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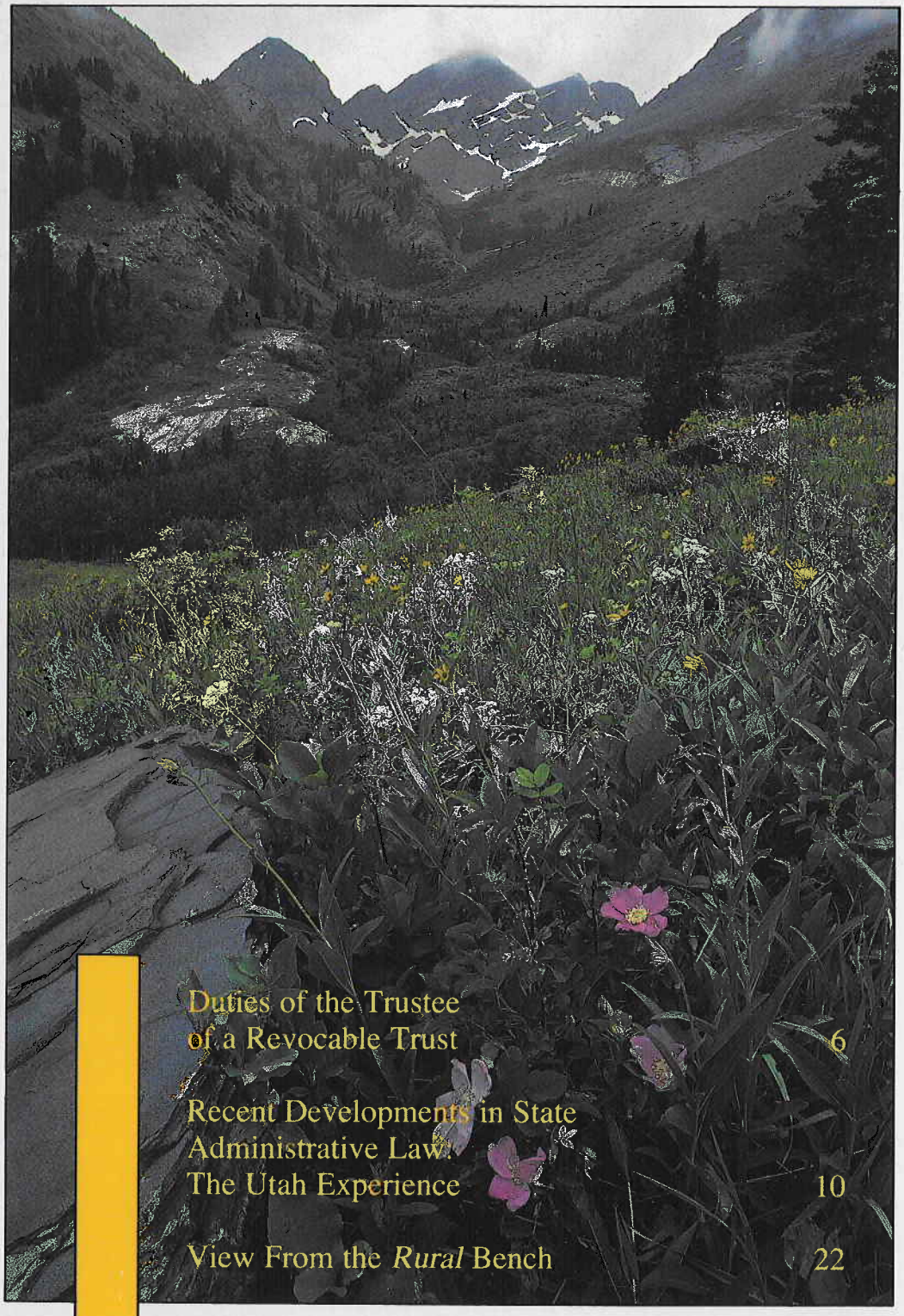

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COVER: "Wild Rose and Twin Peaks," Brand's Fork, Big Cottonwood Canyon, by writer/photographer Stephen Trimble. Mr. Trimble is married to attorney Joanne C. Slotnik, who is Director of Judicial Education, Court Administrator's Office.

The *Utah Bar Journal* welcomes and encourages members of the Utah Bar to submit appropriate art to be considered for use on the *Journal* cover. Contact Randall L. Romrell, Moyle & Draper, 15 E. First S., Sixth Floor, Salt Lake City, UT 84111, (801) 521-0250.

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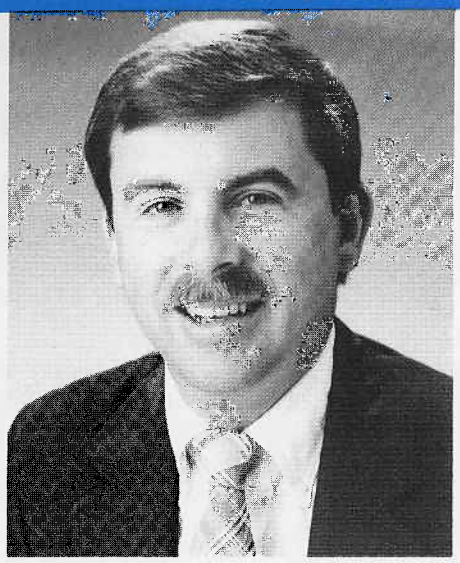
PRESIDENT'S MESSAGE

Are We Kidding Ourselves? 2,200 Billable Hours Per Year



Kent Kasting

Recently, I attended a meeting of the National Conference of Bar Presidents in Denver. During one of the sessions, the subject of annual minimum billable hours was discussed. To my disbelief, I learned that some of the East and West Coast firms were now requiring their associates to bill 2,500 to 2,700 hours per year. I also learned that incoming associates in those firms were starting at about $75,000 per year. Frankly, those numbers dumbfounded me. Upon doing some further investigating, I learned that some Salt Lake firms are paying their new associates $50,000-plus their first year and requiring 2,000 to 2,200 minimum billable hours per year.

Take a minute and think about that type of requirement. If 2,200 hours is the minimum, that means that each of those lawyers has to bill seven hours per day, six days a week, *52 weeks a year.* I repeat:

2,200 hours per year equates to,
Seven hours per day
Six days per week
Fifty-two weeks per year

These are billables and don't include office administration, legal education, pro bono or Bar work hours.

Need I say more?! Something is really wrong with those figures. I can only conclude that one of two things is happening to our young lawyers. Either we're imposing work requirements on our lawyers that will have long-term devastating effects on their professional and personal lives or we are creating a situation where they can only meet their minimum billables and thereby keep their jobs by (and I hate to say it) "padding their time" or performing tasks not germane or necessary to the reasonable and adequate handling of the client's case.

Hopefully, it is the former that is occurring and not the latter. However, even if it is the former, I think it is time that the lawyers who have the responsibility for establishing those minimum standards consider the long-term effect of their decisions on the legal profession and its members. How can we lawyers act as professionals and as public spirited members of our community when we are required to "bill seven hours a day, six days a week, 52 weeks per year"? It makes neither professional nor business sense to have lawyers so overworked that they are miserable to each other, miserable to their families (if they still have one) and perhaps even delivering a miserable product to their clients. I for one didn't decide to become a lawyer so that I could be miserable.

To the contrary, being a professional means not merely being civil to other lawyers and judges, it means caring about the quality of one's work, caring enough to continue to educate oneself in the discipline of the practice of law; caring enough to foster improvements in our profession through participation in Bar activities and it means participating in the affairs of one's community, in pro bono work, and in civic and charitable projects. In sum, it means striking a balance between practicing law and doing all of the other things a person must continue to do in order to be that well-balanced professional we all strive to be.

It doesn't take much persuasion to conclude that a lawyer can't achieve that goal if he or she is billing at least seven hours a day, six days a week, 52 weeks a year. It also doesn't take much to conclude that such requirements may have unknown yet far-reaching and detrimental effects on those lawyers. Possibilities include potential domestic strife, chemical dependency and stress-related illness and narrowing of focus to an extent which would inhibit if not preclude lawyers from continuing to develop the skills necessary to solve *all* types of problems for the people and businesses they serve.

I urge each of you charged with the responsibility of developing and grooming your lawyers into seasoned practitioners that you consider the long-term consequences of the requirements you impose, not only to the well-being of the lawyer working for you, but also for the continued respect and integrity of the legal profession.

By saying what I've just said, perhaps I will be perceived by those who have to bill that 2,200 hours per year as a champion of human rights and elimination of sweatshop practices. There is a *quid pro quo*, however. If the new lawyers didn't have to be paid as much, the firms would not have to require them to bill so many hours and that goes to the second point of my message.

I think it's time for law students, new graduates and, for that matter, law schools to analyze and determine what the true reasons are for a person's pursuit of a law degree and admission to the practice of law. If it is for the acquisition of material wealth and the desire to accumulate "things," then I think our profession is in serious trouble. That is so because the focus of our future members will not be service to others with monetary return being a byproduct of that service, but rather monetary return being the product and service of the byproduct. If that focus changes, then I predict there will be increasing dissatisfaction with the practice of law as a career choice, an increase in the numbers of skilled practitioners leaving at a time when their skills and talents are at an apex and for those that stay, they will be business persons first and lawyers second. I would hope that each of these predictions don't come true.

I believe partners, associates, law students and law schools must rethink and perhaps reorder their priorities and in that regard I make the following challenges to each.

To Partners: Adapt a reasonable billing requirement which includes time for pro bono and Bar work, personal and professional improvement, and family and civic activities. Also avoid getting into a bidding war with other firms which end in unrealistic starting salaries for new lawyers.

To Young Lawyers and Law Students: Re-evaluate the reasons you want to practice law. If those are primarily for financial gain, then rethink because you will not be a professional in the true sense of the word.

To Law Schools: Commit as much if not more money, time and effort to programs on

professionalism as are spent on placement programs.

I sincerely believe, if those challenges are accepted, our profession will be strengthened from within and we as lawyers and judges will all benefit. If they are not accepted or if we choose to ignore what I've tried to say, our profession could be in serious trouble and our members will be prevented from experiencing those things that good, competent, balanced, lawyers are entitled to as true professionals.

Tuesday Night Bar

It's history is short, but if the last few weeks are a true indication, the Tuesday Night Bar at the Law and Justice Center has a bright future. But in order to assure its continuation, more Utah attorneys are needed.

The Tuesday Night Bar is a program which provides legal assistance and referral to the public. On a once each week basis, individuals may make an appointment for "legal first aid" and evaluation of their problem. The consulting attorney assesses the situation and makes a referral to an appropriate agency or to an attorney through the Utah State Bar's Lawyer Referral Program. Experience to date indicates that many problems can be resolved on the spot.

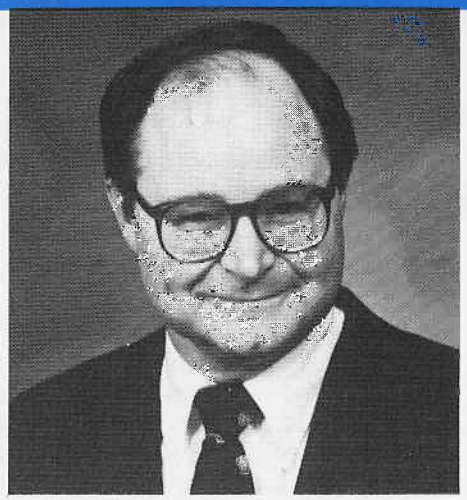
Lawyers who participate in the program will meet with the individuals who have previously scheduled appointments. The Bar staff handles the paperwork and scheduling. "Clients" may schedule appointments on Tuesdays from 4:30 p.m. until 7:00 p.m. by calling the Utah State Bar.

Participating lawyers will be called upon approximately four times each year, or more if they wish. Information regarding the program and time commitment can be provided by contacting Kaesi Johansen at the Utah Law and Justice Center, 531-9077.

According to Cecelia M. Espenoza, Chair of the Young Lawyers Committee on the Tuesday Night Bar, the program is extremely beneficial. "Real people are bringing real legal problems to the program," she said. "Not only are we providing important resources to these people, we are giving them some peace of mind."

During the first few months of the program, approximately 30 appointments were being scheduled each week.

COMMISSIONER'S REPORT



Judicial Criticism Criticized

By James R. Holbrook

In the past year, several prominent prosecutors publicly have criticized both federal and state trial judges for rulings and sentencings in high profile criminal cases. This conduct can pose a serious problem for the fair and independent administration of justice.

Our country has empowered our system of lawyers and courts to be our society's primary dispute resolution mechanism. This system, in turn, extends to qualified lawyers the privilege of a legal monopoly to engage in the authorized practice of law. The success of our system depends in large measure upon public confidence in lawyers and judges performing their responsibilities in a manner such that litigants believe they have been treated fairly and justly and are willing to abide by the result even when they lose.

Obviously, intemperate criticism of judges by lawyers undermines public confidence in our system, and lessens respect for both judges and lawyers, because it appears to the public that lawyers are not willing to abide by the result when they lose. The public does not understand that lawyers' advocacy skills, which are necessary in court and on appeal, can be inappropriate and even improper when used in the press.

Rule 8.2(a) of the Utah Rules of Professional Conduct provides that "A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. . . ." Presumably, the several lawyers who recently publicly criticized judges have not done so falsely or with reckless disregard of the truth. Nevertheless, their remarks clearly tend to undermine public confidence in our judicial system, however honest or honorable their motivations may have been. As one court has observed, unwarranted criticism "does nothing but weaken and erode the public's confidence in an impartial adjudicatory process." *In re Terry*, 271 Ind. 499, 394 N.E.2d 94, 96 (1979).

In order to preserve and promote the administration of justice, a lawyer's truthful statements and honest personal opinions about judges must be expressed in a careful, constructive way. As members of a self-regulated profession and as officers of the court, we must refrain from unwarranted judicial criticism which otherwise would be permitted to laypersons under the doctrine of constitutionally protected free speech. For example, EC 8-6 of the former Utah Code of Professional Responsibility admonishes a lawyer to "be certain of the merit of his complaint, use appropriate language, and avoid petty criticism, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified."

Judges are at a significant disadvantage in attempting to respond publicly to unwarranted criticism by lawyers. Canon 3(A)(6) of the Utah Code of Judicial Conduct provides that "A judge should abstain from public comment about a pending or impending proceeding in any court. . ." In this regard, the Comment to Rule 8.2 of the Utah Rules of Professional Conduct exhorts us as follows: "To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized."

Merely for us to avoid false or reckless criticism of judges is not enough. When considering making any remarks which could be construed to be judicial criticism, we should be mindful of and sensitive to maintaining public confidence in our legal system. If we err, we should err on the side of self-restraint which we pledged to do when we took the oath of attorneys when we were admitted to practice law: "I do solemnly swear that. . . I will maintain the respect due to courts and judicial officers, and that I will demean myself uprightly as an attorney and counselor of this Court, so help me God."

Duties of the Trustee of a Revocable Trust

By Merrill B. Weech

There has been a lot of fuss about revocable trusts for years. Norman Dacey's best seller, *How to Avoid Probate*, keeps getting reprinted. New buyers discover that dreadful dragon, probate, and the Dacey savior, the revocable trust.

Probate has had a bad press, often undeserved. Sometimes probate is the best thing that could happen for the survivors. There is a reason why it stays around.

None of us should uncritically assume that the revocable trust is right for our client, especially if the client suggests it. There is a lot of educating that needs to be done.

Years ago, I collaborated with a great California lawyer/CPA, Irving Kellogg, on an article intended to help Utah lawyers educate their revocable trust clients. Never published, some of that article forms the basis for this one. I have also received helpful suggestions from Charles Bennett, partner in the firm of Callister, Duncan and Nebeker, who was one of my successors as chairman of the Estate Planning and Probate Section of the Utah Bar. In the interest of simplicity, I will use the masculine gender for the Trustor throughout.

Generally, the Trustor hopes to benefit from some or all of these advantages of revocable trust:

1. Reduction of expenses and delay, and avoidance of probate for those assets which were properly transferred into the revocable trust prior to the death of the Trustor.
2. During the lifetime of the Trustor, the financial and investment abilities of an individual or corporate Trustee can be tested and evaluated.
3. If senility, accident or illness befall the Trustor, protection against resulting financial and administrative problems of dealing with the estate of an "incompetent."
4. By the privacy of a non-probate document that covers:

(a) the post-death plan of the Trustor, and
(b) the amount and nature of the property of the Trustor.

Protection of the family from promoters and other menaces.

5. If there is real estate located in another state, avoidance of probate in that state by properly transferring the real estate to the Trustee.
6. After the death of the Trustor, reduction of the probability of attack on the dispositive plan of the Trustor because the legal formalities surrounding the creation of a valid trust are less stringent than those relating to wills. (It can also be argued that this difference might increase the probability of attack.)

Read the trust agreement from beginning to end. If in doubt, communicate with your attorney.

Having been told by someone that one of the supposed *dis*advantages of the funded revocable trust may be the cost of utilizing the expert services of a corporate Trustee, the Trustor may try to minimize or eliminate that cost by naming himself during his lifetime and selecting an individual or individuals to serve as Trustee(s) who ordinarily know little or nothing about the responsibilities and functions of a Trustee.

There is certainly an argument to the effect that the attorney should actively discourage the use of such rank amateurs, as my experience has shown they can make much of an estate plan worthless.

The individual who accepts the role of Trustee has a significant responsibility in helping the Trustor (also called Settlor or Grantor) to achieve his or her objectives in creating the trust.

Unfortunately, the Trustor is generally uninformed about what the Trustor's relationship to a Trustee should be, and, therefore, neither performs the functions necessary to achieve the original purpose of the trust.

Because of the Trustor's concern about surrendering control over the trust assets, the Trustor may insist on serving as his own Trustee. This assumption of the "split personality" of Trustor/Trustee compounds the problem with using individuals. When the Trustor insists on being Trustee, the attorney must draft the trust instruments with great care.

Whether the Trustor decides:

(a) To appoint a separate person as Trustee, or
(b) to serve as both Trustor and Trustee,

the attorney must advise the Trustor as to the duties and functions of the Trustee. If the Trustee fails to perform those duties properly, the trust may fail. Even when the will incorporates the terms of the trust with amendments by reference, the failure can be detrimental to the Trustor's family estate planning and possibly jeopardize the security of the assets.

Orally admonishing the Trustor and Trustee to "take care to operate the trust properly" doesn't complete the attorney's engagement for family economic security. Unfortunately, experience has proved the futility of oral instructions. Clients either misunderstand or forget them.

Despite the frequent frustration that even written instructions are:

(a) not read.
(b) when read, not understood, or
(c) sometimes ignored,

the attorney, if only for self-protection from later recriminations, must communicate complete instructions in writing.

After the attorney has reviewed these written instructions with the Trustor, and

the Trustor has become fully aware of the responsibilities and the dangers he is thrusting upon the individual Trustee, the Trustor may give serious consideration to selecting a corporate Trustee—a bank or trust company. If a corporate Trustee becomes the preferred choice, the attorney may then have to go back and redraft the trust agreement, but at least the Trustor will have entered the esoteric world of trusts more fully informed.

Here is some information you may consider giving the Trustor and prospective Trustee:

WHAT TO DO IF YOU ACCEPT APPOINTMENT AS INDIVIDUAL TRUSTEE OF A REVOCABLE TRUST

A. *Read the trust agreement from beginning to end.* Concentrate on the powers of the Trustee and the administrative duties of the Trustee. If in doubt, communicate with *your* attorney.

B. *At the time of the creation of the trust* (don't wait until later—it is always harder and, sometimes, impossible):

1. Have your CPA prepare a request for a Federal Identification Number from the IRS. It is used:
(a) on all future tax returns, and
(b) by corporate stock transfer agents as the identification number for you as Trustee.

A new number will be required when the Trustor dies.

2. Open a bank account, whether savings, money market or commercial checking, in a bank whose deposits are federally insured.
3. Open a set of accounting books to record:
(a) the assets of the trust received by you as Trustee.
(b) Cash received by you as Trustee and deposited in the bank account.
(c) Checks disbursed by you as Trustee.
(d) Other transactions, such as purchases and sales of assets.
4. Record on separate sheets (for all trust property):
(a) Property which was the separate property of the Trustor (it may also be a good idea to list the major items of the Trustor's property purposely *not* transferred to the trust to avoid later confusion about what is or is not in the trust), and
(b) Any trust property (comment above about listing property *not* transferred to the trust also applies here) in which the spouse of the Trustor has or had an interest, such as:
(i) Property which was separate property of the spouse of Trustor,
(ii) Community property,
(A) Check with a lawyer in the state whose laws gave the community property its character for instructions or provisions which might be applicable.
(iii) Jointly held property.
(A) A trust can hold a joint tenant's interest in property. A trust is probably a person under Utah Code Annotated Sect. 57-1-5, which deals with trusts. 76 AmJur. 2d Sect. 33 states, "The trust may consist of any type of transferable property, either realty or personalty, including undivided, future, or contingent interests."
5. If you, as Trustee, are not certain whether the property transferred to the trust is:
(a) separate property of the Trustor, or
(b) property in which the spouse has an interest,
ask the Trustor's attorney to instruct you by letter as to the character of the property.

If the Trustor and spouse owned property when they came to Utah from a community property state, ask the attorney if any property transferred to the trust is community property or quasi-community property. Because:

(a) Utah is almost surrounded by community property states (California, Nevada, Idaho, Arizona);
(b) the community property laws and common laws vary from state to state; and
(c) some people move frequently from state to state and have residences in more than one state,

the characterization of property can be significant in marital legal relations, income taxation and estate taxation. If you, as Trustee, find it difficult to identify property as community, undivided or separate, consult the attorney of the Trustor for guidance. An incorrect classification by you as Trustee may trigger adverse and unforeseen gift and estate tax consequences. Litigation with IRS may be required to eliminate incorrect assessments.

6. Should the transactions become numerous and complicated, do not hesitate to retain professional accounting assistance. The expense of a CPA can be paid from trust assets.
7. Prepare file folders for each of these categories:
(a) Bank statements and cancelled checks.
(b) Paid bills.
(c) Deposit slips.
(d) Income items.
(e) Correspondence.
(f) Trust agreement and amendments (copies).
(g) Accounting records.
(h) Tax returns.
8. For:
(a) a business operated by the trust, or
(b) real estate owned by the trust, establish additional files. Under these circumstances, you will keep formal accounting records and you will require clerical assistance to keep the details accurately.
9. Open a safe-deposit box in your name, as Trustee of the trust. Place at least one signed ORIGINAL of the trust agreement in the box. If the agreement is subsequently amended, attach any ORIGINAL signed copies of the amendment(s) to the original trust agreement. Use the safe-deposit box for any of these assets of the trust:
(a) Life insurance policies,
(b) Stock certificates,
(c) Bonds,
(d) Notes receivable, deeds, contracts and other valuable documents.

When the assets of the Trust become numerous, you may decide that a custodial account with a bank can minimize your administrative burden in keeping track of the assets. Inform yourself about the bank's fees for the custodian account and ask the Trustor about incurring these trust expenses.

Some Trustees find it advisable to deposit securities in the safekeeping of a brokerage firm. This procedure may be convenient for an active investment account, but you, as Trustee, are still responsible for the safekeeping of the assets and you could be personally liable if you are negligent in selecting a brokerage house which subsequently fails, causing a loss of assets to the Trust.

10. Ask the Trustor's attorney if it is necessary to prepare a notice of your name and address to beneficiaries pursuant to U.C.A. Sect. 75-7-303(a). This statute requires the Trustee to make notification in writing, to the current beneficiaries, and, if possible, one or more persons who may represent beneficiaries with future interests, all within 30 days.

Of the attorneys who even know this statute exists, most I have talked to believe all such persons are represented by the living Trustor. Further, the Trustor would be deemed notified by his naming you as Trustee.

C. *Income Tax Obligation of Trustee.* So long as the Trust is a Revocable Trust, during the lifetime of the Trustor, the trust pays no income tax. For income tax purposes, the existence of the Re-

vocable Trust prior to the time it becomes irrevocable upon death is ignored.

However, as Trustee you must make an income tax return on Form 1041 in these instances:

1. The Trust has any *taxable* income for the year.
2. The trust has *gross* income of $600 or more.
3. Any beneficiary is a non-resident alien.

Trust income taxable to the Trustor as "owner" must be reported on a separate statement attached to the Form 1041, unless you, the Trustee, are also the Trustor. In that case, you just report the income on your own Form 1040 return and you don't file the Form 1041.

If you make a distribution from the trust, you must prepare an information return in triplicate on a Schedule K-1 (Form 1041) or on a substitute that has the same information and file one copy with the return.

You'll also have to file an information return if you claim a charitable deduction for the Trust.

Upon the death of the Trustor, the irrevocable portion of the trust becomes:

(a) a separate taxpayer, and
(b) a new taxpayer with a new accounting year.

Therefore, you, as Trustee, must obtain a new tax number. All Revocable Trusts that become Irrevocable Trusts on the death of the Trustor are put on a calendar year.

D. *Transferring property to the trust while the Trustor is living.*

1. Documents.

Consult the Trustor's attorney as to all transfers of property to the trust. The attorney should prepare all documents of transfer:

(a) Original for you, as Trustee. To be recorded by the county recording officer, if necessary, and returned to you for your files.
(b) A copy for the Trustor and spouse.
(c) A copy for the attorney's file.

2. Transfers of Real Property.

(a) If the real property is separately held by your Trustor, transfers must be made by deed, usually a quit-claim deed, and must be signed by the grantor (Trustor). The procedure must conform to the formalities of the state in which the property is located. These formalities differ from state to state. Therefore, your attorney should check the specific requirements. For Utah, see U.C.A. Sect. 57-3-1 and 57-2-7 or 8.
(b) If the Trustor's spouse has any possible interest in the property, the spouse should join in the transfer, after a determination as to the results for that spouse's estate planning. If your Trustor wants to make the transfer all alone, *insist* on getting advice from competent counsel.

3. Transfers of Personal Property.

Transfer documents should be prepared by the Trustor's attorney. If not prepared by the attorney, he or she should at least examine the propriety of:

(a) Endorsements on stock certificates.
(b) Assignments of contracts.
(c) Assignments of promissory notes and deeds of trust.
(d) Assignments of ownership of life insurance policies (including compliance with insurance company requirements).

The attorney will prepare as required notifications to third parties of assignments of contracts, promissory notes and other documents. Either you or the attorney should send notifications by "Certified Mail, Return Receipt Requested."

4. Transfers of spouse-owned insurance:

Transfer to the Trustee of spouse-owned life insurance policies on the Trustor's life is a valuable family security procedure. But notwithstanding the spouse's ownership of the policies, watch out for potential pitfalls of estate taxation on the life insurance proceeds on the death of the Trustor.

(a) Problems whether or not the Trustor is Trustee:

(1) Because of the Trustor's power to revoke, alter or amend the trust, the Trustor may have an "incident of ownership" over the life insurance polices. Such powers, as to these insurance policies, should be forbidden to the Trustor and spouse.
(2) When a spouse predeceases the Trustor and the spouse's will pours over life insurance policies on the life of the Trustor into the Trust, the result may be the same as item (1).

(b) Problem when the Trustor is Trustee:

Because of the general powers of the Trustee over assets, the Trustee is considered to have powers equivalent to "incidents of ownership."

Therefore, check with your professional advisor as to whether the foregoing problems might exist. If they do not exist, proceed to:

(c) Get the assignment of the insurance policy to the Trustee of the Trust.
(d) Follow the procedures required by the insurance company to give effect to the assignment, and
(e) After you receive the acknowledged assignment for the insurance company, attach the assignment to the life insurance policy and place the life insurance policy in the safe-deposit box.
(f) Read the trust agreement carefully as to your duties and obligation with regard to the life insurance policies.
(g) If the Trustor borrowed against the Cash Surrender Value of the policies prior to the transfer to the Trustee, make a note of the loan in your accounting records. This loan will reduce the proceeds received by you upon the death of the Trustor.

5. *Transfers of Employee Benefits.* If the Trustor participates in a corporation's qualified pension plan or profit sharing plan, inquire if the Trustor should prepare a Beneficiary Statement addressed to the Committee of the Corporation's plan, in which the Trustor will appoint you, in your capacity as Trustee of his trust, to be the beneficiary of both the proceeds of any life insurance policies paid to the plan and the death benefits of the plan. Inform the Trustor that if you, as Trustee, are the beneficiary of those benefits, then upon the death of the Trustor, the trust will receive payment. Federal estate tax will be due on the distribution of benefits from those plans. Benefits other than insurance proceeds are includable in the Trustor's estate as "income with respect of a

decedent." (Sect. 691(a) IRC), a special category which requires careful planning.

If the Trustor understands the tax result, and has decided to adopt this estate planning procedure, he should give you a copy of the Beneficiary Statement. To establish your authority to receive the benefits of the plan, confirm to the Trustee or Administrator of the Corporation's Retirement Trust that you are the Trustee of the Trustor's trust. Where the mode of distribution is in the discretion of the plan Trustee, it may prove valuable to meet with the plan Trustee and your tax advisor prior to actual distribution of benefits to review the tax results of alternative distributions.

6. *Installment Notes.* Do not accept as trust asset an Installment Promissory Note arising out of a deferred income sale without first seeking legal counsel. Such a transfer may trigger a gain or loss in the note. If you are aware of the nature of the note, request your attorney, or the Trustor's attorney, to give you an opinion as to whether you should accept the note as an asset for the trust.

Transfer of an installment promissory note by a holder to a Revocable Trust of which the holder is both Trustor and beneficiary does not trigger acceleration of the installment gain or loss.

7. *Real Property.* Do not accept a residence or any other real estate into the trust until you get the opinion of the attorney for the Trustor (a) that the encumbrance on the property will not be accelerated by reason of the transfer, or (b) that there will not be a penalty for such a transfer. Many notes or the related trust deeds contain clauses accelerating maturity of the note and imposing a penalty when the property is transferred, irrespective of the fact that the property is being transferred into a Revocable Trust.

E. *After the Trustor's Death.* The inevitable happens: the Trustor or the Trustor's spouse dies and the Trust requires a distribution of property.

Because of the six months-after-death alternative valuation date, you should not distribute assets from the trust, nor should you sell assets from the trust until your professional advisor informs you that the benefits of the alternative valuation date are secondary to the business or family prupose of the distribution or sale.

What about getting paid for all the time, the headaches and the risk of serving as Trustee? If the trust agreement established fees for you as Trustee, you will be bound by those fees unless they are unreasonably low. However, in order to take fees other than those specified in the trust, the trust agreement must be amended by a Court order. If the fees are not established in the agreement, under the Utah Uniform Probate Code, you may set your own fees subject to a Probate Court review (which may be initiated by any interested person).

Your determination as to legal fees should be based on a number of personal, business and legal factors:

Personal: Your relationship to the Trustor and his family.

Business: The time required to perform properly your duties as Trustee.

Legal: Factors imposed by court cases, some or all of which may be considered by the Court. These may include:

1. The gross income of the estate.
2. The success or failure of the administration of the Trustee.
3. Any unusual skill or experience which the Trustee may have brought to the work.
4. The fidelity or disloyalty displayed by the Trustee.
5. The amount of risk and responsibility assumed by the Trustee.
6. The time consumed by the Trustee in carrying out the trust.
7. The custom in the community as to allowances to Trustees by Trustors, or Courts, and as to charges exacted by trust companies and banks.
8. The character of the work done in the course of administration, whether routine or involving skill and judgment.
9. Any estimate which the Trustee has given of the value of the Trustee's services.

These are some of the rules of conduct imposed on the individual Trustee of a Revocable Trust by the Utah Uniform Probate Code, 75-7-301 *et seq.* The numbers following each state refer to the appropriate section of the Utah Code.

The Trustee MUST:

1. Administer a trust expeditiously for the benefit of the beneficiaries (75-7-301).
2. Following terms of the trust agreement (75-7-302).

"Except as otherwise provided by the terms of the trust, the Trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another..."

4. "...if the trustee has special skills or is named Trustee on the basis of representation of special skills or expertise, he is under a duty to use those skills" (75-7-302).
5. Following the directions of the Trustor so long as the Trustor retains the power to revoke the trust (75-1-108).
6. Follow the directions of any holder of a general power of appointment (75-1-108).
7. Keep the beneficiaries of the trust reasonably informed of the trust and its administration (75-7-303). If the beneficiaries are other than the Trustor, notify them within 30 days of acceptance of trusteeship (75-7-303(a)).
8. "...administer the trust at a place appropriate to the purposes of the trust to its sound, efficient management" (75-7-305).
9. Attempt to prevent a breach of trust by any Co-Trustee (75-7-405(3)).
10. If the Trustee has actual knowledge or information, take the necessary steps to compel the redress of any breach of trust by a predecessor (75-7-306(6)).
11. Reveal the Trustee's fiduciary capacity to third parties dealt with in the course of administration of the trust, if the Trustee wishes to avoid personal liability to them (75-7-306(1)).

The Trustee Must *Not:*

1. Exercise any trust power without court authorization where the separate duty or interest of the Trustee as Trustee conflicts with the Trustee's separate duties as an individual or as Trustee of another trust. (75-404(2)).
2. Transfer the Trustee's office to another or delegate the entire administration of the trust to a Co-Trustee of another (75-7-403).

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Recent Developments in State Administrative Law: The Utah Experience

By A. Robert Thorup

Text and References of Remarks Delivered
at the
AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE
MID-WINTER MEETING, FEBRUARY 3, 1989

Based on both (a) its sharing of the frontier tradition of freedom of the individual,[1] and (b) its history of early antagonism to political governments[2]; and also affected by its relative lack of wealth and population, Utah has until very recently substantially ignored the institutional development of administrative law.[3] An attempt was first made only in the late 1960s to adopt statewide legislation on administrative procedures in the form of the 1961 Model State Administrative Procedure Act ("the 1961 Model Act").[4] Not until 1973 did the Utah Legislature adopt any such legislation, and then only a modified form of the rulemaking provisions (Sect. 63-46-1 *et seq.*, U.C.A. (1973)). Utah then waited until 1985 for any modernizing amendment of these rulemaking provisions (Sect. 63-46a-1 *et seq*, U.C.A. (1986)). Further technical rulemaking amendments in 1987 and 1988 still have not brought the Utah rulemaking statutes up to the level of modern thinking on the subject, and the past failures to involve academic and private bar input in the reexamination and revision of the rulemaking provisions leaves the current Utah rulemaking statutes largely ignored and unappreciated.

Nevertheless, the fact that rulemaking appears to have been Legislatively addressed only once in Utah's first 130 years and more than six times in the next 15 years[5] is evidence of a revolution in awareness and interest in administrative law that now is taking place in Utah.

The crest of this revolution was ridden in 1987 by the innovative Utah Administrative Procedures Act (Sect. 63-46b-1 *et seq.*, U.C.A.) ("UAPA") to a unanimous approval by the Utah Legislature in the face of not insignificant agency opposition. UAPA appears to have been the first state administrative adjudicative procedural statute to be modeled, at least in part, on the 1981 Model State Administrative Procedure Act ("the 1981 Model Act").[6] The "two track" system of judicial review of agency action, discussed later in this paper, was part of UAPA as originally adopted (S.B. 35) in 1987, but was an innovation not found in the 1981 Model Act. The emergence of a broad range of summary decision mechanisms now in UAPA, also discussed later on in this paper, came by way of amendment (S.B. 86) in 1988.

1987 also saw the creation within the Utah State Bar of an Administrative Practice Section. By March 1988, this new Section had begun a study of a reporting system for state agency decisions, discussed later in this paper. The Section was named the Outstanding Section of 1987 by the Utah Board of Bar Commissioners. There are now over 120 Utah lawyers formally affiliated with the Administrative Practice Section.

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Mr. Thorup is a Committee Vice Chair in the American Bar Association Administrative Law and Regulatory Practice Section and is a member of the Federal Regulation of Securities Committee of the Business Law Section. He is also the immediate past Chair of the Utah State Bar Administrative Practice Section and a member of the Bank Capital Markets Association Lawyers' Committee. Mr. Thorup has served as a Special Assistant Utah Attorney General and is a member of the Utah Administrative Law Advisory Committee. He has also lectured on legal issues at administrative law and securities law seminars in Utah, Colorado, Wyoming and Texas.

Mr. Thorup has authored a number of law review articles on administrative law and securities law issues, and for three years was a weekly syndicated columnist with the Enterprise *newspaper group headquartered in Salt Lake City.*

A "TWO TRACK SYSTEM" OF JUDICIAL REVIEW OF STATE ADMINISTRATIVE ADJUDICATIONS

The Utah Code prior to UAPA was no different from other states without a uniform procedural act: each time the Legislature created a new agency or function, it prescribed more or less detailed procedures for agency adjudications and judicial review.[7] Moreover, over the years, agencies and/or interested groups sponsored amendments to agency statutes to create further special procedures and review provisions that differed ever more widely from agency to agency. Some agencies' decisions were reviewed "on the record" by an appellate court, but with various standards (*e.g.*, "substantial evidence," "abuse of discretion," "not in accordance with law" or "arbitrary and capricious") that, while practically tending to melt together in the minds of judges over the years, rendered imprudent the application of judicial precedent from one agency to another. Other agencies were made subject to "on the record" review by trial courts, while still others got *de novo* review in a trial court. The Tax Commission, an agency reviewed *de novo* in a trial court prior to the UAPA, even was able to convince a trial judge that *"de novo"* meant at least partially "on the record."[8]

This situation was an afront to those agen-

cies who devoted considerable effort and formality to agency adjudications, and yet were subjected to *de novo* trial court review; while other agencies were routinely conducting the barest minimums in adjudicative proceedings and sending totally inadequate records to the Supreme Court for review. It also was a misuse of judicial resources, because trial courts were struggling to act like appellate courts without the temperament or experience.[9] The Supreme Court even adopted a rule that essentially ignored the findings of a trial court which reviewed agency action *de novo* even though pursuant to statutory designation.[10]

UAPA implemented three types of agency adjudicative proceedings: formal, informal and emergency.[11] Formal adjudicative proceedings are trial-type proceedings with in-person hearings required; and these proceedings correspond substantially with the "formal adjudicative hearings" of the 1981 Model Act.[12] A formal record with sworn testimony and cross examination is required in formal proceedings. Informal adjudicative proceedings can be "all-paper" adjudications, and will often resemble a cross between the "summary adjudicative proceeding" and the "conference adjudicative hearing" of the 1981 Model Act.[13] Very little in the way of a record for review may result from an informal proceeding. Emergency adjudicative proceedings under UAPA are essentially the same as their namesake in the 1981 Model Act.[14] The level of procedural formality and record-building will vary in emergency adjudicative proceedings based on the class of proceeding involved.[15]

The 1961 Model Act provided for judicial review of all final agency adjudications in the state trial court having appropriate venue.[16] While the 1961 Model Act's judicial review was to be "on the record," it was also non-exclusive. The examples of Florida and Oregon moved the Commissioners on Uniform State Laws in 1981 to suggest an optional alternative provision directing judicial review to the appropriate appellate court.[17] Both the 1961 and the 1981 Model Acts provided a single set of grounds governing the scope of judicial review of agency adjudicative proceedings.[18]

UAPA reflects two principles for the development of a uniform and exclusive system for judicial review of agency adjudications:

1. Agencies who devote sufficient formality, due process protections and record-building to an administrative adjudication should be entitled to deference as to the factual record and findings by a reviewing court, while those agencies who may need to process larger numbers of cases at more informal levels of procedure and only minimum due process protections (and concomitant cost savings to the agency) should be reviewed *de novo* for the protection of the public; and
2. Appellate courts have the experience and attitude that facilitate efficient and effective review of developed agency records, while trial courts are best suited to conduct *de novo* reviews of agency action lacking in prior evidentiary development.

The result of applying these principles to the Utah situation was the development of a "two-track" system of judicial review of agency adjudications reflected in the UAPA. (Appendix A is a diagram of the "two-track" system.)

Under the UAPA, those agency adjudications conducted as informal proceedings are reviewed *de novo* by a trial court of proper venue, with appeal from the trial court's decision to be treated like any other appeal from a trial court: to the appellate court on the cord of the trial court.[19] Those agency adjudications conducted as formal proceedings are to be reviewed on the record by the appropriate appellate court.[20]

A verdict on the efficacy of the two-track system in Utah will await such judicial review and discussion.

To date, no opinion has issued from either the Court of Appeals or the Supreme Court on review of a formal adjudicative proceeding, or on appeal from the *de novo* review of an informal adjudicative proceeding. A verdict on the efficacy of the two-track system in Utah will await such judicial review and discussion.

SUMMARY MECHANISMS FOR AGENCY ADJUDICATIVE PROCEEDINGS

Rather than an exhaustive list of specific agency actions to which UAPA would apply, UAPA generally covers:

(a) All state agency actions that determine the legal rights, duties, privileges, immunities or other legal interests of one or more identifiable persons, including all agency actions to grant, deny, revoke, suspend, modify, annul, withdraw or amend an authority, right, or license; and
(b) Judicial review of all such actions.[21]

UAPA then carves out certain narrow classes of proceedings[22] that would receive partial or total exemption from the Act.[23]

After passage by the Legislature in 1987, a year passed before UAPA became effective.[24] The first year allowed careful examination of the new uniform law by agencies, practitioners and academics, and showed the need to provide certain summary mechanisms to the agencies. Amendments to UAPA in 1988 added important summary measures in two circumstances.

First was in the area of highly repetitive and ministerial actions that nevertheless met the test for "adjudicative proceedings."[25] UAPA had originally contemplated the granting and denial of driver's licenses to be the *sine qua non* of what would be an informal adjudicative proceeding: a highly repetitive simple adjudicate that even so could fit into the procedural model of an informal adjudicate proceeding. However, the granting of hunting and fishing licenses and the issuance of permits for state campgrounds were properly considered during 1988 as "adjudications" that really could not efficiently be handled even as informal adjudicative proceedings under UAPA. More often than not these types of licenses are "granted" merely by payment of a nominal fee and production of some evidence of citizenship, often (in the case of campground reservations) over the phone. Many hunting and fishing licenses are issued by non-state employees (drug and sporting goods stores, etc.) Moreover, the "rights" at stake are of minimal value, thus not requiring more than a modicum of due process. Thus an exemption from the Act for "state agency actions relating to hunting or fishing licenses, or licenses for use of state recreational facilities" was added by S.B. 86 in 1988.[26]

The Comments of drafters[27] indicate an intent that this new exemption be construed narrowly, as with all other exemptions from the Act. Yet this exemptive language sets an important *policy* precedent for other agencies who can demonstrate that a particular class of agency adjudications has the characteristics of game licenses or park reservations, and thus ought to be exempted from the adjudicative proceeding requirements of UAPA. Importantly, however, the judicial review of these exempted

ministerial adjudications remains under UAPA, and should be *de novo* review in the appropriate trial court.[28] The drafters did not envision many cases in these areas that could ever reach the courts.

The second area of change addressed in 1988 was whether agencies should have the explicit power to act like trial courts in connection with motions for summary judgment or to dismiss a proceeding for one of the reasons set out in Rule 12 of the Utah Rules of Civil Procedure.[29] The drafters concluded that, if governed by the well-developed principles and requirements used by the federal and state courts when addressing and reviewing such motions in the trial context, such flexibility was appropriately afforded to an agency explicitly, rather than implicitly. Thus Sect. 63-46b-1 now contains the following language:

(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:
(a) Requesting or ordering conferences with parties and interested persons to:
(i) encourage settlement;
(ii) clarify the issues;
(iii) simplify the evidence;
(iv) facilitate discovery; or
(v) expedite the proceedings; or
(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

A Lexis search of available statutes did not uncover any other state with such an explicit reference to summary powers of state agencies. As with the two track system, the efficacy of these summary mechanisms will need to be validated or disproved by actual use and review by the courts over the next several years.

A REPORTING SYSTEM FOR STATE AGENCY ADJUDICATIVE ORDERS

Currently, Utah lawyers who frequently practice before a state agency haphazardly collect decisions themselves for future use. The agencies themselves vary as to the existence of usefulness of their own indexing systems for adjudicative orders. Lawyers and non-lawyers alike who have a one-time altercation with an agency are thus at a real disadvantage vis-a-vis the agency decisionmakers or the carefully cataloged private libraries of the cognoscenti.[30]

It was persuasively argued to the Utah State Bar Administrative Practice Section that effective use of the UAPA, and indeed the fair functioning of an orderly administration of policy by state agencies, requires some way for the public (and especially lawyers representing the public) to have ready access to agency precedent. The Section responded in early 1988 by creating a task force to study and hopefully propose a system for the regular publication and availability of agency adjudicative decisions, orders and opinions in Utah. This study has been under way now for approximately one year, but has not yet completed its work.

The appropriateness of better and broader availability of prior agency adjudicative decisions is highlighted by the provision in both the Model Act[31] and UAPA[32] that judicial review can proceed upon an allegation that the challenged agency action is contrary to the agency's prior practice.

In analyzing a system for state agency decision reporting, models run from full publication of almost every initial and final agency decision by federal agencies to extremely spotty reporting of state trial court decisions.[33] Many federal agencies, at least the "major ones," are covered by a reporter system that essentially publishes every decision from all but the most minor administrative adjudications.[34] Initially these were all published by the agency as an important service to the public. Over time, private companies saw a lucrative market for these materials in the growing private compliance bar, and undertook at least some of the publishing under license from the agencies involved.[35] Still other private publishers duplicate the publishing of certain agencies' decisions in addition to the offered agency publication.[36]

Lawyers and non-lawyers alike who have a one-time altercation with an agency are thus at a real disadvantage.

While many states have provisions in their administrative procedure statutes requiring *access* to agency decisions, as required under the 1961 and 1981 Model Acts, a *Lexis* search by the author failed to yield statutes providng for affirmative publication of agency precedent, or even indices as required by the Federal APA.[37]

Several hurdles to an effective state agency decisions reporting system seem to exist:

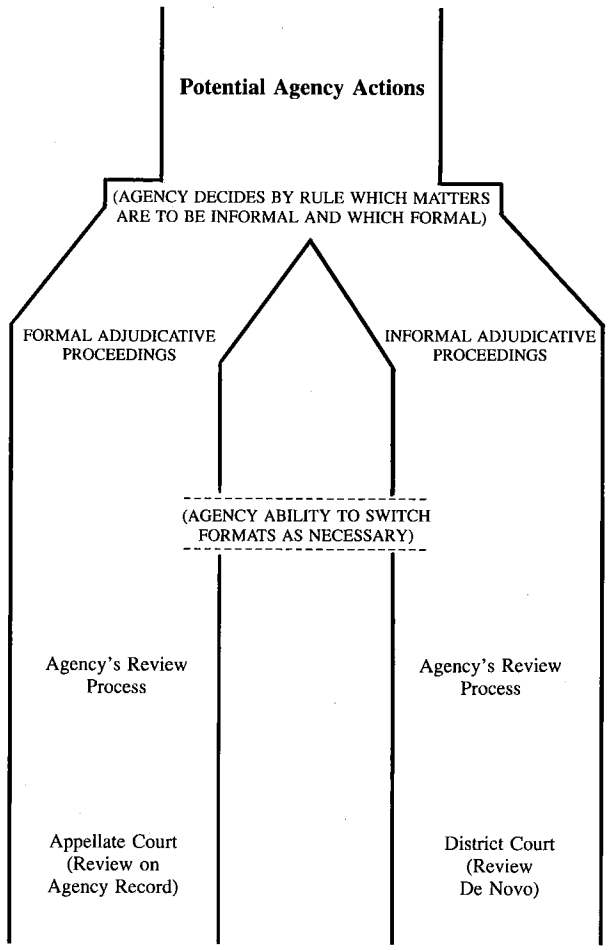
1. How to get agencies to regularly and timely submit copies of decisions to the publisher.
2. How to publish agency decisions—from all agencies or just selected "major" ones.
3. Should all decisions be published, or just those of "significance."
4. How to index the decisions efficiently—topics, digest, etc.
5. How often should decisions be collected and published.
6. How to fund the project—state funding; private subscriptions; self-funding.
7. Who to have publish the service—the Bar? The State? A law school? A private publisher? The publisher of the State Code?
8. How to efficiently conduct and pay for the solicitation of subscriptions.
9. Whether to develop the system as hard copy only or with "on line" access capability.

While the absence of answers to these questions is unsatisfying, the addressing of these questions is a milestone in the development of administrative law in Utah.[38]

An interim step has been taken with the publication by the Utah State Bar Administrative Practice Section of the quarterly *Utah Administrative Law News*. A network of agency "reporters" prepares "squibs" on significant agency or court decisions during the quarter for inclusion in the *News*, and the actual issues are put together by members of the Section assigned for a year to the task. The *News* is sent to each of the over 150 members of the Section without charge, and has an additional 85 paid subscriptions that fully fund the production. While these "squib" descriptions of agency decisions do not provide the fullness of detail that would be appropriate for a cited reference, the *News* goes a long way to even out the playing field between the infrequent agency practitioner and the "expert." It may be that the *News* will be not only the precursor, but perhaps the actual progenitor[39] of a formal reporting system for Utah agency decisions.

CONCLUSION

Utah is a relatively young sibling in the family of States and is not naturally attracted to the trappings of formality in state government. Yet some very interesting experiments in state administrative law are a'blooming there. We look forward to sharing the knowledge gained from our successes as well as our failures.



FOOTNOTES

[1] *See, e.g., Basin Flying Service v. Public Service Commission*, 531 P.2d 1303 (Utah 1975).

[2] *See generally*, Firmage and Mangrum, ZION IN THE COURTS (1988).

[3] In Cooper, STATE ADMINISTRATIVE LAW (1965), Utah was not even mentioned as having any institutional framework of administrative law. Among the hundreds of cases cited by Professor Cooper, only one, *Utah Hotel Co. v. Industrial Commission*, 151 P.2c 467 (1944), was from a Utah court (holding that the doctrine of stare decisis did not apply strictly to administrative agencies).

It is interesting to note that one of the members of Professor Cooper's University of Michigan Law School faculty committee for research who used to support the 1965 Cooper/American Bar Foundation Study of State Administrative Law was Professor Carl S. Hawkins. In 1981, Professor Hawkins, then (as now) with Brigham Young University's J. Reuben Clark School of Law, was named to head the Utah Administrative Law Advisory Committee, and was one of the principal drafters of the UAPA.

[4] National Conference of Commissioners on Uniform State Laws, MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1961) (hereinafter "1961 Model Act").

[5] In the late 1980s, the Utah Legislature has been irritated by the increasing number of substantive rules being promulgated by Utah administrative agencies. Although a paltry number in comparison with some other states—and certainly puny compared to the Code of Federal Regulations—the Utah Administrative Code now comprises four 1-inch-thick paper-bound volumes. Politically powerful constituencies have persuaded key members of the Legislature that agencies are promulgating rules that go beyond the Legislature's desires for regulation in a variety of areas. The result has been the creation of an Administrative Rules Oversight Committee in the Utah Legislature which currently has certain review powers with regard to approval of agency rules. Both in the 1988 and 1989 general sessions of the Utah Legislature, legislation was introduced that would automatically sunset every rule of every Utah administrative agency annually, subject to affirmative reauthorization by act of the Legislature. A political battle is clearly set between the Governor, who maintains that executive agencies have an inherent right to promulgate rules to interpret and clarify what will be done to enforce legislative mandates, and the Legislature, who believes that the agencies have no rulemaking authority that is not delegated by explicit legislative act. It remains to be seen whether the Legislature can weather the Governor's certain appeal to the courts to determine whether executive agency rulemaking is a delegated legislative or inherent executive function in Utah.

Thus, although the Utah Legislature is not overly educated or enthusiastic about the technical aspects of administrative law, it is intensely interested in the general substantive nature of agency rules and is locked in a power struggle with the executive branch over the very ability of agencies to promulgate rules.

[6] National Conference of Commissioners on Uniform State Laws, MODEL STATE ADMINISTRATIVE PROCEDURE ACT (1981) (hereinafter "1981 Model Act").

[7] Although, in 1965, Professor Cooper extolled the 1961 Model Act provisions on judicial review, which at least implicitly encouraged competing avenues and inconsistent methods of judicial review, he criticized the development of judicial review statutes in most states exactly as had happened in Utah:

...The statutory appeals procedures are ordinarily created separately, a method of appeal being enacted with the creation of each new agency. The resulting patchwork is characterized by a lack of uniform pattern comparable to that of the old-fashioned crazy-quilt.

Cooper, *supra*, note 3, at 603-604.

[8] *Denver & Rio Grande Western R.R. Co. v. Utah State Tax Commission*, Utah Third District Court, C-86-3602 (Judge Hanson, December 2, 1987).

[9] Professor Cooper expressed a conflicting view in 1965, noting that it was a significant feature of state administrative procedure acts then extant that appeals from agency determinations were taken to trial courts of general jurisdiction. He noted that this followed the wisdom of the federal "Hoover Commission" which had reported in 1955 that federal district courts should have jurisdiction to review administrative determinations largely because "the judges of these courts are accustomed to deciding a wide variety of cases and controversies, and there is no legal problem beyond their professional competence." *See* Commission on Organization of Executive Branch of Government, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE, 241 (1955). Professor Cooper added his own validation when he stated that:

...[Provisions for review at the trial court level]...afford the litigant who is aggrieved by an agency ruling a convenient, speedy and economical method of obtaining judicial review. Further, experience has demonstrated that review at the trial court level is more efficient than is review by an appellate court.

Trial judges can take more time than can appellate courts to explore carefully, with the assistance of counsel, the complexities of the administrative record and unravel the skeins of proof (which have an unfortunate habit, in administrative proceedings, of becoming badly tangled). If a day or two is required to get at the heart of the case, this much time can be taken in a trial court (whereas in appellate courts, an hour or so is ordinarily all the time that is available).

What is more, the comparatively informal nature of trial court proceedings—permitting a judge thoroughly to master the case by asking searching questions of counsel and by taking proofs as to alleged irregularities in agency procedure not shown on the record—seems best calculated to assure the attainment of full and equal justice.

Cooper, *supra*, note 3, at 611-613.

[10] *See e.g., Bennion v. Utah State Bd. of Oil, Gas & Mining*, 675 P.2d 1135 (Utah 1983).

[11] *See* Sect. 63-46b-5 and 63-46b-20, U.C.A.

[12] *See* Sect. 63-46b-6 through 63-46b-10, U.C.A.; 1981 Model Act at Sect. 4-201 through 4-215.

[13] *See* Sect. 63-46b-5, U.C.A.; 1981 Model Act at Sect. 4-401 through 4-403, Sect. 4-502 through 4-506.

[14] *See* Sect. 63-46b-20, U.C.A.; 1981 Model Act at Sect. 4-501.

[15] *See* Sect. 63-46b-20, U.C.A.; Sect. 63-46b-4, U.C.A. (which provides:

(1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted informally according to the procedures set forth in rules enacted under the authority of this chapter if:

(a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter;

(b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures;

(c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations; and

(d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding.

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

(3) Any time before the final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding, if:

(a) conversion of the proceeding is in the public interest; and

(b) conversion of the proceeding does not unfairly prejudice the rights of any party.)

[16] 1961 Model Act at Sect. 15.

Sect. 15(f) of the 1961 Model Act provided for a review by the trial court "without a jury and shall be confined to the record."

However, the problem with Sect. 15 of the 1961 Model Act was that, while it provided a mechanism for relatively orderly judicial review of administrative decisions by a trial court without a jury and based on the record, it also allowed significant additional taking of testimony that may or may not have been adduced at the administrative hearing, but more importantly, was not intended to be exclusive but rather deferred to the utilization of judicial review "available under other means of review, redress, relief, or trail *de novo* provided by law." 1961 Model Act at Sect. 15(a).

[17] 1981 Model Act at Sect. 5-104 [Alternative B].

[18] 1981 Model Act at page 143 (Comments). Significantly, the 1981 Model Act appears to adopt the philosophy that an administrative procedure act should provide the exclusive road to judicial review of agency determinations, while the 1961 Model Act implicitly encouraged other statutes to provide specialized judicial review procedures that were not consistent with the administrative procedure act provisions. Thus, while the 1961 Model Act had recognized implicitly the propriety in certain circumstances of *de novo* review, the 1981 Model Act contemplates an entirely "on the record" appellate-type review whether in a trial court of general jurisdiction or a state appellate court.

[19] Sect. 63-46b-15, U.C.A. provides:

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency to be reviewed, together with a duplicate copy, summary or brief description of the agency action.

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seek-

ing judicial review is entitled to obtain judicial review;
(vii) a request for relief, specifying the type and extent of relief requested;
(viii) a statement of the reasons why the petitioner is entitled to relief.
(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.
(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.
(b) The Utah Rules of Evidence apply in judicial proceedings under this section.

[20] Sect. 63-46b-16, U.C.A. provides:
(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.
(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.
(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.
(3) The contents, transmittal and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure [Rules of the Utah Supreme Court], except that:
(a) all parties to the review proceedings may stipulate to shorten, summarize or organize the record;
(b) the appellate court may tax the cost of preparing transcripts and copies for the record:
(i) against a party who unreasonably refuses to stipulate to shorten, summarize or organize the record; or
(ii) according to any other provision of law.
(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
(b) the agency has acted beyond the jurisdiction conferred by any statute;
(c) the agency has not decided all of the issues requiring resolution;
(d) the agency has erroneously interpreted or applied the law;
(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
(h) the agency action is:
(i) an abuse of the discretion delegated to the agency by statute;
(ii) contrary to a rule of the agency;
(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
(iv) otherwise arbitrary or capricious.

HB 100, adopted in 1986, restructured the Utah appellate court system by, among other things, establishing an intermediate appellate court (the Court of Appeals), and designating the first line appellate review of most agencies to the Court of Appeals. Appeals from five agencies (the Public Service Commission, the Tax Commission, the State Engineer, the Board of Oil, Gas and Mining, and the State Land Board) would still go directly to the Supreme Court. Under UAPA, informal adjudicative proceedings of the five "Supreme Court agencies" are still reviewed *de novo* by an appropriate trial court, but the appeal then goes directly to the Supreme Court, while other agencies' *de novo* reviews are appealed from trial courts to the Court of Appeals. Similarly, reviews of formal adjudicative proceedings by the five "Supreme Court agencies" go directly to the Supreme Court, while other agencies are appealed directly to the Court of Appeals.

[21] Sect. 63-46b-1(1), U.C.A.

[22] Sect. 63-46b-1(2) provides:

The provisions of this chapter do not govern:
(a) the procedures for promulgation of agency rules, or the judicial review of those procedures or rules;
(b) the issuance of any notice of a deficiency in the payment of a tax, the decision to waive penalties or interest on taxes, the imposition of, and penalties or interest on, taxes, or the issuance of any tax assessment, except that the provisions of this chapter govern any agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of those actions;
(c) state agency actions relating to extradition, to the granting of pardons or parole, commutations or terminations of sentences, or to the rescission, termination or revocation of parole or probation, to the discipline of, resolution of grievances of, supervision of, confinement of, or the treatment of, inmates or residents of any correctional facility or mental institution, or persons on probation or parole, or judicial review of those actions;
(d) state agency actions to evaluate, discipline, employ, transfer, reassign or promote students or teachers in any school or educational institution, or judicial review of those actions;
(e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions;
(f) the issuance of any citation or assessment under Chapter 9, Title 35, the Occupational Safety and Health Act, except that the provisions of this chapter govern any agency action commenced by the employer or other

person authorized by law to contest the validity or correctness of such a citation or assessment;

(g) state agency actions relating to management of state funds and contracts for the purchase or sale of products, real property, supplies, goods or services by or for the state, or by or for an agency of the state, except as provided in such contracts, or judicial review of those actions;

(h) state agency actions under Article 3, Chapter 1, Title 7, and Chapters 2, 8a and 19, Title 7, and Chapter 30, Title 63, or judicial review of those actions;

(i) the initial determination of any person's eligibility for unemployment benefits, the initial determination of any person's eligibility for benefits under Chapters 1 and 2, Title 35, or the initial determination of a person's unemployment tax liability;

(j) state agency actions relating to the distribution or award of monetary grants to or between governmental units, or for research, development or the arts, or judicial review of those actions;

(k) the issuance of any notice of violation or order under Chapters 8, 11, 12, 13 or 14, Title 26, except that the provisions of this Chapter govern any agency action commenced by any person authorized by law to contest the validity or correctness of any such notice or order;

(l) state agency actions, to the extent required by federal statute or regulation to be conducted according to federal procedures;

(m) the initial determination of any person's eligibility for government or public assistance benefits, or the right of any person to obtain documents or information from an agency; and

(n) state agency actions relating to hunting or fishing licenses, or licenses for use of state recreational facilities.

[23] The decision was made by the drafters of UAPA that no agency would be exempted from the Act; but if good cause could be shown, specified classes or portions of proceedings could be wholly or partially exempted.

[24] Sect. 63-46b-22, U.C.A. provides:

(1) The procedures for agency action, agency review and judicial review contained in this Chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on and after January 1, 1988.

(2) Statutes and rules governing agency action, agency review and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988.

[25] *See* Sect. 63-46b-1(1), quoted in the text at note 21.

[26] *See* Sect. 63-46b-1(2)(n), U.C.A. (quoted in note 22, *supra*).

[27] *See* Appendix A, at Sect. 63-46b-1.

[28] The preparation of this presentation caused the author to concentrate for the first time on the judicial review of state agency actions relating to hunting or fishing licenses or for the use of state recreational facilities. While it is clear that judicial review of such agency actions is committed to UAPA provisions, unless the appropriate state agency adopts a rule under Sect. 63-46b-4 designating these proceedings as "informal adjudicative proceedings," the provisions of Sect. 63-46b-4 will trigger appellate judicial review of these actions as formal adjudicative proceedings under Sect. 63-46b-16. This, of course, is an unintended and inappropriate result. Sect. 63-46b-4 (designation of adjudicative proceedings as formal or informal) or Sect. 63-46b-15 (judicial review—informal adjudicative proceedings) should probably be amended to either provide that state agency actions covered by Sect. 63-46b-2(2)(n) will be deemed in all cases to be informal adjudicative proceedings, or to designate such agency actions for *de novo* review in the trial court notwithstanding the absence of a rule designating such as "informal adjudicative proceedings."

[29] The Utah Rules of Civil Procedure are substantially identical to the Federal Rules of Civil Procedure at the same numbers.

[30] The absence from UAPA of any statutory requirements with regard to the collection, indexing and/or dissemination of orders resulting from adjudicative proceedings is partially purposeful and partially inadvertent. The drafters adopted a guiding policy that they would not impose substantive changes on agencies, nor would the UAPA be designed to increase costs to state agencies. Rather, the UAPA was to be drafted in a way that would make changes that were solely procedural in nature and which would save money. To the extent that a system for collecting, indexing and/or publishing administrative agency decisions would be perceived as imposing a substantive responsibility

upon state agencies with a concommitant cost, such was eschewed by the drafters of the UAPA. The author cannot recall any explicit discussion of the public availability of agency decisions among the UAPA drafting task force.

[31] 1981 Model Act at Sect. 5-116(c)(8)(iii).

[32] Sect. 63-46b-16(4)(h)(iii), U.C.A.

[33] The oldest decision-publication model, of course, is the publication of federal court decisions. Again, while the government provided the impetus for this publication initially, over time private publishers found profitable markets among the growing number of lawyers and law libraries for market-priced reporters of federal court decisions. Today, federal courts at every level have their cases reported and readily available to researchers and brief writers through private sources like West Publishing Company. We know that, other than the Supreme Court, not every decision of either the Courts of Appeal or the District Courts is published. Yet even though less than all federal court decisions are published, we still have a virtual pantheon of precedent from the lower federal benches.

State courts are even less helpful. While most decisions of the highest courts of each of the states have been reported for some time (again first by the states and later by the private publishers), lower state court decisions are almost never published in any form, and in the absence of published references to colleagues' opinions, one trial judge is not overly eager to follow another judge's alleged decision, particularly in the absence of well set out factual recitals which are often absent from state trial court memorandum orders.

[34] *See, e.g.,* U.S. Government Printing Office, *Nuclear Regulatory Commission Issuances* (1973-present). The Administrative Procedure Act, 5 U.S.C. Sect. 552(a)(2), requires that each agency

"...in accordance with its published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and descending opinions, as well as orders, made in the adjudication of cases...

...unless the materials are promptly published and copies offered for sale...Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted or promulgated after July 4, 1967, and required by this paragraph to be made available or published.

Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impractical, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if:

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

A much less effective provision than 5 U.S.C. Sect. 552(a)(2) was included in Sect. 2 of the original 1946 Model State Administrative Procedure Act. Substantially the same concept as in the Federal APA was included in Sect. 2(a)(4) of the 1961 Model Act, which required an agency to make available for public inspection all final orders, decisions and opinions. Sect. 2(b) of the 1961 Model Act provided that no agency order or decision would be valid or effective against any person or used by the agency for any purpose unless it had been made available for public inspection.

Sect. 2-102 of the 1981 Model Act provides not only for public inspection, but copying; and requires the agency to index orders and decisions by name and subject. Further, Sect. 2-102 precludes an agency from relying on an order or decision as precedent if it has not been made available as required, except that a person with actual and timely knowledge of the order is not subject to this protection. *See also Bonfield,* "The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process," 60 IOWA L. REV. 731, 791-804 (1975) for a discussion of the Iowa provisions that served as a model for Sect. 2-102.

[35] *See, e.g.,* U.S. Government Printing Office, FEDERAL POWER COMMISSION REPORTS (1931-1977); Federal Energy Regulatory Commission, FERC REPORTS (1977-1980); CCH, FEDERAL ENERGY REGULATORY COMMISSION (1980 to present).

[36] *See, e.g.,* United States Government Printing Office, DECISIONS AND ORDERS OF THE NATIONAL LABOR RELATIONS BOARD (1935-present); CCH, NLRB DECISIONS (1960-present).

[37] The text of 5 USC Sect. 552(a)(2) is set out within note 34, *supra.*

[38] In many ways, these questions are similar to those facing the Center On State Administrative Law (COSAL) Task Force of the American Bar Association Section on Administrative Law and Regulatory Practices in attempting to put together a central clearinghouse for state administrative law materials and expertise. Perhaps the analysis of the Utah Task Force will be of help to the COSAL group, and certainly vice versa.

[39] Another possible progenitor is the monthly Utah Administrative Bulletin, currently published by the Utah Division of Administrative Rules and functioning essentially like a mini-*Federal Register* (limited to rules, proposed rules, executive orders, etc.).

NOTICE TO THE BAR AND THE PUBLIC

February 14, 1989
Suspension of the Registry Fee Assessment for the Administration of Interest-Bearing Accounts

Effective February 8, 1989, the Director of the Administrative Office of the United States Courts suspended imposition of the fee by the United States Courts on interest-bearing funds held by the courts in their registry accounts. He has also directed that any fees collected to date by the courts should be refunded to the paying parties.

The Director noted that it remains the position of the United States Courts that this is a justifiable and reasonable fee, but that the issue is in need of further analysis and review. At such time that the fee requirement is to be reinstated, notice of intent to do so will be published in the *Federal Register* and interested parties will have 30 days' notice prior to its effective date.

Markus B. Zimmer
Clerk of Court

Bar Commission Highlights

The Board of Bar Commissioners met at the Utah Law and Justice Center for its regular monthly meeting on January 27, 1989. During the daylong meeting, Bar Commissioners took the following actions:

1. Met with new Attorney General R. Paul VanDam and Assistant Attorney Joseph Tesch to discuss renewed and closer ties between the Bar and the Office of the Attorney General.
2. Approved the minutes of the December 16 meeting.
3. Received the report of President Kasting and the Executive Committee on various matters, including recent proceedings involving the Bar before the Utah Supreme Court, the policy questions inherent in a Bar response to unwarranted criticism of judges in the public media, and developing activities of the Bar/Law School Relations Committee.
4. Approved recommendations for Bar awards to be given at the Mid-Year Meeting in St. George.
5. Received report of the Executive Director, noting, in particular, the presentations to be made by Utah representatives at the upcoming ABA meetings in Denver.
6. Received a report of the Legislative Affairs Committee, acting to specifically approve the committee's recommendation for Bar support of the proposed judicial salary increases, acting to endorse HB216 regarding the limitation of liability for appointed counsel in indigent defense cases, voting to support the Judicial Council's position that development of child support guidelines is a legislative function and otherwise continuing approval for the previously developed child support guidelines, and received information of other bills being tracked by the Judicial Council and the Legislative Affairs Committee.
7. Received the monthly discipline report, acting on private and public disciplinary matters otherwise reported in the *Bar Journal* and approving for publication Ethics Opinion 86 regarding restrictions on letterhead.
8. Received the monthly report of the Admissions Department, approving applicants for the February student bar examination and the February attorney bar examination, denying a petition for applications to take the attorney bar examination on the basis that the applicant had not graduated from an ABA-accredited law school, and deferring action on certain applications for whom the Character and Fitness Committee report was not yet completed. Appointed Curtis Nesset to replace Earl Spafford on the Bar Examiner Committee.
9. Received status report on pending litigation.
10. Received monthly Budget and Finance Committee report and appointed a committee for planning future computer needs of the Bar.
11. Received a report by the Honorable J. Thomas Greene, chair of the Post Law School Practical Training Committee, on the three-month pilot project, which included a full written report (which is available through the Bar Office) and a full discussion of the feasibility of further implementation of the program. Judge Greene also presented a report on matters to be considered at the ABA House of Delegates meeting in Denver. The Bar Commission approved a resolution of instruction for Utah's ABA delegates regarding the regulation of the practice of law and reaffirming the exclusive role of the judicial branch therein.
12. Received a status report on the Mid-Year Meeting from Associate Director Bassett, noting large numbers of preliminary hotel bookings which indicate a large registration for the meeting.
13. Received Young Lawyers Section report from Jerry Fenn, President, which reviewed current status of all pending activities of the section and including the approval of an ABA grant to the section for its Law for the Clergy Program.
14. Received a report of the Judicial Council liaison, Past President Reed Martineau, as well as Commissioner Dryer, who serves as liaison to the Judicial Oversight Committee. Commissioner Dryer presented a draft of a new judicial poll under consideration for use by the Judicial Council. Bar Commission approved a motion to commend the committee for its work in the preparation of the draft with a request that as much information as possible be made public after each poll is taken.
15. Approved a resolution to establish a policy that Rule III of the Rules of Admission be interpreted to require four years of active practice within the five years preceding an application to the Bar for attorney applicants.
16. Received a status report on Mandatory Continuing Legal Education, authorizing an invitation letter for applications for the MCLE Board positions to be appointed by the Utah Supreme Court, and noting pending meetings with interested law students at the in-state law schools regarding the pending mandatory Bridge the Gap petition.
17. Reviewed information concerning further development of the unfinished space within the Utah Law and Justice Center for occupancy by Law Related Education staff and others.
18. Reviewed and approved a proposal by the Advertising Committee to authorize the committee to work in conjunction with Bar Counsel in reviewing and advising members of the Bar on matters related to lawyer advertising, noting further the need for a greater awareness among the membership of the changes in Rule 7.3 regarding solicitation.

A full copy of the minutes of this and other meetings of the Bar Commission is on file at the Utah State Bar and is available for inspection by members of the Utah State Bar and the public.

Bob Miller Memorial Law Day Run Scheduled

The 1989 Bob Miller Memorial Law Day Run is scheduled to commence at 9:00 a.m. Saturday, April 29, 1989. As always, the race will begin at the Pioneer Trail State Park "This is the Place" monument. The 5 kilometer race will conclude at the University of Utah Law School parking lot. All law firms are encouraged to field teams and to enjoy the camaraderie of the race. Information concerning the race can be obtained from Gary L. Johnson at Richards, Brandt, Miller & Nelson, 531-1777.

Claim of the Month

ALLEGED ERROR OR OMISSION

Plaintiff alleges failure to institute a workers' compensation claim within the statutory time period.

RESUME OF CLAIM

The claimant was injured in an automobile accident which occurred while he was acting within the scope of his employment. The claimant's employer referred his private family attorney to the claimant, his employee, to initiate a claim against the other driver. The Insured referred the case to another attorney to file suit since a settlement could not be reached prior thereto. The claimant was not happy with the representation and went to a third attorney who filed suit against the Insured for failure to initiate a workmen's compensation claim against the employer within the statutory time limitation.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

The Insured should have realized when the case was referred by his longtime client, the employer, that a potential conflict of interest might arise between the employer and employee which would compromise the rights of his new client, the employee.

Although the Insured was retained to initiate a suit against the other driver only, he should have known that the employee may have a right to sue his employer for workmen's compensation. To avoid this potential conflict, the Insured could have either disclosed to the employee his right to sue for workmen's compensation and assert he would only initiate suit against the other driver or, better yet, he should have declined the representation altogether.

DISCIPLINE CORNER

ADMONITION

1. An attorney was admonished for violating Rule 1.3 by failing to adequately communicate with his client regarding a procedural problem involving the filing of an objection to the recommendations of the Domestic Relations Commissioner and the subsequent dismissal of an appeal.

PRIVATE REPRIMAND

1. For violating DR 1-102(A)(6) by engaging in conduct adversely reflecting on the attorney's fitness to practice law, an attorney was privately reprimanded for repeating rumors regarding the alleged illicit activity of a judge and a clerk; the sanction was mitigated by the attorney's acknowledgment of the misconduct and apology to the people involved and the fact that it was an isolated incident.

Law Day

The Young Lawyers Section of the Utah State Bar is hosting its Fifth Annual Law Day activity which will take place on April 22, 28 and 29, 1989. Law Day provides the general public an opportunity to access lawyers for advice and counsel. On those days, lawyers will be present at shopping malls throughout the state, working in booths, screening the legal problems of interested individuals, suggesting that they obtain legal counsel if the problem warrants, offering a fun legal quiz to test the knowledge of participants, and providing legal brochures and handouts with general information about the law and legal services in Utah. The Young Lawyers Section will also provide buttons and activities for kids such as coloring projects, etc.

The Young Lawyers Section needs volunteers to occupy the booths at the malls. Two attorneys are needed at each booth to work for two-hour intervals. The booths will be open from 10:00 a.m. to 5:00 p.m. The legal questions will be fairly simple. You will be provided with information as to the type of advice you are not allowed to give. Of course, you are not to solicit clients through this program. We would appreciate your willingness to help in this community effort.

The following individuals are organizing the programs in your given area. You may contact them by telephone to sign up for a given time and to obtain general information.

LOGAN

April 29, C.V. Mall, Greg Skabeland, 752-9437.

OGDEN

April 22, Ogden Mall, Ted Godfrey, Farr, Kaufman, 205 26th Street, #34, Ogden, Utah 84401, 394-5526.

PROVO

April 29, University Mall, Waine Riches, Legal Services, 455 N. University, #100, Provo, Utah 84601, 374-6766, 1-800-662-1563.

SALT LAKE CITY

April 28, ZCMI Mall, Paul Newman, Ray, Quinney, 79 S. Main, #400, Salt Lake City, Utah 84111, 532-1500.

SALT LAKE CITY

April 29, Valley Fair, Kevin Anderson, Allen, Nelson, 215 S. State, #700, Salt Lake City, Utah 84111, 531-8400.

ST. GEORGE

April 29, Phoenix Plaza, Mike Shaw, Jones, Waldo, 170 S. Main, #1500, St. George, Utah 84770, 628-1627.

If you have any further questions, please contact Richard Hamp, Chairperson for Law Day, at Salt Lake City Prosecutors, 535-7767, or Larry R. Laycock, Public Relations Chairman, at Snow, Christensen & Martineau, 521-9000.

Law Day Luncheon to be Held May 1, 1989

This year's theme for Law Day is "Access to the Law." The Law Day Luncheon culminates program activities of the Committee on Law Related Education and Law Day including the statewide mock trial competition, Judge for a Day Program, Bob Miller Memorial Law Day Run and the Law Day Fair and Art Show. Students and lawyers who have made significant contributions to the Law Related Education program will be recognized. Awards will be given to junior and senior high schools with outstanding law-related education programs. A brief presentation will be made by student finalists in the mock trial competition and the Young Lawyers Section will present the Liberty Bell Award to an outstanding non-lawyer who has contributed to legal education in Utah.

The luncheon will be held at noon on Monday, May 1, 1989, at the Utah Law and Justice Center in Salt Lake City, Utah. Please make reservations with Paige Holtry, 531-9077, prior to Friday, April 28, 1989.

The People's Law Program

The Young Lawyers Section of the Utah State Bar will conduct a six-week course to provide basic information about the legal system. This course is designed to help potential consumers of legal services make more informed decisions when faced with common legal problems. While not a substitute for obtaining legal representation, this course will give background to better understand the legal process should an attorney be needed. The course will be held at Bryant Intermediate School, 40 S. 800 E., Salt Lake City, on Tuesday evenings from 7:00 p.m. until 8:30 p.m. from April 11, 1989, until May 16, 1989. There will be a minimal charge of $10 which will cover materials. There will be a question and answer session following each presentation. The topics and dates of presentation are:

April 11, 1989 THE JUDICIAL SYSTEM: FINDING YOUR WAY THROUGH THE MAZE

Topics: Overview of the legal system; federal and state courts; how and where to file a lawsuit; small claims court.

April 18, 1989 CONSUMER RIGHTS: WHAT ABOUT THE FINE PRINT?

Topics: Consumer credit; door-to-door and telephone solicitations; lemon laws; what to do if you've been defrauded.

April 25, 1989 WILLS AND ESTATES: YOU CAN'T TAKE IT WITH YOU OR CAN YOU?

Topics: Who needs a will; planning for tax purposes; gifts; trusts; probate.

May 2, 1989 LEGAL ASPECTS OF STARTING A BUSINESS: YOU DON'T HAVE TO HOLD YOUR NOSE AND JUMP

Topics: Forms of organization—sole proprietorship, partnership, corporation; taxes; liabilities; governmental regulations.

May 9, 1989 LANDLORD/TENANT LAW: THE COLD WAR IS ALIVE AND WELL IN THE '80s

Topics: Landlord rights; tenant rights; eviction, duty to repair; security deposits; insurance.

May 16, 1989 DIVORCE AND CHILD CUSTODY: HOLY WEDLOCK OR HOLY DEADLOCK?

Topics: Prenuptial agreements; contested and uncontested divorces; alimony; child support guidelines.

State Bar Endorses Disability Insurance Program

The Bar Commission endorsed a disability insurance program in its meeting of February 17, 1989, upon the recommendation of the Lawyer Benefits Committee. The official announcement of the program was made at the Mid-Year meeting March 17 in St. George. This brings to three the number of Bar endorsed insurance programs, to include health and accident insurance, professional liability insurance and now disability insurance. The Lawyer Benefits Committee compared benefits and rates of major disability carriers in arriving at its recommendation to endorse Standard Insurance Company.

The program will be available to all members of the Utah State Bar practicing in Utah, through Scott T. Buie, CLU, and W. Reid Hansen, CLU, of Standard's Salt Lake City office where all policies and claims will be processed. Standard Insurance Company has approved a 10 percent discount off its rates, which were found by the Lawyer Benefits Committee to be among the lowest available for high-quality disability insurance. This discount will apply not only to new policies but also to existing Standard Insurance Company policies effective April 1, 1989.

The Lawyer Benefits Committee has concluded that disability insurance is an important benefit for lawyers and that efforts should be made by the Utah State Bar to make such a benefit more readily available at favorable premiums.

Materials on this new program will be mailed to members of the Bar in April. Anyone wishing to obtain advance information should contact Mr. Hansen or Mr. Buie at 525 E. 300 S., Salt Lake City, UT 84102, or by telephone at 363-8100.

Christopher C. Fuller and Elizabeth Whitsett, Co-Chairs of the Law Day Committee.

ABA Announces Public Service Award Winners

The American Bar Association recently announced winners in the 1988 Law Day USA public award competition. The Utah State Bar is a winner of this award for the third consecutive year and is the only state Bar Association to be so recognized. Law Day USA is celebrated each May 1 as an occasion to reflect on our legal heritage, our responsibilities as citizens and the principles of our democratic government. The ABA conducts the award program to recognize outstanding public service efforts performed by entities sponsoring Law Day USA programs.

Utah Law Day 1988 included among its activities statewide mock trial competitions at junior and senior high school levels, meet-a-lawyer fairs in Salt Lake City and Ogden, a law school for non-lawyers, numerous public service announcements and radio talk show programs, the Sixth Annual Bob Miller Memorial Law Day Run, an awards program recognizing the Utah Law Related Education High School of the year, the Mentor Program, pairing law firms and law-related education classes and the Law Day luncheon, which featured a panel discussion moderated by Rod Decker concerning freedom of the press and public school publications.

This year, those activities will be continued with the Utah law-related school of the year award extended to junior high schools, expansion of the meet-a-lawyer fair to Logan and the addition of a lawyer art show to be held in conjunction with the fair in Salt Lake City.

PHOTO BY PETER ROMNEY

Rental Dispute Mediation
An IOLTA Success Story

The Rental Dispute Mediation (RDM) program assists low-income renters and owners in Salt Lake County who need help to settle a dispute, advice and information, or legal counseling concerning their respective rights and responsibilities. Utah Legal Services has sponsored and operated the RDM program in its Salt Lake City office since 1980. For the last three years, the program has been funded in part by an award from the Utah Bar Foundation's Interest on Lawyers Trust Account (IOLTA) program.

GOALS AND OBJECTIVES

This program attempts to resolve owner/renter disputes without litigation. The Rental Dispute Mediation service strives to inform both owners and renters of their responsibilities as well as their rights. The methods used are: direct mediation between the landlord and the renter; providing information and counseling by telephone; educational presentations to groups; distributing the RENTERS' HANDBOOK; and providing referrals

IOLTA funds are used to pay a portion of the salary of Gloria Larrea, a trained mediator who is fluent in Spanish as well as English, and Denise Davidson, a certified paralegal and LPN. They assist more than 400 persons a year by mediating, writing letters and giving advice on landlord tenant matters as well as answering many of the almost 4,000 requests for information from landlords and tenants.

to other agencies and to small claims court. The program strives to educate and counsel between 3,000 to 4,000 landlords and renters each year, and to provide approximately 400 low-income households with direct service, either mediation or *pro se* assistance.

Thanks in part to IOLTA funding, since 1986 the program has met these objectives and has been able to successfully mediate more than 100 cases each year. Equally important, an average of over 4,000 calls a year were referred to the mediation unit by the ULS switchboard, making assistance with tenant problems the most requested service in our Salt Lake City office.

Our many contacts with members of the public who seek assistance from the RDM service have demonstrated that both tenants and landlords are uncertain about their rights and responsibilities and that a few minutes' discussion with RDM staff, and a copy of the RENTERS' HANDBOOK, is an appreciated and valuable service.

IOLTA FUNDING AT A CRITICAL TIME

RDM was begun in 1986 with a combination of Salt Lake County social services discretionary funds (Community Development Block Grant—CDBG and Title XX Social Services Block Grant—SSBG) and Legal Services Corporation funds. Since 1981 CDBG funds have been drastically cut by Congress and are no longer received by RDM; SSBG funding has been reduced, and ULS suffered a 25 percent reduction in LSC funding. Further, LSC funding requires funding direct legal representation programs as a priority over alternative dispute resolution.

RDM received a grant from the Utah Bar Foundation when the IOLTA program began in 1985. Since 1985, the Utah Bar Foundation has awarded over $80,000 in grants to Utah Legal Services to provide legal aid to the disadvantaged. The Utah Bar Foundation also supports programs providing legal aid to the disadvantaged including Legal Aid Society and Legal Center for the Handicapped among others. The support from the Bar Foundation maintained the RDM service in 1985 and continuing support with IOLTA funds has kept the program in existence despite the loss of other funding sources. The Bar Foundation support for the RDM program is an example of local resources being used to provide services to low-income persons who are often less than one paycheck from homelessness. However, RDM is receiving more requests for assistance each year. Without additional funding from sources such as IOLTA, RDM will be forced to curtail its services next year. ULS hopes that its pending grant application to United Way will forestall any reduction in the RDM program.

WHO REALLY BENEFITS

A good estimate is that there is insufficient housing for more than 50,000 very low-income people in Salt Lake County. The 1980 census indicated that low-income persons spend 45 percent of their total income for rent. In this climate of fierce competition for an inadequate housing supply and lack of statutory protections for tenants, landlords have a powerful position. Given the limited supply of low-income housing, the recent reductions in funding to build and subsidize such housing, and tenants' low incomes, the clients of RDM are in crisis—one step from homelessness—when they utilize our services. Cost and availability may prohibit these clients from securing housing if their current situation cannot be maintained.

RDM deals with owner/renter disputes including evictions, maintenance/repairs/damages, lock-outs, confiscation of renters' personal property, landlord entry at will and non-return of refundable deposits. Mediation can be successful in resolving these problems because there is no direct confrontation between the parties. Both parties may cooperate and compromise when they are talking to a mediator. Landlords perceive that negotiations can save them time, money and the hassle of going to court. Tenants feel that there is a manageable resolution in sight, that they have a chance to stay on their feet.

View from the *Rural* Bench

By Judge David L. Mower

Greetings from the "hinterlands!" Judge Hutchings' asking me to write this article is a recognition that we really are out here and that the borders of the state really do extend south beyond Santaquin (or north beyond Layton, or east beyond Heber City, etc.). I've lived in rural Utah now for about 15 years. It's been interesting to discover what I now believe to be a general feeling in our population—a feeling of being powerless and neglected, of being on the outside looking in. People in small communities feel it toward those who live in the county seat. People in rural counties feel it toward those who live in the state capital. People in rural states feel it toward those who live in the seat of national government. I wonder if we'll all feel it when we discover that we live on a small rural planet?

Whether the feelings are justified or not is the subject of another article to be written some other time. It is true, however, that living in rural Utah is different, and so is the practice of law. A Utah legislator once said that if one were to place a silver dollar on its edge on the map of Utah, it would roll to Salt Lake City. Even without recognizing that concept, we have all learned how to deal with life in "the City," whether it be in traffic, in shopping or in the courts.

Someday, however, and perhaps sooner than you think, a legal matter will come to you that requires the filing of an action in Wayne County or San Juan County or Uintah County. You will probably be faced with such questions as, "Where is Wayne County? What is the county seat?" Unless you've done it before, you'll find that rural practice is different and potentially frustating. The purpose of this article is to give you some tips on how to make the experience a little less painful.

While life in rural Utah is different, it is not a bad life. In fact, I would rather be living and working where I am than anywhere else. The differences are based mainly on geography and population (or perhaps I should say the lack of population). I hope these tips will be helpful to you.

TIP NO. 1: I will repeat: we really are out here. I have found that rural counties are full of helpful, dedicated people who want to be good neighbors. This is especially true of those who staff the various court clerk offices.

Look up the number for the court clerk and *call*. You will find a friend whose store of information will be extremely helpful. In addition to giving special instructions on filing pleadings and obtaining orders, she (or he) can help you with answers to such questions as, "How do I get to Blanding and how long will it take? Where should I eat? Where should I stay?"

Usually the court clerk is an employee of the county clerk's office, but this is not always the case. Check the Bar Directory. If you can't find a contact person, call the Court Administrator's office, 533-6371. If your action is in District Court, ask for Mike Allphin; in Circuit Court, Melinda Monahan; in Justice Court, Louise York.

TIP NO. 2: Make travel plans. One of the overriding facts of rural life is that one must travel at least 50 miles to do anything. Traveling, of course, takes time and plans for court appearances must be made accordingly.

Recognize that others must travel, too. If you need a continuance, be sensitive and ask with as much advance notice as possible.

Have your secretary make a last minute verification that a scheduled hearing will, in fact, go forward. It is especially frustrating

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JUDGE DAVID L. MOWER was appointed to the Circuit Court in 1986 by Governor Norman Bangerter. He received his law degree from the University of Utah in 1974. He has practiced in Panguitch, Garfield County, Utah, and Richfield, Sevier County, Utah. He is currently serving on a Sentencing Task Force Committee and is the chairman of the Circuit Court Board of Judges' Ad Hoc Committee on Forms. He is Judge of the Sixth Circuit Court, a single-judge court whose boundaries are identical with those of both the District and Juvenile Courts (both of which are also single-judge courts).

and embarrassing to drive for five hours, one way, with your client, only to find that the hearing has been cancelled.

TIP NO. 3: Find out where the judge's "home base" is. Most rural judges cover more than two counties. The area that I cover is comprised of six counties. I plan a law and motion calendar that puts me in almost every county at least twice each month. It doesn't always work out that way, and there is one county that I get to only once every other month.

Not knowing this can cause serious problems. For example, let's say you file an eviction action in Wayne County (which happens to be the county that I get to once every other month). Let's assume further that the action is filed under Chapter 36 of Title 78 of the Code which allows the use of a summons providing less than 20 days to answer, but only if the summons is approved in advance by the judge.

You send your complaint to the clerk to be filed, along with a summons to be signed by the judge. Unfortunately, the clerk files both the summons and the complaint, thinking that, as in most cases, a summons with a return of service will be forthcoming.

The judge's home base is in Richfield, Sevier County. He won't see that case file until he travels to Wayne County two months from now (and even then he may not see it unless the clerk brings it to his attention).

You are in your office in Salt Lake, fighting the fires which seem to constitute the daily practice of law. You did not enter this case in your tickler file, thinking that the clerk would surely present the summons to the judge for signature and send it right back to you. Three months later, you get a call from an irate client wondering why the delinquent tenant is still in possession of the premises in Bicknell.

This entire scenario could have been avoided had you known that the judge's home base is in Richfield, and that orders which need immediate attention should be sent to him there.

The statutory parlance for "home base" is "primary location." Check the circuit court enabling legislation (Chapter 4 of Title 78) for a list of primary and secondary locations. If you're not sure, call the Court Administrator's office.

It's also a good idea to send courtesy copies of briefs and memoranda to the judge at the primary location. He'll feel more prepared for a hearing if he's had a chance to read your material before the day of the hearing.

TIP NO. 4: Call local counsel for advice. Check the Bar Directory or call the Bar Office for names and telephone numbers.

TIP NO. 5: Furnish copies of cases. Rural law libraries tend to be rather rudimentary. If you file a brief or memorandum citing cases, especially those outside the Pacific reporter, consider attaching photocopies of the cases themselves. If you're unsure, call the clerk. If she (or he) is unsure, she'll ask the judge and report back to you.

TIP NO. 6: Be committed to the action you file. Remember the old adage, "If you pick up one end of a stick, you've picked up the other end." Don't file an action unless you are prepared to appear if and when required. If you anticipate a large volume of cases, consider associating with local counsel to handle routine appearances.

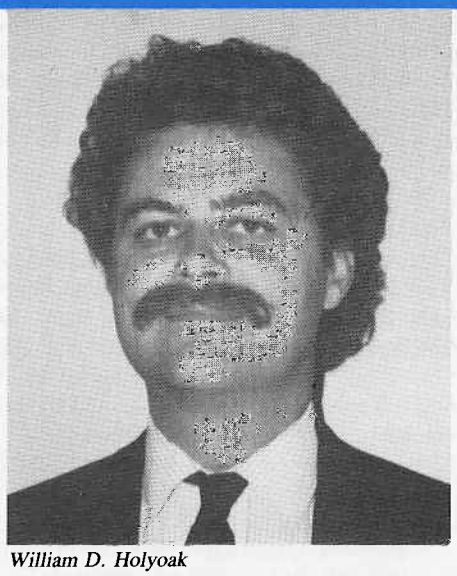
TIP NO. 7: Consider handling routine or default matters by telephone. For example, hearings to set a trial date, to request a continuance or to explain an unopposed motion could easily be handled over the phone with substantial savings in time and money.

TIP NO. 8: Don't be condescending. Never, *Never, Never* tell the judge, "Well, in Salt Lake this is how we do it."

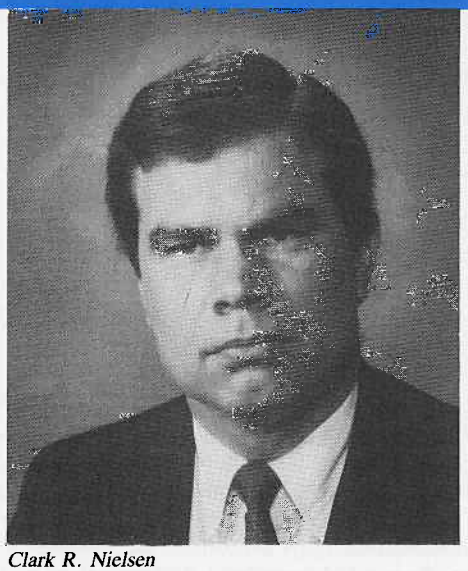
Good luck! We hope to see you someday!

CASE SUMMARIES

By William D. Holyoak and Clark R. Nielsen



William D. Holyoak



Clark R. Nielsen

WHAT CONSTITUTES AN EXECUTING SIGNATURE ON A HOLOGRAPHIC WILL

Robert Erickson died in 1983. His formal will, executed in 1955, was admitted to probate in 1983. The respondent filed a petition for probate of three handwritten 3-by-5-inch cards as Erickson's holographic will. The trial court admitted the cards to probate and Erickson's personal representative appealed.

The Appeals Court concluded that there was insufficient evidence that Erickson "intended his handwritten name on one of the cards to be his signature." The court quoted U.C.A. Sect. 75-2-502, which states that a holographic will is valid "if the signature and the material provisions are in the handwriting of the testator."

The Court pointed out that the signature need not be at the end of a will, as long as a testator intends his name elsewhere in the will to be his signature. The relevant inquiry, wrote the Court, is whether the evidence shows "that the decedent intended his handwritten name to be his signature."

In this case, on one of three unconnected cards appeared the words, "I Robert E. Erickson do hereby state. . ." Nothing on the cards indicated that this name was intended to be a signature or to authenticate the cards as a will, so the trial court's order to admit the cards to probate was vacated.

In Re Estate of Erickson v. Misaka, 98 Utah Adv. Rep. 64 (Ct. App. December 23, 1988).

REQUIREMENTS FOR VERIFICATION BEFORE A NOTARY PUBLIC

When the plaintiff brought an action to foreclose a mechanic's lien he had recorded against subdivision property of a contractor, the beneficiary of a trust deed on the property moved for summary judgment. The beneficiary claimed that the plaintiff's notice of lien was invalid because the plaintiff did not make an oral averment regarding the truthfulness of its contents to the notary public.

In holding for the plaintiff on this issue, the Court discussed prior inconsistent holdings as to the requirements for verification. The strict view of two earlier cases is that proper verification requires that the affiant must verbally swear to the contents of the form being notarized. Later cases hold that no formal ritual of raising the right hand is necessary and that the ritual involved in administering an oath is secondary. To end confusion, the Court adopted as a rule for valid verification that:

> 1. there must be a correct written oath or affirmation, and 2. it must be signed by the affiant in the presence of the notary or other person authorized to take oaths, and 3. the latter must affix a proper jurat.

Justice Zimmerman, in a concurring opinion, pointed out that a remedy for the problems created by unnecessary and conflicting statutory formalities "would be the Legislature's enactment of a law repealing technical swearing requirements in all statutes and substituting the simple requirement that the documents or statements in question be signed or made under penalty of perjury."

Mickelsen v. Craigco, Inc., 99 Utah Adv. Rep. 21 (January 11, 1989).

DISMISSAL OF A WRIT OF CERTIORARI

In a concurrence to the Court's dismissal of a petition for certiorari that had been improvidently granted, Justice Zimmerman clarified the meaning of denial or dismissal of a writ: "The denial of a writ, or the dismissal of a writ previously granted, means only that a majority of the Court has concluded that there are no 'special and important reasons' for considering the case further." Justice Zimmerman pointed out that dismissal is not a decision based on the merits of a case.

Woodward v. Jensen, 98 Utah Adv. Rep. 26 (December 23, 1988).

DEFECTS IN DEED OF TRUST NOT FATAL

American Savings and Loan ("American") made a construction loan to Oakhills Partnership. As security for the note, Oakhills filed a document entitled Deed of Trust showing Oakhills as trustor and American as beneficiary, granting to the trustee the condominium property in trust and with power of sale but without filling in the trustee's name.

When Oakhills defaulted on its loan payments, American sued to collect under the Deed of Trust. Ron Mast sued for payments based on the mechanic's lien statutes. The trial court determined that American's lien had priority over subsequent liens against the condominium property. On appeal, Mast claimed that defects and omissions in the deed of trust were fatal either to the creation of a lien or encumbrance or to the recordability of the instrument.

Regarding the creation of a lien, the Third District Court of Appeals stated that the instrument was not a deed of trust. A deed of trust is "a conveyance by which title to the trust property passes to the trustee," but where the blank naming the trustee has not been filled in, the document is "ineffective as a title-conveying instrument because it does not identifv or name the trustee."

The instrument was operative as a mortgage. A mortgage in Utah does not pass title. Rather, "the mortgagee's interest is a lien on the property to secure payment of a debt. Since the instrument evidenced the existence of a legal debt with a specific amount owing and the intention of the parties to create a mortgage, it was a valid mortgage that gave American a lien against the property as security for American's construction loan.

Regarding the recordability of the instrument, the Court pointed out that the acknowledging statutes in 1983, when the case went to trial, allowed the person acknowledging the execution of an instrument to appear before one of several officers, including a notary public. If acknowledgement is before a notary public, the notary must make a certificate of the acknowledgement and endorse it on or annex it to the instrument of conveyance. The notary need not require a third party to affirm or swear regarding the identity of the acknowledging party if the acknowledging party is personally known to the notary public to be the same person as the one whose name was subscribed to in the conveyance. *Id.* at 56. The Court upheld the trial court's finding that the notary's certificate complied with the acknowledging statutes. The Court concluded that "[a]s a properly acknowledged and recorded mortgage, the instrument imparted notice of its contents to third parties as of the recording date. . . ."

General Glass Corp. v. Mast Construction Co., 98 Utah Adv. Rep. 53 (Ct. App. December 15, 1988).

PRIORITY OF LIENS IN MOTOR VEHICLES

Valley Bank and Trust (the Bank) held a promissory note which the obligor collateralized by signing a security agreement that included a security interest in a cement mixer truck. The Bank did not perfect the security agreement by filing it in accordance with Article 5 of the Motor Vehicle Act.

Approximately three years later, the obligor gave the unencumbered certificate of title to the plaintiff as payment for legal fees. The plaintiff transferred the title to his son. In a suit to enforce the plaintiffs' claim against that of the Bank, the Court rejected the Bank's argument that it had priority as a matter of law because it had fulfilled the requirements of U.C.A. Sect. 70A-9-203 (1980) for a security interest to attach (that the obligor signed a written security agreement, that the Bank gave value to the obligor and that the obligor had rights in the collateral). Under U.C.A. Sect. 4-1-80 (1988), the exclusive method "of giving constructive notice of a lien or encumbrance" upon a registered vehicle is to comply with Sect. 41-1-82 through 41-1-87 of the Motor Vehicle Act. Compliance with these sections results in the Department of Motor Vehicle Regulation issuing a new certificate of title along with any statement of lien. The "filing and issuance of the new certificate constitute constructive notice of all liens against the vehicle. "Sect. 41-1-85.

The Court pointed out that the Bank's belief that its interest was prior to that of the plaintiffs' was "premised on the wrong notion that plaintiffs claim a subsequent unperfected security interest," whereas they actually claimed "ownership in the cement mixer free and clear of the bank's unperfected SI."

Creer v. Valley Bank & Trust, 97 Utah Adv. Rep. 12 (December 9, 1988).

ATTORNEY FEE AWARDS

In a recent litigation section luncheon, Judge Gregory K. Orme, Utah Court of Appeals, discussed developments in attorneys' fee awards on appeal and at trial. The following provides a general outline and synopsis of recent cases dealing with attorney fee awards, an area of law rapidly developing.

I. The "general rule" for attorney fee awards is discussed in:

A. *Dixie State Bank v. Bracken*, 764 P.2d 985, 94 Utah Adv. Rep. 3 (1988). (Discussing basis for an award, factors to be considered and evidentiary support.)

B. *South Sanpitch Co. v. Pack*, 97 Utah Adv. Rep. 42 (Ct. App. 1988). (Fees may be awarded as an element of damages suffered in a quiet title or negligence action.)

C. Attorney fees in divorce cases. *Rasband v. Rasband*, 752 P.2d 1331, 1336 (Utah App. 1988). (An award in a divorce must be based upon evidence of financial need and reasonableness.)

D. *Cabrera v. Cottrell*, 694 P.2d 622 (Utah 1985). (Factors in determining a reasonable fee; fees must be requested and the request and award supported by findings and conclusions.)

II. Attorney fee award on appeal:

A. As part of a general rule *Management Services Corp. v. Development Associates*, 617 P.2d 406, 409 (Utah 1980). *Dixon v. Stoddard*, 95 Utah Adv. Rep. 9 (1988). (Contract or note provision for attorney fees includes fees on appeal.) But, you must timely ask. *Cabrera v. Cottrell.*

B. As a sanction

1. Under R. Utah Ct. App. 33(a) or R. Utah Ct. App. 40(a)

a. *O'Brien v. Rush*, 744 P.2d 306 (Utah Ct. App. 1987). (Under Rule 33(a), attorney fees may be awarded when an appeal has no reasonable legal or factual basis as defined by Rule 40(a).)

O'Brien followed in:

1. *Barber v. The Emporium Partnership*, 750 P.2d 202 (Utah Ct. App. 1988).
2. *Backstrom Family Ltd. Partnership*, 751 P.2d 1157 (Utah Ct. App. 1988). (Double costs.)
3. *Porco v. Porco*, P.2d 365 (Utah Ct. App. 1988). ("*Full* amount of costs and attorney fees, without reduction".)
4. *Brigham City v. Mantua Town*, 754 P.2d 1230 (Utah Ct. App. 1988). ("And double costs.") (2-1 decision.)

b. *State v. Walker*. 752 P.2d 369 (Utah Ct. App. 1988).

III. At trial, as a sanction:

A. *Cady v. Johnson*, 671 P.2d 149 (Utah 1983). (Interpretation of Sect. 78-27-56 to require a meritless claim and a finding of subjective bad faith.)

B. *Amica Mutual Insur. Co. v. Schettler*, 100 Utah Adv. Rep. 17 (Ct. App. 1989). (Discussing the recovery of fees under Utah Code Ann. Sect. 78-27-56 and Utah R. Civ. P. 37.)

C. *See Taylor v. Estate of Taylor* below.

IV. Additionally, issues presently pending before the Court of Appeals include attorneys' fee allocations between partial prevailing parties *(Mountain States v. Neale*, 880192-CA); when the plaintiff voluntarily dismisses his action, who is the prevailing party and may the trial court decline to award attorney fees? *(Cobabe v. Crawford*, 880567-CA); and is plaintiff-developer entitled to attorney fees under 42 U.S.C. Sect. 1988 or under Rule 11? *(Call v. City of West Jordan*, 880047-CA).

ATTORNEYS' FEE AWARD UNDER RULE 11, UTAH R. CIV. P.—MERITLESS CLAIM

The Court of Appeals affirmed a summary judgment rejecting a plaintiff's proffer of decedent's purported testamentary document releasing plaintiff from a note. Because the document was not properly witnessed under Sect. 75-2-502, and plaintiff had no standing to challenge the probated will, his claim was wholly meritless. For the panel, Judge Orme (who also authored the *Dixie State Bank* and *South Sanpitch* opinions) affirmed the assessment of attorney fees against plaintiff under Rule 11, Utah R. Civ. P. No award was proper under Sect. 78-27-56 because the trial court found that plaintiff had not acted in "bad faith," Although failure to do legal research may not constitute "bad faith," it can be a basis for a Rule 11 violation (i.e., no reasonable inquiry, not well-grounded in fact or warranted by existing law). Under Rule 11, subjective intentions are irrelevant and an objective standard of reasonableness applies.

Although affirming the fee award, the panel remanded to the trial court for a determination of whether the fees should be assessed only against plaintiff or also against his attorney. *Taylor v. Estate of Grant Taylor*, Utah Adv.

Rep. (880136-CA, Ct. App. February 1989).

UNINSURED MOTORIST INSURANCE COVERAGE

Although in *Clark v. State Farm*, 743 P.2d 1227 (Utah 1987), the Utah Supreme Court concluded that an insurer *may exclude* from coverage accidents while driving an unlisted vehicle, the insurer may also by its contract policy provide greater uninsured motorist coverage to its insured driver. In a *per curiam* decision, the Court of Appeals ruled that a "motorcycle" is not an "automobile." Therefore, a policy refusing to provide uninsured coverage to automobiles not listed in the policy did not also mean unlisted motorcycles. The language of an insurance policy will be given its usual and ordinary meaning in the absence of specific policy definitions to the contrary.

After argument of this appeal on Rule 31, the panel concluded that a published opinion was appropriate. *Bear River Mutual Insurance Co. v. Wright*, Utah Adv. Rep. (880249-CA, Ct. App. February 1989).

FIRST AMENDMENT; OVERBROAD ORDINANCE

The Utah Supreme Court (J. Zimmerman) struck down a Provo City ordinance that was so overly broad as to deny First Amendment free speech and to make illegal consensual conduct between married and unmarried partners. Despite J. Howe's dissent that the defendant's solicitations for homosexual partners denied him standing to challenge the ordinance, the majority rejected firm adherence to the federal rule on "standing," which it characterized as "rather narrow." Inspite of a presumption of validity and constitutionality, the unambiguous language of a statute (or ordinance) will be given its plain meaning and not some contradictory interpretation. A narrowing construction of the language identifying the prohibited conduct was not reasonable. *Provo City Corp. v. Willden*, 100 Utah Adv. Rep. 7 (1989).

NAME CHANGE OF MINOR CHILDREN; BEST INTERESTS OF CHILD

Reviewing the facts below, the Court of Appeals (J. Greenwood) reversed the trial court's refusal to allow the custodial mother to change the surnames of her children from her married name to her maiden name. The panel rejected any notion that a "tradition" that legitimate children bear their father's surname is binding upon parents or upon the courts. In the absence of any Utah statutory law, no presumption for either father or mother is created and a court should look to the best interests of the children in a surname contest.

In reviewing the findings of the best interest of the Hamby-Jacobsen children, the panel concluded that the "clear weight" of the evidence supported a finding that the surname of the mother was in the best interests of the children. *Hamby v. Jacobsen*, 100 Utah Adv. Rep. 32 (Ct. App. 1989).

UNEMPLOYMENT COMPENSATION, PRIVATE CONTRACTOR OR EMPLOYER

The Court of Appeals (J. Jackson) affirmed a Board of Review determination that private nurses hired to give personal, exclusive care to a paraplegic were not just independent contractors but were his employees for purposes of unemployment compensation. Applying the "ABC test" (which is now an "AB" test), the Court found that while McGuire's nurses were licensed and performed other nursing services, none of them worked as "private nurses" for any other client while working for McGuire. The possession of a professional license is only one of many factors to consider in whether a person is "customarily engaged in an independently established trade or business."

McGuire v. Dept. of Empl. Sec., 101 Utah Adv. Rep. 62 (Ct. App. 1989).

IOLTA GRANT APPLICATION DEADLINE MAY 31, 1989

For further information contact Kay Krivanec 531-9077.

IOLTA QUESTIONS AND ANSWERS

Can I Continue to Use My Existing Trust Account and Checks?

The answer is generally "yes," if your existing account is a commercial account. Upon receipt of notice indicating your participation in the program, your bank will convert your account to an interest-bearing trust account. If a new account is necessary, your bank will contact you. If you have any questions or problems, please contact Kay Krivanec, 531-9077.

Does My Participation in This Program Deprive My Clients of Their Interest Money?

The program was not meant to utilize interest money from all clients' trust deposits—only those which are nominal in amount or to be held for a short period of time. In those situations, no client is deprived of any practicable income opportunity. This is evidenced by current trust accounting practices whereby nominal and short-term deposits are placed in non-interest-bearing accounts. If these deposits were placed in separate interest-bearing accounts, the administrative cost to the lawyer or law firm and the service charges of the financial institutions—coupled with the resulting tax liability to the client—would more than offset the income earned.

Can I Continue to Invest Trust Fund Monies on Behalf of Clients If I Participate in the Program?

Certainly. Upon request of the client, interest earnings may be made available to that client whenever possible on his deposited funds. Large, short-term client deposits or small deposits to be held for a significant period are usually invested by the attorneys in an interest-bearing medium for client's benefits.

Must My Clients Receive Notice About Participation in the Program?

No. As set forth in the opinion of the Utah Supreme Court, it is unnecessary to notify individual clients whose funds are pooled in interest-bearing accounts in the IOLTA program. However, any discussion with the client would continue to include those matters traditionally raised when a lawyer exercises his discretion in determining whether a client deposit is of sufficient size or duration to justify placement in an interest-bearing account, with interest payable to the client. You may, as a matter of information, want to notify your clients of participation in the program in some fashion.

STATE BAR CLE CALENDAR

THE ART OF JURY PERSUASION: INSIGHT AND IMAGINATION IN CREATING AND PRESENTING THE THEORY OF THE CASE

A live via satellite seminar. The powerhouse in every successful case is the theory of the case. The theory embodies the advocate's insight and imagination. The theory dictates everything the advocate does, from jury selection through closing argument. The art of jury persuasion approaches several facets of advocacy from the viewpoint of the theory of the case. From around the country five experienced teachers of trial advocacy have explored the vital, governing role that theory plays in successful litigation. They will discuss and demonstrate the advocacy skills involved in closing argument, expert witness testimony, depositions and discovery. In addition, recent decisions of the U.S. Supreme Court affecting the law of evidence will be analyzed.

Date: April 4, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

DEALING WITH NEW AND CURRENT PENSION REGULATIONS; CONSIDERATIONS FOR ELECTING THE SECTION 490A GRANDFATHER

A live via satellite seminar. This program deals with critical considerations and responsibilities in administering pension plans, with emphasis on compliance under these regulations. There are a number of long-awaited U.S. Treasury regulations which are anticipated for release in time for this program; Department of Labor regulations may be released as well. Of immediate concern will be the need to make a decision regarding whether or not to use the grandfather provisions under Section 490A, an election to be made in filing 1988 individual income tax returns whether due on April 17, 1989, or a later date permitted by extension. Topics may shifted to allow for coverage of unanticipated new developments. The program is designed for experienced practitioners, certified public accounts, actuaries and plan administrators.

Date: April 6, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

WILL DRAFTING TECHNIQUES

A live via satellite seminar. This program reviews selected aspects of will drafting and provides guidance from a panel of experienced attorneys with diverse expertise. It offers practice techniques for lawyers who draft wills either on a regular or occasional basis. Among the topics to be covered are drafting bequests and devises, discretions, tax clauses, generation-skipping tax provisions, qualified terminable interest trusts (QTIPS) and lawyers drafting their own wills. Study materials will include sample will clauses and practice aids.

Date: April 13, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

THE TAX CONSEQUENCES OF WORKOUTS, CHAPTER 11 REORGANIZATIONS AND BANKRUPTCY LIQUIDATIONS—A PRACTICAL GUIDE THROUGH THE MAZE

A live via satellite seminar. Practitioners guiding debtors and creditors through bankruptcy reorganizations must be concerned with two different types of rules. The first deals with collection issues and the status of state and local taxing authorities as creditors of the estate. They also involve the responsibilities of the trustee and debtor to file tax returns and pay taxes. The second set of issues arises from the debtor as a continuing taxpayer. Will mere adjustment of debts create new tax liabilities, and how are the debtor's post bankruptcy liabilities affected by changes in ownership? These rules have always been complicated, but the burden on practitioners has become particularly intense because during this decade they have changed so often. This program will be of special benefit to commercial and bankruptcy lawyers and professionals, including trustees, engaged in business reorganization and bankruptcy practice.

Date: April 18, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

HAZARDOUS WASTE AND SUPERFUND: THE LATEST DIRECTIONS AT EPA

A live satellite seminar. This seminar will include in-depth coverage with key EPA and Justice Department officials of EPA's latest policies under the "Superfund" program and the Resource Conservation and Recovery Act. The program will feature interviews and detailed discussions about EPA's directions in these programs under the new administration. Emerging hazardous waste policy and legislative issues will be discussed. Government officials and experienced private practitioners will discuss strategies for settling hazardous waste site cleanup actions, including *de minimis* settlements, mixed funding, municipal settlements and trends in cleanup technologies. Participants will discuss EPA's increased use of streamlined site assessment and cleanup procedures, as well as the growing use of administrative orders to achieve rapid cleanups.

Date: April 27, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

COMPUTER LAW: CURRENT TRENDS AND DEVELOPMENTS

The constant changes and developments in computer hardware, software and services have led to the development of a body of law also in a state of constant change to govern the purchase, sale and use of computer hardware and software. This program is designed for lawyers familiar with the application of traditional legal concepts to the purchase and use of computer systems. This program calls for an understanding of basic computer technology. This program should be of interest to attorneys and advisers who counsel corporations that produce, supply, distribute, develop and purchase computer hardware, software and computer-related packages.

Date: May 9, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

CORPORATE COUNSEL SECTION LIVE SEMINAR

The Corporate Counsel Section of the Utah State Bar presents a half-day seminar on matters of daily concern for those attorneys working for or representing corporate clients. The seminar will focus on three areas addressing ethical and practical concerns.

Corporate Conflicts—Who do you really represent? Disciplinary and practical views.

The Corporate Attorney-Client Privilege—How do you protect it?

Some practical advice.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ April 4	The Art of Jury Persuasion: Insight and Imagination in Creating and Presenting the Theory of the Case	L & J Center	$160
☐ April 6	Dealing with New and Current Pension Regulations; Considerations for Electing the Section 490A Grandfather	L & J Center	$135
☐ April 13	Will Drafting Techniques	L & J Center	$135
☐ April 18	Tax Consequences of Workouts, Chapter 11 Reorganizations and Bankruptcy Liquidations—A Practical Guide Through the Maze	L & J Center	$160
☐ April 27	Hazardous Waste and Superfund	L & J Center	$135
☐ May 9	Computer Law: Current Trends and Developments	L & J Center	$160
☐ May 10	Corporate Counsel Section Seminar	L & J Center	$35
☐ May 11	Dealing with the S.O.B. Litigator	L & J Center	$135
☐ May 12	Comprehensive Seminar on Family Law	L & J Center	$65
☐ May 23	Counseling Business Clients on Complex Insurance Issues	L & J Center	$160
☐ June 6	Representing Family Owned Businesses	L & J Center	$160
☐ June 15	Joint Ventures	L & J Center	$135

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.

Name Phone Firm or Company

Address City, State and ZIP

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

American Express, MasterCard/VISA
Expiration Date

The Multi-State Corporation—Are you practicing without a license?

Disciplinary and practical perspectives.

Date: May 10, 1989
Place: Utah Law and Justice Center
Fee: $35
Time: 7:30 a.m. to 12:00 p.m.

DEALING WITH THE S.O.B. LITIGATOR

This four-hour live satellite seminar will explore how the court and counsel can effectively deal with the unfair, "cheap-shot, win-at-any-cost" unethical tactics of the belligerent, arrogant and obstreperous attorney. In an era of increasingly adversarial and acerbic relationships, this program will deliver a clear, positive message to litigators that the legal profession demands civility and honest practice. This telecast is developed from the highly acclaimed and immensely popular live presentation of the same name given during the 1988 annual fall meeting of the section of litigation. The telecast will consist of a series of dramatic pretrial and courtroom scenes illustrating S.O.B. behavior in the discovery, trial and settlement process. A panel of expert litigators will offer positive suggestions to prevent or counter the illustrated S.O.B. behavior. The panel will also offer advice on how to counter a wide range of disreputable and unethical conduct including obstructionist discovery tactics, demeaning behavior, secreting potential witnesses, unfair closing arguments and misrepresentations during settlement negotiations.

Date: May 11, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

A COMPREHENSIVE SEMINAR ON FAMILY LAW

A full-day, comprehensive live seminar including leading family law practitioners and the judiciary. Topics will include Effective Financial Arrangements with Clients; Improving the Effectiveness of the Initial Interview; Strategies in the Use of Expert Witnesses; Handling Bankruptcy Related Concerns; Tax Pitfalls in Alimony, Child Support, Property Division, and Pension Treatment; Exhibits and Demonstrative Evidence at Trial; Practice Before Domestic Relations Commissioner; Utah Divorce Case Law Update.

Date: May 12, 1989
Place: Utah Law and Justice Center
Fee: $65. A box lunch may be ordered for an additional $6.50
Time: 8:00 a.m. to 5:00 p.m.

COUNSELING BUSINESS CLIENTS ON COMPLEX INSURANCE ISSUES

A live satellite seminar. Too many business attorneys sweep insurance law issues aside, forced to rely on the insurance industry itself to assure adequate client protection because of their lack of familiarity with the legal issues. Nationally prominent insurance experts will teach you:

- How to recognize insurance issues.
- How to determine proper types and limits of coverage and insurers.
- How to handle terminations and non-renewals.
- How to handle disputes with insurers.
- How to handle insurance issues when your client's customer, vendor or insurer is in bankruptcy.
- How to expand your practice by providing insurance legal check-ups.

Who should attend? Corporate law specialists, in-house counsel, mergers and acquisitions counsel, insurance lawyers, creditors' rights counsel, litigators, legal malpractice lawyers and attorneys wishing to expand their business practice.

Date: May 23, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

REPRESENTING FAMILY-OWNED BUSINESSES

Watch for detailed information in the May *Bar Journal*.

Date: June 6, 1989
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

JOINT VENTURES

Watch for detailed information in the May *Bar Journal*.

Date: June 15, 1989
Place: Utah Law and Justice Center
Fee: $135
Time: 10:00 a.m. to 2:00 p.m.

Utah Bar Foundation Publishes Cliff Ashton's History of the Federal Judiciary in Utah

The Utah Bar Foundation is pleased to announce that Clifford Ashton's history entitled *The Federal Judiciary In Utah* has been published in hardbound form and is now available for purchase at a cost of $15.00. Cliff's many years of experience as a trial attorney and his well-known skill as a raconteur give him a unique perspective on the history of Utah's Federal Judiciary. The book chronicles the federal judges from the early pioneer days of the State of Deseret, through the religious and political turmoil of the Utah Territory, to the controversial era of Judge Willis Ritter. The publication of this interesting book has been made possible by the generous contributions to the Foundation by Calvin and Hope Behle and the C. Comstock Clayton Foundation. Copies may be purchased by completing the attached form and mailing it to the Utah State Bar Office together with your check made payable to the Utah Bar Foundation in the amount of $15.00 for single copies. There is a discounted price for orders of multiple copies: 10-24 volumes at $12.50 each, more than 25 volumes at $10.00 each. Price includes postage and handling.

'The Federal Judiciary In Utah'

by Clifford Ashton

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CLASSIFIED ADS

For information concerning classified ads, please contact Paige Holtry at the Utah State Bar, 645 S. 200 E., Salt Lake City, Utah 84111, or phone 531-9077.

POSITIONS SOUGHT

Tax attorney-member of Utah Bar, relocating to Utah, seeks position or association with Salt Lake City firm in tax or related department. Please contact: Utah State Bar, Box C, 645 S. 200 E., Salt Lake City, Utah 84111.

POSITIONS AVAILABLE

Eight-attorney law firm located at Lake Tahoe, Nevada, looking for an associate attorney with two to four years of legal experience in business and commercial law and/or civil litigation. Must be a member of Nevada Bar or willing to take the Nevada Bar examination in July 1989. Salary DOE. Send resumé and writing sample to Richard Glasson, Esq., Manoukian, Scarpello & Alling, Ltd., P.O. Box 3390, Stateline, NV 89449.

Associate needed immediately for small Salt Lake firm. Salary and overhead in exchange for part-time juvenile court work. Two years' domestic and or criminal law experience required. Send resumé to Rilling & Associates, 8 E. Broadway, Suite 629, Salt Lake City, UT 84111.

Leading manufacturer of natural health care products seeks a junior staff attorney to assist with in-house counsel. One to three years' experience in general corporate and commercial law is preferred. Knowledge of FDA regulatory guidelines helpful. Applicant must be licensed to practice in the State of Utah. Strong communication and interpersonal skills required. Send resumé to: Murdock HealthCare, Personnel Director P.O. Box 4000, Springville, UT 84663.

Five-attorney firm concentrating in estate, business and tax planning is seeking an associate with zero to five years of experience. Send resumé to Box M % Utah State Bar.

Ten-person, a.v.-rated firm seeks litigation associate with one to five years' experience, top 25 percent of class. Please send resumés to: Box #U, % the Utah State Bar.

Attorneys needed for *volume referrals* by National Legal Plan/Fee Limitations; and 10 percent off your usual fee for our members. Reply: Legal Plan, P.O. Box 16254, Seattle, WA 98116.

Young, litigation-oriented firm is seeking an attorney with two to five years' litigation experience. If interested, send current resumé and a writing sample to Utah State Bar, Law and Justice Center, Box O, Salt Lake City, UT 84111.

Salt Lake County is requesting proposals from qualified, interested attorneys and public and private law firms to provide legal services for indigent clients. If you are interested in submitting a proposal regarding these services, the "Request For Proposal" may be picked up in the County Government Center, Contracts & Procurement Offices, 2001 S. State, Room #N4500, Salt Lake City, UT 84190-3100, or call 468-2556. Your proposal, together with an original and 10 copies, must be received no later than 3:00 p.m. on April 27, 1989.

EQUIPMENT FOR SALE

WANG OIS-60, including four internal workstations, LPS8 laser printer and 6581W Daisy printer with twin sheet feeder and WPPlus software. WANG maintained. Will sell as unit or separate. Call Pauline Brown, 521-0250.

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Collier Bankruptcy Manual, King, current through 10/88 rel. #18; Collier Forms Manual, King/Moller, current through 11/88 rel. #9; Anti-Trust Trade Regulation, Desk Edition, Von Kalinowski, current through 11/88 rel. #13; Banking Law Manual, Norton/Whitley current through 4/88 rel. #5. Contact Pam Spencer at 530-7380 for more details.

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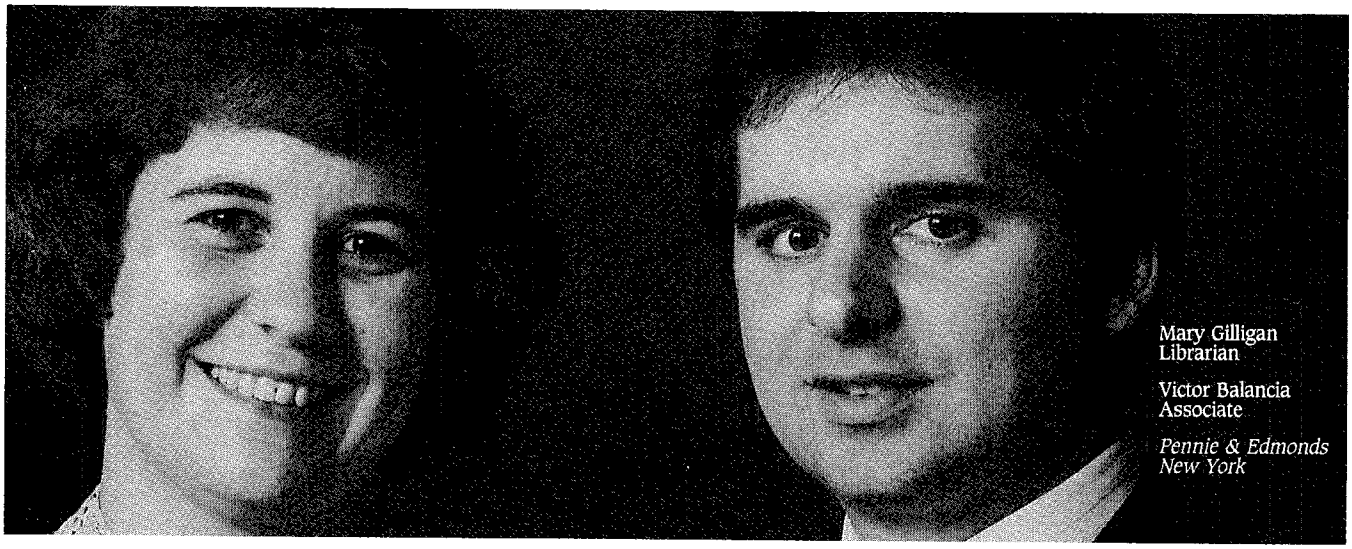

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