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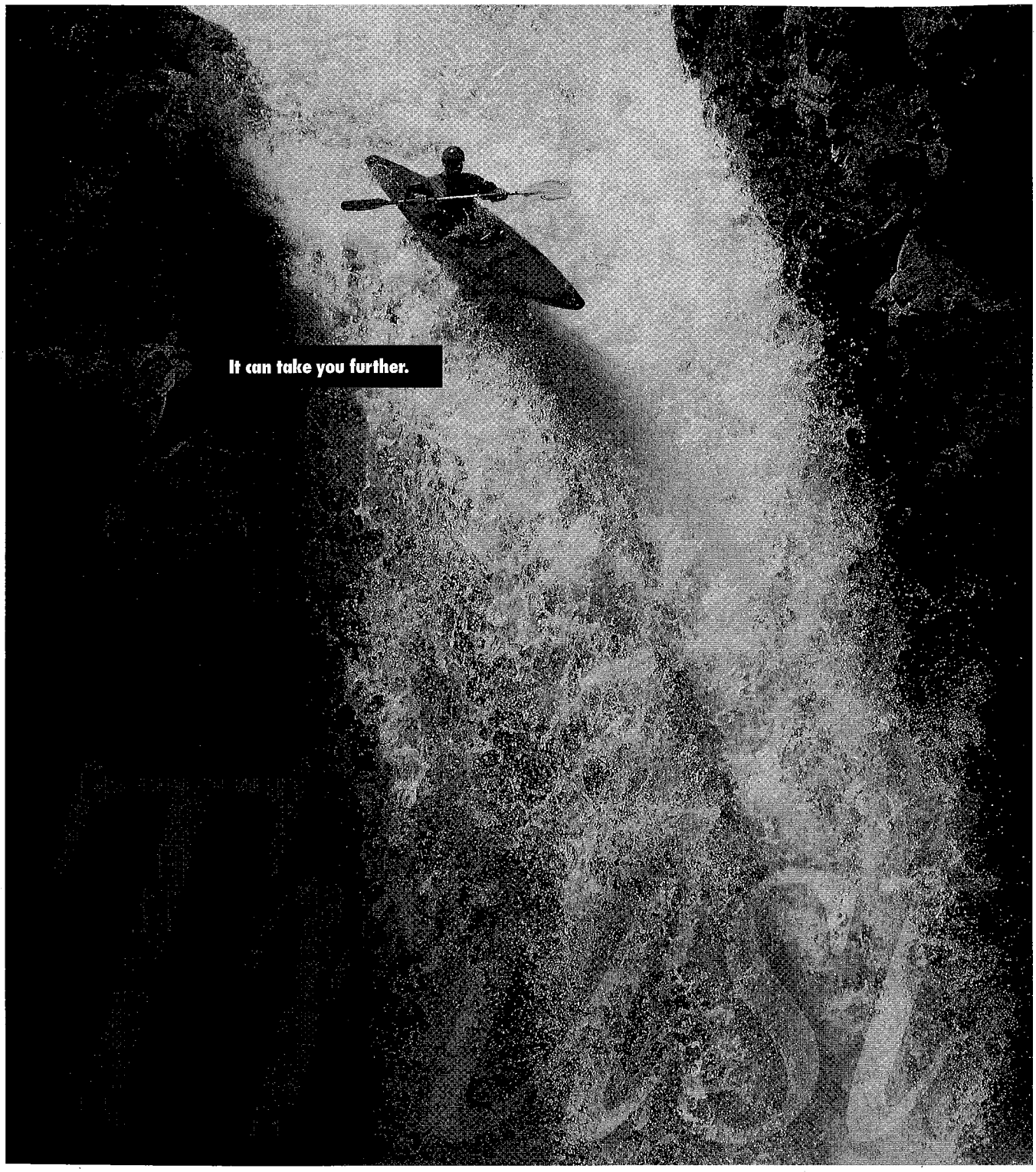

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UTAH BAR JOURNAL

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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.

COVER: Autumn Colors in Logan Canyon, by Bret B. Hicken, Spanish Fork, Utah.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Randle, Deamer, Zarr, Romrell & Lee, P.C., 139 East South Temple, Suite 330, Salt Lake City, UT, 84111-1169, 531-0441. Send a slide, transparency or print of each scene you want to be considered.

The Utah Bar Journal is published monthly, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $40; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

Editor:

Today I submitted my letter of resignation to the Utah State Bar. I am writing now to share with you some of my thoughts as I go.

My decision to resign is a culmination of the deep personal change I have experienced during the past ten years. Over this time I descended into depression and pain. I felt helpless and dissatisfied with the circumstances of my life. Eventually, after pursuing a variety of healing techniques and spiritual practice,s I became more clear about what I wanted and began to act from that understanding. I left my political party, my religion, my marriage, and now find myself letting go of my profession and with it attachment to my identity as "an attorney." I realize that I am not what I do. In the immortal words of Popeye the sailor man, "I am what I am." The more I let go of who I think I am the more wholly myself I become. This apparent irony is, for me, only the simple truth.

Thank you to each of my clients and members of the bar, bench and court staff for your participation in my fifteen year journey to this moment and this understanding.

Sincerely,
Philip Story

Editor:

re: correction to article of *Utah Bar Journal,* Vol. 10 No. 5, June 1997, "Are Income Taxes Dischargeable in Bankruptcy" by Rex B. Bushman

Tax debts can be eliminated through a Chapter 13 bankruptcy even where: A. No return is filed; B. The return is late and the two year rule is not met; and C. Where fraud has occurred.

Sincerely,
Rex B. Bushman

Interested in Writing an Article for the Bar Journal?

The editor of the Utah Bar Journal wants to hear about the topics and issues readers think should be covered in the magazine.

If you have an article idea or would be interested in writing on a particular topic, contact the editor at 566-6633 or write, *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.

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

3. All letters submitted for publication shall be addressed to Editor, Utah Bar Journal and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

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.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author or each letter if and when a letter is rejected.

Future of the Bar

By Charlotte L. Miller

The first weekend of September, the Utah State Bar Commission held a retreat in which its members discussed the long range plan of the Bar. Fortunately, the following people had worked quite hard for several months before the retreat to prepare a proposed long-range plan: Dave Nuffer, John Baldwin, Dan Becker, Scott Daniels, Brian Jones, Debra Moore, Dane Nolan and Ray Westergard. Their work enabled us to focus more clearly on areas that need development. As a result of the retreat, the Long Range Planning Committee is revising the plan to present to the Commission for additional review. When the plan has been refined, we will provide it to Bar members to obtain additional input.

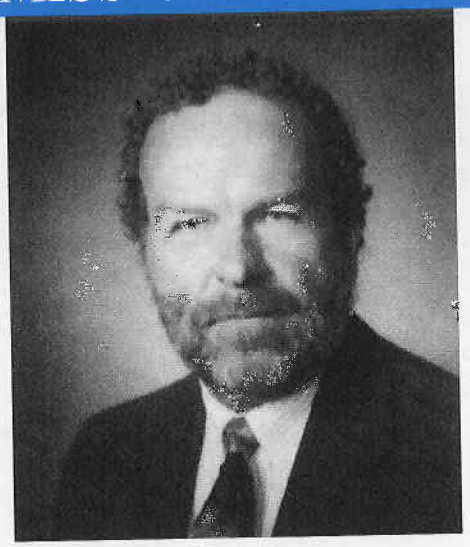
A sampling of the ideas, goals or topics we discussed include the following:

1. Increasing the continuity of the use of the Bar's resources from year to year by stating long term goals which each president will be responsible for leading the Commission to implement.
2. Revising the admission process of the Bar to require more practical knowledge and training prior to full admission to the Bar.
3. Increasing the continuity of the use of the Bar's resources from year to year by stating long term goals which each president will lead in implementing.

The Commission recognizes that it has a dual role: regulating through admissions and discipline; and serving and representing lawyers. These roles may have some conflict. The attendees at the retreat had some valuable discussion about whether the Bar should focus only on regulation, or should provide more services. Some expressed the opinion that, too often, the Bar had tried to be all things to all lawyers; thereby always adding and expanding programs, but never terminating programs. Others indicated that to support the profession we need more programs focused on law practice management, technology, and delivery of legal services. Others voiced the plea that lawyers are the natural agents to promote social change and the Bar should facilitate lawyers' ability to promote social change. One attendee described the Bar Commission as a water bug flitting from place to place, one year to the next – with good intentions but with serious time constraints that prevent us from accomplishing goals that may require more time, more institutional commitment, or a change in culture. The Long Range Planning Committee will certainly help us move out of any water bug syndrome from which we may suffer.

I am thankful to all the commissioners who attended the retreat and for the participation by Dan Becker from the Administrative Office of the Courts and Chief Justice Zimmerman. I was impressed at the commitment of the attendees to wrestle with difficult issues Friday evening and all day Saturday.

At the close of the retreat, each attendee identified the top three priorities for the Bar. I encourage each of you to identify those priorities from your perspective and share your thoughts with a Bar Commissioner. These priorities will drive the allocation of the Bar's human and financial resources. Lawyers have the privilege and responsibility of self-regulation of the practice of law. Please take some time to consider your role in that responsibility and how you can help shape the future of the Bar.



Client Security Fund

By Charles R. Brown

Approximately one year ago, as a continuum of detailed discussion by the Bar Commission regarding the Client Security Fund Program (the "Program"), President Steven M. Kaufman appointed a special Client Security Fund Task Force to analyze the Program and make recommendations to the Commission. I was appointed as Chairman of that Task Force. The other members, all of whom put in extraordinary time and effort investigating and analyzing the Program and the issues, were Commissioner Scott Daniels, Commissioner Denise A. Dragoo, Commissioner John Florez, Commissioner Francis M. Wikstrom, David R. Hamilton, present Chair of the Client Security Fund Committee and Carol A. Stewart, Deputy Chief Disciplinary Counsel.

The dialogue at the Commission level had established there was strong uncertainty among members of the Commission regarding the purpose and philosophical *raison d'etre* for the Program, as well as its efficacy, viability and cost. There was some disagreement as to whether the Program accomplishes anything positive for the Bar and the public and whether it should be continued. If it is to be continued, should it be restructured and/or supplemented? Can it be continued and restructured in a fashion which will increase the actual benefit to the public, as well as the perceived public benefit, in order to create positive reflection on the Bar and its members.

I, for one, was somewhat skeptical about whether the program was worthy of continuation. However, after detailed analysis and dialogue among the Task Force, I became convinced, as did the other members of the Task Force, that, as a small cost of our privilege of practicing law, we do have a duty to protect against, and in extraordinary instances mitigate, damage caused to unsuspecting public consumers of legal services by those few of our members who are less than totally honest.

The Task Force spent many months conducting interviews, obtaining information on other programs and analyzing all issues involving the Program. A summary of the conclusions and recommendations of the Task Force follows:

THE PROBLEM

Utah's Fund for Client Protection (the "Fund") provides a means for clients who have suffered losses as a direct result of dishonest conduct by attorneys operating within the attorney/client relationship to receive some compensation, based totally on the discretion of the Fund. In Utah, those claims have historically been in three (3) areas:

1. Unearned fees
2. Trust fund theft
3. Theft of settlement proceeds

The competing concerns of the Program pit the quiet, somewhat obscure role of the Fund, where committee members and Commissioners zealously guarded the $100,000 Fund, against the realities of legitimate claims that far exceed current caps, and where the number of those claims has expanded and will likely increase even more if there is significant publicity of the Fund.

FINDINGS AND CONCLUSIONS

The Task Force determined that continuation of the Program is the right thing to do – that the Bar and its members do have a duty to continue a viable program to assist clients who may have been defrauded by their counsel. However, the Program must be improved upon in terms of accessibility, effectiveness, efficiency and impact. Although it will likely result in more claims, the Fund must be better publicized and explained so it may be more accessible and responsive to the public's needs. That will also serve to create posi-

tive public perceptions regarding the Bar's commitment in this area. The Task Force also concluded that there are other options which should be reviewed outside the parameters of the Fund Rules to better serve and protect the public, as well as to maintain the high standards of ethical conduct required of attorneys and improve the image of attorneys as a whole.

SUMMARY OF RECOMMENDATIONS

A. Jurisdictional Prerequisites.

The Task Force recommended softening of the restrictions now imposed by the Program for qualification of payable claims, which would facilitate quick and efficient claim processing.

B. Ancillary Programs.

The Task Force recommended implementation of additional programs which may serve to better protect the public and supplement the Program. Those are:

1. Proposed amendments to the Disciplinary rules, which would condition reinstatement or readmission upon full compliance with all disciplinary orders of restitution and reimbursement to the Fund, as well as costs and fees incurred by the OAD in its prosecution.

2. The amendment to Rule 1.15 which requires that financial institutions maintaining client trust accounts notify the OAD of the presentation of an instrument which overdraws the account.

3. Reinstatement or readmission of attorneys disciplined in matters relating to fiduciary obligations should be conditioned upon proof of malpractice insurance and/or proof of some type of fidelity bond.

4. Adoption of a rule which would require payors (such as insurance companies and escrow agents) to notify claimants/payees directly prior to forwarding payment to an attorney.

5. That the MCLE Board adopt a rule requiring attorneys to periodically complete one hour of CLE on Trust Fund Accounting.

6. The Task Force considered and quickly determined that a mandatory surety bond requirement for all lawyers in active practice to supplement or replace the Fund would be far too costly for our membership.

C. Program Funding.

The Task Force recommended increasing the limit per claim to $20,000 and elimination of the cap of $25,000 per attorney per year. It also recommended that the funding base of the Fund be adjusted by increasing the annual assessment for each attorney from $10 to $20 and allowing the Fund to grow above the present $100,000 ceiling. The Bar Commission agreed to fund the increase in the assessment for the 1997-98 year out of its surplus.

D. Management Information.

The Task Force determined that a comprehensive data base should be established to provide the necessary information upon which the Bar can monitor and evaluate the effectiveness of the Program and make changes as needed to promote the mission of the Bar.

E. Public Information.

The Task Force concluded that in order to have an effective Program, it must be publicized to clients and the general public. That publicity must explain the limitations of the Fund as well as the fact that the Program is funded totally by honest lawyers making contributions out of their own pockets in order to protect the public against the very few attorneys who act dishonestly. Brochures explaining the Program were designed and will be made available to the public and the Bar.

The Task Force and the Commission fully understand that the increased funding requirements will create an additional burden on our members. However, it was determined that in order to provide an effective level of assistance to the public and also benefit the organized Bar it is essential that the Program be continued in a more viable form and that it be more adequately publicized.

The full report of the Task Force is available at the Bar office for review by interested members. Any suggestions, comments or random thoughts by any of you would be very much appreciated.

Grand Staircase-Escalante National Monument: Protection of Antiquities or Preservationist Assault?

By William Perry Pendley[1]
Edited by David Hartvigsen and J. Craig Smith,
Utah Bar Journal *Commitee*

INTRODUCTION

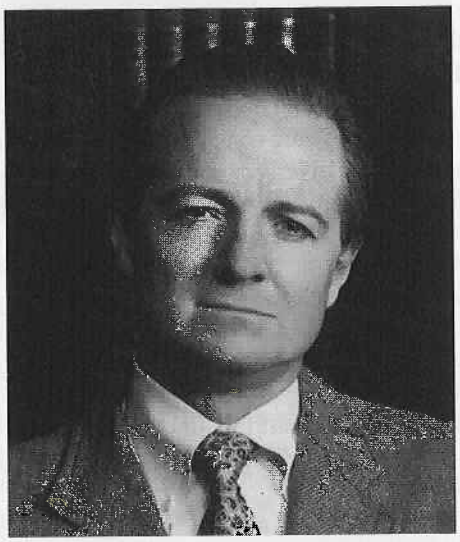
In order to place the designation of the Grand Staircase-Escalante National Monument into proper prospective, one must understand the political context of the current administration from which it was born.

PRESIDENT CLINTON AND THE ENVIRONMENT — FROM TIMBER SUMMIT TO GRAND CANYON

President Clinton's record on the economic needs of the American West and particularly its rural counties, has been dismal. Even before President Clinton was sworn in, would-be Secretary of the Interior, Bruce Babbitt, announced that Congress had too quickly given Western states control over water and that he would utilize such laws as the Endangered Species Act to get it back. Within a matter of weeks, President Clinton was engaged in the same "War on the West", an assault that stretched from the earliest days of his first term to the last.

For example, on April 3, 1993, President Clinton made his famous "I feel your pain" journey to Portland, Oregon, for the Timber Summit, at which he emoted on behalf of loggers, their families and communities, at wits end over their plight as a result of the Northern Spotted Owl. While Clinton was sympathizing, across the street his aides were devising a plan to cut the allowable timber harvest by 75 percent, a process which, by the way, was held to violate the Federal Advisory Committee Act.[2]

Then, apparently to close out his first term on the same note on which it had begun, President Clinton, on September 18, 1996, traveled to Arizona to designate 1.7 million acres of federal land in Utah as a national monument. The reaction in the west, particularly in Utah, was outrage.



WILLIAM PERRY PENDLEY, President and Chief Legal Officer of the Mountain States Legal Foundation in Denver, Colorado, received a B.A. and M.A. degrees, in political science and economics, from the George Washington University in Washington, D.C. He received a J.D. degree from the University of Wyoming College of Law where he was Senior Editor and author of the law review. He successfully argued Adarand Constructors, Inc. v. Peña *before the U.S. Supreme Court and is the attorney who filed* Western States Coalition, et al. v. Clinton, *a case challenging the Monument designation, in the Utah Federal District Court.*

Although various environmental leaders, including Robert Redford, were briefed in advance of the announcement, Utah's Governor and entire congressional delegation were kept in the dark. One immediate impact was that Congressman Bob Orton (D-UT), who represented the district in which the monument was created, became the only member of Congress to lose his seat in the 1996 election as a result of environmental policy.

THE PROCLAMATION

Our President is not anything if not verbose, and thus it was with his Grand Staircase Proclamation. Ignoring the caution his daughter, Chelsea, gave him before he spoke at her graduation ("Be wise, briefly!"), Clinton's Proclamation drones on and on.

> The Grand Staircase-Escalante National Monument's vast and austere landscape embraces a spectacular array of scientific and historic resources. . . .
>
> The monument is a geologic treasure. . . .
>
> The monument includes world class paleontological sites. . . .
>
> The monument is rich in human history. . . .
>
> [T]he monument is an outstanding biological resources. . . .
>
> The Federal land and interest in land reserved consists of approximately 1.7 million acres, which is the smallest area compatible with the proper care and management of the objects to be protected.[3]

Apparently believing that saying it makes it so, President Clinton's proclamation contained all the requisite words of the Antiquities Act, including "scientific," "historic," and "the smallest area compatible." Whether saying it makes it so, even for presidents, and whether words on paper make up for what is not on the ground, remains to be seen, as does the most fundamental question: whether Clinton's decree is what Congress had in mind when it adopted the Antiquities Act in 1906 and when it left it in place with the adoption of

the Federal Land Policy and Management Act (FLPMA) seventy years later.

A couple of aspects of the proclamation do bear mentioning. First is the statement, "The establishment of this monument is subject to valid existing rights." Although this assurance may give comfort to some, that comfort is misplaced in view of the rather unusual interpretation the Clinton administration has made of the phrase "valid existing rights." For before the U.S. Court of Appeals for the Sixth Circuit, in a case involving a property owner in the Upper Peninsula of Michigan, the administration took the position that the phrase "valid existing rights," did not protect the landowner's rights since, when Congress wrote the phrase into law, it had no idea what the phrase meant. Therefore the administration was free to interpret it as it desired. In this case it meant the lake front property owner had only the right to drink water from the lake.[4]

Second is the phrase, "Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation." Senator Orrin Hatch (R-UT) and Congressman Jim Hansen (R-UT) have taken the position that by superimposing the Monument over Wilderness Study Areas (WSAs), President Clinton has erased those WSAs, thus removing them from the Interim Management Plan.[5]

Third is the phrase, "This proclamation does not reserve water as a matter of federal law." Thus, unlike the designation of Devils Hole as a national monument, federal water rights were not reserved. However, President Clinton directed Secretary Babbitt "to assure the availability of water." Given Babbitt's antipathy toward western water law and his willingness to prevent the use of water for the states, this sentence should give serious pause, since the monument lies in the southernmost portion of Utah. Federal demands for water for the monument would take water from upstream appropriators and thus ensure that water guaranteed Utahns would leave the state destined for Babbitt's Arizona and southern California!

"Federal demands for water for the monument would take water from upstream appropriators and thus ensure that water guaranteed Utahns would leave the state destined for Babbitt's Arizona and southern California!"

Finally, the proclamation directs that Secretary Babbitt prepare a management plan within three years of the designation. I will leave to others a discussion of what I regard as largely the arrangement of chairs on the deck of the Titanic and any celebration over the fact that Utah now has a place at the table and, wonder of wonders, a geologist on the panel!

Even more important than the words of the proclamation were the words used by the President on the day of his decision as well as the words of other administration officials. Clinton, noting that the monument designation would prevent the mining of a trillion dollar coal deposit expressed concern about the loss of jobs, but then said, "We can't have mines everywhere." That would appear to include wherever ore bodies are to be found.[6] Other officials also noted that the purpose had been to stop the coal mine. One even asserted that while the mining company might have the right to dig the coal, it did not have the right to transport it out of the area.[7]

A "MONUMENT" OR A MONUMENT?

One management issue does bear brief discussion: that of the placement of the monument under the management jurisdiction of the Bureau of Land Management (BLM), as opposed to the National Park Service (NPS). This decision is quite unusual, since for example, reference to the Code of Federal Regulations (CFR) under the topic heading "Monument" brings the reader to regulations promulgated by the NPS. Nearly every monument is, in fact, managed by the NPS and has been since 1933, when President Franklin D. Roosevelt issued Executive Order 6166, consolidating monument management.[8] Why President Clinton placed the new monument under the BLM is uncertain. Perhaps it was because the land has been under BLM management for decades? Per-

haps it was a small bone tossed to the people of Kane and Garfield counties concerned about grazing, hunting, and other rights regarding which the BLM is much more respectful than the NPS.[9]

Whatever the reason, at least one commentator has concluded that the decision could threaten the validity of the monument. Pamela Baldwin, Esq., of the American Law Division of the Library of Congress' Congressional Research Service, concluded that "the assignment of management of the new monument to the BLM raises the most complex questions; questions that have not been raised or answered by the courts to date."[10] The most significant question, however, is whether President Clinton's decree exceeds his authority under the Antiquities Act or violates one or two provisions of the Constitution: the Property Clause and the Delegation Doctrine.[11]

THE ANTIQUITIES ACT HISTORIC OR SCIENTIFIC

What we refer to as the Antiquities Act is, in reality, merely Section 2 of that Act, which reads as follows:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of *historic or scientific* interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to *the smallest area compatible* with the proper care and management of the objects to be protected.[12]

It is obvious, both from the specific language of the statute and from the legislative history, that Congress intended the Antiquities Act to apply to items of antiquity.[13] The final act was the result of six and one half years of lobbying by archeological organizations.[14] The bill that became law was written by Edgar Lee Hewett, an archeologist, who at last agreed to write the more expansive language favored by the U.S. Department of the Interior—although he did not go as far as Interior suggested. Although Hewett's concerns was with regard to prehistoric antiquities, he added the phrase "other objects of historic or scientific interest." The acreage limitation of 320 to 640 was abandoned as well, and in its place "the smallest area compatible" language was inserted. Despite the changes, the will of Congress, both as to purpose and size, remained clear:

> There are scattered throughout the Southwest quite a number of very interesting ruins. Many of these ruins are upon the public lands, and the most of them are upon lands of but little present value. The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interest relics of prehistoric times.[15]

"The most significant question, however, is whether President Clinton's decree exceeds his authority under the Antiquities Act or violates one or two provisions of the Constitution: the Property Clause and the Delegation Doctrine."

As if to demonstrate what did not meet the requirements of the Antiquities Act, shortly after enactment of that law, Congress created Mesa Verde National Park to protect cliff dwellings in Colorado spread over an area of 216,960 acres.[16] It would appear that Congress made the site a park since it was too large for designation as a monument.[17] The narrowness of the legislative authority provided the Executive by Congress was clear, even to advocates with the Department of the Interior, which had called for more expansive power, including the right to designate scenic areas:

> I have at times been somewhat embarrassed by requests of patriotic and public-spirited citizens who have strongly supported applications to create national monuments out of scenery alone. . . . The terms of the [Antiquities Act] do not specify scenery, nor remotely refer to scenery as a possible *raison d'etre* for a public reservation.[18]

The very first national monument, Devils Tower, was well within the statutory limits intended by Congress. It was a mere 1,153 acres in size—one one thousandth the size of the Utah monument—and was unquestionable of scientific interest, being the core of an ancient volcano left standing alone when the volcano itself eroded away.

AN HISTORICAL AND LEGAL PERSPECTIVE THE GRAND CANYON

It was not long before, to paraphrase Justice Oliver Wendell Holmes, "the natural tendency of human nature [] extend[ed] [its power] more and more until at last [the statutory limits of the original statute] disappear[ed]."[19] On January 11, 1908, President Theodore Roosevelt designated 818,560 acres of the Grand Canyon as a national monument.[20] Although huge, the monument's designation did not seem controversial. In fact, the only challenge to President Roosevelt's authority came, not from local government,[21] but from a private party who sought to use the presence of his mining claims on a popular trail to charge visitors for access to the Grand Canyon.[22]

As a result, the first U.S. Supreme Court case to consider the new Antiquities Act and President Roosevelt's authority under it was, in reality, a mining law case. Ralph H. Cameron, in a apparent attempt to throw in the kitchen sink, asserted that there was no authority for the monument. The Court dealt with Cameron's argument just as quickly, "To this we cannot assent." After citing the language of the Act ("objects of historic or scientific interest") the court quoted Roosevelt's proclamation:

> [The Grand Canyon] is an object of unusual scientific interest. It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.[23]

That's it. The President says it, so it must be so. The Court engages in no further analysis than that. Yet, what about the size of the new monument? How is it that nearly a million acre monument meets congressional intent for "small" areas? The fault was not entirely that of the court. These important matters were "not fully developed in the briefs of the parties."[24]

THE GRAND TETONS

While the first overly expansive use of the Antiquities Act appears to have been acceptable to local citizens, the next such use clearly was not, bringing a fire storm of protest, not just from the targeted state, Wyoming, but from Congress as well. As Wyoming's then-Congressman, Teno Roncalio, explained on the floor of the U.S. House of Representatives during debate regarding the withdrawal provisions of the Federal Land Policy and Management Act, that response appears to have been justified:

> It was only by a ruse that Franklin D. Roosevelt and his old curmudgeon Harold Ickes were able to make such a withdrawal and create that land into [Grand Teton National Park].[25]

Wyoming went to court and, for the first time, a federal judge considered the authority of a president to act under the Antiquities Act. In *Wyoming v. Franke,* 58 F. Supp. 890 (1945), Wyoming raised many of the same issues to be raised more than 50 years later by the people of Utah:

> [First, the new monument] is outside the scope and purpose of the Antiquities Act [since it] contains no objects of an historic or scientific interest . . . ; [second, it] is not confined to the smallest area compatible with the proper care and management of a National Monument; [third, it is] an attempt [] to substitute, through the Antiquities Act, a National Monument for a National Park, the creation of which is within the sole province of the Congress . . . .[26]

Although the federal government raised several bars to the Wyoming lawsuit, the court held that it possessed the requisite jurisdiction "to investigate and determine whether or not the Proclamation is an arbitrary and capricious exercise of power under the Antiquities Act so as to be outside of the scope and purpose of that Act by which the President in the exercise of its provisions has exceeded or violated a discretion thereby conferred"[27] and even proceeded to trial, during which evidence was presented. However, after a brief recitation of that evidence, the court demurred, noting:

> [I]n an ordinary suit the Court would be confronted with the task of determining where the preponderance of evidence rests and render a decision based thereon. This in substance, amounts to no more in the end than the Court's opinion of what evidence in the case purports to show and itself implies an exercise of the Court's discretion.[28]

Instead, ruled the court, it would defer to the President and his proclamation, "[i]f there be evidence in the case of a substantial character upon which the president may have acted . . . ."[29] Remarkably, there was little in President Roosevelt's proclamation to justify such a holding:

> Whereas the area in the State of Wyoming known as the Jackson Hole Country, including that portion thereof which is located in the Teton National Forest, contains historic landmarks and other objects of historic and scientific interest that are situated upon lands owned or controlled by the United States; and
>
> Whereas it appears that the public interest would be promoted by establishing the aforesaid area as a national monument to be known as the Jackson Hole National Monument [therefore the Monument is established].[30]

Nonetheless, the court did recognize that there were outer limits to the president's authority:

> For example, if a monument were to be created on a bare stretch of sagebrush prairie in regard to which there was no substantial evidence that it contained objects of historic or scientific interest, the action in attempting to establish it by proclamation as a monument, would undoubtedly be arbitrary and capricious and clearly outside the scope and purpose of the Monument Act.[31]

However, what if the president's proclamation was, in Congressman Roncalio's words, merely a "ruse?" That possibility was apparently of no interest to the court:

> Neither can the Court take any judicial interest in the motives which may have inspired the Proclamation described as an attempt to circumvent the Congressional intent and authority in connection with such lands. . . Such discussions are of public interest but are only applicable as an appeal for Congressional action.[32]

In fact, the court thought the entire matter was "a controversy between the Legislative and Executive Branches of the Government in which, under the evidence presented here, the Court cannot interfere." [33] Recognizing that there was "great hardship and a substantial amount of injustice" being done to the State of Wyoming "and her citizens," the court concluded that "the burden is on the Congress to pass such remedial legislation as may obviate any injustice brought about as the power and control over and disposition of government lands inherently rests in its Legislative branch."[34]

"While the court recognizes that the power over federal lands is exclusively that of Congress, it is up to the judicial branch to ensure that the limits imposed by the Constitution are met. Obviously, in the face of a veto by the president, Congress cannot protect itself or, more importantly, cannot protect the guarantees assured the American people by the Constitution."

Congress, as livid about the abuse of the Antiquity Act as was the State of Wyoming, passed legislation to abolish the Jackson Hole National Monument, but that legislation was vetoed by President Roosevelt.[35] Thus, the difficulty with the court's reasoning is that while Congress, by a simply majority, may provide authority to the President, it can only reign in an abuse of that authority by a two-thirds vote of the Senate and House. While the court recognizes that the power over federal lands is exclusively that of Congress, it is up to the judicial branch to ensure that the limits imposed by the Constitution are met. Obviously, in the face of a veto by the president, Congress cannot protect itself or, more importantly, cannot protect the guarantees assured the American people by the Constitution.

ALASKA LANDS AND OTHER TESTS

The next test by the Supreme Court of the Antiquities Act came in 1976, regarding a designation of Devil's Hole, a deep cavern on federal land in Nevada, as a national monument in 1952. Again, the focus of the court was on other matters, this time the question of water rights, with

only a brief aside regarding the Antiquities Act. Not surprisingly, the court held that "the pool in Devil's Hole and its rare inhabitants are 'objects of historic or scientific interest.'"[36]

A little more than two years after the court's decision in *Cappaert,* President Jimmy Carter, on December 1, 1978, declared a series of national monuments that, in area, were four and one half times greater than all the national monuments designed in the 72 year history of the Antiquities Act.[37] Again, waves of protest swept across the west, especially Alaska. Yet a test of the authority of President Carter to designate 55.9 million acres of national monuments never reached the U.S. Supreme Court. The matter was resolved instead by Congress with its adoption of the Alaska National Interest Lands Conservation Act.[38]

There were, however, two minor court decisions on the subject. In an unreported bench opinion, *Anaconda Copper Co. v. Andrus,* A79-161 CIV, C.D. AK. (1980), a district court recognized that there are limitations on what qualifies as "scientific or historic" and on how much land is the "smallest area compatible" under the Antiquities Act. The court expressed its frustration with the Supreme Court's failure to delineate those limits.[39]

In *State of Alaska v. Carter,* the only issue addressed was whether President Carter had violated the National Environmental Policy Act (NEPA) in his designation of the national monuments. Not surprisingly, the court held that "the President is not subject to the impact statement requirement of NEPA when exercising his power to proclaim national monuments under the Antiquities Act."[40] As to Alaska's argument that NEPA had been violated by recommendations President Carter received from Secretary Andrus, the court held that the president's authority to ask for and receive advice from his cabinet was not constrained by NEPA.[41]

THEN AND NOW

This, then, is the short and rather skimpy legal history of the authority of a president to withdraw lands under the Antiquities Act. Surprisingly, this very important issue has never been subjected to the type of probing analysis that seems required by a power that belongs exclusively to Congress when delegated to the executive branch.

The commentators recognize that the president possesses no inherent power to make withdrawals. As one noted, "But arguments that the executive has some inherent constitutional authority to make withdrawals of public lands are without merit."[42] Although some suggest that Congress has acquiesced to the use of its power by the executive branch, that too, is meritless. Congress, beginning in 1910, with its adoption of the Pickett Act, has demonstrated both its recognition that withdrawal authority is in Congress alone and its intent to exercise that authority.[43] As one commentator noted:

> That Congress was taking the subject of withdrawals under its control and limiting executive authority seems plain on the face of the [Pickett Act]. And that conclusion is supported by legislative history.[44]

Nonetheless, the Executive Branch withdrew millions of acres between 1910 and 1976, without the requisite statutory author-

ity, causing one commentator to remark:

> Remarkably, the government position upon which these withdrawals rest has not been fully tested. For the Court in *Midwest Oil* to find that congressional acquiescence was tantamount to a delegation of authority to the executive was a long step. Yet that feat was easy compared to the leap that is necessary in order to find that the legislative definition of authority in the Pickett Act imposed no limitations on executive authority in spite of its apparently narrowing language.[45]

It may not have been easy, but the executive branch continued to assert that it had such authority for decades.[46] This is not simply a battle between two branches of government as to which one is in charge. Justice Frankfurter places the matter in context:

> It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particularly instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.[47]

The Founding Fathers place control over federal lands in the hands of Congress, believing it better suited to protect the rights of the American people in the exercise of that power. To ensure that that Constitutional assignment is adhered to is done not to protect the privileges, prerogatives and perquisites of Congress, but to ensure the guarantees of freedom to the American people. Nonetheless, some commentators who favor an expansive presidential authority under the Antiquities Act suggest that there is such a thing as congressional acquiescence:

> The continued practice of making huge withdrawals under the Antiquities Act, like the executive's use of implied [withdrawal] authority, has become its own greatest vindication. By arrogation, authority to go well beyond the Antiquities Act's original intent has become vested in the executive.[48]

Yet, to what acquiescence is the writer referring? Certainly not the response of Congress to President Roosevelt's Jackson Hole National Monument. In that case, Congress did everything it could to demonstrate its disapproval of the president's action, including a return of some of the lands set aside to the Grand Teton National Forest and a prohibition against any future use of the Antiquities Act in Wyoming.[49]

"Having once used FLPMA to "save" Yellowstone National Park, Clinton knew that he could have used similar other FLPMA provisions, including its emergency authority, to save the Grand Staircase-Escalante area."

THE FEDERAL LAND POLICY AND MANAGEMENT ACT THE PUBLIC LAND LAW REVIEW COMMISSION

The issue of withdrawals of federal land by the Executive was of such concern that it was addressed specifically by the Public Land Law Review Commission. In fact, the Commission recommended:

> Large scale limited or single use withdrawals of a permanent or indefinite term should be accomplished only by act of Congress. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for Executive Action.[50]

In its discussion on this recommendation, the Commission emphasized specifically what it meant:

> The Commission recommends that large scale withdrawals and reservations for the purpose of establishing or enlarging any of the following should be reserved to congressional action: national parks, national monuments . . . units of the wilderness system, other areas set aside for preservation or protection of natural phenomena or for scientific purposes, [and] other areas set aside for protection of birds or animals. . . .[51]

WITHDRAWALS UNDER FLPMA

Responding to that recommendation, Congress repudiated any implied authority of the executive branch to make withdrawals.[52] Instead, Congress set forth various mechanisms by which the executive branch could protect federal lands, including an expansive emergency withdrawal authority that could be utilized almost instantaneously[53] In fact, it was that authority that President Carter used in 1978 to set aside over 100 million acres in Alaska.[54] There are limits to even that authority, however, since withdrawals under that provision only last for three years and may not be reauthorized except through the use of other FLPMA withdrawal provisions.

THE NEW WORLD MINE

President Clinton and his officials are well aware of the manner in which federal lands may be withdrawn and the fact that in FLPMA Congress set forth in exacting detail the steps to be followed. In the Summer of 1995, responding to the demands of environmental groups that opposed the New World Mine in southern Montana, Clinton ordered his Secretary of Agriculture to withdraw federal lands surrounding the proposed mine.[55] Having once used FLPMA to "save" Yellowstone National Park, Clinton knew that he could have used similar other FLPMA provisions, including its emergency authority, to save the Grand Staircase-Escalante area.

In fact, there was no such emergency. The Clinton administration's claim that it was fearful that the Republican Congress would take unilateral action harmful to the environment in southern Utah is simply absurd. Earlier attempts to pass a Utah Wilderness Act favored by the state's bipartisan congressional delegation had been defeated by a well-orchestrated national campaign, including *New York Times* editorials, that brought hundreds of environmental lobbyists to Washington, D.C. In addition, by the late summer of 1996, Clinton had already demonstrated he was willing to use the veto and his "bully pulpit," especially in defense of matters included within his famous mantra: "Medicare, medicaid, education and the environment."

WILDERNESS REVIEW AND THE WILDERNESS ACT

Just as the Roosevelt "ruse" of declaring the Jackson Hole National Monument so as to establish a national park that Congress was unwilling to, or too slow to create, Clinton used the Grand Staircase-Escalante National Monument to create an expansive wilderness area that was unacceptable to the Utah congressional delegation. FLPMA sets out the manner in which wilderness areas are to be studied and then designated. However, the results of that process were not to the liking of the Clinton administration.

In accordance with the requirements of FLPMA, the BLM placed 3.2 million acres of Utah's 22 million acres of BLM land in Wilderness Study Areas. After years of hearings and public controversy, 2.0 million acres were recommended to Congress as "suitable" for wilderness designation. Environmental extremists, however, wanted nothing less than 5.1 million acres declared as wilderness. The Utah delegation continued to favor a more reasonable bill, with a little more than 1 million acres of wilderness. The response of the Clinton Administration was to order a "reinventory" of BLM to obtain more "suitable" acreage for wilderness designation. That effort brought a lawsuit by Utah's counties.

No doubt recognizing that even the reinventory would not yield more wilderness designation and without the support of the Utah delegation, the Clinton administration pressed forward with its plan for monument designation; thus circumventing not only the withdrawal provisions of FLPMA, but those provisions setting forth how lands suitable for wilderness designation are to be designated as wilderness. Whether the actions of the Clinton administration also violate the NEPA, as alleged by the Utah Association of Counties in its lawsuit, is also a possibility, especially giving the Counties' allegation that officials at the Department of the Interior solicited a request from the White House so as to avoid the NEPA compliance that any action by the Secretary of the Interior, acting on his own, would entail.

THE PROPERTY CLAUSE

The Constitution could not be more clear as to which branch possesses power over federal lands:

> Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.[56]

As noted above, frequent iterations and reiterations by Congress that it, not the executive branch, has authority to make withdrawals has not inhibited the executive branch's avarice approach to the issue. While the Clinton administration's approach to the issue of monument designation is not unlike earlier Administrations, its view of the Property Clause is.

"Just as the Roosevelt "ruse" of declaring the Jackson Hole National Monument so as to establish a national park that Congress was unwilling to, or too slow to create, Clinton used the Grand Staircase-Escalante National Monument to create an expansive wilderness area that was unacceptable to the Utah congressional delegation."

Remarkably, in a case originating in the Upper Peninsula of Michigan, the Clinton administration takes the position that the Property Clause impliedly gives the executive branch the authority to regulate, not only "[p]roperty belonging to the United States," but private property that affects federal property![57] This is an interpretation of the Property Clause that has been rejected by the U.S. Supreme Court.[58] Nonetheless, the Clinton administration continues to act as if its legal position has merit.[59]

The Property Clause, not as interpreted by the Clinton administration, but as written, poses a quandary for Clinton's Utah monument decree. Either the Antiquities Act, in its delegation of a power that belongs exclusively to Congress, has limits beyond which a president may not go in the designation of a monument, that is, the words "scientific," "historic," and "smallest area," mean something, or the authority given to the president by the Antiquities Act is all of the power possessed by Congress, in which case Congress has run afoul of the Delegation Doctrine.

That Doctrine is best seen in the U.S. Supreme Court decision of *Panama Refining Co. v. Ryan:*

> The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best motives is not a substitute. . . . The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.[60]

If, indeed, President Clinton's authority is unbridled, that anything may be "scientific" or "historic" and even an area the size of the States of Delaware and Rhode Island together is "the smallest area", then the paraphrased language of the Court in *Panama Refining Co.* is applicable:

> [As to the designation of national monuments], the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which [such designation] is to be allowed or prohibited.[61]

THE PRESIDENT'S PROCLAMATION REASON OR RATIONALIZATION

Why did President Clinton designate the Grand Staircase-Escalante National Monument? Administration officials say it was to save wilderness lands, fearful that Congress would do them harm. Clinton said at the site that he didn't want mines "everywhere," including in the area of the new monument. Others have suggested a host of reasons, including: appeasing a host of environmental groups; appealing to environmental voters on the eve of the 1996 elections; punishing the voters of Utah for placing Clinton in third place during the 1992 presidential election; and, possibly, doing a favor for a very important source of campaign contributions.

PIERCING THE PROCLAMATION

In the past, the courts have been reluctant to look beyond a president proclamation in designating a monument. If the president says it, it must be so, conclude the few courts that have considered the issue. The

ability to look beyond the words of the proclamation is essential to the success of any litigation on the Grand Staircase Monument. However, while the one court to have addressed the issue in some detail, the Wyoming federal district court in *Wyoming v. Franke,* seemed willing to hear the facts, it was unwilling to demand that the president justify his actions by a preponderance of the evidence.[62] The court did indicate that if a "bare stretch of sage-brush prairie" were designated, it would overturn the designation.

Unfortunately, that same court indicated that it was disinclined to consider the matter of motive, that is, whether the decision was motivated by other factors. Whether the court hearing the Grand Staircase case will rule similarly is uncertain. Recent disclosure make enhance its willingness to look beyond the proclamation.

SENATOR BOB BENNETT

Recently, the *Salt Lake City Tribune* reported that U.S. Senator Bob Bennett (R-UT) had been permitted to review White House documents regarding the new monument that had been withheld previously. According to the report:

> Under unusual rules of secrecy worthy of a James Bond movie, 20 of the [confidential White House] documents were limited strictly to Bennett's 'eyes only.' Utah's junior senator also was not allowed to keep the file or make photocopies. Another 12 documents were released to Bennett's Senate staff, but with the same 'eyes only' restrictions barring photocopying.[63]

Senator Bennett's response on seeing those documents was that "the documents confirmed absolutely the long-standing belief that the administration misled the Utah delegation and the general public. . . . After reviewing the documents, I'm satisfied that the primary motivation in creating the monument was politics."[64]

Although other White House documents relating to the designation of the Utah monument are still being withheld, despite demands from Congressman Jim Hansen (R-UT), Senator Bennett's response to what has been revealed thus far demonstrate that a court cannot rule on the legality of the Clinton decree solely on the basis of the president's proclamation. If what Clinton said in that proclamation is the mere pretext that Senator Bennett seems to say it is, then it cannot serve as the justification for the designation and a court cannot accord it any credibility. As numerous courts have held, if the reason given by an administrative agency for a decision is not the real basis for the decision, that decision will be stricken as arbitrary and capricious.[65]

"As numerous courts have held, if the reason given by an administrative agency for a decision is not the real basis for the decision, that decision will be stricken as arbitrary and capricious."

THE LIPPO CONNECTION?

It may get even worse. At least two writers have asserted that Clinton's decision was motivated, not by the environment, nor even by a desire to garner votes, but by as a result of a quid pro quo for campaign contributions. Said one writer, "With a stroke of his pen [President Clinton] wiped out the only significant competition to Indonesian coal interests in the world market."[66] That was important to "the Jakarta-based Lippo corporation [which] has business interests related to coal."[67] The link is simple: "Lippo's founder, billionaire Mochtar Riady, his family members and associates have contributed heavily to Clinton and the Democrats."[68] Nationally-syndicated columnist Paul Craig Roberts wrote on the topic and *The Washington Times* editorialized on it.[69] One strictly circumstantial connection is the following: *U.S. News and World Report* reported that, "the monument was on the fast track from late July to its creation on September 18."[70] Coincidentally, *USA Today* reported that on July 30, President Clinton had a private, fund raising dinner at the Jefferson Hotel, "one of the capital's most exclusive hotels," an intimate dinner that included Lippo Group official, James Riady, and no other member of the administration except for Clinton. Don Fowler, Democratic National Committee co-chairman, who was there, said of the dinner, "The president would speak for five or ten minutes, and then people could say what they wanted."[71]

LITIGATION STATUS REPORT MOUNTAIN STATES LEGAL FOUNDATION

MSLF filed its action against President Clinton on Halloween in 1996, asserting that Clinton violated the terms of the Antiquities Act by his decree and may have violated the Constitution, as well. Before and after the filing of its complaint, MSLF has worked with state and local officials in order to facilitate their entry into the lawsuit. MSLF declined to proceed further with its litigation so as to await Utah's state and local representatives.

MSLF's objective is simple: to over turn the president's decree and to establish a legal precedent that the authority possessed by the president under the Antiquities Act is very limited and confined, especially after the adoption of FLPMA, to items that are "scientific or historic" and to the "smallest area" possible. Although MSLF is very concerned about the economic hardship to Utah, Garfield and Kane Counties and their residents, MSLF's lawsuit is not about money, but about which branch of the government has the Constitutional authority to set aside 1.7 million acres of land within wilderness-style classification.

THE RESPONSE OF UTAH AND ITS COUNTIES

On June 23, 1997, the Utah Association of Counties filed its action in federal district court, asserting that Clinton's decree violated the Constitution, the Antiquities Act, numerous provisions of FLPMA, and NEPA.[72] On October 14, 1996, the Utah School and Institutional Trust Lands Administration (SITLA) filed its lawsuit against President Clinton, asserting much the same legal groups as asserted by MSLF and the Utah Association of Counties. While MSLF's case was referred to the Honorable J. Thomas Greene, the Counties case was referred to the Honorable Dee Benson and SITLA's case was referred to the Honorable Tena Campbell.

CONCLUSION

The history of the Antiquities Act reveals that although the statute has been around for 91 years, it has never been subjected to a thoughful court test of the limits of the authority it delegates to the president. Perhaps the use of the Antiquities Act by President Clinton in the case of the Grand Staircase-Escalante National Monu-

ment will be the case where that test takes place, or even where the federal judiciary revitalizes the Delegation Doctrine. Much more is at stake here than the economic future of the people of Utah.

[1]Mr. Pendley is president and chief legal officer of Mountain States Legal Foundation (MSLF) in Denver, Colorado. MSLF is a nonprofit, public interest legal center, dedicated to individual liberty, the right to own and use property, limited government and the free enterprise system. Mr. Pendley is author of *War on the West: Government Tyranny on America's Great Frontier.* He gratefully acknowledges the assistance of Mr. Josh Jennison for his work in finalizing this article.

The views expressed in this article are those of the author and are not necessarily endorsed by the Utah State Bar.

[2]*Northwest Forest Resource Council v. Espy, et al.,* 846 F.Supp. 1009 (1994)

[3]White House Press Release. "Establishment of the Grand Staircase-Escalante National Monument." September 18, 1996.

[4]*Thrall v. United States,* 89 F.3d. 1269 (1996)

[5]*Federal News Service.* 2 May 1997.

[6]*Washington Times.* 5 October 1996.

[7]This is the analysis of Alex Jordan, who heads the Utah Mining Association. *Mine Regualtion Reporter.* 23 September 1996. No. 19. Vol. 9.

[8]Baldwin, Pamela. Congressional Research Service. "Legal Issues Raised by the Designation of the Grand Staircase-Escalante National Monument." 13 December 1996. CRS-8.

[9]Another presidential decision, ostensibly undertaken to sooth sore feelings in the Beehive State, was the appointment of a Salt Lake City lawyer as head of the BLM. The media reported it as such which leads one to ask how simple do the folks think the people of Utah are?

[10]CRS-6

[11]U.S. Const. Art. IV, Sec. 3, cl. 2

[12]16 U.S.C. § 431 (1976). (Emphasis added.)

[13]For example, "antiquities" mean "relics of monuments of ancient times." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). *See* H.R. Rep. No. 2223, 59th Cong., 1st Sess. 1-8 (1906); S. Rep. No. 3797, 59th Cong. 1st Sess. 1 (1906).

[14]For a history of the Act see R. Lee, "The Antiquities Act of 1906" 47-77 (1970), as well as Comment, "Public Land Withdrawal and the Antiquities Act of 1906," *Washington Law Review,* Vol. 56, No. 3, July 1981, pp. 449-451.

[15]H.R. Rep. No. 2224, 59th Cong., 1st Sess. 1 (1905).

[16]Act of June 29, 1906, ch. 3607, §§ 1-2, 34 Stat. 616 (1906) (current version at 16 U.S.C. §§ 111-112 (1976)).

[17]R. Lee agrees. *Id.*, 81. If 216,960 acres is too large for a national monument, what is 1,700,000 acres?

[18]Frank Bond, Chief Clerk of the General Land Office speaking at the first National Park Conference, held at Yellowstone National Park in 1911. R. Lee, *supra* note 76, at 109, *quoting* F. Bond, *The Administration of National Monuments,* in Proceedings of the National Park Conference held at Yellowstone National Park, September 11 and 12, 1911, 80-81 (1912).

[19]*Pennsylvania Coal Company,* 260 U.S. 293, 415 (1922). Of course, Holmes was writing about government regulation going too far causing private property to disappear.

[20]Pres. Proc. No. [unavailable], 35 Stat. 2175 (1908); R. Lee, *supra* note 76, at 90.

[21]Arizona was not a state until 1912.

[22]Getches, David H., "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal,* Vol. 22, No. 2, April 1982, p. 303.

[23]*Cameron v. U.S.,* 252 U.S. 450, 455-56 (1920).

[24]Getches, p. 303.

[25]*Congressional Record,* July 22, 1976, H-23453.

[26]58 F. Supp. at 892.

[27]58 F. Supp. at 894.

[28]58 F. Supp. at 895.

[29]58 F. Supp. at 895.

[30]58 F. Supp. 894-95.

[31]58 F. Supp. at 895.

[32]58 F. Supp. at 896-97.

[33]58 F. Supp. at 896.

[34]58 F. Supp. at 896.

[35]C. Wheatley, Study of Withdrawals and Reservations of Public Domain Land 465 (1968).

[36]*Cappaert v. U.S.,* 426 U.S. 128, 142 (1976).

[37]Comment, at p. 455.

[38]Pub. L. No. 96-487, § 1322, 94 Stat. 2487 (1980) (to be codified in 16 U.S.C. § 3209).

[39]Comment, p. 457.

[40]462 F. Supp. 1155, 1160 (1978).

[41]*Id.* Of note is the Complaint filed by the Utah Association of Counties, which asserts that Secretary of the Interior Babbitt and his staff had solicited a request for a recommendation from the White House to circumvent any NEPA requirements that would apply to any unilateral recommendation from Babbitt. Docket No.: 2:97CV 0479B, C.D. Utah.

[42]Getches, at p. 286.

[43]The Supreme Court found such acquiescence in *United States v. Midwest Oil Company,* 236 U.S. 456 (1915).

[44]Getches, at p. 292.

[45]Getches, at p. 293.

[46]An Attorney General's opinion did just that in 1941. 40 Op. Att'y Gen. 73 (1941).

[47]*Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 609 (1952).

[48]Getches, at p. 308.

[49]Act of September 14, 1950, ch. 950, § 1, 64 Stat. 849 (1950).

[50]"One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission," Washington, D.C., June 1970, p. 54.

[51]*Id.*

[52]"Effective on and after the date of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (*U.S. v. Midwest Oil Co.,* 236 U.S. 459) and the following statutes and parts of statutes are repealed." Pub. L. No. 94-579, §704(a), 90 Stat. 2744, 2792 (1976).

[53]43 U.S.C. § 1714(e).

[54]Public Land Orders 5653 and 5654, 43 *Fed. Reg.* 59756 (1978).

[55]60 *Federal Register* 45732 (1995), and
61 *Federal Register* 49481 (1996).

[56]U.S. Const. art. IV, § 3, cl. 2.

[57]*Thrall v. United States* 89 F.3d. 1269 (1996)

[58]*Sierra Club v. Kleppe* 607 F.2d. 494 (1979)

[59]The BLM regulations recently withdrawn by Secretary Babbitt, which gave to BLM employees expansive law enforcement authority, was based, in part, upon the Clinton Administration's view of the Property Clause. The Administration asserted that it could regulate private property that affected BLM lands. 61 *Federal Register* 57605 (1996)

[60]293 U.S. 388, 420, 421 (1935).

[61]293 U.S. 388, 430.

[62]*Wyoming v. Franke* 58 F.Supp. 890, at 895 (1945)

[63]"Bennett: Papers Prove Clinton 'Misled' Utahns," *Salt Lake City Tribune,* June 24, 1997., p. A4.

[64]*Id.*

[65]See, *Motor Vehicle Mfr. Ass'n v. State Farm Mutual Automobile Ins. Co.* 103 S.Ct. 2856 (1983).

[66]Sarah Foster. "The Utah Coal Lockup: A Trillion Dollar Lippo Payoff?", *Land Rights Letter.* Vol. VI, No. 11, Oct./Nov. 1996, 4-5.

[67]Karen Gullo. "Clinton's National Monumnet Designation Blocked Clean Coal Mining Plan," *Associated Press,* 07 January 1997.

[68]*Id.*

[69]Roberts, Paul Craig. "The Utah Coal Deal," *The Washington Times,* 12 January 1997, 34. and "A Monument to Lippo," *The Washington Times,* 27 December 1996, A18.

[70]"Clinton's 'Mother of All Land Grabs'," *U.S. News and World Report,* 20 January 1997, 42.

[71]"Dinner Raised $488,000-and Questions," *USA Today,* 7 February 1997, 4A.

[72]Docket No.: 2:97CV 0479B, C.D. Utah

LEGAL AID SOCIETY OF SALT LAKE

October 25, 1997 is Official Date for 1997 "Unmask Domestic Violence" Black Tie Masquerade Ball to Benefit Legal Aid Society

Legal Aid Society will hold it's first annual "Unmask Domestic Violence" black tie masquerade ball on Saturday, October 25, 1997 at 6:30 p.m. at the Salt Lake Country Club.

The event will be an elegant evening of dinner and dancing, rounded our by an exciting opportunity drawing. The evening begins with a cocktail hour at 6:30 p.m. followed by dinner served at 7:30 p.m. Entertainment will be provided by The Joe Muscolino Band. Dress for the event is black tie formal wear, masquerade mask optional. (Masks will also be available at the event). For tickets or additional information, please contact Kim at 578-1204.

"The funds raised from this event will benefit Legal Aid Society and allow us to continue to meet the increasing demand for assistance with family law cases for the poor in Salt Lake County" states Executive Director Stewart Ralphs.

Legal Aid Society assists adults and children who are victims of domestic violence to obtain a protective order from the court, regardless of the victim's income and also provides no-cost legal representation to low-income individuals with divorces, child custody and visitation, guardianship, modification of orders and occasionally adoption of children. It does not accept criminal cases.

During 1996, Legal Aid Society assisted more than 3,500 individuals with their family law cases.

Wills v. Trusts

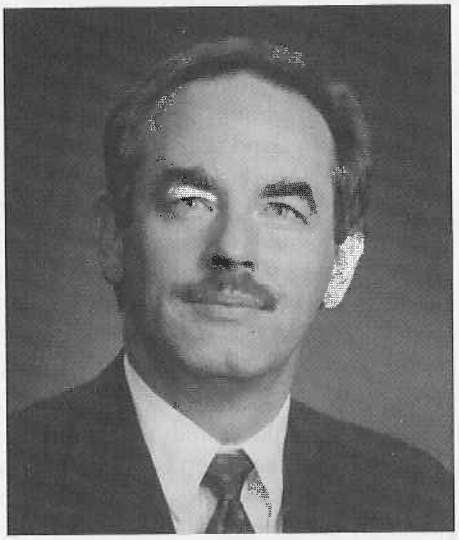
1997 Annual Meeting of the Utah State Bar

By Earl D. Tanner, Jr.

This article is about the choice to avoid probate. Certainly, no one would advise abandoning wills or trusts. One need not look far, however, to find a client who strongly desires that his or her family not suffer the expense, delay, and assorted supposed horrors of probate. The "holy grail" to these clients is frequently the fully funded, revocable, intervivos trust.

Revocable intervivos trusts are valid trusts despite the ability of the settlor to revoke them. *Groesbeck v. Groesbeck,* 935 P.2d 1255 (Utah 1997). They are common documents in estate planning and may permit property that was transferred into the trust during the settlor's life to be transferred to beneficiaries after the settlor's death without a visit to the probate court.

The wisdom of avoiding probate will be addressed by examining various issues which are likely to arise in a decedent's estate. A universal answer is not proposed, although probate is certainly not a great villain and is probably a good idea in most plans. The attorney's advice will be based upon the client's specific situation and concerns. These materials may be useful both as a brief outline for the attorney's analysis and as a tool for educating the client who fears probate but is not acquainted with the details.



EARL D. TANNER, JR. received his bachelor's degree in mathematics and J.D. from the University of Utah, joining the bar in 1976. His practice includes estate planning and litigation. He lectures on administering decedent's estates and is an officer of the Estate Planning Section. The following article was presented at the 1997 Annual Meeting of the Utah State Bar.

DIFFERENCES IN DOCUMENTATION

The chart titled "Documentation" shows typical estate planning documents for plans which do and do not include probate. These are intended to be illustrative only. One can certainly establish trusts inside a will instead of using a separate document, but such testamentary trusts cannot be funded prior to death. Furthermore, there are many types of nonprobate transfers besides trusts, i.e., life insurance, joint tenancy, P.O.D. accounts, etc.

Note that a fully-funded intervivos trust is required to avoid probate unless assets pass by other nonprobate transfers or the estate is small enough to transfer by affidavit (U.C.A. § 75-3-1201). Note also that more complex estates require about the same documentation whether or not probate is intended, e.g. the initial costs are very similar, except for the cost of transferring assets into the trust.

A pour-over will should be executed along with a trust regardless whether probate is intended. There is always the possibility that an asset may not be successfully transferred to the trust prior to death. There is also the possibility that the estate may receive property after the decedent's death.

The pour-over will should usually be probated even if there are no assets to administer. This can be done without appointing a personal representative. If the will is not probated within three years after the decedent's death, it cannot be probated at all (with few exceptions). If the pour-over will is not probated, estate assets will pass by intestacy, which may not be the client's intent. Further, a probated pour-over will gives the trustee/devisee standing to object to a waiver of the limitations that may bar a creditor's claims (U.C.A. 75-3-802). We'll go over more on creditors' claims later.

CONFIDENTIALITY

The "Confidentiality" chart compares the disclosures made in probate to those in trust transfers. Many clients do not want their personal affairs to be made any more public than necessary. A few feel strongly enough about privacy to make it an objective of their planning. Documents that are filed with the probate court are generally open to public inspection, thus a probated will can be read by anyone. Other important information, such as the inventory, accounting, or plan of distribution may or may not be placed in the probate file, depending upon the particular estate. If the personal representative needs the protection of court determinations, more information will be disclosed in the file.

Trust transfers do not insure there will be no record in a probate court. Trustees also occasionally need the protection of court determinations.

POST-MORTEM PROCEDURE

The chart titled "Post-Mortem Procedure" compares the tasks to be done in an estate which includes a probate to the tasks when probate is not required. The point is that avoiding probate does not trivialize post-mortem chores. The true savings from avoiding the expense of probate are usually not large. If one accounts for the time value of money, the extra cost of setting up

a trust in a simple estate may well be more than the cost of a probate.

CREDITORS

The "Claims of Decedent's Creditors" chart compares the treatment of a decedent's creditors in a probate proceeding with their treatment if all assets were transferred to a revocable intervivos trust prior to the decedent's death. While U.C.A. § 75-3-801, et seq. provides a good road map for the probate proceeding, this writer is not aware of a reported Utah case detailing the action against the trust.

There are Utah decisions applying Utah's old fraudulent conveyances statute (U.C.A. § 25-1-1, et seq.) to creditors' rights against a trust while the settlor is still living. See *Leach v. Anderson,* 535 P.2d 1241 (Utah 1975), and *McGoldrich v. Walker,* 838 P.2d 1139 (Utah 1992), cf. *Territorial Savings and Loan Assoc. v. Baird,* 781 P.2d 452 (Utah App. 1989).

The newer Uniform Fraudulent Transfer Act (U.C.A. § 25-6-1, et seq.) could probably be applied in a similar fashion, particularly U.C.A. § 25-6-6(1) which provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
>
> (a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
>
> (b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

The reasoning would be that the settlor had retained the power to revoke the trust until the settlor's death. This loss of the power to revoke would be a "transfer" under U.C.A. § 25-6-2(12) which states:

> "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

Procedurally, the power to avoid the transfer in trust is exclusively in the personal representative who may be required by creditors to exercise that power. U.C.A. § 75-3-709 states:

> The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative. The personal representative is not required to institute such an action unless requested by creditors who must pay or secure the cost and expenses of litigation.

Most claims against a decedent's estate must be presented within a limitation period which does not exceed one year after the decedent's death. (U.C.A. § 75-3-803). This requires a probate proceeding in which the claim may be presented. (U.C.A. § 75-3-103 and 804). Claims asserted in actions pending at decedent's death do not need to be presented. (U.C.A. § 75-3-802). Claims reduced to judgment before the decedent's death raise interesting questions about the need for presentation. If the claim does not require presentation, a creditor could begin a probate proceeding for the purpose of avoiding a trust transfer up to three years after the decedent's death. (U.C.A. § 75-3-107, with some excep-

tions). There are, of course, separate limitations in the Uniform Fraudulent Transfer Act. A creditor who begins a probate for the purpose of asserting and collecting claims should be warned that it could end up paying the costs of the probate if the only probate asset is property retrieved under U.C.A. § 75-3-709.

If faced with these issues, the following references may be helpful:

Kruse, "Revocable Trusts: Creditors' Rights After Settlor-Debtor's Death," Probate & Property November/December 1993, Vol. 7, No. 6 pp. 40-43

Atkins, et al, "Creditors Rights Against Trust Assets," 22 Real Property, Probate and Trust Journal Winter 1987, pp. 735-751

Real Property, Probate and Trust Law Section of the American Bar Association, Committee J-3, Asset Protection Planning. http:///www.abanet.org/rppt/ptj3.html

There are some creditors who will argue federal law preempts state law in the matter of making claims against the estate and trust. The IRS is a good example.

TAXES

The "Taxes" chart compares the taxation of estates created by probate with the taxation of the trust (now irrevocable) after the settlor's death. Estates enjoy various advantages which may or may not be important in a given case.

"What clients often do not understand is that distribution of estate or trust assets is primarily determined by the risk incurred by the personal representative or trustee in making the distribution."

TIME BEFORE DISTRIBUTION OF ASSETS

The "Time Before Distribution of Assets" chart compares distribution timing considerations in probate estates to those in trust estates.

Nearly all clients have heard stories about long-delayed distributions from probate. Distributions can, indeed, be a long time coming in probates, although the high priority of homestead, exempt property, family allowance, funeral expense, and administrative expense permits early payment of these items.

What clients often do not understand is that distribution of estate or trust assets is primarily determined by the risk incurred by the personal representative or trustee in making the distribution. While the risk of personal liability of a personal representative to creditors is fairly clearly addressed by statutes, the personal liability of trustees to the decedent's creditors is not as clearly set forth. Nonetheless, there is real risk for a trustee who ignores potential claims of private creditors and taxing authorities and, as a result, distribution and closure may be held up until the running of the statutes of limitations. For this reason, distribution from an intervivos trust without a related probate proceeding could take longer than distribution from a probate estate or from an intervivos trust combined with a probate estate.

If the personal representative is the person who will receive the estate assets or the trustee is the sole beneficiary, the potential

liability from distribution is offset by continuing control of the assets. In these cases, early distributions are possible.

SOME SPECIAL SITUATIONS

There are situations in which transferring property into a revocable inter-vivos trust is not a neutral decision. The following examples are intended to be illustrative, not complete.

S Corporation stock can be held by a revocable trust (which is a grantor trust) during the settlor's lifetime and for two years after the settlor's death. If the revocable trust meets the requirements, it may elect after the grantor's death to be treated as a Qualified Subchapter S Trust (QSST) or the recently enacted Electing Small Business Trust (ESBT). Note that there is unfavorable income tax treatment of the ESBT under IRC 641 (d). Note also that for income tax purposes, the estate of the grantor, not the trustee, is the shareholder during the two year period after death but before an election. IRC § 1361(c)(2)(A), Reg. 1.1361-1 (j) (6) (iii), Notice 97-12, I.R.B.

The right to roll-over a retirement account into the surviving spouse's IRA may be compromised if it is payable to a trust.

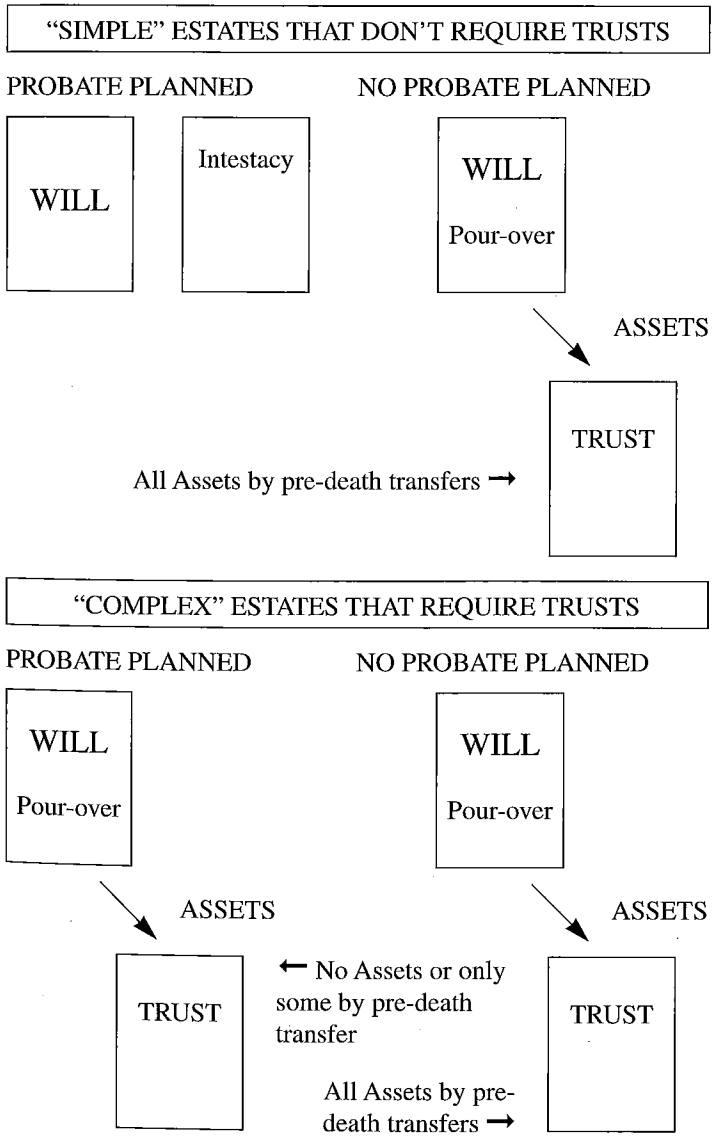
Real property outside of Utah may be subject to a local ancillary probate which could be avoided if title is in a trust. The benefit of trust ownership over ancillary proceedings varies from state to state.

Contaminated or potentially contaminated real property is probably best sold by a personal representative who never takes title and can seek protection through a formal closing.

A settlor who is in declining health or merely weary of managing assets may wish to transfer assets into a revocable trust as a precaution against incompetence or to "test-drive" a fiduciary's services for a surviving spouse.

Medicaid eligibility can be affected by transfers into revocable trusts. A 60-month disqualification can occur and the residence may be counted in determining the applicant's assets. 42 U.S.C. § 1320a-7b(a)(6) makes it a crime to transfer property in order to qualify for Medicaid if the transfer results in a period of ineligibility after applying. Think of it as a federal subsidy for the elderly poor who can't get Medicaid and as free vacations for their lawyers.

DOCUMENTATION



CONFIDENTIALITY

	PROBATE	TRUST
Terms of Will	Public, but may reveal only that all assets "pour over" into a trust from which final distributions are made	Not applicable.
Terms of Trust	Not public but available to beneficiaries; may have to be disclosed to taxing authorities or persons transacting business with trust.	Same.
Inventory, including value and liens	Must be disclosed to "interested persons" (includes creditors, heirs, devisees, and immediate family). Need not be filed with Court. §75-3-705	Available to beneficiaries.
Accounting, including beginning inventory, debts, income, expenses, distributions, and ending inventory	Filing with Court and Court approval is determined by Personal Representative's need for protection. Beneficiaries are entitled but may waive. §75-3-1001 to 1003	Filing with Court and Court approval is determined by Trustee's need for protection. Beneficiaries are entitled but may waive. §75-7-201, 303

Etc. http://www.ca-probate.com/links.htm has links to Wills of famous people such as Jackie Onassis, Richard Nixon, Elvis Presley, Walt Disney, and Ben Franklin.

POST-MORTEM PROCEDURE

PROBATE	TRUST
Interview client	Interview Client
Draft and file Petition, Order, Acceptance, Letters, Notice of Appointment (usually drafted and filed together)	*Not required but probating the pourover Will is usually a good precaution
Attend hearing	*Not required unless Will probated
Inventory and appraisals	Inventory and appraisals
Community Property Issues	Community Property Issues
Intestate succession issues	*Probably, but not necessarily present
Spouse's elective share issues	Spouse's elective share issues
Omitted spouse and pretermitted child issues	*Not present
Homestead, exempt property, and family allowance issues	*Not present
Construction issues (more statutory guidance)	Construction issues
Renunciations and Disclaimers, if appropriate	Renunciations and Disclaimers, if appropriate
Decedent's Final Income Tax Return	Decedent's Final Income Tax Return
Identifying and paying creditors	Identifying and paying creditors
Estate Tax Return, if required	Estate Tax Return, if required (Authority to make certain tax elections is easier to show in a personal representative.)
Accounting for administration	Accounting for administration
Transferring assets	Transferring assets
Estate Income Tax Return	Trust Income Tax Return
Formal or Informal Closing	*Not required, but may be desirable

CLAIMS OF DECEDENT'S CREDITORS

PROBATE	TRUST
U.C.A. §75-3-801, et seq.	U.C.A. §25-6-1, et seq.
Personal representative publishes notice to creditors to file claims and may send notice directly to creditors. Due process requirement is "reasonably calculated to apprise." See *Carlson v. Bos,* 740 P.2d 1269 (Utah 1987).	Trustee has no requirement to publish, nor benefit from publishing.
Creditors have 90 days from publication of notice or 60 days from mailing, if later, in which to file pre-death claims against the estate. Claims not timely filed are barred.	Trust terms commonly give trustee discretion to pay decedents debts. Trustee's liability (except for certain taxes) is probably as a transferee of the decedent at decedent's death without consideration resulting in decedent's insolvency. The power to avoid the trust transfer belongs exclusively to the personal representative who may be required by a creditor to exercise this power to retrieve. (U.C.A. §75-3-709). The trustee thus has indirect protection from the probate rules on claims.
No claims may be presented more than one year after decedent's death. Note that no claim needs to be presented for actions in process at death. Do pre death judgments need to be presented?	See above.
Creditor must commence a probate proceeding if one is not pending in order to present claim.	See above.
Claims not timely disallowed are approved.	See above.
Suit must be brought on disallowed claims within 60 days of disallowance or suit is barred.	See above.
Homestead, Exempt Property, and Family Allowance have priority over creditors (except funeral and administration costs).	No preference of family over creditors.
Claims are classified as to priority if there are insufficient assets.	No prioritization but only the personal representative can avoid the trust transfer.
No execution may issue nor levy be made against property of the estate.	No such protection but only the personal representative can avoid the trust transfer.

CLAIMS OF DECEDENT'S CREDITORS CONT.

PROBATE	TRUST
U.C.A. §75-3-801, et seq.	U.C.A. §25-6-1, et seq.
Claims against personal representative (except fraud, misrepresentation, and inadequate disclosure) are barred by formal closing or 6 months after informal closing statement.	Claims against trustee by beneficiaries for disclosed transactions barred 6 months after final account. Claims based on undisclosed transactions barred after 3 years.
Claims by decedent's creditors against distributees barred one year after decedent's death. Other claims barred after later of one year after distribution or 3 years after decedent's death.	Uniform Fraudulent Transfer Act permits suit by personal representative for 4 years after decedent's death.

TAXES

PROBATE	TRUST
Estate may select any fiscal year.	Trust must have a calendar year.
Federal income tax exemption is $600.	Trusts get only $100 or $300.
The many tax elections involved in income taxes, estate taxes, and generation-skipping taxes can be made by a Person Representative.	The IRS will permit a trustee to make some elections but doing the research is time-consuming. Some practitioners have Trustee sign as "executor" for estate tax purposes using IRC 2203. Income, gift, and generation-skipping taxes?
Renunciations and disclaimers for the decedent may be made by the Personal Representative (IRC §2518, U.C.A. §§75-2-801 and 802).	No authority to renounce or disclaim for decedent.
There are specific provisions for shortening the time for assessments to 18 months and discharging executors from personal liability within 9 months.	IRC §2203 may permit trustee to request discharge from estate taxes. IRC §6905 discharges only executors from income and gift taxes. IRC §6501 permits "other fiduciary representing the estate of the decedent" to request assessment.
Personal representative has liability for unpaid taxes if estate property is not properly applied. IRS §2002, 31 USCA 3713(b), U.C.A. §59-10-540, 541; U.C.A. §59-11-1111(2); U.C.A. §75-3-808	Trustee also has liability for taxes. U.C.A. §75-3-916, U.C.A. §59-10-540, IRC §§6324, 2002, 2203.

TIME BEFORE DISTRIBUTION OF ASSETS

PROBATE	TRUST
No statutory prohibitions on immediate distribution but the Personal Representative has personal liabilities for the improper payment of creditors and failure to pay taxes. 31 USCA §3713(b); IRC §2022; U.C.A. §59-10-540, 541; U.C.A. §59-11-111(2); U.C.A. §75-3-808	No statutory prohibitions on immediate distributions but trustee must beware of personal liability to persons who claim rights in the trust's property. Theories of civil conspiracy, conscious wrongdoer in a constructive trust, etc. may be asserted by creditors. Further, the trustee has personal liability for various taxes. U.C.A. §59-10-540; U.C.A. §75-3-916; IRC §6324; IRC §2002; IRC §2203
Homestead, Exempt Property, Family Allowance, Funeral Expense, and administrative expenses can be paid early without regard to creditors' claims. U.C.A. §75-3-808, §75-2-401 to 403	No protection for preferring family.
Claims of creditors without notice are not barred until 1 year after decedent's death. Creditors with pending actions need not file claims. Creditors with judgments? U.C.A. §75-3-803 and 804	Trustee may wish to wait to see who presents claims as decedent's creditors.
Spouse may claim elective share by later of 1 year after decedent's death or 6 months after will is probated. U.C.A. §75-2-205	Nonprobate transfers are included in spouse's elective share if the election is made within 1 year of decedent's death. U.C.A. §75-2-205
There are quick routes for small estates. U.C.A. §75-3-1201 to 1204	In small estates, the risk associated with quick distributions may be low.
Time of partial and final distributions are determined by acceptable risks. Devisees are not likely to receive final distributions before 1 year in most cases.	Time of partial and final distributions are determined by acceptable risks.
A personal representative who is also the sole heir and devisee could distribute immediately, then file closing statement 4 months after appointment by accepting personal risk in exchange for assets.	A trustee who is also the sole beneficiary may choose to not wait at all and accept personal risk in exchange for assets.

Lawyers Needed in the State Legislative Process

By Representative Patrice M. Arent

This article is based on a presentation Representative Arent made at the 1997 Annual Meeting. The author thanks the Bar Commissioner David Nuffer and Laura Lockhart for their assistance and encouragement in the preparation of this article.

The public perception is that the Utah Legislature is full of lawyers. Actually, only 10 of the 104 members are law school graduates. Some of these attorneys are not practitioners and, even collectively, the small group of lawyer-legislators does not reflect the broad and varied practice experience of Utah's 6,000 lawyers. The attorneys who do serve in the Legislature are often looked to by their non-lawyer colleagues for input and advice. It is, however, unrealistic to expect legislators to have the time and ability to perceive all the impacts of legislation as well as practicing attorneys could. Moreover, the brevity and fast pace of the legislative session result in many legal issues either not receiving the attention they deserve or never being considered at all.

There are excellent lawyers serving on the legislative staff. Their principal function is the preparation of bills. They review each bill for constitutional concerns and provide additional legal analysis on the impact of legislation. These attorneys are expected to understand very broad areas of the law. But during the session it is impossible for them to thoroughly analyze the effect of every bill and amendment.

WHY LAWYERS SHOULD PARTICIPATE IN THE LEGISLATIVE PROCESS

Most lawyers (along with everyone else) complain about legislation passed by the Utah Legislature. You can help improve the system. The Legislature needs more members with legal training and much more input from attorneys about bills that affect their areas of practice. Legislators need your analysis of pending bills. Your comments identifying a bill's deficiencies, inaccuracies, or unintended results can result in much better laws being passed.

PATRICE M. ARENT is a first term Representative from District 41, Holladay/Cottonwood. She graduated from the University of Utah in 1978 and Cornell Law School in 1981. She clerked for two federal judges, including the Honorable Bruce S. Jenkins, who served as President of the Utah Senate (while in a Democratic majority) before his judicial service. Representative Arent practiced law at Snow, Christensen & Martineau prior to serving as Associate General Counsel to the Utah Legislature. In 1989, she became the Director of Legislative Relations for the Utah Attorney General's Office, where she was later appointed Chief of the Fair Business Enforcement Division. Representative Arent is a member of three House committees; Judiciary; Business, Labor & Economic Development; and Ethics. She also serves on the Strategic Planning Committee for Public and Higher Education, Utah Quick Court Policy Board, and on the Executive Offices, Criminal Justice & Legislature Appropriations Subcommittee.

During the annual General Session, legislators have very little time to carefully review every page of legislation, budget information, and correspondence we receive. Legislators are usually in meetings all day (and sometimes late into the night). Therefore, often we are not able to review bills when they are first posted. Unless someone contacts a legislator about a specific bill, or a bill has a particularly high profile, many times the first opportunity we have to review a bill is 10:30 on the night before it will be acted upon. At that time of night, it is too late to call lawyers for input. Ironically, it is then that lawyer feedback to legislators would be most helpful.

Your opportunity to influence the legislative process does not have to be limited to legislation proposed by someone else. Most lawyers think in terms of interpreting the law through the litigation process. But some laws can be changed by simply changing the statutes. If you see a problem with a state statute, you may want to consider contacting a legislator with an idea for new legislation. Often the legislative process is an easier and more cost-effective method to assist your client than fighting the problem through the courts. Suggestions from attorneys sparked much of the legislation I sponsored last session.

Our staff resources are much more limited than most Bar members realize. The Legislature employs approximately fourteen attorneys, including those who work part-time. There are no "majority" and "minority" counsel as found in the United States Congress and some other state legislatures.[1] Each staff attorney has complete responsibility for many bills as well as other assignments. The attorney that drafts a bill also prepares every amendment by both the bill's sponsors and opponents.

WHEN TO GET INVOLVED IN THE LEGISLATIVE PROCESS[2]

You should get involved in the legislative process as early as possible, both for influencing legislation initiated by others and for suggesting legislation of your own. The legislative process actually begins in April, nine months before the annual General

Session, with interim and task force meetings that last through November. Many important bills are considered during these meetings. Also, beginning each May, legislators prefile bills for the following January session.

The annual General Session, which lasts for 45 calendar days, begins on the third Monday in January. During the session, committee agendas are posted 24 hours in advance.[3] Although it is preferable to get involved in the legislative process before the General Session, that is not always possible because many bills are not filed and issues do not arise until well into the session. It is important to keep track of legislation of concern to you until the end of the process – even if you think all of your problems were solved in a committee hearing. Bills that have passed both houses can be recalled for further action before the session is over.

Between General Sessions, the governor will often call the legislature into one or more "Special Sessions." These are usually very short sessions limited to considering a small number of bills. A matter cannot be debated unless it is on the Governor's Special Session "call."[4] Legislation considered during a Special Session are often "consensus" bills that are approved with limited debate. Even more so than during the General Session, any legal problems with Special Session bills should be brought to the attention of your legislator immediately.

GETTING INFORMATION HAS BECOME MUCH EASIER

In the past, one had to be on Capitol Hill to be involved in the legislative process because that was the only way to get up-to-date information. Now the Legislature's web page (http://www.le.state.ut.us/) provides most of the information you need. You can obtain full text access to the numbered and interim bills, committee meeting times, agendas, legislators' resumes, and additional information about the process to enable you to be well advised of legislation in process.[5] Armed with this information, you can frequently know more about the problems posed by a bill than can a legislator who is too involved in the session work to review upcoming bills when they are first scheduled for a committee hearing or listed on the floor agenda. But what should you do with your knowledge?

GETTING INVOLVED IN THE PROCESS - YOU DO NOT HAVE TO BE AT THE CAPITOL

If you have the time to come to the Capitol, your attendance at committee hearings can be very helpful. You may have the opportunity to address several legislators at once. You can also gauge the support for or opposition to a bill. You may be able to work out problems "on the spot" because many of the key players are present. There is one important caveat on appearing before a legislative committee: sometimes the time you will be allowed to speak is severely restricted or eliminated altogether.

If you are not able to meet with a legislator at a committee hearing, you can send a note to a legislator on the Senate or House floor. The legislator may be able to step off the floor to meet with you for a few minutes.

It is not always practical to drop everything on short notice to attend a legislative hearing at the capitol. However, your input is still very valuable. The following suggestions outline methods of providing legislators with your perspective on pending legislation.

"We need more lawyers to run for the Utah Legislature. There is a significant time commitment for the General Session and during interim and other committee meetings. However, the work is very rewarding."

The first question many lawyers have asked me is who they should contact. Some people only contact the legislators elected to represent their district.[6] You should also consider communicating with: (1) the sponsor(s) of the legislation; (2) the legislative staff attorney who drafted the bill or the analyst assigned to the committee where it will be heard; (3) legislators on the committee scheduled to debate a bill;[7] (4) other lawyer-legislators; (5) members of legislative leadership; (6) other legislators you know; (7) special interest groups that may share your concerns; and (8) any lobbyists or groups that originally proposed the bill to the sponsor. In some cases, you may want to send a letter to the entire legislature.[8]

While the telephone has been the traditional method of contacting legislators, it is often ineffective during the session. Legislators are rarely at home or in their nonlegislative offices during normal working hours, so you must contact us at the capitol. Phones do not ring on the legislator's desks. Instead a light blinks on the desk on the House and Senate floor[9] to signify an incoming call. The legislator may not be at his or her desk, or if there, may not notice the light. When a legislator does not answer the phone, a handwritten message is delivered later in the day. Depending on when the call comes in, the message may not be received until the next day. We do not have voice mail.

However, there are easier means. E-mail and fax are excellent ways to communicate quickly with legislators. Last session all legislators were provided with computers. Most legislators now rely on e-mail, which comes directly to our desks. Faxes are also a convenient way to contact legislators. Legislators' home, office, fax and e-mail addresses, as well as our phone numbers are found at: http://www.le.state.ut.us/legs.htm. Committee rosters and agendas are found at: http://www.le.state.ut.us/legcom.htm.

In some cases, communication via e-mail or fax can even be more effective than appearing at hearings. The time of the hearing is often too late to present your views since hearings are greatly accelerated during the legislative season and political machinery is already in motion. As mentioned above, the time you are allowed to testify may be quite limited during the session.

When the legislature is not in session, e-mail is not as effective a means of communication because most legislators do not have access to their state e-mail addresses unless they are at the capitol. During those times, conventional mail, phone calls, and e-mail to homes and offices are best.

When communicating with legislators, it is important not to send a legal treatise. We are inundated with paper all year round. A concise comment pointing out the specific issues is the best approach. Suggested wording changes for legislation, when that appears necessary, are also appreciated.

THE UTAH BAR ASSOCIATION'S ROLE IN LEGISLATION

The Bar does a wonderful job of educat-

ing legislators on certain issues. Lawyers, however, cannot depend on the Bar to watch all legislation. The Bar's legislative involvement is strictly limited by rulings of the Utah and United States Supreme Courts, and budget constraints. The Bar only takes legislative positions on matters that affect the administration of justice. Bad law, poorly written law, or law that negatively impacts specific practice areas is not a focus for Bar lobbying.

If you have a question on a particular legislative issue, a call to the Bar office can put you in touch with the Bar's Legislative Affairs Chair or Legislative representative. Any Bar member can attend the Legislative Affairs Committee meetings which are held right before and during the General Session. Also, the Bar is planning to expand its web page (http:www.utahbar.org) to provide state legislative information and facilitate interaction between legislators and Bar members.

ONE LAST SUGGESTION

We need more lawyers to run for the Utah Legislature. There is a significant time commitment for the General Session and during interim and other committee meetings. However, the work is very rewarding. As a legislator you can affect the future of our state. If you are interested in running, feel free to contact me for any advice or information I can provide.

CONCLUSION

For those who choose not to run for legislative office or spend time at the capitol for legislative hearings, you can still provide valuable input by e-mail, fax, letters, and telephone. Participation by knowledgeable practitioners is essential to improve the quality of Utah's legislation. I think that you will find that your input will be valued by most of the legislators you contact.

[1]Nor do legislators have personal staff to assist them in analyzing legislation. While there are some college interns, they generally lack the experience to provide legal analysis of legislation.

[2]This section is not meant to explain the entire legislative process. There are various publications available from the Legislature that go into great detail about how a bill becomes a law. This information is also available on the Legislature's web page.

[3]Towards the end of the General Session, legislation moves through the process much more quickly and in some cases bills are never presented to a committee before they are debated on the House and Senate floors.

[4]To obtain information about a Special Session, you can check the Legislature's web page. You may also want to call the Governor's office or check the local press, because sometimes legislators are not informed of every bill that will be voted upon until the actual day of the Special Session.

[5]Unfortunately it is not uncommon for fills that finally pass to have important amendments that never made it to the web. So in some cases it is still important to have a presence on the Hill.

[6]You can obtain the names of your legislators by calling your County Clerk.

[7]Most bills are heard by both the House and Senate standing committees, although not on the same day.

[8]During the General Session, decisions are often made very quickly. Therefore, if yo uwant to provide timely input, I do not suggest relying on the U.S. mail. Instead, you can have your letter hand-delivered, or send a fax or e-mail as discussed below.

[9]There are a few exceptions – members of leadership also have offices (and secretaries) off the floor where you can generally leave a message.

LAW SCHOOL GRADUATES IN THE UTAH LEGISLATURE

SENATE			
Name	Lyle W. Hillyard	Robert C. Steiner	Craig L.Taylor
Address	175 East 1st North Logan, 84321	80 N. Wolcott SLC, 84103	312 Oak Lane, Kaysville, 84037
Political Party	Republican	Democrat	Republican
District	25	1	22
Office Phone	752-2610	328-8831	544-5909
Office Fax	753-8895	363-5680	544-5909

HOUSE				
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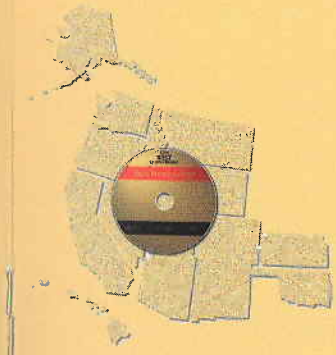

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Discipline Corner

RESIGNATION

On August 19, 1997, the Honorable Michael D. Zimmerman, Chief Justice, Supreme Court, executed an Order Accepting a Petition for Resignation Pending Discipline in the matter of Daniel Marcum.

On January 5, 1995, Mr. Marcum pled guilty to Unlawful Dealing with Property by a Fiduciary, a second degree felony, in violation of the Utah Code Ann. §76-6-513, amended. As a result of his conviction, Mr. Marcum was sentenced to serve one to fifteen years in the Utah State Prison, with such prison sentence stayed in favor of a three-year period of probation.

In consideration of the fact that Mr. Marcum was willing to resign, which is tantamount to disbarment, and considering the aggravating and mitigating circumstances, the OAD consented to the Petition for Resignation Pending Discipline.

SUSPENSION

On July 29, 1997, the Honorable J. Dennis Frederick, Third District Court, executed an Order suspending Stanford V. Nielson from the practice of law for one (1) year effective June 30, 1997.

On or about August 7, 1995, Judge Frederick accepted a stipulation whereby Mr. Nielson consented to entry of a Discipline by Consent which placed him on a two (2) year supervised probation with a further proviso that an immediate one (1) year suspension be implemented if a Screening Panel of the Bar's Ethics and Discipline Committee voted a Formal Complaint against him for misconduct occurring on or after the date of the Court's Discipline during the two year probation.

On or about June 30, 1997, a Screening Panel of the Bar's Ethics and Discipline Committee, ordered that a Formal Complaint be filed against Mr. Nielson for violation of Rules 5.5(a) (Unauthorized Practice of Law) and 8.1(b) (Failure to Cooperate in Office of Attorney Discipline Investigation), Rules of Professional Conduct. On July 9, 1997, the Office of Attorney Discipline ("OAD"), Utah State Bar, filed a Motion to Suspend Respondent Under Terms of the Previous Order of Discipline.

There were no aggravating or mitigating factors considered.

SUSPENSION

On July 31, 1997, the Honorable J. Dennis Frederick, Third District Court, executed an Order suspending Byron L. Stubbs from the practice of law for three (3) years effective July 31, 1997.

On July 26, 1996, Mr. Stubbs pled guilty to one count of Communications Fraud, a Class A Misdemeanor, pursuant to Utah Code Ann. §76-10-1801, as amended. In support of his guilty plea, Mr. Stubbs admitted that he participated in a scheme to defraud by means of participating in the preparation of a letter addressed to the State which contained untrue information, which Mr. Stubbs knew to be untrue, and which he knew was intended to be communicated by mail by his client to the State for the purpose of furthering the scheme.

The fraud committed by Mr. Stubbs and his client caused potentially serious injury to the public when it delayed the proper treatment and disposal of contaminated soil removed from a ditch, thus creating a health hazard for both children and the general public.

The Court considered and relied upon aggravating and mitigating circumstances.

The Bar has filed an appeal of the court's Order of Suspension, and seek the respondent's disbarment.

ADMONITION

On July 15, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 1.2(a) (Scope of Representation), 1.3 (Diligence), Rule 1.4 (Communication), and Rule 3.2 (Expediting Litigation) of the Rules of Professional Conduct. In addition to the admonishment, the attorney is required to attend and successfully complete the Utah State Bar Ethics School within one (1) year.

The attorney was retained in or about March of 1991 to represent a client in a personal injury matter. Thereafter, although the attorney sent the complainant to various medical providers for evaluation and filed a complaint on her behalf in District Court the day before the statute of limitations ran, he failed to take any further action on her behalf. The attorney later advised the complainant that he did not wish to represent her and would not continue to do so. The attorney did not file a Withdrawal of Counsel with the District Court, but remained the attorney of record. The attorney failed to communicate with his client and failed to make reasonable efforts to expedite litigation consistent with the interests of his client.

There were no aggravating factors.

In mitigation, the attorney was candid and cooperative in the proceedings before the Screening Panel. Further, as the Screening Panel required, the attorney paid the outstanding bill of the medical provider who had performed tests on the complainant at the request of the attorney.

ADMONITION

On August 7, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 8.4(d) (Misconduct) of the Rules of Professional Conduct and the Rule 21(e) (Duties of Attorneys and Counselors) of the Rules of Integration and Management of the Utah State Bar.

During the course of an acrimonious deposition where the attorney's client (who was also his wife) was being deposed, the attorney asked where the opposing counsel, who was Jewish, was from. At a later point during the deposition the opposing counsel replied that he was from Connecticut. The attorney then stated that there were lots of people who ate "bagels and lox" in Connecticut. The attorney's comment was unprofessional, inappropriate and displayed a dangerous level of insensitivity which could be interpreted as anti-Semitic.

There were no aggravating or mitigating factors.

Job Announcement

Utah State Bar Chief Disciplinary Counsel

Stephen R. Cochell has announced his resignation as Chief Disciplinary Counsel in the Office of Attorney Discipline to return to full time litigation and general trial practice, effective November 1, 1997. The Bar is now accepting applications for the position.

Applicants should have a litigation background and excellent management and administrative skills. The Chief Disciplinary Counsel supervises four lawyers, a legal assistant and various support staff in the Bar's Office of Attorney Discipline. The office conducts investigations and represents the Bar in disciplinary cases before Ethics and Discipline Screening Panels, various District Courts and the Utah Supreme Court.

Applicants must be admitted to practice law in Utah or sit and pass the Bar Examination within six months of the date of hire. Preference will be given to applicants with at least five to ten years or more of practice.

Salary will range between $70,000 to $80,000, subject to qualifications. Benefits available.

Please submit resume and references to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111, **no later than** 5:00 p.m. October 31, 1997.

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Chief Justice Michael D. Zimmerman Receives the 1997 Peter W. Billings, Sr. Oustanding Dispute Resolution Service Award

Chief Justice Michael D. Zimmerman was awarded the Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award by the American Arbitration Association on Thursday, September 11, 1997. The American Arbitration Association selected Justice Zimmerman for his clear vision, his decade-long dedication to ADR, and his outstanding leadership in promoting the understanding and use of alternative dispute resolution within the legal profession.

Chief Justice Zimmerman has always been a strong proponent of the use of ADR because he believes that "people should be given the opportunity to be autonomous, and to solve their problems with a minimum of external constraints." He also believes that alternative dispute resolution programs may help to provide a means for solving disputes to those who have been shut out of the traditional adversary system because of its high financial and emotional costs.

Chief Justice Zimmerman has been instrumental in shaping ADR policy in Utah, from supporting the use of the Utah Law and Justice Center for mediation and arbitration programs designed to serve the public, to helping pass legislation creating a court-annexed ADR program in the District Court, implementing a victim-offender mediation program in the Juvenile Court and a landlord-tenant mediation program. Most recently, he has supported the development of a mediation program in the Utah Court of Appeals.

The American Arbitration Association established the annual service award in 1996 to honor Peter W. Billings, Sr.'s longstanding contributions to the field of ADR. The award is given annually by the Association to the organization or individual who has done the most to further dispute resolution in the states served by the Salt Lake City office.

Notice of Amendments to Rules

The following rules have been amended by the Supreme Court or Judicial Council with an effective date of November 1, 1997, unless otherwise indicated. The information is intended to alert Bar members to pending changes that may be of interest and not as an inclusive list of all changes made.

RULES OF CIVIL PROCEDURE

Rule 5. Service and filing of pleadings and other papers. Changes requirements for service of judgments and orders. In most cases, requires service of order or judgment by party preparing the document.

Rule 6. Time. Adds reference to Code of Judicial Administration Rule 4-501 (Motions).

Rule 41. Dismissal of Actions. Amends rule to require order of court for dismissal based upon stipulation.

Rule 56. Summary Judgment. Amends rule to require motion, memoranda, and affidavits to be filed in accordance to Code of Judicial Administration Rule 4-501 (Motions).

Rule 58A. Entry. Amends rule to state that the judgment rather than a notice of entry of judgment must be served as provided in Rule 5.

Rule 77. District courts and clerks. Removes paragraph (d), "Notice of orders or judgments."

RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas. Amends rule to reflect current law. Adds requirement that the court enter a finding of a factual basis for the plea. Explicitly recognizes that plea affidavits may be incorporated into the record. States that the court is not required to inquire into or advise the defendant concerning the collateral consequences of a plea.

RULES OF APPELLATE PROCEDURE

Forms 8 and 9. Amended to reflect rule requirements for number of copies to be served on counsel.

RULES OF JUVENILE PROCEDURE

Rule 31. Initiation of truancy proceedings. Adds provision requiring at least five days notice to minor, minor's parents, guardian or custodian before preliminary inquiry interview or hearing.

RULES OF PROFESSIONAL CONDUCT

Rule 1.14. Client under a disability. Removes reference to client's "best" interest in rule. Adds comment.

CODE OF JUDICIAL ADMINISTRATION

Rule 3-306. Court interpreters.* Removes juvenile court probation stage from definition of "legal proceeding." Adds provision for fee for interpreter certification and training.

Rule 3-111. Performance evaluation for certification of judges and commissioners.* Excludes from the attorney survey attorneys who have referred a judge to the Judicial Conduct Commission or a commissioner to the Commissioner Conduct Committee.

Rule 4-106. Conference calls. Expands rule to include video conferencing.

Rule 4-201. Record of proceedings.* Repeals and reenacts the rule. Establishes guidelines for when judges will use a court reporter, a video recording system or an audio recording system for maintaining the verbatim record of court proceedings.

Rule 4-401. Media in the courtroom.* Amendments regulate video and still photography in the courtroom and areas adjacent to the courtroom. Consent of the subject of the still photography eliminated. Permission of judge continues to be required. Video photography generally prohibited except to create the record of the proceedings. Still photography subject to regulation by the judge. Permits video signal to be transmitted to an overflow room for observation.

Rule 4-504. Written orders, judgments and decrees. Removes paragraph (4) governing service of notice of judgment.

Rule 4-506. Withdrawal of counsel in civil cases. Clarifies circumstances in which a court order is required for withdrawal of counsel. Adds provision for substitution of counsel.

Rule 4-510. Alternative dispute resolution.* Removes "opt out" provision and replaces it with a deferral of ADR consideration.

Rule 11-302. Admission Pro Hac Vice. Adopts uniform application procedure for admission pro hac vice which includes a requirement of serving the Utah State Bar with each petition. Establishes $75.00 fee per application. Standard form has been approved.

MANUAL OF PROCEDURES FOR JUDICIAL NOMINATING COMMISSIONS

Submitting Nominees.* Provides for submission of five nominees for judicial vacancies in the Third District.

CODE OF JUDICIAL ADMINISTRATION

Rule 1-101. General definitions-Rules of construction.*

Rule 2-101. Rules for the conduct of Council meetings.*

Rule 2-103. Open and closed Council meetings.*

Rule 2-104. Minutes of Council meetings.*

Rule 3-102. Assumption of judicial office.

Rule 3-113. Senior Judges.†

Rule 3-201. Court commissioners.

Rule 3-201.02 Court Commissioner Conduct Committee.

Rule 3-304. Official court reporters.†

Rule 3-304.01. Substitute certified shorthand reporters.†

Rule 3-305. Official court transcribers.†

Rule 3-407. Accounting.

Rule 3-411. Grant management.

Rule 3-415. Auditing.

Rule 4-107. Consolidation of cases.

Rule 4-408.01. Responsibility for administration of trial courts.*

Rule 4-703. Outstanding citations and warrants.

Rule 4-704. Authority of court clerks to extend payment schedule and dismiss citations.

Rule 5-201. Requests for enlargement of time by court reporters.†

Rule 10-1-201. Criminal case scheduling.*

Rule 11-201. Senior Judges.*

Rule 11-203. Senior Justice Court Judges.*

Appendix E. Criteria for certification of court transcribers.†

CODE OF JUDICIAL CONDUCT

Canon 3. A Judge Shall Perform the Duties of the Office Impartially and Diligently.*

* These amendments were approved as emergency rules and are currently in effect.

† These amendments are effective January 1, 1998.

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. Sixty one opinions were approved by the Board of Bar Commissioners between January 1, 1988 and July 31, 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.

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Advise to Young Lawyers: A Judicial Survey

By Mark C. Quinn

It's an uncomfortable feeling – you're appearing in court for the first time. Maybe you're a new lawyer with your first case, or maybe this is just the first time the partners have allowed you step into the limelight. Either way, you're nervous and you're wondering: What are the common errors to avoid? What mistakes has the commissioner, judge or justice seen over and over? How can I avoid those same problems?

We have help for you. Cathy Roberts, Peggy Stone and I, who make up the Bar Journal Committee of the Young Lawyers Division, have sought out commissioners, judges and justices to solicit their comments on the mistakes commonly made by young lawyers in court. The results are instructive both to young lawyers, even those who have already appeared in court frequently, and also to more seasoned attorneys.

In general, there were several recurring themes from the judges who expressed an opinion, but preferred not to be quoted directly. First, be punctual. Do not make the court and the other parties wait for you. If something should delay you and you know that you will be late, call the court ahead of time and let the court know the situation.

Second, concentrate on resolving the problem before taking it to court for a decision. Nothing infuriates the judges more than when it is obvious that counsel has not tried to reach a settlement prior to the hearing date. Focus on finding a solution to the problem, not exacerbating it. Narrow the disputed issues to those that absolutely cannot be resolved.

Third, be prepared to discuss all aspects of a case, not just the issues involved in the relief you are requesting. In other words, if you are in court on a motion to dismiss one claim out of four, know the issues related to the entire case, not just the claim you are arguing about. The judge will be reluctant to grant your motion if you appear to be unprepared to discuss the case as a whole.

Fourth, know the applicable law. This may seem obvious, but many judges expressed concern about young attorneys coming into court without doing adequate research to discover, for example, that there is a statute which applies to the relief requested which neither attorney has researched or argued. Being thoroughly prepared on all aspects of the law cannot be over emphasized.

Fifth, be prepared to meet your burden of proof. This entails first knowing what your burden is, then ensuring that you have sufficient affidavits and/or witnesses to substantiate every fact necessary to meet that burden. Failure to carry the burden of proof is the number one reason that most motions are denied and trials lost.

Sixth, give courtesy copies to the judge when you file anything. Courtesy copies should include all exhibits and, if possible, all important cases to which you cite. This makes the judge's job easier and quicker and will therefore help you to appear prepared and competent.

The following are the comments from the commissioners, judges and justices who responded individually in writing. We will begin with the Family Law Commissioners, because many young lawyers practice in front of them on a regular basis. These comments are from Commissioner Lisa A. Jones, who also received input from the other commissioners.

1. Don't appear late for a hearing. Not only is it ill-mannered, but it could result in

MARK C. QUINN is an Associate with O'Rorke & Gardiner, LLC. His practice concentrates in the far-flung fields of Commercial Litigation, Municipal Law, Environmental and Water Law, and Copyright and Trademark. Mr. Quinn earned a B.A. at the University of Utah in 1990, and was a graduate of University of Puget Sound College of Law in 1993, where he served on the Executive Committee of the Moot Court Board, was a member of the Inn of Court XXV, and was elected to the Order of the Barristers. He now serves on the Bar Journal *Committee of the Young Lawyers Division.*

the commissioner striking the hearing and you having to reschedule or be fined a "book" for the "booked" program.

2. Don't present pleadings or documents to the opposing counsel or court shortly before or at the hearing. You risk that the pleading will not be considered or that a delay in resolution of the matter will occur while the opposing counsel is given adequate response time.

3. Don't read the affidavits to the commissioner. The commissioner has already read the pleadings. If you have nothing further to say, submit it on the pleadings. Merely reading the affidavits is poor advocacy, a waste of time, and boring.

4. Don't miss a hearing (because of stipulation, scheduling, etc.) and not cancel it with the court. As the commissioners routinely prepare one day in advance, cancelling the hearing at the earliest opportunity is appreciated.

5. Don't interrupt opposing counsel or the commissioner. Do not interrupt during the commissioner's recommendation. Once the recommendation has been made, do not continue to argue the matter, only ask clarifying questions.

6. Don't direct argument, comments, questions, etc., to opposing counsel or to anyone except the court. Having a heated argument with opposing counsel is not only unpersuasive, but also inappropriate as opposing counsel is not making the decision.

7. Don't come to a motion hearing without having negotiated with opposing counsel. It is a waste of time to get up and argue the motion only to find that both parties are stipulating to the order.

8. Don't request alimony or debt payment without an affidavit of income and expenses. The court cannot determine whether the request is appropriate without that information.

9. Don't come to a pretrial settlement conference without filing a complete Financial Declaration including a proposed settlement. If a specified proposal cannot be made, you should at least identify contested issues. Be sure to provide a courtesy copy to the commissioner at least 24 hours prior to the pretrial.

10. Don't bring minor children to a hearing without prior arrangement for an interview with the court. The parties' minor children are not allowed in the courtroom.

Finally, a few justices of our appellate courts have supplied the following comments:

Utah Supreme Court

Justice Christine Durham: The most common (and aggravating) mistake new lawyers make when they occasionally get to our court is to spend far too much time in oral argument on laborious recitation of fact. The repetition is unnecessary and usually boring. Unfortunately, this is not unique to new lawyers.

Justice Michael D. Zimmerman: Among young lawyers, I suppose a problem that I see, more often with them than with more experienced lawyers (although many of them fail in this regard also), is their lack of appreciation for the fact that in the Supreme Court, policy counts for at least as much as precedent, particularly when there is no squarely controlling Utah case law. Importantly, because the Supreme Court has discretion as to which cases are heard, most of the cases argued orally do lack controlling precedent. In such uncharted areas, we must determine the route Utah law will take. In doing so, I, and I believe my colleagues, find reasoning by analogy from previous Utah decisions on other points, or the holdings or courts from other states, far less persuasive than argument premised on the policy implications of the various rules we are asked to follow. New lawyers seem to be too obsessed with case law and trying to ferret out lines of reasoning from other cases and too little concerned with what is the best rule from a pragmatic standpoint.

I understand this discomfort. Law school trains one to parse cases, not to ask what is the best rule. Law school training assumes that lawyers are practicing in a jurisdiction with a dense undergrowth of precedent, precedent that must be carefully distinguished and followed. That training may be very useful in addressing a trial court, but it is of much less use when addressing a court of last resort, a court for which there is little that can truly be called binding precedent.

Moreover, the assumption about dense precedent is simply false in a state like Utah, which has, until ten years ago, had only one appellate court. Arguing policy may be uncomfortable for new lawyers, used to the comfort of narrow case analysis, but is a skill that is essential for effective appellate advocacy.

U.S. Court of Appeals

Judge Michael R. Murphy: In my experience, I have found that many young attorneys are so desirous to please and/or afraid of embarrassing themselves in a courtroom that they fail to listen. If the judge indicates that she has heard enough on a particular point and asks the attorney to move on to the next point, the attorney should listen and move on. Furthermore, it is difficult to effectively examine a witness unless you really listen to what the witness has to say. If you are mentally drafting the next question as the witness is answering the last, you will often miss the chance to develop testimony critical to your case. The ability to slow down and listen to the judge and witnesses and to observe the jury are keys to becoming an effective trial lawyer.

Writing a Winning Appellate Brief

By Justice Christine M. Durham

These remarks are adpated from a presentation at the July, 1997 annual meeting of the Utah State Bar, sponsored by the Section on Appellate Practice.

I sometimes describe appellate judges as "professional students" and appellate advocates as their "tutors" to emphasize the responsibility of the advocate to educate the judge, to lead the judge through the specifics of the case in a purposeful way. In this analogy, judges make ideal learners – they require information and understanding in order to perform their decision-making function. They are highly motivated, alert and (mostly) interested. It should be a difficult task for the average brief writer to discourage or confuse such an audience. Experience suggests that it is not. The following quiz reveals my personal hierarchy of values for the preparation of useful, effective appellate briefs.

1. What do appellate judges actually do with the briefs, anyway?

Appellate judges are expected to master the necessary facts and pertinent law of hundreds of complex cases every year. Their first tool in the process is the appellate brief. From the briefs (or law clerk summaries of them) come the judge's first perception of the nature of the problem, the options available for its solution, the status of the law, and the equities that will influence outcome.

Appellate judges read literally thousands of briefs, and often do so "on the road" (e.g., on planes, trains, automobiles, and exercise bikes; in bed; at meetings; and [sometimes] in their offices). With this in mind, it is important for the brief writer to include necessary textual material in the brief itself (or an appendix). The lower court record in a case is often not reviewed until after oral argument, and sometimes only by the judge actually preparing the opinion. So if you need your decision-makers to be familiar with critical language in a contract or other document, extract that language in a convenient place in the brief - in the text if it is not too long, or in a well-referenced appendix. Never forget that appellate judges regularly face mountains of briefs - they want to learn what they need to know quickly and efficiently. Unless you highlight critical portions in your brief, they may be overlooked or not understood.

Understand as much as you can about the mechanics of the court's process. If the court for which you are preparing your brief, for example, regularly uses bench memoranda prepared by staff attorneys, write for your primary audience. Your brief should be understood by all those who read it. Well-written briefs will be used to organize the issues for consideration in oral argument and conference, and relied on in the drafting of opinions.

THE HONORABLE CHRISTINE DURHAM, Justice of the Utah Supreme Court since 1982, served as a trial judge for four years. She received her undergraduate degree from Wellesley College and a J.D. from Duke University, where she currently serves as a member of the Board of Trustees. Justice Durham is also a member of the Board of Directors of the National Center for State Courts, and was recently appointed to serve as a member of the ABA Committee on Women in the Profession. She is Advisory Board chair and faculty member of the State Justice Institute's Leadership Institute for Judicial Education. She is a past president of the National Association of Women Judges and a former member of the Board of Directors of the American Judicature Society. She is active in judicial education, teaching at the Judicial Education Leadership Institute. She is a Fellow of the American Bar Foundation and a member of the Federal Judicial Conference's Advisory Committee on the Rules of Civil Procedure. Justice Durham also serves on the ALI Executive Committee and is an Adviser for the Restatement of the Law Third, Trusts. She has most recently become a member of the Board of Trustees of the Utah Easter Seal Foundation.

2. What should you write FIRST?

Approach brief writing strategically. Start by writing the conclusion and prayer for relief. Beginning the writing process by spelling out the result you want will keep you focused on the goal of your writing. It will also ensure that you have thought your theory of the case through to logical conclusions, and anticipated procedural or other obstacles to the outcome you seek. It doesn't help to persuade the decision-maker that fairness is on your side if you haven't explained what fairness requires to be done.

Next, work on the issues presented, to be sure they lead the reader to the conclusion you have already identified. Keep the issues as straightforward as possible; the reader should be able to grasp the essence of your case from scanning the issues presented in the table of contents.

...And what should you write LAST?

Finish writing your brief by writing the summary of the arguments. At the end of the drafting process, you should have a clear understanding of what your argument is, and be able to outline a consistent, coherent theory. Too many appellate briefs lack a clear explanation of what the advocate wants and why the court should grant it. Having completed the body of the brief, you should know how to introduce your case to your reader in the argument summary. It ought to resemble the synopsis you would give to friends at a dinner party: accessible, lucid, interesting if not entertaining, and persuasive.

"Never forget that appellate judges regularly face mountains of briefs - they want to learn what they need to know quickly and efficiently."

3. What should ALWAYS appear in an appellate brief?

Never overlook jurisdictional requirements and the standard of review. Both are critical, and will generally be looked for at the outset of consideration of any case. Failure to identify and set forth the applicable standard of review can handicap the advocate who consequently fails to understand what arguments the court will find persuasive. It doesn't do much good to try to persuade an appellate court that a trial judge relied on the wrong facts when the standard of review in a case "abuse of discretion." The outcome of a significant majority of appeals depends on the standard of review; be sure you have it right.

Remember the point made earlier about a coherent plea for relief; your job is to keep the reader focused on where you want to go.

Include consideration of policy issues where they are relevant. Sometimes appellate courts lack context for the issues they hear, so if background, history, or scholarship will help, include it. This is where the appendix can come in handy, or a selective bibliography of helpful and suitable materials. When you do include information, however, make sure it is accessible if you

really want the judge to read it. Not surprisingly, most of us give up long before the end of the 75-page law review article reduced for copying to two pages to a brief page. I once read (carefully!) an even longer article appended to a brief because counsel had thoughtfully enlarged the print for copying purposes. The golden rule of "doing unto others as you would be done to" covers a lot of choices in assembling an effective brief.

Discuss opposing authority and awkward facts. The other side, of course, will, and you lose the advantage if you simply try to ignore the hard parts of your case. Candor always adds to credibility, and its absence is never a good sign.

4. What should NEVER appear in an appellate brief?

Briefs should be written to educate and to persuade. Anything in an appellate brief which accomplishes neither of these objectives, or does not do so effectively, does not belong. Lapses in accuracy or fairness detract from the credibility and authoritativeness of their authors. Be fair, accurate and complete in your treatment of the facts and in your research and analysis. Judges always read both sets of briefs; they almost always read the cases cited and the record themselves. They are never happy to discover that the briefs are misleading in any way.

Remember that less really is more, and be selective. Use the best and strongest of your research and arguments, and give the judge credit for the ability to get it the first time, if you have said it properly. Repetition and over-length are the first two deadly sins of brief writing.

Next on the list of deadly sins come hyperbole and personal attacks on opposing counsel or the lower court. If truth and righteousness are on your side, that conclusion will emerge from the story told by the case; purple prose and multiple exclamation marks do not help and almost always irritate.

5. What should you do if you can't comply with the 50-page limit?

Try again. Literally. As Judge Alex Kozinski noted in a humorous speech at BYU law school, an oversized brief tells judges that you have a losing case:

> [In order to lose an appeal,] you want to tell the judges right up front that you have a rotten case. The best way to do this is to write a fat brief. So if the rules give you 50 pages, ask for 75, 90, 125— the more the better. Even if you don't get the extra pages, you will let the judges know you don't have an argument capable of being presented in a simple, direct, persuasive fashion. Keep in mind that simple arguments are sleeping pills on paper.[1]

Assess your fact summary, theory explication and treatment of cases. Determine whether material may be moved to an appendix. Don't re-invent the wheel. If your background is esoteric, can you proffer it by reference?

6. What is the table of contents for?

The table of contents needs to be organized to serve its purpose: finding things. Judges will use it in oral argument, conference, case research and opinion preparation.

...And what goes in an appendix?

Appropriate materials for an appendix include: findings of fact and conclusions of law; memorandum decisions and orders; key documents or language; and anything else that the reader needs to follow and understand the brief.

7. Does anybody really care about margins, spacing, spelling and grammar?

YES. Remember, we read *thousands* of briefs. Sloppiness, error and crowding really distract, slow and irritate the reader. As Judge Kozinski explains (with sarcasm):

> Now if you don't read briefs for a living, one page of type looks pretty much like another, but you'd be surprised how sensitive you become to small variations in spacing or type size when you read 3,500 pages of briefs a month. ... So, if you do things just right, you will submit an enormous brief with narrow margins and tiny type, copied with a defective photocopier onto dingy pages, half of which are bound upside down with a fastener that gives way when the judge is trying to read the brief at 35,000 feet. You can lose your appeal before the judge even reads the first word.[2]

The same principle holds true for mistakes in spelling, grammar, and citations. Any of these missteps, if repeated throughout the brief, can transform an open-minded, or even sympathetic, reader into a skeptical critic.

8. When you cite a case, does anyone really check to see if it says what you say it says?

YES. Our law clerks are really very smart and diligent. Your credibility is on the line in every brief you write.

Your credibility, of course, is not the only thing that can be lost by preparing a bad brief. Poorly-written briefs will often lose your client's case, as a Utah Court of Appeals case from 1988 illustrates. In *Demetropoulos v. Vreeken,*[3] Judge Orme affirmed the district court's decision in part because of the weakness of the appellant's brief. "The purpose of a brief is to enlighten the court and elucidate the issues rather than confuse the court and obscure the issues."[4] To illustrate the brief's ineffective verbosity, Judge Orme excerpted one of nine point captions, "by no means unique among appellant's points":

> DEMETROPOULOS' PRE-JUDGMENT WRIT OF ATTACHMENT AND PROCEEDINGS THEREON

WERE SUBSTANTIVELY INCORRECT AND VOID BECAUSE THE WRIT AND PROCEEDINGS THEREON WERE AMENDABLY DEFECTIVE BECAUSE A RETURN AND INVENTORY WAS NOT FILED FOR 7 MONTHS INSTEAD OF WITHIN 20 DAYS AS REQUIRED BY RULE 64C(h), A DETAILED INVENTORY WAS NOT FILED AS REQUIRED BY RULE 64C(h), THE SERVING OFFICER FAILED TO ASK FOR MEMORANDUM OF CREDITS ATTACHED AS REQUIRED BY RULE 64C(h), NO DEFENDANTS WERE SERVED WITH PLEADINGS WITHIN 10 DAYS OF ISSUANCE OF THE PRE-JUDGMENT ATTACHMENT IN A WAY ALLOWED BY RULE 4, AND THE WRIT THEREFORE AUTOMATICALLY DIED A JUDICIAL DEATH AT THE END OF ITS 10-DAY LIFE, AND GARNISHMENT UNDER RULE 64D WAS THE APPROPRIATE WRIT TO ISSUE TO LIEN PROPERTY IN THE HANDS OF THIRD PARTIES RATHER THAN ATTACHMENT UNDER RULE 64C.[5]

After noting that the rules of procedure allow a court to disregard a brief that is not in compliance with the rules and impose sanctions on counsel, Judge Orme mercifully noted that "a brief which fails to do its job is, in a sense, its own sanction," and proceeded to treat the case on its merits. *Id.* at 962. Over a dozen cases before Utah's appellate courts in the last five years have been less fortunate; they were dismissed (or issues not addressed) because the briefs did not comply with rule 24 of the Utah Rules of Appellate Procedure 24.[6]

Conclusion

The foregoing comments are, as I said in the beginning, one judge's reflections on the art of brief writing. There are numerous articles, textbooks, treatises and programs devoted to the subject of appellate advocacy, which treat the topic at great length and in very helpful ways for both the neophyte and the experienced appellate lawyers. In more than fifteen years of service on the Utah Supreme Court, I have been pleased and gratified by the increasing sophistication and competence of advocates before our court. Appellate work, like trial practice and other areas of specialization, demands high standards of knowledge and performance, and Utah lawyers are clearly up to the challenge.

[1]Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. Rev. 325, 326 (1992).

[2]*Id.* at 327.

[3]754 P.2d 960 (Utah Ct. App.).

[4]*Id.*

[5]*Id.* at 961-62.

[6]*See, e.g., Rukavina v. Triatlantic Ventures*, 931 P.2d 122 (Utah 1997); *Monson v. Carver*, 928 P.2d 1017 (Utah 1996); *Burns v. Summerhays*, 927 P.2d 197 (Ct. App. 1996); *Walker v. U.S. Gen.,Inc.*, 916 P.2d 903 (Utah 1996); *Phillips v. Hatfield*, 904 P.2d 1108 (Utah Ct. App. 1995); *Debry v. Cascade Enters*, 879 P.2d 1353 (Utah 1994); *State v. Jennings*, 875 P.2d 566 (Utah Ct. App. 1994); *State v. Harry*, 873 P.2d 1149 (Utah Ct. App. 1994); *State v. Jiron*, 866 P.2d 1249 (Utah Ct. App. 1993); *Baker v. Baker*, 866 P.2d 540 (Utah Ct. App. 1993); *First Sec. Bank of Utah v. Creech*, 858 P.2d 958 (Utah 1993); *State v. Horton*, 848 P.2d 708 (Utah Ct. App. 1993); *State v. Dudley*, 847 P.2d 424 (Utah Ct. App. 1993); *Steele v. Board of Review of the Indus. Comm'n*, 845 P.2d 960 (Utah Ct. App. 1993).

Book Review

Life Work

By Donald Hall

Reviewed by Betsy Ross

The paucity of book reviews over the last months has not been due to my lack of reading as much as an insecurity in knowing what to share. The charge that these reviews have "something to do with" the law has been reiterated, although that is not necessarily an impediment, as I cannot really think of any facet of the law that does not draw on and, in return, influence every aspect of our humanity. Thus, I should certainly have shared Arundhati Roy's *The God of Small Things,* which is one of the best novels I have read in the past few years, dealing with global issues of justice, inequality, love, and on the more local level, the continuing effects of the caste system in Indian culture. I might also have shared Paul Theroux's newest novel which looks at the turnover by Great Britain of Hong Kong to China, and its effects on individual's lives.

Although these works certainly have "something to do with" law, I have chosen a work that lingers in my mind and heart, and that continues to have an effect on me and my view of "work" in my life. It is an autobiographical piece by poet and essayist Donald Hall, who embarked in 1993 to write about the role of "work" in his life and is appropriately entitled *Life Work.* It is a meditation on fulfillment; it was a call to me to answer the question in my own life – can I say the same about my attitude to my work?

Written as journal entries, Hall, in language revelatory of his stature as a poet, invites us into his life, and into the lives of his ancestors, as he explores the role of work. He speaks of his grandmother, who worked the family farm sixteen-hour days and six-day weeks, and who never questioned her role in the economy of the day, or lamented the excesses or unfairness of her burden. As an aside, Hall notes with irony that "[w]hen she was forty-four years old, the United States and the State of New Hampshire, in generous condescension, decided to allow her to vote."

Hall intimates that it is not the nature of the work itself that makes one endeavor more fulfilling than another, or even more worthy than another. It is merely the fact of work that does so. Hall portrays this commonality of a sense of worthiness in work in describing the time he sold light bulbs door-to-door in rural New Hampshire.

> "Every October, a woman in Danbury told me about how much she had canned that year. She lived in small rickety cottage, almost a shack, with an old propane cooker. Each year her prodigies increased in prodigiousness. She told me: "This year I did 347 peas, 414 string beans, 77 peaches, 402 corn, 150 strawberry jams . . ." She talked plain, the New Hampshire way without affect, but I felt pride surging in every century of Ball jars, self-worth assembled in dense rows of vegetable love packed in her root cellar. And as I listened I thrilled with her, felt pride with her and for her. Four hundred cans of corn! Did her family *eat* four cans of corn each day all winter? Heavens no. Every time I visited, I took home several examples of her canning."

This little book (124 pages) on a topic so potentially deadening and "work" brims with Hall's generosity of spirit, drawing us into the world in which he lives, including his brush with cancer. During the writing of *Life Work,* Hall discovers that he has a recurrence of colon cancer, this time attacking his liver. His sharing of this time is honest, rife and even, with humor. So he writes upon the discovery: "The nature of

this book alters. Shall I change the title from *Life Work* to *Work and Death?* Box office, he said sneering."

For me most touching, and most difficult to write about without falling into sappiness, which he doesn't, is Hall's discourse on the relationship with his second wife, Jane, who is also a poet. He describes their life together, and her role in his work:

> "All morning Jane has done things parallel and different: breakfast, reading the Upanishads, dog-walk, desk work on poems, maybe some letters. We do not speak all morning, but her presence in her own study, working as I work, means everything to my work. When she is away doing a poetry reading I am lethargic, moony and blue; I work a slow-down half-speed schedule: work-to-order, blue flu. I invent reasons to leave the house on errands; I fill out coupons for magazines and join book clubs."

And he describes, as touchingly as I have perhaps ever read, the gift of a true partner, while describing the effects of cancer in his life and work:

> "I have lost two-thirds of my liver and nine-tenths of my complacency. I have come so close to Jane that I feel as if I had crawled into her body through her pores – and, although the occasion of this penetration has been melancholy, the comfort is luminous and redemptive. Every day she rubs my body, trunk and limbs; her hands knead my back, lift my head, pull my hair – and I feel, intensely, an interdependent fusing together of our bodies and spirits. When she lays hands on my abdomen, pausing, I know that she is praying or meditating the cancer out."

I keep quoting Hall, because his language is so descriptive and precise, encouraging and uplifting. Is it only in the life of a writer, like Hall, that work and life can be so experienced? This work suggests not. *Life Work* is an invitation to all of us who work, and that *is* all of us, to work with devotion and "absorbedness" regardless of what we do. He implores us to revel in the simplicity of the completion of tasks and to see our work as infusing life with meaning. If I could face each day as he does: "The best day begins with waking early – I check the clock: damn! it's only 3:00 a.m. – because I want so much to get out of bed and start working" I would know contentment.

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The Law Firm of Kruse, Landa & Maycock, L.L.C. Is Pleased to Announce

Jody L. Williams

has become a member of the firm

Ms. Williams' practice focuses on water, natural resources, energy, and utility law. Her principal current activities involve the acquisition, development, and protection of water rights for utility, governmental, and agricultural users. In 1996, Ms. Williams was appointed by President Clinton to the Utah Mitigation Conservation Commission, which is responsible for minimizing and mitigating environmental damage resulting from the Central Utah Project. She currently serves as vice chair of the Commission. After graduating from the University of Utah College of Law in 1978, Ms. Williams clerked for the Utah Supreme Court and the U.S. District Court before entering private practice. Thereafter she joined the in-house legal department of Utah Power & Light and later PacifiCorp, representing it on water and natural resource issues in seven western states. She joined Kruse, Landa & Maycock in 1993. Ms. Williams was the 1995 Lawyer of the Year of the Natural Resources and Environmental Law Section of the Utah State Bar. She served as a member of the Utah State Wildlife Board from 1991 to 1995, where she served as chair during 1993-1995.

William N. White

has become an associate of the firm

William N. White has served for the last three years in the Division of Natural Resources of the Office of the Utah Attorney General, with direct responsibility for statewide water rights adjudication for the State Engineer and Division of Water Rights. He is a 1994 graduate of the University of Utah College of Law.

From Zane to Zimmerman

By Pamela T. Greenwood

The Utah Bar Foundation is pleased to announce publication of a historical look at all the justices who have served on the Utah Supreme Court during the one hundred year span from the state court's inception in 1896 through the present time. The publication was made possible by a donation from Cal Behle, former president of the Utah Bar Foundation and staunch supporter of its purposes and mission. The book is entitled *Justices of the Utah Supreme Court, 1896-1996.* It was written by two young lawyers, John M. Peterson, now employed by the Utah Attorney General's office in its child protection division, and James E. Magleby, of Jones, Waldo, Holbrook, and McDonough. Messrs. Peterson and Magleby included both the standard biographical information and more personal vignettes about each justice. For instance, Justice Charles S. Zane, the first Utah Supreme Justice, began his judicial tenure in Utah through appointment by President Chester A. Arthur, before Utah's statehood, to the Territorial Supreme Court. As a young lawyer, Justice Zane officed a floor above the offices of Abraham Lincoln in Springfield, Illinois. Interestingly, many years later, in 1996. Chief Justice Michael Zimmerman played the part of Justice Zane in the play, "The Raid: The Trial of George Q. Cannon," depicting a famous polygamist trial in the early days of Utah. Several of Utah's earliest justices were federally appointed and thought, initially, to be zealous opponents of polygamy and Utah's real or perceived theocracy. Interestingly, they all were later regarded as fair and even-handed jurists who ably served Utah's citizens. The book culminates with the most recently appointed justice, Justice Leonard H. Russon, who has the distinction of being the only justice who served on three levels of courts – the district court, court of appeals, and the Utah Supreme Court, after a distinguished career as an attorney.

Timing of this publication seems to be especially serendipitous. It culminates 100 years of the Utah Supreme Court's existence and includes those justices who have occupied the supreme court courtroom at the state capitol, prior to the court's relocation next year to the Scott M. Matheson Courthouse. Appropriately, the volume includes a color photo of the capitol courtroom, captured beautifully by Don Busath, at the suggestion of Carman Kipp, who just completed two terms as a trustee for the Bar Foundation. Design work for the cover is by Leslie Miller, an artist from Park City. The book was published by Quality Press, with the able assistance of its owner, Jackie Nichols.

We think the publication records a valuable and important segment of Utah's judicial history and are gratified that the Utah Bar Foundation could provide this contribution to our literary collection, thanks to the generosity of Cal Behle and fine work by many individuals. Please contact Zoe Brown at the Law & Justice Center if you are interested in obtaining a copy.

CLE CALENDAR

ESTATE PLANNING AND RETIREMENT PLANS

Date: Wednesday, October 1, 1997
Time: 9:00 a.m. to 4:30 p.m.
Place: Provo Park Hotel
Fee: $150.00 (lunch is included)
CLE Credit: 7 HOURS, WHICH INCLUDES 1 IN ETHICS

NEW CHANGES IN DOMESTIC VIOLENCE

Sponsored by the Criminal Law Section & The Center for Family Development
Date: Thursday, October 2, 1997
Time: 12:00 p.m. to 1:00 p.m.
Place: Utah Law & Justice Center
Fee: No charge – Brown bag Luncheon or $10.00 for a box lunch – optional
CLE Credit: 1 HOUR
RSVP: Please call the CLE Department at 297-7033, to register for this luncheon. Space is limited and registrations will only be taken by phone. Please RSVP no later than Friday, September 26, 1997. Please indicate at the time of registration whether or not you would like us to order you a box lunch. Thank you.

3RD ANNUAL NATIVE AMERICAN LAW SYMPOSIUM: CIVIL JURISDICTION & THE INDIAN CHILD WELFARE ACT

Date: Friday, October 3, 1997
Time: 9:00 a.m. to 5:00 p.m. (Registration begins at 8:30 a.m.)
Place: University of Utah College of Law – Moot Courtroom
Fee: $75.00 for half-day; $125.00 for full-day (before 9/26/97); $150.00 for full-day (after 9/26/97)
CLE Credit: 7 HOURS
Questions: Call Mary Ellen Sloan at (801) 468-3420, or Linda Priebe at (801) 363-1347

ANATOMY OF A COMPUTER: HOW TO USE PC'S IN THE PRACTICE OF LAW

Date: Thursday, October 9, 1997
Time: Registration begins at 8:30 a.m.
Place: Utah Law & Justice Center
Fee: $100.00; $115.00 at the door
CLE Credit: 4 HOURS

ALI-ABA SATELLITE SEMINAR: TAXPAYER RELIEF ACT OF 1997 – PRACTITIONER'S UPDATE

Date: Tuesday, October 14, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $185.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

NLCLE WORKSHOP: ETHICS & CIVILITY

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

COMMERCIAL AND CONSUMER BANKRUPTCIES & BUYING AND SELLING A BUSINESS

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(This seminar was originally scheduled for March 21, 1997)
Date: Friday, October 17, 1997

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.

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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.

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

THE ART OF EFFECTIVE SPEAKING FOR LAWYERS

Date: Wednesday, October 22, 1997
Time: 9:00 a.m. to 4:15 p.m. Registration begins at 8:30 a.m.
Place: Utah Law & Justice Center
Fee: $140.00 pre-registration; $160.00 at the door
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: ACCOUNTING FOR LAWYERS: USING FINANCIAL DATA IN LEGAL PRACTICE

Date: Thursday, October 23, 1997
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 6 HOURS

ALI-ABA SATELLITE SEMINAR: CRITICAL LEGAL ISSUES FOR NONPROFIT ORGANIZATIONS

Date: Thursday, October 30, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $125.00 for nonprofit managers, directors & volunteers; $160.00 for all others *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

ANNUAL CORPORATE COUNSEL SECTION SEMINAR

Date: Thursday, November 6, 1997
Time: 8:00 a.m. to 1:00 p.m.
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: 4 HOURS

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

Date: Thursday, November 6, 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

NLCLE MANDATORY SEMINAR – FOR 1996 & 1997 ADMITTEES

Date: Friday, November 7, 1997
Time: 8:30 a.m. to 4:00 p.m. (Registration beings at 8:00 a.m.)
Place: Utah Law & Justice Center
Fee: $35.00
CLE Credit: This program counts as the ETHICS requirement for New Lawyers, and is mandatory for those attorneys who sat for the Bar Exam as "students" and were admitted in 1996 or 1997. If you have a question about whether or not you need to attend this program, please call Monica Jergensen at (801) 297-7024.

WIN YOUR CASE BEFORE TRIAL: EFFECTIVE PRETRIAL TECHNIQUES & STRATEGIES

Date: Friday, November 14, 1997
Time: 9:00 a.m. to 4:30 p.m. (Registration beings at 8:30 a.m.)
Place: Utah Law & Justice Center
Fee: $140.00; $160.00 at the door
CLE Credit: 7 HOURS

ALI-ABA SATELLITE SEMINAR: EEO BASICS – PRACTICE FUNDAMENTALS OF EMPLOYMENT DISCRIMINATION LAW

Date: Tuesday, November 18, 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

AN EVENING WITH THE THIRD DISTRICT COURT

Date: Tuesday, November 18, 1997
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $15.00 for Young Lawyers and attorneys in practice 5 years or less; $35.00 for members of the Litigation Section; $50.00 for all others
CLE Credit: 3 HOURS CLE & NLCLE

NLCLE WORKSHOP: ESTATE PLANNING & PROBATE

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

ALI-ABA SATELLITE SEMINAR: EVIDENCE FOR THE TRIAL ADVOCATE

Date: Thursday, November 20, 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

LAWYERS ON THE INTERNET: RESEARCH AND ELECTRONIC PRACTICE

Date: Friday, November 21, 1997
Time: 8:30 a.m. to 12:00 p.m. (Registration beings at 8:00 a.m.)
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: 4 HOURS

New Lawyer Mandatory Seminar

November 7, 1997

Attorneys who were admitted to the Utah State Bar in 1997, and are maintaining ACTIVE licenses, must attend the New Lawyer CLE Mandatory Seminar this fall to satisfy part of their NCLE requirements. The date of the seminar has been set for Friday, November 7, 1997. You will receive a detailed notice in the mail regarding the specifics of the seminar. Please make sure that the Utah State Bar has your current address so that you will receive notification of this and other CLE offerings. If you have questions regarding this program or any other Utah State Bar sponsored CLE seminars, please contact Monica Jergensen, CLE Administrator, at (801) 297-7024.

Utah State Bar Litigation Section Presents An Evening with the Third District Court

Mark your calendars for Tuesday, November 18, 1997 to spend "An Evening with the Third District Court" to be held from 5:30 p.m. to 8:30 p.m. at the Utah Law & Justice Center in Salt Lake City. This program will be worth THREE hours of CLE/NLCLE credit and more details will be available later. Watch your mail for a more detailed notice regarding topics and fees. If you have questions, please contact Monica Jergensen, CLE Administrator, at (801) 297-7024.

Divorce and Child Custody Mediator Training

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November 12-14, 1997

Trainers: Diane Hamilton, M.A.
William W. Downes, Jr., J.D.
Marcella L. Keck, J.D.

Location: Law & Justice Center
645 South 200 East, Salt Lake City, Utah

Dates: November 12-14, 1997, 8:00 a.m.-5:00 p.m. daily

Fees: $450.00 ($50.00 discount for registration prior to October 15, 1997)

Focus of Training:

This training is designed for persons interested in mediating divorce and post-divorce conflicts including parenting, property, and support issues. The focus includes basic aspects of Utah law, the psychological factors important to divorce matters, and conflict resolution strategies for mediators.

The training is structured for participants who have received basic mediator training, but who have not received specialized divorce and child custody training.

The 24 hour course satisfies the domestic training required for participation on the Court Annexed ADR program roster for divorce and child custody matters.

For more information contact Tonia Torrence 486-5953

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:_____

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

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

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

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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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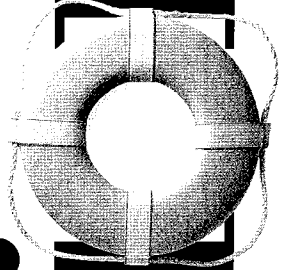

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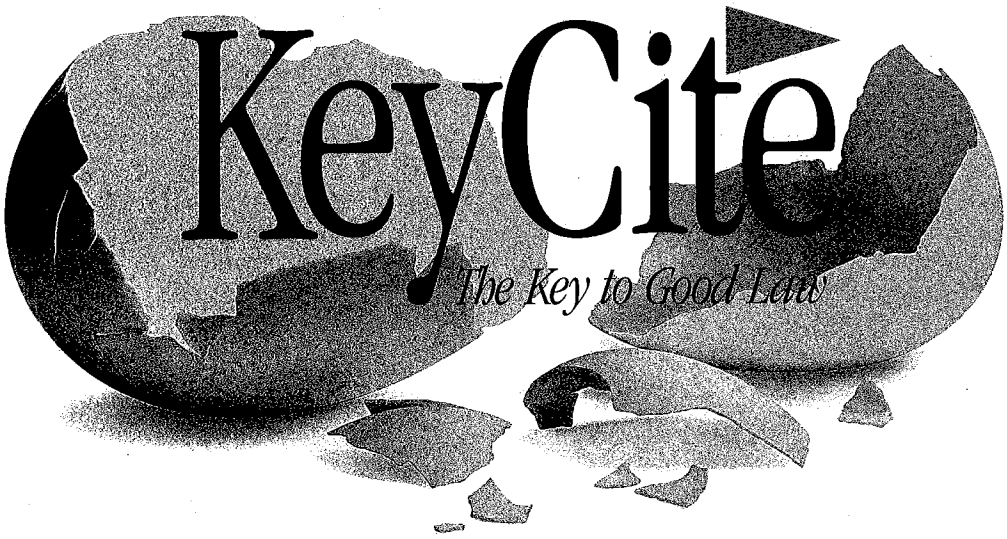

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