UTAH BAR JOURNAL

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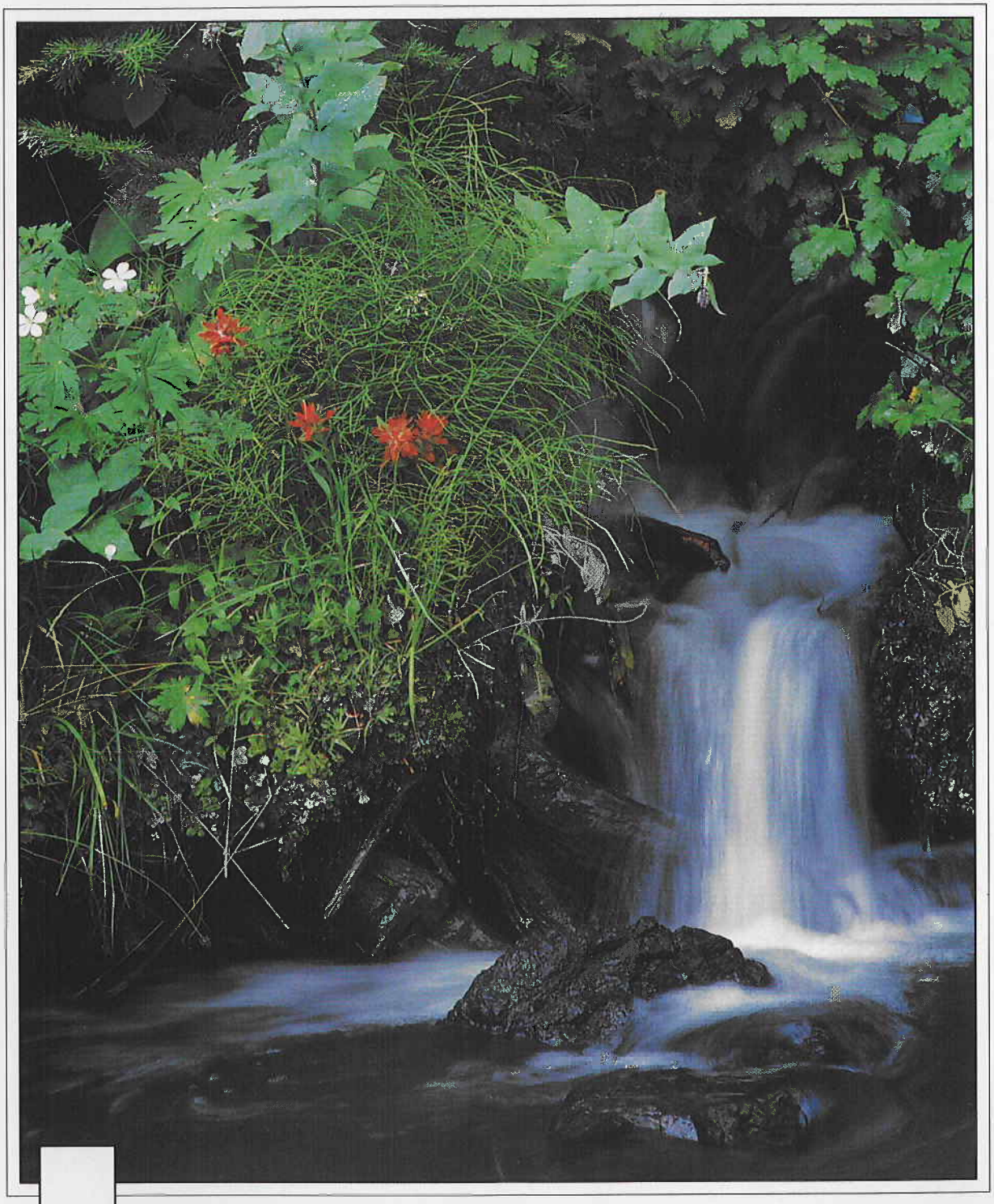

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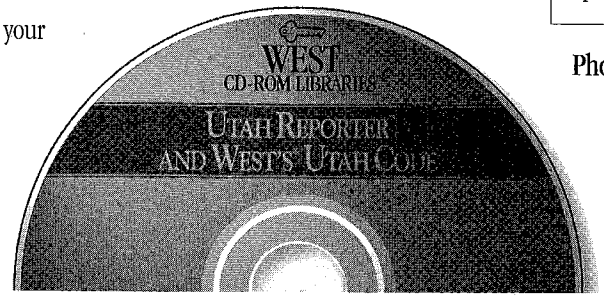

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UTAH BAR JOURNAL

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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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2. No one person shall have more than one letter to the editor published every six months.

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4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Code of Professional Conduct, (c) is deemed execrable, calumnious, obliquitous or lacking in good taste, or (d) otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

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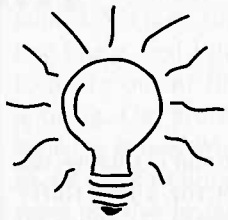

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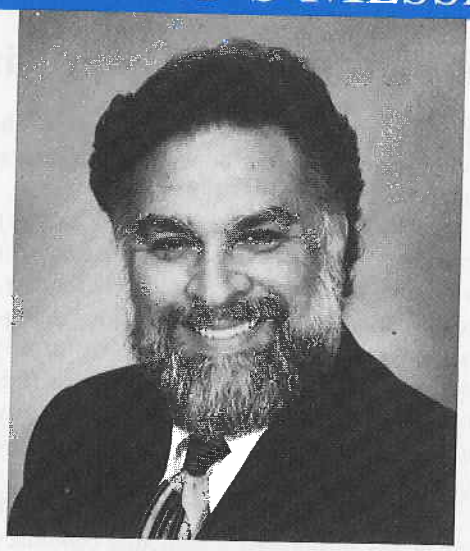


And the Winner Is . . . .

By Steven M. Kaufman

I can't believe it. The sun is shining, the sky is clear except for a few fluffy clouds, and the temperature is about 60 degrees. The climatologist is smiling on me. I have taken you through a year of weather reports, randomly keeping you abreast of the highs and lows, winds beyond compare, and typical seasonal storms and sunny days alike. This is my last weather report as your Bar President. I may, from time to time, be allowed to update you as my friends take over the helm. But basically, you will soon be on your own, free from Steve Kaufman's weather station extraordinaire. Done, but hopefully not forgotten. Who else do you know that reveals so much about so little? Hey, hang onto your hats, as I'm on a roll and I have a lot to say. It is especially grand to know I have carte blanche to write about what ever I want, for however long I desire, and about whomever my sappy little heart wants to ramble on about. This, being my finale, is the perfect forum for me to do just that!

First, I have an extremely long list of kudos and thank-yous to so many who made this such a grand experience. So here goes my awards, which I have christened the first annual, and probably last annual, "Bar Junky Awards," also known as the "Bargies":

Bargie for Best Bar Director: John Baldwin aka J.B. for being my right hand, left hand, mouthpiece, concierge, encyclopedia on law "stuff", caring confidant, and all around Bar pal. John is a Bar President's best friend. He is why I survived, standing proud. I hope I have him to lean on whenever I need that special leadership push. Always.

Bargie for Best Assistant Bar Director: Richard aka Dick Dibblee for always making sure every Bar function I attend has all the creature comforts, keeping me updated on all the important stuff happening concerning Bar staff, being there when John can't be, supplying me with bagels and Dr. Pepper at all hours, always being upbeat, and knowing a great couch when he sees one. This guy obviously loves his job. Dick is a quiet leader who is always there.

Bargie for Best Chief Disciplinary Counsel: Steve Cochell for working so diligently to make his office one that is state of the art, for not just looking for the bad guys but also looking to help the good guys, for assembling a top notch crew of assistant counsel for whom we can be proud: Carol Stewart (Chief Deputy), Kate Toomey, Charles Gruber, and Mark Hirata, and the rest of the staff who I shall not name only for lack of space but shall not be forgotten. Further, for taking my calls at all hours and staying late, working weekends to get caught up or better prepared, and for making me feel that when I had question or comment that I was really listened to. I have gotten to know all of the attorneys and staff, and this is a top-notch operation.

Bargie for Best General Counsel: Katherine Fox, for protecting the sanctity of my office, giving legal opinions at a moments notice, always laughing, never whining, and giving this job her full-time commitment even when it might have been part-time. This is a person who makes everyone feel upbeat, and she's smart, too. Talk to her and get a breath of fresh air.

Bargie for Best Executive Secretary: Mary Munzert for her kindness in always being available to me at a moments notice to prepare whatever my little heart desired, for never complaining about anything, for making all my travel arrangements right so I never had a bad experience at any Bar conference anywhere (and that was a lot of travel), for guarding my office and checking my voicemail, and protecting me from harmful messages. Mary is the consummate help-person, always willing to perform her job with grace and patience, because one needs it to be working with me.

Bargie for Best Admissions Director: Darla Murphy for continuing to care about the process and the lawyers-to-be, her great smile, the ability to take such a mess and organize it, free candy, sharing

the air conditioning between our offices, and always making sure I didn't get depressed or overwhelmed when I was working at my home away from home at the Bar offices. Darla adds a glow to the Bar's environment, and is always helpful in providing me with an answer to a difficult question. Admissions can be a tedious area to administer, but Darla allows the newcomers and their first contact to be a positive one.

Bargie for Best Coordinator for the Midyear and Annual Conventions (even though she is really CLE administrator): Monica Jergensen for making these conventions run smoothly, timely, most interesting, and just plain fun. Even though she administers CLE, and that deserves a Bargie, I worked with her on these meetings which take a great deal of patience or fortitude to pull off without a hitch, and she does it. I ask for something to hopefully make the convention better, and she magically makes it happen.

Bargie for Best Finance Department: Arnold Birrell and Joyce Seeley, for both taking the time to explain to me how it all works, why we can feel safe with our dues expenditures, and the always pleasant handshake from Arnold and Joyce's willingness to drive to Ogden from SLC regularly when I couldn't get to SLC to sign checks and review payments. Watchdogs, and are we thankful since the Bar is so financially sound now.

Bargie for Best Bar Journal: Cal Thorpe and Maud Thurman for continually putting out a first rate document, forcing me to stretch myself by not letting up on me, caring that my articles are timely and appropriate (*Bar Journal* Police), and giving you the thought-provoking, increasingly interesting articles month in and month out that make the Journal ever-anticipated, but never duplicated. I actually started to enjoy writing this column, rather than dreading it. Imagine writing 12 articles for one publication in one year. They helped me want to do it.

Bargie for Best Pro Bono/Access to Justice/Computer Whiz: Toby Brown for teaching the staff how to play on the internet and helping all to understand and promote availability of lawyers and the courts, sometimes having a fancy earring and sometimes not, dressing natty, and sort of being the all-around "can I help you guy." Along with Toby, Rex Olsen for helping people and lawyers connect with each other to allow everyone access to justice, allowing lawyers to help those in need, and reinforcing our profession's grand step toward equality when justice is pursued.

Bargie for Best Bar Commission: Your Bar Commissioners, all twenty-three, for their patience, caring, and downright love. From the first day I became a Bar Commissioner 5 years ago, to the present, I have never felt more welcome and close to a group of people such as those I have associated with in this organization. The present Bar Commissioners have shown me a passion I have never seen in any other large board. They are the best of the best. Imagine taking days every month, and I mean days, not just hours, volunteering this public service just because they have a real and honest desire to make a difference to our profession and society. I should name them, one by one, but space won't allow but hopefully you know who they are, as each has special talent which has shown brightly, especially during my Presidency, an ability to get the job done and help me look good doing mine. These people, in my opinion, are treasures of the Bar. I don't mean to sound sappy, but what the hey. This is my dime. I have been able to reap so many benefits by hanging with, and being part of, this exceptional group. Most of the Commissioners were people I never knew or only heard about because of their fine reputations. I am proud to say that many are now my closest friends, and shall remain so lifelong. To all of you, a special Bargie. You deserve it!

Bargie for Best Executive Committee: Charlotte Miller, our President-elect, Charles R. Brown, Jim Jenkins, and Dave Nuffer for helping me be the best I can be. The Executive Committee is constituted by the Bar President, and I not only had the largest ever assembled, but I think the most active, caring, and thoughtful committee ever. These individuals met an additional day each month, for several hours, to help mold and guide our Bar Commission. This group often had to make immediate decisions when the full Bar Commission could not meet, often at the drop of a hat. In previous years, this committee never exceeded three people. I found that these four people were outstanding in coming together for a common cause, and help the Bar function so well. I think I did a particularly great job in picking them.

Bargie for Best Bar Staff: To the entire staff still unnamed but not unnoticed, you are the best. I would list you all, but then I would be afraid of spelling someone's name wrong or inadvertently forgetting someone. You know how much I appreciate your attentiveness and professionalism. The staff at the Bar deserves this Bargie for putting up with me. They all have shown me their work ethic. They are wonderful. Forgive me for not naming you as time and space do not permit, but you are appreciated, and I am hopeful that you know that.

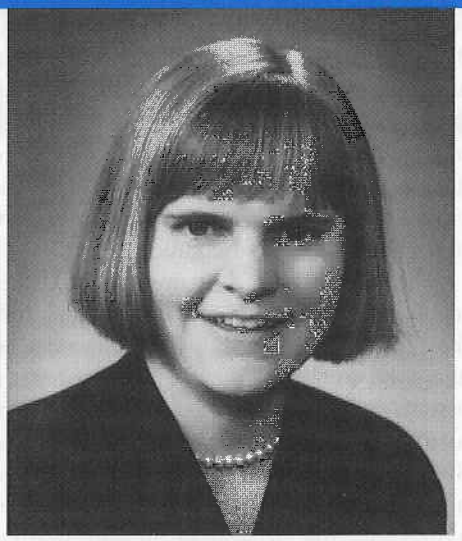
Now that I have made these presentations, I want to talk a bit about what the Bar has accomplished this year. We have stressed civility and professionalism. The Bar Commission has promoted that issue wherever we go. The idea has caught on. Judges and lawyers alike talk up the subject. Articles in our *Journal* stress these ideas. We are beginning to appreciate the magnitude and importance of conducting ourselves appropriately and professionally. Our professional image, due to a few, is tainted. We have strived to erase that negative image, and I think the train is starting to move out of the station. People are noticing. Our profession, at least in Utah, is taking notice. We can be proud that most of us are catching on and promoting a more positive image. Our newspaper message sent out around the state last November and December, "Did you hear the one about the lawyer?" has received national attention. I have spoke to other state Bars about the positive lawyer image, about our promotion here, and about civility and professionalism. These are not worn out subjects. People are listening and watching and we can make a difference.

Our Bar is financially stable. Our programs are progressing in a positive way. Our Bar is well-run and managed. The disciplinary office is working hard to help lawyers to help themselves, and make sure the public is also being well-served. We are upgrading our computer capacities and abilities so we can better serve our members in all areas. The Bar is becoming more member-friendly, and is working toward being a Bar for all its members, in all geographic areas, in all size firms or solo status, private or public, new or more experienced. It is a progressive Bar, ever attempting to better serve the needs of all Utah lawyers. We have continued to have a great relationship with our courts and judges, working together to make justice accessible for all through pro bono and other programs.

A few years ago the Bar was under

much scrutiny, especially as to its financial status. Through dedication and caring, we are no longer in the financial doldrums, and we have been able to continue to upgrade the services provided to our membership. We still have much to do, and as Bar President, I wish I could have done more. Past Presidents told me not to stretch my agenda or have become overwhelmed trying to do too much. I thank them for that ideal and pass it on to Charlotte, who will take over as President in July. She will be an excellent addition to the President's Club. She is bright, energetic, caring, and hard-working. I congratulate her and the Commission for all their hard work. I have had the full support of the Bar Commission this year, and I thank them for that wonderful kindness. I was up for the job, but no one knows until one takes the reigns what this job really entails. I am excited and proud to have been President of our Bar. It was a grand experience. I am not saddened to pass the experience on, as I will always be doing something for, or concerned with, the Bar. I am not quitting. As a matter of fact, I will be the first past President (and I am the 65th Prez) to complete a second term by retaining my status as a voting Bar Commissioner for the final year of my second three year term. So I will remain active. I will also support Charlotte and her new challenges. I have had several people ask me to remain on the Commission since I have one year left as a voting Commissioner from the Second District, and I look forward to the challenge. I also look forward to a little more time at home and work. Finally, I want to thank my wife, Connie, and my children, Kris and Shana, for their wonderful support. It is a sacrifice they also made because most evenings involved Bar business and most weekends I was away. I love them very much for allowing me this year. To my law partners, Steve Farr, Kevin Sullivan, Deirdre Gorman, Scott Jensen, Dick Medsker, Ron Nichols, and Ronn Perkins, thank you for understanding my desire to do this job. You all made me feel sort of special about this Presidency. Now my family and law partners, who are also my best friends, will have to put up with me being around more. I'm ready. To my friends of the Bar who have been so supportive, I won't forget your kindnesses either.

AND THE WINNER IS: me. Thanks. See you in Sun Valley. . . .



Judicial Conduct and Confidentiality

By Denise A. Dragoo

Amidst a hailstorm of criticism by the press, the Utah Judicial Conduct Commission recently adopted the recommendations of a task force convened to examine the confidentiality of its disciplinary proceedings. Even before the task force report was released to the Commission, the press castigated its recommendations as cloaking judicial conduct investigations in secrecy. Ironically, the task force was convened to address criticism that complaints of judicial misconduct enter a "black hole" once filed with the Commission.[1] When the task force was organized in May of 1996, its deliberations were guided by the Commission's enabling statute and constitutional proscriptions regarding confidentiality.[2] During the midst of the task force proceedings, on October 22, 1996, the Utah Supreme Court issued a case of first impression regarding the role of the Commission.[3]

THE COMMISSION AS FINDER OF FACT

In re Worthen, 926 P.2d 853 (Utah 1996) addressed the fundamental relationships between the Commission and the Utah Supreme Court and in this context established when Commission files would be opened for public scrutiny. The Court interpreted the Utah Constitution to limit the role of the Commission to that of fact-finder:

> The Commission's role vis-a-vis this court is to be inferred from the language of the constitution. And, as we explain below, that language [Utah Const. Art. VIII, § 13] makes it clear that *this court, not the Commission, has ultimate responsibility for determining both whether conduct that warrants sanctions has been proven and what those sanctions should be.*

Id. at 862 (emphasis added). Further, the Court established that:

> . . . the commission's 'order' is quite unlike the order of a trial court or the usual administrative agency because the Commission's *order has no effect whatsoever unless it is first reviewed by this court and this court determines to enforce it.*

Id. at 862. The Supreme Court gives limited deference to the Commission's findings under a standard of review applied to attorney discipline matters. *Id.* at 864. The Court grants no deference to the Commission's ultimate decision as to what constitutes an appropriate sanction. *Id.* at 863.

Given the limited deference to the Commission's findings, a decision regarding judicial discipline is not final until the Supreme Court has entered an order of sanction. Indeed, prior to *Worthen,* the court did not open the record regarding Commission proceedings until after entering its final order.[4] However, at the outset of the *Worthen* and *Buckley* cases, the court opened the record at an earlier stage of its proceedings. Under this standing order, once the Commission findings are filed with the Supreme Court, the record is public. Except in extraordinary circumstances, the Court will hold open court proceedings prior to entering its final order. *Id.* at 880.

RELEASE OF COMMISSION RECORDS

Following the *Worthen* decision, the task force recommended that Commission proceedings be held confidential until release by the Utah Supreme Court or by request of the judge being investigated. This recommendation is dependent upon adherence to the standing order in *Worthen* to open the record to the public as soon as it is forwarded to the Court. The record is held for a short period in which a judge may seek to keep the record confidential in extraordinary circumstances. However, the presumption favors opening the record. It is important to note that this candor is not mandated by the Utah Constitution or the Commission's enabling statute. Rather, it is a reflection of the Court's willingness to open these proceedings prior to entry of

the final decision of the court.

Before the order in *Worthen,* Utah was among only five other states to retain confidentiality until final order of the Court. With the order in place, Utah join 15 states in which the record becomes public when the Commission files its recommendation for discipline with the Court. Currently in some 31 states the files are opened earlier once a formal charge is made against the judge.[5] This task force recommendation was made over the vigorous dissent of two members who urged the Commission to join the majority of states providing for early release of the record.[6]

JUDICIAL DISCIPLINE REPORT

The task force conditioned its principle recommendation on release of judicial conduct proceedings upon two further recommendations. First, the task force suggested disclosure of the disposition of all complaints once they become final. The majority of complaints are resolved by the Commission short of formal charges by a private reprimand or admonition. The task force recommended disclosure of the nature of such complaints and their disposition. Only the name of the complainant and the judge would be kept confidential. Similar to the format used for attorney disciplinary proceedings, the task force recommended that a summary of complaints be reported to attorneys and judges in the *Utah Bar Journal.* This report would serve an educational purpose by heightening both the public and judicial awareness of appropriate judicial conduct. To date, the Commission has partially implemented this recommendation. Executive Director Steven Stewart now prepares a public statistical report regarding judicial conduct proceedings which is filed annually with the Utah State Legislature. The Commission has also requested Mr. Stewart to prepare a disciplinary report for regular publication in the *Utah Bar Journal.*

IMPROVED COMMUNICATION WITH COMPLAINANT

Finally, the task force recommended that complainants be kept apprised of the status and final disposition of their complaints. The reason for dismissal was to be fully explained to the complainant within the confidentiality constraints of current law. For instance, the report recommended clarifying if the complaint was dismissed because it involved an appealable issue or a disagreement about the substance of a judicial ruling, rather than a case of judicial misconduct. Further, when a complaint results in an admonition or a private reprimand, the task force encouraged the Commission to communicate that fact to the complainant. The general disposition of the case should be disclosed while not revealing the exact nature of the reprimand or admonition.

The Commission has implemented this recommendation with a rule change. Effective June 16, 1997, R595-1-9 is amended to allow the complainant to be informed that a private reprimand or a dismissal with admonition was issued. In addition, Director Stewart follows up on each complaint and provides the complaining party with a letter explaining the disposition of the matter. When the complaint meets the threshold regarding substantive judicial misconduct or disability, the complainant is interviewed and may eventually be called upon to testify in a formal hearing regarding the matter.

TWO-YEAR IMPLEMENTATION

In sum, the recommendations of the confidentiality task force balance the due process rights of the judiciary with public access to disciplinary proceedings.[7] Given the fact-finding role in which the Commission is cast, it seems appropriate to release its proceedings only after conclusion of a formal hearing. Publication of a summary of judicial disciplinary proceedings in the *Utah Bar Journal* may help prevent misconduct before complaints are filed. Improved communication between the Commission and the complainant should improve the parties' confidence that a complaint is being fairly and timely prosecuted. The task force suggested that the Commission operate under its present structure and the recommended policies for at least the next two years. At the end of that time period, the task force recommended that the issue of confidentiality may be reconsidered.

[1]Denise A. Dragoo, "The Judicial Conduct Commission Comes of Age," Commissioner's Report, *Utah Bar Journal,* Vol. 8, No. 7, August/ September 1995 at 8.

[2]Utah Code Ann. §78-7-30(6)(b); Utah Const. Art. VIII §13, provides that the Commission "shall investigate and conduct *confidential hearings* regarding complaints against any justice or judge."

[3]*In re Richard Worthen, Justice Court Judge, v. William Gibbs,* No. 950536 and *In re Gaylen Buckley, Justice Court Judge v. Robert Newton,* Civil No. 950537.

[4]Utah Code Ann. §78-7-30(6)(b) provides that complaints, papers or testimony may not be disclosed by the Commission . . . until the Supreme Court has entered its final order in accordance with this section, except: (1) upon order of the Supreme Court; (2) upon request of the judge or justice who is the subject of the complaint; or (3) the dismissal of a complaint or allegation against a judge disclosed by the person who filed the complaint.

[5]Judicial Conduct Commission, Confidentiality Task Force Report, January 9, 1997 at 3; *see In re Worthen,* 926 P.2d 853, 879.

[6]Dissenting Report, January 16, 1997 at 3.

[7]The Confidentiality Task Force was chaired by Carol Clawson, Esq., Solicitor General, Utah Attorney General Office; Vice-Chair Gary G. Sackett, Esq., General Counsel, Questar Corp. and Chair of the Utah State Bar Ethics Advisory Opinion Committee; Sylvia Bennion and Denise Dragoo, Esq., both former Chairs of the Judicial Conduct Commission; Hon. Gordon J. Low, First Judicial District Court; Timothy M. Shea, Esq., Administrative Office of the Courts and Sharon Sonnenreich, General Counsel to *The Salt Lake Tribune.*

Salt Lake Attorney, Ray Christensen Joins Mediation Company

Ray R. Christensen, co-founder and director of the Salt Lake City Law firm of Christensen & Jensen, recently contracted with Intermountain ADR (Alternative Dispute Resolution) Group to serve as a member of its arbitration/mediation team. Christensen has been practicing law since 1949, and is past president of the Utah State Bar. His areas of expertise include personal injury, property damage, products liability, professional malpractice, aviation and commercial litigation.

Intermountain ADR Group assists individuals and businesses in resolving disputes outside of the courtroom. This alternative method for settling conflicts is increasing in popularity because it saves time and money. Intermountain ADR was founded in 1995 by Connie Roth, and currently has eleven professional mediators under contract.

Jurors and Justice

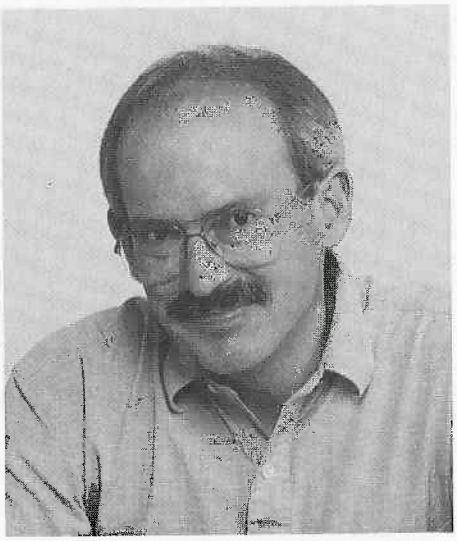
By Stephen Trimble

As I listened to the jurors in the O.J. Simpson civil trial speak about their decisionmaking, I realized that they were speaking for me – and that I could speak for them. In the past five years I have sat on two juries, both murder trials, both involving family violence. I'm a nature writer and photographer and have no special knowledge of the law. The computer just keeps drawing my name for jury duty.

In the first case, an eighteen year old was accused of killing his two-year-old stepson – just six days after marrying the boy's mother – by swinging the toddler headfirst against the bedroom wall. In the second, a mother of three was tried for killing her abusive husband by shooting him in the back of the head while he was asleep. None of the players in these cases had the fame of Nicole, Ron, or O.J. But their lives were in our hands, and both times, I felt that we jurors did our work honorably.

There is a gravity to the judicial system that all the cynicism of American society cannot erase. In each case, we took the rules seriously. The judge asked us to avoid press coverage of the trial, and we asked our spouses to censor the morning paper. The judge instructed us not to discuss the trial with each other or with others, and we filled the courtroom breaks with small talk. Both trials involved technical evidence, and, each time, every juror listened attentively. I don't think we were unusual or naive in our commitment to be this conscientious. The O.J. Simpson jurors revealed the same sincerity and thoughtfulness in interviews after the trial.

The surprise to me in each case was the specificity of the questions we were asked to decide. After listening to witnesses pour out their hearts, or lie in horrifically self-serving ways, after hearing prosecutors and defense attorneys build tedious technical cases detail by detail, everything boiled down to a point of law. Our general feelings about guilt or innocence developed over time – listening, rating credibility, measuring stories against commonplace logic. But the decision we were asked to make turned on the nuances of one or two phrases in the law, phrases we did not even hear until the judge finally read our instructions to us just before deliberations. After all this, they were all that mattered. We read them aloud again and again in the jury room, both startled and reassured by the clarity of judgment they demanded.



STEPHEN TRIMBLE worked as a park ranger at Arches and Capitol Reef national parks in the 1970s and moved to Salt Lake City in 1987 when he married Joanne Slotnik. He has received significant awards for his non-fiction, his photography, and his fiction. His sixteen books on western wildlands and native peoples include: The People: Indians of the American Southwest; Talking With the Clay; The Art of Pueblo Pottery; The Sagebrush Ocean: A Natural History of the Great Basin; Blessed By Light: Visions of the Colorado Plateau; The Geography of Childhood: Why Children Need Wild Places *(co-author); and, most recently,* Testimony: Writers of the West Speak on Behalf of Utah Wilderness *(co-compiler).*

In the case of the young stepfather, the defense offered a lengthy argument concerning the physics of objects hitting walls and floors to convince us the toddler died from falling out of a bunkbed. The state medical examiner said this was impossible. The first statement in the jury room came from a mother and grandmother of many children who said, "I've had lots of children fall out of bunkbeds, and *none* of them died." Our first step was based on evidence and witnesses and our experience as parents.We could imagine the defendant's temper with a cranky two-year-old; he went over the line into forbidden territory. The next decision we needed to make had *only* to do with the law, the fine points defining murder and manslaughter. We found the young man guilty of manslaughter.

The abused spouse on trial for killing her husband admitted to shooting him but claimed that it was an act of self-defense. Police reports and her husband's parents confirmed most of her story – a vivid picture of a violent and unpredictable husband she had every reason to fear. The prosecution tried to convince us she did the deed for insurance money. Some of the jury believed this, but the instructions stated simply and clearly that if there was *any* reason to believe she acted in self-defense, we must find her not guilty. And so we did. Our decision, based on the law, was clear-cut, even though our feelings about what actually happened varied widely.

My time as a juror gives me faith in this one link in the American judicial system. Laws may be ill-conceived or noble, lawyers may be gifted or inept, and justice may or may not be served. But without exception the women and men I have sat with in jury rooms all have tried to apply every ounce of their intelligence, morality, common sense, and honesty to the legal questions before them. I believe the jurors in the O.J. Simpson trial did the same.

Are Income Taxes Dischargeable in Bankruptcy?

By Rex B. Bushman

I started practicing the discharge of federal and state income taxes in bankruptcy because it was a unique item to improve my effectiveness as a bankruptcy attorney. I had experienced preparing and filing Chapter 7 and Chapter 13 bankruptcy petitions, and could apply rules for discharge that offer relief many clients – and some attorneys – don't know is available.

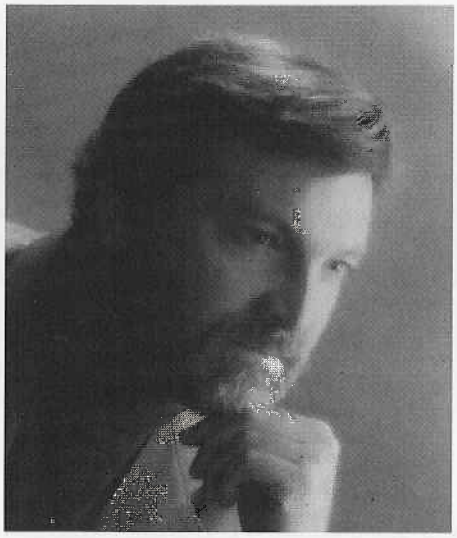
These clients are trying to deal with a three-headed monster: First, their back taxes are overwhelming them financially. Second, they face the nearly unlimited power of the government acting as a collection agency. Finally, both the public and certain attorneys have misconceptions about the remedy that can come from discharging income taxes as unsecured debt.

The solution is applying the bankruptcy and tax codes properly to the many people who qualify for this relief. The answer to the question, "Are income taxes dischargeable in bankruptcy?" is yes, but only under certain limited conditions. This article will cover applicable laws a practitioner can use to gain relief for clients and give them a new sense of hope and a fresh start to build an estate.

PROBLEMS

It is "just understood" that you cannot discharge income taxes is bankruptcy. Owing income taxes is the worst kind of debt because, if you can't pay the taxes, you will always owe the money. You can kiss financial security good-bye. You may never have an estate or a home of your own and you may lose the money you earn before you receive it.

The authority of the state and federal tax entities allows their agents to sell a home or garnish a large portion of a pay check. Collection of income taxes takes place without the adjudication of judgment. You may have to go into hiding to be able to provide a living for your family if you owe the government. The power of the state may be more than the taxpayer can withstand.



REX B. BUSHMAN is the owner of the law firm, Rex B. Bushman, P.C. He graduated from UNLV in 1975 in business administration with an accounting major and obtained a juris doctorate degree from the J. Reuben Clark Law School at Brigham Young University, in 1978. Rex has applied to become a member of the Tennessee State Bar on reciprocity due to his musical interests and country releases under the assumed name of Rex Roberts.

Income taxes are initially an unsecured debt. Why, then, is there no relief provided a taxpayer that comes upon the inability to make ends meet? It is the fact that taxes are owned to government that allows their initial stigma. Taxes take a priority for payment in the taxpayer's mind as though non-dischargeable. This is accomplished by the filing of a lien with the power of judgement in the county of residence, which only the government has the right to levy.

But the debt arises solely from the financial information of the taxpayer. The tax codes enforce against the taxpayer what otherwise would be fifth-amendment rights against self incrimination. If you do not file your return, the IRS may file one for you. The state may estimate the tax you owe from total lack of information and levy upon your assets whether proof exists that you were even a resident during the tax period.

Income taxes may be priority debt in bankruptcy and the bankruptcy trustee will pay them ahead of secured and unsecured creditors of the estate. The classification or status of priority debts is statutory and enables the government to be paid ahead of other creditors. Thus, all available non-exempt assets of the estate may be liquidated to pay administration debts including the government first.

The government's position of interest seems secure. The debtor may not ask his bankruptcy attorney to discharge his income taxes along with his other debt, because he thinks he cannot do that. In addition, tax counsel may try a remedy for the taxpayer to pay payments on the balance owing with interest and penalties accruing in an offer and compromise for resolution of the balance owed.

AVAILABLE RELIEF

What if some kind of tax relief was available? Can you imagine the estate of a taxpayer becoming financially solvent again? He becomes able once again to support his family without threat of loss of income or equity. Gone is the dilemma of accruing interest and penalties more than the negotiated monthly payment of all disposable income on the balance due. The relief offers return of income and ability to accumulate an estate.

This kind of remedy could provide more heart-felt joy to a client than any alternate financial success available. An opportunity to return to the American dream. The prospect of again becoming financially viable. Wouldn't it be great to travel to work, knowing the money you earn is now yours? The plans for the future

again become meaningful.

It was easy to recognize the potential that discharging income taxes can rehabilitate the estates of taxpayers who would otherwise never again experience financial security. With the burden of penalties and interest many taxpayers fall further behind and will never be able to pay what is owed. The fact is that lesser-known statutes of the Internal Revenue Code and the Bankruptcy Code do allow discharge of income taxes as unsecured debt. The remedy is possible and the relief is available. The guidelines offered to the taxpayer are narrow and must be applied carefully, according to law.

With the use of applicable statutes, my treatment of income taxes as a priority, only, has taken on a new perspective. Some taxes are priority, some are secured debt, and some are unsecured dischargeable debt.

Initially there are a few guidelines to apply to the client's factual setting to decipher whether the outstanding income taxes are dischargeable at a given point in time. With proper tax planning, a substantial amount of income taxes, if not all that are owing, will qualify for discharge at some point. The rules of law are fairly simple to learn, but the details get a little tricky.

OBTAIN RELIEF

First, an income tax return must be filed with the taxing authority.[1] The IRS may prepare a return for the taxpayer with information submitted by an employer, but such a return will not suffice to qualify the taxpayer for discharge of taxes. The state may go so far as to estimate the tax owing without foundation, and even levy for collection of the estimated amount.

The taxpayer should initiate, help prepare and sign his own return, whether it is prepared by professionals or otherwise. A copy should be made for the taxpayer's files along with certified mailing for proof of service. These steps should avoid the problem of tax entities stating the return cannot be found and consequently was not filed.

Second, if the income tax return is filed timely, there must be at least three years from the filing date to the date of the bankruptcy petition.[2] Timely filing of a return is from January 1st to April 15th for the previous tax year. If the taxpayer obtains an extension period, the return will still be considered timely if filed within the extension period. If it is filed after April 15 without extension, or after the end of the extension period, it is untimely.[3]

Third, if the return is filed late, there should be more than two years from the filing of the return to the date of the petition.[4] This rule offers the taxpayer a good opportunity for successful tax discharge. Many taxpayers have not filed returns and will find that they may qualify for the discharge of their income taxes after two years of their concerted effort to prepare and file late returns.

The filing of a return on April 16th for the previous tax year will be considered a late return for the purpose of discharge in bankruptcy filing. This shorter statute of limitation may benefit the taxpayer by qualifying income taxes sooner for discharge in bankruptcy.

"With proper tax planning, a substantial amount of income taxes, if not all that are owing, will qualify for discharge at some point."

Fourth, if there is an assessment by the taxing authority, by audit or self-assessment, i.e., an amended return, the taxpayer should allow 240 days before filing a bankruptcy petition to allow for collection of the assessment.[5] This rule gives the tax authority the opportunity to collect newly determined taxes owing before a discharge benefit by filing bankruptcy.

Where an initial return does not disclose all of the income of the taxpayer, an amended return may remedy the problem. To get effective relief the taxpayer will want discharge on all taxes that can be assessed against the taxpayer. The IRS may audit a return during a bankruptcy if income is not declared. The undeclared income will not be dischargeable, so it is in the taxpayer's best interest to make full disclosure on the initial return.

Fifth, a fraudulent return, willfully evading taxes, is not dischargeable.[6] Such a return should, however, be amended and may qualify for discharge in the future. If the taxpayer wishes to obtain the opportunity to discharge taxes he must comply with all requirements of the law. One of the requirements is good faith in disclosure.

The foregoing rules will apply to both federal and state taxing authorities. Taxes may be submitted for discharge as unsecured debt in Chapter 7, Chapter 11 and Chapter 13 forms. The Chapter 7 filing may allow total abatement, whereas Chapters 11 and 13 filings may allow a percentage of the unsecured debt to be discharged.

Taxes that do not qualify for discharge at the time of filing bankruptcy may rightfully be considered priority taxes, and non-dischargeable.

CONSIDERATIONS

Payroll taxes are partially included in the foregoing provisions.[7] The employee's share of that declaration is not dischargeable due to its status as a trust account. The employer's contribution is dischargeable. All of the fears for nondischargeability do apply to the employee's contribution to the payroll tax debt. Penalties, interest and high priority for collection bode extreme caution to the individual that allows himself to become liable for the trust account of his company's payroll taxes. The employer's contribution to payroll taxes, however, is dischargeable as unsecured debt; and may reduce the overall obligation considerably.[8]

Complications arise in obtaining the desired relief where the taxing entity has placed a lien upon the real and personal property of the estate of the debtor. A tax lien must be filed in the county of the taxpayer's residence to be effective. Another problem occurs if the debtor has substantial equity in his estate available as security. This is a typical bankruptcy dilemma which often keeps debtors from discharging their debts without losing their equity interests.

If a taxpayer cannot pay his income taxes, often the status of his estate will allow a complete discharge without loss of anything except credit and attorney fees. For instance, if a taxpayer has no security upon which the taxing authority may place a lien, then the lien amount will be discharged as unsecured debt in a Chapter 7 bankruptcy.[9] There is no priority status for income taxes where the assessment date has passed applicable statutes of limitations and the lien is unsecured.

The amount or value of income taxes equal to that of the assets set forth in the Chapter 7 petition will not receive discharge of the equal value of taxes in spite of any exempt status of the assets in bankruptcy. The value of the exempted assets secures

the taxing authorities' lien prior to the bankruptcy to that amount.[10]

The next question may be what the value of the equity of the taxpayer really is. If the tax entity wants further proof than is designated in the bankruptcy petition, this could be a question for resolution in court. It may be more likely that, with a proffer of value, the IRS agent will determine a conservative estimate of the debtor's equity and the taxing entity's lien will survive as secured to that extent only. The tax lien cannot be effective against security that does not exist and will be released and discharged to the extent it is unsecured.[11]

The tax entity does not normally know what equity of the taxpayer is available to secure its lien when it is levied against the taxpayer. The lien simply designates the gross income taxes owed. For that reason it is routine to have the lien partly or fully released based upon the actual facts of the debtor's estate once they come to light.

The taxing authorities have the power to audit a return during the interim of the bankruptcy.[12] If assessment occurs, the statute of limitation for discharge will then increase a new 240-day waiting period. The debtor, however, is attempting relief in bankruptcy afforded only once in six years for Chapter 7. Since a new assessment will not then be dischargeable, the remedy for this situation may be a good faith declaration in the original return, as the taxes initially declared will receive discharge if they otherwise qualify and will avoid the need for the IRS to audit at a bad time.

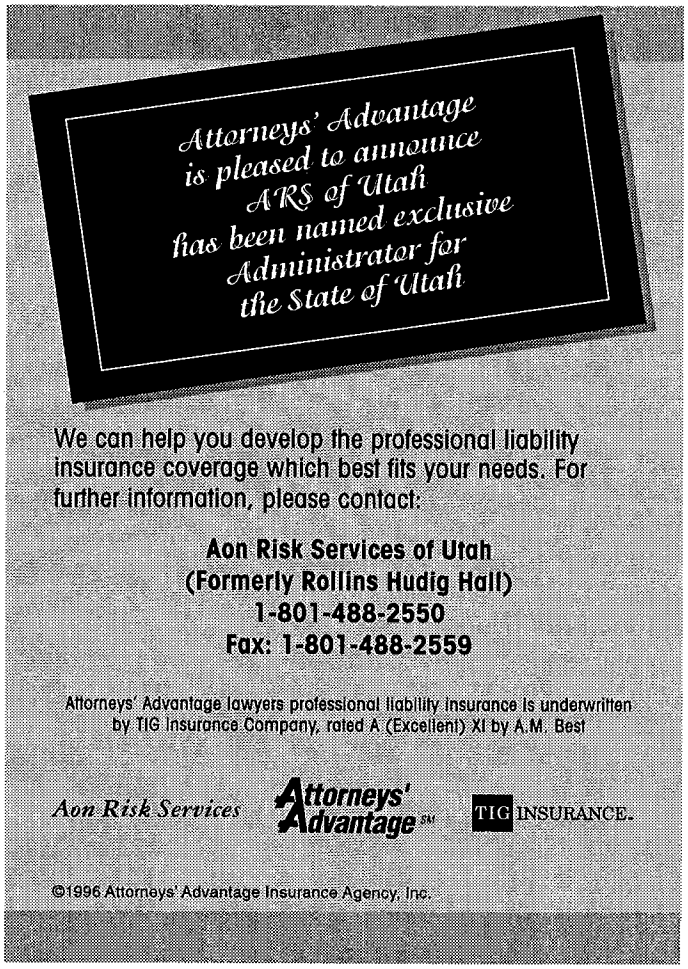
CONCLUSION

Upon occasion, I have interviews with clients having income tax problems that have also been through bankruptcy where they may have qualified for discharge of some or all of their taxes if they had been characterized as unsecured debt. There are several reasons for this, but most have to do with misconceptions about the law held by the public and sometimes by attorneys.

Adequate planning can afford real relief for the taxpayer that has more taxes than he can pay. But the taxpayer may not find the legal expertise necessary for the abatement of taxes by seeking out bankruptcy counsel or tax counsel only. The taxpayer that is aware that this process is allowed in law must seek out counsel that can provide the appropriate remedy and administer relief.

There is no greater benefit to provide a client with saving his future from financial insecurity brought about by the temporary or untimely inability to pay income taxes.

[1]Section 523(a)(1)(B)(I), Bankruptcy Code.
[2]Section 523(a)(7)(B), Bankruptcy Code.
[3]Section 523(a)(1)(B)(ii), Bankruptcy Code.
[4]Section 523 (a)(1)(B)(i).
[5]Section 523 (a)(1)(A) and Section 507(a)(7)(ii), Bankruptcy Code.
[6]Section 523(a)(1)(C), Bankruptcy Code.
[7]Section 523(a)(1) and Section 507(a)(7)(A), Bankruptcy Code.
[8]Section 523(a)(1)(A), Bankruptcy Code.
[9]Section 502(b)(3) and Section 506(a), Bankruptcy Code.
[10]Section 6321 and Section 6334(e), Internal Revenue Code.
[11]Section 502(b)(3) and Section 506(a), Bankruptcy Code.
[12]Section 362(b) Bankruptcy Code.



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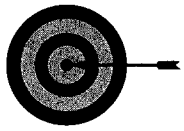

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Welfare Reform Act: Finding Your Way Through the Construction Zone

By Karma Dixon and Renee Jimenez

KARMA DIXON has served as Section Chief for the Northern area of the State in the Child and Family Support Division of the Attorney General's Office for the past three years. Since graduation from the University of Utah College of Law in 1980, she has become a veteran at negotiating the potholes and speed traps of family law.

RENEE M. JIMENEZ, Assistant Attorney General, is the Section Chief for the Salt Lake office of the Child and Family Support Division within the Utah State Attorney General's Office. She has held that position since April 1994 and prior to that time she practice full-time in that Division representing the Office of Recovery Services. Ms. Jimenez received both her J.D. Degree (1991) and her B.S. Degree (1988) in Behavioral Science and Health from the University of Utah. Ms. Jimenez is active in the Utah State Bar and currently serves as a member of the Family Law Executive Committee and was appointed by the Utah Supreme Court in November 1996 to serve a three year term as an alternate panel member on the Ethics and Discipline Committee. Ms. Jimenez also serves as a member of the Board of Trustees for Legal Aid Society of Salt Lake and volunteers her time with various organizations within Utah's Hispanic community.

Most of you probably thought that the most significant reconstruction you would see in the next few years is the reconstruction of I-15. However, in the past year another reconstruction was taking place at a national and state level that will also require some major changes in our lives: welfare reform. The Welfare Reform Act ("Act") on a national level mandated changes in the State law, or Utah would face the possibility of funding being withheld from the block grant given to the State for Aid to Families with Dependent Children. Through this article we will provide a basic road map to help you through the construction zone and potholes of the new legislation. We hope to familiarize you with both the new areas of law and the changes the Act made to existing law. Buckle your seat belt!

License Revocation: One of the most sweeping requirements of the Act mandated each state to have programs for the revocation of occupational, recreational and driver's licenses for the failure to pay child support. Utah Code Ann. §78-32-17, Noncompliance with Child Support Order, has been amended to include "A court may, in addition to other available sanctions, withhold, suspend or restrict the use of driver's licenses, professional and occupational licenses, and recreational licenses and impose conditions for reinstatement. . . ." This sanction may be made to persons who: (1) make no payment on a current child support obligation for 60 days; OR (2) fail to comply with a prior payment schedule to repay arrearages; OR (3) deny contact between a noncustodial parent and a child for 60 days; OR (4) fail to comply with a subpoena or order relating to a child support proceeding. This sanction is not available in circumstances in which there is a stay regarding enforcement of the support or visitation order.

In order to effectuate the license revocation provision, each agency with authority to license is now required to include the social security number of the applicant, which information will be available to the Office of Recovery Services ("ORS") or another state.

Centralized New Hire Registry: The Act also requires each state to have a Centralized New Hire Registry. Utah's provision is found at Utah Code Ann §35A-11-101 through 108 and requires that the newly created Department of Workforce Services maintain the registry. The registry database is established for the purpose of receiving and maintaining information on newly hired or rehired employees. The Act requires that employers report to the registry the name, address, social security number of each new employee, and the employer's name, address and federal tax identification number. The standard period for reporting will be within 20 day of the date of hire or rehire of the employee. The information will be shared with support enforcement agencies and thus is intended to allow for the rapid enforcement of support orders.

For large employers, if approved by ORS, the employer may send the information on a semimonthly basis. For employers who have employees in two or more states, the information need only be sent through one state. That information will then be accessible by the other states through the National Directory of New Hires.

Employers who fail to comply with the reporting provisions of the act shall be subject to a fine of $25.00 for each failure to report or $500.00 if the failure to report is intentional and the employer and employee agree to not provide the information or to provide false information. These penalties may be determined administratively.

"One of the most sweeping requirements of the Act mandated each state to have programs for the revocation of occupational, recreational and driver's license for the failure to pay child support."

Financial Institutions Reporting Requirement: Financial institutions are now required each quarter to provide to ORS the name, record address, social security number, other taxpayer identification number or other identifying information for each obligor who maintains an account at the institution and owes past support. See Utah Code Ann. §62A-11-304.5. A data match system will be developed, and when the financial institution receives from ORS a notice of lien, said institution is required to encumber or surrender the assets of the obligor.

Definitions: The definitions which previously were found as part of the Uniform Civil Liability for Support Act found in Title 78 Section 45, are now listed in the section listing the powers of ORS in Title 62A Section 11. The use of the term "earnings" has been replaced with the term "income" and has been expanded to specifically include bonus pay, allowances, contract payment, severance pay, sick pay and incentive pay.

Modification of Support Orders: The necessary elements for the modification of child support orders was dramatically impacted in the Act. See Utah Code Ann. §62A-11-320.5. If a case is reviewed by ORS for modification after three years, a substantial change in circumstances is not required. If ORS receives a request for review from the parent or legal guardian of the child OR there is an assignment of support rights and ORS determines that a review is appropriate, ORS will conduct a review. If that information shows a difference of 10% or more between the amount of the present order and the amount that would be required under the child support guidelines and the change is not temporary, ORS shall adjust the amount of an administrative order or file a petition to modify for a court order.

The parent who requests such a review is required to provide notice of the request to the other parent within five days of the request. In administrative proceedings, the parties will have 30 days to respond to the notice of adjustment.

In cases within the three year cycle, ORS may now modify if there has been a substantial change of circumstances. See Utah Code Ann. §62A-11-320.6. The statute specifies six circumstances as a substantial change: (i) material changes in custody; (ii) material changes in the relative wealth or assets of the parties; (iii) material changes of 30% or more in the income of a parent; (iv) material changes in the ability of a parent to earn; (v) material changes in the medical needs of the child; and (vi) material changes in the legal responsibilities of either parent for the support of others.

ORS is then to determine whether it is in the best interests of the child, whether a substantial change has occurred and whether the change resulted in a difference of 15% or more between the amount of child support ordered and the amount that would be required under the child support guidelines.

If a party asserts that a modification is appropriate because that person now has

responsibility for the support of others, that does not mean that credit will be given for stepchildren.The Uniform Civil Liability for Support Act at §78-45-7.2(5) still only allows consideration of natural or adoptive children for purposes of credit.

Income Withholding: Another vital part of Utah's child support enforcement program, the Income Withholding statute, underwent construction changes. Utah Code Ann. §62A-11-410 et seq. now provides that all support orders issued or modified after July 1997 although subject to withholding, are not subject to the current $7.00 check processing fee charged by ORS. Further, for cases that are being serviced by the ORS (IV-D cases) that include orders that were issued or modified after October 13, 1990, the order is subject to **immediate** income withholding. Essentially this means that every support order entered after this date is subject to income withholding without the showing of a delinquency.

An order issued or modified after October 13, 1990 is however exempted from withholding if there is a finding on the record of good cause or there is a written agreement for an alternative payment arrangement. Note that the exemption language must be included in the order. If there is an exemption in the order, income withholding may be implemented upon (i) a delinquency, (ii) the obligor's request, (iii) one of the parties to the written agreement requests withholding or (iv) if good cause was a factor, a determination that the good cause no longer exists.

For IV-D cases that include a support order that was issued prior to October 13, 1990 and not otherwise modified, income withholding is applicable if a delinquency has occurred and the obligor and payor are notified of the income withholding. An obligor may contest the withholding only on the grounds of a mistake of fact and the decision to implement withholding may be appealed to the District Court.

Utah Code Ann. §62A-11-501 et seq. addresses income withholding for cases where neither the obligee nor obligor are receiving services from ORS. Implementation of income withholding in a Non IV-D order issued or modified after January 1, 1994, follows the same procedural steps as a IV-D order that is issued or modified after October 13, 1990. Commencing July 1, 1997 however, implementation of income withholding for a Non IV-D support order is commenced upon the request of the obligee or obligor. If a request is made, the court shall start withholding by ordering the clerk of the court or the requesting party to provide to the payor a notice of income withholding and to provide to ORS a copy of the notice and a copy of the support order.

If at the time the order is issued or modified neither party request withholding, the order shall contain a provision that withholding may be implemented by either the obligee or obligor applying for IV-D services or by filing an ex parte motion with the district court requesting income withholding or representing that a delinquency has occurred. If the court grants the motion, either the clerk of the court or the requesting party shall send a notice of income withholding to the obligor and the payor. The obligor may file an objection to the order based on the grounds of a mistake of fact but the objection must be filed within 20 days of the order.

Assignment to and Powers of ORS: If your client has or is receiving Aid to Families with Dependent Children ("AFDC") it is required that ORS obtain an assignment of support rights. The assignment is effective for support that has accrued prior to the assignment and for support that accrues during the receipt of AFDC. The Act creates some time limits as to how long the assignment is effective after the recipient terminates the receipt of AFDC. Under Utah Code Ann. §35A-8-108, the assignment for **unpaid prior support** terminates on and after the date the recipient stops receiving AFDC if the unpaid prior support amount is not collected by ORS by September 30, 2000 if the assignment was taken between October 1, 1997 and October 1, 2000. If the assignment was taken after October 1, 2000 then the assignment for the unpaid prior support terminates on the date the recipient stops receiving AFDC.

The Act also expanded ORS's powers to establish, modify and enforce support

orders. Utah Code Ann. §62A-11-107 specifies that ORS may seek an order that requires an unpaying but physically able support obligor to participate in work activities. Further, Utah Code Ann. §62A-11-304.1 allows ORS, without obtaining a court order or commencing an adjudicative proceeding, to (i) require genetic testing, (ii) subpoena financial and/or locate information from public utilities, cable companies, financial institutions and public and private employers and (iii) access information stored in state and local government databases including marriage and birth records, tax records, property records, license records, wage-employment security records, motor vehicle information and corrections records.

Paternity: The Act did have an impact on the establishment of paternity in that there are changes to the area of genetic testing, assessment of costs, the presumption of paternity and the admission of evidence.

In a paternity action, genetic tests may be ordered by the court on its own initiative or any party to the action may request the genetic tests. Pursuant to Utah Code Ann. §78-45a-1 et seq. the request must be supported by a sworn statement either (i) alleging paternity and stating facts that show the possibility of sexual contact or (ii) denying paternity and stating facts that show the nonexistence of sexual contact.

The party responsible for payment of the costs for genetic tests depends upon who requested the tests. If ORS requests the genetic test then ORS pays the cost but is able to recoup the costs from the alleged father if paternity is established. If the court requests the tests, then the mother and alleged father share the cost and if either the mother or the father request the tests, the requestor pays the cost but may recoup their cost from the challenger of paternity or nonpaternity if the test results are contrary to the position of the challenger.

As to the presumption of paternity, an alleged father is presumed to be the father of a child if the genetic test result in a paternity index of at least 150. The presumption of paternity is rebutted only by a second test that results in an exclusion. The second test may be requested within 15 days following the results of the first test being sent to the parties. It should be noted that if a second test is requested it must be paid for in advance by the requestor.

The genetic test results are admissible as evidence of paternity without the presentation of foundation or other proof of authenticity if the tests (i) are of a type accepted as reliable by a Department of Health and Human Services designated accreditation body and (ii) they are performed by a laboratory that is approved by an accreditation body and (iii) there is not an objection submitted within 15 days of the results being sent to the parties. If genetic expert testimony is needed, it may be presented in affidavit form unless a party objects within 15 days of the results being sent.

Now that reconstruction of the public assistance programs has begun, we must be on alert to the many changes in the way we have previously conducted our business. The Welfare Reform Act pertaining to child support issues in Utah was 86 pages long. We hope this information is helpful, but everyone should review the laws they have relied on for years to see if there are other changes. Good luck, and drive carefully.

Discipline Corner

RESIGNATION PENDING DISCIPLINE

On April 2, 1997, the Utah Supreme Court entered an Order Accepting the Petition of Richard S. Landerman for Resignation Pending Discipline. Under the terms of the Order, Richard S. Landerman ("Landerman") was enjoined from holding himself out as an attorney at law or providing legal services for a minimum period of five years and until such time as he is readmitted to the Bar.

On November 30, 1990, Landerman was convicted of Conspiracy in violation of 18 U.S.C. §371, Assisting in the Preparation of a False Tax Return in violation of 26 U.S.C. §7206(2) and Filing a False Tax Return in violation of 26 U.S.C. §7206(1). As a result of his conviction, Landerman was sentenced to two years imprisonment and five years probation. Landerman was placed on interim suspension by the Court on February 13, 1992. Pursuant to Rule 25, Rules of Lawyers Discipline and Disability, Landerman receives credit from the date of his interim suspension and is eligible to apply to the Bar for readmission.

INTERIM SUSPENSION

On April 15, 1997, the Hon. Timothy Hansen entered an Order Imposing Interim Suspension suspending Loren D. Israelson ("Israelson") from the practice of law pending the outcome of an attorney discipline action arising out of Israelson's conviction for Conspiracy to Defraud the United States on October 11, 1996.

SUSPENSION

On March 31, 1997, the Honorable Glen R. Dawson entered an Order of Discipline by Consent suspending Phillip D. Judd from the practice of law, the suspension to be held in abeyance and Judd placed on a term of supervised probation for a period of two years. Judd was also ordered to attend Ethics School and to make restitution. The discipline is being imposed for violations of Rule 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), and 3.2 (Expediting Litigation) of the Rules of Professional Conduct.

The attorney discipline case arose from Judd's failure to act with reasonable diligence and promptness in representing his clients, his failure to keep his clients reasonably informed about the status of their matters, and his failure to promptly comply with his client's reasonable requests for information.

Mitigating circumstances included Judd's lack of a dishonest or selfish motive in his dealings with clients, Judd's good faith effort to make restitution and to rectify the consequences of the misconduct involved, and Judd's cooperative attitude toward the disciplinary proceedings since December 1996. Aggravating circumstances include Judd's prior record of discipline, a pattern of professional misconduct, the fact that there were multiple offenses, and Judd's substantial experience in the practice of law.

ADMONITION

On March 12, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 1.15 (Safekeeping Property), for negligently handling client funds resulting in temporary loss of the funds to the client. In April, 1996, the respondent received a $500 retainer from a client and, pursuant to an office practice followed by other attorneys in the respondent's law firm, left cash funds unattended on the desk of his law firm's bookkeeper without delivering the funds directly to the bookkeeper for deposit. The funds were taken by person(s) unknown and lost to the client.

In mitigation, the attorney had no prior record of discipline, voluntarily made restitution to the clients, was fully cooperative with the OAD's investigation, and expressed remorse for the mishandling of client funds. The attorney will attend the Utah State Bar's Ethics School.

NOTICE
Consumer Assistance Hotline Position

The Utah State Bar is seeking applications to fill a position which will staff a newly-created Consumer Assistance Hotline. The telephone hotline will assist clients in communicating with their particular attorneys and will respond to requests, inquiries and less serious complaints involving fee disputes, ethical concerns, pro bono projects, and the client security fund. The hotline will (1) provide clients with an outlet and/or solution for problems with their attorneys; (2) improve the current disciplinary system by resolving less serious complaints more quickly without the involvement of the Office of Attorney Discipline; (3) save time and effort of attorneys in responding to these less serious complaints; (4) provide assistance to attorneys having difficulty communicating with their clients. The hotline is patterned after similar programs in other states which have seen successes in facilitating communications between attorneys and clients and resolving disputes before they escalate into disciplinary complaints.

The position requires a law degree, at least five years of practice, and an active Utah State Bar license. The position also requires the ability to help clients identify problems over the phone, focus on solutions and resolve those concerns with attorneys. The hotline may be staffed from an applicant's home, but the position is not intended for someone otherwise engaging in private practice or soliciting outside legal work. The time required to perform this work will take twenty hours per week. Salary negotiable. Equal opportunity employer. Submit resume to John C. Baldwin, Executive Director, 645 South 200 East, Salt Lake City, UT 84111, by June 30, 1997.

New Solo, Small Firm and Rural Practice Section Created

At its regular meeting held on April 25, 1997, the Board of Bar Commissioners unanimously approved the formation of a new section, the *Solo, Small Firm and Rural Practice Section.* The new Section was created to meet the unique needs of solo, small firm and rural attorneys in Utah. All lawyers practicing in firms of five or fewer attorneys or in rural areas of the state are urged to join and support the new Section. Annual Section dues have been set at $15. Interested attorneys can join the Section by paying Section dues with the 1997-1998 Bar licensing statement.

The Section intends on expanding on the work and efforts of the Small Firm & Solo Practitioners Committee, which was created in June 1993 and which has now been disbanded. The Section plans on sponsoring CLE programs that will focus directly on the interests of solo, small firm and rural attorneys. CLE programs will be offered at a discount to Section members and the possibility of permitting attendance at Section CLE programs by telephone is being investigated. Other planned benefits of Section membership include participation in a Section sponsored mentoring program, a free listing in the "Practice Emphasis Index" of *The Intermountain Commercial Record* "Utah Professional Directory," discounts on advertising and subscription rates to *The Intermountain Commercial Record* publications (and possibly other legal publications and services in the future), and continued free access to the "Solo and Small Firm Resource Library" located at the Utah Law & Justice Center. The Section will also continue to participate in law school career fairs and will continue to sponsor the popular "Going Solo Seminar." In addition, the Section plans on looking into the feasibility of establishing a computer "list serve" or "e-mail mailing list" where Section members could pose queries inviting responses from other Section members. The Section may co-sponsor CLE breakfasts or lunches in various communities in the state, perhaps in conjunction with the various County Bar Associations, that would increase the feeling of involvement and professionalism in the State among solo and small firm practitioners. The Section may also sponsor a newsletter, or *Bar Journal* column, focused on solo, small firm, and rural practice issues. In general, it is hoped that the benefits of membership in the Section will far outweigh the modest cost of joining.

Perhaps most importantly, the Section plans on actively lobbying Bar leadership on those issues directly affecting solo, small firm, and rural attorneys so their interests will not be overlooked. The creation of the Section allows for greater involvement in the Bar by solo, small firm and rural attorneys in a Bar Section that is focused on their needs. The Section plans on specifically allowing in its by-laws attendance at Section leadership meetings by telephone so rural attorneys can fully participate in the leadership and direction of the Section by dialing the Bar's toll-free number and without having to drive to Salt Lake City. If you are a solo, small firm or rural attorney, please consider joining the new *Solo, Small Firm and Rural Practice Section* at the time you pay your 1997-1998 Bar licensing fees.

1997-98 Licensing Forms

The 1997-98 licensing renewal forms will be mailed during the first week of June. Please note the return address on the printed form. **If you have not received your form by June 15 contact the Bar immediately.**

License fees are due regardless of whether you receive a form. The Client Security Fund assessment must be paid with your license fees. Payments received without the Client Security Fund assessment will not be processed.

License fees are due July 1, 1997. Payments will be accepted through July 31, 1997 without a late fee. A late fee of $50 will be assessed if your payment is not **received** by 5:00 p.m., July 31, 1997. Payments received without the late fee will not be processed until the late fee is paid.

If your license fees and other assessments are not **received** by 5:00 p.m., August 29, 1997 you will be suspended for non-payment of fees. A reinstatement fee of $100 will be assessed to those who have been suspended and wish to reinstate their license.

If you are aware of an attorney who has moved and has not changed his or her address with the Bar or if you have not changed your address with the Bar, please do so now. Changes must be made *in writing* and should be submitted to Arnold Birrell. The fact you have moved and not changed your address with the Bar or notified another department of the Bar either in writing or verbally will not relieve you from late fees and/or suspension.

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill ten vacancies on the Utah State Bar Ethics & Discipline Committee. The Ethics & Discipline Committee is divided into four panels which hear all informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint shall be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court upon recommendations of the Bar Commission. Please send resume to John C. Baldwin, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 no later than June 30, 1997.

Utah State Bar
Ethics Advisory Opinion Committee

OPINION NO. 97-03
(Approved April 25,1997)

Issue: May an attorney engage in a direct solicitation, by mail and for pecuniary gain, that advertises mediation and arbitration services?

Opinion: A solicitation that is limited to alternative dispute resolution services is not prohibited, provided that the solicitation makes it clear to all parties that the alternative dispute resolution services are not legal services and that no attorney-client relationship will be established.

OPINION NO. 97-04
(Approved April 25, 1997)

Issue: May a law firm furnish lists of clients' names, addresses and telephone numbers to securities brokers, financial planners, insurance salesmen and other professionals, without receiving prior permission from the clients?

Opinion: Information given to an attorney by his client, including the client's name, address and telephone number, is confidential, and the attorney is prohibited from disclosing such information under Rule 1.6 unless the client consents after consultation.

OPINION NO. 97-05
(Approved April 25, 1997)

Issue No. 1: Is it ethical for an attorney to receive payment for legal services other than in money?

Opinion: The Utah Rules of Professional Conduct permit an attorney to accept payment for legal services in a form other than money. All arrangements for payment of an attorney's fees, however, must comply with the applicable provisions of the Utah Rules of Professional Conduct concerning fees and the attorney-client relationship.

Issue No. 2: Is it ethical for an attorney to barter legal services through a barter exchange?

Opinion: Although an attorney's bartering of legal services through a barter exchange is not prohibited per se by the Utah Rules of Professional Conduct, such bartering is unethical if the attorney's conduct or the structure, terms, or conditions of the attorney's arrangement with the barter exchange violate any of the Utah Rules of Professional Conduct.

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 seven opinions were approved by the Board of Bar Commissioners between January 1, 1988 and April 25, 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.

NOTICE

The Office of Attorney Discipline, Utah State Bar gratefully acknowledges the *pro bono* efforts of Gregory Sanders and Sidney Baucom, who served as Trustees in a complex trusteeship of a law practice where the practitioner disappeared. Mr. Sanders served as Trustee for the practitioner's criminal cases and Mr. Baucom served as Trustee for the practitioner's civil cases. Both devoted numerous hours to protecting clients of the disappeared lawyer.

NOTICE

The Legal Services Corporation (LSC) announces the availability of competitive grant funds to provide civil legal services to eligible clients during calendar year 1998. In accordance with LSC's multi-year funding policy, the solicitation of proposals will only be for specified service area. The amount of funds and the date and terms of their availability are not yet known. Request for Proposals (RFP) will be available on or about May 21, 1997. A RFP may be obtained from LSC by calling (202) 336-8900. The Notice of Intent to Compete is due July 1, 1997. Grant Proposals must be received at LSC by 5:00 p.m. EDT, July 2, 1997.

1997 Bob Miller Memorial Law Day Run Results

The 15th Annual Bob Miller Memorial Law Day Run was held on Saturday, May 3, 1997. The run started at the Red Butte Arboretum and finished at the University College of Law. Scott Chamberlain was the overall men's winner with a time of 16 minutes, 5 seconds over the 5K course. He was followed by Kevin Murphy and Mark Beilstein. Heidi Rust placed first among the women with a time of 19 minutes, 57 seconds, followed by Julie Blanch and Mailei Bucher. The top three finishers in each division are listed below.

Snow, Christensen & Martineau's Team B of Connie Calo, Brittney Nelson, Adam Price, David Watson, and Stephen Hill tied for first place with the Christensen & Jensen team of Jan McCosh, Dave Richards, Nate Alder, Laurel Alder and Bill Hansen in the team competition. Tammy Covey, Jenifer Hulme, Kenneth Cauron, Lon Jenkins and Parks Mangelson, making up the LeBoeuf, Lamb, Greene & Macrae team, placed second, followed by the Winder & Haslam crew of Margaret Olson, Christie Babilis, Don Winder, Craig Ulibarri, and Lincoln Hobbs.

Attorney (under 40) – Men
1. Lincoln Hobbs
2. Robert Keller
3. Mark Hindley

Attorney (over 40) – Men
1. Scott Mercer
2. Doug Griffith
3. Jeffrey Appel

Law Student – Men
1. Paul Oestreich

Law Faculty – Men
1. Reyes Aguilar
2. Boyd Dyer
3. Bob Adler

Law Enforcement – Men
1. Fred Ross
2. Robert Mitchell
3. Robert Stevens

Legal Secretary/Personnel – Men
1. Dan Platt
2. Gus Bernardo

Attorney (under 40) – Women
1. Christie Babilis
2. Margaret Olson

Law Student – Women
1. Dana Lee
2. Karen Karevaar

Legal Secretary/Personnel – Women
1. Mary Jill Roth
2. Kismet Rasmussen
3. Jan McCosh

Notice of Contribution to Scott M. Matheson Courthouse

The Bar Commission has voted to direct a contribution to the Scott M. Matheson Courthouse of up to $250,000 from current funds to be used exclusively to provide for a dedicated attorneys' conference room and to furnish attorney-client interview rooms. Our estimates indicate that it would cost between $75,000-90,000 for the attorneys' conference area, with the remainder of the funds used to furnish up to 70 of the interview rooms. The Commission believes that this contribution is an appropriate use of the Bar's funds because it will improve use of the building for lawyers and the public and will provide an environment where services may be more efficiently, safely and effectively performed. To augment the contribution, benefactors in the local business community have committed to match, dollar per dollar, any contribution made by the Bar, thereby doubling the funds received to furnish and improve the services and amenities.

The Bar Commission understands that there are members of the Bar who may disagree with Bar resources being used to fund the project. Although the contribution comes from current funds, the Commission has voted to provide those who would choose not to participate in making the contribution with a credit against the 1997-98 licensing fees. This proposed credit would be $50.00 for active members over three years of practice, $30.00 for active members under three years of practice, and $10.00 for all inactive members. Each credit requested would accordingly reduce the total amount contributed by the Bar and diminish the available matching funds.

If you choose not to participate in the contribution, please notify the Bar Licensing Department by sending the card, previously mailed to all Bar members, with your licensing form and the balance of your licensing fees, voluntary membership dues, and other contributions. In order to receive the credit, the Bar must receive your notice by 5:00 p.m., Thursday, July 31, 1997.

Happy Father's Day

Host Families Needed!

The Council for Educational Travel is in need of host families for students of different countries with one common goal. They all dream of becoming lawyers when they return home after studying abroad for a year. These highly-motivated teenagers will need room and board while attending your local high school for the school year. To help one of these students achieve their dreams, please call Tracy Amadio at 280-5445 or Karen Bloomquist at 969-7104.

NOTICE

The Navajo Nation Bar Association announces it's August NNBA Bar Examination scheduled for August 9, 1997. Application packets may be obtained from the Navajo Nation Bar Association office.

For further inquiries, please contact Andrea Becenti, Executive Director for the Navajo Nation Bar Association (NNBA), at (520) 871-2211, or fax: (520) 871-2229.

Thirteen Survival Skills for the Family Law Practitioner

By Stephen R. Cochell
Chief Disciplinary Counsel

The practice of family law covers broad areas including, for example, divorce, child custody and visitation and also requires expertise in selected areas in the fields of tax and estate planning, real estate, and business organizations. The vast majority of clients engaging the services of a family law practitioner come to the attorney in some level of emotional or psychological distress because of the personal and sensitive nature of their legal problem. Approximately twenty-five percent of the Office of Attorney Discipline's case load is directly related to handling attorney discipline complaints involving family law practitioners.

This note suggests and identifies thirteen "survival skills" for family law practitioners that will: (1) assist you in adopting a "proactive" approach to preventing conflict with your family law clients; (2) improve the quality of your relationship with family law clients; and (3) minimize the likelihood that a client will file an attorney discipline complaint against you.

Survival Skill #1: Assess your client's expectations at the initial interview. Many clients in the domestic relations area have unrealistic expectations about the nature of the legal process and the role of a lawyer in a domestic relations or family law dispute. At the same time, you need to articulate your expectations of the client regarding cooperation, communication and agreement as to how to tentatively plan to proceed in your representation. Many lawyers make the mistake of opining on the probable outcome of a case at the inception of the relationship. Unrealistic expectations inevitably cause friction, dispute, and a potential attorney discipline complaint.

Survival Skill #2: Enter into a written fee agreement with your client. If the client is a new client, you must comply with Rule 1.5, which requires a lawyer to confirm the basis or rate of the attorney's fee in writing if the attorney has not represented the client and the matter is reasonably expected to exceed $750. In anything but a simple divorce, the prudent lawyer should have a standard retainer and fee agreement which establishes a billing practice and the expectation that the lawyer will be timely paid for services rendered. Unless you intend to enter into a flat fee arrangement, be careful about estimating the total cost of a representation.

Survival Skill #3: If you reject a potential client's case, reject it in writing and keep a copy. This is particularly true in cases where a client may have discussed other unrelated matters (an auto accident, a business dispute) with you when you undertook the client's divorce matter, but did not specifically request that you undertake the client's other legal problems. Years later, the client then contends that you agreed to represent the client but failed to timely file a lawsuit. The "declination" letter negates such a claim.

Survival Skill #4: Don't take on more work than you can handle. This is particularly difficult in a competitive environment where the overhead and secretarial bills, not to mention your own salary, have to be paid. However sympathetic the Office of Attorney Discipline may be to an overworked practitioner, the clients whose domestic matters are neglected are predictably upset and may be unforgiving.

Survival Skill #5: Keep accurate time records detailing what you did and when you did it. Many clients are irritated when a lawyer bills them for every minute of their time. Make sure that clients understand about your practice of billing telephone calls, even short calls. As a matter of client relations, you may wish to consider not billing short status calls with the client. This type of "goodwill" has inestimable value with clients.

Survival Skill #6: Recognize a potential conflict of interest and withdraw from representation if you reasonably believe the conflict may cause injury to the client or to the attorney-client relationship. Even though many conflicts can be waived in writing, clients may still contend that they were not fully informed of the conflict and that you talked them into signing a waiver out of self-interest and greed.

Survival Skill #7: Copy your client with all letters and pleadings in the case, and document that practice in the file. Keep the client informed by periodic letters explaining the status of the case or advise the client why nothing is happening.

Survival Skill #8: Return all phone calls as soon as possible or have your secretary or preferably another attorney contact the client and let the client know when you can talk to him or her. If you are in trial or unavailable, and you know the client is in distress or is demanding, let the client know you care about their matter by faxing, e-mailing or handwriting a note to let the client know you will be in touch at the earliest possible moment, and that the matter is important to you. If it is a short-term problem, the client may need the assistance of another lawyer from your office or will, at least, be comforted that someone is there to help them in an emergency.

Survival Skill #9: Recognize your own "burnout." Experienced practitioners in family law are at serious risk of burnout. The combined stress of acting as a "caretaker" of demanding clients, dealing with demanding adversaries, the stress of trial schedules and court appearances inevitably take their toll. Burnout in domestic practitioners results in unreturned phone calls, angry clients, and angry judges.

Survival Skill #10: If your client sends you an angry letter or leaves an angry voicemail, respond in writing and be candid about how you have handled his or her matter. Nothing is more frustrating to clients than a lawyer whom they feel is lying to them or minimizing their concerns. If you are too busy to handle the matter, offer to arrange to transfer the file to a competent attorney. A sensitive approach to a frustrated client will prevent the filing of an attorney discipline complaint.

Survival Skill #11: If you lose a critical motion, or a trial, be open and honest in your assessment of the situation. Be prepared to address the client's frustration and anger. In a custody or visitation matter, the stakes cannot be higher for the client. The lawyer who reacts defensively, appears unconcerned, or who minimizes the client's sense of frustration is a prime candidate for an attorney discipline complaint.

Survival Skill #12: If the client fires you, cooperate fully with your successor. Even if the client has not paid your past due fees, Rule 1.16 of the Rules of Professional Conduct requires you to turn over the file. Nothing causes a client to file an

attorney discipline complaint faster than a lawyer who attempts to keep the file "hostage." Don't be foolish and pick a fight with an unhappy client. Unless it is impracticable or prohibitively expensive, make a copy of the file in case of an attorney discipline complaint. In the last analysis, the copy costs should be considered part of your overhead and cost of doing business.

Survival Skill #13: If the client files an attorney discipline complaint, respond fully and candidly to the initial inquiry from the Office of Attorney Discipline. A lawyer's failure to respond, or untimely response may be construed as support for a client's allegation that you did not handle the matter diligently or failed to communicate with the client. A full, complete explanation of your handling of a matter is the best approach to dealing with the attorney discipline complaint.

CONCLUSION

Focus on good communication skills with your clients. This will increase the value of your services to your clients and minimize your risk of becoming the subject of an attorney discipline complaint.

Practitioners who need assistance on ethical matters can call the Bar's Ethics Hotline at 531-9110.

NOTICE

The Office of Attorney Discipline, Utah State Bar gratefully acknowledges the efforts and spirit of voluntarism of the following lawyers who undertook or volunteered to take criminal and civil cases on a *pro bono* basis following the disappearance of Lewis R. Hansen:

CRIMINAL CASES

Greg Skordas
Larry Weiss
Lonnie Deland
Robert Pusey
Greg Bell
Aric Cramer
Clayne Corey
Ron Yengich
Joe Fratto
Mike Harrison
Ed Brass
Robert Archuletta
Don Winder
Lee Rasmussen
Randy Kester
Cathy Roberts
Mitch Vilos
Lowell Summerhays
Richard Henriksen, Jr.
John Donohue
Steve Sullivan
Dave Wilde
Wayne Braunberger
Bob Wilde
Dave Lambert
Mitch Jensen
Ned Siegfreid
Dan Darger
Ralph Petty
Len McGee
Dave Parker
Charles Abbott
Dallas Massey
Cleo Martinez
Janet Thompson
Robert Muller
Lyle Hillyard
Gil Athay
Mike Sikora
Scott Cottingham
Stan Adams
Steve McCaughey
Kelly Cardon
Bruce Savage
William Parsons
Don Redd
Wally Bugden
Ken Snider
Mary Corporon
Jerry Mooney

CIVIL CASES

Martin Denney
Roger Sandack
Ed Havas
Steve Buhler
Gordon Jensen
Dave West
Jim Boud
Richard Ashton
Bob Sykes
Nelson Abbott
Tim Houpt
Doug Mortensen
Tad Draper
Matt Storey
John Ray
Randall Meek
Erik Ward
Janine Martyn
Stephen Acuna
Richard Lavato
Delia Castillo

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.

1997 annual meeting sponsors

The Annual Meeting Committee extends its gratitude to these sponsors for their contribution in offsetting the costs to registrants and making an enjoyable Annual Meeting. Please be sure to show your appreciation by supporting our sponsors and visiting the exhibit tables.

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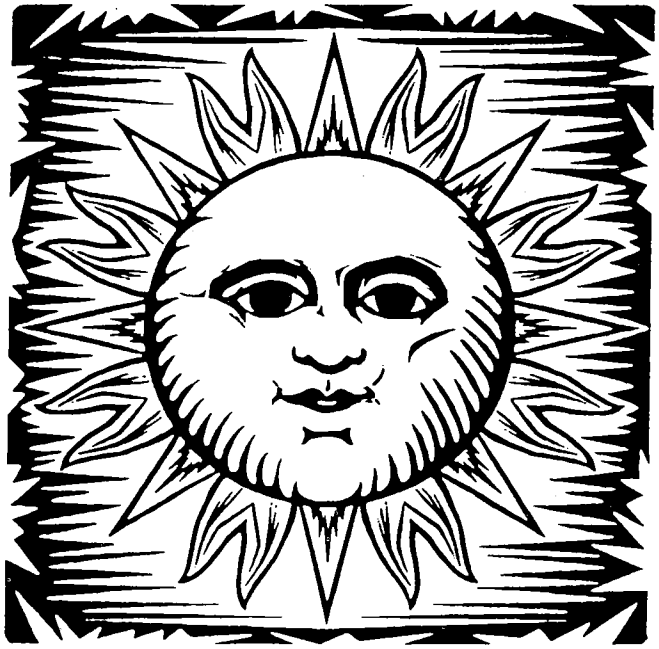
Shoaf & Associates
Stewart Title
Utah Bar Foundation
Blue Cross/Blue Shield of Utah
Women Lawyers of Utah
Salt Lake County Bar Association
MBNA

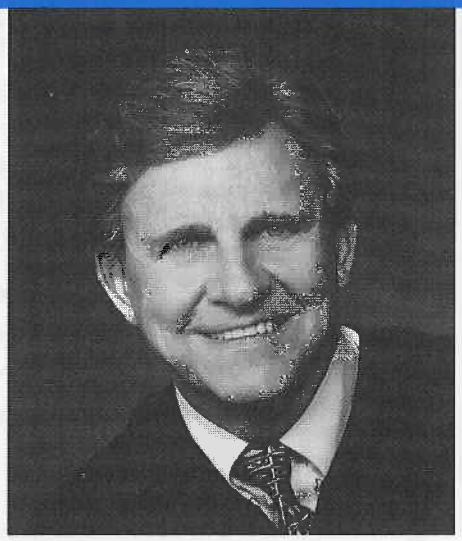
Mark your calendars now . . .



for the 1997 Utah State Bar
Annual Meeting!
July 2 - July 5, 1997
Sun Valley, Idaho

We hope to see you this summer!

And don't miss a special reception especially for attorneys and judges - Wednesday, July 2, 1997 at 5:30 p.m. Offered for the first time at this year's Annual Meeting!



The Child Welfare Reform Act of 1994 Is the Cure Worse than the Problem?

By Judge Arthur G. Christean

NOTE: The views herein are those of the author alone and do not purport to express the views of other judges or any official position on the issues discussed. This article was completed in January 1997 and has been since revised and updated to take into account the amendments enacted by the 1997 Utah legislature.

JUDGE ARTHUR G. CHRISTEAN was appointed to the Third District Juvenile Court in February 1984 by Gov. Scott M. Matheson after serving as judge in the Third Circuit Court for six years. He serves Salt Lake, Summit and Tooele Counties. He graduated from the University of Utah College of Law in 1960 and worked as a Utah State Deputy Court Administrator and Utah State Juvenile Court Administrator. From 1972 to 1973 he served as Deputy Clerk for the United States Supreme Court. He is past chair and a current member of the Board of Juvenile Court Judges, a former member of the Judicial Performance Evaluation Committee, the Judicial Council, the Salt Lake Courts Complex Steering Committee, the State Bar Ethics Committee, and the State Child Abuse and Neglect Advisory Council.

The 1994 Utah Child Welfare Reform Act was a massive piece of legislation. The enrolled copy of H.B. 265, 1994 General Session, totaled 180 pages, which amended existing and enacted new sections primarily in the human services code and the judicial code. Before its enactment, all of Chapter 3a of Title 78 of the judicial code, entitled "Juvenile Courts", consisted of some 19 pages of printed text, exclusive of annotations. The enactment of this legislation (hereafter referred to as "the 1994 Act") expanded this Chapter to *28 pages*. Two years before the 1994 Act, a precursor statute was enacted entitled the "Permanent Termination of Parental Rights Act". Before this 1992 legislation, permanent termination proceedings were governed by a single section in the judicial code occupying less than one-half page of printed text. As a result of the 1994 Act, which incorporated and supplemented the 1992 legislation, the portion of the judicial code dealing with permanent termination was expanded to 14 sections occupying *three full pages of printed text*. Further, prior to the 1994 Act, all statutory provisions in the judicial code governing the conduct of shelter hearings were combined with detention hearings within a single section, and consisted of brief references in two paragraphs. After the 1994 Act, as amended to date, statutory language in the judicial code devoted exclusively to this emergency type proceeding are contained in three sections which take up *over two full pages* of densely worded text.

Even with its corrective amendments thus far, the Utah Child Welfare Reform Act remains a singularly ill-conceived and poorly drafted piece of legislation with some distinctly dangerous implications. No doubt this kind of statement will strike many as an unduly harsh indictment of this legislation, which was heavily promoted as a major advance in meeting the needs of Utah children. It was praised in the media and social welfare circles alike as a long overdue improvement which would place Utah in the forefront as a national leader in the child welfare field. The reasons for such a contrary assessment of its merits are described in this article. *With some notable exceptions, the 1997 amendments enacted by H.B. 307 have not cured but have compounded the difficulties with this legislation by reinforcing and even extending its philosophy.*

The ostensible purposes of the 1994 Act to protect children and provide them with "permanency" are laudable. Few can argue with such aims. In fact, it was widely rep-

resented to the public that this legislation was necessary to achieve them and to correct the defects in the prior law which inhibited their accomplishment. Further, it is not the good intentions of the promoters of the Act nor its use to compromise and settle a difficult lawsuit pending at the time of its enactment which constitute the source of the difficulties it presents. Indeed, the concern is not with the *need* to protect children at all, which every civilized society recognizes as does our own. Moreover, there is no question about the political reality that the wisdom and validity of the social policy this legislation seems to represent, namely, that long term stability in family relationships and overall happiness for children can be achieved through more prompt and extensive government intervention, must be left to the people of the state and their elected representatives to decide.

Rather, the major concern which this article seeks to address is what seems to be the real objectives of this legislation, whether fully intended or not, and the over-reliance on the legal system and the misuse of government power it invites. There is of course no way to protect all children from harm without changing the very fabric of our entire society and the constitutional structure of government itself. However, because of the historic regard the State of Utah has always had for the interest and welfare of children, it is not surprising that noteworthy individuals or groups who represent themselves as child advocates, whose sole motivation is claimed to be the protection and welfare of children, are given considerable deference in their efforts to protect if not all children, as many as possible. Likewise, the legislative proposals they advance are often accepted as beneficial and appropriate without a great deal of careful scrutiny. Few are willing to risk the public opprobrium of being cast on the wrong side of any child welfare debate. Child advocacy has become big business. Thus it is that the people of the state may well endorse and put into law something which may in reality be quite different from what they thought it was and from what it was represented to be. Also, the problems with such well intentioned legislation, legal as well as practical, are not always immediately apparent. It often takes a few years of actual practice and application in individual cases for them to emerge. Such is the situation with Utah's Child Welfare Reform Act of 1994, as amended to date.

The serious problems this legislation presents can for convenience of analysis be grouped under four main headings, each of which will be discussed in turn. Due to ethical as well as statutory constraints, individual cases cannot be identified or discussed.

"The Utah Child Welfare Reform Act remains a singularly ill-conceived and poorly drafted piece of legislation with some distinctly dangerous implications."

1. The serious misunderstanding and misuse of the judicial process.

While the 1994 Act pays lip service throughout to preserving family ties, its design and policy pronouncements indicate otherwise. An objective analysis of the content of the legislation, and the manner in which it has been implemented to date, indicates clearly that its basic aims are not to *preserve* family ties, but rather to *sever them* as quickly as possible in order to protect children from the risk of neglect or abuse, and to *redistribute* those children over whom the state can exercise authority from less deserving biological parents to more deserving adoptive parents. Indeed, the Act's dominant emphasis on *speed* and *certainty* in achieving these results, above all other considerations, is readily apparent. Further, the Act's design and language also seems to serve as a useful way for the state to officially support worthy foster parents by expediting the adoption process for children placed with them.[1]

In order to accomplish these broad social purposes on behalf of children, the judiciary is enlisted as a necessary if not willing accomplice. There are numerous examples of a misunderstanding of the proper function of the judiciary throughout the legislation. A general one which strikes the observer at the outset however is the extensive commingling of executive and judicial functions, including several instances of placement of code sections pertaining exclusively to executive responsibilities in the judicial code and conversely judicial responsibilities in the human services code. A specific example of the former is the placement in the judicial code, within the legislation as originally enacted, of sections 78-3a-301 to 78-3a-304 inclusive, which pertain wholly and exclusively to *executive branch* actions and duties. Section 78-3a-302 through 304 have since been relocated into the human services code, but *78-3a-301,* an important section regarding the authority of caseworkers and peace officers to remove children from their parents without warrant, persons over whom the court exercises no supervisory authority, remains within the *judicial* code.[2] Doing so appears to serve no legitimate purpose other than to give the actions undertaken pursuant to this section the appearance of greater legal legitimacy than they would otherwise enjoy if placed in the human services code. Yet the grounds recited in this section are duplicated virtually word for word in section 78-3a-306, the shelter hearing section which governs judicial review of the state removal action.[3]

However, of much greater importance than the matter of poor drafting or inappropriate placement of code sections is the implicit acceptance throughout this legislation of the role of the juvenile court as an instrument of social policy in general, and the enforcement arm of the Division of Child and Family Services in particular, rather than as an independent tribunal to do justice by deciding each case on its merits on the strength of the evidence presented. Whatever misuse of the court of this nature the 1994 Act may invite seems to be in support of goals deemed more important or superior to constitutional notions regarding separation of powers, namely achieving "permanency" for as many children as possible and as quickly as possible, which basically means "freeing them for adoption" in the words of 62A-4a-205.6(1). Courts of course do not "free" children from their parents as a matter of judicial favor. Yet, with language of this sort highlighting the 1994 Act, it is not surprising that the removal of parental rights can come to be viewed as something more in the nature of an annoying legal obstacle, than the important constitutional requirement that it is.

To elaborate further in this regard, numerous policy statements are to be found throughout the 1994 Act which are

more in the nature of extended sociological statements on the damage to children and society caused by unfit or neglectful parents, and why government has an obligation to control them or eliminate their parental rights, than statutory language with operative legal effect.[4] However, other provisions in the Act set forth specific requirements to be complied with by the court, which by their nature and attempt to anticipate all circumstances, show clear evidence of a design to structure and control the outcome of the judicial process. These include several sections which provide legislative direction to the court on what it must "consider" or what it "shall" determine or order to arrive at certain outcomes.[5] Also in this category are mandatory *time* deadlines which seek to bring about certain results regardless of legal rights or physical realities. Two of the most prominent examples being the 15 day rule for pre-trial and the 45 day rule for the "final adjudication hearing" in section 78-3a-308, neither of which permit continuances for any reason, presumably even death, illness, unavailability of witnesses, available work hours, or other matters totally beyond the control of the court.[6]

The Act also contains numerous instances of inappropriate new responsibilities imposed on the juvenile court. Some examples include:

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(a) The duty imposed on the court to develop a "permanent plan" as defined in 78-3a-403(3), and to "direct" the Division of Child and Family Services to provide "reunification services" to the parents under section 78-3a-311 for "a *maximum* period not to exceed 12 months from the date the child was *initially removed from his home by the division.*" This last is a curious example of legislation which requires one branch of government to "direct" or control the activities of another co-equal branch of government but only for a specific non-discretionary time period.

(b) The duty imposed on the court in sections 78-3a-311, 312, and 313 to conduct multiple "reviews" to assess the adequacy and "reasonableness" of services and the progress of the parents receiving those services as contained in court approved "plans".[7]

(c) The duty imposed on the court to conduct "dispositional review hearings" under section 78-3a-312(a), now styled "permanency hearings" as a result of the 1997 amendments, to order termination of previously ordered services in the case of non-compliant parents, and to change the goal for the child accordingly, including whether termination of parental rights should be pursued.

All of these mandatory review hearings consume a considerable amount of judicial time, particularly if contested. Often these multiple "reviews" duplicate those in the executive branch for similar if not identical purposes.[8] A more serious concern is that

they tend to serve conflicting purposes. To the extent the court is reviewing the progress of therapeutic services, and whether they are appropriate to the needs and circumstances of the individual parents and children involved, it is performing essentially *clinical* or *administrative* functions, not judicial. To the extent the court is reviewing compliance with its orders for the purpose of determining contempt, or short of this, determining if there should be modification due to change of circumstances, or if it is appropriate to terminate court jurisdiction, it is performing necessary *judicial* functions relating to the *enforcement* of its orders. The trouble is that under the 1994 Act the two purposes are combined in the same hearing with the court being expected to perform both simultaneously, confusing both purpose and priority. This often occurs without proper notice to the parties of what, if any, legal rights or relationships are at stake.

Further, because of the long standing statutory requirement for juvenile courts to conduct general non-specific "reviews" of their custody orders, the impression is created that such orders are not true custody orders at all, but are instead a unique and *conditional* kind of "court supervised" custody requiring periodic renewal and reaffirmation, and which create a special form of principle-agent relationship between the court and the designated guardian/custodian, be it an individual or a state agency. However, the law neither authorizes nor creates any such special relationship. The impressions thus generated by this kind of review practice are no doubt rooted in the historic *medical* as opposed to *judicial* orientation of the juvenile court in Utah.

In addition, there is a serious problem with the mandatory 12 month "dispositional review" under section 78-3a-312, restyled "permanency hearing" under the 1997 amendments, compromising the court's impartiality and neutrality. When the court is required to hear evidence to terminate "reunification services" at such hearings, particularly if contested, it will be compelled to hear and rule upon the same or similar evidence that will be presented later in support of the termination petition which will inevitably follow. The court implicitly signals that legally sufficient grounds to terminate the parent's rights exist and sanctions the filing of such a petition by the findings it must make as a basis for its decision to terminate "reunification" services to the parent. In fact, the language in section 62A-4a-205.6, referred to above, that the court is "freeing the child for adoption" is very revealing in that is clearly implies that this is indeed the real purpose of this hearing. Even though such "review" rulings are made on the basis of a lower standard of proof, doing so may well constitute an improper predetermination of the outcome of the later parental rights proceeding. Parents can take little comfort that the judge conducting such reviews will be able to act as an impartial tribunal to decide the ultimate question of their parental rights when in doing so it will be reviewing its own prior order with respect to their lack of compliance and fitness.[9] H.B. 307 has aggravated this problem with four amendments with virtually identical language which provide for court approval of a "final plan of termination of parental rights pursuant to Section 78-3a-312".

Finally, within the framework and approach of the 1994 Act, the *juvenile court* seems to be regarded as simply one of a number of governmental agencies whose primary purpose is the *delivery of social services,* albeit the only one with coercive powers and authority to alter parent-child relationships.The *judge's* function is viewed as not only that of an adjudicator, but as a manager or overseer of various professionals, each of whom is expected to contribute in a particular way to the achievement of certain outcomes that will protect children and promote their interests. Court hearings are for the purpose of development and approval of "permanency plans" which "address" identified "concerns" of state workers, and to ratify diagnostic "assessments" of mental health specialists or "interdisciplinary teams"; and to conduct additional reviews to monitor the progress of such plans, insure compliance, and adjust long term "goals" where specified progress does not occur. An important part of the judge's responsibility within this approach to child welfare is the supervision of state workers to see that they perform their duties properly and that services are delivered in a timely way. The dominant influence of the medical model in all of this is clearly evident.

Under this kind of scheme, the distinctive constitutional functions of the judiciary become easily confused or obscured. Considerable governmental overlap exists, at great public expense, with both branches engaging in parallel activities for essentially similar functions, leaving it unclear who is checking or balancing the other. Examples include "multi-disciplinary team meetings" in the executive branch and "shelter hearings" in the court; fact finding and "adjudication" in the court and "substantiation of referrals" in the executive branch; and "dispositional reviews" in the court and "administrative reviews" or "citizen review boards" in the executive branch.

Using judges to function in the above manner is not only redundant and inappropriate, but wasteful of scarce public resources. That judges are expected to devote as much time as this legislation seems to contemplate in overseeing the Division of Child and Family Services may indicate a lack of trust that these employees will perform their duties properly without constant court supervision. Yet it is not the constitutional responsibility of judges to supervise and discipline division employees; that is the responsibility of the Governor and his appointees.[10] To impose such a burden on the court is not only a misuse of judicial time, but will probably exhaust judges as well in attempting to carry out a responsibility fraught with conflict which they are ill-equipped to perform.

The primary responsibility of juvenile court judges in child welfare cases is not to implement policies designed to protect children and achieve permanency for them. The preeminent duty of juvenile court judges, as with all other judges, is to do justice in each case which comes before them, one at a time, and each on its own merits. To be sure, doing so will usually be in harmony with such policy goals, but in some cases it may not.

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2. The disregard or casual treatment of fundamental rights.

The authority contained in sections 78-3a-301, 62A-4a-202.1, 62A-4a-202.2 and 62A-4a-409 for division workers, with or without the aid of law enforcement officers, to seize children without warrant is one of the most disturbing features of the entire 1994 Act. It constitutes a clear invitation to serious abuse of power. Under these sections, no showing of probable cause nor the identity and credibility of informants need be made to any judge, magistrate or independent fact finder before entry on private property is made and forcible seizure of children is accomplished. Under the broad authority of these statutes, the state worker need only have "reasonable cause to believe" that the child's welfare is "endangered." Such "endangerment" need not be something that occurs in the worker's presence or on-site observation; it need be nothing more than the worker's suspicions of the parent's conduct or deficiencies; the parent's refusal of offered services; or simply a lack of cooperation with the caseworker. Section 62A-4a-409(8) provides for authority of division workers to "enter upon public or private property *using appropriate legal processes*" (emphasis added), but no such appropriate legal process is anywhere provided.[11] Further, the 1997 amendments to section 62A-4a-202.1 and 62A-4a-203 appear to widen rather than contract the discretion extended to the division in its removal actions.

Moreover, these sections appear to afford law enforcement officers, whether in uniform or not, authority to make forcible entry into homes and seize children and take parents into custody if they resist. No advance warning is required nor reasons need be given to parents at the time. Although section 62A-4a-202.2 contains certain notice requirements to be furnished to the parents of seized children, this statute is not self enforcing and there is no effective remedy available to parents for its violation. The only effective check of this exercise of raw state power is judicial review at the shelter hearing which must be held within 72 hours after such seizure if the state elects to file a petition. Note for example the highly ambiguous language in section 62A-4a-202.2(3) which seems to confer blanket immunity on anything state agents undertake to do in investigating reports of neglect or abuse. These statutes appear to grant division caseworkers greater discretionary power without warrant to seize children than other officials of government possess to seize property or to arrest people for criminal conduct.

In reply to the expected response of supporters of the 1994 Act that it will never come to anything like that, from cases handled by the author it has indeed "come to that." It is true that there are sections which attempt to impose a duty to provide services *before* removing children from their parents, to make doing so a last resort rather than the first.[12] However, given the expressed policy views within the Act, and the expanded authority it provides, there is created an almost irresistible temptation to use the power provided and an implied obligation to do so at the first sign of risk to avoid the criticism of agency actions in the past as being too hesitant.

As a result of such broadened authority, other provisions of law with respect to search warrants for children or warrants to take them into custody, such as section 78-3a-505(6), have been rendered essentially

superfluous. As an interesting aside, until the 1997 amendment of section 78-3a-317, an affidavit of probable cause to support a search warrant issued by a judge was required in the case of children who were suspected of being harbored or ill-treated by persons *other than the parents and against the parent's desires,* but not so if it was the parents themselves who were suspected. The 1997 amendment has cured this omission.

Another disturbing feature of this legislation is the creation of what amounts to a *de facto* presumption of parental unfitness by a preponderance of evidence standard at the time of the shelter hearing. This presumption is later confirmed at the adjudication of the petition. This comes about because children can be removed from parents upon a minimal prima facie showing of neglect, abuse, or lack of proper care or supervision. Indeed under the 1997 amendments to section 78-3a-306, the state need only show that the child's welfare is "otherwise endangered". However, once so removed, the parents cannot earn return except upon a satisfactory showing of compliance with a "reunification plan" which typically the court formally adopts as part of its order at the time the petition is adjudicated. At this hearing, there is considerable pressure upon the parents to make certain compromises and concessions with respect to the state's petition against them to speed the return of their children. The court is often put in the position of a mediator approving amendatory language in the petition to remove factually specific or graphic language in place of more moderate wording acceptable to the parents, but which is at least minimally sufficient to meet the legal definitions of neglect, abuse, or dependency, and necessary to establish court jurisdiction.

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By such a procedure, the burden is effectively shifted to parents to rebut such a presumption and prove their fitness by satisfactory compliance with state imposed "reunification plans", and to do so within certain fixed deadlines or lose their children permanently.[13] The justification for such threatened permanent deprivation need not be, and frequently is not, the same compromise grounds which justified initial removal and petition adjudication. Rather, it is the failure of the parents to eliminate all the state's "concerns" about them as to their overall capacity to care for their children. This becomes a matter of some scrutiny as a result of the initial removal of their children. Thus, such plans typically contain requirements for parenting classes, psychological evaluations, general counseling or more specific individual and group therapy, suitable housing and stable employment. While these services are always characterized as remedial and in the interest of family preservation, it cannot be doubted that a parent's failure to fulfill them to the satisfaction of state workers can have but one effect. In fact, current law now has not one, but three grounds for per-

manent termination of parental rights based on failure to satisfy such plans, the contents of which may consist entirely of *clinical and parent training* requirements quite apart from the identified parental deficiency which caused the removal of the children in the first place. Thus, however styled as "reunification services plans" or "treatment plans", they cannot be realistically or objectively regarded as anything other than state imposed fitness tests to determine whether parents deserve to have their children returned to them or not.

A related problem has to do with the *kind of evidence* which has come to be something of a mainstay in child welfare cases. This is the heavy use of child therapists and psychologists, professionals whose training and expertise is usually *not in forensics,* that is, in the *investigation* of child sexual or physical abuse, but whose testimony is nevertheless heavily used by the state for just this purpose. The problem is most pronounced in cases involving custody disputes between parents or between a parent and grandparents, or other relatives, and where expert medical testimony is either not presented or is inconclusive, either as to the cause of the abuse or the identity of the perpetrator, or both. These are the kinds of cases where the parties will be most partisan and where attempts to influence and manipulate the child's testimony will be most pronounced. These are also the kinds of cases where a court is most in need of impartial expert testimony which will be the most *reliable* available in terms of assessing the *truthfulness of the child's reports.* However, in far too many cases this is precisely the kind of testimony the court does not get.

Instead, what the court often does receive is testimony from highly credentialed experts whose training is not in truth seeking, i.e. uncovering facts, but in identifying and dealing with *perceptions, feelings, and emotional statis.* In the clinical environment in which these reports of abuse are disclosed, they are taken at face value and often without any effort to validate or corroborate them, or to test for the child's ability to discern truth from fantasy, or possible motivations to report falsely, as such is not the purpose of the treatment process nor part of the clinician's perceived professional responsibility. Yet such testimony is often crucial and highly incriminating. It typically involves hearsay reports of child victims which form the very heart of the state's case, without which the case would likely not be before the court. This kind of testimony is usually admissible under express statutory exceptions to the hearsay rule, as in Utah, with greater discretion to admit it in civil proceedings before a juvenile court than in criminal proceedings, and to do so whether the child is called as a witness or not.

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The central contradiction presented by this now common practice is that testimony which formed the reason for the emergence of the hearsay rule in the first place centuries ago is now routinely admitted without any effective substitute for the reliability provided by cross-examination. Current laws and rules, in the interest of protecting children, now routinely permit the introduction of this kind of testimony, which is given great weight because of its disclosure in a "trust" or clinical relationship and its presumed intrinsic trustworthiness. Even though the express purpose of such therapeutic relationships are *not to uncover the truth* of the events reported, such disclosures are admitted for use in legal proceedings, the stated purpose of which is, or ought to be, to do precisely that, namely *to uncover the truth* of such reported events. Utah's 1994 Child Welfare Reform Act, with its several provisions which permit the use of such evidence not only to "substantiate referrals", but to ease the state's burden in the prosecution of child abuse cases, and the termination of parental rights, has merely added to the dimensions of the problems associated with this practice.[14]

Given the foregoing, and while no case has thus far squarely raised the issues discussed in this article, the 1994 Act appears to have within it some serious constitutional problems. The law can now be interpreted, as appears to be its intent, to permit deprivation of fundamental rights on lesser grounds and on less stringent evidence than required under prior law. Appellate decisions interpreting prior law uniformly held that state efforts to rehabilitate parents whose children had been placed in state custody were relevant to demonstrate that the parent's habits or deficiencies were so severe or chronic that they remained substantially unchanged despite reasonable efforts by the state to remedy them. However, it was still the identified parental unfitness or incompetence, i.e. fault, that remained the test for termination, *and not* merely the parent's unsatisfactory cooperation or response to state rehabilitative efforts alone.[15] The current law now permits just this. The state may now satisfy the requirements for the permanent termination of parental rights by a showing of parental inability or unwillingness to respond satisfactorily to state services as a totally independent basis for doing so, referred to in the law alternatively as a "failure of parental adjustment", under section 78-3a-403(2), an inability to "remedy the circumstances that caused the child to be in an out of home placement" under section 78-3a-407(4), or by the parent making only "token efforts to avoid being an unfit parent" under section 78-3a-407(6). Perhaps this is because, as discussed above, that once children are in state custody *for any reason*, it is presumed that the parents are unfit without the need of further proof and that the burden is thereafter on them to rebut that presumption.[16]

Thus, the basic indictment of the Act from a constitutional standpoint is simply this: that it authorizes the state to seek permanent termination of the rights of parents without the need to show any conduct or condition that is *seriously detrimental* to their children or that the parents have been *substantially* neglectful or *unfit* in relation to them, but, instead, permits termination on the sole ground that they have failed to cooperate with state officials and have been unable to demonstrate parental fitness as measured by the satisfactory completion of service plans. It is an oversimplification, but one with a large measure of truth in it, to observe that under the 1994 Act parents run a greater risk of loss of their parental rights from *contempt* than for unfitness or neglect of their children.

Would such grounds meet the constitu-

tional standards of prior caselaw? Based on the holdings in leading cases, the answer would clearly be no.[17] Yet, this is precisely what the Utah Child Welfare Reform Act not only authorizes, but is expressly designed to do. It is this new feature which sets it apart from all previous statutes in this area of the law regarding termination of parental rights.

3. The disguised restoration of the "best interest test" as the legal standard for termination of parental rights.

Under the 1994 Act and its 1992 predecessor, there is no longer any requirement to demonstrate that the parent's conduct or condition be "seriously detrimental" to the child. As explained above, termination is now permitted without the need to show any kind of "nexus" between the parent's unfitness or incompetency and harm to their child or children. By this major change in the grounds for termination, the burden on the state has been made much easier, as it no longer is required to produce "hard" evidence of parental unfitness or incompetence, but can rely instead on the "soft" evidence of the parent's failure to comply with service plans. State petitions to terminate typically allege all the statutory grounds permitted, often without any differentiation as to custodial or non-custodial parents, and then present evidence at trial relating basically to what the assigned caseworkers did, how well the parents responded to them and the contents of approved service plans, including psychological evaluations, followed by testimony as to why it is important and in the child's best interest to be adopted.

Proving up permanent termination cases in such a manner affords the state legal grounds to remove children permanently from those parents who, while they may not pose a significant risk of harm to their children, and cannot be shown to be *substantially* unfit or neglectful, are viewed as deficient or sub-standard in other ways. Once a parent has lost custody of a child to the state on the basis of an adjudication of neglect or abuse or dependency, that prior adjudication may well form the basis of a later permanent termination petition when the parent fails to correct or remedy the conditions which caused the original removal. The state is not required to prove the same facts twice. But, and this is the crucial point, under prior law the *unfitness* of the parent, be it drug or alcohol abuse, economic instability and inability to provide for the basic needs of the child, mental illness or emotional deficiency, must have been *substantial or serious enough* to warrant termination of the parent's rights *if not corrected within a reasonable time.* State rehabilitation efforts were important and relevant to show that despite such reasonable efforts, the original conduct or condition was not likely to be corrected.[18]

Under current statutes, such rehabilitative efforts are basic to the state's case not only to establish one of the three new grounds, but as well to demonstrate that the child's best interest would be better served by awarding the child to other adults for adoption regardless of what the original *adjudicated* reasons for removal may have been, because of the parent's

want of motivation or ability to complete their service plans. Yet, however compelling the evidence may be that a child would be better off with adults other than those who gave it life, parental rights are not something created by state law or decree. Nor are they something awarded to parents *by the state* as a form of steward ship or conditional use permit, which the state can revoke upon a showing of misuse. Parental rights are something antecedent to the existence of the state itself and are so fundamental that they are protected by both the state and federal constitutions.[19] Even though the perception common today that too many parents abuse their parental rights may be well founded, this does not confer authority on the state to reduce or limit those rights as a matter of public policy, or to respect them only for parents who qualify within state standards of fitness. If such rights are so construed they cease to be *constitutionally* protected rights and are instead only legislatively created and protected rights.[20]

Of course constitutionally protected parental rights can be lost by those individual parents who abuse, substantially neglect, or abandon their children, or who engage in unlawful conduct which prevents them from discharging the parental duties which all parents owe to their offspring. This has always been a part of the law which has its origins in the ancient doctrine of *parens patriae*. But the loss or forfeiture of those rights must be because of *serious parental fault,* and not because of changes in public policy which seek to redistribute children more speedily from those adults deemed less able to care for children to others deemed better able to do so. As with all *constitutionally* protected rights, those of parents cannot be put in jeopardy of alteration or diminishment by legislative action alone, which in the nature of things will always be subject to the shifting winds of public opinion and whatever ideas and doctrines about parenthood and child rearing happen to be in the ascendancy at a particular time. Further, such a drastic remedy cannot be hastened for political reasons because of public outcry about abused children, or pressure put on courts to be good team players in support of state policies designed to protect children, however commendable everyone agrees such a goal to be.

With the foregoing in mind, an assessment of the extent to which the 1994 Act effectively restores the "best interest of the child" as the operative legal standard for terminating parental rights needs to explore two crucial questions. First, does the 1994 Act *require* a court to base an order terminating parental rights on a showing of parental fault or unfitness? Second, are the three new grounds in section 78-3a-407(4), (5) and (6) merely elaborations or refinements of parental fault or unfitness? Based on a careful review of the 1994 Act the answer to both questions is NO. Section 78-3a-407(3) specifies parental *unfitness* as only one of the seven grounds enumerated. The court is authorized to order termination if it finds *any one* of the listed grounds exist. Four of the grounds are clearly cast in terms of parental fault or unfitness, but the three new grounds are not. Rather, as discussed earlier in this article, they are cast in terms of parental failure to respond or cooperate sufficiently with "reunification services", provided the parents qualify to receive them. Further, these three new grounds are not merely elaborations or refinements of unfitness, but are expressly set forth as separate and distinct *substitutes or alternatives* to parental fault or unfitness.[21]

"Under the 1994 Act parents run a greater risk of loss of their parental rights from contempt than for unfitness or neglect of their children."

Section 78-3a-408(2) enumerates several "conditions" which the court must "consider" in determining whether a parent is unfit or neglectful, all of which are cast in terms of parental fault. However, the court is not required to find or base its order on any of these "conditions", nor is the state obliged to present evidence as to any of them to support an order of termination, and certainly the court cannot "consider" such conditions if no evidence is presented with respect to them. Indeed, termination may be ordered on any one of the grounds in section 78-3a-407 whether or not any of these conditions of parental fault exist. Likewise, the court is required to "consider, but is not limited to" the factors set forth in 78-3a-409, none of which is cast in terms of parental fault or unfitness, but in terms of parental response to state rehabilitation efforts and the child's best interest.[22]

In 1980 and 1981 the legislature attempted to substitute the best interest of the child as the standard for terminating parental rights. The Utah Supreme Court ruled such unconstitutional because it failed to provide adequate recognition and protection for the constitutional rights of parents. In defense of these legislative efforts, it was asserted that the difference between "the best interest of the child" and "parental unfitness" was merely a matter of semantics. Also, that the "conditions" the court was required to consider, similar to those in present section 78-3a-409 and the three new grounds in section 78-3a-407 discussed above, were merely elaborations or refinements of parental unfitness. The Court rejected these arguments holding that a matter of fundamental principle was at stake and that parental rights could not be terminated without a showing of "abandonment, substantial neglect or unfitness",[23] and that despite the factors that the court was required to "consider", some of which constituted parental fault but others did not, because the legislation *permitted termination* without the need to show parental fault or unfitness, it was unconstitutional. When considered in this light, the 1994 Act is difficult to distinguish from the defects found in these earlier 1980-81 statutes.

The most important impetus for child welfare reform has come from high profile media stories about children suffering death or serious injury at the hands of abusive caretakers in which the criminal law is portrayed as being too slow in its response, or child protective service agencies as being too willing to return children to high risk parents in the interest of "family preservation". There is no question such high profile cases are serious and merit prompt and effective response. However, while cases of such a dramatic nature do not make up the bulk of cases handled by Utah welfare workers or the juvenile court, the 1994 Act seems to have been in part at least a response to public pressure generated by them. It is very broad and ambitious in its overall design, and with greater authority to intervene in family life than any prior legislation of its type in the state's history. The authority it confers

tends to encourage workers to err on the side of removing children at the first sign of risk, and to withhold them until parental fitness can be determined. While specific provisions of the 1994 Act do not express it thus, the reality is that with its expanded grounds for permanent termination as explained above, a legally sufficient basis for termination can easily become something to be sought for *after* it is determined that it is in the "best interest of the child" to do so as the "polar star" standard for such proceeding. This is precisely what the Utah Supreme Court in 1982 said the state could not constitutionally do.[24] If the State of Utah, in its zeal to protect children, sought to create an enlarged child welfare system by which children could be seized from parents without a showing of probable cause, and then withheld from them permanently if the beliefs, attitudes, and ways of life of the parents did not merit official approval, as measured by state designed tests, such would be ominous indeed. The majority of Utah citizens would almost certainly not approve. Yet as described above, the 1994 Act comes dangerously close to doing just this.

4. The significant increase in costs to the taxpayers.

Speaking from a judicial viewpoint, there is no doubt that the pre-1994 child welfare statutes, and particularly those in the judicial code, were in need of improvement and clarification. That the system needed such a massive overhaul, with so many expanded burdens on the juvenile court, without relating such changes to carefully identified legal problems or defects, is far less clear. A great many of the changes governing proceedings relating to dependent, neglected and abused children, and termination of parental rights, appear to have been made without adequate study as to the impact on the courts, and insufficient consultation with a sufficient number of judges "in the trenches" doing the work; and too much reliance on the opinions of too few individuals with excessive haste to satisfy pressures from outside sources.

As it is, this legislation has been highly productive of litigation and gives every sign of continuing to be so in the future. Multiple and repetitive hearings and "mini-trials" are now required far beyond that required under prior law and which do not appear to have been necessary to satisfy either state or federal constitutional requirements, or to have been essential to provide identified benefits for children which could not have been obtained without increased adversarial court proceedings.[25] There is a substantial likelihood that the shortcomings in the prior law could have been remedied without such a massive expansion in state government power and expenditures.

"The answer to child abuse and neglect lies not in the courtroom but in the culture."

One measure of the magnitude of the change brought about by the 1994 Act can be seen in the way shelter hearings must now be handled, even though the basic purpose of these hearings has not changed. Shelter hearings are essentially probable cause type hearings to review the legal grounds for removal of a child from its parents, and to return the child to the parents forthwith if such grounds were not present; but if such grounds were and continue to be present, to make temporary orders for custody and visitation pending initial hearing on the petition which must be filed to begin legal proceedings. Before the 1994 Act, these hearings were most often informal in nature much like detention hearings, often handled by court commissioners, and with some exceptions, usually took up a similar amount of time. Now these hearings have been converted into full fledged adversarial proceedings, with attorneys representing all parties required to be present, including the parents, the state, and the guardian ad litem. Given the number of contesting parties which occasionally appear, and the conflict of interest that may exist between them, up to five or six attorneys may need to be present at these hearings, which may on occasion have to be delayed if all parties or attorneys cannot be present. Due to the anticipated volume of cases, in the urban courts at least, large blocks of judicial time must now be set aside each week in anticipation of these hearings without knowing to what extent such time will be productively used.

Finally, in considering the impact on the taxpayers, it is useful to recall that to meet the demands of the 1994 Act, the state was required to add three additional juvenile court judges, the largest percentage increase in the juvenile bench in its history, and 16 additional deputies in the Attorney General's office which was made necessary as a result of the shift in prosecutorial responsibilities from the county to the state level.[26] As a result of the new burdens imposed on judges to carry out the expanded requirements of the 1994 Act, the proportion of judge time devoted to child welfare matters for many judges, particularly in the urban areas, has increased from about 25% of total bench time to 65% or even higher in some districts or for some judges.

RECOMMENDATIONS

The recommendations which follow are suggestions as to steps that can be taken to restore some measure of balance in the Utah child welfare statutes and provide additional checks on the expanded use of power that the system now authorizes. They are offered as well in the spirit of promoting greater awareness of the reality that the answer to child abuse and neglect *lies not in the courtroom but in the culture.*

1. Eliminate the requirement for the *juvenile court* to conduct shelter hearings *in all cases* of removal of a child from its parents under the authority of the 1994 Act. Provide instead for a non-waivable 48 hour administrative hearing, which meets basic standards of due process, to determine grounds for removal, whether styled "shelter hearing" or something else, with a right of prompt judicial review upon the request of aggrieved parents.

Comment: The nature of these hearings is to review the legal and factual justification for removals authorized under the 1994 Act. The 24 hour "child protection team" meeting which is required under section 62A-4a-202.3(5) is currently performing essentially this same function, which is often preceded by an informal meeting with parents. Thus, there does not appear to be a need to duplicate this activity in each and every case by requiring expensive and time consuming court hearings. Further, in the majority of these hearings, the legal grounds or justification for immediate removal will not be in dispute, but rather issues surrounding substitute care with relatives and visitation while court proceeding are pending, matters which are far better handled in a less formal atmosphere than adversarial judicial

proceedings. However, for the reasons mentioned above in the second major topic, a right of immediate judicial review is vital and must be preserved to serve as a check on the abuse of state power. This kind of procedure is already in place under section 62A-4a-206 and 78-3a-315 with respect to removal of children from *foster parents.*

2. Eliminate entirely the requirement for judicial "dispositional review" or "permanency hearings."

Comment: If the real purpose of the court adopting "service plans" at the time the petition is adjudicated is to promote family reunification through the delivery of social services, and not to build a case for severing of family ties and the redistribution of children, then the court should not be involved at all in the business of reviewing each and every case to determine the adequacy of such services and whether they are having their intended effect. Reviews for such purposes confuse *clinical and administrative* functions with *judicial* functions as explained above. Hearings to seek punishment for contempt due to noncompliance, which will be quite rare as the withholding of children from parents has always been the greatest penalty the state can exact, or to modify or terminate service plans, or to seek other modifications of court orders due to changed circumstances, can and should be by way of motion and hearing as the need arises as in all other judicial proceedings.

A related question is whether the establishment of the most important long term family "goal" for a child, as required by section 78-3a-312, is an appropriate judicial determination at all. What legal rights or relationships are involved in the court specifying, as it must, that subject to further proceedings, the best long term goal for a child in state custody is adoption, long term foster care or something else? Who does such a decision bind and in what way? Unless the child is returned forthwith to the custody of the parents at these hearings, all of the rights and duties of the child's legal guardian and custodian, as defined by law, remain intact and are unaffected by such ruling, including the day to day care of the child and the assessment this involves of the child's present and long term welfare. In fact, such a ruling appears to be little more than a mandatory advisory opinion by the court as to what seems to be in the child's long term best interest.

Once children have been made wards of the state by way of formal judicial proceedings, monitoring the length of time in or out of placements, the suitability of such placements, the services they are receiving and their progress or want of it, and conformity to state social policies or goals as to their overall welfare is and must be the sole responsibility of the executive branch of government, not the judicial branch. The function and role of the court is not to be the administrative supervisor of the Division of Child and Family Services, its employees or constituent activities. The judiciary's function should be limited to those things which only courts of law can perform, including hearing and ruling on issues of law and fact and the determination of legal rights and duties when brought before them in the manner provided by law and rules of procedure. The entire philosophy of the Act that the most effective way to accomplish "permanency" for children is by continuous judicial oversight, and that judges should be managers of executive agencies charged with the responsibility of delivering services, needs to be seriously reconsidered.

"The function and role of the court is not to be the administrative supervisor of the Division of Child and Family Services."

3. Except in emergency circumstances, including the need for immediate medical care, require warrants upon affidavits of probable cause before entry upon private property is permitted for the forcible removal of children from their parents. Specifically amend sections 78-3a-301, 62A-4a-201, 202 and 62A-4a-409 to conform.

Comment: It is undeniable that complaints about the promptness, diligence and competence of division workers in child protection matters formed a significant part of the lawsuit against the state which the 1994 Act was instrumental in resolving. However, because a government agency and some of its workers have failed to act properly in the past within the existing authority provided by law, and have been found to lack adequate training to be able to do so, and that as a result cases have been mishandled and some children or families have suffered, is by no means a sufficient, or even rational, justification to dramatically increase the authority of that same agency and its workers to intervene in people's lives *with even greater discretion,* and attempt to limit or reduce by legislation the constitutional rights of parents. Increased discretionary authority is not an acceptable substitute for professional training.

Whether recognized as such or not, current Utah child welfare statutes when viewed as a whole create what amounts to an independent, self contained statewide system, outside the criminal justice system, that has complete internal authority to *investigate*[27] all reports of child abuse, neglect or dependency, to *prosecute*[28] parents deemed unfit by administrative action, to *adjudicate*[29] claims against them, and to *punish*[30] those parents who fail to measure up to state standards by withholding their children from them as long as possible; and further, to monitor and supervise them in a similar fashion to *probation officers,* but styled "case management".[31] Such activities are not social work. They are highly judgmental and intrusive in character, and bear a very close resemblance to law enforcement, prosecution, and judicial activities. As such, they ought to be carefully separated from agency services that are represented as being strictly for the purpose of "helping" families stay together in time of crisis. Family preservation services and child protection intervention have some inherent conflicts of purpose. Involuntary "family reunification" service plans by their nature are designed to measure the extent of parental fitness by how well parents measure up to state expectations. They will also be used to build a case against parents who fail to measure up but who are nevertheless compelled to participate in them as the only effective way to try and regain their children. There is a huge inconsistency and an element of deception involved in the delivery of such "services" when they are represented to be for one purpose when in fact they will serve another, which may well be adverse to the interests of the participating parents as they perceive it, but who have no effective means of challenging such plans if they wish to regain their children.

Further, the system as presently designed operates with very little over-

sight. That which is provided by the legislature is generally by way of complaints that generate sufficient scandal or litigation to compel corrective action. That provided by so called "citizen" review boards may be well intended but is largely ineffective because of the way in which these boards must be selected and staffed from within the Department of Human Services, and their essentially voluntary and part time nature. Also, they have no legal standing in judicial proceedings or means of enforcing their "review" decisions, determinations which result from proceedings which usually lack the essentials of due process. The only effective check against this concentration of governmental power is the judiciary and those judges who do not share the present legislation's presumptive view of the juvenile court as basically a part of the state's child protection "team" and who try to do their best to perform their duties as constitutionally intended. However, for judges to perform this vital function, it must not become clouded or confused by imposing on judges additional duties of child welfare supervisor, chief clinician responsible for developing "permanency plans", or quasi-child protection "team" leader.

4. Amend Part 4, Termination of Parental Rights, to delete "inability to correct", "failure of parental adjustment", and "token efforts" as independent *grounds* for termination of parental rights without any corresponding need to show parental unfitness or conduct which is detrimental to their children.

Comment: For the reasons explained above these matters should not be used as independent *grounds* for termination but rather as an important matter of *evidence* of state rehabilitation efforts in relation to the identified conduct or condition of a parent which *is* a ground to do so if not corrected within a reasonable time.

5. Review all existing child welfare legislation to remove the present duplication of functions between the juvenile court and the division which the present statutes require and to remove the numerous instances of inappropriate responsibilities imposed on the judiciary.

Comment: While too extensive a subject to be addressed in this article, for many of the reasons discussed above, this is an important task that should be undertaken as soon as possible. The present kind of peculiar "partnership" arrangement the present statutory scheme seems to promote, with its numerous statutory cross-references and

duplicate responsibilities, needs to be corrected. Inter-branch cooperation is certainly appropriate, but a special kind of unique and often blurred interdependency between the juvenile court and one particular agency of state government is not. In many respects the 1994 Act represents a step in the direction of reversing the trends of the last 30 years by attempting to return the juvenile court to the pattern of the early 1960's child welfare era in Utah when the juvenile court and all child welfare agencies were united in an unconstitutional arrangement within the then entitled Department of Public Welfare. We should seek to avoid repeating the missteps of an earlier time.[32]

[1]Note the stress on "permanency plans" and time limits in 78-3a-311 and 78-3a-312, and the change in title to "permanency hearings" in the 1997 amendments. See also 62A-4a-607; 62A-4a-201(5) and 62A-4a-205(1). Additional support for this view is to be found in the background and philosophy of the state's "Permanency Project", the final report for which was issued in October, 1996.

[2]Other examples include 62A-4a-204, which is duplicated in part in 78-3a-307(9); 62A 4a-409(9); however, courts do not "approve" shelter facilities or the actions of workers placing children in them as this language implies; 62A-4a-101(16)(d); also, situations in which protective services are provided are not informally "brought to the attention of the court." Courts act when their jurisdiction is properly invoked as provided by law; 62A-4a-203(1)(b); again, courts do not provide "guidelines" for determining removal of children from their parents as this language and cross reference seems to imply; section 78-3a-403(3) implying removal is a joint enterprise between the court and the division, and 78-3a-311(3) and (4) most of which belongs in the human services code as a guide to the division as to circumstances when services need not be provided.

[3]Subsection (k) of 78-3a-301 governing removal justification "as documented by the caseworker" being the one exception. While this may provide support for removal action *by the division,* it does not constitute support for an order of continued removal *by the court,* as it is not one of the enumerated grounds in section 78-3a-306. However, the 1997 amendment has added as a new ground for removal in subsection (k) of 78-3a-306 if "the child's welfare is otherwise endangered", which amounts to virtually unlimited discretion for the court to ratify agency removal action.

[4]See section 62A-4a-201. Note the lecturing tone of the language used and the almost grudging nature of the statements included in subsection (1) selected from various cases that "there is *a presumption* that it is in the best interest of a child to be raised under the care of his . . . natural parents", and that the right of parents to conceive and raise their children . . . *have found protection in the . . . Constitution,* and that the right of a *fit, competent parent* has long been protected . . . by the laws and Constitution . . ." Also, in subsection (5) that it is "the division's obligation, *under federal law,* to achieve permanency for children . . ." (Emphasis added). The 1997 amendments to this section seek to narrow even further the rights of parents and indicate an even greater philosophical shift in this direction than the original language.

[5]Examples include the numerous specific requirements set forth in sections 78-3a-306, 307, and 307.1, relating to shelter hearings. Also the "shall consider" or "shall review" language in sections 62A-4a-204; 78-3a-312; 78-3a-408(2); and 78-3a-409 and 410.

[6]The 1997 amendment to this section has extended the time to *60 days* which is helpful but does not cure the problems with such an inflexible requirement. One can imagine the due process difficulties involved in the situation where upon the expiration of the mandatory time period only the state has been able to present its evidence and, construing this strict statutory provision as a *jurisdictional* rather than a procedural requirement, the court proceeds to make a "final" adjudication on the basis of the state's evidence alone.

[7]H.B. 307 has modified section 78-3a-518 to impose even greater burdens on the court by requiring "reviews" of DCFS cases "every six months" after the initial 12 month "permanency" hearing required by section 78-3a-312. Requests for even more judges can be anticipated to perform such added administrative responsibilities.

[8]See 62A-4a-116(2)(b), 62A-4a-117, and 62A-4a-102(4). Also 78-3g-101 to 103, regarding Foster Care Citizen Review Boards, another instance of inappropriate placement in the judicial code where there are no judicial functions or responsibilities involved. H.B. 178 passed by the 1997 legislature appears to be moving in the direction of making this Board a permanent statewide body with review responsibilities every six months and whose reports "shall be received and reviewed" by the court.

[9] A further complicating feature exists if at the time this hearing is otherwise to take place, proceedings for permanent termination of parental rights have already been initiated. In such a situation the court is faced with a dilemma. If section 78-3a-312 is construed to require this hearing to be conducted separately, and without regard to other parts of the Act which may well have a decisive bearing on the child's "permanency", the court will be compelled to hear evidence and rule on parental unfitness *before* the permanent termination proceedings, involving the very same ultimate issue, can take place. If the court finds in favor of the parent at this "permanency" hearing, with its lower standard of proof, and returns the child only to rule against the parent later on at the conclusion of the permanent termination proceedings, this will prove traumatic and emotionally disruptive to the child and against its best interest. On the other hand, if the court declines to return the child due to a determination that doing so would "create a substantial risk of detriment to his physical or emotional well being", valuable time and effort will have been wasted in conducting two hearings to determine the same or similar issues.

[10]See 62A-4a-105.5.

[11]Even though Section 78-3a-106 authorizes search warrants "pursuant to the same procedures *as set forth in the code of criminal procedure*" (emphasis added), this does not appear in any way to limit the authority of caseworkers or officers under the referenced statutes to seize children without warrants. Section 77-23-202, governing the issuance of search warrants, does not adapt well to the circumstances of neglect proceedings. However, it does clearly require that warrants be based on probable cause and a showing of some form of "illegal conduct" by the parents before a search and seizure of children from private homes is undertaken.

[12]See 62A-4a-203.

[13]See language in 78-3a-311(2)(d) which expressly shifts the burden to parents "in the case of children two years of age or younger"; the legislative finding as to a parent's limited interest in receiving reunification services in subsection (3); and 62A-4a-205 which requires that a plan be "finalized" within 45 days of temporary custody even before the court's jurisdiction over the parents has been established and which must include "what the parent must do to enable the child to be returned home". One interesting indication of the philosophical flavor of the 1997 amendments in H.B. 307 can be found in the language used in four separate places in the bill that neither the court nor the division has a duty to maintain a child in his home or to provide rehabilitative services to parents in cases where "*obvious* sexual abuse or abandonment, or serious physical abuse or neglect are involved." (Emphasis added). Of course the pertinent question is "obvious" to whom?

[14]See 78-3a-512(4) and (5) and 62A-4a-202.3(3) and the general exceptions to hearsay in Rule 803(4) as interpreted in the case of *State of Utah, in the interest of E.D. et al. v. E.J.D. and B.D.,* 876 P.2d 397, 401 (Utah App. 1994). The 1997 amendment to 78-3a-512 now permits admission of written "reports" in evidence in permanent termination proceedings in the same manner as was permitted before in dependency, neglect and abuse proceedings.

[15]See *State in the interest of P.H. v. Harrison,* 783 P.2d 565 (Utah 1989) and cases cited.

[16]While there may have been sufficient evidence to uphold termination for parental unfitness, the most recent case upholding termination on the sole ground of "failure of parental adjustment" is *State v. L.D.* 894 P.2d 1278 (Utah App. 1995).

[17]*In re J.P.,* 648 P.2d 1364 (Utah 1982); *In re Castillo,* 632 P.2d 855 (Utah 1981); and *In re K.S. Jr., K.S. and B.S.,* 737 P.2d 170 (Utah 1987). In the latter case the Utah Supreme Court in reiterating that the "parent-child relationship is constitutionally protected", added that to terminate that relationship the parent's conduct or condition must be "a substantial departure from the norm" and that an unfit or incompetent parent is one who "substantially and repeatedly refuses or fails to render proper parental care and protection." In upholding such required standards for permanently severing the parent-child relationship, the Utah Supreme Court was doing so not as a policy making body superior to the legislature, but simply affirming the existence and nature of fundamental rights, and the limits both state and federal constitutions place on the exercise of all government power with respect to them.

[18]*Harrison,* at 570. Note as pointed out in this case that the state's obligation to assist with rehabilitation efforts, i.e. now styled "reunification services," only applied to cases of parental unfitness and not abandonment or physical abuse. However, section 78-3a-311(3) has essentially eliminated any such express duty on the part of the state altogether by permitting *the court* to waive it "under any circumstances", and the 1997 amendment to subsection (2) authorizes the court to terminate services "at any time." Further, the 1997 amendment to this section also contains one of the four references to the elimination of any state or court duty to provide services in "obvious" cases as mentioned in note 13.

[19]*In re J.P.,* at 1373.

[20]Note the use of language in 62A-4a-201(1), especially in light of the 1997 amendments, which seems to imply that such protection is selective in that only parents deemed fit by the state are entitled to it. Yet it is the requirement of judicial proceedings to determine unfitness or incompetence, to which *all* parents are entitled before their parental rights are disturbed, which gives substance to such constitutional protection.

[21]*Cf. In re J.P.,* at 1376. Note the inconsistency of the present statutory approach with the language used by the Court in this case.

[22]*Id.* at 1370.

[23]*Id.* at 1375, 1377.

[24]*Id.* at 1377, 1378.

[25]An illustration of this is the significant problem which now confronts judges as to whether "reunification services" are a *legal right* or merely a *privilege.* Section 78-3a-311(3) uses the term "parent's *interest*" in describing the limits on the state's obligation to provide such services and then enumerates the circumstances in which that obligation does not exist. However, in the same section "*the court*" (emphasis added) may determine "under any circumstances" that such services are not reasonable and relieve the state of any burden to provide them. Such language indicates an intent on the part of the legislature to regard such services as a privilege to be extended only to deserving parents. If so, there is little justification for the court to be engaged in the regular practice of holding mandatory hearings to review the "reasonableness" or services to which parents have no claim as a matter of legal right. The 1997 amendments provide even greater emphasis on the limits to the state's duty to extend services. See notes 13 and 18.

[26]See 62A-4a-113(4).

[27]See 62A-4a-202.3, 202.4 and 62A-4a-409(1).

[28]See 62A-4a-202.3(5) and 62A-4a-409(4).

[29]See 62A-4a-202.3(3), 62A-4a-409(3), and 62A-4a-115. An interesting question is whether an *administratively* "substantiated referral" of a sibling under these sections may serve as the basis for a later *judicial* order of permanent termination without further proof of parental unfitness? Section 78-3a-408(4)(a) seems to imply as much by use of the term "substantiated" which is used in the cited sections in Title 62A to refer to administrative not judicial determinations which are made without due process procedures.

[30]See 62A-4a-205(5)(c).

[31]See 62A-4a-205(5)(d) and (6).

[32]*In re Woodward,* 384 P.2d 110 (Utah 1963).

UTAH CHILDREN

Judge Jackson Recognized for Child Advocacy

Utah Children's 1997 Award for Outstanding Advocacy for Children was presented on May 9 to Judge Joseph E. Jackson of Cedar City. The award, sponsored by Smith's Food & Drug Centers, Inc., is given to an individual who has shown sustained activity of uncommon merit to improve the quality of life for children. Judge Jackson was presented with an original Dennis Smith sculpture during a child welfare forum held at the Law and Justice Center in Salt Lake City. The award presentation was made by Utah Children Trustees Dave Manookin who is KSL Program Director and Judge Regnal Garff who is senior Judge on the Utah Court of Appeals.

Appointed to the Fifth District Juvenile Court in January 1977, Judge Joseph E. Jackson has worked with youth and on youth issues for 20 years. He serves Washington, Iron and Beaver Counties. Judge Jackson has been an advocate for early intervention with children before they develop serious delinquent patterns of behavior. He has supported and worked with the schools to intervene with truants early on. Because of his positive attitude and effort at involving the community, he has received high praise and respect from both young people and adults. In conjunction with Utah State University and local County Extension Agents, a survey was made of high school seniors to identify most serious problems of youth. Judge Jackson spearheaded the local effort to hold meetings and explore solutions; a grant was secured to establish a mentoring program for delinquent youth.

He received his law degree from the University of Utah College of Law in 1961 and was an attorney with a Cedar City law firm from 1963 to 1971. He was a City Attorney for Milford and Beaver from 1965 to 1975 and a City Attorney for Cedar City from 1972 to 1977. Judge Jackson served two terms as Presiding Judge of the Juvenile Court Board of Judges and was named Juvenile Court Judge of the Year in 1987 by the Utah State Bar.

Utah Children, a statewide child advocacy organization, recognizes annually a Utahn who has exhibited the following criteria:

- spoken out and educated others in ways that led to specific changes for children,
- affected a significant number of children,
- shown initiative and vision in addressing one or more problems that impede mental, emotional and physical development of children,
- confronted and overcome institutional barriers to the healthy development of children,
- and provided leadership and involved others in improving the lives of children.

For more information about child advocacy in Utah and about how you can become a child advocate in your community, call (801) 364-1182.

I.O.L.T.A. Honor Roll

The Utah Bar Foundation honors all individuals and law firms who have supported the Foundation by converting their trust accounts to the IOLTA Program (Interest on Lawyer Trust Accounts).

Foundation funding is generated primarily with interest earned on IOLTA. These are the accounts that are too small or held for too short a period of time to economically benefit the client or to justify paying bank service charges. When pooled together, these accounts provide significant amounts.

Lawyers can take pride in the work the Utah Bar Foundation is performing on their behalf. The Foundation strives to invest their support in projects and programs that will enhance the public understanding of the legal system, improve the administration of justice, provide access to legal services, and support other worthwhile law-related community projects in Utah. Every time a project is funded, the community is enriched and the image of the legal profession enhanced.

If any name has been omitted, we regret the oversight. To rectify the error or omission, please contact the Bar Foundation office (297-7046). We encourage all of those who are not now participating in the IOLTA Program to call and make arrangements to join the following lawyers and law firms.

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CLE CALENDAR

ALI-ABA SATELLITE SEMINAR: UNDERSTANDING THE NATIONAL SECURITIES IMPROVEMENT ACT AND ITS EFFECT ON THE INVESTMENT ADVISORY FIRM

Date: Tuesday, June 3, 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: FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA – 1997

Date: Thursday, June 5, 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: PART I – UNDERSTANDING THE INTERNET: PART II – HANDLING PROFESSIONAL RESPONSIBILITY DILEMMAS

Date: Thursday, June 12, 1997
Time: 10:00 a.m. to 2:30 p.m.
Place: Utah Law & Justice Center
Fee: $95.00 for one part
$175 for both parts
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 2 HOURS for one part
4 HOURS for both parts

NLCLE: DOMESTIC RELATIONS

Date: Thursday, June 12, 1997
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for YLD Members
$60.00 for all others
CLE Credit: 3 HOURS

POWERFUL WITNESS PREPARATION

Date: Friday, June 13, 1997
Time: 8:30 a.m. to 4:15 p.m.
Place: Utah Law & Justice Center
Fee: $140.00 – Pre-registration
$160.00 – Registration at the door
CLE Credit: 7 HOURS

ALI-ABA SATELLITE SEMINAR: SECTION 1983 CIVIL RIGHTS LITIGATION

Date: Thursday, June 19, 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

1997 ANNUAL CONVENTION

Date: July 2 - July 5, 1997
Place: Sun Valley Resort, Sun Valley, Idaho
CLE Credit: 13 HOURS, WHICH INCLUDES 4 IN ETHICS
Times & Fees: *Please look for your Annual Convention brochure in the mail for fees and times. Also, please register for this convention on the official registration form included in the brochure. Thank you.*

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

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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.

ALI-ABA SATELLITE SEMINAR: U.S. SUPREME COURT UPDATE – HIGHLIGHTS OF THE 1996-97 TERM

Date:	Thursday, July 17, 1997
Time:	10:00 a.m. to 1:00 p.m.
Place:	Utah Law & Justice Center
Fee:	$75.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit:	3 HOURS

NEGOTIATING THE ETHICS MINEFIELD: BROADCAST LIVE TO SEVERAL CITIES ACROSS UTAH!

Date:	Friday, August 15, 1997
Time:	To be determined
Place:	Southern Utah University (Broadcast live to several cities across the state)
Fee:	To be determined
CLE Credit:	3 HOURS ETHICS

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.

Case Studies: When Government is Involved

A client's vehicle had stalled on a snowy mountain road. He managed to move the vehicle to an area with a large curb. He believed this was an area designated by the state for motorists to pull off the road in an emergency. While walking behind his stalled vehicle, he was struck by another driver and severely injured. The client lost his leg in the accident.

At the time the accident occurred, the client was visiting relatives in a distant state. After the accident, he returned home and retained local counsel the represent him. The firm agreed to pursue a claim against the other driver and to investigate the merits of the claim against the distant state for negligent design or marking of the roadway. The firm settled the case with the other driver for the full amount of the driver's policy limits. When they began to pursue the action against the distant state, the state argued that the claimant had not complied with the state's requirement that written notice of a claim against the state be given within six months of the date of accident. This is prescribed by statute. The six month period had long expired.

The client is now barred from bringing his claim against the state and is pursuing a claim against his former attorneys. The defendant attorneys state that they advised the client from the beginning that the claim against the state was of questionable merit, but given the severity of his injuries, they would attempt some recovery from that state.

CURRENT STATUS

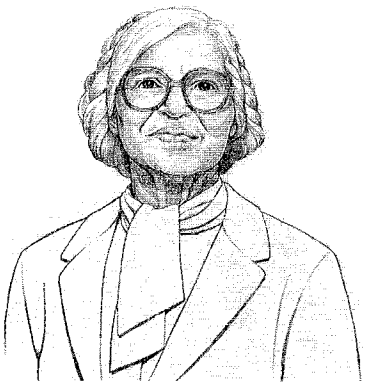
The insurer is in the process of reminding the claimant of the questionable merits of the claim against the state and gathering information as to how the accident occurred along with the claimant's medical records and bills. The claimant denies that the attorneys advised him of the questionable merits of a claim against the state. We view the attorneys' exposure as the amount the state would have paid the claimant had the statutory notice been timely filed.

CLAIM AVOIDANCE

When accepting a case where the cause of action accrues in another jurisdiction outside the firm's general geographical area of practice and a governmental entity of some sort is a likely or possible defendant, immediately determine what statutory reporting requirements may exist as well as all other applicable legal requirements. We typically think of attorneys being sued for missing the statutes of limitations. The number of claims involving the failure to either timely or properly file a statutory notice in cases involving governmental entities may well equal the number of claims involving a missed statute of limitations.

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics



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

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

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

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

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Any attorneys interested in participating in this rewarding, yet truly worthwhile, program are encouraged to contact: Tom Christensen or Mary Ann Fowler @ 531-8900, Fabian and Clendenin, 215 South State, #1200, Salt Lake City, Utah 84111.

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 call (801) 297-7022.

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

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Large established, full-service Salt Lake City firm seeks an associate with three to five years quality experience in litigation and a strong academic background. Expertise in employment law and/or medical malpractice would be useful. All inquiries will be kept confidential. Please send resume to: Confidential Box #30, ATTN: Maud Thurman, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

"A.V." firm seeks 2-4 year LR/Coif Associate to litigate for ski resorts, government and commercial clients. Send resume to Gordon Strachan, Old City Hall, Upstairs, P.O. Box 3747, Park City, Utah 84060-3747.

Small firm seeks associate attorney with one to three years experience to handle family law and other civil litigation. Excellent writing ability, initiative and strong desire to try cases and resolve problems for clients required. Send resume to Debra Doucette, O'Rorke & Gardiner, LLC, 6995 Union Park Center, Suite 470, Midvale, Utah 84047 or fax to (801) 569-3434.

St. George firm seeks two associate attorneys with 1 to 3 years experience in civil litigation or tax/estate planning. Strong credentials, writing skills and references required. Inquiries will be kept confidential. Please send resume and writing samples to Box 2747, St. George, UT 84770.

Small Salt Lake City firm seeking an associate with 1-3 years experience. Background in employment and retirement benefits preferable. Strong research and writing skills necessary. Litigation/appellate experience also helpful. Reply to Maud C. Thurman, Utah State Bar, Confidential Box #31, 645 South 200 East, Salt Lake City, UT 84111.

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SEXUAL ABUSE/DEFENSE Children's statements are often manipulated, fabricated, or poorly investigated. Objective criteria can identify valid testimony. Commonly, allegations lack validity and place serious doubt on children's statements as evidence. Currently research supports STATEMENT ANALYSIS, specific juror selection and instructions. B. Giffen, M.Sc. Evidence Specialist American College Forensic Examiners (801) 485-4011.

The American Board of Professional Psychology has awarded nearly 200 psychologists in the US and Canada the **Diplomate in Forensic Psychology** designating excellence and competence in the field of forensic psychology. For referrals to Diplomates by region or specialty, contact: **The American Academy of Forensic Psychology,** 128 N. Craig St., Pittsburgh, PA 15213; **Phone:** (412) 681-3000; Fax: (412) 681-1471. Internet: http://www.abfp.com/aafp

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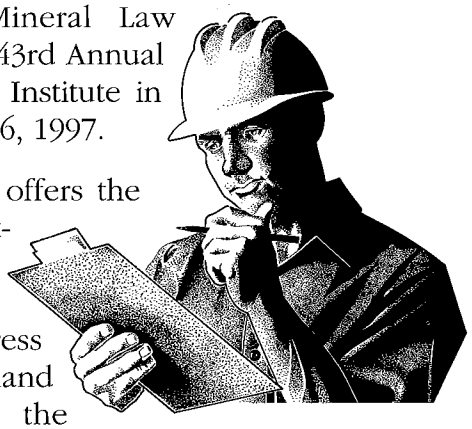
43rd Annual Rocky Mountain Mineral Law Institute



The Rocky Mountain Mineral Law Foundation is sponsoring the 43rd Annual Rocky Mountain Mineral Law Institute in Portland, Oregon, on July 24-26, 1997.

The 43rd Annual Institute offers the combined expertise of 33 outstanding and experienced natural resources law professionals. Presentations will address a variety of practical legal and land problems associated with the exploration for and development of oil and gas, hard minerals, and water on both public and private lands.

Several general sessions, as well as split sections on mining, oil and gas, landmen's issues, and water topics are offered. Papers focusing on environmental, public lands, and international topics are interwoven throughout the program.

Attorneys, landmen, corporate management, government representatives, university faculty, and consultants will benefit from knowledge gained from this year's program.

For additional information, contact the Foundation at (303) 321-8100.

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

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Address:_____ Telephone Number:_____

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Program Title
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Date of Activity CLE Hours Type of Activity**

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Program Title
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Date of Activity CLE Hours Type of Activity**

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

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Program Title
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Date of Activity CLE Hours Type of Activity**

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Date of Activity CLE Hours Type of Activity**

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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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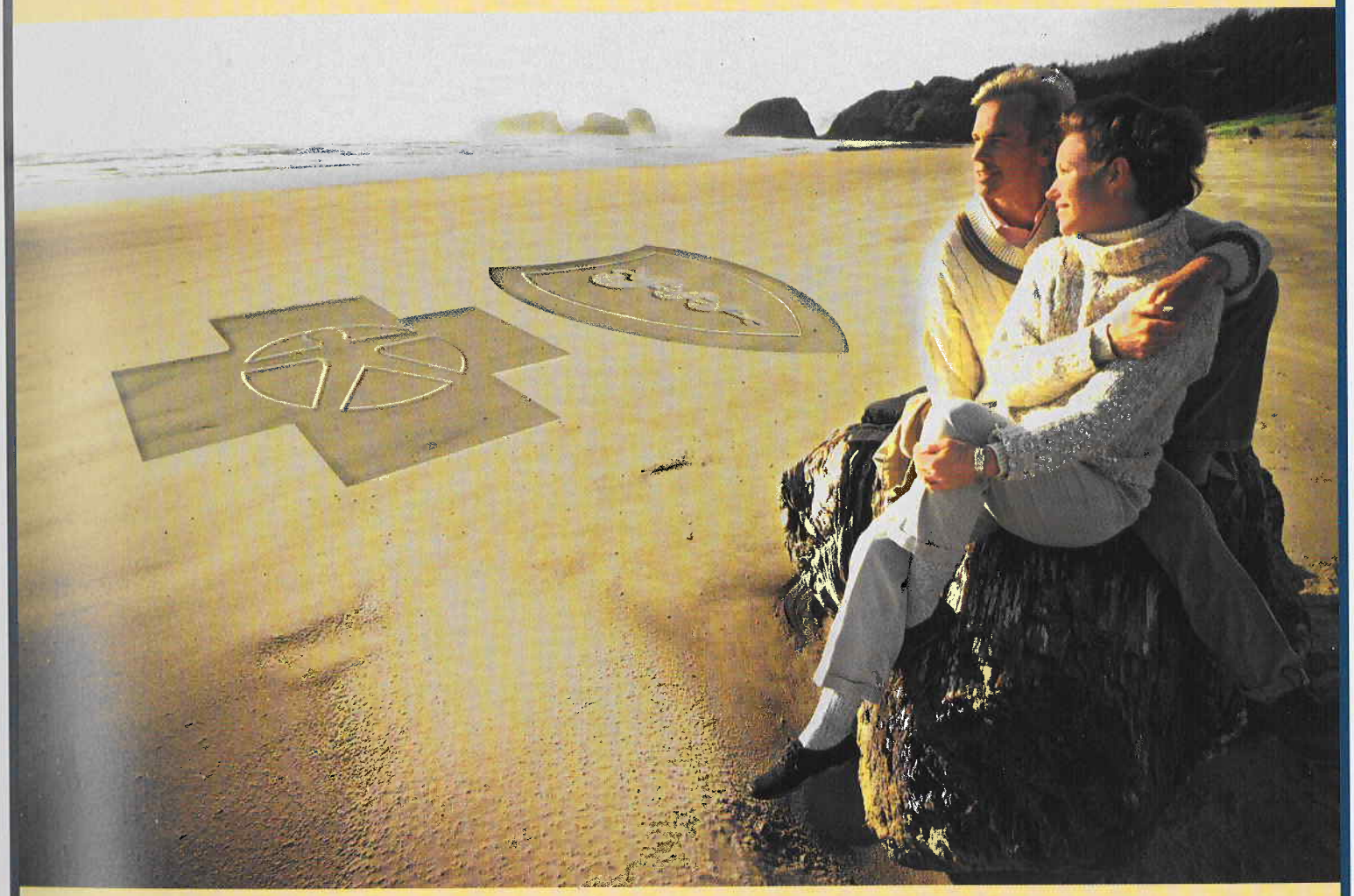

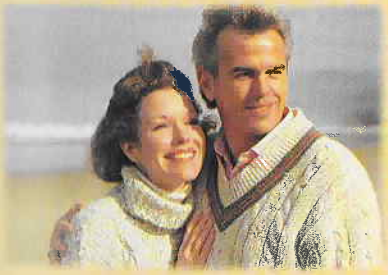

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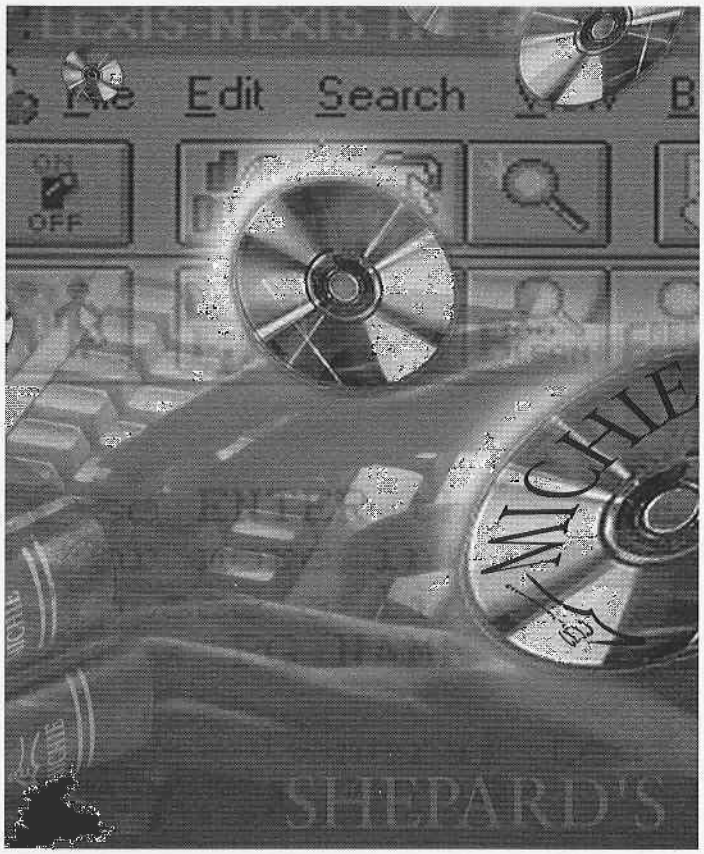

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