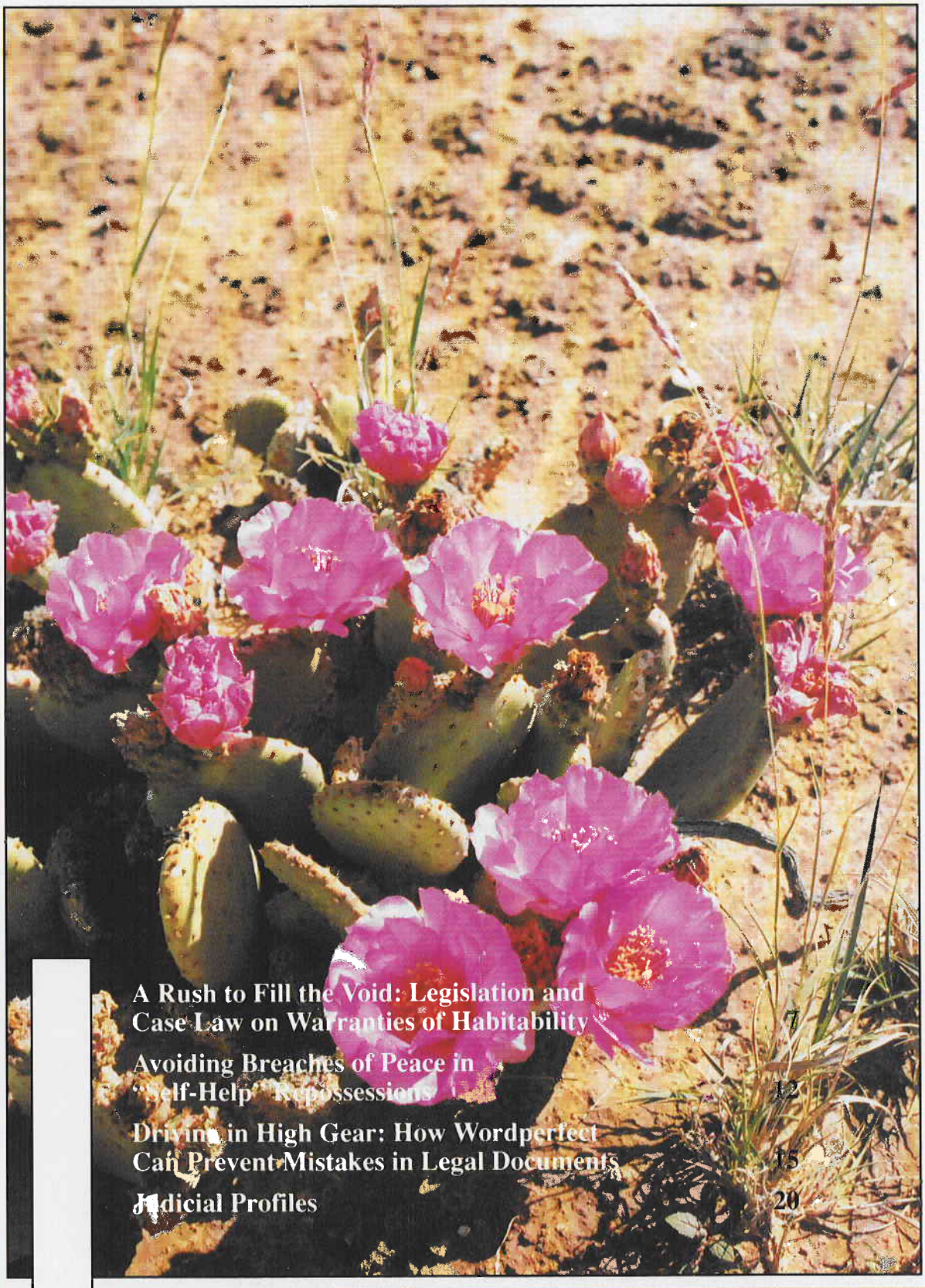
UTAH BAR JOURNAL

Vol. 5 No. 7 August/September 1992



Utah BJ

Published by The Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

Utah Bar Journal

Vol. 5 No. 7 August/September 1992

COVER: Cactus in Bloom, San Rafael Swell/Goblin Valley area, taken by Reid Tateoka, Esq., shareholder/director, McKay, Burton & Thurman, P.C.

Members of the Utah Bar who are interested in having their photographs published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah, 84111, 532-5200. Send both the slide (or the transparency) and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $25; single copies, $2.50. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

Dear Utah Bar Journal Readers:

At the Annual Meeting in Sun Valley we attended a session on the public perception of attorneys - whether they have hearts, etc. We recently had an experience that has shown that lawyers are truly warm, caring and concerned individuals.

As many of you know, our daughter Anne was seriously injured at Sun Valley and was life-flighted to Primary Children's Hospital. The support and kindness expressed by members of the legal profession - judges, secretaries, court reporters, clerks, lawyers, etc. - was unending. Thank you for the notes, calls, visits and gifts. The thoughtfulness and caring helped us through a horrible time. If we have not had the opportunity to thank you personally, please accept this letter as an expression of our gratitude.

Simply saying thank you seems so minimal when many of you helped so much during our crisis. It is impossible to repay you. The best we can offer is our hope that there is never an opportunity to repay the kindness you showed to us.

Sincerely,

Charlotte & Greg

Charlotte Miller
Greg Skordas

Dear Editor,

John Baldwin recently advised me that several members had urged the bar to drop the requirement for malpractice insurance in order to be on the bar referral program.

I have practiced in both Virginia and Texas, where the bar referral service served the purpose of letting new attorneys get a few referrals, a little office traffic, and a little business to help start their practice. It is obvious that a new attorney just starting out without a bankroll, cannot afford malpractice insurance.

Having been on the referral list for several years I can vouch for the fact that not one in two hundred referral calls involved anything substantial enough to present risk of malpractice damages.

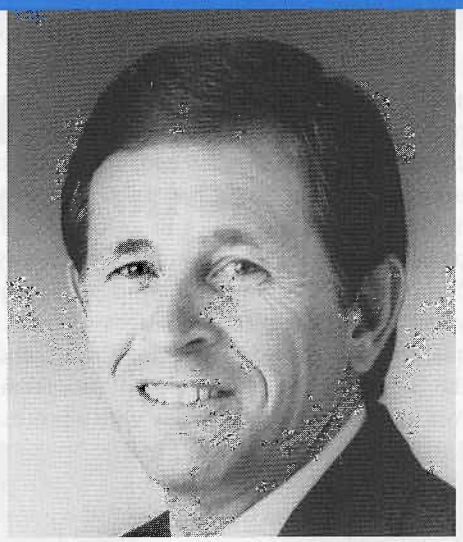
What accounts then, for the unrealistic rule requiring malpractice insurance in order to be on the referral list? Are the established firms in the bar merely controlling this referral service to be available only for their young associates to cut their teeth on client relations, and a few small cases?

Since my move to Utah, I have been quite disappointed at how often the Utah Bar is controlled and manipulated for the sole benefit of the large firm's practices. Your current officers of the bar need to consider whom you intend to serve by bar referral.

As for the stated determination to make bar referral self-supporting, isn't that an example of the haves being unwilling to help the have nots and the bar being unwilling to subsidize a program to make legal services more available to the public?

Sincerely yours,

Edwin H. Beus
Attorney at Law



Ruminations on Challenges Past, Present and Future Facing the Utah Bar

By Randy L. Dryer

I am convinced that five years from now, we will look back and mark 1992 as the beginning of a new era in the history of the Utah Bar. An era marked by financial stability, significantly greater participation in the organized bar by previously disaffected members and a return to the bar's historical commitment to public service through volunteerism. Although my term as President is purely coincidental with its new beginning, I am excited about the prospect of being on the front end.

PAST CHALLENGES

The preceding era – a period encompassing the last five years or so – was a period of dissatisfaction for many members and a period where the Bar engaged in an introspective self evaluation where the very relevancy and necessity of an integrated Bar was questioned. It was a period where the Bar struggled with a myriad of issues surrounding mandatory CLE and the building of the Law & Justice Center, endured a controversial dues increase, witnessed a growing number of disciplinary complaints and felt the sting of a new national pastime – lawyer bashing. The challenges thrust upon the profession the past five years have come in such an intense, staccato fashion that the members, the Bar Commission and the Supreme Court had little time to react to one issue before another surfaced and demanded attention. Crisis management, rather than long term planning, became the operative norm.

PRESENT CHALLENGES

While the issues and problems of the past five years have not been completely resolved, I believe it fair to say that most have been thoroughly addressed either by the Bar Commission, the Utah Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law, or by one or more of the myriad of task forces and commissions created by the Commission, the Supreme Court or the Judicial Council. Much of next year will be spent implementing the recommendations of these study groups. Many of the problems studied, however, have already been addressed by the Commission. For example, the Commission has recently approved the hiring of an additional lawyer in the Office of Bar Counsel to deal with the increased disciplinary case load. A new supervising attorneys panel of the Ethics & Discipline Committee has been established which will provide needed supervision and mentoring to attorneys on probation. The Commission has implemented a new system of accounts, has established the position of financial controller and has significantly upgraded the Bar's financial systems and controls. The indebtedness on the Law & Justice Center has been significantly reduced to the point where the mortgage is now below one million dollars. If current plans are followed the mortgage will be completely retired by 1997.

A representative of the Minority Bar Association has been made an ex-officio member of the Commission in an effort to address the needs of our minority members and increased effort to involve greater numbers of members in Bar committees has met with astonishing success. This year, over 620 members requested appointment to a bar committee, 65% of whom indicated they had never before served on a committee. By increasing committee size, I am pleased to report that we were able to accommodate the first and second choices of 85% of the requests.

THE CHALLENGES OF THE FUTURE

Although the past five years have seen the rise of many difficult and challenging issues, the next five years promise continued challenges, albeit of a different nature. During the next few years I expect the following issues to be paramount in the minds of the Bar Commission and the general membership:

1. Implementing and fine tuning court consolidation;
2. Adopting and implementing a modified lawyer disciplinary system;
3. Dealing with increasing hostility toward lawyers by members of the public and the legislature;
4. Coping with the changing economics of the legal profession and its concomitant impact on professionalism and collegiality;
5. Defining the relationship between the Bar Commission and the Utah Supreme Court; and
6. Struggling with how to make the organized Bar more relevant to those lawyers who historically have not been in the mainstream of the Bar – minority lawyers, solo and small firm practitioners, and government/public service lawyers.

All of these issues pose great challenges to the Bar Commission, the Supreme Court and each and every lawyer in the state. I am pleased to report that the Commission is cognizant of these issues and, for the first time in many years, has had the opportunity to deal with future issues in an organized, proactive manner. The Commission recently completed a day long planning workshop where future goals and initiatives were discussed and defined. The Commission and the Supreme Court, in a historic occasion, met together for an entire day with a professional facilitator to begin the task of defining the role and relationship of the Commission as the Court's agent in regulating the profession.

Some of the specific actions the Commission intends to take to address the issues of the future include the following:

1. Creation of a blue ribbon solo/small law firm practice task force to identify the unique needs of the solo practitioner and to make recommendations for programs or other services that the organized Bar should provide to satisfy these needs.

2. Creation of a "Futures Commission," the purpose of which will be to describe the composition of the bar and predict the market for legal services in Utah in the year 2002.

3. Increased emphasis on communications between the Bar Commission and the membership in general through mailings to members on current issues, holding monthly Commission meetings throughout the state, scheduling meetings between the Commission and local Bar Associations and publishing and distributing to all members a Bar Resources Directory identifying the various services available to members through the Bar office.

Immediate past presidents Jim Davis and Pam Greenwood have struggled mightily to restore financial health to the Bar. They have successfully done so, and in so doing, they have laid the necessary groundwork for restoring confidence in the organized bar and renewing the profession's commitment to public service. I am appreciative of their efforts and look forward to the coming year.

A RUSH TO FILL THE VOID: Legislation and Case Law on Warranties of Habitability

By Gretta C. Spendlove and Kathryn O. Balmforth
Partners, Wood and Wood

GRETTA C. SPENDLOVE is a partner with Wood and Wood, where she practices real estate law and commercial law. Ms. Spendlove has been President of Women Lawyers of Utah for 1991-1992 and is a former Chairman of the Real Property Section the the Utah State Bar.

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The *Utah Bar Journal* last visited the topic of the implied warranty of habitability in 1990.[1] At that time, the Journal described the opinion of the Utah Court of Appeals in *P.H. Investment v. Oliver*,[2] in which the court recognized that Utah had not established a warranty of habitability in residential leases. The court asserted that this area of the law "badly need[ed] reform" and was "exceptionally senseless and anachronistic."[3] The Court of Appeals, however, refrained from establishing such a warranty for a number of policy reasons. The court worried that it would be unable to draft a coherent policy or to fully assess the economic impact of such a warranty based solely on the record before it.[4] Instead, the court invited the legislature to act.

In the intervening two years, legislative bodies and the courts have rushed to fill the void. First, the Utah Legislature enacted the Utah Fit Premises Act.[5] Then, the Utah Supreme Court, apparently less inhibited by policy concerns than the Court of Appeals, recognized a common-law implied warranty of habitability.[6] Finally, the Salt Lake City Council has adopted its own Fit Premises ordinance.[7]

The Utah Fit Premises Act

While the Fit Premises Act does not use the term "warranty of habitability," its clear purpose is the same – to eliminate the doctrine of *caveat emptor* in landlord/tenant transactions[8] and require landlords to maintain rental units "in a condition fit for human habitation."[9] By its terms, the Act applies only to residential rental property.[10]

The Act requires landlords to comply with applicable local building ordinances and health regulations,[11] and to rent only premises which are "safe, sanitary, and fit for human occupancy."[12] The Act does not, however, apply to defects in the rental units "which do not materially affect the physical health or safety of the ordinary renter."[13] The landlord must provide and maintain electrical systems, plumbing, heating and hot and cold water, provide garbage receptacles and removal if a

building contains two or more rental units, and maintain common areas in a "sanitary and safe condition."[14] Landlords are not responsible for repair of damages caused by the tenant or his family, guests or invitees.[15]

The Act also places various duties on tenants. The tenant has a general duty to cooperate with the landlord in maintaining the property in compliance with the Act.[16] The tenant must be current on all rental payments and comply with "all appropriate requirements" of his rental agreement. Other specific duties of the tenant include maintaining the premises in a safe and sanitary manner, occupying the unit in the manner for which it was designed," and using the electrical, plumbing, sanitary and heating facilities, as well as other facilities and appliances "in a reasonable manner." The tenant must also refrain from "unreasonably burden[ing]" the common areas, damaging the unit, and interfering with the peaceful enjoyment of other renters.[17]

The tenant's remedy for a landlord's noncompliance with the Act is to commence a summary court action in which he may recover damages, rescind the lease, and obtain injunctive relief. Damages "include rent improperly retained or collected," but are not specifically limited to those items.[18] The Act specifically disallows damages for mental suffering or anguish.[19] The prevailing party is awarded attorney fees.[20]

The renter may not employ self-help by withholding rents, because he is required to be current on rent and to be in compliance with all his other obligations under the Act before he may bring an action for relief.[21] Presumably, this requirement would bar a tenant from raising the Fit Premises Act as a defense in an action for unlawful detainer based on failure to pay rent or to comply with some other contractual obligation.

Before commencing an action under the Fit Premises Act, the tenant is required to give written notice to the landlord of the problem within a "reasonable time," the tenant must "serve" a second written notice on the landlord, making known the tenant's intention to commence an action if the premises are not repaired within three days.

The Act allows a landlord to elect not to bring a unit into compliance, but instead to terminate the rental agreement "if the unit is unfit for occupancy."[22] The Act also permits the landlord and tenant to agree to reallocate their statutory duties by "explicit written agreement signed by the parties."[23] While this provision has been interpreted to allow "as is" rental agreements,[24] the Act does not by its terms allow waiver of the requirement that all rental units be habitable. Thus, this provision could be interpreted to only allow a tenant to assume the obligation to make the rental units habitable.

The Act drew prompt criticism as being too pro-landlord.[25] Specifically, the Act has been criticized because it does not allow tenants to make repairs and deduct repair costs from rent payments, because it places too many conditions upon a tenant's right to bring suit by requiring the tenant to be in compliance with all his duties under the Act before he can seek relief, because it requires the tenant to give notices to the landlord before bringing suit, because it does not allow damages for mental suffering, because it allows reallocation of statutory duties, and because it allows a landlord to terminate a rental agreement rather than repair the premises.[26]

"The renter may not employ self-help by withholding rents, because he is required to be current on rent and to be in compliance with all his other obligations under the Act before he may bring an action for relief."

Common Law Implied Warranty of Habitability

In 1991, the Utah Supreme Court entered the arena by creating a common law implied warranty of habitability in *Wade v. Jobe*, 818 P.2d 1006 (Utah 1991), a case which arose before enactment of the Fit Premises Act. Lynda Job rented a house in June, 1988, and moved in with her three children. Almost immediately, sewage and water began to accumulate in the basement. Between July and October, the landlord pumped the sewage and water from the basement several times.

In November, Ms. Jobe notified the landlord she would withhold rent until the sewage problem was permanently solved. In response, the landlord called the city inspector who discovered that the house had no sewer connection, and that various other code violations existed which were a substantial hazard to the health and safety of the occupants. Accordingly, the city issued a notice that the property would be condemned if the violations were not corrected. There was no evidence that the landlord had notice of the lack of a sewer connection before renting the house to Ms. Jobe.

Apparently, the landlord chose not to correct the problems, and Ms. Jobe moved out. The landlord sued for the withheld rent, and Ms. Jobe counterclaimed for offset and damages under theories of implied warranty of habitability and application of the Utah Consumer Sales Practices Act. A unanimous Court held that Ms. Jobe had a cause of action under the common law implied warranty of habitability.[27]

The warranty of habitability as currently outlined by the Utah Court is similar in scope to the Fit Premises Act. Like the Act, the warranty of habitability does not apply to minor housing code violations or cosmetic problems, but only to defects which "impact on the health or safety of the tenant," such as failure to supply heat or hot water. "Substantial compliance" with any applicable building codes is evidence that the landlord has not breached the warranty.[28]

In a holding which is somewhat analogous to the provision of the Fit Premises Act which allows reallocation of statutory duties, the Utah Supreme Court held in a companion case to *Wade*, *P.H. Investment v. Oliver*, 818 P.2d 1018 (Utah 1991) (the same case which precipitated the passage the Fit Premises Act), that the protection of the warranty of habitability can be waived when a tenant chooses to rent premises which do not conform to the warranty of habitability. However, any such waiver must be "express," and "the express waiver will be effective only as to any specific defects listed as waived."[29] In addition, any waiver may not be "unconscionable or significantly against public policy."[30]

Like the Fit Premises Act, the warranty of habitability requires a tenant to give his

landlord notice of a defect and a "reasonable time" to make repairs. However, unlike the Fit Premises Act which requires written notice, the warranty of habitability only requires the tenant to give "actual or constructive notice."[31]

It is in the area of remedies that the judicially created implied warranty of habitability differs radically from the Fit Premises Act. The warranty of habitability allows for tenant self-help. If the landlord is in breach, the tenant may withhold rent.[32] The Court left open the question of whether the tenant may make repairs and deduct the cost from his rent.[33]

The tenant may bring an affirmative action for rent abatement, including retroactive abatement for periods of time when rent was not being withheld by the tenant, or the tenant may raise the landlord's breach of the warranty as a defense of counterclaim to a landlord's unlawful detainer action.[34] A breach of the implied warranty gives rise to all usual contract remedies, including special damages, such as "personal injury, property damage, relocation expenses, or other similar injuries."[35] Presumably, "personal injury" would include emotional injury.

The Court has not yet indicated whether, as under the Fit Premises Act, a landlord may choose not to bring a nonconforming property into compliance, and instead to terminate the rental agreement. However, the Court relied heavily on the well-known Skelly Wright opinion, *Javins v. First Nat'l Realty Corp.*, 528 F.2d 1071 (D.C. Cir. 1970), in fashioning Utah's implied warranty of habitability. In a later opinion, *Robinson v. Diamond Housing Corp.*, 463 F.2d 853 (D.C. Cir. 1972), Judge Wright refused to let a landlord take a deteriorated housing unit out of the rental market, requiring instead that the landlord bring the unit into compliance with the implied warranty of habitability before the landlord could evict a tenant at sufferance who had been withholding rents. Furthermore, two Utah justices in Wade found it "shocking" that the landlord in that case had his property condemned and evicted the tenant, rather than make the repairs necessary to bring the property into compliance with the warranty of habitability.[36] It is certainly possible, therefore, that the judicially created warranty of habitability will be interpreted to require landlords to make extensive repairs to bring occupied properties into compliance, even when such repairs do not make economic sense.

The Salt Lake Ordinance

Renters in Salt Lake City have been granted a limited "repair and deduct" remedy by the City's Fit Premises ordinance.[37] The ordinance sets out a specific list of defects as to which the tenant can invoke the remedy.[38] Within 24 to 96 hours after receipt of written notice, depending on the defect, the landlord must take "reasonable steps to begin repairing" the defects, and must "complete the repairs with reasonable diligence."[39] If the landlord fails to timely begin making repairs, and if the tenant is current on all rent, the tenant may begin the self-help process as laid out in the ordinance.[40]

"It is certainly possible, therefore, that the judicially created warranty of habitability will be interpreted to require landlords to make extensive repairs to bring occupied properties into compliance, even when such repairs do not make economic sense."

If the problem is deemed "critical," such as an inoperable toilet, lack of heat when heat is required, or disconnected utilities, the tenant may begin repairs. The tenant must, however, use a licensed contractor, obtain at least two bids, and use the lowest bidder. The tenant may then deduct his expenses to a maximum of four hundred dollars, if all original paid receipts are furnished to the landlord. If the problem is deemed "noncritical," the tenant must serve on the landlord a "second written notice of intent to repair and deduct." If repairs have not been begun within forty-eight hours of service of this second notice, the tenant may undertake repairs, subject to the same limitations set out for "critical" repairs. The remedy does not apply to damages caused by the tenant.

The Salt Lake Ordinance also imposes various other duties on both landlord and tenant. The landlord must comply with applicable codes, and rent only premises which are "safe, sanitary, and fit for human occupancy." In addition, the Ordinance lists several specific standards which the property must meet, most of which appear already to be covered by applicable codes.[41] The tenant is required to abide by the rental agreement and to generally maintain the property in a clean and safe condition. The Ordinance specifically allows the landlord to "allocate any duties to the tenant by explicit written agreement." The agreement "must be clear and specific, boxed, in bold type or underlined."[42]

While the Utah Fit Premises Act allows a landlord to terminate the lease rather than make repairs, presumably the landlord could use this provision to rid himself of a troublesome tenant by evicting, then making repairs and renting to someone else. By contrast, the Salt Lake Ordinance specifically forbids a landlord from retaliating against a tenant for exercising his rights by evicting the tenant.[43] Jurisdictions which recognize the implied warranty of habitability also typically forbid retaliatory evictions,[44] although this issue has not yet arisen in Utah.

Conclusion

After the spate of lawmaking in the area of landlord-tenant relations, Utah practitioners advising both parties face many unanswered questions about the interpretation of legislation and case law, the exact contours of the common-law implied warranty of habitability, and the interaction of common-law and statutes. Some of those questions are:

(1) What is the relationship of the common-law implied warranty of habitability to the Utah Fit Premises Act? At least three Justices of the Utah Supreme Court are concerned about his issue.[45] The Fit Premises Act carefully limits tenant remedies when housing is substandard, and the Supreme Court subsequently expanded those remedies dramatically. Clearly, the Legislature could, if it chose, abrogate the holding of *Wade* by statute. But is there an argument that they have already done so by passing the Fit Premises Act at the express invitation of the courts to legislate in the area of habitability guarantees?[46] Is it possible that the holding of *Wade* applies only to tenants whose cause of

action arose before passage of the Fit Premises Act?

(2) What about commercial property? The Utah Fit Premises Act by its terms applies only to residential leases. The judicially created implied warranty of habitability, for now, applies only to residential leases. *Wade* expressly leaves open the question of whether the warranty is implied in commercial leases.[47] A few courts have extended the implied warranty rationale into the area of commercial properties to create an "implied warranty of quality" in contracts involving commercial property.[48] Interestingly, while the language of the Salt Lake Ordinance appears to be aimed at residential property, speaking in terms of "dwelling units" and specifically requiring provision of such things as kitchens and bathtubs, the Ordinance does not by its terms limit its coverage to residential property by excluding commercial property from its coverage.[49]

(3) What will be the effect, if any, on lenders for apartment complexes? Under the implied warranty of habitability, tenants can withhold rents after only constructive notice to the landlord of defects, raising the possibility of unpredictable interruptions in the stream of income or even concerted action among tenants such as rent strikes.

(4) How broadly or narrowly will the new law be interpreted? For example, what is a "reasonable time" in which defects can be repaired under the Fit Premises Act or the implied warranty of habitability? Will tenants actually be allowed to expressly waive defects in their rental units, or will most waivers be found to be unconscionable when there is unequal bargaining power? What defects will be serious enough to trigger the provisions of the Fit Premises Act or breach the implied warranty of habitability?

Hopefully, the development of Utah law in this area will curtail oppression of tenants without creating economic disincentives for landlords which may ultimately diminish the supply of available low-income housing.

[1]David J. Winterton, *Landlord and Tenant Law: Implied Warranty of Habitability*, 3 Utah B.J. 9 (1990).

[2]778 P.2d 11 (Utah App. 1989).

[3]*Id.* at 14.

[4]*Id.* at 13-14.

[5]Utah Code Ann. § 57-22-1 *et seq.*

[6]*See Wade v. Jobe*, 818 P.2d 1006 (Utah 1991). In *Wade*, two Utah Supreme Court Justices indicated that they would, in addition, extend the protections of the Utah Consumer Sales Practices Act, Utah Code Ann. § 13-11-1 *et seq.*, to landlord/tenant transactions. *Id.* at 1013-18 (opinion of Durham and Zimmerman, JJ.).)

[7]Salt Lake City Ordinances ch. 18.96.

[8]*See e.g., Wade*, 818 P.2d at 1009; Winterton, *supra*, at n.9.

[9]Utah Code Ann. § 57-22-4.

[10]*See* Utah Code Ann. § 57--22-2.

[11]Utah Code Ann. § 57-22-3(1).

[12]Utah Code Ann. § 57-22-4(1)(a).

[13]Utah Code Ann. § 57-22-3(3).

[14]Utah Code Ann. § 57-22-3(1), -4.

[15]Utah Code Ann. § 57-22-4(3).

[16]Utah Code Ann. § 57-22-3(2).

[17]Utah Code Ann. § 57-22-5.

[18]Utah Code Ann. § 57-22-6.

[19]Utah Code Ann. § 57-22-4(5).

[20]Utah Code Ann. § 57-22-6(3)(e).

[21]Utah Code Ann. § 57-22-6.

[22]Utah Code Ann. § 57-22-4(4).

[23]Utah Code Ann. § 57-22-3(4).

[24]Note, *The Utah Fit Premises Act and the Implied Warranty of Habitability: A Study in Contrast*, 1991 Utah L. Rev. 55, 73.

[25]*See generally Id.*

[26]*Id.*

[27]*Wade*, 818 P.2d at 1010.

[28]*Id.* at 1010-11.

[29]*P.H. Investment*, 818 P.2d at 1022.

[30]*Id.*

[31]*Wade*, 818 P.2d at 1012 n.5.

[32]*Id.* at 1011.

[33]*Id.* at n.3.

[34]*P.H.Investment*, 818 P.2d at 1021.

[35]*Wade*, 818 P.2d at 1012.

[36]*Id.* at 1018 (opinion of Durham and Zimmerman, JJ.)

[37]Salt Lake City Ordinances ch. 18.96.

[38]Salt Lake City Ordinance § 18.96.100.

[39]*Id.*

[40]Salt Lake City Ordinance § 18.96.120.

[41]Salt Lake City Ordinance § 18.96.050.

[42]Salt Lake City Ordinance § 18.96.040.

[43]Salt Lake City Ordinance § 18.96.130.

[44]*See, e.g., Robinson v. Diamond Housing Corp.*, 463 F.2d at 856-57.

[45]*See Wade*, 818 P.2d at 1018 (Howe, Hall and Stewart, JJ., concurring).

[46]*See, e.g.*, 73 Am.Jur.2d, *Statutes* § 185 ("Where a statute is clearly designed as a substitute for the common law, such purpose should be given effect.")

[47]*Id.* at n.2.

[48]*See* Frona M. Powell and James P. Mallor, *The Case for An Implied Warranty of Quality in Sales of Commercial Real Estate*, 68 Wash. U. L.Q. 305, 327-30 (1990).

[49]Salt Lake City Ordinance § 18.96.020.

THE LIMITED LIABILITY COMPANY

By William D. Bagley and Philip P. Whynott

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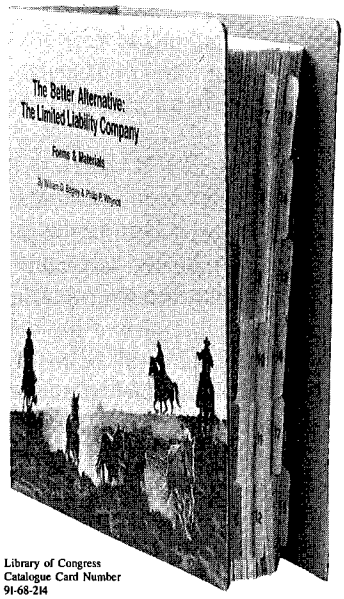

Library of Congress
Catalogue Card Number
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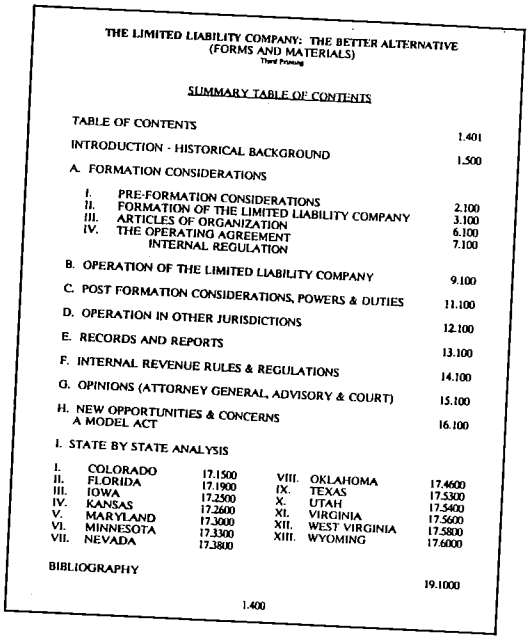

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ORLANDO, FL
December 8-9, 1992

PALM BEACH, FL
December 11-12, 1992

PUERTO VALLARTA, MEX—January, 14, 15, 16, 1993

Avoiding Breaches of Peace in "SELF-HELP" Repossessions

By R. L. Knuth

"When a strong man armed keepeth his palace, his goods are in peace . . ."
—Luke 11:21

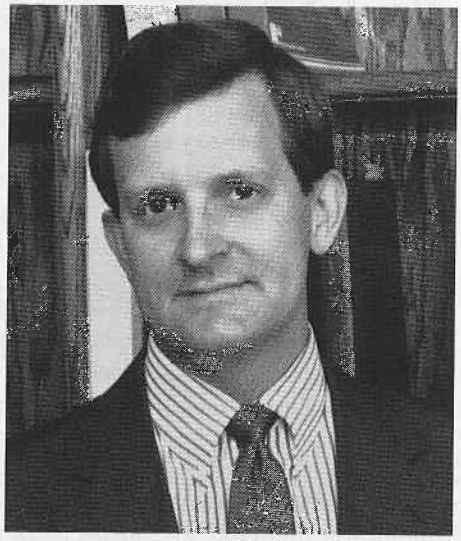
The so-called "self-help" provisions of Article 9 of the Uniform Commercial Code provide a quick and easy solution to the problem faced by a secured creditor in personal property. Upon default, the secured party is permitted to take physical possession of tangible collateral for disposition as prescribed elsewhere in the Code, so long as no breach of the peace occurs.

Like so many short-cuts outside direct judicial supervision, however, the self-help remedy may be quick and cheap for the client, but it is fraught with the potential for abuse. This article is intended to assist in advising clients of what constitutes a breach of the peace, what consequences of a breach of the peace are, and how collateral can be "peacefully" repossessed.

DEFAULT AND REPOSSESSION

Under the Code, once the fact of default can be shown, three options arise: The creditor can 1) waive the security and sue on the obligation; 2) enforce the security interest by disposing of the collateral and seek a deficiency; or, 3) keep the collateral in full satisfaction of the debt, so-called "strict foreclosure". A secured creditor who decides to enforce the security interest against tangible collateral must then obtain actual, physical possession of the collateral.

With tangible collateral, *Utah Code Ann.* Section 70A-9-503 provides that a secured party has the right to take possession of the collateral upon default, unless it has been otherwise agreed between the parties. The secured party may proceed either with or without judicial process. Obtaining possession of the collateral without judicial process is known as "self-help". As will be seen below self-help is subject to some rather severe limitations.



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VOLUNTARY REPOSSESSIONS

Before analyzing the limitations of the self-help remedy, it is worth noting that avoiding self-help entirely may be the wisest course. An alternative overlooked, surprisingly, by many secured creditors, is simply to ask the debtor to surrender the collateral. A voluntary surrender of collateral by the debtor is usually the best method by which to proceed, since it will generally obviate any claim by the debtor that the collateral was illegally repossessed. Often, the debtor realizes he or she is in deep trouble and is willing to surrender the collateral to reduce potential exposure.

The secured creditor, on the other hand, should be prepared to give concessions to the debtor in order to obtain immediate, voluntary surrender of the collateral, such as a liquidated credit being granted for the goods prior to sale, of some discount of the debt. The parties can often agree on what will constitute a commercially reasonable method of sale or sale price in exchange for voluntary surrender. Every voluntary surrender agreement should, however, be reduced to writing, and should specify that the creditor is not waiving any right to a deficiency in exchange for voluntary surrender, unless an agreement for such a waiver has actually been made.

A voluntary surrender of collateral should, first and foremost, be *voluntary*, that is, the debtor is making a knowing, informed decision in the absence of any fraud or deceit. A creditor who repossesses fraudulently, in bad faith, unreasonably, or without justification may be liable for compensatory and, where appropriate, punitive damages. For example, in *Clayton v. Crossroads Equipment Co.*,[1] the debtor was a contract harvester who had purchased a combine harvester on credit. When the secured party learned that the debtor was preparing to take the collateral out of the state where he claimed to have work, the collateral was repossessed, ostensibly under the "insecurity" provision of the security agreement. The debtor was not in default of payment at the time of repossession. The secured party claimed to have received information indicating that the debtor was a poor credit risk, thus justifying repossession.

The Utah Supreme Court affirmed the trial court's award of compensatory and punitive damages. The Court observed that the case before it did not involve deterioration of the debtor's credit, but was based on information the secured party

had had in its possession when it made the loan in the first instance.[2] Thus, the Court concluded, the secured party did not act in good faith when the collateral was repossessed.[3] The Court may also have been influenced by the fact that the repossession was made at the very beginning of the harvest season when the debtor would have had a very pressing need for the collateral.

BREACHES OF PEACE

Where a voluntary surrender cannot be negotiated or where making the request would be futile, the secured creditor can still look to his self-help rights under the Code. Section 9-503 specifically permits a secured party to take possession of the collateral in the absence of judicial process where possession can be had without a "breach of the peace". The prohibition against breaches of the peace is designed to prevent violence or other lawless action by either party. The secured creditor who commits a breach of the peace in the process of repossession is subject to tort liability for conversion, possible loss of rights of deficiency and, in the most egregious cases, punitive and exemplary damages[4], a consummation devoutly to be avoided.

The Code does not define a "breach of peace" and, therefore, the peculiar facts of each case are important in the determination of whether a breach of the peace has occurred. Very generally, a breach of the peace occurs where repossession continues in the face of circumstances provocative of violence.[5] There need be no violence, only the real potential for violence. In determining whether a breach of peace has occurred, courts generally rely on the potential immediate, physical confrontation and the precise nature of the debtor's premises being entered by the secured party seeking to repossess.[6]

Suppose, for example, that the secured creditor forces his way into the debtor's home and hearth and seizes the collateral over the profane objections of the debtor. Is this a breach of the peace? Obviously so, because there is a reasonable possibility of an immediate escalation to violence. Any forced entry into the debtor's residence will most likely be held to be a breach of the peace,[7] not to mention being downright dangerous to the creditor.

What if there is no one at home, or the building containing the collateral is not a dwelling? Although not decided in Utah, the majority of courts hold that any unauthorized breaking of locks, regardless of the type of premises, is a per se breach of the peace.[8]

What if the collateral is not enclosed? Generally, the courts will not find a breach of the peace simply for seizing a vehicle, in the open, from a street or parking lot, without a confrontation.[9] It has been held that repossession of an automobile from a "remote and private" driveway at 5:00 a.m., even when done in a noisy manner is not, standing alone, a breach of peace where there was no physical or verbal confrontation.[10]

In summary, a secured creditor is generally privileged to enter upon the property of the debtor for the limited purpose of repossession, so long as no buildings or enclosures are entered, and such is not a trespass.[11]

"The secured creditor who commits a breach of the peace in the process of repossession is subject to tort liability for conversion, possible loss of rights of deficiency and . . . punitive and exemplary damages. . ."

The most recent discussion of the concept of breach of the peace by the Utah Supreme Court was in the 1989 case of *Cottam v. Heppner*.[12] In that case, the collateral was a herd of cattle which the secured party had removed from corrals belonging to another of the debtor's creditors. The Supreme Court noted especially that the repossession had occurred with the permission of the owner of the corrals and at a time when neither the debtor nor the debtor's employees were present or able to resist the repossession as it was taking place. The debtor was unable to establish that he had a lease for the corrals or that a trespass had occurred in the act of repossession. Further, the Court noted that the debtor's "telephoned displeasure" at the proposed repossession did not, by itself, indicate that a breach of peace was threatened.[13]

Occasionally, secured creditors go to extreme lengths in the act of repossession, resulting in tort liability. An object lesson in how not to conduct a repossession is provided by *Vogel v. Carolina Int'l., Inc.*[14] There, the debtor manufactured kitchen cabinets, which it supplied to builders, including the creditor. After several months of doing business together, the creditor became aware that the debtor was having financial difficulties and offered to loan the debtor money, secured by the debtor's manufacturing equipment. The creditor loaned the debtor over $12,000.00, payable on April 17.

Thereafter the creditor apparently learned that the debtor was in worse financial trouble than was thought earlier. On March 9th, before the note was due, the creditor set up a meeting with the debtor's president to discuss the possibility of moving the debtor's business to Ft. Morgan, Colorado. When the debtor's president arrived at the creditor's office, he was falsely told that the creditor's general manager had been called out of state on an emergency. At that moment, however, the creditor's general manager was at the debtor's factory in Windsor, Colorado repossessing the debtor's equipment. This was never revealed to the debtor's president. Rather, the debtor's president was assured that the secured creditor did not feel insecure and that payment of the notes when due the following month would be satisfactory.

Meanwhile, back at the debtor's factory, the creditor's general manager, who was supposedly in another state at the time, told the debtor's employees that he was there to move the debtor's business to Ft. Morgan. The creditor's employees cut the telephone lines so that the debtor's president could not be reached and proceeded to load up *all* of the debtor's tools and office equipment, without regard to what was collateral and what was not. When the debtor's president returned, it was to an empty factory. Not surprisingly, the jury awarded nearly $19,000.00 in actual damages for conversion, $73,000.00 in punitive damages and $16,000.00 to the debtor's president for the intentional infliction of emotional distress. The Colorado Court of Appeals affirmed:

> There is abundant evidence in the record to show that Century's taking of the property was not an exercise of rights under the Uniform Commercial

Code. The promissory notes which were secured by the security agreement were not yet due. Century took everything in the Kitchen Kraft factory without any effort to select those items listed on the security agreement. This action effectively shut down Kitchen Kraft, rendering it unable to do business. Moreover, this result was achieved by holding Kitchen Kraft's chief executive officer and manager incommunicado and by depriving its employees of the means to reach him. This evidence is sufficient to show malice beyond a reasonable doubt.[15]

A creditor should be especially cautious in the choice of any agents he uses to conduct the repossession, since the creditor may be liable as a principal for any torts committed on his behalf. In this respect, *Sanchez v. MBank of El Paso*[16] is both instructive and cruelly amusing. There, the secured creditor, an ostensibly respectable bank, was held liable in tort for the offenses of two "repo-men" hired to repossess the debtor's car. Without announcing their purposes, the two men commenced towing the debtor's car from her driveway. In an effort to delay them, the debtor locked herself in the car and was thereafter transported inside the car to the repossession lot "and parked in a fenced and locked yard with a loose guard dog. She was rescued sometime later by her husband and the police."[17] The Texas Court of Appeals found the bank vicariously liable, because "the duty to refrain from a breach of the peace is nondelegable and the employer cannot escape liability for the tortious performance of the independent contractor."[18]

Clients should be advised against using a public officer in a self-help situation. The infamous case of *Walker v. Walthall*[19] involved a secured creditor exercising self-help, but accompanied by a deputy sheriff, armed and in uniform. The debtor did not resist the repossession, and the deputy sheriff said nothing. However, the Arizona Court of Appeals held that the mere presence of the armed and uniformed deputy sheriff, who said and did nothing, was intimidating and by itself constituted "state action". The Court found that the deputy's presence, in effect, made the repossession a judicial action without proper notice or hearing.[20]

A different analysis was employed by the Washington Court of Appeals in *Stone Machinery Co. v. Kessler*,[21] where the creditor brought along an armed sheriff's officer to the repossession, though he had no writ of replevin. The court found that the presence of the sheriff without sanction of the court constituted "constructive force, intimidation and oppression" and was a misrepresentation of the creditor's actual authorization to proceed over the objections of the debtor.[22]

There is, however, authority for the proposition that the police may witness the repossession as long as the debtor is not present or arrives after the repossession has already taken place; in such circumstances, there is no danger that the debtor will be intimidated by the officer's presence.[23]

If moving the collateral is difficult, impractical or inconvenient, *Utah Code Ann.* Section 70A-9-503 allows the creditor to "render equipment unusable" and then to dispose of the collateral, by sale or otherwise, on the debtor's own premises.

A good rule of thumb is to retreat and use the courts where there is any resistance at all, whether verbal or physical, to entry of the premises for seizure of collateral. The advantage to be gained by using even a threat of force, or in simply being too clever, is not worth either the potential exposure or the risk of losing rights the creditor would otherwise have had.

[1] 655 P.2d 1125 (Utah 1982).

[2] *Id.* at 1129.

[3] *Id.* at 1127-30

[4] *Bloomquist v. First National Bank*, 378 N.W.2d 81 (Minn. Ct. App. 1985).

[5] Restatement (Second) of Torts, § 116 (1965):

"A breach of the peace is a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order."

[6] *See, McKee v. State*, 132 P.2d 173, 177 (Okla, 1942):

"To constitute a 'breach of the peace' it is not necessary that the peace be actually broken, and if what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required, nor is actual personal violence an essential element of the offense."

[7] *See, Girard v. Anderson*, 257 N.W. 400 (Iowa 1934).

[8] *See e.g., Laurel Coal Co. v. Walter E. Heller Co.*, 539 F. Supp. 1006, 1007 (W. D. Pa. 1982); *Riley State Bank of Riley v. Spillman*, 750 P.2d 1024, 1030 (Kan. 1988); *Henderson v. Security Nat'l Bank*, 140 Cal. Rptr. 388, 22 UCC Rep. Serv. 846 (Dist. Ct. App. 1977).

[9] *See, e.g., Kroeger v. Ogden*, 429 P.2d 781, 786 (Okla. 1967) (airplane repossessed from an open hangar); *Raffa v. Dania Bank*, 321 So.2d 83, 85 (Fla. Ct. App. 1975) (auto repossessed from a private driveway); *Gill v. Mercantile Trust Co.*, 347 S.W.2d 420, 423 (Mo. Ct. App. 1961) (auto repossessed from debtor's front yard).

[10] *Ragde v. People's Bank*, 767 P.2d 949, 951 (Wash. Ct. App. 1989).

[11] *Gregory v. First Nat'l Bank*, 406 P.2d 156 (Ore. 1965)

[12] 777 P.2d 468 (Utah 1989).

[13] *Id.* at 472. *See also Massey-Ferguson Credit Corp. v. Peterson*, 626 P.2d 767, 773-74 (Idaho 1980).

[14] 711 P.2d 708 (Colo. Ct. App. 1985).

[15] *Id.* at 713.

[16] 792 S.W.2d 530, 12 UCC Rep. Serv. 1169 (Tex. Ct. App. – El Paso, 1990).

[17] *Id.* at 531.

[18] *Id.* at 532.

[19] 588 P.2d 863 (Ariz. Ct. App. 1978).

[20] *Id.* at 866.

[21] 463 P.2d 651, 7 UCC Rep. Serv. 135 (Wash. Ct. App. 1970).

[22] *Id.* at 655.

[23] *Harris v. Cantwell*, 614 P.2d 124, 126 29 UCC Rep. Serv. 1097 (Ore. Ct. App. 1980).

DRIVING IN HIGH GEAR: How WordPerfect Can Prevent Mistakes in Legal Documents

By Mark J. Morrise

If a word processor were a car, it would not make sense to drive it in just first gear. Yet that is what happens when a word processor is used as just a computerized typewriter, i.e., to simply enter and revise text.

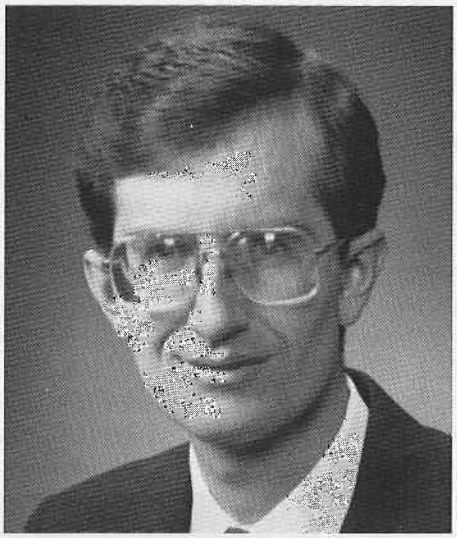
One of the most popular word processors in law firms today is WordPerfect.[1] Like other leading word processors, WordPerfect is a powerful tool that can do much more than simply enter and revise text. Among its capabilities is the power to automatically prevent mistakes in legal documents.

As an example of the type of mistakes that can be prevented, consider the following scenario:

It is Friday at 4:00 p.m. Attorney Smith's Motion for Summary Judgment is due today. As she reviews the final draft of her supporting memorandum of points and authorities, Smith discovers that:

- *The caption does not include a party that was recently added to the case.*
- *The page numbering starts at "3" instead of "1".*
- *Although a paragraph was inserted halfway through the "Undisputed Facts" section, the remaining paragraphs were not renumbered.*
- *The heading of the second point of her argument is split between two pages, with "Point II" appearing at the bottom of the first page, and the description of Point II at the top of the next page.*
- *Although a new month has begun, the date before the signature line still carries the previous month.*

For several years, I routinely encountered these types of mistakes in proofreading legal documents. Then in June 1991, my law firm invested in WordPerfect 5.1. At that time, I began to investigate how WordPerfect's features could help me in my practice.



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I found that several of WordPerfect's features will automatically prevent common mistakes in legal documents. For attorneys, this translates into reduced proofreading time, fewer drafts, and reduced cost to the client. Thus, implementation of these features directly benefits attorneys, whether or not they use WordPerfect themselves.

I also found that most of these features could be included in WordPerfect "macros," or pre-recorded series of keystrokes. This benefits WordPerfect users (either secretaries or attorneys) by making the features simple and fast to use.

Based on my experience, this article discusses several common mistakes in legal documents and how the features and macros in WordPerfect 5.1 can be used to prevent them. After reading this article, attorneys may want to give it to their secretary to implement the techniques discussed.

COMMON MISTAKES AND FEATURES TO PREVENT THEM

1. Typos and Misspelled Words.

The **Speller** feature (Control-F2), which detects and corrects typos and misspelled words, is well-known. This feature alone can significantly reduce an attorney's proofreading time.

Speller does not, of course, do away with the need for proofreading, since it will not detect an incorrect word that is correctly spelled (such as the substitution of "or" for "of"). But the misspellings it does catch easily justify the time it takes to use Speller.

2. Misnumbered Paragraphs.

A very useful feature for documents with numbered paragraphs, such as complaints, memoranda of points and authorities, or contracts, is **Paragraph Numbering** (Shift-F5, 5). This feature prevents misnumbered paragraphs by automatically renumbering all paragraphs whenever new paragraph numbers are inserted or old ones deleted.

Paragraph Numbering becomes much easier to use when it is included in a WordPerfect macro. As mentioned above, a "macro" is simply a pre-recorded series of keystrokes. (Macros can also include

macro commands, discussed below in section eight, "Lost Documents.") A macro is created using the **Macro Define** (Control-F10) feature, which first asks the user to identify the macro by either a name or an Alt-key combination. For example, a macro that inserts an automatic paragraph number could be called "NUM" or "Alt-N." The user can also give the macro a brief description. Thereafter, Macro Define records the user's keystrokes until Macro Define is terminated by pressing Control-F10.

To invoke a macro, i.e., play back the pre-recorded keystrokes, the **Macro** (Alt-F10) feature is used. If the macro was identified by a name, the macro is invoked by pressing Alt-F10, typing the macro name, and pressing the Enter key. If the macro was identified by an Alt-key combination, then the macro is invoked by simply pressing that combination.

The obvious benefit of macros is to reduce the number of keystrokes required to perform routine tasks. For example, if Paragraph Numbering is recorded as a macro called "Alt-N," the number of keystrokes required to use that feature is reduced from five to two, a savings of three keystrokes. When this savings is multiplied by the number of times a secretary uses Alt-N in one day, it can easily amount to 600 or more keystrokes.

One other feature of Paragraph Numbering should be mentioned. Some documents, such as complaints, have more than one sequence of numbered paragraphs. Paragraph Numbering accommodates this situation with the Define feature (Shift-F5, 6, 1), which allows the user to reset the paragraph number to one at any point in the document.

3. Splitting Blocks of Text Between Pages.

There are certain blocks of text that attorneys prefer to keep on the same page. Examples include signature blocks, notary blocks, certificates of service, and multi-line headings in memoranda of points and authorities. Although allowing the block to split between two pages may not technically constitute a mistake, it at least looks poor as a matter of style.

Ordinarily, such splitting of text blocks is corrected in the final draft by manually positioning the text with hard returns or hard page breaks. But sometimes last minute changes to the document can undo this careful positioning, resulting in unwanted page breaks that either are missed in proofing or require re-positioning.

The **Block Protect** feature (Block Text, Shift-F8) automatically prevents a selected block of text from being split between two pages. Once set up, it does away with the need to manually position that block before printing the final draft.

The use of Block Protect can be made automatic through macros. For example, the macro that creates a certificate of service block can be set up to automatically protect that block. This makes the Block Protect feature invisible to the user, who does not even realize it has been used.

A related feature is **Conditional End of Page** (Shift-F8, 4, 2), which protects a specified number of lines from being split between pages. This feature works well only when the number of lines in the block cannot change.

Another related feature is **Widow/Orphan** (Shift-F8, 1, 9), which you do not have to be an estate planning attorney to use. This feature guards against solitary lines, sometimes referred to as "widow" or "orphan" lines, at the top or bottom of a page. Use of this feature can also be made automatic by including it in a document set-up macro (explained in the next section).

4. Pagination Mistakes.

Two common types of pagination mistakes in legal documents are (1) the failure to paginate a document at all, and (2) misnumbered pages. The first type of mistake occurs when the page numbering code is inadvertently omitted at the beginning of the document. The second type of mistake occurs when the user combines two legal documents (such as a motion followed by a memorandum) into a single word processing "document," and forgets to reset the page numbering at the beginning of the second legal document to one. WordPerfect numbers the pages of the second legal document as a continuation of the first, so that the second document does not start with page one.

The way to guard against these mistakes is to begin each document with a document set-up macro that automatically uses the **Page Numbering** feature (Shift F-8, 2, 6) to paginate the document and set the page number to one. Such a set-up macro can also suppress the page numbering on the first page, turn on the Widow/Orphan feature discussed above, and perform other routine document set-up tasks. When such set-up macros are used for pleadings, letters, and memos, they will virtually eliminate pagination mis-

takes in those documents.

An alternative to using macros for document set-up is the **Style** feature (Alt-F8) which inserts a pre-defined "style," or series of feature codes, into the document. The main drawback to Style is that unlike feature codes inserted by macros, its feature codes cannot be displayed or deleted within the document.

5. Incorrect Dates.

Many types of legal documents, including letters, pleadings, and contracts, include the document's date either at the beginning or before the signature line at the end. If such a document is not completed the day it is begun, the user must manually update the document's date before printing the final draft. Occasionally, such updating is overlooked.

WordPerfect's **Date** feature (Shift-F5) frees attorneys and secretaries from ever having to watch for incorrect document dates. This feature allows the user to insert into a document a "Date Code", which is automatically updated each day by the computer's internal date/time clock.

The Date Code can appear in any format the user chooses. For example, a Date Code at the beginning of a letter can be defined to appear as "January 1, 1993," "01/01/93," or "1-1-93." In a pleading, a Date Code can be defined to appear as "January, 1993" for use in the phrase "the____day of January, 1993."

Like some of the features previously discussed, the use of Date can be made invisible to the user when it is included in a macro. For instance, the Date Code for "(month), (year)", which takes nine keystrokes to manually set up, can be made automatic by including it in a macro that inserts the phrase "Dated this _____ day of (month), (year)," Similarly, the Date Code at the beginning of a letter can be included in a letter set-up macro, and the Date Code in a certificate of service can be included in a certificate of service macro.

For the Date Code to work properly, the computer's internal date/time clock must of course be properly set. Ordinarily this is not a problem, because the internal clock automatically advances each day. If for some reason a user does experience problems with the internal clock, he or she should manually set the date and time at the beginning of each day to ensure that the Date Code is correct.

The use of Date Code has one slight disadvantage. After a document is signed and sent, WordPerfect continues to update the Date Code each day. If the document is subsequently displayed on the computer screen, it will show the current day's date and not the date it was signed. To see the date the document was signed, the user must either pull a paper copy of the document from the file or check the "Revision Date" using the **List Files** (F5) feature.

6. Problems with Page Headings in Letters.

A common format in business letters of more than one page is to place a three-line heading in the upper left-hand corner of each page except the first. Such a letter page heading usually includes the name of the recipient, the date of the letter, and the page number. Many attorneys prefer these headings because they give letters a professional look.

When done manually, letter page headings present some problems. One is that they may need to be manually repositioned if revisions are made which move the headings up or down. A second is that

the date on each page may need to be manually updated. A third is that the pages may need to be manually renumbered.

The **Header** feature (Shift-F8, 2, 3) solves these problems by allowing the user to create a page heading that will automatically appear in the upper left corner of each page. When creating the heading, the user inserts a Date Code instead of manually typing the date, so that the date will be automatically updated. In addition, the user types a Control-B (^B) character in place of the page number. WordPerfect automatically substitutes the correct page number for the Control-B character at the time the letter is printed.

The **Suppress Page Format** feature (Shift-F8, 2, 8) allows the user to suppress this header on the first page of the letter.

The creation of such page headings can be made invisible to the user by including the Header feature in a letter set-up macro. This approach can save about 80 keystrokes each time a letter is created.

7. Problems with Pleading Captions.

Pleading captions present two distinct problems. The first problem stems from the fact that when a pleading is created, the user will typically locate a prior pleading in the same case and copy the caption from that pleading. The problem with this method arises when the prior caption happens to not be the most recent version. Changes in subsequent versions, such as the addition of new parties, do not get picked up. Similarly, if the prior caption contains mistakes that were corrected in subsequent versions, the old mistake gets reintroduced. For example, an incorrect case number which had been corrected could reappear.

The solution to this problem is to store the caption to each case as a separate document. All revisions and changes to the caption are first made to this document. Then, when the user wants to create a new pleading in that case, he or she brings the caption document into the pleading using the **Retrieve** (Shift-F10) feature. Therefore, all revisions and changes are automatically picked up in the new pleading.

The foregoing approach works best when a separate WordPerfect directory is set up for each client/matter. Such a directory structure allows the user to name each caption document the same name, such as "CAPTION." Retrieving the caption for a given client/matter is then as simple as changing the default directory to that client/matter (F5, =), using the Retrieve feature, and entering "CAPTION."

A second, separate problem with pleading captions arises because of the caption's unique two-sided format, which makes revising the left side of the caption quite difficult. When revisions to that side result in a line being shorter or longer than it originally was (which usually is the case), then each subsequent line must be manually adjusted for the decrease or increase in length. This is a difficult, time-consuming task.

When faced with this task, the user may elect to simply retype the entire caption rather than revise an existing caption. Retyping the caption, however, allows new mistakes to be made. The attorney may not proofread for such mistakes because he or she does not even know that the caption was retyped.

The solution to this problem is to use the **Columns** (Alt-F7, 1) feature to create captions. In this feature, the user first defines a column format consisting of three parallel columns. The first column is the left side of the caption; the second is the center line; and the third is the right side. When created in this fashion, a caption is very simple to revise, because the text on each side of the caption "wraps" independently of the other side. The insertion of parties to the left side, for example, simply pushes the text down to that side. No manual readjustment is required.

Using Columns the first time is a little tricky. The user must set the column margins and distance between columns, and some experimentation is required to arrive at the right settings. Resort to the WordPerfect reference manual may be necessary. Once the correct settings have been determined, however, the use of Columns can be made very easy by including it in (you guessed it) a macro. Such a macro greatly reduces both mistakes in captions and the time required to create and revise them.

An alternative method for setting up easy-to-revise captions is to use the **Table** (Alt-F7, 2) feature. A table is created with two columns and one row. Initially, it looks like a rectangle with a line down the center. The Table feature, however, allows the user to delete the lines on the sides, top, and bottom of the rectangle, so that only the center line remains. The caption information is then entered in the left and right cells of the table. This approach has both advantages and disadvantages compared to Columns.

8. Lost Documents.

A document can get lost on the computer when the user does not know the directory where the document is saved or the document's computer file name (e.g., "MOTION.MSJ.") This may ultimately require the document to be retyped.

A simple way to avoid this situation is to institute a policy at the end of every document, the document's directory and file name is typed. This document "I.D." can be printed in small type so that it is unobtrusive.

In WordPerfect 5.1, the document I.D. procedure can be automated by setting up a very simple "ID" macro, as follows:

{SYSTEM}path~{SYSTEM}name~

The ID macro automatically inserts the current document's directory (called its "path" in computer jargon) and its file name into the document. Before invoking the macro, the user positions the cursor at the end of the document. Of course, the ID macro will not work until the document has first been saved.

Unlike the macros described previously in this article, the ID macro is not a prerecorded series of keystrokes. It contains a macro command, "{SYSTEM}," repeated twice. To create this macro, the WordPerfect macro editor must be used. The user first presses the Home key, then presses Control-F10. WordPerfect asks for a macro name and a description. WordPerfect then displays a screen with the macro name and description at the top and a large box in the center. To place the {SYSTEM} command inside the box, the user presses Control-PgUp, types "system", and presses Enter. The user then types "path," followed by a tilde (~). The user then repeats the process, but instead of typing "path" types "name." Finally, the user presses F7 to exit.

The ID macro can be enhanced to automatically display the document I.D. in small type and to automatically go to the end of the document.

IMPLEMENTATION ISSUES

If an entire law firm decides to implement the macros discussed above, several issues will need to be addressed. First, even though macros directly benefit the law firm, WordPerfect users may not use the macros unless they are trained to do so. One way to address this issue is to hold lunch time seminars for all WordPerfect users to learn about the macros available to them. Also, for firms with a network, a list of such macros can be made available on the network. If a user forgets a macro name or function, he or she can simply look it up on the list.

A second issue is that many legal secretaries already use macros and may have already assigned all their Alt-key combinations to existing macros. One solution to this problem is to give all new macros names. The secretaries can either use them by name or assign a Control-key combination to the macro using the **Keyboard Layout** (Shift-F1, 5) feature. If secretaries are not using Keyboard Layout, they should have all their Control-key combinations free to assign to macros.

A third issue is to decide who will create and maintain the macros. If a standardized set of macros is to be implemented firmwide, then a logical choice would be to choose just one or two persons to do this, and then channel all requests for changes in the macros through them. If a firm needs outside assistance, there are consultants who specialize in creating and implementing WordPerfect macros.

CONCLUSION

Legal documents are often an attorney's primary work product. The features and macros discussed above offer a systematic method of improving the quality of that product. When a firm uses its word processor in "high gear," attorneys, secretaries, and clients will all benefit.

[1]WordPerfect is a trademark of WordPerfect Corporation.

Profile of Honorable Bruce S. Jenkins

By Terry E. Welch

BACKGROUND

Chief Judge Jenkins grew up locally and attended East High School. Jenkins' father was a teacher and Jenkins dreamed in his early years of becoming a professor. Jenkins, instead, opted for law school, always intending to practice upon graduation. Jenkins lists the fact that his brother was a practicing attorney and his mother a court reporter as influential in his choice of the legal profession. Jenkins' brother later became a member of the National Labor Relations Board.

Upon graduation from law school, Judge Jenkins entered private practice and became an astute general practitioner and litigator, handling a wide spectrum of cases. At the age of 31, Jenkins was appointed a Utah State Senator and, after being re-elected, became President of the Senate at the age of 36. Jenkins says that his experience in the senate helped prepare him for the policy and decision-making responsibilities associated with judging as well as the organizational and administrative responsibilities associated with his position as chief judge. Jenkins unmistakably enjoys his role on the bench. In fact, he states without hesitation that he finds it much more pleasant than he found private practice.

Chief Judge Jenkins states that he has "the finest judicial job in the world." "I thoroughly enjoy what I do," he states good-naturedly. Jenkins lists three aspects of his current position as among the most enjoyable. First, assisting people to resolve problems that they have been unable to resolve among themselves is both challenging and rewarding. Second, Jenkins states that "the world drops in to say 'Hello'." People from all walks of life, including people of amazing accomplishment, pass through the courtroom each year. Thus, judging provides an excellent educational opportunity. Finally, Jenkins genuinely enjoys working with his clerks — all of whom are members of his "alumni association" which tries to meet at least once each year.

Honorable Bruce S. Jenkins
Chief Judge — United States District Court
District of Utah

Appointed:	1978 by President Carter, became Chief Judge in December, 1984
Law Degree:	1952, University of Utah
Practice:	General Practice including construction and communications law
Law Related Activities:	State Senator at age 31; President — State Senate at age 36; Member — Inns of Court; President — Federal District Judges Association for the Tenth Circuit; Tenth Circuit Representative — National Federal Judges Association; Alumni Board — University of Utah College of Law; Member of Committee appointed to study issues of sovereignty between states and Indian Tribes; Member, Advisory Committee Center for Health Policy Research — George Washington University on Science in the Courtroom; Former Adjunct Professor, University of Utah; Fellow — American Bar Association.

Without question, Jenkins states, the least enjoyable, most demanding and most difficult aspect of his job involves sentencing criminals and the sentencing process. The Federal Sentencing guidelines have severely slowed the administrative process and have resulted in the mechanical application of rules designed to fit people within predetermined categories. In addition, while the guidelines purportedly were designed to increase efficiency, they actually have required increases in staff and procedures.

For example, Jenkins states that what used to take approximately three weeks to complete, now requires a minimum of six weeks, sometimes eight. While the district court in Utah used to employ 16 probation staff personnel, they now require 23. Finally, Jenkins states that while the guidelines purportedly eliminated or substantially reduced discretion, they, in fact, simply transferred the discretion from the judge to the prosecutor. This is true because the precise nature of the charge determines, to a large extent, the sentence that must be given. It is difficult to fully promote "justice" (i.e., to treat like cases alike and different cases differently) under such a system.

Since becoming Chief Judge in 1984, Jenkins has overseen dramatic changes in the court. Under Jenkins' direction, the court recently provided new Local Rules to all active members of the bar. Jenkins currently has administrative responsibilities for a court family of more than 125 persons, an extensive and almost completed building program at the courthouse and the automation of the district court's record-keeping system.

VIEWS ON LEGAL SYSTEM

Chief Judge Jenkins is a "great fan of our legal system." Our system, he states, really is like no other system in the world. Jenkins believes that, by and large, the legal system has done a superb job with the tools it has and that it historically has been the stabilizing factor in our society. Jenkins also is a fan of the jury system — which he lists as among our system's greatest strengths. The Utah District Court routinely conducts written surveys of jurors after they have served on a jury to determine, among other things, what improvements could be made in the system. Jenkins states that in all the time he has been on the bench, not one juror ever

has expressed a negative feeling in writing about the system itself. They uniformly are proud to have been a part of the process — and they stand in wonderment of the process. Perhaps this is because the jurors have a much better understanding of the system and why it works after having served on a jury than do most Americans. Along that line, Jenkins notes that public education could take a more active role in educating young people about their legal system to help them understand that it actually works quite well.

Chief Judge Jenkins believes that the system, particularly the state system, has been on "rations" for too long and is being starved. The state system has all the tools it needs to accomplish its intended ends if the various states simply would provide the necessary funding. The tremendous effort for so-called "Alternative Dispute Resolution" (ADR) really is unfair in Jenkins' opinion, because the state system, if inadequate, (and it is adequate in many respects) simply has not been furnished the requisite means. Jenkins feels strongly that all of the "new" ideas and approaches that collectively make up the various ADR mechanisms, in reality, are not new at all. All of these approaches — he stresses — exist, perhaps potentially with greater efficiency, within the current system.

Perhaps we should rethink the system's direction somewhat and funnel our energies into ensuring that the state system has the funding it requires to adequately accomplish its purposes including the just and efficient resolution of small matters. Such a focus on adequate funding of the existing system would obviate the need for many so-called "new ideas."

STRATEGY FOR SUCCESS BEFORE JUDGE JENKINS

Chief Judge Jenkins believes that the quality of litigators in Utah is among the best in the country. Jenkins does, however, offer a word of advice to some of the best attorneys: Do not feel compelled, as the senior partner, to argue a case or motion when the junior attorney clearly has done the bulk of the work in preparation. On occasion, Jenkins states, it is obvious that the junior attorney more effectively could argue the case — let them.

Jenkins also stresses that the failure to listen to and accept the court's ruling is a common mistake, one that frequently is made by out-of-state counsel. Once the court has ruled, do not attempt to re-argue. If you believe the court simply is wrong, take your argument up on appeal. There is no justification for argument after the fact.

Finally, Chief Judge Jenkins stresses that all attorneys should view the litigation process as an educational process and not to liken it to a "war," a "battle," or a "game." The use of such inappropriate and inaccurate metaphors, in Jenkins opinion, are damaging to attorneys and to the system as a whole. On the other hand, viewing oneself — the attorney — as a teacher, the judge or jury as the pupil and the process as an education can positively impact one's attitude and will better the system, the process and — perhaps — the result.

Jenkins encourages new attorneys to come down on occasion to observe trials in action. Such observation can be a great learning experience. Jenkins also encourages attorneys or others with questions concerning procedures in his courtroom to call his secretary or clerks. On the other hand, Jenkins stresses, they are not there to give legal advice or to render an opinion.

OUTSIDE ACTIVITIES

Chief Judge Jenkins enjoys traveling with his wife, so long as it is not job-related — a form of travel he engages in extensively. Jenkins is an avid book collector and owns a wide variety of books and literature from all around the world comprising a large private library. Jenkins loves books — particularly those not directly related to law — and he loves collecting and reading books on a myriad of subjects. Favorite works are numerous and include Wendell Johnson's "People in Quandaries" and a compilation of essays by Sydney Harris, a former essayist for the Chicago Daily News. Jenkins also is interested in photography.

CLAIM OF THE MONTH

Alleged Error or Omission

The Insured attorney allegedly failed to investigate the credit worthiness of a prospective borrower who was to borrow money from the Insured's client. Additionally, the Insured allegedly failed to secure the loan.

Resume of Claim

The Insured represented a client who informed the Insured that he was contemplating making a loan to a business and desired to ascertain both the credit worthiness of the prospective borrowers as well as be certain that the loan would be secured so that, in the event of default, the client could protect himself and obtain repayment of the loaned funds. Shortly after the loan was made, the borrowers defaulted by failing to the make the requisite payments. It is alleged by the claimant that the borrowers were on rather shaky financial ground when the loan was made and that the Insured failed to discover this fact through a prudent, necessary and thorough examination of the borrower's financial condition. Further, the loan was not secured.

How Claim May Have Been Avoided

This claim might have been avoided if the Insured had scrupulously and thoroughly investigated the financial condition of the borrowers. This would have allowed the Insured to determine whether the prospective borrowers where a good loan risk, thereby providing the necessary information for the client in order to determine whether said client would or would not make the loan. Clearly, once the decision was made by the client to make the loan, the Insured should have made certain that it was fully secured by sufficient collateral in order to protect the client's interests and assure replacement.

The investigation of the borrowers should have been conducted in a thorough and painstaking manner. The investigation, and all conclusions drawn from it, should have been memorialized in a letter to the client – both as the means for the client to make the most informed decision possible and for the Insured to protect himself against later claims that a thorough investigation had not been made. Also the Insured should have discovered the existence of collateral to secure the loan and completed the necessary work to perfect the security interest of his client.

Commission Highlights

During its regularly scheduled meeting of April 30, 1992, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the Commission meetings of March 12, 1992 and March 13, 1992 were approved with minor revisions.
2. Jim Davis reported that an ad hoc Court Reorganization committee made up of Helen Christian, Gilbert Athay, Bill Bohling, Debra Moore and Dennis Haslam has been created to help coordinate the Bar's involvement in court reorganization.
3. Haslam recapped the April 27, 1992 Judicial Council meeting, distributed copies of the agenda, and commented on items of particular note.
4. The Board voted to encourage the Court Transition Committee and the legislature to study the Minnesota Court consolidation plan as a true consolidation as opposed to creating a "second-tier" system.
5. The Board discussed the Judicial Council's proposed Rule 4-806 for selection of guardians and asked Baldwin to have the Family Law Section review the proposed rule.
6. The Board voted to approve the creation of a Collection Law Section with the provision that Bar Counsel review the new section Bylaws to be sure they are consistent with current Bar-approved section Bylaws.
7. The Board voted to support the work of the National Conference of Commissioners on Uniform State Laws (NCCUSL).
8. Baldwin reported that the Law & Justice Center Board of Trustees is awaiting a tax opinion regarding issues related to property tax payments and the effect of dissolution on the contributions made to the Center.
9. Baldwin reported that the Bar has discontinued mailing Bar Journals to non-paying subscribers.
10. Baldwin reported on the status of the Bar Commission election and noted that as of April 30th there was only one candidate running uncontested in the Second District and four candidates running in the Third District.
11. The Board voted to approve the Awards Committee nominees as submitted.
12. Baldwin referred to the Budget & Finance Committee report exhibit. After discussion, by the Board and based on current available figures, the Board directed the Financial Administrator, Arnold Birrell, to immediately make another principal payment of $100,000 on the mortgage.
13. Steve Kaufman, Chair of the Unauthorized Practice of Law Committee, reported that the committee feels strongly that it should continue to screen unauthorized practice of law (UPL) cases. The committee also suggested that the Bar upgrade the level of importance of UPL cases.
14. The Board voted to authorize the purchase of computer network equipment for the Office of Bar Counsel.
15. The Board voted to accept the Character & Fitness Committee's recommendation to grant reinstatement to a petitioner who had complied with all terms of suspension and to grant admission to the Utah State Bar to a Bar applicant who had successfully met the Character & Fitness requirements.
16. The Board voted to adopt the February 1992 Bar examination scores and to admit the passing applicants to the Utah State Bar.
17. The Board assigned an ad hoc committee to reconsider the current Admission Rule which allows out-of-state applicants to carry forward MBE scores for a two year period but did not make the same allowance for in-state applicants.
18. Dr. Marlene Lehtinen appeared and distributed a status report on the Utah Dispute Resolution program and explained the progress made to date. She reported that fourteen volunteer mediators had been trained for the program, and the success rate of mediating parties reaching agreement is about 85%.
19. Barbara Algarin and Don Roney, of Rollins Burdick Hunter presented a status report on the Bar professional liability program.
20. The Board voted to give approval to the Member Benefits Committee to further investigate a cellular phone purchase program and to present the recommendation to the Board for approval.
21. Charlotte L. Miller reported that the Young Lawyer Section Officer election would be held concurrently and jointly with the Bar Commission election.

During its regularly scheduled meeting of May 28, 1992 the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the commission meeting of April 30, 1992 were approved.
2. The Board voted to appoint Herm Olsen and Reed W. Hadfield to the First District Trial Court Judicial Nominating Commission as commissioners and Omer J. Call and L. Brent Hoggan as alternative commissioners.
3. The Board voted to appoint Kathleen M. Nelson and Brian R. Florence as commissioners to the Second District Trial Court Judicial Nominating Commission and Douglas M. Durbano and Felshaw King as alternative commissioners.
4. The Board voted to appoint Michael N. Martinez and Barbara K. Polich as commissioners to the Third District Trial Court Judicial Nominating Commission and Robert H. Henderson and John Paul Kennedy as alternate commissioners.
5. The Board voted to appoint Brent D. Young and D. David Lambert as commissioners to the Fourth District Trial Court Judicial Nominating Commission and M. Dayle Jeffs and Ray Phillip Ivie as alternate commissioners.
6. The Board voted to appoint John W. Palmer and David Nuffer as commissioners to the Fifth District Trial

Court Judicial Nominating Commission and Willard R. Bishop and Dale W. Sessions as alternate commissioners.

7. The Board voted to appoint Tex R. Olsen and Paul R. Frischknecht as commissioners to the Sixth District Trial Court Judicial Nominating Commission and Richard K. Chamberlain and Michael R. Labrum as alternate commissioners.
8. The Board voted to appoint L. Robert Anderson, Sr., and Margret Sidwel Taylor as commissioners to the Seventh District Trial Court Judicial Nominating Commission and Dan C. Keller and Michael A. Harrison as alternate commissioners.
9. The Board voted to appoint Kenneth G. Anderton to fill the remainder of the term of Clark Allred on the Eighth District Trial Court Judicial Nominating Commission.
10. The Board voted to appoint Harry H. Souvall and Kenneth G. Anderton as commissioners to the Eighth District Trial Court Judicial Nominating Commission and John C. Beaslin and Machelle Fitzgerald as alternate commissioners.
11. The Board voted to reappoint Reed M. Martineau as the Bar's representative to the ABA for another two-year term.
12. The Board voted to appoint James B. Lee to serve a four-term as the Bar's representative on the State Executive and Judicial Compensation Commission.
13. The Board voted to approve proposed chairs to the various Bar Committees. Randy Dryer indicates the Bar would be publishing in its Rules Directory a listing of the committees with their chairs and members in addition to the various Bar rules.
14. The Board voted to approve new Bar Journal advertising rates.
15. Ray Uno, Mike Martinez, Robert Archuleta, James Esparza and Robert Booker appeared before the Commission to discuss formalizing the relationship between the Minority Bar Association and the Commission and to involve Minority Bar members into existing Bar Sections and Committees. The Board voted to give the Minority Bar Association an ex-officio membership on the Commission.
16. Charlotte Miller and Keith Kelly, President-Elect of the Young Lawyers Section, appeared to outline the proposed operating budget for the Young Lawyers Section for the next fiscal year.
17. Mike Hansen referred to the Budget & Finance report and the monthly financials exhibit, and Arnold Birrell, Financial Administrator, appeared and answered questions.
18. Randy Dryer referred to the proposed 1992-93 Budget which had been mailed May 15 to the Bar Commission. The Board voted that the budget be approved as a preliminary budget and that it be made available for review by the Bar membership as indicated in the May Bar Journal.
19. Dennis Haslam outlined issues which were discussed by the Judicial Council at his last meeting. The Board voted that the Commission communicate to the Judicial Council its belief that lawyers, judges and commissioners on the various court transition teams be allowed to vote on official actions of the teams.
20. Dennis Haslam indicated that the Admissions Committee had met to discuss a modified Rule 9-1 regarding the transfer of MBE scores from out-of-state applicants. The Commission voted to adopt a proposed Rule 9-1 to read: Scores achieved on the Multistate Bar Examination (MBE) administered in a jurisdiction other than Utah will not be accepted unless the examination is taken concurrently with the Utah Examination.

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

Estate Planning Fall Institute Announced

The Estate Planning Section of the Utah Bar invites all those who are involved or interested in estate planning to attend the Salt Lake Estate Planning Council's Fall Institute. The institute will be held October 30, 1992 from 8:00 a.m. to 5:00 p.m. at the Little America Hotel in Salt Lake City.

This institute promises to be an outstanding event with excellent speakers scheduled.

The first speaker in the morning session will be Charles Bennett, JD, with the law firm Callister, Duncan & Nebeker in Salt Lake City, Utah. Mr. Bennett will discuss "When a Fiduciary's Agent Errs: Who pays the bill – Fiduciary, Agent or Beneficiary?"

After the morning break, Alden Tueller, JD, of Provo, will discuss "Recent Developments in Planned Giving". Mr. Tueller is Assistant to the President at Utah Valley Community College and a member of the board of the National Committee on Planned Giving.

Jonathan Blattmachr, JD, will address institute attendees. Mr. Blattmachr is with Milbank, Tweed, Hadley & McCloy of New York City, one of the largest law firms in the country. He will discuss "Recent Developments Under Chapter 14".

Ed Ahrens, JD, Director of Family Wealth Planning for the Pacific Northwest with Arthur Anderson & Co. in Boise, Idaho, will be the first afternoon speaker. He will discuss, "Practical Uses of Trusts in Generation Skipping Planning".

Following the afternoon break, Tim McDevitt, JD, with the law firm Cairncross & Hempelmann of Seattle, Washington, will discuss "Insurance in Estate Planning - Where Does it Fit"?

Jonathan Blattmachr, JD, will then cap the afternoon off with a presentation on "Post-Mortem Planning".

There will be time allowed for questions and answers with all the speakers. Lunch will also be provided.

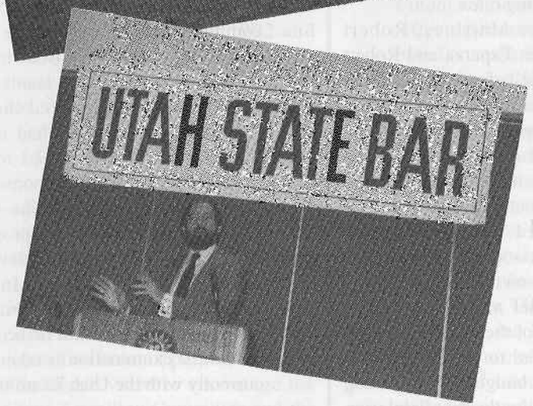
The cost for the institute is:

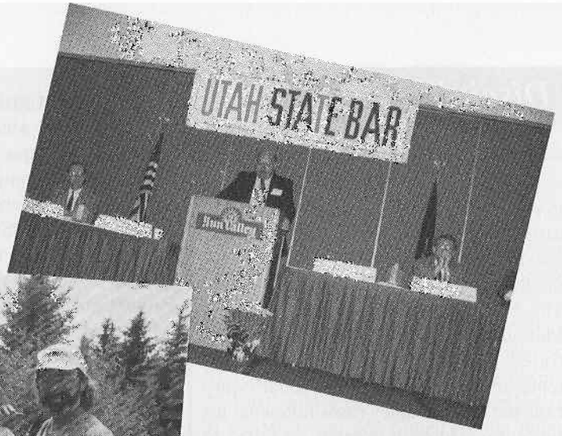
$ 80.00	Salt Lake City Estate Planning Council Members
$100.00	Salt Lake City Estate Planning Council Non-Members

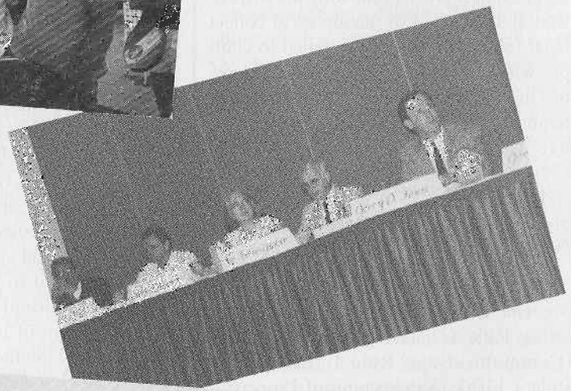
($11.00 additional for CLE Credits)

For additional information, please call Committee Chairman, Blair Whiting, at (801) 266-5611

Activities at the 1992 Annual Meeting







Discipline Corner

DISBARMENTS

El Ray F. Baird was disbarred pursuant to stipulation on June 16, 1992, for continuing to practice law in violation of a previous Order of Discipline entered by the Supreme Court on November 6, 1991. The evidence submitted in support of a Motion for Order to Show Cause substantiated that Respondent continued to represent his clients in a personal injury case and in bankruptcy cases following his suspension. In each instance he failed to notify his clients he had been suspended, accepted new clients following his suspension and collected or attempted to collect legal fees. Additionally, he failed to comply with Rule XVIII(a) of the Procedures of Discipline of the Utah State Bar which requires that within 20 days of the effective date of his suspension he notify his clients of his suspension, return client files and within 40 days of his suspension file proof of compliance with this Rule with the Supreme Court.

Jay W. Fitt was disbarred by the Utah Supreme Court on June 25, 1992, for violating Rule 1.3, (Diligence), Rule 1.4, (Communication), Rule 1.5(a), (Fees), Rule 1.13(b), (Safekeeping of Property), and Rule 8.4(c), (Misconduct), of the Rules of Professional Conduct. These violations stemmed from accepting fees from clients to represent them in criminal matters and, thereafter, providing no legal services. On September 24, 1990, he accepted $2,500.00 to represent a client in his appeal of drug related charges but did not file the appeal. In October 1989, Mr. Fitt accepted $25,000.00 from the parents of an inmate in the Utah State prison. No meaningful legal services were provided. On August 1, 1990, Mr. Fitt accepted a fee of $20,000.00 to represent another prisoner in Utah State Prison seeking to have his conviction overturned. In this instance $5,000.00 was to be kept as a retainer and the balance of the funds were to be placed in Mr. Fitt's trust account and withdrawn upon consent of the client as legal services were provided. Mr. Fitt failed to deposit the money in the trust account and performed no legal services. Mr. Fitt has been ordered to make restitution to these clients as a condition precedent to readmission to the Bar.

SUSPENSIONS

On May 19, 1992, the Supreme Court entered an Order suspending John R. Bucher from the practice of law for a minimum period of 6 months and 1 day pursuant to Rule XIX, SUSPENSION FOR DISABILITY, of the Procedures of Discipline of the Utah State Bar. This Order was entered pursuant to Discipline by Consent wherein Mr. Bucher stipulated to this action in settlement of the complaints, described hereinafter, which charged that he violated Rules 1.3, (Diligence), Rule 1.7, (Conflict of Interest), Rule 1.13(b), (Safekeeping of Property), Rule 1.14, (Declining or Termination Representation), and Rule 8.4(c) (Misconduct).

Case number 1 involved the allegation that upon learning that he had a conflict of interest in a domestic relations matter, he failed to withdraw from the case or take action to adequately protect the client's interests including returning the client file and arranging for new permanent counsel. Consequently, counsel failed to appear on behalf of the client at a Show Cause hearing which operated to the detriment of the client. Additionally, when the client requested return of the unearned attorney's fees they were not then available having not been separately maintained and preserved as required by Rule 1.13.

Case number 2 alleged improprieties involving the use of his trust account and involved a situation wherein Respondent placed funds in his account in connection with the sale of a client's personal property stemming from a domestic relations matter. All of the funds were not available when requested by the client and a full accounting of the funds was not provided. Respondent has since made complete restitution to the client in the amount of $810.00

Case number 3 involved the representation of clients in criminal matters who had interests in conflict with each other. One of the clients was charged with burglary which was the means whereby he supported a drug habit. The other client was a suspected supplier of drugs to Respondent's other client. This dual representation prevented Respondent's first client from entering a plea bargain which included testimony against his drug supplier.

Jerald N. Engstrom was placed on indefinite interim suspension by the Supreme Court on June 25, 1992, pending final disposition of disciplinary action currently pending against him as a result of his conviction on January 31, 1991, in the United States District Court, District of Utah, of 5 counts of Misapplication of Funds by a Bank Officer. The conviction arose when Mr. Engstrom became involved with a group of people who were forming a corporation to purchase the IML terminal when that company was in bankruptcy in 1984. Mr. Engstrom had an interest in the transaction in that it was proposed that he would be an officer and general counsel in the new corporation. The purchase was to be facilitated through the bank where Mr. Engstrom was employed. Mr. Engstrom represented to the bankruptcy trustee, as a representative of the bank, that funds totaling $250,000.00 had been deposited in his bank by the proposed purchasers of the terminal when in truth and in fact no such funds were deposited. This ultimately caused Mr. Engstrom to have to pay $256,712.67 to the trustee of bank funds for which no corresponding deposit had been made. Through other fund manipulations by Mr. Engstrom relating to this transaction his bank ultimately lost the sum of $2,081,712.00.

PUBLIC REPRIMANDS

On June 9, 1992, the Supreme Court entered an Order Publicly Reprimanding Gary J. Anderson. Mr. Anderson was charged with violating Rules 1.3 (Diligence) and 1.4(a) (Communication) in that he was retained in November 1989 by the Complainant to file and complete an uncontested divorce. The case was finally concluded on January 8, 1991 following a default hearing. Mr. Anderson denied the allegations of the disciplinary complaint but his Answer was stricken, default entered and a sanction imposed for his failure to respond to discovery requests filed by Office of Bar Counsel and his failure to participate in a pre-trial conference.

Arden E. Coombs was publicly reprimanded for violation of Rule 1.3, (Diligence), and Rule 1.4(b), (Communication), of the Rules of Professional Conduct. On or about June 15, 1988, Mr. Coombs agreed to represent two clients in a civil suit which had been filed against them in the Circuit Court of Weber County. Mr. Coombs failed to file a timely Answer to the Complaint resulting in a

Default Judgment. Mr. Coombs filed a Motion to Vacate the Judgment but the motion was denied. Judgment was entered against his clients in the amount of $3,724.36.

PRIVATE REPRIMANDS

An attorney was privately reprimanded and placed on one year supervision by a Screening Panel for violating Rule 1.13 (Safekeeping of Property) of the Rules of Professional Conduct. Prior to April 1990, the attorney was retained to defend the client in several criminal matters. The client was ultimately incarcerated. In April of 1990, the attorney agreed to manage the financial affairs of the client through the use of the client's First Security Bank ATM card during the incarceration. From April Through July of 1990 and again October through December of 1990 the attorney and individuals under his control made numerous withdrawals using the ATM card, failing to provide an accounting notwithstanding the client's repeated requests. There was conflicting testimony as to the validity of the document purporting to give the attorney a limited power of attorney pursuant to which the withdrawals were made. The attorney kept no ledger regarding payments made to third persons on behalf of the client. Should the attorney fail to comply with the terms and conditions of the supervision the matter will be reconsidered by the Screening Panel for imposition of a formal complaint.

An attorney was privately reprimanded and ordered to make restitution for violating Rules 1.3 (Diligence), 1.4 (Communication) and 1.13(b) (Safekeeping Property) of the Rules of Professional Conduct of the Utah State Bar. The attorney was retained in August 1990 to file a complaint involving a contract dispute. The attorney researched the issues and concluded there was no cause of action. However, he failed to communicate his opinion to the client and failed to refund the unused portion of the retainer fees notwithstanding the client's written demands.

An attorney received a Private Reprimand for violation of Rule 1.3, (Diligence), and Rule 1.13(b), (Safekeeping of Property), of the Rules of Professional Conduct. The attorney was retained on or about January, 1990, to represent a client in a bankruptcy matter. Respondent failed to inform a collection agency of the filing of the petition for bankruptcy which resulted in garnishment of the client's payroll check. Additionally, the attorney deposited $944.75 belonging to the client into a trust account on or about October 18, 1990, and failed to deliver the funds to the client until on or about January 3, 1992.

An attorney received a Private Reprimand and agreed to make restitution to the client in the amount of $7,000.00 for violation of Cannon 6, DR-6-101(A) (3), (Diligence), and Rule 1.4(a) (b), (Communication), of the Rules of Professional Conduct. The client retained the attorney in August, 1981 to pursue a wrongful death claim arising out of the death of her husband. During the course of this representation the attorney entered into negotiations with the client to purchase certain real property from the client. The attorney drafted the Real Estate Purchase contract which provided for brokerage commissions and attorney's fees both of which were to be paid to the attorney. The attorney never disclosed to the client that the attorney would be paid both fees.

ADMONITIONS

An attorney was admonished for lack of diligence (Rule 1.3) in failing to obtain a timely judgment. The attorney was retained on or about February 21, 1991 to represent a client in a collection matter. The attorney filed the complaint on April 2, 1991, and a default was requested in June, 1991, but not signed by the judge because it contained a request for attorney's fees. The attorney delayed filing the Amended Default, deleting the request for attorney's fees, until October 8, 1991. On October 21, 1991 the attorney misrepresented to his client that he had obtained a Writ of Execution and had delivered it to a Constable. In fact, the Writ was not obtained until December 30, 1991 and delivered to the constable on December 26, 1991, lacking proper execution. The delay in serving the Writ permitted the debtors to move and liquidate their assets.

REINSTATEMENTS

On May 12, 1992, Kenn Martin Hanson was reinstated by the Supreme Court having complied with the terms of his suspension and Rule XVIII of the Procedures of Discipline.

On May 27, 1992, David K. Smith was reinstated by the Supreme Court having complied with the terms of his suspension and Rule XVIII of the Procedures of Discipline.

Appellate Courts Judicial Nominating Commission Applicants Sought

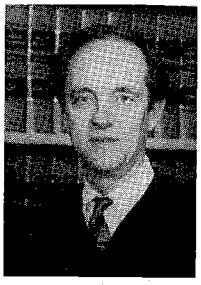
The Board of Bar Commissioners is seeking applications from Bar members for the Bar appointments of alternates to the Appellate Courts Nominating Commission to fill the unexpired terms of Michael N. Martinez and John Paul Kennedy, ending August 1, 1994. Alternates would serve in the place of Bar appointed commissioners, Francis M. Wikstrom and Peter Stirba, if they were unable to serve. Bar appointed alternates must be of different political parties. This nominating commission is for the Supreme Court and the Court of Appeals.

Bar members who wish to be considered for this appointment must submit a letter of application, including resume and designation of political affiliation. Applications are to be mailed to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East #310, Salt Lake City, Utah 84111, and must be received no later than 5:00 p.m., on September 1, 1992.

Attorney General Candidates' Forum

The Women Lawyers of Utah and the University of Utah Women's Law Caucus will co-sponsor a political forum for the Attorney General candidates on Thursday, August 20, 1992. All are welcome to attend this free event. The forum will be held in the Governor's Board Room at the Utah State Capitol. Refreshments will be served at 5:30 p.m. Candidate presentations will begin at 6:00 p.m. with questions to follow. For more information, contact Monica Whalen Pace at 532-1234.

1992 Annual Meeting Awards

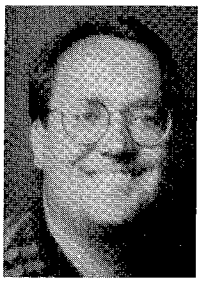


Judge of the Year – Hon. Michael R. Murphy

Judge Michael R. Murphy was appointed to the Third District Court in 1986. He is presiding judge for this court which serves Salt Lake, Summit and Tooele Counties. Prior to his appointment to the bench, he was an attorney with the law firm of Jones, Waldo, Holbrook & McDonough. Judge Murphy received his law degree from the University of Wyoming College of Law where he was editor-in-chief of the *Law Review*. He is a member of the Supreme Court Advisory Committee on Civil Procedure and Child Sexual Abuse Task Force.

Distinguished Lawyer of the Year – Hardin A. Whitney

Harden A. Whitney is president of the Salt Lake City law firm of Moyle & Draper where his practice focuses on corporate law, business litigation, construction and administrative law. He holds a juris doctor from the University of Michigan Law School. Mr. Whitney is chair of the Bar's Alternative Dispute Resolution Committee, vice chair of the Utah Supreme Court's Special Task Force on Management and Regulation of the Practice of Law. He is co-founder, former chair, and emeritus member of the Friends of KUED.

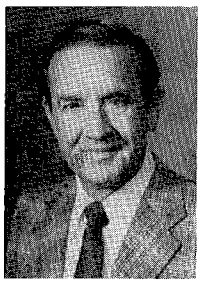


Distinguished Young Lawyer of the Year – Gordon K. Jensen

Gordon K. Jensen is a lawyer in private practice where his focus is on plaintiff's personal injury litigation and commercial litigation. He is a 1984 graduate from the University of Utah College of Law where he was a Leary Scholar. For the Bar's Young Lawyers Section, where he chaired the Law-Related Education Committee, he has coordinated the People's Law Program, Law School for Non-Lawyers, and the High School Guest Lecture Program. He is a delegate to the American Bar Association National Convention.

Distinguished Section/Committee Award – Ethics and Discipline Committee, Dale A. Kimball, Chair

Nearly two thirds of all disciplinary cases brought before the Bar are resolved by four screening panels which hear all cases in the initial stage. The screening panels, composed of attorneys and lay members who volunteer their time, also mediate disputes between lawyers and clients. The panels are overseen by the Ethics and Discipline Committee chaired by Dale A. Kimball, senior partner in the Salt Lake City law firm of Kimball, Parr, Waddoups, Brown & Gee.



Distinguished Non-Lawyer Award for Service to the Profession – Stanley B. Bonham

Stanley B. Bonham has served two 3-year terms as a volunteer lay member on the Utah State Bar Screening Panel "B" which convenes monthly to hear complaints determined by the Bar Counsel to be meritorious. During the last six years, he has never missed a hearing. He is known for his insightfulness, careful questioning, and courtesy to both respondents and complainants, and for his mastery of the facts in each case. Mr. Bonham is a retired farm equipment wholesaler and Arabian horse breeder.

Distinguished Pro Bono Lawyer of the Year – Betsy L. Ross

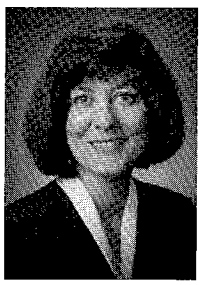
Betsy L. Ross is Assistant Attorney General in the Governmental Affairs Section. She received her juris doctor from the University of Utah College of Law where she was administrative editor of the *Utah Law Review* and a Leary Scholar. She was chair of the Bar's Young Lawyers Section Pro Bono Committee where she has been instrumental in establishing the AIDS-related Pro Bono Project and a domestic relations project for the Salt Lake County Bar.

Utah Trial Lawyer of the Year – Robert S. Campbell, Jr.

The American Board of Trial Advocates presents an annual award to the Utah Trial Lawyer of the Year. The award for 1992 is presented to Robert S. Campbell, Jr. He is senior lawyer in the Salt Lake City law firm of Campbell Maack & Sessions where his practice is comprised of trial and appellate litigation in the fields of complex business, corporate, and commercial litigation. He is a member of the American Board of Trial Lawyers and has been elected a Fellow in the American College of Trial Lawyers.

Family Law Lawyer of the Year – Sharon A. Donovan

Ms. Donovan is a partner in the law firm of Dart, Adamson & Donovan in Salt Lake City, Utah. She was admitted to the Utah State Bar in 1979. In 1989, she was admitted to the Washington State Bar. Ms. Donovan is the past Chairman of the Utah State Bar Committee for the Delivery of Legal Services and was Chairman of the Utah State Bar Family Law Section in 1987-1988. She curently sits on the Executive Committee of the Family Law Section. Ms. Donovan's practice is primarily in the area of domestic relations.



Special Award – Sandra N. Peuler

Ms. Peuler was appointed as a Court Commissioner for the Third District in July 1982 and continues to serve in that capacity. Ms. Peuler was recognized by the Family Law Section and the Utah State Bar for her outstanding contribution to the justice system of the State of Utah as one of the pioneers of the commission concept in the area of Family Law. She helped set the standard by paving the way for future commissioners.

Randy L. Dryer - Elected New President of the Utah State Bar

The Utah State Bar elected Salt Lake City attorney Randy L. Dryer as president for 1992-93. Salt Lake City attorney H. James Clegg is president-elect.

Mr. Dryer is a shareholder in the Salt Lake City law firm of Parsons Behle & Latimer where his practice focuses on media and telecommunication law. He received his juris doctor from the University of Utah College of Law in 1976, where he was editor of the *Utah Law Review*. He is active in community affairs and presently serves as chairman of the Utah Sports Authority, the public agency which oversees the expenditure of $56 million of tax money to be used to build Olympic facilities. He is also a member of the University of Utah Hospital Board of Trustees and the Commission on Justice in the 21st Century.

Mr. Clegg is a shareholder in the Salt Lake City law firm of Snow, Christensen & Martineau. He received his juris doctor from the University of Utah College of Law. He was President of the Salt Lake County Bar and was first elected to the Utah State Bar Commission in 1988. He is a member of the Supreme Court Special Task Force on the Management and Regulation of the Practice of Law and is a Fellow in the American College of Trial Lawyers.

Other Bar Commissioners are: James Z. Davis, Immediate Past-president, Ogden; Denise A. Dragoo, Salt Lake City; Jan Graham, Salt Lake City; J. Michael Hansen, Salt Lake City; Dennis V. Haslam, Salt Lake City; Steven Michael Kaufman, Ogden; Paul T. Moxley, Salt Lake City; Craig M. Snyder, Provo; Gayle F. McKeachnie, Vernal; and Jeff R. Thorne, Logan. Ex-officio members of the Bar Commission are Keith A. Kelly, President of the Young Lawyers, H. Reese Hansen, Dean of the J. Reuben Clark School of Law, Brigham Young University, Lee E. Teitelbaum, Dean, University of Utah College of Law, Norman S. Johnson, ABA Delegate, Reed L. Martineau, State Bar Delegate to the ABA, Michael N. Martinez, Minority Bar Association, and John C. Baldwin, Executive Director, Utah State Bar.

Thomas Jefferson at the State Bar Annual Meeting

By Betsy L. Ross

Rather than John Locke's trinity of "life, liberty and property," Thomas Jefferson wrote of "life, liberty and the pursuit of happiness." When questioned regarding why "pursuit of happiness," Thomas Jefferson, a.k.a. Clay Jenkinson, responded that it did not seem right to encourage in the people a sense of property as an inalienable right; but a chance to farm, to engage in free discussion with others — those were rights that should properly be denied to none.

It was as though Thomas Jefferson himself were speaking to a twentieth century audience. Clay Jenkinson, who holds a doctorate in history and is presently pursuing another doctorate, is currently writing a book about Thomas Jefferson, and who travels around the country lecturing not on Thomas Jefferson, but as Thomas Jefferson, spoke during two sessions of this year's Utah State Bar convention.

He spoke both about events during his day, and, as a "time-traveler," made observations about our day. In commenting about America today, he lamented that it appeared his brother Alexander Hamilton's design for America had won out — that today's world was "Hamiltonian with a Jeffersonian veneer, rather than Jeffersonian with a Hamiltonian veneer."

The audience was given the opportunity to question Mr. Jefferson. The questions often focused on the Bill of Rights, and his views of the application of bill of rights protections in today's world.

In responding to a question on First Amendment rights of freedom of the press, Jefferson responded that even though he was often "calumniated" as a free-thinker and as an adulterer in the press of his day, he supported unshakably the right of the press to publish these views.

When asked the inevitable question concerning rights of privacy, Jefferson remarked that he believed the ninth amendment has been neglected, and that it could certainly support protection in those areas now referred to as "privacy" areas. Intuiting that the question was really about abortion, Jefferson stated that this was not an issue that was debated in his day. In the early nineteenth century, abortion was allowed — but times were very different. Women then were pregnant an average of thirteen times during their lives. A full one-third of babies born alive died during the first ten years of their lives. As a result, the emotional connection emphasized in our day with the fetus simply did not occur in his time. As a matter of self-protection, such connection was not emotionally made until a child had lived through his or her first ten years.

In response to a question about whether the death penalty was cruel and unusual punishment, Jefferson stated that it was not in the event of heinous murders and treason. Mr. Jefferson implied, however, that unequal application of the death penalty in today's world might alter his view.

Clay Jenkinson as Thomas Jefferson spoke with eloquence and ease. He reminded those in attendance on the fourth of July that there were and are goals and ideals worth sacrificing for and that preeminent among these is equality — a goal and ideal not yet attained. If you are not satisfied with your government, he exhorted on more than one occasion, you should resort to revolution, which should be as "peaceful as possible, but as bloody as necessary."

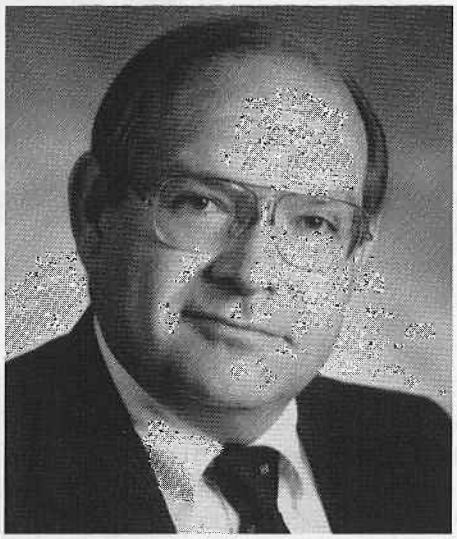
Tribute to James Z. Davis

By John C. Baldwin

Jim Davis closed his final President's Message in the June/July *Bar Journal* by thanking the Bar membership for the opportunity for serving and remarking that "it was a very good year". He was quite appropriately referring to the strides taken and the goals attained during his watch and the valuable services which the Bar has continued to provide through a time of introspection and self-evaluation. Jim gave credit in his article to his predecessors in the office of Bar President for having laid the foundation for the successes he directed, and acknowledged the services of several important members of the Bar staff. Although I can't imagine that his services this last year have provided him any financial bonanza, I hope that he also meant that it had been a very good and rewarding year for him personally.

Now I've been given the chance to give Jim a small measure of well-deserved praise and just a bit of over-due credit for the energy he expended and the uncompensated hours he toiled during his tenure as our elected chief executive officer. I'd like to honor Jim by briefly relating my observations of three of the characteristics which I believe represent Jim's service to the Bar.

First, you would not believe how much time Jim devoted to responsibly performing his duties as Bar president. Most of us have, from time to time, accepted similar assignments which ultimately turned out to be more taxing and consuming than we figured they would be when we agreed to get involved. We initially may have seemed to think that somehow we could properly allocate time to the new project and reasonably carve off some of our spare energy from the various other responsibilities we had and, when we devoted the hours necessary to accomplish the goals we were assigned, we somehow soon became overwhelmed with the meetings, phone calls, thought, conflict or even



politics involved with the work. When facing the onslaught of obligations, I'm sure many of us have been tempted to divert our attentions back to more profitable enterprises and to try to "just get by" until our time was up.

I marvel at the people I know who, when faced with daunting challenges and consuming obligations which require them to commit their limited resources of time and energy, seem to maintain consistent levels of energy, enthusiasm and commitment to the task at hand. I have marvelled at Jim Davis. Jim never backed down from a crisis, diverted responsibility or avoided work for the Bar because he couldn't find the time. He faced the uncertainties and challenges with the energy and devotion necessary to discover solutions. He simply made the time to get the job done and to keep on top of issues as they developed.

Secondly, Jim Davis is a candid and "full-disclosure" kind of guy, which is one of the highest compliments I can give. Before coming to the Bar, I was involved in securities regulation and the enforcement of laws requiring full and fair disclosure. The underlying philosophy of mandating disclosure in the offer and sale of securities is that if average investors are exposed to accurate and complete information, they are in a position to understand their risks and know where their hard-earned investment dollars will be going.

Jim was always open about what the Bar was doing and he was candid, honest and forthright in recognizing problems and reaching solutions in the light of day. Jim made it clear during "his administration" that all members of the Bar – from those in leadership to those whose only involvement was to annually pay dues — should be informed of what was going on and that their opinions should be considered when decisions were made on how their dues were being spent.

Thirdly, Jim faced conflict and change with a healthy attitude and sense of appropriate humor. Just after I had joined the Bar staff in the Fall of 1990, I was involved in a meeting with then-Bar President, Pam Greenwood, then-President-elect, Jim Davis, and one of the several consultants assigned to help create some internal accounting controls. Feeling like we'd made some headway and that we were progressing towards satisfying the auditors and developing an improved system of financial reporting, and after a long and involved meeting, I mentioned in passing to Pam and Jim that despite the fact that there was still room for improvement, we seemed to finally be "getting somewhere." Judge Greenwood thought for a minute and smiled, saying, "Yea, but where are we getting?" Without missing a beat, Jim replied, "Yea, and when we get there, will we like it?"

Well, we reached that particular "somewhere" under the care and concern of Jim Davis and while there will undoubtedly be more "somewheres" out there for the next generations of Bar presidents to be "getting to," I can sincerely say that I like it, and it was a very good year.

Futures Commission Created to Identify Utah's Bar & Legal Market in 2002

James B. Lee of the Salt Lake City firm Parsons Behle & Latimer has been named chair of a Futures Commission established by President Randy L. Dryer. The Commission will include lay members as well as lawyers and is charged with compiling and analyzing current demographic characteristics of the Utah Bar and projecting the anticipated makeup for the year 2002. In addition, the Commission will attempt to predict the likely market for legal services in Utah in the coming decade.

In creating the Commission, president Dryer noted that "we do not currently have an accurate picture of who we are, nor what the bar will look like in ten years." The Commission will examine such things as the percentage of women, minority and rural attorneys in the state, the numbers of attorneys in government versus private practice, income levels, areas of practice and other group characteristics. "The study should provide invaluable information for planning purposes to not only the Bar Commission and The Supreme Court, but also to law firms throughout the State", Dryer said.

Attorneys who are interested in serving on the Commission should contact James B. Lee at 532-1234.

Members Needed For Task Force On Solo/Small Law Firm Practice

President Randy L. Dryer has established a blue ribbon Task Force to study the unique needs of the solo/small firm practitioner and to make recommendations for programs or services the Bar should provide to satisfy these needs. The Task Force, chaired by Richard Burbidge of Burbidge & Mitchell, a four person Salt Lake City firm, will make its report to the Bar Commission and the Utah Supreme Court in May, 1993.

"There is a perception the Bar programs and services are geared primarily to those attorneys who practice in the Wasatch Front and who are members of medium to large law firms" said President Dryer. "Although this perception is not entirely accurate", he said,"there are unique needs of a solo practitioner which could be better addressed by the organized Bar". "The Task Force is charged with making specific recommendations for Commission action", he said.

Persons interested in serving on the Task Force or who have ideas for the Task Force to consider should contact Richard Burbidge at 355-6677.

Judicial Branch of the Navajo Nation Vacancy Announced

POSITION:	District Court Judge
SALARY:	$40,000.00 per annum
CLOSING DATE:	August 31, 1992 (5:00 p.m.)

Contact Mr. Edward B. Martin to request an application packet and to ask questions regarding qualifications. He will also receive applications on behalf of the Judiciary Committee of the Navajo Nation Council:

Edward B. Martin, Director of Judicial Administration
PO Drawer 520
Window Rock, Arizona 86515
(602) 871-6762

The Judicial Branch of the Navajo Nation requires proof of Navajo Tribal membership for consideration of employment for this position. Inquire about the excellent retirement benefits.

Understanding Mandatory Divorce Education

This seminar is the first in a series to be offered by the Needs of Children Committee. The seminar will provide an overview of the procedural and substantive aspects of new legislation which mandates an Educational Course on Children's Needs for Divorcing Parents in the third and fourth judicial districts.

CLE Credit:	1 hour
Date:	September 15, 1992
Place:	Utah Law & Justice Center
Fee:	For lunch reservation, call 531-9077, ask for Teri
Time:	12:00 noon to 1:00 p.m.

Many Thanks to our Sponsors 1992 Annual Meeting

Parsons Behle and Latimer
Ray, Quinney and Nebeker
Snow, Christensen and Martinequ
Van Cott, Bagley, Cornwall and McCarthy
Kipp and Christian
Michie Company
Sun Valley Company
Attorneys Title Guaranty Fund, Inc.
American Bar Retirement Association/
State Street Bank
Utah Bar Foundation
Rollins Burdick Hunter of Utah
Desks, Inc.
Houlihan Valuation Advisors
Merrill Lynch
Salt Lake MRI
First Security Bank of Utah
Charter Summit Hospital
Charter Canyon Hospital
Legal Assistants Association of Utah
Rocky Mountain Reporting

Judicial Vacancies Announced by Chief Justice Hall

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for two judicial vacancies. The first position serves the Fourth and Eight Districts Juvenile Courts. This area encompasses Juab, Millard, Utah, and Wasatch counties for the Fourth District, and Daggett, Duschesne, and Uintah counties for the Eighth District. This position results from the retirement of Judge Merrill L. Hermansen.

The second position serves the Fourth District Court, and results from the retirement of Judge Cullen Y. Christensen. **Applications for both positions must be received by the Administrative Office of the Courts no later than 5:00 p.m., September 4, 1992.**

Applicants must be 25 years of age or older, U.S. citizens, Utah residents for three years prior to selection and admitted to practice law in Utah. In addition, judges must be willing to reside within the geographic jurisdiction of the court.

Article VIII of the Utah Constitution and state law provides that the Nominating Commission shall submit to the Governor three to five nominees within 45 days of its first meeting. The Governor must make his selection within 30 days of receipt of the names and the Senate must confirm or reject the Governor's selection within 30 days. The judiciary has adopted procedural guidelines for nominating commissions, copies of which may be obtained from the Human Resources Division, by calling (801) 578-3800.

The Nominating Commission is chaired by Chief Justice Hall, or his designee from the Supreme Court, and is composed of two members appointed by the state bar and four non-lawyers appointed by the Governor. At the first meeting of each nominating commission, a portion of the agenda is dedicated to a review of meeting procedures, time schedules and a review of written public comments. This portion of the meeting is open to the public. Those individuals wishing to provide written public comments on the challenges facing Utah's courts in general, or the Fourth and Eighth District Courts in particular, must submit written testimony no later than September 11, 1992, to the Administrative Office of the Courts, Attn: Judicial Nominating Commission. No comments on present or past sitting judges or current applicants for judicial positions will be considered.

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact the Human Resources Division in the Administrative Office of the Courts, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102, (801) 578-3800.

Should Lawyer Discipline Matters Be Heard in the District Courts?

The Supreme Court's Advisory Committee on the Rules of Professional Conduct has recommended that formal complaints of attorney misconduct be filed and publicly determined in the state district court system. A publication containing the Committee's specific proposals will be distributed to all in-state attorneys in late July. Written comments regarding the proposals may be filed with General Counsel, Administrative Office of the Courts, 230 South 500 East #300, Salt Lake City, Utah 84102, until **September 11, 1992.**

UNITED STATES OF AMERICA VERSUS GREGORY LENN BROWN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
CRIMINAL NUMBER 91-445 "F"

PLEASE TAKE NOTICE that Gregory Lenn Brown, also known as G. Lenn Brown, doing business as Personal Injury Trial Lawyers Association, U.S.A. Incorporated; PITLA U.S.A., Inc.; PITLA; Promark, Inc.; Promark, Ltd.; Promark Communications, Inc.; Bankruptcy Attorney's Trust, Inc.; BAT; Patientlink; DUI/DWI Defense League, Inc.; HealthLink, Inc.; Association of Accounting and Tax Professionals; AATP; and LawLink, Inc.; has pleaded guilty to various crimes arising out of a fraudulent investment scheme. Mr. Brown has admitted that he and his associates persuaded various individuals and professional firms to invest in referral services which suggested that members of the public retain subscriber professionals through the use of commercial advertising and toll free telephone numbers. Mr. Brown has agreed to forfeit his assets; these assets will be used to repay (in part) the losses of victims of his schemes.

If you believe you are a victim of Mr. Brown's crimes and you want to know how to apply for partial repayment of your losses, you must furnish your name and full mailing address to:

Ms. Mary Jane Lattie
Victim Witness Coordinator
United States Attorney's Office
Hale Boggs Federal Building
501 Magazine Street, 2nd Floor
New Orleans, Louisiana 70130

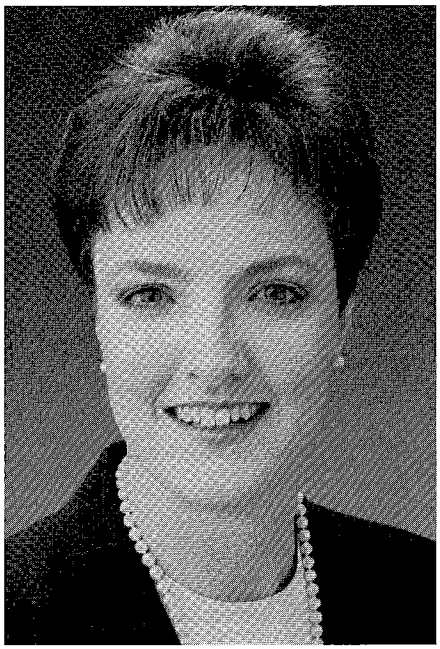
Responses must be in writing and received by the United States Attorney's Office no later than **August 31, 1992** in order to be considered. If your response is timely, further information will be mailed to you.

HARRY ROSENBERG
UNITED STATES ATTORNEY

The American Immigration Lawyers Association

The American Immigration Lawyers Association is a voluntary Bar Association of over 3,000 members, lawyers and law professors practicing and teaching in the field of immigration and nationality law. The Utah Chapter of the American Immigration Lawyers Association has been chartered since June, 1990. The Utah chapter meets on a monthly basis and many of its monthly meetings are accredited by the Utah State Bar for continuing legal education accreditation. If you are interested in attending an AILA Utah chapter meeting or in obtaining additional information concerning the American Immigration Lawyers Association, please contact Lorna Rogers Burgess, PARSONS BEHLE & LATIMER, 201 South Main Street, Suite 1800, Salt Lake City, Utah 84111. Telephone: (801) 532-1234.

American Arbitration Association Names New Regional Vice President



Diane Abegglen has been named the Regional Vice President of the American Arbitration Association's (AAA) Salt Lake Regional Office. The Utah office of the AAA offers arbitration, mediation, education, training and election services throughout the state of Utah. Ms. Abegglen assumed her duties with the AAA on June 1, 1992, replacing Kimberly L. Curtis as Regional Vice President of the Utah region.

Ms. Abegglen graduated from the University of Utah College of Law in 1988. Prior to attending law school, she received a Master of Counseling degree from Idaho State University and worked as a professional counselor in Idaho and the mid-west. Ms. Abegglen clerked for the Honorable Christine M. Durham, Associate Justice of the Utah Supreme Court, from 1988 to 1989. In 1989, Ms. Abegglen joined the Salt Lake City law firm of Jones, Waldo, Holbrook & McDonough where she practiced primarily in the area of litigation. Ms. Abegglen is an active member of the Utah State Bar Association and is a current member of the Salt Lake Rape Crisis Center's Board of Directors.

Lawyers Support United Way

During 1991, induvidual and corporate donations through the United Way of the Great Salt Lake Area raised more than $5.8 million to help deserving people living along the Wastach Front. Utah's lawyers and law firms were an important part of that campaign by raising a total of $89,000 in 1991.

Community leadership and charitable giving through the United Way from attorneys and law firms is critical towards helping address the local health and human needs facing our community. The funds raised in 1991 are now being used in the Salt Lake City Area to assist the poor or homeless, at risk youth, the elderly, and various worthwhile organizations provinding desperately needed services in the Salt Lake Community.

The United Way would like to express its thanks to all of the lawyers and law firms which participated in last year's campaign and particularly to the following members of the 1992 "Golden Spike Leadership Circle" which made generous individual contributions of $1,000 or more during the 1992 campaign:

Ballard Spahr Andrews & Ingersoll
Richard T. Beard
Blaine L. Carlton
Richard S. Fox
Frederick H. Olsen

Kimball, Parr, Waddoups, Brown & Gee
David E. Gee
Robert G. Holt
Mary S. Tucker

Cohne, Rappaport & Segal
Richard A. Rappaport

Davis, Graham & Stubbs
James R. Haisley

Jones, Waldo, Holbrook & McDonough
William B. Bohling

Kirton, McConkie & Poelman
one anonymous contributor

Parsons Behle & Latimer
James B. Lee

Prince, Yeates & Geldzahler
Robert M. Yeates

Ray, Quinney & Nebeker
Clark P. Giles

Richards Brandt Miller & Nelson
Robert W. Brandt

Wilcox, Dewsnup & King
W. Brent Wilcox

United Way thanks these individuals and law firms for their contributions, and encourage others to express their commitment to the community through participation in the United Way's Golden Spike Leadership Circle. As the United Way approaches the 1992 fund raising campaign, it would like to invite all lawyers and law firms to participate and demonstrate their commitment to leadership in the community.

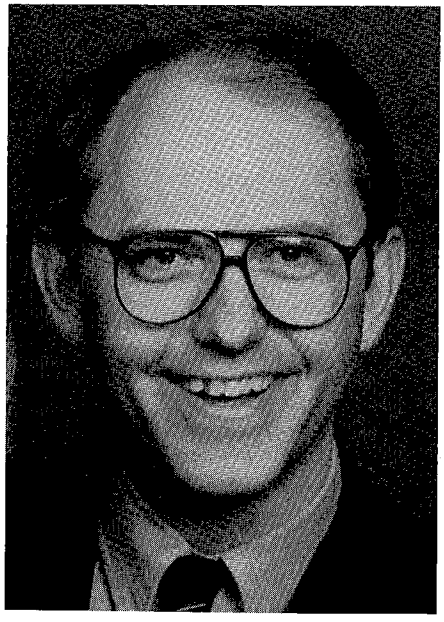
For more information about the 1992 United Way campaign and the Golden Spike Leadership Circle, please call Rebecca Dutson, United Way, at 328-0211.

Family Law Seminars Announced by American Academy of Matrimonial Lawyers

On October 14, 1992 the Utah Chapter of the American Academy of Matrimonial Lawyers will conduct its first annual seminar on preparing for and deftly handling problem areas in family law practice. The seminar, which will be held at the Law and Justice Center, will feature Melvyn B. Frumkes, Esq., a Florida fellow of the AAML who is on the faculty of the National Judicial Counsel speaking on dissipation of assets. Other topics covered will be asset valuation (Clark Sessions), alimony (B. L. Dart), tax problems (Sandy Dolowitz), the importance of findings in appellate practice (Kent Kasting), ethics (Brian Florence), and custody issues (Don R. Petersen).

A. Sherman Christensen Award Given to Ralph L. Dewsnup

Ralph L. Dewsnup of the Salt Lake City law firm Wilcox, Dewsnup & King received the A. Sherman Christensen Award in the United States Supreme Court in Washington, D.C. on June 5, 1992. The national award is presented by the American Inns of Court Foundation in recognition of outstanding contributions to legal professionalism. The American Inn of Court program was established in the U.S. under the direction of former Chief Justice Warren Burger. The goal of the organization is to promote professionalism, ethics, civility and legal skills. Past recipients have been the Honorable Aldon J. Anderson, the Honorable William B. Enright, Chief Justice Warren E. Burger, The Honorable A. Sherman Christensen, Professor Sherman L. Cohn and Professor Peter W. Murphy. Mr. Dewsnup was a founding member of the first American Inn of Court, is past President of the Aldon J. Anderson American Inn of Court, was the Editor of "The Bencher," an American Inn of Court publication, and is currently serving on the Board of Trustees of the Foundation.



* For further information on the American Inns of Court Foundation, contact Wilcox, Dewsnup & King, 533-0400.

ROUNDTABLE DISCUSSION

with

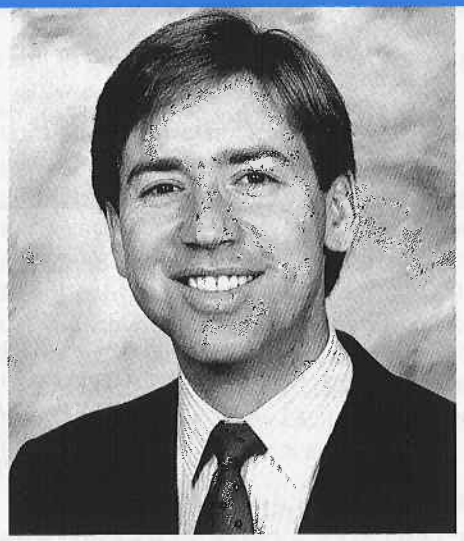
Attorney General Candidates

Scott Burns, Michael Coombs, Scott Daniels, Michael Deamer and Jan Graham

When:	12:00 Noon, September 2, 1992
Where:	Marriott Hotel
Cost:	$15.00, payable to Salt Lake County Bar Association
Moderator:	Jack Ford, KSL – TV News Courts Reporter

R.S.V.P. to Marie Evans at 532-3333, ext. 314 no later than August 31, 1992.

SPONSORED BY THE UTAH STATE BAR AND THE SALT LAKE COUNTY BAR ASSOCIATION



The Young Lawyers Section: An Opportunity for Public Service

By Keith A. Kelly
President, Young Lawyers Section

Our Rules of Professional Conduct state: "A lawyer should render public interest legal service." See Rule 6.1.

The Young Lawyers Section ("YLS") provides an easy way to do this. By joining a YLS committee, you can make a meaningful public service contribution with a minimum of time. For the most part, the projects are already organized — you can step in and help quite easily.

Here are some examples of what you can do:

- Spend a couple hours on a Tuesday evening answering legal questions for people dropping in at the Law and Justice Center.
- Meet with a high school class to discuss the Bill of Rights.
- Help produce a legal information video to educate victims of domestic violence about how the law will protect them.
- Spend two hours at a shopping mall booth on Law Day handing out legal information pamphlets and answering questions.
- Help make and distribute legal information videos to senior citizens centers.
- Draft pamphlets for teachers and health care workers about laws related to the prevention of child abuse.
- Assist in planning a conference and preparing a pamphlet about legal issues affecting persons who are HIV positive.
- Represent an indigent person in a default divorce case.
- Prepare a pamphlet informing victims of rape about their rights in the legal system.
- Provide mock interviews to help law students prepare for their job searches.
- Preside as a judge over a trial in the high school mock trial competition.

The YLS has over eleven committees performing law-related community service. Any of the officers of the YLS would be happy to help you find one with which you might like to be involved. Feel free to call this year's new 1991-1992 YLS officers:

Keith A. Kelly, *president*
532-1500;

Mark S. Webber, *president-elect*
532-1234;

Leshia Lee Dixon, *secretary*
532-5444;

Glinda Ware Langston, *treasurer*
963-1456; and

Charlotte L. Miller, *past-president*
530-0404.

Over five years ago as a new attorney, I approached then-YLS-president Paul Durham about being involved in law-related community service. Soon I was editing and fund raising for a booklet informing senior citizens about their legal rights. The community service activities that have grown out of that involvement have been one of the most rewarding facets of practicing law.

I hope you will pursue opportunities for law-related community service.

We are pleased to announce the opening of our office in

SALT LAKE CITY

June 1992

ALAN R. BLANK
Partner
Mr. Blank concentrates in the practice of general business, acquisitions, corporate finance, securities, real estate, tax, and tax-exempt finance.

JAMES A. HOLTKAMP
Partner
Mr. Holtkamp practices environmental law and public utilities law, with a special emphasis on air quality, water quality, hazardous waste management and electric utility operations.
He has significant experience serving as counsel to refinery operators, mining companies, and utilities in several western states.

THOMAS A. ELLISON
Partner
Mr. Ellison provides corporate and real estate services to the banking, real estate, construction, health care and technology industries, emphasizing acquisitions, financing, joint ventures and land use law.

JOHN S. KIRKHAM
Partner
Mr. Kirkham practices natural resource law, and has particular expertise in coal and hard rock, oil and gas, synthetic fuels, water and geothermal law.
He has significant experience in the representation of mining companies, public utilities, landowners and in all aspects of the coal industry.

GREGORY B. MONSON
Partner
In addition to his public utility and regulatory experience with electric, natural gas and telecommunications clients, Mr. Monson counsels clients in administrative law, real estate and general business transactions, governmental relations, litigation, particularly appeals, and debtor-creditor relations.

EDWARD A. HUNTER, JR.
Of Counsel
Formerly with Utah Power, Mr. Hunter concentrates his practice in the area of public utility law. He has significant experience in the representation of clients on a broad range of regulatory issues before state regulatory commissions in several western states.

DAVID A. WESTERBY
Of Counsel
Formerly with Utah Power, Mr. Westerby concentrates his practice in claims and business litigation, insurance coverage, and intellectual property law.

JOHN M. ERIKSSON
Associate
Formerly with Utah Power, Mr. Eriksson concentrates his practice in public utility law, including general rate proceedings and PURPA proceedings.

JAMES R. HAISLEY
Associate
Mr. Haisley has significant experience in natural resources law, environmental law, public lands law, and public utility law.

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CASE SUMMARIES

By Clark R. Nielsen

MUNICIPALITY'S DUTY TO PUBLIC

Bountiful City had no common law duty to erect a traffic control device or to landscape private property upon which bushes obstructed the motorists' view. The Utah Court of Appeals affirmed the summary judgment that Bountiful City had no statutory or common law duty to remove obstructing foliage or to maintain unobstructed visibility at an intersection. Although Bountiful City had a narrow duty to order the removal of the hazard if Bountiful's investigation had determined that the traffic hazard had existed, it did not have an affirmative duty to order it without the investigation.

The court also concluded that the plaintiff's request to continue the summary judgment to allow further discovery was properly denied. In reviewing a claim under Rule 56(f), Utah R. Civ. P., the appellate court will consider (1) whether the reason articulated for additional discovery is adequate or is merely a "fishing expedition"; (2) has the plaintiff had sufficient time to conduct discovery; (3) has the non-moving party been afforded an appropriate time for response to the motion for summary judgment? In applying these factors the appellate court found that the trial court did not err in denying the motion for additional time for discovery.

Jones v. Bountiful City Corp., 187 Utah Adv. Rep. 183 (Ct. App., May 13, 1992).

BANKRUPTCY, STAY

The filing of a Chapter 11 bankruptcy petition on behalf of a debtor does not stay the action as against a co-debtor or guarantor of the debtor. The bankruptcy code automatically stays an action against the bankruptcy debtor and against property of the bankruptcy estate, but does not insulate and preclude an action to collect the debt against other third persons.

The record also failed to support the appellant's guarantor's contention that he was incapacitated at the time he signed his guarantee agreement and promissory note. The guarantee agreement is separate from the principal obligation and creates a separate and independent obligation. An unconditional guarantee is absolute and the guaranteed party need not fix its losses by pursuing its remedies against the debtor or the security before proceeding against the guarantor. By agreeing to the guarantee agreement, the guarantor waived all defenses that the debtor had against collection of the original debt.

Surety Life Co. v. Rupp, 187 Utah Adv. Rep. 20 (Ct. App. May 13, 1992) (Judge Billings, with Judges Bench and Garff).

EMPLOYMENT AT WILL, TERMINATION, TORT v. CONTRACT

Upon certification from the U.S. District Court, the Utah Supreme Court held that an employee's termination violated Utah public policy because the employee allegedly was terminated because of his refusal to falsify tax documents. Justice Durham wrote that the employee could assert a tortious claim against the employer. Public policy does not allow the application of the at-will employment doctrine when an employee is terminated for refusing to commit an illegal act or for exercising a legal right or privilege. Declarations of public policy can be found in Utah statutes and constitutions. The court should narrowly construe public policy which is argued as a basis for a wrongful termination action. Because there is no requirement of good cause to discharge an employee, the public policy exception to the at-will doctrine requires that the statutory language clearly express public conscience and substantially affect the interests of society. Identification of clear and substantial public policies will require a case by case development. Not every violation of any federal or other state's law will automatically provide the basis for a wrongful termination action based upon the public policy exception. There must be a nexus between the law violated or claimed to be applicable and the public policy in Utah's public policy. In this case, the falsification of tax and custom documents provided such a nexus or connection.

Justice Zimmerman disagreed with Justice Durham's explanation of what may constitute the public policy and also opined that a suit for wrongful discharge should be an action in contract, rather than a tort. Justice Zimmerman criticized the majority opinion as adopting a "formless tort cause of action as a means to separate from the general body of contractual relations between employer and employee those areas where public policy will not permit contract law to operate . . . this tool is capable of excising the offending part, but it poses a considerable risk of unpredictable collateral damage to the surrounding healthy tissue and a consequent impairment of the entire organ." The majority favors a tort because it invokes the specter of punitive damages to deter employers from discharging employees in contravention of public policy. Justice Zimmerman favors a contract cause of action as such damages would be sufficient to make the employee whole in an ordinary case. A discharged employee could seek traditional tort remedies only if an independent tort was proved. This "two-layered" course of recovery would preserve the deterrent effects of an employer's tortious conduct, but still guarantee contractual damages to employees who are discharged in violation of public policy, regardless of the mental state of their employers. The dissent favors the two-layered remedy approach to contractual breaches as adopted in the insurance context, *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (Utah 1985). From the dissent's view, the collateral negative consequences of a tort remedy are far greater than that necessary to accomplish the objective of making the employee whole and deterring the employer. Justice Hall concurred in the dissenting opinion of Justice Zimmerman.

Peterson v. Browning, 187 Utah Adv. Rep. 3 (May 13, 1992) (Justice Durham, with Justice Stewart concurring and concurring opinion by Justice Howe; Justice Zimmerman and Hall in dissent).

BANKRUPTCY, DEFICIENCY JUDGMENT, STAY

The Supreme Court reversed the dismissal of a complaint for a deficiency judgment, holding that the statute of limitations did not run during the pendency of a bankruptcy proceeding. Plaintiff would

normally be free to file a deficiency action within three months of a trustee's sale by reason of the bankruptcy and the resulting stay. The creditor was precluded from filing for a deficiency prior to the termination of the stay. The bankruptcy was filed prior to the time the deficiency action arose. Therefore, under 11 U.S.C. § 108(c) the time for filing a deficiency action was extended for the full three month period after the termination of the stay. The ninety-day period was suspended during the bankruptcy stay.

Citicorp Mortgage, Inc. v. Hardy, 188 Utah Adv. Rep. 5 (Utah June 2, 1992) (Justice Hall).

GOVERNMENT IMMUNITY

The Court of Appeals affirmed the summary judgment in favor of Salt Lake County and its chief building inspector, W. Noble, finding that the Governmental Immunity Act did not violate the open courts provision of the state constitution and the county did not violate the DeBrys' First, Fifth and Fourteenth Amendment rights. After the DeBrys purchased a business building, the county discovered a building permit had never been issued to the builder. When the county later inspected, they determined that a permanent certificate of occupancy could not be issued due to persisting building defects. When the DeBrys failed to make the necessary improvements, they were served a notice and order to vacate the building. Plaintiffs appealed the notice and order to the Salt Lake County Board of Appeal, which also denied DeBrys their right of occupancy.

The DeBrys subsequently filed this action, claiming that the county was guilty of fraud, misrepresentation and gross negligence. DeBrys also alleged violation of their constitutional rights. The court held that the Governmental Immunity Act protected the county and its officials.

DeBry v. Salt Lake County, 188 Utah Adv. Rep. 55 (Ct. App. June 9, 1992) (Judge Russon, with Garff and Greenwood).

DIVORCE, TAX EXEMPTION AWARD

The Court of Appeals reversed the trial court's award of a tax exemption for the parties' minor child to the husband. The husband's cross appeal was also rejected when the court affirmed the final property distribution. In awarding the husband the tax dependency exemption, the trial court did not consider the arguments regarding the award nor make any finding supporting the award. Rather, the award was inserted in the decree by the husband's attorney and the trial court refused to reconsider that portion of the decree. The federal presumption is that the custodial parent receive the exemption. In order to depart from that presumption, it is necessary that the trial court enter specific findings stating the reasons the exemption is given to the non-custodial parent, in accordance with *Motes v. Motes*. The court rejected the husband's appeal of the property division because the husband had failed to marshal the evidence. There was substantial evidence to support the findings dividing the property. The husband's mere reargument of the facts supporting his position would not be sustained on appeal.

Allred v. Allred, 188 Utah Adv. Rep. 47 (Ct. App. June 5, 1992) (Judge Garff, with Judges Jackson and Orme).

ADMINISTRATIVE AGENCY, EDUCATION

The plaintiff appealed the determination of the Division of Rehabilitation Services that denied her reimbursement for travel costs incurred in vocational rehabilitation. The individual work rehabilitation plan developed to assist the plaintiff included reimbursement for transportation costs, counseling sessions, vocational counseling, guidance and a clothing allowance, tuition and books. When the plaintiff also obtained a Pell grant of $255 a month, the Division determined that it was no longer responsible to reimburse her travel expenses because the Pell grant was a comparable benefit and should meet her transportation costs. The court did not find this determination to be inherently unreasonable.

Holland v. State Office of Education, Utah Court Appeals, Case No. 910409-CA, (June 12, 1992) (Judge Garff, with Judges Greenwood and Russon).

ATTORNEY FEES, 42 U.S.C. § 1988, FINDINGS

The Utah Court of Appeals reversed the denial of attorney's fees in a civil rights action against the Tooele Housing Authority for civil rights damages under § 1983.

Plaintiffs claimed the housing authority violated their constitutional rights and breached a contract with them by a determination that the plaintiffs were not eligible for subsidized housing. The circuit court awarded summary judgment to the Princes, who then sought attorney's fees under 42 U.S.C. 1988. The circuit court denied attorney's fees on the basis that the plaintiffs and Legal Services would receive a windfall and an award would work a hardship against the housing authority and the indigent people it represents.

The Court of Appeals held that the circuit court abused its discretion by applying the incorrect legal standard on whether to award fees. The prevailing party in a civil rights action is ordinarily entitled to attorney's fees unless "special circumstances" render such an award unjust. In implicitly finding that the housing authority had violated a federal statute, the court of appeals held that plaintiffs prevailed for the purposes of an attorney's fee award. In determining whether "special circumstances" exist, the court must focus on the justice under the total range of circumstances of conferring the benefit and imposing the burden of the fee. Whether the attorney's fee might work a hardship on the housing authority or its

clients does not justify the denial of fees. Neither does the fact that the award might provide a windfall.

The denial of fees was reversed and the case remanded for determination of a reasonable fee.

Prince v. Tooele County Housing Authority, Utah Court Appeals, Case No. 910249-CA, (June 23, 1992) (Judge Garff, with Judges Greenwood and Russon).

UNEMPLOYMENT COMPENSATION — JUST CAUSE TERMINATION

Petitioner Bhatia was denied unemployment compensation benefits because he left his employment at Pizza Hut on a particularly busy evening, resulting in his discharge. Bhatia claimed he was not terminated for "just cause." Although the Department of Employment Security granted Bhatia unemployment benefits, the Administrative Law Judge reversed their decision.

Whether an employee is terminated for "just cause" is a mixed question of law and fact. Upon review, deference is appropriately granted to the agency's decision if discretion has been given by the legislature, either explicitly or implicitly. In that event, the agency's discretionary decision will be affirmed if "reasonable and rational." Applying that standard, Pizza Hut had a right to expect that Bhatia would refrain from conduct detrimental to the business or that would affect the good will of its customers and employee discipline.

Instead of marshaling the evidence that supported the decision and showing that evidence was insufficient, Bhatia insisted on emphasizing his own evidence, leaving the court to search for itself the evidence that supported the findings. Therefore, the findings were deemed conclusive. Bhatia knew that the restaurant was extremely busy and that he was to assist in closing that night. His vulgar response to the manager's cautions could be heard by Pizza Hut customers. Furthermore, his unauthorized departure placed unexpected pressure on the restaurant staff. Whether or not this incident was isolated, the record indicated that he was sufficiently culpable to warrant denial of employment benefits for his termination.

According to the concurring opinion of Judge Bench, the proper standard of review recognizes the discretion of the agency only to apply the law to the facts. That discretion is not extended to the agency to interpret statutory terms. Discussing *Morton International v. State Tax Comm'n*, 814 P.2d 581, Judge Bench concluded that the majority's standard of review was too broad and urged counsel to be more careful in providing an analytical framework for review of UAPA cases.

Bhatia v. Dept. of Empl. Sec., 188 Utah Adv. Rep. 40 (Ct. App. June 2, 1992) (Judge Billings, with Judges Garff and Bench)

DIVORCE — INSUFFICIENT FINDINGS, CUSTODY, ALIMONY

The husband appealed a divorce decree awarding custody of his minor children to the mother, even though the court-ordered evaluation strongly recommended that the husband be awarded custody. In its award, the trial court entered cursory findings of fact with regard to the moral conduct of the parties, the credibility of the husband

and the relative parenting skills. The Court of Appeals remanded for more detailed findings with regard to the specifics of the general findings in order to determine whether or not the court's award was, in fact, supported by the evidence. The panel discusses in some detail its problematic concerns with the general nature of the findings. Even though the findings address the specific areas at issue, they do not indicate how the trial court resolved the factual disputes and the weight given to the various factors, such as credibility and moral character. The award of alimony was also reversed for more specific findings because the trial court failed to make specific analysis of the parties' circumstances in light of the *Jones* factors: financial condition, ability to pay, and ability to produce income.

Judge Garff dissented from the court's remand of the custody issue for more detailed findings, arguing that the findings were supported by sufficient evidence in the record. It is apparent that the trial judge had considered the necessary relevant factors, (i.e. moral character, credibility, evidence of physical abuse, and ability to provide care for the children). Although the findings are not as detailed as the court might prefer, Judge Garff determined they were sufficiently detailed to allow appellate review.

Roberts v. Roberts, 188 Utah Adv. Rep. 26 (Ct. App. May 28, 1992) (Judge Jackson, with Judge Orme; Judge Garff dissenting).

ADMINISTRATIVE REVIEW, TYPE OF HEARING, CAREER SERVICE REVIEW BOARD

The Court of Appeals reviewed a determination by the Career Service Review Board that petitioner's grievance against his employer, the Industrial Commission, was not within the Board's jurisdiction. The burden of showing the informality of an administrative proceeding is upon the party asserting that the proceeding was informal and that the jurisdiction lay in the district court.

The Career Service Review Board hearing officer had conducted a hearing at which evidence and documents were accepted and a court reporter was present. There was no showing that the requirements of § 8, UAPA were not met. Therefore, the appellate court concluded that the hearing was formal and that it had appellate jurisdiction.

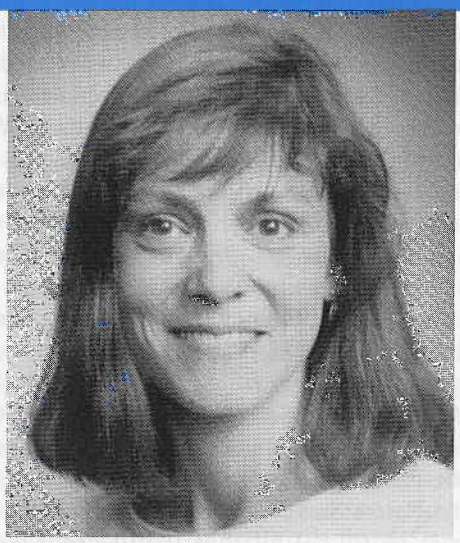
The court next considered whether an appeal was timely filed and whether a motion for reconsideration had been denied by a proper final order constituting the final agency action. The hearing officer had written the petitioner a letter saying that his motion for reconsideration has not persuaded her to change her decision. The court held this was not sufficient to constitute a formal agency order denying the petition for reconsideration. Therefore, the request for reconsideration was deemed denied by the mere passage of time. The court then reached the substantive merits of the petitioner's appeal and concluded that the Career Service Review Board was correct in its ruling that it did not have jurisdiction over petitioner's grievances against his employer.

Lopez v. Career Service Review Bd, 188 Utah Adv. Rep. 19 (Ct. App., June 27, 1992) (Judge Bench, with Judges Orme and Russon).

DEPT. OF EMP. SEC., REVIEW BY ADMIN. LAW JUDGE

An appeal requesting review by an Administrative Law Judge of an Employment Security Department decision must be filed within ten calendar days after the department's decision has been mailed. The court affirmed the Board of Review's decision that the petitioner's appeal for review was not timely filed because it was not filed within ten days. The court also affirmed the refusal to excuse the late appeal for "good cause" because the decision that petitioner did not demonstrate good cause for her late-filed appeal was not unreasonable. A letter requesting appeal needed only be a short, simple statement of the grounds for appeal and the relief requested. There was no ambiguity as to the time period in which the petitioner was required to file that appeal to the administrative law judge, and she could not have reasonably been misled as to her rights to review, the time period required, or her right to a fair hearing. The dismissal by the Board of Review of petitioner's claim for unemployment benefits was affirmed.

Armstrong v. Dept. of Empl. Sec., 188 Utah Adv. Rep. 10 (Ct. App. May 22, 1992) (Judge Billings with Judges Orme and Russon).



By Betsy L. Ross

Summer Meditations

By Václav Havel
Published by Alfred Knopf, 1992
151 pages

EDITOR'S NOTE: It is with pleasure that we introduce a new feature (section) in the Utah Bar Journal, to be titled inornately – "Book Review". The section will be featured in every or every other Bar Journal issue and will be primarily selected and written by Betsy Lynn Ross, an Assistant Attorney General in the Utah Attorney General's Office, and recent recipient of the Pro Bono Service Award. She invites suggestions for books to review and would welcome guest reviews. It is her desire to provide Bar Journal readers with trenchant, evocative reviews of books dealing with a wide variety of subjects including occasionally law. Your suggestions are welcome.

Why am I reviewing a book by Václav Havel in the Utah Bar Journal? What does Havel have to do with law? Actually, I started out reviewing *Hitler and Stalin: Parallel Lives* by Allan Bullock. In fact, I spent a weekend in San Diego just to get away and read about Hitler and Stalin. But then, Havel was in the news (and Hitler and Stalin were not), and it just seemed appropriate to review Havel's *Summer Meditations*. The clincher was the following paragraph from the book:

> The role of schools is not to create "idiot-specialists" . . . but to develop the individual capabilities of the students in a purposeful way, and to send out into life thoughtful people capable of thinking about the wider social, historical, and philosophical implications of their specialties.

It seemed to me, after all, that we lawyers could benefit from a bit of broadening. And that, I hope, is what these book reviews will be about — a chance to think and the "wider social, historical, and philosophical implications" of our profession.

Havel's *Summer Meditations* reads like a book of "Confucianisms" — words from the wise that are catchy and quotable, some pithy, some definitely influenced by his background as an intellectual, i.e., not-so-pithy. Consider the following, all quotes from *Summer Meditations*:

> There is only one way to strive for decency, reason, responsibility, sincerity, civility, and tolerance, and that is decently, sincerely, civilly, and tolerantly.
>
> They say a nation gets the politicians it deserves. In some senses this is true: politicians are indeed a mirror of their society, and a kind of embodiment of its potential. At the same time — paradoxically — the opposite is also true: society is a mirror of its politicians. It is largely up to the politicians which social forces they choose to liberate and which they choose to suppress, whether they rely on the good in each citizen or on the bad.
>
> [D]irectness can never be established by indirection, or truth through lies, or the democratic spirit through authoritarian directives.
>
> In the somewhat chaotic provisional activity around the technical aspects of building the state, it will do us no harm occasionally to remind ourselves of the meaning of the state, which is, and must remain, truly human — which means it must be intellectual, spiritual, and moral.

Havel's idealist spirit, as revealed in these excerpts, often finds him accused of "naivete." It is an accusation he is very aware of. "Some say I'm a naive dreamer who is always trying to combine the incompatible: politics and morality. I know this song well; I've heard it sung all my life." It is a life he has spent as dissident intellectual.

Havel is a playwright, founding spokesperson of Charter 77 and the author

of essays on totalitarianism and dissent. In 1979, he was sentenced to four and a half years in prison for his participation in the Czech human rights movement. In November 1989, he helped found the Civic Forum, the first legal opposition movement in Czechoslovakia in forty years. In December, Havel became president of Czechoslovakia. In June of this year, Václav Havel was not reelected. His book, *Summer Meditations* presages this occurrence. Whether this book will also serve as his legacy to his country and the world is yet to be seen.

Summer Meditations is comprised of five essays, written in the summer of 1991 during Havel's second term as president of the Republic. The essays are entitled, "Politics, Morality and Civility," "In a Time of Transition," "What I Believe," "The Task of Independence," and "Beyond the Shock of Freedom." As the titles suggest, they are the story of a country struggling with its identity; they are as well the story of an individual certain of his. It is in the intersection of the historical and personal that they are remarkable — revealing an extraordinary individual acting during an extraordinary time.

Havel's honesty is disarming. In his essay "What I Believe," he explains his political ideology:

> Some of my opinions may seem left-wing, no doubt, and some right-wing, and I can even imagine that a single opinion may seem left-wing to some and right-wing to others — and to tell you the truth, I couldn't care less.

The essay "Beyond the Shock of Freedom" could be compared to Plato's Republic. It is Havel's idea of the ideal political system and society. Havel discusses the political system, transportation, agriculture, ecology, education, health care, and, as always, the human spirit.

The sense of morality that culminated in his role as dissident in the previously Czechoslovak communist society is what Havel attempts to express in these essays and, it appears, to understand, as history swirls around him.

> A moral and intellectual state cannot be established through a constitution, or through law, or through directives, but only through complex, long-term, and never-ending work . . . It is a way of going about things, and it demands the courage to breathe moral and spiritual motivation into everything, to seek the human dimension in all things. Science, technology, expertise, and so-called professionalism are not enough. Something more is necessary. For the sake of simplicity, it might be called spirit. Or feeling. Or conscience . . .

Havel's spirit, feeling and conscience are what make Summer Meditations interesting and even compelling reading. If it is his legacy as a politician, it is a salutary one.

Utah Bar Foundation Awards 1992 Grants

Utah Bar Foundation funds have been granted to the following agencies to assist them in their respective projects —

Legal Aid Society of Salt Lake — To assist paying salaries for Legal Aid employees ($50,000).

Utah Legal Services — To continue to support the Southeastern Utah paralegal in Price, for publication of the *Landlord Tenant Handbook*, to assist with support of a paralegal office in Tooele and an attorney to handle family law cases in Central and Eastern Utah ($35,000).

Catholic Community Services/Immigration — To expand the outreach position to full-time and cover expenses necessary to properly serve the outlying areas of the state. Funds will also help finance law-school internships and defray general operating expenses ($20,000).

Law Center for People With Disabilities — To supplement the salary of an attorney and intake worker, to create appropriate materials regarding ADA (Americans for Disabilities Act) and for travel statewide ($10,000).

Salt Lake County Bar Domestic Relations Pro Bono Project — To provide necessary professional liability insurance for the project to function ($1,021).

Law Related Education — To supplement staff salaries and for general operating expenses of the program ($30,000).

Utah Children — To reprint the booklet, *Where Do I Stand? A Child's Legal Guide to Separation and Divorce* ($1,950).

Inns of Court — To support necessary expenses ($1,500).

University of Utah College of Law — To facilitate the entrance of lawyers into public service practice and the retention of lawyers by public interest agencies, funds will be added to the Public Service Loan Repayment Assistance Program's endowment corpus to provide law graduates with assistance in repaying student loans ($25,000).

Utah State Bar/Young Lawyers Section — To assist sexual assault victims by providing clothing to wear home from the hospital when clothing worn during sexual assault is left with officials for investigation and evidence ($2,500).

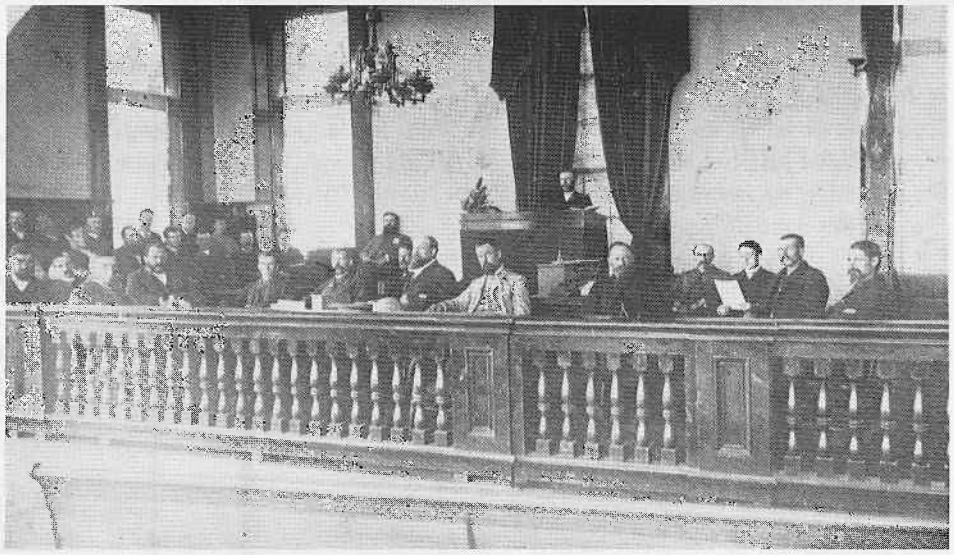
Utah Bar Foundation/Historical Society Publishing Project

A future issue of the *Historical Society Quarterly* will feature articles about Utah Courthouse activities. Several interesting submissions have been received and many more are in planning stages.

Don't forget to send your stories or anecdotes and/or photographs of enlightening and entertaining courthouse events, characters, cases or claims. All submissions published will receive an engraved plaque and the three best submissions will receive cash prizes ($1,000, $500 and $250).

If you have somehow missed the information sent out to Bar members, call the Foundation office (531-9077) to receive a copy of entry guidelines.

Even if material cannot be drafted in rough form by our first cutoff date (October 15), let us know of your interest and intent to contribute.



First District Court in Provo in 1890's, Judge Orlando W. Powers on the bench

from Utah State Historical Society Collection

THANK YOU!

The Bar Foundation wants to express its thanks to the many lawyers and law firms who contribute to the Foundation by donations and through participation in the IOLTA Program.

Also, special thanks go to the donations and new IOLTA participants who signed up with the IOLTA Program on the most recent Bar license forms and through recruitment efforts this past month.

The Foundation presents an excellent opportunity for lawyers to aid in financing worthwhile law-related public projects.

CLE CALENDAR

ADVANCED COMMERCIAL REAL ESTATE

Sponsored by the State Bar of Nevada and cosponsored by the Utah State Bar.

CLE Credit: Approx. 18 hours
Date: August 12-14, 1992
Place: Embassy Suites Resort, Lake Tahoe
Fee: call
Time: 8:00 a.m. to 5:00 p.m.

15TH ANNUAL SECURITIES SECTION WORKSHOP

This is the annual presentation of this workshop. This year's locale will be Jackson Hole. Look for a lively program with many discussions on current securities law topics. Come up and enjoy the scenery and update your securities practice skills.

CLE Credit: 8 hours w/1 in ethics
Date: August 28 & 29, 1992
Place: Jackson Hole, WY
Fee: $130
Time: 8:00 a.m. to 1:00 p.m. each day

EDUCATION LAW SEMINAR

This is the annual presentation of the Education Law Section. Issues relevant to this area of practice will be examined. Once again this seminar will be held in beautiful Park City. This is an excellent chance to enjoy the autumn aloft and update your practice skills in this area. Call for more information on the substance of this program.

CLE Credit: 4 hours
Date: September 12, 1992
Place: Olympia Hotel, Park City
Fee: $30
Time: 9:00 a.m. to 1:00 p.m.

ADVANCED BANKING LAW

Sponsored by the State Bar of Nevada and cosponsored by the Utah State Bar.

CLE Credit: Approx. 12 hours
Date: September 17-18, 1992
Place: Embassy Suites Resort, Lake Tahoe
Fee: call
Time: 8:00 a.m. to 5:00 p.m.

UNDERSTANDING BUSINESS BANKRUPTCY: HOW TO HANDLE EVERYDAY PROBLEMS

A live via satellite seminar.

CLE Credit: 4 hours
Date: September 17, 1992
Place: Utah Law & Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

2ND ANNUAL ETHICS AND GOLF TOURNAMENT — PROFESSIONALISM MADE PRACTICAL

This new annual program stresses professional behavior in practical situations. The idea is to present ethics topics that have direct practice implications. This year breakout sessions are planned to address different practice areas even more directly. Also look forward to the golf tournament this year at beautiful Park Meadows. Take this opportunity to get ethics training on a useful, practical level, while enjoying the surroundings of Park City.

CLE Credit: 3 hours in Ethics
Date: September 19, 1992
Place: Olympia Hotel, Park City
Fee: $50, $42 for Golf
Time: 9:00 a.m. to 12:00 noon — Seminar
1:00 p.m. — Golf Tournament

ULTIMATE TRIAL NOTEBOOK

Sponsored by the State Bar of Nevada and cosponsored by the Utah State Bar.

CLE Credit: Approx. 12 hours
Date: October 8-9, 1992
Place: To be determined
Fee: call
Time: 8:00 a.m. to 5:00 p.m.

ENVIRONMENTAL AUDITING

CLE Credit: 4 hours
Date: October 30, 1992
Place: Utah Law & Justice Center
Fee: call
Time: 8:00 a.m. to 12:00 p.m.

1992 FALL ESTATE PLANNING INSTITUTE

For more information and to register for this, contact David Castleton at 521-9000.

CLE Credit: Approx. 7 hours
Date: October 30, 1992
Place: Little America Hotel, Salt Lake
Fee: $100.00 (plus MCLE fee)
Time: 8:00 a.m. to 5:00 p.m.

Mark Your Calendars!

The annual seminar, "CLE for the General Practitioner" sponsored by Westminster College and the Utah State Bar, will be held November 20 & 21, 1992. This 12 hour CLE program features topics directed towards those in a general practice or those practicing in small firm and sole practitioner situations. Watch for future mailings on this.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____
2. _____ _____
_____

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

Name — Phone

Address — City, State, ZIP

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

Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

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 lease 48 hours in advance. Returned checks will be charged a $15.00 service charge

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

For rates or information regarding classified advertising, please contact Leslee Ron at (801) 531-9077.
CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment which is not received with the advertisement will not be published. No exceptions!

INFORMATION REQUESTED

Seeking my uncle's attorney. Maurice Eugene Thompson passed away on May 15, 1992. I know he had a will with you. Please contact Darla Kennedy at (818) 919-7221 or (818) 334-9058; or write to 1012 East Vine, West Covina, California 91790. Claims have been made that there was no will.

BOOKS FOR SALE

USED LAW BOOKS — Bought, sold and appraised. Save on all your law book and library needs. Complete Law Library acquisition and liquidation service. John C. Teskey, Law Books/Library Services. Portland (503) 644-8481, Denver (303) 825-0826 or Seattle (206) 325-1331.

CCH Federal Tax, CCH Fed. Estate Gift Tax, CCH Fed. Securities Rptr., RIA Pension Coord., BNA Tax Man. Portfolios, U.S. Code Annotated and U.S. Tax Cases (CCH). Contact Kristen (801) 355-9333.

A complete set of 1991 Martindale-Hubbell Law Directories. Please contact Ashley at Flanders & Associates (801) 355-3839 for more information.

OFFICE SHARING/SPACE AVAILABLE

Newly finished, deluxe, professional office space for two attorneys and staff. Approximately 1,300 sq. ft. 7821 South 700 East. Space includes two private offices, reception area, conference room, library, file storage, and much more. Convenient parking immediately adjacent to building for both clients and staff. Call (801) 272-1013.

Deluxe office space for one attorney and secretary. 4212 Highland Drive. Office share with two other attorneys. Facilities include professionally decorated reception area and common areas, conference room, limited library. Entire space finished in oak. Convenient parking immediately adjacent to building for both clients and staff. Call (801) 272-1013.

Professional office suites available with shared secretarial, reception, telephone services. Roomy window offices, great for individual practice, with view of Avenues or Salt Lake Valley. Prestigious South Temple location is convenient to courts. All office equipment and services in place. Free covered parking. Contact Karen or Francine at (801) 359-0052.

Attractive office space is available at prime downtown location, in McIntyre Building at 68 South Main Street. Single offices complete with reception service, conference room, telephone, fax machine, copier, library and word processing available. For more information please call (801) 531-8300.

Office sharing arrangements available, downtown Salt Lake City, Kennecott Building. Rent on month-to-month basis, furnished or unfurnished. Monthly rental would include phone and receptionist service. Other office services available as requested. Call Mike for further details at (801) 530-7436.

Small established law firm in Downtown Ogden seeks lawyer to share space and equipment. Close to District and Federal Courts. Call (801) 621-4430 and request information from Steve or Carol.

Deluxe building with beautiful view, centrally located, in Brickyard Tower, 1245 East 3120 South. Plenty of free parking. Close to freeway and 700 East, just ten minutes to Court. Share complete facilities with four established attorneys. Reception, library, telephone, fax, copier, file room, etc. Space for your secretary. Call Geniel (801) 484-2111.

Attractive office space, great downtown location at very reasonable rates. Shared secretarial, word processing and reception services. Space available for your own secretary. Space includes use of reception area, conference room, copier, fax, telephone and library. For more information, call (801) 363-3550.

ONE OR TWO offices available with established attorney in Sandy, Utah. Facilities include telephones, FAX services, photocopying, library, kitchen and parking. Reception and secretarial services or space is available if desired. Sublease for either a limited or long-term period, rent negotiable. Some referral and rent offset available. Call (801) 566-4000.

The Newhouse Building has space available for full-service leasing, including 2,500 square feet on the sixth floor. The interior walls can be built to tenant specifications. Also available is a suite of four unique offices and a reception area (1381 square feet total) offering ground-floor access with sixteen foot windows overlooking a brick plaza. Other suites are also available or can be built to tenant specifications. Convenient access to Federal Courts, state offices and freeway. Fully-secured reserved parking with 24-hour access is available at the Exchange Place garage. Call (801) 322-9301 for information on availability and rates.

Deluxe downtown office available; prime location, close to courts. Receptionist, photocopier, conference room, telephone, fax. Reasonably priced. For more information, please call (801) 263-1200.

Choice office sharing space for rent in beautiful, historic building in Ogden, Utah. Several offices available. For information please contact (801) 621-1384.

POSITIONS AVAILABLE

Growing intellectual property law firm seeks patent attorney with at least one year of patent prosecution experience and a degree in chemical or biological discipline. Our practice is diverse within all areas of intellectual property law and related litigation; however, this position would initially emphasize chemical patent prosecution. Excellent partner potential and significant initial responsibility. Please reply in confidence to Madson & Metcalf, 36 South State #1200, Salt Lake City, Utah 84111.

POSITIONS SOUGHT

Attorney position wanted: Nine years litigation and trial experience mostly in Personal Injury law. Seek position in plaintiff or defense firm. Licensed in California and Utah. Call Albert W. Gray at (801) 583-5852.

Seeking administrative position with law firm. Master of Professional Accountancy with 5-years business management and 3-years accounting experience. Extensive computer background. Excellent interpersonal skills. Experience includes developing overhead rate; job costing; staff supervision; payroll (including all tax filings); and financial statement preparation. For interview and resume call (801) 272-9867.

Legal Assistant and Office Manager with 15 years experience seeking employment in the Salt Lake or Logan areas. Extensive experience in litigation, collections, estate planning, bankruptcy and domestic law. Will send resume and references upon request. Please call Janet at (801) 265-1724 and leave message.

SERVICES

Need lawyer support-temporary help? More than 2000 experienced attorneys beginning at $25.00/hour. All legal specialties. Call 1-800-835-3561.

RUSSIAN LEGAL RESEARCH. Former guest instructor at Moscow State University has resources in place to research evolving laws and regulations in Russia. Please call David at (801) 487-7643.

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111