UTAH BAR JOURNAL

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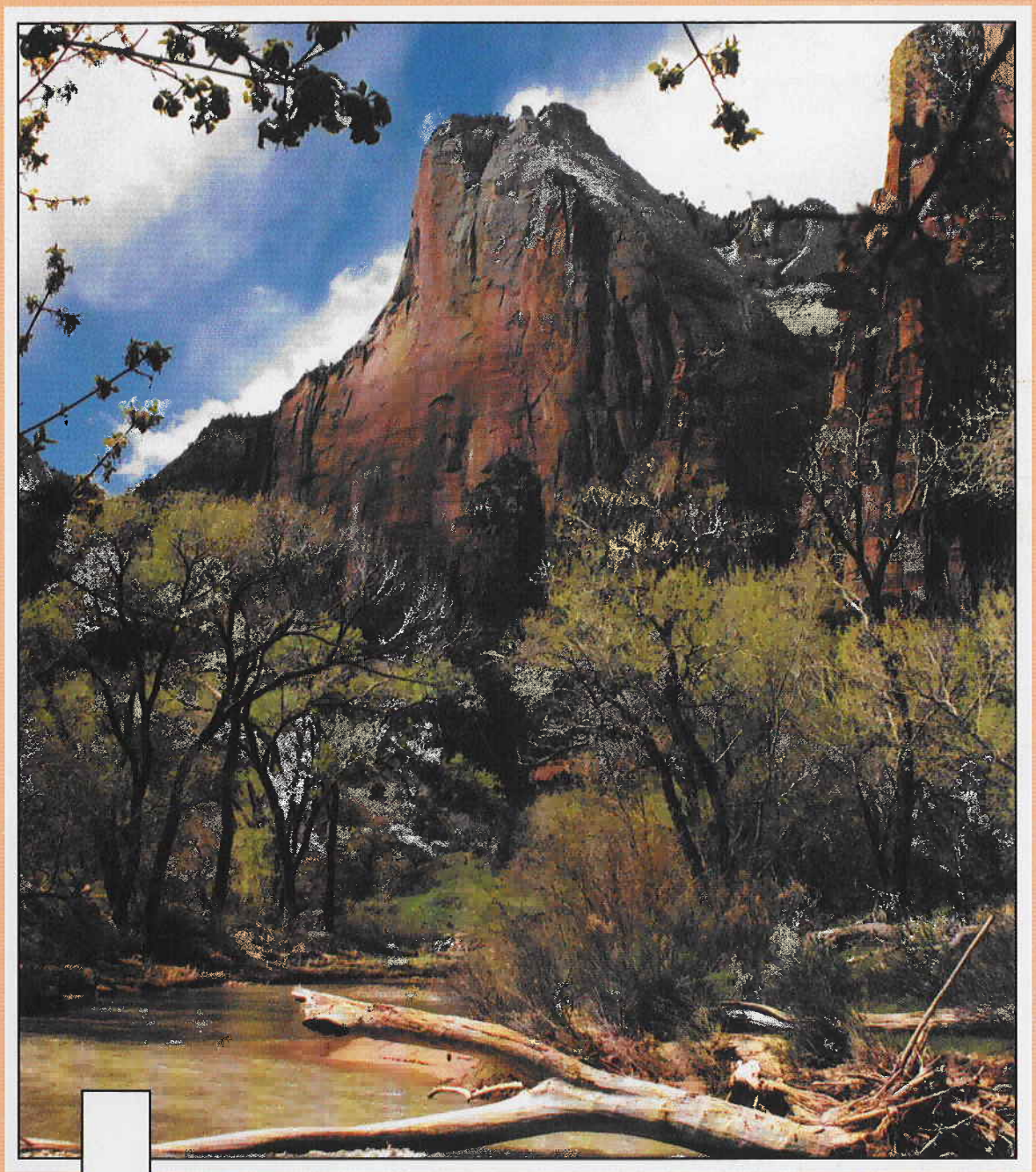

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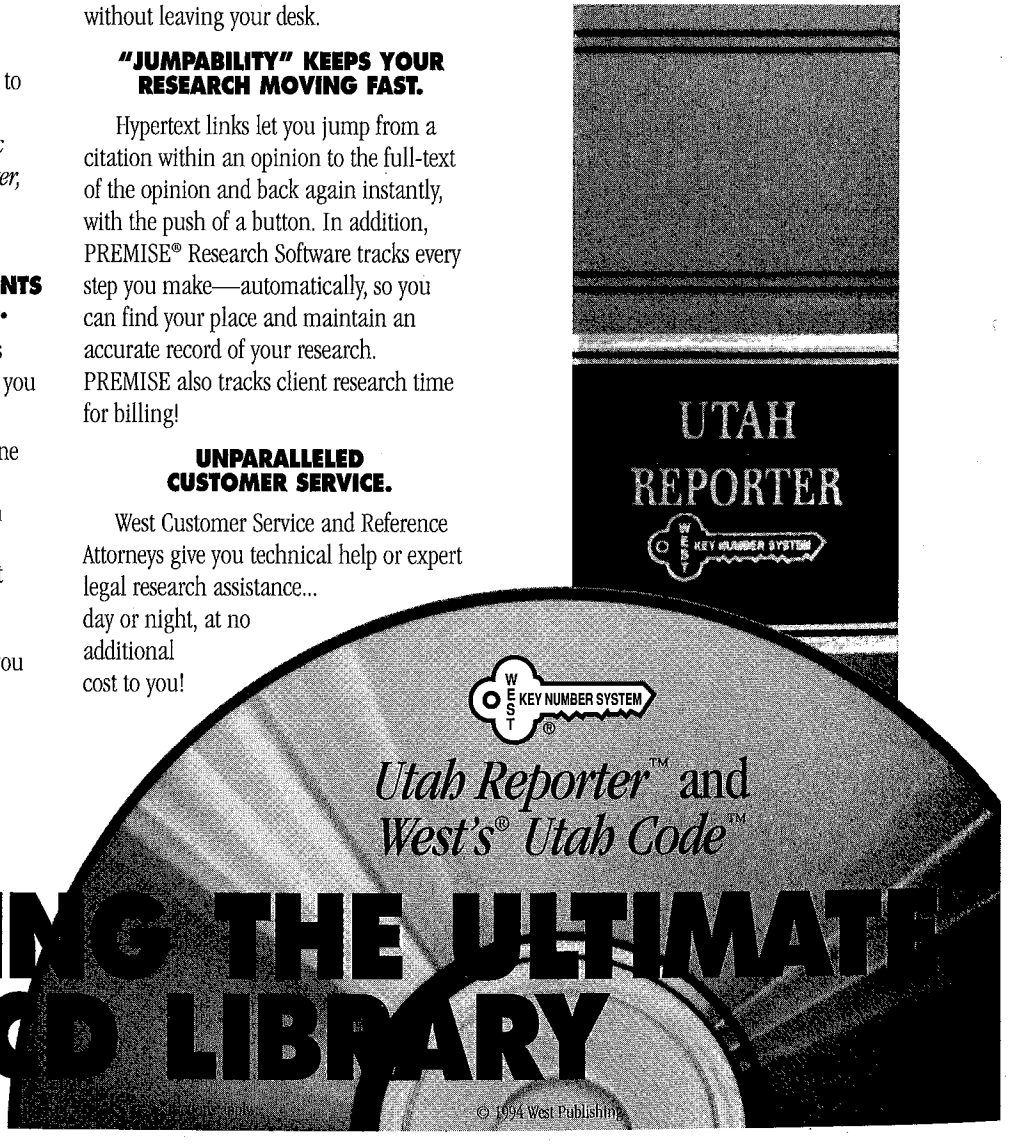

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COVER: Spring Comes to Zions National Park by Mark Dalton Dunn of Dunn & Dunn.

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:

I was interested in Judge Wilkins' article in the April issue of the *Utah Bar Journal.*

I agree a hundred percent with his analysis of the abuse, by way of jokes and recriminating statements which, we lawyers must bear. However, I wonder if there is not another side to those kinds of comments which we should consider.

As a case in point, a couple weeks ago I went to the golf course to get nine in late in the afternoon. It was crowded and the pro suggested if I wanted to go on, I might join a threesome just making the turn.

I introduced myself and asked if I might join them, none of whom I knew. They politely agreed, but it was clear they just as soon I hadn't. For about five holes I played my game and they played theirs.

Then one of the three apparently felt he had to show some sign of congeniality and asked me what I did.

When I told him I was a lawyer, they all perked up, made the obligatory comments such as, "good thing I didn't tell my favorite joke," etc. But, from that point on, it was like I was an old friend, talking with me, asking my opinion on a multitude of issues (some of which I probably should have charged for) and generally treated me in an entirely different manner than they had before they knew my profession.

The point is, it was not me that suddenly inspired respect, it was that I was a lawyer and while people may talk "trash" about us behind our backs, they generally, I have found, speak to and treat us as individuals with respect.

Perhaps we should do as Judge Wilkins suggests as a profession and at the same time strive harder to be considerate.

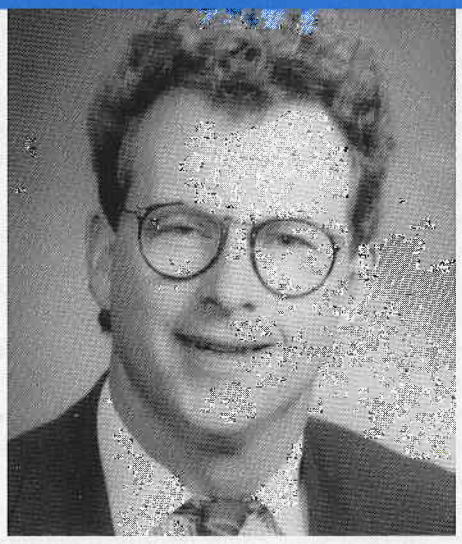
I was impressed with Karl Malone's response when he was vigorously criticized by a fellow NBA basketball player. While I can't quote him precisely, it was something to the effect, . . . I just play the game the best I can and pay no attention to such statements.

Maybe we too need to just do our jobs the best we can and pay no attention to the jokes about us.

I'm never embarrassed or ashamed to tell a new acquaintance that I'm a lawyer.

J. MacArthur Wright

PRESIDENT'S MESSAGE



"Second to Last Shot!"

By Paul T. Moxley

With the appearance of this edition, there is something like 60 days remaining of my tenure as President of the Bar. My year has gone by faster than most (at least for me though probably not for my partners) and the Bar has and is undergoing significant change. The sheer increase in the size of the Bar since I started practicing is staggering and few of us could have foreseen it.

On May 5th we are conducting our first Quality Control conference where members of the judiciary, the practicing Bar and the deans of our law schools will review where lawyer competency is going. So much of the energy of the organized Bar is directed towards minimalistic behavior as opposed to upgrading the quality of work. We are surveying law firms, courts, and the public sector on how lawyers are trained. Many lawyers believe lawyer training – or the lack thereof – is much different than in the past. Our goal is to review issues and make recommendations as needed. Stay tuned for new developments.

During the latter part of March, the state Supreme Court on its own motion, determined that the Board of Bar Commissioners should be reduced from 22 members (13 voting, 9 non-voting or ex officio) to 13 members. The Board continues to review this matter as this article goes to the printer. The input of all commissioners is valued as well as their personal energies. Nevertheless, a Board of twenty-two presents some organizational difficulties. This matter will continue to be studied by our Board and more changes may be forthcoming. One of the consequences, for me anyway, is that I will not be on the Board as the immediate past president as has been the tradition in the past. Soon I will be a Bar junkie without my regular "fix" and not even a Bar consultant, which Jim Clegg has idealized, along with being an immediate past president.

Dennis Haslam is gearing up to be president and will undoubtedly do an outstanding job. After my departure, Dennis will be the last commissioner who lived through the dirt poor days of the Bar when all members were hit with the "double dip" dues increase. The building is now paid for, we have some reserves for repairing depreciating assets and the Board continues its ongoing dialogue about Bar programs and the dues structure. As this is being written, the long range planning commission, chaired by Dennis Haslam, and the Budget and Finance Committee, chaired by our CPA commissioner, Ray Westergard, are studying and making recommendations about all such issues.

Our new pro bono coordinator, Toby Brown, is hard at work and because that program was only recently initiated, it will be this time next year before the Board can analyze whether it should be continued. It is our hope that Toby Brown will be able to bring together volunteer lawyers and legal problems so that the unmet legal needs of people will be met through a voluntary pro bono project. In this connection, the Board of Bar Commissioners for Nevada recently voted for a mandatory pro bono requirement. But, after the first sight of a lawyer mutiny, the Board removed the petition from their state Supreme Court.

In my experience, lawyers have never been scrutinized or criticized as much as recently. At a Western States Bar Conference recently, I was on a panel with a Washington State lawyer of some sixty years experience who stated that many new lawyers are ashamed of their profession and he contrasted this to his pride in his work as a lawyer. The attention to the antics of the lawyers in the O.J. Simpson case is not helping. The circuses being permitted and the feasting on every personal circumstance is disturbing. Most

members of the public do not understand the process that is taking place nor is it being explained properly. Instead, the emphasis is on performance of the lawyers, judge and witnesses. This may be good entertainment, but it is hurting our profession.

Hopefully, our new Public Relations Committee, chaired by Judge Jim Davis, will help with this. And the rest of us need to volunteer to participate in the Bar's speaker bureau, write a column in our newspaper and explain the process to whomever will listen. The duty of the lawyer, of course, is to present every factor which favors his or her client in the best light imaginable. Our duty is to do nothing less than that.

The number one topic of discussion at ABA sponsored conferences is the apparent failure of many attorneys to properly communicate with their clients. This, said those in the "ABA", was the proximate and legal cause of increasing dissatisfaction, and, therefore, of increasing public castigation of attorneys. Just as each of you knows with respect to your own client relationships, I believe that I am not the problem. It must be some other attorney causing all the problems. So what can we do to make those "other" attorneys come to grips with the problem?

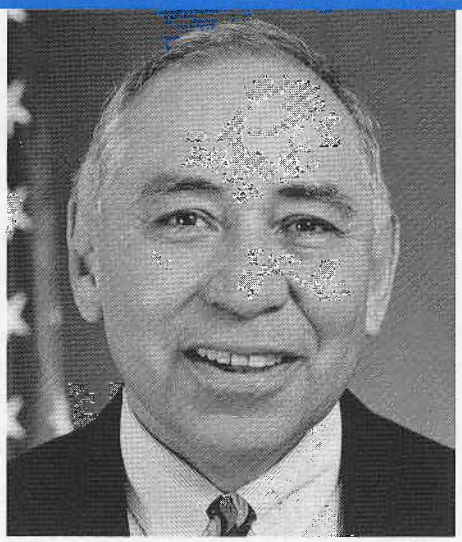
We could start by recognizing at least a little of that "other" attorney in each of our own practices. Make a commitment to focus on your clients — one lawyer at a time making a commitment to clients can make a world of difference. Try some variation of the ABA's "Declaration of Commitment to Clients:"

- To treat clients with respect and courtesy.
- To handle your client's legal matter competently and diligently, in accordance with the highest standards of the profession.
- To exercise independent professional judgment on your client's behalf.
- To charge a reasonable fee and to explain in advance how that fee will be computed and billed.
- To return telephone calls promptly.
- To keep your client informed and provide them with copies of important papers.
- To respect their decision on the objectives to pursue in your case, as permitted by law and the rules of professional conduct, including whether or not to settle the case.
- To work with other participants in the legal system to make our legal system more accessible and responsive.
- To preserve the client confidences learned during our lawyer-client relationship.
- To exhibit the highest degree of ethical conduct in accordance with the Model Rules of Professional Conduct.

Recognize the most common complaints about attorneys, and avoid being one of those guilty as charged of:

- Taking clients for granted;
- Not understanding clients' needs;
- Being condescending;
- Only telling clients what they want to hear;
- Telling clients what to do;
- Not being found and not being reached;
- Speaking in legalese;
- Refusing to admit that they may not be the right attorney for the job;
- Refusing to admit they do not know the answer;
- Sending useless bills;
- Talking too much; and
- Forgetting what matters.

Instead, let us show some appreciation for our clients; Give clients a more personal touch; Have a better bedside manner; Visit their offices; Keep in touch; Learn to listen; Know what clients believe is important; Say what matters; Ask a client's opinion; Be cost-conscious, and even do something for free; Go the extra mile, because just as an unhappy client will tell everyone about the experience, so will a happy client. It's all a matter of dollars and sense and being a professional.



Some of My Best Friends are Lawyers

By John Florez

Lawyer bashing has replaced baseball as America's favorite pastime; some deserved, but mostly the results of our changing society. Sarcastic humor is often an expression of hostility masking unexplainable resentment. Americans are hurting and lawyers, like welfare mothers and immigrants, have become the scapegoats for all of society's problems.

A CALL FOR LEADERSHIP

As we move from the industrial to the information revolution, our social institutions which were designed to serve us in past eras — our justice system, schools, health, economy, transportation, religion and families — are struggling to respond to change. The public is frightened over an unknown future: will I have a job tomorrow, what happens if I get sick, will my kids realize the American dream that I had. As a consequence, our citizens are "mad as hell" and lashing out at the most visible symbols of those failing institutions that "should do something about my problem." Lawyers should not take the hostility towards them personally, but as a compliment. Historically, the legal profession has been one of the basic institutions of our society grounded in principle and providing a moral sense to a civilized society. Society has placed the legal profession on a pedestal and is now frightened to see its lawyers with feet of clay. The hostility should be seen as a cry for help and a call for leadership.

JOHN FLOREZ was appointed to the Bar Commission by the Utah Supreme Court in 1993 as one of the two non lawyers. He has held numerous national and local posts. National appointments include: Deputy Assistant Secretary, U.S. Department of Labor; Director, President's Commission on Hispanic Education; Staff to Senator Hatch, U.S. Senate Labor and Human Resources Committee; Members, President's Commission on Juvenile Justice and Field Director, National Urban Coalition. State appointments include: Commissioner, Utah State Industrial Commission; Director, Office for Equal Opportunity, University of Utah; Associate professor, Graduate School of Social Work, U of U. He has served on over forty community boards some which include: Salt Lake School Board; Chair, Utah State Committee, United States Commission on Civil Rights; Salt Lake City Judicial Nominating Committee; Governor Rampton's Citizens; Committee on Utah Courts. Mr. Florez has extensive history in community organization dealing with social and urban problems. He was born and educated in Salt Lake and holds an MSW degree and an honorary Ph.D.

THE LEADERSHIP VACUUM

Today's legal profession is suffering from trying to live up to the expectations of its predecessors who exercised vision and leadership in guiding our country through turbulent periods. Where are today's Jeffersons and Lincolns when we need them? What are we doing wrong and what should we do to cultivate leaders to guide us into a renewed society. Part of the problem is that our schools and colleges educate the leadership out of students. John W. Gardner, founder of the Urban Coalition, Common Cause and noted writer on leadership and institutional change, pointed out in his book *Recovery of Confidence*:

> . . . colleges not only persuade the young person that most of the world's problems are solved by experts, they teach him subtle ways to be somewhat contemptuous of leaders.
>
> He gains the clear impression from his teachers that the professional man is clear in his motivation and high in his standards; does not become involved in controversy; does not demean himself by becoming entangled in the push and pull of power conflict. In contrast, he gains the impression from his mentors that leaders (politicians, college presidents, corporate executives) are corrupt. They compromise. They make deals. They are ambitious. They lack integrity. They are morally less worthy than those who

toil in the antiseptic. . . laboratory and the study.

Yet anyone who knows university faculties, scientific laboratories, and professions know that they too are the scene of compromise, vested interest, jealousy, rivalry, power conflict, and all the other corrupting forces. But, unlike corruption in public life, the quiet compromise of integrity in the laboratory, studio, or professional suite rarely comes to public attention. It is almost inaudible.

It is true that power often corrupts; so, too, do vanity, complacency, timidity, moral arrogance, and hunger for security, none of which is unknown in the laboratory and the study.

One of the maladies afflicting our society toady is the contempt and skepticism we have for leaders and the sense of helplessness we have about an uncertain future. Such skepticism is fueled by our present generation which experienced Vietnam, civil rights strife, and leaders who were less than truthful. Many of our current lawyers come out of that experience. Is it any wonder they are wary of assuming leadership roles. To them I say: "In America's moment of agony she doesn't need executioners, she needs physicians" (John W. Gardner).

"Our current justice system is paralyzed and unable to respond to . . . new problems . . . ."

OUR FAILING INSTITUTIONS

Our current justice system is paralyzed and unable to respond to the new problems our society is facing in today's environment: more violent youth crime, family violence, worker's injuries, family break up, child abuse, corporate fraud, white collar crime. The legal profession is now experiencing a dramatic increase in complaints of unethical conduct and malpractice. Most alarming, however, is that some lawyers view their practice simply as a commercial venture rather than keeping their vow as "an officer of the legal system . . . having special responsibility for the quality of justice". The public criticism of lawyers has merit since lawyers are to be held to a higher standard.

INSTITUTIONAL RENEWAL

The problems the administration of justice faces today cannot be solved by simply tinkering with the judicial machinery, making a few adjustments here and adding more money there, but by asking ourselves what "ought" our judicial system look like as we move into the twenty first century. The unfortunate thing is that if the legal profession does not take the lead in giving vision and direction to redesigning our legal institutions, self-serving people will make sure nothing happens or buffoons will come along and make senseless changes. The founders of

this country designed our system of government of checks and balances so it could work with vigorous leadership. I suspect Madison and his contemporaries never anticipated our country would be lacking leaders. Jefferson realized the need for institutional renewal and his thoughts are inscribed on the wall of his memorial:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times . . . .

A CHALLENGE FOR CHANGE

The challenge for each of us is to decide whether we want to cling to an outworn institution — a vestige of past good intentions — because of our self interest and insecurity, or take the lead in renewing the administration of justice so it is responsive to the problems of today. Lawyers must be reminded that social change is not for the weak of heart; yet, if they are serious about the oath they took in entering the profession, they must be in the forefront of improving the administration of justice. That involves taking risks!

One of the major barriers to changing public institutions is that we fail to realize they are monopolies which have attracted their special interest groups and have a legislative committee to assure their perpetuation whether or not they still serve the purpose for which they were created. Bureaucrats have brainwashed professionals into believing in the concepts of "collaboration, cooperation, communication and non duplication of services," yet if such notions were entertained in the private sector they would be in court for antitrust violations.

If our system of justice is to be renewed, it will take individuals to begin challenging old assumptions about how the system "has" worked and ask how it "ought" to work in today's turbulent environment. If we do not, we become part of the problem and members of the handwringing crowd which has the answers, but will do nothing about the problems our society faces.

CHANGE STARTS WITH THE INDIVIDUAL

The agenda for change starts with an individual believing he or she can make a difference, can lead with new ideas and — most important — the persistence to make it happen in spite of all the nay sayers and critics. It means rolling up one's sleeves and getting involved in the nitty gritty work of one's community, political party, legislative jungle, or one's professional organization. It means being true to one's values and living them.

As a non lawyer, appointed to the Bar Commission, I have been greatly encouraged by the integrity, and quality of the attorneys I have met and their commitment to the improvement of the profession. (If the public knew how soft hearted lawyers are, it would ruin their image.) All too often we see members of professional organizations complain about what the organization is not doing, but very few of us get involved in helping to carry out its mission. An organization is only as good as its members are willing to make it. As a professional organization, the Utah State Bar has tremendous potential for improving the administration of justice in the state and to promote the professionalism of its members. It can realize that potential only if its members are willing to make suggestions, work toward solutions and speak out on their convictions. Freedom is not a state of tranquility!

We have a silly notion about leadership: somehow, someone else is a better leader and should do something to solve our problems. The reality is that each of us has the talent. All we need is the belief that we can make change and a willingness to risk! Our nation is faced with serious problems and they belong to you and me. And the solutions rest with each of us. If change is to come about, it starts with each of us realizing that we have a responsibility to give it direction. Our society is fortunate to have the talent assembled in the legal profession. All we need is to unleash it. It starts with one individual — you!

Franchising Your Client's Business

By Jeffrey C. Swinton

Based upon a presentation to the Utah State Bar Mid-Year Meeting March 4, 1995

Latest figures from the International Franchise Association indicate that franchising now accounts for over 40% of all retail sales or 803.2 billion dollars per year.

In the event your client desires to franchise its business, it must recognize that the business of "franchising" is far different than operating the business itself. Franchising involves management skills, communications channels and organizational and financial structures different from those in its underlying business. Like many businesses, franchising is complex, difficult and filled with risks and there is no assurance it will be profitable.

It is difficult to franchise a business that does not have an existing prototype or that does not offer something unique that cannot otherwise be easily duplicated. The prototype business should have been in operation for some period of time and have demonstrated its ability to make a profit. Furthermore, it is vital that your client holds a registered trademark or service mark or series of trademarks under which it operates.

A franchise typically begins with offering a single product or a number of related products that can be sold together under the same roof. Fast food operations readily come to mind. The product must be one which has significant appeal and, along with each stage of the business, can be duplicated easily and with simplicity. Your client must be able to quickly and uniformly train each franchisee in the standard business methods of operating the franchise. Your client must consider every aspect of the business and develop a plan for how each aspect can be duplicated in each franchised location. Typically, a confidential operations manual is developed which covers every aspect of the business.

It is essential that each franchised outlet

JEFFREY C. SWINTON is a member of the law firm of Stoker & Swinton. He graduated from the University of Utah College of Law in 1974 where he as Editor-in-Chief of The Summation: A Journal of Utah Law, *which merged into the* Utah Bar Journal *where he became the Associate Editor. He has been admitted to practice before the United States Supreme Court. He practices primarily in the areas of franchise law, corporate law, commercial transactions and related bankruptcy and civil litigation. In recent years he has concentrated in representing franchisors expanding their business through franchise relationships throughout the United States and internationally. He is currently the Vice-Chair of the Franchise Section of the Utah State Bar. He is listed in the Twelfth Edition of* Who's Who in the World *and serves in the community under appointment from the Governor as Chairman of the Utah State Board of Services for People With Disabilities.*

representing your client's business be uniform. The product itself must be of the same quantity and quality and must be delivered in uniform surroundings by people who often dress the same and are always trained in the same methods. This uniformity is essential for product identification by consumers and for the purpose of protecting your client's trademarks. The business must be one which can be operated in the same manner in a variety of locations without significant variation. That includes similarity of equipment, hours of operation, inventory and appearance. A franchisee's business must be sufficiently profitable to keep its operator happy and willing to continue to pay your client a franchise royalty fee.

Elements of the franchised business must be capable of being legally protected. Your client should establish and develop a trademark or service mark, establish and protect its trade secrets, and draft its agreements in such a way that the franchisees bind themselves to protect your client from theft of trade secrets or interference with the franchisor's trademark rights.

Finally, your client must be willing to travel to franchisees' locations to help them start their business and to provide input and guidance after the business is in operation.

THE TRADEMARK OR SERVICE MARK

Your client's trademarks or service marks are integral to the franchise system and the basis for the rights licensed by your client to a franchisee. Therefore, your client's rights must be well established. The terms trademark and service mark are often used interchangeably and are used in connection with the sale or offer of sale of a product or service to distinguish it from others ["mark(s)"]. It may include symbols, logos, characters, mottos or slogans, emblems, designs, or musical themes. If your client owns a valid mark, it may license its use, prevent others from using it and obtain damages from someone who does so without authorization.

Rights in service marks or trademarks are created and exist at common law but federal law allows protection through registration of the mark with the Patent and Trademark Office. The "Lanham Act" located at 15 U.S.C. §§ 1051 to 1096 is the federal law.

Although a mark can be established by

use, federal registration provides the broadest protection. I suggest federal registration rather than state registration, inasmuch as federal registration grants constructive notice of your client's use of the trademark throughout the United States. The benefits flowing from federal registration include the following: (1) the right to sue in a federal court for trademark infringement (although unregistered marks can also be litigated and damages recovered from an infringer); (2) recovery of profits, damages and costs from the infringer with the possibility of trebling damages and obtaining attorney's fees; (3) establishing constructive notice of ownership of the registered trademark; (4) a presumption of ownership and exclusive rights to use the mark; (5) use of the federal registration symbol ® with the mark; (6) by depositing copies of the registration with the Customs Service it may stop importation of goods that bear an infringing trademark; (7) suit for counterfeiting the mark, including both civil and criminal penalties; (8) and, it allows filing a corresponding application in many foreign countries.

No further discussion of trademarks and service marks will follow in this article but sources I rely upon are: *McCarthy on Trademarks and Unfair Competition*, Third Edition, J. Thomas McCarthy, Clark Boardman Callaghan. *Trademark Registration Practice* by James E Hawes, Clark Boardman Callaghan. *Trademark Law Practice Forms* by Barry Kramer and Allen D. Brufsky, Clark Boardman Callaghan.

"The protection of your client's trade secrets is criticial . . . ."

PRODUCT DEVELOPMENT

Your client must be certain its product is fully developed and capable of being marketed on a regional or national basis. Preferably, its own business should be operated for a period of two or three years. You, as counsel, should look closely at the business to determine whether the product incorporates elements that may be covered by patents of others or which may be patented by your client.

Many things which your client does may not be patented or subject to trademark or service mark registration, however, with proper care, trade secrets can be just as critical to the success of your client in operating as a franchisor. Those trade secrets should only be disclosed after the prospective franchisee has signed appropriate covenants not to compete and not to disclose proprietary confidential information. Ideally, your client will have some product, service, procedure or recipe which is unique and for which a potential franchisee is willing to pay an initial franchise fee and continuing franchise royalties.

The protection of your client's trade

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secrets is critical and you, as counsel, must be certain to ensure that those elements of your client's business which are or can be deemed trade secrets are carefully protected and preserved. Trade secrets in Utah are governed by the Uniform Trade Secrets Act, *Utah Code Ann.* § 13-24-1 et seq. In Utah, a trade secret is defined as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy".

SOURCES OF SUPPLY FOR EQUIPMENT AND INVENTORY

In the event it is important for your client's franchisees to obtain specific equipment or inventory to operate the franchised business, it is critical that reliable supplies of the products be made available. In some cases, your client may manufacture or otherwise provide access to suppliers of these items. However, it is more common for franchisors to contract with others for the manufacture of equipment or products which are then supplied either directly to the franchisees themselves or through the franchisor. You may want to have your client enter into supply or licensing agreements with manufacturers or other suppliers under which they will prepare or manufacture products or equipment to your client's specifications and under your client's trademark.

REAL ESTATE ISSUES

Discuss with your client whether prospective franchisees will be acquiring property to operate their business by lease or purchase and what role, if any, your client will play in the process. Some franchisors purchase property and lease it to franchisees while others lease property and sub-lease to franchisees. That provides a certain degree of control over a specific location but presents other problems as well. Some franchisors help franchisees locate property and even help negotiate purchase or lease arrangements. That, too, can create exposure which needs thought and direction.

THE CONFIDENTIAL OPERATIONS MANUAL

The confidential operations manual ("Manual") is certainly one of the most critical elements of the franchising program. It is a comprehensive book, often in loose-leaf format so that pages can be updated and substituted, which details the entire operation of the franchised business. This Manual describes how a franchisee is to operate the business in vivid detail, including the day-to-day operation of the business from opening the store in the morning to locking it up at night. Your role, as counsel, is typically not to prepare the Manual but to review and analyze it with several ideas in mind: (1) does the Manual give a franchisee something of value; (2) does it describe a method of operating the business in a unique way that a franchisee would not otherwise have; (3) can the method of operation be used by franchisees generally; (4) is the Manual consistent with the terms of the Franchise Agreement and the terms of the

Franchise Offering Circular (to be discussed below) or other representations which your client may make.

TRAINING

Your client must design and establish a training program that covers every aspect of the franchised business. Your client must determine who will instruct the training, where it will be located, how long it will last, whether a fee will be charged and who will pay the expenses. Recent disclosure requirements which have taken effect January 1, 1995 for the Uniform Franchise Offering Circular ("UFOC") requires your clients, with respect to *each* subject taught in training, to identify the beginning time of the instruction, an identification of the instructional material to be provided, the number of hours dealing with that subject in the classroom, the numbers of hours dealing with that subject in on-the-job training, and the name of the instructor.

FRANCHISEE FEES, ROYALTIES AND OTHER EXPENSES OF OPERATING A FRANCHISE

You client obviously intends to profit from its efforts in franchising its business. It can obtain income in a number of ways: (1) the initial franchise fee which is the money paid by a potential franchisee for the right to operate a franchised business, be trained, be exposed and have access to the Manual and carry your client's mark to the public; (2) a continuing royalty fee which is typically calculated as a percentage of gross sales and is paid periodically (usually monthly or semi-monthly) through the term of the Franchise Agreement; (3) advertising fees which are fees paid either to the franchisor or to an entity controlled either by the franchisor or by a group of franchisees, to prepare point-of-sale materials, ad slicks, media promotional material as well as the actual purchase of advertising space and time. This, too, is often a percentage of gross sales and, in addition to funds being delivered into the control of the franchisor or an advertising association, other dollar or percentage requirements for advertising in each local area may be imposed by your client upon the franchisees.

MARKETING AND MANAGING

Selling franchises must be closely monitored by your client so that sales are made only in accordance with applicable federal and state law. Initially your client may personally market the franchise opportunity, but as the business expands (which it will because it is *your* client), others may be hired or placed under contract to sell franchise opportunities. This requires careful hiring and training of a sales organization and having programs and methods detailed to ensure appropriate compliance. Your job is to provide extensive guidance with respect to what your client or its representatives may or may not do in the course of selling a franchise; in preparing the appropriate Franchise and other agreements as well as the UFOC, which differs little from the process of putting together a securities prospectus. Preparing and registering the UFOC is very complex and can be very tedious and expensive.

A support system of franchisees needs to be established. This should include not only central management but also a field organization which will visit each franchisee on a regular basis to ensure appropriate business operations in accordance with your client's guidelines and also to assist franchisees in solving their problems and operating their business successfully. Your client needs to have the capacity to monitor and to collect royalties and fees and ensure that the franchisees are in total compliance with the Franchise Agreement and applicable laws.

"Selling franchises must be closely monitored . . . so that sales are made only [under] federal and state law."

THE FRANCHISE AGREEMENT

One of your most critical obligations will be to ensure that your client's franchise agreement incorporates every important element of the arrangement between it and its franchisees that is not otherwise confidential or included in the Manual. There is no "standard" franchise agreement however the information required to be disclosed under the UFOC is often used as a starting point in covering all the relevant terms of the agreement.

FRANCHISE DISCLOSURE

Franchise disclosure is governed in the United States by the Federal Trade Commission under the Federal Trade Commission's Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures. This is known, within the industry as the "Rule" (16 CFR pt 436). In addition, currently sixteen states have adopted their own laws regulating the offer and sale of franchises. Those states include the following: California, Hawaii, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin. Each of those except the states of Michigan and Oregon, require that your client first register with its appropriate agency prior to making any offer or sale of a franchise. Michigan requires only filing of notice of intent to sell and Oregon requires only that full disclosure be made of all relevant terms, but neither of those states nor any of the other states not mentioned, actually review the registration. The fourteen states remaining conduct a full in-house review of the offering circular, charge your client a huge fee for their services and, depending upon how well the documents satisfy each state's requirements or depending on what the examiner ate for breakfast, you may be put to the task of repeated modifications until the Franchise Offering Circular is approved.

In addition to the registration, each state requiring registration also requires that the material used in advertising be filed with the same agency for approval prior to use.

THE UNIFORM FRANCHISE OFFERING CIRCULAR

Most franchisors utilize the form created by the North American Securities Administrators Association (NASAA) which is called the Uniform Franchise Offering Circular ("UFOC"). The UFOC goes beyond the basic requirements set forth in the "Rule" but covers most of the material required by the fourteen registration states and hence, when used, requires comparatively minor adjustments when submitted for approval of registration in the registration states.

The UFOC must be delivered to a potential franchisee by the *earliest* of (1) the first personal meeting to discuss the franchise, or (2) ten business days before

signing of a binding agreement, or (3) ten business days before any payments are made by a potential franchisee to your client.

The UFOC must be written in what is termed "plain English." As a result, many of the words or phrases we have a tendency to use in the practice have been banished forever. Some of the following banished terms or words will serve as an example: thereafter, therefrom, thereof, thereunder, whatsoever, notwithstanding, including but not limited to, further, hereby, herein, hereinafter, hereto, heretofore, etc. (you get the point).

Further, in addressing the parties, the franchisee is often referred to as "you" and the franchisor is often referred to as "us" or "we". Frankly it has been a helpful exercise for me that I am using in other forms of documentation.

Each UFOC must have a cover page disclosing registered agents, risk factors and regulatory authorities governing the sale of the franchise in the particular state. Thereafter, the UFOC requires disclosure in 23 specific "Items" which I shall briefly cover in their numerical order. To whet your appetite, I have listed the captions to the 23 Items for which complete disclosure is required. Believe me, this is a summary only. The NASAA guidelines explaining what is required total 94 pages.

Item #1 The franchisor, its predecessors and affiliates.
Item #2 Business experience.
Item #3 Litigation.
Item #4 Bankruptcy
Item #5 Initial franchise fee.
Item #6 Other fees.
Item #7 Initial investment.
Item #8 Restrictions on sources of products and services.
Item #9 Franchisee's obligations.
Item #10 Financing.
Item #11 Franchisor's obligations.
Item #12 Territory.
Item #13 Principal Trademark.
Item #14 Patents, Copyrights and Proprietary Information.
Item #15 Obligation to participate in the actual operation of the business.
Item #16 Restrictions on what the franchisee may sell.
Item #17 Renewal, Termination, Transfer and Dispute Resolution.
Item #18 Public Figures.
Item #19 Earnings Claims.
Item #20 A List of Outlets.
Item #21 Financial Statements.
Item #22 Contracts.
Item #23 Receipt.

You may obtain a copy of the Uniform Franchise Offering Circular Guidelines which were adopted by NASAA on April 23, 1993 and became effective January 1, 1995 by sending me $10.00 to cover out-of-pocket costs. My address is:

Jeffrey C. Swinton
Stoker & Swinton
311 South State, Suite 400
Salt Lake City, Utah 84111
359-4000 or fax at 359-6603

In the event you intend to take franchising more seriously in your practice, please feel free to call me with any questions you have so that I might steer you in the right direction. Helpful information can also come from being a member of the Utah State Bar Franchising Law Section and the American Bar Association Forum on Franchising.

Federal Civil Judicial Procedure and Rules, 1995 Now Available

West Publishing announces the release of *Federal Civil Judicial Procedure and Rules*, 1995 Edition pamphlet. This pamphlet replaces the 1994 edition, and provides laws of the 103rd Congress, second session, as amended to February 1, 1995.

West's *Federal Civil Judicial Procedure and Rules*, 1995 covers laws pertaining to child support orders, authorization of bankruptcy judges to conduct bankruptcy jury trials, admissibility of evidence in sexual offense, sexual assault and child molestation cases, crimes of prejudice based on disability within the Hate Crimes Statistics Act, extension of the authorization for an independent counsel with prosecutorial jurisdiction, and the involvement of the Attorney General and the Director of the Federal Bureau of Investigation in felony crimes of violence against travelers.

Also included is the incorporation of amendments to the Federal Rules of Evidence and Federal Rules of Appellate Procedure adopted by the Supreme Court of the United States and submitted to Congress for approval, judicial conference schedule of fees to be charged for services performed by district court and bankruptcy court clerks, and schedule of interest on money judgments in civil cases.

For more information about the *Federal Civil Judicial Procedure and Rules*, 1995 Edition pamphlet, contact West Publishing at 1-800-241-0214.

Utilizing Your Support Staff: Law Librarians and the Legal Community

By Marsha C. Thomas

INTRODUCTION

Librarian — immediately the image of a matronly sort in a wide skirt with hair in bun and horn rimmed glasses (on a chain around the neck) pops into mind.

I'm a librarian and my hair is not long enough to put in a bun. I wear contacts instead of glasses, and every day I help people from all walks of life find every kind of legal information you can imagine. I am also an attorney . . . when people find that out they say – "so what is your specialty?" When I say "research" they think I'm joking.

However, that is what a law librarian is – a specialist in legal research. A Law Librarian specializes in finding the information you require. In doing this, a Law Librarian must also organize the information so that it is indeed findable. There is a true story (which happened in Salt Lake) of the people who moved a law library, and thought they were being helpful by shelving all the Volume 1s together, all the Volume 2s together, and so on, totally disregarding whether the volumes were Pacific Reporters or Supreme Court Reporters. As you can imagine, chaos ensued.

A good Librarian is a valuable resource for the practicing attorney. Here are some tips for utilizing a Librarian wisely.

BEFORE WE START

First, before anything, if you don't already have a Librarian, consider hiring one. Sure, your firm may be small or you may think you don't have enough volumes to warrant a Librarian. There are options for you. You can share a Librarian with another firm or you can hire someone part-time, who can make sure your library is well organized and up-to-date. You could designate a person already within the firm as the library liaison. The thing not to do is to set the books in a room and hope they will organize and update themselves while no one is watching. It won't happen. Before you know it, you will be throwing out expensive sets because you are unsure of their reliability.

MARSHA C. THOMAS is a 1992 graduate of the University of Utah College of Law. She is employed at the University of Utah Law Library where she is a Reference and Outreach Librarian. In addition, she teaches sections of beginning and advanced Legal Research to law students.

So, once you have a Librarian, or someone designated for the library, try the following.

TIP #1 ENCOURAGE YOUR LIBRARIAN TO NETWORK

There is strength in numbers. There are a variety of professional organizations for librarians and ways a librarian can network to increase success in obtaining the information you need.

Monthly Meetings with other Librarians

On a local level there is the Wasatch Front Law Librarians. This group of Librarians began meeting in 1979 when two librarians — Marijane Lambert (Snow, Christensen & Martineau) and Maxine Peterson (at Fabian and Clendenin at the time) saw a need for communication between librarians and decided to do something about it. In the beginning, three or four librarians would meet informally for lunch at a local restaurant. Today, approximately 20-25 librarians participate, meeting regularly once a month to discuss everything from cataloging collections to CD-Roms. There is a bi-monthly newsletter published which contains articles of interest to law librarians, as well as a directory of Wasatch Front Librarians. This group also adopts a charity once a year. Last December over $300 in cash and in-kind donations was raised for the Women and Children's program at Odyssey House. Any law librarian (or support staff who oversees your library) is welcome to join. To become involved with this group, contact the coordinator Phyllis Sue Howell from LeBoeuf, Lamb, Leiby & Macrae at 320-6761. No library is too small or too large to benefit from association with this group.

Regional and National Organizations

The national organization for Law Librarians is the American Association of Law Librarians (AALL). It is a very active association, and holds annual meetings which contain a wealth of information for every type of law librarian. In exchange for the yearly dues, in addition to being involved in a dynamic organization, your Librarian will receive a subscription to the *Law Library Journal*. As well, subscriptions are available to special interest newsletters. The Western States chapter of AALL is called WESTPAC, which also holds a more locally situated annual meeting. As well, there is the Utah Libraries Association which holds an annual meeting within Utah and publishes a newsletter, but is not oriented specifically toward law libraries.

The Salt Lake Union List

Jerry Kern, a Law Librarian at Questar Corporation and also a member of the Wasatch Front Law Librarians, has compiled a Union List which lists selected directories, periodicals, codes, treatises, and on-going services from more than a dozen law firms and corporations in Salt Lake City, thus increasing cooperation between libraries for lending purposes. If you are in need of a book your library doesn't carry, this Union list is a good resource for your librarian to check.

Check Out Surrounding Public Law Libraries

In addition to the Union List, think of using your local law and public library as sources of legal material and information. The University of Utah Law Library has Reference Librarians available six days a week. Any Utah attorney with a current bar card is given University of Utah Law Library borrowing privileges at no cost. See if there are similar policies at a law library near you.

There is the Utah State Law Library, there are County Law libraries, and there are University libraries. Utah State University Library is the Regional Depository for federal government documents, and they are generous with their lending of government documents. As well, there are other libraries around the state that carry legal materials and are open to the public.

"The days of an all-paper law library are gone."

Last year, we surveyed public libraries to see which libraries carried which type of legal material. The survey resulted in a document titled *Utah Libraries Law Related Material*. This document is available upon request from the University of Utah Law Library.

Electronic Mail Groups

If your Librarian has an electronic mail address on the Internet, have your Librarian subscribe to the electronic mail list called Law-Lib. There is also a Law-Lib list for librarians at private law firms called PrivateLawLib. This group of Law Librarians discusses topics ranging from the proposals for vendor-neutral citation formats to urgent requests for specific information. This list is also a resource where needed book volumes can be requested or donated. I used this mail list to ask for help in obtaining some 1956 Tanganyika ordinances (fascinating, yes) and received an answer from a Law Library that carried them within a short period of time. If you are not connected with the Internet, get connected (more reasons for this are listed in tip number 2.).

TIP #2 SUPPORT YOUR LIBRARIAN WITH THE REQUIRED TECHNOLOGY.

The days of an all-paper law library are gone. Let your librarian support you with the information you need. Technology is exploding in the legal arena with the advent of affordable CD-Roms and commercial connections to the Internet. In the past, there were the two main electronic legal information providers — Westlaw and Lexis. Now there is a variety of publishers, and a variety of information. What is good about this is that almost any type of information is findable electronically. The bad part about this is that there are so many different methods for searching the information.

Compact Discs (CDs)

There are a lot of legal CDs out there (just take a look at the *Directory of Law-Related CD-Roms 1995*). For every type of CD, there seems to be a new type of "search machine" or way you have to search . . . everything from Folio® to SearchMaster® to Premise® and so on. A librarian needs to be familiar with each of these searching formats. Multi-volume sets can now be searched at the speed of light (almost). Everything from Utah cases to the Code of Federal Regulations can be searched with the stroke of a computer key. To keep up with this, your librarian needs access to CD-Roms (along with adequate training and technical support) that are applicable to your practice. (See David Nuffer, "Do I Need a Compact Disk Reader for My Computer?", 7 *Utah Bar Journal* 32, April 1994).

The Internet and the World-Wide Web

Supreme Court opinions, SEC Edgar filings, IRS tax forms and publications, the Congressional Record, the REI catalog . . . this is all information that is available out on the internet. Connecting your Librarian to the "net" would be a wise thing to do.

What it is

When people talk about the "net", I think of a giant connection of people and sites that have deposits of information. The people and information are all over the world, and it is my job to sort through it to find the information I need.

The people are connected via *electronic mail.* With electronic mail, you can send a message to a colleague in New York. You can join an electronic mail list like the one mentioned above for librarians. (There are other lists: tax lists, copyright lists, oil and gas lists, even an O.J. Simpson list).

There are also public files on the "net", that you can transfer to your own computer directory by *FTPing* (File Transfer Protocol).

There are *GOPHERs* (named Gopher because it was first set up by University of Minnesota and their mascot is the Gopher). These gophers contain all sorts of information. For example, University of Utah Gopher contains the current legislative bills, searchable by keyword. There are federal gophers, commercial gophers, all sorts of gophers.

The World Wide Web

The latest and greatest Internet item is the *World Wide Web.* Whereas Gopher is text-based, the World Wide Web is graphically based. This means that you can now get a picture of Bill Clinton instead of just getting the State of the Union address. How does this help you? You can obtain graphical images like the IRS tax forms in addition to straight text.

In order to access the World Wide Web you need an Internet connection (may be provided by a local internet provider for between $20 and $30 per month) and a "browser".

This browser is your graphical interface to the Web, and allows you to go from Web site to Web site with just a click of a mouse. With a click you can be in Washington D.C., or in Australia. Some browsers allow you to search gophers at the same time you are searching Web sites, so you get a two for one deal. When you hear the names Mosiac®, or Netscape® – those are browsers.

Once your librarian is provided with the adequate technology and training, he or she will be able to pull that recent Supreme Court opinion off the "net" that you require, check the status of a bill you are interested in, or see if the Department of Justice released that Antitrust report.

One more note about technology

In addition to appropriate research technology, give your librarian the organizational tools he or she needs. Is your firm library big enough to require an electronic card catalog? Would it be more cost effective to have an electronic acquisitions system? Check it out.

TIP #3 SUPPORT YOUR LIBRARIAN

By this I don't mean saying "thank you" once a year with that box of chocolates. I mean the following.

Support Staff

Give your librarian the proper support staff. How can a librarian obtain that document you so desperately need if she or he is worried about making sure the looseleafs are properly filed? Provide an assistant for your librarian who can complete clerical tasks. Then your librarian can focus on the more important (and interesting) tasks of locating, accessing and organizing the information you need.

Encourage Excellence

Encourage excellence by giving the librarian *proper work assignments.* Librarians are used to getting a variety of requests from the mundane (Where are the reporters?) to the impossible (Can you get me a copy of this opinion that isn't published anywhere? . . . No, I don't know the name, but I know the state . . .). Be specific in your requests, and explain your request in plain English. Make sure job responsibilities are clear.

Encourage *professional development.* Professional development is what will get your librarians excited about their jobs and in turn cause them to excel. Librarians tend to have high job satisfaction, and as a result, there isn't a lot of upward mobility from job turnover. Ideas for improving job performance will come from outside sources, from library literature, from attending monthly meetings, conferences and seminars. Encourage your librarian to network locally with surrounding librarians. If there isn't a group in your area, encourage your librarian to start one.

Reward Excellence

Give a good salary for good work. Make the librarian an integral part of the staff, not just someone "down the hall". Perhaps use a financial incentive (See Kelly Knunsch, "Commentary, Tip Jars at the Law Library Reference Desk", 86 *Law Libr. J.* 369 (1994)). Some private firms bill for their librarian just as they bill for an associate. If the work is valued, show it.

Try all of the above to increase the productivity of your office. Utilize your librarian . . . because a librarian is too valuable an asset to waste.

"Loser Pays" — Justice for the Poorest and the Richest, Others Need Not Apply

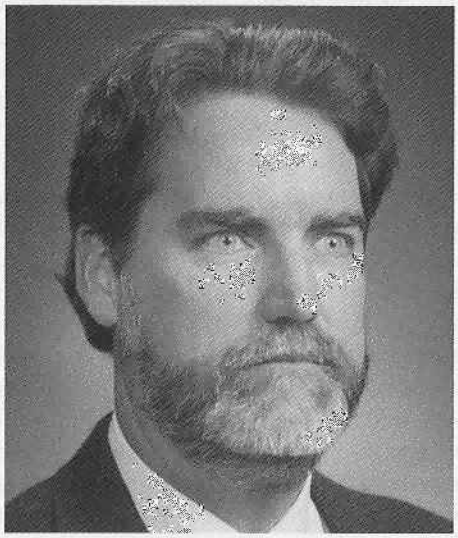
By Francis J. Carney

Pauline Hughes isn't much impressed with the "loser pays" system. Her husband, William, died of complications of a gallbladder surgery in a London hospital. She sued the hospital for malpractice, won a verdict at trial, but lost it on appeal. In the end, Mrs. Hughes owed her lawyers $150,000, contingent fees being illegal in Britain. What's worse, she also was liable for the bills of the hospital's lawyers, leaving her not only with a dead husband but $300,000 in debt.[1]

Had Mr. Hughes died in this country, his family would be out nothing for legal fees. Their predicament was but an accident of Mr. Hughes' birth or, more to the point, of his death. By dying in Britain, his family's wrongful death action became subject to the "English Rule," an idea now advanced as a remedy to the "crisis" in tort litigation.

The English Rule in one variation or another is the subject of several bills now before Congress. As of this writing, the "Common Sense Legal Reform Act of 1995" has passed the House of Representatives and will require, with some limitations, an award of attorney's fees to the prevailing party in all diversity suits. A similar bill applies to securities actions.

There is a flood of civil litigation in America that's costing us billions (three hundred of them according to Dan Quayle), dulling our competitive edge in world markets, and plaguing us with parasitical lawyers fattened on juicy contingent fees. Or so we are told by the insurance companies and the Republicans. But if we listen to the trial lawyers and their allies, we're informed that in reality there is a well-financed conspiracy by the insurance industry and corporate interests to strip from injured consumers the power to hold the malefactors of great wealth accountable for their misdeeds.



FRANCIS J. CARNEY is a partner in the Salt Lake City firm of Suitter Axland & Hanson who specializes in the defense of medical malpractice claims.

Whatever the truth is, we've all heard the overheated propaganda from both sides of the "tort reform" issue. Whether there really is a tort crisis is not the subject of this article, although I will say that I have seen little evidence for it in seventeen years as a defense attorney. The "loser pays" proposal is one issue on which I agree with the trial lawyers: it will reduce litigation, but at a cost none of us will want to bear.

DOES THE ENGLISH RULE WORK FOR THE ENGLISH?

A chief argument in support of the "loser pays" rule is that it has worked for England for years and would work here as well. The English have no less justice than we, and have it at a far cheaper price, or so the argument goes. The American Rule where each side pays its own lawyers is an aberration and our country is paying a steep price for its risk-free litigation tradition that benefits no one but a few lucky plaintiffs and an overpopulation of lawyers. So let's get in step with the rest of the world and make the losers pay all of the lawyers' bills.

An argument not without some superficial appeal. But there is a flaw: the system doesn't work in Britain. Using the civil courts in Britain is too expensive and too risky for all but the poorest and the richest. Don't take my word for it. Take the word of a leading conservative publication, *The Economist*.

The present British system, *The Economist* recently editorialized, denies access to justice to huge numbers of people. The middle class, not having the benefit of the government legal aid available to the poor, can neither afford lawyers nor risk paying the costs of a loss. Some British studies show that as many as 85% of all accident victims never even attempt to collect any compensation, a main reason being the fear of legal expenses. And this from a publication that isn't a mouthpiece of the plaintiff's bar nor generally known for an anti-business slant.[2]

The editors of that respected magazine go so far as to recommend that Britain immediately dump the "loser pays" rule and permit contingent fees: *"Abandoning the 'loser pays' rule in Britain and introducing contingency fees would make it possible for millions more people to use the courts, whatever their wealth. Admittedly, such changes would mean more litigation, though that is the inevitable and, up to a point, the desirable result of providing more access to the courts for more people."*

It's ironic that sensible minds in Britain are thinking of abandoning the "English Rule" while some Americans are proposing that we adopt it. Is the "American Rule" really so bad compared to what the rest of the world has? Again, here's what the Brits have to say: *"So much fury is leveled at litigation in America that the merits of its civil justice system are often forgotten. Unlike in Britain, almost anyone can uphold his rights in the courts. That means redress for consumers against unscrupulous firms and protection for voters against unaccountable public officials. Neither should be sacrificed lightly."* It sounds like we ought to think carefully before we switch to something that might leave us worse off.

THIS HAS BEEN TRIED HERE ALREADY

It's not as if only mad dogs and Englishmen go out in the midday sun. The "loser pays" system is something that has been tried here before. The Florida Medical Association once had the idea that a "loser pays" statute would deter frivolous medical malpractice claims and was able to push through a bill in 1980. Four years later, they were begging for its repeal. There were indeed fewer suits overall. But while the successful plaintiffs got their attorney's fees out of the insurance companies, it rarely worked the other way around. This attempt at tort "reform" was permanently shelved.

There's a reason that similar efforts have gotten nowhere in the Utah Legislature: organized medicine knows they don't work and doesn't support them. As recently as the last legislative session, a "loser pays" bill for all medical malpractice cases was introduced but died from the lack of any support.[3]

LET'S GET REAL

Let's put the abstractions aside and imagine a live breathing client under a "loser pays" system. Jennie Smith comes to you with having just learned of an unnecessary nine-month delay in the diagnosis of her breast cancer. After hearing her story, reviewing the records, and speaking with a doctor or two, you're willing to take her case. You know that Ms. Smith works as a paralegal and couldn't possibly afford your hourly fee nor the rates charged by the experts you'll need to hire, so you agree to take her case on a contingency and front the costs.

The claim has some merit and you can locate experts to testify that the standard of care was breached. However, you also know that the defense will have credible experts to testify that the care was appropriate and that, even if it wasn't, there's no evidence that the delay harmed your client in any measurable manner.

The likely defendants are a radiologist, a family practice physician, and a hospital. They are sure to hire experienced lawyers and each of those lawyers will be billing their client's insurer at about $135 an hour.

Does Ms. Smith want to pursue the claim? You might first want to tell her that there are no assurances that she will prevail. You might want her to know that at least three-quarters of all medical malpractice cases tried result in defense verdicts. And of course you're going to tell her that the "loser pays" system requires that she pay all the defense fees if the trial doesn't go her way. And don't forget to tell Ms. Smith that the defense fees could easily exceed $100,000, and would be treated just like any other judgment. Her new

home in the lower Avenues, her paycheck, and in fact everything she owns might be subject to execution. Is Jennie Smith ready to risk everything to make her point?

Let's suppose she is. The case is filed and trial nears. The settlement conference is underway. I can almost hear the defense lawyer now: "Ms. Smith, my client understands your feelings and sympathizes with your problems. But $50,000 is a very fair offer. I am sure that your counsel here has explained to you that the losing side must pay the winner's costs and legal fees. It's my obligation to tell you and your counsel that my client alone has incurred fees to date of more than $35,000. I suspect that the other two defendants have spent at least that much. Those fees are likely to double if we go to trial. Bearing that in mind, will you please carefully consider our offer?"

Is the insurance company going to swing this club? You bet it will. On the other hand, will the insurance company, be influenced by the threat of having to pay a plaintiff's attorney fees? Perhaps slightly, but not very much so, and certainly not as much as the plaintiff will be. This club is a stalk of stale celery for the plaintiff but a Louisville Slugger for the defense.

Those with nothing to lose, or those who won't be floored by payment of defense fees, will go forward and sue as they did before. But everyone else with an average income, a home with a mortgage, and some savings put aside will think long and hard before filing any claim that isn't a sure and certain winner. The "loser pays" system is a kick in the teeth to all but the poor, who can't pay legal bills anyway, and the rich, who can, but won't go broke if they have to.

"This club [loser pays] is a stalk of celery for the plaintiff but a Louisville Slugger for the defense."

That's exactly what the proponents of the "loser pays" system intend: not so much to deter "frivolous" claims as to reduce the total of all tort actions. And to deter them not because people know their claims have no basis, but because they can't afford to be wrong.

The "loser pays" fans take losing at trial to mean an action was "baseless." It doesn't. A trial victory does not equate with being right; a loss doesn't mean being wrong. Plausible claims go down the tubes for any number of reasons, ranging from arcane procedural ones to whether the jury disliked the plaintiff. Infrequent are the cases where a juror will admit that a defense verdict was a simple or easy one to reach. Our vanities as trial lawyers aside, most trials are close-fought battles that might have gone the other way if tried again another day with another jury.

An obvious point to lawyers but not so obvious to the rest of the world. Really, how many of us have defended claims that were really baseless or frivolous? A few, for sure, but certainly not very many of them. If most claims, therefore, aren't "frivolous," then the effect of the "loser pays" system is to deter people with legitimate claims from pursuing them. If we want to deter "baseless" claims, then let's do it honestly and enact a "baseless claims" statute. Indeed, we already have one, at least on the state level, and we still have Rule 11 in the federal courts.

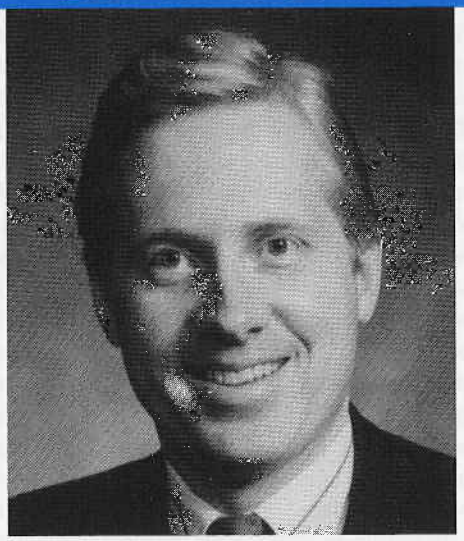
The proponents of the "loser pays" proposals trumpet the rights of injured people to "full recovery," by not having winners at trial bear the expense of their own lawyer's fees. They do have a point. But they would also cause average people to avoid the courthouse because a loss would wipe them out, while there's no such fear for the wealthy or the poor.

Try to right a wrong – but if it doesn't go as planned, welcome to Chapter 7. There's no doubt that there are frivolous lawsuits and absurd verdicts in our system. To some extent we can deal with both. But they may in the end be part of the price we have to pay for keeping the doors to the courthouse open for all of us.

[1]I am indebted to John F. Vargo's excellent article, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice", 42 *Am.U.L.Rev.* 1357 (1993) for the story of Pauline Hughes and recommend it for anyone interested in a more thorough treatment of the subject.

[2]"Bring the Balance Back", *The Economist (UK)*, January 14, 1995, pp. 13, 29.

[3]H.B. 447 (failed and not heard in committee).



Effectively Collect a Debt — Part I
Checklist for Developing Definitive Strategies

by Jeffrey Weston Shields

Debt collection practice, despite its seeming simplicity, requires the creditor and attorney to be familiar with a number of state and federal statutes applicable to the practice as well as to develop definitive strategies in each case to make the effort less expensive and more effective. Part I of this article will provide a checklist for developing strategies for pursuing a collection action (or, indeed, whether to pursue it at all). Part II will focus on statutory regulation of the debt collection process, particularly the Federal Fair Debt Collection Practices Act and the Utah Uniform Consumer Credit Code.

A. Knowing the Debtor. When deciding whether to pursue entry and collection of a judgment against a particular debtor, it is essential for the creditor to know three threshold facts: who (or what) is the debtor; where is debtor; and what is the debtor's financial position.

1. Who (or what) is the Debtor? While this question may seem rhetorical, in practice creditors often miscomprehend who or what owes them money. For example, if goods or services were provided to a corporation on open account, or a lending agreement or other instrument lists only a corporation as the borrower or customer, then an action may only be pressed against the corporate entity unless grounds exist to "pierce the corporate veil."[1] Some creditors incorrectly assume that a suit may be brought and judgment taken against the individual corporate officer or director who, for example, signed a contact or debt instrument on behalf of the corporation. A promissory note signed only "XYZ Corporation by s/John Doe, its President" provides a cause of action for collection only against the corporation and not against John Doe unless, of course, the creditor establishes grounds upon which the court rules that the corporate veil should be pierced.[2] However, if a debt instrument is signed by a corporation and is guaranteed by another corporation or by individuals, then the primary debtor and the guarantors may be sued simultaneously, although the creditor, of course, is entitled only to a single satisfaction (i.e. collection of the debt only once). It is hornbook law that guarantees must be in writing signed by the party to be charged with the guarantee to be enforceable. Utah Code Ann. §25-5-4(2).

It is also important in identifying the debtor to distinguish between a parent company and its subsidiaries. Be certain which is the debtor to avoid your suit being dismissed either for failure to join the actual debtor as an indispensable party (U.R.Civ. P. 19) or for failure to state a claim against the named defendant. Similarly, if a debt is contracted by only one spouse of a married couple, the creditor does not have a cause of action against the other spouse on the same debt, *Utah Code Ann.* §§30-2-1, 2 and 5, except if the consideration involves "expenses of the family and education of the children." (Utah Code Ann. §30-2-9). In this enlightened age, the law recognizes that married couples consist of two individuals who

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have separate rights, financial interests and abilities to make independent decisions on debts and obligations. In others words, we no longer assume, as a matter of law, that husbands and wives are joined at the hip.

Identifying the debtor will assist the creditor in deciding whether to pursue judgment at all. If the only debtor against which the claim can be pressed is a corporation with no assets, it may not be worth the effort to proceed.

2. Where is the Debtor? It is extremely frustrating for a creditor pursuing a claim against a debtor to discover that the debtor has "skipped" and cannot be served with process, contacted by telephone, or otherwise located.

With respect to a creditor being able to locate a debtor when the payment is overdue, an ounce of prevention is worth a pound of cure. In other words, when the credit relationship is first established, the creditor must make certain that adequate information concerning, for example, other persons with whom the debtor has regular contact, such as friends, other business contacts, and particularly relatives is obtained. A well drafted credit application should elicit this information.

There are several firms, such as detective agencies and locator services, whose primary business is locating debtors. Each of them have their own methods for locating so-called "skips." There are, however, a few inexpensive methods which a creditor may employ to attempt to locate the debtor:

a. Updated Credit Reports. If the creditor subscribes to one of the major credit reporting agencies, such as TRW Credit Data, the creditor can obtain a recent address because these services routinely upgrade debtors' addresses. This can be accomplished, for example, by the credit agency having reported to it a new credit transaction by the debtor at a different address. The debtor may have moved from his or her last residence but may have applied for a new credit card at the new address. As soon as the new potential credit grantor accesses the debtor's credit bureau file and provides the necessary information to conduct a credit search, including the address, the bureau's files should be updated.

b. The "Address Correction Requested/Do Not Forward" Letter. People seem to want to get their mail even if they are hiding from their creditors. Consequently, a debtor will often leave a forwarding address with the post office but will not disclose the forwarding address to creditors. If the creditor mails a letter to the debtor's former address, the letter may be forwarded to the new address, but the creditor would not be made aware of the new address. One way to discover the forwarding address is to send a letter to the debtor's last address with the legend "Address Correction Requested, Do Not Forward" prominently displayed on the envelope. The post office will place a sticker on the envelope providing the forwarding address which is on file, and will not forward the letter, but will rather return it to the sender.

"It is extremely frustrating for a creditor . . . to discover that the debtor has 'skipped' and cannot be served . . . ."

c. Interviews of Neighbors or Friends. Interestingly, even debtors attempting to hide from creditors will chat with neighbors or relatives concerning their new address. Sometimes it is worthwhile to stop by the debtor's former neighborhood and knock on the door of a next door neighbor. However, it is essential that the creditor only ask the neighbor if that person knows the debtor's new address or where to find the debtor rather than explaining that the debtor owes money. Otherwise, the creditor may run afoul of the limitations on "acquisition of location information" imposed by the Federal Fair Debt Collection Practices Act, 15 United States Code §1692b(2), provided that the creditor or agent is a "debt collector" pursuing a consumer debt and subject to the provisions of the Act. (The Fair Debt Collection Practices Act will be treated in Part II of this article). In any event, always remember that the neighbor or relative does not owe the debt and always observe common courtesy in making such inquiries.

The Federal Trade Commission has, with respect to skip tracing activities on *consumer* debtors, barred certain practices as being deceptive and improper: (1) representing that the collector is seeking information in connection with a survey; (2) that the collector is in the business of a casting service for the motion picture or television industry; (3) that the collector has a pre-paid package for the debtor; (4) representing that a sum of money or valuable gift will be sent to the addressee if required information is furnished; (5) representing that the accounts have been turned over to innocent purchasers for value; (6) representing that the debts had been turned over to an attorney or an independent organization engaged in the business of collecting past due accounts when such is not the case; (7) that documents are legal process forms. Federal Trade Commission, "Guides Against Debt Collection Deception," 16 C.F.R. §237.0 *et. seq.* (1-1-94 ed.).

3. What is the Debtor's Financial Position? The decision whether to incur the cost and effort to pursue entry of and collection upon a judgment will depend largely upon the debtor's financial condition. In other words, the debtor may be subject to other claims, judgments, or levies which have priority over the creditor's debt or may present an environment which is so full of competing claims that the odds of collecting the debt are very poor. While there are services which can be hired to conduct asset and financial investigations of a debtor, there are some routine and inexpensive methods with which a creditor may initially ascertain the debtor's financial condition at any particular time:

a. Credit Bureau Reports. Credit bureaus track and report items of public record with respect to debtors, such as judgments, suits, and levies (such as those which may be issued by the Internal Revenue Service or State Tax Commission). The credit bureaus also compile information from reporting members concerning the status of debtor's credits such as chargeoffs and delinquencies. A creditor can, in many instances, readily ascertain from an updated credit report the debtor's financial condition, particularly if the credit report is full of chargeoffs, unsatisfied judgments and like negative entries.

b. Public Record Searches. The creditor may also undertake its own public record search. For example, many title companies, for fees as low as $50, will search items of public record on the title

to, for example, the debtor's residence, which searches can reveal judgment liens, foreclosure notices, tax liens and levies, notices of *lis pendens* and like items of record which are indicative of the debtor's financial situation. Also, the federal court, state district court, and state circuit court all have public computer terminals which allow anyone to access information concerning civil and criminal actions against any particular person.

c. Conversation With The Debtor. Some debtors may readily tell the creditor why their debt is delinquent. However, in such conversations, the creditor should request the specific information to verify the veracity of the statements. Many debtors will only say that they are "broke" but when pressed for details, may be better off then that statement implies.

These fundamental methods of ascertaining the debtor's financial condition can also give the creditor clues as to whether, and when, the debtor may file a petition in bankruptcy. Many Chapter 13 bankruptcies, for example, are filed near the time that a foreclosure sale is set on the debtor's principal residence. Accordingly, a search of the title to debtor's real estate which will indicate the progression of a foreclosure action on the debtor's residence will give the creditor a good clue of the likelihood and timing of a bankruptcy petition.

When evaluating whether a debtor has sufficient means to satisfy a judgment, it is important to know why the debtor cannot or will not pay. While many delinquent debtors are simply spendthrifts or poor managers of money who need their priorities rearranged, creditors must simply accept the reality that sometimes unexpected catastrophic events happen to otherwise responsible people which substantially alters their financial situation. One of the most common catastrophic situations is an uninsured or underinsured medical crisis. According to the American Bankruptcy Institute, nearly half of all consumer bankruptcy petitions filed in this country result directly from a catastrophic medical expense triggered by a serious illness or accident which in turn is not sufficiently covered by medical insurance. This state of affairs is sometimes aggravated by the fact that the injury or illness prevents the debtor from working. In reality, all of us are two major illnesses away from financial ruin; that is, the first illness may be covered by insurance and the second one will not.

Another significant cause of financial distress is divorce. Divorce is, quite bluntly, an inherent financial disaster. Two households simply cannot run on the same amount of money that one household can. For example, only a fraction of single or divorced mothers in this country who are entitled to child support receive all of the child support which has been ordered on a timely basis or at all. Yet they rely upon the support to pay their basic bills. While all of these issues have deep political, philosophical and moral implications, suffice it to say that a creditor who encounters a debtor who has become embroiled in one of these catastrophic situations may simply need to conclude that pressing collection of the debt is not worthwhile.

Finally, if the debtor has filed Chapter 7 bankruptcy, and the creditor is an unsecured creditor of that bankruptcy estate, the odds of collection are very low.

B. When Not to Pursue the Judgment. It costs money to pursue a judgment against a debtor, even if the creditor proceeds without legal counsel. There are always filing fees, service of process costs and, usually, attorney's fees. In deciding whether it is worthwhile to pursue entry of a judgment, there are three basic facts which must be evaluated: the costs to collect; the likelihood of recovery; and the condition of assets available for realization of the claim.

1. Understanding the Cost to Collect. Like most things in life, when it comes to pursuing, establishing and collecting upon a judgment, there is no free lunch. There are both tangible and intangible costs in bringing suit against a delinquent debtor. Intangible costs may include alienating an otherwise good customer who is temporarily having financial problems or acquiring a reputation in a particular market or industry as being litigious or difficult. More important are the monetary costs which can quickly add up. These costs fall into two basic categories: Attorney's fees and hard costs.

a. Attorney's Fees. Most creditors employ attorneys to commence legal actions. This is a wise practice because

even small claims proceedings become difficult and confusing for lay people with respect to steps which must be taken, particularly *post*-judgment proceedings to collect on the judgment. It is not uncommon to see a layperson at the window of the court clerk's office trying to solicit legal advice and assistance from a member of the clerk's staff. The old adage that "one who acts as his own lawyer has a fool for a client" generally holds true. The law is simply too complicated. Consequently, there will usually be attorney's fees which will be incurred in the debt collection process. Often clients contract with attorneys in collection matters on a contingency fee; that is, the lawyer takes a percentage of what is recovered, usually one-third to one-half. Sometimes the client may contract with the attorney on an hourly or flat fee basis. Under all three methods, attorney's fees will be incurred in the process of collecting the debt. The creditor may not be able to recover all of the attorney's fees from the debtor. For example, *Utah Code of Judicial Administration* Rule 4-505.1 contains an attorney's fee schedule for small collection matters which caps the amount of attorney's fees which can be awarded based on the size of the claim. Under the fee contract between the attorney and client, the client may incur more fees in the pursuit of a small matter than can be awarded under the Rule. It is interesting that there are often as many procedural and substantive hurdles to jump in cases where the sum in dispute is small as where the sum is substantial. However, it should be noted that the attorney's fee award provided in a judgment can be augmented by the amount of costs and reasonable attorney's fees which may be incurred in post-judgment collection of the action as may be shown by affidavit. In fact, the Utah Code of Judicial Administration directs that such language be placed in every default judgment. It is important to explain to clients that attorney's fees can be recovered in Utah only if provided by contract or statute. Finally, courts have the right to determine a "reasonable" attorney's fee and have full discretion to award less than what the attorney may have actually billed the creditor.

b. Hard Costs. There are myriad of filing fees and services of process fees incurred in the collection process. Filing fees just to initiate a complaint can range from $35.00 to $100.00. Service of process fees vary depending on the difficulty encountered in serving a particular item of process. Post-judgment writs, such as garnishments and executions, have issuance fees, and must be served and enforced by officers who charge a fee for the service. These are all out-of-pocket costs which will have to be paid to the court or the constable and must be factored into the decision to pursue collection.

"Some debtors may readily tell the creditor why their debt is delinquent . . . many . . . only say that they are 'broke' . . . ."

2. The Likelihood of Recovery. When deciding whether to embark on a collection effort against a debtor, a creditor must act as his or her own oddsmaker in assessing the chances of collection should a judgment be established. Factors which impact on the "odds," many of which are discussed under section A above, are: whether the debt is secured or unsecured; if the debt is secured, whether the collateral is in sufficient condition or sufficiently marketable to result in collection of the claim; whether the debtor has incurred some catastrophic loss, such as a loss of employment, catastrophic medical expense, divorce, or disability; whether the debtor is an entity, such as a partnership or corporation, without assets; whether the debtor is in bankruptcy; whether the debtor is subject to numerous other claims (and whether such other claimants have superior ability to collect money against the debtor than does the creditor); whether the creditor's claim is adequately documented and supportable in court in the event the debtor defends against the claim (*e.g.*, whether a claim against an alleged guarantor of a debt is supported by a signed writing as required by the Utah Statute of Frauds).

There is no exact method to ascertain the likelihood of collection; it is simply a matter of analysis and, ultimately, instinct.

3. Discovering the Condition of Assets. In the event the creditor's claim is a secured claim, it is important to ascertain the condition and availability of the collateral. Even if the claim is unsecured, once it is reduced to judgment, the creditor will be able to collect the judgment against non-exempt assets of the debtor and can obtain judgment liens against real property. Consequently, it is important to expose the condition of the assets in order to develop strategies for collecting the debt. The most fundamental way to expose the condition of an asset is to have it inspected. Most security agreements and deeds of trust provide for rights of inspection by the creditor at reasonable times and places. One particular concern for creditors which are foreclosing a deed of trust on debtor's residence, for example, is that debtors who feel they may lose the property will not take care of it and may often strip appliances and other items from the property, decreasing its value.

With respect to assets that are titled, it is essential to investigate whether there are other creditors with equal or superior claims to that asset. On real estate, the creditor must ascertain what superior liens exist against the property. The same information must be ascertained with other items of personal property which have titles, such as automobiles and recreational vehicles. In the case of automobiles and boats, for example, the creditor should check the "blue book" to ascertain the value of the collateral and how quickly that value may be decreasing. If the collateral asset is, for example, agricultural land, the creditor should have an inspection conducted by an expert to determine whether proper farming practices have been observed and whether, for example, the farm is infested with insects.

The creditor must also ascertain, in the case of enforcement by general execution, whether assets which the debtor has available are subject to statutory exemptions from execution. *See*, Utah Exemption Act, Utah Code Ann. §§78-23-1, *et. seq.*

[1]Discussion of when and how to "pierce the corporate veil" in order to bring actions individually against shareholders and officers of corporations is beyond the scope of this article. However, the grounds necessary to pierce the corporate veil must first be established in the action by a preponderance of the evidence and until that time, liability cannot be established against the individual officers, directors and shareholders. *See*, e.g., *Messick v. PHD Trucking Service*, 678 P.2d 791 (Utah 1984).

[2]In any event, piercing the corporate veil is not a simple evidentiary issue. The quantum of evidence necessary to prove a case for piercing the corporate veil is much more difficult than many creditors assume.

Discipline Corner

DISBARMENT

On February 10, 1995, a judge of the Third District Court entered an order disbarring Kathryn Schindelar as an attorney. This action was a reciprocal discipline under Rule 22 of the Rules of Lawyer Discipline and Disability.

In February, 1993, the Colorado Supreme Court, of whose bar Ms. Schindelar was also a member, disbarred her for misconduct that occurred while Ms. Schindelar was representing an elderly Utah client. During the time of that representation, the Colorado Supreme Court found that Ms. Schindelar took advantage of her fiduciary relationship with the client, by borrowing in excess of $75,000.00 from the client without providing adequate security for the loans, without advising the client to obtain independent counsel to review the transaction for fairness, and without obtaining a written waiver of any conflict of interest. After the attorney-client relationship between them terminated, the client sued Ms. Schindelar in state court to recover the loans. Ms. Schindelar then filed for bankruptcy, discharging her indebtedness to the complainant. Since Ms. Schindelar's bankruptcy estate appeared to have no assets, the complainant did not object to her discharge in bankruptcy, but did file complaints with the various state bars in which Ms. Schindelar was a member.

The Third District Court ordered that Ms. Schindelar make complete restitution to the client or to her estate as a condition precedent to any readmission to the Utah State Bar, in addition to all other conditions that she must meet for readmission.

RESIGNATION WITH DISCIPLINE PENDING

On March 27, 1995, the Utah Supreme Court issued an order accepting the Petition for Resignation with Discipline Pending of Lynn Charles Spafford. The Resignation was effective August 21, 1994.

This Resignation with Discipline Pending culminates that Office of Attorney Discipline's ("OAD") lengthy investigation into numerous allegations of Mr. Spafford's misconduct. The Resignation with Discipline Pending was based on Mr. Spafford's admission that he diverted nearly $200,000.00 from his firm's trust account to his own use during the years 1992-1994. Most of the persons affected were either personal injury or workers' compensation clients of Mr. Spafford's firm.

The Supreme Court's Order bars Mr. Spafford from applying for readmission until after August 21, 1999. During that time, Mr. Spafford cannot act or hold himself out as a lawyer, law clerk, paralegal, legal assistant, or in any other capacity in any law office. Mr. Spafford is to disclose to the OAD, under oath, the names of all persons or entities affected by his misconduct and the amount of money converted from each client. As conditions of readmission, Mr. Spafford must make full restitution to all affected clients, and comply with all other requirements for readmission under Rule 25 of the Rules of Lawyer Discipline and Disability.

SUSPENSION

On February 22, 1995, the Fourth Judicial District Court suspended Gary L. Blatter from the practice of law effective from October 21, 1994, the date of his Interim Suspension, until May 12, 1996. This suspension was based upon Mr. Blatter's conviction, pursuant to his plea of guilty, in the United States District Court for the District of Nevada, of Conspiracy to Commit Securities Fraud. The conviction constitutes a violation of Rule 8.4(b), Misconduct, of the Rules of Professional Conduct.

PROBATION

On January 27, 1995, the Third Judicial District Court extended the probation of Robert A. Bentley for an additional three years to afford him more time to make restitution to clients in accordance with an Order of Discipline entered in a prior proceeding by the Utah Supreme Court on April 2, 1992. In the prior Order Mr. Bentley had been placed on supervised probation for a period of two years. The additional period of probation will be unsupervised but will require bi-monthly reports to the Office of Attorney Discipline verifying that restitution is being accomplished.

ADMONITION

On January 13, 1995, an attorney was Admonished by the Ethics and Discipline Committee for violating Rule 1.2, Scope of Representation, Rule 1.3, Diligence, and Rule 1.4(b), Communication, of the Rules of Professional Conduct. The attorney was retained in or about September, 1993, to represent clients in a tort action for defamation. In or about November, 1993, a suit was filed. Thereafter, the attorney failed to prosecute the case and on or about July 5, 1994, it was dismissed without prejudice for failure to prosecute. Between about November, 1993, and July, 1994, the attorney failed to return phone calls or keep the clients informed as to the status of their case. During this period of time the attorney was suffering from and being treated for depression.

On January 26, 1995, the Ethics and Discipline Committee Admonished an attorney, upon the recommendation of a Screening Panel, for violating Rule 8.4(b) of the Rules of Professional Conduct. On or about October 19, 1992, the attorney entered a plea of guilty to Attempting to Distribute Cocaine. The attorney was sentenced to probation and the conviction was later reduced to a Class A Misdemeanor. The attorney is enrolled in a substance abuse program and successfully undergoing treatment.

On February 15, 1995, an attorney was Admonished by the Chair of the Ethics and Discipline Committee pursuant to a Discipline by Consent for violating Rule 1.14(d), Termination of Employment. In this instance the attorney had accepted new employment and withdrawn from private practice. Upon departing private practice the attorney did not withdraw from the Complainant's case or assist the Complainant in obtaining new counsel. When the attorney was advised that the hearing required a personal appearance, a Motion for Continuance was submitted due to the attorney's inability to appear. However, the Motion was not filed until the morning of the hearing. The court denied the motion, the attorney was not present, and the client's case was dismissed with prejudice. An Admonition

was deemed appropriate in light of the fact that the attorney had no prior disciplinary history, could not in fact attend the hearing, and the client was justly compensated for all losses.

On February 23, 1995, an attorney was Admonished by the Ethics and Discipline Committee pursuant to a Discipline by Consent for violating Rule 1.3, Diligence, Rule 1.13(b), and Rule 8.1(b), Bar Discipline Matters, of the Rules of Professional Conduct after refunding $500 plus in trust to the client. The attorney was retained in or about June, 1990 to resolve a dispute pertaining to title to real property. The attorney was given $500.00 to be paid to the opposing party to settle the matter. Thereafter, the attorney provided no meaningful legal services, failed to return any of the money to the client, and refused to respond to the Bar's requests for information concerning the complaint.

REINSTATEMENT

On February 7, 1995, Clayne I. Corey was reinstated to practice law by the Third Judicial District Court. Mr. Corey had been suspended from the practice of law for disability.

Executive Director Position Available

The Utah Judicial Conduct Commission is seeking applications for the position of Executive Director. An applicant must be an attorney licensed to practice in Utah. Duties will include dealing with the public, assisting with filing of complaints involving Utah judiciary, performing preliminary investigations, presenting complaints to Commission for screening, performing or coordinating additional investigations or other duties at the direction of the Commission or special counsel. A new director will be selected by July 31, 1995. If you are interested in this position, please send a latter of inquiry to the Commission at P.O. Box 510210, Salt Lake City, Utah 84151.

Needs of the Elderly Committee Initiates Simple Probate Referral Panel

by Mary Jane Ciccarello

The Needs of the Elderly Committee of the Utah State Bar has organized a Simple Probate Referral Panel in an effort to help persons of moderate means obtain necessary legal assistance at affordable costs.

The panel consists of private attorneys willing to provide probate services for qualifying individuals at a modest, reasonable fee determined by the attorney. To participate on the panel, interested attorneys must complete an application certifying that the attorney is a member in good standing of the Utah State Bar, carries adequate malpractice insurance, and has either taken the MCLE training on probate practice conducted by the Needs of the Elderly Committee or has three or more years of probate practice and has submitted judicial references to the Bar for approval. Finally, the attorneys must enter into a written retainer agreement with their clients. The attorney should structure the fee arrangement to provide the client with a reasonable estimate of fees and costs thereby reducing the client's anxieties. Where the services are limited to a "simple probate" for a fixed fee, the agreement should clearly set forth what is included in a simple probate and should also state what will occur if the probate unexpectedly becomes complex. Examples of written retainer agreements are available through the Bar.

"Simple probates" require legal services in connection with the routine administration of a modest estate. To be eligible for assistance by a panel lawyer, the potential client must have an estate to probate that is worth less than $200,000; the real property of the estate must be non-business and located in Utah only; and, the estate must not include any will contests, settlements of disputes among family members or creditors, or contests concerning the appointment of the personal representative.

The listing of panel attorneys is maintained by Diané Clark, the director of the Bar's Lawyer Referral Service. Callers are screened for eligibility before being referred to panel attorneys. There are currently thirty-five lawyers on the Simple Probate Referral Panel.

The Needs of the Elderly Committee started organizing the panel in the fall of 1994 at the urging of Richard Bojanowski, a committee member and retired lawyer, who also serves as a regular volunteer with the Senior Lawyer Volunteer Project, a privately funded pro bono project affiliated with Utah Legal Services that provides free legal assistance to low income persons with estate planning and planning for incapacity. Richard found that many of his elderly clients were so concerned with avoiding probate that they were doing things that were potentially detrimental to themselves while still alive. The committee, under the leadership of Joe Dunbeck, responded rapidly to his proposal that it do something to counter the myths and horror stories circulating about the evils of probate.

Committee members Kent Alderman and Dave Lauritzen developed training materials and along with Hal Rueckert, the probate clerk of the Third District Court, conducted the first training on probate practice to almost 100 lawyers in November 1994. The committee is now planning subsequent MCLE trainings.

If the probate panel proves successful, the committee plans to develop a Senior Lawyer Referral List to include other legal services such as wills to assist moderate income elderly persons, who are not serviced by existing programs that target only low income individuals, and to locate competent attorneys at affordable rates. Moderate income elderly persons often hesitate to approach private attorneys because of their fear of unexpected costs or because of age-related infirmities, thus often forgoing needed legal services.

For more information about the Simple Probate Referral Panel, contact Diané Clark, at 531-9075, or 1-800-698-9077.

JOB ANNOUNCEMENT

UTAH STATE BAR
CHIEF DISCIPLINARY COUNSEL

The Utah Bar Commission was advised on April 5, 1995 by Chief Disciplinary Counsel Stephen A. Trost that he was accepting a position as general counsel for a corporate entity and would therefore be resigning, effective May 5, 1995. The Bar Commission has appointed a search committee to review applications for the position.

Applicants should have a litigation background and excellent management and administrative skills. The Chief Disciplinary Counsel supervises a nine person staff in the Office of Attorney Discipline, which conducts investigations and represents the Bar in disciplinary cases before Screening Panels, the District Courts and the Utah Supreme Court.

Applicants must be admitted to practice law in Utah or sit and pass the Bar Examination within six months of the date of hire. Preference will be given to applicants with at least 5 to 10 years or more of practice.

Salary will range between $60,000 to $75,000, subject to qualifications. Benefits available.

Please submit resume and references to the Search Committee, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111, **no later than** 5:00 p.m., June 1, 1995.

The Utah State Bar is an equal opportunity employer. The Utah State Bar complies with all State and Federal laws prohibiting unlawful discrimination and provides reasonable accommodation to disabled individuals as required by the Americans with Disabilities Act.

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 Camille Elkington, 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.

Centennial Symposium, Ball, and Exhibit Celebrate Utah's Constitution

Start your week off with a new century! may well be the theme of an upcoming all-day centennial event honoring Utah's Constitution. The Utah State Archives, in conjunction with the University of Utah Marriott Library, Weber State University Stewart Library, and the Division of State History, will present a day-long symposium celebrating the one hundredth anniversary of the signing of Utah's Constitution on Monday, May 8, 1995, in the historic Salt Lake City and County Building, the site of the convention. The symposium, funded in part by a grant from the Utah Humanities Council, will be held between 9 a.m. and 4 p.m. in the council chambers.

A variety of scholarly papers exploring the political and social history of Utah's struggle for statehood and the drafting of the Utah Constitution will be presented. Scheduled speakers include Justice Christine M. Durham, Edward Leo Lyman, Jean Bickmore White, Dean L. May, Thomas G. Alexander, and A.J. Simmonds. Winners of a student paper competition, with the theme "Utah's Constitution and Your Rights," will also present papers at the symposium.

Admission to the symposium is free but due to limited seating participants are encouraged to arrive early. For parking information, please contact the Utah State Archives, 538-3013 or 538-3354 FAX.

"Utah's Road to Statehood," an exhibit featuring documents written at the time of statehood and gathered from various archival repositories in the state, will open on Sunday night, May 7, in the Salt Lake City and County Building. The exhibit, sponsored by the Utah Manuscripts Committee, will continue through May 8.

The celebration continues Monday evening as the Utah State Archives sponsors The '90s Then-and-Now Constitution Ball in the State Capitol Rotunda from 7:30 to 11:00 p.m. The Ball is funded in part by a grant from the Utah Statehood Centennial Commission. The first half of the evening, "Then," will feature ballroom dance music of the 1890s provided by the acclaimed Utah Philharmonic Orchestra conducted by Robert Debbaut. Vocalists George Dyer, Carolyn Talboys-Clawson, and Tom Clawson will sing popular hits of the Victorian era as part of an intermission program arranged by Columb Robinson. The second half of the evening, "Now," will feature the modern sound of the Forte Jazz Quintet under the direction of Evan Coombs. Dress is semi-formal. 1890's period costume is highly encouraged to enhance the spirit of the celebration. A light buffet will be provided. Tickets are $15.00 per person and will be available beginning mid-March, 1995, through Smith's Tix, 1-800-888-8499 or 801-467-8499.

Beat the Monday blahs. Start your week off with a new century!

Please Note

The article appearing in the June/July 1993 *Utah Bar Journal*, entitled "Mediation and Dispute Resolution: Time for a Chiropractic Adjustment to Professional Bias," neglected to give proper credit to the work and inspiration of Mr. Thomas Boyle, a fellow member of the Utah Bar, whose article, "Mediation and the Legal System: New Tricks for an Old Dog," first appeared in the October 1991 issue of the *Defense Counsel Journal*. Although without intent to mislead, the failure to afford proper attribution to Mr. Boyle had the effect of misrepresenting the work as being mine alone. I apologize for that error and any resulting confusion.

– David Slaughter

Appellate Rules Committee to Consider Presumption Against Oral Argument and Issuance of Published Opinions

The Utah Court of Appeals has requested amendments to the Utah Rules of Appellate Procedure creating a presumption both oral argument and a published, "fully reasoned opinion" are unnecessary in appeals. The proposed changes would place the burden on the parties to convince the court, in a new section of the appellate brief, that either or both are necessary in their particular case.

If adopted, these changes would formalize the internal operating policy put into effect at the court last January 1 to deal with the growing number of appeals filed each year and the concomitant need to dispose of more appeals each year in order to avoid unacceptable delays due to a growing backlog. Under this policy, the court anticipates that one-third of its caseload will be disposed of via judge-authored, published opinions. The remainder will be resolved through issuance of short, 2-4 page decisions setting forth the reasons for the result, written by the court's staff attorneys or by judges. These are sent only to the parties and to the originating trial judge or agency.

The Utah Supreme Court's Advisory Committee on the Utah Rules of Appellate Procedure will consider these proposed amendments at its meeting May 17, 1995 from 5:00-7:00 p.m. Interested members of the Bar, the bench, and the public are encouraged to attend the meeting, which will be held in the Administrative Office of the Courts' Education Room, 1st Floor Midtown Office Plaza, 230 South 500 East, Salt Lake City.

Copies of the proposed amendments are available from the Advisory Committee's staff attorney, Brent Johnson at the Administrative Office of the Courts (578-3817), or from its chairperson, Annina Mitchell, Deputy Solicitor General (538-1021). Those who wish to address the Advisory Committee in person about the proposed rule changes should RSVP by May 15 to Mr. Johnson. Written comments can also be submitted to him by that date for consideration by the Advisory Committee members.

Ethics Advisory Opinion Committee Announcement

The Utah State Bar is now accepting applications for positions on the Ethics Advisory Opinion Committee for terms beginning July 1, 1995. The Committee comprises 12 members who are appointed to three-year terms upon application to a Bar selection committee.

The charge of the Committee is to prepare written opinions concerning the ethical propriety of anticipated professional or personal conduct and to forward these opinions to the Board of Bar Commissioners for its approval.

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

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

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

Appointments will be made to accomplish two general goals:

- Maintaining a Committee that is willing to dedicate the effort necessary to carry out the responsibilities of the Committee and is committed to the issuance of timely, well-reasoned, articulate opinions.
- Creation of a balanced Committee that incorporates as many diverse views and backgrounds as possible.

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

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

A Call for Spanish Speaking Lawyers

The Governor's Office of Hispanic Affairs and the Tuesday Night Bar Program have come together to provide assistance to Spanish speaking members of our community. Lawyers who speak Spanish are needed to assist in this program so that Spanish speaking Hispanics can benefit from the Tuesday Night Bar Program. The program is scheduled to begin Tuesday, March 28, 1995. If you speak Spanish and are interested in participating in this program, please contact Kaesi Johansen at 531-9077, Utah State Bar, or Lorena Riffo, Governor's Office of Hispanic Affairs, at 538-8850.

United States Bankruptcy Court
For the District of Utah
STANDING ORDER #7

It is hereby ORDERED that the following Interim Bankruptcy Rules are adopted for use in the District of Utah:

Rule 1. Election of Trustee in a Chapter 11 Reorganization Case

(a) REQUEST FOR AN ELECTION. A request to convene a meeting of creditors for the purpose of electing a trustee in a Chapter 11 reorganization case shall be filed and transmitted to the United States trustee in accordance with Bankruptcy Rule 5005 within the time prescribed by § 1104 (b) of the Bankruptcy Code. Pending court approval of the person elected, a person appointed under § 1104 (d) shall serve as trustee.

(b) MANNER OF ELECTION AND NOTICE. An election of a trustee under § 1104 (b) of the Code shall be conducted in the manner provided in Bankruptcy Rules 2003 (b) (3) and 2006. Notice of the meeting of creditors convened under § 1104 (b) shall be given in the manner and within the time provided for notices under Bankruptcy Rule 2002 (a). A proxy for the purpose of voting in the election may be solicited by a committee appointed under § 1102 of the Code and by any other party entitled to solicit a proxy under Bankruptcy Rule 2006.

(c) APPLICATION FOR APPROVAL OF APPOINTMENT AND RESOLUTION OF DISPUTES. If it is not necessary to resolve a dispute regarding the election of the trustee or if all disputes have been resolved by the court, the United States trustee shall promptly appoint the person elected to be trustee and file an application for approval of the appointment of the elected person under Bankruptcy Rule 2007.1 (b), except that the application does not have to contain names of parties in interest with whom the United States trustee has consulted. If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. If no motion for the resolution of the dispute is filed within 10 days after the date of the creditors' meeting called under § 1004 (b), a person appointed by the United States trustee in accordance with § 1004 (d) of the Code and approved in accordance with Bankruptcy Rule 2007.1 (b) shall serve as a trustee.

Rule 2 Small Business Chapter 11 Reorganization Cases

(a) ELECTION TO BE CONSIDERED A SMALL BUSINESS IN A CHAPTER 11 REORGANIZATION CASE. In a Chapter 11 reorganization case, a debtor that is a small business may elect to be considered a small business by filing a written statement of election no later than the commencement of the meeting of creditors pursuant to § 341 (a) of the Code or by a later date as the court, for cause, may fix.

(b) APPROVAL OF DISCLOSURE STATEMENT.

(1) **Conditional Approval.** If the debtor is a small business and has made a timely election to be considered a small business in a Chapter 11 case, the court may, on application of the plan proponent, conditionally approve a disclosure statement filed in accordance with Bankruptcy Rule 3016. On or before conditional approval of the disclosure statement, the court shall:

(a) fix a time within which the holders of claims and interests may accept or reject the plan;

(b) fix a time for filing objections to the disclosure statement;

(c) fix a date for the hearing on final approval of the disclosure statement to be held if a timely objection is filed; and

(d) fix a date for the hearing on confirmation.

(2) **Application of Bankruptcy Rule 3017.** If the disclosure statement is conditionally approved, Bankruptcy Rule 3017 (a), (b), (c) and (e) do not apply. Conditional approval of the disclosure statement is considered approval of the disclosure statement for the purpose of applying Bankruptcy Rule 3017 (d).

(3) **Objections and Hearing on Final Approval.** Notice of the time fixed for filing objections and the hearing to consider final approval of the disclosure statement shall be given in accordance with Bankruptcy Rule 2002 and may be combined with notice of the hearing on confirmation of the plan. Objections to the disclosure statement shall be filed, transmitted to the United States trustee, and served on the debtor, the trustee, any committee appointed under the Bankruptcy Code and any other entity designated by the court at any time before final approval of the disclosure statement or by an earlier date as the court may fix. If a timely objection to the disclosure statement is filed, the court shall hold a hearing to consider final approval before or combined with the hearing on confirmation of the plan.

Rule 3. Jury Trials

(a) APPLICABILITY OF CERTAIN FEDERAL RULES OF CIVIL PROCEDURE. Rules 38, 39, and 47-51 F.R. Civ. P., and Rule 81 (c) F.R. Civ. P. insofar as it applies to jury trials, apply in cases and proceedings, except that a demand made under Rule 38 (b) F.R. Civ. P. shall be filed in accordance with Bankruptcy Rule 5005.

(b) CONSENT TO HAVE TRIAL CONDUCTED BY BANKRUPTCY JUDGE. If the right to a jury trial applies, a timely demand has been filed under Rule 38 (b) F.R. Civ. P. and the bankruptcy judge has been specially designated to conduct the jury trial, the parties may consent to have a jury trial conducted by a bankruptcy judge under 28 U.S.C. § 157 (e) by jointly or separately filing a statement of consent no later than at the time for the filing the Report of Parties' Planning Meeting pursuant to Standing Order #5. The failure to file such a consent shall constitute a waiver by the parties of their right to a jury trial.

This order shall be effective immediately.

Dated this 21st day of February, 1995.

Glen E. Clark
Chief U.S. Bankruptcy Judge

John H. Allen
U.S. Bankruptcy Judge

Judith A. Boulden
U.S. Bankruptcy Judge

Announcing the Bar's New Pro Bono Project

The Utah State Bar is pleased to announce the initiation of the new Statewide Pro Bono Project. The purpose of this project is to access community pro bono needs and then encourage attorneys to participate by donating their time for specific projects. The initial focus of the program will be on meeting the needs of Legal Aid Society, Utah Legal Services and other existing programs.

This project has been approved for a one year period and if it proves to be a success, it may be continued on. Toby Brown will be serving as the new Statewide Pro Bono Coordinator for the Bar. In this position he will be contacting lawyers and law firms to encourage their participation in the program.

The Bar appreciates and understands the time commitments and pressures that attorneys must deal with regularly. However, Bar members should also be mindful of their ethical responsibilities for public service. People of limited means do not have access to our legal justice system without lawyer volunteers. So please watch for further information on this program in the coming months, and be willing to help out as you are able.

Thank you for your support of this volunteer program. Your time and efforts in this program will benefit you and your community.

Supreme Court Seeks Attorneys to Serve on the Utah State Board of Continuing Legal Education

The Utah Supreme Court is seeking applicants to fill vacancies for the Utah State Board of Continuing Legal Education. Interested attorneys should submit a resume and a letter indicating interest and qualifications to Brent M. Johnson, 230 South 500 East #300, Salt Lake City, Utah 84102. Applications must be received no later than June 1, 1995. Questions may be directed to Mr. Johnson at (801) 578-38000.

Bar Commission Election Results

Denise A Dragoo

Debra A. Moore

Steven M. Kaufman

Following the recent election, Bar members have reelected Denise A. Dragoo and elected Debra A. Moore to serve as Bar Commissioners from the Third Division. Denise Dragoo has served four years on the Bar Commission and is a partner with the Law Firm of Fabian & Clendenin in Salt Lake City. Debra Moore currently practices in the Civil Appeals Section of the Utah Attorney General's Office and teaches legal writing at the University of Utah College of Law.

Steven M. Kaufman has been reelected to serve a second term as Bar Commissioner from the Second Division. Steve Kaufman has served three years as Bar Commissioner and is a senior managing partner with the Law Firm of Farr, Kaufman, Sullivan, Gorman, Jensen, Madsker & Perkins in Ogden, Utah.

Commissioner terms begin with the new fiscal year and commissioners will be sworn in during the Utah State Bar Annual Meeting beginning June 28, 1995 in San Diego.

JOB ANNOUNCEMENT
Utah State Bar
Chief Disciplinary Counsel

The Utah Bar Commission was advised on April 5, 1995 by Chief Disciplinary Counsel Stephen A. Trost that he was accepting a position as general counsel for a corporate entity and would therefore be resigning, effective May 5, 1995. The Bar Commission has appointed a search committee to review applications for the position.

Applicants should have a litigation background and excellent management and administrative skills. The Chief Disciplinary Counsel supervises a nine person staff in the Office of Attorney Discipline, which conducts investigations and represents the Bar in disciplinary cases before Screening Panels, the District Courts and the Utah Supreme Court.

Applicants must be admitted to practice law in Utah or sit and pass the Bar Examination within six months of the date of hire. Preference will be given to applicants with at least 5 to 10 years or more of practice.

Salary will range between $60,000 to $75,000, subject to qualifications. Benefits available.

Please submit resume and references to the Search Committee, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111, no later than 5:00 p.m., June 1, 1995.

The Utah State Bar is an equal opportunity employer. The Utah State Bar complies with all State and Federal laws prohibiting unlawful discrimination and provides reasonable accommodation to disabled individuals as required by the Americans with Disabilities Act.

Bill of Rights Symposium Scheduled

The J. Reuben Clark Law School's 1995 Bill of Rights Symposium is scheduled for Friday, October 27, 1995, from 9:00 am until 4:30 pm on the BYU Campus. This year's theme is "Power Shifting? Federalism in the 21st Century," and the symposium will provide 6 hours of CLE, including 1 hour of ethics. Registration materials will be available after July 1st.

1995 Annual Meeting Program

( ) Indicates Number of CLE Hours Available

Wednesday, June 28, 1995

12:00 noon — **Bar Commission Meeting** - Windsor Complex

6:00-8:00 p.m. — **President's Reception** - Promenade Deck
Registration - Promenade Deck
Sponsored by: Parsons Behle & Latimer
Kipp & Christian
VanCott, Bagley, Cornwall & McCarthy

Thursday, June 29, 1995

7:00 a.m. — **Registration and Continental Breakfast** - Empress Hall
Sponsored by: Michie Company

7:30 a.m. — **Opening General Session and Business Reports** - Regent/Viceroy Hall

Welcome and Opening Remarks
Loren E. Weiss, 1995 Annual Meeting Chair
Report on the Utah State Bar
Paul T. Moxley, President, Utah State Bar
Report on the State Judiciary
Chief Justice Michael D. Zimmerman, Utah Supreme Court
Report on the Federal Judiciary
Chief Judge David K. Winder, U.S. District Court
Report on the Utah Bar Foundation
James B. Lee, President

8:30 a.m. — **Break** - Empress Hall
Sponsored by: LeBoeuf, Lamb, Greene & MacRae

8:30-12:30 p.m. — **Utah Kid's Jamboree** - Check in at Main Pool

8:45 a.m. **(2)** — **Trial Advocacy: Killer Cross Examination** - Regent/Viceroy Hall
Terence F. MacCarthy, Federal Defender Program, U.S. District Court for Northern District of Illinois

10:25 a.m. — **Break** - Empress Hall
Sponsored by: MBNA America
Prince, Yeates & Geldzahler

10:40 a.m. **(1 each)** — **Breakout Sessions**

1 - **Interfacing with In-House Counsel**
Susan Black-Dunn, American Stores
Lisa-Michelle Church, Sinclair Oil
Elizabeth S. Conley, Parsons Behle & Latimer
Keith E. Taylor, Parsons Behle & Latimer

2 - **Customizing Title Insurance Coverage with Policy Endorsements**
Blake T. Heiner, First American Title Company

3 - **Litigation of ADA Claims**
Carolyn Wheeler, EEOC

4 - **Lawyers Are From Mars, Physicians Are From Venus**
Lorraine Shoaf, Forensic Nurse Consultant

11:40 a.m. — **Awards Luncheon** - Ballroom
A Passion for Justice
Morris Dees, Southern Poverty Law Center
Sponsored by: Strong & Hanni
Corporate Counsel Section

1:30 p.m. **(1.5)** — **ETHICS: The "But He Said To" Defense to an Ethics Complaint: Or Professional Responsibility and the Supervised Attorney** - Regent/Viceroy Hall
James B. Lee, Parsons Behle & Latimer
Jeffrey J. Hunt, Kimball, Parr, Waddoups, Brown & Gee
John K. Morris, University of Utah
Stephen A. Trost, Office of Attorney Discipline
Moderator - Marji Hanson, Parsons Behle & Latimer

2:45 p.m. — **Meetings Adjourn for the Day**

3:00 p.m. — **Tennis Tournament** - Hotel del Coronado Tennis Courts

3:30 p.m. — **Military Aircraft Carrier Tour** - Meet at the Gate of the North Island Naval Air Station on Coronado

5:30 - 7:00 p.m. — **Welcome to San Diego Reception for Utah Bar Members**

Friday, June 30, 1995

7:30 a.m. — **Section Breakfasts**

8:00 a.m. **Registration and Continental Breakfast** - Empress Hall
Sponsored by: Snell & Wilmer

8:15-12:15 p.m. **Utah Kid's Jamboree** - Check in at Main Pool

8:30 a.m. **The Theory of the Case: Opening and Closing Statements** - Regent/Viceroy Hall
(2) Charles J. Ogletree, Jr., Harvard Law School

8:30-12:15 p.m. **Spouse/Partner Nordstrom Fashion Breakfast** - Meet at the White Clock on Orange Avenue

10:10 a.m. **Break** - Empress Hall
Sponsored by: Blue Cross Blue Shield of Utah

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

5 - **Civil Liability for Interception of Communications: When NOT to Reach Out and Touch Someone**
Harry Caston, McKay, Burton & Thurman
Hon. Leslie A. Lewis, Third District Court
Clifford C. Ross, Cohne, Rappaport & Segal

6 - **The Basics of Preparation for and Conducting of Patent Infringement Litigation**
Joseph A. Walkowski, Trask, Britt & Rossa

7 - **Environmental Crimes, Enforcement and Litigation**
Mark Pollock, Attorney at Law, Napa, California

8 - **Negotiate To Win**
Wm. Robert Wright, Holme, Roberts & Owen

11:20 a.m. **Break** - Empress Hall
Sponsored by: Green & Berry

11:35 a.m. **Breakout Sessions**
(1 each)

9 - **Environmental Law Issues Affecting Military and Naval Operations**
Lt. Cmdr. Matthew K. Gagelin, JAGC, USN, Staff Judge Advocate, Commander, Naval Base San Diego, California

10 - **Getting the Most Out of Comprehensive General Liability Insurance**
Alan C. Bradshaw, Holme Roberts & Owen

11 - **Introduction to State & Federal Court and Agency ADR Programs in Utah**
Laura M. Gray, ADR Administrator, U.S. District Court
Marlu R. Gurr, ADR Coordinator, Utah Anti-Discrimination Division
Diane Hamilton, ADR Director, Administrative Office of the Courts
Richard H. Schwermer, Administrative Office of the Courts
Moderator - Lucy B. Jenkins, Parsons Behle & Latimer

12 - **The Client Centered Law Firm (No CLE Credit Available)**
Toby Brown, Tobin Professional Administrative Services
Michele Roberts, Ballard, Spahr, Andrews & Ingersoll

12:25 p.m. **Meetings Adjourn for the Day**

1:00 p.m. **Sporting Events**

1:00 p.m. **7th Annual President's Cup Golf Tournament** - Coronado Golf Course

2:00 p.m. **Beach Volleyball Tournament** - Cottage Beach Area

1:30 - 4:30 p.m. **Salt Lake County Bar Film Presentation and Discussion: *Anatomy of a Murder* (CLE credit available through the Salt Lake County Bar)**

5:30 p.m. **Law School Receptions**
J. Reuben Clark School of Law - Cottage
University of Utah School of Law - Esplanade

Saturday, July 1, 1995

8:00 a.m. **Registration and Continental Breakfast** - Empress Hall
Sponsored by: Kimball, Parr, Waddoups, Brown & Gee

8:30 a.m. **ETHICS General Session**
(2) Martin S. Pinales, Attorney at Law, Cincinnati, Ohio

10:10 a.m. **Break** - Empress Hall
Sponsored by: Association of Legal Administrators
Tobin Professional Administrative Services

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

13 - **Air Quality Issues: On a Clear Day You Can See Forever. But Can We Afford It?**
Russell Roberts, Director of Division of Air Quality, DEQ

14 - **Update on Antitrust Enforcement Guidelines**
Richard L. King, Assistant Attorney General
Loren E. Weiss, Attorney at Law
Francis M. Wikstrom, Parsons Behle & Latimer

15 - **Constitutional Limitations on State Taxation of Non-Resident Corporations**
Kent B. Alderman, Parsons Behle & Latimer

16A - **Mock Mediation: Ethical, Liability & Other Practical Considerations**
Laura M. Gray, ADR Administrator, U.S. District Court
Marlu R. Gurr, ADR Coordinator, Utah Anti-Discrimination Division
Diane Hamilton, ADR Director, Administrative Office of the Courts

11:20 a.m. **Break** - Empress Hall
Sponsored by: Farr, Kaufman, Sullivan, Gorman, Jensen, Medsker & Perkins

11:40 a.m. **Breakout Sessions**
(1 each)

16B - **Mock Mediation Continued**

17 - **EPA Regulation of Solid and Hazardous Waste in the Construction Industry**
Rusty Lundberg, Manager, Special Programs of Solid Waste Branch, Div. of Solid & Hazardous Waste, DEQ

18 - **Effectively Dealing With Deposition Discovery Abuse**
LeGrand R. Curtis, Jr., Holme Roberts & Owen
Hon. J. Thomas Greene, U.S. District Court
Hon. David S. Young, Third District Court
Moderator - Wm. Kelly Nash, Holme Roberts & Owen

19 - **Creating and Maintaining a Successful Practice - Trusts and Estates**
Mark E. Lehman, Lehman, Jensen & Donahue
Jane A. Marquardt, Marquardt, Hasenyager & Custen

12:30 p.m. **Break**

12:40 p.m. **Federal Process: The Magical Mystery Tour — Congress, Legislation & Judicial Appointments**
(1)
Utah Congressman William H. Orton

1:30 p.m. **Meetings Adjourn**

NOTICE

OF LEGISLATIVE REBATE

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director, John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

Profile of Glen R. Dawson

By Marnie Funk

They gave him a robe, a courtroom and a great party when he was sworn in.

But they didn't tell him that elusive secret for turning a great attorney overnight into a great judge.

Second District Judge Glen Dawson is one of thirteen men and women sworn in as Utah judges in 1994. One day, they were attorneys arguing various theories of the law. A short ceremony later, they were judges making the final decision on others' arguments.

For all the applying, interviewing and years of yearning for the post, the actual switch is intimidating, Dawson said. After six months on the bench, he's still a little stunned.

Dawson was assigned a mentor judge, Rodney Page. When Dawson has questions, he trots down the hall to his mentor. But that's tough to do in the middle of a trial. So he reads a lot and invites the lawyers who practice in front of him to help educate him.

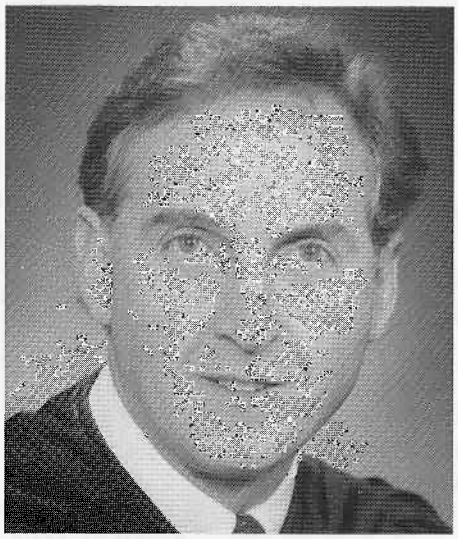
Dawson's challenge is tougher than the challenge facing most new judges. He was a federal attorney before becoming a state judge. Since he graduated from Brigham Young University law school, he has studied and argued federal law. After 15 years practicing exclusively federal law, he was sworn in and empowered to be the final voice in matters of state law.

The irony doesn't escape him. "I'm eager for attorneys to teach me all they can. I'm not afraid of having them help me learn. I don't want them to expect me to already have the answers to some of the questions that are posed."

Tax law, federal assets seizure and forfeiture are familiar ground to Dawson. Adoptions and divorces are not.

"The procedures are similar. The law is different. I have tried to painstakingly read through matters so I understand state law. But I've probably had to spend more time reading than most new judges."

Dawson began his career as a trial lawyer for the tax division of the U.S. Department of Justice. For five years, he traveled in Utah, Kansas, Missouri and Idaho prosecuting tax cases. He represented the government in two or three trials a year and carried a load of about 150 cases.



Judge Glen R. Dawson
Second District Court

Appointed:	Judge, Second District Court, October 1994 by Gov. Michael Leavitt
Law Degree:	Brigham Young University J.D. Cum Laude, 1980
Practice:	Trial Attorney, U.S. Dept. of Justice, Tax Division, Honors Law Program 1980-86 Assistant United States Attorney for the District of Utah 1986-94
Activities:	Recipient of 1990 Director's Award presented by the Attorney General of the United States for Outstanding Service in Civil Litigation as an Assistant U. S. Attorney – April 1991; Recipient of Special Achievement Award for Sustained Superior Performance as an Assistant U.S. Attorney – 1988, 1991; Member, Supervisor Committee, Associated Federal Employees Federal Credit Union, October 1992 – present

But after a daily fare of corporate income tax, gift tax and excise tax and enough of the Kansas countryside for a lifetime, Dawson joined Utah's U.S. Attorney's office in 1986.

He was originally hired as a civil attorney for the office. He represented the government in a wide array of cases, including employment discrimination, medical malpractice, personal injury and environmental cases. In recent years, he prosecuted several white collar criminal cases, including fraud, embezzlement and tax evasion.

Besides having to learn state law, Dawson is one of the new judges who had to immediately take on circuit court work as well as district court work. Second District was one of the districts once fraught with tension over the transition, but Dawson finds both calendars equally interesting. He splits his week easily. Monday morning is district court law and motion; Monday afternoon is circuit court arraignment.

Dawson decided he wanted to be a judge after watching U.S. District Judges David Winder and David Sam preside over his cases. "I saw the great amount of good a fair, conscientious judge can do."

Gov. Mike Leavitt appointed Dawson after Dawson's third application for the post. One or two attorneys who want to be judges have asked Dawson's advice on getting nominated. He has little to give. "I didn't do anything different the last time than I did the other two times. . . . It's like lightning. You have no control over it. Lightning strikes in a certain place, if you happen to be standing there, you get the position."

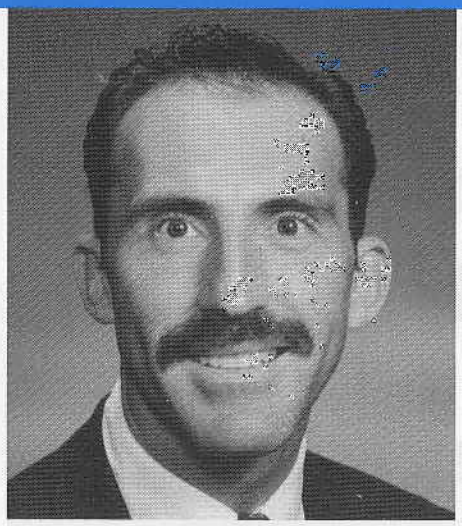
Once he got the position, Dawson was surprised at how lonely it is. A reserved man, he always considered himself a bit of a loner who enjoyed solitude. But now he years for the camaraderie of the U.S. Attorney's office.

His offices are isolated from the comings and goings in the courthouse. "The only time you get to come out is when you are wearing this black robe that intimidates anyone close to you and repels any possibility of human friendship. You can't be friendly to someone in a black robe. It's impossible," he jokes.

Being a judge has taught him a few things about himself. Promptness is terribly important to him. His wife, Susan, could have told him that. But he didn't fully realize it himself until one of his first trials when he heard himself berating an attorney who kept the court waiting for 20 minutes.

Now he acknowledges that that's something lawyers should know about him: He gets "terribly frustrated" with lateness.

And he'd love to be friends, despite the black robe.



Young Attorney Profile
Stewart P. Ralphs

By Michael L. Mower

On a Monday morning in mid-October, 1993, the staff of the Legal Aid Society of Salt Lake (LAS) somberly gathered at the charred remains of their offices. Over the weekend, three burglars broke into their building. The thieves made off with a few radios, a television, a tape player and a little pocket change they found in desk drawers. On their way out two of them set fire to the offices in a vain attempt to cover their nefarious trail.

The fire caused tremendous damage to LAS. Brian Filter, a volunteer and later attorney for Legal Aid, recalls the scene as, "Our own little bit of Armageddon. The heat was so intense the computers, printer and fax machine melted." He added, "The office was in complete ruins. What the smoke didn't destroy, the water did." Fortunately, very few of the agency's client files were destroyed. After surveying the scene, the staff poked through their office remains, literally dusted off their smoke damaged files and got back to work.

One of those staff members was Stewart Ralphs. At that time, Stewart was the agency's Domestic Violence Victim Assistance Program Director. Stewart's immediate concerns was to his clients. Before the fire, Stewart assisted up to 30 clients per week, obtain protective orders against their abusive spouses or partners. This is about half the number of protective Orders Issued in Salt Lake County.

That Monday morning following the fire, Stewart and his staff of three set up their Domestic Violence Victims Assistance (DVVA) program in a corner of the court clerk's offices. Stewart was able to represent all of his clients at the protective order hearings that afternoon. Although Stewart was able to represent clients those which had filed for protective orders prior to the fire, it was impossible to adequately assist additional clients filing for new Protective Orders without an office. Faced with protective order calendars without the presence of LAS representation, the Third District Court Domestic Relations Commissioners asked Stewart to attend the protective order hearings and assist pro se litigants as a "friend of the court." Even after the DVVA program was set up in temporary offices across the street, Stewart continues to assist the commissioners with pro se litigants.

Stewart's devotion and concern for his clients is well known in Salt Lake's family law community. In 1994 he was honored as the Family Law Division Lawyer of the Year. Stewart is also noted for his hard work, quick wit, organizational skills, and, at 6 foot 5, his commanding presence under the basketball hoops.

Stewart was born and raised in the small town of Ferron, Utah. The youngest of five sons, he learned to work hard on his family's cattle ranch near the San Rafael Swell. Stewart played the trumpet in the Emery County High School band and was the center on the varsity basketball team. After graduating from Emery County High School, Stewart attended Brigham Young University and later graduated with a degree in History. While at B.Y.U. he spent a semester in Europe and also took time out to serve an L.D.S. mission in Japan. These experiences gave Stewart an appreciation for diversity among peoples and cultures.

Stewart attended the University of Utah College of Law. After graduating in 1990 he had his own private practice until he was hired by Legal Aid Society of Salt Lake as a staff attorney. Stewart had previously interned for LAS during his third

year of law school. Stewart enjoys working for LAS and says this is because "I really enjoy practicing domestic relations law and I feel I am making a positive difference in the lives of many less fortunate children and their parents."

While LAS was beginning its "phoenix-like" rise from its ashes, Stewart became the agency's new Executive Director. In addition to all of the regular challenges that a director of a not-for-profit organization, Stewart was faced with the additional obstacles of coordinating the remodeling of LAS's destroyed offices and sorting and retrieving files and documents from the ashes of the fire. Stewart also was involved in training a new staff. Within several months of being appointed Executive Director, Stewart hired five new attorneys and three new paralegals. Legal Aid currently has seven full time staff attorneys. Stewart handled the task of remodeling and training the way he handled chores on the farm as a boy, he just dug in and went to work.

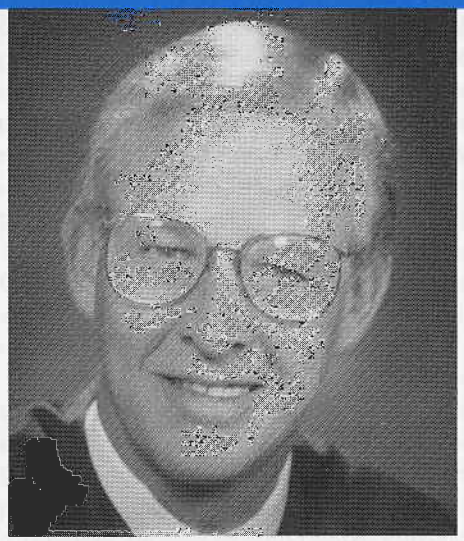
Stewart's work ethic and devotion to LAS was exemplified during the agency's recent move back into their remodeled offices. When he learned the movers charged by the hour, Stewart invoked his parental thriftiness and responded that "the agency's limited resources should not be spent to move things we can carry ourselves" and then personally led the staff in carrying boxes, computers, and chairs across Second East to the LAS offices. Stewart is quick to express his extreme gratitude to the legal community for their generous donations and kind contributions in the interim and now back in the newly remodeled Legal Aid Society offices.

Brown Bag CLE Presentation

SECURITIES LITIGATION UPDATE

Presenter: Prof. James D. Gordon, III, J. Reuben Clark Law School
Location: Marriot Fairfield Inn — 1515 South University Avenue, Provo, Utah
Time: June 7, 1995, 12:00 noon
Sponsored by: Young Lawyers Division, Utah State Bar

All Bar Members Welcome
***R.S.V.P.* to Utah State Bar, 531-9095.**



A New View from the Utah Court of Appeals

By Judge Michael J. Wilkins

JUDGE MICHAEL J. WILKINS was appointed to the Utah Court of Appeals in August 1994 by Gov. Michael O. Leavitt. He received his law degree from the University of Utah College of Law in 1977. From 1977 to 1994 he was engaged in private law practice in Salt Lake City. He and his wife, Judge Diane W. Wilkins of the Second District Juvenile Court, live in Bountiful. Prior to his appointment to the bench, he served on the Legislative Compensation Commission, the Appellate Task Force, and the Courts Complex Steering Committee. He has also been a Bar Examiner, and is now a member of the Board of Appellate Judges.

My first day at the Court of Appeals, Judge Judith Billings, then presiding judge and a classmate from law school, told me that as a member of the court I would find that my jokes were a lot funnier. I scoffed.

She has been right, to a certain degree. There are some lawyers, and a handful of trial judges, who are nicer to me now than they were in the past. I recognize that any increase in respect or deference paid me now is a result of the office that I temporarily hold. I also recognize that it is in spite of my personality, looks, sense of humor, and other personal characteristics. If I find myself forgetting the real me, I can always count on my wife to keep me in line. Her no nonsense honesty has always been one of my best guides.

In the process of becoming part of the work force at the court, I have been pleasantly surprised by the enjoyment I derive from the day to day tasks. The questions presented to us are always challenging, interesting, and important in their own right. During my first few months, I received a number of publications from my new employer and legal publishers directed to the task of being an appellate judge. Perhaps the most reassuring concept in any of those materials was the recognition that appellate judges are not expected to be smarter or better than trial judges, there are just more of us. The idea is that trial judges are faced with the daily requirement of making decisions on a wide variety of issues: procedural, legal and factual. They sit alone, with very little support in the way of legally trained staff, and must rely on the parties to raise the most important issues and legal precedents.

Appellate judges, on the other hand, have the benefit of never acting alone. We sit in panels of three. The Supreme Court sits in panels of five. It requires at least two of us, or three of them, to take any meaningful action on a case. (I even find it difficult to order lunch on my own now.) Each of us has two legally trained full time law clerks who work directly for us to help with research and writing tasks. We have little excuse for not getting the right answer.

But getting the right answer is not actually as easy as it appeared to me from the outside. In my first six months, I have been expected to read and digest briefs totalling something on the order of 50,000 pages. That makes a stack taller than I am, even if I stand up straight. In addition, part of the job here is to come to oral argument, and conference with the other panel members even if no argument is scheduled, independently prepared to discuss the case, and to reach a decision. That requires considerable legal research, especially if the issues are search and seizure, or zoning, or workman's compensation, and your last 18 years have been devoted to becoming more and more narrowly expert in commercial business law.

Fortunately, the other members of the court have been very kind, very helpful (I had no idea Judge Billings used to be an English teacher.), and very patient. The judges and the staff of the Court of

Appeals are as nice a group of people to work with as I have ever encountered. That attitude makes the transition easy, even considering that the group of people I left were also as nice a group of people to work with as I could ever hope for.

A year from now, I will know a great deal more about what the Court of Appeals does. But since I have been asked to make this contribution to the *Bar Journal* now, perhaps my relatively fresh perspective on the court will be of some benefit. As I have traveled around the state meeting judges, watching court, and meeting with lawyers, two questions in particular recur in conversation with practitioners: Why have you guys changed the rules on oral arguments, and what can I do to increase my chances of winning an appeal?

The answers are: "The rules on oral argument have not changed," and "Pick the winning side at trial." But let me explain.

RECENT CHANGES AT THE COURT OF APPEALS

Last year, partly at the request of the judges of the Court of Appeals, the Chief Justice appointed a task force to review the backlog of cases awaiting resolution in the Court of Appeals. The Appellate Court Task Force, as it was called, was asked to determine what backlog existed, assess its impact now and in the future, and recommend steps to avoid unreasonable delay in the resolution of cases.

"A year from now, I will know a great deal more about what the Court of Appeals does."

"Backlog" is defined as the number of cases awaiting resolution on the merits that cannot be considered and disposed of within a "tolerable" period of time. That period of time is measured from the date the case is fully briefed and the record is complete, the date the case comes "at issue", and the date the case is placed on the schedule for argument or conference before a panel of judges.

All appellate courts require a certain minimum inventory of cases from which to construct monthly calendars. At the Court of Appeals we need about eight weeks' worth. This volume allows the court and counsel time to adjust schedules, review the briefs, prepare for arguments or conferences and be ready to act on the case. With this inventory requirement, the "backlog" at the Court of Appeals becomes that quantum of cases at issue, but that cannot be scheduled for argument within the next two months.

Although we treat two months as a tolerable wait to have a case at issue scheduled and disposed of, what is actually the outside limit of tolerable is a matter of opinion and subject to considerable debate. However, there is little debate that nine months between an issue being placed on the schedule for disposition two months later is too long. That was the wait during the first half of 1994 for non-priority civil cases. Because of the higher priority given criminal cases, no backlog exists with them at present.

To understand the growth of the backlog at the Court of Appeals, it is helpful to understand the short history of the court.

The Court of Appeals was created to alleviate a backlog problem at the Supreme Court. Some have likened the Supreme Court to a hotel with a finite capacity of 100 rooms. Each room represents the ability of the court to generate one duly considered, fully reasoned, written opinion during the course of a year. Since all five justices must consider and act upon each issued decision, one hundred opinions represents a considerable workload. This is especially true when considered in light of the 300 to 400 other dispositions of cases by the Supreme Court each year by per curium decisions, voluntary dismissals, summary dispositions, settlements, and otherwise.

Unfortunately, in the 99 years since statehood, the number of cases seeking to occupy one of the limited "hotel rooms" in the Supreme Court has risen at an ever accelerating rate. For example, the total number of new appeals increased from 204 in 1960, to 412 in 1970, 651 in 1980, 1095 in 1990, and is projected to reach 1510 by the turn of the century.

It is no wonder that as "room reservations" got harder to get in the 1980's the Supreme Court found itself forced to delay action on some appeals for many months, with non-priority civil appeals routinely requiring more than three years from filing of the notice of appeal to the issuing of a decision.

Feeling that the people of Utah deserved more prompt action, the Supreme Court asked the legislature to consider changes, and in 1986 the Court of Appeals was created to correct the backlog problem in the Supreme Court. The Court of Appeals was given primary jurisdiction over a portion of the caseload carried by the Supreme Court, including criminal cases other than those involving capital and first degree felonies; civil appeals from the juvenile courts, the circuit courts, and domestic cases from the district courts; extraordinary relief in all but capital and first degree felony cases; appeals from a variety of state agencies; and cases transferred from the Supreme Court.

The Supreme Court has effectively used its transfer authority to "pour over" a portion of its caseload to the Court of Appeals. As a result, no backlog exists now in the Supreme Court.

The Court of Appeals heard its first cases in March of 1987. At that time, the Supreme Court transferred nearly 400 existing appeals, some of which were almost four years old. Since then, the Supreme Court has continued to pour over 200 to 300 cases each year to the Court of Appeals. In addition, direct appeals to our court have numbered from 500 to 650 each year. For example, in 1994, 596 original and 189 transfer appeals were received, for a total of 785. Unlike the "hotel" of the Supreme Court, I have come to think of the Court of Appeals as a "campground" where there is always room to squeeze in one more.

It was against this statistical background that the Task Force did its investigation, and made its recommendations. The Task Force was composed of judges, lawyers, court staff, and interested citizens. They met over a period of months in mid-1994 to consider the increasing demands on the Court of Appeals. Given the increasing number of people in the state, and the increasing number of judges, lawyers, and cases filed, it seems a safe presumption that for the foreseeable future the total number of appeals filed each year will continue to increase.

"The backlog will continue to grow, and the disposition time will continue to extend, unless changes are made."

As the Supreme Court continues to transfer to us that portion of its caseload that exceeds its reasonable capacity each year, the Court of Appeals will simply have to increase the number of cases disposed of, or live with increasing time from appeal to disposition, or both. There do not seem to be any other alternatives.

The number of appeals reaching the Court of Appeals from all sources has been increasing at roughly 10% each year. The number of dispositions by the court has climbed each year at an average rate of 6%. The backlog will continue to grow, and the disposition time will continue to extend, unless changes are made. Because of the priority given criminal matters, no present backlog exists with those cases. However, if the backlog continues to grow, delays in criminal appeals seem inevitable. Currently, the time from filing of the notice of appeal to decision or other disposition is running about 16 months in criminal matters, and 20 months in civil cases. Because of the greater proportion of civil appeals, the overall average is just over 19 months.

The Task Force estimates that in order to eliminate the backlog at the Court of Appeals, we must increase by 60% the total number of annual dispositions by 1998. To accomplish that, the Task Force recommended making changes in three areas now:

1. Provide the judges of the Court of Appeals with procedural tools that allow a significant increase, over time, in the number of appeals the court is able to decide;

2. Add one new judge and two law clerks in 1996, and contingent upon need, another judge with law clerks in 1998, plus a central staff attorney and two clerical staff now; and

3. Initiate a three year pilot program of mediated settlement conferences in the Court of Appeals.

Of these three recommendations, the mediation program, and the additional judges and support staff all require action by the legislature. Requests were submitted to the 1995 general session, and the central staff attorney and part of the clerical staff were approved. The additional judges, law clerks, and mediation program were reserved for later action.

However, the first recommendation made by the Task Force, that of procedural changes within the court, is mostly within our own power to accomplish. Specifically, the Task Force recommended that the number of dispositions annually per judge be increased by greater use of unpublished memorandum decisions. This approach, with its concomitant reduction in fully reasoned and published opinions, has been used in other states to successfully address similar backlog problems.

A "fully reasoned opinion" is one in which the grounds for the decision are fully explained, the facts of the case are presented in detail, and the applicable law is authoritatively reviewed. In the past, fully reasoned opinions were presumed to require oral argument, and have always been published. They are intended as guidance not only to the litigants and trial court involved in the specific case, but also to the public, bench and bar generally. As such, much more detail is needed to

describe the procedural and factual history of the case, the issues being reviewed and decided, the history of the law on the issues, the conclusions reached and the legal and logical justification for the conclusions. In addition, since publication of the opinion is necessary to reach the full intended audience, we are required to carefully edit and proofread the opinion, to assure printer ready form. We invest considerable time in this editing and proofing process.

On the other hand, an unpublished memorandum decision is one intended for the use and benefit of only the litigants and the trial court. Such a decision generally follows the form: You know who you are. You know what happened at trial. You know what you asked. Here is the answer. And here, in simple form, is the basis for the answer.

Until this past January, judges on the Court of Appeals were assigned four fully reasoned opinions to write each month, and eight more each month in which to participate as a panel member. Each judge was expected to be fully prepared for oral argument on each of these twelve cases, to participate in oral argument and conference with the other panel judges, and to actively participate in the preparation for the final opinion in each case.

In an effort to increase by 20% the number of cases disposed of this year, as of January each judge assumed responsibility for five opinions each month, one more than previously. However, in recognition of the significantly greater time needed to do a proper job on publishing opinions, as opposed to memorandum decisions, we are attempting to arrange calendars in such a way that three of these five decisions each month are memorandum decisions.

As before, cases that fail to meet minimum standards, or that are hopelessly one-sided, will continue to be disposed of by summary dispositions, and by per curium opinions which may be proposed by staff attorneys for review and modification by judges.

The effort needed by each judge to be fully prepared for argument or conference on a case, including review of the briefs and independent legal research when needed, does not change with the type of opinion produced. Only the actual writing and editing time is different. With this in mind, we plan to dispose of appeals by published, fully reasoned opinion after oral argument only in those cases involving the development of the law, significant constitutional issues, complex issues of law or issues of important or broad public impact. Cases not meeting these requirements but still requiring a judge-authored opinion will be disposed of more often by unpublished memorandum decision.

As with fully reasoned opinions, memorandum decisions will be decided by a panel of three judges, with a decision authored by a named judge. However, since these cases are selected because they involve simple issues, straight forward facts, and well settled law, they will usually not be afforded oral argument.

Although the Task Force recommended a change to Rule 29 of the Rules of Appellate Procedure to modify the current presumption that argument will be had on all appeals, the provisions of Rule 29 already allow the court to forego oral argument if it determines the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument. The Task Force suggested that the presumption ought to be that no argument would be had unless a case falls within certain guidelines, thereby warning litigants and the bar that not all cases will be accorded the judge time needed for oral argument. It is not up to the Court of Appeals to modify the rule. However, to more accurately reflect this evolving presumption, such a change might better serve to alert parties to the increasing importance of a well prepared and argued brief. Absent a change in the wording of Rule 29, the Court of Appeals still has the authority under the existing rules to reduce the number of cases orally argued to the panel before decision.

Frankly, given the caseload at present, we have little choice but to do so. The court has modified the scheduling of oral argument as of January. Previously, some arguments were granted in order to let litigants feel as though they have had their

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day in court, even though the result was clearly not in doubt. We are less likely to do so now.

In the simple cases for which we intend memorandum decision treatment, argument is often only a formality that is costly to the parties and not of much real help to the court. As such, we are more likely to waive oral argument and decide the case on the briefs and record.

Even with the newer approach, once a case is initially identified for treatment by memorandum decision without argument, it is reviewed by staff and judges to assure we are publishing all of the cases that need to be published. Additionally, as late as the conference stage, or even during drafting and review of the proposed decision, the suggestion of even one judge has been enough to change an unpublished memorandum decision case to a fully reasoned and published opinion case.

If we find that the increase in monthly assignments to judges is manageable when coupled with the slight decrease in oral arguments, and the higher proportion of memorandum decisions, we intend within the next six to twelve months to try to increase by one more, to six, the number of cases to be authored by each judge each month. This would increase our annual dispositions by 40% without the addition of another judge. This may or may not prove feasible.

To get a feel for what this means in caseload for each judge, try to imagine writing 50 or 60 term papers each year. And that thought leads me to the second common question I hear: How can I increase my chances of winning on appeal.

WINNING ON APPEAL

If you are able to envision a stack of briefs 12 or 13 inches tall, with your own brilliant prose and irresistible argument neatly at the bottom, you will begin to realize what has become painfully obvious to me since my appointment to the court: The better your brief, the better your chances. Plus, as I said before, it generally helps to win at trial.

Here are some preliminary thoughts of mine that you may find interesting and helpful to know:

1. We actually read what you send us, if we can figure it out. We read the statements of issues and facts. We read the arguments. We look at, and often look up, the authorities you cite. We look at the exhibits you include with the brief. We look at the record, especially if you give us a reason to do so. In my opinion, short briefs are better than long ones, if you have a choice.

2. If you fail to proofread your own work, we will only try for so long to do it for you. If both parties are referred to as "he" when only one is male, we get lost. If you copy your brief so that page 19 is not legible, we cannot read it. If the exhibits you attach print as black blobs, we ignore them. And if your word processing software eats the last six words of the paragraph, we cannot guess what they were, and usually do not try.

"The better your brief, the better your chances."

3. Assume your case will be decided on the briefs. More and more often, it will be. In addition, if you write a great brief, oral argument will be more precise, and easier.

4. We worry about what the correct standard of review is. You should, too. Cases are won and lost on that issue alone. If you decide not to address the question, but your opponent does, you may not win.

5. Give us your best authority for the proposition. We do not weigh string citations to see who wins.

6. Talk to us in the brief. Convince us. Do not just repeat the allegations of your complaint, or reproduce your memorandum in support of the motion for summary judgment (unless it really was absolutely brilliant).

7. If you claim a summary judgment is inappropriate because of material facts at issue, tell us what they are. You are unwise to assume they are as obvious to us as they are to you. We are not any more perceptive than the trial judge, and he or she did not see them, or you would not be up on appeal.

8. Assume we are tired when we get your brief. Make it as easy to follow your argument as you are able.

9. Each time you propose to do something involving us, reread the rules we are obligated to operate under. We do.

10. At oral argument, do not tell us the facts again unless you failed to include them in your brief, or they are incredibly important to your argument. We have read them, usually more than once, and usually within 24 hours of your argument.

11. At oral argument, only use the time you need. We only plan 15 minutes per side. If you really only have two points, tell us what they are, and why we should go your way, then sit down. Plan your presentation so that you will cover your most important issue first. You may not get to the others.

12. When we ask questions, recognize that we may or may not already know the answer. Sometimes judges ask questions to find out the answer. Sometimes judges ask questions to suggest new ideas to you, or to other judges. Sometimes, we want you to give us the benefit of your thinking on a particular issue or approach.

13. If you do not know the answer, say so. If you do, say so. Be specific. Pay attention. Our questions may be off the point to you, but they are the point to us, at the time.

14. We are not a trial court. We do not hear and evaluate new evidence. We especially do not accept testimony from lawyers at oral argument. If it is not in the record from below, do no waste your time on it.

15. Be specific about what you want us to do. If you can, give us a solid hook to hang that action on. If you do not, we may still figure it out, but it may not be what you were looking for.

16. If nothing changes our minds, we usually will defer to the trial court. They were there. They heard the evidence. They saw the witnesses. They struggled through the issues and did the best they could with what you gave them. If the trial judge got it wrong, the burden is on you to show us how, and what they should have done instead.

Try some of these. But keep in mind that I have been on the Court of Appeals only a bit over six months now, and my colleagues may have other, more tolerant ideas. They have certainly been tolerant with me. I hope I am able to stay for a while longer. Being a judge on the Court of Appeals is a truly great job. No one asks for my time sheets, or my gross billings. In practice I was learning more and more about less and less. Now I am learning a little about more and more. It is like the good part of law school. And my jokes are funnier.

To Kill A Mockingbird

By Harper Lee

Reviewed by Betsy Ross

Atticus, the Harper Lee character from *To Kill a Mockingbird*, made famous by Gregory Peck in the film version of the novel, has since the novel's first publication been the epitome of the ethical, moral lawyer. Yet New York actor Terry Lawman, who played Atticus in the recent production of *To Kill a Mockingbird* by the Pioneer Theater Company, indicated how far the public has come in its perceptions of the ethical lawyer, when he reported on an editorial that had appeared in a New York newspaper. The writer had one point to make: The O.J. Simpson trial proved that Atticus Finch was dead. Interestingly, Mr. Layman noted, the editorial was followed by an outpouring of letters from lawyers rebutting that one statement, and resurrecting Atticus Finch as a lawyer's living model. Many wrote affirming Atticus as either their reason for becoming lawyers, or their inspiration to be socially responsible lawyers.

All of this, and the fact that my son David appeared as "Dill" in the Pioneer Theater Company performance, spurred me to pick up *To Kill a Mockingbird* again for the first time since reading it twenty years ago. The novel has a timeless message, echoed in the movie and the play. It speaks of stepping out of our own lives long enough to see from another person's point of view, or as Atticus puts it "You don't know what another is feeling until you've walked around in their skin for a bit."

And so the story develops, as Atticus, widowed father of Jem and Scout, takes on the defense of Tom Robinson one summer. Tom Robinson is a "colored" man, and this is the south at a time when being "colored" is akin to being an "untouchable" in Hindu parlance. Tom has been accused of raping a white girl. Unlike O.J. Simpson, however, lawyers were not out begging for this case. Tom Robinson had no football pedigree endearing him to the public, and political correctness had not

yet devoured the public mind. Atticus, nevertheless, considers it his duty — no, I'd say privilege — to defend Tom. At the same time during that one summer, Jem and Scout and their friend Dill who is visiting from Meridian, Mississippi, are drawn to the reclusive Boo Radley who lives next door to the Finches. Innocently, they taunt him, frightened and curious at the same time of this unknown and foreign person.

As both stories develop in the novel, an etching of empathy fills in. My son David awakened me at 4 a.m. one morning, talking in his sleep. In one drowsy, epiphanic moment, what it means to see something from another's point of view became clearer to me. David was reciting, in his sleep, one of Dill's lines from the play. In response to one of Jem's antics, Dill says: "Lightin' a match under a turtle's a hateful thing!" (This, at 4 a.m., southern accent and all.) Jem replies: "A turtle can't feel nothin". Dill then wisely asks: "How d'you know? You ever been a turtle?"

The character Atticus is the flashpoint for this exploration of empathy, and of compassion and prejudice. He can appear to be somewhat simplistic — almost "too good to be true." As one looks deeper into the character, however, a weakness that does make him human, and conflict that does result in some tension appear. For all his good intentions, the one thing Atticus cannot do is save Tom Robinson. (Tom is convicted and ultimately shot while attempting to "run away.") Not only can Atticus not save Tom, but he knows, and *accepts* that he can't. It is the acceptance of the anticipated loss that creates the tension in Atticus. One could characterize it, I suppose, as maturity in accepting the "rules of the game," or one could see it as weakness. In fact, it is the sheriff, not Atticus, who introduces the first concrete change, who challenges the rules enough to actually effect change. On their way home from a Halloween party Jem and Scout (Scout still wearing her ham costume) are attacked by Mr. Ewell, who was making good on a threat to Atticus for having defended the man who allegedly raped his daughter. The ever-so-interesting-to-the-children recluse, Boo Radley, kills Mr. Ewell. Atticus anticipates another trial, but the sheriff steps in and rules the death a accident, saying Mr. Ewell fell on his own knife. In so ruling, the sheriff remarks that there has already been one wrong done (in the conviction of Tom Robinson) and he wasn't going to allow another.

This "weakness" in Atticus only makes him more accessible. He becomes easier for us to understand, because we can put ourselves in his skin. It is well for each of us to step back from the flurry and fluster of everyday life, from the onslaught of the Marcia Clark and F. Lee Bailey antics, and review who we are as lawyers. *To Kill A Mockingbird* provides a moving and entertaining way to step out of our everyday lives. It is haunting in its beauty and simple in its message. It is worth re-reading for all of us if only to reconnect each of us with the Atticus (or Attica) within.

IOLTA Honor Roll

The Utah Bar Foundation honors all individuals and law firms who have supported the Foundation by converting trust accounts to the IOLTA Program (Interest on Lawyer Trust Accounts). Thanks to you, the Foundation has awarded approximately $1.4 million in grants.

Foundation funding is generated primarily by interest earned on lawyer trust accounts. These are the trust accounts that are too small or held for too short a period of time to economically benefit the client or to justify paying the bank service charges. When pooled together, these small accounts provide significant amounts.

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

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

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

We encourage all of those who are not participating in the IOLTA Program to call our office and make arrangements to join the following lawyers and law firms.

Adamson, Craig G.
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REMINDER

Ballots to vote for two trustees to the Board of Trustees of the Utah Bar Foundation will be mailed to you in May —

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CLE CALENDAR

EIGHTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

Date: Thursday & Friday, May 11 & 12, 1995
Time: 8:00 a.m. to 5:00 p.m.
Place: Utah State Tax Commission Auditorium
1950 West 210 North, Salt Lake City
Fee: $175.00 for both days
$95.00 for one day
$25.00 late fee
CLE Credit: 15.5 HOURS

NLCLE WORKSHOP: COLLECTION OF JUDGMENTS

Date: **Wednesday, May 17, 1995**
(Please note that this seminar was previously scheduled for May 18, 1995)
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $20 for Young Lawyer Division Members
$30 for all others
CLE Credit: 3 HOURS

ANNUAL FAMILY LAW SECTION SEMINAR

Date: Friday, May 19, 1995
Time: 8:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $100.00 for section members, $110 for non-section members.
CLE Credit: 4.5 HOURS with 1.5 in ETHICS
****Watch for more detailed information to come in your mail.*

1995 UTAH LEGISLATIVE REVIEW

Date: Friday, June 2, 1995
Time: 9:00 a.m. to 12:00 noon
Place: Utah Law & Justice Center
Fee: To be announced
CLE Credit: 3 HOURS
****Watch for more detailed information to come in your mail.*

EVIDENCE LAW: ARTISTRY AND ADVOCACY IN THE COURTROOM

Date: Friday, June 9, 1995
Time: 8:30 a.m. to 4:15 p.m.
Place: Utah Law & Justice Center
Fees: $140.00 – advance registration
$110.00 – five or more registrants from the same office
$165.00 – door registration
CLE Credit: ~ 7 HOURS

1995 UTAH STATE BAR ANNUAL MEETING

Date: June 28 – July 1, 1995
Place: Hotel del Coronado, San Diego, California
(800) 468-3533 for reservations – please indicate you are with the Utah State Bar
Fee: $200.00 before June 9, 1995
$230.00 after June 9, 1995
CLE Credit: 12.5 HOURS, including 3.5 HOURS OF ETHICS
(An additional 3 hours is available through the Salt Lake County Bar's film presentation.)

18TH ANNUAL SECURITIES SECTION SEMINAR

Dates: Friday and Saturday, August 25-26, 1995
Place: The Virginian Lodge, Jackson Hole, Wyoming
Fee: To be announced
****Watch for more detailed information to come in your mail.*

Watch your mail for brochures and mailings on these and other upcoming seminars. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Coordinator, at (801) 531-9095.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

_____

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

Name Phone

Address City, State, ZIP

Bar Number American Express/MasterCard/VISA Exp. Date

Signature

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

Registration Policy: 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.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee*, will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

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 must be received with the advertisement.

POSITIONS AVAILABLE

Established thirty lawyer firm in Boise, Idaho with diverse clientele seeking associate with two to five years experience in real estate, corporate or securities law. Compensation is competitive in market and will be based upon experience. Strong academic record and good writing skills are required. Please send resume, law school transcript, list of references and writing sample to: Givens, Pursley & Huntley, P.O. Box 2720, Boise, Idaho 83710, Attn: Hiring Partner.

POSITIONS SOUGHT

OVERWORKED ATTORNEYS! Do you wish you could spend less time in the library and more time with clients? I am a recent transplant from Montana seeking research work while studying for Utah bar. MT bar member since 1987. References & writing samples available. Call Wendy Wilson @ (801) 553-8675.

Licensed attorney with excellent research and writing skills (law review) seeks project/contract work or full time position. Experienced in domestic, personal injury and employment law including depositions, motions etc. Call (801) 569-0506.

OFFICE SPACE / SHARING

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Choice office space for rent in beautiful, historic building in Ogden, Utah. Several offices available. For information, please contact (801) 621-1384.

Deluxe Office Sharing Space: Downtown Salt Lake law firm has pace to rent on a month to month basis. Close to courts single or multiple office suites, with or without secretary space. Complete facilities available including: receptionist, conference rooms, library, Westlaw, fax, telephone, copier and parking. Please call Ronald Mongone @ (801) 524-1000.

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SALT LAKE LEGAL DEFENDER ASSOCIATION is currently accepting resumes to update its trial and appellate attorney roster. Interested attorneys should submit their application to F. John Hill, Director, 424 East 500 South, Suite #300, Salt Lake City, Utah 84111. (801) 532-5444.

WILL TYPE UP YOUR Transcribing, Pleadings, Appeals: Call Bobbie @ (801) 265-8004

UTAH VALLEY LEGAL ASSISTANT JOB BANK: Resumes of legal assistants for full, part time, or intern work from our graduating classes are available upon request. Contact: Kathryn Bybee, UVSC Legal Assistant Department, 800 West 1200 North, Orem, Utah 84058 or call @ (801) 222-8489.

LEGAL ASSISTANTS — SAVING TIME, MAKING MONEY: Reap the benefits of legal assistant profitability. LAAU Job Bank, P.O. Box 112001, Salt Lake City, Utah 84111. (801) 531-0331. Resumes of legal assistants seeking full or part-time temporary or permanent employment on file with LAAU Job Bank are available on request.

MISCELLANEOUS

LOST WILL – Please search your records for the will of Hazel V. Smith, executed in late 1950–1960 in the Ogden area. Please call Ralph C. Petty Esq. @ (801) 531-6686 with any information.

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MARCH 1, 1995

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Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX 9801) 531-0660

CERTIFICATE OF COMPLIANCE
For Years 19 _____ and 19 _____

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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.

The Tax Section of the Utah State Bar
is pleased to announce the
Eighth Annual
ROCKY MOUNTAIN TAX PLANNING INSTITUTE
On the Cutting Edge

May 11 - 12, 1995
Utah State Tax Commission Auditorium
1950 West 210 North, Salt Lake City, Utah
15.5 hours of CLE Credit

Program Information . . .

Thursday, May 11, 1995 - Federal Taxation
Friday, May 12, 1995 - State and Local Taxation

Registration Fees . . .

Both Days:	$175.00
One Day:	$95.00
Registration after April 28, 1995 add:	$25.00

To register: Please use the registration form provided in the CLE Calendar section at the end of this Bar Journal. Mail the form, with payment to the Utah State Bar CLE Department, 645 South 200 East #310, SLC, UT 84111. For a more detailed brochure, please call the CLE Department at (801) 531-9095.

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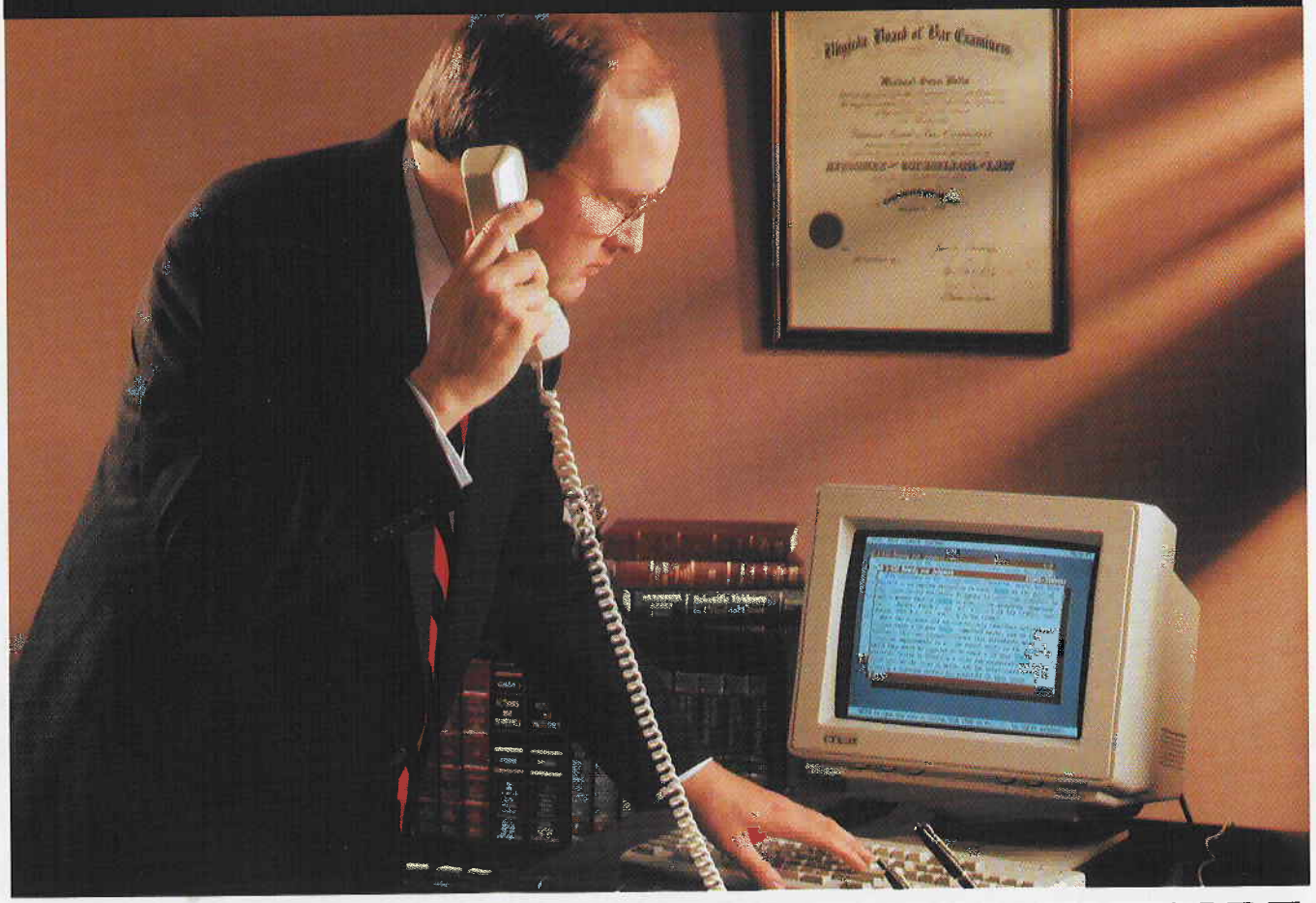

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