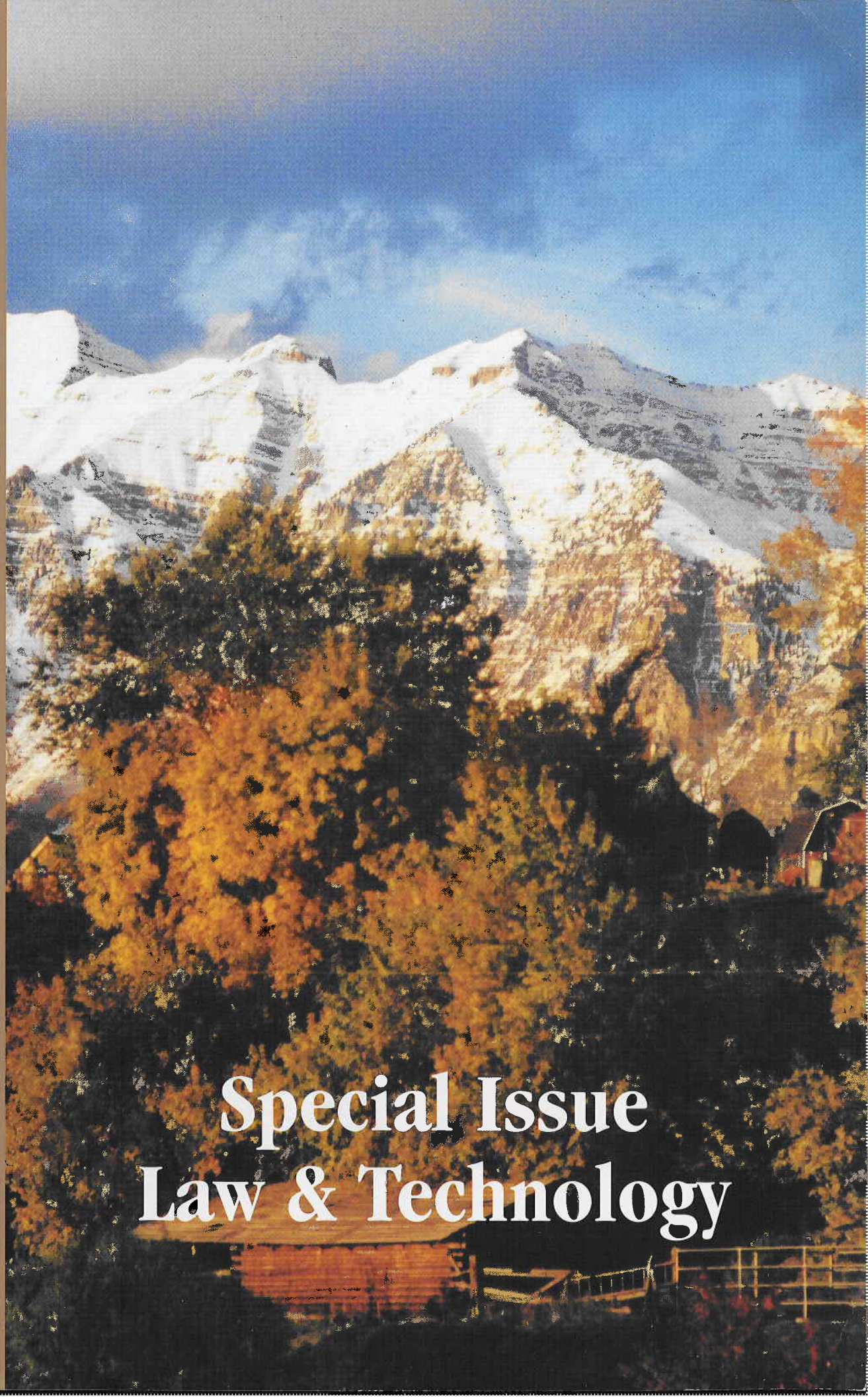


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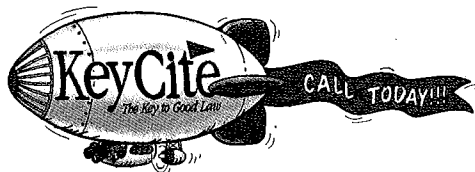
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Letters to the Editor

Dear Editor:

In response to D. Kyle Sampson's article, *Can State Prisoners Sue Under Federal Disabilities Law?*, I commend his interest in persons whose voices often go unheard — those with mental and physical disabilities. The article's analysis of *Pennsylvania Department of Corrections v. Yeskey*, however call for a response. While Justice Scalia's opinion for a unanimous Court dispatches the article's legal arguments, we write to identify the increased social and financial costs from excluding prisons from ADA compliance.

Societal costs increase when inmates leave prison not understanding they are accountable for their actions. Legalizing disability discrimination and thereby punishing disabled inmates for conditions over which they have no control might increase self-centeredness and disrespect for the law; it will not, however, increase an inmate's sense of accountability.

Costs go up, not down, when inmates with disabilities are denied pre-release access to GED classes, technical education, or sex offender therapy. We know from years of dealing with the Utah Department of Corrections that, without the threat of ADA litiga-

tion, inmates with disabilities are often denied such programming. Interestingly, Mr. Sampson's article fails to mention that by denying the inmate in *Yeskey* access to the boot-camp program at issue, the inmate spent thirty-six months in prison at taxpayer expense, instead of the mere six months spent by other boot-camp participants.

The article erroneously dramatizes the cost of ADA compliance. The ADA, Title II, regulations expressly immunize governmental entities, including prisons, from any requirement that would cause a "fundamental alteration" to programs, or that would impose "undue financial and administrative burdens." 28 CFR §35.150(a)(3).

Basic questions of human decency and fairness aside, ADA compliance will save money and lives in the long run. Legalizing disability discrimination in the prisons will not.

Sincerely,

Lauren Barros

John Pace

Jensie Anderson

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2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Code of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.
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8. The Editor, or his or her designee, shall promptly notify the author or each letter if and when a letter is rejected.

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

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For information, call Pat Gatton at 801.581.7481 or Connie Howard at the Utah State Bar
Professor Mark Glick is the director of LES.

Technology

by James C. Jenkins

Yesterday I received an e-mail entitled, "You Know You're From the 80's if . . .". I thought I would share a few of the answers with you here.

You Know You're From the 80's If:

- You remember three words: "Atari," "Apple," and "Pong."
- You remember the days that hooking your computer into your television wasn't an expensive option that required gadgets – it was the **ONLY** option.
- You owned a Trapper Keeper.
- "All-skate, change directions" means something to you.
- You know who shot J.R.
- You remember when your cable TV box had the 3 rows of numbers and you had to move the selector switch accordingly.
- You actually tried to turn on a jukebox by hitting it twice and say "Heey!"
- You remember Bo and Luke Duke.
- You remember when VCR's costs \$1,000.00
- It was a major accomplishment to get to the "Chase" scene in Ms. PacMan.

Not many of the answers fit me because I acknowledge I am from the 70's, however, it did get me thinking about how much things have changed in the last 20 years; especially when it comes to technology. I can remember when microwaves, VCR's, CD players and cell phones didn't exist. That wasn't that long ago. More troubling is the fact that I still don't know how to program any of them. I let the VCR blink 12:00 o'clock for months until I finally swallowed my pride and asked my 10 year old to fix it.

Now think about how much technology in the practice of law has changed. It wasn't that long ago that "word-processor" was a new term. Now look at what we are faced with in our practices: voice-mail, e-mail, networks, faxing, cell phones, on-line research, and the internet. I feel "connected", but I am not sure to what. If you are like me instead of being empowered, you feel intimidated and dependent. These changes have at times been overwhelming. Perhaps you too have felt the crush of technol-

ogy. Something that was suppose to provide us with more freedom, has only driven us to work more and get more done. Being "connected" can mean never leaving the office.

So what can we do? I suppose it is nice to imagine turning our backs on this type of change and continue doing things the same old way. What I am trying to do, instead, is put technology to work for me. E-mail is a great example. Problems that used to take two or three phone messages to address, are now solved in a series of e-mail exchanges and the responses are often more complete. A document can be attached electronically so I can edit it and return it quickly. The client is happier and so am I.

One of the many things that the Bar is doing for our members is to provide up-to-date information on law practice technology. Folks like Brent Israelsen, Commissioner David Nuffer and Toby Brown are constantly providing instruction and advice on how we can use technology to be more productive at reasonable cost. In large measure, Utah has become recognized nationwide as a leader in technology programs due to their efforts. I urge you to check out the Bar's web site at www.utahbar.org, read the "In re Technology" feature by Beckman and Hirsch each month in the *ABA Journal*, and sign up for one of the many CLE technology instruction courses sponsored by the Bar.

I encourage you to face and even embrace technology. The Bar is working to bring you information on technology so that it is easier for you to take advantage of these tools. I know change can be difficult but the alternative is likely worse. Hopefully this technology issue of the Bar Journal will provide you with one more piece to the puzzle and open your eyes to some new possibilities. Special thanks goes to Toby Brown who e-mailed much of the material to me to prepare this message. And, as always, I welcome your thoughts and comments. Write or call me. My e-mail address is jjenkins@n1.net.



Are Lawyers The Railroad of the Future?

by David Nuffer

Railroads emerged in the 1800's as the major means of long haul transportation, for passengers and freight. Railroading evolved from horse power to steam power in the early 1800's and then with the development of sleeping cars, standard rail widths and national rail systems, trains became the best way to travel. Railroad decline began with the emergence of automobiles and decent roads in the 1920's and railroads were in serious trouble after World War II. One hundred years was the life cycle of the railroads industry's dominance of transportation. None of us would now think of taking a railroad train to any business destination. They are still used for some types of freight, but railroads have almost disappeared. First buses and now airlines have taken the railroad's place.

Lawyers, unless they adapt, may be destined for a similar fate. We forget that bar admission and most bar associations are less than a century old. While the ABA was founded in 1878, the Utah State Bar did not exist before 1931. Lawyering arose in the industrial age but this is now the age of information. Lawyers' dominance in delivery of legal services may be headed for the same fate as railroad's key role in transportation. We may pride ourselves in our profession, tradition and heritage, just as railroads stayed on their tracks, but unless we adapt and evolve, we may find ourselves spurned for *other sources of the things consumers want* – resolution, certainty and counsel.

Changes external to the world of lawyering are now affecting us:

In the *information age*, proprietary information is a thing of the past. Democratization and technology fight against exclusivity of knowledge. The value of lawyers' information commodity will diminish. Bright people using widely available resources can educate and help themselves.

New resolution mechanisms are now common place, while attorneys still litigate in a centuries old system which has become so expensive it can resolve disputes of the upper levels of society only. Lawyers' exclusive access to resolution

forums is ending as non-lawyers appear in tax courts, domestic relations forums, small claims courts, and neighborhood centers.

Technology allows expert systems to model documents and processes using reasoning that is lawyer-like. Computers (in person or via the internet) can replace the personal assistance of counsel.

Standard repetitive complex procedures are learnable by non-lawyers. One does not need 3 years of expensive legal education following a four year degree to know how to practice in a limited field. The complexity of society and our reliance on services creates demand for "assistants" or "advocates" or "form preparers."

Other businesses offer legal-type services, such as title companies have done in the West, and bank trust departments nationwide.

The cost of legal education has eliminated lawyer availability for the middle class and small business.

As lawyers, we must decide whether we want to remain as we have been – like a railroad always on our tracks – or whether we want to be "transportation" – catching the vision of the coming future.

Founded in 1906, Smead Manufacturing (<http://www.smead.com>) is a business which has adapted well. Smead has been a major supplier of paper filing supplies, such as folders, labels and indexing tools. Visit Smead today and you will see that the company now emphasizes Smeadlink Document Management software for electronic data repositories. Smead wants to be the customer's resource for organizing data, not just a seller of paper filing products.

As lawyers, we need to think about what we do for our clients and what we can do for those who are not our clients. We need



to simplify, streamline and universalize. Those who are studying the future (<http://www.futurelaw.com>) predict that legal market activity will undergo many changes:

Advocacy will replace adversary activities.

Resolution processes will replace traditional litigation.

There will be layers of professional providers.

There will be new avenues for middle and lower class legal services.

Small firms will increase and virtual firms will increase.

Cross professional businesses (accountant-lawyer-real estate) will become the norm.

Lawyers will retain value for negotiating, counseling, and problem solving.

One area in which we must do better as a profession is our implementation of technology. It is happening around us faster than it is happening with us. Our clients expect it and those who are not our clients are using technology instead of us. We need to understand it and learn to use it to reach new market areas. This issue of the *Bar Journal* examines technology to emphasize the need lawyers have for the leverage technology can give, in efficiency and information.

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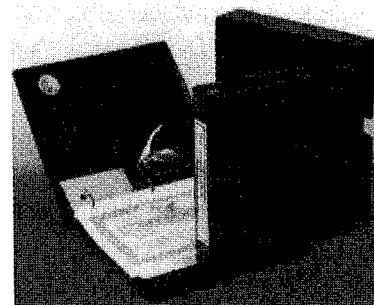
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Technology and Lawyers 1998 – Introduction

by State Bar Law & Technology Committee

This issue of the *Utah Bar Journal* has been produced by the Law & Technology Committee of the Bar. The purpose is to educate Bar members as to current technology issues applicable to the practice of law. Historically, attorneys have been much slower than their clients to incorporate technology. This reluctance exists for a number of reasons. Time pressures inherent in the practice of law are not conducive to learning new technologies. In addition, keyboards are seen as “secretarial tools.” Technology also can be intimidating and something better left to teenagers. Finally, the “traditional” practice of law doesn’t encourage leveraging technology. Change, however, is inevitable. Due to the increasing pressures imposed by clients and the administrative aspects of the practice, all attorneys will have to use more, not less, technology in the next decade.

The Bar, through this technology issue and other tools, wants to help lawyers overcome such hurdles. The Bar recognizes that in order for lawyers to stay competitive and provide reasonably priced services to the public, they will need to embrace the use of technology. Hopefully, the tools and information provided in this issue will be a step towards this goal. However, this effort will be only one among many. As the technology changes, the Bar will continue to make efforts to help lawyers understand and use technology. The Bar also encourages input from you, our membership, on your technology needs.

First in this issue is an article by Larry Peterson. Larry has automated his practice to an extensive degree through the use of technology. His journey down this path demonstrates how any lawyer could accomplish such a goal.

The next section of the *Bar Journal* covers a compendium of topics. These short articles provide brief overviews and updates of topics and projects which are, or will soon be, very pressing for lawyers. First, Tani Downing with the Office of Legislative Research and General Counsel provides an excellent overview of the tools available on the Utah Legislature’s web site. Lawyers who have both little and heavy involvement with the Utah Legislature will find this information highly useful.

Ken Allen, the Digital Signature Coordinator for Utah, then provides an update on the Utah Digital Signature Act. As you may know, Utah was the first state to enact such a law. This law

has put Utah on the cutting edge. Reading Ken’s article will help bring you up to speed and prepare you for the eventual use of digital signatures in your practice for such things as court filings and other electronic transactions.

Next Rolan Yoshinaga, with the Administrative Office of the Courts, gives a status report on the court’s electronic filing project for Utah. This project is pursuing fully electronic filings in the state court system. Find out how this project is proceeding.

Dustin Butler, Director of the POLARIS Project for the Salt Lake County Recorder’s office, will walk you through the recorder’s on-line data system. This Internet site is the envy of recorders across the world. Learn how you can put this advanced tool to work for you.

Finally, in the compendium, Toby Brown, Programs Administrator for the Bar and Treasurer of the Utah Electronic Law & Commerce Partnership (UELCP), will provide a status report on the Partnership’s activities. UELCP is working to facilitate the transition from paper-based legal processes to electronic-based processes. All of the programs noted within the compendium are participants in this partnership.

Following the compendium is a nice piece on Year 2000 legal issues by R. Parrish Freeman, Jr. Lawyers need to understand the legal ramifications of Y2K, in order to properly represent their clients. This article is a must reading for lawyers.

Lastly, Jay Sheen provides a review of the voice recognition software, NaturallySpeaking. Jay produced this unique review actually using NaturallySpeaking. We have left in the errors the software produced to demonstrate its effectiveness in actual use. You may be surprised at how well this type of program works.

Our hope is that the compendium series and the technology articles in this issue of the *Bar Journal* will help lawyers better understand technology. In turn we hope that this understanding leads to more and better use of technology by lawyers. We realize that technology is always changing, and therefore will continue to make efforts to educate lawyers on this ever moving target. Good reading!

The Beauties of Mechanization

by Lawrence R. Peterson
larry@mmmind.com

The industrial revolution can be pictured as a hurricane. If you are at its fringes, you experience only slightly unpleasant weather. But should the core of the hurricane move over your position, its effects cannot be ignored. The first innovations of the industrial revolution were agricultural machinery. As a result, the percentage of the working population involved in agriculture declined from 75% of all workers to just 3%.¹ The core of the mechanization revolution then moved to mining and manufacturing techniques and reduced the percentage of the working population involved in those industries from 50% to 10% of workers. Now, with the development of the thinking machine, the core of the revolution has moved to the thinking industries. Lawyers, like others who make a living by their wits, will have to do more than bury their heads in the sand to avoid the effects of this fierce wind.

WHY SHOULD YOU CARE WHAT I THINK?

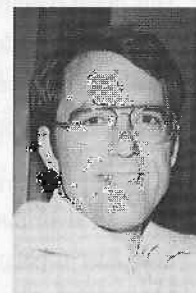
This is an opinion piece. I need to tell you something about myself so you can know how much or how little weight to give to the opinions expressed here. Like many other lawyers I know, I got into the practice of law out of a certain aversion to mathematics. About seventeen years ago, I fell into a medical bill collections practice. That practice cried out for automation. But seventeen years ago, lawyers were just coming out of the age when documents were created on typewriters. Wordprocessors and spread sheets were the hot new items in automation. There were computers, of course, but no legal practice computer programs. So, I undertook to write my own program. I wrote the first version in Basic. The program ran on a single-user computer under the CPM operating system. The program has been through several revisions since its creation. The current version is written in the C++ programming language and is running on a LAN where both Windows and Unix workstations are used. The rest of this article consists of a few of the lessons learned in writing, debugging, revising, and running of this program over the last fifteen years. As the title to this article implies, this has been, on balance, a satisfying experience. The program has repaid its development cost many times over. It now forms the backbone of a large-volume collections practice. To borrow from the language of an Egyptian hieroglyph, "This

incantation has been effective millions of times."

THE INVERSE SIZE RULE

I have often noted, with some sense of irony, that in our modern society, the smaller a transaction is, the more likely it is that it will be computerized. If you are involved in a transaction of less than \$100.00, chances are very good that you are dealing essentially, if not exclusively, with a computer. If, on the other hand, the transaction involved \$200,000.00 or more, you are probably getting some human attention. Is this because the computer cannot be trusted in the high stakes deal? I think not, I submit that it is because the \$200,000.00 deal has enough extra to cover the cost of human inefficiency. You may have made a similar analysis yourself in the following way. In your practice, how much money has to be involved before the use of a lawyer is justified? After deriving the threshold amount, you may want to estimate what percentage of all issues are above and below the threshold. All the lawyers practicing in your area are dividing among themselves that fraction of all possible cases that are above the threshold. The higher the threshold, the smaller the fraction. What happens to the cases that are below the threshold? Are they simply going unresolved, or are they being defaulted to quasi legal businesses such as collection agencies, banks, or title companies? These businesses profit from transactions below the threshold because they employ systems and automation. The implication from this is that lawyers could also profit from this portion of the cases if they would automate. And there are reasons beyond the simple profit motive why society might want lawyers to handle these smaller cases, rather than

Lawrence R. Peterson received his bachelor's degree in English from B.Y.U. in 1968 and his J.D. from the University of Utah in 1974. Between those dates he served as an infantry lieutenant in the U.S. Army, with a tour in Vietnam. He and his wife, Janet, are the parents of six children and have two grandchildren. Larry practices law in Salt Lake City with the firm of Peterson and Simpson.



defaulting on them. The business entity is usually controlled by the profit motive and the law. Attorneys, on the other hand are, educated to a standard, licensed by the state, bound by rules of ethics, influenced by a sense of professionalism, and controlled by obligations as officers of the court.

To demonstrate that such a thing is possible, let me cite a specific example. In our practice, we were able to take over the cases which one of our clients had been filing in small claims court. Not only were we able to handle these cases at less cost to the client than it had been paying in salaries and fees, but we were able to collect a higher percentage and all with no noticeable increase in the burden placed upon our own personnel, both professional and staff.

A word of caution here: The efficiencies which allow the automated lawyers to handle these smaller cases will just as effectively allow the lawyers to handle higher volumes of all sizes. The net result may be a decline in the number of lawyers required. See paragraph one above.

A HIGHER STANDARD OF PROFESSIONALISM

The suggestion that automation will allow attorneys to handle higher volumes and smaller cases does not mean that a lower standard of professionalism will prevail in these cases. On the contrary, it is our experience that the automation of a practice has the potential to raise the bar of professionalism expected in all cases. The following examples from our practice illustrate the kinds of professional advantages which can flow from the machine.

- Notice Pleading: Rather than simply stating the amount due, our complaints itemize each charge included in the complaint with the date of service, the facility involved, and the name of the patient. We can do this in even the smallest cases with no extra effort or cost except for the paper used. This detail requires extra paper but no extra effort. Besides providing the defendant with helpful information, we find this procedure helps to focus the case on the real issues at a much earlier stage.
- Accuracy: There is an old saying that "to err is human." Once an algorithm is programmed and debugged, where a computer is concerned, to err is impossible if the data entry is correct. In our practice, judgment amounts are calculated by the computer from the data in the case. Since the process occurs without effort and automatically, no one is tempted to

short circuit the calculation, even in the smallest cases. The computer can even help prevent data entry errors. For example, we input civil numbers once in the lifetime of a case, not once per pleading.

- Communication with the client: One of the recurring complaints appearing in the discipline corner of the *Bar Journal* is the failure of attorneys to keep their clients advised regarding the status of their cases. The computer has helped solve this problem for our office. We give one client a weekly summary of every transaction which has occurred in any of its cases. This report takes approximately ten minutes to prepare, even though it may extend into the tens of pages in detail. Another client can dial in by modem and has read-only access to the status of any of its cases, day or night.
- Calendar management: Court dates, deadlines, and ticklers can be imbedded in the file and tracked by the computer. For example, in our practice, when the service fee is posted to the case, the date of the service becomes available to the computer. Each morning a list appears of all cases that are now ready for default.

"[I]t is our experience that the automation of a practice has the potential to raise the bar of professionalism expected in all cases."

- Cooperation with the other side: The efficiencies of the computer have allowed our office to permit debtors to implement any kind of a payment plan that will work with their circumstances. Small payments are permitted because

they are not burdensome to post, track or report. Cases where payments are missed are automatically brought to the attention of staff for further action.

- Supervision of staff: The rules of ethics require that the lawyer appropriately supervise the work paralegals do in the lawyers employ. One way to do this is to program into the computer the appropriate requirements and have the computer enforce the rules by not enabling or permitting transactions that fall outside the rules.
- Assisting in the exercise of judgment: One of the things that make a lawyer a professional is the requirement that the lawyer exercise trained judgment. Our experience shows that the computer can also assist the lawyer here by focusing the attention of the lawyer on the decision points while skipping over the tedious detail. A good program will take the operator directly to the critical issues, spread out for review the relevant facts, record the attorney's decision, then take care of all of the necessary details of implementation. Once a

program has been accurately written and debugged, much of its output does not require continual review. Unlike the output of even the best of human assistants, it does not introduce novel results.

BUSINESS ISSUES

In our practice, efficiency is a big thing. It is the *sine qua non* of our existence. We have also learned that one important purpose of legal process from the summons to garnishment is to induce the defendant to open up communications. Once we are successful in getting the other side to give us a call, it would be a disaster to have to say, "Let me review the file and I will get back to you." The program allows us to instantly call up the case and spreads the relevant information on the screen so we can deal with the case immediately and accurately.

An experienced, loyal, and competent secretary or paralegal can be a great boon to a lawyer. We know because we are fortunate enough to have some working for us. But we have also learned that some of our best employees have a tendency to quit to raise babies or further their education. One of the real advantages of a program is in the integration of new employees. New personnel don't have to know typing, grammar, and the law to become effective. They need only be able to learn the program, and the program guides them through the work as we like it done. It is much like the difference between an essay exam and a multiple choice one.

Some time ago, I tried to explain my practice to an attorney in Arizona. After listening for a while, she responded with, "You are not practicing law; you are running a business." I took it as a compliment, although I don't think it was intended as one. As I have reflected on this comment, I have come to the conclusion that a lawyer who is a purist and wants only to practice law, in the classic sense, is likely going to be working for someone else who cares about the business issues. More germane to the issues of this article is the corollary that any attorney who can't or won't become involved in automation issues will eventually find themselves relegated to the position of user only. It will not be possible to go program free. Eventually, even the \$200,000.00 cases will require the benefits of mechanization.

PUBLIC POLICY ISSUES

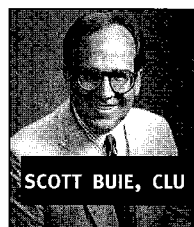
Computers bring enough benefits that there are plenty to go around. Not only is there more money to divide between the attorney and the client, but there are benefits left over that can flow to the other side. As an example only, I mention the issue of attorney's fees. Although a large majority of our debtors have

signed agreements in which they agree to pay attorney's fees, in our practice we seldom find it necessary to invoke these rights. We never require attorney's fees for simple procedures such as supplemental orders or orders to show cause. Attorney's fees become problematic in collection cases to the extent they are intended to reflect the amount of attorney's time devoted to a case. Other aspects of automation that benefit the debtors are accuracy of computation and the ease of access to account information.

CONCLUSION

Computerization is ubiquitous today and inevitable for the future. The computer is the kind of mechanization that is becoming sophisticated enough to perform the functions previously reserved for professionals. Because my practice is a collections practice, you may be tempted to conclude that it is uniquely susceptible to computerization. Although collections may be one of the first areas of practice to be automated, many others could now be mechanized to great benefit. And, as progress continues, no area of the law will avoid increased mechanization. Perhaps in the face of a trend this compelling, lawyers might be well advised to head the dictum attributed to Ted Turner: "Lead, follow or get out of the way."

¹Eli Ginsberg, "The Mechanization of Work", *Scientific American*, Sep. 1982, at 66.



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Legislative Web Pages

by Tani Pack Downing, Associate General Counsel
Office of Legislative Research and General Counsel
tdowning@le.state.ut.us

The Office of Legislative Research and General Counsel recently received the 1998 Roy B. Gibson Freedom of Information Award from the Utah Headliners Chapter of the Society of Professional Journalists. Legislative Research and General Counsel's main web site, www.le.state.ut.us, offers realtime access to the legislative activities both during the legislative session and throughout the interim. Here is just a sample of what is available.

If you are unfamiliar with legislative lingo, you may want to visit the Glossary of Terms at www.le.state.ut.us/lrgc/faqs.htm. To learn more about the Legislature, the legislative process, or how you can influence the laws, see www.le.state.ut.us/legproc.htm. Tips are also available regarding how to lobby your own legislator at www.le.state.ut.us/house/html/lobby.htm.

Bills from the 1997 and 1998 legislative sessions are accessible at www.le.state.ut.us/years.htm and are searchable by sponsor, subject, bill number, and key words. Bills from 1996 are available in searchable infobases. An electronic Journal recording each day's legislative activities is also available at that site. Calendars for each day during the legislative session are also provided so you can track your favorite bills. A searchable 1998 Digest of Legislation from the 1998 General Session is available at www.le.state.ut.us/cgi-bin/foliocgi.exe/digest98.

Suppose you are curious about the state representative or senator for your district, who may be running for those offices, or you want to know more about the leadership in each house of the Legislature. You can check it out at www.le.state.ut.us/house/house.htm or www.senate.le.state.ut.us. If you don't know which district you are in, you can get the telephone number to contact the clerk for your county at www.le.state.ut.us/house/html/vote.htm.

Interested in legislative committee membership, attending a legislative committee meeting, or maybe you just want to see what the committee is studying? The notices and agendas are at www.le.state.ut.us/legcom.htm. The public is encouraged to attend the meetings and give public input on the issues being studied.

Legislative appropriations information at www.le.state.ut.us/lfa/html/reports.htm, as well as legislative audits at www.le.state.ut.us/audit/ad_alldl.htm are also provided on the website. If you need to contact one of the legislative staff offices, try www.le.state.ut.us/offices.htm.

Finally, a searchable Utah Constitution is found at www.le.state.ut.us/~code/const/const.htm. The Utah Code is also accessible in HTML format at www.le.state.ut.us/~code/code.htm or in a searchable infobase at www.le.state.ut.us/cgi-gin/foliocgi.exe/utcode.

Warning: Knowing this much about the legislative process and how laws are made can be hazardous to your perception of the process! Have you ever watched sausage being made?

Tani Pack Downing is an Associate General Counsel for the Legislature where she staffs legislative committees and drafts legislation pertaining to information technology, public utilities, and the judicial code. Ms. Downing is also a member of the steering committee for the Utah Electronic Law and Commerce Project and serves as a member of the Legislative Automation Committee. She previously practiced law with law firms in Las Vegas, Nevada and Honolulu, Hawaii. Ms. Downing received her Juris Doctorate from the J. Reuben Clark Law School in 1991 and her Bachelors of Arts degree from Brigham Young University.



Utah Digital Signature Act Executive Summary

by Ken Allen, Digital Signature Coordinator for Utah
brsec.kallen@email.state.ut.us

HISTORY

Utah was the first legal system in the world to adopt a comprehensive statute enabling electronic commerce through the use of digital signatures. Utah adopted its Digital Signature Act ("Utah Act"), on February 27, 1995. The 1995 Utah Act and the 1996 amendments were developed in collaboration with the Information Security Committee of the Science and Technology Section of the American Bar Association. After the initial draft of the Utah Act was formulated, the Committee drafted the ABA Digital Signature Guidelines. These ABA guidelines were to serve as a unifying foundation for digital signature laws across varying legal settings and a common framework of principles that serve as a uniform basis for more precise rules in various legal systems.

The Utah Digital Signature Act has been a model for approximately 17 states and 5 countries. Currently, the states of Washington and Minnesota have modeled their digital signature legislation after Utah's Act. National and International governments and private corporations have looked to the Utah Digital Signature Program as a model of success. The governments of Malaysia and Singapore, major banks in Japan, as well as legal

scholars in intellectual property have visited Utah to educate themselves on digital signature technology.

The need for digital signature legislation became obvious to Utah when it began exploring digital signature technology in the context of developing a system of electronically filing court documents. It was clear to Utah that digital signature technology was an important means of facilitating electronic commerce. Electronic commerce flows easily across state, national and international boundaries, and is the method most organizations will be using to conduct business in the future. Although the business world was and is on the verge of effectively utilizing digital signature technology, there was no legal infrastructure that would comprehensively address the legality of digital signatures. Consequently, Utah enacted such a comprehensive statute with the intent of encouraging electronic commerce and the concept that the Utah Act would be permissive rather than mandatory.

CURRENT STATUS OF THE UTAH ACT

The Division of Corporations & Commercial Code of the Utah Department of Commerce have been tasked with the responsibility of implementing the Utah Act. The Utah Digital Signature

Kenneth Allen is a product of a military family. With his father honorably serving in the U.S. Air Force for twenty-seven years, traveling all over the world was customary. Ken attended New Mexico Highlands University on an academic and athletic scholarship (NCAA Division II, football) where he received a B.A. in Business Administration in 1985. After graduation, Ken worked for the Defense Logistic Agency as a Program Analyst (1985-88). Thereafter Ken returned to his alma mater as the recipient of the Patricia Harris Roberts Fellowship to pursue graduate studies in the MBA program. Ken then attended the University of Utah College of Law (1989-92) where he received his J.D. and served as the Vice President of the Minority Law Caucus. In 1992 Ken became a member of the Utah State Bar and went into solo practice specializing in intellectual property and corporate law. In 1993, Ken joined a former classmate to form the law firm of Allen & Billeter, L.C., specializing in entertainment law (film & music). In 1995, he became Counsel for Tooele Army

Depot, where he practiced in the areas of employment law, environmental law, and government contracts. This eventually led to Ken's direct commission as a Judge Advocate General in the U.S. Army Reserves, Judge Advocate Corp. In 1996 Ken became Legal Counsel and Digital Signature Coordinator for the Utah Department of Commerce Division of Corporations & Commercial.

Ken has served as Treasurer for the Utah Minority Bar Association (1995), member of the Utah State Bar Young Lawyers Division (1996), committee member of Utah Electronic Law Project (1997) and most recently as co-chair of the State Government Digital Signatures Laws & Regulations Work Group of the Information Security Committee, Section of Science & Technology, American Bar Association (1997).



Program has recently completed the tasks of developing administrative rules to implement the Utah Act and has contracted with a vendor to develop a state recognized repository and a certification authority system for the state of Utah. The vendor selected was the Utah E-Commerce Group, which is a partnership of four companies; Zions Data Services Company, Novell, Inc., Exoterica, Inc., and Certco, Inc.

On November 19, 1997, Utah became the first legal entity in the world to license and regulate a certification of authority, and recognize a repository. Utah's own Digital Signature Trust Company became the world's first licensed certification authority. Utah's Governor Michael O. Leavitt digitally signed a proclamation designating November 19, 1997, as "Utah Digital Signature Signing Day." Additionally, Professor Lee Hollaar became the first known individual in the world to digitally sign his last will and testament. Currently (as of July 13, 1998), there are three licensed certification authorities in Utah, Digital Signature Trust Company, ARCANVS, Inc., and Universal Secured Encryption Repository Company (USERFirst).

The Utah Digital Signature Program is actively participating with other state governments and private industry to help develop uniform national and international certification authority standards and accreditation in conjunction with the National Association of State Information Resource Executives (NASIRE) and the National Automated Clearing House Association's Internet Council (NACHA). Additionally, Utah is currently finalizing a reciprocity agreement with the State of Washington to allow certification authority licenses that are issued in each of the respective states to be valid in the other state. Such a monumental task is the beginning of a necessary effort to achieve uniformity among the states.

NATIONAL RECOGNITION OF THE UTAH ACT

The Utah Digital Signature Program recently received national recognition from the Intergovernmental Enterprise Panel and the National Association of State Information Resource Executives. The Utah Digital Signature Program was awarded the "1996 Federal Technology Leadership Award" in Washington D.C., on November 6, 1996, and the "Best of the Best Federal Technology Leadership Award" in McLean, Virginia, on February 11, 1997. The awards recognized organizations that have demonstrated extraordinary leadership in using information technology to improve services to the public.

"As we move to a paperless society, reliable electronic commerce will require good information security: e.g., knowing who originated what information."

WHAT IS A DIGITAL SIGNATURE?

A digital signature is a convenient method of validating and securing electronic documents. A digital signature provides the following:

- 1) Proof of Origin (assurance of who originated the message)
- 2) Message Integrity (verify whether message has been altered)
- 3) Non-Repudiation (sender cannot deny sending message to avoid promise)

WHY DO WE NEED DIGITAL SIGNATURES?

- 1) As we move to a paperless society, reliable electronic commerce will require good information security: e.g., knowing who originated what information.
- 2) Law and commerce requires a functional equivalent of a paper signature.
- 3) Ability to prevent forgery and fraud in electronic commerce.

WHAT ARE THE BENEFITS OF USING DIGITAL SIGNATURES?

The main benefit that Digital Signatures provide is a more reliable means of authenticating messages. Digital Signatures, if properly implemented and utilized, will:

- 1) **Imposters:** Minimize the risk of dealing with an imposter or persons who can escape responsibility by claiming to have been impersonated.
- 2) **Message Corruption:** Minimize the risk of tampering with messages, altering the terms of a transaction and covering up the traces of the alteration, or false claims that a message was altered after it was sent.
- 3) **Formal Legal Requirements:** Strengthen the support for concluding that legal requirements of form, such as writing, signatures, and an original document, are satisfied, since digital signatures are functionally equivalent with or superior to paper forms.
- 4) **Open Systems:** Retain a high degree of information security, even for information sent over open, insecure, but inexpensive and widely used communication channels such as the Internet. Original documents no longer have to be mailed for a signature.

WHAT ARE THE REAL WORLD APPLICATIONS FOR DIGITAL SIGNATURES?

- 1) Can conduct electronic commerce securely over all networks, including the Internet, which saves valuable time by not having to use the mail system. Distance is no longer a

limiting factor in conducting business.

- 2) Significantly reduces cost of the use and management of paper.
- 3) Can electronically file forms that require a signature such as:
 - court filings
 - UCC & corporate filings
 - drivers license renewal
 - voter registration
 - tax filings
 - wills and trusts
 - contracts
 - letters and e-mail
 - or any electronic document that is generated or stored on a computer
- 4) Privacy enhanced electronic mail and confidentiality of private documents.

WHAT DOES A DIGITAL SIGNATURE LOOK LIKE?

— BEGIN SIGNATURE —

Iqb1aWubmvsIa5qycUmFGnyJaQFAKgI/ZkBfbcNESbthba
4BIrcnjqabcKgNv+a5kr4537y8Cd+RHm75yYh5xxA1ojEL
wNhhb7cltrp2V7LIOnAelws4S87UX80cIBtBcN6AACfIIqym
C2h+RB2j5SU+rmXW
=QFMx

— END SIGNATURE —

The digital signature consists of a string of randomly computer generated letters, characters and numbers that are mathematically associated with the message via a hash function.

Consequently, each individuals digital signatures that is affixed to an electronic message will result in a totally different digital signature for each message that is signed.

HIGHLIGHTS OF THE UTAH DIGITAL SIGNATURE ACT

(Utah Code Annotated Section 46-3-101)

- 1) The purpose of the Act was to facilitate commerce by means of reliable electronic messages; minimize incidence of forged digital signatures and fraud in electronic commerce; to implement legally the general import of relevant standards, such as X.509 of the International Telecommunication Union; and to establish, in coordination with multiple states, uniform rules regarding the authentication and reliability of electronic messages.
- 2) A digital signature is equivalent to a "signature" if it meets certain provisions of the Act.
- 3) A digitally signed document is considered written.
- 4) A digitally signed document is as effective, valid and enforce-

able as an original document.

- 5) Provides a judicial rebuttable presumption that a digital signature is valid: burden on the party to prove otherwise.

MORE INFORMATION ABOUT THE UTAH ACT

To learn more about the Utah Digital Signature Act and how Utah and other states are progressing, contact the Utah Digital Signatures Coordinator, Kenneth Allen, at (801) 530-6026 or at his email address: "brsec.kallen@state.ut.us". Or simply browse the Utah Department of Commerce Web Page. The URL is: <http://www.commerce.state.ut.us>.

Other informative Web Pages include: (1) Summary of Electronic Commerce & Digital Signature Legislation by the law firm of McBride, Bake and Coles at www.mbc.com/ds_sum.html; (2) The PKI Page by the Commonwealth of Massachusetts at www.magnet.state.ma.us/itd/legal/pki.htm.



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Status of Utah's Electronic Filing Project

by Rolen Yoshinaga

Director of Information Technology for the Utah Administrative Office of Courts

Photo not submitted

For the past four years, the Utah Court Administrator's office has been designing an electronic filing system which would allow for the delivery of certain court documents regardless of the location of the sender. As a result of this effort, several spin-off technologies have been created which will benefit filers far beyond the simple transaction with the court. This report will describe the current status of the project and the resulting technology spin-off's.

To date the filing project has been targeted at capturing the document filed by a prosecutor's office to begin a criminal case. This work has been done with the patient participation of the Office of the Salt Lake County District Attorney. The criminal information is perhaps the most data intensive document which is processed by the court. While this complexity has made the design process difficult, the system which is emerging will be easily adaptable to other case types including civil.

Electronic filing of any document requires that there exist a standard method to both structure the document and to reliably convey that document to the court. This method must also be applicable to other document types including those relating to civil cases. Additionally, the methods must adapt to the filer's document management and creation techniques. The difficulty in devising such a method lies in the fact that every filer may be different in the way in which they use word processing, document storage and client management software. It is for this reason that the electronic filing project has maintained a steady effort to keep its methods consistent with national and international standards. The design relies upon electronic mail communication as its method to send filings and receive confirmations. In addition, the documents are structured in a way which allows computers to locate and process the data inside the document without disturbing the content of the document. The project has taken its lead from established filing systems which have been operational within the U.S. Department of Defense and the U.S. Securities and Exchange Commission. It is hoped that by maintaining these open and vendor neutral standards, the filing methods can be used for other governmental filing systems in addition to standardized electronic communication between any two private parties.

An additional complication which arises from the filing process not discussed above is the matter of signing the document. The need to reliably ascertain the identity of the sender in addition to the identity of individuals attesting to the content of a document required that the project establish a digital signature technique consistent with national and international standards. At the time this effort began, there was little formal recognition of a single technique which would provide both reliable sender identity and the integrity of the content of the signed document. This required that the effort focus on assisting in Utah's digital signature legislation which was first passed in 1995. The result has been the creation of one of the more interesting spin-off industries. The management and authentication of a digital signature under Utah law requires the presence of an entity known as a certification authority. That is, a third party who can certify the identity and authority of the signer to conduct the specific transaction. In the case of the Court's electronic filing project that entity will likely initially be the Utah State Bar. However, the role of certification authority can be extended to other public and private entities such as licensing agencies, banks and private certification companies.

During the life of this project much has happened in the world of computer technology. Most significant is the emergence of the World Wide Web as the common means by which different people can view documents regardless of the word processors or computers they may use. Web browser technology has become the lingua franca for the communication of document content to multiple concurrent viewers. This convergence has greatly benefited the electronic filing project due to the fact that

For the past seven years Rolen has been the Director of Information Technology for the Utah Administrative Office of Courts. In addition to directing the activities for the electronic filing project, he has overseen software development projects for the Supreme Court, Juvenile Court and District Court. Prior to coming to the AOC in 1991, he served as technology analyst for the Utah Commission on Criminal and Juvenile Justice and as a software developer for the Utah State Tax Commission.

at the time of its conception there was little consensus on how filers and receivers would commonly view the documents. Word processors lack compatibility and are subject to variations in their treatment of text from one vendor to another. By riding on the coattails of the Web phenomenon the project has created that model for the "electronic filing cabinet." Both filers and receivers need only point their web browsers at the Court's filing cabinet to view the documents. This additional spin-off technology integrated to the digital signature allows the receiver to locate and manage electronically filed documents with little human intervention. The receiver in our case is the court; however, any two parties communicating documents over the Web with a need to authenticate the sender and to maintain the chain of documents can utilize this technology with today's basic consumer technology.

As a result of this long and winding journey, we now have the software and the infrastructure to effectively send, receive and manage court documents which are electronic in nature. Interestingly, these new digitally signed documents can now be considered to be the original. The paper copy becomes the artifact of the transaction which is the exact reverse of the perception of today's ink signed paper documents. This capability now confronts the issues of ease of viewing, portability, permanent archival and access for the technologically impaired (these individuals are found in equal numbers both inside and outside of the Court). Many of these issues will be attacked during our first live filings to be conducted in the coming months. Additional criminal filing documents are being developed and work

has already started on developing a generalized document description for civil cases.

The electronic filing of court documents has proven to be more than that which can be accomplished with traditional data processing techniques. The very unique nature of the documents and their content defies traditional file, record and data element techniques. In addition, many of the barriers to electronic filing are related to the complex nature of the relationship of the filers to the Court and other parties in the case. It is hoped that this initial effort will create the opportunity for other governmental filing systems to be created which are similar in nature. To that end, the Utah Administrative Office of the Court has been an active participant in the Utah Electronic Law and Commerce Partnership (www.uelp.org). This partnership is focused on developing the consensus and awareness of electronic methods for both legal and commercial activities. Those venturing into this realm today face few of the developmental dilemmas that the Court's project has confronted. The rapid pace of Web based electronic commerce applications has made the technological decisions much easier. However, the human side of this process must be carefully navigated. Acceptance of electronic filing will be defined by the level of confidence all parties have in the results. In the upcoming events for the electronic filing project, much of the work will focus on this confidence level. Our hope is that in the end, electronic filing will be seen as a relatively straightforward process which can be accomplished with software tools readily available to the average consumer.

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Salt Lake County Recorder POLARIS System

by Dustin Butler,

Director of POLARIS (Public On-Line Access Recorded Information Systems) for the Salt Lake County Recorder's Office
Currently finishing a Computer Information Systems Degree
dustin@co.slc.ut.us

The Salt Lake County Recorder's Office started implementing this system in about March/April of 1997. Prior to the CRISP and POLARIS systems, the procedure for recording documents was slow and tedious. Each piece of paper was physically handed around from department to department, requiring several months time for each document to complete the recording process.

The vision of Nancy Workman, Salt Lake County Recorder, was to capture an electronic image of each and every document that could be used to do our work. This would accomplish several purposes:

1. It would create a much higher quality image than microfiche or microfilm.
2. It would allow us to finish our work more quickly.
3. It would allow the original document to be recorded to the rightful owner almost immediately rather than months later.
4. It would allow every employee in our office, as well as the other county offices, to access our data from their desktop. No more tedious trips from office to office just to print images from microfiche.

5. It would allow the public to access this data by making it available over the Internet.

Since July 1st, 1997, all of these purposes have been accomplished. POLARIS (Public On-Line Access to Recorded Information Systems), the Internet delivery tool of the County Recorder's Office, is on line and currently has over 400 users. The Recorder's Web site offers public access to all of the county mainframe indices, recorded document images, plat maps, GIS data, and more. Currently, the POLARIS system contains mainframe data back to 1980, electronic images of documents filed back to 1994 and 100% of county plat maps.

Rather than physically visiting the offices of the Salt Lake County Recorder's Office, a good portion of the information required by attorneys is available on-line through POLARIS. To preview the system and for information regarding system access and cost, go to <http://rec.co.slc.ut.us/>.



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Report on the Utah Electronic Law & Commerce Partnership

*by Toby Brown, Treasurer – UELCP
tbrown@utahbar.org*

The Utah Electronic Law & Commerce Partnership (UELCP) is a partnership of lawyers, clients and government working to facilitate the transition to fully electronic-based practice systems and processes. The Utah State Bar has taken a lead role in this partnership, with David Nuffer, a current Bar Commissioner, serving as its Chair. This leadership has put the Bar in a key role in this effort.

The Partnership has been successful thus far in furthering its goals. We have built an excellent network of individuals directly involved in technology within their given organizations. Our monthly meetings have provided excellent opportunities to share information about and integrate the various projects going on within the state. The results have been useful and flexible systems, that will be easy to access by lawyers, such as the Bar's On-Line Licensing Program.

For those of you familiar with the Utah Electronic Law & Commerce Partnership, the first thing you may have noticed is a change in our name. Earlier this year, we added the terms 'Commerce' and 'Partnership' to our name to better reflect our goals. 'Commerce' was added since we recognized that electronic legal processes are the foundation for e-commerce. 'Partnership' was added to better reflective of our approach and make-up.

In pursuing electronic or 'e-commerce' goals, the Partnership is now turning its efforts towards law & policy modifications. Current statutes, rules and regulations do not always recognize the electronic medium. For example, some court rules require one inch margins, 12 point fonts and double line spacing. These parameters are not easily applied to electronic documents. There are countless laws which have similar problems that need to be addressed. The Law & Policy Committee of the UELCP will be working to raise awareness of these problems and to provide input, where appropriate, to help facilitate these transitions. Our primary area of activity this year will be encouraging state legislation that is 'e-commerce' friendly.

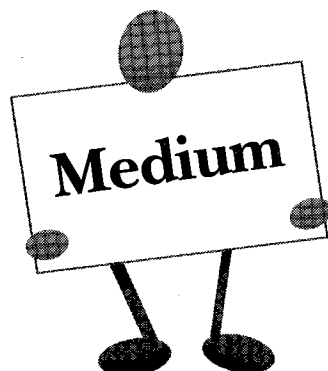
As well, the Partnership will continue its education and outreach efforts. In the end, these efforts may prove to be the most valuable. It is to be expected that people will have some anxiety in using technology, especially when it comes to conducting 'legal' business over the Internet. Therefore the Partnership wants to demonstrate to lawyers, and the public, the value of utilizing technology. Examples of issues surrounding this subject include security and privacy issues. We understand the need for people to feel secure when using technology and therefore will make efforts to demonstrate how technology can address these issues.

Up until this year, the Partnership has been operating on donations from its partners. This year we received funding from the State, in recognition of the value the UELCP brings to fostering and encouraging e-commerce in Utah. With this funding, the UELCP will continue to play a role in the development of an e-commerce infrastructure in Utah.

The UELCP is an exciting concept with great value for Utah attorneys and their clients. The support of the Bar has been critical in this process. Utah lawyers who want to know more about this effort can find out by going to www.uelcp.org. We encourage input and involvement from lawyers and other interested in this subject.

Toby Brown is the Programs Administrator for the Bar. He administers the Bar's network and oversees the Bar's web page.





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Ensuring Your Business Clients Survive The Year 2000 and Beyond

by R. Parrish Freeman, Jr.

Whether we know it as 'The Millennium Bug', 'The Year 2000 Problem', or some other name, we are all, by now, familiar with the issue: the long-time computer programmer practice of saving historically expensive memory bytes by creating date fields with two digit, rather than four digit year entries. The result is that midnight on New Year's Eve, 1999, will signal to unmodified computers, networks, and imbedded chips around the world the arrival of the year 1900. As lawyers, our task is to protect our clients' interests and to make sure that we address, as proactively as possible, all of the potential issues associated with the Year 2000 Problem.

ADVISING YOUR BUSINESS CLIENTS

Maintaining Business Operations through the Millennium

The foremost concern for any business is its continued existence. The Year 2000 Problem is, by its nature, a minutiae-laden conundrum. The mad rush to sift through layers of computer code in an attempt to identify and remediate every two digit year field may obfuscate the overall objective, that of maintaining the going concern. Each business should put to itself that fundamental question, the one that drives our species to invent, explore and evolve, "How's this thing work?" The "thing" in question is, of course, the business and the answer to the question will vary with the nature of the business. To be sure, the answer will be some combination internal process and external interaction. A small cafe may not consider itself vulnerable to the Year 2000 Problem but it will find otherwise when its supplier is unable to keep the cafe pantries full. The supplier may have failed for its own inability to address its system's Year 2000 woes, or the supplier may be dependent on a vendor who failed to do so. The point is that many events and interactions occur each day to allow every business in the world to continue operating. Each business must assess its own unique needs and not be smug in the comfort that addressing internal Year 2000 issues closes the door on addressing the issue altogether.

To the extent that it is possible, the attorney should be involved in every aspect of a complete Year 2000 audit. It could be prudent to bring as many Year 2000 communications as possible within the shelter of attorney-client privilege, given the potential for some sort of future litigation.

Assessment Phase

Among the first steps a business should take in moving toward Year 2000 compliance is assessing its vulnerability. Most companies use a variety of software applications to help run day-to-day operations. These are the most obvious places to search for potential Year 2000 impacts. Glitches in these programs could result in, among other things, unfilled customer orders, inaccuracies in payroll and 401(k) plan deductions, and corruption of the company's financial data.

Other less obvious sources of concern stem from any piece of technology that houses an imbedded computer chip. A failure of some such devices could be just as crippling to a business as the failure of its computer operating system. Security badges that allow employees to gain access to their place of business may be rendered non-operational. The same could happen with building environmental controls, alarm systems, elevators and phone systems.

The health care industry could experience the most serious and possibly deadly impact unless it takes steps to ensure the Year 2000 compliance of the embedded chips present in some 100,000 different devices currently in use. The potential for a Year 2000 shut down exists in these devices regardless of their degree of date dependence. These chips maintain internal clocks that let the device keep track of when it was last calibrated. If it has been too long since the last calibration, or if there has never been a calibration, the machine will not oper-

R. Parrish Freeman, Jr. is a Registered Patent Attorney and licensed to practice law in the State of Utah. He attended the University of North Carolina at Chapel Hill (BA Chemistry 1991) and Campbell University School of Law (JD 1996). He currently works in the Corporate Legal Department of American Stores Company. Mr. Freeman anticipates opening his doors as a solo practitioner of patent and intellectual property law some time in early 1999. His office will be Year 2000 compliant.



ate. An intravenous drip, an apparently date-independent machine will cease operation at midnight on December 31, 1999, because its internal clock is reporting the date as January 1, 1900, somewhat prior to the device's initial calibration. The attorney should explain to the client the importance of thoroughly understanding the business' systems and imbedded chip exposure so that the client can properly remediate.

Solving the Problem

Having identified points of Year 2000 exposure, clients should then begin implementing "a fix." Your client must grasp the time and expense involved in putting the fix through what is sure to prove to be a long period of testing. Current estimates put the cost around \$1.00 for each line of code, regardless of whether the line contains a date field. As each two digit year field is changed to four digits, the entire application must be retested to ensure today's round of fixes did not have an adverse impact on the preceding days' efforts.

1. Patch of Fix from the Vendor

Before committing its own resources to engineering a fix, each business should review the pertinent software licenses or maintenance contracts. Some, albeit few, vendors are supplying a free upgrade, while others are reluctantly acquiescing to legal pressure and providing a solution that addresses the Year 2000 issue, but is in no other way constructively an upgrade. The language of the license may, with any luck, provide expressly for the vendor to address Year 2000 concerns. This is very unlikely. The more likely scenario is that the license impliedly warrants that the software will perform as advertised, barring the occurrence of unforeseen circumstances. The arrival of the Year 2000 can hardly be considered unforeseen. Approximately twenty lawsuits have been filed alleging variously breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, breach of express warranties, fraud, and unfair trade practices. None of these actions has reached trial, but the pressure generated by the suits, almost all class actions, has been enough to cause several vendors to retreat from their original position that Year 2000 compliance should be sold, not bestowed.

2. Modify Source Code

Prior to cracking open the source code to engineer the fix, the business must address certain intellectual property concerns. Unless the client wrote the noncompliant code in house, or at

some point purchased all of the rights to the source code, the client is a licensee of source code still owned by the vendor, or licensor. In the absence of an express agreement otherwise, any modification of the code by the client, or at the direction of the client, could constitute an infringement of the licensor's exclusive right to create derivative works from the code. The preferred course of action would be for the licensee to seek permission from the licensor to make the necessary modifications. If you find, however, that your client has commenced source code revision without licensor permission, there are defenses. The most plausible defense invokes the authority of 17 U.S.C. §117, which allows "the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: 1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner." The licensee would argue that modifying the program toward Year 2000 compliance is "an essential step in the utilization of the program." The other defense is the doctrine of "fair use." There are four

"[C]lients should understand that the potential defection of key IT players is yet another area of vulnerability."

factors, now codified as 17 U.S.C. §107, but the defense saw its inception as a judge-made equitable doctrine. As such, future courts may be inclined to hold that, given the magnitude of the Year 2000 Problem and its global impact,

fairness and public policy dictate that a licensee of noncompliant software should be allowed to remediate source code owned by an uncooperative or incompetent licensor.

For larger companies with in-house information technology (IT) departments, implementing a fix could mean dedicating a portion of the present IT staff or supplementing the staff with new hires who have specialized Year 2000 understanding. Given the magnitude of the Year 2000 Problem, however, such personnel may be difficult to locate. Qualified IT candidates are becoming an increasingly hotter commodity. Bearing this fact in mind, clients should understand that the potential defection of key IT players is yet another area of vulnerability. Each business should implement certain employment incentives to ensure the endurance of its IT department.

3. Outsource

Some business may wish to take another path to implementing a Year 2000 fix, that of outsourcing the task to an independent contractor. There will, of course, be a contract between the client and this third party contractor. The agreement should

address with particularity such issues as ownership of the fix and liability in the event of a failure to deliver. The contractor, similar to the client/licensee, must also have the permission of the vendor/licensor to make the necessary Year 2000 modification to the source code.

Buying New Software

Future contracts with software vendors should particularly clarify a number of issues with regard to the Year 2000. In negotiating a software contract, counsel should clarify and define the boundaries of the following:

- License rights, including reproduction, decompilation/reverse engineering, modification/derivative works, Section 117 rights (defining boundaries of noninfringement), and fair use;
- Express warranties;
- Implied warranties, including implied warranty of merchantability and implied warranty of fitness for a particular purpose;
- Warranty limitations/disclaimers;
- Limitations on remedies and liability;
- Integration clause (i.e., know that the terms of an integrated agreement may still be explained or supplemented by course of dealing, usage of trade or course of performance and that representations concerning Year 2000 compliance may be admissible under one of the exceptions to the parol evidence rule);
- Confidentiality (i.e., make certain that the provision is not breached by the user's efforts to make the product Year 2000 compliant);
- Force majeure (i.e., specify that the Year 2000 is not an "act of God" such that would excuse performance);
- Shortened statute of limitations (i.e., whether the statutory limitation period has been truncated by the language of the contract);
- Year 2000 compliance (i.e., a provision that should now be inserted into all, not just software, contracts that specifies that the occurrence of the Year 2000 will in no way upset the product or service that is the subject of the agreement);
- Virus, timebomb, and Trojan horse (i.e., a provision that warrants that the vendor's product is delivered with no viruses, possibly breached if the product fails at the Year 2000);
- Access to source code (i.e., a provision arranging for the source code to be held in escrow and made available to the licensee in the event of the vendor's bankruptcy or business failure);

"The more common response from the insurance industry to date has been to specifically exclude coverage for Year 2000 related problems in newly issued and renewed policies."

- Term and termination (i.e., make sure the agreement is not terminable "for convenience" by either party or else the vendor may be able to duck Year 2000 responsibility altogether).

Clients should also pay special attention to insurance contracts, not just their own, but those of their software vendors and other trading partners. Very few policies specifically address the Year 2000 Problem, as the scope of coverage is difficult to assess, an uncertainty compounded by lack of historical precedence. For the business client, there are a very few companies that offer Year 2000 Policies. The coverage these policies offer is not far greater than the expense of maintaining the premiums. The more common response from the insurance industry to date has been to specifically exclude coverage for Year 2000 related problems in newly issued and renewed policies. Counsel should review the commercial general liability, business interruption, product liability, errors and omissions/professional liability, and directors and officers liability coverage of the client and the client's trading partners to determine whether Year 2000 issues have been addressed, excluded, or worded in such a way that

coverage is arguable. The creation of two digit, rather than four digit, date fields is, for example, arguably an error or omission. With regard to directors and officers liability policies, where not specifically excluded, actions taken in preparation for the Year 2000 should be argued under the business judgment rule.

Relationships with Suppliers and Service Providers

In addition to an audit of internal systems and operations, the business client should undertake the task of assessing the progress vis-à-vis Year 2000 compliance of all mission critical trading partners. The daily commerce conducted by and between companies around the world is a vast yet easily overlooked area of exposure. Clients should attempt to the extent it is possible to bind its trading partners contractually to continue to meet the client's commercial needs through the millennium. As a practical matter, however, ensuring the Year 2000 compliance of trading partners is a matter of the client's either baby-sitting or abandoning its dubious relations.

Guarding against Future Litigation: Due Diligence

Under the business judgment rule, directors and officers act within their duty of care so long as "the process employed was rational or employed in a good faith effort to advance corporate interests." (See *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959 (Del. 1996)). There are several mea-

sure companies can take now to help tip the scales in their favor in the future regarding the quality of their efforts to prepare for the Year 2000. The board of directors should appoint a Year 2000 committee, generate a Year 2000 plan, create a formal Year 2000 budget and commission a year 2000 legal and technical audit. The board should also develop a contingency plan to ensure the continued legal and technical audit. The board should also develop a contingency plan to ensure the continued operation of the business in the event of Year 2000 failures, either within the company or by those with whom the company does business. The corporate minutes should reflect also that the board has reviewed pertinent insurance contracts, evaluated recent or potential acquisitions for Year 2000 compliance, and has sought to ensure that the company's pension fund manager as well as the companies into which such moneys are being invested are all Year 2000 compliant.

Companies should do what they can to control the Year 2000 paper trail while the handwriting of future lawsuits is on the wall. As previously mentioned, communications between client and attorney are privileged and could be considered a safe harbor. Such documents are not the source of concern. Businesses with a large number of employees, most of whom work "in the trenches," should be aware of the content of emails, internal memoranda, and internet postings through usenet groups or chat rooms. Employees are certainly allowed to express their opinions, especially on their own time, but the content of these writings can create a very dangerous paper trail. Opinions or statements attesting to management's lack of concern or competence in approaching the Year 2000 issue would, of course, be the most damaging. The best way to avoid negative testimonials by employees is to render the allegations baseless. Companies that demonstrate and document due diligence in dealing with the Year 2000 will certainly not prevent disgruntled employees from voicing grievances, but they will effectively diminish the volume and will prevent conscientious employees from airing truthful and legitimate concerns. To emphasize this point, businesses should hold company-wide meetings to communicate to employees the gravity of the paper trail issue and that glib emails, internet postings and other memoranda should be avoided unless such writings contain reality-based opinion.

New SEC Guidelines

Publicly traded companies should be mindful of their duty to disclose known material events, trends and uncertainties that

could impact the business in a manner that would be of interest or concern to potential investors. Prior to July 29, 1998, disclosing Year 2000 risks and expenditures was an exercise undertaken by only those prudent and far-sighted companies interested in avoiding future investor lawsuits. On July 29, however, the SEC issued interpretive and detailed guidelines clarifying Year 2000 reporting duties. Companies must provide a Year 2000 disclosure if 1) its assessment of Year 2000 issues is not complete, or 2) management determines that the consequences of its Year 2000 issues would have a material effect on the company's business, results of operations, or financial condition, without taking into account the company's efforts to avoid those consequences.

FUTURE LITIGATION:

Year 2000 litigation thus far has restricted itself to a handful of mostly class action suits brought by users of noncompliant software against intractable vendors. The progeny litigation of the Year 2000 Problem is will likely include the following:

- Shareholder derivative suits;
- Actions against (unsuccessful) contractors hired to solve the Year 2000 Problem;
- Disputes regarding the scope of insurance coverage;
- Breach of employment contract actions against in-demand Year 2000 IT personnel who defect to pursue better and more lucrative offers;
- Investor lawsuits due to inadequate SEC disclosure;
- Actions between compliant and noncompliant trading partner businesses regarding provision of corrupt data;
- Actions against Year 2000 certification entities;
- Actions against software acquisition consultants for their procurement of noncompliant software;
- Consumer actions against vendors that are Year 2000 compliant based on an inability to handle dramatically increased product and support demand;
- Copyright infringement suits initiated by the vendor/licensor.

Lawyers advising clients regarding Year 2000 preparedness are in the unique position of being able to perceive and brace for what is certain to be a flood of litigation. Awareness of the issues that will arise and determined documentation of due diligence efforts can go a long way toward keeping your client's business operating and toward avoiding the time and expense of future litigation.

"The best way to avoid negative testimonials by employees is to render the allegations baseless."

Steven H. Goldberg, *How Lawyers Can Help Meet The Year 2000 Challenge* (visited Sept. 22, 1998) <<http://www.comlinks.com/legal/gold3.htm>>

Ira T. Kasdan and David K. Monroe, *Memorandum To Senior Management: Of Smoking Guns, Paper Trails and Law Czars - Preparing for the Tidal Wave of Year 2000 Litigation* (visited Sept. 24 1998) <<http://www.year2000.com/archive/NFlegalprep.html>>

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What Is The Year 2000 Problem And Why Should Your Company Care?, LEGAL UPDATE ON THE MILLENNIUM BUG LIABILITY (Hancock Rothert & Bunshoft LLP, Los Angeles, CA), July 1997, at 2.

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Michael D. Scott, *The Year 2000 Crisis: Conducting a Legal Audit* (visited Sept. 24, 1998) <<http://www.year2000.com/archive/NFaudit1.html>>

Warren S. Reid and Steven Brower, *Beyond Awareness: Ten Management and Ten Legal Pitfalls Regarding the Year 2000 Computer Problem That You May Not Have Considered, Yet!* (visited Sept. 24, 1998) <<http://www.year2000.com/archive/NFbeyond.html>>

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Securities and Exchange Commission, *Interpretation: Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers* (visited Sept. 30, 1998) <<http://www.sec.gov/rules/concept/33-7558.htm>>

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Review of Dragon NaturallySpeaking, Ver. 1.0

by E. Jay Sheen

Robinson & Sheen

jaysheen@uswest.net

Photo not submitted

This review is being dictated using Dragon Systems NaturallySpeaking version 1.0, personal addition [edition]¹. I agreed to dictate this review without edits of any kind in order to allow the reader to see what my computer screen shows ANSI [as I] speak. Spelling errors are not mine but all grammatical errors are. I can see that the editor of this article will need to put in parentheses my intended meaning. I have owned the software for more than one year. My use of it has been sporadic at best. You need a relatively quiet environment. You have to put up with the jokes about talking to your computer. The jokes engendered by the headset are legion, of course, but I'm sure or [delete or] it beats holding a microphone. (I am always amazed when the program gets words like engendered and legion correct, since they're not often spoken. I am also amazed and frustrated that no matter how the [many] times I speak it the program can't seem to get policy [pause] and cause correct).

Training the software is very simple. You read a passage from a novel, short story or form letter or agreement (pre-selected). My southeastern Idaho accent created no problems for my voice enrollment. Immediately after my enrollment, I was able to dictate with surprising accuracy. You will note that the beginning of this paragraph does not begin with the [a] capital letter. That is an annoyance that I hope has been corrected in subsequent versions of the software. I often forget to indicate capitalization that [at] the beginning of the paragraph. The program does capitalize sentence beginnings properly.

Dictation is also fairly simple. There it goes again. Newer versions of the software allow you to dictate directly into your preferred word processing program. Version 1.0 requires you to dictate into a separate text window, which I than [then] half [have] to cut and paste into my word processor. I have heard that the trade-off between the two approaches is speed. As I speak to [I] see the words appear on the screen, for the most part. I understand there is more of a lag between the dictation and the appearance of the words on the screen within a word processing program.

Recognition accuracy and speed with which one sees the dictation appear is obviously dependent upon the hardware. I have a Pentium to [II] 266 MHz microprocessor and 64 MB RAM. I have a generic Creative Labs sound card and use the headset provided with the software. I understand that current versions of most voice recognition software work best with a minimum of 64 MB of RAM, with 100 and 28 [128] MB of RAM recommended. As I dictate this I have my word processing program open [in] the background and my connection to the Internet with Netscape navigator open, without an [a] noticeable degradation of speed.

Voice recognition is dramatically improved by using complete phrases or sentences as the program attempts to identify words in their context. I have used IBM's voice recognition software but was dissatisfied with its editing capabilities. NaturallySpeaking allows you to edit completely hands free. You can set fonts and identify attributes such as: cap [spoken as a command - should have capitalized "This"] this phrase should be underlined as I speak it. Now I should be back to normal attribute. You can select words, sentences or paragraphs and edit them, correct them or delete them with voice commands.

As the IBM commercial indicates, all dictation occurs without unnatural pauses except for identifying commands. I have noticed that using the same voice tone improves voice recognition accuracy. My live demonstrations to colleagues and friends have been less than stellar due to my changing tone (the old "excited outer rents [utterance]"). One other thing you notice is that accuracy does not improve if you speak slower or attempt to speak more clearly.

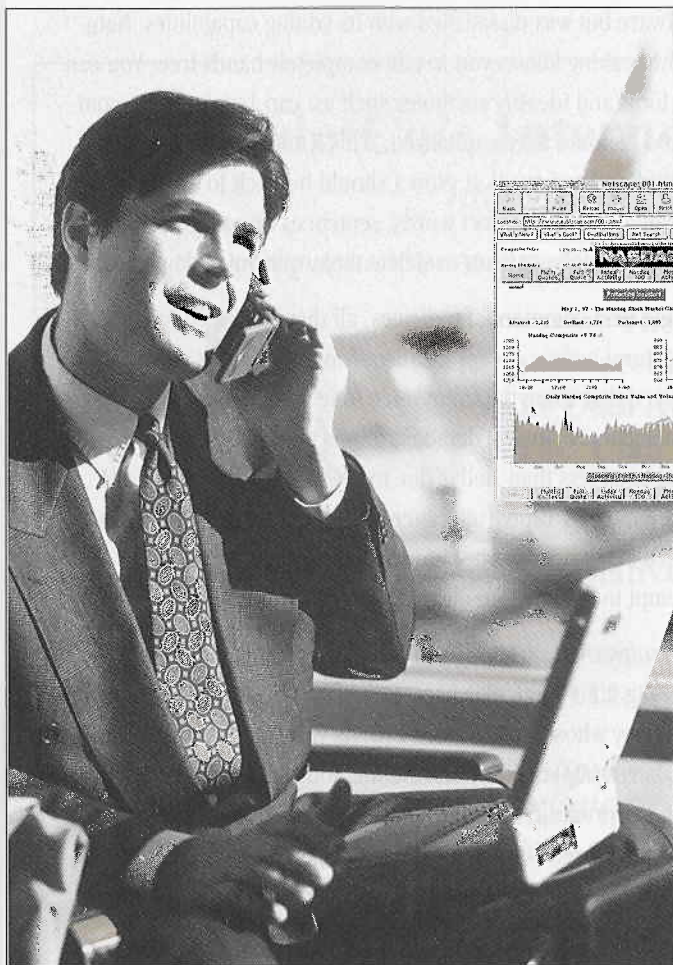
The software trains itself and you can improve accuracy by training it for particular uses. For example, I have represented a company whose initials were URI. As you can see, the program has been trained to understand the initials. The first time I said URI, the program interpreted it as "you are eye." I can force the other interpretation by policy [pausing] in between each letter. That is just one example of the power of constant use of the program.

The program is her a [very] good at interpreting legal language. I'm now reading from a contract that I prepared. "The undersigned cap [command again, not a word] bidder hereby proposes to furnish all plant machinery, Labour [British spelling I guess], services, materials, equipment, tools, supplies, transportation, utilities, and all other items and facilities necessary to perform all Work required under the Bid Schedule of the Contract Documents entitled "deleted material" in accordance with the terms of conditions of the Contract Documents." And now from a pleading: "In essential terms, this is a contract action in which the defendant always [owes] to the plaintiff certain sums of money under a contract entered between the parties in 1994, incident to the sale of a business from plaintiff to defendant. A copy of the contract is attached to the plaintiffs complaint in this proceeding and irrelevant [oops, bad mistake here - should have been "the relevant"] portions of which are attached hereto as exhibit "A."" (you will notice I forgot to say plaintiffs complaint). Punctuation is easily down [done] by saying the word.

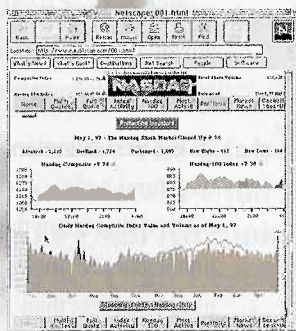
Newer versions of all of the software voice recognition programs include special legal dictionaries as well as medical dictionaries, sometimes as an add-on for [an] additional fee. Dragon Systems has a fairly active installed based of users. I subscribe to the voice recognition users bulletin board service which provides many handy tapes [tips] from actual users of the software. The tips include hardware, software and troubleshooting information. Having an active user group is a big plus improving the learning curve.

Voice recognition software is certainly here to stay. Not only are Dragon Systems and IBM committed to it but also Microsoft is committed to including a [it] with their operating systems and major software programs. The time when it will be used by the masses is fast approaching. Many in the legal community can already appreciate its power.

¹Corrections to errors produced by NaturallySpeaking are noted in [brackets] and were added to this article for clarity.



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Discipline Corner

ADMONITION

On August 31, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.15 (Safekeeping Property) and 8.4 (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School.

In settlement of an action, the attorney's clients agreed to pay the opposing counsel's clients \$2175. Opposing counsel agreed to accept payment on behalf of his client in the form of a cashier's check. The attorney told opposing counsel that instead of a cashier's check, he would pay the \$2175 from his trust account, and personally guarantee payment. The attorney gave opposing counsel a check for \$2175 from his trust account. Opposing counsel deposited the check and dispersed \$2175 to his client. The check from the attorney's trust account was returned for insufficient funds. Opposing counsel contacted the attorney, who told opposing counsel to redeposit the check. The check was again returned for insufficient funds.

ADMONITION

On August 31, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating Representation), 8.1 (Bar Admission and Disciplinary Matters), and 8.4 (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School.

The attorney undertook representation of a client in a collection matter in which he successfully obtained a default judgment in the amount of \$48,955. Since obtaining the judgment, the attorney failed to assist the client in obtaining the assistance needed to retain out-of-state counsel to represent her in collecting the judgment. The attorney failed to return numerous telephone calls from the client, failed to protect the client's interests by returning her client file, and failed to respond to the Bar's repeated requests for assistance in its investigation of the complaint.

ADMONITION

On August 31, 1998, two attorneys were admonished by the Chair of the Ethics and Discipline Committee of the Utah State

Bar for violation of Rules 5.3(a) and (b) (Responsibilities Regarding Non-lawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The attorneys were also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorneys and the Office of Professional Conduct.

The attorneys maintained a law practice in Salt Lake City with several satellite offices throughout the state. One satellite office was in Provo, Utah. The attorneys employed a paralegal who worked out of the Provo office. No attorney worked out of the Provo office. Supervision of the paralegal in the Provo office was done by the attorneys out of the Salt Lake office.

In 1997, a client went to the Provo office and employed the attorneys to represent her in a Bankruptcy matter. The client only met with the paralegal in the Provo office. Initially, the client did not meet with the attorneys or any other attorney from their office. During the course of the client's initial representation, the attorneys failed to properly supervise the Provo paralegal. The attorneys subsequently met with the client directly and proceeded with her representation, which was completed to her satisfaction.

ADMONITION

On August 31, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 5.3(b) (Responsibilities Regarding Non-lawyer Assistants), 5.4(a) (Professional Independence of a Lawyer), 5.5(b) (Unauthorized Practice of Law) and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend the Utah State Bar Ethics School. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

In September of 1993, the attorney opened an off-site satellite office with two non-attorneys. The two non-attorneys serviced personal injury clients, most of whom they brought into the office themselves. The attorney failed to properly supervise the two non-attorneys and by doing so assisted them in the unauthorized practice of law. The attorney paid one non-attorney from personal injury fees on an irregular basis that constituted inappropriate fee splitting, and further, failed to keep adequate records of fees paid to said non-attorney employee.

ADMONITION

On September 1, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 4.2 (Communications With Persons Represented By Counsel) and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The attorney was also ordered to attend six hours of ethics CLE. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct.

On November 4, 1997, a party employed an attorney in a marriage dissolution action. On that same date, the attorney sent a Verified Complaint for Divorce and Entry of Appearance, Waiver and Consent to the client's estranged wife. Thereafter, on behalf of the opposing party, the attorney who is the subject of this discipline sent an undated letter regard-

ing the dissolution directly to the petitioner when he knew the petitioner was represented by counsel. In that letter, the attorney referenced the fact that he was a lawyer and sought to dissuade the petitioner from proceeding with the dissolution. On February 26, 1998, the attorney filed an Answer and Counterclaim on the respondent's behalf.

APPOINTMENT OF TRUSTEE AND TRANSFER TO DISABILITY STATUS

On September 21, 1998, the Honorable Fred D. Howard, Fourth Judicial District Court, entered an order transferring Jay H. Jolley to disability status and appointing the Utah State Bar and an as yet unnamed co-trustee as trustees pursuant to Rule 27 Rules of Lawyer Discipline and Disability, to protect the interests of Mr. Jolley's clients.

NOTICE

The Bar Commission is soliciting a representative to serve on the Judicial Conference of the United States. The conference is responsible "for the continuous study of the operation and effect of the general rules of practice and procedure . . ." (28 U.S.C. §331), which reviews all proposed changes to the Federal Rules of Practice and Procedure. There are five advisory rules committees that report to the Standing Committee and specifically consider amendments to the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and the Evidence Rules.

In accordance with the Rules Enabling Act (28 U.S.C. §§2072-2077) under which it operates, proposed amendments to the rules are subject to public comment. In fulfilling the statutory obligation, those committees rely heavily on the input of the practicing bar.

Interested Bar Members should send a resume to: John C. Baldwin at Utah State Bar, 645 South 200 East, Salt Lake City, 84111 by November 30, 1998.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the bar for the cost of \$20.00. Seventy-two opinions were approved by the Board of Bar Commissioners between January 1, 1988 and October 2, 1998. For an additional \$10.00 (\$30.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1998.

ETHICS OPINIONS ORDER FORM

Quantity	Amount Remitted
----------	-----------------

_____ Utah State Bar Ethics Opinions	_____ (\$20.00 each set)
---	--------------------------

_____ Ethics Opinions/ Subscription list	_____ (\$30.00 both)
---	----------------------

Please make all check 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.

Federal Court Disciplinary Matters

ORDER

On September 8, 1998, the Disciplinary Panel for the Court, U.S. District Court for the District of Utah, held a hearing, after receiving the recommendation of the Disciplinary Committee, on the conduct of an Attorney admitted before this court. The hearing was to afford the Attorney an opportunity to be heard on the question of his conduct. Following the hearing, the Disciplinary Panel entered Findings of Fact and Conclusion of Law.

Based thereon, **IT IS HEREBY ORDERED** that the conduct of the Attorney warrants a private reprimand from the court. The conduct of the Attorney was improper, objectionable, violated the Rules of Professional Responsibility of the Court, and was unacceptable behavior from an attorney and advocate appearing in the United States District Court for the District of Utah. The sanction is necessary to assure there will be no further misbehavior of a similar nature. The Attorney is reprimanded.

By the Court:

David K. Winder, Senior Judge

Ronald N. Boyce, Chief Magistrate Judge

Judith A. Boulden, U.S. Bankruptcy Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having been commenced pursuant to DUCivR 83-1(5) as a disciplinary proceedings against Attorney _____ on a Complaint brought by Honorable Dee V. Benson, United States District Judge; and the Complaint having been referred to the Disciplinary Panel; and the Panel having concluded that the Complaint was not frivolous and having referred the matter to the Committee on Conduct of Attorneys' and the Chair of the Committee having referred the matter to a member of the Committee as investigator to review the Complaint and prepare a recommendation; and the member having prepared a Recommendation; and the Recommendation having been to prosecute the Complaint; and the majority of the Committee having determined that prosecution of the Complaint was warranted; and the Attorney, by formal written waiver of hearing dated June 19, 1998, waived his right to an evidentiary hearing now, therefore,

The Court Hereby Enters the Following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Attorney made a statement on the record at an October 3, 1997 hearing on Defendant's Motion for Summary Judgment before the Honorable Dee V. Benson wherein the

Attorney stated:

"I don't know of a case where it can be brought to this Court – it has been rumored that this court and other courts have indicated that the court believes that these cases are a waste of time. My impression is the court looks for a way to dismiss them. They don't look for a way –" (see transcript of hearing, pg. 6, lines 7-12).

2. The Attorney made a statement on the record at a hearing on Defendant's Motion For Summary Judgment on October 3, 1997 wherein the Attorney stated:

"We'll be back, Your Honor" (see transcript pg. 60, line 12).

3. The Attorney made a statement on the record at a hearing on Defendant's Motion for Summary Judgment on October 3, 1997 wherein the Attorney stated:

"I had a fellow attorney tell me at a CLE put on by this Court, that the Court made the comment that these cases are a waste of time and they're taking up all of the Court's time. And I don't believe that the Court has had the courtesy of even reading the facts that I have presented. And it is disturbing to me that I would put in this kind of time and have the Court come and tell me that the Court has not read our briefs and has not gone through them." (See transcript of hearing pg. 60, line 25 and pg. 61, lines 1-8).

4. The attorney signed and filed a pleading entitled Plaintiff's Objection to Order dated October 15, 1997 which reads in pertinent part:

"Plaintiffs make the following objection to the prepared Order. Based upon the Court's representations at the hearing it is the plaintiffs' position that the Court has not reviewed in any sense of the word the responses filed by the plaintiffs that set forth their objections to defendants' statement of undisputed facts, the plaintiffs' statement of undisputed facts and plaintiffs' legal argument."

5. The attorney made a statement on the record at the hearing held on November 27, 1997 on the Plaintiffs' "Objection to Order" wherein the Attorney stated:

"I think the Court indicated a few things that are of concern to me at the end of the last hearing, and I would admit to the Court that there have been a couple of times, and I even said it at the deposition, where my behavior has not been completely professional to the extent that I would like it to be. I didn't view it nor was there a motion before the Court about counsel bringing their dirty laundry here because, Your honor, I would state and I know this does not have anything

to do with this, but I am worried that it is tainting the Court's feelings in this case, but I could bring the Court transcripts where I have been belittled and maligned by Ms. Jan Smith. I can also bring the Court records of depositions in this case where both Ms. Jan Smith and Mr. Scott Hagen have been having an ongoing conference with their client and whispering to their client during a deposition, and I think that is as inappropriate as the two instances that were brought to the Court's attention." (See transcript of hearing. pg. 7, lines 7-22).

6. An attorney, by formal pleading entitled Waiver of Hearing, dated June 19, 1998, waived his right to an evidentiary hearing.

Therefore based upon the foregoing Findings of Fact, the Court hereby enters its **CONCLUSIONS OF LAW**.

1. The Attorney violated Rule 3.1 of the Utah Rules of Professional Conduct in making statements about Judge Dee Benson's

alleged bias and in signing and filing Plaintiffs' Objection to the Order.

2. The Attorney violated Rule 3.5 of the Utah Rules of Professional Conduct in making improper statements concerning the Judge's alleged bias regarding Title 7 cases.

3. The Attorney violated Rule 8.4 of the Utah Rules of Professional Conduct.

4. The Attorney violated DUCivR 83-1.1(h) in that the Objection to the Order was a violation of Rule 11 of the Federal Rules of Civil Procedure.

5. Cause exists for the imposition of sanctions.

By the Court:

David K. Winder, Senior Judge

Ronald N. Boyce Chief Magistrate Judge

Judith A. Boulden, U.S. Bankruptcy Judge

Membership Corner

UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

- You must provide a street address for your business and a street address for your residence.
- The address of your business is public information. The address of your residence is confidential and will not be disclosed to the public if it is different from the business address.
- If your residence is your place of business it is public information as your place of business.
- You may designate either your business, residence or a post office box for mailing purposes.

***PLEASE PRINT**

1. Name _____ Bar No. _____ Effective Date _____

2. Business Address – Public Information

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (if any) _____

3. Residence Address – Private Information

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (if any) _____

4. Mailing Address – Which address do you want used for mailings? (Check one) (If P.O. Box, please fill out)

_____ Business _____ Residence

_____ P.O. Box Number _____ City _____ Zip _____

Signature _____

Classroom Mentoring: Legal and Citizenship Education for Our Youth

With the 1998-99 school year, the Mentor Program, administered by the Utah Law-Related Education Project and sponsored by the Utah State Bar and the Utah Bar Foundation, begins its fourteenth year. Each year, Utah attorneys and community members join with judges, court personnel, and law enforcement

officers to teach elementary, junior high, and high school students conflict resolution skills and legal concepts.

Thanks to the following people and law firms for their many volunteer hours and for their long-time commitment to teach our youth about their rights and responsibilities as citizens.

Marsha Abernethy	Jennifer Falk	D. Scott Little	Randall W. Richards
Steven J. Aeschbacher	Russell C. Fericks	R. Chet Loftis	J. Wesley Robinson
Steven F. Alder	Jens Fugal	Charles E. Loyd	Stephanie M. Saperstein
Aldrich, Nelson, Weight and Esplin	Ted Godfrey	Kim M. Luhn	Laurie Sartorio
Kevin N. Anderson	Green and Luhn	Raymond N. Malouf	Don R. Schow
Mark Baer	Debra Hess	Ron Mangone	Shayla Shepherd
Diane H. Banks	Renee Jimenez	Pinky McBrier	Mark Shurtleff
Lauren Barros	Raymond A. Hintze	Ric McBrier	Jeffrey L. Silverstrini
John Bowen	Holme Roberts and Owen	Mathew F. McNulty	J. Mark Smedley
Kenneth H. Bronston	Melissa M. Hubbell	Angela F. Micklos	Clark L. Snelson
Randee Cathey	Richard A. Hummell	Thomas A. Mitchell	Robert Steed
Gary Chrystler	Robert K. Hunt	Thomas Montano	Martha S. Stonebrook
Carol Clawson	Amy A. Jackson	Debra J. Moore	Joseph E. Tesch
Cohne, Rappaport and Segal	Jerrold S. Jensen	Brian Namba	Tesch, Thompson and Fay
Jerrald D. Conder	David C. Jones	JoCarol Nessett-Sale	A. Robert Thorup
Craig W. Dallon	Jones, Waldo, Holbrook and McDonough	Michael A. Neider	Utah Attorney General's Office
Lance E. Dean	Joseph J. Joyce	Ann H. Nevers	Van Cott, Bagley, Cornwall and McCarthy
Marian Decker	Patricia A. Judge-Stone	Stephen W. Owens	Gary H. Weight
Lori Demond	Parsons Behle and Latimer	Parsons Behle and Latimer	Paul W. Werner
Palmer DePaulis	Tony R. Patterson	Tony R. Patterson	Alice L. Whitacre
Leon A. Dever	Thomas R. Patton	Thomas R. Patton	Steve Whitehead
Karma K. Dixon	Prince, Yeates and Geldzahler	Prince, Yeates and Geldzahler	Elizabeth A. Whitsett
Tad D. Draper	Ray Quinney and Nebeker	Ray Quinney and Nebeker	Elizabeth D. Winter
James Dunn	Robert H. Rees	Robert H. Rees	Kelly W. Wright
Mark W. Dykes	Richard Brandt Miller and Nelson	Richard Brandt Miller and Nelson	Richard D. Wyss
William T. Evans	Richards, Caine and Allen	Richards, Caine and Allen	Carolyn D. Zeuthen
Fabian and Clendenin			Michael N. Zundel

NOTICE

The Judicial Council is seeking applicants for an attorney position on the Judicial Performance Evaluation Committee. The committee researches and debates issues regarding the evaluation and certification of judges for retention election and recommends policies and procedures to the Judicial Council. The appointment will be for a three year term, which may be renewed for an addition three years. The committee has several items under consideration at the moment and so will meet about once a month through the Spring of 1999. Interested attorneys should submit a letter of interest and a current resume to Tim Shea at Administrative Office of the Courts / P.O. Box 140241 / Salt Lake City, Utah 84114-0241. Contact Mr. Shea at 801-578-3808 with any questions. The deadline for applications is November 13.

Bar Seeks Rural Lawyer For Justice Court Committee

The Bar Commission is soliciting the names of qualified lawyers from rural counties to fill a vacancy and represent rural Utah and the Bar on the Utah Judicial Council's Justice Court Standards Standing Committee. The committee oversees the process of certification and recertification of the state's justice courts and reviews their operational standards. Lawyers with practice experience in justice courts who reside in rural communities may send their resume to the Bar, c/o Executive Director John C. Baldwin, 645 South 200 East, Salt Lake City, Utah 84111 no later than December 1, 1998.

CLE Discussion Groups Sponsored by Solo, Small Firm & Rural Practice Section

Nov 19 Foreclosure — Judicial & Non-judicial
Dec 17 Workman's Compensation Claims & Defenses

Reservations in advance to Connie (USB) (801) 297-7033.

STATE LAW LIBRARY HAS NEW HOURS

Starting October 13, 1998, the State Law Library, located on the first floor of the Scott M. Matheson Courthouse will be opened from 8:00 a.m. until 7:00 p.m.

Position on Ethics Advisory Standing Committee of Utah Judicial Council

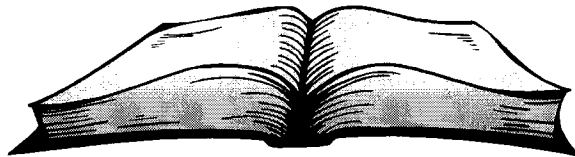
A vacancy will occur in January, 1999 for an attorney from either the Bar or a college of law on the Ethics Advisory Standing Committee of the Utah Judicial Council. This committee is responsible for providing opinions on the interpretation and application of the Code of Judicial Conduct to specific factual situations. Please refer to Rule 3-109, Code of Judicial Administration, for more information about the committee. Attorneys interested in serving on the committee should contact Brent Johnson, Administrative Office of the Courts, P.O. Box 140241, Salt Lake City, Utah 84114-0241 (578-3817) by November 30, 1998.



THE UTAH LANDLORD/TENANT LAW MANUAL

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Loose-leaf binder complete with pleadings and forms on disk (WordPerfect), extensive Table of Contents, Table of Authorities, and Index. Periodic updates available.

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I have enclosed a check to Utah Legal Services in the amount of \$_____ for _____ copies of **The Utah Landlord/Tenant Manual**. \$175.⁰⁰ each, including shipping (discounts for 10 or more copies).

Mail orders to: Mary Lyman, Utah Legal Services, Inc., 254 West 400 South, Second Floor, Salt Lake City, Utah 84101.
For additional information, contact Mary at 801/328-8891 ext. 304, or instate WATS 800/662-4245 ext.304.

Young Lawyers Serve Community at Tuesday Night Bar

by Victoria Coombs Bushnell

As the debate over mandatory reporting of pro bono hours raged last year, the several dozen volunteer attorneys at the Tuesday Night Bar program provided over 800 no cost, half-hour appointments to members of the public with legal problems. As many Bar members know, the Tuesday Night Bar program is organized by the Young Lawyers' Division of the Utah State Bar and is staffed completely by volunteer lawyers. Every Tuesday night, anywhere from four to six volunteer attorneys arrive at the Law and Justice Center at 5:00 p.m. and provide legal advice and referrals to clients. On any given Tuesday, between 15 and 25 people receive legal assistance, courtesy of the Tuesday Night Bar.

A. RECENT CHANGES IN THE TUESDAY NIGHT BAR PROGRAM.

In past years, the program has been organized into eight teams, each with a team leader. With this system, each volunteer lawyer commits to six sessions per year, one every other month, for a total time commitment of approximately 12-18 hours. The Young Lawyers' Division, through its Tuesday Night Bar co-chairs, provides support services to these lawyers. This year, the handbook given to each volunteer lawyer has been extensively updated and brochures have been obtained from every major legal services organization and from the courts, all to aid members of the public in finding the legal help they need.

Another new feature this year is the introduction of organization-sponsored evenings of Tuesday Night Bar. Only six teams have been organized for the Tuesday Night Bar this year, leaving one Tuesday each month open for various organizations to put together their own team of volunteer lawyers to staff an evening of pro bono service. This new program provides an opportunity for those who wish to participate in the Tuesday Night Bar to do so without making the time commitment of a regular team member. It also provides members of the legal community the opportunity to engage in pro bono service as an organization. For example,

the law firm of Anderson & Karrenberg graciously agreed to sponsor the kickoff evening of Tuesday Night Bar which was held on Tuesday, October 6, 1998. The Tuesday Night Bar Program is now in need of other law firms or other legal organizations to sponsor Tuesday Night Bar evenings, as well as individual attorneys to participate in the program during this coming year.

Finally, the Young Lawyers' Division is currently considering a proposal to expand the Tuesday Night Bar Program to every judicial district in Utah. Obviously, such expansion will require modifications of the program to reflect such things as a more widely scattered population and a smaller pool of attorneys to draw from in rural parts of the State. In Ogden, in the Second District, an existing program on Thursday evenings has just acquired a new coordinator. The Young Lawyers' Division has also recruited a coordinator to begin a program in the First District, in Logan. Expansion to other districts will require the participation of many more lawyers from around the State, but will also help fill a pressing need for legal services outside Salt Lake City.

B. SERVICES PROVIDED AT THE TUESDAY NIGHT BAR.

Services rendered at the Tuesday Night Bar program vary widely with the needs of individual clients. In many cases, the volunteer lawyer simply listens to the client's presentation of a problem,

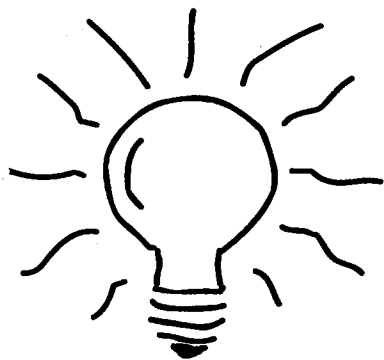
Victoria Coombs Bushnell is an associate with the Salt Lake City law firm of Anderson & Karrenberg, where she concentrates her practice in commercial civil litigation. She is a 1996 graduate of the University of Utah College of Law, where she was Editor-in-Chief of the Utah Law Review. She also clerked for then Chief Justice Michael D. Zimmerman of the Utah Supreme Court. Ms. Bushnell is currently co-chair of the Young Lawyer's Division Tuesday Night Bar Program.



analyzes the legal aspects of the problem, and outlines for the client the options available to him or her. In other instances, a lawyer may refer a client with a domestic violence problem to the Legal Aid Society's Domestic Violence Victim Assistance Program. In some cases, a referral is made to the Lawyer Referral Service or to Utah Legal Services. Lawyers have helped clients to fill out paperwork for Small Claims Court and directed clients to the kiosk at the Third District Court to obtain proper forms for an uncontested divorce. Often a client simply needs information about his or her legal rights.

As volunteer lawyers for the Tuesday Night Bar, participants are confronted with a broad range of general legal problems. The following is just a sampling of the situations encountered last year alone:

- Reviewing a contract for a Utah artist who was about to place his paintings in a California gallery.
- Advising a family whose daughter had been injured in a car wreck about the work an attorney should perform in representing her in negotiations with an insurance company.
- Assisting a woman with the (seemingly endless) forms required for informal probate of her mother's estate.
- Helping a Spanish-speaking family find a Spanish speaking lawyer who could help them with several legal problems.
- Assisting a woman who needed to complete a Qualified Domestic Relations Order regarding her ex-husband's various retirement plans.



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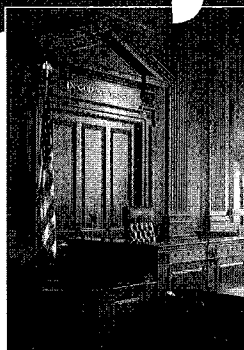
Shelley Hutchinsen • (801) 486-9095

C. A CALL FOR VOLUNTEERS.

As Bar members realize, the cost of obtaining help with simple legal problems like those outlined above is prohibitive for many people throughout the State of Utah. How many Bar members could afford to hire themselves to perform the legal work that is sometimes necessary in every person's life? The Tuesday Night Bar program is a low-cost approach to helping people with simple legal problems. These problems may seem small in comparison to the multi-million dollar problems with which many of us deal in our professional lives, but they seem insurmountable to those with no legal training and limited access to legal advice.

The Young Lawyers' Division of the Utah State Bar is proud to support the Tuesday night Bar program and urges all lawyers to take the opportunity to become involved in organizing a Tuesday Night Bar Program in your district. If you would like to become a Tuesday Night Bar participant, or if your organization or firm is interested in sponsoring an evening of Tuesday Night Bar this year, please contact one of the Tuesday Night Bar co-chairs, Russell Hathaway at (801) 355-6400 or Victoria Coombs Bushnell at (801) 534-1700.

OBJECTION!



If you're not insured with the Attorneys' Advantage Professional Liability Insurance Program... you should object to your current insurer on the following grounds:

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Attorneys' Advantage

Getting Smart as Well as Tough on Crime

by Judge K.L. McIff

Everyone these days is on the side of being “tough on crime.” Members of both political parties, those with no party affiliation, persons on and off the bench, legislators, and other local, state and national public officials, literally everyone has embraced the get-tough position. That debate is settled and no longer deserves the focus that continues to put it center stage in political campaigns and public discussion. As one *Deseret News* writer observed: “Tough talk wins votes;”¹ but we can ill afford to allow political sloganeering to begin and end the inquiry. The “one-upsmanship” in tough talk should give way to an examination of what works; simply put, we need to get smart as well as tough on crime.

TOUGH TALK BYPRODUCTS

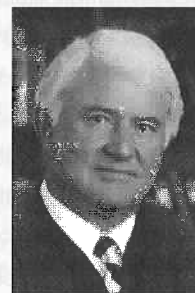
Virtually every legislative session brings a raft of new bills designed to increase the scope of what constitutes criminal conduct, expand the number of offenses that can arise in a single criminal episode, increase the penalties that can be imposed and narrow judicial discretion. Minimum mandatory sentences have gained a counterproductive level of popularity. Class B misdemeanors are ratcheted-up to class A's and A's are moved to third degree felonies, etc. The only exception that comes to mind is a bill in 1997 which reduced the unlawful taking of a cougar from a third degree felony to a class A misdemeanor. No doubt there are others, but they would be few and far between.² As one legislator put it, “This body never met a penalty-enhancement bill it didn't like.”³ The down side to all of this is not necessarily found in the legislation adopted, but rather the diversion of attention from a meaningful analysis of approaches that could produce more long-range benefits. Adding new crimes and increasing the level of old ones can become simply another form of tough talk which never reaches the issue of changing criminal behavior and protecting society.

DRAMATIC LOCKUP EXPANSION

Perhaps the most far-reaching consequence, both locally and nationally, of “getting tough on crime” has been the dramatically increased reliance on incarceration — lockup. Prison

populations have skyrocketed. In Utah, for example, the prison population has increased from 1341 in 1982 to over 5100 at the time of this article.⁴ This near 400% increase is largely a product of changes in philosophy and the manner of dealing with offenders rather than changes in demographic factors such as growth in the population or crime rate. In 1995, state and federal prisons logged their largest prison population increase since record keeping began in 1923.⁵ Some states, notably Texas and California, have charted what may prove to be an impossible course of imprisoning their way out of the crime problem. Each has engaged in a massive multi-billion dollar prison-building spree. Last year the prison population in Texas reached 717 prisoners per 100,000 residents. California weighed in at 475. Utah ranks 8th from the bottom at 205,⁶ but as Correction's legislative fiscal analyst, Bill Dinehart, pointed out, “We're racing toward the national average in terms of the number of people we incarcerate.”⁷ The success of this impris-

Judge K.L. McIff was appointed to the Sixth District Court in November 1994 by Gov. Michael O. Leavitt. He serves Garfield, Kane, Piute, Sanpete, Sevier and Wayne Counties. He received his law degree from the University of Utah College of Law in 1967 and thereafter served as law clerk to the Chief Judge of the U.S. Tenth Circuit Court of Appeals. From 1968 until his appointment to the bench, he maintained a private law practice in Richfield, and also served as Sevier County Attorney from 1970 to 1978, and as Piute County Attorney from 1978 to 1995. Judge McIff is a past president of the Southern Utah Bar Association and former Examiner for the Utah State Bar. He served as a member and chair of the Board of Trustees of Southern Utah University and as a member of the Utah State Board of Regents. Judge McIff was awarded an honorary doctorate of Humane Letters from Snow College in 1996. He is married and has five children.



onment expansion philosophy has not been demonstrated and remains open to serious question. In Texas, for example, the editor of the *Waco Tribune - Herald* points out that, "Despite a multi-billion dollar prison building frenzy, Texas still has more than 29,000 prison-eligible convicts backed up in county jails."⁸ The results of California's experiment have been labeled "foggy."⁹

COUNTING THE COSTS

Enhanced reliance upon imprisonment does not come cheap. During the years I served on the Board of Regents or on a University Board of Trustees, we were briefed annually by the legislative fiscal analyst. Each year, he noted, somewhat apologetically, that education's share of the funding pie was going down while Correction's was necessarily going up. In this regard, California's experience may be instructive. During 1994, for the first time in its history, California's correction's budget surpassed the budget for the entire University of California system.¹⁰ The long range implications of this priority reversal are staggering. When it commenced its prison-building spree, California had a higher education system that was among the very finest in the world. All students were assured at least a two-year tuition-free college education. California's prisons were limited to eight. Most were household words: Folsom, Alcatraz, San Quentin and a handful of others. Now prisons dot the California landscape and growth in the inmate population greatly outstrips growth in student population. During the last ten years California has built 20 new prisons while adding only two college campuses; 26,000 jobs have been *added* to corrections while 8,000 jobs have been *lost* in higher education.¹¹ The annual increase in correction's budget has doubled the increase in the state budget. The number of prison guards has risen from 7570 in 1985 to a 1994 figure of 25,547 and counting.¹² With all of this, the days of tuition-free and expanding educational opportunities in California are on hold and the end is not yet in sight. Another twelve prisons have been planned by century's end, though it appears this will not keep pace with anticipated inmate growth.¹³ Utah should carefully consider whether California, a pioneer and pacesetter in many things during this century, is on the right track in its criminal justice system.

THE LIMITATIONS OF PUNISHMENT

Imprisonment has become the overwhelming choice for inflicting punishment. Punishment serves the useful objective of

allowing citizens to vent anger, frustration and moral disgust in a controlled and civil manner. Further it puts offenders out of circulation for a time and can have a deterring impact on others. The more swift and sure the more useful, but punishment, and particularly indiscriminate incarceration, has its limitations. The view that an offender "pays his debt to society" by going to jail, disregards the fact that it is society that pays. The cost is about \$30,000 per year; roughly the equivalent of tuition, books, room and board and auto expense for three college students,¹⁴ and some ten times what Utah spends to educate a child.¹⁵ Moreover, prison tends to educate in the wrong direction thus magnifying the disparity of the one-for-three or one-for-ten trade. Inmates exchange "war stories," develop new ties, and sever old ones. Hope of future stability may be dashed in the process. Finally, the most compelling fact of all is that prison is a temporary fix. The sobering reality is that over 95% of all offenders will be back on the street in due course.¹⁶ We can construct more prison beds, increase the length of stay,

"Efforts at education and rehabilitation arise not from a 'bleeding-heart,' but from an attitude of self-defense. Most convicted criminals deserve the punishment they receive and more, but that is not the only issue."

make it as miserable as possible, but the pipeline will fill up, the extra time purchased will expire and we will be pushing people out the one end to allow room in the other. This immutable fact fairly requires judges to impose individualized sentences and for the system as a whole to increase its focus on preparing offenders for reintroduction into society. Corrections advises that 60% of current inmates are functionally illiterate

while 75% have a history of substance abuse. These should be compelling statistics in the formulation of public policy and the development of programs both within and without lockup facilities. Efforts at education and rehabilitation arise not from a "bleeding-heart," but from an attitude of self-defense. Most convicted criminals deserve the punishment they receive and more, but that is not the only issue. We must carefully weigh costs and benefits, and not allow a preoccupation with punishment to dictate dispositions that work to society's disadvantage. Nor should we consider "prison" as the singular synonym for "punishment." There are other ways to punish that may be more effective and less costly. Contrary to the course charted in some states, it is doubtful that we will be able to imprison our way to civility and civic decency.

UTAH AT THE CROSSROADS

Utah's sharp incline in prison population has not been endorsed by Correction officials. In 1992, Lane McCotter, then Executive

Director, told the Legislative Judiciary Committee, "We're beginning to face a crisis in offender growth We must look at options other than incarceration. The most expensive thing we can do is incarcerate offenders."¹⁷ McCotter went on to advise that Utah cannot afford to build prison cells for every inmate and indicated that alternatives to incarceration are the only realistic alternative.¹⁸ Current Correction's Executive Director "Pete" Haun has fully endorsed a *getting smart* approach: "This administration is intent on determining what works and what doesn't"¹⁹ These expressions are telling when considered in light of the general tendency of public officials to expand and defend rather than endorse change. In the most recent revision of its strategic five-year offender population management plan, Corrections quotes, with approval, the following observation by Utah's Governor Leavitt: "Emphasis must be placed on improving the ability of offenders to return to our communities as productive citizens"²⁰ The plan goes on to lament that the department "has found it extremely difficult to obtain funding for treatment and programming services over the last ten years." The funding dilemma was appropriately stated by the Utah Sentencing Commission last year:

Utah is approaching a crossroads in Correction's policy. Facing tremendous growth, it can decide to attempt to build its way out of the dilemma with many more prison beds and dedicate all new Corrections money into constructing prison cells, or it can adopt a more balanced, adaptive approach including a significant increase in intermediate sanctions and revising probation and parole's supervision.²¹

To its credit, the Utah Sentencing Commission is currently focused on increasing sentencing alternatives for judges and to extend these options south of Salt Lake City. The latter is welcome news to the judiciary in southern Utah. Additional sentencing options, including most notably those that have been classified as "intermediate sanctions," will be of much greater worth to judges than the increased penalties which the legislature is inclined to adopt. A wider range of intermediate sanctions will serve the positive objectives of matching programs with offender types, reducing competition for prison beds, avoiding the adverse effects of lengthy prison stays, allowing societal engagement at a safe level, plus substantially reducing the cost.

HELP FROM THE JUDICIARY

Corrections has very little control over the size of the prison population. That is determined by the legislature in defining crimes and penalties and by the judiciary in its sentencing philosophy. Judges are not immune from the same pressures which fuel the political "tough talk" heretofore discussed. The easy way out is to simply sentence an offender to jail or prison. It requires no imagination. It immediately passes the ball to someone else's court. The media usually responds favorably and the judge achieves the valued distinction of being tough on crime. For these reasons, I am both impressed and appreciative of judges and others who are attempting to make a difference by taking routes that are more difficult and require much more time, attention and imagination. I tip my hat to the judge who pioneered the "drug court," to the judges who have inmate reading programs and to others who employ creative approaches that look down the road to the time of inmate release. The *Deseret News* recently carried a deservedly complimentary story about the Construction Training Program that

"Getting smart as well as tough on crime requires that we reexamine what works. Protection for a few months while an offender is put out of circulation is not enough."

exists under the auspices of the Utah County Sheriff's Department.²² In my jurisdiction we have attempted to take advantage of §67-20-1, et seq. which allows designation of prisoners as "compensatory service workers" with workman's compensation protection. In this way, the public can offset the cost of

incarceration while attempting to teach responsibility and better work habits. We have put prisoners to work for cities, counties, the Forest Service, Bureau of Land Management and Snow College. In the more successful efforts, prisoners upon release have gone to work for one of these entities or have received a positive referral resulting in immediate productive employment. The attraction of this result is not necessarily its benefit to the offender but to society. It narrows the offender population, reduces our costs and increases our security. Utah's Governor, its Director of Corrections and its Sentencing Commission are attuned to the need for intermediate sanctions that cost less than imprisonment and offer some hope of rehabilitation. The judiciary needs to lend its supporting influence whenever possible.

CONCLUSION

Getting smart as well as tough on crime requires that we reexamine what works. Protection for a few months while an offender is put out of circulation is not enough. We need solutions that will last for the 20 or so years (between the late teens

and late thirties) of the typical offender's involvement with the criminal justice system. The ease and comfort of the "out-of-sight-out-of-mind" lockup remedy should not blind us to the fact that it is temporary and, in most cases, will have to be repeated over and over again unless thinking patterns are altered, substance abuse and illiteracy addressed, and work skills developed. Nor should our penchant for punishment, though justified, overcome our sound judgments about the wise and prudent use of scarce public resources. Unless we find ways to punish other than prison, we inevitably end up punishing ourselves with escalating costs that sap economic strength and diminish government's ability to address other compelling needs. Moreover, failure to be discriminating on the front end of the pipeline reduces the system's ability on the other end to retain those who pose the greatest risk to society's safety and well-being. Large scale funding shifts which in essence trade textbooks for prison cells will, in the long run, prove unwise, the direction of some states to the contrary notwithstanding. We should recognize that current problems reflect profound cultural changes that do not lend themselves to quick, simple fixes. Clever slogans such as "do the crime — do the time" and "three strikes and you're out" may produce legislation satisfying our get-tough objective while failing to address root causes or provide solutions that have some reasonable chance of working. The judiciary should welcome and embrace and the legislature should be willing to fund intermediate sanctions and other alternatives, perhaps less retributive but having a better cost-benefit ratio. Finally, we need to tone down the tough talk and quietly and thoughtfully explore all reasonable options without joining a stampede whose destiny is uncertain at best and a sociological and economic disaster at worst. Intelligently addressing the problem of crime in a society whose basic fabric shows some evidence of fraying will require our collective, innovative best.

¹Jay Evansen, "Time to Get Tough on Crime, Not Just Talk Tough", editorial page, Dec. 8, 1996.

²The cougar bill was overshadowed by a second bill which moved other big game violations from misdemeanors to felonies and imposed mandatory restitution obligations that make these offenses among the "most expensive" in the criminal code.

³Representative Lee Ellertson, as reported in "Corrections System Struggles to Stay Afloat", *Deseret News*, March 9, 1992.

⁴Information supplied by H.L. ("Pete") Haun, Executive Director, Utah State Dept. of Corrections. Hereafter, this source shall be referred to simply as "Corrections Information."

⁵U.S. prison population up 90,000 over '94", *Deseret News*, December 4, 1995.

⁶United States Department of Justice, Bureau of Justice Statistics Bulletin, August 19, 1998.

⁷"Corrections System's Struggle to Stay Afloat", *Deseret News*, March 9, 1992.

⁸Rowland Nethaway, Senior Editor, Waco Tribune - Herald as reported by Cox News

Service, *Deseret News*, February 15, 1994.

⁹"Result of Zeal to Imprison Is Still Foggy," *Deseret News*, May 8, 1994.

¹⁰*Id.*

¹¹"California's Prison Industry Authority", *California Prisoner and Prison Legal News*, on file at Prison's Issues Desk, Prisons Activist Resource Center, P.O. Box 339, Berkeley, California 94701.

¹²*Id.*

¹³Source cited note #9.

¹⁴I have personal experience on this one.

¹⁵The comparative costs of incarceration vs. educating a child was observed by Federal Judge, Bruce Jenkins, on the occasion of his taking senior status. Reported in "Judge Blasts Mandatory Sentences," Marianne Funk, *Deseret News*, August 30, 1994.

¹⁶Corrections information.

¹⁷"Inmate Population Becoming a Crisis in Utah, Official Says," *Deseret News*, August 31, 1992.

¹⁸*Id.*

¹⁹Letter from Director Haun to Judge K.L. McIlff, September 29, 1998.

²⁰1998 5-year Offender Population Management Plan, page 1.

²¹Intermediate Sanctions Recommendation, Utah Sentencing Commission - 1997, page 1.

²²"Inmates' Skills Help County Build a Better Future," *Deseret News*, August 24-25, 1998.

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

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

Drop Date: December 18, 1998

7:30 a.m. to 5:30 p.m.

Place: Utah Law & Justice Center – Rear Dock
645 South 200 East
Salt Lake City, Utah 84111

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

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

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

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

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



Utah Bar Foundation Elects Trustees and Officers



*H. James Clegg,
President*

H. James Clegg was recently reelected to a second term and Brian R. Florence was elected to the Board of Trustees of the Utah Bar Foundation. Mr. Clegg is a member of the Salt Lake City firm Snow, Christensen & Martineau and Mr.

Florence is a shareholder in the Ogden firm

The newly elected officers of the Board of Trustees for 1998-1999 are H. James Clegg, President; Joanne C. Slotnik, Vice President; and Stewart M. Hanson, Jr.,



*Joanne C. Slotnik
Vice President*



*Stewart M. Hanson, Jr.
Secretary/Treasurer*

Secretary/Treasurer. Ms. Slotnik is at the Criminal Appeals Division of the Attorney General's Office and Mr. Hanson is a member of the Salt Lake City firm Dart, Adamson, Donovan & Hanson. Jane A. Marquardt has left the Board after serving two three-year terms.

Since 1985 the Utah Bar Foundation has funded over \$3 million to Utah programs providing free or low cost legal services, community education, administration of justice and other law-related issues.



*Brian R. Florence
Trustee*

Utah Bar Foundation 1998 Grant Awards – \$325,333

LEGAL SERVICES

\$99,000 to Legal Aid Society of Salt Lake to provide legal counsel to indigent members of the community with family law cases.

\$94,000 to Utah Legal Services to provide free legal assistance for low-income Utahns in civil matters.

\$18,000 to the Disability Law Center to support the legal advocacy needs of adults and children with disabilities throughout the state.

\$25,000 to A Welcome Place to provide competent legal assistance to low income individuals and families seeking benefits from the Immigration and Naturalization Service.

\$25,000 to DNA People's Legal Services Inc. to assist in providing direct legal services to low income persons in South-eastern Utah.

\$5,000 to the Utah Legal Services Senior Lawyer Volunteer Project to provide free estate-planning and related legal assistance to low income, elderly or disabled Utahns.

EDUCATION

\$35,000 to the Utah Law-Related Education Project to promote law-related and citizenship education of Utah's youth

and communities through interactive educational experiences to create a citizenry that not only understands the law, the legal system and their rights and responsibilities as citizens, but is ready and able to govern itself.

\$5,000 to the Utah State Bar Needs of Children Committee to print an updated edition and new Spanish translation of the book, *Rights Responsibilities Relations: Your Rights as a Young Person in Utah*.

ADMINISTRATION OF JUSTICE

\$7,000 to Utah Dispute Resolution to continue providing legal services to the disadvantaged and serving as an access to justice using methods of conflict resolution with trained volunteer mediators.

\$5,000 to the Administrative Office of the courts to examine issues of racial and ethnic fairness within the criminal justice system.

\$6,000 – 1998 COMMUNITY SERVICE SCHOLARSHIPS to Cindy L. Cole and Edward J. Stapleton

\$1333 – 1998 ETHICS AWARDS to Bill Orr Heder and Terry and Melinda Silk.

ALI-ABA SATELLITE SEMINAR: "EMPLOYEE BENEFITS LAW & PRACTICE UPDATE"

Date: Thursday, November 12, 1998
 Time: 10:00 a.m. to 2:00 p.m.
 Place: Utah Law & Justice Center
 Fee: \$165.00 Regular Registration
(To register, please call 1-800-CLE-NEWS)
 CLE Credit: 4 HOURS

PAUL M. LISNEK AND ASSOCIATES; DEPOSITIONS: TECHNIQUE, STRATEGY AND CONTROL

Date: Friday, November 13, 1998
 Time: 9:00 a.m. to 4:30 p.m.
 Place: Utah Law & Justice Center
 Fee: \$165.00 before 10-30-98; \$185.00 after
 CLE Credit: 7 HOURS

ALI-ABA SATELLITE SEMINAR: "1998 UPDATE: CLEAN AIR ACT"

Date: Tuesday, November 17, 1998
 Time: 12:00 p.m. to 2:00 p.m.
 Place: Utah Law & Justice Center
 Fee: \$165.00 Regular Registration
(To register, please call 1-800-CLE-NEWS)
 CLE Credit: 2 HOURS

LAW & TECHNOLOGY UPDATE

Date: Wednesday, November 18, 1998
 Time: 8:00 a.m. to 12:00 p.m.
 Place: Utah Law & Justice Center
 Fee: \$50.00/\$60.00 at the door
(To preregister, please call 297-7033)
 CLE Credit: 4 HOURS

NICLE: NEGOTIATIONS

Date: Thursday, November 19, 1998
 Time: 5:30 p.m. to 8:30 p.m. (Registration begins at 5:00)
 Place: Utah Law & Justice Center
 Fee: \$30.00 for new lawyers, \$60.00 for nonmembers
(To register, please call Connie @ 297-7033)
 CLE Credit: 3 HOURS

A FIRST AMENDMENT UPDATE ON RELIGION IN THE PUBLIC SCHOOLS: MOVING FROM BATTLE GROUND TO COMMON GROUND

Date: Wednesday, November 18, 1998
 Time: 12:00 p.m. to 4:00 p.m.
 Place: Double Tree - 255 South West Temple
 Fee: \$15.00 for lunch and 1 HOUR CLE; \$30.00 for Regular Registration *(questions please call Cathie @ 451-7883 or email at cathie@DEA.org)*
 CLE Credit: 1 or 4 HOURS

ALI-ABA SATELLITE SEMINAR: "UNDERSTANDING, PREVENTING, AND LITIGATING YEAR 2000 ISSUES: WHAT EVERY LAWYER NEEDS TO KNOW NOW"

Date: Thursday, November 19, 1998
 Time: 9:00 a.m. to 4:00 p.m.
 Place: Utah Law & Justice Center
 Fee: \$249.00 Regular Registration
(To register, please call 1-800-CLE-NEWS)
 CLE Credit: 7 HOURS

"NUTS AND BOLTS OF GUARDIANSHIP/CONSERVATORSHIP" LAW & PROCEDURE

Date: Friday, November 20, 1998
 Time: 8:30 a.m. to 3:30 p.m.
 Place: Utah Law & Justice Center
 Fee: \$75.00 Regular Registration or free to attorneys volunteering to serve on a statewide guardianship panel *(To register, please call 531-9077, questions regarding the panel call JoAnn Secrist @ 538-4641)*
 CLE Credit: 6 HOURS

PROFESSIONAL EDUCATION GROUP, INC.: A DAY ON TRIAL: THE SECRETS OF PERSUASION

Date: Wednesday, December 2, 1998
 Time: 8:30 a.m. to 5:00 p.m.
 Place: Utah Law & Justice Center
 Fee: TBA *(questions, please call Connie Howard or Toby Brown at 297-7033, or 297-7027)*
 CLE Credit: 7.5 HOURS

ETHICS: "WHY BAD THINGS HAPPEN TO GOOD LAWYERS"

Date: Friday, December 11, 1998
 Time: 9:00 a.m. to 5:00 p.m. (Registration begins at 8:30)
 Place: Utah Law & Justice Center
 Fee: TBA
 CLE Credit: 6 HOURS

NATIONAL PRACTICE INSTITUTE: "EVIDENCE FOR THE TRIAL LAWYER"

Date: Friday, December 11, 1998
 Time: 9:00 a.m. to 5:00 p.m. (Registration begins at 8:30)
 Place: Utah Law & Justice Center
 Fee: TBA
 CLE Credit: 7 HOURS

ALI-ABA SATELLITE SEMINAR: "1999 UPDATE: THE CLEAN WATER ACT"

Date: Thursday, January 21, 1999
 Time: 10:00 a.m. to 2:00 p.m.
 Place: Utah Law & Justice Center
 Fee: \$165.00 Regular Registration
 \$125 Government Employees
 (To register, please call 1-800-CLE-NEWS)
 CLE Credit: 4 HOURS

ALI-ABA SATELLITE SEMINAR: "TWO MERGERS & ACQUISITIONS MINI-COURSES; 1) PROTECTING THE M&A DEAL: NEGOTIATING 'WALK RIGHTS,' 'LOCKUPS,' AND OTHER DEALS, AND 2) FINANCIAL AND ACCOUNTING PROVISIONS IN ACQUISITION AGREEMENTS"

Date: Thursday, January 28, 1999
 Time: 10:00 a.m. to 11:30 a.m. and 12:00 p.m. to 1:30 p.m.
 Place: Utah Law & Justice Center
 Fee: \$125.00 per program or \$195 for both; \$65/95 for government employees; \$25/40 for students
 (To register, please call 1-800-CLE-NEWS)
 CLE Credit: 1.5 HOURS per program

"FOR WHATEVER FLOATS YOUR BOAT: TITLE ISSUES OF TITANIC PROPORTION"

Departure: February 8, 1999
 Return: February 12, 1999
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 CLE Credit: 12 HOURS

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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 Connie Howard, CLE Coordinator, at (801) 297-7033.

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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.

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Salt Lake City business and estate planning firm seeks attorney with 2-3 years business and estate planning experience. Position involves significant client contact and excellent written and verbal communication skills are required. Inquiries will be kept confidential. Please send resume and references to: Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #56, Salt Lake City, Utah 84111.

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We are searching for a **Last Will and Testament of Robert W. Keeley**. If you have any information regarding Robert W. Kelley, please contact; Rev. Clarice Duck, First Baptist Church, 777 South 1300 East, Salt Lake City, UT 84102 or please call (801) 582-4921.

Get To Know Your Bar Staff



JEANNINE P. TIMOTHY

Jeannine P. Timothy joined the Utah State Bar staff on a part-time basis one year ago to develop and administer the Consumer Assistance Program. In her capacity as the Consumer Assistance Program attorney, Jeannine endeavors to facilitate resolution of problems between clients and attorneys

on an informal basis. She finds her position challenging as she defines for clients what they can reasonably expect from attorneys who represent them and helps attorneys understand their clients' concerns.

Jeannine came to the Bar specially equipped to deal with people on an individual basis. Before law school, Jeannine taught high school English and then worked as a graduate school teaching assistant in the English department of the University of Utah. Since her graduation from the University of Utah Law School in 1985, Jeannine has maintained a solo practice in Family Law. Jeannine also is a provider for the Ryan White Title III program, and as such, she performs legal work for people with HIV or AIDS. Additionally, Jeannine is an adjunct teacher at Westminster College where she teaches legal writing in the Legal Assistant Program. Jeannine also volunteers her time as a member of the Greek Orthodox Community of Salt Lake City. She serves as a board member of the Hellenic Cultural Association and as a trustee of the Greek Orthodox Trust Committee Foundation.

Jeannine and her husband, Warren, live in Murray with their four children: Christian, age 14; Steven, age 12; and Elyse and John, 9 year old twins. In the small amount of spare time she has, she enjoys family gatherings, needlework and playing viola with the Murray Symphony.



SHELLY SISAM

Shelly Sisam is the oldest of four children. She married Marty Sisam in 1987 and has one dog and one cat. She enjoys spending time with her husband, playing with her animals, mountain biking, jet skiing, sculpting, and roller blading. Shelly also looks forward to an annual winter vaca-

tion in Maui, Hawaii.

She graduated from Jordan High School in 1984 and attended Utah Technical College for three years studying computer science. She obtained her paralegal certificate from Westminster College in 1993.

Shelly began her career in the legal field in 1990 when she went to work for Parsons Behle & Latimer as a legal secretary. She feels that her time spent there was a great learning experience and assisted her in her pursuit of her paralegal studies. From Parsons, Shelly went to work for Kennecott Corporation as a legal secretary, and then moved into a paralegal position with Kennecott Minerals and Exploration Company. She began working as a paralegal for the Office of Professional Conduct in July 1996. She enjoys her job and frequently tells people she has the best of all worlds. She works with a great group of skilled professionals. She is responsible for litigation assistance, research, probation tracking, statistical review of new cases, locating missing attorneys, trusteeship oversight, assistance with monthly and annual statistical reporting to the Bar Commission, and maintenance of the OPC database.

Shelly is a director and executive committee member of the Legal Assistant Division Board. She is chair-elect, and co-chaired the Licensing Committee in her capacity as Ethics and Professional Standards Chair for the Division.



Happy Thanksgiving

from The Utah State Bar

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Kim L. Williams (Wed. & Fri.)
Tel: 531-9077

Other Telephone Numbers & E-mail Addresses Not Listed Above

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Web Site: www.utahbar.org

Mandatory CLE Board:
Sydney W. Kuhre
MCLE Administrator
297-7035

Member Benefits: 297-7025
E-mail: ben@utahbar.org

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****EXPLANATION OF TYPE OF ACTIVITY**

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through self-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 twelve hours of credit may be obtained through writing and publishing 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 twelve hours of credit 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 complete the CLE requirement by the December 31 deadline shall be assessed a **\$50.00** late fee.

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

DATE: _____ **SIGNATURE:** _____

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



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