UTAH BAR JOURNAL

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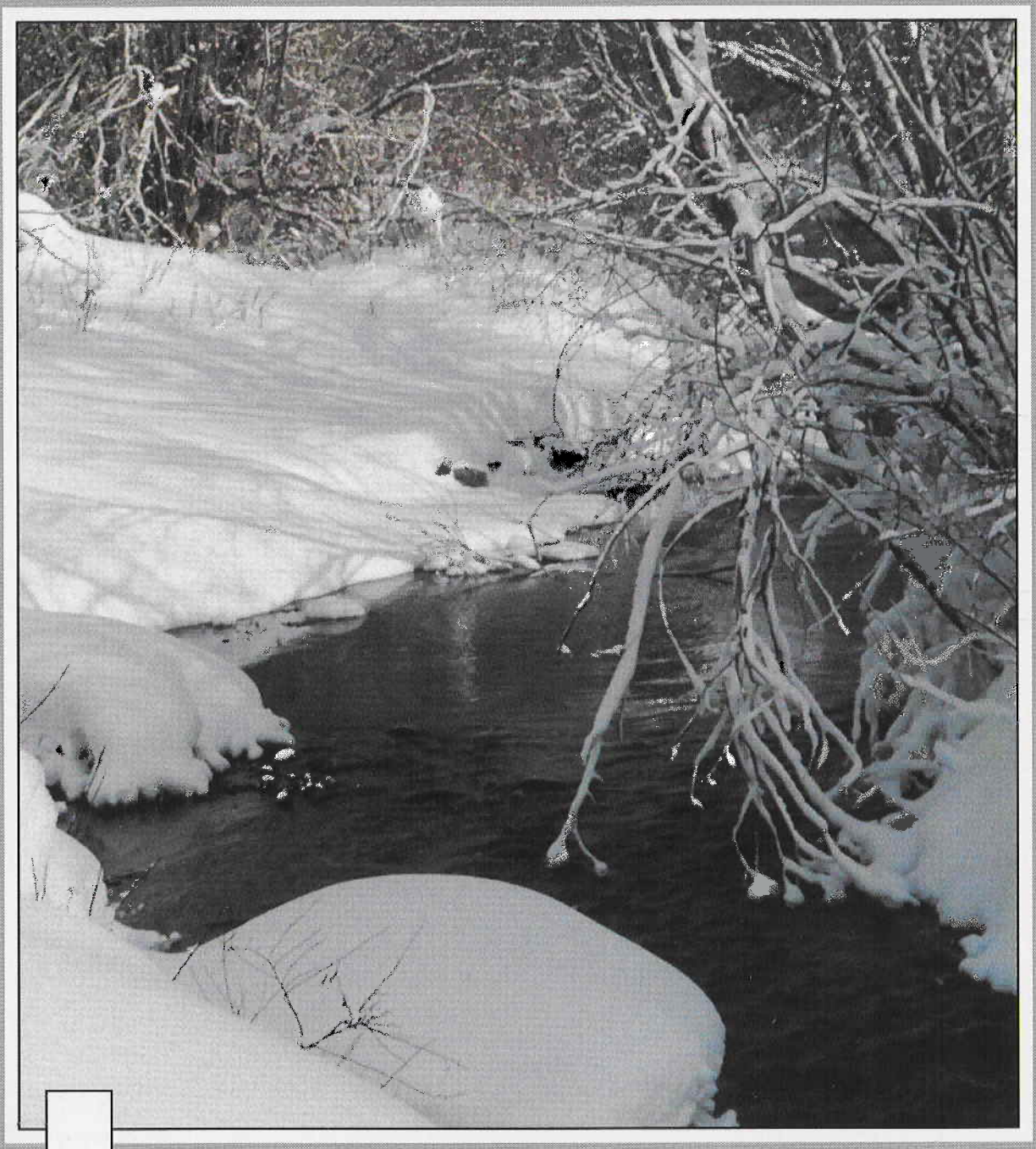

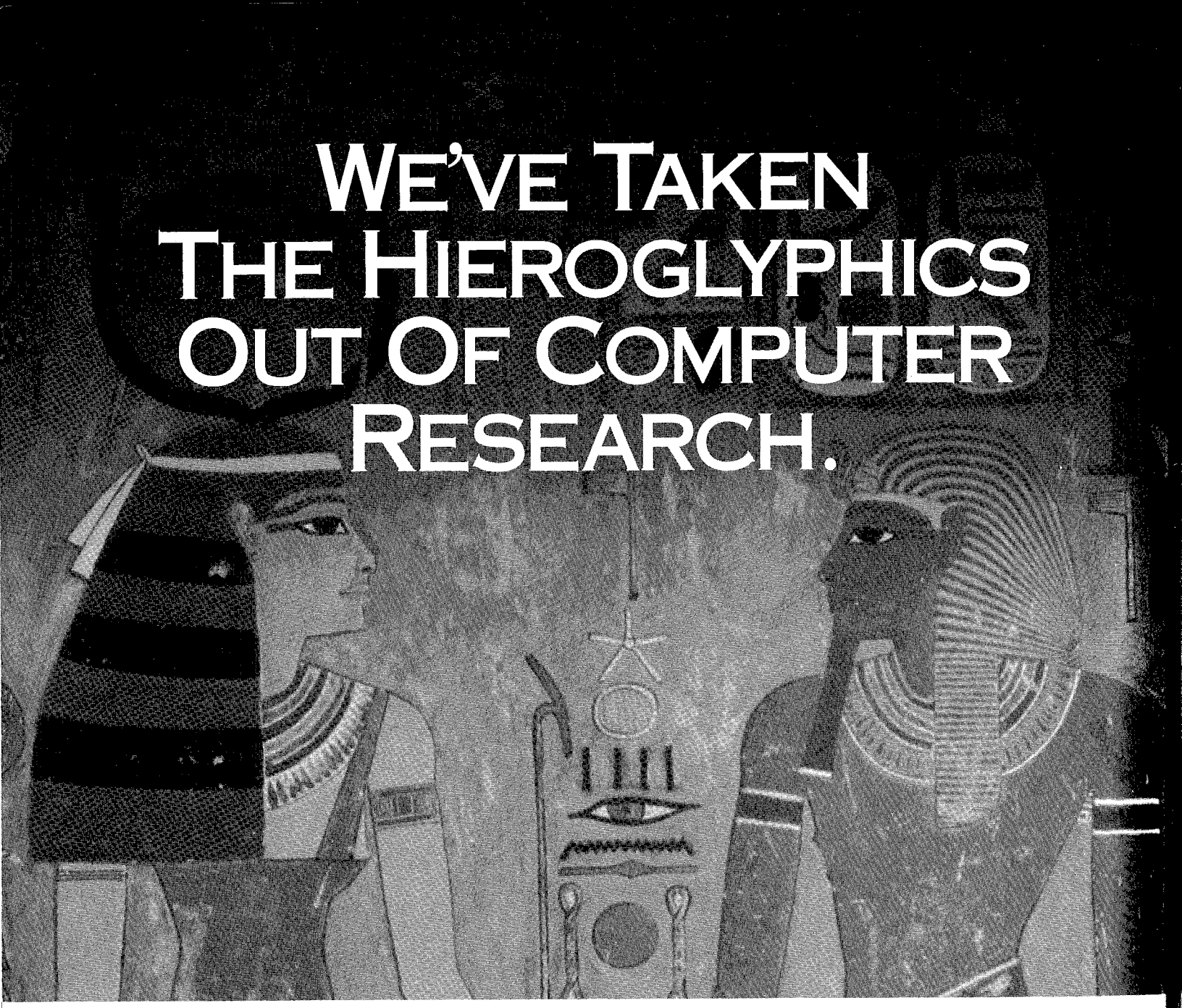

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COVER: Left fork of Blacksmith Fork Canyon, East of Hyrum, Utah, by Richard R. Medsker of Farr, Kaufman, Sullivan, Gorman, Jensen, Medsker & Perkins, Ogden, Utah.

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.

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LETTERS

Dear Editor:

In response to my article in the August-September 1993 issue of the *Utah Bar Journal* criticizing the adoption of the 1993 Amendment to the Utah Business Corporation Act limiting liability of corporate directors to "gross negligence," Lawrence Alder justifies that Amendment on the basis of over-zealousness of the FDIC in pursuing officers and directors of closed depository institutions. The result of the FDIC's suit against officers and directors of Tracy-Collins Bank & Trust, according to Mr. Alder, has created a reluctance of Utah's citizens to serve on the board of directors of Utah's depository institutions.

I submit that my position that the 1993 Amendment fixing "gross negligence" as the standard of liability for directors and officers of *all* Utah corporations is not good policy is not met by Mr. Alder's response. The curbing of alleged overzealousness of the FDIC in seeking to reduce the cost to taxpayers of protecting depositors by suits against a closed financial institution's officers, directors, lawyers, auditors, or accountants is a matter for Congress to remedy.

Mr. Alder does not explain why (1) the business judgment rule as defined and explained in § 4.01(c) of the American Law Institute Principles of Corporate Governance, (2) the test for recovery in derivative actions in § 7.18, and (3) provisions for limitations on damages in § 7.19 do not provide a "safe harbor" for any conscientious outside director, nor why "reckless indifference to or deliberate disregard of stockholders" or actions "beyond the bounds of reason" (the generally-accepted Delaware criteria for "gross negligence" of directors) constitute a proper standard to protect any corporation, its shareholders and creditors.

Under the ALI Principles of Corporate Governance, the business judgment rule is not an affirmative defense to be established by the defendant director — the burden of proof is on the plaintiff to show that the conditions for application of the Rule did not exist and that the director did not actually and rationally believe his or her decision to be in the best interest of the corporation. "Actually" means the director did make a decision and "rationally" that the director was reasonably informed of the facts or reasonably relied on the judgment of others who had knowledge of the facts and circumstances and the consequentent belief of the director was rational at the time it was made. Thus, a director, who takes the time and makes the effort to perform the duties of care under § 4.01 of the ALI Principles, is reasonably informed and makes a rational decision has a safe harbor from liability. A safe harbor from suit should result if the corporate records show the director did so.

Officers and directors of a depository institution have a responsibility for the prudent investment of other people's money — the funds of its depositors, both private and governmental. The public interest in the safe and sound management of depository institutions should take precedence over concern by directors that the business judgment rule does not adequately protect them from liability for breach of their duty of care. Safeguarding the savings of Utah's citizenry and the deposits of state and local governmental entities deserves better stewardship than "gross negligence." Mr. Alder's experience as President of the Utah Banker's Association should have convinced him of that fact. Only recently the Comptroller of the currency, who regulates national banks, pointed out that safety and soundness of depository institutions is not only important to protect depositors but also to promote long-term economic growth.

It should also be noted that the "gross negligence" standard defended by Mr. Alder applies to *all* Utah corporations, not just depository institutions. Should investors in any Utah business be restricted to that standard of protection? Should Utah depository institutions invest their depositors' money in loans to a Utah corporation whose officers and directors have only that standard of care to meet in conducting its business?

Peter W. Billings, Sr.

Dear Editor:

I read with interest "The Expendable Professionals" in your November 1993 issue. Ms. Flores-Sahagun obviously is disillusioned and cynical of the legal profession. Practicing law is, without doubt, a stressful, demanding and, at times, exhausting job. But for the author to portray the profession as one that contributes nothing to society is insulting, and to portray associates as mere victims of capitalism, ludicrous.

I am sorry that Ms. Flores-Sahagun feels so disillusioned as to the value of legal work, and also so oppressed by having to actually work. Believe it or not, there are those of us who think that while law may not be our ultimate calling, it is a profession that delivers valuable services to millions of people. My experience is that most people can joke about lawyers but when they actually need one they give lawyers the highest degree of trust and respect. The author's cynical view of legal work as nothing more than a production line depicts a condescending and disrespectful view to the clients she supposedly serves. And as for her cries of being oppressed, tell that to some actual production line workers and see how they react.

Sorry Sue, while the pursuit of happiness may be an inalienable right, it is not an employer's duty to deliver happiness to its employees. If it's not making you happy, or if you are unwilling to trade some psychic happiness for the ability to pay your rent, then you are perfectly free to try some other line of work.

Ira B. Rubinfeld

Dear Editor:

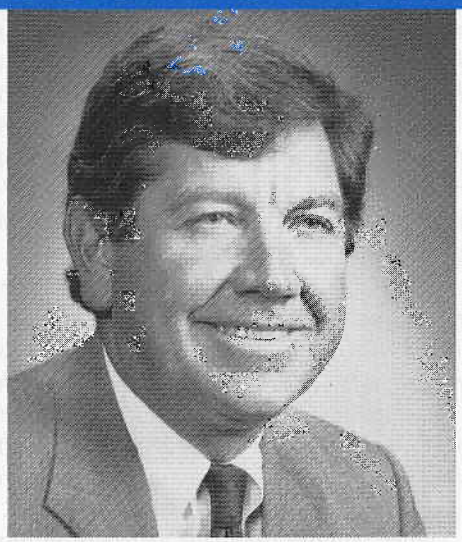
It's easy to see the gears turning at the *Utah Bar Journal*. The goobs out here in Salt Lake just can't wait to lap up the latest self-serving piece of navel-contemplation from the final frontier, California. Your recent article, "The Expendable Professional", by Sue Vogel Flores-Sahagun, recycles every cheap Marxist class-warfare slogan in order to establish that, gee, my life sucks, and it's somebody else's fault. It's one thing to hear this kind of garbage from alienated factory workers; but from alienated yuppies making $75,000 a year?

Ms. Flores-Sahagun has got one thing right: by and large, lawyers don't do anything useful. But only a lawyer; no, only a *California* lawyer, could admit this and then manage to pass the blame off on someone else.

Since lawyers have spent so much time convincing society that everyone is a victim of some kind, I suppose it was only a matter of time before they counted themselves among the victims. Reading this article reminded me of that character on the TV show "L.A. Law", Arnold Becker, rationalizing that he's actually a "victim" of the women he seduces.

Ms. Flores-Sahagun closes her article with a plea for "a system that can satisfy not only our material needs but also our needs [sic] to be treated with dignity and respect." If Ms. Flores-Sahagun wants to be treated with dignity and respect, she ought to quit whining and grow up.

William Robbins
Member, California State Bar



Utah's Merit-Selection of Judges

By H. James Clegg

As you have noted from the papers, there is a controversy concerning our judicial nomination system. Perhaps it will be a bonfire when you read this; perhaps it has even now run its course.

In addition to modifying the judicial selection process, there is interest in legislating a recall statute which will allow the legislature (or just the Senate under one scenario) to "fire" a sitting judge. The criteria for dismissal have not been verbalized to our present understanding.

Based both on press quotes and conversations with individual legislators, it is apparent that some do not understand the present checks and balances on the judiciary. Before new systems are implemented, the legislature really should understand and analyze the present one.

Toward this end, we will prepare, with the help of the Court Administrator's Office and bar members on the Judicial Conduct Commission, the Judicial Standards Review Commission and the trial- and appellate-Judicial Nominating Commissions a synopsis of the present election, continuing education and retention-election scheme for distribution to legislators.

A disquieting rumor is that the dissatisfied legislators, or some of them, rely on complaints of lawyers against present judges and the system which produced them. We hear few such complaints and hope that those lawyers who are dissatisfied will identify themselves and become part of a dialogue for reformation, if that's needed.

Utah is considered a model in its adaptation of the so-called Missouri Plan for non-partisan, merit selection of judges. Our bench is truly excellent in all objective criteria. This doesn't mean our system can't be further modified and improved; it does mean that it should not again become politicized.

With the approval of the Bar Commission, I sent this letter to the Senate Judiciary Committee at the time Governor Leavitt nominated Judge Russon for elevation to the Supreme Court; it has been shortened for the space available here:

Dear Senator Beattie:

The Bar wishes to advise you and the Senate of its unqualified support for the nomination of Judge Leonard Russon for the Supreme Court. While we expect the Senate to take its Constitutional responsibility to "consider" Judge Russon's "fitness for office" fairly "without regard to any partisan political consideration", there are numerous rumors cited by the press indicating that the Senate may not be so disposed.

Judge Russon, in our estimation and from all we know of him, is eminently fit. It will be most unfortunate if the citizens' confidence in him and in the judicial process is reduced by public debate which is not really aimed at him at all but at disagreements with the process through which he was selected.

The U. S. Senate's responsibility is considerably wider, an "advise and consent" standard. The debate surrounding the nominations of Messrs. Bork, Thomas and Ginsberg did nothing to improve the image of the Supreme Court or the Senate, quite the contrary. Further, it appears that Justice Thomas is crippled as a public servant, certainly with the public and perhaps with his own peers on the Court.

Looking at the wider view, we do not shy from further scrutiny and improvement of the judicial nominating system. It has been modified in the past where improvements were needed; that should be a continuing process. However, we strongly urge against returning to a system even reminiscent of the one rejected in 1967.

The nominating commissions have worked diligently to avoid naming people who are lazy, indecisive, intemperate or mentally dull. We think that, upon reflection, all must agree they have succeeded very well if these are appropriate criteria. The essential independence of a judge backfires if a judge is not a hard worker, judicious in temperament, able to come to

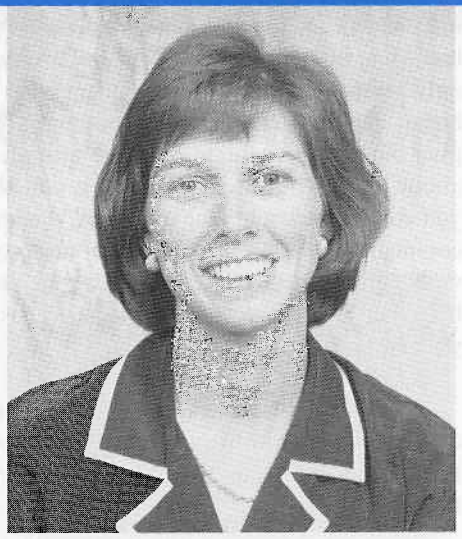
closure on issues and reasonably intelligent and experienced in the law. Regard to participation by women and minorities has been and is given. The bench Utah has developed under its version of the Missouri Plan stands out for quality under any standard, thanks to the efforts of the nominating commissions to be certain that every nominee is capable of serving capably and competently.

The present criticism does not seem to be about quality of nominees but about politics. Politics change frequently, so it is important to have an enduring system which can suffer bad politicians as well as shine with good ones. The longer view insists that the process stay above momentary political expediencies and comforts.

When you are ready for hearings on this issue, we wish to provide testimony from Bar personnel familiar with the current and prior systems as well as from the myriad of stellar lay members appointed to the various commissions by Governors Rampton, Matheson, Bangerter and Leavitt. While they cannot discuss their deliberations about specific candidates, they can certainly explain the process and the effort and hard work dedicated to assure its success.

We enclose a resolution made by the Bar Commission at its November meeting in response to comments made by Governor Leavitt. We have tried to be progressive and constructive in responding to his thoughts. This resolution was delivered to the Governor's staff about two weeks ago; we felt it was received in the spirit offered and hope that the Bar can be helpful to the Governor and the legislature in this study.

We hope the bar membership will be solid in its support of our merit-selection system and will help educate our legislators who may not presently have the background to compare it against rival systems.



Clients: They Aren't Always Right But They Are the Customer

By Charlotte L. Miller

Since the summer of 1993, John Florez and Ray Westergard have served as new members of the Bar Commission. These two members of the Commission are distinguished from the other Commissioners in that they are not lawyers and they were appointed by the Utah Supreme Court to be voting members of the Commission.[1] The theme that resonates from these two members is "How is what we are considering going to impact the users of the legal system?" They remind us that the users of the legal system are not solely lawyers and judges, but a diverse group of people made up of parents, teachers, executives of corporations, owners of small businesses, police officers, victims, etc. Those commissioners remind us that the users of the legal system should be thought of as customers, since they are the ones who create the need for lawyers and judges.

It is probably obvious that when deciding where to build a court house, how to assess court fees, how to select judges or discipline lawyers, that we need to consider the users we are serving. But most of us lawyers think someone else is making those decisions and that we have little power to treat the users as customers in those decisions. We can, however, take some steps in our everyday practice to treat the users of the legal system with whom we interact — our clients — more like customers.

During the past year I have had the opportunity to be not only a lawyer, but a client on behalf of the corporation where I serve as General Counsel. Most of my experiences as a client have been positive. The following are some suggestions I have come up with or stolen from others (who are not lawyers) on how lawyers can do a better job of treating their clients like customers.

1. Teach the support staff that they are in a service industry.

Clients interact with a lawyer's support staff as often or more often than they do with the lawyer. Receptionists, secretaries, runners, accountants, legal assistants, etc. who understand that they are in a service industry and treat clients like valued customers are helpful to clients and may be a great marketing device. Secretaries who can tell a client the status of a matter when the lawyer is unavailable is invaluable. Secretaries who are "put out" by the client's calls are of no value. The following are examples of good and poor customer relations:

After a day of telephone tag the client calls the lawyer and the secretary says, "I know she wants to talk to you, she's just down the hall. If you hold on I will get her."

"She is here but she is not in her office. I have given her your previous messages."

***

"I will check and see if the fax you sent is here and call you right back."

"I don't know if the fax you sent two hours ago is here because the fax machine is on a different floor."

***

"We sent the package overnight. Let me do a trace to see where it was delivered."

"You had to get it because I sent it by overnight delivery."

***

"Mr. Perez is with a client, but I will make sure he gets your message."

"Mr. Perez is with a very important client and cannot be interrupted."

***

My personal favorite: After eight months of talking on the telephone to the lawyer

or his secretary at least once a week, the secretary says to me, "Now who is the attorney you work for?"

***

The best way to encourage a service-oriented attitude in your staff is by example. The way you treat a client and talk about a client will influence the way your staff treats a client. Also, lawyers need to be cautious of putting the staff in an awkward position when a lawyer hasn't returned phone calls or completed a project timely.

2. Look at the bills before they go out.

Treat bills like you would correspondence or any other documents. Check for misspellings and make sure the entries make sense. Look at the total amount charged and identify the service the client received for it. Ask yourself, "Would I be comfortable if the client read this while I was sitting in the room?"

3. Be interested in the client.

Ask the client questions and listen to the answers. The more you know about the client, the better you will be able to serve the client. But, don't ask the same questions every six months. Customers can spot insincerity. Make sure you listen to the answers so you can follow up on the information you've been given. Find out how the client operates, what motivates the client, what worries the client, how the client sees the future.

4. Treat each client as if it were the most important client.

Whether a client has a small or large economic matter, a simple or complex question, make sure the client knows that you think the question or problem is important. Don't talk about how important you or your other clients are.

5. Don't be afraid of the client.

If the project is not going to be finished by the designated time, tell the client as soon as possible. If the client disagrees with you about a course of action, don't let the client intimidate you. Honest communication with the client is the key to providing good service. Don't give the client false expectations about an outcome in an effort to convince the client you are aggressive and on the client's side. Long term the client will prefer accurate information over "feel good" information. New lawyers suffer from this problem the most.

6. Don't complain about the legal profession.

Lawyers are often their own worst enemies. Don't try to make other lawyers look bad in an effort to appear as if you are the only reasonable lawyer alive. Clients don't buy it and they use the bad-mouthing you give them to perpetuate negative attitudes about the legal system, including you. If you complain about being a lawyer, you are complaining about the service you are providing the client. A client would prefer to hear that you enjoy your work — because your work is the client's work.

7. Offer solutions.

A friend in the marketing department called me up one day and read to me Instruction 267 from *Life's Little Instruction Book:*

> Never ask a lawyer or accountant for business advice. They are trained to find problems, not solutions.

Lawyer's are supposed to find problems so that a client can avoid bigger problems in the future. A client becomes frustrated when a lawyer does not offer any options to solve the problem.

Example: The lawyer says, "This is the most restrictive non-competition clause I've ever seen. The other side is unreasonable and I recommend you not sign a contract with this provision."

Another approach: "This is the most restrictive non-competition clause I've ever seen. Let's find out the goal of the other party in requesting this clause and see if we cannot satisfy its concerns with less restrictive language that will be satisfactory to you. I will draft some alternatives for you to review."

The second approach evidences an understanding on the part of the lawyer that the client is not simply going through a negotiation exercise but really wants to do the deal. This can result in a client viewing the lawyer more as a facilitator than a terminator.

Being a client, I can say it is often the client, not the lawyer, who is difficult, demanding and egotistical. Part of being a good lawyer is learning how to deal with a difficult client, give good advice, and convince the client you've performed a great service for them. In today's world it is not only the substance of the work that is performed, but the atmosphere in which it is given. Lawyers provide a valuable service. As a retort to my marketing friend with the *Life's Little Instruction Book* I read to him the following:

> True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures — unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see.
>
> But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state.

(From an address by John W. Davis, March 16, 1946 to the Association of the Bar of the City of New York.)

There is a lot of truth to the quote, but use it carefully. My marketing friend's response was, "Someone get a shovel." I guess I have some more customer relations work to do.

[1]Some people refer to these members as the "non-lawyer" members or the "public" members to distinguish them from the other Commissioners. I don't like either term. We don't have non-doctors, non-teachers, etc. And, I too, consider myself a member of the public. Since I haven't found a good descriptive word, I simply refer to them as "these commissioners."

The Evolution of Court Consolidation

By Harold G. Christensen

During the past two years, while involved with the effort to consolidate the district and circuit courts, I cannot count the number of times I have heard the tired phrase: "If it ain't broke, don't fix it." It is poor advice based on an incorrect premise. As the programs by our Governor and our President to reinvent government reflect, the public demands improvement in the way government conducts itself. No less is expected of the courts than of the executive branch. Randy Dryer, the immediate Past-President of the Utah State Bar, is quoted in the final report of the Commission on Justice in the Twenty-first Century, *Doing Justice In Utah:* "The courts can either choose to embrace change or to chase it, but they can't ignore it."

The Commission on Justice in the Twenty-first Century frames over two decades of reform in the administration of justice in Utah. In 1972 United States District Judge J. Thomas Greene, then in private practice, chaired the Unified Court Committee of the Utah State Bar that recommended sweeping changes in the organization, administration, and jurisdiction of the Utah state court system. *Recommendations of the Utah State Bar Concerning Adoption of Unified Court for Utah* (April 22, 1972). Paralleling the work of the Bar, the Legislature established the Unified Court Advisory Committee, which issued its report in September 1972. *Utah Courts Tomorrow: Report and Recommendations of the Unified Court Advisory Committee.* The report of the Bar committee cannot be found, but its recommendations are quoted at length by the legislative committee whenever the two touch upon a common subject. The recommendations of these two state committees are similar to the recommendations of the American Bar Association's *Standards Relating to Court Organization* (1990). All three reports agree on one point: the advisability of a single trial court of general jurisdiction for all types of litigation.

HAROLD G. CHRISTENSEN served as Deputy Attorney General of the United States during the Reagan and Bush administrations with responsibility for the day-to-day operations of the Department of Justice. For the prior thirty-five years he was engaged in a general litigation practice in Salt Lake City. After leaving the Department of Justice, he taught at the University of Utah College of Law, Hastings College of Law in San Francisco, and Bond University, Queensland, Australia. This academic experience was interrupted by a tour as Chief of the Litigation Division of the Utah Attorney General's Office. Mr. Christensen and his wife Jacquita Corry, former Assistant Dean, University of Utah, College of Law, have returned to Salt Lake City where he serves as counsel to the firm of Snow, Christensen & Martineau.

With just two significant exceptions and some modifications over the years, all of the major and most of the minor recommendations of the two committees have either been put into effect, are in the process of implementation, or are being studied for possible implementation. Both committees recommended the creation of a Judicial Council as the executive body for the courts and an administrative office of the courts to direct all non-judicial business of the courts. Both committees recommended replacing all of the then existing trial courts with a single trial court of general jurisdiction funded by the state — the district court. Both committees recommended establishing district court magistrates, our current court commissioners, with duties assigned by the Judicial Council. Both committees recommended a family department of the district court integrating juvenile and domestic jurisdiction.

The principal exceptions to the Bar and legislative committees' recommendations resulted from the further work of the Constitutional Revision Commission. In drafting a wholesale revision of the Judicial Article of the Utah Constitution, a recommendation of the Bar and the legislative committees, the CRC retained courts not of record as a feature of the court system. The CRC also paved the way for an intermediate Court of Appeals rather than an expanded Supreme Court.

Efforts towards implementation of these recommendations have not been the stuff of banner headlines. The work has been sporadic and difficult. The results have not been a linear progression towards a unified state court system as envisioned by the Unified Court Committee and the Unified Court Advisory Committee. Circuitous and even retrograde paths were often required to reach an important objective. But through the joint efforts of the Bar, the Legislature, and the courts we have made progress, and working together we will continue to make progress.

Representative John Valentine (R - Orem) is to be commended for his stalwart and zealous efforts to develop the legislative framework for court consolidation. The merger of the circuit court into the district court was the centerpiece of his

1991 legislation, but Representative Valentine's bill reached far beyond the consolidation of court jurisdictions. Its major purposes were to:

- further public policy rather than fiscal policy in charging and prosecuting misdemeanors;
- establish public policy rather than fiscal incentives as the motivating factor in creating municipal justice courts;
- eliminate the proliferation of specialty fees attached to criminal fines;
- eliminate the proliferation of single judge courthouses; and
- simplify court structure and improve public access to and understanding of the courts.

Many of these goals were accomplished directly by the legislation. The legislation replaced the multiplicity of fees on criminal fines with a single surcharge on fines. It distributed misdemeanor fines equally regardless of the level of offense charged, the court in which charged, or the type of disposition. It eliminated the ability of a municipality to dictate the location of a circuit court and reduced the financial incentive to start a municipal justice court.

However, the legislation wisely left much to be accomplished by future Legislatures and the Judicial Council based upon the experience gained during the transition. To assist in the implementation of the 1991 legislation, the Judicial Council established state and local transition teams on which judges of all levels of court and the Bar are represented. Representatives of the Judicial Council, the state and local transition teams, and the Administrative Office of the Courts have met repeatedly with the Bar Commission, its committees, and the Legislature to discuss methods for consolidation and other issues.

The task is tremendous. The judiciary has as its goals improving the quality of justice, improving access to justice, controlling the cost of justice, and simplifying the bureaucracy of justice. To achieve these goals the judiciary has tried to build a coalition of judges, the Governor, the Legislature, and the Bar. Such coalitions are not easily achieved. Reasonable people often disagree.

The next step in this evolutionary process is to complete the consolidation of the district and circuit courts. During the 1991 general session, the Legislature consolidated the district and circuit courts in districts five through eight effective January 1, 1992, but delayed consolidation in districts one through four until January 1, 1996. The Utah Judicial Council, at the request of the judges of districts one through four, is now seeking legislation that will accelerate the process by 18 months and complete court consolidation on July 1, 1994. At the deadline for submission of this article for publication, the Judicial Council had considered proposed legislation, but had not yet secured a sponsor. References in this article are to the draft bill, which is subject to change.

Lawyers and legislators have raised issues during the implementation of court consolidation. Not all of the questions are related to court consolidation, but whether related to court consolidation or not, the questions will best be answered by moving forward with consolidation, not backward.

Court commissioners. Despite the rhetoric, the role of court commissioners

has not significantly changed since the 1991 court consolidation bill. Court commissioners have been well respected participants in the judicial process for thirty years. Over those three decades, their authority has increased periodically to include juvenile court cases, civil mental commitments, domestic cases, magistrate functions, and class A misdemeanors. The proposed legislation does not affect the authority of court commissioners.

Since 1991 there have been three separate studies of proposed increases to court commissioner authority. The proposals originated in the Third District Court. The Third District Court likely will continue to propose appropriate increases in court commissioner authority. Two of these studies were sponsored by the Judicial Council and one by the Legislature. All three studies were with full participation of the Bar. Discussions with individual lawyers and committees of the Bar show that there is support for court commissioners to continue the work they currently do and to expand that work into other areas, such as probate law and landlord/tenant disputes, where the expertise of the commissioner suits the needs of the case. The courts will continue to seek the counsel of the Bar in efforts to use court commissioners for best effect. The Bar should not fear a reasoned debate over the role of court commissioners.

Although some lawyers and legislators cannot mention either court commissioners or court consolidation without mentioning the other, the two issues are no longer related. With the passage in 1993 of HB 188, the Legislature resumed its historic responsibility of approving the creation of court commissioner positions. The Legislature and the Judicial Council share the responsibility for establishing the authority of court commissioners. The plan for completing consolidation in judicial districts one through four does not rely upon expansion of the use of court commissioners. Any increase in the number of court commissioners will be based upon growth in the volume of the cases currently handled and any agreed upon increase in the types of cases commissioners should handle.

Continued service of the courts of record to municipalities. The judiciary is committed to keeping courthouse doors open to host cities and to adjudicating their cases in an expeditious manner. One of the motivating factors behind the 1991 court consolidation bill was the proliferation of small, single judge circuit courthouses at the sole discretion of a municipality. The goal of eliminating that proliferation has been accomplished. The Legislature has now communicated its desire to keep existing courthouses open. The proposed legislation leaves exclusively to the Legislature the decision to remove the consolidated district court, including current circuit courts, from the cities where they now exist.

Whether to establish a court of record in any particular municipality has always been a delicate balance between the need for local access to the court and the need for the efficient expenditure of public funds. In many cases the answer is clear, but in many cases it is not. The Judicial Council will continue to work with the Bar, the Legislature, and local government to strike that balance.

"Representative John Valentine (R-Orem) is to be commended for his stalwart and zealous efforts to develope the legislative framework for court consolidation."

Consolidation of circuit courthouses has been limited to two. The Kaysville and Clearfield Circuit Courts have been consolidated into the Layton courthouse in Davis County.

The Third District Transition Team recommends no courthouse consolidation in Salt Lake County. A proposal for a Salt Lake Courts Complex in the downtown greater business district housing the District, Circuit, and Juvenile Courts, the Supreme Court, the Court of Appeals, the State Law Library, and the Administrative Office of the Courts is proceeding independently of court consolidation. The courthouses in Murray, Sandy, and West Valley are not affected by the proposed Salt Lake Courts Complex.

Role of justice courts. The proposed legislation precludes a municipality that is a location of the district court from creating a justice court without the approval of the Legislature. This feature is a return to a provision that precluded circuit courts and municipal justice courts in the same city or town. This restriction ensures control of the growth of justice courts to those municipalities that can demonstrate a need to the Legislature.

The subject matter jurisdiction of justice courts will not change with court consolidation. As always, justice courts will continue to have jurisdiction over small claims cases, class B and C misdemeanors, and infractions.

An identified goal of court consolidation is elimination of concurrent jurisdiction between the courts of record and justice courts. This goal was not accomplished in the 1991 court consolidation bill but is accomplished in the proposed 1994 legislation.

The proposed legislation does not eliminate concurrent subject matter jurisdiction, but rather amends the territorial jurisdiction of county justice courts to create an exclusive place to file misdemeanors, infractions, violations of ordinances, and most small claims. This is in keeping with the commitment of the Judicial Council to adjudicate municipal ordinance violations and misdemeanors in the district court where a district court exists. The following is a summary of the filing requirements proposed in the legislation. With the small claims exception noted, all filings are exclusive, not concurrent.

Consolidated District Court

- Small claims if the defendant resides in or the claim arose in a city with a district court.
- Civil litigation above the small claims limit.
- State B and C misdemeanors, state infractions, and city ordinance violations occurring within a city with a district court.
- Class A misdemeanors and all felonies.

County Justice Court

- Violations of county ordinances.
- State B and C misdemeanors and state infractions in the unincorporated county or in cities without a municipal justice court or district court.
- City ordinance violations in cities without a municipal justice court or district court.

Municipal Justice Court

- Small claims, state B and C misdemeanors, state infractions, and city ordinance violations within the municipality where the court exists.

Magistrate functions. Justice court magistrate functions continue as before.

Small claims. Residents of the unincorporated county and residents of municipalities without a municipal justice court may continue to choose between the county justice court and the consolidated district court for filing small claims cases.

The role of the justice courts has always been largely in the hands of county and municipal government. At least since 1977, and the enactment of the Circuit Court Act, the Legislature has granted local governments discretion regarding the establishment of a justice court and a municipal department of the circuit court. The 1991 court consolidation bill removed the latter discretion, but the opportunity to establish justice courts continues.

No other level of court enjoys this discretion. Historically, district court and most circuit court locations were established by statute. The Judicial Council has little discretion in the number and location of justice courts. The Council has established and enforces criteria for the creation of a justice court and the competence of its judges, but the Council has no discretion to deny an application to establish a justice court if the municipality meets the necessary criteria.

The proposed legislation permits municipalities that are not locations of the courts of record to establish justice courts in accordance with the criteria established by the Judicial Council. For the most part, these are towns and smaller cities that do not have convenient access to the courts of record or to the county justice court. If a municipality is a location of the consolidated district court, the bill requires legislative approval to establish a municipal justice court. County justice courts will continue to co-exist with the consolidated district court in 28 of 29 county seats, but the county justice court territorial jurisdiction within the county seat is limited to the enforcement of county ordinances.

These provisions should halt what appears to be a developing trend to establish a municipal justice court even in those cities with a court of record.

Family court. A task force of almost two dozen lawyers, judges, citizen representatives, and others was established by

the Judicial Council at the request of the juvenile court to consider what, if anything, to do with the jurisdiction and organization of the juvenile court in view of the eventual consolidation of the district and circuit courts. The task force is now considering the need and the feasibility of a family court, which for its purposes includes the possibility of a family department of the district court. The task force is scheduled to make its final recommendations in the autumn of 1994.

It has been the stated position of some bar commissioners that if all court levels cannot be consolidated simultaneously, consolidation should not occur. Failing to achieve part of a reform agenda because the whole agenda is not immediately achievable is poor policy. Significant improvement is often accomplished only after painstaking change in small doses. The systems for district and juvenile court management are large enough and complicated enough that incremental change is by far the better approach.

Conclusion. Court reform is not for the faint hearted nor the short winded. Witness the span of years between the following recommendations made by the 1972 Legislative and Bar committees and their implementation:

- Circuit court established (1977).
- State responsibility for operation of the circuit court (1983).

"The task force is now considering the need and the feasibility of a family court . . . . The task force is scheduled to make its final recommendation in the autumn of 1994."

- Revision of the Judicial Article of the Utah Constitution (1985).
- Uniform judicial district boundaries (1989).
- State responsibility for the operation of the district court (1989).
- Consolidation of the district and circuit courts (1992; Proposed completion 1994).
- Family department of the district court (Study initiated 1993).

Like rocks upon which one might cross a stream, these steps in court reform have served well but take us only part way to the opposite bank. To stop now treats each rock, each step as an objective in itself rather than as a means to cross the stream. I commend the Bar leadership and the Bar membership for providing much of the critical analysis necessary to reforming the administration of justice in Utah. I ask for your continued support to complete consolidation of the courts.

THE TENTH ANNUAL

Jefferson B. Fordham Debate

Gun control: Should we? Can we?

Moderator

Paul G. Cassell
Professor of Law

2 hours

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Panelists

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President, Handgun Control, Inc.

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David Kopel
Executive Director, 2nd Amendment Project

Ruben Ortega
Salt Lake City Police Chief

Andrew A. Valdez
Juvenile Court Judge

speaker from NRA
NRA representative

University of Utah • Fine Arts Auditorium (Museum, lower level)

Thursday, February 17, 1994
6:30 p.m.

Co-sponsored by the U of U College of Law and Journal Alumni Association

VIEWS ABOUT UTAH'S JUDICIAL SELECTION PROCESS

The Judiciary's Perspective – The Merits of Merit Selection

By Kay S. Cornaby and Ronald W. Gibson

For more than a quarter century, Utah law has required the selection of state court judges to "be based solely upon consideration of fitness for office without regard to any partisan political considerations." In the state constitution and in legislation as recently as last year, the Legislature has consistently adhered to this fundamental principal. Utah Const. Art. VII, §8, Utah Code Annotated §20A-1-505. In determining whether to change significantly the method for the selection of judges, the Legislature should carefully consider the successful operation of the system it designed and built so many years ago.

The current method for the nomination and appointment of Utah's judges has changed only slightly since 1967 when the Legislature first enacted the judicial merit selection system. Laws of Utah 1967, Chapter 35. Prior to 1967, the governor had unrestricted authority to fill judicial vacancies. Judicial nominating commissions did not exist. In 1967, the Legislature established judicial nominating commissions for the Supreme Court and each judicial district of the district court. The Chief Justice of the Supreme Court presided over the commissions. The governor and the Utah State Bar each appointed two members to the nominating commissions and the Utah State Senate and House of Representatives each appointed one member. The clerk of the Supreme Court provided staff support to the commissions. The commission responsible for a judicial vacancy nominated the three best qualified applicants. The governor appointed one of these three, and the State Senate confirmed the appointment.

This model remained unchanged until 1982 when the Supreme Court ruled that the establishment by statute of Senate confirmation of judicial appointments resulted in a violation of the separation of powers clause of the Utah Constitution. *Matheson v. Ferry*, 641 P.2d 674 and 657 P.2d 240 (1982). In response to the *Matheson* decisions, the Legislature removed the statutory provision giving it the right to appoint nominating commission members and proposed to the electorate a revision of the Utah Constitution to require the Senate to "consider and render a decision on each judicial appointment . . ." Utah Const. Art. VIII, §8. This constitutional revision was approved at the General Election in 1984.

The constitutional revision prohibited the Legislature from appointing members to nominating commissions and prohibited legislators from membership in nominating commissions. The constitutional revision left to the discretion of the Legislature nearly all other aspects of judicial nominating commissions, including composition and procedures. In the face of this almost unlimited opportunity, the Legislature retained the core features of the system it had previously established by statute. The Chief Justice remained as the chair of the nominating commissions. The Bar retained the appointment of two lawyers to each nominating commission. The governor was allocated the appointment of four non-lawyers to each nominating commission.

The merit selection system is purposefully designed to enable all three branches of government to participate in the judicial selection process and to ensure that no one branch of government dominates the process. However, the governor retains — rightly — the most significant control of the appointment process. Except by default of the governor, only the governor can appoint a judge. The governor is limited to the nominees recommended by the nominating commission, but the governor appoints a majority of the members of the commissions and so should consistently find preferred candidates among the nominees. The Senate can reject but not propose an appointee.

The merit selection system has served three governors from two major political parties for more than 25 years. The recent interest in modifying the process appears to have arisen in large part because five of the last six nominees to two appellate court vacancies were judges. Yet the nominating commissions have not historically favored judges over non-judges for appellate vacancies. Indeed, the contrary is true. Of the twenty-four nominees submitted to Governor Bangerter for eight vacancies on the Court of Appeals, only five were judges. Governor Bangerter appointed four of those seven judges to the Court of Appeals. Of the fifteen nominees submitted to Governor Matheson for five vacancies on the Supreme Court, seven were judges. Governor Matheson appointed two of those five judges to the Supreme Court. These figures show that Governor Bangerter and Governor Matheson worked to balance the appellate court appointments between judges and non-judges in spite of a nominating commission tendency to prefer non-judge candidates. If the current governor favors private or public practitioners over incumbent judges for appointment to the appellate bench, there is every reason to believe that over time the merit selection system will accommodate that preference.

In our experience, the courts as much as or more than any organization within state government proved their willingness to participate in the debate and the implementation of changes designed to improve the quality of justice and access to the courts, regardless of the source of the idea for change. In our opinion, the courts are willing to embrace improvements in the method of judicial selection. But the validity of the improvement must itself first

be proven.

The merit selection of judges has been endorsed by the American Judicature Society since 1913 and more recently by the American Bar Association. Twenty-five percent of the states and the District of Columbia use the merit selection system for the appointment of all judges. An additional 18% of the states use the merit selection system for at least one level of court.

In the rush to change what has worked so well for so long, no one has offered any explanation of why the current process is flawed. No one has argued that the current system nominates unqualified or poorly qualified candidates. It would indeed be unfortunate if the proponents of change were to reintroduce partisan political considerations into the judicial selection process, whether by intent or by default. The Legislature should carefully consider the impact of any proposed changes to the process. The old maxim still obtains that "If it isn't broken, don't fix it."

One Legislator's Perspective – More Executive, Less Judicial

By S.K. Christiansen

When Lane Beattie began investigating the judicial selection process more than two years ago, he did not intend to create a stir. The Senate majority leader was merely responding to complaints from members of the Bar.

Now Beattie's legwork is coming to the fore in a bill that would shift more power to the governor and remedy what he sees as nonexecutive domination of the process. And it's coming at a time — quite coincidentally — when the subject matter of his proposal is a topic of intense debate in the Bar.

"I started working on this matter long before Judge Russon's nomination to the Utah Supreme Court," he said. "But after watching that nomination process, I came away more convinced than ever that things needed to change. The balance of real power within the judicial nominating commission weighs too heavily in favor of the judiciary."

Beattie began an investigation of the problem after attorneys complained repeatedly that the system made it futile to apply for judicial openings if they did not have a prior "in" with the judiciary. The result of his investigation: a draft bill to revamp the makeup of the judicial nominating commission. He prepared to introduce his ideas to the 1994 Legislature.

In the meantime, unforeseen events turned his proposal into a hot issue. Chief Justice Gordon Hall announced his retirement. The judicial nominating commission produced three candidates to replace him. Governor Mike Leavitt expressed dissatisfaction with his control of the choices.

Suddenly, Beattie's bill was something to talk about.

"The process is not as open as it could be," Beattie said. "The nomination only heightened the concern I already had."

Beattie's specific concern is that the roles of the Chief Justice and of the two attorneys handpicked by the Bar overshadow those of the other members of the commission. Despite the fact the Chief Justice is the only member of the judiciary on the nominating commission, his position as commission chair combined with his position as head of the highest court may overpower the commission.

"The Chief Justice does what he feels is important in the nomination," Beattie said. "And I emphasize that Chief Justice Hall has done a superb job with the tasks the system has assigned him. The problem does not lie with the Chief Justice himself but with the system in which he operates.

"There are not enough checks and balances. The Chief Justice oversees the workings of the commission. He invites the guests that make presentations to the commission. He defines the terms by which the commission operates.

"There are four individuals on the commission with nonlegal backgrounds. Their input to the process is critical. But in reality their impact may be outweighed by the three members with legal backgrounds — especially the Chief Justice who controls the process."

The result of this judicial-heavy input in the latest nomination was predictable: all three candidates who emerged from the commission were judges.

"Attorneys felt there was no use in applying if they were not somehow 'preselected,'" he said. "The commission is supposed to look at the nominees on an individual basis. But the legal influences were greater than most people thought. The process tends to exclude qualified individuals, while the purpose of the nominating commission was to include such individuals in the first place."

The flaw lies not in the idea of a judicial nominating commission, but in the composition of the commission. "This is a much better process than we've ever had before," Beattie said. "But it needs to be fine tuned."

He proposes three possible changes that would shift more control of the commission's makeup to the governor and free up the commission's decision making process:

(1) Decrease the influence of the Chief Justice. Beattie thinks the Chief Justice could still be involved in the process somehow, but is not sure he should be a voting member.

(2) Let the governor choose an additional attorney to sit on the commission. The governor could select from among a variety of individuals nominated by the Bar.

(3) Include the governor's chief legal counsel on the commission. This proposal, still in the "investigation stage," would put on the commission an individual who is close to the governor and at the same time familiar with legal processes.

The bottom line to these and other proposals in Beattie's bill: Give the executive branch back more control of judicial selections while respecting the idea of a nomination commission.

Beattie admits that his formulations have included executive input. "We've

been working with the governor on this issue," he said.

In a separate investigation, Beattie is looking into the possibility of a bill that would allow the recall or impeachment of sitting judges with a two-thirds vote of both houses. "Current law allows for the removal of judges for malfeasance," he said. "But beyond that, where are the checks and balances?"

His concern in this matter stems again from constituent complaints. This time, the complaints focused on judges allegedly passing the bounds of "interpreting law" and entering the realm of "making law."

"If judges are not in sync with two criteria, there should be a check," he said. "First, judges must be in sync with the law. That proposition is clear. But just as important, judges should be in sync with the philosophy of the Legislature. Too many times I've heard of judges saying, 'I don't care what the Legislature thinks, here's my ruling.' At present, there's no remedy for a situation like that."

Beattie cautions that he does not think the Legislature should be running the judicial branch, only that the judiciary is operating in some instances without having to answer for its actions. "Some people say an appeal is a check," he said. "I think it is an ineffective one at best."

Two commissions currently exercise some control over the members of the judiciary: the Judicial Conduct Commission and the Judicial Council. Beattie is studying their composition and the effect of their efforts to determine whether to go forward with his ideas. But he points out that only two members of the Legislature — one from each house — sit on the Judicial Conduct Commission and that the current rules do not allow for impeachment when a judge strays too far legally or philosophically.

"The focus of my investigation is on who is determining the effectiveness of judges' work and how that determination is made," he said. "It may be that the current system is satisfactory."

Perspective of the Governor – Modify, Not Abandon, The Process

By Governor Mike Leavitt
State of Utah

I appreciate the invitation by the *Utah Bar Journal* to share my thoughts about Utah's judicial nominating system. The responsibility of appointing judges is one I take very seriously. Let me begin by emphasizing that I like our current system. I think it serves the citizens of Utah well. But I do believe that the process can be improved with a few adjustments as has been done in the past.

The judiciary, both at the federal and state levels, currently wields more power than at any time in the history of the nation. The selection of judges is one of the most important functions of the executive branch. The impact of judicial appointments typically reaches far beyond the terms of the elected officials who nominate and confirm. If my own recent experience is any indication, most voters understand the importance of the power to appoint and are rightly interested in the philosophy and other relevant attributes a governor would consider in making judicial selections. There is a legitimate expectation that a governor's philosophy will be reflected in the governor's judicial appointments.

The Constitution of the United States of America invests in the president the power to nominate and, with the advice and consent of the Senate, appoint judges for what amounts to lifetime tenure. The division of labor was structured by the Founders as an important device in the system of checks and balances. The approach has been emulated to varying degrees in nearly all fifty state constitutions.

GOVERNOR MIKE LEAVITT has completed his first year as Governor of Utah.

In 1984, Utahns approved an amendment to the state constitution that established a judicial nominating commission to screen judicial candidates for the governor to ensure nominees would be professionally and ethically qualified. This amendment also provided for judges to periodically stand for non-partisan, non-contested retention elections. The nominating process has produced many qualified judges, none of which have been turned out of office by the voters. I seek to modify, not abandon, this approach.

It is important the judiciary remain free from partisan political influences. Judges should not be subject to a partisan election process where they would at very least be tarnished by the perception of undue influence by campaign contributors who stand to benefit by subsequent judicial decisions. Furthermore, if members of the judiciary were required to vigorously campaign for political favor it would create an improper disincentive for judges to render unpopular decisions. Justice would less likely be served, the legitimacy of the courts would be undermined, and a vital check on representative government would be lost.

For these reasons I oppose efforts to subject the nominating and retention pro-

cess to more political influences. Similarly, I will oppose any attempt to provide for a legislative recall of a sitting judge for reasons short of those that would justify impeachment.

While I will resist any attempt to alter the retention process, the current composition of the judicial nominating commission has created the perception and, to some extent, the reality of a closed system limited to those with deep affiliations to the Bar and, in the case of appellate appointments, to sitting members of the judiciary.

As currently constituted, the commission has seven members. According to the controlling statute, the Bar Association appoints two, the governor appoints four, and the chief justice of the Utah Supreme Court appoints one who serves as chair. In the past, the chief justice has appointed himself to serve on every nominating commission.

Although the governor appoints the majority of the commission, he or she is prohibited by law from naming members of the Bar or the judiciary. Judges and lawyers, because of their knowledge and legal stature, are inevitably the most influential members of the commission. The non-lawyers on the commission tend to rely heavily on the subjective perceptions of the lawyers and the chief justice about the qualifications necessary to be a good judge. Because lawyers are the most influential members of the commission, I feel it is important that their views reflect the philosophy the voters espoused when they elected the governor.

I believe the Bar can play an important role in the nominating process. The Bar Association is well positioned to ensure that appointees to the judicial nominating commission meet all of the professional and ethical qualifications. I would like to maintain an open dialogue with the Bar, receiving nominations for commission members and consulting with the Bar on potential commission members.

However, I am concerned about the power that the Bar Association has in directly naming members of its association to the nominating commission. Of the hundreds of boards and commissions I oversee, I am not aware of any non-governmental association that has the unchecked power to appoint individuals from the same association to a public commission. To ensure sound public policy, the Bar Association should be no exception.

As prescribed in the Constitution, the selection of judges should be an executive branch function. A governor should be able to appoint individuals to a judicial nominating committee who share the views the governor was elected to advance.

I am committed to preserving the merit system. I have no desire to appoint judges who are not competent or who are otherwise unworthy of the bench. I do believe that the current system goes too far in limiting the governor's legitimate input into the process. My goal is to broaden, not weaken, the nominating commission's roles in screening for merit.

In this spirit I intend to propose the following adjustments:

1. Instead of the Bar Association directly naming two members to the nominating commission, the governor would select at least three Bar members to serve on the nominating commission. One of the three may be a judge. The governor will receive recommendations for commission members from the Bar and will consult with the Bar to verify the commissioners' good standing as Bar members.
2. The chief justice will not be precluded from, but will not necessarily serve on nor chair the judicial nominating commission.
3. The governor will appoint the chair person of the nominating commission from among the membership.
4. The empaneling of a judicial nominating commission should be an executive branch function. The executive director of the Commission on Criminal and Juvenile Justice shall serve as secretary to the commission.
5. On appellate or supreme court appointments, a judge may not serve as a member of any judicial nominating commission that is nominating a replacement to that judge's panel.

UTAH LEGAL SERVICES, INC. PRESENTS MONDAY BROWNBAG LUNCHEONS

Utah Legal Services, Inc. announces that each Monday it will conduct free brownbag luncheons on various legal topics. These topics will be published each month in the *Utah Bar Journal*. The luncheons will begin promptly at noon and end at 1:00 p.m. The Utah State Bar has donated the space in the Utah Law and Justice Center (645 South 200 East) so seating is limited. All those who desire to attend must contact Mel Jones at 328-8891 or 1-800-662-4245 one week in advance. One hour CLE credit. (Subject to change without notice.)

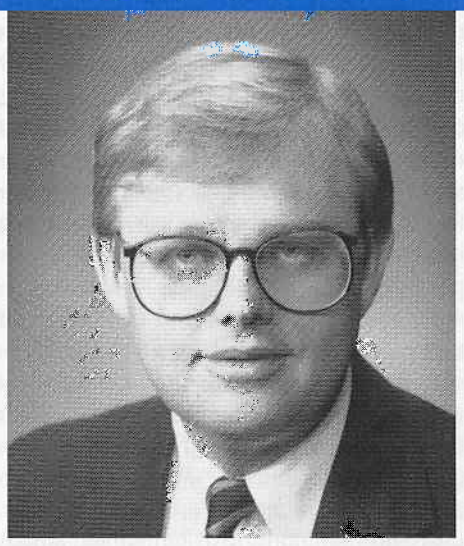
The topics for February and March are:

FEBRUARY

February 7 – Low Income Shelter Resources/Facilities
February 14 – Ethics
February 21 – Holiday – President's Day
February 28 – Warranty of Habitat & Fit Premises Law

MARCH

March 7 – UAPA Overview – Changing Under Consdieration
March 14 – Easements/Adverse Possession/Boundary Disputes
March 21 – Negotiations
March 28 – Housing Problems for Migrant Workers



Basic Utah Water Law

By J. Craig Smith

J. CRAIG SMITH is a shareholder in the Salt Lake City firm of Nielsen & Senior. He concentrates his practice in Natural Resource and Environmental Litigation, and represents a number of local governments and redevelopment agencies. He formerly was a full-time municipal attorney with Park City.

INTRODUCTION

There is, perhaps, no area of American law which evokes the lore of the West more than water law. The scarcity of water in the West has been dramatized in dozens of books and movies from *Shane* to *Chinatown* to *The Milagro Beanfield War*. The body of law that developed in the irrigated river basins and mining camps to allocate this scarce and valuable resource is unique to the arid states of the West, and has long been shrouded in mystique. As an installment of a new "How To" series in the *Utah Bar Journal*, this article will discuss basic Utah water law. The goal of this article is to acquaint the reader with the major principles of water law.

Water law is, in essence, a form of property law and thus is best understood in that context.[1] It seeks to allocate a finite and unique resource. There are two standard measures of water that are used interchangeably.[2] The first is acre feet. This is a measure of *volume* which has its origins in irrigation. An acre foot is the amount of water necessary to cover one acre of land with one foot of water. This equals 325,851 gallons. The second standard measure is cubic feet per second (CFS). This is a measure of *flow*. A CFS or "second foot" is the number of cubic feet of water that passes a certain point each second. One CFS for an entire year yields 235,905,363 gallons or 723.97 acre feet.

APPROPRIATION DOCTRINE

The basis of Utah water law is the appropriation doctrine which first evolved in Colorado. This doctrine prescribes that all water not already appropriated, i.e., not being used, is available for use by any person for a "beneficial" purpose.[3] The appropriator does not "own" water, but rather holds the right to perpetually use the water appropriated.[4] Courts have long recognized this right of use, once it is perfected, as a property right.[5] This property right may be conveyed separately by deed, or transferred by shares of stock, or if appurtenant to land, with the land.

Beneficial uses are generally considered to be those uses that promote economic activities. In recent years this concept has expanded, in limited circumstances, to include instream flow to enhance fishery, natural stream habitat and recreation.[6] Once appropriated, the right to use water exists only so long as the beneficial use continues. A term which must be understood in connection with beneficial use is the "duty" of water. This is the concept that only so much water may be beneficially used for any authorized purpose. For example, the "duty" of irrigation water is, depending on location, around 3 acre-feet per year. Only this much water may be beneficially used for irrigation of an acre of land.

If there is a failure to use water for five years, the right is forfeited.[7] Water rights may also be abandoned, and, prior to 1939, water could be adversely possessed by seven years of adverse use of the water.[8] A large and important exception to the state water law principles discussed in this article are water rights held by or reserved for the federal government. Federal water rights are not subject to many aspects of state law. They cannot be forfeited or lost through non-use and may exist without any record or documentation.[9]

A critical aspect to understanding the appropriation doctrine is recognizing its slavish adherence to priority. The principle of priority fully protects beneficial users in order of seniority of their use.

Whoever has the first or prior water right is entitled to receive their entire allocation of water prior to any junior appropriator receiving any water. Need or relative importance of various uses is not a consideration. Obviously, this becomes of particular significance during times of drought when a junior water right holder may not receive any water. During the recent drought, river commissioners on various drainages ordered that holders of water rights with lower priority dates refrain from taking any water. As the drought worsened, the prohibition date moved back into early pioneer times, leaving more and more water users without any water at all.

PRACTICE BEFORE THE STATE ENGINEER

The ultimate goal of the appropriation doctrine is to put all water to beneficial use. Unappropriated water is available at no cost to anyone who can use it beneficially. To accomplish this goal and to administer water rights, an extensive legal and administrative system has been put into place by the State. Title 73 of the Utah Code is the Water and Irrigation volume. Since water is the property of the public, water rights in Utah are administered by the state, subject to federal sovereignty. The administrative body established by Utah statute to regulate water for the State is the State Engineer's office, also known as the Division of Water Rights.[10] The State Engineer, Robert L. Morgan, is the director of the Division of Water Rights in the Department of Natural Resources.[11]

Since 1903, when statutory administrative procedures to appropriate water were first established, the exclusive method of obtaining a new surface water right, (and since 1935 an underground water right) is through filing an application with — and ultimately obtaining a certificate from the State Engineer.[12] Prior to 1903, the method for obtaining the right to use water was by putting the water to beneficial use. These water rights are known as diligence claims and require beneficial use prior to 1903. In order to memorialize a diligence claim, which is also known as a water user claim, a written claim must be filed with the State Engineer.[13]

In addition to appropriation,[14] the State Engineer is also responsible for general adjudications where the rights in an entire drainage are determined by Court Decree,[15] distribution of water,[16] dam safety,[17] and regulating water well drillers,[18] stream alterations[19] and geothermal power.[20] In many drainages which are fully appropriated, or in other words, where all of the available water has been put to beneficial use, a major function of the State Engineer is to preside over applications for changes in use or points of diversion of water. A catalyst for such applications is often urbanization, where irrigation water is sought to be changed to domestic or municipal use. In addition, the State Engineer maintains public records of water rights, applications, deeds and assignments.[21] Working under the State Engineer are subordinate engineers over appropriations, distribution and adjudications, dam safety, and finally, special investigations.

"Water law is, in essence, a form of property law and thus is best understood in that context. It seeks to allocate a finite and unique resource."

The State Engineer has divided Utah into seven regions with regional engineers overseeing each region. Regional offices are located in Logan, Vernal, Price, Richfield and Cedar City. The engineer for each region is known as the Area Engineer. All other offices, including two regional offices, are located in the State Engineer's main office in the Department of Natural Resources Building at 1636 West North Temple, Suite 220, Salt Lake City, Utah 84116. The telephone number is (801) 538-7240.

Practice before the State Engineer is best described as an informal administrative practice. Applications to appropriate water, change the use of or point of diversion of water, extend the period of time to resume use of water, exchange water, and segregate water, among others, are all initiated by completing and filing pre-printed forms, along with a filing fee. Assistance in completing the forms is readily available from the staff of the State Engineer. Certain applications, including applications to appropriate water, change the nature or place of use of water, and extensions of time to resume use are advertised by publication and "any interested person" has the right to protest the approval sought in the Application. If a protest is made, a hearing is generally held on the Application and protestants are given an opportunity to be heard.

The State Engineer has designated that all adjudicative proceedings be informal under the Utah Administrative Procedures Act.[22] Special regulations govern informal proceedings before the State Engineer. These regulations are found at R655-6 of the Utah Administrative Code. At State Engineer hearings, evidence will often be given in the form of a proffer. Hearsay is admissible. Any aggrieved party may, within thirty days,[23] appeal the decision of the State Engineer to the District Court in the County where the water is located. The review by the District Court of an informal hearing is de novo.[24]

However, approval of an application is not the final step. For example, an application to appropriate is merely a hunting license for water. Once an application to appropriate water is approved, the applicant must build the diversion works and actually divert the water and put it to the approved beneficial use. A Proof of Appropriation verifying that the water right has been diverted must be filed with the State Engineer within five years of the approval of the application, or an extension my be sought upon a showing of diligent progress.[25] Only a licensed engineer may submit the proof of appropriation. And, only after a proof of appropriation is filed, examined and accepted by the State Engineer will a certificate of appropriation be issued by the State Engineer. This is the final step in obtaining and perfecting a water right.

TRANSFER OF WATER RIGHTS

So long as there is not a change in the nature of use, point of diversion, period of use, or place of use, transfer of ownership of water rights does not require approval of the State Engineer's office. However, because of the various ways water rights may be held, transfers must be accomplished in certain specified ways. For example, water may be appurtenant to and transferred with the land, transferred separately by deed, or transferred via shares of stock.

The first step in any transfer of water rights, as in land, is determining the status of the title. However, unlike land, it is not possible to obtain either title reports or title insurance for water from a title insurance company. Title insurance companies, perhaps sensing the title complexities and pitfalls inherent to water rights, steer a wide berth. Thus, determining title and issuing any opinions as to title of water rights fall squarely on the shoulders of lawyers. The source of "insurance" is the professional errors and omissions coverage of the lawyer.

There are several sources to check in researching the status of title or rights to water. First is the County Recorder's office. In many cases water is connected to the land where it is used typically for irrigation. This water is considered appurtenant water, and its title is automatically transferred with the land unless specifically excluded.[26] Title to appurtenant water is determined, in part, in the same fashion as title to land. Research of land title, so long as the water has not been lost through nonuse or severed from the land, will reveal the title of appurtenant water. Each link in the chain of title should be examined to verify that the water or some portion of it has not been severed from the land. Loss of the water through forfeiture or abandonment will obviously not be of record, but must be ascertained by other means.

The County Recorder also has a file of conveyances of water without land. While practices vary from county to county, they are typically found in a "water" or "miscellaneous" index. This index should be checked whether or not the water is believed to be appurtenant to land. An otherwise unknown severance of water rights which were formerly appurtenant to land may be discovered by checking this index.

A second and even more important source in determining title is the State Engineer's office. The State Engineer maintains an index of title to all water rights filed with or approved by the State Engineer. Additionally, pre-1903 diligence claims, if memorialized, are on record there. The records of the State Engineer should always be carefully reviewed.

It should also be determined whether a general adjudication has been held or is ongoing in the drainage where the water right exists. A general adjudication is a court proceeding which determines all of the water rights in a particular drainage. For example, the Weber River had been adjudicated. The quantity and priority dates of most water rights in the Weber River drainage are found in the general adjudication decree entered by the Court. There are many adjudications that, while not complete, are ongoing and affect water rights in those drainages. It should always be determined whether an adjudication has been completed or is ongoing which may affect the water right in question.

Finally, if the water right is represented by shares of stock in an irrigation or mutual water company, the records of the company should be checked. Company records should, if accurate, indicate owners of all shares of stock issued or transferred. The validity of the ownership of shares of stock can be readily ascertained. The company issuing the stock can also advise as to unpaid stock assessments, and potential marketability or value of the stock.[27]

CONCLUSION

There are numerous areas of water law omitted or only mentioned briefly in this article. Many of these areas, such as water quality, federal reserved water rights and security interests in water rights are too complex to be dealt with here. Hopefully, this discussion of basic Utah water law will help the reader to recognize water law issues which would otherwise go unnoticed.

[1]See for example, Utah Code Ann. §73-1-10 (1989), which requires that all water rights be transferred by deed in substantially the same manner as real estate, except for water rights represented by shares of stock.

[2]Utah Code Ann. §73-1-2 (1989).

[3]See Utah Code Ann. §73-1-3 (1989).

[4]See *J.J.N.P. Co. v. State, etc.*, 655 P.2d 1133 (Utah 1982), for a discussion of the ownership issue.

[5]A water right is entitled to legal protection including due process protection. See *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967).

[6]In Utah, only the Division of Wildlife Resources and State Parks may hold an instream flow right. Utah Code Ann. §73-3-3(11) (1993 Supp.).

[7]Utah Code Ann. §73-1-4 (1989).

[8]Utah Code Ann. §73-1-4 and §73-3-1 (1989). See also *Smith v. Sanders*, 189 P.2d 701 (Utah 1948).

[9]Federal water rights and the implied reservation of water by the federal government or Indian tribes are complex subjects outside the scope of this article. Many articles and treatises have been written on these subjects.

[10]See Utah Code Ann. Title 73, Chapter 2 for duties of State Engineer.

[11]Utah Code Ann. §73-2-1.2 (1989).

[12]Utah Code Ann. §73-3-1 (1989).

[13]Utah Code Ann. §73-5-13 (1989). See *East Jordan Irrigation Co. v. Morgan*, 218 Utah Adv. Rep. 62 (Aug. 5, 1993), for a recent discussion of the two methods to appropriate water.

[14]Utah Code Ann. Title 73, Chapter 3 (1989).

[15]Utah Code Ann. Title 73, Chapter 4 (1989).

[16]Utah Code Ann. §73-5-1 to 5 (1989).

[17]Utah Code Ann. Title 73, Chapter 5a (1993 Supp.).

[18]Utah Code Ann. §73-3-22 to 26 (1989).

[19]Utah Code Ann. §73-3-29 (1989).

[20]Utah Code Ann. Title 73, Chapter 22 (1989).

[21]Utah Code Ann. §73-1-10, §73-2-11, and §73-3-18 (1989).

[22]Utah Code Ann. Title 63, Chapter 46(b) (1989).

[23]Utah Code Ann. §63-46(b)-14(3) (1989).

[24]Utah Code Ann. §63-46(b)-15 (1989).

[25]Utah Code Ann. §73-3-12 (1989).

[26]Utah Code Ann. §73-1-11 (1989).

[27]A recent Utah Supreme Court ruling held that the corporate structure of mutual water companies prohibits individual shareholders from filing a Change Application without the water company's approval. *East Jordan Irrigation Co. v. Morgan*, 218 Utah Adv. Rep. 62 (Aug. 5, 1993).

1994 Mid-Year Meeting Program

( ) Indicates Number of CLE Hours Available

THURSDAY, MARCH 10, 1994

6:00 - 8:00 p.m. - **Registration and Opening Reception** *Hotel Lobby/Sabra Rooms*
SPONSORED BY: Jones, Waldo, Holbrook & McDonough

FRIDAY, MARCH 11, 1994

7:00 a.m. **Utah Trial Lawyers Association Breakfast Tort Update** - *Hilton Hotel*

7:30 a.m. **Registration/Continental Breakfast** - *Hotel Lobby*
SPONSORED BY: First Interstate Trust Division

8:00 a.m. **Opening General Session** - *Sabra Rooms*
Welcome and Opening Remarks
H. James Clegg, President
Douglas J. Parry, Chair, 1994 Mid-Year Meeting

8:10 a.m. **Keynote Speaker: America's Children at Risk - The Unmet Legal Needs of Children** - *Sabra Rooms* (1)
Hon. Rosemary Barkett, Chief Justice, Florida Supreme Court
SPONSORED BY: The Litigation Section

9:00 a.m. **New Issues/New Challenges/New Era for the Utah Attorney General's Office** - *Sabra Rooms* (1)
Jan Graham, Utah Attorney General

9:50 -10:15 a.m. **Break** - *Hotel Lobby*
SPONSORED BY: Fabian & Clendenin

10:15 - 11:05 a.m. **Breakout Sessions:** (1 each)

1 **A Practical Discussion of Section 1031 Like-Kind Exchanges** - *Cinema 6 Theaters*
David D. Jeffs, Jeffs & Jeffs

2 **Representing Children in Utah - How Could a Kid Possibly Need a Lawyer and What's In It For Me?** - *Sabra ABC*
L.G. "Buz" Cutler, Sole Practitioner
David E. Littlefield, Third District Juvenile Court, Guardian Ad Litem
Hon. Sharon P. McCully, Third District Juvenile Court
Kellie F. Williams, Corporon & Williams

3 **What Every Lawyer Should Know About Patents, Trademarks & Copyrights** - *Sabra FG*
Alan K. Aldous, Trask, Britt & Rossa
Berne S. Broadbent, Broadbent Law Offices
Craig J. Madson, Madson & Metcalf

11:00 a.m. **Golf Clinic** - *Green Spring Golf Course*

11:05 - 11:20 a.m. **Break**

11:20 a.m. - 12:10 p.m. **Breakout Sessions:** (1 each)

4 **Federal and State Health Care Legislation and Health Care Reform** - *Cinema 6 Theaters*
Penny S. Brooke, Assistant Dean of Nursing University of Utah
Elizabeth King, Utah Attorney General's Office
Shannon Stewart, Jones, Waldo, Holbrook & McDonough
William Stilling, Parsons Behle & Latimer
Kathleen H. Switzer, GTE Health Systems

5 **Education Law Update** - *Sabra FG*
(to be announced)

6 **Flesh and Bone: Domestic Torts, Divorce and Lawyer Malpractice** - *Sabra ABC*
Frederick N. Green, Green & Berry
Clifford C. Ross, Cohne, Rappaport & Segal

12:10 p.m. **Meetings Adjourn for the Day**

1:15 p.m. **Golf Tournament** - *Green Spring Golf Course*

2:00 p.m. **Tennis Tournament** - *Green Valley Tennis Courts*

6:30 p.m. **Reception** - *Holiday Inn Lobby*
SPONSORED BY: The Michie Company

7:00 p.m. **Dinner** - *Holiday Inn Sabra Rooms*
Speaker: Gang Uprising -- Five Ways to Make A Difference - Detective Isileli (Izzy) T. Tausinga, Salt Lake Metro Gang Unit

SATURDAY, MARCH 12, 1994

7:00 a.m. **Fun Run**

7:30 a.m. **Registration/Continental Breakfast** - *Hotel Lobby*
SPONSORED BY: Prince, Yeates & Geldzahler

8:00 a.m. **Ethics General Session: Is It Real or Is It Unauthorized Practice of Law** - *Sabra Rooms* (1)
Toni Marie Sutliff, Northwest Pipeline
SPONSORED BY: Legal Assistants Association of Utah

9:00 a.m. **Tennis Clinic** - *Vic Braden Tennis College*

9:00 - 9:25 a.m. **Break** - *Hotel Lobby*
SPONSORED BY: Rollins Hudig Hall of Utah, Inc.

9:25 - 10:15 a.m. **Breakout Sessions:** (1 each)

7 **What Happened to My Waste on the Way to the Dump? or Why I am Liable to Clean Up An Approved Recycling Facility, and Other Major Developments in the Environmental Area** - *Sabra FG*
Kevin R. Murray, Parry, Murray, Ward & Cannon

8 **What to Do When You Receive that Call at 1:00 a.m. from Your Neighbor in Jail** - *Sabra ABC*
Gregory G. Skordas, Salt Lake County Attorneys Office

9 **Legislative Update** - *Cinema 6 Theaters*
John T. Nielsen, VanCott, Bagley, Cornwall & McCarthy

10:15 - 10:30 a.m. **Break** - *Hotel Lobby*

10:30 - 11:20 a.m. **Breakout Sessions:** (1 each)

10 **The Americans with Disabilities Act and Employee Benefits** - *Cinema 6 Theaters*
W. Mark Gavre, Parsons Behle & Latimer

11 **Distributor Relationships: What You Don't Know CAN Hurt You** - *Sabra FG*
C. Jeffrey Thompson, Sole Practitioner

12 **Criminal Justice Act Appointments in Federal Court** - *Sabra ABC*
Hon. Samuel Alba, United States District Court

11:20 - 11:35 a.m. **Break**

11:35 - 12:25 p.m. **Breakout Sessions:** (1 each)

13 **Financial Statement Fraud: How They Do It** - *Sabra ABC*
Alan V. Funk, Coopers & Lybrand

14 **Real Property Guaranties** - *Cinema 6 Theaters*
Thomas G. Berggren, VanCott, Bagley, Cornwall & McCarthy
R. Stephen Marshall, VanCott, Bagley, Cornwall & McCarthy

15 **Estate Planning For Lawyers** - *Sabra FG*
Thomas Christensen, Jr., Fabian & Clendenin

12:25 p.m. **Meetings Adjourn**

1:00 p.m. **Mountain Biking Tour** - *Snow Canyon*

Discipline Corner

ADMONITION

An attorney was Admonished for charging an excessive fee in violation of Rule 1.5(a), FEES of the Rules of Professional Conduct based upon a recommendation by a Screening Panel of the Ethics and Discipline Committee. The attorney was retained to represent a client in a personal injury matter involving the client's son who was struck by an automobile. When it was discovered that the motorist was uninsured the attorney filed a claim against the client's own insurance company and collected policy limits of $100,000.00 under the uninsured motorist portion of the policy. The attorney kept one-third as a fee. A fee arbitration panel found this was an improper fee in that the contingency fee agreement between the attorney and the client did not include recovery from the client's own insurance company. Therefore, the attorney was entitled only to the reasonable value of the services rendered.

PROBATION

On November 8, 1993, the Utah Supreme Court approved the Recommendation of a Hearing Panel of the Ethics and Discipline Committee that an attorney be placed on Probation for one year for violating Rule 1.13, SAFEKEEPING PROPERTY of the Rules of Professional Conduct by negligently retaining fee payments to the attorney's law firm, which the attorney believed were a personal bonus, and for negligently delivering client funds held in trust to a third party thereby rendering the funds unavailable to the client. The Order of Discipline requires the attorney to repay the client within six months of the start of the probationary period.

DISBARMENT

On December 1, 1993, the Utah Supreme Court disbarred A. Paul Schwenke from the practice of law for violating Rule 1.13, SAFEKEEPING OF PROPERTY, and Rule 8.4(c), MISCONDUCT, of the Rules of Professional Conduct. Mr. Schwenke was retained in June, 1985, to represent Caren Serr who was severely injured in an auto accident on November 16, 1983.

On September 23, 1985, just three months after being retained, Mr. Schwenke settled his client's personal injury claim for approximately $93,539.48 and misappropriated most of the settlement proceeds, $65,049.52, to his own use.

On September 1989, Mr. Schwenke appeared in the Third Judicial District Court before Judge John A. Rokich and stipulated to a $100,000.00 judgment against himself based on fraud, not dischargeable in bankruptcy.

On March 2, 1992, a Disciplinary Hearing Panel of the Ethics and Discipline Committee found that Mr. Schwenke settled his client's personal injury claim with two insurance companies for a total of $93,539.48. However, Mr. Schwenke told his client that the most he could get for her was $26,763.75 with which he would purchase an annuity providing her $250.00 per month for life. Instead of purchasing the annuity Mr. Schwenke converted the funds to his own use. He made some $250 payments to his client with his own money telling her the payments were from the annuity.

Subsequently, Mr. Schwenke received two additional checks from the second insurance company in the amount of $27,847.88 and $13,381.88 to which he endorsed the name of his client and kept all of the funds for his own use.

Mr. Schwenke's conversion of this money has prevented his client from obtaining the rehabilitative surgery she needs and she remains permanently disabled. Due to her inability to obtain this surgery her condition will get progressively worse until she becomes totally disabled and unable to walk. (Mr. Schwenke filed a Petition for Rehearing on December 29, 1993. On January 18, 1994, the Supreme Court denied his petition for rehearing)

REINSTATEMENT

Richard S. Clark, II has filed a Petition for Reinstatement to practice law. Any person who desires to support or oppose this petition should file an opposition or concurrence with the Fourth Judicial District Court, Civil No. 930400678CV within 30 days of the date of this publication. It is also requested that a copy of the opposition or concurrence be sent to the Office of Attorney Discipline, 645 South 200 East, SLC, UT 84111.

Scott M. Matheson Award

In 1991, the Law-Related Education and Law Day Committee of the Utah State Bar presented the first annual Scott M. Matheson Award to Greg Skordas and the law firm of Van Cott, Bagley, Cornwall and McCarthy. The second annual award went to Ogden attorney Barry Gomberg and the law firm of Fabian and Clendenin. Kevan F. Smith and the law firm of Ray, Quinney and Nebeker received the award in 1993. Currently, the committee is accepting applications and nominations for the fourth annual Scott M. Matheson Award.

PURPOSE: To recognize a lawyer and a law firm who have made an outstanding contribution to law-related education for youth in the State of Utah.

CRITERIA: Nominations and applications will be accepted on behalf of individuals or law firms who have:

1. Made significant contributions to law-related education for youth in the State of Utah, such contributions having been recognized at local and/or state levels.
2. Voluntarily given their time and resources in support of law-related education, such as serving on planning committees, reviewing or participating in the development of materials and programs and participating in law-related education programs such as the Mentor/Mid-Mentor Program, Mock Trial Competition, Volunteer Outreach, Judge for a Day, or other court or classroom programs.
3. Participated in activities which encourage effective law-related education programs in Utah schools and communities, such programs having increased communication and understanding between students, educators and those involved professionally in the legal system.

APPLICATION PROCESS: Nomination forms may be obtained from and nominations may be submitted to the:

Scott M. Matheson Award
Law-Related Education and
Law Day Committee
Utah Law and Justice Center
Box M-2, 645 South 200 East
Salt Lake City, Utah 84111
Phone: 322-1802

Included in the nomination should be a cover letter, a one page resume and the nomination form. The form describes the following criteria to be used by the selection committee in evaluating the nominee:

- materials which demonstrate the nominee's contributions in the law-related youth education field;
- copies of news items, resolutions or other documents which evidence the nominee's contribution to law-related education for youth;
- a maximum of two letters of recommendation.

All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Nominations must be postmarked no later than **March 15, 1994.**

UTAH STATE BAR
1994 Mid-Year Meeting

March 10 - 12, 1994
St. George Holiday Inn

See you there!

Building For Success
An Advanced Legal Management Seminar

The Association of Legal Administrators (ALA) and Hildebrandt, Inc., the world's largest law firm management consulting company, proudly announce a unique one-day seminar featuring advanced-legal educational programming in your area. You don't have to travel far to attend an innovative seminar that helps you run your law firm more efficiently and effectively. We're making it simple by bringing the experts directly to you.

The seminar will address many topics which include:

- Interrelationships of Practice Management, Compensation and Marketing — Rethinking Partner Compensation Plans
- Techniques to Measure and Analyze Financial Performance
- Lessons to be Learned from Troubled Firms
- Impact of Pricing on Profitability and Partner Compensation

Seating is limited to 50 people per session and will be available on a first-come basis. The ALA and American Bar Association member cost for the entire day is only $125.00 for the first person, $100.00 for additional participants from your organization, or $150.00 for non-members. The fee includes all of the classes listed above plus lunch, refreshments and session materials.

For more information and to register, contact Diane Hinn, ALA Headquarters at (708) 816-1212.

Date: March 15, 1994
Location: To Be Announced

Post-Judgment Interest Rate

Pursuant to Utah Code Ann. § 15-1-4, the post-judgment interest rate for judgments entered between January 1, 1994 and December 31, 1994 is 5.61%. This rate does not apply to judgments based on contracts specifying some other interest rate agreed upon by the parties or to judgments for which a statute specifies another rate of interest.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH
POSITION ANNOUNCEMENT

Position:
Law Clerk to the Honorable Glen E. Clark
United States Bankruptcy Judge
Starting Salary:
$28,648 to $64,218, depending on qualifications
Starting Date: August 1994 or earlier
Application Deadline: **March 15, 1994**
Qualifications:

1) One year of experience in the practice of law, legal research, legal administration, or equivalent experience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation;
   OR
2) A recent law graduate may apply provided that the applicant has:
   a) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or
   b) served on the editorial board of the law review of such a school or other comparable academic achievement.

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

Applicants should send resume and transcript. Applicants should also provide a writing sample and references.
Applications should be made to:
Chief Judge Glen E. Clark
United States Bankruptcy Court
350 South Main Street, Room 365
Salt Lake City, Utah 84101

• *EQUAL OPPORTUNITY EMPLOYER* •

BENEFITS SUMMARY
Employees under the Judicial Salary Plan are entitled to:

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

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

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

Attribution Correction

Paul Evans
Mr. Evans joined Snow, Christensen & Martineau in 1992 and practices in the area of intellectual property. He is registered to practice before the U.S. Patent & Trademark Office.

Mr. Evans received his B.S. in mechanical engineering from the University of Utah (cum laude) in 1986. He earned is Juris Doctor degree from the University of Utah College of Law in 1992.

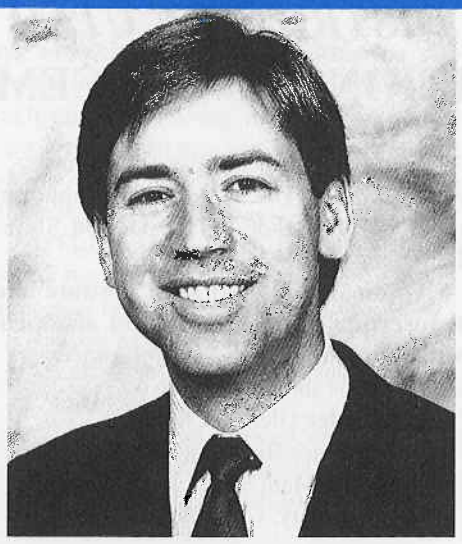
David B. Dellenbach
Mr. Dellenbach received his B.A. in English with a minor in Chemistry from the University of Utah (magna cum laude, Phi Beta Kappa) in 1989. He turned down a scholarship to medical school to attend the University of Utah College of Law where he served on the law review and earned his Juris Doctor degree in 1993. Mr. Dellenbach joined Snow, Christensen & Martineau in 1993 and practices in the areas of intellectual property prosecution and litigation.

The names of Paul Evans and David B. Dellenbach were inadvertently omitted as co-authors of the article entitled *An Intellectual Property Primer: What Every Attorney Should Know About Patents, Trademarks and Copyrights*, by Bryan A. Geurts, which was published in the January 1994 issue of the *Utah Bar Journal*. We regret any confusion this may have caused our readers.

WANTED: Mock Trial Judges

The Law Day and Law-Related Education Committee of the Utah State Bar is looking for a few (200) great lawyers and judges and a few more (80) non-lawyers to judge junior and senior high school mock trials through Utah from March 21 through April 22. The Mock Trials are held in actual courtrooms and are judged by a panel of three (3) persons; a presiding judge (lawyer/judge), a panel judge (lawyer/judge), and a community representative.

If you'd like to have some fun and be a hero, please complete the pull-out form at the end of the magazine.



Breaking the Cycle of Domestic Violence

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

The Utah Domestic Violence Council estimates that each year 55,000 Utah women are abused by an intimate partner. The Council reports that one in ten women is abused by an intimate male partner, and one-fourth of police officer injuries will occur while trying to break up a family fight.[1]

In 1990, the Utah Task Force on Gender and Justice has added that a quarter of couples in this country are in relationships in which violence has occurred more than once. The Task Force states that battering "is the single greatest cause of injury to women, accounting for 20% of all visits by women to emergency medical services."[2] The Task Force also reports that "[e]ighty percent of the women served by Utah's shelters were physically abused, and half of those were injured seriously enough to require medical attention."[3]

Attorneys who have represented battered women understand the physical and emotional toll of abuse. Self-esteem and independence are typically shattered in an abusive relationship. And the abused person feels a continuing sense of fear. A client in a pro bono case reported to me that she still felt fear after months of separation and even after the entry of a protective order. Just knowing her abusive husband was in town made her wary.

There are no simple solutions to the problems of domestic violence. But public education and legal intervention are vital in breaking the cycle of abuse. Abused persons must know about Utah's Cohabitant Abuse Act, which allows them to obtain ex parte protective orders against abusers. *See* Utah Code § 77-36-1 *et seq*. They need to know about the network of shelters in Utah where victims of abuse can turn for help. They need to understand that our legal system has improved the available responses for abuse victims.

The Bar has a vital role to fill in solving this problem. For several years, the Legal Aid Society of Salt Lake ("LAS") has handled most Cohabitant Abuse Act proceedings in Salt Lake City, responding within 24 hours for persons reporting abuse. However, LAS Director Russell Minas reports that the increasing number of cases is straining the resources of the LAS. In 1989, the LAS handled about 80% of all Cohabitant Abuse Act proceedings in Salt Lake. Now, the LAS is able to handle only about 50% of those cases. In certain areas of Utah, no legal help may be available to indigent persons who need protection from abuse. The Legal Needs Assessment currently being carried out by the Delivery of Legal Services Committee indicates that help for victims of domestic abuse is one of the most important unmet legal needs in Utah.

Just as every doctor ought to know first aid, every lawyer ought to know how to handle a Cohabitant Abuse Act case. Forms for such cases ought to be available in every attorney's computer form file.

A difficulty in handling such cases is that they typically need emergency attention, which can interrupt the busy schedules of volunteer lawyers. However, the Delivery of Legal Services Committee is working to develop ways volunteer members of the Bar can handle such cases without disrupting their schedules.

Some ideas we are pursuing include setting up a statewide 800-number "hot line" for victims to call to receive basic legal guidance. Calls to that number could be transferred to different law firms on a rotating basis. The volunteer lawyers could remain in their offices at pre-set times to handle phone calls. Other ideas include having attorneys volunteer on a given day to handle a group of court appearances after appropriate forms have already been filled out. This could ease the

burden for the LAS and Utah Legal Services.

In addition, we need to make the system more "user friendly" to victims. An idea being considered by the State Legislature is the use of a "kiosk computer system," which would allow indigent victims to follow simple computer directions for filling out of Cohabitant Abuse Act forms. After the victim follows a simple computer touch-screen procedure, the "kiosk" will print out the Cohabitant Abuse Act papers for obtaining a protective order. This could help ease the burden on volunteer attorneys.

Finally, more needs to be done to educate the public about the domestic violence problem. The Utah Women Lawyers and the Young Lawyers Division have been working together for many months to produce a series of video tapes to inform victims of domestic violence about their rights. Hopefully, the various courts in Utah will make these tapes available for viewing at court facilities.

As lawyers, we have a vital role to fill. As the only persons licensed to represent others in Court, we must take the lead in obtaining judicial intervention for the victims of domestic violence. If you have any further suggestions for solutions or would like to volunteer, please do not hesitate to call me at (801) 532-1500.

[1]Utah Domestic Violence Advisory Council, Pamphlet "Working Together to End Domestic Violence" (undated).

[2]Utah Task Force on Gender and Justice, Report to the Utah Judicial Council, at 43 (March 1990).

[3]*Id.* at 44.

Child Safety is Focus of Needs of Children Ad Campaign
NEVER SHAKE A BABY, NEVER!

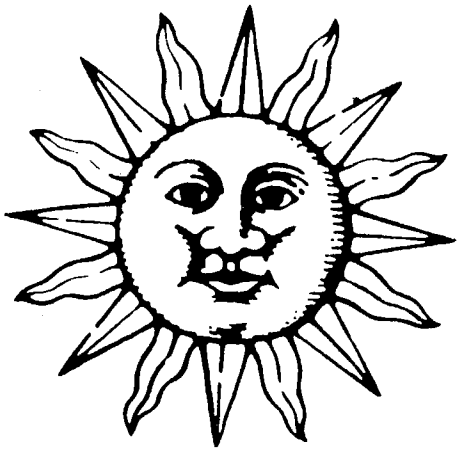
By Michael Mower
Young Lawyers Division

This vital message is currently airing on several Utah radio and television stations thanks to the combined efforts of members of the Needs of Children Committee of the Young Lawyers Division and the Child Abuse Prevention Council of Ogden. These public service announcements are an important part of a program designed to increase the awareness of parents and caretakers of newborn children concerning the dangers involved in shaking young children.

The dangers are quite real. In 1990, there were 12 deaths in Utah due to child abuse; 6 of those deaths were a direct result of shaking. Tossing and shaking young infants and children can also cause whiplash and brain damage, according to April Barry of the Salt Lake City-County Health Department.

To alert parents to the dangers of shaking their babies, the Needs of Children Committee co-sponsored three television and radio public service announcements. Under the direction of Colleen Larkin Bell, committee members contacted various media outlets and urged them to run the twenty-second "Never Shake A Baby, Never!" warnings. The response they received to this campaign was strongly supportive. Television Channels 2, 4, 5, and 13 and radio stations Rock 103, KBER, Oldies 94.9, 99.5, KSL, KPCW, 107.5 FM and KSOP are currently broadcasting these messages. Other stations are also considering airing these warnings. The "Never Shake a Baby. Never!" public service announcements are scheduled to air throughout 1994.

Young Lawyers are optimistic about their chance for success in reducing this type of child abuse. "While many parents are not aware of the harm they can cause by shaking their babies, statistics show 70 percent of parents are less-likely to shake them once they are aware of the potential danger involved," noted Needs of Children Committee member David Barton.



UTAH STATE BAR
1994 Annual Meeting

June 29 - July 2, 1994
Sun Valley, Idaho

Hope to See you there!

"What Do I Know?"

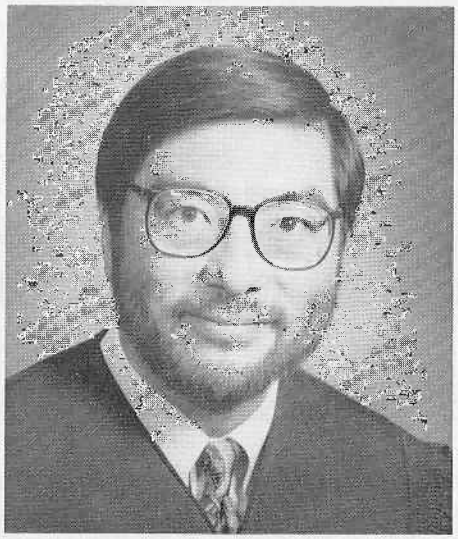
By Judge Glenn K. Iwasaki

When I was first approached by Judge Michael Hutchings to write something for the *Bar Journal*, I had been on the bench a grand total of approximately one and one-half months. I asked him what I could write about, and he indicated that it would be helpful to advise lawyers who appear before me as to my likes and dislikes since I had taken the bench. It seemed to me extremely presumptuous to even have formulated likes and dislikes in the brief time that I was on the bench, and so I requested a continuance from Judge Hutchings until after I had at least had an opportunity to attend the National Judicial College. He kindly assented to my request and allowed me the opportunity to not only attend the National Judicial College, but also to become accustomed to the "Views from the Bench" which is a totally different perspective from that of a practitioner.

For those of you who were attempting to get court dates before me between the period of April 18 up to and including May 7, 1993, I was attending the National Judicial College located on the campus of the University of Nevada at Reno, Nevada. In quoting from the 1994 catalog, the General Jurisdiction course is:

> . . . NJC's renowned introductory program for new judges who preside over felony trials and unlimited jurisdiction civil cases. Includes an overview of substantive areas of the law, including civil law and procedure, evidence, criminal law and procedure, sentencing, handling of juries, and more. Checklists, guidelines and procedures are explored to enhance your learning experience and to assist you in managing your court and in making better and more comprehensive decisions immediately upon your return to the bench. A must for the new judge!

I found that to be exactly true. Classes were held Monday through Thursday from 8:00 a.m. until 5:00 p.m. with an hour for lunch, and Friday from 8:00 a.m. until 12:00 p.m. They commenced and terminated upon a ringing of bells and/or buzzers. (Can you believe that?) While attendance was not taken, in order to receive your Certificate of Completion, you must have attended all of the sessions.



JUDGE GLENN K. IWASAKI was appointed to the bench by Governor Norman H. Bangerter in July 1992. He assumed the bench in August 1992. He graduated from the University of Utah College of Law in 1971. He was a prosecutor with the Salt Lake County Attorney's Office from 1974 to 1978; a Salt Lake Legal Defender from 1978 to 1981; a partner in the law firm of Collard, Pixton, Iwasaki and Downes from 1981 to 1985; and prior to his appointment to the bench, was again, a prosecutor in the Salt Lake County Attorney's Office from 1987 to 1992. His main area of practice had been in criminal law, with an emphasis on trial work.

Housing was provided through the University Inn (a dormitory by any other name). During my collegiate years, I was fortunate to avoid living in dormitories and so this experience was new for me. I did have the fortunate/unfortunate experience of sharing my floor with the members of the University of Nevada baseball team who seemed to enjoy late evening and night practices in the hallway. Other than that, the food was good and substantial, and if one did not vigorously exercise and watch what they ate, additional pounds could be added with very little effort.

I was very fortunate to attend the college with six other newly appointed judges from the state of Utah. They included: Judge Michael Glasmann, Judge Jon Memmott, and Judge Michael Lyon all from the Second District; Judge Ben Hadfield from the First District; Judge John Andersen from the Eighth District; and Judge Guy Burningham from the Fourth District. Altogether, the session was attended by over 100 judges from almost every state in the Union. The judges ranged from elected judges, both partisan and nonpartisan; appointed judges who stood for retention elections; and judges who were appointed for life. It was extremely interesting to speak, especially with the elected judges, as to how they ran their campaigns and the cost, expenses and ethical problems which may or may not have been problems for them. A Japanese judge, Judge Tamura, was also in attendance and I had an especially rewarding opportunity to speak with him at length as to the legal system in Japan, as well as the limited use of juries in that country. The last week of the session included a group of Russian judges who had been touring the United States, examining the different aspects of the American judicial system in order to make changes and recommendations in the Russian court system. It was extremely interesting to see them struggle with the concept of juries and how it would be applied to their own administration of justice.

In spite of the classwork and the interesting and necessary topics of instruction, the most important aspect of the session was to interact with all of the different judges from different jurisdictions, and to gain their points of view as to common

problems experienced by all. Furthermore, the opportunity to be in close contact with the other Utah judges was invaluable in getting to know the judges and to be able to contact them, without hesitation, if the occasion so arose. The State of Utah should hold its head high as to the quality of judges who attended the National Judicial College. I found that the Utah judges were as competent, if not more so, than any other of the states' judiciaries which were present.

Some personal observations about the other Utah attendees: (1) Judge Memmott is an exceptionally good tennis player and has a great backhand; (2) Judge Lyon is remembered as doing work that was faxed to him from his office during his stay at the college; (3) Judge Hadfield gave no quarter and asked for none on the basketball court against much younger students during the free time activities that were provided; (4) Judge Andersen was able to keep his pipe lit in the most difficult of situations; (5) Judge Burningham seemed to always come up with an insightful comment during discussions; and last, but not least, (6) Judge Glasmann has a keen interest in mathematical probabilities, combinations, permutations and was above all extremely good company in the pursuit of other activities that Reno, Nevada had to offer.

So, into the question of "What Do I Know After Approximately a Year and One-Half on the Bench and Attendance at the Judicial College?" I have found that certain things such as being honest, being courteous, being concise, being professional, being prompt, being ethical, and having integrity all should go without saying as to practitioners who appear before me. One of the keys to successfully appearing in my court is to **get the name right!** It is **Glenn K. Iwasaki!** That may seem a trivial matter to a lot of you Smiths, Youngs, Joneses, etc., but it is surprising how many times and what interesting ways my name has been misspelled. It is not Glen, with one "n"; Glenn, with middle initial "W", "P", "R", "T"; nor is the last name Iwaski, Kawasaki, a favorite of mine: Isawaki, Iwisiki; and I am not (with apologies to the following), Paul F. Iwasaki, Kenneth Hisatake, or Kenneth Okazaki. All of the foregoing at one time or another have appeared on pleadings.

I hope that my brief summary of the National Judicial College has shown that its course is an essential and important part of my judicial education, and my suggestions for success in my court should not be taken too seriously. I take what I do very seriously, not myself.

Case Summaries

By Clark R. Nielsen

Fraud and Scienter, Securities

On certiorari to the Utah Court of Appeals, the Supreme Court affirmed the conviction of the defendant, holding that scienter is not required to establish a violation of the Uniform Securities Act, Utah Code Ann. §§ 61-1-1 and 61-1-21. Under Utah Code Ann. § 76-2-103 a person acts "willfully" when he or she desires to engage in the conduct that causes a result. The defendant need not act with specific intent to defraud. A representation that is false or misleading may support a charge of securities fraud regardless of the defendant's specific intent.

The court rejects the defendant's argument that there is, or should be, a specific intent requirement in the statute. The Utah Uniform Securities Act is not a direct parallel to the scienter requirement of Rule 10b-5 of the Federal Securities Exchange Act of 1934. Under our state statute, "willfully" requires only that the prosecutor prove that the accused desired to engage in the conduct that caused the result.

State v. Larson, 228 Utah Adv. Rep. No. 3 (Dec. 17, 1993) (J. Zimmerman)

Contracts, Choice of Law and Choice of Forum Provisions

Plaintiff sued the defendant manufacturer under a value added resale ("VAR") agreement. Under the VAR agreement plaintiff purchased a computer system from the defendant Canadian corporation and, after improving and adding software for the customer, plaintiff was to resell the computer system to the customer at a reasonable profit. When defendant broke the VAR agreement and dealt directly with the customer, plaintiff filed suit in the Utah district court against the defendant manufacturer and the customer. Defendant moved to dismiss because the VAR agreement provided that New York would be the exclusive venue. The district court refused to dismiss and the defendant sought interlocutory appeal.

On appeal, the allegations of the plaintiff's complaint are reviewed in the light most favorable to the plaintiff. The trial court's decision that venue was proper, despite a forum selection clause to the contrary, is reviewed for abuse of discretion.

Under the *Restatement of Contracts*, the state law chosen by the parties to govern their contractual rights will be applied unless that state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the choice. In this case, the court found no reasonable basis to apply New York law because there was no substantial relationship between New York and the parties or the transaction. "All contacts were within the State of Utah and only Utah had an interest in the law suit." The agreement was to be performed in Utah, was signed in Utah, and breached in Utah. Utah will apply Utah law, and not New York law, in determining the validity of the choice of forum provisions in the VAR agreement.

Under Utah's law, the parties' agreement as to the chosen forum will generally be given effect unless it is unfair or unreasonable. Plaintiff must demonstrate that the chosen forum state would be so seriously an inconvenient forum as to be unjust. While this may be a heavy burden, it is not unsurmountable. If the plaintiff were bound to choose New York as the proper forum under the agreement, then the plaintiff would be required to try the case in Utah against the Utah customer and New York against the computer defendant. Bifurcating the trial on the same issues contravenes the objective of modern procedure to litigate all claims in one action if possible and increases the cost and confusion of litigation.

The denial of Pinpoint's motion to dismiss for lack of venue and to refuse to enforce the VAR agreement provision regarding choice of forum was not an abuse of discretion. The refusal to dismiss was affirmed.

Prows v. Pinpoint Retail Sales System, Inc., 228 Utah Adv. Rep. 23 (Dec. 23, 1993) (J. Howe)

Medical Malpractice, Limitations and Repose Statute Unconstitutional as to Minors

Consolidating two malpractice cases, the court reversed the dismissal of both actions and remanded for trial on the merits. The cases had been dismissed because the statute of limitations and repose had expired as against the plaintiff minors. In case number one, the complaint was not filed until more than four years after the defendant doctor's diagnosis and two years after the diagnosis was determined to have been improper. The trial court ruled that the two year statute of limitations barred the action as against the claim of the minor for his injuries.

In the second case, the plaintiffs filed their action for negligent delivery of the twin plaintiffs seven years after their birth. The trial court dismissed this case as terminated by the four year statute of repose. (See Utah Code Ann. § 78-14-4)

In both cases, the limitations and repose provisions were determined unconstitutional as against minors under the Uniform Operation of Laws provision of Article 1, Section 24, Utah Constitution. The limitations period applicable to the Malpractice Acts treats minors injured by health care providers categorically different from other minors injured by other defendants. It also treats minors and adults as if they were situated the same under the law. However, minors and adults are not similarly situated under the law with respect to their ability to assert claims for injuries caused by malpractice. For example, minors have no legal capacity to sue and parents or guardians have no legal duty to sue on their behalf.

The stated purpose of the Utah Malpractice Act was to curb rising malpractice insurance rates and insure the availability of malpractice insurance, thereby reducing the cost of health care. To accomplish these objectives, the Act seeks to abolish all malpractice actions not filed within four years (repose) and to limit the limitations period to two years.

The court reviews the historical underpinnings of laws relative to the protection of minors' legal interests. For example, a minor is not sufficiently mature or knowledgeable to litigate a legal claim and has no legal capacity to do so. The limitations statute which fails to recognize these fundamental differences between minors and adults with respect to their status in the law is discriminatory and unjustifiable. The effect of the statute terminates a minor's legal right to a remedy before the minor even reaches majority age or has a reasonable opportunity to assert the action.

The court had previously affirmed the constitutionality of the statute with respect to adults in *Allen v. IHC, Inc.*, 635 P.2d 30 (Utah 1981). Justice Stewart reviews the act's history since 1981 and the numerous cases finding various repose and limitation statutes unconstitutional under a strict scrutiny standard, rather than a lesser rational basis standard. The court holds that a statutory classification that discriminates against a person's constitutionally protected right to a remedy for personal injury is constitutional only if it is (1) reasonable and (2) has more than a speculative tendency to further the legislative objective and in fact actually and substantially furthers the legislative objection and (3) is reasonably necessary to further the legislative goal.

In applying the stricter standard to the instant matter, the court criticizes the legislative findings which motivated the statutory provisions. The court clearly disagrees with both the empirical and subjective data used by the legislature to justify the limitations periods. Applying the strict scrutiny standard, the court holds that the non-uniform application of the limitation provisions in the malpractice act to minors' malpractice claims does not actually or substantially further the desired policy to curb or reduce malpractice premiums or assure reasonably priced health care services.

According to Justice Stewart, the rise and fall of malpractice insurance rates is cyclical and has little to do with malpractice claims and law suits, citing the ABA Action Commission. Even if there was evidence of significantly increased malpractice law suits or increased jury verdicts in Utah, that would be no basis to conclude that limiting the claims of minors would actually substantially reduce such increases. The limiting of malpractice claims by minors does not substantially further the objectives announced by the legislature.

The court hastens to add that it does not hold that the legislature can never enact statute of limitations as against minors' claims before the age of majority is reached. However, the law must provide minors with a reasonable opportunity to have their legal claims adjudicated.

Justice Zimmerman and Chief Justice Hall concur only in the result and do not base reversal on the uniform operations of laws provision of the Utah constitution. These justices would reverse and strike down the limitations and repose provisions under the open courts provision of Art. I, § 11, Utah Constitution. Justice Zimmerman prefers to employ a substantive due process analysis appropriate to Art. I, § 11.

Lee v. Gaufin, 227 Utah Adv. Rep. p. 3 (Nov. 30, 1993) (J. Stewart, with Js. Howe and Durham; J. Zimmerman and C. J. Hall concur in result)

Sovereign Immunity; Worker Compensation

The State of Utah and its employees owe no duty to the plaintiff and the plaintiff's decedent for the parole of a Utah State prison inmate who later murdered the plaintiff's wife. There was no evidence to justify a jury decision that the paroled inmate was so "uniquely dangerous that the actor upon whom the alleged duty would fall can be reasonably expected to distinguish that person from others who are similarly situated, to appreciate the unique threat the person presented, and to act to minimize and protect against that threat."

The decedent's employer also was not liable to the family of the decedent because the employer's duty and responsibility to the decedent has been replaced by the Workers Compensation Act, which is the exclusive remedy against an employer. A strict exclusive remedy of workers compensation is not avoided by a claim of "dual capacity" that the employer provided security to the employee. The employer's efforts to provide security were part of its obligations and role as an employer.

Hunsaker v. State of Utah, 227 Utah Adv. Rep. 19 (Nov. 30, 1993) (C. J. Hall)

Likewise, parents whose child was sexually abused by a state-contracted cab driver could not recover from state school officials who hired the cab driver. The Utah Governmental Immunity Act, § 63-30(10) retains immunity from assault and battery claims against the state. The immunity focuses upon the conduct causing the injury and not the negligent act of the state official who negligently hired the cab driver. In dissent, Justice Stewart agreed with plaintiffs that the immunity in this case was so unconscionable as to require judicial intervention. (*See Ledfors*, 849 P.2d 1162 (Utah 1993)).

S.H. v. State of Utah, 228 Utah Adv. Rep. 21 (Dec. 23, 1993) (J. Zimmerman; J. Stewart dissents)

Attorney Discipline

In an attorney disbarment appeal, the court held that whether a person had been served with process (the summons and complaint) is a question of fact. Whether the service is proper becomes a question of law. A plaintiff is required only to exercise reasonable diligence and good faith as a means of finding and servicing the defendant under Utah R. Civ. P. 4.

In re Schwenke, 227 Utah Adv. Rep. 21 (Dec. 1, 1993) (C. J. Hall)

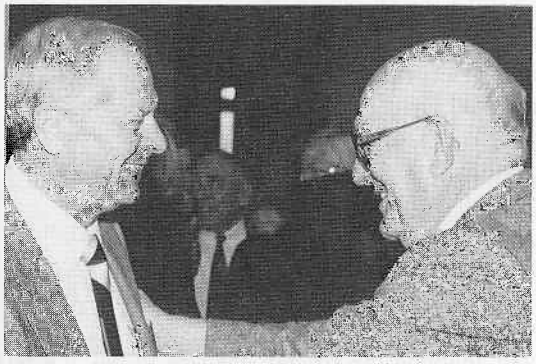
Criminal Law, Diminished Mental Capacity Defense, Involuntary Intoxication

The legal standard applicable to the defense of involuntary intoxication is incorporated within the mental illness defense for diminished mental capacity, Utah Code Ann. § 76-2-305. The court rejects the defendant's argument that the pre-1983 standard (which is also applied in Colorado) should apply in Utah. Because of the 1983 amendments, the defendant must show that he or she was temporarily so intoxicated during the crime due to the involuntary ingestion of drugs that he or she lacked the mental state required as an element of the offense charged.

State v. Gardner, 227 Utah Adv. Rep. 28 (Dec. 3, 1993) (C. J. Hall)

Utah Bar Foundation Honors Retiring Chief Justice Gordon R. Hall





(left) President Ellen Maycock presenting achievement plaque to Richard C. Cahoon — (center) Chief Justice Gordon R. Hall receiving gift from Ellen Maycock — (right) Chief Justice Hall and D. Frank Wilkins

Photo credit: Robert L. Scmid

The Utah Bar Foundation honored Chief Justice Hall at its annual luncheon held December 14, 1993, at the Law & Justice Center.

President Ellen Maycock recognized several award recipients. Duane Carling and German T. Flores were given the 1993 Community Service Scholarships, and Laura Kirwan and Andrea Nuffer received the Law School Ethics Awards. Former trustees, Richard C. Cahoon and Hon. Norman H. Jackson, received plaques recognizing their many years of service on the Board. Also, Max D. Eliason and Chad Hamilton were shown the appreciation of the Board of Trustees for their service on the Finance Committee.

Foundation Vice-President James B. Lee announced that the Board of Trustees distributed approximately $200,000 in grants during the past year. He stated that, even though 1993 interest rates were down, resulting in lower revenue from interest on lawyers' trust accounts, the Foundation was able to make grants at the usual level as a result of the foresight of previous trustees in investing funds in previous years.

Justice Hall, introduced by Trustee Stewart M. Hanson, Jr., recounted highlights of his career and reaffirmed his support of judicial nominating commissions as the method of choosing judges. Justice Hall stated that choosing judges by election or political appointment would make the process political, rather than merit-based.

President Maycock presented Justice Hall with a silver tray recognizing his distinguished service to the Utah Judicial System and to the people of Utah.

Support The Utah Bar Foundation and Utah Community by Enrolling in the IOLTA Program

The Utah Bar Foundation was organized in 1963 as a nonprofit charitable corporation, dedicated to the improvement of relations between members of the Bar, the Judiciary, and the public. Its membership consists of all active members of the Utah State Bar. The Foundation is administered by a Board of seven trustees who serve staggered three-year terms.

The Foundation is working to carry out its law-related public purposes and improve the image of lawyers in Utah. Last year the Board of Trustees awarded grants for about $200,000, and has awarded a total of approximately $1,250,000 since 1985. As lawyers and members of the Foundation, you can be proud of the realization of these goals. We appreciate all who have supported the Foundation with personal donations and enrollment of trust accounts in the IOLTA Program. IOLTA is the program whereby a non-interest bearing trust account is changed to an interest-bearing account, with the interest payable to the Foundation.

We need the support of each of you, so if you have not yet authorized your bank to enroll your trust account to the IOLTA Program, we urge you to do so. Enrollment poses no cost or administrative burden to you. Call the Bar Foundation office to receive the necessary authorization form (531-9077) — simply complete and return the form and it will be forwarded to your bank. By supporting the Foundation, Utah's lawyers can serve the public interest.

CLE CALENDAR

CIVIL RIGHTS —
NLCLE WORKSHOP

Civil rights causes of action, including prisoner rights cases and 1983 claims. 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: February 17, 1994
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.

PROFESSIONAL LIABILITY SEMINAR

This seminar will cover loss control ideas, including a discussion of conflict of interest exposures and hazardous areas of practice. The latest trends in professional liability claims and their prevention will be discussed, as well as a look at local claims statistics. Please note that this is an excellent way to meet the Supreme Court required three hour CLE in ethics.

CLE Credit: 3.5 CLE hours in ETHICS
Date: February 25, 1994
Place: Utah Law & Justice Center
Fee: Pre-registration $45.00, registration at the door, $60.00.
Time: 9:00 a.m. to 12:30 p.m.

UTAH STATE BAR MID-YEAR MEETING
in St. George, Utah

Watch for additional information coming in the mail.

CLE Credit: 8 hours of CLE, including 1 CLE hour in ETHICS
Date: March 10-12, 1994
Place: St. George Holiday Inn, St. George, Utah
Fee: Pre-registration $135.00, registration at the door, $160.00.
Time: Thursday, March 10th, reception from 6:00 p.m. to 8:00 p.m. Friday, March 11th, CLE meetings from 8:00 a.m. to 12:15 p.m. Saturday, March 12th, CLE meetings from 8:00 a.m. to 12:30 p.m.

PERSONAL INJURY —
NLCLE WORKSHOP

From picking good cases to preparing for trial. 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: March 17, 1994
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.

ENERGY, NATURAL RESOURCES LAW SECTION'S ENVIRONMENTAL PERMITTING

Watch for additional information coming in the mail.

CLE Credit: 7 hours of CLE
Date: March 31, 1994
Place: Utah Law & Justice Center
Fee: Pre-registration TBD, registration at the door, TBD.
Time: 9:00 a.m. to 4:30 p.m.

1994 UTAH LEGISLATIVE REVIEW

Get a unique review of issues relevant to attorneys and their practices that came before the 1994 Utah State Legislature. Changes in the law may impact environmental issues, employment law contracts, criminal procedure, real property, family law & taxes. This program provides an excellent opportunity to get a step ahead of the upcoming session and to prepare your practice for changes in Utah law.

CLE Credit: 3 hours
Date: April 8, 1994
Place: Utah State Capitol, Rooms 303-305
Fee: $50.00 early registration, $60.00 door registration
Time: 9:00 a.m. to 12:00 noon

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____
Total Due

Make all checks payable to the Utah State Bar/CLE

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Name — Phone

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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.

BUSINESS ASSOCIATIONS — NLCLE WORKSHOP

PLEASE NOTE THE DATE CHANGE TO WEDNESDAY, APRIL 20. A program designed to cover Limited Liability Companies, Corporations and Partnerships. 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: *April 20, 1994* — Please note: This program had been scheduled for April 21, 1994.
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.

SEVENTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

Watch for additional information coming in the mail.

CLE Credit: 8 hours of CLE. This program will also meet CPE hour requirements.
Date: May 6, 1994
Place: Utah Law & Justice Center
Fee: Pre-registration $125.00, registration at the door, $150.00.
Time: 9:00 a.m. to 5:00 p.m.

APPELLATE PROCEDURE & JURISDICTION — *NLCLE WORKSHOP*

Effective appellate advocacy, avoiding common pitfalls. 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: May 19, 1994
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.

POSITION ANNOUNCEMENT

ATTORNEY-ADVISOR (CONTRACT)
ANNOUNCEMENT NO: L-94-01
GS-905-12 ($41,543)

ISSUE DATE: 2 February 1994
CLOSING DATE: 4 March 1994

This position is located in the Staff Judge Advocate's Office, Hill Air Force Base, Utah.

Qualification Requirements:

1. To be eligible for consideration for initial appointment applicants must be graduates of a law school that is accredited by the American Bar Association.
2. To be eligible for consideration, you must be a member of the BAR.
3. The first professional law degree (LLB, or J.D.) plus two years of professional legal experience (at least one of which was at or equivalent to the GS-11 level); or
4. The first professional law degree plus the second professional law degree (LL.M.) plus one year of professional legal experience (at equivalent to the GS-11 level); or
5. Attorneys without experience may, in unusual cases, be employed at grade GS-12, provided the individual has advanced educational attainments substantially beyond those indicated as required for work at the GS-11 level (listed below) and the education clearly indicates ability to perform work of the type to be assigned, for example, education which included courses directly pertinent to the work of the Air Force.

Qualifications Required at CS-11 Level:

a. The first professional law degree (LL.B. or J.D.) plus one year of professional legal experience; or
b. The first professional law degree plus the second professional law degree (LL.M.) provided it required one full academic year of graduate study; or
c. The first professional law degree provided the applicant's record shows superior law student work or activities as demonstrated by one of the following:

– academic standing in the upper third of his/her law school graduation class, or

– work or achievement of significance on his/her law school's official law review, or

– special high-level honors for academic excellence in law school, or

– winning of a moot court competition or membership on the moot court team which represents the law school in competition with other law schools, or

– full time or continuous participation in a legal aid program as opposed to one-shot, intermittent or casual participation, or

– significant summer law office clerk experience, or

– other equivalent evidence of clearly superior achievement.

What to File – READ CAREFULLY

1. SF-171. "Application for Federal Employment," ** On the SF-171, be sure to give a full description of the nature, extent and complexity of work performed. The applicant must clearly establish possession of the qualifying experience as described in this announcement. Credit will be given for unpaid experience or volunteer work such as community, social service and professional association activities on the same basis as for paid experience. To receive proper credit, applicant must show actual time in hours per week spent in such activities.
2. A current official certificate showing that the applicant is an active member of the BAR and the the applicant's fitness to practice law or conduct as an attorney has never been challenged. Certificate must be furnished by applicant. If either fitness or conduct has been challenged, an official statement is required concerning the facts and circumstances, together with any explanation which the applicant may care to submit.
3. Applicants who claim 10 points veteran's preference must submit Standard Form 15 and current proof of preference as specified on that form.
4. Official law school transcript indicating class standing or final grade point average. If class standing is not indicated on transcript, submit a letter from the head or registrar of the university, college or school, or other academic official of the institution responsible for assessing the relative ranking of student. Applications and/or supplemental information submitted should include a full description of:

a. Honors program participation (including moot court, law review, etc.).
b. Law school scholarships and awards.
c. Authorship of published articles on legal topics (show titles, publication and date).

**The SF-171 and SF-15 may be obtained from the College Placement Office, any Federal Job Information Center, or by writing to the Hill Air Force Base Address listed below. The Background Survey Questionnaire Form may be obtained from Hill Air Force Base:

Where to File
or For More Information Contact:

00-ALC/DPCFA
ATTN: Kay Watanabe
6063 Elm Lane
Hill AFB, Utah 84056-5819

CLASSIFIED ADS

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

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

BOOKS FOR SALE

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

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FOR SALE: Pacific Reporter, Leather Bound Vols 1-154; Pacific Reporter, Vols 172-300; Pacific Reporter 2d, Vols 1-835; ALR 4th, Vols 1-45; AmJur Trials, Vols 1-32; Proof of Facts, Vols 1-30; Proof of Facts 2d, Vols 1-44; Numerous other publications available, make offer. Call (801) 968-3501.

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Utah Bar Journal
1988-1993 Subject Index

NOTE: Indexing is a subjective art at best. Where an article could have been put under two or more categories, e.g. tax laws impacting divorce, it was arbitrarily put under one. Please check under any related categories for articles that may be of interest to you. The Bar Journal gives Leslee A. Ron and Barrie A. Vernon a special thanks for completing this mammoth undertaking.

1994 Mock Trial Schedule

Name: _____ Firm: _____

Position: _____ Address: _____

Phone: _____ _____ Zip: _____

I have judged before. Yes _____ No _____ I will judge _____ (number) of mock trial(s).

Please indicate the specific date(s) and location(s) that you will commit to judge mock trial(s) during the months of March and April. The dates and locations are *fixed*; you *will* be a judge on the date(s) and time(s) and location(s) you indicate, unless several people sign up to judge the same slot and we call you to advise you of a change. You will receive confirmation by mail as to the time(s) and place(s) for you trial(s) when we send you a copy of the 1994 Mock Trial Handbook. Please remember -- all **trials run approximately 2 1/2 to 3 hours and you will need to be at the trial 15 minutes early.** We will call one or two days before your trial(s) to remind you of your commitment.

Please be aware that Saturday session will be held on March 26th and April 9th. Multiple trials will be conducted. Please give these dates special consideration.

Ogden Area means Layton, Roy, Clearfield, Ogden. SLC means downtown SLC (3rd Circuit Court, Court of Appeals, Public Service Commission). Specific addresses for all courtroom will be mailed with the confirmation letter.

Date	Time	Place	Preside	Panel	Comm. Rep.
Monday, March 21	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Tuesday, March 22	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	2:00–5:00	Logan	( )	( )	( )
Wednesday, March 23	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
Thursday, March 24	1:00–4:00	Tooele	( )	( )	( )
	2:00–5:00	Coalville	( )	( )	( )
Friday, March 25	2:00–5:00	Cedar City	( )	( )	( )
Saturday, March 26	9:00–12:00	3rd Circuit Ct.	( )	( )	( )
	9:00–12:00	3rd Circuit Ct.	( )	( )	( )
	9:30–12:30	3rd Circuit Ct.	( )	( )	( )
	9:30–12:30	3rd Circuit Ct.	( )	( )	( )
	10:00–1:00	3rd Circuit Ct.	( )	( )	( )
	10:00–1:00	3rd Circuit Ct.	( )	( )	( )
	10:30–1:30	3rd Circuit Ct.	( )	( )	( )
	10:30–1:30	3rd Circuit Ct.	( )	( )	( )
	12:30–3:30	3rd Circuit Ct.	( )	( )	( )
	12:30–3:30	3rd Circuit Ct.	( )	( )	( )
	1:00–4:00	3rd Circuit Ct.	( )	( )	( )
	1:00–4:00	3rd Circuit Ct.	( )	( )	( )
	1:30–4:30	3rd Circuit Ct.	( )	( )	( )
	1:30–4:30	3rd Circuit Ct.	( )	( )	( )
Monday, March 28	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
Tuesday, March 29	9:00–12:00	SLC	( )	( )	( )
	9:00–12:00	Ogden Area	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
Wednesday, March 30	9:00–12:00	Tooele	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	2:00–5:00	Ogden Area	( )	( )	( )
Monday April 4	9:00–12:00	SLC	( )	( )	( )
	9:30–12:30	SLC	( )	( )	( )

Date	Time	Place	Preside	Panel	Comm. Rep.
	5:00–8:00	Logan	( )	( )	( )
Tuesday, April 5	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Vernal	( )	( )	( )
Wednesday, April 6	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	2:00–5:00	Ogden Area	( )	( )	( )
	2:00–5:00	Coalville	( )	( )	( )
Thursday, April 7	9:00-12:00	SLC	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
Friday, April 8	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	1:00–4:00	Brigham City	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
	1:30–4:30	Price	( )	( )	( )
	2:00–5:00	Spanish Fork	( )	( )	( )
	2:00–5:00	Price	( )	( )	( )
Saturday, April 9	9:00–12:00	3rd Circuit Ct.	( )	( )	( )
	9:00–12:00	3rd Circuit Ct.	( )	( )	( )
	9:30–12:30	3rd Circuit Ct.	( )	( )	( )
	9:30–12:30	3rd Circuit Ct.	( )	( )	( )
	10:00–1:00	3rd Circuit Ct.	( )	( )	( )
	10:00–1:00	3rd Circuit Ct.	( )	( )	( )
	10:30–1:30	3rd Circuit Ct.	( )	( )	( )
	10:30–1:30	3rd Circuit Ct.	( )	( )	( )
	12:30–3:30	3rd Circuit Ct.	( )	( )	( )
	12:30–3:30	3rd Circuit Ct.	( )	( )	( )
	1:00–4:00	3rd Circuit Ct.	( )	( )	( )
	1:00–4:00	3rd Circuit Ct.	( )	( )	( )
	1:30–4:30	3rd Circuit Ct.	( )	( )	( )
	1:30–4:30	3rd Circuit Ct.	( )	( )	( )
Monday, April 11	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Orem	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	2:00–5:00	Coalville	( )	( )	( )
Tuesday, April 12	9:00–12:00	SLC	( )	( )	( )
	9:00–12:00	Ogden Area	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Wednesday, April 13	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	1:00–4:00	Spanish Fork	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
Thursday, April 14	9:00–12:00	SLC	( )	( )	( )
	1:00–4:00	SLC	( )	( )	( )
Semi-Final Rounds (If you will have judged a previous mock trial)					
Monday, April 18	1:00–4:00	Orem	( )	( )	( )
	2:00–5:00	Ogden Area	( )	( )	( )
Tuesday, April 19	1:00–4:00	Orem	( )	( )	( )
	2:00–5:00	Ogden Area	( )	( )	( )
Wednesday, April 20	1:00–4:00	SLC	( )	( )	( )
	2:00–5:00	Logan	( )	( )	( )
	2:00–5:00	SLC	( )	( )	( )
Thursday, April 21	1:00–4:00	SLC	( )	( )	( )
	1:00–4:00	Ogden Area	( )	( )	( )
	2:00–5:00	Logan	( )	( )	( )

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Utah Law-Related Education Project
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Salt Lake City, Utah 84111

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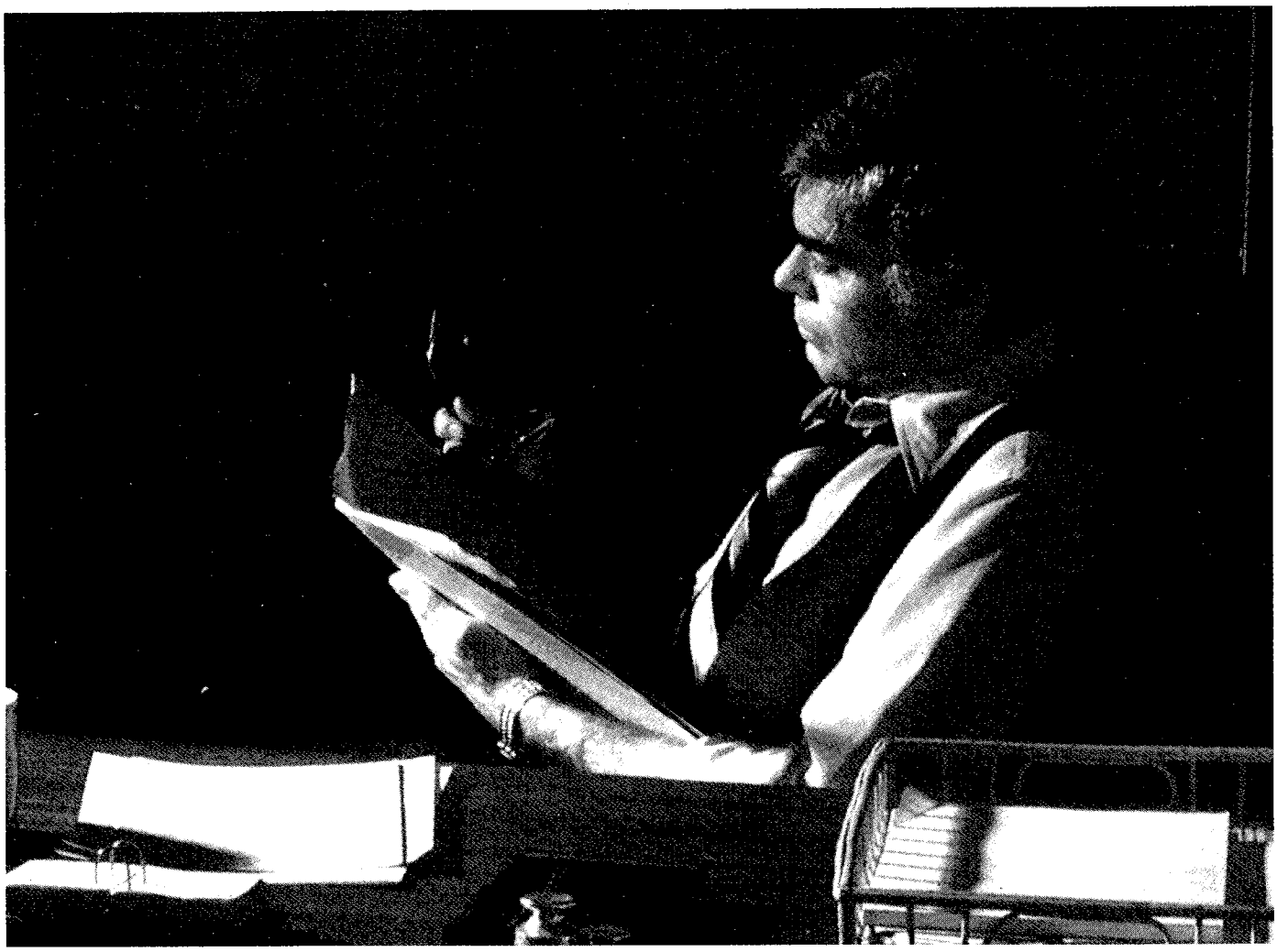

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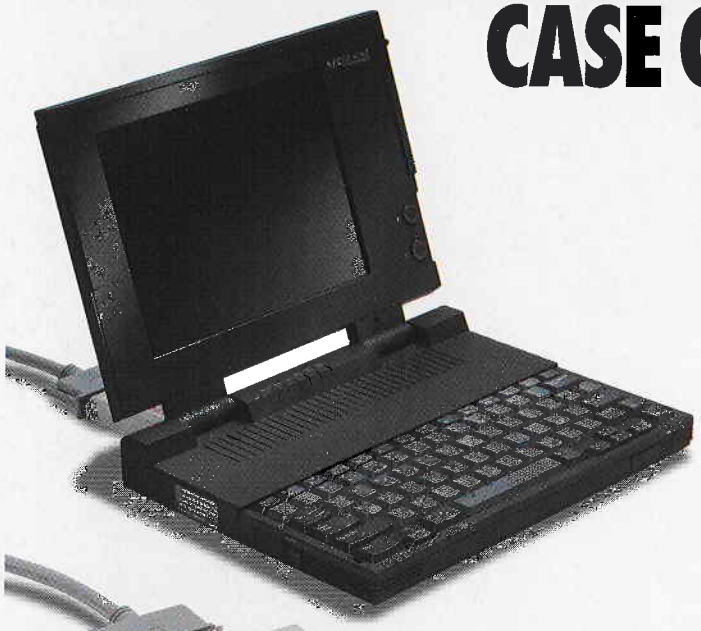

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