UTAH BAR JOURNAL

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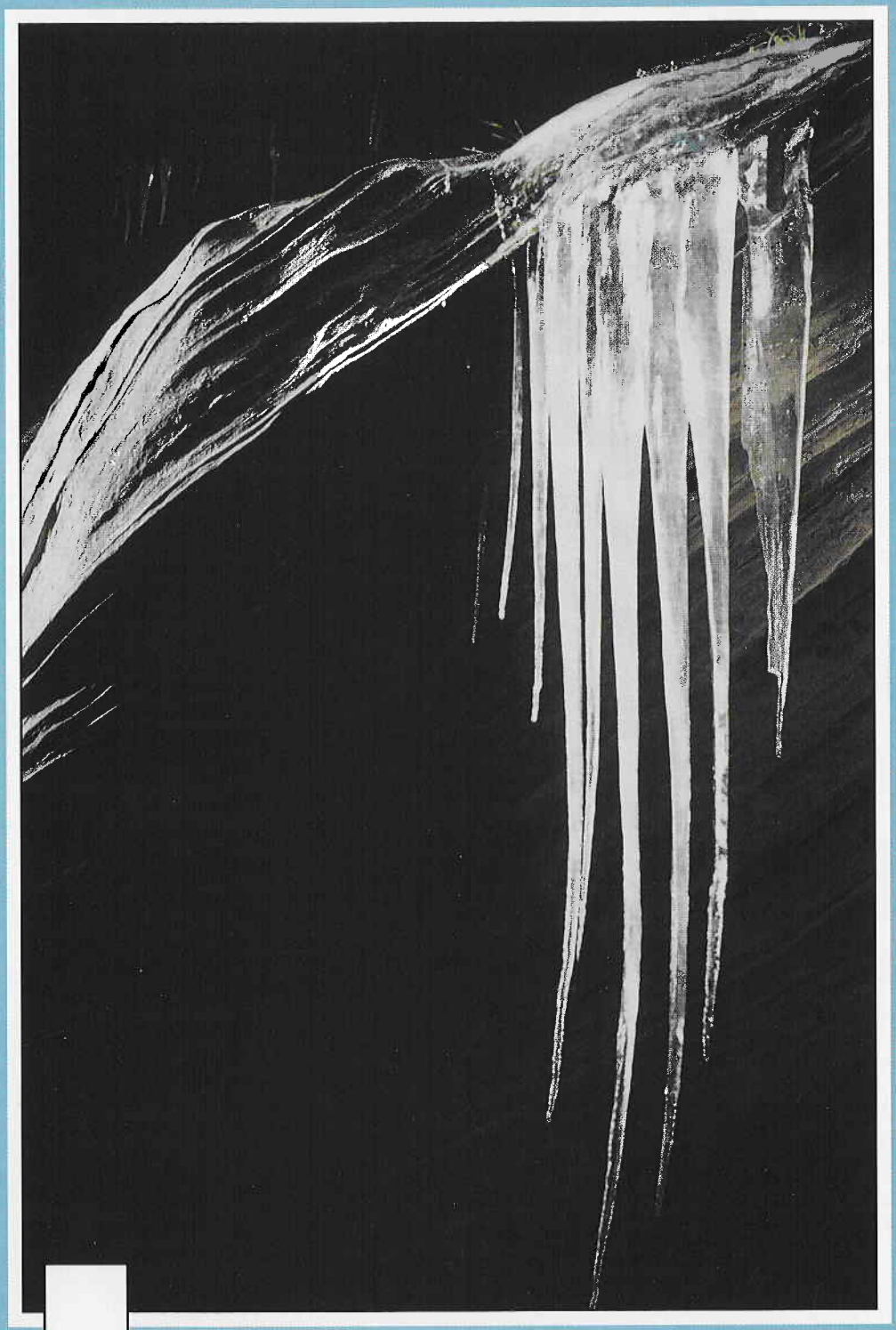

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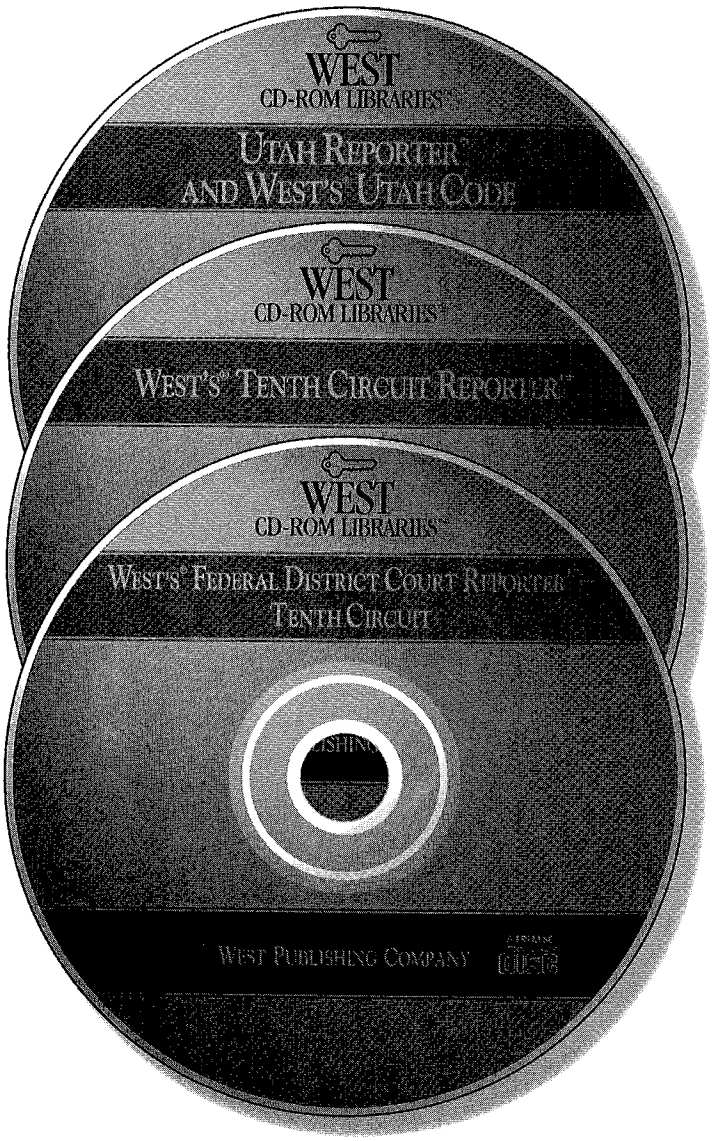

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VISION OF THE BAR: To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

MISSION OF THE BAR: To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.

COVER: Icicles in Zion National Park by Gordon J. Swenson, Salt Lake City, Utah.

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BE IT RESOLVED: THE JURY SYSTEM SHOULD BE REFORMED

FEBRUARY 29, 1996
6:30 P.M.

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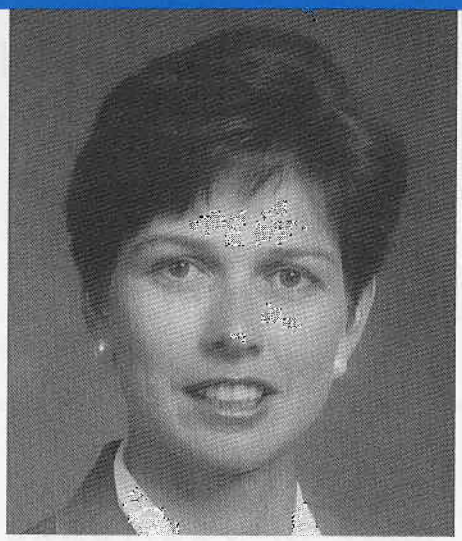

Checklist for Improving the Workplace Environment (or Dissolving the Glass Ceiling)

By Charlotte L. Miller

In 1995 the Glass Ceiling Commission (established by the 1991 Civil Rights Act) issued its findings regarding the success of women and minorities in reaching top level positions. Most of us do not have the luxury of ordering the report and reviewing it or spending days and years in our own workplace with our coworkers analyzing the philosophical issues and educating ourselves about the advancement of women and minorities. In my workplace I spend a fair amount of time training supervisors on issues of managing employees hopefully helping them to learn how to avoid discrimination, violation of OSHA laws, FLSA laws, drug testing laws, etc. Usually I get one hour in a three day training session, so I don't often discuss burdens of proof, summary judgment motions, etc. Instead, I try to provide practical and simple information, and as a result I spend a lot of time writing checklists — a checklist for hiring, a checklist for evaluating, a checklist for firing, a checklist for interacting with an injured customer, a checklist for responding to theft, a checklist for signing a contract. After about 13 years of practicing law, I might be able to create a checklist for any legal question. (Some of you may remember that two years ago my Bar Commissioner's report was a checklist on how lawyers can be more customer oriented.) So, I thought I would try to provide some practical advice to members of the Bar — in the checklist approach — on how to help dissolve the glass ceiling (dissolving is a slower process than breaking — so I believe it more accurately describes the actual process — it is also less violent).

I require my managers to learn the following rule: **"Not everything that is stupid is against the law."** There are many events that occur in the workplace that do not rise to the level of "discrimination" as legally defined, but there are many events that detract from cooperation among co-workers, morale, and therefore productivity. When events interfere with productivity, they also interfere with the bottom line, whether the events are discriminatory or not. The same is true with regard to dissolving the glass ceiling. Behavior in a work place may not be legally actionable as "discrimination" but may create perceptions that women and minorities are not appropriate for upper level positions. Behavior needs to be viewed more from a human resources, interpersonal communication perspective than through the legal elements necessary to prove discrimination. Behaviors that are not illegal may be unwanted because they interfere with productivity.

The following checklist is for senior people in workplace — like law firms, corporations, governmental agencies — and is mostly common sense in helping to create and maintain a positive, cohesive, nurturing and productive workplace. Therefore, those of you who do not believe there is a glass ceiling can do these things too without giving up any philosophical position, and get some benefit.

INCLUDE WOMEN AND MINORITIES IN INFORMAL FUNCTIONS

Much of the building of rapport, developing mentor relationships, and creating trust and interest among colleagues is begun or is nurtured in social settings — lunch, golf, traveling (sometimes as part of work), even Bar activities. Make sure that

you do not unintentionally exclude either women or minorities in your workplace from these activities (I'm assuming intentional exclusion is already recognized as unwise). Some exclusion may occur because you are used to going to lunch with a particular group, or because you don't think the woman or minority person in your office wants to participate. Make a point to not only invite but to strongly encourage newer women and minority individuals to participate in social settings. They may feel uncomfortable (especially if they are the only woman or minority) — but help them overcome that discomfort by participating more fully.

TEACH CLIENT DEVELOPMENT

Make sure that you include women and minorities in your interactions with clients. Introduce them to your clients, have them spend time in conferences, and talk about how you have gotten clients in the past.

HAVE HIGH EXPECTATIONS

Do not lower expectations for women and minorities. Make sure that you expect them to be as tough, as hard-working and as smart as others (but not tougher, smarter or harder-working). Do not treat women or minority employees in a manner that makes them seem frail. Make sure you think of the women and minority employees when recommending someone for a project, presentation, seminar, etc.

WATCH FOR STEREOTYPES

We all have our own stereotypes and biases. Do a check once in a while to see if they are interfering with how you interact with co-workers. For example, if a woman leaves early to take care of a sick child or attend a piano recital do you question her commitment more than the commitment of a man who leaves work early to go skiing? Or, is a man who leaves early for a piano recital seen as a hero and a woman seen as not being committed. I know in my household if I leave town for a few days, my husband receives offers from a multitude of volunteers to help with the children, but if he leaves town, I don't get any offers of assistance. This is probably more discriminatory toward him since he is actually quite capable of taking care of his children (although even I don't like to admit he is as capable as me).

Don't force women to walk a narrow tightrope by labeling them as "sweet" or a "witch," while labeling men with similar characteristics as "diplomatic" or "tough."

"Make sure that you do not unintentionally exclude . . . women or minorities in your workplace . . . activities . . . ."

DON'T ASSUME WOMEN AND MINORITIES ARE MONOLITHIC

Not all women and minorities are liberal democrats. Don't assume women lawyers should be advocates for children or minority lawyers should be criminal defense lawyers. Also, don't leave it to the minority lawyer to criticize racism in the workplace, or the woman lawyer to criticize gender bias. Whoever recognizes such bias should make efforts to eliminate it.

DON'T FOCUS ON GENDER OR MINORITY STATUS

Don't embarrass the women or minority individuals by drawing attention to them in a way that emphasizes their status as a woman or minority over their abilities as a professional. For example, when you talk about an associate who happens to be a woman to other lawyers, clients, etc., emphasize her skills, not her looks, and don't introducer her as a "woman lawyer." I worked with a gentleman once who would always talk to co-workers about their areas of interest — car racing, karate, golfing, etc. When he would see me each day he would almost inevitably say "Charlotte, you look really nice today." Finally I told him that I really didn't look that nice every day. You can certainly tell people they look nice — both men and women — just be careful not to emphasize that issue with women while excluding discussion about their good work. Likewise, don't think that the only thing

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African American men like to talk about is sports. By focusing on people's professional talents, you will help them be respected by others and move up in the profession.

VISUALIZE WOMEN AND MINORITIES AS LEADERS

If you think of only white men as senior partners, board members, leaders, etc., try to start thinking differently. Some of this visualization is helped by language. Much fun has been made of America becoming overly politically correct in its language; but to some degree the use of alternate pronouns and diverse groups in photographs helps us visualize minorities and women in leadership positions. For example, when you say "the lawyers and their wives," you visualize male lawyers. It also may make the female lawyer in the audience feel uncomfortable, especially if you then say "oh and you and your husband." It may create a sense of not belonging which if created often enough and long enough can cause the person to focus more on not belonging than on being productive, which is not good for the workplace as a whole.

When my daughter Annie was four she was describing for me one day the "farmer in the dell" game they played at school. I asked her if she was ever the farmer. She told me that only boys could be farmers. I told her that girls could be farmers — that my grandmother (and grandfather) were farmers. I forgot about the conversation but a few weeks later Annie walked into the house shouting, "Today I was the farmer and picked Jonathan as my husband." When questioned she told me that her teacher announced that they were going to play the farmer in the dell and asked who wanted to be the farmer. Annie raised her hand and said "girls can be farmers too." The teacher then asked Annie to be the farmer.

Every year I have to fill out a form for a liquor license in a state (other than Utah) which asks my name, my wife's name, and other names ever used by my wife. It never asks me for any other names I have used. Once I wrote and told them of the discrepancy, but I never received a response and the form hasn't changed either.

The language issue also applies to the manner in which one addresses women and minorities differently from white men. Referring to some men as "Mr. _____," and women or minorities by their first names may cause others watching or listening to think the woman or minority is less important. My personal pet peeve is when I am listed with a group of men and they all have formal names with middle initials and my middle initial is omitted.

Also, get used to saying the word "woman." Skip the discussion about how "girl" "honey" or "dear" are meant in a flattering manner. Those terms detract from a woman's knowledge, expertise and ability, and focus on gender rather than the employee's position in the workplace. It's difficult to visualize the president of a law firm or company as a girl. It is hard to give

a raise or promotion to a "girl."

On a related note, shake hands with women the same as you would with men. Don't wait to see if the woman wants to shake hands, just do it. Shaking hands is an expected form of greeting in the legal and business community. If a lawyer (especially a new lawyer) who is a woman doesn't initiate shaking your hand, it is probably because she doesn't know if you will shake her hand, so stick your hand out and shake hers. This is a visual mechanism that lets others know who you respect.

WHEN A WOMAN OR MINORITY DOES NOT SUCCEED IN THE WORKPLACE, DO NOT PLACE SO MUCH EMPHASIS ON THAT EVENT THAT YOU ARE AFRAID TO HIRE, PROMOTE, MENTOR ADDITIONAL WOMEN AND MINORITIES

Success or failure by a woman or minority may be more noticeable because they are more noticeable because they are different from the majority of the workforce, but do not let that fact create stereotyping.

CHECK YOUR TRACK RECORD

If you don't have any women or minorities in leadership positions in your workplace, find out why. If you have a woman or minority who seems to have done everything requested (billed hours, worked in every department, etc.) but is still not successful, examine the situation. Although there may not be anything to do to salvage the current situation, you may learn some things that will be helpful to the work place in the future. Don't be defensive — be willing to listen for ways to improve the work environment.

HAVE A SENSE OF HUMOR

Be able to laugh at yourself and others. This can relieve some of the tension and make it easier for a group of diverse people to work together in harmony and productively.

None of the above suggestions address the more complicated issues of flexible work time, reduced work schedules, parental leave, etc., and none of them alone will dissolve the glass ceiling. However, they are tangible, practical ways to check to see how you treat people in the workplace. By being a mentor to women and minorities in the workplace and giving them respect and support you will help them and others feel that it is possible for them to progress and succeed.

For women and minorities I have the following suggestions. I cannot claim any of these as truly mine; rather they are comments I have heard from a variety of attorneys and judges (mostly women) for the past 16 years.

DEVELOP CLIENTS

In a small firm, medium firm or large firm developing and retaining clients is the key to being a success. Watch how other lawyers develop clients and ask other lawyers how a particular client chose them. Law firms, like most businesses, are in the business of making money. Understand the financial situation of your employer and contribute to the bottom line and the financial decisions of the employer. In an non-firm setting — government, corporate, etc. — there may not be the need to develop clients but the ability to recognize, understand and interact with your client is important. A brilliant mind (researcher, writer) who cannot effectively communicate with the client is of little, if any, help.

"Discriminiation exists — deal with it."

WORK HARD AND SMART; PROVE YOURSELF

This is a good way to develop and retain clients, and also a good way to obtain the respect of your colleagues. Don't just put in hours, but be smart about working effectively and efficiently.

BE INTERESTED

Express interest in matters you want to work on. Don't wait for someone to come to you with projects.

PARTICIPATE

Join in social events, ask people to lunch, participate in meetings. Initiate and develop rapport that will allow others to have confidence and trust in you and your work. A lawyer told me once that she used to always eat lunch at her desk to save time because she wanted to bill lots of hours and yet get home at a certain time, but then she realized she was cutting herself out of an important aspect of the work environment. Casual settings are often the opportunity to express interest in progressing professionally. Not everyone has to learn to play golf, but participate in some way that makes you comfortable. This may mean experimenting with a few things that make you uncomfortable. On the other hand, do not create friendships for the purpose of providing protection. The friendships should be a natural outgrowth of working together hard and developing a relationship; not a forced relationship for the purpose of being promoted.

DEAL WITH ADVERSITY

Discrimination exists — deal with it. This does not mean you have to accept it or that you shouldn't try to change it. Recognize it and learn how and when to respond. Most discrimination is not the result of evil motives, but of lack of experience and discomfort with people who are different. Help make people more comfortable with you. Try to educate rather than threaten. This is easier said than done, especially if a number of frustrating events have occurred and you are billing 2200 hours a year. If I threaten to quit because someone doesn't use my middle initial or call me "girl", I probably don't seem very rational; but it is probably the cumulative effect of a number of events that results in the outburst. Try to deal with the daily issues one at a time — not in a whole lump.

SEARCH OUT MENTORS

Look for mentors. Watch how other women and minorities respond to difficult situations and how they succeed. Make sure you can separate yourself from your mentor when appropriate.

HAVE A SENSE OF HUMOR

Same as above. Be able to laugh at yourself and others. This can relieve some of the tension and make it easier for a group of diverse people to work together in harmony and productively.

Elimination of a glass ceiling requires revising people's pre-conceived ideas about minority status and gender. That process is one of continual training and heightened awareness of the impact of behavior in the workplace. A nice by-product is a better workplace for everyone.

Ethical Considerations Under the Amended Federal Rules of Civil Procedure

By Phillip S. Ferguson

SMALL V. MONOLITHIC, INC.: THE PROBLEM

The phone rings. By force of ugly habit, you glance at your watch. It is 2:00 p.m. Charlie, your estate planning friend from law school with whom you occasionally share referrals, is on the line.

"An old high school acquaintance, Guy Small, has been consulting me about his financial problems. Seems he was involved in a fairly serious accident a couple of years ago," Charlie informs you. "He swears it wasn't his fault but he has been too busy dealing with his injuries and their complications that he hasn't been in to see a lawyer. I thought you might be able to help."

"How long ago was the accident?" you inquire, your statute of limitations antennae already on the alert.

"Small said it was either 3 or 4 years. He wasn't altogether sure. I told him that personal injuries actions are outside my bailiwick and suggested he call on you. I hope that is okay. He should be there momentarily." Sure enough, Guy Small was in your reception area by the time you got off the phone with Charlie.

It was obvious that he suffered extreme physical limitations. He used a cane. He walked slowly and stiffly. He was breathing quite hard by the time the two of you reached the office. Mental gymnast that you are, you were already calculating the special and general damages (and the resultant fee) such a client as this could bring if the facts proved out the way Charlie had intimated.

After the preliminary inquiries, you got right to business. "When did this accident happen?"

"After talking to Charlie, I look it up in my personal journal. It will be exactly four years tomorrow," he wheezes.

"Four years tomorrow!" you exclaim. "That means the statute of limitations will expire almost immediately! We need to move fast."

PHILLIP S. FERGUSON is the Managing Director, and a shareholder in the Salt Lake City law firm of Christensen & Jensen, P.C., where he practices in the areas of products liability, aviation and professional malpractice law. He received his A.A. degree from Ricks College, where he was a Spori Scholar, his B.A. degree, summa cum laude, *and his J.D. degree,* cum laude, *from Brigham Young University, where he also served as a member of the Board of Directors of the Board of Advocates. Mr. Ferguson is a member of the Utah State Bar, and currently sits on the Needs of the Elderly Committee. He is a member of the Utah Defense Association, the Defense Research Institute, and the American Bar Association.*

You obtain the facts giving rise to the accident. Small was a traveling salesman. He was rear-ended by a long-haul truck driver employed by Monolithic, Inc., while on business in Nevada. He was minding his own business and driving in accordance with the rules of the road. After some well-placed inquiries, you learn that Monolithic shares a small terminal in the Salt Lake area, but that it is based in California and operates largely in the southwestern United States. You conclude that it would be well to file in federal court to gain the advantage of the broader subpoena power, even though you haven't had occasion to file in federal court for a couple of years.

In a potent demonstration of modern efficiency and skill, you have drafted a complaint seeking special damages, including both past and future lost income, general damages, and damages for the loss of enjoyment of life, so-called hedonistic damages, filed the complaint, and put both the summons and the complaint in the hands of the process server before 5:00 p.m. that day. Confidently, you assure your new client that you have the matter well in hand and will protect his interests zealously, as is your style.

Soon after the complaint is filed, your process server effects service. Within a few days you receive a packet from the clerk of the federal court containing some forms and materials you have never seen before. You read about electing Alternative Dispute Resolution through the Court Annexed ADR program and a Rule 26(f) conference to be held at least 14 days prior to the Initial Scheduling Conference which will be set by the court. You discover that you must file some kind of joint scheduling or planning report with defense counsel within 10 days of the Rule 26(f) meeting.

Alarmed, you decide to take a quick look at the Federal Rules of Civil Procedure and the local Rules of the District Court. You were aware that some amendments had been proposed, but since all of your recent work has been in the state courts, you did not pay much attention to them. "A few amendments couldn't really make that much difference anyway," you reasoned. "Besides, I can always attend one of those

ubiquitous CLE programs on the federal rules before I get too far into the case, if necessary."

Your biggest surprises still await you. You read about mandatory initial disclosures in Rule 26(a)(1). You read about detailed expert reports in Rule 26(a)(2), and of the need to file pretrial disclosures in Rule 26(a)(3). You find that you must supplement or amend your disclosures and discovery responses pursuant to Rule 26(e) at "appropriate intervals." You glance through Rule 26(g) and realize, to your horror, that failure to fulfill these various new duties can result in the imposition of sanctions.

In a flash of inspiration, you look at Rule 37, which used to govern sanctions, and find that it still does. However, on this reading, you discover that the sanctions now include a complete bar to the use of any evidence which was not properly disclosed at the outset of the case, reasonable attorney's fees, the striking of your complaint, and various other potentially lethal remedies.

Shaken, and cursing the day you ever filed in federal court, you call in your client. Carefully, you explain these new rules and the obligation you both have to abide by them. Willingly, and in complete trust, Guy Small tells you everything.

Eight years earlier, Small divorced his wife. About 2 years later, he inherited a couple of the more lucrative national accounts from a retiring colleague. Not wanting to share this new-found wealth with his ex-wife, he has carefully concealed from her the changes that have taken place. Trained by years of living with a traveling salesman, she had insisted on a copy of his tax returns. You discover to your eternal dismay that Small, a shrewd but short-sighted fellow, has filed false tax returns with the government. Furthermore, he has kept a careful record of his true earnings in his personal journal, the same journal you were counting on to establish the general and hedonistic damages about which you have been drooling.

The bad news does not end there. Small tells you that, while he was seriously injured in the accident, he had been diagnosed with a degenerative disease of the nervous system two weeks before the accident during a routine physical exam. His doctor was not certain how quickly the disease would begin to affect his ability to earn a living, or the quality of his life. Even now, the doctor is unable to say, with any

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The Jammin' Jurist's Mid-Year Meeting Music Festival

All members of the Utah State Bar who are musicians are welcome to attend and participate in the musical jam session at the Mid-Year Meeting, March 7-9, 1996. We are trying at this time to put together several groups, representing different types of music, to head off the jam session. We are looking for categories such as classic rock-n-roll, rhythm-n-blues, jazz, and country western/blue grass. Members of the Bar who play instruments are encouraged to fill out a pre-registration form so that we can put you with the group in which you would feel most comfortable. A leader for each band will be chosen, who will coordinate five or six numbers for their group. Drums, percussion instruments, microphones, amplifiers, and a public address system will be provided. Except for drummers, the musicians should bring their own instruments. Guitar players, horn players, fiddle players, etc., should bring their own instrument. The jam session will follow Friday night's dinner on March 8, 1996, and you do not have to attend the dinner to be a part of the jam session, although we hope you will attend both. Don't worry if you are a bit rusty. This is for everyone with any musical talent at any level. Don't be sorry because you didn't sign up.

Please pre-register on the form attached to this announcement and mail to:
Scott Jensen, 205 26th Street, #34, Ogden, UT 84401 or
Scott Reed, 236 State Capital, SLC, UT 84114.

Name: _____

Bar Number: _____ Phone Number: _____

Address: _____

Instrument(s): _____

Years Experience: _____

Circle type of Music with which you are most familiar:

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degree of medical certainty, that the accident exacerbated the underlying degenerative disorder or to quantify the extent to which Small's current physical limitations are due to the accident rather than the disease.

"Surely you don't have to disclose these things to the other side," Small queries when he sees your deeply furrowed brow and the veins beginning to swell a deep purple in your neck. "You're my lawyer. I'm entitled to have my conversations with my own lawyer protected, aren't I? And what about my privilege against self-incrimination? That's constitutional, isn't it?"

Thinking that Small may be too facile with the law to suit you, you growl, "I'm sure we can figure something out." You assure Small that things will work out appropriately even though your own internal organs are seething under pressures that are all too reminiscent of the day you called in for your bar exam results.

"Can the Federal Rules of Civil Procedure really force me to disclose to opposing counsel the very information I've obtained from my own client in confidential interviews?" you wonder with trepidation. "I've got to be certain of my obligations before I make what could be a monumental mistake."

You make a more careful study of the language of Rule 26(a)(1), emphasizing the language that strikes you as operative:

> Except to the extent otherwise stipulated or directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:
>
> (A) the name and, if known, the address and telephone number of each individual likely to have **discoverable information relevant to disputed facts alleged with particularity in the pleadings,** identifying the subjects of the information;
>
> (B) a copy of, or a description by category and location of, all documents, data, compilations, and tangible things in the possession, custody, or control of the party **that are relevant to disputed facts alleged with particularity in the pleadings;**
>
> (C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and
>
> (D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

"Can the Federal Rules . . . really force me to disclose to opposing counsel . . . information . . . from . . . confidential interviews?"

> Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting of the parties under subdivision (f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

In light of this rule, you conclude that the allegation for lost income makes the tax returns and personal journal "relevant." You also conclude that your allegations of permanent injury and loss of enjoyment of life make the information regarding the diagnosis of the degenerative disease "relevant." Now what are you going to do?

Meanwhile, across town, at the firm of Aggressive, Worthy & Opponent, your opposing counsel is going through the very same exercise. He has discovered that the subject truck driver has a habit of picking up passengers, in violation of company policy, and that it was probably her interaction with one of these passengers that diverted her attention from the road and resulted in the accident. The driver has been repeatedly warned about this behavior, although none of the warnings is in writing. There are 2 dispatchers and a former supervisor, still in the employ of Monolithic, Inc., who have personally given warnings about such behavior to the driver. In his first visit to the offices of Monolithic, Inc., he is shown computer files created during the hiring process which indicate that this driver was invited to leave her prior employment because, even though she is an excellent driver, she had a habit of picking up passengers. She had promised vociferously not to do so here. On a subsequent visit, he discovers that these computer files no longer exist.

Your opponent nervously observes that you did not allege conduct giving rise to punitive damages, but you did allege that the driver was in violation of company policy. You did not specify which policies nor the manner in which the driver was in violation, and your opponent concludes that you made a lucky guess. (Having been involved in trucking accident cases over the years, you know that such allegation is often closer to a certainty than a lucky guess, and you made the allegation in light of this knowledge.) He is concerned that by voluntarily disclosing the names of the former supervisor and the 2 dispatchers, neither of whom would otherwise have any involvement with the driver, along with the subject of their testimony, will only serve to inspire an amended complaint on your part. He is virtually certain that you will request an instruction that the jury is entitled to conclude that Monolithic's personnel file on the subject driver was damning because it destroyed the file during the pendency of the lawsuit. He is modestly concerned that you may tell the County Attorney that Monolithic has engaged in spoliation of evidence, a criminal offense. He whines to his partners that all of this information seems to fall squarely within the language of Rule 26(a)(1)(A).

Worried sick, both of you scurry off to study the Rules of Professional Conduct for some guidance on what must be disclosed and what can safely be keep confidential.

THE RULES OF PROFESSIONAL CONDUCT

This hypothetical example focuses upon the mandatory disclosure requirement of

amended Rule 26(a)(1) because it, more than most of the other amendments which became effective on December 1, 1993, encroaches upon the near-sacred relationship of attorney and client in startling and disquieting ways. The other amendments represent a marked departure from past practices, to be sure, but they do not present the ethical dilemmas of a rule that mandates disclosure of information which is "relevant to disputed facts alleged with particularity in the pleadings."

Utah shifted from the *Code of Professional Responsibility* to the Rules of Professional Conduct, patterned on the ABA's Model Rules of Professional Conduct, on January 1, 1988. The Preamble to the Rules provides a general overview of the lawyer's duties:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.
>
> In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Rules of Professional Conduct, "Preamble: A Lawyer's Responsibilities," Utah Court Rules Annotated, at 1072. The "Scope" of the Rules further cautions that,

> The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.
>
> Moreover, these Rules are not intended to govern or affect judicial application of either the client-lawyer or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the client-lawyer privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The client-lawyer privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that

information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with the recognized exceptions to the client-lawyer and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against discloure.

Utah Court Rules Annotated at 1073, 1074. Unfortunately, these Rules were promulgated prior to the amendments to the federal rules of civil procedure. The Rules of Professional Conduct appear to be inconsistent with the duty to disclose under Rule 26(a)(1).

"The Rules of Professional Conduct appear to be inconsistent with the duty to disclose under Rules 26(a)(1)."

Rule 1.3 provides that "A lawyer shall act with reasonable diligence and promptness in representing a client." This rule replaces the old Canon 7 which required a lawyer to "represent a client zealously within the bounds of the law." The comment to Rule 1.3 makes it clear that a "lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Utah Court Rules Annotated at 1078.

Rule 1.6, Confidentiality of Information, provides:

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.

(b)A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another;

(2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used;

(3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or

(4) To comply with the Rules of Professional Conduct or other law.

(c) Representation of a client includes counseling a lawyer(s) about the need for or availability of treatment for substance abuse or psychological or emotional problems by members of the Utah State Bar serving on the Lawyer Helping Lawyer Committee.

One can immediately ask whether the provisions of 1.6(b)(4), holding that the lawyer may reveal confidences "to comply with . . . other law," may not mandate disclosure of confidential information which is "relevant to disputed facts alleged with particularity in the pleadings" as required by Rule 26(a)(1). Certainly, the provisions of Rule 37(c)(1) make it clear that the lawyer and the client refuse to make these disclosures at considerable risk to the case and their financial circumstances:

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions autho-

rized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

Rule 37(b)(2)(A)-(C) allows the court to consider certain allegations established for purposes of the case, to prohibit the introduction of evidence which contravenes evidence elicited by opponents, and to strike answers, dismiss complaints, or otherwise enter judgment against the disobedient party.

The matter is complicated further by the provisions of Rules 3.3, 3.4, 4.1 and 8.4 of the Rules of Professional Conduct. Rule 3.3 provides:

(a) A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) Offer evidence that the lawyer knows is false. If a lawyer has offered material evidence and comes to know its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that a lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 provides:

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do such an act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rule of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

"The matter is complicated further by the provisions of [other] Rules [of Professional Conduct]."

(e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 4.1 provides:

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Finally, Rule 8.4, Misconduct, provides:

It is professional misconduct for a lawyer to:

(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official; or

(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law.

The American Bar Association held, in Formal Opinion No. 93-376, that the candor requirement of Rule 3.3 "trump" the obligation to maintain client confidences, as set forth in Rule 1.6, in the somewhat related context where the lawyer learns that her client has lied on deposition and falsified documentary evidence.

Returning to our hypothetical example, you now know that your client has filed tax returns which are false, and that any evidence on which you rely to claim a loss of past and future income may depend upon those falsified returns. Under Rules 26(a)(1)(C), you are obligated to provide damage computations and the documents upon which those computations are based. Even if you successfully avoid producing the tax returns themselves, a strong argument can be made that, at a bare minimum, you are required to inform both the court and opposing counsel that your client has information bearing on the issues which you are not at liberty to disclose, a disclo-

sure which itself raises the possibility of prosecution by the IRS, and a motion by Small's ex-wife for additional child support and alimony payments, not to mention sanctions for having lied to the judge in the domestic proceeding.

If you opt to present the true income figures from Small's journal, or through records and testimony from the employer, there is still a risk that both the IRS and the ex-spouse will learn of Small's deception. Moreover, the value of the lost income claim is significantly reduced by foregoing the income figures from the tax returns.

Using the true income figures, combined with the pre-accident diagnosis of degenerative disease in the nervous system, will almost certainly lead defense counsel to argue that Small has suffered no prospective income loss because any inability to work in the future is due to the degenerative condition, not to injuries suffered in the accident. Accordingly, you have strong incentive to make the damages for past lost wages, those closer in time to the accident, as large as possible.

Under Rule 26(a)(1) you do not have the choice of selecting the evidence which you will disclose. You are obligated to disclose "relevant" evidence, whether it is helpful or harmful to your client's position. This dilemma is not susceptible of any easy solution. There is no "right" answer.

"Under Rules 26(a)(1) you do not have the choice of selecting the evidence which you disclose."

The Rules of Professional Conduct impose upon the lawyer a strong obligation to keep the client well informed, to make disclosures about the lawyer's tough choices, and to seek input from the client before decisions are made. Without question, Mr. Small needs to be told about the consequences of refusing to disclose his false tax returns and his pre-accident diagnosis. Perhaps he will elect not to pursue certain claims, thereby potentially relieving you of your obligations to the court and opposing counsel. Perhaps, between the two of you, you can fashion a claim that assures compensation for those injuries which are easily traceable to the accident and forego the remaining claims. Perhaps you can encourage Small to file amended tax returns covering those years for which the IRS can still prosecute him. Perhaps Small will simply find another lawyer less concerned about her ethical behavior to pursue the case — and to keep you and your malpractice carrier uneasy for the next four years.

The Rules of Professional Conduct obligate you to "take reasonable remedial measures" when you learn that your client has falsified evidence:

> When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.
>
> Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(c). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the

client could in effect coerce the lawyer into being a party to fraud on the court.

Comment to Rule 3.3, Utah Court Rules Annotated at1102.

It is a closer question whether the Rules of Professional Conduct obligate you to remonstrate with your client over past indiscretions which are not directly related to the action for which you have been retained.

The spirit of Rules 1.6(b)(1), 3.3(a)(2), 3.4(a) and 8.4 prohibits a lawyer from using his high office and calling to help others perpetrate frauds or gain unfair and improper advantage of others, and from allowing anyone else to do so either. You know that Small may have perjured himself in a domestic proceeding and in the filing of his income tax returns. You know that he will probably continue to do so unless you successfully encourage him to change his ways, even though the false information is technically not necessary to prosecute the matter for which he has consulted you. You are in a position to prevent future fraud in unrelated matters by disclosing your client's confidential communications to appropriate authorities. It is a difficult position in which you find yourself.

The Comment to Rule 3.3 provides, that "[a] practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation." Utah Court Rules Annotated at 1103. This Comment may relieve you of any obligation to contact the judge who presided over the domestic matter although, as we all know, domestic "proceedings" almost never conclude. For those of us who practice no criminal defense law, now might be a good time to send Mr. Small over to someone who does.

What about your esteemed colleague over at Aggressive, Worthy & Opponent? He may not have a client who has filed false tax returns and lied to the judge in a prior judicial proceeding, but he has a client who has apparently destroyed evidence with the intention of making it unavailable for use in this litigation. There is little question that his client's conduct is illegal, and very probably a second degree felony pursuant to §76-8-510, U.C.A. Must your adversary make a disclosure of his client's indiscretion under Rule 26(a)(1) of the Federal Rules of Civil Procedure?

The Rules of Professional Conduct make it clear that there are occasions when remaining silent is tantamount to participating with the client in a deception or fraud. *See, for example,* Comment to Rule 3.3 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative representation."), Utah Court Rules Annotated at 1102; Comment to Rule 1.2 ("However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. . . . When the Client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate."), Utah Court Rules Annotated at 1077; and Comment to Rule 4.1 ("Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud."), Utah Court Rules Annotated at 1110. Monolithic's lawyer has likely encountered one of these situations.

"[T]here are occasions when remaining silent is tantamount to participating with the client in a deception or fraud."

There is a qualitative difference between knowing that your client has destroyed evidence and merely knowing that your client has evidence which hurts your case. Your opponent probably should disclose the destruction of computerized evidence by Monolithic, but the Rules of Professional Conduct do not specifically require that he disclose the names of the former supervisor and the 2 dispatchers, and their knowledge that the truck driver repeatedly violated company policy. That obligation is supplied by Rule 26(a)(1).

The Rules of Professional Conduct begin to make your opponent sweat when they admonish the lawyer to obey discovery rules and to avoid quibbling unnecessarily. Rule 3.4(a) says that a lawyer shall not "[u]nlawfully obstruct another party's access to evidence. . . ." Rule 3.4(c) says that a lawyer shall not "[k]nowingly disobey an obligation under the rules of a tribunal. . . ." Rule 3.4(d) says that a lawyer shall not "make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

Mandatory disclosures under Rule 26(a)(1) are not quite the same as a request for production under Rule 34, or a set of interrogatories under Rule 33, but the spirit and tone of Rule 3.4 of the Rules of Professional Conduct leads inexorably to the same result. Your opponent probably has the obligation to disclose the identity of the witnesses and the substance of their testimony.

Both you and your opposing counsel may decide to wait and see how things go before making these uncomfortable disclosures. Your strategy may be to disclose the obvious materials and to hold back on the inflammatory stuff until you have a better feel for what the case is like. This strategy is not without its risks.

Aside from the obvious risk of sanctions under Rules 26(g) and 37, there is 28 U.S.C.A. §1927 which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Further, Rule 8.4 admonishes lawyers that it is professional misconduct to "[e]ngage in conduct that is prejudicial to the administration of justice." You should likewise be mindful of the general provisions of Rules 3.1 and 3.2. Rule 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rule 3.2 states that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The Comment to Rule 3.2 provides:

> Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.

Utah Court Rules Annotated at 1101.

A SUGGESTED APPROACH

No one can prescribe in the abstract how all cases under the new federal rules should be handled. The strategic, legal and ethical considerations will differ from case to case. The discussion presented above is intended to focus on some of the more significant issues and potential pitfalls. It should not be read as advice on which to call in the event Bar Counsel or the Court want to chat with you.

There are some basic questions to ask yourself as you go about preparing to litigate a case under these amended rules. If you are counsel for the plaintiff, do you want your complaint pled with greater particularity, thus making your complaint serve double duty as a request for production of documents by invoking greater disclosure responsibilities on the part of the defendant{s)?

If you represent the defendant(s), do you want to answer with greater particularity, thus obligating the plaintiff to make greater disclosures? Or do you want to admit more of the allegations than usual so as to remove issues from the realm of "disputed facts" and, therefore, from the realm of those matters about which disclosures must be made?

Have you made reasonable inquiry for relevant documents and witnesses? Would you be satisfied if your opposing counsel conducted an inquiry only as extensive as the one you have conducted?

Carefully examine applicable privileges. There are several that you may invoke as a basis for refusing to disclose documents and witness identities (depending upon the circumstances, of course):

(1) attorney client privilege, codified at §§78-24-8(2) and 78-51-26(5), U.C.A.;

(2) attorney work product limited privilege, set out at 26(b)(3), (4) and (5), Fed. R. Civ. P.;

(3) Trade secrets or other confidential research, development, or commercial information, as protected by 26(c)(7), Fed. R. Civ. P.;

(4) Protection from annoyance, embarrassment, oppression or undue burden or expense, as delineated in 26(c), Fed. R. Civ. P.;

(5) The general requirement that discovery be "relevant to disputed facts alleged with particularity in the pleadings." Rule 26(a)(1), Fed. R. Civ. P.

"Careful early thought about the lawsuit also encourages settlement and saves the client money."

There are other privileges which are not so well known, or are just emerging as the jurisprudence of the common law develops. For example, if your litigation involves health care providers, be alert to the limitations on discovery mandated by §§26-25-3 and 58-12-43(7), U.C.A., and the physician/patient privilege codified at §78-24-8(4) (and in various other places, depending upon the specific class of health care provider you are suing or representing). If your litigation involves governmental entities, their employees, or their patients, be alert to the limitations on discovery imposed by the Government Records Access and Management Act ("GRAMA"), §63-2-101, U.C.A., *et seq.*, (especially §63-2-202(7)). An exhaustive list of privileges is beyond the scope of this article, but the point is that you should carefully consider whether a privilege under common law or statutory law relieves you of or at least tempers the obligation to make a mandatory disclosure under Rule 26(a)(1).

If you decide that certain materials are protected by a privilege, it is often a good idea to prepare a "privilege log" identifying the materials with enough specificity that opposing counsel can make a meaningful determination as to whether the privilege has been improperly claimed. *See,* Rule 33(b)(4). The case law under the rules frequently requires that such a log be shared with opposing counsel at the time the claim of privilege is made.

Are you claiming damages? How are those damages calculated? Have you made the materials upon which the computations are based available? This is one area where you could find yourself in serious trouble if the court later determines that you did not make timely disclosure and prohibits the introduction of your evidence.

These amendments are basically designed to foster greater communication between counsel. The rules provide that the parties may alter the application of these rules by stipulation, and it is often in the interests of both parties to discuss modifications to the rules, not only those requiring disclosures, but those relating to the number and length of depositions, the number of interrogatories that each party may serve, and whether discovery ought to be conducted in phases. At the scheduling conference, the court will usually honor the stipulations of counsel if the stipulations are reasonable.

These amendments are also designed to encourage counsel to think about the case, the theory of liability, the necessary witnesses, and the documentary evidence, as well as the damages, early in the litigation. A well-drafted complaint and answer (and counterclaim, if necessary) can make a huge difference in the discovery phase of the case. Careful early thought about the lawsuit also encourages settlement and saves the client money.

Ultimately, these amendments require

counsel to practice law in the same way that experienced and effective counsel have been practicing for decades, if not centuries. Some of the discovery strategies may be different under these new rules, and the timing of the exchange of information will certainly be new, but the essential approach of thinking through the case at the outset, and communicating with opposing counsel in a civilized manner, will be familiar territory.

FURTHER THOUGHTS

If the issues surrounding the interaction of the mandatory disclosure requirements of Rule 26(a)(1) and the Rules of Professional Conduct do not cause you at least momentary reflection, consider some of the following questions. They relate to a variety of different issues under the Rules of Professional Conduct.

An issue which we skipped at the outset is whether Aggressive, Worthy & Opponent can (or should) represent both Monolithic and its employee driver. While the driver was likely in the course and scope of employment at the time of the accident, she was also in flagrant violation of company policy. This suggests a strong potential for a conflict of interest between the employer and the employee. Can one law firm, even after disclosure and consultation, appropriately represent both defendants in this litigation? How can your opponent proceed when, after meeting with the driver he realizes that the driver's interests are adverse to Monolithic's interests? What if he has obtained confidential information from the employer which is harmful to the employee? And information from the employee which is harmful to the employer?

Suppose the truck driver's former supervisor is also a former employee of Monolithic, Inc. Can you contact him informally? What if he was a low level supervisor, and not part of the "control group" of Monolithic?

Suppose further that Monolithic's former supervisor/employee has retained counsel who is considering a claim against Monolithic for gender discrimination and who intends to use the case of this truck driver to illustrate the point that women in the company receive preferential treatment? Can you contact the former supervisor informally under these circumstances?

Rule 4.2, on its face, prohibits a lawyer from contacting a **party** the lawyer knows to be represented by counsel. The ABA recently amended Rule 4.2 of the Model Rules of Professional Conduct, on which the Utah Rules are based, to replace the word "party" with the word "person." Under the amended version of Rule 4.2, there is a serious question whether Monolithic's own lawyer can contact the former supervisor/employee about the accident since it may form a basis for the gender discrimination case against Monolithic and the former employee has retained counsel. This is apparently so even if the former employee is not considered part of the "control group."

Suppose that the case of *Small v. Monolithic* has been grinding away slowly in the inimitable fashion of lawsuits in the federal courts. Due to the press of other business, you have had to hire additional legal talent to help with your burgeoning case load. Just as you are making an assignment to the 3rd year associate you recently hired,

Claim of the Month

A 28-year old, married mother (plaintiff) of two children, presented herself to an attorney's office seeking representation for injuries which she allegedly sustained in an automobile accident. At the time of the initial consultation, the plaintiff was accompanied by her husband. The plaintiff had advised the attorney that she suffered from a fractured cervical vertebrae along with some minor lacerations and contusions as a result of the accident. When initially asked the value of the case, the attorney advised that he did not feel comfortable making any initial evaluations until he had a further opportunity to review the underlying liability and some of the more important medical records. The husband indicated that they had already consulted with several other attorneys, all of which would at least place an initial evaluation on the case. After several questions by the husband, the attorney finally did give his initial evaluation, indicating value approximating $200,000.

The plaintiffs signed a retained agreement with the law firm and the attorney began to investigate the merits of the case. In terms of the liability, it became clear that the plaintiff was stopped at a red light and was struck by another vehicle. Liability appeared to be in favor of the plaintiff. The attorney then began to review the plaintiff's medical records. The medical records indicated the plaintiff had sustained cervical injuries in three prior automobile accidents. The records further indicated that the plaintiff's fractured vertebrae probably resulted from the second accident. The statute of limitations for the second accident ran during the time the attorney was investigating and evaluating the plaintiff's injuries.

CLAIM AVOIDANCE

Obviously, the attorney made an error in his initial investigation and in diarying his file for the running of the statute of limitations. Maybe not quite as obvious, but of almost equal importance, is the fact that the attorney created unreasonable expectations on the part of the client when he gave an initial evaluation of $200,000. This error was compounded by the fact that the attorney failed to advise the client of the problems with the case regarding the previous accidents.

Plaintiff has now sued the attorney for missing the statute of limitations. This is a case that could possibly be settled, however, the plaintiff now has the idea that she should recover at least the $200,000 that was "promised" during the initial consultation and maybe more, given that the defendant is now an attorney.

Complete notes, confirming letters and other documentation can help clearly recreate the client's representations and the services that will be provided. Further detailed letters can also clarify what services will not be provided, should a situation so warrant.

Compiled by a Claims Coordinator for the Lawyers Professional Liability program at Coregis. Endorsed by ten bar associations.

she tells you that she worked at Aggressive, Worthy & Opponent right after law school. She was aware of *Small v. Monolithic*, but handled only one or two small research projects relating to the case before being whisked off to spend the next several months reading documents in some accountant malpractice case, the case which drove her from Aggressive, Worthy & Opponent to the small firm from which you recruited her. Can she work on the case for you? Can you continue to handle the case yourself now that you have an attorney in your firm who has or may have confidential information about the defendant? Ho do you determine whether she has acquired information protected by Rules 1.6 and 1.9(b) which is material to the matter, as set forth in Rule 1.10?

In what surely must now be regarded as the "case from Hell," suppose that, on the eve of the court-ordered deadline for making all pre-trial disclosures, including those which you successfully managed to postpone through some timely and sensitive negotiations with opposing counsel, he makes a settlement offer which Small is inclined to accept. After costs and expenses, your one-third of the remainder will barely cover the cost of the associate and paralegal who have assisted you in discovery and trial preparation. You are convinced that the case has a value greatly in excess of the settlement offer in question. For his part, Small is concerned about his future legal problems with the IRS and his ex-wife, and has less anxiety about the financial recovery than you do. To what extent can you go in attempting to persuade Small to reject his offer and allow you to employ your legendary negotiating skills to extract something more reasonable? Do you have a duty to help Small appreciate that Monolithic's offer is unacceptably stingy? Or can you seize upon his willingness to settle, cut your own losses, and get out of the case while the getting is good?

Over at Aggressive, Worthy & Opponent, Monolithic's counsel is worried. The offer he made was crafted by Monolithic's insurance carrier. The carrier issued a reservation of rights letter at the outset of the litigation, on the grounds that the truck driver intentionally violated company policy. Monolithic, while not thrilled with the behavior of the truck driver, has doggedly resisted all efforts to settle, arguing that it has legitimate concerns about your client's damages and credibility. Without coming right out and saying so, Monolithic's insurer, one of Aggressive, Worthy & Opponent's largest clients, let it be known that failure to make the settlement offer would not be looked upon kindly by the local claims manager or the regional claims office. It wants to cut defense costs and does not really care about Monolithic's concerns over its reputation, the fact that the settlement offer is little more than Monolithic's deductible, or arguments about "the principle of the thing." Is this settlement offer legitimate in view of these conflicting attitudes about the propriety of settlement? To whom does your adversary owe his allegiance? What happens to him if you accept the offer?

"There is no substitute for an occasional reading of the Rules of Professional Conduct."

CONCLUSION

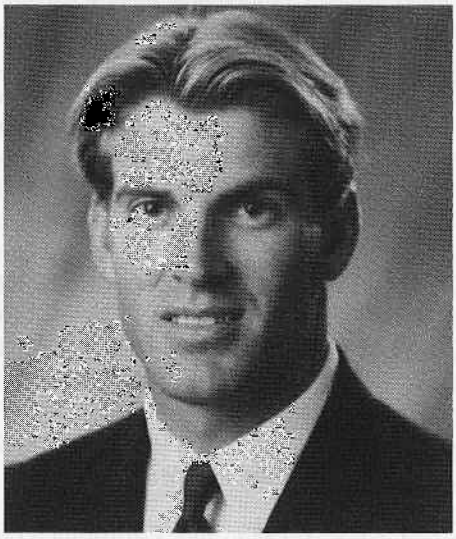
This article does not permit treatment of all of the ethical considerations a lawyer must make in the process of representing clients and engaging in litigation. It does not even treat all of the potential ethical issues that can arise in connection with the recently amended federal rules of civil procedure. Instead, it highlights a few of the more troubling issues that are beginning to come to the fore as we gain more experience with these amendments.

There is no substitute for an occasional reading of the Rules of Professional Conduct. It is also wise to peruse the discussion of these issues which proliferate in professional journals and law reviews from around the country. It is particularly helpful to read articles written by those who practice in the same general area of law, and from the same perspective (i.e., plaintiff or defendant), that you do. That way, you gain insight into problems that you are likely to encounter in your own practice.

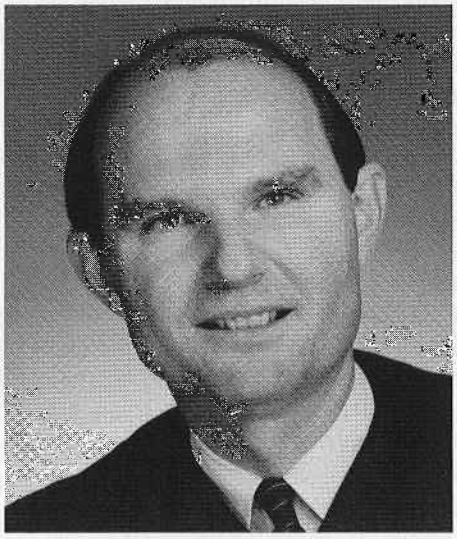
Utah's experience with the amendments to the federal rules, like the experience of other jurisdictions, is still too new to have resulted in the creation of much case law, especially case law dealing with the Rules of Professional Conduct. However, it is only a matter of time before we begin to see the courts resolving some of the issues raised by the hypothetical example with which this article began. With careful study, diligence and luck, yours will not be the test case.

Justicia Para Todos[1] Ensuring Equal Access to the Courts for Linguistic Minorities

By Michael Gardner and Judge Lynn W. Davis



MICHAEL GARDNER graduated from Brigham Young University with a B.A. in Political Science and a minor in Spanish. Mr. Gardner is currently in his second year at the National Law Center at George Washington University, where he serves as a member of the Moot Court Board. While working as a summer clerk for the Honorable Lynn W. Davis of the Utah Fourth District Court, he worked on various projects promoting due process for non-English speaking minorities.



JUDGE LYNN W. DAVIS is the Presiding Judge of the Fourth District Court. He is chair of the Utah State Court Committee on Interpretation and Translation and he sits on various national advisory committees. He is a member of the charter class of the J. Reuben Clark Law School. In his spare time, he coaches youth soccer and baseball, and he and his family raise and train dogs for Guide Dogs for the Blind.

Immigration and cultural diversity are among the nation's most significant trends for the 1990s and the next century. These trends have had an impact on the administration of justice in the courts and on the rights of linguistic minorities. Jurists and lawyers generally do not understand the significance of the court interpreter's role and the unique needs of the linguistic minority in the courtroom. As a result, few trial judges and attorneys know what should be required of a court interpreter, what judicial duties arise in a case where interpreter services are used, and what can and does go wrong when court interpreting is improper.[2]

Court interpreters are frequently utilized in criminal cases in the State of Utah. Spanish, the Island languages, South East Asian languages and Navajo are the four most utilized categories of languages in Utah, with Spanish comprising 80-90% of the interpreters needs.

This presentation does not address the unique challenges of court interpretation for the hearing-impaired. The Utah Division of Rehabilitative Services establishes the proficiency of sign interpreters and establishes, maintains, updates, and distributes a list of qualified interpreters. Utah Code Ann. § 78-24a-1 et seq. (1992 & Supp. 1995) specifically deals with interpreters for the hearing-impaired. That is an important topic reserved for another day.

I. THE ROLE AND FUNCTION

The duty of the court interpreter is to interpret to the party or witness all statements made in open court as part of the case. The duty includes interpreting accurately for the judge, counsel and the jury what the accused or witnesses are saying when they speak. As pointed out in the Code of Judicial Administration, "the interpreter shall not answer questions or give advice but shall direct such requests to counsel and/or the court." CJA 3-306 (2)(B). The interpreter does not independently read rights, give legal advice, or conduct anything off the record unless authorized to do so by the court. It is very important to note that interpreters must not "correct erroneous facts posed in the questions and shall not correct the testimony given by the party or witness even if clearly in error." CJA 3-306 (20)(c)(vi). Sometimes judges reprimand interpreters for not correcting erroneous statements when, in fact, they are mandated not to do so by a Code of Professional Responsibility.

Attorneys and judges should understand the basic interpreter modes:

- **Simultaneous** – the interpreter speaks (interprets/transmits) at the same time as the source language person.
- **Consecutive** – the interpreter waits until the source language finishes, then interprets.
- **Sight translation** – the interpreter translates the source language from a written document.

"Current thinking in the field of judicial interpreting leans toward the use of consecutive interpretation when testimony or statements by non-English speakers are interpreted into English for the record, and simultaneous interpretation when the proceeding is taking place in English and needs to be interpreted for the benefit of non-English speakers."[3]

This fundamental background leads us to the constitutional underpinnings.

"[F]ailure to assign each defendant an individual interpreter . . . is not automatically reversible error."

II. CONSTITUTIONAL IMPLICATIONS OF COURTROOM INTERPRETATION

There is no federal constitutional provision guaranteeing the right to an interpreter,[4] and only a few states constitutionally guarantee non-English speaking defendants the right to an interpreter.[5] Courts, however, have recognized that when a criminal defendant is so unfamiliar with English that he cannot effectively communicate with his counsel or understand the charges against him, he is entitled to an interpreter to take full advantage of his constitutional rights and to ensure due process.[6] "The right of a criminal defendant to an interpreter is based on the fundamental notion that no person should be subjected to a Kafkaesque trial which may result in the loss of freedom and liberty."[7] The simple statement that a non-English speaking defendant is entitled to an interpreter belies the complexities inherent in this issue. The constitutional questions that arise include: when in the proceedings should an interpreter be provided, is each co-defendant entitled to an individual interpreter, and what are the applicable standards of review for violations of the interpreter provision requirement? Utah has not decided these important issues. Utah, in fact, has yet to establish a standard of review for interpreter violations. This section explores these issues.

STANDARD OF REVIEW – "HARMLESS BEYOND A REASONABLE DOUBT"

In trials of non-English speaking defendants, courts across the country have not applied a uniform standard of review to determine whether an error occurred at trial because of incompetent interpretation. In 1985, the California courts applied an "informed speculation" of prejudice standard of review for cases in which the defendant's right to an interpreter was violated.[8] Under this standard the defendant could only have the decision overturned on appeal for reversible error if he could show that he suffered either actual or "informed speculation of prejudice." This standard, however, was replaced by the "harmless beyond a reasonable doubt" standard of review in *People v. Rodriguez*[9] and *People v. Chaves.*[10] Other state and federal courts have reviewed the trial court's actions under an abuse of discretion standard.[11]

STAGES OF THE PROCEEDING

Rodriguez held that failure to assign each defendant an individual interpreter throughout all proceedings is not automatically reversible error. Nevertheless, significant decisions have leaned the other way, leaving one unsure of exactly what error will be found to violate the harmless beyond reasonable doubt threshold. For instance, *Monte v. State,*[12] holds that absent a valid waiver of one's right to an interpreter, or other circumstances that would

allow a defendant to understand the proceeding, failure of the trial court to appoint an interpreter during the pretrial hearings or sentencing is reversible error.[13] The Florida Appellate Court has held that failure to appoint an interpreter to a defendant during his plea constitutes reversible error.[14] In California, *People v. Mata Aguilar*[15] holds that a defendant must be able to communicate with her counsel throughout the trial, and that using the defendant's court appointed interpreter to interpret for the benefit of the jury violates that right.[16] *People v. Rios,*[17] another California case, established a defendant's right to hear and understand the testimony of all witnesses without fear of interrupting the trial, implying that one defendant cannot be required to share his interpreter with a co-defendant.

INTERPRETER CERTIFICATION

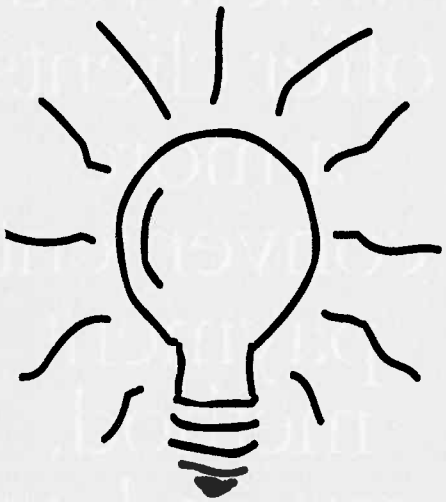
Once it is determined that the defendant needs an interpreter, the trial court must appoint an interpreter who is able to readily communicate with the defendant and accurately repeat and interpret the trial proceedings.[18] This does not necessarily mean that the interpreter must be certified. Most states have no formal certification process, and even though Utah has certified court interpreters, it is not necessary to be certified to be a court interpreter. In accordance with Utah Code of Judicial Administration, Rule 3.306(2), Utah courts shall appoint interpreters from a list of certified interpreters prepared by the administrative office, or the court shall appoint an interpreter after ascertaining that he/she has met the minimum requirements, which shall include: (1) an understanding of the terms used in court proceedings; (2) an ability to explain these terms in the English language and the foreign language which will be used; and (3) an ability to interpret these terms into the foreign language being used. Thus, if a certified interpreter is not used, it is the court's responsibility to evaluate whether the interpreter is qualified.

"To ensure quality court interpreting, a certification program is critical."

In several states, courts have held that absent a showing of incompetence, the appointment of an uncertified interpreter is not error.[19] The Utah Court of Appeals recently addressed the issue of appointment of court interpreters. In *State v. Fung,* the trial court appointed an interpreter on behalf of the defendant. The defendant objected to that appointment because the interpreter lacked courtroom experience. The trial judge questioned the interpreter in chambers and evaluated his experience and background. The court "found that [the interpreter] understood the court system adequately to perform the required duties," despite the fact that the interpreter lacked familiarity with some legal terms. In denying the defendant's appeal, the Utah Court of Appeals applied an abuse of discretion standard in reviewing the trial court's choice of an interpreter, and held that "the burden rests with the defendant to show that he was somehow denied a fair trial by the interpreter's deficiencies."[20]

III. UTAH'S RESPONSE TO THE LEGAL REQUIREMENTS NECESSITATING COURT INTERPRETERS[21]

Linguistic minorities appear in Utah's courts in substantial and increasing numbers.[22] In the average month, an estimated minimum of 250 proceedings involve a



non-English language interpreter. To ensure quality court interpreting, a certification program is critical. However, in Utah, as in most states, the problems related to interpreter certification are beyond an affordable solution at the state level due to inadequate expertise and financial capacity. Utah courts have not yet decided many issues regarding uncertified interpreters. Utah is currently in the process of considering the applicable standards for court interpreter certification at the state level.

Despite the lack of adequate funding for a comprehensive certification program, the Utah courts have made the following efforts to address court interpreter issues using existing resources. First, two training seminars (one day each) for court interpreters were offered in 1994, to teach interpreters the basics of interpreting in a court setting – including procedural and ethical issues. Eighty interpreters from around the state attended the training and their names have been provided to the courts. There have been two equally successful seminars in 1995. These seminars are not language specific and do not involve testing or result in any certification that can ensure the expertise level of those interpreters who complete the training.

Second, training has been provided to District, Circuit and Justice Court judges to assist them in court proceedings involving a court interpreter. Plans to train Juvenile Court judges are in progress.

Third, the AT&T "Language Line" interpreter service was installed on a pilot basis in the West Valley City Circuit Court. This system is a cost-effective means of dealing with interpreter needs that occur in *short hearings* such as arraignments and sentencings, rather than bringing in and paying an interpreter. It is particularly useful in cases involving languages that are not commonly used in Utah, and for which interpreters are not readily available.

Finally, several frequently used court documents have been translated into Spanish for use in all courts and by all public defenders and prosecutors. These are currently undergoing revision, and new versions will soon be distributed.

The goal for several years has been to obtain funding, through federal grant sources and/or appropriations from the state legislature, for a court interpreter certification program. Because the costs are substantial (to develop and administer tests in *one* language may exceed $100,000), interpreter certification lends itself especially well to interstate resource sharing; Utah's long-term strategy is to join with other states to share in the benefits of their interpretation certification efforts.

The National Center for State Courts has formed a "State Court Language Interpreter Certification Consortium" with membership currently consisting of the states of Utah, Washington, New Jersey, Minnesota, Oregon, Maryland, New Mexico, Virginia, and also the City of Philadelphia. Other states have also shown an interest in participating in the Consortium. To establish the Consortium, the founding states contributed court interpreter skills tests in several foreign languages and underwrote the planning and organizing costs. The purpose of the Consortium is to establish court interpretation test development, administration standards, and provide testing materials to individual states. This will enable

individual states and jurisdictions to have the necessary tools and guidance to implement certification programs.

Utah's Administrative Office of the Courts has now been awarded federal grant funding from the Byrne Memorial State and Local Law Enforcement Assistance Program to develop a court interpreter certification program for Spanish language interpreters. With the funding, Utah has joined the Consortium and has contracted with the National Center for State Courts to conduct training, testing and certification for Utah court interpreters. The grant funding is available for one year only. To provide for an ongoing interpreter certification program and for expansion of the program to other languages, a budget request is being prepared for submission to the 1996 Legislature.

IV. SUGGESTIONS FOR THE PRACTITIONER

The quality of court interpretation cannot be evaluated or challenged on appeal absent an audio and/or video record of the proceedings. This is a concern for those judges who typically only use a court reporter. It is obvious that a court reporter does not preserve any non-English record for appeal or review.

It is recommended for all settings where a court interpreter is used that an audio and/or audio-visual record be maintained. Court personnel should confirm that audio equipment adequately records the interpretation. Since the position of the interpreter may change in the courtroom, assurances of adequate sound pickup are imperative. In any trial, the use of recording equipment should be mandated.

Attorneys and judges ought to appreciate how difficult, complex and incredibly mentally demanding court interpretation is. Judges must be aware of the fatigue factor associated with interpreting, particularly consecutive interpreting. There is a wide range of language skills represented in the courtroom: judges, attorneys, witnesses and the accused. An expert witness who, for example, has a post doctorate degree needs to be understood by an accused who may have no formal education whatsoever.

A paper of this length can only briefly touch upon practical considerations. A "Practitioner's Checklist" has been attached and its use may prove helpful in avoiding miscarriages of justice.

CONCLUSION

Immigration and demographic changes in language use present enormous challenges and consequences for the judiciary. Courts are increasingly compelled to use language interpreters in court proceedings. Furthermore, this diversity makes it increasingly difficult for the criminal justice system to meet Constitutional requirements of fundamental fairness, equal protection, and the right to confront and cross examine adverse witnesses. Language barriers and barriers erected by cultural misunderstandings can render criminal defendants virtually absent from their own court proceedings, and can result in misinterpretation of witness statements made to police or triers of fact during court proceedings. Further, language minority litigants are deterred from using the civil justice system as a forum for redress of grievances.

Non-English speaking defendants are entitled to an interpreter to take full advantage of constitutionally guaranteed rights and to ensure due process. The State of Utah is taking important steps in developing a certified interpreter program. Part of this important process involves the education of lawyers and jurists regarding the role of the court interpreter. Counsel and judges should give deference to the important role of the court interpreter; interpreters should be treated with dignity and as professionals.

The interpreter "may not edit, summarize, add, or omit meaning. The original message must be transmitted exactly, or as closely as possible, into the second language."[23] Once judges and counsel understand this role, it is hoped they will respect it, appreciate the difficulty of its performance and cooperate in its fulfillment.

[1] "Justice for all" in Spanish.

[2] Portions of this paper are drawn from the following article: Judge Lynn W. Davis & William Hewitt, *Lessons in Administering Justice — What Judges Need to Know About the Role, Function and Professional Responsibility of the Court Interpreter,* Harvard Latino Law Review (forthcoming 1996).

[3] Fundamentals of Court Interpretation: Theory, Policy and Practice, Gonzales, Vasques & Mikkelson, Carolina Academic Press, 1991, p. 163.

[4] *Cervantes v. Cox*, 350 F.2d 855 (10th Cir. 1965) (observing that there is no per se constitutional right to an interpreter to supplement the right to assistance of counsel).

[5] *See, e.g.,* CAL CONST. ART. I § 14 ("A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings").

[6] *United States ex. rel. Negron v. New York,* 434 F.2d 386 (2d Cir. 1970) is perhaps the most significant case regarding court interpretation. In that case, Negron, a Puerto Rican American with a sixth-grade education, was found guilty of murder. He neither spoke nor understood English, and his court-appointed lawyer spoke no Spanish. The testimony of two Spanish-speaking witnesses was interpreted for the benefit of the jury by an interpreter employed by the prosecution, but she did not interpret the testimony of English speaking witnesses for Negron except for providing summaries during recesses. In affirming the district court's grant of relief on Negron's habeas corpus petition, the court of appeals held that it is imperative that every criminal defendant possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. Not only for the sake of effective cross-examination, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as his trial proceeded. *Id.* at 390.

[7] *People v. Mata Aguilar,* 677 P.2d 1198, 1200.

[8] *People v. Resendes,* 210 Cal. Rptr. 609 (1985).

[9] 728 P.2d 202 (Cal. 1986).

[10] 283 Cal. Rptr. 71 (Ct. App. 1991).

[11] *See, e.g., People v. Warren,* 504 N.W. 2d 907 (holding that abuse of discretion will be found only where it appears that the witness was not understandable, comprehensible, or intelligible, and that absence of an interpreter deprived the defendant of some basic right); *United States v. Yee Soon Shin,* 953 F.2d 559 (9th Cir. 1992); *United States v. Rosa,* 946 F.2d 505 (7th Cir. 1991); *Valladares v. United States,* 871 F.2d 1564 (11th Cir. 1989).

[12] 443 So.2d 339 (App. 2d Dist. 1983).

[13] *See United States v. Cirrincione,* 780 F.2d 620 (7th Cir. 1985) (holding that a criminal suspect was entitled to translation during pretrial hearings); *Martinez v. State,* 449 N.E.2d 307 (Ind. Ct. App. 1983) (holding that the defendant was denied effective assistance of counsel and the right to be meaningfully present at every stage of proceedings when no interpreter was present for vior dire or jury panel).

[14] *Balderrama v. State,* 433 So.2d 1311, 1313 (Fla. App. 2d Dist. 1983) (citing Fla. R. Crim. P. 3.170(j)).

[15] 677 P.2d 1198, 1200.

[16] *See People v. Nieblas,* 207 Cal. Rptr. 695 (Ct. App. 1984) (holding that defendant's right to an interpreter was violated when the court borrowed his interpreter to assist in testimony of three prosecution witnesses, thus making it impossible for him to communicate with his attorney or understand instructions and rulings of judge during that period).

[17] 161 Cal. App. 3d 905, 912 (1984).

[18] *State v. Van Pham,* 675 P.2d 848 (Kan. 1984).

[19] *People v. Estrada,* 221 Cal. Rptr. 922 (Ct. App. 1986) (holding that defendant has no right to a certified interpreter, only to a competent interpreter, and thus use of an uncertified interpreter at a preliminary hearing was not error); *Montoya v. State,* 811 S.W.2d 671 (Tex. Crim. App. 1991) (holding that the trial court did not err in appointing a Spanish-speaking bailiff to fill in for the qualified interpreter who became ill, because there was no evidence that the bailiff was not competent to act as interpreter).

[20] *State v. Fung,* Utah Adv. Rep. 24 (CA, 12/7/95).

[21] Special thanks to Holly Bullen and the Utah Administrative Office of the Courts for her valuable contribution to this section.

[22] Based on data derived from the payments made to language interpreters provided by the Administrative Office of the Courts, the following is a district by district list of the use of court interpreters. The languages are listed according to frequency of use.

1st District: District – Spanish, Iranian, Cambodian. Juvenile – Spanish, Iranian, Cambodian, Laotian.

2nd District: District – Spanish, Vietnamese, Laotian, Chinese. Circuit – Spanish, Vietnamese, Laotian, Chinese. Juvenile – Spanish, Vietnamese, Laotian.

3rd District: District – Spanish, Vietnamese, Tongan, Arabic. Circuit – Spanish, Vietnamese, Tongan, Arabic. Juvenile – Spanish, Vietnamese, Laotian, Thai, Tongan.

4th District: District – Spanish, Vietnamese, Japanese, Tongan. Circuit – Spanish, Vietnamese, Japanese, Tongan.

5th District: District – Spanish, Navajo, Vietnamese, Polish. Juvenile – Spanish, Navajo, Vietnamese, Polish.

6th District: District – Spanish, Navajo, Vietnamese. Juvenile – Vietnamese only.

7th District: District – Spanish, Navajo.

8th District: District – Spanish only. Juvenile – Spanish only.

[23] Samuel Adelo, "Courtroom Interpreters Often Misunderstood," The New Mexico Lawyer, May 4, 1992 at 20.

The Courtroom Interpreter
A User's Guide and Checklist

PRE-TRIAL CONFERENCE CONSIDERATIONS:[1]

- ❑ Appoint interpreters at the earliest stage to afford preparation.
- ❑ Consider the possible need for multiple interpreters.[2]
- ❑ Remember the fatigue factor and necessity of recesses.
- ❑ Be aware of and caution the participants regarding speed and simultaneity of conversation.
- ❑ Discuss interpreter modes – simultaneous, consecutive, and sight translation.
- ❑ Allow the interpreter contact with the accused in order to:
  1. explain the interpreter role including the fact that everything will be interpreted, including vulgarities;
  2. confirm education level.
  3. become familiar with dialects, jargon, regionalisms, and colloquial expressions; and
  4. explain the role of the interpreter and emphasize that interpreting is not an advocate role.
- ❑ Supply all written documents which will need to be sight translated at trial to the interpreter and advise the interpreter of experts who will testify at trial.
- ❑ Lawyers representing non-English speakers should always determine the immigration/naturalization status of their clients. (What appears as a great plea bargain for the moment, may result in the deportation of the client or otherwise disturb the client's legal status.)

TRIAL CONSIDERATIONS

- ❑ Physical accommodations: microphone and sound equipment may be needed to hear speakers. Interpreters should stand or sit where they will not block the view of the judge, jury, counsel, or accused and must be able to hear every speaker.[3]
- ❑ Certify or qualify and voir dire interpreter.[4]
- ❑ Administer oath.[5]
- ❑ Allow counsel to take exception to qualification.[6]
- ❑ Always refer to interpreter by name.
- ❑ Give preliminary instructions to the jury, parties and witnesses regarding the role of the interpreter.[7]
- ❑ Caution participants about speed, clarity and simultaneity of speech.
- ❑ Take breaks to avoid fatigue.
- ❑ Watch for interpreter improprieties.[8]
- ❑ Consider the unique requirements of an interpreter for the deaf or hearing impaired.
- ❑ Make and preserve a record: audio, if non-english speaking, or audio/visual, if deaf or hearing impaired speaker.

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[1]It is invaluable to include the interpreter at pretrial. While it may not be as necessary for a routinized arraignment, preparation for a hearing, motion or trial is imperative. Inclusion of an interpreter at pretrial allows her to understand the case, examine the file, examine written documents, and be advised of the extent of expert witnesses and field of technical language. At pretrial an interpreter can be advised of specific documents which might be used at trial such as written confessions or affidavits.

[2]Multiple interpreters are necessary in lengthy or complex cases. Many states now use two courtroom interpreters; one for client-attorney conversation and the other to interpret for the record. It is also obvious that multiple interpreters are necessary with multiple non-English speaking defendants. The number of interpreters can be reduced by the use of headsets.

[3] 1) Interpreters ought to have access to drinking water at counsel table or nearby without interruption.
2) Interpreters ought to be positioned to maintain eye contact with parties, the lawyers and the judge. "The interpreter shall be positioned in the courtroom to hear the witness or party but shall not block the view of the judge, jury, or counsel." CJA 3-306 (2) (C) (vii).

[4]Before the oath is administered, until such time as a certification procedure is adopted, some inquiry should be made by the judge to assure proficiency of an interpreter appearing for the first time and to insure absence of bias. Simple, but fundamental questions such as the following might be asked:

- Do you have any particular training or credentials as an interpreter?
- What is your native language?
- How did you learn English?
- What was the highest grade you completed in school?
- Have you spent any time in the foreign country?
- Did you formally study either language in school? Extent?
- How many times have you interpreted in court?
- Have you interpreted for this type of hearing or trial before? Extent?
- Do you know the applicable legal terms in both languages?
- Are you a potential witness in this case?
- Do you have any other potential conflicts of interest?
- Have you had an opportunity to speak with the non-English speaking person informally?
- Were there any particular communication problems?
- Are you familiar with the dialectal or peculiarities of the witnesses?
- Can you interpret simultaneously?
- Can you interpret consecutively?
- Do you have any teaching experience?
- Have you interpreted in any non-court settings?
- Have you ever had your interpreting skills evaluated?
- Have you ever been qualified by a judge to interpret in court?
- Have you ever been disqualified from interpreting in any court or administrative hearing?
- Have you had training in Professional Ethics for Court interpreters?
- Have you ever been arrested, charged or held by federal, state or other law enforcement authorities for violation of any federal law, state law, county or municipal law, regulation or ordinance?

Many of the above questions were drawn from two sources: (1) Heather K. Van Nuys & Joanne I. Moore, *Using an Interpreter in Court,* Washington State Bar News, May 1987, at 13; and (2) A document which is being circulated for review by The California Judicial Council, entitled, "Recommended Procedures for Finding Certified Interpreters and Voir Dire Procedures to Establish the Qualifications of a Noncertified Interpreter."

[5]The court should make a preliminary determination on the basis of the interpreter's testimony that the interpreter is qualified and then have the following oath administered:

Oath

Do you solemnly swear that you will well and truly and to the best of your ability discharge the duties of interpreter and that you will interpret and translate from English into _____, and from _____ into English such questions and answers as shall be put to the witness and received from the witness in the case now pending before the Court, so help you God?

[6]The court may also allow counsel to question the interpreter before he or she is sworn to discharge the duties of interpreter. Utah Rules of Criminal Procedure, Rule 15. It is also well to note that interpreters are subject to the provisions of the Utah Rules of Evidence relating to qualifications as an expert and the administration of an oath or affirmation that he/she will make a true translation. Utah Rules of Evidence, Rule 604.

[7]A preliminary instruction should be given to the jury to advise the jurors of the important role of the interpreter; that he or she is not an advocate for the accused, nor part of the defense team. Judges are required by Rule 3-306 (2) to instruct the parties or witnesses: a) to speak so that the entire court can hear, not just the interpreters; and b) not to ask questions, seek advice or engage in discussion with the interpreter, but to direct questions to counsel or the court. (See Rule 3-306(2)(A-B), Utah Code of Judicial Administration).

[8]Judges need to watch for interpreter improprieties, such as:

1) Improper influence of the answer by head nodding, facial expressions;
2) Lengthy exchanges between the interpreter and the accused;
3) Otherwise leading of the witness;
4) Answering questions, giving advice, etc.
5) The interpreter's task is to interpret, not to arbitrate or mediate a resolution of a case. Lawyers and judges should address the parties, not the interpreter; and
6) When speaking for the accused, the interpreter should speak in the first person; not "he said he didn't do it," but "I didn't do it."

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Real Property Section
Women Lawyers of Utah
Michie Company
Blue Cross Blue Shield of Utah
First Interstate Bank Trust & Private Client Service
Attorney's Title Guaranty Fund, Inc.
Knight Adjustment Bureau
Sedgwick James/CNA Insurance
Software Studios, Inc.
Utah Bar Foundation
Rollins Hudig Hall of Utah, Inc.
21st Century Office
The ITC Companies

1996 Mid-Year Convention

PROGRAM

( ) Indicates Number of CLE Hours Available

THURSDAY, MARCH 7, 1996

6:00 – 8:00 p.m. **Registration and Opening Reception**
Hotel Lobby/Sabra Rooms
Utah Opera Presentation
Sponsored By: Jones, Waldo, Holbrook & McDonough
Blue Cross/Blue Shield of Utah
First Interstate Bank Trust & Private Client Service

7:00 – 12:00 a.m. **Fun Bus to Mesquite's Players Island**
Meet in front of the Holiday Inn

FRIDAY, MARCH 8, 1996

7:30 a.m. **Registration/Continental Breakfast** – *Hotel Lobby*
Sponsored By: Farr, Kaufman, Sullivan, Gorman, Jensen, Medsker, Nichols, & Perkins; Snow, Nuffer, Engstrom, Drake, Wade & Smart

8:00 a.m. **Opening General Session** – *Sabra Rooms*
Welcome and Opening Remarks
Dennis V. Haslam, President
G. Scott Jensen, Chair, 1996 Mid-Year Meeting

8:10 a.m. **The Business of Sports** – *Sabra Rooms* **(1)**
Leigh Steinberg, Steinberg & Moorad
Leigh Steinberg, well known sports attorney, will discuss his experiences and expertise on the art of negotiating personal service contracts for professional athletes.
Sponsored By: Litigation Section

9:00–9:25 a.m. **Break** – *Hotel Lobby*
Sponsored By: Ray, Quinney & Nebeker
Snow & Jensen

9:25 a.m. **Breakout Sessions:** **(1 each)**

1 **Tripping Over Good Intentions: Common Pitfalls in Employment Law** – *Hilton Inn*
Kathryn O. Balmforth, Wood, Quinn & Crapo
How lawyers can avoid common employment law traps.

2 **Why Don't They Let Your Evidence In? Common Problems With Admissibility** – *Sabra ABC*
Hon. Dee V. Benson, U.S. District Court, District of Utah
Hon. Ronald E. Nehring, Third District Court
Hon. Anne M. Stirba, Third District Court
An indepth substantive review of a few common admissibility issues.

3 **Write Well in Less Time** – *Sabra FG*
Dr. Joe Moxley, Department of English, University of South Florida
This former ABA presenter will show how you can produce effective documents in less time. Writing myths, effective writing habits and strategies will be critiqued.

9:30–12:30 p.m. **Kid's Fiesta Fun Activity** – *meet at Fiesta Fun – Family Fun Center*

10:15– 10:30 a.m. **Break** – *Hotel Lobby*
Sponsored By: Real Property Section
Corporate Counsel Section

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

4 **Black Eyes and Broken Bones: What To Do When Your Client Is Not Safe at Home** – *Sabra ABC*
Commissioner Michael S. Evans, 3rd District Court
Domestic violence prevention & changes in protective orders.

5 **Planes, Trains, and Automobiles: An Introduction to International Business Law** – *Hilton Inn*
David R. Rudd, Holland and Hart
Mark Wolfert, Senior International Legal Counsel, NuSkin
A non-practitioners guide to International Business Law.

6 **Editorial Secrets** – *Sabra FB*
Dr. Joe Moxley, Department of English, University of South Florida
Learn how to produce effective documents by systematizing revision and by employing readability guidelines

11:20–11:35 a.m. **Break** – *Hotel Lobby*
Sponsored By: Women Lawyers of Utah

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

7 **Disclosure – You've Read the Book, You've Seen the Movie . . . Now Get the Picture** – *Sabra ABC*
A star-studded cast of real life action heroes will play out what is fact and fiction: What do women really want in the office, the courtroom and the boardroom?

8 **David vs. Goliath: How Small Firms Can Compete With Large Firms in Providing Quality Legal Services at Competitive Costs** – *Sabra FG*
Moderator – Rex C. Bush, Attorney at Law
This session will cover topics including small firms doing complex litigation, using the Internet and other current technologies, the ethics of practice development, qualifying clients and cases, and finding your niche.

9 **Holding On To the Family Farm in the 90's** – *Hilton Inn*
G. Fred Metos, McCaughey & Metos
This session will be a basic primer for all lawyers and relates to the history and recent developments in forfeiture, double jeopardy and excessive fines, including new constitutional limitations on forfeiture.

10 **Basic Bankruptcy** – *Hilton Inn*

12:00 noon **Golf Clinic** – *Green Spring Golf Course*

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

1:15 p.m. **Golf Tournament** – *Green Spring Golf Course*

2:00 p.m. **Tennis Tournament** – *Green Valley Tennis Courts*

2:00 p.m. **Trapshoot Tournament** – *Green Valley Skeet & Trap Range*

7:00 p.m. **Reception** – *Holiday Inn Lobby*
Sponsored By: The Michie Company

7:30 p.m. **Dinner** – *Holiday Inn Sabra Rooms*
Speaker: The First Thing We Do, Let's Kill All The Cartoonists – Pat Bagley

PROGRAM CONT.

( ) Indicates Number of CLE Hours Available

Sponsored By: VanCott, Bagley, Cornwall & McCarthy

9:30 p.m. **The Jammin' Jurist's Mid-Year Music Festival** – *Holiday Inn Sabra Rooms*

SATURDAY, MARCH 9, 1996

7:00 a.m. **Fun Run** – *Snow Canyon*

7:30 a.m. **Registration/Continental Breakfast** – *Hotel Lobby*

Sponsored By: Parsons Behle & Latimer

7:50 a.m. **Court Technology Committee Report** – *Holiday Inn Sabra Rooms*
Hon. Anne M. Stirba, Chair, Court Technology Committee

8:00 a.m. **ETHICS General Session** – *Holiday Inn Sabra Rooms*
Views from the Bench: Making the Most of Your Court Appearances (1.5)
Hon. Guy R. Burningham, 4th District Court
Hon. J. Philip Eves, 5th District Court
Hon. Leslie A. Lewis, 3rd District Court
Hon. Gordon J. Low, 1st District Court
Hon. Rodney S. Page, 2nd District Court
Hon. Sandra N. Peuler, 3rd District Court
Moderator – Hon. Michael D. Lyon, 2nd District Court
District judges will offer trial practice suggestions in such areas as ethics, professionalism, motion practice, briefing, oral arguments and attorney's fees; they will also identify behaviors and practices of successful trial attorneys.

9:00 a.m. **Tennis Clinic** – *Vic Braden Tennis College*

9:15–9:40 a.m. **Break** – *Hotel Lobby*

Sponsored By: Fabian & Clendenin
Rollins Hudig Hall of Utah, Inc.

9:40 a.m. **Breakout Sessions: (1 each)**

11 **Legislative Update** – *Sabra ABC*
Robin L. Riggs, Counsel to Governor Leavitt
A review of the 1996 session of the Utah Legislature.

12 **Introduction to Patent, Trademark and Copyright Law** – *Hilton Inn*
Charles L. Roberts, Madson & Metcalf
Todd E. Zenger, Workman, Nydegger & Seeley
This session will cover fundamental principles necessary for a general practitioner regarding intellectual property matters. Patent and Trademark law changes resulting from GATT implementation legislation will also be reviewed, as well as current developments in copyright law.

13 **The Perils of Appeals: What the Trial Lawyer Needs to Know** – *Sabra FG*
David L. Arrington, VanCott, Bagley, Cornwall & McCarthy
J. Frederic Voros, Jr., Attorney General's Office
A concise look at the most common procedural pitfalls, including the preservation requirement and its exceptions, cross-appeals, marshalling, standards of review, waiver, and oral argument requests.

14 **Why Did the Tortoise Cross the Road? A Case History of Habitat Conservation** – *Hilton Inn*
Bill Mader, Habitat Conservation Plan Administrator, Washington County
Ronald Thompson, District Manager, Washington County Water Conservancy District
This session will explore the tensions between conservation and development under the federal Endangered Species Act (ESA) by examining the creation of a Habitat Conservation Plan (HCP) for the desert tortoise. Participants in the process will give their thoughts in a case-history type discussion.

10:30–10:45 a.m. **Break** – *Hotel Lobby*

Sponsored By: Christensen & Jensen

10:45 a.m. **Breakout Sessions: (1 each)**

15 **How to Find the Information You Really Need: Effective Legal Research** – Hilton Inn
Suzanne Miner, Computer Services Librarian, U of U College of Law
Rita Reusch, Director, U of U College of Law Library
Marsha Thomas, Reference Outreach Librarian, U of U College of Law
Basics of legal research and accessing additional resources beyond your office.

16 **ETHICS: Client Trust Accounting: How to Account for Client Funds and Stay Out of Trouble** – *Sabra ABC*
Stephen R. Cochell, Office of Attorney Discipline
This session will cover the basic principles of client trusts accounting for solo and small firm practitioners, the areas of frequent client complaints and potential disciplinary action by the Bar.

17 **Should We Ever Trust A Judge? Minimum Mandatory Sentencing** – *Sabra FG*
Paul G. Cassell, University of Utah
Ronald J. Yengich, Yengich, Rich & Xaiz
Moderator – John T. Nielsen, Chair, Utah State Sentencing Commission
This debate will discuss minimum mandatory sentencing and who should determine the length of sentencing: Judges or Legislators.

18 **Community Property Issues in a Common-Law State** – *Hilton Inn*
Lyle R. Drake, Snow Nuffer, Engstrom, Drake, Wade & Smart
Learn how to deal with clients' community property when those clients have moved between community and common law property states.

11:35–11:50 a.m. **Break**

Sponsored By: Salt Lake County Bar

11:50 – 2:00 p.m. **Salt Lake County Bar Film Presentation and Discussion: *Compulsion*** – *Sabra ABC* **(2.5)**
(2.5 hours CLE credit available through the Salt Lake County Bar)
Hon. Timothy R. Hanson, Third District Court
Hon. Leslie A. Lewis, Third District Court
Hon. Ronald E. Nehring, Third District Court
Ronald J. Yengich, Yengich, Rich & Xiaz
This 1959 film based on the Loeb and Leopold trial will be followed by an intriguing panel discussion.

2:00 p.m. **Meetings Adjourn**

2:30 p.m. **Mountain Biking Tour**

Discipline Corner

DISBARMENT

On January 4, 1996, the United States District Court for the District of Utah, Central Division disbarred A. Paul Schwenke from the practice before that court based upon the court record of the disbarment proceedings *In re Schwenke,* 865 P.2d 1350 (Utah 1993), *cert. denied,* 115 S.Ct. 93 (1994).

In 1985, Schwenke represented Caren Serr in a personal injury action. In 1987, Serr and her husband Ron Serr filed a complaint with the Office of Bar Counsel ("the Bar") alleging that Schwenke had violated the Rules of Professional Conduct by misappropriating approximately $100,000 in the course of settling Serr's personal injury case. The matter was then held in abeyance pending the outcome of civil litigation between the parties.

On September 19, 1989, the parties entered into a stipulation in the third district court in which Schwenke agreed to a $100,000 judgment against him based on fraud, not dischargeable in bankruptcy. The hearing panel found that pursuant to the $100,000 stipulated judgment entered by third district court, Schwenke had paid $250 and conveyed a Duchesne County property valued at $2500 to Serr, leaving a balance of $97,250. The panel recommended that Schwenke be disbarred and that he make restitution to Serr in the amount of $97,250. On December 1, 1993, the Utah Supreme Court affirmed the order of disbarment and payment of restitution.

INTERIM SUSPENSION

On December 29, 1995, the Fourth Judicial District Court placed Stott P. Harston on interim suspension from the practice of law. This action was taken as a consequence of the Bar having received approximately 16 complaints from Respondent's clients. The substance of the complaints are that Mr. Harston accepted the complainants as clients, accepted a fee, and then failed to provide any meaningful legal services, return phone calls, appear at hearings, or advise the clients as to the status of their cases. He will remain on interim suspension until further order of the court.

PROBATION

On November 27, 1995, the Third Judicial District Court entered an Order of Discipline Reprimanding John M. Bybee and placing him on unsupervised probation for one year to commence on or about December 31, 1995, which is the day following termination of his probation in a prior disciplinary matter. The Order was entered pursuant to a Discipline by Consent for violating Rules 1.3, 1.4(a), and 1.4(b) of the Rules of Professional Conduct of the Utah State Bar.

On or about November 1992, a client retained Mr. Bybee to collect back due child support. Respondent failed to serve the ex-husband with appropriate documents until approximately June, 1993 and failed to attend hearings that had been scheduled for March and May, 1993. On July 13, 1993, the court awarded the client a judgment, however, Respondent did not prepare an appropriate order to submit to the court for signature until December, 1993. During the period of time Respondent represented this client, he failed and refused to take or return her telephone calls, failed to advise her that certain hearings on her case had been postponed, that he would not attend those hearings, and he failed and refused otherwise to keep her advised of the status of her case.

ADMONITION

On December 18, 1995, the Chair of the Ethics and Discipline Committee Admonished an attorney for violating Rule 1.4(a) and 1.4(b), Communication, of the Rules of Professional Conduct based upon the recommendation of a Screening Panel of the Ethics and Discipline Committee. Respondent was retained on or about March 30, 1994 to represent the clients in a landlord tenant matter. The case was tried on December 2, 1994. Thereafter Respondent failed to properly advise his clients of the Final Judgment in the matter.

NOTICE OF PETITION FOR REINSTATEMENT
IN THE MATTER OF DISCIPLINE OF JAMES N. BARBER
CIVIL NO. 930903956
THIRD DISTRICT COURT

On December 8, 1995, James N. Barber filed a Petition for Reinstatement to the practice of law in Utah pursuant to the terms of Rule 25 of the Rules of Lawyer Discipline. Pursuant to the Order of Discipline entered in the above matter by Judge William B. Bohling, Mr. Barber was suspended from the practice of law for a period of 2 1/2 years beginning on July 6, 1993, for violating Rule 8.4 of the Code of Professional Conduct. He is eligible for reinstatement upon order of the district court on completion of the following conditions: (1) the payment of restitution to all complainants; and (2) the completion of all the terms and conditions imposed by Rule 25 of the Rules of Lawyer Discipline, including attending Ethics School, successfully passing the Multistate Professional Responsibility Examination and not violating the order of suspension.

Also pursuant to the Order of Discipline, after reinstatement, Mr. Barber shall be placed on probation for an additional 2 1/2 years during which time he will be under the direct supervision of attorneys approved by the Bar who will have access to all of Mr. Barber's client files and will make monthly reports to the Office of Attorney Discipline regarding his case load and each of his clients.

Rule 25 of the Rules of Lawyer Discipline requires that notice of the Request for Reinstatement be sent to all complainants and published in the *Utah Bar Journal,* and that any individual who opposes or concurs with Mr. Barber's Petition for Reinstatement may file notice of their opposition or concurrence with the Honorable William B. Bohling of the Third District Court, 240 East 400 South, Salt Lake City, Utah 84101, within 30 days of publication.

ATTENTION: All State, County and Municipal Courts and Civil Practitioners

Pursuant to Utah Code Ann. § 15-1-4, the postjudgment interest rate for judgments entered between January 1, 1996 and December 31, 1996 is 7.35%. This rate does not apply to judgments based on lawful contracts specifying an interest rate agreed upon by the parties or to judgments for which a statute specifies another rate of interest.

Scott M. Matheson Award

In 1991, the Law-Related Education and Law Day Committee of the Utah State Bar presented the first annual Scott M. Matheson Award. Last year the fifth annual award recipients were Gordon K. Jensen and the Utah Attorney General's Office. Currently, the committee is accepting applications for the 1996 Scott M. Matheson Award.

PURPOSE: To recognize a lawyer and a law firm who have made an outstanding contribution to law-related education for youth in the State of Utah.

CRITERIA: Applications will be accepted on behalf of individuals or law firms who have:

1. Made significant contributions to law-related education for youth in the State of Utah, such contributions having been recognized at local and/or state levels.
2. Voluntarily given their time and resources in support of law-related education, such as serving on planning committees, reviewing or participating in the development of materials and programs, and participating in law-related education programs such as the Mentor/Mid-Mentor Program, Mock Trial Competition, Conflict Management Program, Volunteer Outreach, Judge for a Day, or other court or classroom programs.
3. Participated in activities which encourage effective law-related education programs in Utah schools and communities, such programs having increased communication and understanding between students, educators, and those involved professionally in the legal system.

APPLICATION PROCESS: Application forms may be obtained from and submitted to the:

Scott M. Matheson Award
Law-Related Education and
Law Day Committee
Utah Law and Justice Center
Box S-10, 645 South 200 East
Salt Lake City, Utah 84111
Phone: 322-1802

Included in the application should be a cover letter, a one page resume, and the application form. The form describes the following criteria to be used by the selection committee in evaluating the applicant:

- materials which demonstrate the applicant's contributions in the law-related youth education field;
- copies of news items, resolutions, or other documents which evidence the applicant's contribution to law-related education for youth;
- a maximum of two letters of recommendation.

All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Applications must be postmarked no later than March 15, 1996.

Popular Going Solo Seminar Expanded into Seminar Series

Due to the overwhelming popularity of the Going Solo Seminar held recently, the program has been expanded and will be offered as a series through the University of Utah College of Law.

The program, presented by the Solo/Small Firm Committee of the Utah State Bar, covers a variety of law management topics, which include: Technology in Your Practice; Personnel & Facilities Issues; Choice of Operating Entity; How to Make It; Ethics of Practice Development; and Financial Management.

This series is directed at those about to enter into a solo or small firm practice or those attorneys in the initial phases of starting a practice. More experienced practitioners may even find some useful information applicable to their practices.

The Going Solo Seminar series will be held Wednesday evenings from 5:30 to 7:00 p.m. in room 105 of the Law Building on the University of Utah campus. The dates for the programs are: Feb. 7, Feb. 14, Feb. 21, Feb. 28, Mar. 6 and Mar. 13. To reserve your place at any session, contact Leslie Morley at (801) 581-7767. The cost is $15.00 per evening, payable at the door. This program is approved for 9 hours of CLE credit.

The Bar Gratefully Acknowledges
the Services of

PERRIN R. LOVE, ESQ.

and

E. BARNEY GESAS, ESQ.

of the firm of

CAMPBELL, MAACK & SESSIONS

for their assistance as
special prosecutors
in the
Attorney Discipline matter of
In re Jean R. Babilis

Both Perrin and Barney
contributed pro bono services
on behalf of the Bar
in the trial of this complex case

The Bar Gratefully Acknowledges
the pro bono services
rendered by

BRUCE L. JORGENSEN, ESQ.

in acting as an expert witness
on probate matters in the
attorney discipline case
In re Jean R. Babilis
before
The Honorable Gordon J. Low

Mr. Jorgensen's invaluable assistance
on complex probate matters
was a credit to the firm of
OLSON & HOGGAN
and to the Bar

The Bar Gratefully Acknowledges
the pro bono services of

FRANCIS J. CARNEY, ESQ.

of the firm of

SUITTER, AXLAND & HANSON

for his assistance as
special prosecutor
in a complex securities matter

To the Membersof the Utah State Bar Association, Their Employees and Associates and Court Personnel

The Bar Association's Sixth Annual Food and Clothing Drive was very successful this year, garnering over five truck loads of new, nearly new and used clothing and new and used toys and food of all types; $1,855 was also donated for payment to various charities being supported.

The response was overwhelming, as Toby Brown (Co-Chairman), his son Sean and I saw more contributors come to the Law and Justice Center than ever before.

A special thanks goes out to the volunteers who contacted us and headed the drive at their firms, and to the Salt Lake County Bar Association and the Securities Subsection Members of the Bar Association, whose efforts were especially helpful.

Some of the donated funds were paid to the Jennie Dudley Eagle Ranch Ministry; Ms. Dudley has been feeding the homeless every Sunday under the Fourth South Viaduct for a number of years, and several members of the Bar were kind enough to bring food donations and serve as volunteers on Thanksgiving and Christmas.

Thank you very much for your support.

Leonard Burningham

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $5.00. Thirty six opinions were approved by the Board of Bar Commissioners between January 1, 1988 and September 22, 1995. For an additional $2.00 ($7.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1996.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($5.00 each set)
_____	Ethics Opinions/Subscription list	_____ ($7.00)

Please make all checks payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Maud Thurman
645 South 200 East #310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Committee Seeks Comments on Recorded Telephone Conversations

Ethics Advisory Opinion No. 90 permits attorneys to tape-record conversations to which they are a party without disclosing the fact of the recording. The Ethics Advisory Opinion Committee is currently considering issuing an opinion that would provide further guidance to attorneys about the ethical aspects involved in undisclosed recording. The Committee solicits comments or suggestions from members of the Bar regarding the ethical issues raised by undisclosed tape recording of conversations. Please submit written comments by February 29, 1996, to:

Gary G. Sackett, Chair
Utah State Bar
Ethics Advisory Opinion Committee
P.O. Box 45433
Salt Lake City, Utah 84145

or e-mail to Gary S@QC2PO.QSTR.ORG

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics

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

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

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

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

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

Management's Comments Regarding Financial Statements Year Ended June 30, 1995

TO ALL BAR MEMBERS:

The following pages summarize the financial results for the Utah State Bar (the Bar), the Client Security Fund, and the Bar Sections for the year ended June 30, 1995. The Bar's financial statements were audited by the national accounting firm, Deloitte and Touche, and a complete copy of the audit report is available upon written request. Please direct these to the attention of Arnold Birrell. The 1994 results and 1996 budget figures are provided for informational and comparison purposes only.

The statements provided include a Balance Sheet and Statement of Revenue and Expenses. To help you better understand the information being reported, included below are notes of explanation on certain items within the reports. Should you have other questions, please feel free to contact Arnold Birrell or John Baldwin.

CASH AND OTHER CURRENT ASSETS

The bottom portion of the Statement of Revenues and Expenses provides an explanation of how the Bar's cash is being used. After allowing for payment of Current Liabilities and providing certain reserves, the Bar's unrestricted cash balance is $395,709 at June 30, 1995 and projected to be $517,675 at June 30, 1996.

NET RECEIVABLE FROM THE LAW AND JUSTICE CENTER

The receivable balance at June 30, 1995 was $17,627 which represents current charges.

MORTGAGE PAYABLE TO THE LAW AND JUSTICE CENTER

The Bar purchased the Utah Law and Justice Center 50% interest in the land and building and improvements, and the Center's furniture and equipment in October, 1994. The Bar applied the June 30, 1994 receivable balance due from the Center as the down payment toward the purchase price. The balance will be carried in a note payable to the Center with an interest rate of 10%. Principal and interest payments on the note payable will equal amounts necessary to subsidize the Center's future operating losses. During the year ended June 30, 1995 the Bar paid $86,420 in principal on the Law and Justice Center mortgage.

DEFERRED INCOME

As of June 30, 1995, the Bar had collected $418,230 in 1996 Licensing Fees and Section Membership Fees. These fees have been classified as Deferred Income since they pertain to the 1996 fiscal year.

REVENUE OVER EXPENSES

The Revenue Over Expenses in the actual amount of $349,636 for 1995 and the budgeted amount of $137,179 for 1996 reflect the Board of Commissioners' and current management's commitment to exercising sound fiscal policies in the management of the Bar's funds. Current plans are to continue the present policies to provide the funds necessary for debt retirement, to make necessary capital expenditures, provide replacement and contingency reserves, and to maintain a reasonable fund balance.

SUMMARY

In summary, the Bar continues to be financially sound. The computer system that came on line during the 1992 fiscal year enables the Bar's staff to provide information to callers immediately in most cases. Since January, 1993 we have been tracking CLE hours which are printed on the Bar Journal labels.

UTAH STATE BAR

BALANCE SHEET

As of June 30, 1995 (with 1994 totals for comparison only)

ASSETS	1994	1995
CURRENT ASSETS:		
Cash and short term investments	$ 1,080,296	$ 1,398,145
Receivables	43,839	32,134
Prepaid expenses	14,992	8,231
Total current assets	1,139,127	1,438,510
NET RECEIVABLE FROM LAW AND JUSTICE CENTER	429,586	17,627
PROPERTY:		
Land	316,571	633,142
Building and improvements	1,324,574	2,058,178
Office furniture and fixtures	354,994	456,257
Computer and computer software	179,731	207,370
Total property	2,175,870	3,354,947
Less accumulated depreciation	(793,729)	(939,119)
Net property	1,382,141	2,415,828
TOTAL ASSETS	$ 2,950,854	$ 3,871,965
LIABILITIES AND FUND BALANCES		
CURRENT LIABILITIES:		
Accounts payable and accrued liabilities	226,620	$ 297,753
Deferred income	549,843	418,230
Long-term debt--current portion	0	75,000
Total current liabilities	$776,463	$790,983
LONG-TERM DEBT	0	556,955
Total liabilities	776,463	1,347,938
FUND BALANCES:		
Unrestricted	1,922,594	2,303,667
Restricted:		
Client Security	78,727	52,657
Other	173,070	167,703
Total fund balances	2,174,391	2,524,027
TOTAL LIABILITIES AND FUND BALANCES	$ 2,950,854	$ 3,871,965

STATEMENT OF REVENUES AND EXPENSES

For the year ended June 30, 1995 (1994 actual and 1996 budgeted for comparison only)

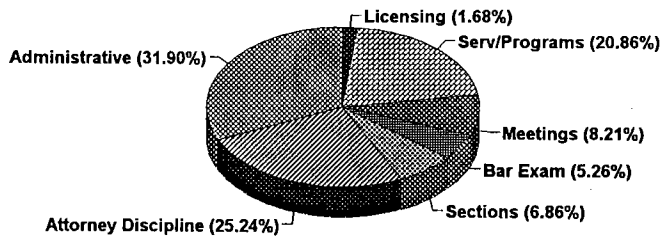
	1994	1995	1996 Budget
REVENUE:			
Bar examination fees	$ 185,877	$ 172,853	$ 150,625
License fees	1,526,145	1,583,710	1,637,959
Meetings	209,432	188,263	196,025
Services and programs	331,286	331,182	336,329
Section fees	175,318	186,368	12,106
Interest income	38,310	74,343	71,704
Property management	0	112,487	160,800
Other	115,512	120,923	89,515
Total revenue	$ 2,581,880	$ 2,770,129	$ 2,655,063
EXPENSES:			
Bar examination	$ 111,241	$ 114,947	113,308
Licensing	35,456	33,426	22,030
Meetings	173,645	183,317	195,440
Services and programs	441,325	458,773	586,709
Sections	145,054	203,802	12,150
Office of Bar Counsel	533,792	561,610	583,413
Property Management	0	67,563	300,906
General and administrative	602,909	687,322	627,485
Other	71,723	109,733	76,443
Total Expenses	2,115,145	2,420,493	2,517,884
REVENUE OVER EXPENSES	$ 466,735	$ 349,636	$ 137,179
Add Non-Cash Expenses Depreciation	121,694	145,390	138,210
Cash from operations	588,429	495,026	275,389
ACTUAL AND PLANNED USES OF CASH			
Mortgage Payments(LJC - 1995)	$ (574,543)	$ (86,420)	$ (83,423)
Capital Expenditures	(51,815)	(35,702)	(70,000)
Change in A/P	(39,806)	71,133	
Change in A/R	(52,340)	(1,336)	
Change in PPD Expenses	(7,581)	6,761	
Change in Deferred Income	102,701	(131,613)	
INC. (DEC.) IN CASH	(34,955)	317,849	121,966
BEGINNING CASH	1,115,240	1,080,295	1,398,144
ENDING CASH - TOTAL	1,080,295	1,398,144	1,520,110
DEDUCT:			
Deferred Income	(549,843)	(418,230)	(418,230)
Restricted Fund Cash	(249,930)	(284,205)	(284,205)
Reserves	(280,522)	(300,000)	(300,000)
UNRESTRICTED CASH AT JUNE 30	$ 0	$ 395,709	$ 517,675

UTAH STATE BAR

Financial Results and Projections

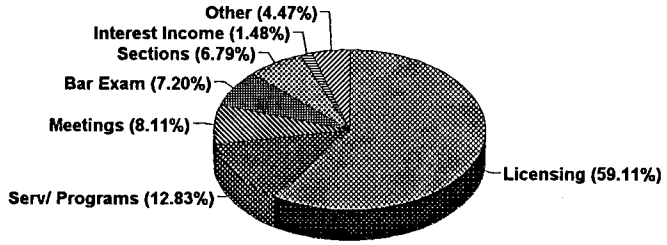
EXPENSES BY CATEGORY

For the Year Ended June 30, 1994



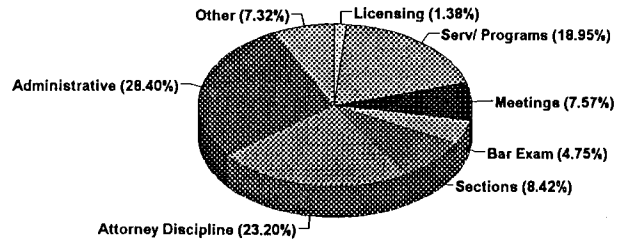
REVENUES BY SOURCE

For the Year Ended June 30, 1994



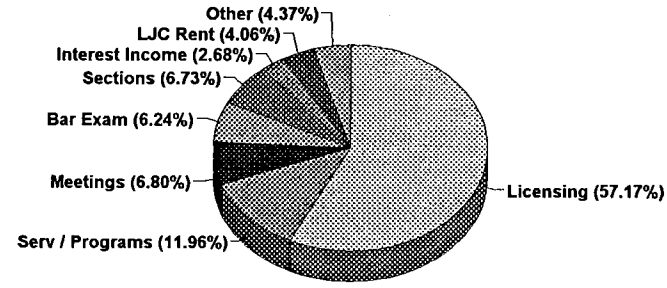
EXPENSES BY CATEGORY

FOR THE YEAR ENDED JUNE 30, 1995



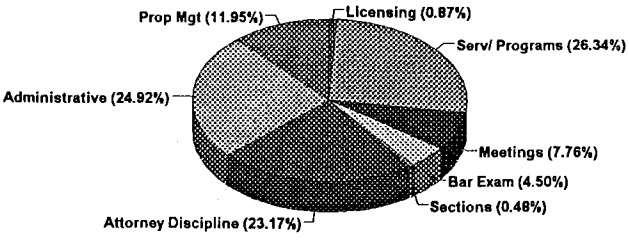
REVENUES BY SOURCE

FOR THE YEAR ENDED JUNE 30, 1995



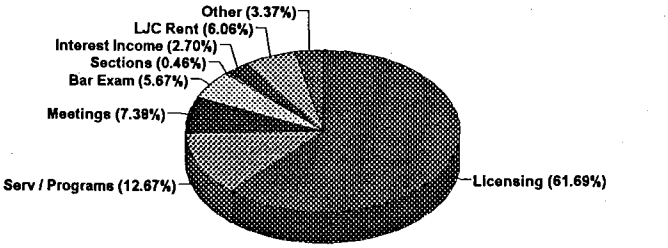
EXPENSES BY CATEGORY

BUDGETED - 1996



REVENUES BY SOURCE

BUDGETED - 1996



Young Lawyer Profiles — David & Chelom Leavitt

By Michael Mower

In 1855, Territorial Governor, Brigham Young, and other territorial leaders decided the new capitol for the Utah Territory should be located somewhere in the middle of the vast Great Basin. They chose Fillmore, 200 miles South of Salt Lake City. After one meeting in this Millard County locale, the legislature voted to move the capitol back to Salt Lake. Fillmore, they decided, was too far away, had too few residents and was too rural.

In 1991 David and Chelom Leavitt, recent Brigham Young University Law School graduates, moved to Fillmore for many of the same reasons early Utah lawmakers left. They felt a small, rural town would be a great place to start a law practice and raise a family. So they set up the firm of Leavitt & Eastwood Leavitt in the basement of their home. Soon after, they moved their practice to an office on Main Street.

David Leavitt was no stranger to life in southern Utah. Born and raised in Cedar City, David spent his youth involved in sports, school activities, and scouting and spent many summers and holidays working on the family ranch in Wayne County.

Chelom Eastwood Leavitt, raised in Yakima, Washington, required more of an adjustment to life in Fillmore, population 1,980. She liked the friendly, down-home attitude of local residents, but she was surprised to learn that a quick trip to the doctor, shopping, or to a Continuing Legal Education class often meant a two hour trip to Provo and back.

David and Chelom met in their first class on their first day of law school. David remembers hearing someone say "Chelom." Having lived in Israel, David wanted to know who was using what he thought was "shalom," the Hebrew greeting for peace. A classmate, Linda Magleby, introduced David to Chelom. They soon began dating, and married after the end of their first year in law school.

During their second year of law school, the two paired up as moot court partners. The Leavitt's first son, Adam Eastwood Leavitt, was born during the couple's final year of law school.

After graduation, both Leavitts knew they wanted to be in court as soon as possible. Neither liked the idea of writing briefs for six years before arguing in court. That, coupled with their desire for life in a smaller town, led them to look for work possibilities off the Wasatch Front. They learned that a contract for Fillmore City's civil work might be available. That contact became the base for their practice and the young family moved to Millard County.

Chelom said it didn't take them long to get their practice going. There were only two attorneys in Fillmore when David and Chelom arrived: the Justice of the Peace and the Deputy Millard County Attorney. They found a real need for legal help in their community. "It seemed as though every time I went to the grocery store, I was asked for legal advice," Chelom recalls.

The Leavitts divided their practice areas. Chelom handled primarily domestic relations cases. Along with handling Fillmore City's civil work, David obtained the local public defender's contract. He also handled probate and criminal defense cases.

The law partners soon learned that people in their small town had definite ideas about how a law firm should run. For example, David said that clients expected the law firm's fees to be "priced like light bulbs at the hardware store. The wanted to know in advance what our service would cost them." The firm adapted to meet this expectation by charging set fees for legal services like drafting wills and handling divorces instead of basing fees on hourly rates.

David and Chelom also learned the small town dress code allowed them to wear casual clothes to work.

They also found a great need for pro bono work in their area. Chelom often helped women who couldn't afford divorces obtain them. David, who learned Spanish while serving a mission for the L.D.S. Church in New York City, assisted many poor Spanish-speaking migrant workers who needed legal help, but made too much money to be represented by Utah Legal Services.

When the Leavitts first moved to Fillmore, they planned to stay about five years. However, soon they both became deeply involved in the community. Chelom became the founding member of the Fillmore Community Theater. David was actively involved in civic and youth programs. Their children, who now include daughters Danielle and Hannah, were also happy in Fillmore. In addition, the couple acquired an indispensable element of any small town law practice, the trust of the people of the area. The Leavitts planned to live in Fillmore forever.

Their plans, however, soon changed. A little over a year ago, David received a phone call from a Juab County Commissioner asking him to apply for the position of Juab County Attorney. Juab's current attorney, Donald J. Eyre, Jr., had just been appointed as a judge of the Fourth District Court. County personnel were familiar with David and his work as he had handled many cases where the Juab public defender had a conflict. David and Chelom originally decided not to apply for the position. It would entail a pay-cut for their family and they enjoyed living in Fillmore. However, after more consideration, David applied for the position and was chosen as Juab County Attorney.

Upon his appointment as Juab County Attorney in 1994, David gained some immediate distinction. At age thirty one he became the youngest county attorney in Utah. He was also the first Republican to serve as Juab County Attorney in over fifty years. A few critics of Leavitt's appointment note that he is Governor Leavitt's younger brother and asked if this played a role in David's appointment. County personnel, however, noted that David's appointment was by unanimous vote. Even the Democrat on the county commission felt David was the best attorney for this position.

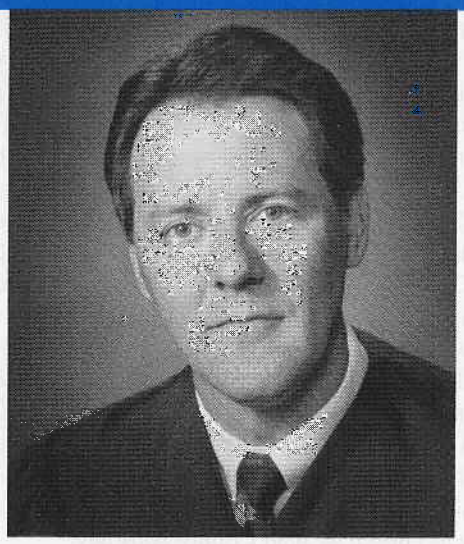
The move to Nephi from Fillmore brought a number of changes to the Leavitt family. Chelom left the full-time practice of law and now provides mediation services and takes care of the Leavitt's three children. David had to adjust to prosecuting alleged criminals instead of defending them. He now spends 80% of his time on criminal cases. The majority of his cases involve suspected drug traffickers apprehended by the Utah Highway Patrol as they cruise through Juab County on I-15. David faces his first election for Juab County Attorney in November 1996.

Pro Bono Guardian Ad Litem Program Expands

In January 1994 the Young Lawyers Section Needs of Children Committee and the Office of Guardian Ad Litem Director began a Pro Bono Guardian Ad Litem Program in the Third Judicial District. The Committee is now prepared to expand that program to the Second and Fourth Judicial Districts (Ogden, Farmington, and Provo areas).

The Committee is looking for interested attorneys to go through the training to be certified as a pro bono Guardians Ad Litem and who are willing to take one case to represent the interests of children. This training offers twelve hours of CLE credit for those who complete the six sessions. The training will be conducted at the Office of the Guardian Ad Litem, 230 South 500 East, Suite 170, Salt Lake City, Utah.

All those interested in taking the training should make their reservations by February 20, 1996 by calling either Jenny at 378-3829 or Sally at 278-3700.



A Pop-Quiz on Ethics

By Judge Fred D. Howard

Some years ago, my father, a skilled trial lawyer, had a client come to his office for help over a heated dispute with a neighbor. After some discussion the client declared, "So, I have come to hire you to sue the man, and if you don't win, then I am going to go to the church to have him dismembered!"

Such typifies the pressure on lawyers with their clients and their causes. Clients have causes which they are determined to win, and which emotions strain the adversary system. In our haste and desire to win, however, we cannot win "at all costs," but only under the right costs. Winning should never eclipse our personal integrity, honesty and ethical standards. During the past year we watched in horror many distortions of the judicial system with the O.J. Simpson trial. The poor public perception of lawyers and judges was further accentuated by instances of misconduct during the case which, among other things, left many with the impression that:

– Justice was not served;

– Lawyers will stoop to anything for an advantage, either in court or in front of the media, including personal attacks of opposing counsel or the judge;

– Courtroom etiquette is nonexistent;

– Underhanded discovery and trial tactics, while despicable, work;

JUDGE FRED D. HOWARD graduated from Brigham Young University in 1975, with a B.S. degree in Accounting and a minor in Italian. He received his Juris Doctor degree from the J. Reuben Clark, Jr. Law School at Brigham Young University in 1979. Prior to his recent appointment to the bench in July, 1995, he practiced as a county prosecutor of Carbon County, followed by civil practice in Price, Utah, and then as an associate and later partner of the law firm of Howard, Lewis and Petersen of Provo, Utah. He is a Master of the Bench for the A. Sherman Christensen American Inn of Court I and is a District Judge in the Municipal Division of the Fourth District.

– Jurors stupidly fall prey to such tactics;

– Trials allow virtually any and all questions thought of to be asked, and asked three different ways;

– There are no "real" sanctions for professional misconduct; or violating pre-trial rules, or discovery disclosure requirements;

– Jury trials can take forever;

– It is too expensive to go to court; or, if you can pay enough money, you can win;

– An overall loss of confidence in the judicial system.

Obviously, the case was controversial and more could be said about it. Most of us would agree that it bears little resemblance to the day to day trials and the practice of law we are involved in. However, the Simpson case is a call to each of us to pay particular attention to our professional conduct and to communicate to the public by our actions and words that the judicial system is governed by adherence to rules of ethics, fair play, access, and economy. The best approach for this is a self-policing one. On an individual level we should each examine ourselves to see if we are keeping up our standards of ethics or if we are falling prey to the pressures of the system. Here are a few questions that we might ask ourselves. Each question may not be a professional breach or ethical violation per se, but is designed to stimulate thought and mental discussion on the subject. Consider the following questions of some common circumstances, noting that there are innumerable others that might be asked.

Attorneys

1. Under pressure to meet the overhead, have I ever accepted a retainer to a case for which I was unqualified?

2. Have I ever charged an unreasonable fee in a case?

3. In preparing pleadings have I ever used demeaning or offensive language to describe a cause of action or defense?

4. Have I ever used a technical rule of law

(such as Rule 11 motion, etc.) for purposes of harassment or retribution in a case?

5. Have I a habit of expressing profanity or sarcasm in addressing a judge or attorney?

6. Have I ever quoted a fee retainer for a case based on my perception of a client's ability to pay as opposed to the work required?

7. Have I ever taken a client's case, the fee of which was paid for by another, and, therefore, followed the direction and instruction of the payor in pursuing the representation?

8. Have I engaged in the practice of "stone-walling" regular discovery requests?

9. Have I ever written a "nasty" letter to opposing counsel threatening him or his client with sanctions, complaint to the bar, or hearing before the court, and sending a copy of the letter to my client with the purpose of the letter being to placate a client or communicate an aggressive representation?

10. Have I ever objected during a lawyer's summation simply to interrupt his stride?

11. Have I purposely failed to disclose witnesses or documents in requested discovery for purposes of surprise?

12. Have I ever failed to return all or part of an unearned client retainer?

13. Have I mischaracterized, denigrated or been critical of a previous lawyer's representation of a client in order to acquire the representation?

14. In seeking an order in an ex parte proceeding, have I exaggerated facts or failed to disclose to the judge material facts adverse to my client?

15. Have I ever sought an ex-parte communication with a judge for an advantage?

16. Have I ever failed to communicate to a client limitations for representation such as calendar conflicts, license suspension, disability, etc.?

17. Have I ever reneged on an agreement regarding the payment or division of attorney fees between lawyers on a case?

18. Have I ever refused a requested transfer or pickup of a client's file upon substitution of counsel?

19. Have I ever sought to purposely mischaracterize the law in either argument or written pleadings?

20. When my adversary has clearly made an unintentional error of oversight, have I taken advantage of the opportunity to his ruin?

Judges

1. Have I ever been intemperate at either a lawyer or litigant?

2. Have I ever stricken a case from a trial calendar setting under an excuse pretense simply because I did not want to try the case?

3. Because of a long-standing association with a lawyer, have I felt more easily persuaded to his or her position when I might not otherwise have been?

4. Have I communicated sarcasm or criticism, or displayed abrasive, impatient, unkind, or an intemperate attitude to pro-se litigants?

5. Have I ever held the view that a particular female lawyer was unduly impassioned simply because she was a woman?

6. Have I ever felt predisposed towards a litigant based upon a comment by a staff member, clerk, or some other person?

7. Have I ever engaged in an ex parte communication with a lawyer or litigant to a case?

8. Have I ever failed to recuse myself from a case involving a friend or associate?

9. In deciding a hard custody case, has my own personal or religious belief been a factor in making the decision?

"As judges and lawyers we are all human and admittedly we make errors and mistakes. We should, however, constantly remind ourselves of our professional ethics and how we might improve our work so that we keep the highest ethical standards."

10. Have I ever sanctioned a lawyer before his or her client without first allowing an explanation or when a private reprimand would do?

11. Have I ever given preferential treatment to a defendant in a criminal proceeding because the individual was either a neighbor, closely-associated to my family, or shared religious beliefs?

12. Have I ever accepted an unsolicited "gift of appreciation" of substantial value?

13. Have I ever conducted a private investigation or inquiry on a case outside of the trial proceeding?

14. Have I ever unfairly cut-off an attorney during either opening statement or closing summation?

15. Have I ever dismissed a case for failure to prosecute without adequate notice or without giving an attorney who failed to appear an opportunity to explain his or her nonappearance?

16. When requested, and without pay, have I given legal advice to friends, neighbors, or former clients?

17. Have I ever thanked or given visible affirmation to a jury for their decision?

18. Has a litigant's ill manners or unkept appearance ever influenced my decision regarding his or her case?

19. Have I ever dozed or fallen asleep during a trial proceeding?

20. Have I long forgotten the difficulties of the practice of law and that I too was once a lawyer?

As judges and lawyers we are all human and admittedly we make errors and mistakes. We should, however, constantly remind ourselves of our professional ethics and how we might improve our work so that we keep the highest ethical standards. There are many things that we can do more of which will further insure fair play and fair trials, and improve our image to the public. For example, if a party is unable to respond to requested discovery, his or her lawyer should promptly explain the problem to opposing counsel and commit to a date certain for the response to be provided. Lawyers should refuse client requests to take inappropriate actions including a practice of sending threatening letters. We should refuse ex parte communications, indifference to parties, and arrogance. We should refrain from making unsupported commentaries on the performance of other lawyers. Lawyers should quote reasonable fees, promptly return unearned fees, and there are a host of other things. Ultimately, over the process of time, each of us develop a reputation for either honesty, ethics, courtesy, and professionalism, or the lack thereof. Others know instinctively if we are honest and ethical, and if then an error is committed, our colleagues will rush to forgive our oversight in light of that standard, and so will the public.

REFERENCES OF RULES

Attorneys

1. A lawyer shall provide competent representation. (Rule 1.1 Rules of Professional Conduct) Note comment of rule, that "a lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation." Also, a lawyer may ". . . asso-

ciate or consult with . . . a lawyer of established competence in the field of question."

2. A lawyer shall not . . . charge or collect . . . a clearly excessive fee. (Rule 1.5(a) RPC)

3. A lawyer may withdraw . . . if a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent. (Rule 1.14(b)(3) RPC) A lawyer shall not bring or defend a proceeding, . . . unless there is a basis for doing so that is not frivolous . . . . (Rule 3.1 RPC. See comment. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person . . . .)

4. See comment of Rule 3.1 RPC, wherein an action should not be taken for "the purpose of harassing or maliciously injuring a person." Also, see Preamble of Rules of Professional Conduct, "a lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others."

5. See Preamble of Rules of Professional Conduct, "a lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials."

6. Factors to be considered as guides in determining the reasonableness of a fee do not include a client's ability to pay; but, the time and labor required, difficulty of questions involved, skill required, customary fee for similar services, results obtained, time limitations, and experience, and the reputation and ability of lawyer. (Rule 1.5 RPC)

7. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person . . . . (Rule 1.7 (b)) See rules comment on loyalty to client.

8. A lawyer shall make reasonable efforts to expediate litigation consistent with the interests of the client. See rule comment: "Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose." (Rule 3.2 RPC) Also, a lawyer shall not . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. (Rule 3.4(d) RPC)

9. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it compares the lawyer's services with other lawyers services, unless the comparison can be factually substantiated." (Rule 7.1 RPC) See also, Preamble and duty of respect to other lawyers.

10. A lawyer shall not engage in conduct intended to disrupt a tribunal. (Rule 3.5(d) RPC)

11. See 8 above, and Rules 3.2 and 3.4(d) RPC.

12. A lawyer shall not charge an excessive fee. (Rule 1.5(a) RPC) Upon termination of representation, a lawyer shall take steps to . . . protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned. (Rule 1.14(d) RPC)

13. See reference to 9 above.

14. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse. (Rule 3.3(d) RPC)

"Factors to be considered as guides in determining the reasonableness of a fee do not include a client's ability to pay; but, the time and labor required, difficulty of questions involved, skill required, customary fee for similar services, results obtained, time limitations, and experience, and the reputation and ability of lawyer."

15. A lawyer shall not seek to influence a judge. . . . (Rule 3.5(a) RPC) A lawyer shall not in an adversary proceeding, communicate, or cause another to communicate, as to the merits of the cause with a judge . . . except in the course of official proceedings in the cause. (Rule 3.5(c) (1-4))

16. A lawyer shall act with reasonable diligence and promptness (Rule 1.3 RPC), avoid conflicts (Rule 1.7-9), and advise of limitations, including impairments (Rule 1.14(a) RPC).

17. A division of fees shall be in proportion to the services performed by each lawyer or by written agreement. (Rule 1.5(e) RPC) See comment of rule regarding dispute over fees and mediation procedure established by the Bar for resolution.

18. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled. . . . (Rule 1.14(d) RPC)

19. A lawyer shall not knowingly make a false statement of material fact or law to a tribunal. A lawyer shall not fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client. . . . (Rule 3.3(a)(1) & (3) RPC)

20. See Preamble of Rules of Professional Conduct.

Judges

1. A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others. . . . (Code of Judicial Conduct, Canon 3B(4)) See also, disciplinary action against judge on ground of abusive or intemperate language or conduct towards attorneys or parties, 89 ALR 4th 278.

2. A judge shall hear and decide matters assigned to the judge. . . . (Canon 3B(1)) A judge shall dispose of all judicial matters promptly, efficiently, and fairly. (Canon 3B(8))

3. A judge shall dispose of all judicial matters promptly, efficiently, and fairly (Canon 3B(8); without bias or prejudice . . . and shall be alert to avoid behavior that may be perceived as prejudicial (Canon 3B(5)). A judge shall not allow . . . social or other relationships to influence a judge's judicial conduct or judgment. (Canon 2B)

4. See reference to 1 above.

5. A judge shall not, . . . manifest bias or prejudice, . . . based upon race, sex, religion, national origin, disability, age, sexual orientation, ... (Cannon 3B(5)) See reference to 3 above, Cannon 3B(6) & (8).

6. See reference 3 above. A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties. (Canon 3C(2) and 3B(4))

7. A judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. (Cannon 3B(7))

8. A judge shall enter a disqualification in a proceeding in which . . . the judge has a personal bias or prejudice . . . (Cannon 3E); and also, a judge shall not allow fam-

ily, social, or other relationships to influence the judge's judicial conduct or judgment (Canon 2B).

9. A judge shall perform judicial duties without bias or prejudice. A judge shall not . . . manifest bias or prejudice . . . based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. . . . (Cannon 3B(5))

10. While a judge should maintain order and decorum in proceedings before the judge (Canon 3B(3), and should take appropriate disciplinary measures against a lawyer for unprofessional conduct (Canon 3D), he or she shall accord every person a full right to be heard according to law (Canon 3B(7)).

11. See references to 8 & 9 above.

12. See Canon 1 & 2; reference to 3 above, and Canon 3E regarding disqualification for economic interests. A judge shall not accept . . . a gift, except. . . . (Canon 4D(5))

13. A judge shall apply the law and maintain professional competence. (Canon 3B(2)) A judge may consult with court personnel whose function is to aid the judge . . . provided the judge does not abrogate the responsibility to personally decide the case pending before the court. A judge may obtain the advice of a disinterested expert on the law applicable . . . if the judge gives notice . . . and affords reasonable opportunity to respond. (Canon 3B(7))

14. A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers. . . . (Canon 3B(4)) A judge shall accord to every person . . . full right to be heard according to law. (Canon 3B(7))

15. See reference to 3, 10 & 14 above.

16. A judge shall not practice law. However, a judge may act pro se, without compensation, to give legal advice to members of the judge's family. (Canon 4G)

17. A judge shall not commend or criticize jurors for their verdict . . . , but may express appreciation to jurors for their service to the judicial system and the community. (Canon 3B(10))

18. See reference to 1 & 4 above.

19. A judge shall hear and decide matters. . . . (Canon 3B(1)) a judge shall dispose of all judicial matters promptly, efficiently, and fairly. (Canon 3B(8))

20. See reference to 1 above. A judge . . . should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary. (Canon 2A)

Potential Issues for the 1996 Annual General Session of the Utah State Legislature

By Jane Peterson and Lisa Watts Baskin

ADMINISTRATIVE RULES REVIEW COMMITTEE

• **Annual Sunset Legislation** — Each session the Administrative Rules Review Committee sponsors legislation to sunset state agency rules it determines inappropriate during the previous interim. The bill reauthorizes all rules of the state except those specifically enumerated in the bill.

• **Five Year Review Legislation** — By statute, state agencies are required to review their rules every five years to determine whether the rules should be retained or repealed. However, no enforcement of the requirement is included in the law. Proposed legislation provides for enforcement.

BUSINESS, LABOR, AND ECONOMIC DEVELOPMENT

• **Affordable Housing for Low and Middle Income Residents** — Potential legislation deals with appropriating or earmarking funds for current programs, tax incentives, changes in bond allocation requirements, and incentives to developers to provide affordable housing segments within housing developments.

• **Utah's Role in Preparation for the 2002 Winter Olympic Games** — Potential legislation deals with control of state expenditures, coordination of the state's involvement in games preparation, and the disposition of proceeds from the sale of state funded Olympic facilities.

• **Worker's Compensation Coverage Requirements for Contractors, Subcontractors, Sole Proprietors, Partnerships, and Independent Contractors** — Potential legislation deals with establishing exemptions from coverage, expanding the scope of coverage, or establishing an independent contractor registry mechanism.

CONSTITUTIONAL REVISION

• **Jury Trial Resolution** — This constitutional amendment amends provisions on trial by jury, preserves the right to trial by jury in criminal cases, and repeals the requirement of eight-person juries in general jurisdiction courts to accommodate court consolidation changes.

• **Labor Article Revision** — This constitutional amendment amends provisions regarding labor by requiring the Legislature to provide for a board or commission which fairly represents the interests of both labor and capital in tandem with the repeal of archaic language referencing the nonexistent Board of Labor, Conciliation, and Arbitration, repeals the eight-hour workday language to be applied to the public employees, provides for minimum wage and maximum hours for public and private employees, and makes technical amendments.

• **Resolution Amending Local Government Article** — This constitutional amendment repeals the prohibition against municipalities selling waterworks and the recognition of counties at the date of adoption, amending provisions on highway user and motor fuel taxes, and making technical amendments.

• **Resolution Amending the Revenue and Taxation Article** — This constitutional amendment amends fiscal year language, repeals the section on mining assessment in tandem with intent language that "this deletion is not intended to make a substantive change in the existing law," and makes technical changes.

• **Resolution Amending Veterans' Property Tax Exemption** — This constitutional amendment amends the provisions permitting the property tax exemption of disabled persons who were disabled or killed in the line of duty during any war, international conflict, or military training and gives direction to the Lieutenant Governor to withdraw and replace S.J.R. 5 from the 1995 General Session, a measure not studied by the CRC prior to the 1995 General Session.

• **State's Authority to Guarantee the Debt of School District** — This constitutional amendment permits the state to guarantee with its full faith and credit the debt of all Utah school districts, permits the legislature to provide for reimbursement by participating school districts, and removes the limitations on public debt and lending public credit for this purpose.

DOMESTIC VIOLENCE

• **Injury Reporting by Health Care Providers** — Proposed legislation clarifies who in the health care community must report injuries and the reporting procedures they must follow.

• **Amendments to Domestic Violence Law** — The task force considered changes to current law covering a wide array of issues. Legislation will be finalized by volunteers from among the task force membership.

EDUCATION

• **Class Size Reduction** — Large class size in Utah public schools has long been a problem. Legislation has been prepared which will define reduction for kindergarten through sixth grade. Districts are required to use 50% of their allocation to reduce class size in the first grade, with an emphasis on developing reading skills.

• **Educational Equity** — The State Office of Education established a committee that reviewed fiscal problems in the state's critical school building program, capital outlay, voted leeway guarantees, and equalized distribution formulas. Recommendations were reviewed by the Education Interim Committee, and legislation was adopted which will be introduced in the 1996 General Session.

• **Modification of Highly Impacted School Legislation** — Legislation was enacted during the 1995 General Session granting additional funds to schools whose students have been impacted by socio-economic factors including income and head-of-household status. Although criteria has been established to qualify participating schools, concern has been heard by admin-

istrators and legislators that specific parts of the criteria are not totally objective and should be revised.

• **Utah Centennial Opportunity Program for Education** — Utah is near the bottom nationally in providing state student funding for financially needy students, and tuition and fees at the community colleges are among the highest nationally. Students are forced to borrow more, work longer hours at low-paying jobs, or drop out of school to earn money for tuition. The Education Interim Committee and the State Board of Regents are supporting a program of need-based grants and work-study stipends for Utah residents attending a USHE institution or applied technology center who can demonstrate substantial financial need. The program is designed to offer help to truly needy students and not a "free ride."

ENERGY, NATURAL RESOURCES AND AGRICULTURE

• **Dam Safety** — For the last four years, the Division of Water Rights has been investigating the safety of dams. The division presented a report to the Energy, Natural Resources and Agriculture Interim Committee indicating the cost of upgrading dams in conformance with new minimum safety standards is approximately $62 million. The legislature will consider whether dams should be rehabilitated in accordance with the new safety standards and, if so, how the costs of dam rehabilitation should be paid.

• **Forfeiture of Water Rights** — Under Utah water law, a water right is forfeited if it is not used for a period of five years, unless the water right holder applies for an extension of time to use the water. Clear title to a water right may be difficult to establish if there is no proof that the water has been continually used. The interim committee approved a bill establishing a 20-year statute of limitations for filing a suit asserting a forfeiture of water.

• **Stock in Water Corporations** – A recent Utah Supreme Court opinion stated that the procedures for the transfer of stock specified in the Uniform Commercial Code do not apply to stock in water corporations. The interim committee approved a bill making stock in water corporations subject to the Uniform Commercial Code.

• **Water and Wastewater Infrastructure Funding** — It is projected that water and wastewater infrastructure expenditures in the state in the next decade will amount to $200 million annually. These costs will be borne primarily by local governments. The state has traditionally provided low interest loans to communities for water and wastewater projects. Continued appropriations to the loan programs will be considered.

HEALTH AND ENVIRONMENT

• **Air Quality** — Utah, Salt Lake, Davis, and Weber counties along the Wasatch Front have been designated by the federal EPA as non-attainment areas for several air pollutants. The federal government threatens to withhold highway funds (more than $100 million in Utah) if air quality and transportation plans do not conform with each other. The projected population growth along the Wasatch Front compounds air quality compliance problems. The Utah Division of Air Quality estimates that about 60% of PM10 emissions and 55% of CO emissions are from automobiles. The major focus of discussion is on growth, and transportation and air quality conformity.

• **Health Care Reform** — During the 1994 General Session, the legislature established the Utah Health Care Policy Commission. The commission will propose recommendations regarding health care reform as mandated by statute.

HUMAN SERVICES

• **Child Support Enforcement** — The committee considered three bills in the area of child support enforcement. These bills provide for suspension of driver licenses and occupational and professional business licenses, and reporting of new hires by new businesses.

• **Federal Block Grants** — As Congress considers changing many human service programs to block grants, the committee examined how the state should respond.

• **Review of Settlement Agreement in the Case of *David C. vs. Leavitt*** — In May 1994, the state entered into an agreement with the National Center for Youth Law to settle a lawsuit against the state's welfare system. The legislature has appropriated significant resources to implement this settlement agreement. The Child Welfare Legislative Oversight Committee reviewed this agreement to determine whether its provisions are in the best interests of children.

• **Sunset Review of Programs for Persons with Disabilities** — The committee considered major changes in the way community programs for persons with disabilities are funded. The new proposal promotes consumer choice and competition between providers.

• **Welfare Reform** — The committee is proposing a new welfare program called "Employment Assistance for Utah Families." Under this program, employment is stressed for heads of households who are qualified for entry level employment. Training and other forms of employment assistance, including child care, will also be available.

INFORMATION TECHNOLOGY

• **Geographic Information Systems** — Proposed legislation continues the statewide mapping project began last year.

• **Municipalities Providing Telecommunication Services (TS) to Residents and Businesses** — The commission reviewed the role of state and local governments in providing telecommunication services, the broad implication of 238 municipalities becoming telecommunication service providers, and the impact on the citizens of Utah.

• **Utility Pole Access** — Proposed legislation amends current statutes expanding the use of utility poles and allows any telecommunication provider to use them.

JUDICIARY

• **Sentencing and Treatment of Sex Offenders** — SB 2 from the 1995 First Special Session delayed the effective date of amendments to minimum mandatory sentences which the legislature passed in SB 287 during the 1995 General Session. Those amendments will not take effect until April 29, 1996. The Utah Sentencing Commission studied the merits of SB 287 along with other sex offender provisions during the interim period and sponsored several public hearings throughout the state, some of which were co-sponsored by the Judiciary Interim Committee. The commission presented three proposed pieces of legislation, all of which were endorsed by the committee. Those recommended provisions are:

  • Criminal Penalty Adjustments — This legislation amends sentencing provisions, makes nonmandatory the minimum sentences, provides for mandatory imprisonment, and amends related provisions on probation and parole.

• Parole Term for First Degree Felony Sex Offender — This legislation requires lifetime parole for sex offenders convicted of first degree felony sex offenses, provides the parolee the right to petition to terminate the lifetime period of parole, and makes technical changes.

• Sex Offender Treatment — This legislation provides for increased funding for sex offender treatment, diagnosis, and assessment.

• **Recodification of the Juvenile Code** — The Judiciary Interim Committee endorsed a draft bill prepared by the Juvenile Court Recodification Subcommittee. The draft is a comprehensive technical rewrite of Chapter 3a of Title 78, "Juvenile Court." While recommendations for substantive changes emerged during the subcommittee's technical rewrite process, they were intentially deferred for future study so that a workable statutory framework can first be established.

LAND CONSERVATION

• **Land Conservation** — The Land Conservation Task Force is considering the creation of a clearinghouse to provide technical information to landowners, amendments to agricultural protection areas, facilitation of land trades with the BLM and Forest Service, and provisions for incentives for the purchase and donation of conservation easements.

NATIVE AMERICANS

• **Indian Worship at Correctional Facilities** — Proposed legislation provides for access of Native American inmates to Native American spiritual advisors, items used in Native American religious ceremonies, and a site of worship on the grounds of the correctional facility.

RETIREMENT

• **Early Retirement Alternatives** — The committee is considering options relating to early retirement and amendments to previously passed early retirement bills including SB 34 (1995), "Retirement Service – Conversion and Credit Amendments," and SB 182 (1994), "Public Employee Retirement Purchase Option."

• **Equity in Service Formulas** — Issues relating to groups retiring at less than 2% per year of service will be raised again this year.

• **Health Care Issues Relating to the Utah Retirement Systems** — The committee will review the funding formula, competition in the area of 24-hour coverage, long term disability, and potential duplication with workers' compensation.

• **Uniformity in Retirement Systems and Plans** — The committee will be looking at cost of living allowances and early retirement options to see if more uniformity can be achieved among the five different retirement systems.

REVENUE AND TAXATION

• **Tax Reduction and Reform** — The legislature is looking at whether to reduce taxes beyond the general reductions of the past couple of years. If a reduction is in order, the debate will center on *which* taxes to reduce and the magnitude of the reduction. Further reduction of the minimum school levy and repealing the sales tax from food are among the options under consideration.

STATE AND LOCAL AFFAIRS

• **Advisory Commission On Intergovernmental Relations** — The legislation limits the commission's membership to elected officials and redefines its mission by prohibiting lobbying for or against proposed legislation.

• **Board and Commissions** — Proposed legislation completes the reorganization of all boards and commissions into a separate title of the Utah Code.

• **Bonding Process** — Proposed legislation amends statutes governing bonding by government entities, particularly guarantees of local government bonds.

• **Election Law Reform** — Proposed legislation addresses campaign finance and voting requirements for primary elections.

• **Incorporation/Annexation** — Proposed legislation rewrites the portion of the Utah Code dealing with the incorporation process by specifying the role of voters and the county commission in approving any proposed incorporation.

• **Lobbyist Disclosure** — Proposed legislation addresses the disclosure of lobbyist expenditures.

• **Personnel Management** — Proposed legislation modifies statutes governing state employees.

TRANSPORTATION AND PUBLIC SAFETY

• **Future Transportation Corridor Preservation** — Growth within the state is continuing, and land available for future highways is disappearing. The Transportation and Public Safety Interim Committee is recommending legislation establishing a revolving fund for earlier acquisition of needed rights-of-way. Additional consideration is needed to improve coordination of state and local efforts for future transportation needs.

• **Highway Funding** — The legislature must decide how to fund the I-15 corridor reconstruction and respond to other transportation needs. The level of funding will have a direct impact on the scheduling of the project and the extent of traffic detours and delays during construction. The legislature may also look at ways to reduce the use of single occupant vehicles during peak commuting hours.

• **Motor Carrier Regulation** — After recent federal preemption of price, route, and service regulation of intrastate motor carriers, the Transportation and Public Safety Interim Committee is recommending legislation to eliminate all economic regulation of motor carriers. The legislature must decide whether this approach has merit and whether additional adjustments should be made to ensure that any remaining state motor carrier regulation is effective and worthwhile.

• **Repeat DUI Offenders** — The Transportation and Public Safety Interim Committee is recommending legislation attempting to address the DUI problem and reduce the number of repeat offenders. Additional consideration is needed to increase the number of peace officers assigned to enforce DUI laws.

• **State Speed Limit** — With the repeal of the national maximum speed limit, states may set speed limits as they see fit. Several legislative proposals will be considered during the session.

• **Uninsured Motor Vehicles** — The Uninsured Motorist Identification Database Program is due for sunset unless the legislature reauthorizes it. The Transportation and Public Safety Interim Committee is recommending legislation extending the sunset by two years. Additional consideration may be needed on whether the system reduces the number of uninsured motorists on Utah highways and whether the program is being administered in a fair, efficient, and effective way.

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Case Summaries

By Clark R. Nielsen

SUMMARY JUDGMENT, MUNICIPAL REDEVELOPMENT

Summary judgment in favor of Salt Lake County Redevelopment Agency and the County Commission was reversed and judgment was granted to the plaintiff as a matter of law. The Redevelopment Agency failed to comply with statutory section 1208 (1) because it failed to make a formal finding that the area for redevelopment was "blighted." The formal finding by the commission excluded the plaintiff's property. Therefore, the commission's ordinance adopting the redevelopment plan was invalid and the plaintiff, not the county, was entitled to summary judgment. The court discusses the finding necessary and the elements included in the finding to substantiate the action of the RDA. The purpose of the redevelopment legislation is to alleviate blight. A general finding of "blight" is insufficient to guarantee that the redevelopment process is properly motivated by the desire to cure blight. Mere economic development is not an appropriate purpose for legislative redevelopment. Strict compliance with the redevelopment statutes is required in order to enact an ordinance that adopts a redevelopment plan.

Johnson v. Redevelopment Agency of Salt Lake County, 277 Utah Adv. Rep. 3 (11/2/95) (Justice Zimmerman)

INSURANCE, PRACTICE OF LAW

The Utah Supreme Court affirmed the trial court's finding that "third-party adjusting" constitutes the unauthorized practice of law. The Supreme Court has the exclusive authority to regulate the practice of law in Utah under Article VIII of the Constitution. Therefore, the Legislature cannot authorize public adjusters to perform "third-party adjusting" under the Utah Insurance Code. The court determines and finds that third-party adjusting constitutes the practice of law and that such practice is unauthorized if not in conjunction with a law practice. However, the court also interprets the statutory provisions of the Insurance Code, Title 31A, Chapter 26 as not including or permitting such practice.

"Third-party adjusting" occurs when an insurance adjuster represents a claimant stranger to the insurance contract on a claim asserted against the tort-feasor. This is distinguished from "first-party adjusting" when an insured party hires a public adjuster to assist the insured in filing a claim of loss with the insurer. The adjuster then negotiates with the insurance company to obtain the best settlement for the insured. The adjuster then receives a percentage of the settlement amount. In "third-party adjusting", there is no legal relationship between the party asserting the claim and the insurance company. The third-party adjuster then represents the claimant on the basis of the tort principles and determines the extent of the liability rights and duties of the parties before attempting to resolve the issue. Third-party public adjusters do not perform services in court, but they do execute contingent fee contracts and negotiate with the insurer of the tort-feasor to settle claims.

The practice of law, although difficult to define, does involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with the consent of that person. In addition to services in court, it involves counseling, advising and assisting others in connection with their legal rights, duties and responsibilities. This is essentially what the third-party adjuster also does. Legal services are not restricted to only those before a court of law.

Although the Insurance Code (Title 31A) does provide for and recognize first-party adjusting, the Code does not apply to the concept of third-party adjusting. Section 31A-26-102 does not include the handling of claims by adjusters when there is no contractual relationship between the claimant and the insurer.

Utah State Bar v. Summerhayes and Hayden, 277 Utah Adv. Rep. 12 (11/3/95) (Justice Stewart)

SECURITIES, PERSONAL LIABILITY

A partner, officer, director or other similar person of a corporation which is involved in selling securities, is liable for violations committed by the entity unless that person proves, as an affirmative defense, that he lacked the knowledge of unlawful acts by the corporation. The Supreme Court affirmed the jury verdict of fraud and violation of the Uniform Securities Act by the defendants who were principles in the investment company Zephor. The court recited various facts in the record showing that the defendant Lichfield, a vice-president, had extensive knowledge and involvement regarding the misrepresentations and gross violations of the act committed by the corporation against the plaintiff and her investment. The jury's findings were clearly supported by the evidence.

The defendant claimed that he was not liable because his corporation had been suspended from doing business. A person who purports to act for, and on behalf of, a corporation that has no corporate authority is personally liable. There is, however, a split of authority as to whether personal liability applies when a corporation's authority has been suspended. A majority of jurisdictions hold that a corporate officer is personally liable for continuing business while the corporation has been suspended. The Supreme Court adopts the majority rule and holds that §16-10-139 applies to all persons who act as or for a corporation without authority. Officers and directors who continue the business of a suspended corporation are personally liable for all debts and liabilities arising from those operations in a continuation of the business.

Under the Utah Securities Act every partner of a securities seller and a person occupying a similar status is liable unless he proves he neither knew of or could have known of the violation. Accordingly, the defendant officers are equally liable for the negligence and misrepresentations of the other defendants on behalf of the corporation. The court finds of the finding that all of the defendants are jointly and severally liable, it imposes liability for the total amount on each defendant with the right of indemnity or contribution from the other defendants for their share, as the treble damages which were assessed were punitive in nature.

Steenblik v. Lichfield, 277 Utah Adv. Rep. 16 (11/3/95) (Justice Stewart)

CONTRACT BREACH VS. TORT CLAIMS, STATUTE OF LIMITATIONS

The Supreme Court reversed a summary judgment in favor for defendant Intermountain Farmers Association for damages to plaintiff's bean crop, due to a chemical spray applied the previous year. The trial court had concluded that the statute of limitation barred the action and that the plaintiff had given a release of liability to IFA.

The Supreme Court reversed the judgment as a matter of law and held that there were triable, disputed issues of fact as to whether the release agreement was reasonably susceptible to Ward's interpretation based upon the representations of IFA and the intention of the parties. Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties at the time the release agreement was given.

The Court reversed the trial court's conclusion that the plaintiff's complaint was not for breach of an oral contract. The trial court had held that it was a tort action and therefore barred by the malpractice and product liability statute of limitation. The appellate court examined the straight forward pleading of the breach of contract claim of plaintiff's complaint and held that it was, in fact, a claim for breach of a contract to apply the proper chemical spray. There was no reference at all to strict liability, negligence, express or implied warranty, or professional standards of care. The plaintiff may waive the tort claim and proceed only on a claim for breach of contract.

As to the release provision which the plaintiff gave, the release is interpreted as a contract. The parole evidence rule has only narrow application. The trial court erred in not considering the oral testimony as to the intent of the parties and the purpose of the agreement. Such testimony would not contradict the parties' written agreement.

Justice Russon concurred in the result, issuing his own opinion that the agreement was ambiguous because it was susceptible to two different interpretations. According to Justice Russon, the majority's opinion imposes a disruptive rule of construction that allows extrinsic evidence to establish an ambiguity in what would be an otherwise clear contract provision. The majority opinion invites the parties to create ambiguity by oral testimony even when contract provisions are clear and unambiguous.

Chief Justice Zimmerman dissents from the conclusion that the release agreement was ambiguous. He would hold that oral evidence was not admissible to explain the purpose and intent of the release document which the defendant required the plaintiff to sign after purportedly promising to take care of the plaintiff.

Ward v. IFA, 277 Utah Adv. Rep. 58 (11/15/95) (Justice Durham, with J. Russon concurring in result and C.J. Zimmerman dissenting)

White Man's Grave

By Richard Dooling

Reviewed by Betsy L. Ross

This is a book for all of us who mailed in Peace Corps applications while we were in college. It is even more for those of you who went. A very literate book by a Nebraska lawyer (who spent seven months in Africa in the early eighties), and a National Book Award finalist. *White Man's Grave* is a venture into the savageries of the African bush and the American bankruptcy courts. Although the conjunction of First and Third World societies makes for interesting pondering, it is Dooling's characters and his sardonic wit that keeps one turning pages.

Randall Killigan is a bankruptcy "warlord" who leaves no prisoners. He and his partners "giggle" about what they can do to an unsecured creditor: "You said you found a way to skin an unsecured creditor, leaving nothing but vital organs and a nervous system behind." He giggled. "They were still alive, you said. They were still conscious, but they were absolutely powerless to do anything but scream themselves to death." He is an overbearing, condescending, chauvinistic, cocky son-of-a-bitch, who, presumably, epitomizes the American malaise. He is equally fearsome as a husband. Witness his take on counseling, through Dooling's narrative, after agreeing to go with his wife: "Once he got there, he found out the guy was not a doctor at all, but a Ph.D. in psychology who called himself a doctor. Randall looked at his watch and realized that he was going to be stuck in a small room with his wife and a patronizing dweeb in a sport coat and turtleneck for an hour. The good doctor kept throwing out phrases like 'marital dynamics' and 'dysfunctional codependency,' which Randall instantly recognized as *billing* words, or words that one charged by the hour to explain."

Boone Westfall is an idealist who is settling down to the family insurance business to pay his rent. Explaining the business of denying claims, Boone's brother responds to Boone's incredulity: "Look, I know how you feel about coming to work here. I used to be a Nietzsche scholar myself, and from there I was on my way to Wittgenstein. But you can't pay the rent with that kind of behavior." (Dooling's characterizations of the insurance business are hilarious. For example, in discussing the "how to's" of denying claims, Boones' brother explains, "Everything is a preexisting condition, except maybe injuries from automobile accidents. But don't take my word for it! Who said, 'We carry the seeds of our own destruction with us from birth'? Socrates, or somebody, I don't know.")

Fearing being caught in the life cycle of an American insurance adjuster, Boone schedules a trip to Paris with his best friend, Michael Killigan. Or as Dooling puts it, "Instead of hanging around Indians and waiting for his first coronary bypass operation, his second wife, his third child, his fourth incremental pay raise, and his fifth of single-malt scotch. [Boone] decided to do something drastic. Something Gaugin or Henry Miller might do, something impulsive and irrational, financially irresponsible, and dangerous. He knew where to find guidance in such matters: his best friend, Michael Killigan."

It is Michael Killigan, best friend of Boone and son of killer attorney Randall, who is the draw into the Third World. Michael has joined the Peace Corps, been stationed in Sierra Leone, Africa, and has been missing for two weeks in the politically unstable African backcountry. This is the plot set; Randall Killigan and Boone Westfall, two divergent symbols of First World values venture into the Third World to find Michael.

The journey into Africa has the feel of Joseph Conrad with a sense of humor. We immediately meet Boone's guides, two very different white men, Lewis and Sisay.

Sisay has adopted the Third World as his own, while Lewis finds everything in his surroundings vile. It is through their eyes that Dooling is able to present a heterogenous Africa. Through the vehicle of these divergent characters, Dooling presents a story dense with meaning rather than static and superficial. Ironically, he challenges our own predispositions toward stereotyping by presenting opposing stereotypes.

We also meet the corrupt African politician, campaigning to be the Section Chief, who takes Randall's money ostensibly to find Michael, but uses it to buy the election. And we meet Pa Ansumana, who becomes Boone's grandfather in a necessary African ritual emphasizing the importance of relationships and responsibility. In an introduction to African values, Dooling explains through Sisay that Boone must be given a "grandfather" during his stay in an African village, because "[w]ithout a name and a grandfather, you don't really have social identity. The villagers have no frame of reference for you. Whose son are you? Who is responsible for you? To whom should they address their compliments or complaints about you? Without a family, you are just an unsettling enigma, rolling around like a stray white chess piece in a game of checkers."

And finally, we meet the witchfinder, who can cut out his tongue as a show of power, and then return it to his mouth. It is he who can rid a person of the witch that may be hiding within. What appears allegorical to us is very real and direct to the African villagers. Boone's "witch" is pulled out of him by the witchfinder as a gecko with "[o]ne black eye set in a streak of orange [that] peered from the side of the head, and a red tongue [that] flicked the air."

White Man's Grave is a highly entertaining, comic satire of First and Third World societies, and invites our musings as to the real differences between the two. In fact, can the "bad medicine" of African superstition be differentiated from harassing motions in the scabbard of the bankruptcy headhunter? Is reality really only the omnipresence of the automatic stay, or could it be the shapeshifter in the bush? Maybe it just depends upon with whose eyes you are seeing.

Questions Attorneys Ask

As a Claim Coordinator for the Coregis Lawyers Professional Liability insurance program, I am frequently asked two particular questions. While each situation as it applies to individual attorneys and their clients is different, many times the answers are the same. The two questions are:

"I've made a mistake, what do I do now?"

Should I sue my client for fees?"

WHEN THE ATTORNEY ERRS

As to the first questions, this usually applies to an attorney who realizes that he or she missed the filing of a suit within the applicable statute of limitations or some similar realization. This realization may occur at 6:00 p.m. on the date of the Statute of Limitations expired or it may occur years later. Regardless, there are certain actions that must be taken as soon as possible.

The attorney should notify his or her professional carrier.

The attorney should also tell the client of the problem. We find that many attorneys are reluctant to tell the client and will try to go to the adverse party and attempt to settle the case. Usually the adverse party is already well aware of the problem regarding the Statute of Limitations and is either not willing to settle at all or will only offer what they anticipate having to pay an attorney to win a motion to dismiss if suit is filed. Even if the attorney is successful and does obtain a settlement, the attorney is later open to charges that he or she had a conflict of interest when advising the client to accept the settlement as the client could argue the case was worth more than the amount of the settlement.

Generally, the best course of action is to tell the client of the error. The attorney should consult his or her carrier before going to the client and informing them of the error. Most professional liability insurance policies have a condition that an insured is not to admit liability. The insurance carrier must still recognize that an attorney has an ethical obligation to be truthful to a client. The carrier should advise the attorney to tell the client that a deadline was missed (or an error was made of some sort) and the ramifications of that error.

Juries are much more forgiving of an attorney who admits that he made a mistake than one who may attempt to mislead a client or fails to advise a client of the true status of a case. In doing so, that attorney should avoid making statements such as "I'm terribly sorry, I've ruined your life, I'll never be able to make this up to you . . ." as such statements make it more difficult for the insurer to deal with the client or the new attorney.

SHOULD YOU SUE A CLIENT FOR FEES?

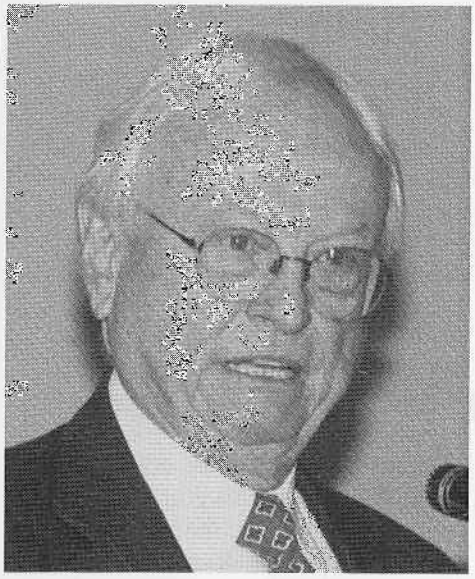
The obvious risk of this is that the client will strike back with a legal malpractice counterclaim. Although the attorney may review his or her file thoroughly prior to filing the suit for fees and determine there is no basis for a counter-claim, it cannot be guaranteed that the client will not file one. The client may very well have a different memory of events that occurred or advice that was given at any particular time.

A major factor to consider in determining whether to bring a suit for fees is the amount of the deductible obligation contained in the applicable professional liability insurance policy. If the fees owed to the firm are less than or close to the amount of the deductible, there is the risk that although the attorney may win the battle over the fee dispute, they may lose the war by incurring expenses greater than the original fee claim in having to defend the counterclaim.

Additionally, there are the hidden costs of defending a fee suit counterclaim in the form of time taken away from the attorney's practice. Attorneys are often surprised at the amount of disruption to the firm and the time spent with their insurer and defense counsel in investigating and defending the counterclaim.

An alternative may be to include an arbitration clause for attorney fee disputes in the retainer arrangement or engagement letter. However, you should check with your broker or professional liability carrier to be sure such a clause would not impact their ability to defend a counterclaim in a civil court.

Bar Foundation Honors Harold G. Christensen at its Annual Meeting



Harold G. Christensen speaking to luncheon guests.

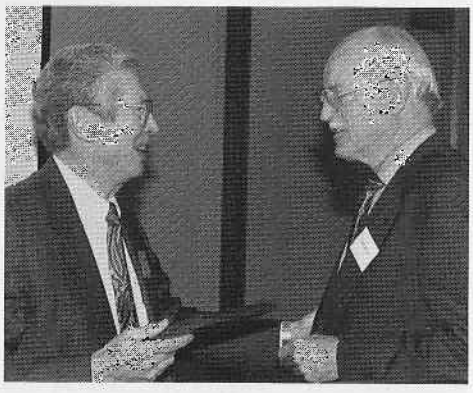
The Utah Bar Foundation honored Harold G. Christensen at its annual luncheon meeting on December 13, 1995, at the Law & Justice Center. Among the guests were Bar Commissioners, federal and state judiciary, grant recipients, bank officers, and former trustees.

James B. Lee, President, welcomed guests and noted distinguished visitors. Vice President Jane A. Marquardt reported on the current status and financial condition of the Foundation. She explained the process by which funds are generated and made available for use by community agencies through Foundation grants, and she then expressed appreciation for all of those making it possible. Stewart M. Hanson, Jr., Secretary/Treasurer, announced the scholarship and ethics award recipients.

James Lee presented a plaque of appreciation to retiring trustee Stephen B. Nebeker for his many years of service on the Board of Trustees of the Foundation and distributed final 1995 grant payments to recipients. Trustee Joanne C. Slotnik introduced John Schaefer as the talented artist who was responsible for the development of the photographic exhibit recently hung in the main foyer of the Law & Justice Center. Mr. Schaefer explained the process he used to make the photographs so unique. An article of Mr. Schaefer's efforts compiling the exhibit will be highlighted in the *Utah Bar Journal* in a later issue.

Trustee Carman Kipp introduced honored speaker Harold G. Christensen, former Deputy U.S. Attorney General and also a former trustee of the Foundation. Mr. Christensen related some of his early experiences in Washington, D.C. He discovered one measure of a person's importance was whether he was given the use of a car – which included a driver to deal with the heavy traffic and scarce parking, emergency medical equipment and the capability of talking to anyone in the world. (It should be noted that he was issued a car.)

He explained his thinking that the adversary system may have outlived its usefulness, at least in some civil contexts and that something different might work better. For instance, domestic relations cases are costly, take too much time and create too much rancor. Sometimes mediation and arbitration work. But the Bar Foundation might look into funding an investigation into possible changes, to examine the trail of the ancients and see if there are better ways to solve disputes.



Stephen B. Nebeker receiving plaque of appreciation from James B. Lee.

Randolph H. Barnhouse, Executive Director, DNA People's Legal Services, receiving final 1995 grant payment from James B. Lee.

Stewart M. Hanson, Jr. Trustee, and D. Frank Wilkins sharing a moment at the luncheon meeting.

The Utah Bar Foundation has now provided over $1.6 million in grants for legal aid, legal education and other law-related services since 1983, when the IOLTA (Interest on Lawyers Trust Accounts) was initiated. The Foundation was organized in 1963 as a non-profit charitable Utah corporation. All active members of the Utah Bar are members of the Foundation and can make direct contributions and/or voluntarily participate in the IOLTA Program which generates the major source of funds for grants.

Photo Credit: Robert L. Schmid

CLE CALENDAR

LAW OFFICE TECHNOLOGY UPDATE: BASIC SYSTEMS AND PRACTICAL APPLICATIONS

Date: Thursday, February 8, 1996
Time: 4:00 p.m. to 7:00 p.m.
Place: Utah Law & Justice Center
Fee: $60.00; $75.00 at the door
CLE Credit: 3 hours

ALI-ABA SATELLITE SEMINAR: CLEANING UP THE URBAN ENVIRONMENT

Date: Thursday, February 8, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 (To register, please call 1-800-CLE-NEWS)
CLE Credit: 4 hours

MEDIA AND THE LAW

Date: Friday, February 9, 1996
Time: 9:00 a.m. to 12:00 noon
Registration begins at 8:30 a.m.
Place: Utah Law & Justice Center
Fee: $60.00 before February 2, 1996
$75.00 after February 2, 1996
CLE Credit: 3 hours, which includes 1 in Ethics

NLCLE WORKSHOP: BASICS OF BANKRUPTCY

Date: Thursday, February 15, 1996
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for members of the Young Lawyers Division
$60.00 for all others
CLE Credit: 3 hours

ALI-ABA SATELLITE SEMINAR: SECURITIES ARBITRATION – UNDERSTANDING THE BASICS

Date: Thursday, February 15, 1996
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 (To register, please call 1-800-CLE-NEWS)
CLE Credit: 6 hours

THE INTERNET: A PRAGMATIC OVERVIEW FOR PRACTICING ATTORNEYS

Date: Friday, February 16, 1996
Time: 8:00 a.m. to 12:00 noon
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: ~4 hours

TRIAL ACADEMY 1996: SESSION 1 – JURY SELECTION

Date: Thursday, February 22, 1996
Time: 6:00 p.m. to 8:00 p.m.
(Registration at 5:30 p.m.)
Place: Courtroom of Judge Pat Brian, Third District Court, 451 South 200 East #300
Fee: $20.00 for Litigant Section members; $30.00 for non-members
CLE Credit: 2 hours

ADVANCED ADVOCACY & PROFESSIONAL RESPONSIBILITY: KEITH EVANS

Date: Friday, March 1, 1996
Time: 9:00 a.m. to 5:00 p.m.
Place: Utah Law & Justice Center
Fee: $150.00 before February 23, 1996
$175.00 after February 23, 1996
CLE Credit: 6 hours, which includes 3 in ETHICS

1996 MID-YEAR CONVENTION

Date: Thursday, March 7 – Saturday, March 9, 1996
Place: Holiday Inn, St. George, Utah
CLE Credit: 7.5 hours, which includes up to 2.5 in ETHICS
(An additional 2.5 hours is available through the Salt Lake County Bar)

****Watch your mail for a more detailed brochure.****

MANAGING YOUR FIRM FOR SUCCESS

Date: Thursday, March 14, 1996
Time: 4:00 p.m. to 7:00 p.m.
Place: Utah Law & Justice Center
Fee: $60.00; $75.00 at the door
CLE Credit: 3 hours

NLCLE WORKSHOP: LANDLORD/TNEANT LAW

Date: Thursday, March 21, 1996
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyers Division Members;
$60.00 for all others
CLE Credit: 3 hours

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

Credit Card Billing 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

Large Salt Lake City law firm is seeking one or more experienced patent/intellectual property attorneys to head its section in firm. At least five years experience necessary with good academic credentials. Competitive salary and benefits. Please send resume to: Maud C. Thurman, Utah State Bar Box 15, 645 South 200 East, Salt Lake City, UT 84111.

DYNAMIC downtown Salt Lake City litigation firm seeks energetic, talented associate with 1-4 years of good legal training. Excellent salary and benefits. All resumes received in confidence. Send resume to Maud C. Thurman, Utah State Bar – Box 17, 645 South 200 East, Salt Lake City, UT 84111.

POSITIONS SOUGHT

I am admitted to both CALIFORNIA and UTAH, and based in Sacramento. I will make appearances anywhere in California, or help in any other way I can. $60. Per hour + travel expenses. Contact John Palley @ (916) 455-6785 or Palleyj@aol.com.

Solo practitioner admitted to UT seeks **contract or project work** in the areas of: Corporate and Partnership Taxation, Partnership or Corporation to LLC conversions, Trusts, Estate Planning (including Gift, Estate and GST Taxation), or Qualified Plans. **$25.00 per hour** or flat rate. Call Ken @ (801) 355-1345.

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar. **LAHERTY & ASSOCIATES,** 9 Exchange Place, Suite #400, Salt Lake City, UT 84111, Call (801) 583-0206 or (801) 359-8003.

OFFICE SPACE/SHARING

PRIME OFFICE SPACE. Layton Barnes Bank Building. One or two attorneys turn key operation. Already one attorney on site. Call (801) 546-1100. Ask for Erik!

CHOICE OFFICE SPACE FOR RENT in beautiful, historic building in Ogden, UT. Several offices available. For information, please contact (801) 621-1384.

Downtown Law offices available for one attorney. Great location near court buildings, restaurants, fed-ex office, post office. Private suite includes conference room, reception area, library. Complete office equipment available. Covered and uncovered parking next to building. Receptionist and secretarial services available. (801) 364-5600.

OFFICE SPACE on a "money-making" street with great advertising sign seen by 40,000 cars per day; 2500 sq. ft. building with 5 offices (partially furnished). Large reception area with secretarial areas, conf/lib, plenty of parking, $2500, or 3 other offices separate entrance $900. Call (801) 964-6100.

Deluxe shared office space for one or two attorneys with established law firm in Broadway Center (111 East Broadway). Spacious offices, conference room, storage and secretarial station included. Fax, copier, telephones and receptionist available. Call (801) 575-7100.

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.

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.

TAX PROFESSORS WANTED: Adjunct part-time tax instructors, to teach LL.M. Taxation degree in a N.A.P.N.S.C. accredited post-graduate educational program in Salt Lake City. Next part-time two year program begins Sept., 1996. LL.M. Taxation degree (or M. S. Tax degree or M. Acct. Degree) and a strong tax background is preferred. Classes are held in the evening one night per week, 6 to 10 P.M. with flexibility for the instructor's schedule. Washington School of Law, Washington Institute for Graduate Studies. Contact Dean Joslin, Tel. (801) 943-2440 or Fax resume to (801) 944-8586.

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.

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

REG CR 43 ETHICS CR 7.5
MR. WILLIAM HOLYOAK
201 SOUTH MAIN STREET
P. O. BOX 45898
SALT LAKE CITY UT 84145