UTAH BAR JOURNAL

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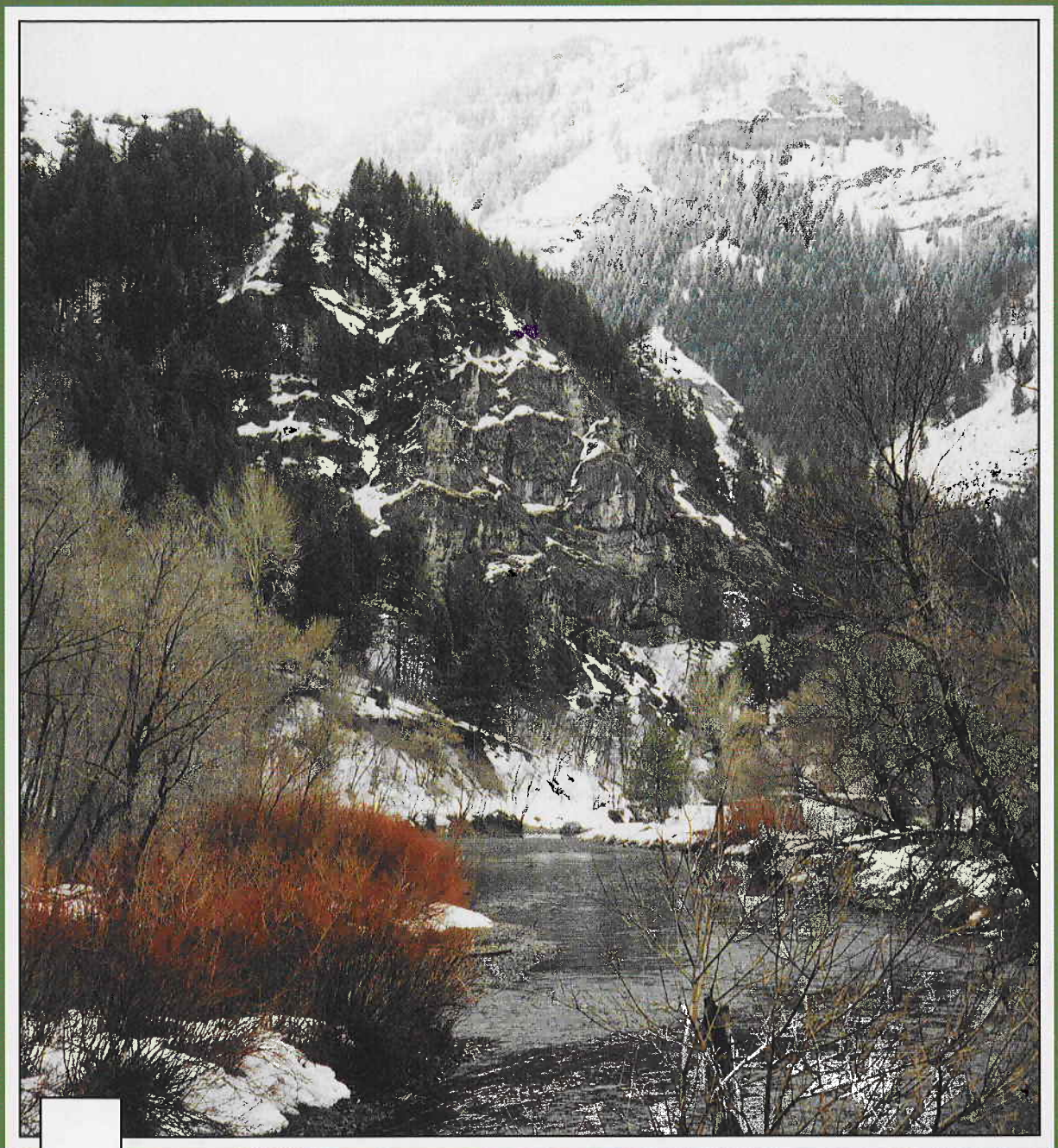

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Vol. 10 No. 10 December 1997

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: Fresh Snowfall in Spanish Fork, 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

Dear Editor:

Since when has the *Journal* been so lacking in articles of informative value that you would find it suitable to print such a political diatribe such as Mr. Pendley's in the October, 1997 issue? I have never observed anything close to such a partisan display, and do not believe the same – on either side of the political spectrum – belongs in a professional publication (especially one written by an out-of-state stooge for Utah's congressional delegation and right-wing minions).

Notwithstanding my own disagreement with the tone of the article, it was not well written, and not to be saved by its exorbitant length and superfluous attribution references. Since the grim Mr. Pendley's unscholarly opinion does not have the support of the majority of the citizenry, as polls have clearly indicated, and cannot be taken as a serious analysis of the validity of the designation of the monument because of the author's blatant bias, why should the *Journal's* longstanding tradition of non-political legal commentary be broken by such a bag of hot air as this?

Sincerely,
Scott C. Welling

Dear *Utah State Bar Journal* Staff:

The article by William Perry in the latest *Bar Journal* was nothing more than a disingenuous political argument based on flawed information. I'm troubled my dues were wasted on the publication of such material. Please remove my name from the mailing list for your publication.

I'd suggest next time you have space to fill you include a few pages from the phone book. At least the content would be accurate.

Sincerely,
T. Scott Groene
Southern Utah Wilderness Alliance

Editor:

William Perry Pendley's diatribe against the Grand Staircase-Escalante National Monument and President Clinton (October, 1997) is better-suited for a weekly tabloid than a bar journal. Pendley's legal analysis is sophomoric; his factual analysis nonexistent. Obviously, Pendley has an ax to grind with the Clinton administration and those he derides as "environmental extremists." Why the *Bar Journal* considered his editorial worthy of publication I cannot fathom. Rather than well-reasoned legal analysis or even insightful political commentary, we are treated to tired assertions, popular with the extreme right by lacking completely in any documented factual support, that the Monument was created at the behest of the Lippo corporation. What next for the *Utah Bar Journal*? Will we be enthralled by tales of Hillary-ordered assassinations and gossip concerning Bill's extramarital affairs?

As a lawyer practicing environmental law who has lived and worked in southern Utah, I had hoped the *Bar Journal* would approach the controversial issue of the proper use of southern Utah's public lands in a well-reasoned and fair-minded manner. I am extremely disappointed that the *Bar Journal* chose to publish such a slanted, ideology-driven article. Unfortunately, the editors of the *Utah Bar Journal* appear incapable of distinguishing legal writing from extremist dogma. The *Bar Journal* has lost my respect; in my opinion, is has forfeited its standing as a professional publication worthy of any serious consideration.

Sincerely,
David Negri

Mr. Pendley responds:

Mr. Negri wants the *Bar Journal* to discuss "the proper use of southern Utah's public lands." That might be an interesting discussion, but it was foreclosed by Clinton's decree.

The only issue left is whether Clinton's decree is legal? I concluded it is not. Using the legal analysis I used – Mr Negri calls it "sophomoric" – the Utah School and Institutional Trust Lands Administration and the Utah Association of Counties agreed with me and sued Clinton.

The Constitution gives power over federal lands to Congress. Congress delegated some of that power in the Antiquities Act; how much has not been answered. Congress rejected the notion that it had acquiesced in the expansive use of the Antiquities Act when it passed the Federal Land Policy and Management Act. Finally, if Congress grants too much of its power it violates the Delegation Doctrine. If Mr. Negri doesn't like my analysis, he should read nothing else on the subject; most other scholars have reached similar conclusions.

Mr. Negri calls my "factual analysis nonexistent." Clinton is to blame since he refuses to release White House decision documents to give us the "facts." The House Resources Committee had to issue a subpoena to get them. Just days ago, Chairman Don Young wrote demanding "immediate" compliance with the subpoena.

Senator Bob Bennett (R-UT), after viewing White House documents, says "I'm satisfied that the primary motivation in creating the monument was politics." (Does that include fundraising? No one knows, certainly not Mr. Negri!)

Mr. Negri says that quoting Senator Bennett and others on the reasons for the Clinton decree makes me part of "the extreme right" and a writer of "extremist dogma." When it comes to choosing sides in a truth telling contest, I will gladly stand with Senator Bennett and allow Mr. Negri to defend Clinton.

Sincerely yours,
William Perry Pendley

Editors Note:

All letter writers were invited to respond substantively to Mr. Pendley's article; Mr. Negri agreed – his response, in article form, is included in this issue.

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 of each letter if and when a letter is rejected.

Are Lawyers Responsible to Provide Access to Justice for the Poor? – An Update on the Access to Justice Task Force

By Charlotte L. Miller

Christopher is a five year old boy who inherited a disabling condition that results in Christopher having a chemical imbalance. The imbalance causes Christopher to suffer from severe depression and outbursts of anger. His condition is controlled with medication. Christopher's Supplemental Security Income (SSI) benefits have enabled him to receive his medication and daycare services. This year Christopher's SSI benefits were denied when the government reclassified those children with certain medical disabilities. Christopher has two siblings and is residing with his aunt whose annual income is $18,000. He and his aunt need assistance in applying for renewal of his SSI benefits which includes a hearing and appeals process.

Stephanie, a 73 year old woman, lives on her deceased husband's monthly $700 social security payments. The apartment she rents is poorly maintained, and is often without plumbing and heating. Stephanie has asked the landlord to make repairs on many occasions, and she is one month behind in her rent. The landlord has not responded to her requests and has served her with an eviction notice. Stephanie has no relatives to live with if evicted.

Are lawyers responsible for assuring that Christopher and Stephanie receive legal representation?

The oath that we took when we were sworn in as attorneys states: ". . . that I will strictly observe the Rules of Professional Conduct promulgated by the Supreme Court of the State of Utah." Rule 6.1 of the Rules of Professional Conduct states:

> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal service to persons of limited means.

The preamble to the Rules of Professional Conduct provides some guidance as to why a lawyer should render public interest legal service:

> A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.
>
> . . . In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.

The legal system is an adversarial system. Many of the positions lawyers take and tasks lawyers perform as part of that adversarial system may fly in the face of the lawyer's "interest in remaining an upright person." We are able to resolve this conflict when both sides of a matter have adequate representation, which is designed to allow both sides to be represented zealously

thereby preventing overreaching. When one party does not have counsel it is difficult, if not impossible, to resolve that conflict.

The practice of law is a monopoly. Those who are not members of the Bar are not allowed to help a neighbor, friend or a poor person in need with a legal problem. Lawyers hold themselves out to be the only ones who can and should provide legal advice and appear in court. Lawyers reap the benefits of this power and exclusivity. Along with the power comes the responsibility of ensuring that the adversarial system is valid. It cannot be upheld as a valid system if poor people are not provided adequate representation. Thus, lawyers perform a multitude of pro bono services.

Over the past several years the Legal Services Corporation and other governmental supported agencies have provided an enormous share of the legal services to the poor. Recently, the funding for Legal Services Corporation has been significantly reduced. Therefore, lawyers need to take another look at their obligation to provide services to the poor. Others, too, may be responsible to ensure that the poor have legal representation, but the monopolistic and adversarial nature of our profession requires us to lead in finding a solution to access to the justice system by the poor. One solution would be to convince Congress to increase federal funding to Legal Services Corporation. That solution is being worked on daily by people all across the country and they have seen some progress, but it is unlikely we can depend on Legal Services Corporation to continue to be funded at past levels. Another solution would be to convince our Utah State Legislature to infuse funds into a new state legal services system. With the current costs of road construction, funds for new programs are not readily available, and there is no state legal services system in place. Long-term, this second solution seems at least partially more viable than the first.

The Access to Justice Task Force has spent over a year studying this issue and issued its report. I will not go into the detail of the Task Force's recommendations because many prior *Bar Journal* articles have addressed those (see *Utah Bar Journal*, "Legal Services Cutbacks – Catalyst for Constructive Change", Vol. 9 No. 3 (March 1996); *Utah Bar Journal*, "Lawyers' Public Service Responsibility", Vol. 9 No. 5 (May 1996); *Utah Bar Journal*, "Point/Counterpoint – Mandatory Reporting of Pro Bono Services", Vol. 2 No. 2 (Summer 1997); *Utah Bar Journal*, "Common Questions About Pro Bono", Vol. 10 No. 4 (May 1997). I encourage you to re-read these articles, or to read them for the first time. I also encourage you to read the report of the Access to Justice Task Force which was mailed to every member of the Bar last June. If you have lost yours, ask a colleague for a copy, or call the Bar office for another copy. For several months the Task Force has solicited input from attorneys about the task Force's proposed recommendations through meetings with sections, committees and at the Mid-Year and Annual Meetings of the Bar.

"When an opposing party is well represented, a lawyer can be a zealous advocate . . . and assume that justice is being done

In September, the Utah State Board of Bar Commissioners approved the Task Force's seven recommendations. As a reminder, the seven recommendations are:

1. The Bar should seek state funding from general revenues and other appropriate sources for legal services.
2. The Bar should petition the Supreme Court to amend the Rules of Professional Conduct to implement Mandatory Reporting of Pro Bono Services by Bar members. Such reporting of pro bono services should include an optional contribution. Under this system, pro bono service and financial contributions should remain aspirational. Only the reporting of these items should be mandatory. A similar rule in Florida has produced increases in funding for legal services and pro bono participation.
3. The Bar and the Bench should actively support and encourage pro bono efforts and the development of reduced fee projects and self-help materials.
4. The Bar should explore and, if appropriate, adopt licensure by the Bar of legal assistants, enabling them to provide limited service and advice.
5. A Centralized Intake Unit ("CIU") be created to provide initial interviews and screening of clients for all agencies and brief service and advice to clients. In addition, the CIU should provide quality control feedback to agencies on client service, which could include an "Annual. Consumer Report."
6. A computer based network should be created to link all existing poverty law agencies electronically.
7. The Bar should create a permanent Access to Justice Board.

The Bar Commission has appointed an Implementation Committee (whose names are listed at the end of this article) to spend the next few months determining the logistics and details of the recommendations. Specifically, the Implementation Committee will

- review and refine, if necessary, the definition of pro bono
- recommend revisions to Rule 6.1 to provide for reporting of pro bono services
- develop the structure, by-laws and articles for the Access to Justice Board
- recommend the manner in which the Access to Justice Board members are appointed
- review the report of the Commission's funding committee.

The Implementation Committee will make recommendations to the Bar Commission. If appropriate, the Bar Commission will petition the Supreme Court for any rules changes. You are welcome to make recommendations to the Implementation Committee.

All of the recommendations of the Task Force are significant and could result in exciting changes. The recommendation that has received the most comment is the recommendation requiring attorneys to report the amount of time they spend performing pro bono work each year. The aspirational goal for every lawyer would be 36 hours of service; however, there is no requirement for any number of hours. In fact, a lawyer may report "0" hours without consequence. In lieu of reporting hours, a lawyer may make a dollar contribution. The recommended contribution would be $360 representing $10 per hour of pro bono service. Again, a lawyer may report "0" and pay nothing. When the information is received at the Bar office with the licensing form, the lawyer is checked off as having met his or her reporting requirement. No other information is kept on an individual basis, and

there is no auditing of the lawyer's report. The Bar will maintain statistics of the total hours and dollars each year, but no information will be retained for each attorney. If a lawyer fails to report, the lawyer's active license would not be renewed.

The purposes of the reporting requirement are to 1) gather information about the amount of pro bono service being provided in total by lawyers so that better and more informed plans can be made on what is needed to provide services to the poor, and the Access to Justice Board can develop broader community and governmental support for access to justice, 2) raise awareness about the need for pro bono work and 3) raise funds for the other recommendations of the Task Force, i.e. the Central Intake Unit (read the report if you do not know what that is). No one – judges, governmental lawyers, in-house lawyers, etc. – is exempt from the reporting requirement.

Most of the conversations about required reporting focus on how each group can perform pro bono services. Every group has its built-in challenges: judges can't practice law; government attorneys don't have staff resources; large firm attorneys have to bill too many hours per year; small firm and solo practice attorneys don't have the attorney and staff support; in-house attorneys may not have malpractice insurance. We have learned from looking at a variety of programs that all of these problems can be addressed. The Bar has obtained malpractice insurance for those who are performing pro bono services through Bar programs. When learning of the Task Force's recommendations, other professionals (court reporters, secretaries, legal assistants and private investigators) have come forward to donate their services to attorneys to assist in providing pro bono work. The U.S. Attorney General has developed methods for her attorneys to provide pro bono service and those programs can be copied by others. Finally, there is always the option of making the contribution. I often think that may be the best alternative because I believe an attorney trained at Legal Services Corporation or Legal Aid is far more valuable to a person who has a landlord-tenant, domestic, or social security matter than I; however I would not discourage anyone from becoming trained in an area and donating their time and expertise as a lawyer.

Attorneys also ask about what constitutes pro bono. The Implementation Committee will be struggling with that question. The current Rule 6.1 provides a definition that is broader than delivering legal services directly to the poor. I do not know how much broader (if at all) the final definition will be, but it will be up to each lawyer in good conscience to interpret and apply the definition to himself or herself. I was recently asked why a personal injury lawyer who may work on a contingency fee case for several years without pay should have to perform additional pro bono service. A lawyer uses business and legal judgment when accepting a personal injury case on a contingent fee case. Some of those business decisions turn out to be fruitful and some do not. I doubt that the lawyer accepts the contingent fee case intending not to be paid. Contingency fee arrangements serve a valuable purpose, but they are not a substitute for pro bono service.[1]

"We cannot protect our monopoly when paid and ignore it when the poor need counsel."

Some of the conversations among attorneys about the reporting requirement focus on the very basic reason of why attorneys should provide pro bono services. At a recent meeting, the following comments were made:

- Why should the Bar make itself an arm for social reform?
- Who decided that it is the Bar's responsibility to provide access to the poor?
- Why should we make lawyers step up and take care of this?
- Why should the Bar deem this charity more important than other charities which I support such as feeding the homeless?
- Clients who don't pay may not tell the truth, may file frivolous actions, may take up too much of the attorney's time, and don't follow their lawyer's advice.
- If general contractors don't have to build houses for the poor to get a contractor's license, why should attorneys have to provide free services?
- If there is super easy access, we are no more important than a grocery clerk.

To many of the above questions and comments, I respond that we all need to read the Rules of Professional Conduct again. We demean the value of legal representation if we allow a certain class of people to go unrepresented. (Yes, lawyers must make a living and they should charge their clients for the services and their clients should pay them.) For lawyers to continue to convince their clients that lawyers' services are valuable, we cannot say that the poor who have a legal problem do not really need legal representation. We cannot protect our monopoly when paid and ignore it when the poor need counsel.

Furthermore, I suggest that clients who cannot pay do not have a monopoly on exaggerating, misperceiving, lying, refusing to follow an attorney's advice, or on filing frivolous actions. In private practice and as in-house counsel, I have advised clients with all of those characteristics. As lawyers we are not required to pursue every case brought to us. If a case appears frivolous we have a responsibility to inform the client and discourage the client from going further. None of us are bound to pursue frivolous cases by paying or non-paying clients. I would venture to say that it is probably harder for some lawyers to turn away a paying client with a frivolous case than a non-paying client. So the risk of frivolous cases would seem to arise more from paying clients. Attorneys are responsible for addressing that risk. Part of a lawyer's responsibility is to evaluate his or her client and to investigate and analyze the facts. Again, that responsibility does not lessen for a pro bono client.

How are we different from a contractor? When a contractor builds a new house for someone who can pay, the contractor is not inflicting harm on a poor person. When an attorney in the adversarial system does his or her job and represents a client against an unrepresented poor person, we risk committing harm to the poor person. The attorney inflicts such harm under the cloak of the rules of professional responsibility – the attorney has no obligation to protect the opposing party – and, in fact, it may be unethical for the attorney to do so. But if we wish to continue to use that cloak, we have the obligation of providing a system that allows the poor to have proper representation.

Some attorneys are concerned that requiring reporting of pro bono work will lead to mandatory pro bono service – the "slippery slope." I appreciate these concerns and fears. Having served on both the

Task Force and the Bar Commission, I personally believe that it is highly unlikely (almost impossible) that we would have mandatory pro bono service, but I recognize my assurance does not allay many attorneys' fears. If we are successful in providing legal services to the poor, mandatory pro bono will not be necessary. More importantly, we cannot refuse to try to solve this problem simply because we are afraid of what may happen in the future. If you are convinced that the Task Force's recommendations are not the best way to solve this problem, propose another solution.

I am confident that Utah lawyers will work together toward a solution to the problem of access to justice for those who cannot afford legal services. We have a history of providing legal services to the poor. With the reduction of funding for Legal Services Corporation we have the opportunity to institutionalize our own legal service system – that has the potential to be better and stronger than the Legal Services Corporation. Can the lawyers in Utah solve this problem alone? No, we will need the help of private business and the legislature; but let's be the leader and use this opportunity to develop a system of which all of us can be proud.

Finally, we are responsible to make sure that Christopher and Stephanie have adequate representation. Without that responsibility, we are not a profession.

[1]The question has arisen as to whether Bar Commissioners' service on the Bar Commission constitutes pro bono work. For me, it does not. I do not consider any of my time as a Bar Commissioner or as Bar President to qualify for pro bono service. If giving of that time prevents me from performing pro bono services, then I will contribute dollars.

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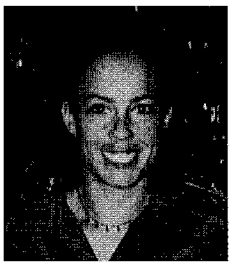
In Memoriam



Caroline J. Tescher
(1-15-69 – 10-2-97)

Caroline J. Tescher died in an automobile accident on Thursday, October 2, 1997, while in route to her wedding which was to have taken place the following Saturday. Caroline and her fiancé, Matthew Steward, were admitted to the Utah State Bar in October 1996. We extend our sympathy to Matt and to Caroline's family.

While our memories of Caroline are a poor substitute for her lively presence, they do soften our grief. She carried herself with extraordinary grace, confidence and civility. She was a genuine person who had great compassion for the environment and the people who surrounded her. Caroline's death was a profound loss to those who knew her; which is exceeded only by the loss to those who did not.

Co-workers and friends
at Peterson Reed L.L.C.

The Mahatma (Great Soul)

By D. Frank Wilkins

Nineteen ninety-seven is the fiftieth anniversary year of the India's independence from Great Britain. Mahandas K. Gandhi, the Mahatma, was born in India (1869), and was that independence's architect and splendid spirit.

Gandhi studied law in England and practiced in South Africa and then India. He adopted the lifestyle (and dress) of a Hindu ascetic, and in 1919 led a movement of non-violent non-cooperation against the British for which he was imprisoned then and later. He became president of the Indian National Congress in 1924 for several years. Of course, his unyielding fight to rid Hinduism of the curse of untouchability was superb. Finally, he led the efforts and negotiations that culminated in a free India and the partition of Pakistan as a separate Muslim state in 1947. Though Gandhi deserved and received world-wide plaudits for making his people free, he was heart-broken that *one* India did not continue, after independence, with his country's "new birth of freedom."

William L. Shirer, who won the Pulitzer prize as author of *The Rise and Fall of the Third Reich* (1960), said about Gandhi in his 1979 book *Gandhi – A Memoir* (a masterpiece itself):

> In a harsh, cynical, violent and materialist world he taught and showed that love and truth and non-violence, ideas and ideals, could be of tremendous force – greater sometimes than guns and bombs and bayonets – in achieving a little justice, decency, peace and freedom for the vast masses of suffering, down-trodden men and women who eke out an existence on this inhospitable planet.

In the introduction to Gandhi's book *An Autobiography: The Story of My Experiments With Truth* (Beacon Press – 1957) Gandhi said:

> It is not my purpose to attempt a real autobiography. I simply want to tell the story of my numerous experiments with truth . . . My experiments in the political field are now known, not only to India, but to a certain extent to the "civilized" world. For me, they have not much value; and the title of "Mahatma" that they have won for me has, therefore, even less. Often the title has deeply pained me . . . But I should certainly like to narrate my experiments in the spiritual field which are known only to myself, and from which I have derived such power as I possess . . . in the political field. If the experiments are really spiritual, there can be no room for self-praise . . . In judging myself I shall try to be as harsh as truth, as I want other also to be . . .

Another remarkable and moving statement was made in 1922 by Gandhi to the court after he was convicted of sedition for publishing articles in a magazine *Young India*. Some few excerpts by Gandhi to the judge follow (after which he was sentenced to six years in prison):

> Section 124-A, under which I am happily charged is perhaps the prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen . . . Affection cannot be regulated by law. If one has affection for a person or system, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote, or incite to violence. But the section under which . . . I (was) charged is one under which mere promotion of disaffection is a crime . . . I hold it a virtue to be disaffected toward government which . . . has done more harm to India than any previous system . . . I consider it a sin to have affection for the system.
>
> The only course open to you, the judge, is either to resign your post, and thus dissociate yourself from evil

> if you feel that the law you are called upon to administer is an evil and that in reality I am innocent, or to inflict on me the severest penalty if you believe the system and the law you are assisting to administer are good for the people of this country. . .

See *Lend Me Your Ears: Great Speeches in History* (1992) by William Safire.

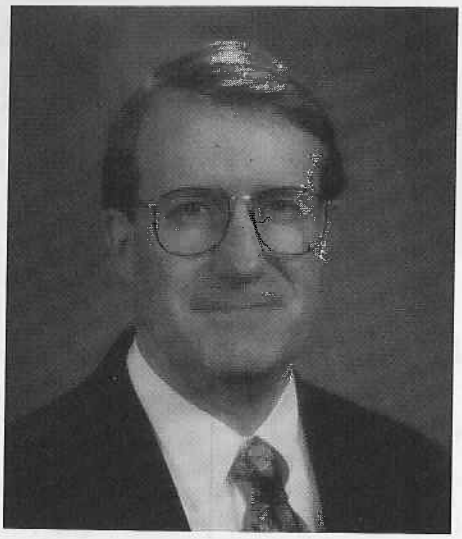
It is fitting that we speak of Gandhi during this anniversary year. The Utah State Bar's mission is to promote ". . . justice, professional excellence, civility (and) ethics . . ." What a preeminent model for these qualities this man was. And more. He was a saint in our time of the twentieth century.

I believe most of us in our profession on "this inhospitable planet" do better "in achieving a little justice, decency, and peace" for unfortunates than the cynics would allow. But *this* man – who, no question, had some human frailties – towered in his use of inspirational language and his acts of radiant goodness. Albert Einstein said of him that future generations "will scarce believe that such a one has this ever in flesh and blood walked upon this earth." When Gandhi was killed in 1948 by Nathuram Godse, a Hindu assassin, George Bernard Shaw sadly and bitterly commented that this killing just showed how dangerous it was to be good.

Do not we lawyers – and others – learn most deeply and richly about justice, professional excellence, civility, and ethics from a remembrance of the life of Gandhi, and those few other "generative souls" of good and light in our historical past, who Will and Ariel Durrant in *The Lessons of History* (1968) assure us "still live and speak, teach and carve and sing."

Bankruptcy and the Bad Faith Filing

By William Thomas Thurman and Brett P. Johnson



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Nationwide, the number of bankruptcy filings is exploding. In the year ending June 30, 1997, U.S. bankruptcy filings increased 26.4% over the previous year.[1] Utah too is experiencing a record increase which is outpacing the national rate: Utah's prior one – new record for number of petitions filed was surpassed in the first ten months of 1997. Additionally, through the end of October 1997, 43% of personal bankruptcy filings were individual reorganizations under Chapter 13 – a ratio that gives Utah one of the highest percentages of Chapter 13 filings in the nation.[2] For Utah attorneys, the climbing rate of bankruptcy filings necessarily means that bankruptcies will increasingly affect all types and many stages of litigation. Growing numbers of us will therefore encounter the bankruptcy system. In light of this reality, attorneys should be aware of an issue of increasing importance in bankruptcy law--dismissal of bankruptcy petitions for bad-faith filing. The dismissal of a reorganization petition on bad-faith grounds is a significant victory for a creditor and a significant hardship for a debtor. Such dismissals are therefore the focus of this Article.

In section I, we offer some brief background on the bankruptcy system's evolution and the statutory protections available to creditors. In section II, we

explain the judicially-created remedy of dismissal for bad-faith filing. In sections III through V we discuss, in detail, several of the most commonly encountered "badges of bad faith."

I. BACKGROUND

This country's founding fathers recognized the importance of the right to file bankruptcy. Article I of the United States Constitution provides that Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States."[3] The courts and Congress therefore carefully protect the right to file bankruptcy. One long-standing example of this protection is the common law rule that a person cannot waive by agreement their right to file bankruptcy.[4] Despite the importance and protection given bankruptcy-related rights, many debtors who secure bankruptcy relief are commonly perceived to be abusing the bankruptcy system to achieve improper purposes. Moreover, creditors often complain that the current bankruptcy system has "fostered abuse."[5] One of the most frequently cited examples of abuse involved Paul Bilzerian, a former Wall Street financier, who spent millions building a Florida mansion and then filed bankruptcy to take advantage of Florida's unlimited homestead exemption.[6]

Despite these exceptional cases, it has arguably become more difficult for debtors to abuse the bankruptcy system. Congress has significantly reformed the bankruptcy laws over the course of this century, and particularly during the past two decades. Congress enacted the modern Bankruptcy Code (the "Code") in 1978. The Code revamped the bankruptcy laws, supplanted the former system established by the Bankruptcy Act of 1898, and better articulated the bankruptcy laws, making them more concise and comprehensible. Change to the bankruptcy laws has continued. Most significantly, on October 22, 1994, Congress passed the Bankruptcy Reform Act of 1994.[7] As a partial consequence of these changes, debtor relief has increased and the number of filings, both in Utah and nationwide, has swelled.

These reforms have sought to improve the bankruptcy system's ability to meet the often cited but vaguely defined dual purposes of the bankruptcy system: "[F]acilit[ing] rehabilitation or reorganization of [the debtor's] finances and promot[ing] a 'fresh start' through the orderly disposition of assets to satisfy . . . creditors."[8] Bankruptcy reform has also reduced the potential for debtors to use the bankruptcy system to "get away with something." For example, the Code's use of independent trustees for debtors filing under Chapters 7, 12, and 13 has dramatically increased scrutiny of debtor finances.[9] Similarly, in Chapter 11 cases where the debtor is left in possession, a court may appoint an independent trustee at the request of either the U.S. trustee or any party in interest "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor."[10] If the court does not appoint a trustee, it may alternatively appoint an examiner to investigate the Chapter 11 debtor-in-possession or its management.[11] Beyond scrutiny of debtors by trustees and examiners, increasingly severe penalties await persons who commit any one of many offenses that constitute bankruptcy fraud.[12] Congress is considering further reforms: The bankruptcy system may soon involve random audits of filings to check for fraud and abuse, a national registry to track repeat filers, and limits on repeat filings under Chapter 13.[13]

"When a court addresses the bad-faith filing issue, the court applies a 'sniff test': if the court smells something fishy, dismissal is likely."

Creditors too play a large role in policing debtors in bankruptcy cases. For example, creditors have the right to put the debtor under the microscope of examination;[14] to challenge or seek revocation of the debtor's discharge or the discharge of an individual debt;[15] and to recover their collateral through a lift of stay.[16]

In addition to this wide-ranging statutorily-mandated scrutiny of debtors is an increasingly employed judge-made check on the filing of reorganization petitions–namely, the requirement that all bankruptcy petitions be filed in good faith. A growing number of courts are dismissing bankruptcy petitions that are filed in "bad faith."

II. WHAT IS A BAD-FAITH FILING?

The requirement that all bankruptcy petitions be filed in good-faith is a judge-made constraint applicable mainly to petitions for reorganization–primarily petitions filed under Chapters 11 and 13. While the Code explicitly requires debtors to propose plans of reorganization in good faith,[17] the Code contains no definition of "bad-faith filing," nor is there any express mandate that bankruptcy petitions be filed in good faith. Indeed, the Code contains no definition of "good" or "bad faith" at all. Although no explicit statutory good-faith filing requirement exists, bankruptcy relief is considered an equitable remedy and courts have imposed by judicial interpretation the requirement that debtors file petitions in good faith. In fact, every federal circuit that has addressed the issue has imposed a good-faith filing requirement for reorganization petitions.[18]

In general terms, a reorganization petition's "dismissal or conversion [to Chapter 7 for bad-faith filing] is a determination that, even though the court has jurisdiction over the case, proceeding with the case . . . would not be in the interests of justice."[19] One court explained that "[s]uch a standard furthers the balancing process between the interests of debtors and creditors which characterizes so many provisions of the bankruptcy laws and is necessary to legitimize the delay and costs imposed upon parties to a bankruptcy."[20] Depending on the chapter under which the would-be debtor is seeking relief, a court will look to one of several Code sections to support the good-faith filing requirement. The two most frequently employed Code sections are 1112(b) and 1307(c), which permit dismissal or conversion of Chapter 11 and Chapter 13 petitions "for cause." Courts frequently find that bad faith constitutes "cause" under these sections.[21] In addition to dismissal and conversion to a Chapter 7, a finding of bad faith can also justify the granting of relief from the automatic stay, an award of sanctions against the debtor and/or its counsel, and sometimes retroactive "annulment" of the automatic stay.[22]

When a court addresses the bad-faith filing issue, the court applies a "sniff test": if the court smells something fishy, dismissal is likely. The bad-faith-filing test is a sniff test because most courts, including the Tenth Circuit, have found that the good or bad faith of a reorganizing petition

requires consideration of the "totality of the circumstances" and therefore does not hinge on any single factor.[23] In considering the totality of the circumstances, courts look for many so-called "badges of bad faith." Commonly cited badges of bad faith include:

(1) a debtor's ownership or interest in only one asset;
(2) improper prepetition conduct by the debtor;
(3) the presence of few unsecured creditors;
(4) the posting of the debtor's property for foreclosure coupled with an unsuccessful fight against the foreclosure in state court;
(5) the debtor and the principal creditor have litigated to a standstill in state court and the debtor has lost or been required to post a bond;
(6) the debtor evaded court orders by filing the petition;
(7) the debtor lacks an ongoing business or employees;
(8) the timing of the petition's filing is overly strategic;
(9) the debtor's motive for filing the petition is improper; and
(10) the debtor's actions negatively affected creditors, both before and after the debtor filed the petition.[24]

As one can see from the length of this noninclusive list, a huge range of factors is relevant and the bankruptcy court can pick among them to support or deny a finding of bad faith. Moreover, these factors are necessarily examined in light of the overall purposes of the bankruptcy system, which are ill-defined, evolving, and variable from courtroom to courtroom.[25] In short, one can identify no precise test by which a bankruptcy filing can be labeled a bad-faith filing.

Despite the absence of a precise test, several general considerations run throughout the bad-faith filing cases. First, courts will not permit debtors to file reorganization petitions "'solely to frustrate the legitimate efforts of a legitimate creditor to enforce [its] rights.'"[26] Frustration of creditors' rights can of course take a number of specific forms, several of which we address in more detail below. Thus, for example, a debtor's decision to file its petition in a court more than 700 miles from the location of the debtor's assets and creditors can evidence a bad-faith attempt to frustrate creditor rights.[27]

However, the intent to frustrate creditors does not alone establish bad faith. "[B]ecause a major purpose behind our bankruptcy laws is to afford a debtor some breathing room from creditors, it is almost inevitable that creditors will, in some sense, be 'frustrated' when their debtor files a bankruptcy petition."[28] Thus, closely tied to protection of creditors' rights is the general requirement that the debtor have some legitimate prospect of reorganization. When a creditor raises the issue of bad-faith filing, a debtor must generally "establish to the court's satisfaction that there exists the 'realistic possibility of an effective reorganization.'"[29] Beyond the likelihood of a successful reorganization, a debtor must intend to reorganize and cannot be "motivated by a desire *not to pay* his creditors rather than an *inability* to pay."[30] If a debtor has no real intent to reorganize, nor legitimate prospect of reorganization, a petition will likely be considered an attempt to frustrate creditor rights and therefore "an abuse of process–the unlawful exercise of a right or remedy."[31]

Attorneys for both creditors and debtors must be aware of the consequences of a petition's dismissal for bad-faith. For the creditor's attorney, successful dismissal of

a petition for bad-faith filing represents a significant victory because the entire bankruptcy case is dismissed, often early in the litigation. Moreover, courts may award sanctions against debtors and their counsel for bad-faith filings, thereby allowing creditors to recover their attorney fees.[32] It is for these reasons that debtors' attorneys must also be aware of the dangers posed by the bad-faith tag: "Dismissal of a bankruptcy case is the ultimate sanction . . . ."[33]

This Article highlights several of the most common badges of bad faith: (1) petitions filed on the eve of foreclosure, and one-asset, one-creditor debtors; (2) serial filing of petitions; and (3) bankruptcy filing as a litigation tactic.

III. PETITIONS FILED ON THE EVE OF FORECLOSURE, ONE-ASSET DEBTORS

A. Eve of Foreclosure Petitions

Perhaps the most commonly cited indicator of bad faith is a petition filed on the eve of a creditor's foreclosure on the debtor's property. In many of these cases the petition is quite literally filed on the "eve" of foreclosure.[34] Such filings are a product of the benefits offered by the automatic stay and often implicate several of the specific badges of bad faith listed above. Eve-of-foreclosure filings often follow unsuccessful attempts by the debtor to fight foreclosure in state court, often evidence overly-strategic timing by the debtor, and often indicate an improper motive in filing the petition. In short, courts often find such eve-of-foreclosure filings to be in bad faith when they are nothing more than last-ditch attempts to hang onto property for just a little while longer.

However, "[f]iling a petition on the eve of foreclosure, or to stop a foreclosure in progress, is not, standing alone, bad-faith conduct. Nor is it bad-faith conduct for a debtor to file on the eve of foreclosure with what then appears to be an unrealistic hope of the ability to reorganize."[35] The court will apply a totality of the circumstances test and likely examine the debtor's entire financial picture. Thus, for example, where the debtor files a Chapter 11 petition on the eve of foreclosure, but the debtor's assets are "still capable of forming the basis of a successful plan" and the debtor shows a "strong commitment" to seeing the plan through to completion, a creditor's claim of bad faith has been rejected.[36]

Eve-of-foreclosure cases often involve what has been termed the "new debtor syndrome." The new debtor syndrome is a Chapter 11 phenomenon "characterized by the creation or revitalization of a one-asset entity on the eve of foreclosure for the sole purpose of 'isolating investors from the insolvent property and its creditors.'"[37] In other words, the principals transfer the single asset to a shell entity which then immediately files for bankruptcy protection shortly before the creditor forecloses on the asset. Understandably, where courts diagnose the new debtor syndrome, petitions are often dismissed on bad-faith grounds as attempts "to delay or frustrate the legitimate efforts of secured creditors to enforce their rights."[38]

"Beyond the likelihood of a successful reorganization, a debtor must intend to reorganize and cannot be 'motivated by a desire not to pay his creditors rather than an inability to pay.'"

In such cases, as one California bankruptcy court explained, the court will "look to the substance of what has been done" to determine whether it has "detrimentally altered" any creditor's substantive or procedural rights with respect to assets which were available to creditors before the transfer to the shell entity.[39] However, as this same court went on to note, asset transfers to new entities on the eve of bankruptcy filings are not bad faith *per se*, but are rather mere evidence of "an improper state of mind." The court may find the filing to be in good faith "if the debtor was organized and the case was filed for a legitimate business reason with an eye toward legitimate reorganization."[40]

B. Single Asset, Single Creditor Cases

Closely tied to the eve-of-foreclosure cases are cases in which the debtor owns a single asset and may have only one creditor (or alternatively, one dominant secured or partially-secured creditor in addition to a few unsecured trade creditors or insider creditors). The debtor is generally a corporation or partnership and the single asset is often a large parcel of real estate consisting of income producing property such as a hotel, shopping center, or apartment complex. After the debtor defaults on its payments to the secured creditor and the parties exhaust all workout options, the debtor files bankruptcy to stay foreclosure.

A debtor's ownership of only one asset is a factor which has figured into many bad-faith dismissals and has been explicitly considered as a factor by the Tenth Circuit.[41] Of course, the fact that a debtor owns only one asset is not alone sufficient to justify dismissal, especially in light of the 1994 amendments to the Code.[42] However, a court will likely consider the debtor's ownership of a single asset in conjunction with the other facts of the case. For example, in weighing the debtor's ownership of a single asset, courts have considered whether there is "net equity" in the single asset in assessing the likelihood of successful reorganization.[43] Courts have also noted that a reorganization petition sought by a single-asset entity may be legitimate when the asset is an operating business; when the asset is a real estate development "nearing the end of construction whose completion would markedly enhance the asset's value"; or when the asset is a real estate venture that includes undeveloped property and the debtor filed the petition "to protect true owner equity when market conditions suggest the remedy of a debt restructuring, as opposed to simple liquidation."[44]

However, when the debtor's ownership of a single asset is paired with other factors, such as the debtor's lack of employees and lack of an ongoing operating business,[45] a finding that the petition was filed in bad faith is much more likely. Under such circumstances, "[r]esort to the protection of the bankruptcy laws is not proper . . . because there is no going concern to preserve, there are no employees to protect, and there is no hope of rehabilitation, except according to the debtor's 'terminal euphoria.'"[46]

IV. SERIAL FILING OF PETITIONS

The Code contains several explicit limitations on the filing of serial bankruptcy petitions. For example, a debtor cannot secure a Chapter 7 discharge within six years of filing a petition in a prior case and receiving a discharge under Chapters 7 or 11, nor, under some circumstances, can a

debtor receive a Chapter 7 discharge within six years of the filing of a Chapter 12 or 13 petition.[47] Moreover, a debtor may not file a petition under any chapter within 180 days (commonly called the "180-day lockout") of a dismissal for the debtor's willful failure to abide by orders of the court, for failure to prosecute the case, or for obtaining a voluntary dismissal after a creditor has requested relief from the automatic stay.[48] Courts have also extended the 180-day lockout to cases in which courts dismiss the debtors' petitions for bad-faith filing.[49]

Despite these limitations on serial filings, explicit statutory constraints on successive filings are noticeably absent in other contexts. For example, a debtor can generally file successive Chapter 13 petitions, a Chapter 13 petition following a Chapter 7 (sometimes called a "Chapter 20"), or successive Chapter 11 petitions.[50] However, both debtors and creditors should be aware that, in addition to the 180-day lockout, courts frequently employ the good-faith filing requirement to ensure that debtors do not abuse the system through such successive filings. Here again, the court will examine the totality of the circumstances to determine whether the debtor filed the subsequent petition in bad faith.

For example, in *In re Eisen*, a second Chapter 13 petition, filed shortly after a prior Chapter 13 petition was dismissed for bad faith, was itself dismissed for bad faith and resulted in sanctions against the debtor.[51] Similarly, in *In re Rasmussen*, the Tenth Circuit dismissed for bad faith a Chapter 13 which followed a Chapter 7 discharge. In *Rasmussen*, the debtor was unable to file a Chapter 13 initially because his debts exceeded the jurisdictional dollar limit. The debtor therefore filed Chapter 7 and received a discharge of all but one debt which the court ruled was nondischargeable due to the debtor's fraudulent conduct. When the debtor subsequently sought the discharge of that remaining debt through nominal payments in a Chapter 13, the court dismissed the Chapter 13 case, ruling that it was a bad faith "manipulation of the system" and that to hold otherwise would be "tantamount to a discharge of [the debt that the bankruptcy court ruled was nondischargeable in the Chapter 7 proceeding.]"[52]

Where successive Chapter 11s are concerned, "the good faith inquiry must focus on whether the second petition was filed to contradict the initial bankruptcy proceedings."[53] Thus, successive Chapter 11 petitions may be justified when a prior confirmed Chapter 11 plan has not yet been "substantially consummated" under section 1127(b); when an unanticipated change of circumstances has occurred; or when the second Chapter 11 is a liquidating Chapter 11 filed because the original plan simply failed.[54] However, when the debtor files the successive Chapter 11 petition "with the aim of evading responsibilities under the old reorganization plan," the petition's dismissal for bad-faith filing is probable.[55] For example, in *In re Elmwood Development Co.*, the Chapter 11 debtor reached a settlement agreement with its principal creditor, agreeing that the creditor would have an absolute right to foreclose if the debtor failed to satisfy the creditor's claim by a specific date. The bankruptcy court approved the settlement agreement and the debtor incorporated the agreement into the plan. After the debtor later defaulted, the debtor filed a second Chapter 11 petition to avoid the foreclosure the debtor and creditor had bargained for in the first proceeding. The court dismissed the debtor's second petition for bad faith.[56]

"[W]hen the debtor files the successive Chapter 11 petition 'with the aim of evading responsibilities under the old reorganization plan,' the petition's dismissal for bad-faith filing is probable."

V. BANKRUPTCY FILING AS A LITIGATION TACTIC

When a debtor files a bankruptcy petition solely as a litigation tactic or to avoid an adverse judgment, the court is likely to find that the debtor filed the petition in bad faith. Thus, where the debtor filed the petition solely to collaterally attack a judgment, to avoid a judgment (or an anticipated judgment), or to avoid the expense and trouble of obtaining a stay and posting bond on appeal, dismissal for bad faith is likely. The likelihood of dismissal in these cases generally hinges upon whether other legitimate reasons for the bankruptcy filing exist, beyond the attempted attack upon the judgment. In enunciating the applicable standard, the Second Circuit has explained that "because bankruptcy filings must be made in good faith, an entity may not file a petition for reorganization which is solely designed to attack a judgment collaterally–the debtor must have some intention of reorganizing."[57] This standard generally translates to the requirement that a debtor must be experiencing–or at least forsee–some financial distress.[58]

Courts have applied a similar standard in cases where debtors file bankruptcy petitions to stay execution by a judgment creditor and to avoid the hassle and expense of posting bond on appeal. Bankruptcy's automatic stay is quicker and more pervasive than other stays, not to mention less costly than most supersedeas bonds (surety companies commonly require cash collateral equal to the amount of the judgment before they will issue an appeal bond). Moreover, a trial court may be unwilling to grant the judgment debtor a stay. When a debtor files a bankruptcy petition to stay execution on a judgment or to avoid posting bond, the good faith of the petition will likely depend upon whether the debtor has sufficient assets to satisfy the judgment or to post bond without severely disrupting the debtor's business. If the debtor can pay the judgment or bond, the court will likely view the filing as an abuse of the bankruptcy system and an attempt to skirt state court procedural rules.[59] In contrast, when debtors are simply unable to pay the judgment or bond, or when payment would severely disrupt their business, petitions are often upheld as good faith efforts to obtain the "fresh start" offered by bankruptcy.[60]

This latter circumstance existed in the Fifth Circuit's benchmark *In re Little Creek Development Co.* decision.[61] In *Little Creek*, the debtor filed a state court action against its creditor to preempt foreclosure proceedings on the debtor's sole asset. The state court granted the debtor a preliminary injunction conditioned upon the debtor's posting of a substantial bond which the debtor was subsequently unable to pay. The debtor then filed a Chapter 11 petition to stave off foreclosure. In the bankruptcy proceeding the debtor raised several issues already raised in the pending state court proceeding, and the debtor's counsel admitted that the debtor had filed the peti-

tion because it was unable to post the state court bond. Despite these facts, the Fifth Circuit found that the debtor's litigation tactics and its counsel's admissions regarding the bond did not "rise to the level of egregiousness necessary to conclude that the reorganization process [was] being perverted."[62] The outcome in Little Creek could have been quite different if the debtor had the funds to post bond, but filed its petition merely to avoid doing so.

Moreover, though the *Little Creek* court did not find that the debtor's attempt to relitigate the state-court issues in the bankruptcy court constituted bad faith in that particular case, counsel should nonetheless be wary of such attempts to forum shop or relitigate issues in bankruptcy court. Bankruptcy courts seldom condone litigation of issues that are pending or already decided in other courts. Consequently, under these circumstances, a court may favorably consider a motion to dismiss for bad-faith filing or a motion for lift of stay.

A final example of the use of a bankruptcy filing as a litigation tactic is the instance where bankruptcy is filed during state court proceedings by a debtor who sees an adverse judgment looming on the horizon. Such filings are often found to be in bad faith and dismissed. For example, in *In re Dixie Broadcasting, Inc.*, a petition was dismissed for bad faith where the debtors, after more than two years of litigation in state court, filed Chapter 11 during a lunch recess immediately following the court's announcement that it was ready to rule against the debtors.[63] A similarly filed Chapter 11 petition was dismissed for bad faith in In re Kissinger, where the debtor, who was being sued for legal malpractice and knew he was losing the case, filed the petition during a recess just before the case went to the jury.[64]

VI. CONCLUSION

Attorneys for both creditors and debtors must scrutinize the facts of each case with an eye to potential claims of bad-faith filing. A claim of bad faith is no doubt attractive to the creditor who suddenly finds that her debtor has fled to the shelter of the bankruptcy system. Indeed, if creditors look hard enough, they will likely find bits and pieces of the various elements of bad faith in just about every case. It is the totality of the circumstances that matters, however.

Both creditors and courts should remember that bad-faith dismissal is a drastic judge-made remedy. "Dismissal of a [reorganization] case for bad-faith filing is a power that should be exercised with extreme caution" and "should not be judicially developed as an easy alternative to other post-petition creditor remedies, thereby, subverting the reorganization and confirmation scheme of the Code."[65] Too quick a dismissal can do injustice, especially where the debtor has not yet had the opportunity to propose a plan of confirmation and attempt to get it confirmed.[66] Other statutorily explicit remedies are available under the Code and should therefore be looked to first: "Creditors who become entangled in hopeless . . . cases filed by debtors have remedies of relief from stay, adequate protection, and dismissal or conversion based on the enumerated grounds in 11 U.S.C. § 1112(b)."[67] In other words, both creditors and courts should be reluctant to immediately allege bad faith. However, in those egregious cases where a debtor has no legitimate prospect of reorganization and is motivated by the desire to stall or frustrate its creditors' rights, the petition should probably not be filed, and where it is, creditors should then consider seeking its dismissal.

[1] *See* "Bankruptcies Explode", *Nat'l L.J.*, Sept. 1, 1997, at A11; *See also* Christine Dugas, "Bankruptcy Stigma Lessens", *USA Today*, June 10, 1997, at A1 (stating that nationwide, personal bankruptcy filings increased 29% from 1995 to 1996) [hereinafter Dugas, Stigma].

[2] *See* Stephen Obereck, "Utah Bankrupticies at Record High", *Salt Lake Trib.*, Nov. 8, 1997, at A-1, A-16; Stephen Obereck, "Utah Boom Can't Slow the Busts", *Salt Lake Trib.*, July 11, 1997, at A-1, A-10; 1997 Statistics, United States Bankruptcy Court, District of Utah, Comparison of the Percentage of Filings by Chapter for the Last Five Years (statistics through Sept. 30, 1997) (on file with United States Bankruptcy Court, District of Utah). The bankruptcy court is currently averaging 986 cases filed per month in Utah, and estimates that if current filing rates continue, 11,832 cases will be filed in 1997. *See id.*

[3] U.S. Const. art. I, § 8, cl. 4.

[4] *See Century Bank v. Peacock* (*In re* Peacock), 87 B.R. 657, 659 (Bankr. D. Colo. 1988) (holding that contract's bankruptcy default clause imposes penalty on debtors "for exercising their constitutional right to file bankruptcy"); *In re* Winters, 69 B.R. 145, 146 (Bankr. D. Or. 1986) (finding that contract provision providing for default imposed penalty on exercise of federal right); 7 Samuel Williston, A Treatise on the Law of Contracts § 15:10 (Richard A. Lord ed., 4th ed. 1997) (stating that "an agreement waiving the right to file a petition in bankruptcy" is "illegal as against public policy").

[5] Dugas, Stigma, *supra* note 1, at A2.

[6] *See* Christine Dugas, "Congress Takes up Bankruptcy Law Reform", *USA Today*, June 10, 1997, at 3B [hereinafter Dugas, Reform]. Utah's homestead exemption is limited to $8,000 for head of family, $2,000 for spouse, and $500 for each dependent. *See* Utah Code Ann. § 78-23-3(1) (1996).

[7] Pub. L. No. 103-394, 108 Stat. 4106 (1994); *see generally* David E. Leta, "Highlights of the Bankruptcy Reform Act of 1994" (pts. 1 & 2), *Utah B.J.*, Mar. 1995, at 11, *Utah B.J.*, Apr. 1995, at 7 (offering overview of Bankruptcy Reform Act).

[8] *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1071 (5th Cir. 1986) (finding insufficient evidence to establish lack of good faith in filing Chapter 11 petition).

[9]*See CFTC v. Weintraub*, 471 U.S. 343, 352-55 (1985), 105 S. Ct. 1986, 85 L. Ed. 2d 372 (discussing extensive powers and duties of trustee which include investigation of debtor's financial affairs).

[10]11 U.S.C. § 1104(a).

[11]*See id.* § 1104(c).

[12]*See* 18 U.S.C. §§ 151-57.

[13]*See* Dugas, Reform, *supra* note 6, at 3B (discussing proposed reforms). The National Bankruptcy Review Commission issued its report to Congress and the President on October 20, 1997. The 1300 page report is available on the Commission's Web site. *See* National Bankruptcy Review Commission, *Report of the National Bankruptcy Review Commission*, (visited Nov. 8, 1997) <http://www.nbrc.gov>.

[14]*See* 11 U.S.C. § 1104(a).

[15]*See id.* § 727(c), (d).

[16]*See id.* § 362(d)-(f).

[17]*See id.* §§ 1129(a)(3), 1225(a)(3), 1325(a)(3). In comparing the good-faith filing requirement for petitions with the good-faith filing requirement for plans of reorganization, one commentator has noted that "[y]ears usually pass between petition filing and plan confirmation, so the difference is significant." Janet A. Flaccus, "Have Eight Circuits Shorted? Good Faith and Chapter 11 Bankruptcy Petitions", 67 *Am. Bankr. L.J.* 401, 405-07 (1993).

[18]The good faith filing requirement is not without its critics. For example, in *In re Victoria Ltd. Partnership*, despite the fact that "[g]ood faith, like apple pie, is difficult to oppose," the court rejected the good-faith filing doctrine as contrary to the "Code, its legislative history, Supreme Court precedent, and logic." 187 B.R. 54, 54 (Bankr. D. Mass. 1995); *see also Carolin Corp. v. Miller*, 886 F.2d 693, 707 (4th Cir. 1989) (Widener, J., dissenting) (arguing that repeal by Congress of express good-faith filing provisions in Bankruptcy Act may indicate good-faith filing requirement not intended under Code and that judicial creation of such a requirement may violate *Erie Railroad*); Flaccus, *supra* note 17, *passim* (arguing against imposition of good faith filing requirement).

[19]*Merrill v. Allen* (*In re* Universal Clearing House Co.), 60 B.R. 985, 994 (D. Ut. 1986) (Winder, J.).

[20]*Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1072 (5th Cir. 1986).

[21]*See, e.g.*, Gier v. Farmers State Bank (*In re* Gier), 986 F.2d 1326, 1329 (10th Cir. 1993) (addressing application of § 1307(c)); *Universal Clearing House*, 60 B.R. at 993 (addressing application of § 1112(b)); *Carolin*, 886 F.2d at 699 (same); *In re* North Redington Beach Assocs., Ltd., 91 B.R. 166, 167 (Bankr. D. Fla. 1988) (noting that "cause [under § 1112(b)] now has been construed to include the bad faith of the Debtor to seek relief under [Chapter 11]").

[22]*See Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc.* (*In re* Dixie Broadcasting, Inc.), 871 F.2d 1023, 1026 (11th Cir. 1989) (granting relief from the automatic stay due to debtor's bad-faith filing of petition), *cert. denied*, 493 U.S. 853 (1989); *Albany Partners, Ltd. v. W.P. Westbrook, Jr.* (*In re* Albany Partners, Ltd.), 749 F.2d 670, 674-675 (11th Cir. 1984) (granting retroactive relief from automatic stay due to debtor's bad-faith filing of petition); *infra* note 32 and cases cited therein (awarding sanctions against debtor and/or its counsel for bad-faith filing of petition).

[23]*Gier*, 986 F.2d at 1329 (Chapter 13); *accord Trident Assocs. Ltd. Partnership v. Metropolitan Life Ins. Co.* (*In re* Trident Assocs. Ltd. Partnership), 52 F.3d 127, 131 (6th Cir. 1996) (Chapter 11), *cert. denied*, 116 S. Ct. 188 (1995); *Elmwood Dev. Co. v. General Elec. Pension Trust* (*In re* Elmwood Dev. Co.), 964 F.2d 508, 510 (5th Cir. 1992) (Chapter 11).

[24]*See Gier*, 986 F.2d at 1329; Trident, 52 F.3d at 131; *Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1072-73 (5th Cir. 1986).

[25]*See* Lawrence Ponoroff & F. Stephen Knippenberg, "The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy", 85 *Nw. U. L. Rev.* 919, 944-91 (1991) (discussing debate concerning purposes of bankruptcy).

[26]*Udall v. FDIC* (*In re* Nursery Land Dev., Inc.), 91 F.3d 1414, 1415 (10th Cir. 1996) (quoting bankruptcy court below); *accord Phoenix Picadilly, Ltd. v. Life Ins. Co. of Va.* (*In re* Phoenix Picadilly), 849 F.2d 1393, 1394 (11th Cir. 1988); *Albany Partners*, 749 F.2d at 674.

[27]*See Phoenix Piccadilly*, 849 F.2d at 1395.

[28]*Baker v. Latham Sparrowbush Assocs.* (*In re* Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 228 (2d Cir. 1991) (holding that Chapter 11 debtor did not file petition in bad faith).

[29]*Carolin Corp. v. Miller*, 886 F.2d 693, 698 (4th Cir. 1989) (citation omitted); *see also Nursery Land*, 91 F.3d at 1416; *Albany Partners, Ltd. v. W.P. Westbrook, Jr.* (*In re* Albany Partners, Ltd.), 749 F.2d 670, 674 (11th Cir. 1984).

[30]*Gier v. Farmers State Bank* (*In re* Gier), 986 F.2d 1326, 1330 (10th Cir. 1993) (emphasis added); *see In re* North Redington Beach Assocs., Ltd., 91 B.R. 166, 169 (Bankr. D. Fla. 1988) ("[T]he real test [of good faith] . . . is the presence of honest intention of the Debtor and some real need and real ability to effectuate the aim of reorganization . . . .").

[31]*In re* Mill Place Ltd. Partnership, 94 B.R. 139, 142 (Bankr. D. Minn. 1988) (holding that eve-of-foreclosure Chapter 11 petition filed in bad faith).

[32]*See Udall v. FDIC* (*In re* Nursery Land Dev., Inc.), 91 F.3d 1414, 1416 (10th Cir. 1996) (awarding sanctions against debtor's principal and debtor's attorney); *Jones v. Bank of Santa Fe* (*In re* Courtesy Inns Ltd.), 40 F.3d 1084, 1089 (10th Cir. 1994) (holding that 11 U.S.C. § 105(a) permits bankruptcy court to award sanctions for bad-faith filing of petition); *Marsch v. Marsch* (*In re* Marsch), 36 F.3d 825, 829-30 (9th Cir. 1994) (finding that sanctions can be imposed for bad-faith filing under Bankr. Rule P. 9011).

[33]*In re* Marion St. Partnership, 108 B.R. 218, 223 (Bankr. D. Minn. 1989); *see also Mill Place*, 94 B.R. at 141 (urging caution in dismissing petitions on bad-faith grounds).

[34]*See, e.g., Nursery Land*, 91 F.3d at 1415; *Courtesy Inns*, 40 F.3d at 1085; *Trident Assocs. Ltd. Partnership v. Metropolitan Life Ins. Co.* (*In re* Trident Assocs. Ltd. Partnership), 52 F.3d 127, 129-30 (6th Cir. 1996).

[35]*Mill Place*, 94 B.R. at 142.

[36]*In re* I-95 Technology-Industrial Park, 126 B.R. 11, 16 (Bankr. D. R.I. 1991).

[37]*Carolin Corp. v. Miller*, 886 F.2d 693, 704 (4th Cir. 1989); accord Trident Assocs., 52 F.3d at 132.

[38]*Albany Partners, Ltd. v. W.P. Westbrook, Jr.* (*In re* Albany Partners, Ltd.), 749 F.2d 670, 674 (11th Cir. 1984); *see also Phoenix Piccadilly, Ltd. v. Life Ins. Co. of Va.* (*In re* Phoenix Piccadilly, Ltd.), 849 F.2d 1393, 1394 (11th Cir. 1988).

[39]*Sundstrom Mortgage Co., Inc. v. 2218 Bluebird Ltd. Partnership* (*In re* 2218 Bluebird Ltd. Partnership), 41 B.R. 540, 543 (Bankr. S.D. Cal. 1984) (Chapter 11).

[40]*Id.*

[41]*See, e.g., Udall v. FDIC* (*In re* Nursery Land Dev., Inc.), 91 F.3d 1414, 1416 (10th Cir. 1996) (citing both presence of only one asset and one creditor as badges of bad faith in Chapter 11 case); *Jones v. Bank of Santa Fe* (*In re* Courtesy Inns, Ltd., Inc.), 40 F.3d 1084, 1090 (10th Cir. 1994) (finding that ownership of only one asset was badge of bad faith).

[42]The Bankruptcy Reform Act of 1994 added new provisions for cases involving "single asset real estate." Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 218, 108 Stat. 4106 (adding § 54B, "single asset real estate," to 11 U.S.C. and amending 11 U.S.C. § 362(d) to provide for relief from stay in some circumstances involving "single asset real estate"); *see generally*, Leta, Part 1, *supra* note 7, at 17-18 (providing brief synopsis of singe asset real estate amendment and posing questions regarding its implications). While the 1994 amendments implicitly recognize the legitimacy–under certain circumstances–of petitions filed by debtors holding real estate as their sole asset, it is yet unclear

what effect, if any, this will have on ownership of a single asset as a badge of bad faith. It is worth noting that the Tenth Circuit, in Nursery Land, a 1996 decision, noted that ownership of a singe asset is a legitimate indicator of bad faith and omitted any mention of the 1994 amendments. *See Nursery Land*, 91 F.3d at 1416.

[43]*Carolin Corp. v. Miller*, 886 F.2d 693, 705 (4th Cir. 1989).

[44]*Humble Place Joint Venture v. Fory* (*In re* Humble Place Joint Venture), 936 F.2d 814, 818 (5th Cir. 1991) (Chapter 11).

[45]*See, e.g., Nursery Land*, 91 F.3d at 1416; Humble Place, 936 F.2d at 817; *see generally* Flaccus, *supra* note 17, at 405-07 (discussing single asset cases).

[46]*Little Creek Dev. Co. v. Commonwealth Mortgage Corp.* (*In re* Little Creek Dev. Co.), 779 F.2d 1068, 1073 (5th Cir. 1986).

[47]*See* 11 U.S.C. § 727(a)(8), (9).

[48]*See id.* § 109(g); see also Bankr. D. Ut. LBR 7041-1 ("Dismissal–Voluntary and for lack of prosecution"). Section 109(g) must be read in conjunction with 11 U.S.C. § 349, which governs the effect of a dismissal and also limits the bankruptcy court's authority to deny access to the bankruptcy court for any period longer than 180 days. *See Frieouf v. United States* (*In re* Frieouf), 938 F.2d 1099, 1104-05 (10th Cir. 1991) (holding bankruptcy court exceeded its authority under 11 U.S.C. § 349 when it denied debtor all access to bankruptcy court for longer than 180 days).

[49]*See Frieouf*, 938 F.2d at 1104-05; *Sundstrom Mortgage Co., Inc. v. 2218 Bluebird Ltd. Partnership* (*In re* 2218 Bluebird Ltd. Partnership), 41 B.R. 540, 545-46 (Bankr. S.D. Cal. 1984) (ordering that, as a consequence of debtor's bad-faith filing, neither debtor nor its principals could file any bankruptcy petition for six months without obtaining court order).

[50]*See Johnson v. Home State Bank*, 501 U.S. 78, 87, 111 S. Ct. 2150, 2156 (1991) (stating that Chapter 13 petition filed after debtor received Chapter 7 discharge permissible under Code); *Fruehauf Corp. v. Jartran, Inc.* (*In re* Jartran, Inc.), 886 F.2d 859, 869 (7th Cir. 1989) (stating "there is no prohibition of serial good faith Chapter 11 filings in the Code").

[51]*See Eisen v. Curry* (*In re* Eisen), 14 F.3d 469, 470-71 (9th Cir. 1994). *See generally* Richard I. Aaron, *Bankruptcy Law Fundamentals* § 13.01[2] at 13-10 to -11 (1997) (discussing dismissal for bad faith in successive Chapter 13 filings).

[52]*Pioneer Bank of Longmont v. Rasmussen* (*In re* Rasmussen), 888 F.2d 703, 705, 706 (10th Cir. 1989) (per curiam). Rasmussen technically involved denial of confirmation of the plan for lack of good faith under 11 U.S.C. § 1325(a)(3). However, the Tenth Circuit's language arguably embraces dismissal of petitions for filing in bad faith, while its reasoning certainly extends that far.

[53]*Elmwood Dev. Co. v. General Elec. Pension Trust* (*In re* Elmwood Dev. Co.), 964 F.2d 508, 511 (5th Cir. 1992).

[54]*See id.*; *In re* Jartran, 886 F.2d at 866-67 (holding that successive liquidating Chapter 11 plan which was filed in good faith is permissible).

[55]*In re* Jartran, 886 F.2d at 867-68.

[56]*See* Elmwood Dev., 964 F.2d at 510-11.

[57]*Baker v. Latham Sparrowbush Assocs.* (*In re* Cohoes Indus. Terminal, Inc.), 931 F.2d 222, 228 (2d Cir. 1991) (holding that Chapter 11 petition was not filed in bad faith because debtor's sole purpose in filing was not to delay execution of state court judgment).

[58]*See id.* ("Although a debtor need not be in extremis in order to file such a petition, it must, at least, face such financial difficulty that, if it did not file at that time, it could anticipate the need to file in the future.")

[59]*See Marsch v. Marsch* (*In re* Marsch), 36 F.3d 825, 828-29 (9th Cir. 1994) (affirming dismissal of bankruptcy petition where petition was filed solely to delay collection of judgment and to avoid posting appeal bond).

[60]*See, e.g., Reardon v. Kisberg* (*In re* Kisberg), 150 B.R. 354, 358 (Bankr. M.D. Pa. 1992) (finding that Chapter 7 petition filed by wife after imposition of adverse divorce court judgment not in bad faith because filing was legitimate effort to obtain "fresh start" contemplated under Code); *In re* Holm, 75 B.R. 86, 87 (Bankr. N.D. Cal. 1987) ("[A] Chapter 11 filing is in good faith and may be used to replace an appeal bond if the judgment against the debtor is so large that the debtor faces sever disruption of his business if enforcement of the judgment is not stayed.").

[61]779 F.2d 1068.

[62]*Id.* at 1073.

[63]*Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc.* (*In re* Dixie Broadcasting, Inc.), 871 F.2d 1023, 1027 (11th Cir. 1989), *cert. denied*, 493 U.S. 853 (1989)

[64]*Mataya v. Kissinger* (*In re* Kissinger), 72 F.3d 107, 108-09 (9th Cir. 1995) (affirming dismissal of petition and retroactive annulment of automatic stay).

[65]*In re* Mill Place Ltd. Partnership, 94 B.R. 139, 141 (Bankr. D. Minn. 1988).

[66]*See In re* North Redington Beach Assocs., Ltd., 91 B.R. 166, 169-70 (Bankr. D. Fla. 1988) (denying motion to dismiss on bad-faith grounds and permitting debtor to propose plan of reorganization and to attempt to obtain confirmation).

[67]*Mill Place*, 94 B.R. at 141.

Grand Staircase-Escalante National Monument: Presidential Discretion Plus Congressional Acquiescence Equals a New National Monument

By David Negri

On September 18, 1996, President Clinton, by Presidential Proclamation, established the Grand Staircase-Escalante National Monument encompassing 1,700,00 acres in Kane and Garfield Counties.[1] This action was taken pursuant to the authority granted the President by the Antiquities Act to designate national monuments based upon "historic or scientific interest."[2] In the October issue of the Bar Journal, William Pendley vehemently criticized the President for establishment of the Monument and argued that the President's action was unlawful. Contrary to Pendley's assertions, the Monument designation is well within the President's authority under the Antiquities Act, is amply supported by the Presidential Proclamation itself and, in fact, accomplishes the stated purpose of the Antiquities Act – protection of an area of scientific and historic significance. If history if my guide, and if judicial precedent has any meaning, legal attacks on the establishment of Grand Staircase-Escalante are certain to fail.

The best starting point for analyzing President Clinton's action is the Presidential Proclamation establishing the Monument. Although Pendley derides the President for "dron[ing] on and on," the Proclamation is a concise recognition of the extraordinary opportunities for historic and scientific study found in the Monument. The President's staff did its homework and presented, within the Proclamation, a compelling picture of the historic and scientific values found within the Monument. The Proclamation rightfully notes that the area designated as the Grand Staircase-Escalante Monument provides "exemplary opportunities for geologists, paleontologists, archeologists, historians, and biologists." The following features of the Monument form the basis of and are explicitly relied upon in the President's Proclamation:

1. Some of the more striking geologic features in the southwest, including the twisted rock of the Cockscomb monocline, the canyon-cut uplift known as the Waterpocket Fold, the rugged canyon country of the Paris and Escalante regions, the geologic stairway known as the Grand Staircase, and numerous arches and natural bridges.
2. World-class paleontological sites, in the Circle Cliffs, the Kalparowitz Plateau, and the Straight Cliffs.
3. Countless archeological sites, including rock art panels, occupation sites, campsites, and granaries dating from the prehistoric times of the Anasazi and Fremont.
4. Historic sites from the Navajos, the Southern Paiutes, the Powell expedition, and Mormon pioneers.
5. The incredible biology of the area – spanning five life zones and containing relict plants and grasslands, thousand-year-old pinyon and juniper, impressive fauna, and relatively intact ecosystems.[3]

Anyone who has spent any significant amount of time in southern Utah in general, and the Grand Staircase-Escalante area in particular, should have little trouble understanding that the region is blessed in all the respects noted by the President. Completely ignoring its scenic value, southern Utah is a treasure trove for scientists of many disciplines. As just one example, the scientific value of the Grand Staircase area was recognized as early as 1880 by geologist Clarence Dutton's *Report of the Geology of the High Plateaus of Utah*. The Presidential Proclamation is no more than a recognition of the scientific and historical significance of the Grand Staircase-Escalante area. This significance has been rather thoroughly documented by the Bureau of Land Management's listing of numerous geologic, paleontologic, prehistoric, historic and biological areas and sties within the Monument.[4]

As such, arguments that the designation of Grand Staircase-Escalante was unlawful are, to say the least, questionable. The Antiquities Act grants the President broad powers to designate areas of historic and scientific value. These powers, by the explicit language of the Act, are to be exercised in the President's discretion. There certainly is no fundamental legal flaw in

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the President's Proclamation; on its face, it is a lawful exercise of presidential power under the Antiquities Act. Indeed, even assuming that the factual basis of the President's Proclamation is subject to judicial review, it should be clear to anyone with even a perfunctory knowledge of the area that the Proclamation accurately describes the land and features contained within the Monument. To conclude that the entire area that now composes the Grand Staircase-Escalante National Monument is not an area of exceptional scientific and historic interest is to deny the reality of what is on the ground.

Similarly, it is difficult to quarrel, at a factual level, with the Proclamation's assertion that the Monument boundaries are the "smallest area compatible with the proper care and management of the objects to be protected." How does one properly care for and manage the shale badlands of the Blues; the 42-mile long escarpment known as the Straight Cliffs; the red and rugged coal-fired Burning Hills; hundred-foot waterfalls; dinosaur, crocodile, and mollusk fossils; the best record of Late Cretaceous terrestrial life in the world; riparian corridors which connect high mountains with desert lowlands; relict populations of plants and trees; eleven plant species found nowhere else in the world; thousands of prehistoric sties, covering at least 8,000 years of prehistory; and Mormon trails and settlements and other historic routes from the 19th century?[5] A quite persuasive argument could be made that, given proper care and management as the goal, a much larger area than that chosen should have been considered.

Additionally, the current fervor worked up by the creation of Grand Staircase-Escalante, although quite captivating, is nothing new. Monument designations often have been opposed initially by local interest who wish to use the affected area as they see fit.

Lawsuits have been filed, and the same arguments now raised in opposition to Grand Staircase-Escalante have been forcefully advocated in public forums and courts of law. In the courts, the results have been consistent and clear: Presidential designations under the Antiquities Act have been uniformly upheld.

The Antiquities Act has been used at least 103 times by a long list of Presidents of both parties: Taft, Hoover, Coolidge, T. Roosevelt, F.D. Roosevelt, Harding, Wilson, Truman, Eisenhower, Kennedy, Johnson, Ford, Carter, and Clinton. The Act has a long history in Utah. Zion, Bryce Canyon, Arches, and Capitol Reef National Parks all initially were protected by Presidential Proclamation under the Antiquities Act. Natural Bridges, Rainbow Bridge, Dinosaur, Timpanogos Cave, and Cedar Breaks National Monuments similarly were established by Antiquities Act Proclamation.[6]

Most of these designations have been relatively non-controversial. Several, however, have encountered opposition similar to that directed at Grand Staircase-Escalante. Four times litigants have challenged monument designations under the Antiquities Act. Four times the courts, including the United States Supreme Court, have rebuffed such challenges and found the presidential actions lawful.

"The factors which the Court used to bring the Grand Canyon within the ambit of the Antiquities Act – geology, erosion, and general scientific interest – are not dissimilar to the interests noted in the Grand Staircase-Escalante Proclamation."

In 1908, President Theodore Roosevelt established 808,120 acres of public land in northern Arizona as Grand Canyon National Monument.[7] The Presidential Proclamation justified creation of the Monument by stating only that the Grand Canyon "is an object of unusual scientific interest, being the greatest eroded canyon within the United States, and it appears that the public interest would be promoted by reserving it as a National Monument, with such other land as is necessary for its proper protection."[8]

In *Cameron v. United States*, the first legal challenge to presidential authority under the Antiquities Act, the monument designation was attacked by a mining claimant on the grounds that there was "no authority for its creation."[9] The Supreme Court had little difficulty in dispatching with such a claim, finding that the declaration was within presidential authority under the Antiquities Act. The Court relied upon the President's Proclamation and added:

> [The Grand Canyon] 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."[10]

Thus, in the first analysis of the Antiquities Act by the Supreme Court, the Court did not limit the range of presidential authority under the Act to that of preserving archeological sites and gave the Act an expansive interpretation. The factors which the Court used to bring the Grand Canyon within the ambit of the Antiquities Act – geology, erosion, and general scientific interest – are not dissimilar to the interests noted in the Grand Staircase-Escalante Proclamation.

A second chance for the Supreme Court to visit the Antiquities Act was provided by President Truman's 1952 inclusion of an area known as Devil's Hole in Death Valley National Monument. Devil's Hole is a deep limestone cavern in Nevada with an underground pool home to a relict species of fish. Although the primary issue facing the Court was one of reserved federal water rights,[11] the petitioners argued that the Antiquities Act was limited to protection of archeological sites and did not give the President the authority to reserve a pool.[12] The Court disagreed, stating that the Antiquities Act is not so limited and held that the Monument designation, pertaining to "objects of historic or scientific interest," came within the language of the Act.[12]

Two other challenges to presidential authority under the Antiquities Act have been decided at district court level. The state of Wyoming, after establishment of Jackson Hole National Monument, filed suit to void the underlying Proclamation and restrain the Interior Department from managing and controlling the Monument area.[14] The court heard evidence from both sides concerning the land within the Monument.[15] The court noted the reaction to the Monument included the circulation of "argument and propaganda . . . in forums and through the press of the Nation." The arguments against Jackson Hole, according to the court, included assertions of "encroachment upon the State's sovereignty over lands within its boundaries by adding to

the already large acreage of public lands over which the Federal government exercises authority, more lands and more restrictive measures, thereby retarding the State's growth and development."[16] The state argued, as does Pendley, that the court should look beyond the Proclamation to supposedly improper presidential motives.[17]

The court would have none of it, holding that "[s]uch discussions are of public interest but are only applicable as an appeal for Congressional action."[18] The court explained its reasoning:

> [I]f the Congress presumes to delegate its inherent authority to Executive Departments which exercise acquisitive proclivities not actually intended, 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.[19]

The court held that both the object of the Monument designation and the appropriate size of the Monument were delegated to the President and that it was inappropriate for the judiciary to interfere in a controversy between Congress and the Executive.[20]

By far the largest use of the Antiquities Act, in terms of acreage affected, was made by President Carter in Alaska. On December 1, 1978, Carter established 15 separate National Monuments and added acreage to two others.[21] The total amount of federal land affected by the designations was 55,955,000 acres.[22] The only court decision which reached the issue of presidential authority under the Antiquities Act to create these Monuments rejected a narrow interpretation of the Act's terms, found that the clause "other objects of historic or scientific interest," was meant to enlarge presidential authority beyond archeological structures, and held that there was a consistent and long-established executive practice of a broad exercise of presidential authority and Congressional acquiescence to such practice.[23]

Although Pendley makes light of the congressional acquiescence argument, there is little doubt that congressional inaction in response to Executive action has shaped judicial analysis of federal land withdrawals.[24] Indeed, the seminal case in the area of congressional acquiescence, *United States v. Midwest Oil Co.*, involved presidential withdrawals of federal lands from mining location, entry, and disposal.[25] Such withdrawals were not explicitly sanctioned by Congress[26] and were, arguably, contrary to policy as expressed by statute.[27] The Court rejected suggestions that the President was granted such powers by the Constitution but found a "long-continued practice" of presidential withdrawals, that Congress had apparently recognized such practice and acquiesced in its exercise, and that there was, therefore, an implied delegated authority to make withdrawals of public lands.[28]

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The case for Congressional acquiescence under the Antiquities Act is much stronger than that which led the *Midwest Oil* decision. The implied authority found in *Midwest Oil* was directly contrary to Congressional policy, explicitly recognized in statute, that all mineral lands were open and available to the public.[29] The Antiquities Act, however, grants the President broad authority – designation of any lands which have "historic or scientific interest" – which authority has been broadly exercised by numerous Presidents. The acquiescence of Congress has been in a broad interpretation of the Act, rather than in powers not sanctioned (or denied) by statute.

That such acquiescence has not occurred is hard to argue. Pendley contends that creation of Grand Staircase-Escalante "circumvents . . . the withdrawal provisions of FLPMA."[30] Creation of a national monument has little to do with FLPMA and, indeed, is not an exercise of presidential authority granted by FLPMA. Yet, FLPMA provides the clearest indication of Congressional acquiescence in a broad reading of presidential authority under the Antiquities Act. FLPMA, possibly the most comprehensive attempt at public lands management enacted by Congress, explicitly repealed almost all sources of executive withdrawal authority. One notable exception is the Antiquities Act.[31] The conclusion that, in so doing, Congress has sanctioned the broad authority exercised by numerous Presidents under the Antiquities Act is inescapable. The few negative congressional responses to specific monument designations that have occurred[32] are dwarfed by congressional failure to repeal or even limit the Act when the entire system of federal land management was on the legislative table.

Another factor strongly suggesting that establishment of Grand Staircase-Escalante is unlikely to be overturned by the courts is the judiciary's reluctance to review discretionary factual determinations. The *Franks* court, in upholding the designation of Jackson Hole National Monument, relied upon Supreme Court authority in holding that:

> Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.[33]

This principle applies with equal force today to presidential actions under the Antiquities Act. As a general rule, federal agency actions that are "committed to agency discretion by law" are not subject to judicial review.[34] The Supreme Court, in *Franklin v. Massachusetts*, recently held that presidential actions are not reviewable for abuse of discretion under the Administrative Procedures Act because the President is not a "federal agency" within the meaning of the Act.[35] The Supreme Court also recently held, in *Dalton v. Specter*, that "[w]here a statute . . . commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available."[36]

This principle does not necessarily mean that discretionary actions by the President are never reviewable. *Franklin* noted that, notwithstanding the foregoing, presidential actions always may be reviewed for constitutionality.[37] However, Dalton held that claims simply alleging that the President has exceeded his statutory authority do not

raise a constitutional issue.[38]

What, then, might be likely avenues for constitutional attack upon the Antiquities Act itself? Pendley supposes that the delegation doctrine can do the trick. However, the delegation doctrine has rarely been used to invalidate federal legislation.[39] Although the Supreme Court has recently been in the business of resuscitating seemingly dead constitutional doctrines as bases for checks on federal action,[40] the chances of the Court reviving the delegation doctrine in review of the Antiquities Act, certainly a minor delegation of power compared to many much more far-reaching federal statutes, are unlikely.

The crux of the delegation doctrine is that Congress must provide the Executive with standards to guide its actions such that a court may ascertain whether the will of Congress has been obeyed.[41] To the extent that it is even appropriate for the judiciary to second-guess the President's factual findings, the Antiquities Act provides such standards: The area must be reserved for scientific and historic purposes and must be the smallest area compatible with such reservation. Although these are admittedly broad, general terms, they are not more vague than "excessive profits," "fair and equitable" prices, "just and reasonable rates," or "public interest, convenience, or necessity" – delegations which have all withstood attack on delegation grounds in the Supreme Court.[42] The likely outcome of such an analysis is arrived at by the Wyoming court in *Franks:* If the President presents some evidence supporting action under the Antiquities Act – and this may be as easy as making the appropriate assertions in the underlying Proclamation – the designation will be upheld.

To the extent the delegation doctrine might be reinvigorated, as have other dormant constitutional doctrines, the opinions of Justice Rehnquist provide insight into its likely formulation. The evil to Rehnquist is simple: That of "fundamental policy decisions" made by "politically unresponsive administrators."[43] Such is not the case with the Antiquities Act. The President takes the heat or the credit, as the case may be. Indeed, the political heat generated by the establishment of Grand Staircase-Escalante is evident from a read of Pendley's article. The new Monument has been blamed or credited for several political reactions, including Clinton's purported success with environmental voters and the banishment from Congress of the lone Democrat in Utah's congressional delegation.

Those who rail against Grand Staircase-Escalante will have to, eventually, come to grips with the history and judicial construction of the Antiquities Act, the resources and values found within the Monument's area which form a compelling basis for the President's actions, and the limited likelihood of reversing monument designation in the courts. A continuing insistence on chasing windmills, although symptomatic of ideologues and crusaders, rarely leads to concrete results.

[1]Proc. 6920, 3 C.F.R. p. 64 (1997).

[2]"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." 16 U.S.C.A. §431.

[3]Proc. 6920, 3 C.F.R. p. 64 (1997).

[4]This listing can be found on the Bureau of Land Management's Grand Staircase-Escalante website. The website itself is at http://www-a.blm.gov/utah/monument. The listing is at http://www-a.blm.gov/utah/monument/objects.html. Given the remoteness of the area, there is little doubt that there exist countless additional sites, yet to be discovered.

[5]*Id.* at http://www-a.blm.gov/utah/monument/objects.html.

[6]A list of all Monuments established by Presidential Proclamation can be found at http://www.blm.gov/nhp/news/alerts/Monuments.html.

[7]35 Stat. 2175 (1908). The area was enlarged by subsequent proclamations and now includes 1,180,618 acres as Grand Canyon National Park. *See supra*, note 6.

[8]35 Stat. 2175 (1908).

[9]252 U.S. 450, 455 (1920).

[10]252 U.S. at 456.

[11]*Cappaert v. United States*, 426 U.S. 128, 131 (1976).

[12]426 U.S. at 141-42.

[13]426 U.S. at 142.

[14]*State of Wyoming v. Franks*, 58 F.Supp. 890, 892 (D. Wyo. 1945).

[15]58 F. Supp. at 895.

[16]58 F. Supp. at 896-97. Opponents of the Jackson Hole designation, as with opponents of Grand Staircase-Escalante, were unable or unwilling to understand that designations under the Antiquities Act affect only lands already in the public domain; no private or state land is "added" to federal land ownership.

[17]58 F.Supp. at 896.

[18]58 F.Supp. at 897.

[19]58 F.Supp. at 896.

[20]58 F.Supp. at 896.

[21]Proo. Nos. 4611-27, 3 C.F.R. pp. 69-102 (1979).

[22]David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands", 22 *Nat. Resources J.* 279, 301 n. 118 (1982).

[23]*Anaconda Copper Co. v. Andrus*, 14 ERC 1853, 1853-54 (D. Alaska, 1980), an unreported decision from the federal district court for Alaska. The court demonstrated that legislative history is an elusive concept, using similar legislative history as that relied upon by Pendley to determine, contrary to Pendley's conclusion, that Congress intended the phrase "other objects of historic or scientific interest" to be broadly construed.

[24]Monument designation under the Antiquities Act is nothing more than a specific type of withdrawal of federal land from availability for private acquisition and other uses allowed under public land laws. *See* Getches, *supra* note 22, at 300.

[25]236 U.S. 459, 466-67 (1915).

[26]*See* 236 U.S. at 466-69; 236 U.S. at 504 (Day, J., dissenting.)

[27]236 U.S. at 504, 505-06, 511-12 (Day, J., dissenting); Getches, *supra* note 22, at 291-92.

[28]236 U.S. at 468-73.

[29]*See supra* note 27.

[30]Pendley's argument that designation of the Monument is an end-run around FLPMA because "Clinton used the Grand Staircase-Escalante National Monument to create an expansive wilderness area," is absurd. While the new Monument contains much *de facto* wilderness, it contains no *de jure* wilderness. A national monument is not *de jure* wilderness. Wilderness designations are distinct and disconnected to monument designation. The fate of Grand Staircase-Escalante lands, in the context of wilderness designations. remains to be seen.

[31]FLPMA explicitly repealed twenty-nine statutory provisions for executive withdrawal authority, leaving intact only the Antiquities Act and four others. *See* Getches, *supra* note 22, at 315.

[32]*See* 16 U.S.C.A. §§431a, 3213 (limiting monument designations in Wyoming and Alaska). In fact, that Congress acted in response to what it perceived to be problems with Antiquities Act designations in certain states, but left the President's general powers untouched, is further evidence of congressional acquiescence to the broad powers historically exercised by the Executive.

[33]58 F.Supp. at 896 (quoting *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)).

[34]*See* 5 USCA §701. Admittedly, this principle seemingly contradicts other provisions of the Administrative Procedures Act and has not been uniformly applied.

[35]505 U.S. 788, 800-01 (1992).

[36]511 U.S. 462, 477 (1994).

[37]505 U.S. at 801.

[38]511 U.S. at 471-74.

[39]*See* Uwe Kischel, "Delegation of Legislative Powers to Agencies: A Comparative Analysis of United States and German Law", 46 *Admin. L. Rev.* 213, 217-20 (1994).

[40]E.g., Seminole Tribe of Florida v. Florida, 517 U.S. 609 (1996) (overruling Supreme Court precedent and holding that the Eleventh Amendment prevents Congress from authorizing certain suits against states under its Commerce Clause power.)

[41]*E.g., Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989).

[42]Respectively, *Lichter v. United States*, 334 U.S. 742, 778-86 (1948); *Yakus v. United States*, 321 U.S. 414, 420, 426-27 (1944); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 194 (1943).

[43]*Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

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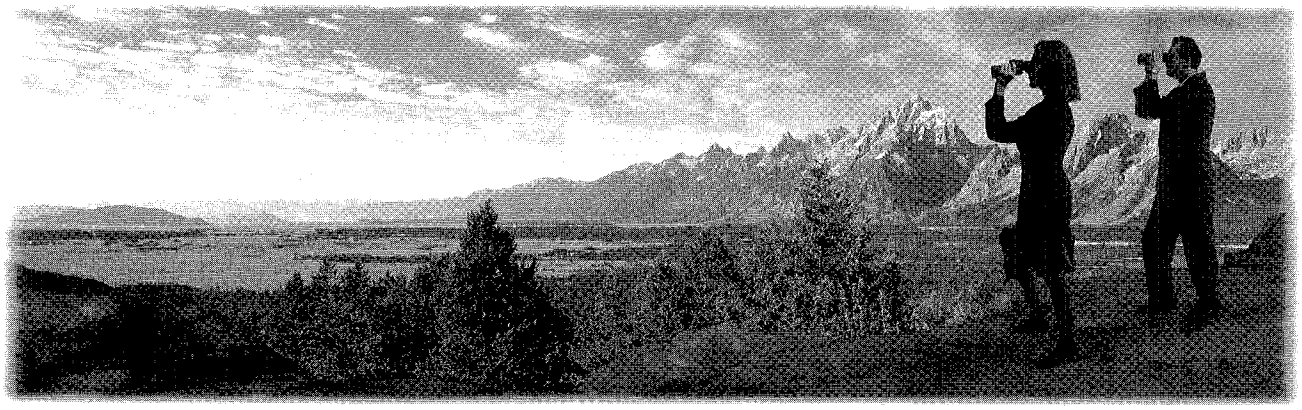

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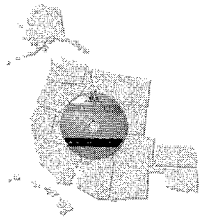

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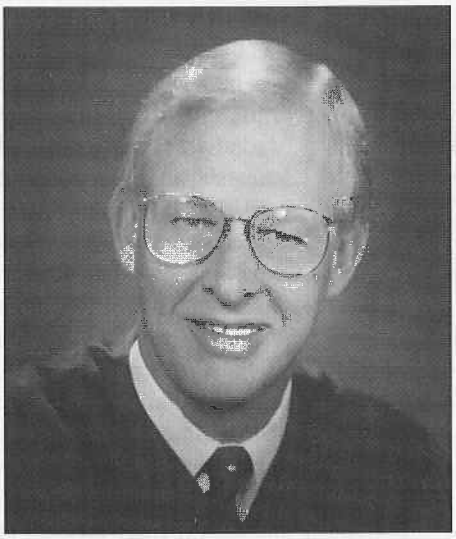
Utah's Appellate Mediation Office Opens January 1998 A New Option for Case Resolution at the Utah Court of Appeals

By Michael J. Wilkins, Associate Presiding Judge
Karin S. Hobbs, Esq., Chief Appellate Mediator
Utah Court of Appeals



JUDGE MICHAEL J. WILKINS was appointed to the Utah Court of Appeals in August 1994, where he currently serves as associate presiding judge. A 1977 graduate of the University of Utah College of Law, Judge Wilkins was in private law practice in Salt Lake City from 1977 until his appointment to the court. He chairs the judiciary's Standing Committee on Technology, is a member of the Board of Appellate Court Judges, and has previously served on other committees and boards, including the Joint Committee on Court Security, and the Supreme Court Task Force on Video in the Courtroom. He and his wife, Judge Diane W. Wilkins of the Second District Juvenile Court have three grown children and four grandchildren.

KARIN S. HOBBS, a native of New England, is a 1985 graduate of the University of Utah College of Law where she was a writer for the Journal of Contemporary Law and Articles Editor for the Journal of Energy Law and Policy. Ms. Hobbs worked at the Utah State Bar as Acting/Associate Bar Counsel prosecuting attorneys for unethical conduct and mediating disputes between attorneys and clients. While at the Utah State Bar, she met Judge Pamela T. Greenwood who hired Ms. Hobbs as her first law clerk in February 1987. Ms. Hobbs became a Central Staff Attorney at the Utah Court of Appeals in 1989 and has remained in that position for the past eight years, with the exception of a brief absence to be Deputy Director of the Division of Child and Family Services. In June of 1997, Ms. Hobbs successfully mediated the first appellate case that was referred to mediation under Rule 28 of the Utah Rules of Appellate Procedure.

Beginning in January 1998, the Utah Court of Appeals will select a variety of cases for assignment to the new Appellate Mediation Office. The newly created office, under the direction of Karin S. Hobbs, Chief Appellate Mediator, will seek to assist parties in resolving appellate cases through mediation.

Mediation, unlike arbitration, is not an

attempt to judge the merits of the dispute and render a decision. Mediation is an attempt to assist the parties, in a non-coercive environment, to objectively evaluate their positions and negotiate a settlement. By the time a case has reached the Utah Court of Appeals, the underlying issues may have been obscured by necessary procedural and legal questions that give rise to the appeal. The mediator will candidly discuss the issues with the attorneys with an eye toward reaching a mutually acceptable resolution.

The Appellate Mediation Office, while an official function of the Utah Courts of Appeals, will operate independently of the court. Because the purpose of mediation is to allow the parties a safe and confidential environment within which to explore the possibility of settlement, parties and counsel must be certain that discussions will not impact their position on appeal. Only complete separation of the information generated by the Appellate Mediation Office from the rest of the court can assure that safe environment. Careful attention has been given to assuring the complete confidentiality of any activities regarding particular cases within the Appellate Mediation Office. The appellate mediation staff will report stastically only, and even then, only to the presiding and associate presiding judge of the court. Judges, their law clerks, staff attorneys, and the clerical staff of the court, will be insulated from the day to day operations of the mediation office.

The judges of the Utah Court of Appeals, with the support and encouragement of both the Utah Supreme Court and the Utah Judicial Council, are enthusiastic about the Appellate Mediation office. The judges believe that attorneys and citizens who find themselves before the court will be better served by providing a mediation option. Costs both financially and emotionally to the parties, as well as costs to the taxpayers generally, can be reduced by a successfully mediation effort.

QUESTIONS AND ANSWER ABOUT THE APPELLATE MEDIATION OFFICE

What is the purpose of mediation?

The purpose of mediation is to negotiate a settlement with the assistance of a neutral third-party in a low-cost forum. Appellate mediation may also include consideration of other matters relating to the efficient management and disposition of the case.

What cases are subject to mediation?

Primarily civil and agency cases will be involved in appellate mediation. At least initially, the Appellate Mediation Office will not handle criminal cases, cases involving pro se parties, juvenile court cases, original petitions for extraordinary relief, and appeals from petitions for extraordinary relief.

Why are cases randomly selected?

All cases have the potential to settle. Random selection provides a broader spectrum of cases with settlement potential. In addition, settlement potential is very difficult to predict accurately, and time is best spent mediating rather than evaluating settlement potential.

How will an attorney know if a case has been selected for mediation?

The Utah Court of Appeal will officially notify all parties. In addition, the Appellate Mediation Office will send the attorneys a letter shortly after the docketing statement is filed scheduling the case for a prehearing conference pursuant to Rule 28 of the Utah Rules of Appellate Procedure. The initial conference may take up to two hours. The lead attorney on the case or the person with the most authority to settle should participate in the mediation conference. During much of that time, the attorney may continue to work on the other matters. The mediator will talk with the parties together initially and then speak with each party privately.

Who is the Appellate Court Mediator?

Karin S. Hobbs, who has been a staff attorney at the Utah Court of Appeals for the past eight years, is the Chief Appellate Mediator, appointed as referee under Rule 28, Utah Rules of Appellate Procedure. Ms. Hobbs has had extensive experience in the appellate court system, has been trained in appellate mediation by the Tenth Circuit Court of Appeals in Denver, and has attended CDR Associates' mediation seminar in Boulder, Colorado. Prior to her term as staff attorney for the court, Ms. Hobbs was a law clerk for Judge Pamela T. Greenwood from 1987-89. She came to the Utah Court of Appeals after working as Bar Counsel at the Utah State Bar, mediating, prosecuting, and investigating complaints against members and nonmembers of the Utah State Bar.

Why are telephone conferences used?

Telephone conferences are used primar-

ily to make the process as inexpensive as possible. By using telephone conferences, attorneys can work on other cases while the mediator is talking to the other attorney. Furthermore, telephone conferences have been proven to be as effective and efficient as in-person conferences. In cases where an in-person conference would be useful, in-person conferences may be conducted.

Are my discussions with the mediator confidential?

Statements and comments made during a conference and in related discussions are confidential and must not be disclosed to any court in argument, briefs, or otherwise by the appellate mediation office, counsel, or the parties. The Appellate Mediation Office is operationally separate from the Utah Court of Appeals, and all matters before the mediator will be kept confidential to allow for candid discussions that may assist in settling the case.

Will the mediator pressure parties to settle a case? Can mediation really work?

The philosophy of the court and the Appellate Mediation Office is while participation in the program is mandatory, settlement is voluntary and not to be coerced. A party's position may be thoroughly probed and the risks associated with proceeding with the appeal may be discussed, but there is no undue pressure to settle contrary to the parties' wishes or interests. The mediator's purpose is to assist in assessing the risks of appeal, provide a candid view of the issues, act as a buffer when needed, and facilitate communications between parties. The mediator will not attempt to prejudge the case, predict the court's decision or force settlement. This is the philosophy used in many federal and state court mediation offices, and non-coercive mediation efforts are highly successful. To further this approach, strict rules of confidentiality will be followed to avoid even the appearance that a party's settlement position could negatively affect their case.

Can an attorney request a mediation conference?

Counsel for either party may request a mediation conference by contacting the Appellate Mediation Office. The office will determine whether a conference will be conducted. Requests for mediation conferences will be kept confidential.

Can the mediation office extend my time for filing a brief or ordering a transcript?

The time for filing briefs and ordering a transcript is not automatically tolled pending a mediation conference. However, in cases in which a prehearing conference has been scheduled, counsel may contact the Appellate Mediation Office to request an extension of time to order a transcript or to file the brief.

Will mediation delay my appeal?

Mediation has been successful in the federal appellate courts for more than fifteen years. Studies indicate that although some cases may be delayed due to mediation, most cases are not. In addition, even in cases that are not settled, attorneys surveyed have indicated that mediation assists counsel in narrowing the issues and fine-tuning the legal arguments presented to the court. The Tenth Circuit Court of Appeals estimates that one mediator resolves at least as many cases as one judge and therefore saves tax dollars.

What is the value of having an appellate mediation program?

Studies indicate greater public satisfaction with mediated results. Sometimes the results are simple compromises but other times they are effective solutions that address and resolve fundamental problems between the parties. The Appellate Mediation Program allows cases to be resolved in ways that cannot be achieved by a decision rendered according to rules of law and thus provides another option offered by modern courts to resolve cases.

In Memoriam
J. Allan Crockett
1906-1994

By Judge J. Thomas Greene

Allan Crockett was born January 19, 1906, in Smithfield, Utah. He married his beloved Eulalia Smith of Salt Lake City in 1934, a marriage of 54 years duration. They had one son, Calvin. At the age of ten, Allan vowed to take care of his mother because his father had been killed in an untimely accident. He later said that he "worked every day of my life" since then. This included work at selling newspapers, farm chores, a grocery store, a pharmacy, and a petroleum company. he saved much of what he made, both before and after law school, and acquired income property in the name of his mother who managed it. During the last few years of her life until age 80 when she died she lived in that rooming house in the lower avenues in Salt Lake City. Justice Crockett also helped to support his younger brothers and sisters in the early years.

Judge J. Allan Crockett, Judge J. Thomas Greene, and Eulalia Crockett in 1982.

Judge Crockett began practicing law in 1931, the year the Utah State Bar was organized. In addition to law practice during the next decade, he served as Deputy Salt Lake County Attorney, and as secretary-counsel to the Public Service Commission of Utah. In 1941, attorney Allan Crockett assumed his duties as an elected trial judge in the District Court of Salt Lake County and served for 10 years. In 1951 he began his long service as a Justice of the Utah Supreme Court, a position he occupied for 30 years, longer than any other person. He was Chief Justice for eight years. Justice Crockett was recognized as a great jurist, and had a profound influence on the development and interpretation of Utah law. He published many opinions and contributed articles to legal journals. However, the compilation and analysis of his legal writings is beyond the scope of this short biographical sketch.

Justice Crockett provided very great and dedicated service to the public and community through the years. This included service as Chairman of the March of Dimes; Chairman, Executive Committee of Salt Lake County National Foundation for Infantile Paralysis; Chairman, Legal Aid and Family Service Societies; Judge Advocate of the Utah Peace Officer Association; Chairman, Utah State Institute of Fine Arts; and Chairman, Board of Utah Symphony. He was much involved with improvements in the law concerning adoption, and devoted substantial time and energy in that important arena.

He was a music lover. His favorite composer was Beethoven, but he loved and appreciated a wide range of music, including the musical antics and comedy of Victor Borge. He joined the Salt Lake Oratorio Society in 1928, singing bass, and for twenty-five years gave it his robust support. In December 1993, the Oratorio Society dedicated its annual rendition of Handel's "Messiah" at the Tabernacle at Temple Square in Salt Lake City to Judge Crockett, who was a Director Emeritus.

Justice Crockett was active physically. He played handball regularly at the Deseret Gym, and had a group of "cronies" with whom he played round robin tennis, including myself during the time I served as his law clerk. He had a particular love of southern Utah, and took a number of hikes through the Zion narrows and the back country in the Escalante area. He went hiking and on a river raft trip with former Supreme Court Justice Douglas, and in the East when attending sessions of the State Chief Justices Association he struck up an acquaintance and went swimming with Chief Justice Warren Burger. He was also very active mentally. In this regard, he had the capacity to commit to memory various poems and passages from philosophical works. He was know as the Court's philosopher, and reputedly would engage the other Justices on a one on one basis in discussions which went beyond stare decisis and the following of precedent. On occasions when I would take my sons and daughter to visit at his home, both for the pleasure of the visit and to broaden our education, he would mesmerize them with quotations from such diverse sources as Omar Khayyam, Mark Twain, Edgar Guest, Stephen Leacock on the nature and philosophy of humor, and most of all his favorite – William Shakespeare.

One of Justices Crockett's favorite methods of discussion was to raise questions in Socratic dialogue which, when

thoroughly considered by the questioned person, would reveal the answer. In order to provoke thoughtful introspection, he often called attention to the following self answering questions posed by the Jewish sage and philosopher, Hillel, about 100 years before the Christian era:

1. If I am not for myself, who will be for me?
2. But if I'm only for myself, what am I?
3. If not me, who?
4. If not now, when?

A short time before he passed away, Judge Crockett and I were beginning to organize and compile, with a view toward publication, his collection of "bits of wisdom," courtroom humor and other miscellaneous items.[1] He labeled one of the categories of his collections as "moralizing rhymes," and recited one of these at a memorial dinner attended by most of his former law clerks about a year before his death.[2] He said that although doubtless familiar to all of us, this anonymous piece had influenced his life and "it is worth listening to again":

If you have had some success in your struggle for wealth,
You may feel like you're king for a day,
But go to the mirror and look at yourself
And see what that man has to say.
It's not your father or mother or wife whose judgment upon you must pass,
But the man whose verdict counts most in your life
Is the one that you see in the glass.
He's the fellow the please more than all of the rest,
He'll be with you right down to the end.
And you'll pass your most stressful and difficult test
If the man in the glass is your friend.
You may feel like Jack Horner and garner a plumb
And think you're a wonderful guy,
But the man in the glass will know you're a bum
If you don't look him straight in the eye.
You may get some praise as you pass down the years
And get pats on the back as you pass,
But your final reward will be heartaches and tears
If you cheated the man in the glass.

Justice Crockett had been asked to talk on whatever subjects he might want to address on this memorial occasion, and in his recorded remarks which were later compiled and supplied to his legal disciples, he ranged from recollections of law school and early professors, to humorous stories which had a message, to various aspects of philosophy. On friendship, he quoted from the advice given by Polonius to his son, Laertes, and to Hamlet: "Don't join thy hand in revelry with each new unfledged comrade; but hast thou a friend and his adoption tried, grasp him to thy bosom with hoops of steel." He quoted rather extensively from Omar Khayyam, including this reference to frustration about the status of things as they are:

Ah love could thou and I conspire
To grasp this sorry scheme of things entire
Would we not shatter it to bits
And then remold it nearer to our heart's desire

The Utah law on mandatory retirement was successfully challenged by Justice Crockett. In response to his suit, the Utah Supreme Court held that a person should be allowed to serve the full term of office to which he or she is elected, even though such would extend service beyond the mandatory retirement age.[3] This permitted Justice Crockett to serve as a Supreme Court Justice for the full 10 year period for which he was re-elected in 1971, until he retired in 1981. After retirement, he performed various services for the court, including the writing and publication of monographs of several former justices and other services "as needed." He also continued working with the Utah State Bar Committee on revision of court rules. He had previously served as chairman of the committee which developed an authoritative set of model jury instructions known as Jury Instructions for Utah (JIFU).

Justice Crockett painstakingly recreated relevant historical materials concerning the tenure of the first Chief Justice of the Utah Supreme Court, Charles S. Zane.[4] He noted that Judge Zane presided over the "most tempestuous period" of Utah's history – the transition from territory to statehood – and that he dealt with many difficult problems, including polygamous marriages following the "official declaration" commonly called the "Manifesto" which discontinued the practice on October 6, 1890.[5] Justice Crockett assessed the overall contribution of Justice Zane to the court and to the cause of justice thusly:

> With undaunted courage and determination, he coped with the difficulties of that time in such a creditable manner that we should be proud and grateful. Most of those who are familiar with the facts would agree that no one has done more than Judge Zane to reduce the long-standing conflict and bring about the degree of harmony that exists. He left an indelible mark on law and justice here, and that stands as a monument to his memory.

In other monographs of former Utah Supreme Court justices, Justice Crockett went beyond individual biographical data, and provided valuable insight and understanding not only as to those jurists, but as to the court as an institution.[6] In 1985 Justice Crockett wrote an historical piece entitled "The Supreme Court of Utah,"[7] which broadly addresses the role of the court, lessons learned from the past, and observations about the "fundamental principles" followed by the justices over the years, such as freedom of thought and expression, including freedom of religion. His overall assessment of the historical work and contribution of the Supreme Court during its first almost 90 years was as follows:

> . . . our judiciary can have pride and satisfaction in the opportunity which has been and is theirs of meeting and dealing with the challenges which continually arise from the stresses of the world. In doing so, they have exerted their best efforts to demonstrate that our system, even with whatever faults it has, is the best way to assure that each person has the fullest possible opportunity to pursue his aspirations with dignity and pride. The judiciary can continue its efforts to fulfill those purposes with the resolve that the link being forged in the chain of history is an addition worthy to "sustain and enhance the glory" of its past; and thus contribute toward what is hoped will be a society yet nobler and finer than our own and make the celestial light of liberty, and its companion, justice under law, continue to shine brightly in the world.[8]

In addition to his life-long dedication to the law and justice, J. Allan Crockett was fond of poetry, literature and philosophy. His idea of Heaven was not a promised far off place, but an awareness of what can be seen and known along the way, "in this earth's holy trinity of beauty, truth and love."[9] Accordingly, his philosophy of religion as well as his overall philosophy was

simply, "Be Good and Do Good." These concepts are central in understanding the life and career of Justice Crockett.

For them there is divinity
This side of heaven above
In this earth's holy trinity
Of beauty, truth and love.
Let heaven await that future day
In the promised land sublime
Make sure to see it along the way
And enjoy it all the time.

[1]Justice Crockett's collections reveal an overarching philosophy of life which was broad, liberal in inclusive.

[2]Justice Crockett employed eighty-five law clerks during his tenure at the Utah Supreme Court. No doubt that is a record number. He disliked the term "clerk" and respectfully referred to us as "research assistants."

[3]*Matheson v. Crockett*, 577 P.2d 948 (1978).

[4]Judge Zane had been appointed by President Chester A. Arthur as Chief Judge of the Territory of Utah in 1884. He was reappointed by President Benjamin Harrison in 1893. He became Utah's first Chief Justice by operation of law and was elected to a further 2 year term in 1897. His term of office ended at the turn of the century.

[5]In response to the Manifesto, Judge Zane announced in open court:

> The alleged revelation . . . announcing the abandonment of polygamy – I regard it as an authoritative expression of [the Church]. My confidence in my fellow men leads me to accept such a solemn declaration, and the expression of such a good purpose as being honest and sincere.

Justice Crockett observed that the activities of Judge Zane with the Mormons were less concerned with the law than "sociology and psychology in enforcing it." He concluded:

> In his activities with the Mormons, as with others, their experience followed the path so common in life: As they worked and associated together, the areas of difference and misunderstanding decreased while the areas of understanding increased. Judge Zane came to know that despite their feelings of resentment of intrusion into their lives and their desire to be isolated, the Mormons were really a people of love and goodwill; and they came to know that, quite apart from his judicial reserve, Judge Zane was a man of compassion and concern for his fellowmen who by steadfast devotion to duty evidenced sterling qualities of character.

[6]During the period 1959-1981, Justice Crockett wrote memoriams for the court concerning Justice E. R. Callister who was appointed by a republican governor in 1959, Justice R. L. Tuckett who was appointed by a democratic governor in 1966, and Justice Richard Maughan who was elected rather than appointed in 1974. Some of his monographs and writings about other justices were published: Justice Daniel N. Straup, 14 *Utah B.J.* 25 (1986); Justice LeRoy Tuckett, 12 *Utah B.J.* 20 (1984); book review of Justice A. H. Ellett's "Forty-Four Years as a Redneck Judge." 12 *Utah B.J.* 39 (1984).

[7]13 *Utah Bar Journal* 17 (Spring-Summer 1985). This article among other things, set forth the tenure of 37 of the 38 justices who served since statehood, including the present incumbents, except Leonard Russon who was elevated to the Utah Supreme Court in 1994 from his prior judicial positions as state trial judge in the Third Judicial District, and appellate judge in the Utah Court of Appeals.

[8]*Utah Bar Journal*, *id.* at p. 18.

[9]The full text of his poem "Heaven Advanced," (one of many poems authored by Judge Crockett) is as follows:

Some seek to find salvation
Through worship, faith and grace
To rise to exaltation
In a promised far off place.

While other sense sublimity
In all they see or know
From the cosmos' vast infinity
To the humblest flowers that grow.

Discipline Corner

RESIGNATION WITH DISCIPLINE PENDING

On October 23, 1997, the Utah Supreme Court, executed an Order Accepting Petition for Resignation with Discipline Pending in the matter of Stephen Cronin.

Pursuant to Rule 22 of the Rules of Lawyer Discipline and Disability, the Office of Attorney Discipline gave notice to Cronin that it intended to seek reciprocal discipline against him based on an Order Imposing Discipline against Cronin in the Superior Court of Guam for the Territory of Guam.

Thereafter, Cronin expressed a desire to resign from the Utah State Bar in lieu of further disciplinary proceedings in Utah. Pursuant to Rule 21 of the Rules of Lawyer Discipline and Disability, Cronin filed a Petition for Resignation with Discipline Pending. In that Petition, Cronin admitted to the allegation made against him by the Bar of Guam Ethics Committee.

An Amended Petition filed with the Bar of Guam Ethics Committee on September 22, 1986 alleged that Cronin, representing King's Supermarket, filed a complaint in the Superior Court of Guam against three defendants. The complaints alleged that the three defendants owed the estate of King's Supermarket the sum of $1008. At the time the complaint was filed, the obligation allegedly owed by the named defendants had previously been satisfied in full by payments made through Cronin's law office. Although confronted with this fact by one of the defendants subsequent to the filing of the complaint, Cronin refused to terminate the proceedings until the defendants paid and additional sum of $80.00. Cronin submitted a sworn statement admitting to the Amended Petition, and affirmed the sworn statement in open court.

Additionally, the complaint alleged that Cronin entered into a contingent fee agreement with another client. The client was to provide payment to Cronin based on the outcome of litigation involving the client's legal right to child support. Cronin was to receive a percentage of all child support collected. Cronin submitted a sworn statement and affirmed these facts in open court.

Lastly, the complaint alleged that Cronin, a court appointed attorney for a client convicted in the Superior Court of Guam of aggravated murder and other crimes, was assigned to prosecute the appeal. After filing the notice of appeal, Cronin failed to take any further action on the appeal, and failed to communicate with his client regarding the abandonment of the appeal. Cronin allowed the appeal to be dismissed on motion from the government without appearing in court to oppose the motion or provide an explanation. Cronin admitted to this conduct in his sworn statement, and further admitted his statement in open court.

Based on these admissions and on an agreement between Cronin and the Committee, the Bar of Guam Ethics Committee ordered Cronin to wind down his practice and tender his resignation from the Guam Bar Association no later than ninety days from September 22, 1986. Cronin would not be eligible to reapply for readmission to the Guam Bar Association for a period of not less than two years from the day following the date the resignation was tendered. Further, Cronin was ordered to make restitution to the second client of all sums obtained from her as a result of the contingent fee agreement.

ADMONITION

On July 29, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The attorney was also ordered to attend and successfully complete the Utah State Bar Ethics School.

On October 8, 1995, the attorney was involved in an automobile accident with the complainant. The attorney was driving drunk, without a driver's license, and without automobile insurance. The attorney fled the scene of the accident.

Criminal charges were filed in the Sandy Justice Court. The attorney pled guilty to Driving Under the Influence and Reckless Driving, and agreed to pay restitution to the complainant as part of the plea bargain. After the complainant had difficulty obtaining the restitution the Court ordered and other money the attorney had promised to him to cover the deductible for his insurance, he complained to the Bar.

The Office of Attorney Discipline wrote to the attorney on three occasions requesting a response to the complaint. The attorney failed to respond or otherwise cooperate with the Office of Attorney Discipline.

There were no aggravating circumstances noted by the Screening Panel. The mitigating factors found by the Screening Panel were that the attorney acknowledged an alcohol problem, and regularly attended AA meetings after he completed a program with the Betty Ford Clinic. The attorney also provided proof of full, albeit tardy, restitution to the complainant.

ADMONITION

On October, 1, 1997, an attorney was admonished in four matters by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), and 1.4(a) (Communication) of the Rules of Professional Conduct. The attorney stipulated to an admonition and the Order was entered pursuant to a Discipline by Consent.

The four complaints filed against the attorney alleged that the attorney was not diligent in the representing the attorney's clients in personal injury matters. The complaints further alleged that the attorney failed to communicate with the clients regarding the status of their cases.

The attorney established that the clients had not been materially prejudiced, and that he would cooperate with their new attorneys to assure that the clients' interests were protected.

ADMONITION

On October 3, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.7 (Conflict of Interest: General Rule) and 1.9 (Conflict of Interest: Former Client) of the Rules of Professional Conduct. The Order was entered pursuant to a Discipline by Consent.

On April 10, 1995 the attorney met with a client regarding a divorce matter. The client paid $250 for the attorney's services. The attorney proceeded to initiate the divorce. On October 3, 1995, the client's spouse met with another attorney from the attorney's office regarding the divorce. On October 5, 1995, both clients met with the attorney to discuss their divorce, which was contested. At this meeting the attorney

acknowledged that he was prohibited from representing both clients, but agreed nevertheless to assist the couple with their divorce. The attorney failed to fully inform either client about potential adverse effects that might be caused by the conflict, and failed to secure from them informed consent to the dual representation. The attorney later rendered legal services for both clients by preparing divorce papers on behalf of each. The conflict of interest issue was later used successfully by the first client through his new attorney to challenge and modify the divorce decree prepared by the attorney.

The attorney agreed to stipulate to an admonition for the violation of Rules 1.7 and 1.9, and agreed to attend the Utah State Bar's Ethics School.

ADMONITION

On October 3, 1997, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violating Rules 1.1 (Competence), 5.4(a), (b) and (c) (Professional Independence of a Lawyer), 5.5 (Unauthorized Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The Order was entered pursuant to a Discipline by Consent.

On November 17, 1990, a financial planner contacted the attorney. The financial planner wanted the attorney to assist him in preparing a will and trust agreement for his client, the complainant. The attorney accompanied the financial planner to the client's house where he drafted several documents for the client's signature using a portable computer. These documents included a will, trust, various deeds, and other papers. The client paid the financial planner $350 for these services. The attorney later received a portion of this fee. The client later became suspicious about the documents the attorney had prepared and took them to another attorney. The second attorney advised the client that the documents were inadequate, and drafted new documents for the client.

The attorney agreed to stipulate to an admonition for the violation of Rules 1.1, 5.4(a), (b) and (c), 5.5, and 8.4(a). The attorney established that he has retired from the legal profession and agreed not to re-enter the profession without first completing appropriate ethics and estate planning courses approved by the Office of Attorney Discipline at his own expense.

ADMONITION

On October 24, 1997, Judge Timothy R. Hansen, Third District Court, entered an Order of Discipline admonishing an attorney for violating Rules 1.1 (Competence), 1.3 (Diligence), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The attorney was also ordered to attend Ethics School, to pay $800 restitution within one year of the date of the Order, and to pay costs in the amount of $100 to the State Bar.

In December 1991, a client retained the attorney to represent him in a civil matter in which the client was the name defendant. In July 1992, after a discovery dispute where the Plaintiff Filed a Motion to Compel, the Court granted Plaintiff's Motion for Sanctions, which included granting a judgment against the Defendant.

At some time after the entry of the judgment against him, the client retained a new attorney to represent him. The new attorney failed to file a Motion to Set Aside and the Plaintiff obtained a Default Judgment in the amount of $1862.65. However, it appears that the client could not have successfully resisted the plaintiff's claims for money owed.

MINUTE ENTRY ON ORDER TO SHOW CAUSE

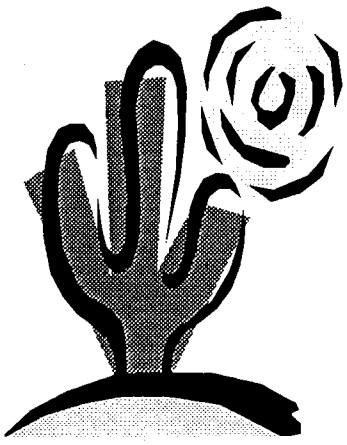
On June 27, 1997, the Honorable Anne Stirba, Third District Court, entered a Minute Entry ordering Lynn Spafford to serve thirty days in jail for each of three counts to which he pled guilty for practicing law while suspended, in violation of his Resignation with Discipline Pending. The time served was ordered to run consecutive to a federal sentence Spafford served in another matter. Spafford was further ordered to pay a $1000 fine, plus a 35% surcharge for each count, and to pay a $500 recoupment fee.

The Court stayed the sentence and placed Spafford on probation under the following conditions:

Spafford is on probation for twelve months and is ordered to abide by all terms and conditions of federal probation, including all drug and alcohol provisions. Spafford is not to engage in the unauthorized practice of law. Spafford is to complete sixty hours of community service, doing at least ten hours per month. Spafford is to write a letter of apology to the Utah Supreme Court. Spafford is to pay a $500 recoupment fee, with monthly payments of at least $50 per month. Spafford is to report any violation of probation to the Supreme Court, the Utah State Bar, and counsel.

Get out of the snow and into the sun at the 1998 Mid-Year Meeting in St. George, Utah!

Mark your calendars now for March 5-7, 1998. We hope to see you there!



1998 Mid-Year Meeting Awards

The Board of Bar Commissioners is seeking applications for one Bar award to be given at the 1998 Mid-Year Meeting. This award honors publicly those whose professionalism, public service and personal dedication have significantly furthered the **advancement of minorities** in the law profession or judiciary. Your award application must be submitted in writing to Monica Jergensen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than **Tuesday, January 20, 1998.**

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

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

Drop Date: December 19, 1997
7:30 a.m. to 5:30 p.m.

Place: Utah Law & Justice Center
Rear Dock
645 South 200 East
Salt Lake City, Utah

Selected Shelters: Traveler's Aid Shelter School (Treshow School)
The Rescue Mission
South Valley Sanctuary
Women & Children in Jeopardy Program

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

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

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

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

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.

ETHICS OPINIONS ORDER FORM

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

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

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Ethics Advisory Opinion Committee

OPINION NO. 97-10

Issue: May a Utah attorney advertise services on a web page or engage in other electronic advertising on the Internet?

Opinion: Attorneys may operate and maintain a web site and post advertisements to newsgroups, provided they comply with Rule 7. Advertising through e-mail messages, which are directed to specific recipients, is generally permissible unless it violates Rule 7.3(b). Attorneys' participation in "chat groups" is considered to be an "in person" communication and subject to the restrictions of rule 7.3(a).

MEMBERSHIP CORNER

CHANGE OF ADDRESS FORM

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

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-mail _____

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

Information Needed

Phoebe W. Couzins, 1872
Georgianna Snow Carelton, 1872
Josephine Kellogg, 1892
Miss Lee, 1892
unknown, 1892
Margaret Beall Connell, 1908
Agnes Swan Bailey, 1912
Rebakah W. Hornbein, 1915
Josephine A. Chase Bradshaw, 1920
Alice L. Manning, 1923
Beryl Mary Bonner Meyers, 1925
Edith R. Lawrence Cooper, 1925
Mrs. Frank Evans, 1925
Madge Lee Guard, 1930
Margaret R. Nelson, 1977

If anyone has information about a living relative of any of the above deceased women attorneys on this list, would you please be so kind as to have them contact:

Contacts for First One Hundred Committee
Debra J. Moore (801) 366-0132
Patricia W. Christensen (801) 532-7840
Donald J. Winder (801) 322-2222

MARK YOUR CALENDARS NOW!

The Utah Star Bar Presents:

Utah's First One Hundred Women Attorneys
A Celebration of Women in the Profession

Reception and Dinner
Wednesday January 14, 1998
Little America Hotel • Grand Ballroom

For information, please contact the Utah State Bar, 531-9077

The Homeless in Utah – Reflections from a New Bar Member

By Sandra Langley

I had forgotten how cold it gets under the 4th Street Viaduct. It's probably the coldest place I have ever been although I am bundled in polar fleece. The steam rises from Jeanne's makeshift grills while hundreds of men, women, and children wait patiently for breakfast this Sunday morning. I am always struck by the almost courtly manners of the men. More and more women and children are here and as if by some unspoken agreement, the men step aside and give them first place in line.

I started coming here three years ago when I was a frightened and overwhelmed. I quit coming when preparation for the bar examination took over my life to the exclusion of everything else. Now, I've come back and I am saddened to see that Jeanne still feeds between 300 to 500 their only meal on Sunday. Three years have passed and the only change has been a shift from primarily men to more and more women and children—small children and babies.

It shouldn't surprise me that I see more women and children. The current estimate is that women and children as families, women as single individuals, and children as runaways constitute the fastest growing segment of the homeless. At present from 40% to 50% of all homeless fall into one of the three preceding categories.[1]

SANDRA LANGLEY is a native of Atlanta, Georgia and a recent convert to Utah. She is the proud mother of four children and grandmother to nine exceptionally bright and beautiful grandchildren.

She graduated from University of Utah College of Law in May 1997 and was admitted to the Utah Bar this past October, all of which proves that dreams really do come true.

She practices in the area of family law.

Before I started coming to the viaduct, I never realized how pervasive homelessness is. Many people who previously lived on the "fringe" (commonly defined as three paychecks away from homelessness) are now on the streets.[2] The term "homeless" is pretty broad and includes persons living on the street, in shelters, doubled up with friends or relatives because they have no home of their own, and those who live in substandard accommodations.[3]

In 1984, the Department of Housing and Urban Development released its first estimates of the size of the homeless population stating that between 250,000 and 350,000 people were homeless.[4] In the past decade, this number has increased ten-fold and it is now estimated that more than three to five million people living in the United States are homeless.[5] The numbers in Salt Lake have grown in corresponding proportions.

Current estimates also suggest that on any given night at least 700,000 people across the county are "literally" homeless.[6] More surprising is the estimate that about 12 million adults—6.5% of the adult population of the United States—have been literally homeless at some time in their lives.[7] Who are the homeless? Before the viaduct, I thought the homeless are male alcoholics or drug users who voluntarily chose to be on the streets. You know the ones, the dirty and ugly ones that aggravate our clients by sleeping in Pioneer Park or loitering around downtown businesses. They are the panhandlers, those who soil our sidewalks and sleep in the doorways of our office buildings. I've since learned who they really are.

To say the homeless are generally extremely poor is an understatement. Nationally, the average monthly income for homeless people from **any and all** sources is under $200.[8] Why they are so poor deserves a careful examination by this

community.

At any given time, about 20% of the homeless population is employed full- or part-time. Of those homeless living in shelters, about one-third work at some point during a given week. Relatively few homeless people are eligible for or actually receive public assistance benefits: only about half are enrolled in any kind of benefit program.[9]

Perhaps as many as 30% of adult homeless suffer from severe mental Illness.[10] It is estimated that a significant number of the mentally ill are on the street as a result of downsizing federal programs that previously warehoused them.[11] About half of the single adults suffer from past or present alcohol of drug addiction.[12]

It is interesting to note that a 1992 Stanford University study of 1400 homeless adults in Santa Clara County, California, showed that after five years of being homeless more than one-third of those with no prior problems had become alcoholics, one-fourth had become addicted to drugs, and one-fifth had been hospitalized for mental illness.[13] Many believe that the degrading nature of poverty itself is to blame for so many turning to some form of chemical relief. Approximately 17% of the homeless are physically disabled.[14] The average life expectancy for homeless people is 51.[15] Given the foregoing, is it any wonder that findings show anywhere from 48% to 80% of the homeless are seriously depressed, three to five times the national average.[16]

At least 70% of homeless people were born in the state where they currently reside or have resided in their current city for over 10 years.[17] The national average for the general population is about 60% born in the state where they currently reside.[18]

If all of this comes as a surprise to you as it did to me, perhaps the following will as well. According to the most recent study, the causes of homelessness are, in descending order of frequency, lack of affordable housing, substance abuse and the lack of available treatment programs, mental illness, domestic violence, family crisis, and poverty.[19]

The lack of affordable housing, the primary reason for homelessness, comes as a result of many factors. For example, in 1991, there were eight million very poor renters with only three million rental units they could afford.[20] The gap of five million units represents an increase of over four million units since 1970.[21] Add to that information, the fact that, after adjusting for inflation, direct aid to cities for poverty programs has fallen more than 60% since 1981.[22] As has been previously mentioned, the lack of affordable housing, the decrease in poverty programs, and the loss of half million beds for the mentally ill have all contributed to the increased number of individuals who are now homeless. These factors should also serve to dispel the belief that the homeless have "voluntarily" chosen to sleep on the streets. If there is anyone left who is not in a fact and figures induced coma, I want to apologize.

I know that as one of the most recent members of the Bar, I shouldn't be lecturing to those who have been in the profession longer and are more familiar with the infrastructure of Salt Lake, its challenges and its successes. Please accept my apology if I have offended. I really did try to write a "plain vanilla" article but I just couldn't. The reason was one homeless man I saw the last time I was at the viaduct.

I don't know his name or the reason he was on the street but I was struck with the similarity between his physical appearance and that of a ragged homeless pioneer that was featured in many of the ads announcing sesquicentennial events.

I thought how this valley was settled by the homeless, the ill, the hungry. I thought how the ancestors of many of you were driven from Ohio, Missouri, and Illinois because their neighbors didn't want "that kind" of people in their midst. How ironic that today, so many of their descendants don't want another "that kind" of people in their midst.

I believe that those of our profession do more to shape the attitudes of this community than is commonly realized. I also believe, and I am sure that this is self-serving, that many of Salt Lake's brightest are in our profession. If you combine the opportunity to influence with the magnitude of ability, you have a group that might just be able to find an equitable solution to complex and emotionally charged problem. Anyone interested?

[1] 1991 Survey of the U. S. Conference of Mayors.

[2] 1995 Survey of the U. S. Conference of Mayors.

[3] *See generally*, National Law Center On Homelessness & Poverty, *No Homeless People Allowed*, (1994); National Law Center On Homelessness & Poverty, *The Right To Remain Nowhere*, (1993); and National Law Center On Homelessness & Poverty, *Go Directly To Jail*, (1991).

[4] U.S. Dep't. Of Housing & Urban Development, "A Report to the Secretary on the Homeless and Emergency Shelters 18" (1984). The number of homeless was obtained by asking directors of shelters to estimate how many people were turned away as well as how many people stayed in their shelter during a specific period. Obviously, the count was not accurate since it failed to include those who were homeless in cities without shelters as well as those who did not apply for or stay in shelters.

[5] *Supra*, note 3.

[6] Maria Foscarinia, "Downward Spiral: Homelessness and Its Criminalization", *Yale L. & Pol'y Rev.* Vol. 14:1, (citing W. Tucker, "Where Do The Homeless Come From," 25 *Nat. Rev.* 32, 32-43 (1987)).

[7] *Supra*, note 6 (citing Bruce Link et al., "Lifetime and Five-Year Prevalence of Homelessness in the United States: New Evidence on an Old Debate," 65 *Am. J. Orthopsychiatry* 347, 353 (1995)).

[8] *Supra*, note 6 (citing Interagency Council on the Homeless, Priority: Home!. The Federal Plan To Break The Cycle of Homelessness 22-23 (1994)).

[9] *Id.*

[10] Federal Task Force On Homelessness and Severe Mental Illness, Outcasts on Main Street, 7-13 (1992).

[11] "Mentally Ill Homeless Are On Rise", *N. Y. Times*, Nov. 9, 1991, 1, at 8, indicating that state mental hospital beds were reduced from 559,000 to 150,000 between 1955 and 1980.

[12] *Id.*

[13] Laura Kurtzman, Study: Homelessness Leads Many To Alcohol, Drugs, Mental Illness, S. J. *Mercury News*, Oct. 21, 1992, at 8B.

[14] *Supra*, note 6 (citing James D. Wright, Address Unknown: The Homeless in America, 1989).

[15] *Id.*

[16] *Id.*

[17] *Id.*

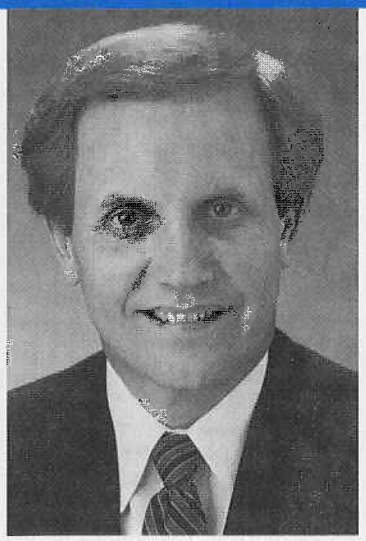
[18] *Id.*

[19] *See generally* U. S. Conference of Mayors, A Status Report on Hunger and Homelessness in America's Cities: 1995 (1995).

[20] *Id.*

[21] *Id.*

[22] "The War Against The Poor", *N.Y. Times*, May 6, 1992, at A20.



What's New in the Juvenile Court?

By Hans Q. Chamberlain

JUDGE HANS Q. CHAMBERLAIN was appointed to the Fifth District Court in August 1995 by Gov. Michael O. Leavitt. He serves Beaver, Iron and Washington Counties. Prior to his appointment to the bench, he was the senior member of Chamberlain & Higbee. He also served as the Iron County Attorney for eight years and is the past president of the Utah State Bar, the Statewide Association of Prosecutors and the Southern Utah Bar Association. He has also been a member of the Utah State Board of Regents and is a past member and chair of the Southern Utah University Board of Trustees. He is currently a member of the Board of Juvenile Court Judges and is chair-elect for 1997-98. He also serves on the Standing Committee on Court Facilities Planning.

I have now been on the bench a little over two years, and I appreciate the opportunity to share some thoughts concerning the role of a Juvenile Judge and some thoughts concerning Juvenile Justice in the State of Utah.

Having practiced law for the most part in the District Court for the 25 years before I was appointed to the bench, I sensed that some of my fellow practitioners were surprised that I sought the appointment to the Juvenile bench. Now with two years under my belt, I can honestly say that I have thoroughly enjoyed working with children and protecting families. The area of Juvenile Justice is an exciting arena. The Juvenile bench provides an opportunity to help kids in trouble and protect children who are either abused, dependent, or neglected. You can go home in the evening actually believing that you have made a difference in a child's life and that society will be better because a youthful offender has proven to you that he or she has changed their ways or knowing that a child is now back in a home which was previously unsafe because the parents have obtained new parenting skills or otherwise followed a course of action implemented by Court order.

I would like to also report on what is happening in the Juvenile Court and offer some suggestions to practitioners who may not frequent the Juvenile Court on a regular basis.

(1) Adoption of Sentencing Guidelines: After considerable study, the Juvenile Court adopted sentencing guidelines for Juvenile crime. The guidelines are to be used by the Probation Officers to make a recommendation to the Court at the time of sentencing. The Court is not bound to accept the recommendation, but always reviews it at the time of sentencing, together with aggravating or mitigating circumstances that are well defined to determine if the sentencing guideline recommendation is appropriate. A lawyer representing a youth should obtain a copy of the Sentencing Guidelines, and in my Court, the youth's attorney is always entitled to know the recommendation from the Probation staff regarding sentence and is likewise entitled to see the report from the Probation Officer before sentencing, but with the caution to not disclose to the youth the source of sensitive information. One of the main purposes of the Sentencing Guidelines is to be able to monitor how much of the rehabilitative resources are being used up if the guidelines are utilized and thus to be able to predict in advance how many new detention beds will be needed or whether or not enough secure beds exist, and if not, to ask the legislature to fund capital construction costs to build additional facilities before it is too late.

(2) Rules of Juvenile Procedure: If you have a matter in Juvenile Court, take time to read the Juvenile Rules of Procedure found in the Utah Court Rules Annotated. If you are appearing for the first time at a detention hearing, call one of your fellow practitioners who appears in

Juvenile Court on a regular basis, or call one of the Juvenile Probation Officers to find out how the Judge handles the detention hearing and perhaps even find out what the recommendation of the Probation Officer will be with regard to either detaining or releasing the youth.

(3) Child Welfare Reform Act: Because this Act is relatively new, most Juvenile Judges have had to become familiar with this Act when dealing with what we sometimes refer to as DNA cases – dependency, neglect, and abuse cases. (This should not be confused with what we ordinarily understand when someone talks about DNA). If you are going to get involved as counsel at the Shelter Hearing stage it is imperative that you familiarize yourself with the code, specifically UCA 78-3a-306 and 307.

You should also understand that the State of Utah will always be represented at a Shelter Hearing by a Deputy Attorney General, who represents the Division of Child and Family Services and the Guardian-Ad-Litem, who is an attorney hired by the State to represent the interests of the child and to serve as an advocate for that child through the entire proceeding and until released by the Court. Because the Court must conduct a Shelter Hearing within 72 hours after removal of a child from his or her home (excluding weekends and holidays), if you are retained to represent the father or mother, one of your first calls should be to the Deputy Attorney General in your area to obtain a copy of the written report prepared by the case worker from the Division of Child and Family Services, together with a copy of the petition to be filed by the State, so that you can do some of your own investigating prior to the Shelter Hearing. Remember, the Court is charged with looking at the best interests of the child, and if you involve yourself as soon as possible, your counsel can be of great assistance to the Court in addressing what are usually serious circumstances for the child involved and you will also be able to reduce the stress level for your client.

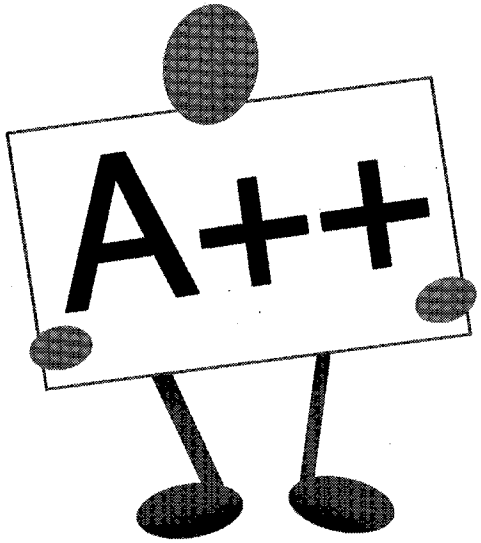
(4) The Juvenile Court is More Open Than You Think. Few practitioners and members of the public realize that if a youth is 16 years of age or older and charged with a felony, the Juvenile Courtroom is open to the public, even at the Detention Hearing stage, which is the hearing held within 48 hours after the youth has been placed in detention and where the Court determines whether or not the youth should be further confined in detention or released under home detention or house arrest. Many states have reduced the age from 16 to 14 years of age and there is going to be legislation considered in the 1998 legislative session to reduce the age in Utah from 16 to 14 years of age. If any of you have thoughts regarding that proposal, please let your concerns be known to your legislative representative. I doubt the Juvenile Court will take a formal position on this proposal, believing that to be a legislative decision.

Even though the Courtroom is open to the public for youth 16 years of age and over and who are charged with a felony, I seldom find any of the public in my Courtroom, and I believe this holds true for most Juvenile Judges throughout the State.

(5) Juvenile Task Force: As most of you know, a Juvenile Justice Task Force has been in place and is now completing it's second full year. It is co-chaired by Senator Lyle W. Hillyard and Representative Christine R. Fox. There is legislation pending to extend the task force by an additional year, or through December 31, 1998. The task force meets usually on the fourth Friday of each month, excluding the time when the legislature is in session. The task force has addressed many issues involving Juvenile Justice and made recommendations that will have a long-term impact for the Juvenile Court; i.e. recommending legislation regarding sentencing guidelines, and legislation and funding to hire additional Probation Officers so that intervention can occur much earlier in the life of a youth. The task force has continually addressed the Serious Youth Offender Act, including a recent study conducted to track the present status of youth who were in secure confinement in recent years. In my opinion, the Task Force has been very open-minded, diligent and resourceful in addressing Juvenile Justice.

(6) New Juvenile Court Administrator: John MacNamara, the current Juvenile Court Administrator recently announced his retirement after thirty-plus years of service. A search is now under way for his replacement, and by the time this article is printed in the *Bar Journal*, his replacement will likely be known. I did not personally know John before I became a Juvenile Judge, but I have come to appreciate his commitment and dedication to Juvenile Justice. He cares about the youth of this State and has been totally committed to improving the way Juvenile Justice is administered. John has had to oversee a rapid expansion in the Juvenile bench, which doubled in numbers in just a few short years. He has also overseen the implementation of new programs recently funded by the legislature that will allow Juvenile Judges to place a youthful offender on probation much earlier in hopes that a youth's criminal conduct will be addressed before they get too far ingrained in the system. John has been a public servant in the truest sense, and I want to thank him personally and in public.

(7) Lawyers: Finally I want to say something publicly about lawyers. Practicing law is not the easiest way to make a living, and I think the lawyers of this State are dedicated individuals and are to be commended in their efforts on behalf of those they represent. Good lawyering not only makes a Judge's job easier, it enhances the credibility of the entire legal profession.



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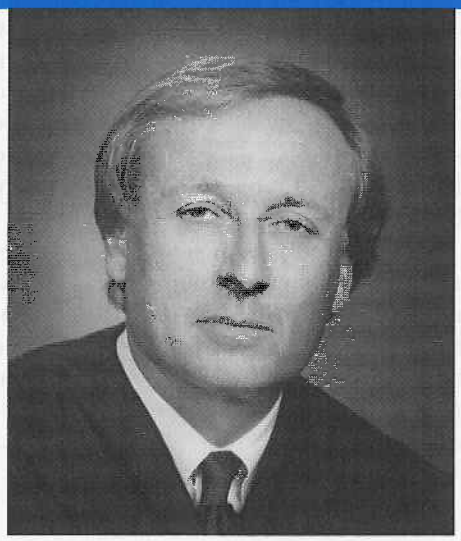

Judge Ronald Nehring

By Jennifer L. Ross and Jerry T. Amberger

JUDGE RONALD NEHRING was appointed to the Third District Court bench by Governor Leavitt. Prior to his judicial appointment, Judge Nehring practiced civil law at Prince, Yeates & Geldzahler where he focused on commercial litigation. Between law school and his tenure at Prince, Yeates & Geldzahler, Judge Nehring worked as an attorney for Utah Legal Services. Starting January 1, 1998, Judge Nehring will hear a combined calendar in Summit County, presiding over all matters traditionally heard by separate judges in the district and circuit courts.

How did your experience at Utah Legal Services influence what you are doing today?

I came to understand the legal problems of poverty. While I saw those problems at legal services in a civil context, it gave me a better understanding of the environment in which criminal problems of the poor are presented to me. It helps me understand what is going on with the defendants. Legal services did mental health commitments which helps me understand odd behaviors.

Can you give a word of advice to lawyers who want to become judges?

I tried for five years to obtain a judicial appointment, including being interviewed by Governor Leavitt four or five times before I was successful. Being a judge is a very rewarding occupation. You have a feeling of contribution to the community everyday. You see a tremendous amount of variety in human beings and of human predicaments. You have at least the illusion of making a positive difference in individuals lives and the life of the community as a whole. I think it is certainly a job that good lawyers could and should aspire to. I think that Governor Leavitt has been blessed with a lot of very qualified people which makes his decision making very difficult when he has to select. That means there are a lot of very qualified people that have been appointed, and those who have not been should not give up. Persistence pays off and I am exhibit A through Z of that. Discouragement comes easy but it can be overcome.

How does working as a judge compare to working as a lawyer?

The stresses are different. I tend not to bring work home in both a literal and figurative sense. As a judge I can leave the cases at the office which I could not do as a lawyer. In part because from time to time clients felt at liberty to call me at home, while defendants and prosecutors do not know where to find me.

To be a judge does a lawyer have to be experienced in all areas of the law?

No, I had very little experience in criminal law before I became a judge. In my opinion one of the benefits of a legal education is that the cliché that they tell you in the first day of law school, that we are going to teach you how to think differently, pays off. You know how to approach the problems. You learn how to approach the problems quickly so that the substantive law comes to one relatively easily. Having experience in particular subject areas is not as important as having general trial experience.

What do you anticipate to be upcoming challenges for the judiciary?

Keeping pace with technological change. Technological change is a push/pull phenomenon. The push comes from the sheer increase in case load versus limited resources. The pull comes from lawyers who are trying to be more innovative in the presentation of evidence, in their persuasion generally. I think that it is going to challenge the courts to adapt in a practical sense and in adapting its rules to accommodate technological changes. For example, how does one introduce remote witness interrogation without physically bringing the witness to the courtroom?

Also, there are greater expectations of

judges to take on non-traditional judicial roles. You see this in family law settings where I am invited to be a therapist. Should I? Could I? Would I?

Another challenge is dealing with jury reform. Our state is aggressively pursuing this issue, following the lead of Arizona. For example, should we let jurors ask questions. I have been doing it for a long time. There are probably ten or twelve judges in the Third District who let jurors ask questions. When a question arises during deliberation should we bring the jury back out and allow the lawyers to argue the question or should we reopen the record and allow additional testimony bearing on that question. Another reform would be allowing the jury to deliberate about the case as the case is going on as long as they are in the jury room. There are pros and cons to allowing the jury to deliberate while the case is ongoing. There is a task force looking into these options. I would at least like to try them out and see what happens.

Finally, one of the major challenges facing the judiciary is preserving judicial independence which is at risk. Our independence is at risk due to what appears to be purposefully inaccurate reporting about judges and judges' ability to respond to criticism. Both the press and the public feel there is open season on judges. The reality is that judges are going to make unpopular decisions all the time, that is what we are supposed to do. And if difficult decisions of law were to be made by plebiscite? I would not choose to live in that society.

The Captive Mind

By Czeslaw Milosz

Review by Betsy Ross

Abstruse and ponderous in parts, vividly piercing and translucent in others. Czeslaw Milosz's *The Captive Mind* presents a mirror through which we must ask if we recognize ourselves. *The Captive Mind* is a psychoanalysis of the totalitarian mind or as Milosz states, "I try to explain how the human mind functions in the people's democracies."

Milosz was born in Lithuania in 1911, trained as a lawyer, and became active in the Polish underground in Warsaw when Poland was invaded in 1939. After the war he became a diplomat for Poland, but broke with the Polish government in 1951, and went into exile to France, then the United States. It is against this background that he wrote *The Captive Mind*, initially copyrighted in 1951, as his own coming to terms with the forces that led him to the choice of exile. It could have been no easy choice – the untethering of relationships, the alienation from memories, the loss of identity itself.

What could lead someone to choose exile, which Milosz writes means "sterility and inaction?" For Milosz it was the rise of socialist realism, of the "Method," of communism. It was what socialist realism required. "In the field of literature it forbids what has in every age been the writer's essential task – to look at the world from his own independent viewpoint, to tell the truth as he sees it, and so to keep watch and ward in the interest of society as a whole. It preaches a proper attitude of doubt in regard to a merely formal system of ethics but itself makes all judgment of values dependent upon the interest of the dictatorship."

This is a highly philosophical work, written by a Nobel Prize winner (for literature, as Milosz is also a world-class poet) that can be intimidating, but elucidating, with lessons for our own society. For example, Milosz explains the communist antipathy for "cosmopolitanism," defined as "admiration for the (bourgeois) culture of the West." The antipathy is born of a disdain for the arrogance of the West that would belittle the contributions of unknown Eastern Europe. As he writes: "A citizen of Iowa asked to define what he means by 'Europe' would probably name France, Holland, Italy, Germany. He would go no farther East, and he would imagine the inhabitants of that distant area to be a mixture of untrustworthy, backward tribes." Written almost fifty years ago, is this observation still not true?

In an age, however, of the decline of communism, what importance can this work have? Given the cyclical nature of history, an effort to understand totalitarianism is not wasted. Looking at our own society even now, we have to ask whether we may be caught in a "socialist realism" of our own, ofttimes sponsored by the majority political party of the time. Could "political correctness" not be the indoctrination of the left, and a rigid religious morality the indoctrination of the right, the lenses through which all judgments by such parties are made, the so-called "interest of the dictatorship/" In either case, are our minds as free as we believe them to be, or do we also share in the dilemma Milosz presents in his study of the captive mind? Milosz contends that "[n]ever before has there been such enslavement through consciousness as in the twentieth century." Though communism is not the "threat" it was in the fifties, perhaps other threats related to the diffraction of reality through the lenses of the majority still exist, and this book could be a primer for understanding the twentieth century.

1997 Grant Recipients

Trustees of the Utah Bar Foundation are shown below presenting checks to the recipients of the Foundation's 1997 grant awards. Beginning at center and moving clockwise are: UTAH LAW-RELATED EDUCATION PROJECT Director Kathy D. Dryer and Board Chair H. Michael Keller from Stewart M. Hanson, Jr. ($35,000); LEGAL AID SOCIETY OF SALT LAKE Board President Tobin J. Brown and Director Stewart P. Ralphs from Joanne C. Slotnik ($99,000); DISABILITY LAW CENTER Executive Director Fraser Nelson, Managing Attorney Ronald Gardner and Board President Joseph T. Dunbek, Jr. from H. James Clegg ($18,000); UTAH LEGAL SERVICES Director Anne Milne and Board President Martin W. Custen from H. James Clegg ($94,000); UTAH DISPUTE RESOLUTION Board Chair Hardin A. Whitney with Board members Phyllis Geldzahler, Jane Semmel, William W. Downes, Jr., Constance White and Diane Hamilton from Hon. Pamela T. Greenwood ($7,000); SENIOR LAWYER VOLUNTEER PROJECT Mimi Mortenson and Director Jane Semmel from H. James Clegg ($5,000); A WELCOME PLACE Director Teresa L. Hensley from Hon. Pamela T. Greenwood ($10,000); UNIVERSITY OF UTAH COLLEGE OF LAW (Fordham Loan Forgiveness Program) Dean Lee E. Teitelbaum, Asst. Dean Mary Jane Ciccarello and Program Director Margaret N. Billings from James Z. Davis ($10,000). Not pictured is DNA PEOPLE'S LEGAL SERVICES ($25,000). **TOTAL 1997 GRANTS – $309,929** which includes $6,000 for law student scholarships and $929 for Ethics Awards.

Photos courtesy of Robert L. Schmid

CLE CALENDAR

ALI-ABA SATELLITE SEMINAR: THE CONVERGENCE OF ELECTRICITY, GAS & TELECOMMUNICATIONS – NEW OPPORTUNITIES FOR THE PRACTICING LAWYER

Date: Thursday, December 4, 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

IS DISCOVERY ETHICAL? A PANEL DISCUSSION OF SOME OF THE COMMON ISSUES IN DISCOVERY

Date: Wednesday, December 17, 1997
Time: 12:00 noon to 1:00 p.m.
Place: Marriott Hotel
Fee: $15.00 for Litigation Section Members
$30.00 for Non-section Members
CLE Credit: 1 HOUR ETHICS

ETHICS – ESTABLISHING SUCCESSFUL & PROFITABLE CLIENT RELATIONSHIPS

Date: Friday, December 19, 1997
Time: 9:00 a.m. to 12:00 p.m. *(time subject to change)*
Place: Utah Law & Justice Center
Fee: $70.00 pre-registration
$60.00 for three or more registrations from the same office
$85.00 at the door
CLE Credit: 3 HOURS ETHICS

ETHICS – THE BOTTOM LINE: SETTING & COLLECTING FEES

Date: Friday, December 19, 1997
Time: 1:00 p.m. to 4:00 p.m. *(time subject to change)*
Place: Utah Law & Justice Center
Fee: $70.00 pre-registration
$60.00 for three or more registrations from the same office
$85.00 at the door
CLE Credit: 3 HOURS ETHICS

DOMESTIC VIOLENCE CLINIC – PROTECTIVE ORDERS

Date: Thursday, January 8, 1998
Time: 5:00 p.m. to 7:00 p.m.
Place: Utah Law & Justice Center
Fee: No charge
CLE Credit: 2 HOURS

WHY BAD THINGS HAPPEN TO GOOD LAWYERS: ETHICS & PROFESSIONALISM SEMINAR

Date: Wednesday, January 21, 1998
Time: To be determined
Place: Utah Law & Justice Center
Fee: $90.00 pre-registration
$100.00 registration at the door
CLE Credit: 6 HOURS ETHICS

NLCLE WORKSHOP: LANDLORD/TENANT

Date: Thursday, January 22, 1998
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

FAMILY LAW PRO BONO PROJECT TRAINING

Date: Friday, January 23, 1998
Time: 8:00 a.m. to 12:00 noon
Place: Utah Law & Justice Center
Fee: FREE to those willing to accept a pro bono case
$45.00 for all others
CLE Credit: 4 HOURS

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

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

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____
2. _____ _____

_____ Total Due

Make all checks payable to the Utah State Bar/CLE

Name _____ Phone

Address _____ City, State, Zip

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

Credit Card Billing Address _____ City, State, ZIP

Signature

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

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

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

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

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

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

> ***A record of the points for establishing an agreement of comity which will allow individual lawyers licensed to practice in more than one of the participating states to fulfill their mandatory continuing legal education (MCLE) requirements in any participating state by fulfilling the MCLE requirements in the state where they maintain their principal offices for the practice of law, agreed to by participating representatives of the Idaho State Bar, the Oregon State Bar, the Utah State Bar, and the Washington State Bar.***
>
> ***The program was implemented January 1, 1997***

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

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

Mandatory Continuing Legal Education Reminder

Attorneys who are required to comply with the odd year compliance cycle will be required to submit a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by December 31, 1997.

- The Mandatory CLE requirement is: 27 hours of total credit with at least 3 hours of ethics.
- The New Lawyer CLE Requirement is: A one day Mandatory Seminar (ethics), 12 New Lawyer CLE hours and 12 regular hours.

Please be advised that attorneys are required to maintain their own records as to the number of hours accumulated. Your "Certificate of Compliance" should list all programs that you have attended that satisfy the CLE requirements, unless you are exempt.

If you have any questions concerning your hours, please contact Sydnie Kuhre, MCLE Administrator at 297-7035.

Just a reminder to those on the 1997 CLE Cycle:

CLE Reporting Deadline December 31, 1997

New Lawyer CLE Requirement:
Mandatory Seminar (Ethics)
12 NLCLE hours + 12 regular hours

CLE Requirement:
27 total hours with 3 hours in Ethics

If you have any questions regarding your CLE requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator, at 297-7035.

If you need a listing of Utah State Bar courses, please contact Monica Jergensen, CLE Administrator, at 297-7024.

In an effort to assist those who fall short of their requirements, the Utah State Bar will provide its annual "LAST MINUTE CLE VIDEO" program on **Monday, December 29, 1997.**

Mandatory Continuing Legal Education Rule Changes

The Utah Supreme Court has granted the Board's petition to modify Regulation 4(d)-101(1)(a), 4(d)-101(2), Rule 5 of the Rules and Regulations governing mandatory continuing legal education and Regulation 5-101.

Regulation 4(d)-101

(1) Credit is allowed for the following activities

(a) Self-Study with board accredited audio and videotapes in accordance with the following:

(i) the audio or video tape presentation must have been accredited by the board;

(ii) one hour of credit is allowed for viewing and/or listening to fifty minutes of audio or videotape or computer interactive telephonic presentation in accordance with Rule 4(a);

(iii) no more than twelve hours of credit may be obtained through study with audio or videotapes or computer interactive or telephonic presentation pursuant to this subsection (a).

Regulation 4(d)-101

(2) No credit is allowed for self-study programs except as premitted above in Regulation 4(d)-101-(1)(a).

Rule 5 Annual Reports by Attorneys

On or before January 31 of alternate years, each attorney admitted to practice in this state shall make a wirtten report to the board, in such form as the board shall prescribe, concerning such attorney's completion of accredited continuing legal education ending with the preceding 31st day of December. The report shall include the title of programs attended, or the audio or video, computer telephonic presentation viewed or listened to, the sponsoring agency, the number or hours in acutal attendance at each such program, or the number of hours of such audio or video presentation and such other information as the board shall require.

Regulation 5-101

Each licensed attorney subject to these continuing legal education requirements shall file with the board, by January 31 following the year for which the report is due, a statement of compliance listing continuing legal education which the attorney has completed during the applicable reporting period.

On or before January 31 of alternate years, each attorney admitted to practice in this state shall make a written report to the board, in such form as the board shall prescribe, concerning such attorneys.

Should you have any questions regarding the above changes, please contact Ms. Sydnie Kuhre, Mandatory CLE Administrator, at 297-7035.

CLASSIFIED ADS

RATES & DEADLINES

Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please call (801) 297-7022.

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

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

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

BOOKS FOR SALE

Utah Law Review, *Complete Set* from Volume 1-2 (1949-50) thru Volume 1991, No. 4 (Some bound, most separate copies.) *Perfect Condition.* Call Ross @ (801) 266-4618.

Utah Reports 2d Vol. 1-30 (1953-1974) – $600.00; Utah Reports P.2d Vol. 520-921 (1974-1996) – $600.00; Call Geniel @ (801) 484-2111.

For Sale: 1955 Edition of Corpus Juris Secundum. Blue leather bound, historical interest. Make offer. Call Bob Steiner @ (801) 320-0141.

POSITIONS AVAILABLE

HAWLEY TROXELL ENNIS & HAWLEY LLP seeks two attorneys for its Boise, Idaho office. **Real Estate Associate** – must have 2-5 years transaction real estate experience. **Commercial Litigation Associate** – must have 2-5 years litigation experience. Strong academic credentials required. All replies are confidential. Please send resume to: **Hiring Partner P.O. Box 1617, Boise, ID 83701.**

ATTORNEY: Small civil lit firm; 1-2 yrs experience in litigation. Send resume to Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #42, Salt Lake City, Utah 84111.

The Salt Lake City Prosecutor's office is currently accepting applications for a criminal prosecutor position. Must have excellent advocacy skills and criminal law experience. Check with Human Resources for closing date and application procedures. Send resumes to Nina Frese, 451 South 200 East, Room 125, Salt Lake City, Utah 84111.

AV rated Ogden law firm seeks associate to work in area of estate planning. Strong computer and writing skills required. Accounting background helpful, some legal experience preferred. Approximately one-fourth of clients are gay or lesbian. Send resume to Jane Marquardt, 2408 Van Buren Ave., Ogden, Utah 84401. Inquiries will be kept confidential.

ATTORNEY-ASSOCIATE POSITIONS: Strong & Hanni seeks a litigation associate to assist with insurance defense work. One position requires 2-4 years of experience and the other position requires 0-2 years of experience. Both positions require excellent analytical thinking, research, writing and computer skills. This is a good opportunity for an individual interested in working on a variety of legal matters. Salary is negotiable based on experience and qualifications. Strong & Hanni offers an excellent benefit package. All inquiries are confidential. Qualified candidates should send a resume and writing sample to Strong & Hanni, Attn: Office Manager, 600 Boston Building, 9 Exchange Place, Salt Lake City, Utah 84111 or fax to (801) 596-1508. Strong & Hanni is an equal opportunity employer.

POSITIONS SOUGHT

ENTERTAINMENT LAW: Denver-based attorney licensed in Colorado and California available for consultant or of-counsel services. All aspects of entertainment law, including contracts, copyright and trademark law. Call Ira C. Selkowitz @ (800) 550-0058.

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #100, Salt Lake City, UT 84111. Call (801) 583-0206 or (801) 534-0909.

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

CONTRACT WORK. Uncertain about the appellate process? Need assistance with a complex or lengthy motion? Attorney with extensive experience clerking for the Utah Court of Appeals and the Utah Federal District Court seeks contract appellate/motion work. Excellent research and writing skills combined with very reasonable rates. Sheleigh A. Chalkley @ (801) 532-7282.

Out of state lawyer, in Salt Lake City for six months, seeking temporary legal work. Bankruptcy experience, desire to learn trademark/copyright law. No benefits sought, will be responsible for own taxes. (801) 293-1019, Timothy.

OFFICE SPACE / SHARING

Deluxe office space for two or three attorneys. Avoid the downtown/freeway congestion. 7821 South 700 East, Sandy. Includes three spacious offices, large reception area, conference room, space for library, file storage, wet bar and refrigerator, convenient parking adjacent to building. Call (801) 272-1013.

Deluxe office space for one attorney. Avoid the rush hour traffic. Share with three other attorney's. Facilities include large private office, large reception area, parking immediately adjacent to building, limited library, fax, copier, telephone system, & kitchen facilities. 4212 Highland Drive. Call (801) 272-1013.

Office space available for attorney. Secretarial space available. Space includes office (10' x 13'), shared reception area and kitchen. Possible sharing of secretary, receptionist, fax, copier and telephone. Centrally located in Ogden. Excellent space for DUI attorney or attorney looking to get on own. Contact Paul D. Greiner @

(801) 627-1455.

Deluxe office space for two attorneys, 7321 South State, Midvale, Utah. Avoid freeway congestion. Conference room, reception area, two secretarial spaces, wet bar, and refrigerator. Large parking lot, copy machine, fax, etc. (801) 562-5050.

Deluxe office space for two attorneys. Avoid the downtown/freeway congestion. 7026 South 900 East, Midvale. Includes two spacious offices, large reception area, file storage, wet bar, convenient parking adjacent to building. Call (801) 272-1013.

LARGE CORNER OFFICE available. Small downtown estate planning firm located in classic landmark building. Excellent decor, including wood floors and large windows. Digital phones, fax, copier, small and large conference rooms and receptionist available. Also, free exercise facilities with showers. Prefer attorney or CPA. Call (801) 366-9966.

Choice office sharing space available for 1 attorney with established law firm. Downtown location near courthouse with free parking. Complete facilities, including conference room, reception room, library, kitchen, telephone, fax, copier, etc. Secretarial services and word processing are available, or space for own secretary. Please call (801) 355-2886.

OFFICE SPACE FOR RENT: Choice office space for rent in beautiful, historic building in Ogden, Utah. Several elegant offices with character available; great associations; security system; extremely convenient location; and ample parking. For information, please contact (801) 621-1384.

SERVICES

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

Help Clients Raise Cash on secured payment streams: Real Estate Notes, Business Notes, Structured Settlements, Annuities, etc. Purchase can be all payments, splits, partial, Multi-stage. Call about advances on Estates in Probate. Abram Miller, Ph.D., (801) 281-9723, pager (801) 460-9500.

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

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

Office Furniture: Executive Kimball desk, matching credenza, blue leather desk swivel chair, 2 blue leather wing-back guest chairs, 6 blue leather club chairs and conference table. $3000.00 For more information, please call (801) 656-0705, after 5:00 p.m.

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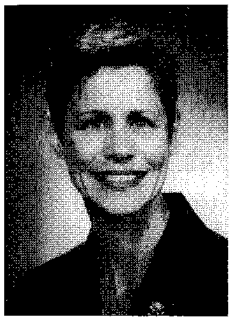
Get to Know Your Bar Staff



KATE TOOMEY

Kate is one of three Assistant Disciplinary Counsel in the Bar's Office of Attorney Discipline. Her duties include providing general education and guidance to practitioners concerning their ethical responsibilities, and investigating and resolving or prosecuting professional ethics complaint.

During her time away from Bar responsibilities, Kate serves as Editor-in-Chief of *Voir Dire*, now published twice a year as an issue of the *Utah Bar Journal*. She is also an officer of the Appellate Section.

Although Kate was born in the East, she is a daughter of the desert, and began her professional life as an archeologist here in Utah. She earned her bachelor's and master's degrees from the University of Utah, and was particularly intrigued with understanding why humans engage in agricultural production, a problem she has never resolved, but continues to think about. Kate did several seasons of field work throughout the western United States, often serving as the site cartographer. She also worked for many years at the Museum of Natural History, and continues to pursue her interest in understanding human cultural adaptation, particularly in the Great Basin.

Kate loves spending time outdoors, most recently running rivers in the Uintah Basin, and visiting Archaic period cave sites in the west desert. She also loves cooking for her friends ("instant gratification"), tending her xeroscape garden ("soul food"), and looking at birds.

DIANE CLARK

Diane (pronounced "Dee-on") is the person responsible for coordinating the Bar's Lawyer Referral Service, answering approximately 1200 requests for referrals per month. Diane also assists with the Tuesday Night Bar program sponsored by the Young Lawyers section, and answers correspondence from all over the world, including many inquiries from people incarcerated in correctional institutions.

Diane was born in Tooele, where her parents were in the theater business. As a result, Diane's regular babysitter was the movies. (There were no X-rated films in those days.) Diane graduated from Tooele High School, then married right away. For many years, Diane's priority was raising her six children. Today, she enjoys interacting with her twenty-one grandchildren and her two great-grandchildren.

Diane's tenure with the Bar is longer running that that of any other Bar employee. Diane began work with the Bar as the Lawyer Referral clerk under Dean Sheffield, when the Bar was still housed at 425 East First South; John Beaslin was the Bar President. During her nineteen years with the Bar, Diane has enjoyed the excitement, changes, and new ideas of each of the twenty Bar Presidents under which she has served.

Diane's favorite thing about working for the Bar is the endless variety of problems she has the opportunity to assist people with. She says that each day brings her a broad spectrum of people with potential legal matters, and the challenge is to help them find the right attorney. You might even say that she's the Ann Landers of the Utah State Bar, but Diane wants everyone to know that her family is still her number one priority.

One of Utah's Largest Law Firms Announces New Name

Utah's fourth largest law firm has announced a change in its name to Parr, Waddoups, Brown, Gee & Loveless. The firm, formerly known as Kimball, Parr, Waddoups, Brown & Gee, announced the change in conjunction with the recent confirmation of one of its named shareholders, Dale A. Kimball, as a new United States District Court judge. Under the ethical rules governing law firm names, an attorney appointed as a judge may not allow the continued use of the attorney's name as part of his former firm's name.

"I am confident that Parr Waddoups will continue the fine tradition of excellent legal services started 22 years ago when the firm was founded," said Kimball, who was appointed as the newest federal judge in Utah.

Parr Waddoups has replaced the name of Kimball with that of Scott W. Loveless, a senior transactional lawyer with the firm. Loveless, a graduate of Georgetown Law School, has more than 20 years of experience, much of it with complex mergers, acquisitions and securities matters.

"Scott has been a significant part of the fabric of the firm for many years, and this transition provides a wonderful opportunity to showcase those contributions," said Clayton J. Parr, the current president of the firm.

Since the firm's inception in 1975, Parr Waddoups has grown from five to 45 attorneys and from a small litigation firm to a full-service law firm. Parr Waddoups practice areas include securities, natural resources, real property, environmental, employment, construction and land use law. Despite that growth, litigation continues to be a mainstay of the firm's services.

"Kimball's judicial appointment underscores the strength of the litigation team at the firm and our commitment to achieving excellent results for our clients," said Clark Waddoups, who becomes the firm's senior litigator.

Parr Waddoups is somewhat unique in the Utah legal market. Each attorney at the firm, from the newest to the most senior, has equal voice in the management of the firm's affairs. The unusually democratic structure requires that all members be committed and innovative in addressing clients' needs.

"Our progressive approach to providing legal services is designed for efficient and cost-effective solutions to meet and exceed our clients' needs. At the same time, it allows the firm to offer the judicial community some of the finest attorneys in the state," said Parr, explaining that two of the firm's shareholders have been appointed to judicial bench positions during the past year.

Parr Waddoups has been recognized for its commitment to excellence by being the only Utah law firm invited to maintain membership in Commercial Law Affiliates (CLA), the largest affiliation of independent commercial litigation, business and real estate law firms in the country. Each year, CLA conducts rigorous peer reviews of its members. While CLA firms practice independently and are not in the joint practice of law, membership in CLA gives Parr Waddoups access to quality law firms in all fifty states and 70 countries.

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

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

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

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

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

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

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

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

DATE:_____ **SIGNATURE:**_____

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

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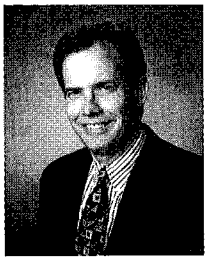
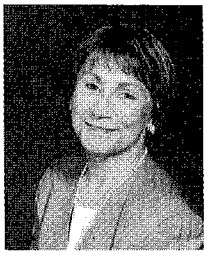
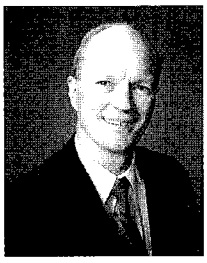


William Downes, Jr.
Mediator, Arbitrator, ADR Trainer



Pat M. Leith
Mediator, Arbitrator

David O. Black
Mediator, Arbitrator



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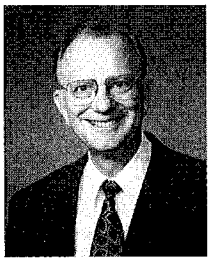

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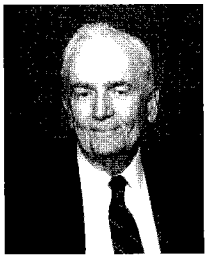
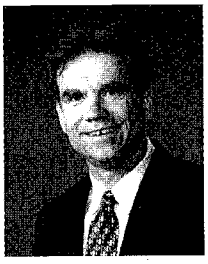


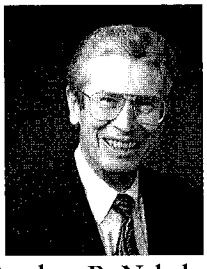
Ray Christensen
Mediator, Arbitrator

Ellen Maycock
Mediator, Early Neutral Evaluator



Timothy C. Houpt
Mediator, Arbitrator

T.J. Tsakalos
Mediator, Arbitrator



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Salt Lake City, Utah 84111

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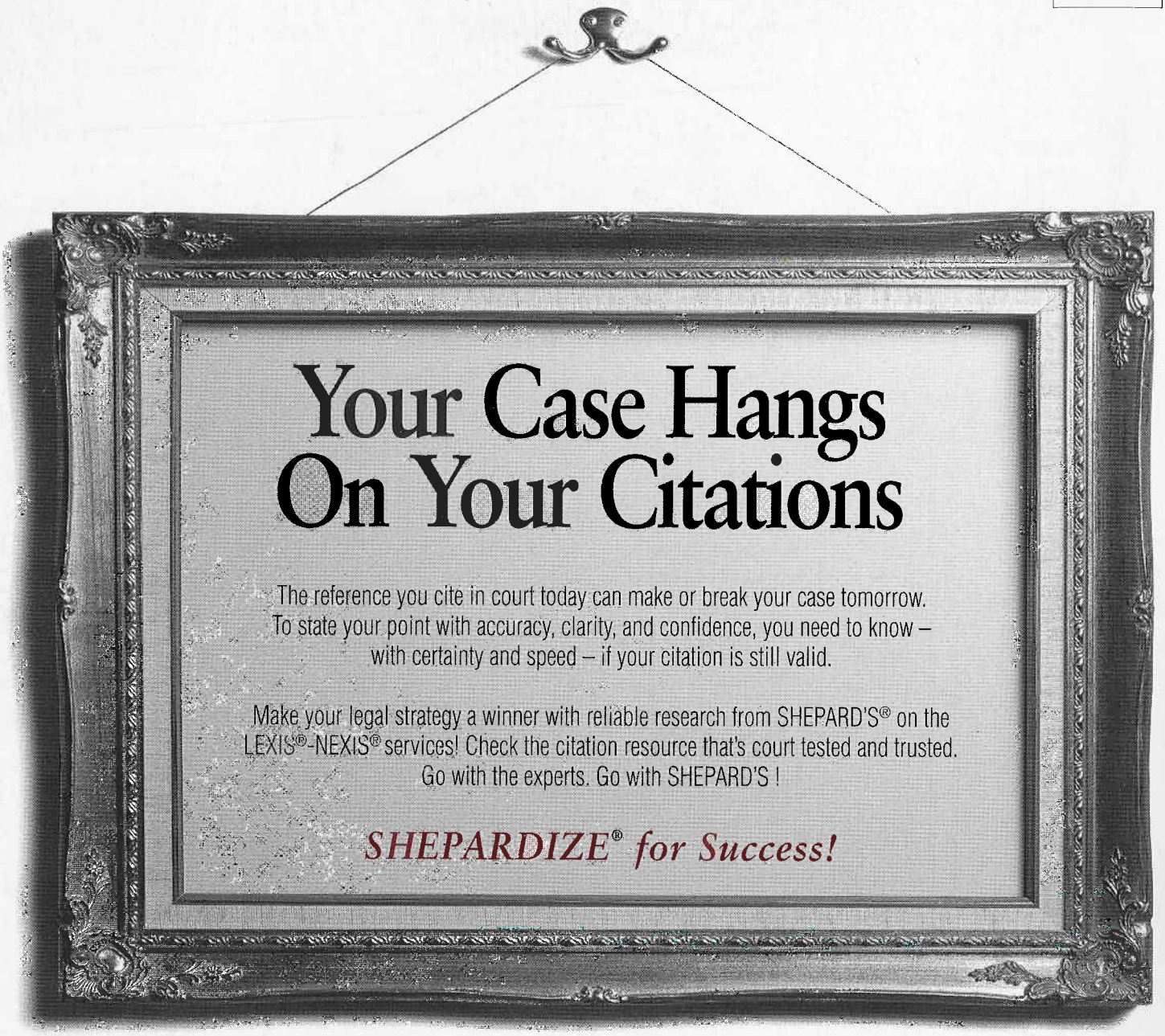

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