday practice.

Upon reading this letter, if I have made some sense to you, and if you agree with me, then raise your voice and write a letter to let your opinion be known. The proposed amendments to the Federal Rules of Civil Procedure have been referred to Congress and will become effective December 1, 1993, unless Congress acts to prevent it. A Bill has been introduced in the House of Representatives (H.R. 2814) to prevent the disclosure rules in the proposed Federal Rules of Civil Procedure from becoming effective.[1] I believe that Federal Judges of our state, our representatives in Congress and the other people who have worked hard to create our Rules of Procedure care about our individual and collective conclusions. We all have reason to be proud of the accomplishments of those who have worked so hard to make Utah's judicial system what it is today. Unfortunately, in an effort to make the system even better, a rule of disclosure has been proposed which is a mistake. I hope something can and will be done.

This letter is functionally identical to a June, 1992, letter written by Robert J. Bruno, a Phoenix attorney and an owner at my former firm, TEILBORG, SANDERS & PARKS. I thank Bob for granting me permission to edit, modify, and personalize this letter so that it could be presented to a Utah audience.

[1]A Bill (H.R. 2979) has also been introduced to prevent the amendments to Rule 11 from occurring.

ROCKY MOUNTAIN MINERAL LAW FOUNDATION

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Denver, CO 80220
Telephone (303) 321-8100
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PRESS RELEASE

Special Institute
on

WETLANDS ISSUES IN RESOURCES DEVELOPMENT

Denver, Colorado
November 19, 1993

The Rocky Mountain Mineral Law Foundation is sponsoring a one-day institute in Denver on "Wetlands Issues in Resources Development in the Western United States" on November 19, 1993.

Wetland regulation is a significant issue facing every developer of natural resources in the western United States. There is much misunderstanding about the identification of wetland areas, the types of regulated activities, and the options available to resource developers whose projects may impact wetlands.

This Institute will provide the legal and scientific foundation necessary for a thorough understanding of wetland issues, presented by experienced practitioners in the field. Detailed discussions on steering a new project through the wetland regulatory requirements and bringing existing projects into compliance will give environmental managers and attorneys practical guidance for their own projects. New developments in federal wetland policy will be discussed and predicted.

This Institute will be beneficial to mineral and real estate developers; environmental, real estate and natural resource attorneys and managers; wetlands administrators; permitting and compliance managers; and environmental consultants.

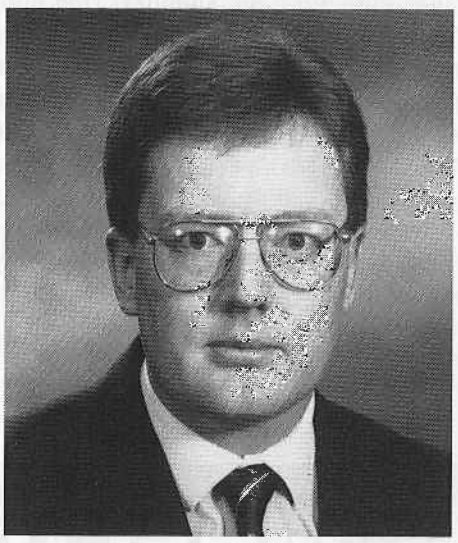
As a nonprofit educational organization, the Foundation would appreciate any publicity you can provide for this Institute, including notices in magazines, professional journals, newsletters, and calendars of events. For additional information, contact the Foundation at (303) 321-8100. Thank you.

Now You See It, Now You Don't: Road Side Warnings to the Hocus Pocus World of Construction Management

By Gregory M. Simonsen

The words "construction manager" are appearing increasingly in contracts where the words "general contractor" previously appeared. The emergence of the construction manager as substitute for a general contractor, and to a lesser extent for design professionals, is a trend that raises numerous potential legal issues for lawyers representing property owners, liability insurers, title insurers, lenders, contractors, materialmen, governmental entities and others. These issues arise because most statutes, case decisions, form contracts, insurance policies, surety bonds, and other legal documents affecting the construction industry have been drafted contemplating the traditional tripartite construction system of architect, general contractor and subcontractor. Use of a construction manager changes the tripartite relationship and thereby alters duties and potential liabilities in the overall scheme of the construction project. Often these changes are subtle, not easily recognized, causing the parties to assume they are in one legal position, when in fact, they are in an entirely different position. The result can be expensive litigation with potentially disastrous and unexpected liability problems.

A recent case illustrates the point. The owner was a Fortune 500 corporation constructing a large hotel in Las Vegas. It hired a construction manager to oversee the project from design to completion. One of the primary duties of the construction manager was to bid various parts of the project to trade contractors. The bidding process was conducted in almost the exact manner that a general contractor bids out portions of a project to subcontractors. The construction manager performed most of the same supervisory duties that the general contractor traditionally performs. In fact, most of the trade contractors thought of themselves as subcontractors.



GREGORY M. SIMONSEN is a 1985 graduate of the University of Utah College of Law. Mr. Simonsen is presently a shareholder at the Salt Lake firm of Fetzer, Hendrickson & Simonsen, which will join the Salt Lake firm of Kirton, McConkie & Poelman on November 1, 1993. Mr Simonsen's practice focuses on construction, surety, land use planning and real property law.

Several Utah trade contractors were awarded large contracts on the project. Nearly identical form contracts were sent to each. The first sentence of the contract recited that the agreement was between the construction manager and the trade contractor. Similarly, the agreement was signed by the construction manager and the trade contractor. However, the third paragraph of the contract stated that the construction manager was entering into the agreement as the agent of the owner.

The project proceeded smoothly and near completion the owner recorded a notice of substantial completion. Under Nevada law, the recording of a notice of substantial completion shortens the lien recording time from 90 days to 40 days *if a copy of the notice is sent to general contractors*. In this case the owner assumed the construction manager was the *de facto* general contractor and only sent a copy of the notice of substantial completion to the construction manager. Approximately 50 days after the recording of the notice of substantial completion, the owner sold the hotel. The buyer's mortgage company and title insurer did not concern themselves with potential mechanic's liens because more than 40 days had passed since the notice of substantial completion was recorded and no liens had been recorded. Unfortunately, during the 30 days after the sale, the seller declared bankruptcy and trade contractors recorded mechanic's liens in the aggregate sum of 1.3 million dollars.

In actions brought by the lien claimants to foreclose, the buyer, the trust deed beneficiary and the title insurer claimed the liens were not valid since they were recorded more than 40 days after the notice of substantial completion was recorded. The trade contractors, basically reading their contracts seriously for the first time, claimed to be general contractors in direct privity of contract with the owner. They argued that because they had not been mailed a copy of the notice of completion, the 90 day recording period was applicable, not the 40 day period. The buyer and its title insurer contended that the trade contractors were subcontractors,

not entitled to notice since they performed all the functions traditionally performed by subcontractors. On a motion for summary judgment brought by the lien claimants, the court ruled the trade contractors were all general contractors, thereby concluding the liens were timely filed and superior in right and time to the trust deed recorded by the buyer's lender.

In this case the buyer, its title insurer and lender made the mistake of assuming that the usual tripartite system of architect, general contractor and subcontractor was in place. It is easy to see how this mistake was made. The construction manager looked, acted and supervised like a general contractor. The trade contractors looked, acted and even thought of themselves as subcontractors. It was easy for the buyer, lender and title insurer to assume the usual relationship existed, or to assume that the use of a construction manager does not affect or change the legal obligations. Unfortunately, such assumptions cost the buyer, and ultimately the title insurer, over one million dollars.

This case is just one example of how construction management, when blended with laws or forms drafted contemplating the traditional tripartite system, can lead to misunderstanding of legal rights and obligations. Aside from the problems pointed to by this example, there are numerous other legal snares inherent in construction managed projects. After a brief discussion of the nature and purpose of construction management the balance of this article will be devoted to a general survey of some of these potential problems.

I. What is a Construction Manager?

Unlike the terms "owner," "contractor," "subcontractor," or "supplier," the term "construction manager" has no precise meaning within the construction industry. What a construction manager is depends on what the particular contract says it is. One commentator has stated:

> "Construction Manager" is to the construction industry what "Of Counsel" is to law firms, a convenient term to describe varied relationships. Just as "Of Counsel" is used to describe retired partners, contract lawyers, office sharers, lateral hires on an accelerated partnership track, senior associates who will not become partners, part-time lawyers and other relationships that do not neatly fit within the definition of "partner" or "associate", "Construction Manager" can mean anything from an Owner's agent functioning in a fiduciary relationship and compensated with a lump sum fee for managing the project to an independent contractor who contracts with subcontractors and suppliers, self-performs work and guarantees a maximum price for the project. A further complication is that the role of the Construction Manager varies depending on the type of project. What the Owner needs from a Construction Manager on a project with completed plans and specifications is different than on a fast-track project in which design and construction are occurring simultaneously.[1]

The varied roles of construction managers explain why no single form contract is adequate for all construction management contracts. The American Institute of

Architects ("AIA"), the Associated General Contractors ("AGC") and the Construction Management Association of America ("CMAA") have all published form Construction Management Contracts, but none has received widespread acceptance.[2]

Although the term "construction manager" defies exact definition, there are some general characteristics that distinguish a contract manager from the usual players in the tripartite cast. First, unlike a general contractor, a construction manager is usually utilized during project design and will sometimes supervise or at least have input in the design. The construction manager will typically assist the owner with project scheduling, cost estimating, budgeting and purchasing long lead time items. During the construction phase the construction manager provides many of the supervisory services typically provided by the general contractor. The construction manager will often supervise bidding to parties that normally would be subcontractors in the tripartite system.

One of the greatest advantages of construction management is the construction manager's involvement in both the design and construction phase. This overlap permits fast track and design-build construction techniques, where design of later phases takes place while earlier phases are already under construction. Usually fast track construction precludes the use of a general contractor in the traditional sense because the general contractor cannot bid the entire project while substantial portions are still being designed.

Although the construction management process has certain general characteristics, the most important thing for attorneys to remember is construction management's chameleon qualities. The fact that a party describes itself as a "construction manager" really says very little. The construction manager's role, compensation, and resulting liabilities vary widely from project to project. The existence or non-existence of certain legal relationships or statutory rights cannot be assumed when labeling a party as a construction manager, as they sometimes can be assumed when labeling a party as a general contractor or subcontractor.

II. Owner Liability on Construction Managed Projects

A construction manager entering into contracts with trade contractors generally acts as agent for the owner. Thus, not only does the owner become directly liable to the trade contractor, the owner becomes liable for authorized acts of the construction manager. Since the construction management agreement usually gives the construction manager broad authority, the owner may become responsible for a wide variety of events over which it has little direct control.

Owners are often unfamiliar with many of the terms and provisions of the contracts that the construction manager is entering into as its agent. Illustrative of this is *Seither & Cherry Co. v. Illinois Bank Building Corporation*[3] where the owner believed it was not subject to arbitration proceedings in a claim brought by a plumbing contractor. However, the arbitrator, relying upon the arbitration provision in the contract between the construction manager and the plumbing contractor, entered an award against the owner. On appeal, the Illinois Court upheld the decision noting that the construction manager had been within the scope of its duties when it signed the contract with the plumbing contractor.

"The existence or non-existence of certain legal relationships or statutory rights cannot be assumed when labeling a party as a construction manager. . ."

Overall, owners should recognize that because of the agency relationship between owner and construction manager, they are placing a tremendous amount of trust in an individual or company. Some courts have described the relationship as fiduciary and the provisions of the AIA and CMAA standard contracts seem to support this conclusion.[4] Hence, the contract manager should be selected very carefully, with special attention to experience, bonding capacity and liability insurance.

III. Insurance Issues

In view of the shift from the traditional tripartite system to construction management, it is not surprising that there has been an influx of individuals and companies into construction management. Architects, engineers, general contractors, scheduling consultants and even real estate developers hold themselves out as construction managers. Unfortunately, many of these new construction managers have not considered whether a shift from their previous role to construction management necessitates a revision in their general liability (GL) policies.

As observed earlier, one of the notable features of construction management is the construction manager's involvement in the design phase. However, most general liability policies include an architects/engineers errors and omissions (A/E E&O) exclusion with wording something like this:

> This insurance does not apply to (claims arising) out of the rendering or failure to render any professional services by or for you, including: 1) The preparing, approving, or failing to approve maps, drawings, opinions, reports, surveys, orders, designs, or specifications and; 2) Supervisory, inspection, or engineering services.

This exclusion is a problem for developers and general contractors that also work as construction managers, since they usually do not carry professional liability insurance. It is also a problem for general contractors performing professional services under design-build contracts.

The concern that the A/E E&O provision may preclude coverage for construction manager's for bodily injury or property damage claims was heightened by a decision that has rocked the construction community, *Harbour Insurance Company v. Omni Construction.*[5] In that case, the court held that the A/E E&O clause precluded coverage to a general contractor even though the alleged professional service was provided "incidental" to the construction process. The court was not impressed by the fact that the general contractor did not have primary responsibility for design and engineering, and was mostly involved in non-professional work. It ruled:

> The exclusion clearly refers to the nature of the service provided, not to the nature of the service provider and whether a particular service is professional in nature is not determined by whether the entity

responsible for it also performs related non-professional work.[6]

Although the *Harbour* decision does not directly involve a construction manager, it clearly is a harbinger of liability problems for construction managers and design-build contractors not carrying professional liability insurance.

Architects, engineers and design firms engaged in construction management have their own set of insurance problems. Their general liability policies will always carry the A/E E&O exclusion, forcing them to carry separate E&O insurance as a part of their professional liability package. This can lead to coverage gaps since construction management may not be considered a professional service, especially those services traditionally performed by general contractors.

IV. Preliminary Notice Requirements

In 1989, the Utah Legislature enacted the preliminary notice requirements relating to mechanic's liens and bond claims on non-federal construction projects. Most lawyers are familiar with the requirement that "any person . . . intending to claim a mechanic's lien . . . for labor, service, equipment, or material shall provide preliminary notice to the original contractor as prescribed by this section."[7] The law goes on to warn that any persons failing to provide such notice cannot avail themselves of the lien statute. The same notice is required of any person seeking to collect upon any bond provided pursuant to Sections 14-1-20 and 63-56-38 of the Utah Code. However, a subcontractor or materialman that is in direct privity of contract with an original contractor is exempt from the requirement.

"Caution is the order of the day in determining whether a particular person is required to give preliminary notice on a construction managed project."

Caution is the order of the day in determining whether a particular person is required to give preliminary notice on a construction managed project. Under the statute, an original contractor is a person providing labor or materials pursuant to an express or implied contract with the owner. All others are subcontractors. Under this definition, a construction manager is usually an original contractor since it is usually providing services under a direct contract with the owner. Furthermore, if the construction manager follows a common pattern of entering into contracts with trade contractors and materialmen as the agent of the owner, those trade contractors are, by definition, original contractors as well.

However, one common format on construction managed projects is where the owner contracts with a construction manager who contracts with a "general contractor" who in turn contracts with subcontractors. This format is especially common where the construction manager is a developer. If, as is common in such a format, the construction manager enters into a contract with the general contractor on its own, and not as an agent of the owner, this results in the very unfortunate situation where the general contractor is actually a subcontractor, having no express or implied contract with the owner. Confusion abounds on such projects because everybody labels this party as the "general contractor" even though legally it is a subcontractor. In fact, even the contract may label it as a general contractor. Frankly, nobody knows what else to call it. Using the proper "subcontractor" label leads to confusion since that fails to distinguish its unique role from the other numerous subcontractors on the project. The "construction manager" label is similarly inappropriate because you already have one of those. Hence, everybody labels this party as the general contractor and most fail to perceive it to be a subcontractor when th time comes to file pre-lien notices.

Suppliers downstream from the subcontractors have a similar problem, but in reverse. Where the construction manager has entered into contracts with the trade contractor as agent for owner, the trade contractor is an original contractor but there is a good chance the supplier will believe the trade contractor to be a subcontractor. Thus, the supplier may file a pre-lien notice even though it is not required to do so. No real harm there. However, if under these circumstances the

supplier fails to pursue a mechanic's lien claim because it thinks it was required to give a pre-lien notice and did not, then a substantial harm results as the supplier denies itself this remedy because of its ignorance of the facts.

V. Statute of Limitations[8]

Section 38-1-11 of the Utah Code governs the time in which a mechanic's lien may be enforced. It provides in part:

> Actions to enforce the liens herein provided for must be begun within twelve months after completion of the original contract, or the suspension of work thereunder for thirty days.

The Utah Supreme Court has held that the words "the original contract" means the contract between the original (general) contractor and the owner.[9] Thus, a subcontractor that completes its work in the early stages of the contract does not need to bring action to foreclose its lien within 12 months of finishing its subcontract. Instead, the subcontractor need only commence its action within 12 months of the date that the general contractor completes its work. In the usual circumstance this means the subcontractor only needs to commence its action within 12 months of completion of the project.

Unfortunately, on a project administered by the construction manager, the same subcontractor performing the same work may not have nearly the same amount of time. The so called "subcontractor" may actually be an original contractor where it signed a contract with the construction manager acting as agent for the owner. In this situation it is unclear whether the "original contract" for purposes of Section 38-1-11 is the contract between the construction manager and the owner, or the contract between the trade contractor and the owner. Prudent attorneys must assume that the relevant original contract is the agreement between the trade contractor and the owner. Once again the typical trade contractor may not recognize the difference between the construction management scenario and the general contractor scenario and may thereby assume that it has a much longer period of time in which to commence its foreclosure action than it actually does.

Conclusion

It should be apparent that certain assumptions that can be made about legal issues in the traditional tripartite system cannot be made when a construction manager is involved. Under the traditional tripartite system, lawyering is often done with "off the rack" contracts and statutory interpretation. Construction management calls for a custom fit. Those that have had significant experience with construction management know that the likelihood of litigation is much greater with construction management than with the traditional format. Lawyers must recognize the inherent problems and help their clients avoid them.

[1]Goldstein, Construction Management: *Definitional Approaches to the Different Project Delivery Methods — Contractor as CM*, American Bar Association Forum on the Construction Industry Eighth Annual Forum 2-3 (1992).

[2]The relevant CMAA documents are A-1 Standard Form of Agreement Between Owner and Construction Manager (1990 Edition); A-2 Standard Form of Contract Between Owner and Contractor (1991 Edition); A-3 General Conditions of the Construction Contract (1990 Edition); and A-4 Standard Form of Agreement Between Owner and Design Professional [CMAA A-4] (1990 Edition).

The relevant AIA documents are the B801 Standard Form of Agreement Between Owner and Construction Manager (1980 Edition); A101/CM Standard Form of Agreement Between Owner and Contractor Construction Management Edition (1980 Edition); A201-CM General Conditions of the Contract for Construction, Construction Management Between Owner and Architect, Construction Management Edition (1980 Edition).

The relevant AGC document is Document No. 8, Owner-Construction Manager Agreement (1980).

[3]419 N.E.2d 940 (Ill. App. 1981).

[4]*Attlin Construction Inc. V. Muncie Community Schools*, 413 N.E.2d 281, 284, N.3 (Ind. App. 1980). *See*, AIA form A121/CM Article 1.1 and CMAA Document No. A-1, Article 1.1.1.

[5]912 F.2d 1520 (D.C. Cir. 1990).

[6]912 F.2d at 1525.

[7]Section 38-1-27 Utah Code Annotated (1989).

[8]The time limitation of section 38-1-11 can operate to invalidate the lien, but unlike a traditional statute of limitation it does not bar the underlying claim. *Projects Unlimited Inc. v. Copper State Thrift and Loan Co.*, 768 P.2d 738 (Utah 1990). Thus, the use of the term "statute of limitation" in this section is somewhat a misnomer.

[9]*Roberts v. Hansen*, 479 P.2d 341 (Utah 1971).

Commission Highlights

During its regularly scheduled meeting of May 20, 1993, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board voted to approve the minutes of the April 22, 1993 meeting.
2. The Board voted to authorize the Bar's ABA representative to support the petition on the proposed ABA model rule for admission of clinical teachers.
3. The Board voted to add the Utah State Bar as co-sponsor on the resolution to preserve the state and local bar majority in the ABA House of Representatives.
4. Randy Dryer reported that the Non-Profit Corporation Handbook is completed. The handbook was a joint effort by the Business Law and Corporate Counsel Sections and the Utah Association of CPA's.
5. The Board ratified the action of the Executive Committee authorizing Dryer to write a letter endorsing Justice Christine Durham as a possible U.S. Supreme Court nominee.
6. The Board discussed unauthorized practice of law related issues of cost and the necessity of historical expertise in prosecuting UPL cases.
7. Jim Clegg reviewed discussion he had been involved in regarding the Bar's efforts to encourage pro bono services.
8. The Board voted to authorize Randy Dryer to execute the purchase documents on the purchase of the Utah Law & Justice Center, Inc.'s 50 percent interest in the building.
9. Court's Order in response to its Task Force on the Regulation and Practice of Law report is nearing final form and it appears that (1) two public members will be added to the Bar Commission with full voting privileges, and (2) an annual retention election for the Bar's President-elect will be required. If a majority of all licensed active members of the Bar vote to reject the nominee, then the Commission shall choose another nominee until a president-elect is retained.
10. The Board voted to make an additional principal payment of $200,000 on the mortgage.
11. The Board voted to accept the recommendation of the Ethics Advisory Committee to approve Ethics Advisory Opinion #115 with a correction. Ethics Advisory Opinion #115 addresses under what circumstances a lawyer representing private party may directly contact the employees of a government agency if the private party is involved in litigation against the agency.
12. The Board voted to accept the recommendation of the Ethics Advisory Committee to approve Ethics Opinion #131 which addressed the issue of whether an attorney may include on letterhead the name of a non-lawyer employee with the indication that the employee is a CPA.
13. Randy Dryer reported that he received many letters in response to his request in a recent special mailer for comments on the issue of voting privileges for ex officio members of the Bar Commission. He indicated that, with one exception, all comments expressed opposition. The Board heard comments from Minority Bar Association Past President Judge Raymond Uno who articulated that the Minority Bar would like some greater input into the Bar and voting representation.
14. The Board voted that, except as otherwise directed by the Supreme Court, the Bar would continue its present policy regarding voting members of the Commission because it was considered inappropriate policy to extend voting privileges to those who have not stood for election and who would be representing special interest groups.
15. The Board voted to approve the Young Lawyers Section request to designate the section as a Division of the Bar.
16. The Board agreed to take final action on the proposed 1993-94 budget at the June meeting in Sun Valley.
17. The Board reviewed the Law Related Education (LRE) operating program budgets, the levels of support for its various programs, and a list of other state bar's contribution to LRE programs.
18. James Z. Davis reported on the recent Judicial Council meeting, referred to his written report and answered questions.
19. Executive Director John C. Baldwin referred to his written report and pointed out that the Continuing Legal Education Board has agreed that video tapes of live CLE seminars at the Utah Law & Justice Center may be replayed for live CLE credit in rural areas if a moderator experienced in the subject area were present to answer questions that may arise.
20. All ex-officio and staff were excused from the balance of the meeting and all discipline matters were acted upon.

During a Special Discipline Meeting of June 24, 1993, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board considered 24 discipline matters from noon until 5:25 p.m. During a break in the hearings the Board considered the following additional items.
   A. The Board voted to approve the letter of engagement with Deloitte & Touche to perform the Bar's audit for the year ending June 30, 1993.
   B. The Board directed John Baldwin to contract for Errors & Omissions insurance through Rollins Hudig.
   C. Jim Clegg brought the Commission up to date on the names of committee chairs he was considering appointing.
   D. Clegg also reported on current discussions involving the authority of Court Commissioners and distributed responsibility outlines.
   E. The Board voted to adopt the Commission policy that neither Commissioners nor their partners or members of their firms should be involved in representing a lawyer involved in the Bar's disciplinary process.

During the Annual Meeting of the Board of Bar Commissioners of June 30, 1993, which was held in Sun Valley, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board voted to reappoint William G. Fowler and Roland F. Uresk to the Board of Directors for Utah Legal Services, Inc. and to review letters and resumes of Bar members interested in serving on this Board at the November meeting to fill the five terms expiring in December.
2. The Board authorized the Executive Committee to appoint a representative from the defense bar to the legislature's Collection of Court Ordered Restitution & Debt Committee.
3. The Board authorized the Executive Committee to make the appointment of a law school designated representative to the Utah Substance Abuse Coordinating Council.
4. Dryer indicated that he received positive feedback on his Special Mailing No. 8 which summarized (1) the Bar Commission's decision not to extend voting privileges to ex-officio members; (2) the Utah Supreme Court's adoption of new discipline rules and procedures; and (3) the Utah Supreme Court's action on the Task Force Recommendations reaffirming the integrated nature of the Bar, delegating its regulatory powers over the practice to the Bar, altering the procedure for selecting the president-elect and adding two public members to the Board of Bar Commissioners.
5. The Board voted to create a permanent standing Bar committee on Solo & Small Firm Practitioners.
6. The Board voted to accept the Futures Commission's final report with appreciation for its work.
7. Randy Dryer indicated that Bar members have an opportunity to give input into the Judicial Rules Review Committee by contacting committee members whose telephone numbers would be published in the *Bar Journal.*
8. Dryer reported on his attendance at the Jack Rabbit Bar Meetings in New Mexico.
9. Jack Helgeson appeared on behalf of the Utah Trial Lawyers Association to review proposed legislation regarding third-party adjusters.
10. J. Michael Hansen Budget & Finance Committee Chair reviewed the financial reports for the month.
11. Mary Jo Rasmussen and Mike Wilkins appeared on behalf of the Law Related Education project to thank the Bar for its past support and to make a funding request.
12. In accordance with provisions of the Bylaws that the Executive Director be selected on an annual basis, the Board voted to renew the contract of John Baldwin.
13. The Board voted to approve the 1993-94 budget as amended.
14. Timothy M. Shea, Administrative Office of the Courts and James B. Lee, Family Court Task Force Chair, gave an interim update report on the Family Court Task Force to the Bar Commission.
15. The Board voted to approve applicants to take the July 1993 Bar Examination and to provisionally approve those applicants pending a favorable recommendation of the Character & Fitness Committee.
16. The Board voted to defer acting on the recommendation of the Character & Fitness Committee to deny readmission for an applicant until next month and invite the Character & Fitness Committee Chair to respond to the Board's questions.
17. The Board voted to accept the recommendation of the Character & Fitness Committee to deny an applicant, who applied for readmission following disbarment, to sit for the Bar examination.
18. The Board voted to postpone review of a Character & Fitness appeal until next month to give the Board more time to review the Findings of Fact.
19. The Board voted to accept the recommendation of the Commission Hearing Panel to deny a Character & Fitness appeals applicant to sit for the Bar examination.
20. The Board voted to accept the recommendation of the Bar Commission hearing panel to approve a Character & Fitness appeals applicant to sit for the Bar examination.
21. The Board voted to petition the Court to allow for a temporary license for general counsel attorneys and to direct Bar Counsel Steve Trost to prepare a proposed rule based on the Idaho rule.
22. The Board voted to accept the recommendation of the Admissions Committee to approve the acceptance of totally complete bar examination applications up until May 1 for the July exam and December 1 for the February exam with a $300 late fee.
23. The Board voted to appoint the following ex-officio members of the Bar Commission for the up-coming year: the Dean of the University of Utah Law School, the Dean of Brigham Young University Law School, the Bar Commission's representative to the ABA House of Delegates, the Utah ABA delegation's delegate to the ABA House of Delegates, the Young Lawyers Division President, the Past President of the Bar, and a representative of the Minority Bar Association.
24. The Board approved the addition of the Women Lawyers ex-officio representative to the Bar Commission.
25. James Z. Davis referred to his written report and distributed a copy of the Judicial Council's agenda for June 30.
26. The Bar's Delegate to the ABA, Reed Martineau, asked for the Board's recommendation on two proposals which would be voted on during the ABA Annual Meeting in August. The Board voted to authorize it's ABA representative (1) to use his best judgment after consultation with justices in voting on the proposed ABA admissions legislation and (2) to vote his conscience or best judgment on the ABA proposed lawyer responsibility rule.
27. The Board directed Bar Counsel Steve Trost to acquire other states' statutes on criminalization of UPL cases, to explore the idea with the Attorney General's office and the Unauthorized Practice of Law Committee, and to draft a proposed bill for Board review.
28. The Board voted to give permission to Bar Council to file an amicus brief on the Bar's Confidentiality Rule 1.6.
29. Paul Moxley was appointed president-elect.

A full text of the minutes of these and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Discipline Corner

ADMONITION: (under new rules)

1. On August 11, 1993, the Chair of the Ethics and Discipline Committee entered an Order of Discipline pursuant to the terms of a Discipline by Consent wherein an attorney received an Admonition for failing to take timely action to prosecute a criminal appeal. Effective July 1, 1993, an Admonition replaces the Private Reprimand. In this instance the client was convicted in February 1991, the Notice of Appeal was timely filed, however, the Appeal Brief was not filed until May 1993.

PRIVATE REPRIMANDS: (under old rules)

2. An attorney received a Private Reprimand for violating Rule 4.4 (Respect for Rights of Third Persons) of the Rules of Professional Conduct of the Utah State Bar. In a custody dispute, the Domestic Relation's Commissioner recommended that the Division of Family Services (DFS) conduct a custody evaluation pursuant to the Utah Code Ann. §62A-4-509. Upon completion, the evaluation report was filed with the court. Thereafter, the attorney, dissatisfied with the evaluation results contacted DFS, alleging the evaluation was performed in absence of a court order. The attorney successfully demanded the retraction of the report. The evaluator's report was ultimately resubmitted. In mitigation, the Screening Panel considered the fact that the attorney had no prior discipline history.

3. On June 24, 1993, the Board of Bar Commissioners upheld the decision of a Screening Panel of the Ethics and Discipline Committee privately reprimanding an attorney for violating Rule 1.1 COMPETENCE, Rule 1.3 DILIGENCE and Rule 1.5(a) FEES. The attorney violated these Rules by failing to prepare a personalized, relevant Qualified Domestic Relations Order from the date of the divorce, January 14, 1991, through the attorney's withdrawal on July 28, 1992. In addition, the attorney attempted to charge the client for the preparation of the QDRO.

PUBLIC REPRIMANDS:

4. On June 28, 1993, Thomas R. Blonquist was publicly reprimanded by the Utah Supreme Court pursuant to a Discipline by Consent for violating DR 7-101(A) ZEALOUS REPRESENTATION. The basis of this action involved Mr. Blonquist's failure to adequately review and verify information for inclusion in a Proxy Statement prepared by Mr. Blonquist in January of 1984 and distributed in March of 1984.

5. On June 29, 1993, Donald E. Elkins was publicly reprimanded by the Utah Supreme Court pursuant to the terms of a Discipline by Consent. Mr. Elkins was retained in December 1990 to assist clients with bankruptcy and accepted a fee of $200.00. Thereafter, he failed to provide any meaningful legal services. He failed to attend any of the four hearings that were set in the case. Instead, he sent an associate to ask for a continuance. On January 14, 1992, the case was dismissed for lack of prosecution. Mr. Elkins agreed to make restitution of $1,200.00 to his clients which included compensation for an automobile that was repossessed when the bankruptcy was dismissed.

SUSPENSIONS:

6. On September 2, 1993, the Third District Court entered an Order of Interim Suspension against Nick H. Porterfield. The Order suspends Mr. Porterfield from the practice of law until all pending disciplinary matters are resolved. Mr. Porterfield was suspended for multiple violations of Rule 1.3 DILIGENCE, Rule 1.4 COMMUNICATION, Rule 1.5 FEES, Rule 1.13 SAFEKEEPING PROPERTY, Rule 1.14 DECLINING OR TERMINATING REPRESENTATION, and Rule 8.4(a), (b), (c) and (d) MISCONDUCT. Mr. Porterfield effectively abandoned his practice and clients by leaving the state, without notice to clients or the Courts, and failing to provide alternative counsel. This occurred on May 26, 1993. As a result of his departure, he was locked out of his office and made no attempt to contact clients or the Courts regarding pending matters. The Office of Attorney Discipline has received more than fifty-five complaints against Mr. Porterfield from clients, colleagues, former employees and others. While many complaints arose out of Mr. Porterfield's actions on and subsequent to May 26, 1993, just as many arose out of conduct prior to May 26, 1993.

7. In August 10, 1993, the Utah Supreme Court suspended Doyle Buchanan from the practice of law for three months for accepting a fee of $600.00 to represent a client in a criminal matter and failing to provide any legal services. Mr. Buchanan cannot be reinstated to practice law until the client or the Client Security Fund is reimbursed for this unearned fee. The Court also directed that he be placed on supervisory probation for a period of six months following reinstatement.

NOTICE OF PETITION FOR REINSTATEMENT

On or about August 17, 1993, John R. Bucher filed a Petition for Reinstatement to practice law. Mr. Bucher was suspended on May 19, 1992, for a period of not less than six months pursuant to Rule XIX, Disability, of the Procedures of Discipline of the Utah State Bar. Individuals objecting to or concurring in Mr. Bucher's reinstatement to practice law should file their opposition or concurrence with the Third Judicial District Court within 30 days of the date of this publication.

NOTICE

It is the attorney's responsibility to notify the Bar, in writing, as soon as an address has changed. Send all changes to:

Utah State Bar
ATTN: Arnold Birrell
645 South 200 East #310
Salt Lake City
Utah 84111

NOTICE

Utah State Bar Commission Approves Ethics Opinions

Opinion No. 111
Approved July 29, 1993

Issue: Utah Ethics Advisory Opinion No. 45, issued in 1978, holds that an attorney may not represent a collection company in lawsuits to collect on assigned accounts if he owns stock in or has an interest in the company. Is Opinion No. 45 still valid in light of the relaxation of attorney advertising and solicitation since 1978?

Opinion: The conclusion of Opinion No. 45 is reversed. It is not per se unethical for an attorney who has a financial interest in a collection agency to represent the agency in lawsuits to collect on assigned accounts.

Opinion No. 136
Approved July 29, 1993

Issue: Can an advance payment made by a client ever be characterized as a "fixed fee" ("nonrefundable retainer"), which would be earned by the attorney when received and therefore not deposited into a trust account?

Opinion: Fixed-fee contracts (nonrefundable retainers) are not prohibited by Rule 1.5 of the Rules of Professional Conduct. Under appropriate conditions, a nonrefundable retainer may be considered earned when paid, and therefore, may be deposited into the attorney's operating account rather than his trust account. However, a nonrefundable retainer is, like any other type of fee, subject to the standard of Rule 1.5 that an attorney "shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee." As a result, although considered earned on payment, a nonrefundable retainer may be subject to disgorgement if it is clearly excessive under Rule 1.5. Furthermore, a fixed fee should be clearly set out in a written fee agreement that clearly informs the client of what circumstances would entitle him to a disgorgement of all or part of the "nonrefundable" retainer.

Opinion No. 121
Approved August 26, 1993

Issue: May a lawyer pay another lawyer a fee for referring a case?

Summary: A lawyer may not pay referral fees to another lawyer, unless the referral arrangements meets the standards of Rule 1.5(e) for dividing fees and is otherwise consistent with the Utah Rules of Professional Conduct.

The Utah Rules of Professional Conduct permit lawyers to divide fees, subject to the following three conditions: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable.

Opinion No. 132
Approved August 26, 1993

Issue: May an attorney who is leaving a law firm take, either to another law firm or to solo practice, the files and clients gathered while the attorney was an employee or member of the law firm?

What duties does the departing attorney owe the law firm with respect to fees paid to the attorney by these clients for services performed subsequent to the attorney's departure from the firm?

Summary: When an attorney who is an employee or member of a law firm leaves the firm, he may take with him a client and the relevant legal files generated while at the firm, but only with the prior authorization of the client.

The departing lawyer has no duty to the departed law firm with respect to fees for services rendered after the withdrawal from the firm, unless the departing lawyer and his law firm have agreed otherwise. Any such fee arrangement must comply with the Rules of Professional Conduct 1.5 and 5.6 and should not effectively deny the client a choice of counsel.

Exciting Early Resolution Project

Judge Pat B. Brian of the Third District Court has initiated an experimental project that could have far reaching implications. Beginning September 1, 1993, Judge Brian will hear Early Resolution Conferences in any domestic case in which both attorneys certify that they believe the case to be one capable of early resolution. Before so certifying the case, each party must make a full disclosure of all financial information to the other party and exchange financial declarations which are also to be filed with the Court, at least forty-eight (48) hours prior to the Early Resolution Conference. Once the case has been certified as set forth above, Judge Brian will schedule an Early Resolution Conference to be attended by both parties and Counsel. At that time, the parties, Counsel, and the Court will engage in settlement negotiations necessary to resolve all issues in the case. If successful, the divorce will be granted at the time of the hearing and Judge Brian will favorably consider motions to waive the waiting period and other statutory requirements.

The advantages of this procedure are almost too numerous to mention. Obviously, there would be enormous savings in costs, attorney's fees, time, and perhaps most important, emotional wear and tear. The case would be finalized at the first and only hearing without the necessity of discovery, multiple hearings, or trial. It must be emphasized that Judge Brian is willing to hear any divorce case certified by Counsel, regardless of which judge the case is assigned to. In order to encourage full disclosure, if the case is assigned to Judge Brian and the case is not resolved at the Early Resolution Conference, Judge Brian will recuse himself. We urge you to consider this alternative procedure for any divorce case to which it might be applicable. Judge Brian has indicated that if the demand is greater than the resources he has available, he will recruit other members of the judiciary to assist him.

A Pro Bono Initiative: Assessing Unmet Legal Needs and Seeking Solutions

By Keith A. Kelly
Chairperson, Delivery of Legal Services Committee
Past-President, Utah Young Lawyers Division

Last January, the Bar Commission approved a significant pro bono initiative. It approved (a) an assessment of unmet legal needs in Utah and (b) development of a statewide pro bono Plan of Action by the Young Lawyers Division ("YLD") and Delivery of Legal Services Committee ("Delivery Committee").

THE NEED

Anecdotal evidence indicates that significant legal needs go unmet in Utah — despite the hard work of Utah Legal Services, Utah Legal Aid, and other organizations. For example, Legal Aid reports a six to nine month waiting period for eligible persons needing help with domestic cases. Due to increased demand for its services, it may have to start turning away indigent persons whose divorce problems do not involve domestic violence or child custody. At the same time, Utah Legal Services reports that, due to lack of staffing and funding, it turns away an average of 83% of eligible low income persons. The Director of Utah Legal Services, Anne Milne, reports that, between 1980 and 1990, Utah experienced a 32% increase of those in poverty. In some areas of Utah, no legal help may be available for indigent persons. Finally, anyone who has volunteered to do pro bono work recognizes how much legal help is needed by many indigent people.

At the same time, law practice is demanding and complex. Increasing financial pressures face law firms and solo practitioners. At times, just meeting client needs seems to require all of our energies, without even considering pro bono commitments. New ideas need to be considered for the Bar to most efficiently provide pro bono services.

THE PROJECT

The proposed needs assessment and Plan of Action is designed to assess and respond to Utah's unmet legal needs. The Plan will be presented to the Utah State Bar Commission in April 1994. This project will identify the greatest unmet legal needs in Utah and identify ways that the Bar and other law-related organizations can help to fill those legal needs.

The American Bar Association reports that most other states have carried out such integrated need assessments and plans of action. The results have been heightened awareness of unmet legal needs and more effective efforts to meet those needs.

But no such assessment and plan has been prepared in Utah. To remedy this situation, the Committee is beginning by assembling pre-existing studies, and then studying legal needs by geographic region (e.g., Southeast Utah) and by substantive legal area (e.g., disability law and domestic law). The Committee will be drawing on the resources of Utah Legal Services, Utah Legal Aid, and other organizations currently filling legal needs. In addition, the Bar has committed staff support to the project. While carrying out the needs assessment, the Committee will be developing ideas for better filling those needs. The result will be an integrated statewide Plan of Action.

THE ROLE OF THE ADVISORY BOARD

Critical to the success of the needs assessment and Pro Bono Plan of Action is a distinguished Advisory Board. The YLD and Delivery Committee are assembling an Advisory Board of judges, attorneys, professors and community leaders who have an interest in pro bono issues. The purpose of an Advisory Board is to obtain experienced guidance and input for the project. The Advisory Board will first meet on October 12, 1993. At the meeting, the YLD and Delivery Committee will present its progress and ideas to the Board, while seeking suggestions and input.

NEED FOR VOLUNTEERS

In undertaking the needs assessment and pro bono Plan of Action, the YLD and Delivery Committee can use all available help. Any interested members of the Bar are encouraged to volunteer. We believe that the work will be significant in charting a course to respond to the many unmet legal needs in our state.

If you have any questions about this project or would like to volunteer, please call Keith Kelly (Delivery Committee Chairperson & YLD Past-President) at 532-1500, or Leslee Ron (Committee Liaison) at 531-9095.

Pro Bono Attorney of the Month

By Anne Milne, Director Utah Legal Services

Question: **Are there any attorneys willing to give free advice Sunday mornings under the 4th South Viaduct? Expertise in criminal law and good people skills required, long term commitment and knowledge of common legal problems preferred.**

Answer: **Yes, Scott Cottingham.**

Finding attorneys to assist staff and volunteer law students working in the Homeless Project of Utah Legal Services is a must because clients frequently have criminal law questions that we could not answer. But would attorneys **volunteer** to be under the viaduct at 8 a.m. regardless of the weather and number of potential clients lined up for help? "Which Sundays do you want me?" was Scott Cottingham's only question.

The Homeless Project has weekly office hours at the Salvation Army, the Homeless Shelter, St. Vincent de Paul Center and during the breakfast served each Sunday by volunteers under the 4th South Viaduct. In three years the Project has assisted more than 2,400 persons who are homeless or at risk of becoming homeless in eviction proceedings. Providing this volume of service is dependent on volunteer law students and undergraduates as well as private attorneys who will go to shelters or under the Viaduct to meet clients.

For two years Scott Cottingham has been at the "Free Legal Help" table at *least* one Sunday every month. As one of several experienced criminal law attorneys who responded to the plea for help from the Homeless Project, Scott agreed to take an alternating Sunday and several hundred questions later reports that he actually looks forward to his turn and has been known to come more often than he is scheduled. "People have common questions that often involve trying to get a new start. For me it is pretty simple to answer the same questions over and over, but I know that it is significant to each person who is trying to get their life back on track. By 10 o'clock on a Sunday morning I can walk away feeling that I have made a

contribution to some of those in greatest need for legal help who have no means to pay for it."

If Scott isn't under the viaduct on a Sunday morning people will ask for him by name and find out when to come back to see him. "In more than two years he has never missed a month, so it is not surprising that Scott has a reputation for credibility and clients have confidence in him and trust him. "He gets a lot of referrals from the community" says Kay Fox, the ULS attorney who supervises the Homeless Project. While many attorneys might wonder if this is the devoted clientele they would want, Scott is realistic about the pressure on many of them and that some may be ill, volatile and/or intoxicated but says that he never has had a problem and finds clients to be very courteous and appreciative. "Sunday mornings are very peaceful and relaxed, a real contrast to some of the other times in and around Pioneer Park."

Asked why he chooses to give *pro bono* service in such an unusual setting, Scott modestly explains that he just responded to ULS's request for help because he had some expertise and that it was a simple way to take a turn to meet a need of homeless persons who would not otherwise get assistance. "*Pro Bono* work is an obligation that all attorneys have. We need to pay attention to it and find ways to do our share. I thought this was a good way to make a contribution without devoting a lot of time during the work day. It is like Tuesday Night Bar. You can usually confine your time to giving advice at the site. It is rare that I need to do follow-up work."

Scott knows the advantage of selecting a volunteer opportunity like outreach with the Homeless Project, Tuesday Night Bar or acting as a Small Claims Court judge which he has done on a regular basis because he also takes referrals from ULS of contested cases. "Scott always has at least one complicated case, sometimes two, and we give him the tough ones" says Mary Nielsen, the *pro bono* coordinator at ULS. When pressed about why he is such a soft touch as a volunteer, he responded that "Many people cannot afford legal services, not only the homeless but some middle class people. Providing some help is my responsibility as a member of the profession. And I find that I enjoy doing it. Volunteering under the viaduct puts your own life and problems in perspective."

Scott says that there is a need for additional volunteer attorneys at the viaduct, particularly those who have experience in criminal, domestic or bankruptcy law and having some attorneys who speak Spanish would be great. "People are mostly asking for information about where they stand, a general explanation of how the legal system works or what the next step for them would be. While the questions are pretty simple legally, often the problem is not nearly as bad as the person fears and they are relieved so it is rewarding for both of us."

The Delivery of Legal Services Committee of the Bar is analyzing the unmet legal needs and consequent *pro bono* opportunities throughout the State. Please contact Leslee Ron, the Delivery of Legal Services Committee Liaison, at 531-9095, to find a match for your skills. It is guaranteed that there is an opportunity that you would find worthwhile and enjoy. If you want more information about the Homeless Project which has just opened an outreach office at the St. Vincent de Paul Center, or other volunteer opportunities at Utah Legal Services call Mary Nielsen at 328-8891.

Three Law Firms Honored by Westminster College

SALT LAKE CITY — Parsons, Behle & Latimer; Parker, McKeown & McConkie; and Utah Legal Services were honored recently by Westminster College for supporting and promoting effective use of legal assistants. The three Salt Lake law firms were presented awards in graduation exercises for the Legal Assistant Certificate Program at the college. Val R. Antczak, vice president at Parsons, Behle & Latimer accepted the award for the firm. James W. McConkie represented Parker, McKeown & McConkie, and Waine Riches, director of Utah Legal Services accepted the award for his organization.

"Although legal assistants are a relatively recent phenomenon in the field of law, they have quickly become an integral part of the legal system" said Kelly De Hill, director of legal education and general counsel for Westminster College. "The August 1993 graduating class wanted to honor firms in the community who make particularly good use of legal assistants with this award."

She reported that the large firm of Parsons, Behle & Latimer employs 15 legal assistants, while Parker, McKeown & McConkie, a three-attorney firm, employs 4.

In the Salt Lake City office of Utah Legal Services, with its large case load, there are 16 full time legal assistants, while more than 60 volunteer their services on a regular basis. Legal Services offers an evening service staffed primarily by legal assistants under the supervision of attorneys in order to provide more individuals with access to legal information.

The Westminster College Legal Assistant Program has been training legal assistants since 1981 and its graduates are well represented in the three firms which received the award.

"We're training excellent legal assistants," Ms. Hill said, "and this award is a way of recognizing the firms who provide our students with good internships and hire our graduates." She says the program plans to recognize other supportive firms in the future. "Legal assistants perform many tasks once handled exclusively by attorneys, and many firms find they are a cost-saving way of providing clients with good service," she added. "But they are required to work under the supervision of an attorney."

Using Utah Court Information Technology in Your Law Practice

Presented by the Utah Minority Bar Association in cooperation with the Administrative Office of the Courts

A three-hour CLE seminar to enable legal practitioners to more effectively use the information resources offered by the Utah courts. The seminar will explain the information services offered by the Utah state courts, including:

- Computer-assisted legal research
- Access to Utah court information systems
- Using Utah court information databases
- The future of Utah court information systems and how to tie in your strategy for your practice

Instructor: Alan Asay, Judicial Information Services, Utah Administrative Office of the Courts
Juris Doctor, Brigham Young University J. Reuben Clark Law School, 1982
Associate Editor, *Brigham Young University Law Review*, 1982

Continuing Legal Education Credit: 3 hours, non-ethics

Fee: $50 or $40 for members of the Minority Bar Association

Registration: Enrollment will be limited to the first 75 registrants in order to offer hands-on opportunities.
To register, send (1) the following form or a letter with the information contained on the form, and (2) a check payable to the Utah Minority Bar Association, to:

Utah Minority Bar Association
c/o Robert M. Archuleta, President
431 South 300 East Suite 401
Salt Lake City, UT 84111
Phone: 363-0141

Name: _____

Address: _____

_____

Bar Number _____ Phone _____

Career Opportunity
United States District Court for the District of Utah

Submit Applications to:
Ms. Kathleen Johnson,
Administrative Analyst
U.S. District Court
140 U.S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101-2180

Announcement Date: August 23, 1993
Application Deadline: Open Until Filled

ADR ATTORNEY/ADMINISTRATOR — FEDERAL COURT

The United States District Court for the District of Utah seeks applications for the position of ADR Attorney/Administrator. This is a half-time position with a work schedule of four hours per day, five days per week. The ADR Attorney/Administrator is responsible for the administration of the Court's Alternative Dispute Resolution Program. Specific functions include conducting ADR orientation sessions for members of the Court's bar and their clients who may be considering arbitration or mediation as an alternative to the traditional litigation process; tracking the referral of civil cases to the ADR program and monitoring their progress once they are so referred; coordinating the selection process whereby parties select prospective arbitrators and mediators from the Court's ADR panel to oversee their cases; serving as the Court's liaison to the ADR panel; and maintaining contact with the ADR counterparts in other districts throughout the nation. The position also will be responsible for conducting case-related research and for preparing statistical and other reports related to the Civil Justice Reform Act. The position is located in the Office of the Clerk of the Court and reports to the Clerk.

REQUIRED QUALIFICATIONS

Applicants for appointment as the ADR Attorney/Administrator must have earned a law degree from an accredited law school and be members in good standing of the Utah State Bar in either active or inactive status. Applicants also should have a minimum of one year relevant work experience working in a court environment or in the practice of law. Applicants should provide evidence of excellent communication skills, both oral and written, and should include a writing sample with their applications for the positions. Preference will be given to applicants who have expertise and/or experience in ADR such as providing instruction in ADR or administering ADR programs. The position also requires demonstrated skills in working and interacting effectively with a wide variety of persons, lawyers as well as laypersons. Applicants should be highly motivated self-starters who exhibit pride in their work product and who are interested in serving as effective and highly capable representatives for the Court.

SALARY, BENEFITS, AND OTHER INFORMATION

Salary: The base starting salary is $15,301 which is equal to one-half of JSP 10/1. The promotion potential of the position is uncertain at this time and will depend on a variety of factors, including what level of activity the ADR Program eventually generates in terms of cases referred. Cost of living increases for the general civil service apply to the salary of this position.

Benefits: This position is a non-civil service position, but carries similar federal employment benefits. These benefits include health insurance, life insurance, paid holidays, vacation leave, and sick leave. The position falls under the Federal Employees Retirement Systems (FERS).

APPLICATION PROCEDURE

Qualified persons are invited to submit a cover letter, writing sample, and completed SF-171 (Application for Federal Employment), with any supporting materials, to Ms. Kathleen Johnson, Administrative Analyst, at the address shown at the top of this announcement. Qualified candidates will be contacted for interviews. SF-171 Forms are available from the Office of the Clerk or at other federal agencies. No deadline for the submission of applications has been set; the position will be open until it is filled. All applicants will receive notification once the position has been filled.

PROBATIONARY PERIOD

An incumbent will be placed in probationary employment status for the first six months of tenure. During this period, the incumbent's performance will be monitored by the Clerk of the Court to determine the incumbent's ability to fully meet the requirements of the position. If the Clerk determines that the incumbent's performance during the probationary period does not meet the minimum standards of performance, the incumbent's employment may be terminated.

ABOUT THE COURT AND ITS ADR PROGRAM

The United States District Court for the District of Utah covers the entire state of Utah. The Court is headquartered in Salt Lake City although court occasionally is conducted in Ogden. The ADR Program was initiated in March 1993, by the judges of the Court as an experimental effort to offer dispute resolution alternatives to parties who file cases in federal court. Interest in the program by members of the legal community in the State of Utah has been growing in recent months.

The District of Utah is an equal opportunity employer and has adopted an Affirmative Action Plan; members of minority groups who meet the qualifications are encouraged to apply.

The Salt Lake Legal Secretaries Association Annual Court Observance Day
Thursday, October 14, 1993

The Salt Lake Legal Secretaries Association's annual Court Observance Day will be held in the courtroom of Judge Leslie A. Lewis, 240 East 400 South, Room 504, Salt Lake City, Utah, on Thursday, October 14 beginning at 5:30 p.m. A demonstration of computer integrated courtrooms will be presented by Cecilee Wilson, CSR, with remarks from Judge Lewis.

Reservations for this event can be made by calling Debbie Zuckerman at 322-9230.

1993-94 LOCAL BAR PRESIDENTS

BOX ELDER BAR ASSOCIATION
Ted Blanchard 257-0242
Deputy County Atty.
8880 North Highway 69
Deweyville, UT 84309

CACHE COUNTY BAR ASSOCIATION
Dale G. Siler 752-2610
175 East 100 North
Logan, UT 84321

CENTRAL UTAH BAR ASSOCIATION
David D. Jeffs 373-8848
90 North 100 East
P.O. Box 888
Provo, UT 84603-0808

DAVIS COUNTY BAR ASSOCIATION
David J. Peters 292-1818
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Bountiful, UT 84010

SALT LAKE COUNTY BAR ASSOCIATION
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Salt Lake City, UT 84147-0898

SOUTHEASTERN UTAH BAR ASSOCIATION
Michael A. Harrison 637-1245
90 West 100 North
Price, UT 84501

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250 South Main Street
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Cedar City, UT 84720

TOOELE COUNTY BAR ASSOCIATION
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121 West Main Street
Vernal, UT 84078

WEBER COUNTY BAR ASSOCIATION
Richard R. Medsker 394-0823
205 26th Street, #34
Ogden, UT 84401

1993-94 SECTION OFFICERS

ADMINISTRATIVE LAW
Alan L. Hennebold, Chair 530-6484

BANKING AND FINANCE
Jeffrey M. Jones, Chair 531-8400

BANKRUPTCY
Gerald H. Suniville, Chair 532-3333
Joel T. Marker, Vice-Chair

BUSINESS LAW
David G. Angerbauer, Chair 532-7840

COLLECTION LAW
Kirk A. Cullimore, Chair 566-1400

CONSTRUCTION LAW
Graham Dodd, Chair 328-3600
Darrel J. Bostwick, Chair-Elect
Douglas E. Griffith, Secretary/Treasurer

CORPORATE COUNSEL
Chris Malan, Chair 298-7733
William Rideout, Vice-Chair
Ginger Smith, Secretary/Treasurer

CRIMINAL LAW
Jerry Mooney, Chair 364-5635
Ronald N. Boyce, Vice-Chair
G. Fred Metos, Secretary/Treasurer

EDUCATION LAW
Barbara H. Ochoa, Chair 575-1650
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ENERGY, NATURAL RESOURCES AND ENVIRONMENT LAW
A. John Davis, Chair 531-8446

ESTATE PLANNING LAW
Fred D. Essig, Chair 328-3600
Gary Henrie, Program Chair

FAMILY LAW
Rex W. Olsen, Chair 363-5650

FRANCHISE LAW
Robert W. Thompson, Chair 575-1600

GOVERNMENT LAW
Cheryl D. Luke, Chair 535-7767
Richard Fox, Past-Chair

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Charles L. Roberts, Chair 537-1700

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Andrew W. Buffmire, Chair 532-7300
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LABOR AND EMPLOYMENT LAW
W. Mark Gavre, Chair 532-1234

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Leshia Lee-Dixon, Secretary
Glinda Ware-Langston, Treasurer

MCLE Reminder 91 Days Remain

For attorneys who are required to comply with the odd year Compliance cycle.

On October 1, 1993, there will remain 91 days to meet your Mandatory Continuing Legal Education requirements for the third reporting period. In general the MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a 27 hour total. Be advised that attorneys are required to maintain their own records as to the number of hours accumulated. The second reporting period ends December 31, 1993, at which time each attorney must file a Certificate of Compliance with the Utah State Board of Continuing Legal Education. Your Certificate of Compliance should list programs you have attended to meet the requirements, unless you are exempt from MCLE requirements. Following is a Certificate of Compliance form for your use. If you have any questions, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

Notice of Judicial Rules Review

The Utah State Legislature has created a Judicial Rules Review Committee to examine existing and proposed rules promulgated by the Supreme Court through the Judicial Council and the Advisory Committees. The committee has requested that interested members of the Bar provide input to the committee by contacting its lawyer members. Those Committee members include John L. Valentine, Chair, telephone 373-6345; Sen. David L. Watson, telephone 628-4884; Rep. Frank R. Pignanelli, telephone 481-6658; and committee Staff, Lisa Watts Baskin, Esq., telephone 538-1032.

The Committee is hoping to serve as a resource to the members of the Bar and the Judiciary to ensure that proposed rules are previously examined and commented upon before their application.

MCLE Certificiate of Compliance 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 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 to 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. Following is a Certificate of Compliance for your use. If you have any questions concerning the MCLE requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

DUI Expert Witness CLE Credit in Utah, Wyoming, Idaho

La Pier & Associates presents "Role Of The Expert Witness in DUI Cases". This course will focus on the Standardized Field Sobriety Tests (Horizontal Gaze Nystagmus, Walk & Turn, One-Leg-Stand), Direct Breath Testing and how they relate to Effective DUI defense and prosecution. This program will be presented December 10, 1993 at the Utah Law and Justice Center in Salt Lake City. For more information and registration call 1-800-257-4643.

Bill of Rights Symposium

The J. Reuben Clark Law School's annual Bill of Rights Symposium is scheduled for Friday, October 22, 1993 from 8:30 a.m. until 4:00 p.m. This year's theme, RIGHT OF PRIVACY v. THE PUBLIC'S RIGHT TO KNOW, will explore the following contexts: Personal Right to Privacy v. Access by the Press, Public Health Disclosures, Employer Hiring Decisions, Access to Government Records, and Access to Genetic Information. For registration information contact Kathy Pullins at (801) 378-5576.

The Sixth Annual Salt Lake Estate Planning Council Fall Institute

This institute includes professionals with both tax and legal expertise. Topics to be covered include: What if the Heart Attack Doesn't Kill You?; Restatement (Third) of Trust' Prudent Investor Rule: Trust Investment Law in the 90's; Marital Deduction Planning and Tax Allocation Clauses; and Funding of Revocable Living Trusts. Bring your estate planning practice up-to-date with this information seminar.

CLE Credit:	8 hours
Date:	October 8, 1993
Place:	Joseph Smith Memorial Building (Old Hotel Utah)
Time:	8:00 a.m. to 5:00 p.m.

Mark Your Calendars NOW!

Utah State Bar Mid-Year Meeting

St. George, Utah
March 10-12, 1994

NOTICE

To: Solo and Small Firm Practitioners, Utah State Bar

Pursuant to the recommendations of the Special Task Force on Solo and Small Firm Practitioners, the Bar Commission has established a permanent standing Committee on Small Firm Practice. The initial Chairman of the Committee will be Charles R. Brown of the firm of Hunter & Brown. The definition of a small firm, pursuant to the Task Force recommendations, is a firm composed of five attorneys or less. If you do practice in a small firm, the Bar and the new permanent Committee on Small Firm Practice would like to complete a roster of small firm practitioners for the purposes of organizing the Committee and for future notices of interest to small firm practitioners. Please complete the following questionnaire and mail it to the State Bar office at 645 South 200 East, Suite 310, Salt Lake City, Utah 84111. Attention: Committee on Small Firm Practice.

Committee on Small Firm Practice:

Name of Firm:

_____

Address:

_____
(Street Number) (Suite Number)

_____
(City) (State) (Zip Code)

Telephone Number: _____

Telefacsimile Number: _____

Number of Attorneys in Firm: _____

Names and Bar Numbers of Each Attorney in Firm:

Name	Bar #

Members of Firm Who Are Interested in Serving as Members of Committee on Small Firm Practice:

_____

_____

_____

_____

_____

Specific Areas of Interest:

_____

_____

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The First Thing We Do . . .

By Judge Bruce S. Jenkins

(The following are the comments of Judge Jenkins made at a meeting of the A. Sherman Christensen American Inn of Court # I on August 24, 1993).

I am honored to speak at the 1993 opening banquet of the American Inn of Court I, the A. Sherman Christensen Inn. It bears the name of our honored colleague and friend. This is where it all began. The idea caught fire and spread throughout the land. There are now over 200 chapters which have sprung from the original work of Judge Christensen and his colleague in creativity, Judge Aldon Anderson, and others. I was invited to join that original group. I am proud to still be an emeritus member. I remain an active member in the Aldon Anderson Inn — Inn 7 in Salt Lake City.

Our professed areas of interest are legal excellence, civility, professionalism and ethics, subjects which receive little attention in the popular press. We know their importance. That is why we engage in this effort at self-improvement and social improvement as well.

I very much enjoyed Judge Sam's introduction and thank him for it. However in the interest of fairness you are entitled to a second opinion. Some years ago a defendant standing by the side of his court-appointed attorney wanted me to reconsider a pro se motion filed by him which I had previously denied. The following took place:

"The Court: We're going to set a trial date today. Your motion to dismiss I have considered, sir. It looks to me like you have nothing to add to it. The motion will be denied. Let's fix a date."

"DEFENDANT: Your Honor, I am bound by the laws of God to state to you that you are in violation of your oath. That you are a criminal under the laws of this United States of America. I command in the name of Jesus Christ the angels speedily take your spirit to the spirit prison and there retain you until the resurrection of the unjust, in the name of Jesus Christ, Amen."

"The Court: Okay. Now let's fix a trial date."

In the few minutes I have this evening I want to talk about one facet of professionalism which permeates everything we do. We can call it our quest for factual accuracy, our interest in, for want of a better word, what we call Truth.

In a courtroom setting, we want witnesses to tell us what they know. We optimistically have them swear to tell the truth. A witness is a person who knows something. He tells us what he knows. He testifies. We are concerned with how he knows and the limitations found in language itself in his telling us what he saw, heard, or did. And we test what he knows through examination to arrive at some way of evaluating how reliable his information is. In a courtroom setting, that process of information gathering has worked well in this country for more than two hundred years. Indeed, it is a model admired

JUDGE BRUCE S. JENKINS has served as a Federal District Judge in Utah since 1978. Previously, he served as a Bankruptcy Judge in Utah between 1965 and 1978. For nine years (1984-1993), he served as Chief Judge of the Federal District Court for Utah.

He graduated from the University of Utah College of Law in 1952 and served as a member of the Board of Editors of the Law Review. After law school, he entered private law practice and also served as a clerk to a State Supreme Court Justice, as an Assistant Attorney General and as a Deputy Prosecutor for Salt Lake County.

At the age of 31, he was appointed a member of the Utah State Senate and was twice re-elected becoming Minority Leader and later President of the Senate at the age of 36. Judge Jenkins has served on numerous distinguished panels and committees and is widely recognized for his many contributions to the administration of justice. His most recent recognition came this year when he was named as "Distinguished Judge of the Year" by the Utah State Bar Association.

throughout the world. One of the essential participants in that process is the lawyer.

Recently there has been an upsurge of hostility towards the legal profession. This is symptomized by the wave of popular jokes about lawyers. "Question: Why did the research scientist substitute lawyers for rats in his laboratory? Answer: Lawyers breed more rapidly, scientists become less attached to them and there are some things rats just won't do."

Historically, attitudes towards lawyers have always been mixed — honorable distinction and popular dislike. A New Jersey newspaper published before the American Revolution — The *Salt Lake Tribune* of its day — called lawyers "Serpents . . . private leeches, sucking out the very heart's blood."

And there is Carl Sandburg's poetic celebration:

"Why is there always a secret singing when a lawyer cashes in? Why does a hearse horse snicker hauling a lawyer away?"

We have references in ancient books. Luke, for example.

Even Brigham Young said a few unkind things about lawyers when trying to build the territory of Deseret. You may recall he once said, "a lawyer is like a bird of prey, smelling the carcass from afar." He also said, "A lawyer is a stench in the nostrils of every Latter Day Saint." (I am told from lawyers who currently serve as apostles that he was not speaking prophetically, but that is only one opinion in a pluralistic world).

"Civilization depends on accurate information. The duty to be accurate is not just endemic to the legal profession. It seems essential to all professions."

I see nothing wrong with laughing at lawyers.

I revel in the fact that it has been the work of lawyers in creating the first amendment and litigating its scope that has created the environment of freedom in which we can laugh not only at lawyers but at others as well.

But my subject tonight is that aspect of professionalism which deals with accuracy and with truth. I suggest that these are so important that they ought not be confined to the legal profession but should extend to all social activity.

My illustrations are two. Both come from the world of literature: Dickens and Shakespeare. Their use is widespread.

From Shakespeare we hear and see quoted from *Henry VI* the famous line, "The first thing we do, let's kill all the lawyers." Many times it is hung out like a shirt on a clothesline all by itself — pristine, pure, as if a self-evident proposition. It is often printed or spoken with a certain self-righteousness, as proof positive of the evils of those engaged in the legal profession.

From Dickens' *Oliver Twist* we have the quotation often used as an indictment of the whole legal system: Mr. Bumble's historic pronouncement that "The law is a(n) ass."

Yet quoted in this fashion, each in its

own way is inaccurate. Indeed, each presents a picture opposite to that intended.

Let me start first with Mr. Bumble. The quoted passage is but a portion of what he said. It is a truncated quotation which either through ignorance or malice leaves out its qualifying introductory clauses.

Let me quote ALL of the words and quote them correctly.

In law we deal with responsibility. Mr. Brownlow is talking with Mr. Bumble about Mr. Bumble's responsibility for the acts of Bumble's wife.

"That is no excuse," replied Mr. Brownlow. "You were present on the occasion of the destruction of these trinkets, and indeed are the more guilty of the two, in the eyes of the law; for the law supposes that your wife acts under your direction."

"If the law supposes that," said Mr. Bumble, "The law is a(n) ass — a idiot" (please note that we usually get only part of that sentence). Bumble goes on and says, "If that's the eye of the law, the law is a bachelor; and the worst I wish the law is, that his eye may be opened by experience — by experience."

In most parts of western civilization the law no longer presupposes that kind of inter-marital influence. Indeed, Bumble's longed-for experience has opened the eye of the law, as it always does. Yet rarely a month goes by that I don't see the truncated quotation which, absent the essential "if," conveys a meaning which is entirely different from that intended by its author.

Civilization depends on accurate information. The duty to be accurate is not just endemic to the legal profession. It seems essential to all professions. One who uses the truncated quotation perhaps is simply describing himself.

The Dickens quotation illustrates the importance of completeness and the evils which result from the use of half a quote. That is one form of inaccuracy. My quarrel with the quotation from *Henry VI* is more complex.

The quotation from Shakespeare tracks the literal language of the sentence in the text. The word sequence is found. Dick the Butcher indeed says the words. Yet, we are told nothing of Dick, we are told nothing of what comes before and after — we are told nothing of the context in which the words are used. As a result, we are misinformed just as surely as we were misinformed by the truncated words of Mr. Bumble.

We are not told that *Henry VI Part II* relates to Henry's marriage to Margaret of Anjou, the daughter of the king of Naples, in the midst of the on-going contest between the houses of York and Lancaster known in history as the war of the Roses. We are not told that Richard, Duke of York, ambitious for the English throne to which he pretends, deliberately foments rebellion by inciting one Jack Cade, a clothier, to rouse the rabble.

The scene drawn by the Bard finds the conspirators meeting together at Blackheath to plan an uprising of the commoners. Great effort is made to stir up class hatred. One conspirator (John Holland) says, "The nobility think scorn to go in leather aprons . . . yet it is said 'labor in thy vocation,' which is as much to say as, 'let the magistrates be laboring men.' And therefore should we be magistrates." George Bevis replies; "Thou hast hit it; for there's no better sign of a brave mind than a hard hand."

Jack Cade, Dick the Butcher, and "infi-

nite numbers" of others now appear. These are people seeking to replace the then-government. Cade promises to reform England. Now listen to what Cade says:

"Be brave, then, for your captain is brave, and vows reformation. There shall be in England seven half-penny loaves sold for a penny, the three-hooped pot shall have ten hoops, . . . all the realm shall be in common . . . and when I am king, as king I will be . . . there shall be no money. All shall eat and drink on my score; and I will apparel them all in one livery, that they may agree like brothers . . ."

Now it is that Dick the Butcher says, "The first thing we do, let's kill all the lawyers." Cade responds: "That I mean to do. Is not this a lamentable thing, that the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo a man?"

Cade later steers the mob against our own namesake institution: "Now go some and pull down the savoy; others to the Inns of Court, down with them all."

The wrath of Jack Cade, of Dick the Butcher, of the rest of the mob was not directed solely against lawyers. Anyone able to read, able to write was condemned. The clerk of Chatham stands accused before the mob: "He can write and read . . ." cries one; "O monstrous!" cries another. The clerk confesses, "sir, I thank God, I have been so well brought up that I can write my name." His punishment? Cade commands, "Away with him, I say! Hang him with his pen and ink horn about his neck."

Later Cade condemns Lord Say to death, charging "Thou hast most traitorously corrupted the youth of the realm in erecting a grammar school; and whereas, before, our forefathers had no other books but the score and the tally, thou hast caused printing to be used . . ."

Only in the full context of Shakespeare's scene can you see why the mob was interested in doing away with a profession which could read and write and think and speak. It was a part of their intended destruction of the existing social order.

Only in context does the motive of Cade and Dick become clear: Dick says to Cade that it should be "only that the laws of England may come out of your mouth." Cade subsequently replied, "I have thought upon it. It shall be so. Away, burn all the records of the realm; my mouth shall be the parliament of England."

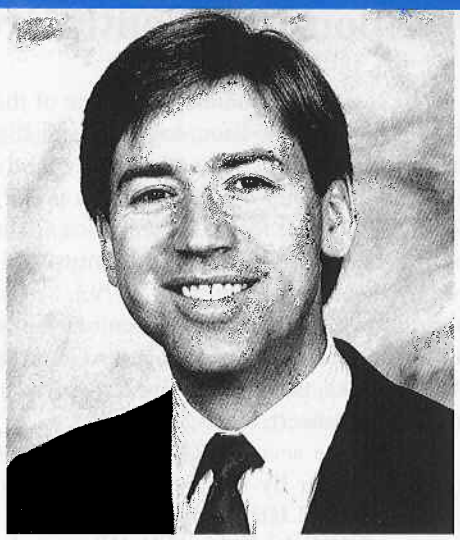
What I have tried to do here is to demonstrate that accuracy is intimately tied in with context. Those who quote Dick the Butcher without providing context are inaccurate and perpetuate inaccuracy. We are not just imposed upon by half a sentence, we are imposed upon by an incomplete picture.

The irony is, of course, that those who employ both forms of inaccuracy do so in being critical of the legal profession. Their failings demonstrate to me that I can legitimately put in a good word for lawyers. I know of no group with a livelier intellect, no group more skilled in bringing order out of chaos, and no group which has received less credit nor done more in creating and maintaining the instruments which hold our social structure together.

The critics can stand with Dick the Butcher if they wish. That is their right, carved out by the work of lawyers.

I prefer to stand with those interested in excellence, civility, professionalism, ethical conduct — with the Christensens and the Andersons and the Sams, and those of you here tonight.

Accuracy is a professional obligation, an ethical obligation, a social obligation. Accuracy in what we do oils the wheels of dispute resolution and furthers the search for truth. Accuracy is not the exclusive province of the legal profession. We are perfectly willing to share this obligation with others.



What's In a Name

By Keith A. Kelly
Past-President
Utah Young Lawyers Division

The Utah Young Lawyers Section recently underwent a name change. Now it is known as the Utah Young Lawyers *Division* ("YLD"). The change was unanimously approved by the Board of Bar Commissioners in its May 20, 1993 meeting.

But why should the name have been changed?

The name change reflects the YLD's unique status within the Utah State Bar. The YLD is different from all sections of the Bar, which exclusively focus on various practice areas. At the same time, it differs from the Bar's committees, which either focus on various legal needs (e.g., legal needs of children), or accomplish a specific function (e.g., annual meeting or bar examination).

Rather, the YLD membership includes all members of the Bar under age 37, regardless of practice orientation or type. YLD membership also includes all recent law school graduates, regardless of age. Before the recent Bar Exam, 31 percent of active Bar members were young lawyers (1,364 active young lawyers / 4,247 active total Bar members). With the induction of new admittees who took the July 1993 Bar Exam, the percentage will be higher. Year after year, this group has been more active in the Bar than any other.

The YLD does not focus on any particular interest or need, but attempts to address the broad range of needs of young lawyers, and a broad range of public service needs. For example, the YLD has committees dealing with membership support, new lawyer CLE, and law-related education — while other committees address specific legal needs of children, the elderly, crime victims, etc.

In a sense, the YLD operates as a "mini Utah Bar Association." It has its own officers, elected in state-wide elections via mail ballot to all Bar members under the age of 37. It has an executive council that meets monthly to coordinate YLD activities and set YLD policy. The executive council not only includes committee chairpersons, but area representatives from northern and southern Utah, as well as Ogden and Provo.

The YLD carries out the lion's share of public service activities of the Bar. It staffs the Tuesday Night Bar, and has expanded the program to Ogden and Provo. The YLD has a wide range of active public service projects that not only help meet legal needs in Utah, but provide significant community educational efforts.

Renaming the YLD also puts Utah in line with the practice of the ABA, whose young lawyer organization is called the "Young Lawyers Division" of the American Bar Association.

For the YLD to continue to carry out its broad-ranging objectives, we need the help of all interested young lawyers. Being involved in a YLD committee can be a small time commitment, but can provide great opportunities for public service and professional development. If you are interested, call the current YLD President Mark Webber (532-1234), President-Elect David Crapo (521-5800), or Past-President Keith Kelly (532-1500). We would be happy to discuss opportunities for you to participate.

Executive Council of the Young Lawyers Division

Membership:

The Executive Council consists of the officers of the Division and the chairs of the Division's nine committees (See Barrister's article).

Purpose:

The Council acts as an oversight committee for the Division's committees. The Council also coordinates both educational and social events for the young lawyers throughout the state.

Council Activity:

On August 18, the Executive Council held its first meeting for the 1993-1994 year. At the meeting, the Council began planning a reception at the Utah Law & Justice Center for the new inductees to the Bar. In addition to welcoming the new inductees to the Division, the Council hopes to introduce the inductees to the various committees of the Young Lawyers Division. The reception will be held sometime in October.

Since most committee chairs are still in the process of finalizing committee memberships, they did not have any committee activity to report at the Council meeting. So stay tuned for future reports!!

The Needs of Children Committee Sponsor a Youth Group Activity Program

The Needs of Children Committee of the Young Lawyers Division, together with Big Brothers and Big Sisters of Utah, recently sponsored a group activity program (GAP) for Utah's youth. Mike Tomko, Vice Chair of the Needs for Children Committee, reported that on August 14, 1993, seven children and four attorney mentors hiked along the trials south of Red Butte Gardens. After the hike, the group enjoyed a Caribbean steel drum concert, lunch, and games.

This is the second GAP activity sponsored this year by the Needs of Children Committee. In January, twenty-five children, each with attorney mentors, attended a Golden Eagles hockey game. This activity launched the Needs of Children Committee's efforts to provide some of Utah's children an exciting evening with adult mentors, while introducing attorney chaperons to the Big Brothers/Big Sisters program. The attorneys had a great time with the kids and appreciated the chance to provide much needed service to Utah's dis-advantaged young people.

Tomko notes that Big Brothers/Big Sisters attempts to provide sponsors for one activity per month for the children. He stated that the Needs of Children Committee set a goal of sponsoring two GAP activities per year.

Those interested in participating in Big Brothers/Big Sisters, contact Ann Slater at 265-1818. Attorneys interested in becoming involved in the Needs of Children Committee, contact either Mike Tomko at 532-1234 or Dena Sarandos at 355-3839.

CASE SUMMARIES

By Clark R. Nielsen

GUILTY PLEAS, WITHDRAWAL

Defendant pleaded guilty to three counts of a sex crime. On appeal, he challenged his guilty plea and his sentence. Defendant claimed that his guilty plea was void because the trial court failed to determine whether there was a factual basis for the plea, as required by *State v. Gibbons*, 740 P.2d 1309 (Utah 1987). The court agreed with the State that the issue was not properly raised on appeal before the court because the defendant had not moved to withdraw his guilty plea in the district court. A defendant is obliged to seek a trial court's ruling on the issue before raising the question on appeal.

Reviewing defendant's sentencing argument, the Supreme Court reversed the denial of probation and remanded for a new sentencing hearing based upon the standards set forth in Utah Code Ann. § 76-5-406.5.

State v. Johnson, 218 Utah Adv. Rep. 3 (July 16, 1993) (J. Stewart)

CONDITIONAL GUILTY PLEA, NONFINAL

Defendant's conditional guilty plea was reversed and vacated because he failed to appeal an issue the disposition of which would effectively bring the prosecution of his case to an end. Defendant appealed the trial court's denial of his motion to sever the counts charged against him. If the appellate court agreed with the defendant, then the prosecution would continue on both counts in separate trials. Therefore, the trial court erred in accepting a conditional guilty plea that purported to preserve defendant's right to appeal the denial of his motion to sever. Because the conditional plea was erroneously entered, the Court of Appeals did not address the merits of the appeal and vacated the plea.

State v. Harris, Utah Ct. App. 920139-CA (August 13, 1993) (J. Bench, with Js. Garff and Jackson)

SENTENCE, FIREARM ENHANCEMENT

The additional five-year enhancement of a sentence for use of a firearm under § 76-3-203(4) cannot be imposed when a defendant is convicted of two offenses but sentenced at the same time for both offenses. The enhancement provision requires that the defendant be sentenced for a felony in which a firearm was used and then later be convicted of another felony where a firearm is used, in order to receive the enhancement.

State v. Ewell, Utah Ct. App. 920379-CA (August 17, 1993) (J. Garff, with J. Jackson, J. Bench dissenting)

WATER LAW, DILIGENCE RIGHTS AND DECREE

The 1937 Weber River Decree does not bar the filing of diligence claims to certain springs and waters in the Weber River drainage system, as there are water sources and water rights within the Weber River drainage system that were not adjudicated in the decree.

Provo River Water Users Assn v. Morgan, 218 Utah Adv. Rep. 9 (July 27, 1993) (J. Zimmerman)

A shareholder in a mutual water corporation may not apply to change the point of diversion without corporate approval, as the water right is owned by the corporation and not by the individual shareholder. A shareholder has no legal right and lacks standing to file a change application in his own name without the consent of the irrigation company. To allow an individual shareholder this right will ultimately lead to confusion and discord within the corporation in the use of water.

Justice Durham dissented, arguing that shareholders in a mutual water company actually own the water rights which they have contributed to the corporation. She distinguishes the ownership of water rights from other types of property rights. Because of the special status of water in Utah, a water user should be allowed to change his or her use of the water without the permission of the irrigation company. Keeping an individual shareholder from changing a point of diversion interferes with the ability to respond to new needs and uses for water.

East Jordan Irrigation Co. v. Morgan, 218 Utah Adv. Rep. 62 (August 5, 1993) (Chief J. Hall)

RULE 65A PROCEDURE, TEMPORARY RESTRAINING ORDER

The Utah Supreme Court vacated the trial court's permanent injunction and held that a temporary restraining order had expired, remanding the case to the trial court for trial on the merits. In a dispute between the irrigation company and one of its shareholders regarding access to and maintenance of irrigation water, the Court vacated a permanent injunction against the defendant. The injunction prevented him from interfering with plaintiff entering on defendant's land to maintain plaintiff's irrigation system. The permanent injunction was improperly granted and a temporary restraining order issued was also an abuse of discretion because it failed to comply with Rule 65A(b) in that it did not define the injury and state why the harm was irreparable. Conclusory statements do not comply with the rule. The rule articulates and expects an explicit and complete definition of the harm and its irreparable nature. Furthermore, the order extending the temporary restraining order did not specifically set forth the reasons as required by 65A(b).

Birch Creek Irrigation v. Prothero, 219 Utah Adv. Rep. 11 (August 12, 1993) (J. Durham)

WAIVER

Utah cases regarding the defense of waiver are ambiguous and some have incorrectly stated the law. Reviewing the historical development of waiver, the court redefined the elements of waiver. A waiver is the intentional relinquishment of a known right. To constitute waiver, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intent to relinquish it. The intent to relinquish a right must be distinct, as shown by a preponderance of the evidence. Under this legal standard, a fact finder need only determine whether the totality of the circumstances warrants the inference of relinquishment. The proper standard for the waiver was originally set forth in *Phoenix, Inc. v. Heath*, 61 P.2d 305 (1936).

Soter's Inc. v. Deseret Federal Savings & Loan, 218 Utah Adv. Rep. 14 (July 29, 1993) (J. Zimmerman)

STATUTE OF LIMITATIONS, DISCOVERY; FINDINGS OF FACT, SUFFICIENCY

To toll the statute of limitations running in an action for negligence by a title insurance company, plaintiffs failed to show that they could not have reasonably discovered the defendant's negligence before 1987. Balancing the equities, the court concluded that the hardships posed on the defendants from the passage of time precluded the application of the discovery rule for the statute of limitations.

Sevy v. Security Title Co. of Southern Utah, 218 Utah Adv. Rep. 34 (July 29, 1993) (J. Billings, with Js. Garff and Orme)

WORKER COMPENSATION, COURSE OF EMPLOYMENT

While bringing a keg of beer into the bar, plaintiff was injured. The Court of Appeals held that the plaintiff failed to establish that her injury occurred within the course of her employment because she was not on duty as a bar tender at the time of the injury, but was socializing at the bar. Judge Jackson dissented, arguing that under the Workers Compensation Act, any doubt concerning the right of compensation should be resolved in favor of the injured worker and that the court does not favor the worker with such a presumption. The dissent argues that the plaintiff stepped back into the course of her employment when she ceased to socialize and went back across the bar to engage in activities for the benefit of her employer.

Walls v. The Industrial Comm'n, 218 Utah Adv. Rep. 38 (Utah App. July 29, 1993) (J. Russon, with Js. Orme and Jackson)

FOREIGN JUDGMENTS, FULL FAITH AND CREDIT

The Utah Supreme Court reversed the district court's refusal to enforce a prior California judgment distributing the testator's California property. The district court improperly ordered the property to be redistributed according to Utah law.

At the time the decedent executed his will, he was domiciled in Utah. The son objected to the will, claiming to be a pretermitted child under Utah Code Ann. § 75-2-302 (1978). The Utah trial court found that Jones was not a pretermitted child and ordered formal probate of the will. The Utah Court of Appeals reversed and held that Jones was a pretermitted child and that he was entitled to his equivalent intestate share of the estate (759 P.2d 345).

During this Utah probate proceeding, the personal representative filed for ancillary probate in California. The California property was ordered by the California court to be distributed to the personal representative and not to the pretermitted son. After the Utah Court of Appeals ruling, the Utah trial court concluded that the California property could not be distributed according to the California ancillary probate decree, but must be distributed according to the Court of Appeals decision. The district court ruled, without explanation, the California judgment was wholly invalid because Jones was a pretermitted heir.

The Supreme Court reversed. The California judgment respecting the California real property is binding on Utah courts under the Full Faith and Credit clause (Article IV, Section 1, U.S. Constitution). The California judgment was valid and final for purposes of recognition and enforcement in Utah. There is nothing beyond mere speculation to support the district court's apparent conclusion that any failure to disclose the pending appeal undermined the California judgment. The California court was the first to reach a *final* determination of the pretermitted child issue. Its judgment is *res judicata* and entitled to full faith and credit in Utah. A foreign judgment that is both final and valid cannot be collaterally attacked, even if factually or legally erroneous.

In re Estate of Jones, 219 Utah Adv. Rep. 6 (August 9, 1993) (J. Zimmerman)

PROCEDURE, DISMISSAL UNDER RULE 4-103

Rule 4-103 of the Utah Code of Judicial Administration allows the district court to dismiss a complaint for lack of prosecution. However, the court may not dismiss *sua sponte* without notice and an opportunity for the plaintiff to show good cause, if any, for failure to prosecute the action within the time limits of the rule. The court interprets its judicial rule to require a showing of good cause before dismissal. The trial court erred by failing to give notice and an opportunity for the plaintiff to be heard. Dismissal was improper.

Breuss v. Wilkerson, 219 Utah Adv. Rep. 8 (August 11, 1993) (Per Curiam)

SALES TAX

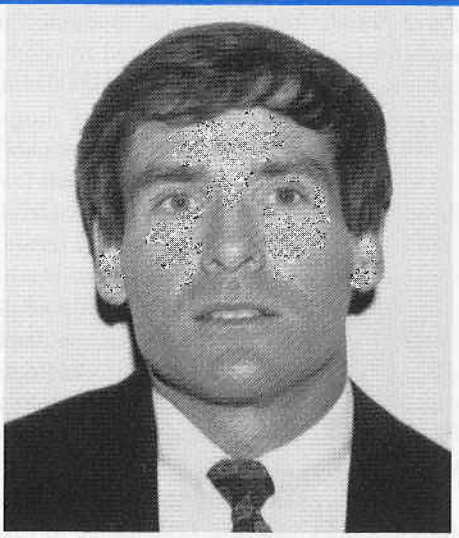
Plaintiff challenges the Tax Commission judgment of sales tax for the plaintiff's purchases in Utah of materials from Utah vendors. The materials for use by the plaintiff were purchased in Utah from Utah vendors and assimilated in Utah into fabricated products which were subsequently installed in out of state buildings. The petitioner paid sales taxes in other states for the finished products sold in those states. Relying upon *Chicago Bridge & Iron*, 839 P.2d 303 (Utah 1992), the appeals court affirmed the Tax Commission decision that the petitioner was a real property contractor for the contract ostensibly undertaken by a joint venture and was liable for the taxes assessed. Petitioner entered into the contract to install the steel and was obligated to see that it was properly installed. If its co-venturer failed to do so, petitioner would have been obligated to effect the installation. The fact that the amount of the tax might also be passed along to a religious organization later on did not allow an exemption for a religious institution. The taxpayer was also not entitled to a credit against the Utah sales tax for sales taxes paid in Nevada.

Neiderhauser Ornamental v. Tax Comm'n, Utah Ct. App., 920338-CA, (August 13, 1993) (J. Orme, with Js. Greenwood and Garff)

APPEAL, FINAL ORDER

The plaintiff's appeal was dismissed as not properly taken from a final order. Therefore the court of appeals lacked jurisdiction. The defendant of the appellant had never sought interlocutory review by interlocutory petition, and the interlocutory order was not certified final under Rule 54(B). The trial court's order holding all matters in abeyance pending the outcome of the appeal did not make the order final or confer jurisdiction in the court of appeals.

Shaw v. Layton Constr. Co., Inc., Utah Ct. App. 920685-CA (June 11, 1993) (J. Bench, with Js. Orme and Russon)



The Night Manager

By John LeCarre

Reviewed by Lawrence A. Gingivan

The difficulty in reviewing the writing of John Le Carre is that his novels, like the characters they present, are arrayed with deception. You begin teasing out the threads of what must be a complicated metaphor but then recall that the virtue of Le Carre's stories is the simplicity of their telling. You become certain that a ringing statement of world view given in an early chapter is key to understanding a central figure in the cast. But you know that Le Carre never serves up his players in tidy verbal packages. Rather, he reveals them over the course of chapters by allowing the reader to eavesdrop on their moments of introspection. Even Le Carre's prose misleads. With the turn of a page you are released from the interminable bickerings of Whitehall and carried off to the cliffs of Land's End. A moment of repose, you assume; Le Carre is taking stock. But instantly you are delivered to the scene of some hapless Scot's undoing. You are not prepared for that; you take no notes.

You contemplate writing your review but wonder whether your mental summary of plot and theme is shot through with disinformation. Perhaps they sold you the wrong book, deliberately, at King's English. Perhaps you grabbed the contents of a dummy file and are about to lead your readers far afield. It takes courage to interpret Le Carre. But it takes only a willingness to slip completely into a world of unforgettable characters and plot to get the full measure of "The Night Manager," Le Carre's most recent novel.

The year is 1991. Communism is in its second year of retreat from eastern Europe; statues of Lenin lie toppled in the streets of Moscow. In the United States, Congress debates the measure of peace dividend while idle foreign policy experts ponder the end of history. The close of the cold war is all good news except, of course, for arms merchants whose steady customers have been the client states of the world's superpowers. As the Soviet Union and the West reassess their ideological differences, they reduce the flow of foreign military aid their surrogates use to purchase weapons. One of Le Carre's stock characters in "The Night Manager," a veteran observer in British intelligence, acidly summarizes the arms dealers' predicament:

> Trouble with arms is, everyone thought they were recession proof, but they're not. Iran-Iraq was an arms dealers' charter, and they thought it would never end. Since then it's been downhill all the way. Too many manufacturers chasing too few wars. Too much loose hardware being dumped on the market. Too much peace about and not enough hard currency.

Richard Onslow Roper is such an arms merchant, one determined to profit handsomely from the sale of his considerable inventory of military hardware. British by birth, Roper has sloughed off all national and personal loyalties in order to serve all customers and favor none in the international arms bazaars. Roper nominally oversees a network of shadowy trading companies from his retreat in the Bahamas, "[b]ut weapons are his first love. Toys, he calls them. If you're into power, there's nothing like toys to feed the habit . . . Arms are a drug, and Roper's hooked."

Because western currency is no longer available to fuel the international arms trade, Roper looks to the raw cocaine of South American despots as a substitute. The elegance of his scheme provides the appeal. As the United States and the Soviet Union lose interest in underwriting their South American clients, opportuni-

ties arise for trading weapons for the region's plentiful cocaine. With the apparatus of secret police disbanded throughout the former Soviet bloc, the streets of eastern Europe capitals promise a lucrative market for addictive drugs.

Roper's plotting does not go unnoticed by British intelligence officials and their "masters" in Parliament. He is, after all, a British national with a global reputation as a plunderer. In the post-cold war vacuum, however, with "no more Russian bear to fight, no more Reds under the bed at home," Roper is useful to the espionage bureaucracy as an international bogey man. The longer Roper is abroad trafficking in arms and cocaine, the longer otherwise idle "espiocrats" can point to him as a threat to national security. Not everyone in British intelligence subscribes to this sleazy accommodation. Leonard Burr, a career agent in Whitehall's Enforcement Office, loathes Roper and is determined to bring him to earth.

A harsh winter's night finds Roper on the threshold of the hotel Meister Palace, a bastian of old world reserve set in the hills above Zurich. Roper is abroad to arrange an arms-for-cocaine deal calculated to rescue his business ventures from financial collapse. In addition to a retinue of thugs, Roper is accompanied by the "unpardonably attractive" Jemima Marshall — "Jeds" as Roper terms her. A convent-school educated vagabond in her twenties, Jeds is presented by Le Carre as one with the "vague air of shambles, the raggedy smile and unselfconscious carriage, that appointed her an instant citizen of Paradise." As Roper and Jeds enter the Meister Palace's lobby, they are received by Jonathan Pine, the night manager.

Pine emerges as one of Le Carre's splendidly complex characters. A former British soldier, Pine retired at twenty-five to the monastic life of a hotelier. Pine is a man of deep conviction but one afflicted with an intellectual dissonance that at times short circuits his capacity to act. He is skilled in martial arts; he is a linguist, he is an accomplished sailor and mountain climber. And on that bitter night in Zurich, he is emotionally unstrung by Jeds. Le Carre labors over the sculpting of Pine as if intent on introducing this new protagonist to himself. He omits no essential detail. There is no excess in the writing here, just Le Carre going about what he does best, creating then fastening his hero in the reader's mind.

The development of Pine actually occurs on two levels in "The Night Manager." While Le Carre is crafting Pine for his readers, Leonard Burr is constructing a counterfeit Pine to burrow into Roper's arms empire. Indeed, a second encounter between Roper and Pine involves the decoy and leads to a final confrontation on two fronts: Burr tilting with rival agents in London; Pine opposing Roper on the high seas. The outcome of both contests is wrapped in suspense that virtually exhausts the reader and can't be revealed here. The good news is that it awaits anyone who delights in a master wordsmith's art.

Newly Elected Trustees

Stewart M. Hanson, Jr.

Joanne C. Slotnik

Stewart M. Hanson, Jr. and **Joanne C. Slotnik** were recently elected to the Board of Trustees of the Utah Bar Foundation. Mr. Hanson will serve on the Foundation's Finance Committee, and Ms. Slotnik will serve on the Recruitment and Public Relations/Publications Committees.

Stewart M. Hanson, Jr. presently is Director and Officer of the firm Suitter, Axland & Hanson. He is a Fellow of the American Bar Foundation and American College of Trial Lawyers and a former member of the Legislative Task Force of Tort and Insurance Reform, the National Conference of State Trial Judges, the Board of Trustees of Salt Lake Legal Defenders' Association, and the Utah State Judicial Advisory Council. He also serves as a member on the Board of West One Bank, Habitat for Humanity, Utah Children, and Shelter the Homeless.

Joanne C. Slotnik is an Assistant Attorney General in the Criminal Appeals Division. Ms. Slotnik has served as Judicial Education Director for the Utah judiciary and clerked for both the Utah Supreme Court and the Tenth Circuit Court of Appeals. She is particularly committed to education, both for participants in the court system as well as the public at large, as a means of promoting the fair administration of justice.

Utah Bar Foundation Recognizes the Achievements of Richard C. Cahoon and Judge Norman H. Jackson

Richard C. Cahoon

Hon. Norman H. Jackson

Effective July 1993, Richard C. Cahoon and Judge Norman H. Jackson stepped down as trustees of the Utah Bar Foundation. Mr. Cahoon and Judge Jackson joined the Board of Trustees in 1982. Mr. Cahoon also became president in 1982, and served as president until 1991. Judge Jackson became vice-president in 1984, and served in that capacity until 1991, and as president from 1991 until July of 1993. Although the Bar Foundation was organized in 1963 as a nonprofit corporation, it did not see significant growth until 1984, when the IOLTA (Interest On Lawyers' Trust Accounts) program was implemented. Thus, Mr. Cahoon and Judge Jackson were in a very real sense "founders" of the Foundation as it exists today. They participated in the implementation of IOLTA and the growth of the Foundation that followed. When they joined the Foundation in 1982, its yearly revenues were minimal and its total assets were approximately $40,000. In 1992, the Foundation had revenue from interest on lawyers' trust accounts of approximately $230,000 and assets of more than $640,000.

During the years that Mr. Cahoon and Judge Jackson led the Bar Foundation, it began to make significant annual grants to organizations who assist in providing legal services to the disadvantaged, such as Legal Services, Legal Aid, and Legal Center for People with Disabilities, and to organizations that promote legal education and increased awareness of law in the community, such as Law Related Education. The Utah Bar Foundation also implemented programs to provide annual ethics awards and community service scholarships to students from the University of Utah College of Law and J. Reuben Clark College of Law. The Foundation participated in several legal history projects and made grants for special projects sponsored by the Young Lawyers Division, Women Lawyers, and other organizations.

When Judge Jackson and Mr. Cahoon first became trustees of the Utah Bar Foundation, it had no office and no staff. Mr. Cahoon and other trustees voluntarily bore the administrative burden and provided the necessary services for the Foundation. During Mr. Cahoon's time as president, the Bar Foundation first established an office of its own and hired an administrator.

The present trustees of the Foundation wish to acknowledge the enormous contributions of Judge Jackson and Mr. Cahoon to the growth and success of the Utah Bar Foundation. The present status of the Foundation and its ability to fund worthwhile law related projects are in large part a result of their leadership of the Utah Bar Foundation.

1993-1994 Board of Trustees

Ellen Maycock, *President*
James B. Lee, *Vice President*
Stephen B. Nebeker, *Secretary/Treasurer*
Carman E. Kipp
Jane A. Marquardt
Stewart M. Hanson, Jr.
Joanne C. Slotnik

CLE CALENDAR

RAINMAKING: FROM PROSPECTS TO PAYING CLIENTS

This course is designed for attorneys, in sole, small & large firm practices, who want the post powerful strategies and techniques available in order to maximize their ability to attract clients and keep them.

CLE Credit: 8 hours
Date: September 30, 1993
Place: Utah Law & Justice Center
Fee: $115.00,
Door registration $145.00
Time: 8:00 a.m. to 5:30 p.m.

STRESS MANAGEMENT: SURVIVING IN TODAY'S LEGAL ARENA

This program will help every member of your office, staff and family. In today's high stress legal market, we should all learn how to leave "work" at the office. Join the professional staff of Jenkins, Hogue & Associates as they bring their secrets of stress management to the Utah Bar.

CLE Credit: 8 hours
Date: October 1, 1993
Place: Utah Law & Justice Center
Fee: $115.00,
Door registration $145.00
Time: 8:00 a.m. to 5:30 p.m.

TURNING RECYCLABLE INTO PRODUCTS — GROWING BUSINESS OPPORTUNITIES

CLE Credit: 4 hours
Date: October 5, 1993
Place: Utah Law & Justice Center
Fee: $100 plus $6 MCLE Fee,
$125 after September 15, 1993
Time: 10:30 a.m. to 2:30 p.m.

CHOICE OF ENTITY: PROPRIETORSHIP, PARTNERSHIP, CORPORATION, LIMITED CORPORATION

CLE Credit: 3 hours
Date: October 6, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

THE CUTTING EDGE: ADVANCED COMMUNICATION AND PERSUASION SKILLS FOR LAWYERS

Gain practical, new, and unique skills to conduct a more effective voir dire, stronger direct and cross examination questions, more powerful opening statements and closing arguments, and increased rapport with clients, juries, and judges.

CLE Credit: 7 hours
Date: October 8, 1993
Place: Utah Law & Justice Center
Fee: $150.00,
Door registration $195.00
Time: 8:30 a.m. to 4:30 p.m.

TAX PLANNING: BUSINESS PLANNING/INDIVIDUAL PLANNING

CLE Credit: 3 hours
Date: October 13, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

INTELLECTUAL PROPERTY ISSUES: PATENTS, COPYRIGHT & TRADEMARK

CLE Credit: 3 hours
Date: October 20, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

CIVIL LITIGATION II: TAKING A DEPOSITION — 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: October 21, 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.

LITIGATION CASE MANAGEMENT FOR LEGAL ASSISTANTS

CLE Credit: 4 hours
Date: October 21, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

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

Name — Phone

Address — City, State, ZIP

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

Signature

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

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

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

TRIAL ACADEMY: DIRECT AND CROSS EXAMINATION SKILLS

This course is a two-day intensive, participatory program on the mechanics and strategies of effective witness questioning. Participants will engage in simulated courtroom exercises and receive coaching from an expert faculty on how to improve their skills. Because of the unique participatory nature of this program, we are limited to only 48 registrants. Co-Sponsored with the National Institute for Trial Advocacy and the Litigation Section of the Utah State Bar.

CLE Credit: 16 hours including 2 in Ethics
Date: October 22 & 23, 1993
Place: Utah Law & Justice Center
Fee: $275.00
Time: Friday — 8:00 a.m. to 7:00 p.m.; Saturday — 8:30 a.m.to 5:15 p.m.

TAX LAW FOR NON-TAX LAWYERS

CLE Credit: 4 hours
Date: October 28, 1993
Place: The "new" Joseph Smith Building, Wasatch Room, 10th floor.
Fee: $100.00
Time: 8:00 a.m. to 1:30 p.m.

HOW TO DETERMINE THE ASSETS NECESSARY TO RETIRE: A SURVIVAL GUIDE FOR LAWYERS, ACCOUNTANTS, & THEIR CLIENTS

CLE Credit: 4 hours
Date: October 28, 1993
Place: Utah Law & Justice Center
Fee: $155 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

EMPLOYMENT LAW: HARASSMENT, ADA, UPDATE ON TITLE 7

CLE Credit: 3 hours
Date: November 3, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

ENVIRONMENTAL LAW

CLE Credit: 3 hours
Date: November 10, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

SECURITIES LAW: WHAT IS SECURITY? FEDERAL & STATE SECURITIES LAW, ISSUING STOCK, LIMITED STOCK, LIMITED PARTNERSHIPS, DEBT VENTURES

CLE Credit: 3 hours
Date: November 17, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

CIVIL LITIGATION III: ENFORCEMENT & COLLECTION OF JUDGMENTS — 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: November 18, 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.

FINANCIALLY TROUBLED BUSINESS: WORKING WITH CREDITORS, ALTERNATIVES TO BANKRUPTCY, AND BANKRUPTCY

CLE Credit: 3 hours
Date: December 1, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

LITIGATION: AVOIDING, PREPARING, ALTERNATIVES, PRE-TRIAL PREP

CLE Credit: 3 hours
Date: December 8, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

CLE Credit: 3 hours
Date: December 15, 1993
Place: Utah Law & Justice Center
Fee: $60.00
Time: 6:00 p.m. to 9:00 p.m.

CLASSIFIED ADS

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

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, advertisements received without payment will not be published. No exceptions!

INFORMATION WANTED

Any person having information concerning the whereabouts of a will or trust for GERALDEAN H. MERRITT, deceased February 16, 1993, is asked to contact Robin K. Nalder at (801) 392-3131, or at 795 24th Street, Ogden, Utah 84401. Thank you.

BOOKS FOR SALE

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

LAW BOOKS FOR SALE — AmJur Trials, Proof of Facts 2d/3d; ALR Federal; Causes of Action; Municipal Ordinances; Manual of Federal Practice 4th; Motions in Federal Court; Civil Actions Against State/Local Government; Civil Actions Against U.S. Government; Local Government Law. Call Gary Crane (801) 546-8530.

USED LAW BOOKS FOR SALE — ALR 2d through 5th; AmJur 2nd; Proof of Facts 2d and 3d; AmJur Legal Forms 2d. All are complete sets with current supplements. Please call Jolene at (801) 637-1245.

FOR SALE — Pacific Reporter, includes 1st and 2d through Volume 723. Excellent condition. Make offer. Call (801) 538-2344.

OFFICE EQUIPMENT

Law office equipment and furniture for sale. The items for sale include: Xerox 1025 copier, Merlin phone system, Ricoh FAX20, Dictaphones and transcribers, conference room tables, chairs, beautiful reception desk, file cabinets, etc. Please call Heidi at (801) 355-1503.

OFFICE SHARING/SPACE AVAILABLE

Deluxe office space. 7026 South 900 East. Included 2 spacious offices, large reception area, convenient parking adjacent to building. Call (801) 272-1013.

Large corner office with a lovely view available at 310 South Main Street, Suite 1330, with 8 other attorneys. Office has secretarial space for your own secretary, receptionist, reception area, copier, telephone, fax machine, library and conference rooms available. Contact Sharon at Dart Adamson & Donovan (801) 521-6383.

Prestigious Office Sharing space available. Beautiful completely furnished office space is available at a prime downtown location — KEY BANK TOWER. Four to five offices, secretary stations and work-file room. Reception service and kitchen available. Call Don Maughan at (801) 322-1100.

POSITIONS AVAILABLE

A nationally known law firm is seeking an associate for its branch office in Salt Lake City, to practice in the area of municipal bond law. This person must have strong academic credentials with up to three years experience. The position requires excellent analytical and communication skills, with particular attention to detail, and the ability to function as a team player. Send resume to Utah State Bar, Box C-8, 645 South 200 East #310, Salt Lake City, Utah 84111. EOE:M/F

Office space/position available. Small Salt Lake firm is seeking an attorney with two or more years of experience to share offices, assist and take over case load. Excellent downtown location, near courts and freeway. Free covered parking for attorneys and clients. Full support services with complete facilities and equipment. Friendly atmosphere. Send resume to: Utah State Bar, Box K-8, 645 South 200 East #310, Salt Lake City, Utah 84111.

Salt Lake Firm seeking full time Tax attorney, LLM preferred but not required. Must be a Utah resident licensed in Florida and/or Texas. Some travel required between offices. Send resume to Utah State Bar, Box M-8, 645 South 200 East #310, Salt Lake City, Utah 84111.

Immediate opening for attorney with 3-5 years experience. Must have graduated in top 25% of class. Experience in commercial litigation and business (Real Estate) transactional law preferred. Send resume to Roy B. Moore, 505 East 200 South #400, Salt Lake City, Utah 84102 or call (801) 359-0800 for appointment.

The Salt Lake Legal Defender Association is currently accepting applications for several contracts to be awarded for the fiscal year 1994. To qualify, each application must consist of two or more individuals. Should you and your associate have extensive experience in criminal law and wish to submit an application, please contact F. John Hill, Director of Salt Lake Legal Defender Association at (801) 532-5444.

SERVICES

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

EXPERIENCED ATTORNEY WITH EXCELLENT RESEARCH AND WRITING SKILLS SEEKS PROJECT/CONTRACT WORK OR FULL-TIME POSITION. Experienced in litigation and appeals, architectural, construction, condominium, personal injury, insurance, business and contract law, oil, gas and mineral leasing, title examination, and organization of large projects. Extremely low overhead. Call (801) 521-8026.

NEED TEMPORARY HELP? Westminster College Legal Assistant Certificate Program students are looking for internships working under an attorney's supervision. Students are trained in legal research, writing, and document control as well as general overview of the law. Call Kelly DeHill, Director of Legal Education at (801) 488-4159.

The Legal Assistants Association of Utah (LAAU) has an employment referral service which without charge provides the metro legal community with a source for posting employment needs and opportunities. Contact LAAU's Job Bank whenever you need a full or part-time temporary or permanent legal assistant in your office. Complimentary copies of resumes of legal assistants currently seeking employment will be forwarded to you. Contact LAAU Job Bank, P.O. Box 112001, Salt Lake City, Utah 84111 or call (801) 531-0331.

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

CERTIFICATE OF COMPLIANCE
For Years 19____ and 19____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

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

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

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

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

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

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

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

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

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

* Attach additional sheets if needed.

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

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

Date: _____ _____
(signature)

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

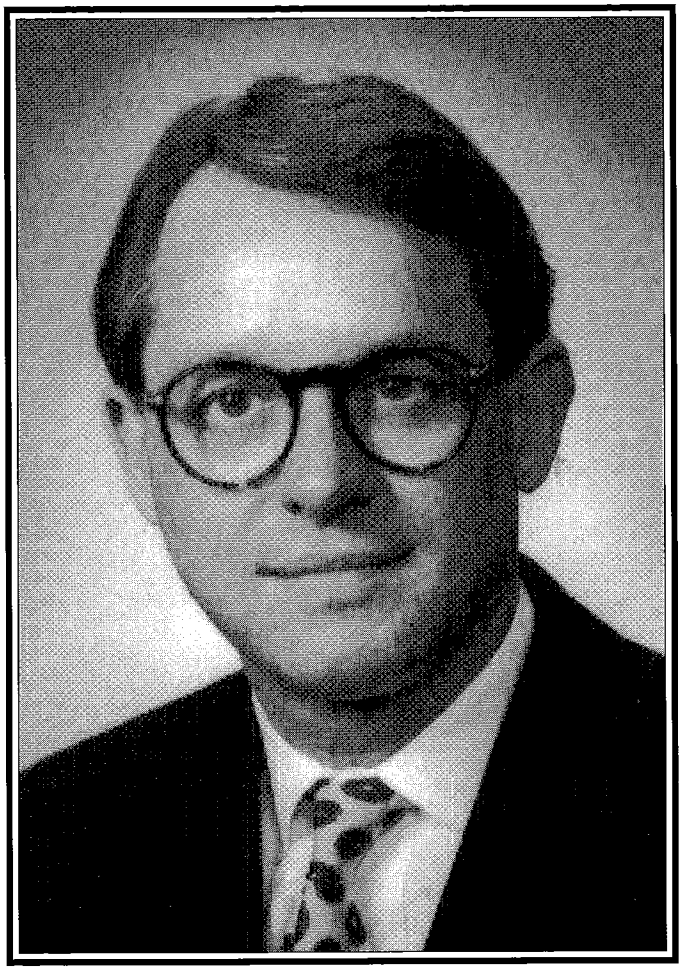
C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through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

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

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

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

Greg Gunn, SIOR



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