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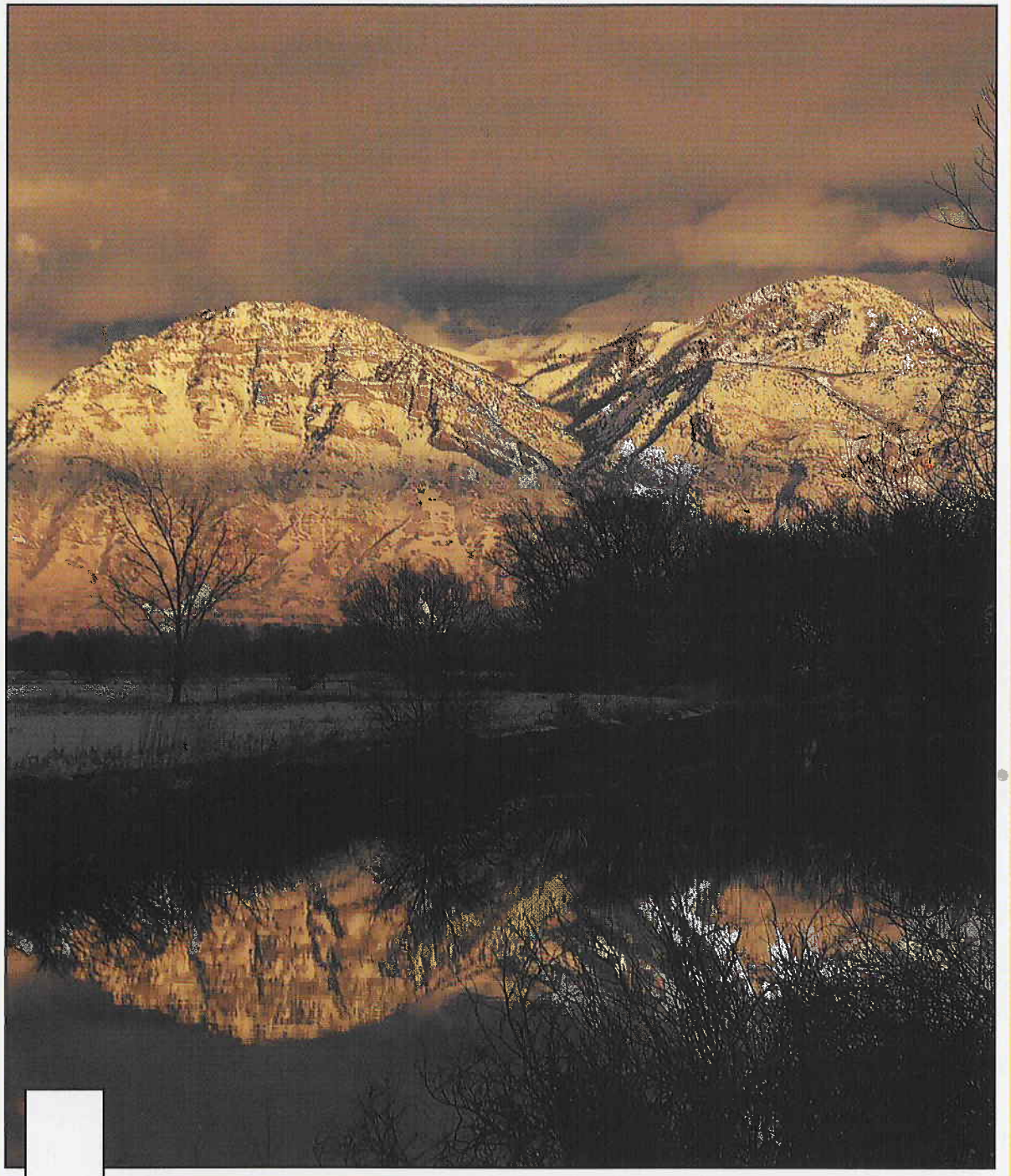

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VISION OF THE BAR: To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

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

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LETTERS

Note from editorial board of *Voir Dire:* Because of the overwhelming number of responses to the letter of Mark Gould printed in the Winter Issue of *Voir Dire*, the *Utah Bar Journal* has agreed to publish a group letter signed by several attorneys. The letters which were submitted by individual attorneys will appear in the Summer Issue of *Voir Dire.*

Dear Editor:

This letter is in response to the letter of Mark H. Gould (*Voir Dire,* Winter 1997) attacking *Voir Dire* for honoring Jane Marquardt as a "Credit to the Profession." According to Mr. Gould, Ms. Marquardt is unworthy of such an honor because she is an "admitted homosexual."

Many of us have known Jane Marquardt throughout her twenty-year career as a lawyer and we concur that she is, indeed, a credit to our profession. During her early career as a skilled and effective litigator and in her current field of tax and estate planning, Ms. Marquardt has exhibited the finest attributes of a member of the bar. Her thoughtfulness and reputation for hard work have made her a sought-after candidate for bar committees and community assignments. In addition to the many accomplishments noted in the *Voir Dire* article, she is currently serving as President of the Utah Bar Foundation. In her practice, Jane Marquardt has always demonstrated an uncompromising integrity and adherence to ethical standards to which we all should aspire. She has given much to the profession and the community and she has earned the recognition she was given.

Ms. Marquardt's sexual orientation has nothing to do with her ability to practice law or to be an outstanding member of the bar. By contrast, one's eligibility to participate in civilized society, much less to practice law, is substantially compromised by bigotry and insensitivity. Intolerance has no place in our profession.

Ms. Marquardt's decision to make her private life a matter of public record in a dignified manner is courageous. Jane Marquardt is well deserving of the admiration and respect that we hold for her.

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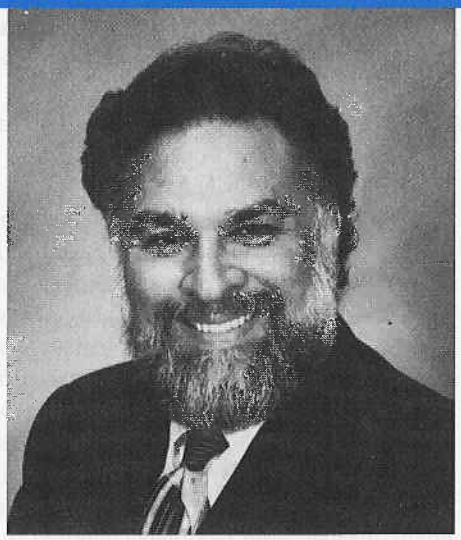


Take a Number and Get in Line

By Steven M. Kaufman

It's a beautiful winter's day in Utah. The sun is shining, and it's 18 degrees outside. I have always loved the fact that it could be so cold but yet so clear and wonderfully sunny. When I was in law school 23 years ago, I only remember drab, winter days where the last thing I saw was sunshine. My personal weather report has gotten progressively better over the last 20 years, and I owe that to a profession that has allowed me to progress as an individual, a father, husband and son, a friend, and a lawyer. Along that long road which is ever-changing, I have learned that how one practices, as a member of our noble profession, has a great deal to do with how one progresses within its ranks.

As you probably know if you have read any number of my one-sided "Let's Kiss All the Lawyers" articles, my tendency is to cheerlead for our Bar and its membership. Well, guess what! I'm not finished yet. But I am ready to put a different slant on it, because I'd like to emphasize that the best lawyers are those who treat not only their peers with respect and kindness, but also those who acknowledge that we, as attorneys, must realize that our most important commodity besides our knowledge is our client.

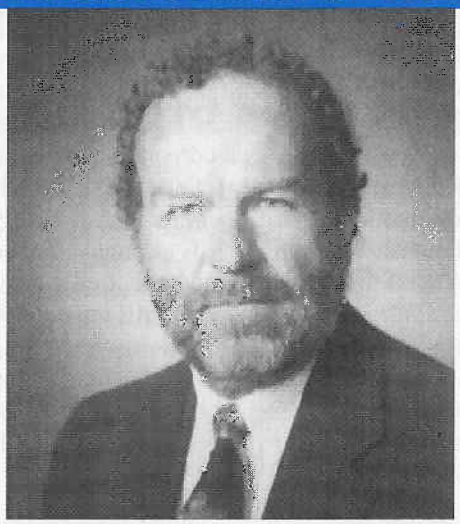
I spent a few days in grand San Antonio, Texas, as I previously reported to you, attending an ABA convention. I always try to bring back something useful for our members, something that reestablishes the view that these getaways are worthwhile and purposeful. When I was elected your President, the thought of going out of town to all sorts of different events sounded, quite frankly, exciting and worth the time. Most have been; a few have not. But I can honestly say that none have been a total bust. I seem to always bring back some idea or proposal, meet someone who shares a program some other Bar has found useful, or meet an attorney or judge who helps me keep my unfaltering view about our profession. I also come back from these meetings knowing that our Bar is as progressive as any, and that we are moving in the right direction.

This brings me back to the basis for this message – that our clients are not to be forgotten. At this most recent convention, I listened to the President of Southwest Airlines speak about customer service. You have probably seen this gentleman, who is also a lawyer, espouse loudly that he has taken a relatively unknown airline and turned it into one of the most revered and profitable companies in the airline industry (or any industry, for that matter). We can learn a great deal from him because we must never forget that, for most of us, without the client, our practices don't grow or prosper. Whether we teach or do research, practice in a solo, small, mid-size or large firm, work for a governmental agency or corporation, or whatever our legal endeavors might be, without a client, a happy client, our career could be short-lived. We need to remember that although we are the captains of our ships, the clients help the ships get out of the harbor. Sound like a goofy analogy? I don't think so. If we don't keep in good touch with our clients, acknowledge their questions without acting high and mighty, and react to their legal needs with respect and caring, then soon our reputations will sink the ships, for we have forgotten that without the clients, we have nothing to pursue. Each clients represents a particular position, ideal, or need that cannot be gainfully and rightfully pursued unless we show our gratitude toward the client by addressing his or her needs in an honest, caring way. No, we need not be a babysitter, but we do need to remember that a return phone call, a timely response, a short letter of acknowledgment sent in a timely manner, an explanation setting out the legal procedure, and just plain old honest concern for the client's needs will cause our reputations to glow, our client to trust and retain confidence in us, and our brothers and sisters in the Bar to take us at our word. If we have a service-oriented attitude toward our practice, no matter who the client we serve represents,

I suggest we will see our practices grow and prosper. We will gain that respect we hopefully deserve, and our peers will appreciate our professionalism. The client and opposing counsel both deserve our constant attention until a particular case, dispute, or matter has been totally resolved. Customer/client preservation requires nothing less. We always refer to the customers of our services as clients, but as I learned a few weeks ago in San Antonio, they are one and the same. We are not salespeople in the sense of the retail world, but we are our profession's own best advertisement. It really doesn't take much to return a phone call, answer a question which may have gone unanswered too long, or just be diligent in handling our legal duties. When a lawyer doesn't return my call in a timely manner and then gives me the excuse that he or she has been *so* busy, I tend to want to put that lawyer on eternal hold, but then being the civil kind of guy I am and remembering that I have a duty to practice what I preach, I kindly acknowledge that the lawyer is lucky to have so much business, and then I think to myself about the last 30 days of meetings I have attended outside of my everyday practice and that I was still able to return those telephone calls. I definitely am not perfect, but we all can make time to do the right thing, follow through with common courtesy, and show our clients and adversaries alike that our profession is client-oriented, client-friendly, and lawyer-responsible. Maybe I overdid the hyphenated words, but they tend to emphasize my point, and I am hopeful that you get the picture.

Professionalism is a word which may mean many things to many people, but I hope we all agree that we can do better in our efforts to facilitate quicker and kinder resolutions to the problems we try to solve for our clients. As lawyers, we have a solemn duty to best serve our clients and their needs. We also have the same duty to clarify our role in society, while serving the public and private sector alike. We are duty-bound to serve our clients to the best of our ability, which goes without saying, even though I just said it. Within those boundaries, we must do our best to complete our tasks in a timely manner, keep our clients apprised as to the status of their case, deal fairly and appropriately with opposing counsel, and help the courts and judges remain available to the public so everyone has equal access to justice, which should begin when the attorney-client relationship commences. If we take this duty seriously, we will have happier clients, whether the outcome is ultimately in their favor or not. The judges will have more time to make their courts available to those who really need access to them, and our profession will surely move up a notch on the survey of favorite professions. Maybe then there would be one less lawyer joke, one less disgruntled client who tells the world how much we don't do for society, and maybe then there would be a happier workplace for you and me.

As much as I like ice cream, I hope our profession never gets to the Baskin-Robbins status of "take a number and get in line" because there *is* a better way. Being accessible, providing good legal services and caring about the entire circle of people involved in a particular case (from the client to the courts) are the best ways to promote something other than what I call "ice cream store access." If clients or peers ever feel like they have to take a number, something is really wrong. It's time to take a good look at ourselves and how we practice law. Take one less scoop, have a few less choices of ice cream, and then give our richest and most tasty ice cream to those chosen few who are lucky enough to have us as their lawyers. Scoop it in a meaningful way, and let's not make those ice cream lovers wait in line. The law and ice cream – nothing and everything to do with how we practice. I think I'll take a break now to return a call and get a cone. But no waiting in line. Talk to you soon!



Diversity Revisited

By Charles R. Brown

In my last Commissioner's Report I discussed the issue of diversity – not diversity in a necessarily politically correct sense, but the diversity of our profession as it related to the broad category of clients and interests we represent. I had intended to write this Commissioner's letter on a totally unrelated topic. However, a couple of recent events involving our organization cause me to review the issue again from a different angle.

Diversity is a broad term. In addition to the broad spectrum of our clients' interests, it must also include different perspectives or philosophical points of view on various issues, as well as the more commonly understood reference, which includes differences in physical characteristics or cultural background. As lawyers trained in the Constitution we should be the first to recognize that those other aspects of diversity should also be respected.

Two recent events relate to both of those aspects of diversity. As most of you recall, the recent winter issue of *Voir Dire* published a letter to the Editor from a Bar member criticizing a previous *Voir Dire* article which had commended the positive contributions to our profession of another member, whose lifestyle the letter writer did not approve of. The second event which sparked my interest involves an ongoing national controversy. A suggestion was floated regarding whether the United States Supreme Court Justice Clarence Thomas should be invited to speak to our 1997 Annual Convention. That suggestion created the same type of controversy and strong disagreement which has occurred on a national level.

My point of view on both events, as an absolutist on First Amendment issues, is that, although I strongly disagree with the opinion of the *Voir Dire* letter writer (more on that later) and one may not necessarily agree with the judicial philosophy or behavioral history of Justice Thomas, they both have a right to be heard. As Voltaire stated centuries ago: "I disapprove of what you say, but I will defend to the death your right to say it." A number of people believe that *Voir Dire* should not have published the letter. The decision to publish must have been a difficult one. However, the purpose of letters to the editor is to allow publication of viewpoints, no matter how offensive or objectionable, which differ from those of the editorial board. Our profession should be the last group in society which attempts to suppress a point of view with which we disagree.

Regarding Justice Thomas, no less an authority than NAACP President Kweisi Mafume, in scolding a Maryland Chapter which had protested a scheduled speech by the Justice to a youth group, stated:

> Free speech in a democratic society must be fought for, whether we like what we hear or not, because one day someone will come to silence us and then who will speak for us?

Certainly President Mafume could not, under any stretch of the imagination, be considered to agree with the judicial philosophy of Justice Thomas.

President Mafume's words should also apply to us. Our organization should not be tentative about inviting speakers who may be objectionable to some. We are, after all, a diverse group. If we are hesitant to invite speakers whom some may find objectionable, we will end up with speakers on important issues who are not threatening but who also fail to challenge us. We should invite Justice Thomas; and other conservatives such as Judge Richard Posner; Professor Michael McConnell or even Rush Limbaugh. We should also invite speakers representing the other end of the spectrum on important issues – examples might be Professor Angela Davis; Professor Catherine McKinnon; a proponent of critical legal scholarship or a legal advocate for gay rights. I may or may not agree

with the philosophical or political point of view of any or all of the foregoing speakers, or others from the right or left. However, I still want to hear what they have to say and hope that it may stimulate all of us to an intelligent, rational discourse which will provide more insight into the important issues facing us.

With that premise in mind, I will now exercise my free speech rights. The second important aspect of diversity on which I am focussing in this report involves differences in physical characteristics or cultural background. Those include, of course, differences in gender, race, religion, political affiliation and sexual preference, among others. A couple of years ago there was a minor controversy in the Bar Commission involving our ex-officio members. A group of us, of whom I was one, wanted to reduce the number of ex-officio members. That proposal was not successful. My motivation in supporting a reduction in the Bar Commission was because, as a corporate attorney, it is my experience that the efficiency of a policy-making Board becomes substantially diminished once it exceeds a certain number. While I am still concerned about efficiency, I am pleased with the result. All the ex-officio members of the Board contribute substantially to our discussions. They improve our understanding of the impact the issues we face may have on those with a different background or perspective.

As I stated in my previous report, our principal role should be to zealously represent the interests of our clients, who are as diverse as the population in general. So long as an individual member of our organization represents her or his clients with creativity, competence, diligence, ability and ethical behavior, his or her background, physical characteristics or personal preferences should not be relevant. Each of us is an individual and we each have personal characteristics which may not be appreciated by others. I know many people think I am a little off kilter because of my love of the cinema of David Lynch and the lyrics and music of Warren Zevon. That is my personal choice. Likewise, although I may disagree with the personal preferences or philosophical viewpoint of many of our members, that has no bearing on their competence as attorneys or their contribution to our profession.

I am not acquainted with the writer of the recent *Voir Dire* letter. However, I consider myself a friend of the person who was the subject of that letter. I have worked with her often on tax law matters, have served with her on Bar committees and call on her often when I need a competent answer to an esoteric area of estate planning or probate law. Although I do not practice her lifestyle choice, neither do I share similar religious beliefs and political views with many other Bar members whom I also consider to be a credit to and a positive public representative of our profession. I have many friends, including members of our profession, who run the gambit of diversity. I judge them as individuals, and as individuals only; not as members of a gender or race; or as subscribers to a religion, a political party or a particular sexual preference. In fact, I will even admit that I have some friends who are, and I have been known on occasion to associate with, – (dare I speak the word) – Democrats.

Our principal role as attorneys should be to serve our clients with diligence and competence. As long as our members fulfill that goal they are a credit to our profession and should be respected. Likewise, the members of our enlightened profession should not be in the business of intimidating or suppressing expression by those with a different point of view, history or lifestyle. Otherwise, the next time that intolerance or suppression may be directed at each of us.

The Law and Economics of Patent Infringement Damages

By Mark A Glick

Traditionally, economists have played a surprisingly limited role in the damage phase of patent infringement cases. Until recently, patent infringement damages have been the exclusive domain of accountants and patent lawyers. This is unfortunate because economic theory can be a powerful tool for both calculating your client's damages or challenging the logic of your opponent's damage calculation.[1] The purpose of this article is to familiarize Utah Bar members with how economists approach the murky law of patent damages.

THE PATENT STATUTE

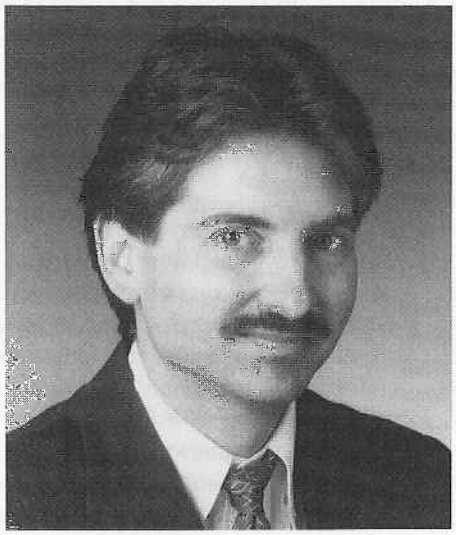
The starting point for any analysis of patent damages is 35 U.S.C. § 284 (the "Patent Statute"), which provides that:

> Upon finding for the claimant the court shall award the claimant damages adequate to *compensate* for the infringement, but in no event less than a reasonable royalty, for use made of the invention by the infringer.

(Emphasis added.)

Prior to 1946, the precursor to section 284 went beyond "compensation", allowing for both recovery of compensation and the infringer's profits. The 1946 Amendment, Act of August 1, 1946, Ch. 726, § 1, eliminated the language regarding the infringer's profits and added the reference to compensation.[2]

This revision is important. Before 1946, patent owners were awarded damages that included both the lost profits to the patent owner and the infringer's profits.[3] Essentially, a successful plaintiff was placed in a better position than had the infringement not occurred because profits on some sales were counted twice—once as lost profits to the patent owner and again as the actual profits the infringer received. The Supreme Court interpreted the 1946 revision as correcting this situation. *Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964), held that the intent of the revised statute was to limit a plaintiff's damages to "compensation for the pecuniary loss [the patent owner] has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts." *Id.* at 507. According to the Court, the statutory reference to compensatory damages means that damages are limited to "the difference between [the patent owner's] pecuniary condition after the infringement, and what his condition would have been if the infringement had not occurred." *Id.* In other words, "[h]ad the infringer not infringed, what would [the] Patent Holder . . . have made?" *Id.*



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LOST PROFITS

The Patent Statute is also abundantly clear as to how compensation is to be calculated. Compensatory damages have consistently been interpreted by the United States Court of Appeals for the Federal Circuit (the "Federal Circuit")[4] to mean "lost profits," with a reasonable royalty acting as the floor for damages when lost profits cannot be proven. Accordingly, plaintiffs will typically seek lost profits when possible, and attempt to calculate a reasonable royalty only when insufficient information is available to prove lost profits, or when the requirements of such proof cannot be satisfied.

Proof of lost profits requires that the patent owner demonstrate that, absent infringement, he would have made the sales that the infringer actually made. The standards for such proof have changed measurably in the last fifteen years. Before the establishment of the Federal Circuit, the burden of proof to establish lost profits was substantial. Any possibility that someone other than the patent owner could have made any sales of the infringer completely negated a recovery of lost profits. *See Tektronix, Inc. v. United States,* 552 F.2d 343, 349 (Ct. Cl. 1977) ("if lost profits are ever to be awarded . . . it should be only after the strictest proof that the patentee would actually have earned and retained those sums in its sales"). In contrast, the Federal Circuit has adopted a lower standard of "reasonable probability." Under that standard, the patent owner must show only that it is more probable than not that he would have made the infringer's sales.

While the Federal Circuit has made it clear that there is no single method by which the patent owner must carry its burden of proving lost profits, by far the most common approach is the four-part test out-

lined in *Panduit Corp.v. Stahlin Brothers Fibre Works, Inc.,* 575 F.2d 1152 (6th Cir. 1978). The *Panduit* test requires that the plaintiff establish (1) the existence of demand for the patented product, (2) the absence of acceptable noninfringing substitutes, (3) the patent owner's ability to meet demand, and (4) some proof of the amount of profit lost per lost sale. *Id.* at 1156. Satisfying these four factors results in the establishment of the fact that, absent infringement, the patent owner would have made the infringer's sales.

The first prong of the *Panduit* test is rarely difficult for the plaintiff to meet. In fact, it is nonsensical. After all, if there were no demand for the patented product, there would be no infringement either. Likewise, the fourth factor may require little more than the production of the plaintiff's income statement. It is not surprising, then, that the key inquiries involved in proving lost profits are the absence of acceptable noninfringing substitutes and the patent owner's ability to produce, market and sell to the infringer's customers. Both of these questions are well-suited for economic analysis, and the Federal Circuit has increasingly incorporated economic analysis when addressing these issues.

Initially, the Federal Circuit required proof that noninfringing substitutes did not possess *all* of the attributes of the patented product. *See e.g., TWM Manufacturing Co., Inc. v. Dura Corp.,* 789 F.2d 895, 901 (Fed Cir. 1986) ("a product lacking the advantages of the patented [product] can hardly be termed a substitute acceptable to the consumer who wants those advantages"). Such a test cannot withstand even cursory scrutiny, however, because substitutes that possess literally *all* of the attributes of the patented product would be infringing, not "noninfringing." Accordingly, the effect of this early Federal Circuit doctrine was to assure that patent owners virtually automatically met the critical second prong of the *Panduit* test.

The logical defect in this first approach led the Federal Circuit to focus on the attitudes of consumers toward the patented product and any substitutes, rather than on their physical attributes. While this change of focus marked an improvement, the Federal Circuit also held that acceptable noninfringing substitutes are legally absent when some set of customers can be shown to prefer the patented product. *See Standard Havens Products, Inc. v. Gencor Industries, Inc.,* 953 F.2d 1360, 1373 (Fed. Cir. 1991) ("if purchasers are motivated to purchase because of particular features available only from the patented product, products without such features - even if otherwise competing in the market place - would not be acceptable noninfringing substitutes"). The difficulty with this approach is that, if consumer tastes are not uniform, some subset of consumers will always prefer the patented product. As a consequence, this second approach also negated any serious analysis and assured that the patent owner could satisfy the second *Panduit* prong.

"It is not surprising, then, that the key inquiries involved in proving lost profits are the absence of acceptable noninfringing substitutes and the patent owner's ability to produce, market and sell to the infringer's customers."

Federal Circuit case law has now advanced significantly. In *State Industries, Inc. v. Mor-Flo Industries, Inc.,* 883 F.2d 1573 (Fed. Cir. 1989), the Federal Circuit held that lost profits are available to the patent owner only for the *share* of the infringing sales that would have gone to the patent owner absent the infringement. The Federal Circuit has thus finally dispensed with the rigid all or nothing approach of *Panduit.* Under this new procedure, a court can award lost profits to the patent owner on the portion of the infringer's sales that are equal to the patent owner's market share. This approach, though a substantial improvement, is still not without its problems, however. The *Mor-Flo* approach is economically correct only for cases in which the products at issue are "homogenous", that is, where the products lack significant brand name recognition or significant physical or quality differences. However, in cases where products are heterogenous, the *Mor-Flo* market share approach may still lead to erroneous conclusions.

Consider the following example of infringement in the carbonated soda industry where products are heterogenous. Suppose it were found that Pepsi had been infringing on the patented formula used by Coca-Cola (in reality the formula is a trade secret). Assume further that the relevant market is defined as branded soda in the United States and includes the sales of 7-Up, Dr. Pepper, several root beer brands and a few other products sold nationally[5]. Moreover, for purposes of illustration, assume that in this market, Coca-Cola's market share is 30% and Pepsi's is 20%. Using the Federal Circuit's current analysis, Coca-Cola would be entitled to lost profits on 30% of Pepsi's sales. The lost profits calculation would take Coca-Cola's profit margin and multiply it by 30% of Pepsi's sales.[6] The theory is that if Pepsi had not infringed its customers would have switched to other branded soda products in proportion to their market shares. But this assumption is clearly erroneous. If Pepsi had not infringed, Coca-Cola would have more likely garnered more than 30% of the Pepsi sales. This is because Coke and Pepsi are very close substitutes while the other branded sodas are more distant substitutes. Consumers who purchased Pepsi are likely to have preferred another cola product like Coca-Cola to products like 7-Up, Dr. Pepper or root beer. The problem being illustrated is that the market share approach treats all competing products in the market as equals, even when clearly this is not the case.

In *BIC Leisure Products, Inc. v. Windsurfing Intern, Inc.,* 1 F.3d 1214, 1218 (Fed. Cir. 1993), the Federal Circuit recognized the importance of product differentiation to the lost profits analysis. In that case, the patent owner sold a high-end, high-priced wind surfing board, while the alleged infringer sold a similar but lower priced, low-end board. The Federal Circuit reached beyond the standard market share approach to lost profits and held that the two products at issue, while arguably part of the same product market, were sufficiently differentiated that the patent owner would probably have sold to very few of the infringer's customers. This was the court's conclusion despite the fact that the patent owner had a significant overall market share. *BIC Leisure* thus represents a clear advance in economic thinking for the Federal Circuit.

In order to be entitled to lost profits damages, the patent owner must also demonstrate that he possesses the marketing and manufacturing capability to make

the infringer's sales. The reason is that, even if it can be shown that demand would have gone to the patent owner absent the infringement, the patent owner must still show that it could have met the additional demand.[7] While in the past the ability to make the infringer's sales was considered solely from the point of view of manufacturing capacity, courts today inquire whether the patent owner has the ability to market and service the infringer's customers as well. *See Polaroid Corp. v. Eastman Kodak Co.,* 16 U.S.P.Q. 2d 1481 (D. Mass. 1990). This is important because, as any businessman knows, the ability to procure sales requires much more than merely producing the product. The ability to distribute, market and service a product is equally as important as the manufacturing capacity to produce it. In sum, the Federal Circuit's analysis of the *Panduit* factors has evidenced a willingness and increasing ability to apply economic analysis in the calculation of the patent owner's lost sales.

PRICE EROSION

Lost profits include not only the loss of sales due to infringement but also the price reduction that results from the unlawful competition from the infringer. This reduction in price, or "price erosion," is now a recognized part of the lost profits damage measure. According to the Federal Circuit, "lost profits may be in the form of diverted sales, *eroded prices,* or increased expenses. The patent owner must establish a causation between his lost profits and the infringement. A factual basis for the causation is that 'but for' the infringement, the patent owner would have made the sales that the infringer made, charged higher prices, or incurred lower expenses." *See LAM,Inc. v. Johns-Manville Corp.,* 718 F.2d 1056, 1065 (Fed. Cir. 1983) (emphasis added).[8]

The earliest case to establish a price erosion element of lost profits was *Yale Lock Manufacturing Co. v. Sargent,* 117 U.S. 536, 548 (1886). In *Yale Lock,* the Supreme Court found that the infringer was selling locks that included the infringing device at a lower price than the patent owner. As a result, the patent owner was forced to lower his price by $1 on some types of locks and $2 on other types of locks. The Court awarded, as part of the patent owner's lost profits, the erosion of the patent owner's lock price multiplied by the sales on which the lower price had been applied. But *Yale Lock* failed to consider the impact that the hypothetical price increase might have on output or sales. As some later courts have recognized, it is not consistent for the patent owner to claim that "but for" the infringement prices would have been higher, while at the same time contend that total sales would have remained unchanged.[9]

"This reduction in price, or "price erosion," is now a recognized part of the lost profits damage measure."

Economic principles teach that there is a direct relationship between the price level and the level of output or sales.[10] Some courts have recognized this connection. For example, in the seminal case of *Panduit Corp. v. Stahlin Bros. Fibre Works,* 575 F.2d 1152, 1157 (6th Cir. 1978), Judge Markey held for the purposes of calculating lost profits that demand was sufficiently elastic that "any loss in Panduit's profits due to the price reduction was more than compensated by the gain in profits due to the increase in plaintiff's sales volume because of the price reduction." Id. at 1157. Similarly, in *Polaroid Corp. v. Eastman Kodak Co.,* 16 U.S.P.Q. 2d 1481 (D. Mass. 1990), the Massachusetts District Court concluded that no lost profits from price erosion were justified because "the higher prices Polaroid says it would have charged would have depressed demand so substantially that the strategy they historically pursued is actually the more profitable one." *Id.* at 1506. Put differently, the court found that price elasticity was already too high to justify an award based on price erosion.

Despite the apparent simplicity of this principle, the majority of courts that have awarded damages for price erosion have done so *without* adjusting the level of output on which lost profits are calculated. The case of *Micro Motion, Inc. v. Exac Corp.,* 761 F. Supp. 1420 (N.D. Cal. 1991), is illustrative. The case involved Exac's infringement of Micro Motion's patent for flow meters. Before Exac entered the market, Micro Motion was the only supplier of the flow meters at issue. Micro Motion

claimed patent damages in the form of lost profits on Exac's sales for which Micro Motion had the capacity to produce, and a reasonable royalty on the remainder of Exac's sales. But Micro Motion also claimed that, but for the infringement, its prices on its sales would have been higher. It called Professor Daniel Rubinfeld, a nationally recognized economist, who testified that absent infringement Micro Motion's prices would have been 4% higher, and as a result total output would have been 1% lower (thus, elasticity was .25). Citing to this testimony, the court awarded the plaintiff an additional 4% of sales on the lost profits portion of Exac's sales, but surprisingly did not reduce the size of the total output base consistent with Professor Rubinfeld's analysis. The court was clearly in error. Either output should have been reduced based on the theorized price, increase as plaintiffs' expert conceded, or the court should have refused to grant damages for price erosion all together on the theory that, if Micro Motion would have licensed Exac (the basis for the reasonable royalty award), Exac would have competed with Micro Motion for all sales (since it had a license), eliminating any ability of Micro Motion to raise price.

THE ENTIRE MARKET RULE

Another issue often raised in patent infringement cases is what product sales are eligible for compensation to the patent owner — that is, can the sale of products not covered by the patent in suit be a basis for lost profits? The contours of the proper legal and economic limitations to recovery on the sales of non-patented items raises serious legal and constitutional issues. Only a brief outline of the pertinent rules is provided here.[11] The Federal Circuit recently addressed this issue in *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 35 U.S.P.Q. 2d 1065, 1071 (Fed. Cir. 1995). There, the Federal Circuit held that lost profits on non-patented components or complementary products sold with the patented product must satisfy the so-called "entire market rule" to be compensable. The entire market rules requires that, in order to be recoverable, the "unpatented components must function together with

the patented components in some manner so as to produce a desired end product or result. All the components together must be analogous to components of a single assembly or be parts of a complete machine, or they must constitute a functional unit." *Id.* at 1071. Thus, the sale of products that are complementary to a patented product (i.e., convoyed sales) but not functionally integrated, are not compensable.[12] The court reasoned that the Patent Statute sought to compensate only competitive injury, and products sold with the patented product do not necessarily compete directly with the infringer.

While this reasoning narrows the lost profits recovery by eliminating awards for convoyed sales, it expands potential recoveries for lost sales on products not covered by the patent in suit, but which nonetheless compete with the infringer's products. To illustrate such a situation, suppose that the patent owner sells two products, A & B. Assume further that the infringer infringes the patent covering product A, but sells its product in competition with product B. According to *Rite-Hite,* the patent owner can recover for lost profits on its lost sales of product B, even though product B does not use the patented technology.

The *Rite-Hite* holding is likely to raise future controversy.[13] The foundation of the *Rite-Hite* rule lies in the court's definitions of "competition" and "functional integration." Both concepts are defined narrowly by the Federal Circuit. Functional integration is defined in physical rather than economic terms, focusing on how products physically relate to each other in use, rather than the efficiencies or inefficiencies from complementarity. Likewise, competition is limited to a direct product by product confrontation and does not consider broader strategic rivalry among firms. Economic analysis can be useful in unpacking the logic of the *Rite-Hite* holding as these issues are revisited in the future.

REASONABLE ROYALTY

One of the most confusing areas of patent damage law is the calculation of a reasonable royalty. In my view, application of three economic principles is critical to maintaining even minimal consistency in calculating a reasonable royalty. The three bedrock economic principles are: (i) there must be gains from voluntary trade; (ii) measures of cost must include "opportunity cost"; and (iii) distribution of the gains from trade are indeterminate.[14] As discussed below, strict adherence to these three basic economic principles is necessary to arrive at any defensible reasonable royalty calculation.

Absent an "established royalty,"[15] the Federal Circuit requires that a reasonable royalty be determined as the "hypothetical results of hypothetical negotiations between the patentee and the infringer (both hypothetically willing) at the time infringement began." *Mahurkar v. C.R. Bard, Inc.,* 79 F.3d 1572, 1579 (Fed. Cir. 1996). In other words, the Federal Circuit test asks what royalty would have resulted from a voluntary negotiation between the patent owner and the infringer prior to the onset of the infringement. This test is called the willing licensor/willing licensee test.[16]

"Economic theory can be a powerful tool in the calculation of patent infringement damages."

In applying the willing licensor/willing licensee test, it must be assumed that there are mutual gains from voluntary trade, that is, that both the licensor and the licensee will be better off if a license is granted. If this were not the case, no trade between the parties would occur. To see why, suppose that the patent owner is the low cost producer over the entire range of output. In this case, the patent owner can make more profits by producing the product entirely himself than he could by licensing over any range of output, and thus he will have no incentive to license the infringer. The willing licensor/willing licensee test requires us to assume away this case and presume that a license will benefit both the patent owner and the licensee.[17]

But how should the magnitude of the mutual gains be measured? The mutual gains, or the "profitability pie," is the net profit that the licensee can gain from the license. To calculate the "profitability pie", or any measure of net benefit, requires that we use the second economic principle described above—that cost must include the infringer's opportunity cost. Opportunity cost means the benefits that could have been derived from the licensee's next best opportunity. To illustrate, ask yourself what is the maximum amount that a willing licensee would pay for use of a technology. The answer is an amount equal to the additional profits that would accrue to the infringer from using the technology. These profits are equal to the profits that the licensee expects to receive from using the new technology *net of* the profits that it could obtain by utilizing the next best alternative technology available.

It would be a fundamental error to consider the licensee's potential gains to be the actual accounting profits. Yet, this is precisely what many courts do in calculating patent damages.[18] An example will illustrate. Suppose that a licensee can make $5000 using technology A. But using this technology will cause infringement. In the alternative, the licensee can obtain only $4000 from using an available noninfringing technology. In these circumstances, the licensee will be willing to pay no more than $1000 for a license to use A, even though on its income statement the licensee will report $5000 in profit. Notice that if the licensee were forced to pay more than $1000 for a license, he will be better off simply using technology B. As a result, he can be expected to pay no more than $1,000 for a license. While many courts are inconsistent on this point, several have recognized that taking account of opportunity cost is the only correct method.[19]

The most difficult issue in calculating a reasonable royalty involves how to divide the gains or the profitability pie between the patent owner (his reasonable royalty) and the licensee (his profit). The division will be the result of the patent owner/licensee bargaining process. It has been traditional in economics to suggest that the outcomes of bargaining are essentially indeterminate.[20] One possible method for dealing with this problem is to make assumptions about the characteristics of the bargaining process in order to narrow the range of indeterminacy.[21] A second approach taken by some licensing attorneys is to rely on a rule of thumb that distributes 25-33% of the profitability pie to the patent owner.[22] A third approach is to evaluate the relative bargaining strengths of the parties using the famous 14 factors set forth in *Georgia-Pacific Corp. v. U.S. Plywood Corp.,* 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified on other grounds,* 446 F.2d 295 (2d Cir. 1971), *cert.*

denied, 404 U.S. 870 (1971).[23] While the *Georgia-Pacific* factors can be useful for determining the portion of the potential gains that should be awarded to the patent owner as the reasonable royalty, they cannot be used to calculate a reasonable royalty directly as some experts attempt to do. Such an application of the *Georgia-Pacific* factors becomes simply an arbitrary exercise at best, or more often, an example of result-oriented reasoning.

THE FUTURE, A "UNIFIED" APPROACH?

At bottom, calculating economic compensation requires a determination of what the patent owner's income would have been absent the infringement. If there had been no infringement, the patent holder may have produced and sold the product itself, or it may have licensed another producer or seller either exclusively or non-exclusively. If it *would have produced the product* "but for" the infringement, then lost profits are the appropriate approach to compensation. If the patent owner *would have licensed the patent* "but for" the infringement, then the best damage measure is the lost "reasonable" royalty.

The problem is that the most likely optimal strategy for the patent owner, absent the infringement, may have involved both production and licensing. The patent owner is likely to be the lowest cost producer only over some range of output, while others may be more efficient in producing additional units of output or selling in other markets. Under such circumstances, the patent owner has an incentive to produce over a limited range of output and then license any further production. This is because the licensee can produce more cheaply, and, therefore, can sell the patented item more profitably than can the patent owner over these additional units of output. The licensee's costs, however, must include the royalty charged by the patent owner. As a result, the division of output between the patent owner and the licensee is functionally related to the size of the royalty. The patent owner's price is also related to the level of output it can sell. Thus, for the patent owner, the decision of what range of output to produce, what price to charge and what royalty to offer is really a single interrelated decision.

The optimal combination of production and licensing, as well as the optimal royalty rate and price level will depend on (i) the nature of competition, (ii) the number and characteristics of the competitors, (iii) the cost structure (economics of scale) of the patent owner and the potential licensees, and (iv) the extent to which license fees are "passed on" in final product prices. These factors are uniquely suited to economic analysis. Economic theory can be used to model such a situation and simultaneously compute an estimate of the size of lost profits and the optimal (or reasonable) royalty. This "unified theory" of patent damages, though not yet adopted in any reported decisions, is likely to be on the horizon.[24]

CONCLUSION

Economic theory can be a powerful tool in the calculation of patent infringement damages. The patent damage problem requires that the analyst study what the economic world would look like if the infringer were removed from the market. Economic analysis is well-suited to address this issue, whether considered globally or within a circumscribed analysis of lost profits, price erosion or a reasonable royalty. As discussed above, the influence of economic thinking is becoming more and more evident in judicial decisions that address patent damages issues. This is likely to continue in the future as lawyers and judges recognize the potential impact that economics can bring to bear in this area of law.

[1]In my opinion, it is best to treat accountants and economists as complements rather than substitutes. Accountants, I believe, are better suited than economists for assisting in the fashioning of discovery requests and reviewing financial documents. Economists, on the other hand, are better equipped to assist in the development of an effective damage theory. I have experienced the benefits of this complementary relationship in working with Coopers & Lybrand in patent cases.

[2]The legislative history of the Patent Statute is discussed in *Kori Corp. v. Wilco Marsh Buggies & Draglines, Inc.,* 761 F.2d 649, 654 (Fed. Cir. 1985).

[3]See *Kori Corp.* 761 F.2d at 655.

[4]Pursuant to the Federal Courts Improvement Act of 1982, the Federal Circuit was created and given exclusive jurisdication over appeals in patent cases.

[5]This is how the Federal Trade Commission has defined the relevant market in this industry.

[6]Profit margin is calculated as sales less variable costs, with the total divided by sales.

[7]This third *Panduit* prong is connected to the second because the size of the patent owner's capacity impacts the number of non-infringing substitutes in the market. If the patent owner cannot meet demand, then the class of acceptable non-infringing substitutes must expand as consumers turn to other products to satisfy their needs. Despite their connection, the two issues can be treated separately.

[8]*See also General American Transp. Corp. v. Cryo-Trans, Inc.,* 893 F. Supp. 774, 796 (N.D. Ill. 1995) ("price erosion occurs when a plaintiff is forced to lower prices due to the presence in the market of the defendant's infringing product"); *Saf-Guard Products, Inc. v. Service Parts, Inc.,* 491 F. Supp. 996, 1002 (D. Ariz. 1980) ("Computation of the plaintiff's lost profits also requires determination as to the plaintiff's effective selling price. If the plaintiff's reduced selling prices are used in the computation of lost profits, the defendant would receive a substantial benefit as a result of its infringing competition with the plaintiff.")

[9]Courts have granted damages based on a price erosion theory on the basis of a variety of types of evidence. For example, in *TWM Mfg. Co., Inc. v. Dura Corp.,* 789 F.2d 895, 902 (Fed. Cir. 1986), the Federal Circuit upheld an award of damages based on price erosion because of proffered evidence that TWM "had to give special discounts to compete with Dura's pricing practices." *Id.* at 902. The court further dismissed defendant Dura's argument "that there was no correlation between the special discounts and its infringing activity." *Id.* Similarly, in *Brooktree Corp. v. Advanced Micro Devices, Inc.,* 977 F.2d 1555, 1579 (Fed. Cir. 1992), the Federal Circuit upheld an award of lost profits based on price erosion because of evidence presented by Brooktree that "it was forced to reduce its prices when AMD announced its chips at lower prices, and that but for the infringement, Brooktree would have continued to sell its chips at the prices that had already been established." *Id.* at 1579.

[10]This relationship is measured by the economist's concept of "elasticity." A product is said to be very elastic when consumers are willing to switch to a different good that is only slightly less expensive. Gasoline and groceries are common examples of elastic goods. This is demonstrated by the way gas stations display their prices in big signs at intersections and grocery stores always promise to give the lowest price in town. An inelastic good is one in which consumers are not willing to switch. Prescription medication is an example of an inelastic product; an AIDS patient is not likely to quit buying the prescribed medicine regardless of any price increases.

[11]Those readers interested in the deeper issues raised by the entire market rule should consult the complete set of opinions in *Rite-Hite Corp v. Kelley Co., Inc.,* 56 F.3d 1538 (Fed. Cir. 1995).

[12]Prior to *Rite-Hite* convoyed sales were compensable if they were normally sold with the patented product.

[13]For a discussion, *see* Lisa C. Childs, "*Rite Hite Corp. v.*

Kelley Co., The Federal Circuit Awards Damages for Harm Done to a Patent Not in Suit," 1996 Loy. U. Chi. L. Rev. 665.

[14]For a discussion of these principles, *see* Robert Cooter and Thomas Ulen, *Law and Economics* at 72-78 (1995).

[15]An established royalty is defined as the prevailing royalty in the industry as evidenced by a substantial number of prior licenses. To qualify as "established" such prior licenses must have the following characteristics:

1. They must be secured before the alleged infringement
2. They must be paid by a substantial number of industry participants
3. They must be in the same market involving the same technology
4. They cannot be secured under threat of litigation or settlement.

See Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1518 (Fed. Cir. 1984); *American Original Corp. v. Jenkins Food Corp.*, 774 F.2d 459, 462 (Fed Cir. 1985).

[16]There is an alternative approach to the willing licensor/willing licensee test called the "analytical method." The analytical approach takes the profits of the infringer, subtracts the infringer's normal profit and award the remainder to the patent owner. The approach in *Tektronix, Inc. v. United States*, 552 F.2d 343 (Ct. Cl. 1977), is typical. In that case the court calculated the reasonable royalty as follows: First, the court determined the infringer's sales, and subtracted both variable and fixed costs to arrive at gross profits. Next, the infringer's rate of profit on his other products was subtracted. Finally, the remainder was divided among the infringer and the patent owner in order to provide some return to the infringer for the risks of manufacturing the patented product.

[17]We are asked to make this assumption despite the knowledge that the parties themselves did not arrive at a mutually acceptable license agreement.

[18]*See e.g., Poloroid Corp. v. Eastman Kodak Co.*, 16 U.S.P.Q. 2d 1481 (D. Mass. 1990); *Fromson v. Western Litho Plate & Plate & Supply Co.*, 853 F.2d 1568, 1575 (Fed. Cir. 1988).

[19]*See, e.g., Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 194 F. 108, 110, 114, C.C.A. 186 (C.C.A. 1911); *Union Carbide Corp. v. Graver Tank & Mfg. Co.*, 345 F.2d 409, 411, 145 U.S.P.Q. 240 (7th Cir. 1965); *Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078, 219 U.S.P.Q. 679 (Fed. Cir. 1983); *Smith Intern., Inc. v. Hughes Tool Co.*, 1986 WL 4795, 299 U.S.P.Q. 81, 83 (C.D. Cal. 1986); *Ellipse Corp. v. Ford Motor Co.*, 461 F. Supp. 1354, 1369, 201 U.S.P.Q. 455 (N.D. Ill. 1978); and *Slimfold Mfg. Co., Inc., v. Kinkead Industries, Inc.* 932 F.2d 1453, 1458, 18 U.S.P.Q. 2d 1842 (Fed. Cir. 1991).

[20]*See* Paul Milgram and John Roberts, *Economics, Organization & Management* at 140 (1992).

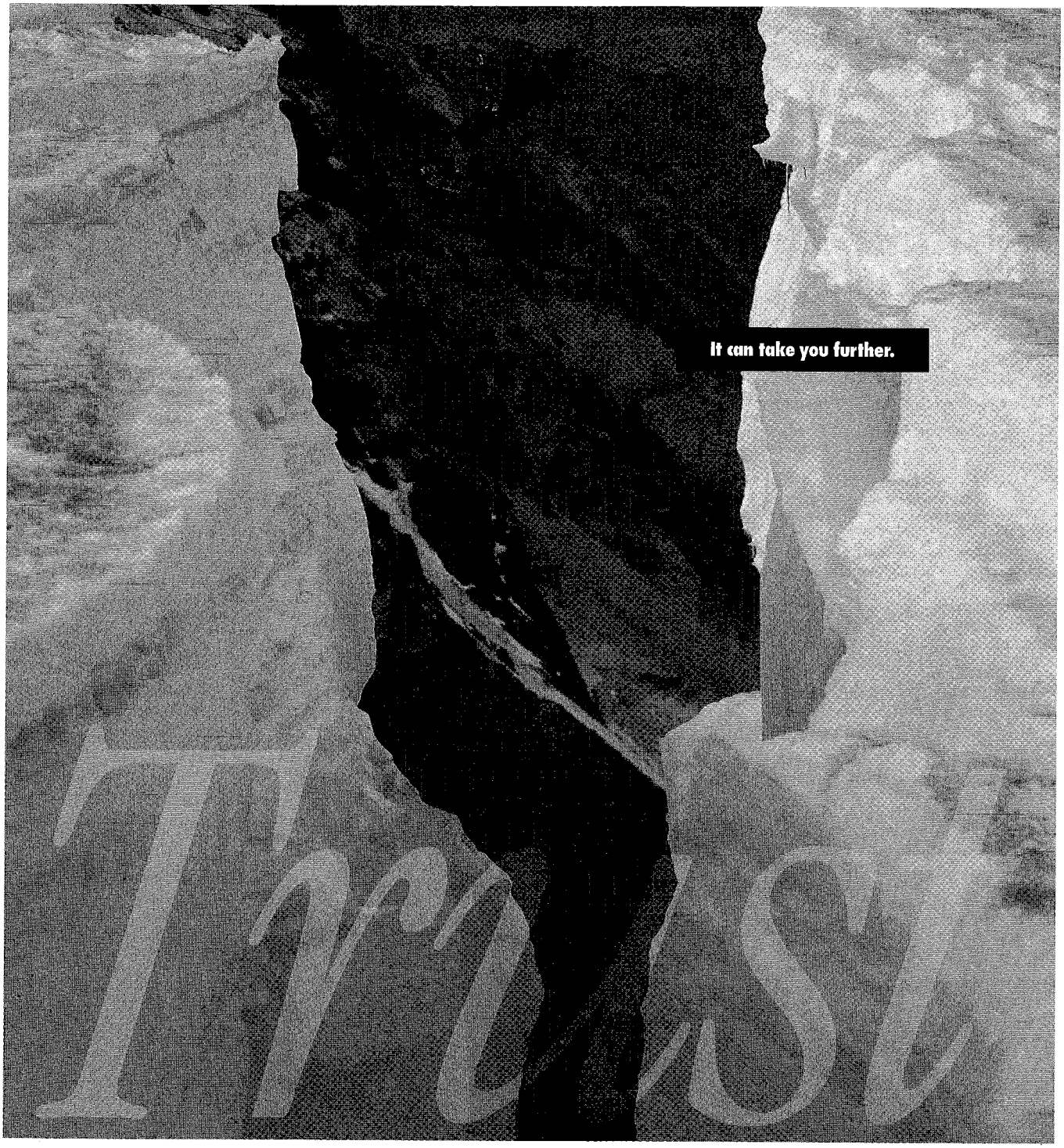
[21]For example, rather than try to recreate a hypothetical negotiation that has already been tried and abandoned, one might ask what would have been the outcome of such negotiations assuming full information. *See id.* ("informational asymmetrics can prevent any agreement from being reached, even when an agreement would be efficient under complete information").

[22]*See e.g.*, Robert Goldscheider, *The Licensing Law Handbook* (1993-94). Reference to this rule can be found in *Tektronix, Inc. v. U.S.*, 552 F.2d 343, 350 (Ct. Cl. 1977), *Paper Converting Machine Co. v. Magna-Graphics Corp.*, 745 F.2d 11, 22 (Fed. Cir. 1984); *Syntex Inc. v. Paragon Optical Inc.*, 7 U.S.P.Q. 2d 1001, 1027 (D. Ariz. 1987); and *Polaroid Corp. v. Eastman Kodak Co.*, 16 U.S.P.Q. 2d 1481, 1535 (D. Mass. 1990)

[23]The fourteen factors are:

1. The royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty.
2. The rates paid by the licensee for the use of other patents comparable to patent in suit.
3. The nature and scope of the license, as exclusive or non-exclusive; or as restricted or non-restricted in terms of territory or with respect to whom the manufactured product may be sold.
4. The licensor's established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention or by granting licenses under special conditions designed to preserve that monopoly.
5. The commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business; or whether they are inventor and promoter.
6. The effect of selling the patented specialty in promoting sales of other products of the licensee; the existing value of the invention to the licensor as a generator of sales of his non-patented item; and the extent of such derivative or convoyed sales.
7. The duration of the patent and the term of the license.
8. The established profitability of the product made under the patent; its commercial success; and its current popularity.
9. The utility and advantages of the patent property over alternative products or methods, if any, that had or could have been used to obtain similar results.
10. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by the licensor; and the benefits to those who have used the invention.
11. The extent to which the infringer has made use of the invention; and any evidence probative of the value of the use.
12. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.
13. The portion of the realizable profits that should be credited to the invention as distinguished from non-patented elements, services provided in conjunction with the product, the manufacturing process, business risks, or significant features or improvements added by the infringer.
14. The opinion testimony of qualified experts.

[24]The problem of an optimal license fee is similar to the problem faced by a vertically integrated firm deciding whether, and at what price, to sell upstream inputs to its downstream competitors. *See* Duncan Cameron and David Reiffen, "Merger Analysis With Captive Capacity: A Suggested Approach," 17 Res. in Law & Econ. 127 (1995). Therefore, economic models already exist to perform the analysis necessary to implement the unified theory. In my opinion, it is only a matter of time before judicial decisions will catch up with available analytical techniques.



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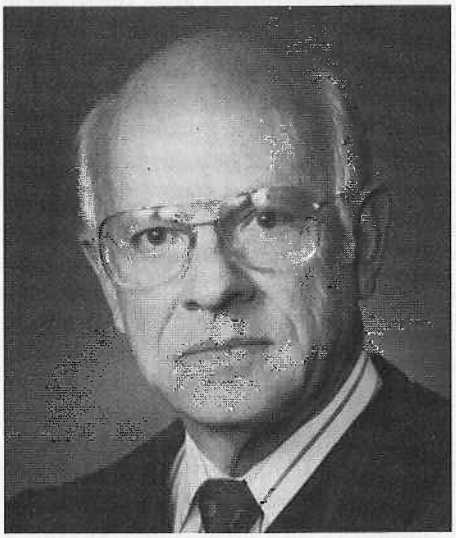
Tenth Anniversary of the Utah Court of Appeals

By Judge Norman H. Jackson

I. INTRODUCTION

In case you haven't been keeping track, the Utah Court of Appeals recently noted its tenth anniversary.[1] An entire decade has passed since we set out on this venture to start up the new court. Before our debut, Utahns had seen only one major change in their appellate court system since territorial days—in 1918, the three-justice supreme court was enlarged to its present membership of five justices. By the 1980s, Utah's burgeoning population, urbanization, commerce and crime overwhelmed the supreme court with appeals. Many cases took four or five years to process. Some litigants were being told their cases would not be calendared for seven years. A task force was empaneled to study the problem. In 1985, the task force recommended that Utah add a seven-judge court of appeals to its appellate system. The legislature approved this proposal and the judicial selection process began.

As with any new venture, involvement as a judge was not without some risks. For example, suppose someone proposed that you become a member of a new seven-person law firm. Suppose one condition would be that a third party (in this case, the Governor) select all the members, even complete strangers. Those selected would be required to work together and succeed or fail together. These were some of the risks facing the original judges of the Utah Court of Appeals. Now, looking back at the last decade and what has been wrought by the judges selected, it seems like a splendid odyssey. Thus, in attempting to recall what we have experienced, I feel the concern expressed by Joseph Conrad that "in plucking the fruit of memory one runs the risk of spoiling its bloom."[2] Even so, in this article I plunge forth, intending not only to recount historical facts, but to view Utah's appellate system as a living organism, considering its past, present and future.



JUDGE NORMAN H. JACKSON was appointed to the Utah Court of Appeals in 1987 by Gov. Norman H. Bangerter. He graduated from the University of Utah School of Law and was a practicing attorney for twenty-five years. He has Masters and Bachelors Degrees in Economics from BYU.

Formerly, he served on the Utah State Bar Commission, Utah Legal Services Board, J. Reuben Clark School of Law Board of Visitors, Utah Bar Foundation Board of Trustees, and the Utah Air Travel Commission. Presently, he serves on the Board of Appellate Judges, the Judiciary's Alternative Dispute Resolution Committee and the Utah Information Technology Commission.

II. PERSONNEL

To launch our second decade, Presiding Judge James Z. Davis is at the helm, with the assistance of Associate Presiding Judge Michael J. Wilkins. Judge Gregory K. Orme kept us on a steady course the past two years as Presiding Judge. He succeeded Judge Judith M. Billings. She succeeded Judge Russell W. Bench who presided over this court at the time of the Fifth Anniversary article.

Ten judges have served on the court: Russell W. Bench, 1987-present; Judith M. Billings, 1987-present; Richard C. Davidson, 1987-1990; James Z. Davis, 1993-present; Regnal W. Garff, 1987-1993; Pamela T. Greenwood, 1987-present; Norman H. Jackson, 1987-present; Gregory K. Orme, 1987-present; Leonard H. Russon,[3] 1990-1994; and Michael J. Wilkins, 1994-present. All the current judges, except Judge Wilkins, stood for retention election in 1996 and were retained for a six-year term beginning January 6, 1997.

Because five of the founding judges continue to serve, it would be correct to assume that we enjoy our work and enjoy working together. The work of the court is shared equally as judges rotate on and off thirty-five different configurations of oral argument panels, the law and motion panel, the per curiam panel, and case-screening duties. Along with our shared institutional history, we and staff members have a shared personal experience of births, deaths, marriages, and other notable lifetime events.

The judges on the court form a cosmopolitan group who maintain close contact with the public in many areas of the state. For instance, at this writing, the seven judges are residents of six different Utah counties, four Utah judicial districts, and all three congressional districts. Also, three or four times a year, panels go on circuit to different judicial districts. We have heard cases in Logan, Monticello, St. George, and Vernal, and in many cities in between. Hopefully, our ongoing interaction with Utah's citizenry has dispelled the possible perception that we are isolated judges occupying ivory towers.

Further, the judges of this court have continued their support of and involvement in the legal profession. Besides service in the judiciary, judges are involved in the Utah State Bar, American Inns of Court, American Bar Association, American Judicature Society, and related organizations

and associations. We have been willing to go the second mile to advance the administration of justice and other worthwhile law-related projects and programs.

In 1990, the court operated for six months with only six judges. This happened when there were unexpected delays in filling a vacancy on the court. To deal with the consequent additional work, each remaining judge simply took up some of the slack. In 1995, Judge Greenwood served as interim Utah Court Administrator for nine months when that post became vacant. At that time, Senior Judge Garff stepped in to help with our caseload by assuming a portion of Judge Greenwood's cases. Their efforts and cooperation helped both the court and the administrative office to keep operations on an even keel.

Over the past ten years, we have been capably served by three clerks of the court: Tim Shea, 1987-1988; Mary Noonan, 1988-1994; and Marilyn "Matty" M. Branch, 1994-present. On January 1, 1997, Matty began serving us and the supreme court in the recently created position of Appellate Court Administrator. She has a key assignment as the two courts collocate at the new Scott M. Matheson Courthouse in downtown Salt Lake City and merge some operational and administrative functions early in 1998.

Our staff attorneys also appear to enjoy the working environment at the court. Karen Thompson has been on board since our inception. Karin S. Hobbs began at the court as a law clerk, also at the outset, and returned to her staff attorney position after a brief hiatus with the Division of Child and Family Services. Julia C. Attwood has been with us since 1992, and Michelle Mattsson joined our team in 1995. Deputy clerks Janice Ray and Julia D'Alesandro also provided support from the outset until last year. Kathy Vass has served as a legal secretary since August 1987, with a short break at the Salt Lake County Attorney Office.

The stability of judges and staff has added much to our increased productivity. The installation of computers at all work stations and the addition of a second law clerk in each chambers in 1992 have also been highly beneficial. Further, productivity has been enhanced by increasing the use of unpublished memorandum decisions and summary dispositions, and by reducing the number of cases scheduled for oral argument. During the 1990-1994 period, the court increased dispositions by 25.8%.

III. 1994 TASK FORCE RECOMMENDATIONS

In 1994, a blue-ribbon task force led by attorney Alan L. Sullivan was empaneled to study appellate court operations and recommend ways of dealing with an escalating number of appeals. Chief Justice Michael D. Zimmerman indicated that the supreme court had placed a cap on the number of its personnel and the number of justice-authored opinions. He advised the task force that the court of appeals was designed to be expandable and to absorb the elevated appellate caseload. The task force study was thus devoted to identifying means by which the court of appeals could handle the remaining appellate work and avoid building a backlog of cases.

"By the 1980s, Utah's burgeoning population, urbanization, commerce and crime overwhelmed the supreme court with appeals."

The task force issued its final report on August 17, 1994 and made the following recommendations to increase the court's post-briefing dispositions: (1) adopt procedural means to boost the number of cases decided by the court; (2) add one central staff attorney and two clerical staff by July 1, 1995; (3) institute a three-year pilot program of settlement/mediation conferences; (4) add one judge and two law clerks by January 1, 1996; and (5) possibly add one more judge and two law clerks by January 1, 1998.

In 1995, this court began implementing the task force's recommendations. First, we started screening cases more carefully to evaluate which would actually benefit from oral argument and published opinions. Second, we added a staff attorney. Third, we began planning to implement a settlement/mediation process to be patterned after the successful settlement/mediation conferences used by the Tenth Circuit. There, a two-person settlement staff has been disposing of as many cases as a judge's chambers at half the cost. More important, however, is the resolution of disputes by parties fashioning their own "win-win" remedy rather than accepting a court-imposed "you win-you lose" outcome. Our proposed settlement operation received wholehearted support from the 1996 Utah State Legislature. However, funding failed at the eleventh hour. Even so, we continue to pursue the development of settlement conferences as part of our case disposition process. To avoid conflicts, the settlement staff will be independent, reporting only periodically to the presiding judge.

For the present, the above measures seem adequate for managing our current caseload. Thus, additional judges are not needed at this time. I believe we can postpone the task force's proposal of adding other judges by introducing up to three more staff attorneys. With the addition of three staff attorneys, the staff attorneys would total seven, and would create a one-to-one ratio with the judges. By adding more than three staff attorneys, we would likely reach the point of diminishing returns. A point of diminishing returns can also be reached with judges. As I pointed out in my prior article, simply increasing the number of judges on intermediate courts of appeals is not necessarily a panacea for all appellate systems facing increasing caseloads. With the addition of more members, the dynamics of any small group organization can reach a point where it will break down from the sheer weight of numbers, the loss of collegiality, and the inability to enhance productivity while accommodating more divergent personalities. Accordingly, I favor adding judges as a last resort, only after all other feasible means have been tried and tested.

IV. APPELLATE SYSTEM STATISTICAL ANALYSIS

A. Case Disposition Time and Backlog Status

Presently, the court of appeals' caseload is "current." While a small number of cases is always under advisement or awaiting argument on our calendar at any time, we have no backlog of cases awaiting disposition by judge-authored opinion or memorandum decision. As soon as appellate counsel have completed their briefing, the appeals are calendared for final action within a few weeks. In 1996, 192 days passed between notice of appeal and end of briefing, compared to 265 days in 1994. In

1996, 158 days passed from end of briefing to issuance of decision or opinion, compared to 330 days in 1994. The total age of all cases in 1996 was 350 days, compared to 536 days in 1994. These processing periods show the usefulness and productivity of the reforms initiated by the court based on the task force recommendations. In short, as the court of appeals enters its second decade, appeals are being processed, beginning to end, in less than one year.

B. Petitions for Writs of Certiorari

Over the last five years, the court of appeals has been averaging 828 dispositions per year. Petitions for writs of certiorari have averaged 107 annually. The supreme court has on average denied 85 petitions and granted 19 petitions each year. Petitions which have been granted have resulted in an average of 4.6 reversals per year. In 1996, there were no reversals. An appellate practitioner could analyze these statistics as follows: When filing a petition for writ of certiorari your odds of obtaining a grant are less than one in five. Assuming you make that cut, your odds of obtaining a reversal are less than one in four. A view of the gross numbers reveals that of 828 court of appeals dispositions per year, less than five will obtain a different result on supreme court review.

V. THE DEVELOPING APPELLATE BENCH, BAR AND LAW

The number of appeals filed at both appellate courts has plateaued recently. Total filings at the court of appeals peaked at 878 in 1992. Filings have averaged 823 over the last four years. Meanwhile, supreme court filings peaked at 634 in 1993.[4] They have averaged 579 over the last three years. This has temporarily helped us manage our caseload.

It is impossible to identify the specific reasons for the filings plateau, particularly in light of the increasing caseloads in the trial courts. Perhaps one significant reason is that more attorneys and their clients are becoming more sophisticated about the appellate process. Practitioners may have recognized and are explaining to clients the substantial distinction between "harmless" error and "reversible" or "prejudicial" error at the trial court. When this distinction is noted, fewer unwarranted appeals will be undertaken.

Further, it is also possible that our appellate system has become more sophisticated. With the addition of the court of appeals, the supreme court has had to take a fresh look at how it operates and sets forth law, both as an appellate court and as the state's court of last resort. For example, in 1994, the supreme court recognized that it had "not focused much attention on the articulation of . . . standards [of appellate review] until recently, when they assumed an increased level of importance." *State v. Pena,* 869 P.2d 932, 935 (Utah 1994). The supreme court and this court have therefore placed more emphasis on specifically setting out and following standards of review.

"In short, as the court of appeals enters its second decade, appeals are being processed, beginning to end, in less than one year."

The appellate rules likewise now require appellant's counsel to state the standard of appellate review for each issue. Utah R. App. P. 24(a)(5). The rules also require appellant's counsel to specify where in the record the issue they desire to raise was preserved for appeal. *Id.* As the bench and bar become more focused on standards of review and the requirement that issues be preserved, more attorneys may evaluate cases for appeal with a sharper eye, leading to fewer unmeritorious appeals being filed. Attention to these appellate details may account, in part, for a slower growth rate in appeals now being filed.

Moreover, with over eight thousand cases handled by the court of appeals in ten years, and with substantially more appellate opinions being issued in virtually every area of the law, Utah law has developed a higher degree of clarity and certainty. Our early years were marked by many significant first impression cases which focused on a vast array of questions. In recent years, however, the first-impression issues have become fewer and narrower, as various areas of the law are settled and refined. One obvious example is the area of family law. It appears to me that many tough issues are now largely settled, including child support and custody, property division, and retirement benefits.[5] Thus, as the law has been developed, with more issues having been considered and decided, less room for dispute exists in many areas of the law.

VI. CHANGES IN APPELLATE JURISDICTION

In 1987, Utah became the thirty-seventh state to create an intermediate appellate court. The label can be misleading because there are many different types of intermediate appellate courts—i.e., pure pour-over, pure certiorari, civil, criminal, administrative, and those with geographic divisions. I describe our appellate system as a hybrid that is always evolving as the two courts work together to achieve proper balance and better ways of managing the state's appellate caseload.

While the supreme court retains plenary responsibility for the "appellate process," Utah Const. art. VIII, § 4, Utah's appellate system is administered by the Board of Appellate Court Judges. The board consists of all members of the two courts. Board meetings enable the courts to coordinate and cooperate in operating, developing, and refining the system. This joint administration appears to be an excellent

organizational tool that is unique to Utah. The structure of appellate systems in many other states has unfortunately resulted in competition, lack of cooperation, and even dysfunction, to the detriment of the bench, bar and public.

At the time the court of appeals was created, the supreme court's prior jurisdiction was divided between the two courts. The supreme court initially retained original jurisdiction over cases involving district court civil decisions, first degree felonies, capital murders, the tax commission, the public service commission, the state engineer, and election disputes. The supreme court also had authority to transfer certain cases.

Meanwhile, the court of appeals was given original jurisdiction over circuit, juvenile, and district court domestic relations and criminal appeals (except for first degree felonies and capital murders). The court of appeals also received original jurisdiction over appeals from administrative agencies, except the public service commission, state engineer, and tax commission. Later, the supreme court's pour-over authority was augmented, allowing the court to transfer tax commission and first degree felony appeals.

In 1996, the consolidation of circuit courts into district courts was completed, sending appeals of many former circuit court cases directly to the supreme court rather than to the court of appeals. The supreme court is consequently now receiving, screening, and transferring cases that it would not have handled before. Trial court consolidation has thus skewed the appellate system, resulting in duplication of appellate effort concerning a class of appeals in which we had avoided duplication in the past.

VII. CONCLUSION: LOOKING TO THE FUTURE

Since the inception of the court of appeals, a number of ideas for improving the caseload balance within the appellate system have been discussed. As a result, the transfer authority of the supreme court has been enlarged. Also, the process for "certification" of cases to the supreme court from the court of appeals has been refined. In the future, former ideas may be revisited and new ideas will undoubtedly arise to deal with ongoing imbalances. As Utah enters its second century, the judiciary and its appellate system will need to keep pace. Collocation at the new Scott M. Matheson courthouse during 1998 will present new opportunities for the judiciary to move forward. Fine-tuning the appellate system would be an excellent pursuit as the court of appeals enters its second decade.

[1]For an account of the first five years of the Utah Court of Appeals, see Norman H. Jackson, *The Fifth Anniversary of the Utah Court of Appeals*, 5 Utah B.J. 18 (1992). I acknowledge the able assistance of my law clerks Lauri Gilliland and Tanya Cluff in preparing this article.

Further, I note that any expressions of hope or opinion herein are strictly my own.

[2]Joseph Conrad, *The Arrow of Gold* (1919).

[3]Judge Russon was appointed to the Utah Supreme Court in 1994 and, this, is now Justice Russon.

[4]When combining total filings at both courts one must adjust for cases transferred to the court of appeals by the supreme court to avoid duplication in the total number of cases filed. In 1996, the supreme court poured over 186 cases. 191 cases were transferred in 1995, and 189 in 1994.

[5]Alimony may be the only area lacking some degree of finality due to phrases such as "equalize the parties' respective standards of living" and "maintain . . . [the] standard of living enjoyed during the marriage" which linger in the law without precise definition. *See Gardner v. Gardner,* 748 P.2d 1076, 1081 (Utah 1988).

Characteristics of Successful Law Firms

By Ezra Tom Clark, Jr.

Hardly a week goes by without reports about partners or groups of partners abandoning their firm to join another or to start a new firm. Some lawyers justify their departures by citing disputes about compensation, lack of direction or vision, management conflicts, clashes regarding values and philosophies, and concerns about firm productivity and profitability. Of course, these may be a lawyer's ostensible reasons for bolting a firm, but the deeper reason, which should concern all attorneys who practice in a law firm, is the growing perception among successful lawyers that their firm provides little or no value to them. The problem can be stated simply: "How does a firm offer value in excess of the sum of its parts?" In other words, can a law firm as an institution, acquire a measure of value that is independent of the skills, talents and contributions of its partners?

This question can be answered only by analyzing the advantages that a law firm has over a sole practitioner or a group of lawyers who share only overhead. There are a number of possible answers, including the following:

- Shared skills and expertise
- Back-up or additional help when needed
- A "safety net" during economic cycles
- Shared resources, such as technology, library, forms, research and other work product
- Cross-selling and/or referral of work
- Expertise and access to others with different disciplines
- Use of highly trained associates, legal assistants and support staff
- A brand name or firm reputation that makes marketing easier
- More sophisticated and skilled management
- Opportunities for individual lawyers to become highly specialized
- Instill a system of partner coaching to bring out the best in each partner.
- Emotional support, encouragement and personal recognition
- Flexibility to allow lawyers to be more involved in pro bono, community and bar activities
- Continuation of existence beyond that of current owners

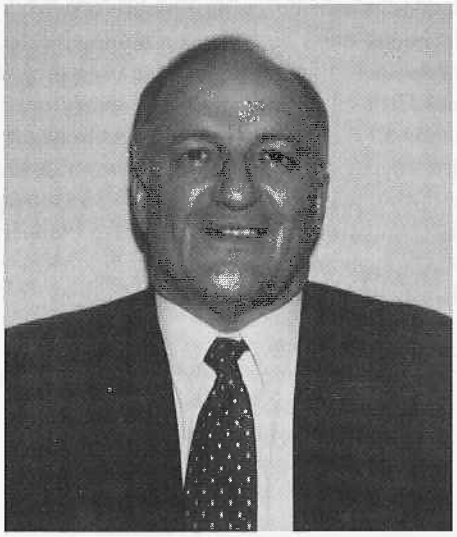
Few firms provide all of these advantages effectively. However, without the "firm" advantages that a partner believes are important, it is unlikely that he or she will stay with the firm.

Most successful and dynamic law firms have certain characteristics or hallmarks which distinguish them from their competitors. Some of these are listed below:

1. Competent, Hard Working, Focused Lawyers. A law firm cannot operate as a collection of practices that have no interaction with one another. When individual practices merely exist under the same roof, internal competition, hoarding of work, jealousy and suspicion develop. Successful law firms must have a focus or raison d'etre, and each lawyer should develop specialized expertise consist with the firm's mission. Focused law firms will have significant marketing advantages because they will know what they are marketing. They will also be able to use technology, personnel, value pricing more effectively and will be able to respond to changing economic and political considerations much better than firms which continue to have a general practice or full service mentality.

2. Commitment to Quality. Successful firms recognize that "quality work" has a dual meaning: technical quality (how good is the work?) and service quality (did the client have a positive experience dealing with the firm?). Unfortunately, quality work in most law firms is like the constitutional definition of obscenity, "you know it when you see it." This ad-hoc and subjective approach to quality legal work exists because no standards or evaluation procedures exist in most firms. Service quality, which clients are increasingly demanding, can be determined only by regular client and matter performance evaluations. Clients value lawyers and law firms who know how to communicate and are sensitive to their needs and concerns.

3. Collegiality and Esprit de Corps. Successful firms have a team attitude and spirit, including a willingness to share work and clients. Firms with this attribute are comprised of lawyers who care about and respect the persons for whom and with whom they work, trust their employees to



EZRA TOM CLARK, JR., is a former practicing attorney and managing attorney of a major Phoenix firm. He is President of E.T. Clark, Inc., a law firm management consulting firm located in Mesa, Arizona which assists firms in dealing with the issues raised in the article. He is a member of an ABA Law Practice Management Section Task Force which will be publishing three books on starting a law firm, keeping it together, and taking it apart when there is no other alternative. This article is one of the chapters of the first book, Getting Started: Basics for a Successful Law Firm. *Mr. Clark is also a member of the Utah Bar. The author can be reached at 602-890-1122.*

be smart and use initiative, and ask for genuine input regarding changes or challenges.

4. Loyalty. Fragmenting firms are plagued by declining allegiance and commitment to the firm and its lawyers and the failure to keep confidences and build relationships. Loyalty is strengthened when individuals are respected, trusted, involved in the process of making decisions that impact them, credit and decision making are shared, there is recognition for a job well-done, and where there are honest, fair and consistent relationships. Loyalty evaporates when secrecy, poor communication and pseudo caste systems exist among associates and partners or staff and lawyers. The symptoms of disloyalty and distrust typically are a lack of interest in the firm, reduced productivity, high turnover, poor attendance at firm meetings or activities, lack of cross-selling and a fear of expressing opinions because of possible retribution.

5. Leadership (more than a title). Most flagging law firms have poor or weak leadership. Effective leadership involves spending time to articulate firm goals and objectives and motivating partners and employees of the firm to embrace those goals and objectives. In addition, it requires example, consensus building, fairness, patience and good communication skills. Many firms have leaders, but lack of leadership. Leaders who exercise leadership must establish a sense of direction and maintain the firm's focus. Leaders must avoid the temptation to place themselves above others. Conversely, leaders must provide for succession and their own eventual replacement. Most important, effective leaders subordinate their own interests to those of the firm.

6. Accountability. Successful law firms encourage and demand responsibility for their members' positive and negative acts. A lack of accountability breeds apathy, sloth and frustration. Accountability is illusory until firm policies and standards have been defined and each partner and employee is willing to voluntary abide by them. In many firms, lawyers, particularly associates, simply do not understand what is expected. Successful firms have written partnership agreements, established, yet fair, criteria for partnership, and written policies and procedures.

7. Financial Generosity of Most Productive Lawyers. In many firms the most productive lawyers do not always receive all the financial rewards they have earned. The concept of a firm necessitates sharing with others. This attribute is frequently weak or missing in firms with an "eat what you kill" compensation system or one that primarily rewards individual performance and profitability.

8. Sense of Fairness or "Rough Justice." Successful firms realize that not all decisions can be made objectively. Many decisions must be based on subjective factors – including a rough sense of justice. A law firm cannot ensure that everyone is happy all the time. Disagreements in healthy firms occur. Most important, however, is that everyone feels that he or she is being treated fairly most of the time. Subjective compensation systems are essential components in firms with a "rough justice" philosophy.

"The concept of a firm necessitates sharing with others."

9. Willingness to Place the Interest of the Firm Ahead of Personal Interests. Selfishness and an unwillingness to compromise weaken and ultimately destroy law firms. Individuals must subordinate individual interests and personal aspirations for the good of the whole. Consensus legitimizes important decisions. However, consensus building can go too far and paralyze a firm. All decisions do not need unanimous consent or agreement. In too many firms, an individuals' willingness to place the good of the firm above more parochial interests is declining.

10. An Understanding of What the Firm is and Where it is Going. This is a serious weakness in many firms. There must be common goals and aspirations which lawyers and staff understand. In addition there must be sense of vision or direction. Yogi Berra understood this principle when said, "If you don't know where you are going, you might end up somewhere else."

11. Progressive Attitude and Spirit. Firms need a recognition that the status quo often stymies creativity, new opportunities, and new challenges. A proactive approach must be used to resolve problems and react to opportunities. In many firms there is a reactive approach to resolving most problems and disputes or "if it ain't broke, it doesn't need to be fixed" attitude. In a competitive marketplace, firms with an entrepreneurial spirit and a willingness to take reasonable risks will thrive and prosper.

12. Client Driven. The well-known business maxim "the client always comes first" applies to law firms. All decisions and efforts must be focused on what is in the best long term interests of clients. Client communications, service and needs are paramount concerns in firms with this attribute.

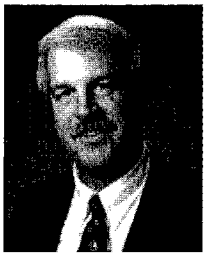
13. Culture. A complex but usually cohesive amalgam of a firm's ideas, customs, values, personalities, backgrounds, relationships and skills is its culture. It is honed over time, reshaped periodically by internal and external factors, and manifested in its lawyers and how they practice and relate with each other. It reveals itself in how decisions are made, work ethic, communication styles, how information is shared, ethics of the firm and individual lawyers, attorney relationships, significance of meritocracy in advancement, morale, reward system, and how employees are treated and recognized. In many firms it is difficult to define the culture because of this amorphous mix of components. Not all cultures are perceived positively. Some firms are termed "sweatshops," "clubby" or "whiteshoe." The failure of a firm to define its culture is often one of the reasons for high turnover, lack of direction, or internal conflict and disputes.

14. Diversity. There should be respect for diversity regarding ideas, gender, age, ethnic background, religion and education. Excessive diversity may pose a threat to some firms, particularly if differences undermine core values or the culture of the firm.

A group of lawyers become a firm to the extent there is some sense of common purpose, common approaches, and shared values. They must be willing to help each other out in the many small ways that are the essence of a legal practice, i.e., assistance, cooperation, support and mutual encouragement. This does not mean that everyone has to be best friends and have similar interests and personal goals. However, unless a firm is more than a compensation arrangement, it is doomed to have many problems and defections.

Put your client in front of a friendly face.

William Downes, Jr.
Mediator, Arbitrator, ADR Trainer



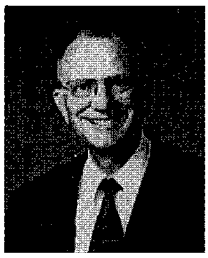
Paul S. Felt
Mediator, Arbitrator

*While **litigation** can be a nightmare for your client . . .*

*. . . **mediation** helps you avoid the time, expense, and emotional drain of a lawsuit.*

David O. Black
Mediator, Arbitrator

P. Keith Nelson
Mediator, Arbitrator



A. Dean Jeffs
Mediator, Arbitrator

Marcella L. Keck
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We want to help you resolve your problems, face to face.

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Alternative Dispute Resolution Specialists

Where solutions are created.[SM]

Richard B. McKeown
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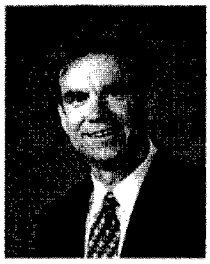
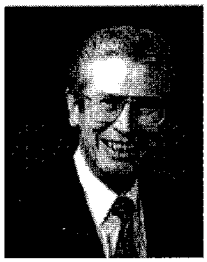
Mediator, Arbitrator



Timothy C. Houpt
Mediator, Arbitrator

T.J. Tsakalos
Mediator, Arbitrator



Stephen B. Nebeker
Mediator, Arbitrator

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

Notice of Trusteeship

Please take notice that on February 6, 1997, the Honorable Leslie A. Lewis, Presiding Judge, Third District Court, granted the Office of Attorney Discipline's request for entry of an order pursuant to Rule 27, Rules of Lawyer Discipline and Disability imposing a trusteeship over the law practice of Mark R. Madsen, Esq., based on Mr. Madsen's disappearance and abandonment of his law practice.

Nominations Sought

The American Arbitration Association is seeking nominees for its annual "Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award." The award will be given by the AAA later this spring to the person or organization who has done the most during the past year to further dispute resolution in an expeditious, inexpensive and fair manner. Written nominations should be submitted to Diane Abegglen, Regional Vice President, by March 14, 1997.

Position Announcement

The **U.S. Attorney's Office** in Salt Lake City is seeking an attorney for an Assistant United States Attorney position. The attorney will serve in the health care fraud area of prosecution in the Criminal Division. Bar admission (in any jurisdiction) and at least three years of post J.D. required. White collar prosecution experience is preferred. Years of experience will determine the appropriate salary level. The possible range is $44,000-$65,000. Please send resume by **March 31, 1997** to Linda Pearson, U.S. Attorney's Office, 185 South State Street, Suite 400, Salt Lake City, Utah 84111. The United States Attorney's Office is an Equal Employment Opportunity/Reasonable Accommodation Employer.

Reminder Notice: Rule Change Effective April 30, 1996

The Utah Supreme Court has adopted a change to Rule 1.15(a), requiring attorneys in Utah to maintain client trust funds only in institutions that automatically notify the Office of Attorney Discipline in the event of a non-sufficient check or check overdraft. To ensure compliance with this rule, attorneys are advised to contact their financial institutions at the earliest opportunity to make appropriate arrangements.

A copy of the revision and the comment is set out below.

Rule 1.15 Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. **The account may only be maintained in a financial institution which agrees to report to the Office of Disciplinary Counsel in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored.** Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

COMMENT

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. **In addition to normal monthly maintenance fees on each account, the lawyers can anticipate that financial institutions may charge additional fees for reporting overdrafts in accordance with this rule.**

Public Notice
Appointment of Chapter 13 Standing Trustee

The Office of the United States Trustee is seeking resumes from persons wishing to be considered for appointment as a standing trustee to administer one-half of the cases filed under Chapter 13 of the Bankruptcy Code. The appointment is for cases filed in the United States Bankruptcy Court for the District of Utah. Standing Trustees receive compensation and expenses pursuant to 28 U.S.C. § 586. Compensation depends on disbursements. Maximum compensation, including benefits, is now $126,473 annually. In addition, the trustee operation receives payments for certain necessary and actual expenses.

The minimum qualifications for appointment are set forth in Title 28 of the Code of Federal Regulations at Part 58. To be eligible for appointment, an applicant must possess strong administrative, financial and interpersonal skills. Experience and/or training in management is desirable. Fiduciary experience or familiarity with the bankruptcy area is not mandatory.

A successful applicant will be required to undergo an FBI background check, and must qualify to be bonded. Although standing trustees are not federal employees, appointments are made consistent with federal Equal Opportunity policies which prohibit discrimination in employment.

Forward resumes to the Office of the United States Trustee, Boston Building, Suite 100, #9 Exchange Place, Salt Lake City UT 84111-2709. All resumes will be kept confidential and should be received on or before March 31, 1997.

1997 Scott M. Matheson Award

In 1991, the Law-Related Education and Law Day Committee of the Utah State Bar presented the first annual Scott M. Matheson Award. Last year the sixth annual award recipients were Kevin P. Sullivan and the law firm of Richards, Caine and Allen. Currently, the committee is accepting applications for the 1997 Scott M. Matheson Award.

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

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

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

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

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

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

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

All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Applications must be postmarked no later than March 20, 1997.

"Did You Hear the One About the Lawyers?"

Public Education Campaign Brochures Availabl for Distribution

The Utah State Bar produced and ran six public service announcements in the seven largest newspapers in the state over six consecutive weeks several months ago. This education campaign was intended to: (1) call attention to worthy legal service projects which might not otherwise be known to exist; (2) call attention to volunteer service rendered by lawyers generally; (3) acknowledge six particular lawyers and indirectly call attention to the acts of others also engaging in service; (4) specifically encourage support for identified projects by the public and by lawyers; and (5) reflect a more positive general image of lawyers.

A limited number of brochures compiling the public service announcements are now available for display in client reception areas and other appropriate public areas. The Bar Commission encourages your help in distributing these brochures and encouraging greater participation by lawyers and the public in a wide variety of public service opportunities.

Brochures are available in limited quantities for pick up at the Bar Offices.

MEMBERSHIP CORNER

CHANGE OF ADDRESS FORM

Please change my name, address, and/or telephone and fax number on the membership records:

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-mail _____

All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell. Fax Number (801) 531-0660.

Ethics Advisory Opinion Committee

Opinion No. 96-11
Approved January 24, 1997

Issue: May an attorney appointed to represent both the mother and father in an abuse/neglect proceeding continue to represent one of the parents after an actual or potential conflict between the two parents arises?

Opinion: No. Such representation of either parent is prohibited by Rule 1.7 and Rule 1.9.

Opinion No. 96-12
Approved January 24, 1997

Issue: Is it ethical for an attorney to charge for legal advice given to callers using a "1-900 number" that would automatically bill the caller on a per-minute basis?

Opinion: It is not unethical for an attorney to give legal advice over the telephone and charge for such advice by the use of a 1-900 number.

Opinion No. 96-14
Approved January 24, 1997

Issue: Is it permissible under the Utah Rules of Professional Conduct for an attorney practicing law in Utah to form a partnership or otherwise associate with one or more non-Utah lawyers or with legal practitioners from other countries?

Opinion: A Utah attorney may form a partnership or otherwise associate with individuals who are licensed to practice law in any jurisdiction within the United States or with persons qualified and authorized to engage in the functional equivalent of U.S. legal practice under the laws of a foreign country.

Opinion No. 97-01
Approved January 24, 1997

Issue: What is the ethical obligation of an attorney to a client or former client, when the attorney is unable to locate the client, and the attorney is holding trust funds on behalf of that client?

Opinion: The first obligation of an attorney under these circumstances is to secure the funds on behalf of the client as against all other possible claimants. In other words, if the funds are still held in the form of a check, the attorney should take care to endorse the check and deposit it into the attorney's trust account to insure that the funds are not eventually lost to the client simply by the passage of time or the expiration of the client's right to negotiate the instrument.

Thereafter, the attorney should keep the client's property in safe keeping, in conformity with the requirements of Rule 1.15 of the Utah Rules of Professional Conduct. Specifically, the attorney should keep the funds in a trust account for the client. If the sum is substantial, or if the period of time during which the lawyer will be unable to locate the client is expected to be lengthy, the funds should be placed in an interest-bearing account. A separate trust account may be warranted when administering these monies.

Opinion No. 97-02
Approved January 24, 1997

Issue: Is information provided by an accused to his attorney in an initial telephone conference confidential as against a request from law enforcement authorities for such information?

Opinion: Information given to an attorney in an initial telephone conference by an individual whom the attorney has agreed to represent is confidential, even against a request for such information by law enforcement authorities seeking to apprehend the accused client.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $10.00. Fifty four opinions were approved by the Board of Bar Commissioners between January 1, 1988 and January 24, 1997. For an additional $5.00 ($15.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1997.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($10.00 each set)
_____	Ethics Opinions/ Subscription list	_____ ($15.00)

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

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

1997 Mock Trial Schedule

Name: _____ Title: _____

Firm or Place of Employment _____

Address: _____ Zip: _____

Phone: _____ Fax: _____ I have judged before. Yes ____ No ____ I will judge ____ (number) of mock trial(s).

Please indicate the specific date(s) and location(s) that you **will commit** to judge mock trial(s) during the months of March and April. The dates and locations are *fixed*; you *will* be a judge on the date(s) and time(s) and location(s) you indicate, unless several people sign up to judge the same slot. If that occurs, we call you to advise you of a change. You will receive confirmation by mail as to the time(s) and place(s) for your trial(s) when we send you a copy of the 1997 Mock Trial Handbook. Please remember — all **trials run approximately 2 1/2 to 3 hours and you will need to be at the trial 15 minutes early.** We will call one or two days before your trial(s) to remind you of your commitment.

Please be aware that *Saturday sessions* will be held on April 5 and April 12. Multiple trials will be conducted. *Please give these dates special consideration.*

Specific addresses for all courtrooms will be mailed with the confirmation letter.

Date	Time	Place	Preside	Panel	Comm. Rep.
Monday, March 24	9:00–12:00	Murray	( )	( )	( )
	9:00–12:00	Coalville UP	( )	( )	( )
	9:00–12:00	Coalville CC	( )	( )	( )
	1:00–4:00	Brigham City	( )	( )	( )
	1:00–4:00	Murray	( )	( )	( )
	1:00–4:00	PSC-Lg.	( )	( )	( )
	1:30–4:30	PSC-Sm.	( )	( )	( )
Tuesday, March 25	9:00–12:00	Murray	( )	( )	( )
	1:00–4:00	Murray	( )	( )	( )
	1:00–4:00	Brigham City	( )	( )	( )
	1:30–4:30	Spanish Fork	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Wednesday, March 26	9:00–12:00	Roy	( )	( )	( )
	1:00–4:00	Coalville	( )	( )	( )
	1:00–4:00	American Fork	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
	1:30–4:30	Spanish Fork	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Thursday, March 27	1:30–4:30	Roy	( )	( )	( )
Friday, March 28	1:00–4:00	Roosevelt	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
Monday, March 31	1:00–4:00	Brigham City	( )	( )	( )
	1:00–4:00	3rd District	( )	( )	( )
	1:30–4:30	PSC-Lg.	( )	( )	( )
Tuesday, April 1	1:00–4:00	Brigham City	( )	( )	( )
	1:30–4:30	Spanish Fork	( )	( )	( )
Wednesday, April 2	1:00–4:00	American Fork	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
Thursday, April 3	1:00–4:00	Nephi	( )	( )	( )
Friday, April 4	9:00–12:00	Ogden J.	( )	( )	( )
	1:00–4:00	Ogden J.	( )	( )	( )
Saturday, April 5	9:00–12:00	3rd District	( )	( )	( )
	9:30–12:30	3rd District	( )	( )	( )
	9:30–12:30	3rd District	( )	( )	( )
	10:00–1:00	3rd District	( )	( )	( )
	10:00–1:00	3rd District	( )	( )	( )
	10:30–1:30	3rd District	( )	( )	( )
	10:30–1:30	3rd District	( )	( )	( )
	12:30–3:30	3rd District	( )	( )	( )
	12:30–3:30	3rd District	( )	( )	( )
	1:00–4:00	3rd District	( )	( )	( )
	1:00–4:00	3rd District	( )	( )	( )
	1:30–4:30	3rd District	( )	( )	( )
	1:30–4:30	3rd District	( )	( )	( )
	2:00–5:00	3rd District	( )	( )	( )
	2:00–5:00	3rd District	( )	( )	( )
Monday, April 7	1:00–4:00	Murray	( )	( )	( )
Tuesday, April 8	1:00–4:00	Murray	( )	( )	( )

Date	Time	Place	Preside	Panel	Comm. Rep.
Tuesday, April 8	1:30–4:30	Spanish Fork	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Wednesday, April 9	1:00-4:00	American Fork	( )	( )	( )
	1:00–4:00	PSC-Lg.	( )	( )	( )
	1:30–4:30	PSC-Sm.	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
Thursday, April 10	1:30–4:30	Roy	( )	( )	( )
Friday, April 11	9:00–12:00	Ogden J.	( )	( )	( )
	9:00–12:00	Tooele	( )	( )	( )
	1:00–4:00	Tooele	( )	( )	( )
	1:00–4:00	Ogden J.	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
Saturday, April 12	9:00–12:00	3rd District	( )	( )	( )
	9:00–12:00	3rd District	( )	( )	( )
	9:30–12:30	3rd District	( )	( )	( )
	9:30–12:30	3rd District	( )	( )	( )
	10:00–1:00	3rd District	( )	( )	( )
	10:00–1:00	3rd District	( )	( )	( )
	10:30–1:30	3rd District	( )	( )	( )
	10:30–1:30	3rd District	( )	( )	( )
	12:30–3:30	3rd District	( )	( )	( )
	12:30–3:30	3rd District	( )	( )	( )
	1:00–4:00	3rd District	( )	( )	( )
	1:00–4:00	3rd District	( )	( )	( )
	1:30–4:30	3rd District	( )	( )	( )
	1:30–4:30	3rd District	( )	( )	( )
	2:00–5:00	3rd District	( )	( )	( )
	2:00–5:00	3rd District	( )	( )	( )
Monday, April 14	1:00–4:00	PSC-Lg.	( )	( )	( )
	1:30–4:30	PSC-Sm.	( )	( )	( )
	1:30–4:30	3rd District	( )	( )	( )
Tuesday, April 15	1:30–4:30	Spanish Fork	( )	( )	( )
Wednesday, April 16	9:00–12:00	Roy	( )	( )	( )
	1:00–4:00	American Fork	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Thursday, April 17	9:00–12:00	Roy	( )	( )	( )
	1:30–4:30	Roy	( )	( )	( )
	1:30–4:30	3rd District	( )	( )	( )

Semi-Final Rounds (If you will have judged a previous mock trial)

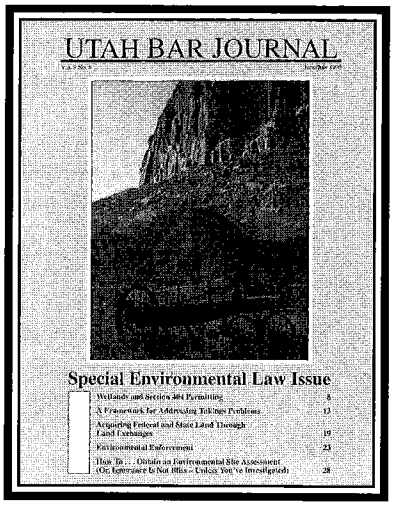
Monday, April 21	9:00–12:00	3rd District	( )	( )	( )
	9:00–12:00	Murray	( )	( )	( )
	1:00–4:00	Brigham City	( )	( )	( )
	1:00–4:00	Murray	( )	( )	( )
Tuesday, April 22	9:00–12:00	3rd District	( )	( )	( )
	9:00–12:00	Murray	( )	( )	( )
	1:00–4:00	Brigham City	( )	( )	( )
	1:00–4:00	Murray	( )	( )	( )
	1:30–4:30	Spanish Fork	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Wednesday, April 23	9:00–12:00	3rd District	( )	( )	( )
	9:00–12:00	Roy	( )	( )	( )
	1:00–4:00	American Fork	( )	( )	( )
	1:30–4:30	Spanish Fork	( )	( )	( )
	5:00–8:00	Logan	( )	( )	( )
Thursday, April 24	9:00–12:00	3rd District	( )	( )	( )
	9:00–12:00	Roy	( )	( )	( )
	1:00–4:00	Roy	( )	( )	( )

Please mail this form to: Mock Trial Coordinator
Utah Law-Related Education Project
645 South 200 East, Suite 101
Salt Lake City, Utah 84111

or Fax to: (801) 323-9732

Utah Bar Journal Announces "1996 Cover of the Year"

The *Utah Bar Journal* is pleased to announce that it has selected the cover of the June/July issue as the 1996 "Cover of the Year." The photograph, "Farm Implement Displayed in the Orchards of Fruita, Capital Reef National Park," was taken by Ken M. Barry, Assistant Attorney General, Provo Utah. This cover will join others (including the October 1990 issue which also featured a photograph by Mr. Barry) in the "Covers of the Year" display located on the second floor of the Law & Justice Center.



Since August 1988, photographs (primarily of Utah landscapes) submitted by 22 different members of the Utah Bar have appeared on the covers of the *Journal*. Fifteen contributors have had more than one of their photographs selected to appear on the cover, and one contributor has had 15 photographs selected. Cover photographs are generally selected as a group, by season. To be considered, photographs should be submitted 2-3 months before the beginning of each season. Typically, fewer photographs are submitted for the winter and spring issues.

The committee wishes to thank all members of the Bar who have participated in the cover program, as well as the many readers who have taken the time to express their appreciation for the covers.

1997 Annual Meeting Awards

The Board of Bar Commissioners is seeking nominations for the 1997 Annual Meeting Awards. These award have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Monica Jergensen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, **no later than Friday, April 11, 1997.** The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Young Lawyer of the Year
4. Distinguished Section/Committee
5. Distinguished Non-Lawyer for Service to the Profession

The Utah Supreme Court announces the retirement of Geoffrey J. Butler Clerk of the Court

In his honor an open house will be held at the Utah Supreme Court March 27, 1997 4:00 p.m to 5:30 p.m. All who know him are cordially invited

Young Lawyers Profile – Kristine Rogers

By Cathy Roberts

Going to law school after a hiatus of fifteen or twenty years away from school can give one a sense of giddiness. As the G-forces (having to master huge amounts of information on many different subjects in small amounts of time) increase on re-entry, a non-traditional student may feel a kind of brain implosion. So many subjects; so little time. At least that was my experience upon starting my first year of law school at age 41. Kris Rogers, several years younger, but no less "non-traditional" than I, saw things differently. While I fretted and skidded, not knowing exactly where I saw heading, Kris had made up her mind before entering law school that she would be a criminal defense attorney.

Kris was born and raised in Salt Lake City, but spent time around the Moab area with her father. She lived for a time in Alaska, and then moved back to Salt Lake City where she married A.J. Rogers and moved to Thompson Springs, in Grand County. While in Thompson Springs she occupied herself with "traditional housewife duties as well as a few outside interests." She cared for her nephew Benjamin and her own son Orion. Kris's fascination with the law began when Thompson Springs hired attorney Ken Chamberlain from Richfield to create a special service district to administer the town's water resources. "Ken's knowledge and personal skills amazed me," says Kris. "His abilities made a seemingly insurmountable task possible." Soon after she finished working with Ken the position of Grand County Justice of the Peace opened. She applied and soon found herself presiding over criminal and civil proceedings. After about five years of signing search warrants, processing thousands of traffic citations, and conducting bench and jury trials, she felt "hungry for more." Her years on the bench had given her a respect for our much-maligned criminal justice system, and the realization that she would rather fight than make peace. And the road to becoming a warrior led north on I-15.

In 1990, she made a deal with herself: "get accepted by the University of Utah College of Law, or stay where you are." She was accepted during the winter of 1991. Then, in the spring following her acceptance, a family member was murdered. A parolee on a killing spree, on the run after having murdered three women in California, shot and killed Kris's mother-in-law as she started her Saturday morning shift in a convenience store near I-70. Kris was the first family member on the scene. Even after she later testified in the penalty phase of the murderer's trial, her belief of the rights of the criminal defendant remained unshaken. She still sees her son suffering from the loss of his grandmother but persists in her belief that everyone has "goodness that can be developed and something positive to offer." The problem, she says, is that in our troubled society, judges simply do not have enough resources to order rehabilitation.

In the fall of 1991, she brought her son Orion up to Salt Lake, rented an apartment and entered him in kindergarten. Like many law students who are also parents of young children, she brought Orion to class occasionally. He brought crayons and paper or did his homework. Classmate Judy Wolferts remembers sitting by Orion in Professor Oberer's first year Contracts class. As the kindergartner laboriously formed his letters and struggled to stay within the lines, Judy felt a strong bond with the little boy. "He was learning the alphabet for the first time," she says. "I was learning my alphabet all over again." Another student warned Kris that she'd be turned in for child abuse by subjecting her

child to a particularly stultifying first year class. Far from being abused by the experience, Orion thrived. By the time Kris was in her third year, Tom Lund could call on him in Conflicts of Law and expect an answer. During her three years of law school Kris also worked as a clerk in the U.S. Attorney's office, was a research assistant to Ed Brass and Ken Brown, did Medicare hearings for a large insurance carrier, and became a single parent.

The payoff for her hard work came when she began clerking at Legal Defenders in March '94. By October of that year, she had completed her journey to the other side of the bench and was representing indigent misdemeanants. In June 1995 she moved into the felonies section.

One of her first clients had also been a fellow classmate. While in law school, Henry Rudolph had been accused of burglary and sexual assault of his estranged wife, had represented himself in his first trial and had been acquitted of the assault charged but found guilty of burglary. Legal Defenders had successfully appealed the conviction and Kris came on as co-counsel in the new trial. She found it rough going with Rudolph, who fired her when she did not oppose the prosecution's motion to have him undergo a competency evaluation. After he was found competent he let her resume as co-counsel. Rudolph was ultimately convicted of burglary and is currently serving a life sentence in prison. Kris says, "I still believe he's innocent, and he certainly does not belong in prison."

She says the hardest thing she's ever done was trying unsuccessfully to persuade convicted murderer John Taylor to appeal his death sentence. She shared his last mass and took communion with Taylor moments before he began his "death walk" to the firing squad in 1996. Being with Taylor forced her to "deal with the reality of the death penalty in a system I believe in." Despite her support of the system, she doesn't support the death penalty. "It hurts all of us and doesn't correct the problem," she asserts. "We can warehouse people who are a danger to society." Both as a criminal defense attorney, and as a family member of a murder victim, she hasn't seen evidence that killing the murderer helps the victim's family, saying, "Nothing had changed the day after they killed John." She notes that in death penalty appeals, defendants usually attach their attorneys for ineffective assistance of counsel. "The reality is that when you're an attorney in a death penalty case part of your soul is given." She also believes the legal appeals process which often follows a death sentence places a tremendous burden on legal resources. "Slap a BPL [cost-benefit analysis] on it," she says, echoing one of Professor Tom Lund's favorite phrases, "and you're not ahead."

After seeing the system from several different perspectives, she still enjoys a good fight and still believes it's a good system. She is a strong defender of the system and says, "It works if everyone is doing their job zealously and if the judge remains neutral and follows the law. If one fails, the system fails." She loves working at Legal Defenders and believes John Hill cultivates camaraderie and "does everything he can do to give us an environment in which we can zealously represent indigent people.

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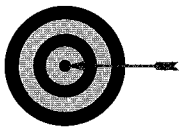

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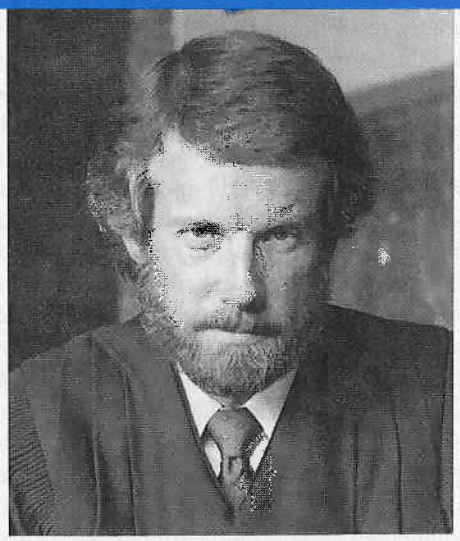

The State of the Judiciary

Delivered by Chief Justice Michael D. Zimmerman
January 20, 1997

Governor Leavitt, President Beattie, Speaker Brown, legislators, and members of the public. On behalf of the Utah Judicial Council, the Utah Supreme Court, and all the judges and staff in the third branch of government, I thank you for this opportunity to report on the state of the Utah judiciary.

Contrary to my usual practice, I have come today without my robe. This symbolizes the fact that I am here not as a judge, a decider of cases, but as chair of the Utah Judicial Council, the elected body of judges given responsibility by the Utah Constitution to oversee the administration of the judicial branch. I am here to report to you the state of that branch of government from an administrative and operational perspective. You probably expect me to talk in detail about money. Well, just to set your minds at ease, I am not going to use this time to ask for money. However, I will leave that to the State Court Administrator's office in presentations before your committees in the coming weeks.

I thought this would be a good opportunity to reacquaint you with a judicial branch that looks quite differently than it did in 1896, or even in 1986. In the last decade, a number of new programs have been grafted on the the branch. They bring more service to the public, but they also present some difficult challenges to those administering the judicial branch.

In giving you an overview of the current state of the third branch, I must begin with an acknowledgment of its core responsibility, a responsibility that has not changed since the writing of the Magna Carta almost 800 years ago. As Sir Edward Cooke wrote in his famous commentaries on that document, "every Subject of this Realm, for injury done to him in [goods, land, or person], . . . may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without denial, and speedily without delay."

This statement of the judiciary's responsibility sounds as fresh today as it did in 1215, a fact that shows a deep and long standing social and political consensus as to what the people expect of the justice system. But because of that ingrained notion as to what judges have historically been charged to do, I find that members of the public, and occasionally legislators, tend to think of the judiciary exclusively in those terms – as black robed judges presiding in their courtrooms. Ten years ago, that might have been a fairly accurate portrait of all that the Utah judiciary did. But from an administrative standpoint, today's Utah judicial branch is much more.

The root of this transformation lies in the fact that in 1985, the Legislature and the people amended the constitution and empowered the judiciary to administer itself in a coherent and unified fashion. The changes wrought by this amendment led us

MICHAEL D. ZIMMERMAN has served on the Utah Supreme Court since 1984, and has served as Chief Justice since 1993. He received his Juris Doctorate from the University of Utah in 1969, graduating first in his class. Additionally, he served as Note Editor of the Utah Law Review *and was elected to the Order of the Coif. After graduation, he served as law clerk to Justice Warren E. Burger of the United States Supreme Court. Thereafter, Chief Justice Zimmerman worked in Los Angeles, California for the law firm of O'Melveny and Myers.*

In 1976, he returned to Utah and became an associate professor of law at the University of Utah. In 1978, Chief Justice Zimmerman returned to private law practice in Salt Lake City with the law firm of Krause, Landa, Zimmerman, and Maycock, and later, with Watkiss and Campbell. During this time, he also served as a part-time member of the staff of Governor Scott M. Matheson.

Chief Justice Zimmerman has served on numerous boards and committees including the Utah Judicial Council, the Federal Rules Advisory Committee, the Task Force on Gender and Justice, the Alternative Dispute Resolution Task Force, the Utah Legal Services Corporation, the Snowbird Institute of Arts and Humanities, the American Law Institute and the Utah Future/Project 2000. In 1988, he was named as "Appellate Court Judge of the Year" by the Utah Bar Association.

Chief Justice Zimmerman is the father of three daughters and was married to the former Lynne Mariani, who died in 1994.

to develop administrative competence. That demonstrated competence, in turn, resulted in the Legislature placing increased responsibilities with us. Today, the Utah Judicial Council oversees 1,100 people employed within the branch. Only slightly more than one hundred of these are judges.

You may ask what those other thousand people do. The answer is that the judiciary has broad administrative functions. For example, we now manage all support services needed by those judges on the bench. This may be something that is within the expectations of many.

But perhaps less expectedly, the administrative umbrella of the judiciary shelters an increasing number of diverse programs and initiatives that the judges and the Legislature have concluded are necessary to make justice more effective and more broadly available to members of the public. Some of these programs have been given to us to administer because they serve ends allied to those of the judge in the courtroom. Others have been given to us, frankly, because they do not fit comfortably in any other agency of state government.

I want to give you a sense for the variety of the services we provide. The easiest way may be to describe how today's Utah judicial branch would look in a series of snapshots. Among those images would be the following:

- In a courthouse in Salt Lake City you would see a deputy clerk helping a victim of spouse abuse, trailed by her two young children, through the hour-long process of filling out the necessary forms and going to see a judge to obtain a restraining order against the abuser.
- In a St. George juvenile court, you would see a judge holding a hearing to determine whether a child will be left with his parents, or taken from the home. This hearing has the full panoply of procedural protections for the child and for the parents.
- In that same hearing, you would see a lawyer acting as a guardian ad litem, representing the interests of the child separate from those of the state and the parents.

  Both the statutory requirement for the formalized hearing, and the routine presence of the guardian ad litem, who is now an employee of the judiciary rather than the Department of Human Services, are the result of recent legislation. That legislation was passed to better protect the interests of the child and to assure permanent placement plans are in effect for all children under the custody of the department.
- Another picture: In a conference room in an office building in Tooele, you would see a mediator participating in our court-annexed alternative dispute resolution program. She would be working with parties to settle a complex case, a case that the assigned trial judge had been told would take two weeks to try. Within an afternoon, the parties resolve the dispute. They come to an agreement that also lays the foundation for future business dealings between them.
- In a courthouse in Richfield, you would see an in-court clerk at her computer terminal accessing some of the over three hundred screens that permit her to set trial schedules, produce forms, track payments, and input information on everything that occurs in the courtroom into a statewide data base. That same system will permit the Administrative Office of the Courts to gather and integrate detailed case data from every court in the state, to better predict trends, to let the public and the Legislature know more about the courts' business, and to make sure we are using our resources to the best advantage.
- In Provo, you would see a juvenile probation officer supervising a team of teenage offenders removing graffiti from the side of a business earlier defaced. This is the Juvenile Court's nationally recognized work restitution program. Similar programs across Utah returned well over $1 million to victims of juvenile crime and provided over 500,000 hours of community service in the last year alone.
- Another shift of scene: After hours, in a Salt Lake City district courtroom, you would see a small group of drug addicted defendants charged with non-violent crimes appearing before a district judge, a judge who volunteered to run our pilot drug court program. The judge reviews the defendants' regular drug test results to monitor any recent drug usage. He also receives reports about their progress in the mandatory treatment program. These are all conditions of their not going to jail. This pilot program, undertaken with no state funds, promises to cut repeat criminal conduct by getting minor offenders off of drugs.

  By the way, I would invite any of you to attend Judge Fuchs' courtroom on a Tuesday or Thursday afternoon to observe this promising new program.
- In another picture, taken any day of the week in any number of locations, you would see judges and court administrators meeting with representatives of other agencies and with legislators to work on common problems. This could be a meeting of the Commission on Criminal and Juvenile Justice; it could be the Families, Agencies, and Communities Together (FACT) Council; it could be the Legislature's Judicial Rules Review Committee, or it could be any number of other committees and task forces.

  It might even be the Juvenile Justice Task Force, which you established last year. Its excellent recommendations calling for a fundamental change in how we address juvenile crime will be before you this session.
- The final picture I would show you would be of a district court judge presiding over a civil or criminal jury trial. I want to return to the trial judge because this is where the judiciary started. This is still our core function.

The Utah judiciary I have pictured is radically different from the one you would have seen even ten years ago. And it is certainly not the picture that average members of the public would form if asked how they envision the court system. Yet it is a picture of which we can be proud. These eleven hundred people are performing the variety of different tasks they have been given sufficiently well that they have earned recognition as one of the most efficient, effective, and forward looking judicial administrations in the nation.

You may ask where this descriptive portrait of the judiciary is taking us. What relevance does it have for the legislature? My answer is that it not only gives you a better sense of the variety of tasks we perform, but also explains why the growth in population , in crime, and in civil litigation that Utah is experiencing have multiple impacts on the judiciary.

For example, assume a divorce in which there are allegations of abuse. Not only does this affect the trial judge before whom the case is heard, but also the personnel assigned to the mandatory divorce education program we have been given to administer. It may also lead to one party filing for a protective order, requiring significant time of the deputy clerk assigned

to help applicants for such orders. Perhaps it will also affect the juvenile court, where proceedings concerning placement of the child may be filed. And that means another case for the guardian ad litem. These multiple impacts are common, and they have a significant effect on our resource needs.

Another impact on the judiciary of the proliferation of new programs is that they can distort our funding priorities. Each program is important. Many expand the quality and availability of justice, and they reduce crime. But we cannot lose sight of the fact that the essential job of the judiciary is still to hear cases and to decide them fairly, impartially, and without delay, just as it was 800 years ago, and, I am sure, it will be 800 years from now.

It is not always easy to attend to the funding and support needs of that core function and to those of the newer programs at the same time. New programs seem to grow faster than old ones. This is so because often the true scope of the need being addressed is not fully understood when the program is first put into place.

A prime example is the guardian ad litem program. This program was sharply expanded and put under the judiciary's administrative umbrella in 1994. Since then, it has grown from $250,000 to $2,000,000, taking a disproportionate share of all new money flowing into the judiciary's budget over the fiscal period 1994 to 1997. And the guardians are still unable to handle adequately the mounting caseload of abused and neglected children while meeting th responsibilities set for them by the legislation.

Another example is the program under which deputy clerks assist those seeking spouse abuse protective orders. First put in place in 1995, the legislation was enacted without any funding for the needed clerks. And the demand for the orders has grown by more than 90% over the past two years. This has required creative efforts on our part to assure the availability of the necessary help to the public.

While these and other new programs have been rapidly expanding and consuming our time and resources, we have faced a growing threat to our ability to timely adjudicate civil and criminal cases in the district courts. Over the past ten years, total case filings in what is now the consolidated district court have increased by 33%; there has been a 14.4% increase from 1993 through 1996 alone. More critically, in the very near past, we have seen an unprecedented rise in criminal filings, particularly felonies. They have increased 54% since 1993. Because of the constitutional requirement that we adjudicate criminal cases before civil, a direct consequence has been a rapid increase in delays in the handling of civil matters.

During this same ten year period, we have added only two new judges in the courts now consolidated as the district court. And in by far our busiest district, the Third District that includes Summit, Tooele, and Salt Lake Counties, where over 57% of our total statewide filings are handled, no new judges have been added since 1986.

We are proud that we have managed to accommodate these dramatic increases by using more efficient calendaring procedures, adding domestic commissioners, better utilizing existing judges through consolidating circuit and district courts, and putting our court-annexed alternative dispute resolution program in place.

But we are at the point where adding resources to perform our core function is inescapable. Demand is exceeding our ability to keep up. Civil case processing times are getting steadily longer. We are now accumulating an ever increasing backlog of cases. This is a dramatic change for Utah. We have traditionally had one of the faster civil dockets in the country.

I have no solution for these conflicts in priorities between our traditional, core function and the new initiatives for which we now have responsibility. But by making you aware of the dilemma often faced by the Judicial Council in preparing its budget requests, I hope you will better understand those requests, and our seeming omnipresence in your hearing rooms.

In closing, I assure you that those of us charged with administering the judicial branch, both judges and staff, will continue to search for ways to do our diverse jobs better and more efficiently. We will continue to innovate, and we will continue to carry out the various programs you choose to give us with a view toward making the justice system work better for the people of Utah.

As I have mentioned in previous years, my door, like that of everyone else with administrative responsibility in the judiciary, remains open to all who have questions about how we are doing our job, and to those with thoughts about how we can do it better.

Thank you for your attention. I wish you well in your deliberations.

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The Mid-Year Meeting Committee extends its gratitude to the following sponsors for their contributions in making this a successful and enjoyable Mid-Year Meeting. Please show your appreciation for their donation by supporting these firms and businesses:

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Judge Fred D. Howard

By Derek P. Pullan

JUDGE FRED D. HOWARD was appointed to the Fourth District Court in July 1995 by Gov. Michael O. Leavitt. He serves Juab, Millard, Utah and Wasatch Counties. He received his law degree from the J. Reuben Clark Law School at Brigham Young University in 1979. Before his appointment to the bench, he was an attorney with the law firm of Howard, Lewis & Peterson. He was also a sole practitioner of general civil practice until 1984. In addition, he was a Deputy County Attorney for Carbon County from 1981 to 1982.

BACKGROUND

In 1979, Judge Fred D. Howard was a new member of the Utah Bar and a young prosecutor in the Carbon County Attorney's Office. However, he was not new to the practice of law. He was "raised in the law office" of his father, Jackson Howard, whom he described as "a gifted attorney."

Judge Howard attended McGeorge School of Law in Sacramento, California, but transferred to the J. Reuben Clark Law School during his third year. After prosecuting in Price and then establishing a solo practice, Judge Howard returned to Utah County in 1984 and associated with his father's firm, Howard, Lewis & Petersen. He became a partner in the firm and specialized in family law, medical malpractice, and personal injury. In the summer of 1995, Judge Howard was appointed a District Judge in the Fourth District. On March 1 of this year, he will begin his work in the Civil Division.

Becoming a judge has allowed Judge Howard to serve individuals and the community. "I wanted a career that was people-oriented and intellectually stimulating" he said. He enjoys the opportunity to study the "entire spectrum of law," but acknowledges that he is "still being schooled because the law is ever-changing." That fact is "a challenge for all of us."

FAMILY

Judge Howard is the husband of Carolyn Howard. They are the proud parents of nine daughters ranging in age from 21 to 6. We have a "full house" he said, acknowledging that he is "seriously outnumbered." His judicial training has proved useful at home "giving me the skills necessary to screen young men who come to call."

PERSONAL INTERESTS

Judge Howard spends most of his free evenings "doing homework" with one or more of his daughters. However, he enjoys playing tennis, rollerblading, and skiing. He is also a "fledgling painter." "Learning how to paint," he said "has been a stimulating outlet to counter balance the demands and stresses of legal work." Judge Howard's favorite book is *Les Miserables* by Victor Hugo. His favorite legal movie is *The Fortune Cookie.*

ADVICE TO YOUNG LAWYERS

When asked what advice he would have for young attorney's embarking on the practice of law, Judge Howard gave four suggestions:

1. Obviously the law business is demanding and needs to be balanced. We all need to keep a sense of humor and take time to smell the roses or we soon get bogged down and lose sight of the benefits of practicing law.
2. Attorneys should always be professional and courteous in their conduct and speech towards each other.
3. Lawyers who are prepared do their best. Preparation, or the lack of it, shows in their confidence and presentation.
4. Remember that judges are not predisposed to one side or the other. "I am regularly persuaded by the arguments of counsel who educate me on the issues and the law." Judicial decisions are vitally affected by persuasive argument, preparation, and professional work.

Annual Community Service Scholarships

The Utah Bar Foundation will award two 1997 Community Service Scholarships in April – one to a student at the J. Reuben Clark Law School at Brigham Young University and one to a student at the University of Utah College of Law. The amount of each scholarship is $3,000.

To qualify to receive on of these scholarships, the student must have participated in and made a significant contribution to the community by performing community service for organizations such as the Legal Aid Society, Utah Legal Services, Travelers Aid Society, Salt Lake Community Shelter and Resources Center, United Way, The Children's Center, the Family Support Center, Guadalupe School, Salt Lake Detention Center, Odyssey House, Bennion Center or Law-Related Education.

Applicants should send application letters and resumes to the Utah Bar Foundation (645 South 200 East, Salt Lake City, UT 84111) describing the service performed, identifying the beneficiary or organization receiving the service, and naming at least two individuals who can be contacted concerning that service. **Deadline: March 31, 1997.**

1996 Scholarship recipients Steven G. Black and Amy Landerman at the 1996 Annual Bar Foundation Luncheon

Utah Bar Foundation Board of Trustees

Notice of Election

NOTICE IS HEREBY GIVEN, in accordance with the bylaws of the Utah Bar Foundation, that an election of two trustees to the Board of Trustees of the Foundation will be finalized at the annual meeting of the Foundation held in conjunction with the 1997 Annual Meeting of the Utah State Bar in Sun Valley, Idaho. The two trustee positions which will be eligible are currently held by Carman E. Kipp and Hon. Pamela T. Greenwood. The term of office is three years.

Nomination may be made by any members of the Foundation (every attorney licensed to practice law in the State of Utah is also a member of the Foundation) by submission of a written nominating petition identifying the nominee, who must be an active attorney duly licensed to practice law in Utah, and signed by not less than twenty-five attorneys who are also duly licensed to practice law in Utah.

Petitions should be mailed to the Utah Bar foundation, 645 South 200 East, Salt Lake City, Utah 84111 so as to be received on or before **April 30, 1997.** Nominating petition forms can be obtained at the Foundation's office or requested by telephone (297-7046). The election will be conducted by secret ballot which will be mailed to all active members of the Foundation on or before May 31, 1997.

1997 IOLTA Grants

The Application Process

The Board of Trustees of the Utah Bar Foundation awards grants annually to Utah organizations that (1) promote legal education and increase knowledge and awareness of the law in the community, (2) assist in providing legal services of the disadvantaged, (3) improve the administration of justice, and (4) serve other worthwhile law-related public purposes.

The Trustees occasionally consider grant requests that are not made as part of the yearly grant cycle, but only in unusual circumstances. They prefer to review and consider grant applications at the same time in June of each year so that the funds available may be equitably allocated between the many deserving organizations.

The funds available for grants are generated by interest on client trust accounts of lawyers in private practice who participate in the Interest on Lawyers Trust Accounts (IOLTA) Program. Lawyers who do not currently participate in the IOLTA Program may obtain authorization forms from the Bar Foundation office. Participation costs lawyers nothing, but provides a significant public benefit.

The grant application is a simple one, consisting of a financial budget supported by a narrative proposal not to exceed eight pages. The Trustees prefer grant applications which specifically describe the purpose of the request and how the funds are to be used. Those receiving grants must agree to report the use of the funds.

Organizations seeking grants may obtain application forms from the Utah Bar Foundation office in the Utah Law & Justice Center, 645 South 200 East, Salt Lake City, Utah 84111 (297-7046). The deadline for submitting applications for 1997 grants is **May 31, 1997.**

CLE CALENDAR

ALI-ABA SATELLITE SEMINAR: COPYRIGHT & TRADEMARK LAW FOR THE NONSPECIALIST

Date: Thursday, March 13, 1997
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: LIMITED LIABILITY VEHICLES

Date: Thursday, March 20, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(Please call 1-800-CLE-NEWS to register)*
CLE Credit: 4 HOURS

NLCLE WORKSHOP: REAL PROPERTY LAW

Date: Thursday, March 20, 1997
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 HOURS

COMMERCIAL & CONSUMER BANKRUPTCIES AND BUYING & SELLING A BUSINESS

Two seminars in one!

Date: Friday, March 21, 1997
Time: Session I (Bankruptcy) 8:30 a.m. to 11:45 a.m.
Session II (Business) 1:00 p.m. to 4:15 p.m.
Registration begins 30 minutes before each session
Place: Utah Law & Justice Center
Fee: $85.00 for one session
$150.00 for both sessions
CLE Credit: 3.5 HOURS for one session
7 HOURS for both sessions

ALI-ABA SATELLITE SEMINAR: ANNUAL SPRING ESTATE PLANNING PRACTICE UPDATE

Date: Wednesday, March 26, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

ALI-ABA SATELLITE SEMINAR: BROWNFIELDS TRANSACTIONS – MAKING THE DEALS WORK

Date: Thursday, March 27, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

ALI-ABA SATELLITE SEMINAR: LITIGATORS UNDER FIRE – HANDLING PROFESSIONAL RESPONSIBILITY DILEMMAS IN AND OUT OF LITIGATION

Date: Thursday, April 3, 1997
Time: 9:30 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $179.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 5 HOURS ETHICS

ALI-ABA SATELLITE SEMINAR: THE CLEAN AIR ACT

Date: Thursday, April 10, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 531-9095, for further details.

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

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____

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

_____
Name — Phone

_____
Address — City, State, Zip

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

_____
Credit Card Billing Address — City, State, ZIP

_____
Signature

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

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

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee*, will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

ANNUAL REAL PROPERTY SECTION SEMINAR

Date: Thursday, April 17, 1997
Time: To be determined
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: To be determined

NLCLE WORKSHOP: ADMINISTRATIVE LAW PRACTICE

Date: Thursday, April 17, 1997
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division members
$60.00 for all others
CLE Credit: 3 HOURS

ALI-ABA SATELLITE SEMINAR: ANNUAL SPRING EMPLOYEE BENEFITS LAW AND PRACTICE UPDATE

Date: Thursday, April 17, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

ANNUAL CORPORATE COUNSEL SECTION SEMINAR

Date: Friday, April 25, 1997
Time: 8:00 a.m. to 12:00 noon (times may change)
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: 4 HOURS

ATTENTION NEW LAWYERS!

Change of Date for Upcoming NLCLE Workshop

The New Lawyer CLE Workshop entitled **"Domestic Relations"** originally scheduled for Thursday, May 15, 1997 has been postponed. Please mark your calendars for **Thursday, June 12, 1997** to attend this workshop. The workshop will be held from 5:30 p.m. to 8:30 p.m. at the Utah Law & Justice Center. If you have any questions about this program, or any other NLCLE Workshops, please contact the CLE Department at (801) 531-9095.

CLASSIFIED ADS

RATES & DEADLINES

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

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 486-9095. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

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

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

BOOKS FOR SALE

FOR SALE: *Bankruptcy Court Decisions* binders (John Wiley Publishers). Volumes 18-29 including all indexes, 1993-1996. Worth $2,400. **Asking $1,400 OBO.** Contact Craig Maddux (801) 359-1313 ext. 118.

For Sale: Utah Reports 2d Vol. 1-30 (1953-1974); Utah Reported P2d Vol. 520-921 (1974-1996); AmJur2d; AmJur2d Legal Forms; AmJur Pleadings and Practice Forms. Call Roy @ (801) 484-2111.

For Sale: West Bankruptcy Reporter, Volume 1 to Current. Call: Steven R. Bailey - (801) 621-4430.

POSITIONS AVAILABLE

ASSOCIATE POSITION for a transactional attorney with 2 or 3 years experience in the areas of commercial real estate and general business law is available in ten member law firm in Boise Idaho. Send resume and transcript to Hiring Attorney, Meuleman, Miller & Cummings, P.O. Box 955, Boise, Idaho.

ATTORNEY: I am looking for several entrepreneurial-minded attorneys to open a general practice (small business oriented) law firm just south of the Salt Lake City Area. Requirements: member of the Utah Bar, a distinct area of legal expertise and comparable experience, excellent communication skills, impeccable ethical standards and a drive to succeed. All responses will be held in the strictest of confidence. Respond with letter, resume and/or relevant materials to Maud C. Thurman, Utah State Bar, **Box 27**, 645 South 200 East, SLC, UT 84111.

"Patent and Trademark attorney needed for large medical device company located at South end of the Salt Lake County, Utah. At least two (2) years medical device patent prosecution experience required. Avoid the I-15 drive into downtown SLC! Compensation commensurate with experience. Reply to Maud C. Thurman, Utah State Bar, **Box 28**, 645 South 200 East, SLC UT 84111."

Assistant General Counsel Position: Clark County School District, Las Vegas, NV. Minimum 3 years experience, general litigation. Deadline: March 14, 1997. Telephone (702) 799-5373 for application.

POSITIONS WANTED

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #3100, Salt Lake City, UT 84111. Call (801) 583-0206 or (801) 534-0909.

CALIFORNIA LAWYER . . . also admitted in Utah! I will make appearances anywhere in California; research and report on California law; and in general, help in any other way I can. $75 per hour + travel expenses. Contact John Palley at (916) 455-6785 or PalleyJ@palley.com.

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Contract or project work sought by licensed attorney and former judicial law clerk with excellent research, analytical and writing skills; and a solid understanding of the litigation process. @25 per hour. Call Jeffrey B. Teicher @ (801) 227-0643 or cellular / (801) 358-0127.

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OFFICE SPACE FOR RENT: Choice office space for rent in beautiful, historic building in Ogden, Utah. Several offices available. For information, please contact (801) 621-1384.

Office space for one lawyer, or lawyer and associate in restored Heber Grant Mansion, 174 East South Temple. $8.35/sq. ft. Large space with large windows, fireplace, hardwood floors, antique appointments. Furnished conference room, kitchenette, reception area. Modern phones, equipment, paralegal/receptionist included. Ample storage and parking. Call Monica, office of E. Craig Smay @ (801) 539-8515 between 8:30 and 5:00.

Professional office space for one attorney. Share with two other attorneys. Complete facilities, including large private office, large reception, conference room, parking immediately adjacent to building, limited library, fax, copier, telephone system, kitchen. 4212 Highland Drive. Call (801) 272-1013.

One office available in beautifully renovated one hundred year old manor home located in downtown Salt Lake City. Receptionist, copying, runner service and library facilities available. Some overflow work possible. Call Jane @ (801) 532-3555.

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

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SERVICES

UTAH VALLEY LEGAL ASSISTANT JOB BANK: Resumes of legal assistants for full, part-time, or intern work from our graduating classes are available upon request. Contact: Mikki O'Connor, UVSC Legal Studies Department, 800 West 1200 South, Orem, UT 84058 or call (801) 222-8850. Fax (801) 764-7327.

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former Assistant Utah Attorney General and
former Uintah County Attorney

and

SCOTT K. WILSON
former Trial Attorney, U.S. Justice Department,
Civil Division
former Assistant District Attorney for Riverside County, California,
and former Clerk to
United States District Judges Sam and Campbell

and

KEITH A. CALL
formerly of Beus, Gilbert & Morrill
of Phoenix, Arizona

have become associated with the firm.

Mr. Souvall's practice will emphasize civil rights defense and public entity representation.

Mr. Wilson's practice will emphasize commercial litigation, civil rights defense and public entity representation.

Mr. Call's practice will emphasize commercial litigation, concentrating on shareholder and partnership disputes and real estate litigation.

Mr. Call is licensed to practice in both Utah and Arizona.

February, 1997

Salt Lake Legal Defender Association is currently updating its trial and appellate attorney roster. If you are interested in submitting an application, please contact F. John Hill, Director, for an appointment @ (801) 532-5444.

APPRAISALS: CERTIFIED PROPERTY APPRAISALS/COURT RECOGNIZED – Estate Work, Fine Furniture, Divorce, Antiques, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Eighteen years experience. Immediate service available. Robert Olsen C.A.G.A. (801) 580-0418.

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SEXUAL ABUSE/DEFENSE: Child statements are often manipulated. Current research supports STATEMENT ANALYSIS not child credibility. Scientific/Objective – B. Giffen, M.Sc. Evidence specialist / Expert Witness. American College Forensic Examiners, 1270 East Sherman Avenue, Ste. 1, Salt Lake City, Utah 84105. (801) 485-4011.

SKIP TRACING/LOCATOR: Need to find someone? **Will find the person or no charge / no minimum fee for basic "search."** 87% success rate. Nationwide. Confidential. Other attorney needed searches / records / reports in many areas from our extensive data bases. Tell us what you need. **Verify USA** Call toll free **(888) 2-Verify.**

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

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

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

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

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

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

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

DATE:_____ **SIGNATURE:** _____

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

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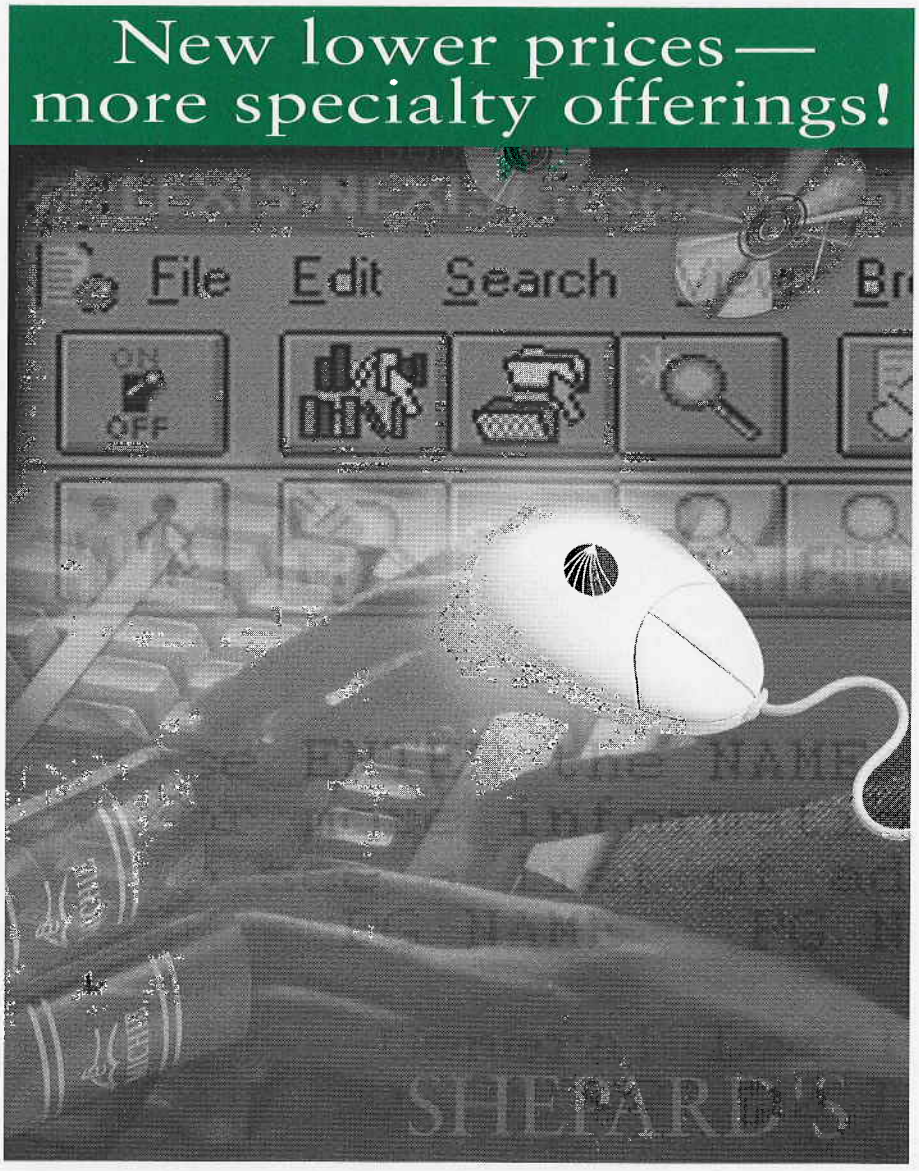

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