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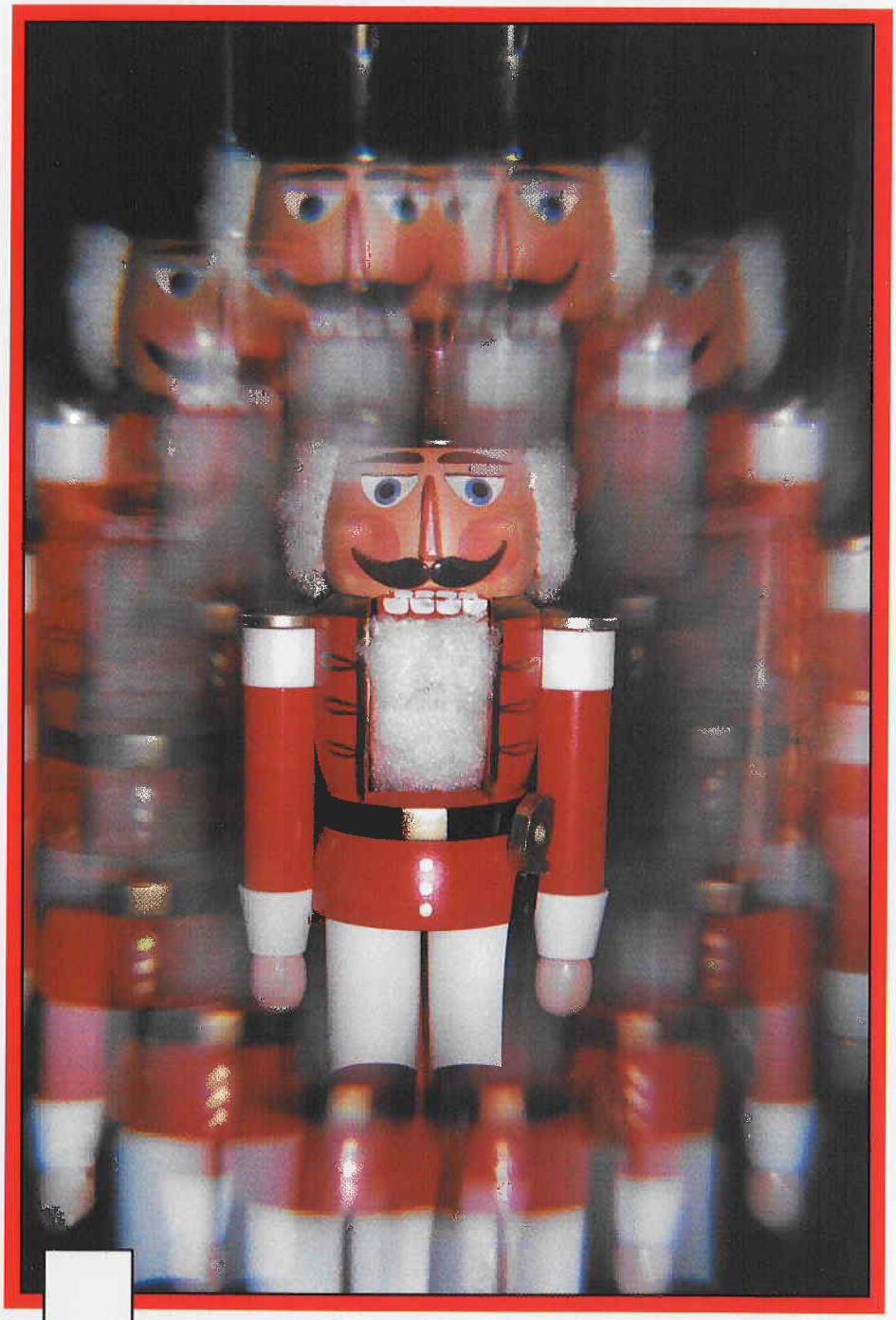

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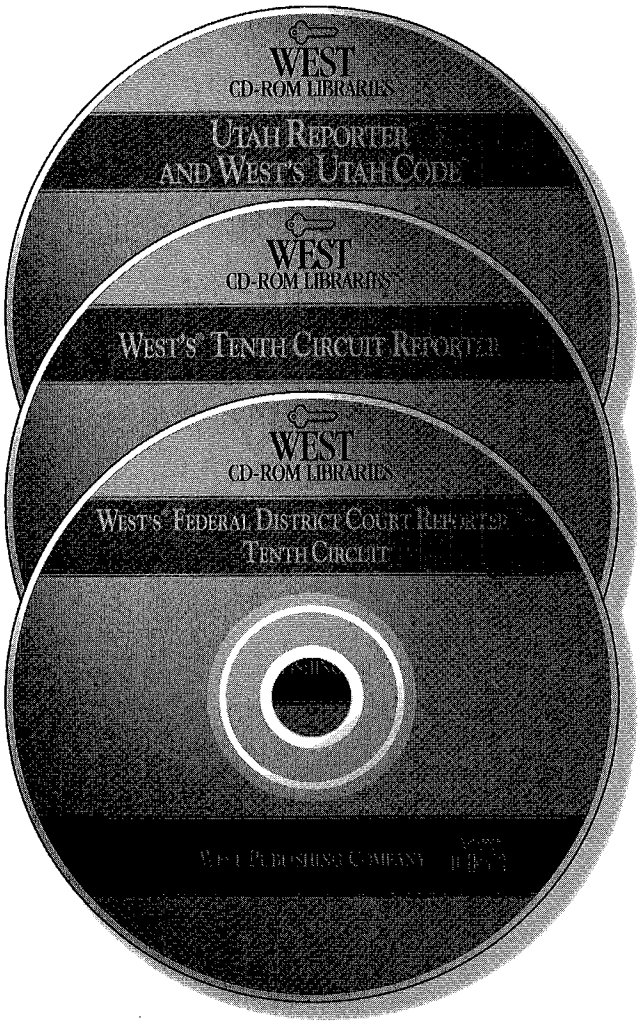

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VISION OF THE BAR: To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

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.

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LETTERS

Dear Editor:

I deeply appreciate the Bar's response to pro bono needs since I wrote my August 7, 1995 letter to this Editor proposing fee waivers and more technical help for pro bono attorneys. I am gratified that: 1) lawyers on inactive status may now take pro bono cases through LAS & ULS without paying full active fees; and 2) Rex Olsen is now on board full-time to provide technical support for pro bono cases. I cannot emphasize enough how much it means to me personally to believe that my suggestions "did not fall on deaf ears." Thank you. Please keep up the good work to expand the implementation of these necessary interventions.

Sincerely,
Jerri Hill, Attorney at Law

Dear Editor:

Regarding Judge Michael L. Hutchings' reference to "Pioneer Park and the homeless shelters" as "the most dangerous part of Utah" (*Another Vietnam: Salt Lake's War On Crime,* Nov. 1996, at 37): Aside from the danger of stepping in horse scat, I sense considerably less threat to my well-being as a democratic citizen in and around the park than in several Salt Lake area courtrooms.

Sincerely,
John Pace, Attorney at Law

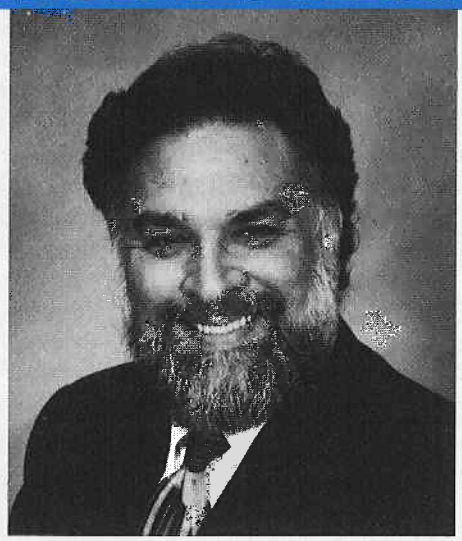
Dear Editor:

Normally, upon receiving my monthly copy of the *Utah Bar Journal,* I quickly flip through its unnecessarily thick and glossy pages to look at the pictures. I'm simply trying to spot an old comrade in arms for any sign of blood pressure. Failing that, I yawn through a couple of the lead paragraphs dealing with the Uniform Code of Minutia and Redundancy and then, in one wristy motion, flip it in the direction of the round file, nothing but net.

This thirty-second ritual was disrupted, however, by my November issue. *Excuse me?* Not one, but *two* poets, a bearded and rankly sentimental essayist, and a judge who still thinks the Vietnam war could have been *won?* (Sorry, you honor, I was at that clambake; those dishes were destined to be served cold.)

I know that my personal opinion counts for naught – I've been inactive for well over a decade – but the *Bar Journal* is basically the only thing that I get for my sixty-five bucks. The chance to hear local lawyers talking among themselves. So why not have poetry, a little sentimentality and some dare-devil metaphors? Way to go, whoever is bending the branch out there. For the first time in memory, it was fun, lively and . . . well . . . there *was* that article on derivatives.

Sincerely,
Curtis K. Oberhansly



Have You Heard the One About the Lawyer? (Or Give and Ye Shall Receive)

By Steven M. Kaufman

The mountains are towering and their snowcapped tops are gleaming. People are starting to feel this wonderful season's warm tradition. I look around and see that the season is putting a happy face on those who know its best intentions. And, the best of the best, my colleagues, my lawyer buddies, are continuing to do what they do best. Now, you may, at first glance, think of the courtrooms and corporate conference rooms when you think of what we do best. But, especially during this time of year, that should not be your first thought, nor should it be the first thing to come to mind for the average person on the street when the subject of lawyers comes up. As you and I know, lawyers of Utah are contributing and giving to their communities in so many ways. Donating time and skills and service to others has long been a common bond lawyers have shared, one with the other. Giving back to the communities we serve through our legal practices is, of course, one way to comfort and help those who need our help, but more importantly, we need to remember that our education and skills make us especially able to give. And we have so much we can give.

Hopefully, you have seen the media messages we have put in local newspapers throughout our state over the last few months. If not, you need to. Our profession is doing so much for so many that really need our help and intervention. People of all walks of life are receiving our goodwill. Lawyers are gearing up through our pro bono enterprise to help those who otherwise would not have equal access to justice. I could spend a large portion of my message talking about what needs to be done. But, that is not the purpose of this communication. Rather, it is a thank you to those of you who continue to go beyond the daily lawyering and give someone an extra piece of your kindness and expertise. You are feeding the hungry on Sundays under a viaduct, helping immigrants find their way and ease them into our way of life, helping victims of domestic or criminal violence best deal with the evils they have been confronted with, given a charitable donation to the needy or less fortunate, finding homes for the homeless, opened doors to the legal community otherwise locked, clothed those who had not seen a new coat for years, and endless other service oriented endeavors too numerous to mention. But, to my way of thinking, there can never be enough said about our profession and its wonderful willingness to give. We hear too much about all the negative aspects, and I will not take up the space in this President's message to talk about that. Lawyers do the positive, giving service and very little is said about it. I think it is time to bang the drum, and let the naysayers become aware of our good and helping side, because I know of no other profession that does so much for so many, and seldom gets the positive feedback that I think its members deserve. Someone has got to toot our bell, and what better time than during the bell ringing season? I was at a special dinner recently where we gave an award to one of our own for his unwavering contributions of service to the Bar, the community, and justice. He spoke of the necessity to give back to the community, that not only is it the right thing to do but also it is our obligation. I thought about that a great deal and it really hit home. Most of us have had the opportunity to grow and work within a circle of friends (mostly lawyers for me) who have wonderful lives. Much of society has not had that experience. It is a privilege we should not take for granted. Rather, we should draw from those positive experiences and try to bring others into the fold, helping them

however we might. As trite as this may seem, for me, it is a subject that needs strong mention on a regular basis so we do not forget our roots as a profession meant to help those who sometimes cannot help themselves. Most of us have it pretty good, and we should share that with those who do not.

Along those lines of thought, I want to expound on the necessity within our wonderful profession to help the newer, the curious, the inexperienced. In that vein, we are moving forward with a pilot program to mentor law students not yet knowledgeable about our real world, as I refer to it. I suspect the subject of civility and professionalism will find its way into most of my messages. Sorry, but not really. We can never take too much time to emphasize the importance of learning how to be gracious and act appropriate when dealing with other lawyers. The new lawyers need to learn something about this before they get out of law school, and our Bar is taking one small step to aid in that cause. Utah and BYU law schools are with us in this endeavor, and if we can take one law student and make her or him a better, more appropriately acting lawyer, and that rubs off on another and another, then the endeavor was worthwhile. Starting at the law school level seems like the right place to start. I will keep you posted on this, hoping to kickstart it about February, 1997. Mentoring these students on how to lawyer seems to be another important way to give something back. It seems to me there are so many ways that we, as lawyers can, and do, give so much back. Word just needs to get out. The positive must certainly outweigh the negative.

Giving should be a four season endeavor, but it always seems to hit home during December. This is not a religious proclamation. This time of year just tends to bring out these thoughts. It is a busy time for family and friends to declare a moment of civility and kindness. It is a time to remember that good comes in all sorts of packages, and that we, as lawyers, know how to wrap up some of the best kinds of goodness. I take this moment to thank you for that which you do for others.

Have you heard the one about the lawyer lately? There are plenty of grant stories to tell. Ask me any time. HAPPY HOLIDAYS, MERRY CHRISTMAS, HAPPY HANUKKAH, and GOOD HEALTH. The holiday season is upon us. Enjoy it. As a lawyer or judge, you've earned it. Talk to you soon!

Swan Song

by Craig Snyder

After serving for six years on the Bar Commission, I have decided it's time for someone else to have an opportunity to serve the profession. I do not intend to run for re-election when this term expires in July of 1997. I have thoroughly enjoyed my experience on the Bar Commission and in particular, serving with other men and women who are truly giants of our profession. The collegiality and camaraderie among commissioners, and the opportunity to meet lawyers throughout the state have been the highlight of my experience on the Bar Commission.

I have enjoyed the opportunity to discuss problems common to the profession and to participate on a variety of committees and task forces which have been designed to assist the profession in adapting to the problems of the 21st Century.

As a person who has a tendency to be somewhat outspoken, I have often offended my colleagues, both on the bench and in the bar, by expression of opinion that sometimes did not tow the "party line." Indeed the politics involved in the issues that come before the Bar Commission are some of the most distasteful aspects of serving on the commission. I do not enjoy, for example, the politics that are played by certain bureaucrats who spend time lobbying the Bar Commission to support their particular legislative agendas. Sometimes important pieces of legislation were presented to the commission for their support only a matter of two or three days before the legislation was presented to the legislature for a vote. This lack of communication, particularly between the Administration Office of the Courts and Bar Commission is something I have written about on many occasions and is in need of continuing improvement.

I am proud of the commission's accomplishments during the past six years. These include, but are certainly not limited to:

1. Paying off the Bar's mortgage on the Law and Justice Center and continuing to re-establish fiscally responsible management and budgetary policies.

2. Working with the Office of Attorney Discipline to resolve minor and frivolous complaints before they ever get to a screening panel stage. The Bar Commission has strongly urged the Office of Attorney Discipline to put forth more effort to resolve these minor and frivolous complaints before spending a great deal of time in investigating matters that can be resolved with simple and effective communication between the lawyer and the client. The Office of Attorney Discipline now summarily dismisses 15 to 20% of all complaints it receives. Another 40 to 50% are resolved without any screening panel referral through mediation, fee arbitration or through a determination that no violation has occurred.

3. The Bar Commission has established a speakers bureau to speak at various schools throughout the state on issues related to government, the courts, civics and other topics which may be of interest to the students in our communities.

4. Alternative Dispute Resolution. The Bar Commission has continued to stay in the forefront of developments in alternative dispute resolution. The Bar continues to encourage its membership to take advantage of resolving disputes through the use of such techniques as mediation and arbitration and actively promotes the use of the Law and Justice Center as a place to educate the public about alternative dispute resolution techniques and practices.

5. Pro Bono Services. The Bar Commission has hired a pro bono coordinator to help assist in the delivery of pro bono services to the poor and disadvantaged. This involves a substantial amount of work effort and coordination in assisting legal aid and legal services and other pro bono groups in being able to utilize the more than 1100 lawyers that have indicated a

willingness to volunteer their time in providing legal services to those who cannot otherwise afford them.

6. Court Consolidation. As most everyone knows, this was topic that occupied a great deal of my time and efforts while on the Bar Commission. We were unsuccessful in convincing the Administration Office of the Courts and those that administer court consolidation in Districts One, Two, Three and Four to adopt a uniform proposal similar to what is in effect is Districts Five, Six, Seven and Eight. At least we were able to inform the members of our profession concerning the probable impact that court consolidation would have upon their practices. At this moment, even though our district and circuit courts have been effectively consolidated in Districts One, Two, Three and Four since July, there is still no uniform application of the principles and practices of consolidation. Some courts have instituted divisions (such as the Fourth District), some have given their judges particular status (the Third District) and Districts One and Two have different policies that apply to consolidation. Hopefully with some judicial retirements and continued pressure, we will achieve the original goal of having a uniform and consolidated state-wide court system. We should not go back to the days when city courts and justice courts served as revenue and fee generators instead of dispensing justice.

During my six years on the commission there have been many other issues that have been dealt with responsibly and effectively by the members of the Bar Commission. Before I leave the commission, it will be my intent to try to persuade President Steve Kaufman and the members of the Bar Commission to put to a vote my thoughts and ideas with regard to bar election reform. As I have previously indicated to you in my commission report which appeared in the January, 1996 *Bar Journal*, it is my belief that the time has come to give our membership an opportunity to vote for the office of president-elect of the Utah State Bar. As a member of the State Bar of Texas, I maintain my license on an inactive non-resident status, yet I have been able to vote for president of the State Bar of Texas every year for twenty-four consecutive years. I have only voted for president of the State Bar of Utah during the last six years that I have been a commissioner. Most of you have never had the opportunity to vote for your president-elect. Our commission slots also need to be reapportioned. Division 1, for example, has one commissioner for approximately 80 lawyers. Commissioners in the Third District, on the other hand represent some 550 lawyers.

I would like to openly thank the bar members in the Fourth Division which consists of Utah, Wasatch, Juab and Millard counties, for the opportunity that I have had to serve them over the past six years. I appreciate the confidence that they have had in me and I am most appreciative of the opportunity that I have had to serve.

The Recovery of Attorney Fees in Utah: A Procedural Primer[1] for Practitioners – Part I

By James E. Magleby

I. INTRODUCTION

In 1984, the University of Utah Law Review published a symposium[2] which summarized the state of Utah law[3] on the recovery of attorney fees[4] which contained a brief discussion of the procedural aspects of the process.[5] Although Utah law on the subject has developed substantially since 1984, the procedural aspects of the recovery of attorney fees are often overlooked by courts and practitioners alike.[6] Accordingly, this article attempts to reduce the confusion by providing an overview of the procedural aspects of pleading and recovering attorney fees in Utah and surviving appellate challenge to the award.[7]

II. PROCEDURAL REQUIREMENTS

a. Pleading

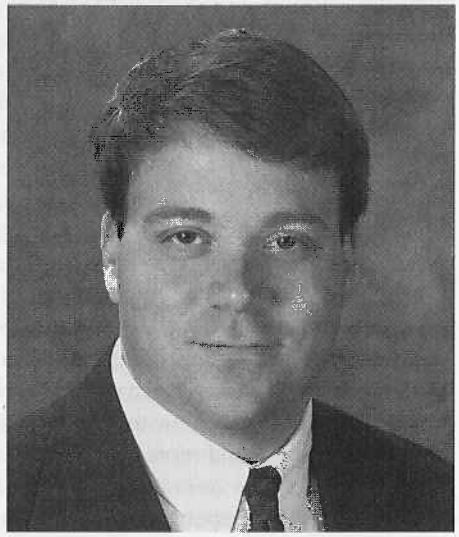
Although it may appear obvious, practitioners have, on occasion, failed to request an award of attorney fees in the pleadings. Such an omission can have dire consequences, as a party who fails to raise the issue of attorney fees until late in the proceedings may be precluded from recovering fees at all. This position was first taken in *Leger Construction, Inc. v. Roberts, Inc.*,[8] where the court declined to award attorney fees because the statute under which fees were sought was not pled in the original pleadings.[9] The court noted that, at least with regard to a request for attorney fees under statutory authority, "one entitled [to attorney fees under a statute], in fairness, should make his claim known in his pleadings."[10] Although this statement was couched as mere observation,[11] the rule in practice is that attorney fees which are not requested in the pleadings will not be awarded.[12]

However, if the issue of attorney fees is raised before the trial court and the other party placed on notice, Utah courts appear willing to interpret the rules of procedure liberally to allow a fee award. In *Palombi v. D.C. Builders*,[13] the Utah Supreme Court upheld an award of attorney fees under the mechanics lien statute, although the issue had not been raised in the original complaint.[14] In doing so, the Supreme Court ruled:

> The fact that there was no specific pleading in that regard does not preclude such an award. It is indeed important that *the issue be raised and that the parties have full opportunity to meet it.* But when that is done, our rules indicate that there shall be liberality of procedure to reach the result which justice requires. Rule 1(a), [Utah Rules of Civil Procedure], provides that they shall be "liberally construed" to secure a "just . . . determination of every action and Rule 54(c)(1) provides " . . . every final judgment shall grant the relief to which the party . . . is entitled, *even if the party has not demanded such relief in his pleadings.*[15]

Other rules have been construed in similar manner to reach similar results. Rule 8(e) of the Utah Rules of Civil Procedure contains the "notice pleading" rule which provides that "no technical forms of pleadings or motions are required."[16] This rule has been applied to allow recovery of attorney fees where the opposing party was "clearly on notice" that fees were sought, albeit by imperfect pleading.[17] Trial courts have discretion to take evidence on attorney fees at trial under Utah Rule of Civil Procedure 15(b),[18] even if the parties did not raise the issue in the pleadings.[19] Nor do the pleadings limit the amount of fees recoverable,[20] unless they are awarded pursuant to a default judgment.[21]

From these cases, it appears that where a party has failed to request attorney fees in the initial pleadings, as long as *"the issue be raised and . . . the parties have full opportunity to meet it,"*[22] particularly where the opposing party is "clearly on notice,"[23] Utah courts will probably allow recovery of attorney fees despite a failure to con-



JAMES E. MAGLEBY graduated from Swarthmore College with Honors in 1989. He then spent three years in San Francisco as a legal assistant, specializing in the preparation of computerized databases for use in national litigation in the areas of products liability and insurance defense. Jim received his J.D. from the University of Utah College of Law in 1995, and was admitted to the Order of the Coif upon graduation. He was admitted to the Utah State Bar in October of 1994.

Jim is the author of Hospital Mergers and Antitrust Policy: Arguments Against a Modification of Current Antitrust Law, 21 The Antitrust Bulleting 137 (1996), and The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution, 21 The Journal of Contemporary Law 217 (1995). Jim is also the co-author of a book commissioned by the Utah Bar Foundation, Justices of the Utah Supreme Court 1896-1996, consisting of a biographical survey of all past and present Utah Supreme Court Justices.

After law school, Jim clerked for the Honorable Pamela T. Greenwood of the Utah Court of Appeals for one year, from August 1995 through September 1996, when he joined the Salt Lake City office of Jones, Waldo, Holbrook & McDonough. The focus of his practice is litigation.

form to a specific pleading format. Therefore, a practitioner who has inadvertently failed to plead attorney fees, or is not entitled to do so until the case has progressed,[24] should (1) take steps to bring the issue before the court and (2) place opposing counsel on notice that fees are an issue.

In pleading attorney fees, practitioners must decide the grounds upon which attorney fees will be sought, whether they be statutory, contractual or equitable.[25] Next, the practitioner must decide the appropriate method for pleading the grounds upon which attorney fees are sought. The practice in Utah varies, with some preferring to request attorney fees in the prayer for relief, rather than as separate claim.[26] Intuitively, this may make sense as attorney fees are usually awarded after the conclusion of the lawsuit,[27] in temporal proximity to an award of damages. Another approach is to plead attorney fees as a separate claim.[28] This method seems particularly appropriate where the request is based upon a statute or other rule which requires the party requesting fees to produce proof on discrete issues.[29]

b. Burden of Proof

Once recovery of attorney fees is allowed,[30] "[a] party requesting an award of attorney fees has the burden of presenting evidence sufficient to support the award."[31] A party which does not provide such evidence, even if indisputably entitled to recover attorney fees, may not recover at all,[32] even if there is no disputed issue of material fact.[33]

Various types of evidence may be sufficient to meet this burden. Generally, "[s]ufficient evidence should include the hours spent on the case, the hourly rate charged for those hours, and the usual and customary rates for such work."[34] This evidence should probably be submitted by affidavit,[35] although testimony[36] by counsel for the party requesting attorney fees is allowed.[37] Practitioner should beware reliance solely upon their own opinion, however, as "[e]ven [if the] evidence is undisputed, the trial judge [is] not necessarily compelled to accept such self-interested testimony whole cloth and make . . . an award."[38]

The simplest way for a practitioner to meet the initial evidentiary burden is to file an affidavit in compliance with Rule 4-505 of the Utah Code of Judicial Administration. Rule 4-505, designed "[t]o establish uniform criteria and a uniform format for affidavits in support of attorney[] fees,"[39] provides:

> 1) Affidavits in support of an award of attorneys fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorney[] fees are claimed, and affirm the reasonableness of the fees for comparable legal services.
>
> (2) The affidavit must also separately state hours by persons other than attorneys, for time spent, work completed and hourly rate billed.[40]

Although Rule 4-505 does not require the inclusion of an hourly rate for each attorney working on the case,[41] such information should probably also be included as "an hourly rate would likely be helpful to the court."[42]

". . . the party requesting attorney fees is often entitled to fees incurred in pursuing only some portions of the lawsuit . . . ."

Once the initial burden of production is met, opposing counsel has the opportunity to investigate the evidence supporting the claimed fees. Although the procedure is meant to be informal, practitioners opposing an attorney fee award may challenge the evidence, and the trial court is obligated to act "so that procedural fairness will be accorded one who opposes a requested award."[43] The Supreme Court has summarized its position regarding the nature of this process:

> Although we do not intend to turn fee award determination into satellite litigation with full scale discovery, thereby increasing the overall cost of litigation, an adversary-type mechanism through which an opponent to a fee request can examine the accuracy of factual assertions underlying the request must be available. Usually, it will be sufficient if the opponent is provided access to supporting documents such as attorney time records. If necessary, however, a party should have an opportunity to contest the accuracy of the documents by either counter-affidavit or cross-examination of the opposing attorney before the court. Full-blown discovery should rarely be necessary.[44]

Accordingly, practitioners should take advantage of the procedural protections, and investigate any request for attorney fees. In particular, inquiry should be conducted to insure that the requested fees have been properly allocated,[45] and meet the evidentiary[46] and reasonableness[47] requirements discussed in this article. Failure to investigate, and dispute, at least some of the evidence presented in support of the request for attorney fees creates the risk of summary adjudication in favor of the party requesting the fees.[48] However, if a party has failed to provide the court with sufficient evidence, or failed to properly allocate between the recoverable and non-recoverable fees may result in a denial of the fee award altogether.[49]

c. Allocation of fees

Practitioners should also be aware of the rule[50] that "[a] party is . . . entitled only to those fees resulting from its principle cause of action for which there is a contractual (or statutory) obligation for attorney[] fees."[51] In other words, the party requesting attorney fees is often entitled to fees incurred in pursuing only some portions of the lawsuit, as authorized by statute, contract, or equity. For example, attorney fees awarded under the terms of a contract may not allow recovery of all the fees generated in the lawsuit.[52] Similarly, attorney fees awarded under a statute will not allow an award of fees incurred in pursuit of common law, or other statutory claims.[53]

In the event a party is entitled to only some of the legal fees incurred, the practitioner requesting attorney fees has the burden of allocating fees between the various claims. The Utah Supreme Court has summarized:

> One who seeks an award of attorney fees must set out the time and fees expended for (1) successful claims for which there may be an entitlement to attorney fees, (2) unsuccessful claims for which there would have been an entitlement to attorney fees had the claims been successful, and (3) claims for which there is no entitlement to attorney fees.[54]

A party who fails to allocate attorney fees between those which are recoverable, and those which are not, may forfeit the award entirely,[55] at the trial court's discretion.[56]

[1]A primer is defined as "a small introductory book on a subject." Webster's Ninth New Collegiate Dictionary 934 (1986). This definition reflects that this article is not meant to be the complete word on its subject, but rather a review of the procedures for recovering attorney fees in Utah.

[2]*See generally* 1984 Utah Law Review 533-669 (1984).

[3]*See* Kelli L. Sager, *Attorney's Fees in Utah,* 1984 Utah L. Rev. 553-571 (1984).

[4]The terminology for this phrase varies and has included "attorneys' fees," "attorney's fees," "attorney fee" and "attorney fees." Because the Utah courts seem to have settled upon the nomenclature "attorney fees," this is the phrase used in this article. *See, e.g. Salmon v. Davis County,* 916 P.2d 890 (1996).

[5]*Supra* Note 4 at 563-65.

[6]Despite the focus of the 1984 symposium, the issue of attorney fees is often ignored or given only cursory treatment by both practitioners and the courts. As the Utah Supreme Court has noted, "[i]n many instances, where the question arises at all, the attorney fee issue is treated as incidental by the appellant, who focuses on more substantial issues, and has accordingly tended to receive the same kind of cursory treatment by us." *Dixie State Bank v. Braken,* 764 P.2d 985, 989 n.6 (Utah 1988). This problem is compounded by the often confusing, or even contradictory, statements in Utah case law. *See, e.g.,* notes 96 through 98 and accompanying text.

[7]Traditionally, Utah appellate courts have "generally reviewed a trial judge's decision on the issue of attorney fees for abuse of discretion." *Salmon, supra* note 4 at 892. However, in *State v. Pena,* 869 P.2d 932 (Utah 1994), the Utah Supreme Court clarified that in some cases the appropriate standard of review would be a mixed question of law and fact, and therefore require a somewhat different standard of review. *Id.* at 935-39. Since then, the appropriate standard of review for an award of attorney fees has been subject to some debate. Justice Durham now takes the position that "[i]n light of . . . *[Pena]* . . . the reasonableness of an award of attorney fees ordinarily presents a question of law, with some measure of discretion given to the trial court in applying the reasonableness standard to a given set of facts." *Id.* at 893 (Durham, J., lead opinion). However, Justice Durham may be alone in this approach. *Id.* at 897-98 (disputing that *Pena* calls for a change in the standard of review for an award of attorney fees) (Russon, J., joined by Justice Howe, dissenting); *id.* at 900 (Zimmerman, C.J., concurring "in Justice Russon's articulation of the proper standard of review for a trial court's award of attorney fees . . . ."); *id.* at 900 (Stewart J., making no comment on Justice Durham's argument).

[8]550 P.2d 212 (Utah 1976).

[9]*Id.* at 215. Attorney fees were also not requested until after judgment was entered, and the request came one day before the time for filing a motion to amend expired. *Id.* It is unclear from the decision how much weight, if any, the court gave to this consideration.

[10]*Id.*

[11]The court noted that "[a]lbeit we say in fairness [a request for attorney fees in the pleadings] should be done we need not and do not decide that point." *Id.*

[12]*See, e.g. Christensen v. Farmers Insurance Exchange,* 669 P.2d 1236, 1239 (Utah 1983) (denying a request for attorney fees because, in part, "a review of the pleadings on file does not reflect any claim for attorney fees."); *cf. Projects Unlimited v. Copper State Thrift,* 798 P.2d 738, 753 n.18 (Utah 1990) (declining to award attorney fees to bank which was statutorily entitled to fees where bank "did not request attorney fees as part of its motion for summary judgment."); *Cabrera v. Cottrell,* 694 P.2d 622, 625 (Utah 1985) (declining to award attorney fees on appeal where prevailing party "has not sought them").

[13]452 P.2d 325 (Utah 1969).

[14]However, attorney fees could not have been raised in the original complaint, as the mechanics lien statute was not raised until the defendant contractor raised the statute by filing a counterclaim. *Id.* at 327. It is unclear from the decision how much weight, if any, the court gave to this consideration.

[15]*Id.* at 328 (footnote omitted) (partial emphasis added).

[16]Utah R. Civ. P. 8(e). Other rules call for similar results, although they have not yet been used by Utah courts to allow an award of attorney fees. *See, e.g.* Utah R. Civ. P. 8(f) ("All pleadings shall be so construed as to do substantial justice."); Utah R. Civ. P. 15(a) ("[A] party may amend his pleading only by leave of the court or by written consent of the adverse party; and *leave shall be freely given.*") (emphasis added); *Id.* ("A party may amend his pleading once as a matter of course before a responsive pleading is served, "or, if no responsive pleading is allowed, "within 20 days after it is served."); Utah R. Civ. P. 15(d) (allowing filing of supplemental pleadings, noting "[p]ermission [to file a supplemental pleading] may be granted *even though the original pleading is defective* in its statement of a claim for relief or defense") (emphasis added).

[17]*Sears v. Riemersma,* 655 P.2d 1105, 1110 (Utah 1982) (allowing party who requested attorney fees in counterclaim, but not in answer, to recover fees incurred in defending lawsuit because the other parties "were clearly on notice that [attorney fees] be awarded in connection with the dismissal of [the] complaint").

[18]Rule 15(b) states, in relevant part:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits.

Utah R. Civ. P. 15. Because it is unlikely that an award of attorney fees would prejudice an objecting party on the merits, a practitioner should almost always be able to argue that the issue of attorney fees may be raised as late as trial. However, the decision is within the trial court's discretion, *see infra* note 8, and care should therefore be taken no to rely upon this approach unless absolutely necessary.

[19]*Redevelopment Agency v. Daskalas,* 785 P.2d 1112, 1125 (Utah 1989) (holding that "the trial court was within its discretion in concluding that the pleadings could be amended to include attorney fees, even though not initially raised in the pleadings").

[20]*Pope v. Pope,* 589 P.2d 752, 753 (Utah 1978) ("[U]nder [Rule 54(c)(1), an award of attorney[] fees in excess of that requested in the pleadings, is allowable where the proof shows the party to be entitled to it."); *Ferguson v. Ferguson,* 564 P.2d 1380, 1383 (Utah 1977) (same); *see also* Utah R. Civ. P. 54 (c)(1) ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. . .").

[21]*Pope,* 589 P.2d at 753; *Ferguson,* 564 P.2d at 1383; *see also* Utah R. Civ. P. 54(c)(1) (*"Except as to a party against whom a judgment is entered by default,* every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . .") (emphasis added).

[22]*Palmobi, supra* note 13 at 328.

[23]*Sears,* supra note 17 at 1110.

[24]Such as in *Palombi, supra* note 13 at 328, where plaintiff was not allowed to seek recovery under the mechanics lien statute, but was allowed to recover fees as a prevailing party once defendant raised a counterclaim under the statute.

[25]"It has long been established that "[t]he general rule in Utah, and the traditional American Rule, subject to certain exceptions, is that attorney fees cannot be recovered by a prevailing party unless a statute or contract authorizes such an award." *Stewart v. Utah Public Service Com'n,* 885 P.2d 759, 782 (Utah 1994). However, recent decisions by the Utah courts may indicate an increased willingness to consider equitable grounds for awarding attorney fees. *See id.* at 782 (recognizing inherent power of courts to award fees where party acts in bad faith, vexatiously, wantonly, or for oppressive reasons); *id.* at 783 (recognizing power of court to award fees under common fund theory); *id.* (recognizing power of court to award fees under private attorney general theory); *see also Jensen v. Bowcut,* 892 P2d 1053, 1059 (Utah App. 1995) (affirming an award of attorney fees "based on principles of equity and justice as they relate to the specific circumstances of this case."); *Saunders v. Sharp,* 840 P.2d 796, 09 (Utah App. 1992) (noting that "courts may, in some situations, award attorney fees on an equitable basis").

[26]This conclusion is based upon the author's own observations and those of a number of practitioners in Salt Lake City, Utah.

[27]There are exceptions, such as an award of attorney fees for failure to comply with discovery requests, or Rule 11 sanctions. *See* Utah R. Civ. P. 37 ("If the motion [to compel compliance with a discovery request] is granted, the court shall . . .require the party or deponent whose conduct necessitated the motion . . . to pay . . . the reasonable expenses incurred . . . including attorney fees . . ."); Utah R. Civ. P. 11 ("If a [court paper] is singed in violation of this rule, the court . . . shall impose . . . an appropriate sanction, which may include an order to pay . . . a reasonable attorney fee").

[28]This conclusion is based upon the author's own observations and those of a number of practitioners in Salt Lake City, Utah.

[29]*See, e.g.,* Utah Code Ann. §78-27-56 (1992) (awarding attorney fees to a prevailing party where action was without merit or brought in bad faith); *see also Hermes Assocs. v. Park's Sportsman,* 813 P.2d 1221, 1225 (Utah App. 1991) (requiring proof of three discrete elements before attorney fees may be awarded under §78-27-56).

[30]After pleading attorney fees, the parties must obviously litigate the right to attorney fees. This step is beyond the scope of this article.

[31]*Salmon, supra* note 4 at 893. This has been the explicit rule in Utah since at least 1945. *See Mason v. Mason,* 160 P.2d 730, 733 (1945).

[32]*See, e.g. Dixie, supra* note 6 at 988; *see also Regional Sales Agency, Inc. v. Reichart,* 784 P.2d 1210, 1126 (Utah App. constitutes an abuse of discretion and must be overruled."); *Bangerter v. Poulton,* 663 P.2d 100, 103 (Utah 1983) ("[T]he award of the trial court of attorney's fees and certain costs is not supported by any evidence in the record and is reversed.").

[33]"Even if there were no disputed issue of material fact, the summary judgment would not award an attorneys fee without a stipulation as to the amount, an unrebutted affidavit, or evidence given as to the value thereof." *Freed Finance Company v. Stoker Motor Company,* 537 P.2d 1039, 1040 (Utah 1975). Therefore, even if the opposing party does not dispute the fee award, practitioners should take care to submit either a stipulation, an affidavit, or other evidence regarding the value of the requested attorney fees. In the event evidence is undisputed, a party may be entitled to recover attorney fees by summary disposition. *See infra* note 88 and accompanying text.

[34]*Salmon, supra* note 4 at 893; *see also Cottonwood Mall Co. v. Sine,* 830 P.2d 266, 268 (Utah 1992).

[35]Aside from the obvious advantages of submitting a fee request in writing, rather than by oral testimony, a written fee request reduces the chance that counsel requesting attorney fees will be subject to cross examination. However, a party may be entitled to cross examine regardless of the method chosen to submit the evidence. As the Utah Supreme Court has noted, "[i]f necessary . . . a party should have an opportunity to contest the accuracy of the documents by either counter-affidavit or cross-examination of the opposing attorney before the court." *Cottonwood Mall, supra* note 34 at 269.

[36]*Associated Indus. Developments v. Jewkes,* 701 P.2d 486, 489 (Utah 1985) (finding "trial court abrogated its responsibility to undertake a full inquiry" of evidence in support of attorney fees by refusing to receive testimony by attorney for party requesting fee); *Stubbs v. Hemmert,* 567 P.2d 168, 170 (Utah 1977) (finding trial court's award of attorney fees was reasonable based, in part, upon testimony of plaintiff's attorney); *see also, Associated Indus. Developments,* 701 P.2d at 488. ("Logically, the attorney claiming the fee ought to be a valuable and relevant source of information concerning the composition of that fee."); *but see Paul Mueller Co. v. Cache Valley Dairy Assoc.,* 657 P.2d 1279, 1287-88 (Utah 1982) (noting that where "detailed billing records" were submitted by stipulation, trial court abused its discretion in relying only upon statement of counsel at post-trial hearing).

[37]A practitioner should not, however, object on the grounds that counsel cannot act as both a witness and an attorney in a case. First, such an argument is incorrect. *See* Utah Rule of Professional Conduct 3.7(a)(2) (allowing attorney to testify where "[t]he testimony relates to the nature and value of legal services rendered in the case."); *see also Associated Indus. Developments, supra* note 36 at 489 n.1 (allowing attorney to testify regarding attorney fees under previous version of Rules of Professional Conduct). Second, if the trial court erroneously sustains the objection, the appellate court may find that "counsel cannot successfully object at trial to [opposing] counsel's testimony about his fee and then complain on appeal that plaintiff has failed to prove the reasonableness of the fee." *Id.* at 489 (declining to reverse award of attorney fees for insufficient evidence where attorney for party requesting fees was not allowed to testify because opposing counsel objected on grounds that "attorneys are not permitted to testify in cases in which they represent" a party).

[38]*Beckstrom v. Beckstrom,* 578 P.2d 520, 523-24 (Utah 1978); *see also Regional, supra,* note 32 at 1215 ("[A] trial court is not compelled to accept the self-serving testimony of a party requesting attorney fees even if there is no opposing testimony."); Paul Mueller Co., supra note 36 at 1287-88 (noting "it is not good practice to make an award [of an attorney fee] predicated only upon [the] opinion [of a party's attorney]") (quoting 59 C.J.S. Mortgages §812e(2), at 1554.); *but see infra* note 88 and accompanying text (discussing propriety of summary judgment motion for attorney fees where no disputed issue of material fact).

[39]Utah Code Jud. Admin. R4-505.

[40]*Id.*

[41]*In LMV Leasing, Inc. v. Conlin,* 805 P.2d 189 (Utah App. 1991), the Utah Court of Appeals noted the hourly rate for each attorney is not required, and that "[s]o long as the legal basis of the award, the nature of the work performed by the attorneys, the number of hours spent to prosecute the claim, and some affirmation that the fees charged are reasonable in light of comparable legal services are included in the affidavit submitted by the party requesting the fees, there is no failure to comply with Rule 4-505(1). *Id.* at 198. Inconsistent statements have also been made in this area. Although perhaps distinguishable because the court was not discussing Rule 4-505, the Utah Supreme Court has apparently contradicted the statement in *LMV Leasing,* by noting that "[s]ufficient evidence should include the hours spent on the case, *the hourly rate charged for those hours,* and the usual and customary rates for such work." Salmon, supra note 4 at 893 (emphasis added).

[42]*Id.*

[43]*Cottonwood Mall, supra* note 34 at 269.

[44]*Cottonwood Mall, supra* note 34 at 268-69

[45]*See infra* notes 34 through 38 and accompanying text.

[46]*See* subsection c.

[47]*See* subsection b.

[48]*See infra* note 88 and accompanying text. "Specifically, where attorney fees are awarded to a prevailing party on summary judgment, the undisputed, material facts must establish, as a matter of law, that (1) the party is entitled to the award and (2) the amount awarded is reasonable." *Taylor v. Estate of Taylor,* 770 P.2d 163, 169 (Utah App. 1989).

[49]*See infra* notes 32 through 33 and accompanying text, and subsection c in general.

[50]The allocation issue is treated as separate rule by the courts, independent of the reasonableness analysis discussed in section d. *See, infra* notes 48 through 51; *but see Mountain States Broadcasting v. Neale,* 776 P.2d 643, 649 n.10 (Utah App. 1989) (noting that "a reasonable fee" will only compensate party for those fees expended upon issues where the party prevailed.).

[51]*Utah Farm Production Credit Association v. Cox,* 627 P.2d 62, 66 (1981).

[52]*See, e.g., Paul Mueller Co., supra* note 36 at 1288 (allowing only those fees incurred in defense of the main causes of action, but not those incurred in pursuit of counterclaim); *Stubbs, supra* note 36 at 170 & n.11 (refusing to award any attorney fees incurred in trial where contractual liability for fees was limited to collection of debt and these claims were settled before trial); *Sears, supra* note 17 at 1110 (upholding trial court's reduction in fees where trial court found "'a goodly portion of the time' would have been directed to activities other than simply defending against . . . the claim."); *Trayner v. Cushing,* 688 P.2d 856, 858 (Utah 1984) ("[A] party is entitled only to those fees attributable to the successful vindication of contractual rights within the terms of the agreement").

[53]*See, e.g. Graco Fishing v. Ironwood Exploration,* 766 P.2d 1074, 1079-80 (Utah 1988) (remanding for allocation of attorney fees between those incurred in pursuit of successful claims under one statute, and unsuccessful claims pursued under other statute).

[54]*Cottonwood Mall, supra* note 34 at 269-70.

[55]*Utah Farm Production Credit Ass'n supra* note 51 at 66. (finding no abuse of discretion in trial courts refusal to award any attorney fees where party requesting fees failed to distinguish between time "spent *prosecuting* its complaint and the portion spent in *defending* the counterclaim"); *Selvage v. J.J. Johnson & Assoc.,* 910 P.2d 1252, 1266 n.16 (Utah App. 1996) (noting that "it may be proper to deny a request for attorney fees if the requesting party fails to allocate in accord with the directive of *Cottonwood Mall*").

[56]"[S]uch a decision is within the trial court's discretion, rather than being a strict legal requirement." *Selvage, supra* note 55 at 1266 n.15 (citing *Schafir v. Harrigan,* 879 P.2d 1384, 1394 (Utah App. 1994)).

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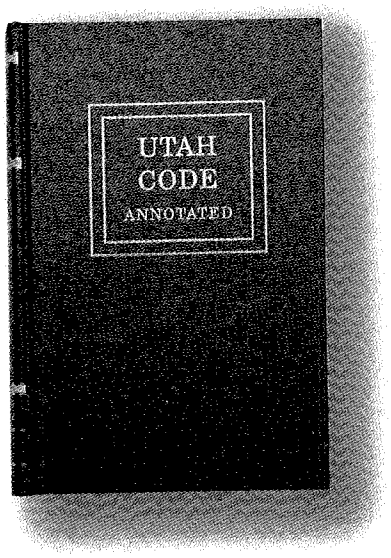

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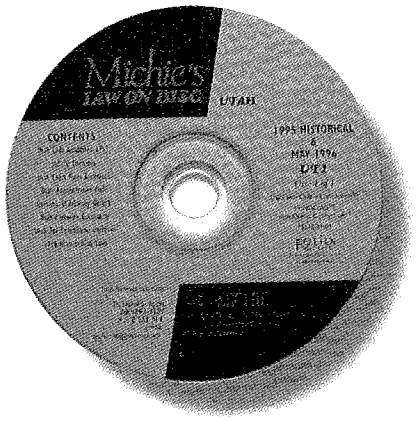

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ISO 14000 and Environmental Management Systems in a Nutshell

By Craig D. Galli

INTRODUCTION

In the 1970s, the United States pioneered the enactment of "command and control" regulatory programs to reduce the pollution of air and water, and to manage hazardous waste. While these programs can boast significant success, the current enthusiasm for encouraging companies to adopt voluntary environmental management systems implicity recognizes the failure of rigid command and control strategies alone to effectively regulate industrial sources of pollution. This paper discusses the emergence of international environmental management system standards under International Organization for Standardization ("ISO") 14000, and practical implications for industry.

What are environmental management systems?

The term "environmental management system" refers to a formalized set of programs, policies, practices and procedures implemented by a company to achieve and maintain environmental compliance with statutes, regulations, permits and internal corporate requirements.

What is ISO and how does it establish standards?

The International Organization for Standardization ("ISO") was founded in Geneva, Switzerland in 1946 as a non-governmental federation of national standards organizations dedicated to developing international standards "with a view to facilitating international exchange of goods and services, and to developing cooperation in the sphere of intellectual, scientific, technological and economic activity." The American National Standards Institute is the United States' ISO representative.

To date, ISO has adopted approximately 9000 standards pertaining largely to chemicals, non-metallic materials, electronics, data processing and photography. The standards adoption process begins with the preparation of proposed standards by technical committees. Subcommittees and working groups assist each technical committee in this effort. Each ISO member country has the right to participate on any technical committee. National representatives also form technical advisory groups to coordinate national positions on proposed standards. After approval by the technical committees, the proposed standard must be approved by a 75% vote of all ISO members in order for the proposed standard to be elevated to the status of an "ISO standard."

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What is ISO 14000?

ISO commenced work on environmental management standards – ISO 14000 – in 1991 through the establishment of the Strategic Advisory Group for the Environment ("SAGE"), which recommended the creation of a new technical committee ("TC207") dedicated to the development of environmental standards. Shortly thereafter the United Nations endorsed ISO's efforts as the "basis for environmental measurement, control, management and for harmonizing appropriate technical regulations."

TC207 currently has under consideration over twenty separate ISO 14000 documents relating to environmental management systems, auditing, site assessments, environmental labeling, environmental performance evaluation and life cycle assessment. The ISO 14000 standards do not include technical standards or numeric effluent and emissions limits. Rather, they establish a systematic framework for companies to evaluate and improve environmental management and performance. They also include methodology for product and process evaluation, and product labeling. Companies will be able to "self declare" that they have informally implemented an ISO 14000 environmental management system or they may apply for "registration" which requires formal certification by a certified ISO 14000 auditor.

The most important document generated to date by TC207 pertains to "Environmental management systems – Specification with guidance for use" (ISO 14001). In addition, ISO 14004, "Environmental Management Systems – General Guidelines on Principles, Systems and Supporting Techniques" provides useful explanatory descriptions and examples regarding the implementation of an effective environmental management system. However, it is ISO 14001 which provides the specific standards which certified auditors

will use for ISO accreditation purposes.

What are the requirements of an environmental management system under ISO 14001?

ISO 14001 mandates that "organizations" have in place the following components of an environmental management system ("EMS"):[1]

Environmental Policy. Top management shall establish and implement an environmental policy which includes a "commitment to continual improvement and prevention of pollution" and to "comply with relevant environmental legislation and regulation, and with other requirements to which the organization subscribes." The policy statement must be appropriate given the nature and scale of environmental impacts, and provide a "framework for setting and reviewing environmental objectives." While no environmental "statement" of impacts is required, the organization shall make the environmental policy statement publicly available.

Environmental Planning. As part of its environmental management systems, the organization shall undertake the following environmental "planning" activities:

- Environmental Aspects. The organization shall establish and implement procedures for identifying significant environmental "aspects" of its activities, products and services over which it has control and influence. These aspects include impacts on air and water, waste management, contamination of land, impact on communities, use of raw materials and natural resources, and local environmental issues. A risk assessment, however, is not required.
- Legal and Other Requirements. The organization shall have procedures for identifying all legal requirements and voluntarily commitments applicable to its operations.
- Objectives and Targets. The organization shall set environmental "objectives and targets" taking into consideration applicable legal obligations, significant environmental impacts, technological options, operational and financial limitations, and views of "interested parties." The term "interested party" is defined as an "individual or group concerned with or affected by the environmental performance of an organization."
- Environmental Management Programs. The organization shall establish and implement programs to achieve environmental objectives. These programs shall include designation of responsibilities and time frames.

Implementation and Operations. The following tasks relating to "implementation and operation" of the environmental management system shall be performed:

- Structure and Responsibility. The organization shall define, document and communicate the roles, responsibilities and authority for implementing the environmental management system. Top management shall ensure the availability of adequate resources (including human resources, expertise, technology and financial resources) to implement the environmental management system.

"The organization shall . . . establish . . . implement . . . maintain . . . perform . . . ."

- Training, Awareness and Competence. The organization shall establish and implement a training program for all employees whose work may impact the environment. Through the training program, employees shall be instructed in: (1) the requirement of the environmental management system, (2) the significant impacts of organization activities and the benefit of improved personal environmental performance, (3) the employee's responsibilities for complying with the environmental policy statement and the environmental management system procedures, including emergency response requirements, and (4) the potential consequences of the employee's noncompliance.
- Communication. The organization shall establish and implement procedures for internal communication and for receiving documenting and responding to communication from external interested parties. However, the standard does not require publication of audit reports and environmental management system documentation (other than the environmental policy statement) to external interested parties.
- Environmental Management System Documentation. The organization shall establish, in paper or electronically, information on the core elements of the environmental management system, and provide instruction regarding such information.
- Document Control. The organization shall maintain environmental management system documentation in a manner that ensures that documents can be located at key operational locations, and periodically reviewed and revised. A system should be established for destroying obsolete documents or archiving them for their historical significance.
- Operational Control. The organization shall establish and implement procedures for identifying environmental impacts of its activities. These procedures shall include operational criteria and shall cover situations in which deviation from the environmental policy and objectives could occur. The organization shall also establish operational controls and requirements applicable to those who provide it with goods and services.
- Emergency Preparedness and Response. The organization shall establish and implement procedures for responding to accidents and emergency conditions, and preventing and mitigating environmental impacts caused by such incidents. These procedures shall be periodically tested as well as reviewed after the occurrence of environmental incidents.

Checking and Corrective Action. The organization shall perform the following corrective action and follow-up activities:

- Monitoring and Measurement. The organization shall establish and implement procedures to monitor and measure significant environmental impacts of its activities. These procedures shall also track performance with meeting environmental objectives and targets. Calibration procedures and record keeping regarding the same shall be established for monitoring equipment.
- Non-Conformance and Corrective and Preventive Action. The organization shall establish and implement procedures for managing and investigating non-compliance situations and events, and for taking actions and corrective measures to mitigate any impacts.
- Records. The organization shall establish

and implement procedures (including retention times) for identifying and maintaining environmental records. Such records shall include at a minimum training records, results of audits and reviews, environmental requirements, and corrective measures.

- Environmental Management System Audit. The organization shall perform periodic environmental management system audits to determine whether the environmental management system conforms to applicable requirements and has been properly implemented and maintained. Results of the environmental management system audit shall be provided to management. The requirements for environmental management system audits are contained in the "Guidelines for environmental auditing – Audit procedures – Auditing of environmental management systems" (ISO 14011).

Management Review. Top management shall periodically review the environmental management system to ensure "continuing suitability, adequacy and effectiveness." Revisions to the environmental management system shall be implemented as necessary in light of environmental management system "audit results, changing circumstances and the commitment to continual improvement."

What are the benefits to implementing an environmental management system?

The development of environmental management system standards have motivated many business to commit additional resources to environmental management. While establishing and implementing an environmental management system cannot guarantee perfect environmental compliance and the avoidance of liability and public relations fallout from environmental incidents, a proactive environmental management system can significantly reduce the risks arising from noncompliance. A proactive environmental management system is also indispensable to anticipating and tracking legislative and regulatory developments, and adapting operations to comply with changes in the law.

While maintaining environmental compliance will likely remain the most important reason for implementing a proactive environmental management system, other reasons can be compelling. First, many lenders and shareholders (especially institutional shareholders) now pressure companies to implement formal environmental management systems. They routinely require companies to complete detailed due diligence questionnaires regarding environmental compliance and the effectiveness of a company's environmental management system. Second, the lack of an environmental management system may expose companies to increased exposure in tort law suits, as courts increasingly view environmental management systems as a requisite for proving due care. Third, the presence of an effective environmental management system has public relations appeal and may offer competitive advantages. Fourth, the existence of a well designed and proactive environmental management system can be used to mitigate and offset potential civil and criminal penalties.

Are there risks associated with implementing an environmental management system?

The risk of criminal liability signifi-

cantly increases by creating a sophisticated environmental management system on paper and then failing to implement it. To avoid the imposition of criminal liability on the corporation or company employees, senior managers should reach a common understanding of the goals of a corporate-wide environmental management system and the need to judiciously implement it with sufficient resources. Unfortunately, adequate environmental management systems do not come inexpensively. Therefore, senior environmental staff and legal counsel must verify the commitment of time and resources of senior management.

How does a company develop and implement an environmental management system?

The following describes the basic conceptual and practical steps companies may take to implement a proactive environmental management system.

1. Determining what environmental management system already exists.

Once a company decides to implement a proactive environmental management system, it must determine what if any environmental management system currently exists and whether it is effective. To do so, a company should first identify the key environmental requirements and issues which apply to each activity and division/subsidiary of the company. Next, even if a company has no interest in becoming ISO 14000 registered, the ISO standards provide an excellent blueprint upon which to evaluate an existing environmental management system. Such an evaluation is often referred to as a "gap analysis."

2. Implementing a corporate environmental management system

Organization Structure. Senior management must clearly define the environmental responsibilities of corporate management, site management and other key personnel. These responsibilities should be in writing and included, if possible, in job descriptions. Environmental compliance should also be considered in job performance evaluations.

Written Policies. Environmental policy statements generally reflect a company's core values or "mission statement" with respect to environmental controls and compliance. In addition to containing between five and twenty concise policies or principles, many companies include a short explanation of each policy or principle. Such statements are increasingly included in annual reports or presented as separate glossy brochures complete with pictures. Some companies have taken the next step of issuing annual environmental performance reports to shareholders and to interested parties. These reports attempt to describe and measure the company's environmental performance.

Communication. Companies should develop formalized written procedures to ensure adequate communication and reporting of environmental incidents and releases with respect to: (1) internal reporting (from staff to site managers and from site managers to corporate managers/counsel), (2) external reporting to government agencies, and (3) when appropriate, external communication to the public. Some companies have also developed external communication procedures for "crisis management." Formal communication procedures are especially critical for operations located in remote areas.

"Environmental policy statements generally reflect a company's core values . . . ."

Training Program. Effective training programs identify specific training needs (rather than rely on "off the shelf" training programs and videos) and maintain records of the names of employees and dates of those receiving new employee training and refresher training. Training programs should acquaint the employee with legal requirements, environmental management system programs and procedures, potential environmental impacts resulting from the employee's work activities, and the consequences of environmental noncompliance. In some instances, the company should require its contractors to receive the same training.

Environmental Planning. Environmental planning for new projects and for expansion of existing projects has never been more important. Feasibility studies for new projects should describe environmental controls and determine associated costs to comply with current, proposed and anticipated environmental requirements. Those designing new projects should meet early with environmental professionals to incorporate good environmental controls into the project.

Compliance Monitoring. Compliance monitoring should consist of two parts. First, site environmental staff should conduct routine inspections of site operations. Second, comprehensive compliance audits (including environmental management system audits) should be conducted at least once every three years.

Record Keeping Program. Every company should establish and implement a document retention policy to ensure the discarding of documents that should not be retained, and the maintenance of documents with historic or other significance. Most sophisticated companies today recognize that some types of documents, such as environmental baseline studies and hazardous waste manifests, should be kept in perpetuity.

Contractor Management. Many companies rely heavily on outside contractors. It is critical to carefully monitor the on-site work and environmental compliance of contractors, and to clearly define the scope of the contractor's environmental compliance responsibility. In addition, contracts should be reviewed and revised to contain adequate environmental provisions.

CONCLUSION

Companies will no doubt experience increased pressure to demonstrate good environmental stewardship through the development and implementation of proactive environmental management systems. Whether a company decides to become registered under ISO 14000, to "self-declare," or merely to use ISO 14000 as general guidance, the success of any environmental management system is contingent on the time and resources dedicated to environmental management, and on the personal commitment of the company's employees.[2]

[1]The term "organization" includes any "company, corporation, firm, enterprise or institution, or part or combination thereof, whether incorporated or not, public or private, that has its own functions and administration . . . For organizations that are more than one operating unit, a single operating unity may be defined as an organization." ISO 14001, at 8.

[2]For more information, the following recently published books provide useful guidance on the contents and application of ISO 14000. *See* Tom Tibor, *ISO 14000: A Guide to the New Environmental Management Standards* (1996); Joseph Cascio ed., *The ISO 14000 Handbook* (1996).

The Mystique of "Going Offshore"

By David D. Beazer

INTRODUCTION – SUNNY PLACES AND SHADY PEOPLE

The casual reference to Switzerland, the Isle of Man, the Bahamas, the Caymans, and the Cook Islands will likely conjure up images of the ultrarich secretly amassing money in order to avoid taxes and launder unclean funds. While in the past, part of this notoriety has been warranted, today's offshore reality is something very different. The magnitude of financial activities in tax havens, now more accurately called offshore financial centers (OFCs) is immense. Walter Diamond, economist and author of *Tax Havens of the World,* reports that approximately half of the world's funds pass through OFCs each year and is a sum in excess of five trillion dollars.[1]

There are many reasons why the offshore world has grown to such proportions, but essentially an individual who uses an offshore jurisdiction has the same motivations as someone "onshore" who goes to an accountant for insight on tax savings, or to an attorney to limit the risk of liability. Today's OFCs fulfill a multitude of diverse needs, including tax planning, international estate planning, global investing and banking, protection of privacy, facilitation of international business transactions, relief from regulatory burdens, reinsurance, shipping, expatriation planning, and asset protection planning. OFCs are no longer just sunny places for shady people.

OFFSHORE BANKING – BURIED TREASURE

In its broadest terms offshore banking can be explained as the carrying on of banking and financial activities in foreign jurisdiction. For IRS purposes even something as innocuous as a bank account in Canada is considered to be "offshore banking."[2] A more practical definition for offshore banking is the use of a financial institution in a tax-free environment which is essentially free of fiscal and exchange controls. There are two basic techniques for utilizing an offshore bank: (1) An individual or entity can use another's offshore bank, such as an account in the Bahamas with BankAmerica or the Royal Bank of Canada, or (2) An individual or entity can form an offshore bank.

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Formation. In the more suitable jurisdictions the incorporation of an offshore bank is derived from the English law registration system. The registration system includes a two-tiered application process. The first tier is a permit to incorporate, and the second tier is an offshore bank or financial institution operating license. Application disclosure requirements customarily ask for information about the principals of the bank, its capitalization amounts (including audited financials), the proposed management structure, and its intended situs of operation. There are two types of operating licenses issued, type "A" and type "B". A type "A" operating license is broader in scope and the holder can transact business both within and without the local jurisdiction, while type "B" (or the "brass plate bank") is limited to outside transactions. U.S. shareholders of an offshore bank may avoid taxation of undistributed income by obtaining a certification from the IRS that the bank was not formed for, nor will it be used for evading taxes.[3]

An offshore bank has several distinct advantages over its traditional American counterpart. For example, an offshore bank's activities may extend to *any* legal endeavor. Manufacturing, insurance, underwriting, and the sale of securities are common activities for a private offshore bank. Offshore banking also has a high degree of confidentiality which is usually maintained by civil and criminal penalties,[4] however, varying OFCs do have "informal" ways of disseminating proprietary information and there are experts who specialize in tracking offshore funds.

The following are some of the more popular offshore financial centers used by U.S. citizens:

1. The Bahamas – Professional services are excellent and well established, good for banking.
2. Bermuda – Good for captive insurance companies, part of the U.K., parity w/ U.S. dollar.
3. British Virgin Islands – Currency is the U.S. dollar, few professional services.
4. Cayman Islands – Still one of the fastest growing, British Crown colony, skilled professionals.
5. Cook Islands – Remote location, very aggressive trust law, limited professional services.
6. Isle of Man – Own court system, excel-

lent professional services, aggressive in marketing.
7. Switzerland – Most stable world currency, skilled professionals, confidentiality, civil law.
8. Turks and Caicos – Relatively new and dynamic, few professional services, self-governing.
9. St. Kitts & Nevis – Aggressive trust law, a new player in the offshore word, few professionals.

Selecting both the proper jurisdiction and the appropriate trustee of an offshore bank is vital, as few offshore centers have legislated for any kind of bank deposit compensation schemes. The due-diligence laws, political stability, and the potential for the applications of external pressures also vary from jurisdiction to jurisdiction. Shell-corporation pushers, phony fund managers and fictitious banks exist, so the practitioner interested in formation options should perform thorough due diligence and stick with companies and individuals that have high-profile reputations to protect. In spite of these potential pitfalls, offshore banking is an excellent option when considering where to cache a treasure.

OFFSHORE ENTITIES – THE WORLD IS YOUR OYSTER

The offshore world contains many unusual entity and investment structures, everything from limited liability limited partnerships (LLLPs), limited partnership liability companies (LPLCs), and Swiss stiftungs (similar to a family partnership), to the much more conventional and familiar limited liability companies or corporations. The following is a brief survey of the more common:

International Trading Companies. Significant tax savings can be realized by interposing an offshore company into an international trading transaction. One of the more routine structures authorized by the Internal Revenue Code is the Foreign Sales Corporation.[5] Foreign Sales Corporations were enabled by Congress in 1984 to encourage the export of U.S. goods and services by exempting a portion of foreign export trade income from federal income taxes.

Offshore Corporations and Trusts. These are often used to hold investments in subsidiaries and associated companies and to facilitate international joint venture projects. Capital gains arising from the disposal of particular investments and reduced levels of withholding on dividend payments can be achieved by the utilization of jurisdictions that have "double taxation agreements." In addition, offshore trusts can have unique and almost impregnable asset protection capabilities.

Intellectual Property, Licensing and Franchising. Intellectual property can be owned or assigned to an offshore entity and then licensed or franchised to companies interested in exploiting the worldwide rights. The income derived can then be accumulated offshore and, through the selection of an appropriate jurisdiction, withholding amounts can be reduced.[6]

Shipping Companies. Ships can be registered in jurisdictions that typically have low cost registration and licensing fees and the income derived from shipping is tax exempt.

"An asset protection trust . . . is one of the most potent tools available for protecting assets . . . ."

Personal Service Companies. The offshore personal service company may contact to provide the services of an individual outside the country in which that person is a resident. The fees earned, that are related to the performance of the service, may then accumulate in a tax free offshore environment.

Employment Companies. Many use offshore companies to employ staff working on overseas assignments. Proper structuring can have substantial tax and regulatory benefits for both the multinational company and the employee.

Captive Insurance Companies. Many multinationals have created their own insurance companies to insure the risks of their subsidiaries and affiliates. Corporations creating captive insurance companies may do so for both tax and nontax reasons, and the premiums paid by the company or a subsidiary may be tax deductible.[7]

Subpart F. & Taxes. Significant restrictions on OFC's entity transactions are contained in Subpart F of the Internal Revenue Code. Basically, these restrictions require that each U.S. resident who owns, directly or indirectly, 10 percent or more of a controlled foreign corporation (CFC) must report as gross income his pro rata share of the foreign corporation's Subpart F income. A foreign corporation is deemed to be a CFC if more than 50 percent of its voting stock is owned by U.S. shareholders on any day during the taxable year.[8] Shareholders in a CFC may be taxed on undistributed profits of the CFC regardless of whether a dividend is actually paid. The veneer of Subpart F gives the appearance of effectively proscribing tax mitigation planning.

Other taxes that must be considered in the formation of offshore entities are the Foreign Personal Holding Company tax, the Passive Foreign Investment Company tax, the Accumulated Earnings Tax, Withholding for Nonresidents taxes, and the actively-connected-with-U.S. taxes, Foreign Tax Deductions and Credits and Recapture, and any tax treaties between the U.S. and the foreign jurisdiction. U.S. taxpayers engaged in international transactions are also required to report and file forms with various agencies on certain transactions, profits, and incomes. Legislation currently pending before Congress contains disclosure requirements specifically targeting offshore transactions. Taxation is the grit that produces the entity "pearls" in the offshore world.

OFFSHORE FOREIGN TRUSTS – COVER YOUR ASSETS OR GET BURNED

An asset protection trust (APT) is one of the most potent tools available for protecting assets, and when coupled with other entities causes minimal interruption of the settlor's affairs, still allows substantial beneficial enjoyment and control.[9] The goal of an APT is to create an impervious barrier that in a "worst case scenario" will allow the debtor to effectively manage a negotiated settlement.

Among the asset protection advantages available through the use of an APT, probably the most significant are derived from concepts of jurisdiction and comity.[10] Legal enforcement action against the APT requires that the litigation occur *de novo* in the foreign situs where a shorter statute of limitations,[11] more restrictive legal requirements and the inconvenience and expense of trying a case outside of the U.S. create an effective barrier to all but the most tenacious creditors. In addition, legal counsel in these foreign jurisdictions will not normally work on a contingency fee arrangement, and local courts often require

the posting of a bond before the initiation of a suit.

A typical APT is established under foreign law in a jurisdiction which has specific trust statutes based on English common law. The location of the trust usually governs the rules under which the trust operates, however, for a number of reasons one situs may be adopted for the trust's administration and another situs for interpretation of questions of trust law. Normally, the APT is administered by two trustees, a U.S. individual and a foreign institutional trustee. The APT's assets may be held overseas or in the U.S. Assets, such as real property, that remain in the U.S. may be exposed to litigation claims, but with the proper equity stripping triggers, these onshore assets can be effectively converted into offshore assets that are very difficult for a U.S. creditor to reach.

Planning for APTs requires that they be established long before they are needed. In other words, if you wait until you are exposed to litigation and creditors, then it's probably too late to settle an APT. However, a potential debtor may (with extreme caution) change the nature of particular assets exposed; for example, a $450,00 stock portfolio can be removed offshore as long as other assets, such as Limited Partnership Interests (with their phantom income penalties) are available to satisfy a potential creditor. Techniques may be applied that essentially turn very attractive asset apples into execution lemons.

APTs can be used as:

1. Protection against malpractice suits and as a supplement to insurance.
2. Protection from investment activities outside of the client's main area of work.
3. A stop-loss where an institution requires an open-ended personal guaranty.
4. An alternative to premarital agreements, or for a spouse concerned with the financial risks or imprudence of the other spouse.
5. A method to reduce one's financial profile and segregate a portion of one's assets for future ventures.
6. Additional protection for retirement benefits.
7. A strategic positioning tool for current problems – use extreme caution!
8. Protection of inheritance or proceeds from the sale of a business.
9. A method to limit toxic waste liability exposure.

Here are some examples[12]

1. Client A is selling a business. She will realize several million dollars and is concerned that as the "deep pocket" she might be sued for subsequently arising problems, including environmental contamination. She wants to protect her proceeds.
2. Client B, a wealthy individual, believes that his son's wife may sue for divorce (alimony and property settlement) and wants to provide funds for the son and his grandchildren without risking loss to the daughter-in-law.
3. Client C serves on the board of directors of several local charities, but has been advised by an attorney that to do so risks being named individually as a defendant in lawsuits. Client C wishes to guard against this eventuality.

"International investment scams cost Americans more than $1.1 billion a year . . . ."

4. Client D wishes to undertake a long-term gift giving program as part of her estate plan. She is fearful that a lawsuit might arise in the middle of this program.
5. Client E is an architect/structural engineer and cannot obtain liability insurance at a reasonable cost. He is concerned about the possibility of a large lawsuit.

APT TAX IMPLICATIONS, COMPLIANCE AND CONTEMPT

The APT will be drafted to produce the following "tax neutral" income and gift, estate, and excise tax results:

a. The trust would be treated as a grantor trust and the settlor would include in his or her personal income tax return all items of income loss, deduction or credit, etc.
b. No gain or loss would be recognized on the transfer of assets to the trust.[13]
c. The transfer of assets to the trust is incomplete and not subject to gift tax.
d. Assets transferred to the trust would remain part of the settlor's estate.
e. Excise taxes do not apply.

Contempt. Contempt is a relatively extreme remedy, i.e. incarceration, based on an individual's refusal to perform a very specific court order. The United States Supreme Court has held that impossibility to perform a court order is a complete defense to contempt[14] and a properly drafted APT makes it impossible for an individual to repatriate assets when compelled to do by a court order, or other exercise of power. An exception to this "complete defense" rule is the self-created impossibility doctrine; any self-created impossibility disallows the use of the defense.[15] In order for this self-created impossibility rule to be applied, there must be a nexus-in-time between the order of the court and the self-created impossibility. A properly created and funded APT does not meet the requisite nexus-in-time requirement, and the impossibility defense will not be defeated.[16]

DANGERS – SAFE HARBORS AND HIDDEN REEFS

Because offshore jurisdictions have strict confidentiality laws, the potential for exploitation and abuse by both practitioners and unsavory characters is a very real one. U.S. law attempts to counter this potential with strong civil and criminal penalties.

Practitioners Liability. Advisors must consider: RICO, bankruptcy crime laws, tax crimes, conspiracy to defraud the U.S., the Crime Control Act of 1990, the Money Laundering Control Act, mail fraud, aiding and abetting, securities crimes and penalties, joint tortfeasor laws, fraudulent conveyance statutes, IRS penalties, and malpractice claims. An advisor is bound by ethical rules, such as rule 1.2(d) of the American Bar Association Model Rules of Professional Conduct, which prohibits attorneys from assisting a client in conduct that the attorney knows is fraudulent.

"Have I Got a Deal for You . . ." International investment scams cost Americans more than $1.1 billion a year and most of these are tied to overseas investment programs in metals, currencies, bonds, and bank instruments.[17] Many scams attempt to produce entities and transactions that are outside of IRS perusal. This "Rube Goldberg" approach to tax planning usually involves transactions that give away assets, often through multiple trusts, which allegedly allow the client to live tax free on the "borrowed" (wink wink) income. When the IRS collapses these embellished structures and transactions and seizes your client's bank accounts and home, you as the advisor to this mess better have another passport to the jurisdiction(s) you've been crowing about.

Safety. In offshore practice, perhaps even more than many other areas of the law, the integrity and reputation of the professionals you deal with is paramount. Most reputable offshore practitioners have demanding due diligence programs to protect themselves and "cull" out any "undesirable" clients. General knowledge of fraudulent conveyances is necessary for any trusts and estate/tax practitioner under normal circumstances, and when advisors are interested in taking steps to use offshore vehicles particular care must be taken.

CHOOSING A JURISDICTION

Depending on which definition you use, the number of OFCs is more than 60, with each jurisdiction having a very individualized reputation and use.[18] A number of factors besides the choice of law issues are vital when it comes to selecting an offshore location including: foreign business operations, banking and investment infrastructure, language, political stability, telecommunication capabilities, and access to qualified trustees and money managers. In addition, there is an extremely wide range of set up costs, annual maintenance fees, and minimum capitalization requirements between OFCs. Success in offshore formation requires an acute awareness of how the offshore world works and the advantages and disadvantages of each OFC must be balanced with the objectives of the client.

CONCLUSION – IT'S BETTER IN PARADISE

Going offshore is not appropriate for all clients, but for those who can use offshore vehicles the results can be dramatic and effective. If you and your client want to sleep at night and pass administrative scrutiny, proper setup and structuring of your offshore plan is essential. Doing your homework beforehand and making informed decisions during your search are the keys to long-term offshore success. The offshore world is maturing quickly and practitioners must be watchful for the uninformed or unscrupulous promoter, the adage "too good to be true" should be balanced against the lack of exposure to the true planning possibilities.

RECOMMENDED READINGS

Practical International Tax Planning, by Marshall J. Langer, 3rd Edition, PLI, 1994.

Asset Protection – Legal Planning and Strategies, by Peter Spero, Warren Gorham Lamont, 1994.

Offshore Review, Published by the Offshore Institute. (The name is change to *Shore to Shore*).

Tax Havens of the World, by Thomas P. Azzara, New Providence Press, 1991.

Preserving Your Wealth, by F. Bentley Mooney Jr., Irwin Publishing, 2nd Edition, 1993.

Tax Havens, by Hoyt L. Barber, McGraw-Hill, 1993.

Offshore Investment, Published ten times a year by Barry C. Bingham.

Fundamental of International taxation, by Boris Bittker and Lawrence Lokken, Warren Gorham Lamont, 1991.

Strategic Planning Through Offshore Trusts, by Barry S. Engle, Ronald Rudman, and Neal Wolf, P.E.S., 1996.

Journal of Asset Protection Planning, Published six times a year by Warren Gorham Lamont.

Asset Protection Planning, by Howard D. Rosen, Tax Management Portfolios, 1989.

[1]The International Offshore Centeres Handbook, by Barry Engle, 1993, pg. 9 *quoting* Walter Diamond.

[2]Foreign bank accounts must be reported on Form TDF 90-22.1 by any person with an interest in, or signing authority over the account. See also RIA Federal Tax Coordinator 2d ¶ S-3650.

[3]I.R.C. Code Sex. 552(b)(2); Treas. Reg. Secs. 1.552-4, 1.552-5

[4]The most strict are the Cayman Islands, Switzerland, Austria, and Vanuatu.

[5]I.R.C. Code Sec. 922. In addition to meeting the requirements of §922 the corporation must make an election to qualify pursuant to the procedures outlined in I.R.C. Sec. 927(f).

[6]Caution must be used as the transfer of intellectual property may trigger a recognizable gain which may be treated as ordinary income rather than a capital gain. I.R.C. Code Secs. 958, 1249 and 7701(a).

[7]*Americo v. Commissioner,* 96 T.C. 18 (1991), aff'd 92-2 USTC ¶ 50, 571, 979 F.2d 162 (9th Cir. 1992). The Americo case holds that insurance premiums paid to a wholly owned subsidiary are deductible when the subsidiary conducts a "significant" amount of business with unrelated parties. In *Americo* the 9th Circuit Court of Appeals defined "significant" unrelated business as being 52 to 74 percent. Subsequently, the 9th Circuit has held that 29 to 33 percent is "significant." *Harper Group v. Commissioner,* 96 T.C. 45 (1991), overruled 92-2 USTC ¶ 50, 572 (1992).

[8]Where a foreign corporation is controlled for an uninterrupted period of 30 days U.S. shareholders may be taxed on portions of undistributed as well as distributed earnings. I.R.C. Code Secs. 951, 957 and 958; In addition, an annual information return must be filed on Form 5471 or penalties may be incurred pursuant to I.R.C. Code Sec. 6038.

[9]Too much control may convert the trust into a sham trust. *Dahlstrom v. Commissioner,* 999 F.2d 1579 (5th Cir. 1993) (unpublished). Also, *Para Technologies Trust v. Commissioner* [Tax Ct. Dkt. Nos. 12089-91, and 12242-91].

[10]Journal of Asset Protection Vol. 1 Number 1 September/October 1995, by Howard D. Rosen, Warren Gorham Lamont.

[11]The statute of limitations in the more protective jurisdictions is limited to two years from the date of initial asset transfer.

[12]These examples are a compilation from several articles with the major credit going to Howard D. Rosen in Tax Management Portfolios, 810 T.M. 1st (1989).

[13]A 35 percent excise tax may be imposed by I.R.C. Code Sec. 367 on transfers to foreign trusts, *except* when the trust is a grantor trust. Rev. Rul. 87-61 provides that an offshore grantor trust is *not* subject to the excise tax.

[14]*U.S. v. Rylander,* 460 U.S. 752 (1983); *U.S. v. Bryan,* 339 U.S. 323 (1950).

[15]*U.S. v. Bryan,* 339 U.S. 323, 332 (1950).

[16]*See, e.g., F.T.C. v. Blatne,* 308 F. Supp. 932, (D.C. Ga. 1970), where the court held that the respondent was not in contempt where the requested documents were missing. The Court stated: ". . . the respondent can not be said to be 'responsible for their unavailability' if prior to the time he was served with a subpoena to produce the documents he had previously disposed of the same in good faith." at 933.

[17]F. Bentley Mooney Jr., Preserving your Wealth, pg. 212 (1993); The Securities and Exchange Commission maintains and publishes a Foreign Restricted List, which is designed to put broker-dealers, financial institutions, investors and others on notice of possible unlawful violations of the registration requirements of Section 5 of the Securities Act of 1933 (distributions of foreign securities).

[18]F. Bentley Mooney Jr., Preserving You Wealth, pg. 119 (1993).

Commission Highlights

During its regularly scheduled meeting of October 4, 1996, held in Provo, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the August 26, 1996 Commission meeting.
2. Bar President Steve Kaufman reported that he attended the New Mexico and Colorado Annual Bar Conventions.
3. Kaufman indicated that most section and committee chairs were present at the recent Bar Leadership luncheon where he reported on current Bar initiatives including the public education campaign.
4. Kaufman reported that during the recent Bar Commission retreat, two subcommittees were formed to review in more detail the Client Security Fund and Fee Arbitration Rules.
5. The Board voted to accept the Executive Committee's recommendation to raise the threshold for fee arbitrations heard by one person.
6. The Board appointed Jim Gilson as chair of the Lawyers Helping Lawyer Committee.
7. Steve Kaufman indicated that the comment period ends November 15 on the proposed amendments to Supreme Court rules.
8. John Baldwin reviewed a request from a failing Bar examination applicant for a policy change to allow rereading of bar examination essay answers when an examinee receives a score of 128. The Board voted no to change the policy.
9. Dave Nuffer reported on the recent meeting of the Electronic Law Project and indicated that standards will be reviewed at the next meeting.
10. Budget & Finance Committee Chair, Ray O Westergard, reported that the Budget & Finance Committee met with Deloitte & Touche to review the audit results. Westergard noted that the Bar received a high review and no exceptions were noted. The Board voted to accept the 1995-96 audit report by Deloitte & Touch and to print a summary in the *Utah Bar Journal.*
11. Westergard reviewed the August financial reports including budget highlights and answered questions.
12. Executive Director John Baldwin reported on department activities and noted that the Law & Justice Center continues to be busy. He indicated that, since there has been an amazing response to the CLE seminar on legal research on the Internet, several more seminars are planned to accommodate everyone interested.
13. Baldwin reported that Petty Lawden, Chair of the Legal Assistants Division, will be proposing Bylaws for this new division and making an appointment to the Bar Commission.
14. General Counsel, Katherine A. Fox, reported that the number of unauthorized practice of law complaints continues to climb.
15. Baldwin referred to Carolyn B. McHugh's letter of August 20, 1996 requesting the Bar's support of legislation to limit the liability for pro bono attorneys. The Board agreed that Baldwin should submit the request to the Legislative Affairs Committee for their review and recommendation.
16. Baldwin indicated that accolades continue to come in on the Centennial Play and the Executive Committee voted to present a token of appreciation next month to Lisa Michele Church to appropriately thank her for her work.
17. Debra Moore presented the final report of the Equal Administration of Justice Committee. The Board voted to have the Bar Commissioners take some time to study the report and vote to accept or reject the recommendations at next month's meeting.
18. Chief Disciplinary Counsel, Stephen R. Cochell, reported on current litigation matters.
19. Young Lawyers Division President, Daniel D. Andersen, reported that the Young Lawyers Division is co-sponsoring with the YWCA "a week without violence" which will include short events, seminars and activities in coordination with Washington Elementary School.
20. James C. Jenkins reviewed the Judicial Council meeting of September 4. He noted that voting on the Family Court issue has been postponed until 1998, and confirmed Scott Daniels appointment to the Judicial Performance Evaluation Committee.

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

Discipline Corner

SUSPENSION

On November 4, 1996, the Honorable Tyrone Medley entered an Order of Discipline By Consent suspending Elliott Levine ("Levine") from the practice of law for a period of three (3) years effective September 6, 1995. Levine was also ordered to attend Utah Ethics School and pay costs.

The attorney discipline case arose out of two criminal cases in which Levine represented two defendants in separate cases on unrelated charges of aggravated murder. In 1987, Levine was appointed to represent James R. Holland on a capital homicide charge. In 1990, Levine was appointed to represent Von Lester Taylor ("Taylor") in an unrelated capital murder case.

During Taylor's death penalty hearing, Levine attempted to have James Holland ("Holland"), who was in prison and whose appeal of the death sentence was still pending, testify in the Taylor case for the purpose of comparing Holland's background and criminal activities with those of Taylor to demonstrate that Holland did not deserve the death penalty. The State objected to allowing Holland to testify in the Taylor case, and the trial court excluded the testimony. Taylor was subsequently sentenced to death, and an appeal was taken which Levine argued that the trial court erred in excluding Holland's testimony.

On appeal in Taylor's case, Levine argued that the trial court should have permitted Levine to present Holland's testimony to support an argument that a person such as Holland "who has committed multiple murders, had been incarcerated for nearly his whole life, comes from an abusive background, and who has little, if any

remorse . . . *is a prime candidate for the death penalty while (Taylor is) not.*

The Supreme Court issued an opinion in Holland's appeal that Levine "had breached his loyalty to Holland in violation of defense counsel's duty under the Sixth Amendment to the United States Constitution." Levine's conduct also violated Rule 1.7, Conflict of Interest.

The trial court in the attorney discipline action found that the violation was aggravated by Levine's prior record of discipline and vulnerability of the clients. The court also found the violation was mitigated by the fact that Levine had no dishonest or selfish motive, had personal problems at the time of the violations, was remorseful and cooperated in the disciplinary process.

INTERIM SUSPENSION

On November 5, 1996, the Honorable Kenneth Rigtrup placed Robert L. Wood ("Wood") on interim suspension pending the final outcome of an attorney discipline action arising out of Wood's guilty plea and conviction on a two count felony information charging Securities Fraud and False Tax Return. The OAD alleges that Wood's criminal misconduct violates Rule 8.4, Utah Rules of Professional Conduct.

ADMONITION

On or about October 8, 1996, an Attorney was admonished by the Chair of the Ethics and Disciplinary Committee of the Utah State Bar for violating Rule 8.4(c), Misconduct, of the Rules of Professional Conduct of the Utah State Bar.

The Attorney was retained to represent a client in an action against Salt Lake County and one of the County employees. The suit was based on two events, Complainant was raped on the job as a County employee, and breach of confidentiality of Complainant's supervisor who disclosed this information which the Complainant considered an unwarranted invasion of her privacy. On or about July 21, 1994, Respondent sent a letter to Complainant wherein it was stated a complaint had been filed against Salt Lake County and the County had been served but proof of service had not yet been returned. The letter also stated a complaint against a County employee had been prepared but needed to be amended and had not been served when in fact, no complaint was filed against either Salt Lake County or the County employee.

There were no mitigating or aggravating circumstances.

MCLE Reminder

Attorneys who are required to comply with the even year compliance cycle will be required to submit a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by December 31, 1996. The MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a combined 27 hour total. Be advised that attorneys are required to maintain their own records as to the number of hours accumulated. Your "Certificate of Compliance" should list all programs that you have attended that satisfy the CLE requirements, unless you are exempt from MCLE requirements. A Certificate of Compliance for your use can be found at the end of this magazine. Should you have questions regarding the requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

Stephen D. Swindle Appointed Lex Mundi Chairman

Stephen D. Swindle, Esq. was elected chairman of Lex Mundi during its Annual Meeting October 18-20, 1996 held in Berlin, Germany. Mr. Swindle is the president of the law firm of Van Cott, Bagley, Cornwall & McCarthy in Salt Lake City, Utah.

Lex Mundi is the world's largest international alliance of 133 independent law firms. Each Lex Mundi firm is among the oldest and largest in its location: Van Cott, Bagley, Cornwall & McCarthy is the exclusive Utah Lex Mundi member. Member firms have more than 350 offices worldwide, representing over 9,000 attorneys. Lex Mundi provides for the exchange of professional information about the legal and global practice and development of law, facilitating and disseminating communications among its members and improving the members' abilities to serve the needs of their respective clients.

In addition, Lex Mundi members elected new offices and directors during the annual meeting. Finn E. Engzelius, Esq. of Thommessen Krefting Gree Lund AS in Olso, Norway was elected chairman-elect. Michael E. Ray Esq. of Womble Carlyle Sandridge & Rice, PLLC in Winston-Salem, North Carolina was elected secretary. Robert Furter of Pestalozzi, Gmuer & Patry (Switzerland, Alex Hertman of S.Horowitz & Co. (Israel), John Sapp of Michael, Best & Friedrich (Wisconsin) and Carita Walgren of Roschier-Holmberg & Waselius (Finland) were elected to serve on the board of directors.

Mr. Swindle received his J.D. from the University of California at Berkeley and his M.B.A. and B.S. from the University of Utah. He is a member of the Utah State Bar, Salt Lake County and American Bar Associations. Mr. Swindle is actively involved with a number of professional and civic associations including the Salt Lake Area Chamber of Commerce. He was recently elected as chairman of the Chamber's Board of Governors.

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NSF Check/Overdraft Notification: Implementation Guidelines for Attorneys

By Stephen R. Cochell

On September 9, 1996, the Utah Supreme Court adopted modifications to Rule 1.15, Utah Rules of Professional Conduct which, in pertinent part, requires attorneys to maintain client funds in financial institutions that agree to automatically notify the Office of Attorney Discipline ("OAD") in the event of a non-sufficient funds check or check overdraft. The effective date of the rule is January 15, 1997.[1] This note will briefly discuss the purpose of the rule modification and guidelines to assist members of the Bar to comply with Rule 1.15, as modified.

Misappropriation or mishandling of client funds undermines, if not destroys, public confidence in the administration of justice and the legal profession as a whole. There is no question that attorneys who violate client trust accounting rules are a small minority of the Bar. At the same time, however, misappropriation or theft of client funds draws public criticism of the profession and detracts from the integral role played by lawyers in business and the administration of justice. The NSF Check/Overdraft Notification Program was adopted, in part, to provide an "early warning system" to ensure that client funds are protected against lawyers who are either dishonest, unable, or unwilling to comply with basic principles of trust accounting.

As modified, Rule 1.15 requires, in pertinent part, that:

> (a) A lawyer shall hold property of clients or third parties that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. *The account may only be maintained in a financial institution which agrees to report to the Office of Disciplinary Counsel in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored.*
> (emphasis supplied).

Utah joins twenty other states which have implemented a Non-Sufficient Check/Overdraft Notification program.[2]

The following is a list of anticipated questions and answers regarding implementation of the NSF Check/Overdraft Notification Program.

1. How will the Office of Attorney Discipline ("OAD") handle a notice of an NSF check/overdraft notice?

ANSWER: Upon receipt of an NSF check/overdraft notice, the OAD will usually contact the attorney or law firm requesting an explanation. In most cases, the initial OAD contact will immediately be followed by a letter formally requesting a *documented* explanation within ten (10) business days from the date of the formal request.

If bank error is claimed, an affidavit from a bank officer should be submitted. If attorney error is claimed, for example, a claim that a check was incorrectly deposited to another account by office personnel, an affidavit from the appropriate office personnel together with a copy of the dated slip showing deposit to the incorrect account will be required. Most inquiries will be concluded in this manner.

Inadequate or seriously incomplete explanations, or an absence of an explanation or reply, may generate other action, including a request for production of books and records, referral of the matter to a screening panel, or other disciplinary action.

2. If a trust account instrument is dishonored, will the attorney be given notice at the same time as the Office of Attorney Discipline so he/she can immediately begin to investigate to determine if it resulted from an error?

ANSWER: Yes. It is common practice for financial institutions to give notice of dishonor to the attorney whose account is charged within 24 hours of dishonor. This is the same time period within which trust overdraft notification will be given to the OAD.

3. How can an attorney ensure that the attorney remains in compliance with the NSF Check/Overdraft Notification Program?

ANSWER: Each attorney should provide written notice to the financial institution and the Bar identifying his/her client trust account(s), the account number, and branch location. Each institution will provide an agreement that allows the financial institution to report NSF checks/overdrafts in client trust accounts. The OAD anticipates the financial institutions will include a limited liability provision in their account agreements as a condition of providing NSF check/overdraft notification.

Lawyers should ensure that their general and specific attorney trust accounts (other than fiduciary accounts maintained as executor, guardian, trustee or receiver or in any other similar fiduciary capacity) include the words "Attorney Trust Account" on the title of the checking account and that they maintain a copy of the trust agreement between the attorney and the financial institution.

Signatories on an attorney trust account should take proper steps to comply with generally accepted accounting standards in accounting for client trust funds (e.g., maintaining a client ledger, a general ledger, and performing a monthly reconciliation of accounts). Rule 1.15 requires each attorney to account for the receipt and expenditure of all client trust funds. Failure to maintain proper records, or a lawyer's inability to properly account for client funds through proper documentation may be a disciplinary violation under Rule 1.15.

4. Can a financial institution charge additional fees associated with NSF check/overdraft notification?

ANSWER: Yes. The comment to Rule 1.15 acknowledges that financial institutions may charge additional fees associated with reporting NSF checks and overdrafts.

5. Are financial institutions prepared to participate in the NSF Check/Overdraft Program?

ANSWER: The OAD has initiated discussions with the Utah Bankers Association and provided information to the Association on how other states have approached NSF Check/Overdraft notification. The effective date of the rule was extended an additional 75 days to allow financial institutions additional time to address legal or technical issues associated with the NSF Check/Overdraft Program.

The OAD has recommended that the Utah Bankers Association cooperate with

the Utah League of Credit Unions to develop a uniform attorney trust account agreement and a uniform format for reporting NSF checks or overdrafts. Further developments regarding financial institutions and the NSF Check/Overdraft Program will be reported in future issues of the *Utah Bar Journal.*

Specific questions regarding a lawyer's duty to account for client trust funds or the NSF Check/Overdraft Notification Program may be addressed to the Office of Attorney Discipline's Ethics Hotline. (801) 531-9110.

[1]The modification to Rule 1.15 was originally proposed by the Rules Advisory Committee in November, 1994 and a public hearing was held in December, 1994. After further consideration by the Rules Advisory Committee, the rule was submitted for the Utah Supreme Court's consideration in August, 1996.

[2]The other states are California, Connecticut, District of Columbia, Florida, Georgia, Idaho, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont and Washington. *See* 1996 Client Protection Fund Survey, ABA Center for Professional Responsibility.

1997 Mid-Year Meeting Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 1997 Mid-Year Meeting. These awards honor publicly those whose professionalism, public service and personal dedication have significantly furthered the **advancement of women** and the **advancement of minorities** in the law profession or judiciary. Your award application must be submitted in writing to Monica Jergensen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than **Tuesday, January 21, 1997.**

Electronic Law Practice Issues Forum

The Utah Electronic Law Project will hold an Issues Forum open to all on Saturday, January 11, 1997. The location is yet to be determined. The Issues Forum will take broad based input on problems, challenges, and benefits to moving legal services and processes completely to electronic media. Lawyers, government officials and business representatives are invited to attend. For further information please contact Toby Brown at the Utah State Bar at tbrown@utahbar.org or (801) 297-7027.

Fee Arbitration Committee

By G. Steven Sullivan
Chairman of the Utah State Bar Fee Arbitration Committee

It is unavoidable that every attorney in private practice must have his or her client pay the attorney's bill in order for the attorney to stay in business. And, there is not an attorney in private practice that has not had a conflict with the client paying the fee charged. It is always terribly difficult to deal with the delicate issue of fees with a client which you have been hired to protect and provide needed legal services. Fee disputes between clients and attorneys are one of the most common complaints made by the public against lawyers. For all of these reasons, the Utah State Bar earlier created the Utah State Bar Fee Arbitration Committee. The committee's task is to resolve fee disputes through binding and non-binding arbitration. Either the attorney or the client may petition the Arbitration Committee for a determination of a disputed fee. The use of the Arbitration Committee has grown steadily since its inception. In 1995, 259 applications for arbitration were sent out. 30% of these forms were returned to the Bar and the arbitration process completed. To date in 1996, 283 applications were sent out and 26% of those applications were returned and the arbitrations completed or are ongoing.

The Arbitration Committee is comprised of an attorney, a judge, and a lay person. The arbitration panel hears evidence by both the petitioner and respondent in a summary fashion. An arbitration decision is then filed with the Bar as well as forwarded to the parties. This program has been a great success both in resolving the actual complaint and more importantly, providing a better understanding to the client and the attorney of the concerns generating the fee complaint. The process of the informal hearing often will help the involved parties resolve the emotional component of the complaint as well as resolve the ultimate fee question. Through this process, the client's feelings toward the attorney are often resolved. The arbitration process is a valuable tool for both the attorney and the client.

The arbitration program has been so successful that there is a need for attorneys and lay persons to devote time and energy to the program. The need for more help is especially acute in the Provo and southern Utah area. If you are an attorney practicing in these areas, and you want to become involved with the committee, please contact Maud Thurman at the Utah State Bar. If you are an attorney that has clients or persons having an interest to serve as a lay person on the panel, please have such persons contact Maud Thurman right away. If you have any questions about the committee process, please do not hesitate to contact myself or Maud Thurman.

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

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

Drop Date:	December 20, 1996 7:30 a.m. to 5:30 p.m.
Place:	Utah Law & Justice Center Rear Dock 645 South 200 East Salt Lake City, Utah
Selected Shelters:	Traveler's Aid Shelter School The Rescue Mission Utahns Against Hunger Women & Children in

Jeopardy Program

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

For more information and details on this drive, watch for the flyer or you can call Leonard Burningham or Sheryl Ross at 363-7411 or Toby Brown at 297-7027.

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

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

CEELI
A Pro Bono Project of the ABA

By Paul Moxley

In September of this year, I participated in a project of the American Bar Association called the Central and East European Law Initiative (CEELI). It is designed to advance the rule of law in the world by supporting the law reform process under way in Central and Eastern Europe and the New Independent States of the former Union (NIS). Through various programs, CEELI makes available pro bono U.S. Legal expertise and assistance to emerging democracies that are in the process of modifying or restructuring their laws or legal system.

According to the 1995 financial statements of CEELI, as of May 1996, the value of pro bono time donated by CEELI volunteers ($150.00 per hour) yields a total in-kind contribution of approximately $55 million from the inception of the project.

In the early 1990's the former Soviet Union Countries approached the State Department for help with their legal system. The State Department approached the ABA with the issue and it developed the project since then. The 1995 contributions for this project raised were close to nine million dollars. The Executive Board is an all star cast including Sandra Day O'Connor, Talbot "Sandy" Dalemberte and a host of other lawyers, judges and individuals.

CEELI's legal assistance programs were conceived through consultations with leaders in the region to respond quickly and broadly to the enormous tasks associated with reforming their economies and legal infrastructures. CEELI began working in Central and Eastern Europe in 1990, and the NIS in 1992. With little other technical legal assistance flowing into the regions from Western Europe or the United States, CEELI initially focused on such issues as constitutional law, judicial restructuring, and criminal law. Assistance quickly expanded to an array of additional legal issues such as media law, nonprofit law, civil codes, property, and land use law. In 1992, CEELI started its Commercial Law Program, which focuses on the fundamental legal principles necessary for a functioning market economy. The program has recently commenced a joint program with the U.S. Department of Justice on criminal law reform.

In an effort to support the development and reform of indigenous legal institutions, CEELI is allocating additional resources to assist in judicial restructuring, strengthening lawyers associations, reforming legal education, and combating organized crime and corruption.

In providing technical legal assistance, CEELI is guided by several key principles. First, CEELI is designed to be responsive to the needs and priorities of the countries of Central and Eastern Europe and the NIS, not those of the U.S. participants or sponsors. Accordingly, the structure of CEELI is heavily influenced by consultations with government and non-government officials, legal scholars, and practitioners from the host countries.

Second, CEELI recognizes that U.S. legal experience and traditions offer but one approach that participating countries may wish to consider. A variety of models, including those of many civil law countries, offer alternative legal traditions that are also valuable sources of law. Consequently, CEELI includes other perspectives, particularly West European, in its programs. In the emerging democracies of Central Europe and the NIS, however, there is great interest in the U.S. legal tradition, particularly with regard to individual and human rights, allocations of governmental power, and the free market system.

Finally, CEELI is a public service project and not a device for developing business opportunities. Accordingly, CEELI has adopted strict conflict of interest guidelines designed to ensure that technical advice offered by CEELI participants is neutral and that conflicts of interest, or appearance of conflicts, are avoided to the maximum extent possible.

By turning to the ABA's 370,000 member lawyers, as well as other legal experts in the United States and Western Europe, CEELI has been able to marshal and make available a high level of expertise in the areas in which the participating countries have requested assistance. Because participating lawyers and judges volunteer their time on a *pro bono* basis, and because host countries agree to cover certain local costs, CEELI has been able to achieve an extraordinary degree of financial leverage.

I was fortunate enough to be asked by CEELI to go to the countries of Uzbekistan and Kazakstan which I readily accepted. It was a professional experience of a life time. I had the good fortune of participating in seminars on our legal system of justice and law office management in four different cities including Tashkent, Samarkand and Namagand, Uzbekistan and in Chimkent, Kazkstan. In total I presented eight full day seminars in eleven business days. The travel from city to city was exotic driving on roads similar to what we have between Brighton and Park City. I could see how these people live. It was fascinating. They are so resourceful. Their economy is energizing. You can see changes almost daily. People line the highways selling produce and other consumer supplies. People's spirits are remarkable. The highways have donkeys hauling loads, old vehicles, people bicycling or walking. In nineteen days I saw few westerners. In the remote areas outside the cities, life goes on as it did decades ago. This area of Central Asia is heavily influenced by the Muslim religion. While under the influence of Russia, a great deal of effort was expended in extinguishing the local culture and customs. The native language was discouraged and Russian language and customs were imposed. There are one hundred and ten different nationalities in Uzbekistan alone. Calling it a hodgepodge would be an understatement.

My seminars were attended by three hundred law students, lawyers, law professors and judges. Kazkstan has had the private practice of law for two years and Uzbekistan expects to have it within six months. Historically the courts were dominated by the Communist party. They merely carried out the wishes of the party and the process was flawed at best. The judges were controlled by the prosecutors. The defense lawyers have lead mostly hopeless lives representing people who had few legal rights. Typically in the past con-

fessions were beaten out of their clients before they met with their lawyers and their job was negotiating a jail sentence from forty years to perhaps thirty seven or thirty eight years. Concepts of judicial review, federalism, jury trials and freedom of speech and of the press are intriguing to these lawyers. The fact that lawyers can have a strong role in their community is of great interest. These lawyers want assistance with building their bar and judge's associations. They are interested in building stronger roles for lawyers in their society.

The volunteer lawyers working for CEELI are inspiring. They donate a year of their time and are referred to as liasons in going to these countries including: Albania, Belarus, Bosnia, Bulgaria, Croatia, Czech Republic, Estonia, Kazakstan, Kyrgyzstan, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Russia, Slovakia, Ukraine and Uzbekistan.

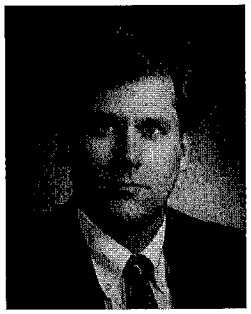
As a result of my Bar work, I have met many lawyers around the country from other states. Bar junkies profess frequently that we have a great Bar here in Utah. The Bar, Judiciary, and law schools work closely together and towards improving our legal system. The states are not involved in licensing. Much change has taken place while I have practiced since the early 1970's. Middle aged and older lawyers frequently bemoan the "good old days" when we were more collegial in nature and competition had not effected some of our attitudes about the practice. Observing these lawyers in Central Asia struggling with these same issues was fascinating. Regardless of our shortcomings which are frequently heralded, we have an excellent system here.

What impressed me the most about their experience was the strong sense of professionalism and spirit that these lawyers in the former Soviet Union have. Many of the same sentiments are shared by our lawyers here in Utah. A strong desire to do a good job for our clients while being responsible to our society and community. This experience re-enforced that we are moving toward a global law economy. Our clients will be going to these countries because of their vast resources and because of the talent, energy, enthusiasm and abilities of the lawyers. Jay Forsberg reported at the state bar convention this past July that English trained lawyers in India are performing legal research at ten dollars an hour. Lawyers will soon be competing with each other all over the world.

Upon reflection, I was also touched by how young of a society and Bar we have in Utah. Utah is a state one hundred years now. Our integrated bar was started in the 1930's. My father started the practice of law in the late 1930's. His brother was a lawyer and so I have heard about this profession for about fifty years now. It is improving. In late September I was in Samarkand and Uzbekistan. It is two thousand years old. Algebra was started there. The first study of stars commenced in that city. It is on the silk route where Marco Polo brought silk from China to Europe. Lawyers like us are starting all over and dedicating themselves to professionalism. They ask questions which we frequently ponder: "How do you find a good secretary? Good clients that pay your bills? What defenses are available for clients for crimes? Where do you find expert witnesses? What is the best way to portray a practice situation, etc.?"

Very interesting stuff.

Glen Cook honored by the NAACP



In November, the National Association for the Advancement of Colored People honored Glen Cook for his free legal work and commitment to the civil-rights struggle in Utah.

Cook says that although discrimination is not as blatant as the Jim Crow laws of the 1950s, it is still there – it's just more subtle.

"When you send someone to the back of the bus, it's easy to see. If you deny somebody a job because of the color of their skin, it's harder to prove," Cook said.

In the courtroom, Cook said, he has seen examples of sometimes unintentional discrimination.

"I know there are different sentences for people of color and several studies have proved that," Cook said. "The judges I work with are not consciously racist, but we tend to like people who are like us, as a judge, if I see somebody in front of me who looks like me, I do not want to put that other 'me' in jail."

In his pro bono work for the NAACP, Cook has handled cases of alleged discrimination in housing, the workplace and the judicial system. Cook, his friends say, tries to resolve seemingly insoluble conflicts with a folksy, backslapping approach that usually works.

"If there is any possible resolution, Glen will work to find it. He is one of the few people who can cut through all the personalities in a discrimination case and find the right thing to do, not just the legal thing," said William Cunningham, a member of the NAACP's legal redress committee. "He's one of the few people I know who has a spiritual commitment to his profession."

Cook may not be combative, as far as attorneys go, but he is no pushover, either.

"He has a nice personality, but he doesn't take garbage from anyone. He does not accept excuses," said Kenneth Wallentine, chief deputy Uintah County attorney and a former attorney for the Salt Lake NAACP.

Jeannetta Williams, president of the Salt Lake branch of the NAACP, says Cook's commitment to the civil-rights movement harkens to the 1960s when blacks and whites marched side by side and worked together to register black voters in the South.

"This is what the NAACP is all about," Williams said. "We are all fighting – black and white – to end discrimination."

WANTED

Attorneys to judge student competitors in ATLA's regional trial advocacy competitions. Great opportunity to help law students prepare to be trial lawyers while serving on scoring panels composed of local lawyers and judges. The competition is scheduled for February 27 through March 1, 1997. Please call Stephen J. Buhler for further information at 521-4145.

"The RAID plays to sell-out crowds as the Lawyers' Centennial Event!"

By Lisa-Michele Church

It was a night of drama and humor September 19 at the Kingsbury Hall premiere of the Bar's original theatrical production of **"The Raid."** A sold-out audience of approximately 2,000 attended "The Lawyers' Centennial Event," which starred Utah Supreme Court Chief Justice Michael Zimmerman, local lawyers Ron Yengich, Rob Youngberg, Norman E. Plate, Richard Wilkins, Richard Dibblee, Debora Threedy, and others.

The Bar commissioned the play as a way of exploring Utah's legal history, particularly the issues of religious freedom and individual conscience. **"The Raid"** centered on the polygamy trial of early LDS Church leader George Q. Cannon, a popular Mormon lobbyist for statehood.

(l-r) Tom Vick, Katherine Taylor. Polygamist wife is carried out of the courtroom

"We were hoping to portray the legal issues at the time of statehood in a dramatic and entertaining way," noted Lawyers' Centennial Committee member Carol Clawson. "The play was the Bar's effort to promote understanding of our history on these controversial topics."

Chief Justice Zimmerman played the role of the Federal Territorial Judge Charles Zane, who presided over the Cannon trial in the play. Zane was known for his outspoken admonitions to polygamists concerning the need to give up the controversial practice. "Unless you start changing things, the U.S. government is going to grind your kingdom down to dust until there's nothing left of it," Zane warns Cannon in the play.

Cannon, portrayed by Equity actor

(l-r) Richard Scott, Michael Zimmerman. George Q. Cannon argues with Judge Charles Zane

Richard Scott, tells Zane that he will not renounce his religious beliefs, nor their role in attempting to build a utopian society in the Utah mountains. "We chose this land that nobody else wanted because it was our intention to build up a society that would be pleasing to God," Cannon says. "For this, I have no regrets and make no apologies." Cannon was defended in the play by Attorney Franklin S. Richards, played by BYU Law Professor Richard Wilkins.

The play also included dramatic courtroom scenes where Cannon's polygamous wives were compelled to testify against him. Martha – played by U of U Law Professor Debora Threedy – used wit and cleverness to make her point that she is entitled to practice her religion without governmental interference. Martha was an eloquent defender of her right to practice polygamy, despite the very human cost exacted from her as a plural wife. The audience reacted with delight as

(l-r) Debora Threedy, Richard Scott. George and Martha Cannon in Jail

Martha repeatedly got the best of Federal Prosecutor Charles Varian (portrayed by Tony Larimer) by turning his constitutional arguments around on him. "I must give up my beliefs so that others might have theirs?" Martha asks Varian at one point.

"I am not about to debate philosophy or the foundations of the law with you," Varian retorts. Richards wryly comments, "I can see why!"

The audience responded warmly to the various points of view as presented in the dilemma. Norman E. Plate, playing Jewish businessman Fred Simon, received applause for his running commentary on the Mormon/non-Mormon tensions in early Utah, noting at one point, "For a Jew, it is very interesting to see the Christians at each other's throats for a change."

(l-r) Tony Larimer, Michael Zimmerman, Ron Yengich. A scence from the polygamy trial

Rob Youngberg played Mead – a member of the Mormon community who suggested a violent solution to the dilemma. One of the play's most dramatic moments came in the second act, when Mead visited Cannon in jail and urged him to organize a revolt against the federal authorities. Cannon is shown wrestling with the difficulties of trying to lead his church from jail, while federal authorities pass law after law to deprive the Mormons of their property, their church organization and finally, their individual rights.

The play was written by local author Paul Larsen, based on research by Lisa-Michele Church. Some of the characters were composites, and the program con-

continued on pg. 40

Utah State Bar Approves Ethics Opinions

ETHICS ADVISORY OPINION
NO. 96-08
APPROVED NOVEMBER 1, 1996

Issue: May an attorney represent a person who seeks to obtain payment under the terms of a client-solicitation agreement entered into with another attorney, where the agreement involved the payment of a "finder's fee" to the person?

Opinion: Although a "finder's fee" agreement between an attorney and a client may be a violation of Rule 5.4(a) of the Utah Rules of Professional Conduct, the Rule governs the ethical conduct of *attorneys.* Thus, the solicitation agreement did not violate any duty of the non-lawyer parties under the Utah Rules of Professional Conduct. Therefore, absent a violation of Rule 3.1 concerning non-meritorious actions, the plaintiff's new attorney may seek recovery under the solicitation agreement on behalf of his non-lawyer client.

ETHICS ADVISORY OPINION
NO. 96-09
APPROVED NOVEMBER 1, 1996

Issue: May an attorney recover attorney's fee's for a collection action pursued on behalf of the attorney's partner?

Opinion: There is no prohibition against an attorney's hiring another attorney to collect the debts of the first attorney, even though the two attorneys are in the same law firm. Whether the second attorney may collect attorney's fees from the debtor is a question of law that the Committee has no authority to decide. if the debt is incurred in connection with legal services provided by the firm of the two lawyers, Utah case law clearly prohibits the recovery. Under other factual circumstances, such as debt arising out of a lawyer's non-legal, personal business, the matter would be judicially resolved, but the lawyer attempting to collect such fees has an ethical obligation under the Rules of Professional Conduct – particularly under Rule 3.3(a)(3) – not to mislead the court as to the attorney's right to collect such fees.

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

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. Forty eight opinions were approved by the Board of Bar Commissioners between January 1, 1988 and November 1, 1996. 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.

Notice to Utah State Bar Members Licensed in Idaho, Oregon & Washington

Upon the recommendation of the Utah State Board of Continuing Legal Education, the Utah Supreme Court has approved and adopted the "Boise Protocol." The "Boise Protocol" was prepared by a Regionalization Study Group consisting of members from the states of Idaho, Oregon, Utah and Washington. The Boise Protocol is as follows:

A record of the points for establishing an agreement of comity which will allow individual lawyers licensed to practice in more than one of the participating states to fulfill their mandatory continuing legal education (MCLE) requirements in any participating state by fulfilling the MCLE requirements in the state where they maintain their principal offices for the practice of law, agreed to by participating representatives of the Idaho State Bar, the Oregon State Bar, the Utah State Bar, and the Washington State Bar.

The change will be effective January 1, 1997

Ultimately the Utah State Board of Continuing Legal Education believes that by approving the "Boise Protocol", and by adopting the comity rule this would allow lawyers admitted in more than one of the four states to simplify their MCLE compliance, while preserving mutual commitment to a well educated bar membership through the mandatory continuing legal education program.

If you would like further information, or have questions regarding the implementation of the program, please contact Sydnie W. Kuhre, MCLE Board Administrator at 297-7035.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH

POSITION ANNOUNCEMENT

POSITION: **Law Clerk** to the Honorable Judith A. Boulden
United States Bankruptcy Judge

STARTING SALARY: $36,426 (JSP 11) to $43,658+ (JSP 12), depending on qualifications

STARTING DATE: April 1997

APPLICATION DEADLINE: December 16, 1996 – Interviews will not commence prior to January 6, 1997

QUALIFICATIONS:

1) One year of experience in the practice of law, legal research, legal administration, or equivalent ex perience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation;

OR

2) A recent law graduate may apply provided that the applicant has:
   a) graduated within the upper third of his/her class from a law school on the approved list of the A.B.A. or the A.A.L.S.; or
   b) served on the editorial board of the law review of such a school or other comparable academic achievement.

APPOINTMENT: The selection and appointment will be made by the United States Bankruptcy Judge.

Preference may be given to the applicants who have experience in the practice of law, who have taken bankruptcy related classes or who have commensurate experience, and who have computer skills.
Applicants should send resume and transcript only. Applicants may be requested to provide a writing sample and references.

Applications should be made to:

JUDGE JUDITH A. BOULDEN
UNITED STATES BANKRUPTCY COURT
350 South Main Street, Room 330
Salt Lake City, Utah 84101

BENEFITS SUMMARY

Employees under the Judicial Salary Plan are entitled to:

- Annual grade or within-grade increases in salary, depending on performance, tenure and job assignment.
- Up to 13 days of paid vacation per year for the first three years of employment. Thereafter, increasing with tenure, up to 26 days per year.
- Choice of federal health insurance programs.
- Paid sick leave of up to 13 days per year.
- Ten paid holidays per year.
- Credit in the computation of benefits for prior civilian or military service.

EQUAL EMPLOYMENT OPPORTUNITY

The court provides equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age or handicap.

ABOUT THE COURT

The United States Bankruptcy Court, District of Utah, is a separately-administered unit of the United States District Court. The court is comprised of three bankruptcy judges and serves the entire state of Utah. The Clerk's office provides clerical and administrative support for the court, which conducts hearings daily in Salt Lake City and monthly in Ogden.

EQUAL OPPORTUNITY EMPLOYER

UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH

POSITION ANNOUNCEMENT

POSITION: **Second Law Clerk** to the Honorable Judith A. Boulden
United States Bankruptcy Judge

STARTING SALARY: $36,426 (JSP 11) to $43,658+ (JSP 12), depending on qualifications

STARTING DATE: January 6, 1997

APPLICATION DEADLINE: December 16, 1996 – Interviews will not commence prior to December 17, 1997

QUALIFICATIONS:

1) One year of experience in the practice of law, legal research, legal administration, or equivalent ex perience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-for-month basis whether before or after graduation;

OR

2) A recent law graduate may apply provided that the applicant has:
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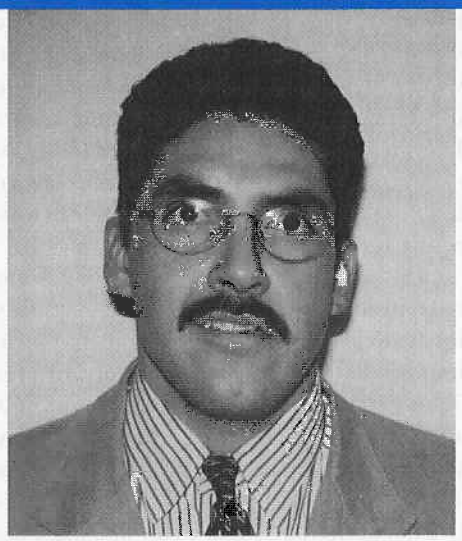
EQUAL OPPORTUNITY EMPLOYER



Young Attorney Profile: Reyes Aguilar

By Erik A. Christiansen

Justice Warren E. Burger once wrote that "free-speech carries with it some freedom to listen."[1] Such a statement just as easily could have been written by Reyes Aguilar, the Assistant Dean for Admissions and Financial Aid at the University of Utah College of Law, but with a slightly different twist. Rey more likely would say that free speech carries with it not only the freedom to listen, but the obligation "to agree to disagree and to do so in a civil manner.".

Part of Rey's respect for divergent points of view stems from the fact that he was raised in an unique community. Although born in El Paso, Texas, Rey spent the first seventeen years of his life in Santa Fe, New Mexico. Rey describes Santa Fe as a small city with a strong sense of community. "It is a city with a reputation for arts and literature, with a tremendous cultural history. It's a place where people choose to live, and not just a place where people live to work. It is a multi-cultural community, with a lot of views."

After graduation from high school in Santa Fe, Mr. Aguilar first attended college at Texas Tech, where he played football for a year as an outside linebacker. After "paying too much attention to football and not enough to school," Rey eventually decided to leave Texas Tech and to spend time working construction in Texas, New Mexico and California. While working and travelling the Southwest, and saving some money for school, Mr. Aguilar matured and got an idea of what he wanted to do.

Returning to Texas, Mr. Aguilar enrolled in San Antonio College, the largest community college in Texas, and started going to night classes while he worked days. At San Antonio College, Rey took a career test, which predicted that he would be a veterinarian, a forest ranger, a lawyer, or a lithograph printer. "They said that I needed to be creative, but to have access to the outside world."

After spending three years at San Antonio College, Mr. Aguilar transferred to Texas A&M. Unlike Santa Fe and San Antonio College, however, Texas A&M was a politically conservative place. Although Rey considered himself to be more of a political liberal, he decided to try something different. "I'm comfortable with who I am, but I had never really surrounded myself with conservatives. So I thought it would be a good thing and a way to challenge myself. I had a good experience and learned a lot. I found that I was in the extreme minority, both demographically, that is, there are not many minority students at Texas A&M, and politically. I think this was valuable in both opening my eyes to other arguments, being reasonable, and giving an ear to somebody and letting them have the floor."

Mr. Aguilar also found that his upbringing in Santa Fe gave him an advantage at Texas A&M. "When I was in New Mexico, I was very much a part of the community. I was liberal, hispanic and Roman Catholic. And I knew I could reach back in my life and find examples and say well, I do know a hispanic mayor and governor. I've seen doctors and lawyers, and all sorts of professionals in my experience. So it wasn't as troubling as it was for other students in my situation. They didn't have many examples that they could reach back and draw upon."

After graduating from Texas A&M with a degree in Political Science and a minor in Sociology. Rey taught history for a year to 8th and 9th grade students in a private school for children with learning disabilities. Mr. Aguilar originally planned on teaching as a substitute for part of the year and skiing for the rest of the year while he waited to be admitted to law school. Instead, he was asked to teach full time, and had to defer hitting the slopes.

When applying to law school, Rey wanted to return to the mountain west. He also had in interest in a trial level practice, as well as environmental law and family law. "As I investigated these schools, it turned out that Utah had the strongest reputation, had an area of emphasis in

environmental law; and the size of the college was optimal. Also, since I missed out on a year as a ski bum, it was close to the slopes."

Ultimately, however, what convinced Mr. Aguilar to come to the University of Utah was a visit to the campus. While visiting, he dropped in on then professor Lee E. Teitelbaum (now Dean of the College of Law), whom Rey knew had previously taught in Albuquerque, New Mexico. "I just kind of stuck my head in professor Teitelbaum's office and asked if he had a moment, I described myself as a candidate and was looking at the school. He turned off his computer, sat down on his couch and we ended up talking for about 45 minutes about culture and green chile. So I said if the school is willing to spend that much time with someone they do not even know, it spoke highly for the institution."

After his acceptance, Mr. Aguilar was active in many law school organizations, he served as a teaching assistant in the Council on Legal Education Opportunity program, and was elected President of the Student Bar Association. As a result of his active involvement, he was also called on to assist Bonnie Mitchell, then Dean of Admissions, in recruiting and assisting other students applying to law school.

Following his graduation from law school, Ms. Mitchell was promoted and Mr. Aguilar applied for and was offered the position of Director for Admissions and Financial Aid. Although flattered by the job offer, Rey was at first reluctant to accept the position. "I just put myself through three years of law school, and now I was faced with the question of whether or not I wanted to practice law. I told myself, there's always the opportunity to practice in a couple of years. Well, that was five years ago, and that's one thing I didn't do. But that ultimately was a conscious decision also."

Now, as Assistant Dean for Admissions and Financial Aid, Mr. Aguilar not only directs the admissions process, recruits students to attend law school, coordinates financial aid, and oversees various law school bulletins and publications, but also works in the College of Law's academic support program. "That's one of the things I love about my job. I don't feel like there are mundane day-to-day things. Each day is a new challenge. Being around bright, articulate students helps create that atmosphere. Also, because the admissions cycle begins and closes on a 12-month cycle, it's terrific. If you want to look at other peoples' jobs, sometimes they talk about the drudgery of cases that go on for years. In my job there is closure every year."

In recruiting for the law school, Mr. Aguilar travels to the "six corners of Utah", as well as to most of the states "west of the Mississippi." He also speaks to Political Science classes, pre-law societies and students at virtually all of the universities and colleges in the state. He has visited indian reservations, spoken to community groups and regularly attends regional and national law school fairs. As a result, while law school applications are down nationally, the College of Law's applications have decreased by a smaller percentage than the national decline, while the quality of the school's applicants has continued to increase.

Mr. Aguilar enjoys the divergent points of view that are present in working in an academic setting. "I think respect is an important aspect of working in an academic environment, where there are different points of view. Often times, faculty, staff or students will have diametrically opposed opinions. Despite this fact, there is still the unspoken rule in the law school environment that you agree to disagree, but you do so in a civil manner."

Finally, Rey believes that the "College of law is a terrific place to work because you're surrounded by energy, you're surrounded by diversity and you're surrounded by excellence. I know I'm doing something different and really enjoying it. It required a little bit of risk on my part, but I think in the end it paid off. And, no you can't have my job. I want to keep it for awhile."

[1] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980).

Workflow and Group Ware

By David Nuffer

This article relies in part on concepts included in a presentation at the American Bar Association Techshow 96 in Chicago, Illinois, by Ben Hirsch, Sally Gonzales and Donald Sternfeld.

DAVID NUFFER is a member of Snow, Nuffer, Engstrom, Drake, Wade & Smart, with offices in St. George and Salt Lake City, Mr. Nuffer received his B.A. cum laude in Humanities from Brigham Young University in 1975 and his J.D. cum laude from the J. Reuban Clark Law School in 1978. He has served as a commissioner for the Utah State Bar since 1994.

Computers, especially computers set up in networks, are natural engines for transmission and storage of messages. It follows that there ought to be a way to exploit this kind of improved communications in the law office. As always, automation requires a thorough understanding of the work process, however, and communications are not easy to break into categories which are readily automated. Such communications range from the simple (the yellow sticky note pasted on a draft of a document, or the pink phone message slip) to the elaborate (such as the full-scale suite of documents for a major real estate closing, or the papers needed for a securities issue). Software developers have sought to identify common features in all of these transactions but have had difficulty delivering software that effectively replaces these diverse means of giving messages. Recently software developers have proposed the concept of "workflow" as the concept around which the many communications needs and activities of the office might be organized.

In its simplest form, workflow is just the transmission of messages among the participants in a project. These messages range from penciled notes to full-scale drafts of documents, among the participants of a project. You may not think so, but you have workflow, at least, to some degree. Workflow is about the process of work. Groupware is the name software developers have given computer software that facilitates workflow. You may have groupware and not know it, or you may not have groupware at all. You will definitely have groupware in the future. Understanding groupware and workflow will help improve legal service to clients and by providing better coordination and effectiveness among participants in rendering legal services, may reduce costs.

WORKFLOW

We think of workflow when we think of assembly lines. In manufacturing each station on the assembly line has a duty and adds value in the process by adding a part or performing labor. This perspective can be applied to other types of manufacturing and service processes. All work goes through stages of completion and therefore has workflow, from start to finish.

In a lawyer's environment, workflow is the sum of where something comes from, who handles it, what they do with it, and where it goes after they handle it. From inception to completion, the performance of the project can be seen to progress by steps. This is workflow.

WHY IS WORKFLOW IMPORTANT?

Workflow is a hot topic right now in service industries like law because there are so many types of information and routes for information handling. The opportunity for cost saving and greater effectiveness through automation appears great. The introduction of computers into the law office environment has complicated the picture. Information may now be delivered by fax, mail, express services, delivery, e-mail, voice mail and other methods. This is a much more diverse mix

of activities than found in the traditional law office with its telephone, mailbox, and messenger.

There are also more types of individuals working on any given project. The supervising attorney, associate and secretary have been joined by clerks, paralegals, and filing assistants. Work groups may be very large. It is possible to be the supervising attorney in charge of a project and find people working on it who are unaware of the overall objectives of the project and of how their participation fits in with the work done by others.

Knowledge and information are the resources from which lawyers draw to perform services. Sharing knowledge and information spreads the wealth and increases the capacity to serve. Communication enables shared decision making and participation. Communication is thus a core business activity for lawyers and improving communication is the benefit sought in adopting groupware methods for handling workflow.

CHANGING WORKFLOW

We all have workflow, and we all need to do more about workflow. Once we have grasped the concept of workflow as an organizational principle, it may be exploited to improve the way work is done. This is not simply a matter of pushing more through the workflow pipe, however. Changes in workflow may be thoughtfully implemented to the benefit of the product and the workers.

In some cases, workflow has evolved without any real thought as to best, appropriate or effective ways to work. History may not be the best tool to shape workflow.

Workflow is primarily an analytic tool. To improve workflow, it is necessary first to study the way work is done and to analyze the flow. This may begin by simply attempting to identify all the activities performed in the course of a project. How do things happen? Map the path of a typical document, product or communication, and examine each step.

This process benefits from discussing it with the various participants in the process. It is relatively common to solicit written evaluations of employees. Ask your employees or partners for evaluations of the process by which work is done. Think about the things you do and ways to improve them. Workflow may need to be formalized, standardized, made less formal, or just changed.

There are several useful models for managing workflow. One, mentioned already, is the assembly line, a linear organization in which each participant handles the project consecutively. Sometimes workflow should be distributed so that concurrent processing can take place, that is, so that several participants can all work at the same time on the portion of the project assigned to them. Some workflow improvement should focus on assembly of all relevant information on task. The best analysis, decision and action will more likely result from from information.

Good workflow enables everyone in a group to be "on task." All talents are brought to bear on a challenge. It is difficult to step back and take the time to analyze workflow. Usually this analysis is best done in a detached, removed atmosphere away from the heat of delivering services under the pressure of a deadline. But time must be taken with the work group to discuss workflow and gain perspective and understanding from everyone's viewpoint.

". . . groupware . . . also facilitates a single user working on a project at different locations at different times."

GROUPWARE

Groupware software facilitates workflow. It makes workflow more versatile and more or less linear and more or less formal, depending on what is desired. It can greatly facilitate communication and organization. The existence of computer networks (first installed for file sharing and printer sharing) has led to easy implementation of groupware applications. Groupware software is designed to enable people to work in a collaborative fashion across the barriers of time and space.

A prime example of groupware is e-mail. The recipient and sender of e-mail do not need to be present at the same time. The sender can send it and the recipient can read it at separate times and at separate locations, but they can still collaborate, communicate and share. The use of e-mail permits workflow to proceed at different times and different places.

Groupware helps with complex workflow. Multiple participants may assist in a project. Multiple concurrent projects may become more common. Groupware facilitates the clear delineation and tracking of projects. Groupware has made it possible for a highly mobile user population with varied schedules to work together effectively.

While groupware enables many people to participate in a project at many locations at many times, it also facilitates a single user working on a project at different locations at different times. Organizing one's own work using groupware makes the work more portable and preserves work done in one context for the benefit of others at another time. By creating a record or matrix of activity, groupware can improve individual workflow and work product.

Groupware becomes an important method of perpetuating, preserving and improving the business culture. When lawyers analyze and understand the workflow of legal services, groupware can be constructed in such a way as to contribute to and preserve that pattern. This can improve personal job satisfaction as well as client service.

TYPES OF GROUPWARE

Types of groupware include:

- **File Sharing** – the sharing of documents across the network so that people at different locations at different times can work on them. Each team member can add to, edit, or correct a document from a personal computer. This avoids drafting and editing on paper, and the interchange of floppy disks.
- **Electronic Mail,** mentioned above.
- **Document Management** software such as Soft Solutions or PC Docs which enables the indexing and retrieval of documents, or software such as ZyIndex or ISYS which are full text indexing products. All of these allow centrally filed document data to be located.
- **Electronic Publishing** software such as Folio Views or HTML publishers, which enable multiple access to indexed documents. These allow in-house manuals and documents to be available to the whole team.
- **Discussion** tools such as bulletin boards, internet listservs, usenets (the organization of news groups on the Internet is called the Usenet, and smaller scale news operations on local networks have come to be knows as usenets) or similar methods

implemented in-house, or the discussion or contribution software such as Collabra Share and Lotus Notes. These allow common sharing of information on general subject or specific cases.

- **Project Management** software which allows all participants to view the resources and time frames of the project.
- **Shared Calendar** software. Access to all workers calendars enables meeting and appointment scheduling.

Remote access is an important feature of any group or solution. People should be able to use the software while disconnected, and they should be able to connect from a remote location via telephone dial-up. This allows traveling and home workers to be up-to-date

All of the above have different effects on workflow. Some software packages include overlapping features. In determining which software is needed and which to implement first, the features of a software suite should be considered. Microsoft's Office contains mail and calendaring software. IBM/Lotus and Novell/Corel sell mail and calendaring software which interact with their respective work processor/ spreadsheet suites.

The existing selection of basic individual working software such as word processing software may determine which groupware solution should be implemented. A single vendor solution is usually best. That is, if Ami Pro is in use as a word processor, the best e-mail choice is probably Lotus cc:Mail.

The type of computer hardware may determine the type of groupware that can be run. The computer operating system (Windows 3.1, Windows 95, or OS/2) already in use may determine what groupware you may run.

When evaluating groupware, it is important to proceed in an evolutionary manner rather than by leaps. If people are not familiar with e-mail, they will not be able to adapt immediately to internet style messaging. Implement one piece first; then move on.

HIGH POWER GROUPWARE

Lotus Notes is probably the most powerful groupware product presently available. It creates a "knowledge base" of information and includes workflow design tools. If mounted on the network and licensed to all users, it may be accessible by everyone in the enterprise. Lotus Notes replicates itself across servers and creates distributed databases, that is, repositories of information which include sources located on more than one computer, which are very serviceable for very large enterprises and firms. Small firms are also implementing Lotus Notes to provide for a "ground up" integration of the firm processes as growth occurs, however.

Notes features strong-security and systems management and tools and operates across most hardware and operating system types. It has very robust development tools. Notes can integrate with external systems such as internet e-mail "data feeds" or "news feeds" which are essentially downloaded newspapers.

Lotus has competitors on the horizon. Novell and Microsoft are introducing Groupwise XTD and Exchange, while Netscape has purchased Collabra Share for its Netscape environment. All of these are designed to be advanced groupware products like Lotus Notes.

CONCLUSION

Workflow is a key concept in automating communications in the law office. It is a useful concept even without computer software. The installation of groupware offers benefits just by itself as participants in the office learn to use it in an ad hoc way. The most beneficial approach is to analyze workflow and implement groupware in a way which supports the organized communications patterns of the office workflow. Workflow and benefits from the use of groupware will both be optimized by working together, as the communication services become better understood and the process improves through successive refinement. The improvements can work to improve lawyers' service to clients, and to improve the satisfaction of the law office staff.

FOR FURTHER INFORMATION

(Note that Web URL's change often and therefore some of these sites may be outdated by the time of publication. At press time Novell's site was in transition, so a visit to http: //www.novell.com or http://www. novell.com catalog/bl_cat.html may be the best starting point for Novell products.)

E-Mail
Lotus cc;Mail:
http://www.lotus.com/comms/ccmail/
Novell Groupwise:
http://www.novell.com/intranetware/main.html
Microsoft Mail:
http://www.microsoft.com/mail/
Microsoft Exchange:
http://www.microsoft.com/Exchange/default.htm

Calendar Software
Microsoft Schedule: http://www.microsoft.com/msscheduleplus/

File Servers
Netware 4.11:
http://www.novell.com/intranetware/main.html
Windows NT Server:
http://www.microsoft.com/NTServer/default.asp

Document Management
Soft Solutions:
http://corp.novell.com/catalog/qr/sne/44670.html
PC Docs:
http://www.pcdocs.com/

Folio
http://www.folio.com/

Workflow
http://www.ifi.unizh.ch/groups/dbtg/Workflow/workflow_sites.html

Lotus Notes
http://www.lotus.com/comms/notes.htm

Collabra Share
http://www.collabra.com/products/

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Observations of a Sitting Judge

By Judge Ronald Nehring

On March 5, 1995 I fumbled for the snaps on a frayed robe and, prodded forward by two imposing companions, fear and duty, negotiated the three steps that give way to the view from the bench of courtroom number three in West Valley City. I was greeted by the metallic groans, creaks and raspy inhalations as the room's full complement of theater seats hinged upward, snapping after their rising occupants like a school of fish after elusive bait. The throng stood expectantly, honoring, I suspected, I paralyzing anxiety. As I surveyed the scene from the bench that morning, I saw in turn the audience at the 1955 accordion recital where I, my sweat soaked fingers sliding over the keys, tried to fake "Lady of Spain," the pews crammed with worshippers awaiting my woefully unrehearsed verses from the Book of Luke. Some view. It was the Tuesday morning arraignment calender and time to get to work.

Since that Tuesday morning, the EMT's have removed a heart attack victim from Courtroom Three, a group of very well tailored and sophisticated businessmen/alchemists have tried to persuade me to enjoin the sale to creditors of a machine which they passionately insisted could transform junk into gold, and I have witnessed, without regret, the passing of that most emotionally charged of all courtroom events, the photocop speeding ticket trial. Embolden by confidence that my experiences on the bench has inspired, I offer the following modest observations.

JUDGE RONALD NEHRING has served on the Third District Court bench since March, 1995. Before his appointment to the bench, Judge Nehring practiced law with the form of Prince, Yeates and Geldzahler in Salt Lake City. Judge Nehring is a graduate of Cornell University and the University of Utah College of Law.

Since July 1st, the effective date of court consolidation, I have 27 colleagues on the Third District Court Bench. I have come to know each of them, even the judges who seemed to rule against me with regularity and a sense of glee when I tried a case before them, as women and men of integrity and intelligence. At no time since Judges William Snow and Aaron Farr adjudicated disputes among gold rush emigrants from 7:00 a.m. until well after dark in 1850 have the trial courts been so well served. The talent and commitment of this corps is, based on my own experience, becoming seriously taxed.

Ballooning criminal case filings have strained dramatically the resources of the court and threaten to compromise the integrity of the criminal justice system. At the time of my appointment, I had no idea that the business of helping to make the courts work comprised so much a part of judging. In the 18 months since that memorable March morning, the West Valley Court has been compelled by the flood of criminal filings to restructure its calenders, reassign personnel, streamline procedures, and yes, cut corners in ways that may well implicate due process, to keep up with the press of the court's business. The challenges of increasing caseloads is not only institutional, but personal. While the rule of law owes much of its legitimacy to its impersonality, the operation of the courts, and judging in particular, can claim legitimacy precisely because it is, or should be, so personal. It is a because a judge is a human being armed, one hopes, with enough curiousness to understand the particular facts of each case and reasoning power to apply the law to those facts in a way that makes sense so that we can retain the belief that our courts are impartial, and not arbitrary. Each of the persons who occupies one of the seats - or as is increasingly the case, the standing room space - in my courtroom on an arraignment morning comes to the courthouse with a unique

story. Among the lessons I have learned on the bench that all life stories are unique, that all excuses are the same, and that on a good day a judge can tell the difference. But good days seldom coincide with morning calenders of more than one hundred cases, and those calenders appear with greater frequency.

To observe the complexity and pathos of human condition is both an important part of judging, and perhaps the single greatest reason that judging is so appealing. But judging also owes much of its allure to the opportunities is offers to do what most lawyers like to do most: taking on and subduing legal issues. Not surprisingly, the judge's work of deciding cases is both at its most challenging and satisfying when the issues are precisely identified and artfully argued.

It is the sad reality of life on the bench that most of my time and judging energies are directed towards solving the problem of how much carrot to offer or stick to apply to a defendant or strayed probationer whose tale of hardship, victimization and pure intentions gone awry I have attempted to hear attentively and consider respectfully despite being able to provide surprisingly accurate cues when the narrative falters since I usually know the script all too well. It is after too many days of this necessary, yet taxing, part of judging that a well lawyered case has its most restorative effect.

From these and other observations gleaned from my brief tenure on the bench I have formulated, modified, and junked countless resolutions. Here, I will present only two. I have selected them because they are ones that have the promise of being interactive in the sense that you, as a lawyer who may appear before me, have my invitation to hold me to them.

To remember that lawyering is a tough job. I should know this. In fact, from time to time my subconscious releases the noxious notion that perhaps one of the reasons I am a judge is because lawyering was too tough for me. A lawyer's job, when done right, is demanding. Facts can be fickle, the law obtuse or misguided, your opponent cunning, your client saturated with self-righteousness and his account well in arrears. If, in the face of these all too frequent realities I rule against you, the temptation will be great to blame my stupidity, laziness or other unflattering character flaw. Yield to this temptation. I would. You've earned it.

I assume that every lawyer who appears before me has brought in her briefcase generous quantities of skill, integrity and energy. I also know that I will inevitably say or do something that a lawyer will interpret as an unfairly critical comment on the quality of her representation. If you should be the victim of such an experience, let me know. It might be a sign that I am losing sight of the "lawyering is a tough job" principle.

To have the courage to change my mind. Over the years that I tried cases I encountered too frequently the thankless task of bringing post trial motions in cases I had lost at trial. Although I always felt passionately about the merits of these motions, I despaired at the prospect of persuading a judge to change her mind and vindicate my cause. Of course, judge's have a strong and well founded interest in holding fast to a decision, once having expended the effort to make it. Still, I hope to maintain the resolve to remain receptive to the suggestion that I have erred and the integrity to act when convinced that I have, once again, demonstrated fallibility and decided wrongly.

Finally, most of us learned what we know about good judging from watching good judges in action. This is an opportunity I no longer have. I am convinced, however, that lawyers can, and should, take it upon themselves to help judges improve their craft. I expect to hear from you.

continued from pg. 29

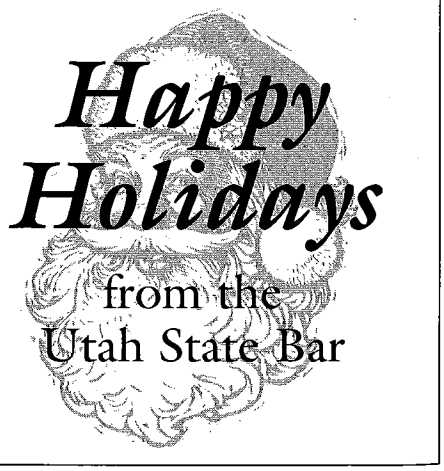
tained extensive notes explaining the historical basis for the characters and incidents portrayed. "George Q. Cannon's despair in the play is more representative of a general desperation felt by many Mormons over the dismantling of their religion, than of any emotional experience recorded by the man himself," Larsen said. Larsen described the characters in the play as "historical in one sense and fictional in another." He used journals and descriptions of actual polygamy trials in writing the script.

The cast also included bar member Richard Dibblee, who played a jury foreman, a masked man, and a newspaper purchaser; Tom Vick, as Marion Early, a young man from Boston; Katherine Taylor as Cannon's youngest plural wife, and Geoff Hansen as Prosecutor Robert Baskin. Director Marilyn Holt enjoyed working with the colorful cast, and found the attorney/actors to be as entertaining as their actor co-stars.

Community reaction to the play was widespread and favorable. The play was featured prominently in both the *Deseret News* and *Salt Lake Tribune,* and many local government and religious leaders attended the premiere. All three performances were sold out. The Bar donated many tickets to local high schools so that students could attend free of charge.

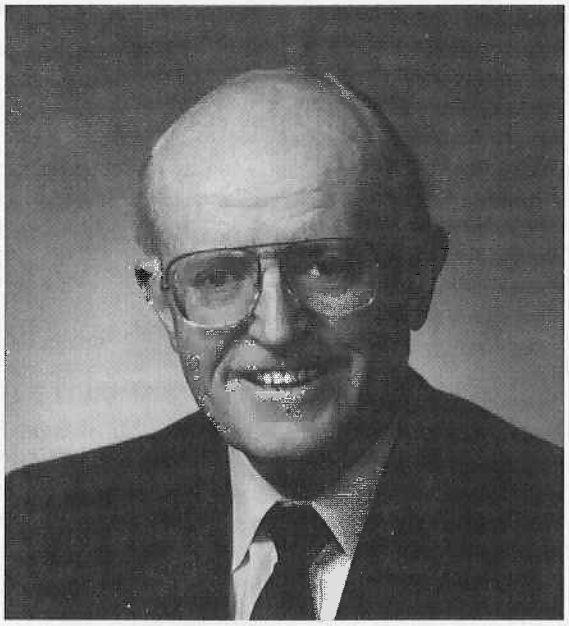
Justice Zimmerman noted in a *Tribune* article written by Nancy Melich that the play was very thought-provoking, because it is "a meditation on some pretty difficult issues we don't get beyond in the play, and are not likely to get beyond in our lifetime. Individual conscience vs. the majority never goes away." Law School Dean Lee Teitelbaum voiced similar compliments in the same article. He noted that the issue of religious freedom still resonates today in debates about such diverse issues as same sex marriage or civil disobedience. Teitelbaum called the play "a stunning piece of work . . . a historical document raising issues that are playing out in today's court."

The production culminated a year-long effort by the Lawyers' Centennial Committee (James Backman, Lisa-Michele Church, Carol Clawson, Richard Dibblee, Jan Graham, Victoria Kidman, Larry Laycock, Paul Moxley, Rick Nydegger, Kris Steinmann, Debra Moore, David K. Winder and Michael D. Zimmerman). Thanks are in order to major contributors Ultradent Products, Inc., Merit Medical Systems, and to contributing organizations: The Utah Attorney General's Office, the U of U Theatre Department, Northwest Pipeline, BankOne, Leucadia Corporation and the Salt Lake County Bar.



Take the Example of James Lee

By Joanne C. Slotnik



James Lee's life list of law-related activities – all run together in a block, semi colons in between, single-spaced for compactness – fills a full page of his resume. But on a visit to his office, "on assignment" to write about the Utah Bar Foundation's immediate past president, I am more interested in talking with him about the broad outline of his career – how he came to the law, what it's meant to him, and how he sees the practice developing in the future.

Picture, for a moment, James Lee as a youngster in Price, Utah. He sees his father's lawyers around town, regularly solving a wide range of legal problems, among the most admired members of the local community. He heads to the local district court after school to watch courtroom dramas unfolding. He contemplates law as a profession.

College. His mother, inspired by a series of novels whose main character is a cadet, urges West Point. James secures an appointment to the military academy and, out of pure pragmatism, earns his degree in civil engineering, the only choice then available at West Point. Five years as an engineer convinced James that his original yearning to be an attorney was on the mark, and off he goes to law school at George Washington University.

As a young lawyer, James hones his skills in the Attorney General's Office, assigned to the Office of the Secretary of State to implement the new corporate code. Never doubting that his greatest satisfaction will ultimately come from working in a private firm, James consults with Justice Henroid, for whom he had clerked. When the judge announces the time has come for James to move "downtown," James turns to Cliff Ashton for advice. Ashton suggests that James should find a firm with a good client base and older lawyers who won't be around in ten years. Ashton's recommendation: the firm now known as Parsons, Behle and Latimer.

Jump to the present. Thirty-four years of law firm practice, experience, stories, insight. The common thread running through our conversation is James's long-term commitment to public service, a value ingrained from childhood. When he received the Utah judiciary's prestigious Amicus Curiae award in 1982, he acknowledged these roots of dedication to community service: "The reason I got so involved was my parents. They taught me that you are to contribute to the community. I've never quit taking on roles. It's made the practice more fun and more meaningful." Now, within his law firm, James's extensive involvement in community affairs serves as a model for newer attorneys.

Looking to the future, James sees the growth of more boutique law firms, each handling a particular kind of corporate law nationwide, using associated local counsel to the extent required by the law, but ultimately with a net loss of local control. He also sees the time of the generalist passing, with a concomitant growth of referrals to specialists. Within the larger firms, he sees a growing number of internal conflicts of interest, whose early detection requires diligent, frequent communication.

James's advice to new lawyers: Find an area of the law that will provide dependable job satisfaction and pursue it. If you believe in something, stand up for it. But do it thoughtfully. Pick and choose and then commit yourself.

In this era of much maligned lawyers, I left James Lee's office reassured, with a model in mind of what attorneys aspire to be, and the image of one individual whose career is tangible evidence that those aspirations are, indeed, achievable.

CLE CALENDAR

ALI-ABA SATELLITE: Rx FOR HEALTH PLANS – HOW TO COMPLY WITH NEW HEALTH LEGISLATION

Date: Thursday, December 12, 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

LEGAL MALPRACTICE: A FACT OF LIFE

Date: Thursday, December 12, 1996
Time: 9:00 a.m. to 12:00 noon
(Registration begins at 8:15 a.m.)
Place: Utah Law & Justice Center
Fee: $40.00 for members admitted after January 1, 1994
$60.00 all others
CLE Credit: 3 hours ETHICS

FAMILY LAW BASICS AND PRO BONO OPPORTUNITIES

Date: Friday, December 13, 1996
Time: 8:00 a.m. to 12:00 noon
Place: Utah Law & Justice Center
Fee: **FREE** *(for those attorneys willing to accept a pro bono case from Legal Aid Society)*
$50.00 for all others
CLE Credit: 4 hours (also counts toward the NLCLE requirement)

TRIAL ACADEMY PART VI: SUMMATION

Date: Thursday, December 19, 1996
Time: 6:00 p.m. to 8:00 p.m.
Place: Hon. Dee V. Benson's Courtroom, U.S. District Court
Fee: $20.00 for Litigation Section members
$30.00 for non-section members
CLE Credit: 2 hours CLE (also counts toward NLCLE requirement)

NLCLE WORKSHOP: LAW OFFICE MANAGEMENT

Date: Thursday, January 16, 1997
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 hours

NLCLE WORKSHOP: BUSINESS ORGANIZATION

Date: Thursday, February 20, 1997
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
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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 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

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.

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

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