UTAH BAR JOURNAL

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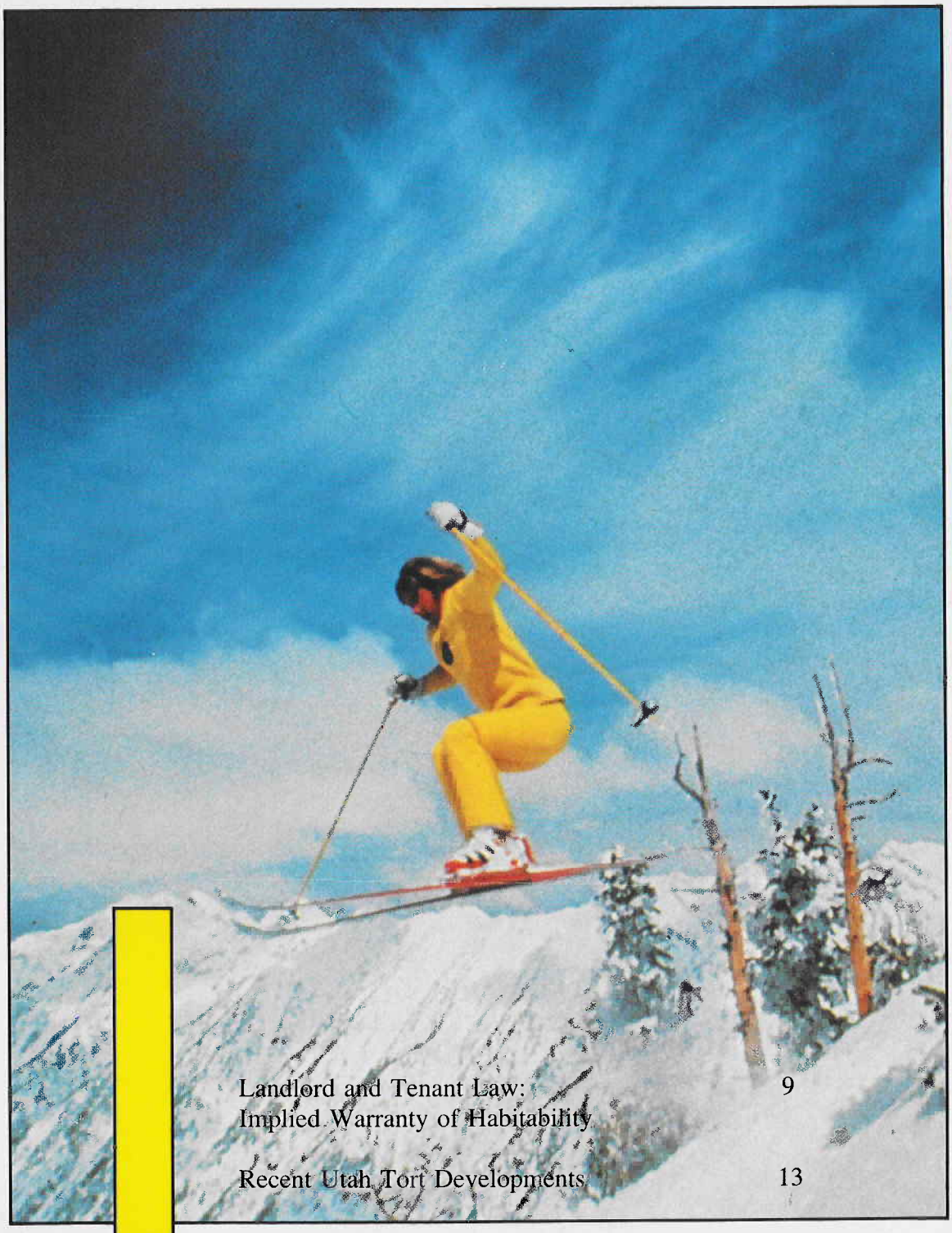

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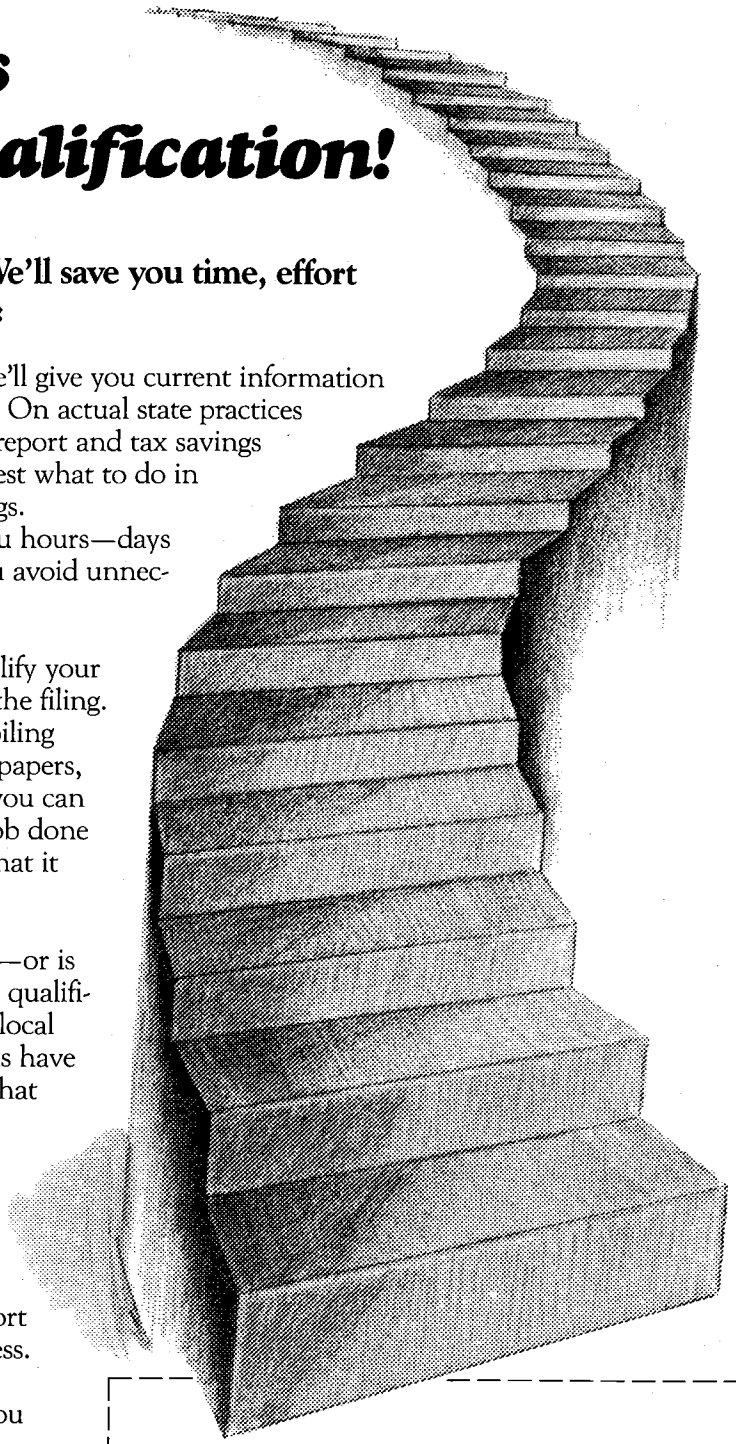

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COVER: Our thanks to the Salt Lake Convention and Visitors Bureau. Skier enjoying Utah's "GREATEST SNOW ON EARTH."

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

LETTERS

Editor's Note: Because letters responding to Governor Lamm's editorial were invited by the *Bar Journal*, the usual limitations on length are being waived for such letters.

Dear Editor:

As always, I am fascinated by the unfairness and double standards of the Utah State Bar Commission. In contrast, I thought that you would always be above such conduct.

The *Utah Bar Journal* (August/September 1988 Edition. p. 4) made clear that "Letters to the Editor" to be published must not exceed two hundred (200) words. However, when the Bar Commissioners respond to Brian Barnard in a "Letter to the Editor" your rules don't apply. The Commissioners directed Brian Florence to respond to Barnard's letter and Florence defended the Commissioners and rambled on for three hundred plus (300+) words. October 1989 Edition, p. 4.

It is unfair that the Bar Commissioners can review a letter before it is published and direct that one of their own respond to it. The Minutes from the Bar Commission meeting of July 20, 1989, reveal the Commissioner read Barnard's recent letter long before publication and ordered that a response be published simultaneously.

Actions like this reflect poorly on your integrity as Editor and on the integrity of the publication.

Ronald O. Neerings
Attorney at Law

Letters Editor Reply:

The *Utah Bar Journal* did not intend to be "unfair" or to maintain "double standards" by printing Brian Barnard's Letter to the Editor in the same section as a response from the Bar Commission. Rather, the *Bar Journal* published the two letters simultaneously in order to present two sides of a question of interest. The *Utah Bar Journal* apologizes for any confusion caused by the length and positioning of the Bar Commission's response to Barnard's letter.

Letters Editor

Dear Editor:

The statistics quoted by former Governor Lamm are interesting but misleading. For instance in Japan the major companies do not employ attorneys to draft contracts and other documents because they have in-house people who perform that function. I wonder if Governor Lamm took into account the divided legal system in Britain, solicitors and barristers, when he counted lawyers. Even if he did, would anyone like to compare the productive output of the United States per capita with the United Kingdom. Does Richard Lamm believe that the British are more productive than Americans?

Governor Lamm's statements are too general and sweeping. It leads one to believe the whole problem with our economy is the legal system. The number of attorneys and the number of disputes are not cause and effect. The old joke that one attorney in a town starves but two make money is just that, a joke. The level of litigation is merely symptomatic of the larger problems.

Would Governor Lamm care to go into private business? He is now a member of the law firm. He could just as easily work for private enterprise and do "productive work." Is he suggesting that the government limit the free choice of individuals in pursuing a legal education? He states, "The solutions are numerous and clear," and gives some offhanded cures. Such statements are typical of politicians guilty of demagoguery, but are unworthy of one in Richard Lamm's position.

Michael W. Crippen CLU, ChFC
Attorney at Law
Salt Lake City, Utah

Dear Editor:

You invited responses from members of the Utah Bar to the Richard Lamm editorial "Too Many Lawyers, Too Much Litigation." I suspect most of the comments you receive on Lamm's "startling claims" will be spirited rebuttals. However, I believe we should give thoughtful consideration to his principal point that we have too many lawyers and our legal system costs too much, because it's in our own long-range professional interest to do so.

His statistics, if accurate, are the startling feature of his editorial, and appear to support his claims. Certainly our nation, with 5 percent of world population and 70 percent of world lawyers, would prima facie seem imbalanced, unless there are strong reasons to justify such disparity between us and the rest of the world. Some have argued that it's one of the prices we pay for being the freest and most prosperous nation in the world. However, with both Europe and Japan overtaking us economically, this argument will increasingly ring more hollow, and any differences in individual liberties between us and other western democracies has lately existed more in our own rhetoric than in the perceptions of the citizens of each.

Even if our expensive legal system presently gives us some qualitative edge over other nations in the free world, how much longer will it withstand cost-benefit analysis? Such analysis, and the conclusions it will suggest will increasingly be reached in a future of declining prosperity, not by lawyers, but by unhappy citizens seeking a scapegoat, and the legal profession will be a prime target.

Our proliferation of lawyers and system costs has been explained as necessary to protect our rights on the criminal side, and to maximize justice on the civil side, but these rationales come mainly from our own ranks, and more rarely from the society we serve. If I interpret correctly what I read and hear, the lawyer proliferation is increasingly viewed not as a natural and beneficial consequence of a free enterprise system, but as more analogous to the model of a runaway arms race, in which we occupy the role of a military-industrial complex, open to the suspicion of serving our own pecuniary interests above larger social goals, by fomenting strife.

I submit the most effective way to arrest present trends is to reduce the number entering the profession each year. This will be best accomplished, not by quotas, but by removing stimulus—the profit and power motives—and need, which means beginning to dismantle the adversarial system (which we have begun to do, anyway, in many areas of the law). Although the adversarial system has served our needs for two centuries of national life, its cost, like a nuclear explosion, is suddenly mushrooming. There are less costly and equally good alternatives. On this point, I recommend David Luban's book *Lawyers and Justice,* Princeton University Press.

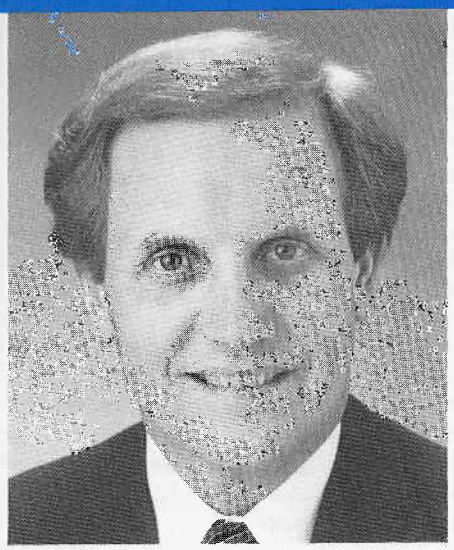
As we enter a new age in world history, we need to be open to the Richard Lamms who prescribe radical surgery. It may be our only salvation.

Robert F. Owens
Circuit Court Judge
Fifth Circuit

Dear Editor:

The only thing startling about Mr. Lamm's editorial, as reprinted in the November 1989 *Utah Bar Journal*, is that you found his claims to be "startling." The validity of his claims is patently obvious to anyone whose outlook has not been obscured by his proximity to the profession.

Grant A. Hurst
Attorney at Law
Dallas, Texas



Future Trends

By Hans Q. Chamberlain

I recently attended a regional ABA Board of Governor's Meeting which focused on the future of the legal profession, law practice management, economics and technology. Two speakers, Bob McKay and Ward Bower, gave excellent presentations and I thought many of the items discussed were well worth passing on to you. While I have observed changes in the legal profession during my 20 years of practice, this conference focused on not only where we have been over the last 20 years, but what these two experts see for the future.

Some of the statistical information was quite revealing. For example:

1. Growth in revenues generated by law firms has increased from $51 billion in 1985 to $73 billion in 1988, or a rate of approximately 10 percent to 13 percent per year.

2. There now exists three firms with over 1,000 lawyers, 40 firms with over 300 lawyers and 300 firms with over 100 lawyers.

3. Over the past 10 years, law firms have experienced a profit squeeze in the sense that while growth revenues are up 137 percent, expenses to operate an office are up 164 percent. It only follows that law firms must learn to operate on a more effective basis because operating expenses cannot continue to grow faster than gross receipts.

4. Billable hours per year for partners in law firms are up 12 percent over the past 10 years, while associates are up 8 percent. Lawyers, therefore, appear to be working more hours just to stay even with the cost of operating an office.

5. An average law firm invests $150,000 to $250,000 over the first two years for each new associate it hires, and it takes from three to four and a half years to recover the up front costs. Because lawyers are much more likely to change firms than they were 10 years ago, a law firm may not recover its initial investment if an associate leaves during his or her first two years of practice.

6. In 1980, on a nationwide basis, the ratio of lawyers to the general population was 1 to 418. In 1995, it is projected that there will be 1 lawyer for every 270 persons.

7. Twelve percent of licensed lawyers are now women, and 40 years of age is now the medium age for lawyers nationwide.

What much of this boils down to is the fact that the legal profession must be careful to adjust to the marketplace and recognize that while we are professionals and unique in that sense, the practice of law is similar to other service industries and, therefore, we must be careful to avoid what has happened in the banking and savings and loan industry which failed to adjust to market conditions. Ward Bower coined the phrase "market maturity," and used as an example the soft drinks industry where for approximately 100 years, Coca-Cola had only one product to sell, but because of "market maturity" in the past few years, we now see Diet Coke, Diet Cherry Coke, Caffeine-free Coke, Caffeine-free Diet Coke, Coca-Cola Classic and New Coke. We are now seeing a great deal of "market maturity" in the legal profession as to what the client wants and expects.

Mr. Bower also indicated that the client is much more sophisticated, particularly the corporate client. There now exists 70,000 "in-house" lawyers, or approximately 1/10th of all licensed lawyers in the nation. Thus there is now a skilled lawyer within the corporate structure who wasn't there in past years who advises the corporation concerning the quality of legal services provided by competing firms, which in turn necessitates the need to provide quality legal services at a competitive price.

The 1990s will see a wide-open marketplace according to Mr. Bower, with much more emphasis on marketing. At the present time, law firms spend approximately 1 percent of gross revenues on marketing, while other service industries are spending 3 percent to 4 percent of gross revenue. Undoubtedly, we will see an increase in law

firm marketing because of the increased competition occurring from outside professions, i.e., tax law practiced by accounting firms and estate planning conducted by banks and the insurance industry.

With that statistical background, Bob McKay's discussion was based on the need of lawyers and law firms to have a different vision than what has existed over the past 25 years. Mr. McKay indicates that with the recent mergers of many large firms, we must be careful not to become like the Big Eight accounting firms and points out that if mergers continue to take place because "bigger seems better," we may see pressure to have imposed a Federal Law Control Board which I don't think anybody would welcome.

Concerning the future of the legal profession, Mr. McKay indicates that our focus must be on two major areas, (1) access to justice and (2) professionalism. He points out that citizens expect access to adequate and competent legal justice, and that because the right to civil (as compared to criminal) legal services is not mandated by the Constitution, we may see a Constitutional amendment because the poor, as well as much of the middle class, do not have access to the legal system to resolve civil disputes.

We are all keenly aware of the current focus on professionalism. I recently heard professionalism simply and appropriately defined as "the client comes first." Each of us must therefore recognize the need to serve the interests of the client, the public, and not just the interests of our profession. This conference affirmed to me that the legal profession has an obligation to stake out its position and be on the front line in the area of social justice, and that no one is better equipped to do this than the organized Bar on both a state and national level.

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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COMMISSIONER'S REPORT

By Anne M. Stirba

It's a safe bet that most members of our Bar have never had any contact with the Judicial Conduct Commission. Some have undoubtedly heard about the Commission, but probably only a few know what the Commission actually does. Of the ten Judicial Conduct Commission members, by statute three are Bar Commissioners. Because I was selected as one of those three, I am using this opportunity to explain what the Commission does.

CONSTITUTIONALLY CREATED

The Judicial Conduct Commission is a constitutionally created body whose purpose is to "investigate and conduct confidential hearings regarding complaints against any [state court] justice of judge."[1] The conduct for which the Commission has jurisdiction is as follows:

1. Actions which constitute willful misconduct in office;
2. Final convictions of a crime punishable as a felony under state or federal law;
3. Willful and persistent failures to perform judicial duties;
4. Disabilities that seriously interfere with the performance of judicial duties; or
5. Conduct prejudicial to the administration of justice which bring judicial office into disrepute.

Upon a finding of misconduct the Commission may order the reprimand, censure, suspension, removal or involuntary retirement of any justice or judge. Commission findings are subject to *de novo* review by the Utah Supreme Court.

WHAT THE COMMISSION *CANNOT* DO

Complaint proceedings are *not* a substitute for an appeal of a judge's ruling. The Commission has *no* authority to direct a judge to take legal action, review a case for judicial error, mistake or other legal grounds. The Commission *cannot* supervise court administration.

[1] Article VIII, Sect. 13 of the Constitution of Utah.

WHO MAY FILE A COMPLAINT WITH THE COMMISSION?

Any individual, attorney, judge or group may file a complaint. The Commission has received complaints from litigants, attorneys, judges, court personnel, jurors and court watchers.

WHAT HAPPENS AFTER A COMPLAINT IS FILED?

Complainants are asked to complete a form provided by the Commission. Thereafter, complaints undergo an initial inquiry by Commission staff, following which they may either be dismissed or result in a more thorough investigation. Complaints may culminate in formal hearings. The Commission meets monthly or more often as necessary to review and take action on pending cases.

Additional information concerning Commission procedures may be obtained from the Commission's Executive Director, Dean W. Sheffield, 180 South 300 West, Salt Lake City, Utah 84101, telephone: 521-3911.

HOW MANY COMPLAINTS DOES THE COMMISSION RECEIVE?

In FY 1988-89, 64 complaints were either filed or pending before the Commission. Of these, 48 were dismissed; one was withdrawn; one was dismissed with advice; four were dismissed with an admonition; and one resulted in a public reprimand. The remaining nine cases have been acted on by the Commission after the end of FY 1988-89 or are pending.

CONFIDENTIALITY

The Utah Constitution requires that the hearings before the Commission be kept confidential. However, during the course of an investigation of a complaint, a complainant's identity may come to the attention of the judge. If a matter is sufficiently serious enough to warrant a hearing, a complainant may be called to testify at that hearing.

COMMISSION MEMBERSHIP

Pursuant to Sect. 78-7-27 Utah Code Ann. (1953), as amended, the membership of the Judicial Conduct Commission consists of:

1. Two members of the House of Representatives;
2. Two members of the Senate;
3. Three members from the Board of Commissioners of the Utah State Bar;
4. Two persons not members of the Utah State Bar appointed by the governor; and
5. One judge of a trial court of record selected by the Utah Judicial Conduct Commission.

1989-1990 COMMISSIONERS

Commissioners for 1989-1990 are as follows:

Merrill Bean (Lay Member)
Sylvia Bennion, Chair
(Lay Member)
Rep. Stephen M. Bodily
Sen. Kay S. Cornaby
Sen. Frances Farley
Jackson B. Howard, Esq.
Kent M. Kasting, Esq.
Hon. Leonard H. Russon,
Chair-Elect
Anne M. Stirba, Esq.
Rep. Daniel H. Tuttle

Like complaints against lawyers, complaints against judges are a very serious matter. Historically, Utah judges have responded to Commission inquiries thoroughly and professionally. However, all complaints, whether actionable or not, cause distress and anxiety. Thus complaints should not be filed merely out of anger or disappointment in an adverse ruling, but only if there is factual support for them.

We on the Commission wish to perform responsible public service, and we welcome your input on how we may best carry out the duties of the office.

Landlord and Tenant Law: Implied Warranty of Habitability

By David J. Winterton

The State Appellate Court recently reviewed a case of a defendant who was appealing a judgment for back rent and an order to restore possession of a premises to the plaintiff. The defendant has counterclaimed with the defense of breach of implied warranty of habitability. Utah does not recognize the theory of implied warranty of habitability. The defendant's appeal was denied with two judges affirming the lower court's decision. The Judge writing the opinion stated that Utah's landlord-tenant rules are "exceptionally senseless and anachronistic rules of medieval common law."[1] He further stated that "Establishing an implied warranty of habitability in this case would require us to weigh the conflicting interests of lessors and tenants, and would undoubtedly have an economic impact that we are unable to fully access from the information before us."[2] Since the above stated ruling, a number of newspaper articles have been written suggesting that the Legislature take the appropriate steps to protect the rights of the tenant. It is important to know the major interests of the lessors and tenants, and review some of the practical application of the theory of implied warranty of habitability.

DAVID J. WINTERTON received his B.S. from Brigham Young University (1981), and his J.D. from Pepperdine University School of Law (1985). He is presently practicing in Provo, Utah. He is serving as a member of the Lawyer's Benefit Committee and Bill of Rights Bicentennial Committee for the Utah State Bar. He is also a member of the American Trial Lawyers Association and the American Bar Association. A substantial portion of his practice is devoted to real estate law, bankruptcy and corporate law.

I. BACKGROUND OF LANDLORD-TENANT LAW

In the old English feudal society, the landlords established a system whereby land would be held in fee with devisable rights. The right of possession was one of the most treasured rights in this agrarian society. Before taking possession, a tenant would inspect the premises for defects. When the tenant signed his tenancy (lease), the tenant usually had possession of the property "as is" absent any written agreement to the contrary. If a defect was later discovered in the property, the tenant not only had the ability to do the repairs, but had the responsibility to remedy the defect to avoid waste.[3]

As our social-economic system and real estate construction became more complex, the courts started to create exceptions to the old English property law theory. Smith v. Marrable[4] was one of the landmark cases establishing an exception to the old rule. This was an English case in which a tenant leased a furnished residence for a short tenancy. The courts concluded, that since the tenants were renting the premises for a short term and did not have time to inspect the property prior to occupancy, it was the landlord's responsibility to repair the premises and to have the premises ready for immediate occupancy.

The laws continued to evolve with the changes in our society. The courts began to recognize a lease not only as a right of possession under property law, but as a legal binding contract with certain contractual obligations.[5] This legal interpretation effected the lessee liability to pay rent. Under the property law approach, the tenant is liable for rent based upon his possession of the property, whereas under the contract approach, a tenant is liable to pay rent based upon the lessor's compliance with the contract.[6] If the contract did not contain a provision requiring the landlord to repair or maintain the premises, the liability to pay rent was not dependent upon the condition of the premises.

In the 1960s, the courts concluded that our existing social policies established by the legislature rendered the old common law obsolete and required that an implied warranty of habitability should be established in all residential leases.[7] The courts concluded that if there were local housing codes or ordinances requiring a certain level of quality for the occupants, there must be an implied contractual covenant that the premises were in compliance with the local housing codes or ordinances.

The state of Utah does not have a housing authority requiring landlords to maintain a certain level of quality in their residential housing. A couple of towns and a county have enacted their own housing authorities regulating residential housing. Due to the lack of regulations, the courts do not have the authority to imply a warranty of habitability throughout the state of Utah. The Utah Courts have required the landlords to use a reasonable standard of care in maintaining their premises to avoid harm to the tenants.[8] As a consequence, Utah has become known as a Caveat Lessee[9] state.

II. DEFINITION OF WARRANTY OF HABITABILITY

Warranty of habitability is a covenant by the ". . . landlord of a dwelling unit, [who] impliedly [or expressly] warrants that the premises is fit for habitation at the time of letting and will remain so during [the] term of tenancy."[10]

There are three different interpretations of the phrase "fit for habitation:" a) If the premises is not in compliance with the current housing codes or ordinances then the premises is not fit for habitation. (This encourages strict enforcement of the local housing codes but it would be inappropriate in Utah due to the limited housing authorities;)[11] b) The tenant needs to establish that the premises is not in compliance with the

housing codes and the tenant must find some additional authority to support its claim before the premises is ruled unfit;[12] c) The trier of fact must evaluate a number of facts to determine whether or not the landlord breached the covenant of warranty of habitability. Non-compliance of a local housing code or ordinance is only evidence that the landlord may have breached this covenant.[13] A list of the important facts to be considered are as follows: 1) applicable codes or sanitary regulations if available; 2) how vital the defect is to the facility; 3) potential or actual effect upon the safety and sanitation of the premises; 4) length of time the deficiency existed; 5) age of the structure; 6) amount of rent; 7) has the tenant waived his rights or is the tenant estopped from enforcing the agreement; and 8) was the tenant responsible for the defect.[14] This is the definition that is commonly used by the courts where there is a lack of housing authorities available.

III. LESSORS INTERESTS REGARDING IMPLIED WARRANTY OF HABITABILITY

There have been a number of arguments against creating an implied warranty of habitability. The major arguments are as follows:

a) The statute would limit one's right to freely negotiate a contractural lease. A tenant may negotiate a lease in which the tenant agrees to repair the premises if the lessor agrees to reduce the monthly rent. Under warranty of habitability, this would eliminate the tenant's right to negotiate a repair/reduced rent contract.

b) There are a sufficient number of circumstances obligating the lessor to repair and maintain the premises. Such obligations include: 1) The Department of Health or Public Housing Authorities may order repairs if it is dangerous to the health, moral, or safety of the public;[15] 2) Local building codes regulate all repairs and all new construction made on a premises; 3) The lessor is subject to tort liability if he fails to maintain common areas and in some cases if he fails to maintain the inside of a residence even if the contract does not contain a provision to do the repairs;[16] 4) Any fraud or intentional concealment of a defect would require the lessor to repair the premises;[17] and 5) An expressed intent of use of the premises creates an implied condition of fitness for such purpose.[18]

c) The tenant has sufficient remedies to protect his interest. Some of these remedies are as follows: 1) If a premises is dangerous to the health, moral and safety of the public the lease (contract) is unconscionable relieving the tenant from his/her obligation to pay rent;[19] 2) If the landlord sues for back rent the tenant may be entitled to equitable relief and a declaratory judgment preventing the lessor from evicting the tenant from the premises. The equitable relief may be the reimbursement of the cost of labor and material to repair the premises and the guarantee of the return of the security deposit;[20] and 3) Utah has ruled that a breach of the landlord's covenant to repair may constitute constructive eviction if a defect is not remedied within a reasonable amount of time.[21]

d) Utah has not conducted an economic impact study evaluating the effect of enacting such a statute. The current housing codes enacted are very strict and it would increase the quality of the current low-income housing. With these strict housing requirements, the landlords will have to increase their rent on the low-income, non-qualifying housing to bring the premises into compliance. This may result in a decrease in low-income housing leaving a number of tenants homeless. There is also a concern that this could lead to further regulations such as rent control. This will ultimately take some landlords out of the housing market to avoid the cost and the problems involved in renting a premises.[22].

Public policy dictates that landlords should be required to maintain residential housing in a habitable condition.

e) Since Utah has limited housing authority regulating the quality of residential housing, it will be hard to equally administer a statute governing implied warranty of habitability. Each jurisdiction would have a different standard. This could also foster an increase in litigation of landlord-tenant disputes.

IV. TENANTS INTERESTS REGARDING IMPLIED WARRANTY OF HABITABILITY

The courts have given a number of reasons to depart from the old English rule and institute an implied warranty of habitability. The reasons are as follows:

a) Public policy dictates that landlords should be required to maintain residential housing in a habitable condition as evident by an increasing number of state statutes and local ordinances;[23].

b) Under the old common law rule, the majority of the remedies available to the tenant result in the termination of the lease. If there is a shortage of low-income housing, a tenant may not want to terminate the contract. Implied warranty of habitability allows the tenant to exercise a remedy without vacating the premises;[24]

c) In today's urban development, the repairs are too complicated and costly for the average tenant to repair;[25]

d) The early common law fosters slum dwellings.[26] A landlord is mainly concerned about his return on his investment and not on the quality of his/her housing;

e) Some statutes have permitted waiver allowing the free negotiation of contracts unless the contract is unconscionable;[27] and

f) Under Utah tort law, a tenant may recover for an injury that has occurred, but under implied warranty of habitability, a tenant could require the landlords to repair the premises before the injury occurs.[28]

V. LEGAL REMEDIES

If the Utah Legislature weighs the interests of the parties and enacts an implied warranty of habitability, the Legislature needs to determine what will be the remedies available to the tenant. The Legislature could enact the following possible remedies:[29] a) Terminate the Contract—The court may terminate the contract relieving the tenant from his obligation to pay rent;[30] b) Rent Abatement—The court may relieve the tenant from his obligation to pay rent until the repairs are made. This could be a complete abatement of the rent or a partial abatement of the rent equivalent to the fair market value of the premises. This remedy usually gets the quickest response from the landlord but it could give a tenant unlimited free rent without a remedy available to the landlord if the landlord is unable to make the repairs;[31] c) Rent Application—The tenant's rent is applied to repair or improve the premises;[32] d) Rent Withholding—The rent is put in escrow and when the defect is remedied, the rent is paid to the landlord;[33] and e) Damages—The courts have rarely enforced an order on a landlord to repair the premises. The courts have awarded a tenant damages for costs to repair the premises and guaranteed the tenant return of his security deposit.[34]

VI. CONCLUSION

After this review of landlord-tenant law, the ultimate responsibility of the Legislature is to weigh the interests of the lessor and lessee. If the Legislature creates a statute, it will be the judiciaries' responsibility to interpret and enforce the statute. The poor deserve high-quality, low-income housing. Utah, however, does not want to increase the cost of housing, and, as a consequence, increase the number of homeless individuals on the streets. The landlord also needs pro-

tection and not just another loophole for the tenant to avoid paying rent. These problems can be alleviated by careful structuring of the statute.

[1] *P.H. Investment v. Oliver*, 113 Utah Adv. Rep. 31 (1989).
[2] Id. at 32.
[3] *Restatement (Second) Landlord and Tenant* § 5.1 comment b (1977); *see also, Powell On Real Property* § 233 (1988).
[4] 11 M&S 5, 152 Eng. Rep. 693 (Ex. 1843).
[5] *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C.Cir., 1970), cert. denied, 400 U.S. 925 (1970).
[6] *American Law On Property* § 3.64 (1952).
[7] *Pines v. Perssion*, 14 Wis.2d 590, 111 N.W.2d 409 (1961); *Wilson v. Manning*, 657 P.2d 251 (Utah 1982); *see also, American Law On Property* § 3.64 (1952).
[8] *See, Hall v. Warren*, 632 P.2d 848 (1981), appeal returned, 692 P.2d 737 (1981).
[9] The phrase of Caveat Emptor (let the buyer beware), was derived from the 16th Century English trade society where the political philosophy of laissez faire was such that a buyer deserved what he got if he inspected the merchandise and did not get a written expressed warranty. It was later used in the purchase of residential homes in the United States around the mid-1950s. There is a trend to use the above phrase in conjunction with the leasing of a premises (Caveat Lessee); *see, Restatement (Second) Landlord and Tenant* § 5.1 (1977); *see also, Dukeminier & Drier, Property*, (1981).
[10] *Black's Law Dictionary* 1425 (5th ed. 1979).
[11] *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); Pines at 590.
[12] *Lund v. MacArthur*, 51 Hawaii 473, 462 P.2d 482 (1969).
[13] *Foist v. Wyman*, 83 Wash.2d 22, 515 P.2d 160 (1973); *see also, Restatement (Second) Landlord and Tenant* § 5.1 (1977).
[14] *Thompson On Real Estate* § 1231 (1981).
[15] A lessor can not create a nuisance on the premises of which he has control. *Goldberg v. Lloyd*, 110 N.Y.S. 530 (1908). Lessor must make repairs required by public authorities. *Buckley v. Liggett*, 218 A.2d 515 (D.C. App. 1966).
[16] *Hall*, 632 P.2d at 850-51.
[17] *Brittain v. Atlantic Ref. Co.*, 126 N.J.L. 528, 19 A.2d 793 (1977).
[18] Covenant of quiet enjoyment is always implied in a lease. *East Walton Inc. v. Chicago Title & Trust Co.*, 69 Ill App.3d 635, 387 N.E.2d 751 (1979).
[19] *Restatement (Second) Landlord and Tenant* § 5.6 (1977).
[20] *Sheets v. Seldon*, 74 U.S. 416 (1969); *Kann v. King*, 204 U.S. 43, 27 S. Ct. 213 (1907); *see also, Hinson v. Delis*, 26 Cal. App.3d 629, 102 Cal. Rptr. 661 (1972); *Lemle v. Breeden*, 51 Hawaii 426 P.2d 470, 40 A.L.R. 3d 637 (1969).
[21] *Brugger v. Fonoti*, 645 P.2d (Utah 1982).
[22] The current housing codes are very strict. One landlord had his premises rejected for failure to have two (2) electrical outlets in each bedroom, no outlets in the bathroom, three (3) windows screens were missing and two (2) light covers missing from the ceiling lights. Utah has not conducted an official study regarding the economic impact of enacting a statute. This argument is supported by a number of real estate developers interviewed for this report.
[23] *Javins v. First National Realty Corp.*, 428 F.2d 1071, (D.C. Cir., 1970), cert. denied 400 U.S. 925 (1907); *Kline v. Barns*, 111 N.H. 87, 276 A.2d 248 (1971); *The Great Green Hope: The Implied Warranty of Fitness*, 28 Stan. L. Rev. 729 (1976).
[24] *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *see also, Restatement (Second) Landlord and Tenant* § 5.1 note 6 (1977).
[25] *American Law On Property* § 3.64 (1964); *see also, Restatement (Second) Landlord and Tenant* § 5.1 (1977).
[26] *The Great Green Hope: The Implied Warranty of Fitness*, 28 Stan. L. Rev. 729 (1976).
[27] *Restatement (Second) Landlord and Tenant* § 3.78 note 18, *infra; American Law On Property* § 5.6 (1974).
[28] *Gregory v. Fourthwest Investment Ltd.*, 754 P.2d 89 (Utah App. 1988); *William v. Melbey*, 699 P.2d 723 (1985).
[29] *American Law On Property* § 2.64 (1952).
[30] *Pines*, 14 Wis.2d 590, 111 N.W.2d 409 (1961).
[31] *Javins*, at 1071; *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973).
[32] *Marini v. Ireland*, 56 N.J. 130, 765 A.2d 526 (1970), 40 A.L.R.3d 1356-69 (1971).
[33] *Javins*, at 1071; *Marini*, 130 A.2d at 526.
[34] *Kline*, 276 A.2d at 252; *Pines*, 111 N.W.2d at 412.

Recent Utah Tort Developments

By Donald N. Zillman
Peggy Gentles

INTRODUCTION

1988-89 was a "tort rich" year for the Utah appellate courts. This article will summarize some of the most prominent cases. A full review of cases and statutory revisions appears in the 1989 update of Utah Tort Law which is available from the University of Utah College of Law.[1] This article reports cases decided through October 10, 1989.[2] The format will follow the classifications used in Utah Tort Law. Readers are cautioned that citations to Utah Advance Reports are subject to modification prior to final publication.

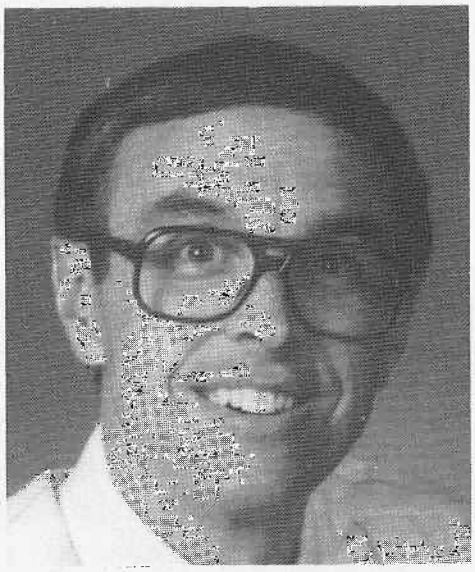
INTENTIONAL TORTS

The Utah Supreme Court addressed the issue of culpability for drunk driving accidents in *Johnson v. Rogers*.[3] In this case, Johnson was standing at a corner in downtown Salt Lake City when he and his son were struck by a truck driven by Rogers when it jumped the curb.[4] Johnson was injured and his son was killed in the accident. Rogers was driving under the influence of alcohol.[5]

The Court discussed whether Johnson could recover punitive damages. In doing so, the Court addressed the culpability for drunken driving. Justice Durham refused to hold that all drunk driving was *per se* knowingly reckless and exhibiting a high degree of disregard for the safety of others. Instead, such a level of culpability must be proven at trial.[6]

A Utah Court of Appeals case discussed the malicious prosecution action. In *Amica Insurance v. Schettler*,[7] the court examined the required nexus between the defendant's actions and the criminal prosecution. To prove that defendant instituted criminal proceedings against the plaintiff, the defendant must have been "actively instrumental in putting the law in force."[8]

The final notable intentional tort case this year is more interesting for its facts than for the law of the case. *Boisjoly v. Morton Thiokol*[9] involved a suit by a Thiokol engineer for severe emotional distress due to the tragic launching of the space shuttle Challenger. Plaintiff, among other engineers, had expressed concern about launching the shuttle in cold weather. The Court rejected plaintiff's claims finding that any claim that Thiokol had recommended launch to hurt plaintiff was "ridiculous."[10]



DONALD N. ZILLMAN is Professor of Law and Director of Graduate Studies at the University of Utah College of Law. He is a graduate of the University of Wisconsin-Madison (BS 1966 and JD 1969) and the University of Virginia (LLM 1973). At the Wisconsin Law School, he served as Editor-in-Chief of the Wisconsin Law Review *and was elected to the Order of the Coif. Since graduation, he has been law clerk for the Hon. James M. Carter, U.S. Court of Appeals for the Ninth Circuit; Staff Attorney, Defenders, Inc., San Diego; a legal officer in the United States Army Judge Advocate General's Corps; and a Special Assistant Attorney General for the state of Arizona. He has served on the faculty of Arizona State University Law School and has been a member of the Utah Law Faculty since 1979. From 1979 to 1986, he was the Director of the Energy Law Center at the College of Law.*

Professor Zillman spoke on the History of Surface Rights in Mining Law at the 1984 Special Institute on Rights of Access and Surface Use. He spoke to the Natural Resources Law Teachers biennial meeting in 1987 on United States Energy Policy.

He is the author (with President Laurence Lattman) of Energy Law *(Foundation Press 1983). He has written numerous articles on energy and natural resources law and policy.*

PEGGY GENTLES is currently a law student at the U of U College of Law.

THE NEGLIGENCE ACTION

The Utah Supreme Court adopted two new negligence causes of action: negligent infliction of emotional distress and wrongful pregnancy. The first of these was announced in the *Johnson* case discussed in the intentional torts section. The Court unanimously held that a cause of action for negligent infliction of emotional distress to a plaintiff within the zone of danger did exist in Utah. However, the Court was split 4-1 on the standard for determining who can recover.[11] The majority held that the "zone of danger" rule from the Restatement (Second) of Torts, Sect. 313, applied. The "zone of danger" doctrine allows liability for negligent infliction of emotional distress if the actor:

> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of third person and (b) from facts known to him, should have realized that the distress, if it were caused, might result in illness or bodily harm.[12]

Further, the Restatement allows recovery for distress from viewing injury to a third person due to the defendant's conduct only if "the negligence of the actor has otherwise created risk of bodily harm to the [person seeking to recover]."[13] The majority viewed the "zone of danger" theory as being the best balance between the interest of potential plaintiffs and the interest of establishing a predictable rule for the courts and public. Until the courts gained more experience in the cause of action, the majority felt it wise to take "the more conservative approach."[14] Justice Durham felt that the "zone of danger" rule was a "rigid and inequitable limitation" that unjustifiably predicated recovery on close physical proximity.[15] Instead, she favored the so-called *Dillon* rule, first articulated by the California Supreme Court in *Dillon v. Legg*.[16] Under this rule, three factors should be considered to evaluate foreseeability: 1) plaintiff's proximity to the scene of the accident; 2) whether the

plaintiff's distress was a result of witnessing the accident; and 3) if plaintiff was closely related to the victim.[17]

In another significant decision, *C.S. v. Nielson*,[18] the Court adopted the wrongful pregnancy cause of action. The case addressed two questions of law certified from the federal district court. Essentially, the questions addressed the existence of the cause of action in Utah and the measure of damages if remedy were available. The facts were relatively straightforward. The defendant Dr. Nielson performed a sterilization operation on plaintiff. Plaintiff claimed that Nielson did not inform her that the procedure was not infallible and that alternative procedures were available. Subsequent to the operation, plaintiff became pregnant and delivered a healthy baby. Plaintiff sought damages including medical expenses for the pregnancy and birth, the expenses of having a hysterectomy performed following the birth, emotional distress due to the pregnancy and birth, pain and suffering, and the cost of rearing an unplanned child.

In answering the federal district court's first question, the Court found that a cause of action existed. In doing so, Chief Justice Hall distinguished a claim for wrongful pregnancy from wrongful birth and wrongful life actions. Wrongful pregnancy is an action by parents to recover damages due to the birth of a healthy, but not desired, child. Wrongful birth or life refers to an action by parents or the child claiming that but for the doctor's negligence the child, born impaired, would have been aborted or would have never been conceived.[19]

The majority refused to apply Utah's Right to Life statute[20] to bar plaintiff's action. The statute's language "[a] cause of action shall not arise. . . based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted"[21] was not applicable to this situation. The plain language of the statute addressed the wrongful life and wrongful birth action only. "Clearly, '[a] person's decision *not to conceive a child* and to undergo surgical sterilization should not be confused with one's decision to *abort a child already conceived*.' " [22] Dr. Nielson's view, according to Chief Justice Hall, would ignore the principal that the pregnancy, not the birth, gives rise to the cause of action. Further, to not establish a cause of action would immunize a physician from any liability in similar situations.[23]

Justice Howe was the sole dissenter on the first question. He felt that recognition of a wrongful pregnancy action was contrary to public policy because it "denigrates human life and awards damages for the birth of a healthy child."[24] Plaintiff could be afforded relief for the medical costs associated with the unsuccessful surgery in a contract action. However, pain and suffering would never be recoverable.[25]

The measure of damages was much more controversial. The four justices agreed that the following damages could be recovered: any medical and hospital expenses resulting from the negligence; pain and suffering; wages lost by mother and/or father; and punitive damages, if applicable.[26] The majority also refused to require that parents mitigate damages by aborting or placing the child for adoption.[27]

The justices in the majority differed, however, on the recovery of the ordinary costs of raising the child. Justices Durham and Zimmerman in separate opinions favored the adoption of the "Benefits Rule." This view allows the recovery of a portion of the child-rearing costs. The child-rearing costs, however, are reduced by any pecuniary or non-pecuniary benefits which accrue to the parents as a result of rearing a healthy child.[28] Justice Durham felt that the "Benefits Rule" was more responsive to the highly individualized circumstances which would arise in wrongful pregnancy cases.[29] The presence of a child could have profoundly different effects depending upon differing economic, emotional and physical attributes of the family unit.[30] "Recovery for child-rearing costs where a negligently performed sterilization has a substantial negative impact on the family is in the interest of 'greater justice.' " [31] Justice Zimmerman viewed Justice Durham as not allowing for the child-rearing costs to be offset by the intangible benefits of raising a child. He disagreed, favoring "the unadulterated 'benefits rule' for measuring damages which most closely approximates the general damages rule that if the tortfeasor has conferred benefits as well as detriments on the plaintiff, the benefits and detriments must be netted out in any award."[32]

Wrongful pregnancy is an action by parents to recover damages due to the birth of a healthy, but not desired child.

The Chief Justice and Justice Stewart felt that the "Limited Damages View" which was applied in a majority of jurisdictions should govern. While allowing the other types of damages mentioned above, this view does not allow recovery of child-rearing costs.[33] Chief Justice Hall cited many of the reasons that other courts have used to justify the "Limited Damages View." Among them were the speculative nature of child-rearing damages, the potential that the plaintiff would suffer a windfall at the defendant's expense, and the difficulty of establishing the amount of damages at an early time in the child's life.[34]

Two other negligence cases are worth noting. First, the Utah Court of Appeals refused to apply state and federal OSHA standards to establish a standard of care owed a member of the public. Since the plaintiff was not employed by the establishment, he was not in the class intended to be protected by OSHA.[35] Second, the federal district court refused to hold Kennecott liable for the workplace injury to an independent contractor's employee. The case also offers a good review of the exceptions to the general non-liability rule in this type of case.[36]

One final case deserves note. In *Brinkerhoff v. Forsyth*,[37] the Supreme Court discussed the Dram Shop Act's[38] application to a bartender at Camp Williams NCO Club. The Court unanimously held that the immunity of state employees[39] barred plaintiffs' action against the bartender. Of particular interest is the final footnote in the relatively short opinion. The footnote accompanies the sentence "[The bartender's] activities fall within and are protected by the provision of Sect. 32-11-2," and says "Plaintiffs have not challenged and we do not address the constitutionality of Utah's Dram Shop Act."[40]

LANDOWNER TORTS

The Utah Court of Appeals has begun to assert its role as an appellate court capable of altering current doctrine as well as following Supreme Court precedent. This new activism is especially apparent in the landowner torts area with the two significant decisions in this field of law in the last year. Most notable is the late September 1989, decision of *Donahue v. Durfee*.[41] In *Donahue*, the plaintiff was injured while working on the roof of a building. He contacted an electric power line which was four or five feet above the roof. Plaintiff was not warned about the power line, but he apparently saw it and understood the danger it posed. The issue posed in the case was whether the "open and obvious danger rule" was an absolute bar to plaintiff's action against defendant landowner. The Court held that the open and obvious doctrine was incompatible with Utah's adoption of comparative

negligence. "[T]he Utah Legislature has by necessary implication abolished the open and obvious danger rule as an absolute bar to an injured guest's recovery."[42] To allow the open and obvious doctrine to operate would "resurrect contributory negligence as an absolute bar to recovery in cases involving land possessor's liability.' " [43] Also, since assumption of risk has been expressly abolished, "[i]t would defy rationality to maintain [the rule] as a complete bar to recovery where the essentially indistinguishable assumption of risk doctrine no longer compels such as result." [44]

The other significant case in the landlord liability area is *English v. Kienke.*[45] Plaintiff's decedent had entered into agreement with defendant landowner pursuant to which the decedent would live rent-free in return for repairs. The decedent was killed while fixing the porch on defendant landowner's property. The Court concluded that since the decedent had done all the planning and work, he had created the risk of harm and therefore the defendant could not be held liable.

PROFESSIONAL TORTS

One of the few professional tort cases decided by the Utah Supreme Court this year, *Ramon v. Farr,*[46] dealt with the relevance of the Physician's Desk Reference [PDR] and manufacturer's instructions in setting the standard of care in a medical malpractice action. The defendant injected plaintiff with a cervical anesthetic before the birth of her child. Several hours after birth, the child began to show signs of severe trouble. The baby later developed permanent physical and mental defects. Plaintiff sought recovery on three theories. First, the defendant had negligently injected the anesthetic into the baby's head in utero. Second, the anesthetic should not have been used since the manufacturer expressly stated that the anesthetic was not recommended for use as a paracervical block. Third, defendant failed to inform plaintiff of the risks associated with the use of the anesthetic. The trial judge refused to give jury instructions on the second and third theories.

The plaintiff argued that the PDR and the manufacturer's instructions alone established a standard of care which the defendant had breached. The Court disagreed. "[W]e think the better rule is that manufacturers' inserts and parallel PDR entries do not by themselves set the standard of care, even as a prima facie matter."[47] Instead, such information is "some evidence" of a standard for care.[48] In so holding, the Court noted that package inserts served conflicting purposes and do not alone establish a standard of care. The functions of the enclosures include advertising, government regulation and information to the doctor.[49]

The Court of Appeals addressed the statute of limitations for an attorney malpractice case.[50] In 1976, the defendant attorney had been involved in the sale of plaintiff's business. During the course of the sale, defendant filed a financing statement with the state government. The statement had to be renewed in five years to maintain plaintiff's security interest in the property. Neither plaintiff nor defendant renewed the statement in 1981 as required. As a result, plaintiff alleged he was injured when in 1983 the business went bankrupt and plaintiff did not have a valid claim against the defaulting purchasers. In 1984, the plaintiff filed the malpractice action which the parties agreed was governed by a four-year statute of limitations.[51] The trial court dismissed plaintiff's action stating that any malpractice had occurred in 1976 and thus plaintiff was barred from asserting a right to relief.

The defendant argued that the cause of action accrued either at the time the damage occurred (performance of contract between the plaintiff and defendant) or at the time of termination of legal services. However, the Court agreed with plaintiff and adopted the discovery rule which establishes a cause of action "at the time the client discovers, or through the use of reasonable diligence should have discovered, the attorney's negligent act."[52] Thus, the case was remanded to determine at what date the cause of action accred under the discovery rule.

A cause of action is established at the time the client discovers, or through the use of reasonable diligence should have discovered the attorney's negligent act.

The Utah Legislature passed a bill immunizing attorneys who provide services to indigent clients.[53] No civil liability arises if the attorney is assigned by court to represent indigent clients. The attorney must be providing services for free or for an amount not covering the attorney's costs. No immunity exists if the client shows gross negligence or willful misconduct.

COMMERCIAL TORTS

The major case in the commercial tort area this year was the Supreme Court's decision in *Berube v. Fashion Center.*[54] Plaintiff Berube had worked for the defendant for over two years. Defendant's written termination policy provided that no employee would be terminated without notice except in specified circumstances. One such circumstance was failing to pass or refusing to take a polygraph test. Berube had received favorable employment reviews and had been promoted during her tenure with defendant. Following an inventory shortage, all employees in the store were required to take a polygraph test. Berube exhibited stress reactions to one question. However, the examiner determined after the test that the reactions did not result from any guilt on her part. Nevertheless, defendant required that Berube take a second polygraph test without informing her of the reason why. Berube performed satisfactorily on the exam but responded in a pretest interview that she had rounded off inventory counts when she felt a mistake had been made. Defendant requested that Berube take a third test, once again not disclosing the reason. On the day scheduled for the third test, Berube said she was too nervous to take the test. She was told that she had to take it or be terminated. Berube did not take the test and was terminated.

Berube sued based on, among other theories, wrongful discharge. Defendant claimed that since Berube was an at-will employee, she had no cause of action. The Court was willing to recognize exceptions to the termination-at-will rule. However, there was sharp division on which exceptions should be recognized. Justices Durham and Stewart would recognize three circumstances in which the at-will rule should not be applied: 1) if the employee was terminated contrary to public policy; 2) if an express or implied contract term exists which was violated in the termination; and 3) if the termination violates an implied covenant of fair dealing. Justice Zimmerman, however, did not agree that the covenant of fair dealing should be recognized. He felt that this case was not appropriate to address the issue. "I can understand the desire to assure that justice is done to individual employees, but the cost of uncertainty for employers is simply too great to justify creation of the cause of action."[55] Justice Howe and Chief Justice Hall both felt that the written terms of the policy manual were sufficient to establish Berube's right not to be terminated without warning. Therefore these justices did not feel that exceptions to the at-will employment rule needed to be discussed.[56]

Another commercial tort case dealt with the duty that arises from a bank's premature return of checks.[57] Plaintiff had presented checks drawn on an account at defendant

bank. There were not sufficient funds in the account to cover the checks. Plaintiff's counsel placed the checks with the bank on the understanding that they would be held for 30 days for collection. The bank returned the checks to plaintiff after three days having cleared other checks presented later. The Court found that the bank had a duty "to act in good faith and exercise ordinary care in all its dealings."[58] This duty arises from the following language of the Uniform Commercial Code: "no agreement can disclaim a bank's responsibility for its own lack of good faith or failure to exercise ordinary care."[59]

PRODUCTS LIABILITY

The most notable action in this area is the recent Supreme Court declaration that the Utah architects and builders statute of repose [60] is unconstitutional. The Court did so in two separate opinions, *Sun Valley Water Beds v. Herm Hughes & Son*[61] and *Horton v. Goldminer's Daughter.*[62] It is not clear why these two cases were not consolidated.

Chief Justice Hall, writing for a unanimous court in *Sun Valley*, found the statute of repose to violate the open courts provision of the Utah Constitution.[63] To analyze the question, the Court used the two part test developed in *Berry v. Beech Aircraft.*[64] The first part allows a statute to survive a constitutional challenge if it provides an "effective and reasonable alternative remedy." Even if no sufficient alternative is provided, a statute will endure if adequately justified. This standard is met only if "a clear social or economic evil" is to be eradicated and the elimination of a legal remedy is "not an arbitrary or unreasonable means" to do so.

The Court rejected the defendant's argument in *Sun Valley* that recovery against others involved in the construction (suppliers, manufacturers) provided an adequate alternative. Chief Justice Hall said, "alternative claims are to be distinguished from substitute or alternative remedies."[65] Further, the Court could find no alternative remedy that had been provided when the Legislature eliminated the right to recover against builders and architects more than seven years after completion.[66] The Court found the statute also failed the second part of the *Berry* test. The only reasons for the statute that the Court could find were to limit stale claims and protect the construction industry. Chief Justice Hall refused to accept these rationales as sufficient: "[W]e do not believe that abrogation of an individual's Sect. 11 constitutional right is a reasonable way to provide for an industry's peace of mind."[67] Further, the number of claims against architects and builders that arise nationally were so small that it did not appear that the statute in fact accomplished its goals.[68]

In *Horton*, authored by Justice Stewart, the Court found the same statute unconstitutional, again under the open courts provision. The same *Berry* test was used in *Horton* as was used in *Sun Valley.* Discussing the possible justifications for the statute, Justice Stewart noted that the concern about stale claims does not support the statute. "Although the passage of time increases the difficulty of providing reliable evidence, the difficulties of proof fall much more heavily upon the plaintiffs."[69] Justice Stewart was not willing to say that statutes of repose were *per se* unconstitutional (a point not addressed in *Sun Valley*).

> We do not believe that the open courts clause necessarily forbids forever and always all such forgiveness of mistake. What it clearly does is make certain that periods of repose only be allowed when the possibility of injury and damage has become highly remote and unexpected.[70]

The Utah architects and builders statute of repose was found to violate the open courts provision of the Utah Constitution.

Chief Justice Hall cited a law review article that placed the number of lawsuits filed more than seven years after completion at 2.1 percent.[71] If this figure is correct, Justice Stewart may be unwilling to uphold any statute of repose.

This year the legislature reconstituted a statute of limitations for products liability.[72] In 1985, the existing statute of repose governing products liability actions was declared unconstitutional.[73] In response, the legislature passed a statute allowing for suits within two years from when the cause of action was discovered or should have been discovered.

GOVERNMENT AND GOVERNMENT OFFICER TORTS

In the area of governmental tort, the Utah Supreme Court announced a significant, but highly fractured, decision in *Condemarin v. University Hospital.*[74] Crelia Condemarin, pregnant with her second child, was admitted to University Hospital because her treating physician expected a difficult delivery. Following an emergency caesarean, the child was born severely retarded. The uncontested cause of the damage was asphyxia at birth. Condemarin sued University Hospital and some of its employees for negligence. At the time of the suit, the legislature had limited the amount a plaintiff could recover from a government entity to $100,000.[75] Another portion of the Utah Governmental Immunity Act prohibited suit against any governmentally owned hospital.[76] Condemarin moved to have both sections of the Utah Governmental Immunity Act be declared unconstitutional. The trial court denied the motion, and the Supreme Court granted a petition for an interlocutory appeal.

The Court held 3-2 that the $100,000 limit as applied to University Hospital was unconstitutional. However, each of the three justices in the majority wrote a separate opinion and cited different reasons for the decision. Justices Durham and Zimmerman would have also declared the immunity for government hospitals unconstitutional. However, Justice Stewart did not agree and therefore the holding was limited to the damage cap.

Justice Durham would have struck down both provisions as violative of the due process provision of the Utah Constitution.[77] She cited *Berry v. Beech Aircraft* [78] as articulating a "balancing analysis" for the due process questions under the Utah Constitution.[79] This approach compares the legitimacy of the legislative purpose and the advancement of the purposes by the means with the denial of due process rights.[80] While Justice Durham was concerned about both sections of the Immunity Act, she felt the case was presented in such a way that only the recovery cap had to be considered. Finding the cap unconstitutional would also invalidate the immunity of the employees "to the extent that [the immunity portion] brings health care entities . . . within the purview of the recovery limits statutes."[81] The state had claimed that the cap was necessary to protect public funds. However, there was no showing that such was the case. In fact, without a showing that "a measure so drastic . . . is urgently and overwhelmingly necessary," Justice Durham would not uphold the cap.[82] Neither would she uphold the immunity provision working in conjunction with the cap.[83]

Justice Zimmerman agreed with Justice Durham that a due process, not equal protection, analysis should be used to invalidate the provisions. However, he emphasized that portions of the statute failed the *Berry* standard. "The justifications advanced . . . and extraordinarily

weak. . . . In fact, at oral argument, [the state] admitted that [it] had no empirical evidence that damage awards in Utah have threatened the stability of any unit of government and that the concerns that led to the legislation were based on anecdotal evidence."[84]

Justice Stewart found only the damage limitation as applied to the hospital unconstitutional. Further, he felt that an equal protection analysis was necessary to evaluate the cap.[85] Justice Stewart opined narrowly "that the damage limitation. . . on tort recovery as applied to the University Hospital is unconstitutional." He concluded the hospital's activities were not sufficiently governmental in nature to rationalize the limit.[86] Justice Stewart left "for another day" whether the cap could apply to municipal hospitals and other health care facilities. Chief Justice Hall, joined by Justice Howe, dissented. He contended the statutes should be reviewed under a "rational basis standard." The Legislature's fear that unrestricted tort liability could threaten government entities with "insolvency or grave financial burdens" provided such a rational basis.

MULTIPLE DEFENDANTS

Several cases in this area defined the limits of the respondeat superior action. The Utah Supreme Court in *Whitehead v. Variable Annuity Life Insurance Co.* reaffirmed that the "coming and going" rule bars a respondeat superior action.[87] Larry Anderson, co-defendant, worked for defendant insurance company [VALIC] as a district manager/salesman. Anderson generally arrived at his office around 9:00 a.m. and left for the day at 5:00 p.m. During the day, he made sales visits in his own car for which he was reimbursed. Occasionally, Anderson made sales calls on his way home and he also made some business telephone calls at night from his home. On his way home one night, Anderson rearended plaintiff's vehicle causing severe injury to plaintiff.[88] That night Anderson had no appointments between his office and his home. The jury found that Anderson was negligent but was not acting in the scope of his employment. However, the trial Court granted plaintiff's and Anderson's motion for directed verdict that Anderson had been acting within the scope of his employment.

The Supreme Court agreed with VALIC that Anderson was not within the scope of his employment the night of the accident even if Anderson planned to make some business phone calls from home later that evening. It rejected plaintiff's argument that, because it was necessary for Anderson to have his car at work, VALIC should be vicariously liable. Instead, the Court adopted the "coming and going" rule in third-party negligence cases. In order to find the employer liable, "employee [must be] acting for the benefit of the employer and under his control."[89] To hold otherwise, in the opinion of the Court, would be unfair to the employer.[90]

The Supreme Court defined scope of employment further in *Birkner v. Salt Lake County.*[91] Plaintiff called a county mental health facility for help. Defendant Social Worker Flowers contacted plaintiff later to check on her progress. Plaintiff then began to receive counseling from Flowers. During this time, Flowers and plaintiff engaged in sexual activities at least twice. Plaintiff did not disclose the conduct until after her case had been reassigned to another therapist. Plaintiff sued Flowers and Salt Lake County claiming that the county was liable under the doctrine of respondeat superior.

Justice Stewart noted three factors which must be present to hold an employer liable in Utah. First, the conduct must be "of the general kind" for which the employee was hired. Second, the behavior must occur within the normal hours of employment and within the physical boundaries of the employment. Finally, the conduct must, at least partially, have been pursued to benefit the employer. Justice Stewart stated:

> Although Flowers' misconduct took place during, or in connection with, therapy sessions, it was not the general kind of activity a therapist is hired to perform. More critical, it was not intended to further his employer's interest. On the contrary, it served solely the private and personal interests of Flowers.[92]

Birkner could be read as stating that any sexual misconduct is outside the scope of employment. While the Court does not expressly adopt this position, it cites other jurisdictions that have adopted such a rule in support of its holding.[93]

While Birkner was denied recovery against the county for Flowers' negligence, the Court felt that enough evidence existed to support the jury's finding that the county was independently liable for negligent supervision. Plaintiff Birkner also appealed the jury's judgment in finding her 10 percent negligent. She claimed that since she was mentally impaired, she was incapable of being negligent. The Court denied Birkner's challenge saying, "Those who are insane are incapable of contributory negligence, whereas lesser degrees of mental impairment should be considered by the jury in determining whether the plaintiff was contributorily negligent."[94]

Those who are insane are incapable of contributory negligence, whereas lesser degrees of mental impairment should be considered by the jury in determining whether the plaintiff was contributorily negligent.

In yet another respondeat superior case, the Supreme Court discussed an employer's liability for punitive damages. In the *Johnson* case (discussed *supra*), the driver Rogers was employed by co-defendant Newspaper Agency Corp. [NAC]. At the time of the accident, Rogers was driving one of NAC's trucks. The precise issue was whether NAC could be held liable for punitive damages for the actions of one of its non-managerial employees. The Court was unwilling to provide for full vicarious liability for punitive damages. Instead, it felt that liability must be premised on some wrongdoing on the part of the employer.[95] The Court adopted the conservative approach of the Restatements (Second) of Agency and Torts.[96] This standard "limits vicarious punitive damages to those situations where wrongful acts were committed or specifically authorized by a managerial agent or were committed by an unfit employee who was recklessly employed."[97] The procedural posture of *Johnson* was an appeal by plaintiff from a summary judgment for defendants on the issue of NAC's liability for punitive damages. As a result, the Court remanded for a determination of whether there were sufficient facts to allow a jury verdict on the question.[98]

The final significant multiple defendant case from the Supreme Court this year was *Slusher v. Ospital.*[99] *Slusher* dealt with the validity of Mary Carter Agreements, specifically requisite disclosure of the settlements. Plaintiff Slusher had been injured in a car accident that had killed Ospital and had involved co-defendant Campbell. Slusher filed suit against Ospital's estate and Campbell. Before trial Slusher and Ospital's estate entered a settlement agreement fixing the latter's liability at $65,000. Campbell found out about the settlement two days before trial and requested that the Court follow one of three possible courses: 1) invalidate the settlement; 2) bifurcate the proceeding; or 3) admit the settlement into evidence. The trial judge declined all Campbell's motions. The jury found Campbell 100 percent responsible for the accident. Campbell appealed stating that the Slusher-

Ospital agreement was against public policy and should be invalidated, or at the least disclosed to the jury.

The Court, per Court of Appeals Judge Orme,[100] Began its analysis by noting the elements of a traditional Mary Carter Agreement. Such an agreement: 1) fixes the liability of defendant(s) who remain in the case; 2) is not disclosed to the other parties or the judge and jury; and 3) ensures plaintiff a minimum recovery regardless of the outcome of the litigation.[101] Slusher and Ospital's estate attempted to argue that since Campbell and the trial judge knew of the settlement, the compact was not a true Mary Carter Agreement. The Court said, "[T]his is largely irrelevant.... The fact that the agreement might influence testimony but was kept secret from the jury is enough to trigger legitimate concern about whether Campbell received a fair trial."[102] However, the Court stated in a footnote that it was not deciding the status of true Mary Carter Agreements in Utah.[103]

Judge Orme easily dismissed Campbell's claim that a bifurcated trial should have been granted. He noted that cases involving comparative liability of joint tortfeasors should be tried in the same actions.[104] Campbell's assertion that the agreement between Slusher and Ospital was against public policy was also disposed of summarily. A strong policy favoring settlement is present in Utah, and the agreement "did not contain the objectionable features which occasionally prompt Courts to invalidate secretive settlement agreements."[105]

The bulk of the *Slusher* decision involved disclosure of an agreement to the jury. The Court first noted that most jurisdictions required that Mary Carter Agreements be disclosed to the judge and sometimes to the jury.[106] Judge Orme then considered problems which could arise from the disclosure of a settlement to the jury. Concerns about the language of the agreement and disclosure of the amount in the settlement have potential to prejudice the uninvolved parties. Further, the jury could draw inferences about the liability of the parties who settle. Also, the jury could make assumptions about the availability of insurance. The Court found the last of these arguments especially unpersuasive in the case at hand since the law requires that all automobiles be insured.[107] In cases with settlements not involving all the parties, the Court established the following standard:

> The parties must promptly inform the Court and the other parties to the action of the existence of the agreement and of its terms. Where the action is tried by jury, the Court shall, upon motion of a party, disclose the existence and basic content...to the jury *unless* the Court finds that...such disclosure will create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury.[108]

The trial judge also must determine whether the explanation is sufficient, or whether the actual document should be admitted. However, the Court stated "instances would be rare when the amount of the settlement should be disclosed."[109]

DEFENSES

The Utah Supreme Court in *Forsman v. Forsman*[110] decided which conflicts of laws principle applies to interspousal immunity. In *Forsman*, a wife sued her husband to recover damages for injuries sustained in a car accident in Utah. The parties resided in California. The trial Court had granted summary judgment for defendant finding plaintiff's cause of action precluded by the doctrine of interspousal immunity. California law, however, does not recognize interspousal immunity for negligent torts. The Court adopted the Restatement (Second) of Conflicts view that the law of the parties' domicile will almost always govern.[111] In support of its position, the Court quoted the rationale of an earlier California case dealing with the same issue:

> [The domicile] state has the primary responsibility for establishing and regulating the incidents of the family relationship...Moreover, it is undesirable that the rights, duties, disabilities and immunities conferred or imposed by the family relationship should constantly change as members of the family cross state boundaries.[112]

A Court of Appeals case, *Mikkelsen v. Haslam*,[113] involved assumption of risk and contributory negligence in a medical malpractice case. While no new law was established, the case offers a useful and extensive discussion of the topics.

"Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purpose of civil damages."

MISCELLANEOUS

Punitive damages were a popular topic this year. The United States Supreme Court ruled that the Excessive Fines Clause of the Eighth Amendment does not prohibit the award of punitive damages.[114] "Simply put, the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purpose of civil damages."[115] The Court also rejected a claim that federal common law outlawed the award.[116]

The *Johnson* drunk driving case discussed earlier also included a discussion of punitive damages. The standard of fault required was "knowing and reckless disregard for the rights of others."[117] The Court emphasized that it was not adopting a per se rule; every drunk driving case did not support a claim for punitive damages.[118] Defendants attempted to argue that because Rogers was too drunk to know what he was doing, he could not be held to a "knowing and reckless disregard" standard. The Court rejected this stating that the jury could find the requisite behavior in the consumption of the alcohol.[119]

The final development in the punitive damages area was legislative.[120] The legislation established standards for awarding punitive damages. To grant such damages, clear and convincing evidence must be present. Also, punitives are available only if compensatory or general damages have also been awarded. Liability for punitive damages must be established before any financial information about the defendant may be admitted.

In *Parry v. Ernst Home Center*,[121] the Utah Supreme Court discussed the application of Utah's Long Arm Statute[122] to a foreign defendant in a products liability action. The plaintiff was injured by a maul manufactured by a Japanese company, Hirota Tekko K.K. The maul had been sold to a Japanese distributor who in turn had exported the machinery to a California corporation. From California, the maul was transferred a number of times before being sold in Idaho. Plaintiff sued all the American companies involved in the sale and distribution of the maul. These defendants filed a third party complaint against Hirota and the Japanese exporter, Okada Hardware. The Japanese companies claimed that the Utah Court did not have personal jurisdiction.

The Court in *Parry* declined to construe the Long Arm Statute, assuming it applied, and considered the Due Process concerns. In doing so, the Court relied very heavily on the United States Supreme Court case of *Asahi Metal Industry v. Superior Court*.[123] *Asahi* involved somewhat similar cir-

cumstances of jurisdiction over a foreign corporation. The Court felt that "the due process approach taken by most Courts in this country overlooks important differences between assertions of jurisdiction in the interstate context and those in the international context."[124] Justice Howe felt that *Asahi* could be partially distinguished. First, the interests of the plaintiff and state are much stronger. In *Asahi*, the plaintiff had settled and the Court was adjudicating an indemnity action between two foreign corporations. Second, the product involved had been manufactured solely in Japan as opposed to being a component part placed in a product in another country. Finally, the California distributor had placed many orders with the foreign corporations over an extended period of time.[125]

However, the Court felt that jurisdiction could not be exercised. None of the "additional conduct" required by *Asahi* was present in this case.[126] The opinion emphasized that the Japanese corporation did not direct any business toward Utah.[127]

Pate v. Marathon Steel Co.[128] examined the statutory employer defense in workers' compensation situations. Employee Pate had been badly burned on a highway project. Her immediate employer paid her compensation benefits. Her employer was a subcontractor of Marathon Steel which was in turn a subcontractor of Hensel-Phelps. Pate sued Marathon and Hensel-Phelps. They claimed immunity from liability due to being "statutory employers" of Pate.

The Supreme Court found "statutory employer" status did not bar Pate's action. The 1975 amendments to section 35-1-62 of the Workers' Compensation laws expressly allowed the injured employee to bring action against "subcontractors, general contractors, independent contractors...not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death." The provision governed notwithstanding section 35-1-42 defining employers. The Court expressed no opinion about a suit against a statutory employer that had been required to make compensation payments after the default of the immediate employer.

In *Cruz v. Wright*,[129] the Utah Supreme Court again rejected a claim that a cause of action for loss of consortium existed in Utah. A 1987 case had established that the adoption of the Utah Married Women's Act in 1898 abolished any loss of consortium action, if in fact any such claim had existed previously.[130] Plaintiff claimed that the Legislature's abolition of the cause of action violated Article I, Sect. 11 of the Utah Constitution. Further, plaintiff argued that the loss of consortium, that traditionally only could be asserted by the husband, should as a matter of equity be extended to wives.

The Court first pointed out that Article I, Sect. 11 did not prohibit the Legislature from modifying or even destroying a cause of action.[131] Next, Justice Zimmerman found:

> The Married Women's Act of 1898 was a reasonable legislative enactment intended and reasonably tailored to place men and women on equal footing with respect to their ability to bring actions for their own injuries and to extinguish the concept that a wife was the property of her husband.[132]

The Court also noted that "the statute...did not operate either to extinguish a cause of action after it had accrued or to limit the remedies available; it simply prevented one from ever arising."[133]

The final significant case this year also comes from the Supreme Court. *Phillips v. Smith*[134] considered the propriety of an attorney's lien. Plaintiff Phillips engaged a law firm concerning a potential medical malpractice suit against defendants. The written employment contract included a provision that the firm would receive one-third of the "amount recovered." The firm gave advance notice of intent to sue as required by state law and entered settlement negotiations. Defendants offered a $35,000 settlement. The firm recommended that the offer be accepted in a letter that also set out Phillips' options. One option was to terminate the attorney-client relationship. Phillips rejected the offer and instructed the firm to make a $45,000 counteroffer. The firm returned with a settlement offer of approximately $40,000. Phillips rejected the offer and terminated the relationship with the firm.

Following Phillips retention of another firm, but before any more action was taken in the case, the first firm filed a "Notice of Attorney's Lien." The lien claimed one-third of the $40,000 offer that had been negotiated by the firm. Phillips and defendants settled for essentially the same terms as the first firm had negotiated.

The Supreme Court by 3-2 invalidated the lien. The majority opinion, written by Justice Zimmerman, initially pointed out that the firm was claiming a statutory "charging" lien[135] as opposed to common law "retaining" lien. Justice Zimmerman stated, "[T]he statutory lien is only as good as the underlying agreement regarding compensation."[136] Construing the contract against the firm, as it is the party with expertise in the area, the Court found that it lacked any provision for a fee if a settlement was negotiated by another firm. The agreement was interpreted "as being predicated on the assumption that the [first] firm would handle the matter through its conclusion."[137] Since the assumption proved to be false, the lien was invalid. The Court also noted that to hold otherwise would yield an unconscionable result.[138] However, the Court noted, without deciding, that the firm may be able to recover under *quantum meruit*.[139]

[1] Utah Tort Law and yearly supplements may be purchased by contacting Ms. Elizabeth Kirschen, College of Law, University of Utah, Salt Lake City, UT 84112. Please enclose a check payable to the College of Law for $32.50.
[2] The reports covered are 118 Utah Advanced Reports, 872 F.2d, and 710 F.Supp.
[3] 90 UAR 3, 763 P.2d 771 (Utah 1988).
[4] There are other aspects to this case which will be discussed later.
[5] Evidence was introduced at trial that immediately before reporting to work Rogers had consumed seven mixed drinks and had "chug-a-lugged" a 27-ounce drink with two mini bottles of tequila. *Johnson*, 90 UAR at 5.
[6] *Id.* at 5.
[7] 100 UAR 17, 768 P.2d 950 (Utah Ct. App. 1989).
[8] *Id.* at 20.
[9] 706 F.Supp 795 (D. Utah 1988).
[10] *Id.* at 802.
[11] This Johnson opinion is unusual in that Justice Durham's lead opinion is not the majority position. Justice Zimmerman wrote a concurring opinion that was joined by the other three justices, thus forming a majority for the issues it discussed. The major difference was in the standard to be applied in the negligent infliction of emotional distress action.
[12] Restatement (Second) of Torts, § 313.
[13] *Id.*
[14] *Johnson*, 90 UAR at 13.
[15] *Id.* at 9.
[16] 441 P.2d 912 (Utah 1968).
[17] *Johnson*, 90 UAR at 9 citing *Dillon*, 441 P.2d at 920-21.
[18] 98 UAR 4, 767 P.2d 504 (Utah 1988).
[19] *Id.* at 4-5.
[20] Utah Code Ann. §§ 78-11-23 to 25 (1987).
[21] Utah Code Ann. § 78-11-24 (1987).
[22] *C.S.*, 98 UAR at 6 quoting *Morris v. Sanchez*, 746 P.2d 184 (Okla. 1987) (Opala, J., concurring in part and dissenting in part) (emphasis in original).
[23] *C.S.*, 98 UAR at 6.
[24] *Id.* at 18.
[25] *Id.* at 19.
[26] *Id.* at 7.
[27] *Id.* n.27.
[28] *Id.* at 7.
[29] *Id.* at 13.
[30] *Id.* at 14.
[31] *Id.*
[32] *Id.* at 17 citing Restatement (Second) of Torts § 920 (1979) and 22 Am.Jr.2d *Damages* § 551 (1988).
[33] *Id.* at 9.
[34] *Id.* at 9-11.
[35] *Knapstad v. Smith's Management Corp.*, 108 UAR 61 (Utah Ct. App. 1989).
[36] *Simon v. Deery Oil*, 699 F.Supp. 257 (D.Utah 1988).
[37] 116 UAR 23 (Utah 1989).
[38] Utah Code Ann. §§ 32-11-1 to -2 (Supp. 1983) (repealed and reenacted in 1985).
[39] Utah Code Ann. § 32-11-2 (Supp. 1983).
[40] *Brinkerhoff*, 116 UAR at 24 n.5.
[41] 118 UAR 64 (Utah 1989).
[42] *Id.* at 66.
[43] *Id.* quoting *Keller v. Holiday Inns*, 671 P.2d 1112, 1119 (Id. Ct. App. 1983).
[44] *Donahue*, 118 UAR at 67.
[45] 108 UAR 54 (Utah Ct. App. 1989).
[46] 101 UAR 48 (Utah 1989).
[47] *Id.* at 50.
[48] *Id.*
[49] *Id.* quoting Comment, *Package Inserts for Prescription Drugs as Evidence in Medical Malpractice Suits*, 44 U. Chi. L. Rev. 398, 416 (1977).
[50] *Merkley v. Beaslin*, 113 UAR 45 (Utah Ct. App. 1989).
[51] Utah Code Ann. § 78-12-25 (1)(1981).
[52] *Merkley*, 113 UAR at 47.
[53] House Bill 216, Utah Code Ann. § 77-32-8.
[54] 104 UAR 4, 771 P.2d 1033 (Utah 1989).
[55] *Id.* at 17.
[56] The Utah Supreme Court used *Berube in Caldwell v. Ford, Bacon & Davis Utah*, 114 UAR 14 (Utah 1989). That case upheld a summary judgment against terminated employee. In doing so, the Court found that even if the employment manual constituted an implied-in-fact part of the contract, the terms were not breached.
[57] *Arrow Industries v. Zions First National Bank*, 99 UAR 10, 767 P.2d 935 (Utah 1988).
[58] *Id.* at 12.
[59] UCC § 4-103 (1).
[60] Utah Code Ann. § 78-12-25.5 (1987) (amended 1988).
[61] 118 UAR 27 (Utah 1989).
[62] 118 UAR 37 (Utah 1989).

[63] Utah Const. Art.1, Sect. 11.
[64] 717 P.2d 670, 680 (Utah 1985). The *Berry* decision declared the products liability statute of repose unconstitutional.
[65] *Sun Valley*, 118 UAR at 29.
[66] *Id.*
[67] *Id.* at 30.
[68] *Id.*
[69] *Horton*, 118 UAR at 42 citing *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725, 728 (Ala. 1983).
[70] *Horton*, 118 UAR at 42-43.
[71] *Sun Valley*, 118 UAR at 30 citing Note, *The Constitutionality of Statutes of Respose: Federalism Reigns*, 38 Vand. L. Rev. 627, 633-34 (1985) and *Berry*, 717 P.2d at 681-82.
[72] Senate Bill 25, Utah Code Ann. § 78-15-3.
[73] *Berry v. Beech Aircraft*, 717 P.2d 670 (Utah 1985).
[74] 107 UAR 5 (Utah 1989).
[75] Utah Code Ann. § 63-30-34. The amount was later increased to $250,000.
[76] Utah Code Ann. § 63-30-3.
[77] Utah Const. Art I, Sect. 11.
[78] 717 P.2d 670 (Utah 1985).
[79] *Condemarin*, 107 UAR at 12 citing *Berry*, 717 P.2d at 683.
[80] *Id.*
[81] Condemarin, 107 UAR at 15.
[82] *Id.* at 16.
[83] *Id.* at 17.
[84] *Id.* at 21.
[85] *Id.* at 22.
[86] *Id.* at 24.
[87] 101 UAR 24 (Utah 1989).
[88] Plaintiff's injuries were exacerbated by the fact that the Jeep Commando he was in rolled. Plaintiff, in a separate action, sued AMC/Jeep for negligent design. The appeal to the Utah Supreme Court in that case was decided the same day as this case. See *Whitehead v. American Motor Sales Corp.*, 101 UAR 27 (Utah 1989).
[89] *VALIC*, 101 UAR at 26.
[90] *Id.*
[91] 104 UAR 18 (Utah 1989).
[92] *Id.* at 20.
[93] *Id.* at 21.
[94] *Id.* at 22.
[95] *Id., Johnson v. Rogers*, 90 UAR at 7, 12.
[96] *Johnson*, 90 UAR at 6 citing Restatement (Second) of Agency § 217C and Restatement (Second) of Torts § 909.
[97] *Johnson*, 90 UAR at 7.
[98] *Id.* at 13. The court was split on this issue. Justices Durham and Stewart felt that sufficient evidence was present to provide for a jury decision. Justice Durham cited many facts which could possibly give rise to liability: while NAC had a policy of checking driving records of employees, it had not discovered that Rogers had a conviction for drunk driving; Rogers and other employees testified that Rogers' drinking habits were evident at work; Rogers often was inebriated and openly drank alcohol at work; NAC supervisors of 10 participated in alcohol and drug use at work. *Id.* Also, a deposition claimed one supervisor who saw drivers smoking marijuana told the drivers to " 'do it on the road.' " *Id.* at 3.
[99] 111 UAR 18 (Utah 1989).
[100] Judge Orme sat in the place of Justice Stewart.
[101] *Id.* at 19 citing *General Motors Corp. v. Lahocki*, 410 A.2d 1039, 1042-43 (Md. Ct. App. 1980).
[102] *Slusher*, 111 UAR at 20.
[103] *Id.*, at 23, n.6.
[104] Id. at 20, citing *Madsen v. Salt Lake City School Bd.*, 645 P.2d 658, 663 (Utah 1980).
[105] *Slusher*, 111 UAR at 20.
[106] *Id.*
[107] *Id.* at 21.
[108] *Id.* at 22 (emphasis in original) citing *Raintree v. Bartlett*, 707 P.2d 1063, 1074-76 (Kan. 1984).
[109] *Id.* After determining that the trial judge had erred in not disclosing the agreement to the jury, the court found that the error was harmless and therefore affirmed the trial court.
[110] 111 UAR 6 (Utah 1989).
[111] *Id.* at 7 citing Restatement (Second) of Conflicts § 169.
[112] *Emery v. Emery*, 289 P.2d 218, 223 (Utah 1955).
[113] 96 UAR 20, 764 P.2d 443 (Utah Ct. App. 1988).
[114] *Browning-Ferris Industries v. Kelco Disposal*, 109 S.Ct. 2909 (1989).
[115] *Id.* at 2915.
[116] *Id.* at 2923.
[117] *Johnson*, 90 UAR at 4 and 12.
[118] *Id.* at 5 and 12.
[119] *Id.* at 5.
[120] Senate Bill 24, § 78-18-1.
[121] 114 UAR 19 (Utah 1989).
[122] Utah Code Ann. § 78-27-24 (1987).
[123] 480 U.S. 102 (Utah 1987).
[124] *Parry*, 114 UAR at 21.
[125] *Id.* at 24.
[126] *Id.* at 24 citing *Asahi*, 480 U.S. at 111-12.
[127] *Parry*, 114 UAR at 24-25.
[128] 110 UAR 3 (1989).
[129] 94 UAR 27 (Utah 1988).
[130] *Hackford v. Utah Power & Light*, 740 P.2d 1281 (Utah 1987). Plaintiff in *Cruz* tried to establish the cause of action under a different theory than the one used in *Hackford*.
[131] *Cruz*, 94 UAR at 28.
[132] *Id.*
[133] *Id.*
[134] 100 UAR 3 (Utah 1989).
[135] Pursuant to Utah Code Ann. § 78-51-41 (1987).
[136] *Phillips*, 100 UAR at 4.
[137] *Id.* [138] *Id.* [139] *Id.* at 5, n.5.

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Please contact the Utah State Bar when your address or phone number changes. This will ensure accurate information for Bar records and for the Annual Bar Directory.

Call (801) 531-9077 or toll-free from outside Salt Lake City 1-800-662-9054, or use this coupon and mail.

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Mail to: **The Utah State Bar**
645 South 200 East
Salt Lake City, Utah 84111

Bar Commission Highlights

At its regularly scheduled meeting of October 27, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Approved with minor modification, minutes of the September 29 meeting.

2. Received the Executive Committee report, including a status report on the space study underway for Law and Justice Center meeting and office spaces, approved a resolution of support for lawyers and judges in Colombia who are battling to maintain the rule of law and to resist the takeover of their country by drug cartels, and acknowledged the Young Lawyers Section for hosting a successful reception for new Bar admittees.

3. Received the Executive Director's report, including an announcement that the ABA will feature the Law and Justice Center during the upcoming Outreach to the Public Conference, noted the final dissolution of Utah Prepaid Legal Services Plan with net proceeds being transmitted to the Utah Bar Foundation, discussed the need for developing a mass disaster response plan, noted the new occupancy of space in the Law and Justice Center by Attorney's Title Guaranty Fund of Utah, and received an update on activities of the ABA Standing Committee on Professional Discipline.

4. Received Associate Director's report noting personnel changes, the time table for the next Bar Commission election cycle, and plans for the Mid-Year meeting.

5. Received the Discipline Report, acting on pending private and public discipline matters as reported elsewhere in this issue. Approved Ethics Opinions #95, #98 and #99 as published in the February *Bar Journal*. Appointed a special screening panel and reviewed various administrative matters of the Office of Bar Counsel.

6. Received a report and appearance by the Legislative Affairs Committee chairperson and discussed policies and roles applicable to the committee. Directed the committee to recommend a lobbyist for use by the Bar during the upcoming legislative session.

7. Received the Admissions Report, approving reinstatements for individuals who had corrected dues deficiencies. Reviewed an extensive report by the Admission Rules Committee and approved the recommendations within the report in concept. Thanked the committee for its extraordinary volunteer effort.

8. Received the report of the Budget and Finance Committee, noting the pending audit for FY89. Authorized the filing of a petition to change the annual dues cycle to coincide with the beginning of the fiscal year, and directed that a specific communication strategy be developed to advise the members of the change in the dues cycle as well as future dues increase proposals.

9. Appointed Janet Hugie Smith to the Judicial Nominating Commission for the Third District to fill the vacancy created by the resignation of Kristine Strachan, after reviewing all applications received from the membership.

10. Received a report of the Admissions Grievance Panel, reviewing the findings and recommendations of the panel on the 12 grievance petitions filed. The Board approved four of the petitions and denied the remainder. The panel also offered recommendations with regard to the need for a study on the limited use of computers during Bar examinations, the need for strict enforcement of sequestration procedures and an increased awareness and sensitivity regarding non-traditional student applicants.

11. Received a report of the Young Lawyers Section and authorized the section to develop plans for sponsoring future CLE programs.

12. Received a litigation report on pending litigation, noting the U.S. Supreme Court's actions taken in unified Bar cases.

13. Met in joint session with the Executive Committee of the Salt Lake County Bar. Matters discussed included the financial condition of the Bar and the proposed change in the dues cycle, the range of County Bar programs including the new pro bono programs, luncheon programs and the Bar and Bench forum. Advised the County Bar leaders of the status of the Judicial Poll and the plans for the upcoming Mid-Year Meeting of the Bar as well as the 1990 Annual Meeting. County Bar leaders noted the schedule for their annual Christmas event on December 9.

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

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating DR 2-106 and Rule 1.5(b) for failing to reasonably and promptly enter into a clearly defined fee agreement. In the future, the attorney must first enter into a representation agreement with his client before rendering any services.

2. For filing a trade name with no intention to transact business under that name, an attorney was admonished for violating Rule 3.1. The sanction was aggravated because the attorney filed the trade name for improper leverage purposes.

3. An attorney was admonished for failing to refund the unearned portion of his fees after terminating his services with his client in violation of DR 2-110(A). The sanction was mitigated by the attorney's willingness to refund the money, and his cooperation with the disciplinary process.

PRIVATE REPRIMANDS

1. An attorney was privately reprimanded for violating DR-1-102(A)(6) and Rule 8.4(b) because of his failure to secure the payment of workers' compensation benefits for the involved employee. His conduct also led to a criminal conviction on related charges and constituted conduct adversely reflecting on his fitness to practice law. Respondent's failure to pay workmans' compensation also constituted dishonesty in violation of Rule 8.4(c). The sanction was mitigated by the attorney's lack of prior disciplinary history and his belief that, instead of submitting the money to the State for workers' compensation, the employees could use the money for Christmas.

2. An attorney was privately reprimanded for acquiring a personal loan against a client's trust without first disclosing that fact to the client or receiving the client's consent, and for failing to maintain a separate account for the trust funds in violation of DR 5-104(A) and DR 9-102(B)(3).

SUSPENSION

1. On October 5, 1989, Galen J. Ross was suspended from the practice of law pending the final determination of other disciplinary proceedings against him.

1990-1991
Utah State Bar
Request for Committee Assignment

I. Instructions to Applicants: All applicants for committee assignment will be assigned to a committee, with every effort made to assign according to choices indicated. Service on Bar committee includes the expectation that members will regularly attend meetings of the committee. Meeting frequency varies by committee, but averages one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside the Salt Lake area are encouraged to participate in committee work. Many committees can accommodate to travel or telephone conference needs and much committee work is handled through correspondence, so it is rarely necessary for such members to have to expend large amounts of time traveling to and from meetings. Any questions may be directed to: Paige Stevens, Bar Programs Administrator, at 531-9095.

II. Applicant Information

Name _____

Address _____

_____

Telephone _____

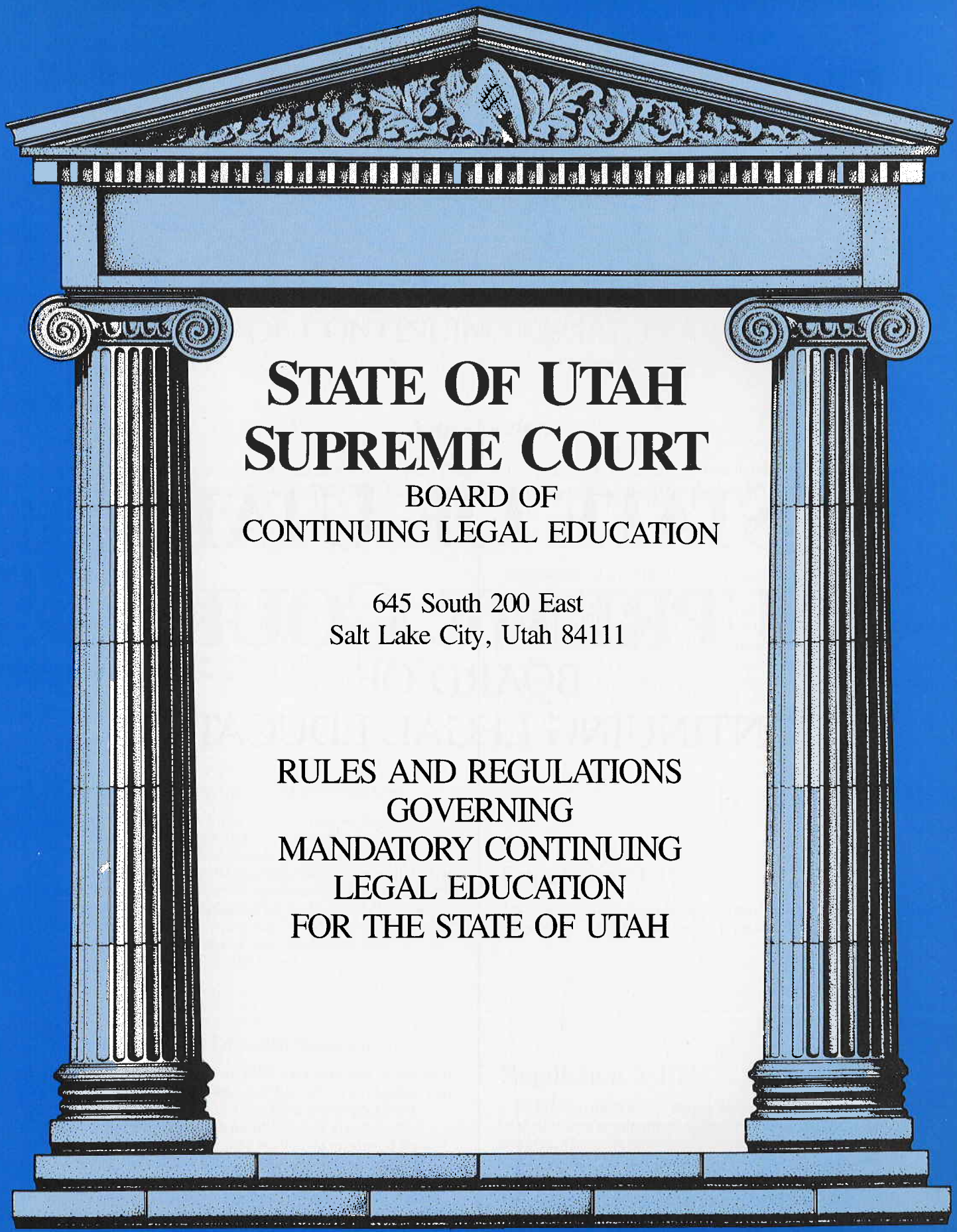
Most Recent Committee Assignments _____

_____

For each committee requested, please indicate whether it is your first, second or third choice and/or whether it is for reappointment (R). For example:

____ Advertising
____ Alternative Dispute Resolution
____ Annual Meeting
____ Bar Examiner Review
____ Bar Examiners
____ Bar Journal
____ Character and Fitness
____ Client Security Fund
____ Continuing Legal Education
____ Courts and Judges
____ Delivery of Legal Services
____ Disciplinary Hearing Panel
____ Ethics Advisory Opinion
____ Ethics and Discipline
____ Fee Arbitration
____ Law Related Education and Law Day
____ Lawyer Benefits
____ Lawyer Referral Service
____ Lawyers Helping Lawyers
____ Legal Economics
____ Legal/Medical
____ Legal Net
____ Legislative Affairs
____ Mid-Year Meeting
____ Needs of Children
____ Needs of the Elderly
____ Needs of Women and Minorities
____ State Securities Advisory
____ Unauthorized Practice of Law
____ Professional Liability Insurance
____ Tuesday Night Bar

Please return this form to Paige Stevens, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111 by March 15, 1990.



STATE OF UTAH SUPREME COURT

BOARD OF CONTINUING LEGAL EDUCATION

645 South 200 East
Salt Lake City, Utah 84111

RULES AND REGULATIONS GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH

Effective January 1, 1990

STATE OF UTAH
SUPREME COURT
BOARD OF
CONTINUING LEGAL EDUCATION

RULES AND REGULATIONS OF THE BOARD OF CONTINUING LEGAL EDUCATION

Introduction

These regulations are adopted pursuant to Supreme Court Rules 1 through 8 governing mandatory continuing legal education for members of the Utah State Bar. Each Supreme Court rule which authorizes the board to adopt regulations accompanies the regulation.

RULE 1. Purpose

By continuing their legal education throughout their period of practice of law, attorneys can better fulfill their obligation competently to serve their clients. These rules establish minimum requirements for such continuing legal education and the means by which the requirements shall be enforced.

RULE 2. State Board of Continuing Legal Education

There is hereby established a Board of Continuing Legal Education to be appointed by this Court. The board shall consist of 15 members, all of whom shall be members of the Utah State Bar. Members shall be appointed for three-year terms, except that three members of the initial board shall be appointed for a one-year term and three members shall be appointed for a two-year term. Each yearly class of members shall include one member residing outside of Salt Lake County. No person may serve more than two consecutive terms as a member of the board.

RULE 3. Continuing Legal Education Requirement

Commencing with calendar year 1990, each attorney admitted to practice in this state shall complete, during each two-calendar year period, a minimum of 24 hours of accredited continuing legal education as defined in Rule 4. In addition, each attorney shall attend within each two-calendar year period, an approved three hour program on the subject of professional responsibility and ethics.

Inactive members of the bar, as defined in Rule 7, shall not be subject to the requirements of this rule.

A member who fulfills the requirements of the New Lawyer Continuing Legal Education Program, as prescribed in Rule Fifteen of the Rules of Admission, shall be deemed to have satisfied the accredited continuing legal education of this rule for the reporting period ending December 31 of the second year following the member's year of admission (e.g., a member admitted in October 1990 would be expected to complete the New Lawyer Continuing Legal Education Program by December 31, 1991 and will thereby satisfy the mandatory continuing legal education requirements through December 31, 1992).

Regulation 3-101

No credit will be given for any continuing legal education program completed by a member of the bar prior to January 1, 1990.

Regulation 3-102

(1) Inactive members of the bar are not subject to meeting continuing legal education requirements during their enrollment as inactive members. However, inactive members may comply with continuing legal education requirements during their enrollment as inactive members and use that continuing legal education credit to satisfy the requirements of Subsection (2) for the same reporting period in which the credits were earned.

(2) Notwithstanding Rule 19 of the Rules for Integration and Management of the Utah State Bar, an inactive member who returns to active status shall complete the continuing legal education requirement of 27 hours by December 31 of the year following the member's return to active status.

RULE 4. Hours of Accredited Continuing Legal Education Defined

(a) An hour of accredited continuing legal education means at least fifty minutes in a one hour period in attendance at an accredited continuing legal education program. Attorneys who lecture in an accredited continuing legal education program shall receive credit for three (3) hours for each hour, as defined in this Subsection (a), spent in lecturing.

(b) Accredited continuing legal education programs include those specifically accredited by the Board of Continuing Legal Education, and such programs sponsored by the accredited sponsors as provided by the Board of Continuing Legal education.

(c) The final published course schedule of an accredited continuing legal education program shall be determinative of the number of hours of accredited continuing legal education available through such program. In all other cases, the Board of Continuing Legal Education shall determine the number of hours of accredited continuing legal education available through such a program.

(d) The board shall allow equivalent credit for such activities; as, in the board's determination, further the purpose of these rules and should be allowed such equivalency. Such equivalent activities may include, but are not limited to, viewing of approved continuing legal education videotapes, writing and publishing an article in a legal periodical, part-time teaching by a practitioner in an ABA approved law school, or delivering a paper or speech on a professional subject at a meeting primarily attended by lawyers or law students. The number of hours of credit to be allowed for such activities and the procedures for obtaining such equivalent credit may be established by regulation of the board or may be determined specifically in particular instances by the board.

(e) A lawyer or a sponsoring agency desiring approval of a continuing legal education activity or program shall submit to the board all information required.

Regulation 4(b)-101

(1) The accredited legal education activities provided by these regulations shall:

(a) have as their primary objective the increase in professional competence of licensed attorneys;

(b) deal with subject matter directly related to the practice of law; and

(c) comply with the specific requirements set forth in these regulations with respect to each activity.

(2) Formal instruction or educational seminars which meet the requirements of Subsection (1) lend themselves well to the fulfillment of the educational requirement imposed by these regulations and will be readily accredited by the board. However, it is not intended that compliance with these regulations will impose any undue hardship upon any registered attorney by virtue of the fact that the attorney may find it difficult because of health or special reasons to attend such activities. Consequently, in addition to accrediting formal instruction at centralized locations, the board shall accredit such educational activities as video and audio tape presentations, teaching, preparation of articles and other meritorious learning experiences provided in these regulations.

(3) The board shall assign an appropriate number of credit hours to each accredited educational activity. One hour of credit will be given for attendance at the accredited educational activity in accordance with Rule (4)(a).

(4) All courses offered to fulfill the three hour ethics and professional responsibility requirement must be specifically accredited by the board.

Regulation 4(b) - 102 - Individual Course Approval

(1) The board may accredit continuing legal education courses or activities offered by nonapproved sponsors if they meet the following standards:

(a) the course must be of intellectual or practical content and, where appropriate, should include a professional responsibility component;

(b) the course must contribute directly to a lawyer's professional competence or skills, or to the attorney's education with respect to professional or ethical obligations;

(c) course leaders or lecturers must have the necessary practical or academic skills to conduct the course effectively;

(d) before or at the course, each attendee must be provided with written course materials of a quality and quantity which indicate that adequate time has been devoted to preparation and that they will be of value to attorneys in the course of their practice;

(e) the course must be presented in a suitable setting;

(f) during courses presented by a sponsor by means of video or audio tape, motion picture, simultaneous broadcast or other such systems or devices, there should be an opportunity to ask questions of course faculty or other qualified commentators;

(g) the course must be made available to attorneys throughout the state unless its sponsor demonstrates to the satisfaction of the board that there is good reason to limit the availability of the course;

(h) a sponsor or course attendee must submit to all reasonable requests for information and such other criteria established by the board; and

(i) a sponsor or course attendee must submit a written request for approval of the course on a form approved by the board within sixty days prior to or following the course. Sponsors who wish to advertise a course as being accredited must submit a request for approval at least sixty days before the course is advertised.

Regulation 4(b) - 103 - Sponsor Approval and Presumptive Accreditation

(1) Sponsors Offering Courses Within the State. The board may designate an individual or organization as an approved sponsor of accredited continuing education courses or activities within the State of Utah if they meet the following standards:

(a) The sponsor shall be an (i) ABA accredited law school or an (ii) organization engaged in continuing legal education which, during the three years immediately preceding its application, has sponsored at least six separate courses which comply with the requirements for individual course accreditation under Regulation 4(b)-102. Status as an approved sponsor shall be subject to periodic review.

(b) Within sixty days prior to offering a course, the sponsor shall represent on a form approved by the board that the course satisfies the provisions of Regulation 4(b)-102. Each course for which this representation has been made shall be accredited as long as the sponsor has presumptive approval.

(c) The sponsor shall submit information concerning courses it offers to the board within sixty days following the presentation of a course, including the registration list in an approved format, a copy of the brochure describing the course, a description of the method or manner of presentation of course materials, and, if specifically requested by the board, a set of course materials.

(d) The sponsor shall make its courses available to all attorneys throughout the state, unless it can show to the satisfaction of the board that there is good reason to limit the course to certain attorneys only.

(e) The sponsor shall submit to all reasonable requests for information and abide by all regulations adopted by the board.

(f) Notwithstanding a sponsor's compliance with the foregoing standards, the board may deny a sponsor designation as an approved sponsor if the board finds there is just cause for such denial.

(2) Sponsors Offering Courses Outside the State. The board may establish a list of those state bar associations that have continuing legal education requirements and accreditation standards which are consistent with those of the board. Courses offered outside of Utah which are accredited by those states on the reciprocity list shall be entitled to presumptive accreditation. The board may review and revise the reciprocity list at any time.

(3) Presumptive Approval. Presumptive approval of a sponsor shall entitle courses offered by that sponsor to accreditation until such time that the board determines that the sponsor is not entitled to presumptive approval. The board may audit any sponsor having presumptive approval and may revoke the presumptive approval if it determines that the sponsor is offering, as accredited, courses which do not satisfy the standards established under Regulation 4(b)-102.

Regulation 4(d)-101

(1) Credit is allowed for the following activities:

(a) Study with board accredited audio and videotapes in accordance with the following:

(i) the audio or video tape presentation must have been accredited by the board;

(ii) the audio or video tape presentation must be made simultaneously to at least three members of the bar association, one of whom shall be designated as the leader, and who shall be responsible to document attendance at the presentation, unless the presentation takes place at the Law and Justice Center, in which case any member or members may attend and receive attendance certification by the executive director or a designee;

(iii) one hour of credit is allowed for attendance at an audio or videotape session in accordance with Rule 4(a); and,

(iv) no more than one-half of the credit hour requirement may be obtained through study with audio and video tapes pursuant to this Subsection (a).

(b) Writing and publishing an article in a legal periodical in accordance with the following:

(i) to be eligible for any credit, an article must (A) address an attorney audience, (B) be at least 3,000 words in length, (C) be published by a recognized publisher of legal material, and (D) not be used in conjunction with a seminar;

(ii) three credit hours are allowed for each 3,000 words in the article;

(iii) an application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit;

(iv) two or more authors may share credit obtained pursuant to this Subsection (b) in proportion to their contribution to the article; and

(v) no more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles pursuant to this Subsection (b).

(c) Lecturing in an accredited continuing legal education program and part-time teaching by a practitioner in an ABA approved law school in accordance with the following:

(i) lecturers in an accredited continuing legal education program and part-time teachers may receive 3 hours of credit for each hour spent in lecturing or teaching as provided in Rule 4(a);

(ii) no lecturing or teaching credit is available under this Subsection (c) for participation in a panel discussion; and

(iii) no more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching pursuant to this Subsection (c).

(d) Lecturing and teaching by full-time law school faculty members in accordance with the following:

(i) full-time law school faculty members may receive credit for lecturing and teaching in accordance with Subsection (c), but only for lecturing and teaching at accredited continuing legal education courses;

(ii) no lecturing or teaching credit is available under this Subsection (d) for participation in a panel discussion; and

(iii) no more than one-half of the credit hour requirement may be obtained through lecturing and teaching by full-time faculty pursuant to this Subsection (d).

(e) Attendance at an accredited legal education program in accordance with the following:

(i) credit is allowed for attendance at an accredited continuing legal education program in accordance with Rule 4(a); and

(ii) there is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program under this Subsection (e). However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

(2) No credit is allowed for self-study programs.

RULE 5. Annual Reports by Attorneys.

On or before December 31 of alternate years, commencing 1991, each attorney admitted to practice in this state shall make a written report to the board, in such form as the board shall prescribe, concerning such attorney's completion of accredited continuing legal education during the two preceding calendar years. The report shall include the title of programs attended, the sponsoring agency, the number of hours in actual attendance at each such program, and such other information as the board shall require.

Regulation 5-101

Each licensed attorney subject to these continuing legal education requirements shall file with the board, by December 31 of the year in which the report is due, a statement of compliance evidencing the number of hours of continuing legal education which the attorney has completed during the applicable reporting period.

Regulation 5-102

In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to file the statement or pay the fee shall be assessed a $10.00 late fee.

Regulation 5-103

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

(2) Failure by the attorney to produce proof of compliance within fifteen days after written request by the board constitutes a rebuttable presumption that the attorney has not complied with the continuing legal education requirements for the period of time involved.

(3) The board may, at any time within four years after the statement of compliance is filed, commence verification proceedings to determine an attorney's compliance with these rules and regulations.

RULE 6 Penalty for Failure to Satisfy Continuing Legal Education Requirement

Any attorney who fails to comply with the reporting provisions of Rule 5 shall be assessed a late fee of $10.00. An attorney who fails to comply with Rule 5 or who files a report showing that such attorney has failed to complete the required number of hours of continuing legal education shall be notified that unless requirements are completed and reported within 30 days, a petition for his or her suspension from the practice of law will be forwarded to the Supreme Court. Such attorney shall be given the opportunity during the 30 day period to file an affidavit with the board disclosing facts demonstrating that such person's noncompliance was not willful and tendering such documents, which, if accepted, would cure the delinquency. A hearing before the board shall be granted, if requested. If, after hearing, or failure to cure the delinquency by satisfactory affidavit and compliance, such person is suspended by the Supreme Court, the person shall be notified thereof by certified mail, return receipt requested.

An attorney suspended by the Supreme Court under the provisions of this rule may be reinstated by the court upon motion of the board and upon a showing that such attorney has cured the delinquency for which the attorney has been suspended.

For good cause shown, the board may, in individual cases involving hardship or extenuating circumstances, grant waivers of the minimum educational requirements or extensions of time within which to fulfill the requirements or make the required report.

Regulation 6-101

(1) Any person who is aggrieved by any action or decision of the board may, within 30 days from the date of that notice of the action or decision, appeal to the board by filing with the board a petition setting forth the action or decision appealed from and the relief or determination sought by the appeal with the factual and legal basis therefore.

(2) Unless the petition is filed pursuant to Subsection (1), the action or decision of the board shall be final.

(3) The board may approve any petition without hearing, or may set a date for hearing.

(4) If the board determines to hear the petition, the petitioner shall be given at least 10 days notice of the time and place set for the hearing. Testimony taken at the hearing shall be under oath, to be administered by the chairperson of the board.

(5) The board shall enter written findings of fact, conclusions and an appropriate decision on each petition, a copy of which shall be mailed forthwith to the petitioner.

(6) If the petitioner is an attorney who has failed to comply with the requirements of these regulations, the board may grant the attorney an extension of time within which to comply on such terms as the board considers appropriate.

(7) (a) Decisions of the board pursuant to Regulation 6-101, other than a denial of a request for a waiver or a recommendation of suspension of an attorney's license to practice, are final and are not subject to further contest.

(b) A decision of the board denying a request for a waiver or recommending suspension of an attorney's license to practice is final and not subject to further contest unless within 30 days after service of the findings, conclusions and recommendations the attorney files a written notice of appeal with the Supreme Court.

Regulation 6-102 - Appeal to the Supreme Court

To perfect an appeal to the Supreme Court, the attorney shall, at the attorney's expense, if testimony was taken before the board, cause to be transcribed and filed with the board a narrative report of proceedings. The board shall certify that the narrative report of proceedings contains a fair and accurate report of the occurrences in and evidence introduced in the case. The board shall prepare and certify a transcript of all orders and other documents pertinent to the proceeding before it, and file these promptly with the clerk of the Supreme Court. The matter shall thereafter be heard in the Supreme Court under Court rules.

Regulation 6-103

The time set forth in these rules for filing notices of appeal are jurisdictional. The board or the Supreme Court, as to appeals pending before each such body may, for good cause shown:

(a) extend the time for the filing or certification of any material, or,

(b) dismiss the appeal for failure to prosecute the same diligently.

Regulation 6-104 - Change of Status

If an attorney has been suspended by the Supreme Court for non-compliance with these rules, the attorney affected must comply with the applicable regulations of the board to return to active status.

Regulation 6-105 - Deferrals

The board may defer the continuing legal education requirement in the event of serious illness.

RULE 7 - Inactive Practitioners

A member of the Utah State Bar who is not engaged in the practice of law in the state may, upon application to the board, be granted a waiver of compliance with the continuing legal education requirements of Rule 3 and obtain a certificate of exemption.

RULE 8 - Fees and Expenses

Each member of the bar shall pay a fee of $5.00 to the Utah State Bar at the time of filing the report required by Rule 5. Such fee shall be deposited in a special account of the Utah State Bar and used to defray the costs of administering these rules.

The Board of Continuing Legal Education may establish other fees to defer administrative costs related to requests for accreditation, and such fees shall be approved by the Supreme Court.

Members of the board shall not be compensated but shall be reimbursed for expenses incurred by them in the performance of their duties.

Regulation 8-101 - Fees and Expenses

The costs of administering the continuing legal education program shall be covered by fees paid by attorneys and sponsors of continuing legal education programs as follows:

(1) Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5 at the time of filing the statement with the board.

(2) All sponsors of continuing legal education programs or activities who offer any course in Utah for a fee shall pay to the board, within thirty days of presenting the course, a fee of $3 for each credit hour per attendee.

(3) Any attorney who is required by these regulations to apply to the board for any special accreditation or approval of a particular educational activity shall pay a fee of $5 at the time of application.

UTAH LAW AND JUSTICE CENTER

AFFILIATED WITH THE UTAH STATE BAR

Meeting and Conference Rooms Designed For You

Members of the Utah State Bar, Law Firms, and Law-Related Organizations are invited to use the meeting and conference rooms at the new Law and Justice Center. They are available daytime and evenings, and are ideal for

- client meetings and consultations
- firm events and meetings
- settlement conferences
- continuing legal education
- depositions
- conferences
- arbitration
- business receptions

The staff of the Law and Justice Center will make all arrangements for you, including room set-up for groups of up to 300 people, food and beverage service, and video and audio equipment.

The costs for use of the Law and Justice Center are significantly less than similar facilities in a hotel . . . and specifically designed for your use. Adjacent free parking is one more advantage, making this an ideal location for your event.

For information and reservations for the Utah Law and Justice Center, contact Kaesi Johansen, 531-9077.

YOUR BLOOD
or
YOUR MONEY!!

As part of its continuing community service efforts the **YOUNG LAWYERS SECTION** has agreed to co-sponsor an annual high school blood drive program with Intermountain Health Care in Salt Lake County.

The yearlong contest between high school students will increase blood donations among the younger population and hopefully secure regular donors for the long-term future. The high school that donates the most blood receives a scholarship given, at the school's discretion, to a student who participated in the program.

The Young Lawyers Section has agreed to help fund the annual scholarship.

This is an opportunity for lawyers to serve the community and to increase the public's awareness that **LAWYERS CARE!**

Even if you haven't contributed blood in the Young Lawyers Section's regular blood drives, you can now aid its blood drive programs through a small contribution to this scholarship fund. If every attorney in the state contributes only one dollar, an endowment can be established and the scholarship permanently funded! **JUST ONE DOLLAR!**

Please send your donation of one dollar ($1) to:

Young Lawyers Section—
I.H.C. Blood Drive Endowment
% BRIAN M. BARNARD, Chairman
214 E. Fifth South
Salt Lake City, UT 84111-3204

If you have questions or suggestions, please call Brian Barnard, Chairman, Blood Drive (328-9532).

Litigation Section Report

By John L. Young, Chairman

The Litigation Section has established a Committee that is presently working toward publication of Revised Jury Instructions for Utah (JIFU). We believe that this project is of great importance and will be very useful to the members of the Bar and the judiciary. We have appreciated the words of encouragement from many of the trial and appellate judges of Utah.

The JIFU Committee has been divided into jury instruction topic subgroups for research and drafting of specific instructions. We are very grateful to the many excellent lawyers who are donating hundreds of hours of their time to this project.

Featuring JAMES W. McELHANEY, Professor of Law, Case Western Reserve University School of Law.

James McElhaney is North America's most widely read author on the art of trial advocacy. He is author of *McElhaney's Trial Notebook Second Edition* (1987, American Bar Association), columnist for the *ABA Journal's* popular monthly feature "Litigation," and writes "Trial Notebook" for *LITIGATION* journal.

As one of the country's premier lecturers on evidence and trial practice, he is consistently applauded for his creative, energetic and effective teaching style. Here's what other attorneys have said about his programs:

"Absolutely the best lecturer I have ever heard."

"Invaluable information shared in an entertaining style."

"Inspired me to improve my skills."

"Knowledgeable, articulate, witty."

McElhaney holds the Joseph C. Hostetler Chair in trial advocacy at Case Western Reserve University School of Law. After serving in the Judge Advocate General Corps of the U.S. Army and practicing law in Milwaukee, Wisconsin, he began his teaching career at the University of Maryland. McElhaney received his undergraduate and law degree from Duke University.

I. The Open Door Theory of Relevance
- ☐ The relevance reality
- ☐ The probative value balance
- ☐ Changing the rules in the middle of trial

LITIGATION SECTION EVIDENCE SEMINAR

On March 30, 1990, the Litigation Section will present a one-day seminar on evidence. The Seminar, to be conducted by Professor James W. McElhaney is entitled "Evidence for Advocates—The Law You Need to Prove Your Case."

II. Character Evidence and Impeachment
- ☐ Taking the confusion out of character evidence
- ☐ What is admissible—and what is not
- ☐ How to use character evidence

III. Foundations and Objections
- ☐ Steps in introducing exhibits
- ☐ Basic checklist—the elements of all foundations
- ☐ The 10 most common foundations
- ☐ Solving problems before they happen

IV. Making and Meeting Objections
- ☐ The basic rules
- ☐ Making them understandable to the jury

V. Privileges
- ☐ Attorney-client
- ☐ Husband-wife
- ☐ Using the Federal Rules

VI. Hearsay
- ☐ Two easy definitions
- ☐ The edge of hearsay
- ☐ The basic exceptions

VII. Expert Witnesses
- ☐ The key to understanding the rules
- ☐ How to prepare your expert for trial
- ☐ Using experts to persuade

Legal/Medical Committee Co-Sponsors Mid-Year Panel

Whether doctors and lawyers can work together in future health-related issues will be debated by a blue-ribbon panel at the Utah State Bar's Mid-Year Meeting on January 17.

History will be made as the presidents of the American Bar Association and the American Medical Association appear for the first time together in opening the Wednesday session of the Salt Lake program. L. Stanley Chauvin Jr. who also directs the National Judicial College, will be discussing with Dr. Alan R. Nelson current problems facing both professions.

Joining them on the panel is a diverse group of doctors and lawyers. Ken Verdoia, senior producer at KUED TV, will moderate the program.

Assisting the Mid-Year Committee with development of this do-not-miss program is the Bar's Legal/Medical Committee co-chaired by Karie Minaga-Miya and Caroline L. Skuzeski.

Among other projects, the committee also plans an update of the Interprofessional Code for Utah, which was first drafted in 1971 and has been jointly adopted by the Utah State Bar and the Utah State Medical Association. The Code coordinates efforts of lawyers and physicians in solving patients' legal problems. Suggestions are welcome. Copies of the code are available through the Utah State Bar office.

Amateur or Professional Artwork Wanted for One-Day Show

In conjunction with the Law Day activities sponsored by the Young Lawyers Section, the Law Related Education and Law Day Committee and Utah Lawyers for the Arts are soliciting artwork of all kinds and all levels of professionalism from Utah attorneys, judges, paralegals and legal secretaries for display or performance. We would like to exhibit visual arts such as drawings, paintings, sculpture, photography and graphic art, and would like to schedule performances of music or dance, poetry or other readings, and other types of performing arts. The exhibit and performances will be scheduled to coincide with the Young Lawyers' Law Day Fair which will probably be held Saturday, April 28, 1990, in the Salt Lake Valley. The show will provide public exposure for legal professionals of an artistic bent. Please contact Dawn Hales at 322-2516 for further information.

Special Institute on Federal Onshore Oil and Gas Pooling and Unitization II

The Rocky Mountain Mineral Law Foundation and the Bureau of Land Management will co-sponsor a three-day Special Institute on Federal Onshore Oil and Gas Pooling and Unitization. The Institute will take place on January 29-31, 1990, at the Hyatt Regency Hotel in Denver, Colorado.

The Institute is designed to provide a definitive analysis of legal and land management issues associated with the pooling and unitization of federal and Indian onshore oil and gas leases affecting 600 million acres of public domain, Forest Service, and split-estate lands and a significant portion of the 52.5 million acres of Indian tribal and allotted lands. Registrants will receive hands-on experience in forming units. The format will be a combination of professional papers, workshops, and panel discussions provided by attorneys and professors of law, as well as by geologists, petroleum engineers, and adjudicators of the Bureau of Land Management.

For additional information, contact the Foundation at (303) 321-8100.

Legal Secretaries Offer Advanced Course

The Salt Lake Legal Secretaries Association is offering an advanced course for legal secretaries winter quarter at the University of Utah College of Law. Classes will be held in Room 105 of the College of Law on Wednesday evenings at 6:15 to 9:15 p.m. from January 3 through March 14, 1990.

Edwina H. Howard, PLS, Legal Education Chairman of the Salt Lake Legal Secretaries Association, announces that the subjects to be taught include litigation/torts, legal research, court systems/appellate procedure, real estate, family law, workers' compensation, contracts/consumer credit, wills and estates, criminal law and bankruptcy.

The course is an official course of the National Association of Legal Secretaries (NALS), and a NALS Certificate of Completion will be awarded to students who meet all course requirements.

The $98 registration fee may be mailed to the Salt Lake Legal Secretaries Association, P.O. Box 25, Salt Lake City, UT 84110-0025. Contact Ms. Howard at 481-6647 for further information.

National Director Re-elected

Kaye Aoki, a Certified Professional Legal Secretary (PLS), of Salt Lake City, Utah, was recently re-elected to the board of directors of the National Association of Legal Secretaries (NALS) for her 11th term. She will represent the Utah chapters at the national board of directors meetings during the coming year in Tulsa, Oklahoma; Orlando, Florida; and Philadelphia, Pennsylvania.

In recent years Ms. Aoki has served NALS as chairman of its scholarship, continuing legal education, history and manual committees. She also chaired the NALS annual meeting and educational conference held in Salt Lake City in 1988 which was hosted by the Salt Lake Legal Secretaries Association. She is a past president of the Salt Lake chapter and is currently employed by the law firm of Giauque, Williams, Wilcox & Bendinger of Salt Lake City.

Ski Party For Young Lawyers

A Ski Party is planned for the Young Lawyers Section to take place on Februrary 17, 1990. The festivities will be based at a home on Jeremy Ranch Golf Course. We will have cross-country skiing, alpine skiing, a warm Jacuzzi and sauna and plenty of refreshments. Cross-country skiing is available to the public at Jeremy Ranch. Everyone will be responsible for his or her cost to ski, and a minimal cost will be charged for refreshments. Please R.S.V.P. to Cecelia Espenoza at the Salt Lake City Prosecutors' office at 535-7767 or Charisse Haws at Holme, Roberts & Owen at 521-5800 by February 1, 1990. Feel free to invite friends.

NOTICE

The following form is approved by the Third District Court and required for Notice to Submit for Decisions under Rule 4-501. Forms are available at no cost from Third District Court.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT SALT LAKE COUNTY, STATE OF UTAH

_____

_____ **NOTICE TO SUBMIT FOR DECISION**

_____

Plaintiff

Case Number: _____

vs.

Judge: _____

_____

_____

Defendant

_____

The following motion(s) are now at issue and ready for decision of the court. The documents indicated have been filed with the court.

1. (a) Type of motion: _____

   (b) Date filed: _____

   (c) Party filing motion: _____

   (d) ☐ Affidavit in support

   (e) ☐ Memorandum in support

   (f) ☐ Affidavit in opposition

   (g) ☐ Memorandum in opposition

   (h) ☐ Memorandum in reply

   (i) ☐ Other pleading(s) necessary to determine motion (specify):

   _____

2. (a) Type of motion: _____

   (b) Date filed: _____

(c) Party filing motion: _____

(d) ☐ Affidavit in support

(e) ☐ Memorandum in support

(f) ☐ Affidavit in opposition

(g) ☐ Memorandum in opposition

(h) ☐ Memorandum in reply

(i) ☐ Other pleading(s) necessary to determine motion (specify):

_____

3. (a) Type of motion: _____

(b) Date filed: _____

(c) Party filing motion: _____

(d) ☐ Affidavit in support

(e) ☐ Memorandum in support

(f) ☐ Affidavit in opposition

(g) ☐ Memorandum in opposition

(h) ☐ Memorandum in reply

(i) ☐ Other pleading(s) necessary to determine motion (specify):

_____

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing NOTICE TO SUBMIT FOR DECISION was mailed, postage prepaid, on _____ to the following:

_____

The *Utah Law Review* Announces the Forthcoming Publication of its *Recent Developments in Utah Law* Section, Appearing in Vol. 1990, No. 1, scheduled for publication in March 1990.

Recent Developments in Utah Law consists of brief expositions of selected noteworthy cases decided recently by the Utah Supreme Court and the Utah Court of Appeals, and selected statutes enacted by the 1989 Utah Legislature.

Among the several cases and statutes appearing in this year's *Recent Developments* are *Berube v. Fashion Centre, Ltd.*, 771 P.2d 1033 (Utah 1989) (exception to Utah's employment-at-will doctrine); *C.S. v. Nielson*, 767 P.2d 504 (Utah 1989) (recognition of wrongful pregnancy cause of action); *State v. Mortizsky*, 771 P.2d 688 (Utah Ct. App. 1989) (first Utah criminal conviction overturned because of ineffectiveness of counsel); Utah Code Ann. Sect. 57-21-1 to 10 (Supp. 1989) (Fair Housing Act); Utah Code Ann. Sect. 13-11a-1 to 5 (Supp. 1989) (Truth in Advertising Act); and Utah Code Ann. Sect. 26-14d-101 to 801 (Supp. 1989) (Hazardous Substances Mitigation Fund).

Single issue purchases of Vol. 1990, No. 1 are available at a cost of $6. Please send your check to the attention of Administrative Editor, *Utah Law Review*, University of Utah College of Law, Salt Lake City, Utah 84112. The subscription rate is $20 for one year. For more information on the *Recent Developments* section or subscription information, call 581-5770.

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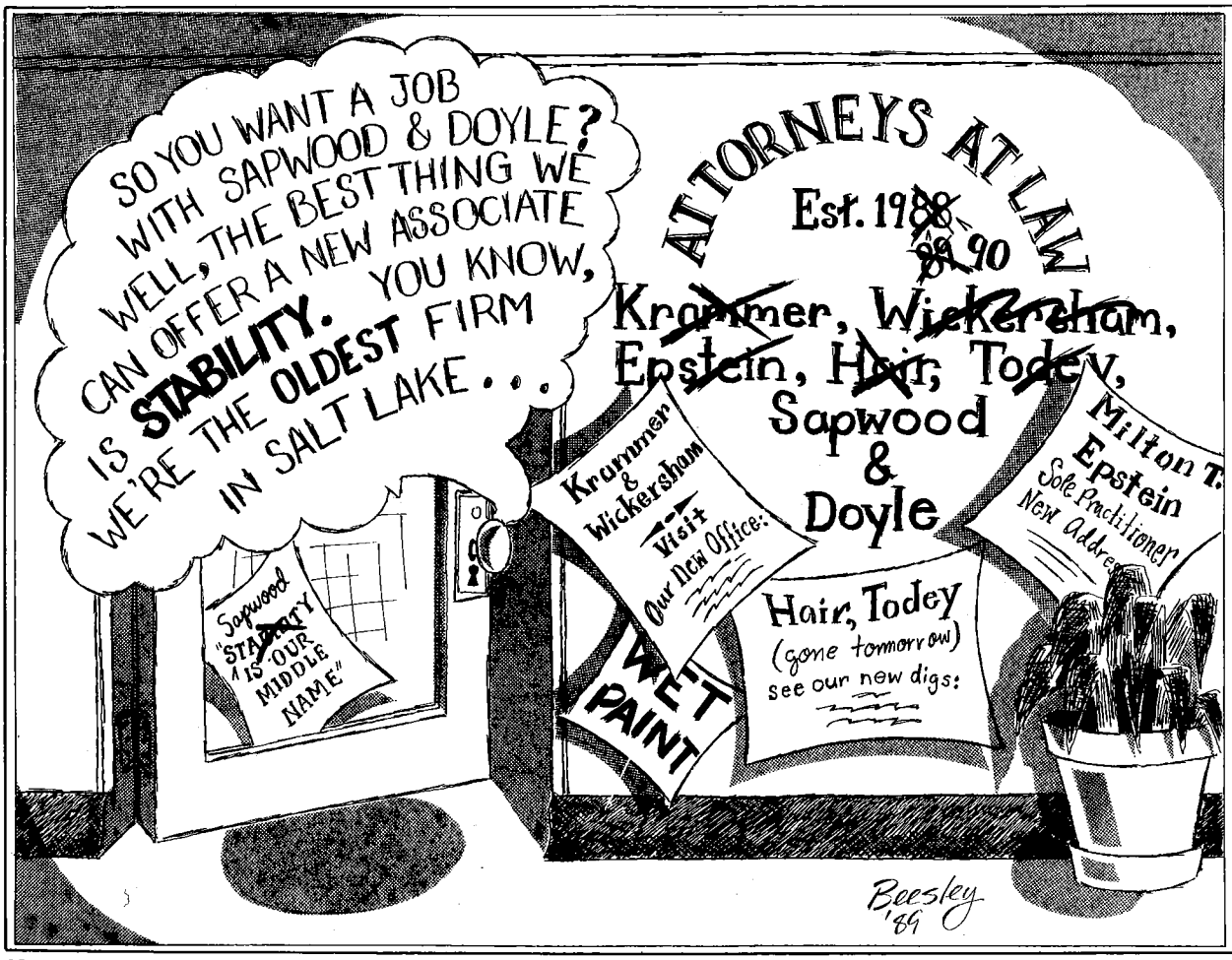

MARK BEESLEY, a Salt Lake City native, is currently a judicial clerk for Chief Justice Gordon R. Hall of the Utah Supreme Court. Beesley graduated from Brigham Young University in 1985 with a bachelor's degree in English Literature. He graduated from Cornell Law School in 1988 with a juris doctor degree.

Pro Bono Project: Opportunity for Young Lawyers

By Charlotte L. Miller

The Young Lawyers Section of the Utah State Bar appointed a new committee this year: The Pro Bono Committee. The appointment of this Committee resulted in part from the American Bar Association House of Delegates and Utah State Bar Commission resolutions calling on attorneys to commit 50 hours per year to pro bono activities. More importantly, the appointment was in response to the large number of young lawyers in Utah who have expressed concern over the increased need for Pro Bono services and the desire of young lawyers to perform those services.

Since June, 1989, the Pro Bono Committee has been working with the Pro Bono Committee of the Salt Lake County Bar to develop a project that provides excellent opportunities for attorneys to serve disadvantaged clients with domestic relations problems.

The Pro Bono Project will provide volunteer lawyers with training, manuals, liability insurance and mentors. The Legal Aid Society will screen clients for eligibility and schedule the initial meeting with the lawyers.

The training includes video tapes of what to do in the courtroom, luncheons where the attorneys can ask simple (even embarrassing) questions without humiliation, and a manual with forms, simple instructions and a helpful list of "do's" and "don'ts." Mentors drawn from the family law Bar will be available to give suggestions and answer questions on issues, how to deal with clients, judges' idiosyncrasies and for handholding if necessary.

Beginning with the first appointment with the client, participating young lawyers will have the opportunities that they often claim are lacking in their regular practice: client contact, exercising professional judgment, making their own decisions, going to court. The case is the attorney's own case, without anyone looking over his or her shoulder (unless you ask).

Participating in the program will allow young lawyers to gain confidence. A respected attorney recently commented that the difference between a successful, experienced attorney and an inexperienced attorney is the attorney's confidence and the ability to project that confidence to clients, opponents and judges. This Project allows young lawyers to get a jump on that confidence.

The Project also will serve a critical public need in Salt Lake. The Legal Aid Society currently has a waiting list of over 1,000 cases. An individual must wait six months before he or she can get in the doors at the Legal Aid Society for assistance with a divorce, child support or other domestic problem. As attorneys, we cannot take much pride in a system that does not provide access to people in need. Young lawyers should be the first to take the initiative to correct this problem because we have to live with the system for a long time. The Pro Bono Project will help reduce the backlog and allow clients to receive service in a more timely fashion. Because the backlog is mainly in the area of domestic cases, the Project initially will handle only domestic cases.

During the next two months, Ron Nehring and Jody Burnett of the Salt Lake County Bar Executive Committee will be contacting law firms and requesting commitments of time and talent to the Project. Young lawyers should make sure their firm or employer does not miss the opportunity to participate.

In February, a kick-off reception will be held at the Law & Justice Center for all participants. Make sure you and your firm or employer are on the invitation list.

Young lawyers need to send a message to senior attorneys and the community that we are not only willing but anxious to commit to public service. This Project provides you the opportunity to send the message loudly and clearly.

"Blood!" Young Lawyers Section Blood Donation Reminder

During the holiday season, people often forget to make their regular blood donations. Local blood banks are encouraging people to help re-stock their shelves at this time of the year.

The Young Lawyer Section reminds all members and friends of the legal community "to roll up your sleeve" and donate.

The Section will be out in full force this summer during its regular summer blood drive to recruit donors, but a donation *now* would help.

Start the year off right with a donation of life-giving blood to your local blood bank.

For more information call Brian Barnard, Chairman, Young Lawyers Blood Drive, 328-9532.

New Officers for The Legal Assistants Association of Utah (LAAU)

Members of The Legal Assistants Association of Utah (LAAU) elected officers at the annual business meeting held at the Utah State Bar Law and Justice Center. Max Bullett, CLA has been elected President of the Association for 1990. Ms. Bullett is a legal assistant employed by the law firm of Moyle & Draper. Ms. Bullett will be assisted by Vice President, Carol Elggren, CLA, who is employed by US WEST Communications; Secretary, Deanna Spillman, CLA, Robert DeBry & Associates; Marie Smith, CLA, Treasurer, US WEST Communications; and Margit Philips, Kimball, Parr, Crockett & Waddoups, Liaison to the National Association of Legal Assistants, of whom LAAU is an affiliate. LAAU is a non-profit association which was organized to support the professional, educational, and social interests of legal assistants throughout Utah. It operates and functions through various committees whose 1990 elected chairs are Shari Faulkner, Van Cott, Bagley, Bagley, Cornwall & McCarthy, Education; Marilu Peterson, CLA, Jensen & Lewis, Public Relations; Heleny Kathryn, Neilson & Senior, Membership; and Carole Miller, Energy Mutual Insurance Company, Ethics.

Thanks to the Tuesday Night Bar Participants

The Utah State Bar and the Young Lawyers Section acknowledges the time and efforts of the following lawyers who have voluntarily participated in the Tuesday Night Bar Program as of Novermber 14, 1989. Special recognition is also extended to the Pro Bono Committee members of the Young Lawyers Section, Kaesi G. Johansen of the Law & Justice Center and the Utah Bar staff, all of who have been instrumental in organizing and coordinating the Tuesday Night Bar Program.

Richard I. Aaron
Steven J. Aeschbacher
Jane Allen
Kevin R. Anderson
Patrick L. Anderson
John Andrews
J. Michael Bailey
Colleen L. Bell
Bryon J. Benevento
Brad C. Betebenner
Kristin G. Brewer
Rebecca A. Broadbent
Olga A. Bruno
Thomas B. Brunker
Julie A. Bryan
Brian W. Burnett
JoAnn E. Carnahan
Steven W. Call
Michael L. Chidester
William H. Christensen
Christopher J. Condie
Scott Cottingham
Carolyn Cox
Carol Clawson
Maureen L. Cleary
Douglas R. Davis
Steven W. Dougherty
Cecelia M. Espenoza
Wendy A. Faber
Janice L. Frost
Kenneth R. Garrett
Arnold G. Gardner Jr.
F. Mark Hansen
Morris O. Haggerty
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Curt A. Haws
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William D. Holyoak
Stephen F. Hutchinson
Nathan R. Hyde
Tamara S. Jergensen
Michael K. Jones
Marcella L. Keck
Kris C. Leonard
Loren D. Martin
John C. McKinley
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L. Craig Metcalf
Charlotte L. Miller
Anne Milne
Mark C. Moench
Edward R. Munson
George T. Naegle
Laurie L. Noda
Barbara H. Ochoa
Rene Orosco
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Douglas H. Patton
Beatrice M. Peck
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Teresa Silcox
Kathi Sjoberg
Linda Faye Smith
Sandra L. Steinvoort
G. Steven Sullivan
Toni Marie Sutliff
Robert M. Tucker
Richard A. Van Wagoner
Phyllis J. Vetter
Russell E. Vetter
James H. Woodall
Marc T. Wangsgard
Cole A. Wist
Orson B. West
Robert G. Wright
Lisa A. Yerkovich

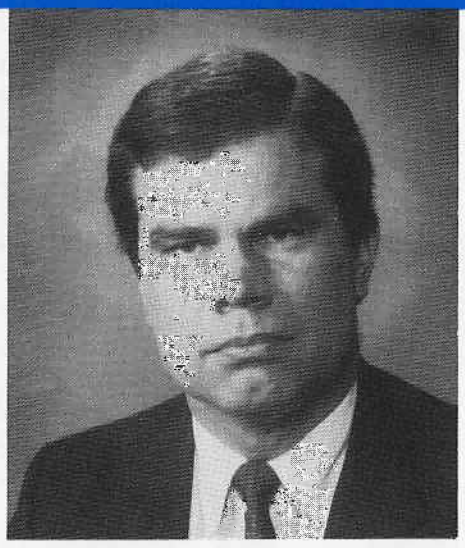
The Young Lawyers Section of the Bar will be sponsoring an open house/training session for the Tuesday Night Bar Program at the Law & Justice Center on Tuesday, January 30, 1989, at 5:15 p.m. Those who want to participate in the Tuesday Night Bar Program should attend.

Reception Held to Welcome New Admittees to the Utah State Bar

The Young Lawyers Section of the Utah State Bar hosted a reception to welcome new admittees to the State Bar from 5:30 to 7:30 p.m. on October 26, 1989 at the Law and Justice Center. The reception was organized by the Bridge the Gap Committee, chaired by JoAnne Shields, and the Social Committee, chaired by Cecelia Espenoza. Members of the state and federal judiciary, Bar Commission members, and representatives from contributing law firms were invited. There was excellent attendance from the judiciary and the Bar.

Several law firms made generous contributions for the reception. Contributors included: Allen, Nelson, Hardy & Evans; Cohne, Rappaport & Segal; Clyde, Pratt & Snow; Dart, Adamson & Kasting; Dunn & Dunn; Edwards, McCoy & Kennedy; Jones, Waldo, Holbrook & McDonough; Giauque, Williams, Wilcox & Bendiger; Kimball, Parr, Crockett & Waddoups; Kipp & Christian; Kirton, McConkie & Poelman; Kruse, Landa & Maycock; Moyle & Draper; Parsons, Behle & Latimer; Ray, Quinney & Nebeker; Richards, Brandt, Miller & Nelson; Spafford and Spafford; Strong & Hanni; Van Cott, Bagley, Cornwall & McCarthy; and Watkiss & Campbell.

All leftover food was taken to the Salt Lake City Family Shelter. The Young Lawyers Section hopes to host a similar event next year and wishes to especially thank the contributors for making the reception possible. We also thank Chase Kimball and John A. Donahue of Spafford & Spafford for delivering food to the family shelter.



By Clark Nielsen

STATUTE OF REPOSE—OPEN COURTS PROVISION (Art. I, Sect. 11)

The Utah Supreme Court invalidated the statute of repose insulating architects and engineers from liability seven years after the completion of construction. In *Horton v. Goldminer's Daughter,* 118 Utah Adv. Rep. 37 (9/29/89) (J. Stewart), the issue was presented by certification from the federal district court. In *Sun Valley Water Beds v. Herm Hughes and Son, Inc.* 118 Utah Adv. Rep. 27 (9/29/89) (J. Hall), the Court reversed a summary judgment for the contractor. The Court struck down Utah Code Ann. Sect. 78-12-25.5 as a violation of the "open courts" provision of the Utah State Constitution, Art. 1, Sect. 11. Although all repose statutes which similarly limit the right to recover for injuries are not necessarily unconstitutional, the strong reliance upon *Berry v. Beech Aircraft Corp.,* 717 P.2d 670 (Utah 1985) further undermines their possible validity.

A statute of repose differs from a limitation period because, in this case, repose bars all actions against planners, designers and builders of a building for injuries seven years after construction. Repose decrees that after a certain date no claim can exist. A limitation statute causes a claim to expire but only after it has arisen and time has passed with no action taken by the claimant.

The Court attributes the repose statute to extensive and successful legislative lobbying by insurers to limit the duration of their liability for negligence damage claims. Although recognizing that other states have upheld similar statutory limitations, the Court observed that their justifications were firmly rejected in *Berry.* Under *Berry,* a statute which limits a person's remedy by due course of law must (1) provide a reasonable and effective alternative remedy which is substantially equal in value of benefit to the remedy abrogated and provides comparable protection of the person, property and reputation; or (2) if no substitute or alternate remedy is provided, the legislative enactment must show that a clear social or economic evil is being eliminated and that the evil is not being eliminated by an arbitrary or unreasonable means.

Applying these *Berry* principles in the present matters, the Court concludes that the repose statute does not provide a reasonable alternative remedy and does not show a clear social or economic evil. Insurer liability, high insurance costs, and the difficulty of proof over time do not justify the drastic curtailment of a basic right of access to the courts.

As a caveat the Court adds that "we do not believe that the open courts clause necessarily forbids forever and always all such forgiveness of mistake. What it clearly does is make certain that periods of repose only be allowed when the possibility of injury and damage has become highly remote and unexpected." *Horton v. Goldminer's Daughter.*

The *Goldminer's Daughter* case is also significant as a rare decision arising out of the certification to the Utah Supreme Court of the issue in pending litigation in the United States District Court, District of Utah.

Horton v. Goldminer's Daughter, 118 Ut. Adv. Rep. 37 (9/29/89) (J. Stewart) and *Sun Valley Water Beds v. Herm Hughes & Son, Inc.,* 118 Ut. Adv. Rep. 27 (9/29/89) (J. Hall).

APPEALS COURT STATUTORY JURISDICTION—EXTRAORDINARY WRITS

A prisoner sought to appeal the district court's denial of mandamus because of the prisoner's transfer from Arizona to Utah. The panel held that prisoner's challenge of his incarceration in Utah and the refusal to return him to Arizona was not an appeal from an order "involving a criminal conviction..." under Sect. 78-2a-3(2)(g). Therefore, the Court of Appeals lacked statutory jurisdiction of the dispute. The appeal was transferred to the Utah Supreme Court, where it is unlikely that the jurisdiction issue will be reconsidered.

The statutory jurisdiction of the Utah Court of Appeals offers the first direct conflict between decisions of different court panels. Interpreting Utah Code Ann. Sect. 78-2a-3(2)(g) (Supp. 1989), a panel of J. Orme, J. Davidson and J. Garff rejected a prior decision of another law and motion panel in *Hernandez v. Hayward,* 764 P.2d 993 (Utah Ct. App. 1988). J. Orme had dissented in the *Hernandez* case.

Ellis v. Deland, Case No. 890357, Utah Court of Appeals, (Nov. 20, 1989) (Per Curiam).

GOVERNMENTAL IMMUNITY

The Supreme Court upheld the application of governmental immunity statutes to insulate from liability the state department of financial institutions for alleged negligence in supervising failed companies. *Gillman v. Dept. of Financial Institutions* and *Hilton v. Borthick.* Claims against financial institution employees and the state are barred by Utah Code Ann. Sect. 63-30-10(3) arising out of the failure to suspend or revoke the licenses of failed supervised lenders. Although the state legislature has generally waived immunity for an employee's negligence within the scope of employment, Sect. 63-30-10 retains immunity for certain specific types of negligent acts, including the failure or refusal to suspend or revoke a license, certificate or other such state authorization.

In *Gillman,* the plaintiff attempted to avoid immunity by claims that the defendants breached a common law duty to the public; failed to perform a non-discretionary function; and failed to act when presented with information of improper activities by the supervised lender. Rejecting each theory, the Court opined that the injuries suffered arise out of licensing and revocation decisions and not about the negligent implementation of a discretionary decision or a "common law" duty. *Compare Doe v. Arguelles,* 716 P.2d 279 (Utah 1985).

At the heart of the Court's decision is a broad, encompassing interpretation of the statutory terms employed in Sect. 64-30-10. Sound public policy justifies immunity in "essential governmental functions."

J. Hall dissented, stating that the failure to inspect and supervise the lenders was not a matter of licensure and revocation and was not excused by the immunity statutes.

Gillman v. Dept. of Financial Institutions, 120 Utah Adv. Rep. 3 (1989) (J. Zimmerman) and *Hilton v. Borthick,* Case No. 20040, Utah Supreme Court (Nov. 16, 1989) (J. Durham).

DIVORCE—ALLOCATION OF TAX EXEMPTIONS CITATION OF AUTHORITY

Under, I.R.S. Code, 26 U.S.C. Sect. 152(e) (1988) a state court may order a custodial parent to execute a declaration waiving federal tax dependency exemptions in favor of the non-custodial parent. Under Sect. 152, a custodial parent is *automatically* entitled to the tax exemptions unless a written declaration of waiver is filed with the IRS. The Court of Appeals (J. Orme) held that Congress intended that divorce courts still retain the power to allocate the exemptions. A court allocation could be accomplished by ordering the custodial parent to sign the IRS-required waiver declaration for the benefit of the other parent.

NOTE: The decision properly follows the majority view developing since the IRS statute's implementation in 1984. Inexplicably, the panel attaches particular importance to the *Hughes v. Hughes,* decision because the Supreme Court could have, but didn't, grant certiorari. With this increasing frequency of discretionary appeals and the use of Rule 42, Rules of the Utah Supreme Court, attorneys should not purport to confer a Utah Supreme Court sanction upon the views of a Court of Appeals decision when certiorari has been denied. The denial of certiorari is not an expression of any opinion on the merits of the case. Rule 48, Rules of the Utah Supreme Court. Also, citations of Court of Appeals decisions as precedence need not disclose that a petition for certiorari to the Utah Supreme Court has been denied. But, of course, in the proper citation of case authority an attorney should always reveal whether a petition for certiorari has been granted or is still pending.

Motes v. Motes, 121 Ut. Adv. Rep. 50 (1989) (J. Orme).

BAD CHECKS—STRICT LIABILITY

Under Utah Code Ann. Sect. 7-15-1, a corporate employee who signs a check at the direction of her employer is not strictly liable to the check's holder when the check is dishonored by the bank. The absence of any statutory language regarding any willfulness or intent to defraud by the check's makers does not preclude a Utah Supreme Court determination that willfulness and fraudulent intent should be fairly implied as necessary to impose liability on an innocent corporate employee. If "strict liability" was intended, a legislative departure from traditional rules should be effected by a "clearer manifestation" of such legislative intent.

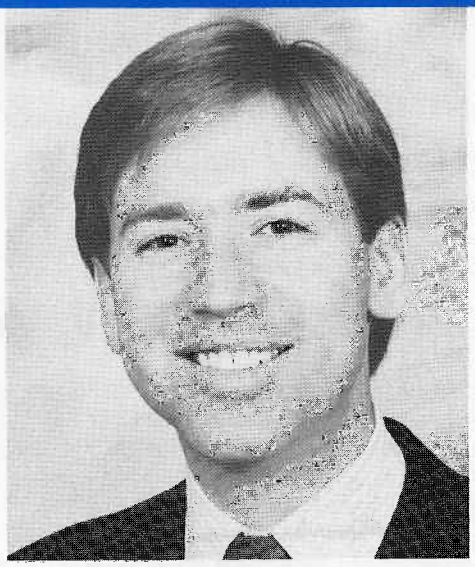
Mountain States Telephone and Telegraph v. Payne, 119 Utah Adv. Rep. 27 (1989) (J. Durham).

UCC—ARTICLE 9, DEFICIENCY JUDGMENT AFTER COLLATERAL SALE

An auto dealer repossessed a truck which it had sold to Mrs. Curley. The dealer resold the repossessed truck to another dealership after cleaning, obtaining value bids, and advertising the truck for resale. Mrs. Curley was charged with a deficiency under Article 9, of U.C.C.

The Court of Appeals (J. Billings) held that the Navajo Tribal Code did not apply because Mrs. Curley submitted no evidence that she was a Navajo Indian. The Court also sanctioned the truck's resale under Utah Code Ann. Sect. 70A-9-504 (1980) as a "commercially reasonable" private sale.

Chrysler Dodge Country, USA, Inc. v. Curley, slip opinion, Case No. 880424-CA, Utah Court of Appeals, Nov. 2, 1989 (J. Billings).



Officer's Message

What's Your Cause?

By Keith A. Kelly
Treasurer, Young Lawyers' Section

The warning caught me off guard: "DON'T BECOME A LAWYER."

I hardly expected it. As a bright-eyed undergraduate, I had approached a successful attorney on campus to ask how to prepare for law school. Instead of receiving pre-law advice, I was told to find another profession, so I could do something "productive" for the world. The attorney pointed to an agricultural specialist who was doing food-production research. I should follow a profession like the agricultural specialist.

The advice was not new.

I am the first and only lawyer in my family. As an eager ninth-grader, I announced my career plans to my relatives. My engineer father never objected out loud, but he often pointed out all of the problems lawyers create for society. My uncle—a successful Idaho potato farmer—was more vocal. He went out of his way to dig up anti-lawyer quotes from famous people, such as Mormon leader Brigham Young. I prepared for law school knowing that I was studying to become a "leach on society."

When I arrived at law school, I found myself among roomfuls of bright men and women who devoured intriguing concepts such as the Rule Against Perpetuities and the Mailbox Rule. As weeks turned into semesters, some of my classmates publicly questioned what they were doing. I will never forget a colleague who, in the lunch line, said she wished she had never studied law. There she was (this was a person who had received highest academic honors and undoubtedly could have had her choice of firms in most cities in the country) wishing she had never started. Others expressed that, after debt-creating educations at Ivy League Universities and at expensive law schools, they felt forced to take the highest paying jobs they could find, despite unfavorable working conditions.

Through it all, I noticed a category of students who did not appear to be disillusioned. Though diverse in interests and political persuasions, these students shared a common trait—an interest in law that transcended the desire to earn money or gain prestige. Some wanted to protect the environment. Others sought social change—advocation feminist or gay rights. And still others desired to promote traditional values. All saw the study of law as a means of helping to create a better world. All had a cause.

As practitioners, it is no different for us. Unlike my wife, who is a nurse, we are in a profession that does not automatically produce intrinsic rewards. After the unending hours of creating fine print or arguing discovery motions, it can be easy to drive home unfulfilled. Depositions with abusive opposing counsel may make us wonder why we ever took the LSAT. And, repeated often enough, even the most intellectually challenging transactions become mundane.

To move beyond the mire of professional disillusionment, I believe we each must have our own cause—our own reasons beyond the lure of a biweekly paycheck to continue in practice. No one can create a cause for us; it must be based upon our own personal values.

APPROACH TO LAW PRACTICE

I believe our personal cause must be founded in an approach to law practice that is consistent with our personal ethical standards and our philosophy of life. For example, if we value environmental quality, we will not find fulfillment trying to justify an irresponsible polluter. If we value time with our families, we will not be happy billing 2,500 hours per year.

Moreover, our approach to practice should include personal goals of professionalism. In my limited experience as a lawyer, I have observed that attorneys who most enjoy practicing law are those who maintain high personal standards of professional excellence. They seem to enjoy the challenge of doing their best.

At the same time, I believe our approach to practice should be rooted in a desire to make our legal system better. As members of the bar and bench, we should have the clearest view of the faults in our legal system. We are the ones who can best make our system work properly and, where needed, produce positive change.

COMMITMENT TO OTHERS

Founded on an approach to practice which is consistent with our values, we should look beyond immediate personal regards and help others. This type of commitment can take many forms. For example, one of my colleagues provides voluntary legal services to aid others in obtaining adoptions. Many others offer free advice through the Tuesday Night Bar and through the Volunteer Lawyers Project of Utah Legal Services. Many have lectured to senior citizen groups and offered free help to indigent defendants. Others have worked

with Bar committees to author pamphlets providing legal information to many facets of our community. Still, others have spent significant hours on committees which strive to make our legal system more efficient and just.

The many committees and service projects sponsored by the Bar can be a handy way to find a cause. Chances are that a Bar committee is already working to provide service in your area of interest. If not, there is certainly room for new ideas. Do not hesitate to contact a Bar officer to offer your services.

THE IMPACT

When all lawyers find their own cause our legal system will be more accessible and fair. Our profession will be viewed as productive and helpful to society. And our personal lives will be more rewarding: We will not have to wonder why we chose to practice law.

Excerpts and Observations From Calvin L. Rampton's "As I Recall"

By Margaret R. Nelson

> I learned as a political figure what I already knew as a trial lawyer—you should not underestimate the average juror or the average voter. If you have a good case and present it fairly, you will be listened to and will receive a fair verdict. However, if you attempt to deceive jurors or citizens or to patronize them, your cause is certain to be lost.

Calvin L. Rampton, prominent lawyer and 11th governor of the State of Utah, has penned his memoirs in a newly released book titled "As I Recall." Following 16 years of Republican domination of the governorship, Rampton was sworn into office on January 4, 1965. He served for 12 consecutive years and became the only three-term governor in Utah's history.

Published by the University of Utah Press and edited by Floyd A. O'Neil and Gregory C. Thompson, "As I Recall" opens with a nostalgic look at Rampton's roots in Bountiful, Utah. As the book begins, most people are still moving about in horse-drawn buggies, a movie admission is 10 cents, and a favorite childhood prank is to wait until an outhouse is occupied, then run out, nail the door shut and tip it over with the person inside. It tells of Rampton's Uncle Charles Mabey who became Utah's fifth governor and held the post until the successful bid of Governor George Dern in 1924. The Democratic slogan that year was: "We want a Dern good governor, and we don't mean Mabey."

The book portrays a close knit family struggling to make ends meet following the premature death of his father, when Rampton was just 17 years of age. His mother sold cosmetics and corsets while Rampton assumed responsibility as the principal wage earner of the family. He managed the family garage, worked as a janitor at the University, leased a filling station and, finally, built a 12-unit motel in Salt Lake City.

The year 1936 marked a turning point in Rampton's personal and professional life. As the administrative assistant to Democratic Congressman Will Robinson, from Utah's Second Congressional District, Rampton traveled to Washington, D.C. where he met his future wife, Lucybeth Cardon. At the time of their marriage, Lucybeth was a legal secretary for Ernest L. Wilkinson. From their first blind date on Halloween night to their first kiss on the evening that Rampton proposed, the book relates details of their Courtship with warmth and charm.

With his election as speaker of the Little Congress, an organization comprised of administrative assistants and clerical workers of congressmen and senators, Rampton received increased visibility and social contacts. On one occasion, while sitting in his office, Rampton and a friend observed a Texas Congressman in a compromising position. His secretary, a young, flirtatious, good looking girl, was seated on her boss's lap. He was making advances and she was making a half-hearted resistance. Rampton's friend decided to teach the Congressman a lesson. He called his number and they watched as the Congressman let go of the girl with one hand, picked up the telephone, and said, "Yes, yes, who is this?" Rampton's friend said, "This is your conscience." He hung up the phone and the Congressman dropped the girl.

Rampton's law school years were spent at the University of Utah and George Washington University. He was elected Davis County Attorney while still a law student and one of his first cases involved a serious traffic violation. It was a bench trial before Justice of the Peace Joseph Sill, father of Sterling Sill, a general authority of the LDS Church. The defense attorney was Vern McCullough. Rampton tells the story as follows:

> Not only was this the first case of any substance that I had tried, but I think it was the first case of any substance that Mr. Sill had tried. Obviously Justice Sill was impressed with Mr. McCullough, who was a big city lawyer with a considerable reputation, and he was not at all impressed by the young country attorney who wasn't even a member of the bar. It was obvious that I wasn't making much of an impression on him as I presented my evidence. When I completed questioning my last witness and said, "The prosecution rests," Vern McCullough said, "Your honor, I move for a dismissal." The Justice of the Peace responded, "Second the motion."

While still a youngster, Rampton created a spectacular show of fireworks when he threw a wire over the high-tension line which paralleled the track and fed the boosters of the Bamberger Railroad. The explosion knocked out all of the booster stations between Salt Lake and Ogden, and the Bamberger was non-operational for several hours. Many years later, while serving as Assistant Attorney General and lawyer for the Public Service Commission, Rampton cross-examined Julian Bamberger regarding a matter involving his bus line. He recounts the incident in this fashion:

> I had been roughing him up just a little bit, although we were good friends, but he was kind of irked at me. I said, "Julian, do you remember when some kids threw a wire over your high-tension line and blew out the booster stations?" He blew up, "Oh I do, I do." I said, "Well, I did it." And he said, "You S.O.B., you've been giving me trouble for the last 30 years."

While still in the Attorney General's office, Rampton had a series of encounters with J. Bracken Lee, a man whom he describes as "one of the most colorful political figures in Utah history." Lee was the mayor of Price, a town plagued by liquor and gambling activities. In a bitterly fought campaign for governor in 1944, Lee was defeated by Governor Maw. Rampton describes the aftermath as follows:

> There then ensued a sort of running feud between the administration of Mayor Lee in Price and the state administration in Salt Lake. Liquor con-

trol officers raided a private club in Price and took possession of some premises in which Mayor Lee's brother had an ownership interest...The Price City Police, under the direction of Mayor Lee, demanded entrance and charged the state liquor enforcement officers with illegal entry...There followed a physical fight between the Price officers and the state liquor control officers, and it resulted in the state officers being arrested by the Price City Police.

When a group of citizens from Price called upon Attorney General Grover Giles and demanded that he intervene and prosecute liquor and gambling violations, Giles directed Rampton to go to Price and seize all slot machines. Armed with search warrants obtained from District Judge Fred Keller, Rampton called upon all highway patrolmen in that part of the state to serve them. Within a short period, the entire length of Main Street in Price was lined with slot machines on both sides. Thereafter, Rampton and others went to a place in Price to get something to eat. The restaurant refused to serve them. When they reported back to Judge Keller, he was amused at the whole incident and told them:

I don't know that you're going to do any better in any of the other restaurants, so I better call my wife and tell her I'm bringing you fellows home to lunch.

Following his entry into private practice, Rampton represented industrialist and longtime friend, Morris Rosenblatt, in a lawsuit against Utah Power & Light. After obtaining a favorable result and carefully evaluating his services, he submitted a bill for $1,500—$150 a day for each of the 10 days he had worked on the case. What occurred thereafter should make Rampton the envy of the legal profession. He received a check from Rosenblatt for $2,500 and a note stating that he had to revalue his services—that he should not sell them too cheaply.

While Rampton's law practice prospered, his political aspirations were thwarted by one defeat after another. In his unsuccessful bid for the U.S. Senate in 1962, Rampton faced opposition from incumbent Congressman David King within his own party. On the Republican side, J. Bracken Lee challenged incumbent Senator Wallace Bennett. With typical good humor, Rampton relates an interesting anecdote from this campaign:

About a week before the primary, I got a call from a man who said he was an Indian named Frank Takes Gun, and that he was the head of the Native American Church, which I believe was true. He asked me to meet him at a downtown motel, which I did, and he told me that if I would give him some money he would campaign for me among the Utes. I think he wanted $1,000. Finally, I paid him $250, but there weren't 50 Utes who turned out to vote. I was with Dave King one day after the election was over, and I said to him, "Did you ever hear of an Indian named Frank Takes Gun?" Dave turned very red and said "Yes. How much did he get from you?" I answsered, "Oh, I don't know—about $250." He said, "I gave him $500." Later, after I was governor and Brack Lee and I were at a head dinner table one night, I said to him, "Brack, do you remember an Indian named Frank Takes Gun?" Brack almost choked on his coffee and said, "Oh, that son-of-a-bitch. How much did he take from you?" I told him $250 and he replied: "I gave him $2,000."

Rampton was elected to Utah's highest post in 1964, and he wasted no time in preparing for the first legislative session in January. As one of his first orders of business, he enlisted the services of 30 bright

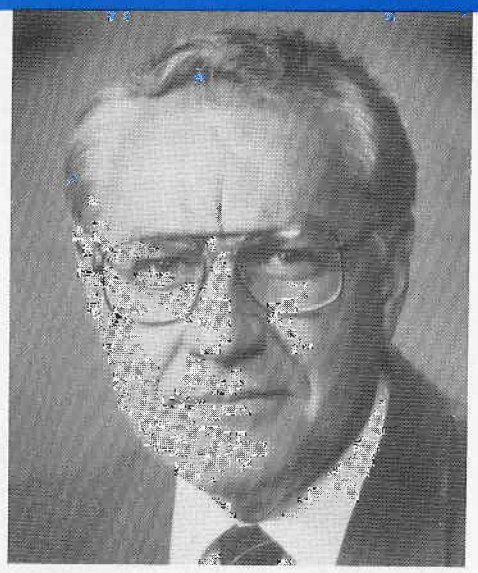
young Democratic lawyers, among whom was his successor, Scott Matheson. Together, these lawyers prepared 114 separate pieces of legislation, 102 of which ultimately passed. Rampton's initial address to the legislature was one of the longest speeches he had ever given. As he came down from the rostrum and passed by the senators, Rampton relates the following exchange:

> Reed Bullen, the senator from Logan, said, "I think, governor, that's the longest speech I ever listened to." I replied, "I'll have to watch that, Reed, because when a Mormon stake president complains about the length of a speech, there's certainly room for concern."

Rampton's impact on state government was substantial. His legacy is seen in the recommendations of the Little Hoover Commission for the reorganization of Utah's executive branch and in the efforts of "Rampton's Raiders" for the promotion of industrial development. Symphony Hall and the renovated Capitol Theatre are additional fruits of his administration.

Rampton's rise to prominence as chairman of the National Governors' Conference allowed him to rub shoulders with some of the most notable men and women of his day. A sizable portion of Rampton's book deals with his impressions regarding a broad spectrum of local and national figures. In a direct and straightforward style, Rampton shares his views with unabashed candor. Readers may agree or disagree with his evaluations, but none are likely to find them dull.

On Inauguration Day 1977, Calvin L. Rampton entered the Capitol Rotunda to bid a final farewell to his friends and supporters. Amidst an impressive ovation and an obvious outpouring of affection, the band struck up "Try to Remember." "As I Recall" is a powerful written record of a remarkable leader and his central role in one of Utah's most progressive eras. Through its pages, lawyers, historians, political scientists, and others will "remember" the challenges of Utah's past and gain a clearer vision of its future.



The Role of the Utah Bar Foundation

By President Richard C. Cahoon

As President of the Utah Bar Foundation for almost a decade, it has been my privilege to see the Foundation grow from an organization that had a total income of approximately $4,000 a year to over $207,000 a year. Yet, the Foundation is still an unknown to most of you. People are always asking, "What is the Foundation and what does it do?" The simple answer is; the Utah Bar Foundation is a charitable, 503(c)(3) non-profit corporation, governed by seven Trustees and its membership is made up of all members of the Utah State Bar Association. As a result, every attorney licensed to practice law in Utah is a member of the Foundation. All contributions made to the Foundation are deductible contributions on your income and estate tax returns. This report is written to help you understand what your Foundation is doing.

Over the past decade, the Foundation has formulated the following objectives:

1. Increase the income of the Foundation, through voluntary contributions, and increased enrollment in the Interest on Lawyer's Trust Account Program (IOLTA).
2. Let the people of Utah know that the Foundation has funds available for worthwhile law-related projects and judiciously analyze all requests for funds to make sure that the funds are properly disbursed for the benefit of the people of the State of Utah.
3. Improve the image of the legal profession.
4. Establish a Judicial History Fund and publish the Judicial Histories of Utah.
5. Establish a Capital Account which will enable the Foundation to serve the needs of the people of this state.
6. Promote awareness of the proper use of trust accounts.

INCREASING THE INCOME OF THE FOUNDATION

The Foundation has limited its drive for individual contributions. However, several of you have made sizable contributions to the Foundation and we appreciate those contributions and encourage you to continue to make individual contributions. Our goal is to have each attorney make an annual contribution of $10 to the Foundation.

In addition, we have developed the Interest on Lawyer's Trust Accounts (IOLTA) Program. Over half of the members of the Bar are now participating in IOLTA. In 1988, the IOLTA income was $183,000. Most of you understand the IOLTA Program, but let me simply state that it is a program whereby your non-interest bearing trust account can be changed to an interest-bearing trust account, with the interest payable to the Foundation. It does not require you to make any change in the way you handle your trust account. It is a very simple process to enroll in IOLTA. If you have any questions about IOLTA, call the Foundation and our Executive Director will be happy to meet with you, on a one-on-one basis and go over the IOLTA Program. IOLTA has now been adopted in 49 of the 50 states.

DISBURSEMENT OF FUNDS

The IOLTA Program funds are used to promote legal education and increase knowledge and awareness of the law in the community, to assist in providing legal services to the disadvantaged, to improve the administration of justice, and to serve other worthwhile, law-related public purposes. Each year, we receive more applications from people who believe they have a project that meets one or more of the above criteria. The trustees judiciously review all of the applications which are received and determine which ones will be given grants. In 1988, the Foundation disbursed $142,972 from the IOLTA Funds. I refer you to the November issue of the *Utah Bar Journal* for a list of those awards. Since the IOLTA Program was adopted in 1983, the Foundation has distributed over $500,000.

IMPROVING THE IMAGE OF LAWYERS

While this is a nebulous topic, it is my firm belief that we improve our image whenever we are able to assist others in a positive way. The Foundation is one visible way lawyers can make a cash contribution to assist the people in our state. Cash contributions provide the means for legal services, publications, surveys and other programs which otherwise would not be available. I personally believe that one of the great strengths of this state comes from the willingness of the lawyers to give their support to community service.

JUDICIAL HISTORY

The Foundation has received private contributions which have been earmarked solely for the purpose of publication of Utah judicial histories. It is hoped that the image of our profession will be enhanced as people are able to read about outstanding members of our profession. The Foundation published a *History of the Federal Judiciary in Utah* in 1987, which 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 Foundation has placed free of charge copies of the *History of Federal Judiciary in Utah* in every public library, junior high, high school and college library in the state of Utah.

We are now in the process of preparing a book on the history of the Justices of the Utah Supreme Court. Most of you are familiar with the biographical sketches of the Justices of the Utah Supreme Court which have been prepared by Retired Justice J. Allan Crockett. Using the biographical sketches already prepared by Justice Crockett and others which he is now preparing for the purpose of this publication, we have employed John Alley Jr., a historian, to assist Justice Crockett in the preparation of biographical sketches on all of the Justices of the Utah Supreme Court. As soon as these biographical sketches are completed, they will be compiled and published as the Foundation's second volume of Utah Judicial History.

CAPITAL FUND

It is the goal of the Foundation to establish a meaningful capital fund, which will enable the Foundation to provide income for many projects in the state of Utah, independent of its current income. This has been and is a difficult task because of the pressing, current needs of the applicants who come before the Foundation. However, the Trustees have annually set aside 10 percent of the IOLTA Funds for the purpose of building a Capital Fund, which would enable the Foundation to have a sufficient asset base to provide for the increased needs of the people of this state. At the end of 1988, this Fund had grown from an initial fund of $40,000 to the sum of $123,459.

TRUST ACCOUNTS

The Foundation has been concerned that more emphasis needs to be placed on the proper use of trust accounts. The Trustees believe that lawyers need to receive more instruction in the proper use of a trust account. As a result, the Foundation is now in the process of preparing and printing a booklet entitled *Trust Account and IOLTA Guidelines*. This booklet will be distributed on a regular basis to all new attorneys admitted to practice law in the state of Utah. It will also be made available to all attorneys in the state. In addition, the trustees are taking it upon themselves, in cooperation with the law schools at the University of Utah and at Brigham Young University to participate in classroom instruction on the proper use of trust accounts.

THE FUTURE

These are some of the major objectives of the Foundation, which have resulted in the Foundation's growth over the past decade. In order for it to continue to grow, it will continue to need dedicated individuals to serve as its Trustees and Officers. I encourage all of you who have interest in the Foundation and serving the lawyers of this state, to submit your nominating petition and get your name on the ballot to become a Trustee. I am confident that the Foundation is just in its beginning stages. I encourage all of you to continue to support the Foundation. The future of the Foundation is very bright.

CLE CALENDAR

CORPORATE MERGERS AND ACQUISITIONS

This two-day advanced course is designed to offer the experienced corporate lawyer an overview of some of the more sophisticated strategies and techniques, as well as the latest developments, in the field of corporate mergers and acquisitions. The program will cover (i) tax considerations in structuring the acquisitions; (ii) methods of formulating the purchase price; (iii) issues that should be considered by both purchaser's and seller's counsel in negotiating the acquisition of a closely held company (or a subsidiary or division of a publicly held company); and (iv) special problems that should be considered in leveraged buyouts and when acquiring divisions and subsidiaries.

The faculty will identify and discuss some of the major as well as more subtle issues that may (or should) arise in the context of the acquisition. Important tax considerations will also be noted, with particular reference to the effect of the recent changes in the tax laws. Included in the program will be a discussion of the factors to be considered in the structuring of a negotiated transaction and the determination of the purchase price, as well as a mock negotiation of an acquisition agreement as a vehicle for identifying the various issues that should be considered, both from the purchaser's and seller's perspectives.

Continuing Legal Education Credit Pending.
Date: February 8 and 9, 1990
Place: Olympic Hotel, Park City, Utah
Fee: $375
Time: 8th, 9:00 a.m. to 4:30 p.m.; 9th, 8:30 a.m. to 4:00 p.m.

HOW TO HANDLE BASIC COPYRIGHT AND TRADEMARK PROBLEMS

A live via satellite seminar. Copyright law and trademark law have ever-increasing importance in the legal and business worlds, both in the domestic and international spheres. A faculty consisting of experts with a wide range of knowledge and experience in the copyright and trademark areas will focus on the handling of basic, everyday problems that practitioners in these areas and non-specialists most commonly encounter. The faculty will cover the fundamental principles, policies, and practices in each area, including the significant changes introduced in copyright law by the Berne Convention Implementation Act of 1988 and in trademark law by the Trademark Law Revision Act of 1988.

Other topics will include copyright and trademark infringement litigation, licensing and ethical considerations in the copyright and trademark field. In addition, the program will cover practice and procedure in the United States Copyright Office and the United States Patent and Trademark Office. This seminar is designed as an introducton for attorneys with little experience in copyright and trademark and as a review and update for those who need reacquaintance with intellectual property practice and procedure.

Continuing Legal Education Credit Pending.
Date: February 13, 1990
Place: Utah Law and Justice Center
Fee: $160
Time: 8:00 a.m. to 3:00 p.m.

TAX PLANNING FOR INDIVIDUALS AND CLOSELY HELD BUSINESSES

The Utah State Bar in conjunction with Brigham Young University is pleased to announce the Third Rocky Mountain Tax Planning Institute. The Institute's focus will be on income tax planning opportunities available to individuals and closely held businesses. An experienced faculty will examine current planning techniques and describe the circumstances in which those techniques may be employed.

General topics will include tax planning considerations in the use of corporations, partnerships and trusts, fringe benefits, passive activity losses and the impact of 2036 (c). Speakers will emphasize the impact of recent developments in legislation, rulings, and case law on planning techniques and opportunities.

Continuing Legal Education Credit Pending.
Date: February 14 and 15, 1990
Place: Utah Law and Justice Center
Fee: $195
Time: 14th, 8:00 a.m. to 5:00 p.m.; 15th, 8:30 a.m. to 12:45 p.m.

PROFESSIONAL LIABILITY LOSS CONTROL SEMINAR

The Utah State Bar announces a Loss Control Seminar to be presented in conjunction with The Home Insurance Company and your local administrator, Rollins Burdick Hunter of Utah, Inc. This three-hour seminar will cover loss control ideas, including a discussion of Conflict of Interest Exposures and Hazardous Areas of Practice. The latest trends in Professional Liability claims and their prevention will also be discussed, as well as a look at local claims statistics. The seminar will include a panel discussion on the above subjects as well as insights into the Lawyers Professional Liability marketplace. Individuals on the panel will be Mr. Joseph Action, JD, publisher of *Lawyers Liability Review Journal*, Mr. Thomas Key, JD, Utah State Bar Professional Liability Insurance Committee representative, and Mr. Mark Dougherty, JD, Assistant Vice President and Claims Coordinator for Professional Liability Underwriting Managers (PLUM). Please take time to reserve your space for this informative seminar. Call Barbara Rainey at Rollins Burdick Hunter of Utah, Inc., (488-2550) for more details.

Continuing Legal Education Credit Pending.
Date: March 5, 1990
Place: Utah Law and Justice Center
Fee: $55
Time: 12:00 to 5:00 p.m.

EVIDENCE FOR ADVOCATES— THE LAW YOU NEED TO PROVE YOUR CASE

This seminar features the popular James W. McElhaney, Professor of Law, Case Western Reserve University School of Law. Program topics and highlights include: The Open Door Theory of Relevance, Character Evidence and Impeachment, Foundations and Objections, Making and Meeting Objections, Privileges, Hearsay and Expert Witnesses. The program offers "invaluable information shared in an entertaining style," from one of the country's premier lecturers on evidence and trial practice.

Continuing Legal Education Credit Pending.
Date: March 30, 1990
Place: Marriott Hotel
Fee: TBA
Time: 8:00 a.m. to 5:00 p.m.

ENVIRONMENTAL AND NATURAL RESOURCE ISSUES IN COMMERCIAL TRANSACTIONS

The Utah State Bar and the Energy, Natural Resources and Environmental Section of the Utah State Bar are pleased to announce a one-day seminar examining the important environmental and natural resource law issues facing business and real estate practitioners in Utah. Environmental laws and regulations increasingly influence the negotiation of real estate sales, corporate mergers and acquisitions, asset sales, corporate reorganizations and dissolutions, financing development and leasing. Practitioners must be sensitive to the serious risks and potential liabilities posed by these laws and also recognize the important natural resource law issues, involving water rights, severed mineral interests, and public land rights, that uniquely affect commercial and real property transactions in Utah and other western states.

The Seminar will be geared toward non-natural resource and environmental law practitioners. It will provide an overview of the important state and federal environmental laws, and the important transactional aspects of natural resource laws. The Seminar will stress transactional problems and dilemmas posed by these laws, including identification and allocation of environmental risks and liabilities, transfer of water, mineral and public land rights and interests, creating and perfecting security interests in these property rights, and the procedures for transferring environmental and natural resource permits and approvals.

Continuing Legal Education Credit Pending.
Date: April 25, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: 8:30 a.m. to 5:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
☐ Feb. 8-9	Corporate Mergers and Acquisitions	Park City	$375
☐ Feb. 13	How to Handle Basic Copyright and Trademark Problems	L & J Center	$160
☐ Feb. 15-16	Tax Planning for Individuals and Closely Held Businesses	L & J Center	TBA
☐ March 2	Professional Liability Loss Control Seminar	L & J Center	$55
☐ March 30	Litigation Section Seminar	L & J Center	TBA
☐ April 25	Environmental and Natural Resource Issues in Commercial Transactions	L & J Center	TBA

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1990. Watch for future mailings.

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.

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Snow, Nuffer, Engstrom and Drake, St. George, seeks a Utah licensed attorney (no experience necessary) to start employment in Spring or Summer, 1990. Direct, confidential inquiries to Steven Snow, P.O. Box 400, St. George, UT 84771-0400.

LEGAL ASSISTANT: Salary $11.00 to $14.74 hour. The Utah State Department of Corrections is recruiting for the position of legal assistant in the Inspector Generals office. Duties will include preparing cases for administrative hearings; conducting legal research; assisting in administrative hearings; providing legal and technical assistance for contracts; assists department in formulation policies; researches and resolves legal issues involving the department; communicates and implements recent legal decisions affecting the department. A juris doctor degree is required. Verification of juris doctor degree must accompany application. An official state application is required and must be completed. Applications should be submitted to the Department of Corrections, 6100 S. 300 E., Salt Lake City, UT 84107.

POSITIONS SOUGHT

Attorney with experience in bankruptcy, personal injury defense, criminal defense, and administrative law seeks full-time position with reputable law firm, corporate legal department, or government agency, Member, Utah and Idaho Bars. Please reply to Utah State Bar, Box X, 645 S. 200 E., Salt Lake City, UT 84111-3834.

Attorney with six years practice in commercial litigation, real property and bankruptcy. Resume and references available. Direct inquiries to: Utah State Bar, Box Y, 645 S. 200 E., Salt Lake City, UT 84111-3834.

BOOKS FOR SALE

For Sale: *Utah Reporter.* Up-to-date. New condition. Cost $1,400. Will sell for $600. *Damages in Tort Actions.* Up-to-date. New condition. Cost $1,025. Will sell for $500. Gary at (801) 532-1601.

SERVICES AVAILABLE

LAAU has established an Employment Referral Service or "Job Bank" to provide the metro legal community with a source for posting employment needs and opportunities.

We ask that you consider the LAAU Job Bank whenever a legal assistant position becomes available in your offices. You may send notice of the opening to: LAAU JOB BANK, P.O. Box 112002, Salt Lake City, UT 84147, or call Joy Nunn, Job Bank Coordinator at (801) 521-3200. Complimentary copies of resumes sent to Job Bank by those currently seeking legal assistant employment will be forwarded to your attention for review.

Notice of this service is given to LAAU's members as well as to legal assistants at large. Resumes, information pertinent to experience/expertise, education and type of position desired is sent to the Job Bank for referral on to you. Positions, as they become known, may also be published in LAAU's newsletter which circulates each month.

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Utah State Bar
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Salt Lake City, Utah 84111

Mr. William D. Holyoak
185 South State #600
P.O. Box 11898
Salt Lake City, UT 84147-0898

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