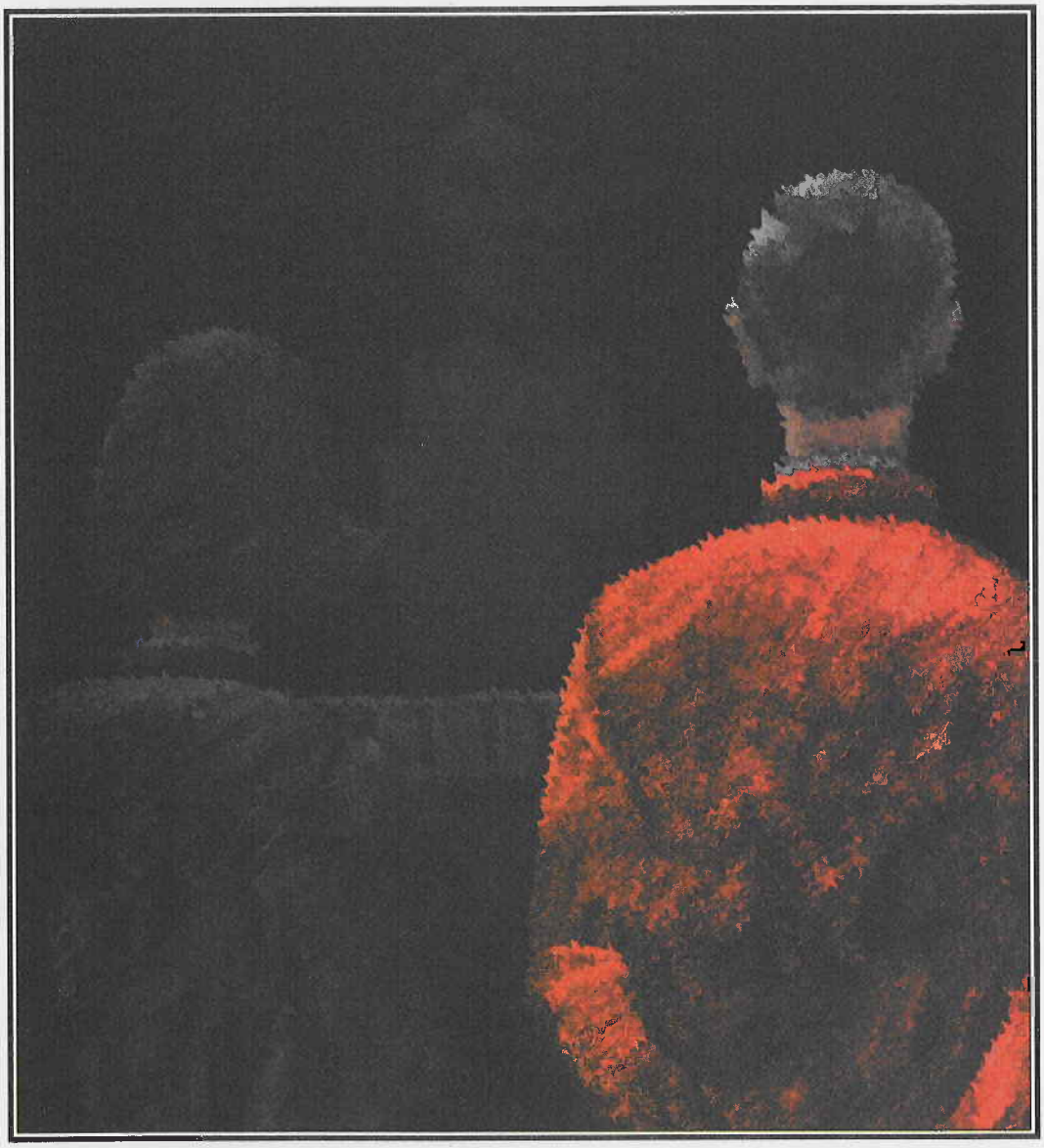
VOIR DIRE

JOURNAL OF THE UTAH STATE BAR
LITIGATION SECTION



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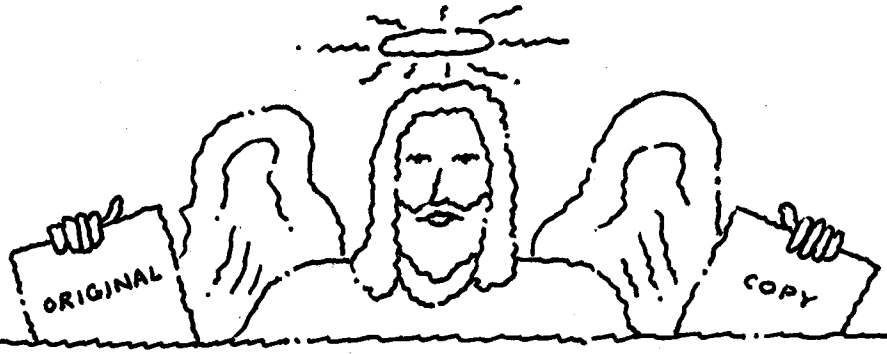

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- ☐ Project and Work Order reviewed with Production Manager
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- ☐ Project and Work Order delivered to Copy Operator
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  - ☐ **Before copying, each original page counted by hand**
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  - ☐ **Each copy checked for quality and accuracy**
  - ☐ "Best Possible Copy" markers inserted to flag poor originals
- ☐ Project and Work Order delivered to Finishing Dept.
  - ☐ Finishing instructions reviewed (binding, hole-punch, etc.)
  - ☐ Finishing completed
- ☐ Project and Work Order delivered to Quality Assurance Inspector
  - ☐ Work Order in clear view at all times
  - ☐ **Each and every copy compared to original, page by page**
  - ☐ Binding/finishing inspected for compliance with Work Order
  - ☐ Project packaged according to Work Order
  - ☐ **Inspector signs "Assurance of Quality" Certificate**
- ☐ Project and Work Order delivered to Project Coordinator
  - ☐ Project *promptly* delivered to client
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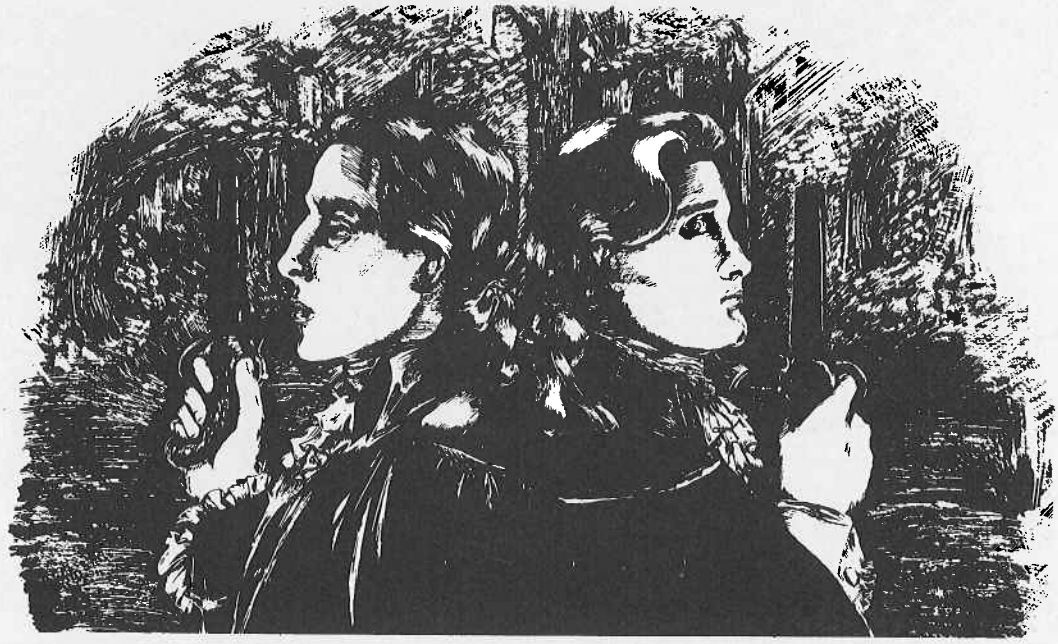

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VOIR DIRE
JOURNAL OF THE UTAH STATE BAR
LITIGATION SECTION

Voir Dire is a quarterly publication of the Litigation Section of the Utah State Bar.

The opinions contained in *Voir Dire* are those of the contributors, and not necessarily of the Litigation Section.

Voir Dire will review original articles submitted for publication. Please submit proposed articles to *Voir Dire*, 50 West Broadway, 700 Bank One Tower, Salt Lake City, Utah 84101-2006. The Editorial Board reserves the right to edit all submissions accepted for publication.

The Editors of *Voir Dire* are pleased to announce that the Utah State Bar will generously provide funds so that all members of the Bar will receive at least this and the next issue of *Voir Dire*.

FROM OUR PERSPECTIVE

Trial by Jury Is Essential to Civil and Political Liberty

If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost.

– Aristotle, *Politics*, book IV, ch. 4

Juries are called the bulwarks of our rights and liberties; and no country can ever be enslaved as long as those cases which affect their lives and property are to be decided, in a great measure, by the consent of 12 honest, disinterested men.

– Samuel Spencer (1788)
(quoted in Schwartz, 4
The Roots of the Bill of Rights
946)

A jury of twelve men and women, having heard evidence for eight months, acquitted O.J. Simpson of the murder charges against him a few months ago. Now, many otherwise responsible people are saying that the verdict proves the jury system is a failure and that we should abolish it.

In calling for the demolition or drastic alteration of our system of trial by jury, many Americans have demonstrated not only their capacity for extreme reaction, but an underlying contempt for democracy. Or perhaps they have learned and thought so minimally about the foundations of our system of government that they cannot be credited with enough knowledge or contemplation to formulate such a contempt.

Trial by jury is a right guaranteed by the Magna Carta and by the constitutions of the United States and every state in this nation. Its roots go back at least 4000 years, perhaps to the Kenbet in ancient Egypt, where juries were comprised of eight jurors, four from each side of the Nile. According to Blackstone, trial by jury "hath been used time out of mind in [England] and seems to have been coeval with the first civil government thereof." Thomas Jefferson stressed that "[t]he wisdom of our sages and the blood of our heroes has been devoted to the attainment of trial by jury."

The value of the jury system to a democracy has been recognized for hundreds of years. Sir Edward Coke noted in 1628 that "[t]rial by jury is a wise distribution of power which exceeds all other modes of trial;" David Hume declared in 1762, "[T]rial by jury is the best institution calculated for the preservation of liberty and the admission of justice that ever was devised by the wit of man;" Sir Winston Churchill asserted in 1956 that "[t]he jury system has come to stand for all we mean by English justice;" and Cynthia J. Cohen warned in 1991 that "[u]nless we find new respect for the Seventh Amendment, one of the basic elements of our democracy may be lost."

What "reasoning," then, comprises the ammunition of the recent assaults on the institution of trial by jury? A recent perusal of newspaper columns and letters to the editor provides some curious, yet common, observations. For instance, a letter appearing in *The Salt Lake Tribune* offers the following commentary: "What does the Simpson trial prove about our joke of a justice system? If you have enough money, you can get away with murder — twice."

That letter echoes what many of us have heard almost every day since the verdict. "He bought himself out of trouble." "We have two types of justice in this country; one for the rich and one for the poor." "A poor African-American in Los Angeles would have been convicted of the same crimes in a week." But none of these critics offer any solutions.

Of course, the wealthy get a better shake of it in our legal system. On the whole, the wealthy in our country also get better health care, better education, better food, better housing, and better transportation. If the critics of the jury system are saying that everyone should be reduced to the lowest common-denominator in legal representation, do they also advocate that everyone get the worst health care being provided to the poor, the worst education, the worst nutrition, the worst housing, and the worst transportation?

True, we should do what we can to achieve equal justice, just as we should

provide equal opportunities in education for every citizen in this country. However, inequity in the provision of legal services is not a justification for razing the jury system—described by Elihu Root as "the most vital, most sacred of the institutions which maintain our free and popular government."

Another argument of those who would destroy the jury system is that an African-American is not likely to be convicted by a jury that is predominately African-American. That racist argument, which we have even heard spewing forth from Marcia Clark (who, of course, must find *some* reason other than her performance for her defeat), is empirically hogwash. First of all, the Simpson jury verdict was *unanimous*. Even the non-African-American jurors, who comprised one-quarter of the panel, voted for acquittal. And those jurors who have spoken publicly have not mentioned race or intimidation as a basis for their verdict.

The explanations provided by those jurors who have spoken publicly have been well considered and rational, referring to just the sort of reasons that have made *many* intelligent people conclude that there may, indeed, have been a reasonable doubt as to Simpson's guilt. Further, a recent Justice Department study, which found that only two percent of husbands charged with killing their wives are acquitted, also establishes that African-American jurors are not tolerant of husbands murdering wives, *regardless* of the defendant's race.

We also hear from many that, inasmuch as Simpson was obviously guilty, the acquittal proves that the jury system (or the criminal justice system altogether) is a failure. Even if we assume that Simpson is guilty, what these critics do not understand is that our system is not a *guarantor* that every offender will be proven guilty beyond a reasonable doubt, or even that every guilty person will be brought to trial for his or her crimes.

The fact is that many people get away with murder, without enough evidence available even to try them for the crime. Dozens of murders have occurred in Utah in the past ten years, for which arrests have not even been made. And sometimes acquittals are returned by juries simply because not enough persuasive evidence is available. Acquittals in those cases, although sometimes a result of shoddy or unethical police practices (as in the Simpson case), are truly a vindication of a system that demands proof beyond a reasonable doubt for a conviction.

Some believe that the evidence in the Simpson case was overwhelming, the jurors clearly were in error, and, therefore, that in itself is proof of the need to rid ourselves of the jury system. That is tantamount to demanding an end to representative government because Al D'Amato is re-elected to the United States Senate. We must all face the fact that mistakes happen. An expectation of perfection in every instance is naive, and certainly not the basis for abolishing a principal component of democratic government.

As lawyers, we have an obligation to speak out and inform others about these issues. If our friends, family members, and others with whom we associate are left in the dark about the importance of our democratic institutions, we are to blame, and we will come to regret our inability or unwillingness to champion our fundamental freedoms. As Justice George Sutherland said, "The saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

REPORT FROM THE CHAIR

Civility Is Not Optional

The fault, dear Brutus,
is not in our stars,
But in ourselves . . . .

– William Shakespeare
Julius Caesar, I, ii. 134

In a recent pollution case involving Monsanto Company, the following battle took place at the deposition of a Monsanto board member. The gladiators were two well-known lawyers who were hired by their respective clients for big dollars. Both attorneys had reputations for effective and zealous advocacy. Joseph Jamail (of *Pennzoil v. Texaco* fame), and his worthy opponent, Edward Carstarphan, squared off against one another in the following manner:

Mr. Jamail: You don't run this deposition, you understand?

Mr. Carstarphan: Neither do you, Joe.

Mr. Jamail: You watch and see. You watch and see who does, big boy. And don't be telling other lawyers to shut up. That isn't your (obscenity) job, fat boy.

Mr. Carstarphan: Well, that's not your job, Mr. Hairpiece.

(The witness tried to speak but could not make himself heard.)

Mr. Jamail: What do you want to do about it, (obscenity)?

Mr. Carstarphan: You're not going to bully this guy.

Mr. Jamail: Oh, you big (obscenity), sit down.

Aren't we fortunate not to have anything like this in Utah? But what about a recent case pending before the United States District Court in the District of Utah where the out-of-state counsel accosted the opposing local attorney at a deposition, locked him in a military hold and threw him to the ground? The attacking counsel walked out of the room, and with him went his *pro hac vice* privileges to practice law in Utah.

In a recent address to the American Bar Association, Supreme Court Justice Sandra Day O'Connor pointed out: "[T]he justice system cannot function effectively when the professionals charged with administering it cannot even be polite to one another."

What happened to civility among professionals? Are there too many lawyers chasing after too few clients? Do lawyers feel the need to make more money so their lifestyles can keep pace with that of other well paid professionals? Are we really buying that old dictum of an angered and shortsighted client: "Win at all costs"? Do we still have the courage to be professionally independent of our clients?

What is the Litigation Section doing to promote professional civility? Why not form another committee? So we did. Let's call this one the "Civility Committee" and have a highly respected attorney, Craig Adamson, chair a blue-ribbon assortment of heavyweight jurists. Serving on the committee are Judges Pat Brian, Bill Bohling, and Steve Henriod, together with former district court judges Phil Fishler and Scott Daniels. Experienced attorneys Frank Carney, Bruce Badger, and Martin Jensen are also key people who serve on the Civility Committee. Civil enough for you?

Okay, members of the Litigation Section, what do you expect from the Civility Committee? Should we adopt a civility code and require every attorney to hang it directly under his oath of office? How about displaying a civility code banner in every federal and state courtroom to make things look really good? Should we take another trip down to Southern California to see what they have? What about the *Litigation Guidelines* adopted by the Los Angeles County Bar Association in 1989, and the Los Angeles County Bar Civility Code adopted in connection with those guidelines? Now there's a "civil" place to practice law.

For years we've had Rule 11 of the Federal and Utah Rules of Civil Procedure, and Rules 3.1 through 3.6 of the Rules of Professional Conduct. Rule 3.2 specifically provides: "A lawyer shall

make reasonable efforts to expedite litigation consistent with the interests of the client." We have articles that appear in bar journals. We have continuing legal education programs on ethics. We have the benefit of what can be learned from *Report of the Commission on Professionalism to the Board of the Governors and the House of Delegates of the American Bar Association,* 112 F.R.D. 243 (Aug. 1986). We also have the Seventh Federal Judicial Circuit's Committee on Civility, and the American Bar Association's Tort and Insurance Practice Section's Committee on Professionalism.

What more do we need? What more do Craig Adamson and his Civility Committee need to do to bring about the perfect order of civility? They need *YOU!!!* Yes, you, the "born again lawyer," to step up and realize that Justice O'Connor makes sense when she so accurately states that our justice system cannot function unless lawyers take personal responsibility for their professionalism.

Let's improve and protect this profession of ours. Why don't we do something complex and novel by learning to disagree without being disagreeable? In the words of the Georgia Supreme Court in a recent decision: "If the bar is to maintain the respect of the community, lawyers must be willing to act out of a spirit of cooperation and civility and not wholly out of a sense of blind and unbridled advocacy." *Green v. Green,* 437 S.E.2d 457, 459 (Ga. 1993).

Each year, a well-known Phoenix law firm conducts a session with its new associates on the subject of "How to Be a Classy Lawyer." As part of their training, the associates are informed about some of the good reasons for being "classy." Here is a brief summary of those reasons:

- It's a small town. If you aren't classy, word gets around.
- Classy lawyers get better results. Judges, juries, and appellate courts trust classy lawyers more.
- It's more efficient. Less time is wasted on petty and needless disputes.
- Classy lawyers get more referrals.
- It's good for the firm. A firm with a classy reputation provides each of its members with tremendous advantages.

How, then, do we become "classy lawyers"? The following is a list of suggestions offered by United States District Court Judge David Sam during his presentation at the Federal Court Litigation Practice Seminar held last fall in Salt Lake City:

- Have respect for the fairness and dignity of the role of the law in maintaining a free society.
- Work out matters with other attorneys without involving the court. Conserve the court's resources so that the court can be used for more substantive matters, such as settlement conferences and trials.
- Give extensions, and waive formalities unless real prejudice results to the client.
- Use discovery and law and motion practice to solve the problems, rather than creating another layer of difficulties.
- View compromise as a tool.
- Consider alternate forms of dispute resolution in settling all or certain parts of your case.
- Be punctual, and promptly return phone calls. Take time to communicate often and accurately with opposing counsel.
- Advise clients that you will refuse to take any course of action that is without merit. Any position that you take will have a good faith basis in the facts and the law governing your case.
- Do not disparage or attribute bad motives to opposing counsel.
- Treat witnesses, the court's staff, and clerical personnel with courtesy and respect.

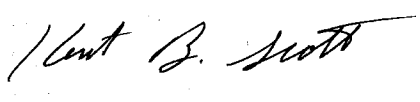
Good luck to each of you in your daily pursuit to develop a better professional environment in which to practice law. Craig Adamson and the rest of the members of the Litigation Section's Civility Committee have a challenging and rewarding job. Every member of the Utah State Bar is an officer of the court. Take time to read the attorney's oath each of us signed which states, in part: "I will maintain the respect due to courts of justice and judicial officers. I will not counsel or maintain any suit or proceeding which shall appear to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land."

I am aware of, and fully acknowledge, my need to shape up and be "born again" in matters dealing with professional civility. Incivility is like B.O. The person who is infected with it is usually the last to know.

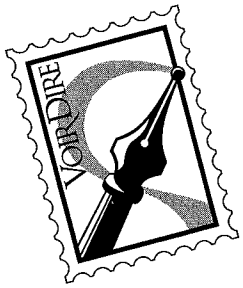
Each attorney has a stake in regaining the professionalism and collegiality that once characterized the practice of law. The real solution is not found in more committees, civility codes, oaths, or continuing legal education programs. These things are desirable, but only serve as tools that attorneys can use to build a better professional environment.

Consider the words of former Supreme Court Justice Warren E. Burger in a 1984 address to the American Bar Association: "The entire legal profession—lawyers, judges, law teachers—has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflicts . . . . Should lawyers not be healers? Healers, not hired guns?"

The Litigation Section will use its resources to build a better professional environment and a more civil way of resolving disputes. We invite each member of the Utah State Bar and the judiciary to contribute ideas and comments on this subject to me, Craig Adamson, or any member of the Litigation Section Civility Committee. The members of the Bar have the collective intelligence to develop a better way to treat one another. All we need is a dash of desire to fuel our fire.



LETTERS FROM OUR MEMBERS



DEAR EDITOR:

As a member of the Legislature that passed the court consolidation measure in 1991, I have a few comments and observations regarding the articles on that subject in your summer issue.

Regardless of the number of big cannons wheeled out by the Judicial Council to declare the success of court consolidation, the fact remains that consolidation has not turned out as promised. The assurance given to the Legislature to induce its passage was that a consolidated system would be more efficient and more economical. The reasoning was that an entire layer of judiciary (circuit courts) would be eliminated, and the number of district judges would be reduced. The lesser matters previously handled by these eliminated judges would be assumed by less expensive commissioners and justice courts. This consolidation system would not only be less expensive, but would be more efficient because it would foster specialization by the commissioner, justice court, or district judge in a particular category of cases.

As it turns out, consolidation will be neither more economical nor more efficient than the prior system. We have now more judges than before, and each additional judge requires additional facilities and support staff. Moreover, those judges are handling a broader range of cases, reducing the opportunity for specialization and development of expertise in particular subject matters. Meanwhile, court commissioners and justice courts have assumed little, if any, of the prior judicial work load. The bottom-line effect of court consolidation is more judges, doing a greater variety of tasks, at a much higher cost. At a time when most states are moving toward judicial specialization and non-judicial alternatives to dispute resolution, we are moving back to judicial generalization.

I commend Craig M. Snyder for having the courage to speak up and question the consolidation movement from its inception. Unfortunately, he has been a lone voice crying in the wilderness.

Finally, I intend no criticism of those who initiated the consolidation movement; their motives were pure and their goals were laudable. It simply seems to me that we have lost sight of those goals in the rush to consolidate.

Merrill F. Nelson

DEAR EDITOR:

I read with interest the article, appearing in the Summer 1995 issue, by Nathan B. Wilcox dealing with surreptitious tape recording by lawyers. It was informative and confirmed what I thought to be the law and the formal ethical rule, but something was missing.

I kept waiting to see the author's acknowledgement that, although it may be legal and not prohibited by the written rules of ethics to do such things, and although it may be reasonably necessary in limited circumstances of the kind referenced at the outset of the article (like those in which another lawyer has shown himself or herself to be a liar), surreptitious tape recording of conversations should *never* become a routine practice, or anything close to it. Lawyers should always strive, consistent with their duties zealously to represent their clients, to abide by the "Golden Rule." Lawyers should, if possible, never even come close to the line of what the formal rules proscribe as "unethical conduct."

Peter C. Collins

Letters From Our Members

Please send letters to Letters to the Editor, Voir Dire, *50 West Broadway, 700 Bank One Tower, Salt Lake City, Utah 84101-2006. Letters should be type-written, double-spaced, and concise. All letters are subject to editing, and some may not be published at all, at the discretion of the Editorial Board.*

Report of the Civility Committee

by Craig G. Adamson

What, if anything, can be done to increase the practice of civility between lawyers or, in the alternative, what can be done to decrease incivility? That is the question being studied by the Litigation Section subcommittee on civility. The committee is in its second year of operation, and, as you might suspect, it has no easy or ready answers to these questions.

During its first year, the committee adopted a program of publishing scurrilous letters from one lawyer to another. That program continues, and you are invited to submit appropriate examples of letters you have received. The committee also is considering publishing laudatory letters about lawyers. The first of those, a letter by Bob Wilde praising the conduct of Mike Mohrman, is published below. Other examples of encouraging behavior will be noted in this space in the future.

At its initial meeting in 1995, the committee focused on the question of whether adopting yet another code is likely to improve civility. The question is still being debated, and your comments are welcome.

Although it is difficult to believe that anyone who has been able to graduate from an accredited law school and pass the bar exam has not figured out that abusing court personnel is a very poor idea, the committee is assured that it happens ever more frequently. Judge Pat Brian is putting together a group of court personnel who will report to the committee on problems they face, and possible solutions.

Incivility is a difficult problem. The difficulty begins with a definition. Sometimes a third party cannot tell whether a lawyer's conduct is uncivil, or merely firm advocacy. On the other hand, most lawyers are well able to recognize incivility when they see it. While this committee and other bodies, both within and without the Bar, struggle with how to improve civility, a few modest suggestions seem to be in order.

First, civility begins at home. Begin each day by dedicating yourself to the idea that you are going to be civil in your dealings with others. Many people fail to understand that you can be civil and still be an effective advocate. Examples of Utah lawyers who are unfailingly civil, but who have never been accused of failing to strongly and effectively advocate their client's position, come easily to mind. Among those are Steve Nebeker, Gordon Roberts, and Carman Kipp. Being civil works. If you haven't tried it, you should.

Second, being civil helps your clients. Remember that your job is to secure a just resolution of a dispute, and not to become a personal participant in it. If you have allowed yourself to become part of the problem, instead of part of the solution, you can only expect that your opponent is going to insist on the matter being handled in the most formal manner possible. If you have personally abused opposing counsel or the opposing client, you will end up doing things in the most expensive way possible, and you will have to explain the cost of doing it that way to your client.

Third, do not let the miracles of modern technology trap you. Modern technology has made it possible for a lawyer to sit in the office, and either dictate into a microphone or type into a computer terminal, letters and pleadings that go out to third parties almost immediately. Under these circumstances, it is easy to be carried away by the sound of your own voice, or the beauty of your rhetoric on the computer screen. Court rules that limit oral argument on motions tend to further insulate attorneys from having to look opposing counsel in the eye, or of being able to directly observe the poor effect or non-effect that such comments have on judges. An example of this problem, recently received by the writer, is set forth below. These comments were made in response to a motion to dismiss under Rule 12(b)(6), and a motion for a protective order.

> Knowing that P is an individual who must fund this litigation personally, D and its insurance carriers have instructed counsel for D to assign three lawyers to this case and file every conceivable objection and motion, whether such objection or motion has merit or not.
>
> D then filed a meritless Motion to Dismiss that is currently pending before this Court . . . . Indeed, D seeks to keep from both this Court and P internal documents that demonstrate D's liability to purchasers such as P. This Court should not tolerate such blatant stonewalling.
>
> [I]n an effort to keep these incriminating documents from the Court, D filed a Motion for Protective Order.

The lawyer who made these comments has been around for some time, and should have known that the judge who read them would be perfectly aware that he had no knowledge of conversations between defendant's counsel and its client, that the comments about insurance were inappropriate, that characterizations of the documents and what they would show would not be helpful to the court, and that opposing counsel likely would be offended by the comments. These comments did not move the case toward resolution, and did not help the court.

Your job as a trial lawyer is not to be a "paid hater." It is to attempt to resolve conflicts. If you are part of the conflict, it is much more difficult to secure a good result for your client.

Mr. Adamson is a shareholder of the Salt Lake City law firm Dart, Adamson & Donovan.

THE CIVIL LITIGATOR

DEAR EDITOR:

As calculated, I was embarrassed to note that you printed my letter under your "Uncivil Litigator Section" in your summer 1995 edition of *Voir Dire*. I hereby publicly apologize to your readers and to the attorney it was sent to. Although the message was merited and was the result of a "bad hair day," the vehicle used to express it was not. The splenetic and poorly drafted letter should have been tabled.

I also want to apologize to all the practicing retarded monkeys who are members of the Utah Bar and indicate that my reference to them was unwarranted. To allay some of your writers' (I am sure heartfelt) concerns, be aware that I do have a mother and I am very interested in the personality transplant that was alluded to in one of your articles. Where can I obtain one? Moreover, although the suggested $80.00 of Valium a month has been ineffective, I have found that a steady dose of Prozac, an increase in my earning capacity, and several deep breaths before dealing with condescending and equally obnoxious fellow attorneys, have substantially curbed my desire to resort to incivility. (Not to mention the possibility of being published again.) *

Back again to a more serious note, I am an avid reader of *Voir Dire* and other articles that are put out by the Bar and want you to know that I find your articles instructive and very persuasive. I am also encouraged by the admission that those on your civility committee recognized that they have been uncivil at times in their past. Their admissions give me hope that we all can do better, and I hereby make a commitment to do so.

* This paragraph is not to be taken seriously.

I would like to know, however, if any other young attorneys or new members of the Utah Bar have had the experience that I have had with fellow litigators who have lengthy careers under the belt. Personally, I have found that some of these older and outwardly "civil" attorneys tend to, as a fellow friend and attorney said, "stab you in the back while they're pleasantly greeting you with a handshake." I have found that many that fit this description knowingly misrepresent the law and the facts, do not answer calls, unnecessarily badger clients, do not grant any reasonable concessions, schedule dates without any consultation, and are very condescending and overbearing. Perhaps I possess a persecution complex and I am the one that has been totally at fault for this perception, but I would be interested in knowing from your readers if they have experienced the same. I would also like to know if you would give equal time to such "uncivil" behavior in your publication instead of merely airing the obvious.

In parting, while I will admit that I am one of the offenders in need of direction, I would again emphasize that I appreciate the efforts being made to promote civility among members of the Bar, and I reiterate my commitment to better regulate my behavior and communications.

Loren M. Lambert aka Jeffrey E.R. King

Dear Mr. Carney:

Thank you for your Report of the Civility Committee in *Voir Dire*. I recently photocopied it and included it with a Motion for Protective Order to opposing counsel, who had been so thoughtful as to schedule a deposition in the middle of a week during which I will be out of town, without bothering to coordinate it with my calendar.

I agree that identifying the uncivil litigators is appropriate. I also think it appropriate to recognize the civil litigators, when you find them. To that end, I submit the following anecdote.

I appeared in a civil matter in front of one of the judges of the Third District Court, who had granted Summary Judgment to our opponent, who was represented by Michael Mohrman of Richards, Brandt, Miller & Nelson. I felt, and the judge ultimately concurred, that summary judgment had been inappropriately granted. I filed a Rule 59 motion for a new trial. During a hearing on the matter, the judge expressed her view that Rule 59 was not the proper mechanism to bring this issue back into court. During the subsequent hearing, Mr. Mohrman informed the court that he had researched the issue following the last hearing, and, much as he would have liked to have it be otherwise, Rule 59 was in fact the appropriate mechanism. Mr. Mohrman provided the court with several citations of cases supporting my position.

While, in theory, we all know that Rule 3.3(a)(3) of the Rules of Professional Conduct requires us to disclose such precedent to the court, my observation is that the rule is more often honored in the breach than in the following. In my book, Mr. Mohrman is truly a "Civil Litigator" who ought to be recognized as such.

Robert H. Wilde

POINT/COUNTERPOINT

MANDATORY PRISON SENTENCES

Why Minimum Mandatory Sentences Should Be Repealed

by Judge Bruce S. Jenkins

A young man, married, with three children and one on the way. Passive personality. A little on the dull side. (What Rumpole would call "of the humdrum persuasion.") Supportive wife. Influenced by orators on the Federal Reserve system, he resolves to rob a bank. He and his wife pray, seeking a sign that if his plan is wrong in God's sight, they will be told. No sign is given. She drives him to a country bank. He goes to the loan department and gives the officer a note asking for money. The note threatens. He has a gun in his pocket. About $600 is passed. He is followed into the parking lot and subdued by local police officers who were called while the event was in progress. No one is harmed. The Federal Reserve, which manufactures money, hasn't lost anything. He is charged with bank robbery and the use of a gun. Had he only robbed the bank, he may have avoided a lengthy prison term, but the gun in his pocket was worth a minimum of five years.

A Mexican alien. Charged with drug and weapons violations. Subject to deportation after service of his sentence. Early deportation or the exploration of incarceration in Mexico through a treaty is desirable but not possible because of a minimum mandatory sentence.

A drug event. The defendants are charged with distribution. Split sovereign interests—state and federal. One defendant processed in state court. Sentenced to eight days. The other in federal court, with a potential of twenty-one years.

Another drug event. Principal provides on-going information. No charges brought. Principal put on government payroll. Lesser figures charged, convicted and, depending on the quantities of drugs and weapons involved, sentenced to anywhere from four months to twenty years. Principal remains free and on the government payroll.

These examples point up some of the problems with minimum mandatory sentencing.[1]

Judge Bruce S. Jenkins is a senior judge of the United States District Court for the District of Utah. This article is adapted from remarks given to the Federal Judges Association.

[1]Although my topic is minimum mandatory sentencing, the rationale for repealing minimum mandatory sentences also applies to the mandatory nature of sentences under the federal sentencing guidelines. While rigid, however, the sentencing guidelines do not impose the same, inflexible limits minimum mandatory sentences do. In fact, Judge Wilkins, the Chairman of the United States Sentencing Commission, has suggested that minimum mandatory sentences "are philosophically at odds" with sentencing guidelines and that "most of the problems alleged to stem from the guidelines can more properly be traced to mandatory minimum

1. Minimum mandatory sentencing is unscientific and illogical. The process runs backwards. Minimum mandatory sentencing provides an answer before the specific conduct, context, persons, mental state, provocation, or other aggravating or mitigating factors are adequately defined. This is like asking an accountant to give his bottom line before he has ever examined the books. Unlike the common-law tradition, which applies the law (major premise) to the facts (minor premise) to reach a conclusion, minimum mandatory sentencing starts with the conclusion (the sentence), before it knows all the relevant facts.

2. Minimum mandatory sentencing is hopelessly in conflict with important goals of the criminal justice system. The purported justification for minimum mandatory sentences is to protect the public. But that is only one goal of our criminal justice system.[2] Perhaps equally important is rehabilitation. Indeed, our penal system is commonly called a "corrections" system. Minimum mandatory sentences ignore the corrective aspect of punishment. They make "correction," or rehabilitation, much more difficult, if not impossible in many cases. Lengthy prison sentences produce career prisoners, not useful members of society. Rehabilitation is only possible through what one scholar has called "the individualization of punishment."[3]

For example, perhaps one of the best indicators of potential recidivism is family support, yet minimum mandatory sentences, like the federal sentencing guidelines, "start from the premise that '[f]amily ties and responsibilities . . . are not ordinarily relevant . . . .' "[4] For a defendant convicted of a crime carrying a minimum mandatory sentence, prior good conduct, genuine sorrow and repentance, a high probability of future good conduct, a supportive family or supportive community are simply of no moment. Punishment is the policy. Rehabilitation is forgotten.

We don't have a unified system with consistent social goals. We have several systems with social goals and the means to achieve them in perpetual conflict. Minimum mandatory sentencing enshrines a particular theory of criminal justice (punishment) at the expense of other penological goals.

> *"Minimum mandatory sentencing starts with the conclusion before it knows all the facts."*

3. Minimum mandatory sentencing overburdens the available correctional resources. Overcrowded prisons, the costs of new prison construction and remodeling and the ever-expanding maintenance costs of a growing prison population result, in part, from the diminishment of the power of the court to select non-prison alternatives. In 1985, when the federal sentencing guidelines were initiated, the federal prison population was 36,000. Seven years later, it had virtually doubled—to 71,000.[5] The costs of housing these prisoners are staggering. It now costs about $30,000 per year to house a federal inmate—roughly the cost of a Harvard education.[6] That's $2.13 *billion* (71,000 x $30,000) every year in taxpayer dollars. Admittedly, not all that money could be saved by repealing minimum mandatory sentences. I am not advocating "the opening of the prison to them that are bound."[7] But not every defendant sentenced to a minimum mandatory term needs to serve that term to achieve the legitimate goals of the criminal justice system. Even if the repeal of mandatory minimum sentences only saved two million dollars a year instead of two billion, think of the good that could be done with that money.

And the real costs—the social costs—of minimum mandatory sentences are much greater than just the cost of warehousing prisoners. Take our bank robber in the first example I gave. He was sentenced to thirty days on the substantive count and five years on the mandatory gun count. The result? A wife on welfare; children (now four) on welfare. Probation would have been a viable alternative for such a defendant—no prior history, no genuine probability of violence in the future, passive, sorrowful, compliant—and probation alone would have kept a family together and off welfare.

Or take another recent example: a single father, the sole caretaker of his minor son, a loving and conscientious parent. The son is on his school's honor roll and is a stabilizing influence in his father's life. Father addicted to marijuana. He grows it for his own use. When confronted by law enforcement agents, he cooperates fully. He shows them his personal stash and consents to a search of his house. The search turns up a .22 calibre rifle with a homemade silencer made out of old toilet paper tubes and stuffing from old stuffed animals. If the father is incarcerated, the son will stay with the father's stepson, who is in his early twenties and never finished high school. The father is placed on proba-

statutes." William W. Wilkins, Jr., *Mandatory Minimum Penalties*, 5 Fed. Sentencing Rep. 201, 201 (Jan./Feb. 1993). The Sentencing Commission has recommended the repeal of minimum mandatory sentences on the federal level, as has the Federal Court Study Committee. The Federal Judges Association has joined in the recommendation.

[2]Congress has identified the following functions punishment is meant to serve in the federal system:"to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant"; "to provide the defendant with needed . . . correctional treatment"; and "to provide restitution to any victims of the offense." *See* 18 U.S.C. § 3553(a)(2), (7).

[3]*See* Raymond Saleilles, THE INDIVIDUALIZATION OF PUNISHMENT (Rachel Szold Jawstrow trans., 1913).

[4]*United States v. Webb*, 49 F.3d 636, 638 (10th Cir. 1995) (quoting U.S.S.G. § 5H1.6).

[5]*See* Abner J. Mikva, *It's Time to "Unfix" the Criminal Justice System*, 20 HASTINGS CONST. L.Q. 825, 829 (1993).

[6]As former Judge Mikva noted, "while one could argue about which institution inflicts more harm on its inmates, Harvard is not paid for with taxpayer dollars." *Id.*

[7]*Isaiah* 61:1.

tion, but his sentence is reversed on appeal, with instructions to sentence within the prescribed guideline range of twenty-seven to thirty-three months. The son begins to have difficulties at school.[8]

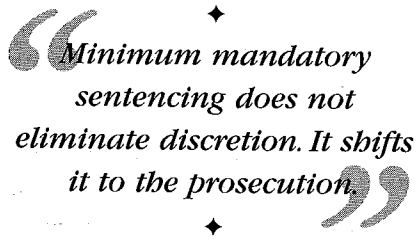
4. Minimum mandatory sentencing produces arbitrary and disparate results. The well-intentioned legislative effort to achieve uniformity and evenhandedness, as applied, does not eliminate disparity. If anything, it merely encourages its concealment.

Disparity results when the same consequence is assigned to very *different* events. Indeed, the Chairman of the United States Sentencing Commission has criticized mandatory minimum sentences as having "the tendency to skew punishment levels by sometimes producing *unwarranted uniformity.*"[9] In drug cases, for example, minimum mandatory sentence statutes impose lengthy prison terms based on the amount and type of drug involved, without accounting for the offender's actual level of involvement in the distribution system.

Disparity in sentencing may also arise from the decision to prosecute some participants in the same criminal event in different systems. Some may be charged in the federal forum, while others may be charged in the state system. The two systems do not provide identical punishments for the same event. One may impose a minimum mandatory sentence where the other does not. Statistical surveys of federal sentencing routinely overlook this source of disparity.

5. Minimum mandatory sentencing leads to a dangerous concentration of power in the Executive Branch. Minimum mandatory sentencing upsets the traditional division of power among the three great branches of government by concentrating the power to charge, prosecute, and fix the sentence in one branch—the Executive. The opportunity of the Judicial Branch to oversee and balance out arbitrary action by the Executive is diminished.

Minimum mandatory sentencing does not eliminate discretion. It shifts it to the prosecution. The outcome is determined by the charge. For this reason, the charging process becomes highly important. Yet there is no public oversight of the process of selecting the outcome in a particular case, no judicial tailoring of the result to the circumstances of the case. The results can be just as arbitrary and disparate as sentencing results under indeterminate sentencing. As Judge Wilkins, the Chairman of the Sentencing Commission, recognized, mandatory minimum sentences "often apply on a hit or miss basis, depending on how prosecutorial charging discretion is exercised."[10] At least one federal district court has determined that, in a series of prosecutions, the United States Attorney's Office for that district had brought disproportionately harsher charges against male drug couriers than as against female drug couriers engaged in substantially similar conduct.



Similarly, under the federal system, *only* the prosecutor has discretion to seek a departure below the mandatory, or guideline, range based upon "substantial assistance," and that discretion is unreviewable. Recently gathered data suggest at least some racial disparity in departures sought by federal prosecutors.

One may argue that a prosecutor has always had discretion in charging. That is true, but he has not always had control over the penal consequence, as he often does now.

With minimum mandatory sentences, public oversight of the real sentencing decision—the charging decision—is nonexistent. There is no independent judicial review with respect to individual charging decisions. Moreover, no coherent program of legislative oversight of the administration of minimum mandatory sentencing statutes currently exists.

The prosecutor has a built-in conflict. A judge cannot be both judge and prosecutor, but a prosecutor can in essence perform both functions. When a judge has a conflict, he can recuse himself, but there is no mechanism for a prosecutor who is called on to be both prosecutor and judge to get off the case. His desires are not subject to public scrutiny or to the neutral balance and oversight of a coordinate branch of government. The concentration of the charging and sentencing powers in the Executive Branch is an open invitation to manipulation and corruption.

When we talk of mandatory sentencing, we are talking about power, process, method, mission—in short, about the structure and function of government in trying to deal rationally with criminal action and criminal consequence. We have been warned from the beginning about the abuses that can arise from the concentration of governmental power. The principle of fractured power, our great experiment with fractured power, is found in that most fundamental of documents—the Constitution. We find there a general expression of role and of the relationship of the three great departments. The current scheme of minimum mandatory sentences ignores the wisdom of the Founding Fathers.

6. Minimum mandatory sentencing does away with the rational process of judgment. The usual rational process requires the exercise of judgment. It requires that information be gathered first before an answer, dependent on such information, can be given.

Statutes should be written to do what statutes do best: define standards of conduct applicable to all. Legislatures should make policy, but they are ill-equipped to make micro-judgments. A criminal statute can define the standard

[8] *See United States v. Webb*, 49 F.3d 636 (10th Cir. 1995).
[9] William W. Wilkins, Jr., *supra* note 1, at 201 (emphasis added).
[10] *Id.*

of conduct and the elements of the offense. In a sense, however, every violation of a statute is different because of the make-up of the persons involved and the context. Each criminal offense is fact-intensive. It depends on context, mental state, capacity, provocation, sequence, aggravating and mitigating factors. A statute cannot anticipate all of these factors. It cannot anticipate the actual conduct of a given defendant in a given situation. The statute cannot define or describe the *event*. Yet, consequences can fairly be measured only in terms of the event and its attendant circumstances. In a sense, every violation of a statute is different because of the make-up of the persons, the context, the sequence of events. Mandating a prescribed consequence, a punishment, before the myriad of individualized fact questions have even arisen, ignores the critical factors that must be taken into account in fitting punishment to the event.

If judgment is fact-intensive, with due regard for individual differences, then the court is better equipped than either of the other branches to exercise judgment as to a particular defendant enmeshed in a particular factual context with the myriad of differences that always exist. I submit that the application of judgment by a trained jurist after fact-gathering in full public view, subject to further review on appeal, is a process far superior to the mechanical application of a predetermined outcome. When determinate sentencing is mandated, however, judicial discretion is nonexistent. The court applies the sentence mechanically. Allocution is merely a ritual. The essential discretionary choices have been made, either by the legislature or by the prosecutor in bringing the charge. The legislature has both defined the crime and mandated the consequence. Events with genuinely important factual differences are given predetermined answers that ignore the differences. The neutral magistrate, the judge, has no power to consider the differences and tailor the punishment to fit the crime. Everyone is given the same size suit off the rack. "One size fits all." No alterations allowed.

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Judging—the hands-on process of comparing and deciding the particular consequences of particular events—should be left to those best situated to judge, those in whom both the Constitution and Congress have invested the judicial power of the United States—the courts. The court is better equipped than either of the other branches to exercise judgment as to sentencing of a particular defendant under a particular set of facts.

Deference to process and deference to the traditional concepts of federalism support the repeal of minimum mandatory sentences. The search for even-handedness is best served when the punishment can be tailored to fit the particular crime, with due consideration for all of the individual differences. That is best done in the open courtroom, on the record, subject to appellate review and public oversight. A common answer that ignores the differences only institutionalizes disparity.

The Case for Mandatory Prison Sentences

by Brent D. Ward

Mandatory prison sentences have received a bad rap in some quarters lately. Of course, criminals and defense attorneys have never liked them—for obvious reasons. Judges, too, typically line up against them as an encroachment on their decisions.

But many people were surprised last winter when the Utah State Legislature precipitously gutted Utah's mandatory sentences for sex crimes against children. The Legislature later had second thoughts, and postponed the effective date of its repealer to allow for study by the Utah Sentencing Commission. The Sentencing Commission has now finished its work, and recommended retaining the mandatory sentences. It is to be hoped that the Legislature will follow suit.

Mandatory sentences have become more common in recent years. All federal sentences are now mandatory in the sense that federal judges must adhere to sentencing guidelines recommended by the United States Sentencing Commission and approved by Congress. In most felony cases, these guidelines leave the sentencing judge no choice but to give jail time.

Moreover, the sentence pronounced in a federal case is very nearly the sentence served, because (1) the concept of parole, and with it the United States Parole Commission, has been abolished by Congress; and (2) the effect of "good time" has been severely curtailed.

Likewise, many states are opting more often for mandatory prison sentences, especially for crimes that are anathema to the public, including child sex abuse crimes, drug crimes, and crimes committed with the aid of a firearm.

Of course, popularity does not always signal good policy. Are there other reasons for mandatory prison sentences? Certainly there are. Mandatory sentences make good sense for many serious crimes.

Reason number one. Mandatory incarceration incapacitates the offender. To the extent the offense is one the offender is likely to repeat, mandatory sentencing gives the general population absolute protection from that offender during the period of incarceration. This is especially important in the case of serious crimes, such as the seven crimes that carry mandatory sentences under Utah's Child Kidnapping and Sexual Abuse Act of 1983: aggravated kidnapping, aggravated sexual abuse, rape of a child, sodomy of a child, aggravated sexual abuse of a child, object rape of a child, and kidnapping of a child. Mandatory prison terms take sex offenders off the streets, among them people who have an exclusive sexual attraction to children and who are likely to attack other children if placed on probation.

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"Mandatory sentencing not only makes us feel safer, it actually makes us safer."

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Mandatory sentencing not only makes us feel safer, it actually *makes* us safer. On the average, a pedophile assaults children sixty times before being caught. Every day he is off the streets is a safer day for the public. He can't hurt anybody, because he can't get out.

To prove the point, more sex offenders have been going to prison in Utah since mandatory sentencing was adopted. In 1980, they made up nearly eleven percent of Utah's prison population. In 1994, they made up twenty-five percent of the total inmate population. The actual number of sex offenders in prison in Utah has increased six times, today requiring more than 750 beds. That is a dramatic increase. It is a tragedy to have to "warehouse" people this way, but in the case of the most serious sex offenders, there is no better way right now to give the public the protection it needs. Fortunately, there is a growing prospect that in the next session the Legislature will appropriate funds needed to give these offenders treatment while they are in prison.

Reason number two. There is no greater deterrent to crime than justice that is both swift and sure. Well, one out of two is not bad. Swift justice still eludes us, but we can make sure that "if you do the crime, you do the time."

The absolute certainty of a prison sentence may not always show up when academicians study deterrent effects, and is not as good as a strong-willed mother, but common sense says that a crime that brings incarceration every time is a crime less likely to be committed. If a crime is treated lightly, either because of lax laws or lax enforcement, the incidence of that crime generally goes up. For example, when speed limits are not enforced, speeding violations increase. On the other hand, there are few things like a sure prison sentence to make a person think twice.

Reason number three. Mandatory sentences make the statement that some wrongs are so beyond the pale that society will not tolerate them in any degree; no equivocation, no hemming and hawing, and no hand-wringing. "Do not pass Go—go directly to jail." This crime is so egregious that severe punishment—certain incarceration—is the most fitting punishment in every case.

This kind of emphatic statement is important when it becomes necessary to address a persistent threat to the basic fabric of our society, as in the case of crimes committed with a firearm, sex offenses against children, and drug trafficking. In those cases, there can be no argument that a prison term is not commensurate with the severity of the offense. The only question may be, "Is the prison term long enough?"

Mr. Ward is a partner of the Salt Lake City law firm Parry Murray Ward & Moxley.

An emphatic statement is especially important in the case of sex crimes against children. Without mandatory prison sentences, few of these offenses are ever reported (perhaps one in ten), few of them are ever prosecuted, and few of those prosecuted result in prison terms. Even today, when reporting is up dramatically from fifteen years ago, out of one hundred reported cases of child sexual abuse in Utah, only twenty are prosecuted at all. Of those twenty, only five receive prison terms and only one receives a mandatory prison term. Every criminal case that actually reaches the sentencing phase, therefore, must carry a strong message.

Reason number four. Mandatory sentences promote uniformity and equality in sentencing. It doesn't matter whether you are the mayor or the janitor. Nobody is going to get special treatment. Money doesn't matter, status doesn't matter, connections don't matter, slick defense attorneys don't matter.

The criminal justice system comes in for heavy criticism for disparity in sentencing. Left to their own discretion, different judges sentencing different people for the same conduct, where all of the factors relevant to sentencing are substantially the same, are likely to hand down different sentences. Some will give probation; others will give jail time. Mandatory prison sentences have the advantage of reducing this disparity. At the same time, they promote public confidence in the criminal justice system.

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> *"Mandatory sentences promote uniformity and equality in sentencing."*
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A related, but more subtle, problem is the ability of some defendants to win probation partly because of the sympathy they are able to evoke as the judge reviews their cases, sees the defendants' families, hears the pleas of the defendants and their defense lawyers, and reviews letters procured by the defendants from family members, friends, business associates, and community leaders. Meanwhile, if there has been a plea bargain, the judge never sees the victims or hears the victims' family, friends, business associates, or contacts in high places. The full impact of the crime can be lost amid an avalanche of support for the offender. The result can be an anomalous sentence of probation. By adopting mandatory prison sentences for an offense, the Legislature reduces the possibility that a judge will be persuaded to give probation, because the Legislature has decided that prison is appropriate every time.

There is nothing wrong with a legislature making a policy judgment to limit judicial discretion where one or more of the above reasons apply. Nothing is sacrosanct about absolute judicial discretion. It is well within the legislative sphere to decide that the legislative purposes of proscribing certain criminal conduct are best served by prescribing a prison sentence in every case. When we the public say we favor mandatory prison sentences for some crimes, we are right.

PRACTICE POINTERS

Trial Basics: Using Exhibits

by Francis J. Carney

Getting exhibits into evidence without embarrassing yourself is a rite of passage for the trial lawyer. The naturally timid ones, like me, had nightmares of being chased out of court by a hooting jury, just as I was chased out of my first confession by mean old Father Boland. At seven years old, and meeting the forbidding priest for the first time, I nervously and unwisely forgot my well-memorized prayers in the Catholic darkness of the confessional, and was sternly bade by him to *leave* and *never* return until I *properly* learned my prayers.

The first time that you stand before court and jury, and those ritual incantations effortlessly flow from your mouth, is the moment you think, "Hey, I can do this. This is easy. Maybe I didn't make a horrible mistake in going to law school after all."

There's really no great mystery to it. It's a simple mechanical skill that's intimidating for some of us only because we weren't taught how to do it in law school, and we haven't had enough chances to practice since then. Here are the basic steps for admitting any exhibit:[1]

1. Clerk marks the exhibit.
2. Show the exhibit to opposing counsel.
3. Lay the foundation.
4. Offer the exhibit.
5. Get a ruling on admissibility.
6. Use the exhibit.
7. Publish the exhibit to the jury, if necessary.

Here's how it works in practice. You've pre-marked the exhibit at the break, given copies to opposing counsel and to the judge, and now approach the witness:

You: *"Mr. Witness, I show you Exhibit 8 and ask if you've seen it before."*

Witness: *"Yes. This is a blow-up of the photograph that I took of my car."*

You: *"And does Exhibit 8 fairly and accurately depict your car on the day of the crash?"*

Witness: *"Yes, it does."*

You: *"We offer Exhibit 8."*

Court: *"Any objection?"*

Other lawyer: *"No."*

Court: *"Exhibit 8 is received."*

You got the exhibit into evidence and now you can use it. No more fussing about is needed.[2] Some judges take offense if a lawyer approaches a witness without asking for permission. Some find it annoying for a lawyer to continually bother them with asking. Despite what you've seen on T.V., few judges will allow a lawyer to hover over a witness during examination. But the level of formality varies in every court. If you haven't tried a case before this judge, ask in advance what the rules are from the bailiff and the court clerk. They'll be happy to fill you in.

Dos and Don'ts on Exhibits

1. ***Do*** *pre-mark exhibits.*

Judges hate having court time wasted on lawyers who fumble around getting exhibits marked while the witness and the jury are waiting. Ideally, counsel will identify all exhibits before trial. There's no reason you cannot also agree on pre-marking all proposed exhibits and exchanging copies. Even if you can't mark an exhibit before trial, get it marked by the clerk during a break. You don't need the judge's permission or the consent of opposing counsel; just do it.

2. ***Do*** *reach stipulations on exhibits before trial.*

No one should make an opponent call a records custodian to establish the authenticity of records, unless there is a legitimate issue about it. The judge and everyone else will resent this unprofessional waste of time. Laying foundations for exhibits can be time-consuming and it bores the jury. Get stipulations on foundations before trial.

Some stock pretrial orders provide that all objections to "foundation" are waived unless made before trial. If this is not the case, ask for a stipulation on foundation for exhibits. There are a few lawyers too inexperienced or obstinate to stipulate to foundation before trial, and with those your best bet is to raise the issue at the pretrial conference.

Mr. Carney is a Director of the Salt Lake City law firm Suitter, Axland & Hanson.

[1] One usually clear-thinking author suggests a mnemonic: **"MOASTE,"** for "Mark-Opponent-Approach-Witness-Show-Testimony-Evidence." Keith Evans, THE COMMON SENSE RULES OF TRIAL ADVOCACY 121 (1994). **"CSLOGUP"** works just as well.

[2] Courts in other places sometimes follow more stilted procedures:

Defense lawyer: *"Your honor, may the clerk mark this blown-up photograph as Exhibit 8 for identification purposes only?"*

Court: *"Yes, the clerk will so mark the photograph."*

Defense lawyer: *"Your honor, may the record reflect that the clerk has marked this photograph as Exhibit 8 for identification purposes only?"*

Court: *"Yes, it may."*

Defense lawyer: *"Your honor, may the record reflect that I am showing the photograph marked as Exhibit 8 for identification purposes only to Plaintiff's counsel?"*

3. ***Don't*** *stipulate on exhibits without understanding what you're stipulating to.*

Stipulations are marvelous, but know what you're agreeing to. There's a dramatic difference in stipulating to the *authenticity* of an exhibit, stipulating to its *foundation,* and stipulating to its *admissibility.*

Suppose plaintiff was admitted to the Wasatch Mental Health Center for treatment of depression, and the defense wants to get those records before the jury. To plaintiff's counsel, that treatment is irrelevant.

You're plaintiff's attorney, and are asked to stipulate to the "foundation" on the mental health records. You ought to know that stipulating to "foundation" means different things to different people.

To some, it means that you are stipulating to the *authenticity* of the medical records; that is, that the records really are the official records from the Wasatch Mental Health Center, and the records custodian does not need to come in to testify to that fact.

To others, it means you are also stipulating to *relevancy;* that is, that the records tend to prove or disprove a fact of consequence to the action. Don't be afraid of appearing stupid: ask what "foundation" is taken to mean. Most of the time you'll find the other side doesn't understand it either.

On the other hand, stipulating to the *admissibility* of the medical records means that the records will be admitted without any foundation and may be used for all appropriate purposes in trial. That is, counsel can use them in direct examination, cross examination, argument, and they will go into the jury room.

If I were the plaintiff's attorney, I would stipulate on *authenticity,* I wouldn't stipulate on *foundation* without further explanation, and I would never stipulate to *admissibility.*

4. ***Do*** *understand Rule 104.*

Rule 104 of the Utah and the federal evidence rules provides that preliminary questions of admissibility are determined by the court, and in making that determination the court is not bound by the rules of evidence, except as to those regarding privileges. Therefore, you can and *should* lead the witness when laying the foundation for an exhibit. Don't be buffaloed by "leading the witness" objections on any foundational matter, either as to an exhibit or as to the qualifications of a witness.

5. ***Don't*** *show the jury exhibits, or refer to them before they have been received.*

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> ***"You can and should lead the witness when laying the foundation for an exhibit."***

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It's improper to display any exhibit in view of the jury before it has been admitted. Keep your eyes open, and insist that your adversary keep all exhibits, especially blow-ups and models, out of the jury's sight until then. You will find amateurs and not-so-amateurs out there who insist on being cute in this fashion. Put a stop to it.

It's also a common error to ask a witness about the substance of a document before it's been admitted. That's objectionable, and a sloppy practice. Get the document admitted *before* getting into its contents.

Attorneys want to keep their own blow-ups in view of the jury, even after their side is finished. Don't allow it. When it's your turn to speak, make the stage your own. Erase the blackboard. Turn those blow-ups away from the jury. Flip over the big pad. Then, and only then, speak.

If you're going to use an exhibit in your opening statement, clear it with opposing counsel. If she objects, raise it with the judge. It normally will be allowed, unless there's a question on the exhibit's ultimate admissibility.

6. ***Do*** *give the judge a copy of all exhibits.*

Don't make a judge ask to see an exhibit before ruling on its admissibility. The judge, as a courtesy, should have a copy of whatever documents the witness and the lawyers have.

Ideally, the court and opposing counsel have identical exhibit binders containing all of your pre-marked exhibits. (By the way, exhibits don't need to be marked in order, and you can always add an unexpected one in the middle of trial, even though it will be out of order.) This isn't always possible. When it's not, hand a copy to the clerk to pass up to the judge on your way to the witness chair.

7. ***Do*** *make copies of all exhibits for other counsel.*

Counsel is entitled to see the exhibit before you examine the witness on it. Don't be embarrassed at the start of your examination by the court's ordering you to bring the exhibit back from the witness stand to show opposing counsel. Do it right the first time.

The usual way is to hand it to counsel in open court. Which means that you stand and wait while opposing counsel takes his time to examine the document. The better way is to hand him his own copy and use another for the witness. And the best way is to have all exhibits pre-marked in a binder, with a copy provided before trial to the court and to opposing counsel. (Unless, of course, there's a surprise value in the exhibit that you don't want to give up.)

8. ***Don't*** *"move to admit" exhibits into evidence.*

To many judges, this is like fingernails on the blackboard. Exhibits are *offered* and *received.* A "motion to admit" an exhibit is wrong and confusing. Just say, "I offer Exhibit 5," not "I move to admit Exhibit 5 into evidence."

Court: *"Yes, it may."*

Defense lawyer: *"Your honor, may I approach the witness?"*

Defense lawyer: *"Mr. Witness, I am showing you what has been marked as Exhibit 8 for identification purposes only. Have you seen this before?*

Mr. Witness: *"Yes, this is a blow-up of the photograph that I took of my car the day after the accident."*

Defense lawyer: *"And does Exhibit 8 for identification purposes only accurately depict the condition of your automobile on that occasion?"*

Mr. Witness: *"Yes, it does."*

Defense lawyer: *"Your honor, the defendant offers Exhibit 8 for identification purposes only into evidence as defendant's Exhibit 8 and requests that the clerk strike the designation of Exhibit 8 for identification purposes only and designate it as Defendant's Exhibit 8."*

Court: *"Any objection?"*

Plaintiff's lawyer: *"No."*

Court: *"Exhibit 8 for identification purposes only is received as Defendant's Exhibit 8.The clerk shall redesignate the exhibit accordingly."*

This sort of hypertechnical mumbo jumbo is unnecessary. Skip the obsequiousness and the incantations, and get to the point.

9. ***Do*** *speak for the record.*

Refer to exhibits by their proper identification numbers or letters. Don't say, "this contract," or "that photograph." It makes for work by an appellate judge attempting to understand the transcript. Say instead, "the photograph marked as Exhibit 7," or simply "Exhibit 7."

When a witness makes a vague reference to an exhibit, clarify it for the record. "When you said 'this letter' you were referring to Exhibit 7, and when you said 'this photograph' you were referring to Exhibit 8, correct?" Similarly, when a witness refers to a part of an exhibit, clarify the reference for the record: "When you say 'right here in the contract,' you are referring to the second paragraph on page 2 of Exhibit 8, correct?"

10. ***Do*** *keep your own exhibit list.*

Exhibits are marked and tracked by the court clerk. (Not by the reporter, contrary to deposition practice.) The clerk keeps a list of all marked exhibits, as well as physical custody of those that have been offered. Keep your own list as you go along: exhibit number, description, offered, received, and comments. Occasionally, compare the clerk's list with your own to make certain that you aren't missing anything.

11. ***Do*** *review your exhibits before closing your case.*

When you've finished with your last witness, ask for a break. Get the clerk's exhibit list. Review all the exhibits you meant to offer, and make sure that you did. Review all the exhibits you offered, and make sure you received a ruling. Then rest your case. Finding an exhibit after you've closed that wasn't received isn't pleasant.

Some lawyers try to cover this by making a statement before resting like, "We offer all of the exhibits and specifically offer any exhibits that weren't received," to which most judges will rightly respond, "Huh?"

12. ***Do*** *"publish" the exhibits to the jury.*

Being lawyers, we can't say "show" as everyone else would. But that's what it means to "publish" an exhibit. Whatever you want to call it, show the jury the exhibit. Anything the jury can't see is likely to be ignored or misunderstood. So don't just tell them—always show them. These are your alternatives:

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> ***"[An exhibit] the jury can't see is likely to be ignored or misunderstood."***

✦

a. Do nothing. Examine the witness on the document and don't show it to the jury. A confused and bored jury is the likely result.

b. After the witness testifies about the document, ask the court if you may "publish the exhibit" to the jury, and then hand it to the closest juror. One by one, they will each review the exhibit while you, the witness, counsel, and the court wait. You've lost control over your stage, and wasted everyone's time.

c. Make a separate copy of the exhibit for each juror, and hand them out while the witness is testifying. This is better, but the problem is that whatever you give them to read, they will. And while you're trying to focus on paragraph 4 of the contract, one juror is reading paragraph 8, another is reading paragraph 2, and a third is studying the signatures. You've again lost control of the action.

d. Make a blow-up readable at ten feet. (You might be surprised at the number of "blow-ups" that are unreadable to someone sitting five feet away.) The downside to this is the cost of commercial blow-ups.[3] Be restrained on the number of blow-ups you use, as they can get overwhelming. Bring your own portable stand for them, and learn how to set it up before you try it in court.

e. Use an overhead projector. This is probably the most effective way to show large numbers of documents, such as medical records, although some hold for the looseleaf binder approach. The technology is simple. The downside is dimming the lights and finding a place for the screen—always a problem in the round courtrooms of the Third District. You'll need a laser pointer for yourself and for the witness, as it is next to impossible to point things out clearly with your finger. And, please, learn how to use the overhead before you step into court.

f. There are many new high-tech computer projection devices coming onto the market. One provides simultaneous projection of any exhibit on monitors for the lawyers, the witness, and the jury, via a laptop computer. In Utah, it's unlikely that level of technology will ever receive widespread use unless the clients happen to pay for it.[4]

13. ***Don't*** *allow any exhibit into the jury room without your inspection.*

Review the exhibits after closing argument is finished and the jury is sent out, to make sure that the jury gets only what it's supposed to get. There will be a pile of documents, poster boards, photographs, models, and other exhibits. It may be late, and you will be exhausted. The temptation is to delegate this task to a paralegal. Don't. You need to take the time to carefully review what goes into the jury room from that pile.

Just because something is marked as an exhibit does *not* mean it goes into the jury room. For example, the jury does not get to see depositions or trial transcripts, although they will ask for them. *See* UTAH R. CIV. P. 47(m); *Shoreline Dev., Inc. v. Utah County,* 835 P.2d 207, 210 (Ut. Ct. App. 1992). They don't get counsel's chart scribbles made during argument. They don't get medical literature or learned treatises, UTAH R. EVID. 803 (18), they certainly don't get the pleadings, nor do they see anything else that has not been offered and received.

[3]About the best thousand dollars I ever spent was for a blow-up copier. All you do is insert the page, and a 4' x 5' blow-up comes out, which is then mounted on posterboard. Quick, easy, and cheap.

[4]Excessive technology, especially if it's expensive, has a potential for leaving the wrong impression with the jury, just as swarms of associates and other helpers might. On the other hand, most jurors who've actually been exposed to these computer toys claim to have positive impressions. One sure thing is that a lawyer's fumbling with unfamiliar equipment will be remembered.

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Potential Tax Advantages of Gross Fee Arrangements

by Charles R. Brown

Depending on the circumstances, a trial lawyer undertaking a matter for a client on a contingent fee basis may wish to consider a "gross fee" contract instead of the more customary "net fee" contract. Under a "gross fee" arrangement, a law firm agrees to pay all litigation costs, but, upon recovery of a settlement or judgment, receives only a specified percentage of the recovery with no separate reimbursement of costs advanced. This is in contrast to the more customary "net fee" arrangement, where the firm agrees to advance all litigation costs, but, upon recovery, receives the costs advanced in addition to the contingent fee.

In a recent decision by the United States Court of Appeals for the Ninth Circuit, an attorney licensed to practice in California and the District of Columbia was allowed to deduct his share of the litigation costs paid by his cash method partnership pursuant to its "gross fee" arrangement with the firm's clients. *See Boccardo v. Commissioner,* 56 F.3d 1016 (9th Cir. 1995). In prior cases involving this issue, "net fee" arrangements were determined to be non-deductible "advances" or loans when paid, rather than deductible business expenses under section 162 of the Internal Revenue Code of 1986 (the "Code"). *See Boccardo v. Commissioner,* 12 Cl. Ct. 184 (1987); *Burnett v. Commissioner,* 356 F.2d 755 (5th Cir. 1966); *Canelo v. Commissioner,* 447 F.2d 484 (9th Cir. 1971); *John W. Herrick,* 63 T.C. 562 (1975).

In the underlying United States Tax Court decision involving the taxpayer, which was appealed to the United States Court of Appeals for the Ninth Circuit, the Tax Court agreed with the Internal Revenue Service that litigation costs paid in a "gross fee" arrangement were not deductible in the year paid. *See James R. Boccardo,* 65 T.C.M. 2739 (1993). The Tax Court held that litigation costs incurred in a "gross fee" arrangement, although more contingent than in a "net fee" arrangement, would still constitute advances that ultimately would be repaid out of the recovery. In ruling against the taxpayer, the Tax Court also determined that, as to the California practice, if a "gross fee" arrangement does not constitute an "advance to the client," it would violate the California Rules of Professional Conduct. That violation would cause the expenditure to be non-deductible under the provisions of section 162(c) of the Code, which states: "No deduction shall be allowed for any payment . . . if the payment constitutes an . . . illegal payment under any law of the United States, or under any law of a State . . . which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or a business."

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> *"Under a "gross fee" arrangement, a law firm agrees to pay all litigation costs, but, upon recovery of a settlement or judgment, receives only a specified percentage of the recovery with no separate reimbursement of costs advanced."*
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In reversing the Tax Court and holding for the taxpayer, the Court of Appeals accepted the taxpayer's argument that in a "gross fee" arrangement, the payment of costs by the law firm is not an "advance" of the costs. The court agreed that in a "gross fee" arrangement, the firm has no contractual right to reimbursement; the firm is no more reimbursed its expenses than a self-employed commissioned salesman is reimbursed for the travel costs incurred in making a sale when the commission check for the sale finally arrives.

Regarding the Tax Court's holding that if the costs paid by the law firm do not constitute an "advance," then the "gross fee" arrangement must be a violation of the California Rules of Professional Conduct, the United States Court of Appeals for the Ninth Circuit distinguished the California rule from the District of Columbia Rules of Professional Conduct (Rule 1.8(d) and comment (5) to that rule), which do not require the client to remain ultimately liable for the expenses. The court also held that, even if the "gross fee" arrangement violated the California Rules of Professional Responsibility, there was no evidence concerning enforcement of the California rule that would cause it to rise to the level of violation of "a law of the United States" or a "State law that is generally enforced, which subjects the payor to a criminal penalty or the loss of a license or privilege to engage in a trade or business," as proscribed by section 162(c) of the Code.

The ethical constraint and the section 162(c) argument are not a problem for attorneys licensed to practice in Utah. Specifically, Rule 1.8(e) of the Utah Rules of Professional Conduct states as follows: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent upon the outcome of the matter."

The comments following the Utah rule specifically state that "[p]aragraph (e)(1) eliminates the requirement that the client remains ultimately liable for such expenses." This rule is precisely the same as the District of Columbia rule discussed by the United States Court of Appeals for the Ninth Circuit.

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The I.R.S. can be expected to continue to challenge the deductibility of litigation costs in "gross fee" arrangements in jurisdictions outside of the Ninth Circuit, including Utah, under the theory that the costs are still "advanced" with some contingency of repayment. Nevertheless, the rationale of the *Boccardo* decision is persuasive, and should constitute "substantial authority" for taking the deduction on a tax return, in the absence of an adverse decision on the issue by the United States District Court for the District of Utah or the United States Court of Appeals for the Tenth Circuit.

Assuming that the *Boccardo* holding is not rejected in Utah, what is its relevance to a Utah lawyer? As noted, the advantage to a "gross fee" contract is that the costs may be deducted by the law firm when paid, and will not have to be funded out of the after-tax dollars.

An example: Assume that the litigation costs total $25,000, and resolution of the case will not occur until four or five years after the case is undertaken. In a "net fee" arrangement, the law firm would have to fund the $25,000 out of after-tax dollars. Assuming a marginal income tax rate of thirty-five percent, that would result in a total expenditure exceeding $35,000, including the taxes which must be paid on the income generated to fund that expenditure. For heavy hitters in the highest brackets, the marginal rate could exceed forty-five percent, which could result in a total expenditure exceeding $45,000, including taxes. In a "gross fee" arrangement, the law firm will pay the $25,000 and deduct it in the year paid, with the result that the total cost is, in fact, $25,000.

In an unsuccessful case where the costs are not fully recovered, the economic cost to the law firm is substantially worse under a "net fee" arrangement. The firm may not deduct the unrecovered costs until final resolution, and has lost the use of the "time value" of the taxes paid to fund the costs incurred in earlier years. In a "gross fee" arrangement, the payment of the costs and the deduction occur in the same year. There is no loss of the use or the "time value" of the taxes that would have been paid under a "net fee" arrangement.

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"The I.R.S. can be expected to continue to challenge the deductibility of litigation costs in 'gross fee' arrangements...under the theory that the costs are still 'advanced' with some contingency of repayment."

✦

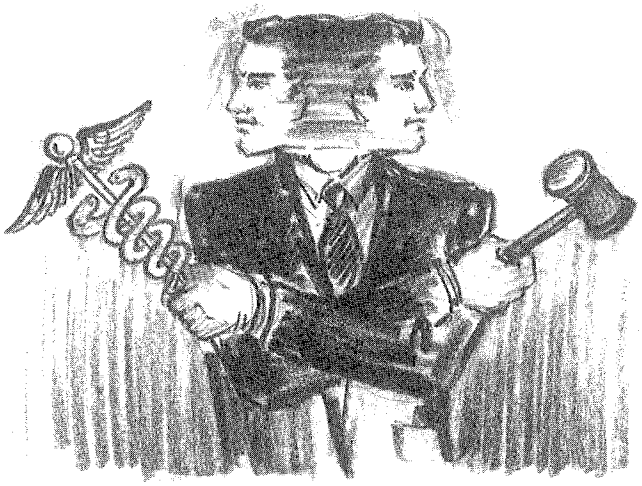
If the contingent fee rate is the same in both a "gross fee" and a "net fee" case, say thirty-three and one-third percent, and there is a successful recovery, the law firm of course, will recover more gross dollars in a "net fee" arrangement. For example, assuming a recovery of $300,000, the law firm would recover its costs advanced of $25,000, in addition to a contingent fee of $100,000. In a "gross fee" arrangement, the total amount recovered by the law firm would be limited to the contingent fee of $100,000. But a more sophisticated analysis would determine that the extra recovery in the "net fee" arrangement is not as disproportional as it appears, once the lost earnings on the additional taxes incurred in earlier years are factored in.

A slight adjustment in the contingency percentage may also compensate for the difference. For example, if, in the "gross fee" contract, the contingent fee were forty percent rather than thirty-three and one-third percent, the law firm would receive $120,000 in the year of recovery and could have deducted the $25,000 in expenses when paid. The client may retain more in a "gross fee" arrangement at forty percent than a "net fee" arrangement at thirty-three and one-third percent, depending upon the amount of the costs.

Because of the tax advantages, a "gross fee" arrangement may be more economically advantageous, to both the client and the law firm, depending upon the circumstances, the predictability of the costs, and the duration of the case.

POINT/COUNTERPOINT

PROPOSED CHANGES IN MEDICAL MALPRACTICE LAW



Physician "Reforms" of the Medical Malpractice Laws in Utah — Don't Confuse Them with Facts, Their Minds Are Made Up

by Ralph L. Dewsnup

So-called "reforms" in the law of medical malpractice are not doctors versus lawyers issues. Patients are the ones who are affected by the changes in law that have made it more difficult and expensive, and which may eventually make it impossible, to sue doctors. Such laws have been advocated by the medical industry (doctors and their insurers), as ways to rein in the cost of, and improve access to, health care. Well orchestrated public relations campaigns have turned public opinion against the victims of medical malpractice and cast the medical industry itself in the role of victim. Since all citizens who receive medical care are potential victims of medical negligence, further "reforms" in the tort system involving medical malpractice should be carefully scrutinized and analyzed before people realize, too late, that they have been sold out.

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> *"By lobbying for passage of restrictive legislative proposals, the medical industry has succeeded in erecting more barriers to the legal recourse of its victims than any other profession, vocation, or occupation in this state."*

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Just about anyone's life can be ruined by negligent medical care. Just ask the man whose good leg was amputated by an inattentive physician; or the family of the woman who received a fatal dose of chemotherapy that was four times the desired amount; or the woman who was seriously burned and rendered sterile when she was negligently swabbed with a concentrated acid solution 100 times stronger than the one she was supposed to have received; or the family of the man who was negligently given incorrect doses of blood thinners that killed him after he developed an uncontrollable brain hemorrhage. None of these people ever suspected that they would be victims of negligent medical care. It is important to remember that medical malpractice *can* happen to the people who least expect it.

The tort system has always operated on the general premise that when a wrong is committed by one person against another, there should be accountability for the resulting injuries and damages. That philosophy sits well with

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people's basic sense of fairness and justice. But it has been under attack for the past twenty years by the medical and insurance industries, that seem single-minded in their efforts to avoid responsibility and accountability to the very people they are supposed to serve. The erosion of the rights of victims of medical malpractice has been relentless, yet so gradual that most people do not realize how disparate the legal treatment of this class of tort victims has become.

In Utah, victims of medical malpractice have been handed a shorter (two year) statute of limitations (Utah Code Ann. § 78-14-4); a four year statute of repose (Utah Code Ann. § 78-14-4); the elimination of the collateral source rule (Utah Code Ann. § 78-14-4.5); a requirement that they give their doctors advance notice of their intent to sue (Utah Code Ann. § 78-14-8); restrictions on their ability to claim they did not give informed consent to treatment (Utah Code Ann. § 78-14-5); the preclusion of their ability to bring claims for breach of oral promise, contract, warranty or guarantee (Utah Code Ann. § 78-14-6); a prohibition against including specified damage amounts in their complaints (Utah Code Ann. § 78-14-7); caps on non-economic damages (Utah Code Ann. § 78-14-7.1); ceilings on attorneys' fees (Utah Code Ann. § 78-14-7.5); a mandatory deferral of payments on jury verdicts in excess of $100,000 (Utah Code Ann. § 78-14-9.5); and requirements that they participate in a prelitigation screening hearing at the Division of Occupational and Professional Licensing as a condition precedent to filing suit (Utah Code Ann. § 78-14-12).

By lobbying for passage of these and other types of restrictive legislative proposals, the medical industry has succeeded in erecting more barriers to the legal recourse of its victims than any other profession, vocation, or occupation in this state. It was able to do this by convincing the public, and many members of the legal profession, that there were crises which required immediate action. A brief examination of some of those crises shows them to be more imaginary than real.

Cries of Crisis

The "Insurance Crisis" of the 1970s. One of the first "crises" that was concocted to support passage of medical malpractice reform legislation received attention in the 1970s. Insurance companies began raising malpractice insurance premiums to exorbitant levels, claiming that skyrocketing claims payments were causing them to lose money. This gambit has now been exposed as a hoax perpetrated by the insurance industry to make up for huge losses brought about by bad investment decisions during an era of rising interest rates. *See* Jethro K. Lieberman, THE LITIGIOUS SOCIETY 82-85 (1981). The Utah Supreme Court recently said there was no basis for a legislative finding that there was such a crisis. The Court therefore held portions of the Utah Health Care Malpractice Act unconstitutional. *See Lee v. Gaufin*, 867 P.2d 572 (Utah 1993).

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> *"[C]omprehensive legislation was passed in Utah, and elsewhere, on the basis of a 'crisis' that never existed."*
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An ABC News Nightline program in 1989 demonstrated that insurance company greed and monopolistic markets were responsible for disproportionate increases in malpractice premium rates during a time when actual claims payments were not increasing at all.[1]

Simply put, comprehensive legislation was passed in Utah, and elsewhere, on the basis of a "crisis" that never existed. Even after the hoax was exposed, the laws were never repealed. Rather, the medical industry, encouraged by its successes, has continued to pursue an agenda that has fed on newly announced "crises" whenever the old ones seem to be losing steam.

The "Glut of Cases" Crisis. One of the next "crises" ballyhooed by the sponsors of malpractice "reform" was that Utah courts were being inundated by huge numbers of medical malpractice lawsuits. This glut of suits supposedly was paralyzing the courts. But, according to data supplied by the Utah Court Administrator's Office, of the 38,760 cases filed in the state district courts in 1994, only 1,928 were tort cases. And of those cases, only ninety-four involved claims of medical malpractice. That makes medical malpractice cases responsible for a tiny fraction of one percent of all district court filings. This is hardly a glut, considering the thousands of physicians, nurses, and other medical professionals who are licensed in Utah, and the hundreds of thousands of tests and procedures that they perform each year.

Lest someone argue that the number of cases actually filed in court is not a fair indication of the number of claims asserted, the Legislative Auditor General of the State of Utah has provided some helpful additional information. In January 1994, a performance audit of Medical Malpractice Prelitigation Panels disclosed that during the period from 1985 to 1990, health care malpractice prelitigation hearings were requested in fewer than 250 cases per year for the whole state! Actual hearings were conducted in an average of only 174 cases per year. See Legislative Auditor General, Report to Utah State Legislature No. 90-07, "A Performance Audit of the Medical Malpractice Prelitigation Panels," Jan. 1994. This shows just how erroneous and self-serving the medical industry's arguments have been.

The "Frivolous Case" Crisis. Another claim used by the medical profession to advocate adoption of restrictive legislation is that doctors are being burdened by the filing of frivolous cases.

[1]The program aired Feb. 14, 1989; a transcript is available from Radio TV Reports, Inc.

It does not take much effort to figure out that attorneys who file frivolous medical malpractice cases will soon go broke. The contingent fee on a frivolous case is a whopping zero. By calculating the costs an attorney usually must advance to pursue such cases, it can be seen that the attorney who pursues frivolous causes is demonstrating some serious stupidity.

Furthermore, patients are not all that eager to sue their doctors. When the Utah Medical Association set about to learn more about the risks of being sued in Utah, it learned that eighty-nine percent of all patients never even considered suing their doctor. Of the remaining eleven percent who considered it, only four percent ever actually did anything. *See* THE SALT LAKE TRIBUNE, Apr. 12, 1989, at A7. This is not the stuff of crisis.

The "Runaway Verdict" Crisis. One of the arguments frequently heard to justify changing the legal system is that juries are running amok and awarding outlandish sums of money for the infliction of the slightest of injuries. Plentiful *anecdotal* evidence is trotted out for its requisite shock value so that lawmakers will be appropriately inflamed. But the *factual* evidence seldom gets much air time. People often forget that the big verdicts reported in the news got there because they are unusual, surprising—newsworthy. Coverage is rarely given to the fact that a large verdict was remitted by the court, or that a new trial was granted, or that a verdict was overturned on appeal, or that a seemingly meritorious case was no-caused by a jury.

In a comprehensive study reported in a respected legal publication, Duke University Professor Neil Vidmar found that in North Carolina, large verdicts were handed down in only four of 117 cases that went to trial. *See* 76 *Judicature*, Oct.-Nov. 1992, at 118. Those four awards involved catastrophic injuries: brain damage, death, and paralysis. The effect of those awards was to create an average verdict in the 117 cases of $367,737. But the median verdict (where the number of verdicts exceeding the figure was equal to the number of verdicts that were less than the figure) was only $36,500. Professor Vidmar also reviewed fifteen years of data from forty-three counties in ten states, including data for malpractice verdicts in Chicago and San Francisco. His conclusion: large verdicts "are the exception, not the rule."

The "Medical Cost Containment" Crisis. One of the arguments that will not die, in spite of all the evidence against it, is that medical malpractice suits are responsible for the high cost of health care in the United States. No one can seriously challenge the now clearly known national fact that substantially less than one percent of the health care dollar goes to finance the entire medical malpractice system: claims, investigation, defense costs, attorneys' fees, adjustor salaries, insurance company profits, taxes, judgments, settlement, etc.—lock, stock and barrel. *See* United States Congressional Budget Office, *Economic Implications of Rising Health Care Costs* 4 (Oct. 1992); Ellen M. Nedde, *U.S. Health Care Reform* 15 (INT'L MONETARY FUND, Dec. 1993); Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (HHS) (1992). Therefore, if all malpractice claims brought in America were assumed to be frivolous, which they clearly are not, elimination of the entire claims system theoretically would reduce health care costs by less than one percent. The savings would be less than one dollar for every hundred dollars spent. And the incidents of malpractice would continue and probably increase. The reason is that doctors are human. They are well trained and highly skilled, but still human. Because they are human, they make mistakes that inflict injury, damage, pain, and suffering. If they are to be shielded from accountability for their actions, is it likely that doctors, any more than other human beings, will make fewer mistakes?

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> *"The right of access to courts, right to trial by jury, and sundry other constitutional rights, would be 'sacrificed for the greater good.'"*
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Interestingly, despite the "reforms" in Utah medical malpractice law of the 1970s and 1980s, Utah medical bills rose 140.8% from 1980 to 1990. *See* BUS. INS., Dec. 12, 1991, at 3. This is in line with increases everywhere, and would seem to illustrate that laws restricting patient rights and remedies have little, if anything, to do with the cost of health care.

The "Defensive Medicine" Crisis. The current "crisis *du jour*" in the medical industry is the claim that health care costs are rising because of the practice of "defensive medicine" (doctors prescribing unnecessary tests and procedures, not because of medical need, but because of fear of being sued). During the last presidential campaign, candidates were heard to estimate the cost of "defensive medicine" at anywhere from six billion to thirty billion dollars annually. These figures were pulled out of thin air. The Office of Technology Assessment of the United States Congress concluded in 1994 that accurate measurement of the phenomenon [of defensive medicine] is virtually impossible. *See* United States Congress, Office of Technology Assessment, *Defensive Medicine and Medical Malpractice*, OTA-H-602 4 (Washington, D.C.: U.S. Government Printing Office, July 1994). The OTA estimated that fewer than eight percent of diagnostic procedures were motivated by malpractice concerns. Furthermore, it concluded that some of those tests and procedures actually constituted the practice of good medicine, albeit motivated by the wrong reason.

Unnecessary tests and procedures are just that—unnecessary. They are not appropriate for any legal or medical reason. Nevertheless, a doctor charges the same for a test whether it is necessary or unnecessary. Could it be that the desire to make money has something to do with the ordering of unnecessary tests? Physicians with financial interests in

laboratories order thirty-four to ninety-six percent more tests than those without such interests. *See* Mark N. Cooper, *Physician Self-Dealing for Diagnostic Test in the 1980s: Defensive Medicine vs. Offensive Profits,* CONSUMER FEDERATION OF AMERICA, Oct. 2, 1991, at 8-9.

The Next Step—A Potential Real Crisis

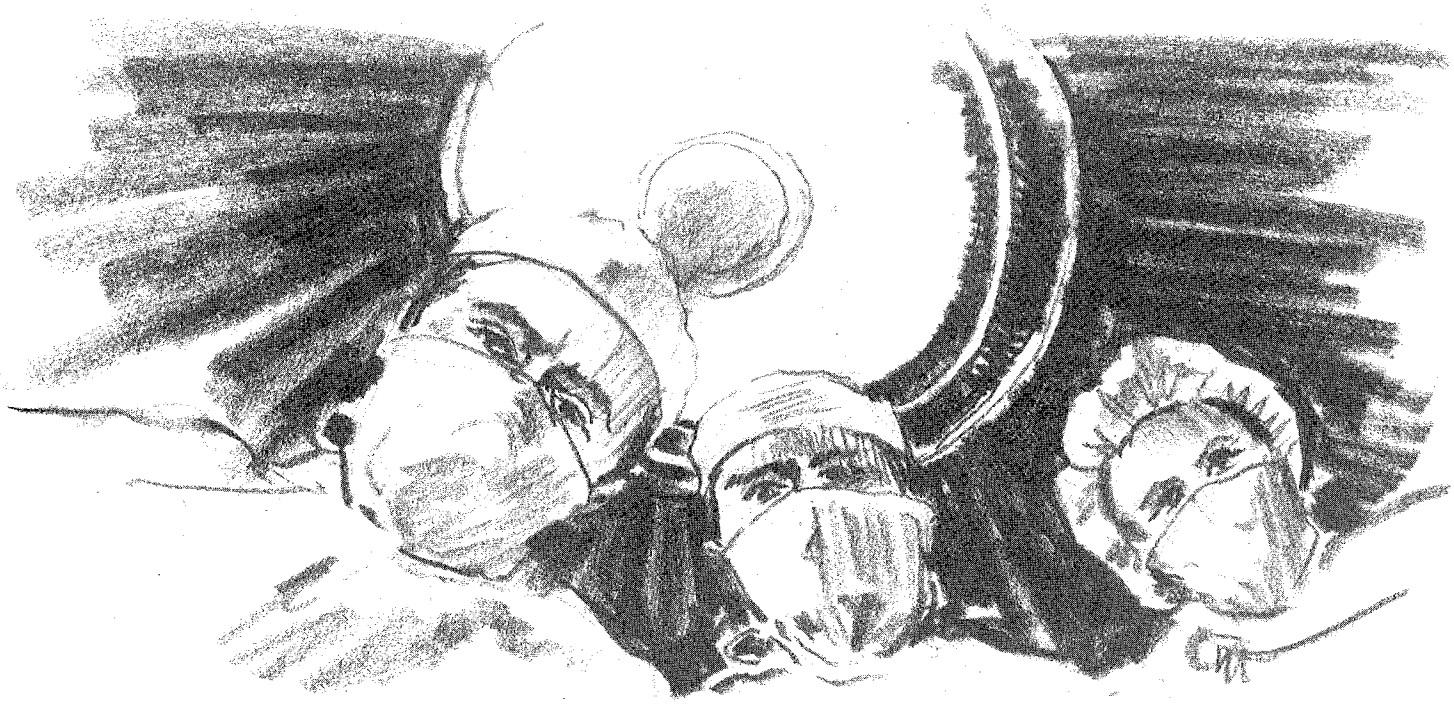
Having been successful thus far with its legislative agenda for reforming the medical malpractice laws, the medical industry is no longer content with mere tinkering. As could have been expected, the enactments to date have completely failed to bring about the promised results of lower cost and more accessible health care. By both ignoring that, and inconsistently seizing upon it to perpetuate the crises myths, the medical industry now advocates the entire dismantling of the tort system as it relates to health care professionals. In a nutshell, many doctors and their insurers want a "no-fault" medical malpractice system so that injured patients can be "compensated" without having to prove negligence, (even though they would still have to prove causation). The amount of compensation would be fixed by a payment schedule established by insurance claims adjusters, and funded by the medical industry. Total payments would depend on money available, not on the degree of injury sustained. The program would be administered by doctors. Physician responsibility would be transferred to corporate entities, and individual doctors would be immune from suit. Lawyers would be precluded from participating in the system unless they agreed to a compensation scheme established by doctors and bureaucrats. The right of access to courts, right to trial by jury, and sundry other constitutional rights, would be "sacrificed for the greater good." Now, doesn't that sound fair?

The medical industry has not said when its proposal will be introduced in the Legislature. Studies are presently being conducted under a grant by the Robert Wood Johnson Foundation (Johnson & Johnson) to gather the data needed to support such an effort. Its proponents are dead serious. Every prejudice against injured people, lawyers, courts, and lawsuits will be exploited. The public must be educated, so that informed decisions can be made. Otherwise, we may live to see the fulfillment of the warning given by American patriot and president John Adams, who said,

> Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.[2]

Ed. Note: *The editors attempted, without success, to solicit a "Counterpoint" article regarding proposed changes to medical malpractice law. We would welcome the submission of such an article if any of our readers would like to take issue with Mr. Dewsnup. Of course, Mr. Dewsnup will be provided the opportunity to respond.*

[2] *Quoted in* CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC 388-89 (1953), *quoted in* J. KENDALL FEW, I TRIAL BY JURY 161, 239 (1993).



The Judicial Rules Review Committee

by Lisa Watts Baskin

In 1993, the Utah State Legislature enacted legislation creating the Judicial Rules Review Committee. *See* 1993 Utah Laws Ch. 282. The Legislature's primary purpose was to create a forum for communication between the judicial and legislative branches concerning court rules of procedure, evidence, and judicial administration as they relate to statutory law. Legislators were motivated to establish this forum by their increasing concerns about changes to court rules that directly affect statutes in the absence of notification to the Legislature and an opportunity for legislators to comment.

For example, Utah Code Annotated section 78-12a-2 is in direct conflict with Rule 69(d), Utah Rules of Civil Procedure (formerly Rule 69(b)). Rule 69(d) precludes peace officers who are not sheriffs or constables from serving writs of execution, but the statute permits *any* peace officer to serve process. This created confusion for the courts, practitioners and, of course, peace officers, sheriffs, and constables.

Another example is the advisory committee note to the 1992 amendment of Rule 501, Utah Rules of Evidence, which amended certain privileges. The advisory committee note provides that Rule 501 "accepts all pre-existing statutory privileges, except those inconsistent with these rules." The note adds that certain privileges provided by statute "are made ineffectual by the adoption of rules specifically redefining those privileges." The note perfunctorily dismisses any potential conflict between a statutory privilege, a substantive (from the Legislature's perspective) right, and a rule promulgated by the courts. The note was not well received by legislators and by attorneys for the Legislature.

Additionally, during the 1992 General Session, the judiciary proposed legislation augmenting the authority of court commissioners. Upon review and negotiation with the Legislature over constitutional concerns regarding the authority and functions of court commissioners, the Administrative Office of the Courts withdrew the bill. Slight variations on that theme, however, appeared not long after the session in the proposed additions to the Code of Judicial Administration.[1]

"The legislature determined that it needed more interaction with the judiciary to monitor the judiciary's authority to amend court rules having a substantial impact on legislative policy and authority."

The writing was on the wall. Because of these episodes and others, the Legislature determined that it needed more interaction with the judiciary to monitor the judiciary's authority to amend court rules having a substantial impact on legislative policy and authority.

The Judicial Rules Review Committee: A New Forum for Communication Between the Legislature and the Judiciary

The statutory design for this new forum for communication was the Judicial Rules Review Committee, consisting of six legislators,[2] whose duty it is to review existing and proposed court rules and any conflicts between judicial rules and statutes or the Utah Constitution. The committee is also responsible for preventing encroachment of the judiciary on the executive and legislative branches, and to propose legislative action when necessary. The committee's members meet as needed to review and evaluate submissions of court rules or proposed court rules. The statute requires the committee to examine whether the rules are authorized by the state constitution or by statute, and, if authorized by statute, to consider whether the rules comply with legislative intent. The statute also requires the committee to examine whether the rules conflict with existing statute, or govern the same policy articulated in a statute. Finally, the committee must consider whether the rules are primarily substantive or procedural in nature, and whether they infringe upon the powers of the executive or legislative branches.[3]

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[1] *See* proposed rules 3-201.2, 3-201.3, 3-201.4, & 4-905.

[2] Current members of the Judicial Rules Review Committee are Rep. John L. Valentine, Co-Chair; Sen. Robert F. Montgomery, Co-Chair; Rep. Christine R. Fox; Rep. Frank R. Pignanelli; Sen. Wilford R. Black, Jr.; and Sen. Nathan C. Tanner.

[3] *See* UTAH CODE ANN. § 36-20-4 (1994).

For purposes of committee work, "court rules" means:

a) rules of procedure, evidence, and practice for use of the courts of this state;

b) rules governing and managing the appellate process adopted by the Supreme Court;

c) rules adopted by the Judicial Council for the administration of the courts of the state.[4]

Simply put, the Judicial Rules Review Committee reviews and comments upon early drafts of proposed rules, or amendments to current Rules of Civil Procedure, Criminal Procedure, Appellate Procedure, Juvenile Procedure, Evidence, and Professional Conduct, and reviews and comments upon administrative rules in the Code of Judicial Administration when those rules are substantive, rather than administrative in nature, or when they conflict with statute.[5]

The Judicial Rules Review Committee has the option to make an informal recommendation or to make written findings of its review and suggest possible legislative action or Supreme Court or Judicial Council rulemaking action.[6] The practical effect is that the committee provides written feedback to the Supreme Court or the Judicial Council and, if necessary, recommends amendments to rules of procedure and evidence. The committee also proposes legislation to amend or repeal statutes that are in conflict with court rules.

You might ask at this point why the Legislature has any right to affect the rules the Supreme Court proposes or adopts.

The Constitutional Authority for Rulemaking

Article VIII of the Utah Constitution, covering the Judicial Department, was repealed and re-enacted by voters in the general election of 1984, effective July 1, 1985. The revised article VIII establishes the relationship between the Legislature and the judiciary with regard to rulemaking.

> *"[Article VIII, Section 4] implies that the legislature may amend only those rules that are already adopted, and no others."*

Article VIII, Section 4. The Judiciary's rulemaking power is outlined in article VIII, section 4 of the Utah Constitution:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. Except as otherwise provided by this constitution, the Supreme Court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. . . . The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

The Supreme Court had no such authority prior to the constitutional grant contained in section 4. The Constitutional Revision Commission, in its 1984 report, summarized its study of the Judicial Article: "This section gives the supreme court general authority to establish rules of procedure and evidence for the state's various courts." *Report of the Utah Constitutional Revision Commission* ("1984 Report"), Jan. 1984, at 27. The 1984 Report also explained the commission's rationale: "Members of the commission felt that the rulemaking authority of the supreme court should be specifically included in the constitution. This power is considered essential to maintaining an independent judiciary." *Id.* On the floor of the Senate, proposed section 4 was amended to give the Legislature amending power over the rules of evidence and procedure by a two-thirds vote of both houses. This provision implies that the Legislature may amend only those rules that are already adopted, and no others.

Section 4 does not limit the Supreme Court's rulemaking power, as did previous legislation.[7] Rather, the Utah Constitution is silent on several important issues. First, it does not explicitly prohibit the Supreme Court from making rules affecting substantive rights. Second, it does not indicate whether court rules supersede legislative enactments, or vice versa, or how conflicts between court rule and statute are to be resolved. The constitution and commission notes are silent about whether the Legislature can veto or simply amend court rules, whether the Legislature can sidestep the Supreme Court's rulemaking process and directly regulate the Court's procedure, and what course of action the Court should take after the Legislature amends, vetoes, or makes a court rule.

Article VIII, Section 12. Article VIII, section 12 of the Utah Constitution establishes the Judicial Council's administrative rulemaking authority.

> There is created a Judicial Council which shall adopt rules for the administration of the courts of the state. . . . The chief justice of the Supreme Court shall be the chief administrative officer for the courts and shall implement the rules adopted by the Judicial Council.

[4] UTAH CODE ANN. § 36-20-1(3).

[5] The Administrative Office of the Courts generously provides the Judicial Rules Review Committee with information, both with early drafts and finalized versions of rules circulating for comments. Also, the Administrative Office provides staff of the Judicial Rules Review Committee notice of, and an opportunity to attend, any meeting of the Judicial Council and the Supreme Court's Advisory Committees as rules are being formulated.

[6] *See* UTAH CODE ANN. § 36-20-6.

[7] Act of Mar. 6, 1943, 1943 Utah Laws ch. 33 (*repealed by* Act of Mar. 8, 1951, § 2, 1951 Utah Laws ch. 58, § 2, at 247); Act of Mar. 8, 1951, 1951 Utah Laws ch. 58, § 1, at 152 (*repealed by* Act of Feb. 26, 1986, 1986 Utah Laws ch. 47, § 41, at 135).

The scope of section 12 as it relates to legislative authority is no less difficult to characterize than section 4. For example, the meaning and scope of the word "administration" is unclear. *See State v. Egbert,* 748 P.2d 558, 562 (Utah 1987) (Durham, J., dissenting).[8] A law review article states that "the clarity of the term 'administration' is deceptive." A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 34 (1958). It adds that, "to entrust [the administrative field] to the exclusive power of the judiciary is palpably unwise." *Id.* at 35. The Constitutional Revision Commission report provides a brief description of the intended scope of administration. The report states:

> Some questions arose over the administrative authority of the judicial council and the rulemaking authority of the supreme court. The commission felt that the primary role of the council lies in developing basic administrative policies including consolidated budgeting procedures, personnel systems, relations with other governmental entities, and the management of judicial resources. The role of the supreme court is to establish the actual adjudication procedures used by the courts. In addition, the supreme court is specifically charged with the management of the appeals process.

1984 Report, *supra,* at 35.

Some legislators and judges have argued that administrative rules sometimes amount to substantive provisions—if not outright legislation in their impact—thus violating the separation of powers provision of Utah Constitution, article V, section 1. Importantly, once a Judicial Council rule is adopted, the Legislature has no authority to amend, repeal, modify, or adopt the Judicial Council's administrative rules. Even under Judicial Council procedures outlining its rulemaking process, the Judicial Council may or may not heed comments. The attempted remedy was an unsuccessful bill proposed in the 1995 General Session to clarify the principle that Judicial Council rules are not "law." *See* H.B. 238, "Definition of Law."

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"The tension between the branches is constitutionally designed to prevent public wrongs and encroachment upon the other branches' authority."

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Substantive vs. Procedural Rules

The vast majority of court rules are inherently procedural or administrative in nature, outlining the practice and procedure of, or the legal machinery for using the courts. Nevertheless, some rules take on a substantive nature, creating or amending a person's rights to equal enjoyment of fundamental protections and immunities, such as the right to a jury trial or, more commonly, the right to assert a privilege. Because court rules and statutes each contain elements of both substance and procedure, the distinction is not always clear. In fact, it can be quite gray. The distinction ironically becomes apparent, however, when one branch of government feels encroached upon by another.

Separation of Powers

The executive branch carries out policy through action; the legislative branch passes laws prescribing general policy affecting its citizenry; courts interpret the law and resolve conflicts on a case-by-case basis. The judiciary also protects individual rights and the general structure of government by blocking unconstitutional or statutorily unauthorized actions by other branches. Each branch is equal to the others, and consequently equipped with a system of checks and balances.

The tension between the branches is constitutionally designed to prevent public wrongs and encroachment upon the other branches' authority. Recent illustrations from the 1995 General Session show an accommodation by the legislative and judicial branches to maintain this delicate balance. The Supreme Court's advisory committee on the Rules of Evidence reviewed Senate Bill 180, "Admissibility of Optical Imaging Evidence," which amended the current statutory parol evidence rule and which would have affected Rule 1001, Utah Rules of Evidence. The committee suggested that the existing evidence rule already covered what was contained in S.B. 180. Consequently, the sponsor withdrew the bill, awaiting the committee's written statement that optical imaging evidence would be admissible under Rule 1001. In a cooperative spirit, the advisory committee provided the written statement to the lobbyist and sponsor as requested. Senate Bill 71, "Admissibility of Drug Analysis," was modified so that the criteria for the admissibility of drug analysis would be set forth in an evidentiary rule, rather than by statute. Senate Joint Resolution 6, "Environmental Self Evaluation Privilege," *created* a new evidentiary rule. The advisory committee on the Rules of Evidence was informed of this resolution, and although the committee opposed the new rule in concept, it provided valuable comment concerning ways to improve it.

Since the 1993 statute creating the Judicial Rules Review Committee, there has been extensive and continuing communication between the advisory committee on the Rules of Juvenile Practice and Procedure and the Judicial Rules

[8] In a case discussing the minimum mandatory sentencing scheme for convicted sex offenders and factors of aggravation and mitigation, Justice Durham provided insight on the sentencing guidelines promulgated by the Judicial Council through the Code of Judicial Administration based upon a delegation from the Legislature. In her dissent, she stated, "The development of nonbinding guidelines for improving the uniformity and fairness of sentencing practices appears to be consistent with the constitutional grant of authority. Deciding when persons convicted of the same offense should receive one of three different minimum mandatory terms, however, does not by any stretch of the imagination involve the 'administration of the courts.'"

Review Committee. For example, the Judicial Rules Review Committee assisted in the process of amending the rules of the juvenile court and kept a watchful eye to ensure that amendments to the rules conformed to rapidly evolving statutory law.

Another example can be seen in the dialogue about the 1994 law regarding criminal discovery, House Bill 379, "Discovery of Expert Witnesses," and how it differed from Rule 16, Utah Rules of Criminal Procedure, concerning discovery. The advisory committee on the Rules of Criminal Procedure reviewed Rule 16 in an attempt to resolve the conflict. The Utah Supreme Court held in *State v. Larsen,* 850 P.2d 1264, 1266 (Utah 1993), that an amendment to a statutory section regarding release on bail pending appeal applied where the statute was more stringent than the requirement of Rule 27 of the Rules of Criminal Procedure. In the process, the court noted that the conflict was not indicated anywhere in the bill. Associate Chief Justice Howe stated that any legislation that amends (or requires a subsequent amendment to) a court rule should be noted in the legislation. *See Larsen,* 850 P.2d at 1267. This is a good suggestion, and illustrates the ongoing dialogue between the judiciary and the Legislature, setting a higher standard of cooperation.

Aside from these recent concrete examples, there are other potential problems that enhanced communication between the judiciary and the Legislature could alleviate. For example, the Judicial Council could create a rule of administration or the Supreme Court could create rules of procedure and evidence that the Legislature believes are actually substantive law, or, at the very least, have the effect of substantive law. Not only could the rules conflict with statutory law; they could be unconstitutional. Conversely, instead of amending a rule of civil procedure or evidence, which requires a two-thirds vote by both houses, the Legislature could enact a law that conflicts with a rule of procedure or evidence, such as a special privilege. The potential for overreaching by the Legislature and the judiciary in the realm of rulemaking is substantial. When a statute and a court rule conflict, there will be confusion as to which provision governs and how to reconcile the differences.

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> *"Absent a determination that a rule is substantive, or unconstitutional as a violation of the separation of powers, the rulemaking authority of the courts and the Judicial Council is unfettered..."*
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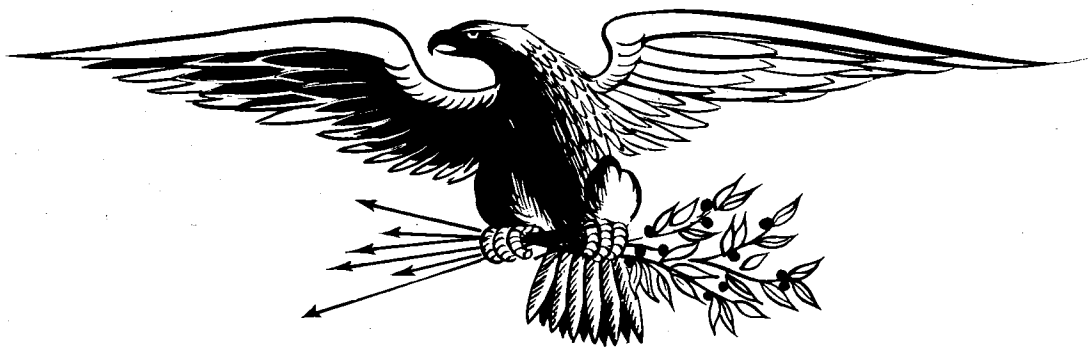
Absent a determination that a rule is substantive, or unconstitutional as a violation of the separation of powers, the rulemaking authority of the courts and the Judicial Council is unfettered, and the courts are generally the body that would make such a determination. In other words, under Utah's constitutional system, the courts are essentially left to police themselves. Other states' constitutions prevent this stalemate. For example, California's constitution specifically limits the Judicial Council's authority to adopt rules of administration, practice and procedure that are "not inconsistent with statute." CAL. CONST. art. VI, § 6. No such provision exists in Utah's constitution.

Conclusion

Reasonable minds differ on what is substance and procedure, and arguably the term "administration" is a subset of that distinction. Tests for determining which is which include balancing the judiciary's efficiency interests against the Legislature's policy interests in order to determine whose jurisdiction is paramount. The best solution for such characterization problems is prevention through communication, and this has been accomplished in large measure through the process established by the Judicial Rules Review Committee Act. Under the authority of Utah Code Annotated, sections 36-20-1 through 36-20-8, the judiciary provides notice to the Legislature that a statute needs to be repealed or amended. Alternatively, the Legislature provides notice to the judiciary that a rule may need to be modified, or that a proposed rule should be rejected. This unique cooperation between the judiciary and the Legislature has benefited both branches and enhanced the practice of law by reducing, if not eliminating, confusion and distrust.



CASES IN CONTROVERSY

Sullivan v. Scoular Grain: Injured Employees Further Forced to Bear Burden of Boss's Neglect

by Alan W. Mortensen

The Utah Supreme Court decision of *Sullivan v. Scoular Grain*, 853 P.2d 877 (Utah 1993), represents a further blow to injured employees' rights. Under Utah common law, an employee had the right to fully recover damages in tort against an employer for the employer's breach of the duty to provide a safe workplace and to properly supervise an employee's labors. *See, e.g., Scudder v. Kennecott Copper Corp.*, 881 P.2d 890, 894 (Utah 1994), *re-hearing pending*. But with the imposition of the workers' compensation system, employees lost their right to prove and be compensated for the negligence of employers and fellow employees. An employee who suffers an industrial injury is compensated under the workers' compensation scheme without inquiry into the employer's actions. The oft-cited policy determination behind the workers' compensation scheme "'is to provide a speedy and certain compensation for workmen and their dependents and to avoid the delay, expense and uncertainty which were involved prior to the act; and the concomitant purpose of protecting the employer from the hazards of exorbitant and in some instances perhaps ruinous liabilities.'" *Lantz v. National Semiconductor Corp.*, 775 P.2d 937, 938 (Utah Ct. App. 1989) (citing *Adamson v. Okland Constr. Co.*, 508 P.2d 805, 807 (1973)).

One exception exists to the exclusive remedy of the workers' compensation act. *See* UTAH CODE ANN. § 35-1-60 (1988) (Utah's Exclusive Remedy Provision). In *Bryan v. Utah International*, 533 P.2d 892, 894 (Utah 1975), the Utah Supreme Court recognized an exception for injuries intentionally caused to employees by employers. The subsequent decision by the Utah Court of Appeals in *Lantz* demonstrates that this "intentional injury" exception provides no substantive relief to employees. In order for an injured employee to recover in tort against an employer, the employee must prove more than just a "substantial certainty that injury will follow." 755 P.2d at 940. The Court of Appeals noted:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering claimant to perform an extremely dangerous job, willfully failing to provide a safe place to work, or even willfully and unlawfully violating a safety statute, this still falls short of the kind of actual intention to injure that robs the injury of accidental nature.

Id. (quoting 2A A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 68.13 (1988)).

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> *"Under the workers' compensation scheme, an injured employee is forced to bear the lion's share of an employer's culpable conduct."*
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As a result of the *Lantz* decision, an employee must prove the employer "had an actual deliberate intent to injure him ...." *Id.* This high standard of proof effectively eliminates an employee's remedy to recover for an employer's tortious conduct. *Id.* at 939 n.3 ("We note that no reported Utah cases recognizing the exception created in *Bryan* have invoked that exception."). Thus, for all practical purposes, an employee is left to the inadequacies of the workers' compensation system for redress.[1]

Under the workers' compensation scheme, an injured employee is forced to bear the lion's share of an employer's culpable conduct. It is no secret that an employee injured by his employer's negligence is most likely never fully compensated for injuries, because "the amounts which may be awarded are at all times very modest, and in inflationary times practically penurious . . . ." *Thatcher v. Industrial Comm'n*, 207 P.2d 178, 182 (Utah 1949).

Nevertheless, the workers' compensation system provides the right to bring suit against negligent third parties, which right provides one venue for full redress of employees' injuries. *See* UTAH CODE ANN. § 35-1-62 (1988). Unlike the no-fault

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[1] Moreover, an employer is not vicariously liable for an employee's intentional conduct that occurred within the scope and course of employment, unless the employer directed or intended the employee to so act. *Mounteer v. Utah Power & Light Co.*, 773 P.2d 405, 407 (Utah Ct. App. 1989).

system of workers' compensation, where employees bore the risk of "paying" for the negligence of employers, juries did not allocate fault to immune employers on the verdict form prior to the 1986 enactment of the Liability Reform Act. *See Wollam v. Kennecott Copper Corp.*, 663 F.Supp. 268, 274 n.9 (D. Utah 1987) ("[A]s a matter of law, [the third party] is the sole cause of 'liability' that could be paid to the plaintiff."). Experience demonstrates that juries naturally allocate an immune employer's fault among both plaintiffs and defendants. *See Sullivan v. Scoular Grain Co.*, 853 P.2d 877, 886 (Utah 1993) (Stewart, J. dissenting). Other commentators assume that third-party defendants were allocated the entire amount of an immune employer's fault. *See id.* at 882; Dale T. Hansen, *Sullivan v. Scoular Grain Co.: Apportioning the Fault of Immune Employers*, 1994 B.Y.U. L. REV. 187, 190 (1994). Thus, injured employees and industry both bore the burden of employer negligence, while the immune, albeit negligent, employer pillaged the employee's third-party recovery for reimbursement of workers' compensation benefits. *See* UTAH CODE ANN. § 35-1-61 (1988). This burden shifted solely onto injured employees as a result of the *Sullivan* decision.

Factual Background of *Sullivan*

Kenneth Sullivan lost his arm and leg on the railroad tracks of the Freeport Center. Sullivan brought suit against numerous entities that were later found by the trial court to be Sullivan's employers, and thus dismissed under the exclusive remedy provision. Sullivan also brought suit against Trackmobile, Inc., G.W. Van Keppel Company, Oregon Short Line Railroad Company, Utah Power & Light, and Union Pacific Railroad Company.

Defendant Trackmobile moved to have the jury apportion the fault of all those who were initially named defendants. Sullivan argued that the immune employers' actions could not be apportioned by the jury because, under the Utah Liability Reform Act, Utah Code Annotated, section 78-27-39, a jury can only apportion the fault attributable to "each defendant." Utah Code Annotated, section 78-27-37(1) specifically defines a defendant as "any person not immune from suit who is claimed to be liable because of fault to any person seeking recovery." Plaintiff argued that because the employers were immune under the exclusive remedy provision, they were not "defendants," and thus were excluded from apportionment. *Sullivan*, 853 P.2d at 878-79.

> *"The Supreme Court's decision in* Sullivan *further stripped injured employees of their rights to recover the full measure of their damages."*

The Slippery Slide of Injured Employees' Rights

In *Sullivan*, the Utah Supreme Court held that a jury is required to "account for the relative proportion of fault of a plaintiff's employer that may have caused or contributed to an accident, even though the employer is immune from suit." *Id.* at 878. While justifying its decision by the language of the Utah Liability Reform Act, the court placed little emphasis on the definition of "defendant," and focused instead upon its notions of "equitable considerations." In addressing the equities, the court ignored Sullivan's argument that allocation of his employer's negligence would force him to bear a disproportionate share of his damages. Instead, the court adopted the defendants' argument that they, not the injured employee, would be forced to bear the entire amount of damage caused by the immune employers.

The dissent recognized that the equity handed out by the majority opinion was one-sided, was based upon faulty assumption and inquiry into legislative intent, and was void of empirical observation of the jury apportionment process:

> Practically speaking, a jury would naturally be inclined to allocate the fault of an immune person among both plaintiffs and defendants. If a plaintiff is 20% at fault, each of two named defendants 30% at fault, the Legislature could reasonably assume that a jury would allocate the immune person's 20% fault among the plaintiff and the defendants, probably according to their respective percentages of "actionable fault." Thus, there is no reason to assume, as the majority does, that the immune person's fault will be attributed solely to defendants under Utah's comparative negligence scheme.
>
> The majority position will necessarily result in the entire amount of an immune person's fault being deducted from a plaintiff's damages.

Id. at 886 (Stewart, J., dissenting).

Adding to the grim plight of injured employees, the court recognized that an immune employer who may be found to be at fault at a near intentional level may further escape liability for payment of workers' compensation benefits. An immune employer is statutorily entitled to recover the entire amount it has paid in workers' compensation benefits from the third-party verdict. Though seeking to protect defendants from the perceived inequities of the statutory language of the Utah Liability Reform Act, the court left employees a "legislative" remedy, not a judicial remedy. When forced "between two evils," the court shunned splitting the baby between the third party and the employee, placing the entire "evil" upon the injured employee, who is least equipped to bear such a plight. *See* Dale T. Hansen, *supra*, at 198.

The Supreme Court's decision in *Sullivan* further stripped injured employees of their rights to recover the full measure of their damages. An injured employee who 100 years ago was entitled to sue his employer for violation of its duty to provide a safe workplace,

now can only maintain suit against his employer if the employee can show "an actual deliberate intent to injure him . . . ." *Lantz*, 775 P.2d at 940. In return for foregoing the right to sue an employer, an employee receives workers' compensation benefits, which are paltry in comparison to an employee's actual damages. *See Thatcher v. Industrial Comm'n*, 207 P.2d 178, 182 (Utah 1949). Moreover, as a result of the *Sullivan* decision, an employer's fault reduces to nearly nothing the employee's ability to recover proven damages, while allowing the employer to strip the remaining verdict to recoup its workers' compensation payout. Clearly, the *quid pro quo* envisioned through the workers' compensation scheme has left injured employees with almost nothing to compensate them for their damages. The aftermath of *Sullivan* left employees, not employers, in a position of bearing "exorbitant and in some instances perhaps ruinous liabilities." *Lantz*, 775 P.2d at 938 (quoting *Adamson v. Okland Constr. Co.*, 508 P.2d 805, 807 (Utah 1973).

Legislative Postscript

In the aftermath of *Sullivan*, the Utah State Legislature amended the Utah Liability Reform Act in an attempt to partially rectify the decision's inequities. The Legislature's amendments more fully and equitably allocate an immune employer's fault among all parties, including the employer. *See* UTAH CODE ANN. § 78-27-39 (1994). Under the amended provision, if an immune employer's proportion of fault is less than forty percent, the fault is allocated among the other parties, including the injured employee, in proportion to the percentage of fault initially attributed to each party by the jury.[2] If an immune employer's fault exceeds thirty-nine percent, the employer's fault is not allocated, and the injured employee continues to bear the entire burden of the employer's acts for purposes of the jury's apportionment of fault. *See* Brent W. Wilcox & Tim Dalton Dunn, *Significant Changes in Comparative Fault and Workers' Compensation Reimbursement*, 7 UTAH BAR J. 7-11 (1994).

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> *"Clearly, the* quid pro quo *envisioned through the workers' compensation scheme has left injured employees with almost nothing to compensate them for their damages."*
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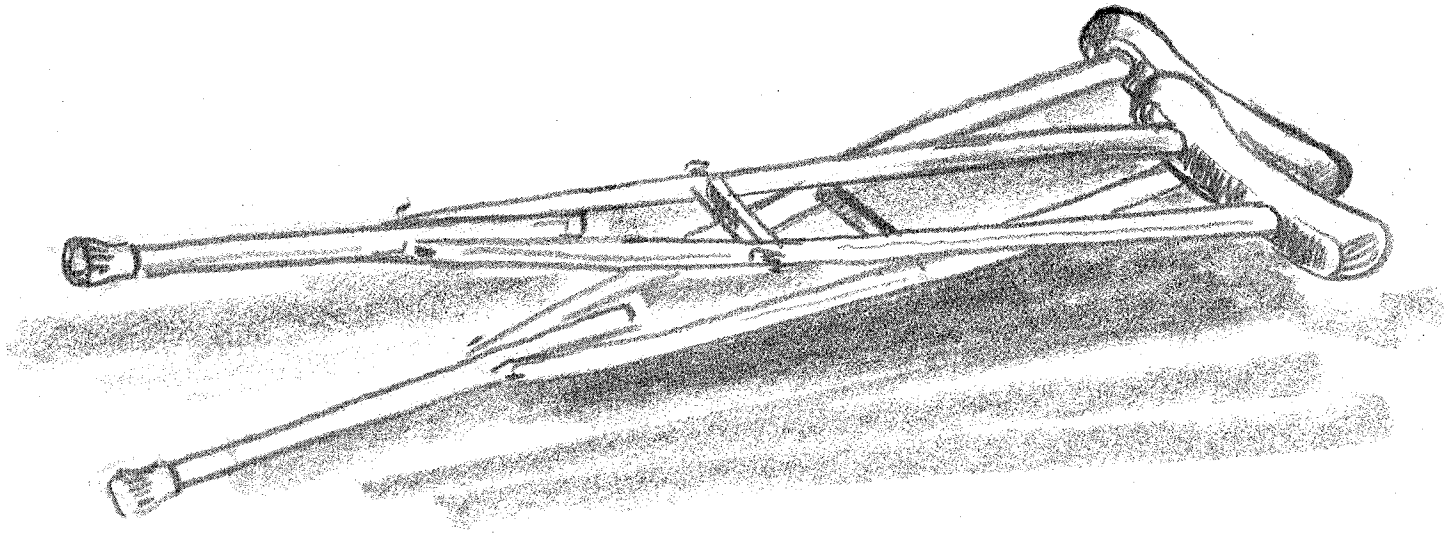
Conclusion

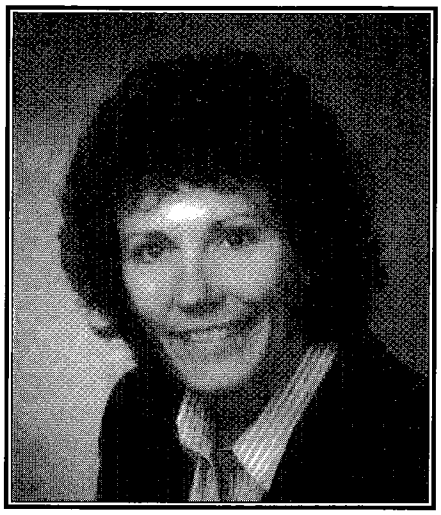
Injured employees have lost significant rights to be fully compensated for their damages. This precarious pathway began with the imposition of the workers' compensation scheme, thereby allowing an employer immunity from liability for failing to provide a safe workplace to its employees. The path continued with the *Lantz* decision, which broadened an employer's immunity from suit unless the employee was able to prove an employer's actual, deliberate intent to hurt the employee. The path reached a tragic crossroad with the *Sullivan* decision, as injured employees were left to bear the entire burden of an employer's fault in a jury apportionment, and also were forced to reimburse fully the workers' compensation benefits the employer paid out. Though recent legislative enactments have turned the path back toward a more equitable distribution of immune employers' faults, the fact remains that injured employees are the least equipped to bear the cost of an employer's negligence. But based upon the "equitable considerations" of the Utah Supreme Court in *Sullivan*, employees are forced to bear the brunt of employer negligence.

[2]Employers are not entitled to full reimbursement of workers' compensation liens if their fault exceeds thirty-nine percent; rather, their right to reimbursement is reduced by the percentage of fault attributed to the employer by the jury. *See* UTAH CODE ANN. § 35-1-62(5)(b)(i) (1994).



A CREDIT TO THE PROFESSION

Jane Marquardt



Sometimes it seems to those who know her well that Jane Marquardt has tapped into the secret of expanding a day to more than twenty-four hours. Jane is a partner in the Ogden law firm Marquardt, Hasenyager & Custen, an active member of the State Bar Estate Planning Section, serving as Chairperson in 1994-95, and a Fellow of the American College of Trust and Estate Counsel. Jane has also served on the Board of Directors of the Utah Bar Foundation since 1992, including a year on the Executive Committee in 1994-95.

Jane's tireless devotion to the betterment of her profession and her community is demonstrated in her many years of service. Jane was a member of the Third Circuit Court Judicial Nominating Committee, and she has been President of the Weber County Bar Association. She also served as a member, and then Chairperson, of the Utah State Bar Ethics and Discipline Committee, and as a member of the Utah State Bar Committee on Model Rules of Professional Conduct. Jane was also the Utah Reporter for the ABA Real Property, Probate and Trust Section Committee on Recent Significant Decisions. Additionally, through the years, Jane has been an indefatigable member of numerous boards of directors and advisory boards, including the University of Utah College of Law Alumni Association, the Management and Training Corporation, the Utah Planned Giving Roundtable, and the Senior Lawyer Volunteer Project.

Born in Dayton, Ohio, but raised in Ogden, Jane attended the University of Utah, where she earned her baccalaureate and her juris doctor degrees. She began her law career with Utah Legal Services, Inc., in the Ogden office where her current partners were also employed. Jane was a Reginald Heber Smith Fellow from 1977-79, an honor she received for her work with Legal Services. Entering private practice in 1979, Jane had a general practice until 1990, when she began to concentrate on family law, adoption law, and business law. In 1990, Jane returned to school, earning an LL.M. in taxation from the University of San Diego. Since then, Jane's practice has focused on the areas of estate planning, probate, business and tax law.

Jane has always made time for community and activities. In various capacities, Jane has devoted her time to the Eccles Community Art Center, the Ogden Dinosaur Park and Museum Foundation, the Intermediate Gifts Committee of the Downtown Ogden Conference and Performing Arts Center, the Fundraising Committee of the Ogden River Parkway, the Planned Gifts Committee of Primary Children's Medical Center, the Weber State County Democratic Convention, and the Utah Department of Social Services Domestic Violence Advisory Council.

In her professional life, Jane is best described as calm, insightful, meticulous, and caring. She is a terrific listener, and this contributes to her considerable skills as a problem solver. Jane's colleagues know her as a consummate professional, and other attorneys are eager to discuss their ideas and theories with her. Although Jane has been honored with numerous awards, one would have to virtually pry that information from her, because she is too modest to boast about her many achievements.

Jane also makes the most of her personal time. She and Pauline, her partner of many years, travel extensively together, and Jane has been active in the lives of Pauline's three children. Jane is something of an athlete. She loves to ski, and even skied competitively for the University of Utah's women's team when she was in college. Jane also enjoys cycling, hiking, and, most recently, golfing (for which she has developed an unsurpassed passion). Jane is an accomplished amateur photographer, and especially likes nature photography. Jane's close friends know her as a funny, witty person, with a penchant for puns and practical jokes.

Everyone who gets to know Jane comes to respect and admire her intelligence, wit, and dignity. She is totally committed to her professional life and the enrichment of her community, and she is likewise committed to her family and pursuing her amateur interests. The attorneys who know her hold her in the highest esteem, because she represents the best of our profession—extremely capable, friendly, compassionate and giving.

How to Win Cases and Influence People (on the Bench)

by "She Who Must Be Obeyed"

The Judge aimed a look of distaste in my direction and then turned to speak to the witness. The Judge was, as always, reluctant to exercise his right to silence.

– John Mortimer, *Rumpole and the Right to Silence*[1]

Clearly, some judges, like some lawyers, talk too much. However, having been invited to author this issue's "View from the Bench," as a follow-up to "What Lawyers Want from Judges" (*Voir Dire*, Spring 1995), I intend to state my practice tips. Certain practices of lawyers impact a judge's ability to "hear" or focus on counsel's arguments and affect the overall mood of the Court. Following these tips will help an attorney avoid certain pitfalls and cultivate judicial respect and affection.

(1) Aim to Assist the Court. Your goal should be to help the Court understand your position. At the outset of your argument, begin with a succinct statement of the *relief* you are seeking and the *basis* for entitlement to the relief. Remember, a trial court judge is a generalist, not a specialist. Share your expertise about the area of law in which you practice and disclose the relevant facts the Court may have missed.

(2) Adopt an Appropriate Attitude. Your attitude and demeanor should be professional, courteous and pleasant, as you seek to educate the Court. Professionalism includes appropriate dress and manners. A lawyer who evinces a pleasant, helpful demeanor helps set the mood for an enlightening dialogue with the Court. Remember the adage: *"Argue to the Court, not with the Court."* A pragmatic approach to problem solving is appreciated. Retain and use your sense of humor. Keep an open mind. Consider that doing the right thing and dealing with opposing counsel with civility, generally serves your client best and always impresses the judge. Judges abhor being put in the position of acting like a kindergarten teacher, forced to separate battling kids on the playground. Mean-spiritedness is anathema in court.

(3) Operate with Candor and Honesty. A lawyer's reputation for integrity is the most precious quality he/she possesses. Playing "hide the ball" with evidence or misrepresenting facts and case law to a judge, results in the destruction of one's reputation and may well anger the Court.

We've got a few rules, old sweetheart. We don't deceive Courts, not on purpose.

– John Mortimer, *Rumpole and the Alternative Society*

Judges may not always remember an attorney for his or her eloquence, but they will always remember an attorney who has misrepresented facts. Once a lawyer's reputation with the judiciary is made, it is difficult to remake.

Candor includes acknowledging the weaknesses in your case and your own need for direction or assistance.

(4) Express Yourself Clearly and Succinctly. Get to the point. The art of thinking and speaking clearly, succinctly, and at a reasonable speed is important to a judge and her staff. Consider the court reporter and the record, and avoid "taking over" a witness. If an attorney masters this and adds an animated delivery style, that attorney will unfailingly impress the Bench.

A state trial court judge has, at any given time, between 700 and 850 cases, so an attorney who makes his or her point with brevity and clarity will earn the judge's attention and appreciation.

"Just the facts, Mr. Rumpole. Just give me the plain facts," snapped the old spoil-sport.

– John Mortimer, *Rumpole and the Age for Retirement*

Learn to phrase your questions and effectively articulate your arguments with plain speech, devoid of legalese. If you cannot express yourself in a way that a judge can grasp, it is unlikely you will persuade a jury.

At last I had irritated Mr. Justice Vosper beyond endurance. "Mr. Rumpole!" he thundered. "Are you going to conduct this entire case in what the jury may well find to be a foreign language?"

– John Mortimer, *Rumpole and the Rotten Apple*

[1]Horace Rumpole, as millions know from reading John Mortimer's books or watching the PBS television series, is a fictional barrister-at-law. Rumpole's life's work, defending criminals, is rendered more difficult due to the interference of obtuse, churlish judges. Lawyers empathize with Rumpole's ruminations on the judiciary.

It is important to note that when a judge limits your time, she's not urging you to speak faster. (This only increases a court reporter's stress level and propensity to carpal tunnel syndrome.) The judge is really saying, *"Get to the point."* Objections should also be voiced concisely. An objection that is lengthy and argumentative irritates judges *and* juries.

Lawyers who fail to make a clear record regarding exhibits, who interrupt or talk over witnesses, or speak too softly, irritate the judge.

(5) Listen to the Court. When arguing a motion or doing a trial, it is important to listen to the judge and take your cues from the judge's questions and rulings. During motion hearings, a mere recital of what you have written in your memorandum is not helpful. And, at trial, while you may want to repeat objections to make a record, make it clear you've understood the Court's prior rulings. Avoid giving the appearance that you are ignoring the Court.

> *"Mr. Rumpole!" I had now lit the blue touch paper and Mr. Justice Graves went off like a rocket. "This is quite intolerable! I stopped you when you pursued this line before and you have totally disregarded my ruling. You persist in attempting to involve this most distinguished gentleman in the terrible crime of which your client stands accused. That is not the way in which we 'play the game' in these courts, as you should know perfectly well."*
>
> – John Mortimer, *Rumpole on Trial*

(6) Be Prepared. Careful preparation is fundamental to the effective practice of law. Preparation, for motion hearing, should include consideration of possible questions from the Court. Adequate preparation insures that you won't be tied to your notes and can meaningfully respond to questions from the Court. Your witnesses also need to be prepared for a courtroom experience. They are entitled to know what a judge will expect of them. Advise your witnesses to avoid hearsay, and rambling in non-responsive answers. Remind your witnesses to speak distinctly and audibly. The misery created by a lack of preparation is incalculable.

> *So my client's evidence wound on, accompanied by toothache and an angry judge, and I felt that I had finally fallen out of love with the art of advocacy.*
>
> – John Mortimer, *Rumpole and the Younger Generation*

While judges recognize that litigators have to gain skill and experience over time, it is essential that lawyers, coming to court in the service of a client, avail themselves of every training opportunity available. The American Inns of Court program facilitates this educational opportunity. This program, which brings together lawyers (with varying levels of experience) and judges in social and educational settings, promotes civility and helps lawyers to prepare to deal with a variety of trial and motion issues, through demonstrations and discussions.

Be prepared, when calling a judge on a discovery dispute, to arrange for the judge to have the file, and clearly identify the discovery issue, in the context of the case facts.

(7) Know Your Judge. Ascertain what your judge's background, practices and preferences are. A judge who reads everything before oral arguments assumes you know this, and does not want counsel to repeat everything that she has already read in the pleadings.

Recently a lawyer painstakingly explained the holding in a key case on expert testimony to a disgusted judge. Knowledge of the judge's background, and a closer reading of the case, would have provided the lawyer with the relevant information that this judge had tried the referenced case and authored several articles on expert testimony and did not need or appreciate the lawyer's simplistic, condescending approach.

(8) Remember Judges Are Human. Judges are not perfect. However, the majority of judges want to do the right thing and work diligently to achieve that end.

> *For some reason the then Lord Chancellor took it into his head to make Guthrie (Featherstone), who suffered from a total inability to make up his mind about anything, a judge. Clad in scarlet and ermine, Mr. Justice Featherstone presided over his cases in a ferment of doubt, desperately anxious to do the right thing, fearful of the Court of Appeal, and frequently tempted to make the most reckless pronouncements which got him into trouble with the newspapers. Despite all these glaring character defects, there was something quite decent about old Guthrie. He often tried, in his nervous and confused fashion, to do justice . . . .*
>
> – John Mortimer, *Rumpole and the Summer of Discontent*

Remember, judges were attorneys once. Each judge is an individual with a unique personality. Treat judges like you expect them to treat you. A judge responds positively to a good natured smile, and a kind word. An attitude reflective of respect and consideration (including arrival on time), will endear you to the Court.

> *"Even judges are human." Guthrie spoke as though letting us into a closely guarded secret.*
>
> – John Mortimer, *Rumpole on Trial*

Judges can generally tell if you like and respect them. Judges, being human, tend to respect or like people who like them. Your feelings about members of the Bench, whether expressed, demonstrated, or suggested by your attitude, are not likely to be lost on the judge.

If you communicate contempt to a judge, it's difficult for the court to ignore this "input."

As we bowed to each other I gave my opponent a whispered character sketch. "This judge," I told her, "is an absolute four-letter man. He's humorless, tedious, unimaginative and unjust. In a word, he's a judicial pain in the behind."

Having bowed, Graves was still standing and made a pronouncement, in my direction.

"Mr. Rumpole, it may come as a surprise to you to know that the acoustics in this Court are absolutely perfect and my hearing is exceptionally keen. I can hear every word that is spoken on Counsel's benches."

– John Mortimer, *Rumpole and the Reform of Joby Jenson*

Judges come on the Bench with varying degrees of experience. Understanding a judge's experience or inexperience and tailoring your arguments "to fit" the judge, is wise.

Just as lawyers seek humane treatment from the Bench, judges appreciate this. The majority of judges have huge case loads, immense responsibilities, and little support. Additionally, judges have to deal with the occasional difficult attorney, *i.e.*, "jerk litigators,"[2] who treat one another with a lack of civility, or unskilled lawyers, who have literally construed the phrase "practicing the law."

"You never wanted to be a judge, did you, Rumpole?"

"Judging people? Condemning them? No, that's not my line, exactly. Anyway, judges are meant to keep quiet in court."

"And they're much more restricted, aren't they?" It may have sounded an innocent question on a matter of general interest, but her voice was full of menace.

"Restricted" I repeated, playing for time.

"Stuck in Court all day, in the public eye and on their best behavior. They have far less scope than you to indulge in other activities. . . ."

– John Mortimer, *Rumpole on Trial*

(9) Avoid Abuse of the Court and Court Resources. Make a good faith effort to resolve disputes, without the court's involvement, when possible. Have your exhibits pre-marked, to avoid wasting trial time. Get pleadings in on time. Avoid requesting unnecessary trial continuances, and abide by the rule on page limitations, when filing memoranda.

(10) Consider Your Audience. When you choose your words and your delivery style, it is wise to remember to whom you're directing your words.

"Mr. Rumpole," the Judge said. '" think perhaps you need reminding. That jury-box is empty."

I looked at it. His Lordship was perfectly right. The twelve puzzled and honest citizens, picked off the street at random, were conspicuous by their absence. This was one of the occasions, strange to Rumpole, of a trial by Judge alone . . . .

"It is therefore, Mr. Rumpole, not an occasion for emotional appeals." The Judge continued his lesson. "Perhaps it would be more useful if you gave me some relevant dates and a comparison of the two wills."

– John Mortimer

Most of my favorite people (including most of my family) are lawyers, so I will always try to treat counsel with respect and understanding. These tips may help you with my colleagues—who aren't all as "lawyer-friendly" as I am.

[2] "Jerk litigators" is a term used in *What Lawyers Want from Judges* by Leonard Hand, *Voir Dire*, vol. 1, No. 1, Spring 1995.

Smoothing the Bumps Along the Way to Uniform Procedure

by Roger H. Bullock

Believe it or not, there was a time when bureaucracy was not a dirty word. It meant the administration of rules by routine guidelines so the players could rely on a known (or knowable) path to get their jobs done. For the Chinese Empire of 200 B.C., which radicalized government with it, bureaucracy was immensely preferable to the alternative of unique approaches to individual potentates, each with his own procedure, agenda, and idiosyncrasies.

The importance of civilized civil procedure in Utah courts has never been greater. In the Third Judicial District Court alone there are fourteen district judges, who deal with 3500 lawyers and 20,000 new matters each year. The numbers are different in other districts, but the principle is the same. Whether we like it or not, growth and complexity are facts of life. The court bureaucracy functions well only when judges and lawyers follow both the letter and the spirit of rules.

On an evening in December, many members of the Bar gave up some precious dinner time to attend "An Evening With the Third District Court" to listen to judges Bill Bohling, Glenn Iwasaki, and Anne Stirba, panelists Mike Mohrman and Patricia O'Rorke, and gadfly moderator Ross "Rocky" Anderson.

Messages abounded. The wisdom might condense into these two propositions:

1. Rules should be utilized in a reasonable manner consistent with their obvious purpose.

2. Rule 1 apples to all players, judges and lawyers alike. Each must do his or her best.

Some specific areas covered by the speakers:

Ex Parte Perils. The Cohabitant Abuse Act (Utah Code Annotated, section 30-6-1, *et seq.*) provides an expedited procedure for protective orders, usually on an *ex parte* basis. This is an enlightened piece of legislation, bringing help to victims often made desperate in their own homes. Judges are assigned to be available on short notice, including late afternoons, and the procedure is accessible to those who do not have an attorney. But the procedure also opens the door to abuse by lawyers and parties, for example, as a pretext to get the adverse spouse out of the house a few days before filing a divorce complaint. The *ex parte* format is necessary to get timely action. On the other hand, by the very nature of *ex parte* proceedings, the adverse spouse is denied a hearing. The judges on the panel question applicants carefully, and have been known to telephone the adverse spouse in the middle of an *ex parte* application. Lawyers are well advised to use this procedure only after careful scrutiny of clients' accounts of facts and needs. Credibility is extremely important in this arena. If you are too easily sold on your client's story at the expense of the other party's due process, the judge will remember, and more importantly, you will have misused the procedure. If the day comes when critics of the Cohabitant Abuse Act complain that it does not work because the lawyers abuse it, the fault will be ours.

> *"Lawyers are well advised to use [ex parte procedures] only after careful scrutiny of clients' accounts of facts and needs."*

Similar challenges arise in other *ex parte* proceedings for temporary orders under Rule 65, Utah Rules of Civil Procedure. The judges have seen more of these than most lawyers have, and they are very reluctant to grant relief *ex parte*. Most judges are also mindful of the high standards for obtaining temporary orders. *See* UTAH R. CIV. P. 65A(b). Lawyers should take a lesson from this, and evaluate seriously whether an *ex parte* attempt to get an order is appropriate. Sometimes this is difficult in the face of a client's remonstrations that irreparable harm is about to occur. Nevertheless, an aware lawyer knows that sometimes such matters are not the crises they first appear to be. Further, most legal wrongs can be repaired by money damages.

If a restraining order is indeed essential, it is a rare application that truly must go forward *ex parte*. Most lawyers notice early in their practices that it is easier to prevail in the absence of opposition, and the temptation to skirt the notice requirements therefore is great. But do the right thing. Try to inform the opposition, and provide reasonable notice. Give whatever notice you can, however informal, under the circumstances. Give notice to unrepresented parties. For example, you may suspect that the opposing party has talked to an attorney and, if you ask, the party may identify the attorney, allowing you to notify him or her. Your presentation may not go as smoothly as it would if it had been unopposed, but you can be sure the judge's deliberation of your argument will be properly influenced by the fact that it is not *ex parte*.

The *ex parte* temptation is not limited to domestic orders and other types of temporary restraining orders. Judges, like everyone else, are entitled to have friends. Some of those friends may even be lawyers. Friends socialize, trade ideas, and do small personal courtesies for each other. This is the stuff that makes the world go round. But when you seek preference based on your familiarity with the judge, even on procedural matters you deem minor, you have crossed the line. *See* Rule 3.5, Canon 2(B), 3(B)(7) Rules of Professional Conduct. Judges are sensitive to this potential problem. Friendship is too valuable in life to squander in this way.

Trial Schedule. When it comes to moving a civil matter toward resolution, any schedule is better than no schedule.

Mr. Bullock is a partner of the Salt Lake City law firm Strong & Hanni.

Rule 16, Utah Rules of Civil Procedure, governing pretrial, scheduling, and management conferences, is a fine piece of work on the printed page. But the written rule is worthless if judges refuse Rule 16 requests for conferences. Analytically, there are two tracks through state court litigation: (1) Rule 16 scheduling conferences; and (2) certificates of readiness for trial under Rule 4-104, Code of Judicial Administration. A few judges are known to inexplicably decline Rule 16 conference requests until a certificate of readiness for trial is filed. Rule 16 conferences and orders are hard work for everybody, and consume precious court time. Parties often return to court to modify a scheduling order, alleging changed circumstances. But Rule 16 proceedings save judicial resources in the long run by moving cases through the discovery process toward potential settlement. The consensus of the panel was that *judges should respect Rule 16 requests.* If the court's reticence is based on time constraints, perhaps the judge could experiment with directing the parties to meet and confer beforehand, and submit a proposed scheduling order prior to the conference.

Final pretrial settlement conferences under Rule 16(c) are another opportunity for judges to save time by investing a little. The timing is important. Some judges favor a settlement conference two to four weeks before trial. At that point, the parties and their attorneys are getting very interested in their case, but last minute intensive trial preparation can still be saved. Judges should not underestimate the healthy benefit of their input at the settlement conference. Parties may give great weight to the reasoned observations of the trial judge.

Alternative Dispute Resolution. The Third Judicial District Court and the Fifth Judicial District Court follow the court-annexed Alternative Dispute Resolution program for mediation and arbitration. If you have not yet watched the eleven-minute mandatory videotape, you're in for a treat. It is polished and professional, and starts clients thinking about dispute resolution, especially through mediation. The biggest obstacles are our own inertia and unfamiliarity, but these are disabilities we can overcome.

A Closing Note on Civility. For every lawyer's story of insensitive treatment by a judge, there is probably a similar story the judge could tell. Perspective is difficult. The lawyer may feel bullied and arbitrarily cut off during motion argument; the judge may suspect that the lawyer behaves as if her cause were the only one pending before the court. Some common sense strategies help: (1) Inform, do not ignore. Telephone calls to the judge's clerk and to other counsel on scheduling matters can do wonders towards lubricating the mechanism of judicial procedure. Fax and phonemail are great advances. (2) Temper your words. Observe protocol. Be polite.

As our numbers grow and the court system expands, we face great challenges to preserve the quality of justice and collegiality among lawyers and judges. We are all on the same basic mission to help people solve their problems. The administration of justice is the business, and the calling, of each of us, lawyers and judges.

Letters to Lennie

Dear Leonard Hand:

I realize that the judges and justices must be very busy with all of their receptions, luncheons, conventions, retreats, committees, boards and councils; however, is there anything that can be done to get those who are far behind in deciding cases to attend once in a while to their *judging*? I recently surveyed some of my colleagues and have heard the following nightmare accounts of delay in our system of justice:

- One relatively uncomplicated case was before the Utah Supreme Court for five years—two years before oral argument and three more years between oral argument and the opinion.
- In one case pending before the Utah Supreme Court, the plaintiff, who is medically disabled, was awarded a verdict in early 1993 to cover his medical expenses and lost wages. The case was appealed in July 1993 and oral argument was held fifteen months ago. No opinion has yet been issued. Because of the appeal, the plaintiff has not yet received one cent and there is no telling how long it will be before the Court finally decides the case. (One hopes that the plaintiff will be alive by the time a decision is rendered.) Some of the issues in that case are also involved in other cases, which are currently on hold pending the decision of the Court. Thus is the delay multiplied!
- In a case that has been languishing in state court for more than a year, plaintiff's counsel filed a Motion for Scheduling Conference in order that discovery deadlines could be set and the matter proceed in a timely manner to trial. The trial judge denied the motion, refusing to set a scheduling conference. The judge indicated that the filing of a certificate of readiness for trial must be filed in order to obtain a trial date. (Of course, had discovery been completed, a certificate of readiness would have been filed in the first place.) Now, without a scheduling order in place, the case continues to languish, without any deadlines, with discovery slowly plodding along, and without a trial setting.

✦

> *"If justice delayed is justice denied, there are many on the bench who clearly are* not *doing justice."*

✦

- A few years ago, a motion to dismiss was timely filed in the United States Federal Court soon after service of a complaint. The trial judge took the matter under "advisement". Thereafter, the defendant paid his lawyers in excess of $125,000 during the course of extensive discovery over the next eighteen months. At a pretrial conference, the judge, almost offhandedly, stated that he was granting the motion to dismiss. (Currently, in another case, a motion for summary judgment, which was filed nearly two years ago, is still pending before that same judge!)

These illustrations are only a few of many instances of incredible delays in the workings of our judicial system. Three questions: What can be done to get these judges to do their job in a timely manner? How can a lawyer explain to his clients and others the ridiculous delay and waste caused by dilatory judges? And how is the judicial system ever to regain respect in our society when judges demonstrate their arrogance and disdain for the interests of litigants by failing to complete their work in a timely manner? If justice delayed is justice denied, there are many on the bench who clearly are *not* doing justice.

Peeved at Delays

LENNIE RESPONDS

Dear Peeved:

Your concerns are shared by many of your colleagues who are too shy to speak out. Our Supreme Court has limited itself to deciding only one hundred cases a year and, even so, seems unable to handle that many on a timely basis.

Utah Code Annotated, section 78-7-25, requires *trial* judges to decide all matters within sixty days, unless the circumstances causing the delay are beyond the judge's personal control.

Remember term papers in college? Sure you do. Remember how you promised yourself to write each new one long before it was due, thoughtfully and with care? Remember what actually happened? You wrote each in a blind, caffeine-induced frenzy the day before it was due. That's only human nature.

Judges, being human, are subject to human nature. Think of their written opinions as being term papers, but term papers *with no deadline*. Does it surprise you that things get put off so long?

I have a few thoughts on how to solve this problem, some of which have been followed for years by other states:

1. Let's impose terms of court on the Utah Supreme Court and the Utah Court of Appeals, just as the United States Supreme Court has. All matters must be argued and decided in one term. No carry-overs.

2. Publish a list in the next edition of *Voir Dire* of the most egregious offenders on the Bench. We all know who they are. Let's let them know that we know who they are, even if we can't impeach them.

3. Send an underling down to the offending judge's court to discreetly ask the clerk if the judge has reached a decision on your motion yet. Tell him to sit there in that courtroom, day after day, watching the proceedings, not making a nuisance, but occasionally making inquiries of the clerk, and to never leave until the judge writes the overdue opinion. Have your friends in other firms do the same thing with their overdue motions and underworked messengers.

4. Write a "friendly" letter to the offending judge on your opposing counsel's stationary *demanding* a prompt decision from the court and intemperately expressing displeasure with the delays in the judicial system.

5. Call the court clerk and identify yourself as a reporter from *The Wall Street Journal.* Inquire about the decision and when it might be expected, noting that it concerns a timely and important issue and might receive prominent coverage in the "Law and Lawyers" section, but only if it can make it in the newspaper within the month.

6. *Somehow* educate certain state trial judges about Utah Rule of Civil Procedure 16. Scheduling conferences are not only provided for under the rules; they are probably the best tool for moving cases along, in a timely fashion, toward a conclusion. Nothing ensures that foot-dragging counsel get their discovery completed like witness-designation and discovery deadlines. And, nothing motivates a party to settle a case like a looming trial date.

Peace and Justice,

Lennie

Litigation Section Announces Trial Academy 1996

The Litigation Section of the Utah State Bar announces its first annual Trial Academy. The Academy will consist of evening seminars held every other month taught by top-notch trial practitioners, focusing on basic trial skills for the trial lawyer.

The tentative schedule is as follows:

February 22, 1996:	Jury Selection
April 25, 1996:	Opening Statements
June 27, 1996:	Direct Examination
August 29, 1996:	Cross Examination
October 24, 1996:	Exhibits at Trial
December 19, 1996:	Closing Argument

This promises to be the most in-depth training program available for the Utah lawyer on the basics of trial practice in our local courts. It is designed to acquaint the new and not-so-new lawyer with the basics and some of the intricacies they will encounter in court.

On February 22, the first session will be held in Judge Pat Brian's courtroom from 6:00 to 8:00 p.m. Prominent local trial attorneys will demonstrate the jury selection process using a live jury and a federal and state judge sitting jointly on the bench.

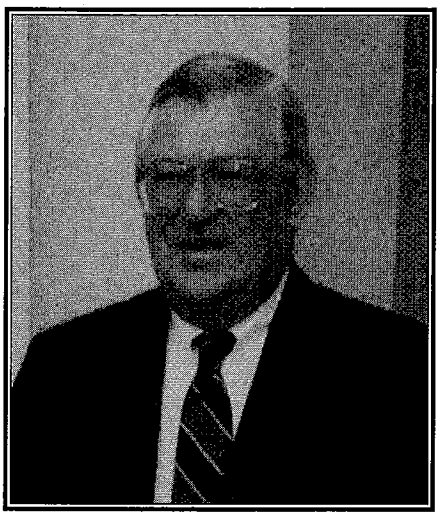
Students will receive two CLE credit hours for each session attended. The cost is $20 per session for Litigation Section members, and $30 per session for non-members. Students may sign up for the entire six sessions at a cost of $100 for Section members, and $150 for non-members.

Enrollment for the February 22 session is limited to forty students. To register, call Monica Jergensen at the Utah State Bar offices at 531-9077. For further information on the program, contact Francis Carney at 532-7300.

IN MEMORIAM

Robert D. Moore

By Kevin M. McDonough



On August 14, 1995, the Utah legal community suffered a tremendous loss when Robert D. Moore unexpectedly died while vacationing outside of the country. The personal loss that I feel is overwhelming, because Bob was my friend, my uncle, and my mentor, with whom I practiced law for the past nine years.

Although I knew Bob for virtually my entire life, it was not until I began working with him in 1986 that I came to fully realize, and appreciate, the complete person of Bob Moore. Having daily contact with someone allows you to see their many different qualities, and I consider myself fortunate to have had the opportunity to do this with Bob.

For Bob, practicing law was almost an obsession. He was entirely devoted to each of his clients, whether the client was a wealthy corporation, or an individual of little means. Most of the people Bob represented fit more squarely within the latter category, because Bob was a champion of the small person. He enjoyed representing underdogs, and took on causes no one else would touch. Bob represented people without reservation, pursuing their causes as though he personally had something at stake. Anyone who practiced law with Bob or against him, knows well that Bob was never intimidated by any person or situation, and the greater the odds against his client, the more zealous he became.

I greatly benefitted from Bob's unyielding passion for the law. You simply do not practice law with an attorney the caliber of Bob Moore without walking away a better attorney, and a better person.

Bob not only was a great practitioner, but a great teacher. In addition to instilling in me the fundamentals of practicing law, he taught me how to practice law ethically, and with dedication. Bob taught as much by example as by instruction, which is not to say that he did not verbally express his feelings. If Bob felt I had handled a matter inadequately, he certainly let me know that perhaps I should have done something differently. By the same token, he was never short on praise for a job well done. Bob could anger you, embarrass you, praise you, and make you laugh—all in the same afternoon.

Bob was genuinely proud of his profession. On one occasion, he was cross-examining a witness in federal court when the witness made a flippant comment that Bob perceived as being derogatory to the legal profession. Bob took it personally, and in his characteristically loud and booming voice, chastised the witness, informing the witness that he (Bob) took great pride in being a member of the legal profession.

Although Bob was absorbed in the practice of law, he certainly was not all business. Oftentimes Bob called me into his office to discuss a case we were working on, and after we had discussed the issues at hand, we ended up discussing how the University of Utah football team or the Utah Jazz had fared that weekend, and how we would have done things differently. Other times, Bob summoned me to tell me about a challenging golf course he had played, and we ended up discussing strategy to employ in an upcoming trial.

Bob had a knack for striking a balance between business matters and non-business matters, and always maintained a sense of humor. Even during the heat of battle, Bob was able to employ his subtle sense of humor while getting his point across. On a recent occasion, opposing counsel was cross-examining one of our witnesses, re-plowing an area of inquiry upon which he had already expended considerable time. Bob became impatient,

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and objected to the line of questioning as being "asked and answered, argumentative and boring." The objection was sustained. At the conclusion of trial that day, I told Bob I had never heard an objection bottomed on the ground of being "boring." Bob simply smiled, and advised me never to so object.

Bob also was a family man. He reveled in each of his childrens' accomplishments, and he was never shy about boasting about his wonderful wife. Before his children grew up and ventured out (world-wide) on their own, the family took vacations to go deep-sea fishing off the coast of Mexico, and to Ireland to get a better handle on family heritage.

Bob's specific accomplishments are almost too numerous to list, because he was actively involved in community and civic affairs. In addition to being a well-respected trial lawyer for more than thirty years, Bob was a leader in the Utah Democratic Party, having served as chairman of the Salt Lake County Democratic Party. He also served as a delegate to national presidential nominating conventions, as Salt Lake County Chairman of former Governor Calvin Rampton's three election campaigns, as chairman of Pat Shea's gubernatorial campaign, and as General Counsel for the Democratic Committee for Rules and Procedures for National Conventions.

Bob also was President of the Board of Directors of the University Club, on the Board of Directors of Fort Douglas/ Hidden Valley Country Club, and a Member of the National Public Lands Advisory Board. Bob served as Chair of Law-Layman Conference of the Intermountain Area, Chair of the Legislative Committee for the Utah State Bar, and he was on the Judicial Selection Committee for the Third Judicial District Court of Utah. At the time of his death, Bob was a member of the American Inn of Court, and was practicing law, of counsel, to the firm of Giauque, Crockett, Bendinger & Peterson. He also was active in the Catholic Church, and served on the Board of Directors of Catholic Community Services of Utah.

As I sit in my office adjacent to the office Bob previously occupied, I can still hear his booming voice and infectious laugh. To use a cliche, Bob Moore truly was "bigger than life."

AMUSEMENT IN THE LAW

And What No Good Can *You* Be Up to During Time Out?

APPENDIX B

"Time Out" Rule

A. *Statement of Rule*

For no good cause shown* each side will be entitled to three (3) time outs between now and the date of trial. A time out is defined as a one week period in which no discovery can be served, all deadlines are postponed and counsel can generally goof off.

1. The procedure for calling a time out will be as follows:

Both plaintiffs and defendants will designate one individual as the official time out persons (hereinafter referred to as the "Designated Whistler"). The designated whistler will be issued a whistle from the case liaison logistics committee which will be strung around his, her or its neck. When a time out is desired, the designated whistler will go to the offices of opposing lead counsel (see ¶ XVI.E.) and blow the whistle three (3) times. Thereafter there will be a one (1) week time out.

2. As stated above, each is entitled to three time outs. However during the period of the two month warning (*see* ¶ B below) each side will be entitled to only one time out, providing that side still has remaining at least one time out.

3. Time outs must not be called on two consecutive one week periods. That is there must be an intervening week between time out periods. This rule is designed to prevent counsel from spending more than one week of their time with their family, friends, partners and associates.

4. As stated above, each side will be entitled to only three time outs. Any attempt by any side to exceed this three time out limit will be regarded by the Court as a serious infraction of the rules (hereinafter "illegal use of whistle"). The sanction for illegal use of whistle will be that such counsel attempting to exceed the three time outs will have his, her or its desk moved five yards (in the event of a non-flagrant violation) or fifteen yards (in the event of a flagrant infraction) further from the jury box at trial.

*No good cause shown is defined as family events, such as anniversaries, birthdays, sporting events involving siblings, laziness, genuine ennui (pronounced NUE); drunkenness, firm events, such as annual dinner dance or outing; and anything else which helps attorneys to keep their sanity during the course of these proceedings.

B. *Two Month Warning*

As stated above, there will be a two month warning. Such a two month warning will be called by the Court two months prior to trial. At this point, there will be a three day stoppage of the clock in which all counsel will be required to get their personal affairs in order. Personal affairs will include such items as Last Will and Testament, final instructions to spouse and family, arrangements for publication of memoirs and other less important details.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F.Supp. 889, 959-60 (E.D. Pa. 1979).

If you have enjoyed a humorous or odd experience in the practice of law, please share it with the rest of us. Submit your amusing stories, transcripts or pleadings for publication to Voir Dire *Editorial Board, 50 West Broadway, 700 Bank One Tower, Salt Lake City, Utah 84101-2006. Please advise if you do not want your name published as having been responsible for the submission.*

Is the Law a Lass (Light [*See Proverbs* 6:23] and Ass [*See* Dickens, *Nicholas Nickleby*])?

Once upon a time, in lands far, far away, lived strange but cuddly creatures that became involved in a struggle for identity. In 'Whatland,' which is just a few miles north of Fairyland, lived the 'Whats.' In the 'Land of Wuz' lived the 'Wuzzles.' We don't known where 'Wuz' was, but we are told we could get there if we 'snuzzle a Wuzzle.' It appears that for a time, never the two did meet. But one day the creators of the 'Whats' discovered the 'Wuzzles' and were astonished to learn that 'Whats' and 'Wuzzles' had certain similarities. Most specifically, it seems each 'What' and 'Wuzzle' had the names and characteristics of two different animals combined into one. In 'Whatland,' there was 'Me-ouse' (a mouse and a cat combined), 'Wissh' (a walrus and seal), 'Chuck' (a chicken and duck), 'Skeet' (a skunk and parakeet), 'Pea-tur' (a peacock and turkey), 'Gir-itch' (a giraffe and ostrich), 'Leo-Lamo' (a lion and lamb), and 'Beav-aire' (a beaver and bear). The 'Wuzzles' included 'Moosel' (a moose and seal), 'Butterbear' (a butterfly and bear), 'Hoppopotamus' (a rabbit and hippopotamus), 'Eleroo' (an elephant and kangaroo), 'Rhinokey' (a rhinoceros and monkey), and 'Bumblelion' (a bumblebee and lion).

Our story now moves to its sad conclusion. The creators of the 'Whats,' who were protected by copyright, were outraged and thought that the creators of the 'Wuzzles' had stolen their idea. A lawsuit broke out, with the plaintiffs, creators of the 'Whats,' alleging violation of the federal copyright laws and unjust enrichment. The defendants, creators of the 'Wuzzles,' have moved for summary judgment, as well as attorney's fees and sanctions under 17 U.S.C. § 505 of the Copyright Act, 28 U.S.C. § 1927, and Rule 11 of the Federal Rules of Civil Procedure for plaintiffs' pursuit of allegedly frivolous and vexatious litigation.

This battle on high between creators has filtered down to us in this 'What'-less and 'Wuzzle'-less Land of White Plains. The questions before us are really quite simple, 'Just what's a 'What,' what's the similarity between a 'What' and a 'Wuzzle,' and 'Wuzzle' we do about it?'

Selmon v. Hasbro Bradley, Inc., 669 F.Supp. 1267, 1268-1269 (S.D.N.Y. 1987)

Trial Academy 1996 to Begin on February 22

The first session of the Litigation Section's annual Trial Academy will be held on February 22 in Judge Pat Brian's courtroom. The subject will be "Jury Selection" and the faculty will cover every aspect of the jury selection process in Utah, with an emphasis on the basics for the novice lawyer.

Judge Brian and Judge Dee Benson (Unites States District Court) will preside jointly. David Jordan (Stoel, Rives, Boley, Jones & Grey) and Gordon Campbell (Assistant United States Attorney) will act as counsel for Plaintiff. Richard Burbidge (Burbidge & Mitchell) and Ross Anderson (Anderson & Karrenberg) will represent the defense. Eddie the whooping llama will serve drinks.

A live panel will be seated and a jury selected. The faculty will cover the mechanics of jury selection, the basis for cause challenges, the tactics of peremptory challenges, the use of jury panel questionnaires, the limitations of court-conducted voir dire, the use of supplemental attorney voir dire, the proper use of in-chambers conferences, the differences in procedures among the state and federal courts, and other key concepts the lawyer should understand before picking a jury. Every lawyer who has never picked a jury and has a trial on their calendar should plan on attending.

Enrollment is limited and is nearly closed. So please call Monica Jergensen at 531-9077 immediately if you'd like to register.

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