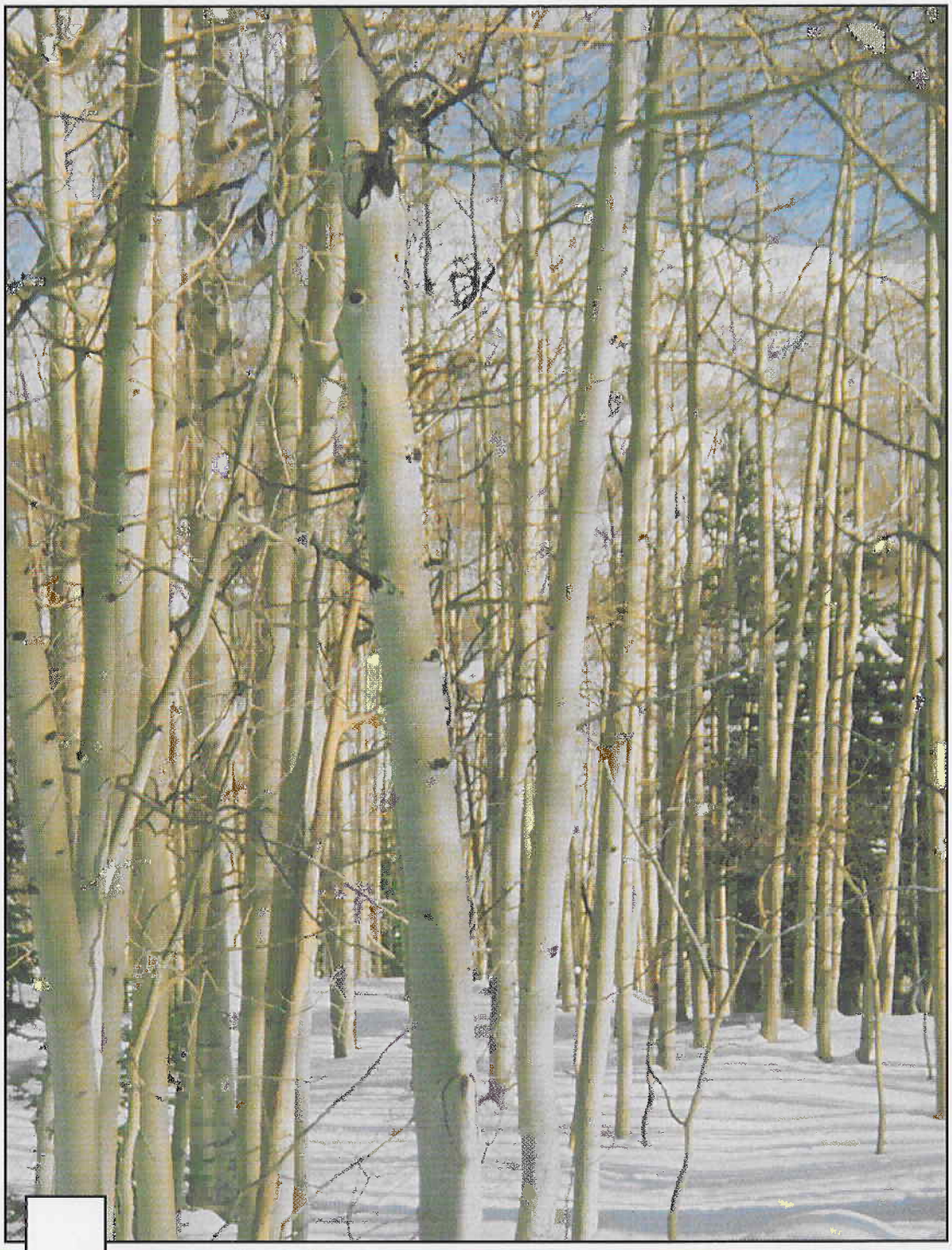
UTAH BAR JOURNAL

Vol. 8 No. 10 December 1995



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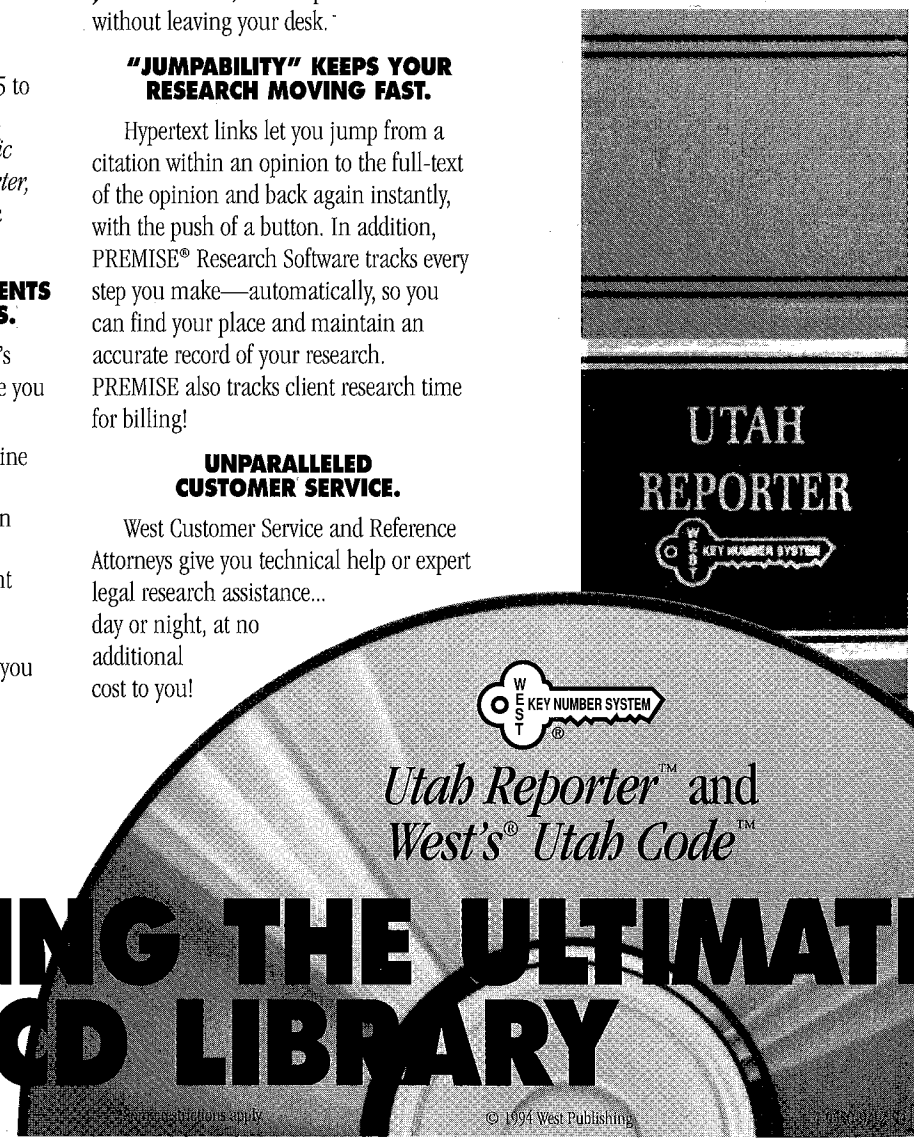

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COVER: Aspens in Snow, Big Cottonwood Canyon, Utah by J. Wayne Gillman, Salt Lake City, Utah.

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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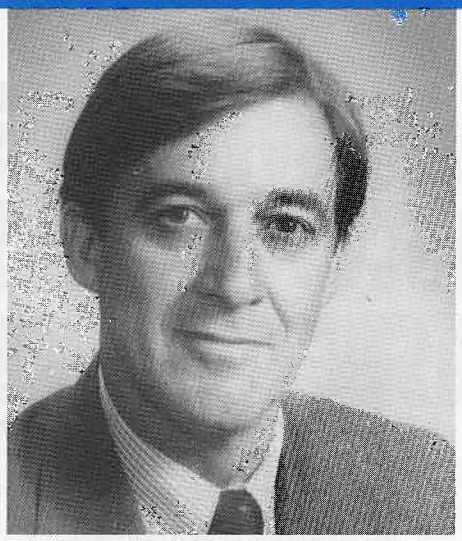


Results of Needs Assessment Survey

By Dennis V. Haslam

A few months ago, the Bar Commission undertook, through Bar staff, to conduct a needs assessment survey. Over 400 Bar members were randomly selected for telephone interview and 282, or 70%, were willing to respond. Statistically, a 70% response of 10% of in state active lawyers is considered adequate and represents a majority of opinion.

The major purposes of the study were to identify issues and needs of members and seek suggestions as to how best to meet those needs. We contracted with an independent researcher to oversee the administration of the survey and to analyze the findings. The completed survey forms have undergone computer tabulation and analysis and a more formal report will appear in an upcoming special edition of the Bar Journal.

Most respondents were male, caucasian, about 40 years of age and have practiced law for an average of 14.9 years, with a median of 13 years, e.g. half were above or below 13. About 40% of the respondents have practiced law 10 years or less. Over 80% of the respondents were male and 16.7% were female; 2.5% represent minorities; 97.5% are caucasian, and two declined to respond regarding gender or ethnicity.

About 82% of the respondents practice in Salt Lake County, and 80% were in private practice. Over half are involved in litigation; about 30% were solo, and an additional 20% were in small firms.

Of 12 areas which the Bar can best serve its membership, 84% felt we can serve in the area of education; 80% felt the Bar should provide more timely notices of legal and judicial activity, including opinions; 75% of the respondents feel the Bar should work harder to provide membership discounts.

Over 84% of the respondents indicated, in varying degrees, that the Bar was helpful to their practices. However, four comments were voiced frequently:

1. Dues are too costly; lawyers do not always see their value personally.

2. The Bar should be more aggressive in educating the public and promoting a better image of attorneys (perhaps hire a public relations firm).

3. The Bar should focus more on needs of the solo practitioner and small firms.

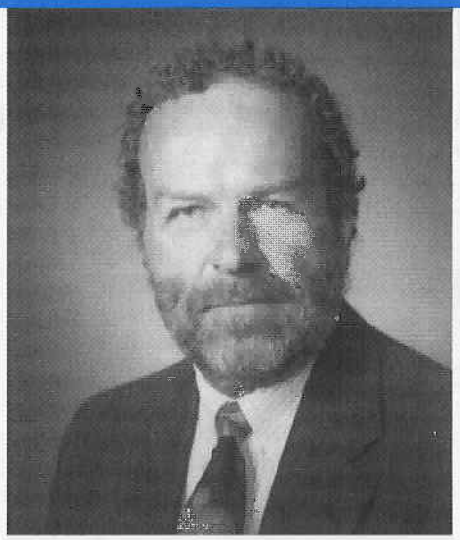
4. The Bar should tailor CLE's seminars and conferences to practices needs at lower costs.

About 15% of the respondents felt the Bar was not helpful to them, and half of those were solo practitioners and three-fourths were in private practice.

The Bar Commission continues to be concerned about the needs of its members. The Small Firm and Solo Practice Task Force suggested formation of a committee to serve those members. That committee is now on line to assist its members. Additionally, Bar Commissioner Dave Nuffer has been studying the possibility of assisting members to utilize the Internet in their practices and perhaps have the Utah State Bar open a homepage there.

We are planning public education and awareness programs for 1996 and plenty of Law Day activities. During April and May, we will make lawyers available to every high school in the state to speak on legal issues that are important to our youth. Lawyers cannot buy a better image through advertising but we can earn a better image through good deeds and public service.

To those of you who gave your valuable time to help us with this survey, we thank you. The Bar Commission will study this assessment survey in order to improve services to the membership and the public. Keep the cards and letters coming.



Diversity Is Our Business

By Charles R. Brown

Events of the past few months have caused each of us to engage in serious introspection regarding our role in society and the public perception of our profession. In addition to that famous criminal trial in Los Angeles, a couple of items locally are also relevant. A few months ago an attorney wrote a letter to the *Utah Bar Journal* stating that he was basically tired of his own profession. He was not sure he wanted to remain a member of a profession which, among other things, helped make it possible for drunken drivers to stay on the road. Also, within the last few months there was an extensive article in the *Salt Lake Tribune* about a law suit involving sexual harassment in the work place and the alleged "scorched earth" tactics being used by lawyers for the corporate defendant. Each of those situations illustrates why the public may develop negative impressions of our profession.

Part of the problem may be the slant placed on each event by the media. The larger problem, however, is the public's real lack of understanding of our professional role in society. In his Commissioner's Report for November, Jim Jenkins pointed out that lawyers are generally in the forefront of civic and charitable activities which benefit the community. That is, of course, true and it is important that the public be made aware of the spectrum of public service activities we render. It is just as important, if not more so, that the public understand just what it is we do in our professional lives. One of my mentors, the late Leroy S. Axland, who was as active in public service activities as anyone, always emphasized that our primary role and our first priority as attorneys is to act as zealous advocates for the interests of our clients. In representing our clients, we should always act with civility and within the bounds of ethical behavior. However, within those constraints we have an absolute duty to marshall all of the resources at our disposal, including intelligence, aggressiveness, creativity, diligence and tenacity in order to obtain every advantage possible for our clients.

The clients of lawyers constitute every possible diverse element of society. We represent and prosecute criminal defendants; we represent injured parties and corporations involved in product liability actions; we represent developers and environmentalists. The list is infinite. Lawyers constitute the only profession which has that breadth of diversity in the interests and matters they represent. A party on one side of a legal matter or a member of the public whose political or sociological sympathies lie with that side is generally not going to be pleased with the job the attorney for the opposing side performed for her client. Compare that with other professions. Doctors, for example, are always on the side of good and right. They are fighting injury and disease. No one would generally be philosophically or politically in favor of the doctor's opponent.

Just as a defendant on trial for a double murder in California, a drunk driver in Utah and a corporation being sued in a sexual harassment matter are entitled to expect the best representation possible from their attorney; so also are a Michael Milken, a tobacco company, or a major petroleum company being sued for damages relating to an oil spill. In order to improve our image, we must better educate the public regarding the distinction between our role as advocates for our clients and our status as citizens and members of society. Just as, I hope, nobody believes that an attorney representing a defendant accused of murder or drunk driving is necessarily an advocate for murder or drunk driving, likewise an attorney representing a junk bond guru, a tobacco company, an oil company, or a corporation involved in a sexual harassment suit should not be perceived, or portrayed by the media, as necessarily being in favor of securities fraud, cancer, pollution, or sexual harassment.

That image conflict between our duty to our clients and our rights as citizens to have a point of view which may differ from the matter upon which we are representing our clients is, I believe, the single most important cause of public dissatisfaction with and misunderstanding of lawyers. A lawyer representing a corporation in a sexual harassment suit could well be, in her civic activities, a leader in the community in programs to mitigate sexual harassment in the work place and improve the status of professional women. A lawyer whose job is to prosecute violent criminals may also be involved in civic activities to improve unacceptable conditions in our jails and prisons.

Each of us as individuals may be revered by our clients from time to time and will generally be respected by our friends and neighbors and others we know and meet in our private lives. It is only those "other" attorneys, who are adversarial to them in a particular dispute or who represent the wrong party or issue in that certain public matter, whom members of the public are upset with. As lawyers generally and as an organized bar we have a duty to promote the cause of justice. However, as recent events have confirmed, in individual cases "justice" is, more often than not, in the eye of the beholder.

Better education of the public regarding our role as professional advocates under our system is essential to the improvement of our image. Nevertheless, even with greater public understanding, lawyers, as a class, will always remain the subject of some public disapproval. If that were not the case, I might be concerned that we were not doing our job as effective advocates for our clients. From the beginnings of organized civilization there have always been public sentiments of anger towards or dissatisfaction with lawyers. The reason those sentiments may never change totally is because, as noted, "diversity is our business."

Choice of Business Entity in Utah

By Randy K. Johnson

Choosing the form of entity in which to conduct business is one of the first, and often one of the most important, issues faced by someone starting a business. In Utah, there are several basic business entities from which to choose, each offering its own advantages and disadvantages. The basic business entities are discussed in this outline are (a) sole proprietorship, (b) general partnership, (c) limited partnership, (d) limited liability partnership (e) C corporation, (f) S corporation, and (g) limited liability company. Beyond the scope of this outline are less common or more specialized entities such as professional corporations, non-profit corporations and business trusts.

Several factors determine which form of business entity is most appropriate for a particular business. The primary factors include protection of the owners of the business from debts, obligations and liabilities of the business, and achieving favorable tax treatment. Secondary factors include items such as flexibility of management, control, simplicity, cost, transferability of interests, and ease of raising capital.

Determining which form of business entity is most appropriate involves a careful examination of the type of business to be conducted, the identity and background of the principals, the short and long term objectives of the principals, how the business will be financed, and numerous other issues. Only after these areas have been examined can a recommendation be made as to appropriate choice of entity.

A. SOLE PROPRIETORSHIP

1. Definition. A sole proprietorship consists of a single individual who owns and operates a business, typically using his or her own assets. The sole proprietorship is the simplest form of business entity, and little distinction is made between the owner and the business.

2. Formation. A sole proprietorship comes into existence when the proprietor first uses property or offers services in the conduct of a trade or business. There are no formal requirements to form a sole proprietorship, and no annual filings are required. An application to transact business under an assumed name (DBA) should be filed in each state in which the sole proprietor is doing business under a name other than his or her own name.

3. Tax Treatment. A sole proprietorship is not a separate entity for tax purposes. The proprietor reports all items of income, gain, loss, deduction and credit on Schedule C of his or her personal income tax return.

4. Liability. A sole proprietor faces unlimited personal liability for all debts and obligations of the business. Creditors of the proprietor can seek recovery from the proprietor's personal assets, assets employed in the business, or both.

5. Advantages. A sole proprietorship is simple and requires no formalities or state filings. The tax treatment of a sole proprietorship is simple and, in many respects, advantageous. The owner of the business is allowed to deduct business expenses and losses from his or her personal income, and there is no separate income tax at the business level.

6. Disadvantages. The sole proprietor's unlimited personal liability for debts and obligations of the business presents a major drawback to this form of business entity. Also, all profits from a sole proprietorship may be subject to self-employment tax, even if part of the profit is attributable to a return of capital.

B. GENERAL PARTNERSHIP

1. Definition. A general partnership is an association of two or more persons formed for the purpose of conducting a business for profit.

2. Formation. A partnership may be created by a formal agreement or solely by the action of the parties. To formally create a partnership, articles of partnership should be filed with the Utah Division of Corporations and Commercial Code (Department of Commerce). It is possible to inadvertently form a partnership. A partnership is not considered to be a separate legal entity. Rather, it is simply an association of two or more persons.

3. Tax Treatment. Although a partner-

RANDY JOHNSON is a shareholder with Fabian & Clendenin, where he represents several start-up and emerging growth businesses in a variety of corporate/securities and general commercial matters. Randy graduated from the University of California at Berkeley in 1977, and received his law degree from Boalt Hall School of Law at the University of California at Berkeley in 1980. He practiced for several years in San Francisco and in the Silicon Valley of California before joining Fabian & Clendenin in 1988. He has served as a bar examiner in the area of business entities for the past six years, and has participated as a volunteer, together with other members of his firm, in the State Bar sponsored Domestic Violence program and in the Safe at Home program sponsored by the Office of the Utah Attorney General.

ship is not a separate legal taxpaying entity, it nevertheless files a tax return for informational purposes to report its income or losses, and to report each partner's share of partnership income and deductions. The partnership acts as a conduit through which items of income and deduction pass to the individual partners, whether or not actually distributed to the partners. A partner must report as income his or her share of the partnership's net income, whether or not the partnership's income was actually distributed to the partners. Subject to several qualifications, a partner can use his or her share of the partnership's losses to offset income from other sources.

4. Liability. Each partner is jointly and severally liable for all debt and obligations of the partnership. On dissolution of a partnership, a creditor of the partnership whose claim is not satisfied in full can sue any or all of the partners to obtain satisfaction of the claim.

5. Advantages. The biggest advantage of a partnership is its relatively favorable tax treatment. There is no separate tax at the entity level, and individual partners get the benefit of business expenses and deductions to offset income from other sources. Partners may also specially allocate items of income and deduction, thus allowing them, to some extent, to shift tax benefits and obligations. A partnership can be formed and operated with minimal formality, and no filings or agreements are necessary. As long as the partners get along and are not numerous, partnerships are relatively easy to manage.

6. Disadvantages. The joint and several liability of each partner for all debts and obligations of a partnership is a major disadvantage of a partnership. In the absence of an agreement to the contrary, the death or withdrawal of one partner dissolves the entire partnership. Management of a partnership can be difficult if too many partners are involved or if the partners do not get along well or do not have sufficient trust in each other. Interests in partnerships are not freely transferable. There is no centralized management in a partnership, and any partner can bind the partnership and his or her partners in any matter of partnership business. Raising capital is difficult in the partnership form since a partnership cannot raise capital through the broad distribution of ownership. Finally, it takes at least two persons (although they do not necessarily have to be natural persons) to form a partnership.

C. LIMITED PARTNERSHIP

1. Definition. A limited partnership is a partnership comprised of one or more general partners who operate and manage the business, and one or more limited partners who do not actively participate in the operation or management of the business.

2. Formation. A limited partnership is formed by filing Articles of Limited Partnership with the Utah Division of Corporations and Commercial Code. The rights of the partners with respect to management and financial matters may, but need not, be set forth in a partnership agreement. Aspects of the relationship not covered by the partnership agreement are prescribed by statute. The name of a limited partnership must contain the words "limited partnership," "limited," "L.P.," or "Ltd." A limited partnership must file an annual report with the Utah Division of Corporations and Commercial Code in order to remain in good standing.

". . .[L]imited partnership interests are still not as freely transferable as shares in a corporation."

3. Tax Treatment. The tax treatment of a limited partnership is essentially the same as the tax treatment of a general partnership. However, since limited partners are not allowed to participate in the management of the business, they will be deemed to be passive investors, subject to the fairly complex passive income and loss rules.

4. Liability. As long as limited partners do not take part in the management of the business, they will not be personally liable for the debts and obligations of the limited partnership. General partners in a limited partnership are jointly and severally liable for all debts and obligations of the limited partnership, just as general partners in a general partnership.

5. Advantages. A limited partnership enjoys the same basic tax advantages as a general partnership, subject to the passive income and loss rules, and except that limited partnerships may be more limited in how they can specially allocate items of income and deduction. The limited partnership affords investors limited liability, much like a corporation, so long as the limited partners do not take part in the management of the business.

6. Disadvantages. The general partners of a limited partnership remain jointly and severally liable for all debts and obligations of the partnership. As with a general partnership, the death or withdrawal of a general partner will dissolve a limited partnership, absent a provision in the partnership agreement to the contrary. Although more freely transferable than general partnership interests, limited partnership interests are still not as freely transferable as shares in a corporation.

D. LIMITED LIABILITY PARTNERSHIP.

1. Definition. The limited liability partnership is a general partnership that combines the flexibility of a traditional partnership with limited liability for partners similar to a limited liability company. A limited liability partnership must comply with certain statutory registration and disclosure requirements. The limited liability partnership form of entity came into existence in Utah as of July 1, 1994, and there will likely be few instances in which a limited liability partnership will be the entity of choice. So far, there have been only a handful of limited liability partnerships created in Utah. The most likely use of a limited liability partnership will be in the professional service area when professional corporations or limited liability companies are not available or desirable.

2. Formation. A limited liability partnership is formed by an oral or written agreement among the partners, and by filing a registration with the Utah Division of Corporations and Commercial Code. The registration statement that must be filed with the Division of Corporations sets forth specified information about the partnership and its partners. Annual reports must be filed. The name of a limited liability partnership must include the name "limited liability partnership" or must contain the initials "L.L.P." or "LLP."

3. Tax Treatment. A limited liability partnership is basically a general partnership and is therefore taxed the same as a general partnership.

4. Liability. As long as the statutory fil-

ings are made, the partners of a limited liability partnership are not personally liable for the partnership's debts or obligations. However, a partner in a limited liability partnership providing professional services may still be personally liable with respect to such services, but will not be liable for the professional services rendered by a fellow partner.

5. Advantages. The primary Advantage of a limited liability partnership is its favorable flow-through tax treatment. As compared to a general partnership, the limited liability partnership also offers the advantage that the partners will not be personally liable for debts and obligations of the partnership.

6. Disadvantages. As with a general partnership, the death or withdrawal of a partner will dissolve a limited liability partnership. Also, management of a limited liability partnership may be made difficult if there are too many partners involved. As with general partnerships, it may be difficult to raise capital in a limited liability partnership, and partnership interests are not freely transferable.

E. C CORPORATION

1. Definition. A corporation is a legal entity for and pursuant to state statute that exists separately from, and independent of, its owners. A corporation has most of the same powers, rights and duties as a natural person. The corporation is the most common form of doing business.

2. Formation. A corporation is formed by filing Articles of Incorporation with the Utah Division of Corporations and Commercial Code. The Articles of Incorporation set forth specified information about the corporation and about the stock it is authorized to issue. The management structure and financial and voting rights of the shareholders are typically embodied in bylaws or shareholder agreements.

3. Tax Treatment. A regular or C corporation is subject to federal and state income tax as a taxable entity separate and apart from its owners (i.e., shareholders). The net income of a C corporation is therefore taxed twice. The corporation pays federal and state income tax on the net income when it is earned, and the shareholders pay federal and state income tax on distributions of income from the corporation in the form of dividends. Compensation paid by a corporation to a shareholder/employee for services rendered will be subject to FICA withholding and employment taxes, but will also be deductible by the corporation as an expense. Items of income and deduction do not flow through a C corporation to the shareholders. If a C corporation shows a net loss at the end of a taxable year, the loss may be carried forward to offset net income in future years. However, the shareholders cannot offset income from other sources with losses at the corporate level.

4. Liability. Neither the shareholders nor the officers or members of the board of directors of a corporation are personally liable for the corporation's debts or obligations, unless they have personally guaranteed those obligations or unless the corporate "veil" can be "pierced."

"The corporate veil may be pierced . . . if the corporation is . . . the 'alter ego' . . . [and] the corporation as a separate legal entity would sanction fraud, promote injustice or . . . inequitable result[s]."

The corporate veil may be pierced, and the shareholders, officers or directors may be held personally liable for debts and obligations of the corporation, if two factors are met. First, if there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist. That is, if the corporation is in fact the "alter ego" of one or a few individuals. Second, if the observances of the corporation as a separate legal entity would sanction a fraud, promote injustice or if an inequitable result would follow. Some of the factors that will be examined to determine whether there is a unity of interest and ownership between the corporation and the individual include whether corporate formalities were observed, whether corporate assets were used for the personal benefit of the individual, whether corporate and personal funds were intermingled, and whether the individual respected the corporation as a separate legal entity.

5. Advantages. In practice, it is somewhat difficult to pierce the corporate veil to

hold shareholders, officers or directors personally liable for corporate debts and obligations. The liability protection offered by a corporation is the principal reason the corporation is a preferred form of business entity. Also, corporations have been around a long time, and a large body of corporate law has developed. Issues involving the management or operation of corporations are therefore reasonably settled in the absence of an agreement to the contrary. Shares of stock that evidence ownership interests in a corporation are freely transferable, in the absence of an agreement to the contrary. Agreements restricting the transferability of shares of stock are common in closely held corporations.

6. Disadvantages. The double taxation treatment of a regular or C corporation can be a major impediment to this form of business entity. Also, operating as a corporation involves more formalities and is somewhat more complex than operating as a sole proprietorship, a general partnership or a limited liability company. Annual reports must be filed, and corporate formalities, such as keeping proper corporate minutes, should be followed in order to maintain the separate identity of the corporation. Operating a corporation may be slightly more costly than operating a sole proprietorship, a partnership, or a limited liability company because of the formalities that should be followed. Also, corporations are less flexible from a tax standpoint than other entities.

F. SUBCHAPTER S CORPORATION

1. Definition. A subchapter S corporation is a corporation that, by complying with certain requirements of the Internal Revenue Code, avoids the double taxation problem of regular corporations, and is taxed more like a partnership than like a regular corporation. Generally, a subchapter S corporation may not have more than 35 shareholders, all of whom must be individuals, estates or certain defined trusts. A subchapter S corporation may not have a nonresident alien or a corporation as a shareholder. A subchapter S corporation can only have one class of stock, although certain differences in voting rights may be permitted. A subchapter S corporation cannot own more than 80% of the stock of another corporation.

2. Formation. A subchapter S corporation is created the same way that a regular C corporation is created. That is, Articles of Incorporation must be filed with the Utah Division of Corporations and Commercial Code. In addition, the corporation must file with the Internal Revenue Service a completed Form 2553, Election by a Small Business Corporation. All shareholders of the corporation must consent in writing to the subchapter S election. The election, together with written shareholder consents, must be filed with the Internal Revenue Service on or before the 15th day of the third month of a taxable year in order for the election to be effective during that tax year. If the election is not timely filed, or if the corporation did not meet all of the requirements for being a subchapter S corporation at all times during the year for which the election is filed, the election would not be effective, although it might be effective for the following tax year if the corporation then qualifies. The subchapter S is effective until it is terminated or until a disqualifying event occurs.

"A limited liability company (LLC) . . . combines some of the features of a partnership with some features of a corporation."

3. Tax Treatment. Assuming a proper subchapter S election is filed, the tax treatment of a subchapter S corporation and its shareholders is similar to the tax treatment of a partnership and its partners. The subchapter S corporation files an information tax return, and each shareholder separately accounts for his or her allocated share of items of income and deduction. Distributions to shareholders are generally nontaxable unless the corporation has accumulated earnings or profits from a pre-election period. A shareholder's proportionate share of flow through losses can only be used to offset income from other sources to the extent of the shareholder's basis in his or her stock.

4. Liability. Shareholders of a subchapter S corporation enjoy the same protection from liability for the debts and obligations of the corporation as shareholders of a regular C corporation.

5. Advantages. The primary advantage of a subchapter S corporation over a C corporation is the avoidance of double taxation. Another advantage is that, to the extent there are losses in the corporation, those losses may be passed through to shareholders to be offset against shareholders' income from other sources, subject to certain limitations. Many corporations begin their corporate existence as a subchapter S corporation, and convert to a C corporation at a later time.

6. Disadvantages. A subchapter S corporation is limited by the number and type of shareholders it can have. It is also limited to one class of stock. These limitations may make it difficult for a subchapter S corporation to raise capital. Also, unlike a partnership, items of income and deduction cannot be specially allocated to shareholders. Items of income and deduction flow through to the shareholders in proportion to their percentage of stock ownership.

G. LIMITED LIABILITY COMPANY

1. Definition. A limited liability company (LLC) is a relatively new form of business entity in Utah that combines some of the features of a partnership with some features of a corporation. An LLC has the tax advantages and operational flexibility of a general partnership, together with the limited liability protection of a corporation. The LLC is a separate legal entity which is organized by two or more persons.

2. Formation. A limited liability company is formed by filing Articles of Organization with the Utah Division of Corporations and Commercial Code. The Articles of Organization are very similar to Articles of Incorporation filed to create a corporation. The owners of a limited liability company are called "members." The rights of the members with respect to management and financial matters may be set forth in an operating agreement, which is a hybrid between corporate bylaws and a partnership agreement. The name of a limited liability company must include the words "limited company," "limited liability company" or the letters "LC" or "LLC." An annual report must be filed each year with the Division of Corporations and Commercial Code. Fewer formalities are required to set up and operate a limited liability company than a corporation. Although company minutes and resolutions are not required by statute, they are, nevertheless, a good idea.

3. Tax Treatment. A limited liability company is taxed like a general partnership.

Items of income and deduction flow through to the members, and may be specially allocated by agreement among the members.

4. Liability. Neither the members nor the managers of a limited liability company are personally liable for the debts or obligations of the company. However, the limited liability may not be recognized with respect to transactions in states not yet recognizing limited liability companies (currently just Hawaii, Massachusetts and Vermont), or in states whose limited liability statutes differ from Utah's. A member of a limited liability company providing professional services will still be subject to personal liability with respect to such services, but will not be liable for the professional services rendered by a fellow member. Unless otherwise provided in the Articles of Organization, any member has the power to bind the company. Because the liability protection of members is conferred by statute, and because fewer formalities are required with a limited liability company than with a corporation, it is arguably more difficult to "pierce the veil" of the limited liability company to hold members personally liable.

5. Advantages. The limited liability company offers the best features of a partnership combined with the best features of a corporation. Limited liability companies enjoy favorable flow-through tax treatment. Unlike subchapter S corporations, limited liability companies can specially allocate items of income and deduction among members. Also, unlike subchapter S corporations, there is no limit on the number or type of members, and an operating agreement can, in effect, create different classes of ownership interests. As discussed above, it is possible that the liability protection afforded by a limited liability company will be stronger or more absolute than the liability protection offered to shareholders of a corporation. There are relatively few formal requirements to create and operate a limited liability company. Limited liability companies also offer the following specific tax advantages over an S corporation:

a. LLC's can use an advantageous provision of the Internal Revenue Code to "step up" the basis of the LLC's assets when LLC ownership interests are transferred;

b. An LLC member's basis in the LLC includes the member's share of the LLC's debt, whereas a shareholder's basis in a subchapter S corporation does not include any portion of the corporation's debt (except to the extent a shareholder has made a loan to the corporation);

c. Unlike shareholders in a subchapter S corporation, LLC members who contribute appreciated property to the LLC and are not in control of the LLC after the contribution to not recognize gain;

d. An LLC can make distributions of appreciated property to members without triggering the recognition of income, unlike the situation with subchapter S corporations.

6. Disadvantages. Perhaps the biggest disadvantage of a limited liability company is the fact that it is the newest form of business entity and, as such, is relatively unknown and somewhat untested. There is considerable uncertainty with respect to issues such as piercing the veil of an LLC, the treatment of the LLC and its members in a bankruptcy, and the like. Another disadvantage of the LLC is that there is not a uniformity of state laws governing the LLC. An entity that plans to conduct multistate business may find it difficult to comply with the LLC laws in all of the various states. Also, to the extent an LLC engages in business in one of the states which have not yet passed LLC legislation, there is a risk that a court might not recognize the limited liability of members, and might hold the members personally liable in that state for the debts and obligations of the entity. Certain benefits such as medical insurance and group-term life insurance, when paid by the LLC on behalf of its members may be taxed to such members, whereas that is not the case with respect to corporations.

The favorable partnership tax treatment of a limited liability company depends upon the entity not possessing more than two of the four corporate characteristics. If an LLC is determined to have three or four corporate characteristics (limited liability company, centralized management, continuity of life, and free transferability of interests) it will be taxed as a corporation. This may present a trap for the unwary. Finally, a limited liability company must have two or more members, whereas a corporation can be formed in Utah with only one shareholder.

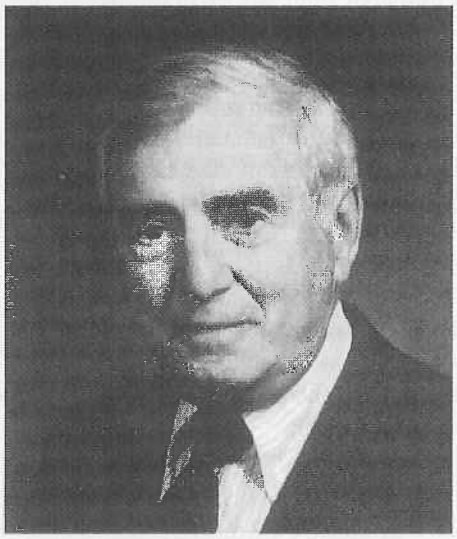
ADR and Access to the Courts

By Peter W. Billings, Sr.

Hollywood's version of dispute resolution in the early West showed resort to gun powder or other threats of force in disputes over mining claims, water rights and cattle grazing. Later, as more residents required a more civilized method of settlement, the methods created the phrases "horse trading" and "poker face." Our civilized society has developed a state governed method of dispute resolution in the third branch of government — the courts: submitting civil disputes to resolution by a judicial system where judges determine what disputes are involved and the applicable principles of law and juries resolve issues of fact under those principles, known as "a trial." In the twentieth century, the percentage of cases filed in court that actually go to trial has steadily decreased. Recent statistics show that only about 6% of cases filed go to trial by a judge and an additional 2% go to trial by a jury. Thus, a substantial number of disputes are settled by the parties after suit has been filed or the claims are dismissed by the court as legally insufficient.

There are many reasons for the large number of settlements. One, of course, is the negotiation efforts of counsel. Another is the delays due to crowded court calendars — a new problem for Utah. Another results from the discovery efforts of counsel. Discovery has increased not only the cost of litigation but also the time involved. Another cause, which does not receive the public attention as do cost and time, is the development of principles of public access, and that of the press and the electronic media as representatives of the public, to trial of civil actions, similar to that earlier established for access of the public to criminal trials.

All America has been made aware of access of the public and the press to criminal proceedings by the televised O.J. Simpson trial. But relatively few are aware that a constitutional right of access to criminal trials, based on the First and Fourteenth



PETER W. BILLINGS was born in Salt Lake City on June 20, 1917. He received his B.A. from the University of Utah in 1938 and his J.D. from Harvard, in 1941. He was admitted to the Utah and California Bars in 1941. He was also admitted to Ninth and Tenth Circuit Court of Appeals and U.S. Supreme Court. He served as Chief of Legal Division, Office of the Chief of Transportation, U.S. Army, in World War II. He has been with Fabian & Clendenin since April, 1946. He has served as Chair, Coordinating Council of Higher Education 1965-69; First Chairman, State Board of Regents, 1969-73; Chairman, Advisory Council, American Arbitration Association, 1988 to date. He is the author of articles on ADR and a Panel Member of CLE programs on ADR. He was also Chairman, Access to Courts Committee, Commission on Justice in 21st Century, 1990-91; Chairman Supreme Court Task Force on Management and Regulation of Practice of Law, 1991; Chairman, Utah Chapter, Fellows of American Bar Foundation, 1973-94. He is a current member of committees to draft rules for Court annexed ADR, both U.S. District Court and Utah State Courts.

Amendments, was only recognized by the United States Supreme Court in the nineteen eighties.[1] Even fewer are aware that the reasoning of the Court has been applied to civil actions, allowing public and press access to such proceedings on both constitutional principles and that of the common law.[2]

Two years before *Richmond Newspapers* was decided, in a case arising out of President Nixon's famous tapes,[3] the Court recognized a common law right of access to court documents, a right the Court stated was not absolute and was not to be used as a vehicle for improper purposes.[4]

Two reasons given in *Richmond Newspapers* for recognition of a constitutional basis for a right of public access in criminal cases — history and public interest — would appear to have equal application to civil cases. In reviewing the historical recognition of such a right of access, the court referred to Blackstone, where he stressed the importance of openness to the proper functioning of a trial to give assurance that the proceedings were conducted fairly to all concerned and to discourage perjury, the misconduct of participants, and decisions based on secret bias or partiality. The court also noted that the appearance of justice can best be provided by allowing people to observe it.[5] He also noted that public places are places traditionally open for application of First Amendment rights.[6] The Chief Justice in a footnote, pointed out that whether the public has a right to attend trials of civil cases "is a question not raised by this case," but he noted that historically both civil and criminal trials have been presumptively open. Mr. Justice Stewart in a concurring opinion stated that the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.[7]

While what the opinions in *Richmond Newspapers, Inc.* stated as to access to civil trials was dicta, and the Supreme Court has not yet expressly held a constitutional right of access exists as to civil cases or materials arising out of civil cases, the lower federal courts have consistently so assumed. The discussions have been over what restrictions may be placed on the rights of the public and the press and the nature and timing of the public access.

Both with respect to the common law right of access and the right of access under

the First and Fourteenth Amendments, the courts have found a presumption of right of access with the burden on the party seeking to restrict such access to justify any restrictions. The courts have sought to preserve the fundamental basis for access — the enhancement of the quality of fact finding, assurance of the appearance of fairness, the cathartic role of permitting the community to see justice done, and demonstrating the legitimacy of our judicial system for resolving disputes.

Not all parties, and sometimes no party, desire the aspects of public access to their civil dispute, as it may invade privacy rights, or affect intellectual or property rights by disclosing information discussed in the course of discovery or trial. The parties to a civil dispute may have a continuing relationship which public knowledge of the nature of the dispute might damage or destroy. Seeking a protective order runs the risks the petitioners cannot overcome the presumption of access or a private dispute is converted from civil litigation for resolution of the dispute between the parties to litigation with the press or other news media as to the nature or extent of any restriction on dissemination of knowledge produced at the trial or in the course of discovery.

As one solution to the public access problems, parties are increasingly entering into contracts that their existing or any future dispute will be resolved by the use of a neutral third party to promote a settlement — mediation, or the use of neutral third parties to hear the evidence and the position of each party and enter an award enforceable as a court judgment — arbitration. Both differences and similarities exist between civil trial of a dispute and arbitration as a means of resolving that dispute. An analysis should dispose of the existence of any public right of access to an arbitration proceeding.

To promote the use of such contracts, Congress in 1925 enacted the Federal Arbitration Act, now codified in Title 9 of the United States Code. That act applies to agreements to arbitrate which evidence a transaction involving interstate commerce. Section 2 makes such contracts enforceable. Section 3 provides for stay of litigation involving an issue subject to arbitration. Section 4 provides for specific performance of arbitration contracts, and Section 5 for appointment of an arbitrator by the court where the contract itself does not provide for a means. The act also provides for a court order enforcing an award (Section 9), and limits the court's powers to vacate or modify an award (Sections 10 and 11) and places limitations on court review (Section 16). Thus, the act is applicable to contracts the parties themselves have made to submit their dispute to arbitration and does not involve the judicial system in resolving the merits of the dispute, but merely to determine whether the actual procedure employed was fair and free of bias and prejudice. Since the reasons for public access to trials are not applicable to arbitration hearings or mediation services, the courts have generally upheld closing the door.

"Presumably the Utah state courts would follow the precedents established by the United States Supreme Court . . . in applying the Federal Arbitration Act [as to the Utah Arbitration Act]."

Recent decisions of the United States Supreme Court confirm the principle that the Federal Arbitration Act does not involve the federal judicial system in resolving the dispute between the parties, but limits the judicial system's involvement to determining that the contract to arbitrate is enforced according to its terms. Thus, there would be no need to find a right of access by the public and the press to the arbitration hearing itself. The hearing itself is not the creation of the judicial system but that of the contract between the parties themselves to use arbitration as a means of resolving their dispute without the resort to trial.

In a 1989 decision by the Court,[8] it was stated that the parties may limit by contract the issues which they will arbitrate and may also specify by the contract the rules under which the arbitration will be conducted. The Court accordingly concluded that since the parties had agreed that applicable law would be that of California, its procedural provisions with respect to arbitration applied rather than the Federal Arbitration Act even though the act applied to the contract on the basis of the Interstate Commerce provisions.[9]

The current Utah Arbitration Act[10] in its latest version (1985), is an adoption of the then model state act patterned after the Federal Arbitration Act. Presumably the Utah state courts would follow the precedents established by the United States Supreme Court and lower federal courts in applying the Federal Arbitration Act.

As noted, while the Supreme Court has not yet expressly held that there is both a common law and a First Amendment public right of access to civil trials, there has been substantial dicta in its opinions that it would so hold. The courts of appeal have so assumed and so held, but have noted that such right is not absolute. In most civil actions, the contract involves private dealings between private parties. Certainly that is true of arbitration pursuant to an agreement to resolve disputes arising out of a contract by private arbitration.

The leading case on the right of access to civil cases is an opinion of Judge Higginbotham of the Third Circuit.[11] In assuming such rights existed with respect to civil cases, Judge Higginbotham found such right was not absolute, but as a fundamental right based on the Constitution, it is to be afforded due process protection from unreasonable restrictions. To limit the public's access to a civil trial, there must be a showing that the denial serves an important interest and that there is no less restrictive way to serve that interest. He also noted that there are certain exceptions to a presumptive openness of civil judicial proceedings and cited as an example the protection of a party's interest in confidential commercial information such as a trade secret.[12] He noted that such countervailing interest can involve the content of information such as a trade secret, a binding contractual obligation not to disclose the information, the relationship of the parties such as an attorney-client privilege or the nature of the controversy. In that case, the dispute was whether the illegal manufacture of Scotch whiskey should be disclosed to creditors and stockholders of the distillery.

Judge Higginbotham's analysis is generally accepted in state and federal courts.[13]

While the courts are in general agreement as to the existence of a right of public access to civil trials, there has been little court consideration as to whether such a right exists as to alternative dispute resolution proceedings, whether such procedure has been generated by an agreement between the parties to use an alternative to

trial for resolving their dispute or whether the use of ADR has been directed by the court to litigation already filed and pending before the court.

Finding of a common law right to access to trials, both civil and criminal, has been based on the historical precedent of English procedure. One would search in vain for discussion by Blackstone or Lord Coke as to openness of arbitration proceedings.

Judge Higginbotham in the *Publicker* case, found the constitutional right of access to civil trials as inherent in the nature of democratic government and quoted Justice Oliver Wendell Holmes as to "the security which publicity gives for the proper administration of justice" and that "every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." He also quoted from findings of the U.S. Supreme Court on access to criminal trials, that public access to trials enhances the quality and safeguards the integrity of the fact finding process, and insures that discussion of governmental affairs is an informed one. He found that in essence both criminal and civil trials are part of our governmental system, and public access serves as a check on the judicial process as part of government.

The question presented is whether the use of ADR procedures is such a part of our governmental system that public access is necessary to ensure the integrity and quality of the system.

The answer may vary with the type of ADR procedure contemplated and the source of the mediation or arbitration selection. For example, mediation does not involve any judicial process. It is merely a means of expediting settlement of a dispute by employing the services of an impartial third party to promote full and frank discussion so as to reach a result agreeable to the parties. It requires no adjudication by a court but merely an agreement by the parties to try to resolve their dispute through the mediation process. Courts have recognized a need for confidentiality in mediation proceedings to promote open and frank discussion of the issues by creating a mediation privilege against requiring testimony about any mediation process or statements against interest by the parties which led to settlement.

Similar analysis of summary jury trial procedures was made by the Sixth Circuit Court of Appeals.[14] It reviewed a district court protective order issued in connection with a court ordered "summary jury trial" which resulted in a court approved settlement. Because the case involved highly confidential documents involved in the construction of a nuclear energy plant, news media sought access to the summary trial. The Court of Appeals sustained the district court order against a claimed constitutional right of access, noting that the summary jury trial did not present any matter for adjudication by the court, and public access would have a significant adverse effect on the utility of a summary jury trial as a settlement device.

"Federal courts generally have, as is the case with the [Utah] Federal District Court . . ., preserved the confidentiality and privacy of the ADR proceedings . . . ."

Arbitration is more like the civil trial it replaces. It is an adversary proceeding under relaxed procedural and evidentiary rules with an award entered by an arbitrator or panel of arbitrators who hear the evidence, review the issues of fact and law, and issue an award. However, the involvement of the judicial system is limited under the Federal Arbitration Act and comparable state laws. The court's authority is only to order enforcement of the agreement to arbitrate pursuant to its terms, to enter judgment on the award, but not to review the merits of the award, and only to consider claims of fraud, corruption, bias or other misconduct of the arbitrators.

The involvement of the court is so limited as to make public access to the arbitration hearing not pertinent to the judicial process. In addition, the very reason for the parties' agreement to use arbitration as a means of resolving the dispute was to protect the privacy of the conduct of the parties and information at issue, the relationship of the parties or the nature of the controversy. Unlike trials, arbitration proceedings pursuant to a private contract do not involve public moneys or public institutions. The courts that have considered the issue have determined that there is no presumption of public access as is the case with civil or criminal trials. Another issue not yet resolved by the courts is whether a different rule would be applicable where there is no agreement of the parties to arbitrate the dispute, but the court has ordered use of ADR in a pending case in an effort to promote settlement or resolve the dispute before proceeding with a trial. Public institutions and public funds are involved.

The use of ADR in resolving civil litigation pending in federal courts has arisen from the Civil Justice Reform Act of 1990.[15] Federal courts generally have, as is the case with the rules adopted by the Federal District Court for the District of Utah, preserved the confidentiality and privacy of the ADR proceedings on the theory that it is necessary for the success of the program, and like *Cincinnati Gas & Electric,* allowed public access to the proceedings only on a showing of public necessity.

Use of ADR for resolution of litigation in the Utah state courts was authorized by the Utah Legislature in enacting the Alternative Dispute Resolution Act effective January 1, 1995. The use of ADR as a method of resolving litigation pending in the state courts arose originally from a recommendation of the Access to the Courts committee of the Commission on Justice in the Twenty-First Century, issued in 1991. The Judicial Council apparently found that enactment by the legislature of Chapter 31b of Title 78 in 1991 was directed more to promoting use of ADR providers certified under Title 58, Chapter 39a, than to developing a court-annexed program for use of ADR, and proposed a rewrite of Chapter 31b which was adopted by the 1994 legislature.[16]

The Utah Legislature in Chapter 31b adopted a presumption of confidentiality for Court Annexed ADR proceedings. Section 8 of Chapter 31b provides that ADR procedures under the Act:

> "shall be conducted in a manner that encourages informal and confidential exchange among counsel, the parties and the ADR provider to facilitate resolution of the dispute. ADR proceedings shall be closed, unless the court finds a strong countervailing interest against maintaining the confidentiality of the proceedings in that particular case or unless the parties agree that the proceedings be open."

The requirement that the Court find a strong countervailing interest in effect

changes the presumption against confidentiality as applied to civil cases and reverses it as to ADR cases.

The rules adopted by the Utah Supreme Court under authority of Chapter 31b eliminated the phrase with respect to finding "a strong countervailing interest" and substituted "unless otherwise directed by the Court." Despite that change, presumably the statutory language of "strong countervailing interest" would govern a Court and make the presumption in favor of confidentiality, not of access in cases where the media seeks access to an ADR proceeding.

Another "unless" should be considered. That "unless" would reverse the burden as to closure if there is a constitutional right of access to court annexed arbitration. If the court has ordered the parties to arbitrate, such a right may exist. As the Sixth Circuit noted in the *Cincinnati Gas & Electric* case, it is the presence of the exercise of a court's powers that is the touchstone of the recognition of a right to access. In that case, the court observed that a summary jury trial does not affect the parties' right to a full trial de novo on the merits. If the court referral of a case to arbitration allows either party resort to a trial de novo, if not satisfied by the award, the principles of *Cincinnati Gas* would find there is no constitutional right of access to the arbitration proceedings. If the order to resort to ADR makes the arbitration award binding and subject only to such court review as is provided in the Federal Arbitration Act or Chapter 31a of the Utah Code,[17] such a right of access may exist, being based on the Constitution's requirement of public knowledge of operation of a public institution.

On that analysis, it would appear that if the court, proceeding under Chapter 31b, orders arbitration as a means of resolving the dispute, but the order or rules provide that if either party is dissatisfied with the terms of the award, it is entitled to a trial de novo, the question of constitutional right of access to the ADR proceeding would be resolved under *Cincinnati Gas.* As to a common law right of access, both the legislature in Section 78-31b-5(m) and (n) as well as in Section 8, and the Supreme Court in adopting the rules for Court Annexed ADR (Rule 102(k) and Rule 103) sought to preserve the confidentiality and privacy of the ADR proceeding.

If the parties have concern about having to go through a trial de novo after the award is issued[18] and want to eliminate the possibility of representatives of the media invading the privacy of their dispute by convincing a Court that there is a strong countervailing interest requiring elimination of confidentiality, they should probably stipulate to a dismissal of the litigation and enter into an agreement to resort to private arbitration under Chapter 31a of Title 78 of the Utah Code or the Federal Arbitration Act. A similar choice would be available under the program adopted by the local Federal Court.

Recent publicity about the concerns of the Utah Judiciary as to a crowded court calendar might increase the Court Annexed ADR Program in the Third and Fifth Districts and expand the program to the Second District. It should also be an inducement to commercial enterprises on the Wasatch Front to enter into contracts to use private ADR to avoid the problems of delay from a congested court trial calendar. Confidentiality is an added bonus to speed of resolution.

[1]*Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 65 L.ed 2d 973 (1980).

[2]*Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059 (3d Cir., 1984).

[3]*Nixon v. Warner Communications,* 435 U.S. 589, 55 L.ed 2d 570 (1978).

[4]The Court stated: "It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." 435 U.S. at 599.

[5]In the opinion of the Court, written by Chief Justice Berger, in concluding that the right of access to criminal trials was based on the First Amendment, he stated: "What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted." 448 U.S. at 576.

[6]He said, "A trial courtroom also is a public place where the people generally — and representatives of the media — have a right to be present and where their presence historically has been thought to enhance the integrity and quality of what takes place." 448 U.S. at 578.

[7]448 U.S. at 599.

[8]*VoLT Information Services v. Stanford University,* 489 U.S. 468, 109 S.Ct. 1248, an opinion by Chief Justice Rehnquist.

[9]Two 1995 decisions of the Supreme Court have reaffirmed the contract principles. In *Allied-Bruce Terminix Cos. v. Dobson,* ___ U.S. ___, 130 L.ed 2d 753, 115 S.Ct. 831, an opinion written by its newest justice, Justice Breyer, the court reaffirmed its earlier rulings: 1) that the Federal Arbitration Act was enacted to overcome any court's refusal to enforce agreements to arbitrate; 2) that it was an exercise to the fullest extent of Congress' power to control interstate commerce; and 3) that to the extent the act applied to a contract, the act preempted state law and was applicable to arbitration in both state and federal courts.

In May, 1995, in another opinion written by Justice Breyer, *First Options of Chicago, Inc. v. Kaplan,* 115 S.Ct. 1920, the court noted that the parties disagreed about the merits of the controversy. Secondly, that they disagreed about whether they had agreed to arbitrate the merits, and thirdly, they disagreed about who should have the primary power to determine the question of whether they had agreed to arbitrate a particular issue. The court considered only this third question, and applied general contract law as to how the issue was to be determined.

[10]Sections 78-31a-1 to 20.

[11]*Publicker Industries v. Cohen,* 733 F.2d 1059 (1984).

[12]Judge Higginbotham stated: "Procedurally, a trial court in closing a proceeding must both articulate the contravailing interest it seeks to protect and make findings specific enough that a reviewing court can determine whether the closure order was properly entered." 733 F.2d at 1071.

[13]"Behind Closed Doors", 76 Judicature 303 (1993), and Miller, *Confidentiality, Protective Orders and Public Access to the Courts,* 105 Harvard Law Review 42 (1991).

[14]*Cincinnati Gas & Electric Co. v. General Electric Co.,* 854 F.2d 900 (1988).

[15]Now codified as 28 U.S.C. §§ 471-482.

[16]Ch. 228 Laws of Utah, 1994.

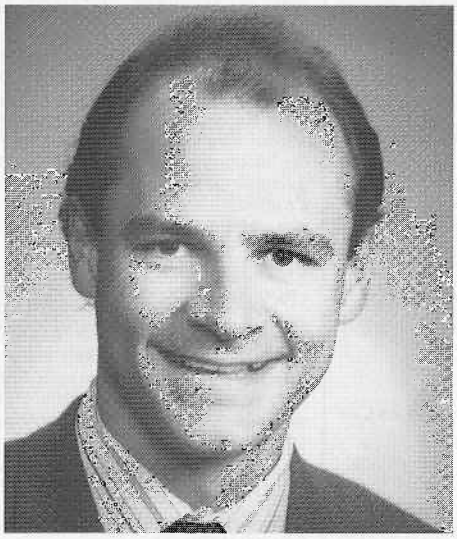
[17]Such an order would probably be unconstitutional as a violation of the Constitutional right to a trial by jury (Article 1, Section 10 of the Utah Constitution) and the Seventh Amendment of the United States Constitution). It is also doubtful that Section 78-31b-6(2) would authorize such an order.

[18]Presumably, preserving the right to a trial de novo is probably necessary to meet the Article VIII of the Utah Constitution requirement that a judge appointed under that provision exercise the "core judicial power" of deciding the case. *Salt Lake City v. Ohms,* 881 P.2d 844 (1994), a requirement that cannot be waived by the parties. *Ibid.*

Pricing Your Legal Products

Alternative Billing Strategies and How to Get There – Part II

By Toby Brown and Michele Roberts



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The next 10 years promise to be a time of massive risk and massive opportunities as the [legal] profession seeks a new paradigm. . . . There will be a radical shift whereby lawyers will again be paid to be efficient rather than inefficient yielding tremendous opportunities for those who can change rapidly to meet client needs. True value and innovative billing structures will move toward dominance.[1]

INTRODUCTION

In Part I of this series published in the June/July issue, we reviewed alternative methods for billing legal services. In this article we will explore how a lawyer or firm might implement *value based* pricing strategies. We will discuss how you can get an accurate picture of the costs going into each of the services rendered and how product value can contribute to the price. We will conclude with a discussion on staying profitable by utilizing alternative pricing strategies.

The legal market is becoming increasingly competitive and lawyers are seeing a narrowing of their profit margin. Consumers of legal services are becoming more selective in purchasing legal products based on the value they perceive in them. Many sources, including news columns, inexpensive audio tapes and word-of-

mouth, now provide advice and information to persons who employ lawyers about ways to negotiate for legal services. Many large corporations are already aggressively whittling legal expenses through negotiation and budget setting. At the same time that lawyers are under pressure to grant fee concessions, costs continue to rise. In order to remain profitable in the coming years, a lawyer or firm must find a way to maintain a reasonable profit margin. An ideal solution would be to realize untapped profits possible when a lawyer sets fees for legal services not on the familiar hourly rate but on a measure of value.

BILLING AND CLIENT EXPECTATION

Pricing legal services, whether done by hourly rate or by a means introduced in this series, may be viewed as part of a larger process. This larger process includes the whole history of the relation between the lawyer and client. It begins with the initial interview, the engagement letter, discussions about the merits of the client's case, from which the client begins forming expectations about what results he or she may expect and the effectiveness of the lawyer in delivering the services the client seeks to obtain. These expectations are often the basis by which the client perceives the value of the services, and they play a large role in whether the client feels that he or she has obtained their money's worth. Thus changes to attach the price of legal services to the value of the services may include more than just streamlining billing practices and the basis upon which bills are to be rendered.

Changes may be equally needed in how legal products are delivered to clients. A lawyer should direct the entire process to create *accurate expectations* for the client so that at the conclusion of a legal matter, the client perceives the transaction as the purchase of a legal product at a price the client expected. Billing is simply part of the process to create accurate expectations. When a lawyer sends a statement of services rendered there is a great opportunity to demonstrate the value of the lawyer's legal product and how that legal product has contributed to the client. Too often with traditional hourly billing, a client is unpleasantly surprised by the bill. The client's expectation of the time and expense necessary to provide the legal service was not clearly defined at the beginning of an engagement and refined during the course of the engagement. This is not to suggest that the lawyer did not adequately set out the parameters of the case, nor that the advice at the outset was not good, but that adequate communication with the client during the development of the case has failed, and that, billing by the hourly rate does not encourage efficiency and may contribute to higher expense than expected by a client.

". . . [A]ll billing should begin with an engagement letter."

It seems appropriate to note at this point that all billing should begin with an engagement letter.[2] We will not address in this article the ethical considerations involved with clearly defining the parameters of your engagement. Our concern is that the engagement letter is an opportunity to establish with the client a common footing upon which you can build a solid relationship. An engagement letter can be used to establish with the client the expectation that they will receive a quality legal product fairly priced. The letter is an opportunity for you to educate the client as to the value of the legal product you are offering within the framework of the client's needs. Ordinarily, where the lawyer understands the engagement to impose no fixed limit on the expense that may be incurred, the lawyer may make judgments about what work is necessary or how work should be done with which the client reasonably disagrees. When the statement is received by the client, however, questions may be raised as to the value of the legal product purchased. Of course lawyers should continue to represent clients with limited means as zealously as required by the rules of ethics, but many decisions about what should be done are within the client's competence and the client would perceive it as a valuable service to participate in deciding how much things should cost.

The most significant difference between value based billing and traditional hourly billing is that the lawyer establishes with the client what value will be gained from a product and sets a product price equal to that value before significant work has been done on the matter. Before a price can be set, the lawyer must have a good understanding about the client matter (which may mean that a certain amount of legal time is either billed hourly to the client or that the costs incurred in determining the appropriate legal course of action for the client are included in the proposed billing strategy).

The current practice is that the lawyer gives a billing rate and then begins working on a case or matter. In contract, value based pricing requires that the lawyer closely examine potential courses of legal action to prepare a plan of action, such as a construction contractor preparing a bid on the construction of a building. This plan creates a context in which the lawyer can state to the client the value of proposed actions. The lawyer will set the fee as part of the case plan. Efficiency results because the lawyer does not perform actions which do not support the approved plan and because the lawyer may seek ways to perform the plan at a lower cost, keeping in mind that the fee has been based on a judgment about value, and it is not necessary to record a particular number of hours or to have the participation of a particular lawyer in order to justify the fee.

In order to realize a return on the product being purchased by the client, the lawyer or firm would manage the case or matter the most efficient way possible. Without a plan, some actions may be perceived by the client has having provided nothing tangible (such as research that ends up not applying to a case). In the context of the plan, pursuing these courses does add value. Unsuccessful research adds value because it eliminates optional directions in which the lawyer and client might have directed the case. The engagement letter should deal with the possibility that the plan will break due to events the parties did not anticipate. In a construction contract this is said to require extra work, which in effect is an additional agreement setting a charge for work not included in the original plan.

One commentator has said, "Assessing value requires subjective judgments, but the subjectivity can be reduced by careful analysis of the multiple factors that affect value, some of which are quite concrete. This requires intensive communication and analysis early in the process and often at subsequent stages. . . . Early discussion of the value of a case and the appropriate fee structure produce several benefits beyond

matching the fee to the case. It forces clients to define and communicate expectations relative to the case early. . . . Setting fees by assessing value is unavoidably an imperfect process because of the uncertainties inherent in most cases. The fee structure needs to provide the flexibility to renegotiate the terms of the fee arrangement should unforeseen developments materially change the character of the case." *Value Billing, Does it Work,* an ABA Satellite Seminar, the Division for Professional Education and the Committee on Corporate Counsel of the Litigation Section, December 1993, at 44-45. (Remarks of the General Counsel of Aetna Life and Casualty Company.) Aetna has negotiated flat fees for handling cases, subject to adjustment for extenuating circumstances.

You will probably see another significant advantages, as you begin to use alternative billing methods and eventually convert your practice entirely to value based pricing strategies. Value based billing strategies should enable you to cut out activities that do not add value to the client, resulting in a time savings to you. Recently many lawyers have been expressing concerns about quality-of-life issues. By becoming more efficient in providing legal services, you should be able to reduce some of the time and stress demands in practicing law.

Currently some sophisticated clients, such as in-house counsel, are embracing and even demanding alternative billing methods.[3] It is expected that this trend will spread into the rest of the legal market. So depending on your practice you may safely continue billing hourly. However, we would recommend that you not wait for your clients to come knocking on your door requesting, even demanding, value based pricing for the legal products they are purchasing. Instead, incorporate a bit of the Boy Scout Code and "be prepared" for the coming changes. "'Firms that don't want to put the effort into designing an alternative structure up front, simply don't get any business from us,' says NASSCO's Kalmanson."[4]

Traditional billing practices are a cost-plus pricing system. The lawyer uses a cost accounting system based on taking all anticipated costs for the accounting period, dividing them by the number of hours to be charged in that period, and charging those costs to the hourly rate. Lawyers have also charged some costs directly. Customarily law firms break out and charge separately costs for long distance telephone charges and copying, and absorb in the hourly rate costs for building rental, secretarial salaries, most supplies, and so forth. The hourly rate is set to pay the predicted costs plus compensation for the lawyer. Billing by the hour provides lawyers a built-in profit margin. In the 1980s lawyers and firms were able to raise their rates to correspond with rising costs and thereby maintain the level of returns to which they had become accustomed. This is no longer the case. In a competitive buyer's market, cost-driven pricing systems will not work. Profits must come from other pricing strategies such as value-based pricing.

So how do we get an accurate picture of the costs involving in producing a legal product?

". . . [T]he more detailed information you have, the better equipped you are to set product prices . . . [to] cover your costs."

DETERMINING COSTS

In order to begin utilizing value-based pricing, you will need to alter your billing system. You need to know your cost of production for producing each of your legal products. And the more detailed information you have, the better equipped you are to set product prices at a level that will cover your costs. Most law firms do not currently maintain adequate cost data in their time and billing systems. One effective method for developing this detailed cost information is to set up task-based billing. Task-based billing (as noted in part I of this article) creates a connection between tasks defined in the system and the hourly time entries recorded each time lawyers perform the task. You may then use this information to predict how much the task will cost in terms of time and materials when it is performed again. Lawyers are accustomed to recording their time by client and matter; task based pricing requires that finer distinctions be made, among the actions which have been defined for a client as part of the plan of services to be rendered. Thus while you may view a project as the "William Jones client, personal injury litigation matter", you may need to establish in your record of time and cost entries subdivisions for "preparing the complaint", "service of process", "defendant's deposition" and so forth. These task codes may generally be standardized, but the idea is to provide information to the client about the effectiveness of the money spent on the services and to the lawyer about the accuracy of estimates pertaining to how much the services should cost. Thus the system should have the capability of gathering cost data based on the specific details of the budget for that client's work. After you have developed some history, you will have the information you need to calculate the cost of separate products or product phases. Under value-based pricing, you will need this information to determine the profitability of your products.

The next step in this process is to reexamine the steps you take in producing each product and eliminate the steps that do not add value. This can be a broad-ranging review of everything that you do as a lawyer. For example, does it make sense to treat every single service of process as a matter which must be handled directly by a lawyer who must draft the papers afresh, contact a process server and supervise the service, deal with the difficulties which come up, and personally file the return? Are there economies of scale possible by educating a staff person to perform this service who then handles many routine instances and develops considerable expertise in this narrow activity, always under the supervision of a lawyer? You can trim your processes to increase your efficiency and profits. This includes client motivated processes but also reaches administrative tasks. For instance, by re-engineering and automating your accounting system and procedures, you can eliminate unnecessary overhead.

In the past law firms obtained leverage and improved profits by employing associates, in the future firms will obtain leverage from knowledge and efficiency. Automation will play a key role in your ability to become more efficient. One way to accomplish this is with an automated document generation system. Utilizing software programs you can store and reproduce the knowledge incorporated in your legal documents in an effective manner. By being able to reproduce past work for a new matter quickly and bill this work at its value, you will see greater returns on your

time. This typifies the new type of leveraging.

Currently, a measure of efficiency for firms are secretary-to-attorney ratios. This is based on the concept that secretaries are a pure cost and should be kept at a minimum staffing level. Yet by reducing the number of staff persons or by not paying the premium necessary to obtain capable employees you may cut your effectiveness to the point that you are no longer able to add the value to your services that your client expects. Once you have structured your billing system to record tasks, you can look at how much attorney and staff time actually goes into your products, then work on reducing the cost of that time both by delegating work to capable staff persons and by eliminating unnecessary activities. If the lawyer knew from cost studies that the law firm would recover in revenue the money spent on employees, there would be more freedom in assigning tasks within the law firm to secretaries and other staff members. Given a value-based billing arrangement, you will increase your profitability. This process will focus your energies on what is most important for your business.

A NOTE ON AUTOMATION

Automation, meaning computers, will play a key role in your ability to become more profitable. This must mean working smarter, not harder, however. The investment needed to automate is a cost that is not justified using the hourly rate billing system. If you perform a service in ten hours that can be performed in two through automation, basing your bill purely on your hourly rate means that you invested in computers and as a result you make less money. An independent analysis into the value of the services rendered and a negotiated fee, which takes into account actual costs, not the rule of thumb that all costs must be absorbed into every billable hour, provides a means to remain profitable while becoming more efficient.

If you are going to automate your law firm, you should consider this; the whole purpose of technology is to speed up processes while the profession's rewards come from slowing things down.[5] With value billing strategies, you can leverage off your technology. An efficient use of computers and technology will lead to greater returns on your time. If you are not going to utilize value billing methods, you would do well to only automate your staff and administrative duties. Otherwise automation will decrease your income. You will have spent the money to automate and your billable hours will drop. So there is no economic incentive to automate.

How do we determine the value of a legal product in order to set a fair and profitable price?

DETERMINING VALUE AND THEREFORE PRICE

Value = Perception The value of legal services is a judgment made jointly by the attorney and the client. When trying to determine the value of a product, you first need to know what your client perceives the value of the product to be. Many lawyers overlook the most obvious way to learn what the perceived value is, asking your clients. Many lawyers and firms are hesitant to survey or interview their clients on subjects like money and quality of service. It is impossible (or extremely difficult) to improve client service or to accurately predict client perceptions of the value of legal services without this type of information. There are many books and articles available on the subject of developing and properly utilizing client satisfaction surveys.[6] The primary guide to understanding client perceptions is experience, however. A continual dialogue with the client about client perceptions and expectations is essential to satisfy the client with the quality of your services.

You have the ability to impact your client's perception of product value. By improving your service, you can increase the value of your products and your returns on them. The primary issue of quality is effectiveness. Do you get results? Are you responsive to the client's expressions of his needs? When your client loses, can the client say that the case was handled in a professional manner and that the loss was not attributable to you? The client's perception of you may be improved by returning phone calls promptly, training staff in client service principles, improving your communication with your clients by keeping them informed about case status, installing voice mail and responding as promptly to voice mail as you would to a conventional telephone conversation. Anything you can do to increase the client's perception of the value of your service is worth investigating.

The second step in determining product value is to analyze the product within the market niche. There are basic economic principles that help determine the value of a product based on its placement within that market or niche. In a market-based economy, the market determines the value of a product, where price is a means by which supply balances demand. When a business introduces a new product it looks at market data, looks at the costs involved in producing the product and then selects a price by guessing (albeit an educated guess). After some products are sold, the prices are reevaluated and perhaps adjusted to better position that product within the market niche (see Figure 1). Reevaluating the pricing strategy is a constant challenge.

Common sense tells us that the more

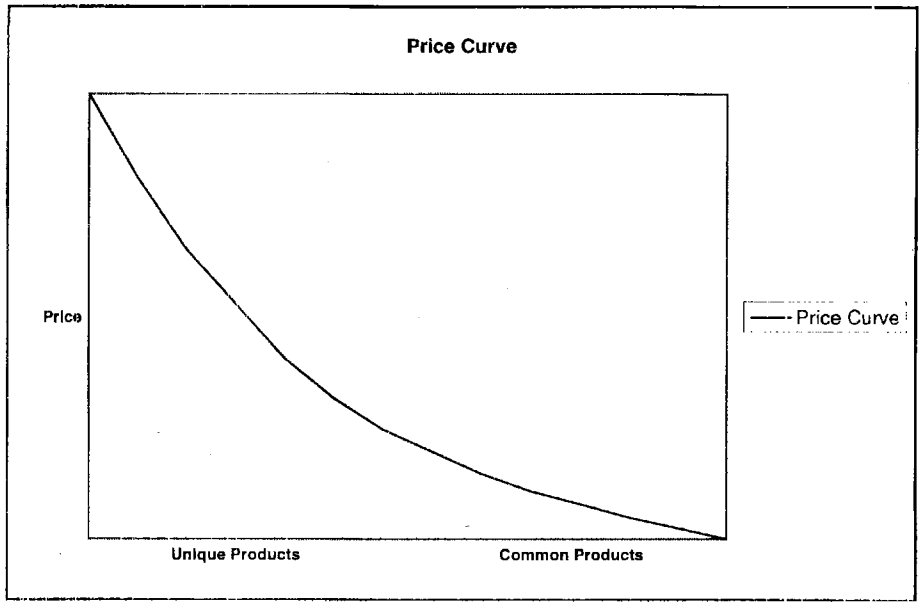

Figure 1

ordinary the product, the lower the value and the more unique and specialized, the higher the value. For example, if there are a multitude of Chevettes on the market, their value will drop. And if there are only a few Corvettes available, they will be more valuable and therefore more expensive. This distinction applies in addition to the distinction between the quality of Corvettes and Chevettes, which also contributes to price. It is important to note that you can make money selling both Chevettes and Corvettes, it is just that your margin of return on each item will differ. In order to make money on more common products, you will need to sell a greater volume.

The same rules apply for legal products. A more common legal product might be a simple, straight-forward divorce and a more unique or specialized legal product might be a biotechnical patent. You will need to sell a number of divorces to realize the same return as perhaps one biotechnical patent. Your task will be to find out where on the curve your products fall. Although you may have implicitly known your product's point on this curve, by explicitly understanding it, you will make better decisions on pricing your products. It is important to note that a firm may have a number of price curves which may be viewed by practice group or even by individual lawyer. Another important analysis to conduct is whether the product pricing will result in additional profits for the firm. Understanding where your products fit within the legal market will also help you better understand your clients' perceptions of your products' value.

STAYING PROFITABLE

Price = Costs + Profits Previously we mentioned that clients are starting to demand value billing or product pricing. As we have mentioned previously, perhaps more compelling, reason to integrate product pricing into your practice. Product pricing will lead to greater profitability for you and your firm.

Current economic trends indicate moderate growth rates for billing rates while growth rates in law firm expenses continue to rise. Both of these factors are market determined and are only marginally under the control of law firms. Therefore the result will be a continuing decrease in profits or distributions.

Value based product pricing provides a way out of the squeeze between costs and revenue. Please note Figure 2 below. The vertical axis represents revenues and the horizontal axis represents the range of legal products an attorney might produce. Traditionally hourly billing produces revenue at the fixed level indicated (1500 annual hours is shown in the example).

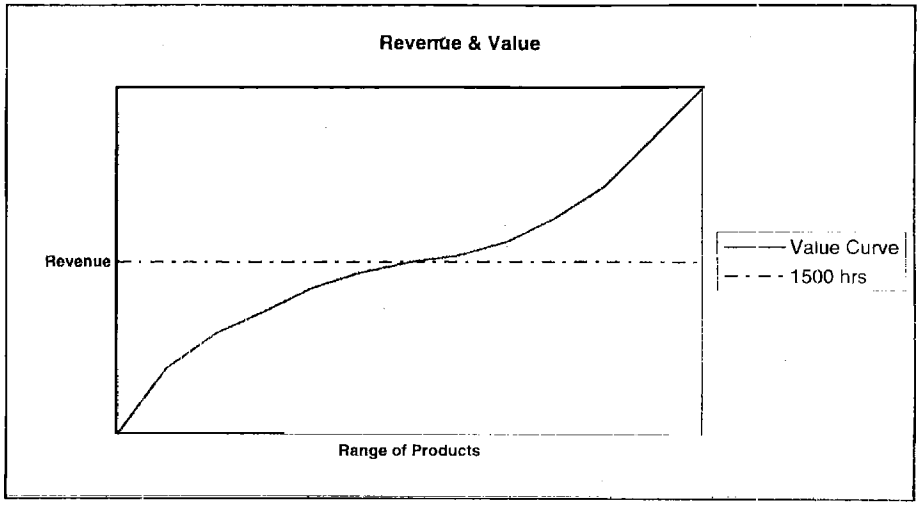

Figure 2

The value curve in the graph demonstrates that the value of a product to a client is not always directly related to the amount of time spent producing the product. This reality is seen currently, when products on the value curve below the 1500 hour line are discounted or written down to reflect the lower value. Instead of realizing fee income for 1500 billed hours, we might realize revenues on only 1200 to 1400 hours. Because most lawyers and firms quote standard hourly billing rates in engagement letters, it would be unethical to charge more than the time you spend multiplied by your rate, even if the value exceeds the price. The question we are left with is how do we realize the value of products above the 1500 hour line? The answer is through alternative billing or value based product pricing. Value based product pricing with corresponding engagement letters will eliminate this ethical dilemma, set appropriate expectations for the clients and improve firm profitability.

CONCLUSION

Most of the ideas discussed in this article are not revolutionary. They are ideas that businesses have been utilizing for decades. While the legal industry must remain a professional service industry, in order to remain viable and competitive, firms must function like a business. Systems, procedures, compensation methods and organizational structure will likely need to be altered to insure your profitability and success.

In some respects the legal industry has it easy; we are not blazing new trails in functioning as businesses. We have the benefit of being positioned to learn from other's mistakes. The real challenge for law firms will be to adapt quickly in a new market oriented environment. For other industries, the 90s are proving to be a time of rapid market change which means that the legal industry is maturing during a chaotic period. Lawyers must not only adapt quickly, but be prepared to remain in a mode of change. Firms and lawyers which remain inflexible and move slowly, won't be seeing the competition pass by, because the competition will have run over them. Be innovative and move out in front. Start now in developing alternative billing and pricing strategies for your practice. You will be more successful and the view is better.

[1]Martin, Ronald, The Empowered Law Firm, p. 36, Law Practice Management, October 1994, Section of Law Practice Management, A.B.A.

[2]You can find some sample "alternative" engagement letters in Win-Win Billing Strategies, Richard Reed, 1993, A.B.A.

[3]See "New Corporate Strategy Leaves Firms Trembling," The National Law Journal, October 31, 1994, S A, Page 1.

[4]Marshall, J. & Hershey, E., Take a Closer Look at Value Billing Before the Competition Does, Law Management, November/December 1994, Section of Law Practice Management, A.B.A.

[5]Martin, Ronald, The Empowered Law Firm, p. 37, Law Practice Management, October 1994, Section of Law Practice Management, A.B.A.

[6]Contact the Association of Legal Administrators or the Law Practice Management Section of the A.B.A. These two sources have many excellent publications and articles on client surveys as well as all aspects of legal management. Or contact the National Association of Law Firm Marketers. They are a good resource for client survey ideas.

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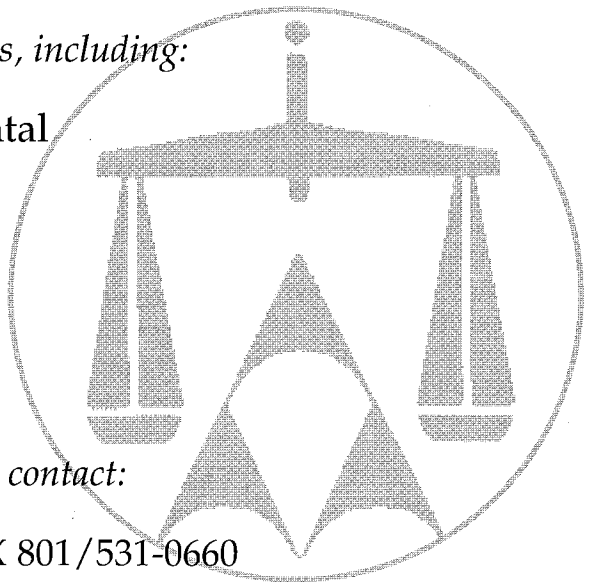

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Protect a Claim in Bankruptcy

By Steven F. Allred

A. INTRODUCTION

Since the enactment of the Bankruptcy Code in 1978, the number of bankruptcy filings across the country and in the State of Utah has seen a steady increase followed by a moderate decline. While the number of cases filed in Utah during the last couple of years has declined from the number of filings during the late 80's and early 90's, the number of cases filed remains high.[1] During the year 1994, there were 6,514 cases filed in the District of Utah.[2] The vast majority of these cases were filed by consumers. The number of cases filed may be indicative of a lessening of the stigma long associated with bankruptcy. Because of the sheer number of filings, not only in Utah, but across the country, many people will be impacted in some way by a bankruptcy filing. Once a bankruptcy case is filed, it is important that a creditor take the necessary steps to protect his or her claim.

Recognizing that claims may be defined by the Bankruptcy Code as secured claims, priority unsecured claims, and non-priority unsecured claims, and that each type of claim is given somewhat different treatment, the primary focus of this article will be on the treatment and protection of non-priority unsecured claims.

B. NOTICE OF THE BANKRUPTCY FILING

A bankruptcy case is initiated by the filing of a petition in the bankruptcy court. Within approximately one week after the petition is filed, the court prepares a one page document captioned "Notice of Commencement of Case". The court mails a copy of this notice to all creditors identified in a mailing list filed by the debtor. Among other things, the notice contains the date the petition was filed, the bankruptcy chapter under which the petition was filed, the case number, the name of the judge to whom the bankruptcy case has been assigned, the exact name(s) of the debtor, and instructions regarding the filing of claims.

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If a debtor fails to include the name and address of a creditor on the mailing list, and the creditor, therefore, does not receive formal notice of the bankruptcy, the creditor may still be required to take steps to preserve a claim in the bankruptcy court. Such action should be considered anytime a creditor has actual knowledge of a bankruptcy case, even if the knowledge has been obtained by informal means. If a creditor with actual notice fails to inquire about a bankruptcy or to assert a claim, such claim may be discharged pursuant to Section 523(a)(3).[3] However, "[e]ven if a creditor is aware of bankruptcy proceedings, there must be reasonable notice before a claim will be barred for untimeliness." *In re Herd,* 840, F.2d 757, 759 (10th Cir. 1988).

C. WHAT IS A PROOF OF CLAIM?

Section 501 specifies when and under what conditions a proof of claim must be filed. A proof of claim form may be obtained from the bankruptcy court. Alternatively, the form is generally appended to most volumes of the bankruptcy code in the "Official and Procedural Bankruptcy Forms" (Official Form No. 10). A proof of claim is a "creditor's statement as to the amount and character of the claim." *In re Harrison,* 987 F.2d 677, 680 (10th Cir. 1993). Among other things, a proof of claim contains the name and address of the creditor, the basis for the claim, the classification of the claim, and the claim amount. Any documentation which supports the claim, such as a contract, a lease agreement, an unpaid bill, a note or an invoice, etc., should be attached to the proof of claim. The Court keeps a "Claims Register" to keep track of the claims filed in each case. The bankruptcy trustee may review each proof of claim to determine whether to object to the claim.

D. WHEN DOES A PROOF OF CLAIM NEED TO BE FILED IN A BANKRUPTCY CASE?

The requirement for filing a proof of claim may be determined by reference to the original notice sent out by the bankruptcy court. If a case is filed under Chapter 7, typically the Notice will indicate that no claims need be filed unless and until the trustee determines that there are available assets to distribute to creditors.[4] When a trustee makes this determination, the court will send out a second notice with a bar date for filing a proof of claim.

In a Chapter 11 bankruptcy case, however, the deadline for filing a proof of claim is 90 days after the date of the initial meeting of creditors held pursuant to Section 341, and is normally specified in the court's original notice. Typically, this creditors' meeting is held within thirty to forty-five days after a case is filed, making the claim

filing deadline approximately 120-135 days after the petition filing date.

If a creditor receives a formal notice of a bankruptcy case from the court, a creditor may conclude that the debtor has included the creditor in the court mailing list. Within 15 days after the petition date, a debtor must file his bankruptcy schedules. *See* Section 521. Schedule "F" is a debtor's list of all known non-priority unsecured claims, including creditors' names and addresses, and the amounts and dates of the various claims.

If a debtor "schedules" a creditor's claim in a chapter 11 case, the creditor need not file a proof of claim unless the claim is listed as "contingent", "unliquidated" or "disputed,". *See* Section 502(a). However, if a debtor in a chapter 11 case either fails to schedule a creditor's claim or lists the claim as "disputed", "contingent" or "unliquidated", an unsecured creditor *must* file a proof of claim in order to have the claim allowed.[5]

In a chapter 7 case, when assets may be available for distribution, a creditor *must* file a claim in every instance in order to have the claim allowed. Therefore, upon receipt of a formal bankruptcy notice, or upon obtaining knowledge of a bankruptcy filing, a wise creditor will determine the chapter under which the case has been filed, verify whether the creditor's claim has been properly scheduled, and, if in doubt, file a proof of claim to protect the creditor's position.

"A discharge is an order . . . from further pursuit of a debtor or the debtor's assets [to satisfy] prepetition claims."

E. WHAT IS THE EFFECT OF FILING A PROOF OF CLAIM?

The effect of a properly filed proof of claim is to create a presumption that such claim is valid. *See* Rule 3001(f) of the Federal Rules of Bankruptcy Procedure. Unless a trustee or other interested party takes further action, such as filing an objection to a properly filed proof of claim, the claim is deemed allowed. However, an allowed claim can only be paid if a debtor's estate has sufficient assets with which to satisfy the claim. As a general rule, allowed non-priority unsecured claims have the same priority and must be treated the same during the administration of a bankruptcy estate.

For purposes of any distribution, a particular non-priority unsecured claim may be paid in full only if all other non-priority unsecured claims are also paid in full. If, on the other hand, there are insufficient estate assets to pay all unsecured claims, then each unsecured creditor shares pro rata in whatever is available for distribution. This furthers one of the primary goals of bankruptcy, to provide fair and equitable treatment to all creditors and to discourage discriminatory claim treatment.

F. OBJECTIONS TO PROOF OF CLAIM

After a trustee has had an opportunity to review the filed proofs of claim, he or she may object to the allowance of any claim. This process is commenced by the filing of a formal objection with the bankruptcy court. The most common grounds for an objection to a proof of claim are a dispute as to the amount, validity, type or timeliness of the claim. Any interested party in a case may file an objection to the allowance of a proof of claim. However, once a trustee has been appointed, "the demands of orderly and expeditious administration have led to a recognition that the right to object is generally exercised by the trustee." Rule 3007 of the Federal Rules of Bankruptcy Procedure, Advisory Committee Note. *See* also *In re TS Industries,* 125 B.R. 638 (Bankr. D. Utah 1991).

Objections to a proof of claim are brought pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure. This rule requires that the party objecting to a claim schedule a hearing and give at least 30 days notice of the hearing to the claimant. The hearing is evidentiary in nature. Therefore, creditors receiving objections to their claims should generally be prepared to present evidence to support their claims at the time scheduled for the evidentiary hearing.

Because of the presumptive validity of the proof of claim, the party objecting has the burden of going forward on the objection. The burden of persuasion then shifts to the claimant to prove that the claim should be allowed. Practitioners should note that failure to respond to a claim objection may result in the entry of a final order disallowing the claim without further notice to the claimant. Rule 3008 of the Federal Rules of Bankruptcy Procedure provides for reconsideration of orders allowing or disallowing a claim against a bankruptcy estate.

G. EFFECT OF DISCHARGE ON A CLAIM

A discharge is an order of the court generally prohibiting creditors from further pursuit of a debtor or the debtor's assets for satisfaction of pre-petition claims. Typically, in a Chapter 7 case, a discharge will be entered within approximately 120 days after the filing of the original petition.[6] Effectively, a discharge amounts to forgiveness of debt and furthers the policy of providing a debtor with a "fresh start". In the context of a Chapter 7, only an individual is entitled to a discharge. *See* Section 727. In the context of a Chapter 11, a discharge may be obtained by a non-individual, but only if the debtor emerges as a viable and rehabilitated entity and continues to do business.[7] In other words, if a Chapter 11 plan provides for liquidation of the estate's assets and the discontinuation of a debtor's business operations, no discharge is granted. *See* Section 1141(d)(3). In a Chapter 7 case, unsecured claims that remain unpaid through the administration of the bankruptcy estate, are generally discharged. Unlike unsecured claims, secured claims generally survive bankruptcy to the extent of the value of a debtor's collateral securing such claim.

H. CONCLUSION

Based upon the number of bankruptcy cases being filed, the impact of bankruptcy is likely to touch virtually everyone at one time or another. In the event of a bankruptcy, a creditor should verify that the claim is properly "scheduled" or that a proof of claim is filed in a timely manner. If an objection to a proof of claim is filed, a creditor needs to take the necessary steps to respond and defend the claim. Once a debtor's discharge is entered, further pursuit of a debtor by a creditor to satisfy a pre-petition claim, other than to protect the claim in the bankruptcy case itself, is prohibited. Vigilance is the name of the game in claim protection in bankruptcy. When in doubt, file a proof of claim.

[1]Figures compiled by the bankruptcy court indicate that since 1993, the number of filings decreased by 20%. The greatest number of filings occurred in 1991 (8,207) followed by 1992 (8,135).

[2]The number of cases filed may be broken down by chapter as follows: Chapter 7 (4,415); Chapter 11 (69); Chapter 13 (2,028); and Chapter 12 (2).

[3]All references are to the United States Bankruptcy Code, 11 U.S.C.

[4]A majority of all chapter 7 cases are "no-asset" cases which means there is nothing available for distribution to unsecured creditors.

[5]If a creditor fails to timely file a proof of claim, a debtor or trustee may file a proof of claim on behalf of a creditor. *See* § 501(c).

[6]Calculated as follows: 30-45 days for a 341 meeting, plus 60 days thereafter to file non-dischargeability complaints, plus 10-15 days to enter the discharge.

[7]In a Chapter 13, an individual may obtain a discharge through consummation of a Chapter 13 plan which generally lasts for between 3-5 years and requires payment of unsecured claims in an amount at least equal to what a creditor would receive in a Chapter 7. Because Chapter 7 cases are often no-asset cases, in Chapter 13 cases, it is not uncommon for unsecured creditors to be paid only a small percentage of their claim amounts. *See* § 1328(c).

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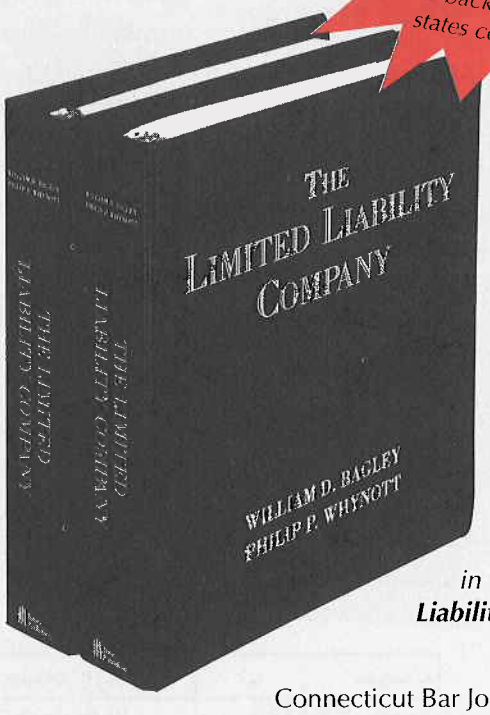

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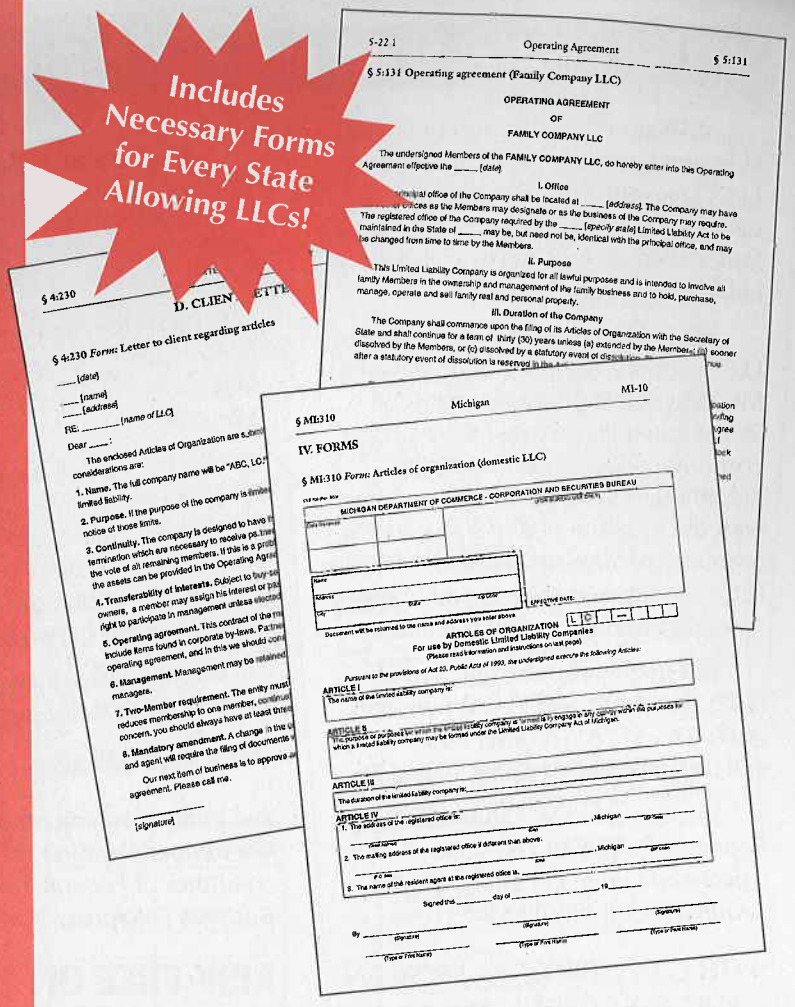

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Commission Highlights

During its regular meeting of July 28, 1995, held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Attorney General Jan Graham and Carol Clawson appeared to follow up a letter from the Utah Prosecutorial Council.
2. Dennis Haslam reported that this year's Executive Committee would consist of himself, Charlotte L. Miller, Steven M. Kaufman, and Charles R. Brown.
3. The Board voted to approve changing the signatures on the checking account from the former Executive Committee to the new Executive Committee including John C. Baldwin.
4. Dennis Haslam reviewed recommendations for committee chairs, functions, and goals of the committees for the upcoming year.
5. The Board voted to reorganize the Continuing Legal Education Committee and to create an advisory board.
6. Haslam reviewed ideas for Law Day 1996 in connection with the Centennial celebration.
7. Norman Johnson reported he would like to step down as chair of the Securities Advisory Committee in light of his nomination to a position with the Securities & Exchange Commission.
8. The Board voted to approve the committee chair appointments.
9. The Board confirmed reappointment of Chair, Ray Westergard, and members, Stewart Hinckley, Peter Ellison, Robert Graham and Jonathan Butler to the Bar Commission's Budget & Finance Committee for the 1995-96 year.
10. Haslam reported that the Long-Range Planning Committee would consist of Steve Kaufman, Chair, John Florez, Charlotte Miller, Debra Moore, David Nuffer, Jim Jenkins and Denise Dragoo.
11. Haslam reported that Paul Moxley would be chairing a committee on Quality Control.
12. The Board reappointed J. Michael Hansen as Bar Commission liaison to the Judicial Council.
13. The Board voted to approve Opinion No. 95-06 which allows the reporting of suspected child abuse as a result of information obtained in the course of representation.
14. The Board postponed approval of Ethics Advisory Opinion No. 95-05.
15. Anne Milne indicated that last year the Utah Legal Services office lost $63-66,000 in funding and if new legislation goes through they will lose $600,000, which would have significant impact on services they could provide. The Board agreed to form a committee made up of attorneys, public members and business leaders to review issues, organize efforts, and prepare letters. Haslam asked Jim Jenkins to chair the committee.
16. Charlotte Miller distributed copies of the final report of the Committee to Review the Office and the Board voted to accept the committee's report and publish a summary in the *Utah Bar Journal.*
17. Stephen R. Cochell, Chief Disciplinary Counsel, distributed a statistical report for July breaking down the number and types of case and current status.
18. John Baldwin reviewed the monthly financial reports and indicated that the annual audit of the Utah State Bar and the Law & Justice Center has begun.
19. Kaesi Johansen, the Bar's Convention Coordinator, reported on the recent Annual Meeting. She noted that next year's meeting committee chairs will invite the Attorney General's office and more women lawyers to participate on panels.
20. John Baldwin reported on the Pro Bono Program and that Coordinator Toby Brown has been actively meeting with law firms.
21. John Baldwin reviewed the Bar's gender statistics and pointed out that the number of women lawyers has been steadily increasing and is now at 16.9%.
22. The Board voted to draft a resolution honoring the deans of the two law schools and expressing appreciation for all their help and support over the past few years.
23. The Board voted to approve publishing a leadership and rules directory to replace the one published in 1992.
24. ABA Delegate, Norman Johnson, reported that he would be attending the upcoming ABA Annual Meeting in Chicago.
25. Steven Lee Payton reported on current activities of the Minority Bar Association, and Marty Olsen reported on Young Lawyers Division.
26. J. Michael Hansen reviewed substantive issues discussed at the last Judicial Council meeting, and Charles R. Brown reported on his recent attendance at the ABA Conference on Small Firm Practitioners.
27. Lisa-Michelle Church reported on current activities of the Women Lawyers of Utah.

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.

Mark Your Calendar! March 15, 1996

The Park City Bar Association Presents

The Second Annual CHIEF JUSTICE'S ETHICS CLE & SKI

A morning of lively panel and audience discussion

featuring

- Chief Justice Michael Zimmerman
- Lawrence J. Fox, Chair of the ABA Litigation Section and Member of the ABA Standing Committee on Ethics
- and a Panel of Utah Litigators

followed by

An Afternoon of Spring Skiing at Deer Valley

and

The Chief Justice's Reception at 4:00 p.m.

Full details in January

Justice Zimmerman Elected to Board of American Judicature Society

Michael D. Zimmerman, Chief Justice of the Utah Supreme Court, was recently elected to the Board of Directors of the American Judicature Society, a national organization that promotes improvements in the courts.

Founded in 1913, AJS is supported by judges, lawyers, and other members of the public. Through research, educational programs, and publications, the Society addresses concerns related to ethics in the courts, judicial selection, court administration, and public understanding of the justice system.

Chief Justice Zimmerman is chair of the Utah Judicial Council, the body charged with administering the courts of the state of Utah. He serves on the Board of Directors of the Snowbird Institute for the Arts and Humanities and the Coalition for Utah's Future/Project 2000. He is a member of the Board of Directors of the Conference of Chief Justices and a member of the American Law Institute, the Advisory Board of the Utah Law Review, and the American Inns of Court VII. Chief Justice Zimmerman has been an adjunct professor at the University of Utah College of Law, vice-chair of the Utah Judicial Council Task Force on Gender and Justice, a member of the transition team that is supervising the merging of Utah's general and limited jurisdiction trial courts, a member of the Federal Rules of Civil Procedure Advisory Committee of the U.S. Judicial Conference, and a member of the board of directors of Utah Legal Services. Chief Justice Zimmerman attended the University of Arizona, Arizona State University, and the University of Utah, graduating in 1966. He then attended the University of Utah College of Law, where he served on the editorial board of the Utah Law Review. Following graduation in 1969, he clerked for Chief Justice Warren E. Burger of the U.S. Supreme Court before entering law practice and teaching.

Also elected were the Society's officers: AJS President Robert M. Kaufman, partner in the New York law firm Proskauer Rose Goetz & Mendelsohn; Chair of the Board Henry E. Frye, associate justice of the Supreme Court of North Carolina; vice-presidents Deirdre O'Meara Smith, clerk of court for the Missouri Court of Appeals; Jerrol M. Tostrud, executive vice-president of West Publishing Company; and Jean Reed Haynes, partner in the New York law firm Kirland & Ellis. Elected secretary was Sara B. Davies, executive director of Leadership Evansville, Inc., and as treasurer, Lawrence S. Okinaga, partner in the Honolulu law firm Carlsmith Ball Wichman Case & Ichiki.

Special Institute on Land and Permitting II

On January 25-26, 1996, the Rocky Mountain Mineral Law Foundation and the American Association of Professional Landmen are co-sponsoring a program on Land and Permitting II in Denver.

Unlike many overview seminars, this Special Institute will present topics that are vital to all natural resources professionals from a "hands-on" practical perspective. Access, permitting, title research, title review, settling damages, mineral and surface conflicts, and mineral evaluation are key issues for landmen, lawyers and all professionals who work in the natural resources industry.

This program focuses on carefully selected topics; speakers will deliver information and insights that will directly impact attendees. The Institute will benefit individuals interested in land and permitting problems encountered by the oil, gas, coal, and hardrock and industrial mineral industries, including landmen, attorneys, rights-of-way agents, permit agents, corporate managers, environmental consultants, government employees, and representatives of Indian tribes.

Substantially reduced registration fees are offered for this Institute (20% less than RMMLF's regular fees) to attract a wide diversity of professionals working in this area.

Contact the Foundation at (303) 321-8100 for additional information.

Annual Lawyers, Employees & Court Personnel Food & Winter Clothing Drive for the Homeless

Please mark your calendars for this annual drive to assist the homeless. Once again, local shelters have indicated shortages in many food and clothing items. Your donations will be very much appreciated in alleviating these conditions. Even a small donation of $5 can provide a crate of oranges or a bushel of apples.

Drop Date:	December 22, 1995 7:30 a.m. to 5:30 p.m.
Place:	Utah Law & Justice Center Rear Dock 645 South 200 East Salt Lake City, Utah
Selected Shelters:	Traveler's Aid Shelter School The Rescue Mission Utahns Against Hunger Women & Children in Jeopardy Program

Volunteers are needed who would be willing to donate a few hours of their time to take the responsibility of reminding members of their firms of the drop date and to pass out literature at their firms regarding the drive.

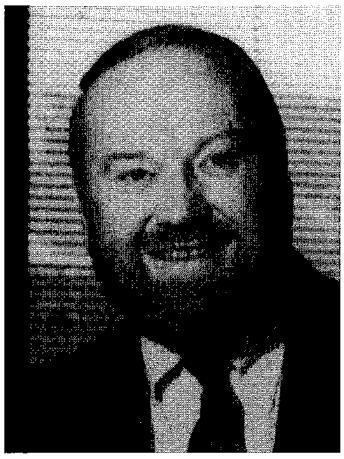
For more information and details on this drive, watch for the flyer or you can call Leonard Birningham or Sheryl Ross at 363-7411 or Toby Brown at 531-9077.

When you feel you are having a tough time, just look around you; we have it pretty good when compared with so many others, especially the children.

Please share your good fortune with those who are less fortunate!

Jody L. Williams & Robert G. Pruitt, Jr. Honored

Jody L. Williams



Robert G. Pruitt, Jr.

The Energy, Natural Resources and Environmental Law Section of the Utah State Bar honored Jody L. Williams as the Section's Lawyer of the Year, and presented its Distinguished Service Award to Robert G. Pruitt, Jr. The awards were presented by new Section President Lucy Jenkins at the Section's Annual Award Meeting held at the Gallivan Center.

The Lawyer of the Year Award recognizes Ms. Williams' prominence in important water law issues, including the recent successful negotiation of a settlement in the long-standing Bear Lake/homeowners case. She was also instrumental in securing access for fishermen to critical stretches of the Provo River and negotiating a resolution to difficult resource issues in the San Rafael River area.

Ms. Williams is a member in the Salt Lake City law firm of Kruse, Landa and Maycock where she focuses her legal practice on water and natural resources, and is recognized throughout the West for her expertise in water law and environmental mitigation planning. She is past chair of the Utah State Bar's Natural Resources & Environmental Law Section and past vice chair of the Water Law Committee for the American Bar Association. Ms. Williams received her juris doctor from the University of Utah College of Law. She was chair of the Utah Wildlife Board, and the Utah Wildlife Federation recently presented its highest honor to her, naming her "Conservationist of the Year."

Mr. Pruitt is the founding partner in the Salt Lake City firm of Pruitt, Gushee & Bachtell. He holds a B.A. and M.S. degree in geology from Emory University and Juris Doctor from the University of Utah. Mr Pruitt is an active member of many industry organizations, including serving as president of the Rocky Mountain Mineral Law Foundation. He has authored many papers for the Foundation and is author of the Digest of Mining Claim Laws now in its fourth edition. He is well recognized as an expert in oil, gas and mining law, and the Section honors him for his many years of distinguished practice in these areas.

In the Supreme Court of the State of Utah

In Re: Rules of Civil Procedure **No. 940535**

Rule 64G. Garnishee Fee.

With the service upon a garnishee of a writ of garnishment under Rule 64D, the party serving the garnishment shall pay to the garnishee a fee of $10 for a single garnishment and a fee of $25 for a 120 day garnishment. This rule shall be effective on November 15, 1995 and shall automatically expire upon the effective date of any legislation setting a fee to be paid to a garnishee for garnishments under Rule 64D.

Utah State Bar Approves Ethics Opinions

Ethics Advisory Opinion No. 95-07 Approved September 22, 1995

Issue: After the Utah Attorney General has represented a division of a state agency in an action the division has brought before a state disciplinary board and the division has adopted the recommendation of that board, may the Attorney General file and pursue an appeal in her own name or on behalf of the public at large to the head of the agency of which the division is a part?

Opinion: Where no conflict with other constitutional or statutory provisions exists, the Attorney General retains common-law authority to protect what she perceives to be the public interest. Under certain circumstances, the Attorney General may appeal the decision of a division of a state agency to the executive director of that agency, without violating the Utah Rules of Professional Conduct.

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, 645 South 200 East, Salt Lake City, Utah 84111.

Availability of the *Software Legal Book* by Paul S. Hoffman

The two volume Software Legal Book by Paul S. Hoffman was reviewed in the October, 1995 issue of the Utah Bar Journal. For those interested in obtaining a copy, refer to the following:

The Software Legal Book is published by Shafer Books, Inc., 139 Grand Street, P.O. Box 40, Croton-on-Hudson, New York 10520-0040 (914) 271-6919. The two volume set at $199.75 includes no cost updating through the October 31, 1996 end of the subscription year. An optional forms diskette is available at $40.00 Shipping is free for pre-paid orders.

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U.S. District Court Judge Tena Campbell

By S.K. Christiansen

B.A., University of Idaho
M.A., Arizona State University
J.D., Arizona State University
Private Practice, Johnson, Durham & Moxley/Fabian & Clendenin, 1977-81
Assistant Salt Lake County Attorney, 1981
Assistant United States Attorney, 1981-95
United States District Judge, District of Utah, 1995-

On the wall in Judge Tena Campbell's chambers is a clock. Not all that unusual in the usually staid environment of the judiciary. Only this one has Mick Jagger on it.

"I've had this on my wall for years," Judge Campbell said. "People would think I'm a snob if I suddenly took it down just because of my new job."

Her "new job" is, of course, federal district judge in Salt Lake City. She is the first woman ever appointed to that position in the District of Utah. She has all the attributes necessary for success in her lifetime appointment. And she remains a diehard Stones fan.

She knows it's only rock 'n' roll, but she likes it.

"It started as a joke when I worked in the U.S. Attorney's office," said Judge Campbell. "I needed some music to jog to, so I bought some Rolling Stones tapes.

"Everyone at the office thought that was funny, and they started kidding me about it. So I put up some posters just to encourage them. Pretty soon, they gave me some more posters, and next thing I know I really am a fan."

The pinnacle of her devotion came, by her own account, when she attended the Rolling Stones concert in Salt Lake City last year.

But if her conversion to Stones fandom was slightly improbable, then her appointment to the bench must have seemed, at one time, unthinkable. Early in life, Tena Campbell never dreamed of being an attorney, much less a judge. Far from it. She pursued a degree in French, spent a year studying in France, and taught high school and college.

"I was happy as could be with my job," she said. "I didn't ever picture myself going to law school." She continued her studies, pursuing a master's degree in French language and literature and enjoying the constant stimulus of the humanities. Then she met Gordon.

"Gordon was a law student at Arizona State," she said. "My life changed after I married him."

Gordon remembers meeting her at Mariposa Hall on the ASU campus in Tempe. "A friend of mine told me there were a lot of good looking women at Mariposa," Gordon said. "But he said there was one great looking one named 'Tena.' One day I was over there and I saw the most beautiful woman I had ever seen. Before I even met her, I knew she was the one named 'Tena.' She was an absolute fox."

"Still is," he added.

After graduating, Gordon worked as a law clerk in San Francisco. Teaching jobs were hard to find, so Tena served a stint as a receptionist. That experience, as well as a constant, positive interaction with judges and clerks, convinced her she was destined for a professional change. So when Gordon returned to work in Phoenix, Tena did the only logical thing for a French literature master to do: she enrolled in law school.

Life after law school brought Tena and Gordon to "Ski Utah." Literally.

"We moved here to go skiing," Judge Campbell said. Gordon was already an excellent skier and Tena eventually fine-tuned her skills under the tutelage of longtime friend, associate, and ski instructor Stewart Walz.

"Stu made Tena a skier," Gordon said. "His work was the breakthrough." The pastime has now consumed Tena and Gordon during the winter months.

Life in Utah also brought Tena more attractive offers than her receptionist job in California. She spent nearly five years in private practice, primarily in securities work. From there, she moved to the Salt Lake County Attorney's Office, where she prosecuted misdemeanors. That, she said, was the training ground for what was to follow.

"I tried cases involving dog bites, assaults, shoplifting, everything," she said. "After six months, I was just about to move up to felonies." Instead, she landed a job at the U.S. Attorney's office, where she would prosecute felonies for the United States. During the next fourteen years, she served under four different bosses.

"I loved the bedlam in the U.S. Attorney's office," she said. "I worked well in the bedlam. There was so much going on, all the time."

Tena quickly found her niche prosecuting white collar crime: bank fraud, embezzlement, false statements, and the like. Her work involved "cases with millions of dollars at stake and cases with very little." She soon found herself busy in the role of federal prosecutor, a job she looks back on with fond memories.

"I loved working with other attorneys — I rarely worked on a case by myself. I enjoyed putting a case together. I loved knowing every aspect of the cases I worked on. It was exciting."

The fact that she is now on the other side of the bench has not yet totally sunk in.

"I'll catch myself standing for the judge," Judge Campbell said. Other well-formed habits die just as hard. "I find myself still wanting to cross-examine people from the bench. Right now, that's still a more comfortable role for me."

One thing that hasn't changed is the preparation she pours into her cases.

"Tena can't do anything without being fully prepared," Gordon said. "She works very hard and can't rest until she understands the problem." He cites a patent case currently pending in her court as evidence of this fact.

"She has books strewn all around the house. She's reading about machine bolts and parts and all the technology involved. She used to be sitting around screaming about con men. Now it's machinery."

"I'm probably a little rusty in the civil area," Judge Campbell said. "I'm more familiar with criminal matters right now."

continued on pg 38

Why We Love the Law

By Michael Mower
Secretary, Young Lawyers Division

It is no revelation that the law, and those who make the law theirs, are often maligned and sometimes misunderstood. It can be a challenge for an average citizen to comprehend why justice carries a price, often a very high one. It is even more upsetting when justice doesn't always seem to prevail.

Despite misunderstandings about the law and lawyers, there is no shortage of people wanting to become attorneys. Reyes Aquilar, Assistant Dean of Admissions and Finance at the University of Utah College of Law, reports that applications for admissions have increased slightly over the past few years. Darla Murphy, Admissions Administrator for the Utah State Bar, said 93 people passed the Bar Exam in February 1995 and 234 passed in July 1995. The law is still a popular profession.

Certainly there are challenges in practicing law. Young associates lament the numerous hours they must bill. Sole practitioners often have plenty of work but few clients who pay. New admittees to the bar face a formidable task in finding a job. Yet despite the drawbacks, most young lawyers seem to enjoy their work. Many even love it. Interestingly, the reasons Young Lawyers I spoke with gave for enjoying the law as a profession were often the same: they like helping clients, they find the law intellectual challenging and they are able to make a difference in our society.

Joseph Nemelka is one of those attorneys who really loves his profession. A 1993 graduate of University of Idaho, Nemelka is an associate at the firm of Holmgren, Arnold & Wiggins. Nemelka says he especially enjoys the challenge of the law. "Regardless of whether or not I've handled a type of case a dozen times, each one has its own unique set of facts." He added that while the legal process may often be the same, "the potential ending to every case is different." Nemelka also said he enjoys helping clients get something accomplished. "I enjoy finishing complex problems for clients and realizing how much I have been able to help them."

Stacie M. Smith is a 1994 graduate of the J. Reuben Clark Law School at Brigham Young University. She majored in finance as an undergraduate with expectations that this training would help her in her law practice. She is now a partner at McDougal & Smith, a five person law firm with offices in Orem and West Valley City. Smith said she wanted to be an attorney from the time she was a young child. "I used to argue with my family members and at time I could even convince my parents not to punish me if I'd done something wrong." She majored in finance as a undergraduate with expectations this training would help her in her law practice.

Smith enjoys not only the practice of law, but the "business" of law. "I enjoy solving the problems associate with a small business," the young lawyer said. "I realize everything we do impacts on our firm." "An advantage in having our own firm is we do not have to accept clients whose cases go against our principles." Smith added that while helping to run a small firm is a great deal of work, she enjoys assisting her clients and working with opposing counsel. Smith also finds a real advantage to being a partner at her own firm: "I can almost always make my tee time."

Michael Jewell, a 1992 graduate of Brigham Young University J. Reuben Clark Law School, is a Public Defender for Utah Country. Jewell said in law school he expected to work as a prosecutor. However, when the opportunity came to be a public defender, he took it. "I haven't been disappointed," he said. "All along I wanted to be a trial attorney," Jewell commented. "I enjoy having to think on my feet. You can only prepare so much and then you have to be ready to shoot from the hip." Jewell finds his work challenging. He added one of the most satisfying aspects of his job is the opportunity to help people who don't

have anyone fighting for them. "It's easy to be an advocate for a popular cause, but when it is just you and your client, it's a whole different ball game."

Julie Fortuna graduated from the University of Utah College of Law in 1993. She worked at Fabian & Clendenin. Currently she is a law clerk for Judge Judith A. Boulden of the United States Bankruptcy Court. Fortuna enjoyed her work as an associate because she felt "intellectually challenged" and enjoyed working with her colleagues. Her current employment as law clerk has added to her appreciation of the law – both in theory and in practice. "It has been very interesting to observe matters from the other side of the bench," Fortuna said. "Judge Boulden has been an excellent mentor," Fortuna added. While her work as a law clerk is different from her work as an associate, Fortuna fells both assignments have been rewarding.

Brad Smith, University of Utah College of Law Class of 1993, is an associate with the Law Office of David S. Kunz, in Ogden. His firm practices in a wide variety of areas including plaintiff's personal injury, real estate and banking law. Brad enjoys working in the legal profession because "the law, especially in the United States, provides a relief valve for many social problems. Other countries aren't fortunate to have this system." Smith continued, "one of the greatest challenges facing the United States is the break down of the Rule of Law. Even if we don't agree with the status or the administration of the law, the law provides a very important role in adjudicating our differences." Smith concluded, "I enjoy playing a role in our legal system."

Daren Barney, University of Texas at Austin School of Law 1994, is an associate with Snow & Jensen in St. George. He works primarily in the area of real estate law. Barney sums up what most young attorneys say about practicing law, "I enjoy the intellectual challenge of the law, but most of all I enjoy helping people."

Young Lawyer Section Utah State Bar Annual "Sub-for-Santa" Project

For the 19th consecutive year, the Utah State Bar YOUNG LAWYER SECTION will participate in *The Salt Lake Tribune* "Sub-for-Santa" program. "We should share with those less fortunate," declares Salt Lake Attorney and Project Coordinator Joseph J. Joyce. "Our law firm has sponsored several families over the last few years and have enjoyed the experience," he said.

Acting as a clearinghouse, *The Tribune* program matches those willing to share at Christmas time with families needing help. *The Tribune* has thus been serving needy children in the Salt Lake area at Christmas time for over 60 years. "Salt Lake area attorneys have supported the Sub-for-Santa program for many years," explains Mr. Joyce. The Sub-for-Santa program "provides an avenue for law firms and individual attorneys to become directly involved with families in need. After all, that is really what Christmas is all about."

Interested law firms should appoint a person to coordinate the project and work with the YOUNG LAWYER SECTION and *The Tribune* to select a family, purchase gifts and groceries and deliver them before Christmas.

Mr. Joyce proudly notes that last year several firms directly sponsored three or four families. Lawyers unable to support an entire family, may still help by contributing funds payable to "Sub-for-Santa," to the Young Lawyer Section, Attn: Joseph J. Joyce, STRONG & HANNI, 600 Boston Building, Salt Lake City, Utah 84111.

The YOUNG LAWYER SECTION will answer questions regarding the program and encourage them to call *The Tribune* Sub-for-Santa program (237-2830). Questions regarding the YOUNG LAWYER SECTION project may be referred directly to Mr. Joyce.

Over the years, *The Tribune* has helped thousands of children enjoy Christmas. This year, with the help and generosity of the legal community, we hope to reach even more children and families. "You just can't imagine the great feeling you get from helping a neighbor at Christmas time," says Mr. Joyce.

Soles for Souls

Only snowmen don't need shoes this winter. The Holiday's are cold and miserable if you don't have shoes. A significant number of elementary school children do not have adequate shoes for school and play. The Young Lawyers Division of the Utah State Bar and the Third District Juvenile Court are undertaking a special project to help provide shoes to underprivileged and needy children at Whittier and Lincoln Elementary schools.

In order to make this project a success we need your help. We are accepting donations to help purchase shoes for these children. We are working with shoe manufacturers in order to get the best deal for our dollars and to help the largest number of needy of kids. Please be generous with your support! Please refer any donations or questions to:

Gary Winger
Chair, Community Services Committee
c/o Holme Roberts & Owen
111 E. Broadway #1100
Salt Lake City, Utah 84111
(801) 521-5800

Bradley Helsten
Co-Chair, Community Services Committee
c/o Hanson, Epperson & Smith
P.O. Box 2970
Salt Lake City, Utah 84110-2970
(801) 363-7611

How to Be Effective and Contented in the Practice of Law

Remarks of Judge J. Thomas Greene
to new Admittees of Utah State Bar – May 16, 1995

Judge J. Thomas Greene
U.S. District Judge

Appointment: *1985 by President Ronald Reagan*
Education: *University of Utah – BA in Political Science – Magna Cum Laude – 1952*
University of Utah – JD – 1955
Practice: *Greene, Callister & Nebeker (and predecessor firms - including Marr, Wilkins & Cannon) – 1955-85*
Chairman of Board immediately prior to appointment as U.S. District Court Judge
Activities: *Commissioner, Utah State Bar 1960-72; President, Utah State Bar 1970-71; Fellow (Life), Chairman and Trustee, Utah Bar Foundation 1972-89; American Bar Association 1977 -present; Governor, American Bar Association 1988-91; Utah Director, American Judicature Society 1971-75, 1979-85; Member, American Law Institute 1975-present; President and Counsellor, American Inns of Court (Inns I, II, and VII) 1983-present;*

As we all know, it is fashionable these days to disparage lawyers, and it is getting more and more fashionable and common place to disparage judges as well as the entire justice system. There *is* need for reform, including particularly reducing cost and delay. This is being addressed effectively in this District and State, and elsewhere, but that is not the purpose of my remarks here today. My purpose is to suggest to you newest of lawyers that you can truly make a difference and greatly improve the public perception of lawyers and of the system by the way that you practice law. Not only can you cause a positive impact, but more importantly you can feel good and at peace with yourself by the way that you practice law, and at the same time be good and effective lawyers.

Before discussing the conduct and characteristics I have in mind, it is important to note that all lawyers – old and new – are expected to learn and to implement minimum duties imposed upon members of the legal profession. So we must start with what is required of lawyers. Read and reread the Rules of Professional Conduct, and know the duties imposed upon practitioners by the Rules of Civil and Criminal Procedure, and by the particular rules of any court before which you practice. Scrupulously abide by the Rules of Professional Conduct and all minimum duties and obligations. Have in mind that you owe duties not only to your clients, but to the court and to the public. Realize the special position of trust in which a lawyer is placed as a result of fiduciary duties owed to clients and as an officer of the Court. If you comply with the spirit as well as the letter of the rules, and exercise utter honesty and integrity, you will be governed by doing and finding the right thing to do – rather than doing and finding simply what you have a right to do. In that spirit, the following suggestions, which would raise our focus above minimum standards, will help greatly to make your practice of law more effective and satisfying.

1. Be There

If you are starting a job – or if you have a job already – the most important single thing is to be there. Arrive each day before your boss arrives. If you develop the habit of early arrival, you will find that your work product will be better. Also, importantly, your boss, associates and potential clients will come to know that you are there – like Old Faithful. Take a leaf out of Chief Judge David Winder's book. He arrives at the courthouse before dawn each day, sometimes earlier, after his morning exercises. As a result, he is always ready for what may

be presented on the day in question.

This talk may begin to sound to you like a review of the Broadway hit show, "How to Succeed in Business Without Really Trying." In a way, it is. But if you want to get ahead, don't lag behind. Be There.

2. Undertaking Legal Work

When you begin work on a legal problem or project which is assigned to you, take time to define the problem itself before you start on the solution. Truly understanding the issues and the ramifications of the problem is crucial to any solution. This will save much time in the long run, and will help you to avoid often irrelevant effort.

When undertaking a new case, truly know what you are getting into before agreeing to represent anyone for any cause. There is almost nothing worse than undertaking a legal cause which involves matters and areas of the law you really are not prepared to do, or which is underfunded because of failure to know the scope of the problem. If the matter requires specialized legal services, recognize that fact and either arrange for joint representation or don't become involved. It is sometimes easy to get into a legal relationship, but hard to get out of it. Be sure that you want "in" to begin with. Otherwise, as a wise lawyer once said, "I'd rather go fishing."

3. Plan – Prioritize – Don't Get Behind

The most important time you will spend is in planning and allocating your time. Have in mind what your goals are for each day and what you want to accomplish. Remember the 5 ps: "Prior Planning Prevents Poor Performance."

Obviously, you could work all day and all night and not get all of your work done. But if you prioritize, you will know what must be done each day. It is imperative that you review this either at the close of the day relative to what must be done the next day, or at the early beginning of the next day relative to what must be done that day. Keep a handle on this personally and make a written checklist. No matter how good your assistant or secretary is, or how marvelous your computer or other planning system may be, be sure to understand and keep control of your own affairs. Above all, don't let things you know you must do get ahead of you.

4. Don't Get into the Habit of Taking Work Home

Clocks that make us tick are different in different people – as we march to different drummers. My clock used to call for late hours of night work, with great difficulty in arriving at work early. So I formed the habit of taking work home. Now, my clock has changed. I find that it is difficult to stay awake past the 10 o'clock news, and that it is easy to awaken early and get up. But alas, I have been unable to break the old habit of taking work home, so while I often get up and work on things early, I find myself doing that in my study at home and as usual, arriving just in time for court with no time to spare. The best course of action, however, is to start early at the office, do your legal work there as a rule, and leave the office at a decent hour, without carrying any work home.

". . . [C]lients are more interested in having a lawyer earnestly and fully represent them, even more than in winning."

5. Back Up – Do Not Undercut – Associates

When you discover that the senior partner with whom you have been assigned is really a dinosaur and still practicing under Code pleadings, or has never heard of the new rules of evidence, be tolerant. It may be hard not to demonstrate, even in front of clients, your new and improved grasp of things. It won't advance your cause, however. After you have worked along for a while, you may discover that the old fashioned dinosaur whose ways and mannerisms you mentally disapproved, knows more than you had supposed. It's something like a teenager growing up and discovering, after years of discounting the knowledge of a father, that all of a sudden the old man remarkably has learned a great deal. Remember also, that those older practitioners are not young enough to know everything. In no way should you compromise principles, but remember that you still have a lot to learn.

Back to "How to Succeed in Business Without Really Trying." It is just as important and maybe more important to your success in a law firm to work to please, assist and back up your senior partner and associates as it is the client directly. So, be sure to support and bolster your co-workers – don't undercut.

6. Communication

In my experience, clients are more interested in having a lawyer earnestly and fully represent them, even more than in winning. This requires constant communication to let the client know what is going on. Copy the client with correspondence and involve the client in every important aspect of the case. A lawyer can do a magnificent job in pursuing a client's cause, but if the extent of his efforts and services is not known by the client you can be sure that even victory won't be fully appreciated.

The pleasure and meaningfulness of the attorney-client relationship will be lost or never really established if client contact is relegated to intake personnel and shuffled from associate to paralegal. Keep in touch with your client – not only to keep the client happy, but to keep yourself happy.

Maintaining effective communication not only is smart lawyering, but it will make your work more meaningful and you may even receive a word of appreciation now and then.

7. Civility

One point of view as to the role of a lawyer is that he or she is a "paid, professional hater." This is the "hardball" or "macho" school of thought in which the rules and standards we just took note of are used for purposes never intended, such as too much discovery, tactical attempts to disqualify opposing counsel, purposeful refusal to accommodate the schedules and problems of the other side, needless presentation of collateral matters and issues, motions, requests for continuances, and other tactics to keep the other side off guard or preoccupied. I'm talking about those who learn and follow the technical rules of conduct, but use them for improper purposes. One of the manifestations of this sort of behavior is the hostile attitude often displayed by counsel toward each other, even in open court. Seemingly endless paper warfare, haranguing about alleged grievances and self serving statements of piously held positions are often employed.[1]

This type of conduct has lead to a nationwide movement to establish codes of professionalism – calling for voluntary and sometimes court imposed standards – beyond ethics to courtesy and civility. I'm not going to detail the content of such codes which many bar associations and some

courts have adopted. Suffice to say: be courteous, civil and even magnanimous in your dealings with other lawyers and persons. This will bring dividends. Not only will you like yourself more, but interestingly, you will be more effective and perceived to be a better lawyer.

8. Fixing Reasonable Legal Fees and Charges

In 1985 the American Bar Association released a report developed by a blue ribbon Commission on Professionalism.[2] With respect to the matter of acquisition of wealth by attorneys, this admonition was given: "Resist the temptation to make the acquisition of wealth a primary goal of law practice." Also, this rhetorical question was posed: "Has our profession abandoned principle for profit, professionalism for commercialism?" The public perception was not good then. It is worse today, as evidenced by the recent Associated Press report:

> Forked tongues, sharp suits, slippery ethics. That image of lawyers is presented on prime-time television, talked about in marathon media trials and ingrained in the nation's psyche. Lawyers are looked upon as shysters, sharpies, greedheads and cutthroats. . . . their image has lately gone even farther south. One survey commissioned by the American Bar Association found respondents felt lawyers were "greedy . . . money hungry." Popular beer commercials show lawyers being roped like bulls at a rodeo. Television dramas present some members of the bar as little more than morally corrupt fashion plates.[3]

A recent series of articles in *The American Lawyer* describe how some big firms are not only billing extremely high rates, but charging separately for things ordinarily regarded as overhead – such as secretaries, librarians, printers and even donuts and coffee with a mark up for handling charge.[4]

To set the record straight, it should be noted that the vast majority of lawyers in America are solo practitioners or practice in firms of 10 lawyers or less, charge modest fees, and are not overly compensated. Only a very small percentage of lawyers charge rates in the $200 to $600 per hour range or render billings which include separate charges for what customarily has been regarded as overhead.

The market for legal services will not tolerate continued exorbitant charges. Many corporate clients now require very competitive detailed bids for legal work and a close monitoring of time and charges. Others are organizing "in house" legal departments to replace "out house" attorneys. Governments are scrutinizing legal bills. Bar grievance committees are reviewing more and more fee complaints. Unjustifiably large fees are being ruled unconscionable by the courts.

When I became a member of the bar over 40 years ago, this phrase was explicitly included in the Attorney's Oath: "I will never . . . delay any man's cause for lucre . . ." That concept is also clearly implicit in the Attorney's Oath which you will take.

You didn't choose to study law and obtain a law degree to become rich. You made that determination because you have respect for the rule of law and justice, you have regard for the rights and obligations of all people, you recognize the need to address and to solve the complex legal problems which exist in society today, and you want to be a player. You can expect to earn a reasonable living, but your greatest reward will be in practicing in this noble profession, which will make you rich in ways beyond monetary remuneration and filthy lucre.

"You didn't choose to study law and obtain a law degree to become rich."

9. Take Every Case and Work Assignment Seriously, But Don't Take Yourself Too Seriously

Do not trivialize any legal assignment you are given. Take it seriously. Remember, even the smallest case and matter is important to the client you serve. Also, you will discover that doing a good job on small matters will lead to assignments and opportunities on bigger matters. It will also endear you to your co-workers and clients.

With respect to taking yourself seriously, that is another matter. Resist being categorical. Don't be inflexible and rigid. Have in mind that the practical side of law practice is yet to be discovered by yourself. Roll with the punches, smile at your mistakes, see the light side of things. It will help you to cope.

10. Keep the Monkey off Your Back

Don't leave things open ended. Don't leave what is to be done and who is to do it up in the air. It is a good idea to memorialize in a transmittal letter such things. This is true in your dealings with clients as well as opposing counsel. Such a habit or practice will remove ambiguity and uncertainty. Your client will not wonder what you are doing – what you are waiting for – why things are at a standstill or whatever – if you set it forth in writing.

In these days of malpractice claims, it is not only wise but quite necessary to CYA – in order to protect yourself and to prevent misunderstanding. Make clear what arguably could be a problem.This will help bring peace of mind.

11. Understatement is Usually Best

It is often said that a new law school graduate who has passed the bar knows at that point in time more law than he or she will ever know again. That may be the reason such persons sometimes come off as being more than willing to admit to the possession of great knowledge, having genuine affection for themselves, and perhaps being too sure of their wisdom. The state of mind can make one prone to assert extravagant and sometimes overly broad and categorical positions.

In your dealings with clients and presentations in court, be realistic. But even if you are a flaming liberal, be conservative in your statements. Remember that understatement usually is more effective than overstatement.

12. Balance – Quality of Life

Don't spend too much time in the practice of law. Yes, work hard. "The law is a jealous mistress." But don't sacrifice quality of life because of over emphasis of law practice to the detriment of other aspects of your life – such as family, church and public service. Nothing is worth that. In a recent analysis of large law firm practice, the authors had this to say:

> Lawyers give up their private lives, consoling themselves with lavish salaries, perks, and fringe benefits. The pressure and the isolation combine to compel lawyers to accept deception to whatever extent it is accepted in the firm, . . . The structure of the work in large law firms places large firms on an institutional collision course with many humanistic values such as truthfulness and altruism.[5]

Indeed, there is a point of view out there that would lead one to practice law in such a way as to subordinate values and quality of life. That type of "dedication" doesn't lead to peace of mind or truly effective practice.

13. Have Compassion

Learn the great lesson of forbearance. Don't always press your advantage. For instance, in theory there may be opportunity to take a default or default judgment. Best to talk to opposing counsel, and inquire whether some extenuating circumstance exists. You likely will make a friend of a fellow lawyer with whom you will be dealing for many years. Perhaps he or she will return the favor. No matter. Besides, if there is a defense on the merits, or if a truly extenuating circumstance exists, in almost every case a judge ultimately will lift such defaults.

Make it clear that your forbearance has limits, and be clear about what you are agreeing to do. If you practice this way, you will become known as "fair but firm," rather than "exacting and heartless." As Shylock learned, exacting a pound of flesh has implications which can backfire. Also, Rumpole of the Bailey even though subject to the directives of "She Who Must Be Obeyed," always shows compassion for the downtrodden. So, in all of your dealings, whether with the downtrodden or otherwise, have a heart – show forbearance and compassion.

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In conclusion, we should all recognize that one never "arrives" in the practice of law. It is a journey, not a destination. I am confident that the principles just mentioned will help to make it a pleasant journey. Besides, you will be an effective and contented practitioner along the way.

Best wishes to all of you.

[1]The "hired gun" attitude of the "contemporary bar," which allegedly has placed the justice system in "disarray" has been decried as follows:

> [t]he problem is not one of a lack of competence on the part of its [the bar's] lawyer participants, but of a lack of civilizing and moderating qualities that include accommodation, trust, compassion, and similar qualities. More competent technicians, lacking in these qualities and adhering to the total commitment model of today's codes, will multiply litigation, abuse every possible procedural device, and employ any stratagem or tactic that will help win for a client. The result is not justice but social disaster. Increasingly, many lawyers have lost a sense of obligation to courts, opponents, and the general public.

Cramton, Professionalism, Legal Services and Lawyer Competency, reprinted in *ABA, Justice for a Generation* 144, 148 (1985).

[2]*ABA Commission on Professionalism Report:* "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism" (1985).

[3]Associated Press: "The First Thing We Do, Let's Boost the Image of Lawyers." Reported in *Deseret News,* Salt Lake City, Utah, May 4-5, 1995.

[4]*American Lawyer:* "Skaddenomics The Ludicrous World of Big Firm Billings," by Susan Beck and Michael Orey, September 1991.

> Big-firm lawyers already earn so much money from their hourly billings alone that it's difficult to understand charges for secretaries, librarians, or printers, especially since these costs are really not variable by client and assignment the way , say, a plane ticket is. It's as if a fancy restaurant tacked on charges for "dish and linen rental" to a $150-per-person dinner tab.

[5]*Lerma, Lying to Clients,* 138 U. Pa. L. Rev. 6589, 759 (1990). Professor Lerma also stated:

> The legal profession is becoming increasingly competitive and intense. This makes it more difficult for lawyers to be honest with their clients or their colleagues. They must work outrageous hours in order to produce work more quickly than every before. In addition, lawyers face intense pressure to bring in business. The subculture of the law firm does not put much emphasis on truthfulness as a value. In large firms, earning money is valued above all else.

CASE SUMMARIES

By Clark R. Nielsen

ADMINISTRATIVE REVIEW, MINING

The Supreme Court affirmed the decision of the Division of Oil, Gas and Mining that the Plaintiff had exceeded the five acre minimum limitation on its limestone quarry. The Division had determined that the Plaintiff was operating a large mining operation and was required to comply with the administrative regulations. The Division's finding was supported by substantial evidence under the jurisdiction of the Utah Mine Land Reclamation Act.

Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." The substantial evidence test determines whether the findings were reasonable and rational and is not a *de novo* review or a re-weight of the evidence by the Appellate Court.

Larson Limestone Company v. State of Utah, 274 Utah Adv. Rep. 3 (Sept. 25, 1995) (J. Durham)

TAX, INCOME TAX LIABILITY

The Court rejected the State tax payer's argument that he was not obligated to file a tax return or pay State income tax because taxable income was limited to "foreign earned income" and he had no such income. He also believed that because he was not liable for Federal taxes he did not have to pay State taxes. His failure to file and report had resulted in failure penalties and evasion penalties from the Tax Commission. The Appellate Court grants no deference to administrative agencies legal conclusions. Nelson had a legal duty to file a tax return and to pay State income taxes as they come due, regardless of whether he is obliged to file a Federal tax return. Like most Utah residents, the petitioner has a duty to file tax returns and pay State income taxes as they come due. A duty to file a return arises when the income is earned and not when the income is assessed for tax purposes. The mere assertion of a novel or new tax theory is not enough to avoid tax penalties or evasion. Irrational and unsupported interpretation of the tax code will not justify circumvention of the requirement to file and pay State taxes.

Nelson v. Auditing Division, Utah State Tax Commission, 274 Utah Adv. Rep. 5 (Sept. 28, 1995) (J. Durham)

DAMAGES, LOST EARNINGS CAPACITY

The Court of Appeals affirmed the judgment against Defendant of $107,623.00 for general damages, medical expense and lost earning capacity. When the Plaintiff suffered injuries in an automobile accident after her rear wheel came off the car, she incurred $9,800.00 in medical expenses which prevented her from fully engaging in her employment responsibilities. She was required to hire workers to perform her tasks that she could no longer do herself in her business, costing her approximately $25,000.00. The trial jury awarded Plaintiff $16,000.00 for past lost earning capacity and $53,000.00 for estimated future lost earnings. The court also awarded pre-judgment interest to the Plaintiff for her past lost earnings. The Plaintiff was able to adequately prove the economic value of the tasks that she was not able to perform after her injury. These were out-of-pocket expenses for which she had to use her own money and could not get reimbursement for until resolution of the case. These special damages permitted interest under §78-27-44(1).

The Court also affirmed the award of damages based upon the cost of hiring workers to perform the tasks. The Plaintiff has a general right to recover her lost earning capacity. The loss must be proved with reasonable certainty. When an injured party works in her own business, earning capacity may be calculated by reference to the cost of hiring a replacement to perform the same tasks that the injured party was formerly able to do. Although a person may not recover lost business profits as a general rule, such inability to recover lost profits does not bar a recovery for out-of-pocket expenses to perform those tasks.

The Court approved the jury instruction given that "when the injured person was not receiving a salary, but owned and was operating a business that was deprived of his services by the injury, his damages are the value of his services in the business during the period." The instructions did not create a high probability of confusing the jury and were not erroneous. The damage award was affirmed.

Corbett v. Seamons and Big O Tire, 274 Utah Adv. Rep. 6 (Ct. App. 9/28/95) (J. Greenwood with Js. Billings and Garff)

WORKER'S COMPENSATION, "COMING AND GOING" RULE

The Plaintiff petitioned the Court for worker's compensation benefits for injuries in an automobile accident. The Court disagreed with the Commission's determination that the Plaintiff was not operating within the course and scope of her employment at the time of her accident. At the time of her accident, Plaintiff had left her office for home and dropped off and picked up her employer's file in Ogden. These referral files were to be delivered in Salt Lake the next morning. The Plaintiff resided in Ogden but worked in Salt Lake. At the time of the accident, she had been picking up files from the Ogden FHP office.

The court agreed with the Plaintiff's argument that she was on a "special errand for the benefit of FHP" when her accident occurred. The Commission concluded that the coming and going rule applied barring her recovery. The court reconciles the "coming and going" rule with the "special errand" exception. Traveling to and from work is not part of the employment and is not covered by worker's compensation, except when the employee is on a special errand for the employer. The court considered the picking up and dropping off of the files at the Ogden FHP office to be a special errand. Her special errand required her to detour from her normal route home and also extended beyond regular working hours. Her acceptance of this assignment helped her to perform her regular duties as a referral coordinator in a timely manner. The special errand exception does not necessarily require a one-time occurrence or assignment. The Court also reminded the Commission that the Compensation Act was to be given liberal construction to provide coverage.

Drake v. Industrial Commission, 274 Utah Adv. Rep. 10 (Ct. App. 9/28/95) (J. Billings with Js. Garff and Jackson)

PROPERTY, QUIET TITLE AND SLANDER OF TITLE

Defendants appealed the trial court judg-

ment of quiet title decree and special damages for attorney's fees. The parties purchased adjoining properties from the same source and disputed the interpretation of the legal description in the Plaintiff's deed. The legal description referred to a road which was made at some point after the deeds were given. The Plaintiffs brought an action to quiet title and for slander title damages. The trial court found that the Defendant slandered the Plaintiff's title and awarded the Plaintiff special damages in the form of attorney fees and costs. The court rejected the Defendant's argument that there was insufficient evidence to support the judgment. The trial judge is considered to be in the best position to assess the credibility of witnesses and to derive a sense of the proceeding as a whole, something that an appellate court cannot hope to garner from a cold record. The court concluded that the deed was unambiguous and therefore, extrinsic evidence was not admissible to vary its terms. Although the deed refers to a road, it does not use the road as a boundary line description. The Court also found sufficient evidence to support the trial court's finding that the Defendant had failed to establish a boundary by acquiescence. Boundary by acquiescence requires a visible marking or monument as the boundary which, mutual acquiescence of the boundary; a long period of time not less than 20 years by adjoining land owners.

Finally, the Court affirmed the judgment that the Defendant had slandered the Plaintiff's title to the property by the publication of a false slanderous statement disparaging the title which was made with malice and that the statement caused actual or special damages. Because of the documents recorded by the Defendant, the record provides adequate evidence of malice and of slander of the title. The Court observed that the trial court had interpreted the Defendant's demeanor as a witness as confirmation that he acted with malice.

The Court did remand to redetermine the damages because special damages in slander of title may only be awarded for "lost sale or the loss of some other pecuniary advantage." Attorney's fees may be recoverable as special damages if incurred to "clear title or to undo any harm created by whatever slander of title occurred," such as to remove a cloud placed by defendant. Because the record was not clear as to the reasons for the trial court's award of the amount of fees, which was less than the amount claimed, the matter was remanded to properly determine the amount of damages, including the fees claimed as special damages to clear title or undo harm caused by the Defendant's slander.

Gillmor v. Cummings, 274 Utah Adv. Rep. 29 (Ct. App. 9/28/95) (J. Jackson with Js. Garff and Billings)

INDIAN LAW, STATE TAX LIABILITY

Maryboy, enrolled in and enrolled members of the Navajo Tribe, disputed the assessment of Utah Income Tax against their earnings. Mr. Maryboy is a County Commissioner. Mrs. Maryboy is employed at the Utah Health Department, Department of Human Services, to provide mental health services for Navajos on the reservation. Most of her duties were performed on the reservation. Under *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), the State has no authority to tax income that is earned from on-reservation activities. Federal law preempts the exercise of State jurisdiction when the federal and tribal interests outweigh the interests of the State and where State authority may unlawfully infringe on Indian self government.

Utah does not have adequate interest in Mrs. Maryboy's income as a state employee because the services which she performs as a state employee are much like those provided in the private sector. Her employment as a therapist is not unlike the therapist position in a private mental health clinic. Most of the activity occurred on the reservation and/or for reservation Navajos. Therefore, it is within the proscription of *McClanahan* and is not taxable by Utah.

However, Mr. Maryboy's county commission work is in the representation of all the citizens of San Juan County. His activities are necessary for the benefit of and affect all San Juan County citizens, whether or not Navajos. Therefore, his income is not derived from "value generated solely on the reservation." As a public, elected official, Mr. Maryboy is subject to state taxation, as are all citizens.

In reviewing the Tax Commission's order, the court reminds us that the test of substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."

Maryboy v. Utah State Tax Commission, 273 Utah Adv. Rep. 7 (9/14/95) (J. Stewart)

PERSONAL INJURY, SEAT BELT LAW

On interlocutory appeal, the Defendant Gold Cross Ambulance, had challenged the constitutionality of Utah Code Ann. §41-6-186 which provides that the failure to wear a seat belt does not constitute contributory or comparative negligence and is not relevant at trial on the issue of damages or mitigation. The Supreme Court affirmed the trial court's conclusion that the statute is constitutional and enforced its limitations in Gold Cross' attempt to show that the Plaintiff's injuries were aggravated because of her failure to wear a seat belt.

Constitutionality of a statute is presumed and the court's reasonable doubts are resolved in favor of constitutionality. The court views this statute as a statement of substantive law and not mere evidence. The statute decrees that the non-use of a seat belt is not negligent and its evidence is inadmissible because it is not relevant. Therefore, the statute does not violate the uniform operation of laws in Article 1, Section 24 of the Utah Constitution or impinge upon the court's procedural rule-making power with regard to rules of evidence.

Generally, the violation of a safety standard, established by ordinance or statute is prima facia evidence of negligence. However, as part of the statutory scheme regarding seat belts and negligence, Section 41-6-186 carves out a class of defendants who are treated differently from other tort defendants. The court finds that it is not inherently unreasonable for the Legislature to make a distinction in the use of seat belts and possibly other safety issues. It is not a suspect classification. Although the legislative purpose need not be specifically stated, nor will the court accept any conceivable reason, it is sufficient that a legislative purpose can be reasonably inferred from the legislative language. This particular statute seeks to resolve the conflicting interest between those arguing for the mandatory use of seat belts and those arguing in favor of the personal freedom to choose. Mandating that the failure to use a seat belt does not constitute negligence is a reasonable legislative determination to insure that public policy encouraging seat belt use is adequately evaluated along with the personal freedom to choose.

Ryan v. Gold Cross Services, Inc., 273 Utah Adv. Rep. 13 (Sept. 20, 1995) (J. Durham)

VEHICLE FORFEITURE, CONSTITUTIONAL LAW, DOUBLE JEOPARDY

The majority of the appeals panel concludes as a matter of law that criminal prosecution of a Defendant violates double jeopardy when the Defendant has already been subjected to a civil forfeiture penalty under Utah Code Ann. §58-37-13 (1994), the law forfeiting a defendant's vehicle for its involvement in a drug-related offense. The Fifth Amendment to the U.S. Constitution bars multiple criminal prosecutions and punishments for the same criminal offense under the Double Jeopardy Clause.

The appellate panel holds that a civil sanction is subject to double jeopardy analysis if the sanction is not "solely remedial." If the civil sanction has imposed any punitive aspect whatever, jeopardy attaches. The court holds that a forfeiture, under the statute, constitutes a punishment for double jeopardy purposes and later criminal proceedings against that defendant, may not be pursued.

The court rejects the State's analysis that the forfeiture of defendant's vehicle in a civil proceeding did not constitute punishment because the value of the vehicle was not disproportionate to the cost of the prosecution.

Although the forfeiture statute may be deemed to serve some remedial objective, such as reimbursing the government for the cost of prosecution, the court finds the statute to be punitive, at least in part. Based upon the recent decision *State v. 392 South,* 886 P.2nd 534 (1994) and the U.S. Supreme Court decision of *Austin v. U.S.* 113 Supreme Court 2801 (1993), the court opines that the State's argument has already been rejected in these cases.

State v. Davis, 273 Utah Adv. Rep. 18 (Ct. App. Sept. 21, 1995) (J. Davis with J. Orme, J. Bench dissenting)

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She makes up for it by characteristically plunging into the subject matter.

"She'll be here pulling books off the shelf herself," said law clerk Scott Wilson. "She'll point cases out to me instead of the other way around."

Despite her dedication, Judge Campbell's work is only one part of her very full life. Besides skiing, she and Gordon love to sail. They have sailed in the Caribbean and often sail off the coast of California. And then there's Mary, a senior in visual arts at Brown University.

"Mary is her pride and joy," said Phyllis Walker, Tena's longtime secretary. "They have an absolutely wonderful relationship."

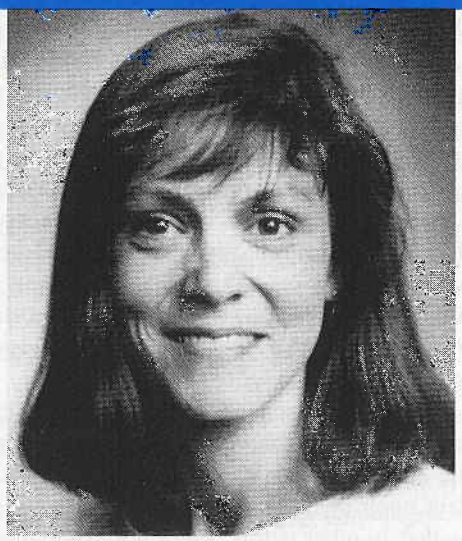
Like her mother, Mary spent her junior year in France. Her artwork and photographs fill Judge Campbell's chambers, easily outweighing the Jagger clock in prominence and quantity.

"She is very artistic," said Judge Campbell. "Just like my mother. It must have jumped a complete generation."

What does Judge Campbell see in her future?" "This," she said. "Unless I'm impeached."

Not likely. The French teacher with the penchant for Stones tunes has already made history. And from the looks of things, now that she's started up, she'll most likely never stop.

Book Review



Strange Justice: The Selling of Clarence Thomas

By Jane Mayer and Jill Abramson

By Betsy Ross

FOUR YEARS LATER. . .

Justice Clarence Thomas was confirmed, at least according to authors Jane Mayer and Jill Abramson, because no one saw anything but political disadvantage in opposing him, the "truth" having become irrelevant. Of course, the truth, I suppose, is still up for grabs, although Mayer and Abramson definitely have their opinion on who deceived the American public.

Although there is much to focus on in this book, my own attention was grabbed in reading this book, as it was during the hearings, by the role of Utah's venerable senator, Orrin Hatch.

It was Senator Hatch who stepped in when things were looking gloomy for Justice Thomas during the hearings and suggested, according to the authors of *Strange Justice,* the brilliant strategy of playing on racial stereotype. It was Hatch who recognized the public anger that could be evoked in portraying Hill's characterizations of Thomas' behavior — boasting about his sexual prowess and penis size — as the worst kind of racial stereotyping. It was Hatch who recognized the power of divisiveness, or as the authors note:

> "By playing the race card — the game of ethnic advantage that Thomas had built a career of opposing — Thomas could win the victim sweepstakes. A professional woman's complaints about sexual mistreatment on the job had no chance against a black man's claim to being lynched simply because he dared to think independently and go against the political mainstream."

And, it was Senator Hatch again who exemplified how far the Republicans were willing to go to discredit Anita Hill, according to the authors, when Hatch suggested that Hill's "slick" legal team had found the famous references to pubic hair in *The Exorcist* and Long Dong Silver in a federal court case and manipulated Hill into incorporating them into her testimony.

Not only were the Republicans willing to discredit Hill on innuendo, but they were willing to discredit the Senate body itself, according to Mayer and Abramson, in order to shift the focus from their candidate's character. And again, it was Hatch who played point man, accusing Senator Metzenbaum of leaking the FBI report of Anita Hill's testimony to the media. Metzenbaum is quoted as saying:

> "Hatch publicly lied about me. . . . I literally hadn't seen the damn FBI report at the time I was accused of leaking it. But Hatch must have thought it would intimidate me."

And, he admitted, it had:

> "Sure, it created a problem – a hell of one. . . . I'd say when you tell a deliberate lie without a shred of evidence, it's a strategy."

In fairness, the authors record that Hatch later came to the Senate floor to apologize to Senator Metzenbaum.

Two other books present a a very different view of Clarence Thomas and Senator Hatch: The Real Anita Hill, written by David Brock, which became a bestseller in 1993, and Leading the Charge, a biography about Orrin Hatch written by Lee Roderick and published in 1994.

There are only twenty pages or so in Leading the Charge dealing with the Clarence Thomas hearings. In those pages, Roderick presents a picture of an innocent and maligned Clarence Thomas and a righteously outraged Orrin Hatch. Roderick appears, however, to act more as apologist

than biographer. Roderick appears righteously indignant himself about the "helpers" surrounding Anita Hill, yet never mentions the behind-the-scenes coaching of Thomas that is rigorously detailed in *Strange Justice.* Roderick accepts Hatch's version of an FBI leak at face value. In fact, as underscored by Hatch's apology to Metzenbaum detailed above, the investigation initiated by Hatch was completed and no leak could ever be confirmed. Finally, Roderick compromises any attempt at objectivity as he bridles at the "feminist" anger toward Hatch as a result of Hatch's behavior at the hearings:

> "Feminist anger at hatch was not unusual but it was ironic. The record shows hatch did not ask Hill a single question, yet the impression that he tormented Hill was spread far and wide by feminists, allied liberal activists, and the media."

In fact, what Roderick does not present is that although Hatch may not have directly questioned Hill, what he did do may have been more harmful: speak about her when she had no opportunity for direct rebuttal.

The Real Anita Hill is not so easily dismissed. It contains a wealth of information asserting that Anita Hill was sexually aberrant, mentally unbalanced, and politically and personally motivated to frame Clarence Thomas. *Strange Justice* addresses some of this evidence, but is not written as a direct rebuttal to Brock, and so a decision on much of the warring "evidence" can only be made by those of us who have the time and energy to compare the minutiae of the stories.

I learned long ago, while in a graduate literature program studying literary theory, that the reception of any literary work is dependent upon the subjective experiences of the reader. In other words, I will not experience *Crime and Punishment* the same way you will, and certainly not the same way a Russian would. Concomitantly, my own biases and experiences will affect my opinion of the Hill-Thomas hearings, as will yours. The result is that none of us may ever agree on the "truth" of the Hill-Thomas hearings. In fact, whether there is any "truth" to be found is compoundedly obscured by not just your prejudices and mine as the receivers of the information, but by another level of prejudices – the authors' own.

I suppose the only important truth to be told now is in Justice Thomas' performance on the bench; and even that is subject to interpretation. Mayer and Abramson record disappointment by many who supported Thomas, some of whom refer to Thomas as the "house Negro." Perhaps time will tell something, for time is on Thomas' side. On his confirmation day, at age forty-three, Thomas vowed that he would spend the *next* forty-three years of his life as a Supreme Court justice.

Claim of the Month

A STRAINED FRIENDSHIP

Bill Barnes and John Murray became close friends during law school. They graduated together and each started an individual practice. They remained in close touch over the years and when Bill contemplated filing a lawsuit against the person from whom he purchased his home, he and John spent hours informally discussing the merits of such a suit. Finally, Bill decided to file the suit, and did so without John's knowledge. The defendant filed a motion to dismiss the suit based on the statute of limitation. Bill then called John and without telling John of the motion to dismiss, asked John to represent his interest in the prosecution of the case. John agreed and asked Bill to sign a retainer agreement.

John timely responds to the Motion to Dismiss but Bill's case is ultimately dismissed because it was not timely filed. Much to John's surprise, Bill sues John claiming that John should have advised him of the statute of limitations.

Fortunately, John prevailed in this suit due primarily to the fact that the retainer agreement was dated after the statute of limitations had run. John had the foresight to have his "friend" actually sign a retainer agreement. Without the agreement, it would have been very easy for Bill to argue that he had an attorney-client relationship with John since they first started chatting about a possible lawsuit.

THE LESSONS

For some reason, attorneys are not nearly as likely to commit the terms and scope of their representation in writing with their clients as are other professionals. It is always a good idea to have written documentation as to the date the attorney-client relationship is established, what the attorney is expected to do and an understanding of the fees to be charged.

Claim of the Month is compiled by a claims coordinator for the Lawyers Professional Liability Program at Coregis, and endorsed by the State Bar.

Alternative Dispute Resolution Conference

January 25-26, 1996
Stanford Court Hotel, San Francisco

This two day advanced course shows both inside and outside counsel how to use the various methods of alternative dispute resolution (ADR) to their advantage. The course deals with such practical concerns as how and when to initiate ADR; the drafting of pre-dispute ADR clauses and how to avoid the booby traps in arbitration; how to keep employee disputes out of court, and at the same time maintain or enhance employee morale; and other critical legal issues and ADR strategies.

Tuition for this course is $685. This entitles registrants to admission to all sessions, a set of study materials, Continental breakfasts daily, and a reception. Space is limited, register today. PHONE (800) CLE-NEWS (toll free) • FAX (215) 243-1664. All major credit cards accepted.

Stephen B. Nebeker Retires From Board of Trustees

Stephen B. Nebeker recently completed seven years on the Board of Trustees of the Utah Bar Foundation. While on the Board, he served as Vice President, Secretary/Treasurer and Chairman of the Recruitment Committee. Steve's organizational abilities are legendary – he is one of few attorneys known to be able to attend a 7:30 A.M. board meeting on the same day he is in the middle of a trial. Steve's leadership and energy demonstrated his commitment to the Bar Foundation's goals of expanding the public's access to and understanding of the legal system.

In 1954, Steve graduated from the University of Utah College of Law. After two years in the U.S. Army, he joined his present law firm of Ray, Quinney and Nebeker. His skill as a trial lawyer was recognized by the Utah State Bar in 1994 when he received the Trial Lawyer of the Year Award. He has also been honored as the University of Utah Law School Alumnus in 1988 and the Utah State Bar Lawyer of the Year in 1986.

Many community organizations also have benefitted from Steve's sense of public responsibility. He is presently the Chairman of the University of Utah's National Advisory Committee. He is a past member of the Board of Governors of the Salt Lake Area Chamber of Commerce and is a member of the Salt Lake Rotary Club.

Unclaimed Trust Funds

Most firms and lawyers which have been around for some time have unclaimed trust funds which are cumbersome to carry and, in many cases, will never be claimed nor can the owners be found. While most such accounts are small, even tiny, in total they probably add up to a considerable amount.

The Bar Foundation proposes that these funds be paid to it to be maintained in a separate, pooled account. The interest earned from the pooled monies will be used by the Foundation for its charitable purposes and the principal shall be maintained against the possibility of claims by owners.

No interest will be paid to the owners; in most cases the owner would receive no interest from the firm, anyway. Nor will the Foundation be involved in disputes among claimants as to entitlement to the funds; in the event of dispute as to ownership, it will simply repay the money to the lawyer or firm which deposited it or into Court if the lawyer or firm cannot be found.

This seems like a good way to relieve the repetitive accounting responsibility of lawyers and further the laudable works of the Foundation. Before putting this article down, why not ask your accountant if you have such funds on hand and, if so, take steps to pay them over to the Foundation.

The following form will provide the needed information:

Name of Remitting Lawyer _____

Utah State Bar No. _____

Name of Law Firm _____

Address: _____

_____

Name(s) of Owner(s)	Amount Submitted
_____	$ _____
_____	$ _____
_____	$ _____
	TOTAL $ _____

For further information, contact Zoe Brown . . .

Future editions of the Utah Bar Journal will contain an abbreviated reminder of this message.

CLE CALENDAR

GENERAL PRACTICE UPDATE

Date: Wednesday, December 6, 1995

Time: 9:00 a.m. to 5:00 p.m.
Registration begins at 8:30 a.m.

Place: Historic Courthouse
51 South University Avenue
Provo, Utah

Fee: $120.00 for full day
$50.00 for first 3 hours,
$50.00 for second 3 hours,
$40.00 for last two hours add
$10.00 for door registration

CLE Credit: 8 HOURS, WHICH INCLUDES TWO IN ETHICS

THE ETHICAL ADVOCATE

Date: Friday, December 15, 1995

Time: 8:30 a.m. to 11:45 a.m. – and – 1:00 p.m. to 4:15 p.m.
This program is being offered twice for your convenience.
(Registration begins one-half hour before each session.)

Place: Utah Law & Justice Center

Fee: $75.00 – please indicate morning or afternoon session when registering
$90.00 after December 5, 1995

CLE Credit: 3 HOURS ETHICS CREDIT

FAMILY LAW BASICS & ACCEPTING PRO BONO CASES

Date: Tuesday, December 19, 1995

Time: 8:00 a.m. to 12:00 noon
(Registration begins at 7:30 a.m.)

Place: Utah Law & Justice Center

Fee: Pro Bono Volunteers – FREE
Those attorneys willing to accept a pro bono case from Legal Aid Society, can attend for free, provided they leave the seminar with a case in hand.
All others – $50.00

CLE Credit: 4 HOURS, or NEW LAWYER WORKSHOP CREDIT

PROCRASTINATOR'S PARADISE: THE LAST MINUTE CLE VIDEO EXTRAVAGANZA

Date: Wednesday & Thursday, December 27 & 28, 1995

Time: 8:00 a.m. to 5:00 p.m.

Place: Utah Law & Justice Center

Fee: Full day = $50.00
Half day = $25.00
(Minimum charge of $25.00)

CLE Credit: 9 HOURS, WHICH INCLUDES AT LEAST 3 HOURS OF ETHICS, EACH DAY
(Please note: A maximum of 12 hours of video CLE Credit can be applied toward your requirement of 27 hours.)

NLCLE MANDATORY SEMINAR

For those attorneys admitted in May or October of 1995.

Date: Friday, January 26, 1996

Time: To be determined

Place: Utah Law & Justice Center

Fee: $30.00

CLE Credit: This counts as ETHICS credit for New Lawyers

Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____

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

_____

Name — Phone

_____

Address — City, State, ZIP

_____ _____

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

_____

Signature

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

Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee*, will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.
NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

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.

POSITIONS AVAILABLE

Winder & Haslam, P.C., a mid-sized downtown law firm is seeking an associate with 2 to 3 years experience. The firm's area of practice includes business transactions, litigation, entertainment and sports law. Please send your resume to Suzy M. Edwards, Winder & Haslam, P.C., 175 West 200 South, Suite 4000, Salt Lake City, UT 84101.

Small Salt Lake City litigation shop seeking hard-wking attorney with 2 to 5 years experience in complex litigation. All applications kept confidential. Competitive salary. Send reume by December 20, 1995 to Maud Thurman, Utah State Bar Journal, Box 10, 645 South 200 East, Salt lake City, Utah 84111.

Down town Salt Lake City firm seeks associate with excellent academic credential and writing skills and one to four years of litigation experience. Send resume and writing sample in confidence to: Maud Thurman, Utah State Bar Journal, Box #16, 645 South 200 East, Salt Lake City, Utah 84111.

POSITIONS SOUGHT

Tax Attorney, Admitted in PA and UT, LL.M. (Taxational), desires opportunity to practice with progressive firm, in any of the following taxation areas: Corporate Tax Planning, Partnerships, Limited Liability Companies, IRS issues, Asset Protection, Bond Issues, Trusts, Estate Planning or State & Local Taxes. Consultative/Specific-Issue relationships for small firms/solo practitioners also welcomed. Hourly or package rates. Call (801) 572-6156.

OFFICE SPACE / SHARING

Professional office space located at 7026 South 9th East, Midvale. Space for two (2) attorney's and staff. Includes two spacious offices, large reception area, sink/wet bar, file storage, convenient client parking immediately adjacent to the building. Call (801) 272-1013.

Downtown private offices for up to two (2) attorneys. Great location near court buildings, restaurants, fed-ex office, post office. Conference room, reception area, library. Fax, laser printer, copier, telephones, postage meter. Three attorneys in office. Computer network and Internet. Parking next to building. Secretarial services available. Call Amy or Craig @ (801) 364-5600.

Convenient downtown office space/office share for one or two attorneys, including at tenant's option, fax, photocopy, extra storage, secretary space, furnishings. Located at 320 South 500 East. Ask for Steve @ (1) 521-4145.

"Fully equipped small firm has opening. Excellent location and view. No salary, but we will make overhead livable for right applicant. Call (801) 486-3751."

Beautiful Exchange Place Historical Bld. 844 sq. ft. office sapce, includes reception area and small conference room. Half block from new courts complex, great location for attorney or any court-related services, $750 month. Parking, kitchen and law library available. Contact Joanne Brooks @ 534-0909.

SERVICES

APPRAISALS CERTIFIED PERSONAL PROPERTY APPRAISALS – Estate work, Fine furniture, Divorce, Antiques, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Eighteen years experience. Immediate service available. Robert Olson C.A.G.A. (801) 580-0418.

UTAH VALLEY LEGAL ASSISTANT JOB BANK: Resumes of legal assistants for full, part time, or intern work from our graduating classes are available upon request. Contact: Kathryn Bybee, UVSC Legal Assistant Department, 800 West 1200 South, Orem, UT 84058 or call (801) 222-8489 / Fax (801) 225-1229.

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.

SOFTWARE FOR SALE: STI law practice management software for sale. Includes TABS III time and billing, case management, general ledger, accounts payable. Latest version, includes full documentation. Will sell for fraction of retail, only $400.00. Call (801) 363-9966 for further information.

CHILD SEXUAL ABUSE — CASE EVALUATION Statement Validity Assessment (SVA). An Objective method for determining the validity of child statements and interviewer quality – time saving and concise – advanced graduate training. No fee for initial consultation. Bruce M. Giffen, M.S., Investigative Specialist. (801) 485-4011.

OFFICE FURNITURE FOR SALE: Authentic oak Globe-Wernicke antique sectional bookcases, antique oak secretarial desk, other fine antique law office furnishings – excellent condition. Call (801) 272-1013.

LEGAL RESEARCH / WRITING: Part-time or contract work in research/writing sought by attorney with over two (2) years of directly related experience. For research, memos, motions or discovery call: M. Todd @ (801) 544-9383.

Videotape Depositions: Video Services for the Legal Professional: Depositions-Claims Investigations-Evidence: **UTAH LEGAL VIDEO SERVICES.** Call (801) 484-2120.

MCLE Reminder

Attorneys who are required to comply with the odd year compliance cycle will be required to submit a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by December 31, 1995. The MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a combined 27 hour total. Be advised that attorneys are required to maintain their own records as to the number of hours accumulated. Your "Certificate of Compliance" should list all programs that you have attended that satisfy the CLE requirements, unless you are exempt from MCLE requirements. Following is a Certificate of Compliance for your use. Should you have questions regarding the requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

Utah State Board of
Continuing Legal Education
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

Professional Responsibility and Ethics — **Required: a minimum of three (3) hours**

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

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

Continuing Legal Education — **Required: a minimum of twenty-four (24) hours**

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

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

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

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

IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE

**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 three 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 $5.00 at the time of filing the statement with the Board.

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 Regulations 5-103(1).

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 of which the statement of compliance is filed, and shall be submitted to the board upon written request.

INTERMOUNTAIN ADR GROUP

Alternative Dispute Resolution Specialists

Standing (from left to right) are the Neutrals of Intermountain ADR Group: Elizabeth T. Dunning; Stephen B. Nebeker; P. Keith Nelson; William W. Downes, Jr.; Paul S. Felt; Timothy C. Houpt; Andrew W. Buffmire; Tyke J. Tsakalos and Marcella L. Keck. Seated (from left to right): Steven R. Hansen (Executive Director), Connie D. Roth (President and Founder) and Wendy J. Crozier (Regional Director-North). Neutrals not shown: David O. Black, A. Dean Jeffs, Richard B. McKeown.

Negotiating—each of us participates in it every day. Sometimes, however, the outcome is less than satisfactory or agreement simply cannot be reached. A "Win-Win" Resolution is possible.

We would like to introduce you to the members of our team. At Intermountain ADR Group, we specialize in resolving disputes through alternative methods. Our group is highly skilled in mediation, arbitration and other ADR formats. We recognize and honor your commitment to professional excellence in representation of your clients. You have our promise of timely, cost-effective and impartial service. The facts are clear—This is *Where Solutions Are Created.*™

6911 South 1300 East, Suite 149 Midvale, Utah 84047
Office: 801-568-3805 Toll-free: 800-945-9245 Fax: 801-568-1018

4305 Harrison Blvd., Suite #6 Ogden, Utah 84403
Office: 801-479-6959 Fax: 801-479-8758

Utah State Bar
645 South 200 East
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Reg Cr 43 Ethics Cr 7.5
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SALT LAKE CITY UT 84145