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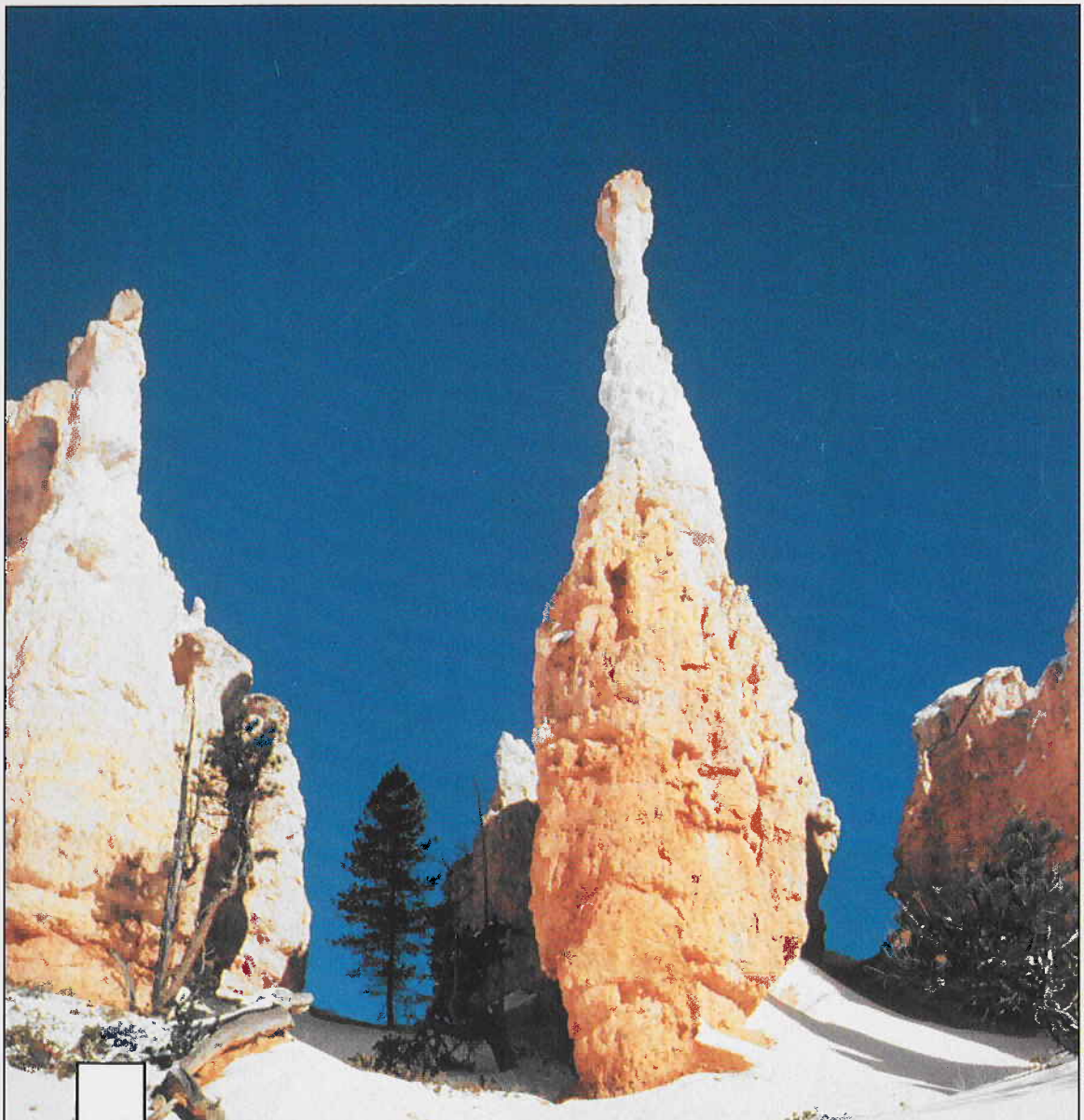

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COVER: Bryce Canyon in Winter, by Brian D. Kelm, Esq. of Salt Lake City.

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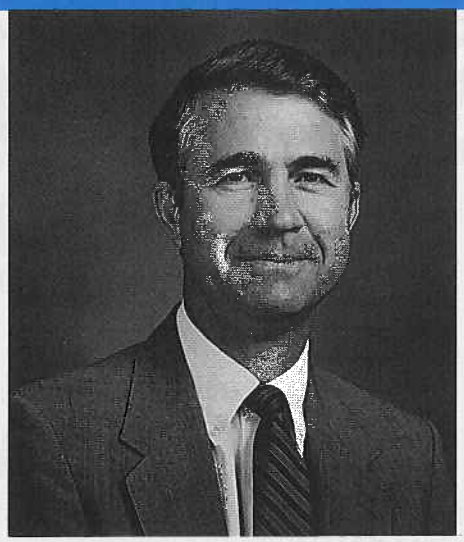


Some Employee's Views of Lawyers

By Gayle F. McKeachnie

Recently, I have been thinking about lawyer and lawyer staff productivity. Most lawyers, whether they work in a solo practice, law firm, government, or business environment, work in concert with other people, both lawyers and nonlawyers.

Most of us have the opportunity to deal with people who always seem to meet deadlines and lead a calm organized life with time for family, civic associations and play. Likewise, we can each probably think of a lawyer who is always late, works nights and weekends to catch up, is stressed out and suffering ill health due in part to the pressures of lawyering.

Recent surveys have indicated a high degree of dissatisfaction among practicing lawyers largely due to long and hard hours coupled with the stressful nature of law. These same pressures exist for the nonlegal staff working with attorneys.

A law office is a natural repository for stress. Competition created by an increased lawyer population, rising costs, decreasing profits, and more demanding and sophisticated clients all contribute. The lawyer often has had no training running a business. Even where there is an administrator or an office manager, the needs and desires of several—sometimes many owners rather than one creates a dilemma and tension. Each lawyer is probably an individualist by nature who believes his or her own way of doing things, even in administration areas, is better than anyone else's. The adversarial nature of the practice where the attorney either wins or loses and is constantly faced with the fear of failure and public humiliation, adds stress.

A law office is the home of much human misery such as divorce, physical injury, loss of a loved one, a business person trying to survive in a complex world. The lawyer finds himself or herself with responsibility for people in these situations. In addition to the many pressures outside the control of the lawyer, some of the greatest stress caused in a law practice may result from the behavior and work habits of the lawyers.

I was recently told by an experienced legal secretary about the stress and pressure existing because of the work habits and behavior of one of the two lawyers for whom she works. I venture to guess that the lawyer has little inclination of the $10,000 to $20,000 cost he or his firm will incur in training a new secretary when this lady leaves because of lawyer created stress. Law firms are plagued with high and costly turnover.

Considerate lawyers who manage their time and tempers usually have loyal and productive employees. The disorganized, ill tempered employer has costly and high turnover with lower productivity.

Listed below are four of the most commonly voiced areas of frustration among people working with lawyers.

I. Poor Manager of Time

Many lawyers do a poor job of organizing themselves to utilize their time. This results in raising the levels of tension already existing in a law office. The concepts involved in the study of time management, if applied to the running of a law office, have a beneficial impact, not only on the general feelings in the office but also on the pocketbook of the lawyer.

II. Procrastination

Most legal secretaries or legal assistants report that the biggest reason work is not getting done on time is the lawyer's procrastination. A lawyer's work habits and disorganization can have an extremely negative impact on support staff as well as other attorneys. It means someone has to work late, often requiring special arrangements with family and cancellation of personal plans. It means extra expense for the firm. Look around your work place. I have been amazed at the signs hung on office walls joking about this problem. Lawyers generally do not even realize that they are creating such an impact on the good will of the staff until people move on to work some place else seeking a less stressful environment.

III. Perfectionism

The perfectionist may be worse than

the procrastinator. This is the lawyer who does every piece of work five or six times or until time runs out. The perfectionist shows such insecurity in his or her work that everyone around goes nuts revising and changing the document up to the last possible minute. I once had a secretary tell me, "It seems to me that after all those years of schooling, you could get it right in two or three tries." The secretary who must work with such a lawyer usually soon feels frustrated and bored.

IV. Refusal to Delegate

Lawyers who are unwilling to delegate usually make a big mistake. Nonlawyers have excellent organizational skills and could really help the lawyer if he or she would only let them. Many lawyers resist delegation. This is reflected in the perfectionists attitude. The failure to delegate often creates stress and boredom as people feel underchallenged or poorly utilized. They report feeling not trusted, not challenged, and interpret the failure to delegate as an indication that the lawyer believes the secretary or other staff person is not intelligent or cannot think.

A law office is the home of much human misery such as divorce, physical injury, loss of a loved one, a business person trying to survive in a complex world. The lawyer finds himself or herself with responsibility for people in these situations.

We can all probably improve in these four areas where we often create unnecessary stress and tension in our own lives and those with whom we associate.

If our staff is not as productive as we think it should be, we should first look at ourselves to see if we are part of the problem or part of the solution.

Recent Utah Real Property Decisions

By Victor A. Taylor

Appellate courts in Utah have issued a number of significant opinions on real property issues, during 1991. The following is a brief summary of those decisions.

1. Damages When Real Estate Contracts are Forfeited

In *Bellon v. Malnar*,[1] a buyer's assignee had defaulted under a real estate contract. Under the contract, the seller retained title, a warranty deed from the seller to the buyer was placed in escrow pending payment in full under the contract, and a quitclaim deed back from the buyer in favor of the seller was also held in escrow in the event of the buyer's default. The contract provided that 30 days after a default by the buyer and the buyer's failure to remedy the default within five days after written notice, the seller was released from any obligation to convey the property, and all payments made up to that point were forfeited as liquidated damages for the nonperformance of the contract.

In *Bellon*, the buyer had defaulted and the seller had exercised the forfeiture remedy under the contract, taking back the property by causing the recordation of the quitclaim deed held in escrow and retaining the sum of approximately $76,000 paid to the seller prior to the default. The buyer's assignee brought this action for "equitable restitution" of the $76,000 paid under the contract by the buyer, claiming in essence that, if the seller was permitted to retain the entire amount paid by the buyer to the seller, the seller would be unjustly enriched.[2]

The court explored the peculiar facts of the case at length in trying to determine whether or not the amount forfeited by the buyer and retained by the seller as liquidated damages under the contract was a fair amount that reasonably reflected the damages suffered by the seller. To calculate damages, the court considered the following elements:

(1) loss of an advantageous bargain;

(2) any damage to, or depreciation of, the property (delinquent taxes and assessments would also fall under this item);

(3) any decline in value due to change in market value of the property not allowed in item numbers 1 and 2; and

(4) the fair rental value of the property during the period of occupancy (interest on the contract is an allowable alternative to fair rental value).[3]

After a lengthy discussion of property values and damages, the court found that the seller sustained actual damages of approximately $50,000 and that the $76,000 paid by the buyer prior to default gave the seller a $26,000 windfall.

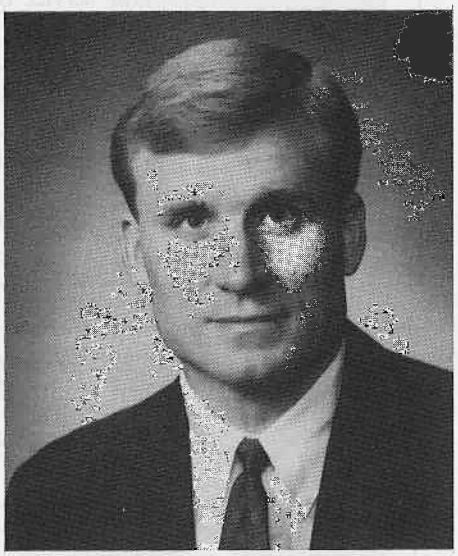
The court then recited the general principles underlying consideration of permissible damages in a forfeiture action under a real estate contract:

> We will enforce a forfeiture clause unless we find that the forfeiture would be so "grossly excessive in relation to any realistic view of loss that might have been contemplated by the parties that it would so shock the conscience that a court of equity would refuse such forfeiture." Examination of our case law indicates that this court will enforce the forfeiture clause when the amount of forfeiture does not greatly exceed, or is less than, the amount of damages.[4]

The court found the Utah case law on liquidated damages to be clear:

> [I]n all cases where the stipulation for liquidated damages was enforced it bore some reasonable relation to the actual damages which could reasonably be anticipated at the time the contract was made and was not a forfeiture which would allow an unconscionable and exorbitant recovery.[5]

The court concluded that a recovery of



VICTOR A. TAYLOR is shareholder in the Salt Lake City law firm of Kimball, Parr, Waddoups, Brown & Gee, where he practices exclusively in the real estate area. Mr. Taylor obtained his B.A. in political science from BYU, where he graduated Magna Cum Laude with High Honors in the Honors Program, and obtained his J.D. from the University of Virginia School of Law, where he was a member of the Editorial Board of the Law Review and of the Order of the Coif. Mr. Taylor is an officer in the Real Property Section of the Utah State Bar.

over $26,000 in excess of the actual damages showed that liquidated damages bore no reasonable relationship to actual damages and that a complete forfeiture would allow "an unconscionable recovery."[6] Therefore, the court ordered the seller to refund the buyer's assignee approximately $26,000.

Bellon is one in a long line of cases examining the forfeiture remedy of the type set forth in a Uniform Real Estate Contract, which provides that, on the buyer's default, the seller can terminate the contract and retain all moneys paid through the date of termination. The lesson of *Bellon* and its predecessors is to avoid using a real estate contract in connection with purchase money indebtedness. Generally, it is preferable for the seller to take back a note and trust deed evidencing and securing the purchase price. Then, if a default and foreclosure occurs, this type of litigation—basically arguing over the loss of the buyer's equity in the property—will not occur because the buyer has the right to preserve its equity by bidding at the trustee's or sheriff's sale, and the seller has the clear right to acquire or sell such equity should the buyer fail to successfully bid. In most cases, the uncertainties created by real estate contracts, as evidenced by *Bellon* and similar cases, far outweigh any perceived convenience or benefit achieved by their use.

2. Broker's Commissions and the Statute of Frauds

In *Wardley Corp. v. Burgess*,[7] the plaintiff broker, through one of its agents, had obtained a six-month agreement from the owner to list the defendant owner's home for sale. The listing agreement provided that "[d]uring the life of this contract, if [the broker] find[s] a party who is ready, able and willing to buy, lease or exchange said property . . . [the owner] agree[s] to pay [the broker] a commission of 6 percent for the sale, lease or exchange."[8]

At the end of the six-month term, the broker had not yet located a buyer. The listing agent alleged that he called the owner on the last day of the contract term and that the owner orally agreed to extend the listing agreement for three months. There was never any written agreement indicating that the original listing agreement had been extended. The owner was aware that the broker was still endeavoring to find a buyer following the termination of the original listing agreement. On several occasions, the owner was even present when the house was shown by the broker.

Eventually, the broker found a prospective buyer and the owner and this buyer entered into an earnest money agreement. However, the owner refused to go through with the sale at the closing. Although the closing was never consummated, the broker argued that it was nevertheless entitled to a commission because it had produced a ready, able and willing buyer. The broker acknowledged that the proposed buyer was not found until after the original term of the listing agreement had lapsed, but argued that it was entitled to a commission because the owner orally extended the listing agreement.

The Court of Appeals upheld summary judgment against the broker. Reasoning that the alleged oral extension to the written listing agreement ran afoul of the statute of frauds, which at the time of the alleged extension provided:

> In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:
>
> . . .
>
> (5) Every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation.[9]

The court noted that this section is "'intended to protect property owners from fraudulent and fictitious claims for commissions,' by placing an unyielding duty upon real estate agents and brokers to obtain written listing agreements or face the risk of nonpayment."[10] The court rejected the broker's argument that the oral extension of a listing agreement should be permissible under the statute: "The rule is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the requirements of the statute of frauds to be enforceable."[11]

The obvious lesson of this case is that real estate brokers or agents must get their commission agreements and any changes to them in writing be enforceable. In addition, when representing an owner contracting to pay a commission, it is prudent to provide in the agreement that a commission is payable only if and when the closing is actually consummated and not before. This will require modification of the standard printed form of listing agreement commonly used in Utah. An agreement to pay a commission on the presentation of a party who is ready, able and willing to complete the transaction, as in this case, gives rise to uncertainties and disputes when the closing does not occur. Moreover, most owners do not intend to pay a commission unless the sale concerned is actually consummated, despite language to the contrary in the standard form listing agreement.

3. Avoiding Ambiguity in Commission Contracts

In *Sprouse v. Jager*,[12] the seller conveyed a motel to the buyer pursuant to an Earnest Money Sales Agreement, under which the buyer made the down payment by trading other real property to the seller, and agreed to pay the balance over time. The agreement also provided for a $25,000 commission to be paid to the broker. At the closing, the purchase money debt was evidenced by a Uniform Real Estate Contract between the seller and buyer.

Because no cash down payment existed that could be used to pay the broker's commission at the closing, the seller executed an instrument in favor of the broker styled "Note/Agreement/Assignment" which provided that the $25,000 commission was to accrue interest and be paid over a four-year period. This instrument granted a $25,000 interest in the motel to the broker to secure the payment of the commission and provided that the seller was not personally liable for the commission:

> The parties hereto understand and agree that this instrument does not obligate the undersigned to personally pay the amounts set forth herein. The obligation for payment hereunder arises only out of the payments received by [the escrow company] under the Unif[or]m Real Estate Contract referred to above.[13]

The seller was the only signatory of this instrument.

Payments were made by the buyer to the escrow company for about one year, and a portion of each of those payments was applied to payment of the broker's commission. At the time the buyer stopped making the payments, the commission was reduced to about $19,000.[14] The seller brought a foreclosure action under the Uniform Real Estate Contract which resulted in the seller, buyer, and broker all making claims, counterclaims, or cross-claims against one another. Eventually, the seller foreclosed and made a "credit bid" at the sheriff's sale. However, the trial court found the seller personally liable for the balance owing on the commission (approximately $24,000), plus interest and attorney's fees, despite the nonrecourse language contained in the Note/Agree-

ment/Assignment.

The primary question the appellate court considered was whether the parties intended that the seller pay the commission if the buyer defaulted. The appellate court affirmed the trial court's finding that, although the note and assignment portions of the Note/Agreement/Assignment were binding on the seller, the nonrecourse portion was not binding on the broker because the broker did not sign and never manifested an intent to enter into the terms of the Note/Agreement/Assignment. (This ruling by the trial court was based on the trial court's review of extrinsic evidence regarding the intent of the parties.)

The appellate court surprisingly ruled that one can accept the execution and delivery of an instrument, yet not be bound by some of its terms. The dissent argued that in accepting the assignment of the benefits under this instrument, the broker acceded to all of its terms as a matter of law, even though he did not sign it: "[The broker] cannot enforce the parts he likes and claim he is not bound by the rest. If happy with its terms, his remedy was to refuse the assignment until the document was revised to correspond with his understanding of the parties' agreement concerning commission."[15]

The dissent concluded that the nonrecourse provision was enforceable against the broker, and insulated the seller from personal liability for the unpaid commission reflected in the note portion of the instrument, and restricted the source of payment on the note to amounts paid by the purchaser under the Uniform Real Estate Contract. However, because the seller received an aggregate amount in excess of the commission owned during the year in which payments were made by the buyer, and because the seller's liability for the commission was co-extensive with payments received under the Uniform Real Estate Contract, the dissent reasoned that the seller became liable to pay the broker's commission out of payments already received.

One clear lesson from *Sprouse* is that an instrument to be executed by your client in favor of another party, such as a promissory note, should also be executed by the other party if the instrument contains limitations on the obligations of your client under the instrument.

4. Foreclosure of Trust Deeds and the Three-Month Time Limit for Deficiency Judgments

In *Phillips v. Utah State Credit Union*,[16] a loan from a creditor to a borrower was secured by a note and trust deed on real property owned by the borrower and also by an assignment to the creditor of a note and mortgage on different property originally executed in favor of the borrower. After the borrower defaulted, the creditor foreclosed on the note and trust deed executed by the borrower in favor of the creditor. Following the foreclosure, the creditor failed to bring a deficiency action within the three-month period mandated by section 57-1-32 of the Utah Code,[17] but continued to hold the assignment of the note and mortgage made by the borrower to the creditor. The borrower brought an action to compel the creditor to reassign the note and mortgage to the borrower, arguing that the creditor had forfeited the right to this additional security by failing to bring a deficiency action within the statutory three-month period.[18]

On appeal, the Utah Supreme Court ruled against the debtor, holding that the one-action rule does not deny a junior lienholder the right to recover after the security has been purchased by the senior lienholder through nonjudicial foreclosure.

The Utah Supreme Court ruled on appeal that the creditor's retention and use of this additional security was not an "action" against the borrower governed by section 51-1-32.[19] The creditor did not seek a deficiency judgment by a legal action against the borrower, but merely sought to retain the creditor's additional security. The court reasoned that to require the creditor to reassign the note and mortgage deprived the creditor of the ability to make use of the additional security it had bargained for and received in granting the borrower the initial loan.[20]

> We therefore hold that where a creditor takes more than one item of security upon an obligation secured by a trust deed, the creditor is not precluded from making use of that additional security merely because the creditor has not sought a deficiency judgment within three months of a nonjudicial sale of one of the items covered by the trust deed property, nor is the creditor required to seek a deficiency judgment under section 57-1-32 in order to maintain its right to the additional security, so long as the security is applied toward the debt owed on the original loan.[21]

The court did not address the policy considerations behind the three-month statutory limitation on deficiency actions and their impact in this case. Under *Phillips*, after foreclosure a creditor might hold onto additional collateral forever without execution on, or foreclosure of, the additional collateral. This appears to be potentially inconsistent with the underlying policy of the three-month limitation. Generally, in a deficiency action following a nonjudicial foreclosure, the beneficiary/creditor is limited to the difference between the amount owed and the fair market value of the property at the time of trustee's sale.[22] The court failed to discuss whether a creditor, in looking to additional collateral for satisfaction of the debt balance following foreclosure, is constrained by this fair market value limitation. It may be very difficult to establish the fair market value of the property foreclosed if the creditor waits, for example, two or three years before executing on the additional collateral.

However, even after *Phillips*, a creditor may be better off foreclosing all collateral (e.g., multiple trust deeds or mixed real and personal collateral) simultaneously than doing so at different times. Otherwise, the creditor may wind up litigating the questions left unanswered by this case.

5. Foreclosure of Trust Deeds and Second Lienholders

In *City Consumer Services v. Peters*,[23] a debtor owned property subject to a first and a second trust deed. Both trust deeds went into default, and the first trust deed was foreclosed nonjudicially. The holder of the first trust deed purchased the property at the trustee's sale, but the holder of the second did not bid. Subsequently, the second lienholder brought an action for the amounts secured by the second trust deed.

The debtor argued that the second lienholder was barred by the one-action rule[24] from suing under its note because the second lienholder failed to exhaust the security by bidding at the trustee's sale. The debtor contended that the second lienholder had the duty to either purchase the property at the sale despite its appraised value (which was in excess of the balance owing to the first lienholder) or forfeit the right to sue on its note.

On appeal, the Utah Supreme Court ruled against the debtor, holding that the one-action rule does not deny a junior lienholder the right to recover after the security has been purchased by the senior lienholder through nonjudicial foreclosure.

The purpose of the one-action rule is to regulate the procedure of recovery of a secured creditor, not to deny the creditor's contract right to recover on its loan. Therefore, when a junior [lienor] becomes unsecured due to foreclosure by the senior lienor, the junior is not barred by the one-action rule from proceeding against the debtor on the note, since the creditor's status as to security is determined at the time the suit is brought.[25]

The second argument made by the debtor was that, even if the second lienholder was permitted to sue on its note, Utah's trust deed deficiency statute limits the second lienholder's recovery to a deficiency in excess of the fair market value of the property at the time of the trustee's sale. Section 57-1-32 of the Utah Code provides that in an action to recover a balance secured by a trust deed "the court shall find the fair market value [of the property] at the date sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale . . . exceeds the fair market value of the property as of the date of sale."[26]

Because the second lienholder did not foreclose and was unsecured following the foreclosure of the property by the first lienholder, the court held that the second lienholder did not pursue a "deficiency judgment."[27] Instead, the second lienholder simply brought an action on the note as an unsecured general creditor, and the statute governing deficiency actions did not apply. Thus, following foreclosure by the first lienholder, an unsecured second lienholder may bring an action on the note as a general creditor without regard to the fair market value limitation or three-month time limit provided in the deficiency action statute.[28]

6. Purchases at Tax Sales

In *Buchanan v. Hansen*,[29] the Utah Supreme Court determined that a second lienholder did not displace the first lienholder by redeeming property at a tax sale. In 1986, the second position lienholder judicially foreclosed his trust deed and purchased the property concerned at a sheriff's sale, subject to the first trust deed. Later in May 1987, the second lienholder purchased the property from the taxing authority at a tax sale which was being held to pay delinquent 1982 taxes. The second lienholder paid the 1982 taxes as well as the delinquent taxes for the intervening years, plus penalties and interest. He then brought an action to quiet title to the property, arguing that as a "purchaser" at the tax sale, he cleared out all other interests, including the first lien.

The issue before the court was whether a person who holds a lien on property when the property taxes become delinquent may later purchase the property at a tax sale and thereby extinguish other liens against the property. The court reasoned that, because the second lienholder had the duty to pay the taxes (as between the second lienholder and the taxing authority), the second lienholder could not strengthen his title to the property by payment of taxes at the tax sale. Therefore, the second lienholder's purchase of the property at the tax sale was merely a redemption and the property remained subject to the first lien.[30]

7. Mechanic's Liens

In *Butterfield Lumber v. Peterson Mortgage Corp.*,[31] a lumber company acquired a mechanic's lien on certain real property in Salt Lake County. A mortgage company later recorded a trust deed on the same property. Subsequently, the lumber company brought a timely action to foreclose its mechanic's lien. While the lien foreclosure was pending, the mortgage company foreclosed its trust deed and the property was ultimately sold to a third party who did not have notice of the mechanic's lien and therefore took the property free and clear of the mechanic's lien.

The lumber company argued that its lien attached to the proceeds of the property's sale to the third party. The court agreed, reasoning that because the lumber company properly named and served the mortgage company as a party to the lien foreclosure, it met the statutory requirements for preserving its lien against the mortgage company's interest in the property, whether such interest continued in the realty or became personalty (proceeds) on a sale of the realty. The court reasoned that to rule otherwise would create an unfair result.

[1] 157 Utah Adv. Rep. 41 (Utah Mar. 29, 1991).
[2] *Id.* at 41.
[3] *Id.* at 44 (citing Perkins v. Spencer, 243 P.2d 446 (Utah 1952)).
[4] *Id.* at 45 (quoting Jensen v. Nielsen, 485 P.2d 673, 674 (Utah 1971)).
[5] *Id.* at 45 (quoting Perkins v. Spencer, 243 P.2d 446, 449 (Utah 1952)).
[6] *Id.*
[7] 158 Utah Adv. Rep. 70 (Utah Ct. App. Apr. 17, 1991).
[8] *Id.* at 70.
[9] *Id.* at 70-71 (quoting **Utah Code Ann.** section 25-5-4 (1989)). The relevant portions of section 25-5-4 underwent minor stylistic changes in 1989. *See* **Utah Code Ann.** section 25-5-4 (Supp. 1991).
[10] *Id.* at 71 (quoting Machan Hampshire Properties v. Western Real Estate & Development Co., 779 P.2d 230, 234 (Utah Ct. App. 1989)).
[11] *Id.* at 71 (quoting Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985)).
[12] 806 P.2d 219 (Utah App. 1991).
[13] *Id.* at 28.
[14] *Id.*
[15] *Id.* at 32 (Orme, J., concurring in part and dissenting in part).
[16] 159 Utah Adv. Rep. 18 (Utah Apr. 23, 1991).
[17] The Utah trust deed deficiency statute provides in part: "At any time within three months after any sale of property under a trust deed, . . . an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security . . . . " **Utah Code Ann.** section 57-1-32 (1990).
[18] *See Phillips*, 159 Utah Adv. Rep. at 19.
[19] *Id.* at 20.
[20] *Id.*
[21] *Id.*
[22] *See* section 57-1-32.
[23] 160 Utah Adv. Rep 16 (May 8, 1991).
[24] *See* **Utah Code Ann.** section 78-37-1 (1987) ("There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate . . . . "), *quoted in Peters*, 160 Utah Adv. Rep. at 16.
[25] *Peters*, 160 Utah Adv. Rep. at 16.
[26] **Utah Code Ann.** section 57-1-32 (1990), *quoted in Peters*, 160 Utah Adv. Rep. at 19.
[27] *Peters*, 160 Utah Adv. Rep. at 19.
[28] *See* section 57-1-32.
[29] 165 Utah Adv. Rep 3 (Utah, July 26, 1991).
[30] *Id.* at 4-5.
[31] 165 Utah Adv. Rep 33 (Utah Ct. App. July 23, 1991).

Profile of Judge Pat B. Brian

By Terry Welch

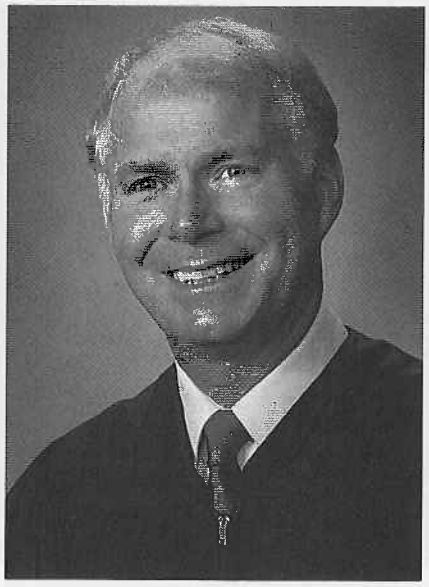
Judge Brian has always wanted to be a lawyer. Those aspirations date back to early childhood. That level and intensity of interest, at such a young age, may not be unusual for many people who grew up watching Perry Mason or who had lawyers in their family as role models. However, Judge Brian grew up in rural Wayne County, Utah, where he had no access to television until after he graduated from high school. Also, he has no family members, "dating back to Adam," who are attorneys. Before being appointed to the Bench, Brian accumulated an enormous amount of trial experience. He prosecuted 260 jury trials and 25 first degree murder cases while serving as a State and Federal Prosecutor. After viewing the profession from the practitioner's point of view for approximately 20 years, Brian was not only well prepared, but delighted to receive an appointment to the bench.

Judge Brian states that one of the unattractive aspects of his job is the realization that too many people are "lawsuit happy." Too often, frivolous, petty, unfounded lawsuits are filed which are totally meritless. Considerable expense must then be incurred by the litigants and the Courts in resolving these cases.

Judge Brian believes that one of the strengths of the judicial system is the caliber and quality of Utah's judiciary. In his opinion, Utah's current bench is as strong as any judiciary in the United States.

The implementation of the "individual" calendar in the Third District Court has significantly increased the effectiveness of the bench. The individual calendar provides "continuity" by insuring that the same judge handles a particular case from beginning to end, including all pretrial motions and hearings. This system also helps to expedite cases and requires "accountability" by the judges.

Judge Brian believes that a judge's ability to function properly is directly related to the caliber and integrity of the attorneys who practice in his court. He notes that while a rude or inept attorney cannot completely frustrate the judiciary he or she can make life very miserable for a judge.



Judge Pat B. Brian
Third District Court Judge
State of Utah

Appointed:	1987 by Governor Bangerter
Law Degree:	Vanderbilt University (1965)
Bachelor's Degree:	Brigham Young University (1962)
Practice:	Deputy District Attorney (Orange County, California) —Prosecuted 260 Jury Trials —Prosecuted 25 First Degree Murder Cases Assistant U.S. Attorney (Anchorage, Alaska) Private Practice (Criminal Defense & General Practice)
Law Activities:	California Trial Lawyers Association; National District Attorneys Association; American Trial Lawyers Association; American Judges Association; BYU Law School—(Adjunct Professor); Pepperdine Law School—(Adjunct Professor).

On the other hand, a well-prepared, principled attorney not only makes the judge's job easier, but helps to ensure the most fair, expedient outcome of his or her clients' case.

Judge Brian notes three possible improvements in the Court which could be more effectively utilized. First, he strongly believes that Rule 11 sanctions should be pursued and enforced in appropriate cases. In some instances, on the Court's own motion. Second, alternative resolutions should be pursued more aggressively. Brian often encourages parties to opt for arbitration proceedings as an alternative to litigation, particularly in domestic relations and family law matters. Alternative approaches to litigation often produce better results at a much less emotional and financial cost to the parties.

Finally, Judge Brian is a strong advocate of children's rights. He stresses that he routinely incarcerates parents who refuse to pay child support. The same is true of a custodial parent who interferes with the visitation rights of the non-custodial parent.

One cannot help but notice when walking into Judge Brian's courtroom, the pleasant colors, paintings, and subtle courtroom decor. Judge Brian believes that the courtroom is intimidating at best. He attempts to make lawyers and litigants feel relaxed and at ease in his courtroom.

Judge Brian lists two rules that are essential for attorneys practicing in his courtroom. First, superb preparation, and second, professional courtesy. Although Brian occasionally needs to reprimand an attorney, he rarely does so in open court or in the clients' presence. He treats everyone in his courtroom with respect and accepts no less from the attorneys.

Judge Brian advises new and seasoned attorneys to maintain personal and professional integrity and apply the "Golden Rule." As he explains, "what goes around, comes around," especially in the state of Utah. Brian further states that contrary to popular belief, the legal profession is a very honorable, noble profession. The bench and bar should act accordingly.

Judge Brian is married and the father of six children. He enjoys jogging and all spectator sports. He also enjoys spending "precious" free time at his ranch in Wayne County. He is an intense BYU football fan!

Profile of Judge Joseph E. Jackson

By Elizabeth Dolan Winter

BACKGROUND

Judge Jackson grew up in Fillmore, Utah. He went to the University of Utah to play football, but played only until his sophomore year when an injury ended his football career. Judge Jackson was a member of the University of Utah Track team for three years. Jackson received a degree in banking and finance and accepted a banking position in Uruguay for which he was to take a crash language and customs course at Rutgers University. Expecting their first child, Jackson and his wife decided to wait until the baby was born before entering the program. In the interim, Jackson took the first prelaw exam offered by the University of Utah, and decided to go to law school when he "didn't do too poorly on the exam—" a familiar decision-making strategy by LSAT examinees today.

After law school Jackson worked as a Congressional assistant for two years in Salt Lake City, and started a private law practice. In 1963 Jackson returned to Southern Utah, working in private practice as well as city attorney for Milford and Cedar City.

LIFE IN JUDGE JACKSON'S COURT

As a juvenile judge, Jackson's court has exclusive jurisdiction over delinquent offenses—acts that would be crimes committed by adults. According to Judge Jackson, about two-thirds of the cases he sees are misdemeanor and felony offenses. The other third of the cases, the most difficult, he says, involve children who have been abused, neglected, or abandoned by their parents. The fundamental principle in the juvenile system is to determine what is in "the best interests of the child," in each case. Although it is heartbreaking to see what happens to the children of these dysfunctional families, Jackson acknowledges how vital parental rights are. He says that although it may be tempting to place all children from these difficult families in foster care, that attitude ignores both the fundamental notion of parental rights and the interest of the child in remaining with the child's own family. Jackson's sense of the law is that even seriously offending parents should be assisted with rehabilitation so they will be capable of caring for their children.

JUDGE JOSEPH E. JACKSON
Fifth District Juvenile Court

Appointed:	1977 by Governor Scott M. Matheson Serves Washington, Iron and Beaver Counties
Law Degree:	University of Utah, 1961
Legal Practice:	Private Practice with Cline, Jackson, Mayor & Benson; City Attorney for Milford and Cedar City
Law-Related Activities:	Court Bail Committee; Chair, Ethics Advisory Committee; Juvenile Judge of the Year, 1987; Member Judicial Council.

Judge Jackson sees more and more juveniles as victims of sexual abuse and as perpetrators of sexual offenses. Before mandatory reporting statutes and the increased awareness of sexual abuse, the juvenile authorities and police officers repeatedly found and brought runaway children home, without discovering the reasons the kids ran away. In addition, juvenile sex offenders were rarely prosecuted. Today, the 10 beds in the detention center in Cedar City could be filled exclusively with juvenile sex offenders, although they try to limit the number to six or seven to leave room for other juveniles committing violent crimes. Jackson says the children he faces are not participating in acts that one could expect from normal childhood curiosity, they are "12 and 13 year olds forcing 3 and 4 year olds to participate in bizarre, unnatural acts." Jackson says we could decrease the numbers of adult repeat sex offenders if we had the resources to identify and treat sexually aberrant behavior in children.

VIEWS ON LEGAL SYSTEM

Judge Jackson has been on the juvenile court bench for 15 years. He says that what he likes best is the fact that the majority of children who enter the system learn from their experience with the court and do not come back. The system is successful with these kids, Jackson says, because the youth acknowledges his mistake and with the help of his family, learns how to behave more appropriately. Jackson takes great satisfaction from being able to take advantage of the chance to guide (or sometimes force) families to utilize community resources that until court involvement the parents resisted. Needs for special education, vocational counseling, testing services, or family counseling, for example, often are resisted until the child is involved in some violation that forces the family into the system. Finally, Jackson enjoys seeing tough kids change as a result of the intense psychological evaluation and treatment involved in long-term care.

The downside to his job, says Jackson, is the reality of dealing with the emotional distress involved with the ugly cases of mistreated children, and facing the sorrow and concern of the parents and victims. Jackson is also frustrated with the lack of resources to deal with the following three issues in juvenile rehabilitation:

1. Young Offenders Jackson reports that there is a growing number of 8, 9, 10 and 11 year olds engaging in vandalism, arson, theft and sex offenses. Jackson says some of these children forge checks they steal from their neighbors, parents and grandparents or break into schools and destroy computer equipment worth thousands of dollars. The offenses are serious,

yet in our present system, there are no resources for children this young. Although they can be placed in a residential detention center, co-mingling an 8-year-old vandal with a 15-year-old rapist is counterproductive—the 8-year-old is just more sophisticated by the time he or she is old enough to get real help.

2. Perpetrators and Victims of Sex Offenses Before the laws requiring individuals to report sexual abuse and prosecutors to act upon those reports, Jackson says a great deal of sex offenses were never prosecuted. In rural areas, prosecutors were often well acquainted with anyone accused of abuse. Files of serious offenders were maintained but never prosecuted except in the most brutal cases. Changes in the laws in Utah requiring reporting and prosecuting these offenses, says Jackson, created a new attitude about sex crimes. Although jail time for adult sex offenders is criticized by some as counterproductive because it breaks up the family unit and forces taxpayers to absorb the economic problems often arising from the loss of the family's breadwinner, Jackson thinks counseling and punishment resulting in separating the offender from the family unit are both integral parts of rehabilitation. Jackson says we need more resources, however, for integrating the victim and the abuser back into society.

3. Serious Drug Offenders Of the children appearing before Judge Jackson, only a few are so seriously involved with drugs that they need to be placed in a residential center for detoxification and rehabilitation. For those few, however, placement in an extended residential center with regular follow up care is essential for them to avoid further involvement with the courts as adults. The State of Utah does not have any adequate programs for these serious offenders. Private treatment centers seem to have a fair success rate, says Jackson, yet the $400 to $700 they charge per day makes them unavailable for most of the offenders he sees.

STRATEGY FOR SUCCESS BEFORE JUDGE JACKSON

Jackson says that even the best families can benefit from outside resources, yet most families still resist the court's request for counseling or other community referral. The court often gives families the stimulus they need to get involved and help their children.

Jackson encourages attorneys to keep in mind the goals of the juvenile system when representing juvenile clients. Attorneys should try to temper the traditional goal of vigorously representing the client to get an acquittal on any grounds. Often kids appearing in the juvenile court system need the referrals and follow-up programs so they can avoid trouble with the law again. Receiving an acquittal on a technical ground may be within the bounds of zealous advocacy, but ignores the goal of the juvenile system, to address the "best interests of the child."

OUTSIDE INTERESTS

Judge Jackson enjoys spending time with his family, he has six children and eight grandchildren. He also likes to hunt and fish, when he has the chance, on mountain property he is developing in southern Utah. Jackson spends a fair amount of time doing yard work and gardening, although he doesn't enjoy it—and reads for relaxation, mostly "relaxing" intrigue spy novels and mysteries.

The Model Utah Jury Instruction Project

By John L. Young, Chairman

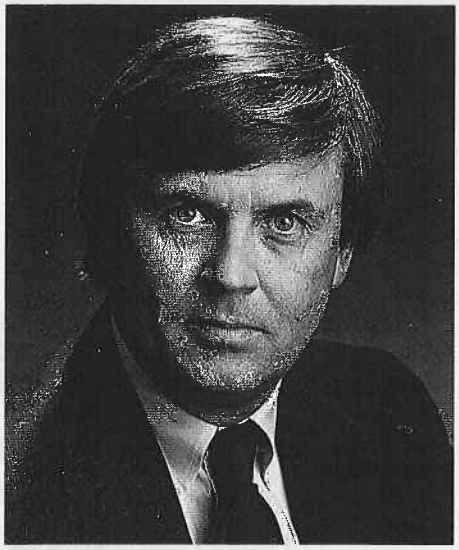
In 1957, Justice J. Allan Crockett and his Committee completed publication of *Jury Instructions for Utah* ("JIFU"). The Committee of eight lawyers and judges was appointed in January 1951, in an effort to publish "a set of patterns for jury instructions which may be looked upon with some degree of assurance as to their accuracy under the laws of Utah."

In his preface to "JIFU," Justice Crockett expressed the hope that refinement of "JIFU" would continue through criticisms and suggestions by judges and lawyers, and that "further and broader coverage . . . not treated herein will follow." Unfortunately for all of us in the field of civil litigation, this process of "refinement" was ultimately left to each lawyer and judge to craft "new" instructions for each trial. As the law developed in the ever-changing nature of our system, "JIFU" became a "collectors" item for law office decor.

However, the same purposes set forth by Justice Crockett in 1957 form the principles upon which the Litigation Section determined to rewrite JIFU. Those are:

> The saving of time and energy of the Bench and Bar by providing a basis upon which to prepare simple and meaningful instructions, which are accurate as to the law and understandable to juries and thus be a contribution to our common objective: the prompt and efficient administration of justice.

A Committee was formed in 1989 by the Litigation Section, to begin the process of writing current civil jury instructions. The guidelines of our Committee are not unique. They are essentially the same as those set forth in California's *Book of Approved Jury Instructions* ("BAJI").



JOHN L. YOUNG is a litigation attorney with the law firm of Richards, Brandt, Miller & Nelson. He received his J.D. Degree from the University of Utah Law School in 1973. He was Chairman of the Litigation Section of the Utah State Bar 1989-90, and presently chairs the Model Utah Jury Instruction Project

1. An instruction should be an accurate statement of the law;

2. An instruction should be as brief and concise as practicable;

3. An instruction should be understandable by the average juror; and

4. An instruction should be neutral, unslanted and free of argument.

Additionally, we have sought to make the instructions gender neutral, where possible. However, reviewing the proposed instructions, you will find continued use of the word "foreman" in the verdict forms; the reason is the continued use of this terminology in Rule 47(q) of the Utah Rules of Civil Procedure.

The substantive areas of the law included in the jury instruction drafting process are as follows:

1. Preliminary Instructions Before Trial
2. General Instructions Regarding Duties of Court, Jurors and Lawyers; Consideration of Evidence, and Burden of Proof
3. Negligence/Causation
4. Tort Law/Special Doctrine
5. Motor Vehicles
6. Medical Negligence
7. Other Professional Negligence
8. Railroad Crossings
9. Common Carriers
10. Intentional Torts
11. Owners, Occupiers, Lessors of Land
12. Products Liability
13. Federal Employer's Liability Act
14. Public Entities/Public Employees
15. Eminent Domain/Condemnation
16. Fraud and Deceit
17. Employer/Employee Rights
18. Business Torts/Interference With Contract
19. Officers, Directors, Partners, Insiders Liability
20. Insurance Company's Obligations
21. Emotional Distress
22. Will Contest
23. Implied Indemnity
24. Vicarious Responsibility
25. Contracts/Sales/Secured Transactions
26. Damages
27. Verdict Forms

Subcommittees were formed and assigned to each of the above substantive areas. Drafting began in November 1989.

The first draft was completed by February 1, 1990. Thereafter, review and revision by the Subcommittees continued through the fourth draft, which was published for comment on April 15, 1991.

The published draft, which we titled *Model Utah Jury Instructions* ("MUJI"), contains citations for most instructions, including Utah statutes, Utah cases, cases from other states, other instructions ("BAJI," "JIFU," etc.), and *West's Key Number Digest References*. Comments or use notes are included where the Drafting Committee deemed appropriate. In cases where the Subcommittee was unable to agree on a particular instruction, alternative instructions were occasionally submitted. The editing or review of the last draft of the instructions was completed by the Executive Committee of the Litigation Section for the April 15, 1991, published draft.

From the beginning of the project, we have had valuable encouragement and assistance of the Judiciary of the state of Utah. Meetings with the Board of District Court Judges, and all District Court Judges at the 1990 and 1991 Annual Judicial Conferences provided significant input for the editing of the instructions, the manner of publication and their use.

The published draft of "MUJI" was presented to the District Court Judges at their Spring Meeting on April 17, 1991, for the purpose of review and comment. The decision was made at that time that the District Courts would begin use of "MUJI" during the comment period as a means of subjecting the draft to critical review by the judges and the lawyers involved in pending cases.

The Administrative Office of the Courts has placed the draft "MUJI" instructions into the Court's statewide word processing system so that it can be conveniently accessed by all Courts in the state. Additionally, many of the Judges have requested and been provided word processing disks for their personal review and critique of the proposed instructions. Copies of the April 15, 1991, draft instructions are available to members of the Bar through the office of the Utah State Bar for a cost of $75. This cost is just for copying and mailing of the large volume of instructions.

The comment period was scheduled to end September 30, 1991, but has now been extended to March 31, 1992. Critical review and substantive comment from members of the Bar and Judiciary is extremely important in the development of the final instructions. Written comments, when received, are submitted to the appropriate Subcommittee for review and consideration. Revisions of the draft by the Subcommittee are then submitted to the Executive Committee for further review. At the conclusion of the comment and review period, professional editing will be completed. It is our goal to publish *Model Utah Jury Instructions* in 1992.

With the encouragement of the Justices of the Supreme Court, a standing Committee within the Litigation Section has been established for the purpose of continual review and publication of annual updates to *Model Utah Jury Instructions*. This Committee will consist of members of the District and Circuit Courts, and members of the Bar.

The "MUJI" Committee has devoted literally thousands of volunteer hours to this project. Their efforts to improve the quality and efficiency of litigation in the state of Utah will be evident to all of us as we begin to use their work.

COMMITTEE MEMBERS

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James R. Black
William Bohling
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John L. Young
Michael P. Zaccheo

MCLE Reminder 31 Days Remain

On December 1, 1991, there will remain 31 days to meet your Mandatory Continuing Legal Education requirements for the first reporting period. In general the MCLE requirements are as follows: 24 hours of CLE credit per two-year period *plus* three hours in ETHICS, for a 27-hour total. Be advised that attorneys are required to maintain their *own* records as to the number of hours accumulated. The first reporting period ends December 31,1991 at which time *each* attorney *must* file a Certificate of Compliance with the Utah State Board of CLE. Your Certificate of Compliance should list programs you have attended to meet the requirements, unless you are exempt from MCLE requirements. On page 24 is a Certificate of Compliance form for your use. If you have questions concerning the MCLE requirements please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

The Legal Profession: Changes, Problems and Future Direction

Report No. 1

By Karen McCreary

A diverse group of Utah judges and lawyers is meeting biweekly to focus on "The Legal 'Profession': Changes, Problems and Future Directions." The study group is sponsored by the University of Utah College of Law and is led by Edward D. Spurgeon, Wm. H. Leary, Professor of Law and Policy, and Karen McCreary, of the Attorney General's Office. Topics which will be studied by the Legal Profession Study Group between October 1991 and April 1992 include: The Voluntary or Mandatory Bar; Access to the Courts and Legal Services, Mandatory Pro Bono, Trends in the Practice of Law, Ancillary Business Activities, Lawyer Ethics and Judicial Conduct, Feminist Theory and Women in Law, Gender Bias, Minorities in the Law, Legal Education and Law School/Bar Cooperation, and Post-Law School Apprenticeship and CLE Programs. Future editions of the *Utah Bar Journal* will report the Study Group's discussion of these topics.

The Legal Profession Study Group has focused first on the growing challenges to the integrated, or mandatory, bar; i.e. challenges based primarily on first amendment freedom of speech and association concerns and asserted against the requirement of mandatory membership in a state bar organization. Utah's own mandatory bar has been the focus of recent study by a special task force established by the Utah Supreme Court. The Special Task Force on the Management and Regulation of the Practice of Law issued its preliminary report in July at the State Bar meeting. *See* Clegg, "Thoughts on the Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law," *Utah Bar Journal*, October 1991. In its Report, the Task Force recommends that Utah should continue an integrated bar as "the most effective and cost efficient way to carry out the key governmental functions and to provide the public services required of an association of lawyers."

As the Task Force had done, the Study Group analyzed the impact of recent court decisions on the role and activities of the Utah State Bar. Last year the United States Supreme Court in *Keller v. State Bar of California*, 110 S. Ct. 2228 (1990) set forth the guiding standards for determining permissible expenditures by a mandatory bar so as to avoid First Amendment challenges. The expenditures must be necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal service available to the people of the State. The First Circuit in *Schneider v. Colegio de Abogados* 917 F.2d 620 (1st Cir. 1990) applied *Keller's* 'sketchy' guidelines to review the constitutionality of the mandatory bar structure in Puerto Rico. The First Circuit offered examples of what expenditures it believed could be undertaken with mandatory dues. Political activities, including lobbying, can be funded "so long as the target issues are narrowly limited to regulating the legal profession or improving the quality of legal services available to the public. 917 F2.d at 632. According to the *Schneider* Court, it would be permissible for a state bar to lobby for budget appropriations for new judicial positions, for example, but not permissible to use mandatory dues for such lobbying if the Bar's position "rested upon partisan political views rather than on lawyerly concerns." Similarly, the First Circuit opined that activities that could not properly be funded with mandatory dues would be lobbying on controversial bills to change the law in ways not directly linked to the legal profession or the judicial system. 917 F.2d at 633. The First Circuit also concluded that activities incidental to the operation of an association, such as social events and the provision of insurance to members, could be financed with mandatory dues. 917 F.2d at 632.

The *Keller* case made clear that the provision of ongoing educational and training services for lawyers by the bar is constitutionally permissible, as is the provision of services regarding lawyer discipline and Bar admissions. The more difficult task faced by a mandatory bar is the delineation of which legislative and lobbying activities it can undertake.

In Utah, the State Constitution delegates the supervision of the practice of law to the Utah Supreme Court. The Utah Supreme Court, in turn, adopted an order in 1989 which authorizes the Bar Commission to determine those areas of public policy and legislative issues with which the State Bar can be involved. The Supreme Court orders limit the Bar Commission's consideration of public policy issues to "those issues concerning the courts of this state, procedure and evidence in the courts, the administration of justice, the practice of law, and matters of substantive law on which the collective expertise of lawyers has special relevance and/or which may effect an individual's ability to access legal services or the legal system."

In its study of the Supreme Court order, the Legal Professions Study Group reflected on many of the legislative matters that have split the Bar in previous years, including limitation on director liability,

tort reform and fee shifting. As the Study Group explored these topics, it became clear to the members that it can be difficult to draw a clear line between those legislative activities which arise from the Bar's public responsibility to inform the legislature or the public about technical legal problems and those activities which contain ideological aspects. For example, the issue of tort reform involves technical legal issues of which members of the bar could be expected to advise the legislature. Tort reform also implicates the financial interests of certain members of the bar, however, and thus members of the bar could certainly disagree about the bar's use of their mandatory dues to lobby on behalf of tort reform. Other issues involve similar mixes of technical and procedural legal issues as well as philosophical and moral questions. The Study Group concluded that the Utah State Bar or the Supreme Court should consider revising its guidelines for lobbying and legislative activities in light of *Keller* and recent court cases.

Also, while The Utah State Bar currently provides pro-rata refunds of a portion of Bar dues for members opposing certain legislative activities, the Study Group discussed whether the process for that refund should be changed to allow for a more up front and direct method of rebate. Although the United States Supreme Court in *Keller* did not fully address the issue of the procedures a mandatory Bar might adopt to allow individual Bar members to protest specific Bar activities, the First Circuit, in *Schneider*, reviewed in some detail Puerto Rico's bar rebate and escrow system to determine whether the system adequately protects dissenters from the use of compulsory dues to fund challenged activities.

The Study Group also reviewed the way in which the Utah State Bar name is currently used to indicate the Bar's support for certain activities or legislative issues. Because the *Keller* case left open the issue of the use of the Bar's name to advance certain causes or beliefs, the Study Group felt certain that The Utah State Bar would need to explore this issue further.

The Study Group also discussed the Task Force's recommendation that the Bar continue to provide legal services and programs to the poor and to those without adequate access to the courts. Although the United States Supreme Court in *Keller* held that compulsory dues could be used to improve the quality of legal services to the public, the Court suggested that there might be constitutional limits to the provision of those services as well. The Study Group expressed the view that The Bar Commissioners might examine more fully what sorts of legal services programs and training would come within the scope of the *Keller* and *Schneider* decisions.

In conclusion, in light of *Keller* and *Schneider*, the Study Group concluded that the Utah State Bar Commission review its current legislative and lobbying policy, reexamine its dues refunding policy for those who might disagree with its activities and consider types of public service legal activities the Bar can constitutionally provide.

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Commission Highlights

During its regularly scheduled meeting of September 26, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of August 30, 1991, were approved with minor revisions.

2. Jim Davis thanked John Baldwin and the Bar staff for their efforts in organizing the successful Bar Leadership Orientation meeting held.

3. A copy of proposed Committee Charges were distributed to the Board.

4. Davis also noted that a summary of the Bar's annual financial report will appear in the November *Bar Journal*.

5. The Board agreed to ask the Courts & Judges Committee to participate on behalf of the Commission at the all-day task force meeting on October 16 at Little America.

6. Davis reported that he just signed off on the Petition to the Supreme Court on the Lawyer Referral Service program.

7. Denise Dragoo reported on the Public Communications Sub-Committee proposals.

8. The Board discussed the image of the Bar and the need to balance available resources and set long-term goals on communications and P.R. issues related to the public, to lawyers, and to the Courts.

9. Arnold Birrell reported that the financial handbook requested by the Board at the last meeting is being prepared.

10. Birrell reviewed the monthly financial report, responded to the Board's questions, and explained the Bar's cash flow and status of fee collection.

11. Deloitte & Touche Auditors, Floyd Peterson and Al Van Lewen, appeared before the Commission to present the FY91 Audit.

12. All Staff and ex-officio members were excused for the discipline report and all discipline was acted upon.

13. Dennis Haslam and Darla Murphy reviewed the Bar Examination results including the statistics on the scores, high and low area, and the grading percentages. A motion was made by Haslam to submit the July Bar Exam results to the Supreme Court for acceptance. Seconded by McKeachnie. Passed Unanimously.

14. A request was made by Reese Hansen to disclose the scores immediately if applicants called instead of waiting until October 1 as previously planned.

15. After review of the Annual Meeting site analysis, a motion was made by Jeff Thorne to accept staff's recommendation to hold the 1993 Annual Meeting at Sun Valley.

16. The Board also agreed to tentatively book Sun Valley for 1994 through 1998 and to decide year to year if it should be held elsewhere. To encourage more sole practitioner participation, McKeachnie suggested the Annual Meeting Committee make available a list of all of the lodging including motels in the next town over from Sun Valley.

17. Linda Barclay reported on the September 23, 1991, Young Lawyers meeting to organize a Young Lawyers Committee in Utah County.

18. Dennis Haslam highlighted the recent Judicial Council meeting.

Second Annual Food and Winter Clothing Drive

The Second Annual Food and Winter Clothing Drive is now under way. Contributors are asked to deliver donations in food, winter clothing or money to the Utah Law & Justice Center, 645 South 200 East, Salt Lake City, Utah, on **December 13, 1991.** A "Flyer" listing the most-needed food and clothing items will be distributed shortly. Contributions will be shared among the Travelers Aid Society Family Shelter, Indian Walk-In Center, The Rescue Mission of Salt Lake and Utahns Against Hunger. Anyone wishing to assist in this effort should contact Leonard W. Burningham, Esq., Chairman, at 363-7411 or Paul T. Moxley, Esq., Co-Chairman, at 537-5555.

Utah State Bar and The Utah Symphony Celebrate the Bicentennial of the Bill of Rights

The Young Lawyers Section of the Utah Bar Association and the Utah Council on the United States Constitution and the Bill of Rights, co-chaired by Lieutenant Governor W. Val Oveson and Keith A. Kelly, commissioned an orchestral work from Morris Rosenzweig to be performed by the Utah Symphony in celebration of the bicentennial of the Bill of Rights.

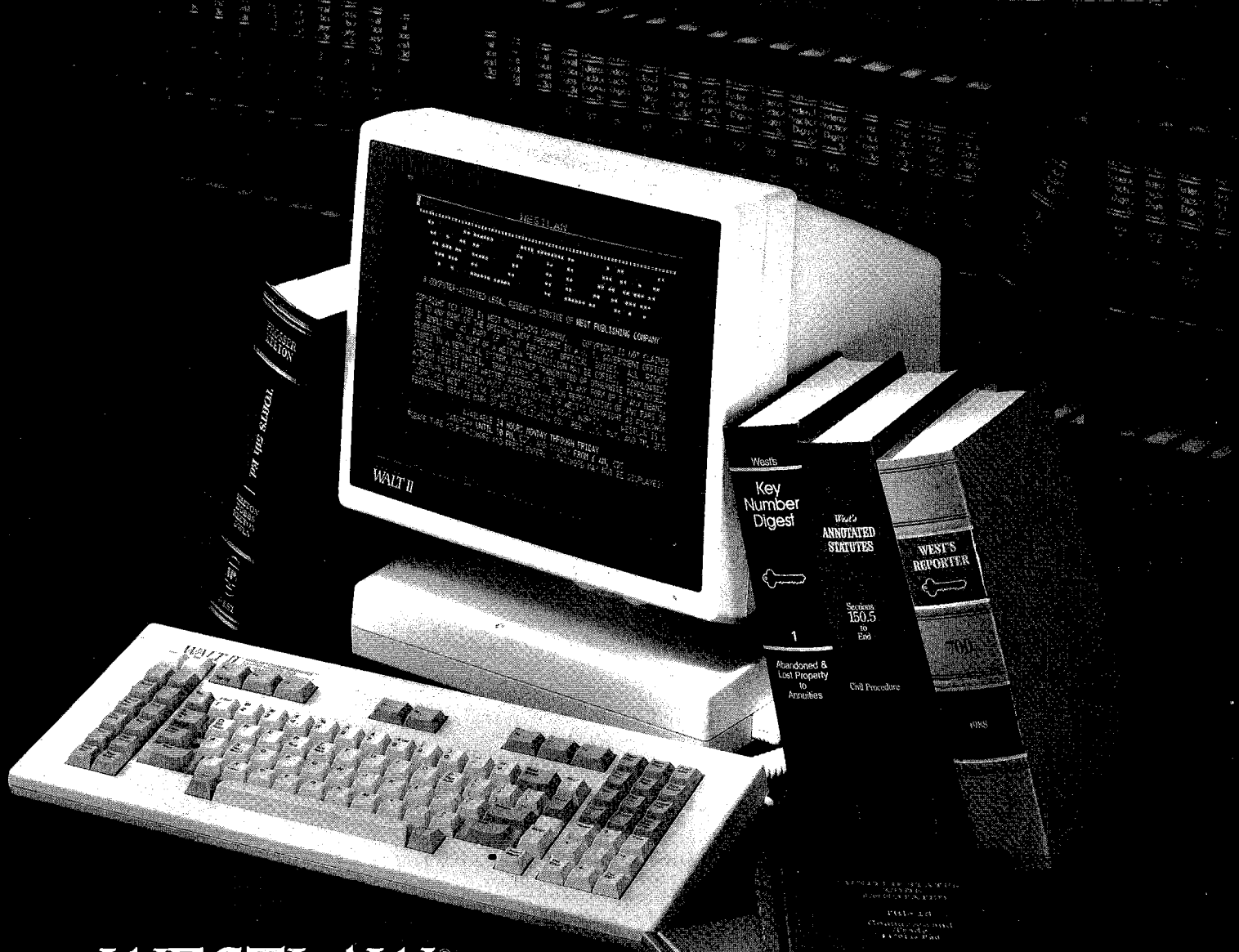
Composer Morris Rosenzweig's "Concord" was written specifically to honor musically the Bill of Rights during its 200th anniversary. Mr. Rosenweig, a University of Utah composition and theory professor, explained that he wrote this piece to be "feflective of that great document's richness, diversity and dignity." The Symphony will premiere this work in concert on December 6 and 7, 1991.

Also featured on the program is Senator Orrin Hatch, who will narrate Aaron Copland's Lincoln Portrait. The Utah Symphony Chorus will perform Howard Hanson's "Song of Democracy" and Ralph Vaughan William's *Dona Nobis Pacem.*

The Utah Young Lawyers, the Utah Council on the Bill of Rights and the Utah Symphony invite you to join them for a moving evening of patriotism.

Correction Note

The article entitled "Causation and The Judicial Equation" by Judge Bruce S. Jenkins in the November 1991 issue of the *Utah Bar Journal* was published by permission of Georgetown University Medical and Law Centers. The article first was published in *Courts, Health, Science and the Law.*



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Discipline Corner

ADMONITIONS

1. An attorney was admonished pursuant to Rule 8.1(b) of the Rules of Professional Conduct for not replying for five (5) months to Bar Counsel's request for information regarding a complaint. The attorney was also admonished for violation of Rule 1.14(d) for failure to promptly return the corporate books and other documents over which he asserted no valid lien upon his termination as counsel. Respondent was terminated as counsel on or about August 14, 1990, but did not return the documents to his former client until sometime after the complaint was filed with the Utah State Bar on September 24, 1990.

2. An attorney was admonished pursuant to Rule 1.3 of the Rules of Professional Conduct for failure to exercise reasonable diligence and promptness in reviewing the accuracy of the proposed Findings of Fact, and the Decree in a divorce action. These documents were prepared by the opposing counsel on or about February 19, 1990 and served upon Respondent on or about February 21, 1990. The proposed Findings and Decree contained significant factual error. The decree of divorce was entered on February 28, 1990 containing these errors due to Respondent's failure to file an objection with the court.

PUBLIC REPRIMAND

1. On October 28, 1991, D. Karl Mangum was publicly reprimanded for violating Rule 1.3 and Rule 8.1(b) of the Rules of Professional Conduct of the Utah State Bar. Mr. Mangum was retained in May of 1986 to defend a claim for back child support. Mr. Mangum, subsequently, assigned the case to an associate in his office. The client was aware of the fact that an associate was working on her case but believed that Mr. Mangum would remain the supervising attorney and would be ultimately responsible for the prosecution of the case. The court subsequently dismissed the case with prejudice for failure to prosecute.

In mitigation, the Court considered Mr. Mangum's acknowledgment of wrongdoing and his reasonable belief that an associate was pursuing the case.

2. On October 28, 1991, G. Blaine Davis was publicly reprimanded for violating Canon 6, DR 6-101(A)(3) of the Code of Professional Conduct and/or Rule 1.3 and Rule 1.4(a) of the Rules of Professional Conduct of the Utah State Bar. Mr. Davis was retained in January of 1982 to represent the estate of the Complainant's father in a probate action. Mr. Davis failed to have the appropriate tax returns prepared and filed for approximately six (6) years; nine (9) months of which was properly allocated for the preparation and subsequent amendments of the returns.

In mitigation, the Court considered the fact that Mr. Davis reimbursed the estate for all penalties, reimbursed the Complainant for a portion of his attorney fees incurred in his attempt to conclude the matter, and that Mr. Davis has accepted employment in the public sector and is no longer engaged in private practice.

Mr. Davis has no prior discipline history.

JUDGE LESLIE D. BROWN

Judge Leslie D. Brown was appointed to the Fourth District Juvenile Court in July 1979 by Gov. Scott M. Matheson and has also been a judge in the Eighth District Juvenile Court since 1988. He serves Wasatch, Utah, Juab, Millard, Dagett, Duchesne and Uintah Counties. He received his law degree from the University of Utah College of Law in 1972. He was in private law practice from 1972 to 1977 and was Duchesne County Attorney from 1975 to 1977. He is currently a member of the Board of Juvenile Court Judges. He is a former member of the Commission on Criminal and Juvenile Justice.

What's Happening to the Juvenile Court?

The Mission Statement of the Division of Youth Corrections as set forth in the early pages of its 1990 Annual Report provides, in part, as follows:

> The primary purpose of Youth Corrections is to provide a continuum of supervision and rehabilitation programs which meets the needs of the youthful offender in a manner consistent with public safety. These services and programs will individualize treatment and control the youthful offender for the benefit of the youth and the protection of society.

Though this is the mission statement of just one agency, it clearly and accurately sets forth the philosophical underpinning of the entire juvenile justice system in Utah. Though there has been some shift away from the historical welfare procedural safeguards, the three primary purposes of the Juvenile Court in Utah are still to provide for individualized justice, protection of the community, and welfare of the child.

The philosophy behind such a purpose is that young people are more capable of a change in behavior than their adult counterparts. Because of this philosophy the courts exercise more patience, and sometimes long-suffering, in maintaining them in their own homes. The very idea of individualized justice is that, consistent with constitutional procedural safeguards, the court through its probation department or an allied administrative agency, will tailor a dispositional alternative which meets the individualized needs of a given youthful offender. Such an approach has proven to be very effective. It requires, however, that intervention take place early in the criminal career of the young person. To delay until the sixth or seventh offense before intervening in any meaningful way loses the effectiveness of the system described above.

In recent years Utah has experienced a tremendous growth in its youthful population. All its residents are familiar with the impact of that growth in our public schools. It's important to recognize, however, that the pressure of that growth is felt in every agency that deals primarily with youth. This is particularly frustrating when one considers that children are generally heavy consumers of public resources, but contribute very little for the support of such resources. The impact felt in the juvenile justice system might be even more dramatic than that felt in public education. Our history demonstrates that as the youthful population increases rapidly, we experience an even greater increase in the number of crimes committed by juveniles. For example, during the decade of the '80s the youthful population in the State increased by approximately 33%. However, during that same period of time criminal offenses referred to the juvenile courts increased by 82%. The number of professionals in the juvenile court charged with carrying out the purposes cited earlier have in no way kept pace with the growth in numbers. In 1978, there was a total of 103 juvenile probation positions statewide. In 1990, there was a total of 112. The present figure has remained constant since 1985.

In 1976 the Legislature commissioned a study of probation officer needs in the juvenile court. The results called for such dramatic increase that it was mutually agreed that an attempt would be made to maintain staff at 65% of the recommended level. In recent years the level of staff has fallen so far below the suggested standard that the standard itself was discarded. Recently a new effort was launched to assess the probation staff needs of the Juvenile Court. Mr. Robert Springmeyer was retained to perform the assessment. A comprehensive examination was performed attempting to evaluate every task that a probation officer performs in processing a referral and the time needed to accomplish those tasks. The study evaluated both the workers assigned to the intake, or initial processing of the referral, and those who perform probation supervision. The conclusion of the Springmeyer study was that the present probation staff is at 63.7% of where it should be. It suggested that a total of 60 probation officers were needed to bring it up to the suggested standard.

Though all those in public services should be expected to increase their efficiency, we eventually arrived at the point where we cannot expect to continue to do more and more with less and less. Unfortunately the price that we are paying is that the idea of early intervention is a thing of the past, and individualized justice is becoming more and more of a theory rather than a reality. Because of the pressures of growth, each of the dispositional alternatives are utilized very late in the game. Individuals are generally not placed on probation without very extensive criminal records. Last year more than 4,000 youth were not placed on probation even though they had been referred to court six or more times. By the same token, youth are maintained longer on probation before they are removed from their homes in order to accommodate very limited resources. Youth are likewise maintained longer in community alternatives than may be advisable because of a lack of space in secure confinement. In a recent conversation with the Director of the Division of Youth Corrections, the author was advised that on that day there were 18 youth in detention centers across the State waiting for space to open in one of our secure facilities. According to statistics compiled by the Utah Commission on Criminal and Juvenile Justice, approximately 35% of all criminal cases processed by law enforcement are referred to juvenile court. The Division of Youth Corrections operates three secure facilities having a total combined capacity of 70 beds. That figure will soon be expanded to 80. When compared with the available bed space in the adult system,

however, one can readily see the enormity of the disparity. It should be noted that no one in the Juvenile Court is advocating that juvenile secure facilities have capacities remotely approaching those of the adult system. But the disparity between the two systems is at the least an interesting commentary on our priorities as a community. It should likewise be pointed out that not all of the delay in removing youngsters from their own homes is a result of growth. Some is done intentionally to serve their best interests. It would, nevertheless, be folly to underestimate the tremendous impact growth has played in the Juvenile Court in Utah over the past decade.

Two other factors have greatly impacted the operation of the Juvenile Court. In recent years we have been witness to a tremendous upsurge in the number of child abuse cases referred to the court. This is particularly true of child sexual abuse. These cases are far more complex and difficult than the "dirty house" neglect cases which were so common for many years. Because of their complexity they require far more time to investigate and prepare. For that reason at first we actually experienced a decrease in the total number of neglect and abuse cases being referred to court, though far more time was actually being expended by both the Division of Family Services and the Court in the processing of these cases. The cases have continued to grow to the point that we now are faced with cases which are far more complex and time-consuming, and yet which have increased in raw numbers as well. Since 1980, referrals to the court for abuse, neglect, and dependency increased by 42%.

Last year more than 4,000 youth were not placed on probation even though they had been referred to court six or more times. By the same token, youth are maintained longer on probation before they are removed from their homes in order to accommodate very limited resources.

A second factor which has aggravated the situation further has been the expansion of the Juvenile Court's jurisdiction into the domestic relations area. District Courts are required in some circumstances, and have the discretion in others, to certify questions of support, visitation and custody to the Juvenile Court. The net effect has been a considerable increase on the demands for judicial bench time in some of the districts. The identification of this factor should in no way be construed as a criticism of the District Courts. This practice is clearly in keeping with the language and the intent of the transfer statute. The fact remains, however, that a new demand has been placed upon the already overburdened system.

Perhaps the most frightening aspect of this entire discussion is that the worst of the growth is still ahead. According to the 1990 Annual Report of the Utah Commission on Criminal and Juvenile Justice, more people are arrested for both property and violent crimes at age 17 than any other. This age is followed closely by ages 15, 16 and 18. Males in this crime-prone age of 15-17 years will increase more from 1990 to 1995 than during the entire decade of the '80s. The Juvenile Court is now far behind where it should be in keeping pace with the demands on its limited resources. A sharp increase in funding to bring court resources up to where they must be to meet the demands on those resources will be a most difficult task to sell in a time when public revenues are tight. But imagine where we will be in five short years if dramatic changes don't take place.

By refusing to provide adequate funding at the front end of the criminal justice system, we relegate the clientele to the back end of the system. A few years ago there was a popular television commercial in which a mechanic decried the foolishness of his customer in not taking better preventative care of his automobile, presumably including changing oil filter, leading to the necessity of major engine repairs. It ended with the phrase "you can pay me now or pay me later." We are truly at a crossroads in the juvenile justice system. Painful as it may be, it is time that we invest in our future now in order to avoid a far greater price later.

Special Institute on

Federal and Indian Oil and Gas Royalty Valuation and Management

The Rocky Mountain Mineral Law Foundation and the Minerals Management Service (MMS) are co-sponsoring a three-day Special Institute on Royalty Valuation and Management. The Institute will take place on January 29-31, 1992, at the J.W. Marriott Hotel in Houston, Texas. The Institute will provide a definitive analysis of legal, accounting, marketing, and management issues associated with the valuation and payment of federal and Indian royalties under the various federal and Indian statutes, regulations, leases and agency orders, guidelines, and directives.

MMS and industry speakers and panelists will instruct registrants in virtually the entire gamut of topics relevant to federal and Indian oil and gas royalty valuation and management. The format will consist of scholarly professional papers and panel discussions with question and answer sessions. Experienced attorneys, accounts, oil and gas marketers, and senior members of the MMS staff will participate on the panels. The Institute will be especially unique in that registrants will be invited to submit questions for the panelists in advance of the institute date.

This Institute will benefit attorneys who represent their clients in federal and Indian royalty matters, administrative appeals, and litigation; accountants and managers who are responsible for the valuation, reporting, and accounting of royalties; product marketing managers and representatives who arrange for the sale and transportation of oil, gas, gas liquids, and other lease products subject to royalties; landsmen responsible for managing lease account status; and employees of state and federal agencies and Indian tribes who are responsible for accounting for royalty receipts and auditing royalty payors.

As a **non-profit** educational organization, the Foundation would appreciate any publicity you can provide for this Institute, including notices in magazines, professional journals, newsletters, and calendars of events. A brochure is attached for your convenience. Thank you.

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

CONTINUING LEGAL EDUCATION

Utah Law and Justice Center
645 South 200 East • Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

CERTIFICATE OF COMPLIANCE

NAME: _____ UTAH STATE BAR NO.: _____
ADDRESS: _____ TELEPHONE: _____

Professional Responsibility and Ethics* **(Required: 3 hours)**

1. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

2. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

3. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

Continuing Legal Education* **(Required: 24 hours)** **(See Reverse)**

1. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

2. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

3. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

4. _____
Program Name

Provider/Sponsor	Date of Activity	CLE Credit Hours	Type**

*Attach additional sheets if needed.
**(A) audio/video tapes; (B) writing and publishing an article; (C) lecturing; (D) law school faculty teaching or lecturing outside your school at an approved CLE program; (E) CLE program—list each course, workshop or seminar separately. NOTE: No credit is allowed for self-study programs.

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

Date: _____ _____
(signature)

T E A R O U T S E C T I O N

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.

EXPLANATION OF TYPE OF ACTIVITY

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

B. **Writing and Publishing an Article.** Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least 60 days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. **See Regulation 4(d)-101(b)**

C. **Lecturing.** Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. **See Regulation 4(d)-101(c)**

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

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

TEAR OUT SECTION

Utah Judge Becomes Vice President of National Judicial Organization

WILLIAMSBURG, VA—November 5, 1991—Judith M. Billings, judge of the Utah Court of Appeals, became vice president of the National Association of Women Judges at NAWJ's annual conference in Chicago, Illinois.

NAWJ consists of approximately 1,000 members, both female and male, who come from every level of the judiciary and every region of the country. The members of NAWJ are at the forefront of the legal profession, playing dynamic and influential roles in their communities.

Judge Billings attended law school at the University of Utah, receiving her Juris Doctorate Degree in 1977. While at law school, she was an Associate Editor of the Utah Law Review. Judge Billings received an L.L.M. in the Judicial Process from the University of Virginia Law School in 1990.

Judge Billings was a litigation partner with the law firm of Ray, Guinney and Nebeker. In 1982, Governor Scott Matheson appointed Judge Billings to the Third District Court where she served as a general jurisdiction trial judge until appointed in 1986 to the newly created Utah Court of Appeals. Judge Billings is also an adjunct Professor at the University of Utah law school.

Judge Billings has served as President of the Board of District Judges, and as President of the Salt Lake County Bar Association, and as President of American Inns, Court III. Judge Billings is a member of the Fellows of the American Bar Association and the American Law Institute.

Young Lawyers Section Utah State Bar Annual "Sub-for-Santa" Project

For the 14th consecutive year, the Utah State Bar YOUNG LAWYER SECTION will participate in *The Salt Lake Tribune* "Sub-for-Santa" program. "We should share with those less fortunate," declares Salt Lake attorney and Project Coordinator Joseph Joyce. "Our law firm has sponsored several families over the last few years and have enjoyed the experience," he said.

Acting as a clearinghouse, *The Tribune* program matches those willing to share at Christmastime with families needing help. *The Tribune* has thus been serving needy children in the Sale Lake area at Christmastime for almost 60 years. "Salt Lake area attorneys have supported the Sub-for-Santa program for many years," explains Mr. Joyce. The Sub-for-Santa program "provides an avenue for law firms and individual attorneys to become directly involved with families in need. After all, that is really what Christmas is all about."

Interested law firms should appoint a person to coordinate the project and work with the YOUNG LAWYER SECTION and *The Tribune* to select a family, purchase gifts and groceries and deliver them before Christmas.

Mr. Joyce proudly notes that last year, several firms directly sponsored three or four families. Lawyers unable to support an entire family, may still help by contributing funds payable to "Sub-for-Santa," to the Young Lawyer Section, Attn: Joseph J. Joyce, STRONG & HANNI, 6th Floor, Boston Building, Salt Lake City, UT 84111.

The YOUNG LAWYERS SECTION will answer questions regarding the program, and encourage them to call *The Tribune* Sub-for-Santa program (237-2830). Questions regarding the YOUNG LAWYERS SECTION project may be referred directly to Mr. Joyce, 532-7080 or Brian M. Barnard, 328-9532.

"Last year, *The Tribune* helped more than 2,000 children enjoy Christmas. This year, with the help and generosity of the legal community, we hope to reach even more children and families. You just can't imagine the great feeling you get from helping a neighbor at Christmastime," says Mr. Joyce.

ABA Report Says Stone-Age Policies Harm Law Firm Morale, Profits

Law firms across the country are in hot water: They are criticized for making the practice of law a business, but at the same time are experiencing severe economic setbacks. Attorney job dissatisfaction and deterioration in the workplace environment are on the rise. And their clients are increasingly voicing unhappiness.

According to a recent American Bar Association report, the firms' own "Neanderthal" management and personnel policies—both contrary to the practice of law as a profession and sound business management—are at the root of all of these problems.

The report, "At the Breaking Point: The Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services," is the product of a conference which brought together law firm managing and upper management partners to address the serious workplace issues confronting the profession.

Conference participants agreed that the management practices of law firms have resulted in a hostile working environment. And far from being merely "touchy-feely" issues, workplace difficulties and job dissatisfaction have a direct negative impact on client satisfaction and law firm economic strength. The report goes on to chart a blueprint for law firm management to address these problems and create a stronger, healthier, better firm.

That the law firm is an increasingly inhospitable place to work for many attorneys has been widely studied and reported. In its 1990 "National Survey of Career Satisfaction/Dissatisfaction," one of the most comprehensive examinations of law firm workplace issues ever undertaken, the ABA Young Lawyers Division found that dissatisfaction in the profession is on the rise, causing increased levels of physical and mental stress, lower productivity, poorer quality of services rendered to clients, and ultimately, financial problems for the firm.

To begin a serious examination of these issues and map out ways law firms can begin to improve their operations, the ABA Young Lawyers Division invited managing partners and bar leaders from across the country to the "At the Breaking Point" conference held last spring. Other ABA sponsors were the Sections of General Practice, Litigation, Real Property, Probate and Trust Law, and Tort and Insurance Practice.

According to YLD Director Ron Hirsch, conference participants agreed that unsound management practices are widespread throughout the profession. Among the most common:

- Encouraging lawyers to sacrifice, rather than dedicate, themselves to their firm by working ever-increasing billable hours.
- Failure to share with all lawyers information regarding firm management.

Failure to communicate practice and time expectations to all lawyers, and to measure performance against those communicated expectations.

- Failure to provide adequate training, mentoring and feedback.
- Compensating lawyers solely on the basis of hours worked rather than on the value of service to clients and contribution to the firm.
- Failure to provide equal opportunities for women and minorities and to provide an environment free of actions that demean, embarrass or harass them.
- Failure to delegate client work properly.
- Failure to encourage lawyers to communicate openly their professional as well as personal needs and problems, and to develop collegiality, mutual support and institutional loyalty.

"These all are practices that 'demotivate' rather than motivate lawyers, and that create or contribute to a negative firm culture," the conference report observes.

However, because the source of these problems is internal to the profession, "we have the ability to effect solutions through positive decisions and actions of our own," the report states.

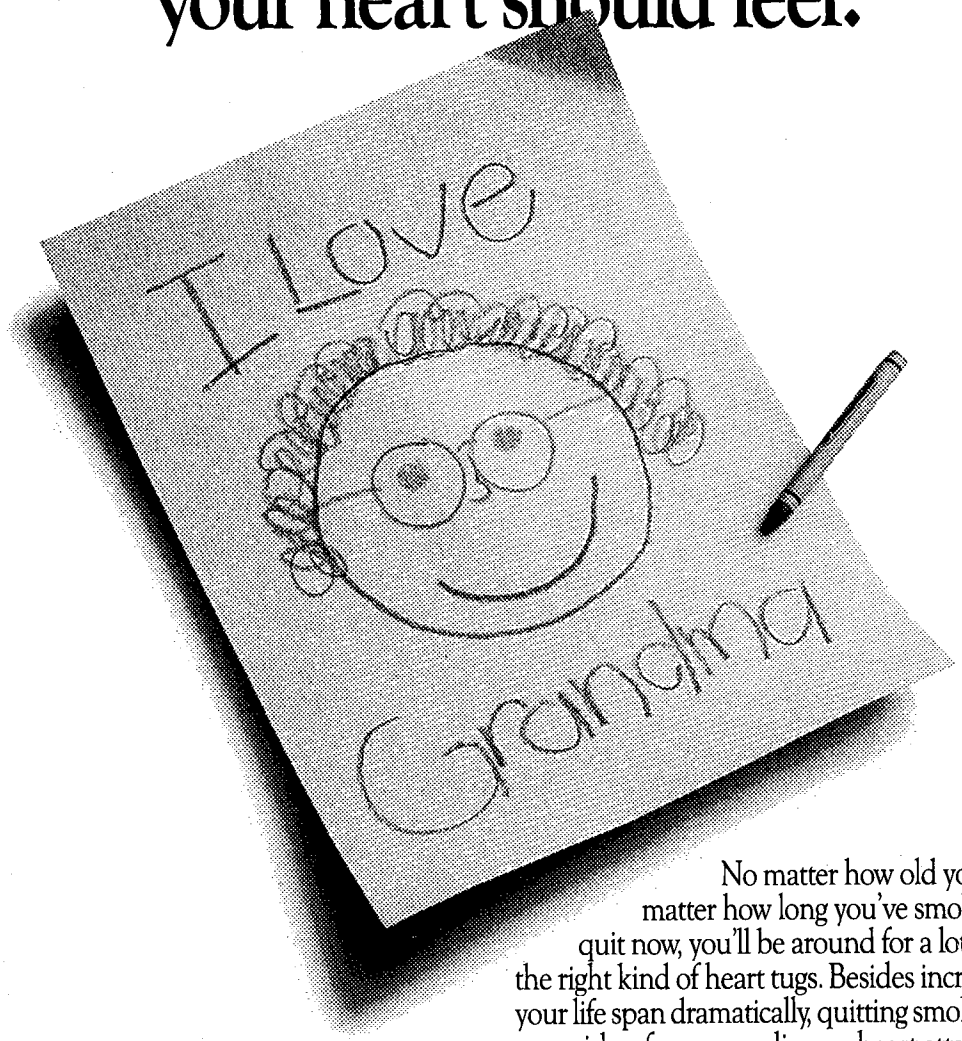
The report suggests that firms could improve their bottom lines by adopting management principles appropriate to operating the firm as a professional business—principles that maximize services to clients and create an efficient, productive workplace. According to the report, firms should consider:

- Incorporating value billing and compensation procedures.
- Working smarter, e.g., taking advantage of law firm technology and delegating responsibility.
- Improving communications within the law firm (in the areas of performance evaluation, exchange of information and in employee assistance and counseling) and with clients.
- Improving training and encouraging mentoring.
- Allowing flexible work schedules.
- Supporting diversity among employees.
- Conducting long-range planning.

"The profession must address these problems to prevent them from becoming even more serious in the future," the report notes. "We owe that effort to our colleagues, our clients, and ourselves."

Copies of the 34-page report, "At the Breaking Point," are available from the ABA. The first five copies are free; additional copies are $2 each for each additional copy, plus a $2 handling fee. To order, contact: ABA Order Fulfillment, 750 N. Lake Shore Drive, Chicago, IL 60611; or call (312) 988-5555.

This is the only tug your heart should feel.



No matter how old you are, no matter how long you've smoked, if you quit now, you'll be around for a lot more of the right kind of heart tugs. Besides increasing your life span dramatically, quitting smoking reduces your risks of coronary disease, heart attack and stroke. And as soon as you quit, your heart begins to get healthier.

It all adds up to more happy and healthy times spent with the people you love.

It's never too late to quit smoking. For free support, encouragement and information on how to quit, call the Cancer Information Services free help line at **1-800-4-CANCER.**

It's never too late to quit smoking.

U.S. Department of Health & Human Services

1992 WESTERN STATES BAR CONFERENCE

Hyatt Regency Maui
Lahaina, Maui, Hawaii
February 26-29, 1992

Wednesday, February 26, 1992

5:00 - 6:30 p.m.	Registration (Hyatt)
6:00 - 7:30 p.m.	President's Cocktail Reception

Thursday, February 27, 1992

8:15 - 9:00 a.m.	Registration/Continental Breakfast
9:00 - 12:00 Noon	Spouse/Guest Activity
9:00 - 9:20 a.m.	Welcome to the Conference
9:20 - 9:25 a.m.	Overview
9:20 - 10:05 a.m.	Hawaii's Alternative Dispute Resolution Program
10:05 - 10:50 a.m.	The Impact of *Gibson* on Unified Bars
10:50 - 11:00 a.m.	Law Office Technologies
11:10 - 11:20 a.m.	ABA President-Elect J. Michael McWilliams address
11:20 - 12:15 p.m.	Roll Call of States
5:30 - 7:30 p.m.	Sunset Champagne Sail

Friday, February 28, 1992

7:30 - 9:00 a.m.	Breakfast Buffet
9:00 - 12:00 Noon	Spouse/Guest Activity
9:00 - 9:45 a.m.	ABA Report on Discipline Enforcement
9:45 - 10:25 a.m.	Bar Mgt. Issues of the 1990's
10:25 - 11:10 a.m.	Status of Legal Technicians
11:10 - 11:20 a.m.	Update on Insurance Market
11:20 - 11:40 a.m.	Update on Professional Liability Ins.
11:40 - 12:30 p.m.	Roll Call of States
5:30 - 9:00 p.m.	"Drums of the Pacific" Luau

Saturday, February 29, 1992

8:00 - 9:00 a.m.	Continental Breakfast
9:30 - 9:45 a.m.	Report of the ABA Standing Committee on Bar Svcs.
9:50 - 11:30 a.m.	Roll Call of States
11:30 - 12:00	Noon Business Meeting a. Election of Officers b. Plans for 1993 and 1994 WSBC
12:00 Noon	Adjourn

REGISTRATION FORM

NAME _____ **SPOUSE/GUEST** _____

ADDRESS _____ **CHILDREN** _____ **AGE** _____

CITY _____ **STATE** _____ **ZIP** _____ _____ **AGE** _____

HOME ADDRESS _____ _____ **AGE** _____

CITY _____ **STATE** _____ **ZIP** _____

PHONE NUMBER ( ) _____

CONFERENCE REGISTRATION FEE $ 120.00
(No registration fee for spouse/guests)

ACTIVITY TICKETS _____

_____

Number of Tickets

_____ Thursday	**SUNSET CHAMPAGNE SAIL ON THE WAILEA KAI**	$ 20.00
_____ Friday	**"DRUMS OF THE PACIFIC" POLYNESIAN LUAU SHOW** Dinner Theatre Style on the Sunset Terrace at the Hyatt.	$ 15.00
_____ Saturday	**BREAKFAST BUFFET**	$ 10.00

TOTAL ENCLOSED $ _____
(Registration fee and Ticket purchases)

RETURN THIS FORM WITH REMITTANCE AS SOON AS POSSIBLE TO:
Linda McDonald, Secretary/Treasurer, Western States Bar Conference
State Bar of New Mexico, P.O. Box 25883, Albuquerque, NM 87125, Telephone 1-800-876-6227

Jury Selection and Peremptory Challenges, Racial Motivations

By Clark Nielsen

CLARK NIELSEN is a partner in the new firm of Henriod, Henriod and Nielsen. After serving over six years as a staff attorney in Utah's appellate courts, Clark specializes in appellate litigation in all areas of the law and in all appellate courts. He joined the Utah Supreme Court legal staff in 1985. In February 1987, he moved to the new Utah Court of Appeals, assisting in its initial organization and establishment until November 1991. He was a partner at Nielsen and Senior prior to joining the Utah Supreme Court.

Defendant's aggravated arson conviction was remanded for the prosecutor to show a race-neutral basis for his challenge of a prospective juror. Race discriminatory peremptory challenges harm the defendant and affront the legal system. The Utah Supreme Court amplified its decisions in *State v. Cantu*, 750 P.2d 591 (Utah 1988) and 778 P.2d 517 (Utah 1989). Defendant's objection to a prospective juror challenge is *not* conditioned upon defendant belonging to the affronted minority race or ethnic group. When a defendant shows that an excluded prospective juror is a member of a cognizable minority group, the burden shifts to the plaintiff to show a race-neutral reason for the exclusion. The court acknowledged the absence of a clear standard to determine a juror's affiliation with a "cognizable minority group." If a plaintiff strikes a juror solely because of a perception that the juror's race or ethnic origin will "make a difference in the juror's weighing of the case" then a "cognizable minority group" has been established. By so establishing the minority group, it would appear that the defendant has also cut off any opportunity for the prosecution to show a race-neutral basis for the exclusion.

State v. Span, 170 Utah Adv. Rep. 16 (Sept. 30, 1991) (J. Stewart).
(Note: Whether a criminal defendant must show a race-neutral basis for his exercise of peremptories is presently pending before the U.S. Supreme Court.)

JURY VOIR DIRE, EXERCISING PEREMPTORIES

In a medical malpractice action, the trial court abused its discretion when, in totality, plaintiff's attorney was not afforded an adequate opportunity in jury voir dire to gain relevant information on the views and attitudes of prospective jurors. Whether plaintiff should have been allowed to inquire regarding exposure to "insurance-crisis" articles requires a balancing of plaintiff's right to an informed, intelligent selection of jurors and defendant's right to exclude prejudicial suggestion of insurance coverage. Plaintiff has a legitimate interest in hearing whether jurors have read about or developed a bias on medical negligence and tort reform. However, in this case, the trial court's error in unduly restricting voir dire inquiry was harmless, based upon the evidence at trial.

Evans v. Doty, 171 Utah Adv. Rep. 43 (Ct. App. Oct. 16, 1991) (J. Billings).

RULE 54(B) CERTIFICATION— FINALITY OF ORDER

In an apparent effort to stem the growing number of appeals taken from Rule 54(b) certified orders, the Supreme Court followed the Seventh Circuit approach, holding that multiple legal theories based on one set of facts are not separate claims for purposes of Rule 54(b). When "separate" claims are based upon the same "operative facts" (or, with minor variations), a judgment based on less than all claims may not properly be certified as final under Rule 54(b). A separate claim requires facts different than other remaining claims. The court suggested that district courts freely grant certifications for appeal purposes without a close examination of whether certification is proper.

Kennecott Corp. v. Utah State Tax Comm., 163 Utah Adv. Rep. 3 (June 14, 1991) (J. Zimmerman, with Justices Hall and Durham concurring; Justices Howe and Stewart concurred in result). *See also First Sec. Bank v. Conlin*, 164 Utah Adv. Rep. 27 (July 9, 1991) (Per Curiam Order) (The absence of a certification resulted in dismissal of the appeal even though plaintiff claims were bifurcated for trial from defendants' crossclaims; *Town of Manila v. Broadbent Land Co.*, 169 Utah Adv. Rep. 5 (Sept. 9, 1991); and *Webb v. Vantage Income Properties*, 169 Utah Adv. Rep. 4 (Sept. 9, 1991), applying the *Kennecott* decision and holding certification improper. These appeals were dismissed even though the briefs had been filed and the cases were at issue.

CHILD CUSTODY, DEATH OF CUSTODIAL PARENT

Upon the death of a custodial parent, the noncustodial parent automatically acquires custody of a minor child until such time as the district court changes custody based upon the best interests of the child. Natural parents have the right to custody absent a suspension or termination of their parental rights. A mere custodial battle determination that one parent have custody as opposed to the other parent does not deprive that other parent of her or his right to custody in the event of the death of the custodial parent.

Nielson v. Nielson, 171 Utah Adv. Rep. 27 (Ct. App. Oct. 1, 1991) (J. Billings).

LANDLORD-TENANT, WARRANTY OF HABITABILITY

Reversing a long traditional refusal to adopt a warranty of habitability defense in unlawful detainer actions, the Utah court in *Wade v. Jobe* held that a claim of breach of the warranty of habitability may

be raised when the tenant's right to possession of leased premises is challenged. Breach of the warranty may be asserted as a counterclaim in an unlawful detainer action or as a cause of action in a separate tenant suit for excessive rent paid. As a remedy for uninhabitable premises, a tenant may continue to pay full rent and sue for damages for the warranty breach or may withhold rent to provide the landlord with incentive to repair the premises. A majority of the court rejected the argument that the premises' condition may violate Utah's Consumer Sales Practices Act. Only Justices Zimmerman and Durham agreed to provide a tenant relief under the Act.

In the companion case of *P.H. Invest. v. Oliver*, the court reversed the Court of Appeals and adopted the approach of the dissent (J. Garff) in the Appeals court decision (778 P.2d 11 (Utah App. 1991)). A tenant does not impliedly "waive" her right to assert the warranty just because she rents the premises in a deteriorated condition. Any such waiver must be expressed and is limited only to specific defects listed.

Wade v. Jobe, 170 Utah Adv. Rep. 5 (Sept. 23, 1991) (J. Durham); *P.H. Investments v. Oliver*, 170 Utah Adv. Rep. 3 (Sept. 23, 1991) (J. Durham).

JUDGMENT LIEN, SALE OF REAL PROPERTY

The supreme court affirmed the Court of Appeals' decision (786 P.2d 1377) that a vendor's interest in real property sold under an executory real estate contract is not "real property" under U.C.A. Section 78-22-1, but is personalty. A judgment creditor's lien does not automatically attach to the vendor's contract interest.

Cannefax v. Clement, 170 Utah Adv. Rep. (Sept. 30, 1991) (J. Stewart).

ALIENATION OF AFFECTIONS/CRIMINAL CONVERSATION

The Utah Court reaffirmed the common law tort of alienation of affections that protects the marital relationship from all unreasonable intrusions by others. Sexual misconduct is but one means to alienate spousal affection. A plaintiff must prove by clear and convincing evidence that defendant's conduct constituted a controlling cause of the injury to the marital consortium interest. Defendant's conduct must be more than just incidental to other factors or an already damaged marital relationship.

A majority of the court abolished any action for the tort of "criminal conversation" (i.e. adultery). If the marital relationship is damaged by adultery, then adequate redress for such conduct is included within an alienation of affections claim. If the marriage is already "dead," then there is no legitimate interest to be protected by a "criminal conversation" tort. *Norton v. McFarlane*, 169 Utah Adv. Rep. 12 (Sept. 12, 1991) (J. Stewart); *Drew v. Roskelly*, 169 Utah Adv. Rep. 10 (Sept. 12, 1991) (J. Howe).

DIVORCE, EQUITABLE RESTITUTION

The Utah Supreme Court rejected the appeals court creation of "equitable restitution" intended to increase spousal property and alimony awards to achieve a "fair and equitable result." In effect, "equitable restitution" was, in this case, a division of the professional degree. The court reiterated that professional degrees are not marital property and are not subject to equitable distribution. The appellate court's solution was considered "highly speculative" and impinged the broad functions of alimony and property distribution. These functions are adequate, when properly and broadly applied to achieve a "fair and equitable" result.

In dissent, Justice Durham criticized the majority for making "no effort to guide the trial courts in fashioning a realistic remedy for what is a realistic loss." After outlining perceived deficiencies in traditional alimony and support awards and property distribution, Justice Durham explains an example of an alternative balance sheet approach to spousal support—the "reliance measure of loss."

Martinez v. Martinez, 169 Utah Adv. Rep. 29 (Sept. 16, 1991), reversing 754 P.2d 69 (Utah App. 1988) (J. Stewart).

LIMITATIONS STATUTE, TOLLING DURING PLAINTIFF'S INCOMPETENCE

A jury verdict was reversed and plaintiff's negligence action dismissed against the State Division of Family Services because of governmental immunity and the statute of limitations. As a minor, Plaintiff was abused by an adult custodian arranged by the defendant Family Services. Plaintiff's alleged resulting disability after reaching age 18 was not sufficiently proved to be of such a nature to render him unable to manage his business affairs or to comprehend his legal rights or liabilities. Therefore, plaintiff's claim against the state was not tolled because of the alleged disability upon plaintiff attaining adult status.

O'Neal v. Division of Family Services, 168 Utah Adv. Rep. 3 (Aug. 27, 1991) (J. Zimmerman).

PRO SE APPEALS

The Utah Supreme Court upheld the summary judgment dismissal of various wrongful discharge, slander, malice, negligence and breach of contract claims brought by a former employee of Northwest Pipeline Corp. The court expressed its willingness to be lenient in considering the substance of pro se arguments, but refused to become his advocate. Even *pro se* appeals and arguments require a legal analysis and supporting legal authority.

Winter v. Northwest Pipeline Corp., Utah Sup. Ct., No. 890182 (Oct. 30, 1991) (J. Stewart).

APPELLATE JURISDICTION

Under the 1990 amendment to U.C.A. Section 78-2a-3(2)(g), an appeal from the denial of a writ of habeas corpus is taken to the Court of Appeals when the conditions of confinement or the acts of the parole board are challenged.

Padilla v. Utah Bd. of Pardons, Utah Sup. Ct., No. 910036 (Oct. 30, 1991) (Per Curiam).

INEFFECTIVE ASSISTANCE OF COUNSEL, PREJUDICIAL ARGUMENT

A claim of ineffective assistance of trial counsel and appellate counsel may be raised for the first time on certiorari review in the direct appeal of defendant's conviction when the record has been developed and judicial economy can be achieved.

A closing argument by the prosecutor that a witness exercised her Fifth Amendment privilege because she did not want to lie is prejudicial error. Defendant was deprived of effective counsel by the failure to object to the prosecutor's comment.

State v. Humphries, 171 Utah Adv. Rep. 6 (Oct. 4, 1991) (J. Howe).

ADDRESS CHANGES

It is the responsibility of the attorney to notify the Utah State Bar regarding address and telephone changes. Information concerning this should be directed to Darla Murphy or Amy Wilkerson at 531-9077.

End of a Bicentennial Era

By Keith A. Kelly
President-Elect,
Young Lawyers Section, Utah State Bar
Co-Chairperson, Bill of Rights Bicentennial Committee
Co-Chairperson, Utah Council on the U.S. Constitution and Bill of Rights
Shareholder, Ray, Quinney & Nebeker

December 15, 1991 marks the end of an era. That date is the 200th anniversary of when Virginia ratified and supplied the necessary approval to make the Bill of Rights a part of the Constitution. With that ratification 200 years ago, freedoms of speech, press, religion—along with other fundamental rights—became the law of the land.

December 15 also ends a 15-year national bicentennial celebration. The celebration began on July 4, 1976, when we commemorated the 200th anniversary of the Declaration of Independence. The bicentennial era has reminded us about the struggles of the American Revolution, the problems of the Articles of Confederation, the foresight shown in establishing a Constitution, the beginnings of the federal judiciary, and lastly the ratification of the Bill of Rights.

The Young Lawyers Section has played an important role in ending our bicentennial era through celebration of the Bill of Rights Bicentennial. The following is a summary of activities the Section has carried out as a part of our bicentennial celebration. As noted, many of the activities have been carried out in conjunction with other organizations.

Educational Programs. The Section's Bill of Rights Bicentennial Committee set as its major objective educating students about the Bill of Rights. We felt that the best way to preserve our rights would be by helping young people understand the importance of those rights. Thus, the Section consulted with educators who explained that the Section could best achieve its goal by preparing teaching materials and by helping to implement them in the classroom.

In order to carry out its educational project, the Section sought and obtained a $10,000 grant from the Utah Bar Foundation. Using those funds, along with its own budgeted funds, the Section prepared and printed a 350-page book of teaching materials about the Bill of Rights. The book contains original, existing, and adapted materials encouraging students to discuss their views on issues related to the Bill of Rights. The Section printed over 600 copies, more than two each for the 300 secondary schools in Utah. In addition, Attorney General Paul Van Dam contributed money from his discretionary fund to print thousands of bookmarks containing the Bill of Rights.

In order to assist teachers in using the materials, the Section and the State Board of Education contacted all Utah social studies teachers and invited them to participate. The Section then presented a closed-circuit television training program demonstrating use of the materials. Videotapes of the broadcast were then made available to all Utah secondary schools.

Following up on the materials distribution, the Section, along with the Law-Related Education Committee of the Senior Bar, contacted schools throughout the State to volunteer the services of young lawyers. Dozens of presentations have been made to social studies classes and school assemblies.

In addition the Section, along with the Governor's Council on the Bill of Rights, obtained and staffed a booth at the Utah Education Association Convention. From the booth, young lawyers distributed over 30 boxes of free educational materials to teachers.

Although it is difficult to determine the total impact of this educational program, a conservative estimate is that more than 40,000 Utah students have been educated about the Bill of Rights through materials provided by the Young Lawyers Section.

Essay and Poster Contest. As part of these educational efforts, the Section—along with the ACLU, Brian Barnard, and the Utah Law-Related Education Project—sponsored an essay contest for secondary students and a poster contest for elementary students. The theme of the essay and poster contests was "America Without the Bill of Rights." Many students represented their schools by submitting essays and posters, from which winners were determined in each division.

Bill of Rights Conference. In order to increase public awareness about the bicentennial among community leaders in Utah, last February the Section—along with the Utah Humanities Council and the Utah Council on the Bill of Rights—sponsored a statewide forum for community leaders. The forum featured columnist Jack Anderson as a speaker along with a panel of distinguished judges and scholars who commented about the Bill of Rights. The forum featured workshops instructing community leaders about programs, activities, and educational opportunities related to the Bill of Rights. The conference was attended by over 225 people from throughout the State, each of whom received materials related to the Bill of Rights celebration that could be used in their communities.

Law Day Activities. The Section also encouraged public awareness about the Bill of Rights through its Law Day celebration. The Law Day theme this year was "Freedom Has a Name—The Bill of

Rights." Young lawyers staffed booths at shopping malls throughout the State, distributing materials about the Bill of Rights.

Speakers Bureau. Along with the Utah Humanities Council, the Section sponsored a speakers bureau featuring distinguished law professors, judges, and attorneys. With help from grants from the Humanities Council and American Bar Association, the speakers bureau was organized and publicized. Its speakers have educated numerous community organizations about the Bill of Rights.

Legislative Resolution and Governor's Proclamation. The Section has also had a major role in encouraging enactment of a legislative resolution reaffirming the importance of the Bill of Rights. Working with the Utah Council on the Bill of Rights, young lawyers helped to author the resolution that was passed by the Legislature and signed by the Governor. In addition, young lawyers are working to obtain a Governor's proclamation to be issued December 1991, proclaiming December 15 as the day of the Bill of Rights Bicentennial.

Utah Symphony Concert. Section members have also been working with the Utah Symphony to promote a Bill of Rights Bicentennial symphony celebration in early December. Section members facilitated the commissioning of a special symphony commemorating the Bill of Rights Bicentennial. Through the help of Section members, a $5,000 grant to partially fund this special commission was obtained from the George S. and Delores Dore Eccles Foundation.

Other Activities. In addition to the preceding activities, many Section members have participated in the Bill of Rights Bicentennial celebration through individual efforts. We are aware of young lawyers who have spoken to church, school, and community groups on their own initiative. And not to be forgotten is the important contribution that many young lawyers have made to vindicate Constitutional rights through representing their clients in the courts, many on a pro bono basis.

Beyond the Bicentennial. Although the Bill of Rights was ratified on December 15, 1791, for most purposes it remained dormant for many decades. It was not until the late 19th century and the 20th century that courts interpreted and enforced the Bill of Rights to limit the activities of the federal and, later, state governments. Just as the Bill of Rights represented a promise that would be fulfilled in the future, the end of our bicentennial era promises greater public awareness of our basic rights and freedoms. We hope that the Section's efforts made in celebrating the bicentennial will take root in our State's consciousness, and that we will reap the reward of continued freedom and protection of our rights.

P.S.: Thanks. Space does not permit listing the many young lawyers and others who helped make possible the preceding Bicentennial celebration activities. But at the risk of leaving many out, the Section officers give special thanks to the following persons who have expended major time, effort and support for our Bicentennial celebration: Brian Barnard, Brian Crockett, Jathan Janove, Gordon Jenson, Brian Larson, Lorrie Lima, Kim Luhn, Nancy Matthews, Michelle Mitchell, Mike O'Brien, DelMont Oswald, Lieut. Gov. Val Oveson, Morris Rosensweig, Joseph Silverstein and Attorney Gen. Paul Van Dam. We also thank organizations contributing to different aspects of our celebration: the Utah Bar Foundation, the Utah Humanities Council, the Utah Humanities Resource Center, the Utah Council on the U.S. Constitution and Bill of Rights, the George S. and Delores Dore Eccles Foundation, the ABA Fund for Justice and Education, the Utah State Office of Education, the Utah Law-Related Education Project, the ACLU, and the League of Women Voters.

Richard C. Cahoon Steps Down As President of the Utah Bar Foundation

Richard C. Cahoon

A decade of growth for the Utah Bar Foundation came to a close on September 17, 1991 when Richard C. Cahoon did not seek reelection as the President of the Foundation. Mr. Cahoon, a partner in the Salt Lake City law firm of Marsden, Orton, Cahoon & Gottfredson, will continue to serve as a Trustee until his present term ends in June of 1993. He was nominated to serve as a Trustee by O. Wood Moyle, III, the President of the Utah State Bar Association in 1981, and shortly thereafter Mr. Cahoon was elected as the President of the Foundation.

During Mr. Cahoon's administration, the Foundation has: (1) grown to where it was able to make grants totaling in excess of $162,000 in 1990; (2) obtained approval of the IOLTA Program from the Utah Supreme Court; (3) implemented the IOLTA Program; (4) revised the Bylaws and election process to allow nominations and a secret ballot by mail for the election of Trustees by the entire Bar membership; (5) published and distributed to all secondary schools, colleges, and libraries in the State of Utah the book entitled *Federal Judiciary in Utah* by Clifford L. Ashton; (6) established a policy and had a certified financial report prepared and distributed annually; (7) established a monthly Bar Foundation update published in the Utah Bar Journal; (8) acquired a formal office location in the Law & Justice Center and hired an Executive Director for the general administration of the Foundation's funds and activities; (9) initiated the annual Founders Day luncheon on the Foundation's 25th anniversary; and (10) organized a Finance Committee to advise the Board of Trustees.

Mr. Cahoon is an outstanding attorney who has given the Foundation much of his time, talents, and special expertise to help further the purpose of the Foundation's Incorporators and fellow Trustees—that of community involvement, helping the disadvantaged, and improving the legal community and administration of justice.

THANKS, RICHARD!

Growth of the Foundation

The Utah Bar Foundation was incorporated on December 13, 1963. During the first 18 years of its existence, the foundation accumulated only approximately $40,000. The bookkeeping was done by the Trustees of the Foundation or their personal secretaries. The Foundation had no office, and all the work was done by the respective trustees of the Foundation.

In 1982, the Foundation directed its then president, Richard C. Cahoon, to attend a meeting that was being held in Florida regarding the interest on lawyer's trust accounts (IOLTA). It was at that meeting that President Cahoon came to understand the great untapped resource that was available to the Utah Bar Foundation. Upon President Cahoon's recommendation, the trustees of the Foundation, joined by the Utah Bar Association filed a joint petition with the Utah Supreme Court, requesting permission to implement the IOLTA program in Utah. On October 25, 1983, the Utah Supreme Court approved the Petition to implement an interest on lawyer's trust account program (IOLTA) in Utah, *In the matter of interest on lawyer's trust accounts*, 672 P2nd 406 (Utah 1983). The program was effective only after the Internal Revenue Service issued a favorable determination letter indicating that the interest on the lawyer's trust accounts would not be taxable to the lawyer/firm but would be taxable to the Foundation, and since the Foundation was a charitable organization exempt from taxation under Section 503(C) of the Income Tax Code, no tax would be paid on the interest.

The program of the Utah Bar Foundation was conceived as an "opt out" program, which meant that if the lawyers did not sign up with the program within 30 days they would automatically be in the program. However, as a practical matter, the program became a voluntary program because the banks would not transfer an account to an interest bearing account unless the lawyers signed the necessary form allowing their account to earn interest and have the interest paid to the Foundation. It was very gratifying to the Foundation to see many lawyers and firms immediately join the IOLTA program.

At the time that the petition was presented to the Utah Supreme Court, it was hoped that the Foundation might receive as much as $200,000 a year if all of the attorneys in the State joined the IOLTA program. In 1989, the interest received by

the Utah Bar Foundation on the IOLTA program exceeded $200,000 for the first time, this, despite the fact that not all of the attorneys in the State of Utah have joined the IOLTA program. In 1990, the year for which the most recent audit for the Foundation has been completed, the Foundation received $233,138 from the IOLTA program. With more lawyers joining IOLTA, it is anticipated that the interest received in 1991, will be even greater than in 1990.

The Foundation moved into a small office in the Law & Justice Center in 1988. Contrary to the notion of some, the Utah Bar Foundation is not the owner of the Law & Justice Center. The Law & Justice Center Foundation is the owner of the Law & Justice Center. They are two separate, distinct entities. Nor is the Utah Bar Foundation controlled by the Utah Bar Association. The Utah Bar Foundation is a separate, distinct legal entity which is governed solely by the seven trustees which are elected by all of the lawyers in the State of Utah.

The trustees of the Utah Bar Foundation have worked with the banks of the State of Utah, and have found the banks to be most cooperative and most helpful. It is important to realize that the banks play a very important part in the IOLTA program. Once a lawyer executes the form requesting the bank to pay interest on his trust account, the bank then changes his non-interest bearing trust account to an interest bearing account, and each month sweeps that account and puts the interest in an account established by the Utah Bar Foundation at that bank. The bank then mails to the Utah Bar Foundation a monthly statement indicating the interest that has been placed in its savings account at the bank.

We encourage all of you who have not yet taken the time to execute a form transferring your account to the IOLTA program to do so. Lawyers are not entitled to interest on their trust accounts. Monies which are placed in trust accounts for a short period of time, or small amounts that will not justify the establishment of a separate account with the interest payable to the client, are pooled together and earn interest which is paid to the Foundation in the IOLTA program.

The Foundation now has a small office in the northeast corner on the first floor of the Law & Justice Center. The Foundation presently employs an Executive Director on a part-time basis. Since moving into the Law & Justice Center, these administrative costs have been paid by using five (5%) percent of the IOLTA monies received plus the interest earned on all IOLTA monies received prior to distribution.

The trustees have established two perpetual accounts to assure that the Foundation will be able to provide grants in the future. The Perpetual Endowment Fund-IOLTA consists of 10% of the money received by the Foundation from the IOLTA program. As of December 31, 1990, this Fund had grown to $137,499. The other perpetual account consists of monies which have been received by the Foundation from non-IOLTA sources. This account includes the original $40,000 accumulated prior to the adoption of the IOLTA program. On December 31, 1990, this account had a balance of $159,153.

The Foundation, at the end of 1990, had total assets of $572,040. Since the IOLTA program has been established, the Foundation has also made grants in excess of a million dollars for the following programs:

1. To promote legal education, increase knowledge and awareness of law in the community.
2. To assist in providing legal services to the disadvantaged.
3. To improve the administration of justice.
4. To serve other worthwhile, law-related public purposes.

The tremendous growth of the Foundation during the last 10 years has been the result of the devoted efforts of the Trustees, voluntary participation by Lawyers in the IOLTA program, and the cooperation of the Banks. Thanks.

Claim of the Month

Lawyers Professional Liability

Alleged Error or Omission

The Insured attorney allegedly failed to raise objections to the existence of a "time of the essence" clause in a contract for the sale of real property. He further failed to ascertain, prior to the date of closing, exactly what type of documentation plaintiff required to close the deal.

Resume of Claim

The Insured represented seller in the sale of real estate. He reached agreement with buyer as to the price ($2 million) and agreed to buyer's demand that a "time of the essence" clause be placed in the contract. At the closing, buyer raised objections to the existence of the $200,000 mortgage on the property. The Insured, in agreement with the title company, worked out an arrangement regarding the mortgage. However, prior to conclusion of the deal that satisfied the title company, buyer produced a recision notice and walked out, stating that he did not believe complications could be worked out and that seller, therefore, could not comply with the "time of the essence" clause. Under that provision, buyer had the right to insist on closing that day or rescind the contract. Seller sold the property one year subsequent, for $350,000 less. The Insured, along with the buyer, is not liable for the diminution in purchase price, as well as interest on the purchase price for one year.

How Claim May Have Been Avoided

Although buyer may not have been justified in walking out of the closing, the Insured could have taken steps prior to closing which might have prevented the recision and this litigation.

He could have advised the "time of the essence" clause not be included in the contract of sale. Had time not been of the essence, buyer would not have had the right to insist on closing that day. In light of the fact that all documentation demanded by buyer was in place by the following day, it appears that the deal could have closed 24 hours later and this litigation would not have ensued.

The Insured attorney also could have procured the necessary documentation, or in the alternative, buyer's written consent to the sufficiency of existing documentation, prior to the day of closing. He was aware of the existence of the $200,000 mortgage, the "time of essence" clause in the contract, and the fact that buyer had a desire not to proceed with the deal and would possibly seize any opportunity to rescind the contract. Accordingly, prior to closing, he should have ascertained the precise documentation required by each party and the title company, and taken the steps necessary to make same available on closing day.

"Claim of the Month" is furnished by Rollins Burdick Hunter of Utah, Administrator of the Bar Sponsored Lawyers' Professional Liability Insurance Program.

CLE CALENDAR

THANK YOU: To all of the volunteers who helped in preparing and delivering CLE seminars for the Utah State Bar over the past two years, THANK YOU! It has been a pleasure working with each of you in planning and putting on seminars for the Bar membership. Your efforts have not gone unnoticed. The CLE Department at the Bar wants to express our sincere gratitude for your help.

Thank you again,
Monica & Toby

DEAR PROCRASTINATORS: For those of you who have put off getting your CLE credit until the last possible minute, the Bar is offering its assistance. On December 26, 27, 30 & 31, 1991, we will be showing videotaped CLE seminars. These will run from 8:00 a.m. to 5:00 p.m. (only to 12:00 noon on the 31st) and be on a variety of topics, including some in ETHICS. Cost will be $5.00 per day, payable at the door. If you like you can reserve a seat ahead of time by calling 531-9077. Hopefully you will not need this service, but it is here if you do.

TITLE INSURANCE BEYOND THE BASICS

A live via satellite seminar. This program is designed to build on the attorney's basic knowledge of title insurance in order to allow him to effectively represent his or her client at a more advanced level in commercial transactions as well as specialty situations.

CLE Credit: 6.5 hours
DATE: December 3, 1991
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

HOW TO TRY A FAMILY LAW CASE

A live via satellite seminar. This course will teach you how to strengthen the skills that are the keys to success in trying cases well. It will teach you how to try a family law case from preparation to final submissions.

CLE Credit: 6.5 hours
DATE: December 4, 1991
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

LITIGATION TECHNIQUES FOR LEGAL ASSISTANTS

A live via satellite seminar.

CLE Credit: 4 hours
DATE: December 5, 1991
PLACE: Utah Law & Justice Center
FEE: $150 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

CLE FOR THE GENERAL PRACTITIONER

A one and one-half day CLE Institute geared to the needs of sole practitioners and attorneys in small offices will be co-sponsored by Westminster College and the Utah State Bar. The Institute offers 12 CLE credits (3 of these in ETHICS) in one Friday afternoon and all day Saturday session. Other topics include appellate procedures; attorney's title guaranty fund; limited liability companies; juvenile, employment, family, and collections law; and, implementing computers in the law office. Call 488-4159 for registration information.

CLE Credit: 12 hours (3 in ETHICS)
DATE: December 6 & 7, 1991
PLACE: Westminster College, 1840 S. 1300 E., S.L.C.
FEE: $200
TIME: 1:00 to 5:00 p.m. Dec. 6: 9:00 to 5:00 p.m. Dec. 7

HOW TO ATTACK AND DEFEND THE DEBT DEAL GONE WRONG

A live via satellite seminar.

CLE Credit: 6.5 hours
DATE: December 10, 1991
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

MAKING THE SYSTEM WORK— BANKRUPTCY SEMINAR

This seminar is part of the continuing series offered by the Bankruptcy Section. Barbara Richman, Chapter 13 Trustee, is the presenter for this program. We expect a strong turnout for the program so register early.

CLE Credit: 2 hours
DATE: December 12, 1991
PLACE: Utah Law & Justice Center
FEE: $25
TIME: 12:00 noon to 2:00 p.m.

RAINMAKING: FROM PROSPECTS TO CLIENTS

This course is designed for attorneys, in sole, small and large firm practices, who want the most powerful strategies and techniques available in order to maximize their ability to attract clients and keep them. If the development and maintenance of your practice in this changing legal marketplace is a priority, this program is for you.

CLE Credit: 8 hours
DATE: December 16, 1991
PLACE: Utah Law & Justice Center
FEE: $115
TIME: 8:00 a.m. to 5:30 p.m.

EMPLOYMENT LAW II

This is a New Lawyer CLE workshop and is open to general registrations on a space available basis. This workshop, a continuation of November's, will cover basic employment law issues.

CLE Credit: 3 hours
DATE: December 18, 1991
PLACE: Utah Law & Justice Center
FEE: $30
TIME: 5:30 to 8:30 p.m.

LEGISLATIVE PREVIEW

This seminar is co-sponsored with the Division of Continuing Education at the University of Utah. The seminar will examine bills and issues for the upcoming 1992 Utah legislative session. Presenters will examine these issues and their possible ramifications to the legal industry and to Utah in general. Presenters for the program include attorney lobbyists, an attorney who has argued bills before legislative committees, and a Representative from the Utah House. This program provides an excellent opportunity to get a step ahead of the upcoming session and to prepare your practice for possible changes in Utah law.

CLE Credit: 4 hours
DATE: December 20, 1991
PLACE: Utah Law & Justice Center
FEE: Call
TIME: 8:00 a.m. to 12:00 noon

BIOREMEDIATION: THE STATE OF PRACTICE IN HAZARDOUS WASTE REMEDIATION OPERATIONS

A live via satellite seminar. This seminar is being presented by the American Waste Management Association.

CLE Credit: 4 hours
DATE: January 9, 1992
PLACE: Utah Law & Justice Center
FEE: $150 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m

BANKRUPTCY WORKSHOP

This is a New Lawyer CLE workshop and is open to general registrations on a space available basis. Carolyn Montgomery, the former Chair of the Bankruptcy Section, will be making this presentation on basic practice in bankruptcy.

CLE Credit: 3 hours
DATE: January 15, 1992
PLACE: Utah Law & Justice Center
FEE: $30
TIME: 5:30 to 8:30 p.m.

FUNDAMENTALS OF THE PERSONAL INJURY TRIAL

This seminar will cover the basics involved in a personal injury case. An automobile acci-

dent case will serve as a demonstration case to highlight the elements of the personal injury case. Experts with experience in presenting these cases will bring their experience and techniques to you in this basic level and review course.

CLE Credit: 4 hours
DATE: January 17, 1992
PLACE: Utah Law & Justice Center
FEE: to be determined
TIME: 8:00 a.m. to 12:00 noon

WINNING STRATEGIES IN PRODUCT LIABILITY CASES

A live via satellite seminar. Here's an opportunity to hear from some of the most experienced trial lawyers in the country on handling product liability litigation. This seminar will take you from an evaluation of the case all the way through examination of the expert.

CLE Credit: 6.5 hours
DATE: January 21, 1992
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

LAW FIRM BUSINESS MANAGEMENT

A live via satellite seminar. This seminar will be of special interest to firm managing partners, executive and management committee members, department and office heads, executive directors, chief financial officers, and all partners concerned with how their firms can be managed more effectively.

CLE Credit: 6.5 hours
DATE: January 28, 1992
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

HOW TO DIAGNOSE AND TREAT YOUR BANK OR THRIFT CLIENT

A live via satellite seminar. This program will detail proven methods on how to perform a due diligence assessment of your client and how to design an action plan to address specific problems. The program is designed for attorneys, accountants, and other consultants to financial institutions, bank directors and officers, as well as the regulators. The issues explored are important for all financial institutions, large or small, public or closely held.

CLE Credit: 6.5 hours
DATE: February 11, 1992
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 8:00 a.m. to 3:00 p.m.

THE CIVIL RIGHTS ACT OF 1991

A live via satellite seminar.

CLE Credit: 4 hours
DATE: February 13, 1992
PLACE: Utah Law & Justice Center
FEE: $150 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

CONSUMER BANKRUPTCY

This course, co-sponsored with ALI-ABA, is designed to assist counsel who are not specialists in representing consumer debtors or their creditors. The course is structured around the question of whether a client will be better served by filing a chapter 7 liquidation case or a 13 case and plan. The advantages and disadvantages of each chapter, as well as the opportunity for chapters, will be fully explored by the faculty.

CLE Credit: 13 hours
DATE: February 13-14, 1992
PLACE: Olympia Hotel, Park City
FEE: $495
TIME: 9:00 a.m. to 5:00 p.m.

UPDATE: IMPLEMENTATION OF THE 1990 CLEAN AIR ACT AMENDMENTS

A live via satellite seminar.

CLE Credit: 4 hours
DATE: February 27, 1992
PLACE: Utah Law & Justice Center
FEE: $150 (plus $6 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

CORPORATE MERGERS & ACQUISITIONS

Cosponsored with ALI-ABA

CLE Credit: Approx. 12 hours
DATE: March 5-6, 1992
PLACE: Olympia Hotel, Park City
FEE: $495
TIME: 8:00 a.m. to 5:00 p.m.

NON-DISCHARGEABLE DEBTS

A live via satellite seminar.

CLE Credit: 6.5 hours
DATE: March 10, 1992
PLACE: Utah Law & Justice Center
FEE: $185 (plus $9.75 MCLE fee)
TIME: 10:00 a.m. to 2:00 p.m.

UTAH STATE BAR 1992 MID-YEAR MEETING

Come down to St. George for this excellent CLE convention. Enjoy the warmth of southern Utah while getting a jump on your CLE requirements for the next reporting period. Watch for mailings on this program and sign up early to ensure your registration.

CLE Credit: 8 hours (2 in ETHICS)
DATE: March 12-15, 1992
PLACE: Holiday Inn, St. George

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____
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_____

Make all checks payable to the Utah State Bar/CLE — Total Due

Name — Phone

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

Signature

Please send in your registration with payment to: Utah State Bar, CLE Department, 645 S. 200 E., Salt Lake City, UT 84111.

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

Registration and Cancellation Policies: Please register in advance, as registrations are taken on a space-available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day. If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. No refunds will be made for live programs unless notification of cancellation is received at least 48 hours in advance.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the two-year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

For information regarding classified advertising, please contact Leslee Ron at 531-9077.

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Walnut conference table with glass top, eight custom-made chairs, walnut bookcase, JVC 26" color TV with remote, Panasonic Omnivision VCR with remote, large TV stand. Please call (801) 269-0505 for additional information.

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Office Share—Deluxe downtown office space for one attorney and secretary. Receptionist, copier, FAX, telephone, free parking, conference room, overflow work, common reception and private reception areas, east access to freeways. Send all inquiries c/o Box B, Utah State Bar.

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Small, growing Salt Lake firm of experienced attorneys needs to fill a void left by our deceased lead litigation attorney. We want an established, hard-working attorney(s) with significant caseload/clientele to merge with ours. Firm has civil practice—focus on commercial and real estate transactions and disputes, family law, estate planning, as well as plaintiff and defense civil litigation. New offices. Great opportunity for the right attorney or firm. Replies kept confidential. Contact us through Box L, Utah State Bar.

POSITION SOUGHT

Out-of-state solo attorney admitted in Utah desires to relocate to Utah. Eight years' general practice experience. Can generate local clientele with family and business ties. Is willing to consider various options, positions and locations but prefer Salt Lake or Utah counties or vicinity. Excellent legal and interpersonal skills. Reply to Box H, Utah State Bar, to request resume and references.

Ex-Utah resident practicing in Denver seeks position in Salt Lake City. Seven-and-a-half years commercial litigation experience, including securities, commodities, broker/dealer. Licensed in Utah and Colorado. Inquiries must be confidential. For copy of resume or interview: (303) 866-9412 (w) or (303) 423-2518 (h).

MISCELLANEOUS

International Cultural Enrichment Opportunity for your child and family. Students with two years study in French, German or Spanish can live for 3 to 4 weeks during the summer with a family in France, the Ivory Coast, Germany or Spain. Excellent opportunity to really learn a foreign language and experience a foreign culture. Total cost, exclusive of spending money, is $1600-$1800. Program to Russia also available. No study of Russian required. AND/OR be a host family to a foreign student for 3 to 4 weeks during the summer for a great experience. Arrangements through NACEL, a non-profit foreign exchange organization. Contact David at 269-9868 or Karma at 261-4121.

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Notice of Special Institute on Mineral Title Examination

The Rocky Mountain Mineral Law Foundation is sponsoring a two-day Special Institute on Mineral Title Examination at the Hyatt Regency in Denver on Thursday and Friday, February 20 & 21, 1992.

This program complements and updates the Foundation's two previous title examination institutes in 1977 and 1982 by presenting in-depth insight into the legal and practical aspects of the title examination process. The program provides a thorough review and training session, while at the same time, exposes new issues and problems not previously encountered or anticipated.

Program topics include the types, nature and scope of title opinions; the methodology of reviewing title data and preparing opinions; examination of title to fee, state, federal, and Indian lands, as well as to unpatented mining claims, water rights, and other commonly encountered lands; curing title defects; non-record considerations; and ethical issues in mineral title examination. Speakers will endeavor to provide practical solutions for common, and not so common, title problems encountered in the exploration for and development of oil, gas, water, and hard minerals.

As an attendee or purchaser of the manual from the 1982 Institute on Mineral Title Examination, we thought you might be particularly interested in this program. If you wish to register anyone in your office, please submit a registration form as soon as possible. Room reservation request and registration forms are available upon request.

Thank you for your interest. If you have any question, please give us a call. We hope that you will be able to join us in Denver.

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