UTAH BAR JOURNAL

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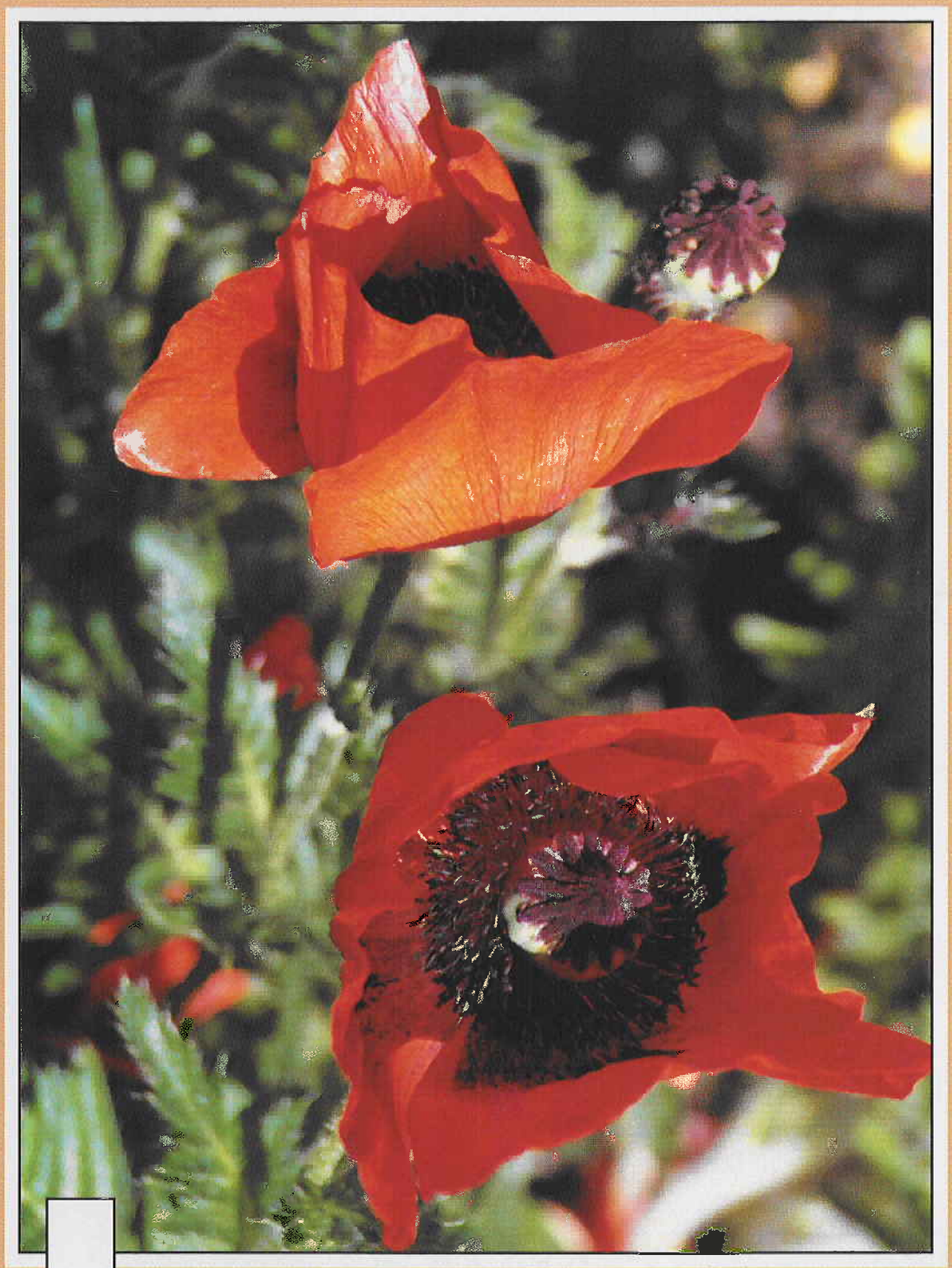

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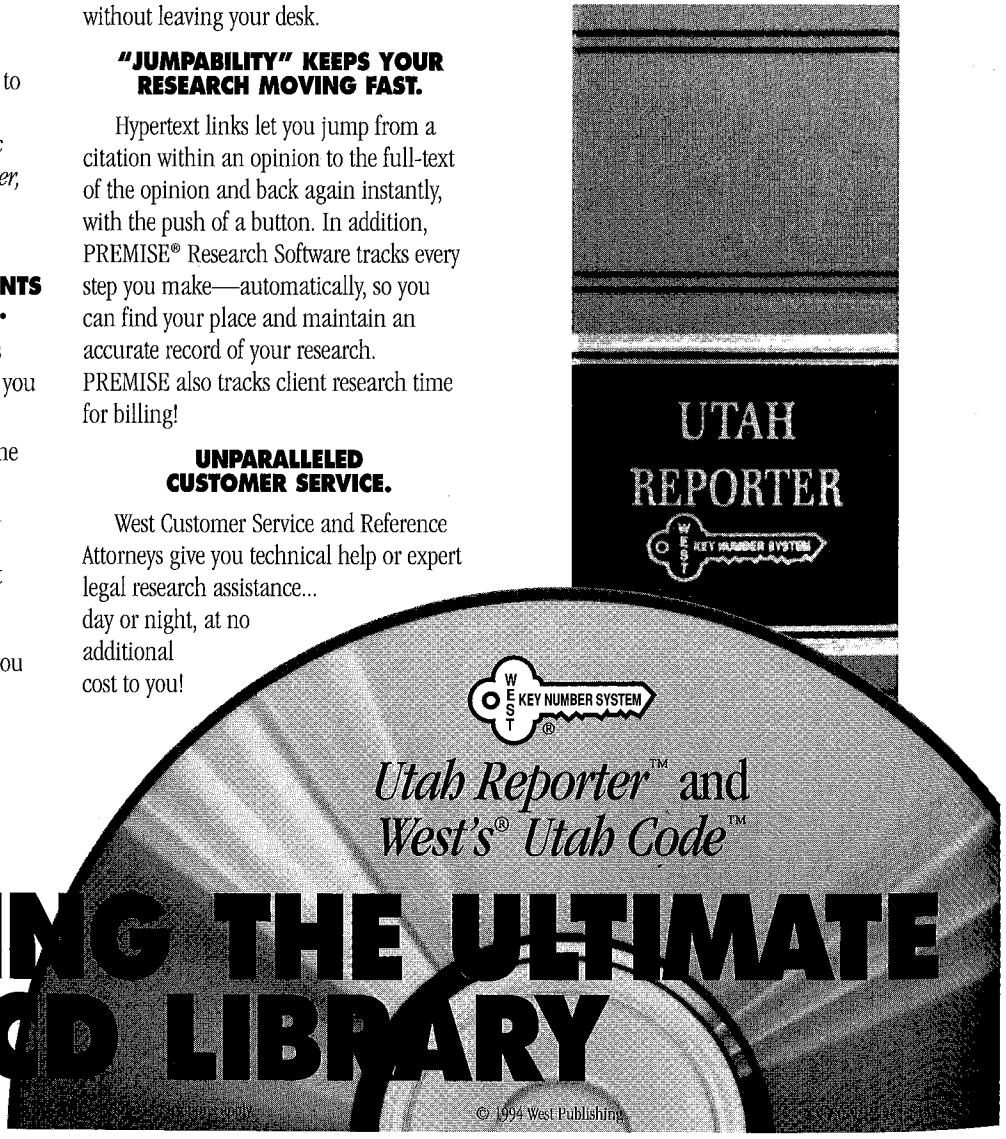

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COVER: Poppies Near North Mountain, Alpine, Utah, by A. Dennis Norton of Snow, Christensen & Martineau.

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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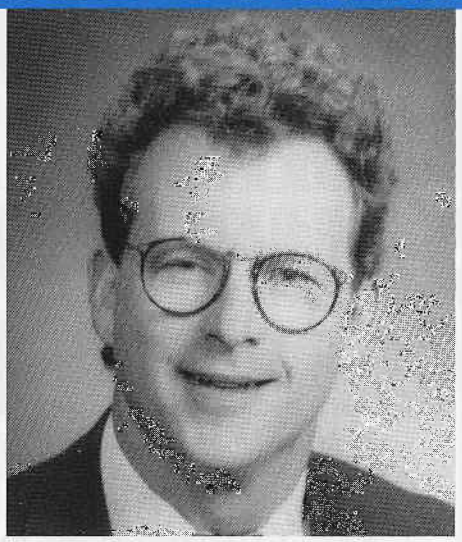


Final Column

By Paul T. Moxley

My final column is being completed on a beautiful Memorial Day, the best day of the year climatically, only about three weeks overdue. My tenure is about up and I am ready for it. I need to get back to work. It has been a wonderful experience. I recall a book that I read in college in the late 60's which suggested that people can be divided into those who "enjoy doing" versus those who "enjoy having done." For me, I can say it has been both this past year. The Bar staff that is lead by John Baldwin has been most effective, helpful and enjoyable to work with.

Since I first became a Bar Commissioner in 1989 I have witnessed a great number of changes in Bar operation. My first year was spent with the other Commissioners detecting the nature of the financial difficulties of the Bar which were occasioned, in part, by the construction of our building. After such detection and the work of the Task Force, we received the support of our members and the Supreme Court and last year retired the mortgage on the building. Much of the reason for that was the decision of the Board of Bar Commissioners to put off that which would have significant financial effect until the building was paid for. This past year we approved numerous new programs which were approved by the Supreme Court with close to unanimous support.

In the interim the costs of the discipline went up dramatically. On a national and state level the number of complaints against lawyers rose almost geometrically during this period. The office of Bar counsel grew from two lawyers to its present staff of four lawyers and two paralegals. In addition, a great deal of this work is performed outside of the office by lawyers hired by the Bar. Other general counsel work is needed. Greater attention needs to be given to prosecuting the unauthorized practice of law cases. The Bar needs to be vigilant about this issue. Members voice concerns about this problem and the Board is desirous of solving it. As this column is going to press we are interviewing for a new head bar counsel and are optimistic that this office will function better in the future.

I continue to marvel at the commitment and energy of our lawyers who volunteer generously of their time. We lawyers must continue to work together to solve the problems of our profession. The number of lawyers continues to increase and so do the legal problems of our clients and we continue to need to work to solve how we can provide access to our justice system at a cost which people can afford. During my years of practice, our generation of lawyers has witnessed many changes. Good arguments can be made and have been that we presently preside over the demise of the profession. No more carbon papers, etc. The profession is now a business. The transition in some respect has been ugly.

Nonetheless, we need to solve the problems for the public and the profession. Law firms need quality control. Experienced lawyers need to mentor new lawyers. The Bar needs to provide a method for lawyers to provide pro bono services to the public who in rare instances believes it is not able to have access to our justice system, etc., etc.

Along these lines of improvising the profession, here are some of the major activities the Bar has engaged in this past year:

1. Office of Attorney Discipline Review. Bar Commissioners Charlotte L. Miller, Charles R. Brown, and Francis M. Wikstrom have been serving with Dale A. Kimball, Jane A. Marquardt and Robert L. Stolebarger over the past year to study processes, policies and procedures of our Office of Attorney Discipline. The Disciplinary Office performs a core function of the Bar and utilizes about 25% of our bud-

get. The committee has been interviewing most of the participants in the disciplinary committees. We anticipate continuing many of the effective procedures currently in place in the office, and anticipate implementing several new changes which we hope will improve our services.

2. Quality Control Conference. On May 5, 1995 the Bar sponsored a forum which addressed the problems of assuring the competence of lawyers in our growing profession, and reviewed how the law schools, firms, judiciary and the Bar can work together to improve our contributions to the system of justice. A group of over sixty attorneys and judges were invited to hear presentations of a report on the proceedings and will be considering what next step would be appropriate to take in following up on the dialogue. We hope that the conference will be the beginning of continuing efforts to enhance competence in the profession and improve the quality of legal practitioners in the state and, not surprisingly, no simple solutions were offered.

3. Bar Business Meeting. On April 28, 1995 the Bar Commission held a business meeting in Salt Lake City to provide those who historically have not been able to attend the annual summer convention with an opportunity to hear reports on the various Bar activities and to ask questions of the Bar Commission. The agenda included reports from Chief Justice Michael Zimmerman, the Bar's Long-Range Planning Committee, the Utah State Board of Mandatory Continuing Legal Education, the Utah Bar Foundation, the Women Lawyers of Utah, the Minority Bar Association, the Young Lawyers Division and the two lay members on the Bar Commission.

4. Pro Bono Services. The Commission allocated funding to hire a pro bono services coordinator whose specific one-year program would include encouraging lawyers to participate in pro bono activities on a voluntary basis. The Bar is currently focusing these efforts on the backlog of cases at Utah Legal Services and the Legal Aid Society of Salt Lake, and in a Domestic Violence Program within the Third District.

5. Affiliation with Legal Assistants. After many years of discussions with various groups of legal assistants, the Bar Commission voted to petition the Supreme Court to authorize a formal relationship with legal assistants of Utah. The Commission felt that this was the best manner to assure communications between the Bar and the various legal assistant groups, as well as to decrease the likelihood of unauthorized practice of law and increase the professionalism of the relationship within the profession.

6. Foreign Legal Consultants. The Supreme Court has authorized the Bar to grant a limited license to lawyers who are members in good standing of a recognized legal profession in a foreign country and who wish to assist local lawyers in understanding the laws of that country.

7. Public Education. The Commission has engaged in lengthy and numerous discussions regarding how the profession can appropriately educate the public on its role and help them better understand the system of justice. The Commission has recently solicited lawyers to participate in a Speakers' Bureau and has received an overwhelming response to those interested in this public education. We are now in the process of lining up speaking opportunities.

"I continue to marvel at the commitment and energy of our lawyers who volunteer generously of their time. We lawyers must continue to work together to solve the problems of our profession."

8. New Awards. In response to the increasing number of women and minorities who are providing contributions to the Bar and professional services, the Bar Commission has voted to honor annually a woman lawyer who has engaged in distinguished service to women and a minority lawyer who has performed distinguished service in the law on behalf of minorities.

9. Bar Operations Review. The Bar Commission created a zero-based budget program to review each of the Bar programs and services and to determine the appropriateness of continued funding. The Commission also proposed amendments to the Bar's Bylaws, as well as to the Supreme Court's Rules For Integration, to update practices and clarify policies and procedures. The Commission is also in the process of reviewing the Client Security Fund Rules to determine whether or not the annual assessment is providing a public service.

10. Continuing Education and Admissions. In addition to these initiatives, the Bar has sponsored hundreds of hours of quality continuing legal education, including those held at the St. George Mid-Year Conference and those which will be held at the Summer Conference in San Diego. We have enjoyed the opportunity to meet with local lawyers in Ogden and St. George where the Bar Commission held meetings outside Salt Lake this year, and felt it was particularly helpful to receive input and comments regarding the unauthorized practice of law and the need to make more continuing legal education available to those outside the Wasatch Front.

I have enjoyed my year as President of the Bar and have found the challenges and opportunities to be stimulating and enriching. The Bar Commission has taken its role to be your representatives very seriously and has taken to heart the importance of acting as fiduciaries over your licensing fees. I want to particularly thank the other members of the Bar Commission as well as the members of the various Bar committees. The profession is represented by quality and capable lawyers and non-lawyers, who spend countless hours assuring that our programs and services are meeting the needs of the profession, and that we remain sensitive to the concerns of all.

A continuing challenge for Bar leadership is representing the members of the integrated Bar and leading this group who by their nature are not apt to follow easily. Frequently, the Bar leadership believes it knows what is best for the membership but understands it must not get too far out in front of the membership in committing to programs or even ideals that not all members would support. At the same time, one's time at the helm is short and the tendency is to do as much as possible in an effort to benefit the lawyers and public. We understand this is a difficult profession and that the times are presently challenging. The Bar understands the problems of lawyers, the difficulties that are faced on a daily basis. At the same time, we believe that lawyers must continue to work together in improving and safeguarding our legal justice system.

Now, I'm ready for San Diego.

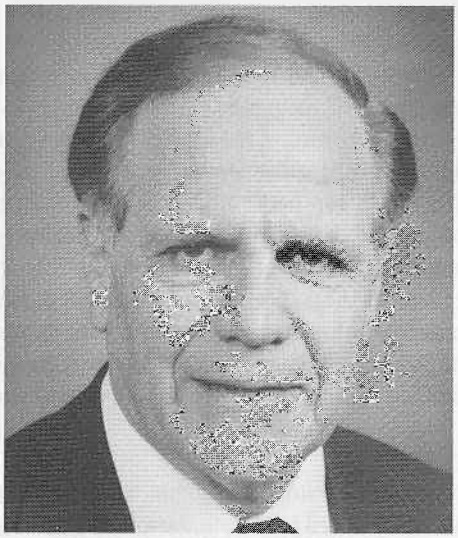
Changes in Health Care Will Impact Every Lawyer, Ready or Not

By Don B. Allen

(Adapted from a presentation at the Utah State Bar Mid-Year Meeting, March 4, 1995.)

Current market-driven health care reforms should be of significant interest to lawyers. Their practices may be impacted whether they represent physicians, allied health professionals such as physicians assistants, nurse practitioners, nurses, podiatrists, chiropractors, etc., hospitals or hospital systems, health insurers, HMOs or other managed care companies. Areas of legal work experiencing dynamic changes include (a) individual or group practice establishment, modification, merger or sale, (b) physician employment agreements and other contracts of many varieties, (c) new roles for professional corporations and limited liability companies, (d) antitrust compliance, and (e) regulatory work such as "fraud and abuse" and "Stark II" self-referral limitations.

State Health Care Reform — Legislative. Utah legislative reform began with Governor Leavitt's "Healthprint for Utah," formulated in 1993 and acted upon by the 1994 and 1995 Legislatures. Early legislative action created the Health Policy Commission to give in-depth study to health care issues and guide the Governor and the Legislature. State reform will attempt to: (a) increase access and coverage for all persons, with at least standard benefits available to all; (b) control growth of medical costs in system as a whole; (c) continue improvement in quality of care; (d) increase purchasing power for health benefits among those not covered with bargaining-strong employers, insurance plans, HMOs and other contracting units; (e) enhance competition on the basis of price and quality; (f) increase accountability among providers; (g) re-allocate the risk sharing (including increase in capitation fee programs) and re-evaluate risk adjustment mechanisms; and (h) stimulate more provider networks in the health care delivery system. Discussions include significant tort reform and antitrust reform, but those developments are remote in time and speculation is not helpful.



DON B. ALLEN has practiced with the firm of Ray, Quinney & Nebeker since 1961, after receiving his J.D. at the Univ. of Calif., Berkeley. For most of those years he worked in banking and finance, and has transitioned into a substantial health care law practice, representing hospitals, doctors and other providers.

Market Reforms — Contracts. A non-exhaustive review of the representative contracts is foundational to the discussion of market developments. Lawyers should have a role in the following contracts affecting the business and legal aspects of physician practice:

a. Recruitment agreement for a new physician or *practice relocation agreement* for an experienced physician on the move, containing financial inducements from a hospital, system, group practice or rural government entity;

b. Physician practice sale agreement, whether purchaser is a hospital or system, or another physician or practice group, documenting: (1) "hard" or "soft" (goodwill) assets to be sold; (2) whether seller is a physician or a professional corporation; (3) tax consequences; and (4) handling retirement plan. *Medical Economics*, October 24, 1994, pgs. 120, *et seq.* describes a survey concluding that two-thirds of office-based physicians are making big changes, from joining a PHO to selling their practices.

c. Employment agreement with a hospital or system, covering the full practice in a hospital or in a medical office owned by the employer. In Utah alone during the last two years at least 300 physician practices have been purchased by hospital systems. Issues include: (1) term of contract and termination; (2) compensation formulas; (3) handling outside income from research, teaching, etc.; (4) health plan and other benefits; (5) covenant not to compete; and (6) malpractice and indemnification.

d. Independent contractor agreement that may cover most of the same ground as an employment agreement, or a variety of circumstances such as inducements for locating a practice (loans and income guarantees, with or without forgiveness for designated services over time), or a departmental medical director position. Issues include whether the non-employment status can be sustained in view of potential IRS audits on FICA and other tax payments and withholdings.

e. Group practice legal documents may include: (1) professional corporation articles of incorporation, bylaws and other implementing documents, or limited liability company or partnership documents in some cases; (2) employment agreements between the professional entity and member or non-member physicians in the group; (3) tax planning documents

(including retirement) for the group, or (4) individual or group practice mergers. Issues include how decisions are made, who controls, how workload is allocated, how income is divided, allocation of expenses, and use of a single professional corporation vs. a separate PC for each physician with an "umbrella PC" for joint contracting.

Contracts Unique to Integrating Groups for Managed Care. "Managed care company" or "payor" for purposes of this article is a very general term and may include in context any current form of health maintenance organization ("HMO"), preferred provider organization ("PPO"), self-insured employer, trust health plan, licensed health insurer, or other third-party payor or administrator that is commonly known under that terminology. Government payors (Medicare/Medicaid) may be dealt with in the same manner but are not particularized in this discussion. Each payor offers a health "Plan". To the physician, obtaining patients and performing services on a profitable basis represent the obvious goals. Patients come from the *"covered lives"* who are enrollees of managed care companies. This is especially important in Utah, where managed care contracts are very prevalent and cover at least 1.3 million Utah residents. Attorneys for physicians want to help in the contracting process in order to protect the physicians' rights and delineate carefully the physicians' obligations.

"In Utah alone during the last two years at least 300 physician practices have been purchased by hospital systems."

a. A physician-hospital organization ("PHO") constitutes an entity under which a hospital is the managed care contracting entity for some or all of the physicians on the medical staff. These contracts bind all of the PHO physicians and cover the scope of services to be rendered by primary care and specialty physicians, as well as the methods and rates of reimbursement through discounted fee-for-service, capitation or other methods. The PHO may be an unincorporated association, but alternatively may be formed as legal entity through a for-profit or nonprofit corporation, partnership or limited liability company. The hospital may provide the equity (capital investment), or both the physicians and the hospital may be burdened with capital. Detailed bylaws or operating agreements are critical. The PHO physicians remain competitors and are not in an integrated practice group, yet they are not unlawfully bargaining to fix prices. As more fully discussed below, some risk sharing joint pricing arrangements are permitted as negotiated by hospital representatives or by independent parties (non-provider business managers, CPAs or other medical/financial analyst persons). All marketing, billing and collection, management, utilization review data collection and like expenses are absorbed by the PHO from the capital and revenues.

b. An independent practice association ("IPA") may be formed for a group of physicians who are not otherwise integrated into a group practice, but who desire to bid and contract as an offering unit with Plans of managed care companies. An IPA will consist of selected physicians in the same specialty or in multiple specialties, but not including the whole medical staff such as in a PHO. An IPA can utilize nearly any form of entity. Their governing documents must be carefully crafted to avoid antitrust and other legal problems. The IPA contracts *directly* with the managed care company for the providing of physician services to the

managed care enrollees, without going through a hospital or system as in the case of a PHO. Both IPAs and PHOs are examples of "networking" as manifest in current practice.

c. Physician agreements with PPOs are documents reviewed frequently by lawyers. A PPO is most typically sponsored by an insurer or a hospital or system. This form of managed care company may contract directly with insurers or with self-funded employers or trust benefit plans to attract the enrollees (covered lives) necessary to create a critical mass of persons needing health care. The PPO will then contract with hospitals, physicians and other providers for the services, with rates and payment methodologies to be negotiated. The PPO will often have an independent group (non-providers) establish the rate schedule and then offer those rates to the providers for acceptance.

d. Participating physician agreements with PPOs, HMOs and other payors:

A primary care participating physician contract will place the primary care physician in a "panel", offering services of all such physicians to the patients and their payors. This contract will by reference incorporate the plans to be utilized and/or the method by which such plans are determined by the basic contracting entity. The scope of services, peer review, utilization and other quality assurance mechanisms will be built into the process. Typically, the primary care physicians are the "gatekeepers", and have primary responsibility for managing cases both medically and financially, within the capitated rates, including that part of the capitation fund that is designed for the specialty physicians to whom the primary care physicians will refer patients when medically necessary.

A specialty physician participating contract functions as the corollary to the primary care contract discussed above, and keeps the diagnostic, treatment or surgical specialty physician in the "specialty panel" whose services are offered to a universe of enrollees.

e. Other issues affecting physician contracts. For purposes of the balance of this article each physician encompassing organization such as PHO or IPA will be referred to as the "PO" for "Physician Organization".

Credentialing for qualifying the PO physicians will be implemented and monitored at the PO level *and* at the payor's Plan level. A national organization (NCQA) sets standards for payors to follow in qualifying each physician provider. The Plans do not simply adopt the credentialing results at the related hospital. The threshold conclusion that each active member of the hospital's medical staff is eligible to be a PO provider does not always hold. The process cuts two ways — the physician has the individual decision whether to join the PO and/or participate in the Plan, and the PO and the Plan will have rights and obligations to reject some physicians while accepting others. Physician disciplinary actions and "departicipation" may be made by any of the PO, the hospital, or a Plan. These actions may be based on utilization review ("UR") testing the *efficiency* of medical care as well as quality assurance ("QA") testing the *quality* of care administered. Physicians who are not included or are disciplined will consult their lawyers on antitrust and other issues.

"The capitation arrangement is structured to ensure that 'risk sharing' exists among the providers at every level."

Quality Assurance and Utilization Review Issues. Managed care contracts will be accompanied by a copy of the QR/UA program for each Plan specifying standards, scope and functional requirements of the processes in each program. Contracts will specify an appeal procedure for providers within the QA/UR process. This is part of the "peer review" procedures and an example of an internal dispute resolution procedure through which the parties will be notified and will attempt to make a good faith effort to remedy any significant dispute about QA, UR, credentialing, disciplinary sanctions, reimbursement, etc. A *final* external dispute resolution procedure may be the increasingly popular *binding arbitration.*

Liability. The physician's liability insurance should cover each physician for his or her actions related to medical services provided under the Plan.

Capitation fees (risk contracting). Capitation fee programs necessarily involve risk sharing, and usually further cost containment. Capitation is derived from the "per capita" payment that each enrollee of a Plan (or the person's employer) makes to the Plan sponsor for health coverage, *and* the payment per member per month ("PMPM") made by the Plan to each hospital, physician and other provider in the program. Based on actuarially calculated risk-based experience of the frequency of each disease, injury, etc., and the associated medical and administrative costs, each type of medical treatment, pharmaceutical cost, diagnostic procedure, surgery or other procedure is categorized by medical codes. The anticipated reimbursement for frequency times the cost of each coded procedure is calculated for each hospital, outpatient surgery center, rehabilitation center, and the physician in every specialty. Each provider, i.e. a physician, for example, then receives the PMPM or $xx.xx per month for each enrollee in the Plan, and that capitation fee is the total compensation to the provider. If the costs and incidence of disease or injury are less than the actuarial projection, the provider makes a "profit". If the costs and incidence are higher, then for the time period the provider "loses". In order to induce efficiency in rendering the medical treatment the payor usually withholds (say up to 20%) of the PMPM monthly fee and holds it in a risk pool for distribution after the end of the year to the respective providers in each Plan if the actual medical costs are within the original projection. Accordingly, the capitation arrangement is structured to ensure that "risk sharing" exists among the providers at every level. In like manner, if primary care physicians are capitated and they in turn subcapitate specialists for diagnostic or surgical procedures, there should be risk pools at each level. This assures that primary care physicians are at risk for the behavior of their colleagues, and specialists are at risk for their behavior as well. If risk pools are absent, and each physician is individually capitated for his/her patients, the incentive for each physician to be concerned about the cost effectiveness of colleagues is reduced, and there is no presence of sufficient risk sharing or integration for antitrust compliance.

Fee-for-service contracting (almost always on a discounted basis) includes an

alternative under antitrust guidelines called the *"messenger model"*. The PO provides an independent agent (the "messenger") who collects unilaterally determined fee schedules from each of the competitive providers. Neither the providers nor the messenger exchange that information among the providers. This agent is the conduit for negotiations between each payor and all of the "independent" providers. The messenger takes offers and counteroffers back and forth until such time as the payor for the Plan has reached agreement with a sufficient number of providers so that the payor has an adequate panel of physicians in the primary care or specialty field, plus relevant hospital provider contracts. Under the messenger model each individual physician provider must have the right to "opt-out" of any particular Plan if the payor's rates are not acceptable on a unilateral basis. The messenger model avoids any suggestion that competing providers have jointly negotiated a fee schedule. It may create logistical problems that the providers will work through.

Fee-for-service contracting using joint pricing arrangements may incorporate sufficient risk sharing without the messenger model if they include "cost-containment goals" and a "withhold reserve". These features sound similar to the risk pools in capitation, but are adapted specifically to the fee-for-service billing and payment methodologies. The PO may engage the services of a third party to collect information from the physicians and develop a unified fee schedule plus specific cost-containment goals for each provider and generally for all providers. The Plan will pay a percentage (not more than 80%) of the amount provided in the fee schedule for every procedure performed. The remainder (not less than 20%) will be withheld. The Plan will pay the PO the amount withheld at the end of the year if the PO has met the predetermined cost-containment targets. The withhold reserve can then be redistributed to the deserving providers, or forfeited if goals are not achieved. A similar method of risk-sharing can be used for collaborating hospitals or other providers.

Antitrust Guidelines. The final subject in the managed care area describes briefly the most important recent legal developments affecting provider collaborations. The Federal Trade Commission and the U.S. Department of Justice issued joint Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust in 1993, and revised statements in September, 1994 ("Guidelines" herein). The Guidelines describe enforcement policy and create "safety zones" (similar in concept to the traditional "safe harbor") for health care providers desiring to effect joint ventures of many kinds and be free from antitrust challenges ". . . except in extraordinary circumstances . . . ." The Guidelines are worth reading in detail. They cover: (i) hospital mergers, (ii) hospital joint ventures involving high technology or expensive equipment, (iii) hospital joint

ventures involving specialized clinical services, (iv) provider collective provision of information to purchasers in fee-related and non-fee-related areas, (v) provider participation in exchanges of price and cost information, (vi) group purchasing arrangements, (vii) physician network joint ventures, and (viii) analytical principles for multiprovider networks. In the physician network joint venture area the foregoing discussion about POs is tailored to comply with the antitrust standards for physician collaboration and establishment of fees under the safety zone and the related analytical principles. In addition, if any PO is the *exclusive* contracting agency for the physicians, it cannot comprise more than 20% of the physicians in the same specialty (the product market) offering services in the same community(ies) (geographic market). If the PO's contracting authority is non-exclusive (i.e., the physicians are free to make managed care contracts on their own in addition to participating in the PO's contracts), then the threshold figure is 30% of the applicable specialty market. These Guidelines, though sometimes difficult to apply with certainty, represent significant assistance to medical practitioners and their legal counsel in planning collaborative arrangements.

"The [Antitrust] Guidelines, though sometimes difficult to apply with certainty, represent significant assistance to medical practitioners and their legal counsel in planning collaborative arrangements."

The Anti-Kickback Statute and the Stark Law

Under the so-called "anti-kickback statute"[1] medical providers are prohibited from receiving any form of payment for referral of patients to other providers where government programs (Medicare and Medicaid) may be the payor. In order to prove a violation the government must show *more than* the mere presence of referrals and a payment relationship, but must prove that the payment scheme, however devised, is a financial relationship that is *intended* to induce referrals. Typically a physician will not inadvertently violate this statute, and when parties to a financial relationship do not comply with any "safe harbor" provided in the applicable regulations[2] it is not automatically an illegal kickback transaction but may be defended on its factual and legal merits.

In contrast the *"Stark law"*[3], as amended effective as of January 1, 1995 (sometimes called "Stark II"), creates a *per se* prohibition against certain referrals. Compliance with a safe harbor (there called an "exception") is mandatory to avoid a violation.

The Stark law creates a *per se* prohibition on physician Medicare and Medicaid referrals for "designated health services" to entities with which they have a "prohibited financial relationship", unless one or more of the exceptions can apply.

Prohibited financial relationships include: Ownership or investment interests that may be through equity, debt, or other means and include indirect ownership interests through other entities; and Compensation arrangements that include virtually any form of remuneration directly or indirectly, in cash or in kind. For these purposes "physician" includes osteopath, dentist, dental surgeon, podiatrist, optometrist, or chiropractor; and an immediate family member of a physician. "Designated health services" include all diagnostic services, clinical laboratory services, radiology, and other diagnostic services; and therapeutic and other services, physical and occupational therapy, radiation therapy services, durable medical equipment, parenteral and enteral nutrition, orthotic and prosthetic devices, outpatient prescription drugs, inpatient and outpatient hospital services, and home health services.

The following exceptions may apply to render as permissible certain ownership/investment interests and compensation arrangements:

Physician Services. This exception permits referrals for physician services to another physician within the same group practice, requiring: (a) each physician

must provide substantially the full range of his/her services through the group; (b) the group must share space, equipment, facilities and personnel; (c) substantially all of the services (meaning at least 75% of the patient encounters) must be performed by members of the group; (d) bills must be submitted under a group billing number in the name of the group; (e) amounts received must be treated as receipts of the group; (f) overhead expenses and income must be distributed in accordance with previously determined methods; (g) compensation cannot be related to referrals but bonus payments based on overall profits and productivity bonuses based on services personally performed or supervised are permitted; and (h) the group must meet such other standards as the Secretary of Health and Human Services may impose by regulation.

In-office Ancillary Services. To qualify, three standards must be met: (a) *who* performs the service — this exception is only available for ancillary services performed within a group practice, personally by a physician, or under the personal supervision of a physician; (b) *where* performed — although clinical laboratory services need not be provided in a centralized location, all other designated health services provided by a group practice must be provided in a centralized location; and (c) *billing,* that must be done by a group using a common billing number. This exception does not apply to durable medical equipment (other than infusion pumps, that do qualify as an ancillary service under this exception) and parenteral and enteral nutrition.

Other exceptions are: Prepaid Health Plans, Publicly-Traded Securities, Hospitals in Puerto Rico, Rural Providers, Hospital Ownership (this exception essentially protects only physician ownership of an entire hospital and thus hospital-physician joint ventures in hospital ownership are gone), Rental of Space and Equipment, Bona Fide Employees, Non-employee Personal Service Arrangements, Hospital Compensation Arrangements, Physician Recruitment (permitting reasonable and market oriented payments to induce physicians to relocate to a new service area), Purchase of Practice or Sale of Property, Group Practice Arrangement With Hospitals, and Payments by a Physician (permitting physicians to pay independent laboratories for clinical laboratory services, and other entities for separate services at fair market value).

The statutes require each entity providing designated health services to report to the U.S. Secretary of Health and Human Services all relevant information concerning the covered items and services provided by the entity and the names and identification numbers of all physicians who have investment interest in the entity. This allows "tracking" of possible violations. The essential governmental remedies in the case of a violation may be exclusion from the program, denial of Medicare and Medicaid payment to the offending physician, and/or civil money penalties. There is no "grandfathering" of existing relationships, so every arrangement must be tested from "ground zero."

State law must also be considered. Utah requires a written disclosure by the practitioner of any financial relationship the practitioner or any immediate family member has in any clinical laboratory, ambulatory or surgical care facility or other treatment and rehabilitation service center, to which the practitioner refers patients. The disclosure must also describe the right of the patient to choose *any* facility or service center for the purpose of having the lab work or service performed.[4]

[1]42 U.S.C. § 1320a-7b (b), sometimes referred to as the "fraud and abuse statute."

[2]42 C.F.R. § 1001.952, *et seq.* (1991 and subsequent proposals).

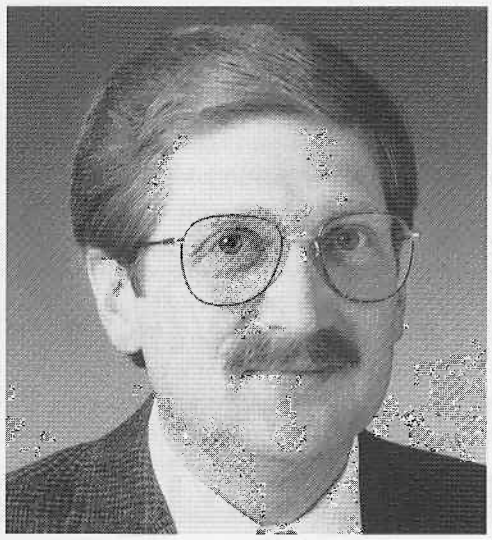
[3]42 U.S.C. § 1395nn.

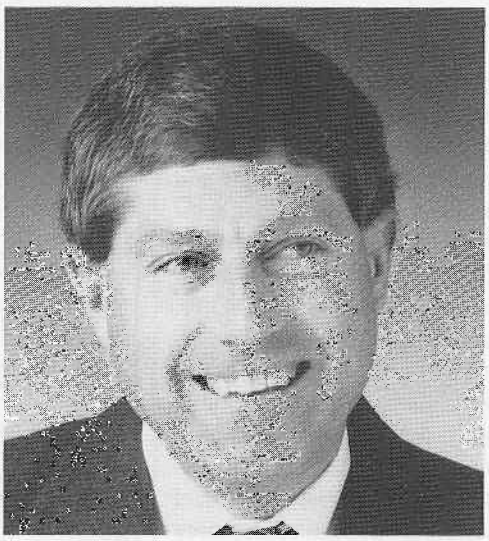
[4]Utah Code Ann. § 58-12-44.

Reach Out and Tax Someone:

State Taxation of Income from the Sale of Intangibles

By Maxwell A. Miller and Randy M. Grimshaw





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Mr. Grimshaw is an active member of the Tax Section, the Business Law Section, and the Real Property and Probate Section of the American Bar Association, and the Tax Section, Business and Corporate Section and the Estate Planning and Probate Section of the Utah State Bar. For the past several years, he has served on the executive committee of the Tax Section of the Utah State Bar and is a past Chair of that section. Mr. Grimshaw is also a member of the National Association of Bond Lawyers. Mr. Grimshaw served in the United States Air Force from 1972 to 1976 as a jet fighter instructor pilot.

AN OVERVIEW

The past decade has seen an increased trend in corporate "downsizing," a process whereby corporations divest themselves of entire lines of business, whether to reduce debt, avoid hostile takeovers, move into other, more profitable lines of business or for other reasons. For example, in 1981 Bendix Corporation sold its 20.6% stock interest in ASARCO, Inc. for $211 million gain. In 1983, Jewel Companies, Inc. sold its 36% interest in Aurrera for a $3.7 million gain. In 1986, Hercules Incorporated sold its 13% interest in Erbamont for a $1.7 million gain. The same scenario frequently plays out throughout the United States.

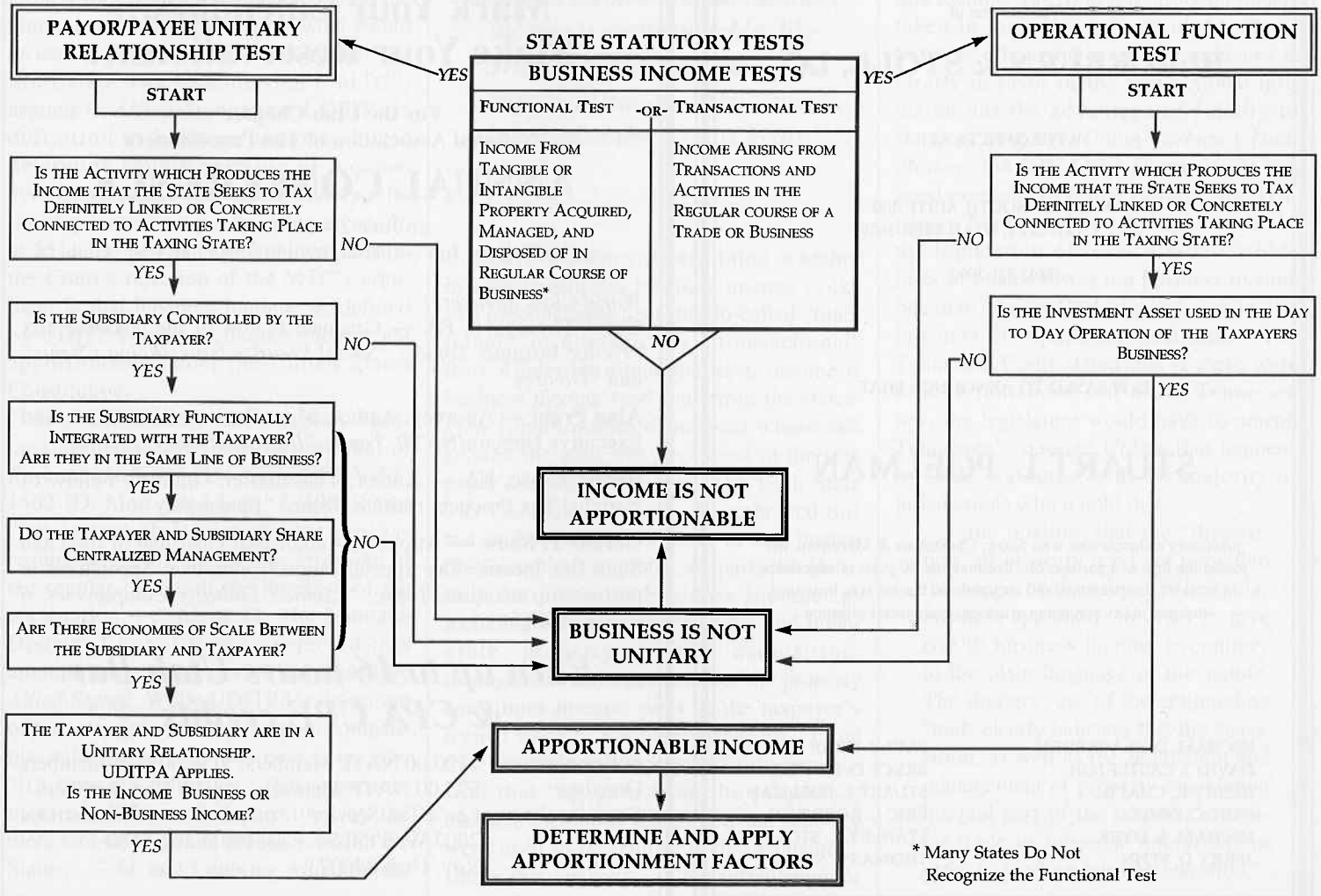
Such transactions often generate significant capital gains, which states typically clamor to tax. If the corporation is domiciled in Utah and derives its income solely from Utah sources, it is easy to figure the corporate franchise tax on the corporation's Utah taxable income. It is 5% of the taxpayer's "adjusted income" (i.e., federal taxable income plus or minus state adjustments.) But that is almost never the case. If the corporation is not domiciled in Utah, conducts business in multiple jurisdictions, and derives gain from the sale of stock in a subsidiary engaged in a different line of business, legitimate state taxation of the gain becomes complex as the attached schematic shows.[1]

Utah may "apportion" or tax its fair share of "business income" of a multistate "unitary business" (one characterized by centralized management, functional integration and economies of scale) under Utah's version of the Uniform Division of Income for Tax Purposes Act ("UDITPA").[2] Under Utah State Tax Commission administrative rules, income, including gains, is presumptively business income deemed apportionable, and deficiency assessments are presumptively correct.[3]

Consequently, taxpayers who dispute an audit deficiency must play on a decisively unlevel playing field. More like charging up a 45 degree incline, taxpayers must overcome the double presumption against them, almost always with no explanation from the Auditing Division as to the factual basis for its conclusions.[4]

Non-domiciliary corporate taxpayers frequently face at least two serious perils from states seeking to apportion their gain on the sale of intangible assets. First and foremost, states have been expanding the definition of business income to such extremes that there is no practical restraint on a state's power to reach beyond its borders and tax income having no operational link with business activities in the taxing

TESTS FOR DETERMINING APPORTIONABILITY OF NON-DOMICILIARY CORPORATE INTANGIBLE INCOME
1. PAYEE/PAYOR UNITARY RELATIONSHIP TEST
2. OPERATIONAL FUNCTION TEST



state. It is as if the concept "nonbusiness income," while yet codified in UDITPA, is non-existent, or has become, as a practical matter, a nullity. Second, assuming these gains are apportionable business income, states typically inflate income subject to taxation because they do not include the source of the income's apportionment factors in the denominator of the apportionment formula. In one case, for instance, 90% of the taxpayer's income for the year came from gain on its sale of stock in a subsidiary, but nowhere in the deficiency did the state give any consideration to any factors (i.e., the property, payroll or sales of the income source) that may have produced 90% of the corporate taxpayer's income. Both of these problems raise serious difficulties under the United States Constitution, which limits states from taxing income earned outside its borders, and mandates fair apportionment of multi-jurisdictional income.

This article will use a question-and-answer format in identifying the major issues and trends in UDITPA case law, and offer our personal view on arguments taken by the states and the taxpayers.

"Taxpayers who dispute an audit deficiency must play on a decisively unlevel playing field."

1. What is "business" and "nonbusiness" income?

UDITPA defines "business income" as "income arising from transactions and activity in the *regular* course of the taxpayer's *trade or business*, and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute *integral* parts of the taxpayer's *regular* trade or business operations." Utah Code Ann. §59-7-302(2) (emphasis added). As an unhelpful, circular afterthought, UDITPA defines "nonbusiness income" as "all income other than business income." Utah Code Ann. §59-7-302(4).

Approximately half of the states have adopted UDITPA and many others have adopted variations of the act. State revenue departments have at times interpreted the definition of business income as encompassing anything which adds riches to the corporation. In other words, states argue in essence that all income is business income apportionable to the taxing state. As a result, there is not such thing as nonbusiness income, at least for nondomiciliary corporations.

For instance, in *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307

(1982), Idaho argued that all income whose "purposes [were] related to or contributing to the corporation's business," constituted business income. *Id.* at 326. The Court rejected this expansionary notion, stating "The business of a corporation requires that it earn money to continue operations and to provide a return on its invested capital. Consequently, all of its operations, including any investment made, in some sense can be said to be for purposes related to or contributing to the corporation's business. When pressed to its logical limit, this conception of the 'unitary business' limitation becomes no limitation at all." *Id.*

Notwithstanding *ASARCO*, New Jersey argued in *Allied-Signal, Inc. v. Director, Division of Taxes*, 504 U.S. 768 (1992), that "all the income of a separate multistate corporate taxpayer" was apportionable. *Id.* at 550. Once again the Court rejected the state's expansive notion, stating that "Were we to adopt New Jersey's theory, we would be required either to invalidate those statutes [which allocate nonbusiness income to the domiciliary state] or authorize what would be certain double taxation." *Id.* at 552. The Multistate Tax Commission ("MTC") argued in *Allied-Signal* that UDITPA's definition of business income should determine apportionability of income, even though there may be no unitary relationship between a payor and a payee. *Id.* at 551. The unavoidable implication from the Court's rejection of the MTC's argument is that business income, as defined by UDITPA, may encompass income not apportionable under the United States Constitution.

Notwithstanding *Allied-Signal*, Montana argued in *Montana Department of Revenue v. Jewel Companies*, CDV-93-1562 (D. Mon. filed Sept. 7, 1994)[5] that "[i]t is enough [to satisfy due process requirements] that the income arises out of the regular course of the business of the corporation. . ." *Id.* at 17. The Montana District Court likewise rejected this attempt, concluding it was foreclosed by *Allied-Signal*. While UDITPA's definition of business income may be quite compatible with the unitary business principle, "[i]t does not follow . . . that apportionment of all income is permitted by the mere fact of corporate presence within the State . . ." *Id.* at 17 quoting *Allied-Signal* at 552. *Jewell* is thus notable because the Court held that dividends and capital gains from the sale of Jewell's stock in a subsidiary could not be included in apportionable income under federal constitutional standards explained in *Allied-Signal.* This followed even though the parties stipulated that the dividends and gains were "business income." The definition of business income may be compatible with constitutional standards for apportionment, but they are not identical.

The states' persistent argument that, in effect, all income is business income and all business income is apportionable, like Dracula rising from his coffin, simply will not die unless a stake is pounded through its heart. Fortunately, an increasing number of state appellate courts have provided that service.

"The states' persistent argument that, in effect, all income is business income and all business income is apportionable, like Dracula rising from his coffin, simply will not die unless a stak is pounded through its heart."

Court decisions determining whether income constitutes business income evoke two irreconcilable tests, the so-called "functional," or alternatively, "transactional" tests. Under the functional test, income is business income (and thus from the states' view apportionable) if the asset whose sale created the gain was *ever* used in the taxpayer's trade or business. The Utah State Tax Commission expressly embraced this test in Appeal No. 93-0481. In that matter, the Commission quotes, in part, the statutory definition of business income, as including income from "tangible and intangible property if the acquisition, management and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations." From this, the Commission leaps to the conclusion that "all gain from the property's business income is included if the property were used in its regular trade or business. Under this analysis . . . the infrequency or the extraordinary nature of the transaction is irrelevant." Decision at 5. The Commission does not explain in this decision how it is even possible for the nature or frequency of a transaction to be irrelevant in deciding what constitutes business income when the statute says business income must arise from transactions in the "regular course" of the taxpayer's trade or business. Gain from liquidations, for example, would be taxable under this theory, even though it is not the regular course of a business to liquidate itself.

A reported case exemplifying the functional theory is *District of Columbia v. Pierce Associates*, 462 A.2d 1129, 1131 (1983), which held that insurance proceeds were business income because the "property had an integral function in the taxpayer's unitary business . . . even though the transaction itself does not reflect the taxpayer's normal trade or business." One has to ask himself/herself how this is logically possible.

Under the "transactional" test, income is business income only if the source of that income was from a transaction undertaken in the taxpayer's regular trade or business. The trend in adjudicated cases is clearly in favor of the transactional test, which has the advantage of fidelity to statutory language. *Union Carbide v Huddleston*, 754 S.W.2d 87 (Tenn. 1993) is a good example. In *Union Carbide*, the Tennessee Supreme Court held that gain on the liquidation of seven Union Carbide lines of business was not business income because Union Carbide was not in the business of liquidating businesses. The Tennessee Court stated that if there were to be a functional test under Tennessee law, the legislature would have to amend Tennessee's statute.[6] Unless that happens in Utah, we agree with the majority of jurisdictions which hold that:

> . . . the position that the "disposition" of property need not be within the scope of the taxpayer's regular business operations in order to give rise to business income is contrary to the plain language of the statute. The drafters' use of the conjunction "and" clearly indicates that the disposition, as well as the acquisition and management of property must be an integral part of the taxpayer's regular trade or business operations in order to produce business earnings.[7]

2. Are administrative regulations in conflict with UDITPA?

Of course, the MTC endorses the functional test, and its rules interpreting UDITPA, which the Utah State Tax Commission has adopted, embrace a definition of business income that includes income arising from property that has ever been used in the taxpayer's business.[8] These and other such rules ignore UDITPA's statutory language to encompass virtually all income within the scope of apportionable income.

For instance, one offender, labeled Rules R865-6F-8.3. of the Utah rules, provides in part the "Gain . . . constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business." This language has been interpreted to mean that a tangible asset exchanged for stock, which is held for a period of years and later sold at a gain, generates business income even though the asset (stock) has no connection whatsoever to the taxpayer's regular trade of business in the taxing state. Similarly, the rule provides that dividends (and, by extension, gains) are business income if the "purpose" of holding and acquiring the stock generating dividends is "related to or incidental to such trade or business." It takes no gifted insight to see that the words "integral," as used in the statute to describe a relationship between income and a taxpayer's regular course of business are not synonymous with, and indeed are antithetical to, the word "incidental" as used in the rule. Likewise, it is not hard to see that there is probably no corporate income that is not "incidentally" related to the taxpayer's trade or business, especially if "business" is defined broadly to include such indicia as "corporate purpose," "making money," "use of proceeds," or the like.

No wonder Professor Jerome R. Hellerstein, possibly the leading commentator in the field, has noted that "The MTC regulations also appear to adopt an excessively broad definition of the term [business income] by including in business income interest or intangible property, if the "holding of the intangible [i.e. stock] is *related to or incidental to* the taxpayer's regular trade or business operations." Hellerstein, *State and Local Taxation*, par. 9.10(1) (1983) (emphasis added).

3. What are the constitutional restraints on state apportionment of income?

Both the due process and commerce clauses of the United States Constitution preclude states from taxing value earned outside their borders. *See, e.g., Miller Bros, Co. v. Maryland*, 347 U.S. 340, 344 (1954); *Allied-Signal* at 545. These limitations are satisfied if there is some legitimate connection between the taxpayer's interstate activities and the taxing state, *Mobil Oil Corp. v. Commissioner of Taxes of Vt.*, 445 U.S. 425, 436 (1980); and there is a rational relationship between the income attributed to the state and the intrastate values of the enterprise the state seeks to tax. *Id.* at 437.

The two constitutional predicates which allow apportionment of income from intangibles are the "payor/payee unitary relationship" and the "operational function" tests. *Allied-Signal* at 552. Both rely on different factual analysis to determine whether income is apportionable.

A. Unitary Relationship. The "payor/payee unitary relationship" analysis ignores the form in which the income is earned, e.g., dividends, interest, capital gain, and examines the relationship between the two legally distinct entities, the payor and the payee, to determine if

one controls the other and if that control results in functional integration, centralized management and economies of scale. *Id.* at 549. These underlying relationships, i.e., the operational interdependency of the separate legal entities, may give rise to a flow of value which justifies apportionment. If, as a result of functional integration, centralized management and economies of scale, there is a flow of value to the parent corporation from its investment in the subsidiary in connection with the subsidiary's activities in the taxing state, then apportionment of that flow of value is justified.

B. Operational Functions. The "operational function" analysis, by contrast, seeks to determine if the intangible income which the state seeks to apportion is related to the investor's business activities in the taxing state. *Id.* at 552. The essential test is whether the intangible asset itself is part of the investor's unitary business operations in the taxing state, not whether two separate corporations are engaged in a common enterprise.

As noted in *Allied-Signal*, "the relevant unitary business inquiry focuses on the objective characteristics of the *asset's use* and its relation to the taxpayer and *the activities within the taxing State*." *Id.* at 550 (emphasis added). While stressing that "there must be a connection only to the actor the state seeks to tax," the Supreme Court in *Allied Signal* at 552 gave the following example of an "operational function":

> Hence, for example, a State may include within the apportionable income of a non-domicile corporation the interest earned on short-term deposits in a bank located in another State if the income forms part of the working capital of the corporation's unitary business, notwithstanding the absence of a unitary relationship between the corporation and the bank.

In this example, the "asset," working capital — capital currently used in business operations — generates interest on short-term deposits. The interest is apportionable even though the corporation and bank are not unitary. It is the corporation's use of the "asset," i.e., the working capital, to generate interest as part of its regular business operations *in the taxing state* which allows the income to be apportionable.

These two legal theories which justify apportionment require a fact intensive analysis, but neither are "purpose" tests. They are "asset use" tests. The facts which may support a certain business purpose will not support a conclusion that gain has been derived from payor-payee unity or an operational function.

In many cases in which states seek to tax gain from the sale of stock, it is obvious that the payor is not unitary with the payee, and that, accordingly, the payor-payee unitary theory will not work to justify taxation. Undaunted, the states turn to the as yet undeveloped "operational function" test to tax gain. For example, in *Jewell*, the state argued that Jewell's investment in Aurrera "served an operational rather than an investment function." *Jewell* at 16. Despite Montana's invocation of the magic words "operational function," it turned out that the state's list of examples simply described a mutually beneficial exchange of information and expertise between the two businesses. "They [did] not disclose sufficient functional integration, centralization of management, and economies of scale to justify a conclusion that Jewel's investment in Aurrera served an operational, as opposed to an investment, function." *Id.* The asset (stock) had nothing to do with Jewell's business in Montana. The court then equated Montana's argument with that rejected in *ASARCO* and *Allied-Signal* — namely, that the state's notion of "operational," which encompassed virtually all income as business income, "would destroy the [unitary business] concept." *Id.*

This court got it right. "Payor-payee" unity and "operational" income are not mutually exclusive concepts; they are instead two subdivisions of the "unitary principle," which is that a state cannot apportion income unless it is linked in some concrete fashion to the taxpayer's business operations in the taxing state. Often asking the right question — what does this income have to do with the corporation's unitary business operations *in the taxing state* — should make it obvious when the state has overreached statutory and constitutional bounds. However, litigation over what "operational function" means is in its infant stages, leaving everyone unsettled over state attempts to tax income from intangibles.

[1]Our schematic is *simplification* of the apportionment issue, even though it looks like a new board game for Saturday night recluses.

[2]*See* Utah Code Ann. §§ 59-7-302 through 321. The apportionment ratio is computed by averaging a property factor, a payroll factor, and a sales factor, as follows:

$$\frac{\frac{\text{Utah Property}}{\text{All Property}} + \frac{\text{Utah Payroll}}{\text{All Payroll}} + \frac{\text{Utah Sales}}{\text{All Sales}}}{3}$$

The tax is then calculated as follows:
Total Business Income x Apportionment Ratio = Income Taxable by Taxing State

[3]*See* Rule R865-6F-8.A. and Rule R865-1A-7.G. If gains are treated as "nonbusiness income," they are "allocable" to the taxpayer's commercial domicile under Utah Code Ann. § 59-7-306.

[4]Although the Taxpayer Bill of Rights, Utah Code Ann. § 59-1-1002(1)(e), provides that the "commission [i.e. the Auditing Division] shall explain its audit and collection process *before* the first interview . . .[,]" (emphasis added) there is no statute requiring the Auditing Division to explain its assessment in writing. As a matter of practice, *partial* explanations are *sometimes* given. Despite a general policy of "full disclosure" in Commission proceedings, the Auditing Division's "work papers, appraisals, and audits" are nondiscoverable, even as to the taxpayer defending itself in a formal hearing. *See* Rule R861-1A-6.C. and D. As a result, the taxpayer often remains in the dark as to the facts and legal theories the Auditing Division felt justified an audit deficiency.

[5]Though a state district court decision, *Jewell* has been given considerable play in the state tax literature. *See, e.g., Multistate Tax Analyst* Vol 8, No. 6 (October 15, 1994). As of this writing, there is no appellate court decision in the case.

[6]Although Tennessee is not a UDITPA state, its apportionment statute is similar. Ultimately, the Tennessee Legislature did, in fact, amend its statute so as to pick up gain that would otherwise under *Union Carbide* have been classified as "nonbusiness" income. This underscores the irrationality in arguing that the functional test is authorized under UDITPA. It remains to be seen whether a functional test can pass constitutional muster.

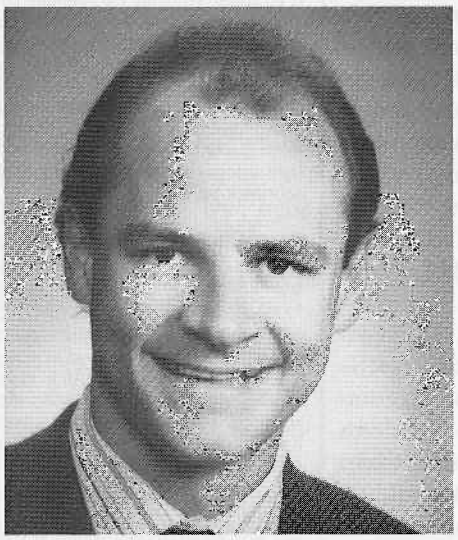
[7]In the *Matter of the Appeal of Chief Industries*, 875 P.2d 278, 286 (Kan. 1994), quoting *General Care Corp. v. Olsen*, 705 S.W.2d 642 (Tenn. 1986) at 646; *see also Phillips Petroleum Co. v. Iowa Dep't of Revenue and Finance*, 511 N.W.2d 608 (Iowa 1994); *Laurel Pipe Line Co. v. Commonwealth of Pennsylvania* (No. J-141-1993, May 26, 1994); *Wisconsin Department of Revenue v. Citizen Publishing Co. of Wisconsin, Inc.* (No. 93-0328) in which the courts focus on the statutory language requiring that the disposition of the property be an integral part of the taxpayer's regular business.

[8]*See, e.g.*, Multistate Tax Commission Reg. IV.1.(c).

Pricing Your Legal Products:

Alternative Billing Strategies and How to Get There – Part I

By Toby Brown and Michele Roberts



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This article is dedicated to the memory of Craig M. Peterson, Esq.

INTRODUCTION

This two part article looks at the trend towards setting the prices of legal services upon more direct consideration of value to the client than is traditional in the practice of billing by the hour. In the legal industry two terms are being used to describe this new practice. The first term is *alternative* billing and the other is *value* billing or pricing.

A perception has arisen among clients that the traditional pricing strategy of billing by the hour does not always result in adequate incentives to lawyers to maximize the efficient use of time or to minimize costs. Some clients, especially those which have critically reviewed their own pricing and cost strategies, have begun seeking ways to reduce their legal bills by requesting such incentives. Lawyers who embrace these ideas and provide the benefits of such pricing strategies for all of their clients who could benefit, not just those who require them, are the ones that will get and keep new clients and remain successful in their practices.

In Part 1 of this series we will examine the spectrum of methods for pricing legal services, beginning with the traditional method, such as regular-hourly rates, and moving to alternative, value based methods. As we do this we will weigh the pros and cons of each method.

As part of this discussion we will men-

tion legal services in terms of projects desired by the client, e.g., from the preparation of a will to the prosecution of an action at law, and we will assume that some comparison can be established between different projects on which decisions about price can be made. We will refer to such projects or convenient packages of legal services as "products", by analogy to the term which marketing theorists apply to such products as an insurance policy, a bank account, the purchase of a tract of real estate, or the administration of a construction loan. We recognize that many projects pursued by lawyers have a variety of characteristics so broad that the name "product" is somewhat less than apt than it would be if applied to a line of retail merchandise. The endeavor of this paper is to show that progress can be made toward estimating costs and establishing sufficient incentives for efficiency to encourage lawyers to consider alternatives to billing strictly by hours recorded.

This review will prepare us for Part 2 where we will examine how to integrate these methods into your practice of law. We will explore how a lawyer or law firm might move from hourly billing to other forms of billing. We will discuss how you can get an accurate picture of the costs going into the services rendered and how considerations of value contribute to the price. We will conclude with a discussion on staying profitable by utilizing alternative pricing strategies.

BILLING METHODS[1]

I – Hourly Billing

Hourly billing is currently the most common practice in the legal industry. With this method you track your time spent on each project and charge the client a fee set by multiplying an hourly rate by the number of hours devoted to that project. When the fee is first agreed upon the time has not been applied to the project and therefore it cannot be said with certainty how many hours will be required. There may have been a discussion with the client of the attorney's estimate of how many hours may be required, but the general idea is that the size of the fee depends on circumstances that cannot be predicted with assurance. You set your hourly rate by dividing the costs of operating your law office for a year by your predicted costs, including staff salaries, costs of rent and supplies, and your own take home pay projections. Hourly billing is a simple method for pricing your services and for developing revenue projections which provides security to the lawyer. You get paid whether you deliver a good product or not. If you work consistently every day, record each hour as it is spent, and bill all your time, the total amount billed to all your clients for any given period will be a figure which can be stated at the time that you set your hourly rate. A lawyer or law firm that can bill clients hourly has an incentive to operate efficiently with regard to costs that are not broken out separately from the hourly rate, such as rent, but not with regard to their own use of time. This may be illustrated by the observation that if a lawyer reduces the time it takes him to complete a project, he will reduce not only the revenues allocable to his own pay but also to the expenses of his office. This may not be a serious concern if the lawyer's time is fully occupied no matter how efficiently he works.

"A perception has arisen among clients that the traditional pricing strategy of billing by the hour does not always result in adequate incentives to lawyers to maximize the efficient use of time or to minimize costs."

The greatest disadvantage to this method is that you cannot predict very well what the total cost of a project will be to the client. Most clients prefer to budget for legal expenses, to forecast in advance what will be needed for legal services, and do not like this unpredictability. Because hourly billing does not encourage the delivery of legal services at a minimum number of hours, clients may feel that they are paying too much for their lawyer and are likely to go to another lawyer.

II – Discounted Hourly

This method is a small modification of the hourly method. Here a lawyer or firm provides a percentage discount to a client. This discount is typically based on volume,

although it has been our experience that any client that asks for a discount will get one. This method may give clients the sense of getting a deal in some circumstances. As an incentive it may be counter-productive because it provides for a price based on total hours charged to the project. In the long run it provides no impetus for greater efficiencies and has a negative consequence of reducing revenues allocated to cost.

A permutation on this method is called "Pre-Paid Legal Services." Here you sell blocks of time paid for in advance, then you can discount based on volume. With this method, you are giving volume discounts up front while your collection costs go down, allowing your clients to perceive and actually get a discount, while your revenues remain stable.

III – Blended Hourly

The blended hourly pricing method is another modification of the traditional hourly method, involving multiple timekeepers. The blended rate gives the client assurance that his project will be staffed in a way the client considers appropriate. For example, if the client determines, in consultation with his attorneys, that half the work should be done by a senior partner at $150 per hour, a quarter by a junior attorney at $100 per hour, and a quarter by a paralegal at $50 per hour, the blended rate would be $112.50, the average representing 30 minutes billed by the senior attorney, 15 minutes by the junior one, and 15 minutes by the paralegal. The firm has no obligation to divide the work up according to this formula, but those who work on it know that if the blended rate is less than their own usual rate, they will personally lose productivity by putting in more time than is allowed for in the blend calculation.

With this method there is an impetus for efficiency because the law firm makes more money by pushing the work down to the cheapest possible labor source. One problem often encountered in a law firm that doesn't use blended rates is a reluctance by the partners to push the work down because they are wary about delegating or they are worried that their own hours will be low. So if your firm has partners that exhibit these concerns, the blended hourly method may require taking other steps to assure that the junior attorneys and paralegals are competent and effectively supervised and that the senior partners have work that will keep them productive at their higher rates.

There is a nice marketing feature associated with the blended hourly method. When a client is considering price as the primary reason for selecting a lawyer or firm, as a partner you will probably be quoting a lower rate than someone not using this method. This marketing advantage will become less effective in securing clients as clients become less comfortable with hourly billing, however.

IV – Straight Retainers

Straight retainers are actually just a derivative of the hourly method where you are paid an amount in advance of the services to be offered, and you then bill against this amount. This is a great idea if a client is willing to pay for services in advance, but the same inefficiencies and problems listed for the hourly billing method still exist.

V – Retainers for Access

This method was used by many lawyers prior to the hourly method. A client paid a fixed periodic fee that gave them access to a lawyer or law firm. The lawyer kept himself in readiness to serve the client. The client had access to the lawyer and firm for all the client's legal needs and depending on the size of the retainer may not have paid additional for work performed. In current practice this method typically allows a client to call any time with questions, but does not cover other legal services. For example, if a client were to file a lawsuit, additional fees would be required.

One reason a client might select this method is to prevent a lawyer from representing adverse parties or competitors. This strategy may limit your income from other sources. Depending on the demands this type of client makes on your time, however, a retainer for access can still be profitable.

VI – Contingencies

The contingency method is currently a common pricing strategy for a lawyer who handles litigation for a client having a potential for a large monetary recovery. The traditional justification for a contingent fee was that a client lacking means to pay with a worthwhile case could obtain adequate legal representation no other way. The lawyer agrees to share the risk with the client and collects fees only if the case is won. Typically the percentage of the award that a lawyer receives is 33%. A

lawyer with a contingent fee practice plans to make a reasonable fee on his entire case load but does not make anything on cases that are lost. These losses are made up by a recovery of more than the usual hourly rate from cases which are won.

This method has a number of advantages. For example, the more efficient you are in preparing the case, the more profitable you are if you win. And the client does not pay unless you do win, which means the client receives his recovery at the time he pays the fee and usually does not have to make sacrifices in other expenditures to finance the litigation. Clients are generally happy with this pricing method, even though the amount of the fee may not be directly related to the value of the legal services in terms of the difficulty of the case, the time allotted to it, the significance of the issues determined, and other measures of value received by the client. It is also difficult to predict how much the fee will be and therefore, whether a case might be profitable. This makes for high risk situations.

A subset of this category is the reverse contingency. In this situation you are not expecting to be paid out of a client's settlement. Instead your legal work is expected to save your client a sum of money and your fees are a portion of this sum. From the client's perspective, without your help they would have had to pay the entire sum, with your help they will only have to pay a portion of it. The advantages and disadvantages of a reverse contingency billing are the same as those of a regular contingency arrangement.

Generally the contingency method seems to work well for certain types of practices (i.e. personal injury cases), but it still is not a method whereby your fee equals a predetermined value.

VII – Modified Contingencies

We will discuss two possible forms of a modified contingency. In the first form the lawyer agrees to bill at a "subsistence" billing rate plus a contingency. The subsistence rate is set at a point calculated by the lawyer to break even on costs in the event the case is lost. If the case is lost the lawyer may lose potential profits that could have been made on time and effort. A contingency fee or bonus is then added to the break-even rate. The amount paid can be tied to either incremental success (having one issue resolved with a summary judgment), or winning the overall case or obtaining another desired result, such as the consummation of a corporate merger.

This first form of modified contingency is effective because it allows the client to tie its costs to receiving successful legal results. Additionally, it forces some efficiencies on the lawyer or firm, since hours spent unwisely on this case equal lost profits. If the case is lost or the client does not receive a desired legal result, i.e. a merger, the client is left potentially paying a large sum for a product it did not want. This is the same problem a client might face in a straight hourly arrangement.

In the second form of modified contingency the client pays a lower hourly rate to begin representation, say 80% of standard rates. After a legal result is obtained, the client evaluates the value of the legal work, both in terms of quality of legal work and the level of client service received. The client then applies a "bonus" based on this evaluation. You would pre-define a range for the bonus, such as 0 to 40% of the bill based on standard rates. The result of this billing method is that the total return for a lawyer or firm would range from 80% of the normal fees (when given 0% bonus) to 120% of normal fees.

"Task based pricing is a beginning to the process of collecting the information you will need to establish the cost of providing your legal services."

This pricing strategy allows the client to begin to equate the value they receive with the amount they pay and can be used for both litigation and non-litigation services. It still is based in the hourly method, however. Modified contingencies are a step towards value billing, but they do not make the leap completely.

VIII – Lodestar

The lodestar has arisen when the fee is fixed by a court under a statute authorizing the court to impose attorney fees on a party. It is applied to records of services already rendered. The court reviews the bill based on the hourly method and then applies a multiplier. The multiplier arises from the considerations of the difficulty of the project, the significance of the issues decided, the usual cost of legal services in the community, and so forth. This method has been around awhile and is used in some specific court applications. It could be used in the place of the second form of modified contingency described above. A pre-defined range for a multiplier (i.e. .8 up to 1.2) could be applied to hourly fees after a legal result is obtained. The same pros and cons outlined in the modified contingency would apply to this method. This would be similar to a declaration by the client at the outset that it would either subtract a discount or add a bonus to the bill at the close of the project, at its discretion. This might be appropriate in circumstances where there was a close relationship between the attorney and the client.

IX – Task Based Pricing

Task based pricing is a different way to organize the information the attorney includes in his bills. A typical hourly rate bill contains chronological entries. These are often not organized in relation to the activity involved or even to the project. To a client these entries may mean very little without considerable study and reorganization of the entries on the bill into functional categories. Task based pricing attempts to demonstrate meaning and therefore value to a client by organizing a bill by tasks instead of time of entries. For example, a traditional bill would have time entries pertaining to a deposition scattered throughout a bill or even in separate bills. The client has no idea which entries comprised the deposition and what the total cost was for the deposition.

A task based bill entry might appear as follows:

Deposition of Hunter S. Thompson:

Fees – Research by associate, 4 hours. Six phone calls to Client, Opposing Counsel and Mr. Thompson by Partner, Associate and Paralegal, 10 hours. Preparation for deposition by Partner and Associate, 8 hours. Deposition by Partner, 3 hours. Costs – Copies $, FAX $ . . . .

Total Fees $4,000.00

Total Costs $237.47

Total $4,237.47

With task based billing, the client is able to identify the specific legal services rendered and connect that with the price

paid. This does not set price equal to a predetermined value, but it does better demonstrate the value received by the client. Task based pricing improves the communication of value to your clients.

Task based pricing is a beginning to the process of collecting the information you will need to establish the cost of providing your legal services (depositions, in this instance). Once the cost of rendering legal services can be projected with some assurance, the attorney may depart from billing strictly by the hour and adopt a value based pricing strategy.

X – Fixed or Flat Fee

The fixed fee pricing method is the most often mentioned method when referring to alternative billing or pricing strategies. This method consists of actually putting a fixed price on each of your legal projects. Here we are finally equating price with value, within the legal market.

Clients will appreciate such a method, because now to the extent that they can decide which projects they will undertake within the next budget year, they can plan for them as expenditures. Clients seem to have an easier time paying their legal bills if they enter the process with a clear expectation of the costs involved. It allows them to make a more informed decision on whether purchasing a certain legal product will benefit them or their business. So fixed fee pricing can serve as a client development tool as well as a billing method.

An option within fixed fee pricing is referred to as phase or trunk pricing. This is a method to generate a price for a complex project by breaking the project into parts and setting prices for the parts. This list of prices becomes a budget for the project. Phased pricing can be used effectively in litigation. Given the number of depositions to be taken and the amount of documents under consideration, an attorney might set a fixed fee price for the discovery phase of a case.

The "trunk" idea follows the analogy of a tree. A deal coming together might have several possible paths or limbs it could follow. So again the lawyer sets a price for each possibility. We offer the following example of this pricing method for a bank's collections business. Obtaining a judgment would start the process. From there negotiations, or foreclosures or liens or garnishments might be separate paths that could be priced. While the price document would not be a simple spending plan for the project, it would give the bank better financial information on which to base its decisions to proceed. By knowing the price of each possible path and having formulated estimates of probability of success in each case, the bank could decide which trunk would give it the greatest return for their money.

On the surface billing by flat prices stated in advance seems relatively simple, since all that is required is to agree on the content of the work the client desires to perform, to specify the details and estimate the cost of rendering the services, with a suitable shrinkage factor to protect against errors in estimating, to assign a price that will return costs including reasonable compensation for the attorneys involved, and to formulate a contract having appropriate provision for changes in the fee if significant changes occur in the circumstances under which the lawyer estimated the price. As all lawyers know from experience, however, it will not be easy to implement.

The trick for all businesses is to set prices at a level where clients will want to buy the products and the business will make a reasonable return. In the past lawyers were sheltered from this market reality because clients perceived them as professionals, not as participants in a market of legal services, and the success of lawyers depended more on their reputations and less on price comparisons made by clients. Now lawyers and law firms need to develop ways to set prices that meet current market conditions and demonstrate to clients that prices equal the value a lawyer's service adds.

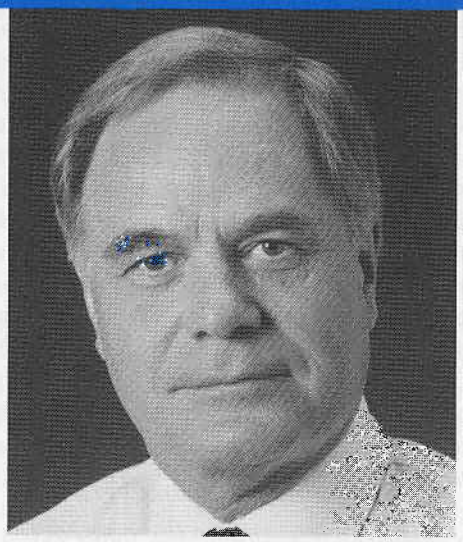
XI – Combinations

An example of a combination type pricing strategy might include combining blended hourly, with a phased pricing scheme and possibly a performance bonus. You could utilize a blended hourly strategy in the beginning. This would be hourly time going towards assessing the merits of a case and the potential settlement or jury award. Once the client had satisfied itself that it knew the range of potential outcomes of the case, it would be easier to estimate what time and resources the case would require in order to set prices for each phase of the case. Then the client could use that information to weigh its potential costs and rewards and make an informed financial business decision on a budget for the case and a fee arrangement which departed in some way from the conventional hourly rate. At the conclusion of the case, there could be a prescribed option for a bonus for the lawyer or firm based on the outcome of the case (the client may have received a result better than expected).

As mentioned in the beginning of this article, billing is a process. The attorney needs good information from clients in order to set reasonable prices. In some cases that will mean spending a considerable amount of time and resources prior to coming up with this price. The attorney can use creativity, along with the clients' creativity and input, in constructing useful and mutually beneficial pricing procedures. Including the clients in the pricing process will increase the level of trust and help cement the attorney's professional relationship with them.

Now that we have examined a range of alternative pricing methods, we will explore how a lawyer or firm can successfully price its legal products and remain competitive in the changing legal market. Part 2 of this series will look at how a lawyer or firm might accomplish this transition.

[1]Categories for billing methods were drawn from *Win-Win Billing Strategies: Alternatives That Satisfy Your Clients and You*, R. Reed, ABA, 1992, and various other sources and experiences.



Drafting Distribution and License Agreements (What You Don't Know Can Hurt You)

by C. Jeffrey Thompson

INTRODUCTION

Attorneys representing businesses that market goods or services through independent distributors must be increasingly aware of the franchise and business opportunity laws that may be applicable to their client's business. Such business arrangements are fraught with problems and must be carefully analyzed. All that is required for a transaction to constitute the sale of a franchise or business opportunity is a product or a service, an associated trademark, a fee for the opportunity of selling the product or service, and a marketing plan or community of interest. This last element is usually achieved through significant control of or assistance to the distributor. These elements are present in most relationships between a manufacturer or other supplier of goods or services and its distributor or licensee.

An understanding of how the courts and the Federal Trade Commission ("FTC") apply these elements to particular business transactions becomes significant in evaluating whether or not your client's distribution contract or license agreement is in fact a franchise or business opportunity. If your client is found to have sold a franchise or business opportunity one or more of the following may apply: (1) The FTC rule requiring pre-sale disclosures; (2) State laws requiring registration of the offering; (3) State laws requiring pre-sale disclosure; (4) State laws affecting renewals and termination, the so-called "relationship" laws; (5) Litigation claims for misrepresentation and fraud; (6) Post termination restraints and enforcement problems; (7) Possible territory encroachment claims; (8) Allegations of bad faith dealing or fraud; and (9) Violation of criminal laws. In addition, a determination that the business is a franchise or business opportunity may give rise to personal liability of the officers and directors of the supplier.[1]

Twenty-nine states have general franchise or business opportunity laws.[2] The federal government regulates the sale of franchises and business opportunities through the Federal Trade Commission. As a result of market and economic demands, there is increasing pressure on manufacturers and other suppliers of goods or services to distribute through independent agents and licensees as a method of cutting sales and related overhead costs. Typically the supplier will ask its attorney to draft an agreement with an independent distributor. However, the supplier customarily is interested in selling its

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product or service in relationship to its trademark and therefore desires to retain control over the quality of the product or service and the methods of distribution. In addition, the supplier often wants to charge a fee for technical training and ongoing support services or to charge a fee for the territory or privilege of marketing its product or service.

In accomplishing the goals of the client, the attorney may inadvertently draft provisions in the contract or license agreement which subject the client to state and federal franchising or business opportunity laws. Such provisions may also bring into play laws relating to securities, anti-trust, trademark, pyramid and multi-level marketing. In this regard it does not matter what your client's intent is, what the contract is called, nor how the parties are identified in the contract. If the elements of a franchise or business opportunity are present, the enforcing agency may well use these laws against your client.

It is easy to unintentionally incorporate provisions relating to trademarks, fees and marketing plans into your client's contract. For example, language which requires the independent distributor to use best efforts to promote the supplier's name, trademark and logo or prohibits the sale of competing products may bring the contract within the application of these laws. In a recent New Jersey case, the court found that where the distributor is required to use best efforts to promote the supplier's name, trademark and logo and could not sell competing systems, an unintended license was created within the meaning of the New Jersey Franchise Practices Act.[3]

"The attorney may inadvertently draft provisions in the contract or license agreement which subject the client to state and federal franchising or business opportunity laws."

However, the court made it clear that not every authorization to use the trademark is a license within the meaning of the Act. "A franchise is distinguished from an ordinary distributorship in that with a franchise license the good will inherent in the name and mark attaches to the entire business of the seller, not just to the goods themselves."[4] The license must be one in which the franchisee wraps himself with the trade name of a supplier and relies on the supplier's good will to induce the public to buy.

Furthermore, there is a lack of uniformity of laws between the various states and also between the states and the FTC. It is also possible to have a contract relationship covered by the FTC Rule, but not by certain state laws, or to have the contract relationship governed by one or more of the states, but not by another. In *Agnes Y. Kim V. Servosnax, Inc.*, the court held that the requirement under the California Franchise Investment Law that there be substantial association with the franchisor's name or symbol was met even though the franchisee was prohibited from

using the name in the operation of the business and the licensor's name did not appear on any of the distributor's stationary, business cards or signs.[5]

However, in *Kornacki v. Norton Performance Plastics*,[6] the Court refused to find that the relationship between a manufacturer and its sales representative was a "dealership" under the Wisconsin Fair Dealership Law, because the sales representative did not pay a franchise fee, make a substantial investment in the business, or have the right to use the manufacturer's trademark or trade name. The court dismissed Plaintiff's claim that he was a franchisee/dealer based on the fact that he was permitted to use business cards and brochures containing the manufacturer's trademarks and to place yellow page advertisements. Such use fell short of the level of "prominent" trademark use required by the statute. This lack of uniformity requires the practitioner to examine the laws in each of the states where his or her client plans to do business and carefully analyze the impact of the franchise and business opportunity laws on the product or service to be distributed.

In addition, a poorly drafted document may not come to attention for a number of years. The client may not know of the problem until it is brought to the attention of a state regulator or one or more of its distributors complains or brings a lawsuit. At that point, a poorly drafted contract with franchise or business opportunity provisions can lead to disastrous consequences. In a lawsuit for violation of the franchise or business opportunity laws, a distributor can allege violation of the franchise or business opportunity laws and seek recision, monetary damages and attorney's fees not only against the supplier, but its officers and directors as well. Further, there may be an investigation by a state or federal authority and possible enforcement of civil penalties or criminal action.

FRANCHISE LAWS

Though the elements differ state-by-state, a transaction will usually constitute the sale of a franchise if the following elements are present: An express, implied or oral contract for a product or service with (1) an associated trademark; (2) a fee for the opportunity of selling the product or service; and (3) significant control or assistance to the distributor commonly referred to as a "marketing plan" or in some states as a "community of interests" between the supplier and the distributor. Each element must be present.

The Federal Trade Commission adopted its trade regulation rule in 1979 (the "FTC Rule").[8] The FTC Rule is effective throughout the United States, including states with franchise laws. The FTC Rule does not preempt state laws.[9] The FTC Rule establishes minimum disclosure standards, but states are free to require broader disclosures. There are no exemptions. Even the sale of a single franchise is covered by the FTC Rule. All franchisors are required to provide a written disclosure document to potential investors. The FTC Rule requires disclosure only; it does not require approval, registration or filing with any federal agency as a condition to offering or selling a franchise.[10]

"The FTC Rule establishes minimum disclosure standards [for franchises], but states are free to require broader disclosures."

Sixteen states have enacted laws regulating the offer and sale of franchises.[11] These states generally require the Franchisor to submit a franchise registration application and a disclosure document with exhibits including audited financial statements and a filing fee which ranges between $50.00 and $750.00. The review process generally takes eight to ten weeks. These states have adopted uniform disclosure requirements through the Uniform Franchise Offering Circular, commonly referred to as the "UFOC". The UFOC guidelines were amended effective January 1, 1995. This new document is often referred to as the "New UFOC". The UFOC is acceptable to the FTC and each registration state with only minor changes. The FTC and the registration states also require an updating and renewal process. In addition to the registration of the offering, each registration state requires the filing of advertising for approval before use in the state.

The FTC Rule and most states provide for the following exemption from the franchise laws: Fractional franchises, leased departments and minimal investments of under $500. There are also exemptions for bona fide employer employee relationships, general business partnerships and single trademark licensing relationships.[12]

The Trademark Element

The trademark element is always present if the franchisee is licensed. However, not all laws require a license. Some states, such as New Jersey, require only that the franchise business must be "substantially associated" with the franchisor's trademark. Under New Jersey's definition, a license means, "that the alleged franchisee must use the name of the franchisor in such a manner as to create a reasonable belief on the part of the consuming public that there is a connection between the licensor and licensee by which the licensor vouches for the activity of the licensee."[13]

Under Iowa law, the trademark element is satisfied if the manufacturer or supplier merely "allows" the business to be associated with the mark.[14] Also, in a recent California case, the trademark element was satisfied even though the end-users of the services of the licensee had no knowledge of the franchisor's name or mark.[15]

The Fee Element

In addition to the payment of money for the right to distribute the products the fee may be in the form of a required payment for rent, advertising assistance, equipment and supplies or training or other payments. In determining whether or not there has been a payment of a franchise fee, the FTC and certain states generally do not include payment for a reasonable quantity of goods for resale or inventory at a bona fide wholesale price. However, in the *Flynn Beverage* case, the court found that "allegations of required purchases of excess inventory were sufficient to establish payment of a franchise fee for purposes of surviving Seagram's motion to dismiss."[16]

Special fee problems are created for the supplier in the states of Arkansas, Connecticut, Minnesota, New Jersey, Virginia and Wisconsin since the franchise relationship laws of those states do not require a "fee" for the relationship to be considered a franchise. In addition, the court in *Wright- Moore Corp. v. Ricoh Corp.*,[17] found that required fees paid to third parties ("indirect fees") also could be sufficient to meet the fee requirement. However, in *Implement Service, Inc. v.*

Tecumseh Products Company,[18] the court held that indirect fees payable to third parties were not franchise fees since the services were not rendered or the goods provided to the franchisor.

The Marketing Plan Element

In general a "marketing plan" exists whenever a group of distributors present themselves to the public as a unit with the appearance of a uniform system. This can be accomplished through requirements relating to the appearance and uniformity of the premises, the interior decor, uniforms, limitations on products or services, training, common advertising or signage, trade dress, the use of a standard manual and uniform policies and procedures.

At times, the courts have found a marketing plan in extreme cases. In *Salkeld v. V.R. Business Brokers, Inc.*,[19] the court found the requisite conditions of a franchise marketing plan based upon the sales manual provided to the distributor containing product information and sales strategy and the company's promised support in marketing, training, advertising and promotion.

A different conclusion was reached in *James v. Whirlpool.*[20] There, the court found that the contract failed to meet the statutory definition of a franchise under Michigan law. Although the agreement required the distributor to have a marketing plan, neither the agreement nor Whirlpool prescribed the content of the plan.

The "community of interests" doctrine is usually far more inclusive than the "marketing plan" concept. Under this doctrine, the court looks for "shared goals" or "cooperative, coordinated efforts" between the manufacturer and the distributor in determining whether or not a relationship involves a "community of interests". In *Ziegler v. Rexnord*,[21] the Wisconsin Supreme Court identified ten factors for determining whether or not there is sufficient financial interest and interdependence to constitute a community of interests. These factors include among others: The length of the relationship, mutual obligations, the number of employees engaged in the related business, the percentage of related revenue, whether or not there is an assigned territory, use of the trade dress and the dealer's investment.

Franchise Relationship Laws

Seventeen states have laws of general applicability that govern the franchise relationship.[22] Franchise relationship laws primarily concentrate on perceived abuses relating to termination, renewal and transfer of franchise rights and other abuses such as encroachment, discriminating between dealers, arbitrating outside of the franchisee's state and changes in management. The definition of a franchise is often far broader under the franchise relationship laws than under the registration and disclosure laws.[23]

BUSINESS OPPORTUNITY LAWS

Business opportunity laws are generally designed to cover guaranteed distribution arrangements including dealerships, work at home businesses, rack jobbers, vending machines and businesses promoted as a "sure thing". However, definitions of a business opportunity are usually very broad and some state administrators can be very aggressive in applying these laws to various contractual relationships. Assur-

ance of profitability, marketing assistance and buy-backs are hallmarks of the business opportunity.

The predominate pattern for a business opportunity under state laws is as follows: (1) a supplier furnishes goods or services (this is broader than buy or sell); (2) for the payment of a fee ranging from $50.00 to $500.00 or more; (3) to enable the buyer to start a business (this is interpreted very broadly and may include payments for start-up inventory) and (4) the supplier represents to the buyer any one or more of the following:

(a) The supplier guarantees that the buyer will derive income from the business opportunity in excess of the price paid for the business opportunity; or

(b) The seller will purchase all or part of the buyer's output; or

(c) The seller will find or help find locations or accounts for the products (vending machines, etc); or

(d) If the buyer becomes dissatisfied, the supplier will refund the initial payment or will buy back the merchandise or products sold; or

(e) For a fee, seller will provide a marketing or sales plan which will enable the buyer to derive income in excess of the investment.

The business opportunity laws usually require a pre-commitment disclosure obligation and that the business opportunity offering be registered with the designated state agency before it may be offered or sold in the state. Many states also require bonding, escrow accounts or other forms of financial assurance. The FTC Rule has a self-implementing disclosure obligation. It simply makes a business opportunity a form of franchise.

AVOIDING APPLICATION OF THE FRANCHISE OR BUSINESS OPPORTUNITY LAWS

There are no clear safe harbors in drafting a contract to avoid application of these laws. The laws of each state must be analyzed. Traditional ways of trying to avoid application of these franchise or business opportunity laws in distribution and license agreements include: (1) avoiding the initial fee, (2) eliminating all fees, (3) avoiding any "representation" in connection with the sale, (4) selling the marketing plan in connection with a registered trademark, or (5) eliminating market support programs.

(1) The Initial Fee

Most states and the FTC provide a threshold investment of $500.00 before the franchise or business opportunity law is applicable. However, this amount varies state by state. In addition, some states aggregate all fees regardless of how they are designated. Under the FTC Rule and certain states, the required purchase of reasonable levels of inventory at bona fide wholesale prices is not included in determining the threshold fees.[24]

"There are no clear safe harbors in drafting a contract to avoid application of [franchise and business opportunity laws]."

(2) Avoiding Certain Representations

Avoiding representations relating to guarantees of income, buy-backs, refunds, marketing support, location assistance or account assistance is another possibility.[25] A disclaimer in the contract may be helpful, but will not eliminate the application of these statutes. The courts and administrative agencies will look behind the contract to the relationship of the parties. Such assistance as restricted territories, setting of prices, presenting a sales program, involvement in promotional decisions, help in locating customers, or providing product or promotional training may be interpreted as a representation of assistance. The contract needs to make clear that the dealer has total discretion over marketing decisions and all prescribed operations. Uniforms, hiring, audits and financing prescribed by the supplier should be eliminated from the contract and the business relationship. An assurance of profit may arise by implication rather than from expressed representations and may be made either orally or in writing.

(3) Eliminating All Required Payments

Under this approach, the supplier must sell its products at a bona fide wholesale price in reasonable quantities and cannot charge any other fee for any other service, including technical training and market support. Virtually all franchise regulations, including the FTC Rule, expressly exclude from the definition of a "franchise fee" payment representing the bona fide wholesale price of goods. If the manufacturer can derive sufficient profit from selling reasonable amounts of its products at bona fide wholesale prices it may avoid the regulatory scheme entirely.[26]

To qualify for the bona fide wholesale price exception, there are three conditions: (1) The goods must be sold at their bona fide wholesale price; (2) The manufacturer cannot compel the buyer to purchase more than reasonable quantities of inventory; and (3) The manufacturer cannot charge any other fee or required payment for the right to sell branded or trademarked products regardless of whether the manufacturer renders services for which it could otherwise be compensated.

(4) Marketing Plans Sold in Connection with a Registered Trademark.

In some states such as Connecticut, Florida, Georgia, Iowa, Maine, Maryland, North Carolina, Oklahoma, South Carolina, South Dakota, Utah and Washington, if a supplier provides a marketing program in connection with a registered trademark (either federal or state depending on the particular state), the sales or marketing program may be exempt from the business opportunity laws if no other representations are made.

(5) Eliminating Marketing Support.

The common elements of a market support program or substantial assistance or control include: setting of prices, sales territories, sales and marketing plans, and whether the supplier offers to help locate customers or accounts or provides product or promotional training.

Eliminating these elements does not guarantee that the contract will be safely outside the regulated relationships because the courts broadly construe the services provided that will satisfy the elements. It is very difficult to draft a distribution contract that will avoid application of the franchise and business opportunity laws by eliminating all marketing support assistance or controls if there are geographical restrictions, business line restrictions or sales quotas, since many courts have found these factors to satisfy the required elements.

[1]*American Franchise Lawyer's Nightmare*, Martin Mendelsohn, Franchise Law Journal, Vol. 13, No. 1 Quarterly Journal on the Forum of Franchising, Summer of 1993.

[2]These states are California, Connecticut, Florida, Georgia,

Hawaii, New York, North Carolina, North Dakota, Ohio, Oklahoma, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin. See also Appendix "A".

[3]*Instructional Systems, Inc. v. Computer Curriculum Corp.*, 624 A.2d 124, Bus. Fran. Guide (CCH) ¶ 10,000 (N.J. 1992).

[4]*See also Liberty Sales Association Inc. v. Dow Corning Corp.*, 816 F.Supp. 1004, Bus. Fran. Guide (CCH) ¶ 10,233 (D.N.J. 1993).

[5]*Agnes Y. Kim v. Servosnax, Inc.*, Bus. Fran. Guide (CCH) ¶ 10,124, (Ca. Ct. App. 1992). See also *A Look Back, 1993 Judicial Update* presented at the American Bar Association Forum on Franchising, Dallas, Texas, October, 1993.

[6]*Kornacki v. Norton Performance Plastics*, Bus. Fran. Guide (CCH) ¶ 9949 (7th Cir. 1992).

[7]*An-Port, Inc. v. MBR Industries, Inc.*, Bus. Fran. Guide (CCH) ¶ 9966 (D. Puerto Rico 1991).

[8]*Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures*, 16 C.F.R., § 436 (1979); Business Fran. Guide (CCH) ¶ 6,090 – 6,192.

[9]See Business Fran. Guide (CCH) ¶ 6,192; 16 C.F.R. § 436.3.

[10]See FTC *Statement of Basis and Purpose*, Business Fran. Guide (CCH) ¶ 6,316.

[11]California, Hawaii, Illinois, Indiana, Iowa, Maryland, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, South Dakota, Virginia, Washington and Wisconsin.

[12]*Id.* at page 7, footnote 8, Disclosure Requirements.

[13]*Neptune T.V. and Appliance Service, Inc. vs. Litton Sys. Inc.*, 190 New Jersey Sup. 153 (App. Div. 1983).

[14]Iowa Code § 523 (H)3(a)(1)(c).

[15]See *Servosnax, Id.* at page 4 footnote 5.

[16]*Flynn Beverage, Inc. v. Joseph E. Seagram & Sons, Inc.*, 18 F. Supp. 1174, Bus. Fran. Guide (CCH) ¶ 10,237 (C.D. Ill. 1993). See also *Franchise Law Journal*, Fall, 1993, at page 54.

[17]*Wright-Moore Corp. v. Ricoh Corp.*, Business Fran. Guide (CCH) ¶ 10,111 (7th Cir. 1992).

[18]*Implement Service, Inc. v. Tecumseh Products Company*, 726 F. Supp. 1171 (S.D. Ind. 1989). For other cases discussing the fee requirement see *Boat and Motor Mark v. Sea Ray Boats, Inc.*, 825 F.2d 1285 (9th Cir. 1987), *Cambee's Furniture v. Doughboy Recreational*, 825 F.2d 167 (8th Cir. 1987); and *Inland Printing Company v. AB Dick Company*, Business Fran. Guide (CCH) ¶ 8,997 (W.D. Mo. 1987).

[19]*Salkeld v. V.R. Business Brokers, Inc.*, Business Fran. Guide (CCH) ¶ 10,070 (Ill. App. 2nd 1992). See also *King Computer, Inc. v. Beeper Plus, Inc.*, Business Fran. Guide (CCH) ¶ 10, 182 (S.D.N.Y. 1993).

[20]*James v. Whirlpool*, Business Fran. Guide (CCH) ¶ 10,205 (E.D. Mo. 1992).

[21]*Ziegler v. Rexnord*, 407 N.W.2d 873 (Wis. 1987), remanded, 433 N.W.2d 8 (Wis. 1988).

[22]Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Virginia, Washington and Wisconsin. The District of Columbia, Puerto Rico and the Virgin Islands also have relationship laws.

[23]Thomas M. Pitegoff, ABA Forum on Franchising, 1993 Annual Forum.

[24]See *Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures;* Promulgation Final Interpretative Guides, 44 Fed. Reg. 49966 (1979).

[25]*Informal FTC Staff Advisory Opinion to Travel Host Magazine, Inc.*, Bus. Fran. Guide (CCH) ¶ 6444 (March 2, 1989).

[26]See 1991 ABA Forum on Franchising, *When Does a Product Distribution System Become a Franchise or Business Opportunity* by Kennedy A. Brooks, Rochelle Buchsbaum-Spandorf and Clay A. Halvorsen.

APPENDIX "A"
States With Franchise or Business Opportunity Laws

State Franchise Laws:

California: Franchise Investment Law, Cal. Corp. Code §§ 31000 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3050.01 *et seq.*

Hawaii: Franchise Investment Law, Ha. Rev. Stat., § 482E-1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3110.01 *et seq.*

Illinois: Franchise Disclosure Act, Ill, Rev. Stat., Ch. 85-551, Bus. Fran. Guide (CCH) ¶ 3130.01 *et seq.*

Indiana: Franchise Law, Ind. Code Title 23, § 1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3140.01 *et seq.*

Iowa: Business Opportunity Promotions, Iowa Code § 523B.1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3158.01 *et seq.*

Maryland: Maryland Franchise Law, Md. Code Ann., § 14-201 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3200.01 *et seq.*

Michigan: Franchise Investment Law, Mich. Comp. Laws, § 445.1501 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3220.01 *et seq.*

Minnesota: Minn. Stat. § 80C-01 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3230.01 *et seq.*

New York: New York Gen. Bus. Law, § 680.01 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3320.01 *et seq.*

North Dakota: Franchising Investment Law, N.Dak. Cent. Code Ann., § 51-19-01 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3340.01 *et seq.*

Oregon: Oregon Transactions, Or. Rev. Stat., § 650.005 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3370.01 *et seq.* (Disclosure obligation only; no registration required).

Rhode Island: Franchise and Distributorship Investment Regulations Act., Title 19, Ch. 38 § 19-28-1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3390.01 *et seq.*

South Dakota: Franchises for Brand-Name Goods and Services, S.D. Comp. Laws Ann. § 37-5A-1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3410.01 *et seq.*

Virginia: Retail Franchising Act, Va. Code § 13.1-557 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3460.01 *et seq.*

Washington: Franchise Investment Protection Act, Wash. Rev. Code § 19.100.010 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3470.01 *et seq.*

Wisconsin: Wisconsin Franchise Investment Law, Wis. Stat., § 553.01 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3490.01 *et seq.*

State Business Opportunity Laws:

California: Contracts for Seller Assisted Marketing Plans, Cal. Civ. Code § 1812.200 *et seq.*, Bus Fran. Guide (CCH) ¶ 3058.01.

Connecticut: Conn. Gen. State, § 36-503 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3078.01 *et seq.*

Florida: Sale of Business Opportunities Act, Chapter 559, § 559.80 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3098.01 *et seq.*

Georgia: Business Opportunity Sales Act, Ga. Code § 10-1-410 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3108.01 *et seq.*

Indiana: Business Opportunity Transactions, Ind. Code, Title 24, § 1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3148.01 *et seq.*

Iowa: Business Opportunity Promotions, Iowa Code § 523B.1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3158.01 *et seq.*

Kentucky: Sale of Business Opportunities, Ky. Rev. Stat. § 367.801 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3178.01 *et seq.*

Louisiana: Louisiana Revised Statutes Annotated, Sec. 51:1821 *et seq.*

Maine: Regulations of Sale and Business Opportunities, Me. Rev. State. Ann. § 4691 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3198.01 *et seq.*

Maryland: Business Opportunity Sales Act, Md. Code Anno., § 14-101 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3208.01 *et seq.*

Michigan: Consumer Protection Act, Mich. Comp. Laws § 445.901 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3228.01 *et seq.*

Nebraska: Seller Assisted Marketing Plan Act, Neb. Rev. Stat., § 59-1701 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3278.01 *et seq.*

North Carolina: Business Opportunity Sales, N.C. Gen. Stat., § 66-94 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3338.01 *et seq.*

Ohio: Business Opportunity Purchasers Protection Act., Ohio Rev. Code Ann., § 1334.01 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3358.01 *et seq.* (Disclosure obligation only; no registration required.)

Oklahoma: Business Opportunity Sales Act, Ok, St., Title 71, Ch. 4, § 801 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3368.01 *et seq.*

South Carolina: Business Opportunity Sales Act, S.C. Code § 39-57-10 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3408.01 *et seq.*

South Dakota: Model Business Opportunities Act, § 37-25a-1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3418.01 *et seq.*

Texas: Business Opportunities Act, Tex. Rev. Div. Stat., Act. 16.01 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3438.01 *et seq.*

Utah: Business Opportunity Disclosure Act, Utah Code Ann., § 13-15-1 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3448.01 *et seq.*

Virginia: Business Opportunity Sale Act, Va. Code § 59.1-262 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3468.01 *et seq.*

Washington: Business Opportunity Fraud Act, Wash. Rev. Code § 19.110.010 *et seq.*, Bus. Fran. Guide (CCH) ¶ 3478.01 *et seq.*

1995 Annual Meeting Sponsors

The Annual Meeting Committee extends its gratitude to these sponsors for their contribution in offsetting the costs to registrants and making an enjoyable Annual Meeting. Please be sure to show your appreciation by supporting our sponsors and visiting the exhibit tables.

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Commission Highlights

During its regularly scheduled meeting of December 2, 1994, held in Ogden, the Bar Commission received the following reports and took the actions indicated.

1. The Board approved the minutes of the October 28, 1994 meeting as modified.
2. Paul Moxley introduced Steven Lee Payton, the new Minority Bar Association ex officio member to the Commission.
3. The Board voted to approve creating a public relations committee.
4. Moxley reminded the Board that the Bar's response to the proposed court rules is due December 16 and recommended that the Commission discuss this issue more fully and prepare a response during a special meeting of the Board on December 14.
5. The Board voted to propose that Barbara K. Polich be recommended for appointment to the Judicial Council's Standing Committee on Information, Automation & Records.
6. Moxley reported that he would arrange a meeting of lawyers in the legislature and see how it might be appropriate to encourage more lawyers to participate.
7. The Board voted to recognize the persons who have done the most to promote the advancement of women and the advancement of minorities in the legal profession by an award presentation during the Bar's Mid-Year Meeting.
8. Judge Michael Murphy appeared to discuss current issues on funding for the new courts complex.
9. Paul Moxley reported that he has invited Judge James Z. Davis to report on the creation of a speakers' bureau.
10. The Board voted that the commissioner election process not provide for an extension of term for commissioners standing for retention election and running for president-elect in their third or sixth years and that the "sitting commissioners" elect the president-elect prior to the seating of new commissioners.
11. The Board voted to disapprove proposed changes to the Rules of Procedures for the Ethics Advisory Opinion Committee which would have allowed the committee to automatically adopt opinions. The Board then decided to have the Bar Commission consider the balance of the proposed changes to those Rules at the January meeting.
    The Board also discussed how to expedite the approval process of ethics opinions.
12. John Baldwin referred to the Bar Programs Monthly Activity report and reviewed some of the items.
13. Baldwin indicated that he and Paul Moxley had met with the Business Law Section to discuss their assistance during the upcoming legislative session.
14. Baldwin reported that one bar examination admissions appeal had been received and the Admissions Committee had met and would be filing their response for Bar Commission review in January.
15. Steve Trost referred to the statistical report on cases being handled by the Office of Attorney Discipline.
16. Trost requested the Board's direction regarding enforcement of the new collection rules which have been in effect since December 1, 1994. The Board voted to have the Collection Task Force reconvene and made part of the UPL Committee so that recommendations could be solicited for enforcing the new collection practices rules.
17. Jane Marquardt appeared to recommend that the Bar endorse a proposal concerning a uniform method of fiduciary accounting. The Board voted to accept the recommendation of the Estate Planning Section to adopt the "Content of Accountings Rule" and to endorse the Estate Planning Section going before the Judicial Council to recommend formal adoption of the rule.
18. The Board had lunch discussions with the Weber and Davis County Bars.
19. Norman Johnson, ABA Delegate, indicated that he would be voting on particular issues at the ABA Mid-Year meeting and requested the Bar Commission's direction and input.

During the special meeting of December 14, 1994, held in Salt Lake City, the Bar Commission received the following reports and took the actions indicated.

1. The Board voted to approve most of the changes in the Appellate Rules of Procedure and Civil Procedure and to comment on the following: Rule 506 of the Utah Rules of Evidence, Rule 101(f) and Rule 102(e) of the Utah Rules of Court Annexed Alternative Dispute Resolution, Rule 1.5 of the Rules of Professional Conduct, and Rule 1-201 of the Code of Judicial Administration.
2. The Board approved proposing changes to the Rules for Integration and the Bylaws regarding election of the president and commissioners.
3. Judge Michael Murphy appeared with Mark Jones, Administrative Office of the Courts to review the proposed increase in court fees to fund the new courts complex. After an extensive question and answer period, the Board voted to approve increased court fees subject to an affirmative proposal from the Legislative Affairs Committee.
4. J. Michael Hansen, Bar Commission liaison to the Judicial Council, reported on a recent meeting.
5. Jay Holdsworth appeared to speak regarding a rules modification.

During its regularly scheduled meeting of January 27, 1995, held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the December 2 and December 14, 1994 meetings.
2. Paul Moxley led a discussion regarding the meeting held with various lawyer legislators regarding how it would be appropriate for the Bar to encourage lawyers to get involved in the legislature and in the campaigning process generally.
3. Moxley reported that Jim Clegg, Charlotte Miller, Dennis Haslam and he met with Chief Justice Zimmerman over lunch to review items currently under consideration by the Bar Commission and to discuss improvements in communications.
4. Steve Kaufman reviewed his preliminary work regarding the client security fund including his request to Committee Chair, Dave Hamilton, to

report to the Commission at its meeting in St. George.

5. Moxley indicated that he and John Baldwin were working on an agenda for a Quality Control Conference to be held Friday, May 5, 1995.
6. Long-Range Planning Committee Chair, Dennis V. Haslam, reported on the process by which the committee would be performing their zero-based budget evaluation of Bar programs and services.
7. Baldwin mentioned that the Lawyer Benefits Committee and Professional Liability Committee were reviewing the Bar's relationship with the Home Insurance Company and would be reviewing other insurance companies which might be interested in being endorsed by the Bar.
8. Baldwin also indicated that Randon Wilson, Chair of the Lawyer Benefits Committee, was continuing to review long distance telephone carriers who had requested the Bar's endorsement.
9. The Board voted to appoint Amy Weissman and reappoint Michael Nielsen, James Backman and Mary Tucker to serve on the Board of Directors of Utah Legal Services.
10. Moxley mentioned that the ABA had requested the Bar to contact our delegates to Congress and request their continued support for the Legal Services Corporation. After discussion, the Board voted to send a letter to the congressional delegation mentioning the good that Legal Services was serving in Utah.
11. The Board reappointed Dean H. Reese Hansen and appointed Greg Skordas to the Utah Substance Abuse Coordinating Council.
12. Baldwin reviewed the Bar Programs Monthly Activity Report.
13. The Board voted to hold the Bar's Mid-Year Conference in St. George and to hold the Bar's Annual Conference in Sun Valley in 1996, 1997 and 1998.
14. The Board requested the Executive Committee to discuss additional Bar parking with a consultant and come back to the Board to review those findings.
15. The Board approved candidates for the February 1995 Bar Examination.
16. Stephen Trost reported that the Supreme Court had approved a rule authorizing the Bar to license foreign legal consultants based upon a petition made at the Commission's request.
17. Trost mentioned that disciplinary statistical information was being gathered continuously and indicated that Utah had a higher percentage of complaints per lawyer than most other states.
18. The Board confirmed that complaints filed against lawyers should not be used as leverage in other civil and criminal litigation matters in which the lawyers were involved.
19. The Board voted to approve Ethics Opinion No. 152, which deals with the ethical considerations of a lawyer who wishes to publish a legal "How To" book for lay persons.
20. The Board reiterated that it passed Opinion No. 115R and not No. 115, and that it be authorized *nunc pro tunc.*
21. The Board voted to have the Executive Committee appoint a committee to review the appeal and rehearing procedures and the Ethics Advisory Opinion Committee's proposed procedures.
22. The Board voted to amend and approve proposed changes to the Bylaws.
23. The Board voted to amend the Rules For Integration.
24. Budget & Finance Committee Chair, Ray Westergard, reviewed the monthly December financial statements.
25. J. Michael Hansen, the Bar's Liaison to the Judicial Council, reported on the recent Judicial Council Meeting.
26. The Board approved a resolution honoring Judge Bruce Jenkins.
27. Young Lawyers Division President David J. Crapo reported that the Young Lawyers Division had been working with the Needs of Children Committee and the Student Bar Association of the University of Utah Law School in community projects.
28. The Board reviewed the three letters which had been received in response to published request for comment on initiatives being considered by the Board.
29. The Board considered a report of the Legislative Affairs Committee and voted to accept the committee's recommendation to support S.B.82 "Digital Signatures Act," S.B.81 "Expanding the Number of Judges," S.B.87 "Court Commissioner Amendments," Substitute H.B.167 "Court Reorganization Amendments" and to oppose H.B.68 "Enforcement of Foreign Judgement" and H.B.164 "Jury Information Act."
30. The Board considered matters of litigation and character and fitness during an executive session.

During the Mid-year Meeting of March 2, 1995, held in St. George, the Bar Commission received the following reports and took the actions indicated.

1. The Commission had a joint lunch meeting with the members of the Southern Utah Bar Association President.
2. Paul Moxley reported on the various issues discussed at the National Conference of Bar Presidents meeting, including concerns about discipline procedures, the Americans with Disabilities Act's impact on bar admission questions.
3. Moxley referred to a copy of a letter from Rollins Hudig Hall expressing their concern with the current status of the Home Insurance Company.
4. Moxley reminded the Commission that they would be having lunch with the Supreme Court to discuss current management items.
5. Dave Hamilton, Chair of the Client Security Fund Committee, appeared to discuss the effectiveness of the Fund for Client Protection.
6. The Board discussed related issues and public perception and appointed a task force to review issues.
7. John C. Baldwin reviewed the Bar Programs Monthly Activity Report.
8. ABA Delegates Norman S. Johnson and Reed L. Martineau reported on current ABA issues.
9. Judge James Z. Davis distributed a brochure which he proposed would be used to solicit participation in the Speakers Bureau.
10. The Board voted to approve the Unauthorized Practice of Law Committee request to file a cease and desist agreement.
11. Mary Ellen Sloan, Women Lawyers of Utah, reported on various projects currently being engaged in by the Women Lawyers of Utah including a domestic violence video project.
12. Steve Payton reported on the activities of the 100-member Minority Bar Association.

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

Discipline Corner

DISBARMENT

On May 26, 1995, the Third Judicial District Court disbarred Anthony M. Thurber from the practices of law. The effective date of his disbarment is March 16, 1994, to coincide with the date he was placed on interim suspension. Mr Thurber stipulated to the order of disbarment in Civil Cases No. 940901071 and 940907816 filed in the Third Judicial District Court. The substance of the allegations in those cases are the he misappropriated client funds and in some instances failed to provide meaningful legal services on behalf of clients.

SUSPENSION

On or about March 28, 1995, pursuant to a Discipline by Consent and Settlement Agreement, the Sixth District Court ordered that D. Michael Jorgensen be suspended from the private practice of law effective April 1, 1995. The Court ordered that D. Michael Jorgensen be suspended from the practice of law for a period of two (2) years; however, stayed all but six (6) months of the suspension and allowed Mr. Jorgensen to continue his representation of governmental agencies, but not private clients, provided he successfully completes a term of probation for a period of (2) years. Any violation of the terms of probation will result in his serving the full remaining period of suspension. This action was taken for Mr. Jorgensen's repeated violations of Rule 8.1(b) – BAR ADMISSION AND DISCIPLINARY MATTERS, Rule 1.3 – DILIGENCE, Rule 1.4(a) – COMMUNICATION and Rule 8.4(c) – MISCONDUCT by knowingly failing to respond to the Office of Attorney Discipline's lawful demands for information regarding disciplinary action, by failing to properly represent a client in a domestic matter, by failing to communicate the status of the case to the client, by misrepresenting the client's income to the Court, by stipulating to matters that the client had not agreed upon and by misrepresenting the status of the case to the client.

ADMONITION

An attorney was admonished on April 11, 1995 for violating Rules 1.2(a), 1.3, 1.4(a), 1.13(a), 8.1(b) and 8.4(a) of the Rules of Professional Conduct of the Utah State Bar. The complainant retained the attorney to represent him in a divorce action and paid a retainer. Thereafter, the attorney did no meaningful work in the case. The opposing party obtained a default decree of divorce against the complainant. The attorney did not advise the complainant that a default decree had been entered against him; the complainant discovered this only when the court sent him notice of the decree.

The attorney also did not cooperate with the Office of Attorney Discipline's investigation until just prior to the Screening Panel hearing, when he filed a brief answer to the informal complaint. At the hearing, the attorney returned the retainer to the complainant. Based upon the return of the complainant's retainer and the relatively minor economic harm to the complainant, the Panel determined that an admonition was appropriate. The Panel also directed the attorney to attend the Bar's Ethics School.

RESTATEMENT

On April 3, 1995, Duane R. Smith was reinstated to practice law by the Third Judicial District Court.

Utah Judges Attend the National Judicial College in 1994

In 1994, nine judges from the state of Utah attended The National Judicial College to enhance their skills as members of the judiciary. Promoting improvements in the American system of justice, NJC provided Utah judges a forum for education, and the opportunity to exchange ideas with judges from across the nation and around the world. Over the years, more than 508 certificates of completion for course work have been issued from the College to Utah judges.

Founded in 1963 by U.S. Supreme Court Justice Tom C. Clark, The National Judicial College is the leading national judicial education and training institution in the country. An ABA-affiliated institution located on the University of Nevada, Reno's campus, it remains the only institution of its kind. The College's objective is to improve justice through national programs of education and training directed toward judge proficiency, judge performance, and judge productivity.

The faculty at NJC is composed of outstanding judges, lawyers, and law professors from across the nation who serve without compensation. Some 300 faculty members serve the College each year. Faculty from the state of Utah include: Judge Christine Durham, Professor James Loebbecke, Curtis Newman and Virginia Walker.

The College has issued more than 55,000 certificates of completion to judges from all 50 states and 136 foreign countries. On the average 2,000 judges of various jurisdictions attend one or more of the 50 courses offered each year. NJC also sponsors and co-sponsors additional programs in other locations including : Orlando, San Diego, Las Vegas, and San Antonio.

In 1994, over 3,000 judges attended NJC's programs in Reno and other locations across the country. NJC also continued to improve international understanding of quality judicial education by hosting 87 participants from 38 different countries.

The Master of Judicial Studies program awarded 10 degrees during the year of 1994. The reputation of this degree program, the only one of its kind for state trial judges in the U.S., is growing each year. Many judges have come to view obtaining the degree as the pinnacle of a judicial career.

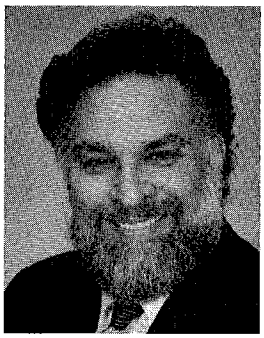
A native of Iron Mountain, Michigan, V. Robert Payant is the President of the National Judicial College. For 20 years (1963-1982) Payant was a Michigan trial judge, serving as probate, district and circuit judge in the Upper Peninsula, as well as serving as Michigan's state court administrator.

The College's corporate membership is the American Bar Association Board of Governors, which appoints the 15-member Board of Trustees of the College.

NJC FACT SHEET

- The National Judicial College is the leading national judicial education and training institution in the country.
- Since its establishment in 1963, the College has issued more than 55,000 certificates of completion to judges from all 50 states and 136 foreign countries. In 1994, over 3,500 judges attended NJC's programs in Reno and at other locations across the country.
- The College's objective is to improve justice through national programs of education and training directed toward judge proficiency (competence), judge performance (conduct), and judge productivity (case flow).
- Affiliated with the American Bar Association, the College became a Nevada not-for-profit 501 (c) (3) educational corporation effective January 1, 1978.
- The College's corporate membership is the American Bar Association Board of Governors, which appoints the 15-member Board of Trustees of the College.
- Academic activities include over 50 resident sessions of one to three weeks' duration. General courses are presented for judges of all jurisdictions.
- The College offers a series of one- and two- week advanced and specialty courses including alternate methods of dispute resolution, medical and scientific evidence and computers and technology. These courses are directed toward graduates of general courses and to those who have longer service on the bench. A series of two and a half-day "short courses" were added to the curriculum in 1992.
- The Master of Judicial Studies program, the nation's only advanced degree program for trial judges, was inaugurated by the College in 1986 in cooperation with the University of Nevada, Reno.
- The Oxford Program, an Advanced Seminar in Anglo-American Jurisprudence, was conducted by the College in July of 1991. A similar program was offered in London and at Cambridge University in 1992.
- International programs sponsored by the College include special one-week courses presented for judges from Eastern Europe, Latin America and Russia.
- The College sponsors national meetings on topics of importance to the judiciary, including the recent National Conference on Toxic Torts and the National Conference on the Court-Related Needs of the Elderly and Persons with Disabilities.
- The College publishes reference tools for judges written by the country's leading judicial experts on topics such as evidence and judicial problems. The *Criminal Law Outline* is updated annually to include the most recent U.S. Supreme Court decisions, and recent publications include *The Judges Book* and *Inherent Powers.*
- The faculty is composed of outstanding judges, lawyers and law professors from across the nation who serve without compensation. The law faculty is joined by representatives of other disciplines including medical doctors, psychologists, sociologists and communications experts. Some 150 faculty members serve the College each year.
- A 275-member alumni association, the State Alumni Liaisons, provides assistance through advocacy in all 50 states.
- The President of the College is Judge V. Robert Payant, formerly a Michigan trial court judge for 20 years and Michigan state court administrator. Dean of the College is Judge Kenneth A. Rohrs, former judge of the Henry County Court of Common Pleas, Napoleon, Ohio.
- The annual operating budget for the College in 1994 is $3.5 million.
- Operations of the College are supported from a complementary blend of sources, including federal funds and corporate, foundation and individual gifts. Tuition and program fees make up approximately 45% of the budget needs.
- The tuition and conference fees for a one-week session in 1994 total $870.
- The Council for the Future of The National Judicial College is a national assemblage of leaders from the legal, corporate and foundation arenas, along with community leaders from across the country, that assists NJC with its fundraising efforts.

Message From the State Bar President-Elect — Steven M. Kaufman



I have had the honor of serving on the Board of Bar Commissioners since 1992. On April 3, 1995, I was re-elected to another three-year term as a Bar Commissioner, and on April 28, 1995, I was elected by the Board to serve you as President-Elect of the Utah State Bar. I am thrilled for this opportunity to serve our six thousand members. I can assure you that I anticipate the next two years to be very busy, assisting our incoming President and the Board. I will work diligently to continue making the Bar an efficient, strong, and caring organization. I am hopeful and confident that I can strengthen the relationships among our members, and promote collegiality and professionalism.

I began practicing law in Ogden in 1977, and entered the profession with the same wide-eyed excitement that most of you probably experienced. I knew very little about lawyering, and much less about the Bar and its functions. Nevertheless, over the years I became more involved in Bar activities, first as a local Bar President in Weber County in 1981, and then moving on to State Bar activities for approximately the past fifteen years. I have written several *Bar Journal* articles concerning our profession and I am very enthusiastic about its future direction. I have been a member and chair of the Unauthorized Practice of Law Committee and am presently Bar Commission liaison to that Committee. I am also Bar Commission liaison to Advertising, Admissions and Client Security Fund Committees. I am concerned about ethical issues confronting attorneys, law firm and small/solo practice issues, and Bench and Bar relations. My greatest interest is, of course, doing whatever I can to promote a Bar in which we can all be proud — one that promotes a positive, proactive image of lawyers who practice with professional integrity and ethics, competency, and with a sense of caring.

I have been on the Executive Committee of the Board and have learned a great deal about the day-to-day management of the Bar, which presently consists of the President, President-Elect and me. Although our Bar has seen difficult times in the past, it is now a well-run, top-notch, first class association. Our Bar leaders over the past several years have shown strength and wisdom. It is our duty as lawyers and judges to provide the public with easy and affordable access to the justice system, along with allowing our members to thrive educationally, socially, and professionally.

I believe it is time to help our new, less experienced lawyers feel comfortable in their workplace through mentor programs. We can always do better in providing programs that teach excellence and professionalism to lawyers at all levels of experience. I hope to encourage many more members to become involved in Bar activities, since there are so many areas that need quality involvement.

I know the Bar Commission's sincere efforts are focused towards developing a Bar that is professional, competent, caring, and ethical. These ideals are realistic and attainable, and we must continue to foster a membership that has the wisdom to expand these ideals and to set appropriate examples.

There is much to do, and I am both prepared and eager to help. This is the most positive experience I have had in the last several years while serving members of the Bar. It has been a pleasure working on the Board of Bar Commissioners, working with the Bar staff, and meeting and getting to know numerous lawyers and judges through this involvement.

I accept this new challenge with great joy. In this endeavor, I have the support of my law firm, and I am prepared to spend whatever time it takes to facilitate the needs of our membership, the Bar Commission, the Bench, and the public. Further, I welcome your input regarding Bar issues, and I encourage you to provide your thoughts on every occasion. Thank you for this grand opportunity!

Notice ADR Rule Changes

The Judicial Council met on April 24 and adopted several important changes to the ADR rules:

Cases are now referred to the ADR program *after a responsive pleading is filed* rather than at the time the complaint is filed. This change was made to eliminate uncontested matters from the program. Plaintiff's attorneys will continue to be given the ADR materials by the court clerk when the complaint is filed, but parties and their attorneys are not required to view the videotape or mail a copy of those materials to the defendant until after an answer has been reviewed.

The Council also voted to exempt temporary orders from the program under Rules 64 and 65 of the Utah Rules of Civil Procedure, and all temporary orders requested under Title 30. Unlawful detainers actions in the Fifth District have been eliminated from the program due to the short time-frame involved in those actions.

Actions brought by the Office of Recovery Services including child support establishment and modifications, paternity suits, and medical lien cases are highly regulated by the federal government. Because of these regulations, ORS has almost no ability to participate meaningfully in ADR. These cases will now be eliminated from the program.

One final note. It is no longer necessary to mail a copy of the opt-out forms to the ADR Director. The court clerk will have the original copy, and any data the program needs to obtain regarding opt-outs can be retrieved from the computer.

The Judicial Council agreed to make these changes on an emergency basis. They take effect immediately, and we hope will relieve some of the problems that have arisen with the implementation of this program. Thank you very much for your support of the ADR program and for your patience while the mechanics of it are worked out.

Diane Hamilton, ADR Director

Utah State Bar Approves Ethics Opinions

ETHICS ADVISORY OPINION NO. 152
APPROVED JANUARY 27, 1995

Issue: Does the publication by a licensed attorney of a "How To" booklet on a legal subject matter violate the Rules of Professional Conduct?

Opinion: Mere publication of a "How To" booklet is not violative of the Rules of Professional Conduct; however, if the material proposed for publication contained gross distortions of law or fact, Rule 8.4 might proscribe its publication.

While disclaimers may be set forth in the materials, whether liability for malpractice exists is a matter of substantive law, not professional ethics.

ETHICS ADVISORY OPINION NO. 146A
APPROVED APRIL 28, 1995

Issue No. 1: May a lawyer who is also a life insurance agent, in the course of selling life insurance products, suggest the need for estate planning and then perform legal services for the customer, if requested, where the customer initially did not contact the insurance agent for legal advice?

Opinion: (a) A lawyer who is employed for an insurance firm or who works as an insurance agent is restricted from soliciting legal services from insurance customers under Rule 7.3.

(b) A lawyer may sell insurance products to existing legal clients after fulfilling the disclosure and consent requirements of Rule 1.8(a).

Issue No. 2: May an attorney who is an employee of a financial planner perform legal services for the planner's clients?

Opinion: A lawyer employed as an agent of a financial planner may perform legal services for the planner's client only when (a) the legal services offered by the lawyer to the client fall outside the scope of the lawyer's employment responsibilities to the financial planner with respect to that client, (b) the lawyer establishes an independent attorney-client relationship with that person and (c) the lawyer complies with Rules 1.7(b) and 1.8(f) of the Utah Rules of Professional Conduct.

Issue No. 3: May a lawyer, who is also an insurance agent, take referrals from other insurance agents to do legal work for those agents' customers under the circumstance where every agent has his own territory and the lawyer/insurance agent would be only doing the legal work referred to him and representing those clients on a consent basis between the client and the attorney?

Opinion: A lawyer is permitted to accept referrals from any source and enter into an attorney-client relationship with the referred individual.

ETHICS ADVISORY OPINION NO. 95-03
APPROVED APRIL 28, 1995

Issue: Is a private attorney who is a part-time city prosecutor for a city on a contract basis precluded from representing a defendant in a civil contempt proceeding?

Opinion: No. A city attorney with prosecutorial functions may represent a defendant in a civil contempt proceeding, provided the city is not a party to the proceeding.

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

See entire opinion for a complete discussion of the opinion. The full text of these and other opinions may be obtained from Maud Thurman at the Utah State Bar, Office of Attorney Discipline, 645 South 200 East, Salt Lake City, Utah 84111.

Small Firm/ Solo Practitioners Practice Library

The Bar Commission recently approved a proposal from the Small Firm and Solo Practitioners Committee to establish, at the Utah Law and Justice Center, a library devoted to the practical concerns of starting up and managing a small law firm.

Initially the library will consist of approximately 30 volumes. Bibliography for the library was prepared by former law firm administrator and legal management consultant Tobin Brown. (Toby also serves as Pro-Bono Coordinator for the Bar.)

Topics covered by the library include facilities management, human resources, total quality management, marketing, financial management, technology (including computer hardware and software.)

Although designated the Small Firm / Solo Practitioners Practice Library, the library will be available to all Bar members and their support staff. However, books must be checked out under the Bar member's membership number.

For further information regarding the contents of the library, or questions in general, please contact Kim Williams at the Utah State Bar (531-9077).

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.

Arraignment Schedule Change

Please be advised that the **Monday Arraignment Schedule** for the Third District Court has been changed. The revised schedule is as follows:

Judge	Time	Room	Status
Judge Iwasaki	9:00 a.m.	310	Same
Judge Bohling	2:00 p.m.	302	Change
Judge Young	8:30 a.m.	401	Change
Judge Rigtrup	1:30 p.m.	404	Same
Judge Murphy	2:00 p.m.	402	Same
Judge Medley	8:30 a.m.	403	Change
Judge Stirba	9:00 a.m.	304	Same

The **Friday Arraignment Schedule** remains the same. Times are as follows:

Judge	Time	Room	Status
Judge Lewis	8:30 a.m.	504	Same
Judge Frederick	9:00 a.m.	503	Same
Judge Wilkinson	8:30 a.m.	502	Same
Judge Hanson	9:00 a.m.	501	Same
Judge Peuler	10:30 a.m.	330*	Same
Judge Noel	10:30 a.m.	320*	Same
Judge Brian	10:30 a.m.	310*	Same

*Judges Peuler, Noel, and Brian are located on the Third Floor of the Salt Lake Circuit Building.

The changes to the Monday Arraignment Schedule are effective June 5, 1995, and are being made to reduce crowding in the holding cells in order to provide better security and safety to attorneys, law enforcement officers, and court personnel.

41st Annual Rocky Mountain Mineral Law Institute

Sun Valley, Idaho
July 20-22, 1995

The Rocky Mountain Mineral Law Foundation is sponsoring the 41st Annual Rocky Mountain Mineral Law Institute in Sun Valley, Idaho, on July 20-22, 1995.

The 41st Annual Institute offers the combined expertise of 39 outstanding and experienced natural resources law professionals. Presentations will address a variety of practical legal and land problems associated with the exploration for and development of oil and gas, hard minerals, and water on both public and private lands.

The Institute will open with a day-long General Session, and subsequent days are split between Mining, Oil and Gas, Federal Royalty Valuation, Landmen's, and Water Sections. Papers focusing on environmental, public lands, and international topics are interwoven throughout the program.

The Institute will be of interest to lawyers and landmen, as well as to corporate management, government representatives, and university faculty.

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

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
645 South 200 East
Salt Lake City, Utah 84111

New Decision Release Procedures Announced in Utah Court of Appeals

Effective April 10, 1995, and except in emergencies, the Utah Court of Appeals will release its opinions and memorandum decisions on Thursdays at 10:00 a.m. Emergency decisions will continue to be issued as quickly as possible. After 2:00 p.m. each Wednesday, a list of those cases in which a decision will be issued the following day will be made public. The list will be posted at the court counter and on the bulletin board outside the courtroom. The list of cases will also be available to the public, via a recorded message, by dialing 578-3923. At 10:00 a.m. on Thursdays, decisions in the listed cases will be deemed issued and will be available for release to the parties, counsel of record, the press and the general public.

If you have any questions regarding the foregoing procedures, please call Marilyn Branch, 578-3900.

Bill of Rights Symposium

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 BYU Campus. This year's theme is "The Dilemma of American Federalism: Power to the People, the States, or the Central Government?" with Rex E. Lee as the keynote speaker. Other guest speakers include Judge Monroe McKay, 10th Circuit Court of Appeals; Judge David Sam and Judge Dee Benson, U.S. District Court for Utah; Justice Fred Martone, Arizona Supreme Court; Thomas McAffee, Southern Illinois College of Law; Cynthia Lebow, Department of Justice; and Pace McConkie, Lawyers Committee for Civil Rights Under the Law. The Symposium will provide 6 hours of CLE, including 1 hour of ethics. Registration materials will be available after July 1st.

Utah State Courts Position Announcement

Position Title: Central Staff Attorney
Location: Utah Court of Appeals, Salt Lake City
Number of Positions: 1 Full-Time
Closing Date: June 23, 1995

Applications should be directed to:
Marilyn Branch
Utah Court of Appeals
230 South 500 East #400
Salt Lake City, UT 84102
(801) 578-3800

SUMMARY OF DUTIES: The Utah Court of Appeals is seeking an attorney to join its central staff. The applicant will work with other staff attorneys, under the general guidance and direction of the Court of Appeals judges. Responsibilities include the performance of complex legal work, including review and classification of appellate cases and assistance in the preparation of per curiam opinions, memorandum decisions, and orders.

MINIMUM QUALIFICATIONS: Graduation from an accredited law school. (Four years general legal experience or in-depth background in appellate practice is preferred. The applicant should have strong legal research and writing skills, and must be a member of the Utah State Bar at the time of appointment.)

STARTING SALARY: $40,000, approximately, with benefits.

APPLICATION PROCEDURE: Application must include a court application form, resume, law school transcripts, and a recent writing sample that has not been edited by others.

Application forms are available at the Court Administrator's Office: 230 South 500 East, Suite 300; Salt Lake City, UT 84102. Phone: 578-3800.

The Utah State Courts is an Equal Opportunity Employer. Appointments are made without regard to gender, age, race, creed, religion, national origin, ancestry, handicap or other non-job related criteria.

Constitution Centennial Essay Contest Winners Announced

Winners of a student essay contest sponsored by the Utah State Archives have been announced. Over 130 entries were received from elementary and secondary pupils statewide writing on the theme, "Utah's Constitution and Your Rights." First place winners will each be recipients of a $100 United States Savings Bond while runners-up get a $50 bond. Those selected will accept their awards and present their winning papers during a symposium honoring the centennial of the state constitution held Monday, May 8, 1995, at 9:30 a.m. in the Salt Lake City and County Building.

Two sixth grade students from Ensign Elementary (Salt Lake City School District) took first and second place honors from among the 69 entries in the elementary school division. Laura Naylor finished first while classmate Justin Britt was the runner-up. Honorable mention certificates went to eight fourth grade students representing three schools: Krys Hallows and Gavin Pace of Loa Elementary (Wayne School District), Megan Paley, Luisa Hafaka, Breanne Ruiz, John Walters, and Adriana Silva of Hillsdale Elementary (Granite School District), and Emily Wall of Sunrise Elementary (Jordan School District).

An essay by Katrina Rhodes, a ninth grader at American Fork Junior High (Alpine School District), was judged best among the 60 entries in the junior high/middle school division. Second place went to Marlena Gonzales, a seventh grader at St. Olaf's Catholic School in Bountiful. Seventh graders Nicolette O'Leary of St. Olaf's Catholic School, Callie Kofoed and Carla Coates of Fillmore Middle (Millard School District), Wendy Ott and Stephen Francis of Orem Junior High (Alpine School District) earned honorable mention certificates as did eighth grader Erin Cammack and ninth graders Jeremy Raymond, Tara Anderson, and John Dye of Vernal Junior High (Uintah School District).

A pair of Ben Lomond High (Ogden School District) students captured top honors in the high school division. Monica Hoxie, a senior, submitted the winning essay. Tanna Barry, a freshman, took second-place. Five entries were received from high school students.

The day-long symposium celebrating the one hundredth anniversary of the signing of Utah's Constitution will be held in the historic Salt Lake City and County Building, the site of the convention. In addition to the student compositions, 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 by Justice Christine M. Durham, E. Leo Lyman, Jean Bickmore White, Dean L. May, Thomas G. Alexander, Kathryn L. MacKay, and A.J. Simmonds.

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. Organizers include the Utah State Archives, the University of Utah Marriott Library, Weber State University Stewart Library, and the Division of State History.

Guidelines Concerning Applications for Compensation in Bankruptcy Cases are Available

The Bankruptcy Reform Act of 1994 contained an amendment to 28 U.S.C. § 586(a)(3)(A) which required the Executive Office of the United States Trustee to adopt guidelines for the review of applications for compensation and reimbursement under Section 330 of Title 11. The Guidelines reflect and formalize many of the procedural standards used by the United States Trustees in the past to fulfill their statutory duty to review and comment on applications for compensation filed in bankruptcy cases. The Guidelines are effective May 1, 1995 and apply only to bankruptcy cases commenced after October 22, 1994. Copies of the Guidelines have been mailed to attorneys who frequently practice before the United States Bankruptcy Court for the District of Utah. If you would like to review the Guidelines, a copy may be obtained from the United States Trustee's Office for the District of Utah by calling (801) 524-5734 or mailing a request to the United States Trustee's Office, Boston Building, Suite 100, #9 Exchange Place, Salt Lake City, Utah 84111-2709. A fixed comment period for the Guidelines will end August 1, 1995.

POSITION ANNOUNCEMENT

FEDERAL PUBLIC DEFENDER
for the
DISTRICT OF COLORADO

POSITION: The United States Court of Appeals for the Tenth Circuit is accepting applications for the position of Federal Public Defender for the District of Colorado, headquartered at Denver. The term of appointment is four years. The incumbent whose term is expiring will be an applicant.

DUTIES: Pursuant to 18 U.S.C. § 3006A, the Federal Public Defender represents indigent criminal defendants in federal courts, manages the Federal Public Defender Organization, supervises a staff of attorneys and support personnel, and serves as a permanent member of the district court's Standing Committee on the Criminal Justice Act.

QUALIFICATIONS: To qualify an applicant must be a member in good standing of the bars of all states in which admitted to practice, must have an ability to administer an organization effectively, must have a reputation for integrity, and must have a commitment to the representation of those unable to afford counsel.

SALARY: $115,700 per annum.

APPLICATION: Application forms and instructions may be obtained by writing Robert L. Hoecker, Circuit Executive, Byron White United States Courthouse, 1823 Stout Street, Denver, Colorado 80257, or by FAX (303) 844-2079, setting forth your full name and mailing address. Completed applications must be received in the office of the Circuit Executive no later than July 31, 1995.

THE COURT IS AN EQUAL OPPORTUNITY EMPLOYER

Mock Trial Heroes

More than 1,000 junior and senior high school students and teachers participated in the Sixteenth Annual Mock Trial Competition sponsored by the Utah State Bar, the Utah Bar Foundation, the Law-Related Education and Law Day Committee of the Utah State Bar, and the Utah Law-Related Education Project. The Utah Law-Related Education Project recognizes and thanks the judges, attorneys, paralegals, and community representatives who gave generously of their time and talents to coach or judge mock trial teams:

ATTORNEY COACHES FOR 1995 MOCK TRIALS

High Schools
Craig Alan Bott/Bountiful High
David Brickey/Cedar City High
Kevan Smith/Cottonwood High
Hon. John Memmott/Davis High
Mick Cristensen/Granite High
Don Young/Grantsville High
Francis Mark Hansen/Great Basin High
Marinus Heymering/Intermountain Christian School
Diane Banks and Susan Black/Judge Memorial High
Miles Jensen/Logan High
Barry Gomberg and Martin Custen/Ogden High
Davis Tuckett/Payson High – A
Mitch Maughan/Payson High – B
Bill Barrett/Rowland Hall St. Mark's High
Ronald Perkins and Tricia Judge-Stone/St. Joseph High
Tony Rampton and Bruce Badger/Salt Lake Lutheran High
Doug Fadel/Viewmont High
Jeff Burton/Weber High
Hon. Andrew Valdez/West High
Kim Luhn/Woods Cross High

Junior High Middle Schools
Kevin Bennett/American Fork Junior
Julie Luhn/Bryant Intermediate
Paul M. Warner/Butler Middle – A
Edward O. Ogilvie and Martha Stonebrook/Butler Middle – B
Steve Garside/Central Davis Junior
Richard Jones and Kelly Lowrey/Central Middle – A
Kevin Sullivan/Central Middle – B
Richard Russell/Churchill Junior
Marty Olsen/Elkridge Middle
Gary Weston/Hillcrest Junior
Emily Bean and Julie Flint/Fairfield Junior
Tom Seiler and Danny Frazier/Farrer Middle
Diane Banks and Hon. Dennis Frederick/Judge Memorial High (9th)
Joseph Bean/Kaysville Junior
Miles Jensen/Logan High School (9th)
Scott Squires and Davis Isom/Millcreek Junior
George Harmond/Mount Harmon Junior
Monet Hurtado and Barry Gomberg/Mound Fort Middle
Paul Vernieu/Mt. Ogden Middle
Gordon DuVall, Richard Parmley and Rich Firmage/North Layton Junior
Joseph Joyce/Oquirrh Hills Middle
Dale Jeffs/Orem Junior
Hon. Leslie Lewis and Mary Mark/Our Lady of Lourdes
Richard Burbidge/Redeemer Lutheran
Tom Barton/Rowland Hall St. Mark's (9th)
Mike Keller and Mathew McNulty/St. Vincent's
Jeff Burton/Snowcrest Junior
Kent Christiansen/South Davis Junior
Don Brown/South Sevier Junior
John Allan/Springville Junior
Hon. Andrew Valdez/West High School (ELP)

1995 MOCK TRIAL JUDGES

Doug Ahlstrom
John Allan
David Allred
Paul Amann
Linda Anderson
Hon. John Backlund
Marvin Bagley
Bruce Baird
Junior Baker
John Baldwin
Diane Balmain
Barbara Bawden*
Laura Beck*
Charles Behrens
Brent Berkley
Daniel Bertch
Stephanie Bird*
Mary Black
Larry Blackhair*
Ann Boyden
Sylvia Browne*
Heidi Buchi
Patsy Bueno*
Jeff Burbank
John Bybee
Scott Card
Michael Carter
Lori Cave
Joe Chambers
Ralph E. Chamness
Terry Christiansen
Gary Chrystler
Steve Combe
Glen A. Cook
Christina Cope
James Cope
Lois Cotten*
Gary Crane
William Daines
Julia Dalesandro*
Chris Davis
Christine S. Decker
Marian Decker
Ojik Degeus*
Kevin DeGraw
Gerry D'Elia
Richard Dibblee
David Dillon
Doug Durbano
Paul Durham
Raelyn Eckersley*
Phyllis Embley*
Bruce Embry
Vivian Faddis*
Mary Falslev
Scott Fisher
Joseph Fratto, Jr.
Robert B. Funk
Jeffrey Gabardi
Pat Garner*
Lillian Garrett*
Todd Godfrey
Ronald Goodman
Jeff Gray
Douglas E. Griffith
Dawn M. Hales*
Jan Hamer*
Carrie Hamilton*
David R. Hamilton
Kay Hanson*
Melissa Hawkley
Natasha Hawley
Alicia Head
Richard Henriksen
Gary Heward
Rein Heymering
Ken Higgins
Robert K. Hilder
Mark Hirata
Richard G. Hollin
Robert G. Holt
Larry Hornak*
Kristine Howes*
Mike Isbell
Gordon K. Jensen
Alan K. Jeppesen
Stephen Jewell
Gail Johnson*
Howard P. Johnson
Karl R. Johnson
Lisa Johnson*
Raycine Jones*
Dr. David Judd*
Dennis Judd
Phillip Judd
Lezlie Kelley*
Lucy Kidder
Brian King
Linda Kucera
David Lambert*
David Leavitt
Chelom Leavitt
Shirl LeBaron
John Lemke
Margaret Lindsay
Kim Luhn
Carol Lynn
Robert Macri
Windy Manning*
Kathy Mannos*
Robert Mansfield
Linda Mariotti*
Jane Marquardt
Nancy N. Mathews*
Cheryll May*

Sam McVey
Karen McDowell
Angela Micklos
Bonnie Miller*
Tiffany Miller*
Angela Mitchell*
David Money
Jacqueline Morgan*
Katie Morgan*
Ann Morton*
John Morrison
Michael Mower
Sheri Mower
Lisa Nagel
Jennifer Nakai
Lori W. Nelson
Carolyn Nichols

Ron Nichols
Clark R. Nielsen
JoAnn Nielsen
Mike Norman*
Marilyn B. Noyes*
Kelli Olson*
Marti Olsen
David Ostler
Kris Pace*
Steve Payton
Karen Petersen
Linda Priebe
Bruce Pritchett
Robert Rees
Glen Richman
Mark Robinson
Betty Robison*

Jeanne Robison
Brent A. Rose
Hon. Leonard Russon
Joseph C. Rust
Tom Santise*
Stephanie Saunders*
Stacy Schmidt
Robert Schumacher
Mary Schwab*
Tom Scribner
JoAnn B. Seghini*
Laura K. Sensenig
Brook Sessions
JoAnn Shields
Leslie Shupe*
Sharon Sipes
Kathi Sjoberg

Wendell Smith
Kent E. Snider
Ann Steele*
Dan Steele
Carolyn Stewart
Robert Stott
Kevin P. Sullivan
Jo Suttlemyre*
Nate Taggart*
Carrie Taylor
Margaret Thornton*
Robert Thorup
David Tibbs
Kirk Torgensen
Richard Tretheway
Roland Uresk
Larry Waggoner

Kim Walpole
Virginia Ward
Larry Whyte
Dorothy Wikstrom*
Hon. Michael Wilkins
Hon. Sharla Williams
Dr. Jean Wollam*
Kaye Workman*
Georgia Yardley-Barker
Louise York
Robin Youngberg
Mike Zundel

*Community Representatives

Law Day Run Results:

Beauchemin, Taylor and Kipp & Christian Overall Winners

The 13th Annual Bob Miller Memorial Law Day Run was held on Saturday, April 19, 1995 at the University of Utah. Marc Beauchemin of Harding & Associates in Pleasant Grove was the overall men's winner with a time of 15 minutes 22 seconds over the 5K course. He was followed by Richard Elmon and Kevin Murphy of the Attorney General's Office. Lorri Taylor placed first among the women with a time of 18 minutes 28 seconds, followed by Cindy Jackson and Victoria Kidman, last year's women's winner. Kipp & Christian's three-man, two-women team of John Johnson, Michael Skolnick, Kirk Gibbs, Tina Mikesell and Victoria Kidman won the team competition with the team from King & King in second place and the Richard Murray team in third place. The top three finishers in each division are listed below.

Attorney (under 40) — Men
1. Marc Beauchemin
2. Rob Keller
3. McKay Marsden

Attorney (over 40) — Men
1. Kevin Murphy
2. Jeff Nelson
3. Mont McDowell

Law Student — Men
1. Scott Gordon
2. Randy Allen

Law Faculty — Men
1. Reyes Aguilar
2. Boyd Dyer
3. John Martinez

Law Enforcement — Men
1. Terry McKinnon
2. Robert Mitchell
3. Brent Palmer

Attorney (under 40) — Women
1. Victoria Kidman
2. Julie Blanch
3. Julie Lund

Attorney (over 40) — Women
1. Joanne Slotnik

Law Student — Women
1. Dianne Obritsch
2. Karen Konevaar

Law Enforcement — Women
1. Nancy Hornsby
2. LuAnn Hooker

Legal Secretary/Personnel — Men
1. Brock Hansen
2. Mike Ostermiller
3. John Durkin

Paralegal/Legal Assistant — Men
1. Brent Scott
2. Greg Ford

11 and under — Men
1. Micah Menlove

12-13 — Women
1. Bethany Layton

15-19 — Men
1. John Manning
2. Greg Gordon
3. Sean Miller

20-29 — Men
1. Richard Elmon
2. Paul Lund
3. Bruce Gardner

30-39 — Men
1. Wayne Cottrell
2. Scott Kelly
3. Paul Borgmeier

40-49 — Men
1. Layne Hansen
2. Dave Clark
3. Ken Hornok

Legal Secretary/Personnel — Women
1. Tina Mikesell
2. Ruth Howe
3. Shawna Thurgood

Paralegal/Legal Assistant — Women
1. Monica Ford
2. Shalayne Wilson
3. Annette Wismar

11 and under — Women
1. Rachel Montague
2. Elizabeth Johnson

15-19 — Women
1. Whitney Diamond
2. Annette Evans

20-29 — Women
1. Amy Rossi
2. Corrine Warner
3. Sherry Dudley

30-39 — Women
1. Lorri Taylor
2. Cindy Jackson
3. Linda Mulkey

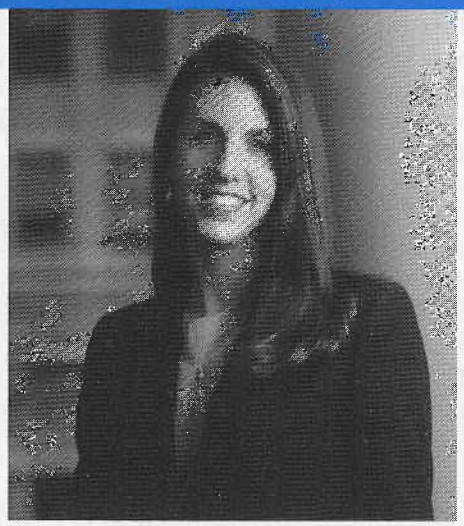
40-49 — Women
1. Annina Mitchell
2. JoAnne Black
3. Joy Gerber

50-59 — Men
1. Ed Pond
2. Stan Layton
3. Joseph Rust

60-69 — Men
1. Jim DeMet

70 and over — Men
1. John Cahill

50-59 — Women
1. Phyllis Howell



Young Lawyers Division Law Day Luncheon with Gerry Spence

By Lisa Rischer

In honor of Law Day 1995, on May 1, the Young Lawyers Division sponsored a Law Day luncheon for members of the Bar and special guests. Renowned trial attorney and author Gerry Spence was the honored guest speaker during the lunchtime celebration attended by nearly 500. Spence, clad in his famous buckskin jacket, spoke to the group in his strong commanding voice about the importance of justice and the power of uniqueness.

Spence challenged lawyers to recognize their own uniqueness and thereby recognize their individual power. He related some of his own experiences and spoke of how the discovery of oneself is a lifetime process. According to Spence, the vision one has of oneself creates who that person is and further, he emphasized that people can empower themselves by deciding their place in life.

Spence stressed that justice is the most important human goal and a principle without which the species cannot survive. He equated being a lawyer with fighting for justice and noted that lawyers "are all that stand between the people and tyranny." According to Spence, without a great case, one cannot be a great lawyer, and since many of the people with great cases do not have great wealth, in order for justice to prevail, a client's ability to pay should not be the major factor when a lawyer is deciding whether to take a particular case. Spence also acknowledged the wisdom and justice of juries and praised the jury system as "what separates us from the rest of the world."

The Young Lawyers Division extends its appreciation to Gerry Spence and to all those involved with this year's Law Day luncheon, with special thanks to the Young Lawyers Division Law Day Committee chaired by Dan Andersen and Jeff Scoubye.

Call-A-Lawyer Program Draws Huge Response

by Marji Hanson

On Law Day, May 1, the Pro Bono Committee of the Utah State Bar Association Young Lawyers Division ("YLD") sponsored a public service project in partnership with Fox-13 Television (KSTU). The tremendously successful "Call-a-Lawyer" program was a first time event in Utah and will hopefully become a Law Day tradition. David Crapo, current president of the YLD, commented that the "Call-a-Lawyer" program was a fitting close to an entire slate of Law Day activities sponsored by the YLD.

Those of you glued to "Melrose Place" on May 1 may have noticed the "1-800" number crawling across the bottom of the screen promoting the "Call-a-Lawyer" program. The hotline was open from 6:00 to 10:00 p.m. on Law Day and was staffed by sixty YLD members. The project was directed by Jeff Hunt and Susan Grassli, chair and co-chair of the YLD Pro Bono Committee. Callers had the chance to consult by phone with an attorney for up to 15 minutes. An AT&T system set up for that night distributed in-coming calls to attorneys located at Kimball, Parr, Waddoups,

Brown & Gee, Fabian & Clendenin, Van Cott, Bagley, Cornwall & MacCarthy, and Parsons Behle & Latimer.

The call detail report from AT&T indicates that 15,654 calls were attempted and 1,391 calls were completed. According to Jeff Hunt, who also directs the Tuesday Night Bar program this year, "we could have kept 150 lawyers busy on those phones — it was non-stop." Hunt added that "we handled more calls in this single night than we get in a year at Tuesday Night Bar." Volunteer Shannon Clark, of Dart, Adamson & Donovan, commented that "It felt like a marathon. As soon as I put the receiver down, another call would ring through. I hardly had time to catch my breath between callers." Volunteer attorneys came from private practice, government service and public service and represented all areas of legal expertise.

Calls came in from all over Utah, and some calls came from Wyoming, Colorado and Idaho. Some callers assumed that this was a nationally sponsored program and were surprised to hear they were talking to an attorney in downtown Salt Lake City. Callers included everyone from an inmate at a southern Utah county jail without heat or hot water for the past three weeks to a women whose 24 cats and 16 dogs brought complaints from the neighbors. "She wanted to know if there was anything she could do to make the neighbors desist, and we had to tell her the neighbors were right," Jeff Hunt commented. Some callers were encouraged to talk to an attorney because of the anonymity provided by the telephone. Some callers with very serious problems were helped by local law firms on a pro bono basis because of their calls into the program. Similar to Tuesday Night Bar, volunteers were not allowed to take callers as clients unless they could help the caller on a no fee basis.

The tremendous response to the "Call-a-Lawyer" program demonstrates that there is a large, unmet demand for affordable legal services. Jeff Hunt observed, "It's amazing how many people there are out there who really need to talk to a lawyer, but can't afford it or are intimidated. We gave them their chance on Law Day, and they really took advantage of it." Volunteer Rusty Vetter, of Parsons Behle & Latimer, commented that "all of the callers I spoke to seemed genuinely grateful for the chance to get some very basic advice about problems of great concern to them."

The YLD Pro Bono Committee wishes to thank the host law firms, AT&T Long Distance Services, the YLD Law Day Committee, all of the volunteer attorneys and the Utah State Bar for its financial assistance.

Young Lawyer of the Year Award

by Michael O. Zabriskie

The Honorable Kimberly K. Hornack was named the Young Lawyer of the Year by the Young Lawyers Division of the Utah State Bar. The award was presented at the Second Annual Law Day Luncheon at the Red Lion Inn on May 1st, 1995. The award was presented in recognition of outstanding dedication and professional embodiment of the goals of the Young Lawyers Division. "Judge Hornack possesses an abundance of energy, skill and dedication to the community and especially to the children of Utah," observed David Crapo, President of the Young Lawyer Division.

Governor Mike Leavitt recently appointed Judge Hornack to the bench as a Third District Juvenile Court Judge. Prior to her appointment Hornack served as a Deputy County Attorney for Salt Lake County. She was also a member of the special Victim Unit, responsible for the prosecution of all child abuse and sex crimes. She prosecuted over 600 cases in that capacity.

Hornack also spent time in the Attorney General's Office, working in the Criminal Appeals Unit. This gave her the opportunity to argue before both the Utah Supreme Court and the Utah Court of Appeals. Before that she spent several years in the public interest area, working for the Legal Aid Society of Salt Lake and Utah Legal Services in Ogden, where she practiced in areas of domestic law and spouse abuse.

Currently, Judge Hornack is an adjunct professor at the University of Utah College of Law and at Westminster College. She has lectured on child abuse and domestic violence for such organizations and events as the Utah Judicial Conference, Utah Prosecution Council, B.Y.U. Government and Politics Legal Society, Legal Secretaries Association, Utah Peace Officer's Association, Adult Probation and Parole, Salt Lake City Police Department and numerous other civic groups.

Judge Hornack is currently the Chair of the American Bar Association/Young Lawyer Division, Domestic Violence Committee. That committee is currently compiling a source book identifying programs designed to combat domestic violence from all fifty states. She is also the past Chair of the American Bar Association/Young Lawyer Division, Children and Law Committee and published "America's Children at Risk: A National Agenda for Legal Action".

As a member of the Young Lawyers Division of the Utah State Bar, Hornack served as Secretary, Representative to the ABA, Co-chair of the Law Related Education Committee and member of the Legal Services Committee. She has also written a model policy for law enforcement responding to domestic violence complaints, assisted in the production of a video advising domestic violence victims of their legal rights, and prepared a report on the unmet legal needs of Utah children. She is also a member of the Utah Supreme Court's Advisory Committee on the Rules of Criminal Procedure. Her civic associations include the Rape Crisis Center, the Center for Family Development, the Utah Chapter for the Prevention of Child Abuse, the Salt Lake County Domestic Violence Council and the "Booked" Literacy program in the Salt Lake County Jail.

Hornack was born in Topeka, Kansas. Her father served in the military and the family lived in such exotic places as Hong Kong, Okinawa, Japan, and Ogden, Utah. She has shown Appaloosa horses and is an avid horse rider. She has won awards in both English and Western style riding. She also enjoys gardening, golfing, skiing, "Arethea" and aerobics.

A graduate of Clearfield High School, Hornack was always interested in debate. She attended Weber State, where she met and married her husband, Nile Eatmon, in 1984. She received her undergraduate degree in Secondary Education and student-taught at Skyline High School.

When Hornack decided to attend law school, her father reminded her that she always had a "legitimate profession" and a teaching certificate to fall back on. When she sat for the Bar exam, he again advised her of her teaching abilities as a fall back profession if she should fail to pass the exam. Her response was to pass both the Utah and Washington State Bar exams. When she was appointed to the bench, she told her father that she did not need the fall back profession. He was quick to remind her of retention elections.

But Judge Hornack is more concerned with the individuals in her courtroom than she is with her retention status. She demonstrates this concern in numerous ways. Former co-workers and attorneys who appear before her are impressed with her fairness and expertise. They state: "She has quickly adapted and thrived in her short tenure on the bench," and "Her experience on the County Attorney's Special Victim Team gives her an important insight to the needs of victims. She is adamant about victim rights and notification."

Judge Hornack is not only a credit to the Bench but also to the Young Lawyer Division, and well deserving of this year's recognition.

Third District CASA Director Susan McNulty Receives Bar's Liberty Bell Award

On April 19 at the State Capitol, Governor Michael Leavitt presented this year's Liberty Bell Award to Susan McNulty, Director of the Utah CASA (Court Appointed Special Advocate) program. McNulty was granted the award to recognize her outstanding work with the CASA program, and her mobilizing efforts in the major renovation of the Salt Lake County children's shelter early this year.

The Liberty Bell Award is presented annually by the Young Lawyers Division of the Utah State Bar to a non-lawyer who has provided outstanding service in promoting a better understanding of the rights of others, has encouraged greater respect for law, and has stimulated an individual sense of responsibility so that citizens can recognize their duties, as well as rights.

CASA volunteers work with Guardian ad Litem attorneys who represent the best interests of children who are abused, neglected, or dependent. These children have petitions pending before the juvenile court. Each CASA volunteer represents only one child or sibling set in a family at a time. This sets them apart from state social workers, who usually have many children on their client lists. Volunteers try to make contact with their assigned child at least once a week, and keep the child's Guardian ad Litem informed about the child's general welfare and special needs. Since McNulty was appointed last July to coordinate the Third District (Salt Lake area) program, the number of CASA volunteers has increased from 15 to over 100. In addition to Susan's training, coordination, and recruiting duties, she is herself a CASA volunteer.

Late last year, after a visit to the county children's shelter, McNulty mentioned to Guardian ad Litem Director Kristin Brewer that the shelter was run down and that they needed to do something about cleaning it up. Brewer agreed, as did Martin Olsen from the Young Lawyers Division of the bar. The Young Lawyers became eager partners in the renovation scheme. The lawyers collected contributions for the effort from law firms, and McNulty and Olsen solicited donations from businesses and others, and supervised the volunteer work crews, which put hundreds of hours into the remodeling effort.

Among the substantial donations to the shelter were bunk beds from Deseret Industries, fencing from American Fence, and wallpaper and tools from Wallpaper Warehouse. Representative Enid Waldholz, after visiting the shelter at McNulty's invitation, donated the purchase and installation of new carpet for the center, and many other businesses and law firms came through with generous contri-

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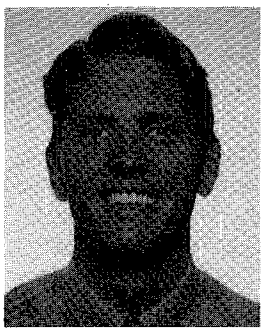
Young Lawyers Elect New Officers

by Michael Mower

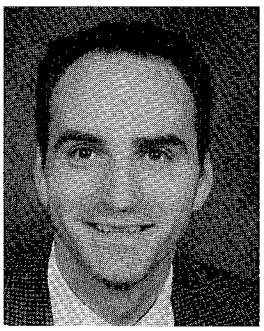
New officers were recently elected for the Young Lawyers Division (YLD) of the Utah State Bar for 1995-1996. Martin N. Olsen will serve as President. Others to serve the YLD include Daniel Andersen, President-Elect; Michael Mower, Secretary; and Lisa Rischer, Treasurer.



Martin N. Olsen
President

Martin Olsen graduated from the University of Utah College of Law in 1991. He worked as a clerk for Judge (now Justice) Russon of the Utah Court of Appeals. Martin is employed at Olsen & Olsen, where he concentrates in the area of family law, child advocacy and real property law. Marty also works as a guardian ad litem in the Third District Court.

Olsen said he plans to continue to involve the Young Lawyers Division in youth oriented programs, which has been one area he focused on while serving as President-Elect of the YLD. Last year, Olsen spearheaded the complete restoration of the Salt Lake County Children's Shelter. Olsen is also involved in the Big Brother/Big Sister program and the Child Life Unit at Primary Children's Hospital. Olsen, a 1984 graduate of Hillcrest High School in Salt Lake, is also a golf and tennis afficionado.



Daniel Andersen
President-Elect

Daniel D. Andersen, President-Elect of the YLD, received his bachelor's degree, cum laude, in English from the University of Utah in 1987. After graduation, he spent a year traveling in the Orient. In 1991, he graduated from the University of Utah College of Law. He worked as an associate at Hanson, Epperson & Smith for two and one-half years where he practiced insurance defense law. He currently works at Howard & Associates where he practices in the areas of business, real estate and health care law.

Andersen currently serves on the YLD Executive Committee as the co-chair of the Law Day Committee. He volunteers for the Young Lawyers Tuesday Night Bar program, and he has coached Jr. Jazz basketball. He has several outside interests which include hunting, fishing, dog training, and history. He is married to Susan Grassli, an assistant attorney general. They are expecting their first child this summer.

Michael Mower
Secretary

Michael Mower, the new YLD Secretary, is a staff attorney at the Legal Aid Society of Salt Lake. A native of Ferron, Utah, Mower received his B.A. degree from Brigham Young University in International Relations. Mower worked as a legislative assistant to Representative Howard C. Nielson before attending law school at the University of Utah College of Law. He received his J.D. in 1993. While in law school, Mower served as President of the Student Bar Association.

Along with his YLD work, Mower serves as a Vice Chair of the Rose Park Community Council, as a volunteer with the Boy Scouts of America, and is active in Republican party politics. Mower met his future wife, Sheri Williams, while both were in law school. Sheri is currently an associate at Wood, Spendlove & Quinn. The Mowers have one daughter, Mallory, and are expecting a second child in November.

Lisa M. Rischer, the new YLD Treasurer, is an associate at the law firm of Jones, Waldo, Holbrook & McDonough practicing in the Real Property Department. She graduated from B.Y.U. in 1986 with a B.S. in Nursing and was employed thereafter as a registered nurse through 1991. She received her J.D. degree from the University of Utah College of Law in 1990, where she served on the Utah Law Review

Lisa Rischer
Treasurer

and as a teaching assistant in the Legal Writing Program. Prior to joining Jones, Waldo, Holbrook, & McDonough in 1992, Ms. Rischer served as a law clerk to the Honorable Judith M. Billings of the Utah Court of Appeals. Rischer has been active in a number of professional organizations and served as a Co-chair of the Young Lawyer's Division Bar Journal Committee.

MEDIATION TRAINING

Sponsored by **The Lighthouse Group**. Presented by nationally acclaimed **Appropriate Dispute Resolution Associates** of Palo Alto California. The course is taught by Nancy Yeend - nationally recognized dispute management strategist, and John Paul Jones - attorney and state and federal certified mediator and arbitrator. The seminar qualifies for **CLE credit** and meets the training requirement for Utah Court-Annexed Mediation. To be held at the Willow Creek Country Club August 7-11, 1995. Enrollment will be limited. **CALL NOW TO RESERVE YOU SPOT**. The deadline for early registration is July 1, 1995. For registration or information call **1-801-561-1100** or write to:

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84047

The O.J. Simpson Trial and the Public's View of Our Judicial System

By Judge Rodney S. Page

"What do you think of the O.J. Simpson trial? How would you like to be in Judge Ito's place?" It would be nice if we all had a quarter for each time we've been asked questions like these. Undoubtedly, the questions will linger long after the trial and appeal process has ended.

Never in the history of our country — or, indeed, in the history of court proceedings — has a trial become such an item of interest for so many people. The Simpson trial blares from network news and CNN. It beckons from magazine racks and bookshelves. It is the topic of conversation at lunch counters from Portland, Maine to Portland, Oregon. The level of information dissemination in modern society has made it possible for citizens around the world to discuss, analyze, debate and criticize the proceedings as they happen. Never has the general public had such a bird's-eye view of a legal proceeding and the workings of the criminal justice system. Each new day finds an eager public glued to the television set watching the story unfold. Some say interest is so high the traditional viewing habits of the nation have changed, and traditional TV news programming will never be the same.

JUDGE RODNEY S. PAGE graduated from the University of Utah in 1964, with a B.S. degree in Business and Economics. He received his juris doctor degree from the University of Utah College of Law in 1969. Prior to going on the bench, he maintained a private law practice in the Davis County Area and served as Davis County Attorney for two terms. He was appointed a District Judge in the 2nd District in 1984. During the years on the bench he has served as Presiding District Judge of the 2nd District, a member of the Board of District Court Judges, and presently serves on the Judicial Council.

While all this is very interesting to the public, the impression our citizens are getting about how our judicial system works is a matter of grave concern. In particular, the role judges and attorneys play in the system is grossly distorted. Unfortunately, the Simpson trial is the only trial most citizens will ever see.

What they see leaves the impression of a system fostering trials that last forever; of a jury selection process so intrusive into one's private life no one wants any part of it; and a system that forces jurors, if selected, to forsake normal life and jobs and thereby so limits those who can serve the resultant panel bears little semblance to a fair cross section of the community it represents.

The public is left with the impression of a judicial system which allows, if not encourages, dishonesty by counsel. In the public's eye, disclosure between counsel is not required and surprises are rewarded. They see a system allowing attorneys to snipe at one another, argue back and forth and engage in vitriolic personal attacks during the course of the trial; and a system which emasculates any concept of a code of professional conduct or courtroom etiquette.

The system shown in the Simpson trial allows counsel to examine witnesses ad nauseam with slight regard to relevance or redundancy. The public perceives the judge with little control over the courtroom or counsel. The "side bar" becomes the rule rather than the exception, and counsel are more concerned about ratings and residuals than their client and the fair administration of justice.

The Simpson trial viewer sees a system that moves at a glacial pace, with testimony limited to two-and-a-half hours on a good day. Most other days the jury spends

sequestered while the judge and counsel wrangle about procedures and personalities. The most disturbing aspect of the Simpson trial is that citizens of this country, and more particularly this state, are exposed to a judicial system that bears little or no resemblance to the way judges and attorneys conduct business in Utah.

There is little doubt the Simpson trial will have serious and undesirable effects on the courts and the legal profession as a whole because of what people perceive as "normal" after watching the Simpson trial. Even more dangerous is the tendency of people who don't know better to advocate change on their distorted perception of the judicial system obtained from an aberration which bears little resemblance to the judicial system as we know it.

We must take care that we not let our judicial system or the standard of professional conduct of counsel degenerate to a level that would allow a spectacle such as the Simpson trial to occur in this state. While there is no question we will wrestle with the negative reverberations of the Simpson trial as a profession and judiciary for many years to come, we can also use it as a wake-up call. We must:

- Continue to require adherence to the highest standards of professional conduct and ethics and adhere to procedures fostering appropriate courtroom etiquette.
- Enforce those standards of conduct in a fair and evenhanded manner, and the bar must continue to be vigilant in policing itself from within.
- Use care in allowing the media in the courtroom so as to strike that delicate balance between the public's right to know and the necessity of maintaining the integrity of a fair trial.
- Be mindful of the jury system, and not allow the jury selection process, the use of voir dire and other theories of jury selection to subvert the jury system as has occurred in California.
- Re-examine rules of evidence, especially as they apply to discovery and disclosure, so as to guard against the atrocities evident in the Simpson trial.
- Insure our rules of evidence and procedure not become so distorted that practice allows trials to extend beyond the time which is reasonably necessary to insure a fair trial.

The courts and the attorneys who practice here bear no resemblance to the negative impressions generated from the Simpson trial. We must do all we can to insure our judicial system stays that way, and find a way to convey that message to the public.

continued from pg 44

butions. Because of the project spearheaded by McNulty and Olsen, the shelter was transformed from a depressing and dilapidated facility into a pleasant, homelike refuge for temporarily displaced children.

The CASA and children's shelter projects are just the latest in a long list of McNulty's community service projects. "Susan is an incredible person," says Guardian ad Litem Director Kristin Brewer. "Children in this state have a dedicated and talented person speaking for them and getting others to join the effort."

Trial Handbook for Utah Lawyers

By David W. Scofield

Products Liability: 50 State Handbook

By Kahnke and Price

Stress Management for Lawyers

By Amiram Elwork, Ph.D.

Reviewed by Betsy Ross

It's a bonus issue — three exciting new books, and all concerning law! (You guessed right, this was an editorial fiat.) The first two are not books that one reads in one sitting, but are reference books, helpful to have on one's bookshelf. The first is by a local attorney. The third book is one that can be read in one sitting, although the author would like to refer to it also as a reference book.

Trial Handbook for Utah Lawyers is a thirty-nine chapter book covering just about everything, with liberal sprinklings of references to the Utah Code, the Utah Rules of Civil Procedure and Utah case law. Among the topics covered are trial motions, contempt of court, selection of jury, the opening statement (where you can learn, for example, that "an opening statement may properly contain all of the material facts which the evidence will establish but not facts which the party is unable to prove and which are unsupportable by legal evidence. *State v. Distefano* (1927) 70 Utah 586, 262 P. 113"), (citation form, though not "bluebook" is consistent throughout), burden of proof, stipulations, examination (direct, cross and re-direct), credibility and impeachment, opinion evidence, hearsay evidence, weight and sufficiency of the evidence, damages, mistrial, directed verdict, closing argument, instructions, and conduct of the jury. There is a helpful topical index, and a "total client-service library" reference index, with chapter by chapter references to Am Jur and ALR citations. *Trial Handbook* appears to be both a good primer for the new attorney, as well as an excellent research tool for any Utah trial lawyer.

Products Liability: 50 State Handbook is exactly that, a reference book of the common threads in product liability law presented state by state (chapter by chapter). Thus one can easily compare one state's law on, for example, successor liability, with another state's simply by looking for the same numbered subsection in each state's chapter. Covered are issues of liability, including negligence, breach of warranty, strict liability, defective design, manufacturing defect, failure to warn, post-sale obligations, liability of non-manufacturers, and successor liability. Under defenses is covered assumption of risk, comparative fault, misuse of product, alteration of product, informed intermediary, government contractor, sealed container, state of the art, privity of contract, intervening and supervening cause, statute of limitations, statute of repose, and notice of claim. The issue of damages includes the following topics: contribution and indemnity, compensatory damages, punitive damages and damage to property or product itself. And, finally, there is in each chapter a section on jury instructions, with a reference to where pattern jury instructions for that state can be located. Utah's chapter was written by local attorneys Doug Davis and Ted Grandy, and though short (12 pages), provides ample citation to Utah law, including cases from the federal district court for the District of Utah and from the Tenth Circuit.

Stress Management for Lawyers is a short (95-page) treatise on what the author presents as an "overwhelming" problem for lawyers. It begins rather simplistically, with the sentence "Something is making the practice of law an increasingly difficult occupation." It ends borrowing directly from Stephen Covey's *The 7 Habits of Highly Effective People*. Along the way, there are statements that I found to be very true, like the discussion for reasons that conflict is felt: "[I]t is generally known that our adversary legal system promotes Machiavellian relationships, in which aggression, selfishness, hostility, and cynicism are widespread." Often observations made by Dr. Elwork are obvious, but I suppose that's the very definition of a psychologist's work: to make what is obvious to everyone else, obvious to the affected individual. There are also some obvious, yet helpful suggestions for dealing with the causes of stress and the stress itself. For example, Dr. Elwork suggests that one can refocus a problem simply by changing how one thinks about it. That is, if one looks to solutions rather than focusing on the repercussions of the problem, stress can be minimized. This is a simple, short book that can be read in an hour, but could be pondered much longer.

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1994-95 Board of Trustees

Seated are Stephen B. Nebeker (Vice President), Jane A. Marquardt (Secretary/Treasurer), James B. Lee (President) and standing are Trustees Carman E. Kipp, Joanne C. Slotnik, Stewart M. Hanson, Jr., and Hon. Pamela T. Greenwood.

Now the Ba-ar Foundation of Utah
Is handling bunches of dough
It's from trust accounts of Utah lawyers
That quite a few bucks always flow

12 - 63's the date of our founding
Our members include all the Bar
We address worthy charity projects
Where we feel our profession should star

Last year's folks who have shared in the largesse
Dealt with causes which needed support
With our funds we assisted with missions
They might otherwise have to abort

Legal Aid, Legal Service and others
Use our help to perform all their work
Needs of Kids and law ed get some dollars
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So your Trustees would like to say thank you
For the benefits spread near and far
For the generous funds you've provided
Let's continue the good done so far

— Carman E. Kipp

CLE CALENDAR

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.)

NEGOTIATING THE ETHICS MINEFIELD – BROADCAST LIVE TO 7 UTAH CITIES

Date: Thursday, August 17, 1995
Time: 2:00 - 5:00 p.m., registration begins at 1:30 p.m.
Place: Southern Utah University Auditorium, Cedar City, Utah
Broadcast live from Cedar City to the following cities: *Logan, Ogden, Vernal, Roosevelt, Delta, Richfield and Moab*
Fee: $60.00 before August 7, 1995
$70.00 after August 7, 1995
CLE Credit: 3 HOURS ETHICS CREDIT
SHAKESPEARE TICKETS: This seminar is being held during the Utah Shakesperean Festival. If you would like information on plays and how to obtain tickets, please call the Festival Box Office directly at (801) 586-7878.
****Watch your mail for a more detailed brochure about this program.*

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.*

NLCLE: IMMIGRATION LAW

Date: Thursday, September 21, 1995
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Division Members
$30.00 for all others
add $10.00 for a door registration

NLCLE: DEPOSITIONS

Date: Thursday, October 19, 1995
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Division Members
$30.00 for all others
add $10.00 for a door registration

KEITH EVANS ADVANCED ADVOCACY TRAINING SEMINAR

Date: Friday, October 27, 1995
Time: To be determined
Place: Utah Law & Justice Center
Fee: To be determined

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 Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

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Signature

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

Registration 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

RATES & DEADLINES

Utah Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please contact (801) 531-9077.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 532-4949. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

Utah Bar Journal and the Utah State Bar Association do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

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.

BOOKS FOR SALE

Utah Code Annotated; complete set, current. Contact Jan McCosh, @ Christensen & Jensen (801) 355-3431.

POSITIONS AVAILABLE

EXPERIENCED LITIGATOR / Immediate placement: Insurance defense preferred. Submit resume to: Herndon, Sweeney & Halverson, P.O. Box 80270, Billings, MT 59108-0270. All inquiries kept confidential.

Mid-sized Salt Lake City, Utah, law firm is seeking an attorney with excellent research and writing skills; one to three years active experience in litigation, preferably commercial. Strong academic credentials will be important. Salary range is competitive and the position is fully benefited. Send resume to Robert G. Wright, P.O. Box 2465, Salt Lake City, Utah 84110-2465.

ATTORNEY: Member of the Utah Bar. Background in public interest law with some experience and knowledge of laws assuring the rights of persons with disabilities desirable. Supervisory experience and demonstrated ability to effectively communicate orally and in writing. Litigation experience preferred. Submit resume and letter of application to: Legal Center for People with Disabilities, 455 East 400 South, Suite #410, Salt Lake City, Utah 84111. Equal Opportunity Employer

POSITIONS SOUGHT

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.

Expert **EMPLOYEE BENEFITS (ERISA)** attorney, (labor and tax) for corporation or law firm. Seventeen years experience. Will relocate. (713) 937-8195.

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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.

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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.

CHILD SEXUAL ABUSE — STATEMENT VALIDITY ASSESSMENT (SVA). A highly discriminative and proven method for determining the validity of child statements. No fee for initial consultation. Bruce M. Giffen, M.S. Investigative Specialist – 1270 East Sherman, Suite #1, Salt Lake City, Utah 84105 (801) 485-4011.

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MISCELLANEOUS

LOST WILL – Our records indicate that Parley E. Norseth and/or Theodore Bohn may have prepared a will for Hazel V. Smith. The will was executed in the late 1950's or 1960's, in the Ogden area. If you have inherited any of the files belonging to these attorneys, please review them for this will. Please contact Ralph C. Petty Esq. @ 531-6686 with any information.

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Firm _____

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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 _____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

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

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

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

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

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

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

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

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

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

* Attach additional sheets if needed.

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

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

Date: _____ _____
(signature)

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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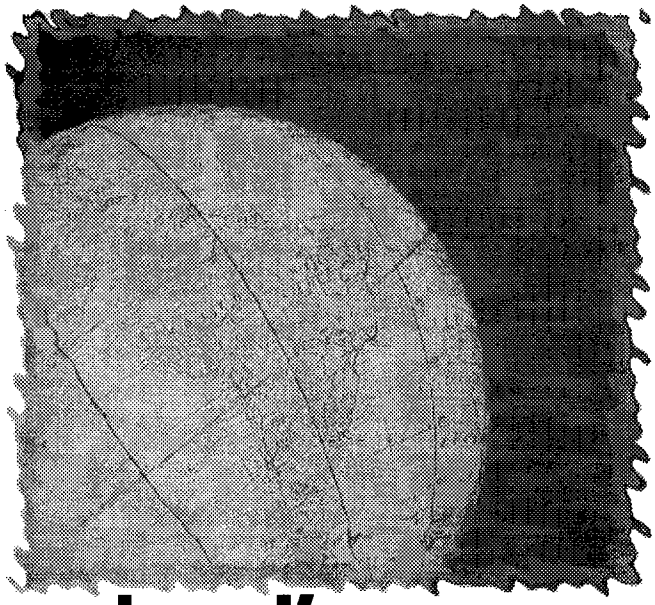

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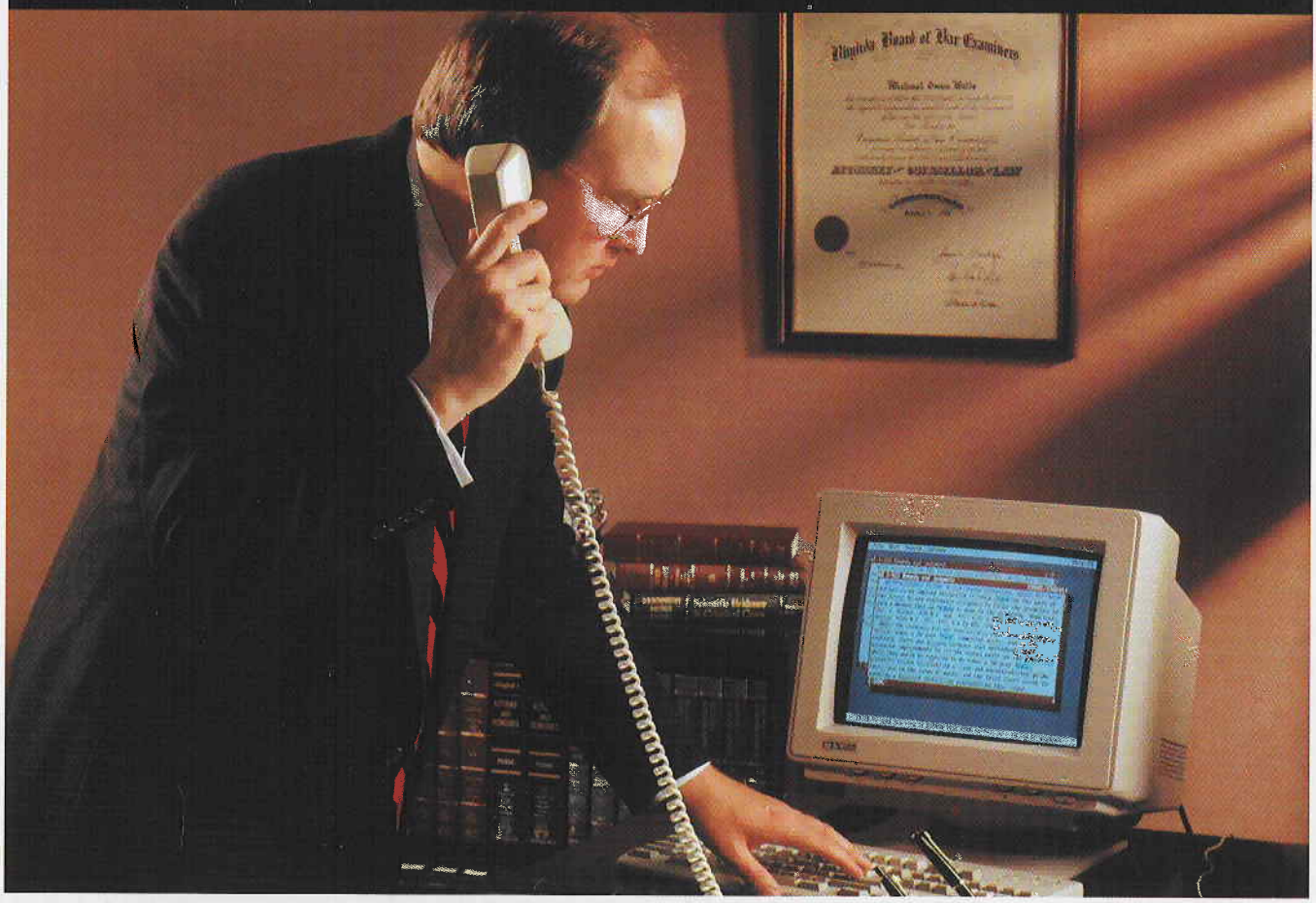

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