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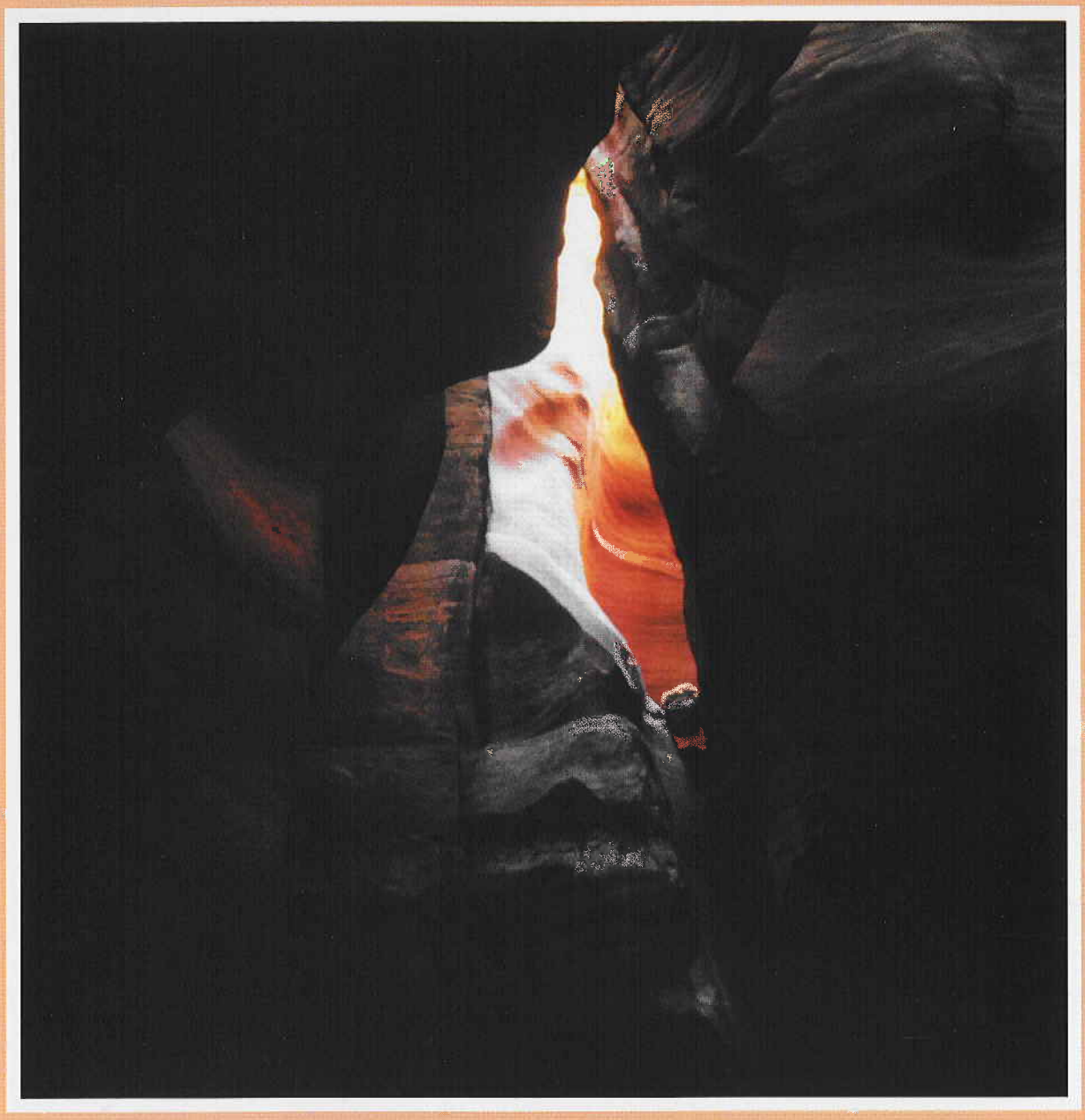

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COVER: Fry Canyon, Utah by Gordon J. Swenson, Esq. of Anderson & Holland.

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.

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LETTERS

Dear Editor:

"Punitive Damages: A Suggestion for Change" by Moab attorney, Stephen Russell, may have overlooked an important consideration. UCA, Section 78-18-1 (3), which became effective five years ago, on May 1, 1989, provides as follows:

> In any judgment where punitive damages are awarded and paid, 50% of the amount of the punitive damages in excess of $20,000.00 shall, after payment of attorneys' fees and costs, be remitted to the state treasurer for deposit into the General Fund.

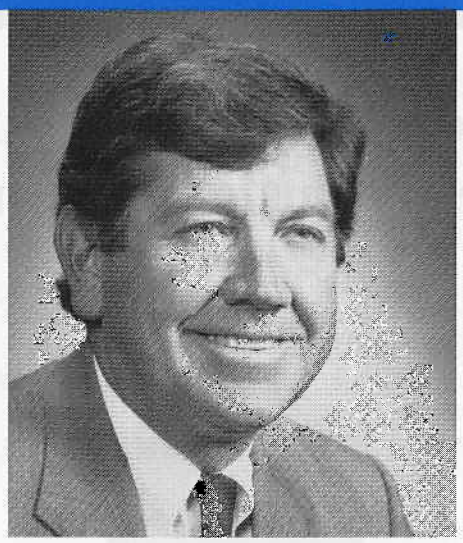
It is only "after" the victim of the wrongful conduct has been compensated for the injustices imposed on him that this statute attempts to give Utah's General Fund a lion's share of the punitive damages "awarded and paid". Amendment V of The United States Constitution prohibits "private property be taken for public use without just compensation".

Colorado Revised Statutes Annotated, Section 13-21-102 (4) was very similar to UCA, Section 78-18-1 (3). The Colorado statute provided that "One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund". Applying the standards established by U.S.C.A. Const. Amends. 5 and 14, the Supreme Court of Colorado, in *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991), held that state's statute unconstitutional. The Court concluded, at page 273, that

> CRSA, section 13-21-102 (4) constitutes a taking of a judgment creditor's private property interest in an exemplary damages award without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution . . . .

Before we start divvying up our clients' property rights, as suggested by Mr. Russell's article, let us at least measure those rights by simple constitutional principles.

H. Deloyd Bailey, Esq.



The Last (Printed) Hurrah!

By H. James Clegg

Well, Moxley (finally) returned from the depths of the Indian Ocean and the heights of the Himalayas, professing newfound energy, dedication and vision. Taking this as a welcome cue, yours truly is fitting him to harness and preparing to become an ex-officio "consultant". A good word, consultant; in fact, a fine word!

It has been a memorable five years, ten months and seventeen days since I joined the Bar Commission. I was wise enough to know that I was at the end of my troubles; I was dumb enough not to recognize which end. Just as well, as it turned out.

The best thing about bar activity is the great folks you meet and work with. Commissioners, committeemen (and women), task forcers, section leadership and staffers have all been great to know and, together, we have accomplished a great deal.

Gayle McKeachnie and Mike Hansen will be leaving the Commission this July. Both have been enthusiastic, hard-working and effective. They will be much missed. The Commission will also have to live without the likes of Jim Davis and Randy Dryer; Jim's ascension to the bench was alleged to compromise his loyalty to the Bar as its delegate to the Judicial Council. Not true; those who know Davis realize that *nothing* compromises his loyalty to the Bar. Dryer will be designated our international ambassador and we will have a flood of applications for sister-bar status. We are processing Lillejammer's application now.

It was my good fortune to have lived as neighbor, at different times, to Scott Matheson and Norm Bangerter before they became governors. This provided considerable warmth and trust, I believe, when I met later with them concerning Bar issues. I did not have the benefit of a prior relationship with Governor Leavitt. In all truth, in our meetings he was cordial, logical, thoughtful and most considerate. While we did not always agree (perhaps I wasn't a very good advocate on the issues of appointment of judges), we understood and respected the other's point of view and became sensitive to considerations pulling in both directions. He is either a good statesman or a great politician, or (if it is possible) both.

We are looking forward to a great Annual Meeting in Sun Valley. I hope you will all make the effort to attend; we are certainly making the effort to make it worth your while.

Recent Twists and Turns in the Evolution of Alimony

By David S. Dolowitz

The evolution of the law of alimony was explored in an article published in December of 1989 (*Utah Bar Journal*, Vol. 2 No. 10). Since then, a number of decisions have moved the law down interesting, and in some instances, conflicting pathways which present challenges to practitioners and trial courts alike. These questions result in part from the continued unexplored conflict between the goals of providing alimony to maintain the standard of living enjoyed during the marriage and the goal of encouraging rehabilitation and self-support by the recipient. While there has been an exploration and articulation of some of the concepts which underpin these conflicting social goals, no formula has been articulated which can be generally utilized by the practitioner or the court in confronting an alimony case.

An interesting conceptual basis for alimony was articulated by Cicily Carson Maton in "Opportunity Costs in Divorce Cases", *Fair$hare — The Matrimonial Law Monthly*, Vol. #12, December, 1992. Ms. Maton suggests:

> Opportunity 'costs' in the context of marriage and divorce may be defined as the loss of market wages, employment benefits, a depreciation of earning capacity.

Id. at 6.

She then goes on to point out that choices and decisions are made throughout a marriage where one spouse advances his/her earning capacity by education, job experience, professional training, while the other may make the choice of staying home to raise children, having children, moving away from a job, working for low or no wages to assist in a family business or working for the benefit of an entire family group. These career enhancements or sacrifices must be recognized at the time of a divorce. The spouse, whether it is a man or a woman, who has sacrificed his/her career development to assist in the professional or business training and experience of the employed spouse has given up opportunities for which compensation (alimony) should be paid.

DAVID S. DOLOWITZ is a member of the Board of Directors of Cohne, Rappaport & Segal; Fellow, American Academy of Matrimonial Lawyers; Past President and Member of the Executive Committee, Family Law Section, Utah State Bar Association; Family Law Section, Utah State Bar's "Lawyer of the Year"; Chairman, Utah Supreme Court, Advisory Committee for Juvenile Court Rules of Procedure.

Cicily Carson Maton goes on to discuss a research study concerning women who remained in the work force versus those who for some reason interrupted their jobs. Those who do often suffer economic detriment for which alimony should serve as compensation. The study followed women who interrupted their jobs for at least six months and, when comparing such women with those who stayed on the job, concluded that the women who dropped out of the work force earned, on average, thirty-three percent less during the year they returned to the work force than did a woman who stayed on the job. Even after eleven to twenty years, women who dropped out for any length of time were earning ten percent less than women who had not had an interruption. After twenty years, the gap between those who had remained on the job and those who had dropped out for a period of time was seven percent. In other words, at least in the women studied, those who had dropped out of the work force for family purposes suffered a loss of earning capacity, to-wit: an opportunity cost which was never recovered.

Quantifying opportunity cost is a difficult chore for the courts, but if that were the articulated goal at least it could be pursued. This concept has been adopted in Illinois, as is clear from the examination of the relatively recent case of *In Re Marriage of Schuster*, 224 Ill. App. 3d 958, 167 Ill. Dec. 73, 586 N.E.2d 1345 (Ill. App. Second Dist. 1992). The court stated:

> The policy underlying maintenance awards is that a spouse who is disadvantaged through marriage be enabled to enjoy a standard of living commensurate with that during the marriage.

586 N.E. 2d at 1354.

The Appellate Court goes on to note that the recipient spouse cannot simply sit around and expect to be supported:

> The Illinois Marriage and Dissolution of Marriage Act (Act) creates an affirmative duty on a spouse requesting maintenance to seek and accept appropriate employment. (206 Ill.App.3d at 510, 152 Ill. Dec. 27, 565 N.E.2d 269.) An award of maintenance to a spouse capable of improving his income can be an abuse of discretion.

586 N.E.2d at 1354.

If Utah had a clearly stated underlying policy for alimony, implementing that policy by decision would be more easily effected and the conflict in decisions which are discussed in this article should not exist.

PROFESSIONAL MARRIAGES

The Utah Supreme Court has rendered two decisions involving the termination of marriages involving a professional spouse in which major guideposts to handling that particular situation were erected. At the time of publication of the original alimony article, the decision of *Martinez v. Martinez*, 754 P.2d 69 (Utah App. 1988) was pending before the Utah Supreme Court. On September 16, 1991, the decision in that case was published. *Martinez v. Martinez*, 818 P.2d 538 (Utah 1991). Justice Stewart, speaking for the majority of the court ruled that the Court of Appeals' remedy of equitable ~~resolution~~ restitution, where one spouse had helped the other attain a professional degree, was inconsistent with Utah law and the ruling of the Court of Appeals was vacated. The majority declared that utilizing alimony and property distribution if any available, was the appropriate remedy. As Justice Stewart articulated for the court:

> An alimony award should be determined by the receiving spouse's earning capacity, financial condition and needs and by the ability of the other spouse to provide support. *See Jones*, 700 P.2d at 1075 (Utah 1985). . . . Usually the needs of the spouses are assessed in light of the standard of living they had during the marriage. *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988); *Jones*, 700 P.2d at 1075. In some circumstances, it may be appropriate to try to equalize the spouses' respective standards of living. *Gardner*, 748 P.2d at 1081; see also *Olson v. Olson*, 704 P.2d 564, 566 (Utah 1985); *Higley v. Higley*, 676 P.2d 379, 381 (Utah 1983). When a marriage of long duration dissolves on the threshold of a major change in the income of one of the spouses due to the collective efforts of both, that change, unless unrelated to the efforts put forward by the spouses during the marriage, should be given some weight in fashioning the support award. *Cf. Savage v. Savage*, 658 P.2d 1201, 1205 (Utah, 1983). Thus, if one spouse's earning capacity has been greatly enhanced through the efforts of both spouses during the marriage, it may be appropriate for the trial court to make a compensating adjustment in dividing the marital property and awarding alimony. *See, e.g., Kerr v. Kerr*, 610 P.2d 1380 (Utah, 1980); *Tremayne v. Tremayne*, 116 Utah 483, 211 P.2d 452 (1949).

818 P.2d at 542.

"If Utah had a clearly stated underlying policy for alimony, implementing that policy by decision would be more easily effected . . . ."

Justice Durham dissented from the majority. She declared that in a case such as *Martinez* where there was insufficient property available to compensate the spouse who had been investing time, labor and earnings in the improved standard of living for the long term benefit of the marital community, that spouse was entitled to compensation and equitable restitution was appropriate. Justice Durham pointed out that if you examine only the criteria recited by the majority, that is, that alimony is normally based upon the needs of the recipient spouse, the ability of the recipient spouse to produce sufficient income to meet those needs and the ability of the payor to pay the support, you will not have addressed the major problem of awarding sufficient alimony. This is particularly true when attempting to equalize the parties' respective standards of living and maintain them at a level as close as possible to the standard of living enjoyed during the marriage because, in bottom line terms, the parties will never have enjoyed the standard of living during the marriage that the professional spouse will now enjoy. 818 P.2d at 544-46. As applied to the *Martinez* facts, Dr. Martinez was just completing his residency and starting into private practice at the time of trial. The parties had never enjoyed the six figure income he was now starting to earn.

Justice Durham went on to observe that even if alimony is utilized as the majority requires, there is the additional problem of alimony terminating, by statute, on remarriage or cohabitation. Thus, unless a special criteria is established to compensate the non-professional spouse, alimony cannot properly do what the majority declares it should. Justice Durham pointed out that the majority failed to provide any guidelines for the trial court to impose a realistic standard or methodology for making appropriate awards to meet this problem or to adequately compensate the non-professional spouse. 818 P.2d at 544-46.

The Utah Court of Appeals issued its opinion in *Johnson v. Johnson*, 855 P.2d 250 (Utah App. 1993) on June 4, 1993, less than two years after Justice Durham voiced her concerns. The *Johnson* opinion clearly demonstrated the validity of Justice Durham's concerns by reversing the trial court's award of non-terminable alimony to the non-professional spouse. The appeals court found that non-terminable alimony was not the appropriate method of compensating the non-professional spouse and, in fact, was legally impermissible.

It is ironic that Justice Zimmerman in *Martinez* concurred specially to deal with the dissenting opinion of Justice Durham, yet he too was ignored in *Johnson*. In his opinion, he attempted to bridge the two positions and provide some of the guidelines that Justice Durham had noted were omitted in the majority decision. In his concurring opinion, Justice Zimmerman stated:

> The majority opinion also makes it clear that the trial court can make such compensating adjustments to both the property division and the alimony award as it deems necessary to make the ultimate decision equitable . . . .

818 P.2d at 543.

The Supreme Court did not discuss the concept of non-terminating alimony rejected in *Johnson* even though it was examined by the Utah Court of Appeals in *Petersen v. Petersen*, 737 P.2d 237, 242 (Utah App. 1987). If the Supreme Court had addressed the concept articulated in *Petersen*, it could have made it clear that non-terminating alimony is an appropriate economic adjustment in a divorce falling

within the *Martinez* parameters.

The value of this idea is enhanced when it is considered in terms of how the funds are transferred. If equitable restitution were considered a transfer of property, it would be governed by Section 1041 of the Internal Revenue Code, that is, a transfer which is not tax deductible to the payor and not included as income to the payee. However, if alimony is made non-terminable, it becomes tax deductible under Section 71 of the Internal Revenue Code to the payor and taxable income under Section 215 of the Internal Revenue Code to the payee. Since the professional education is reflected in the enhanced income that the professional can earn, a non-terminable alimony award would appear to be the most equitable and appropriate method of compensating the non-professional spouse while imposing minimum cost on the professional spouse. At the same time, the trial court would retain jurisdiction to order further adjustments to the award based on changes of circumstances in the parties, which would make the award equitable. *Muir v. Muir*, 841 P.2d 736, 739 (Utah App. 1992).

"[U]nless a special criteria is established to compensate the non-professional spouse, alimony cannot properly do what the majority declares it should."

In *Dunn v. Dunn*, 802 P.2d 1314 (Utah App. 1990), the Utah Court of Appeals held that marriage is an economic partnership and that the parties, while carrying out different roles, each contribute to the partnership which entitled them to an equitable division of the partnership assets. Since the asset involved, the professional education, manifests itself as an increased income that will be received over a number of years, payment of a portion of that income to the non-professional spouse — a payment which is tax deductible to the professional spouse — would appear to be the most equitable adjustment mechanism available. Retention of jurisdiction by the awarding court to make adjustments as circumstances change allows the court to continue to monitor the situation and equitably balance both parties' interests. It also allows the trial court to make an award built around future income rather than the living standard enjoyed during the marriage, if that was low during the training period, as is required by present law. *Gardner v. Gardner*, 748 P.2d 1076, 1081 (Utah 1988).

It should be noted that the Utah Court of Appeals decision, *Johnson v. Johnson*, not only totally ignores this rationale, but does so without even discussing what Justice Zimmerman and Justice Durham were addressing in *Martinez*, or what another panel of the appeals court articulated in *Petersen*. It would thus appear that in *Johnson*, the Utah Court of Appeals totally ignored both the instructions of the Utah Supreme Court and its own prior decisions. This presents conflicting guidelines to the trial courts and attorneys that will have to be clarified in the future.

Two additional areas of potential problems exist that Justice Zimmerman felt could be dealt with and Justice Durham aptly warned would be ignored. These two areas are: 1) the *Martinez* fact situation where one spouse puts the other through school and raises the family, and 2) where the professional spouse has gone into practice and is making substantial earnings, but has not accumulated a sufficient estate to award property in an amount that will compensate the non-professional spouse. This is not an exhaustive list of the circumstances under which the problem will have to be addressed. These are described to illustrate the valid concerns Justice Durham enunciated. She pointed out that the loss of future income is financially real. The action of the Court of Appeals in *Johnson* demonstrates the impact of the debate and underlines its importance in view of the second Supreme Court decision dealing with a professional spouse.

In *Sorensen v. Sorensen*, 839 P.2d 774 (Utah 1992), the Utah Supreme Court reversed the Utah Court of Appeals, 769 P.2d 820 (Utah App. 1989) which had approved valuing and dividing the good will of a professional practice by a dentist engaged in solo practice. The court stated:

> The reputation of a sole practitioner is personal, as is a professional degree. Both enhance the professional's earning capacity. The

> combination of the degree and the practitioner's reputation enable him or her to earn in many cases a substantial income, the fruits of which are shared by the children in the form of child support and by the former spouse in the form of alimony.

839 P.2d at 776.

Thus, for the spouse of the professional who practices by himself or herself, the only assets available for division from the professional practice are the accounts receivable and hard assets, less the debts of the practice. The Supreme Court opinion leaves no doubt that it is via alimony and child support that the former spouse is to share the fruits of the practice. This relates back to the issue discussed specifically in *Martinez*, by Justices Durham and Zimmerman without, unfortunately, dealing with the concept of non-terminable alimony.

The Utah Supreme Court in *Martinez*, and the Utah Court of Appeals in *Petersen*, indicated that alimony in Utah may be made non-terminable. However, the Utah Court of Appeals in *Johnson* destroyed the equitable tool without even discussing why it should not exist or be utilized. Perhaps the Utah Supreme Court will grant certiorari and revisit this issue. It should do so.

Section 30-3-5(5) of the Utah Code (1993) provides:

> *Unless a Decree of Divorce specifically provides otherwise*, any order of the Court that a party pay alimony to a former spouse automatically terminates upon the remarriage of that former spouse. (emphasis added).

Under this statute, alimony may be made permanent and not terminable on remarriage. By implication, this could be true of cohabitation as well, but that is not as clear because § 30-3-5(6) of the Utah Code (1993) which provides for termination or alimony on cohabitation, does not contain the language *"Unless a Decree of Divorce specifically provides otherwise"*. However, if the trial court specifically ruled that alimony would not terminate on remarriage or cohabitation, it would be a special type of alimony which constitutes compensation to the non-professional spouse which would not be tied to need. This would permit the non-professional spouse to enjoy the standard of living he or she would have enjoyed had there not been a divorce. If *Johnson* means, despite *Martinez*, that this will not occur, the non-professional spouse must remain single and almost celibate or lose his or her alimony. This reasoning appears inconsistent with the language of §30-3-5 of the Utah Code, which provides:

> (1) When a decree of divorce is rendered, the court may include in it *equitable orders* relating to the children, property, debts, or obligations, and parties.

As it is inequitable to link the award which is to equitably divide the professional education to the alimony recipient's remarriage or sexual behavior.

These decisions deal with the termination of the marriage of a professional spouse. They could be equally applicable to other situations where the facts brought them within concepts that, while appearing unique to a professional, may apply equally to other business or academic careers in which advanced education has produced an enhanced income which may otherwise be indivisible.

"The question that arises from recent appellate decisions such as Dunn is whether the duration of the marriage plays any role in setting alimony."

LONG TERM MARRIAGE

The concept of a long term marriage as an economic partnership was articulated by the Utah Court of Appeals in *Dunn v. Dunn*, 802 P.2d 1314 (Utah App. 1990). That decision dealt with the division of property rather than alimony, but theoretically should apply to all aspects of the divorce. The question that arises from recent appellate decisions such as *Dunn* is whether the duration of the marriage plays any role in setting alimony. The courts have traditionally held that, in a long term marriage, alimony should be awarded. In recent cases, however, permanent alimony in relatively short term marriages has been affirmed without discussing the duration of a marriage. It would appear that the duration of the marriage is becoming decreasingly important in determining the duration of an alimony award.

The Court of Appeals considered, without serious discussion, the longevity of the marriage in *Thronson v. Thronson*, 810 P.2d 428 (Utah App. 1991). The parties were married for 11 years. They had one child. Both of the parties were professionals, the husband was an attorney and the wife a pharmacist. The fact situation was similar to *Davis v. Davis*, 749 P.2d 647 (Utah, 1988) (discussed in "Evolution of Alimony" in the *Utah Bar Journal*, Vol. 2, No. 10, December 1989, at 9) where each of the parties was a professional, in that case a lawyer and a teacher. In *Thronson* there was a substantial discrepancy in the earnings produced by each of the parties' practice of the respective professions. The trial court, in determining Mr. Thronson's earnings, averaged them over several years. The Utah Court of Appeals held that such averaging was inappropriate even though the earnings fluctuated and ruled that the alimony should have been based on the earnings of both spouses as of the date of trial. Mr. Thronson's earnings as of that time were found to be high enough to meet the full monthly need that Mrs. Thronson was not able to meet from her own earnings ($800.00 per month). The appellate court determined that the trial court appropriately awarded $800.00 per month as support to Mrs. Thronson, but ruled that the trial court erred in putting a duration on that alimony and made the alimony award open-ended.

Then, in *Watson v. Watson*, 837 P.2d 1 (Utah App. 1992), the Court of Appeals affirmed an open-ended alimony award in a seven year marriage. The Court of Appeals affirmed an alimony award of $2,000.00 per month which would reduce to $1,500.00 per month after the minor child commenced school. The parties had agreed that the wife would remain at home to care for the minor child and the husband would provide support until the child started school. The trial court was found to have examined all of the required alimony criteria and was affirmed. There was no discussion of the length of the marriage being a consideration for permanent versus rehabilitative alimony. Because of an absence of any discussion of this issue, it is difficult to tell whether or not in all cases involving children, alimony should

be open-ended regardless of the duration of the marriage, or if, because this was simply not addressed, the trial court was affirmed as not having abused its discretion.

Without mentioning the *Watson* decision, another panel of the Utah Court of Appeals in *Rappleye v. Rappleye*, 855 P.2d 260 (Utah App. 1993) affirmed a trial court award of alimony of $800.00 per month for two years. The Rappleyes were married for 5 years before they separated and for 7 years by the time the divorce was entered. Mrs. Rappleye challenged the trial court's award claiming it should have been higher and longer. Mr. Rappleye responded that it was a short term marriage and the duration of the alimony was appropriately limited. In its decision, the Court of Appeals analyzed the traditional three points and found that the trial court had considered each of these factors and that the findings were appropriately supported by evidence. 855 P.2d at 263-264. Then, without even mentioning the *Watson* case which appears to be contrary to the ruling in *Rappleye*, the court declared:

> Because these findings are supported by the evidence before the trial court, and *especially in light of the short term of the marriage*, we conclude the trial court did not abuse its discretion in only awarding Mrs. Rappleye alimony in the amount of $800.00 per month for two years. (emphasis added).

855 P.2d at 264.

The Appellate Court went on to note that, because it was remanding for further consideration of the property award, the alimony would have to be reconsidered, as a change in the property award might create additional need on the part of Mrs. Rappleye.

"[A] separate finding regarding income from property divided between the parties should be made in determining the alimony award factors."

It appears that the *Watson* decision and the *Rappleye* decision are directly contrary holdings that were affirmed by the Court of Appeals as being within the sound discretion of the trial court. The Appellate Court considered only that the trial court had made findings regarding the appropriate factors in making the alimony award. No policy regarding the duration of the alimony *vis-a-vis* the marriage was articulated.

CRITERIA FOR AWARD OF ALIMONY

In several recent cases, the Utah Court of Appeals re-examined the standard criteria for awarding alimony, as recapitulated by the Utah Supreme Court in *Martinez v. Martinez*. These decisions examined particular aspects of alimony and provided answers to specific questions raised by the courts and practitioners in establishing alimony.

In *Roberts v. Roberts*, 835 P.2d 193 (Utah App. 1992), the Utah Court of Appeals after restating the standard language for an alimony award added:

> This analysis of alimony payments, which determines the parties' future

needs and abilities to pay, is necessarily separate from the analysis of property distribution, which equitably distributes the parties' current assets and liabilities. Hence the court must make separate findings on these factors.

835 P.2d at 198.

The Court of Appeals ruled that the trial court failed to make this specific analysis. Thus, even though Mrs. Roberts remarried during the pendency of the appeal, the case was remanded for the trial court to make appropriate findings so that, should there be another appeal, the Court of Appeals could then determine what the alimony should have been. This ruling was made without declaring that the trial court had erred in any respect in making a nominal alimony award.

In *Chambers v. Chambers*, 840 P.2d 841 (Utah App. 1992), the trial court's decision to award alimony of $10,000.00 per month for three years, reduced to $5,000.00 per month after three years and then to terminate, was vacated and remanded for more specific findings. The Court of Appeals ruled that there should have been specific findings regarding the health and ability of Mrs. Chambers to earn income on her own as well as the specific income she would receive from assets awarded to her.

Thus, even when there is a substantial amount of property that is being awarded the income that will be produced by that property must be specifically determined by the trial court if it is to serve as the basis for a subsequent decrease in or termination of alimony. An examination of the receiving spouse's ability to produce income for herself/himself may also justify step down and termination. The *Chambers'* ruling is an elaboration of the rule first stated in *Johnson v. Johnson*, 771 P.2d 696, 700 (Utah App. 1989), where the Court of Appeals declared that a separate finding regarding income from property divided between the parties should be made in determining the alimony award factors.

The *Chambers'* decision dovetails with the decisions of the Court of Appeals in *Andersen v. Andersen*, 757 P.2d 476 (Utah App. 1988) (alimony may not be ordered terminated in the future based on projected completion of education) and *Rudman v. Rudman*, 812 P.2d 73 (Utah App. 1991) (it was error to order alimony to be reduced or terminated because of anticipated social security payments absent very specific findings as to the amount of the social security award). A similar ruling was made in *Munns v. Munns*, 790 P.2d 116, 120-122 (Utah App. 1990), where the ordered termination of alimony upon reaching age 62 was vacated. If there is to be a change in alimony, it is to be ordered only after economic circumstances have changed. *Muir v. Muir*, 841 P.2d 736 (Utah App. 1992).

This concept was revisited in *Johnson v. Johnson*, 855 P.2d 250 (Utah App. 1993), in which the Court of Appeals ruled that a trial court must consider and make findings about the continuation or adjustment of alimony when retirement income is projected to be received. As the Court of Appeals stated:

> [I]f a trial court knows that a party will be receiving additional future income it should make findings as to whether such additional income will affect the alimony award.

855 P.2d at 253.

"In* Howell, . . . *the Court of Appeals ruled that the date for determining and applying the alimony criteria is the date of the trial."

In *Whitehead v. Whitehead*, 836 P.2d 814 (Utah App. 1992), the Court of Appeals reversed the trial court's refusal to award a judgment against the husband for unpaid alimony which had been ordered to permit the wife to pay for a home and utilities, when, after she did not pay them, the home was foreclosed. The Court of Appeals ruled that even though the property was gone and payments had not been made for the purposes intended, the obligation to pay the alimony became an unalterable debt as the payments accrued and could not be retroactively reduced or excused. The Appeals Court ruling has particular impact because the Court then went on to affirm the trial court's refusal to award Mrs. Whitehead permanent alimony based upon the finding that she had failed to produce evidence of need for that financial assistance.

DATE FOR SETTING ALIMONY

In *Howell v. Howell*, 806 P.2d 1209 (Utah App. 1991) *cert. denied*, 817 P.2d 327 (Utah 1991), the Court of Appeals ruled that the date for determining and applying the alimony criteria is the date of the trial. Mr. Howell's earnings doubled between separation and the divorce trial. The issue emerged of what was the standard of living during the parties' marriage. Never, during the course of their marriage, did they enjoy the income that Mr. Howell was earning as of the date of the trial. As Judge Greenwood stated for the court:

> No cases in Utah or elsewhere, that we or counsel have discovered have specifically addressed the question of when a couple's "standard of living" should be determined for the purpose of calculating alimony, should it be separation, trial or some other time.

806 P.2d at 1211.

The majority of the court then went on to rule that the income would be determined as of the date of the divorce. As in *Thronson v. Thronson*, the Court of Appeals ruled Mr. Howell's income at the time of trial would be the basis of his ability to pay.

While *Howell* and *Thronson* rulings are consistent in this regard, in *Thronson* there was an increased standard of living that had existed during the marriage. In *Howell*, the parties had never mutually enjoyed a higher standard of living with the income that Mr. Howell was earning at the time of trial. Judge Bench, while concurring in part in *Howell*, dissented on this point. The trial court had found that the increased income would apply to Mr. Howell's ability to pay alimony to Mrs. Howell to maintain her standard of living enjoyed during the marriage. Judge Bench believed this was appropriate. The majority of the court did not. They ruled that the trial court must determine what would have been the standard of living had this increased income been available throughout the marriage, creating rather a "challenging" problem for the trial court. The majority of the court declared:

> In so holding, we agree with the dissenting opinion that determining standard of living is a "fact-sensitive, subjective task." We disagree, however, that the standard of living

is determined by actual expenses alone. Those expenses may be necessarily lower than needed to maintain an appropriate standard of living for a variety of reasons, including possibly a lack of income . . . . In light of the facts of this case, we conclude that the trial court erred in looking at the pre-separation standard of living in setting alimony, but should have instead considered the standard of living "during the marriage" up to the time of trial. In so concluding, we do not intend to establish a rigid rule that must be followed in all domestic cases, but acknowledge that trial courts have discretion to determine the standard of living which existed during the marriage after consideration of all relevant facts and equitable principles. In this case, it was inequitable and an abuse of discretion to pinpoint the standard of living as of the time of the parties' separation.

806 P.2d at 1212.

In a footnote, the court did go on to say:

> Exact mathematical equality of income is not required, but sufficient parity to allow both parties to be on an equal footing financially as of the time of the divorce is required.

806 P.2d at 1213.

The Supreme Court denied a Writ of Certiorari in *Howell*, 817 P.2d 327 (Utah 1991) shortly before issuing its *Martinez* decision.

The problems Judge Bench predicted in his dissent in *Howell* came back before the Utah Court of Appeals in *Hoagland v. Hoagland*, 852 P.2d 1025 (Utah App. 1993). Mr. and Mrs. Hoagland, after living together and running a grocery business that failed, separated. Mrs. Hoagland refused to move with Mr. Hoagland to Las Vegas where he became far more successful. Mrs. Hoagland then filed for divorce and requested alimony based on Mr. Hoagland's earnings. The trial court awarded alimony based on the standard of living the parties enjoyed in Utah while running the grocery business and did not consider the more substantial income earned by Mr. Hoagland in Las Vegas, except as to his ability to pay the required alimony. The Court of Appeals affirmed the trial court's approach even though Mr. Hoagland's approach was precisely the one rejected by that court in the *Howell* decision. Speaking for the court, Judge Garff wrote:

> Here the court found that Wife has not become accustomed to a high standard of living during the marriage . . . .
>
> . . . Here, Wife did not want to move from her home in Utah to continue the marriage, yet she wanted to benefit from the higher standard of living obtained, in part as a result of Husband's relocation. Moreover, the court found that the marriage essentially ended when Husband moved out of Utah. Because the court made relevant findings, supported by relevant evidence and equitable principles, we hold that it did not abuse its discretion in this case in departing from the general rule and in basing alimony on the standard of living enjoyed at the time of separation.

852 P.2d at 1027-28.

Judge Bench, observing that this opinion validated the concerns that he expressed in his supplemental opinion in *Howell*, concurred in the result stating:

> The trial court's ruling in this case should be affirmed, not because the trial court has discretion to depart from the rule provided in *Howell*, but because the trial court correctly followed the general rule, which is to look at the standard of living actually enjoyed.

852 P.2d at 1030.

Judge Jackson concurred specially, noting that he believed the *Howell* decision was limited to its facts. He stated specifically that:

> I do not agree that *Howell* establishes a general rule that the standard of living must be determined as of the time of trial. Rather, the trial court has discretion to determine whether the standard of living should be determined as of separation or as of the time of trial.

852 P.2d at 1030.

In *Morgan v. Morgan*, 795 P.2d 684 (Utah App. 1990), the Utah Court of Appeals made it clear that in examining alimony, the needs of both payor and payee, as well as the ability of each to earn income, must be considered and there must be specific findings regarding both prior to and in making an award of alimony. After remand, the trial court's alimony award was again appealed. The alimony award was affirmed based on revised findings. *Morgan v. Morgan*, 854 P.2d 559 (Utah App. 1993).

The Court of Appeals again looked at the criteria for an alimony award in *Willey v. Willey*, _____ P.2d _____, 227 Utah Adv. Rep. 39 (Utah App. 1993), and ruled that when determining the ability to pay, the trial court must consider not only the income of the payor spouse, but also the financial need of the payor spouse which is an underlying factual determination required for an assessment of the ability of the payor spouse to provide support. 227 Utah Adv. Rep. at 39.

In an interesting decision, the Utah Court of Appeals in *Hagan v. Hagan*, 810 P.2d 478, 482 (Utah App. 1991), held that the provision in an original decree of divorce that required the husband to pay all of the utilities incurred at the residence of the parties while the wife continued to reside there must be construed as requiring spousal support of the wife. As the court stated:

> Utah case law clearly states that regardless of label, a provision's true nature determines whether it is property, alimony or child support. It is not the label placed by decree upon payments which constitutes them either alimony or lump sum property settlements; it is the elements inherent in the case as a whole, the record of which the decree is a part, which determine to what category such payments belong.

810 P.2d at 482.

The court then ruled that, because the utility payments were not for a fixed sum or a fixed period, the Defendant was required to pay them as long as the wife resided in the home, as this was continuing spousal support.

"In Bridenbaugh, *. . . the Court of Appeals affirmed a termination of alimony after determining the trial court had appropriately found that the recipient was able to support herself at the standard of living to which she had become accustomed during the marriage."*

The Utah Court of Appeals made a clear ruling in *Baker v. Baker*, _____ P.2d _____, 226 Utah Adv. Rep. 27 (Utah App. 1993), that in considering the need of the receiving spouse, the needs of grandchildren residing with the recipient spouse are not to be included when determining the alimony award. Only the living expenses of the recipient spouse were ruled relevant. In *Willey v. Willey*, the court ruled the same way regarding step-children. By analogy it would appear that this rule should apply to considering the needs of either adult children, or emancipated children living with a recipient.

In *Bell v. Bell*, 810 P.2d 489 (Utah App. 1991), the Court of Appeals vacated an alimony award that was made in disregard of the standard examination of financial conditions and needs of the wife, the ability of the wife to produce sufficient income for herself to meet her needs and the ability of the husband to provide support. The trial court ignored these factors because it found that each of the parties had pursued a separate career and there had been a history of marital problems. The trial court appeared to be using alimony to effect a property division. By giving the wife the personal property in her possession worth $6,000.00, then awarding her alimony of $6,000.00 and deeming it paid by possession of the property, the trial court disposed of the alimony claim. This was found to be an abuse of discretion. The appellate court said that while the trial court had not considered rehabilitative alimony, this case looked like an appropriate one for its use.

WHAT ALIMONY SHOULD NOT DO

In *Burt v. Burt*, 799 P.2d 1166 (Utah App. 1990), the Court of Appeals ruled that alimony is not to be automatically awarded whenever there is a disparity between the parties' income. An alimony award should not be awarded simply to help equalize the income of the parties. 799 P.2d at 1170. The Court of Appeals, questioning whether alimony should have been awarded at all, vacated the $300.00 per month alimony award and remanded for further consideration by the trial court.

In *Haumont v. Haumont*, 793 P.2d 421 (Utah App. 1990), the Court of Appeals vacated the trial court award of alimony which had simply given the wife the amount of alimony she gave up when she entered into the marriage. The Court of Appeals ruled that the trial court did not follow the criteria established for making an alimony award. It could only be based on need, the wife's ability to meet her need and the husband's ability to pay, not what she gave up to enter the marriage.

IMPUTATION OF INCOME

The question of imputed income reached the Court of Appeals in *Hall v. Hall*, ____ P.2d ____ (Utah App. 1993), where the issue of imputed income was explored in terms of both alimony and child support. Even though the provisions of U.C.A. §78-45-7.5(7)(a) and (b) deal with imputed income for child support, the same criteria were applied for alimony. Mr Hall had been employed in the computer industry and for three years averaged in excess of $100,000.00 per year with average gross monthly earnings in excess of $8,500.00 per month. About ten days before trial started, Mr. Hall started a new

job at $40,000.00 per year. At trial he requested that child support and alimony be based on his present income of $40,000.00 per year (which would have been appropriate under the *Thronson* and *Howell* decisions discussed above) rather than on his historical income of approximately $100,000.00 per year. The trial court determined his average historical income over three and one-half years prior to trial and imputed a gross average income of $8,208.21 per month. The Court of Appeals carefully examined first the propriety of imputation. The court utilized §78-45-7.5(7)(b) since there was no stipulation as to the amount to be imputed as provided in §78-45-7.5(7)(a). The Court of Appeals declared that the trial court must make careful and explicit findings of underemployment and that the underemployment was voluntary. The Court of Appeals did not determine that imputation could not be effected in this case but rather ruled that income could not be imputed from the findings made and remanded the case for appropriate findings that Mr. Hall was voluntarily underemployed. In examining the issue of the amount of imputed income, the Appellate Court then declared:

> Accordingly, if upon remand the trial court finds that appellant was voluntarily underemployed, it must then make findings as to prevailing earnings for persons of backgrounds similar to that of appellant as required by Section (7)(b) in determining the *amount* of income to impute.

858 P.2d at 1027.

Then, in *Hill v. Hill*, ____ P.2d ____, 229 Utah Adv. Rep. 46 (Utah App. 1993), the Court of Appeals affirmed the imputation of income ruling because the court had made the necessary findings that Mr. Hill's underemployment was voluntary and it was therefore appropriate to impute income to him when determining child support.

REHABILITATIVE ALIMONY

In *Bell v. Bell*, 810 P.2d at 492-493 the Utah Court of Appeals described the concepts involved in rehabilitative alimony.

> A rehabilitative award could well be appropriate in this case as Wife is college educated, in good health, and worked throughout the marriage. She is independently minded, as evidenced by her decision to stay in North Carolina when Husband went to Korea and to stay in Utah when he was assigned to New Mexico. She is comparatively young and the marriage was comparatively short. On the other hand, Wife helped Husband get his master's degree, but the marriage ended before she had the chance to get hers, as had been contemplated. There is no question that receiving an advanced degree would better equip her to compete in the job market for a position at a better salary. An award of alimony geared toward reimbursing her for the help she extended Husband in getting his degree, or towards assisting her in acquiring her degree which would better enable her to support her daughter may well be closer to the mark than the traditional alimony analysis. However, if this approach is taken, it would be inappropriate to

impute income to Wife at the level of her previous teaching salary as the trial judge did. The purpose of rehabilitative alimony is in the short run to close the gap between actual expenses and actual income to enable the receiving spouse to then be better able to support herself when the alimony and schooling end. Under this analysis, Wife's income must be considered to be $863, the amount she was actually earning as a teaching assistant. Furthermore, a non-monetary award of alimony would not establish a rehabilitative result if there is a demonstrated difference between Wife's income and expenses.

RECOVERY OF ALIMONY

In *Hinckley v. Hinckley*, 815 P.2d 1352 (Utah App. 1991), the Court of Appeals affirmed the trial court ruling that where Mr. Hinckley knew that he was paying alimony that he did not owe, he was not entitled to recover it. The court found that, as he had taken no action to reduce the alimony even when he had the right to do so, he had waived his right to recover the monies paid. The implication is that, had Mr. Hinckley not known that he was making extra payments, he may well have had a right to recover the extraneous alimony payments.

"[T]he Foxley *decision and the* Howell *decision raise the interesting question of whether a person who has been divorced from a spouse who later becomes very successful can return to court for increased alimony based on that sucess."*

MODIFICATION

In *Muir v. Muir*, 841 P.2d 736 (Utah App. 1992), the Utah Court of Appeals ruled that the trial court retained jurisdiction to modify an award of alimony after entry of the Decree, based upon a substantial change of circumstances not contemplated at the time of the Decree. The court then effected an excellent discussion regarding determination of the amount of income that one receives from a closely-held corporation which while constituting legitimate appropriate business expenses, constitute additional untaxed income or lifestyle enhancement for the owner. The court related that many corporations legitimately expense for tax purposes expenditures made for officer - shareholders, such as car expenses, insurance, meals, entertainment, travel, deferred tax benefits including pension contributions and employment of a subsequent spouse. The court noted that for the purposes of determining the income of either spouse, these items should be considered in addition to all declared income. Finding that the trial court failed to make adequate findings regarding these factors, the reduction in alimony ordered was vacated and the matter was remanded to determine whether, in light of these factors, there really was a material change in circumstances not contemplated in the original Decree that would justify a modification of the Decree.

In *Bridenbaugh v. Bridenbaugh*, 786 P.2d 241 (Utah App. 1990), the Court of Appeals affirmed a termination of alimony after determining the trial court had appropriately found that the recipient was able to support herself at the standard of living to which she had become accustomed during the marriage.

STANDARD OF LIVING

A question presented for trial courts and practitioners alike is the question of

what constitutes the standard of living during the marriage, discussed in the *Howell* and *Hoagland* decisions above. The trial court in *Howell* was directed to determine a standard of living that the parties never enjoyed during their married life together. In *Bridenbaugh*, alimony was terminated because the wife was earning sufficient income to enjoy a standard of living equal to or better than that enjoyed by the parties during their marriage. In *Hoagland v. Hoagland*, each of the appellate judges agreed that the trial court appropriately determined the standard of living during the marriage while the parties were living together, though they disagreed on the reasons for doing so.

This creates a troubling question as to precisely what is the standard of living involved in setting alimony. This is exacerbated by the decision of the Court of Appeals in *Foxley v. Foxley*, 801 P.2d 155 (Utah App. 1990). Dr. and Mrs. Foxley were married during Dr. Foxley's medical training. When the parties were married, Dr. Foxley was a graduate student and Ms. Foxley was an undergraduate student. They lived together for six years, separated and were divorced in the seventh year after Dr. Foxley had graduated from medical school but prior to the ultimate completion of his medical training. The doctor went on to complete his residency and develop a professional practice.

One year after the divorce, Mrs. Foxley received a bachelors degree and continued with her education. Three children had been born during the marriage and Dr. Foxley adopted a child born to Mrs. Foxley from a prior marriage. When the Decree was entered, Mrs. Foxley was awarded alimony of $10.00 per month, and child support for the children of $150.00 per child per month. The alimony award, the Court of Appeals noted, had been based on Dr. Foxley's background as a medical student and a prospective increase in income after graduation. 801 P.2d at 156. Mrs. Foxley returned to court seeking an increase in alimony and child support after Dr. Foxley's practice became successful. The trial court increased the alimony from $10.00 per month to $1,350.00 per month and the child support from $150.00 per month per child to $546.00 per child per month. The trial court was very specific that it was not granting any type of equitable restitution based on the decision of the Utah Court of Appeals in *Martinez v. Martinez*, 754 P.2d 69 (Utah App. 1988), *rev'd*, 818 P.2d 538 (Utah 1991). The trial court expressly stated it was increasing the alimony based on the substantial change of circumstances of Dr. Foxley having increased his income to between $120,000.00 to $224,000.00 per year. In contrast, Mrs. Foxley and the children had experienced severe economic hardship and had been on public assistance from time to time.

Read together, the *Foxley* decision and the *Howell* decision raise the interesting question of whether a person who has been divorced from a spouse who later becomes very successful can return to court for increased alimony based on that success. That question was not raised in *Bridenbaugh*, but it is nevertheless interesting to contemplate. Had Mrs. Bridenbaugh said that Mr. Bridenbaugh attained the basic tools that he later utilized to become a highly successful businessman during the marriage, would her petition to increase alimony have been granted rather than her husband's to terminate alimony under the rationale of *Howell* and *Foxley*. This is an open question which will have to be considered in light of the *Martinez* concept of using alimony as a means of equalizing the standard of living that comes from a profession attained during the marriage.

CONCLUSION

The evolution of the law governing alimony in Utah continues. Some traditional questions have been answered. New questions arise. The basic social conflict in an alimony award remains unexplored by the appellate courts, thus the law evolves by the common law process of case by case decision without basic policy direction. While this lack of definition presents occasional difficulties for both family lawyer and the trial courts, it also presents interesting opportunities to mold the law while fashioning appropriate remedies.

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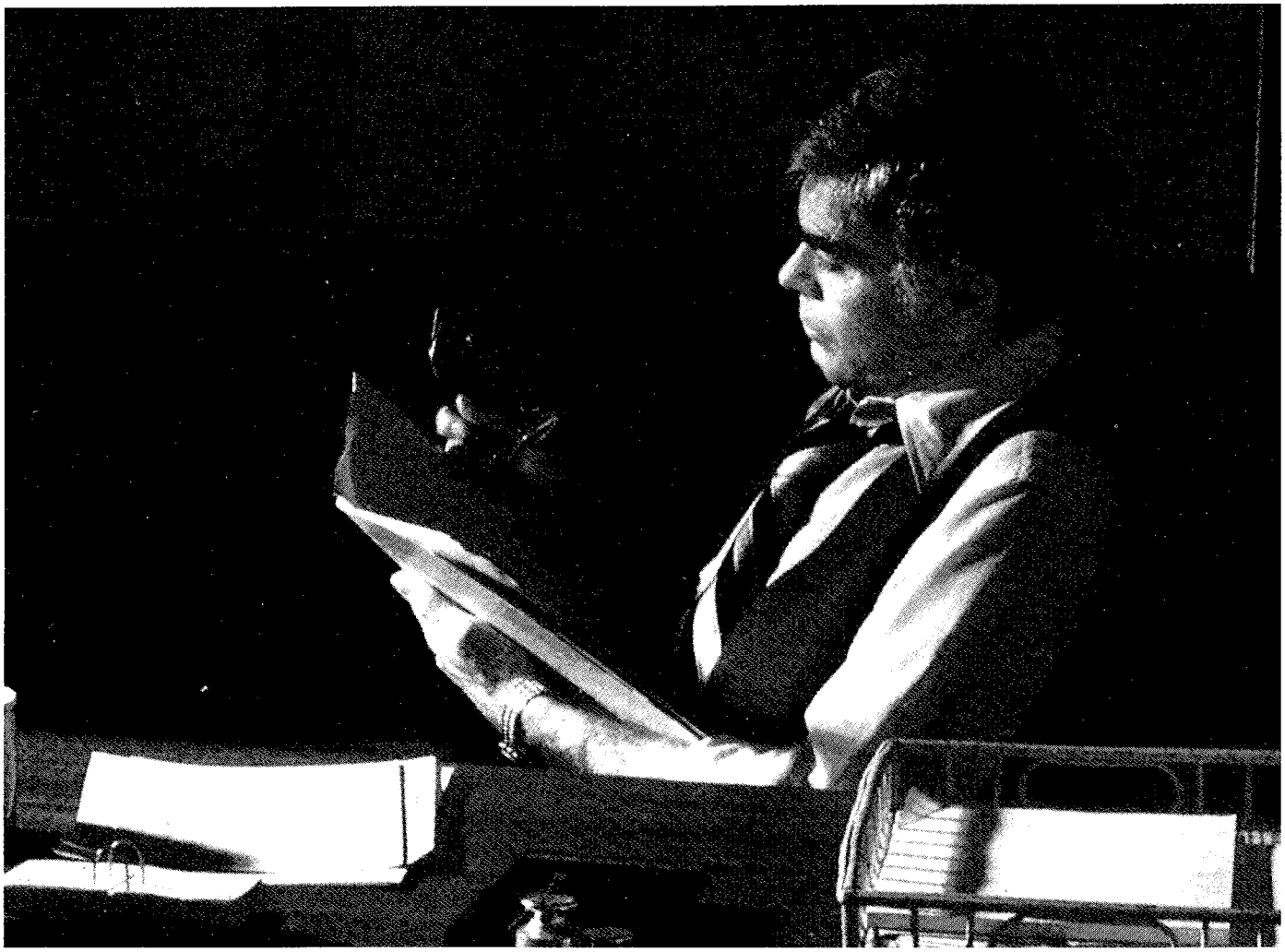

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ance for the parties' two children from the previous marriage, and the coverage also includes the present spouse and three stepchildren, the dependent coverage for six is divided between them, and the actual out-of-pocket cost of the premium for the parties' two children is one-third of that cost, split between the two now-divorced parents.

This section also requires the parent who provides coverage to keep the other parent informed as to any changes in the provider coverage, including premium and benefits, within thirty days of such change.

Any noncovered medical expenses, including deductibles and copayments, incurred by a parent for the children shall be shared equally between the parties. The parent who incurs medical expenses is required to provide written verification to the other parent within thirty days of payment. Unlike the previous statute, the amendment allows the court to impose sanctions against a parent who fails to comply with the requirement to provide change of coverage notice, including a denial of the right to receive credit for expenses incurred or recover the other parent's share of the expenses.

Finally, because the premiums for health insurance and even the provider of such insurance are subject to frequent change, these expenses are treated as additions to the base support award, similar to the payment of child care expenses.

V. Child Care Expenses

Prior statutory language required the parties to share the reasonable work-related child care expenses incurred by the parents. The amendments require the parents to share the child care expense upon presentation of proof of the expense provided by the parent who incurs the child care expense. This section also requires the parent who arranges for the child care to notify the other parent of any change in the provider or the monthly expense within thirty days, or the court may, as a sanction, deny that parent the right to receive credit for, or payment of, the other parent's share of the expense.

One additional amendment to the payment of child care expenses extends to the non-custodial parent who incurs child care expenses during extended visitation. Prior to section 78-45-7.17(1), the non-custodial parent who incurred child care expenses because of his or her employment during extended visitation was not entitled to receive reimbursement for that expense from the custodial parent, despite the language that referred simply to "work related child care costs actually incurred on behalf of the dependent children of the parent." Utah Code Ann. §78-45-7.16 The amendment clarifies that the non-custodial parent is entitled to the same reimbursement from the custodial parent for his or her child care expenses incurred while exercising extended visitation with the children.

VI. Accountability

One of the most controversial amendments to the Guidelines is Section 78-45-7.20, which authorizes the court, upon the petition of the obligor parent, to order the obligee parent to provide an accounting to the obligor of amounts spent on or for the children. The statute does not specify the frequency or form of the accounting, and it also prohibits the obligor parent from petitioning the court for an accounting if he or she is not current in support payments.

"One of the most controversial amendments to the Guidelines . . . authorizes the court, upon the petition of the obligor parent, to order the obligee parent to provide an accounting to the obligor of amounts spent on or for the children."

VII. Award of Tax Exemption

Since enactment of the Guidelines in 1989, it has been believed, at least by most practitioners and judges, that the amount of support awarded under the Guidelines presumed that the custodial parent would be entitled to claim the dependency exemption for the minor children. This issue frequently became contested and decisions of the lower courts were appealed to the Utah Court of Appeals. See *Martinez v. Martinez*, 754 P.2d 69 (Utah Ct. App. 1988), *rev'd*, 818 P.2d 538 (Utah 1991) (custodial parent entitled to dependency exemptions for children); *Fullmer v. Fullmer*, 761 P.2d 942 (Utah Ct. App. 1988) (trial court's award of dependency exemptions to non-custodial parent reversed); *Motes v. Motes*, 786 P.2d 232 (Utah Ct. App. 1989) (trial court properly determined that IRS regulations do not mandate that a state court grant all exemptions to custodial parent); *Hill v. Hill*, 869 P.2d 963 (Utah Ct. App. 1994) (affirming trial court's award of dependency exemptions to custodial parent, with non-custodial parent permitted to purchase right to claim exemptions).

To end this controversy, and to codify the case holdings, the Utah Legislature enacted Section 78-45-7.21 which states:

> (1) No presumption exists as to which parent should be awarded the right to claim a child or children as exemptions for federal and state income tax purposes. Unless the parties otherwise stipulate in writing, the court or administrative agency shall award in any final order the exemption on a case-by-case basis.
>
> (2) In awarding the exemption, the court or administrative agency shall consider:
>
> (a) as the primary factor, the relative contribution of each parent to the cost of raising the child; and
>
> (b) among other factors, the relative tax benefit to each parent.
>
> (3) Notwithstanding Subsection (2), the court or administrative agency may not award any exemption to the noncustodial parent if that parent is not current in his child support obligation, in which case the court or administrative agency may award an exemption to the custodial parent.
>
> (4) An exemption may not be awarded to a parent unless the award will result in a tax benefit to that parent.

VIII. Modification

The Guidelines provide for a modification in the support level determined before the amendment without a further showing of the required material and substantial change of circumstance if the child support amount calculated in accordance with the Guidelines is 25% greater or less than the amount currently paid. Utah Code Ann. § 78-45-7.2(6).

IX. Universal Income Withholding

On January 1, 1994, Universal Income Withholding became effective and these

provisions are codified in Utah Code Ann. § 62A-11-501 et. seq. Pursuant to these requirements, each child support obligation ordered or modified subjects the income of an obligor to immediate income withholding, regardless of whether a delinquency occurs, unless:

(a) The court finds that one party has demonstrated "good cause" not to require income withholding; or

(b) The parties have entered into an alternative agreement that has been entered in the record by the court.

The statute also requires the parties to submit documentation regarding their employment and other information sufficient to process income withholding in accordance with this chapter.

CONCLUSION

Although there are still obvious areas of dispute, the Guidelines have made award amounts of child support much more predictable and consistent throughout the State. The new amendments have made the shared responsibility for health insurance coverage and noncovered expenses more equitable, and the increase in the support levels reflects the increased costs of raising children in the current economy. While Utah child care law has come a long way in ensuring the adequate support of children subsequent to divorce, it continues to remain an important factual and legal issue in every family in which the parents are considering divorce.

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PRESS RELEASE

40th Annual ROCKY MOUNTAIN MINERAL LAW INSTITUTE

San Diego, California
July 21-23, 1994

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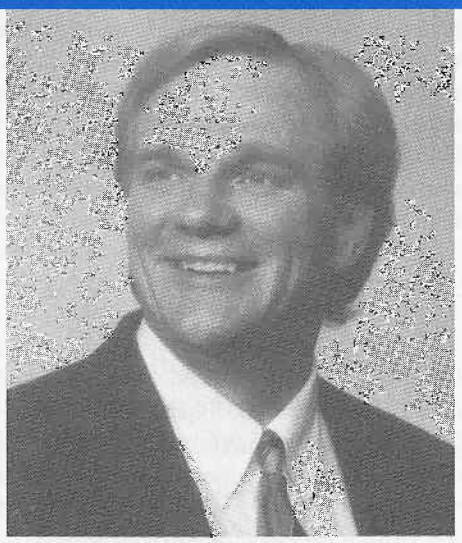
For additional information, contact the Foundation at (303) 321-8100. Thank you.



Utah Deposition Primer – Part III

By David K. Isom

III. CREATING AND USING THE DEPOSITION RECORD

A. Officer and Reporter

A deposition must have the following components, unless otherwise stipulated: (1) the deponent must be put under oath by the proper "officer," i.e., any person authorized to administer oaths by the laws of the United States or of the place where the examination is held, or by a person appointed by the court in which the action is pending;[1] (2) the testimony must be given before the officer; and (3) the testimony must be recorded by the officer or someone under her direction.[2] The officer may not be an attorney of any of the parties, nor a relative or employee of a party or party's attorney, nor have any financial interest in the action.[3] You must object to the qualifications of the officer as soon as grounds for objection are discovered or should have been discovered.[4] To preserve such objections, therefore, you should ask about those qualifications before the deposition proceeds.

By written stipulation, the parties may provide that depositions be taken before any person, at any time or place, upon any notice and in any manner.[5] Thus, the parties may change all of the preceding rules regarding officers by stipulation.

B. Recording the Deposition

Under the new federal rules, the deposition may be recorded by sound, sound-and-visual, or stenographic means.[6] Under current Utah rules, non-stenographic recording still requires a stipulation or court order.[7] Increasingly, courts are tolerating and even encouraging video and audio recording of deposition testimony.[8] Several courts have described acceptable procedures for both audio and video recording.[9] Excellent articles are available regarding the advantages and disadvantages of electronic recording and various safeguards for accuracy and fairness.[10]

For each deposition, you should weigh the advantages and disadvantages of video or audio recording against the advantages and disadvantages of stenographic recording. For example, the relative cost and convenience will vary depending on the parties' desire for a written transcript of the recording, the expense and availability of recording equipment, and the fees charged for the various recording methods. Deposition costs may be recovered by the prevailing party under some circumstances.[11] Electronic recordings may be more difficult to edit for use as evidence than written transcripts, but will have a greater impact on the judge and jury at trial and will aid the fact-finder in weighing credibility. You should also consider the significant influence electronic recordings may have on the tone and procedure of the deposition. For example, a reluctant witness may be more candid when she is "on television," and counsel will be less likely to confer repeatedly with her client if the conference is shown on videotape.

C. Telephone Depositions

Upon a court order or stipulation of the parties, a deposition may be conducted by telephone or other remote electronic means.[12] Courts are divided in their attitude about telephonic depositions,[13] but video tele-conferencing may alleviate concerns created by the inability of participants to see each other.

Obviously, telephone depositions can save enormous expense in some situations, and can be effective for discovering some types of objective evidence, such as accounting information. Because of the difficulty of reading and controlling the witness by telephone, however, complex depositions which involve subjective matters or which challenge a witness's credibility are not likely to be effective by telephone.

D. Transcribing the Deposition

The rules do not require that the party noticing the deposition or any party order a transcript so long as the deposition is

recorded by some means.[14] However, any party may arrange for a written transcript to be made at the deposition or from the recording of a deposition taken by non-stenographic means.[15] The party noticing the deposition must give "ample notice" if she does not intend to order a transcript so that other parties may arrange to do so if they wish.[16] If any party or witness requests a transcript, the party instigating the deposition may be required to pay for transcription.[17]

Although a transcript is not required initially, and will never be required if all parties agree that the deposition was not important, as a practical matter important depositions will need to be transcribed for summary judgment,[18] and for trial.[19] If the deposition was not recorded stenographically, counsel can produce a transcript from the video or audio tape, so long as the accuracy of the transcript is verified by opposing counsel.[20]

E. Correcting the Transcript

To preserve the right to change the deposition transcript under FRCP 30(e), the deponent or party must, prior to the termination of the deposition, formally request to review the transcript.[21] If review is requested, FRCP 30(e) allows the deponent to change the form or substance of the deposition within 30 days after the court reporter notifies the deponent that the deposition transcript is available for review.[22]

"For each deposition, you should weigh the advantages and disadvantages of video or audio recording against the advantages and disadvantages of stenographic recording."

In contrast, URCP 30(e) does not require a formal request to review the deposition transcript. Instead, once testimony is transcribed, the officer must submit the transcript to the witness for review and signature unless review is waived.[23] The witness must then make desired changes within 30 days of receipt of the transcript.[24]

Courts generally do not limit the number or type of changes a deponent can make.[25] However, courts have been strict in requiring compliance with the technical requirements of Rule 30(e).[26] If changes in form or substance are made, the deponent must sign a statement delineating and explaining the changes.[27] If changes make the transcript incomplete or obsolete without further testimony, the party who took the deposition can reopen the examination.[28]

The importance of ensuring that the transcript accurately reflects the deponent's position cannot be overstated. "The general rule in Utah is that an affiant may not raise an issue of fact (on summary judgment) by his own affidavit which contradicts his deposition, unless he can provide an explanation."[29] Courts consider

a deposition to be more reliable than an affidavit because a deponent, unlike an affiant, is subject to cross-examination.[30] Therefore, the deponent who fails to correct an inaccurate deposition transcript may be stuck with damaging testimony on a motion for summary judgment and at trial.

F. Certifying and Filing the Transcript

Rule 30(f) requires that the recording officer file the sealed deposition with the court, or send it to the attorney who arranged for the transcript or recording, who safeguards it against loss, alteration, or destruction.[31] However, because of the increasingly large volume of discovery material produced in civil litigation, most courts do not allow the routine filing of depositions and other discovery material. Such materials may not be filed routinely with the United States District Court for the District of Utah.[32] Similarly, depositions may not be filed with Utah trial courts except by court order.[33]

Compliance with Rule 30(f), governing the certification and filing of the deposition, is necessary to make the deposition transcript part of the record. A deposition not properly filed with the trial court will not be considered on appeal.[34] Historically, depositions which were not presented to the trial court for "publication" were not considered part of the trial court's record.[35] However, "(u)nder a recent amendment to Rule 32(d) of the URCP, a formal order of publication is no longer necessary to admit a deposition to the record. Now a deposition need only be used in a hearing or at trial to be deemed part of the public record."[36]

Without a protective order, the public generally has access to filed deposition transcripts, though the law on this issue is somewhat unsettled. For example, the Utah Supreme Court recently held that deposition transcripts filed with a court but not used by litigants in court were subject to public access under the Utah Public and Private Writings Act unless a protective order was obtained.[37] Shortly thereafter, the relevant provisions of that Act were repealed.[38] The Utah Supreme Court has also stated that the "presence of one's adversary in the deposition proceeding destroys any notion of privacy," and therefore no work product protection attaches to the deposition.[39] Thus, deponents or parties who wish to protect sensitive information contained in deposition transcripts from competitors or the general public should seek a protective order.[40]

G. Using the Record at Trial

The deposition transcript of both a party and a non-party witness may be used by any party for any purpose if the court finds the witness is unavailable[41] or if the interests of justice require it.[42] A proper deposition transcript constitutes an exception to the hearsay rule.[43]

Furthermore, any deposition may be used by any party for the purpose of contradicting or impeaching the deponent at trial.[44] A trial witness who has changed the original deposition transcript can be impeached with the original transcript.[45] The rules governing the use of videotaped depositions require that any changes made by the witness be set forth in a writing that accompanies the videotape.[46] While a list of written changes may have some impact on the trier of fact, that impact will likely pale next to seeing and hearing the deponent's original depiction of the events in question.[47]

[1]Rules 28(a) & 30(c). Rule 28(b) defines other officers permitted to administer oaths and take depositions outside the United States. In Utah, the Governor may appoint commissioners in other states who are empowered to take and certify depositions and affidavits. Utah Code Ann. §§ 46-2-1 & 46-2-2 (1993).

[2]Rule 30(c).

[3]Rule 28(c).

[4]URCP 32(c)(2); FRCP 32(d)(2).

[5]Rule 29.

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

[7]URCP 30(b)(4).

[8]*See, e.g., Windsor Shirt Co. V. New Jersey Nat'l. Bank*, 793 F. Supp. 589, 606-08 (E.D. Pa. 1992); Weiss v. Wayes, 132 F.R.D. 152, 154-55 (M.D. Pa. 1990).

[9]*See, e.g., Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 520-21 (D.C. Cir. 1975); *Rice's Toyota World, Inc. v. Southeast Toyota Dist. Inc.*, 114 F.R.D. 647 (M.D.N.C. 1987); *Jones v. Evans*, 554 F. Supp. 769, 778 (1982). *See generally* John A. Glenn, Annotation, *Recording of Testimony at Deposition by Other Than Stenographic Means Under Rule 30(b)(4) of the Federal Rules of Civil Procedure*, 16 A.L.R. Fed 969 (1973).

[10]Lewis, *The Video Deposition as a Civil Litigation Tool*, 13 Campbell L. Rev. 375 (Summer 1991); Citrin, *Rules and Case Law Governing Videotape Deposition*, 12 AM. J. TRIAL ADVOCACY 87 (Summer 1988); Underwood, *The Videotape Deposition: Using Modern Technology for Effective Discovery*, 31 THE PRACTICAL LAWYER 61 (April 1985). *See also Sandidge v. Salen Offshore Drilling Co.*, 764 F.2d 252, 259 n.6 (5th Cir. 1985) (listing additional articles).

[11]*Ong Int'l. Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 461 (Utah 1993).

[12]Rule 30(b)(7).

[13]*Compare Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444 (W.D. Mich. 1993) (favoring telephone depositions) *with Clem v. Allied Van Lines Int'l Corp.*, 102 F.R.D. 938 (S.D.N.Y. 19484) (requiring showing of extreme hardship to justify telephone deposition).

[14]Rule 30(c).

[15]FRCP 30(b)(2) & (3); URCP 30(b)(4).

[16]*Green v. Williams*, 90 F.R.D. 440 (E.D. Tenn. 1981).

[17]*Caldwell v. Wheeler*, 89 F.R.D. 145 (D. Utah 1981).

[18]Rule 56 does not expressly require a written transcript, but only a "deposition . . . on file." However, no district court is likely to welcome a video or audio recording for summary judgment.

[19]FRCP 32(c).

[20]FRCP 26(a)(3)(b) and advisory committee notes to FRCP 32(c).

[21]Rule 30(e).

[22]*Id.*

[23]URCP 30(e).

[24]*Id.*

[25]*Gaw v. State ex rel. Dep't of Transp.*, 798 P.2d 1130, 1139 (Utah App. 1990). *But see Greenway v. International Paper Co.*, 144 F.R.D. 322 (W.D. La. 1992) (interpreting Rule 30(e) to allow only the correction of transcription errors — "A deposition is not a take home examination.").

[26]*Gaw v. State*, 798 P.2d 1130, 1139 (Utah App. 1990).

[27]Rule 30(e).

[28]*See Lutig v. Thomas*, 89 F.R.D. 639, 642 (N.D. Ill. 1981).

[29]*Gaw v. State*, 798 P.2d 1130, 1140 (Utah App. 1990). *See also, Willco Kuwait (Trading) S.A.K. v. de Savary*, 843 F.2d 618 (1st Cir. 1988) (excluding affidavit conflicting with prior videotaped deposition).

[30]*Webster v. Sill*, 675 P.2d 1170, 1172 (Utah 1983).

[31]Rule 30(f). The current version of URCP 30(f) still requires the officer to file the transcript with the court. However, a proposed amendment which would require the officer to send the transcript to the attorney who arranged for the deposition was published for comment in December 1993.

[32]Rules of Practice (U.S. Dist. for Utah) 204-3(c)(1).

[33]Utah Code of Judicial Administration Rule 4-502(4).

[34]*Pratt v. Mitchell Hollow Irrigation Co.*, 813 P.2d 1169, 1171 (Utah 1991).

[35]*Carter v. Utah Power & Light Co.*, 800 P.2d 1095, 1102 (Utah 1990) (Stewart, J., dissenting) (citations omitted).

[36]*Id.* at 1103.

[37]*Id.* at 1100.

[38]Utah Code Ann. §§ 78-26-1 & 78-26-2.

[39]*Trail Mountain Coal Co. v. ARCO Coal Sales Co.*, 749 P.2d 637 (Utah 1988).

[40]Rule 26(c).

[41]A witness is "unavailable" if the witness is dead; beyond 100 miles from the place of trial; unable to testify due to age, illness, infirmity or imprisonment; or beyond the reach of the court's subpoena power. Rule 32 (a)(3); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 204 (1st Cir. 1988). *See also Condas v. Condas*, 618 P.2d 491, 495 (Utah 1980) (admitting deposition testimony because deponent was deceased at time of trial); *Marshall v. Van Geren*, 790 P.2d 62 (Utah App. 1990) (trial court abused discretion by refusing to accept deposition of non-party who lived outside the 100 mile area within which attendance could be compelled); *Department of Social Services v. Ruscet*, 742 P.2d 114, 115-16 (Utah App. 1987) (deposition inadmissible absent showing of unavailability).

[42]Rule 32(a)(3)(E).

[43]*United States v. Vespe*, 868 F.2d 1328, 1339 (3d Cir. 1989).

[44]Rule 32(a)(1).

[45]*Id. See Lutig v. Thomas*, 89 F.R.D. 639, 641 (N.D. Ill. 1981).

[46]*See* Rule 30(b)(4).

[47]*See, e.g., Falwell v. Flynt*, 797 F.2d 1270, 1277 (4th Cir. 1986) (demonstrating impact of videotaped deposition on credibility of subsequent changes).

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WHILE AT THE BAR SUMMER MEETING STAY IN TOUCH WITH YOUR OFFICE THROUGH THE UBS BUSINESS CENTER AT THE SUN VALLEY INN.

What to Do When You Receive a Call From Jail at 1:00 a.m.

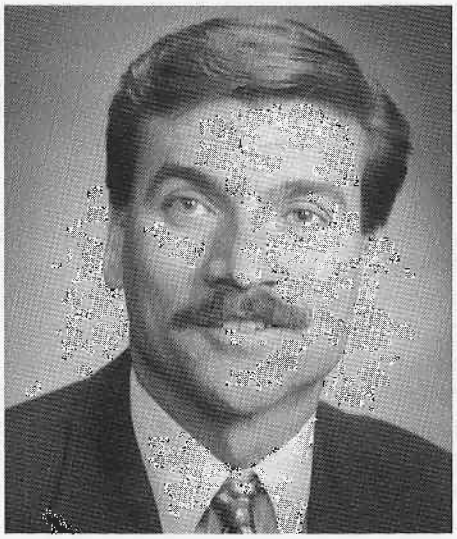
By Gregory G. Skordas
Deputy Salt Lake County Attorney

The other night our telephone rang at 1:30 a.m. waking up half the family. On the other end was a guy who alleged he went to high school with me and that he heard I was now an attorney. After he congratulated me on that accomplishment, he mentioned that he needed some legal help and was "calling in his markers," whatever that means. I surmised that twenty years ago he must have had a chance to beat me up but didn't and so I've owed him all this time. He asked, without apology, if his call woke me up and informed me that a friend of his had just been arrested on drug charges and he wanted to know what he could do to help.

It might seem odd that someone in trouble would call a prosecuting attorney at home to ask for legal advice on how to deal with criminal charges or, more so, why a prosecutor would write an article on how to think like a defense attorney in the middle of the night. After all, I personally feel that most of the people currently incarcerated in this country are there for a very good reason. But after three years of law school and many more in practice it's tough to tell a friend who has been arrested to call someone else. Here are some things to keep in mind the next time you get "the call."

GETTING SOMEONE OUT OF JAIL

To a first time offender, an hour in jail is the worst experience of their life. Surprisingly, a lot can be done to get someone who is incarcerated some relief even late at night. Obviously, you need to find out where the arrestee is. Every county in the state has a jail or some type of holding facility where people are taken after their arrest. Depending on where the crime was committed and which law enforcement agency made the arrest, the corresponding county jail is the first place to call. Since we don't have a federal penitentiary in Utah, even the United States of America will use our local county jails to hold their prisoners.



GREG SKORDAS is a 1982 graduate of the University of Utah College of Law. For five years Greg was a criminal defense lawyer and since 1987 has been a prosecutor for Salt Lake County where he is now the First Assistant County Attorney. For the past two years Greg has been the chief of the sex and child abuse crimes unit. Greg was a founding board member of the Salt Lake Area Gang Project, and he currently serves on both the Utah State Legislature's and the Salt Lake City Mayor's gang task forces. Greg's contributions to the Bar include service on the Executive Committee of the Salt Lake County Bar, Chair of a Disciplinary Screening Panel, Bar Examiner and Small Claims Judge. Greg writes a column for the Salt Lake Police Journal and teaches at the Police Academy and Salt Lake Community College. Greg is the Alta Township prosecutor. When not practicing law, Greg is a volunteer ski patrol for Park City, competes in biathlons, and most importantly coaches his daughter, Annie's soccer team, "the minnows."

If a person is arrested and taken to jail on misdemeanor charges, bail is automatically set according to a Uniform Bail Schedule which depends on the crime charged. No judge needs to be contacted to decide on the bail amount. For example, the bail for someone arrested on shoplifting charges is automatically set at $150.00. Similarly, bail for disorderly conduct is $200.00; soliciting and trespassing, $300.00; Drunk Driving, $600.00; serious misdemeanors such as assault on a peace officer, $1,000.00; and so on. Anyone can go to the jail and post the required amount in cash, to secure another's release. Don't have $600.00 cash lying around the house? Most bail bondspersons are on call 24 hours a day. They are experts in cutting through the paper hassles at the jail and getting people out quickly. Most charge 10% of the bond amount as their fee and may require some form of collateral.

An even easier, no-cost method of securing someone's release is provided in several Wasatch Front counties. Pre-Trial Services now operate in Salt Lake, Summit, and Weber Counties. Utah, Davis and Tooele Counties have similar agencies which operate directly through the local sheriff's office in charge of the given jail. These agencies will obtain "own recognizance" releases and monitor the supervision of people who are not perceived as a flight risk. They also operate around the clock. When a person is booked into jail, intake personnel from one of these agencies will interview the arrestee to determine his or her ties to the community. They are especially interested in a person's family, local contacts and job. According to intake workers from Salt Lake County Pre-Trial Services, a late night call from an attorney friend who

knows the accused and can vouch for his or her local ties goes a long way in giving assurances that a supervised release is appropriate. A homeowner with a family and a full-time job is not likely to leave the state simply because of their DUI arrest. Therefore, such a person would likely be released without posting any bail and will only be required to stay in contact with Pre-Trial Services and make all court appearances. These agencies can and often do obtain a release within an hour of booking. A responsible party is usually required to go to the jail and pick up the accused.

FELONIES

Felonies are a little more complicated. Unless someone is arrested on an existing warrant (for which bail is already set) they must wait until a judge decides on the appropriate bail. Only a judge can set bail on a felony and most jailors will not contact a judge at home after 10:00 p.m. absent some extraordinary circumstances. Therefore, if someone is caught drunk driving and during the arrest they are found to possess a gram of cocaine (possession of which is a felony), they are very likely going to sit in jail until the next day when a judge can set bail. In most counties, Circuit Court Judges, Commissioners or Justice Court Judges are on call such that even on weekends and holidays, a judge will review felony bookings and set a bail amount based on the information they are provided.

Once bail has been set, the same suggestions apply for felonies as with misdemeanors. Pre-Trial Services can take accused felons out of jail on their own recognizance if they are not seen as a flight risk. This includes even serious offenders.

One word of caution, during the time it takes to get someone out of jail, they will be exposed to a lot of people, including police and other inmates. If you get the chance, tell them to shut up. In addition, make sure that they blame you for doing so, "Gee officer, I really want to help you out but this lawyer told me I shouldn't talk."

DEALING WITH THE POLICE

Speaking of police, 1:00 in the morning is no time to argue with an officer. Telling a police officer that he or she has done their job wrong in the middle of the night doesn't do any good for the guy wearing handcuffs, especially when the criticism comes from a lawyer sitting comfortably at home. Besides, even if the police conducted a bad search, failed to read someone their rights or were a little aggressive, what are you going to do about it at 1:00 a.m.? Save it for court next month. Keep in mind also that drunk drivers and people on cocaine love to tell police officers how to do their jobs late at night because it all seems so clear and easy at the time. Usually, this nets additional charges of public intoxication, disorderly conduct or resisting arrest which makes obtaining one's release that much more difficult. At 1:00 in the morning the police are in charge, are always right and should be treated with complete respect. Watch an episode of *COPS* some night and see if I'm not right.

DOMESTIC VIOLENCE

Ask any Domestic Relations or Criminal Defense lawyer or any police officer and they will tell you that one of the worst calls to get late at night involves domestic violence. In addition to the typical problems, the emotions of the individuals involved make these situations volatile. An otherwise rational and calm person takes on a different personality when attempting to deal with a spouse about to leave or the inability to visit with one's own children. Get the police involved immediately. Even if this means one of the parties gets carted off to jail for a few hours. The cooling down period is well worth the sacrifice.

All police now receive specialized training in dealing with situations of domestic violence. New policies and law now require officers to make arrests under circumstances where abuse has taken place to prevent the situation from escalating after the police leave. Any time someone calls about even a threat of violence, tell them to get in contact with police.

"REAL" CRIMINAL DEFENSE COUNSEL

After you've made numerous phone calls in the middle of the night, helped a friend get out of jail and dealt with the police on their behalf, refer them to experienced defense counsel. You've done all you can and they will be indebted for life. The criminal defense bar in this state is outstanding and our public defenders are the best and most aggressive in the nation. Now, the hard part, try to go back to sleep.

Commission Highlights

During its regularly scheduled meeting of March 10, 1994, held in St. George, Utah during the Mid-Year Meeting, the Bar Commission received the following reports and took the actions indicated.

1. The Board approved the minutes of the January 7, 1994, January 27, 1994 and February 22, 1994 meetings.
2. Jim Clegg reviewed the legislation recently passed on the Judicial Nominating Commission selection process, and John Baldwin indicated that a notice would be inserted in the *Bar Journal* to solicit interested applicants.
3. The Board voted to select Jim Jenkins as Bar Commission liaison to the Council of Justice Court Judges.
4. The Board discussed issues regarding the Idaho rule to license house counsels. The Board voted to have the Utah rule on house counsel drafted along the lines of the Idaho rule, circulated to appropriate sections for comment, and presented back to the Bar Commission for review and adjustment and approval to send to the Supreme Court along with an appropriate motion.
5. Jim Clegg reported on the Western States Bar Conference and the ABA presentation on lawyer advertising.
6. The Board agreed that the Bar's president-elect should be selected at the April Commission meeting to allow the retention election to take place along with the upcoming election of commissioners.
7. The Board voted to approve the use of an absentee ballot for Bar Commissioners who are not able to vote in person for the president-elect.
8. John T. Nielsen, the Bar's Legislative Representative, and David R. Bird, Chair of the Legislative Affairs Committee, appeared to summarize recent legislature activity and distributed a written report.
9. John Baldwin reported that a petition to extend the late filing deadline for Bar examination applicants would be filed with the Supreme Court in the next few weeks.
10. John Baldwin reported that the 1994-95 budget process has begun and a notice would be put in the *Bar Journal* letting Bar members know that following the May Commission meeting a preliminary Bar budget would be available for review and that the final budget would be adopted in July.
11. John Baldwin noted that the Member Benefits Committee has reviewed a proposal for US West Cellular phone service. The Board asked questions, expressed concerns, and deferred voting on the proposal until next month's meeting.
12. John Baldwin distributed reports on the Bar's long-term objectives.
13. Moxley reported that the Long-Range Planning committee has met 3-4 times and has been discussing the long-range goals and objectives from the Board's past retreat and recommended the mortgage be paid off. The Board voted to approve paying off the building's mortgage in June.
14. Judge K. Roger Bean, Judge Roger Livingston, David Challed and Gary Sackett appeared to discuss collection issues.
15. Jim Clegg reported on the Bar's efforts to clean up collection practices and summarized his meeting with the heads of collection agencies noting that the Bar's efforts have been largely unsuccessful in changing the status quo.
16. Clegg reminded the Board that it is the Bar's prerogative to review its ethics opinions from time to time. He indicated that Ethics Opinions No. 100 and No. 111 need to be reviewed to be sure they do not mislead collection agencies.
17. The Board voted to direct the Ethics Advisory Opinion Committee to address the issue of fee splitting and review the dicta and the Board agreed to reconsider Ethics Opinions Nos. 100 and 111. The Board voted to suspend Opinion No. 111.
18. Ethics Advisory Committee Chair Gary Sackett appeared to review several ethics opinions prepared by the committee.
19. The Board voted to adopt Ethics Opinion No. 142 as proposed by the Ethics Advisory Committee. No. 142 addresses the ethical considerations of whether the rules of imputed disqualifications apply to the Office of the Utah Attorney General when it is fulfilling its duty of representing all state agencies, some of which may be adverse to each other on certain issues.
20. The Board agreed to review a revised draft of Ethics Opinion No. 115 at the April meeting in Logan and to debate the issues at the May meeting in Vernal.
21. ABA Delegate, Reed L. Martineau, reported on the February 7, 1994 ABA House of Delegates' Meeting and the issues ruled on by the House.
22. J. Michael Hansen reported on the outcome of the Judicial Council's bills in the last legislature. Hansen added that the Council may follow up with a bill in the next legislative session to consolidate district and circuit courts and a new bill has already been drafted.
23. Mark Jones, Administrative Office of the Courts, reported that his office would recommend that the small claims court jurisdictional amount level stay at where it is currently.
24. The Southern Utah Bar Association held a joint meeting with the Bar Commission from 5:00 to 6:00 and discussed various topics.
25. Young Lawyers Division President, Mark Webber, reported that the Young Lawyers Division received an Affiliate Outreach Program Award for its project work on the needs of the elderly.

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

Discipline Corner

ADMONITIONS

On April 14, 1994, based upon a Discipline by Consent, the District Court entered an Order which admonished an attorney for the attorney's failure to diligently pursue the Client's interest, RULE 1.3, and for failing to obtain a written waiver of a conflict of interest, RULE 1.7. It was determined that the attorney's conduct was negligent and not intentional. The attorney was also ordered to pay restitution to the Client and attend Ethics School.

SUSPENSION:

In March 4, 1994, an order of Interim Suspension was entered by a Third District Court Judge against Ronald V. Thurman based upon his plea of guilty to a felony charge involving moral turpitude filed in the State of Texas.

Kate Lahey Named Woman Lawyer of the Year

Women Lawyers of Utah has selected Kate Lahey as the 1994 Woman Lawyer of the Year. The purpose of the Woman Lawyer of the Year Award is to recognize those attorneys who have demonstrated professional excellence and integrity while working to create new opportunities for women in the legal profession.

Lahey is an associate adjunct professor at the University of Utah College of Law, where she directs the Legal Writing Program. Prior to joining the law school faculty in 1988, Professor Lahey was a shareholder with the Salt Lake City law firm of Van Cott, Bagley, Cornwall & McCarthy, where her emphasis was in media law and natural resources law.

Lahey has been active in professional and community activities. She has served as the President and as an Executive Committee Member for Women Lawyers of Utah, and is currently an ex-officio member of the Utah State Bar Commission, where she represents the interests of women attorneys. Lahey is also an officer of the Board of Directors for the Salt Lake City Public Library, and has served as the president of both the Valley Mental Health Board and of Writers at Work.

The Utah Chapter of the Society of Professional Journalists has awarded Lahey its Freedom of Information Award twice — in 1986 and in 1992 — for her work in promoting public access to government records and government meetings.

Lahey graduated with honors from the University of Utah College of Law in 1979. She was a staff member of the Utah Law Review. She received a B.A. in English and Mass Communication, magna cum laude, from the University of Utah in 1975.

Women Lawyers of Utah is a professional organization of women and men dedicated to supporting the contributions of Utah's women attorneys. Past recipients of the Woman Lawyer of the Year Award have included Justice Christine M. Durham of the Utah Supreme Court and Utah Attorney General Jan Graham.

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics

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

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

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

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

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

Law Day Run:
Mylar, Kidman and Snow Christensen & Martineau Lead the Pack

On April 30, a beautiful Saturday morning, 225 of the most athletic of the Wasatch Front legal community participated in the Twelfth Annual Bob Miller Law Day Run. Frank Mylar of the Attorney General's office was the overall winner with a time of 15 minutes and 47 seconds over the 5 kilometer course. He was followed closely by John Liccardo of Snow Christensen & Martineau, and Wayne Cottrell placed third. Vicky Kidman ran to place first among the women, running the course in 18 minutes and 57 seconds, followed by Kathy Thomas and Juli Blanch. Snow Christensen & Martineau's "A" Team of Liccardo, Blanch, Rob Keller, Derek Topham and Lindsay Keller was awarded the traveling team trophy for compiling the fastest team result, with the Attorney General's team of Mylar, Kevin Murphy, Dane Nolan, Debbie Mylar and Kara Pettit in second and the Utah Legal Services team of Thomas McWhorter, David Challed, Bruce Plenk, Cindy Crane and Lauren Barros in third. The top three finishers in each division and their overall places of finish are listed below.

Attorney (under 40) – Men
Frank Mylar (1)
Dave Castleton (8)
Thomas McWhorter (20)

Attorney (under 40) – Women
Vicky Kidman (19)
Juli Blanch (40)
Julie Lund (67)

Attorney (over 40) – Men
Kevin Murphy (4)
David Challed (36)
Keith Nelson (45)

Attorney (over 40) – Women
Leslie Randolph (55)
Cynthia Daniels (73)

Law Student – Men
Paul Slater (5)
Jack Morgan (12)
Jan Hockenberger (102)

Law Student – Women
Kara Pettit (98)
Cindy Crane (136)

Law Faculty – Men
Reyes Aguilar (14)

Law Enforcement – Men
Brent Palmer (38)
Robert Mitchell (52)
Rudy Perez (94)

Legal Sec/Personnel – Men
Newell Jensen (23)
Derek Topham (44)
Josh Wells (46)

Legal Sec/Personnel – Women
Tina Mikesell (41)
Sally Jones (103)
Debbie Stone (115)

Paralegal/Legal Asst – Men
Jules Weaver (82)
Jim Dober (155)

Paralegal/Legal Asst – Women
Karen Vandenburg (54)
Shalayn Wilson (133)
Allysen Rice (151)

Child (under 12) – Boys
Nicholas Page (157)

Child (under 12) – Girls
Kasey Tate (100)
Elizabeth Johnson (137)

Student (12-18) – Boys
Wade Morden (7)
Brandon Tucker (13)
Christian Scott (18)

Student (12-18) – Girls
Monica Diaz (143)
Amber Dimmit (149)
Ash Chelsea (170)

Open (19-34) – Men
John Liccardo (2)
Wayne Cottrell (3)
Clark Kidman (6)

Open (19-34) – Women
Amy Nelson (60)
Lindsay Keller (65)
Debbie Mylar (68)

Senior Open (35-44) Men
Trot Morden (10)
Mark Overfelt (15)
Brent Del Porto (28)

Senior Open (35-44) Women
Kathy Thomas (29)
Kimberly Wangsgard (78)
Leslie Stephens (79)

Masters (45-54) – Men
Lino Margas (11)
Leo Aldana (17)
Mont McDowell (32)

Masters (45-54) – Women
Marianne Dabel (96)
Madeline Stover (149)
C. Franco (164)

Sr. Masters (over 54) – Men
Edwin Pond (47)
Ray Grousman (104)
Tony Eyre (112)

Sr. Masters (over 54) – Women
Teddy Daniel (154)
Riet Coomans (185)

REMINDER

The Utah State Bar will accept applications for membership on the Ethics Advisory Opinion Committee for terms beginning July 1, 1994. If you are interested in serving on the Committee, please submit an application with the following information before July 1:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience, interest in or ability to contribute to well-written, well-researched opinions. This should be a statement in the nature of what you can contribute to the Committee.

Further details can be found on page 18 of the April *Utah Bar Journal*. If you would like to contribute to this important function of the Bar, please submit a letter indicating your interest to:

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

Opinion No. 127
Approved April 28, 1994

Issue: May a lawyer make in-person solicitations of persons to join the lawyer in forming a citizens' group that will be the nominal plaintiff in litigation, if the members of the citizens' group will be requested to contribute funds for the payment of legal fees and the lawyer intends to serve as legal counsel for the citizens' group in the litigation?

Does the lawyer, who has a personal interest in the outcome of the litigation, have an actual or potential conflict of interest in representing the citizens' group?

Opinion: If a significant motive for the lawyer's solicitation of members to the citizens' group is the lawyer's own pecuniary gain, the lawyer's conduct would violate Rule 7.3(a) of the Utah Rules of Professional Conduct. However, if the citizens' group is a bona fide association of persons commonly interested in the assertion of legal rights and is not a sham association formed by the lawyer to avoid the solicitation rules or an association so controlled or dominated by the lawyer that it was the alter ego of the lawyer, the lawyer's solicitation of members to the group would be an associational activity protected by the First and Fourteenth Amendments of the United States Constitution and could not be proscribed by Rule 7.3(a).

The lawyer's personal interest in the outcome of the litigation may materially limit the ability to adequately represent the group and its members. Additionally, the lawyer's representation of multiple parties in the same matter may give rise to a conflict of interest. If such potentials for conflict of interest are present, the lawyer may only undertake the representation if permitted by Rule 1.7(b) of the Utah Rules of Professional conduct after obtaining the informed consent to the representation from each member of the group.

Judge Benson to Address Labor and Employment Section

At noon on July 15, 1994, the Honorable Dee V. Benson, U.S. District Court Judge, will address members of the Labor and Employment Section of the Utah State Bar. Judge Benson's talk will concern employment discrimination and wrongful discharge cases in federal court. The luncheon will begin at 12:00 noon at the Law and Justice Center. Lunch will be provided at no charge. Please RSVP to Monica Jergensen at 531-9077. One hour CLE Credit.

Opinion No. 145
Approved April 28, 1994

Issue: May a law firm accept a court appointment to represent an indigent defendant in a re-trial of a criminal case in which an investigator who had been involved in the State's investigation of the defendant and testified against the defendant at the first trial is now a full-time employee of the law firm?

May a law firm represent other defendants in matters in which the investigator personally and substantially participated while employed with the State but in which the investigator will not be called as a State witness?

Opinion: A law firm must avoid representing a defendant in a case in which its investigator may be called as a State witness. In addition, in matters in which the investigator will not be a State witness, the law firm must screen the investigator from participation in any matter in which the investigator had substantial, personal involvement for the State.

Norton Institutes on Bankruptcy Law Present Seminar on Bankruptcy Law

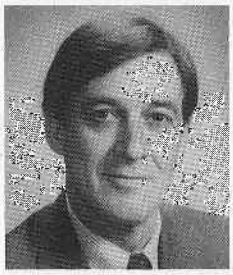
The Norton Institutes on Bankruptcy Law will present the Twelfth Annual Western Mountain Bankruptcy Law Institute at the Jackson Lake Lodge in Jackson Hole, Wyoming. The dates of the seminar are June 30-July 3, 1994. Featured topics are: Confirming a Chapter 11 Plan, Recent Developments, Consumer Bankruptcy Developments and Bankruptcy Rules. For more information, please contact Joyce Seabolt, Norton Institutes on Bankruptcy Law at (404) 535-7722. CLE credits are available.

BAR COMMISSION CANDIDATES

President-Elect

Commencing this year, the President-Elect of the Bar is chosen by the Board of Bar Commissioners subject to a retention ballot submitted to all active members of the Bar. In the event that a majority of all active members of the Bar vote to reject the President-Elect, the Board would choose another President-Elect and conduct another retention election. Dennis V. Haslam has been selected by the Board as President-Elect subject to a retention election.

DENNIS V. HASLAM



Dennis V. Haslam

Dear Colleagues:

I have had the pleasure of serving on the Board of Bar Commissioners since 1989. In April of this year, I was elected by the Board to serve as President-Elect. Being just a kid from West High School in Salt Lake City, I must tell you that I am humbled by it all.

Like many of you, my roots in the organized bar began with committee assignments and section participation. I have been involved with the Character & Fitness Committee, the Admissions Committee, Courts & Judges Committee, Ethics and Discipline Screening Panel and a few others. During my service on the Bar Commission, I was appointed to the Judicial Council as the Bar's representative. It was a real eye opener! The administration of justice looks a little bit different from the Judicial Council's viewpoint, though it is not necessarily inconsistent with the view of Utah lawyers. These last few years have been a great learning experience for me.

In the future, our Bar must find ways to respond to the unmet needs of the growing numbers of poor in our country. Additionally, to the extent possible, we must streamline our court system, reduce the expense of litigation and be open-minded to seemingly untraditional methods of resolving disputes. If the Bar is not at the forefront of these issues, then the legislature or someone else will take this bull by the horns to make it happen. The recent changes to the Federal Rules of Civil Procedure are an example of what we are likely to see over the next few years.

Many of you will recall law school speeches or sermons on the mount from wise folks like former Justice D. Frank Wilkins and Judge Bruce S. Jenkins on the subject of lawyer collegiality. As a younger lawyer, I thought it was a bit of bunk. Of course, I didn't know those giving the sermons and I didn't understand what was involved in being a lawyer. It seems that judges, Bar Commissioners and Bar Presidents are the only ones reminding us of the importance of collegiality among our members. We must set examples, not only for less experienced lawyers, but for our clients and the public. We should also look to improving the quality of new lawyers entering practice in Utah and find a way to provide mentors, or other programs, that teach professionalism and law practice.

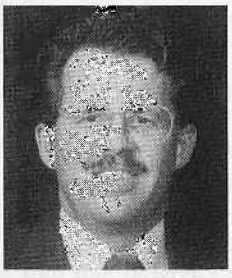
When I joined the Bar Commission five years ago, our Bar was taking a serious financial nose dive. That problem has been resolved and we have systems and experienced financial managers available to assist us. I doubt we will see those same problems in the next few years.

The Bar Commission understands its responsibility to effectively represent lawyers in Utah and to serve the public and the profession by promoting justice, professional excellence and respect for the law. This responsibility includes the need to have lawyers continue to provide quality legal services and uphold standards of courtesy, ethics, competence and professionalism. I support these efforts. I also support the notion that our profession has its business aspects and that the practice of law involves lawyers like you and me putting bread on the table and providing for our families.

I would appreciate your input and suggestions on these issues and where you think the Bar should go in the future.

Very truly yours,
Dennis V. Haslam

Third Division Candidates



J. Randall Call

J. RANDALL CALL

I am Randall Call, an attorney with Prince, Yeates & Geldzahler. I have practiced in Utah since graduating from the University of Utah College of Law in 1977. I am seeking election to the Utah Bar Commission. I have been actively involved in Utah State Bar activities, including Fee Arbitration Committee Chairman, Bar Examiner and a member of the committees for both the Mid-Year and Annual Meetings.

Based upon my experiences and activities with the Bar, I understand the challenges facing the Bar and its members. As a member of a mid-sized law firm, practicing in a variety of areas, I believe I am qualified to represent the concerns and views of lawyers in our district.

I would appreciate your support and vote and am willing to commit the necessary time and energy to represent you.

Robert P. Faust

ROBERT P. FAUST

Dear Colleague:

I am seeking your support for the position of Bar Commissioner from the Third Division. I will support you in your concerns as you practice law and confront these changing times. I am committed to provide service to others, to our profession and have done so in the past. I have actively served on Bar Committees and participated in Bar Sections for many years. At the end of this year, I will complete my term as President of the Federal Bar Association, Utah Chapter, after four years of service with that association.

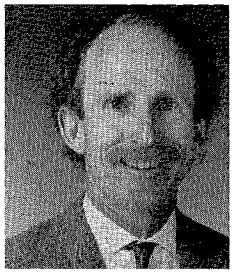
I have practiced in a small office in Vernal, Utah and in a large law firm. My practice has covered many areas of the law, providing me a broad perspective and understanding of today's challenges facing lawyers.

I believe these experiences and the service I have rendered gives me a perspective of the concerns which lawyers have facing them today. I believe the Bar should assist attorneys in the practice of law and to face the challenges as our profession evolves. I know that the practice of law can be a rewarding and fulfilling experience.

I appreciate your consideration and your support.

FRANCIS M. WIKSTROM

(Francis M. Wikstrom has practiced in Utah since 1975. He has had experience working in a two-person law firm and the United States Attorney's Office prior to joining Parsons Behle & Latimer, where he currently serves as chairman of the litigation department. Over the years he has been involved in many bar activities. He is immediate past-President of the Salt Lake County Bar Association and serves on the Civil Rules Advisory Committee, and the Appellate Court Task Force, the Bar Exam Review Committee, and the Third District Transition Committee. He is a Master of the Bench in American Inns of Court II. In the past he has served on the Appellate Courts Judicial Nominating Commission, the Courts and Judges Committee, the Alternative Dispute Resolution Committee, and as special disciplinary counsel for the Utah State Bar.)



Francis M. Wikstrom

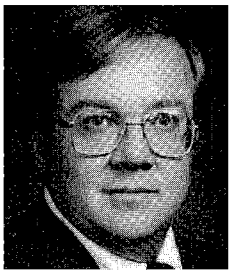
Dear Colleagues in the Third Division:

I would like the opportunity to serve as your representative on the Bar Commission. There are many challenges facing the Bar as we approach the Twenty-first Century. I don't pretend to have all the answers, but I will work hard to revitalize our spirit of collegiality and sense of pride in the legal profession.

I would very much appreciate your vote.

Sincerely,
Fran Wikstrom

Fourth Division Candidate



Craig M. Snyder

CRAIG M. SNYDER

As many of you know, I have been the Bar Commission Representative from the Fourth District for the past three years. I am running for reelection to a second three-year term. For the past three years, the Bar Commission has been involved in a variety of topics related to the professional practice of law. These include new admissions, discipline, court consolidation, continuing legal education, unauthorized practice of law, lawyer advertising, and many others.

I have been pleased to serve on the Commission during a period of time that has seen the Bar recover from poor accounting practices and a variety of fiscal difficulties. I am pleased to indicate that the Bar is now on sound financial footing, and that we have begun to initiate sound fiscal management practices. We now have an actively used law and justice center, which is in the process of being paid off on a rapid basis.

It is my belief that the Bar Commission needs to continue to be actively involved in those issues which affect the day-to-day practice of law, including those issues which involve the implementation of court consolidation in Districts 1, 2, 3 and 4. We also need to become increasingly aware of problems created by the unauthorized practice of law and deal with those problems in a vigorous manner.

I am willing to continue to devote the time and effort to represent the Fourth District in the Bar Commission and would very much appreciate your vote and continued support in accomplishing these goals.

Uncontested Elections . . .

According to the Utah State Bar Bylaws "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected.

Craig M. Snyder is running uncontested in the Fourth Division and will therefore be declared elected.

Fifth Division Candidates

David Nuffer

DAVID NUFFER

If Rush Limbaugh had his way, the rest of America would have as many lawyers per square mile as the Fifth Division of the Utah State Bar. The Fifth, Sixth, Seventh and Eighth Judicial Districts in the Fifth Division include over half Utah's land area, yet have less than 200 lawyers.

Representing the needs of Utah's rural attorneys takes a special approach. Obviously, our representative can never out vote the Wasatch Front. Therefore, our representative must be resourceful. Communication skills are essential to insure that the rural perspective is heard. Creative negotiation skills will enable our viewpoint to be included in state-wide solutions. Judgment must be exercised to know which efforts deserve our focus and emphasis. Finally, awareness and sensitivity of the needs of all lawyers will enable the Fifth Division Commissioner to effectively participate in the Bar Commission team.

The Bar will face increasing challenges in the 1990's. Consumerism, technology, and government regulatory influences, in a rapidly changing marketplace will challenge us all. The Bar must lead our profession's response to these new realities.

I look forward to service to Utah's rural lawyers as the Fifth Division Commissioner.

DALE W. SESSIONS

Mr. Sessions is the immediate past president of the Southern Utah Bar Association (SUBA). Recognizing the needs of members somewhat distant from the "Wasatch Front" area, he actively sought and achieved support for MCLE seminars to be locally available to the SUBA membership. Under his presidency a "social" aspect of membership in SUBA was reintroduced. The Association now meets monthly for live MCLE and/or a luncheon. This provides an opportunity for local professionals to get better acquainted and share skills and practice tips.

Mr. Sessions brings a varied background and a wealth of community service to this candidacy. His interest and commitment to serve are genuine. As an associate at the firm of Chamberlain & Higbee in Cedar City a portion of his practice is dedicated to the Guardian ad Litem position in the 5th and 6th Judicial Districts.

Outside the office he volunteers his time and talent to the arts. He conducts a group of adult musicians that meet weekly and give private and public concerts. He has received nine Special Merit Awards from the U. S. Treasury Department which are indicative of his creative and analytical skills.

POSITIONS AVAILABLE

The Utah State Bar and the Utah Law and Justice Center are seeking qualified applicants to fill two positions:

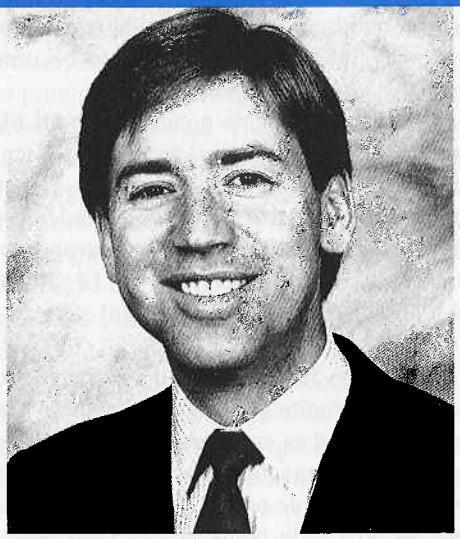
UTAH LAW AND JUSTICE CENTER COORDINATOR

- Coordinates all scheduling of building activities;
- Facilitates all requirements of meeting planners, i.e. meeting space, food arrangements, A/V supplies, etc.;
- Maintains the upkeep of the Center in terms of coordinating janitorial, security, tenant needs, indoor/outdoor maintenance;
- Requirements: Dependable and responsible individual who requires little supervision; self-starter and problem solver; excellent public relations skills and service-oriented; excellent organizational and communication skill; computer experience and Word Perfect preferred.

ENTRY LEVEL CLERICAL

- Assists Utah Law and Justice Center Coordinator in scheduling and facilitating meetings in the Center.
- Assists clerical staff in performing daily responsibilities;
- Requirements: excellent organizational skills; computer experience and Word Perfect preferred.

Please send resumes to Richard Dibblee, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.



Making Pro Bono Easy

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

I do *not* support *mandatory* pro bono. Rather, I strongly support voluntary pro bono.

I believe that, as a whole, Bar members want to do pro bono work. Many already donate significant time. But many more attorneys would volunteer if given the right opportunities. Thus, while the Bar should *not* mandate pro bono, the Bar should make it easier to volunteer. It should facilitate pro bono opportunities and provide training so that attorneys can more readily do pro bono work.

The Bar Commission presumably had this philosophy last year when it charged the Delivery of Legal Services Committee ("DLSC"), in conjunction with the Young Lawyers Division ("YLD"), to assess unmet legal needs in Utah. In addition, the Commission charged the DLSC and YLD to propose a Plan of Action for responding to those unmet legal needs.

The assessment of Utah's unmet legal needs has been completed, and a Volunteer Legal Service Plan of Action has been presented to the Bar Commission. This Plan of Action includes several projects that should make pro bono easier for members of the Bar.

Pro Bono for Non-Litigators. A common complaint to the DLSC comes from attorneys who have no interest, inclination, or expertise in litigation. Traditional pro bono programs have typically involved persons who need representation in court, such as in divorce cases. Many tax or business lawyers have indicated a lack of aptitude or interest for handling such cases. Yet they would like to provide volunteer legal service.

The Bar can solve this problem by becoming a clearing house for non-litigation pro bono opportunities. Tax, corporate and contract attorneys can provide on a pro bono basis much needed help to non-profit and other community organizations. For example, a local community organization helping the homeless may need the help of a tax attorney to assure tax-exempt status. A local battered women's shelter may need help incorporating. A community organization helping troubled youth may need assistance with a real estate lease.

The DLSC suspects that many Bar members would like to provide such services, but there is no clearing house to match up willing volunteers with non-litigation pro bono opportunities. The DLSC has proposed for the Bar to undertake this task to facilitate providing non-litigation pro bono service to the community. Bar associations in other states, such as Minnesota, report great success with such non-litigation pro bono programs.

In-Courthouse Domestic Violence Clinic. In carrying out its study, the DLSC determined that some of the greatest unmet legal needs in Utah are those of domestic violence victims. Although Utah law envisions that such victims can obtain protective orders on a pro se basis to shield themselves from their abusers, victims often have a difficult time understanding the process of obtaining protective orders. Current programs to assist such victims, although effective, lack the necessary resources to help significant numbers of domestic violence victims.

Thus, the DLSC is proposing a pilot project similar to programs established in New York, San Francisco, and elsewhere. The project would involve an in-courthouse clinic staffed for a few hours each afternoon by volunteer attorneys who could provide basic information to victims of domestic violence. Volunteer attorneys could assist pro se litigants in filling out forms and understanding the procedures for obtaining a protective order. Video tapes on protective order procedures would be provided for victims to view. In

addition, volunteer attorneys could provide mediation assistance for victims who, after obtaining a temporary protective order, appear in court in adversary proceedings for a 120-day protective order.

The DLSC is proposing a pilot project for Third District Court, and has already arranged for a commitment of courthouse space for the clinic. Training programs for volunteers and drafting simplified protective order pleadings will also be a part of this project. A presentation on this subject is planned for the Annual Meeting in Sun Valley. This project will accommodate busy lawyer-volunteers because the time commitment will be limited to only the few hours of time spent at the clinic.

Allowing Inactive-Status Attorneys to Do Pro Bono. In carrying out its study, the DLSC has also learned that there are many inactive-status members of the Utah State Bar who would like to perform pro bono work, but are unable because of their inactive status. These include law professors, law clerks, corporate lawyers, and other attorneys who, for various reasons, choose not to practice. For example, the DLSC is aware of several lawyers who have chosen not to practice while they care for young children. Such Bar members cannot volunteer unless they pay fees to become active-status members of the Bar.

To respond to this concern, the DLSC has presented a proposal to the Bar Commission to allow such inactive-status members to do pro bono work under the direction of a qualified legal service agency, such as Utah Legal Services, the Legal Aid Society, or other similar legal services providers.

Lawyers in Transition Project. Pro bono opportunities can also be a means of getting started as an attorney or for making transitions in practice. Some Bar members have been unable to find employment, others are simply in between jobs, and others would like to return to practice after a period of having other employment. Such lawyers could benefit from a "lawyers-in-transition" program, such as the one that exists in New York City. Under such a program, a lawyer could seek placement on a temporary basis to do pro bono work with Utah Legal Services, the Legal Aid Society of Salt Lake, or another similar organization. Although there would be no expectation of compensation from the organization, the program would allow such attorneys on a temporary basis to work with experienced staff attorneys to provide legal services to low-income persons. Lawyers participating in the program would gain the benefit of courtroom experience, work supervision, and development of connections that could enable them to gain full-time employment. At the same time, low-income persons in need of legal help would be benefitted.

Providing Pro Bono Client Income-Qualification Materials for Use by Volunteer Attorneys. The Bar can assist volunteer attorneys by making available the income-qualification intake materials of Utah Legal Services. Not infrequently, members of the Bar are informally asked by neighbors, local church leaders, and prospective pro bono clients to take on cases on a no-fee or low-fee basis. When this happens, attorneys could use the income-qualification materials to determine whether the prospective pro bono

client meets the income guidelines of Utah Legal Services. This would provide attorneys the opportunity to screen effectively the numerous requests for them to do pro bono work. An attorney or firm could develop a policy of not taking cases pro bono unless a proposed pro bono client fits within the Utah Legal Services income guidelines. Those not fitting within the guidelines could be charged fees commensurate with their income under a normal attorney-client relationship.

Providing such income-qualification materials would especially be helpful to solo and small-town practitioners. The DLSC perceives that many attorneys in small rural communities, where there are only a few attorneys in their area, receive numerous informal requests for pro bono help. It can be difficult to turn down such requests, especially when the attorney knows that no other legal help may be available. By providing income qualification materials, the attorney would be able to focus his or her pro bono efforts in helping those who are truly needy.

"Counseled *Pro Se*" Divorces. The DLSC has also proposed an idea first suggested by Bar President Jim Clegg. The proposal would involve structuring a court-approved system for volunteer attorneys to provide assistance to *pro se* divorce litigants in simple, uncontested divorce cases. The proposal would include working with the courts to establish protocols for attorneys whose practice does not permit them to appear in court on a normal basis, such as government attorneys, corporate attorneys, and others. The program would allow such attorneys to handle carefully-screened cases and assist low-income persons in need of divorce help without the added burden of making a formal appearance in the case or having to appear at court. This system could significantly trim the extensive waiting list of low-income persons in need of domestic-law help.

Bilingual Pro Bono Services. Currently, a significant body of legal information materials are available in English. Utah Legal Services, the Legal Aid Society, and other organizations could use the help of bilingual attorneys to translate such materials into Spanish and other languages, so that non-English speakers can understand their legal rights.

Other Bar Activities. In addition to these proposals, the Utah State Bar already has in place its Tuesday Night Bar program. Every Tuesday night at the Law & Justice Center, attorneys volunteer for a few hours to provide legal information to persons who have legal problems. The time commitment is limited to the few hours in that particular evening, and many members of the public are benefitted by this service. The Tuesday Night Bar concept has been expanded to Ogden, Provo, and St. George.

At the same time, the Salt Lake County Bar/YLD pro bono project continues to provide assistance to persons needing help in divorce cases in Salt Lake County.

In addition to these projects and proposals, the DLSC is working to develop recognition programs for pro bono volunteers. The DLSC also acts as a liaison with other community organizations who are interested in working with the Bar to provide legal information and services to low-income persons.

The recently completed Volunteer Legal Service Plan of Action contains further ideas for pro bono projects. I encourage you to obtain a copy and review it. Copies will be available at the Annual Meeting in Sun Valley.

The DLSC and YLD hope that these ideas will be of interest to you. If you would like to volunteer to help with any of these programs, please call me, Keith Kelly, at 532-1500.

A Final Post-Script. At the end of June, my term as Past-President of the YLD will end, and next year I will "age out" of YLD. Thus, this is my last contribution to the YLD Officer's Message of the *Bar Journal.* In finishing my final Officer's Message, I want to express my appreciation and great respect for the many persons that I have worked with over the past several years in the YLD. It has been a great learning experience and a tremendous opportunity to serve.

Rex Lee Addresses Law Day Luncheon

By Michael Mower

At a recent gathering of Utah Bar members, Rex E. Lee, President of Brigham Young University and former U.S. Solicitor General, attacked the notion that "the Supreme Court ought to look like the country." Lee argued this statement showed a profound misunderstanding between the political and non-political branches of government. Instead, Lee suggested the Supreme Court "ought to look like the very best people qualified and available at any time." Race, religion, gender, and geographical balance should not be the primary motivating factors in determining the next justice, the former clerk to Supreme Court Justice Byron White added.

Lee's comments were made as part of a recent luncheon hosted by the Young Lawyers Division of the Utah State Bar. After an absence of several years, Young Lawyer Division Executive Officers decided to again sponsor this event to commemorate Law Day.

The Law Day gathering proved to be a great success. The event sold out in three days, according to Young Lawyer Division President Mark Webber. "It was a great speech and a wonderful way to commemorate Law Day," said one luncheon attendee. "We hope to continue this in years to come," added Young Lawyer President-elect David Crapo.

Law Day Celebrated in Ogden

By Tricia Judge-Stone

In honor of Law Day, young lawyers held Law Information Fairs throughout the State. In Ogden, on May 7, 1994, attorneys Deanna Lasker, Randy Phillips and Tricia Judge-Stone dispensed free legal advice to the masses assembled at Ogden City Mall. "They're either here for us, or here to do their Mother's Day Shopping," said Lasker, "I'm not sure which."

The attorneys met with clients one-on-one, in a modified form of Thursday Night Bar. They also displayed more than fifty brochures, including legal information from Utah Legal Services and the Utah State Bar, and other publications from government sources. In addition, they handed out pencils, buttons and magnets, suggesting they would make great gifts for Mom.

Even though few people actually sought advice, a number of people wandered through and picked up literature. Many passersby seemed surprised that attorneys would make themselves available to the public in this manner, and it was great exposure for the local Bar. In addition, the attorneys had the opportunity to share insight on cases and enjoy the symphony playing on the first floor.

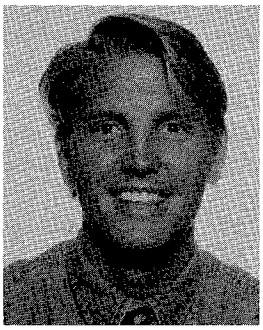
Law Day USA Around the State

Law Day USA was celebrated Nationally on May 1, 1994. Here in Utah, the Young Lawyer's Division of the bar held information fairs on April 30, 1994 from 10:00 a.m. to 4:00 p.m. Information booths were placed at the Cache Valley Mall in Logan, the ZCMI Center, Cottonwood Mall, Valley Fair Mall, South Towne Mall, the University Mall in Orem, and the Red Cliffs Mall in St. George. Members of the Young Lawyers Division staffed these booths and supplied legal advice free of charge.

"We received a very positive response from the public," stated Jeff Skoubye, Chairman of the Law Day Committee for the Young Lawyers Division. "We tried very hard this year to better publicize the fairs and the publicity seemed to work. At the Cottonwood Mall where I was, we had almost a constant flow of people with legal questions, big and small. Often we could answer their questions. But often we referred them to other services available through the Bar. The reports I have received from those staffing the other malls were similar. The fairs appear to have been a great success."

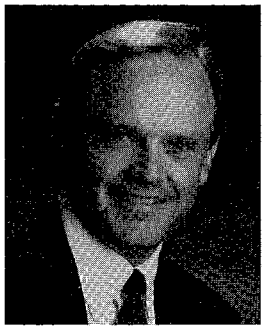
Young Lawyers Division Elects New Officers

By Michael Mower

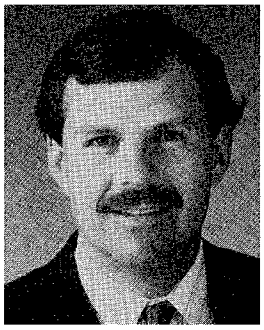


Marty Olsen

Marji Hanson



Robert Wright



Mark Webber

David Crapo

Marty Olsen was recently elected President-Elect of the Young Lawyers Division of the Utah State Bar. Joining him on the Young Lawyers leadership team are Marji Hanson as Treasurer and Robert Wright, who was re-elected as Secretary. They, along with President Mark Webber and President-Elect David Crapo, will comprise the Executive Officers of The Young Lawyers Division. The new officers will assume their positions during the annual meeting of the Utah Bar Association.

After learning of his election, Olsen stated he was excited to serve as the leader of the Young Lawyers Division. He then expressed appreciation for those who had supported him and pledged to work hard in his new assignment.

Olsen, a 1991 graduate of the University of Utah College of Law and a former clerk to Judge Leonard H. Russon at the Utah Court of Appeals, campaigned heavily on the importance of promoting the needs of children. Olsen's platform stated children are "our most indispensable and valuable resources." The President-Elect, who is actively involved in the Young Lawyers Needs of Children Committee, promised to increase the Young Lawyer's Division already strong commitment to children. He hopes to accomplish this by working with other community groups that are involved in children's issues and to increase the number of Young Lawyers who commit time and resources to supporting children in need.

Olsen is also associated with Big Brothers and Big Sisters of Utah and volunteers with the Child Life Unit at Primary Children Hospital. He works at Olsen & Olsen where his emphasis is in family and real property law.

Marji Hanson was elected Treasurer of the Young Lawyer's Division. Hanson, a 1990 graduate of the University of Utah College of Law, will be responsible for all Division financial matters. She will also serve as a liaison to other Utah State Bar Divisions. Hanson, a past clerk for Judge Judith A. Boulden and an associate at Parsons Behle & Latimer, also serves as the Chair of the Needs of Children Committee of the Young Lawyers Division.

Robert Wright was re-elected as Division Secretary. Wright said he was excited to continue in his position for a second term. Wright agreed to serve again because "it is important for all to get involved and do as much as we can for the community." In addition to his duties as Secretary, as an Executive Officer of the Division Wright will serve as a liaison to various Division committees. Wright is a 1988 graduate of the University of Wyoming and is an associate at the firm of Richards Brandt Miller & Nelson.

Outgoing officers include Immediate Past President Keith Kelly and Treasurer David Zimmerman.

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 Gerre Ron at 328-8891 or 1-800-662-4245 one week in advance. One hour CLE credit. (Topics are subject to change without notice.)

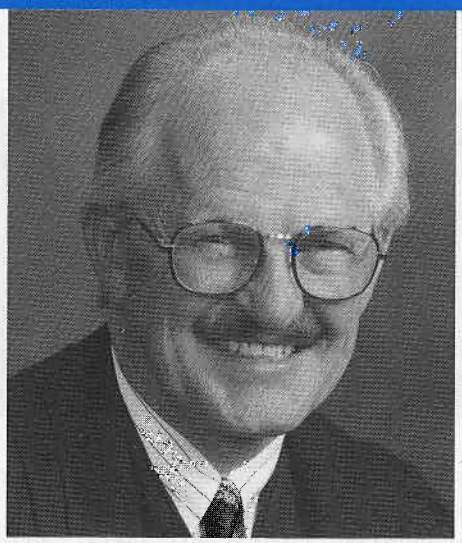
The topics for June and July are:

JUNE

June 6 – Overview of an Adoption
June 13 – Consumer Scams and Legal Remedies
June 20 – Warrantee/Mag Act
June 27 – State & Federal Fair Housing Laws/Enforcement

JULY

July 11 – Agencies (not CLE Credit)
July 18 – Name Changes



Domestic Violence

By Judge Roger S. Dutson

JUDGE ROGER S. DUTSON has served as a Circuit Court Judge in Weber, Morgan and Davis Counties since 1988. Prior to his appointment as a judge he was City Attorney for Roy City where he was also Redevelopment Director and Assistant City Manager. He was a partner in the law firm of Handy, Dutson and Sampson in Ogden and engaged in a general practice of law from 1968 to 1980. He was an officer and criminal defense attorney in the Judge Advocate General Corps of the United States Navy from 1965 to 1968. He received his Juris Doctorate Degree from George Washington University in Washington, D.C. after graduating from Utah State University in Logan, Utah. He presently sits in the Second Judicial District in Ogden.

When asked to comment about issues of some value to the Bar from my perspective as a Circuit Court Judge, the tragedy of Domestic Violence encountered almost daily in my courtroom immediately came to mind. This article applies only to factually proven assaultive behavior and each case must be determined on its own merits before applying any of the concepts discussed herein.

From contact with attorneys in almost every legal specialty, I find this issue popping up in almost every attorney's office, at least occasionally. Attorneys can certainly help society as a whole if we can better understand the dynamics of and potential for stopping Domestic Violence when we encounter it. Certainly the public is interested because there are almost weekly TV movies on the subject, Bobbitt jokes still abound, the Menendez homicide case is about to be retried, some local judges are ruling that they will permit evidence of Battered Victim Syndrome defense in homicide and assault cases, and *The Salt Lake Tribune* series on the subject, with headlines reading "55,000 Utah Women – That We Know of – Beaten Yearly" and "Why Men Beat Women: Why Women Don't Leave," has focused on this problem. We, in the legal profession, through proper response to cases involving domestic violence can have a great impact in addressing this tragedy.

In Domestic Violence cases in my court the following scenario is common: (1) A woman is assaulted by a man she is married to or living with, (2) The police have intervened and the prosecutor files criminal assault charges, (3) Before or at trial the female victim requests the court or prosecutor to drop the charges. Victims frequently request dismissal even after months or years of being a victim. The cases include victims whose husbands or boyfriends have broken their legs or arms, burned them, cut them severely, knocked out their teeth, beat them with ball bats, kicked them with steel toed shoes, sexually assaulted them or committed other serious physical harm to them. In addition, there has generally been severe psychological and emotional abuse. Children are often exposed to the abuse. Certainly, that type of request by a victim is hard for many people to understand, yet it occurs daily in our Utah courts! Equally astonishing is the fact that the abusers cover the spectrum of society, including doctors, lawyers, bakerymen and thieves.

Researchers, psychologists and other professionals dealing with this abuse present some interesting conclusions. Their claims include:

1. Batterers are usually males who are not generally assaultive except with their partner. Most do not possess symptoms of mental illness or otherwise show personality disorders and in most respects are "ordinary people."

2. The goal of batterers is generally to maintain power and control over their partner. In addition to physical control, batterers frequently isolate their victims from other people, intimidate, threaten divorce and custody of children, threaten financially, assert 'male privilege' and female subservience, claim emotional and

sexual 'entitlement' from partner, minimize physical damages, deny fault and blame the partner for the conflict.

3. Batterers frequently engage in a long term pattern of abuse, even though often not reported outside the home except in unusually violent cases.

4. Female victims frequently accept the historically traditional subservient role of females, e.g., woman's inferiority, male superiority and dominance, male breadwinner or patriarch, woman homemaker, woman obligation to meet male sexual and emotional needs.

5. Female victims generally have no safe place to go, no money for survival, often are co-dependent on partner, feel they must protect children and often believe their abusive partner's accusations that she is an unfit mother or partner and that she is at fault for "upsetting" her partner, causing him to beat her. In other words, victims often feel helpless to leave and frequently at least somewhat deserving of the assault.

6. Treatment and change of Domestic Violence offenders and victims is generally a very difficult and a slow process. A batterer will often engage in treatment so he can get his family back rather than truly change his "power and control" feelings. The victim's insecurities, helplessness and low self esteem cause her to feel her main responsibility is to have a "stable" family or relationship and as a result, she will accept almost any gesture of her male partner's changes as satisfactory.

7. Offenders batter because of a learned behavior, generally from observing conduct in their own home or some other significantly important male model or family member. The batterer can "unlearn" the misconduct. The excuse that the offender is an alcoholic or drug user is nonsense. Alcohol or drugs or work stresses are excuses and may reduce inhibitions or aggravate the violence but are not the cause of it. It is intentional assertion of power and control that causes nearly all Domestic Violence. Alcohol, drug and stress management treatment is often also needed, but it is not the cause of the battering.

Dr. Geraldine Butts Stahly, Ph.D., California State University, asserts there is a three phase "Domestic Violence Cycle." First is a "Tension Building Phase" where a woman is convinced by her partner she has the responsibility to make him feel good and she feels guilt because she fails in meeting his expectations. She is then caught in a tension filled no-win relationship. The second phase is the "Acute Battering Incident" with the male accusing the victim for the problem and trying to make her feel somewhat or totally at fault for the conflict. The result is that she, although a victim, often feels at fault for making her partner upset. Third, is the "Loving Reconciliation" phase where the male showers the victim with gifts and apologies and promises he will never hit her again and reassures her she is needed and loved. The studies show that without intervention, the battering generally increases in both frequency and severity and the tension building phase shortens, the acute battering is more severe and the loving reconciliation phase may disappear altogether.

"Batterers are usually males who are not generally assaultive except with their partner."

The Utah Legislature has enacted the "Cohabitant Abuse Procedures Act" (UCA 77-36-1, et. seq.) which requires police officers to take assailants into custody, rather than release on citation, based only on probable cause, if the officer believes violence will continue, serious bodily injury has occurred, or a weapon has been used. The statute also provides for a 'No Contact Order' to be issued to the assailant prior to jail release. In a 1991 amendment, the Utah Legislature added the following:

> . . . . because of the unique and highly emotional nature of domestic violence crimes, the high recidivism rate of violent offenders, and the demonstrated increased risk of continued acts of violence subsequent to the release of an offender . . . . it is the finding of the Legislature that . . . . bail may be denied if there is substantial evidence to support the charge . . . .

Whether or not the legislature is correct in their assessment and policy, their thinking on the subject is clear.

Most successful treatment programs are patterned after the Duluth Model from Minnesota. Treatment consists of about 26 weekly group counseling classes for offenders. Victims groups are also provided to help them to learn not to tolerate the abuse and break the abusive cycle. Cost for treatment is usually based on a sliding scale, and is relatively inexpensive. The State of Utah has adopted and subsidized funding for this counseling mode in most parts of the state. Thousands of offenders and victims have benefitted from counseling and the recidivism rate of offenders has decreased substantially when treatment has occurred. Throughout Utah there are non-charging "safe houses" for females and children who have left their homes. The prosecuting attorney's office can assist female victims by providing information regarding these locations.

Perhaps attorneys should take an absolute "no tolerance" position regarding Domestic Violence. Where factually supported, it should not be tolerated in any circumstance. Claims of abuse often arises in divorce cases, and because it is occasionally used as a manipulative tool by a party in divorce and custody cases it might be more carefully examined in that context. However, the problem is severe, victims need protection and children from abusive homes often become abusers and victims themselves. The attorney often has a unique opportunity to divert these cases to treatment or refer to prosecution if a "no tolerance" position is taken by that attorney. The attorney counseling parties in conflict, even though perhaps encountering a first time assaultive complaint by a client or party in an action, should do something to address the issue. Defense attorneys who represent clients who are found guilty of Domestic Violence can direct their clients toward changes available through counseling. By a united effort of not tolerating continuing Domestic Violence the legal profession can assist in creating a more positive public attitude toward attorneys and improve the quality of life in our communities.

CASE SUMMARIES

By Clark R. Nielsen

EMPLOYER-EMPLOYEE, RESPONDEAT SUPERIOR

On petition for certiorari, the Utah Supreme Court held that the issue of whether an employee acted within the scope of her employment at the time of her alleged negligence in an automobile accident was factual, precluding summary judgment. The prior Court of Appeals decision had affirmed the trial court's summary judgment that the defendant employee had acted outside the scope of her employment. The Supreme Court reversed and the case was remanded for a trial of the issue.

As a security guard at Geneva Steel, the defendant employee was given a brief lunch break. Employees regularly drove to a nearby cafe to buy food for lunch. The employee went to pick up her food at the cafe and, while gone, struck and injured the plaintiff.

Defendant's employer disclaimed liability, claiming that defendant's lunch trip was not within the scope of her employment. Whether defendant acted in the scope of her employment in view of all of the relevant facts, and the inferences arising from those facts in the light most favorable to the defendant, was a fact issue. The question may be decided as an issue of law only if the activity is so clearly within or without the scope of employment that reasonable minds could not differ. Action within the scope of employment is so closely connected with what the servant is employed to do, and so fairly and reasonable incidental thereto, that the conduct may be regarded as methods (even though improper methods) of carrying out the objective of the employment:

> (1) the employee's conduct must be of the general kind that the employee is hired to perform; (2) the conduct must occur substantially within the "hours and ordinary spatial boundaries" of the employment; and (3) the employee's conduct must be motivated in part by the purpose of serving the employer's interest.

The Court of Appeals decision concluded that the defendant had failed to satisfy the second criteria and did not address the first and third criteria. The Supreme Court holds that, in this case, reasonable minds could differ on all three criteria. The court expressly does not hold that all lunch breaks fall within the scope of the employment, but rather that the question in this case was one of factual determination and not appropriate for summary judgment. The term "ordinary spatial boundaries" does not appear intended to equate to "on employer's premises."

Christensen v. Swenson, 238 Utah Adv. Rep. 8 (May 9, 1994) (J. Durham)

APPELLATE REVIEW, RES JUDICATA; SUMMARY JUDGMENT

The court affirmed the dismissal of a civil rights complaint that the defendant had conspired with the Circuit Court in a prior action for unlawful detainer against plaintiff. Default judgment had originally been granted to Beneficial Utah in unlawful detainer action. Plaintiff's appeal of the unlawful detainer default judgment was dismissed.

Thereafter, the plaintiff filed a pro se civil rights action in the District Court against Beneficial Utah, the circuit court judges, the clerk of the court, and the county sheriff, all involved in the unlawful detainer action. The plaintiff complained that the defendants had conspired to deprive him of his equal protection and due process rights. The defendants moved for summary judgment, alleging there was no genuine issue of material fact. The complaint was dismissed as to all the defendants.

On appeal, plaintiff was not allowed to raise issues which he could have raised in his prior appeal in the unlawful detainer action. When he failed to perfect his appeal in the unlawful detainer case, he lost the opportunity to raise the issues.

Also, the plaintiff had an affirmative duty to respond to the summary judgment with affidavits or other materials appropriate under the rules to rebut the motion and the uncontroverted relevant facts. However, the plaintiff did not meet the burden of presenting admissible, relevant evidence that raised a credible issue of material fact. Summary judgment of the dismissal of the civil rights action was affirmed.

Thane v. Beneficial Utah, Inc., 238 Utah Adv. Rep. 3 (April 29, 1994) (J. Zimmerman)

APPELLATE REVIEW; INTERPRETATION OF PRIOR DECISION

The Court of Appeals decision in *Amax II*, 848 P.2d 715 (Utah App. 1993) requiring the Utah State Tax Commission to apply a 20% reduction in valuation to all Amax property was reversed on certiorari by the Supreme Court. The standard of review in determining whether or not the Court's mandate from its first decision had been followed on remand was a "correction of error" standard.

The Supreme Court concluded that the State Tax Commission properly interpreted the *Amax I* decision in seeking a hearing and determination of Amax which properties were assessed by either the comparable sales or the cost appraisal method. Only such properties were entitled to a reduction as required by statute. If neither the comparable sales nor the cost appraisal method of assessment was used, no such reduction is appropriate to either county or state assessed property, be it real or personal. Therefore the Tax Commission's order that further proceedings be held to ascertain which property should be entitled to the reduction was consistent with the Court's prior decision in *Amax I*. The tax commission decision was affirmed and the Court of Appeals reversed.

Amax Magnesium Corp. v. Utah State Tax Comm'n, 238 Utah Adv. Rep. 6 (April 29, 1994) (J. Russon)

SEARCH AND SEIZURE, PRETEXT STOP

The Supreme Court overruled and rejected the pretext stop and search doctrine adopted by the Court of Appeals in *State v. Sierra*. Relying on *Sierra*, the trial court had suppressed the drugs found in the inventory search. The Court of Appeals held (831 P.2d 1040) that the trial court had misapplied the pretext stop doctrine and remanded for adequate findings on reasonable suspicion. On certiorari, the Supreme Court reversed the Court of

Appeals, accepting the state's invitation to abandon the pretext stop doctrine.

Believing that the defendant did not have a valid driver's license and suspecting him of illegal drug activity, the arresting officer stopped defendant for making an illegal turn. A subsequent inventory search discovered several bags of cocaine. The trial court granted the defendant's motion to suppress the cocaine, concluding that the stop was a pretext and the subsequent inventory search was invalid.

Search and seizure issues are highly fact sensitive. Therefore, detailed findings are necessary to enable the appellate court to meaningfully view the issue on appeal. When the trial court has failed to make findings on the record, the appellate court assumes that the trial court found the facts in accord with its decision insofar as such assumption and finding would be reasonable. Although the trial court did not explicitly find whether the officer had reasonable suspicion, it was reasonable for the appellate court to conclude that the trial court found no reasonable suspicion to stop the defendant for driving without a license. The trial court did not find whether defendant made an unlawful turn in the officer's presence and the case was remanded for an express determination.

Although remanding for further factual determination, the Supreme Court rejected the *State v. Sierra* pretext stop doctrine. It is no longer relevant whether a reasonable officer would have stopped a defendant for the traffic offense, but rather whether the violation occurred, the officer had probable cause, and the officer did make the stop for that purpose. Once the traffic stop is made, the detention must be temporary and last no longer than necessary to effectuate the purpose of the stop. If reasonable suspicion of more serious criminal activity arises, the officer must diligently pursue a means of investigation that will either confirm or dispel the suspicion quickly. Running a check for warrants during the course of a routine traffic stop does not violate the Fourth Amendment so long as it does not significantly extend the period of detention beyond that reasonably necessary to request a driver's license invalid registration and to issue the citation. The warrant check may become unreasonable if an inordinate amount of time is taken.

The issue is not what the officer did but whether the defendant made a turn without signaling. If he did not make the turn, the the stop was unjustified and the evidence must be suppressed. If he did make the unlawful turn, then the court must determine whether the detention was reasonably related in scope to the traffic violation and whether the resulting warrant check significantly expanded the period of detention beyond that reasonably necessary to issue the citation.

An officer who observes a traffic violation has probable cause to stop the driver regardless of other "unconstitutional motivations." The rejected pretext doctrine is ultimately a subjective standard, because it focuses upon the subjective motivation of the officer. Focus on the officer's subjective state of mind is inconsistent with the objective standards imposed by the Fourth Amendment. The Court opined that the focus is upon what the officer actually did and not upon what a reasonable officer would do in similar circumstances. To focus on usual or reasonable police practice is merely an aggregation of subjective intention. Subjective intent of the officer may be one factor relevant to the question of the attenuation of a subsequent search from prior illegality.

The Court of Appeals erred in basing its decision on the pretext search doctrine and the case was remanded back to the trial court for findings as to whether the defendant made an illegal left turn and whether the officer's subsequent stop and warrants check exceeded the scope and time required for the traffic violation.

State v. Lopez, 237 Utah Adv. Rep. 9 (April 25, 1994) (J. Howe)

SEARCH AND SEIZURE, ABANDONMENT, STANDING, CONSENT

Defendant's conviction for possession of marijuana was reversed because the initial stop of the vehicle was not properly incident to a traffic violation committed in the officer's presence and the stop was unjustified at its inception. Although the officer had witnessed the defendant momentarily lose control of his vehicle, he did nothing more concerning the incident until later, when by mere happenstance he again saw defendant's car on the freeway.

The Court also reversed the trial court's determination that the plaintiff lacked standing to challenge the search of the vehicle and its contents. Defendant's unchallenged statement that he had permission from his friend to drive the car and that the car had been loaned to him established the requisite expectation of privacy under Utah law.

The Court also rejected the State's argument that the defendant surrendered his expectation of privacy when the defendant disavowed ownership of the suitcases during the search. The trial court's findings with respect to standing and possible consent were inadequate to justify the search. Both consent and alleged abandonment of defendant's expectation of privacy must be voluntary and sufficiently attenuated from the initial illegal stop. Because the initial stop was illegal, the matter was remanded to determine whether or not the defendant had voluntarily abandoned any expectation of privacy in the suitcase and, if so, whether the abandonment was sufficiently attenuated from the illegal stop.

State v. Matison, Utah Ct. App. 930106-CA (May 19, 1994) (J. Bench, with Js. Billings and Greenwood)

Utah Bar Foundation and IOLTA

Pictured are the present Board of Trustees of the Utah Bar Foundation. Standing (l-r) are Trustees Jane A. Marquardt, Stewart M. Hanson, Jr., Joanne C. Slotnick and Carman E. Kipp. Seated (l-r) Stephen B. Nebeker, Secretary/Treasurer, Ellen Maycock, President, and James B. Lee, Vice-President.

Photo: Robert L. Schmid

Despite the fact that it has existed since 1963, the Utah Bar Foundation remains something of a mystery to many Utah attorneys. Likewise, although the IOLTA (Interest on Lawyers' Trust Accounts) program has existed since 1983, it still seems to be poorly understood by many members of the Bar.

One persistent source of confusion seems to be the relationship between the Utah Bar Foundation and the Utah State Bar Association. Although all Utah attorneys are automatically members of the Bar Foundation, the Foundation and the Bar Association are two separate, distinct entities with different governing bodies and entirely different purposes. Likewise, the Utah Bar Foundation is a separate entity from the Utah Law and Justice Center Foundation.

The Utah Bar Foundation is governed by its seven trustees, who are pictured above, not the Bar Commission, and its purposes are (1) to promote legal education and increase knowledge and awareness of the law in the community, (2) to assist in providing legal services to the disadvantaged, (3) to improve the administration of justice, and (4) to serve other worthwhile law-related public purposes.

The Foundation carries out these purposes primarily by making grants of funds collected through the IOLTA program. That program was created in Utah in 1983 by the Utah Supreme Court's decision in *In the Matter of Interest on Lawyers' Trust Accounts*, 672 P.2d 406 (Utah 1983). Through the court's decision, attorneys' trust accounts, which were not interest bearing, were permitted to be changed to interest bearing accounts with the interest payable to the Foundation.

The Foundation has collected as much as $230,000 in a single year in interest on lawyers' trust accounts, although amounts have been substantially lower in recent years because of the decline in interest rates. The funds have been used for regular annual grants to Legal Aid, Legal Services, the Legal Center for People with Disabilities, and law related education, as well as individual projects carried out by Women Lawyers of Utah, Utah Children, Young Lawyers, and other organizations. The Bar Foundation also gives annual scholarships to law students at the University of Utah College of Law and the J. Reuben Clark College of Law who have a consistent record of service to the community.

Since 1983, the Foundation has made grants of more than $1.25 million for the purposes described above. The trustees also believe that one of the Foundation's purposes is to counteract the negative image of the legal profession by drawing attention to the worthwhile public projects made possible by the Foundation grants.

CLE CALENDAR

HOW TO PRESENT & CHALLENGE EXPERTS IN EMPLOYMENT CASES

CLE Credit: 4 hours of CLE – Live Satellite broadcast
Date: June 2, 1994
Place: Utah Law & Justice Center, Salt Lake City, Utah
Fee: $155.00. Please make checks payable to "ALI-ABA." MCLE fee of $6.00 payable at the door.
Time: 10:00 a.m. to 2:00 p.m.

FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA – 1994

CLE Credit: 4 hours of CLE – Live Satellite broadcast
Date: June 7, 1994
Place: Utah Law & Justice Center, Salt Lake City, Utah
Fee: $155.00. Please make checks payable to "ALI-ABA." MCLE fee of $6.00 payable at the door.
Time: 10:00 a.m. to 2:00 p.m.

FACING THE 90s AS A WOMAN LAWYER IN CORPORATE & LITIGATION PRACTICES

CLE Credit: 4 hours of CLE – Live Satellite broadcast
Date: June 9, 1994
Place: Utah Law & Justice Center, Salt Lake City, Utah
Fee: $155.00. Please make checks payable to "Practising Law Institute." MCLE fee of $6.00 payable at the door.
Time: 10:00 a.m. to 2:00 p.m.

NEW EMERGING ISSUES IN PROFESSIONAL RESPONSIBILITY & LEGAL MALPRACTICE

CLE Credit: 4 hours of CLE – Live Satellite broadcast
Date: June 16, 1994
Place: Utah Law & Justice Center, Salt Lake City, Utah
Fee: $155.00. Please make checks payable to "ALI-ABA." MCLE fee of $6.00 payable at the door.
Time: 10:00 a.m. to 2:00 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.

17th ANNUAL SECURITIES SECTION WORKSHOP

CLE Credit: At least 7 hours of CLE - exact credit to be determined
Date: August 19 and 20, 1994
Place: Sun Valley, Idaho
Fee: Registration for Members of the Securities Section, $100.00. Registration for Non-members $125.00. For Registration received after August 12, 1994, please add $25.00.
Events: Scramble Format Golf Tournament & complimentary Friday night dinner for section members.
Info: Please call the Utah State Bar for additional information. Watch for the registration and informational brochure announcing the event, coming very soon in your mail.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____
Total Due

Make all checks payable to the Utah State Bar/CLE

Name _____ Phone

Address _____ City, State, ZIP

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

Signature

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

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

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

CLASSIFIED ADS

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

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

BOOKS FOR SALE

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.

Top Value Law Books of the West — Buying, Selling and Appraising law libraries. The Southwest's Law Book leader is now located in Arizona. State and Federal material. We will not be undersold! 1-800-873-6657.

Pacific Reporter, Leather Bound Vols. 1-154; Pacific Reporter, Vols. 172-300; Pacific Reporter 2d Vols 1-835; ALR 3d (Complete); ALR 4th, Vols. 1-45; AmJur Trials, Vols. 1-32; Proof of Facts, Vols. 1-30; Proof of Facts 2d Vols. 1-44; numerous other publications available. Make offer. Call (801) 968-3501.

OFFICE EQUIPMENT AND FURNISHINGS

CANON NP4835i copier. Well maintained; "low mileage." Two paper trays plus hand-feed; 20-bin sorter; stapler; color expansion available. $17,000 new; must sell $6,000 or offer. Call (801) 355-7900 for details and inspection.

Conference table. Beautiful light oak with 10 upholstered chairs. Newly refinished; custom glass shield protects finish. Top condition, must sell $2,000 or offer. Call (801) 355-7900 for details and inspection.

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Class A office sharing space available for one attorney with established small firm. Excellent downtown location, two blocks from courthouse. Parking provided. Complete facilities, including conference room, reception area, library, telephone, fax, copier. Secretarial services included. Excellent opportunity. Please call Larry R. Keller or A. Howard Lundgren at (801) 532-7282.

Nearing completion. Victorian House gutted, entirely new. For law or professional offices, main floor, two offices. Secretary and reception area, also conference or library room. Approximately 1200 square feet. Can finish to your specifications. Three blocks from the Metropolitan Hall of Justice on Denver Street. Parking available. Call (801) 521-2990.

Professional office space for one attorney. Share with two other attorneys. Complete facilities, including large private office, large reception, conference room, parking adjacent to building, limited library, fax, copier, telephones, kitchen, 4212 Highland Drive. Call (801) 272-1013.

Small Salt Lake Firm, near courthouse and freeway seeks an attorney to share space and overhead. Some overflow work will be available. Covered parking, full support and equipment available. Some office furniture available. Rates negotiable. Call Nalani at (801) 531-0900.

DELUXE OFFICE SHARING SPACE in class A building. Downtown location, close to courts. Single or multiple office suites with space for your secretary. Includes receptionist, conference rooms, library, Westlaw, fax, telephone, copier and underground parking. Contact Ronald Mangone at (801) 524-1000.

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For Years 19 _____ and 19 _____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

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

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

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

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

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

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

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

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

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

* Attach additional sheets if needed.

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

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

Date: _____ _____
(signature)

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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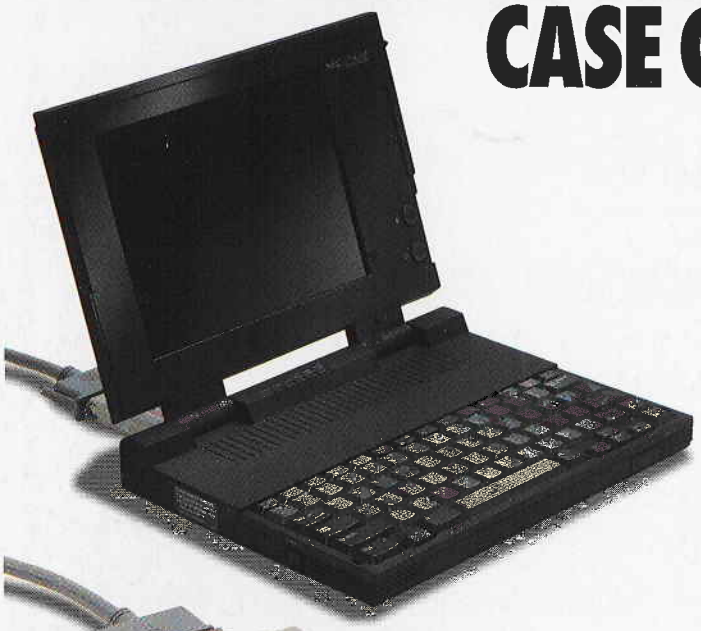

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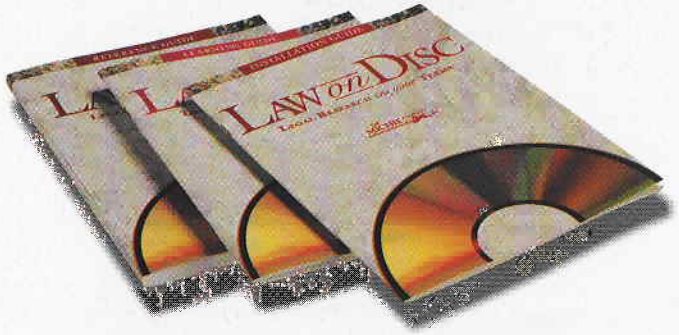

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