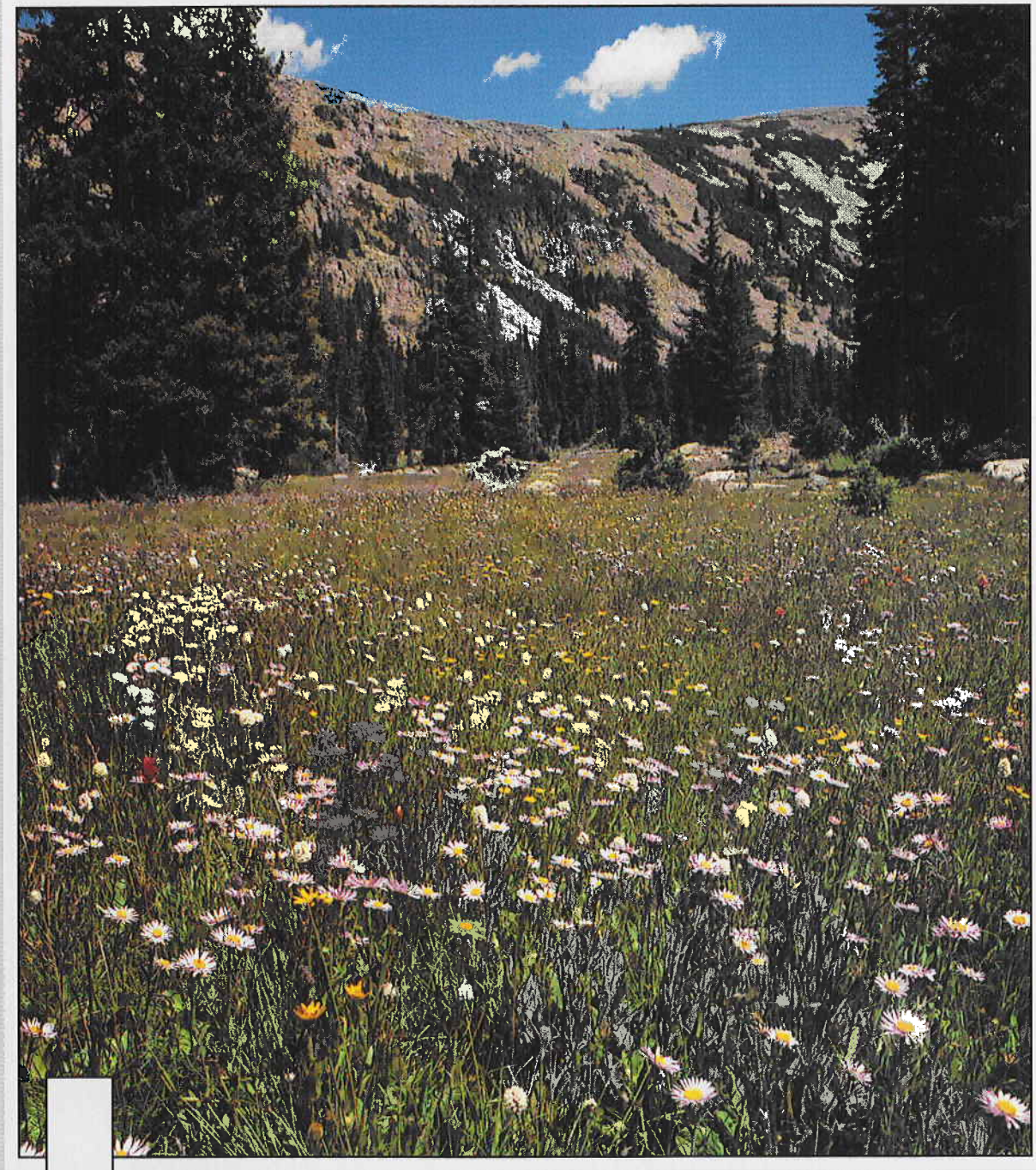
UTAH BAR JOURNAL

Vol. 7 No. 5 May 1994



Administrative Office of the Courts

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Utah BJ

Published by The Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

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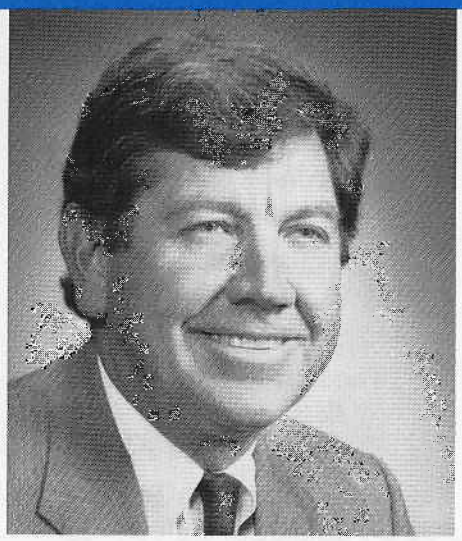
COVER: High Uintahs by Harry Caston, Esq. of McKay, Burton & Thurman.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes 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, transparency or print of each photograph you want to be considered.

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



Meetings, Meetings and More

By H. James Clegg

I know; this goes into the category of the dog eating the homework. But I really did write a Pulitzer Prize winning Bar Journal Article immediately before the hard disc crashed. And real men don't save!

So here goes: a belated report of the Western States Bar Conference (WSBC) held February 16-19. And you cynics will complain that my otherwise-objective perspective is clouded by the location, Maui, Hawaii. Be assured that the skies were cloudy each day, and usually dripping, and the Utah contingency was completely homesick and remorseful the whole time.

On that subject, the Utah contingency was out in good force. Considering that we are a small bar, when compared to the West Coast states and Arizona, we had a supportive turnout. They included the Cleggs, the Greenwoods, the Novaks, the Martineaus, Jim Davis, Paul Moxley, the Kipps, the Baldwins and the Wikstroms. Certainly, as a per-capita of bar membership, Utah was the clear winner.

We like the WSBC because the problems of the member bars are similar to our own. Further, they sometimes happen to others first, allowing us to change course and avoid the reefs, as in *State Bar of California v. Keller*. All are integrated (i.e., mandatory, compulsory) bars, except Colorado. The thirteen "western states" are represented, plus North Dakota. We have a lot in common, with geographic dissimilarities between rural and urban practitioners and hard economic times.

On balance, Utah appeared to be in good shape. At least, with Carman's prodding, we can still laugh at our mistakes and foibles. Washington seems to be going through the confidence and fiscal crisis that we saw 3-4 years ago. Hawaii is still working out the problems of integrating; it was a voluntary bar until a couple of years ago.

Compare the usual haunts of the WSBC (Tucson, Hawaii, Santa Barbara, Monterey, all in February) against those of the ABA (Boston or Chicago in January, New Orleans or New York in August) and wonder why some of us lean to the Western mentality. Perhaps more relevant are the issues of debate: WSBC sticks to the core issues of taste vs. Constitutionality in legal advertising, access to the justice system, peer review (for matters of manners, short of ethical misconduct), law office technology, professional liability coverage and MCLE issues and trade-offs. We didn't once hear of the desperate need for a civil rights code in Hong Kong after 1997 (or in Rwanda today); not that those issues aren't real but what can we do about them? Nor about abortion rights or responsibilities. We did hear from ABA president-elect George Bushnell about the challenges facing him and the national bar; we also heard from Jack Sweeney, Director of Bar Services, about the support the ABA gives and can give us.

All in all, but for the rain, it was a terrific convention.

On other fronts, the Bar Commission will move up by a month its nominations to the Appellate Court Nominating Commission; we had planned on handling all these nominations in May but the press of matters, and shortage of a judge on the Court of Appeals dictates that deliberations for Justice Russon's replacement commence soon.

On April 13 we had, in my humble opinion, a truly elegant occasion at the Capitol in honor of Law Day. Governor Leavitt signed a proclamation designating May 1 as Law Day, following which we honored Kim Luhn of Green & Luhn for individual efforts and contributions toward Law-Related Education and members of LeBoeuf, Lamb for firm efforts. Kim has "adopted" Rowland Hall/St. Mark's and Woods Cross High. LeBoeuf adopted Bingham High School. Additionally, Ralph Mabey was attorney coach for Millcreek Junior High for five years, as well as mock trial judge for final rounds of state competition. Note that Kim is from a two-

person firm and LeBoeuf is a national firm. They set good examples for the rest of us.

The Liberty Bell Award was presented to Mel Jones, retired from Unisys and now associated as a legal assistant with Parker, McKeown and McConkie. It was especially rewarding because Norma Matheson was there. If there was a Florence Nightingale for this movement, it was Norma (and Kay Greene and Nancy Matthews). Plaudits and bouquets to the Young Lawyers Division for spearheading this outreach program.

Steve Kaufman attended, and made a presentation, at a regional ABA meeting on lawyer advertising in Las Vegas. I look forward to reading his report in these pages.

My days are running short now; if Moxley weren't communing with the Delai and Dryer in Tibet as we speak, he'd now be picking up the mantle. My partners look forward to July 1, thinking I'll return to full-time practice and pay my share of the overhead. For myself, I'm hearing the sirens: Carman Kipp: "I love lawyers and like to work for them;" Hans Chamberlain: "Awful as it was to be stone-broke, it was the best year of my life;" Joy Clegg: "For the sake of all that's sacred, get a job and a life!"

Don't quit on me; I still have one article left.

Defending Our Voluntary Pro Bono Responsiblities and Opportunities

We encourage all law firms and interested attorneys to attend this Utah State Bar Forum regarding current bar committee recommendations to the Commission on pro bono standards and resources as well as to discuss how the members of the bar might further organize on a voluntary basis to provide increased pro bono services to the public. Interested members of the public are welcome to attend as well.

Written comments and recommendations of those who have attended the Forum will be welcome after the Forum. The Forum proceedings and attendees' comments will be summarized for a Bar Public Forum Report.

For more information regarding cost and CLE credit, please contact Monica Jergensen at the Utah State Bar, (801) 531-9077

June 9, 1994
2:00 p.m. – 5:00 p.m.
Utah Law & Justice Center
645 South 200 East, Salt Lake City

3 Hours CLE Credit

The Judicial Wordsmith

By D. Frank Wilkins

At times, in this era of intense pressure and burn-out, the strife and sting of legal battles shatter our nerves and exhaust us. One way perhaps to replenish our strength — to hearten an overburdened spirit — is for us to muse upon eloquent language of high purpose.

It is in this vein that I note for remembrance a few thoughts from the mind and pen of United States District Judge Bruce S. Jenkins. You will see, I believe, that his writings abound with elevated felicity of expression.

On December 3, 1993, I delivered some remarks about Judge Jenkins in Salt Lake City, Utah, to the Federal Bar Association where he was honored for his concluded tenure as Chief Judge of the U.S. District Court of Utah. In this article I draw from those remarks and add others.

In *Allen, et al. v. United States*, 588 F. Supp. 247 (D. Utah 1984), a case about the United States government conducting open air atomic testing, Judge Jenkins wrote in a delightful introduction:

> In a sense this case began in the mind of a thoughtful resident of Greece named Democritus some twenty-five hundred years ago. In response to a question put two centuries earlier by a compatriot, Thales, concerning the fundamental nature of matter, Democritus suggested the idea of atoms. This case is concerned with atoms, with government, with people, with legal relationships, and with social values.

I must tell you concerning *Allen* that Professor Kenneth Culp Davis, author of the *Administrative Law Treatise* and giant of American jurisprudence for decades, paid Judge Jenkins the highest compliment when he said to him six years ago:

> The Supreme Court has denied certiorari in the *Allen* case, and that means that your position is rejected.
>
> Weighing my words carefully, I should like to say that your opinion is one of the greatest judicial opinions I have read in more than a half century of reading judicial opinions. My reaction to your opinion is not a quick one but a carefully studied one.
>
> In the long run, your view should and will prevail . . .

In *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982), where the Judge upheld the challenge against a municipality's ordinance barring cable transmission of "indecent" programming as unconstitutionally broad, he said, initially citing another of his cases, *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 986 (D. Utah 1982):

> At least under some definitions a high percentage of what we see on television, I think, could very well be brought under the umbrella of indecency. I think the appeal to violence is indecent. I think the appeal to the lowest level of the intellect is indecent. I think the appeal to instant gratification is indecent. I think appealing to the worst in all of us is indecent. Those who do ought to be ashamed of themselves. But that does not mean that what they do is proscribed.

He then concluded in *Community Television* by saying:

> Yet who after viewing Jacob Bronowski's "Ascent of Man" or "Nature", or "The Long Search" by Ninian Smart, or after watching Itzhak Perlman, can say what we see and hear is all bad?

On April 27, 1993, he spoke to teachers of the Davis County Schools — and electrified them — at an Educators Hall of Fame Award Dinner by saying:

> Why are teachers essential? They help pupils to be discriminating . . . in the sense of selecting the significant — of deciding what is important — in emphasizing the essential sameness of mankind —

but fully appreciative of the individual differences . . .

Clever and competent as you are, how many here could begin entirely on your own? Who among you is clever enough to invent the alphabet, movable type, the vacuum tube, the transistor? Or in a more enduring sense, who could produce the commentaries of Hillel, the Beatitudes, or the rest of the Sermon on the Mount? Who here could compose the Declaration of Independence or turn mold into penicillin?

In truth, many of you could, but you don't have to. Among your functions you share such subjects with others and thus preserve them as part of all of us.

And from an address entitled "Thinking About *Daubert*" (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993)) before the annual mid-year meeting of the Environmental Litigation Committee, Section of Litigation, American Bar Association, on February 12, 1994, at Park City, Utah, Judge Jenkins spoke these discerning and articulate words:

> *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."

We could — and should — spend an evening together on Judge Jenkins' writings and addresses. He has an ear the most sensitive to the music of elegant language and a talent to use that language with artistry. This dual gift, so precious and rare, makes him more than a local treasure — much more indeed.

The Judge graced the position of the Chief Judge of the United States District Court of Utah for which he has such a deep affection. And he will continue to grace his position as an active United States District Judge, only *now* that his tenure as Chief Judge has ended, he will be able to write and speak more fully and frequently, thereby increasing the occasions of our sheer delight when he presents us, as the poet James Terry White said, with hyacinths to feed our souls.

The Powers That Be

By Betsy L. Ross

It came to a head over abortion, but the battle has been long-brewing. This time the focus is not on pro-choice (those of the "If you can trust me with a child, why can't you trust me with a choice' bumper stickers) versus pro-life (the "It's not a choice, it's a child" chanters), however, but on the role of the attorney general versus the governor in enforcing and upholding the laws of the state.

It arose when Utah Attorney General Jan Graham fired the attorney hired presumably by her (after all, as Solicitor General for former Attorney General Paul Van Dam, wasn't it she who directed litigation for the office) to defend the lawsuit filed against the state over the abortion statute.

Subsequently, Governor Mike Leavitt hired Mary Ann Wood, the attorney just fired by the attorney general, to advise him on the pending abortion litigation. According to the governor, any decision on settling the lawsuit would come from his office. Ms. Graham's response? "I regret the open personal bickering; I do not intend to participate. I regret the clamor for control of decisions that have been made in the Attorney General's office for almost 100 years . . . . Politics and partisan symbols have no place in the Attorney General's office . . . ."

The narrow abortion-centered issue is really not what the ballyhoo is all about. It is about *POWER* — who wields it, and who ought to wield it. Two separate questions emerge: Who does have the power to make decisions affecting litigation in which the state is a party, or stated another way, given that Rule 1.2 of the Rules of Professional Conduct requires an attorney, within certain bounds, to follow the client's directive — who is the client? Second, if decision-making power lies solely with the attorney general, should the playing field be balanced, i.e. the governor given some power, by authorizing the governor to appoint the attorney general?

A. GRAPPLE FOR POWER

In addressing the issue of who controls litigation for the state, Rod Decker in a news broadcast indicated the winner to be the attorney general, but, as he noted, though Jan Graham may have won the battle, the war may be won by the governor next legislative session when the attorney general's budget comes up for approval. This is the balance of power currently.

The legal issue is as follows. The Utah constitution provides for a distribution of powers over the three branches of government, the Executive, the Legislative, and the Judicial. Utah Const. art. V, § 1. The Executive department consists of the Governor, Lieutenant Governor, State Auditor, State Treasurer and the Attorney General. Utah Const. art. VII, § 1. Vested in the governor is the executive power of the state. The governor "shall see that the laws are faithfully executed." Utah Const. art. VII, § 5. The attorney general shall be the "legal advisor of the State officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law." Utah Const. art. VII, § 16.

The attorney general, by statute is also given the charge to "prosecute or defend all causes to which the state, or any officer, board, or commission of the state in an official capacity is a party; and *take charge, as attorney, of all civil legal matters in which the state is interested* . . . ." Utah Code Ann. § 67-5-1 (1993) (emphasis added). Although the attorney general is given the power to "take charge, as attorney, of all civil legal matters," the question is whether the discrete state agencies often involved in those civil matters are the clients of the attorney general who can then direct the litigation, or whether the client is some amorphous body consisting of the "public good" in whose shoes the attorney general stands. And similarly, when no discrete agency is involved but when the state is a party, as in the abortion litigation, is the client the governor as chief executive officer, or again, this amorphous body of "public good" whose interest the attorney general upholds? Historically, at least, Ms. Graham is correct that decisions regarding litigation have been left with the attorney general. Suffice it to say, however, that this is certainly no dead issue.

B. GRAPPLE FOR POWER, PART II: ELECTION OR APPOINTMENT?

The question of the balance of power between the attorney general and the governor is not a novel one. The Constitutional Revision Commission ("CRC"), created in 1969 to review the Utah Constitution and the need for amendments, has studied the historical tension between the attorney general's office and the governor's office. See Utah Code Ann. § 63-54-1 et seq. In fact, when Scott Matheson was governor, he appeared before the CRC and testified regarding the need he felt for his own attorney. Additionally, there have been many battles in the past, some culminating in lawsuits, in which agencies like the Public Service Commission have fought to obtain an independent status that would allow them to hire their own attorneys and

thus direct their own litigation.

It is well-recognized that many agencies of government hire what have become known as "closet" attorneys: attorneys hired without designation as legal counsel, but who fill the role essentially of in-house counsel, forbidden constitutionally.

The CRC, recognizing these issues, made a two-fold recommendation: (1) that the governor be allowed to appoint his own legal counsel, and (2) that the "closet" attorneys be essentially ratified, but ultimate control would remain with the attorney general's office. Attorney general at the time, Paul Van Dam, and his solicitor general Jan Graham, posed the second part of the CRC recommendation, and it was ultimately withdrawn. Independent legal counsel for the governor was, however, approved by the legislature and by the citizenry, and took effect January 1, 1993.

The CRC considered the issue, additionally, of whether the attorney general should be elected or appointed. It canvassed the states, and discovered that the majority of states have elected attorney generals.[1] Ultimately, the CRC took no position on this very thorny issue.

It is, of course, the public who will answer the question of elected or appointed attorney general. In order to change the status quo, a constitutional amendment would be necessary. An amendment to the constitution requires a two-third vote by the members of each house of the legislature, and a majority vote by the citizens of the state. Utah Const. art. XXIII, § 1.

The question of what structure best protects the public interest by producing the most sensitive balance of power is a difficult one. Eradication of politics from the playing field, as Ms. Graham suggested, may be laudable, but either naive or political rhetoric itself. An elected attorney general must be political. She plays to those who have the power to keep her in office, most notably, those with the resources to be financial backers. An appointed attorney general, however, must also play politics, being cautious not to offend the governor who appointed him. And, it is possible that a second point of view, always valuable, may not be present where the attorney general is appointed and must echo the viewpoint of the governor.

The goal must be the same whether the attorney general or the governor runs the show, whether the attorney general is appointed or elected. The best interests of the state and its citizens as a whole must rule. It may be that the system as it exists provides the best checks for the public good. There is incentive for Ms. Graham to continue to consult with the governor and executive branch agencies if nothing else to avoid the political ramifications of angering politically powerful people. To act arrogantly and in a vacuum can only backfire — resulting in budget shortfalls and/or a concerted push for an appointed attorney general.

[1]The majority of states also allow gambling, however, so being in the majority is perhaps of little comfort to the attorney general. Utahns generally, and the Utah legislature in particular, are not afraid of being in the minority.

Law – A Pretty, Great Profession

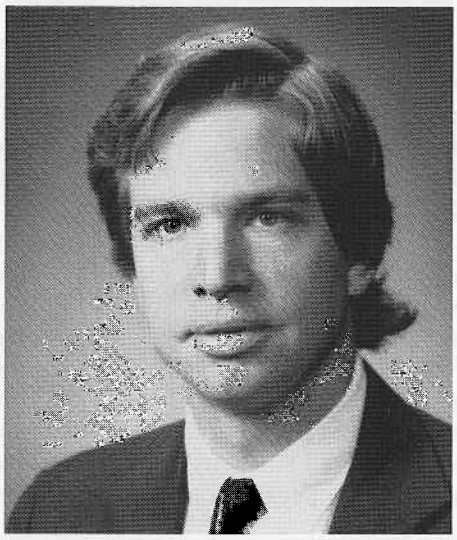
By Jathan W. Janove

Recent material in the *Utah Bar Journal* has me questioning whether I am a member of an endangered species: a lawyer who enjoys practicing law. I don't think so. Notwithstanding the public's perception of my profession, the necessity of keeping time, billing clients, and occasional oppressive deadlines, I believe that many, if not most, lawyers feel fortunate for their calling. Based on this belief, I offer the following, perhaps idiosyncratic, observations of the legal profession.

One of the criticisms of law is that it is a "fall back" profession. But for the siren call of the Bar, the argument goes, society would be blessed with many more scientists, engineers, doctors, mathematicians, teachers and other contributors of value. Instead, their ranks are thinned due to the tendency of people with talent to take the easy way out by signing up for law school.

My first response to this criticism is that it is based on a fallacious assumption — that these would-be scientists, engineers, etc., provide value to society, whereas lawyers do not. Twelve years in this profession has shown me that what we do, by and large, is good for society. We facilitate commerce. We improve communication. We provide comfort to those in need. We preserve this nation's democracy and provide a means to resolve disputes which would otherwise remain intractable or which would be resolved in more destructive ways. With all due respect to mediation and arbitration, law is the true ADR to violence, something this country has enough of as it is.

My second response is personal. So far as I'm concerned, if law is a fall back profession, it is not a bad place to land. As a college senior, I too agonized over whether I should follow what I then perceived to be my true talents and sources of inspiration or, alternatively, send in a check to secure placement in law school. For me, the debate was between journalism and law. I will readily admit that the former seemed more alluring at the time whereas the latter appeared to offer more security and income potential.



JATHAN JANOVE has practiced law in Salt Lake City since 1982 and represents management in labor and employment matters. He is a harried but happy father of three, an enthusiastic but mediocre basketball player and an aspiring musician who, but for a paucity of talent and discipline, would have achieved proficiency on the trumpet, piano, recorder, cello and, his latest ambition, the guitar.

Nevertheless, the choice of law over journalism was not confirmed solely on material considerations but rather, as I have since come to realize, recognition of where my true talents, such as they are, lie.

To illustrate, as one of the senior writers for the Arts Desk of the *Indiana Daily Student*, I was asked to do an in-depth feature of an up and coming local musical group with the potential for greater things. Deferring to my journalistic instincts, my editor asked me to choose between two prospects, (1) a singer in local bars by the name of Johnny Cougar and (2) The Gizmos, a band which had plans to ride the punk rock wave of the 1970's to great heights, and which allegedly had secured a recording contract and world tour.

After carefully evaluating the candidates, I chose The Gizmos. I then conducted a series of interviews, attended concerts and composed a full page feature article, complete with photographs. The members of the band, virtually unknown at the time, were grateful for the exposure.

After graduating from college, I never heard another word from The Gizmos. To the best of my knowledge, their world tour, commencing in Bloomington, Indiana, died out somewhere in the vicinity of Indianapolis.

A few years later, in Utah by this time, I happened to note the name of an artist whose song was receiving a lot of play on the airwaves. His name was John Mellencamp, sometimes also referred to as John Cougar Mellencamp. Could it be, I asked? The bar singer turned star? The guy I could have "discovered" instead of those silly Gizmos with the safety pins in their cheeks? The answer, of course, confirmed the wisdom of my decision to send that check to the University of Chicago Law School.

In the decade or so since I graduated and began practicing law, my experiences as a lawyer have been for the most part positive. I don't mean to suggest that there haven't been any bumps or bruises along the way — or days when I would have been willing even to write about The Gizmos rather than continue what I was doing at the time.

Yet, overall, the term "pretty great" fits. There is the agony and the ecstasy of trial work. There is the somewhat surreal, but seldom boring, duality of treating opposing counsel as friends during the breaks, then attempting to punch their lights out when the gavel sounds.

Other aspects of the law are equally rewarding. Although negotiating and drafting contracts can be tedious at times, assisting in the successful closing of a

transaction can be highly satisfying. Not only has the lawyer served the client and helped define the boundaries of the parties' legal rights; he or she has helped the parties understand the nature of their bargain and why it is in their mutual interest to reach a consensus.

Even the less glamorous aspects of law such as legal research can be rewarding and enjoyable. If nothing else, legal research reaffirms the fact that you still comprehend English. (Although it occasionally raises a question as to this ability in some judges who write opinions.) I would advocate that all lawyers, regardless of seniority, continue to do at least some of their own legal research. Now I should confess that it has been suggested to me that given my number of years in law, it is time to retire from this aspect of the practice, the unstated assumption being, to put it in spring-time vernacular, that I am no longer capable of hitting a major league curve ball. (These critics probably don't believe in Michael Jordan either.) Hopefully not at my clients' peril, I continue to resist such advice. I also don't accept the adage that, to paraphrase Sam Johnson, "a senior lawyer doing legal research is like a dog walking on its hind legs; it's not done well, but you're surprised to see it done at all."

Even some of the negative aspects of law have their dispensations. Take, for example, bill collection. One of my first assignments as a young lawyer was representing an attractive woman in a real estate dispute. We prevailed at trial whereupon she surprised me with a kiss and a warm embrace. Nevertheless, many months passed before I was paid. Yet I reconciled myself to this by reasoning that a man does not live by bread alone.

Value can be found even in such things as the stereotyping of lawyers. Bear in mind that people are always grateful for a reason to laugh. Thus, through lawyer jokes, we bestow yet another benefit to society. Also, apparently due to the plethora of books, movies and television shows featuring lawyers, people in society tend to think we are smarter than we actually are. Again thanks to Hollywood, they think we are better looking, too.

On a more serious note, the practice of law helps us in ways other than simply earning a living. It enhances our communicative skills. It increases our understanding of how society works and what its problems are. It helps us to understand the interdependence of people and the inevitable difficulties and frustrations which arise from the necessity of such interdependence.

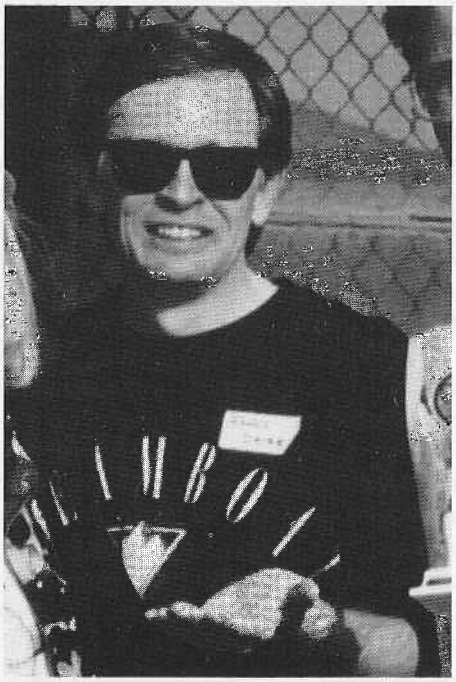
Law encourages us to contribute to society in ways other than strictly through the practice. Attorneys are often predominant on civic and charitable boards, causes and organizations. I don't believe this is due solely or even primarily to client development strategies. Rather, it stems from the understanding attorneys have of the importance of such entities and the motivation they have to better society and its institutions.

The practice of law has certainly been of great value to me in my involvement with charitable organizations. For example, as President of the Board of Trustees of Congregation Kol Ami, my experience in law has helped prepare me for the administrative, business and sometimes legal issues implicated in running a synagogue. More importantly, my experiences have enabled me to cope with the inevitable conflicts, hurt feelings and animosities which arise from time to time and which are often forcefully directed to the president's attention. Indeed, whenever this occurs, I usually am able to deal with the situation calmly and effectively simply by viewing the complaining congregants as just another judge who won't listen to me, another client who won't pay the bill or another loudmouth telling the latest lawyer joke at a cocktail party.

All facetiousness aside, I do feel fortunate to be a lawyer and believe that the legal profession plays an important and beneficial role in society's affairs. Rather than give a point-by-point rebuttal to those attorneys who have expressed the contrary view, I would cite the aphorism that life is what you make of it. Much can be made of the practice of law. Not just in a material sense, but in the opportunity to develop and hone one's skills and put them to productive use, to enter into lasting and meaningful relationships, and, yes, to hold one's head high among fellow members of society.

To test whether you have reached this state of mind, I suggest doing the following: the next time the cocktail party oaf starts telling the one about the dead skunk and the dead lawyer, steal his punch line. Smile serenely while explaining that the difference between the two lies in the location of the skid marks.

Another approach: Wait until someone has finished making a toast. Just as everyone is raising their glasses to their lips, yell out: "Here's to lawyers!" (Just watch out for the spray.)



Randy's working attire for the next five months.

Interview with Randy Dryer,
Past State Bar President, Chairman, Utah Sports Authority

UBJ:

You were Bar Commissioner for some time and served as the State Bar President for a year. What motivated you to get involved in Bar activities in the first place?

Randy:

I first started in Bar activities 15 years ago when I was asked to be on the Executive Committee for Salt Lake County Bar. I have been a Bar junky ever since. At the time, I viewed it as an opportunity to interact with other lawyers in a non-adversarial way and give something back to the profession.

UBJ:

Do you believe that Ex-State Bar Presidents ought to be allowed to retire from Bar service or should they stay involved?

Randy:

I think that for a period of time after you are Bar President you are kind of burned out and you probably need a little rest, but I think you will find that most Bar Presidents will continue to be involved in some way. I certainly intend to. Past Bar Presidents provide a good historical perspective on issues. There is a wealth of information that past Bar Presidents can bring to most issues or problems. Immediately after your presidency, however, you are kind of tired and you need to rebuild your personal practice again, too.

UBJ:

What aspects of your tenure as State Bar President did you find most fulfilling?

Randy:

I think interacting with Judges and the Judicial Council in again a role other than a litigant appearing before them. The dealings with the Supreme Court in their administrative capacity was fascinating. As an organization entity, the Court experiences the same dynamics and conflicts in personality issues that any group has. One tends to think of the Court as a monolithic institution, but there are five individuals up there, some of whom get along better with each other than others and to see them with their administrative hats on as opposed to their judging hats, I thought was very, very interesting.

UBJ:

What aspects of your tenure were the most frustrating or challenging to deal with?

Randy:

I think dealing with the tremendous diversity of the Bar membership. There are so many different types of practices and people tend to view things from their own unique perspective. The natural tendency is to focus only on how rules and regulations and activities affect the lawyer in his own practice. It is hard to get people to focus on the legal profession as a whole as opposed to their little part in the legal profession. There is a tremendous diversity of viewpoints and perspectives as to the wants and needs of the membership. Some would like the organized Bar to be very aggressive, offer lots of programs, while others have the attitude of just leave them alone. So, I thought that was particu-

larly frustrating. I also thought the disciplinary system was frustrating from an administrative point of view in terms of the Bar Commission's role in the disciplinary process. I was pleased the Supreme Court adopted the new disciplinary system which removes the Bar Commission from the adjudicatory process.

UBJ:

What do you consider during your term to be the most important and valuable contribution?

Randy:

There are really four things which I feel most proud of that were accomplished during my term as President although I can't take sole credit for them. They were the result of a lot of hard work from a lot of different people, but I certainly was a player in making them happen.

The first is getting a voting lawyer representative on the Judicial Council. We have always had a non-voting position, but never a voting position. Some people may view this as only a symbolic gesture, but I think it was more than that. It gives a legitimacy to the organized Bar in the judicial structure and it says to all of the Judges that the organized Bar is a partner with the judiciary in the administration of justice and the administration of the judiciary. I feel very good about this development.

Secondly, I felt good about the efforts to diversify the Commission itself. We added non-voting representatives from the women lawyers association and from the minority bar association. Two public members were also added by the Supreme Court. So from an institutional perspective, I think the Commission's breadth and source of input is much more diverse and far reaching than ever before.

Third, the restructuring of the disciplinary system will probably be the single most significant long-term change that lawyers will see in the foreseeable future. I think the new system is much more efficient. It is fair and impartial and will be perceived by the public and the legislature as fair and impartial, which is important if the Bar is to remain self governing.

Finally, the last thing I felt good about is a little esoteric and hard to pin down specifically — but it relates to the concerted efforts to increase the communication between the office of Bar President and the Bar membership. I created a small firm task force which was an effort to increase communication between the Commission and small firm practitioners. This was a good step toward assessing the needs and being responsive to a very large part of the Bar. A part of the Bar which has historically felt neglected. I spent a better part of a month in small group meetings with individual lawyers, primarily small group practitioners, in trying to find out what their needs were, what the Bar Commission could do to better serve them. We had a series of mini-breakfasts geared to small firm practices; we increased the amount of mailings to the membership and there was a concerted effort to keep the membership apprised of issues before they were resolved so we could get their input.

UBJ:

You didn't mention the Futures Commission and some of the thoughts that came out of that activity. Do you feel that the efforts of the Futures Commission are going to be of value to attorneys in guiding them or giving them some direction in their practices?

Randy:

Sure, I think the Futures Commission was a project that was needed and was very well received. It has provided information that will be useful to the Bar in the coming decade. I include that in with the increased communications effort because the Futures Commission was a way to find out who we are as a profession and where we are going to be in ten years. I think it is a planning tool that was very significant.

UBJ:

Although this question may have been covered to a certain extent in the last one regarding the Futures Commission, what do you feel are the most critical issues facing the Bar today and in the near term?

Randy:

I think there are two short term immediate issues that the bar is going to have to wrestle with in the next two to five years. The first is implementing court consolidation in a manner that is efficient and is acceptable to not only lawyers but also to judges. We must be careful to not leave the Bar and the judiciary so fractionalized and embittered that there is irreparable damage done in terms of relationships. It is a hot controversial topic. People have very strong views on it, and I think we are going to have to be very careful in what the final consolidation product looks like. This will be a strong test for the Judicial Council and the Bar Commission. Another issue that I think looms larger and larger for the next few years is the unauthorized practice of law. Public adjusters, paralegals, realtors and do-it-yourselfers are encroaching on lawyer's traditional practice areas. The legal profession, particularly smaller practitioners, are getting squeezed with more and more other providers who are giving services that lawyers traditionally provide. ADR is in some respects a practice threat to some, although it shouldn't be. We need to become more attuned to the opportunities of ADR and embrace it rather than resist it.

UBJ:

Do you think the organized Bar can take a stand against these encroachments without appearing greedy or without appearing to be trying to maintain a monopoly on legally related services?

Randy:

That is a good question. The opponents of the Bar's efforts to prohibit unauthorized practice of law always will paint the Bar as trying to be protectionist. In my view, unauthorized practice of law is a consumer issue. Consumers can be victimized by persons who are not professionally trained, who are not governed by a code of ethics, and against whom one has no recourse if they do something that is inappropriate. We need to educate the public and the legislature that this is a consumer issue. If we are perceived as just trying to protect our own turf, then we won't be successful. But if the real motivation and real interest is trying to protect the users of legal services, then we will be successful in our efforts.

Long term, the profession is going to have to do something to counteract the growing hostility against lawyers by the legislature. I doubt there is much we can do about the antipathy toward lawyers from the general population. But I do think the legislature needs to be educated about the proper role of judges and lawyers in our system. Otherwise, we are going to continue to have significant problems legislatively. Lawyers and the judiciary will be singled out for disparate treatment, our judicial system will be under funded, and there will be continued encroachment into the judiciary from the legislative and executive branches.

UBJ:

Switching to another subject — your

involvement with Salt Lake City's bid for the 2002 Winter Olympics, could you give us your impression of how things are going in the bid process and what your prognostication is?

Randy:

Well, if the vote were today, my best prediction is that we would be successful. Unfortunately, the vote is a year and a half from now. The bidding process is a political process, a process that has lots of little pitfalls and dangers along the way and is very unpredictable. I think we are a front runner, but it is just too inherently unpredictable to make any prognostication with any degree of certainty. But I think things are going very, very well. We have demonstrated to the Olympic family that Salt Lake as a community does what it says we will do. We promised that we would build facilities, whether we got the games or not. We are in the process of doing that now. We have already completed the nordic jumps at the Utah Winter Sports Park. We will begin construction on the bobsled and luge track this summer as well as the 400 meter speed skating oval. By June of 1995, which is when the IOC makes its decision, we will basically have all of our Olympic facilities substantially completed. They will have to be upgraded in order to make them suitable to host the Olympics, but the basic infrastructure of the facilities will be done. So, we have done what we promised as a community. In addition, we have built up a relationship of credibility with the IOC members over an extended period of time. So, I think we are positioned very well and hopefully geography and other non-technical issues will not work against us as they did in the 1998 bid effort.

UBJ:

You mean Atlanta getting the 1996 bid?

Randy:

Yes, I think geographical considerations played a very large part in Nagano winning out over Salt Lake in the 1998 bid. Not only had the games not been in Asia for a while, but it would have been difficult for the IOC to have awarded back-to-back games in the same country.

UBJ:

What could go wrong?

Randy:

Well, I suppose anything that could go wrong in a political campaign could go wrong in the bid campaign. We could lose our base of support from the public; there could be world developments that make some other place more attractive or make North America less attractive, or we could make some major mistake in the campaign. Some of these things we have little control over. If the community were to become disillusioned and become hostile to hosting the games, that could have a detrimental effect, although I don't see that happening. The community support has been consistently strong for years and all of the polls indicate that the strong majority of Utahns support hosting the games in Salt Lake and believe that it will be a positive thing for our community.

UBJ:

Do you have any misgivings at all about the costs or whether if Salt Lake City does get the bid this may end up a seriously losing proposition?

Randy:

I think with the current contractual arrangements that are in place now, the risk of loss to the taxpayers is very minimal. I think that with appropriate fiscal controls, which are also already in place, and with the concept that these will be revenue driven games, that there is a good likelihood that when all is said and over, there will be profits from the Olympics and there will be no deficit. We need to keep in mind that Salt Lake does not have to build a lot of the infrastructure that Lillehammer had to do, that Albertville had to do, and even Calgary. The Calgary games made money; Lillehammer and Albertville did not, but they were totally different types of Olympics. The latter two were government run Olympics, and they had a lot of social and economic development objectives that drove how they spent their money which would not necessarily be a part of Utah's format.

UBJ:

Tell us something about your family.

Randy:

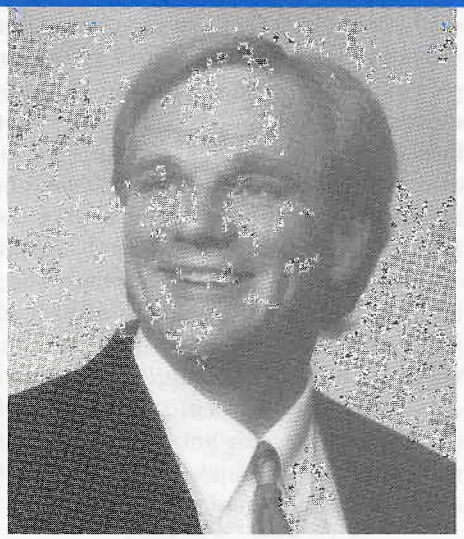
I have three wonderful kids who, knock on wood, have not yet caused problems in terms of discipline and things like that. They do well in school, they are responsible and they are lots of fun to be with. They love to travel and they love the out-of-doors and athletic activities which my wife and I do as well. So we have a great time doing these things together Trevor is 15 going on 35, which is probably good as he is the oldest and can set an example for the other two. My daughter Ashley who is soon to be 13, is the free spirit of the family and the family jock as well. She loves the Jazz more than probably anything else. And then my youngest son is Preston who is kind of the mischievous one of the family and the social butterfly. But they are all bright kids, great kids to have and we do a lot of things together. Kathy, who is also a lawyer but just works part time, has done an incredible job of balancing career and family.

UBJ:

Kathy is in charge of law-related education?

Randy:

Kathy is the State Director for the Law-Related Education project. She teaches a seminar at the law school with senior law students who then go out into the high school and teach an individual rights and responsibilities class. She is also in charge of the "mentor program," which matches up law firms with high schools for career possibilities and things of that nature.



Utah Deposition Primer – Part II

By David K. Isom

II. TAKING AND DEFENDING THE DEPOSITION

A. Preparing the Witness

To prepare a witness to be deposed, you should orient the witness to the deposition setting and process, define the goals you and the witness hope to achieve in the deposition, and emphasize the need to tell the truth.

Perhaps because of the current ill repute of lawyers generally, almost every witness wonders if her lawyer will encourage her to lie. Witnesses must be told to tell the truth. Moral reasons aside, there are strong legal and strategic reasons for truthfulness. The most obvious legal reason is that lying in a deposition is perjury, a felony.[1] The most compelling strategic incentive for truth is that a witness can seldom succeed in the lie. With the powerful discovery and investigative tools available, and the near total certainty that the facts are reflected in papers, bank accounts, credit records, and computer and other electronic data, a case built on lies is rarely successful.

How much the witness should prepare for the deposition is an important strategic decision. Witnesses other than experts[2] and those designated under Rule 30(b)(6) have no duty to conduct investigations, review documents, or learn additional information for a deposition. However, given the reality that a deposition is normally your best opportunity to show strength before settlement, summary judgment or trial, your witness can rarely afford to be coy. Finally, beware of Evidence Rule 612. There is a substantial risk that the attorney-client privilege and other privileges may be waived if a witness reviews privileged documents to refresh recollection in preparing for the deposition.[3]

B. Defining Your Purpose

Effective examination techniques depend entirely upon the goals you hope to achieve by taking a deposition. Only by considering your objectives can you decide whether and how a deposition should be taken.

The purpose of most depositions is to learn facts and opinions and to observe the witness's attitude and appearance. The witness will be more likely to remember and reveal facts if she feels comfortable. Courtesies such as introducing yourself, the stenographer and other persons present, and explaining the deposition procedure, will help. Witnesses who know generally what the case is about will have a theory about who should win and why. You should try to discover these theories and the facts which support and contradict the theories. To do this, you should ask open-ended questions to which you do not know the answer and then follow the witness into the newly revealed areas as the examination proceeds.

Questions that are objectionable at trial may be proper in a deposition. For example, a question which arguably calls for speculation may uncover information which will be admissible. Also, questions about how the witness feels or what the witness thinks which may be inadmissible at trial may lead to admissible evidence and may be helpful to evaluate settlement.

Although lawyers commonly distinguish "discovery" depositions from "trial" depositions, there is no such distinction in the rules. Keep in mind that, even if your sole purpose is discovery, the deposition transcript may be admissible at trial under Rule 32. Rambling responses to open-ended questions may come back to haunt you.[4] If your sole goal is to create a transcript which will be admitted into evidence at trial to persuade the fact-finder, open-ended questions are treacherous. Creating such a transcript requires you to know, to the extent possible, the answer to each question before you ask it, just as if you were at trial. In a deposition, however, you can take the time necessary after each answer to construct a focused, persuasive question, since the transcript does not show how much time has elapsed between questions.

Finally, be sensitive to every verbal and non-verbal clue. A witness's failure to answer exactly the question put, or request to consult with counsel before answering, often signals that you are onto something important. If a witness talks to someone other than her attorney during a break, ask her about the conversation. Train yourself to watch the witness' eyes and body for signs of discomfort with the pending question or answer. Watch for clues that the witness wants to say more.

C. Who May Attend

The public and media may be excluded from depositions under some circumstances.[5] In *Seattle Times Co. v. Rinehart*,[6] the United States Supreme Court held that the public and media have limited First Amendment interests in depositions, which can be overridden by a party's countervailing privacy and fair trial interests.

The court may exclude persons from a deposition either under Rule 26(c)(5) or under Evidence Rule 615.[7] Rule 26(c)(5) is broader than Evidence Rule 615 in that it authorizes exclusion of anyone, including parties.[8] Evidence Rule 615 only authorizes the exclusion of certain potential witnesses; it "does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause."[9] However, Rule 26(c)(5) is narrower than Evidence Rule 615 in that it requires a showing of good cause.[10]

D. Stipulations

Occasionally, a lawyer may request that you agree to the "usual stipulations." If this incantation at one time had a generally recognized meaning, it no longer does. If the purpose of the "usual stipulations" was to preserve certain objections, that purpose has been accomplished by URCP 32(c)(3) and FRCP 32(d)(3), which govern in the absence of stipulations. Of course, you can enter into written stipulations which will govern the deposition,[11] but you should understand and articulate the nature of each stipulation.

E. Objections

Objections to the form of the question are waived if they are not made at the deposition.[12] These include objections that the question is argumentative, lacks foundation or is leading.[13] When such objections are made at the deposition, they are noted on the transcript and the testimony is taken subject to the objections.[14] Since the purpose of requiring these objections to be made at the deposition is to allow the examiner to cure the objectionable aspect of the question, the statement "I object to the form of the question" is meaningless as a method of allowing or requiring a properly framed question to be asked. If you want the objection to stand or the question to be cured, you should identify the specific basis upon which the form of the question is objectionable. For example, specific statements such as "objection, leading" or "objection, argumentative" should be used to preserve any objection to the form of the question.

"Ask questions in plain English, not legalese. Short words in short sentences are best. You cannot corral a plain meaning by a complicated question. . ."

Other than objections to the form of the question, generally no objection need be made during the deposition to preserve it for trial or summary judgment. For example, objections to competency, relevancy or materiality need not be made at the deposition to be preserved, unless "the ground of the objection is one which might have been obviated or removed if presented at the time."[15] Although the "obviated or removed" exception has been applied, it is rare.[16]

Objections should never be made as a disguised method of communicating with the deponent. Not only is the witness unlikely to understand the message, but such objections are improper and may subject you to sanctions.[17]

When your opponent makes an objection, get the answer to the question before dealing with the objection. You can ask the question in an unobjectionable form later. Insisting on an answer will discourage opposing counsel from objecting to try to keep you from helpful information. It will also help you to rephrase the question and to get control of both the witness and the deposition by diminishing the impact of the objection. If you want to deal with the objection after you get the answer, insist that counsel specify the reason for the objection so that you can cure it.

F. Pinning Down A Position

An important purpose of most depositions is to commit a witness, especially a party, to a position. If the position a witness adopts supports your client's case, you may be able to obtain a favorable settlement or summary judgment. If the witness's testimony is adverse to your case and is false, you may be able to impeach her with her own words at trial.[18] To do this, you must eliminate every imaginable escape route through which the witness can later change her testimony. Exhaust the deponent's memory by persistent questions, such as: "Can you remember anything else about the incident?" "What were the reasons for the action?" "Who else was present?" "Who else knows about the incident?" "Have you made any notes about the incident?" "What else might help you remember?" When you have asked the deponent to give the reasons for an action, keep asking if there are any more reasons until she has definitely said "No."

Ask questions in plain English, not legalese. Short words in short sentences are best. You cannot corral a plain meaning by a complicated question; each added word is another possible escape route, especially when the word will appear in a cold transcript which the witness can think about and reinterpret for months before trial.

If the witness has a personal stake in her testimony or the lawsuit, you must be prepared for bias or even perjury.[19] Commit such a witness firmly and completely to as many details of the incident as possible, so that other evidence can specifically contradict those details. It is a rare witness who can fabricate a detailed story in the heat of a deposition which will withstand further investigation and study.

G. Instructions Not to Answer

Under the new federal rules, you may properly instruct a deponent not to answer a question "only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion (to limit or terminate the deposition)."[20] Therefore, unless the court has entered an order limiting evidence, or unless you actually make a motion to limit or terminate the deposition, the only

proper reason for instructing a witness not to answer is to preserve privileged information.[21] Other objections may be made for the record, but do not justify an instruction not to answer. This rule allows depositions to proceed without interruption or obstruction and without excessive court intervention.[22]

A question which is irrelevant to the subject matter of the lawsuit justifies an instruction not to answer only if there is potential harm from the disclosure.[23] Under the new federal rules, an instruction not to answer based upon relevance must be accompanied by a motion to terminate or limit the deposition.

If you believe opposing counsel has improperly instructed a witness not to answer, make as complete a record as possible by explaining why the question is relevant or why there is no privilege, or by citing cases which warn that an instruction not to answer is a drastic measure.[24] This procedure may convince counsel to allow an answer. At least it will show the court, if you move to compel an answer, that your opponent persisted in her instruction with knowledge of your position.

H. Handling Documents

You can simplify a deposition involving documents by marking the deposition exhibits in advance. If possible, agree with opposing counsel at the beginning of the case as to a deposition exhibit numbering system so that documents are marked only once throughout the case. Since a transcript is "blind," refer to exhibits by number and describe the portions you are discussing sufficiently so that the reader can "see" what you mean.

Depositions are helpful supplements to Rule 34 document requests. Ask the deponent about documents you have requested, since an opposing party or subpoenaed witness may not have been diligent in locating all the documents you requested. If a witness identifies more responsive documents, request that they be produced and follow the request by a written letter or request for documents. Ask a deponent about the documents she used to refresh her recollection in preparation for the deposition. If any privileged documents were reviewed, the privilege may be destroyed.[25]

I. Coaching

In a deposition, you want the sworn testimony of the witness, not the crafty arguments of her lawyer.[26] Opposing counsel may attempt to influence the witness's testimony by signals, suggestive objections or conferences. Try to stop such tactics by whatever ethical methods your personality and creativity allow. For example, in addition to objecting, make a record of what you see. Remind counsel that you want and are entitled to the uncoached testimony of the witness. If the coaching is done in the guise of long-winded objections, offer to stipulate that three-word objections will be sufficient to preserve them for trial unless you specifically request an explanation of the objection. If you cannot resolve a dispute about opposing counsel's tactics, you may suspend the deposition and seek the court's help.

"In a deposition, you want the sworn testimony of the witness, not the crafty arguments of her lawyer."

J. Motion to Terminate or Limit Examination

Rule 30(d) allows a party or the deponent to move to terminate or limit the deposition upon a showing that the examination is being conducted "in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party."[27] The motion may be made either in the court where the action is pending or in the court where the deposition is being taken.[28] The motion may be made immediately by telephone or in person if the court is available and if counsel can present the necessary facts and arguments before the transcript is available. Otherwise, the moving party or deponent may unilaterally suspend the deposition in order to make the motion.[29]

If the court terminates the examination, it can be resumed only upon an order from the court in which the action is pending.[30] Properly used, this rule can curb such abuses as harassment of the witness, repeated and unfounded objections by counsel, "coaching" objections which attempt to change a witness' testimony, repeated conferences between deponent and counsel, and unfounded instructions to the deponent not to answer questions.[31]

[1]Utah Code Ann. §76-8-502 (1993).

[2]*See* Rule 26(b)(4).

[3]*See Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 n.3 (N.D. Cal. 1991) (split of authority concerning whether attorney-client privilege prevents discovery of information used to refresh recollection in preparation for testimony at trial).

[4]*See Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 (1st Cir. 1988).

[5]*See Banco Popular v. Greenblatt*, 964 F.2d 1227, 1233 (1st Cir. 1992) (citing *Seattle Times Co. v. Rinehart*, 467 U.S. 20 (1984)). For a discussion of the need to balance the private nature of pretrial depositions against the public's limited First Amendment interests in depositions, see *Seattle Times*, 467 U.S. at 32-33; *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir. 1986).

[6]467 U.S. 20 (1984).

[7]Federal courts have held that Fed. R. Evid. 615 applies to depositions. *See, e.g., In re Shell Oil Refinery*, 136 F.R.D. 615, 617 (E.D. La. 1991); *Lumpkin v. Bi-Lo, Inc.*, 117 F.R.D. 451, 453 (M.D. Ga. 1987). *But see BCI Comm. Sys., Inc. v. Bell Atlanticom Sys. Inc.*, 112 F.R.D. 154, 159 (N.D. Ala. 1986) (Fed. R. Evid. 615 does not require sequestration of witnesses between deposition and trial).

[8]*See, e.g., Beacon v. R. M. Jones Apartment Rentals*, 79 F.R.D. 141 (N.D. Ohio 1978). But *see Kerschbaumer v. Bell*, 112 F.R.D. 426 (N.D. Tex. 1986) (majority of courts bar parties from attending depositions only in very limited circumstances).

[9]Fed. R. Evid. 615. *See also* Utah R. Evid. 615.

[10]*Skidmore v. Northwest Eng. Co.*, 90 F.R.D. 75 (S.D. Fla. 1981).

[11]Rule 29.

[12]*See Kirschner v. Broadhead*, 671 F.2d 1034, 1037 (7th Cir. 1982). *But see Wilmington v. J.I. Case Co.*, 793 F.2d 909, 921 (8th Cir. 1986) (failure to object to errors or irregularities at time of deposition did not preclude eliciting testimony at trial concerning circumstances surrounding taking of deposition).

[13]Rule 32(d)(3)(B). *See Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979); *Bahamas Agric. Indust., Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1180 (6th Cir. 1975).

[14]Rule 30(c); *Hearst/ABC-Viacom Entertainment Serv. v. Goodway Mktg., Inc.*, 145 F.R.D. 59, 63 (E.D. Pa. 1992).

[15]URCP 32(b)(3)(A); FRCP 32(d)(3)(A).

[16]The exception was applied in *Bahamas Agricultural Industries, Ltd. v. Riley Stoker Corp.*, 526 F.2d 1174, 1180 (6th Cir. 1975), to preclude objection at trial to the competency of a witness to give testimony. Arguably, all objections to relevance are preserved for trial despite Rule 32(d)(3)(A), because only relevant evidence is admissible under Rule 402 of the Utah and Federal Rules of Evidence. *See Reeg v. Shaughnessy*, 570 F.2d 309, 316-17 (10th Cir. 1978).

[17]FRCP 30(d) and committee notes to FRCP 30(d); *Hall v. Clifton Precision*, 150 F.R.D. 525, 530 (E.D. Pa. 1993).

[18]*Slusher v. Ospital*, 777 P.2d 437, 445 (Utah 1989).

[19]"Almost every party to a civil lawsuit (and his agents) is suspect of stretching the truth for his own cause, and to the most cynical, the very service of the complaint is a prelude to perjury." *International Elec. Corp. v. Flanzer*, 527 F.2d 1288, 1294 (2d Cir. 1975).

[20]FRCP 30(d)(1).

[21]*Hearst/ABC-Viacom Entertainment Serv. v. Goodway Mktg., Inc.*, 145 F.R.D. 59, 63 (E.D. Pa. 1992).

[22]*See Hisaw v. Unisys Corp.*, 134 F.R.D. 151, 152-53 (W.D. La. 1991).

[23]The scope of discovery relevance is much broader than admissibility relevance. *Stailus v. Haynsworth, Baldwin, Johnson & Greaves*, 144 F.R.D. 258, 265 (E.D. Pa. 1992). *See, e.g., Hearst/ABC-Viacom Entertainment Serv. v. Goodway Mktg., Inc.*, 154 F.R.D. 59, 63 (E.D. Pa. 1992) (objection based on relevance not sufficient basis for instruction not to answer). *See also International Union v. Westinghouse Elec. Corp.*, 91 F.R.D. 277, 279-80 (D.D.C. 1981).

[24]*E.g., Shapiro v. Freeman*, 38 F.R.D. 308 (S.D.N.Y. 1965). In requiring plaintiffs' attorneys to pay some of the defendants' attorneys' fees, the court said:

> if counsel were (allowed) to rule on the propriety of questions, oral examinations would be quickly reduced to an exasperating cycle of answerless inquiries and court orders . . . . There is no justification for his conduct, no basis at all for his instructing the deponents not to answer. As a result, the cooperative atmosphere envisaged by the federal rules has been poisoned by antagonism."

[25]*See Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 n.3 (N.D. Cal. 1991).

[26]"The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's words to mold a legally convenient record. It is the witness — not the lawyer — who is the witness." *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

[27]FRCP 30(d)(3); URCP 30(d). Typically Rule 30(d) is invoked by the deponent to protect against abuses perpetrated by the examining party. However, the deposing party may also invoke Rule 30(d) if the questioning on cross-examination is conducted in bad faith or in an unreasonable manner. *See, e.g., De Wagenknecht v. Stinnes*, 243 F.2d 413 (D.D.C. 1957).

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

[29]Once the deposition is suspended, the motion to terminate or limit the deposition should be made promptly. *See Hearst/ABC-Viacom Entertainment Serv. v. Goodway Mktg., Inc.*, 145 F.R.D. 59, 62 (E.D. Pa. 1992).

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

[31]*Eggleston v. Chicago Journeyman Plumbers Local Union*, 657 F.2d 890,903 (7th Cir. 1981), *cert. denied*, U.S. 1017 (1982).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

PUBLIC NOTICE

REAPPOINTMENT OF PART-TIME MAGISTRATE JUDGE

The current term of part-time United States Magistrate Judge F. Bennion Redd sitting in Monticello, Utah, will expire on March 28, 1995. The Court is required by law to establish a panel of citizens to consider the reappointment of an incumbent part-time magistrate judge to a new four-year term.

The duties of a part time magistrate judge include the conduct of preliminary proceedings in criminal cases, the trial and disposition of certain misdemeanor cases, and the conduct of various pre-trial matters as directed by the Court.

Comments from members of the Bar and the public are invited as to whether the panel should recommend the Court reappointment of the part-time magistrate judge. Names of those providing comments shall not be disclosed. Comments should be directed to:

Markus B. Zimmer, Clerk of the Court
United State District Court
120 Frank E. Moss U.S. District Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Comments must be received no later than Monday, June 13, 1994.

Commission Highlights

During a Special Meeting on January 7, 1994, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board voted to select Michael Hansen to serve as the Commission's representative on the Judicial Council to fill the unexpired term of Judge James Z. Davis.
2. Jim Clegg informed the Commission that he had appointed Denise Dragoo to replace Michael Hansen as liaison to the Legislative Affairs Committee.
3. Jim Clegg led the Commission in discussion regarding its position on changes to the Judicial Nominating Committee selection process.
4. Jim Clegg led a discussion by the Commission on the upcoming meeting with the Judicial Council and members of the Administrative Office of the Courts regarding proposed court consolidation legislation.

During its regularly scheduled meeting on January 27, 1994, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the December 2, 1993 meeting.
2. The Board voted to appoint Jim Jenkins as the Bar Commission's liaison to the Litigation Section and Ray Westergard as Chair of the Budget & Finance Committee.
3. The Board voted to appoint Robert M. Archuleta, Lisa Hurtado and Marilyn M. Branch to the Legal Services Board of Directors and to reappoint Robert D. Merrill, John A. Beckstead and Martin W. Custen.
4. Clegg indicated that non-resident Bar member, Wayne Williams, has volunteered to survey other non-resident Bar members to solicit their level of interest in Bar activities and their willingness to perform some service or organize together.
5. The Board voted to reiterate that there is no special provision for inactive lawyers to engage in the practice of law.
6. Hon. Michael Murphy, Hon. Frank Noel and Mark Jones of the Court Administrators Office appeared to discuss Court Consolidation.
7. Clegg indicated that he has received several complaints regarding lawyer advertising and the feeling that the Bar has not been aggressive enough in its monitoring. The Board appointed Steve Kaufman to review the issue.
8. The Board approved changing the Ethics Advisory Committee membership process so that beginning with the '94-95 year, the committee would be comprised of twelve members plus a chair; applicants will submit a detailed application which will be reviewed by a nominating panel; and terms will be three years.
9. The Board scheduled a joint luncheon meeting with the Justice Court judges and the Bar Commission to foster better communications.
10. ABA Delegate Reed Martineau reported that the Kansas City ABA Mid-Year Meeting would be held in February.
11. The Board adopted a procedure for publishing ethics opinions for a sixty-day period in the *Bar Journal* and unless the Bar Commission, after the publishing period, reviews the matter and votes against it, the opinion will be final.
12. Ethics Advisory Committee Chair, Gary Sackett reviewed Ethics Opinion No. 128 which addresses whether a Utah attorney can pay a fee to a for-profit lawyer referral service that employs a television print media advertising campaign. He explained that, under the Rules of Professional Conduct 7.2 as currently approved by the Supreme Court, a Utah lawyer may not pay a fee to a for-profit lawyer referral service if the advertising does not display the name of the attorney. The Board voted to adopt the resolution of the Ethics Advisory Committee to file a petition with the Utah Supreme Court to remove the phrase "not-for-profit" from Rule 7.2(c).
13. The Board voted to approve Ethics Opinion No. 126 which states that a city attorney with prosecutorial functions may not represent a criminal defense client in any jurisdiction, and that a city attorney with no prosecutorial functions may represent a criminal defense client if various other detailed conditions are met.
14. The Board voted to approve Ethics Opinion No. 138 which states that a lawyer may not use "& Associates" as part of a firm name where no attorney associates are currently employed by that firm.
15. The Board voted to approve Opinion No. 139 which generally states that under Rule of Professional Conduct 5.4(a)(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, which may be based upon a percentage of the net or gross income of the firm, so long as compensation is not tied to receipt of particular fees.
16. Alternative Dispute Resolution Committee Chair, Hardin A. Whitney, appeared to review proposed ADR legislation. The Board voted to accept the recommendation of the Legislative Affairs Committee to support the proposed ADR legislation.
17. The Board ratified the status of John T. Nielsen as the Bar's legislative representative.
18. David L. Bird, Legislative Affairs Committee Chair, and John T. Nielsen reported on legislation recently reviewed by the Legislative Affairs Committee including those requiring Bar Commission action. Twelve voting members of the Board of Bar Commissioners were present and took action on the following legislative issues.
    (A) The Board voted unanimously to accept the recommendation of the Legislative Affairs Committee to support the proposed judicial appropriations bill.
    (B) The Board voted to accept the recommendation of the Legislative Affairs Committee to support SB22 "Incompetent Defendant Amendment."
    (C) The Board voted to accept the recommendation of the Legisla-

tive Affairs Committee to support the concept of HB53 "Criminal Expungement Revisions."

(D) The Board voted to accept the recommendation of the committee to support SB91 "Amendments to the Utah Exemptions Act."

(E) The Board voted to accept the committee's recommendation to allow the Bar Commission to go ahead with whatever they are going to do towards a compromise between all parties regarding court consolidation.

(F) The Board voted to accept the recommendation of the committee to authorize the Family Law Section to lobby against HB83 "Revision of Alimony Standards."

(G) The Board voted to accept the recommendation of the committee to oppose HB144 "Payment of Attorneys fees in a Lawsuit."

(H) The Board voted to accept the recommendation of the Legislative Affairs Committee to oppose HB153 "Payment of Medical Malpractice Legal Fees."

(I) The Board voted to accept the recommendation of the Legislative Affairs Committee to authorize the Family Law Section to lobby for SB49 "Emancipation of Minors."

(J) The Board voted to accept the recommendation of the committee to authorize the Family Law Section to lobby against SHB71 "Mandatory Divorce counseling for Children."

(K) The Board voted to accept the recommendations of the Legislative Affairs Committee and the Family Law Section to oppose HB81 "Enforcement of Visitation Order."

(L) The Board deferred taking action on HJR5 "Resolution Amending Rule of Evidence Regarding Mental Health Practice Privilege" which amends Rule 506 of the Rules of Evidence.

(M) The Board voted to not accept the recommendation of the Legislative Affairs Committee to oppose HJR7 "Appointment of Attorney General Resolution" but to take no position on the bill.

(N) The Board voted to accept the recommendation of the Legislative Affairs Committee to support SB73 "Juvenile Court Judgeship" which would appropriate $176,000 for an additional juvenile court judge in the Fourth District.

(O) The Board voted to defer taking action on a bill regarding Juvenile Sentencing Authority and decided to review the bill at the March Commission meeting.

19. The Board voted to appoint Timothy Allen, Michael G. Wilkins, David Gee, Rusty Vetter, Gary R. Heward, Robert H. Henderson, Glen T. Hale, Larry A. Kirkham, and Liz King to the Bar Examiners Committee.
20. John Baldwin referred to the report on hours of continuing legal education offered for the two-year cycle, 1992-93, and indicated that 718 hours including 94.5 in ethics were provided.
21. The Board voted to accept a policy proposed by the CLE Committee promoting variety and presenters for CLE seminars.
22. The Board voted to approve the creation of an Appellate Practice Section of the Bar.
23. Ray Westergard referred to the financial reports and reported on the recent Budget & Finance Committee meeting.
24. J. Michael Hansen reported on the last Judicial Council meeting and indicated that judicial performance evaluations have been completed.

During a special conference call meeting on February 22, 1994, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Dennis Haslam explained the actions which took place in the Senate during the week of February 14. He indicated that modifications were completed on the bill to amend the judicial nominating commissions and the Bar had decided to endorse the governor's amendments.
2. Jim Clegg led a discussion regarding proposed changes in court consolidation including proposed amendments to §78-3-14 in HB372.
3. After significant discussion, the Board voted to reject the compromise language of HB372 and stay with its prior position to oppose early consolidation.

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

Discipline Corner

ADMONITIONS

An attorney was admonished and required to attend ethics school for engaging in a physical altercation outside the courthouse with an opposing party in violation of Rule 8.4(d) of the Rules of Professional Conduct. The attorney was the defendant in a small claims case. After the trial, the attorney and the husband of the plaintiff got into an argument that continued out into the parking lot. The argument escalated and the attorney struck the plaintiff's husband.

SUSPENSIONS

On March 31, 1994, the Utah Supreme Court suspended Duane Smith from the practice of law for one year. This action was based upon his misdemeanor conviction in 1990 of attempted recording of a false or forged instrument. The conviction arose out of a situation where Mr. Smith confessed to forging his wife's signature, and the signature of a notary, on an Acceptance of Service and Waiver which he used to obtain his own bogus divorce in the Third Judicial District. Subsequently, Mr. Smith admitted his misconduct to the court and had the divorce set aside. There were a number of mitigating circumstances presented to the court including his absence of prior disciplinary record, personal and emotional problems, a timely good faith effort to rectify the consequences of his misconduct, and full and free disclosure to the disciplinary board, a cooperative attitude toward the proceedings, and remorse.

On January 27, 1994, the Third Judicial District Court entered an Order placing C. Dean Larsen on Interim Suspension from the practice of law pending final resolution of a disciplinary action filed against him by the Office of Attorney Discipline. The Complaint in the disciplinary action is

based upon his felony theft conviction on January 23, 1993. Subsequent to the filing of the initial action, the Utah Supreme Court upheld Mr. Larsen's conviction on eighteen counts of securities fraud. The Office of Attorney Discipline has obtained leave to include this additional conviction in the pending disciplinary action.

Anthony M. Thurber was placed on Interim Suspension by the Third Judicial District Court on March 20, 1994. Mr. Thurber stipulated to his suspension on the advice of his physician. A complaint has been filed in the Third District Court charging Mr. Thurber with several counts of misappropriation of client funds.

REINSTATEMENT

On February 17, 1994, the Fourth Judicial District Court reinstated Gary J. Anderson to practice law subject to the following conditions: Supervised probation for a period of two years, during which he is to perform 200 hours per year of pro bono legal services, and is to resolve disputed claims with former clients through arbitration. Mr. Anderson's supervising attorney is Douglas Baxter.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 1994, and ends June 30, 1995. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 29, 1994 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at the Law & Justice Center after May 26, 1994. You may pick up a copy from the receptionist.

Please call or write John Baldwin at the Bar office with your questions or comments.

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.**

Notice of Availability of Membership List

Current Bar policies and procedures provide that the Bar's membership list may be sold to third parties who wish to communicate via mail with members of the Bar about products, services, causes or other matters. Any Bar member may have his or her name removed from the membership list which is sold to third parties, by submitting a written request to Arnold Birrell, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

4th Annual Utah Gang Conference
May 23 and 24, 1994

Salt Lake Hilton
150 West 500 South • Salt Lake City, Utah

Instructors include those who work in the "trenches" and on the street with gangs and youth.

Registration Fee: $65.00 (CLE approval pending, additional fee required)

Registration fee includes 1994 Gang Training Manual and lunch both days. Manual has in-depth articles, photos and graphs on local gangs, recruitment, activity, and community and law enforcement response.

Pre-register: Salt Lake Area Gang Project
315 East 200 South
Salt Lake City, Utah 84111
(801) 799-GANG

POSITION AVAILABLE FOR CIRCUIT EXECUTIVE, TENTH CIRCUIT COURT

CIRCUIT EXECUTIVE, United States Court of Appeals for the Tenth Circuit, Denver, Colorado. Responsible for providing administrative support to the Chief Judge, Judicial Council, and the courts of the circuit. Duties are substantially described in 28 U.S.C. 332 (e), but include coordination of the Court of Appeals budget, supervision of a circuitwide computer network, space and facilities planning, providing staff support to the Judicial Council, and acting as liaison to other courts and the Administrative Office. Must possess a minimum of ten years of progressively responsible administrative or legal experience, demonstrating an understanding of management and organization, including at least five years in a position of substantial responsibility; experience in a federal or state court is preferred. A law degree is desirable. Must possess strong analytical, communications, and interpersonal skills. Salary range to $120,953 (max. equiv. to S.E.S. Level IV). **Send resume and letter of application to be received no later than Friday, May 13, 1994**, to Stephanie K. Seymour, Chief Judge, Tenth Circuit Court of Appeals, 333 West Fourth Street, Room 4-562 U.S. Courthouse, Tulsa, OK 74103 (918) 581-7416.

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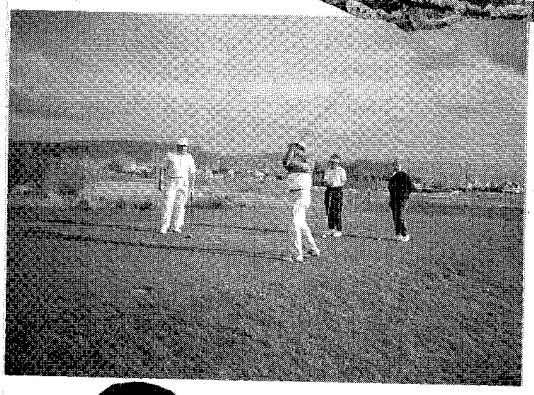
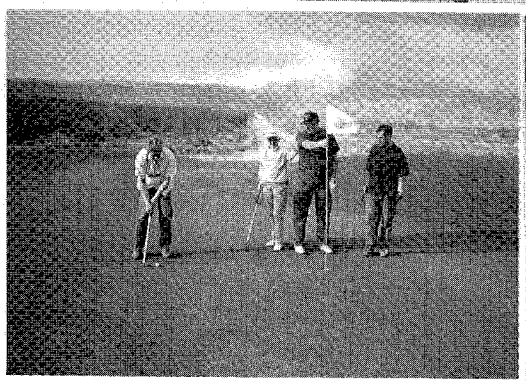
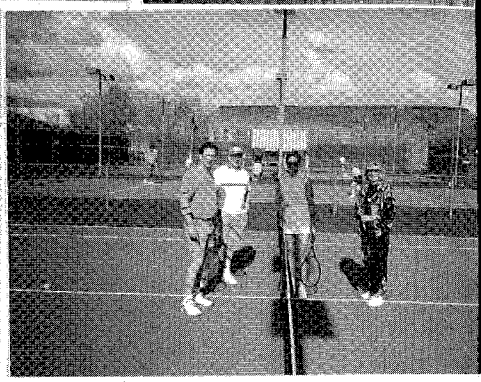
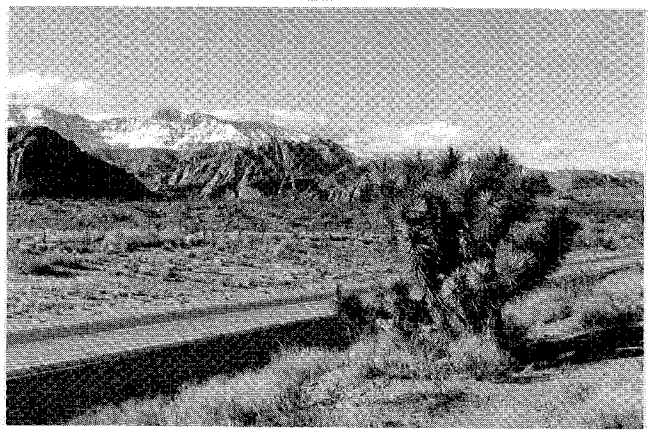
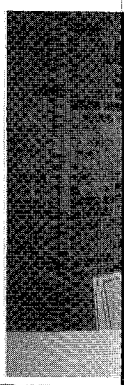
Utah State Bar Mid-Year

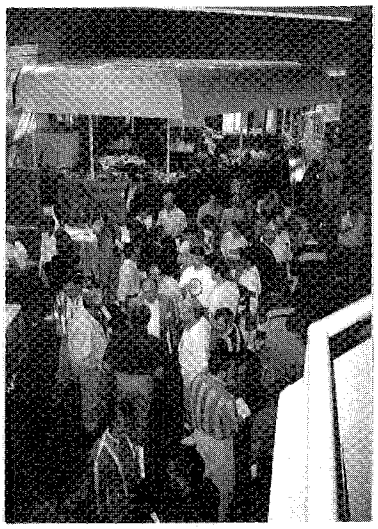


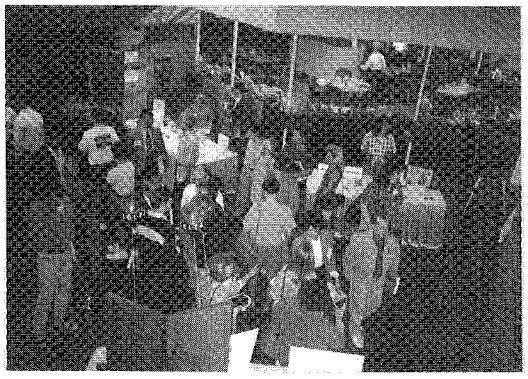




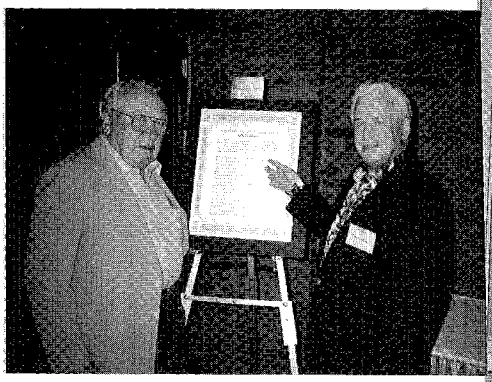








Meeting Happenings



Many Thanks to our 1994 Mid-Year Meeting

SPONSORS

The Mid-Year Meeting Committee extends its gratitude to the following sponsors for their contributions in making this a successful and enjoyable Mid-Year Meeting. Please show your appreciation for their donation by visiting the exhibit tables and supporting these firms and businesses.

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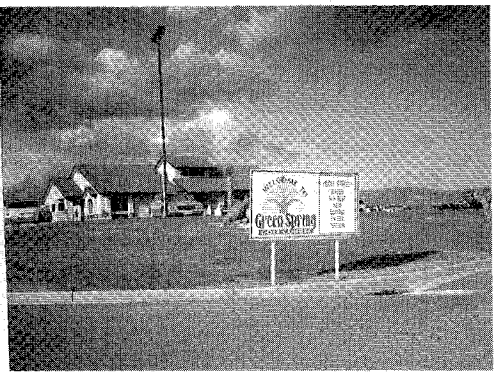
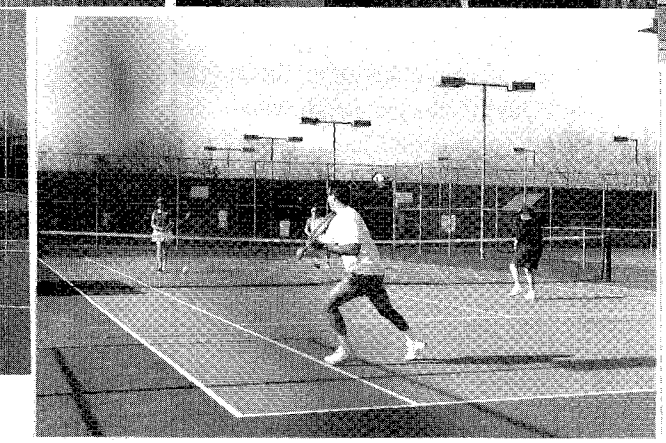
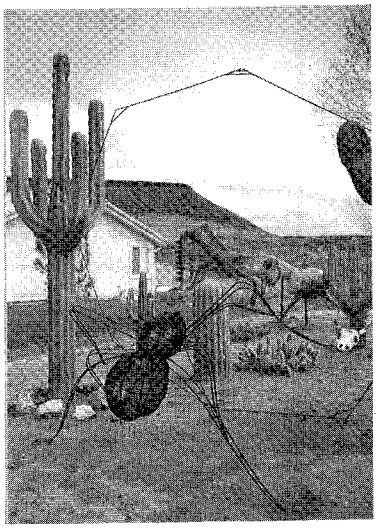
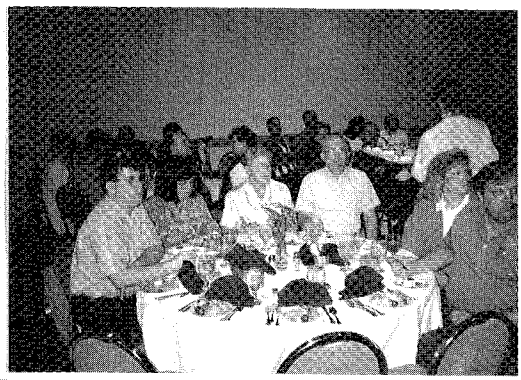
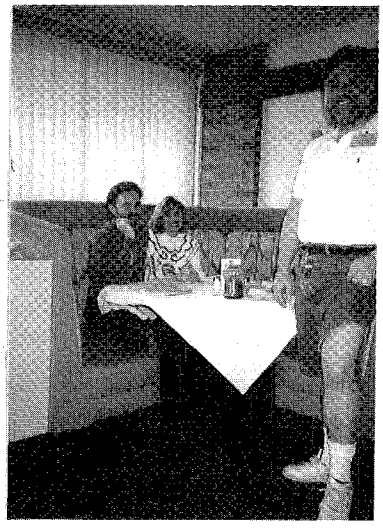










ANNOUNCEMENT
of
JUDICIAL VACANCY

ANNOUNCING:

That applications are now being accepted for five newly created judgeships in the Juvenile Court. The districts are as follows: 1 position in Second District Juvenile Court (Davis, Morgan, and Weber counties); 2 positions in Third District Juvenile Court (Salt Lake, Summit, and Tooele counties); 2 positions in Fourth District Juvenile Court (Juab, Millard, Utah, and Wasatch counties). Juvenile Court Judges of the Fourth District also serve the 8th Judicial District (Daggett, Duchesne, and Uintah counties).

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., ***May 6, 1994.***

ELIGIBILITY REQUIREMENTS:

Applicants must be 25 years of age or older, citizens of the United States, Utah residents for three years prior to selection and admitted to practice law in Utah. After appointment, the judge must reside within the geographic boundaries of the court.

SELECTION PROCESS:

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

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's courts in general, or the Second, Third, or Fourth District Juvenile Courts in particular, submit a written statement no later than May 31, 1994, to the Administrative Office of the Courts, Attn: Judicial District Nominating Commission.

To obtain an application form contact:

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

TERMS OF EMPLOYMENT:

A. BENEFITS:

Salary as of July 1, 1994, is $83,650 annually. • 20 days paid vacation per year • 11 paid holidays • $18,000 term life insurance policy (with an option to purchase $200,00 more at group rates) • Choice of five Medical and Dental Plans. Some plans paid 100% by the state, others requiring a small employee contribution.

Retirement Program: The state contributes an amount equal to 10.32% of judge's salaries toward the retirement system. Two percent of a judge's salary is deducted as their share of the retirement system costs. Judges are able to retire at any age with 25 yrs. service; at age 62 with 10 years service; or at age 70 with 6 years service. Retirement amount is calculated on the basis of years of service and an average of the last 2 years of salary. Judges receive 5% of their final average salary for each of their first 10 years of service, 2.25% of their average salary for each year from 11 to 20 years of service, and 1% of their final average salary for each year beyond 20 years to a maximum of 75%.

B. JUDICIAL RETENTION:

Each judge is subject to an unopposed, non-partisan retention election at the first general election held more than 3 years after the appointment. To be retained, a judge must receive a majority of affirmative votes cast. This means that newly appointed judges will serve at least 3, but not more than 5 years prior to standing for their first retention election.

Following the first retention election, trial court and appellate judges appear on the retention ballot every 6 years. Supreme Court Justices stand for retention every 10 years.

C. PERFORMANCE EVALUATION:

All sitting judges undergo a performance review every two years. Judges not up for retention election can use the performance review results (which are confidential) as a guide for self-improvement. Judges up for retention election are subject to Certification Review by the Judicial Council. Prior to the election, the Council announces those judges who have and (if applicable) have not been certified as meeting the following evaluation criteria:

- *Compliance with case delay reduction standards.*
- *No formal sanctions (and not more than 1 informal sanction) by the Judicial Conduct Commission.*
- *Completion of 30 hours of approved judicial education each year.*
- *Self Certification that a judge is physically and mentally able to serve, and complies with the Codes of Judicial Conduct and Administration.*
- *A satisfactory score on the certification portion of the Council's Survey of the Bar. (Judge's pass/fail scores on the certification section of the bar survey are released to the press with the Council's certification report).*

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact Marilyn Smith, Administrative Office of the Courts, 230 South 500 East, Salt Lake City, Utah, 84102. (801) 578-3800. Application packets will be forwarded to prospective candidates.

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

LAWHELP Provides Pro Bono Service In Utah County

by Professor James Backman and Derek P. Pullan

In August 1992, Thomas Seiler, President of the Central Utah Bar Association, Susan Griffith, Director of the Provo Office of Utah Legal Services, and Professor James Backman, Clinical Education Coordinator at the J. Reuben Clark Law School, created LAWHELP, a cooperative partnership designed to provide pro bono legal services in Utah Valley. The project has been a remarkable success. In the past 16 months, local attorneys and BYU law students participating in LAWHELP have provided pro bono legal services for more than 1,100 clients.

LAWHELP currently consists of six independent projects:

1. Tuesday Night Bar: Drawing on the Utah State Bar Association's experience, LAWHELP initiated a Tuesday Night Bar program. Each Tuesday, four volunteer attorneys provide free legal advice and referrals. BYU law students enrolled in the Legal Interviewing and Counseling course observe and assist in client interviews. To date, 55 attorneys and 59 students have served more than 700 clients.

2. Domestic Relations Project: This project assists clients of limited means in family law cases. Utah Legal Services refers clients to more than 40 local LAWHELP attorneys who are assisted by law students. To date, more than 70 clients have been helped and 25 cases concluded.

3. Immigration Project: Eleven attorneys and 13 law students have participated in this project. Together, they have provided pro bono legal services in immigration law matters for 84 clients.

4. Spanish-Speaking Project: This project has coordinated the efforts of 14 spanish-speaking attorneys and 10 spanish-speaking law students. The participants have developed a pro bono "general practice," offering legal advice in various areas of the law including landlord-tenant disputes, employment benefits, civil rights, welfare benefits, divorce, child custody, tax, and workers compensation.

5. Mediation Project: Law students in the Mediation Project with the help of four local attorneys, provide alternative dispute resolution at the Provo City Small Claims Court and BYU's Off-Campus Housing Office. To date, 65 mediation sessions have been conducted and more than half have resulted in the parties resolving their disputes by a binding agreement.

6. LIFE (Legal Intervention For the Elderly) and LIFT (Legal Intervention For Those With Disabilities): Six LAWHELP attorneys have participated in these two projects. With the help of 16 law students, they have assisted more than 150 elderly and disabled clients.

LAWHELP has combined the resources and coordinated the pro bono efforts of the Utah County Bar Association, Utah Legal Services and the J. Reuben Clark Law School. Professor James Backman, believes this cooperation is the secret of LAWHELP's success. "The partnership of the three co-sponsors of LAWHELP produced a natural win-win situation for each organization," stated Backman. "The students bring an enthusiasm and willingness to the assigned cases that is inspiring. Attorney's seem to enjoy the combination of mentoring students who are assisting them while they are also providing legal services to persons in need. The involvement of Utah Legal Services assists in providing quality control in the identification, intake, and monitoring of clients who are especially in need of legal services."

Each co-sponsoring organization has benefited from its involvement in LAWHELP. The local bar now has a structured program through which its members can provide pro bono service. Utah Legal Services, which has in the past been forced to turn away many clients because of its limited staff, can now refer clients to LAWHELP. For the J. Reuben Clark Law School, LAWHELP has been the vehicle for expanding clinical education. Prior to LAWHELP, only eight to ten students each semester worked at Utah Legal Services. However, during the past two years, 167 students have participated in the new pro bono projects.

Encouragingly, LAWHELP has expanded beyond its original three co-sponsors. It has, in the words of Backman, "caught the attention of the entire community." Other organizations including the United Way, Utah Valley State College, the Utah Latino Council, and the BYU Office of Cooperative Education have contributed to LAWHELP's success.

Backman hopes that LAWHELP's success will continue and that the program will be replicated. "The assistance provided the clients," says Backman, "is of high quality because a motivated student and an experienced attorney have joined together in serving the client's needs."

NOTICE

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

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

1994-1995 Utah State Bar
Request for Committee Assignment

DEADLINE - MAY 31, 1994

When the Utah Supreme Court organized the Bar to regulate and manage the legal profession in Utah, it defined our mission to include regulating admissions and discipline and fostering integrity, learning, competence, public service and high standards of conduct. The Bar has standing and special committees dedicated to fulfilling this mission. Hundreds of lawyers spend literally thousands of hours in volunteer service on these committees.

Many committee appointments are set to expire July 1, 1994. If you are currently serving on a committee, please check your appointment letter to verify your term expiration date. If your term expires July 1, 1994 and we do not hear from you, we will assume that you do not want to be reappointed, and we will appoint someone to take your place. If your term expires in 1995 or 1996, you do not need to reapply until then. If you are not currently serving on a committee and wish to become involved, please complete this form. See reverse side for a brief explanation of each Committee.

COMMITTEE SELECTION

Applicant Information

Name _____

Office Address _____

Office Telephone _____

Choice	Committee Name	Past Service On This Committee?	Length of Service On this Committee?
1st Choice	_____	Yes/No	1, 2, 3, 3+ yrs.
2nd Choice	_____	Yes/No	1, 2, 3, 3+ yrs.
3rd Choice	_____	Yes/No	1, 2, 3, 3+ yrs.

ADDITIONAL COMMENTS (to include qualifications, reason for serving and other past committee affiliation):

_____

_____

_____

For over 60 years, the Utah State Bar has relied on its members to volunteer time and resources to advance the legal profession, improve the administration of justice, and to serve the general public. The Bar has many outstanding people whose talents have never been tapped. Many of you have never served on a Bar committee. I urge you to do so.

Sincerely,

Paul T. Moxley, President-Elect

DETACH & RETURN to Paul T. Moxley, President-Elect, 645 South 200 East, Salt Lake City, UT 84111-3834.

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside Salt Lake are encouraged to participate in committee work.

Committees

1. Advertising. Makes recommendations to the Office of Bar Counsel regarding violations of professional conduct and reviews procedures for resolving related offenses.

2. Alternative Dispute Resolution. Recommends involvement and monitors developments in the various forms of alternative dispute resolution programs.

3. Annual Meeting. Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.

4. Bar Examiner Review. Drafts and grades essay questions for the February and July Bar Examinations.

5. Bar Examiner Committee. Reviews essay questions for the February and July Bar Exams to ensure that they are fair, accurate and consistent with federal and local laws.

6. Bar Journal. Annually publishes ten monthly editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.

7. Character & Fitness. Reviews applicants for the Bar Examinations to make recommendations on their character and fitness for admission to the Utah State Bar.

8. Continuing Legal Education. Reviews the educational programs provided by the Bar to assure variety, quality and conformance with mandatory CLE requirements.

9. Courts and Judges. Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.

10. Delivery of Legal Services. Explores and recommends appropriate means of providing access to legal services for indigent and low income people.

11. Ethics and Discipline. Screens complaints made against members of the Bar to determine violations of Rules of Professional Conduct and issues either non-public sanctions or formal complaints.

12. Fee Arbitration. Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.

13. Law Practice Management. Studies, evaluates and recommends improved methods of managing the practice of law.

14. Law Related Education and Law Day. Helps organize and promote law related education and the annual Law Day including mock trial competitions.

15. Law & Technology. Creates a network for the exchange of information and acts as a resource to Bar members about new and emerging technologies and the implementation of these technologies.

16. Lawyer Benefits. Reviews requests for sponsorship and involvement in various group benefit programs, including health, malpractice, disability, term life insurance and other potentially beneficial group activities.

17. Lawyers Helping Lawyers. Provides assistance to lawyers with substance abuse or other various impairments and make appropriate referral for rehabilitation or dependency help.

18. Legal/Health Care. Assists in defining and clarifying the relationship between the medical and legal professions.

19. Legislative Affairs. Monitors pending or proposed legislation which falls within the Bar's legislative policy and makes recommendations for appropriate action.

20. Mid-Year Meeting. Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.

21. Needs of Children. Raises awareness among Bar members about legal issues affecting children and formulates positions on children's issues.

22. Needs of the Elderly. Assists in formulating positions on issues involving the elderly and recommending appropriate legislative action.

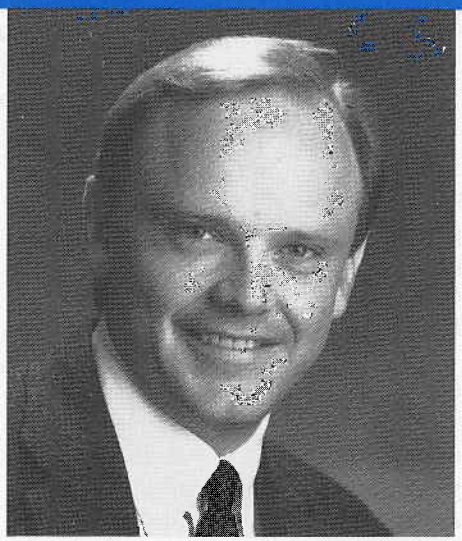
23. New Lawyers CLE. Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New Lawyer CLE requirements.

24. Professional Liability. Monitors the Bar's continuous liability insurance program with carriers under a fully standard policy form.

25. Securities Advisory Committee. Provides input to the Utah Securities Division on issues regarding the regulation of the securities marketplace.

26. Small Firm and Solo Practitioners. Assesses the needs and requirements of solo/small firm practitioners and develops recommendations and programs to meet those needs.

27. Unauthorized Practice of Law. Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.



The Young Lawyers Division: An Excellent Opportunity to Get Involved Outside the Office

By Robert G. Wright
Secretary, Young Lawyers Division

Soon, the Young Lawyers Division will have new officers to help coordinate activities with which the Young Lawyers Division is involved. The Young Lawyers Division is one of the most active divisions of the Utah State Bar and one of which all Utah State Bar members should be proud. More importantly, the Division provides all young lawyers with wonderful opportunities to assist others and spend some worthwhile time outside of the office.

This past year, each of the Young Lawyers Division committees have been very active. For example, the Membership Support Committee recently coordinated and conducted mock interviews at the University of Utah and at Brigham Young University Colleges of Law. This program provided law students an opportunity to have their resumes reviewed and to participate in mock interviews. The Membership Support Committee has also coordinated the Brown Bag Series which has been a rewarding program from which all Utah lawyers can benefit.

The Needs of the Children Committee completed three short public service announcements regarding the "Shaken Baby Syndrome." Local TV channels 2, 4, 5 and 13 agreed to air the public service announcements. Several radio stations agreed to play the audio cassette version of the announcement or have a disc jockey read the public service announcement. Also, that Committee distributed approximately 20,000 pamphlets which were sent to local clergy regarding reporting of child abuse. Many religions agreed to distribute the pamphlet to their clergy and members. The pamphlet was very well received. Finally, the Committee completed the Volunteer Guardian Ad Litem Program. Five training sessions were conducted regarding the program.

The Needs of the Elderly Committee will soon distribute an updated version of the Handbook for the Elderly. This handbook will be distributed to various agencies who can ascertain that the handbook will get to all needy senior citizens. The Committee also has continued with their public presentation series in the Salt Lake and Ogden areas. The Needs of the Elderly Committee has completed a videotaped presentation regarding tax, estate planning, and other such topics. These videotapes are available at the Utah Law and Justice Center.

The Community Service Committee coordinated and completed a blood drive in December, 1993, which was a success. That committee also completed its Sub-for-Santa program during that month from which came many toys for needy children. The Community Service Committee completed its "telephone for free" program. Several telephone companies donated free telephone time to homeless individuals during the holiday season.

The Pro Bono Committee has been continuously conducting Tuesday Night Bar sessions at the Utah Law and Justice Center. The Committee worked very hard to staff these sessions which have been successful. The Committee has also conducted a seminar at the University of Utah to help third-year students get involved with the Tuesday Night Bar session. That program gave an opportunity for the students to observe a Tuesday Night Bar conference.

The Law Related Education Committee continued its Peoples Law Seminar again this year in the Salt Lake area. The Committee also coordinated the "Law School for Non-Lawyers" programs which were held in the Salt Lake, Sandy and west side public libraries. These seminars provided information on various legal topics to the individuals who attended these one-night sessions. The Committee also completed several speaking engagements at local high schools about certain law-related topics.

The Diversity in the Legal Profession Committee has been working on domestic violence videos. The videos should be completed in the very near future and will be distributed around the valley. Such entities as Smith's Food & Drug Centers and Blockbuster Videos have agreed to rent the videos, free of charge, at the local stores.

The Consumer Credit Counseling Committee has been working with a task force on collections in Utah. The Committee is working with the Utah Bar Commission and its task force on certain issues regarding collections.

All members of the Utah Young Lawyers Division and their respective Committees have been working very hard. The Committee members, as well as all officers, have donated their time and effort to better our community and the perception of all lawyers in this state. The Young Lawyers Division is a great opportunity for all Young Lawyers to become involved and to further this endeavor.

If any young lawyer has not become involved with the Young Lawyers Division, I strongly encourage you to do so. As any other volunteer project, you will get as much out of the Division as you put into it. Moreover, you can give as much time or as little time as you wish. The opportunity is yours to explore and can be one on which you can greatly capitalize.

A new legal career can be very challenging. However, such non-office related activities, such as activities with the Young Lawyers Division can be a great diversion which you should find and rewarding. If you would like more information about how you can get involved with the Young Lawyers Division, please contact any one of the officers of the Utah State Bar.

Something Nice by the Ice, Young Lawyers Host Little Brothers and Sisters

By Michael Mower

Ten young lawyers recently hosted twenty youth at a Golden Eagles Hockey game. The outing was part of an ongoing partnership between members of the Needs of Children Committee of the Utah State Bar and Big Brothers/Big Sisters of Utah.

While the Golden Eagles lost to the Cincinnati Cyclones that night, the match was still enjoyable for the youngsters and their young lawyer friends. Many of the youth, who were between the ages of 6 and 14, had never watched a professional hockey game. With the Golden Eagles flying away forever from Salt Lake City, this evening out provided these youth their first and possibly final opportunity to experience professional hockey.

The kids, most of whom are from economically challenged, single-mother homes, were provided with seats and spending money by their young lawyer buddies. "I was paired with a brother and sister. It was fun to see their eyes sparkle with excitement," said young lawyer Dena Sarandos. "It was a delightful experience," Sarandos concluded after participating for her first time in a Young Lawyer/Big Brother & Sister project.

Most important, the "Little Brothers and Sisters" there that night were given a good deal of individual attention. As participant Michael Tomko noted a lot of friendships quickly developed. "There was no shyness about warming up to interaction," Tomko said. Like the youth, the young lawyers had a rewarding time that evening at the Delta Center. As one young lawyer noted it was nice to be able to help the less-fortunate youth in our community, even if it was just for one evening.

The Needs of Children Committee of the Young Lawyers Division of the Bar plan to host other similar activities in the future. Those who would like to participate are invited to contact Needs of Children Co-chairs Michael Tomko at 523-1234 and Dena Sarandos 355-3839.

Young Lawyers Division Presents 1994 Liberty Bell Award

by Gretchen C. Lee

Mel Jones has been named the recipient of the 1994 Liberty Bell Award. This award is presented by the Young Lawyers Division of the Utah State Bar on an annual basis to a nonlawyer in recognition of his or her service to the community in promoting a better understanding and respect of the law.

In 1993, Mr. Jones, in conjunction with Ned Spurgeon, former dean of the University of Utah Law School, started the Senior Lawyer Volunteer Project. Staffed by four senior attorneys, the project provides free estate planning to qualified senior and low-income residents. Until recently, Mr. Jones served as the project coordinator for this program. Mr Jones was also vital in assisting Legal Services in starting a night call-in program for seniors seeking legal services.

After retiring from UNISYS Corporation where he worked for 32 years, Mr. Jones enrolled at Westminster College and received his paralegal certificate from the college in 1992. He is currently working as a paralegal at the law firm of Parker, McKeown & McConkie. He continues to donate his time and services to Legal Services and the Utah State Bar.

Mr. Jones will be recognized for his accomplishments at a Law Day luncheon which will be held on April 29, 1994 at noon at the Joseph Smith Building.

Judging the Judges — Some Observations

By Judge Pamela G. Heffernan

JUDGE PAMELA G. HEFFERNAN graduated from the University of Utah College of Law in 1981. She left a general litigation practice at Snow, Christensen and Martineau when she was appointed to the Second Circuit Court in 1989.

She has a B.A. in Sociology and Philosophy from St. Cloud State University and an M.A. in Sociology from Washington State University where she was a National Institute of Mental Health Fellow in the area of Family Sociology.

Growing up in a small town in Minnesota, not unlike Garrison Keillor's famous Lake Wobegone, it never crossed my mind that one day I would be a judge in the state of Utah, or anywhere else for that matter.

To the extent I thought about judges, which was very little I must confess, what came to mind were men with white or grey hair — not far from the truth at that time. Not only did I not know any judges personally, I did not know any lawyers either and, therefore, their ilk was not among my universe of career choices at that time. Like most young girls in that era my aspirations vacillated between becoming a nurse or a schoolteacher. The only nontraditional female role models I remember were the female professional wrestlers on television (professional wrestling is very big in Minnesota) and I knew I did not want to become one of them.

Sometime later I decided that my career preference was to be someone in charge rather than being charged and, thus, began my somewhat self-determined stray from the traditional career choices that were quickly becoming undesirable if not unacceptable.

When I was appointed to the Circuit Court bench in 1989, I was the first female judge appointed to serve in a court of record outside the Salt Lake City area in the history of the state. I do not point this out as some kind of personal achievement but, rather, I highlight it as a quirky if not amazing historical fact and to put the following remarks in proper context.

While I had some apprehension about taking on my new duties and responsibilities (after all, who really trains to be a judge?) I was pleasantly surprised that the job and its attendant duties were not far out of the realm of my experience, and the job was intrinsically rewarding. I thoroughly enjoyed the association of my colleagues on the Circuit Court bench who were great role models and who very generously shared their time and experience with me. What I was not prepared for and did not realistically anticipate, despite some advance warnings from a few "grey beards" in the practice, was the degree of scrutiny and evaluation that judges are subjected to from wide ranging sources — from court personnel to the press to the bar and beyond.

More pointedly, I was initially surprised and somewhat amused at the responses my gender would engender. It quickly became apparent to me that despite the gender neutralizing tendency of the black robe (or the burgundy or blue robe you are likely to see in the Ogden Circuit Courts) people in and out of "my" court were definitely paying attention to the fact that I was not just a judge but a woman judge.

A local reporter informed me during an interview that I was an oddity in Northern Utah. My clerk told me that, at least in the beginning, there were murmurrings in the non-lawyer audience that this new woman judge would certainly give preferential treatment to a woman over a man. This concerned me and I made a conscious effort to dispel the misperception.

Later I tried a criminal case reminiscent of the Hatfields and McCoys after which I received a letter from one of the witnesses who stated the following:

> Why when I first heard that we were going to have a woman judge, I thought to myself this will be a first for me.

The letter writer went on in a singularly lefthanded way to complement me that, amazingly enough, I had conducted myself in a professional and, apparently, pleasing manner.

In some instances there has been gender perception reversal with some intimidated criminal defendants addressing me as "yes, sir". Another time I was introduced to a group as: "she's not a woman, she's a judge."

"The additional layer of frustration arises when a judge at sometime during his or her career is subjected to unfair and perhaps unintentionally harsh criticism. . ."

Aside from the issue of evaluation based on gender, I quickly came to the sobering recognition that judges as public figures are constantly being evaluated by everyone for all sorts of reasons. Everyone seems to have an opinion and in many instances a criticism of the judge. To the new judge it is difficult not to take it personally. The additional layer of frustration arises when a judge at sometime during his or her career is subjected to unfair and perhaps unintentionally harsh criticism and suffers the concomitant inability because of the position itself to respond to or rebut the unfair evaluation.

To lawyers, it is known that judging the judges is an activity that frequent users of the court have engaged in from time immemorial. It is almost a right of passage for young lawyers to familiarize themselves with members of the judiciary from afar and engage in the after court banter of criticism and general commentary on the judges.

Looking back on my own experience in practice, I was not exempt from pontificating about individual judges and my experiences in their courts. It usually made for lively and often humorous conversation. It was functional, too, since some useful and true information was passed from generation to generation this way. Many of the evaluations of the judges were positive, I might add.

I realize now that every judge by virtue of being a public figure develops a public history beyond just the context of the bar as a group. This is often referred to somewhat pejoratively as the judge's reputation. My experience tells me that this reputation is comprised of actual in and out of court experiences of observers, exaggerated accounts of such experiences, generally inaccurate accounts of such experiences, and finally mythical and otherwise fictitious accounts of would be experiences which for lack of a better phrase I will call judicial lore. I have learned that how a judge behaves including his or her facial expression, tone of voice, eye contact or lack of it, and interaction generally in and out of court is loaded with as much information for the evaluators to interpret and misinterpret as is the content of the judge's opinions and other decisions.

An analogy that comes to mind to illustrate the different postures a lawyer and a judge occupy is that of the difference between acting in the theater versus acting in the movies. Stage acting requires exaggerated gestures, facial expressions, and a projected tone of voice. Sound familiar? After all even though the theater audience is intensely interested in the action on stage they are physically and to a certain degree psychologically and emotionally removed from the action. You have to try to impress them.

The movie camera, on the other hand, magnifies even the smallest movement of the actor by the intensity of its scrutiny. The audience feels physically closer to the actor. The smallest mistake or betrayal of character is immediately apparent to the eye of the movie audience. It is not unlike the effect of the microscope. Restraint is the watchword.

The experience of the judge as public figure is more akin to the movie actor. The smallest gesture is frequently magnified and more meaning is attributed to it than might otherwise be expected. The audience is larger in number. Unless carefully cast in a premeditated way actions can be misinterpreted and set in a negative light. That, coupled with the fact that judges are authority figures with considerable power to affect litigants lives in significant ways as well as the power to make litigators comfortable or miserable in court, makes them particularly vulnerable to more frequent criticism than praise.

In addition to the multitude of informal evaluation of judges, in 1987-1988 came the advent of formal institutionalized eval-

uation of the judges by members of the bar. Every other year judges are evaluated by a group of attorneys who have appeared at least once in the judge's court. The list of evaluating attorneys is prepared by court clerks who scan court calendars for appearances of attorneys over a period of a year. Attorneys with more frequent appearances are ranked over attorneys with few or perhaps only one court appearance during that year. Attorneys who have appeared more recently before the judge are given preference for inclusion in the pool than others whose appearances are more remote in time.

Most of you have probably participated in this process. Some of you who appear in court frequently and before many judges are probably more familiar than you expected or perhaps wanted to be with the program. Undoubtedly, a responsible evaluation of a judge takes considerable time and deliberation. That is the idea and seems to be the manner in which the majority of respondents treat the process.

In addition to filling out the computerized evaluation form, responding attorneys are encouraged to send written anonymous communications to the judge being evaluated. These are private communications that are intended to give the judge candid information that augments the summarized information from the form evaluation.

There are multiple purposes for the formal evaluation by attorneys. First, it is part of the certification process engaged in by the Judicial Council for judges undergoing retention of election. The primary purpose is to provide the public some meaningful information on which to base their vote to retain or not retain an individual judge. Second, the purpose is to provide judges with information that they can use for self-improvement. After all the evaluation process has been going on in an informal way for years. Why not let the judges in on some of the things that are being said about them privately?

The purpose of this article is not to extensively critique the judicial performance plan in concept or practice. That is not to say the process could not be improved. The program does accomplish some of its goals, however crudely, in its present form. Many judges have commented that the information has been useful to one degree or another for self-improvement. After all, it is hard to deny that when large numbers of people settle on a particular judgment there is some truth to it whether you like it or not.

One of the criticisms of the program I've heard expressed by some judges is that the process may have a chilling effect on the independence of individual judges who will feel a subtle if not overt need to adjust their opinions or, even worse, feel a need to ingratiate themselves to their evaluators. Frankly, this may happen to a degree. It is just as likely, however, that judges resemble leopards and have just as difficult time changing their spots at will. Frequently, the things a judge needs to change or improve are areas to which they are blind — blind spots as it were.

One point in closing is that just as a judge is not "born to judge" (contrary to popular judicial wish and myth), judges also tend to change over time and hopefully get better. Learning the skill of judging is subject to mutation and maturation just as is the skill of lawyering. While personality characteristics may shape a judge's style in a more immutable way, and some judges are just more talented than others, it is also likely that wisdom and skill will in most instances become more finely honed with experience, education, and, with the evaluation process, through insight gained from those with a different perspective.

I urge you to continue to take the judicial performance evaluation process seriously and responsibly knowing that it is serious in its consequences and is taken seriously by those being evaluated. In the same vein, I urge you to judge as you would like to be judged — on the basis of your own observations and first hand information, not general lore, and with the tempering quality occasioned by the scope of your experience with the individual judge. If you have limited first hand knowledge of a judge's performance then you should consider limiting or declining your evaluation. If you have limited experience with a particular judge and found it less than satisfactory consider the possibility that your path crossed with the judge's on a "bad" day — either yours or the judge's. When evaluating set aside your biases and prejudices as you would expect the judges to do when deciding your cases in court. Finally, keep up the good work!

Utah Civil Practice

By David A. Thomas
Charlottesville, Virginia: The Michie Company, 1992
1049 pages

Reviewed by Brian J. Romriell

BRIAN J. ROMRIELL was admitted to the Utah State Bar in 1986 after his graduation from the Boalt Hall School of Law. He has clerked for both Judge Aldon J. Anderson of the U.S. District Court for the District of Utah and Judge Stephen H. Anderson of the U.S. Court of Appeals, Tenth Circuit. Mr. Romriell is currently employed with the firm of Kimball, Parr, Waddoups, Brown & Gee and practices in the areas of Civil and Commercial Litigation.

In his literary classic *The Magic Mountain*, Thomas Mann wrote that, "order and simplification are the first steps toward the mastery of a subject — the actual enemy is the unknown."[1] *Utah Civil Practice* provides that first step towards mastering the art of civil litigation in Utah. Professor Thomas' treatise is an ambitious undertaking that brings order and simplification to the surprisingly complex tangle of rules, laws, and legal opinions that govern Utah litigation. Even a brief perusal of its pages will convince civil practitioners, novice and experienced alike, that there is much they can learn about civil practice from this book.

In the early 1980's, Brigham Young University published a multi-volume series of looseleaf treatises on Utah law, including a set on Utah Civil Procedure by Professor Thomas.[2] That project was not kept current, however, and Thomas' four-volume treatise soon became outdated and obsolete. Thomas' newest book is a substantial improvement. Although it is published as a single volume, *Civil Practice* contains more information than the prior four-volume set and is vastly more accessible. It is an attractive book, the size, style, and appearance of which is designed to complement Michie's hardbound Utah Code Annotated.

Overall, the book is very user friendly. Its table of contents runs seventeen pages and serves as an exhaustive outline of the litigation process from start to finish. The book is divided into fifteen chapters that roughly follow the chronology of a civil lawsuit from evaluating a case prior to filing a complaint to past-appeal procedures such as issuing a remittitur.[3] In addition, its contents can be accessed through comprehensive tables, included in the appendix, of the cases, rules, and statutes cited in the book. It also includes more than one-hundred sample forms which are conveniently placed throughout the book in the sections in which they are discussed and are separately indexed in the appendix. The topical index resembles the one contained in Michie's four-volume Utah Code Unannotated.

Some topics that are frequently neglected in treatises of this nature are covered with clarity and great detail. For example, Thomas devotes more than thirty pages to service of process, guiding the practitioner carefully through the morass of technical rules governing service and around the pitfalls that one is likely to encounter. He covers the gamut from practical questions like how to submit a request for service to a constable to areas in which even experienced litigators may need help such as effecting international service of process or serving a petition for an extraordinary writ to the Utah Supreme Court.

Thomas' zealous attempt to be exhaustive results in discussions of obscure topics that at times are entertaining, if not useful. For example, one paragraph-long section, complete with its own subhead-

ing, is devoted to the notice that Utah law requires prior to enjoining a brothel as a nuisance. *See* § 2.04(1)(c). Regrettably, that discussion may never be discovered by some future lawyer embroiled in brothel litigation, because the index fails to include a separate subject heading for "Brothel."

Thomas includes an intriguing chapter entitled "Specialized Litigation" in which he discusses forty-seven different "unique and infrequent proceedings" that depart in some way from the rules of civil procedure. *Id.*, § 14.01, at 542. Each of the forty-seven topics is given its own subheading, making it easy for one to scan the table of contents for topics of interest. The topics addressed in the chapter include such diverse subjects as civil actions for theft of livestock, judicial review of tax commission decisions, and the right to recover consideration paid in a pyramid scheme. None of the subsections is long or detailed, but each provides the practitioner with access into an area with which most of us are unfamiliar.

From a practitioner's point of view, one unfortunate publishing decision was to include the full text of all Utah rules in the appendices. Not only do they require over 300 pages of the volume, the rules are amended so often that the version bound in *Civil Practice* is already outdated. Indeed, nearly 250 pages of the 300-page supplement published in 1993 consists of corrections and additions to the rules themselves. Michie already publishes annually an inexpensive volume that includes the most current version of all the rules. That volume is much easier to use for the full text of the rules than *Civil Practice*, which requires reference to both the hardbound volume and the supplement. As a result, only those who do not have the one volume court rules — principally out-of-state practitioners and research libraries — are likely to benefit from inclusion of the full text of the rules in *Civil Practice*.

In the Preface, the author states that the text is "intended as a comprehensive reference work on virtually every aspect of conducting civil litigation in Utah courts." *Civil Practice* at xxi. Despite that lofty aim, some important topics receive scanty treatment and deserve increased attention in future supplements and revised editions. For example, one of the first tasks facing a litigator in a new case is a document review to determine if the documents are protected from discovery by any privilege of the work product doctrine. Yet the various privileges that may apply are either ignored or treated with a breathtaking simplicity that cloaks their true complexity. Neither the attorney-client privilege nor the work product doctrine is even indexed, although "Trial Preparation Materials" is included as a subtopic under "Discovery." Privileges receive only the briefest of mention in the text — certainly not enough to provide the practitioner with any confidence in undertaking a document review. *See Civil Practice*, at § 9.07(1)(c)(i). A civil practitioner needs to be familiar with other privileges involving persons such as spouses, physicians, and clergy, but Thomas does not mention those privileges.[4]

"Professor Thomas' book . . . offers much for any attorney involved in civil practice, whether a beginning practitioner, a seasoned trial attorney, or a specialist with a narrow focus. . ."

The subject of interlocutory appeal also is largely absent from the book. One might guess that one of the most pressing concerns of lawyers in civil practice would be to answer the burning question, "Can I appeal the court's ruling against me?" Yet the subject of interlocutory appeals is largely absent from the book and the little that is included is incorrect. *See Civil Practice* at 563 (stating that an appeal from an interlocutory order "is initiated by filing with the *trial court* a petition for permission to appeal from an interlocutory order" (emphasis added). *Cf.* Utah R. App. P. 5(a). Of as much interest to the practitioner as calculating how many days she has to file an appeal is determining what constitutes an order from which an appeal can be taken and what effect subsequent actions, like filing a motion for reconsideration, have on the running of the appeal deadline. Such questions are an integral part of civil practice, yet Professor Thomas does little beyond reciting the language of the rules on these matters.

Improvements in coverage are evident in the supplement and undoubtedly more will appear in the future. For example, over the past several years, the Utah Supreme Court has issued a number of decisions concerning what constitutes a final order for purposes of Rule 54(b). Those cases are gathered and succinctly discussed in the supplement. *See Supplement*, § 15.02(1), at 41. Other topics such as the one-action rule (*Id.* at § 3.02, at 7) and tolling of the statute of limitations (*Id.* at § 8.02, at 210) also receive enhanced treatment in the supplement.

Professor Thomas' book is an energetic and commendable effort. It includes a rich variety of information available in a well-organized single volume. It offers much for any attorney involved in civil practice, whether a beginning practitioner, a seasoned trial attorney, or a specialist with a narrow focus such as tax or bankruptcy. The book would benefit from some revisions to provide more information on a few neglected, but important topics, and to correct errors that naturally occur in the first edition of a work of this magnitude. Although Utah may never have enough lawyers to justify a full series of comprehensive treatises such as is available in California through the Continuing Education of the Bar, Professor Thomas' book is a solid step forward for Utah Legal practice.

[1]Thomas Mann, *The Magic Mountain* [*Der Zauberberg* (1924)], trans. by H.T. Lowe-Porter (New York: Alfred A. Knopf, 1975): 245-46.

[2]David A. Thomas, *Utah Civil Procedure*, vols. 1-4 (Provo, Utah: Community Press, 1980).

[3]Chapter headings include: "Overview of Utah's Legal System;" "Factors to Consider When Commencing an Action;" "Preparing a Complaint; Commencing an Action;" "'Long-Arm' Jurisdiction in Utah;" "Defaults and Default Judgments;" "Responding to the Commencement of an Action: Pre-Pleading Motions;" "Pleading and Other Responses to a Claim;" "Pretrial Conferences and Discovery;" "Restructuring the Action Before Trial;" "Trial Procedure;" "Judgments and Post-Trial Motions;" "Post-Judgment Remedies and Enforcement;" "Specialized Litigation;" and "Outline of Appellate Procedure."

[4]The Utah Rules of Evidence were revised in 1992 to include rules for various privileges, *see* Utah R. Evid. 501-507, but these received no mention in the text of the 1993 supplement to *Civil Practice*.

IOLTA Honor Roll

The Utah Bar Foundation honors all individuals and law firms who have supported the Foundation by converting trust accounts to the IOLTA Program (Interest on Lawyer Trust Accounts). Thanks to you, the Foundation has awarded approximately $1.25 million in grants.

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You can take pride in the work the Utah Bar Foundation is performing on your behalf. The Foundation strives to invest your support in projects and programs that will enhance the public understanding of the legal system, improve the administration of justice, provide access to legal services, and to support other worthwhile law-related community projects in the state.

Every time a project is funded, the community is enriched and the image of the profession enhanced.

If we have inadvertently omitted any name, we regret the oversight. To rectify an error or omission, please contact the Bar Foundation office — 531-9077.

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REMINDER

Ballots to vote for two trustees to the Board of Trustees of the Utah Bar Foundation will be mailed to you in May — REMEMBER TO TAKE THE TIME TO VOTE!

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 May and June are:

MAY

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

JUNE

June 6 – Overview of an Adoption
June 13 – Utah Consumers Credit Code/Consumer Credit
June 20 – Protection Act/ Excessive Interest Rate Problems
June 27 – State & Federal Fair Housing Laws/Enforcement

CLE CALENDAR

SEVENTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

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.

EFFECTIVE 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. Former U.S. Solicitor General Rex Lee, the featured luncheon speaker, will talk about the issues of new counsel on appeal. The registration fee includes parking at the University of Utah as well as lunch.

CLE Credit: 7 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.

APPELLATE PROCEDURE & JURISDICTION — NLCLE WORKSHOP

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

CLE Credit: 3 hours
Date: May 19, 1994
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

ANNUAL FAMILY LAW SECTION SEMINAR

CLE Credit: 6.5 hours
Date: May 20, 1994
Place: Utah Law & Justice Center
Fee: $100 early registration, $110 door registration after May 13, 1994
Time: 8:30 a.m. to 4:30 p.m.

UTAH STATE BAR ANNUAL MEETING

CLE Credit: 14 hours of CLE, including 3 hours of Ethics
Date: June 29 through July 2, 1994
Place: Sun Valley, Idaho
Fee: Registration before June 10, 1994, $200.00. Registration after June 10, 1994, and at the door, $230.00.
Time: Thursday, June 30; 8:00 a.m. to Noon. Friday, July 1; 8:30 a.m. to 4:50 p.m. Saturday, July 2; 8:30 a.m. to 12:20 p.m.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____
2. _____ _____

_____ Total Due

Make all checks payable to the Utah State Bar/CLE

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Name — Phone

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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, advertisements received without payment will not be published. No exceptions!

INFORMATION WANTED

The family of **Barbara Lucille Fife Fessler King** is looking for a will or trust. The decedent's date of birth was August 14, 1931, and date of death was August 14, 1993. Last known address of the deceased was 3780 Viking Road, Salt Lake City, Utah 84109. Anyone knowing the whereabouts of these documents is asked to contact Katherine King Caudle at (801) 585-7002 or (801) 278-3288.

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

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FOR SALE — BOOKS, OFFICE EQUIPMENT AND FURNISHINGS. Law books, book cases, office furniture, typewriters and equipment located at 536 East 400 South, Salt Lake City, in a building to be demolished. Law books include Utah Reports Volumes 1-66; Pacific Reporter Volumes 1 to last book; Pacific 2nd Volumes 1-632; Corpus Juris; C.J.S.; United States Supreme Court Reports L.Ed and L. Ed 2d; Session of Laws of Utah; U.S.C.A.; American Law Reports; Pacific Digests; and numerous text books, old and new. Call (801) 359-2329 or (801) 581-9823.

OFFICE SHARING/SPACE AVAILABLE

Up to five choice, Class A offices available with ALLEN NELSON RASMUSSEN & CHRISTENSEN at 215 South State Street, 9th Floor, Salt Lake City, Utah. Secretarial space also available. $450 per month per office. Includes covered parking. Call Nancy at (801) 531-8400.

Reasonably priced large office available in four attorney firm. Great location, close to state and federal courts. Access to facsimile, copier, phone and conference room. Secretarial and receptionist support available. Contact Julie at (801) 364-4040.

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Fully equipped office has one opening. Low overhead. Overload work and case sharing available. Call (801) 486-3751.

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POSITIONS AVAILABLE

Olson & Hoggan, P.C., Logan, Utah seeking associate attorney. Requires excellent academic record and strong analytical and communication skills. Send current resume in confidence to Olson & Hoggan, P.C., Attention: Miles P. Jensen, P. O. Box 525, Logan, Utah 84323-0525.

Salt Lake Firm seeking full time Tax Attorney who is licensed in Arizona to work out of the Utah office. LLM preferred but not required. Send resume to Utah Bar Journal, Box B-5, 645 South 200 East, Salt Lake City, Utah 84111.

ASSOCIATE POSITIONS AVAILABLE IMMEDIATELY . . . Prominent Nevada law firm seeks attorney with 1-5 years experience in corporate, lending and/or real estate law, and an attorney with 1-5 years experience in legislative/lobbying activities, for Reno office. Strong academic credentials and experience required. We offer an excellent benefit package and pay reasonable household moving expenses. Reply to Margie Bowman, Recruiting Administrator, Lionel Sawyer & Collins, 300 South Fourth Street #1700, Las Vegas, Nevada 89101.

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

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For Years 19 _____ and 19 _____

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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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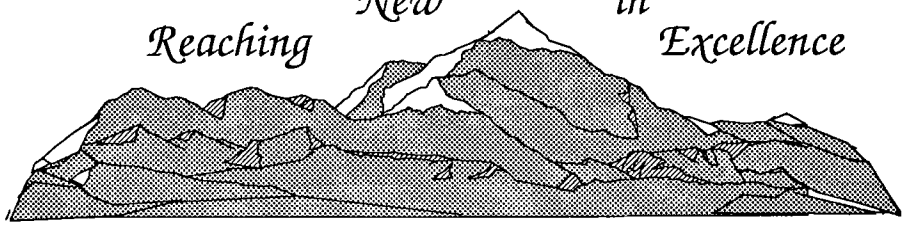

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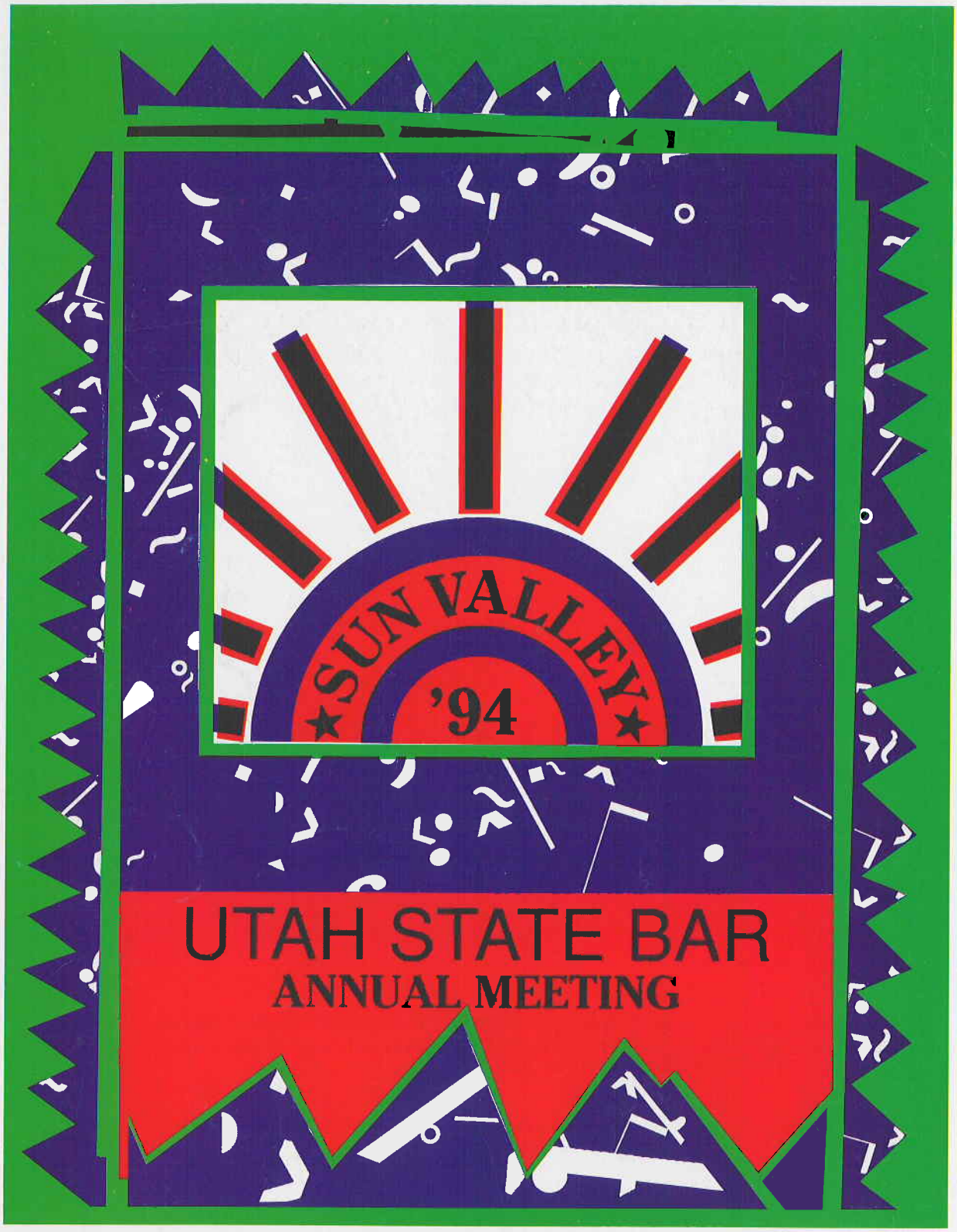

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