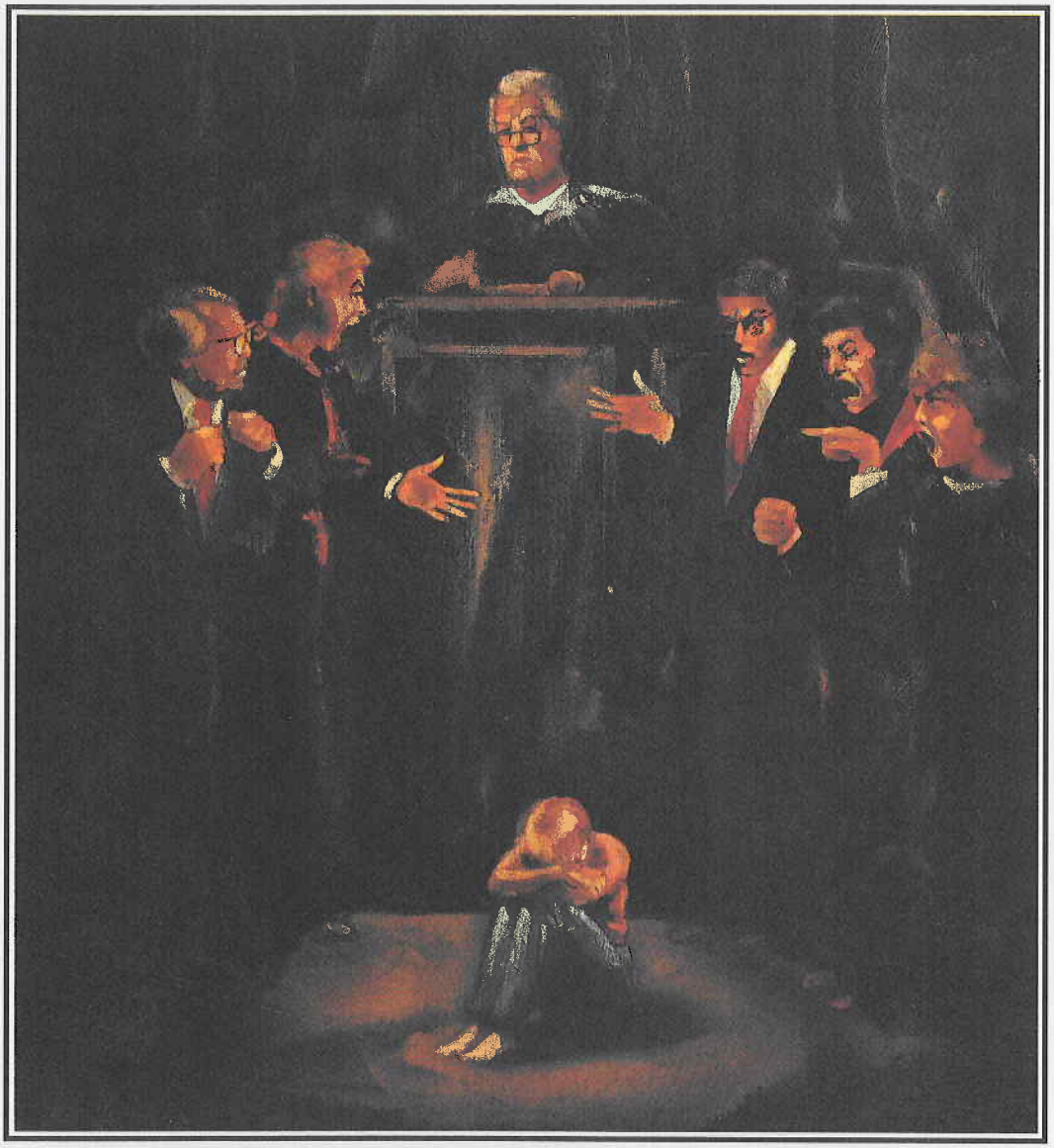
VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL



Volume 2 • Number 1 • Winter 1997

Unlimited Westlaw research for Utah as low as $125* per month!

WESTLAW PRO™
Predictable Research Online

For the first time, solos and small Utah law firms of 2-9 attorneys can have the research power of WESTLAW® at one low monthly fee.

With WESTLAW PRO™ (Predictable Research Online), you get unlimited access to the complete lineup of Utah databases for only $125 per month for one attorney and just $70 per month for each additional attorney.**

WESTLAW PRO includes Utah Reporter™, Utah Statutes Annotated, Utah Court Rules and Orders, Utah Administrative Code, Utah Attorney General Opinions, Utah Workers' Compensation Cases and many additional Utah databases.

What's more, with WESTLAW PRO PLUS™, add federal databases like U.S. Supreme Court Cases, U.S. Court of Appeals–Tenth Circuit Cases, Utah Federal District Court Cases, USCA® and related databases for an additional $25 per month for one attorney, and an additional $30 per month for each additional attorney.

Even better, no matter which PRO plan you decide on, you will also receive other West exclusives like KeySearching™ and the Key Number service, terms added in synopses and headnotes by our editors, WIN® (WESTLAW is Natural™) plain-English searching and all the other features that make WESTLAW the choice of legal research professionals.

There's no initial fee and there's no cancellation fee.

OPTION: PROMOTION FOR NEW WESTLAW SUBSCRIBERS!
Subscribe to WESTLAW PRO or PRO PLUS and your **first 60 days** of WESTLAW charges will be waived. One-year subscription required. Some restrictions apply.

WESTLAW®
KeySearching. Research you can trust.

CALL: 1-800-255-2549
EXT. 749

*$125 per month applies to one attorney for the WESTLAW PRO plan.
**Offer limited to solos and law firms of 2-9 attorneys. Other restrictions apply.
Prices subject to change without notice.

To Remain As Your Guardian Angel, We Go Through Copying Hell

DON'T BLAME YOURSELF. To reduce the burden of your trials, we can't avoid it. To deliver HeavenSent™ Legal Copying, we must go through purgatory.

To see what we mean, take a glance at our *Copying Checklist From Hell.* The Checklist causes torment due to the number of times we have to check and recheck your copies. Plus, it tells you why no other copying service dares touch it. Sure, they may say they do it (the little devils). But when their feet hit the brimstone, do they?

It goes deeper. Day or night, we work like demons to complete your urgent projects. Yet we still manage to remain as your Guardian Angel due to one word: *Accuracy.* (We don't like flying down into purgatory any more than we have to.) We also keep a close watch for compliance with court specified formats.

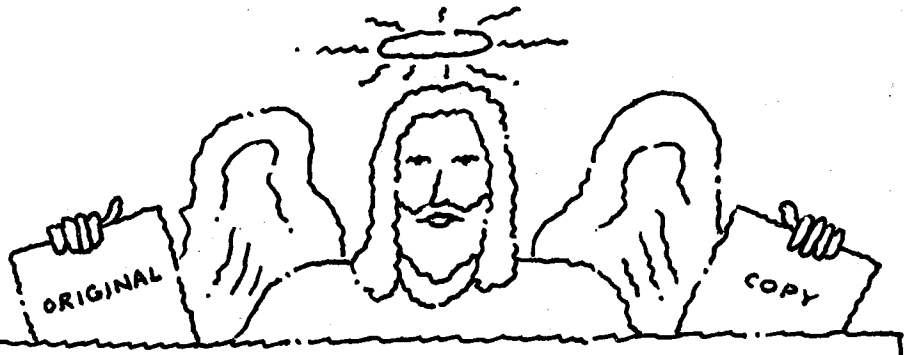
So call down your Guardian Angel from *Litigators Overnight.* With Heaven Sent™ Legal Copying, we're the answer to your prayers.

HEAVEN SENT
LEGAL COPYING

Litigators Overnight LC.

Copying . Trial Exhibits . Imaging & OCR

Downtown SLC: 363-3330



THE COPYING CHECKLIST FROM HELL

(A 28-point legal copying checklist to stop us from committing sin.)

- ☐ Client's project *promptly* picked up
  - ☐ Client's specifications reviewed, compared to documents
  - ☐ **28-point Work Order of Instructions completed**
- ☐ Project and Work Order delivered to Project Coordinator
  - ☐ Deadline compared with estimate of project's completion
- ☐ Project and Work Order reviewed with Production Manager
  - ☐ Client called to clarify any unclear instructions
- ☐ Project and Work Order delivered to Copy Operator
  - ☐ Operator makes sure Work Order is always in view
  - ☐ Document's binding needs noted (clips, staples, bind, etc.)
  - ☐ **Each original checked for margin notes, two-sided, etc.**
  - ☐ **Copier set for optimum quality on each page, as needed**
  - ☐ **Before copying, each original page counted by hand**
  - ☐ **After copying, each copy counted by hand**
  - ☐ **Each copy checked for quality and accuracy**
  - ☐ "Best Possible Copy" markers inserted to flag poor originals
- ☐ Project and Work Order delivered to Finishing Dept.
  - ☐ Finishing instructions reviewed (binding, hole-punch, etc.)
  - ☐ Finishing completed
- ☐ Project and Work Order delivered to Quality Assurance Inspector
  - ☐ Work Order in clear view at all times
  - ☐ **Each and every copy compared to original, page by page**
  - ☐ Binding/finishing inspected for compliance with Work Order
  - ☐ Project packaged according to Work Order
  - ☐ **Inspector signs "Assurance of Quality" Certificate**
- ☐ Project and Work Order delivered to Project Coordinator
  - ☐ Project *promptly* delivered to client
  - ☐ **Follow-up call to client to ensure satisfaction**

Can you get ALL of these, tailored to your law firm, from ONE insurance company?

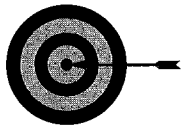
Lawyers' Professional Liability Coverage

Employment Practices Coverage for Law Firms

Employee Dishonesty Coverage for Law Firms

Nonprofit Director and Officer Coverage for Lawyers

Public Officials' Coverage for Lawyers



YES.

Introducing Coregis' New Customized Practice Coverage℠

Easy, one-stop shopping for multiple coverages designed solely for law firms, at lower, risk-related rates. From Coregis Insurance Company, a leader insuring lawyers for 25 years.

For more information, contact:

CONTINENTAL INSURANCE AGENCY, L.L.C.

1111 E. Brickyard Road • Suite 202 • Salt Lake City, UT 84106
1-888-466-0805 • 801-466-0805 • Fax: 801-466-2633

COREGIS®
Custom Insurance Programs

Volume 2 Number 1 Winter 1997

VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

CONTENTS:

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.

VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

PREPARED BY
THE UTAH STATE BAR LITIGATION SECTION

Voir Dire is a semi-annual publication of the Litigation Section of the Utah State Bar.

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

Voir Dire will review original articles submitted for publication. Please submit proposed articles to *Voir Dire*, 645 South 200 East, Salt Lake City, Utah 84111. The Editorial Board reserves the right to edit all submissions accepted for publication.

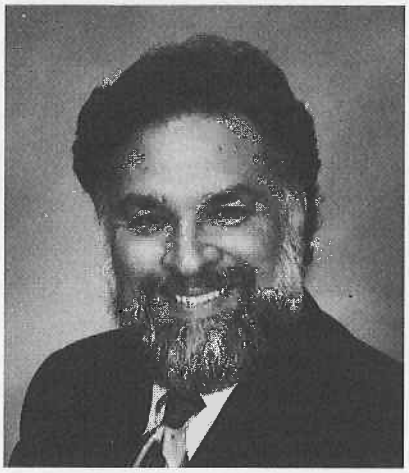
President's Message

A New Year with Old Ideas (or How to Make a Commitment and Keep It)

by Steven M. Kaufman

It's early December and I am writing my fourth message to you. I have some pressure put on me by the *Utah Bar Journal* police to get this done in a timely manner, so as to set a good example for all the other contributors to our revered publication. I am doing my best, as ideas come easily, but putting them to the computer keyboard is tedious, to say the least. It is a privilege, one I take seriously, to have a forum to say just about anything I want about anything that seems appropriate to write about at the moment. The moment I finished the last message I was already searching for the next idea to write to you about, something warm, different, and of course, lawyer-like. Snow is again falling today, and I set the fireplace aflame so I could think of something warm and fuzzy to write about. As the new year is upon us, I think about all the things I want to accomplish for our Bar, as its President, as a lawyer, and as a friend.

As President, I am half way through what has been a most gratifying, but exceptionally busy year of Bar business. We have run our first-ever media message about lawyers and the good they do for so many, and the response has been impressive. For example, the Guardian ad Litem program has received enough volunteers to start a new training program. One of our members received several calls offering assistance in his effort to help the underprivileged, along with monetary contributions. Another giving lawyer not only received many positive comments, but also received a commitment to send money to her chosen charity for their Christmas contribution project. A new staff of volunteer students will attempt to



set up a program to serve migrant workers. Another lawyer has offered to work under the viaduct to help the homeless, and even the homeless have seen the message and sought help from our giving attorneys. We can be proud of our own who help others and who do it, not for the recognition, but just to do good for those in need. Our Bar can be congratulated, and this series of newspaper messages was a success, in my opinion. Maybe we can publish some more, because I know there are hundreds of lawyers out there doing wonderful things. I am proud of their commitment, and this program is one way to let those in need find us, and to allow those skeptics who don't think we are up to anything good to see that we are.

Another program I am attempting to get moving is the mentor/mentee program through the University of Utah and Brigham Young University Schools of Law. We have put together the policy package and are attempting to match the students with the lawyers and law firms. It is gratifying to note that all we had to do is pick up the telephone and ask, and no one, and I mean no one, has said no to the request to get involved in this new endeavor. We have Carman Kipp and his wonderful ability to "seek and ye shall find" format, and I am excited and hopeful that this is a first step in the Bar's continuing effort to promote professionalism and civility within its ranks, starting with those who need to see it first hand before getting out in the real world of lawyering. This is another showing of the commitment our experienced members put forth, especially with such busy schedules to meet. Thanks for your help, which ultimately will help us all.

When anticipating this wonderful job, I often thought of the many things I would like to do, and complete. Doing and completing are separate agendas. Taking on too much only guarantees lack of completion. I have been told by several past presidents to have an agenda and complete it. This subject often advances itself, and I find myself thinking of something new that seems like a grand idea. Then I remember the sage words of my predecessors and rethink my agenda. As the new year gears up, I think it's an appropriate time to remember that a new year is a good time to remember old ideas. Old ideas just get older unless you take the time to put them into effect, and sometimes the oldest of ideas are the best ones to promote. Professionalism and civility issues will always have a forum as long as I have the pulpit. I try to keep my agenda directed, but sometimes best intentions go unfulfilled. Don't ever hesitate to remind me that our profession needs spokespeople who care and for whom the image of lawyers is an appropriate issue about which to speak positively.

January is a time for reflection, a

time to again commit to oneself that ours is the best profession. We have an opportunity afforded us that few other professions allow. We have the ability to help remind society that ours is the best system and we are its committed associates. Our education has given us the ability to represent others in their grave times of need. We are able to commit to society that we are a profession that can, and does reveal what is good and important in today's world. We must continue, with resolve, to maintain a commitment to new ideas and ideals, utilizing the old ideas of those before us because they, too, had the same resolve. As I continue to help in the guidance of our Bar, I look forward to meeting as many of you as I can during my tenure as your President, and as this new year progresses I will often be reminded of our caring and sharing membership. Share a commitment to your profession and fellow lawyer and judge to maintain the highest standards of demeanor with your adversary, either in or out of the courtroom. Remember that he or she also is your friend in the profession, that there will always be another case to settle or try, and that your relationship with other members of our Bar is ongoing past this one case or dispute. I am hopeful that you will consider my message as a positive reminder that, we, as lawyers and judges, are our own best advertisement. Society looks to us for direction. We can give to that society a wonderful calling card for the new year. It's not that difficult to be a good lawyer, in the true sense, and still represent your client appropriately and with the skills with which you have been entrusted.

On a final note, this new year brings with it a great many opportunities for your involvement in Bar activities. Honestly, did you think I could write a new year's message without a plug? Not only will you be exemplifying all that I have been discussing, but you also will have the opportunity to network with so many other talented people. To keep you updated on my involvement: I have been attending monthly Bar staff meetings, which is something a little different. Your Bar staff is busily preparing for the Mid-Year Meeting in St. George set for March 6-8, and the Annual Bar Meeting in Sun Valley, July 2-5. Both of these meetings should take an advance marking in your calendars, as they look to be wonderful, both from an eductional and social aspect.

I am also going to San Antonio and Scottsdale next month for two very important Bar functions. In San Antonio, the National Association of Bar Presidents meets for discussions on how we can better lead our Bars into the next decade. The Western States Bar Conference meets in Scottsdale at the end of February to discuss how states with similar issues and membership can better meet the needs of the membership. These both should be well worth attending. Granted, I am not complaining about this duty either, as these are both great places to go. I just want to keep you updated on where I am going and what I will be doing on your behalf. I think it is important to let you know. On most Fridays or Mondays, if I'm not at my office, you can find me at the Law and Justice Center, if I'm not out of town on Bar business.

Also, I want to thank everyone in advance for being so kind in allowing me continuances on cases. My Bar travels and meetings take a lot of time, but I am grateful and happy to take that time, as I strongly feel the Bar and its work are well worth it.

On a final, final note I apologize to those whom I have promised to take to dinner, or go to lunch with, but have not. You know who you are so I won't embarrass you in my column. I will respectfully request that you call me and force me to live up to my commitments. Have a great new year, filled with grand health and wonderful friends. Talk to you soon!

Toward a Better System of Justice

by Debra J. Moore

A recent Bar study of racial bias in Utah's criminal justice system represents a valuable step toward the creation of a more credible justice system. During the past year, the Equal Administration of Justice Committee gathered data and interviewed people throughout the state about their perceptions of the treatment of minorities within the system. The interviewees included judges, prosecutors, private and public criminal defense attorneys, law enforcement officers, a law professor, and minority members of the public. The Committee concluded that despite conscious efforts to erase racial and ethnic bias from the criminal justice system, such bias probably still exists.

The Committee's conclusion was necessarily tentative because of a marked lack of statistical data to explain anecdotal evidence of perceived bias in the system. Nevertheless, the Committee recognized that both the perception of bias and the lack of such data are, in and of themselves, significant problems that require action. Accordingly, the Committee's study urges all state agencies involved in the justice system to develop management information reports to monitor the agencies' practices and procedures for disparate impact on minorities. Such reports will allow agencies to remedy any illegal discrimination and to dispel any misperceptions of discrimination.

The Committee further recommended that the Bar:

- actively encourage more participation by minorities;
- provide Continuing Legal Education programs on bias and diversity;
- gather and review statistics to determine whether any disparate impact on minorities exists in the Bar admission process;

- encourage more aggressive recruitment of minorities in the justice system and develop methods for evaluating recruitment efforts through statistics;
- develop training to educate participants in the legal process about different cultures and how well-meaning persons can discriminate because of a lack of comfort or understanding about persons who are different; and
- participate in and support a more comprehensive study of the judicial system by a racial bias task force recently approved by the Judicial Council.

The Committee, which consisted of Bar Commissioners Denise A. Dragoo, John Florez, James C. Jenkins, Charlotte L. Miller, D. Frank Wilkins, and me, was formed by then-President Dennis Haslam in the aftermath of the jury verdict in the O.J. Simpson criminal trial. One of many concerns about the justice system highlighted by the Simpson trial was the existence of widespread public distrust of the system, particularly by racial and ethnic minorities. The Committee's study establishes that Utah is far from immune from such concerns. Among the comments heard by the Committee were:

- Every police department has a "Mark Fuhrman." He just hasn't surfaced in every department.
- Many minorities don't understand how the criminal justice system works and often are inadequately represented by counsel.
- A perception exists within the criminal justice system that minorities can more easily do jail time than others.
- Law enforcement profiles for particular crimes, such as drug trafficking and domestic violence, are racially, ethnically, and sexually biased.
- Minority youths are more likely to be arrested, detained, incarcerated, and enter the juvenile justice system with fewer offenses than other youths.
- Juries in Utah are rarely racially representative.
- Many minority victims and witnesses believe that their interests and testimony are given less weight because of their race.
- Pre-sentence reports, probation or parole supervision, and post-sentence rehabilitation efforts are less favorable to minorities than others.

The study's recommendations, if implemented, will effectively address such concerns and increase public confidence in Utah's justice system. Of course, the ultimate test of the study's value will be whether it does more than gather dust on a shelf at the Law and Justice Center. The Committee therefore welcomes the efforts and suggestions of Bar members toward implementing its recommendations and eliminating racial bias in Utah's justice system.

REPORT FROM THE CHAIR

As the new year begins, it's traditional to take stock of past activities and look ahead to upcoming plans. In that spirit, the Litigation Section Executive Committee offers this report.

Voir Dire

We are very proud of the first three issues of *Voir Dire*. The articles and features have been as good as can be found in any professional journal. That's the good news. The bad news is that the expense of publishing quarterly consistently exceeded advertising revenues. Through the committed efforts of Vicky Kidman, Cal Thorpe, and the Bar Commission, we have found a solution which will allow us to sustain *Voir Dire* over the long haul. We are pleased to announce that effective with this issue, *Voir Dire* is merging with the *Utah Bar Journal*. In the past, the *Bar Journal* has been published ten times each year. In the future, *Voir Dire* will be published twice yearly as a special litigation edition of the *Bar Journal*, making the *Bar Journal* a year-round publication. *Voir Dire* will retain its look and feel, with editorial control of the non-*Bar Journal* articles being retained by the Litigation Section. Printing, advertising, and other business functions will be handled by the *Bar Journal*. These changes also will make it possible for the entire membership of the Bar to continue to receive *Voir Dire*.

Trial Academy

The brain child of Frank Carney has eclipsed our most optimistic expectations. The trial academy held six advocacy seminars in 1996, ranging from jury selection to closing argument. We are indebted to the volunteer faculty of trial lawyers and judges who made the academy come to life. Special acknowledgement is owed to Frank, who not only moderated all the sessions but also put together the excellent written materials. Each seminar saw increased demand, forcing us to move to ever larger courtrooms. The last session, featuring head-to-head closings from Gordie Roberts, Dick Burbidge, and Dan Berman was a fitting finale. We plan to repeat the trial academy in 1997, beginning with a special two-hour session on jury selection at the Mid-Year Meeting.

Civility

For years, the civility committee has struggled to find a way to deliver its message. Everyone perceived the need, but no one knew how to meet it. We believe we now have a vehicle that works. Last year, as part of the Bar's mandatory new lawyer training, the civility committee, headed by Craig Adamson, put on a civility seminar. An experienced faculty of lawyers and judges demonstrated, with no little humor, the dos and don'ts. We plan to repeat the civility seminar on an annual basis.

Model Jury Instructions

The Litigation Section continues to be active in contributing to the continuing evolution of the Model Utah Jury Instructions.

Annual and Mid-Year Meetings

The Litigation Section will sponsor and conduct break-out and plenary sessions in St. George and Sun Valley.

Evening with the Bench

In a continuing effort to foster good working relations between Bench and Bar, the Litigation Section will again host an evening of socializing and professional exchange with district court judges from around the State. We are looking into the feasibility of sponsoring a similar evening with appellate court judges.

This report hits some of the highlights of the Litigation Section's activities. It is not all-inclusive, nor is it intended to be exclusive. The Litigation Section exists to serve the professional needs of its members. We are always open to new ideas and worthwhile undertakings. By the same token, we are always looking for willing volunteers to help carry them out.

David Jordan

FROM OUR PERSPECTIVE

Frankly, we're weary of lawyer jokes and anecdotal bad-mouthing. Everyone seems to have a story about a bad lawyer, an avaricious lawyer, a lawyer who took advantage of them. These are the stories that make the best press because they appeal to a public all too willing to accept the misguided stereotype that most lawyers are corrupt and amoral predators, motivated by greed. The stories we don't often see in print are the ones about attorneys who challenge these unflattering stereotypes with quiet courage, hard work, and no expectation of financial reward.

You may have heard that one of our number abandoned his law practice, leaving scores of clients to fend for themselves. The media predictably focused on this part of the story. What we didn't see was much coverage about the Bar's considerable efforts to right this wrong, or about the generosity of individual attorneys who volunteered their time and that of their support staffs to assist the Bar.

Many of the abandoned clients were people with pending criminal matters who paid their attorney with cash up front. Their stories had a common thread: the money to pay for an attorney was hard to come by. Often, it was an entire paycheck, or the client had to borrow the money. In either case, the clients simply had no resources to pay for another attorney.

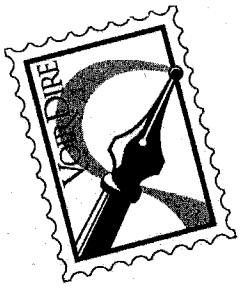
Enter the Bar and some of the area's decent, caring criminal attorneys. Under authority of a court order imposing a trusteeship over the attorney's law practice, the Bar took control of and inventoried the attorney's client files. In criminal matters with immediately pending court dates, the Bar contacted the judges and prosecutors, as well as the clients, to assist in arranging for postponements sufficient to permit the clients to obtain substitute counsel. The Bar's co-trustee, Gregory Sanders, and his paralegal, Randy Lloyd, assumed the demanding task of contacting the clients and returning their files. With the assistance of the Bar's Pro-Bono Coordinator, Toby Brown, the Bar identified attorneys willing to donate their time by meeting with the abandoned clients, reviewing their cases, and, where appropriate, taking the cases on a pro bono basis. In this manner, all abandoned clients with active criminal matters who wanted pro bono counsel were assigned to someone who would help them.

The Bar and its other co-trustee, Sidney Baucom, along with Mr. Baucom's paralegal, Joy Nunn, also took control of and inventoried scores of client files pertaining to civil matters. Again, clients were contacted and the files returned. Any client with a civil matter who wanted assistance in finding new counsel was given this assistance. Clients with domestic matters who paid their attorney's fees in advance were referred to pro bono counsel with experience in domestic matters.

The Bar is also coordinating a huge operation to identify and contact clients whose closed files were abandoned by their attorney. Several law firms and a number of students are donating paralegal time to the Herculean task of sorting through more than one hundred boxes of files, with the goal of returning them to the clients.

Your Bar dues helped fund the Bar's efforts to protect these abandoned clients, and in this respect we all share credit for being among the good guys. And then there are those of us who stepped into the crisis and offered to help, not with any expectation of compensation, but simply because it was the right thing to do. Next time someone tells you about a rotten lawyer, remember the collective efforts of the attorneys who rushed to give their assistance when it was so badly needed. We can all be proud that ours is a profession composed of generous individuals who respond selflessly to the community's needs.

LETTERS FROM OUR MEMBERS



DEAR EDITOR:

I enjoy *Voir Dire* as a publication. Most of the articles that are contained inside your periodical are interesting and sometimes even helpful in my practice of law.

Nevertheless, I feel compelled to comment on something that appeared in the Winter 1996 issue. I refer specifically to an article on page 35 of your journal entitled "A Credit to the Profession." This is an article which features an Ogden attorney named Jane Marquardt. I know Jane and I don't disagree with most of what is in the article. I know that I am raising a sensitive subject, but I feel it is an important one. Therefore, I have taken the liberty of writing what is a difficult letter for me.

Jane Marquardt is an admitted homosexual. She admits to being in a long-term lesbian relationship. I suppose that one can take the attitude that this has no bearing on her fitness and accomplishments as an attorney. I disagree. I think the title to the article "A Credit to the Profession" says it all. To hold this person up as some kind of role model or someone who is typical of the "best of our profession" is something I find very upsetting.

Jane shares a lifestyle which is endorsed or followed by only a very small percentage of people. Those who enter into this lifestyle are behaving illegally and immorally. In fact, there are subtle references in the article to Jane's lifestyle.

Utah is a culture that prides itself on family values and moral behavior. The next time you write an article like this, I wish you would take these factors into consideration.

Mark H. Gould

Letters From Our Members

Please send letters to Letters to the Editor, Voir Dire, *645 South 200 East, Salt Lake City, Utah 84111. Letters should be type-written, double-spaced, and concise. All letters are subject to editing and some may not be published at all, at the discretion of the Editorial Board.*

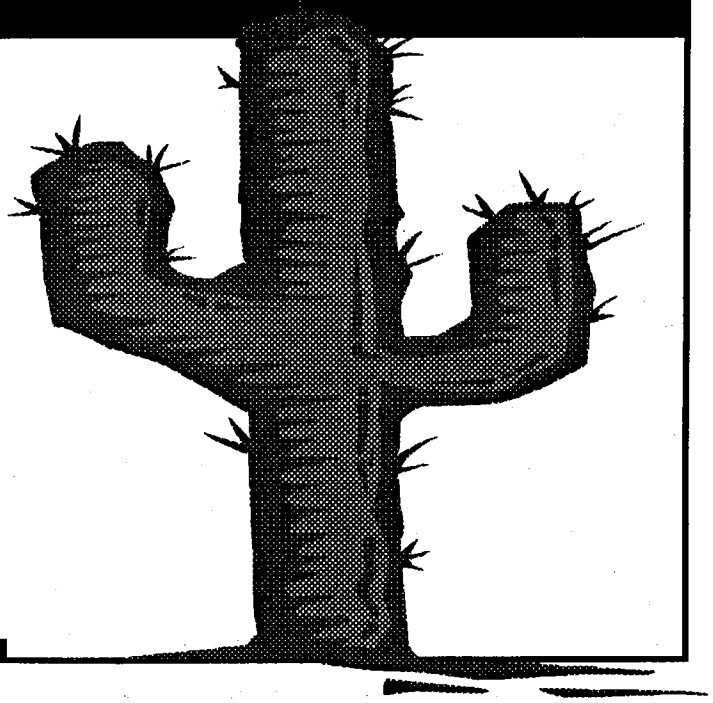
The opinions contained in Letters to the Editor are those of the contributors and are not necessarily of the Voir Dire *Editorial Board, the Litigation Section, or the Utah State Bar.*

Mark your calendar now!

The 1997 Mid-Year Convention is right around the corner!

March 6 - 8, 1997
St. George, Utah

More detailed information is coming soon. We hope to see you in St. George!



Abstaining From Offensive Personality

by Peter C. Appleby

The general mood these days seems more than a little antinomian. Many of us clearly believe that our lives are unduly constrained by regulations of various kinds ("Get the government off our backs!") and professionals have particular reasons for feeling chafed by the recent proliferation of ethical codes, which often seem to impugn their intelligence and integrity while threatening their autonomy as practitioners. Who needs more rules, it might be asked, when our lives are already so maddeningly hemmed in? After all, lawyers, doctors, academics, and other professionals undergo intense academic training and lengthy apprenticeships before they are permitted to practice on their own. Individual clients who feel mistreated have access to a generous array of institutional and legal remedies. And the public interest is well served by licensing and accreditation processes that protect the overall quality of professional education and practice. So why should we professionals not say, as some early Christians did, "Love the Lord and do what you will"?

Having experienced some of the irritation caused by various rules and laws enacted in recent years, I am more than a little sympathetic to the idea that there should be fewer regulations, rather than more. Nevertheless, I will argue that professional codes in general serve important purposes, and that a specific code of conduct for litigating attorneys might be a very useful addition to the canon. My ideas result from more than a decade of academic work in applied ethics, six years as the public member of the Ethics Committee of the American Psychological Association, and my participation in the drafting of one professional code and the major revision of another. They do not, however, reflect more than an interested reader's knowledge of the law or the practice of litigation.

The first and perhaps most important consideration is the fact that we (all of us, as far as I can tell) do need instruction in how to conduct ourselves. Whether or not choices were simpler and thus easier in the happier days of sentimental memory, good will, honest intent, and technical skill are simply not enough in the complex world of today's professional practice. Psychotherapists need guidance concerning the gifts they are offered by grateful and emotionally dependent clients. Physicians need help with the inevitable conflicts between patient autonomy and patient well-being. And attorneys need instruction about ethical, as well as legal, constraints on advocacy. Even finely crafted codes can not, of course, resolve substantive issues of any real subtlety. They can, however, provide valuable frameworks for ethical reflection, not only for neophytes, but also for veterans encountering new problems and changing circumstances.

A second important reason for adopting codes is their utility in informing clients, patients, and students about what to expect, and what not to expect or accept, from the professionals they consult. Whatever the game may be, it is likely to be played more fairly, honestly, and with greater finesse when all the players have access to the rules. Students don't know a priori how good professors should conduct themselves, any more than I know what is appropriate for my legal advocate to do (and not do) on my behalf, or most of us know about the proprieties of cardiovascular surgery. So it's a good idea to have a clearly written handbook readily available. Once again, codes won't answer difficult particular questions for clients and the public, any more than they will for practitioners. But they can give useful information about standards and limits, helping us to appreciate sound practice, showing us what it is not reasonable to expect of the professionals we consult, and warning us away from at least the more egregious forms of misbehavior.

Codes of ethics also offer means of disciplining miscreants without recourse to the complexities and costs of formal legal processes. Relatively minor problems can be resolved informally, by peer review committees for example, and sanctions such as warnings, reprimands, and censures can be imposed fairly, efficiently, and at minimal expense to the parties involved. The number of cases handled by any particular disciplinary agency may be very small in comparison to the likely number of violations committed. But the fact that some malefactors are punished is good in itself. And if professional associations and licensing groups are rightly seen as making substantial and effective efforts to encourage appropriate conduct and correct wrongdoing, their codes will return well deserved dividends in public confidence.

Admittedly, the adoption of sound codes will not by itself secure the benefits I have listed. Members of involved groups must know the documents and feel some sense of ownership in them, and the public, especially the relevant clienteles, must be informed of their central provisions and of available avenues of redress. This means that major efforts must be made to involve affected practitioners in code con-

Mr. Appleby is a Professor of Philosophy and Associate Director of the Tanner Humanities Center at the University of Utah.

struction and later revisions, to train both novice and established professionals in the application of the rules, and to educate the public through large-scale programs. Substantial and continuing commitments of time and money are obviously necessary to do these things well, and support of the required kinds is not easy to obtain. But while it might be better not to try at all than to undertake the enterprise without adequate backing, I am convinced that any professional group is better off policing itself than allowing discipline to become the responsibility of public officials by default.

In Utah, the Rules of Professional Conduct already provide the foundations for a code of conduct for litigators and its effective enforcement. Rule 9 of the Rules of Lawyer Discipline and Disability permits disciplinary action against members who violate the Bar's rules, willfully violate valid disciplinary orders, or are publicly disciplined in other jurisdictions. But apart from injunctions in the Rules for Integration and Management of the Utah State Bar (21, b and e) "To maintain the respect due to the courts of justice and judicial officers," and "To abstain from all offensive personality," there are no specific guidelines for the appropriate conduct of litigation. In effect, Utah attorneys are told not to act like Roberto Alomar, and the rest is left to their discretion. In my view, that is not enough.

What is needed is a litigators' code of conduct articulating, at a minimum, standards of comportment and civility in judicial procedures, including depositions. Much of the public contempt for the profession of law stems from the perception that lawyers are mercenary barbarians with no principled constraints on what they are willing to do to advance the interests of their clients. Television viewers of high-profile trials think they are watching circuses in which the achievement of justice is the last thing on anyone's mind. And people who are deposed or called as witnesses in trials often feel that they are manipulated, treated with contempt, and systematically denied the opportunity to tell their stories by lawyers who care little or nothing about the truth. Admittedly, many of us harbor low opinions of attorneys and the law at least in part because we don't fully understand the adversarial character of our own judicial system. But even after allowance is made for this quite general ignorance, the public animosity toward litigating attorneys continues to call for explanation. My suggestion is that the perceived amorality and incivility of trial lawyers is at or near the heart of the problem, and that a conspicuously enforced code of ethics could do much to ameliorate it.

There is no denying that the composition of this code would be a difficult task. Boorishness, like obscenity, may be very hard to define, especially by means of rules, even though most of us recognize it with no difficulty when we encounter it. And while it might be easy to set out a list of platitudes broadly describing professionally appropriate behavior, devising a substantive characterization of such behavior would be another matter altogether. Nonetheless, skillful writers could build a useful code beginning with the central notions of respect for persons and fairness in the legal process. And though interesting cases often do make bad law, it would also be possible to draw lessons from clear instances of misconduct not covered by current regulations. Drafters could survey their own experiences, those of their colleagues, and documents such as court records for examples of both appropriate and inappropriate behavior, and then develop rules to encourage the former and discourage the latter. The draft, preferably accompanied by a case book and/or explanations of the authors' intents, could then be circulated to the membership of the Litigation Section and perhaps to the public for discussion and eventual ratification.

Right from the beginning, it would be useful to include provisions for the review and revision of the initial document within a reasonable time after its adoption, and regularly thereafter. Such a measure would reassure practitioners who might reasonably fear the imposition of untried standards. It would also cover the near certainty that errors and oversights would occur in the first edition. And it would signal the Bar's willingness to adjust to changing circumstances.

Having worked through processes of this kind, I am not sanguine about the politics involved in securing the ratification of a strong code. Deeply conflicting interests require accommodation, it can turn out that behavior that looks obnoxious to one part of the constituency seems acceptable to another, and there can be serious disputes about the boundaries between duty and supererogation. In mental health care, for example, divisions of opinion concerning the effectiveness of various kinds of treatment make it impossible for the psychologists' code to include substantive standards of competence. Divergence about the acceptability of romantic relationships between professors and students led to the omission of that subject from the new Code of Faculty Rights and Responsibilities at the University of Utah. And readers of this journal will surely remember the intense nationwide debate over pro bono service during the last revision of the Model Code, as well as its unsatisfactory outcome.

The inevitability of problems such as these virtually guarantees that there will be some weaknesses in any document which actually achieves ratification. Compromise is inescapable in democratically structured professional associations, and it is essential to provide as much latitude as possible for diverse opinions about propriety and sound practice. Nor should the rules and arrangements for enforcement be so inflexible as to preclude leniency in special cases. (In this regard, I remember the famously disruptive tactics of William Kunstler and his associates in their efforts to defend the Chicago Seven against the misbehavior of Judge Julius Hoffman.) But if a start could be made on raising the levels of civility and procedural fairness in our courts, and if an initial code were adopted with adequate provision for continuous improvement, the public perception of litigators might well improve, along with the quality of their work. I think it would be worth a try.

POINT/COUNTERPOINT

Keep Judicial Conduct Commission Proceedings Confidential

by Tim Shea

The Utah Judicial Conduct Commission has formed a task force, of which I am a member, to consider whether and to what extent the proceedings of the Commission should be open to the public. The study of confidentiality and public access is premature; until we improve the structure and procedures of the Judicial Conduct Commission, Commission proceedings should remain confidential.

Currently, the Commission notifies the complainant that a complaint has been dismissed—by far the most common resolution of all complaints. Aside from this, the hearings of the Commission are confidential under article VII, section 13 of the Utah Constitution, and the investigations and records of the Commission are confidential under Utah Code Annotated section 78-7-30 until the final order of the Utah Supreme Court. The judge can consent to earlier disclosure, and the Supreme Court can order earlier disclosure. Upon its most recent opportunity to review an order of discipline, the Supreme Court ordered Commission records filed with the Court opened to the public after oral argument.

✦

"[U]ntil we improve the structure and procedures of the Judicial Conduct Commission, Commission proceedings should remain confidential."

✦

The American Judicature Society, which has worked for nearly a century promoting the selection, retention, and discipline of judges based upon qualifications and merit, rather than upon politics, favors removing confidentiality from the judicial discipline process after formal charges are filed. Ironically, a letter from Cynthia Gray, Director of the Center for Judicial Conduct Organizations of the American Judicature Society, to the task force supporting the removal of confidentiality served to clarify my opposition to that conclusion. Ms. Gray wrote: "The judicial discipline process affords judges due process protection from partisan interests, public clamor, and fear of criticism." If Ms. Gray's comments were true, greater public access to the proceedings of the Judicial Conduct Commission might be appropriate. In the end, however, I believe Ms. Gray's comments describe a system for judicial discipline far different from the one faced by Utah judges.

Improve the Commission Structure

Composition of the Commission. Utah has only one judge on its Judicial Conduct Commission. The American Judicature Society reports that Indiana and Iowa are the only other states with a commission with just one judge, and Hawaii and Oklahoma are the only states with a commission with no judges. The latter has a two-tier discipline system in which

Mr. Shea is the Senior Staff Attorney for the Administrative Office of the Courts.

judges are members of the tribunal established to try the formal charges brought by a separate investigative body. Boards established by the Utah State Legislature to regulate licensure for a profession are comprised principally of members of that profession.[1] The same should be true of the Judicial Conduct Commission.

Of more concern than the paucity of judges on the Commission is the plurality of legislators. Four of the ten Commission members are legislators. The American Judicature Society reports that only two other states have conduct commissions with legislators as members. The Arizona and Rhode Island judicial conduct commissions each have three legislator members, and on both commissions judges outnumber legislators. Utah's Judicial Conduct Commission has not yet become politicized. Indeed, I think legislators on the Commission gain a greater understanding of and respect for the obligations of judges, the highly charged emotional environment in which judges work, and the strict code of ethics to which judges are held accountable. But the risk of political influence upon the Commission certainly is present. Public access to a tribunal with legislators would exacerbate that risk by giving legislators a public forum from which to present a political agenda. Ms. Gray's observation that the "judicial discipline process affords due process protection from partisan interests" is not necessarily a valid point for Utah judges.

Separation of Functions. Testimony to the task force and comments of some task force members observe that the discipline of judges should be public, as is the discipline of lawyers. The appointment and roles of the Ethics and Discipline Committee of the Bar and the Bar's Office of Attorney Discipline are largely independent of each other. The procedures for attorney discipline separate the prosecution and adjudication functions—functions that are shared by the Judicial Conduct Commission and its staff. These shared responsibilities do not afford Utah judges, as Ms. Gray claims, "due process protection."

✦

"Utah's Judicial Conduct Commission uses a one-tier system, in which the Commission and its staff share the responsibilities of investigator, prosecutor, fact-finder, and decision-maker."

✦

Due process requires the separation of prosecution and adjudication functions, and for regulatory agencies this requirement may be satisfied by internal or external separation. Internal separation of functions allocates responsibility for prosecution and adjudication to separate people or groups within a single organization. External separation of functions allocates responsibility for prosecution to an organization independent of the body responsible for adjudication. The American Bar Association favors external separation of judicial discipline functions (a "two-tier" system in the ABA vernacular), and the American Judicature Society reports that seven states have adopted a two-tier system. Utah's Judicial Conduct Commission uses a one-tier system, in which the Commission and its staff share the responsibilities of investigator, prosecutor, fact-finder, and decision-maker.

Whether the internal separation of functions maintained by the Commission is sufficient to satisfy the constitutional requirements of due process has not yet been tested, but Commission rules merge prosecution functions and adjudication functions in the Commission. According to its rules, the Commission is responsible for investigating the misconduct of judges with or without the filing of a complaint,[2] screening complaints and filing formal charges,[3] conducting formal hearings,[4] entering findings of fact,[5] and making the final adjudicative decision.[6] Commission rules do not explain the responsibilities and discretion of the Executive Director, who in practice combines the authority of the Commission's chief administrator, investigator, and prosecutor.[7]

If external separation of functions is not required by law, it should, nevertheless, be favored by policy. Two public policies claimed to favor internal over external separation in regulatory agencies—expertise of the agency and the ability of the agency to set law and policy on a case-by-case determination—do not apply to the Judicial Conduct Commission. With only one judge on the Commission, it appears Commission members are not selected for their expertise in judicial conduct. Nor does the Commission exist to establish law and policy; it is, rather, exclusively an adjudicative body. For an adjudicative body with narrowly drawn jurisdiction, the traditional external separation of functions offers a model more sound than that of regulatory agencies.

Improve the Commission's Procedures

Just as the structure of the Judicial Conduct Commission does not afford Utah judges due process protection, the current standards and procedures of the Commission are not sufficiently sound to afford that protection. Only in the past several months has attention focused on these standards and procedures. That attention reveals the need for further amendments. The Commission in

[1] See Utah Code Ann. § 58-1-201(1)(b).

[2] Rule 5(a): "The Commission, upon receiving a verified statement . . . , shall make a preliminary investigation to determine whether formal proceedings should be instituted and hearing held. The Commission without receiving a verified statement may make such a preliminary investigation on its own motion."

[3] Rule 6(a): "After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, the Commission shall without delay issue a written notice to the judge advising that formal proceedings have been instituted to inquire into the charges against him."

[4] Rule 10(a): "At the time and place set . . . , the Commission . . . shall proceed with the hearing . . . ."

[5] Rule 14: "After the conclusion of the hearing . . . , the Commission . . . shall promptly prepare a report which shall contain . . . findings of fact . . . ."

[6] Rule 19: "If the Commission finds good cause it shall order the censure, reprimand, suspension, removal, or retirement of the judge."

[7] The only mention of the Executive Director in the Judicial Conduct Commission's rules is in the May 10, 1996 amendment to Rule 10(i), which directs "the Commission's Executive Director to prepare findings of fact, conclusions of law, and an order consistent with the memorandum decision" prepared by the Commissioners attending the formal hearing.

the last several months has adopted for the first time standards for when it will consider sanctions against judges, and the Commission has amended for the first time six of its rules of procedure. These are steps in the right direction, but the standards and procedures need much more detailed scrutiny to ensure they are fair to, and protect the interests of, the complainant, the judge, and the people of Utah.

For example, Commission Rules 10 and 19, regulating the number of Commissioners required to be present at the formal hearing and the number of votes needed to enter an order of discipline, contain internal inconsistencies as well as provisions that fall short of statutory minimum requirements. The decision to impose a sanction constitutes the core function of the Commission, and discrepancies in this area are particularly troubling.

Under Utah Code Annotated sections 78-7-27(5)[8] and 78-7-30(2)(c),[9] at least six members of the Commission must be present at the formal hearing. Under Commission Rule 10(d),[10] and one clause of Rule 19,[11] the Commission need have only five members at the hearing. Under Rule 10(j)[12] and a separate clause of Rule 19[13] the Commission may enter its order with as few as three members present at the formal hearing. Whether the Commission rules permit the Commission to act with three or five members is ambiguous. What is clear is that both numbers are less than the statutory minimum of six.[14]

Section 78-7-30(2)(c) requires a majority of the quorum to enter a finding or order after the formal hearing. Under this formula, the minimum number of votes required to act fluctuates based upon the number who attend the hearing: at least four votes if the statutory quorum of six Commissioners are present, up to at least six votes if all ten Commissioners are present. Judicial Conduct Commission Rules 10(j) and 19 require the affirmative vote of a fixed minimum number of Commissioners, five, to sanction a judge or to dismiss the complaint, regardless of the numbers present. If five Commissioners are present—as permitted by Commission rule but not by statute—five affirmative votes represents unanimity. If between six and nine Commissioners are present, five affirmative votes represents a majority or super-majority. But if all ten members of the Commission are present, five votes is exactly half the body, and does not constitute a majority. Under traditional rules of procedure, the failure to obtain a majority vote means the measure fails, yet, under this last scenario, Commission rules permit the entry of an order of discipline with less than a majority. The unanimity and super-majority scenarios do not favor the judge; under Rule 19, five votes are required to dismiss the complaint, as well as to enter an order of discipline.

✦

"It is difficult to believe . . . that public access would focus attention on issues of due process, conflicting laws, and partisan politics when allegations of judicial misconduct make a much more interesting headline."

✦

I have provided my research to the Executive Director of the Judicial Conduct Commission, and I expect these particular inconsistent and ambiguous provisions to be corrected by the time this article is published. But such piecemeal and coincidental amendments to the rules are not sufficient. A wholesale review of the policies, statutes, and rules regulating the Judicial Conduct Commission is needed. When the policies are reviewed and determined to be sound, and when the procedures implementing those policies are reviewed and determined to be sound, only then does it make sense to ask the question: should the records and proceedings of the Commission be more accessible to the public?

Conclusion

The examples presented here are not exhaustive. Greater scrutiny of the statutes, rules, and practices governing the Judicial Conduct Commission will yield other examples of deficiencies to be corrected before confidentiality can be addressed. The issues are not so complex as to render them unsolvable. Yet neither are the problems inconsequential. Perhaps greater public access to the proceedings of the Commission would raise public awareness of these problems and public pressure for solutions. It is difficult to believe, however, that public access would focus attention on issues of due process, conflicting laws, and partisan politics when allegations of judicial misconduct make a much more interesting headline.

Few believe more strongly than I in the need for public access to information regarding the public's business, and to information regarding the people who conduct that business on the public's behalf. But until the structure and procedures for the discipline of judges can be strengthened, and until judges really are afforded "due process protection from partisan interests, public clamor, and fear of criticism," judges need the protection of confidentiality. ■

[8]"Six members of the commission shall constitute a quorum. Any action of a majority of the quorum constitutes the action of the commission." Utah Code Ann. § 78-7-27(6).

[9]Section 78-7-30(2)(c), as amended by Laws of Utah 1996, chapter 120, provides as follows: "A formal hearing may be conducted before a quorum of the commission. Any finding or order shall be made upon a majority vote of the quorum."

[10]Rule 10(d): "When the hearing is before the Commission, not fewer than five members shall be present when the evidence is produced."

[11]Rule 19: "The affirmative vote of five members of the Commission who have considered the record and report of the masters and who were present at any oral hearing . . . is required for an order of censure, reprimand, suspension, removal, or retirement of a judge or for dismissal of the proceedings."

[12]Rule 10(j): "The findings of fact, conclusions of law, and order shall be reviewed and approved by at least five members of the Commission who have considered the record, and at least three of whom must have been present when the evidence was produced."

[13]Rule 19: "[W]hen the hearing was before the Commission without masters, [the affirmative vote] of five members of the Commission who have considered the record, and at least three of whom were present when the evidence was produced, is required for an order of censure, reprimand, suspension, removal, or retirement of a judge or for dismissal of the proceedings."

[14]Commission Rules 10 and 19 require five affirmative votes to impose a sanction or dismiss the case. This represents unanimity of the minimum number required by rule to be present, but under traditional rules of procedure, the Commission should not be able to take a vote without the necessary quorum.

The Public Should Have Access to Judicial Disciplinary Proceedings and Records Before the Utah Supreme Court

by Jeffrey J. Hunt

The judiciary is the only branch of government that is, with narrow exceptions, *constitutionally* required to conduct its business in public. This constitutional dimension to the public's right of access to judicial proceedings and records reflects a recognition of the fundamental value of openness in the proper functioning of our judicial process and in the creation and maintenance of public confidence in that process. Or, as the United States Supreme Court put it, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

I believe the public has a strong and compelling interest in the conduct of its judicial officers, and in observing the work of the Judicial Conduct Commission and the Utah Supreme Court in applying standards of judicial conduct. For the public to have confidence in Utah's judicial disciplinary process and the results it produces, however, the public must, *at a minimum*, have free and open access to proceedings and records when that process reaches the Utah Supreme Court. You may be surprised to learn that Utah statute *bars* public access to judicial disciplinary records filed with the Utah Supreme Court. *See* Utah Code Ann. § 78-7-30(6)(b) (1996). Public access to such records is permitted only upon the request of the judge or justice who is the subject of the disciplinary proceeding or upon order of the Utah Supreme Court. *See id.* § 78-7-30(6)(b)(i)-(ii) (1996). It also has been argued that the statutory confidentiality for records applies to proceedings of the Utah Supreme Court. Although the Utah Supreme Court rejected the most recent attempt to close judicial disciplinary records and proceedings before it, the Court decided the issue on statutory, not constitutional, grounds. *See In re Richard Worthen, Justice Court Judge, and In re Gaylen Buckley, Justice Court Judge*, Nos. 950536 and 950537, slip op. at 1 & n.1, 42-43 (Utah Sup. Ct. Oct. 22, 1996). Indeed, the Court *presumed* that judicial disciplinary records and proceedings before the Court are closed to the public unless the Court orders otherwise, or the judge who is the subject of the complaint consents. *Id.*, slip op. at 41. Although the Court stated that it would take an "unusual set of circumstances" to justify closing records and proceedings to the public, it nevertheless left intact the presumption of closure. *Id.*, slip op. at 43. The issue is certain to recur, given the Court's practice of denying public and press access to disciplinary records filed with the Court until the judge or justice has an opportunity to file a motion for closure.

✦

"For the public to have confidence in Utah's judicial disciplinary process and the results it produces . . . the public must, at a minimum, have free and open access to proceedings and records when that process reaches the Utah Supreme Court."

✦

In my opinion, the current presumption of closure is unwise, unconstitutional, and benefits neither the judiciary nor the public it serves. In his Point/Counterpoint article, Tim Shea makes a persuasive case for overhauling the statutes, rules, and policies regulating the Judicial Conduct Commission to ensure that judges who are the subject of complaints are treated fairly. Shea's analysis and conclusions appear sound. The Utah Supreme Court already has addressed some of these due process concerns in its recent opinion reviewing the first disciplinary orders of the Commission to reach the Court. *See id.*, slip op. at 38-40. But regardless of the changes made to the Commission and its procedures, the public will not have confidence in the judicial disciplinary system, and the results it produces, unless the public can see for itself that the system is working. Although a case could be made for public access at some point during the Commission proceedings, say, perhaps when the Commission issues a notice of formal proceedings,[1] *at a minimum*, such proceedings and records should be open to the public as a matter of course when the case reaches the Utah Supreme Court.

The Public Has a Compelling Interest in Information

Courts have long recognized the First Amendment values served by the right of the public and press to speak about the conduct of judicial officers. As Justice Black stated more than fifty years ago in *Bridges v. California:*

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. . . . [A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

314 U.S. 252, 270-71 (1941).

The United States Supreme Court later

Mr. Hunt is a shareholder of the Salt Lake City firm Kimball, Parr, Waddoups, Brown & Gee.

[1] Rule 6 of the Judicial Conduct Commission Rules of Procedure ("Commission Rules") provides that if, after a preliminary investigation of the complaint, the Commission finds "reasonable cause" that formal proceedings should be instituted, the Commission may issue a notice to the judge advising the judge that formal proceedings have been instituted to inquire into the complaint, or issue a private reprimand. COMMISSION R. 6.

reaffirmed that principle in *Landmark Communications, Inc. v. Virginia*, where it stated:

> Although it is assumed that judges will ignore the public clamor or media reports and editorials in reaching their decisions and by tradition will not respond to public commentary, the law gives 'judges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.' *The operations of the courts and the judicial conduct of judges are matters of utmost public concern.*

435 U.S. 829, 98 S.Ct. 1535, 1541 (1978) (quoting *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting) (citation omitted; emphasis added)).

In *First Amendment Coalition v. Judicial Inquiry and Review Board*, Judge Adams of the Third Circuit Court of Appeals identified four structural values served by recognizing a constitutional right of access to judicial disciplinary proceedings that apply with equal force to such proceedings in Utah. *See First Amendment Coalition*, 784 F.2d at 467.

First, access "height[ens] public respect for the judicial process." *Id.* at 485 (Adams, J., concurring in part and dissenting in part) (quoting *Globe Newspaper v. Superior Court*, 457 U.S. 596, 606, (1982)). To deny public access to judicial misconduct charges when such charges have reached the stage of judicial review may well create an impression that the decision of the Judicial Conduct Commission and the Court are "based on secret bias or partiality," or stem from "parochial protectiveness." *Id.* at 486 (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion of Burger, C.J.), and quoting *In re Subpoena Served by Penn. Crime Comm'n*, 470 A.2d 1048, 1060 (1983)).

> The most stringent set of ethical standards . . . would be of limited worth if the public is not persuaded that the standards are being fairly enforced. Legitimacy rests in large part on public understanding.

Id.

Second, access serves a community therapeutic value. "Allegations of misconduct by judges who are charged with meting out justice often provoke public outcries." *Id.* Allowing the public to observe how judicial rules of ethical conduct are applied and enforced by the Commission and Court allows an appropriate outlet for such reactions. Allowing the public to see that justice done is, in large part, as important as doing justice.

✦

"A public better informed by access would, in turn, be better equipped to evaluate the performance of our judicial system, an essential component in our form of government."

✦

Third, access demonstrably advances the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* (quoting *Richmond Newspapers*, 100 S.Ct. at 2826 (plurality opinion)). Free and open access to judicial disciplinary proceedings and records before the Utah Supreme Court would educate the public about the work of the Commission and the Court. Access would allow the public to determine how the Commission and the Court apply and enforce standards of judicial conduct and whether such standards are applied in a consistent manner. A public better informed by access would, in turn, be better equipped to evaluate the performance of our judicial system, an essential component in our form of government. *Id.*

Fourth, access to judicial disciplinary proceedings makes such proceedings more effective by enhancing the integrity of the fact-finding process. *Id.* Utah statute authorizes the Utah Supreme Court to consider additional evidence after a Commission order has been referred to the Court for action. *See* Utah Code Ann. § 78-7-30(5)(a) (1996). As in the civil and criminal trial context, public scrutiny would discourage perjury and act as a check on the conduct of participants in the proceeding. Access thus serves an important purpose as "security for testimonial trustworthiness." *First Amendment Coalition*, 784 F.2d at 486 (Adams, J., concurring in part and dissenting in part) (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984)).

Utah's Procedural Framework

Utah's constitutional and statutory framework for investigating and adjudicating complaints against judges supports public access to the process. The Utah Constitution authorizes the creation of a Judicial Conduct Commission to investigate and conduct confidential hearings regarding complaints against any judge. *See* Utah Const. art. VIII, § 13; *In re Greenwood*, 796 P.2d 682, 683 (Utah 1990). Once a complaint is received concerning a judge that is not "obviously unfounded or frivolous," the Commission conducts a preliminary investigation to determine whether reasonable cause exists to warrant further proceedings. *See* COMMISSION R. 5.

If the Commission finds "reasonable cause" that formal proceedings should be instituted, it issues a notice advising the judge that formal proceedings have been instituted to inquire into the charges. *See* COMMISSION R. 6. The notice describes the charges against the judge, the facts upon which such charges are based, and advises the judge to file a written response to the charges within fifteen days. *See id.* The Commission then conducts a formal hearing concerning the reprimand, censure, suspension, removal, or retirement of the judge or justice. *See* Utah Code Ann. § 78-7-30(2)(a)(1996); COMMISSION R. 8. Alternatively, the Commission may appoint three special masters, who are justices or judges of courts of record, to conduct the formal hearing and report to the Commission. *See* Utah Code Ann. § 78-7-30(3)(a)(1996); COMMISSION R. 8.

At any time prior to a formal hearing, the Commission may issue a private reprimand to the judge in lieu of proceeding with the formal hearing. *See* Utah Code Ann. § 78-7-30(4)(1996); Commission R. 9. A private reprimand is a negotiated resolution between the Commission and

the judge requiring the written consent of the judge against whom the complaint is pending. *See* COMMISSION R. 9. The Commission may also dismiss a complaint with an admonition to the judge. *See id.* Private reprimands and admonitions do not require review or approval by the Utah Supreme Court. *See* Utah Code Ann. § 78-7-30(5)(1996); COMMISSION R. 9.

Upon conclusion of the formal hearing before the Commission or masters, the Commission may order the reprimand, censure, suspension, removal, or retirement of the judge. *See* Utah Code Ann. § 78-7-30(2)-(3)(1996); COMMISSION R. 19. If the Commission issues such an order, it must prepare a transcript of the evidence and all proceedings and make written findings of fact and conclusions of law. *See* COMMISSION R. 20. Upon the issuance of an order but prior to its implementation, the Commission files a copy of the order, together with the transcript of evidence, and its findings and conclusions, with the Clerk of the Utah Supreme Court. *See* COMMISSION R. 21.

Prior to implementing any Commission order concerning the removal, suspension, public reprimand, censure, or retirement of any judge, the Utah Supreme Court reviews the record of the proceedings on the law and facts, and may permit the introduction of additional evidence. *See* Utah Code Ann. § 78-7-30(5)(a)(1996). Finally, the Court enters an order implementing, modifying, or rejecting the Commission's order.

Even without the procedural improvements advocated by Shea, the structure of Utah's current statutory scheme for investigating and adjudicating complaints against judges supports public access to judicial disciplinary proceedings when such proceedings reach the Utah Supreme Court.

First, under the Utah scheme, judges have an opportunity to resolve allegations of judicial misconduct through a negotiated private reprimand or admonition that is confidential and non-reviewable by the Utah Supreme Court. "In practice, it has been demonstrated that one of the most effective methods of meeting the problem of the unfit judge is to remove him from the bench by voluntary retirement or resignation." *First Amendment Coalition*, 784 F.2d at 476. Allowing public access to judicial disciplinary proceedings at the stage of judicial review does not infringe upon the confidentiality afforded such proceedings when they are pending before the Commission. Thus, public access to the proceedings when they reach the Utah Supreme Court protects the salutary benefits of confidentiality at the pre-judicial review stage, *e.g.*, by encouraging negotiated resolutions of complaints and protecting judges from public disclosure of unfounded complaints, while at the same time protecting the public's compelling interest in scrutinizing the performance of the Commission and the Utah Supreme Court.

Second, under Utah statute, the documents generated during a judicial disciplinary proceeding are closed only "until the Supreme Court has entered its

final order in accordance with this section . . . ." Utah Code Ann. § 78-7-30(6)(b) (1996). It makes no sense, as a matter of judicial or public policy, to allow public access to the Court's final order in a judicial disciplinary proceeding, while denying the public an opportunity to observe the proceedings and records upon which the Court's final order is based. Public confidence in the results the judicial system produces depends, in large part, on the process that system follows. A system that allows the public to see only the end result of a judicial disciplinary proceeding does not inspire public confidence. *See, generally, Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

Third, although imperfect, the Utah scheme affords at least traditional due process protections for judges and justices who are the subject of complaints. The Commission disposes of unfounded or frivolous complaints prior to the initiation of a preliminary investigation. *See* COMMISSION R. 5. When a formal proceeding is initiated, the judge or justice is given formal notice of the inquiry, an opportunity to respond in writing to the complaint, a formal hearing, the opportunity to have counsel present, and the opportunity to examine and cross-examine witnesses, and introduce evidence. *See* COMMISSION R. 6-16. Only when the Commission conducts a hearing and issues an order for good cause that involves public reprimand, censure, suspension, removal or retirement, does the issue reach the Utah Supreme Court. Although the Utah Supreme Court recently found the Commission's compliance with these procedural protections wanting, it found "nothing lacking" in the text of the Commission's rules, with the single exception of a rule that authorized the Commission to make a preliminary investigation on its own motion. *See In re Worthen*, slip op. at 37-38.

Thus, the Utah statutory scheme, as implemented through the Commission's existing procedures, is designed to weed out frivolous or unfounded complaints against judges or justices under the protection of a confidential process. The only cases that reach the Utah Supreme Court are cases that the Commission has determined are not frivolous or unfounded, that cannot be resolved through a negotiated private reprimand or admonition, and merit an order concerning public reprimand, censure, suspension, removal or retirement of a judge. Given this fairly rigorous adjudicatory process, when such an order reaches the Utah Supreme Court for review, the judge against whom the order is directed should not reasonably expect to keep the Court proceedings and records secret.

✦

"[T]he Utah statutory scheme, as implemented through the Commission's existing procedures, is designed to weed out frivolous or unfounded complaints against judges or justices under the protection of a confidential process."

✦

Conclusion

The constitutional right of access to judicial proceedings and records is, by design, a right that is *not* subject to the passions and prejudices of legislatures or judicial rule-making bodies. The public's right of access applies with equal force to judicial disciplinary proceedings and records in the Utah Supreme Court. Regardless of what changes are made to the procedures of the Commission, Utah's current statutory bar on public access to judicial disciplinary records filed with the Utah Supreme Court is unwise as a matter of policy and is unconstitutional. The Legislature should repeal the statute. If the Legislature refuses to act, the Utah Supreme Court should strike down the closure statute and/or exercise its rule-making authority to provide free and open public access to such records. Only when the public has unfettered access to judicial disciplinary proceedings and records in the Utah Supreme Court will the Judicial Conduct Commission fulfill its promise.

PRACTICE POINTERS

Preparing Child Sexual Assault Victims to Testify

by Robert N. Parrish

Our legal system, founded on hundreds of years of tradition and practice, has undergone a tremendous change in recent decades: the testimony of young children, which was once generally disregarded,[1] is now a pivotal component of sex abuse trials. Indeed, critical decisions sometimes rest on nothing more than the testimony of a three year old child.

Tremendous changes engender tremendous problems. For example, we have done a poor job of ensuring adequate communication in the courtroom with very young witnesses. Attorneys often call young children as witnesses with little or no preparation, without having spent sufficient time assessing the child's abilities as a witness, and without having earned the child's trust. Likewise, judges were unprepared for the onslaught of cases with child witnesses. Many attorneys and judges consider their qualifications adequate if they like children, have children, or get along with children. But this underestimates the sensitive nature of the problem of communicating with child witnesses.

Chaos in child abuse cases was the net result of inadequately trained attorneys and ill-prepared judges. Only by the end of the 1980s did we begin to realize that there were lessons we must learn about children, about child development, about the ways children react to abuse, and about the effects of abuse. We also have learned that children must be prepared to testify before they are called to the stand.

Prosecutors must educate juries concerning the capacities of children. Most adults believe that children have a limited ability to perceive, remember, and relate events they have witnessed. Additionally, adults often believe that children are more suggestible than adults, and that they might even imagine having been abused. But these beliefs are inaccurate. Children are not significantly more suggestible than adults, and young children do not even have the developmental ability to incorporate into their own accounts the subtle suggestions embedded in leading questions. Most important, they lack the capacity to fabricate detailed allegations of sexual contact with adults. You can overcome the jury's erroneous beliefs about children as witnesses, but you must do it through the creative use of expert witnesses, whose testimony creates a foundation whereby children come into the court on what is more nearly equal footing.

Naturally, as you prepare a child victim of sexual abuse, you must determine whether the child will be able to testify at all. But the preparation session is also essential to improving the quality of the child's testimony. Jurors are more inclined to believe children who have been prepared to testify. Most attorneys agree that the following steps are essential in preparing the child witness.

> ***"Children are not significantly more suggestible than adults, and young children do not even have the developmental ability to incorporate into their own accounts the subtle suggestions embedded in leading questions."***

First, you must make the child feel comfortable, and confident that you care about him and will help him. Listen to the child. Avoid distractions. Learn all you can about him before the interview.

Second, make your own assessment of the child's communication abilities, her language skills, and her capacity to understand basic concepts that are relevant to the case. Do not assume that young children use language in the same way that you do. When a child uses a word to describe something, make sure that you know what she means by it. Preschoolers often are extremely literal in their use of vocabulary, and may attach a single meaning to a word that for the rest of us conveys any of several meanings.

Third, use meaningful examples to test the child's ability to distinguish between truth and falsity, reality and fantasy. The jury will want to know whether he knows the difference between talking about something that really happened, and talking about something he imagined happened. When you prepare the child for testifying, ask him to relate to you an event in his recent past that he really enjoyed. Then change the story to see whether he can detect the differences. Then ask him what would happen if his brother or sister snuck a cookie, and blamed it on him. Most kids will say that this wouldn't be right or fair, and you can use this opportunity to make sure they understand that if they tell something about someone that didn't happen, that wouldn't be right or fair, either. Even young children can understand this.

Although you should test the child's ability to remember and recount the things

Mr. Parrish is an Assistant Attorney General in Salt Lake City.

[1]Until the mid-1980s, many states retained the presumption that any witness under the age of ten is incompetent.

that happened to her, don't turn it into a full-blown review of every detail told to others in previous interviews. At the same time, if you fail to even ask about the details of the crimes, you could have an unpleasant surprise in court when the victim can't testify, and you haven't planned in advance to offer her out-of-court statements.

Considering how commonly children disclose sexual abuse piecemeal over time, you must have a third party present, in case he recounts new matters that must be disclosed to defense counsel. Using the cognitive interview technique recommended by treatment professionals and forensic experts gives the child the opportunity to remember what happened, and to relate the details he remembers. Be sure to use age-appropriate language, and remember that there are differences among children–even children of the same age.

Take the child to visit the courtroom. Identify the people who will be in court on the day she testifies, and explain each person's role. Doing these things reduces the nervousness and fear she may be experiencing.

As you would with any other witness, instruct the child about how to be a witness. Most admonitions you ordinarily give to adult witnesses work equally well with children: tell the truth; tell only what you remember; don't guess; it's okay to say you don't know or can't remember. Reassure her that the defendant can't move around the courtroom while she testifies, can't say anything to her (unless the defendant is *pro se*), and can't do anything to hurt her. Let her know that she doesn't have to look at the defendant, and tell her that you will make sure that the defense attorney doesn't do things to make her look at the defendant. Make sure she knows that testifying is different from whatever she may have seen on television or at the movie –it's not as scary.

Don't postpone doing the interview until just before court is scheduled to begin. Child victims cannot obtain justice in court unless you spend enough time to build rapport with them. You must learn what type of questioning works best, and you must make the child feel comfortable about testifying. This investment is important beyond measure. If jurors are predisposed to disbelieve the prosecution's primary witness, your failure to prepare the child is an almost certain recipe for disaster.

It's Time for You to Be Part of the Solution to Unmet Legal Needs

by Carolyn B. McHugh

At the Women Lawyers of Utah Fireside this year, Justice Christine Durham spoke eloquently of the crushing need for legal assistance for the poor. The Utah State Bar has published a report on Unmet Legal Needs, and has hired a full-time pro bono coordinator to organize the efforts of volunteer attorneys throughout the state. The American Bar Association has published a proposed Rule of Professional Conduct that would encourage practitioners to provide at least thirty hours of pro bono service each year, or to donate at least $350 to an organization that provides legal services to those of limited means. The message is consistent and resonates from numerous respected sources: your help is needed, and it is needed now.

Attorneys who provide pro bono services are inestimably rewarded for their efforts. Last year, a close friend of mine handled a difficult adoption that raised issues of a Baby Jessica magnitude. My friend worked tirelessly, for no pay. When the matter concluded, he received a photograph of the baby, which he displayed in his office for months. Every time he looked at the photograph, it reminded him of the most important legal matter he ever handled. This from a man who routinely negotiates and litigates large dollar cases for his clients.

As the financial constraints on organizations providing legal services to the poor become more severe, even as the need becomes more important, your assistance becomes even more important. And there are as many ways to volunteer your expertise as there are problems facing our community. For example, if you are interested in helping children, the Office of the Guardian ad Litem will train you to serve as a pro bono guardian ad litem for children involved in difficult custody or visitation disputes. Other pro bono opportunities abound. If you want to assist victims of domestic violence, the Domestic Violence Program needs you. If you can help the elderly with estate planning and matters affecting the aging, the Needs of the Elderly Committee will help direct your efforts. If you have a spare evening to give legal advice and direction, you can participate in the Tuesday Night Bar program. For those of you who are willing to help but who need more direction, call Rex Olsen at the Utah State Bar.

Each of us has commitments unrelated to the practice of law that make volunteer service more difficult during some years than others. If you cannot give your time, you can still be part of the solution. With the extensive budget cuts suffered by Legal Aid and Legal Services, your financial support is welcome and appreciated. Indeed, money contributions often are used to fund the efforts of attorneys who specialize in a particular area, and your contribution can make a significant difference in the quality and efficiency of legal services provided.

It is not as important where you find your pro bono niche as it is that you find such a niche. As the *Talmud* says, "If I am not for others, who am I for? And if not now, when?"

Ms. McHugh is a shareholder of the Salt Lake City law firm Kimball, Parr, Waddoups, Brown & Gee.

PRACTICE POINTERS

This Is Not "Kiddie" Court

by Judge Joseph W. Anderson

Because some of the articles in this volume of *Voir Dire* focus upon issues involving children, my remarks will concern matters that will be of most benefit to those who practice in juvenile court. Let me first state, however, that having spent most of my twenty-one years of practice in the federal court system, I feel somewhat like one of the three blind men who were asked to describe an elephant after having felt only the trunk, tail, or leg. You will recall that each mistakenly described the entire elephant based on the limited part of the anatomy that he felt. I hope that my inexperience in the juvenile justice system has not led me to similar mistakes in the perceptions and conclusions described below.[1]

As someone with experience in a different part of the judicial system I have observed some fundamental practices which, if followed in the juvenile court, could improve the process and image of the juvenile justice system specifically, and contribute to increasing the respect such proceedings are accorded. This is important because, like much of learning, if these practices are acquired at an early age, they can have a lifelong effect on the individual and on the community.

In the words of Edmund Burke, "Justice is itself the great standing policy of civil society." Judge Stephen A. Van Dyke, of the Second District Juvenile Court, articulated the importance of the juvenile portion of the justice system as follows: "If the future of society resides in our children, then juvenile courts play a role of profound significance; for children in courts in increasing numbers will impact by their behavior and presence the schools, businesses, neighborhoods, towns and families of tomorrow." *See Whose Children Are These? A Primer for Juvenile Court Practice,* UTAH B. J., Mar. 1994, at 31.

The importance of juvenile court proceedings, including juvenile crime or delinquency matters and cases of abuse, neglect, or dependency, are perhaps best indicated by the scope of the dispositions that are available to the juvenile court, as set forth in title 78, chapter 3a, section 39 of the Utah Code. This statute allows the juvenile court to impose upon a delinquent youth sanctions that include, among others:

1. Imposing fines and/or community service hours;

✦

"[W]hile the overall rate of juvenile arrests decreased during the past ten years, the rate of juvenile arrests for violent offenses such as murder, rape, robbery, and aggravated assault increased during the same period."

✦

2. Ordering repair, replacement, or restitution for damage caused by the juvenile;

3. Placing the juvenile on probation or under protective supervision in the juvenile's own home;

4. Placing the juvenile outside of the home in a substitute care facility;

5. Ordering temporary custody in the Division of Youth Corrections for observation and assessment;

6. Commiting the juvenile to the Division of Youth Corrections for secure confinement; and

7. Transferring the juvenile to the adult system for adjudication and imposition of penalties.

In cases of child abuse, neglect or dependency the same statute allows the court to take the following actions:

1. Place the child in the legal custody of a relative or other suitable person;

2. Place the child in a substitute care facility;

3. Vest legal custody of the child in the Division of Children and Family Services;

4. Order that the child be examined by a physician, surgeon, psychiatrist, or psychologist, with hospitalization if necessary;

5. Appoint a guardian for the child;

6. Require parents to comply with a planned approach of therapy and/or other measures to remedy the problems that required removal of the child; and

7. Terminate all parental rights.

The importance of the proceedings that occur in juvenile court are also reflected in statistics which demonstrate that crime among juveniles, and cases of child abuse, neglect, and dependency, are on

Judge Anderson is a judge of the Third District Juvenile Court.

[1]Because many foundational elements of the "judicial system" apply equally to the juvenile system as to the federal judicial system, I recommend to attorneys practicing in juvenile court the Bar & Bench article "How to Win Cases and Influence People (on the Bench)" in the Winter 1996 Issue of *Voir Dire,* and to judges who preside in juvenile court the Bar & Bench article, "What Lawyers Want From Judges" in the Spring 1995 issue of *Voir Dire.* These articles address important principles for carrying out our respective responsibilities in the judicial process to achieve a "just" result. I also recommend "Juvenile Court Practice," by Judge Mark Andrus of the Second District Juvenile Court, published in the October 1995 issue of the *Utah Bar Journal,* which contains excellent suggestions specific to practice in juvenile court.

the rise and projected to increase. In a recent report by the Utah Commission on Criminal and Juvenile Justice, titled "Juvenile Justice in Utah 1995," statistical information was compiled that showed an 85.3% increase in offenses filed in Utah juvenile courts between 1988 and 1994. And while the overall rate of juvenile arrests decreased during the past ten years, the rate of juvenile arrests for violent offenses such as murder, rape, robbery, and aggravated assault increased during the same period. United States Attorney General Janet Reno said in 1993, "I think that youth violence is probably the most serious crime problem that we face in America today." The Juvenile Justice in Utah 1995 study also reports that Utah's juvenile population is younger than that of any other state in the nation, and projects an increase in Utah's juvenile population of 32.2% between 1995 and 2020. Combined, these statistics suggest that a growing juvenile population that is committing more violent crimes will pose a greater risk to our communities, and further burden the juvenile justice system.

A recent publication from Utah Children reports that, according to the Utah Division of Family Services, in 1984 there were 8,945 investigations of alleged child abuse in Utah, but by 1994, such investigations increased to 17,125. *See Measures of Child Well Being in Utah, 1996.* Of the 17,125 investigations in 1994, 10,430 claims were substantiated as follows: 22.3% physical abuse, 19.0% sexual abuse, 18.9% physical neglect, and 14.17% emotional maltreatment. These statistics, coupled with the projected increase in Utah's juvenile population and the mandate of the Child Welfare Reform Act to accelerate the process of either rehabilitating families to whom removed children may be returned, or, where rehabilitation fails, to terminate parental rights and find a stable adoptive family for the children, demonstrate the juvenile court's important role.

If juvenile court proceedings are as important as the foregoing suggests, it is incumbent upon all who are involved with the juvenile justice system to treat them as important proceedings, and encourage others who are involved in the system to do likewise. One of the entrances to the Department of Justice Building in Washington, D.C. bears the following inscription: "Justice in the life and conduct of the State is possible only as first it resides in the hearts and souls of citizens." In the juvenile justice system, we must cultivate a sense of justice in the lives of all who come before the court, particularly those whose first exposure to the justice system occurs in juvenile court, demonstrating through our practice that *this is very important business.* Here are some suggestions that may help to achieve this result.

✦

> ***"Determining whether a juvenile has committed a crime, whether and how to compensate victims, and how to deal with the juvenile to protect the community and to reform him or her, if possible, are as important to the juvenile, his family, and society than similar proceedings in the adult system where rehabilitation is less likely."***

✦

First, we must view the proceedings as important. This is not "kiddie court." Determining whether a juvenile has committed a crime, whether and how to compensate victims, and how to deal with the juvenile to protect the community and to reform him or her, if possible, are as important to the victims, and may be more important to the juvenile, his family, and society, than similar proceedings in the adult system where rehabilitation is less likely. And determining whether a child has been abused and/or neglected, how to remedy the damage done and to prevent further damage are critical issues, not only to the child and the family involved, but also to the future families of those youths who are before the court, and to society in general. *Obviously, this is serious business!*

Second, in juvenile court proceedings, as in almost all other situations in our lives, our personal appearance demonstrates how seriously we consider the matter in which we are involved. Prepare yourself to attend the important event that brings you to the court, and encourage your clients and witnesses to do likewise. In my experience, this is not so much a problem with counsel as it is with clients, witnesses, workers, and service providers. Make sure that in situations where dress may be used to make some kind of a statement (for example, gang clothing), you do all you can to discourage such statements in your part of the case. If such clothing appears in the courtroom, the court may find it appropriate to require the person to leave, or to change into clothing obtained from the detention center.

Third, *be on time!* It is unfair to clients, parties, and witnesses involved in a case, others whose cases will be delayed, and to the court and its personnel, for anyone involved in the proceedings to be late. At a minimum, if you anticipate being late, let the court know so that other business can be conducted. And be realistic in the amount of time you request for a hearing, so as to avoid going beyond the scheduled time. Time management problems are also frequently caused or exacerbated by the courts. We judges must do a better job of management and control to prevent time-wasting delays.

Fourth, conduct your practice before the juvenile court in accordance with the importance of the proceedings in which you are engaged. For example:

a. Prepare your pleadings carefully and thoroughly, with complete development of the facts and law, and argument on the application of the law to the facts. The court depends upon the legal analysis and argument of counsel to flesh out the strongest arguments on all sides of an issue. Failing in this responsibility places an unnecessary burden upon the court, and risks a decision based on incomplete information or inaccurate law. Also, follow the rules governing deadlines and pleadings.

b. In trials or evidentiary hearings, know what your burden is, and present

adequate evidence to carry it. Don't expect the judge to leap large chasms to reach the conclusion that you are advocating.

c. Know and use the Utah Rules of Evidence. If you have an objection, cite the rule upon which you rely. Or, if you are responding to an objection, cite the basis for your position. Also, know the basis, and be prepared to cite the rule that allows you to introduce evidence you intend to use. And, if you can anticipate objections, consider filing a *Motion in Limine* before the trial.

d. Know the procedures for dealing with evidence, such as the necessary foundational and procedural steps you must take to introduce an exhibit, qualify an expert, impeach a witness, and so on. An excellent reference for this type of information is Thomas A. Mauet, *Fundamentals of Trial Techniques (1980).*

e. At a dispositional hearing, come prepared with thoughtful and workable suggestions about what the disposition should be and why, including specific programs or services to deal with the indicated needs. Don't be ridiculous! Be willing to admit that the best interests of the juvenile are not necessarily what the juvenile wants. We are fortunate to have many resources (albeit not enough) that address particular needs of those who come before the juvenile court. Also, we are fortunate to have the flexibility to order that such resources be used alone or in combination to address the needs of both the juvenile and his or her family. Creative and concerned counsel and case workers usually can find a combination that addresses the specific needs in any particular case.

Fifth, represent your client to the best of your ability and at the same time maintain client control. For example:

a. In dependency cases, make sure your clients understand that it is their burden to "pursue," not merely "follow," the treatment or service plan or other requirements imposed upon them, and to report their progress to you and their case worker. Don't appear in court at the end of the allotted time, making excuses that your clients have not complied with what they were ordered to do because others have failed to follow up or to provide services.

b. Treat your client as the important person he or she is. The Rules of Professional Conduct outline the obligations an attorney owes to her client. Make sure you comply with the rule and *then go further.* Discuss the case with your clients and witnesses before the hearing at which they are to appear so that you are sure of their testimony and/or their position on the issues. Failure to do so indicates a noticeable lack of preparation and concern on your part. Besides, the need to take valuable court time to gather this information during the hearing is inconsiderate of everyone involved in the case who must wait for you to do your work.

c. Take responsibility for ensuring that your client performs according to the requirements outlined by statute, rule, or court order. If a report is required by a certain date, *you* make sure it is filed. If information (such as a court report, or a psychological assessment) would be helpful to the court in rendering its decision and can appropriately be submitted before a hearing, make sure the judge and opposing counsel receive it in advance so that it can be read outside of court, and careful consideration can be given to any recommendations it contains. It is inconsiderate to submit the report for the first time during a hearing, when everyone must wait while the judge hurriedly reads it, without time to give it the thoughtful review it deserves.

d. Discuss the case with opposing counsel before you come to court to see whether you can stipulate to any areas of dispute. That way, you avoid taking everyone's time unnecessarily.

During my limited tenure in the juvenile justice system, I have been impressed with the volume and gravity of cases that come before the court for resolution. And, although I have been impressed with many of the people and practices involved in the system, I believe that each of us needs to give thoughtful consideration to the role we play, and to the serious nature of the cases in which we are involved. We all need a periodic reality check to make sure we are performing our tasks to the best of our ability, and to ensure that our focus remains on improving the lives of the young people and families whose problems we encounter, and upon protecting the community in which we all live.

PRACTICE POINTERS

Objectionable Jury Argument

by Francis J. Carney

Just because a jury argument is objectionable doesn't mean that you must object. Many technically objectionable statements should pass without objection; after all, a trial is a struggle to persuade and not a demonstration of your knowledge of evidence law. Bouncing out of your seat at every provocation to voice a strident objection hardly endears you to the jury, especially if the judge overrules your objection, leaving everyone with the impression that you should sit down, shut up, and stop annoying people.

Misstatements of the facts are often better dealt with in your own argument, rather than by objection. If you have the chance to respond, you may want to hold your objections and in your response, skewer your opponent with his every inaccuracy. Jurors tend to view the message as no better than the messenger. Exaggerations, claimed facts that weren't facts at all, promises that weren't kept, are all meat for the stew of your closing argument.

Professionalism also allows a bit of latitude in argument to the other side, especially in summation, although in some quarters this is now thought quaint. And there are a few trial judges who will let nearly anything pass in closing argument, and consider it rank bad manners for counsel to ever interrupt.

Don't misinterpret me. You shouldn't hesitate to object when it's necessary, because objections not timely made will be waived. (This means immediately, and not at the conclusion of the argument.) If the objection isn't made, you'll have no basis to claim error before the appellate court. If your objection is sustained, you should follow it up with a request for a cautionary instruction to the jury or, if the offending argument was especially egregious, with a motion for a mistrial. (Made at the bench and not in front of the jury.)

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

✦

"[T]here are a few trial judges who will let nearly anything pass in closing argument, and consider it rank bad manners for counsel to ever interrupt."

✦

Improper argument may lead to a reversal but you will have to show "prejudice," which means showing that it made a difference to the outcome. This is always a tough burden. *See e.g. Jones v. Carvell,* 641 P.2d 105, 112 (Utah 1982) ("Although the argument was improper, we do not think that it affected the fundamental fairness of the trial, and reversal is not, therefore, called for because we do not believe a different result would have occurred"); *Reeves v. Gentile,* 813 P.2d 111, 121 (Utah 1991) (counsel's mention of insurance during argument was in error but was "harmless").

Here's a checklist of the more common objectionable arguments you may expect to hear sooner or later in your trial career, to be used, as suggested, with much discretion.

1. Argument in the Opening Statement.

This is often more a matter of tone than of substance. Argument is difficult to define but most judges claim to know it when they hear it. The opening statement is supposed to be an outline of the evidence to come and not about how the evidence should be interpreted.

2. Misstating the Law or the Facts.

Jones v. Carvell, 641 P.2d 105 (Utah 1982): "It is as improper to misstate facts in the record as it is to state as facts propositions for which there is no evidence." *Id.* at 112. Some courts in other states prohibit all comment on the law by counsel on the ground that it invades the court's province in instructing the jury. Most Utah judges allow some comment by counsel on the law but require it to be limited to the instructions as given by the court. It's certainly an appropriate and standard practice for counsel to discuss the application of the instructions given by the court to the facts in closing argument in state court, where closing argument is given after the jury is instructed.

3. Appeals to Passion or Prejudice.

Appeals to ethnic, racial, sexual, and other prejudices are obviously improper, as are appeals to regional biases. *See e.g. Shemmam v. American S.S. Co.,* 280 N.W.2d 852, 858 (Mich. App. 1979) (counsel's argument that "defense attorneys were a bunch of New York lawyers trying to pull the wool over the eyes of midwestern folks" was improper). Hometowning happens, but it has got to be kept subtle.

4. References to Matters Outside the Record.

It is permissible to argue general knowledge and common sense, but it's not proper to argue material facts that are not

in the record. Some examples:

"I am sorry that we did not have Dr. Jones here to testify. He could have told you exactly why he performed the procedure that way and why it was necessary for him to do it in that manner."

"We all know that there is a conspiracy of silence among doctors not to testify against each other . . . ."

5. Vouching.

"I believe that my client was telling the truth." This is vouching and it is improper. The lawyer isn't sworn in and cannot give testimony, except on certain limited issues, such as fees. Unsworn statements of personal knowledge of the facts or statements of personal knowledge of the credibility of a witness by an attorney also violate Rule of Professional Conduct 3.4(e). Some other, less obvious, examples of vouching:

"If you knew Lizzie Borden like I have for the past twenty years, you'd know that she couldn't hurt a fly . . . ."

"I tell you that Dr. Mengele was a good doctor. Maybe his methods were unusual, but his motives were honorable, in my humble opinion as an officer of this court . . . ."

"In twenty years of practice, I have never seen a case that more demands a verdict for the plaintiff than this one . . . ."

Better to stay away from "It is my opinion," "I believe," and the like in argument. They are trigger words that may well prompt a response. They are verbal fluff that weakens the power of your words and shouldn't be used for that reason alone.

6. References to Insurance Coverage.

Generally improper, but possibly acceptable if relevant to agency, ownership, bias, and the like. See UTAH R. EVID. 411; *Reeves v. Gentile*, 813 P.2d 111 (Utah 1991).

7. Let Me Tell You About Myself.

A few of our colleagues attempt to ingratiate themselves with the jury by telling them in opening statement about their background, their family, schools, and so on. The lawyer isn't on trial and her personal history is irrelevant. Think of the possibilities for cross-examination were it otherwise.

8. Come, Let Us Grovel Together.

A recent favorite, especially with those who've been to seminars conducted by lawyers in fringed jackets. The attorney shares his fears with the jury in a transparent attempt to garner empathy. He wants them to know how he fears his own limitations. How that gnaws at him. How he's worried that they won't like him and, thus, not like his client and his case. How that worries his wife. And so on.

✦

"Despite the temptations we all sometimes feel, personal attacks on opposing counsel are improper and objectionable."

✦

Object to this drivel in argument. What the lawyer fears has no bearing on any issue in the case. It's as ineffective and obvious an attempt at manipulation as wearing a placard that says: "Please Love Me." Here's an actual example taken from the transcript of an opening statement in a civil action tried in Salt Lake City about three years ago. The defense lawyer began with this:

Ladies and Gentlemen, I would like to just tell you for a minute about how I feel about this case. I'm extremely nervous right now, and didn't sleep at all last night. And I'm afraid. And I'm afraid that I'm going to fail these three men who have been accused of some pretty serious things, and I'm afraid for myself. I'm afraid that I won't be adequate to defend them in what they deserve . . . .

At this point, the plaintiff's lawyer objected and the judge promptly sustained it. As you might imagine, the opening statement slid downhill from there. After the trial, some of the jurors commented to the plaintiff's lawyer on how odd they all thought it was for a prominent defendant to have an attorney with so little self-confidence and how odd it was that the defendant, with all its money, could not have found a trial lawyer a bit more sure of himself. There's a lesson here, and it seems to be that we shouldn't believe everything we learn at seminars.

9. Reference to Wealth, Size, or Social Status of Parties.

This comment cost a plaintiff's attorney a verdict in a Utah medical malpractice case:

'In our system, a small, but an injured party, is allowed, through the jury system, to take on the strong and the mighty, and have even a chance of success' . . . . Suing IHC 'is a little like suing Mother Nature in this community.'

References to the relative wealth of the parties are improper. *Donohue v. Intermountain Health Care, Inc.*, 748 P.2d 1067 (Utah 1987) held these remarks were an inappropriate attempt to appeal to the social or economic prejudices of the jurors. Even rich people are supposed to get a fair shake, and you can't brazenly appeal to the underdog instincts of a jury.

10. Attacks on Opposing Counsel.

"We don't call that law firm 'Dumb & Dumber' for no reason. Even grinning moronic geeks like them know that this was a matter of medical judgment, and not of malpractice . . . ."

This remark was held to be an appropriate and accurate comment in closing argument by defense counsel in a medical malpractice action. Not really. Despite the temptations we all sometimes feel, personal attacks on opposing counsel are improper and objectionable. Not that they work anyway; a jury expects to see professionals at work, not kids on a playground. Even something as mild as "[Plaintiff's attorney is a member of a] very large law firm . . . whose job it is to build up big cases" won't fly. *Weinberger v. City of New York*, 468 N.Y.S.2d 697 (N.Y. Sup. Ct. App. Div. 1983).

11. Mathematical Damage Formulae.

"Just give the plaintiff a dime for every hour he will spend with this pain . . . ." This, the "per diem" argument, is border-

line. *Olsen v. Preferred Risk Mut. Ins. Co.*, 554 P.2d 575 (Utah 1960) held that the per diem argument was a matter for the discretion of the trial court and proper with a cautionary instruction. *Tjas v. Proctor*, 591 P.2d 438 (Utah 1979) upheld rejection of a per diem argument by the trial court. A variant is the "job-offer" in which plaintiff's attorney asks the jury to "assume" the job of being injured as the plaintiff is, and to then determine what an acceptable daily "salary" would be.

12. The Golden Rule.

This is asking the jurors to put themselves into the shoes of the plaintiff, in other words, "Do unto the plaintiff as you would want done onto yourself." It's generally held to be inappropriate. Here are some variants:

> "How much would you want if you lost your arm?"
>
> "How much pain would being in a wheelchair the rest of your life cause you?"

It's not something used only by plaintiff's counsel:

> "What would you have done if you were the defendant in this situation?"

Lopez v. Langer, 761 P.2d 1225 (Idaho 1988) held this to be improper.

13. Send Them a Message.

An appeal for the jury to "send a message" or "let them (the defendant corporation) hear you" is improper if punitive damages are not in issue.

14. The Motion to Dismiss Was Denied for a Reason.

It's improper to advise the jury that a motion for summary judgment or for directed verdict was denied by the judge or to suggest that the case would have been thrown out if it had been lacking in substance. *See Propriety and Prejudicial Effect of Counsel's Argument or Comment as to Trial Judge's Refusal to Direct Verdict Against Him*, 10 A.L.R.3d 1330 (1966).

15. This Case Should Have Been Settled.

> "It is a case that really shouldn't be here. This is a case that should have been resolved without coming to trial. But it just wasn't possible to do it. It is not my idea that we are here."

Donohue v. Intermountain Health Care, Inc., 748 P.2d 1067, 1068 (Utah 1987) held this improper. Of course, settlement discussions themselves are not admissible. But neither are references to the notion that either side should have settled the case and, therefore, not wasted the jury's time in forcing a trial.

16. The Pleadings Tell the Story.

Generally held improper, if the pleadings are not in evidence. (And they aren't, unless you have put them there.) *See Taylor v. Missouri Natural Gas Co.*, 67 S.W.2d 107 (Mo. Ct. App. 1933).

✦

"[A] plaintiff's attorney shouldn't be allowed to argue that his client will become a burden to the taxpayers if a verdict for him isn't rendered."

✦

17. Addressing Jurors By Name.

Counsel cannot make an argument like this: "Now, Mr. Spencer, you wouldn't think the defendant was such a bad guy if you knew these things, would you?" The courts that have considered it mostly find referring to jurors by name to be an improper attempt to influence the jury. *See Prejudicial Effect of Counsel's Addressing Individually or By Name Particular Juror During Argument*, 55 A.L.R.2d 1198 (1957 and later case service.)

18. An Insured Defendant Will Have to Pay the Verdict.

"We are talking about money that my client will have to pay out of his own pocket" was an improper argument when there was insurance. *See Priel v. R.E.D., Inc.*, 392 N.W.2d 65, 67 (N.D. 1986); *cf. Ostler v. Albina Transfer Co.*, 781 P.2d 445 (Utah Ct. App. 1989).

19. The "Missing Witness."

It may or may not be proper in closing argument to comment upon the failure of a party to call certain witnesses. Usually, one must first show that the witness was available, that the witness was more easily available to the non-calling party, that the party failed to explain the absence of the witness, and that the testimony would not have been immaterial or cumulative. *See* R.C. Park, TRIAL OBJECTIONS HANDBOOK § 10.16 (1991).

20. The Taxpayers Will/Won't Pay This Verdict.

It is objectionable to appeal to the self-interest of jurors as taxpayers when a governmental entity is the defendant. *See Byrns v. St. Louis County*, 295 N.W.2d 517, 521 (Minn. 1980). Likewise, a plaintiff's attorney shouldn't be allowed to argue that his client will become a burden to the taxpayers if a verdict for him isn't rendered. *See Trinity Universal Ins. Co. v. Chafin*, 229 S.W.2d 942, 947 (Tex. Civ. App. 1950).

21. Experts Are Not to Be Believed Because They've Been Paid.

Weinberger v. City of New York, 468 N.Y.S.2d 697, 699 (Sup. Ct. App. Div. 1983) held that, "It is serious error to argue in summation that an expert is not to be believed because he was paid to testify. I suppose that the gist of it is the fiction that the expert was paid for his time away from his practice, and not paid for his opinions. On the other hand, it is common, appropriate, and necessary to argue against the credibility of hired experts who derive a substantial income from testifying.

22. Subpoenaed Witnesses Are More Reliable.

Several cases hold this to be a misleading argument because it incorrectly presumes that "volunteer" witnesses are more likely to have been coached. *See Hoffer v. Burd*, 49 N.W.2d 282 (N.D. 1951). Although we know this presumption is often correct, the point of the cases is that there isn't any evidence before the jury to prove it.

CASES IN CONTROVERSY

State in Interest of E.K. and the Protection of Children: Expanding the Grounds for State Intervention

by John Warren May

The majority of child abuse and neglect statutes aimed at providing for the safety and protection of the nation's children are innately reactionary. Rather than affording child welfare workers a tool with which to champion the *prevention* of child abuse, state child welfare statutes predominantly take the form of after-the-fact child protection schemes. Nevertheless, as evidenced by a recent Utah Court of Appeals decision, *State in Interest of E.K.*, 913 P.2d 771 (Utah Ct. App. 1996), Utah's laws are beginning to acknowledge the benefits of an active, as opposed to a reactionary, child protection scheme.

Utah Code Annotated section 78-3a-2(16)(a)(iv) (Supp. 1995) ("sibling statute") includes within the definition of a "neglected child" a child "who is at risk of being a neglected or abused child . . . because another child in the same home is a neglected or abused child . . . ." This codification seemingly provides Division of Child and Family Services ("DCFS") workers, the Attorney General's child protection division, and the Utah Office of the Guardian ad Litem, a legal weapon in the fight against child abuse. Namely, rather than waiting for each child of a neglectful or abusive parent to suffer at the hands of that parent, the sibling statute evidently enables DCFS to remove the siblings of an abused or neglected child from the care of their parents based solely on the abuse or neglect of the first child. Hence, on its face, the sibling statute challenges years of judicial deference to parental autonomy.

The recognition of a parent's right to control the upbringing of his or her child is interwoven throughout our nation's jurisprudential history. Describing parental duties and rights under the common law in 1827, James Kent, then New York Supreme Court Chief Justice and Chancellor of New York wrote:

> The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. . . . The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws. . . . The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right of such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust.

✦

"[S]tate involvement is invited when parents violate their duty to care for and nurture their children."

✦

James Kent, 2 COMMENTARIES ON AMERICAN LAW 189-205 (1867). Indubitably, such historical deference to parental authority was influenced by general religious themes pervading Western Christian-based cultures. *See e.g. Proverbs* 10:1 & 30:17; *Deuteronomy* 21:18, 21 & 27:16.

Several landmark decisions of our nation's highest court echo the juristic deference toward parental autonomy. The United States Supreme Court has decided an expansive line of cases creating and defining the sanctum parents enjoy in rearing their children. In so doing, the Court has repeatedly, though often very generally, pronounced the fundamental right parents enjoy in raising their children: "The child is not the mere creature of the state; those who nurture and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citation omitted). "[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). By this line of reasoning, the Supreme Court includes within the scope of family autonomy the parental right to exercise control over the custody, education, health, discipline, and economic well-being of their children free from state interference.

Nonetheless, "the private realm of family life which the state cannot enter" is not absolute. *See Prince*, 321 U.S. at 166. The Court has noted that "the family itself

Mr. May is a law clerk for the Utah Court of Appeals.

is not beyond regulation in the public interest. . . . [T]he state as *parens patriae* may restrict the parent's control[;] . . . the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ." *Id.* at 166-67. As *Prince* implies, state involvement is invited when parents violate their duty to care for and nurture their children. In other words, state interference with a fundamental parental right is not forbidden where a compelling countervailing interest exists that warrants deference to the state's parens patriae duty. *See Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981). Thus, the Supreme Court has declared that "the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have potential for significant social burdens." *Yoder*, 406 U.S. at 233-34.

As many authors have noted, the trend away from blind deference in favor of parental rights is overdue. Despite the longevity of our nation's judicial deference to family privacy, "[a]ttempts to accommodate family autonomy and privacy interests have significantly compromised the protection of our children, and . . . privacy interests have traditionally served as justifications for leaving many maltreated children unprotected." Judith G. McMullen, Privacy, Family, and the Maltreated Child, 75 MARQ. L. REV. 569 (1992). As one treatise asserted:

> Although it is certainly true that in general the family is better able to care for children than state agencies, the cases on child abuse and neglect provide convincing evidence that many families are not only not able to perform this function but are inflicting such serious harm upon children that state intervention is essential to their welfare.

Homer H. Clark, Jr., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 9.4, at 351 (1988). Indeed, continued support of parental autonomy in familial matters often augments a basic facilitator of abuse and neglect, namely isolation. As many researchers have discovered, social isolation is a primary factor in abusive families:

> Family violence is the most private form of violence. Violence feeds on family isolation for it prevents detection; ignores positive social values and monitoring that might inhibit the violence; and keeps resources, expertise, and the input of others from the family. All these are natural helping factors that might prevent the violence. No matter the form of violence in the family, isolation from support and detection can only serve to feed the on-going nature of such violence. Isolation must be reduced before any hope for the elimination of the problem is realistic.

Frank G. Bolton & Susan R. Bolton, WORKING WITH VIOLENT FAMILIES 46 (1987) (citation omitted).

✦

"[Utah's sibling statute] enables DCFS to champion the rights of children who are at risk because they reside in the same home as an abused child."

✦

Attempting to combat the isolated nature of child abuse, all fifty states, as well as the District of Columbia, in the years spanning from 1963 until 1967, enacted child abuse reporting laws. *See e.g.* Utah Code Ann. § 62A-4a-403 (Supp. 1995). The rapid diffusion of such laws throughout the United States reflected our loathing of child abuse. Nevertheless, "few anticipated the relationship between reporting laws and the dramatic increase in demand for child protective services, indeed, for child welfare services of all kinds. Simply put, the legislators saw child abuse as a serious but not a terribly prevalent problem." Barbara J. Nelson, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 76 (1984). Thus, the legal and social mechanisms through which reported cases of abuse and neglect were to be dealt were widely underdeveloped. Accordingly, even in light of an alarming rise in the frequency of known child abuse and neglect cases, the advent of these child abuse reporting laws did not translate into proportional reporting ratios or court action. See Arthur H. Rosenberg, *The Law and Child Abuse*, in CHILD ABUSE: INTERVENTION AND TREATMENT 161, 163 (Ebeling et al. eds. 1975). Additionally, because most child abuse and neglect reports are submitted after-the-fact, reporting laws usually are not an effective *prevention* mechanism.

Ironically, the detected abuse of a child creates a unique occasion for child welfare workers to *prevent* child abuse; specifically, the abuse that child's siblings otherwise would likely endure in the absence of state intervention. Hence, Utah's sibling statute. As previously noted, this law enables DCFS to champion the rights of children who are at risk because they reside in the same home as an abused child. In a recent radio address, noted author Richard Gelles articulated the extent of the child abuse dilemma:

> What many people don't know is that there are approximately 1,300 children who are killed by parents and caretakers each year and half of that number, approximately 650 of those children, are killed after they come into the child welfare system or after their siblings have come into the child welfare system. We already know the kids are at risk. We already know they're in danger and if we can't protect these children, we can't protect any children.

All Things Considered (National Public Radio broadcast, Aug. 17, 1995) (emphasis added). In *State in Interest of E.K.*, the Utah Court of Appeals broadly defined the scope of the sibling statute as applied to an after-born child, thereby protecting the children we already know are in danger.

Specifically, the Court of Appeals faced a scenario in which the appellant admitted "that she caused [her then seven-month-old] twins' skull fractures and broken bones by hitting and throwing the infants out of frustration and a lack of parenting skills." *E.K.*, 913 P.2d at 775. Ten months thereafter, DCFS took custody of E.K., the appellant's third child, when he was two days old. *Id.* at 772. DCFS filed a neglect petition on behalf of E.K. based primarily on the appellant's prior guilty plea to a third-degree felony for the abuse

of the twins. *Id.* at 772-73.

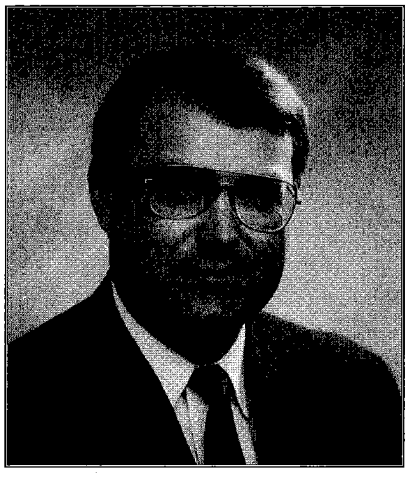
Concluding that the sibling statute "can apply to a child conceived and born after another child in the home has been abused or neglected," the court stated that "[t]here is no rational distinction for excluding such an after-born child from protection. A distinction excluding after-born children would leave a large group of at-risk children outside the [sibling statute's] protective reach based only on an arbitrary time limit." *Id.* at 773-74. Moreover, the court recognized that judicial notice of adjudicative facts from prior proceedings was sufficient to meet the State's burden of proving by clear and convincing evidence that E.K. was at risk. In doing so, the Court of Appeals strengthened a historically ineffectual area of the law:

> There is no weaker area of the law than that area which relates to the family and its members and to the relationship of the family to third parties. The conflict between parents and children in all dimensions is reflected in conflicting legal views of the reciprocal rights and duties of parents and children. The inadequacy and confusion of the laws governing the subject reflect our own ambivalence about our children and ourselves as parents.
>
> . . .
>
> The result of this ambivalence is the failure to develop a consistent philosophy to guide in the formulation of effective legislation. On the one hand, we favor protection of the child; on the other hand, we cleave to sustaining family integrity, often at all costs. These are not always consistent alternatives. Consequently, we fail to commit the resources necessary to make such legislation either meaningful or workable and thereby fail to garner the maximum preventive or remedial benefits contemplated by the laws.

Rosenberg, supra, at 166.

In *E.K.*, the Utah Court of Appeals clarified a previously controversial section of Utah's Child Welfare Reform Act, thereby providing child advocates a meaningful and workable means of preventing child abuse and neglect.

IN MEMORIAM



W. Brent Wilcox

Judge Aldon Anderson & W. Brent Wilcox

JUDGE ALDON ANDERSON

by Judge Bruce S. Jenkins

I have been asked to say a few words about Judge Aldon Anderson, from the point of view of a colleague, a lawyer, and a friend. I am honored to be asked because of my personal admiration and genuine affection for Judge Anderson, Andy. All of us colleagues on the bench of the United States District Court, District of Utah, begin as friends. We end as brothers and sisters.

Judge Anderson many times over the last few years told me that he wanted me to talk at his funeral. He told me that if nobody asked me to speak, I was to march right up here and speak anyway. Well, fortunately I was asked, so I march and speak by invitation.

I told him I would speak—hard as it may be—provided he agreed to speak at my funeral. He said he would. As all lawyers know, a promise for a promise is good consideration. Well, I for one, intend to hold him to his promise. How and when he performs his promise is his problem, not mine.

I am not going to talk in detail of his legal work. It is enshrined in the books and records of the court, the Reporter series, electronic data bases, and in the lives and memories of those who appeared before him. His work is the product of a vigorous mind, careful scholarship, the proud work of an adept legal craftsman. His work has been admired, followed, quoted, and relied upon by judges throughout this nation.

If there is one characteristic that stands out in the great body of his work, it is that of balanced judgment. Judges are asked to judge, and he was very good at it. The admiration of lawyers, the Bar, and his colleagues nationwide, are summarized in the plaques and commendations which have been on display. Included in that group is one I saw presented to him by the Chief Justice of the United States Supreme Court for his unselfish service as President of the Inns of Courts Foundation during a difficult period when that movement had growing pains.

When Kevin Anderson called me, I was out of town, down in Sante Fe, New Mexico, attending a workshop for the federal judges who work within the Tenth Circuit. I announced to the group of judges that Andy had died. While the many plaques and commendations are impressive, I was more impressed by the number of people, appellate and trial judges, who came up to me to express their sorrow. So many said, "I really liked that man." Some of the judges said, "I really loved that man." All of the judges readily stood for a moment of silence in honor of an admired colleague.

I want to touch on just three subjects and then I'll sit down.

- Judge Anderson loved his work.
- Judge Anderson was a kind man.
- Judge Anderson had a wonderful sense of humor.

He had broad experience when he came to the Federal bench: state trial judge, trial lawyer, district attorney. He succeeded Judge Christensen as an active judge when Judge Christensen took senior status. During a challenging time for the

Judge Jenkins is a Senior Judge of the United States District Court for the District of Utah. These comments are excerpted from a tribute given by Judge Jenkins at Judge Anderson's memorial services. Judge Anderson died on March 24, 1996.

court, a transition time, he provided stability and leadership. He always quipped when pointing to his embossed commission signed by the President and the United States Attorney General that the president who appointed him had to resign from office, and the attorney general who screened his nomination went to prison. Well, I would shoot back, "The Lord moves in mysterious ways."

When Judge Anderson succeeded Judge Ritter as Chief Judge, he was then the only Federal Judge in the District, so he was, he said, a chief with no indians. He was amused that his mother took inordinate pride in his new status as Chief Judge, in spite of the fact that he was the only judge there.

In 1978, I joined him as a colleague, and Judge Winder joined in 1979. Under Judge Anderson's leadership, the court began a new era of progress that continues to this day. We had a lot to do, but we did it, inspired by his well-intentioned leadership. I remember some good advice at my investiture, my swearing-in, when I joined him on the bench amidst much clamor and applause. He leaned over and said to me, "Remember Bruce, they won't always applaud." Balanced judgment, don't you think?

He was interested in his subject—trial work, the law. He and I used to travel to Provo to participate in the very first Inn of the Court, which was being used as a prototype, an experiment, a model for possible adoption nationwide. He would drive one month; I would drive the next. We did that for six or seven years. Often we became engrossed in conversation. Andy liked to examine and re-examine things in detail—walk around a problem many times. He liked to assume a position and defend it. He and I explored the universe and other subjects in our conversations. We were scheduled to be in Provo at the courthouse where the Inn met. We were trying to improve advocacy and civility in court work with a mix of students, judges, and experienced lawyers. Well, Andy became so interested in his subject, and I so interested in what he was saying, that neither of us noticed the Provo turn-off, and by the time we finished our conversation we had reached Spanish Fork and had to backtrack to Provo, and, quite frankly, were late. I took delight in pointing out to him and others what he had done. I did so until I drove, three months later, and darned if we didn't do the same thing. A wonderful lesson in humility. When we arrived at the meeting, the local president was regaling that "judges were but men," and we both smiled with the knowledge of our own humanity. Three Inns opened in Utah. One was named in his honor. There are now more than 160 nationwide—and growing.

He loved his work and even after a demanding day in trial he was willing to spend himself, his time and energy, to improve the process.

Judge Anderson was *a kind man*. He was genuinely interested in those with whom he worked—his colleagues, his secretaries (Fern and Norrine), clerks, court staff, and colleagues nationwide. When he decided to take senior status and I succeeded him as chief, in a drawer on the bench that he had used he left me a little sticker—one of those yellow post-it notes. "Dear Chief," it said, "Good luck. Enjoy." Then he had scribbled a happy face. I used to kid him that it was his face because he had shifted the burden of administration to someone else. He enjoyed court personnel, was interested in their welfare, their marriages, their children, their health. He was comfortable with anyone.

Judge Anderson had a wonderful sense of humor. He took great joy in telling a new story he had picked up, and to the amazement of someone who did not know him well, he would laugh out loud. I only saw him once when I thought he was nonplussed, but later he told this story on himself. He had a case, dirty pictures, not quite pornographic. He labored long and hard on a scholarly First Amendment opinion, citing the law, logically building from precedent, which precedent disciplined his actions as a judge. He issued a very good opinion. He told me that one of the local newspapers reporting the case had a headline something like this: "Federal Judge Says Okay to Run Naked in the Streets," with no reference to or understanding of his very balanced opinion.

The last time he spoke to the Federal Bar Association at a seminar the judges participated in each year, he told a story I appropriated and use. Nice teacher in Sunday school filled with spirit, after giving a lesson as to the degrees of knowledge and belief. He concluded by telling his class, "I don't *think–I know!*" A nice young man on the first row spoke up and said, "That is a relief, teacher, I don't think I know either."

Good memories. When I think of Andy, there comes to mind three of the ancient prophets I admire. Micah, on duty: "What doth the Lord require of thee, but to do justly, and to love mercy and to walk humbly with thy God?" Isaiah, on method: "Come now, and let us reason together." And Moses, speaking in *Deuteronomy,* on choice: "I have set before you life and death, blessing and cursing: therefore choose life."

A more current observer of the human condition reminds me of Judge Anderson. He put it this way:

> You talked to your rose;
> you said, "nice day."
> You planted your rose-
> and it grew.
>
> Words, Heaven knows,
> are here to stay.
> And words, I suppose,
> are good to say.
>
> But love is what you do.

My hardworking, kind, humorous colleague and friend indeed chose to love and to do.

W. BRENT WILCOX

by Colin P. King and Alan W. Mortensen

Our friend and partner, Brent Wilcox, died November 11, 1996. He was an enigma of sorts. He was a driven and hardworking man, obsessed with attaining the top of his profession and obtaining the very best result for his clients, yet his passion was his time with his wife, Ann, and

Mr. King is a partner and Mr. Mortensen is an associate of the Salt Lake City firm Wilcox, Dewsnup & King.

his four children; he was known to take liberal and exotic family vacations, all around the planet. He was an expert at making his career very profitable financially, but he had a penchant for, and indeed made his reputation on, taking cases which to others often seemed hopelessly unwinnable. He was as easy-going as a lamb, yet stubborn as a mule. He got along comfortably with hardened, crass and atheistic oil field roughnecks, yet lived his life as a devout Mormon who never was heard to utter an obscenity. He was a man who was told by his torts professor he had no aptitude for the law and should find a job other than as a lawyer, but who reached the pinnacle of his profession as judged by his peers and colleagues.

Brent was born in Ogden on March 27, 1940. He grew up along the Wasatch and next to the Great Salt Lake, attending Davis High School, excelling as a football player and debater. He attended Weber State University on football and debate scholarships, interrupting his schooling for an LDS mission to southern Australia. It was there he was first exposed to mining and miners, touring several underground coal and hard rock mines. One of Brent's favorite pictures is of himself as a missionary, donned in full miner's gear, standing next to a dirty and grizzled Australian coal miner just after he and Brent had emerged from a mine shaft. The patented Brent Wilcox smile he displayed foreshadowed the ease and happiness he always felt while underground with those he would later represent throughout his career.

Brent began his law practice doing insurance defense at Hansen and Garrett in 1966. He later joined Draper, Sandack & Saperstein, Moyle & Draper, and Giauque, Williams, Wilcox & Bendinger, before establishing in 1990 the firm of Wilcox, Dewsnup & King.

It was at Moyle & Draper, beginning in the early '70s, that Brent developed his affinity for underdogs in the legal system, which led to his love for plaintiff's personal injury work. He tried several criminal defense cases, including at least one first-degree murder case. He got involved in mining cases, and ended up in 1973 as the workhorse lawyer in the Sunshine Mine Disaster case in Idaho, in which he represented 62 widows and 300 children. That case consumed five years of his life, resulted in a six million dollar settlement against certain defendants, and a nine month long trial against the United States. After the Sunshine case, in which 20,000 exhibits were offered into evidence, Brent never feared taking on a "big" case. The Sunshine case and many other coal mining cases handled by Brent prepared him well for his role as the lead lawyer in the Wilberg Mine Disaster in the mid-1980s, in which he engineered a $28,000,000 settlement against Utah Power & Light.

Brent's outstanding advocacy skills and leadership qualities have been recognized by his peers in numerous venues. In 1991 he was honored by being elected into the American Board of Trial Advocates (ABOTA), and in 1994 Brent was elected to the American College of Trial Lawyers (ACTL). Brent was a chair or member of numerous Bar committees, including the Utah Supreme Court Rules of Evidence Advisory Committee. He was elected to the ATLA Board of Governors in 1989 and remained on the board until his death. He was the Chairman of the Mining and Oil Field Products and Accidents Litigation Group, and a member of the Construction Accidents Litigation Group.

Brent was the legislative chairman of the Utah Trial Lawyers Association from 1987 until 1995. He served as the UTLA president from 1992-1994. He almost singlehandedly transformed the UTLA into the influential and active organization it presently is. Brent spent many hours writing articles and meeting with legislators with regard to legislation that affected the rights of his clientele.

Throughout almost all of his career, Brent's clientele were "little people." He eschewed representing powerful interests; they had all the attorneys money could buy. Brent identified with those who were not so fortunate by birthright or status. Indeed, a remarkable change would come over Brent as he raced down U.S. 6 toward Carbon and Emery Counties. One could observe the sophisticated Salt Lake attorney race back into his childhood, gun and fishing pole in hand, excited to hunt, fish and otherwise get "muddy" with those he counseled. Brent gave peace of mind to the "little people" he served, knowing that he was protecting them from the well-represented power brokers, and that no one could beat them by the mere fact of having more money or better lawyers.

The cases which often seemed hopelessly unwinnable to others are where Brent excelled as an advocate. His victories in the Wilberg and Sunshine Mine Disasters have left many lonely miner's widows and children with food in their cupboards and peace in their hearts. Brent's ability to focus on the clients' financial and emotional needs, and not on the labyrinth of obstacles blocking the satisfaction of those needs, motivated him to achieve victory for his clients against great odds. Whether filing and keeping a Utah case in Harris County, Texas, to obtain a settlement three times the value of the case in Utah for a seven-year-old boy who lost both legs in a horrific accident; whether traveling to the northernmost outposts of Canada to find at least one miner who had experienced a similar malfunction in a mining drill, resulting in a settlement which provides financial security for a severely brain-injured miner and his family; or whether finding the only expert in the world who has performed seat belt studies on seven-month unborn fetus's brains during automobile accidents, resulting in a settlement to devastated parents of a baby born with a severe brain injury; Brent permitted nothing to detour his client's course to victory.

Though no longer with us, Brent continues to influence and guide us. His advocacy skills, firmness, friendship, and uncompromising example, much like the results he obtained for his clients, will always provide us comfort and direction in our professional and personal lives. As Brent's funeral program declares, "Some people come into our lives and quietly go, some stay awhile and leave footprints in our hearts and we are never ever the same." W. Brent Wilcox was such a person. We shall always miss him.

LEGISLATIVE NEWS

Utah's New Sex-Offender Registry Statute

by Brian R. Allen

Summertime! Cool mornings; hot, lazy afternoons. The sound of children racing and playing through the neighborhood. It brings back fond childhood memories. Even now, I like to lounge around on Saturday mornings and watch "Looney Toons" and listen to my children outside as they chase balls and bugs with shrieks of delight, the only limit to their fun being the bounds to their imaginations.

July 29, 1994, must have been a day like that in the Hamilton Township of New Jersey. Seven year old Megan Kanka, life full of promise, was chasing her dreams in this quiet, suburban neighborhood. Then suddenly, her laughter was silent, her dreams unrealized. Megan was found later that day brutally raped, suffocated with plastic bags, and discarded like trash in a local park. The perpetrator was a twice-convicted sex-offender who lived in anonymity across the street from Megan.

This heinous crime was the impetus for Megan's Law in New Jersey. Around the state, pink and white bumper stickers appeared that read, "Megan's Law: The Right to Know." The public was outraged that such a dangerous person lived in virtual obscurity in a quiet, residential neighborhood, and no one was aware of the potential threat. The people wanted to know.

In recent years, more than forty states have initiated sex-offender registries, and more than half of those provide for some type of public notification about sex-offenders. New Jersey's Megan's Law, and that of several other states, requires blanket notification to neighbors in the immediate vicinity of a sex-offender's residence. Other states require the sex-offender to register with the local law enforcement agency, and permit the agency to notify residents as it deems appropriate.

During the 1996 General Session of the Utah Legislature, I sponsored legislation allowing public access to Utah's Sex Offender Registry, and expanding the type of information contained in the registry. And just this year, the United States Congress passed a law requiring states to initiate notification programs.

✦

"[W]ith our corrections system bulging at the seams, and the demand for prison space increasing faster than our ability to fund and build it, more and more dangerous sex-offenders are being released, and the general public is demanding to know where they are."

✦

The subject of notification has engendered substantial debate. Critics call it a modern-day "scarlet letter." Others have raised concerns over the potential for vigilante-type actions against sex-offenders. Still others question the constitutionality of the blanket notification on the premise that it is an invasion of privacy. There are also those who would live in greater fear if they knew that a sex-offender lived down the street, so they simply don't want to know.

But, with our corrections system bulging at the seams, and the demand for prison space increasing faster than our ability to fund and build it, more and more dangerous sex-offenders are being released, and the general public is demanding to know where they are. In my view, the over-riding concern for our children's welfare compels us to provide some type of notification to the public concerning the whereabouts of convicted sex-offenders.

In crafting the Utah law, (House Bill 15, 1995 General Session of the Utah Legislature), I tried to look at both sides of this debate. With the assistance of Lisa Watts Baskin, Associate General Counsel with Utah's Office of Legislative Research and General Counsel, I looked for problems that had manifested themselves in other states when similar laws were implemented.

For example, Megan's Law faced an early setback because it was applied retroactively. A federal district court judge in New Jersey ruled that the law's public notification requirement, if applied retroactively, violates the federal constitution's ban on changing the legal consequences of a crime after it has been committed. Another problem that surfaced involved misuse of information. Some localities reported that homes were mistakenly targeted for vandalism or arson because notification flyers contained inaccurate information. In other areas, crimes were committed against sex-offenders. Additionally, many people feel that notification of a dangerous neighbor could make families feel that they are prisoners in their own homes.

With these concerns in mind, we set out to craft legislation that would take a moderate approach to addressing the need for notification. The legislation considers two objectives of the sex-offender registry: enforcement and prevention. House Bill 15 expands the information

Mr. Allen serves in the Utah House of Representatives.

required in the registry to include the offender's name and aliases, current address, physical description, current photograph, types of vehicles the offender drives, any conditions or restrictions upon the offender's probation or parole, the name and phone number of the sex-offender's parole or probation officer, the crimes the sex-offender was charged with and convicted of, a description of the sex-offender's primary and secondary targets, and the method of offense. We anticipate that this expanded information will minimize the risk of misidentification. We also hope that it will be helpful in identifying suspects of sex crimes. As technology advances, it may even be possible to include DNA information for comparison.

The prevention aspect of the legislation involves the public notification provision. We were cognizant of the concerns of those who did not want the information forced upon them, and we also considered the potential for abuse of the information in an uncontrolled, blanket notification process. In analyzing various approaches used elsewhere, it became clear to us that disseminating information to the public would be best if it were available on demand. Rather than print flyers and circulate them in a neighborhood, the information could be better controlled if those who want information are required to make a written request for information on registered sex-offenders living in their neighborhoods. This would provide a mechanism by which those who really want to know can obtain information, but it would not force information on those who do not want or have a need to know. In the cases of misuse or abuse of the information, a paper trail will exist that will assist investigation efforts of law enforcement officials. The legislation also allows victims who feel they need to know, the opportunity to obtain current information about the person who victimized them. And to address the constitutionality problems associated with the ex post facto clause, notification cannot be applied retroactively.

Much of the actual process in obtaining access to the registry will be determined by the administrative rules of the Department of Corrections. Department of Corrections officials are in the process of drafting those rules, but are committed to allowing as much public access to information as possible. The legislation anticipates that a petitioner could include anyone wanting to obtain information on any known sex-offender living in their neighborhood, or organizations such as Little League, youth clubs, and scouts wanting to determine whether someone is listed on the registry. The Department of Corrections would then respond to the petitioner in writing, providing as much information from the registry as possible, after redacting any information that could inadvertently identify a particular victim. The Department of Corrections could deny a request for cause. Cause could include the past criminal history of the petitioner, or past misuse of information from the registry by the petitioner. House Bill 15 also provides that there is no implied duty to use the registry. This provision is intended to limit the liability of organizations that elect not to use the registry to screen their members or volunteers.

✦

"In the cases of misuse or abuse of the information, a paper trail will exist that will assist investigation efforts of law enforcement officials."

✦

After six years in law enforcement, three of which were spent as a sex crimes investigator, I am convinced that the public has a legitimate need to have access to this information. Many sex-offenders are predatory and extremely gifted in their ability to win the confidence of neighbors and children. Although prevention of child sex abuse comes from loving parents who carefully monitor their children's activities, it is impossible to be with a child at every scout outing, Little League function, and neighborhood bike ride. House Bill 15 will not identify every potential threat, and it does not effectively deal with the problem of incest. But it certainly could narrow the field of threat, if applied appropriately.

AMUSEMENT IN THE LAW

John Mortimer

by Ronald J. Yengich

I never thought I would meet any of my literary heroes. They are few in number: Mark Twain, Damon Runyon, Rex Stout, and John Mortimer. All but the last have been dead for a considerable period, and unless I slip through a hole in time like the characters in a W.P. Kinsella novel such as *Shoeless Joe* or the *Iowa Baseball Confederacy*, it looked as though Mr. Mortimer was my only hope. Although now that I think about it, W.P. would be okay, too.

My fortune changed, however, when Betsy Burton of The King's English asked me to assist in bringing the living Mr. Mortimer to Salt Lake City. I was not only gratified to meet him, but honored to introduce him to the audience at the Salt Lake Community College, where he gave a well-received and hilariously enjoyable lecture.

Mr. Yengich is a partner of the Salt Lake City law firm Yengich, Rich & Xaix. A version of this article appeared in the Inkslinger Magazine.

I admire Mr. Mortimer not only for his talent as a writer, but because he created the fictional hero for so many of us who scurry for our daily bread in the dusty hallways of, as Horace Rumpole would say, the "palais de justice."

Prior to his coming to Zion, I had an opportunity to talk to Mr. Mortimer on the telephone. I rang him at his home in Henley-on-Thames at 2:00 a.m., mountain standard time. The purpose of the phone call was to write a short blurb to announce his forthcoming appearance here. He proved, in the twenty-five minute discussion, to be an extremely gracious man who obviously is used to suffering fools kindly. When I suggested that I usually interview people at my law office, or in prison or jails, he chuckled and reminded me that he had done that on many occasions. I also recalled the many interviews Mr. Mortimer artfully chronicled in his collections *In Character* and *Character Parts*. I knew I was not up to the quality contained in those "jottings," as he might refer to them. But he and I soldiered on in the best tradition of the Bar, if not journalism.

My notes of the interview are a hodge-podge and jumble. The reason is simple: John Mortimer is a wonderful conversationalist and raconteur and the proposed interview was more like conversation between two lawyers than searing, profound journalistic questions. I realize there may be an oxymoron in there somewhere. He set me at ease, and when I felt that I had pestered him sufficiently, I told him that my yellow pad had less than a page of what looked like scrambled eggs, but I would try to make something up. He said to make sure he came out well in the end.

Once Mr. Mortimer arrived in Salt Lake City, his first visit to Zion, we took up our conversation about the law and matters

legal over a cold draft in the Peery Pub.

John Mortimer has seen much in his life. The son of a noted barrister, the literary father of the Patron Saint of Defense Lawyers, Rumpole of the Bailey, and creator of plays such as *A Voyage Round My Father* and *The Dock Brief*, as well as many novels. Yet, he is a genuinely thoughtful and humble man. He is witty, occasionally caustic, and offers those offhand randy comments that are publicly acceptable only when coming from septuagenarians.

He is, as he told me, first and foremost a writer–a chronicler of events. As a lawyer, I was interested in knowing whether the Barrister John Mortimer misses the practice of law. The answer was unequivocally "no." He reiterated what he said in his latest autobiography, *Murderers and Other Friends, Another Part of Life*, that if he writes a bad book, people don't go to prison. He couldn't assure his legal mistakes would end benignly. As a writer, he isn't standing on his hind legs "saying what other people say." He is creating his own words, and he much prefers the life of a writer. He considers himself a writer first, foremost, and now, solely.

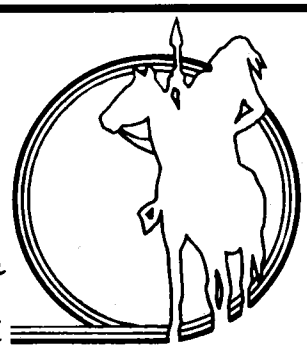
Mr. Mortimer waxes eloquent when speaking about writing: "It's a wonderful thing to be a writer," he told me, and I'm sure he wondered what mishmash of incomprehensible stew I would offer from our conversation. And, when questioned about what he wants to be known as in England, he says simply, "a good writer." For his fans not only of the *Rumpole* series but of his many other contributions to literature, including *Summer's Lease, Paradise Postponed, Titmuss Regained*, and *A Voyage Round My Father*, he has succeeded admirably in that quest. For others in his native land, he has become "England's favorite uncle," as a recent *New Yorker* referred to him.

His message on a personal level is the same as that in his books, including his latest autobiography. It comes from a man who has observed much in the last three quarters of a century. His gospel is compassion for those who show human frailties native to all of us bipeds. He propounds the idea that understanding of our basic human weakness is not only important in this era of fear, of crime, and of downsizing of corporations; it must be the genuine golden thread that binds the best of human nature. Without our understanding of each other's failings, it might be said that life is just ordinary red plonk and cigar ash without the heart of a Rumpole.

As for the law, his message is the same as Horace Rumpole's. The twin golden threads of the burden of proof beyond reasonable doubt and the presumption of innocence, should remain unburdened by the efforts of politicians and judges to unravel them. He told me that we must understand that the right against self-incrimination and leaving the burden of proof on the government, are not technicalities but are two of our highest aspirations in a civilized world. It was my pleasure to be able to sit with the lawyer John Mortimer and hear him expound personally on his philosophy of life.

> ***"[U]nderstanding of our basic human weakness is not only important in this era of fear, of crime, and of downsizing of corporations; it must be the genuine golden thread that binds the best of human nature."***

Oh, by the way. For those of you who believe exercise is the key to reaching seventy: While driving to an engagement in my car, ("the Ron-Mobile" to John), he saw a woman and man jogging along a residential street. He hit the window's electronic control and yelled, "Studies show that will only add about nine months to your life." When the window was back up, he proclaimed, "It's true, you know. Nine months, tops," and then added, "I prefer champagne and a good book." Not a bad philosophy when you think about it.



Western States Bar Conference

FEBRUARY 26 – MARCH 1, 1997
Scottsdale, Arizona

The 49th Annual Western States Bar Conference will be held in sunny Scottsdale, Arizona, February 26 - March 1, 1997, at the DoubleTree Paradise Valley Resort. Scottsdale provides an abundance of recreational, dining and shopping opportunities.

The Western States Bar Conference is an annual gathering of current and past state bar leaders, ABA officers and attorneys interested in issues affecting lawyers and bar associations. This year's topics include: integrating young lawyers in to the profession, bar programs on family violence, lawyers and the Internet, and the bar's role in judicial appointments. All programs have CLE credits pending.

A special pre-meeting golf tournament will be held Wednesday, February 26 at the Stone Creek Golf Club. A casual wild west dinner and casino night will cap the Friday meeting sessions.

For further information and registration, contact Dana Vocate, Director of Administration for the Colorado Bar Association, (303) 860-1115.

ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Special Institute

on

Onshore Pooling and Unitization

Private, State, Federal, and Indian Lands

Denver, Colorado • January 29-31, 1997

The Rocky Mountain Mineral Law Foundation is sponsoring a three-day Special Institute on Onshore Oil and Gas Pooling and Unitization at the Hyatt Regency Hotel in Denver.

This Institute is directed to corporate and outside counsel who represent their clients in forming, maintaining, and terminating units on **private, state, federal, and Indian lands**; landmen who are responsible for forming units; geologists and petroleum engineers who provide the science that underlies unitization; and employees of state, federal, and Indian tribal agencies responsible for oil and gas conservation, spacing, communitization, and unitization.

The Institute will provide an analysis of legal and land management issues associated with the pooling and unitization of onshore oil and gas leases (including federal and Indian onshore leases). Registrants will receive hands-on experience in forming units. The format will be a combination of professional papers, workshops, and panel discussions provided by attorneys, law professors, and BLM geologists and petroleum engineers. The first 1½ days will cover concepts applicable to pooling and unitization experiences on **private lands**. The next 1½ days will emphasize co-operative agreements on **federal and Indian lands**.

Presentations on the first day will address historical and theoretical underpinnings of pooling and unitization; ethical issues for conflicts of interest in representing multiple parties in pooling and unitization disputes; duties owed by operators to non-operators; conservation practice in selected states; and the new model form unit agreements.

The second day will include papers and workshops on gas balancing and split stream sales; state regulatory jurisdiction over private agreements; secondary recovery units, pressure maintenance, and recycling; terminating non-federal units; communitization of federal and Indian lands; and forming the federal and Indian unit.

The third day will include papers and workshops on validating, maintaining, and terminating federal units; paying well determinations for both technical and non-technical personnel; and alternative federal cooperative agreements. The institute will conclude with a two-hour BLM workshop designed to resolve actual unitization situations encountered in the field.

Registration fees for this program include two manuals containing comprehensive institute papers, applicable statutes, regulations, forms, and the BLM Manual and Handbook, as well as a hosted luncheon, reception, and coffee breaks.

Audiotapes and the course manual are available if you are unable to attend. See inside for details.

Discipline Corner

DISBARMENT

On November 20, 1996, the Honorable Pat B. Brian, Third District Judge, entered an Order of Disbarment disbarring Conrad L. Caldwell effective September 25, 1995, the date the court placed Caldwell on Interim Suspension.

Caldwell was found guilty on an indictment charging conspiracy to defraud the United States Government and impede the ascertainment, computation, assessment and collection of income taxes by fraudulently concealing the income and assets of clients. The object of the conspiracy was accomplished by engaging in sham paper transactions (creation and sale of foreign and domestic trusts) having no economic substance or business purpose and which were designed to conceal ownership and control of funds through creation of false documents.

After a contested hearing on disciplinary sanctions, the court found that Caldwell's felony conviction constituted misconduct under Rule 8.4(b), Criminal Acts, and 8.4(c), Misconduct. The court also found that Caldwell's conduct warranted disbarment as a matter of law and that Caldwell's evidence in mitigation regarding good character was outweighed by Caldwell's prior record of discipline, dishonest or selfish motive, pattern of misconduct, substantial experience in the practice of law, vulnerability of the victims, multiple offenses, and refusal to acknowledge the wrongful nature of his misconduct.

SUSPENSION

On November 18, 1996, the Honorable John R. Anderson, Eighth District Judge, suspended Mark H. Tanner from the practice of law for a period of three years.

The court found that Tanner violated Rule 8.4, Misconduct, when he was convicted of false statement in violation of 18 U.S.C. § 1001. The underlying felony conviction occurred when Tanner forged his client's signature on a special power of attorney to settle a civil drug forfeiture action without his client's knowledge or consent. The court found that the offense committed by Tanner was a disbarment offense and that the aggravating evidence outweighed Tanner's evidence in mitigation. Specifically, the court found that Tanner had a prior record of discipline, dishonest or selfish motive, and found that the defendant was a vulnerable victim and that Tanner did not acknowledge his wrongful conduct until after he was caught. The court found that Tanner's misconduct was mitigated by his relative inexperience in the practice of law, that he was remorseful, and had good character and reputation in his community where he was elected County Attorney.

The court awarded costs in favor of the Bar and refused to award Tanner any credit for the two years and four months spent on inactive status pending trial of the attorney discipline action.

The Bar has filed an appeal of the court's Order of Suspension.

WANTED:

Attorneys to judge student competitors in ATLA's regional trial advocacy competitions. This is a great opportunity to help law students prepare to be trial lawyers while serving on scoring panels composed of local lawyers and judges. The competition is scheduled for February 27 through March 1, 1997. Please call Stephen J. Buhler for further information at 521-4145.

Utah State Bar Mailing Lists

The Bar's roster of licensed lawyers is available for sale to third parties. Any lawyer who wishes to make his or her name unavailable may do so by submitting a written request to Arnold Birrel, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834: Fax 531-0660.

United States District Court for the District of Utah

Notice to the Bench and Bar

Request for Comment on Revised Local Civil and Criminal Rules of Practice

In November 1996, the Advisory Committee on the Local Rules of Practice of the United States District Court for Utah proposed both structural and substantive amendments to the Local Civil and Criminal Rules of Practice for adoption by the District Court.

In addition to certain substantive changes, the revision, for the first time, completely renumbers and reformats existing Local Rules to correspond with and track the Federal Civil or Criminal Procedural Rule to which each Local Rule relates.

Chief Judge David K. Winder has ordered that the Rules be published for a period of comment to the practicing Bar and the general public. The court has set an *en banc* hearing for members of the Bar and the general public to comment on the proposed Rule revisions for Friday, January 31, 1997, at 12:00 noon in the Courtroom of United States District Judge Bruce S. Jenkins.

Written comments including the rationale for the comment will be received and considered by the court and may be addressed to Chief Judge Winder or Robert S. Campbell, Jr., Esq., Chair of the Advisory Committee.

Copies of the proposed Local Rule revisions are available from the Office of the Clerk of the Court, Room 150 of the Frank E. Moss U.S. Courthouse Building, 350 South Main Street, Salt Lake City, Utah, and also will be available through state and local bar associations and law schools. Please telephone (801) 524-5160 to be placed on the agenda for the public hearing, or for further information regarding the proposed revisions.

Notice of Election of Bar Commissioners

Third, Fourth and Fifth Divisions

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for two members from the Third Division, one member from the Fourth Division, and one member from the Fifth Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar office on or after January 10, and **completed petitions must be received no later than February 10.** Ballots will be mailed on or about March 1 with balloting to be completed and ballots received by the Bar office by 5:00 p.m on March 31. Ballots will be counted on April 1.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1) Space for up to a 200-word campaign message plus a photograph in the March issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March *Bar Journal* publications are due along with completed petitions, two photographs, and a short biographical sketch **no later than February 10.**

2) A set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division.

3) The Bar will insert a one-page letter from the candidates into the ballot mailer. Candidates would be responsible for delivering to the Bar no later than February 20 enough copies of letters for all attorneys in their division. (Call Bar office for count in your respective division.)

If you have any questions concerning this procedure, please contact John C. Baldwin at the Bar office, 531-9077.

NOTE: According to the Rules of Integration and Management, residence is interpreted to be the mailing address according to the Bar's records.

ANNOUNCEMENT OF
JUDICIAL VACANCY
JANUARY 8, 1997

ANNOUNCING:

That applications are now being accepted for the position of district court judge in the Third District.

The vacancy on the Third District Court bench is the result of the retirement of Judge Edward A. Watson.

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., ***Monday, February 10, 1997.***

TO OBTAIN APPLICATION FORMS AND INSTRUCTIONS:

Copies of forms required in the application process and instructions are available from the Administrative Office of the Courts. Forms and instructions also are available in the following world processing formats:

ASCII Text; WordPerfect 5.x; WordPerfect 6.x; Microsoft Word 6.x; Word for Macintosh 5.x.

To obtain the forms and instructions in a world processing format, provide a return Internet E-Mail address or a 3.5" disk to Marilyn Smith at any of the following:

Internet E-Mail: marilysm@email.utcourts.gov

Administrative Office of the Courts
Attention: Marilyn Smith
230 South 500 East, Suite 300
Salt Lake City, Utah 84102

FAX: (801) 578-3843

When requesting forms and instructions in a word processing format, indicate the requested format. The application form, waiver forms, and instructions are available in all of the above formats to subscribers of the Utah State Court Bulletin Board.

Administrative Office of the Courts
230 South 500 East, Suite 300
Salt Lake City, Utah 84102
(801) 578-3800

Potential Issues for the 1997 Utah Legislative General Session

by Jane Peterson and Lisa Watts Baskin

ADMINISTRATIVE RULES

Annual Rule Sunset Legislation - Each year the Administrative Rules Review Committee sponsors legislation to reauthorize the rules of the state. The reauthorization bill does not include rules which the committee determines should be repealed.

BUSINESS, LABOR, AND ECONOMIC DEVELOPMENT

Department of Workforce Services - Potential legislation deals with implementation of House Bill 375 from the 1996 General Session, which created the Department of Workforce Services. Legislation will address department budget issues, relationship to the Industrial Commission, statewide delivery of services, and department structure.

Quasi-Governmental Entities - Potential legislation establishes criteria for the creation of new quasi-governmental entities and may examine the appropriateness of governmental oversight exemptions currently allowed for existing quasi-governmental entities.

Workers' Compensation Fund - Potential legislation will address the current and future operations of the Workers' Compensation Fund of Utah.

2002 Olympic Winter Games - The governor may propose legislation allowing a portion of sales tax diversion repayment funds to be escrowed as a contingency fund for possible budget shortfalls. These funds are currently scheduled to be repaid to the state, municipalities, and counties.

CONSTITUTIONAL REVISION COMMISSION

Resolution Repealing Provisions on Property Rights of Married Women, Article XXII, Section 2 - Potential legislation repeals this provision in the Utah Constitution which the commission studied. Based upon legal concerns raised on equal protection grounds, the commission recommends its repeal.

Resolution Amending Legislative Eligibility Standards, Article VI, Section 5 - Potential legislation amends the criteria for eligibility for office as a state representative and senator, making clear that the residency requirements are consecutive.

EDUCATION

Children and Youth at Risk Amendments - Proposed legislation designates the executive director of the Department of Workforce Services as a member of the state council of Families, Agencies and Communities Together (FACT). The executive director is authorized to assign a representative each year from his agency to sit on the FACT steering committee.

Extracurricular Activities - Proposed legislation requires the State Board of Education to establish rules and minimum standards for the scheduling of and participation in interdistrict extracurricular activities.

Joint Liaison Committee Amendments - Duties of the Joint Liaison Committee are expanded to include sharing performance levels achieved by graduates from both educational systems and reviewing changes in one system that impact the other. The liaison committee, in its annual report, will review and make recommendations for teacher pre-service and in-service issue. The committee is authorized to create an ad hoc task force(s) as needed to carry out its duties.

Prison Inmate Education Amendments - Proposed legislation places responsibility for the education of persons in custody of the Department of Corrections with the State Board of Education and the State Board of Regents.

School and Institutional Trust Lands Amendments - These amendments make technical changes in procedures for trust lands adjudications and provide for registration of pre-existing federal mining claims that encumber trust lands. Incentives are given to county governments as rewards for assisting in the apprehension and prosecution of trespassers on trust lands. The Land Grant Management Fund is converted into an enterprise fund.

Transportation of Students by School Districts - Proposed legislation increases the tax rate a local school board may levy to transport its students, not to exceed .0003 per dollar of taxable value, and provides a state guarantee not to exceed 85 percent of the state average cost per mile if a local district levies a tax of at least .0002.

ENERGY, NATURAL RESOURCES AND AGRICULTURE

Elk Farming - Certain species of wildlife, such as elk and reindeer, are raised commercially in other states. There is interest in the state to raise elk, particularly for the value of their antlers. The velvet antlers of elk are used in folk medicine in Korea and China. The

interim committee approved in concept legislation creating a regulatory program to allow commercial ranching of elk while protecting wild elk populations.

Electric Industry Restructuring - The Utah Public Service Commission is studying the feasibility of restructuring the electric industry to allow for retail competition of electric power. California has enacted a bill creating retail competition, and nearly every other state and the federal government are investigating electric industry restructuring. The interim committee has been monitoring the Public Service Commission's study.

Wildlife Outfitters and Guides - Utah is the only western state that does not regulate wildlife outfitters and guides. As a result, outfitters and guides whose licenses have been revoked in other states have come to Utah to operate. The interim committee considered, but did not approve, proposed legislation requiring wildlife outfitters and guides to be registered with the Division of Wildlife Resources. A bill regulating wildlife outfitters and guides is expected to be introduced in the 1997 General Session.

Timber Harvesting - A significant increase in logging on private lands in the state and numerous instances of poor harvesting practices has prompted the Division of Forestry, Fire and State Lands to ask for regulatory authority over timber harvesting on private lands. The interim committee considered, but did not approve, proposed legislation requiring landowners to notify the Division of Forestry, Fire and State Lands before timber is harvested. A bill emphasizing education of landowners and timber harvesters is expected to be introduced in the 1997 General Session.

HEALTH AND ENVIRONMENT

Coordinated Planning - Senate Bill 243, "Air Quality, Transportation, and Land-Use Task Force," 1996 General Session, directed the task force to study and recommend a comprehensive policy and solutions to problems and conflicts regarding the interrelationship of air quality, transportation, and land-use issues. Task force discussions focused on how to encourage cooperative land-use planning to achieve long-term solutions to air quality and transportation problems. The task force recommended legislation that would implement a cooperative planning process to: encourage development of regional growth policies; encourage better coordination between state agencies, local governments, school districts, and special service districts; encourage better planning coordination across jurisdictional boundaries; require consistency between general plans and zoning ordinances; and provide more technical planning assistance to local governments.

Health Policy Commission Recommendations - Legislation implementing the recommendations of the Utah Health Policy Commission on health care reform will be introduced. Follow-up legislation to House Bill 146, "Rural Health Care Provider Amendments," 1996 General Session, which deals with managed health care in rural and frontier Utah will also be introduced.

Petroleum Storage Tank Fund - In 1984, Congress mandated the regulation of underground storage tanks, including a requirement for tank owners to have a $1 million insurance policy protecting against a leaking tank. In 1989, the Legislature created the Petroleum Storage Tank Fund to provide tank owners with a way to satisfy the insurance requirement. In 1990, the Legislature placed a 1/2 cent surcharge on gasoline as the principal source of revenue for the fund which currently has about $26 million. In October 1996, the Utah Supreme Court ruled that the 1/2 cent surcharge on gasoline is unconstitutional. Legislation proposing a new funding source will be introduced. The actuarial soundness of the fund is also being questioned.

Safe Drinking Water - Congress recently amended the federal Safe Drinking Water Act. To access from four to seven million dollars in new federal funds, the Utah code should be amended regarding authority for state revolving loans funds. The proposed legislation also will establish capacity development programs and amend drinking water system operator certification requirements.

Tobacco Issues - Legislation is anticipated relating to the following tobacco issues: 1) unwanted environmental tobacco smoke drifting into adjoining condominiums and apartments; 2) tobacco tax rates; and 3) youth access to tobacco products.

HUMAN SERVICES

Accountability for Results - Policy makers often ask, "Does this program really accomplish anything?" Because public programs do not often have a clear "bottom line," holding programs accountable for results is sometimes difficult. The Department of Human Services has undertaken a major effort to develop outcome measures for its clients, the communities it serves, and for processes within its own organization. Through these outcome measures, policy makers will be able to judge whether a program is having a desired result. Changes in the budget could potentially follow these outcome measures by shifting resources into high performing programs and away from low performing programs.

Child Support Enforcement - As part of federal welfare reform legislation, Congress is now requiring states to massively overhaul their child support enforcement systems. New requirements include a new hire registry for businesses, suspension of license for failure to pay child support, reporting to credit bureaus, improved paternity establishment rates, and new administrative powers for child support enforcement agencies. New federal money also is available to improve compliance with child visitation orders.

The State and County Partnership in Human Service Programs - County governments operate mental health, substance abuse, and aging services programs using federal, state, and county funds. County governing bodies and the Divisions and Boards of Aging and Adult Services, Mental Health, and Substance Abuse within the Department of Human Services provide general oversight, policy direction, and supervision of these programs. No major changes in the governance or funding of these programs is contemplated, but legislation making

technical changes to state statutes will be introduced in the next session.

Welfare Reform - Congress has passed the Personal Responsibility and Work Opportunity Act of 1996. This act replaces the traditional open-ended cash assistance entitlement for poor children and their families with a block grant to states. States have more flexibility in administering this program but also must meet strict work requirements. The Legislature will consider a bill next session to implement this new block grant.

INFORMATION TECHNOLOGY COMMISSION

Electronic Delivery of Governmental Services - This issue focuses on the more efficient delivery of all types of state and local services. Agencies are requesting funds to purchase equipment and software that will allow them to provide enhanced delivery of services including education, telemedicine, and electronic meetings. This will likely be a topic of major concern for a number of years because of public and private needs, and the associated upfront and ongoing costs. The State and Local Affairs Interim Committee has a bill that creates a procedure for conducting electronic meetings. Electronic meetings have been a statutorily approved process for five years (Open Meetings & Records Act) but there have not been any legislative guidelines for implementation.

Information Technology Public Policy - This is a policy document that reflects Utah government's (legislative, executive, and judicial branches and the education community) official state position on the use of information technology in the public and private sectors. It will be part of a larger bill that recodifies certain sections of information technology into one place.

Public Safety Communications: 800 Mhertz. - The Department of Administrative Services is working with concerned state and local agencies to develop support for a statewide broad spectrum communications network. Because of needs and upcoming changes by the FCC in spectrum allocation, it is timely. The outcome of this issue will depend on the type of mechanism selected — either an independent agency or an interlocal agreement.

Rights of Way (ROW) - This issue involves the use of public highway ROW to develop a statewide fiber network for connecting public and private entities. Both state and local governments are attempting to develop public policy for the use of ROW. It is a critical issue that can impede the development of information technology and related private businesses if not properly addressed.

Telecommunication Deregulation - Senate Bill 147 was assigned to the IT Commission for study this year. As a result, a draft bill was prepared for the upcoming session. This bill is designed to incorporate changes based upon the Federal Telecommunications Act of 1996.

JUDICIARY

Child Support Guidelines - The Judiciary Interim Committee committed a significant amount of time, including hosting an evening public hearing, studying and attempting to identify patterns of inequitable or unintended consequences arising from the 1994 adjustments to the Child Support Guidelines. Primary emphasis was placed on the general problems associated with the present system in tracking and accounting for changes in children's needs, the adversarial nature and high costs of litigating child support disputes when parties are most often confronted with limited resources, and what changes in circumstances should justify changes in child support obligations. The committee adopted legislation titled "Child Support Advisory Committee Membership," "Child Support Alternative Dispute Resolution and Order Modification Task Force," "Child Support Guidelines Amendments," "Child Support Reduction for Extended Visitation," "Child Support - Social Security Credit," and "Domestic Relations Cases - Name Designation."

Indigent Defense Costs - Utah has adopted a county-based indigent defense system, in which each county pays for the legal representation of indigents at trial and on appeal. This system lends itself to potentially crippling fiscal obligations, particularly in high profile cases that occur in rural counties. The committee discussed the standards for indigency and a proposed pooling of funds between counties and the state to be used by participating counties when appropriate to address this issue. Focus was also placed on proposed statutory guidelines that outline reasonable defense counsel costs in indigent cases. The committee adopted legislation titled "Counsel for Indigent Defendants" and "Counsel for Indigent Defendants in Juvenile Court." The committee also considered but did not adopt draft legislation titled "Indigent Defense Provisions."

Juvenile Justice Task Force - The two-year Juvenile Justice Task Force initiated its study by placing primary focus on structure, inventory of resources, and youth served in the various components of the juvenile justice system. The task force recommended the implementation of juvenile sentencing guidelines which facilitate earlier intervention, certainty of offender punishment, and sensitivity of individual circumstances. While details of the model are not expected to be finalized until January 1997, the model conceptually provides a progressive continuum of sanctions which considers the "presenting offense" separately from a youth's full criminal history. The model is a less expensive outgrowth of the original "presumptive standards model" endorsed by the Board of Juvenile Court Judges, the Utah Sentencing Commission, and other interested parties in 1995. In addition to the infusion of resources required to support the recent version of the proposed juvenile sentencing guidelines model, the task force recommended additional funding for the Division of Youth Correction's proposed conversion of the Salt Lake Detention Center to a 56-bed secure care facility and a new 72-bed secure facility in Ogden. The Judiciary Interim Committee adopted legislation recommended by the task force titled "Juvenile Judges - Short-Term Commitment of Youth," "Juvenile Court Powers," and "POST Certification of Youth Corrections Workers."

RETIREMENT

Employee Death Benefits - Options for surviving spouse death benefits will be raised to improve uniformity among the five retirement systems, and graduate the benefit based on years of service.

Noncontributory Retirement Systems - Non-contributory retirement systems for judges and firefighters will be proposed in the 1997 General Session.

Public Safety Retirement - The Retirement Interim Committee has recommended that eligibility for public safety retirement determined by the Peace Officers Standards and Training Council be limited in its application retrospectively to avoid financial burdens. Also, legislation proposing an increase in the cost of living adjustment in the Public Safety Retirement Systems will be introduced.

REVENUE AND TAXATION

Local Government Revenue Sources - Potential legislation includes changes to the B and C road funds distribution formula.

Property Taxation - Legislators are discussing options for reducing or eliminating reliance on the property tax.

Tax Treatment of the Telecommunications Industry - This industry is undergoing vast technological changes which will have an impact on how the industry should be fairly and appropriately taxed.

Transportation Corridor Improvements - Legislators are considering ways to finance transportation corridor improvements.

STATE AND LOCAL AFFAIRS

Campaign Finance - The two major issues here are contribution limits and reporting requirements. The federal government is working on reform that will affect all states unless they have existing processes in place to control campaign funding.

County-Municipality Fiscal Issues - Proposed legislation focuses on how counties and municipalities are planning to find the necessary revenue for supplying new services as well as rebuilding existing infrastructure. This legislation also targets the issue of city residents subsidizing county residents.

Election Law Commission - Proposed legislation creates an Election Law Commission to administer state and local elections.

Ethics Reform - This issue focuses on restructuring the existing Public Officers and Ethics Act to make it consistent with federal reforms.

Private Property Protection - Mandatory state reimbursement for "taking" private property is the central concern. Questions focus on a mechanism for state government and land owners to resolve this issue.

Public Officer Ethics - Proposed legislation will strengthen ethics requirements.

Townships - This issue deals with the annexation, incorporation, city versus city government, township creation process, and the powers of planning and zoning boards. Currently, the issue of "majority vote" is before the Utah Supreme Court. There probably will be proposed legislation attempting to clear up some of these issues.

Voter Registration and Residency Requirements - Proposed legislation modifies the requirements to declare residency and register to vote.

TRANSPORTATION AND PUBLIC SAFETY

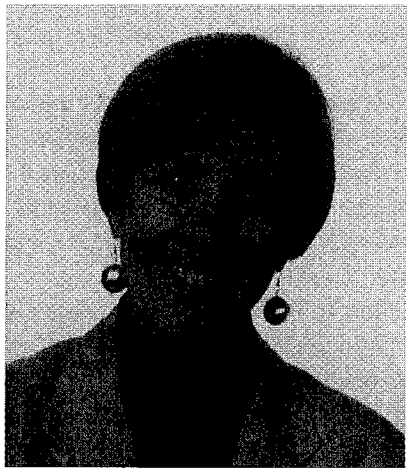
Graduated Driver License System for Juveniles - Teenage drivers are consistently overly represented in traffic accident rates and fatality rates. The concept of limiting early driving privileges for teenage drivers and rewarding safe driving by granting additional privileges over time has recently gained attention across the nation. Legislators are considering whether the state should adopt additional graduated driver licencing type provisions, and, if so, what provisions should be implemented at what ages.

Highway Funding - The Legislature must decide how to fund the major reconstruction needed on I-15 and on other highways. Requests for proposals have gone out for the design and construction of the largest state highway construction contract in the state's history. A plan must be developed and implemented to pay for this project. Issues include funding the I-15 corridor reconstruction and responding to other transportation needs, providing sufficient funding to complete the I-15 corridor reconstruction as scheduled, and implementing alternatives to reduce the use of single occupant vehicles during peak commuting hours.

Selection of Transit District Board Members - Some people argue that the selection process for board members has a direct impact on the quality of the oversight a board provides. Issues include: whether board members should be elected or appointed; if appointed, who should make the appointments; and how this process and other changes might be implemented.

State and Local Highway Jurisdiction and Funding - The level of government that should be responsible for the construction and maintenance of different highways continues to be controversial. Issues of administrative efficiency, interest, and ability to maintain highways must be balanced with highway use, traffic counts, and the apportioning of funds.

Legal Center for People with Disabilities Names Fraser Nelson as Executive Director



For eighteen years, the Legal Center for People with Disabilities has fought to protect and expand the legal rights of Utahns with disabilities. At the center of that battle has been Phyllis Geldzahler, the agency's Executive Director. Under her leadership the Legal Center grew from an agency of two to a staff of more than twenty-five professionals, and expanded its programs to include advocacy on behalf of persons with mental illness and developmental disabilities, people seeking redress under the Americans with Disabilities Act, people living with HIV/AIDS, and people needing assistive technology.

Ms. Geldzahler retired in the spring of 1996 after sixteen years of service to the community. The work of the Legal Center, however, is far from finished. People with disabilities continue to face physical and societal barriers as they seek to participate fully in American life. People in residential facilities still need protection from abuse and neglect. As the federal commitment to the most vulnerable members of our society is decreasing—including services to children with disabilities—the demand on all non-profit organizations will increase. The Legal Center will, like people with disabilities, face new challenges. Joseph T. Dunbeck, President of the Board of Trustees recently announced that Fraser Nelson has been appointed to lead the Legal Center during this time of unprecedented change.

Ms. Nelson comes to Utah with more than fifteen years of leadership in public service, primarily on the front lines of the AIDS epidemic. She most recently spent a year traveling the United States, developing housing plans for cities hard hit by homelessness and AIDS, and coordinated the state of Minnesota's AIDS service programs for five years. Ms. Nelson holds a B.A. in History and Political Science from Duke University, and an M.A. in Human Development. She is an avid writer whose published works include an oral history commissioned by the Minnesota State Hospital Society and literary nonfiction. Her husband Pierre Poltoratszky, a French citizen, coordinates the Hand Therapy Clinic at the University of Utah.

Ms. Nelson began her work in AIDS because of her interest in civil rights and public health, and sees a connection between her previous efforts and the challenges facing the clients of the Legal Center. "The Legal Center is uniquely positioned to push our society toward greater acceptance of its most vulnerable and forgotten members. People with developmental disabilities, mental retardation and physical challenges continue to face restrictions and discrimination at almost every level. Families affected by mental illness have to fight to stay together. Women with mental retardation are still being forced to undergo sterilization. Too many people are left in restrictive institutions. Children are denied the assistance they need to learn and succeed. And people in wheelchairs face barriers from the courthouse to the shopping mall."

Like all non-profit agencies that receive federal support, the Legal Center is seeking to expand its private financial base and meet the needs of the community more efficiently and effectively. Plans for the coming year include:

- an innovative "Citizenship Democracy Project" designed to bring 200 individuals with disabilities from clients to citizens, using an intensive self-advocacy training;
- monitoring the impact of managed care on persons with disabilities;
- launching the Legal Center's first

development campaign and annual fund;

- improving the office's computer system and creating a site on the World Wide Web;
- advocating for the needs of the homeless, adults, and children as changes in Supplemental Security Income eligibility take effect; and
- redressing employment discrimination, including a suit filed against Delta Airlines.

Ms. Nelson hopes to create a stronger relationship between the private Bar and the Legal Center. "The issues people with disabilities face are complex and, unfortunately, the need for assistance far exceeds our resources. Upholding the Americans with Disabilities Act and making Utah a place where all citizens have the support they need to be productive members of society is a responsibility we all share. We look forward to working with the Bar to create pro-bono projects, particularly in the areas of housing and employment discrimination."

The Utah Bar Foundation has been an ongoing supporter of the Legal Center through its IOLTA grant program. These funds have allowed the Legal Center to increase its outreach to persons of color, particularly residents of Native American reservations.

Another challenge facing the clients of the Legal Center centers on changes in national entitlement programs. The Supplemental Security Income and Social Security Disability Income programs have been dramatically redesigned, and children and drug-and-alcohol-addicted adults will see their benefits significantly reduced. The Social Security Administration believes that more than 100,000 persons who receive benefits because of drug and alcohol addiction will have their benefits terminated on January 1, 1997. The Congressional Budget Office estimates that 315,000 low-income children with disabilities will lose or be denied access to SSDI and other services over the next six years. Fifteen percent of these children will also lose eligibility for Medicaid. While the state's public interest law firms, including Legal Aid, Legal Services and the Legal Center, are poised to provide needed advocacy to help reduce the impact of these cuts, Ms. Nelson stresses that assistance is needed from the private Bar. "If Salt Lake City is committed to the needs of all its residents, it must make an effort to see that disabled adults and children–including those who will suffer from our efforts to reduce the budget–are not denied the basic medical and social services they need. Salt Lake City will see an increase in homelessness and costly emergency room based medical care if we do not, as a profession, step forward to advocate for those most vulnerable members of our society."

To reflect the agency's focus on disability law, the Board of Trustees has approved a change of name for the agency. Beginning in 1997 the Legal Center will be known as the Center for Disability Law. For more information about the protection and advocacy services, or to volunteer, please call the Center for Disability Law, (801) 363-1347.

CLE CALENDAR

ALI-ABA SATELLITE SEMINAR: EMPLOYEE BENEFITS CHANGES FOR 1997

Date: Thursday, February 6, 1997
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(Please call 1-800-CLE-NEWS to register)*
CLE Credit: 4 HOURS

NLCLE WORKSHOP: BUSINESS ORGANIZATION

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

ALI-ABA SATELLITE SEMINAR: THE INTERNET FOR LITIGATORS

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

1997 MID-YEAR CONVENTION

Date: March 6–8, 1997
Place: St. George Holiday Inn
CLE Credit: 9 HOURS, WHICH INCLUDES UP TO 3 IN ETHICS
Fees & Times: Please watch your mail for a detailed brochure.

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 Administra-

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.

Classified Ads

RATES & DEADLINES

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

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section. 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 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.

POSITIONS AVAILABLE

ASSISTANT BAR COUNSEL/ STATE BAR OF NEVADA: Executive staff position w/State Bar. Attorney's duties will include: review and investigate allegations of professional ethical misconduct of attorneys licensed or practicing in Nevada, preform prosecutorial duties and represent the State of Nevada at hearings and trials, prepare appellate briefs and argue appellate matters, serve the members of the Bar and respond to inquiries requiring the ethical practice of law in Nevada, conduct public speaking engagements. Three years of significant litigation experience required, some administrative law background preferred. Salary commensurate with qualifications and experience. Please respond to the State Bar of Nevada, Attn: Human Resources Dept., 201 Las Vegas Blvd. So., Ste. 200, Las Vegas, NV 89101. No phone calls please.

WANTED: Retired judge or attorney willing to consider part time employment as in-house counsel for a Regulation A corporation. Except for a law suit the Corporation, as Plaintiff, prosecuted in the Federal District Court in Columbus, Ohio, the Corporation has been inactive since 1989. Final adjudication occurred in September 1996. The Corporation is able to acquire the manufacturing and sales rights to a product which has a market potential of 2 million customers, and **No Competition.** Re compensation: stock options, plus six (6) expense paid one week vacations, sea and/or land packages. Undoubtedly, one of the best investment opportunities of the decade. Questions, details, discussion, phone @ (800) 452-7706.

POSITIONS SOUGHT

Part-time or contract work sought by attorney with excellent credentials (Moot Court, Law Review, Coif. Phi Kappa Phi) and background in civil litigation and civil/criminal appellate work. Licensed in Utah and Colorado. For discovery, motions, briefs, research: call **M. Boudreau @ (801) 466-6531.**

FULL-TIME, PART-TIME, CONTRACT OR PROJECT WORK sought by experienced attorney with background in employment law, tax, civil and criminal litigation; drafting of pleadings, motions, appellate briefs and doing in-depth legal research. J.D. and L.L.M. in Taxation, licensed Utah. Call Lance Wilkerson @ (801) 268-9868.

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 PalleyJ@palley.com

OFFICE SPACE/SHARING

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

Office space for one attorney in convenient Ogden location, ample parking, includes sharing of fax machine, copier, waiting area and kitchen. Also, available sharing of receptionist/secretary and telephone lines. Call Paul @ (801) 627-1455.

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

Prime office sharing space available for one attorney with established firm. Excellent downtown location, close to courthouse. Complete facilities, including conference room, reception area, telephone, fax, copier. Please call (801) 532-7858.

Large office space in 5 attorney suite. Terrific location next to state and federal courts and law library. Secretarial station available if desired. Includes reception, conference room, telephone, fax, and copier. Convenient covered parking located adjacent to building. Contact Shiela @ (801) 364-4040.

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

One office available within beautifully renovated one hundred year old manor home located in downtown Salt Lake City. Receptionist. Copying, runner service and library facilities available. Some overflow work possible. Space available February 1, 1997. Call Jane @ (801) 532-3555.

EXQUISITE PROFESSIONAL OFFICE SPACE** Beautifully furnished, tasteful decor including extensive fine art. Located in the heart of S.L.C. within walking distance of Federal & State Court Bldg. Space available for up to (2) attorneys and (2) secretaries. Includes 2 spacious conference rooms, large reception area, fax, copier, telephones, voice mail, postage meter, computer network with current upgrades, full kitchen, dining area, refrigerator, microwave. Our full library (CD Rom & other) includes Federal Practice, U.S. Supreme Court Reports, Pacific Digest & Reporter, Federal Reporter, ALR's, Am.Jur, USCU, Utah Code, and First Amendment Law, as well as Federal Sentencing Guidelines. Large free parking lot for clients; Covered and uncovered parking available for you. Our law Firm can be found on the Internet, which provides you with E-mail, bios, links and world wide/international advertising! Call Jerry or Kaitlyn @ (801) 364-6500 ext # 110 and/or ext #104.

CONSIDERING SOLO PRACTICE? Hesitant due to high cost of staff/equipment? I have the skills and equipment you need! IBM compatible; WordPerfect; Timeslips 3; Quicken; HP Laser; 24-hour phone-in dictation/fax; copier. 20 years. Experience. 150 wpm; excellent skills. **BARBARA PIÑA SECRETARIAL SERVICES,** 2034 East Fort Union Blvd., (801) 942-9241, fax/dictation (801) 942-9243.

Small law firm has large office available including receptionist, secretarial service, telephone system and access to conference room, telefax, copy machine and WestLaw. Call: (801) 485-5500.

SERVICES

LUMP SUMS CASH PAID For Remaining Payments on Seller-Financed Real Estate Notes, Contracts, Business Notes, Injury Settlements, and Lottery Winnings. Quick, Professional Service. Referral Fees Paid. **Cascade Funding, Inc. 1 (800) 476-9644.**

EDGAR Filing Agent. Preparation and transmission of Securities and Exchange Commission filings via EDGAR. Reasonable rates. **DATA Electronic Filing Service, L.C.,** 445 East 400 South, Suite 100A, Salt Lake City, Utah 84111. Contact: Anita Patterson (801) 323-2393 or Terri Jackson (801) 355-6524.

BARBARA PIÑA SECRETARIAL SERVICES. 20 years experience – civil litigation, contracts, PI, wills, real estate, billing, bookkeeping, etc. 150 wpm; excellent skills; superior work product. WordPerfect; Timeslips; Quicken; HP Laser; 24-hour phone-in dictation/fax; modem; copier. 2034 East Fort Union Blvd., Lower Level, (801) 942-9241, fax (801) 942-9243.

PARALEGAL: Legal Transcription, wp6.1 for Windows: All types of legal typing, filings, appeals: Pick up & delivery. 28 years of experience. Call Rick @ (801) 483-1178 or cell phone @ (801) 232-6648.

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

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

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.

STRUCTURED SETTLEMENTS A BURDEN? (Lighten your burdens and **better** serve your clients). We pay **CASH** for structured settlements! Full or partial. Call: HMC International Inc. **TOLL FREE** – 1-800-426-8367.

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

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

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

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

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

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

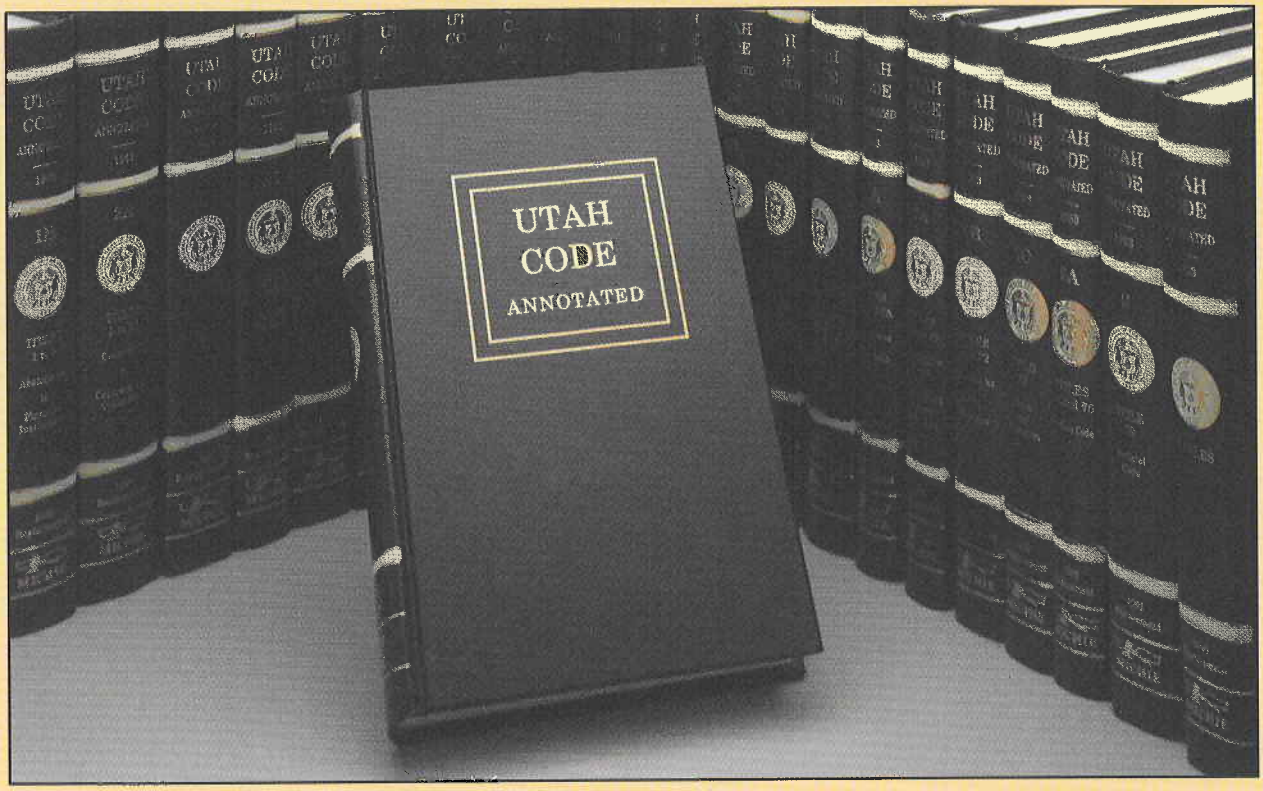
Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

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

DATE:_____ **SIGNATURE:**_____

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

MICHIE'S UTAH CODE ANNOTATED



The State's Most Practical, Reliable, and Affordable Statutory Reference...

SUPERIOR ANNOTATIONS FOCUS AND DEFINE YOUR RESEARCH... Michie's *Utah Code Annotated* contains notes to decisions which directly construe Utah law. The case notes are arranged under brief, concise headings which we list at the beginning of the notes to facilitate research.

PROMPT UPDATES AND ADVANCE CODE SERVICE ASSURE THE MOST CURRENT LAW... Michie will publish fully annotated cumulative supplements within 90 days of receiving the revisions from the legislature. During the period between the publication of supplements, our Advance Code Service keeps you up-to-date with periodic cumulative pamphlets.

PORTABLE AND CONVENIENT... Each individual volume is small enough to carry to the office or the courtroom.

COMPREHENSIVE INDEX ELIMINATES FRUITLESS RESEARCH... We update and replace the General Index annually. With each printing, we improve the index entries according to user suggestions about popular terminology.

ALL RULES CENTRALIZED IN ONE EASY-TO-USE VOLUME... Streamline and simplify your research efforts with our Rules volume which includes and indexes all local federal rules for Utah. Annual supplements ensure that you have up-to-date information.

MICHIE

To order or for more information, call today:

800-562-1215

Please use code PE4 when phoning in your order.

Voir Dire
Utah State Bar Litigation Section
50 West Broadway
700 Bank One Tower
Salt Lake City, Utah 84101-2006

REG CR: 17 ETHICS CR: 4
MR. WILLIAM HOLYOAK
201 SOUTH MAIN STREET
P. O. BOX 45898
SALT LAKE CITY UT 84145-0898

BULK RATE
U.S. POSTAGE
PAID
SALT LAKE CITY, UT
PERMIT NO. 844