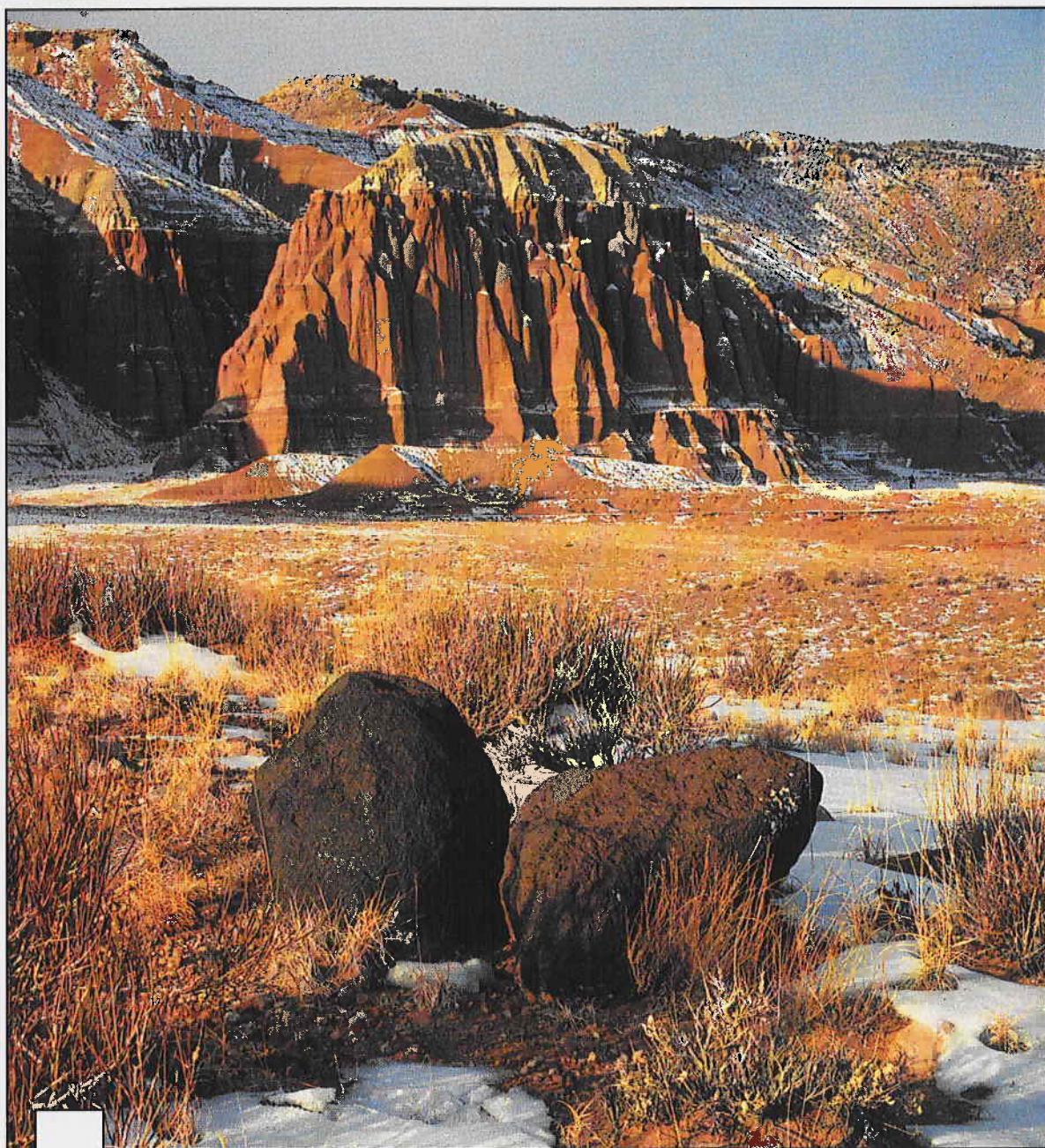


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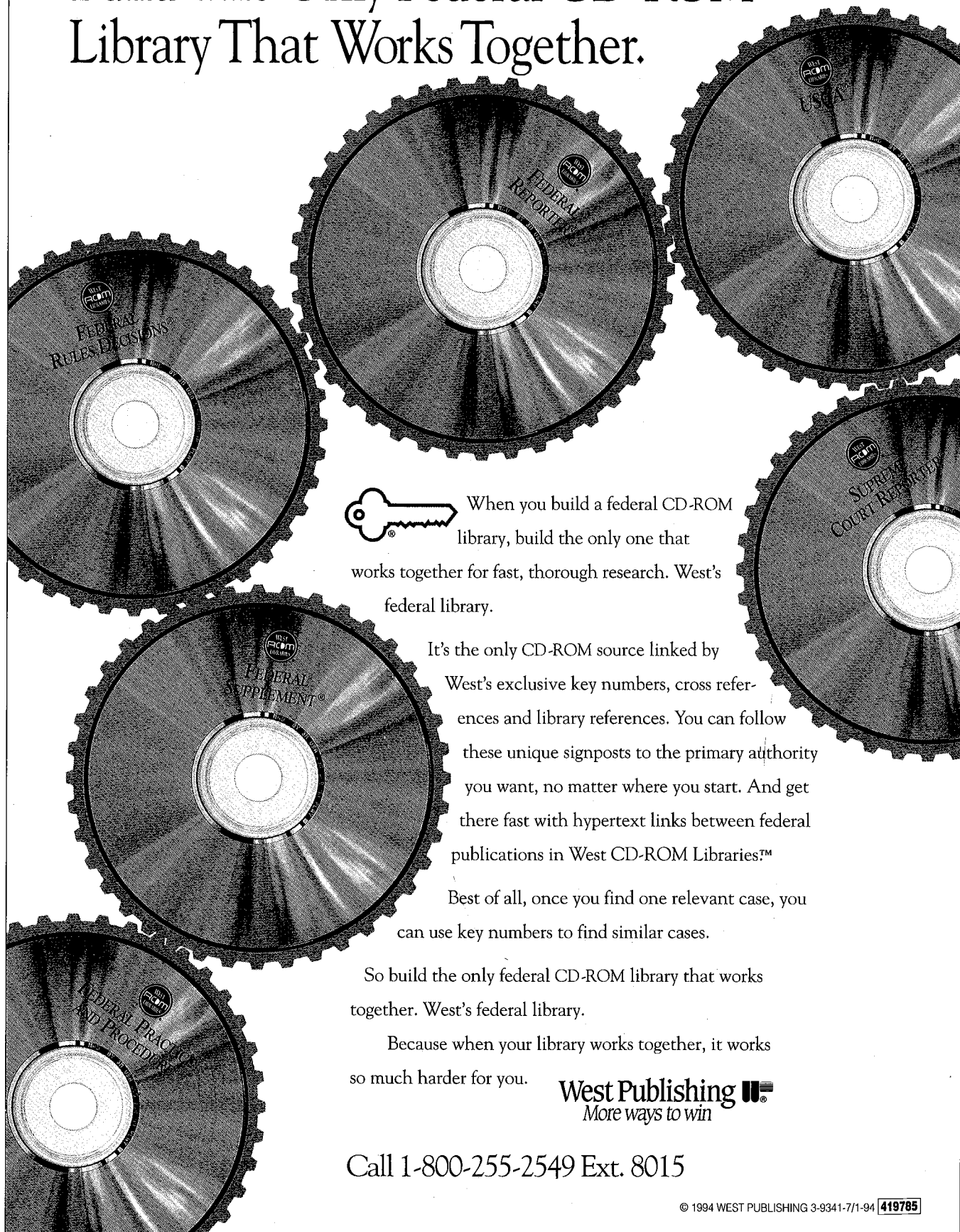
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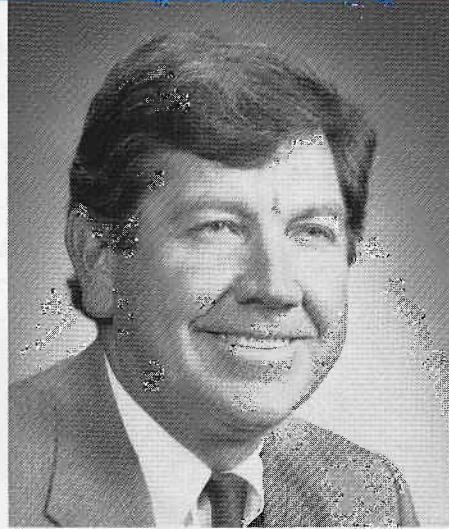
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COVER: Winter in the area of Capitol Reef, Utah by Kent M. Barry, Esq., Assistant Attorney General

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The Bar and the Legislature: One Differing Opinion After Another

By H. James Clegg

This article is written in fits and starts. Numerous things are happening and few have reached conclusion yet, making reporting difficult and somewhat speculative.

Just in case you hadn't heard the legislature is in session.

The Bar Commission has been very active with two pieces of prospective legislation and, potentially, a third.

JUDICIAL NOMINATING COMMISSIONS

Within hours of writing these lines, we expect to see Senator Beattie propose Governor Leavitt's plan to "reform" the judicial nominating commission make-up. This will probably include "reformation" of both trial and appellate court nominating commissions even though we have heard no criticism of the present scheme at the trial level.

The governor and the Bar have very basic differences of opinion:

- He views the Bar as a trade association which follows the will of its membership. When it comes to judicial appointments, the Bar views itself as altruistic and acting purely and solely in the public interest in obtaining hard-working,

bright, experienced, even-tempered judges.

- He thinks no board, much less a non-governmental board, should have much say in the appointment of governmental officials. We think the judiciary is a full partner in government and that its independence is essential and must be protected from political pressures, cronyism and politicization.

- He believes that the people elected him to assemble a government reflective of the ideals he campaigned on and that he will be held accountable by the electorate if he makes mistakes. We believe that a judicial appointment so far outlasts the four, eight or even twelve years a governor serves that there is no effective check by the electorate.

- He believes that a governor's judicial appointments should mirror his own fiscal and social philosophies so as to make state government work more smoothly. We concur but with caution; perhaps our view of the spectrum of beliefs of acceptable judges is more centrist than a given governor wants.

- He believes that the Senate, not the Bar, is the appropriate check on the governor's prerogatives. We believe that serious, public criticism of a qualified prospective judge is symptomatic of a selection system which failed; what qualified candidate wants to go through slashing, party-line

food fights such as given Messrs. Bork, Ginsberg and Thomas? Just what lasting personal honor and effectiveness as a public servant can be maintained even if one survives it? And what prestige is allowed the third branch of government after such a price is extracted?

As you can see, we both have high-minded, articulable and strongly-held positions. We have appreciated the governor's willingness to sit down with us and to his credit, the governor has fulfilled his commitment to keep us involved in the process. However, at the time of this writing, and despite notable effort on both sides, we have found no mutually acceptable common ground and we have ultimately only been able to "agree to disagree" on key issues.

If the Bar is denied a meaningful role in the selection process, perhaps it should refuse any role at all and remain free to comment on, and criticize where appropriate, a governor's appointments to the nominating commissions, a commission's nominations and the governor's appointments while working toward restoration of the merit-selection system. While none of us wish that negative role, neither do we want to be part of a rubber-stamping sys-

tem which negates merit appointments; perhaps it is better to be free to criticize, challenge and campaign for further reforms when times change.

EARLY CONSOLIDATION

As you probably know, H.B. 436 was enacted in 1991 to consolidate the circuit courts into the district court system. As Hal Christensen pointed out in his article in last month's *Journal*, this is a project and goal of some considerable history. Under the 1991 statute, consolidation was to be, and was, effected immediately in Districts 5-8 and deferred until 1996-8 for Districts 1-4.

The latter districts have been urged by forces both internal and external to consolidate before 1996, perhaps as early as 1994. Each of the districts proposed its own plan for early consolidation. The Bar was invited to express its views to the Judicial Council and did so on January 7. Challenged to be creative and progressive rather than belligerent and negative, the Commission expressed general support for the consolidation plan espoused by the Fourth District. We understand this proposal is strenuously resisted by the Third District judges, perhaps others, and have seen no bills submitted to consolidate in 1994.

Alternatively, the Bar Commission offered to support legislation repealing consolidation in Districts 1-4. So far, that motion has not been seconded by an official body although individual judges have expressed support for it.

This has been a difficult, divisive process, between the bench and Bar and internal to both bench and Bar. As Gayle McKeachnie puts it, good people will make any system work. We're trying hard, as are the presiding judges, the Judicial Council and the transitions committees, to find the best way to get there.

JUDICIAL RECALL

There have been suggestions, such as those of Senator Beattie in the February *Bar Journal*, that sitting judges should be subject to legislative recall for less than malfeasance. This apparently includes issuing decisions which "unfairly" impact the state's treasury. Again, we have seen no bill as of this writing and hope one isn't filed.

Interesting times we live in. We hope to see you in St. George.

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1994 State of the Judiciary

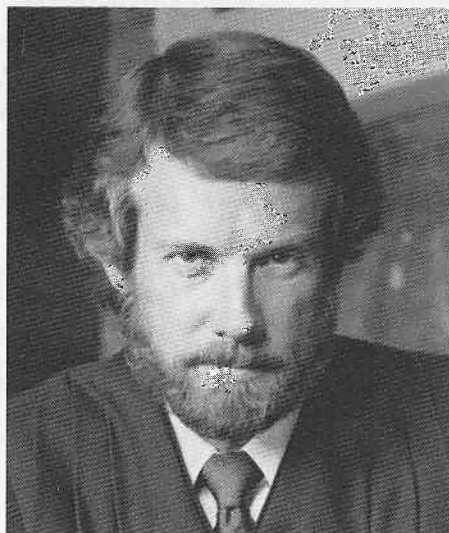
Delivered by Chief Justice Michael D. Zimmerman

Governor Leavitt, President Christensen, Speaker Bishop, legislators, and members of the public. This is my first opportunity to address you as Chief Justice. On behalf of the members of the judicial branch of government, I want to thank you for this opportunity to report on the state of the judiciary.

I know that you have much to do. I will keep my remarks short. Today, I want to use my time to paint a general picture of the current state of the administration of justice in Utah, with emphasis on those aspects of the picture to which our legislative proposals relate. And, I want to comment on the relations between the judicial branch of government and the legislative.

I am pleased to report that on the whole, justice in Utah is being dispensed effectively. As a result of initiatives undertaken by the judiciary, with the support of the legislative and executive branches, we have substantially improved the system's performance and efficiency in recent years. At the most basic level, there is no significant delay in case processing at either the trial or appellate level. The administrative support system for the judiciary is outstanding. There are occasional dark spots in this picture, most particularly the resource-starved juvenile court. But we do not consider that to represent any systemic problem with the juvenile court; rather, it is a matter that can be cured with an infusion of resources and by giving juvenile judges more tools to deal with hard core offenders. Our other legislative proposals are designed to move us to new levels of performance while making the best use of the taxpayer's dollar.

The first of our legislative proposals I want to address relates to alternative dispute resolution. In many states, the courts have rushed to implement mediation, arbitration, and other alternative dispute resolution, or ADR programs, as an alternative to trial of civil cases. They have done this because it promised to speed the



settling of civil disputes. Their action was understandable. In many major metropolitan areas, it takes five or more years to move a civil case from filing through trial. In Utah, we have never had significant trial court delays, and our case processing times have actually gotten even shorter in recent years. In 1987, the median time to complete a civil case in the Third District Court in Salt Lake County was 398 days, well below the national average. By fiscal 1992, this case processing time had been cut in half, to 182 days. And this was during a period when case filings increased 30%.

But while Utah has experienced few of the pressures that fueled the ADR movement elsewhere, we have been studying alternative dispute resolution. We have concluded that it is time for Utah's courts to move into this area. Experience has shown that even in court systems that do not have long delays, ADR offers a realistic prospect of less expensive, faster, and better solutions to citizens disputes than traditional court trials, at least in selected categories of cases. During 1993, the courts worked with interested parties on legislation that will permit the implementation of a program of court-annexed alternative dispute resolution.

We will seek passage of this legislation during this session.

Another area in which we will be presenting legislation relates to capital facilities. In recent years, when we have been confronted with the need to construct or expand court facilities, we have tried to co-locate different levels of courts within a single courthouse instead of building a separate courthouse for each level of court. By putting two or more courts in one building we can achieve significant economies. The number of square feet required for each court is reduced by sharing common facilities. The long-term flexibility of the building is enhanced by constructing courtrooms that can be used by more than one level of court. And putting several courts in one building has the potential for shared support staff and workloads, thus reducing long term growth in personnel needs.

Co-location is something that has been done in the more rural areas for some time, but recently it has been transplanted to the more urban areas. This approach has been followed in the new facilities in Provo and Sandy, and the Brigham City and Ogden courthouses now under construction. This year we will be asking for programming funds for a new Davis County regional facility. And we will be asking for design and construction funds for the Salt Lake Courts Complex.

As you know, we have been acquiring land and have done detailed programming for a co-located facility in Salt Lake that would house the Salt Lake City area courts, the Supreme Court, the Court of Appeals, the Administrative Office of the Courts, the District, Circuit and some of the functions of the Juvenile court. To date, the state has invested over \$3 million in the project, and Salt Lake City has put up an additional \$3 million.

This year, we are proposing legislation that will implement an innovative financing package for constructing the Salt Lake

Courts Complex through a combination of dedicated revenue and bonding. The co-location of these courts will produce over \$11 million in cost savings when compared to separate stand-alone buildings. There will be substantial additional savings in operating and personnel costs. And the co-location of the trial courts within the complex will coincide nicely with the consolidation of the circuit and district courts, giving us great flexibility to meet future needs.

Over the life of the revenue bond we propose, our financing package will ultimately cost the general fund well over \$100 million less than a general obligation bond because it includes significant revenue enhancements in the form of increased filing fees in non-domestic civil cases that will be dedicated to the project. We hope that you will proceed with this important project now, while interest rates are low and before construction costs escalate dramatically.

I have said that the picture of the state of the judiciary is generally good. That is true. But I also mentioned that we have a few dark spots in that picture. First and foremost among those is the juvenile justice system, where a lack of resources has left the system unable to cope with the rising tide of juvenile crime.

For several years, we have warned that the growth rate of the juvenile population has been far outstripping the rate at which we have been able to add needed personnel and facilities. We have repeatedly requested resources to meet these needs. The growing disparity between the number of young offenders and the court's resources has led to long delays between arrest of the juveniles and their processing by the court. It has made intensive intervention programs less available to those with just a few offenses and whose criminal behaviors are easier to change. The limited number of slots in these programs have had to go to the serious, multiple offenders. The squeeze on Juvenile Court resources has also meant that programs demonstrated to cut down on recidivism, like work restitution, intensive probation, and electronic monitoring have had to be severely limited.

This year's top legislative priority for the courts is our juvenile justice program. We are seeking the resources to put serious and chronic offenders on a faster

processing track, to reduce delays in intervening with troubled youth, and to expand programs proven to deter repeat offenders. We are asking for 30 new probation officers, 11 new deputy clerks, and one new juvenile judge. The juvenile court is also asking support for new programs and prerogatives to respond to the special needs raised by the gang problem.

We hope that this set of initiatives receives your early and favorable consideration.

The last topic I want to address is relations between the judicial and legislative branches. In speaking to you on what some might regard as a delicate subject, I do not mean to be presumptuous. But I take my cue from Article I, Section 27 of the Utah Constitution, the last section of our Declaration of Rights. It reads: "Frequent recurrence to fundamental principles is essential to security of individual rights and the perpetuity of free government." I understand this to mean that all of us need to regularly revisit the bedrock principles upon which our form of government is based if our day-to-day actions as public officials are to conform with those principles.

“. . . the state of the judiciary is generally good. . . [but] we have a few dark spots. . .”

On a formal level, our relations are governed by the separation of powers doctrine that underlies all American constitutional theory. As you well know, the basic notion is that government should have three branches; each branch should have separate and limited powers; and, to a large degree, each branch should be independent within its sphere. The idea is that while the resulting checks and balances may not produce the most efficient form of government, it will result in a government that is most likely to protect the individual from the excesses of government power, precisely because no one person or group of persons is likely to dominate all three branches.

A strong and independent judiciary, one that is free to judge cases on their legal merit rather than by the popularity of the resulting decision, is a cornerstone of the

separation of powers doctrine. The importance of an independent judiciary is illustrated by the fact that the Declaration of Independence contains two separate clauses complaining of the British Crown's refusal to permit the establishment of such a judiciary in the American colonies. In addition, the debate over adoption of the United States Constitution focused intensely on the necessity for an independent judiciary.

Over this past weekend I read some of the Federalist Papers that Alexander Hamilton wrote, papers in which he advocates the adoption of the federal constitution and defends the proposal for an independent judicial branch. I must admit that I was reading some of these for the first time, which perhaps shows how many of us take our government's fundamentals for granted. I was struck by how modern some of Hamilton's remarks, written in 1789, sounded, and how true they were to my experience over the past decade.

Hamilton wrote in the Federalist Paper No. 78 that the judicial branch is "the weakest" and the "least dangerous" branch. It lacks power over the purse or over patronage, it has no political constituency, and it cannot set its own agenda. It decides only what comes before it, and in doing so, necessarily disappoints half the parties. Hamilton said, "from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches . . ." "[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments [of government] . . ."

Because of the pressures of which Hamilton spoke, a truly independent judiciary does not exist in a number of states. And the quality of the courts in those states has suffered as a result. However, in the 1984 revision of the judicial article of the Utah Constitution, and the implementing legislation, have given Utah a strong and independent judicial branch. Merit, rather than partisan considerations, became the stated criteria for selecting judges. And the revised article vastly improved the internal administrative structure of the judiciary, giving it the necessary tools to act as a cohesive unit, and to plan for the future. The actions of the Utah judiciary under the revised article

have shown its willingness to unsettle old ways if necessary to make the system efficient and effective.

But no matter how capable we are at self-administration, ultimately, the judiciary remains an independent branch of government largely at your sufferance. The legislature has the power of the purse, it has the ability to strengthen or to undermine the judiciary's real independence through legislation affecting the selection and retention process, and it can propose constitutional amendments designed to weaken or destroy us as a separate branch just as easily as it proposed the 1984 amendments that strengthened our independence.

In a real sense, if the principle of an independent judiciary is to remain strong in Utah, it depends on the legislature's self-restraint. You must be willing to refrain from taking actions that are within your power, and that may seem justifiable based on political or policy concerns of the moment, when upon reflection, those actions are shown to be inconsistent with the separation of powers principle that helped to foment the American Revolution

and that has been a core value of American constitutionalism ever since.

Having stressed the importance of a strong and independent judiciary, I want to make it clear that while the separation of powers doctrine may be a superb means for protecting the people from governmental tyranny, I recognize that its checks and balances necessarily create tensions among the branches. These tensions can, in turn, be destructive of the system itself. In my opinion, they must be diffused if an effective government is to be formed from the three separate branches. And the only means I know for diffusing these tensions among the branches is open and honest communication which fosters mutual understanding and cooperation within the limits set by the constitution.

Communication is a two-way street. Because of the unique ethical code judges must adhere to in discussing cases and legal issues, that code can be used as an excuse to frustrate communication. If we are to fulfill our role as a co-equal branch of government, we cannot use the terms "independent judiciary" and "separation of powers" as

slogans behind which we hide, nor can we use them as simplistic justifications to hold ourselves aloof and remote from discussions of the need for substantive changes in the law or in the way justice is administered. We in the judiciary must work with you to establish a dialogue and to seek mutual understanding.

In recent years, both the Judicial Council and the Supreme Court have made efforts to open their rule making processes to interested legislators and to Legislative Counsel so as to facilitate communication at early stages of policy making. I intend to do more to develop additional lines of communication in the coming months and years. I hope you will do the same. Understanding is the best preventative for unnecessary clashes between branches of government.

Good luck in the coming session. You face unenviable choices. We in the judiciary look forward to working with you to help provide the people of Utah with the quality government they deserve.

Thank you.

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There Was Something Wrong In My Life: One Alcoholic's Story

By Anonymous

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I had it made. I should have been happy. I had a beautiful wife, two healthy kids and a good job in an established law firm in my hometown. My trial practice was growing, and I enjoyed all the respect accorded an up-and-coming trial lawyer.

The only problem was that I was not happy. I couldn't really say why. My wife suggested that maybe I drank too much sometimes. I told her, "Everybody loves me at parties. I tell jokes. I'm fun to be around." And besides, I said, "If you were under all the stress I'm under, you might drink a little too much once in a while yourself." This scenario repeated itself more often than I care to mention.

There was something wrong in my life. I just didn't want to put the right label on it: alcoholism.

I drank to escape. Being a trial lawyer, I believe to this day, is one of the most stressful careers there is. The pressure to produce is enormous. You must win — for the client, the partners, your family, and, of course, your ego and reputation. Alcohol became my escape.

I never wanted to drink too much. I just wanted to get that "glow." I wanted to feel like the world and I were in perfect sync. Drinking to that state of harmony with the world was sort of like roasting marshmallows. You put the marshmallow on the stick, put it into the fire, and if you pull it out at just the right moment, it's perfect. But if you leave it in just a split second too long, it's burned to a crisp and ruined. In the end that's the way my drinking became. Just one more manhattan, martini, or brandy, and I got burned.

Once in a while, in moments of clarity, I would connect my drinking habits to my

past. My father died from active alcoholism when I was 19. We never called it that, though. During my childhood we never called my dad an "alcoholic." After all, an alcoholic was skid row bum who didn't have a job, drank from a brown paper bag and didn't have the willpower to "pull himself up by the bootstraps." My father was a successful businessman and had money. Sure, he would go on drinking binges for days and caused more terror in our home than I care to think about, but he was never an "alcoholic." He simply "drank too much" sometimes.

Just as I had denied my father's illness, I later refused to see my own. The denial system of an alcoholic is overwhelmingly powerful. I had all the signs and symptoms, but I of course wouldn't admit it.

For example, when asked what an alcoholic was, I would say, "That's a person who drinks in the morning." But when I would have a Bloody Mary — or two or three or four — at an 11 a.m. brunch before a football game, that was not morning. That was different. Or I'd say, "An alcoholic is someone who can't stop drinking." I always quit drinking during January just to prove to myself and my wife that I could. I was the most miserable person in the world to be around for those 31 days and when February rolled around, I made up for lost time. I also used to tell myself, "An alcoholic is somebody who gets picked up for drunk driving." I was a prosecutor of drunk drivers, and one of my mortal fears was to get picked up for driving while intoxicated (DWI). I realize now it didn't happen to me only because I was lucky.

The hardest thing of all for me to admit was that I had a drinking problem. Whenever I would read a magazine with one of those damnable quizzes to tell whether you are an alcoholic, I would always flunk the test. I would say, "You know, if most of my

friends answered those questions honestly, they would flunk the test, too." Little did I know then how true that statement would turn out to be.

One reason I didn't believe I had a problem was that I had all the trappings of success. Surely, I thought, I couldn't be an alcoholic and be as successful as I was. I didn't realize that I didn't have to be on skid row to have an unmanageable life. I have seen this blindness to the problem in many successful lawyers who are full-blown alcoholics and have no idea why they are unhappy in their practices, their marriages and life in general.

AN HONEST LOOK

Fortunately for me, there was no loss of job, no loss of family and no DWI arrest. At age 34, I agreed to take an honest look at how my drinking was affecting my life.

I had just tried a tough rape case. I prosecuted and won. My colleagues, the victim, and I went out and celebrated. One of my favorite things to do when I was drinking was to bring people over to my house for breakfast. "My wife won't mind," I said. At 1 a.m. that night we came home. Things started getting fuzzy. I don't remember everything I said or did that night (blackouts are one of the signs of the latter stages of alcoholism).

The next morning my wife said, "Do you remember everything you said and did last night?" I said, "Of course, and don't give me any trouble. You never understand or support me when I need it. Who wouldn't drink, living with someone like you?"

I went to the office. "My God! What did I do?" I wondered. I didn't know. I sent my wife a dozen roses (a more than common occurrence), called, and said, "Let's go to dinner and a movie. It won't happen again, honey. I'm really sorry."

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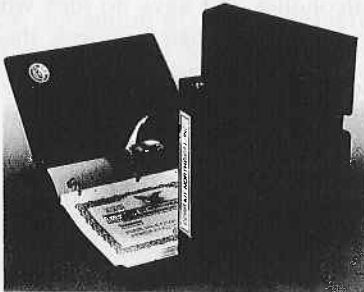
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I had no intention of having a drink that night, but I did. It was Friday, and two of my friends said one wouldn't hurt me. That night over dinner I agreed to see an addiction counselor to satisfy my wife.

I went through an outpatient treatment program and was told that I couldn't stay sober without Alcoholics Anonymous (A.A.). That was more than 15 years ago. I am still very active in A.A.

Little did I know how dramatically my life would change because of my decision to seek help. I always envisioned people who didn't drink at all as being miserable, unhappy souls. I thought drinking would open up my life — all my social activities revolved around alcohol — and stopping would certainly shut it down completely. I wondered who would want a lawyer who was an admitted alcoholic. How would I get new business? I always told my wife that I had to go to bars and socialize in order to build my practice.

None of that was true. From a professional standpoint the greatest result of quitting drinking has been the tremendous improvement in my skills as a trial lawyer. I didn't realize how alcohol had affected me for 17 years. One incident about six months after quitting made me see how I had changed.

*"The hardest thing of all for
me to admit was that I had
a drinking problem."*

REAPING THE BENEFITS

I was involved in a major trial lasting about a month. When it was over, the trial judge, one of the most respected in the state, called me into his chambers. He said, "Sit down. I want to talk to you." I didn't know what to expect. He said, "Do you know what happened in that courtroom?" I was still puzzled. I said, "Well, I know we won, and it was a tough fight with five lawyers on the case."

The judge continued, "This was not a fair fight. Every day you were bright-eyed and bushy-tailed and sharp as a tack. Those other guys came every Friday looking like whipped pups. What are you doing? You were a good trial lawyer before, but you

really have improved. Have you been sneaking off to secret seminars or what?"

By this time I was grinning from ear to ear. I decided to tell him. I said, "Judge, all I did was to stop drinking completely."

"You're kidding," he said. "Well, if that's it, then my advice to you, young man, is to stay stopped because I can tell that it's already paid off for you in this courthouse."

I will never forget that talk. I didn't fully appreciate the improvement in my abilities as a trial lawyer until that moment. My clients have reaped the benefits directly.

Since I quit drinking, I have found that most, if not all, of my preconceived notions about alcoholism were totally wrong. Alcoholism is a fatal illness, and I have seen many good friends and others die from it simply because they refused help. Lawyers, in particular, seem to think they are too smart to be alcoholics. I was one of those until I took an honest look at what alcohol was doing to me, my family and everyone around me.

For trial lawyers, heavy drinking seems to go with the territory. We have so much stress in our work because we deal with other people's problems. It is only natural to want to escape it all. Unfortunately, some people choose alcohol or other drugs as their escape route. Eventually, alcohol or drug abuse becomes the most pressing problem, but the underlying problems that led to addiction are still there. That is the reason I still go to meetings. If drinking were my real problem, I wouldn't need A.A. because I haven't had a drink in more than 15 years. My real problem is still there: living life on a daily basis without my usual escape mechanism.

I have accepted the fact that I am an alcoholic and that alcoholism is a disease. I go to A.A. meetings because I want to go. The people there are kind and loving, and simply doing what they can daily to become better human beings.

Is it easy? Absolutely not. Simply taking the first step, seeking help, is extremely difficult. Once the process is started, though, great things can happen. Awareness of alcoholism and other types of chemical dependency is perhaps at an all-time high now. There are more counselors and treatment centers than ever. Help is everywhere for those who seek it.

If you believe that you or a loved one

may be suffering from this illness, the most important thing to do is to take action. Call a treatment center and just ask some questions. The rest will happen naturally.

History was made at the Association of Trial Attorneys of America annual convention in 1989. A number of recovering alcoholics who are members of ATLA and A.A. got together and started holding A.A. meetings during conventions. We are building lasting friendships. Anyone who wants to stop drinking is welcome. The meetings are totally confidential. A number of people have been helped since we started the meetings.

I believe I owe my life to A.A. and sobriety. I am never alone in dealing with my day-to-day problems, and life has become truly living.

An alcoholic lawyer who continues to drink and refuses to even consider examining the problem is like a person who jumps out of the 20th-story window of a building and while sailing past the 18th floor says, "Everything is going great — so far!" Do yourself, your family and society a favor and take a look at your problem before you hit bottom.

THE OTHER BAR OF UTAH *a support group for lawyers in recovery*

The Other Bar of Utah is a group of lawyers, law students and judges in our community who meet regularly and share with each other in the desire to improve their own personal and professional lives which may have been affected by the

overuse of alcohol and/or drugs. The Other Bar of Utah has been meeting weekly for over four years. Since the Other Bar of Utah first established its meeting for lawyers in recovery we have had over 40 men and women attend.

The Other Bar is NOT affiliated with the Utah State Bar, Alcoholics Anonymous, or any other group. Rather, its primary purpose is providing mutual help and support in achieving sobriety and maintaining our recovery.

Among those who attend are men and women in corporate, governmental, and private practice. The diversity of our group reflects the profession as a whole with lawyers from large firms and solo practice; individuals who have sought professional treatment and those who quit on their own; newcomers to the practice or recovery to those with years of experience; those who have had Bar disciplinary problems and those who have had none. Also represented are lawyers of varied religious backgrounds; as well as lawyers working outside the profession.

The Other Bar is based on successful support groups for lawyers in other jurisdictions and the "Twelve Step" model initiated by A.A. Additionally, we informally network with other lawyers in recovery groups throughout the state and in many jurisdictions, nationally and internationally.

Within the Other Bar, each of us has our own personal level of anonymity and confidentiality which is strictly respected by others. No last names need be used, no per-

sonal questions are asked and information shared during the meetings is not repeated outside the meeting rooms.

We meet every Monday evening at 5:30 p.m., 231 East 100 South (at St. Mark's Episcopal Cathedral — Pyke Room), downtown Salt Lake City. We welcome interested judges, lawyers and law students. Plenty of parking is available. Enter through the East door from the parking lot.

If you think you may have a problem and are interested in how others have learned to handle similar circumstances then you are welcome to join us. For additional information, contact a member of the Other Bar or call Jim at (801) 272-9088.

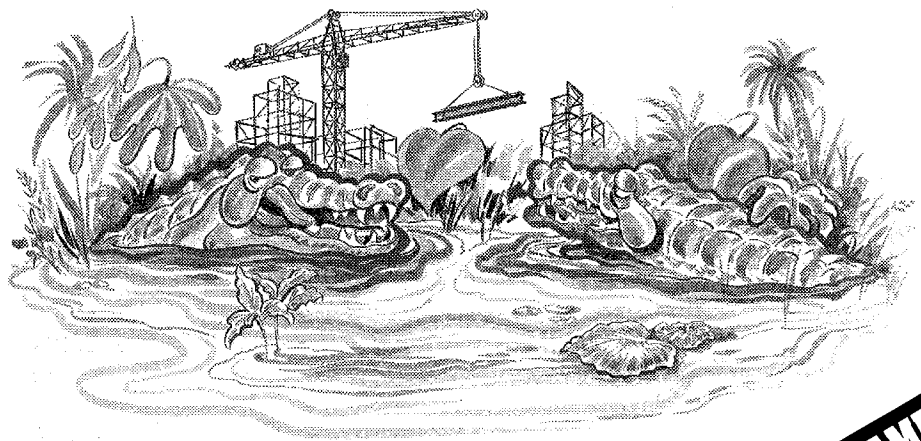
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Do you have concerns that a fellow lawyer is impaired? Unfortunately, most issues of impairment are raised for the first time when disciplinary proceedings are initiated. The Lawyers Helping Lawyers Committee seeks to identify these problems before Bar Counsel becomes involved. Referrals and inquiries to the Lawyers Helping Lawyers Committee are confidential. If you, or someone you care about, has a problem with substance abuse or any other impairment, we can help. Call in confidence, any member of the committee or: James W. Gilson, Chairman — 533-8282; Herschel Bullen, Vice Chairman, — 466-7851; W. James Denver — 272-9088; and H. Don Sharp — 621-2464.

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WE DRAIN SWAMPS

In Memoriam Charles S. Zane 1831-1915

By Retired Justice J. Allan Crockett

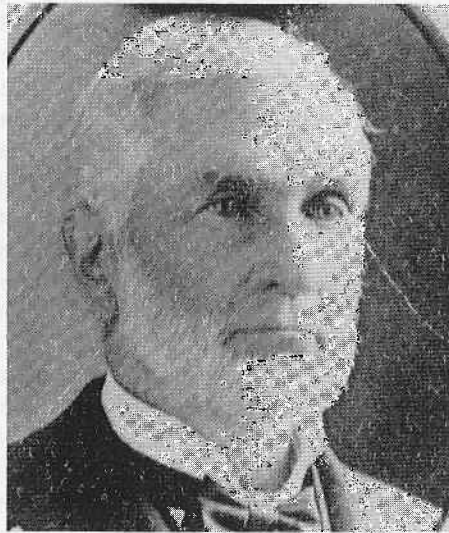
Law is that which commands us to do good and forbids us to do wrong; patience is a bitter tree, but it bears sweet fruit. Those two thoughts, from Cicero and from Confucius, are keys to the career of Charles S. Zane.

* * * * *

He was born March 3, 1831, in New Jersey. At the age of sixteen, he left home and went to Philadelphia, where he worked as a grocery clerk and later operated a livery stable. He attended McKendree College at Lebanon, Illinois, from 1852 until 1855. He then became a school teacher for a season but continued to study law, took the examination, and was admitted to the Illinois Bar in 1857. He entered into a partnership with Shelby M. Cullom, with whom he began the practice of law.

Two years after his admission to the bar, he married Margaret Maxey. They became the parents of nine children, six of whom survived him. He was appointed to and served a term as county attorney of Sangamon County. In 1875, he was elected circuit judge in the Fifth Circuit of Illinois, in which position he continued until 1883. Because he demonstrated superior qualifications as a judge, President Chester A. Arthur offered to commission him as the chief judge of the Territory of Utah. He and his wife, being of an adventurous nature, decided to accept that offer, and he did so on July 5, 1884. They arrived in Salt Lake City on August 28, 1884. On that date, he was sworn in by Governor Eli H. Murray and took office on September 1.

Judge Zane had a long and interesting life about which a book could be written. So the effort to record something of his



personality, activities, and accomplishments, in this capsule sketch, is limited to a few strokes of a wide brush.

He was fully aware that he was coming into a situation charged with hostility. As a representative of the United States government, his main objective was to bring into line the "rebellious" Mormons,¹ who had left (or been driven from) Illinois to establish an independent church colony in the Salt Lake Valley of the Rocky Mountains, which was then Mexican territory. It should be noted, however, that these were American citizens who maintained loyalty to the United States.

He entered into that hostile atmosphere with some apprehension, knowing that troubles were to be encountered. At the outset, he made known his opposition to polygamy and his firm resolve that those who practiced it must desist or suffer the consequences.

The Mormons' defiant attitude was graphically shown by the publication of a statement authored by Brigham H. Roberts

and Orson F. Whitney, both then contemporary Mormon historians: "Judge Zane will stand classed as sharing in the responsibility for the cruelties and injustices which mark . . . [that period of conflict] of Utah's history. . . . He could never divorce himself from the deep-seated prejudice against Mormons. . . . His object was the overthrow of Mormonism as a religion."²

He bore this and similar attacks with patience and made no response, but followed the dictum: A soft answer turneth away wrath. Without departing from his judicial demeanor, he showed an attitude of friendship to the Mormons, both in and out of court. He expressed commendation for their industrious efforts in planning and building their city and their churches, in beginning construction of their temple, and of their homes and businesses, and in diverting the mountain streams to irrigate the land, all in what had been a remote and arid desert.

He thought that the troubled situation he entered into was a good one in which to apply the aphorism: "A pancake cannot be fried so thin that there are not two sides to it." And there had to be two sides to this controversy. He conceived it to be his duty as a judge to try to see the point of view of those on both sides of the dispute and to persuade them to settle, or at least reduce, the tensions between them.

The major problems he confronted in Utah centered on religion. He knew enough about human nature to realize that a person can believe what he wants to believe, even to the extent of feeling and declaring sure knowledge of his belief, so he took no issue with what the Mormons wanted to believe. But for himself, he declared himself to be an agnostic. He had no doubt that there is some great power,

knowledge, and/or enlightenment that created and controls the universe, most often referred to as God or the Creator. But he did not claim to know the answer to what has been called the great mystery of life by many wise men.³ He was not in tune with those who in some manner had had "revealed" to them, or been "inspired" to know, with various degrees of certainty, where they came from, why they were here, and what would happen to them hereafter.

To the Mormons and their representatives, who argued that they were following the laws of God (citing scripture), which they contended to be superior to the laws of the land, he at times showed some impatience, but treated them with judicial courtesy and advised them that it was his duty and theirs to obey the law as established there and now and to leave conjecture as to what might happen hereafter to be dealt with then.⁴

In civil matters, he competently performed the numerous duties of a judge. His rulings gave the impression that he generally leaned toward the protection of the poor and oppressed. In numerous cases, Mormon plaintiffs were awarded substantial sums on claims they made and for injuries they suffered.

Judge Zane was also supportive of the Mormon schools. After investigation by himself and through others, he expressed satisfaction that no religion was taught in them, and he favored the school district in levying taxes for their operation.

But it is not to be assumed that Judge Zane always took the part of the poor and oppressed. He stood squarely on the principle of equal justice for all, and even the rich have rights. When the facts and the law required it, he protected corporations, institutions, and the wealthy. This justified the expression of R. N. Baskin (later a justice of this court), who wrote of him, "A more conscientious and humane judge never sat upon the bench."⁵

In his activities with the Mormons, he was not as much concerned with problems in the law as with the sociology and psychology in enforcing it. His task was to firmly but gently and discreetly bring the Mormons out of the past and into the modern world. He realized that just as each of them was a different individual to him, he was a different individual to each of them; and further, that whatever he experienced

with them became a part of his life, and what they experienced with him became part of theirs. He was sensitive to the impressions they were making on each other. His effort and desire were to seek a balance between the rights and interests of society; and the rights and interests of the defendants, for the purpose of serving both interests, with a bit more emphasis on persuading the defendants to be law-abiding citizens.

The Mormons defended their views and practices in three ways: First, with some plausibility they relied on the often-referred-to First Amendment to the United States Constitution: that Congress shall make no law respecting *religion* or prohibiting free exercise thereof. In the absence of specific legislation on the subject, the Edmunds Act had been passed. It expressly made cohabitation (polygamy) unlawful, and that enactment had been upheld.⁶ Second, they hid out. There are innumerable stories about the ingenious and sometimes devious methods they used to avoid arrest by the "Federals." And third, in whatever way guilt was ascertained, by trial or plea, they took some pride and satisfaction in accepting their prison term and serving it.

In his treatment of the large number of Mormons (about 1500) whose guilt had been determined, he took into consideration the circumstances of each defendant and treated him as he thought would best serve the above-mentioned purposes. In some cases, he imposed the statutory penalty of six months; in others, he modified the sentence as justified; and in a few cases, he extended clemency and gave suspended sentences, requiring no imprisonment at all.

"Judge Zane always stood squarely on the principle of equal justice for all. . ."

Many of those who served their terms of imprisonment felt a sense of triumph in the devotion they had shown to their religion, and they went back to their communities under the belief that they had earned the right to live in polygamy and continued to do so for the rest of their lives.

The issue of polygamy had been a thorny

one ever since the Mormons came to Utah. The Church authorities had three times (1855, 1882, and 1887) caused acts to be introduced in Congress to admit Utah to statehood. Each effort had failed, mainly because of polygamy. When the authorities became convinced that further such efforts would be futile, they decided to accept the inevitable. The difficulty which had persisted for so many years was ostensibly brought to a conclusion when on October 6, 1890, an "official declaration" commonly called "The Manifesto" was presented by Church President Wilford Woodruff in the general conference of the Church. It announced the policy of abandoning polygamy and advised all members of the Church to cease the practice and obey the law. The proposal was presented to the congregation, and in the usual manner, by the show of hands, they voted unanimously in favor of it.

The next day, Justice Zane published an article commending the action and made the following announcement in court:

The alleged revelation . . . announcing the abandonment of polygamy — I regard it as an authoritative expression of [the Church]. My confidence in my fellow men leads me to accept such a solemn declaration, and the expression of such a good purpose as being honest and sincere.

Arriving at that accord shows the nobility of character of both President Woodruff and Judge Zane and the sincerity of their desire to bring about a state of peace and harmony. However, neither of them was naive enough to believe that polygamy had been entirely stamped out. They knew that the jailing of polygamist fathers left mothers to take care of families and that this and other aspects of polygamy results in discord, problems, and hardships in numerous ways.

Judge Zane's appointment expired in 1893, and after considerable urging on both sides, Mormons generally opposed and gentiles generally in favor, President Benjamin Harrison reappointed him. When Utah was admitted to statehood January 4, 1896, he became by law the first Chief Justice of the Utah Supreme Court.

The next year, he ran (along with other state officers) and was elected to a two-year term. He ran for reelection in 1899 but had become involved in a political issue by declaring himself opposed to free

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silver and was not reelected. He and his family felt sufficient acceptance and goodwill that they continued to make their home in Salt Lake City. He resumed the practice of law under the firm name of Zane, Stringfellow and Whitaker.

In his activities with the Mormons, as with others, their experience followed the path so common in life. As they worked and associated together, the areas of difference and misunderstanding decreased while the areas of understanding increased. Judge Zane came to know that despite their feelings of resentment of intrusion into their lives and their desire to be isolated, the Mormons were really a people of love and goodwill; and they came to know that, quite apart from his judicial reserve, Judge Zane was a man of compassion and concern for his fellowmen who by steadfast devotion to duty evidenced sterling qualities of character. He had become so well thought of that the city council named Zane Avenue, just north of the Capitol, in his honor.

During the last two years of his life, his failing energy prevented him from doing very much work. On March 29, 1915, he passed away at the home of his daughter, Margaret Zane Cherdrone, with whom he had been living.

Judge Zane, as the first chief justice of our state, presided over our judiciary during the most tempestuous period: the transition from territory to statehood. With undaunted courage and determination, he coped with

the difficulties of that time in such a creditable manner that we should be proud and grateful. Most of those who are familiar with the facts would agree that no one has done more than Judge Zane to reduce the long-standing conflict and bring about the degree of harmony that exists. He left an indelible mark on law and justice here, and that stands as a monument to his memory.

The author acknowledges the use of materials from *The Americanization of Utah for Statehood* by Gustine O. Larsen and from the article on Justice Zane written by Thomas G. Alexander, both Professors of History, Brigham Young University; the excellent assistance and advice from Martha Stewart, retired librarian of the University of Utah; and the gracious and efficient assistance of Sherlene Baker, a long-time assistant secretary of the Utah Supreme Court.

¹In this article, the terms "Mormons" and "the Church" refer to the Church of Jesus Christ of Latter-day Saints.

²Roberts, *Comprehensive History of Utah* VI 176-77.

³See P. A. Schlipp, *Albert Einstein, Philosopher, Scientist*; Bertrand Russell, *Mysticism and Logic*.

⁴Letters of Secretary Franklin S. Richards to Church Presidency, October 1882 Manuscript 132, Utah Historical Society Archives.

⁵*Baskin Reminisces* 52-53, Utah Historical Society Archives.

⁶In *Reynolds v. United States*, 98 U.S. Rep. 5, the United States Supreme Court reasoned that one can believe, teach, or preach anything he desires, but can be prohibited from actions which are subversive of or hazardous to the peace and good order of society (some exceptions not of concern here).

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PRESS RELEASE

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The Rocky Mountain Mineral Law Foundation and the American Bar Association are sponsoring a two-day institute in Houston on "Oil, Gas, and Mining Development in Latin America."

The conference will feature speakers with international expertise and will present an organized and comprehensive analysis of major factors to be considered when initiating and developing Latin American oil, gas, and mining opportunities.

The general program will feature an overview of current and historical natural resources development activities in Latin America, presentations on political risk and the extraterritorial effect of U.S. laws, and a panel discussion on financing oil and gas and mining projects. **Emilio J. Cardenas**, Argentine Ambassador to the United Nations, will deliver a keynote luncheon address on treaties and other multinational agreements affecting the minerals industries.

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Basic Procedure of a Step-Parent Adoption

By Jeannine P. Timothy

The step-parent adoption decree legally validates the family unit which the parent, step-parent and child have already created together. This decree also prevents the absent biological parent from subsequently asserting parental rights over the adoptee. This article is a basic procedural guide on "How to Perform a Step-parent Adoption." It will first focus on the legal requirements of a step-parent adoption, and then explain the requisite forms and pleadings used to initiate and complete the process.

To perform a step-parent adoption, the Utah Code specifies six criteria that must be satisfied before the granting of an adoption decree. The criteria are as follows:

- 1) The child's biological custodial parent must consent to having his or her spouse adopt the child.¹
- 2) The step-parent must be an adult (21 years or older) and at least ten years older than the minor child.² This age requirement applies also in adoptions of adults.
- 3) The child and the step-parent must have lived together in the same home for at least one year before the decree can be entered.³ This cohabitation requirement may be unreasonable in adult adoptions, but it is not an issue that has been tested. Therefore, when drafting a petition for an

JEANNINE P. TIMOTHY received her juris doctor from the University of Utah College of Law in 1985. Since that time, she has been a solo practitioner in the areas of Family Law, Probate, and Wills and Trusts.

adult adoption, allege the amount of time the adoptee resided with the Petitioner, even if that period of time ended prior to the filing of the petition.

4) If the adoptee is older than twelve, she must consent to the adoption unless she is incapable of consenting.⁴

5) If the adoptee is married, their spouse must either receive notice of the petition to adopt or sign a written waiver of their right to receive notice.⁵

6) The issue of consent from the absent biological parent must be resolved. The resolution of this final criterion in a step-parent adoption is determined by the particular fact situation of each individual adoption matter.

For the attorney and the family involved in a step-parent adoption, the main concern is this issue of consent which may or may not be required of the absent biological parent. Since this sixth criterion is the most difficult part of the step-parent adoption process, three scenarios follow that demonstrate the different fact situations and the

procedure required for each.

In the following scenarios, it is assumed the adoptee is a minor child. If in fact the adoptee of a step-parent adoption is an adult (over the age of 18) then the procedure is significantly simplified because no consent is required from the parents of an adult adoptee.⁶ With no consent required, the matter is truly "uncontested" and proceeds to final hearing without complication.

A. SCENARIO I

FACTS: The absent parent is the child's biological father who was never married to the child's mother and was not named on the child's birth certificate.

PROCEDURE: In such cases a paternity search through the Bureau of Vital Records and Health Statistics is required by law.⁷ The Bureau is located in the Cannon Health Building at 288 North 1460 West. The mailing address is P.O. Box 16700, Salt Lake City, Utah 84116-0700. To conduct a search, the Bureau requires a \$9.00 fee plus the following information:

- Name of child
- Sex of child
- Child's date of birth or estimated date of birth (month and year)
- Place of child's birth
- Mother's name and maiden surname

Mother's residence
Father's name, if known
Father's residence, if known

The Bureau will search its records to see if the child's biological father filed a notice of paternity, called an "Acknowledgement of Paternity by Father." If such a notice was filed, the Bureau will issue a certified copy of the notice. If such a notice is not found, the Bureau will issue a "Certificate of Search" which indicates that notice of paternity was never filed. This "failure to file a timely notice of paternity shall be deemed to be a waiver and surrender of any right to notice of any hearing in any judicial proceeding for adoption of the child, and the consent of [the father] to the adoption of the child is not required."⁸ The step-parent then submits the "Certificate of Search" to the court and the matter proceeds to final hearing.

The absent biological father can dispute this waiver of consent if he can prove that 1) through no fault of his own, 2) it was not possible for him to file a notice of paternity before the petition for adoption was filed with the court, and 3) he filed the notice of paternity within 10 days after it became possible for him to do so.⁹ If the father fails to satisfy this three-prong test, then the waiver of consent stands, and the adoption proceeding progresses to final hearing.

If the search reveals that an "Acknowledgement of Paternity by Father" was filed with the Bureau of Vital Statistics, then the biological father must be given notice of the petition for adoption. Notice must be served by certified mail, return receipt requested, at the last address filed with the Bureau.¹⁰ This notice must specifically state that the father has 30 days to respond to the petition of adoption if he intends to contest the adoption.¹¹

Very often the notice mailed to the biological father is returned because he has moved. The statute does not require that the putative father actually receive the notice of adoption petition, only that the notice be mailed, by certified mail, to the last address he identified with the Bureau of Vital Statistics. Submit the returned notice so that it will become part of the court record and serve as proof that the proper procedure was followed in trying to notify the biological father of the adoption action. Many judges will nevertheless require one more step, notice by publica-

tion, if the certified mailed notice to the biological parent is returned for any reason.¹² This notice by publication must specifically name the father to whom notice of the adoption is given, but it need not name the step-parent seeking the adoption.¹³

B. SCENARIO II

FACTS: The child's custodial parent divorced the absent biological parent and, since the divorce, the absent parent has neither supported nor communicated with the child, or has made only a token effort, for a period of at least one year.¹⁴

PROCEDURE: In this case, the Petitioner should allege in the Petition to Adopt that the absent parent has abandoned the child, and therefore, consent from the absent parent is not required. However, the failure to communicate with one's minor child for one year or more is only a rebuttable presumption that the absent parent has failed to maintain a parental relationship.¹⁵ Most judges, therefore, will require either consent from the absent parent, personal service upon the absent parent of "Notice of Petition to Adopt" or, if the whereabouts of the absent parent are unknown, service by publication of the "Notice of Petition to Adopt."

"... the main concern is the issue of consent which may or may not be required of the absent biological parent."

If either personal service or service by publication is completed and the absent parent does not file an objection within 30 days, then the matter can proceed to decree. No further notice need be given the absent parent, and he or she is barred from any subsequent action to assert parental interest in the adoptee.¹⁶ If the absent parent responds to the petition for adoption, then the attorney must evaluate the circumstances to determine whether or not the absent parent will give consent to the step-parent adoption.

Occasionally, an absent parent will contact the attorney or the custodial parent about the adoption matter to ask questions, but has no serious intention of contesting

the action. If the absent parent agrees to give his or her written consent to the adoption, it is always best to have the consent signed under oath before the judge. If the absent biological parent is reluctant to appear before the judge, his or her written consent may be signed before a notary public and must be voluntary.¹⁷ A consent obtained in an unethical manner can be revoked by the signer, but a validly obtained consent is effective when signed, and is thereafter irrevocable.¹⁸

C. SCENARIO III

FACTS: The absent natural parent, whether previously married to the custodial parent or not, is involved in the minor child's life. This is demonstrated by regular communication with the child, visitation, gifts and/or financial support.

PROCEDURE: In situations such as this, the step-parent adoption will not be granted unless the absent parent gives written consent, either before the judge or before a notary public.¹⁹ This is a rare step-parent adoption scenario, but it recently occurred in a case involving a divorced couple whose child was retarded. After the child's mother remarried, the child desired her step-father to become her legal father. The child was a young teenager at the time, and her biological father could see that she needed the people with whom she lived stabilized into a whole family of mother, father and daughter. This was most certainly a difficult situation for the natural father, but he decided it would be in his daughter's best interest to allow the step-parent adoption, and he gave his written consent.

The above three scenarios should assist the practitioner in discerning whether or not consent is required from the absent parent in a step-parent adoption.

COURT DOCUMENTS:

Below is a list of documents required for step-parent adoptions and the information that must be included in each document. For those who are interested, sample documents are presented in the *Domestic Relations Manual* available from Utah Legal Services.

1. PETITION

Step-parent adoption petitions are filed in the district court in the district where the step-parent resides, or in juvenile court if there are other proceedings

concerning the adoptee already before the juvenile court.²⁰

a. As in general adoption petitions, the adoptee's identity is concealed in the caption.

b. For proper venue, petitions must be residents of the county wherein they file.

c. The subject of the adoption must be named, identified as a minor or adult, and her birth date must be given.

d. The Petitioner must be over the age of 21 and more than ten years older than the adoptee.

e. The natural parents of the adoptee must be named, if both natural parents are known.

f. Indicate whether or not the consent of the absent parent is required.

g. If the consent of the absent natural parent is not required, then explain why.

h. If the absent natural parent is unknown, explain that a paternity search revealed no information and submit the "Certificate of Search" into the record.

i. Allege Petitioner's desire to adopt the adoptee but reserve for Petitioner's spouse all legal rights as a coparent.

j. Allege that Petitioner understands all legal implications of an adoption.

k. Allege the cohabitation requirement of one year and continue with an explanation that, during the time the Petitioner and the adoptee have lived together as a family. The petitioner has assumed complete responsibility for the support of the adoptee, that he is ready to execute the necessary consent as required by law, and that they are a fit and proper person to have custody of the adoptee.

l. Request the court to preliminarily deprive the absent natural parent of any rights he or she may have in relation to the adoptee once the petition is filed until the decree is granted.

m. Allege that Petitioner's home is a suitable home in which to rear the adoptee, and that Petitioner is morally fit and financially able to support and educate the adoptee.

n. Specify that the best interest and welfare of the adoptee will be served by the adoption.

o. Indicate whether the adoptee was born out of state, and allege compliance with the requirements of the Interstate Compact on Placement of Children.²¹

p. Finally, request the court permanently deny the absent natural parent any and all rights in relation to the adoptee, grant the adoption reserving unto the Petitioner's spouse all parental rights, and allow the adoptee's surname to be changed (if applicable).

After the date and attorney's signature, the Petitioner must sign the petition before a notary, declaring that he or she has read and understands the petition.

2. Affidavit of Fees

This document is an affidavit signed by the Petitioner and the attorney itemizing each and every expense incurred by the Petitioner for the step-parent adoption action. After the itemization, include a total amount expended by the Petitioner.

3. Written consent to the step-parent adoption

A parental consent to an adoption should specifically state that the parent signs the document voluntarily and not by force or coercion. Additionally, the language in the consent should state that by signing the consent, the parent understands the following:

a. All parental rights with the adoptee are relinquished;

b. All legal rights to visit the adoptee are relinquished;

c. All legal right to contest the termination of the child-parent relationship are relinquished;

d. The Petitioner may proceed to adopt the adoptee;

e. He or she has a right to consult an attorney of his or her own choosing; and

f. The consent cannot be revoked.

4. Utah Department of Health Report of Adoption

This form, available from the probate clerk, must be completed so that a new birth certificate may be created for the adoptee.

5. Certification of Readiness for Adoption

Also available from the probate clerk, this form must be submitted before final hearing can be scheduled.

6. Agreement of Adopting Parent

This document is signed before the judge at final hearing. It must state that the adoptive parent shall adopt the child and treat her in all respects as his own lawful child.²²

7. Findings of Fact and Conclusions of Law

The information in this document parallels that contained in the Petition.

8. Decree of Adoption

The Decree permanently relieves the natural parent of any parental duties and deprives him or her of any parental rights in relation to the adoptee. Further, the document grants to the Petitioner and the adoptee all the rights, privileges and responsibilities of parent and child.

¹Utah Code Ann. § 78-30-3 (1990).

²Utah Code Ann. § 78-30-2 (1985).

³Utah Code Ann. § 78-30-14(7) (1990).

⁴Utah Code Ann. § 78-30-4.1(1) (1990).

⁵Utah Code Ann. § 78-30-4.7(1)(e) & (4) (1990).

⁶Utah Code Ann. § 78-30-1 (1990). An adoptee over the age of eighteen is considered an "adult adoptee" and, as has been stated, no consent for her adoption is required of the absent natural parent. It is important to understand that although Utah Code Annotated §78-30-16(1)(c) defines an "adult adoptee" as "an adoptee who is 21 years of age or older," this definition applies only as it is used in Sections 78-30-17 through 78-30-19. These specific sections of the code "do not apply to adoptions by a step-parent whose spouse is the adoptee's birth parent."

⁷Utah Code Ann. § 78-30-4.8(5) (1990).

⁸Utah Code Ann. § 78-30-4.8(4) (1990).

⁹Utah Code Ann. §§ 78-30-4.8(3)(a),(b) & (c) (1990).

¹⁰Utah Code Ann. § 78-30-4.7(3)(c) (1990).

¹¹Utah Code Ann. § 78-30-4.7(2) (1990).

¹²Utah Code Ann. § 78-30-4.7(3)(b) (1990).

¹³Utah Code Ann. § 78-30-4.7(6) (1990).

¹⁴Utah Code Ann. §§ 78-30-5(1)(a) & (b) (1990).

¹⁵Utah Code Ann. § 78-30-5(1)(b) (1990).

¹⁶Utah Code Ann. § 78-30-4.10(9) (1990).

¹⁷Utah Code Ann. § 78-30-4.2(3) (1992).

¹⁸Utah Code Ann. § 78-30-4.3 (1990).

¹⁹Utah Code Ann. § 78-30-4.2(3) (1992).

²⁰Utah Code Ann. § 78-30-7(1) (1990).

²¹Utah Code Ann. § 78-30-15.1 (1990).

²²Utah Code Ann. § 78-30-15.1 (1990).

WARD HARPER

Attorney at Law

is pleased to announce the opening of his new law office at 56 East Broadway, Suite 500. Mr. Harper is accepting cases in the areas of Social Security and Workers' Compensation. He is a former staff attorney at the Social Security Office of Hearings and Appeals and Utah Legal Services.

Telephone: (801) 322-2141

Facsimile: (801) 322-1717

Commission Highlights

During its regularly scheduled meeting of December 2, 1993, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the October 28, 1993 meeting.
2. Richard Walker appeared to participate in a discussion regarding the status of the Collection Practices Study. He indicated that any proposed changes would help assure that the lawyer, not the collection agency, is in control of the file, which would aid in the reduction of abuse.
3. The Board voted to have Jim Clegg send a letter to the presiding judge in each district and the Chief Justice stating that the Bar Commission believes the small claim court limit should be reduced to \$2,000 unless a local district could justify a higher figure.
4. The Board voted to appoint Herm Olsen to the DNA Peoples Legal Services Board.
5. The Board voted to defer appointments to the Legal Services Board until the January meeting to allow publication of another notice in the *Utah Bar Journal* to solicit members interested in serving.
6. The Board reviewed the Judicial Nominating Commission Process and passed a resolution outlining its position.
7. The Board voted to reaffirm its earlier position to not only oppose moving up consolidation to July 1994 but also to oppose any legislation accelerating the process.
8. John Baldwin distributed and reviewed his written Executive Director's report.
9. Steve Trost briefly reviewed proposed legislation regarding the public adjuster bill, and Mitch Vilos of Utah Trial Lawyers appeared to discuss the bill.
10. John Baldwin referred to the financial reports and indicated that he and Arnold Birrell, Financial Administrator, are available to answer any questions.
11. Mark Webber, Young Lawyers Division President, reported that the Division's

committees have been active updating and creating pamphlets, brochures and video tapes for needs of children and elderly.

12. The Board voted to proceed with a suit against Jerry S. Gardner and Utah Dads for the unauthorized practice of law.
13. The Board voted to publish in the *Utah Bar Journal* the Standards for Utilization for Paralegals.
14. Hon. Judith Billings and Hon. James Z. Davis appeared to discuss what will happen to the civil appeals process should court consolidation take place. Judge Billings indicated that after discussion and review of past statistics and personnel, the judges voted unanimously that they would like to have all civil appeals go through the Court of Appeals.
15. The Board voted to support the legislative amendment proposed by the Board of Appellate Court Judges which provided that appeals from district court civil cases be handled through the Court of Appeals, provided this legislative amendment were packaged separately from HB436 amendment, and, if not, the Bar Commission could not support the amendment.

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

Discipline Corner

ADMONITIONS:

An attorney was admonished for neglect and ordered to pay \$2,000 in restitution as per the terms of a Discipline by Consent approved by the district court on December 22, 1993. The attorney was retained to pursue a wrongful death action against an excavating company that owned and operated a certain dump truck that was pulling two "pup" type dump trailers on October 16, 1987, when the clients minor son apparently rode his bicycle into the path of the first pup and was fatally injured. Three accident reconstructionists concluded that the excavating company had little if any liability. The attorney was at various times between February 1989 and late 1990 retained, terminated and retained again on

March 7, 1990. On October 16, 1989, the attorney filed the complaint but did not serve the defendants until October 12, 1990. No meaningful legal services were provided between March 7, 1990 and October 12, 1990. The client had their case dismissed without prejudice for failing to serve the defendant's within 120 days but did not lose their cause of action which could have been refiled relying upon Utah Code Ann. §78-12-40, commonly referred to as the "savings statute."

On December 21, 1993, a Discipline by Consent was approved which provided for an Admonition, restitution of \$2,000.00, and attendance at ethics school. In this instance, the attorney received funds for the purchase of stock in a business with which the attorney was associated. The funds were deposited into the attorney's trust account and then disbursed to a business associate. The corporation failed, thereafter, to deliver the stock to the purchaser. This discipline was deemed appropriate since it was not a case of conversion by the attorney. The attorney paid the funds to the business as directed by the purchaser on the same day they were received. However, using a trust account to conduct personal business is improper. This conduct violated Rule 1.13(b) of the Rules of Professional Conduct.

DISBARMENT:

On January 25, 1994, the Third Judicial District Court entered an Order of Disbarment against Donald E. Elkins. Mr. Elkins was disbarred for violating Rule 1.2 SCOPE OF REPRESENTATION, Rule 1.3 DILIGENCE, Rule 1.4(a) COMMUNICATION, Rule 8.4(c) MISCONDUCT involving dishonestly, fraud, deceit or misrepresentation and Rule 8.4(d) conduct that is prejudicial to the administration of justice. The Order also requires Mr. Elkins to notify his clients and to pay the costs of the action.

Mr. Elkins filed four appeals on behalf of clients under a public defender contract and failed to timely prosecute the appeals. Even after being notified by the Court of Appeals, Mr. Elkins failed to perfect the appeals. Mr. Elkins also misrepresented the status of the appeals to his clients. A

fifth appeal was dismissed for failure to prosecute, but it was a civil matter and his client requested that he not continue. However, Mr. Elkins did not notify the Court and the Court was forced to use scarce resources to track the matter.

REINSTATEMENT:

On December 16, 1993, the District Court entered an Order reinstating John R. Bucher to the practice of law subject to supervised probation for one year.

On January 12, 1994, the District Court entered an Order reinstating Steven R. Angerbauer to the practice of law. The Order of Discipline entered by the Utah Supreme Court provides that upon reinstatement to practice law Mr. Angerbauer will be on supervised probation for a minimum of one year.

New Appellate Practice Section of Utah State Bar Seeks Members, Will Meet in Mid-March

On January 27, 1994, the Board of Commissioners of the Utah State Bar approved the formation of the Appellate Practice Section. The petition for creation of this new section was enthusiastically supported by seventy-nine local attorneys, including several appellate judges and members of other Bar sections.

The Appellate Practice Section will have several important goals, including: First, to provide needed training in appellate practice to section members and others, with an eye toward improving the quality of written and oral appellate advocacy. Second, to provide a forum for appellate law practitioners to identify and discuss the latest appellate decisions and trends in the appellate courts. Third, to create an organization of interested practitioners that can speak out on matters that affect appellate practice and the appellate courts.

If you want to be a member of the new section, promptly send your name, current address and telephone, bar number, and a check for \$10.00 (as part-year Section dues through June 30, 1994), payable to the Utah State Bar, to:

Utah State Bar
Appellate Practice Section
Attention: Arnold Birrell
645 South 200 East
Salt Lake City, Utah 84111

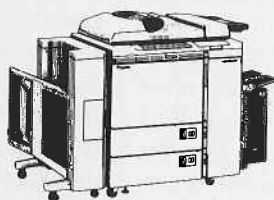
The first meeting of the Appellate Practice Section will be held at the Utah Law and Justice Center on March 16, 1994, from 12:00 noon until 1:00 pm. Please bring your sack lunch and join us. Officers will be elected and bylaws approved, but the main agenda item is discussion of plans for an all-day appellate practice seminar in late spring and another CLE program at the Bar's Annual Meeting in Sun Valley.

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**UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
POSITION ANNOUNCEMENT**

Position:

Law Clerk to Magistrate Judge Samuel Alba

Starting Salary:

\$28,648 to \$64,218, depending on qualifications

Starting Date: May 1994 or earlier

Application Deadline: March 21, 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 Magistrate Judge.

Tenure: This is a temporary law clerk

position whose tenure is limited to a maximum of 18 months.

Applicants should send resume, transcript and any supporting materials. All applicants are required to submit a writing sample, preferably one involving legal research, and references.

Applications should be made to:
Magistrate Judge Samuel Alba
United States District Court
260 Frank E. Moss U. S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101

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BENEFITS SUMMARY

Employees under the Judicial Salary Plan are entitled to:

- Scheduled grade or within-grade increases in salary, depending on performance, tenure, and job assignment.
- Choice of federal health insurance programs.
- Ten paid holidays per year.
- Credit in the computation of retirement benefits for prior civilian or military service.

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an Equal Opportunity Employer*

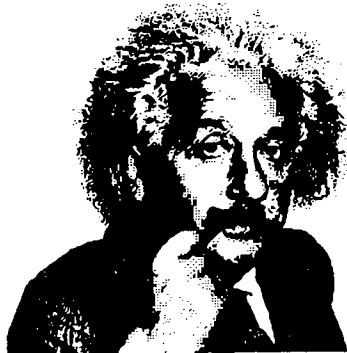
**1994 Annual
Meeting Awards**

The Board of Bar Commissioners is seeking nominations for the 1994 Annual Meeting Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Kaesi Johansen, Convention Coordinator, 645 South 200 East, Salt Lake City, Utah 84111, no later than **Wednesday, April 13, 1994**. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Young Lawyer of the Year
4. Distinguished Section/Committee
5. Distinguished Non-Lawyer for Service to the Profession
6. Distinguished Pro Bono Lawyer/Law Firm of the Year

**Fifth Annual
Intermountain Medical
Ethics Conference**

A conference entitled "Medical Ethics and Health Care Reform: New Issues on the Table," the Fifth Annual Intermountain Medical Ethics Conference sponsored by the Division of Medical Ethics, LDS Hospital and University of Utah, will be held March 30, 1994. The conference will help participants understand the ethical and legal implications of managed competition for individual choice, recognize and evaluate criteria that would be used for rationing health care, and learn what health care organizations and individuals can do to insure responsive and responsible medical decision-making. Speakers include Ezekiel J. Emanuel, M.D., Ph.D., Linda L. Emanuel, M.D., Ph.D. (both of Harvard University), and Michael Garland, D.Sc.Rel (Oregon Health Sciences University). Registration fee, \$75. Application for CLE credit pending. For information contact the Division of Medical Ethics (801) 321-1135.



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Local Law Firm Receives Award From Westminster College

SALT LAKE CITY — The law firm of Jardine, Linebaugh, Brown and Dunn received the Legal Community Award of the Westminster College Legal Assistant Certificate Program at the program's graduation ceremonies on December 17, 1993. The award is presented by each graduating class to a local law firm which furthers the professionalism of legal assistants. Richard H. Thornton, president of the firm, accepted the award.

"Jardine, Linebaugh was selected this year because the firm uses legal assistants extremely well," said Kelly De Hill, Esq., Director of Legal Education and General Counsel at Westminster. "Students who have worked or completed internships there report that they are not only given challenging and professional work to do, but that they are trained and supervised well. The firm appears to have an excellent understanding of the degree of professional assistance that legal assistants can provide, and we feel that firms like Jardine, Linebaugh should be recognized."

Echoing the theme of professionalism, graduation speaker James W. McConkie, Parker, McKeown & McConkie, who is on the faculty of the Westminster Legal

Assistant Certificate Program, spoke to the 17 students who were receiving certificates and their guests about the future of legal assistants. The field is growing, he said, and becoming more professional. He noted the movement in other states to create a level of legal technicians who will be licensed to practice law on a limited basis with clearly defined responsibilities as an example of the changes and pressure the paralegal field is experiencing.

Parker, McKeown & McConkie received last year's Legal Community Award from Westminster. The firm employs 6 legal assistants for 3 attorneys.

The Legal Assistant Certificate Program at Westminster College is an 11-month evening program which provides students with the basic legal knowledge and skills they need to work effectively under the supervision of an attorney. The program stresses good written and oral communication skills, computer skills, litigation support, and legal research as well as offering electives in specific areas of law. The Westminster Legal Assistant Certificate Program is certified by the American Bar Association.

Notice of Election of Bar Commissioners Third, Fourth & Fifth Divisions

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commissioner are hereby solicited for one member from the Third Division, one member from the Fourth Division, and one member from the Fifth Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by written petition of 10 or more members of the State Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar office on or after March 14, and completed petitions must be **received no later than April 25**. Ballots will be mailed on or about May 13 with balloting to be completed and ballots received by the Bar Office by 5:00 p.m. on June 15.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1) Space for up to a 200-word campaign message plus a photograph in the June/July issue of the *Bar Journal* (published around June 1). The space may be used for biographical information, platform or other election promotion. Campaign messages for *Bar Journal* publication are due along with completed petitions **no later than April 25**.

2) A set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their district.

3) The Bar will insert a one-page letter from the candidates into the ballot mailer. Candidates would be responsible for delivering to the Bar **no later than May 5** enough copies of letters for all attorneys in their district. (Call Bar office for count in your respective district)

If you have any questions concerning this procedure, please contact John C. Baldwin at the Bar Office, 531-9077.

NOTE: According to the Rules of Integration and Management, residence is interpreted to be the mailing address according to the Bar's records.

Utah State Bar Long-Range Planning

The Board of Bar Commissioners voted that the mission of the Bar should be, "To represent lawyers in Utah and to serve the public and the profession by promoting justice, professional excellence and respect for the law." The Commission has established the following goals in furtherance of that mission.

1. To promote the administration of justice.
2. To uphold and elevate the standards of curtesy, ethics, competence, professionalism, public service and collegiality in the legal profession.
3. To provide improved access to legal services for the public.
4. To educate the public about the rule of law and their responsibilities under the law and to increase public understanding of the role of the legal profession within the system of justice.
5. To provide service to the public and to

the judicial system.

6. To provide services and benefits to lawyers.

7. To diversify participation of all lawyers in Bar activities.

President-Elect Paul T. Moxley has appointed a long-range planning committee to evaluate the Bar's effectiveness in accomplishing its goals and furthering its mission. The committee consists of Bar Commissioners: Gayle McKeachnie, Charlotte Miller, John Florez, Frank Wilkins, Paul Moxley and Executive Director, John Baldwin.

The Committee is soliciting input from members of the Bar regarding its mission and goals. Any and all comments or questions may be directed to any of the committee members personally at their offices or c/o John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

Utah State Bar Commission Approves Ethics Opinions & 60-Day Comment Period

The Board of Bar Commissioners has adopted a policy whereby ethics opinions will be approved, pursuant to the recommendations of the Ethics Advisory Opinion Committee, pending a 60-day comment period following publication in the *Bar Journal*.

Opinion No. 126

Approved January 27, 1994

Issue: Under what circumstances may a city attorney represent criminal defendants?

Opinion: A city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction. A city attorney with no prosecutorial functions, who has been appointed as city attorney pursuant to statute, may not represent a criminal defense client in that city, but may represent a criminal defense client in other jurisdictions, provided that Rule 1.7(a) of the Utah Rules of Professional Conduct is satisfied. An attorney with no prosecutorial functions, who is retained by a city on a contract or retainer basis, may represent a criminal defense client in any jurisdiction, provided that Rule 1.7(a) is satisfied. An attorney who is a partner or associate of a city attorney may not represent a criminal defense client in any situation where the city attorney is so prohibited.

Opinion No. 138

Approved January 27, 1994

Issue: May a currently practicing sole practitioner who formerly had associates or junior partners continue to use the firm name that includes the sole practitioner's name followed by "& Associates"?

Opinion: A lawyer may not use "& Associates" as part of a firm name where no attorney associates are currently employed by that firm.

Opinion No. 139

Approved January 27, 1994

Issue: May a law firm's nonlawyer office administrator be compensated solely on

ANNOUNCEMENT: Recruiting Ethics Advisory Committee Members

The Utah State Bar is now accepting applications for membership on the Ethics Advisory Opinion Committee for terms beginning July 1, 1994.

In response to the increasing importance and frequency of occurrence of ethical issues that affect Utah lawyers, the Board of Bar Commissioners has modified the procedure for constituting the Ethics Advisory Opinion Committee. Beginning July 1, 1994, the Committee will comprise the Chair and 12 members, who will be appointed upon application to the Bar. Regular appointments will be for three years, although some appointments will be initially for one and two years to provide for staggered terms.

The Committee is charged with preparing written opinions concerning the ethical propriety of anticipated professional or personal conduct, when requested to do so by the Utah State Bar, and forwarding these opinions to the Board of Bar Commissioners for their consideration.

Because the written opinions of the Committee have major and enduring significance to the Bar and the general public, the Board wishes to solicit the participation of lawyers (including the judiciary) who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in resume or narrative form:

- Basic information, such as years and location of practice, type of practice (large

firm, solo, corporate, government, etc.), and substantive areas of practice.

- A brief description of your interest in the Committee, including relevant experience, interest in or ability to contribute to well-written, well-researched opinions. This should be a statement in the nature of what you can contribute to the Committee.

Appointments will be made by a panel comprising the Bar President, the Liaison Commissioner for the Ethics Advisory Opinion Committee and the Chairman of the Committee for the ensuing year. The panel's selections are intended to accomplish two general goals:

- Appointment of members who are willing to dedicate the effort necessary to carry out the responsibilities of the Committee and who are committed to the issuance of timely, well-reasoned, articulate opinions.

- Creation of a balanced Committee that incorporates as many diverse views and backgrounds as possible. The selection panel will attempt to create a Committee with balance in: substantive practice areas, type of practice (small firm, government, etc.), geographical location, and experience.

If you would like to contribute to this important function of the Bar, please submit a letter indicating your interest to:

**Ethics Advisory Opinion
Committee Selection Panel
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111**

the basis of a percentage of the gross income of the firm?

Opinion: Under Rule of Professional Conduct 5.4(a)(3), a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, which may be based upon a percentage of the net or gross income of the firm, so long as compensation is not tied to receipt of particular fees. The nonlawyer's employment, however, must still comport with Rule 5.4(d), which prevents the nonlawyer from owning an interest in or controlling the activities of a law practice.

NOTICE

The 12th Annual State and Local Government Conference, sponsored by the Government and Politics Legal Society of the J. Reuben Clark Law School, will be held at the Provo Park Hotel on Friday, March 18, 1994.

Any questions should be directed to Alex Maynex at 378-3593.

ANNOUNCEMENT of JUDICIAL VACANCY

ANNOUNCING:

The opening of the application period for a judicial vacancy, in the Utah Court of Appeals. The position results from the appointment of Judge Leonard H. Russon to the Supreme Court bench.

Complete application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., March 15, 1994.

ELIGIBILITY REQUIREMENTS:

Applicants must be 25 years of age or older, citizens of the United States, Utah residents for three years prior to selection and admitted to practice law in Utah.

SELECTION PROCESS:

Current Utah law requires the Judicial Nominating Commission to submit three nominees to the Governor within 45 days of its first meeting. The Governor has 30 days in which to make a selection. The Utah State Senate has 60 days in which to approve or reject the Governor's selection. To obtain the procedures of Judicial Nominating Commissions and the names of Commission members call Marilyn Smith (801) 578-3800.*

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's courts in general, submit a written statement no later than March 25, 1994, to the Administrative Office of the Courts, Attn: Appellate Court Nominating Commission.

*Note: Present membership of Commission may change because of pending legislation.

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To obtain an application form contact:

Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah 84102
(801) 578-3800

Attorney Needed

The Office of the Attorney Discipline of the Utah State Bar is accepting applications in the form of resumes for the position of Assistant Disciplinary Counsel. The successful applicant will be responsible for the prosecution of serious cases of misconduct filed in the District Courts. Minimum of five (5) years litigation experience. Competitive salary and benefits. Applications should be submitted to the above at 645 South 200 East #205, Salt Lake City, Utah 84111.

