UTAH BAR JOURNAL

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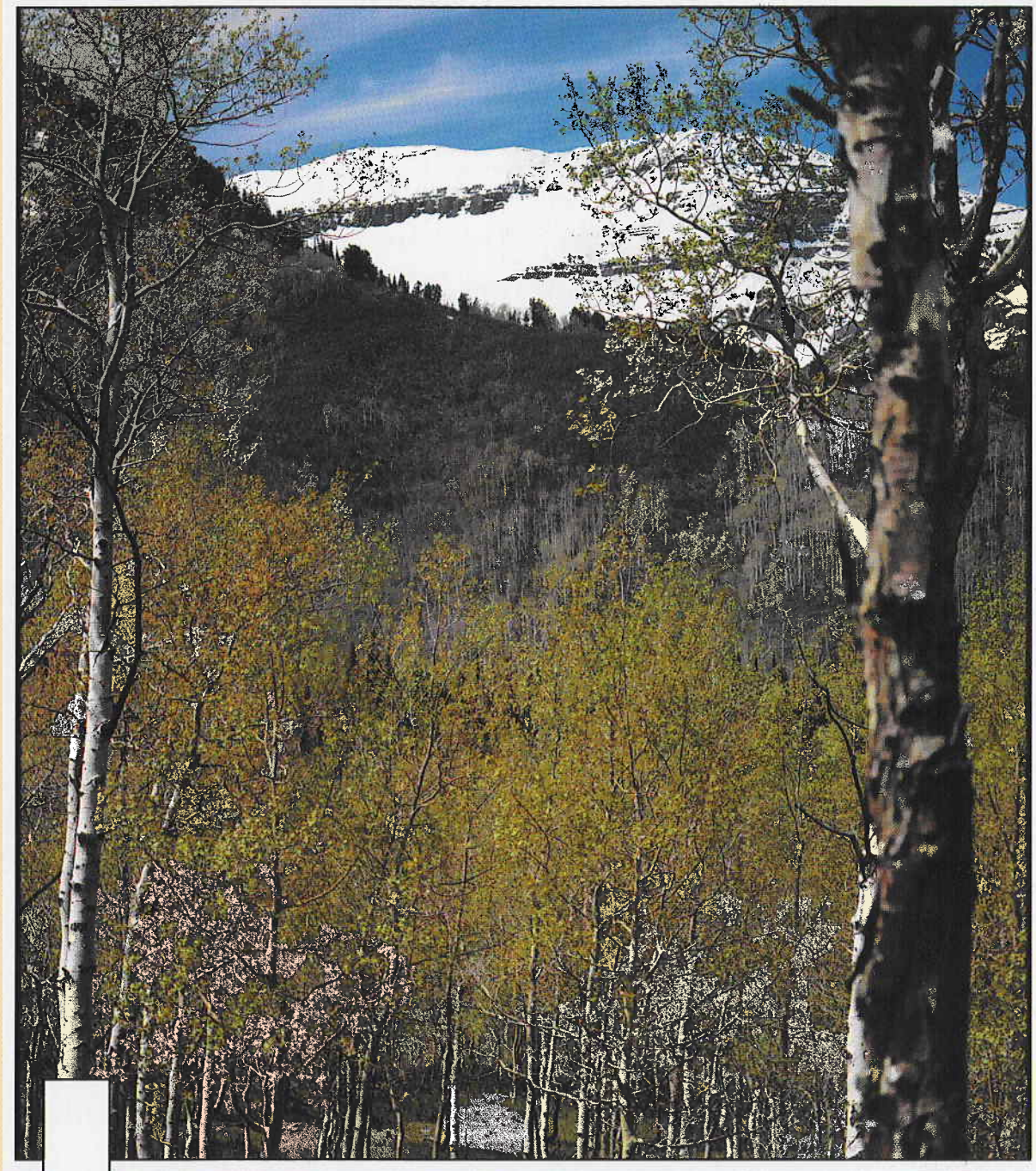

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Utah BJ

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Utah Bar Journal

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COVER: View of Mt. Timpanogos taken by Harry Caston, Esq. of McKay, Burton & Thurman.

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

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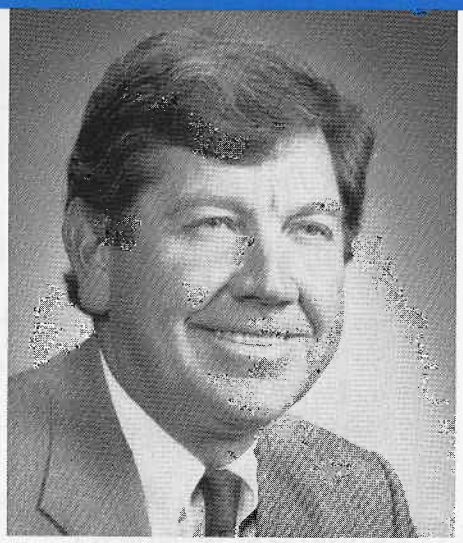


Our Legislature at "Work"

By H. James Clegg

The legislature recessed right on schedule, to the relief of some and to the disappointment of others. Democracy at work is sometimes frightening, and often an unpredictable, process.

The following bills were followed closely by the Bar:

JUDICIAL NOMINATING COMMISSIONS

As reported last month, Governor Leavitt feels the appointment of judges should not be apolitical. While we feel that the judicial appointments can, perhaps even should, reflect philosophies of a sitting governor, we fret over the possibility that merit selection will be compromised in favor of cronyism.

We were unable to persuade the governor to leave the system alone. Under the existing scheme, the Bar appoints two of the seven commissioners in each judicial district and two on the appellate commission; one lawyer is of the same political party as the governor and the other is not. The governor appoints four lay citizens, two from the governor's party and two who are not. The Chief Justice sits as a matter of right as chair and is a voting member.

Senator Beattie introduced a bill in the Senate which made the following changes: (1) the Chief Justice sits *ex officio*, without a vote, (2) two lawyers appointed by the governor *after consultation with* the Bar, (3) up to two additional lawyers, one of whom could be a judge, (4) three or four lay citizens to make a panel of seven voting members.

This was unacceptable to the Bar Commission. It felt that a sham was created, giving the illusion but not the reality of a merit-selection system. The Bar felt that, under this scenario, its proper role was to be outside, free to comment on and, where needed, criticize the governor's appointments to the commissions, the commissions' nominations to the governor and the governor's ultimate appointments.

The bill was assigned to the Senate Judiciary Committee and was to be heard on Friday, February 18. The Bar was present and hoped to be heard. It appeared that a majority of the Committee members were sympathetic to our position and that the bill might not be voted out of committee.

No hearing was held; instead, we were told the bill had been pulled for amendments. Those amendments deleted the "consultation" language and substituted a plan whereby the Bar submits to the governor a list of six lawyers (four in Districts 1 and 5-8), three from the governor's party and three who aren't, from which the governor selects two members. The governor may reject a list and require a substitute.

It appeared to us that the members of the Judiciary Committee believed the amendments were a good compromise and would vote the bill out over our objections, if made.

While we do not believe this scheme is as good as the one it replaces, we feel it is better than being outside the process. Thus, the Bar supported the amended legislation. Arguments similar to those we had prepared were given by Common Cause, but the bill was voted out of Committee and passed by the Senate 18-9. Two-thirds was significant because, if the House also approved the bill by that fraction, it would become effective immediately. The House passed the bill, but not by two-thirds, so the act will become effective sixty days after the session's end.

This should allow sufficient time for considered nominations to be made by the Bar to the governor. If you have an interest in serving as a Judicial Nomination Commissioner, please advise the Bar Commission. There is additional information in this issue on this subject.

COLLECTION PRACTICE

As mentioned two months ago, the Collection Law Task Force has been very active. A committee of the Young Lawyers' Division prepared comprehen-

sive legislation to license and regulate collection agencies. However, the Task Force believed it was too late in the session to have much chance of passing, so it was decided to hold off until 1995. In the meantime, however, it believed that an existing but unenforced criminal statute should be amended to provide a penalty and encourage enforcement. Senator Barlow sponsored the bill believing, as we do, that it was a consumer-protection matter.

Although this seemed a small step to us, the collection agencies opposed the amendment vigorously, obtaining support in surprising places. One of our members, chairing the committee to which the bill was assigned, accused Senator Barlow of sponsoring a lawyer-protection bill. This in itself is noteworthy as Senator Barlow had never before been charged with being friendly to the Bar. This bill apparently did not pass.

JUDICIAL SALARIES

There was a bill to give all state employees, including judges, a salary increase of, I believe, 4.5%. On the Friday before the session ended, the raise for judges was deleted. After a real effort against the clock, it was reinstated to the 3% level, consistent with the raises given elected officials.

INSURANCE FRAUD

While no one wants to support or advocate insurance fraud, lawyers were caught up in a wide-reaching bill. The bill as filed was innocuous, providing for civil and criminal penalties against folks who make fraudulent insurance claims. Nothing too bad about that concept. However, some amendments were added to make the lawyers who assist in the making of false or *incomplete claims* which adversely impact an insurer liable as a perpetrator. This would still not be too bad, so far as false claims go, provided the lawyer knew of the falsity. Incompleteness is another matter; how many claims are "completely complete" at the time of initial demand?

Further, the finding of fraud was to be made by the executive branch, taking prosecution of such matters out of the Office of Bar Counsel and out of the court system, at least until appealed into court from an adverse agency ruling.

Bar Counsel Steve Trost worked with Representative John Valentine in putting the bill on hold over a weekend and the bill was amended to be acceptable to the Bar. In one of those legislative upsets, the amendments were stripped on the floor of the House and the bill passed that body in its objectionable form.

The Senate passed the bill in its final amended form, and we are awaiting its printing to determine the potential impact.

ALTERNATIVE DISPUTE RESOLUTION

This bill, championed by Hardin Whitney and the Court Administrator's Office, to encourage ADR also passed. I'm not aware of any changes after Bar Commission endorsement. Din had to do a great deal of explaining (sometimes lobbying) himself. Great work, Din!

COURTS COMPLEX

For a minute or two, it actually appeared possible that the legislature could bond $64 million this year to build the entire complex in one step. The "professionals" argued that this is the perfect time to borrow for building construction in view of the state's highly favorable bond ratings and the low interest rates. This argument to include funding in the revenue bond appeared to sell in the committees and the Senate but not in the House and not with the governor. He would prefer to finance this project through surplus or the general obligation bond but not a revenue bond. There was a further argument: it is not customary and is poor policy to bond a project which has not been reduced to blueprints and detailed cost analysis.

However, a great step forward was achieved. Over $3.75 million was appropriated for design and Governor Leavitt stated support in financing the project, for single-phased construction, in the 1995 session.

The downside for the Bar and our clients is that filing fees for civil and domestic matters will be increased. The Bar Commission, in a difficult decision, supported this increase, believing it essential to obtaining adequate facilities and liking even less the alternative of courtroom user fees.

SULLIVAN DOCTRINE

One of the hottest subjects of debate this session concerned the Supreme Court decision of *Sullivan v. Scoular Grain Co., et. al.* There it was held that the negligence of an employer and fellow employees should be apportioned by a jury, even though the employer is immune from further liability if workmen's compensation benefits were paid. The proportion of fault found is not chargeable against the non-immune defendants.

Competing bills were introduced, one by Senator Beattie to legislate the *Sullivan* rule with small modification and one by Senator Barlow to legislatively reverse *Sullivan*. Senator Barlow's followers were adamant that the decision did not reflect the legislative history of the 1986 Utah Liability Reform Act. Senator Beattie felt that, irrespective of that, the *Sullivan* result was the fair one, consistent with the principles of the Liability Reform Act.

The Barlow bill passed. Then the Beattie bill garnered support, even among those who had voted for the Barlow bill.

At almost the final day, Governor Leavitt used his influence to broker a compromise. I have not seen the final language but understand that there is a threshold at 40%; if an employer's fault is less than 40% of the total, it is disregarded; if more, it is charged against the amount collectible from the remaining defendants.

I followed the debate on these bills with special interest. The Bar did not take a position favoring or opposing either of them. However, I had represented one of the defendants in the *Sullivan* case and was personally persuaded that it was "fair", that being a relative term and considering the alternative.

Further, Brent Wilcox was very involved in lobbying for the Barlow bill in behalf of the Utah Trial Lawyers Association and we discussed the possibility of a compromise along the same lines as ultimately occurred. At that time, Brent believed there was no sentiment to discover a middle ground. I'm pleased one was found and hope it works out in practice.

By the time you read this, the deadline for filing to run for the state legislature will have passed. I really hope that some of you have chosen to do so. We very much need law-trained legislators who understand, revere and can explain such concepts as due process, separation of church and state, "takings" and equal protection. The Office of Legislative Counsel does a fine job but my bet is that it joins in this hope of having a larger number of lawyers in next year's legislature.

Taking it a step further, I hope that lawyers will seriously consider contributing to the campaign efforts and finances of fellow lawyers, regardless of district or political party. The Bar cannot, of course, do so as an institution but this shouldn't discourage, indeed it should encourage, action by individuals.

Punitive Damages: A Suggestion for Change

By Stephen Russell

In the news the other day was a story about another huge jury verdict including a staggering amount of punitive damages. The plaintiff claimed that a California HMO had denied coverage for a bone marrow transplant, and that the patient died as a result. The jury was persuaded to award $12 million in compensatory damages and $77 million in punitive damages. A spokesman for the defendants said the award exceeded the entire net worth of the HMO, which he claimed was about $57 million. By now, we are all familiar with similar stories where litigants are awarded astronomical sums for punitive damages.

Having represented plaintiffs in personal injury and medical claims for a dozen years, I do not question the salient purpose punitive damage awards play in appropriate circumstances. For example, product manufacturers factor in the cost of catastrophic injury and death of consumers against the cost of a safety device and decide human carnage is cheaper, the availability of punitive damages may be the only effective deterrent.

As it is, awards of punitive damages are not easily obtained. In Utah, the model jury instruction for punitive damages provides;

> Punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the defendant were a result of willful and malicious conduct, or conduct that manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.

Model Utah Jury Instructions 27.20 (1993).

Before awarding punitive damages, a jury must also determine that the award would satisfy specific purposes of punishment and/or deterrence. Stated another way, the jury must find that the conduct in question is offensive not only to the individual litigant, but to the community as well. In awarding punitive damages the jury effectively sends a message to the defendant and others similarly situated that certain conduct will not be tolerated. Again quoting from Utah's model instruction;

> If you find that punitive damages are proper in this case, you may award such sum as, in your judgment, would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage.

Model Utah Jury Instruction 27.20.

The popular notion that juries are "out of control" in their judgments is a myth concocted by the insurance companies who often pay the awards, as well as corporate PACs. One thing lawyers learn after years of trial practice is that juries conscientiously and carefully follow the instructions given by the Court. Moreover, the collective knowledge and intelligence of the eight or twelve assembled members of the community far exceeds that of the judge, lawyers and the litigants. So when a jury unanimously makes an award of punitive damages under an instruction like the one quoted, people should not be quick to jump to the conclusion that the award is ridiculous or excessive.

In any event, there is an immediate and effective check against excessive damage awards. In cases where the jury is truly swayed by anger or emotion to render a verdict out of touch with reason and the evidence, the award is subject to the review of the trial judge and appellate courts. Judicial review is dispassionate, based solely on the evidence and on occasion results in a reduction of the jury's award.

Turning back to the HMO case, let us assume that the award was supported by competent evidence and appropriate under the circumstances. The problem as I see it is not with the award itself, but what happens to it. The jury would have been instructed to award fair and adequate compensation for "any and all damages proximately caused by the defendant's conduct." The HMO jury did so to the tune of $12 million. Why then, should the plaintiff reap the huge windfall of $77 million in punitive damages which are expressly for the larger societal purposes of punishment and deterrence? To make an award of punitive damages truly serve its purpose, most of the award should be turned toward funds and projects relevant to the conduct which resulted in the award, and which are designed to benefit a larger segment of society.

Utah has made an ineffective stab at the problem. Section 78-18-1(3) of the Code provides:

In any judgment where punitive

STEPHEN RUSSELL is a 1981 graduate of the University of Utah, and practices personal injury, civil rights and environmental litigation. Recently of Collard & Russell, Mr. Russell is now establishing a solo practice in Moab, Utah, and has more time to write articles like this.

damages are awarded and paid, 50% of the amount of punitive damages in excess of $20,000 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

Unfortunately, the statute is easily avoided. Let's say a jury awards a plaintiff one million dollars in compensatory and one million in punitive damages. After the trial, the lawyers get together. Defense counsel says, "That's too much, we're going to appeal." Plaintiff's counsel says, "We don't want to have to pay the State $490,000. Tell you what, let's settle the case for $1.75 million and state in the settlement documents that it's all for compensatory damages." Under this scenario the State gets nothing. There is a second problem with the Utah Statute. Suppose the HMO decision occurred in Utah. It would be illogical to take $38.5 million of an award designed to punish and deter HMO's from denying necessary medical care, and give it to the Governor so he or she could pay off the federal retirees or throw it down some other fiscal rathole.

My recommendation would be to pay the plaintiff 20% of an award of punitive damages (the litigant deserves something), pay plaintiff's counsel 20% (it takes great case preparation and one hell of an argument to convince a jury to award $77 million), and use the other 60% for relevant beneficial purposes. This could be accomplished by appointing a "Committee for Distribution of Punitive Damage Awards" composed of judges, lawyers, bureaucrats and blue noses.

Under this proposal, the HMO case would generate a fund of $46.2 million after the plaintiff and counsel took their share. That money could be used to compensate victims of medical negligence who cannot afford, or do not want to sue health care providers. The current system for malpractice claims in Utah is incredibly and unnecessarily protracted and expensive. Further, the system has been designed to so heavily favor health care providers and their insurers, that experienced counsel are reluctant to accept a malpractice case unless there is a very good chance of winning, and significant provable damages of at least $100,000. Alternatively, or in addition, the 46.2 million could be used to fund HMO quality assurance inspectors, or indigent health care. Similarly, if Dow Corning gets hit for fifty million dollars in punitive damages on a defective breast implant claim, the State could take thirty million dollars and pay for the procedures to have defective implants removed from other women. Twelve million dollars of a twenty million dollar damage award against the manufacturers of Prozac could be used to set up a free statewide child immunization program. The limits, as you can begin to see, are bound only by the creative imagination of a group of people who are handed a sum of money and told to spend it for a good cause.

Left to its own devices, the Utah Legislature would probably be more prone to a knee jerk reaction like capping awards of punitive damages or outlawing them altogether. However, it's not the legal system which provides for the recovery of punitive damages that needs to be fixed. Instead, we should create a system where money legitimately awarded for punitive damages is used to rectify the kind of conduct which produced the award, and to provide a tangible benefit to society.

So You Like Legal History

By David V. Stivison

"Well, after all, the old law is the best law." This pearl of wisdom came from a senior partner after I had found only a couple of century-old decisions after two days of library research on a problem. Since then I have found that ancient law is much more than a filler for overlong briefs. Over 3,000 American decisions have cited old English cases. England's Magna Carta of 1215 has been discussed in over 800 U. S. decisions — over 100 by the U. S. Supreme Court alone. Every practitioner should know how to find and use such cases. See *The Practical Uses of Legal History* in ALI-ABA's journal *The Practical Lawyer*, June 1987, pp. 27-34. English statutes as old as 1285 A.D. have been held directly applicable as part of America's common law heritage. *Long v. Long*, 45 Ohio St. 2d 165, 343 N.E.2d 100 (1976). Beyond this practical need, however, it exercises our mind to study our law's origin and learn how other societies handled problems common to us today, from the use of money payments by Anglo-Saxons and Norwegians to stop "gang fights" among clans to the appearance of women as litigants in Medieval England and the forgiveness of fines for the indigent in the same courts.

There are four national organizations available to American lawyers who wish to learn more about our legal heritage.

THE SELDEN SOCIETY

The oldest is the Selden Society, founded in 1887 "to encourage the study and advance the knowledge of the history of English law." It has published over one hundred and twenty volumes of source material such as law reports, court records, Judges' notebooks and diaries, early legal treatises and other materials. If the original is in Latin or law French, a translation is provided. These volumes and their extensive annotations and apparatus are important for social, economic, constitutional and linguistic historians and students of local and family history. The $50 annual membership fee ($65 for institutions) includes the price of the annual volume. The Society's worldwide membership hovers around 1700, with about half in the United States. Meetings are held each July in London. For further information contact David Warrington, Honorary Secretary for U.S.A., Harvard Law School, Cambridge, MA 02138.

AMERICAN SOCIETY FOR LEGAL HISTORY

The American Society for Legal History (ASLH) is a nonprofit membership organization, founded in 1956, dedicated to fostering scholarship, teaching and study of all legal systems, both Anglo-American and international. ASLH sponsors the journal *Law and History Review* and a newsletter, both published twice a year and included in the membership cost. *Studies in Legal History* is a series of books available to ASLH members at a discount. Membership cost ranges from $12 (student or emeritus), $35 (regular), $55 (sustaining), $50 (institution) to $100 (sponsor). For further information write Michael de L. Landon, Department of History, University of Mississippi, University, MS 38677.

THE SUPREME COURT HISTORICAL SOCIETY

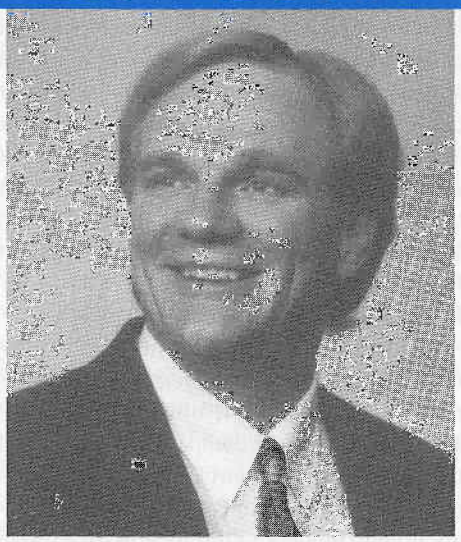
The Supreme Court Historical Society is a private non-profit organization incor-

porated in 1974 and dedicated to the collection and preservation of the history of the Supreme Court of the United States. Its approximately 4,000 members receive a quarterly newsletter and the annual *Journal of Supreme Court History*. This Society is co-sponsor of the multi-volume *Documentary History of the Supreme Court of the United States, 1789-1800* (Four volumes published to date). It is co-publisher with the National Geographic Society of *Equal Justice under Law*, an illustrated history of the Court soon to be issued in a new edition. A series of papers on the Court's five Jewish justices will be published soon. The Society and the Federal Judicial Center are preparing an oral history collection related to the Supreme Court. The Society also actively collects artifacts and antiques relating to the Court's history, which are used in displays for the Court's 800,000 annual visitors. Annual membership dues are $50. For additional information call (202) 543-0400 or write Ann Hendricks, Director of Membership, The Supreme Court Historical Society, 111 Second Street, N.E., Washington, DC 20002.

MAGNA CARTA RESEARCH FOUNDATION

The newest of these groups, the Magna Carta Research Foundation (MCRF) was created in 1992 to explore the history and meaning of Magna Carta today, in America and throughout the world, especially the guidance it can provide in emerging democracies. Magna Carta's heritage includes the very concept of a rule of law binding the government as well as the citizen; protection of due process in all matters, civil and criminal; equal protection for all people; the right to a speedy trial before a jury of one's equals and an impartial judge; freedom of travel in peace time; and freedom of assembly and petition for redress of grievances. The MCRF's first book is *Magna Carta in America* (1993) and work has started on *An Annotated Magna Carta*, collecting all American cases discussing its application. The MCRF was formed with the assistance of the Baronial Order of Magna Charta, a national hereditary society for descendants of the Barons who forced King John to grant the Great Charter of England in 1215. Membership costs $20 per year and inquiries can be directed to David V. Stivison, Esq., 870 North 30th Street, Philadelphia PA 19130-1104.

In addition to these four national organizations, many regional and local historical societies exist for the U. S. Circuit Courts of Appeal and District Courts, State Supreme Courts and even local or county courts. Herein lie the roots and evolution of the institutions that control our lives. If you enjoy intellectual stimulation and the thrill of discovery, you will find it in these organizations.



Utah Deposition Primer – Part I

By David K. Isom

The author acknowledges the valuable research assistance of Joshua D. Isom and David N. Wolfe.

DAVID K. ISOM is president of David K. Isom Law Offices in Salt Lake City, where he practices complex civil litigation. He graduated from Brigham Young University in 1974 and from Duke in 1977 where he was an editor of the Duke Law Journal. From 1985 to 1990, he was Managing Partner of the Salt Lake City office of Davis, Graham & Stubbs. He is a member of the Utah Supreme Court Advisory Committee on the Rules of Civil Procedure.

INTRODUCTION

No skill is more important to you as a civil litigator than the ability to conduct and defend depositions with power.[1] To have this power, you must know the facts of the case and understand the strategy, technique and law of depositions. This article summarizes deposition strategy, technique and law in state and federal courts for Utah civil litigators.

The rules of civil procedure governing depositions are undergoing radical change. FRCP 45 was amended significantly as of December 1991, and the Utah Supreme Court Advisory Committee on Civil Procedure has proposed similar changes to URCP 45.[2] The federal deposition rules (FRCP 16, 26, 28, 29, 30, 31, 32 and 37) were amended effective December 1, 1993, and this article analyzes the impact of those changes upon federal depositions. Because it is too early to predict whether and to what extent similar changes to the Utah rules may be adopted, this article cites the current Utah deposition rules other than URCP 45.[3]

Even with these amendments, however, the rules create as many questions as answers, and say nothing about effective examination techniques. Courts have answered some of these questions.[4] Knowing those answers will assure that your depositions are validly conducted and recorded, and that your defense and objections are effective.

Part I of this article summarizes federal and state law regarding how to set up a deposition. Part II, which will appear in a future issue, will analyze law, technique and procedure relating to conducting the examination, defending a deponent or party in the deposition, and seeking judicial resolution of problems counsel cannot resolve. Part III will consider law and procedure for creating a record of the deposition and using the record for motions, trial and appeal.

SETTING UP THE DEPOSITION

A. Notice to Depose a Party

The first step in setting up the deposition of a party in a civil action[5] is to serve a notice of deposition upon each party[6] to the action and to file the notice with the court.[7] The deposition transcript cannot normally be used at trial or in connection with a motion against any party who did not have proper notice,[8] or who was unable to obtain counsel for the deposition, despite diligent effort to do so.[9]

The notice must state the time and place of the deposition and the name and address of the deponent, if known, and designate any subpoenaed documents or things to be produced at the deposition.[10] A federal notice must also specify the method by which the deposition will be recorded.[11] Because all errors and irregularities in the notice are waived unless written objection is promptly serve upon the party giving notice, you must wait until the deposition to object to errors in the notice.[12]

A party to the action need not be subpoenaed,[13] but must appear at the deposition upon proper notice.[14] A party's failure to appear and give testimony at a properly noticed deposition may result in any of a wide range of Rule 37 sanctions, including default judgment.[15] When serv-

ing a deposition notice after the parties have entered their appearance and opposing counsel have been identified, contact opposing counsel and agree on an acceptable date, time and place for the deposition. This contact should be made before the notice is sent. In the absence of such an agreement, the notice must be served within a "reasonable" time before the deposition.[16] As a general rule, a "reasonable" time is more than 10 days before the deposition.[17]

B. Subpoena and Notice to Depose a Non-Party

A non-party deponent can be compelled to appear only by serving a subpoena upon her[18] and serving a deposition notice upon all parties.[19] To compel the non-party deponent to produce documents or things at the deposition, a subpoena duces tecum[20] must be served upon the deponent. Both the subpoena and the deposition notice must describe the subpoenaed documents or things.[21]

In state actions under the current rules, the court clerk typically issues a subpoena, signed and sealed but otherwise blank, to a party's attorney, who then fills in the required information before service.[22] Before clerks will issue a deposition subpoena, they must have proof that the deposition notice has been served upon all parties.[23] In a federal action, however, the attorney, as an officer of the court, is authorized to sign and issue a subpoena.[24] Proposed URCP 45 will also allow the attorney to issue a subpoena.[25] Both FRCP 45 and new URCP 45 impose an affirmative duty on the attorney and party serving the subpoena to avoid undue hardship or burden upon subpoenaed persons.[26]

C. Service of Deposition Subpoena

A federal subpoena,[27] and a state subpoena under proposed URCP 45,[28] may be served by any person who is at least 18 years of age and who is not a party to the action. Thus, unlike the old Utah role, the federal rule and proposed URCP 45 allow an attorney of record to serve a deposition subpoena. However, you and your employees should refrain from serving the subpoena if possible to avoid becoming witnesses regarding the service and being disqualified from representing the client in the action.

The federal rules require that the subpoena be served upon the deponent personally.[29] Proposed URCP 45, on the other hand, allows the same methods of personal and substitute service as provided in URCP 4(e) for service of the summons and complaint.[30] When the subpoena is served, appearance and mileage fees must be tendered to any witness other than an officer or agent of the United States in a federal action,[31] and other than an officer or agent of the United States or the State of Utah in a state action.[32] Failure to tender the required fee voids the subpoena.

D. Obtaining Documents

Documents for the deposition of a party must be obtained by a request for documents under Rule 34, not by subpoena.[33] This request may accompany the deposition notice.[34] Unless a court orders otherwise, a party has 30 days to respond to a Rule 34 document request. This means, of course, that the request should be made at least 30 days before the deposition.[35]

"With few exceptions, any person who can be persuaded or compelled to be deposed may be deposed."

Documents for the deposition of a non-party witness must be obtained by serving a subpoena duces tecum upon the witness.[36] Non-party witnesses can be compelled to produce unprivileged documents and things which are relevant to the subject matter of the action[37] unless the request is unreasonably burdensome.[38] The party serving the subpoena will normally be required to advance the reasonable cost of producing the documents or things.[39] A non-party witness can automatically avoid producing subpoenaed things or documents by serving an objection. When this occurs, the requesting party must obtain a court order before proceeding.[40]

E. Who May Be Deposed

With a few exceptions, any person who can be persuaded or compelled to be deposed may be deposed.[41] High government officials,[42] news reporters[43] and opposing counsel[44] normally cannot be deposed if the desired information is available from other sources. Similarly, a person confined in prison cannot be deposed absent a court order.[45]

F. Where

A deposition may be taken at any place stated in the notice unless a protective order changes the place. If the deponent is not a party and will not appear voluntarily, the deposition must be taken where she can be compelled by subpoena to appear for the deposition.[46]

In a Utah state action, the possible locations for a deposition differ for resident and non-resident deponents. A resident of Utah may be compelled to give deposition testimony only in the county where she resides or is employed or transacts business, or at such other convenient place as is fixed by an order of the court.[47] A non-resident of Utah who can be served in Utah may be compelled to give deposition testimony only in the county where she is served with a subpoena, unless the court orders otherwise.[48]

In a federal action, county and state boundaries are irrelevant. A person who is neither a party nor the officer of a corporate party can be compelled by subpoena to attend a deposition only within 100 miles of the place where that person resides, is employed or regularly transacts business in person.[49]

In both state and federal actions, a party or deponent may move for a protective order. When this is done, the court may for good cause designate a different place for the deposition than that stated in the notice.[50] Courts have applied certain general rules in deciding where a contested deposition may be held. For example, the plaintiff is usually required to travel to the forum of the action or to pay the defendant's attorney to travel to the place where plaintiff wishes to be deposed. Usually, the defendant must be deposed at his residence or principal place of business.[51] For the purpose of these general rules, a defendant who files a permissive counterclaim has been treated as a plaintiff.[52] The general rules do not apply, however, if they would create undue burden or expense in the particular case.[53]

G. When

In a state action, depositions may be taken at any time after commencement of the action and before the discovery cut-off date, unless the court orders otherwise.[54] However, in most circumstances, a court order must be obtained to depose a defendant within 30 days after service of the summons on the defendant.[55] Under the

new federal rules, no deposition may be taken without leave of the court until after the parties have met, conferred, and established a discovery plan.[56]

H. Interdistrict and Interstate Issues

To compel deposition testimony of a witness located in Utah for an action pending in another state, you may obtain a subpoena from a Utah state court. This is done by filing the deposition notice with the clerk of the court in the county where the deponent resides or is served.[57] When such a deponent is served, the Utah district court acquires power to compel appearance and testimony, and to punish for contempt.[58] To compel appearance at a deposition outside of Utah, in a Utah action, you must comply with the procedure of the foreign state for obtaining subpoenas.[59]

In federal actions, a deposition subpoena bears the caption of the federal court in the district in which the deposition is to be taken without regard to where the action is pending.[60] For federal actions pending in Utah, an attorney admitted to the United States District Court in Utah[61] may issue and sign deposition and document subpoenas for depositions to be conducted anywhere in the United States.[62] For example, contrary to pre-1991 practice, a Utah attorney may sign and issue a subpoena not only on behalf of the U.S. district court in Utah but also for the district court in New York. Commencing a New York action or hiring New York counsel is not necessary. For federal actions pending outside Utah, a Utah attorney may sign and issue a subpoena on behalf of the U.S. District Court of Utah for a deposition or production in Utah.[63]

For depositions in state and federal actions taken outside the forum state or the forum federal district, which court has jurisdiction to supervise the deposition depends upon the dispute and the procedure raising the dispute. In both federal and state actions, both the forum court and the court where the deposition is taken may enter a protective order[64] or an order terminating or limiting the deposition.[65] Both courts also may hold a party-deponent in contempt.[66] However, only the court where the deposition is taken has jurisdiction to punish a non-party witness for contempt, and only the court where the action is pending may impose other sanctions upon a party for that party's deposition-related failures.[67]

I. Corporate Deponents

Additional rules must be considered if the deponent is a corporation or other organization. The key to understanding these rules is to keep the organization conceptually distinct from the individual witness. An individual does not become a party solely because the organization is a party, regardless of the individual's relationship to the organization. The *organization* may be penalized if its officers, directors, managing agents or persons designated under Rules 30(b)(6) or 31(a) fail to appear at a properly noticed deposition or fail to obey a discovery order, but in the absence of a subpoena the court has no jurisdiction to enter sanctions against these persons individually.[68] Also, absent a subpoena, courts have no authority to compel the organization to produce any employee or person other than its officers, directors, managing agents and persons designated under Rule 30(b)(6) or Rule 31(a).

"Additional rules must be considered if the deponent is a corporation . . . ."

Rule 30(b)(6) allows you to name a party organization in the notice or a non-party organization in a subpoena[69] as the deponent and to designate relevant matters which you wish to examine. The organization must then designate one or more persons to testify as to all matters known or reasonably available to the organization in the subject matter about which that person is designated to testify. This procedure allows you to discover who has relevant knowledge and to obtain admissions of the organization. For example, if a properly designated witness testifies that she does or does not know a critical fact, it can be argued that the testimony is an admission of the corporation, since the witness is required to know and testify regarding all designated matters known or reasonably available to the organization.[70] Sanctions may be imposed against the organization if it designates a witness without knowledge of the noticed topics when such a witness is available.[71]

[1]"The significance of depositions has grown geometrically over the years to the point where their pervasiveness now dwarfs both the time spent and the facts learned at the actual trial — assuming there is a trial, which there usually is not. The pretrial tail now wags the trial dog." *Hall v. Clifton Precision*, 150 F.R.D. 525, 530 (E.D. Pa. 1993).

[2]The current draft of revised URCP 45, which has been published for comment, is heavily influenced by the 1991 changes in FRCP 45. Although the current draft of revised URCP 45 is subject to change, this article is based upon the current draft because the author believes that current URCP 45 will be amended, and that the amended rule is likely to be more like the draft than the existing rule. The author is a member of the Utah Supreme Court Advisory Committee, but the views expressed in this article are his own.

[3]In general, the current Utah Rules of Civil Procedure relating to depositions are similar to the Federal Rules before the December 1993 amendments. Where there is no significant difference in the text or interpretation of the two sets of rules, this article refers to both as "Rule." In the few instances where there are significant differences, the Utah Rule is referred to as "URCP" and the Federal Rule as "FRCP."

[4]Because pre-trial discovery disputes are generally not appealable, and because state trial judges do not publish opinions, there are still few published Utah decisions which explicate the law of depositions. United States District Courts, on the other hand, publish opinions, including some deposition rulings, and are therefore the most active interpreters of deposition law. Utah courts have generally shown deference to federal deposition law.

[5]Under the Utah Rules, depositions may also be taken in some state statutory proceedings. *See* URCP 1(a) and 81(a); *State v. Geurts*, 359 P.2d 12, 16 (Utah 1961).

[6]Rule 30(b)(1). Rule 5(a) suggests that there may be situations in which a court would order that service of a deposition notice upon each party is not necessary, but without an explicit court order to the contrary, notice to all parties is required. *See C&F Packing Co. v. Doskocil Companies, Inc.*, 126 F.R.D. 662, 674-80 (N.D. Ill. 1989).

[7]*See* Rule 5(d); Rules of Practice 204-3(c)(1) (U.S. Dist. for Utah).

[8]Rule 32(a). *See also United States v. Vespe*, 868 F.2d 1328, 1339 (3d Cir. 1989).

[9]URCP 30(b)(2); FRCP 32(a)(3).

[10]Rule 30(b)(1); *C&F Packing Co. v. Doskocil Companies*, Inc., 126 F.R.D. 662, 674-80 (N.D. Ill. 1989).

[11]FRCP 30(b)(2).

[12]URCP 32(c)(1); FRCP 32(d)(1). *Cf. Lukus v. Industrial Comm'n*, 391 P.2d 433, 434 (Utah 1964).

[13]*See In re Edwards S. Honda*, 106 B.R. 209 (Bankr. D. Haw. 1989). *But cf. Howell v. Morven Area Medical Ctr., Inc.*, 138 F.R.D. 70, 71 (W.D.N.C. 1991) (defendant should have subpoenaed pro se plaintiff to ensure attendance at deposition).

[14]Rules 30(a)(b); 37(d).

[15]Rule 37(d). *See Darrington v. Wade*, 812 P.2d 452, 457 (Utah App. 1991). *See also First Fed. Sav. & Loan Ass'n v. Schamanek*, 684 P.2d 1257, 1267 (Utah 1984) (striking pleadings was appropriate sanction for failure to appear and answer deposition questions).

[16]Rule 30(b)(1).

[17]URCP does not define a "reasonable" time. Because new FRCP 32(a)(3) allows a party who receives notice less than 11 days before the deposition to stop the deposition merely by filing a motion for protective order, more than 10 days should be allowed. *Cf. also C&F Packing Co. v. Doskocil Companies, Inc.*, 126 F.R.D. 662, 674-80 (N.D. Ill. 1989) (requiring at least seven business days notice for depositions).

[18]Rules 30(a); 45.

[19]Rule 30(b)(1).

[20]The term "subpoena duces tecum" is used only in Rule 30(b). It appears to be a command requiring the recipient not only to appear and give testimony but also to produce specified books, papers or things. Under both FRCP 45(a)(1) and proposed URCP 45(a)(2), a subpoena may command the production of documents or things without requiring any witness to appear for a deposition. This "documents-only" subpoena is not called a subpoena duces tecum.

[21]Rule 30(b)(1).

[22]Current URCP 45(a).

[23]*See* current URCP 45(d)(1).

[24]FRCP 45(a)(3).

[25]New URCP 45(a)(3).

[26]Rule 45(c)(1); *In re Letters Rogatory*, 144 F.R.D. 272, 274-75 (E.D. Pa. 1992).

[27]FRCP 45(b)(1).

[28]Proposed URCP 45(b)(1)(A).

[29]FRCP 45(b)(1).

[30]Proposed URCP 45(b)(1)(A).

[31]FRCP 45(b)(1).

[32]URCP 45(c).

[33]*See, e.g., United States v. Davis*, 140 F.R.D. 261, 263 (D.R.I. 1992). *But see*, 4A JAMES W. MOORE ET AL, MOORE'S FEDERAL PRACTICE ¶34.02 (2d ed. 1993) (courts are divided on question of whether subpoena duces tecum will issue for deposing a party).

[34]Rule 30(b)(5).

[35]Rule 34(b).

[36]Rules 30(b); 45(a)

[37]Rule 26(b)(1).

[38]FRCP 45(c)(3)(A); proposed URCP 45(b)(3)(A).

[39]FRCP 45(c)(2)(B); proposed URCP 45(c)(2)(C)&(D).

[40]FRCP 45(c)(2)(B); proposed URCP 45(c)(2)(D).

[41]Rule 30(a).

[42]*See Zions First Nat. Bank v. Taylor*, 390 P.2d 854, 856 (Utah 1964) (separation of powers doctrine protects bank commissioner acting in quasi-judicial capacity from being deposed).

[43]*Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980); *In re Scott Paper Co. Securities Litigation*, 145 F.R.D. 366, 370 (E.D. Pa. 1992); *In re IBP Litigation*, 7 Med. L. Rptr. 2127, 2128 (N.D. Iowa 1981).

[44]*See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1328-29 (8th Cir. 1986). *But see Mann v. Bristol Bay Housing Authority*, 777 P.2d 188, 195-96 (Alaska 1989) (opposing counsel may be deposed even though evidence sought to be discovered was obtainable elsewhere); In re *San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1016-18 (1st Cir. 1988) (compelling opposing counsel to disclose document lists because such lists do not implicate work product privilege).

[45]Rule 30(a).

[46]*Cf.* Rule 30(a).

[47]URCP 45(b)(3).

[48]*Id.*

[49]FRCP 45(c)(3)(A)(ii).

[50]Rule 26(c)(2).

[51]RICHARD A. GIVENS, MANUAL OF FEDERAL PRACTICE, §§5.89, 5.93 (4th ed. 1991).

[52]*Continental Fed. Sav. & Loan Ass'n. v. Delta Corp.*, 71 F.R.D. 697, 700 (W.D. Okla. 1976). *Cf. also Zuckert v. Berkliff Corp.*, 96 F.R.D. 161, 1962 (N.D. Ill. 1982) (defendants were entitled to be deposed at principal place of business because counterclaim was compulsory and not permissive).

[53]URCP 30(a); *Operative Plasterers' & Cement Masons' Int'l Assoc. v. Benjamin*, 144 F.R.D. 87, 91 (N.D. Ind. 1992).

[54]Rule 30(a). This article does not analyze Rule 27, which allows a court to order a deposition before an action is commenced or pending appeal.

[55]URCP 30(a).

[56]FRCP 30(a)(2)(C) & 26(d). FRCP 26(f) requires the parties to meet at least 14 days before a scheduling conference is held, or ordered pursuant to Rule 16(b), to develop a discovery plan.

[57]*See* URCP 26(h).

[58]URCP 37(b)(1); 37(b)(2)(D); 45(d). *See Barrett v. Denver & Rio Grande W. R.R.*, 830 P.2d 291, 294 (Utah App. 1992).

[59]See URCP 45(b)(1)(C).

[60]FRCP 45(a)(2).

[61]On its face, FRCP 45 does not require that the attorney be counsel of record in the action in which the subpoena is issued.

[62]FRCP 45(a)(3) places limits upon the distance from the place of service which a subpoenaed person can be compelled to travel for a deposition or document production. Thus, although a deposition or document production can be compelled anywhere in the United States, service must occur within the maximum specified distance from the deposition or production.

[63]FRCP 45(a)(3)(a).

[64]Rule 26(c).

[65]FRCP 30(d)(3); URCP 30(d).

[66]Rules 37(b)(1); 37(b)(2); 37(d).

[67]Rule 37(b)(1); Rule 37(d); FRCP 45(e); URCP 45(d); *First Nat'l Bank v. Western Casualty & Sur. Co.*, 598 F.2d 1203, 1205 (10th Cir. 1979).

[68]Rules 37(b)(d). *See, e.g., Deines v. Vermeer Mfg. Co.*, 133 F.R.D. 46, 49 (D. Kan. 1990).

[69]Rule 30(b)(6). *See Ghandi v. Police Dept.*, 74 F.R.D. 115, 118-19 (E.D. Mich. 1977) (subpoena duces tecum directed to an institutional deponent under Rules 30(b)(6) and 45, can compel production of information and documents of the institution.

[70]Rule 30(b)(6).

[71]*Resolution Trust Corp. v. Southern Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993).

Discipline Corner

ADMONITIONS

An attorney entered into a discipline by consent on February 2, 1994, for an admonition and restitution in the amount of $1,191.64 for violating Rules 1.3 (Diligence) and 1.4 (Communication), Rules of Professional Conduct of the Utah State Bar. The attorney was retained on July 17, 1992 for a fee of $200.00 and agreed to defend the client in an action for unlawful detainer. After answering the complaint on July 20, 1992, the attorney failed to appear at the trial which was held, pursuant to notice, on September 21, 1992 or provide any meaningful legal service on behalf of the client. Consequently, a judgment by default was entered against the client ordering the client to pay to the opposing party $2,183.28 which included treble damages. The attorney failed to notify the client of the entry of judgment. The client learned of the adverse ruling when the judgment creditor garnished the client's bank account. In aggravation, the Ethics and Discipline Committee of the Utah State Bar considered the attorney's lack of response to the Office of Attorney Discipline's requests for information.

An attorney was admonished on March 3, 1994 for violating Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.14(d) (Declining or Terminating Representation), and 8.4(c) and (d) (Misconduct), Rules of Professional Conduct of the Utah State Bar. The attorney was retained in or about May of 1992 to represent a minor in a personal injury action resulting from a dog bite incident. From May of 1992 through July of 1993, the attorney failed to commence an action or provide any meaningful legal service on behalf of the client. During this period the attorney accepted employment as an in-house counsel, changed office locations and telephone numbers and failed to inform the client of these changes. Ultimately, the client located the attorney and demanded the return of the file. The attorney, unable to locate the file to surrender to the client, promised to pursue the cause of action diligently. Again, the attorney failed to do so. In mitigation, the Screening Panel of the Ethics and Discipline Committee of the Utah State Bar considered the fact that because of the unique circumstances of the case, the client was ultimately liable for the medical services rendered and there were no actual damages.

Judicial Nominating Commission Applicants Sought

The Bar Commission is seeking applications from Bar members to serve on the trial court judicial nominating commissions for each geographic division of the trial courts and the Appellate Court Nominating Commission. Under legislation recently passed and soon to be enacted, two commissioners will be appointed by the governor to the Appellate Court Nominating Commission from a list of six nominees provided by the Bar. Also, two commissioners on each trial court judicial nominating commission will be appointed by the governor from lists provided by the Bar, with the Bar submitting six nominees for districts 2 through 4, and four nominees for districts 1 and 5 through 8.

All commissioners shall be citizens of the United States and residents of Utah. Commissioners appointed to the trial court nominating commissions shall be residents of the geographic division to be served by the commission to which they are appointed. Not more than four commissioners appointed by the governor to each judicial nominating commission may be of the same political party. All commissioners shall be appointed for terms of four years each.

The Appellate Court Nominating Commission nominates justices to the Supreme Court and judges to the Court of Appeals, and the trial court nominating commissions nominate judges to the district courts, juvenile courts and the circuit courts within their geographic division. Please mail your application to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111. Applications must be received by **May 16, 1994.**

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, Suite 310, 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

12th Annual Bob Miller Memorial Law Day Run

Among the most cherished and awaited rites of spring in the Utah legal community is the annual Bob Miller Memorial Law Day 5K Run. As is tradition, the run is scheduled for the last Saturday prior to the May 1st Law Day. This year's 12th annual run is set for Saturday, April 30, 1994 at 10:00 a.m. The course begins at the Red Butte Gardens, winds down through the University of Utah campus, and finishes at the University of Utah College of Law. Awards will be given for the top three finishers in 14 categories, as well as the team competition, and t-shirts are given to all registrants. For information and registration forms, call Howard Young or Tonya McAllister at 532-1234 or Dawn Hale at 322-2516.

Attorneys Need to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics

Attorneys are needed to contribute two hours during the next 12 months to assist elderly persons in a legal clinic setting. The clinics provide elderly persons with the opportunity to ask questions about their legal and quasi-legal problems in the familiar and easily accessible surroundings of a Senior Center. Attorneys direct the person to appropriate legal or other services.

The Needs of the Elderly Committee supports the participating attorneys, by among other things, providing information on the various legal and other services available to the elderly. Since the attorney serves primarily a referral function, the attorney need not have a background in elder law. Participating attorneys are not expected to provide continuing legal representation to the elderly persons with whom they meet and are being asked to provide only two hours of time during the next 12 months.

The Needs of the Elderly committee instituted the Senior Center Legal Clinics program to address the elderly's acute need for attorney help in locating available resources for resolving their legal or quasi-legal problems. Without this assistance, the elderly often unnecessarily endure confusion and anxiety over problems which an attorney could quickly address by simply directing the elderly person to the proper governmental agency or pro bono/low cost provider of legal services. Attorneys participating in the clinics are able to provide substantial comfort to the elderly, with only a two hour time commitment.

The Committee has conducted a number of these legal clinics during the last several months. Through these clinics, the Committee has obtained the experience to support participating attorneys in helping the elderly. Attorneys participating in these clinics have not needed specialized knowledge in elder law to provide real assistance.

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Anyone attorney interested in participating in this rewarding, yet truly worthwhile, program are encouraged to contact: John J. Borsos or Lisa Christensen, 370 East South Temple, Suite 500, Salt Lake City, Utah, 84111, (801) 533-8883; or Joseph T. Dunbeck, Jr., Parsons, Davies, Kinghorn & Peters, 310 South Main Street, Suite 1100, Salt Lake City, Utah 84101, (801) 363-4300.

Thank You

I would like to thank all the members of the Bar Examiners Committee, Bar Examiners Review Committee and Character and Fitness Committee for a successful February Bar Examination that was given February 22nd and 23rd. Your voluntary time for the bar examination was very much appreciated.

Thank you again,
Darla C. Murphy,
Admissions Administrator

Lawyers' Softball League

Firm Team Recruitment needed and wanted for Lawyers' Softball League to begin in May. Pre-game planning meeting later in April.
Team Fee: $145.00

To inquire and sign up:
Attn: George Haley, Esq.
Softball Commissioner
HALEY & STOLEBARGER
175 South Main, #1000
SLC, UT 84111
531-1555

New Appellate Practice Section Sponsors Appellate Advocacy CLE Seminar

The newly formed Appellate Practice Section of the Utah State Bar will hold its first CLE seminar on Appellate Advocacy on Friday, May 13, 1994, from 8:30 a.m. – 3:30 p.m. at the University of Utah Law School. The ambitious program, which offers 6 hours of CLE credit (including 1 in Ethics), is packed with useful information for attorneys and paralegals who are regularly, or occasionally, involved in state court appeals.

The distinguished group of experienced presenters includes: Utah Supreme Court Chief Justice Michael Zimmerman, Justices I. Daniel Stewart and Christine Durham; Judges Gregory K. Orme and Russell W. Bench of the Utah Court of Appeals; Adjunct Professors of Law Kate Lahey and Debra Moore; practitioners David B. Thompson of Tesch, Thompson & Sonnenreich, David L. Arrington of VanCott, Bagley, Cornwall & McCarthy, and Curtis Nesset of Nygaard, Coke & Vincent; and other appellate advocates, law clerks, and central staff attorneys.

Registration is $75.00 for current members of the Appellate Practice Section and $85.00 for non-members. This fee includes a University parking sticker as well as lunch. A brochure with a detailed agenda and registration form will be mailed to members of selected Bar sections in early April. If you do not receive a brochure but wish to attend the seminar, please call Monica Jergensen at the Utah State Bar (531-9077) or Annina Mitchell, Director of Civil Appeals, at the Utah Attorney General's Office (538-1021).

Topics on the program include:

• Procedural Pitfalls in Appellate Practice
Should You Pursue an Appeal? Assessing your Case for Reversible Error; Preservation of Issues; Plain Error Arguments; Prejudicial Error; the Client's Interests; Public Policy Concerns.
Findings of Fact and Conclusions of Law: What is the Difference? Whose job are they? When are they Sufficient and What if They Aren't? *Standards of Review:* What Are they and Why do they Matter? *Appellant's Burden to Marshall Evidence:* The Appellate Practice Bugbear and How to Tame It. *Certiorari Petitions:* The Do's and Dont's.

• Effective Briefwriting
Writing for Different Audiences: How Appellate Judges and Judicial Clerks use Briefs; Uses and Abuses of Addenda to Briefs. *Briefwriting 101:* Selecting, Ranking, and Framing Appellate Issues; Waiver; Harmless Error; Writing to Inform and Persuade — Developing a Theme, Style, Tone, and Credibility; Creative Editing.

• Motion Sickness: Appeals from Motions, Won and Lost
Appeals of Right; Nonfinal Orders; Collateral Order Doctrine; Interlocutory Appeals; Rule 54(b) Certification; Effects of Post-Judgment Motions on Time for Appeal

• Ethics and Appellate Advocacy
Conflicts of Interest; Disclosure of Trial Counsel's Malpractice; Citation of Adverse Authority; Counseling Clients

Basic Mediator Training

The Division of Continuing Education, University of Utah, is offering Spring Quarter 1994 a 32-hour core course on **Basic Mediator Training**. This intensive 4-day course is the only publicly available short-course mediator training program in Utah. The course includes lectures, demonstrations and frequent student simulations and critiques. The course is designed to comply with basic mediator training requirements of the Utah ADR Providers Certification Act and the Academy of Family Mediators. For further information please call Rose Mary Kelland, 581-5361.

COURSE DEPT/NUMBER: Family and Consumer Studies (FCS) 58R-1
DATES: Friday May 6 and May 13
Saturday May 7 and May 14
COST: $425
LOCATION: Alfred Emery Building (AEB 360), University Campus
INSTRUCTORS: James R. Holbrook, Esq.; Marcella L. Keck, Esq.; Cherie P. Shanteau, Esq.
TO REGISTER: By telephone using a credit card: 581-8113. In person at the DCE Registrar's Office: 1185 Annex

Supreme Court Seeks Attorneys to Serve on MCLE Board

The Utah Supreme Court is seeking applications from Bar members for appointments to serve five three-year terms on the Utah State Board of Continuing Legal Education. Interested Bar members who wish to be considered for appointment must submit a letter of application including a resume. Applications are to be mailed to Sydnie W. Kuhre, MCLE Board Administrator, Utah State Board of Continuing Legal Education, 645 South 200 East, Salt Lake City, UT 84111. Applications must be received no later than 5:00 p.m. on **May 31, 1994.**

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 s 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

Deadline for submitting applications is **June 15, 1994.**

Corporate Counsel Section Annual Meeting

Corporate Criminal Liability: What to do Before and After the Grand Jury Subpeona Arrives

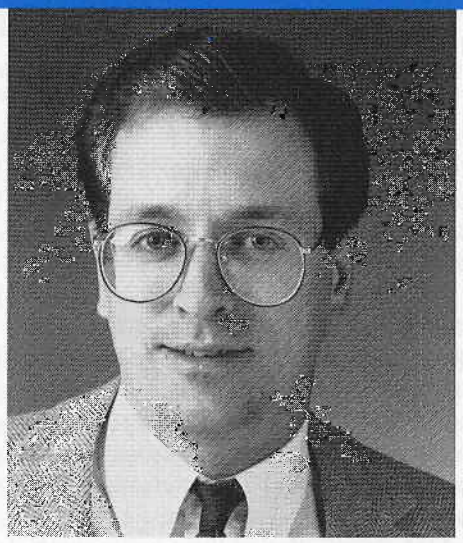
This year's annual meeting will focus on issues surrounding white-collar crime. Professor Charles W. Wolfram of the Cornell Law School and chief reporter for the American Law Institute's *Restatement of the Law Governing Lawyers* will explore a range of issues raised by lawyer advice to clients about white-collar crime matters, focusing on real-life issues of relevance to lawyers in practice. Whitney Adams, former Assistant U.S. Attorney in D.C. and former SEC Assistant General Counsel and currently in practice with Rogers & Wells in D.C. will discuss how to guide your client's response to defend it against potential government charges and subsequent civil litigation when alleged criminal misconduct surfaces.

CLE Credit: 4 hours of CLE, including 2 CLE hour in ETHICS
Date: Friday, April 8, 1994
Place: Utah Law & Justice Center
Fee: $60.00 early registration before April 1, 1994 for Corporate Counsel Section Members. $75.00 early registration before April 1, 1994 for Non-Section Members. Registration after April 1, 1994 or at the door: $75.00 for Corporate Counsel Section Members, $90.00 for Non-Section Members.
Time: 7:30 a.m. (for continental breakfast) to 12:00 noon

A registration form is on page 35 of the *Journal.*

DISCLAIMER

Robert Pusey has asked the United States Postal Service to investigate a matter regarding the fraudulent use of his name as return addressee on a widely mailed document which defamed a local reputable law firm, the Third District Juvenile Court and the apparent author's ex-wife. The circular was received by many law offices and businesses on March 14th and 15th. These materials appear to have been authored, printed and disseminated by an individual who had briefly consulted with Mr. Pusey by long distance telephone once in December 1993. Mr. Pusey has never represented the individual, nor has he at any time associated himself with the person or any claimed organization described in the correspondence. An investigation by the U.S. Postal Inspectors has determined that 668 pieces of this bulk mail were posted from Parkersburg, West Virginia to locations throughout northern Utah.



Young Lawyers Seeking Nominations for Liberty Bell and Young Lawyer of the Year Awards

By David W. Zimmerman

The Young Lawyers Division of the Utah State Bar is seeking nominations for the 1994 Liberty Bell and Young Lawyer of the Year Awards.

LIBERTY BELL AWARD

Each year, in connection with the National Law Day celebration, the Young Lawyers Division presents the Liberty Bell Award to accord public recognition to a nonlawyer for outstanding service in promoting a better understanding of the rights of others, encouraging greater respect for law, and stimulating an individual sense of responsibility so that citizens can recognize their duties as well as rights.

Recent recipients of the Liberty Bell Award include John McMorris ('93), Ben Barr ('92), Reverend France A. Davis ('91) and L.K. Abbott ('90). John McMorris received the Liberty Bell Award in recognition of years of service in preparing and coaching students at Brighton High School in National Model UN competitions and in the Utah State Bar Mock Trial competitions. He has also expended considerable effort in the classroom encouraging students to think about and understand their legal rights. The award was given to Ben Barr to recognize his work at the Utah Aids Foundation. Reverend France A. Davis expended considerable efforts advancing the civil rights of Utah's underprivileged. L.K. Abbott was recognized for over 50 years of public service including, specifically, educating children about the Bill of Rights.

YOUNG LAWYER OF THE YEAR AWARD

The Young Lawyer of the year award is presented annually to an attorney who has both excelled in the legal profession and provided extensive service to the community. Recent recipients include Gregory G. Skordas ('93), Gordon K. Jensen ('92) and Elizabeth A. Dalton ('91). Gregory Skordas received the award for his work as Deputy County Attorney for Salt Lake County as well as his extensive public service including work on the Utah State Bar Mock Trial Competition, the Salt Lake County Bar Pro Bono Project, and other community service. Gordon Jensen entertained and educated students across the state while he served for two years as the Chairman of the Young Lawyers' Law-Related Education Committee. He also completed a host of other law-related education projects while chairing that committee. He is currently completing his second year as Chairman of the Law-Related Education & Law Day Committee of the senior bar. Elizabeth Dalton received the award in recognition of her outstanding professional performance early in her career including pioneering arbitration of domestic relations disputes. She was also recognized for extensive public service.

If you are aware of individuals who are similarly deserving of public recognition through either the Liberty Bell Award or the Young Lawyer of the Year Award, please call Sheri Mower at 521-5800.

Young Lawyers Assist Senior Citizens

By Michael Mower

Grandparents rights, governmental assistance programs and health and consumer fraud avoidance are just a few of the topics offered in a series of seminars for seniors sponsored by the Young Lawyers Division Needs of the Elderly Committee (YLD/NEC).

Under the direction of Karen Thomas Small, the YLD/NEC is sponsoring these seminars for seniors in conjunction with the Salt Lake County Aging Services Program. Aging Services furnish the facilities and advertise the events to their patrons. The YLD/NEC provide volunteer attorney experts to present the seminars and answer any question participants might have.

The seminars have proven to be successful. Warren Overson, site manager of the Harmon Home Community Center in Magna, said the seminars are appreciated because they "give the seniors a lot of good information that they need." He noted that his center's seniors found the most recent program, Government Programs for Older Americans, very helpful.

Nancy Lestor, Coordinator of the Central City Community Center, also lauded the seminars, especially a recent one on preventing fraud. "Seniors seem to be the big targets of fraud," she said. "The attorney who spoke gave good ideas of who to trust and what to believe when someone calls on the phone."

While most praised the seminars, one Salt Lake senior said the hour-long meeting was too long. "Attorneys all seem to like to talk." However, after a moments reflection, he added that what he had learned was helpful, he probably wouldn't have learned it anywhere else and, best of all, he learned it for free.

The well-attended seminars, presented in eighteen different locations in Salt Lake County, may be expanded to towns in other counties during the next bar year.

Young Lawyers Learn to Serve as Guardian Ad Litem

By Sheri Mower

Teaching attorneys the skills they need to represent the interests of children in custody battles was the focus of a recent project of the Needs of Children Committee.

The role of the guardian ad litem is a critical one in the custody process, participants learned. "We handle, on a pro-bono basis, cases where there is a heated custody battle but where there are no allegations of abuse or neglect," noted course participant Lori Nelson. "Where abuse or neglect are alleged," Nelson added, "a guardian ad litem under contract with the court provides representation."

The guardian ad litem training consisted of five two-hour sessions, each focusing on a different aspect of the guardian ad litem program. "We were taught the functions of a guardian as a third party attorney, how to interview children, and the nature and purpose of custody evaluations," said Nelson. Class members were given instructional material prepared under the direction of the Needs of Children Committee Co-chair, Colleen Larkin-Bell, with the assistance of the Court Administrator's office. These materials will serve as a manual for future pro se guardians ad litem.

Presenters included: Helen Christian on custody, litigation, Judge Leslie Lewis on the court's expectation of the guardian ad litem, Dr. Matt Davies on custody evaluations, Detective Willie Draughon, of the Utah Attorney General's office, on interviewing children, and Kristen Brewer on the role of the guardian ad litem.

"The presenters were informative and beneficial. Each speaker sincerely cared about children and advocating for the best interest of children," recalled Dena C. Saradoz, Co-chair of the Needs of Children Committee and a project volunteer.

Over thirty lawyers completed the formal guardian ad litem training. These volunteers are enthusiastic about the opportunities for service that await them. As participant David Zimmerman noted, "I have a desire to help kids, and this is the best way to spend my pro-bono time."

UTAH LEGAL SERVICES, INC. PRESENTS MONDAY BROWNBAG SEMINARS

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

The topics for April and May are:

APRIL

April 4 – Hospital Dumping
April 11 – Commitment Proceedings
April 18 – Fair Debt Collection Practices Act
April 25 – Overview of Public Housing Programs

MAY

May 2 – Ethics
May 9 – Guardianships/ Conservatorships
May 16 – Warranties/MAG Act
May 23 – Model Complaint for Tenant Actions Against Landlord

Young Lawyers Volunteer For Legal Aid

by Mary Jane Ciccarello
Pro Bono Coordinator, Legal Aid Society of Salt Lake

The most important development in Legal Aid's Pro Bono Program during 1993 was winning a Legal Services Corporation grant to fund the hiring of a pro bono coordinator responsible for developing the program, recruiting attorneys, and providing legal support and guidance to those who volunteer. The goal is to recruit volunteer attorneys to handle ten percent of the agency's domestic relations case load, or about 300 cases a year. The typical pro bono case is a divorce action without custody and property issues.

Since Legal Aid began its recruitment program last November, six young lawyers are among those who have provided pro bono representation in divorce actions. While the six lawyers come from different backgrounds and do various forms of legal work, they are strikingly similar in significant ways: all six firmly believe that lawyers have an ethical obligation to provide pro bono representation to people who could not otherwise obtain legal help; also, they all believe that their experience with Legal Aid has been extremely valuable both for the training received as new lawyers and for the personal satisfaction gained in helping someone in need.

Patty Biedermann learned of Legal Aid's Pro Bono Program when she and her husband returned to Salt Lake in 1993 from Detroit where she had recently finished law school. Her main reason for getting involved is a personal sense of owing something back to the community.

Biedermann is now handling a divorce action for her client. "I'm really helping my client do something. Working with her has been wonderful and rewarding," says Biedermann. She believes the experience has helped her as a new lawyer to better learn the rules of civil procedure, service of process problems, and get some court experience. Biedermann plans on volunteering for Legal Aid as much as possible because of her interest in developing an expertise in domestic relations and public interest law.

Like the other lawyers in this article, Biedermann does other volunteer work as well. She volunteers at the University of Utah for the Crimson Club, the Museum of Fine Arts, and Kappa Kappa Gamma. And she serves on the panel of judges for the mock trial program sponsored by the Utah Law Related Education Project.

Valerie Cairns is a science teacher in a local high school. She taught before going to law school and returned to teaching after earning her J.D. Her goal is to combine her teaching experience with her law degree. She currently works in a program at her school to help kids make it to graduation. Volunteering at Legal Aid seemed like a natural extension of her interest in helping kids at risk. Also, coming to Legal Aid was a way for her to get legal experience as well as to provide much needed help. She plans on volunteering more time during the summer months when she is not teaching.

She says her divorce case "has been good so far. The client is very appreciative and the parties are working well together to deal with the children involved."

Cairns says that the Legal Aid Pro Bono Program provides valuable opportunities for people like her who are not currently employed or fully employed in legal work. However, in order to volunteer, Cairns had to pay active status fees to the Bar. She suggests inactive status bar members should have some reduction in fees in order to make it easier for them to do pro bono work.

Mike Mower has already completed his first divorce case for Legal Aid and reports that "the experience was fantastic! It reminded me of the reason I went to law school: to help people." Mower volunteered because he knew Legal Aid needed help. He also knew that volunteering was a good way to get legal experience while receiving solid support from Legal Aid, support so essential to someone just out of law school.

Mower currently writes and revises regulations for the Salt Lake City and County Health Department. He was the Student Bar President for his law school class at the University of Utah and is active in Republican party politics. His membership on the Publications and Awards Committee of the Young Lawyers Division of the Bar gives him the opportunity to do pro bono work as well as spend some time with his wife Sheri who serves on the same committee.

Mower says of his pro bono work: "Taxpayers funded my legal education in large measure and I owe them something in return." He recognizes that lawyers are hesitant to do legal work in areas unfamiliar to them, but explains that Legal Aid offers the type of support lawyers need to provide quality legal services.

Kristen Jocums has found her pro bono client easy to work with and her experience with the Legal Aid program to be positive. Jocums started her own practice in December 1993, and concentrates in the areas of domestic relations, employment discrimination, and ADA-related issues. She believes that no one should be excluded from the legal system because of poverty. She also suggests that pro bono work should be emphasized in law school in order to get people used to the idea early on. Jocums herself has been involved with pro bono work since law school when she worked with the homeless project at Utah Legal Services, and has worked since 1990 for the National Federation of the Blind, specifically in educating the legislature on such issues as braille literacy and the ADA.

Virginia Ward has also been involved with pro bono work since her law school days. In 1991, Ward was one of the founders of the Public Interest Law Organization at the University of Utah College of Law. She organized PILO volunteers to work with Legal Aid's Domestic Violence Victims Assistance program. Once she became a member of the Bar, she wanted to represent a Legal Aid client.

Ward says her experience has been challenging, but great. "Low-income people face a variety of challenges in their lives that make their legal relationships complicated. I do volunteer work because I think it's something all attorneys should do. The client I'm serving now truly needs assistance and this work gives me valuable practical experience as well as exposure to the legal community. Legal Aid has given me unqualified support in planning legal strategies to resolve complex issues and

has provided me with valuable support services."

Ward currently works as a part-time Salt Lake City prosecutor, a clerk for the Salt Lake County Attorney's office, and is the mock trial coordinator for the Utah Law Related Education Project.

Nisa Sisneros practices family law for the law firm of Kruse, Landa & Maycock. She took on a pro bono case because she thought it would be good practice and because she believes that lawyers have an ethical duty to volunteer their legal services to people in need of help. She says her experience has been very rewarding. "Legal Aid is very helpful and has bent over backwards to answer questions and provide support. The experience has been extremely educational because lots of issues come up that have not arisen yet in my regular practice, such as dealing with the new universal income withholding status."

Sisneros also serves as a member of the civil rights committee of IMAGE, a national organization for the advancement of Hispanic people. She looks forward to taking on another Legal Aid case soon.

Legal Aid thanks these young lawyers for their generous help. Their work is deeply appreciated by the agency and the clients they have served so well. If you are interested in volunteering for Legal Aid, please contact Mary Jane Ciccarello, Pro Bono Coordinator at 328-8849 ext. 307.

CASE SUMMARIES

By Clark R. Nielsen

SALES TAX, SALE V. LEASE

The sale and lease-back of equipment between the petitioner Matrix and its customer was subject to payment of sales tax. Although Matrix argued that the transaction was a loan or lease and not a sale, the Court of Appeals agreed with the Tax Commission that the sale and the lease-back were taxable. The agreement provided that Matrix would purchase equipment from the customer, with the title passing to Matrix. The customer then leased the equipment back for a five-year period with an option to purchase the equipment at the end of the period. If the customer did not exercise the option to purchase, then Matrix retained title and possession.

A "sale" occurred when the customer transferred title of the equipment to Matrix. However, the sale from customer to Matrix was exempt from sales tax, since the property had been purchased for resale within the state. The second portion of the transaction was the lease-back by the customer. That transaction was clearly taxable, whether a true lease or whether intended as a mere security arrangement. The Tax Commission order assessing a sales tax was affirmed.

Matrix Funding Corp. v. State Tax Comm'n, 231 Utah Adv. Rep. 23 (Feb. 3, 1994) (J. Bench, with Js. Billings and Russon)

SEARCH AND SEIZURE, PROBABLE CAUSE, CONSENT

The defendant was arrested for possession of cocaine and marijuana after an I-15 stop and consent search.

Defendant was stopped when driving 70 miles per hour on I-15. His stop was not pretextual under *State v. Sierra* because the officer had probable cause or, at least, reasonable suspicion that Delaney's vehicle was speeding. The officer routinely stopped vehicles traveling at defendant's speed. The officer's detection of the smell of marijuana from the stopped car justified his continued detention of the vehicle after the initial traffic stop. The officer's belief that he had probable cause to search the vehicle without consent due to the smell of burnt marijuana was supported by the evidence.

The trial court's determination that defendant voluntarily consented to a search of the vehicle was appropriate. The Court's findings were supported by the evidence and were not clearly erroneous, and the conclusion of voluntariness was likewise supported. The conviction was affirmed.

State v. Delaney, 231 Utah Adv. Rep. 19 (App. Ct. Feb. 2, 1994) (J. Davis, with Js. Billings and Greenwood)

AUTO INSURANCE, INTERPRETATION OF POLICY LANGUAGE

As a matter of law, plaintiff State Farm's policy did not cover the injuries to an injured third-party, Brandon Geary, who was shot by State Farm's insured. In this declaratory judgment action to determine whether State Farm owed a duty to defend its insured and provide coverage under its homeowners policy, the court concluded that the policy's exclusion clause relieved State Farm of any such duty. The intentional firing of a shotgun at or near the victim Geary was not covered by State Farm's policy because it was not an "occurrence" as defined by the policy. The court interpreted the homeowner's policy to not include an intentional shotgun blast as an occurrence, even if the resulting injury was unintended.

Even if the policy did provide coverage of such an "occurrence" the policy's exclusionary clause denied coverage because the insured intended to injure Geary. The intent can be inferred as a matter of law from the insured's intentional firing of the shotgun in Geary's direction.

State Farm Fire & Casualty v. Geary, 231 Utah Adv. Rep. 12 (Ct. App. 1994) (J. Greenwood, with Js. Jackson and Garff)

PARENT-CHILD, DUTY TO CONTROL ADULT CHILD

The parents of an adult drunk driver did not owe a duty to the drunk driver's passenger injured in an accident. The adult driver had a history of alcohol and drug use and had been instructed by the parents not to invite his friends into their home or to drink. The injured passenger had also been present during these conversations and had heard these instructions. However, the son disregarded the instructions, got drunk, and then drove his car into a tree after a party, injuring his passenger.

The plaintiff passenger complained that the parents had negligently left their son home alone where alcohol was present, knowing that he used drugs and alcohol and disregarded their orders not to do so. The trial court granted and the court of appeals affirmed the parents' motion for summary judgment because they owed no duty of care to the plaintiff as a matter of law.

The court applies the Restatement "special relation" analysis to determine whether a special relation existed that imposed a "special duty." The court should examine the factual context in which the duty issue arises, such as the identity and character of the actor, the victim, the victimizer, and their relationships. Here the adult age of the son is a critical factor. A parent has a duty to exercise reasonable care so as to control a minor child, but one's status as a parent does not, without more, impose a duty to supervise and control and adult child. The parents did not authorize or offer alcohol to their son and left instructions to the contrary. It cannot be said that the parents knew or should have known that the adult son would present a risk of danger to the plaintiff.

"Parents often struggle with the issue of supervising their children through instruction, example, and other means and the struggle to control the behavior of one's child becomes even more difficult as the child attains adulthood. To place a duty on parents to control their adult child's behavior is plainly contrary to the Restatement's general principal that one does not have a duty to control the conduct of third persons."

Drysdale v. Rogers, 231 Utah Adv. Rep. 9 (App. Ct. Jan. 25, 1994) (J. Russon, with Js. Greenwood and Orme)

ADMINISTRATIVE LAW, TIMELINESS OF APPEAL

The Utah Supreme Court approves and adopts the rationale of the Utah Court of Appeals in *49th Street Galleria*, 860 P.2d

996. Petitioner Harper challenged the Tax Commission assessment of sales tax for an erroneous in-house accounting treatment of intra-owner transfers on the books of Harper's subsidiaries. After the commission assessed the tax, Harper sought a good-cause extension to file for reconsideration of the commission's decision. The commission granted the extension and reconsidered, but then denied the petition for reconsideration. The time for filing a petition for judicial review begins to run from the denial of the petition for reconsideration and not from the original commission decision. Because the commission chose to consider the petition for reconsideration and to act on it by issuing an order denying it, the period for seeking review did not begin to run until the date that final order was issued.

On the merits of Harper's petition, the Court summarily held that the Tax Commission wrongly assessed the sales tax on transactions that, although reflected in the accounting records, did not have any reality in substance.

Harper Investments, Inc. v. Utah State Tax Comm'n, 231 Utah Adv. Rep. 3 (Feb. 2, 1994) (J. Zimmerman)

CONTRACT INTERPRETATION, PAROLE EVIDENCE

The trial court properly admitted extrinsic evidence to explain the terms of an ambiguous agreement to allocate property taxes on commercial property which plaintiff purchased from defendant. Because the contract was ambiguous, extrinsic evidence was considered to determine the intent of the parties. Based upon that evidence, the court found that they had intended to split the tax liability of the parcel according to the proportionate amount of land owned by each party.

The court will look at the four corners of the document to determine the parties' intent in interpreting the contract. A contract may be ambiguous if it omits terms, or the terms and expressions used may have two or more plausible meanings. When language is ambiguous, extrinsic evidence may be introduced to clarify the parties' intent. The evidence will be viewed in a light most favorable to the trial court's findings and construction of the ambiguity, applying the clearly erroneous test. The court found that the parties had agreed orally in 1988 to split the tax liability according to the proportionate amount of the acres owned.

Wade v. Stangel, Utah Ct. App. 920221-CA (App. Ct. Feb. 7, 1994) (J. Bench, with Js. Greenwood and Garff)

HABEAS CORPUS, RIGHT TO STATE-PAID COUNSEL IN HABEAS PROCEEDINGS

Parsons had pleaded guilty to first degree murder, receiving the death sentence. His sentence was affirmed on direct appeal. On habeas corpus petition, plaintiff first asserted the ineffective assistance of counsel at trial and on appeal.

Parsons claimed that he was denied due process, his right to counsel and a right to confront witnesses prior to the trial. The court examined the merits of Parsons' federal constitutional arguments, even though Parsons had not raised them in the direct appeal because he claimed that his trial did not accord him basic fairness and due process. In this case, the taking of investigatory statements under oath by the prosecutor, without prior notice to the defense, did not violate Parsons' right to counsel, to confront witnesses, or to due process.

Because the same attorney had represented Parsons both at the trial and on direct appeal, the court examined Parsons' claim of ineffective assistance of counsel, even though not raised in the direct appeal. Parsons argues that the cumulative effect of several alleged errors denied him his right to counsel. Applying the standards of *Washington v. Strickland*, 466 U.S. 668 and *State v. Frame*, 743 P.2d 401, the court refused to abandon the "reasonable probability" portion of the test that, but for counsel's unprofessional error, the result of the proceeding would have been different. A defendant must show that the alleged ineffective assistance had a reasonable probability of affecting the result. Legal representation that is ineffective in one case may be sound or brilliant in another. Upon evaluating the specific instances of alleged inadequacy of counsel, the court found that defendant had not been prejudiced by the alleged ineffective representation. Parsons failed to establish that any of the alleged errors of counsel prejudiced his right to a fair trial.

The court reminded Parsons that the United States Supreme Court has held that neither the due process clause nor the equal protection guarantee requires a state to provide counsel for an indigent defendant in post-conviction habeas corpus relief. The majority specifically declined to decide whether the Utah constitution affords such a right. The Court allows a "legislative opportunity" to consider this question. All affected parties, organizations and agencies should also be afforded the opportunity to participate in the argument of such a far reaching issue. The court specifically commended Parsons' attorneys in the habeas corpus appeal for their high quality and professional effort on the appeal.

Concurring, Chief Justice Zimmerman observed that the court continues to sidestep an issue that cannot be ignored much longer, i.e., whether habeas corpus petitioners have a right to an attorney paid by the state. The Chief Justice observes that the traditional view is based on fictions no longer applicable to post-conviction proceedings, such as that they are civil in nature and not an integral part of the criminal justice proceedings. The United States Supreme Court has expanded the application of ineffectiveness of counsel rulings to habeas matters. The time approaches when the court will be unable to avoid addressing the issue whether to afford a habeas corpus petitioner the representation of government-paid counsel.

Parsons v. Barnes, 230 Utah Adv. Rep. 3 (Jan. 11, 1994) (J. Howe)

SEARCH AND SEIZURE, STANDING

Defendant's conviction for possession of marijuana was affirmed. A package of marijuana which was intended for the defendant was addressed and mailed to defendant's neighbor. Defendant was present at the neighbor's home when the police executed their search warrant, seizing the marijuana and arresting the occupants. The defendant did not have a reasonable expectation of privacy in a package which was not in his actual physical possession or addressed to him. The defendant argued that the Court should adopt an "automatic standing rule" under Art. I § 14, Utah Constitution, which would provide that he had automatic standing to challenge the search. The Court held that because the defendant was not in possession of the package at the time of its initial search, he would lack standing to challenge the constitutionality of that search under *Jones*. The Court therefore refused to consider the Utah con-

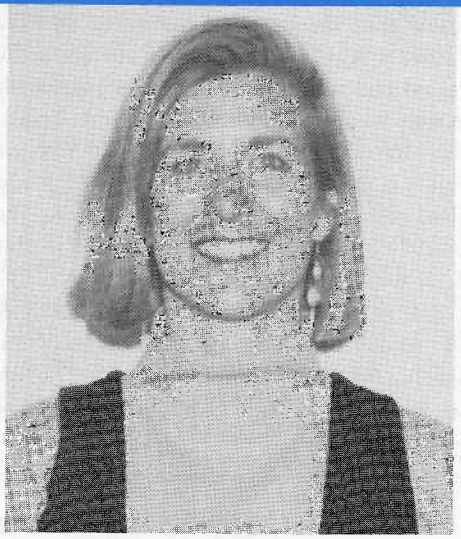
stitution, because even under defendant's arguments, he failed to show that he would come within the broader reading which he advocated. The defendant's conviction was affirmed.

State v. Kolster, Utah Ct. App. 930373-CA (Feb. 15, 1994) (J. Jackson, with J. Orme concurring and J. Bench concurring in the result only)

PATERNITY — ADOPTION; TERMINATION OF PARENTAL RIGHTS

Dismissal of a grandfather's petition to adopt a minor child over the objection of the putative father was affirmed. The petitioning grandfather and the child's mother knew that the issue of paternity and the father's rights and responsibilities were raised and would be resolved in a paternity action which the mother had filed. Therefore, the court would not cut off the father's rights in the adoption proceeding which was filed subsequent to the paternity action. The court's opinion details similarities in this case with the case of *KBE*, 740 P.2d 292 (Utah App. 1987). However, after detailing the similarities, the court purports to distinguish *KBE* from the present case on "factual as well as statutory grounds" in order to reach the same result on non-constitutional grounds. An unwed father's interest in and parental rights with his child require substantial protection under the due process clause, particularly when the father demonstrates a full commitment to the responsibilities to participate in the rearing of the child. Because the mother had alleged that the putative father was the father in the paternity action, he had standing to object to the adoption and the adoption proceedings.

In Re: Adoption of CMG, Utah Ct. App. 930464-CA (Feb. 16, 1994) (J. Davis, with Js. Jackson and Orme)



A Review of the 1994 General Session

By Gretchen C. Lee

At midnight on March 2, 1994, the 52nd Utah State Legislature adjourned *sine dis*. Although the 1994 General Session began with a record-setting 1309 bill requests filed, the Legislature was ultimately able to review and pass 354 of the bills. The following is a summary of bills that passed during the 1994 General Session and which may be of particular interest to practicing attorneys.

BUSINESS AND LABOR

HB 5 LIMITED LIABILITY BUSINESS ORGANIZATIONS (J. VALENTINE)

HB 5 creates a new legal entity within the state called the "limited liability partnership." A limited liability partnership differs from a general partnership in that it limits a partner's liability for conduct of other partners or representatives of the partnership. Other than liability issues and unique name requirements, limited liability partnerships are generally subject to the same statutory requirements of general partnerships.

SB 224 WORKERS' COMPENSATION AND LIABILITY REFORM ACT AMENDMENTS (L. BEATTIE)

SB 224 is in response to a recent Utah Supreme Court holding regarding the apportionment of fault to an employer immune from liability under Workers' Compensation when determining the fault of defendants. This bill prohibits the naming of immune persons as defendants in third-party actions, but permits allocation of fault to immune persons in limited circumstances, but only to accurately allocate fault to the named parties.

CHILDREN

HB 255 AMENDMENTS TO CHILD SUPPORT GUIDELINES (K. ATKINSON)

HB 255 adjusts calculations in child support obligations by providing for a case-by-case determination of obligations of low income and high income obligors. This bill also clarifies which parent may claim the tax exemption for a dependent child. Additionally, the bill addresses the allocation of child care and medical expenses and also allows an obligor to petition the court, or administrative agency when appropriate, for an accounting by the obligee of amounts provided for the child's benefit by the obligor.

HB 265 CHILD WELFARE REFORM ACT (J. HAYMOND)

HB 265 provides guidelines for child protection and foster care services and establishes due process procedures within the juvenile court for children who are removed from their homes. The bill also establishes procedures for removal of a child from foster care.

CRIMINAL LAW

SB 156 STATUTORY PROVISIONS ON VICTIM RIGHTS (C. PETERSON)

SB 156 requires a victim to be notified within seven days of the filing of felony criminal charges and for the right of the victim, or the victim's representative, to be present and heard at important justice hearings. A victim's right to privacy and to a speedy trial is also provided.

SJR 006 CONSTITUTIONAL DECLARATION OF THE RIGHTS OF CRIME VICTIMS (C. PETERSON)

Senate Joint Resolution 006 proposes to amend the Utah Constitution to declare the rights of crime victims and amend the rights of accused persons to limit the function and procedures of preliminary examinations.

INSURANCE

HB 69 PURCHASE OF INSURANCE PROCEEDS (P. SUAZO)

HB 69 allows an individual to enter into, solicit, purchase, and enforce viatical settlements. The bill defines viatical settlements as written contracts under which the insured may transfer control and rights to

an insurance policy insuring the life of a terminally ill person.

JUDICIARY

SB 243 AMENDMENTS TO JUDICIAL NOMINATING COMMISSIONS (L. BEATTIE)

SB 243 amends the membership of each Judicial Nominating Commission to seven members appointed by the governor in addition to the chief justice of the Supreme Court, who is an ex officio non-voting member. A nominating process for the appointment of commissioners with input from the Utah State Bar is also created.

SB 245 ALTERNATIVE DISPUTE RESOLUTION ACT (L. HILLYARD)

SB 245 creates a dispute resolution program to promote the efficient and effective operation of the courts by using alternative methods of dispute resolution of civil actions. The bill outlines minimum procedures for arbitration, mediation, and alternative dispute resolution and grants substantive rulemaking authority to the Judicial Council concerning administration of the program.

TAXATION

HB 170 TAX PENALTIES (G. PROTZMAN)

HB 170 decreases the $50 minimum penalty to $20, modifies the estimated tax payment provisions, and clarifies other tax penalty provisions.

HB 198 LIEN FOR TAXES (J. VALENTINE)

HB 198 requires a taxpayer to be notified and allowed to contest intent based penalties and withholding penalties before, rather than after, the penalty is assessed by the tax commission.

SB 93 CORPORATE TAX REVISIONS (M. DMITRICH)

SB 93 provides that a foreign sales corporation be taxed in the same manner as any other corporation incorporated outside of the United States. The bill also extends the corporate income tax to the unrelated business income of tax exempt organizations.

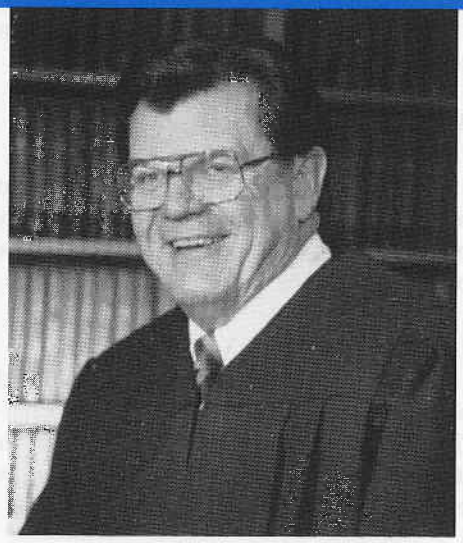
OTHER BILLS OF INTEREST

HB 162 SALES TAX — REPEAL OF FLOOD TAX AUTHORIZATION (D. BUSH)

HB 162 lowers the state sales and use tax rate 1/8% by repealing the 1/8% "flood tax" imposed to fund state projects in response to the flooding of the early 1980s.

SB 90 PROPERTY TAX CHANGES (L. BLACKHAM)

SB 90 increases the primary residential property tax exemption from 29.5% to 32% and lowers the minimum school program basic tax rate levied by school districts from .004275 to .004220.



Thinking About *Daubert*

By Judge Bruce S. Jenkins
Unted States District Court for the District of Utah

Editor's Note: The following represents comments made by Judge Jenkins at the 6th Annual Mid-Year Meeting of the Environmental Litigation Section of the American Bar Association on February 12, 1994.

My remarks if I were to give them a title might simply be "Thinking About *Daubert*."

To understand *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), one must of course read *Daubert*, come to terms with *Daubert*, mine the unexpressed in *Daubert* and be aware of what it doesn't say as much as what it does.

Daubert is not a monolith rising high in the arid desert of the law much like Ayres Rock in Central Australia. It has underpinnings of attitude, philosophy, point of view, purpose. It has location and direction. Like most everything else in this world, its meaning is a function of its context.

Let me distill as best I can what I think *Daubert* does and to some extent what it doesn't do. My brevities are fraught with the error of trying to say a lot in a few words. Be warned.

First, *Daubert* once again legitimizes Rule 702. Rule 702 has been with us since **1975**, having then been given the imprimatur of both the Supreme Court and Congress. Rule 702, now a mature 18, is recognized for what it was from the beginning.

There is nothing very new about that.

Frye v. United States,[1] required that "general acceptance" of a scientific theory or technique be shown before evidence of that theory or technique would be admitted. While the principle of *Frye* may be embraced by Rule 702, *Frye* at no time ever supplanted 702.

Second, *Daubert* reemphasizes the traditional role of the judge as the person to determine whether an "expert" is worth listening to and if so, whether he has something to say which is helpful in deciding a disputed issue in the case.

And, in my opinion, there is nothing very new about that.

Third, *Daubert* characterizes science as method and knowledge derived from such method as "scientific knowledge." While that is one definition of science, we all recognize that it is not the **only** definition of science.

There is not very much new about that, as well.

Fourth, *Daubert* seems to deliberately avoid looking at "technical or other specialized knowledge." That seems to be reserved for another day.

Somewhere in the writings of William James, famous psychologist, perhaps not a scientist, but a "possessor of other specialized knowledge," is a helpful story which I believe illustrates the deterministic almost mechanical, traditional view of science and its ordered universe and the wonderfully unpredictable nature of human conduct. In a rough way it illustrates a major difference between the law of science and the science of law.

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

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

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

Around the turn of the century there was an on-going debate between the determinists of the day and the free-willers. The determinists equate to the B.F. Skinners, the reductionists — the sentencing guideline people of our own day. The free-willers were those who believed in the power of choice and the ability of man to make choices.

The story is this:

A human being, not the "economic man" or the "social animal," walks into a small town. He is seeking information. On one side of the street is a building with a big sign. It says, "Determinist Society." On the other side of the street is a building with a similar sign. It says, "the Free Will Society." He walks into the Determinist Society.

The proprietor asks, "Why did you come here?"

"Because I chose to do so," was the reply. The proprietor points across the street. Our hero walks across the street to the Free Will Society. "Why did you come here?" he was asked. "I had no other choice," he replied.

* * * *

Enmeshed in that simple and paradoxical story is the relationship of the law of science, the determinists, and the science of law, those interested in human behavior and standards of conduct.

The world of hard science bears great resemblance to the newtonian world of descriptive mechanical functions, but not quite, not quite. The world of human behavior is of a different nature and embraces the power of choice and thus the idea of responsibility.

For my own use in times past, I have put together a short summary in parallel columns of what to me seem to be some of the fundamental and essential differences in the law of science and the science of law.

I do so with the caveat that all summaries are inexact. I do so, as well, with the caveat that my summary as to the law of science is more deterministic than modern thought would suggest.

Law of Science
Descriptive (of what is, what was)
Predictive of what may be
Universal (at least assumed so)
Value-neutral
Found
Used by men for good or ill

Science of Law
Prescriptive of human conduct
Descriptive of what should be
Parochial — time and location
Value-rich
Made
Used to prevent or resolve problems of human conduct

In litigation, we are ordinarily concerned with human conduct — how people, individuals or groups have treated one another.

When evidence is presented in court it is offered through witnesses. A witness is somebody who knows something and he tells what he knows through testimony.

Testimony is offered for a purpose, usually to demonstrate a point of fact which is in dispute. If a matter is not in dispute, then ordinarily testimony is not needed, and as to that point, decision is not needed as well.

Decision is needed when a matter is in dispute.

In my opinion, in trial preparation, as a prelude to the decision-making process, a most important function of the trial lawyer is to define with precision, with exactitude, with discreteness, that matter which is in dispute. (How easy to say, how tough to do.)

It is in the area of factual resolution that science may be helpful.

It is important that we ask ourselves with great care "what is the precise question in dispute?" "What is it that I want the fact-finder to find?"

In order to do that with effectiveness, one must develop a refined appreciation for the nature of facts that a court is called upon to resolve. One must also develop a refined appreciation for the nature of the information which is available to assist in resolving the factual matter in dispute.

We speak with great alacrity of facts, yet we give little thought to what is embraced by the word "fact" in the context of litigation.

"Who started World War I?"

The usual answer of course is that Archduke Ferdinand was shot in Croatia by a Serb. Is that the type of fact which can be useful to us? Implicit in that "fact," of course, is the exclusion of other items, contextual in nature, and the unseen relationship of the event to the subsequent conflagration. That is a question of historical fact which requires a different kind of assemblage of information than the question "Do gasoline and water mix?"

"Who killed John Kennedy?" — An event monumentally observed, and the subject of doubt-creating books and fact-resolving commissions.

Implicit in historic materials are points of view — perspective — in a context of time and place. The history of WWII would be written differently by Churchill and by Hitler, and each in his own way was a witness.

I want to offer a simple illustration. Hopefully it will provide some insight into what I mean when I suggest that we have to define with exquisite precision the precise question in dispute and we have to appreciate the manner in which we can acquire and can evaluate information which may help us to resolve that dispute.

I have here in my hand an apple. It bears a small label, "Granny Smith, Product of New Zealand."

A question arises as to whether or not there are seeds in that apple. One can make a prediction, or form a hypothesis that there **are** seeds in that apple. From the accumulation of experience over centuries, an advocate asserts that we can draw an inference that there are seeds in that apple. We can test the hypothesis by cutting it open and looking for ourselves. We can verify.

But, what of **yesterday's** apple? And what if no one saw, observed, recorded, and is in a position to relate? The issue is important. Where do we turn for information?

The apple expert is called to testify: he says that almost all apples have seeds; the probabilities of yesterday's apple having seeds is very high, based on an extended sampling of apples, and the margin of error is very low.

Q: "Can you tell me, Mr. Expert, with reasonable scientific certainty, whether there were seeds in yesterdays apple?"
A: "Yes, I can."
Q: "Can you tell me with absolute certainty whether there were seeds in yesterday's apple?"
A: "No, I cannot."
Q: "In your opinion, were there seeds in that apple?"
A: "My opinion is that there were."

Same kind of apple. Different apples. Different times. Different kinds of factual information. Different level of factual certainty.

In each instance the judge "finds" the

fact that each apple had seeds.

As to yesterday's apple, the finding was not based upon observed facts, but upon inference, in turn based upon experience. As to today's apple, the finding was not based on inference but upon **observation**. The judge's finding as to yesterday's apple doesn't make it so, if it was not so. Different kinds of facts but each used to resolve a question in dispute and each used as a footing to resolve an existing dispute which turned on such a finding.

Of course, it is much more challenging if we are talking about percolating ground water and arsenic and lead, or atomic waste, low level radiation and cancer, and questions of cause.

What precisely is it that you want the fact-finder to decide?

How can the specialized knowledge of the expert help him make that decision?

Are there seeds in that apple?

Were there seeds in yesterday's apple?

Please note the different nature of the problems and the nature of the process by which one comes to some kind of a rational conclusion. Now, substitute low-level radiation for seeds, or arsenic, or lead, or electromagnetic fields, and latency periods which run for decades. **Were** there seeds in that apple? And what consequence flows?

As I early pointed out, I deliberately overstated the traditional idea of scientific law — always inevitable, mechanical. We feel secure with that kind of inevitability.

It is particularly satisfying when we deal with cause.

In truth, not everything is that precise. If it were, decision-making would be easy, judgment unnecessary.

Where scientific law and civil law have genuine difficulty is where we are not dealing with the inevitable, but with the probable, where a consequence is not "always," but "sometimes." For want of a better label, I will call it a "statistical" scientific law. There we deal with numbers, often large — indeed large enough that we can deal with portions of populations — but we are unable to concretely focus with certainty on a particular member. Yesterday's apple, for example.

We should also recognize that neither causal nor statistical law is of any help at all if our precise question is whether Washington crossed the Delaware, or who started World War I, who fired the first shot, or what words were spoken and to whom.

For the most part, matters in court deal with what happened **yesterday**. Usually a case, a dispute, has a historic context. We are concerned with what happened. We view history by the slice.

While we can talk about man in relationship to machine, or man in relationship to molecule, the ultimate question in a legal relationship is of course man in relationship to man. Our emphasis is human behavior — how we treat one another.

While we are vitally concerned with the machine, the molecule, the apple, the seeds, in relationship to man — the connection, the consequence — such is only part of the judicial equation.

I hope we understand that "cause" in nature may well be different than "cause" in law, although each professes to be an orderly system. But, we need to be aware that the order of which we speak are of different kinds and for different purposes. I defer of course to our examination of characteristics and emphasize again that scientific knowledge is descriptive of what is and law is concerned with prescription as to conduct — human conduct.

The standards found in law are prescribed by legislatures, administrative agencies, courts and judges, not by nature. These standards are enforced by the power of the group. The consequence to a person who does not live up to a prescribed standard is by no means inevitable. It is not universal. It is not mechanical. It is not statistical. It is parochial in space and time as well.

My point is, that atoms are not concerned with how people treat each other. Men are. Molecules are not concerned with right and wrong. Men are. A rod of plutonium is not concerned with the rod of Moses. Men are.

There is much in the press releases of advocacy groups about what is labeled "junk science." We are warned to beware. Much of what some would characterize as "junk science" is advocacy disguised as knowledge, proferred through a purported expert. *Daubert* expressly cautions against admitting subjective belief or unsupported speculation as expert testimony. An expert may have an opinion, **but it may not be an expert opinion**. It may be neither reliable nor helpful enough to be considered.

Two little questions everyone may ask as to any testimony: What do you mean? How do you know?

Daubert fortifies what I have long advocated, namely, that we cease being prisoners of our own metaphors. We talk about litigation as a battle, a war, a game and we so conduct ourselves. *Daubert*, it seems to me at long last recognizes that the advocate at his best is a **teacher**, that the litigation process at its best is an educational process, that the pupils are the judge, the jury, opposing counsel, the client. It always seemed to me if litigation were structured appropriately, that the best argument would be a good explanation, and that a fact finder, before he says, "I find," must first be in a position to say, "I understand."

In law as in science a decision-maker always faces degrees of uncertainty. Uncertainty is the very condition which demands judgment. If knowledge were complete, description alone would suffice. Dispute would be non-existent and judgment redundant.

In the pragmatic world of fact, the court passes judgment on the probable. We speak in terms of natural and probable and we talk of things more likely than not.

How men use matter in reference to other men is the subject of law — duty, conduct, human values, public policy, responsibility. The nature and characteristics of matter are the subject of science — at least hard science.

In law, human conduct, and thus human responsibility for conduct is the concern. Dispute resolution, not perfect knowledge, is the mission. A peaceful and just society is the goal. A pragmatic rationalism is the process, all in search of the ideal.

In science, we are concerned with accurate description and verifiable prediction. Replication and prediction are the norm. But you simply cannot replicate the Kennedy assassination in the courtroom if the question is, "Who pulled the trigger?"

Are there seeds in yesterday's apple? is the apple expert, medical man, toxicologist, epidemiologist, nuclear physicist, statistician, worth listening to in the context of a discrete case? Is what he says helpful in understanding and resolving an existing discrete and identified dispute in a peaceful way?

In retrospect, *Daubert* is not really new.

Daubert simply reminds us of what we already know.

[1]293 F. 1013, 1014 (D.C. Cir. 1923) (Van Orsdel, J.) ("the [scientific principle or discovery] from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs").

POSITION ANNOUNCEMENT

Salt Lake City Corporation

Position: Senior Assistant City Attorney (May underfill at the Assistant City Attorney III, or Assistant City Attorney II level.

Starting Salary: Senior Assistant City Attorney - $41,328 to $51,708
Assistant City Attorney III - $36,216 to $45,300
Assistant City Attorney II - $37,740 to $39,696

Application Deadline: May 27, 1994

Qualifications: Senior Assistant City Attorney - 1) Graduation from a law school accredited by the American Bar Association; 2) Must be a member in good standing with the Utah Bar Association; 3) Extensive knowledge of principles of civil and criminal law, judicial procedures, and rules of evidence; 4) a minimum of six years of full-time paid employment in the practice of law, including trial work.

Assistant City Attorney III - Same as Senior Assistant City Attorney with a minimum of four years of full-time paid employment in the practice of law, including trial work.

Assistant City Attorney II - Same as Senior Assistant City Attorney with a minimum to two years of full-time paid employment in the practice of law.

Application: Please send resume, transcripts, and references to:

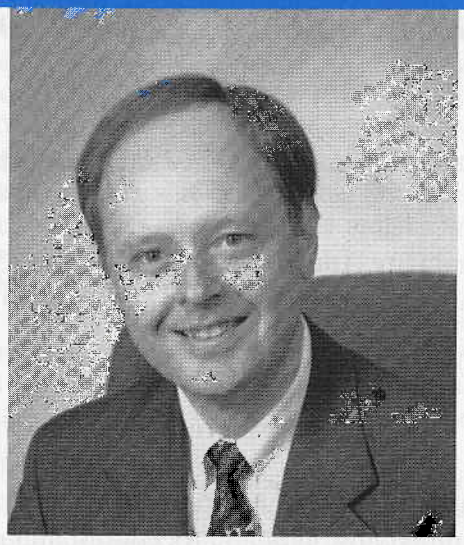
Salt Lake City Corporation
Human Resource Management Division
Attention: Nancy Torres
451 South State Street, Room 115
Salt Lake City, Utah 84111

Benefit Summary: Salt Lake City Corporation employees enjoy a comprehensive benefits program which includes:

- Twelve paid holidays per year
- Up to ten days of paid vacation per year, increasing to 25 days per year after 20 years of employment with the City.
- Up to 15 days of paid sick leave per year.
- Health insurance, life insurance and retirement programs.
- Up to five days of dependent leave annually.

Salt Lake City Corporation attorneys practice law in the following areas: Constitutional, Construction, Employment, Federal Housing & Economic Development, Labor, Environmental, Workers' Compensation, Public Purchasing, Real Property, Insurance and Insurance Defense, Civil RIghts, and Planning and Zoning. The City operates and provides legal services for an international airport, a major water system, sewage system, and its own self insurance program.

Salt Lake City Corporation is an Equal Opportunity Employer with regard to sex, age, race, creed, religion, national origin, ancestry, physical or mental disabilities, and veteran status.



Do I Need a Compact Disk Reader for My Computer?

By David O. Nuffer

Editor's Note: This is the first in what will be a regular feature in the Bar Journal, titled "Law and Technology." Bar Journal readers are invited to submit for publication consideration, articles dealing with technology developments which affect the practice and administration of law.

There is a new technology in the publishing of books for lawyers, using Compact Disks (CDs). One of these plastic disks may contain as much information as many conventional volumes. A publisher now provides a single CD that includes all Utah cases decided since the 1940's, the text of Utah Code Annotated, and all the Attorney General opinions published in the state (Michie's Law on Disk). This article will examine the potential uses of CDs for lawyers.

WHAT DOES A CD CONTAIN?

Computers operate on numbers. A computer may operate on information of any kind, whether sound, pictures, or text, once the information has been encoded as a stream of numbers. Text may be encoded by assigning a number to each letter of the alphabet (in this code, the letter "A" is 65, "B" is 66, and so forth). Once information has been expressed as a list of numbers, the computer is indifferent to how these numbers are stored. They may be kept in the computer's memory, or on recording tape, or in the form of holes in a punch card. Information is recorded on a CD by burning tiny pits in the surface of the disk with a laser. Once recorded, a CD cannot be erased. This leads to the abbreviated, CD-ROM, or Compact Disk Read-only Memory, meaning that you can read from it but you can't change it or write anything new on it.

There are advantages to working with information when presented on one disk as compared to paper copies. The computer program which manages the CD may have the capability of searching the entire contents of the disk in a few seconds for a particular word or phrase. The user may then copy the text found in such a search into other documents. In this way a writer may quote a paragraph from a court decision without having to retype the paragraph. The CD may make the entire text of Utah case law for the last fifty years available in this way within the computer for use in composing a memorandum.

DAVID NUFFER is a shareholder in Snow, Nuffer, Engstrom, & Drake in St. George. The firm has nine attorneys in St. George and one in Salt Lake City, all of whom have access to computers with varying degrees of success. Mr. Nuffer has been in St. George since 1978 when he graduated from BYU Law School. His first computer was a Commodore 64.

CDS AVAILABLE FOR LAWYERS INCLUDE:

Martindale Hubble Legal Directory. Subscribers to Martindale Hubble may receive a hard copy (26 volumes) of this directory of all lawyers or the same text on a single CD. The CD can be searched with greater rapidity and ease than the books, and the disk takes up little space.

U.S. Code Annotated. West Publishing Company publishes the United State Code Annotated on CD. Again, the automated searching facilities make this a powerful tool. The disk obviously takes less space than the hundred volumes of the Code.

State Statutes and Cases. Many vendors now offer state statutes, administrative,

judicial and administrative decisions and other state legal information on CD. In a future article we will examine some of the products available for Utah.

Legal Forms. Many sets of legal forms are offered on CD ranging from general civil forms to specialized tax and bankruptcy practice forms. To the author's knowledge, no such publications suited especially for Utah are yet available.

Specialized Libraries. Research libraries such as federal tax information, securities regulation and other similar libraries are available on CD.

Publishers of CDs for lawyers have often set prices based on periodic service rather than one sales transaction. In many cases the use of the service requires payment on a periodic basis as annual or quarterly updates are issued.

The Utah court system has purchased CD equipped computers for all its court locations and subscribes to a CD service. Many lawyers have heard judges say as they leave the bench that they are going to do a "disk search" rather than go to the library.

WHAT KIND OF EQUIPMENT IS NEEDED FOR CD USE?

A computer needs a *CD drive or reader* added to allow use of CD disks. This is a box that looks like a floppy disk drive or hard drive. It may be installed inside the computer if space is available.

Most CD drives are essentially the same except for transfer speed. Standard CD drives transfer data at 150 kilobytes per second (kbps) (that is, 150,000 characters per second), while double speed (300 kbps) or triple speed (450 kbps) CD drives are now available.

"Juke box" CD drives are available that allow several CD disks to be available to the computer at the same time. most CD drives, like most disk drives, allow only one disk to be inserted at a time. Juke boxes allow simultaneous access to several disks. Juke boxes are especially convenient when used on a network, where the user may not actually be sitting at the computer which physically contains the CD reader and the user would otherwise have to have someone take out one CD volume and put in another each time the user wanted to access a different compact disk.

WHO SELLS CD HARDWARE?

Any computer dealer sells CD readers. Mail order houses have this sort of equipment and software available for those who feel comfortable setting it up themselves.

HOW HARD IS IT TO USE A CD?

Once you install the CD reader in your computer, using a particular piece of CD software is relatively simple. The publishers of CDs each have their own preferences in search software. Most require some study of a manual. New Windows based search software is relatively easy to use. Some CD software includes a tutorial on disk to allow interactive training.

If the computer is networked, the software with the drive may allow access across the network. Most legal CD vendors require additional license fees for use of CDs on a network.

WHO SELLS CDS?

Michie (state law titles)
Town Hall Square
P.O. Box 7587
Charlottesville, VA 22906-7587
1-800-562-1197

West CD ROM Services, Inc., (state law, federal, tax and bankruptcy libraries)
P.O. Box 6479
St. Paul, MN 55164-0779
1-800-328-0109

LegaSearch (state law titles)
P.O. Box 62524
Phoenix, AZ 85082-2524
1-800-678-1196

Bureau of National Affairs
(tax and business libraries)
1250 23rd Street NW
Washington, D.C. 20037-1166
1-800-372-1033

CD Warehouse
(General purpose CD mail order)
1720 Oak Street
P.O. Box 3013
Lakewood, NJ 08701-9917
1-800-237-6623

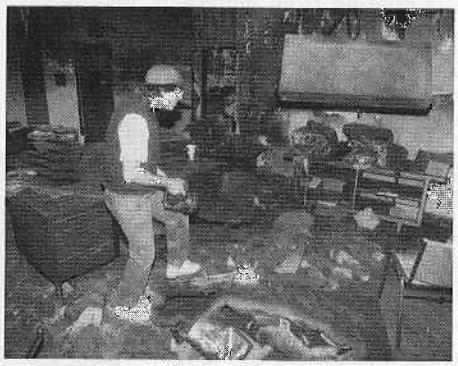
US West Marketing Resource
(CATALIST Reference Directory)
3190 S. Vaughn Way
2 North
Aurora, CO 80014-3506
1-800-431-6600

Alpha Media (Medical CD)
1245 16th Street Suite 100
Santa Monica, CA 90404-1239
1-800-832-1000

CONCLUSION

Lawyers will find CDs more useful and convenient as the availability of familiar materials in CD format increases.

In a future article we will compare some compact disk publications of Utah law and describe other CD libraries.



Utah Bar Foundation Awards Emergency Funds to Legal Aid

The Legal Aid Society of Salt Lake is a private non-profit corporation, founded in 1922, providing free legal counsel to the indigent in domestic relations matters, and to victims of domestic violence, regardless of income. The service area is Salt Lake County.

Most Legal Aid domestic relations clients live at or below the federal poverty level, (currently $581.00 gross per month for a family of 1). Approximately ninety percent of LAS clients are women, and of these, an estimated ninety percent have dependent children. The most common scenario in the Domestic Relations program is when the family already is separated, and the mother has actual physical custody of the children, but no orders custody, visitation or child support. In many instances, child abuse is alleged, wherein Legal Aid intervention can help ensure that the best interests of the children are considered. With primarily four staff attorneys and four paralegals, LAS served approximately 2000 clients in its Domestic Relations program in 1993.

The Domestic Violence program assists both adult and child victims of domestic violence to obtain civil Protective Orders under the Utah Cohabitant Abuse Act. A Protective Order is a temporary civil order that restrains an abuser from causing, attempting or threatening harm to the victim under penalty of criminal sanction. Immediate Ex Parte Protective Orders are frequently issued to provide the victim with emergency relief until the time set for hearing. The Domestic Violence program has no income requirements and is available on a first-come first-serve emergency basis. With one attorney, two paralegals, and a court runner, the Domestic Violence program served approximately 1000 victims in 1993.

In November 1993, Legal Aid added a full-time attorney, Mary Jane Ciccarello, to coordinate a new, ambitious Pro Bono program. Funded by a one-time Legal Services Corporation grant, LAS now has the opportunity to increase the involvement of the legal community to reduce the length of our notorious waiting list. Challenges for the pro bono program in 1994 include not only meeting the timetable for increasing pro bono participation, but also the acquisition of sustaining funding to permit the program to continue beyond June 1995, when the Legal Services Corp. start-up funds expire.

Presently Legal Aid remains displaced in temporary offices, as the rebuilding of the agency continues, following a devastating arson fire in October 1993. (UBJ, December 1993, p. 23). In addition to LAS's annual IOLTA grant, the Utah Bar Foundation provided LAS with an additional $5,000.00 in emergency IOLTA funds to assist the fire recovery process. Legal Aid gratefully acknowledges the support of the Utah Bar Foundation during its time of crisis.

CLE CALENDAR

1994 UTAH LEGISLATIVE REVIEW

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

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

BUSINESS ASSOCIATIONS — *NLCLE WORKSHOP*

PLEASE NOTE THE DATE CHANGE TO WEDNESDAY, APRIL 20. A program designed to cover Limited Liability Companies, Corporations and Partnerships. This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: **April 20, 1994** — Please note: This program had been scheduled for April 21, 1994.
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

ANNUAL EDUCATION SECTION SEMINAR

CLE Credit: 4 hours
Date: April 25, 1994
Place: Utah Law & Justice Center
Fee: $30.00
Time: 9:00 a.m. to 1:30 p.m.

SEVENTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

At this year's Seventh Annual Rocky Mountain Tax Planning Institute will once again be a diverse federal and state tax program with a nationally recognized faculty. This year's program is designed for all tax professionals who wish to update and broaden their knowledge of federal and Utah tax laws. The subjects addressed at this years Institute will be presented in a practical and useful manner and the Institute's syllabus is designed to be a valuable reference source for registrants.

CLE Credit: 8 hours of CLE. This program will also meet CPE hour requirements.
Date: May 6, 1994
Place: Utah Law & Justice Center
Fee: Pre-registration $125.00, registration at the door, $150.00.
Time: 8:00 a.m. to 5:00 p.m. Opening Remarks at 8:30 a.m.

APPELLATE ADVOCACY SEMINAR

This is the first presentation of the newly formed Appellate Practice Section, and the ambitious agenda is packed with useful information for attorneys who are regularly, or occasionally, involved in state court appeals. Several Utah appellate judges and experienced appellate lawyers will discuss: the procedural pitfalls of appellate representation, standards of review, challenging findings of fact, appeals from trial court rulings on motions, effective brief writing, and ethical problems faced by appellate advocates. The registration fee includes parking at the University of Utah as well as lunch.

CLE Credit: 6 hours of CLE, including 1 hour Ethics
Date: May 13, 1994
Place: University of Utah School of Law
Fee: Early Registration: $75.00 for current members of the Appellate Practice Section. $85.00 for non-members. Door registration: $95.00 for current members of the Appellate Practice Section. $105.00 for non-members.
Time: 8:30 a.m. to 3:30 p.m.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

_____

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

Name Phone

Address City, State, ZIP

Bar Number American Express/MasterCard/VISA Exp. Date

Signature

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

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

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

CLASSIFIED ADS

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

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

BOOKS FOR SALE

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

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

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

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

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

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

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

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

* Attach additional sheets if needed.

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

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

Date: _____ _____
(signature)

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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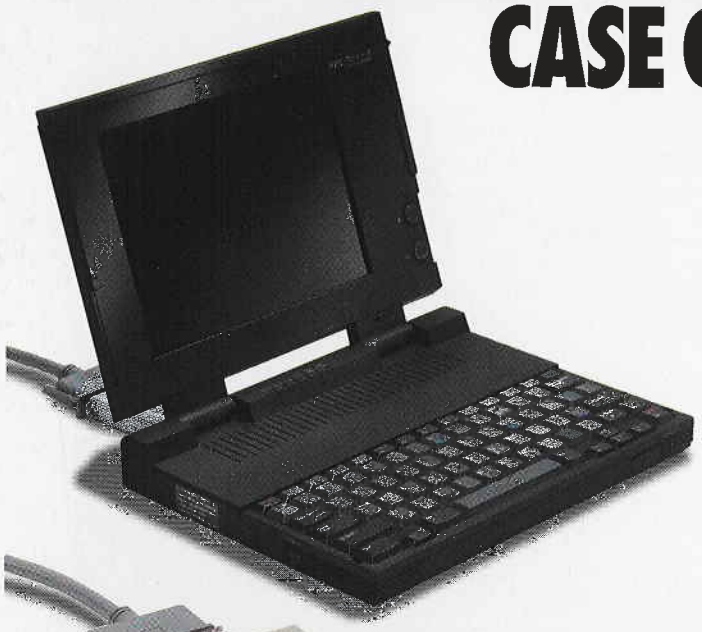

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