UTAH BAR JOURNAL

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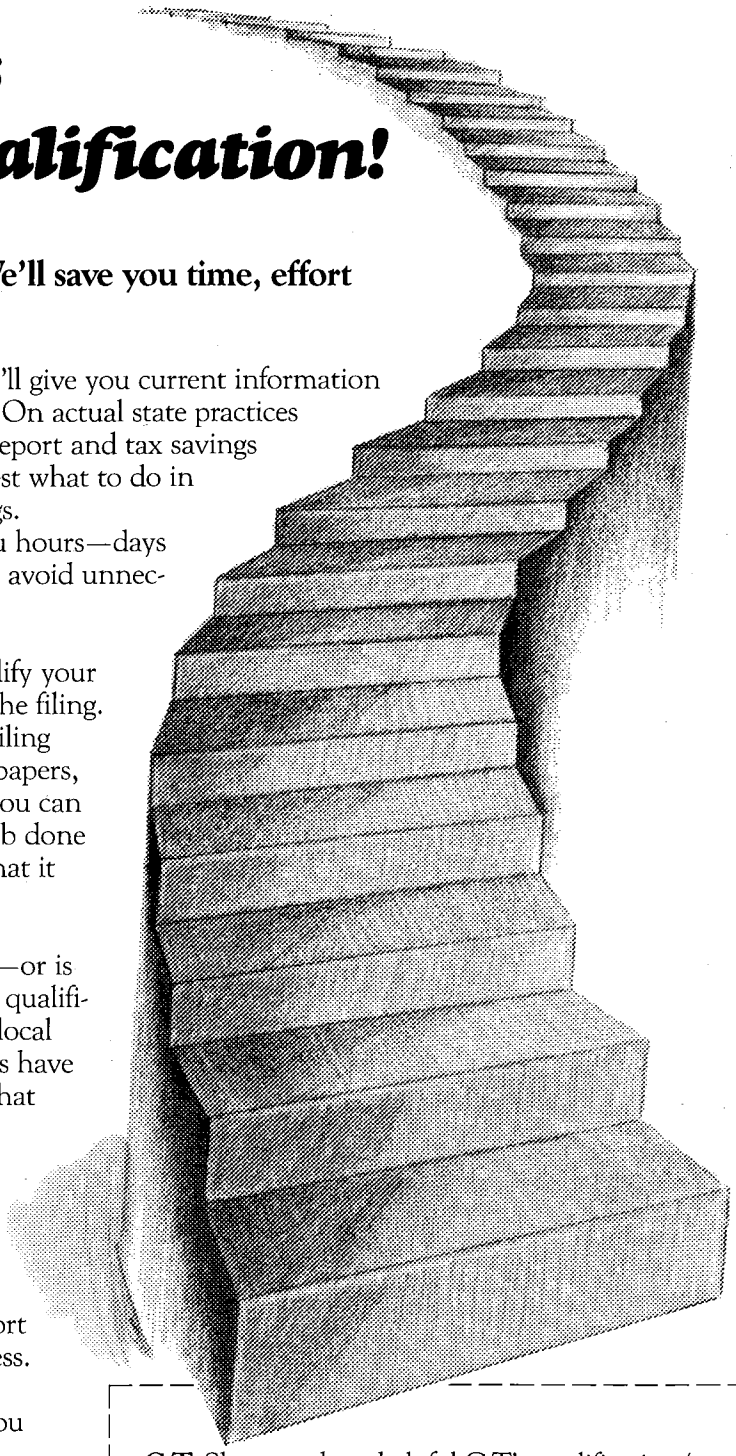

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645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

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Cover: Photograph of the Law and Justice Center by Chris P. Wangsgard, a partner in the firm of VanCott, Bagley, Cornwall & McCarthy

The Utah Bar Journal is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $20; Single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

EDITOR'S NOTE

Introduction

The new *Utah Bar Journal* consolidates in one publication the Utah Bar Letter, Utah Bar CLE, the old Utah Bar Journal and the Young Lawyers Section's Barrister, all previously published separately. The *Journal* thus becomes *the* communications vehicle of the State Bar, designed to:

— present practical, informative articles on the law, legal history and people;
— advise of rule changes, legislation of interest to lawyers and recent court decisions;
— apprise of general State Bar happenings and section and committee news and reports; and
— provide a forum for exchange of opinions and discussion of views.

Request for Articles

Although it may sound magniloquently hyperbolic, the success and worth of the *Journal* will depend in large part on the quality and diversity of legal articles appearing therein. For this reason, contributions of articles for publication are encouraged, but the Bar Journal Committee reserves the right to select the material to be published. Articles will be selected with the intent of providing variety and balance in the legal topics covered. Submissions should be made to the *Utah Bar Journal,* State Bar offices.

Bar Journal Cover

The Bar Journal Committee is also interested in featuring on each cover of the *Journal* works of art by Utah Lawyers. Submissions should consist of photographs or sketches of the Utah landscape, or other scenes or objects representative of the State or a law-related subject. Interested lawyers should contact Randall L. Romrell, 4910 Amelia Earhart Drive, Salt Lake City, Utah 84116-2837, telephone 355-6000, ext. 208.

Letters to the Editor

A policy regarding publication of "letters to the editor" has recently been adopted by the Board of Bar Commissioners, and is presented in its entirety below.

It is the policy of the Utah State Bar, as set forth in the Rules for Integration and Management of the Utah State Bar, to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence and law reform. In furtherance of this policy, one page of each issue of the *Utah Bar Journal* shall be set aside for the purpose of publishing "letters to the editor" submitted by members of the Bar. Letters shall be accepted for publication under the following guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 200 words in length.

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

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

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) which violates the Code of Professional Conduct or (c) which otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the editor shall be made without regard to the content of the letter or to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar.

8. The executive director, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected and shall set forth the reasons for the rejection.

It is also contemplated that questions or issues of interest to lawyers will be posed from time to time in the "letters to the editor" section, with a cross-section of responses being published in subsequent issues of the *Journal.*

The inaugural "letter to the editor" appears below.

Lawyer Announcements and Ads

In addition to the usual bar journal features, the *Utah Bar Journal* will make space available for lawyer and law firm announcements and ads—personnel changes, office relocations and availability of specialty legal services. This should prove to be an attractive lower cost alternative to currently used announcement cards. For information about charges, announcement format, deadlines for submission, etc., please contact Paige Holtry at the State Bar offices.

The Bar Journal Committee is excited about the new *Bar Journal* and its prospects for success, and invites you to participate in making it a worthy and lasting publication.

EDITOR:

The Commission must be complimented on the recent Litigation Report in the *Bar Letter* detailing pending actions. The Commission must be responsive and responsible to Bar members. Members have a right to know what the Commission is doing for the benefit of its members and how members' dues are spent. That report is a step in the right direction.

The report seemed incomplete. Why does the Commission not want the Bar to be determined to be a "state agency?" Most people view the Bar as a "state agency" performing governmental functions in licensing and disciplining attorneys. Why are the Commissioners offended by that suggestion? As a state agency and subject to appropriate state laws, the Bar will be more responsible and accountable. Are the Commissioners opposed to that?

Members should be informed about litigation resolved within the last three years, detailing the thousands of dollars in fees paid to successful litigants against the Bar. How much was paid to defend lawsuits that the Bar lost?

When the Bar Commission begins to view itself as directly responsible and answerable to all members, and openly and publically reports and justifies its actions, then litigation against the Commission might be unnecessary.

BRIAN M. BARNARD
Attorney at Law

PRESIDENT'S MESSAGE

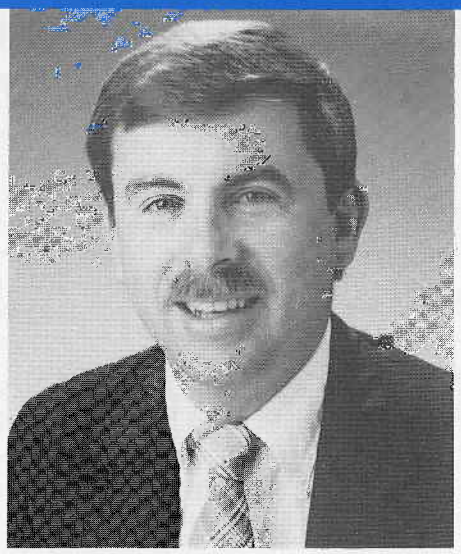
Well, I'm a month into my year as President of the Utah State Bar. The first month has already been exciting and challenging, and I look forward to serving as your president, as best I am able, for the next 11 months. Since this is my first President's Message, I thought it might be appropriate to share with you some of the things I would like to accomplish and focus on in the upcoming year; namely, the Law and Justice Center and the public's perception of lawyers and judges.

The Law And Justice Center

The dream envisioned and embarked upon by Steve Anderson five years ago is now a reality. The Law and Justice Center will be dedicated on September 7. Alternative dispute programs will begin immediately. If you have any doubts that the facility is not a credit to our profession, drive by. Or, better yet, stop in and take a look around (645 S. 200 E.). It is a center for lawyers, for judges, for paralegals and, most importantly, for citizens. One of my major challenges and goals this year is to get the Center operational, performing the functions that it was designed to perform and to let you, as members of our Association, and the citizenry of Utah know that the building is there to use—to serve as a facility to allow disputes to be resolved inexpensively, expeditiously and fairly. Past President Reed Martineau has gone above and beyond the call of duty by saying "yes" to my request that he continue overseeing the project, concluding all of the final construction, coordinating the move, and supervising start-up of operations at the Center. I would hope that by the end of my term, the Law and Justice Center will be serving the public and lawyers and judges.

The Public's Perception of Lawyers and Judges

My second major goal deals with improving our image. To me, professionalism and how the public perceives lawyers, judges and the legal system go hand in hand. This year, I want to continuously remind Utah lawyers and judges that we are all members of a special fellowship—an honorable profession. Sometimes we forget just what it means to be a member of the legal profession. Think about what the New York Court of Appeals said in *Estate of Freeman,* 311 N.E. 2d 480, 483 (1974), when it described what it thought a profession to be:



Kent Kasting

> A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility and notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation. These qualities distinguish professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal. (***) Interwoven with professional standards, of course, is pursuit of the idea that the profession not be debased by lesser commercial standards.

Yes, we in Utah are members of an honorable profession. We fall squarely within the description found in *Freeman.* As lawyers and judges, we give of our time freely, we engage in public service, we volunteer our talents in an attempt to improve our community, our state and our country. In a nutshell, my experience with Utah lawyers and judges reveals them to be hardworking, concerned, decent people engaged in an honorable profession.

In the upcoming year, I am going to strive to get that message to the public. I want to tell them the good things about lawyers—the positive side of our profession and of the judicial system—and why it is that were it not for lawyers, our nation and our society would never have become as strong and free as they are today. So, if you know of anyone who wants to hear a speech that "tells the rest of the story" about lawyers and judges, have them give me a call and I'll be there to speak as your president, on behalf of each of you as members of "an honorable profession."

While the Law and Justice Center and the public's perception of lawyers and judges are special projects to me, I also look forward to reporting back to you at the end of my term in June 1989, that all of the other activities and services provided by your Bar Association have been maintained and improved.

Last, but by no means least, I want to say something about your Bar Commission and your Bar staff. I don't know that I have ever had the privilege of associating with a more concerned, qualified, unselfish group of people. I can say without qualification that each of them is dedicated to improving your Association and the legal profession, and to providing each of you, as members of the Utah State Bar, the services and benefits of a bar association that is recognized nationally as one of the best. The number of voluntary hours that Commissioners spend each month on Bar business is staggering. They do it without pay, and I'm convinced they do it because each is firmly committed to maintaining the high standards of competence and integrity that are implicit in and essential to our profession.

Likewise, your Bar staff is always working hard, assisting the Commission and Bar members with the logistics of committee and section work, providing Continuing Legal Education, admitting new lawyers and making it all happen. With these individuals working for us and with us, success is our only option.

Finally, thanks to each of you for the support and commitment you give to our profession and Association. It is due to you that the Utah State Bar is the strong, dynamic and well-respected Bar Association that it is.

I look forward to working with you and serving as your president in 1988-89, and welcome your comments, suggestions and criticisms.

■

KENT M. KASTING

REFORMING THE REFORMATION:

A "CPS" Amendment To Our New Administrative Procedures Act

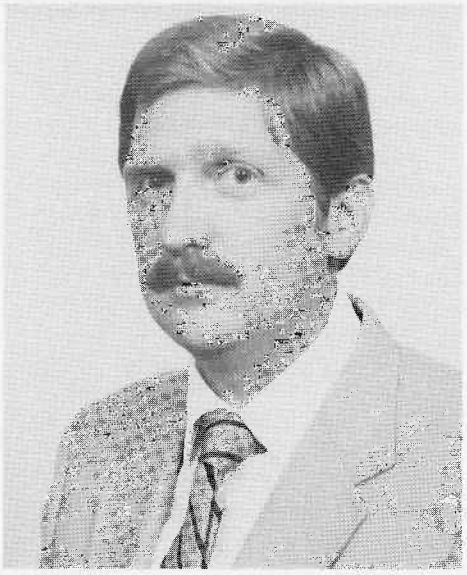
By Maxwell A. Miller

At the most recent State Bar convention in San Diego, Justice Antonin Scalia explained that, for him, the constitutional bulwark of liberty is not the substantive guarantees embodied in the Bill of Rights, but the underlying structure of government prescribed by the Constitution itself. To illustrate, he quoted from the Soviet Constitution which detailed ad nauseam guarantees of free speech and freedom of religion. In contrast, our Constitution simply includes epithets that Congress shall make no laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech. The Soviet guarantees are ultimately hollow, he said, because the underlying structure of Soviet government has no institutional restraint against abusing substantive freedoms.

Often, it seems, laymen do not understand a lawyer's emphasis upon structure and procedure. As Justice Scalia said, politicians can rally the people with impassioned slogans like "Freedom or Die" but it is hard to imagine much enthusiasm for "Bicameralism or Bust." Perhaps more than other citizens, lawyers should understand and insist upon structures and procedures for safeguarding litigants' due process rights. Trying accused murderers rather than summarily shooting them is a potent example. But the same principle holds true, or ought to hold true, in less dramatic settings like administrative hearings before state agencies. Thanks to passage and implementation of the Utah Administrative Procedures Act[1], effective January 1, 1988, the processes whereby aggrieved persons may have their cases adjudicated by state agencies are now consolidated and simplified. Crazy quilt procedures that inhered in forty different state agencies before passage of the Act are gratefully abolished. Unfortunately, the Act did nothing to restructure the agencies themselves by vesting the adjudicative role in different people from those who have administrative control. The Act ought to be further amended to estalish a separate body or central panel system ("CPS") to conduct administrative hearings for state agencies.

Agencies whose heads now have adjudicative, administrative, rulemaking and supervisory authority have no statutory guidance, merely their own good discretion, as to when they are performing one role as opposed to another. Neither have they any institutional restraint against mish-mashing or interchanging those roles for whatever reasons they deem prudent. That is not to disparage any agency—only to make the observation, as Scalia did by quoting Benjamin Franklin, that liberty cannot depend upon and must survive the good graces of a General Washington, or, in other words, a fair system cannot depend upon the beneficent administrator.

The state agency with which I am most familiar is the Utah State Tax Commission. Under Article XIII, Section 11 of the Utah Constitution, the Tax Commission consists of a four member body appointed by the Governor. The Constitution further provides that the Tax Commission shall "administer and supervise" the tax laws of the state. Historically, the Commission has taken that language to mean that it is vested with all adjudicative, administrative, supervisory and rulemaking authority. Whether "adjudicative" is or ought to be subsumed within the meaning of "administer and supervise" poses a problem. Even assuming that "adjudicate" means or can mean "administer" and "supervise," another problem is whether the agency equitably and fairly can or ought to perform all three functions



Maxwell A. Miller

Maxwell A. Miller was born in Provo, Utah on August 20, 1948. He was admitted to the Utah State Bar in 1975 and the Colorado State Bar in 1983. He graduated in 1972 with a Bachelor of Arts degree in political science with a French teaching minor from Brigham Young University, and was designated a "university scholar" and "high honors" graduate. He received his Juris Doctor degree from the University of Utah in 1975, having also attended the University of San Diego College of Law and L'Institut Catholique de Paris. Mr. Miller served as Managing Attorney for Utah Legal Services in Provo, Utah; as Senior Attorney and Chairman of Legal Management for Mountain States Legal Foundation in Denver, Colorado; as Assistant Attorney General and chief litigator for the Tax Section of the Utah Attorney General's Office; he joined Parsons, Behle & Latimer in 1988. Mr. Miller now serves on the editorial board of the *Journal of Social, Political and Economic Studies,* published in coordination with George Mason University, and is the current Chairman of the Government Law Section of the Utah State Bar. He has published in various law reviews and journals on educational and constitutional topics. He is a Utah-American history buff, an essay and fiction writer, and enjoys horses and other outdoor activities.

[1] *Utah Code Ann. § 63-46(b)-1 through 22 (1987).*

interchangeabley or simultaneously. In more concrete terms, one question may be whether the Tax Commission should adjudicate the merits of an audit position it has directed its support staff to make. Another serious question is whether the agency should be making decisions on hearings the commissioners do not attend and/or whether the agency's hearing officers, who do hear the cases, should have independent judgment. The question becomes all the more serious under the Administrative Procedures Act because appeals from a Tax Commission formal hearing go directly to the Utah Supreme Court.[2] The Commission can only be reversed if the taxpayer has been "substantially prejudiced."[3]

Related to that concern is whether the agency, assuming it can sanitize its adjudicative role from prior or current administrative functions, can nonetheless "supervise" its divisions by instructing them either to take or not take a particular position in litigation before the agency. Is the agency itself a party, judge and jury rolled into one? Can it therefore compel its divisions to settle although the division may feel that settlement is not in the best interest of the state? Or from the taxpayer's viewpoint, can the agency simply refuse to adjudicate a difficult case, putting it on hold (perhaps for years), while the agency seeks a solution in the political arena? Likewise, is it permissible for a party appearing before the agency to petition the agency either directly or indirectly in its political and/or administrative capacity, thus completely bypassing adjudication? Can an agency division, appearing as a "party", appeal an agency decision?

To a limited extent, the Administrative Procedures Act *seems* intended by its framers to answer some but not all of such questions. For instance, the Act says that proceedings which are not specifically designated as informal shall be formal, presumably ensuring that due process guarantees shall be observed in a more structured setting.[4] Likewise, the final order after a formal hearing is supposed to be based "exclusively on the evidence of the record in the adjudicative proceedings" presumably minimizing ex parte, supervisory and political contacts that are external to the formal hearing pending before the agency.[5] Further, the definition of party includes "all respondents" presumably ensuring that the agency's divisions have separate party status and can make decisions in adjudicative proceedings without the agency behind the scenes second-guessing the division.[6] But all these conclusions are interpretative (and possibly wrong) readings of the Administrative Procedures Act. More important, the Act does not explicitly separate an agency's adjudicative role from all its other roles.

Primarily for such due process reasons, the City of New York and a growing number of states have adopted a CPS for administrative hearings; that is, a system that vests the agency's adjudicative functions in a separate unrelated body. The Model State Administrative Procedures Act of 1981, after which the Utah Act was in part patterned, makes a CPS an available option. And, typically, states adopting a CPS have merely amended their state Administrative Procedures Act to effect the necessary changes.

At present, nine states have a CPS, the first being California which amended its state Administrative Procedures Act in 1946. Initially California's panel could only hear certain licensing cases. Now over 70 state agencies must use the panel. Following California were Massachusetts, Tennessee and Florida, each establishing their systems in 1974. Colorado and Minnesota followed in 1976; New Jersey in 1977; Missouri in 1978 and Washington in 1981.[7] As of 1987, 11 more states had either proposed central panel systems to their legislatures or have been studying the issue: Alaska, Arizona, Georgia, Maryland, Michigan, Nebraska, North Carolina, Oregon, Pennsylvania, South Dakota and Wyoming.

As envisioned in the nine states, a CPS is an independent agency of state government which has, as its sole function, the conduct of administrative hearings for other agencies of state government, those other agencies having no control *over the hearing process*. Usually, the central panel assigns administrative law judges to hear and decide cases, which decisions are recommendations subject to the agency's adoption. In some states, the panel's findings of fact are binding.

Under the Colorado prototype, the state legislature created a "division of hearing officers in the department of administration, the head of which shall be the executive director of the department of administration."All the hearing officers employed at the effective date of the statute were transferred from their respective agencies to the Division of Hearing Officers. The Executive Director of the Department of Administration appointed such administrative law judges as he deemed necessary to provide the services to each state agency, except (in Colorado) the Public Utilities Commission, which has its own administrative law judges.[8]

Existing central panel systems are funded by direct appropriations, dedicated funding, or a combination of both. The apparent trend, however, is to fund a CPS through a charge-back to the agencies, whereby the panel "bills" the agencies for costs of hearings it conducts.

As would be suspected, no state has adopted a CPS without, at times, strident opposition, although no state, once having made the change, has junked the CPS and retreated to the past. Also as would be suspected, the arguments for and against a CPS are frequently the same—they focus on trade offs between fair proceedings and expedient decision making. The CPS, initially, has the singular advantage of alleviating the tension between administrative and adjudicative roles by separating them and better defining each. Distilled from the articles and speeches, proponents of a central panel system, in addition, argue that:

1. A CPS is more efficient. By making administrators "administrate" but not "adjudicate," cases can be processed more quickly.

2. A CPS reduces agency bias, thereby enhancing public confidence in the entire adminstrative system.

3. CPS administrative law judges, having no other duties than adjudication are able to render longer, and more reasoned justifications for their decisions.

4. A CPS would be cheaper since small agencies would have administrative law judges available to them without hiring fulltime employees. Larger agencies could designate a broader category of matters for informal proceedings under our Administrative Procedures Act (such as locally assessed property appeals) thereby reserving only the more important matters for the CPS.

5. A CPS consolidates the administration, bookkeeping, and cost cutting innovations that all agencies, under the present system, must currently absorb on an individual basis.

(continued on page 8).

[2] *Id. at Section 63-46b-16(1), Utah Code Ann. § 78-2a-3(1) (1987), and Utah Code Ann. § 59-1-601 (1987).*

[3] *Utah Code Ann. § 63-46b-16(4) (1987).*

[4] *Id. at Section 63-46b-4(2).*

[5] *Id. at Section 63-46b-10(1) (a).*

[6] *Id. at Section 63-46b-2(1) (f).*

[7] *Cal. Gov't. Code § 11370 (Deering 1982); Mass. Ann. Laws Ch. 7, § 4H (Michie/Law Co-op. 1980 & Supp. 1983); Tenn, Code Ann. § 4-5-321 (Supp. 1983); Fla. Stat. Ann. § 120.65 (West 1982); Colo. Rev. Stat. § 24-30-1001 (1) (1982); 1975 Minn. Laws, Ch. 380, § 60; N.J. Stat. Ann. § 52:14F-1 (West Supp. 1983-1984); Chapter 621, RSMO Supp. 1984; Wash. Rev. Code Ann. § 34.12.010 (Supp. 1983-1984).*

[8] *See Colo. Rev. Stat. § 24-30-1001(1)(1982).*

(continued from page 7)

6. A CPS, because its whole function is to adjudicate cases according to existing law, is not subject to outside political influences.

Some of the usually articulated "disadvantages" to a CPS are political. It is often argued that stripping the agency of its adjudicative function is an unnecessary shackling of its discretion, or that the agency should *not* be desensitized to outside political influences. Other perceived "disadvantages" are more pragmatic. A CPS, it is argued, may not have the expertise in a given subject area, or may not be able to process cases as quickly as the agency. All of these "disadvantages" are illusory. Desensitizing hearings from politics may actually be an advantage. The so-called pragmatic "disadvantages" can be alleviated depending upon the quality and number of administrative law judges and the jurisdiction of a CPS. More routine cases can either be designated as informal under the present Administrative Procedures Act or kept within agency jurisdiction. In any event, the separation of adjudicative and administrative powers would likely free up the agency to address itself to its already overburdened political, rulemaking, and supervisory fuctions.

Duane R. Harves, former Chief Administrative Law Judge for the Minnesota office of Administrative Hearings, claims that:

> What is clear from review of the existing CPS and the legistlation presently being discussed or pending in the several states and in the federal government is that the CPS has become a fixture in nine states and will soon become the norm for administrative practice throughout the country.[9]

In my past discussions, even asking whether a CPS ought to be adopted in Utah has aroused heated opposition. That in itself could be healthy if it engenders further public debate. Generally speaking, the state bar associations, the Attorney General's office, and the private sector have initiated proposals for a CPS. The opposition has usually come from the agencies themselves. Both sides of the debate could bring sensitivities, data, and concerns perhaps ignored by the other. Will there be a debate in Utah? At this point, and because the question has not arisen, there is no raging controversy about a CPS in Utah, although in June of 1988 the bar formed a task force to study a possible CPS amendment of Utah's Administrative Prodecures Act. In the meantime, those "aggrieved by agency action" are stuck, in many instances, with a sort of amalgamated administrative/adjudicative agency, notwithstanding the recent reforms of our Administrative Procedures Act. Let us as a bar begin asking whether we want to change that system and reform the reformation.

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[9] Harves, The Central Panel System, The National Judicial College (handout)(1985).

Family Law Update 1988

By David S. Dolowitz

In 1986 the legislature of the State of Utah created a Court of Appeals as section 78-2(a)-1, Utah Code Annotated (1986)*et seq.*, and in subsection (g) of section 78-2(a)-3, Utah Code Annotated (1986), placed jurisdiction over domestic relations cases in the Court of Appeals. This had the effect not only of lightening the work load of the Utah Supreme Court, but of creating a court that would develop a particularized expertise in family law matters. The Supreme court may review decisions of the Court of Appeals in section 78-2(a)-4 Utah Code Annotated, on a discretionary basis and thus retains ultimate power to make the determinations of law and policy that will effect family law in Utah. The practical effect of the establishment of the Court of Appeals is to substantially shorten the time spent in appeals for family law matters, which is crucial to our clients and will allow them to have their family disputes resolved more expeditiously and establish a body of law by a court specializing in that area.

COMMISSIONER SYSTEM

Most of the district courts in Utah have adopted a commissioner system pursuant to section 30-3-4.1 through 4.4, Utah Code Annotated (1985). Proceedings before the commissioner were examined in *Wiscombe v. Wiscombe,* 744 P. 2d 1024 (Utah App. 1987). The Court of Appeals noted that hearings before domestic relations commissioners are based solely on proffers. There is no submission of evidence or testimony. In the *Wiscombe* case itself, counsel for Mr. Wiscombe had objected to the recommendation of the commissioner at the conclusion of the hearing, but had not filed a written objection to the recommendation. When he reached the trial court on his objection, the trial court refused to hold a hearing, ruling that no preservation of the objection had been made in writing and therefore there was none to be reviewed. The Court of Appeals determined that this ruling created a denial of due process of law. The challenged order was vacated and remanded. The Court of Appeals declared that one of the fundamental requirements of due process is an opportunity to be fully heard. The opinion suggests that a full evidentiary hearing must be available upon demand or due process is violated. This may not be the specific ruling, but it is the implication of the decision.

ALIMONY

There is a significant change occurring in decisions regarding alimony commencing with *Jones v. Jones,* 700 P. 2d 1072 (Utah 1985), and *Olson v. Olson,* 704 P. 2d 564 (Utah 1985), where the Supreme Court ruled that permanent alimony should be awarded in long-term marriages in amounts commensurate, as nearly as possible, with the living standard enjoyed by the parties during the marriage. Such amounts are then adjusted as to the ability of the recipient to supply income for himself/herself and the ability of the payor to produce income. In one of its first opinions, *Eames v. Eames,* 735 P. 2d 395 (Utah App. 1987), the Court of Appeals explored these same factors as re-articulated by the Utah Supreme Court in *Paffel v. Paffel,* 732 P. 2d 96 (Utah 1986), and upheld an award of alimony that would last until the recipient began receiving retirement income. In *Canning v. Canning,* 744 P. 2d 325 (Utah App. 1987), the Court held that the failure of the trial court to apply these criteria appropriately, particularly in the absence of a finding of the recipient's current or future ability to work, constituted clear error and required reversal. In a similar decision, *Rasband v. Rasband,* 752 P. 2d 1331 (Utah App. 1988), the Court ruled that the trial court erred in ordering declining alimony after a twenty-nine year marriage, where the husband had a demonstrated ability to earn a substantial income, and the wife had demonstrated no significant ability to earn income, and had to provide care for a disabled, adult child. On the other hand, where the Court of Appeals found the trial court had appropriately considered the factors and determined that alimony should not be awarded, the decision was affirmed. *Boyle v. Boyle,* 735 P. 2d 669 (Utah App. 1987).

The Court of Appeals, expanding on the theme that appeared in a number of recent cases, articulated that alimony is to enable the recipient to maintain as nearly as possible the standard of living enjoyed by the recipient during the course of the marriage. *Naranjo v. Naranjo,* 751 P. 2d 1144 (Utah App. 1988). The Court further held that when an alimony award is required under the articulated criteria, it was proper to order it paid even though the payments would have to come from proceeds of a contract of sale, which the trial court determined were the separate property of the payor's spouse. *Sampinos v. Sampinos,* 750 P. 2d 615 (Utah App. 1988).

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The Court of Appeals articulated the standard that trial courts must set out specific findings that will support their determinations, and, in the absence of such proper findings, the rulings of the trial courts will be reversed. *Ruhsam v. Ruhsam,* 742 P. 2d 123 (Utah App. 1987); *Lee v. Lee,* 744 P. 2d 1378 (Utah App. 1987); *Marchant v. Marchant,* 743 P. 2d 199 (Utah App. 1987).

The Utah Supreme Court, without citing these cases, articulated precisely the same standard on January 4, 1988, in *Gardner v. Gardner,* 748 P. 2d 1076 (Utah 1988), and in *Davis v. Davis,* 749 P. 2d 647 (Utah 1988).

The Utah Court of Appeals in *Petersen v. Petersen,* 737 P. 2d 237 (Utah App. 1987), explored the issue of division of a professional license, ruled that a professional license was not property to be divided, but that reimbursement alimony could be utilized in appropriate circumstances to effect an equitable award that could not otherwise be effected. This was based on the fact that a professional license cannot be divided, and as the court noted, 737 P. 2d 242, this type of award may be necessary to effect a division where property interest exists but is not recognized under traditional property concepts and cannot be divided. In *Petersen,* an award of $120,000.00 to compensate for a medical degree was vacated, but the payments that were ordered, $1,000.00 per month, were continued as alimony. This approach was followed in *Rayburn v. Rayburn,* 738 P. 2d 238 (Utah App. 1987), where a $45,000.00 award was revised into alimony, payable at $750.00 per month.

These rulings of the Utah Court of Appeals were observed by the Utah Supreme Court in *Gardner v. Gardner,* 748 P. 2d 1076, 73 Utah Adv. Rep. 35, 37, 38 (Utah 1988). However, no ruling was made as to whether or not the reimbursement alimony principle was correct. The Supreme Court noted that such a decision was not necessary in the *Gardner* case, as the parties had been married for a long time, and a substantial marital estate was to be divided. In this sense, Mrs. Gardner had already realized the benefits of the medical degree in the property she was receiving, therefore, the trial court's determination that no award to her to offset that degree was affirmed.

After the Utah Supreme Court articulated the *Gardner* decision, the issue of professional degree was again considered by the Court of Appeals in *Martinez v. Martinez,* 80 Utah Adv. Rep. 30, 754 P. 2d 69 (Utah App. 1988). The Court first determined that where the trial court had not awarded alimony or child support based upon the earnings of the professional since completing a professional education and starting practice, the Court erred and increased by doubling these awards. The Court then ruled the non-professional spouse who had helped the professional spouse acquire training, but had received no return on that investment (in contrast to *Gardner*), was entitled to "equitable restitution." The case was then remanded for further hearing by the trial court as to appropriate, equitable restitution, which should be paid to the spouse whose sacrifice had led to the professional spouse acquiring the professional education but had obtained nothing in terms of property, income or enjoyment of lifestyle as a result of the attainment of that professional degree.

In two decisions, the Utah Court of Appeals reversed property awards, and in their remand to the trial courts, specifically directed the trial courts to re-examine the denial of alimony or the award of minimal alimony in light of the changed property award, *Bailey v. Bailey,* 745 P. 2d 830 (Utah App. 1987); *Smith v. Smith,* 738 P. 2d 655 (Utah App. 1987).

In 1980, the Utah Supreme Court, in a footnote, observed that, as a result of change of section 30-3-5, Utah Code Annotated (1953), the Utah District Courts should have the power to award alimony in the face of an appropriate change of circumstance where it was initially waived or not awarded. *Georgedes v. Georgedes,* 627 P. 2d 44 (Utah 1981). This question reached the Utah Court of Appeals in *Kinsman v. Kinsman,* 748 P. 2d 210 (Utah App. 1988). In this case, the trial court awarded alimony, after it had been initially waived when the husband took out bankruptcy and left his wife with substantial obligations that he had agreed to pay. While all three of the members of the panel voted to uphold the trial judge, they divided in the rationale on which they upheld the decision. Judges Davidson and Bench declined to hold that a change of circumstances can overcome a knowing and specific waiver in a stipulation, but they upheld the judge as a matter of contract law. They reasoned that the stipulation is a contract and when the husband took out bankruptcy and did not pay what he had agreed to pay, the consideration failed, thus voiding the contract. The wife's waiver of alimony rights was also voided and that required affirmation of the trial judge's award. They noted that another possible theory would be to determine that a part of all of the award was for support, which would be non-dischargeable in bankruptcy. Judge Jackson followed directly the language of the Utah Supreme Court in *Georgedes, supra.* He found the *Kinsman* case to be an appropriate case for application of the doctrine of a change in circumstances, justifying an award of alimony where it had not been originally granted. He felt that the trial courts had the ability to decide when an appropriate change in circumstances had occurred, whether the original failure to award alimony was based on judicial determination or stipulation of parties.

CHILD CUSTODY

The Utah Legislature amended section 30-3-10, Utah Code Annotated (1988) to require a trial court considering custody to consider which parent is most likely to act in the best interest of the child, including allowing the child frequent and continuing contact with the non-custodial parent, when determining what custody award should be made in the best interest of the child. The legislature went on to adopt sections 30-3-10.1, 10.2, 10.3 and 10.4, Utah Code Annotated (1988), which specifically provide for joint custody awards and establish the criteria for making the implementing those awards.

The Utah Supreme Court ruled in *Pusey v. Pusey,* 728 P. 2d 177 (Utah 1986), that there is no sexual preference for one parent or another in child custody cases. Instead, related factors in determining the best interest of the child and applying the other previously-articulated factors involved in determining the best interest of the child. In *Alexander v. Alexander,* 737 P. 2d 221 (Utah 1987), the Utah Supreme Court upheld a trial court's award of three children to their father and one child (substantially younger) to their mother. The court reviewed the decision of the function-related factors it had articulated in *Pusey v. Pusey.* This decision was followed by the decision of *Sanderson v. Tyron,* 739 P. 2d 623 (Utah 1987), where the court ruled that engaging in polygamous marriages itself is not decisive in determining custody of a child and reversed the trial court that awarded custody away from the parent practicing polygamy solely on that basis. The court declared that section 30-3-10, Utah Code Annotated (1984), requires that the courts look into the best interest of the child as well as the past conduct and demonstrated moral standards of the parties. The court also restated its prior ruling in *Smith v. Smith,* 726 P. 2d 423 (Utah 1986), that when custody is in issue and a challenge is to be presented to the appellate courts, careful findings must be articulated by the trial court as to the basis of its decision.

In *Kishpaugh v. Kishpaugh,* 745 P. 2d

1248 (Utah 1987), the court examined again the question of a custody dispute between a parent and a third party. The court reapplied the standard that it had articulated in *Hutchinson v. Hutchinson,* 649 P. 2d 38 (Utah 1982) and upheld child placement with a grandparent.

In *Davis v. Davis,* 749 P. 2d 647 (Utah 1988), the Utah Supreme Court restated that the primary focus of a trial court in determining custody is the child's best interest even when presented with the argument that custody had been wrongfully obtained and the function-related factors articulated in *Pusey* misapplied because of that wrongful act. The court declared that the trial courts must be careful not to reward misconduct by giving a wrongdoer a consequential advantage in evaluating the custody question, but still must focus on the best interest of the child. The court recognized that in looking to the function-related factors and determining best interest, it faces a very delicate question when they tilt in favor of a party who has, in some way, either acted wrongfully or inappropriately and this has produced the result that makes it in the best interest of the child that the child be awarded to that party, where that might not be true but for the challenged conduct.

The Utah Court of Appeals examined a ruling by the trial court where the written findings contained only a summary statement as to why a child's custody award was made, and after noting that Rule 52(a) of the Utah Rules of Civil Procedure was revised on October 30, 1986, and became effective on January 1, 1987, ruled that the revision allowed a reviewing court to examine not just the written findings of fact in testing a decision of the court, but also to consider findings of fact and conclusions of law stated orally by the court and recorded in open court following the close of evidence, applying that standard. *Hansen v. Hansen,* 736 P. 2d 1031 (Utah App. 1987). The custody decision of the trial court thus examined was upheld as complying with the requirements of *Smith v. Smith,* 726 P. 2d 423 (Utah 1986) and *Martinez v. Martinez,* 728 P. 2d 994 (Utah 1986), which decisions presented the requirement that there must be fully articulated findings to support a custody award when it is to be challenged on appeal.

On the other hand, a failure to meet this standard led to reversal of the trial court in *Marchant v. Marchant,* 743 P. 2d 199 (Utah App. 1987). In fact, the Court of Appeals noted in this decision that the trial court had failed to consider the appropriate factors required by *Pusey v. Pusey* (the identity of the primary caretaker, the identity of the parent with greater flexibility to provide personal care of the child, the identity of the parent with whom the child has spent most of his or her time during the custody determination period and the stability of the environment provided by each parent) and, instead, seemed to be fixated on who had broken the marriage, and punished the mother who had left the rural environment for an urban environment and associated with other divorced people while overlooking the husband's assault upon her. In concluding this portion of its opinion, the Court of Appeals stated,

> . . . this Court will not condone any Finding of Fact which might be interpreted as penalizing a woman for acquiring skills in other than the most fundamental and traditional areas necessary for functioning as a wife and mother.

743 P. 2d at 204.

CHANGE OF CUSTODY

In a case which most of us will find easy to remember, *Kramer v. Kramer,* 738 P. 2d 624 (Utah 1987), the Utah Supreme Court ruled that a custody decree could not be reopened unless there is a showing of a change in circumstances materially affecting the custodial parent's ability or fitness to care for a child, and, in making that determination, any changes in circumstances of the non-custodial parent are not relevant. Although the concurring opinions indicate that in certain circumstances the rule may not be this tight, as a general rule, to secure a change in circumstances there will have to be some problem in the functioning of the custodial parent which would be shown before the court, and which the court can look to in determining what is in the best interest of the child. Improvements or changes in the pre-condition or conduct of the non-custodial parent are irrelevant.

VISITATION

Where specific visitation was an issue, the Court of Appeals ruled that the trial court was in error and abused its discretion in establishing a visitation award without making specific Findings of the best interest of the children in *Ebbert v. Ebbert,* 744 P. 2d 1019 (Utah App. 1987).

In *Trent v. Trent,* the Utah Supreme Court explored the provisions of the Utah Uniform Child Custody Jurisdiction Act Section 78-45(c)-1 through 26, Utah Code Annotated (1986) and ruled that the trial court correctly applied the Act in refusing to grant a motion to stay proceedings in Utah, rather than acceding to the jurisdiction of the courts in Idaho, when confronted with the situation where the parent residing in Utah had returned to the Utah court which granted the decree of divorce to secure specific visitation rights. The other parent, now residing in Idaho, sought to have an Idaho court take jurisdiction. The Utah trial court refused. The Court noted that the terms of the statute are discretionary and that there was no real issue concerning the specific visitation rights to be afforded to the Utah parent. Thus, to force the Utah parent to go to Idaho served no purpose and made the Idaho court a *forum non-conveniens.* In addition, the Idaho parent made no showing of any interest that would be served by having the Idaho courts proceed with the action. Under these circumstances, the Utah trial court was held to have exercised its discretion correctly.

In *Rawlins v. Weiner,* 752 P. 2d 1326 (Utah App. 1988), the Utah Court of Appeals examined the ruling of a trial court refusing to surrender jurisdiction over visitation and custody matters to the courts of a sister state. The Court ruled that the trial court acted correctly under the Utah Uniform Child Custody Jurisdiction Act, Sections 78-45(c)-1 to 26, Utah Code Annotated (1987) in communicating with the Judge in the other state and together determining that Utah should retain jurisdiction and resolve pending issues, then proceed to hear and determine the pending issues. While the Court in this decision carefully discussed application of the Uniform Child Custody Jurisdiction Act provisions to the issue before it, it did not mention the Federal Parental Kidnapping Prevention Act, Section 1738A of Title 28, United States Code, which would have required the same result.

CHILD SUPPORT

In *Race v. Race,* 740 P. 2d 253 (Utah 1987), the Utah Supreme Court reversed a trial court order which conditioned the payment of child support to the custodial parent on compliance with ordered visitation. The court observed that support is an obligation imposed for the benefit of the children, not the divorcing spouse. The Supreme Court declared that it found no circumstances *in this case* which would justify the trial court in denying child support until visitation between the children and their father could be worked out.

In *Druce v. Druce,* 738 P. 2d 633 (Utah 1987), the Utah Supreme Court ruled that

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payments which became due under an Order of Temporary Support could be reduced to judgement after entry of the final decree of divorce, despite the failure of the final decree of divorce to expressly preserve the payments. The Utah Court of Appeals affirmed a child support award in *Hansen v. Hansen,* 736 P. 2d 1031 (Utah App. 1987), over the protest of the obligor that the amount he was ordered to pay exceeded the child payment schedule of the District Court. The Court of Appeals noted that the schedule was not offered in evidence at trial, and if it had been offered, its admissibility would have been questionable. On the other hand, the Court noted that the trial judge had the economic circumstances of the parties and the needs of the children before him when he made his ruling. The Court of Appeals upheld a trial court support order against a challenge that the trial court failed to consider the standard set out in section 78-45-7(2), Utah Code Annotated (1987), in *Ebbert v. Ebbert,* 744 P. 2d 1019 (Utah App. 1987), where the obligor argued that the trial court should have considered the wealth of the parents of the custodial parent who had made large gifts of money to the custodial parent during the marriage. The Court of Appeals stated that to consider such a factor would be the same as imputing the wealth and income of the parents of a custodial parent to her and imposing a duty of child support on the grandparents. The court noted that not only was this contrary to law, it was contrary to common sense.

In *Balls v. Hackley,* 745 P. 2d 836 (Utah App. 1987), the Court of Appeals held that where the parties had entered into a Stipulation thereafter incorporated into a Decree continuing child support until the child reached the age of 18, the trial court retained jurisdiction to increase child support for a child between the ages of 18 and 22.

In *Peterson v. Peterson,* 748 P. 2d 593, (Utah App. 1988), the Court of Appeals reversed the trial court and awarded use of a home owned by the father prior to the marriage to the mother to assist in supporting the children. The court noted that it was making use of premarital property by one spouse for the benefit of the other, but felt it was necessary to protect and support the children. The court referred to section 30-4-3, Utah Code Annotated (1984), a statute governing separate maintenance actions, to underpin this decision. It noted that it was part of a legislative intent to give the court as wide as possible discretion to insure the children are protected in the break up of a marriage. The court also relied on the Utah Supreme Court decision of *Burke v. Burke,* 733 P. 2d 133 (Utah 1987) [discussed separately *infra*], which gives trial courts wide latitude in dealing with premarital, gifted and inherited property. The court also required an increase in the ordered child support paid by the father, declaring that child support awards should approximate actual need, and, when possible, should try to give the children the standard of living as comparable as possible to what they would have experienced if no divorce had occurred.

In *Jefferies v. Jefferies,* 752 P. 2d 909 (Utah App. 1988), the Utah Court of Appeals reviewed a trial court decision which awarded property to a disabled adult child. To provide for the support of that child the court ruled that, under existing Utah law, property cannot be awarded to a child in a divorce to create an estate for that child. The Court did articulate the criteria to order support for an adult child who required such support, and specifically noted that in the findings of fact articulated by the trial court to support such an award, the specific criteria of section 78-45-7, Utah Code Annotated (1987), must be addressed. The case was remanded to the trial court for entry of an appropriate revised order with appropriate findings of fact.

PREMARITAL AGREEMENTS

In *Huck v. Huck,* 743 P. 2d 417 (Utah 1986), the Utah Supreme Court ruled that prenuptial agreements based on full disclosure and fair representation would be upheld as to property, but would not be upheld as to support obligations, as those must be determined by the court at the time of consideration of the termination of the marriage.

The Utah Court of Appeals, in *Berman v. Berman,* 749 P. 2d 1271 (Utah App. 1988), ruled that a trial court must enforce, according to basic contract principles, a premarital agreement. Doing so required a reversal of the decision of the trial court to award certain property to the wife that the Court of Appeals felt appropriately should have been reserved for the husband under the prenuptial agreement. However, having so ruled, the case was then returned to the trial court to re-examine the issue of whether or not alimony should have been awarded and in what amount, in light of the Utah rule that premarital agreements can be applied to decide property matters, but not support issues, as those were to be resolved by the trial court at the time of the termination of the marriage.

PROPERTY/ALIMONY

In *Blair v. Blair,* 737 P. 2d 177 (Utah 1987), the Utah Supreme Court examined a provision in a decree of divorce which provided for a series of payments from the ex-husband to the ex-wife. They were labeled support, however, and the Supreme Court analyzed them as being labeled as spousal support for tax advantages; in reality, this was a property settlement and not alimony. Therefore, the payment obligations were not cancelled by the wife's remarriage and the husband was required to continue with the payments until he had completed his contractual obligations.

INTEREST ON JUDGMENT

In *Stroud v. Stroud,* 738 P. 2d 649 (Utah App. 1987), the Court of appeals upheld a ruling of a trial court stating that it did not have the power to stay an accrual of interest on a judgment, although it could stay execution on the judgment. The Supreme Court has affirmed, P. 2d (Utah 1988).

DIVISION OF PROPERTY

Businesses

The Utah Court of Appeals reviewed two decisions dealing with division of businesses. In *Lee v. Lee,* 744 P. 2d 1378 (Utah App. 1987), the court reversed an award of 52% of an interest in a business (the principal asset of the marriage) exclusively to the husband without any finding as to its value, and in *Coleman v. Coleman,* 743 P. 2d 782 (Utah App. 1987), approved piercing the corporate veil where the corporation had been run without regard to the corporate entity and it was necessary to do so in order to effect an equitable division of the parties' assets.

The Court of Appeals upheld a division of property after the termination of a second marriage which considered both the first and second marriages in *Canning v. Canning,* 744 P. 2d 3215 (Utah App. 1987).

The Court of Appeals upheld the trial court's refusal to accept the valuation evidence of either party and ordered sale of some of the marital assets in *Cook v. Cook,* 739 P. 2d 90 (Utah App. 1987), but affirmed the trial court despite its failure to include the valuations in *Boyle v. Boyle,* 735 P. 2d 669 (Utah App. 1987), where the overall balance in dividing the property demonstrated that the court had acted fairly and equitably.

The trial court was reversed in *Ruhsam v. Ruhsam,* 742 P. 2d 123 (Utah App. 1987), where it ordered each of the parties to occupy the house on a six month rotating basis

until it was old. The court also noted the failure of the trial court to include a requirement that the wife could purchase the house at an appropriate price. In an interesting twist, the Court of Appeals upheld as fair and equitable a division of the parties' debts in *Hansen v. Hansen,* 736 P. 2d 1031 (Utah App. 1987).

RETIREMENT PROGRAMS

The Utah Court of Appeals and Utah Supreme Court examined the difficult question of division of retirement benefits in a series of cases. In *Alexander v. Alexander,* 737 P. 2d 221 (Utah 1987), the Supreme Court upheld the decisions of the trial court in not reducing the present value of the retirement plan to account for income tax liability that might be imposed in the future, and approved the trial court's including contributions made by the husband after the wife left the marital home, but before the marriage was terminated. In *Gardner v. Gardner,* 748 P. 2d 1076 (Utah 1988), the failure of the trial court to value the retirement account on the basis of its being futuristic was reversed with directions to properly value and divide this asset.

The Court of Appeals, too, has had to deal with retirement programs. In *Rayburn v. Rayburn,* 738 P. 2d 238 (Utah App. 1987), the Court approved the trial court's order that the retirement plan be awarded to the husband subject to an order requiring him to pay the value of her portion to the wife in a series of periodic payments. Then, in *Merchant v. Merchant,* 743 P. 2d 199 (Utah App. 1987) and *Bailey v. Bailey,* 745 P. 2d 830 (Utah App. 1987), the Court confronted the difficulty of dividing government pensions. The panel split in their decision with the majority directing division of the retirement benefits when they are to be received. The dissenters believed that division could be effected immediately and that was a preferable approach so as not to keep parties financially involved with each other. In *Greene v. Greene,* 751 P. 2d 827 (Utah App. 1988), the Utah Court of Appeals ruled that military retirement benefits are marital property and they are to be divided as part of the marital estate in a divorce.

PERSONAL INJURY AWARD

The Court of Appeals in *Merchant v. Merchant, supra,* dealt with the question of how to divide a personal injury award. The court noted that in *Izatt v. Izatt,* 627 P. 2d 49 (Utah 1981), the Utah Supreme Court had affirmed a trial court ruling that the money received by the wife in settlement of a malpractice suit belonged to her. After noting that there is no fixed formula for dividing property in Utah beyond that it must be fair, equitable and necessary for the protection and welfare of the parties, this question was remanded to the trial court to make findings as to what had occurred and what was the appropriate dispostion of this property.

INHERITED, GIFTED & PREMARITAL PROPERTY

The Utah Supreme Court in *Newmeyer v. Newmeyer,* 745 P. 2d 126 (Utah 1987), revisited the problem of division of inherited, gifted and premarital property. The court reaffirmed the ruling it had previously made in *Burke v. Burke,* 733 P. 2d 133 (Utah 1987), where it had ruled that in appropriate circumstances premarital property gifted to one of the parties during the marriage or inherited by one of the parties during the marriage may be divided between the parties, or, in appropriate circumstances, returned to the party who owned or received it. This is discussed and the Utah cases are listed in *Burke v. Burke, supra.* The resolution is left to the sound discretion of the trial court by the Supreme Court.

Following on this theme, the Utah Court of Appeals examined this problem in three cases. In *Smith v. Smith,* 738 P. 2d 655 (Utah App. 1987), the court reversed the ruling of the trial court that the parole evidence rule prohibited the father of the one spouse from testifying that property was deeded to both solely for financing purposes. The Court of Appeals ruled that the evidence should have been received although receipt of that evidence did not require any change in the distribution of the property under the principle enunciated in *Burke v. Burke, supra.* In *Bailey v. Bailey,* 746 P. 2d 830 (Utah App. 1987), the Court of Appeals noted that the land on which the parties' home was built was the husband's separate property, having been gifted to him as an advance on his inheritance, but went on to rule it is still subject to the principles articulated in *Burke v. Burke, supra,* which the court directed should be considered on remand. Finally, in *Peterson v. Peterson,* 748 P. 2d 593, (Utah App. 1988), the Court of Appeals reversed the trial court which had returned possession of the marital home to the husband as he had owned it prior to the marriage (it had been in his family for two generations). The court ruled that, for the protection and the benefit of the minor children of the parties, the mother should be allowed use of that home until her remarriage, or until the children reached their majority, married or otherwise became independent of her. Title to the home remained with the husband who was ordered to pay the mortgage and property tax obligations.

DIVISION OF PROFESSIONAL PRACTICE

Division of a medical practice was confronted by the Supreme Court in *Gardner v. Gardner,* 748 P. 2d 1076 (Utah 1988). The Court observed that there has been a division of authority throughout the country in dealing with the issue of valuation of a medical degree. It noted the decisions of the Utah Court of Appeals in *Peterson v. Peterson,* 737 P. 2d 237 (Utah App. 1987), and *Rayburn v. Rayburn,* 738 P. 2d 238 (Utah App. 1987), that the license has no value. It determined that it was not required to reach a decision in the *Gardner* case as to whether or not there was any value. because of the circumstances of that case, and affirmed the decision of the trial court in that respect. In a footnote, it cited two authorities who found that there was a value in such a practice and that there was not.

ATTORNEYS' FEES

The Utah Court of Appeals in *O'Brien v. Rush,* 744 P. 2d 306 (Utah App. 1987), interpreted both its rules and section 78-27-56, Utah Code Annotated (1981), regarding an awarding of attorneys' fees on an appeal. The court determined that it could decide what was a frivolous appeal by application of Rule 40(a) of the Rules of the Utah Court of Appeals. This rule contains a restatement of Rule 11 of the Utah Rules of Civil Procedure. The Court of Appeals ruled that this language offered a definition of what was frivolous and noted that it formulated a different standard from that of the lack of good faith required by section 78-27-56, Utah Code Annotated (1981). Applying that standard, it awarded attorneys' fees for the appeal and remanded the case to district court to set the amount. In *Porco v. Porco,* 752 P. 2d 365 (Utah App. 1988), and *Brigham City v. Mantua Town,* 754 P. 2d 1230 (Utah App. 1988), the Utah Court of Appeals affirmed, after examining the facts of the case and the criteria involved, and award of attorney's fees. The trial court then awarded attorney's fees and costs as sanctions for a frivolous appeal, applying *O'Brien v. Rush, supra,* where there was no rational basis for the appeal and it was pursued solely for harassment.

In *Rasband v. Rasband,* 752 P. 2d 1331 (Utah App. 1988), the Court of Appeals declared that attorney's fees may be award-

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ed on appeal where there is need for such financial assistance established by the prevailing party seeking such fees.

SPECIFIC FINDINGS OF FACT

If you are in a position where you intend to challenge a division of property, you must insist that the findings of fact be specific so that the issue can be presented either on the face of those findings or on the overruling of your objections. If this foundation is absent, the matter will have to be remanded to the district court for such determination. *Peck v. Peck,* 738 P. 2d 105 (Utah App. 1987). Or worse, if you have prepared them, you will not be able to present a challenge to the appellate court. *Jones v. Jones,* 700 P. 2d 1072 (Utah 1985); *Boyle v. Boyle,* 735 P. 2d 669 (Utah App. 1987).

JURISDICTION

Although it would seem basic that at least one spouse would have to reside in a county for six months prior to filing an action for divorce, section 30-3-1, Utah Code Annotated (1953), failure to comply with this provision can put clients in a strange position. *Neville v. Neville,* 740 P. 2d 290 (Utah App. 1987).

NUNC PRO TUNC

A discussion of the *nunc pro tunc* order and the change in the law effected by the amendment to section 30-4(a)-1, Utah Code Annotated (1984), which reversed the prior decision of the Utah Supreme Court in interpreting that statute in *Preece v. Preece,* 682 P. 2d 298 (Utah 1984), are explained and applied in *Horne v. Horne,* 737 P. 2d 244 (Utah App. 1987).

PATERNITY

In *Kofford v. Flora,* 744 P. 2d 1343 (Utah 1987), the Supreme Court ruled the H.L.A. test admissible but declared it is admissible only if the probability of paternity is 95% or greater. Anyone dealing with this test in a paternity case should review this case. It was applied after publication in *Martinez v. Lavato,* 744 P. 2d 1364 (Utah 1987), and *Salzetti v. Nichols,* 744 P. 2d 1362 (Utah 1987). In *Department of Social Services v. Ruscetta,* 742 P. 2d 114 (Utah App. 1987), the Court of Appeals ruled that the State of Utah was not collaterally estopped from bringing a paternity action against an alleged father where the father had previously secured a default decree in the claim against the mother.

STIPULATION

The Utah Court of Appeals ruled in *Brown v. Brown,* 744 P. 2d 333 (Utah App. 1987), that a failure to have either a written stipulation signed by all of the parties and their attorneys or an on-record stipulation, was fatal to enforcement efforts. In this particular case, the husband, his attorney, and the wife's attorney all agreed to the stipulation at a scheduled deposition. It was taken down by the court reporter. The wife did not agree on the record to accept the stipulation. She later took the position that she had not entered into the stipulation. The trial court did not agree and required enforcement of the stipulation. The Court of Appeals reversed, determining that a stipulation is legally binding only if it is in writing, signed by the parties or the attorneys for the parties, or if it is admitted in the presence of the court or that there has been substantial change of circumstance in reliance upon the promise or agreement. It

ruled that silence cannot be construed to be acceptance and determined that no stipulation existed in this case.

ADOPTION

In the matter of the adoption of *M.L.G.,Jr.*, 746 P. 2d 1179, (Utah App. 1987), the Court of Appeals affirmed a decision of the trial court ruling that Utah statutes require the presence of a child to be adopted in the court at the time of the adoption. The opinion and the concurring opinion point out that the child does not necessarily have to be advised of what is transpiring, but the child must be physically present in court at the time of the proceedings.

The Court of Appeals revisited the problem of the father of an illegitimate child seeking to establish paternal rights *In The Matter of K.B.E.*, 740 P. 2d 292 (Utah App. 1987), where the trial court had ruled that while section 78-30-4(3), Utah Code Annotated (1981), requires an unwed father to file an affidavit of acknowledgement of paternity prior to the filing of a petition for adoption or relinquishment or placement with an agency for adoption, it did not cut off the rights of a father who filed a few hours after the mother filed when the adopting party was the mother's father. The Court of Appeals reversed the determination of the trial court that the later filing was timely, but ruled that a decision that enforced the statute would impermissibly violate a father's due-process rights under both the federal and state constitutions under the facts of this case and, therefore, affirmed the trial court's refusal to cut off the father's rights and permit the adoption of the child without his consent.

Finally, in the matter of *the adoption of K.O. aka K.D.*, 748 P. 2d 588, (Utah App. 1988), a trial court's summary judgment denying the motion of a grandmother to set aside the adoption of her grandchild was reversed and the matter returned to the trial court for evidentiary determination as to whether or not the trial court had jurisdiction to permit the adoption, and whether or not a fraud on the trial court had been perpetuated. The Appellate Court noted these determinations required factual inquiry and could not be resolved on summary judgment.

Utah Real Property Act Amendments

By David K. Detton and Phillip W. Lear

The 1988 Legislature enacted House Bill No. 25 which amended Titles 57 and 75 of the Utah Code to modernize and make more uniform the Utah statutes governing conveyances of real property, acknowledgments, and recording. These amendments also respond to recent judicial decisions and clarify certain previously ambiguous statutory requirements.

In general terms, H.B. 25 adopts the Uniform Recognition of Acknowledgments Act, amends the statutes governing acknowledgments to provide for a single, permissive form of certificate of acknowledgment, provides for the recording without acknowledgment of certain public records affecting title to federal, Indian, and state lands, amends the elective share provisions of the Utah Uniform Probate Code in order to remove the requirements for spousal joinder for most documents, and establishes certain presumptions concerning the effect of recorded documents to streamline title examination efforts.

Specifically, H.B. 25 makes two important definitional changes. First, it substitutes the term "document" for the term "conveyance," and defines a document as every instrument in writing which affects real estate, except wills and leases for a term not exceeding one year (Utah Code Ann. § 57-1-1(2)). This definition is important in determining what writings give constructive notice when recorded in the records of the county recorder. Second, H.B. 25 defines the terms "real property" and "real estate" to include all "conventional" interests in land, as well as all non-extracted minerals and mining claims (§ 57-1-1 (3)). These definitions clarify the status of non-severed minerals as real property in Utah, at least for purposes of Title 57.

H.B. 25 also substantially revises the acknowledgments statutes. It repeals all of the current statutory forms of certificates of acknowledgment contained in chapter 2 of Title 57 and replaces them with a single, short form certificate of acknowledgment which may be used by all persons (§ 57-2a-7). (See sample form of certificate attached as Appendix A.) Further it adopts most of the provisions of the Uniform Recognition of Acknowledgments Act, which recognizes as valid, certificates of acknowledgment and acts authorized by other states and foreign countries (§ 57-2a-6). The primary impetus for changing the Utah acknowledgment statutes was the increasing number of multi-state transactions affecting Utah real property. Many conveyances and other documents affecting real estate executed outside the State of Utah typically bear the statutory form of certificates of acknowledgment of the jurisdiciton in which the instruments are executed. More often than not, these statutory forms do not conform to the Utah forms for corporate and other acknowledgments mandated by prior law. As a result, Utah and federal courts have invalidated numerous mechanic's liens, mortgages, and trust deeds, or have ruled that these liens, mortgages, and trust deeds have lost their priority as security documents, because they bore non-statutory acknowledgment forms and, therefore, were not entitled to be recorded.

H.B. 25 also affects the Utah recording statute. The changes to the statute emphasize that all documents, with two exceptions, must be acknowledged to be recorded (§ 57-3-2). Those exceptions include (1) the recording of governmental transfers such as patents and mineral leases, as well as judicial decrees, judgments, and certificates; and (2) financing statements, assignments of financing statements, and termination statements complying with Article 9 of the Utah Uniform Commercial Code (§ 70A-9-402). The governmental transfers exception does not apply, however, to title documents executed by the State of Utah and its political subdivisions. The rationale for this limitation is that the State of Utah and its political subdivisions may be required to comply with state law, whereas it is more difficult to mandate compliance by the federal government on Indian tribes. Copies of documents recorded in one county may also be certified by the county recorder of the repository county and thereafter be recorded in any other county (§ 57-3-2).

H.B. 25 also revamps the title curative provisions of Chapter 4 of Title 57. It recognizes that the historical purpose of recording is to give notice of, and not to validate, documents. Accordingly, recorded documents which are properly indexed will be entitled to the benefits of constructive notice and to certain statutory presumptions of regularity (§ 57-4a-4), notwithstanding technical defects in execution, attestation, or acknowledgment (§§ 57-4a-1,-2). H.B. 25 also provides a list of presumptions per-

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David K. Detton graduated from Brigham Young University, cum laude, in 1973 with a Bachelor of Arts degree and from the BYU Law School, magna cum laude, in 1976. He is a partner in the Salt Lake City office of Holme Roberts & Owen, where his practice involves natural resources law, commercial financing, and state and local taxation. This paper and his involvement as co-chairman of the Title Standards Committee of the Energy and Natural Resources Section of the Utah State Bar provided much of the impetus for H.B. 25.

Phillip W. Lear graduated from the University of Utah with an Honors degree of Bachelor of Arts, Phi Beta Kappa, magna cum laude in 1969 and from the University of Utah College of Law in 1975. He practices natural resources law with Van Cott, Bagley, Cornwall & McCarthy, and currently serves as the co-chairman of the Title Standards Committee of the Utah State Bar Energy and Natural Resources Section.

taining to recorded documents which will streamline title examinations for marketable title purposes (§ 57-4a-4).

Finally H.B 25 modifies the Utah Uniform Probate Code to provide that although the right to a spousal elective share will continue to be governed by the law of the decedent's domicile, any determinations concerning title to, or the validity of a conveyance by the decedent of real property located in Utah will be governed by the Utah law of conveyances (§ 57-2-202). These changes are designed to eliminate the need to obtain the joinder of a spouse in conveyances of separate property located in Utah.

In addition to these changes in existing statutes, H.B. 25 also repealed the statutory requirements for recording powers of attorney (§§ 57-1-7, -8, -9, & -18); the statutory provisions pertaining to the effect of reports of "missing" persons or persons "missing in action" as they pertain to powers of attorney (§ 57-1-17); curative provisions relating to documents recorded prior to 1898 (§ 57-3-9); and provisions pertaining to the validity of mayor's deeds (§§ 57-4-2, -3).

H.B. 25 also renumbers and reenacts several sections of Title 57 to facilitate the location of statutes dealing with common subjects. Former section 57-1-6 pertaining to transfers by trustees of blind trusts and the validity of unrecorded conveyances as between the parties is now found in new section 57-3-2. Former sections 57-3-5 and -8 pertaining to the recording of assignments of mortgages as notice to the mortgagor and the liability of the mortgagee for failure to discharge a mortgage after satisfaction are renumbered as sections 57-1-15 and -16 to place them closer to similar provisions pertaining to trust deeds.

One area in which the changes effected by H.B. 25 will be more noticeable is in the clarification of existing Utah law which requires all documents affecting mining claims, including notices of location and affidavits of assessment work, to be acknowledged as a prerequisite to recording. In the past, notices of location often bore no acknowledgment certificates even though acknowledgments technically may have been required under existing Utah law. In addition, affidavits of assessment work and all other affidavits must be acknowledged *in addition* to bearing a formal jurat. (See sample form of jurat attached as Appendix B.)

The limited Utah authority addressing the differences between a jurat and a certificate of acknowledgement suggests that the jurat and the certificate of acknowledgment should not be combined. *See In re Williamson,* 43 B.R. 813, 821-22 (Bankr. Utah 1984); *First Sec. Mortgage Co. v. Hansen,* 631 P. 2d 919, 921-22 (Utah 1981). The jurat certificate in the form "subscribed and sworn to before me this _____day of ___ " is not a certificate of acknowledgment. Rather, it is the formal certification or verification (commonly referred to as "jurat") that an oath or affirmation has been sworn, which entitles affidavits to be used in a court of law as evidence of the facts asserted. An acknowledgment serves an entirely different purpose. It is a certificate verifying the identify of the individual who signed the document. Consequently, in order for affidavits to be recorded they must bear both a jurat and a certificate of acknowledgment. Careful practice suggests the use of two separate certificates, each bearing its own venue statement (e.g. State of _____, County of _____) and separate notary seal.

The effective date of the H.B. 25 is July 1, 1988.

APPENDIX A
(Permissive form of certificate of acknowledgment)

STATE OF _____)
:ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this (date) by (person acknowledging, title or rank, and representative capacity, if any).

_____
Notary Public

(SEAL)
My commission Expires: Residing at:

_____ _____

APPENDIX B
(Permissive form of verification jurat)

STATE OF _____)
:ss.
COUNTY OF _____)

Subscribed and sworn before me this _____ day of

_____
Notary Public

(SEAL)
My commission Expires: Residing at:

_____ _____

Highlights From June Bar Commission Meeting

The meeting of June 17 was President Martineau's last full-agenda meeting as Bar President. He was enthusiastically commended by the Commissioners for his leadership and service as President during this historic year. In actions taken, the Bar Commission:

a. Approved Minutes of the May 18 meeting.

b. Received a report from the Executive Director, including Bar Commision election results, 1988 Annual Meeting plans and management matters.

c. Approved joint appropriation with the Law and Justice Center, Inc., to pave Colfax Avenue and to solicit financial contribution from neighbors on Colfax.

d. Received Discipline Report, acted on discipline matters and approved the call for applicants for the position of Bar Counsel.

e. Received the Admissions Report and acted on various petitions for waiver of Multistate Professional Responsibility Exam requirements as to the sequence of the exams. Reinstated a member who had been suspended for nonpayment of dues. Approved student and attorney applicants for the July Bar Exam. Approved the results of the May Attorney Bar Examination.

f. Received a report on the recent meeting of the Jack Rabbit Bar in Jackson, Wyoming. This is a regional association of bar associations and members from 13 states. It was noted that Bert L. Dart is the Chancellor of the Jack Rabbit Bar for 1988-89, that Barbara R. Bassett will serve as its Secretary-Treasurer and that Utah will host the 1989 meeting in June 1989 at the Homestead.

g. Received a report on the ABA Board of Governors meeting in Denver where Utah State Bar programs and the development of the Utah Law and Justice Center were praised by ABA President MacCrate and the Governors assembled.

h. Reviewed the status of litigation involving the Wisconsin State Bar in which other unified state bars have been asked to join in an amicus brief in the appeal of the *Levine* case.

i. Reviewed and endorsed final report of the Child Support Task Force and recommended approval of the guidelines by the Judicial Council.

j. Reviewed the status of litigation pending against the Bar.

k. Received a presentation and report on proposed research activities to be undertaken in the Law and Justice Center in cooperation with social scientists at the University of Utah and elsewhere.

l. Received a report on the impact of proposed tax initiatives presented by Taxpayers for Utah representative Pat Shea.

m. Received the monthly financial report, noting the continuance of effective controls on expenditures by management.

n. Discussed concepts of Bar structure and membership representation on the Commission, with further consideration to follow.

Utah Joins In 7th Circuit Amicus Brief

On February 19, 1988, Federal District Judge Barbara B. Crabb of the United States District Court for the Western District of Wisconsin issued a decision holding that the Wisconsin State Bar's assessment of mandatory dues violated an attorney's first amendment right of association. The Wisconsin Bar is an integrated bar, though bar admissions and discipline functions are performed by boards separate and apart from the Bar Association. Judge Crabb also found the concept of an integrated bar unconstitutional as opposed to earlier court decisions which only narrowed or restricted bar associations specific ideological and political expressive activities.

Judge Crabb's decision is currently on appeal to the 7th Circuit Court of Appeals. Because of the sweeping implications of Judge Crabb's decision, a number of states have joined together in filing an amicus brief. As of July 11, 1988, those states include North Dakota, Kentucky, Oregon, Nebraska and Washington. Due to the time constraints in filing the amicus brief, the Board of Bar Commissioners in a special meeting on July 8, 1988, unanimously voted to join in the amicus brief. Arguments in the area are scheduled for September 1988.

Those bar members wishing to review the amicus brief and/or review Judge Crabb's decision and the appeal briefs may do so by coming by the Law and Justice Center at 645 South 200 East, Salt Lake City, Utah. Bar members may also contact Kent Kasting, President; Stephen Hutchinson, Executive Director or Christine Burdick, Bar Counsel at 531-9077 for more information.

DISCIPLINE CORNER

Admonitions:

1. An attorney was admonished for violating DR 6-101(A)(3) for neglecting a legal matter entrusted to him by failing to timely and appropriately communicate with a prison inmate regarding the filing of his answer to a divorce complaint.

2. For failing to adequately communicate with his client regarding the settlement decisions being made by the attorney, an attorney was admonished for violating DR 6-101(A)(3).

3. An attorney was admonished for violating Rule 1.4 of the new Rules of Professional Conduct for failing to keep his client reasonably informed concerning the status of his case and explaining the case to the client in a manner reasonably necessary to enable the client to make informed decisions regarding the representation.

4. An attorney was admonished for failing to respond to repeated requests from an out of state colleague for information about the attorney's prior client; said conduct violates DR 1-102 (A)(6).

5. An attorney was adomonished for violating Rule 4.2 of the new Rules of Professional Conduct for contacting the opposing party concerning a foreclosure sale knowing the party was represented by counsel.

6. For violating DR 6-101(A)(3) and attorney was admonished for failing to have in place appropriate office procedures to

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prevent the attorney's missing significant deadlines in the client's case.

7. A prosecutor was admonished for calling himself as a witness in a criminal case where that testimony was essential testimony in proving the element of intent or knowledge. Such conduct violates DR 5-102(A).

8. An attorney was admonished for entering into a business transaction with a client without disclosing in writing all the material facts and potential conflicts in such a transaction.

9. An attorney was admonished for failing to detect a conflict of interest between himself and other attorneys with whom he office shared which violated DR 4-101(A); Utah Formal Ethics Opinion No. 34 prohibits an attorney from undertaking representation of a client if another attorney office sharing with that attorney is or would be precluded from representing that client due to a conflict of interest.

Suspensions

1. Neils E. Mortensen has been suspended from the practice of law in the State of Utah effective May 16, 1988, for a period of six months, said suspension to run concurrently with the suspension Mr. Mortensen is currently serving and which concludes in 1990. Mr. Mortensen was found to have violated DR 6-101(A)(3) (neglect); DR 7-101(A)(2) and (3) (prejudicing/damaging a client); DR1-102(A)(6) (conduct adversely reflecting on fitness to practice law); DR 2-110(A)(2) (improper withdrawal from employment). This suspension was ordered based on separate circumstances with clients wherein Mr. Mortensen undertook representation and subsequently failed to communicate with his clients or render any legal services on their behalf, in addition, Mr. Mortensen was found to have undertaken representation of a client while on suspension as ordered by the Supreme Court in 1985.

2. Charles M. Brown, Jr. has been placed on indefinite disability suspension from the practice of law.

The Continuing Saga of Ethics Opinion No. 90:

As many bar members are aware, the Board of Bar Commissioners is undertaking once again a review of the previously issued and then withdrawn Ethics Opinion No. 90 dealing with surreptitious tape recordings by attorneys. At present, no formal ethics opinion addresses the question of surreptitious tape recording of communications by attorneys. The Board of Bar Commissioners at the January 22, 1988, Bar Commission meeting concluded that it is not unethical for an attorney to surreptitiously tape record a communication with any other person. The Board is aware that divergent views exist among the membership on this issue and has voted to reconsider the issue. Prior to taking any formal action, the Board of Bar Commissioners, through the Office of Bar Counsel, invites comments by interested Bar members on which, if any, of the following three alternatives ought to be adopted as a formal ethics opinion.

Alternative No. 1:

Surreptitious tape recording by attorneys of communications with clients witnesses or other attorneys is unethical.

Alternative No. 2:

Such surreptitious tape recording by attorneys is not unethical.

Alternative No. 3:

Surreptitious tape recording by attorneys of communications with other attorneys and the attorney's own clients is unethical; surreptitious tape recording by attorney of communication with third party witnesses and other similarly situated individuals is not unethical so long as the attorney discloses the fact that she/he is an attorney and who the attorney represents.

Additional proposals departing from the above alternatives are also welcome and invited. Comments and/or proposals should be sent to the Office of Bar Counsel, 645 South 200 East, Salt Lake City, Utah 84111-3834 no later than September 16, 1988.

The "Tuesday Night Bar" Needs Your Help

In order to provide legal assistance and referrals to the large segment of the public which does not have legal service readily available, the Utah State Bar has initiated a program patterned after those in other states.

On a once each week basis, individuals may make an appointment to meet with an attorney or a law student under the supervision of an attorney for consultation, legal "first aid" and referral. Appointments will be scheduled at the Law and Justice Center from 4:30 p.m. to 7:00 p.m. every Tuesday.

The Bar is creating a large panel of volunteer attorneys who will participate in the program. We're hopeful that enough lawyers will volunteer so that participation would only be required four times annually.

An orientation will be held to acquaint you with the program and facilities. If you are willing to dedicate some time to this program, please contact Julee Smilley at 531-9077.

LEXIS Fall Promotion

The Utah State Bar is proud to announce a special fall promotion to introduce the many benefits of the LEXIS service to your firm. If you join our LEXIS Membership Group program by October 31, 1988 and attend a LEXIS training seminar by November 30, 1988, you receive:

* Half-priced training
  (a savings of $37.50 per person trained)
* An additional hour of free time on the LEXIS service
  (must be used within two weeks of attending a LEXIS seminar)
* FREE use of the LEXIS service during December
  (public domain files only)

The Utah State Bar LEXIS Membership Group program is a formidable tool to keep your firm competitive in the legal industry. For more information, please contact Paige Holtry, 531-9077.

Notice Regarding Bar Mailing List

Utah State Bar policies regarding the membership list provide that the list of official/

primary addresses of bar members can be sold to third parties who wish to communicate via mail with bar members about products, services, education programs, causes or other matters. In no case will the Bar sell or release the list of secondary/home addresses as provided on the annual license fees statement. The policy further provides that any member who wishes to have his/her name removed from mailings lists being sold may do so by submitting a written request to the Executive Director of the Utah State Bar.

Judges Certified For Retention Election

The Utah Judicial Council has certified 33 judges who will stand for retention election in November 1988.

The 14-member Council evaluated the judges in the following five areas:

—any disciplinary action taken during the judge's current term,

—constitutional and statutory requirements of age and residency, (the minimum age is 25 and judges must live in the geographical area they serve),

—general health and physical ability of the judge to serve for another term,

—management of workload, including filings, dispositions, and age of pending and disposed cases,

—compliance with the Code of Judicial Conduct.

Since the 1988 legislature consolidated the boundaries of the District, Juvenile, and Circuit Courts into eight judicial districts statewide, some judges will be placed on the ballot in new counties. Following is a list of the judges who have been certified and the judicial districts they serve:

SUPREME COURT

(on ballot *statewide*)

I. Daniel Stewart
Michael D. Zimmerman

FIRST DISTRICT

(Box Elder, Cache, and Rich)

Juvenile Court
Stephen A. Van Dyke
Circuit Court
Robert W. Daines*

SECOND DISTRICT

(Weber, Davis, and Morgan)

District Court
Rodney S. Page
David E. Roth
Juvenile Court
Stephen A. Van Dyke
Circuit Court
K. Roger Bean*
Phillip H. Browning*
S. Mark Johnson*
Stanton M. Taylor*
Alfred Van Wagenen*
W. Brent West*

THIRD DISTRICT

(Salt Lake, Summit, and Tooele)

District Court
Scott Daniels
J. Dennis Frederick
Timothy R. Hanson
John A. Rokich
Circuit Court
Floyd H. Gowans
Paul G. Grant
Leroy H. Griffiths
Maurice D. Jones
Sheila K. McCleve
Tyrone Medley
Philip K. Palmer
Eleanor S. VanSciver
Edward Watson*
Juvenile Court
Arthur G. Christean
Franklyn B. Matheson

FOURTH DISTRICT

(Wasatch, Utah, Juab and Millard)

District Court
George E. Ballif
Ray M. Harding
Circuit Court
Joseph I. Dimick*
E. Patrick McGuire*
Robert J. Sumsion*

FIFTH DISTRICT

(Washington, Iron and Beaver)

Circuit Court
Robert F. Owens

** Indicates judges who will appear on the ballot in new counties.*

Practical Skills Training

AS A NECESSARY COMPONENT IN THE PRACTICE OF LAW

(Talk by Judge J. Thomas Greene to law graduates being admitted to practice law in the state and federal courts of Utah—May 3, 1988)

There are three prerequisites in order to be adequately prepared for the practice of law. The good news is that you have completed two of the three. The bad news: you must still deal with and master the third. The three components of which I speak, are (1) general education; (2) theoretical knowledge of the law; and (3) practical training. The goal and focal point of these three components is to prepare the student adequately for the practice of law.

I wish to talk to you for a few minutes about that third component and your need for practical training. At one time in this country—prior to the coming of the organized bar in 1878 and subsequent developments flowing from the creation of the Committee for Continuing Legal Education—legal training generally was by apprenticeship, with the student reading the law and working under the direction of an established practitioner. There was great emphasis upon the practical day-to-day tasks of lawyering. With the coming of the law schools, the emphasis changed to the theoretical, with an absence of, at least little attention given to, practical training. The practicing lawyer was still relied upon to provide practical application of the acquired theoretical knowledge. There developed a significant gap to be bridged between the entry of the neophyte lawyer into the practice and the effective practice of law by that fledgling lawyer. This was certainly the state of things when my classmates and I who graduated in the mid fifties were turned loose on the public and given licenses to practice law. In the early sixties came the call for "clinical lawyer schools" to provide practical training for the would-be lawyer. This has resulted in the offering of optional courses in the curriculun of many law schools to help students bridge the gap in preparing to assume the duties which lawyers must discharge to clients, as advocates, counsellors, negotiators and facilitators, as well as duties to the courts and to the public. The much needed trend toward practical skills training in law schools has been only moderately successful, and falls far short of the training everyone needs to be adequately ready to practice law.

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The question continues to be: Whose responsibility is it to provide practical skills training for those who will practice law? It would appear that this responsibility may be beyond the mission—and certainly is beyond the presently intended reach—of almost all law schools. Apart from that, however, I suggest that the responsibility for such training does not rest with the law schools alone. It is a shared responsibility with the organized bar and the individual members of our profession. Also, it is the personal and continuing responsibility of each individual newly graduated law student. For you who are about to embark upon the practice of law, the stark reality is that you must forthwith translate your vast store of acquired theoretical knowledge into a nuts and bolts world of practice. I'm talking about such things as developing techniques for meeting and dealing with clients; recognizing conflicts of interest; providing practical advice in matters of seemingly small magnitude; preparing documents such as employment agreements, deeds, wills, and other contracts; learning how a law office operates in terms of overhead, assignment of cases, billings and things of that nature; understanding judges and developing proper decorum in court rooms, and practicing civility with fellow lawyers. These are just a few of the non-textbook practical necessities of the practice of law. Not only that, you must translate theory to practice at a time when the legal profession is undergoing vast changes in the delivery of legal services. All of this in the context of large overhead expenses, changing needs of clients, increased complexity in the practice and legitimate client demand for reduced costs and speedier justice.

The Utah State Bar is embarking this summer on an experimental program aimed at helping a few new law graduates who will participate as volunteers in the conduct of pilot practical skills training programs over a three month period starting this August. The purpose is to explore ways of sharing the responsibility of bridging the gap and providing much needed practical skills training for new law graduates. The program has the backing of prominent lawyers and leaders of the Bar. Depending upon a positive evaluation of the program, it could become a more widespread vehicle in helping to provide much needed practical skills legal training.

Enough said about so-called apprenticeship training. Perhaps you are saying to yourself: "I am already there—I have arrived—I am here to be sworn in, rather than to embark upon still more education." Don't kid yourself. One thing is abundantly clear. None of us ever "arrive" in the practice of law, it is a continuing journey. We lawyers, including law professors and judges, will always be on the way. We will always have need for continuing legal education.

One final word—the only direct advice I will offer. In your entry into the practice, take time to talk to and listen to older lawyers. You will find that they will be more than willing to share their techniques, their experiences, their practical knowledge. This is not so-called "billable" time, but you will find it to be invaluable time. Let established lawyers share with you the responsibility of providing practical training in bridging the gap to the meaningful practice of law. Also. place emphasis upon the quality of your life, as well as the amount of work and quantity of time you may spend. Don't become so enmeshed in the pursuit of immediate renumeration, or the perceived necessity to meet a quota of billable hours, that you feel guilty in taking time to participate in bar activities and service projects, and to participate in civic affairs and enriching non legal matters.

Welcome to each of you, and good luck and success as you embark upon the practice of law.

Claim of the Month

Alleged Error and Omission

Plaintiff alleges failure to file suit within the statutory period or, in the alternative, failure to assert a viable cause of action.

Resume of Claim

The insured represented the natural son of an individual who was shot and killed while having dinner with that son in a local restaurant. Among other legal avenues to recover on the death of a loved one, the state in which the death occurred has a Victims of Crime Act which allows innocent victims of crime to recover up to $50,000 in probable economic loss from a state fund. Recovery under the Act requires proof that the victim and/or their heirs were not culpably involved with the criminal activity and that the victim and/or their heirs sustained economic loss which was not covered by insurance or other collateral sources. The Insured felt that neither element could be proven, and therefore, did not pursue a claim under the Victims of Crime Act.

How Claim Might Have Been Avoided

While the Insured's evaluation of the provability of the elements of the Act and of the ability to recover under the Act may have been correct, the Insured may have avoided this claim by advising the client, both orally and in writing, of the Insured's evaluation of such a claim, the decision not to pursue the claim and that the client should seek other counsel for the purpose of asserting the claim if the client so desires.

I.H.C. YOUNG LAWYERS SECTION
Award Scholarship

Intermountain Health Care and the Young Lawyers Section of the Utah State Bar recently made an award of a scholarship to a participant in the I.H.C. Salt Lake County High School Blood Drive Program. That five hundred dollar ($500.00) award was given to a Riverton resident.

Kimberlee Hales a 1988 graduate of Bingham High School will attend Utah State University this fall with the aid of the award. Kimberlee was selected by her high school to receive the award. An outstanding student, Kimberlee was also a finalist in the recent Sterling Scholar Program and President of the F.F.A. Chapter at Bingham High School.

Under the I.H.C. High School Blood Drive Program, Bingham High School was chosen to receive this annual scholarship award. Bingham High had the highest percentage of participation by eligible donors of the more than fifteen (15) high schools in Salt Lake County that participated in the program. The school administrators made the final selection as to which student, who had participated in the Blood Drive Program, would receive the award.

This annual award is provided in part by the Young Lawyers Section of the Utah State Bar. Beginning in 1987 the Young Lawyers Section collected donations managed by the Intermountain Health Care and Deseret Foundation to create a permanent endowment to fund this award.

Donations are still needed from members of the legal community to help finalize this endowment and to guarantee sufficient money to make this annual award.

This program constitutes a year long contest between high school students in Salt Lake County and is operated by Inter-

mountain Health Care. This program will increase blood donations among the younger population and secure regular donors for the long-term future. This is an opportunity for young lawyers to serve the community and to increase the public's awareness that lawyers care.

If you have any questions with regard to this endowment program or if you want to make a donation to the fund please contact:

Brian M. Barnard
Chairman
214 East Fifth South
Salt Lake City, Utah 84111-3204
(801) 328-9532.

For more information about high schools' participation in the program contact:

Jeannnine Boulden
Donor Resources Coordinator
Blood Donation Center
LDS HOSPITAL
Salt Lake City, Utah 84103
(801) 321-1150

Courts Consolidate Boundaries

As of Monday, April 25, a new state law realigning the judicial districts in the state took effect. The law, passed by the 1988 Utah Legislature, created eight judicial districts statewide, and consolidated the boundaries of the district, juvenile and circuit courts. The eight districts replace the system of seven judicial districts for the District Court, six for the Juvenile Court, and twelve for the Circuit Court. Each of the eight districts now has a district, juvenile and circuit court, with all three courts having the same numbering system.

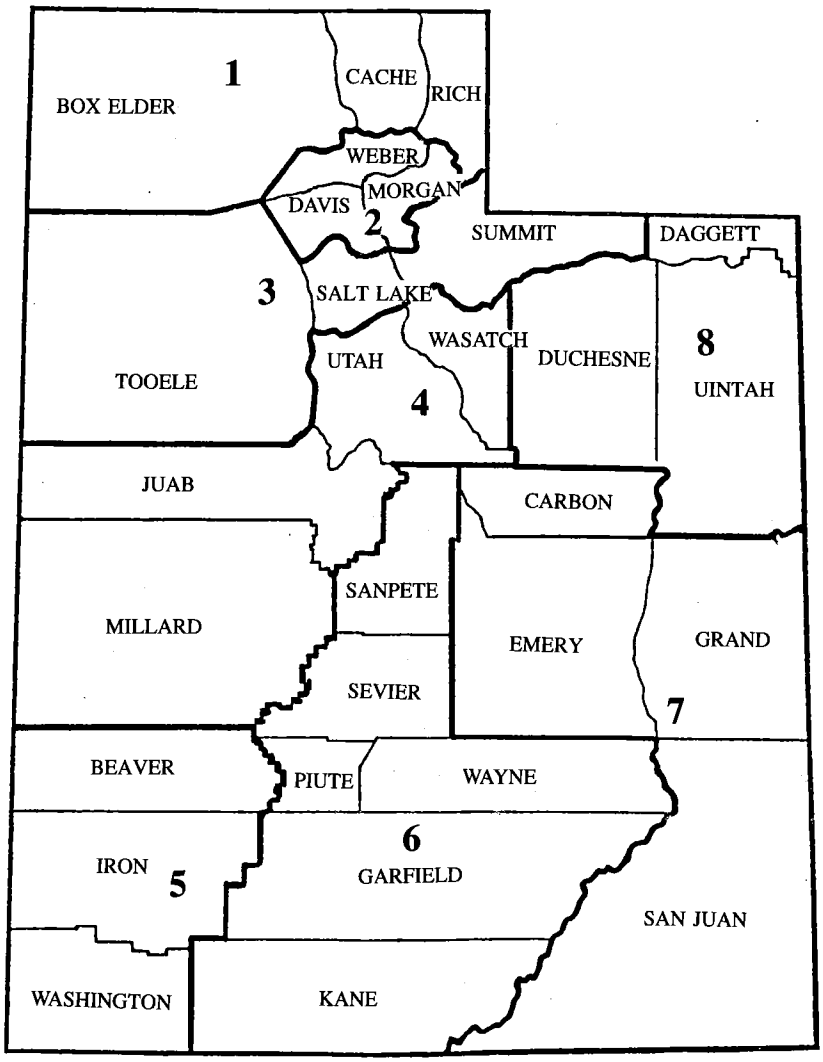
For example, in the Salt Lake County area, 3rd District Court, 2nd District Juvenile Court, and 5th Circuit Court all covered the same geographical area, With the realignment, the three courts become 3rd District Court, 3rd District Juvenile Court, and 3rd Circuit Court. This common numbering system should reduce the confusion that has existed to the public and the legal community due to the multi-numbered system for courts covering the same geographical area.

The new boundaries will also consolidate administration in some areas and pave the way for more efficient operation of the courts. In addition, the number of judicial nominating commissions will be reduced from 25 to eight. Each of these eight commissions will nominate candidates to fill judicial vacancies for all three trial courts instead of having a separate nominating commission for each court level in each district.

The boundary changes will not affect the number of judges statewide. There will still be 29 district judges, 12 juvenile judges, and 37 circuit judges. However, some judges standing for retention election in November will be placed on the ballot in new counties.

If you have any questions, please call Rosemary Gacnik at the Administrative Office of the Courts, 533-6371.

COMMON COURT BOUNDARY EFFECTIVE APRIL 1988
H.B. 209
Consolidates the boundaries for District Court, Juvenile Court & Circuit Court as shown below



1ST DISTRICT (Box Elder, Cache and Rich Counties)
2ND DISTICT (Weber, Davis and Morgan)
3RD DISTRICT (Salt Lake, Tooele and Summit)
4TH DISTRICT (Wasatch, Utah, Juab and Millard)
5TH DISTRICT (Washington, Iron, and Beaver)
6TH DISTRICT (Sanpete, Sevier, Piute, Wayne, Garfield and Kane)
7TH DISTRICT (Carbon, Emery, Grand and San Juan)
8TH DISTRICT (Daggett, Duchesne and Uintah)

(continued on page 24)

(continued from page 23)

LEGAL SECRETARIES INSTALL OFFICERS

Lori bartholomew of Murray, Utah, was reelected to serve a second term as president of the Salt Lake Legal Secretaries Association at a recent dinner meeting at the Fort Douglas Military Club, Salt Lake City.

Ms. Bartholomew has been a member of the association for 4 years and has served as vice president and on various committees. She is currently employed by the DiLor Corporation.

Other officers installed by Max Kramer, PLS are Beverly L. Matheson, vice president; Karen L. Anderton, recording secretary; DeAnn Heath, corresponding secretary; Toni A. Davies, treasurer, and Linda Taylor, PLS, Nals representative. Jeri Schnitker, PLF was appointed to serve

Estate Planning Newsletter AVAILABLE

A free publication on estate planning is available from the American Institute for Cancer Research. The quarterly newsletter, *Estate Planner,* is designed for probate and trust attorneys, bank trust officers and others involved in estate planning.

Offered free with each issue are detailed booklets that focus on planning and drafting particular types of estate planning vehicles.

To subscribe, please write to Kathryn Ward, vice president, American Institute for Cancer Research, 1759 R Street, N.W. Washington, D.C. 20009. Please indicate that you read about the *Estate Planner* in this publication.

First Annual BYU Law School Alumni Banquet Announced

"The Alumni of the J. Reuben Clark School of Law at Brigham Young University will hold their first annual alumni banquet on Friday, October 7, 1988 at the Little America Hotel in Salt Lake City," according to Judge Michael L. Hutchings, Banquet Chairman, Graduates of all 13 classes, all present and former faculty members and friends of the law school are invited to attend.

This year's featured speaker is Rex E. Lee, the founding dean of the law school and former Solicitor General of the United States. Rex Lee is presently the George Sutherland Professor of Law at BYU and a partner in the law firm of Sidley and Austin.

A special tribute will be given to Professor Woody Deem who is now retired from the faculty and living in southern Utah. BYU has recently authorized the establishment of the Woodruff J. Deem Professorship in Law. Additionally, Anna Mae Goold, who recently retired from a career as placement director at the law school will also be honored.

Banquet tickets cost $25 per person and may be obtained by contacting Assistant Dean Claude Zobell at the J. Reuben Clark Law School, Brigham Young University, Provo, Utah 84602 or by calling (801) 378-4274. Please make your reservations early as limited seating is available for this first annual event.

The National Transportation Safety Board Bar Association

The NTSB Bar Association invites all attorneys who practice or are interested in Federal Aviation Administration enforcement proceedings, including those relating to pilot or operator certificate actions, civil penalties and medical certification, to join the association. The association has its headquarters in Washington, D.C. and a membership of over 250 from nearly every state. Efforts of the association are directed toward enhancing the professionalism and improving the practice of this area of law. Improvements in the Rules of Procedure and Evidence Rules have been the subject of the association's committees and a program of distribution of current NTSB Opinions is in practice. In addition to a newsletter, association meetings serve as a means of communication and notification of current matters. The dues are only $45/year. For further information, please contact the Association President, Michael J. Pangia, Esquire, Gilman, Olson and Pangia, Suite 600, 1815 H Street N.W., Washington, D.C. 20006, (202) 466-5100 or Robert P. Smith, Esquire, 3333 Quebec Street, Suite 10-D, Denver, CO 80207, (303) 321-5693.

UTAH TORT LAW— Annual Supplement

A concise supplement to Zillman's Utah Tort Law is now available from the University of Utah College of Law. The supplement contains new state and federal court decisions and the work of the 1988 Utah Legislature relevant to tort law in Utah. The supplement is current to June 15, 1988. EXISTING OWNERS of Utah Tort Law may receive a free copy of the supplement by picking one up from Room 218 Law School or by sending a STAMPED RETURN ENVELOPE to Ms. Elizabeth Kirschen, College of Law, University of Utah, Salt Lake City, Utah 84112. NEW SUBSCRIBERS can receive a supplement with the purchase of Utah Tort Law for $32.50 from Ms. Kirschen. Please make check payable to College of Law. For more information call 581-5880.

Lawyers in the Classroom

Phi Alpha Delta, the national legal service fraternity, the law-related education and Law Day Committee of the Utah State Bar and the Utah Law-Related and Citizenship Education Project of the Utah State Office of Education have launched the Lawyer Resource Project in cooperation with the

public and private elementary and secondary schools of Utah. The Lawyer Resource Project is an outgrowth of a nationwide effort on the part of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) of the United States Department of Justice to expand law-related education in the nation's schools through a partnership between the legal and educational communities.

The Lawyer Resource Project is designed to match an attorney with a teacher for a once-a-year, one-hour interactive classroom experience. A teacher will call the Project two weeks in advance to request a lawyer to teach about a particular subject on a specific date at a specific time. The Project will contact the lawyer and will provide a general, accurate subject matter outline with pointers to follow for the class age group. Videotapes of actual classroom presentations will become available for training and preparation as the Project progresses.

OJJDP studies demonstrate that law-related education can and does reduce juvenile delinquency. Lawyers in the classroom can communicate that law is an influence for good in our society. With dollars shrinking, maintaining the excellent quality of Utah's schools requires contributions of time and talent on the part of parents and the community. Lawyers participating in the Project will be rewarded by the intangible benefits that derive from being in a classroom of respectful, interested and creative young persons.

If you would like to participate in the Lawyer Resource Project, please complete the following and return to: Virginia Curtis Lee, Phi Alpha Delta Liaison, Lawyer Resource Project, Utah Law-Related and Citizenship Education Project, College of Law, University of Utah, Salt Lake City, Utah 84112 or telephone 581-3624 if you have any questions.

Name_____

Firm_____

Address_____

_____

Telephone_____

School District Preference_____

I would be interested in teaching one hour yearly:

Elementary, Junior High School, Middle

_____Kindergarten: Classroom Rules

_____1st Grade: Laws

_____2nd Grade: Consumer Rights and Responsibilities I

_____3rd Grade: Legal Authority

_____4th Grade: Due Process

_____5th Grade: Consumer Rights and Responsibilities II

_____6th Grade: Lawmaking

_____7th-8th Grades: Juvenile Court Procedures

Secondary (9-12)

_____The Criminal Justice System

_____Criminal Procedure (include search and seizure).

_____Free Expression

_____Equal Protection

_____Religion and Constitutional Law

_____Family Law

_____Consumer Law

_____Controversial Issues (AIDS, Drugs, etc.)

CASE SUMMARIES

By William D. Holyoak and Clark R. Nielsen

Indemnity of Retailer for Costs and Attorney Fees in Products Liability Actions

A lawsuit was filed claiming damages from a defective airplane against, among others, the airplane's manufacturer and its retailer. After a settlement of the products liability action, the retailer sought its costs and attorney fees from the manufacturer based on a theory of implied indemnity. The trial court rejected the retailer's claim and granted summary judgment to the manufacturer.

On appeal, after acknowledging the separate lines of authority on the issue, the Utah Court of Appeals reversed and held:

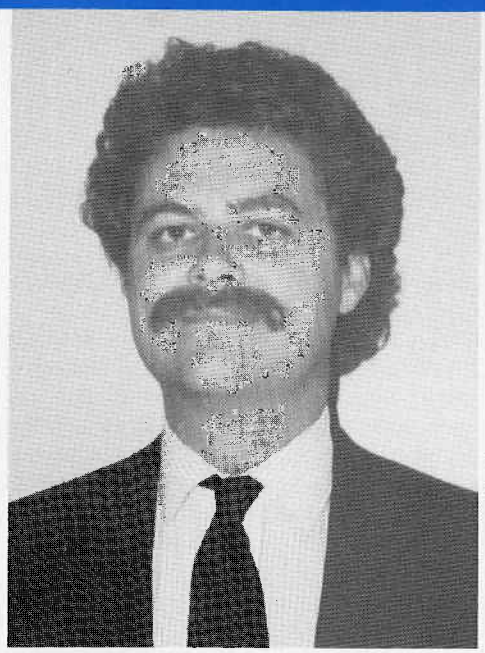
> We believe the better reasoned approach is to allow the recovery of attorney fees, costs, and expenses if the manufacturer produced a defective product or was an active wrongdoer, the retailer is free from active wrongdoing in the underlying products liability action, and the manufacturer has been given notice of the claim for indemnity.

The Court of Appeals remanded for a determination by the trial court whether (a) the manufacturer had produced a defective airplane, and (b) the retailer was an innocent "passive" link in the chain of commerce. If the answer to both of those questions is yes, then the court must apportion the retailer's attorney's fees, costs and expenses between the defense of the product defect claim and the defense of claims against the retailer of active negligence or breach of independent warranty. *(Hanover Ltd. v. Cessna Aircraft Co.,* 85 Utah Adv. Rep. 19 (Ct. App. June 28, 1988).)

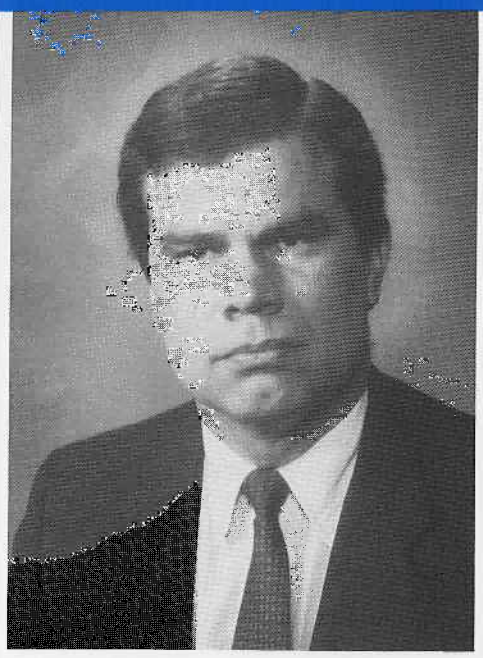
Priority of Homestead Exemption

Both the Utah Constitution and the Utah Code provide a homestead exemption. Section 78-23-3 of the Utah Code provides for an exemption equal to $8,000 for a head of family, $2,000 for a spouse and $500 for each dependent. The statute provides that a homestead shall be exempt from "judicial lien and from levy, execution, or forced sale," subject to certain exceptions, including "[s]ecurity interests in the property and judicial liens for debts created for the purchase property price of such property."

A second mortgage on a residence was foreclosed after the owner of the property had filed a declaration of homestead in the amount of $11,000. The foreclosure sale resulted in proceeds greater than the homestead and the homeowner demanded her $11,000. After a lengthy discussion of the homestead provisions in the Utah Constitution and Code, the Supreme Court concluded that the quoted exception was "a constitutionally valid expression of the scope" of the homestead exemption and the "[s]ecurity interests in the property" was not modified by "created for the purchase price of such property." As a result, the Court concluded that "all consensual security interests in land may be enforced against homestead property," and denied the homeowner's claim to any proceeds from the foreclosure sale. *(P.I.E. Employees Federal Credit Union v. Bass,* 83 Utah Adv. Rep. 10 (June 2, 1988).)



William D. Holyoak



Clark R. Nielsen

Renewal of Judgment Lien After Bankruptcy

Under Utah law, a judgment becomes a lien upon all of a judgment debtor's real property located in the county where the judgment is docketed. The lien lasts for eight years.

A judgment creditor filed an action approximately seven years after obtaining a judgment to renew the judgment and the judgment debtors were adjudged bankrupt, although a certain parcel of real property owned by them in Salt Lake County was not sold by the bankruptcy trustee and the judgment lien thereon was not discharged. The parties agreed that the bankruptcy relieved the judgment debtors of any personal liability on the judgment.

The judgment debtors defended the action by interposing the discharge in bankruptcy. The Utah Supreme Court sided with the judgment debtors. While the judgment lien survived the bankruptcy, it could only be extended beyond its eight-year life through the renewal of the judgment. While some states permit the renewal of judgment liens, Utah does not, enabling a creditor to extend the lien only by renewing the judgment itself. Since the judgment had been discharged, it, and consequently the lien, could not be renewed. Justice Zimmerman, concurring, found the result "rather arbitrary and certainly not a result that the legislature would have intended had it foreseen the interaction of the federal bankruptcy law and the state lien law." *(Cox Corp. v. Vertin,* 82 Utah Adv. Rep. 9 (May 13, 1988).)

Vicarious Liability of Shareholder of a Professional Corporation

A legal malpractice action was brought against, among others, the lawyer who was allegedly negligent, his firm, which was established as a professional corporation, and a co-shareholder of the firm. The co-shareholder moved to dismiss, claiming that she had no personal involvement in the disputed matter.

The Utah Court of Appeals affirmed the trial court's grant of the motion to dismiss, concluding as follows:

(continued on page 28)

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> Following [the] general interpretation of corporate law and finding no specific justification in either the [Utah Professional Corporation Act] or the Utah Business Corporation Act, we hold that a shareholder in a corporation organized under the UPCA is not vicariously liable for the acts or omissions of another shareholder in the performance of professional service unless that shareholder has participated in the alleged acts or omissions.

(Stewart v. Coffman, 748 P. 2d 579 (Utah Ct. App. 1988).)

Conveyance of Property to Trust

Real property was conveyed by deed to the "Bryner Clinic Employees' Profit Sharing and Pension Trusts." When a judgment was entered against the grantor after the conveyance, the trusts brought an action to remove the potential cloud on their title. The judgment creditors argued that a trust is not a legal entity capable of holding title to real property and thus their lien was valid. The trial court held that the conveyance resulted in the Bryner Clinic Employees Profit Sharing Plan and the Bryner Clinic, Inc. Employees Pension Trust jointly owning the real property. The court quieted title in three individuals who acted as trustees of both trusts. Since the judgment against the grantor was recorded after the conveyance, it did not attach to the property.

The Utah Court of Appeals reversed. The Court held that a trust is not a separate legal entity and, since the conveyance did not name the trustees as grantees, the Court concluded that "[a]n attempted conveyance of land to a nonexisting entity is void." The Court remanded the case to the trial court for consideration of the claim that the deed be reformed to substitute the trustees as grantees. *(Sharp v. Riekhof,* 71 Utah Adv. Rep. 39 (Ct. App. 1987).)

Distinction Between Absolute and Conditional Guaranty

In the process of determining the liability of guarantors of a promissory note, the Utah Court of Appeals discussed the important distinction between an absolute guaranty or a guaranty of payment, and a conditional guaranty or a guaranty of collection.

An absolute guaranty or a guaranty of payment "holds the guarantor liable, without notice, upon the default of the principal." On the other hand, a conditional guaranty or guaranty of collection, "is an obligation to pay or perform if payment or performance cannot be first reasonably obtained from the principal obligor." *(Valley Bank & Trust Co. v. Rite Way Concrete Forming, Inc.,* 742 P. 2d 105 (Utah Ct. App. 1987).)

Preservation of Fourth Amendment Objections for Appeal

The Court of Appeals (J. Garff) applied *State v. Lesley,* 672 P. 2d 79 (Utah 1983) to hold that, in search and seizure cases, a fourth amendment objection to illegally seized evidence must be renewed at trial, even though the issue has been previously raised in a pretrial motion to suppress that evidence. The appellate panel concluded that this rule should apply in all cases, whether heard by the same or by a different judge than the judge who heard the motion to suppress. Although *Lesley* was decided under the former rules of evidence, the procedural requirement was held equally applicable under Utah R. Evid. 103, which requires a specific objection to a ruling affecting a substantial right of the defendant. (*State v. Holyoak,* 743 P. 2d 791 (Utah App. 1987); 67 Utah Adv. Rep. 24 (Oct. 14, 1987).)

Preservation of Fourth Amendment Objections for Appeal

The *Holyoak* decision by the Court of Appeals was overruled, *sub silentio,* by the Utah Supreme Court (J. Stewart) in this illegal search and seizure case. The Supreme Court declined to apply *Lesley* when the trial judge was also the judge who heard the pretrial motion to suppress. Because the same judge heard the pretrial motion, it was not necessary to renew the objection at trial to preserve the issue for appeal. The overruling of *Holyoak* was acknowledged by the Court of appeals (J. Bench) in *State v. Griffin,* 82 Utah Adv. Rep. 46 (Ct. App. May 16, 1988).

Consequently, under *State v. Lesley,* in order to preserve a fourth amendment objection to evidence, the objection must be renewed at trial when the trial judge is different than the judge who heard the pretrial motion to suppress. But, under *Johnson* when the trial judge is the same judge who heard the pretrial motion to suppress, no renewal of the objection is required in order to preserve the issue for appellate review. *(State v. Johnson,* 748 P. 2d 1069 (Utah 1987); 74 Utah Adv. Rep. 21 (Dec. 31, 1987).)

Use of Writ of Habeas Corpus to Set Aside Guilty Pleas

This *per curiam* decision appears to have been prompted by a growing number of summary dismissals by district courts of petitions for writ of habeas corpus to set aside a guilty plea. The Supreme Court rejected the state's argument that *State v. Gibbons,* 740 P. 2d 1309 (Utah 1987), (motions to set aside guilty plea must first be brought before the trial judge who took the plea) applies to habeas corpus cases. But, in so ruling, the court reaffirmed that habeas corpus must not be used as a substitute for appeal. Because no findings were entered to establish the basis for the trial court's denial and to assure that the prisoner's constitutional claims were "properly resolved," the court remanded for the entry of findings on the merits of the petition. *(Lancaster v. Gerald Cook,* 753 P. 2d 505 (Utah 1988), 79 Utah Adv. Rep. 28 (April 7, 1988).)

Final, Appealable Judgment

The Court of Appeals (per curiam) dismissed for lack of subject matter jurisdiction an appeal from circuit court where no formal, written judgment of conviction had been signed by the trial judge. A certified copy of the clerk's computerized docket sheet recording the trial and conviction does not meet the requirement of a signed, written order which is capable of either appellate review or enforcement against the defendant. This decision relies upon *State Tax Commission v. Erekson,* 714 P. 2d 1151 (Utah 1986), to underscore the necessity that criminal defendants and attorneys make certain that a written judgment of sentence is signed by the sentencing judge and entered in the court record before an appeal or enforcement of the judgment is attempted. The failure of circuit courts to enter a written order results in dismissal of the appeal. *(Salt Lake City v. Griffin,* 750 P. 2d 194 (Utah App. 1988); 76 Utah Adv. Rep. 9 (Feb. 12, 1988).)

Sufficiency of Circumstantial Evidence to Support Conviction

The Supreme Court (J. Zimmerman) affirmed the defendant's conviction of second degree murder for killing his girlfriend's three year old son. Although the evidence was almost entirely circumstantial, the Supreme Court found it sufficient to submit the case to the jury. Evidence of defendant's conduct may also be considered as circumstantial evidence of his specific intent.

The Court also applied Rule 606, Utah R. Evid., to defendant's attempt to impeach the jury's verdict because of a juror's alleged reliance upon divine guidance in reaching a verdict. J. Stewart dissented, arguing that remand was necessary for a determination of the extent the jury might have been influenced by "the divine indication of defendant's guilt." (*State v. DeMille,* 83 Utah Adv. Rep. 6 (May 26, 1988).)

Admissiblity of Evidence of Other Crimes/Jury Instructions as to Legal Consequences of a Verdict.

In a conviction for child kidnapping, the Utah Supreme Court (J. Stewart) explained the policy for application of Rule 404(b), Utah R. Evid., admitting evidence of other crimes to show motive, intent, opportunity, etc., and not merely to evidence defendant's predeliction for crime. Even if the evidence is admissible under Rule 404(b), the judge must still weigh its probative value and the need of such evidence.

The Court also departed from the general rule that a jury should not be instructed regarding the punishment imposed by, or other consequence of its verdict. When mental capacity is at issue, an instruction as to the legal consequences of a verdict of "not guilty by reason of insanity" or "guilty and mentally ill" may be necessary in the trial court's discretion.

Although the court affirmed defendant's conviction on the above grounds, it reversed the minimum-mandatory sentence given because the trial judge did not explain his reasons for the sentence imposed. In the sentencing phase of trial, the weight given by the trial judge to medical testimony of defendant's mental state was in the court's discretion but the failure to make a record of the reasons for the choice, as required by § 76-3-201(6)(b), was reversible error. The court remanded for resentencing. *(State v. Shickles,* 85 Utah Adv. Rep. 3 (June 24, 1988).)

Accrual of Interest on Judgment For Unpaid Child Support

In its first decision on certiorari to the Court of Appeals, the Supreme Court (J. Hall) affirmed the Court of Appeals' determination that, in domestic matters, the trial court does not have discretion to suspend the accrual of interest on a judgment for unpaid child support. Although the trial court has broad discretion under the general provision of § 30-3-5(1) to fashion appropriate remedies in domestic matters, preference is properly given to the more specific, mandatory language of § 15-1-4 that all judgments *shall* bear interest at the rate of 12% per annum. *(Stroud v. Stroud,* 84 Utah Adv. Rep. 7 (June 10, 1988).)

UNWRITTEN RULES OF PRACTICE

Or How Not to Irritate the Court

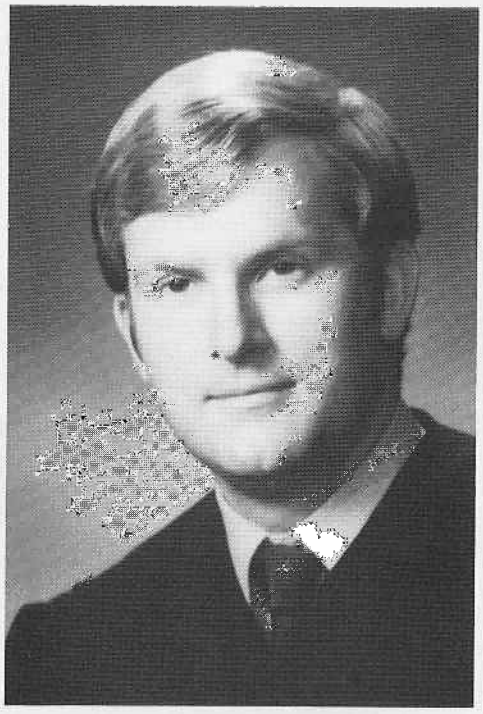
Compiled by Judge Michael L. Hutchings

Editor's Note— *Judge Michael L. Hutchings will compile material for this column. It will include articles by judges, reports of developments in the judiciary, rule changes, advice by judges and general news of the judiciary.*

Have you ever wondered what are the pet peeves of Utah's judges? Some insights regarding judges pet peeves were given at the Annual Meeting of the Utah State Bar in San Diego, California. On Saturday, June 25, 1988 three judges and a court commissioner made specific suggestions regarding how attorneys should conduct themselves and represent their clients in court. These suggestions also provide insight regarding some of the frustrations and challenges associated with being a judge or court commissioner. The participants were Utah Court of Appeals Judge Pamela T. Greenwood, Third District Court Judge Leonard H. Russon, First District Court Judge Gordon J. Low, and Third District Court Commissioner Sandra N. Peuler. The following is a brief synopsis of their comments made at the Bar Convention.

COMMENTS OF JUDGE LEONARD H. RUSSON

1. ***Continuances.*** Avoid the last minute continuance. "Nothing irritates a judge more than having an attorney approach a judge at the last minute and ask for a continuance." Judges usually spend valuable time reading the files and preparing for hearings. It is very frustrating to have that preparation wasted when a matter is continued at the last minute.



Judge Michael L. Hutchings

Michael L. Hutchings is currently serving his sixth year as a Third Circuit Judge in Salt Lake City. In June 1988, the Utah State Bar Association named him "Circuit Court Judge of the Year." He received both a Bachelor of Arts degree in Political Science in 1976 and a Juris Doctorate degree in 1979 from Brigham Young University. He served two years as a member of the Brigham Young University Law Review. *Judge Hutchings was admitted to the Utah State Bar in 1979 and was associated with the Salt Lake City law firm of Senior and Senior. In 1980, he became City Prosecuting Attorney for the newly incorporated West Valley City Municipal Corporation, Utah's second largest city. Judge Hutchings served in that capacity until his appointment to the bench at the age of 29 by Governor Scott M. Matheson.*

2. ***Overlength briefs.*** Avoid the overlength brief. "If you can't put it in five pages, you don't understand it." Judges do not have time to read long, verbose briefs.

3. ***Late briefs.*** Avoid submitting a late brief. It is frustrating for a judge to receive an attorney's brief at the last minute. A brief filed on Friday afternoon at 5:00 p.m. for a law and motion calendar for Monday morning is not only a violation of the rules of court but creates difficulties for the judge.

4. ***Hard to read briefs.*** Make the reader of your briefs want to read them. There are far too many briefs that present issues in a way that is difficult for the reader to comprehend.

5. ***Dot matrix briefs.*** Do not submit dot matrix pleadings, affidavits or motions. Because they are difficult to read, many judges will not read documents that are printed with dot matrix printers. Some court rules prohibit the filing of such documents.

6. ***Orders.*** Orders should, whenever possible, be signed "approved as to form" for two reasons. First, the judge does not have to read the full document and compare

it with the file and other documents in the file. Secondly, the order may be signed without having the clerk pull the file. This saves time for all involved.

Where counsel will not sign "approved as to form," make sure that all proposed orders accurately represent what the judge ordered. Be sure that you mail copies to opposing counsel and give adequate time for response before submitting the proposed order to the judge.

7. ***Rule 41 dismissals.*** Rule 41 dismissals must be by stipulation if an answer has been filed. If no responsive pleading has been filed, be sure that you indicate that fact in your motion and order. The judge may then be able to sign the order without having the clerk pull the file.

8. ***Judge's advice.*** Avoid asking a judge's advice on how to conduct your case. Ask another knowledgeable person instead. A judge cannot act as your coach.

9. ***Courtesy copies.*** Provide copies of exhibits to the judge and opposing counsel. Attorneys often make the tragic mistake of examining witnesses regarding the content of an exhibit when it is not physically in the judge's hands to review during the witnesses testimony.

10. ***Case authority.*** Having cases to support your position is very helpful, but avoid submitting a great number of cases. Often judges will say, "Give me your best case." Be sure that you can identify the best case supporting your client's position.

11. ***Leaving messages.*** A judge should not be a receptionist for the clerk. Some judges are annoyed with having to take messages for clerks. If the clerk is unavailable, call back later.

12. ***Other trial court decisions.*** Don't cite to one trial court judge the decision of another trial court judge. The appellate court decisions provide guidance for trial court judges.

13. ***Knock first.*** Some judges are annoyed when attorneys simply walk into chambers without knocking. Surprisingly, this happens more often than one would think, even when the judge is on the phone or in conference.

14. ***Professionalism.*** Dress like a professional. Act with courtesy. Avoid making derogatory comments regarding opposing counsel. Be certain that you do not exhibit an unprofessional facial expression when the judge rules against your client. Don't blame the judge for your failures in the case.

15. ***Preparation.*** Be sure that you are prepared when coming into court. Find out what you are doing and do it well.

16. ***Rules of evidence and procedure.*** There is a general lack of knowledge of the rules of evidence and rules of procedure. Acquaint yourselves with these rules and utilize them in court. Your credibility and effectiveness will increase.

17. ***Unique problems at trial.*** Give the trial judge advance notice of anything you perceive to be complex or of a unique challenge in a case. Judges genuinely appreciate advance notice so they can consider the issues and rule with more deliberation.

COMMENTS OF JUDGE GORDON J. LOW

1. ***Preparation.*** Be prepared. Know which exhibits you need to offer and their order during trial. Provide courtesy copies of exhibits for opposing counsel and the judge. Know also the order of witnesses you will call. Many attorneys are not prepared with exhibits and witnesses.

2. ***Settlements.*** Attempt to use your skills and settle the case before you actually get to court. Some attorneys do not pursue pre-trial settlement with appropriate vigor.

3. ***Memoranda.*** Avoid filing memoranda on the day of argument. If you do so, they probably will not be read.

4. ***Basic rules.*** Judges know the content of Rule 56 on summary judgments and other basic laws. Avoid the lengthy recital of basic propositions of law which are heard with regularity by the court.

5. ***Length of briefs.*** Briefs rarely should be longer than 25 pages. Trial judges do not have time to read lengthy briefs.

6. ***Criminal Law.*** If you don't practice criminal law, don't do it until you know how. Attorneys unfamiliar with criminal law do not serve the interest of their clients well.

7. ***Plea bargaining.*** Don't involve a judge in the plea bargaining process. Judges are not comfortable with conditional pleas. Keep judges out of the middle of your plea bargaining process.

8. ***Jury instructions.*** Be sure you identify for the judge the really important jury instructions. Often attorneys will give voluminous suggested jury instructions to the judge. Identify those jury instructions which are significant to the position of your client.

9. ***Get to the point.*** Make every attempt to be expeditious in court. Don't take all the allotted time if you really don't need it. It is amazing how many attorneys can quickly wrap up their case by examining many witnesses as time is running out during the trial.

10. ***Credibility.*** "Do not shoot for the stars before a judge—just the tree tops." Maintain your credibility and do not ask for more than you client justly deserves. If you do, you will lose credibility with the court.

11. ***Press coverage.*** If the press is involved in covering a court case and is present, please inform the judge or the judge's clerk, There are special rules which apply for cameras in the courtroom. It is the trial judges responsibility to see that these rules are followed. Judges genuinely appreciate being informed by the attorneys that the news media is in the courtroom.

COMMENTS OF JUDGE PAMELA T. GREENWOOD

1. ***Relief requested.*** Clearly identify in your brief the relief you are requesting and the authority for that relief.

2. ***Addendum.*** An addendum to the brief is helpful to the court. The addendum could include a copy of the trial court ruling, critical documents which were admitted into evidence, applicable statutes and regulations, and copies of crucial testimony. Please do not include law review articles or treatises.

3. ***New evidence.*** Do not attempt to introduce on appeal evidence not admitted before the trial court. This material will not

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(continued from page 31)

be considered by the appellate judges and is viewed with disdain.

4. ***Errors in briefs.*** Proofread all briefs before submission. Too many briefs contain typing, grammatical, citation and other errors.

5. ***Narrow issues.*** Choose the issues carefully which you raise on appeal. Raising too many issues can distract the judges.

6. ***Factual accuracy.*** Be accurate in the statement of facts. Cite clearly to the record in support of all factual statements.

7. ***Organization.*** Organize the argument section of the brief in an understandable and clear manner.

8. ***Reply briefs.*** Reply briefs are generally well regarded by the judges and should be utilized.

9. ***Practice oral argument.*** Practice your oral argument before a knowledgeable colleague. This will help you obtain important feedback and solidify your argument.

10. ***Oral argument.*** Always opt to orally argue the case, rather than submit it on briefs. Do not dwell on the facts at oral argument. Focus on the issues and on legal arguments. Briefs are usually read thoroughly before oral argument by appellate judges and they are conversant with the facts. Often too much time is spent discussing the facts at oral argument.

11. ***Courtesy.*** Refrain from being discourteous with opposing counsel and the court. This lack of professionalism is not well regarded by appellate judges.

12. ***Names of judges on your panel.*** The Utah Court of Appeals has a new policy of disclosing two weeks before oral argument the names of the three judges who will be assigned to hear the appeal. After disclosure, however, there will be no changes in assigned judges.

COMMENTS OF COMMISSIONER SANDRA N. PEULER

1. ***Settlement before final pretrial.*** Make every effort to seriously pursue settlement of the case before the final pretrial conference. Too many attorneys wait to settle the case at the pretrial conference.

2. ***Discovery and the pretrial conference.*** In exchanging information, allow enough time for opposing counsel to evaluate the information before the pretrial. The pretrial conference is only 15 minutes long, so you must be prepared for it. Narrow down the issues for the commissioner and opposing counsel. Be prompt for the pretrial conference.

3. ***Courtesy copies.*** Give the commissioner courtesy copies of all documents. Don't assume that when documents are filed in the clerk's office that they will immediately be filed. There is an approximate two-week lag at Third District Court before many documents arrive in the appropriate file.

4. ***Mark date and time on judge's copies.*** Be sure that you mark the date and time of day of the scheduled hearing on any courtesy copies of briefs, memoranda or documents submitted in conjunction with an upcoming hearing.

5. ***Clearly identify issues.*** At law and motion hearings, clearly identify the issues which need to be resolved by the commissioner.

6. ***Reading pleadings.*** Don't read the pleadings to the commissioner during your argument at a law and motion hearing. The commissioner will have already read them and be familiar with them.

7. ***Repetitive argument.*** Be sure that you do not repeat your point. Making your point once is enough.

8. ***Courtesy.*** Be careful that you are not discourteous to opposing counsel and opposing parties. This happens with more frequency than it should.

9. ***Be informed.*** Domestic relations law is complicated. Many changes have taken place within the last five years. If you don't practice domestic relations law, refrain from doing it until you know how to do it. Do not learn the hard way—at the expense of your clients.

STATE BAR CLE CALENDAR

Sun Valley Securities Seminar

The Securities Section of the Utah State Bar will hold its Annual autumn CLE seminar from September 9 to 11 at Sun Valley, Idaho. The format of this program will be a roundtable orientation, and will consist of two half-day morning sessions—leaving the afternoons and evenings free for you to enjoy this scenic resort community.

Further information will be presented in an upcoming brochure that you will be receiving.

Date: September 9 - 11, 1988
Place: Sun Valley, Idaho
Fee: $75 (before September 6)
Time: 9:00 a.m. to 1:00 p.m. (both days)

Alternative Dispute Resolutions

With the current backlog in the Utah court system, alternative methods for handling many types of cases are not only necessary, but are actually a more desirable technique for both attorney and client. Alternative dispute resolutions provide the attorney with more free time—as he or she is not tied up in protracted court cases. This seminar is designed to provide the attorney, administrator and consumer with a detailed understanding of the ADR process.

The program will be held at the Utah Law and Justice Center. It will be a one-day seminar and will provide the registrant with hands-on experience in the areas of negotiation, mediation and alternative dispute resolutions.

Date: September 15, 1988
Place: Utah Law and Justice Center
Fee: To Be Announced
Time: 9:00 a.m. to 4:30 p.m.

Complex Trial Preparation

On September 23, 1988, the Utah State Bar will present the 3rd Annual Legal Assistants Association of Utah co-sponsored seminar. This year's focus is on complex trial preparation. The areas to be covered include:

—Computer Assisted Litigation
—Trial Notebooks
—Witness Examination
—Exhibit Preparation

Each of these areas will be presented in concurrent workshops.

Date: September 23, 1988
Place: Law and Justice Center, SLC, Utah
Fee: To Be Announced
Time: 8:30 a.m. to 1:00 p.m.

Mark Your Calendar For These CLE Programs

Legal Ethics	September 30, 1988 Law and Justice Center October 7, 1988 (VIDEO REPLAY) Price, Utah October 21, 1988 (VIDEO REPLAY) Logan, Utah
Trial Tactics	November 10, 1988 Law and Justice Center November 18, 1988 Logan, Utah December 1988 (VIDEO REPLAY) St. George, Utah

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
___ Sept. 9-11	Sun Valley Securities Seminar	Sun Valley, Idaho	$75
___ Sept. 15	Alternative Dispute Resolutions	L & J Center	TBA
___ Sept. 23	Complex Trial Preparation	L & J Center	TBA

Total fee(s) enclosed $_____
Make all checks payable to Utah State Bar/CLE

Registration and Cancellation Policies: Please register in advance. Those who register at the door are always welcome, but cannot always be guaranteed complete materials on seminar day.

If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. For most seminars refunds can be arranged if you cancel at least 24 hours in advance. No refunds can be made for live programs unless notification of cancellation is received at least 48 hours in advance.

CLASSIFIED ADS

Classified advertising is accepted only from Utah State Bar Members. Charges are: $5.00 for an ad of up to 50 words in length; $10.00 for an ad of from 51 to 100 words in length. No ads greater than 100 words in length will be accepted. Ads must be received five weeks prior to publication. For further information, call Paige Holtry at the Utah State Bar offices, 531-9077 or (800) 662-9054.

Positions Sought

Sole practitioner with eight years experience and established clientele and practice, including insurance defense, seeks "Of Counsel" relationship or other association with small or medium sized litigation firm where law is one's profession, not one's life. Objective: to add to and/or develop current clientele and practice to the benefit of all concerned.

Positions Available

Group of nine attorneys in Salt Lake seeks one to three other attorneys with client base to associate in office sharing arrangement to replace members who are leaving. Excellent location close to courts. Good library, conference room, receptionist, and facilities. Any reasonable arrangement considered. Contact Julian Jensen at 531-6600, 311 South State, Suite 380.

An established lawyer in a town of approximately 10,000 people is seeking an Associate with whom to share his practice. Any person interested, please write to the Utah State Bar, Attention Paige Holtry, 645 South 200 East, Salt Lake City, Utah 84111.

Office Space Available

Ideal for sole practitioner. Located at 4212 Highland Drive, with receptionist, conference room, small library and convenient client parking. Secretarial, copier and telephone answering services available as needed. Contact Leslie at 272-1013.

Shared office space available with other attorneys. Professional, friendly atmosphere. One office—12'5"x17'5", large windows. One office—12'5"x12', interior office. Close to Court. Free covered parking, easy client access. Receptionist, secretarial and telephone answering services available. Rent includes utilities and janitorial service. Located at 350 East 500 South, Suite 201. Stop by or call 596-1900.

Available office suite—within walking distance of State and Federal Courts and the Wells State Office Building. A suite of offices contiguous with other law offices suitable for one to three attorneys and secretarial staff. Reception service available, together with a full library, facsimile machine, lunchroom, conference rooms, and parking. Terms negotiable. Outstanding opportunity for an established attorney or new practitioner. Call Utah State Bar, 531-9077 or 531-8020.

Books for Sale

Four sets of Utah Code Ann. (1953 as amended), complete and up-to-date, excellent condition. Tracy Richards—363-3300.

Up-to-date *Corpus Juris Secundum*. Call Scott at 292-1078 or Tami Jensen at 532-1900.

For Sale—Complete updated sets of AmJur 2nd, AmJur Legal Forms; AmJur Pleadings and Practice Forms; and AmJur Federal Prodedural Forms. Excellent condition. Asking $3,200.00 or assumption of contract at $190.00 per month. Call McKean at 752-8920.

California Real Estate Law and Practice, Business Organizations and Warren's Forms of Agreements. All sets are current. Call Lynn Itchon at 532-4848 if interested.

AmJur 2d, AmJur Pleading and Practice Forms; AmJur Legal Forms, 2d; Proof of Facts, Proof of Facts, 2d. All sets are complete, current, in excellent condition and priced to sell. Contact Merle Morris, 233 West 200 North, Provo, Utah 84601 or call Merle or Linda at 374-2642.

Books Wanted

Utah Reports 1-20 and/or Pacific Volumes 1-60. Call McKean at 752-8920.

Office Furniture/Equipment

For Sale—Miscellaneous office furniture, computers. Call Scott at 292-1078 or Tami Jensen at 532-1900.

For Sale—Full-sized desk with file drawers and matching computer desk with mahogany finish, floor mat and executive chair—$1,200.00. Call 562-5038.

PANAFAX UF-250 for sale, law office of Snow & Landerman, P.C. Call Marilyn Turner at 265-1041.

For Sale—Ricoh Model 6200 copier, 5 years old, in good condition, new drum. Has reduction feature and bins for three sizes of paper. $800.00 or best offer. Call Dianna at 531-8900.

Executive size desk, credenza and leather chair for sale, $450.00. Contact Kay at 531-6686 or Judith at 394-9431.

Wills

I have been requested by the heirs of Cherrill Wardle Ferguson to assist them in the location of the Last Will and Testament of the decedent. It is their belief that the Will was drafted by a Salt Lake City attorney in approximately 1982 or 1983. I am trying to locate the attorney and a copy of the Will, and request that anyone knowing anything about either contact Wendell E. Bennett, 448 East 400 South, Suite 304, Salt Lake City, Utah 84111, telephone number 532-7846.

The law firm of David Bert Havas & Associates is seeking to locate the attorney in the Ogden/Salt Lake area who prepared a Last Will and Testament for Albert Acuna of Ogden. Mr. Acuna was 86 years of age at the time of his death in 1987. He was predeceased by his wife and has four children surviving. Please contact Attorney David Bert Havas at (801) 399-9636, 2604 Madison Avenue, Ogden, Utah if your firm prepared a Will for Mr. Acuna.

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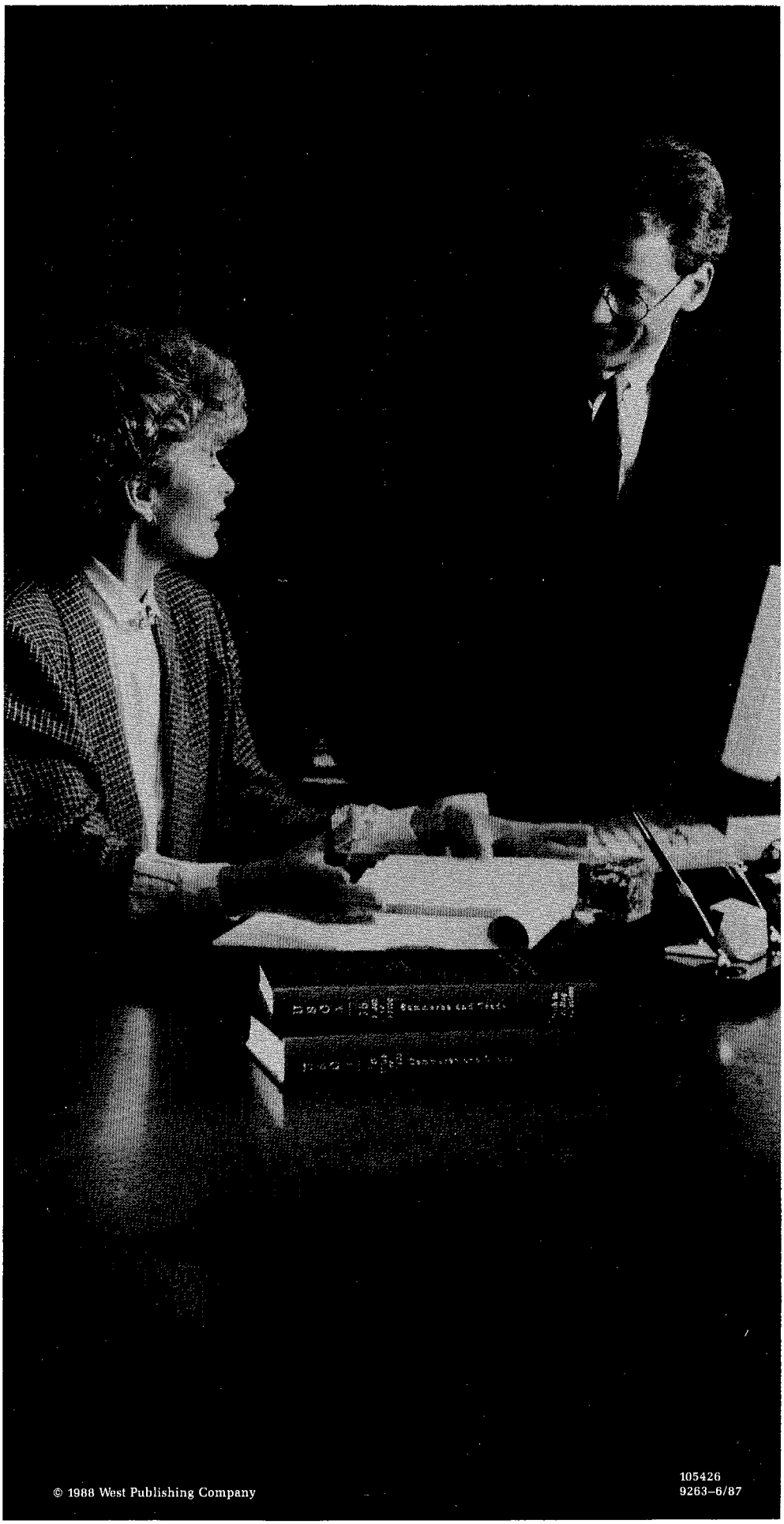

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