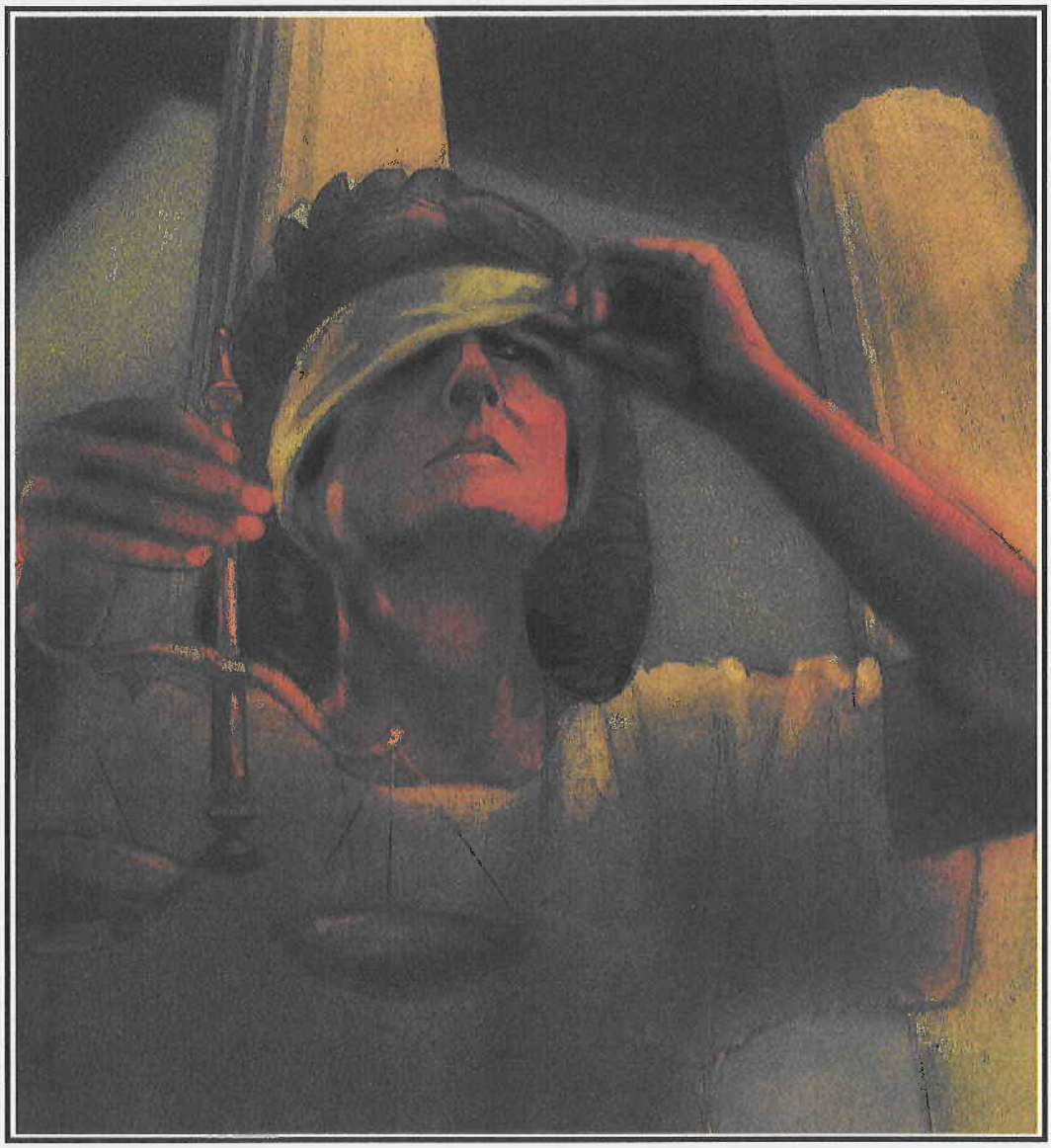
VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL



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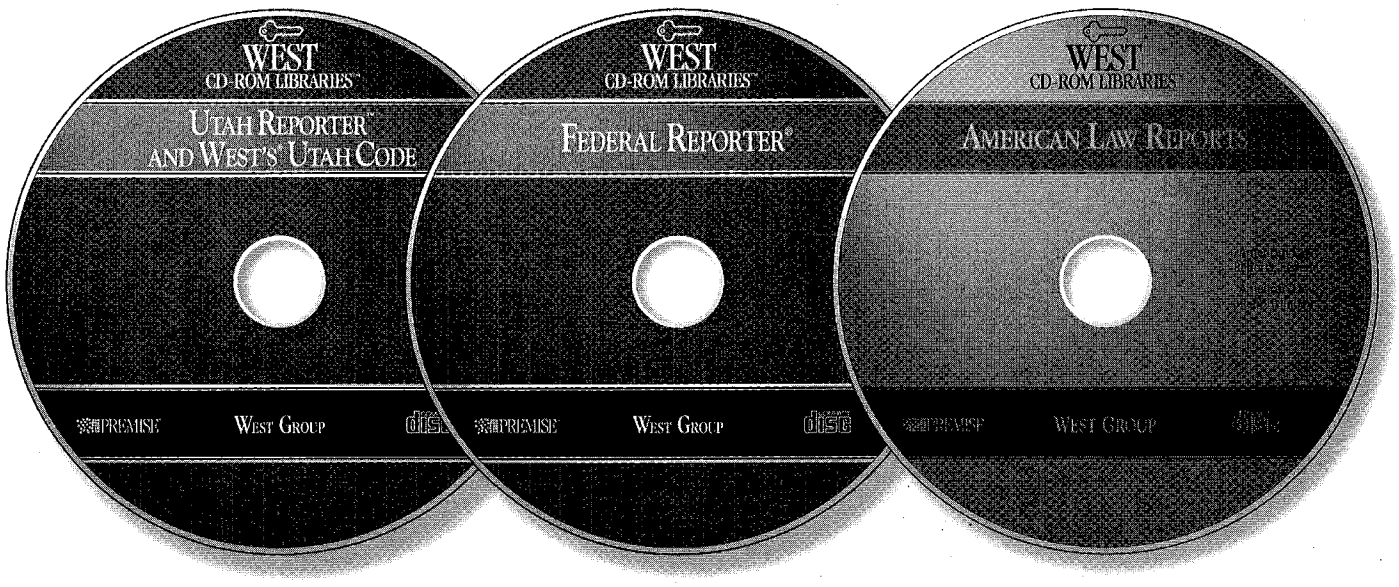

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Volume 2 Number 2 Summer 1997

VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

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

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

VOIR DIRE

ISSUE OF THE UTAH BAR JOURNAL

PREPARED BY
THE UTAH STATE BAR LITIGATION SECTION

VOIR DIRE EDITORIAL POLICY

Voir Dire is an independent intellectual journal for lawyers who litigate cases, and judges who decide them. *Voir Dire* is published twice a year by the Litigation Section of the Utah State Bar.

Voir Dire was created to provide members of the Utah State Bar with an alternative forum to examine issues and express opinions about the adversary system. *Voir Dire* strives to be practical and concrete, lively and readable, and will not avoid controversy or unpopular viewpoints.

The Editorial Board encourages submission of manuscripts of original articles, book reviews, comments, case notes, and letters from members of the Utah State Bar concerning the adversarial process and other material of interest to attorneys who venture into the litigation arena.

All contributions must be typewritten, double-spaced electronic printouts, with all references and footnotes numbered consecutively, on 8½" by 11½" paper. Manuscripts should be submitted with an electronic disk to the *Voir Dire* Editorial Board, 645 South 200 East, Salt Lake City, Utah 84111.

Publishing and editorial decisions are based on the Editorial Board's judgment of the quality of the writing, the timeliness of the article, and the potential interest of the readers of *Voir Dire*. If a submission is accepted for publication, the Editorial Board reserves the right to make deletions to conform to space limitations.

No submission will be published that contains defamatory or obscene material, violates the Rules of Professional Conduct, or which may otherwise subject the Litigation Section, the Utah State Bar, the Bar Commissioners, or any employee of the Utah State Bar to civil or criminal liability.

The opinions and views expressed in *Voir Dire* are those of the authors. The Editorial Board, the Litigation Section, and the Utah State Bar do not necessarily share or endorse any particular views expressed in the materials published in *Voir Dire*.

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President's Message

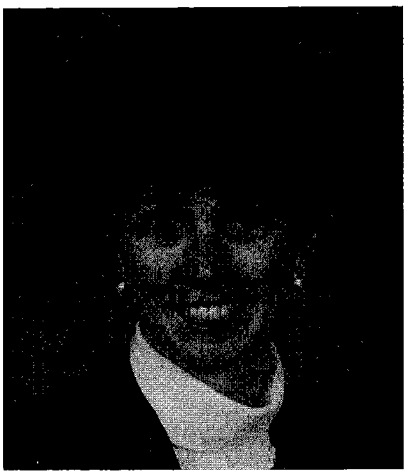
A Memory for Law Day*

by Charlotte L. Miller

I had the opportunity to attend a variety of Law Day functions this year; however, the truest celebration of law was not any official Law Day function, but was the memorial service for David K. Watkiss on May 1 (the real Law Day). The memorial service was a celebration of Dave's life, much of which was spent contributing to the legal profession. The most tangible contribution was certainly obvious – three children and four children-in-law who are lawyers. (One child is a reporter and that fact alone lends itself to such an abundance of overly clever remarks that I will let each of you create your own). At the memorial service, Dave's children reminded us of so many of the characteristics we liked about Dave–his fascination with people, his humor, his desire to have "clients" not a "client base," his desire to practice law not build a practice, his brilliance and humility.

Dave didn't consider himself a mentor or a leader–he was just interested in people. Every person I've spoken with about Dave believed he went out of his way for them, that he took a special interest in them. That natural interest encouraged young associates, and comforted and challenged clients and colleagues. A young attorney who had practiced with Dave wrote: "David was an example of how an attorney can be a successful, tough litigator and a courteous, honest and compassionate professional at the same time. His memory is a genuine motivation to me in my work."

Dave was never afraid of telling clients what they did not want to hear. In fact, he took some pleasure in telling many people what they did not want to hear. Dave could communicate in such



a way that his clients and colleagues would thank him for telling them how wrong or foolish their actions were. Dave had a great dry wit but was not flippant. He was thoughtful, polite, and intelligent, but knew not to take anything–especially himself–too seriously. Dave always introduced himself to my children as "Sam's grandfather." He understood his audience–as all great trial attorneys do.

Dave didn't work to be a "liberated man" and he didn't worry about being politically correct. Dave just did what he thought was right. As a result, he provided many opportunities and much encouragement for women to succeed in the legal profession. Dave told me to run for Bar Commissioner, to run for Bar President, but also told me it was a ridiculous thing to do. He was correct in all respects. Dave could be cynical and inspiring at the same time.

Dave made the most of every experience–whether it was representing a multibillion dollar client or talking to a child–and he was more likely to brag about his conversation with a child than a winning case. Dave represented powerful clients with lots of money, but he told stories about what some might call "small" cases–the evicted tenant or injured plaintiff. Dave talked about cases he lost as well as those he won, and he told many of us that he learned more from his losses than his victories. He helped others learn from their losses by his willingness to share his own disappointing experiences.

Dave had a good time in all of his roles–he liked to work hard at the practice of law, he believed in the political process and supported it with enthusiasm, and he enjoyed his family. He was wildly in love with his wife. He adored and respected her–but mostly he was in love with her.

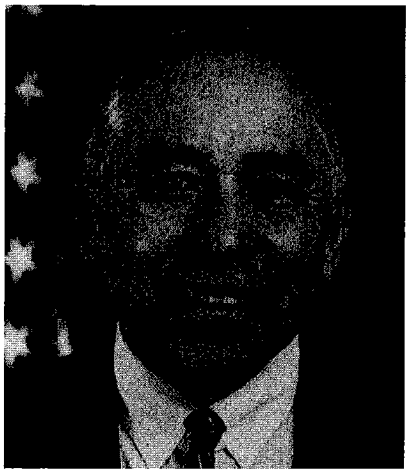
I am fortunate to have practiced law with Dave–but even more fortunate to have had a drink or two and a dinner or two with him and Dorothy. It is somewhat selfish of me to write about Dave. I am sure I just want to keep him around a little longer. For those of you who knew Dave (and many of you knew him better than I), think about him. It will make you smile. For those of you who didn't, ask someone to tell you a Dave Watkiss story. It is sure to teach you a lot about how to practice law and how to enjoy life. As a San Francisco attorney wrote upon learning of Dave's death: "David was one of the tall men in Salt Lake." A perfect memory for Law Day, and all the days we practice law.

**I encourage you to read the obituary at the end of* Voir Dire *written by Dan Watkiss. When I first heard that both items would be in the same publication, I worried about repetition. A close friend told me that an entire issue about David K. Watkiss could not be too much. So true.*

Commissioner's Report

The Million Dollar Question

by John Florez



The purpose of an integrated bar (a monopoly) is to promote the administration of justice and the professional development of lawyers. Toward that end, what has the Bar accomplished with the $2.7 million budget? Why does it have a $1 million surplus?

As a public member appointed to the Bar Commission, I keep asking simple questions for which, I think, Bar members and the public would like answers. Questions which I believe are critical to keeping any organization, especially a monopoly, cost-effective and responsive to its customers and stockholders.

Questions

1. If the mission of the Bar is to promote the administration of justice and the professional development of attorneys, what goals has the Bar established which would further that mission?
   a. What are the problems with the Utah justice system, and what has the Bar done to resolve them?
   b. What are the problems lawyers face in their daily practices, and what has the Bar done to help resolve them?
   c. How does the Bar measure success and who knows the results?
2. What is the vision for the Bar? Where does it expect to be in five years?
3. How does the Bar determine what programs or "good causes" to fund?
4. What programs does the Bar currently fund which:
   a. Are "nice to have," but do little to further the Bar's mission;
   b. Were timely years ago, but now have little relevancy to the needs of Bar members in their practices and should be eliminated?
5. What is the ultimate purpose of the Office of Attorney Discipline (OAD)? Is it simply to discipline unethical attorneys or is it to eliminate unethical conduct among the profession and maintain the public's trust in the profession? How is success of the program measured: by the number of disciplines meted out, or how it has reduced the number of ethical violations and improved the public's confidence in the profession?
6. Should the Bar be spending twenty-five percent of its budget on the OAD, or is there a better way to carry out the program's intended purpose (assuming we know its purpose)?
7. What is the most effective way to improve legal services to the poor? Should the Bar put money into existing programs–to do more of the same–or should it be advocating for change and accountability?
8. If the Bar has put more money into improving *pro bono* efforts, how effective has it been? Of the 1,000 attorneys who have volunteered, how many have been used?
9. How useful are the CLE programs in assisting Bar members in their daily practice, and how accessible are they to members, especially in rural areas?
10. How best can the Bar assist attorneys in carrying out their "oath of office"–to promote the administration of justice (the primary purpose of an integrated bar)?

The final question I keep asking is: If I were an attorney, and membership in the Bar was voluntary, why would I want to join? If you don't ask these questions, who will?

YOUR MONEY, YOUR CHOICE!

REPORT FROM THE CHAIR

The Benefits of Membership

The Litigation Section is the largest in the Bar. Size and geographic diversity make it prohibitively difficult to hold meetings except at the mid-year and annual conferences. Still, the Section strives to provide tangible benefits for its members that go beyond having a voice at the table. For example, the Section owns dozens of CLE tapes and videos which may be borrowed from the Bar office. These include many of the most popular titles for which you and I regularly receive advertising mailers. The check-out fee is ordinarily $30, but for Section members the cost is $0. Last year, the Section put on a series of seminars collectively called The Trial Academy. The quality of the instruction was first-rate. Registration fees for Section members were substantially discounted. We intend to continue this practice at future presentations of The Trial Academy. Similar discounts are also available at NITA short courses hosted by the Section. It's easy to see that the annual dues of $30 can be quickly recouped. Beyond such crass monetary concerns, the Section serves its members through a wide variety of activities, including the publication of *Voir Dire*, mandatory new lawyer training, and updating the Model Utah Jury Instructions. We trust that our members feel their dues are being well spent, and that the Section is meeting their needs. We welcome any ideas or help to expand and improve the services which the Litigation Section offers.

A Short Tribute

I would like to add my voice in tribute to retiring Judge David K. Winder and share a brief reminiscence. Shortly after I began practice in 1980, my partners sent me to appear on an inconsequential matter in federal court. David Winder was the judge. He entered the courtroom through his private door and sprang up the stairs to the bench. He called the case, and recognized the other, more senior, lawyer by name. Then, to my total amazement, he entered my appearance for me and greeted me by name. We had never met before, and I saw no reason why he should have any idea that I even existed. I know now that my experience has been repeated hundreds of times with other lawyers. That Judge Winder would be so considerate of those who practiced before him still strikes me as amazing. Small gesture though it may be, this kindness typifies the graciousness of one of the finest judges before whom any of us have, or ever will, appear.

Farewell to Arms

It has been a wonderful privilege for me to chair the Litigation Section this past year. The aspect of the experience which has most impressed me has been the willingness of Section members to volunteer their time to serve the Bar. The faculty of The Trial Academy, the Executive Committee, the Editorial Board of *Voir Dire*, and many others have given countless hours out of very busy schedules. With such committed people, I am confident of the continued quality of the Section's activities. That "good hands" feeling is reinforced as I turn the reins over to Vickie Kidman. She has been a stalwart, and will be a wonderful Section chair.

David Jordan

FROM OUR PERSPECTIVE

We hope this is the last word on what has proved to be a controversial subject, but thought our readers would be interested to know about the Editorial Board's decision to publish Mark Gould's letter to the Editor, and the emotionally charged aftermath of that decision.

Last year, the Editorial Board selected Jane Marquardt as a member of the Litigation Section who deserves laudatory recognition for her contributions to the profession and to the community, and published a piece about her in its regular "A Credit to the Profession" column. In a letter to the Editor, Gould criticized our choice, arguing that Marquardt is an "admitted homosexual," which has a bearing on her "fitness and accomplishments as an attorney." Gould added that he found it "very upsetting" that Marquardt should be held up as a role model.

The Board thought long and hard about what to do with Gould's letter. The options we considered included not publishing the letter, publishing it with an editorial comment, and publishing it without comment in the "Letters From Our Members" column. We chose the latter because we believe in Gould's right to express his opinion, and we considered any decision not to publish the letter the equivalent of censoring Gould's speech on the matter.

In light of the sensitive nature of the subject, and because we did not want to embarrass or hurt Marquardt, we telephoned her to discuss the Editorial Board's decision to publish Gould's letter. Marquardt did not object. We also invited comment from the Litigation Section's Executive Committee, and notified the Bar.

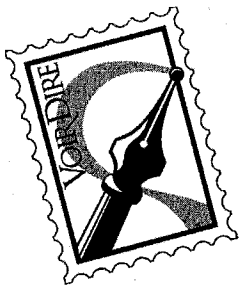
Since the issue containing Gould's letter appeared, we have been inundated by letters to the Editor, requests for media interviews, and numerous verbal comments. The letters we received are published in this issue's "Letters From Our Members" column. Although our initial intent was to excerpt the letters, this proved more difficult than anticipated, and the letters are printed mostly in their entirety.

The tenor of the overwhelming number of comments in the letters to the Editor are supportive of Marquardt. Likewise, people who have spoken to us about it have almost unanimously expressed the opinion that a person's sexual orientation is irrelevant in considering whether that person is worthy of professional praise. A handful of the letters and some of the people who have spoken directly to us criticize the Board for its decision to publish Gould's letter. ("What ever possessed you to publish such drivel?" being a representative sample.) One letter, signed by numerous Bar Commissioners, past presidents of the Bar, the Attorney General, and more than one hundred other attorneys, has already been published in the *Utah Bar Journal*, and expresses support for Marquardt. Another letter, received just a fortnight before this issue went to press, "salute[s] both Jane Marquardt and Mark Gould for publicly working to advance their views of the public good rather than focusing only on groveling for the attention of high bidders." Notwithstanding the overwhelming support expressed for Marquardt, we assume that there are those who support Gould's position, but are unwilling to take a public stand on the issue.

The Marquardt/Gould controversy also engendered a fair amount of attention in the press. *The Private Eye* published the first story ("'Out'-ing the 'Out'-er"), followed by a piece in *The Deseret News* ("Objection! Lawyers take aim at letter"), which was picked up by the Associated Press. In turn, *The Salt Lake Tribune* ("Attorney General, Lawyers Defend Fellow Attorney") ran most of the AP story. We also gave interviews with *The Ogden Standard Examiner,* which ran a follow-up piece ("Gay lawyer finds more support") focusing on the local angle. (Marquardt and Gould are both Ogden attorneys, as is outgoing Bar president Steve Kaufman, who also was quoted in the *Standard Examiner* piece.) Finally, *The Washington Blade*, a Washington, D.C. tabloid, interviewed us and printed an article ("More than 100 lawyers defend Lesbian attorney") focusing on the group letter.

Frankly, we've been a little surprised at all the fuss. In retrospect, however, it seems to us that the dialogue has been a good thing. From its inception, our ambition for *Voir Dire* has been to create a thought-provoking, stimulating publication, and, judging from the number and fervor of the responses we've received in this matter, it appears we have succeeded. Now it's time to move on to other subjects.

LETTERS FROM OUR MEMBERS



Dear Editor:

In response to Mark H. Gould's notorious letter, Brooke Wells and others essentially stated that whether a person is a sodomizer has nothing to do with whether the person is an outstanding member of the bar. These writers declared that bigotry, intolerance, and insensitivity have no place in the legal profession. They effectively suggested that Mr. Gould is bigoted, intolerant, insensitive, and only questionably eligible to participate in our honorable profession, much less civilized society.

I was impressed by this display of tolerance. However, I wish to point out that the foundation of civilized society is not unlimited tolerance. The foundation of civilized society is shared values. Civilized societies institutionalize these values in laws that are respected by a polis committed to civic virtue. Civilized behavior and eligibility to practice law do not require complicity in the destructive effort to engineer an impossible society in which any choice is equally respected (except the choice to deviate from the party line). Civilized behavior requires–and eligibility to practice law should require–support of the democratically created laws which make civilized society possible.

Charles Brown also responded to the Gould letter. Although Mr. Brown's article was otherwise well reasoned, he opined that the role of a lawyer is to represent clients zealously, and that as long as a lawyer is doing so, she or he should be respected.

Sadly, this view is prevalent in the profession. I believe it accounts for much of why lawyers are so widely and often justly despised. Most people recognize the smell of an ethical maxim that appears to have been adopted from the ethical standards of professional assassins or sex workers. To say that all that matters in determining whether one is a good lawyer is whether one zealously and effectively represents one's clients is to say that lawyers are no more than hired guns or whores. No, good lawyers are both effective and virtuous.

A particularly distressing comment I heard regarding the Gould letter came privately from a lawyer who shook his head and wondered why anyone would do anything so controversial when there's no profit in it (unfortunately, I gather that there are a number of lawyers who consider the bottom line more important than establishing ethical high ground).

Such a view brings dishonor upon the profession. We should be better than that. I salute both Jane Marquardt and Mark Gould for publicly working to advance their views of the public good rather than focusing only on groveling for the attention of high bidders. I hope and assume that Ms. Marquardt and Mr. Gould are people of good character and effective practitioners–in other words, good lawyers. At the same time, I lament the number of lawyers who seem to think that the public good will be advanced by creating a [sic] ethical systems which cater to the lowest common denominator.

Paul Wake

Dear Editor:

I believe the point of Mark Gould's letter to the editor was simply the public's perception of an attorney impacts our profession and we need to be careful who [sic] we spotlight as positive examples and how it is done. That makes sense to me. Maybe the problem could have been avoided by using a different title to the article?

C. Bruce Barton

Dear Editor:

I confess to a profound sadness after reading Mark Gould's letter in the Winter, 1997 edition of *Voir Dire*. . . .

Mr. Gould is absolutely entitled to his opinion, publicly expressed or privately held, that homosexuality is wrong. The fact that I disagree with him is in fact a greater reason in my mind to protect his right to expression. What disturbs me about his letter, and the all-too-pervasive attitude it exemplifies, is that it disparages a person based on a wholly irrelevant criterion.

The idea that Marquardt's worth as an attorney is dependent on her sexual preference is, in the most favorable light, without rational basis. It is one thing to indict on moral grounds an otherwise competent attorney who fails to honor the oath of fidelity and honesty we each take to engage in this profession, or to consider unworthy of praise a capable attorney whose greed overshadows the best interests of a client. It is entirely another to withhold our professional esteem from an attorney whose supposed transgression is that her personal lifestyle differs from that of a majority of her peers.

This profession has need of tolerance, if not only for its own sake, then for the wider ambit it grants our ability

to recognize and help solve individual and societal problems. In a mostly bygone age, the majority view in our society was that superiority derived from race, gender and class. I am sad today because a colleague's letter reminds me that, even among practitioners of one of the most enlightened professions, the illogical biases upon which injustice is predicated continue to exist.

Daniel Garrison

Dear Editor:

I was disappointed to see the Letter to the Editor from Mark H. Gould in the Winter 1997 issue of *Voir Dire*. . . .

First, it is inconceivable to me that *Voir Dire* or the *Utah Bar Journal* believed that such a letter merited publication. Second, the substance of the letter, and I use that term loosely, was petty, offensive, and mean-spirited. Third, Gould's letter contributed nothing to the enhancement of the legal profession, and did nothing to bring honor to the Utah State Bar. Fourth, I am a law school classmate of Jane Marquardt's. I haven't practiced in Ogden, but I have followed Jane's considerable career of competent practice, philanthropy, and decency for many years. Jane was a delight as a classmate and has been an outstanding member of the Utah State Bar for almost 20 years.

Neither Jane's professionalism nor her personal life need a defense from me. However, I certainly think that Mark H. Gould could use an introductory course in civility, humility, and good taste.

Craig L. Barlow

Dear Editor:

I have no interest in the sexual persuasion or sexual arrangements of Jane A. Marquardt. I have never met her. I have heard much about her in the community for several years and arrived at the conclusion that she is a credit to the profession on the basis of the good things I heard about her. What on Earth does her sexual persuasion have to do with anything? Why on Earth did it make it into your magazine?

James S. Lowrie

Dear Editor:

I was appalled when I read Mark Gould's letter to the editor . . . . Mr. Gould should not have written the letter, and, more importantly, *Voir Dire* should not have published it.

Todd D. Weiler

Dear Editor:

This letter is in response to the letter from Mark Gould published in the Winter 1997 edition. Suffice it to say I disagree with his conclusion that Ms. Marquardt does not typify the *best in our profession*. He arrives at his conclusion based solely on the fact that she is "an admitted homosexual . . . and admits to being in a long term lesbian relationship." He also points out that "Utah is a culture that prides itself on family values and moral behavior." Actions speak louder than words, Mark. For a state being so concerned with "family values and moral behavior," read the paper every night and day, listen to the radio, watch the news on T.V. . . . see how many of these so-called models who expound these values are committing fraud, theft, child sexual abuse, homicide and other assorted crimes found in the criminal code. Lying is an art form to many of these folks.

Heterosexuality and homosexuality are simply labels put on people to make other people feel stronger/weaker, safer/fearful or whatever. Those labels have nothing to do with ethics, honesty, philanthropy, dedication, and humanity. Jane's actions speak far louder than any words Mark Gould can write or speak; her contributions to *our profession* include her activities in the State Bar, Utah Legal Services, legal education projects, not to mention the founding of the first guardian ad litem program in Ogden many years ago. Jane has had the time, energy and passion to do these things rather than sit back, whine, grumble and complain. I have known Jane since we were kids all the way through school; we ended up at law school together; we came back to Ogden at the same time to begin practicing law. Never have I known her to be unethical, dishonest, unprofessional, lazy, pompous, uncivil, crooked or any of the other unflattering characteristics that have been associated with our profession. She, on the other hand, exemplifies the antithesis of these characteristics.

The placement of Mr. Gould's letter in the Winter Edition opposite the article by Peter C. Appleby, *Abstaining From Offensive Personality,* was fortuitous. Mean spiritedness is a malady not legitimized under the guise of legal persuasion or argument.

Kristine McKee Knowlton

Dear Editor:

I write, with a sense of outrage I trust will be shared by many, in response to the letter, written by Mark H. Gould . . . having to do with Jane Marquardt. What valid purpose could possibly be served by your publishing such a letter?

I have known Jane for approximately 20 years and, although I have never practiced law with her and have, to my recollection, never had a case against her, I have had nothing but the highest regard for her. Those who know her well and have practiced with her and have litigated against her hold her in similarly high regard. She is, to my knowledge and by reputation, one of the finest human beings to grace our profession.

What does her sexual orientation have to do with anything worth publishing in a periodical by lawyers and for lawyers? I don't know anything, really, about your editorial standards, but I am constrained to believe that you must have gotten more than one letter to consider for publication in the most recent issue of your publication. I fail to see, in any event, the reason for publishing such a benighted, antediluvian point of view as that expressed by Mr. Gould in his letter.

I am confident that Jane's friends and associates will write letters more insightful than this one, but I suggest that you consider publishing this letter to express my consternation (as a person who has been a "Gentile in Zion" for 24 years and who has come to believe, over that period of time, that Utah has become a "kinder, gentler" place, with respect to its treatment of all people, regardless of their race, national origin, sex, or sexual orientation) that there

are still educated people like Mr. Gould who think it appropriate sanctimoniously to spout off in publications like yours.

Peter C. Collins

Dear Editor:

What ever possessed you to publish such drivel?

Frank S. Warner

Dear Editor:

Mark H. Gould is correct that Utah prides itself on family values and moral behavior. It is also the state with one of the highest rates of child sexual abuse and teenage suicide. It is also the state that was sued because of its welfare system's inability to protect children from rampant abuse, including death, at the hands of parents, relatives, public and private institutions, and foster care providers. It is a state where the legislature and the judiciary routinely leave the custodial parent and children in poverty after a divorce; and where only the working poor noncustodial parents, after doing the right thing and having lots of children, are left with a child support burden they cannot possibly bear. It is the state which would rather ban all school clubs than allow one which addresses some of the causes of teenage suicide and depression, including differences in human physiological and emotional development. It is a state where the tribunals tend to condemn both parents because "they are fighting", or neither parent, rather than to proceed through evidentiary channels to determine which parent is lying. It is a state where heterosexual people unwittingly marry homosexual people who are trying desperately to be "good", and who believe they can change, and then the whole family is sacrificed at the altar of futility. It is a state like many others where poor people cannot afford justice. It is a state with false pride.

Mr. Gould probably thinks he is doing a courageous thing by publicly abusing a colleague who has done so much for her community that the Bar chose to recognize her. He should take the mote (spelling? It's been a while since I've read that passage) from his eye and recognize, as compassionate and not totally blind jurisprudence has throughout history, that the world is not what we want but what it is; and that true morality is to protect truth, love and beauty, not to hurt or destroy it. I also believe that Mr. Gould should be sued. How appropriate that we are now getting civility training.

Jerri L. Hill

Dear Editor:

I doubt we will settle the issue of the immutability or genetic predisposition of one's sexual orientation in these pages. And I will not even quibble with the possibility that Mr. Gould had a choice, flipped a coin, and upon seeing "tails" selected heterosexuality. But I am concerned with apparent gaps in his argument that one's sexual orientation, of itself, and Jane Marquardt's in particular, preclude greatness as a lawyer or a person.

First, Mr. Gould points out Ms. Marquardt's openness concerning her sexual orientation. True, had she successfully lived and projected what for her would be a lie in order to avoid bigotry and misunderstanding, Mr. Gould would then have had no basis to question her greatness as a lawyer. This fact suggests the irrelevance of one's sexual orientation to the question, except to her credit Ms. Marquardt has chosen to tolerate the bigotry and to live a life of greater honesty. Thus, although her orientation is irrelevant, how she has chosen to deal with it, despite tremendous pressures to the contrary, bears favorably on her integrity.

Second, Mr. Gould references the fact that only a minority of people live openly gay lifestyles. True again, but the majority/minority distinction is irrelevant to the question of greatness, except for the extra effort people in minority groups must make in order to achieve equal recognition, access and treatment, despite the anti-majoritarian character of the federal and state constitutions which purport to protect diversity.

Third, Mr. Gould claims Ms. Marquardt, as a lesbian, is violating the laws. This premise is problematic for three reasons. First, how Mr. Gould has sufficient information to make the claim is uncertain. Second, the current direction of constitutional jurisprudence calls into serious question the justness and validity of state laws which purport to regulate the most personal, private and intimate aspects of consensual conduct. Third, some of the greatest historical figures are people who have refused to obey unjust and immoral laws.

Richard A. Van Wagoner

Dear Editor:

. . . Mark H. Gould suggests that my friend Jane Marquardt cannot possibly be "a credit to the [legal] profession" because she is a lesbian. Mr. Gould castigates Ms. Marquardt for practicing what he calls an "illegal and immoral lifestyle followed by only a very small percentage of people."

Now this is a novel approach to determining who is (or who is not) worthy of public honor. If I understand Mr. Gould correctly, we should not honor homosexuals, we should not honor individuals whose lifestyles are not shared by the majority of the population, and we most certainly should not honor those whose conduct fails to comport with our own exacting moral standards.

Let's see where this leaves us. First, we cross all the homosexuals off the honor roll. We certainly would not want to honor Socrates, Aristotle, Leonardo da Vinci, Richard the Lionhearted, John Milton, Hans Christian Anderson, Walt Whitman, Peter Ilich Tchaikovsky, Emily Dickinson, Virginia Woolf or Dag Hammarskjold, all of whom were reputed to be homosexuals. Next we purge the honor roll of anyone with the poor judgment to espouse a lifestyle different from that of the majority. There's no room on the honor roll, in other words, for Mother Teresa, Mohandas K. Gandhi, most Mormons and Orthodox Jews.

And finally, each of us has a civic duty to object in the strongest possible terms to this practice of honoring people whose conduct flunks our own personal morality test. I, for example, hold strong views about the immorality of blood sports and supply-side economics. With Mr. Gould as my guide, I hereby notify the editors of *Voir Dire* that there will be hell to pay if they publish any more favorable articles about deer hunters or radical right-wing Republicans.

Kate Lahey

Dear Editor:

I wish to submit the following as a response to the Letter to the Editor printed in the Winter 1997 issue of *Voir Dire*. In passing may I say that unlike the writer of that letter, I felt your piece . . . on Ms. Marquardt was courageous and well-balanced. . . .

For Jane A. Marquardt, Attorney-at-Law

Let your light so shine before all persons, that they may see your good works, and glorify your Creator in heaven.

—Matthew 5.16

So let your light before humanity shine
That all may know you by your deeds, inspect
Each detail, great and small. Though some reject
You as unworthy, you did not decline
That risk, but showed your face to all. So fine
An act of courage garners deep respect;
Your life's work–and your life–make us reflect
What great good one good person may enshrine.
This wicked world will not allow unpunished
To pass such virtue; you and your love inspire
At least one insect's petty wrath, who tarnished
His own repute in stinging yours. Admire
Him I cannot, but bow to you, who have banished
Much fear of consequence to tread in fire.

Ellen Bloedel

Dear Editor:

. . . [I]t was a disappointment to see Mark Gould's letter in the most recent issue suggesting that Jane's sexual orientation somehow makes her less than a credit to the profession. It reminded me of what some members of my wife's Norwegian family used to say about a beloved aunt, "She's a fine woman, that Thyra. But, you know, she's Swedish."

Mark's comments are, of course, more serious than that. It is a serious matter to categorize someone as less than deserving of respect than the rest of us, simply because of a perceived moral weakness. The weakness in Mark's objection is hinted at in his acknowledgment that the letter was a difficult one for him to write. Indeed, it should be; fair-minded people sense the injustice in publicly detracting from someone's character for no apparent good reason.

Mark does mention "family values" as a reason for his comments. However, I remember a bumper sticker I saw recently that read, "Hatred is not a family value." We should know that labeling of other people in this way makes it that much easier for them to become the victims of hatred. We are not that far removed from a time in Europe when vulnerable groups of people were dehumanized by derogatory labels, thereby making their inhuman treatment more defensible. While I am not suggesting we are anywhere near that point in this country, we must certainly be careful not to contribute to a climate of hatred that can only weaken our society.

When I first got to know Jane, I thought she would be an excellent elected representative or even a judge. Now it appears she may have a more important role to play as an articulate spokesperson for tolerance and the acceptance of diversity. Seen in this light, Mark's letter is no more than a further word spoken in the ongoing conversation about how to live peacefully in a pluralistic society.

Michael E. Bulson

Dear Editor:

. . .

Try as I might, I cannot find the reference in our statutes that mandates heterosexuality. Furthermore, in my opinion, Jane exemplifies a person with high moral standards. Her actions, memorialized in *Voir Dire*'s Winter 1996 issue, speak for themselves.

Jane has been my mentor, role model, hero and friend since I first met her as a law student almost ten years ago. Jane is always willing to meet with me and give me advice on how to be a better lawyer and person. It is a shame that a member of our bar would condemn a person of her mettle (or any person for that matter) based solely on a misconceived and ill-informed stereotype. I will consider myself a raging success if, in my career, I can accomplish even a fraction of the things that Jane has accomplished in hers.

Laura M. Gray

Dear Editor:

. . . Mr. Gould's letter is unkind, unnecessary and shows an ability to judge, which is beyond his right.

We, members of the Utah State Bar, are subjected to severe scrutiny, at every turn. Questions of our legal ethics and our competency are subject to challenge. It is presumptuous of any member of the Bar to question lifestyle. Mr. Gould commits an egregious error when he presumes to question others as he did in his letter. I resent his presuming to cast a fellow member of the Bar in disrespect and disrepute as he did in his letter.

Perhaps Mr. Gould could check some current edition of the Bible and find some scriptures involving "judge not" or some scriptural reference involving observing the mote in thy brother's eye without reference to thy beam in thy own.

In any event my experience with Jane Marquardt is that she is a kind, and reputable practitioner of the law and I hope some day Mr. Gould will achieve her standard of legal excellence.

Robert V. Phillips

Dear Editor:

Congratulations to Ms. Jane Marquardt on being the first member of the Utah State Bar to have his/her private sex life openly discussed in a Bar publication. . . . What an honor!

This causes me to make a modest proposal for a new marketing program which will enable us all to avoid paying any dues in the future.

Why should we stop at one letter from one disgruntled member, Mr. Mark H. Gould, who felt it necessary to comment on Ms. Marquardt's private life? Let us devote an entire page of each Bar publication to a feature entitled "Who's Out."

The Bar could publish an endless supply of rumor and innuendo about who among the Bar is or is not homosexual or bisexual. Hearsay may not be admissible, but it sure is fun!

And why should we ignore the private sexual practices of the majority of us who are heterosexual? The Bar can hire paparazzi to take embarrassing candids of Bar members and their companions exiting restaurants, taverns and theaters. Perhaps we can even catch a few married members of the Bar at intimate dinners with those not their spouses! Think of the titillation. Members of the Bar staff could also peruse the divorce and paternity filings for any tantalizing tidbits about members' libidos and the consequences thereof.

And, since Mr. Gould wants to address conduct which is either "illegal" or that even-more-difficult to define "immoral," why should we stop at sex? The Bar could pay sources for tales of drug and alcohol consumption habits as well! Confidential sources could tattle on members seen in the '60s or '70s actually inhaling! Some of these members of the Bar are even now prosecutors or (gasp!) judges. Wouldn't this information be a lot more interesting to read than all this dull CLE nonsense?

Who had gin on his breath last Saturday night? Let's print it! Who is driving a car with expired plates? Publish it! Who did not pay a full tithe last year? We want to know!

Maybe we could bribe lower echelon employees of accountants (since they have no obligation of confidentiality) to obtain income tax returns. We could then conduct an analysis of those returns in the *Bar Journal*, and venture a guess as to who is and isn't cheating Uncle. The Bar would be able to protect our sources, of course, by invoking a First Amendment privilege.

If this plan were adopted, readership of the *Bar Journal* would skyrocket. Eventually, we would begin to cut into the circulation of the *National Inquirer* and the *Star* throughout the entire Rocky Mountain region. To protect their circulations, they would have to buy us out for a tidy sum, and we need never pay dues again.

So, bravo! Thank you for stumbling upon this wonderful method of avoiding future dues.

Mary C. Corporon

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

POINT/COUNTERPOINT

Mandatory Reporting of Pro Bono Service: Why It Is an Issue

by Chief Justice Michael D. Zimmerman

The Access to Justice Task Force of the Utah State Bar has studied in depth a number of problems relating to the availability of essential legal services to those with low income. All members of the Bar should have received a copy of the Preliminary Final Report of the Task Force by now. There are a number of proposals in the report, but the one that has drawn the most comment is the proposal to require lawyers to report their pro bono legal services. The purpose of this article is to offer a general explanation, without argument, of the proposal. I hope it, and the accompanying pieces, will encourage a full and open dialogue on the subject.

In order to lay a foundation for the discussion, I want to cover three points: 1) how the Access to Justice Task Force approached its charge; 2) what is mandatory reporting; and 3) why mandatory reporting is a potential option.

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"[T]he basic legal needs of the poor are great and the already inadequate resources for addressing these needs are rapidly diminishing."

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The Bar petitioned the Utah Supreme Court to form the Access to Justice Task Force in response to dramatic federal funding cuts in legal services. In the view of the Task Force, it is entirely possible that federal funding for legal services may be eliminated in the near future. What this means for Utah is that the primary statewide provider of general legal services for the poor, Utah Legal Services ("ULS"), is in great jeopardy. Without federal funding, ULS may not survive, leaving many people in Utah without effective access to justice. As it now stands, ULS has already been forced to cut back considerably on the number of people it serves. The type of legal services ULS provides focuses on basic needs such as housing, health care, and protection from violence.

The Task Force began its work in August of 1996. The first order of business was performing an assessment of the current conditions for access to justice for the poor in Utah. The Task Force formed an Assessment Committee and gave it this responsibility. The Assessment Committee reported that the legal needs of those living in poverty in Utah were great. The "poor" were defined as those persons with incomes lower than 125% of the federal poverty guidelines. For a family of three, that amounts to

Chief Justice Zimmerman sits on the Utah Supreme Court and is the Co-Chair of the Access to Justice Task Force.

$1352 per month. Approximately 75,000 new basic legal needs for the poor can be anticipated to arise each year.

The conclusion from this assessment is that the basic legal needs of the poor are great and the already inadequate resources for addressing these needs are rapidly diminishing. Something needs to be done.

A basic premise of the adversary system, upon which our judicial system is grounded, is that it should represent a level playing field. And to have a level playing field, those involved in legal proceedings usually need legal representation. Without a lawyer, access to justice is often effectively denied. When a major portion of our population lacks effective access to justice, the foundation of our legal system begins to weaken.

When we all took the oath to become lawyers, we accepted the responsibility to be a part of this system of justice. That responsibility is articulated in the Preamble to the Rules of Professional Conduct. It provides: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance and should therefore devote professional time and civic influence in their behalf." Thus, we lawyers accepted responsibility to insure access to justice. Therefore, we have a primary responsibility to find a solution for the problem of access.

The approach the Task Force took to this problem was two-fold. Our first focus was on increasing the amount of resources available to provide access to justice in Utah. We identified two means for accomplishing this task: 1) raising more money; and 2) increasing the level of pro bono services. Our second focus was on improving efficiencies. This included changing the way services are delivered through structural changes and through better use of technology.

Many ideas for increasing the available resources, both monetary and in kind, were discussed. Among those ideas was that of mandatory reporting of pro bono efforts by each Bar member. So what is mandatory reporting?

Mandatory reporting entails only the *reporting* of pro bono services and contributions by Bar members. *Attorneys would not be forced to do pro bono work or to contribute money to it.* Pro bono service would remain aspirational under a mandatory reporting regime. All that would be required is that attorneys report how much pro bono work they do each year and how much money they donate to those providing such services.

A word about reporting financial contributions: recognizing that some attorneys choose to meet their responsibility to assure access to justice through contributions of money, instead of time. Part of the reporting proposal is to also ask lawyers how much money they donate to agencies that, in turn, provide legal assistance to the poor. This allows attorneys who are not able to perform direct pro bono services for a variety of reasons (like being a judge), or who choose not to do pro bono work, to report contributions made instead of hours worked.

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"Attorneys would not be forced to do pro bono work or to contribute money to it."

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The proposed format for mandatory reporting would be to add a line on the annual licensing form that the Bar distributes. Attorneys would need to list the number of hours of pro bono service provided that year and/or the amount of contributions made. A form listing zero in both categories would meet the reporting requirement.

Failure to complete this portion of the licensing form would not be grounds for discipline, but it would be treated as an incomplete licensing form. An attorney would not be re-licensed for the next year until the information was provided. This would be similar to a suspension for non-payment of licensing fees. The only additional burden mandatory reporting would place on attorneys is that of filling in two extra blanks on their licensing forms.

The obvious question is, how will that increase the resources available for access to justice? The answer is two-fold. First, in Florida, a similar rule was implemented in 1993. Since that time, Florida has experienced substantial increases in both the amount of pro bono services provided by lawyers and the amount of money donated by lawyers for better access to justice for the poor. Reporting has served as an effective reminder to lawyers of their professional responsibility to provide access to justice to those of limited means in their communities. The Task Force anticipates that a similar phenomenon would occur in Utah.

Second, the Task Force recommends that additional public funds be sought to provide essential legal services to the poor. At present, the Bar has no good record of the effort members of the Bar make to meet the legal needs of the poor. With the information gathered from mandatory reporting in hand, the Bar would be in a much better position to argue that lawyers have stepped up to meet their responsibilities, and now it is time for others to do likewise. The Task Force does not expect that mandatory reporting will solve the entire problem of access to justice in Utah, but it is expected to have a positive impact.

In summary, the needs for legal services for the poor in Utah are immense, and the resources for providing these services are dwindling. As a profession we have a responsibility to be part of the solution to this problem. Mandatory reporting is one potential tool for us to consider.

The Task Force encourages discussion on the issue of mandatory reporting and all of its recommendations. This forum, within *Voir Dire*, for discussing this important issue is appreciated.

Any comments you have for the Task Force on its Report and recommendations should be directed to Toby Brown at the Bar offices. You can reach him at 297-7027 or via e-mail at tbrown@utahbar.org.

Mandatory Reporting of Pro Bono Services: A Reasonable Response to a Public Need

by Dennis V. Haslam

During the last few years, the Utah State Bar has struggled to increase involvement of lawyers in providing pro bono legal services for those of limited means. More than 1,000 lawyers volunteered to provide those services in one form or another. Once they were signed up, however, we didn't know how, where, or when to send them to the clients who needed their help. So the Bar created the position of Pro Bono Coordinator to find ways to match volunteer lawyers to their clients. At the same time, unfortunately, Congress reduced by one-third the funding for Legal Services Corporation, forcing Utah Legal Services to reduce both the types of services to its clients and its staff size. The Bar responded by organizing the Access to Justice Task Force.

It was clear to the Task Force that it is the Bar's responsibility to help folks with legal needs. No other group or profession in our society has the training, expertise, or licensing to provide legal advice or to appear in court. Rule 6.1 of the Rules of Professional Conduct places responsibility upon us to provide pro bono service:

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

The Task Force determined there was a significant unmet need for legal services for the poor in Utah. Yet it also found many lawyers stand ready to provide their unique talents, but there is no centralized location to bring the lawyers and the clients together. Neither the Bar nor Utah Legal Services had the staff or funds available to create an intake service that would match lawyers with clients. It became apparent that not only do we need volunteer lawyers, but we need funding to deal with the intake questions, conflicts of interest, forms, systematization, and technology in order to coordinate the efforts of pro bono lawyers.

Recognizing the need to mobilize volunteer lawyers and develop funding for volunteer projects, the Florida State Bar implemented mandatory reporting of pro bono service in 1993. The Task Force studied the Florida model and concluded that adoption of mandatory reporting of public service is a method by which volunteer efforts of the Bar can be coordinated and a method by which funds can be raised to facilitate those efforts. The proposal is simple.

> ***"[I]t is the Bar's responsibility to help folks with legal needs."***

The Task Force recommends that the Utah Supreme Court amend Rule 6.1 to require lawyers to report annually, on their Utah State Bar licensing forms, the number of pro bono hours performed during the preceding year. This includes lawyers in private and in public practice. The proposed rule also suggests that each lawyer put in thirty-six hours annually. This is an aspirational goal. In lieu of reporting the number of volunteer hours provided to those in need, lawyers can buy out of the reporting requirement by paying the nominal sum of $10 for each hour of pro bono service not reported on licensing forms. An attorney can fulfill the reporting requirement simply by reporting that 0, 1, or 100 hours of public service were performed. But failure to report the number of hours, or dollars contributed, will result in non-licensure of that attorney for the coming year. The effect will be just like failure to pay Bar dues.

Here is what I believe we can expect from mandatory reporting:

Mandatory reporting will increase participation by lawyers in pro bono services. Many lawyers are hesitant to do pro bono legal work. They feel they may be the only ones participating. Mandatory reporting will address this concern by developing a new atmosphere and attitude for providing pro bono service. It will become recognized as an excellent public service, and something all those in the profession provide for their communities. In some jurisdictions, lawyers have become competitive in providing pro bono services, and take a lot of pride in their level of participation.

Mandatory reporting will serve as an annual reminder of our professional responsibility. Rule 6.1 of the Rules of Professional Conduct creates the responsibility to provide pro bono service. Reporting once a year will serve as a reminder of that responsibility.

Mandatory reporting will increase financial support for access to justice. Since some lawyers are unable to perform direct representation type services, they may choose to make financial contributions. Mandatory reporting also will make attorneys more aware of the needs and the abilities of agencies to provide effective representation through staff attorneys. The increased awareness will lead to increased financial support of poverty law agencies.

Mandatory reporting will provide useful data on the amount of pro bono services provided by volunteer lawyers. The Bar and the

Mr. Haslam is a partner of the Salt Lake City law firm Winder & Haslam.

courts will have a powerful tool for evaluating the amount of pro bono services provided by volunteer lawyers in Utah.

The data we obtain from mandatory reporting will show the high level of commitment Utah lawyers have to access to justice. The ability to quantify that commitment will help us improve our image with the public. It is our societal and professional responsibility to provide pro bono service. Implementation of mandatory reporting, with the option of buying out, will not have a negative effect on any lawyer in Utah except, perhaps, creating a feeling of guilt upon the realization that he or she gave nothing back.

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"It is our societal and professional responsibility to provide pro bono service."

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The benefits for the Bar are numerous. We can all feel good about our profession–what we do and what we stand for. We don't just talk about it, we do it. The Task Force study reveals that there are thousands of impoverished clients who need our help. They need basic legal services to help them deal with life's problems. Many are uneducated and have nowhere to go. They don't know, as we do, their rights and obligations under the law. The profession should embrace the opportunity to provide an organized program for the delivery of legal services to the poor. Mandatory reporting of pro bono service will benefit the profession, our community, and the people who receive our legal help.

Mandatory Reporting Requirement: "The Way Things Are"

by Glen M. Richman

There is an unwritten book governing many of the things we do. It's entitled, "The Way Things Are." "The Way Things Are," (Congress being what it is), leaves many citizens without legal services that were formerly funded by taxpayers. As lawyers, we are now asked to help those who need our services but cannot afford them. Philosophically, I know that it is less of a burden to society to help those people than it is to ignore their needs, and I know it makes sense, and probably dollars, to have safety nets for those less fortunate, paid for by taxpayers.

"The Way Things Are" requires lawyers to bear at least a "fair share" of the burden. Of course, we can do it! Let's do it cheerfully! Most of us tell the truth when we say that we have always done it. Many of us report hours of service for those in need who cannot afford the cost. Most of us perform these services to benefit the person we help, and not to receive recognition for it. Consequently, some of us are offended at being told that we not only must provide the service, but also report it to the "powers that be." There is a difference between doing good works and being required to account for doing good works.

Now, about mandatory reporting to the Bar. The present proposal merely requires providing information concerning how much free work we do. But will the "powers" eventually choose for us whom we will represent? We are told the information is to be used in part to determine how much pro bono work is being done, and how much more must be done for those in need. Who can argue against that? We probably should loudly applaud those who will devote time to gathering that information, and who will use it to develop sound programs to provide for the legitimate needs of those who are not so economically fortunate as most lawyers. Whether the gathered statistics will be used to load more rocks into the wagon most practitioners pull, remains to be seen.

While we are digesting "The Way Things Are," here is another thought: why not put all licensed lawyers on a list (without exception), and require each to take a turn in providing legal services to the needy as determined by a committee of the Bar? The first selection should be random, and later selections made on the basis of when the last service was performed. If an attorney wishes to buy his or her way out, let the selected lawyer pay his regular hourly rate to a lawyer on a second list who is willing to perform the service (and who may be more qualified in that area of the law), perhaps with a cap on the total to be paid. Let judges and prosecutors just pay money, but require their participation.

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"[S]ome of us are offended at being told that we not only must provide the service, but also report it to the 'powers that be.'"

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Attorneys would have either option: serve or pay. Under such an arrangement, I expect we would have little difficulty getting names on the list of those willing to provide the service. The lawyer on the list of providers might well earn the highest hourly rate in town on a particular case. Make no exceptions, and for those who don't charge an hourly rate, let them compute an hourly rate by dividing annual hours into total income; judges and prosecutors can divide annual hours into annual salary. Under such an arrangement, the mandatory reporting and the information gleaned from it would be an integral part of the program. Then let's have the whole Bar vote on what we should do with the statistics gathered.

Just a thought!

Mr. Richman is the manager of the Salt Lake City law firm Richman & Richman, L.L.C.

PRACTICE POINTERS

Motions at Trial–and After

by Francis J. Carney

There must be some kind of way out of here, said the joker to the thief;
There's too much confusion, I can't get no relief.
— Bob Dylan, All Along the Watchtower

Although it is indisputably a dry and perhaps dull topic, a working knowledge of the grounds and distinctions between the various trial and post-trial motions is essential for one who would try lawsuits. Properly asserted motions can and do win trials. Likewise, counsel's failure to make the right motion at the proper time may doom the appeal. This article summarizes what motions should be made, and when.

Motions at Trial

The motions that are most likely encountered in trial are a motion to dismiss in a bench trial and a motion for directed verdict in a jury trial, although not uncommonly the motion in limine and the Rule 47(r) motion will be necessary.

1. Motion to Dismiss

Utah Rule of Civil Procedure 41(b) provides in relevant part that:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

In federal actions, the counterpart rule is now Federal Rule of Civil Procedure 52(c), "Judgment on Partial Findings." Unlike the motion for directed verdict, this rule contemplates that the court in a bench trial may not only determine the legal sufficiency of the plaintiff's case, but also may decide the case on the merits, if it so chooses.[1] That is, the trial judge may determine that the plaintiff has met the burden of going forward but not the burden of persuasion.

For example, in a medical malpractice action, a plaintiff must normally produce expert testimony establishing both a deviation from the standard of care and that the deviation proximately caused the plaintiff's injuries. If the plaintiff's expert testifies as to both requirements, neither a directed verdict in a jury trial nor a Rule 41(b) "legal sufficiency" motion in a bench trial should be granted. But the court in a bench trial may grant a Rule 41(b) dismissal at the close of the plaintiff's case if it is not persuaded by the plaintiff's evidence. The court does not need to wait to hear the defendant's evidence to decide the case.

The basis on which the Rule 41(b) motion was granted is crucial to the standard of review on appeal. If the trial court dismissed the action as a matter of law, the appellate court will review the evidence in the light most favorable to the plaintiff, and will affirm the dismissal only if there was no competent evidence to support the plaintiff's claim. But if the trial court dismissed the case on the facts, then appellate review is limited to a review of the evidence in the light most favorable to the trial court's findings of fact, that is, in the light most favorable to the defendant, and the findings will be allowed to stand if reasonable minds could agree with them. Given this difference in the standards of appellate review, astute defense counsel will afford every opportunity for a trial judge to frame his or her decision as one made on the facts, and not as a matter of law.

2. Motion for Directed Verdict

As its name implies, the motion for directed verdict is used only in jury trials and should not be confused with its bench trial equivalent, the Rule 41(b) motion. Federal Rule of Civil Procedure 50(a) now uses the terminology "motion for judgment as a matter of law," while Utah Rule of Civil Procedure 50(a) keeps the traditional nomenclature of a "motion for directed verdict."

Under either version of the rule, a directed verdict may only be granted if, after reviewing the evidence in the light most favorable to the nonmoving party, the trial court concludes that there is no competent evidence which would support a verdict in its favor. *See DeBry v. Cascade Enters.*, 879 P.2d 1353, 1359 (Utah 1994); *Galloway v. United States*, 319 U.S. 372, 389-96 (1943). If reasonable minds could differ on the issue in controversy, the motion must be denied. *See id.; Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc.*, 652 P.2d 896, 897-98 (Utah 1982).

The term "directed verdict" is an anachronism. There is no verdict, directed

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[1] *See Johnson v. Bell*, 666 P.2d 308 (Utah 1983); *Winegar v. Slim Olson, Inc.*, 252 P.2d 205 (Utah 1953).

or otherwise. In earlier times, the court granted the motion and then sought the assent of the jury to its decision to enter judgment. That is no longer necessary and no verdict of any kind is reached: the court simply makes its ruling and, later, a written judgment. The jury plays no part in it.[2]

The court may deny the motion, grant it, or withhold its ruling until after the jury reaches a verdict. If the verdict is for the moving party, the issue is moot. If the verdict is against the moving party, and the trial court granted the motion, then the appellate court may simply reinstate the verdict if it reverses the trial judge. But if the trial court granted the motion and took the case away from the jury before it reached a verdict, a reversal on appeal will require a new trial that might otherwise have been avoided. For that reason, the preferred practice may be to submit the case to the jury even if the court intends to grant a judgment as a matter of law.[3]

In order to make a motion for judgment notwithstanding the verdict under Rule 50(b), a directed verdict motion must be made at the close of the opponent's case and renewed at the close of all the evidence. The introduction of evidence after the denial of the motion constitutes a waiver of any future objections to the sufficiency of the evidence if the movant fails to renew the motion at the close of all the evidence.[4] This, in theory, gives the nonmoving party the opportunity to correct the deficiency in its case—if the court is inclined to allow a chance to correct it.

Counsel should keep in mind that an appellate court, in the absence of plain error, only reviews the decisions of the trial court; if no decision on a motion for judgment notwithstanding the verdict or motion for new trial was made concerning the sufficiency of the evidence, then the appellate court has nothing to review. The appellate court does not function as the initial reviewer of the sufficiency of the evidence; rather, it only reviews the reviewer, the trial court. And if the trial court was not given the opportunity to review the sufficiency of the evidence under a Rule 50(b) or 59(a) motion, there is nothing for an appellate court to review either.

3. Motions Under Rule 47(r)

Utah Rule of Civil Procedure 47(r) is one of those little-known rules that snares the unwary.[5] It provides simply that, "If the verdict rendered is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be sent out again." This seemingly innocuous statement has been interpreted to mean that an objection must be made before the court discharges the jury whenever a verdict is incomplete or facially incorrect. Otherwise, an appeal on the issue is waived.

For example, if in a personal injury case a jury returns a verdict awarding special damages but no general damages, one would think that a Rule 59(b)(5) motion for new trial based upon inadequacy of damages would be well-grounded. Not so. This error is apparent on the face of the verdict and counsel is required to object and move the court to send the jury out again to clarify its verdict.[6] Another reported example is a jury's inconsistent answers to the special verdict interrogatories.[7]

The moments after the clerk reads the jury's decision are not conducive to a reasoned analysis of the verdict. The hour is often late, counsel may be exhausted, the jury and judge are eager to leave. Nevertheless, you must hold the jury in the box for a few minutes while the verdict form is closely reviewed. If there are any inconsistencies or apparent mistakes, approach the bench, advise the judge, and ask that the jury be instructed to correct or clarify them. This cannot be done at a later time—the jury, once discharged, is nearly never recalled.

4. Motion in Limine

A motion in limine or "at the threshold" is generally used to request the trial judge to rule on evidentiary matters before the trial begins.[8] But there are occasions after trial has started when you may become aware of the potential for the introduction of irrelevant and prejudicial evidence, and a motion in limine is appropriate. This motion has little value in a bench trial but is valuable to use in a jury trial instead of an objection, which may allow the jury to hear some of the adverse evidence and at the same time call attention to it. Of course, losing the motion gives your opponents advance warning and further time to prepare to deflect the objection. And most trial judges have little patience for hearing motions in limine at trial if counsel has had an adequate opportunity to raise the issue before trial.

5. Motion for Mistrial

Inherent in a trial court's discretion is the power to grant a mistrial if circumstances unduly prejudice a party or affront the integrity of the judicial system. Examples that readily come to mind are inappropriate jury argument by counsel (that cannot be cured by a corrective instruction), juror misconduct, such as conducting site investigations or speaking with parties, and testimony by witnesses on inflammatory and irrelevant evidence already subject to an exclusion order. As in the motion in limine, there is no procedural rule which grants this authority, but no one doubts that a trial judge has the power to end the trial and order a new one. That is a matter within its informed discretion and its decision will be upheld on appeal absent an abuse of that discretion.[9] On the other hand, a mistrial should be granted only when it appears that justice will be thwarted

[2] 9 MOORE'S FEDERAL PRACTICE, §50 App.06[3] (3d ed. 1997). The 1991 amendments to Rule 50 of the Federal Rules of Civil Procedure abandoned the terminology of "directed verdict" and "judgment notwithstanding the verdict" in favor of "judgment as a matter of law." Our local practice is further confused by the traditional defense jury instruction Number 1: "You are instructed to return a verdict in favor of the defendant and against the plaintiff, no cause of action."

[3] *See Orfield v. International Harvester Co.*, 415 F.Supp. 406 (E.D. Tenn. 1975), *aff'd* 535 F.2d 959 (6th Cir. 1976).

[4] *See, e.g., Purcell v. Seguin State Bank & Trust Co.*, 999 F.2d 950, 956-57 (5th Cir. 1993); *Jusino v. Zayas*, 875 F.2d 986, 991-92 (1st Cir. 1989).

[5] There is no counterpart to Rule 47(r) in the Federal Rules of Civil Procedure.

[6] *Langton v. International Transport*, 491 P.2d 1211 (Utah 1971); *Cohn v. J.C. Penney Co., Inc.*, 537 P.2d 306 (Utah 1975).

[7] *Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078 (Utah 1985); *Ute-Cal Land Dev. Corp. v. Sather*, 605 P.2d 1240 (Utah 1980).

[8] *See, e.g., Hill v. Dickerson*, 839 P.2d 309 (Utah 1992) (precluding use of late-designated witnesses); *Nelson v. Peterson*, 542 P.2d 1075 (Utah 1975) (references to plaintiff's welfare status and illegitimacy of her child). The possibilities are endless: subsequent remedial measures, payment of plaintiff's medical bills, offers of settlement, prior inadmissible convictions, existence of liability insurance, and so on. Although there is no specific statutory or procedural authority for the motion in limine, Utah Rule of Evidence 104 has been interpreted as such.

[9] *See Rasmussen v. Sharapata*, 895 P.2d 391, 394 (Utah Ct. App. 1995).

unless the jury is discharged and a new trial granted.[10] If a motion for mistrial is refused, the aggrieved party has the burden of proof on appeal to show that the conduct complained of prejudiced the outcome of the trial, a difficult burden indeed.[11]

Motions After Trial

The principal motions made after trial are the motion for judgment nothwithstanding the verdict, the motion for new trial, the motion to alter or amend the judgment and the motion for relief from judgment. These four motions each serve different purposes and have separate standards, although they are commonly made in conjunction with each other after an adverse result at trial.

"After trial" does not mean immediately after a verdict is returned; it is unnecessary and inappropriate to make post-trial motions at the moment the verdict is reached.[12] Indeed, the post-trial motions technically *cannot* be made until after a judgment is entered by the court on the jury's verdict or its own ruling. All of the post-trial motions must be made within ten days after entry of the judgment, except for Rule 60 motions.[13] Two points about the time limit need to be appreciated.

First, under the state rules, the ten-day deadline may be tolled by service of a post-trial motion, but in federal court, tolling only occurs upon *filing*.[14] Of course, no careful attorney would rely on service by mail to toll the deadline on these critical motions, so the distinction should only be significant in the unusual case.

Second, Rule 6(b) prohibits extensions of the ten-day deadline in both state and federal court. In other words, the ten-day period cannot be extended—even with a stipulation for an extension from opposing counsel and an order of the court. These deadlines are jurisdictional.[15]

1. Motion for Judgment Notwithstanding the Verdict

Utah Rule of Civil Procedure 50(b) provides that:

> Not later than ten days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

This motion, more commonly known as the motion j.n.o.v. (judgment *non obstante veredicto*), is best understood as merely the renewal of a prior motion for directed verdict. The 1991 amendments to Federal Rule of Civil Procedure 50(b) recognized this, and have re-designated the motion j.n.o.v. as the "Renewed Motion for Judgment as a Matter of Law."

Because a motion j.n.o.v. is a renewal of a motion for directed verdict, it necessarily follows that a directed verdict motion must have been made at trial. It is not enough to have made a motion for directed verdict at the close of the opposing party's case: it must have been renewed at the close of *all* the evidence or the motion j.n.o.v. is waived.[16]

The grounds are the same as for a directed verdict. That is, a j.n.o.v. can be granted only when the losing party is entitled to judgment as a matter of law. The trial court may grant a motion for a j.n.o.v. only when the evidence is, as a matter of law, insufficient to support the jury verdict. Put differently, the trial court is justified in granting a j.n.o.v. only if, after looking at the evidence in the most favorable light to the non-moving party, it concludes that there is no competent evidence to support a verdict for that party.[17] On appeal, the court will review the record and determine whether there is any basis in the evidence to support the jury's verdict. If there is, the j.n.o.v. will be reversed.[18]

2. Motion for New Trial: Rule 59(a)

Utah Rule of Civil Procedure 59(a) allows seven grounds for the trial court to grant a new trial:

1) Irregularity of the proceedings;
2) Jury misconduct;
3) Accident or surprise;
4) Newly discovered material evidence;
5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
6) Insufficiency of the evidence to justify the verdict or that the verdict is "against law"; and,
7) Error in law.

Its federal equivalent more simply provides that a new trial may be ordered "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The most commonly encountered grounds for Rule 59(a) motions are excessive or inadequate damages and insufficiency of the evidence, and these require some discussion.

To justify a new trial for excessive damages under Rule 59(a)(5), the damage award must be more than generous; it must be clearly excessive under any ratio-

[10] *See Watkins & Faber v. Whiteley*, 592 P.2d 613, 616 (Utah 1979), *citing Goodwin v. Northwestern Mut. Life Ins. Co.*, 83 P.2d 231 (Wash. 1938); *First Gen. Servs. v. Perkins*, 918 P.2d 480, 485 (Utah Ct. App. 1996).

[11] *See State v. Price*, 909 P.2d 256, 262 (Utah Ct. App. 1995); *State v. Boone*, 820 P.2d 930, 932 (Utah Ct. App. 1991).

[12] Except, of course, for the motion to have the jury correct or clarify its verdict before discharge under Utah Rule of Civil Procedure 47(r).

[13] Under Utah Rule of Civil Procedure 58A(c), "entry" of a judgment is only complete upon the signature of the judge on the form of judgment and filing by the clerk. One should not confuse return of a *verdict* by the jury with entry of a *judgment* upon that jury verdict by the court. Nor is a judgment rendered when a judge announces a decision from the bench. *See Atlantic Richfield Co. v. Monarch Leasing Co.*, 84 F.3d 204 (6th Cir. 1996).

[14] This distinction is the result of the December 1995 amendments to Rules 50(b), 59(b), and 59(e).

[15] *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 261-62 n.5 (1978); *Holbrook v. Hodson*, 466 P.2d 843 (Utah 1970); *but see, Eady v. Foerder*, 381 F.2d 980 (7th Cir. 1967); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 585 (9th Cir. 1993) (setting forth a "unique circumstances" exception to the draconian Rule 6(b) where the court has entered an extension order and a party has reasonably relied upon it); *see also*, 12 MOORE'S FEDERAL PRACTICE § 59.06[1] (3d ed. 1997) (full discussion of the "unique circumstances" exception); *Lund v. Third Judicial Dist. Court*, 62 P.2d 278 (Utah 1936) (pre-Utah Rules of Civil Procedure decision).

[16] *See, e.g., Continental Trend Resources v. Oxy USA*, 810 F.Supp.1520, 1523-24 (W.D. Okla. 1992).

[17] *See Braithwaite v. West Valley City Corp.*, 921 P.2d 997, 999 (Utah 1996); *Gold Standard v. Getty Oil Co.*, 915 P.2d 1060, 1066 (Utah 1996) (citing *Hansen v. Stewart*, 761 P.2d 14, 17 (Utah 1988), among other decisions).

[18] *See id.*

nal view of the evidence. *See Bennion v. LeGrand Johnson Constr. Co.*, 701 P.2d 1078, 1084 (Utah 1984). Short of ordering a new trial, the court may also offer the victor the opportunity of accepting a remittitur or additur. Although those words are not found in the civil rules, remittitur and additur are within the inherent powers of a state judge to correct excessive or inadequate damage awards short of the time and expense of a new trial.[19]

In a remittitur, the court offers the victorious plaintiff a reduction in damages as an alternative to granting the defendant's motion for new trial for excessive damages. The flip side of the coin is additur, used where the verdict is too meager, where the trial court conditions its grant of plaintiff's motion for a new trial for insufficiency of damages on defendant's consent to the entry of judgment in a larger amount.[20]

Additur, unlike remittitur, is *not* an option in federal court—the trial judge cannot constitutionally offer the option of an additur but can only order a new trial for insufficient damages.[21] Both remittitur and additur require the consent of the affected party; without it, a new trial follows.[22] No appeal is permissible from an additur or remittitur which a party has accepted; it is analogous to a settlement agreement or a consent decree.[23] If a plaintiff refuses a remittitur or a defendant refuses an additur, a new trial, not an appeal, follows. The order granting the new trial is not appealable because it is not a final judgment.[24]

As to the "insufficiency of the evidence" ground under Rule 59(a)(6), there is a persistent tendency to confuse the standard for granting a new trial based on this ground with the standard for granting a directed verdict or j.n.o.v.[25] Unlike in directing a verdict, which may be done "only when there is no substantial evidence, [a] verdict may be set aside and new trial granted when the verdict is contrary to the clear weight of the evidence, or whenever in the exercise of a sound discretion the trial judge thinks this action necessary to prevent a miscarriage of justice." *See Aetna Cas. & Surety Co. v. Yeatts*, 122 F.2d 350 (4th Cir. 1941), *quoted in Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 803 n.15 (Utah 1991).

In other words, a judge may set aside a verdict on a motion for new trial even though there is substantial evidence to support it. Nor is he or she required to view the evidence in the light most favorable to the prevailing party.[26] The judge's discretion to weigh the evidence is not unlimited and a new trial should not be ordered simply because of disagreement with the verdict. The trial judge may only properly grant a new trial when he or she can reasonably conclude that the verdict is clearly against the weight of the evidence or that there is insufficient evidence to justify the verdict.[27] Interestingly, while a trial court should only grant a new trial when the verdict is against the manifest weight of the evidence, once the motion is granted, the trial court's decision will be reversed only for an abuse of discretion.[28]

Otherwise put, an order granting a new trial will be affirmed if there was substantial competent evidence which would support a verdict for the moving party.[29] This is far more lenient than the standard of review for a granted motion for j.n.o.v. The trial court has no discretion in granting a motion for j.n.o.v.; it must be correct. If there is any basis in the evidence to support the verdict, the trial court's decision will be reversed.[30]

An example of the differing appellate standards for review of j.n.o.v. and new trial motions is *Braithwaite v. West Valley City Corp.*, 921 P.2d 997 (Utah 1996). In that case, the Supreme Court reversed a trial court's entry of j.n.o.v. for a defendant in a personal injury case, finding that there was competent evidence to support the jury verdict. Nevertheless, the court affirmed the trial court's granting of the new trial motion because there was also evidence which would have supported a verdict for the defendant: "Our determination that there was sufficient evidence supporting the jury's verdict in favor of the Braithwaites does not preclude a finding that the City presented substantial competent evidence supporting its position." *Braithwaite*, 921 P.2d at 1002. Therefore, a new trial was ordered.

Keep in mind that the waiver of the right to request j.n.o.v. by not making a motion for directed verdict does *not* prevent a party from moving for a new trial on the ground that the verdict is against the weight of the evidence.[31] In other words, there's no reason for the *pro forma* motion for directed verdict so often made by defense counsel when the plaintiff has obviously made out a legally sufficient case. If the verdict goes against the defense, a new trial motion is still appropriate. All that is waived by not making a directed verdict motion is the chance to make a motion for j.n.o.v. on the ground the plaintiff's case was insufficient as a matter of law.

3. Motion to Alter or Amend Judgment: Rule 59(e)

The rules do not set forth the grounds for this motion but the cases recognize four grounds: to incorporate a new change in the law, to correct clear legal error, to reflect new evidence not avail-

[19] *See generally, Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 803-04 (Utah 1991); 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, Civil 2d § 2815-16 (1995); 12 MOORE'S FEDERL PRACTICE, § 59.26 (3d ed. 1997).

[20] *See, e.g., Dupuis v. Nelson*, 624 P.2d 685 (Utah 1981); *Onyeabor v. Pro Roofing, Inc.*, 787 P.2d 525 (Utah Ct. App. 1990).

[21] *Dimick v. Schiedt*, 293 U.S. 474 (1935) found that additur violated the plaintiff's Seventh Amendment right to jury trial. On the other hand, a remittitur is permissible because it has the effect of "merely lopping off an excrescence." *Id.* at 486-7.

[22] *See Dalton v. Herold*, 312 Utah Adv. Rep. 9, ___ P.2d ___ (Utah 1997).

[23] *See id.*

[24] *See Haslam v. Paulsen*, 389 P.2d 736 (Utah 1964).

[25] 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE, Civil 2d § 2806 (1995).

[26] *See id.; Deats v. Commercial Sec. Bank*, 746 P.2d 1191 (Utah Ct. App. 1987), *cert. denied*, 765 P.2d 1277 (Utah 1988).

[27] *See Crookston*, 817 P.2d at 799 n.9; *Goddard v. Hickman*, 685 P.2d 530, 532 (Utah 1984) ("The power of a trial judge to order a new trial is to be used in those rare cases when a jury verdict is manifestly against the weight of the evidence"); *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1982).

[28] *See Crookston*, 817 P.2d at 799. Later on in the same case, the court somewhat confusingly defines the standard of appellate review as being "in reviewing the judge's ultimate decision to grant or deny a new trial, we will reverse only if there is no reasonable basis for the decision." *Id.* at 805; *see also Amoss v. Bennion*, 517 P.2d 1008, 1010 (Utah 1973); *Braithwaite*, 921 P.2d at 1001.

[29] *See Braithwaite*, 921 P.2d at 1001.

[30] *See id.*

[31] *See Velasquez v. Figueroa-Gomez*, 996 F.2d 425 (1st Cir. 1993).

able at the time of trial, and to prevent manifest injustice.[32] There is considerable overlap between the motion to alter or amend judgment and the motion for relief from judgment under Rule 60, although the motion to amend must be made within ten days of entry of judgment. The motion to alter or amend is typically used to correct technical deficiencies in the judgment, such as a failure to calculate prejudgment interest correctly.[33]

4. Motion for Relief From Judgment

Rule 60(b) allows relief from a final judgment on seven distinct grounds:

1. Mistake, surprise, or excusable neglect;
2. New evidence discovered too late to move for a new trial under 59(b);
3. Fraud;
4. Lack of service of process;
5. The judgment is void;
6. The judgment has been satisfied; or
7. "Any other reason justifying relief from the operation of the judgment."

Motions based upon the first four grounds must be made within three months of entry of the judgment. Other motions must be made within a "reasonable" time.

Unlike the motion for j.n.o.v. and the motion for new trial, the Rule 60(b) motions usually do not go to the merits of the underlying action.[34] Generally they are used to correct clerical errors, for relief from default judgments, or for challenging the jurisdiction of the court entering the judgment, but not for post-trial attacks upon the size of the verdict, the fairness of the trial, or the sufficiency of the evidence to justify the verdict.

5. "Motion for Reconsideration"

No such motion is recognized under either the Utah or the Federal rules.[35] Nevertheless, it is the substance of the motion that matters, not the form, and such a non-motion may sometimes be entertained. It may, for example, be treated as a motion for new trial under Rule 59[36] or as a Rule 60(b) motion for relief from judgment. A motion for reconsideration filed within ten days of judgment that questions the correctness of the verdict will be treated as either a motion under Rule 52(b) or under Rule 59(e).[37] The better practice is to avoid the phrase "motion for reconsideration" entirely and give the post-trial motion its correct term.

Some Closing Thoughts

The distinctions and interplay among the trial and post-trial motions can be confusing. While nothing substitutes for a careful re-read of the procedural rules, these key principles should always be remembered:

✦ The grounds for a motion to dismiss in a bench trial are broader than those for a motion for directed verdict. The judge can consider not only whether the plaintiff has made out a legally sufficient case but also whether he is convinced by that evidence. And because a decision based on the facts is much easier to uphold on appeal than a decision as a matter of law, always press for a "facts" ruling.

✦ A *pro forma* motion for directed verdict in a jury trial is unnecessary if your opponent has made out a legally sufficient case. A motion for new trial under Rule 59(a)(6) is always an option to challenge a verdict which is against the weight of the evidence, whether you have moved for a directed verdict or not.

✦ Whether you represent the plaintiff or the defendant, if you have grounds for a directed verdict, be certain to make the motion both at the close of your opponent's case and at the close of all the evidence. If you fail to renew your motion at the close of the evidence, you will be foreclosed not only from making a motion for j.n.o.v. but also from challenging the legal sufficiency of the evidence on appeal.

✦ A motion for j.n.o.v. is merely a renewal of a directed verdict motion and is judged by the same standards. The "insufficiency of evidence" standard on a motion for new trial is *not* the equivalent of the much-stricter directed verdict/j.n.o.v. standard and allows the trial judge considerable latitude in overturning verdicts even when the case is legally sufficient.

✦ Utah Rule of Civil Procedure 47(r) requires errors or inconsistencies in jury verdicts to be corrected before the jury is discharged, and failure to do so will waive the error. Take the time to review the special verdict before the judge discharges the jury.

✦ Never rely on a stipulation to extend the time to file post-trial motions. Except for Rule 60(b) motions, the deadline for post-trial motions is ten days after the entry of judgment and it cannot be extended.

[32] See S. Baicker-McZee, Federal Civil Practice Rules Handbook, at 627-28 (1997).

[33] See, e.g., *Brunetti v. Mascaro*, 854 P.2d 555 (Utah Ct. App. 1993).

[34] See *Board of Educ. v. Cox*, 384 P.2d 806 (Utah 1963).

[35] See *Hatfield v. Board of County Comm'rs*, 52 F.3d 858, 861 (10th Cir. 1995); S. Baicker-McZee, Federal Civil Practice Rules Handbook, at 629 (1997); *Tracy v. University of Utah Hosp.*, 619 P.2d 340, 342 (Utah 1980).

[36] See *Watkiss & Campbell v. Foa & Son*, 808 P.2d 1061, 1063-65 (Utah 1991) (conceding that a motion for "new" trial may be appropriate following the grant of a summary judgment motion); see also *Moon Lake Electric Ass'n v. Ultrasystems W. Contractors*, 767 P.2d 125 (Utah Ct. App. 1988); *Ron Sheperd Ins., Inc. v. Shields*, 882 P.2d 650, 653 n.4 (Utah 1994).

[37] See *DeBry v. Fidelity Nat'l Title Ins. Co.*, 828 P.2d 520, 522-3 (Utah Ct. App. 1992).

PRACTICE POINTERS

Avoiding the Unauthorized Practice of Law

by Katherine A. Fox and Carol A. Stewart

Would it surprise you to learn that licensed attorneys can engage in the unauthorized practice of law? Like most practicing Utah attorneys, you undoubtedly have a prototype example in mind when you encounter the phrase "unauthorized practice of law." The example is probably much like a recently decided Utah Supreme Court case, *Utah State Bar v. Benton Petersen*, No. 950551 (Utah Apr. 25, 1997). Petersen, a paralegal correspondence school graduate, set up shop in Manti, where he proceeded to, among other things, assist clients with their divorces. In one case, he waived child support on behalf of the children and instead inserted a monthly $5 "remembrance fee." He also pleaded *nolo contendre* in a domestic relations default action. So, what does the unauthorized practice of law have to do with you as a licensed attorney, other than perhaps the occasion when you inherit a legal mess to clean up?

As practicing attorneys you should recognize the situations in which you may be assisting or engaging in the unauthorized practice of law. This article addresses two areas in which an attorney may be violating Utah Code Annotated section 78-51-25, which prohibits the unauthorized practice of law, and/or may be violating Rule 5.5 of the Utah Rules of Professional Conduct.

A license to practice law is not granted irrevocably. As an attorney, you have continuing duties and responsibilities which must be fulfilled to ensure that you remain in good standing and on active status with the Bar. There are several ways that a "licensed" attorney could be placed on an "inactive status" which would prohibit the attorney from practicing law.

First, and perhaps most commonly thought about (and read about in the *Utah Bar Journal*), is a disciplinary suspension. Here, the Utah Supreme Court orders an attorney's license suspended or revoked if he or she is disbarred at the conclusion of disciplinary proceedings. Changes in an attorney's status as the result of discipline most commonly result from a serious violation of the Rules of Professional Conduct. Discipline resulting in a change of status may also arise when a Utah attorney admitted in another state is publicly disciplined by that other state. Under Rule 22 of the Rules of Lawyer Discipline and Disability, the Office of Attorney Discipline is charged with commencing proceedings to determine whether the equivalent discipline should be imposed in this jurisdiction, as well.

✦

> ***"As an attorney, you have continuing duties and responsibilities which must be fulfilled to ensure that you remain in good standing and on active status with the Bar."***

✦

Similarly, an attorney may face a change in status if he or she is convicted of a crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. Rule 19 of the Rules of Lawyer Discipline and Disability outlines the procedures to be followed by the Office of Attorney Discipline when a lawyer is convicted of such a crime. These proceedings often result in suspension or disbarment, which, of course, change an attorney's status.

A second way an attorney's status can be changed is when an attorney chooses to "go inactive." In this situation, an attorney is voluntarily placed on inactive status. Attorneys commonly request this change of status when they leave the jurisdiction for an extended period, or cease practicing law altogether.

A third reason for a change in an attorney's status is when an attorney is suspended for failing to pay Bar dues and/or to comply with MCLE requirements. In that case, the attorney's name is forwarded to the Supreme Court. The Supreme Court issues an order suspending the attorney until such time as the particular requirement is met.

A suspension of this type has the same force and effect as a disciplinary suspension. That is, an attorney is prohibited from practicing law until the suspension is lifted. The Office of Attorney Discipline is receiving an increasing number of reports of attorneys continuing to practice while on such a suspension. If the Office of Attorney Discipline receives such a report, it conducts an investigation into whether the attorney is indeed practicing while on suspension in violation of Rule 5.5(a) of the Rules of Professional Conduct. If the attorney is found to have violated this Rule, discipline may result.

A licensed attorney may also commit an ethics violation if that attorney assists a non-licensed person in activity that constitutes the unauthorized practice of law. In the *Petersen* case cited above, the Supreme Court offered the following guidance in determining what constitutes the "practice of law."

Although "the practice of law" has not been exactly defined,

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> an "ordinary reader" would understand that certain services, when performed on someone else's behalf, are part of such practice. Such service would include not only appearing in court, but also drafting complaints, drafting or negotiating contracts, drafting wills, counseling or giving advice on legal matters, and many other things.

Id., slip op. at 6.

Pursuant to Rules 5.3 and 5.5(b) of the Rules of Professional Conduct, an attorney is responsible for the conduct of non-lawyer assistants employed by or associated with that attorney. Thus, if an attorney improperly utilizes or supervises a non-lawyer assistant, that attorney is subject to discipline.

A juris doctor degree is merely that: an academic credential. Until a person passes the Bar admissions examination, has been duly sworn in by the Supreme Court, and is licensed, he or she is not authorized to practice law. Such a person may not have his or her name inserted on a pleadings caption, may not sign pleadings, may not be listed on firm letterhead or in advertisements or telephone listings, may not negotiate on behalf of a firm's client either by telephone conversation or signing a letter, may not defend or take depositions, and may not appear in court. In short, the unlicensed person may not practice law in the interim period between law school graduation and being licensed, even though he or she may be associated with your firm. They may, of course, act as a law clerk or paralegal where a licensed Utah attorney is supervising them.

But what about the experienced out-of-state licensed attorney who has been practicing elsewhere, perhaps for a number of years, and who moves to Utah and becomes associated with your firm? Surely the Bar does not expect that person in the interim between taking the admissions examination and being licensed to function as a mere paralegal or law clerk? The simple answer is "yes, we do." Jurisdictions confer the right to practice law, not academic credentials and experience. If the latter were the case, paralegals such as Petersen arguably might qualify to practice law.

But wait, you say, how about that out-of-state attorney filing a few (or more) pro hac vice motions in that interim period? That rule permits attorneys who are licensed elsewhere to practice within Utah, doesn't it? That way, the attorney could function in our firm as a "real" lawyer during the interim period. The simple answer is "no." Although the pro hac vice rule found at Rule 40(d), Utah Rules of Appellate Procedure,[1] is sketchy, as are many other rules, the details can be discovered in case law. The rule was designed to permit a non-resident licensed attorney the opportunity to appear in the occasional matter within our state borders. It was not intended as a device for out-of-state attorneys to cross state lines and regularly practice here without Utah licensure, nor was it enacted to permit out-of-state attorneys to move here and begin practicing before becoming licensed.

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"The possible consequences for violating ethics rules and state law are unpleasant..."

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The possible consequences for violating ethics rules and state law are unpleasant for both the Utah-licensed attorney and for the non-licensed person who has associated himself or herself with the former. The unlicensed person or out-of-state attorney who has applied for admission may find himself or herself being investigated by the Bar's Office of Attorney Discipline, the Unauthorized Practice of Law Committee, or the Bar's General Counsel. Once an investigation is complete and if a violation is substantiated, the matter is referred to the Bar's Character and Fitness Committee. That committee is charged with ensuring that every applicant for admission to the Utah State Bar possesses the requisite moral character and fitness to practice law. A hearing may be held on the matter, and if the violations warrant it, the committee will deny admission and recommend to the Board of Bar Commissioners that certification to the Supreme Court be denied. Even after an applicant has passed the admissions examination and awaits the oath of office and licensure, the Board may decide not to certify. If the list of names of passing applicants already has been certified to the Court, the offending applicant's name may be withdrawn.

The Bar is investigating several of these types of allegations of misconduct. In one case, an attorney Bar applicant who had not yet been licensed to practice in Utah was employed by a law firm, engaged in settlement negotiations, and defended depositions in cases where pro hac vice admission had been intermittently sought. In another case, an attorney Bar applicant who had not yet been licensed to practice in Utah was employed by a law firm which sent him (unaccompanied) to represent its client, a city, at city council meetings. That person gave legal advice to the city during the course of the meeting.

Issues to be addressed in the investigation of these types of cases include whether the law firm's clients and opposing counsel were advised of the non-lawyer's actual status and whether there were misrepresentations made to anyone regarding the non-lawyer's status. The potential for miscommunication and misunderstanding in these situations is obvious. If misrepresentations were made, the disciplinary sanctions for licensed Utah attorneys could be severe. There may be other consequences for those not yet admitted to practice law.

As draconian as this discussion may appear, the majority of Utah attorneys are diligent and never have these types of problems. Within the small number that encounter problems, we find that violations may be unintentional or minor in nature. The Bar exists in part to assist you in having a successful and satisfying experience practicing law. If you think you may have had or are having a problem in this area of law, please contact us. Early intervention and cooperation go a long way toward resolving these issues. So please, contact us voluntarily so we can work together before we need to contact you.

[1]There is no comparable pro hac vice "rule" in the Utah Rules of Civil Procedure.

CASES IN CONTROVERSY

Salt Lake City v. Garcia: A Scientific Evidence Decision Built Upon Sand

by Ralph Dellapiana

Introduction

On the unusual date of February 29, 1996, the Utah Court of Appeals made a peculiar ruling in *Salt Lake City v. Garcia*[1] –a case of first impression in Utah regarding the foundational requirements for scientific evidence. At issue was the admissibility of the horizontal gaze nystagmus (HGN) test, a "field sobriety test" often used in DUI cases. Although the Garcia court did not rule clearly on the issue, the majority of jurisdictions have found the HGN test to be "scientific" in nature.[2]

The *Garcia* decision is significant because it allows Utah juries to consider this scientific evidence without first requiring the proponent to establish a foundation that the science is inherently reliable. In fact, the trial court judge admitted the HGN evidence despite specifically finding that the city was unable to establish a foundation that the evidence admitted against the defendant was either inherently reliable, or generally accepted.[3] This is important because, prior to *Garcia*, the foundational showing did not go just to the weight of evidence, but was a *prerequisite* to admissibility.[4] Thus, the *Garcia* decision may have created a shortcut to the admission of scientific evidence: one need only argue that one's scientific evidence (or one's voodoo masquerading as science) is simply "not presented as scientific evidence." Without further ado, the jury gets to hear it.

> ***"[T]he Garcia decision may have created a shortcut to the admission of scientific evidence: one need only argue that one's scientific evidence (or one's voodoo masquerading as science) is simply 'not presented as scientific evidence.'"***

The dubious prudence of this precedent forebodes a potential flood of scientific evidence that may be more easily admitted now that no foundation is required as to its reliability. *Garcia* has especially ominous implications for criminal defendants facing prosecution using "experts" asserting the defendants' guilt based on unreliable theories. The crucial question is: should the house built on this rickety precedent stand? In other words, is *Garcia* good law, or should a prior foundation of reliability still be a prerequisite for the admission of scientific evidence?

The Horizontal Gaze Nystagmus Test

Imagine yourself in the following scenario:

Your eyes are being tested. As the tester moves a stimulus (such as a bright penlight) across your field of vision, your eyes bounce or jerk in a stop-and-go motion as you attempt to follow the stimulus. The tester notes that this jerking begins before your eyes deviate to a forty-five degree angle, and, when you move your eyes as far as possible to one side, the jerking is fairly distinct.

You wonder what it means. According to the Salt Lake Police Department, the test means you have a blood alcohol content of at least .10 grams per deciliter.[5] If the test were performed while you were driving a car, the test could be used as evidence that you were driving your vehicle with a blood alcohol content over the legal limit of .08. This "bouncing-eyeball" test is officially known as the Horizontal Gaze Nystagmus or HGN test.

"Nystagmus" is one of several types of abnormal ocular movements defined as "an involuntary rapid movement of the eyeball, which may be horizontal, vertical, rotary, or mixed."[6] The theory behind the gaze nystagmus test is that there is a

Mr. Dellapiana is a trial attorney with the Salt Lake Legal Defenders Association. This article represents the view of the author and does not in any way reflect the opinion of the Legal Defenders Association. In addition, Mr. Dellapiana was the attorney of record in the case that is the subject of this article, and readily admits he may not be an objective analyst.

[1] 912 P.2d 997 (Utah Ct. App., *cert. denied*, 919 P.2d 1208 (Utah 1996)).

[2] *See e.g. Commonwealth v. Sands*, 675 N.E.2d 370 (Mass. 1997) ("The majority of courts which have addressed this issue have concluded that the HGN test is based on an underlying scientific proposition, requiring the proponent to meet the test for scientific evidence prior to the admission of the HGN evidence."); *People v. Leahy*, 882 P.2d 321, 332-33 (Cal. 1994) (en banc) (holding that HGN is scientific evidence); *State v. Witte*, 836 P.2d 1110, 1116 (Kan. 1992) ("The majority of jurisdictions that have considered the issue have held that the HGN test is scientific evidence"); *see also Florida v. Meador*, No. 950584 (Fla. Dist. Ct. App., May 15, 1996) (following the "majority rule" that HGN is scientific evidence).

[3] *See Garcia*, 912 P.2d at 1000.

[4] *See State v. Rimmasch*, 775 P.2d 388 (Utah 1989) (requiring a foundation of inherent reliability as a prerequisite to the admission of evidence based on scientific principles).

[5] *See* Trial Transcript at 56 (unpublished manuscript on file with the Salt Lake Legal Defenders Association).

[6] *State v. Witte*, 836 P.2d 1110, 1112 (Kan. 1992) (quoting DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1068 (1974)).

correlation between the amount of alcohol a person consumes and the angle of onset of the nystagmus.[7]

When conducting the HGN test, the officer is told to look for three indicators in each eye: (1) angle of onset occurring before forty-five degrees in each eye; (2) ability of the eye to follow the moving object smoothly; and (3) the presence of moderate or distinct nystagmus at maximum deviation. If the officer finds four of the possible six clues, then he can purportedly classify the suspect's blood alcohol content as above .10 percent.[8]

The HGN Test Requires a Foundation

Whatever legitimacy the HGN test may have is clearly based on scientific principles. A foundational showing of the test's underlying principle is necessary because the alleged causal link between bouncing eyeballs and having a blood alcohol content above .10 percent is beyond the understanding of lay jurors.[9] The additional step allegedly connecting a positive HGN test result with the ability to safely operate a motor vehicle similarly exceeds lay comprehension. In addition, the mechanics of the HGN test, unlike those of other field sobriety tests (e.g. one-leg stand, walk and turn), are not within the common knowledge of lay jurors.[10]

Furthermore, the methodology of the HGN field test is fraught with fallibility. First, the failure to use any device to measure the critical angles leads to inconsistent and inaccurate results.[11] Moreover, there is disagreement among authorities as to what is the correct angle of onset. For example, according to one authority, fifty to sixty percent of sober individuals who deviate their eyes more than forty degrees to the side will exhibit nystagmus, and this nystagmus cannot be distinguished from alcohol gaze nystagmus.[12]

Second, no device is used to keep the test subject's head still during the test. Head movement affects the officer's estimation of angle of onset, thus affecting the result of the test.[13]

Third, nystagmus has causes other than alcohol consumption: nystagmus is caused by some illnesses and by substances other than alcohol, and some people in the population exhibit natural nystagmus.[14]

Fourth, the test as typically performed on the street in the dark without measurements or any recording device, is not verifiable by independent means. There is no way to review and confirm or refute the officer's subjective observations; thus the roadside test is prone to abuse.

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"[T]he field-administered HGN test is simply not an inherently reliable method of measuring gaze nystagmus."

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In summary, the field-administered HGN test is simply not an inherently reliable method of measuring gaze nystagmus. Moreover, the test's purported ability to prove alcohol intoxication is not clear. Further, as the alleged connection between gaze nystagmus and blood alcohol content is beyond the understanding of lay jurors, HGN evidence has the potential to mislead jurors.

Consequently, Utah courts considering the admissibility of HGN evidence should reject the *Garcia* court's approach and apply Utah's "inherent reliability" standard. The required foundation necessarily would address both the scientific principle underlying the test and the methodology for administering the test.

Why a Foundation Is Necessary

There are good reasons for requiring foundation in scientific evidence cases. The foundation separates scientific wheat from chaff. This is important because the prejudicial effect of erroneously admitted evidence is greater when scientific evidence is at issue than for other types of evidence. This is because of the danger that the finder of fact will simply adopt the judgment of the "expert" despite an inability to accurately appraise the validity of the underlying science.[15] As the Utah Supreme Court stated its concern:

> We remain wary of the potential of such evidence to distort the fact-finding process by reason of its superficial plausibility and its potential for inducing fact finders to accept experts' judgments on critical issues rather than making their own. And we are convinced that trial courts sometimes admit "scientific" evidence without scrutinizing its foundations carefully. It is for these reasons that we have imposed the threshold reliability requirement.[16]

The potential dangers of scientific evidence are enhanced when the witness presenting the evidence cannot explain the principles underlying the evidence. For example, the California Court of Appeals explained the problem of allowing police officers with no scientific expertise to state their opinions regarding the relationship between alcohol ingestion and HGN:

> [HGN] rests on scientific premises well beyond [the officer's] knowledge, training, or education. Without some understanding of the processes by which alcohol ingestion produces nystagmus, how strong the correlation is, how other possible causes might be masked, what margin of error has been

[7] *See Witte*, 836 P.2d at 1112 (citing Carper & McCarney, *Gaze Nystagmus: Scientific Proof of DUI?*, 77 Ill. B.J. 146, 147 (1988)).

[8] National Highway Traffic Safety Administration, DOT-HS-806-512, Improved Sobriety Testing (January 1984) (reprinted in 2 NICHOLS, DRINKING/DRIVING LITIGATION (26 App. A (1991)) (hereafter "1984 NHTSA Study").

[9] *See Witte*, 836 P.2d at 1115 ("The HGN test is distinguished from other field sobriety tests in that science, rather than common knowledge, provides the legitimacy for HGN testing.").

[10] *State v. Merritt*, 647 A.2d 1021, 1028 (Conn. App. Ct. 1994).

[11] *See* 2 NICHOLS, DRINKING/DRIVING LITIGATION (26:01, at 4 (1991)); *Witte*, 836 P.2d at 1119-20.

[12] *See Witte*, 836 P.2d at 1119 (internal citations omitted); *see* also NICHOLS, *supra* note 11 at 3.

[13] *See Witte*, 836 P.2d at 1119-20; *see* also ROULEAU, Unreliability of the Horizontal Gaze Nystagmus Test, 4 AM. JUR. PROOF OF FACTS 3d 439 (1989).

[14] *See Witte*, 836 P.2d at 1120 (reviewing articles indicating that nystagmus indistinguishable from alcohol nystagmus has many causes other than alcohol ingestion).

[15] *See Rimmasch*, 775 P.2d at 396 (citing MCCORMICK ON EVIDENCE (607-08 (E. Cleary, 3d ed. 1984); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 702-42, -43 (1988).

[16] *Rimmasch*, 775 P.2d at 399.

shown in statistical surveys, and a host of other relevant factors, his opinion on causation, notwithstanding his ability to recognize the symptom, was unfounded.[17]

Moreover, although the prejudice resulting from improperly admitted evidence can be significant in a civil contest between private parties, the reasons for requiring a foundation for evidence based on scientific principles apply with even more urgency in criminal cases because of the due process concerns that arise when the government brings its resources to bear against a private citizen in a prosecution that affects liberty interests.[18]

Thus, the *Garcia* decision creates a dangerous precedent because the proponent of scientific evidence can evade the required foundational prerequisites merely by proffering that the evidence was not offered "as" scientific evidence. For example, after *Garcia*, if a plaintiff in a paternity case were unable to meet the foundational requirements of *Phillips v. Jackson*,[19] the court apparently could cure all prejudice simply by instructing the jury, as the *Garcia* jury was instructed, that "the witness was not testifying as an expert!" Or, a court could now disregard *Rimmasch* and allow witnesses to testify about their opinions of the truthfulness of a sex crime victim without requiring any foundation of the reliability of the sexual abuse victim profile, as long as it added a "*Garcia* instruction" informing the jury that "there was no evidence presented, nor should you infer or assume, that the sex victim profile is a scientifically reliable way to determine whether the victim is telling the truth."

The rationale of *Garcia* would seem to similarly apply to battered child syndrome testimony, polygraph evidence, and statistical, medical, and psychiatric testimony. Moreover, the witness testifying would need relatively little expertise. Note that the police officer who conducted the HGN test in *Garcia* admitted that he did not know anything about the process by which alcohol ingestion supposedly produces nystagmus nor did he know whether the HGN test was inherently reliable or generally accepted.[20]

The justification for the foundational prerequisites required in *Phillips* and *Rimmasch* also applies to HGN tests. The foundation is necessary to guard against the possibility that police officers who have not obtained a reliable blood or breath alcohol test will nonetheless testify that a suspect's bouncing eyes show a blood alcohol level over .08. Requiring a prior showing of reliability is necessary to keep the trier of fact from determining criminal culpability based on unreliable evidence.

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> ***The crux of the* Garcia *court's error was in admitting the HGN evidence without this prior foundational showing.***

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Utah's Standard for Scientific Evidence: Inherent Reliability

Utah law requires the proponent of scientific evidence to show that the principles or techniques underlying the evidence are inherently reliable.[21] Prior to *Garcia*, at least, it was clear that this foundational requirement goes to admissibility, not merely to weight.[22] In the absence of such an initial showing, the evidence must be excluded.[23]

Utah's standard for the admissibility of scientific evidence is more restrictive than its federal counterpart. Under federal law, the *Frye* test, requiring a showing of general acceptance in the scientific community, has long been the standard. The *Frye* test is no longer controlling, however. In *Daubert v. Merrell Dow Pharmaceuticals*, the United States Supreme Court ruled that the *Frye* test has been superseded by the adoption of the more liberal Federal Rules of Evidence.[24] The Court particularly relied on Rule 702, Federal Rules of Evidence, governing expert testimony, explaining that "[n]othing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility."[25] Rule 702, of course, allows a witness to present an opinion to the jury as long as it "will assist the trier of fact to understand the evidence or to determine a fact in issue."[26]

This change in the federal standard has not changed Utah's standard for the admissibility of scientific evidence, however. The argument that the adoption of Rule 702 superseded Utah's test for the admissibility of scientific evidence has previously been raised and settled in Utah. In *State v. Rimmasch*, the Utah Supreme Court held that the test for admissibility of scientific evidence is more restrictive than is the test for expert evidence generally. The Court made it clear that "regardless of how Rule 702 phrases the general test for the admissibility of expert testimony, our case law superimposes a more restrictive test whenever scientific evidence is at issue."[27] That test is the inherent reliability standard announced in *Phillips*.[28]

In sum, Utah law requires a showing that the principles underlying scientific evidence are inherently reliable. The crux of the *Garcia* court's error was in admitting the HGN evidence without this prior foundational showing, thus violating the settled rule that the foundation goes to admissibility, not just to weight.

The Case: *Salt Lake City v. Garcia*

On March 5, 1994, Officer David Warner observed a car driven by Carol

[17] *People v. Williams*, 5 Cal. Rptr. 2d 130, 135 (Cal. App. 1992).

[18] *See State v. Bresson*, 554 N.E.2d 1330, 1336 (Ohio 1990) (restricting HGN testimony because, inter alia, the test's recognized margin of error creates a due process problem in criminal cases which require proof beyond a reasonable doubt); *United States v. Downing*, 753 F.2d 1224, 1241 (3d Cir. 1985) (suggesting added caution because unreliable or misleading scientific evidence will increase the likelihood of an erroneous verdict).

[19] 615 P.2d 1228 (Utah 1980).

[20] 912 P.2d at 1000; Trial Transcript at 22-24.

[21] *See Rimmasch*, 775 P.2d at 403 (sexual abuse profile testimony not allowed absent proof of reliability of principles and techniques); *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980) (foundation required prior to admission of paternity tests as to reliability of both human leucocyte antigen tests in general and of particular tests in each case).

[22] *See Rimmasch*, 775 P.2d at 398.

[23] *See id.*

[24] *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

[25] *Daubert*, 509 U.S. at 588.

[26] FED. R. EVID. 702.

[27] *Rimmasch*, 775 P.2d at 397 (Utah 1989).

[28] *See id.* (citing *Phillips v. Jackson*, 615 P.2d 1228 (Utah 1980)).

Garcia. Warner stopped the car and ticketed Garcia for a seatbelt violation because two teenagers were sitting on the sunroof of the car with their legs inside the car.[29] Warner testified he saw no moving violations by Garcia.[30]

During the course of the stop, Warner noted an odor of alcohol and decided to administer some field sobriety tests. The first test Garcia was ordered to perform was the HGN test.[31] Warner testified that Garcia exhibited nystagmus in both eyes on all three components of the test: lack of smooth pursuit, distinct nystagmus at maximum deviation, and onset of nystagmus before forty-five degrees.[32]

Warner testified that this score indicated that Garcia's blood alcohol content was .10 or greater.[33] Garcia refused to take the breathalyzer test, so the HGN test result was the only evidence adduced at trial that Garcia's blood alcohol content exceeded the legal limit of .08.[34]

At a pre-trial motion hearing, Garcia suggested that, because the HGN test was based on a scientific principle, the following foundational requirements would be required in regard to HGN testimony:

> (1) that nystagmus of the eye is an inherently reliable indicator of an individual's blood alcohol level or ability to safely operate a motor vehicle;
>
> (2) that the three-part HGN test performed by Warner is an inherently reliable means of measuring nystagmus of the eye;
>
> (3) that Warner properly performed the tests on this occasion;
>
> (4) that Warner was sufficiently qualified to testify as to the test's result.[35]

After the hearing, the trial judge found that the officer was not able to provide any evidence that the HGN test is a scientifically accurate means of determining alcohol or drug impairment.[36] Nevertheless, the judge permitted Warner to testify as to the results of the HGN test, instructing the jury that they were not to infer or assume that the test was scientifically accurate.[37] Specifically, the jury was instructed:

> You have heard evidence that the defendant was administered a field sobriety test known as the "Horizontal Gaze Nystagmus" or HGN test. However, there has been no evidence presented, nor may you infer or assume, that test is a scientifically accurate means of determining alcohol or drug impairment. . . .[38]

After trial, the jury found Garcia guilty of Driving Under the Influence. On appeal, Garcia argued that the HGN test was scientific evidence and that the trial court erred by admitting the evidence without first requiring the prosecution to establish that the test is inherently reliable.

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"If the rule of law is to have any practical significance, then alleged violations of the rules must be met head-on by appellate courts."

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The Utah Court of Appeals denied Garcia's appeal. The gist of the opinion was that, because the jury was instructed that the HGN testimony was not admitted "as" scientific evidence, the trial court was not required to follow the *Rimmasch* inherent reliability standard and requirements.[39] A Petition for Certiorari was filed with the Utah Supreme Court, but was denied without explanation on July 10, 1996.[40]

Appellate Review Issues

The *Garcia* opinion raises concerns about the proper role of judicial review. The *Garcia* jury was allowed to consider the HGN test result despite a specific finding by the trial court that the prosecution failed to show that the evidence was reliable.

The Court of Appeals abdicated its judicial responsibility to serve as the gatekeeper for the admission of evidence by upholding the admission of the HGN evidence: (1) without a foundation of reliability, and (2) without even deciding whether it is scientific in nature:

> Because the court allowed Officer Warner to testify only as to his training, experience, and observations, the court was not required to follow the *Rimmasch* inherent reliability standard and requirements. In so holding, we do not address whether HGN test results are scientific evidence or what standard of admissibility they must meet if admitted by a court as scientific evidence.[41]

The fatal flaw of this logic is that, if HGN is by its nature "scientific evidence," then *Rimmasch* requires a foundation of inherent reliability as a prerequisite to admission.

This extraordinarily dubious practice of avoiding appellate review of substantive issues should be rectified. If the rule of law is to have any practical significance, then alleged violations of the rules must be met head-on by appellate courts. If a defendant's right to appeal is to be more than an empty exercise, then prejudicial error analysis must be taken seriously. This failure to decide is worrisome to those who are concerned that the Court of Appeals occasionally appears to have as its goal clearing the docket as opposed to clarifying the issue. Judicial economy may more

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[29] See Trial Transcript at 69-73.

[30] See Trial Transcript at 45.

[31] Garcia also was required to perform three other field sobriety tests, which she performed with varying degrees of success. However, because there was no breath test nor any moving violations there was no conclusive evidence of guilt.

[32] See Trial Transcript at 54-57.

[33] See Trial Transcript at 56; see also id. at 21, 28.

[34] See Salt Lake Code §12.24.100. Notably, because the city argued that Garcia was incapable of safely driving and not that she had a blood alcohol content ("BAC") over .08, Warner's testimony that the HGN test indicated a BAC of .10 or higher was not even relevant to prove the city's case. At the very least, some additional foundation would be necessary to demonstrate a causal link between a positive HGN test result and one's ability to safely operate a motor vehicle. Because the HGN testimony was not relevant, the prejudicial impact of the erroneously admitted test substantially outweighed its probative value.

[35] See Trial Transcript at 14; *see also Witte*, 836 P.2d at 1111, 1117 (requiring initial foundation that: (1) nystagmus of the eye is, in fact, an indicator of alcohol consumption to the degree that it influences or impairs the ability to drive, and (2) the method used to test HGN is a valid test to measure or perceive that phenomenon); *see also Phillips*, 615 P.2d at 1235 (enumerating elements required for foundation for the admissibility of paternity tests).

[36] *See Garcia*, 912 P.2d at 1001.

[37] *See id.*

[38] *Id.* at 1000-01.

[39] *See id.*

[40] 919 P.2d 1208 (Utah 1996).

[41] *Id.*

surely be achieved, not by clearing cases without deciding issues, but by deciding issues now to avoid future litigation.

The unexplained denial of Garcia's petition for certiorari is equally disturbing. Review should have been granted for several reasons: (1) the issue of whether the HGN test is "scientific" evidence involved an important question of first impression; (2) the Court of Appeals' opinion clashed with precedent regarding the admissibility of scientific evidence; (3) the trial courts are split on the issue,[42] and the issue arises hundreds of times a year.[43] Without the benefit of a hearing before the Utah Supreme Court, we are left to speculate about the current state of the law.

Our appellate courts have the power and the duty to interpret the law and to ensure that it is applied uniformly throughout the jurisdiction. Thus, guidance of the appellate courts in Utah is important to ensure that similarly situated defendants are treated equally by the trial courts in Utah.

Conclusion

The fundamental reason the *Garcia* opinion is built on a flimsy foundation is that the Court of Appeals did not decide the critical issue: that is, whether the HGN evidence at issue is scientific evidence. If, as the majority of jurisdictions agree, the HGN test is scientific in nature, then its admission without a prior showing that the test is inherently reliable was clearly error. If not, the Court of Appeals can and should provide a reasoned decision on the point. By avoiding the decision, the Court of Appeals unwittingly created a shortcut that could adversely affect the fair administration of justice.

[42]An informal survey of the attorneys in the misdemeanor division of the LDA indicates that the judges in the Third Circuit Court are fairly evenly divided as to whether they allow HGN evidence. In oral argument before the Court of Appeals, counsel for the prosecution also noted a split of authority. *See Garcia*, 912 P.2d at 1001 (Bench, J., concurring) (noting that both parties indicated that trial courts need further direction on this issue).

[43]In 1994, the LDA handled 578 DUI cases in Salt Lake County. Private counsel and pro se defendants account for many more cases in Salt Lake County, and of course there are DUI cases throughout the state.

THE VOIR DIRE INTERVIEW

The View From the Other Side

Editor's Note: *We were curious what the other side thinks of us; that is, the courtroom personnel other than judges. We hear enough from them. But what about from the reporters, the clerks, and the bailiffs? To find out, our reporter conducted a series of interviews in the halls and courtrooms of the Third District Court in Salt Lake City, asking whether lawyers are doing things that they shouldn't be doing, or contrariwise, aren't doing things they should. The comments we heard were enlightening.*

Courtroom Clerks

If a case set for trial is settled, call and tell me right away so it can be taken off the calendar. Don't leave this for the final settlement papers. There are many other people who want your spot on the trial calendar, and the sooner it is freed up, the better.

I am tired of being talked-down-to by lawyers. Just because someone has a law degree doesn't give them the right to turn up their nose at me. I feel like some attorneys use me when it serves their purposes and could care [sic] less about me otherwise. I will see them on the street and they refuse to recognize me.

When leaving a message for a clerk, always leave the case name and number, and tell me what it is you want. Don't just leave your name and number, leaving me no clue as to what you want or any opportunity to research it before calling you back.

Don't ask me how your case is going in trial. It puts me on the spot. Also, most of the time I am doing something else, and am not really listening to the evidence anyway.

I was a courtroom clerk for seventeen years and never felt that attorneys were not friendly. Some court personnel may get that impression because the attorneys are so very focused on the problem of the moment and lose track of the need to say hello.

I get annoyed by attorneys who just show up to see the judge without calling first to see if she's available. Some judges don't care about these interruptions but my judge does. They don't need to schedule an appointment, but they should at least find out when's a good time to show up.

It amazes me how rude–and stupid–some lawyers are in dealing with us. Don't they know that we talk with the judges? A little common courtesy goes a long way with me. The bad ones are only punishing themselves and their clients.

Lawyers should learn the exhibit marking system. Each judge is different, but all of them hate time being wasted on marking exhibits incorrectly or marking them during examination of a witness. It's easy to pre-mark exhibits before trial, and I will help you do so.

Don't put notices of hearings in the body of an order. I may not see them, and they won't get calendared.

Tell clients not to call me if you are their lawyer. If there's a lawyer on the case, he or she should call the court, not the client.

I am busy too, I don't always have time to visit or to be interrupted, and it's not because I am anti-social or rude. There's a lot to do and I am sorry that I can't always just stop to chat.

Don't try to schedule hearings before the allotted period under the rules.

I hate it when I give some lawyers a very tentative possible time to see the judge and then they treat it as if it were a guaranteed time period just for them.

Lawyers shouldn't impeach me in front of the judge. I dislike it when they say something like, "Well, your honor, your clerk told us this or that," and it's not true.

Most of the lawyers I see are very professional and very courteous to me. I really haven't had any problems, except with a few. They should know that the judge does not always want to be interrupted and is working in chambers, not just waiting for lawyers to stop by. That's the only problem I've noticed.

Court Reporters

It's amazing how some "big name" attorneys get a very poor record from the reporter because they don't know how to speak for the record or if they do, they don't pay attention to it. This is a real basic skill that's often overlooked.

Most attorneys need to learn to speak more slowly and distinctly, especially with the new "real-time" transcripts. There's only one chance to get it right.

I wish lawyers would slow down and not speak when the other attorney or the witness is speaking. Don't get so excited, and focus more on speaking slowly.

Eloquence is a lost art among the trial lawyers. They used to be better and now most of them don't speak as well. There's a tendency to speak in street talk, and I think juries like to see speech more formal and dressed-up in a courtroom.

Lawyers should watch someone like Dick Burbidge and notice what he does: speaks clearly, loud, but not too loud, and always makes a nice record by not interrupting or speaking over other people.

All lawyers need to remember that "this" or "that" doesn't work when reading a written transcript–you have to be clear and also make the witness be clear in referring to an exhibit.

It helps me to have a copy of the exhibits, particularly the ones from which there will be quoting by the lawyers or the witnesses.

Always act like a professional. I had an attorney in our court last week who chewed gum all week long. Or maybe it was a loose plate. But it sure looked terrible to everyone and we all talked about it.

Bailiffs

It drives me nuts to have attorneys and their clients who can't be on time, especially after breaks in a trial. Don't make the bailiff go looking for you while the judge and the jury wait!

Lawyers need to know that showing up on the morning of trial expecting to set up elaborate audio-visual equipment for the first time isn't going to be appreciated.

Lawyers, especially in domestic cases, need to remind clients and witnesses to dress appropriately for court. Some judges will not accept inappropriate attire and it can be embarrassing for the lawyer.

Attorneys need to know what each judge allows and doesn't allow. For example, some are very particular about approaching witnesses without permission.

Some clients need to be told not to talk in court, especially when in the audience, or to make faces at evidence they don't like. Where do they think they are? Babies and toddlers should not be brought to court.

Turn off the cell phones before coming into the courtroom! Some judges would like to ban them entirely, like they do over in the federal court. It's really annoying when they go off during a trial or hearing. The same goes with doctors and their beepers.

I wish lawyers wouldn't ask me how their case is going. It's not very professional and what am I supposed to say if they are doing poorly?

Learn to use your equipment before you try it out in court in front of a jury. It always looks bad when an attorney is fumbling around trying to get some piece of equipment to work. Better to leave it at the office unless you really need it and know how to use it.

Summary – Some Distilled Advice

1. Above all, be considerate of the people who work in the courtroom. They are doing a job and resent being treated as underlings. Learn their names and don't condescend. They have seen many more trials than you will ever see. It scarcely serves your client's cause or your professional reputation to ignore or patronize the courtroom personnel.

2. If a case set for trial is settled, call and advise the clerk that day, and, as always confirm it in writing.

3. A week before trial, provide the indexes to key depositions to the court reporter for inclusion into the reporter's "dictionary." Better still, give the reporter copies of the ASCII disks for the key depositions. Then the reporter doesn't have to "learn" all the proper names and technical terms peculiar to your case, and you'll get a better transcript, especially if "real-time" reporting is used for instant transcripts.

4. Give the reporter copies of the exhibits on which witnesses are expected to testify. This makes it much easier to prepare an accurate transcript.

5. Speak distinctly and slowly, and don't speak over the other attorney or the witness.

6. Learn to speak for the record. Don't use "this" or "that" or similar inexact words without clarifying the reference. Make witnesses do the same.

7. Check with the bailiff on where clients and witnesses may be seated. Many judges will only allow attorneys in front of "the bar" and clients at counsel table during trial. Everyone else must stay behind the bar.

8. Discuss the placement of blackboards, easels, or large exhibits with the bailiff before trial. Don't show up the morning of trial with an array of devices expecting to set up and get it right the first time.

9. Ask the bailiff or the clerk about the judge's preferences on courtroom protocol: for example, will the judge require attorneys to address the jury from behind the podium? Does the judge require attorneys to ask permission to approach a witness? Does the judge have any other preferences on attorney conduct or movements?

10. Learn the court's exhibit marking system (they vary from judge to judge) and pre-mark exhibits before the trial, if possible. Don't waste everyone's time marking exhibits while a witness is on the stand.

11. Resist the temptation to ask court personnel how your case is going. Aside from being amateurish, it puts them in an uncomfortable situation. Suppose they think your case is going poorly–what do you expect them to say?

12. Rehearse the use of audio-visual devices, such as overhead projectors. Nothing detracts more from your image as a professional than fumbling over presentation hardware in front of the jury.

13. If you want to speak with a judge, call the clerk and ask when the judge will be available. Some judges don't mind attorneys just showing up, but others think it's intrusive and rude to show up in court asking if the judge "has a minute." Judges are as busy as you are, and value their focused time in chambers without interruptions. On the other hand, a truly urgent problem can always be dealt with if necessary.

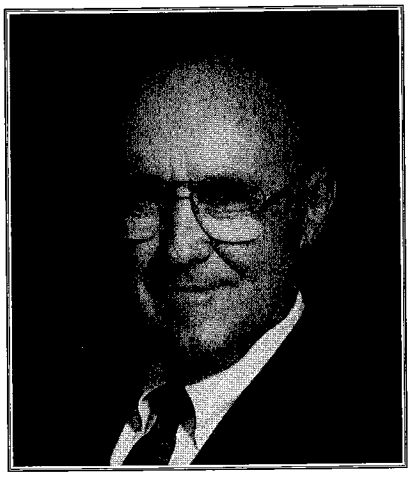
14. Ask the clerk for the judge's preferences on courtesy copies of motions papers. Most appreciate them but some don't want them. Keep in mind that your judge doesn't have a law library in chambers. Making copies of the motions papers from both sides, as well as the most important cases, neatly bound, is usually appreciated. Deliver them at least two days before the hearing, noting in your cover letter the date and time of the hearing.

Salt Lake Attorney, Ellen Maycock, Joins Mediation Company

Ellen Maycock, partner of the Salt Lake City law firm of Kruse, Landa & Maycock, recently contracted with Intermountain ADR (Alternative Dispute Resolution) Group to serve on its team as a Mediator and Early Neutral Evaluator. Maycock has been practicing law since 1975, and is chair of the Utah Supreme Court Advisory Committee on the Rules of Evidence. She has served as president of the University of Utah College of Law Alumni Association and as president of the A. Sherman Christensen chapter of the American Inns of Court. Her areas of practice include domestic, commercial litigation, contracts, construction and employment law.

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

IN MEMORIAM



David K. Watkiss

Wayne L. Black & David K. Watkiss

Wayne L. Black

by Fred R. Silvester

I had the privilege to serve my apprenticeship in this business under the direction of Wayne L. Black. Today's trial lawyers sometimes have difficulty comprehending the practice before the advent of endless discovery, settlement pressures from trial judges, and the burgeoning industry of Alternative Dispute Resolution. Wayne told the stories of a different generation of trial law, when he tried hundreds of jury trials, often back-to-back, with no discovery.

Wayne was proud of being a lawyer, and it was evident in the way he prepared every case he handled. Wayne never accepted a case without beginning to develop his closing argument immediately after the initial client interview. I will always cherish memories of returning from depositions in major personal injury cases and, after reporting the highlights to Wayne, listening to him weave the new facts into his evolving argument. The ability to synthesize issues, to draw parallels, and to make the complex understandable, was the essence of the genius of Wayne's preparation.

Trial preparation always exposed another part of Wayne–his passion for knowledge. Wayne read philosophy, politics, fiction, news, history, and oratory, and thrived in the knowing. His thirst for knowledge was a major component in his closing arguments, and I will always recall Wayne's facility for employing his command of literature, from the Bible to Lincoln, to evoke a jury's empathy.

A memorial stroll would be incomplete without recognizing Wayne the mischief-maker. Once, in Judge Winder's courtroom, as Wayne gave one of his masterful speaking objections, Cliff Ashton suggested, "Mr. Black, if you feel that way, why don't you just object?" Wayne's immediate retort: "Thank you, Mr. Ashton, I think I will." In that short interchange, one of the best judge-controlled courtrooms passed into the control of two old masters. Wayne's mischief was never mean or malicious, though, and we all could learn a great deal from Wayne's "civil" advocacy.

Wayne was a lawyer's lawyer. He brought difficult factual and legal issues into a focus that made sense. And he made learning the art of lawyering exciting. Wayne understood, as few do, that the law is not an academic pursuit, but a dynamic experiment in human relations.

Mr. Silvester is a partner in the Salt Lake City law firm Silvester & Conroy.

David Keith Watkiss

by Jeffrey D. Watkiss

David Keith Watkiss ("DKW"), a proud member of the Utah State Bar for forty-seven years, observed in a 1983 address to the International Academy of Trial Lawyers, of which he was then Dean: "American lawyers have enjoyed the greatest freedom and independence of any lawyers in the world and as a result have played a very influential role in shaping our society." Because of that influence, DKW urged his fellow trial lawyers to repay their communities with the highest ethical conduct and a firm belief that the trial is not theater, but civil society's "truth finding process." DKW took true joy in that process. He genuinely loved being a

Mr. Watkiss is a partner of the Washington, D.C. law firm Bracewell & Patterson, L.L.P.

lawyer from the date of his admission to the Bar in 1949, until his death on April 28, 1997.

DKW's career as a trial lawyer reflected the America that both nurtured and tested his mettle from his birth in 1924 as the only child of English/Russian Jewish immigrants, through a Depression-era youth, front-line infantry service in the Big War, and later as a Lieutenant Colonel in the Judge Advocates General, to devoted husband, father of three baby-boom boys, and ultimately grandfather and generous mentor to countless young lawyers in this jurisdiction and many other venues.

Following active duty on the Allies' front lines in the Netherlands and Belgium, and an assignment to General George Marshall's personal quarters during the Potsdam Conference at war's end, DKW wanted to finish his education and become a foreign correspondent. He returned to Utah and, on the GI bill, enrolled in the Utah College of Law. DKW earned his degree, and moved into the job force just as Frank Moss was building a staff of Deputy County Attorneys in Utah County.

As a young Deputy County Attorney, DKW loved preparing and presenting cases to juries of his peers. Pay, however, was so poor that the Deputy County Attorneys were permitted one day off per week to attend to their own clients. DKW's clients in those days included a client that loaned Japanese war currency to Japanese prisoners of war so that they could buy food and thereby avert starvation in a notoriously cruel internment camp in the Philippines. With his lawyer pig farmer friend, John Rokich, DKW represented Haircut Harry, Mr. New York Shoes, and other characters in a variety of tort and contract cases. DKW treated each case as if it were the most important of his career.

When his wife Dorothy Berntson became pregnant with their first son, DKW sought more remunerative work. He took a position with Standard Oil of California and moved to Colorado. But DKW longed to return to the courtroom and the challenge of the jury.

DKW returned to Salt Lake City, where he met fellow army officer reservist Calvin Rampton, who recruited DKW into his firm, together with Harry Pugsley and Zar Hayes. It was the first of many firms that DKW would ultimately head, then move on to new associations.

In those early years, Cal was perpetually running for some political position, and usually losing. When Cal was finally elected to the first of his three terms as governor, he turned to DKW to represent the State's interests when the United States Department of Defense announced its intention to sell to private developers much of the valuable Wasatch Front foothills real estate that was within the Fort Douglas boundaries. DKW negotiated a favorable settlement whereby most of the Fort's real estate was transferred to the University of Utah and developed into what today is Research Park and Red Butte Canyon.

DKW's war experiences as an infantry scout gave him a certain sangfroid and self-possession that made it possible for him to immerse himself in a case, try it, forget it, and move on to new challenges. Long-time friend and former partner Herschel Saperstein recalls feverishly preparing for a case with DKW for several months. After the case was presented and closing arguments made, the jury decided to deliberate into the night, rather than being dismissed for the day. Herschel and the rest of the trial team anxiously paced about, awaiting the jury's return. Sometime past midnight, they became aware of a low grumbling sound emanating from DKW's office: DKW was snoring, sound asleep.

In the 1960s and early 1970s, DKW increasingly had occasion to express and develop his strong commitment to the Bill of Rights. Together with his friend Ron Boyce, DKW defended movie house operators when authorities closed them down and seized films the authorities deemed obscene. They were a good team: they worked late into the nights, refining arguments, testing ideas, and preparing their cases. They joked about the politicians and religious leaders who believed that Doctor Zhivago was a dirty movie.

The firm had evolved into Pugsley, Hayes, Watkiss, Campbell & Cowley when tragedy brought DKW one of what would be a number of high-profile product liability cases in the aviation field. DKW defended Boeing after one of its commercial jets crashed at the Salt Lake International Airport, killing many on board. It was precisely the type of factually complex case at which DKW excelled. He jumped into the complex facts and did what he often admonished his young colleagues to do: he hugged the case. DKW prevailed by persuading the jury that it was pilot error, not the plane, that caused the crash.

At approximately the same time, DKW was engaged by a scrappy little joint venture that aspired to, and ultimately became, the owner of the pipeline that was then the only source of natural gas in Utah, Idaho, Oregon, and Washington. The fate of the immensely valuable pipeline was being determined in antitrust litigation in a United States District Court. This case consumed years of DKW's attention, bouncing back and forth between district courts, courts of appeal, and the United States Supreme Court.

Throughout the 1970s and 1980s, DKW came into increasing prominence as a highly effective trial advocate. He was honored by membership in the International Academy of Trial Lawyers (of which he was the first Utahn to serve as Dean), the International Society of Barristers, and the American College of Trial Lawyers. He also was honored as Alumni of the Year by his alma mater, the University of Utah.

DKW saw two of his three sons and all three of his daughters-in-law become lawyers. His youngest son, Michael, fulfilled DKW's early career goal by becoming a journalist and correspondent. DKW was a role model not only for his family, but also for several generations of lawyers. Judge David Winder, a long-time friend and colleague of DKW, explained that the example DKW set for all trial lawyers was of absolute preparation and absolute integrity. "He was just so damn compelling!"

With his oldest son, David, and his daughter-in-law Elizabeth Dunning, DKW continued to practice trial law with Watkiss, Dunning & Watkiss until his death. He will long be missed.

A CREDIT TO THE PROFESSION

Judge David Winder

by Gordon W. Campbell

It was a very nasty deposition and it ended abruptly when I said to my client, "do not answer that question." I had done such a thing before, but never before had I been forced to draw breath when, as this one did, opposing counsel said, "we're going to the judge." The judge in this case was David Winder, back in the days when he was on the state bench.

The case involved trade secrets and a former employee's covenant not to compete. Given the state of everyone's blood, it might as well have been the world's ugliest divorce. For nearly an hour my adversary and I stood before this judge whom I had barely met and let our respective spleens vaporize all over his court room. We spewed sanctimonious venom at each other, around each other, and about each other, until it finally dawned on me how badly we were both behaving. Not even in Arizona, from where I had recently immigrated, did lawyers act that way in open court.

As for the judge, he just sat and listened attentively. In the end he said, "here is what we're going to do," and with great composure he dictated an order to the court reporter. Then he said, "thank you gentlemen," and he walked off the bench.

A week later I was in the men's room at the Little America Hotel and I heard someone say, "Hi, Gordon." When I turned, I saw it was Judge Winder. I recall I was flattered that he should remember my name.

"It looked," he said to me, "like you and old [what's his name] had the knives sharpened up the other day."

He was chuckling when he said it.

"Oh, your honor," I said, "I apologize; I hope I wasn't in contempt."

It was what the judge said next that causes me to remember this aging episode with such clarity, that causes me to recite the little story today. I have tried a lot of cases in front of David Winder since that day in the Little America men's room, and somehow every single case has brought back to me what he said that day, when I told him I hoped I had not been in contempt.

"No, no, Gordon, not at all," he said in a very soothing way. "I know how it can get out there."

In case after case after case Judge Winder has demonstrated that what he said that day was absolutely true, that he does know how it can get out here. It is, I believe, this gift for knowing how it can get out here that has galvanized all his many other gifts, those talents that are so prodigious, and has made him what he is. Will I get any real contradiction if I just come out and say it–that by acclamation both within this community and for a substantial distance without–he is simply the very best, the compleat jurist?

You want to know why all the lawyers love him? If we are honest, the soundness of his rulings and the results for the client may come second. Isn't it primarily because he is so exquisitely sensitive to what a court room can do to blood pressure and other more painful indicators of emotional well being? Isn't it because of that sensitivity that, no matter how stupid he has to tell you that you have just been, he does it in a way that you can keep your head up? You want to know why the sophisticated trial lawyers admire him? He knows the problems of proof. He knows what you are up against, just the way the true aficionado of any contest knows the burdens of the contestants. I have heard more than once that, before he went on the bench, Judge Winder was an extraordinary trial lawyer. Of course, I never saw him in action, but I believe it to be true. This is because, when it comes to knowledge of the rules of evidence and their application, he is just about the best in the business. If it ought to come in, it comes in. If it ought to stay out, it is excluded. All with elegant simplicity. (How many times early on did I lay rambling, time consuming foundations for admission of business records, only to have the judge remind me that my witness had actually seen the defendant sign the document being offered?)

Now, putting aside the contentment of counsel, what about the real thing, the soundness of those decisions? It has to be his appreciation of how important the smallest matter is to the people who have brought it before him that has historically driven him to his chambers at such an hour in the morning that there have been no witnesses. I do not know whether anyone has ever seen him arrive for work. I also do not know whether David Winder has ever taken the bench without having first read everything on file about the matter to be heard. Then he reads the cases, and he wants to talk about them. One wish: If I'm coming out of the Winder court, may I always be the appellee.

I suppose it is an understanding of how it can get out here that causes him to fight back tears when he has no reasonable alternative but to send a man to prison for more years than any man can really do.

All this and so much more. And he starts on time.

We are going to miss him.

Mr. Campbell is a partner of the Salt Lake City law firm Moxley, Jones & Campbell.

AMUSEMENT IN THE LAW

Boosting the Bootleg

by Herschel J. Saperstein

Years ago (forty to be exact), I served as a deputy county attorney in Frank E. (Ted) Moss's office. Ted was then the Salt Lake County Attorney, the office he held just prior to his election to the United States Senate. The office had issued a complaint charging a defendant with the illegal sale of alcoholic beverages. The defendant theretofore had apparently enjoyed a rather thriving business in the after-hours sale of wine and whiskey. Bootlegging was a misdemeanor and, accordingly, the complaint was filed in what was then known as City Court. I was asked to try the matter. The case was tried before J. Patten Neeley, one of the three city judges, sitting without a jury. At the conclusion of the evidence and closing arguments, Judge Neeley ruled from the bench, finding the defendant guilty as charged.

Mr. Saperstein is a shareholder of the Salt Lake City law firm Ray, Quinney & Nebeker.

As in any bootlegging prosecution, the obvious *sine qua non* for a conviction–the single most important piece of evidence for the State–is, of course, the bottle of whiskey sold by the defendant. An appeal was taken from Judge Neeley's verdict to the District Court. Pending the appeal, the evidence was kept in the care, custody and safe keeping of the Salt Lake County clerk's office. On appeal the defendant, who was entitled to a trial de novo, requested a jury. The trial in the District Court was held approximately six to eight months after the City Court trial. Ray Van Cott Jr. was the judge.

While delivering my opening statement to the jury, I walked over to the court clerk's desk, was handed my principal evidence –the booze–returned to the podium and with a bit of a theatrical flourish, I removed the whiskey bottle from its paper bag to show the jury. Much to my astonishment, and perhaps even horror, the bottle was completely empty and as dry as a bone–not so much as a drop of whiskey remained!

EPILOGUE: Needless to say, the clerk blanched and the judge became obviously exercised. Struggling to retain my composure, I somehow completed my opening statement, with obvious modifications and additions to what I had originally planned to say to the jury. I called the same witnesses who testified before Judge Neeley (the officers and the State chemist), each of whom testified that when purchased and when its contents were analyzed, the bottle was in fact full of whiskey. Nevertheless, the jury was unable to reach a verdict, and the court declared a mistrial. The one juror who held out for an acquittal, I was told later, emphatically stated that "as far as I know the bottle could have contained lemonade." He obviously had serious reservations about convicting anyone who would have available a little whiskey and even, as Rumpole would say, "a bit of the bubbly" on a weekend or after hours. Wisdom being the better part of valor, I elected not to retry the case and it was subsequently dismissed.

Although Judge Van Cott ordered an

investigation of the clerk's office, it turned up nothing. We all had our suspicions as to who the culprit was; everyone knew everyone in those days. That person obviously will remain nameless. The imbibing of my evidence I trust made life in the clerk's office a little less burdensome and considerably less tedious.

Judge Ritter Revisited

by Glen E. Fuller

As the years march onward, lawyers who can remember the days when Willis W. Ritter was the one and only federal judge in Utah are rapidly becoming extinct. Probably those members of the Bar who were in the United States Attorney's office at that time can best remember, inasmuch as they probably still nurse ulcers acquired from regular appearances before His Honor.

Judge Ritter ruled his court with an iron fist. He customarily instructed juries extemporaneously and, in the process, didn't hesitate to comment on the evidence, thus making it clear where his view of the evidence lay. He often came down hard on federal bureaucracy, particularly so when property owners were being subjected to eminent domain takings, or where Navajos or their horses were being mistreated.

Judge Ritter was regularly reversed as lawyers beat a path to and from the Tenth Circuit Court of Appeals. In fact, if one's client prevailed in a trial before Judge Ritter, the chances were good that the Court of Appeals would reverse and remand the case; similarly, the loser often appealed, and expected a similar result.

Judge Ritter's law and motion day was an experience never to be forgotten. A large calendar of both criminal and civil matters were accumulated and summarily dispatched with relatively little argument. Lawyers with civil matters were usually confronted with the "one case" test: no extensive brief or memorandum, just a single case on point. Otherwise, after being limited to a sentence or two, you had your ruling and the calendar proceeded to the next matter.

Mr. Fuller is a sole practitioner in Salt Lake City.

Some sixty or seventy lawyers, sitting side-by-side on the front row across the entire width of the courtroom, were in attendance at every law and motion day. Lawyers from the United States Attorney's office and certain government agencies suffered mightily at the hand of the judge; those in private practice usually experienced the same fate. It is no exaggeration to say that many lawyers were simply terrorized.

On one law and motion day, while Judge Ritter was moving through the criminal calendar, there was brought to the bench a young lady from Utah County who was charged with embezzling $150 from a local bank while employed as a teller. The charge was a typical "ho hum" matter, but the young lady wasn't. She was beautiful, a real "looker", and Judge Ritter was acutely aware that the situation was anything but run-of-the-mill.

It appeared the lady was impecunious and unable to secure legal help to muster a defense against what all of us felt to be a losing cause. Judge Ritter hesitated briefly, then announced that he would appoint a lawyer to represent her. We froze in our seats.

As a fledgling lawyer, I had successfully represented several clients before the court in eminent domain takings and excise tax cases. Philosophically speaking, one might say that the judge and I were kindred spirits–well, sort of. So, as he ran his eyes across the seated row of lawyers, I was certain that I was going to be "it".

"Mr. Fuller, I want you to take this young lady into the library and fully inform her of her rights and the consequences of her decision. And when you return, we will proceed to take her plea."

As my client and I sat across the library table, I could tell that no amount of discussion would assist me in providing a defense for her–she was obviously guilty as charged. When I mentioned that she should plead "not guilty," she began to sob, crying, "I don't want to go to jail."

Getting nowhere with logic and persuasion, I tried a different approach. "I know you are distressed, but, if you think you have problems, you can't imagine the trouble I will have if I let you go back in there and enter a guilty plea. The judge picked on me to represent you because he figured that I wouldn't let you plead guilty."

When my red-eyed client and I entered the courtroom and approached the bench, Judge Ritter cautiously eyed us, unable to detect a clue. He then embarked on a rambling discussion, making oblique references to the penalties of crime and the rewards of virtue, all the while avoiding the plea problem. As he was doing so, during a brief moment of hesitation, I cut in: "But we are going to plead 'not guilty.'" A short pause. "I should think you *would*!" he thundered.

Thereupon, as we all relaxed, he admonished my tearful and repentant client about leading an exemplary life. Then, with a stroke of judicial wisdom, unilaterally erased and dismissed the charges, released her from custody, and sent her home–where she lived honestly ever after.

It's been said that justice is blind, but I'm not so sure about that. Anyway, all's well that ends well.

"Next case."

There's No Such Thing as "Entry Level"

by Brian Jones

As on officer of the Young Lawyer's Division (YLD) I'm pleased to be one of the first to extend a warm welcome to the February Bar-passers and the July Bar-takers (well, at least about ninety percent of you). We're delighted to have you as a member of the Division, wish you the best with your future careers, and hope to see you active in the YLD and other Bar activities.

Now, enough of the warm fuzzy greetings. I want to address in this installment of the Barrister an issue most new members of the Bar are really interested in. That issue is how to pay student loans, own some sort of transportation, live in some sort of shelter, eat some type of food, and maybe solve some legal problems sufficient to build something resembling the career of a highly skilled and knowledgeable professional (that is what you are, you know).

If you want to pay the bills, you may have to ratchet down your goals and aspirations just a bit. There are only so many big constitutional issues, big class actions, and big business deals to be done around here, and they're already being done by someone else. Probably someone who graduated ahead of you, either in years or class standing. You'll probably be doing something much less enjoyable, though no less challenging, like figuring out how to make today's cover letter a little more interesting than yesterday's. Or maybe you'll be helping out your co-workers at the carwash or burger joint or telephone center or whatever by resolving their pressing legal problems. ("Hey, you're a lawyer. If my cousin gets caught speeding but has a loaded pistol in the back seat, is that a felony?" "You're a lawyer, right? Great! How can my brother-in-law file bankruptcy but still have his wife keep the jet

skis and the big-screen?") But that's o.k., because on your resume you can say, "assisted employees with a broad range of legal issues." Bad experience is better than no experience, right?

I apologize for the somewhat pessimistic outlook. I know things tend to work out well for most of us. But, it seems clear to me that the famous Utah economic boom hasn't trickled down to many of the eighty percent of us who didn't graduate in the top twenty percent of our classes. Let me give you some examples. The following are experiences shared with me during the past few months by four people, three of whom graduated when I did (1993) in the top third of their class. The names have been changed to protect the innocent.

First there's Jim. He works at a court administration office. He sounded somewhat flabbergasted as he reported that he had five law graduates from my class and the class immediately before mine apply for an "entry level" position in his office. Jim was flabbergasted because the position he posted had virtually nothing to do with the law except that the office was in a courthouse. "Lots of filing, taking fees, computer work, that sort of thing." Wow, just the type of position you toiled through law school for. But hey, at least it's in a courthouse right?

Then there's Brad. He had a great story to tell. It seems he clerked for a government office during his last two years of law school. Then, while he still worked there, an "entry level" position came up and he seemed a shoe-in. But, he wasn't really surprised when they hired the ALJ before whom the office argued many of its cases. Nine years experience. "If we said 'no' to him, he'd screw us on all our pending cases." Yeah, right. I'm sure Brad understood perfectly.

How about Frieda? She applied to be an "entry level" clerk for a well-known judge. "Wanted: 3L or recent graduate for entry level position." Who got hired? Not Frieda, the recent graduate, but an eight-year associate from the judge's former firm who just wanted to "get out of the rat race," *i.e.* she just got downsized from her big San Francisco law firm. How about just getting *in* the rat race? Is that too much to ask? Well, yes.

Finally, there's Brent. "Wanted: 3L or recent graduate as an associate in small two-attorney firm." Brent informs me that he felt he interviewed well (yes, he actually had an interview!), had experience relevant to the firm's practice, and had an undergraduate degree from the partner's alma mater in the same major. Brent even had a personal contact he had established in his current position at the "carwash" who had moved on and was working with the firm. He thought maybe this was *finally* the one. Remember, Brent graduated from law school four years ago. He said he almost didn't apply for the job because he thought he might look too

desperate applying for an "entry-level" position with four years of experience. Did he get the job? Not exactly. He got an "although-your-qualifications-are-impressive . . ." letter urging him not to be disappointed. Why? The job went to someone with nine years of experience rather than his paltry four. I suppose he'll get back to them in about five years when the next "entry-level" position opens up. Brent wondered out loud to me whether going brain-dead (his words) at the carwash while "assisting employees with a broad range of legal issues" will *ever* qualify him for an "entry level" position. And from the "you-know-you're-an-un(der)employed-lawyer-when . . ." file, Brent actually thinks a mandatory pro bono (an oxymoron if there ever was one) program would be a great thing because at least then he could practice law for real clients (if he can afford his annual Bar dues).

"Surely," you say, "the economy's booming, businesses and people continue to come to Utah in record numbers, there's got to be some job out there for a highly skilled and knowledgeable professional like me." You're probably right. But let me share with you some scary statistics. In 1993 the Futures Commission of the Bar reported the results of a study performed to determine, among other things, the possible future of the profession in Utah. According to that study, in 1992 there were 336 people for each lawyer in Utah. (Contrary to popular sentiment, most lawyers are also people, but for the sake of clarity, I'll just say lawyers.) The scary part is that by 2002 the people/lawyer ratio was projected to fall to 290:1. Forty-six fewer potential clients per lawyer. I'm no economist, but that seems to be a prescription for a soft job market for at least the next five years, give or take. So while the old-timers complain that the profession has lost its, umm . . . professionalism because the focus of practice seems to have become simply a (cut throat) competition for clients, the competition appears to just be getting started. It seems as though job-seeking YLDers may have to just buckle up and enjoy the ride (or at least the scenery).

So why am I, a normally very positive and sunny-type person, giving you this dose of clouds and rain? (And why are you still reading it?) Because like Jim and Tammy Faye used to say, "behind every cloud, there's a silver lining." Actually, there are two silver linings. First is that a lot of us will be working in places once considered "non-traditional." It can be a hard thing to do, but I think many endeavors could use more bright legally-trained employees. The problem, of course, is convincing those doing the hiring that a lawyer would be a good choice for the job, and then convincing them to pay your Bar dues (good luck). Related to this silver lining, but somewhat different, is the fact that there really is nobody more likely to adapt to and exploit changes in the market for legal services than a Young Lawyer. We're generally technically savvy and able to "think outside the box" even though (maybe because) we're lawyers. We're also more likely to find new practice niches and implement innovative ways to deliver legal services. These characteristics are essential to compete in a more demanding market.

The second silver lining is that few other career choices offer the support that being a lawyer does. The Bar offers mentors, contacts, referral services, CLE courses and many other things that Young Lawyers need when we start out, no matter where we work. As a member of the Bar and YLD, you will have opportunities to influence the direction and policies of the Bar, while making some great friends and contacts. The YLD also sponsors Tuesday Night Bar, the annual Call-a-Lawyer program, and an annual service project. So you can do some fun and worthwhile things even if you work at a carwash. If you'd like to be more involved in the YLD, or have some ideas about how the YLD can serve you better, please e-mail me any time at s686bwj@zionsbank.com.

Commission Highlights

During its regularly scheduled meeting on January 24, 1997, held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board voted to approve the minutes of the December 6, 1996 meeting.
2. John Baldwin summarized proposed changes to Rule 11-101. The Board agreed not to take a position on the rule change.
3. Steve Kaufman reported that the Bar's Mentor Pilot Program would include a small group of University of Utah and Brigham Young University third-year law students.
4. Debra Moore reported that she talked with the Supreme Court's Rules of Civil Procedure Committee about the Bar's suggested recommendation to the pro hac vice rule. Moore noted that the Committee did not adopt the Bar's suggestion, and noted several concerns.
5. The Board voted to approve the list of applicants for the February 1997 Bar examination, pending favorable outcome of Character & Fitness Committee hearings.
6. The Board reappointed Herm Olsen as the Bar's appointment to the DNA People's Legal Services Board.
7. The Board reappointed Kevin Kuramada to fill the unexpired term of Joe Fratto on the Statewide Advisory Board on Children's Justice.
8. General Counsel Katherine A. Fox reviewed current Bar litigation, and unauthorized practice of law cases. Fox reviewed a Bar applicant's petition to the Supreme Court to transfer previously taken Multistate Bar Examination (MBE) results to the Utah examination. She noted that the Utah Admissions Rules specify that MBE scores from another jurisdiction are not accepted unless the examination is taken concurrently with the State Bar Examination.
9. Fox indicated that the Supreme Court has received a petition to waive the Multistate Professional Responsibility Examination (MPRE) requirement for licensure as a Foreign Legal Consultant in Utah and the Court has asked for the Bar's recommendation. The Board voted to recommend the Court deny the petitioner's request.
10. Chief Disciplinary Counsel Stephen Cochell reviewed proposed amendments to the Rules of Lawyer Discipline, and proposed Federal Court Discipline Procedures.
11. Budget & Finance Committee Chair Ray Westergard reviewed the December financial reports and indicated that the Bar is in a good position.
12. The Board voted to sponsor a reception at the Young Lawyers Affiliate Regional Rocky Mountain Workshop.
13. Legal Assistants Division representative Sanda Kirkham reported that the division has prepared new affidavits for contract/legal assistants who tend to do free-lance work.
14. Legislative Affairs Committee Chair David Bird distributed a summary report outlining legislation reviewed by the committee. Bird reviewed the position the committee recommended the Bar take on each bill and answered questions. Nine voting Bar Commissioners were present.

    A. The Board voted to reject the recommendation of the Legislative Affairs Committee to **support** H.B. 43 (County & Municipality Judgeships) because it appears it expands the number of justice court judges and allows municipalities to create multiple justice courts.

    B. The Board voted to accept the recommendation of the Legislative Affairs Committee to **support** H.B. 170 (Domestic Abuse Insurance Practices), H.B. 175 (Workers' Compensation Fund of Utah), H.B. 188 (Malpractice Against Health Care Providers Amendments), H.B. 198 (Amendments to Homestead Exemptions), and H.B. 201 (Professional Corporation Act Amendments).

    C. The Board voted to accept the recommendation of the Committee to **oppose** H.B. 227 - Property Survey - Statute of Limitations, and S.B. 121 - Recording Judgments on Real Property.

    D. The Board voted to refer the Regulatory Issue (Mark Buchi - Tax Commission) to the Bar's Tax Section for review and recommendation.
15. James C. Jenkins reported on the December meeting of the Judicial Council.
16. The Board voted to approve Ethics Opinion Nos. 96-11, 96-14, 97-01, and 97-02.
17. The Board approved Ethics Opinion No. 96-12 with a recommended stronger disclaimer language change.
18. The Board approved Ethics Opinion No. 96-13 subject to action taken on Ethics Opinion No. 95-05 regarding Rule 4.2.
19. Chief Justice Michael Zimmerman, U.S. Attorney Scott M. Matheson, Jr., and District Attorney Neal Gunnerson led a discussion on Rule 4.2.
20. The Board voted to suspend enforcement of Bar prosecution of violations of Ethics Opinion No. 95-05 dealing with Rule 4.2 for a period of six months, or until the Utah Supreme Court adopts a new rule, whichever is sooner, for criminal prosecutors, so long as they comply with the spirit and intent of the "Reno Rule."

During its regularly scheduled meeting on March 6, 1997, held in St. George, Utah, the Board of Bar Com-

missioners received the following reports and took the actions indicated.

1. Steve Kaufman reported that the Executive Committee and Budget & Finance Committee Chair Ray Westergard met with Chief Justice Michael Zimmerman.
2. The Board discussed a request for the Bar to make a contribution to the new courts complex.
3. The Board discussed Park City as the proposed site for a future annual convention, and members agreed that the location would allow better opportunity for judges and Bar members to participate. The Board voted to hold the 1998 annual convention in Sun Valley and have staff work to accommodate the 1999 annual convention in Park City.
4. Charles R. Brown, who chaired the Client Security Fund review committee, reported that the committee has determined that the program is worthwhile and has analyzed the problems. He distributed a preliminary report and indicated the committee would have a final report ready in the next few weeks.
5. The Board appointed a committee to study whether a standard editorial policy should be applied to both *Voir Dire* and the *Utah Bar Journal* and report back.
6. The Board voted to raise the annual pro hac vice fee per case to the identical amount paid annually by active members of the Utah State Bar (currently $350).
7. Dave Nuffer reviewed the status of the Utah Electronic Law Project (UELP). Toby Brown appeared to present a funding request for UELP. Brown summarized that the purpose of the project is to facilitate the transition from a paper-based practice of law to an electronic-based one. The Board voted to fund UELP for $12,000 for this year and each of the next two years.
8. John Baldwin reported that he and President-Elect Charlotte Miller are reviewing drafts of the proposed 1997-98 budget which will be presented to the Board; following approval, the budget will be made available for public review.
9. General Counsel Katherine A. Fox reviewed Bar litigation, admission issues, and UPL cases.
10. Chief Disciplinary Counsel Stephen R. Cochell reviewed revisions to the Rules of Lawyer Discipline and Disability.

During its regularly scheduled meeting on April 25, 1997, held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Steve Kaufman introduced and welcomed C. Dane Nolan as the Minority Bar Association representative on the Bar Commission.
2. The Board voted to approve the minutes of the January 24, 1997 and the March 6, 1997 meetings.
3. Steven Kaufman reviewed correspondence from Ethics Advisory Opinion Committee Chair Gary Sackett showing the disposition of Ethics Advisory Committee cases.
4. John T. Nielsen, the Bar's legislative representative, and David Bird, Legislative Affairs Committee Chair, reported on actions taken during the course of the recent legislative session and distributed a written report.
5. James C. Jenkins and D. Frank Wilkins presented statements regarding their interest in the President-Elect election and answered questions.
6. Randy Dryer and Jim Clegg joined Paul Moxley and Dennis Haslam in recommending the Bar consider making a contribution to the new Scott M. Matheson Courthouse. Following significant discussion and strong opinions regarding its pros and cons, the Board voted to approve $250,000 as a contribution, to offer Bar members the right to opt out, and to be certain that the contribution be used for a meaningful purpose.
7. Din Whitney, Chair of the Utah Dispute Resolution Board of Trustees, reported on the past year's activities. The Board voted to approve funding the Utah Dispute Resolution Corporation for $20,000 for the upcoming year, in addition to providing in-kind office space, telephone and accounting.
8. Dennis Haslam reported on the Access to Justice Task Force.
9. John Baldwin reviewed his April 17 memorandum to the Bar Commission regarding discussions with Salt Lake City regarding sharing parking structure costs. The Board voted to discontinue discussion with the City on leasing parking. Baldwin indicated he would like to express thanks to Deeda Seed and City staff people who have worked hard to try to come up with possible solutions to our parking needs.
10. Craig Snyder distributed a proposal in the form of a motion recommending changes in the election process for president-elect and commissioners. The Board voted to change the mailing address available as a voting address.
11. The Board voted to approve converting the committee to a section and renaming it the Solo, Small Firm & Rural Practice Section.
12. Lawyer Benefits Committee Chair, Randon Wilson, and Don Roney and Laura Maynes of Continental Insurance, reported on the second year's professional liability insurance experience under Coregis.
13. Budget & Finance Chair Ray Westergard reviewed the April financial reports and the proposed 1997-98 budget.
14. James B. Lee, the Bar's ABA Delegate, reported on the 1997 mid-year meeting of the ABA and actions of the House of Delegates.
15. Debra Moore reviewed her evaluation of the proposed amendments to the Rules of Professional Conduct.
16. The Board voted to approve the list of applicants who passed the February 1997 Bar examination for admission to the Bar.
17. The Board approved Ethics Opinion Nos. 97-03, 97-04 and 97-05.
18. General Counsel Katherine A. Fox reviewed Bar litigation, admission issues, and UPL Cases.
19. Chief Disciplinary Counsel Stephen R. Cochell reviewed recent discipli-

nary matters.

20. The Board voted to adopt changes to the Rules of Lawyer Discipline & Disability.

A full text of minutes of these and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

NOTICE OF IMPOSITION OF TRUSTEESHIP OVER LAW PRACTICE

Please take notice that on April 25, 1997, the Honorable Frank G. Noel, Third District Court, granted the Office of Attorney Discipline's request for entry of an order pursuant to Rule 27, Rules of Lawyer Discipline and Disability, imposing a trusteeship over the law practice of Robert Bentley, Esq., based on Robert Bentley's disability.

NOTICE OF IMPOSITION OF TRUSTEESHIP OVER LAW PRACTICE

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

Discipline Corner

ADMONITION

On May 9, 1997, the Chair of the Ethics and Discipline Committee admonished an attorney for violating Rule 1.2(a), (Scope of Representation), Rule 1.3, (Diligence), and Rule 8.4(d), (Misconduct, Conduct Prejudicial to the Administration of Justice).

In May 1995, Respondent was appointed to represent a parent who had lost temporary custody and guardianship over her three children based upon allegations of sexual abuse of one of the minor children. The parent had previously filed an attorney discipline complaint against Respondent's predecessor counsel. From May 1995 to October 1995, Respondent made no attempt to contact the client and discuss the client's case.

On October 4, 1995, the Court held a review hearing to determine whether continued temporary custody and guardianship should be continued with the State. Although Respondent was provided notice of the hearing, he thought it was a "pro forma" hearing which did not necessitate his attendance. Based upon Respondent's subsequent review of the Court's minute entry and order, Respondent realized he made a mistake in not attending the review hearing. Nevertheless, Respondent made no attempt thereafter to contact his client to discuss the case.

Respondent then determined he could not continue his representation of the client due to a conflict of interest between the client and her boyfriend. Respondent transferred the file back to the client's prior attorney, whom the client had accused of mishandling the initial custody hearing. On April 8, 1996, the Court held another review hearing and ordered that the State retain custody and guardianship over the three children. Neither Respondent nor his client's former attorney attended the hearing. Respondent had been sent a notice of hearing and believed he had forwarded the notice to the client's former attorney. At the hearing, the client requested the Court appoint her new counsel. Although the Court denied the request at the hearing, new counsel was appointed in or about May 1996.

In or about June 1996, permanent custody and guardianship over the three minor children was awarded to their maternal grandmother instead of the client. By way of mitigation, Respondent had no prior disciplinary record.

RECIPROCAL DISCIPLINE

On March 24, 1997, the Honorable Glenn Iwasaki entered an Order Imposing Reciprocal Discipline and ordered that Michael V. Stiehl be publicly reprimanded for unprofessional conduct in three separate matters for which he was disciplined by the Nevada Supreme Court.

On August 21, 1992, the Nevada Supreme Court publicly reprimanded Respondent for personally serving upon a judge a complaint filed by him against the judge with the Nevada Commission on Judicial Discipline. Respondent's conduct was held to be prejudicial to the administration of justice and further violated rules concerning the confidentiality of judicial disciplinary proceedings.

On January 20, 1994, the Nevada Supreme Court publicly reprimanded Respondent for failure to respond to a client grievance despite numerous attempts by the Nevada State Bar to elicit an answer. After filing of a formal attorney discipline complaint, the underlying client grievance was dismissed, but Respondent was publicly reprimanded for causing the needless expenditure of the State Bar's limited time and resources and for failing to respond to a disciplinary authority.

On March 31, 1995, the Nevada Supreme Court publicly reprimanded Respondent for filing a complaint on behalf of a client and subsequently failing to communicate with the client (return phone calls) and keep the client reasonably informed. After nearly four years, the case had not been brought to trial, thus violating the duty to communicate and to pursue matters with diligence. Respondent further refused to pay a binding fee arbitration order and an award of attorney's fees incurred in converting the arbitration award into a judgment. Respondent was found to have violated the provision of the Nevada Rules of Ethics prohibiting a lawyer from "knowingly disobeying a valid obligation under the rules of a tribunal."

Notice of Ethics Advisory Opinion Committee Vacancies

The Utah State Bar is now accepting applications for positions on the Ethics Advisory Opinion Committee for a three-year term beginning July 1, 1997. The Committee comprises fourteen members who are appointed upon application to a Bar selection committee.

The charge of the Committee is to prepare written opinions concerning the ethical propriety of anticipated professional or personal conduct and to forward these opinions to the Board of Bar Commissioners for its approval.

Because the written opinions of the Committee have major and enduring significance to the Bar and the general public, the Board solicits the participation of lawyers and members of the judiciary who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in resume or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience, interest in or ability to contribute to well-written, well-researched opinions. This should be a statement in the nature of what you can contribute to the Committee.

Appointments will be made to accomplish two general goals:

- Maintaining a Committee that is willing to dedicate the effort necessary to carry out the responsibilities of the Committee and is committed to the issuance of timely, well-reasoned, articulate opinions.
- Creation of a balanced Committee that incorporates as many diverse views and backgrounds as possible.

If you would like to contribute to this important function of the Bar, please submit a letter and resume indicating your interest to:

Ethics Advisory Committee Selection Panel
Utah State Bar
640 South 200 East
Salt Lake City, Utah 84111

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $10.00. Fifty nine opinions were approved by the Board of Bar Commissioners between January 1, 1988 and May 30, 1997. For an additional $5.00 ($15.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1997.

ETHICS OPINIONS ORDER FORM

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

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

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Ethics Advisory Opinion Committee

Opinion No. 97-06

(Approved May 30, 1997)

Issue: Under the Utah Rules of Professional Conduct, what are the ethical limitations that govern attorneys' acceptance of clients' credit cards to pay fees and costs?

Opinion: Generally, attorneys may accept payment for fees and costs by credit card in the same way that other merchants and service-providers do. This general conclusion is, in part, in conflict with Utah Ethics Advisory Opinion No. 21, which is accordingly overruled.

Opinion No. 97-07

(Approved May 30, 1997)

Issue: Is a lawyer, acting as a trustee under the United States Bankruptcy Code, required to maintain bankruptcy estate trust funds in a financial institution that complies with check-overdraft reporting requirements described in Rule 1.15?

Opinion: No. A lawyer, acting as a trustee under the United States Bankruptcy Code, is not required to maintain funds in a financial institution that complies with the check-overdraft reporting requirements of Rule 1.15, because the administration of such bankruptcy funds is not the practice of law.

Uniform Cover Sheet for Civil Actions

The Administrative Office of the Courts has approved a uniform cover sheet to replace the variety of cover sheets now in use in the several districts. This new uniform cover sheet should accompany all civil complaints and petitions filed in District Court on or after July 1. A correctly completed cover sheet will greatly assist the court clerk in properly recording information about your case, and uniformity should help lawyers with a multi-district practice.

The content of the cover sheet is similar to those currently in use. The person completing the form should include the name, address, and daytime telephone number of the plaintiff(s) and the plaintiff's attorney and the name, address and daytime telephone number of the defendant(s) and, if known, the defendant's attorney. If there is insufficient space on the form to list all parties and attorneys, attach an additional sheet of paper.

The amount of damages claimed also should be listed. If the complaint is not a claim for damages, such as a petition for divorce or probate or a will, a petition for extraordinary relief, specific performance of a contract, or judicial review of an order of an administrative agency, the amount should be left blank.

If a demand for a jury trial is filed with or made a part of the complaint, the "jury demand" box should be marked "yes." Otherwise, the "jury demand" box should be marked "no." Utah Rule of Civil Procedure 38 continues to regulate the demand for a jury trial. Because the cover sheet is not, itself, a pleading and is not served on the opposing party, marking the"yes" box on the cover sheet is not an effective demand for a jury trial. Nor does marking the "no" box waive the right to a jury trial. The objective of the cover sheet is only to advise the court clerk whether a demand for a jury trial, for which a fee should be charged, accompanies or is part of the complaint.

The list of fees includes only those assessed for the initial complaint or petition. The vital statistics fee and jury demand fee, if applicable, are in addition to the fee for filing the complaint. Section 21-1-5 contains the complete list of fees. The entry of "Sch" in the fee column refers to the schedule of fees based on the amount of the claim for damages. If the complaint is not a claim for damages, the fee under the schedule would be $120. Fees are not assessed against an entity of the state or its political subdivisions, but are collected against the judgment debtor. Fees are waived when an affidavit of impecuniosity is filed.

The list of case types includes those most commonly filed in Utah District Court. The case types will be uniform throughout the state but are not intended to be static. In 1997, the Legislature repealed the Uniform Reciprocal Enforcement of Support Act (URESA), and this case type has been removed from the cover sheet. In 1996, the Legislature enacted a statutory cause of action for post conviction relief, and this case type has been added to the list. The case types listed on the cover sheet are dynamic, and lawyers with substantial practice in areas of the law not included are encouraged to contact the Administrative Office of the Court with suggestions for new case types.

In completing the cover sheet, mark only one case type for the category that most closely describes the nature of the action. Reserve "miscellaneous civil" for actions that do not fit within any other category. The category of "custody, visitation or support" should be marked only when filed separately from a divorce or paternity action. The "judgment" case types and fees take precedent over the subject matter of the judgment. For example, if filing an abstract of a foreign divorce decree, mark the box for "abstract of foreign judgment or decree" rather than the box for "divorce." A simultaneous or subsequent petition to modify a divorce decree is treated as a filing in the underlying case rather than a separate case type. There is a statutory fee of $30 for a petition to modify a divorce decree. When filing a complaint with more than one cause of action, mark the case type associated with the cause presented first. For example, a claim for relief in products liability may contain a cause of action in contracts and a cause of action in torts. When completing the cover sheet, mark whichever cause is pled first.

Attorneys may produce their own form, which should conform generally to the content and format of the sample printed here. Attorneys preparing their own form are encouraged to exclude case types and fee amounts not applicable to the case being filed. Thus, your form would include all of the regularly required party and attorney information, the amount of damages claimed, if any, and the jury demand information. But rather than listing all case types and fees and marking those applicable to your case, your form would list only the one applicable case type and any applicable fees.

For a paper copy of the form, please contact the clerk of court. The charge is $.25 per copy, and you may reproduce unlimited copies. For an electronic copy of the form in Microsoft Word 6.0 format, provide your e-mail address to Dave Montgomery at the Administrative Office of the Courts. (davem@email.utcourts.gov) There is no charge for transmission of the file through the Internet.

Lawyers and the Media

Co-sponsored by Utah Legal Services, Inc. and Utah News Clips

Date:	Tuesday, September 9, 1997
Time:	9:00 a.m. to 12:00 p.m. (registration begins at 8:30 a.m.)
Place:	Utah Law & Justice Center
Fee:	No Charge RSVP by September 2 to Mary Lyman, 328-8891 ext. 304
CLE Credit:	3 hours

Cover Sheet for Civil Actions

PARTY IDENTIFICATION (ATTACH ADDITIONAL SHEETS AS NECESSARY)

PLAINTIFF/PETITIONER
Name _____
Address _____
_____
Day Time Telephone _____

ATTY FOR PLAINTIFF/PETITIONER
Name _____
Address _____
_____
Day Time Telephone _____

PLAINTIFF/PETITIONER
Name _____
Address _____
_____
Day Time Telephone _____

ATTY FOR PLAINTIFF/PETITIONER
Name _____
Address _____
_____
Day Time Telephone _____

DEFENDANT/RESPONDENT
Name _____
Address _____
_____
Day Time Telephone _____

ATTY FOR DEFENDANT/RESPONDENT
Name _____
Address _____
_____
Day Time Telephone _____

DEFENDANT/RESPONDENT
Name _____
Address _____
_____
Day Time Telephone _____

ATTY FOR DEFENDANT/RESPONDENT
Name _____
Address _____
_____
Day Time Telephone _____

TOTAL CLAIM FOR DAMAGES
$ _____

JURY DEMAND
☐ YES ☐ NO

SCHEDULE OF FEES: §21-1-5 (SEE CASE TYPES FOR FILING FEES FOR COMPLAINTS OTHER THAN CLAIM FOR DAMAGES)

COMPLAINT FOR DAMAGES

☐ Civil, Interpleader or Small Claims: $2000 or less	$37
☐ Small Claims: $2001-$5000	$60
☐ Civil or Interpleader: $2001-$9999	$80
☐ Civil or Interpleader: $10,000 and over	$120
☐ Civil Unspecified	$120

MISCELLANEOUS

☐ Jury Demand	$50
☐ Vital Statistics §26-2-25	$2

Cover Sheet for Civil Actions

CASE TYPE (CHECK ONLY ONE CATEGORY)

FEE		CASE TYPE
		APPEALS
$120	☐	Administrative Agency Review
$70	☐	Small Claims Trial de Novo
		GENERAL CIVIL
$120	☐	Attorney Discipline
Sch	☐	Civil Rights
$120	☐	Condemnation
Sch	☐	Contract
Sch	☐	Debt Collection
$50	☐	Expungement (Fee is $0 under circumstances of §77-18-10(2)
Sch	☐	Forcible Entry and Detainer
$120	☐	Forfeiture of Property
Sch	☐	Interpleader
Sch	☐	Lien/Mortgage Foreclosure
Sch	☐	Malpractice
Sch	☐	Miscellaneous Civil
$120	☐	Extraordinary Relief
Sch	☐	Personal Injury
$120	☐	Post Conviction Relief: Capital
$120	☐	Post Conviction Relief: Non-capital
Sch	☐	Property Damage
Sch	☐	Property/Quiet Title
Sch	☐	Sexual Harassment
Sch	☐	Small Claims
Sch	☐	Tax
Sch	☐	Water Rights
Sch	☐	Wrongful Death
Sch	☐	Wrongful Termination
		DOMESTIC
$0	☐	Cohabitant Abuse
$120	☐	Common Law Marriage
$120	☐	Custody/Visitation/Support
$80	☐	Divorce/Annulment
	☐	Check if child support, custody or visitation will be part of decree
$120	☐	Paternity
$80	☐	Separate Maintenance
$120	☐	Uniform Child Custody Jursidiction Act (UCCJA)
$120	☐	Uniform Interstate Family Support Act (UIFSA)
		JUDGEMENTS
$25	☐	Abstract of Foreign Judgement or Decree
$40	☐	Abstract of Judgment or Order of Utah Court or Agency
$30	☐	Abstract of Judgment or Order of Utah State Tax Commission
$25	☐	Judgment by Confession
$0	☐	Renew Judgment
		PROBATE
$120	☐	Adoption
$120	☐	Conservatorship
$120	☐	Estate Personal Rep - Formal
$120	☐	Estate Personal Rep - Informal
$120	☐	Guardianship
$120	☐	Involuntary Commitment
$120	☐	Minor's Settlement
$120	☐	Name Change
$120	☐	Supervised Administration
$120	☐	Trusts
$120	☐	Unspecified Probate
		SPECIAL MATTERS
$0	☐	Administrative Search Warrant
$25	☐	Arbitration Award
$0	☐	Criminal Investigation Search Warrant
$0	☐	Deposit of Will
$0	☐	Determiniation of Competency in Criminal Case
$0	☐	Extradition
$25	☐	Foreign Probate or Child Custody Document
$0	☐	Hospital Lien
$25	☐	Judicial Approval of Document not part of a Pending Case
$25	☐	Notice of deposition in out-of-state case

Job Announcement

In-House and Out-of-House

ATTORNEY

1 Full Time or 2 Part-Time Positions or Contract Work Available

Utah Legal Services, Inc. has an immediate need for coverage of priority cases for low-income individuals in Carbon and Emery Counties, and in the Uintah Basin area.

The office locations and responsibilities for this position are flexible, but would include coverage of protective order hearings on Law and Motion Calendars in Price, Castle Dale, and possibly Roosevelt, Vernal and Duchesne, other domestic cases involving abuse, and occasional public benefits and landlord tenant cases.

This position could be filled by:

- a full time attorney in the Price area or in the Uintah Basin; or
- a half time attorney in the Uintah Basin and a half time attorney in Price; or
- negotiated contract attorneys willing to handle a flexible caseload as referred by ULS.

Any reasonable proposal for coverage of this caseload will be considered.

The successful applicant must comply with the regulations and restrictions on case activity and other regulations applicable to all Legal Services attorneys.

Starting Wage for the position is $25,000 per year DOE. Benefits include 12 paid holidays, paid vacation and sick leave, life insurance, and employee contribution medical and dental insurance, and an employee contribution 403(b) retirement plan.

Resumes with cover letter should be sent to Eric Mittelstadt at 455 North University Ave, #100, Provo, Utah 84601 by July 31, 1997. Questions and comments can be directed to 1-800-662-1563, x.111. (Local 374-6766 x. 111)

Utah Legal Services, Inc. is an equal opportunity employer.

Wanted: Pro Bono Case Placement Specialist

The Utah State Bar is looking to fill the position of Pro Bono Case Placement Specialist. This position will work in conjunction with poverty law agencies in Utah, such as Utah Legal Services and the Legal Aid Society of Salt Lake. Primary position responsibilities include: assisting with the screening of cases, contacting volunteer lawyers to place cases, and providing support to the volunteer lawyers. Qualifications for this position are: active member of the Utah State Bar, excellent organizational skills, ability to handle multiple tasks on an on-going basis, and excellent inter-personal skills. Preferred qualities include: one to two years of practice experience, knowledge of poverty law issues and more specifically, knowledge of family law.

To apply for this position, send a resume and cover letter to:

Pro Bono Position
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

The Utah State Bar is an equal opportunity organization.

Wanted: Special Assistant Disciplinary Counsel

The Office of Attorney Discipline is seeking volunteer lawyers to act as Special Assistant Disciplinary Counsel to assist in the investigation, litigation or trial of attorney discipline matters.

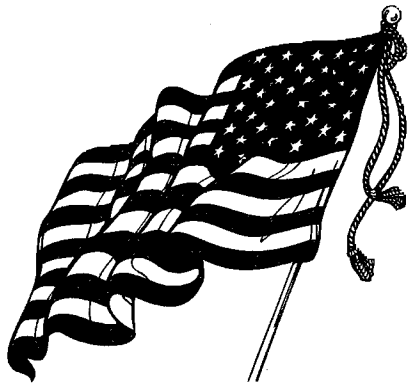
To be considered for a case assignment, an applicant must be: (1) a member in good standing of the Utah State Bar for at least three years, and have practiced law for at least five years prior to application; (2) current in payment of Bar dues and meet current MCLE requirements; (3) not be the subject of an informal complaint or disciplinary action in Utah or elsewhere. Special Assistant Disciplinary Counsel will be assigned cases depending on their litigation, trial or appellate experience.

Specific details regarding the appointment of Special Assistant Disciplinary Counsel may be obtained by contacting or writing Stephen Cochell, Chief Disciplinary Counsel, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

Salt Lake County Bar Association New Officers

New officers elected to serve the Salt Lake County Bar Association were recently announced: President – Bruce T. Jones of Suitter, Axland, Hanson; Vice President – Kathryn H. Snedaker of Van Cott, Bagley, Cornwall & McCarthy; Secretary – Gregory G. Skordas of Watkiss, Dunning & Watkiss; and Treasurer – Raymond J. Etcheverry of Parsons, Behle & Latimer.

Happy 4th of July

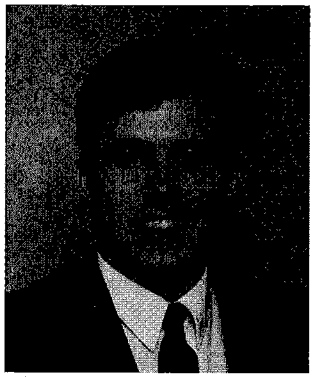


Utah Bar Foundation Recognizes Law Students for Ethical Standards and Commitment to Public Service

Michelle Olsen

Paul Robert Rudof

Mary Torres Berry



Eric S. Lind

Four awards were presented recently to University of Utah and Brigham Young University law students.

The Foundation's two annual Community Service Scholarships of $3,000 each were awarded to **Michelle Olsen** (Brigham Young University Law School) and **Paul Robert Rudof** (University of Utah College of Law). The scholarship recipients were selected by the Board of Trustees from a large field of applicants and selected primarily for their demonstrated commitment to community service.

Michelle Olsen graduated from the Brigham Young University Law School this spring. She has served domestic violence survivors, indigent persons, senior citizens, tenants and landlords, residents of Southwest Provo's Franklin neighborhood, the Bennion Center, and many government entities. Her immediate plans are to serve for a year at the Neighborhood Housing Services.

Paul Robert Rudof has finished his first year at the University of Utah College of Law. He has served at a poverty law project, assisted low-income people with tenants' rights, helped pro bono attorneys in the court process, and assists a Guardian ad Litem advocate. This summer he will work as a Fellow at the Salt Lake City Indian Walk-In Center, and help develop an American Indian legal clinic.

The Bar Foundation also presented Ethics Awards to **Mary Torres Berry** (University of Utah College of Law) and **Eric S. Lind** (Brigham Young University Law School). Each law school selects a graduating senior who embodies high ethical standards of professionalism. The Rules of Professional Conduct adopted by the Utah State Bar establish ethical standards for Utah lawyers, but encourage them to strive for even higher ethical and professional excellence. These students received an engraved pen and pencil desk set, and a cash award of $250 each.

Mary Torres Berry, University of Utah College of Law recipient, received her award from the Honorable James Z. Davis in May at an informal presentation in Dean Lee Teitelbaum's office. Ms. Berry was President of the law school's Minority Law Caucus, has abundant experience in accounting, computer programming, personnel management and foreign travel, and interned at Utah Legal Services in 1996-97.

Eric S. Lind, Brigham Young University Law School recipient, was presented his award by the Honorable Norman H. Jackson, former Bar Foundation President and Trustee, at a dinner/dance awards celebration in Provo in March. Mr. Lind was Managing Editor of *The BYU Journal of Public Law,* and has written an article regarding interstate child support and federalism that will appear in the Journal. He also served as President of the Public Interest Law Foundation of the Brigham Young University law school promoting public interest efforts by law students.

The Utah Bar Foundation was organized in 1963 as the charitable arm of the Utah State Bar. The Foundation receives funds from I.O.L.T.A. (Interest on Lawyer Trust Accounts), and from member contributions. A seven-member Board of Trustees administers these funds and awards grants annually to community agencies and programs which provide free or low-cost legal aid to the disadvantaged, and legal education to the community and to other law-related services. Since 1985, the Foundation has awarded a total of over $2 million.

CLE Calendar

1997 ANNUAL CONVENTION

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

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

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

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

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

NLCLE WORKSHOP: BANKRUPTCY LAW & SECURED TRANSACTIONS

Date: Thursday, September 18, 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: DRAFTING CORPORATE AGREEMENTS

Date: Thursday, September 18, 1997
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE-NEWS*
CLE Credit: 6 HOURS

20th ANNUAL SECURITIES SECTION WORKSHOP

Date: Friday, September 26, 1997 & Saturday, September 27, 1997
Time: To be determined
Place: St. George Holiday Inn
Fee: To be determined
CLE Credit: ~ 9 HOURS

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

Date: Friday, October 3, 1997
Time: 9:00 a.m. to 5:00 p.m. (tentative)
Place: University of Utah College of Law Moot Courtroom
Fee: $75.00 for half-day
$125.00 for full-day
CLE Credit: ~ 6 HOURS
Questions: Call Mary Ellen Sloan at (801) 468-3420, or Linda Priebe at (801) 363-1347

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

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

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

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Total Due

Make all checks payable to the Utah State Bar/CLE

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Address — City, State, Zip

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

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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.

NLCLE WORKSHOP: ETHICS & CIVILITY

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

COMMERCIAL AND CONSUMER BANKRUPTCIES & BUYING AND SELLING A BUSINESS - Two seminars in one!

(This seminar was originally scheduled for March 21, 1997.)

Date: Friday, October 17, 1997
Time: Session I (Bankruptcy) - 8:30 a.m. to 11:45 a.m.
Session II (Business) - 1:00 p.m. to 4:15 p.m.
Registration begins 30 minutes before each session
Place: Utah Law & Justice Center
Fee: $85.00 for one session
$150.00 for both sessions
CLE Credit: 3.5 HOURS for one session
7 HOURS for both sessions

THE ART OF EFFECTIVE SPEAKING FOR LAWYERS

Date: Wednesday, October 22, 1997
Time: 8:00 a.m. to 4:00 p.m. (subject to change)
Place: Utah Law & Justice Center
Fee: $140.00
CLE Credit: ~ 6 HOURS

Case Summaries

Attorney-Client, Malpractice

The Utah Court of Appeals affirmed summary judgment in favor of two groups of attorneys who had represented the plaintiff in bankruptcy proceedings and were then sued by the plaintiff for alleged malpractice. The plaintiff failed to produce any record evidence that the attorneys had caused the denial of the plaintiff's discharge in bankruptcy. Summary judgment for the attorneys was granted because the court found there was no proximate cause of the alleged conduct as a matter of law. Generally, proximate causation is a factual determination for the jury. However, if there is no reasonable difference of opinion on the determination of the facts in the usual sense or on the application of the legal standard to the undisputed facts, the decision is one of law. Thus, summary judgment on proximate cause is appropriate when the facts are so clear that (1.) reasonable persons could not disagree about the underlying facts or the applications of the legal standard to the facts or (2.) when the proximate cause of an injury is left to speculation so that the claim fails as a matter of law.

The plaintiff was required to show that absent the attorney's negligence, the underlying action would have been successful. Thus, the proximate cause issue becomes the means of trying a lawsuit within the lawsuit to establish what the results should have been absent the alleged misconduct. The allegation here that the attorneys failed to list assets on the original bankruptcy statement of affairs and schedules was previously litigated in the bankruptcy court. Therefore, the issue was precluded and could not be litigated again in this case, because the issue had been fully, fairly and competently litigated. As to the other attorney, the Plaintiff's evidence failed to raise an issue of material fact. There was no room for reasonable minds to conclude that the attorneys could have proximately caused the denial of Plaintiff's bankruptcy discharge. The court could not say that, as a matter of law, amended bankruptcy pleadings would have had no effect on the outcome of the discharge. If the plaintiff had not responded to the summary judgment motion, the defendant attorneys would not have been entitled to summary judgment. However, the response of the plaintiff specifically failed to address the attorney's evidence that the plaintiff had instructed the attorney not to amend the statements and schedules. Because that factual assertion was undisputed, the attorney was, therefore, entitled to judgment as a matter of law.

Harline v. Barker, 284 Utah Adv. Rep. 10 (Utah Feb. 14, 1996)

Appeal, Timeliness, Post-Judgment Motions

Defendant's notice of appeal was untimely filed and the appeal was dismissed for lack of jurisdiction. The Utah Court of Appeals relied upon its own 1992 decision to hold that a notice of appeal which is filed before the entry of the order denying post-judgment motions is not effective as a notice of appeal under Utah Rule of Appellate Procedure 4(b). Regardless of whether the post-judgment motion is labeled a motion or objection, if it constitutes a post-judgment motion under Rules 52 or 59, Utah Rules of Civil Procedure, the time for filing a notice of appeal is suspended until disposition of the motion.

The cross-appeal was timely filed because it was within thirty days after the disposition of the motions, regardless of whether the original appeal was valid. However, the cross-appeal error asserted for the trial court's failure to award specific damages was not properly preserved in the trial court. Therefore, the Court of Appeals refused to address the issue. The court did conclude that the trial court erred when it awarded only $403 as damages when the undisputed testimony supported an award of a greater amount.

Reeves v. Steinfeldt, 284 Utah Adv. Rep. 22 (Utah Ct. App. Feb. 15, 1996)

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

Large regional law firm with Salt Lake City office is seeking an experienced employment attorney to head its local employment law practice group. At least five years experience necessary. All responses will be held in strict confidence. Please respond with letter, resume and/or relevant materials to Maud Thurman, Utah State Bar, Box #32, 645 South 200 East, Salt Lake City, UT 84111.

Small firm seeks office-sharing partner whose practice focuses exclusively on tax and estate planning. Beautiful, fully-appointed downtown suite. Extensive tax and estate library: RIA; *Estate Planning* and *Trusts & Estates* journals; Practical Drafting; Brentmark and Henson number-crunching and transfer software. Call (801) 364-3244.

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

POSITIONS SOUGHT

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.

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

OFFICE SPACE/SHARING

Deluxe Class A Office Space Available. Up to 4 offices available in downtown location. Complete facilities, including conference rooms, reception area, library, telephones, copier. Large windows/view. Convenient and close covered parking. For more information, call Nedra @ (801) 531-7171.

Downtown-Kearns Building. Office for one attorney. Four attorneys presently in suite. Beautiful, furnished conference room, reception area. Fax, printer, copier, telephones, postage meter, computer network provided. Library: Westlaw, Utah Reporter, Federal Reporter, USCA/Regs. Pleasant, professional atmosphere. Parking next to building. (801) 364-5600.

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Office sharing space available for one attorney in Broadway Center. Three attorneys currently at location. Spacious office with view, fax, copier, telephones, receptionist and conference room. Formal arrangement for purposes of expanding personal injury practice is a possibility. Call (801) 575-7100.

DIAMOND EXECUTIVE OFFICES: 1939 South 300 West: Finally, there's office space with options for individuals and small firms to cut cost and enjoy an workplace environment. Accessible even in heavy traffic, Diamond Executive Offices are designed with a common reception area, board room, copy room and receptionist to handle incoming calls. Building is newly remodeled this year with offices designed for individuals and larger organizations. **Contact Keith Anderson @ (801) 485-7798.** *Call today, Diamond Executive Offices are filling quickly!*

SERVICES

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

MEDICAL EXPERT EVALUATION AND TESTIMONY: Physician/lawyer, 15 years Emergency Medicine experience, Board certified and Fellow of American College Emergency Physicians. Articulate and knowledgeable. Free phone consultation and initial informal opinion. Clark Newhall, MD, JD. (801) 530-0350.

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

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MEMBERSHIP CORNER

CHANGE OF ADDRESS FORM

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

Name (please print) _____ Bar No. _____

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

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**

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

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

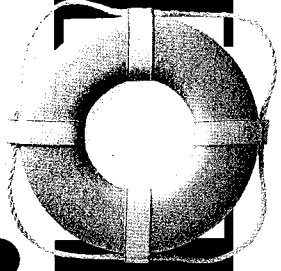
Regulation 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee by December 31 of the year in which the reports are due shall be assessed a **$50.00** late fee.

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

DATE:_____ **SIGNATURE:**_____

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

An Ounce of Prevention



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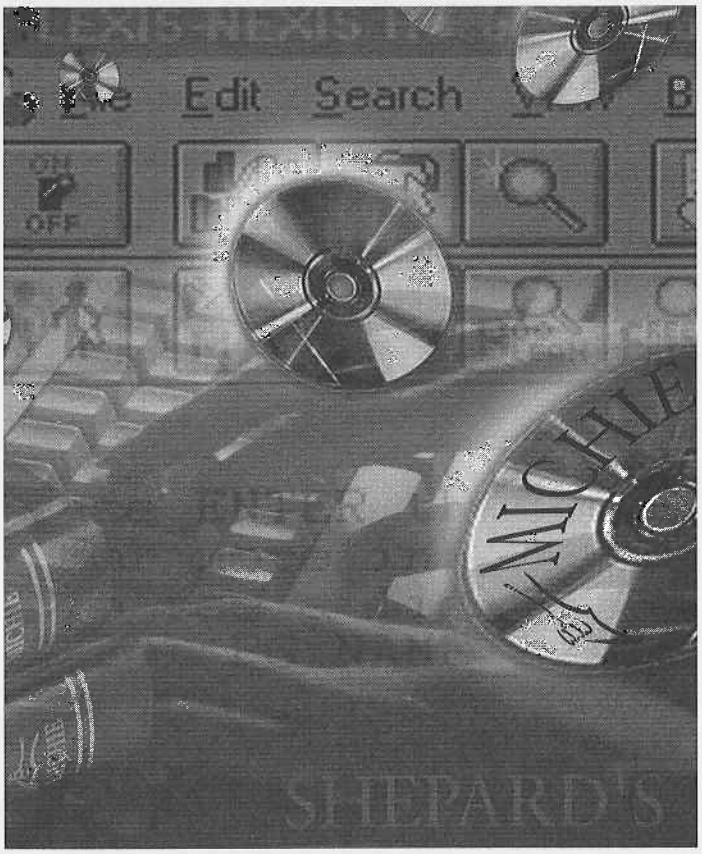

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