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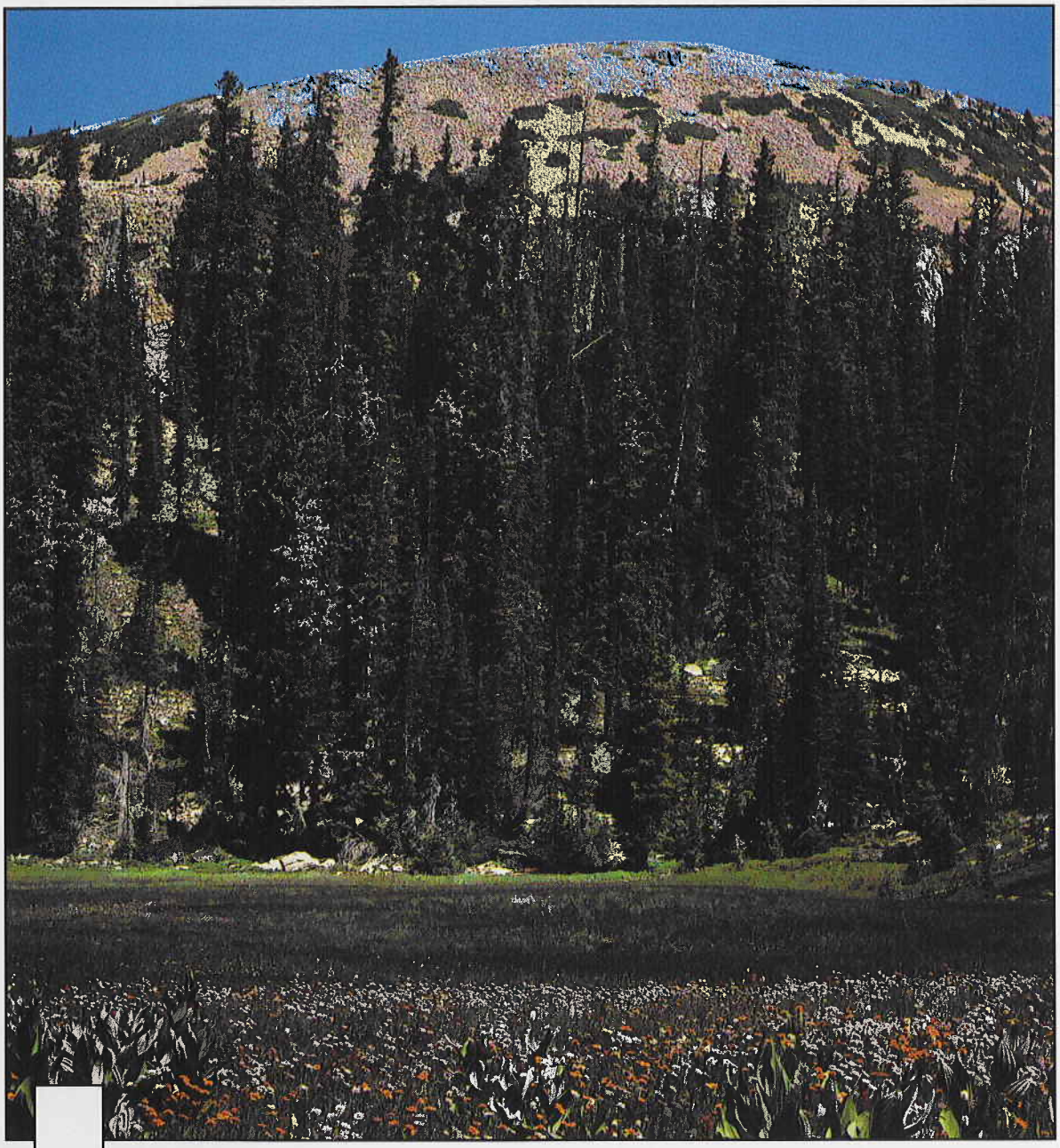

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COVER: High Uintas, Summit County, Utah, taken by Harry Caston, shareholder in McKay, Burton & Thurman.

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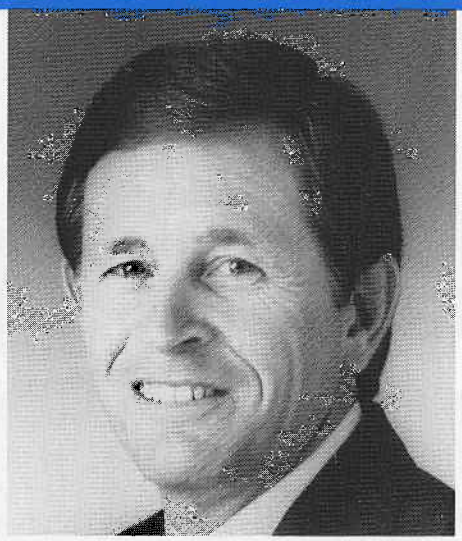


Habeas Corpus Practice in Utah — A Franz Kafka Mind Boggler?

By Randy L. Dryer

Do you know how many petitions for writs of habeas corpus are filed each year in Utah's state courts? Do you know how many petitions are filed by pro se litigants? Do you know how many petitioners are represented by appointed counsel and how many of these appointed counsel are paid for their services?

As a civil litigator my entire professional life, these questions had never crossed my mind for even a nanosecond — until Ron Yengich cornered me one day to bend my ear on the subject. What I learned from Ron and my subsequent investigation into the matter is the operation of the state habeas system leaves much to be desired. I found a system which is inflexible, inefficient, expensive, wasteful, dominated by the *pro se* petitioner and pleases virtually no one involved.

PRO SE OR PRO BONO

According to the State Court Administrator's Office, there were over 250 petitions for writs of habeas corpus filed last year with the state's trial and appellate courts. Approximately 60% of these petitions were *pro se* filings. Of the petitioners who were represented by counsel, the overwhelming majority were court appointed. Utah's statutory indigent defense scheme, unlike the federal counterpart, does not compensate appointed counsel in "discretionary writ proceedings," such as habeas corpus petitions. The "chosen few" who are blessed with a call to serve from a judge are not only "asked" to donate their time, but are asked to absorb any out-of-pocket costs associated with the representation. And while *pro bono* service is laudatory, it hardly offers a reliable system for representing the incarcerated indigent, particularly one on death row. Of the 10 persons presently on death row in Utah, none has appointed compensated counsel. I fully realize that most habeas petitions are without merit and are nothing more than a rehash of the original claims which have been rejected at the trial and appellate levels. Still, meritorious petitions do exist and our system of justice is tilted in favor of innocence. Unfortunately, our system not only fails to expeditiously ferret out the unmeritorious habeas claim, but it presents the real possibility that worthy claims will be trapped in a procedural quagmire and will never be considered on the merits. The problem stems from the fact that most habeas petitions are initially filed by uncounseled litigants. Consequently, petitions are inartfully drawn, procedurally defective, filed in the wrong forum and often fail to raise all the appropriate legal and factual issues.

RAISE IT OR WAIVE IT

The first step taken by the pro se habeas petitioner is too often a misstep, which misstep nevertheless sets in motion a series of subsequent proceedings which are time consuming, expensive and often doomed to failure because of the lack of legal counsel at the outset. The importance of doing it right in the state system cannot be overemphasized, since the United States Supreme Court has held that once a writ has been heard in state court (which it must as a predicate to federal review) any claims not raised in the state proceedings are waived and the petitioner is barred from having them heard in federal court. *See, Herrera v. Collins*, 113 S.Ct. 853 (1993). Thus, the revered Writ of Habeas Corpus recognized in Article I, Section 9 of the United States Constitution will not prevent an innocent person from being put to death unless the claims of innocence

were raised in the original habeas petition filed in state court.

The current state habeas petition practice should be of concern to more than just the civil libertarian or the court appointed, uncompensated counsel. The system should be of concern to Utah taxpayers, as well. The system fosters successive and redundant petitions which chew up thousands of hours of judicial and prosecutorial resources in responding. The recent case of *Gerrish v. Barnes*, 202 Utah Adv. Rep. 7 (1992) offers a prime example.

GERRISH V. BARNES

In 1985, Oliver Gerrish was charged with three counts of aggravated sexual abuse of a child, a first degree felony carrying a minimum mandatory term of 3, 6 or 9 years to life. As part of a plea bargain, where the state purportedly agreed to support a 3 year prison term, Gerrish pleaded guilty to one of the counts and the other charges were dismissed. Gerrish was sentenced to the middle term — 6 years to life. Gerrish was represented by a neighbor/friend who was an attorney with little or no criminal law experience and practiced corporate and estate planning law.

Gerrish appealed his sentence, claiming the minimum mandatory statutory scheme was unconstitutional. In 1987, the Supreme Court upheld his conviction. *State v. Gerrish*, 746 P.2d 762 (Utah 1987).

Habeas No. 1

Following the Supreme Court's decision, Gerrish filed a *pro se* habeas corpus petition in the Third Judicial District Court. The grounds for that petition included, among other things, a claim of ineffective assistance of counsel and an involuntary guilty plea. Judge Homer F. Wilkinson dismissed the petition on the ground that Mr. Gerrish had not previously moved to withdraw his guilty plea.

Habeas No. 2

Shortly after Judge Wilkinson had dismissed that habeas corpus petition, Mr. Gerrish filed a *pro se* motion, in the Utah State Supreme Court seeking reversal of his conviction and sentence on the same grounds. The Supreme Court dismissed that motion, referring to it as a habeas corpus petition.

Mr. Gerrish then attempted to appeal from Judge Wilkinson's decision by filing a *pro se* notice of appeal and a *pro se* petition for interlocutory appeal. The Supreme Court denied the petition for interlocutory appeal and dismissed the appeal as untimely.

Habeas No. 3

In 1988, Mr. Gerrish filed a petition for a writ of habeas corpus in the United States District Court for the District of Utah. The grounds for that petition also included a claim of ineffective assistance of counsel and an involuntary guilty plea. In May of 1989, the federal court dismissed the petition on the ground that Mr. Gerrish had not exhausted his state court remedies because the only issue ever resolved by the State courts was the constitutionality of the minimum mandatory sentencing scheme.

Habeas No. 4

Following the dismissal of his federal petition, Mr. Gerrish filed another *pro se* habeas corpus petition in the Third Judicial District Court again raising a claim of ineffective assistance of counsel. Judge John A. Rokich dismissed the petition as successive without good cause and thus procedurally barred under U.R.C.P. 65B(i)(4). Although Mr. Gerrish filed a *pro se* appeal of Judge Rokich's decision, the Supreme Court ultimately dismissed the appeal for lack of prosecution.

Mr. Gerrish sent a letter of complaint against his trial counsel to the Utah State Bar which ultimately disciplined counsel for violating the ethical rule that prohibits lawyers from handling matters that they know they are not competent to handle.

After learning the outcome of the Bar proceedings, Mr. Gerrish filed a *pro se* motion to set aside his guilty plea. After appointing counsel for Mr. Gerrish and holding an evidentiary hearing, Judge Timothy R. Hanson denied the motion. The Court of Appeals upheld Judge Hanson's ruling.

Habeas No. 5

Gerrish later filed yet a fifth state habeas petition which also was denied on the grounds it was successive without good cause. Gerrish did appeal this denial and the Supreme Court poured over the matter to the Court of Appeals. The Court of Appeals summarily affirmed the dismissal of the petition as successive and for some inexplicable reason, the Supreme Court granted certiorari. For the first time in the habeas process, Mr. Gerrish was provided with appointed counsel — a former law clerk of the Supreme Court. Appointed counsel spent over 365 hours on the case over a 24 month period — all without compensation. Moreover, appointed counsel was required to absorb almost $500.00 in out-of-pocket costs, including long distance collect telephone charges from the client at the Utah State Prison. On the other side of the ledger, the Attorney General's Office spent hundreds of hours responding to the prior state habeas petitions and in preparing its responsive briefs and for oral argument before the Supreme Court, all at taxpayers' expense.

In the end, all the time, effort and resources were for naught (at least as far as Gerrish was concerned) because the Supreme Court ruled that his petition was procedurally barred and therefore declined to consider the substantive merits of his claims. The Court held that Gerrish's claims of ineffective assistance of counsel were not raised in either his direct appeals or in his earlier habeas petitions and could not be raised for the first time in the Supreme Court. Although appointed counsel was not monetarily compensated, the service counsel rendered was acknowledged by the Court in the last sentence of its opinion as follows:

> "This Court expresses its appreciation for appointed counsel's fine work in this matter."

Justice Zimmerman, in his concurring opinion, lamented the sorry state of affairs existing in state habeas proceedings:

> All in all the present case is a fine example of how claims of arguable merit can fall between the cracks created by the combination of insufficiently flexible procedures and insufficiently counseled litigants that is endemic to habeas corpus proceedings. In the long run, both the courts and the parties would save time and money and be better served if we provided criminal defendants with counsel, with one thorough plenary examination and hearing of all post conviction questions, and with a counseled appeal from that determination. Instead, we squander vast time and resources trying to avoid reaching the merits of successive habeas petitions in which uncounseled defendants haltingly attempt to

raise what they think are valid claims. The present system serves only to baffle and anger the public with its costs and delay, while occasionally denying justice.

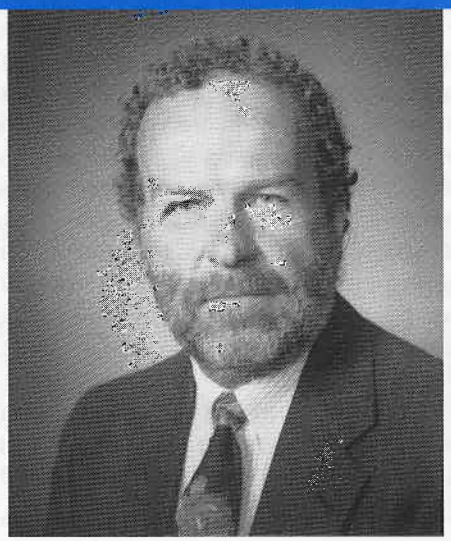
Thus, almost 6 years after Mr. Gerrish entered his plea and 5 habeas petitions later, the highest Court of this state told Mr. Gerrish, in essence, he should have gotten a lawyer in the first place.

No doubt Mr. Gerrish has finally exhausted his state remedies and may now move to the federal forum. I hope someone tells him about *Herrera v. Collins* before countless more hours at taxpayers expense are expended.

GERRISH — REPRESENTATIVE OR ATYPICAL?

Is the *Gerrish* case simply an aberration, or does it represent the state of affairs in our habeas system? Based on my admittedly cursory look, reality seems closer to the latter, rather than the former. What can be done to address this problem, if indeed, it is as serious as it appears? I certainly have no ready answer, but I do know something needs to be done. As a first step, I have requested the Criminal Law Section to review the state habeas system and make specific recommendations for reform to the Bar Commission.

Whether you are an incarcerated indigent who still proclaims innocence, a civil libertarian who cringes at the thought of an incarcerated defendant being procedurally barred from proving his innocence, a taxpayer who is disgruntled and frustrated by the delay and huge public expense attendant to the criminal system, or a court appointed lawyer forced to provide pro bono service, it is clear the state habeas process needs a close inspection and the organized bar should be in the forefront of that examination.



Small Firm Practitioners

By Charles R. Brown

As President Randy L. Dryer pointed out in the October 1992 issue of the *Utah Bar Journal*, approximately 57% of all attorneys in Utah practice alone or in firms of five persons or less. Although solo and small firm practitioners constitute a majority of the Bar, their involvement in Bar matters has historically been substantially less than proportional to their numbers. There is generally a perception by those practitioners that the Bar is less than responsive to their needs.

With an understanding of that perception and a goal to improve the response of the Bar to the needs of those practitioners, President Dryer created a special Task Force on Solo and Small Firm Practitioners which is chaired by Richard Burbidge and of which I am a member. The goal of the Task Force is to formulate an understanding of the concerns and needs of those members of the Bar and to make recommendations to the Bar Commission as to actions and programs which can be undertaken to better serve those members.

The Task Force has been conducting an informal survey of those practicing in a small firm environment and analyzing those areas of concern in order to make its recommendations to the Bar Commission. Time has been provided at the Annual Convention in July for the Task Force to present the recommendations and to receive comments from the public.

Some of the concerns which were expressed in the informal survey are:

1. Disenfranchisement. A significant number expressed the opinion that the Bar Commission is dominated by the larger firms and that the Commission does not have an understanding or concern for the unique needs of small firm practitioners. There is a feeling that many Bar programs and policies are adopted with little concern regarding how those programs or policies may impact smaller firm practitioners.

The complaints often mentioned in this area include bar dues, disciplinary treatment and the utilization and benefits of the Law and Justice Center.

2. CLE. Although they generally support the concept of mandatory continuing legal education, small firm practitioners believe that the present CLE system results in an economic disadvantage to them. This includes the cost of CLE, the amount of time spent away from their practice in order to complete their CLE requirements and, for those outside of the greater Salt Lake area, the travel requirements to attend CLE programs. A subcommittee of the Task Force has been appointed to make recommendations to the Bar Commission and the CLE Board as to modifications to the programs and requirements which may mitigate some of the economic costs to small firm practitioners.

3. Group Benefits. The small firms are not able to obtain the high volume cost savings available to larger firms in purchasing office supplies, equipment and library materials and in negotiating for group benefits. The Task Force has formed a subcommittee to analyze those areas, in addition to the existing Blue Cross/Blue Shield and Lexis programs, where the Bar could be utilized to obtain group or volume purchase benefits which may be passed through to the smaller firm practitioners.

4. Guidance and Consultation Programs. Solo and small firm practitioners generally do not have the benefit of the guidance, education and accessible consultation which exist in a larger firm. The Task Force is analyzing the establishment of a Bar supported program which would include experienced practitioners in various practice areas who could be called upon for consultation in areas outside a practitioner's customary practice area.

5. Marketing and Quality Perceptions. There is a concern as to how small firm practitioners may better market their services and educate the general public regarding the unique qualities and skills which they have to offer. In this age of specialization, consumers of legal services need to better understand that there are various options available, in levels of quality or cost, or a combination of each, which may best serve a particular consumer's needs. As in all areas of commerce there may be more efficient methods of marketing and educating the public. The Task Force will be considering recommendations in this area.

All members of the Bar are generally committed to providing quality legal services to the public. To the extent the Commission and the Task Force can respond to the needs of the small firm practitioners it will ultimately be in the best interest of all members of the Bar and the public. However, that task cannot be completed without the assistance and support of all members of the Bar. It should be the goal of every attorney, including small firm practitioners, to become more active in Bar matters in order to improve the quality of our profession.

As a small firm practitioner I had many of the same concerns. In order to contribute to the solutions I determined to become more active in Bar matters and asked to be included as a member of the Task Force in addition to my appointment to the Bar Commission as a replacement for Jan Graham. To the extent your practice and personal time needs will allow, I strongly encourage all members of the Bar to become active in some fashion, whether through committee work, section work or otherwise. I believe the Bar Commission is now committed to a serious analysis and program to mitigate the disadvantages faced by small firm practitioners, but we need your involvement to make it work.

BAR JOURNAL SURVEY OF READERS

The *Bar Journal* would appreciate readers taking a few minutes to complete the following survey and return it to: Utah Bar Journal Survey, 645 S. 200 E. Salt Lake City, Utah 84111.

Please circle the correct response to each of the following questions.

1. How much of the Journal do you usually read?

All More than Half Half Less than half None

2. How much time did you spend perusing the last Journal?

less than 10 minutes 10-30 minutes 30 minutes +

3. Is the Journal useful to you?

Very Somewhat Not at all No opinion

4. Please indicate the frequency with which you read the following departments (A=always; S=sometimes; N= never.)

Letters	A	S	N				
Commissioner's Report	A	S	N	President's Message	A	S	N
State Bar News	A	S	N	Feature articles	A	S	N
The Barrister	A	S	N	Case Summaries	A	S	N
Bar Foundation	A	S	N	Book Review	A	S	N
Classified Ads	A	S	N	CLE Calendar	A	S	N

5. Evaluate the following format elements of the Journal. (V=very good; F=fair; P=poor; N=no opinion)

Quality of Editorials	V	F	P	N
Quality of illustrations	V	F	P	N
Quality of photos	V	F	P	N
Overall appearance	V	F	P	N

6. What should the principal focus of the Journal be? (Circle one)

a. In-depth articles on Bar related legal issues.
b. Scholarly or law review type articles.
c. Results of annual bar surveys.
d. Practical, how-to articles on specific areas of practice.
e. News accounts of trends and activities of state, local, minority and specialty bars.
f. How-to articles on association/law practice management.
g. Light human interest articles.
h. Remain as is.

I would like to see articles on: a. b. c. d. e. f. g. h.

7. On which of the following topics would you like to see articles in future issues of the Journal? (Circle all that apply)

a. Bar association management
b. Computerization & technology
c. Bar finances
d. Non-dues revenue
e. Member recruitment and retention
f. Legal trends impacting bar associations
g. Bar public service activities
h. Staff/volunteer relationships
i. Meeting plannin
j. CLE programs.
k Legal ethics and lawyer discipline
l. Information on bar officials
m. Relations with other professionals
o. Judicial selection and polls
p. Public relations activities
q. Bar foundation activities
r. Law school/bar association activities
s. ABA news

8. Please list up to three additional topics on which you would like to see articles in future Journal issues.

a. _____

b. _____

c. _____

9. Would an index of Journal articles be useful to you?

YES NO

10. The Journal is presently published ten times a year. Assuming no major changes in length or format should it be published:

More frequently As is Less frequently

11. When you finished with the last issue of the Journal, what was done with it? (Circle all that apply)

a. Saved for own use
b. Passed to others in office
c. Passed to others outside of office
d. Saved specific articles
e. Discarded
f. Other _____

12. Have you done any of the following after reading an article in the Journal? (Circle all that apply)

a. Contacted author for additional information
b. Called an editor or other staff of the Journal for more information
c. Sought permission to reprint
d. Adapted a new procedure or initiated a new program based on information in an article
e. None of the above

13. a. Would you write a feature article for the Journal?

YES NO

b. If yes, list the topics you would like to write about.

_____

_____

_____

c. If yes, please provide your name and mailing address.

_____

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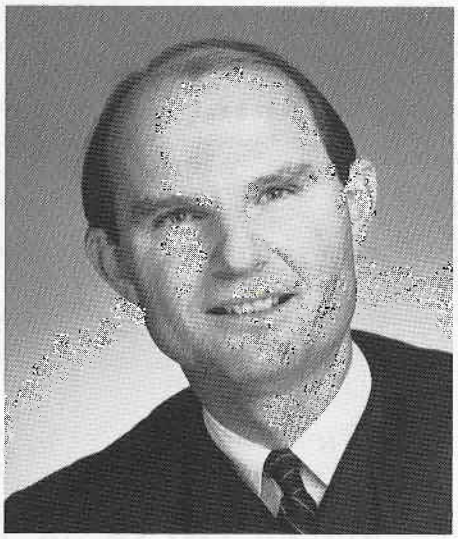
Investigatory Stops Revisited[1]

By Sharon Kishner and Judge Lynn W. Davis[2]

SHARON KISHNER is a 1990 graduate of the University of Utah College of Law. She received B.A. degrees in experimental psychology and sociology from the University of California in 1984, and an M.S. degree in educational psychology from the University of Utah in 1988. After a two-year clerkship with the Honorable Norman H. Jackson at the Utah Court of Appeals, Ms. Kishner joined the Legal Center for Disabilities staff as a program coordinator/attorney. Her practice emphasizes advocacy services for children and adults with developmental disabilities. Ms. Kishner co-chairs the Utah State Bar Needs of Children Committee, is a member of the Young Lawyers Pro Bono Committee, and participates in the Tuesday Night Bar Program.



JUDGE LYNN W. DAVIS serves as a Fourth Judicial District Judge in Provo, Utah. He is a member of the Utah Supreme Court Advisory Committee on the Code of Professional Responsibility, chairs the Criminal Section of the Utah State Bar Examiner Committee, and chairs the State Court's Interpreter and Translation Committee. He is a frequent contributor of articles to legal periodicals. He claims to have one of the largest collections of judicial cartoons in the State. He graduated from the J. Reuben Clark Law School in 1976.

I. INTRODUCTION

No single area of criminal law is more complex and frequently litigated in Utah's appellate courts than investigatory stops and reasonable suspicion.[3] Search and seizure decisions are extremely fact sensitive and unique fact patterns preclude the application of bright-line litmus tests. The legal standard of totality of the circumstances, by its very nature, requires a factual inquiry.

Aside from the wide variety of fact patterns presented to a trial court, other factors contribute to the complexity of these cases. Several come to mind: (1) the Utah Supreme Court has not yet ruled on some unsettled issues, leaving Utah's Court of Appeals without guidance; (2) there is marked divergence of legal thinking on the Utah Court of Appeals which has generated inconsistent panel decisions; (3) the appellate courts are often presented with deficient briefing and poorly framed issues which preclude squarely addressing and resolving some issues, simply reserving judgment for another day; and (4) important appellate announcements are sometimes relegated to footnotes, casting the precedential value into doubt.

The variety of factual scenarios in case law appears to conflict with earlier decisions. Practitioners comment that a particular search and seizure decision raises more questions and issues than it resolves. They hope that some phantom "hypothetical reasonable appellate court decision" will address and neatly answer all of the thorny and complex questions arising in this field.[4] They hope in vain.

The appellate courts of Utah continue to struggle with the concept of reasonable suspicion, when a seizure occurs for Fourth Amendment purposes,[5] what constitutes consent to a warrantless search and the appropriate standard to be applied in reviewing a trial court's determination of these issues. This Article attempts to address some of these struggles.

II. CASE LAW: INVESTIGATORY STOP CASES 1988-PRESENT

A. The Pretext Doctrine and the "Hypothetical Reasonable Officer"

The concept of what constitutes "reasonable suspicion" continues to evolve in case law. An elusive standard, reasonable suspicion is best understood by examining what factors trigger the application of that standard. One such factor that has emerged in recent case law is the "hypothetical reasonable officer" announced in *State v. Sierra*, 754 P.2d 972 (Utah App. 1988). In *Sierra*, the Court of Appeals emphasized that the proper inquiry in determining whether a stop for a traffic violation and subsequent arrest is a pretext is "whether a hypothetical reasonable officer, in view of the totality of circumstances confronting him or her, *would* have stopped" the defendant solely for commission of the traffic offense. *Id.* at 978. The officer's subjective motivation is not the relevant inquiry, and the "inquiry does not focus on whether the officer *could* validly have made the stop." *Id.* While several post-*Sierra* cases have applied the hypothetical reasonable officer, no case has definitively addressed what constitutes a hypothetical reasonable officer. Similarly, as different panels of the Court of Appeals struggle to apply the hypothetical reasonable officer standard, mixed messages have been sent to practitioners.[6]

"The concept of what constitutes 'reasonable suspicion' continues to evolve in case law."

The first search and seizure case after *Sierra* to refer to the hypothetical reasonable officer standard was *State v. Holmes*, 774 P.2d 506 (Utah App. 1989).While the Utah Court of Appeals noted that officers were entitled to assess the facts surrounding a traffic stop in light of their experience, it explicitly declined to "expand the pretextual traffic stop analysis of *Sierra* to the facts of this case." *Id.* at n.3. Several cases after *Holmes* embraced the *Sierra* analysis. In *State v. Smith*, 781 P.2d 879 (Utah App. 1989), police officers stopped the defendant's car after defendant's failure to signal a left turn. The court held that the stop of the defendant's vehicle was not pretextual because a hypothetical reasonable officer would have stopped the vehicle for failing to signal before turning left. Similarly, in *State v. Marshall*, 791 P.2d 880 (Utah App. 1990), the court upheld the stop of the defendant's vehicle based upon defendant's failure to terminate his turn signal. In *State v. Arroyo*, 770 P.2d 153 (Utah App. 1989), *rev'd on other grounds*, 796 P.2d 684 (Utah 1990), the court held that a hypo-

thetical reasonable officer would not have stopped defendant for following too closely, absent "some unarticulated suspicion of more serious criminal activity." *Id.* at 155.

The court in *State v. Lovegren*, 798 P.2d 767 (Utah App. 1990), did not reach the issue of whether the stop of defendants' vehicle was a pretext, remanding the case to the trial court for more detailed findings. The court did, however, discuss the applicability of the hypothetical reasonable officer standard as an appropriate basis for the trial court's conclusion that the stop was proper. *Id.* at 771, n.10.

Confusion over the applicability of the hypothetical reasonable officer standard is best illustrated by examining two recent Court of Appeals cases: *State v. Figueroa-Solorio*, 830 P.2d 276 (Utah App. 1992),[7] and *State v. Lopez*, 831 P.2d 1040 (Utah App. 1992). In *Figueroa-Solorio*, Judge Leonard H. Russon argued *Sierra* was inapplicable to traffic stop cases where it is undisputed that the defendant committed a traffic violation. "That question [whether the officer had a reasonable suspicion of criminal activity in light of the facts known to him] will always be answered in the affirmative in traffic stop cases because issuance of a citation is *always* justified when the officer observes a statute being violated." *Id.* at 278. Judge Russon concluded that officers can no more be expected to make on-the-spot legal determinations as to whether or not a "reasonable officer" would have made a traffic stop or arrest than can they be given discretion in enforcing laws passed by the legislature.[8] Judges Gregory K. Orme and Judith M. Billings, in a concurring opinion, adhered to the analysis set forth in *Sierra* and disagreed with Judge Russon's refusal to do so. Judges Orme and Billings believed that an officer's subjective motivations for stopping a particular vehicle, should be afforded particular significance: "An objectively reasonable police officer who has not witnessed the potential dangers of jaywalking firsthand may be less likely to stop individuals for the offense than an objectively reasonable officer who has recently observed a traffic accident caused by a jaywalker, and who has thereafter embarked upon a consistent course of jaywalker-nabbing." *Id.* at 281-82.

Similarly, in *State v. Lopez*, 831 P.2d at 1044-46, Judge Billings, writing for the majority, reexamined the underlying policies of the pretext doctrine and reaffirmed the court's adherence to that doctrine, while in a concurring and dissenting opinion, Judge Russon concluded that *Sierra* should be limited to a narrow group of cases where the trial court has found that no violation occurred. *Id.* at 1050-51.

"[I]n State v. Arroyo, . . . the Supreme Court . . . established an entirely new framework for analyzing consent in the context of an otherwise illegal search."

Although the Utah Supreme Court has yet to apply *Sierra* directly, the Utah Court of Appeals in *Lopez* argued that by implication, the Supreme Court ratified the *Sierra* doctrine in *State v. Arroyo*, 796 P.2d 684, 688 (Utah 1990):

> [In *Arroyo*], the Utah State Supreme Court reached the issue of whether a voluntary consent which occurred after a pretextual traffic stop was sufficiently attenuated from the prior illegal pretext stop to allow the consent to validate the warrantless search. If the *Arroyo* court disapproved of the pretext doctrine, logic suggests the court would have rejected the doctrine and reversed this court without ever reaching the attenuation-consent issue.

State v. Lopez, 831 P.2d at 1045.

Without specific direction from the Utah Supreme Court, the Court of Appeals will continue to be divided over its willingness to wholeheartedly adopt the pretext doctrine of *Sierra*. Depending on which judges comprise a given panel, the outcome of such cases may differ vastly. Since the same three judges comprised both the *Figueroa-Solorio* and the *Lopez* panels, it is impossible to predict which view holds support with the majority of the Court of Appeals.[9] It is clear that at least one judge quarrels with the application of the Sierra doctrine to traffic stops except in the narrow situation where no violation actually occurred. As for the Supreme Court, it has neither applied nor rejected the pretext doctrine. Until a majority of the Court of Appeals abandons the pretext doctrine, or until the Supreme Court overrules the doctrine, it remains good law in Utah.

B. Validity of Consent Following Police Illegality

Prior to 1990, the Utah Supreme Court had no opportunity to address what factors would be sufficient in purging the taint of an illegal search. However, in *State v. Arroyo*, 796 P.2d 684 (Utah 1990), the Supreme Court rejected the Court of Appeals' analysis on this issue and established an entirely new framework for analyzing consent in the context of an otherwise illegal search.

In *State v. Arroyo*, 770 P.2d 153 (Utah App. 1989), the Court of Appeals held that the traffic stop in question was an "unconstitutional pretext." *Id.* at 155. In reversing the trial court's suppression order, the Court of Appeals held that "although the original illegal stop was unconstitutional, Arroyo's subsequent voluntary consent purged the taint from the initial illegality." *Id.* at 156. On review, the Supreme Court determined that there was no support in the record that the defendant had consented. *Arroyo*, 796 P.2d at 687. Because consent should have been explored at the suppression hearing, the Supreme Court reversed the Court of Appeals and remanded the case to the trial court for an evidentiary hearing on the issue of consent. The Supreme Court then went on to address the legal standard to be applied in Utah concerning the validity of consent following police misconduct.

The Supreme Court outlined a two-pronged test to determine whether or not consent to a search is lawfully obtained following initial police misconduct. The first prong focuses on the voluntariness of the consent while the second prong focuses on "whether the consent was obtained by police exploitation of the prior illegality." *Id.* at 688. The State bears the burden of proving both prongs of the test. *Id.* at 687-88.

As to voluntariness, a "totality of the circumstances" test is applied, and the reviewing court examines both the characteristics of the accused and the details of the police conduct. *See id.* at 689 (quoting *Schneckcloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). This is a fact sensitive inquiry and the Supreme Court has cautioned that a "trial court should regard with caution any claim that the suspect 'consented.' The realities of

interactions between private citizens and the police are such that 'consent' is often merely a fiction, particularly when it results from illegal police conduct." *State v. Ramirez*, 817 P.2d 774, 786 (Utah 1991).

The conclusion that the defendant's consent was voluntary does not end the inquiry. According to *Arroyo*, the reviewing court must also determine if the consent was untainted by the prior illegality. *Arroyo*, 796 P.2d at 689-91. It is on this point that the Supreme Court explicitly rejected the consent analysis employed by the Tenth Circuit Court of Appeals in *United States v. Carson*, 793 F.2d 1141 (10th Cir.), *cert. denied*, 479 U.S. 315 (1986).[10] In *Carson*, the tenth circuit stated that "*voluntary* consent, as defined for Fourth Amendment purposes, is an intervening act free of police exploitation of the primary illegality and is sufficiently distinguishable from the primary illegality to purge the evidence of the primary taint." *Id.* at 1147 (emphasis is original). Under *Carson*, consent purges prior police misconduct. Under *Arroyo*, the State must prove both that voluntary consent was given, and that the connection between the discovery and seizure of the evidence was so attenuated as to dissipate the taint.

The United States Supreme Court has identified several factors in analyzing whether such a taint has occurred: "temporal proximity of the illegality and the evidence sought to be suppressed, the presence of intervening factors and the flagrancy of the misconduct." *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975). The *Arroyo* court quoted these factors from *Brown* but did not elaborate as to whether the primary focus of the analysis is the possible effect of the initial police misconduct on the voluntariness of the consent or the police misconduct itself. *See Arroyo*, 796 P.2d at 690-91 n.4 ("These factors should be considered in determining if there has been an exploitation of the primary illegality in such cases.").

The Court of Appeals, in applying *Arroyo*, initially engaged in a mechanical application of the exploitation analysis without discussing whether the voluntariness of the consent was undermined by the prior illegality. For example, in *State v. Sims*, 808 P.2d 141 (Utah App. 1991), *cert. pending*, the Court of Appeals purported to apply the *Brown* factors but relied most heavily on two factors: (1) the short amount of time between the illegal stop and the consent, and (2) the fact that there were no intervening circumstances between the illegal stop and the defendant's grant of consent to the search. *Id.* at 151; *see also State v. Park*, 810 P.2d 456 (Utah App.), *cert. denied*, 817 P.2d 327 (Utah 1991) (Court of Appeals focused on whether the consent was closely connected in time to the illegal roadblock). It is interesting to note that in *Arroyo*, the Supreme Court remanded the case to the trial court on nearly identical facts, i.e., an illegal stop followed by the defendant's consent to search the vehicle. Had the Supreme Court considered the short period of time between the illegal stop and consent as well as the lack of intervening circumstances to be dispositive of the taint issue, the court would have decided the case and not remanded to the trial court.

"If the stop is for a minor traffic violation, the officer may only detain the vehicle long enough to request a license from the driver, conduct a computer check, and, if appropriate, issue a citation."

Recently, the Court of Appeals has discussed the exploitation question in terms of the potential effect of the police misconduct on the voluntariness of the consent. In *State v. Castner*, 825 P.2d 699 (Utah App. 1992), the Court of Appeals focused on the *Brown* factors in light of the potential coercive circumstances under which the defendant's consent to a search of his vehicle was obtained. After examining the temporal proximity between the first illegal search and the consent for the second search, and the circumstances which intervened between, the court considered the effect of these factors on the voluntariness of the consent. The court concluded that because the defendant had voluntarily extended the encounter by asking the officer questions after his license had been returned and the citation issued, the defendant had been aware that the encounter had ended. *Id.* at 705. Therefore, his subsequent consent to the search was sufficiently attenuated and the search was upheld. This is the only case to date which has applied the *Arroyo* test and concluded that the consent was valid.

From *Arroyo, Sims*, and *Castner*, we may conclude:

1. The State continues to bear the burden in proving both that voluntary consent was given, and that the connection between the discovery and seizure of the evidence was so attenuated as to dissipate the taint,
2. Voluntariness of consent is a fact sensitive issue and the court looks to the totality of circumstances to ascertain if the consent was unequivocal and freely given,
3. The court will focus on temporal proximity of the illegality and the evidence sought to be suppressed, the presence of intervening factors, and the purpose and flagrancy of the police conduct, in determining if the consent was untainted by the prior illegality, and,
4. The court may invalidate a search if the voluntary consent is close in time and circumstance to the prior illegality, or it may focus on the effect of the illegality on the consent to determine if the search will be upheld.

III. EVOLVING ISSUES

A. Does a traffic stop involve a detention of the driver and all the occupants?

Yet another evolving issue in Utah case law is that of the status of the passengers in a vehicle which an officer has stopped. Relying on *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), the Utah Supreme Court and the Utah Court of Appeals have traditionally held that when a police officer stops a vehicle for a traffic violation, the officer may briefly detain the vehicle and its occupants while he or she examines the driver's license and the vehicle registration.[11] Whenever a police officer stops a vehicle and detains its occupants, the stop necessarily involves a seizure, implicating the Fourth Amendment. Such a stop is constitutionally permissible if incident to a lawful detention for a traffic violation, or, if as required in all level two encounters, the officer has reasonable suspicion to believe the person stopped has committed or is about to commit a crime.[12] If the stop is for a minor traffic violation, the officer may only detain the vehicle long enough to request a license from the driver, con-

duct a computer check, and, if appropriate, issue a citation. *State v. Robinson*, 797 P.2d 431, 435 (Utah App. 1990). "Any further temporary detention for investigative questioning after the fulfillment of the purpose for the initial traffic stop is justified under the Fourth Amendment only if the detaining officer has a reasonable suspicion of serious criminal activity." *Id.* (citing *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988)); *see also United States v. Walker*, 933 F.2d 812 (10th Cir. 1991).

This raises several questions involving investigative detention of passengers in vehicles which remain unsolved. Is a passenger automatically detained by virtue of a traffic stop or must the officer have a reasonable suspicion as to each passenger? While the stopping of vehicle constitutes a seizure of all the occupants, a particularized reasonable suspicion is not required as to each occupant in the course of a routine traffic stop unless the seizure becomes an unreasonable one. At what point does the seizure of the passenger become unreasonable?

State v. Robinson, 797 P.2d 431 (Utah App. 1990), involved a stop of a van which had swerved in front of a police officer's vehicle on the interstate. The officer testified his purpose in stopping the vehicle was to see if there were any operational difficulties and to issue the driver a warning citation. After issuing the citation, the officer and a second officer questioned both the driver and the passengers as to what they were doing in the area, and if they were carrying any weapons or large amounts of cash or narcotics. The officers then sought consent to search the vehicle, which, according to the officers, was given by the passenger. Both officers searched the rear of the van, and upon discovering some marijuana seeds, summoned a police dog to further search the van for drugs. The Court of Appeals did not address the constitutionality of the initial stop as the issue had not been raised at trial. However, as to the continuing detention once the warning citation had been issued, the court held that the officers did not have the requisite reasonable suspicion to detain the driver or the passenger. *Id.* at 437.

In *State v. Munsen*, 821 P.2d 13 (Utah App. 1991), the Court of Appeals held that a constitutional investigative detention requires reasonable suspicion as to each individual detained. Munsen was in a supermarket when a police officer observed her companion, Hunter, lying on the seat of a pickup truck working on the car stereo. The officer questioned Hunter, who said he had bought the truck at a pawnshop. Hunter also indicated his girlfriend, Munsen, was inside the store. When Munsen exited the store, the officer questioned her about her relationship with Hunter and then had her wait in his patrol car while he ran a warrants check on her. The check turned up several outstanding warrants. The Court of Appeals concluded that the officer did not have a reasonable suspicion to justify detaining Munsen. "The mere fact that Munsen was with Hunter [did] not necessarily conjoin her actions with his." *Id.* at 15.

"[D]etermining the applicable standard of review for investigatory stop cases has become more difficult due to some conflicting opinions from the appellate courts."

In both *Munsen* and *Johnson*, a separate articulable suspicion was required to detain the passenger, and the "detention" took the form of running a warrants check. The court seemed to be saying that while the occupants of the vehicle in each case were seized, the seizure was unreasonable once the officer made the passenger part of the investigation, absent reasonable suspicion.

More recently, in *State v. Hansen*, 193 Utah Advance Rep. 27, the Court of Appeals held that because the Fourth Amendment does not forbid all seizures, but only unreasonable ones, the proper test to be applied in such cases is the two-pronged test articulated in *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Under the *Terry* analysis, the first question is whether the officer's action was justified at its inception. The second question is whether that action is "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* (quoting *Terry*, 392 U.S. 19-20). Therefore, while a passenger is deemed to be seized when a vehicle is stopped for a traffic violation, that seizure is legal unless it exceeds the scope and purpose of the traffic stop. In *Hansen*, while it was reasonable for the officers to conduct sobriety tests to confirm or deny their suspicion that Blue, the driver of the vehicle, was intoxicated, it was unreasonable to take subsequent action once the purpose of the stop was accomplished. Hence, the officer's request for passenger Hansen's name and date of birth, as well as the warrants check on Hansen, was unreasonable.

Of course, there is justification for seizing all occupants in a vehicle if a police officer has an articulable suspicion of criminal activity on the part of the driver of the vehicle *and* the passenger. In *State v. Holmes*, 774 P.2d 506 (Utah App. 1989), two plainclothes officers observed defendant Holmes strolling State Street in Salt Lake City, having brief conversations with the male drivers of several vehicles. Observing what they believed to be a prostitution deal, the officers followed the vehicle which Holmes entered. When the driver of the vehicle began to drive erratically, the officers decided to stop the vehicle and question its occupants. As they approached the vehicle, the officers observed Holmes stuffing a role of paper towels between the car seats. One officer opened the passenger door of the vehicle, removed the roll and unrolled it, discovering drugs and drug paraphernalia inside. Holmes was arrested on a narcotics violation. Neither Holmes, nor the driver of the vehicle, was charged with a sexual offense. Appealing the trial court's denial of her motion to suppress the drugs and paraphernalia, Holmes argued that the police lacked reasonable suspicion to stop the vehicle, and that the evidence was seized illegally. The Court of Appeals concluded there was reasonable suspicion to stop the vehicle because the police observed behavior which was consistent with an illegal activity, prostitution. However, as to the search of the roll of paper towels, the court reversed, holding that there was nothing to suggest to the officers that the roll of paper was connected in any way with criminal activity.

In sum, given that there is always a seizure, the relevant issue is more appropriately stated: is it a reasonable seizure? In the context of a routine traffic stop, while all occupants of a vehicle are considered to be seized while the officer effectuates the purpose of the stop, there must be a reasonable, articulable suspicion

if the officer focuses any inquiry on the passenger beyond consensual investigative questioning.

B. Is Conducting a Warrants Check Within the Scope of a Traffic Stop?

A similar issue is presented when a police officer conducts a warrants check on an individual. The Supreme Court in *State v. Johnson*, 805 P.2d 761 (Utah 1991) held that "the leap from asking [a] passenger's name and date of birth to running a warrants check on her severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet 'inchoate and unparticularized suspicion or hunch.'" *Id.* at 764 (quoting *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883 (1968)). In *Johnson*, a police officer had stopped a vehicle for faulty brake lights. When the driver of the vehicle was unable to produce vehicle registration, the officer asked the passenger for identification. The officer testified he asked the passenger for identification because he suspected the vehicle was stolen. The passenger had no identification but provided the officer with her name and birth date. Without inquiring further as to who owned the vehicle, or checking to see if the vehicle had been reported stolen, the officer ran a warrants check on both the driver and the passenger. The check revealed the driver had a suspended driver's license and the passenger had several outstanding warrants. The officer then cited the driver and arrested the passenger. The Supreme Court concluded that with the paucity of facts available to the officer, his detention of the passenger was beyond the scope of the traffic stop and not justified by any articulable suspicion that the passenger had committed a crime. *See id.* at 764.

In contrast, in *State v. Figueroa-Solorio*, 830 P.2d at 280-81, the Court of Appeals concluded that conducting a warrants check was within the permissible scope of a routine traffic stop.[13] That conclusion was based upon several factors. The court held that conducting a warrants check is tied to and justified by the circumstances surrounding the detention, that is, the traffic stop.[14] Second, the court considered case law from several other jurisdictions which had determined that conducting a warrants check during the course of a traffic stop was permissible if it does not significantly extend the period of detention. *Id.* at 280. Third, the court considered the length of the detention. The court stated that while length of detention is not dispositive as to reasonableness, the fact the detention in question lasted only two or three minutes was further indication that it was reasonable. *Id.* at 280-81.

IV. STANDARD OF REVIEW IN INVESTIGATORY STOP CASES

The Utah Rules of Appellate Procedure require that both docketing statements and appellate briefs contain a short statement setting forth the standard of review, supported by authority, which is applicable to each issue on appeal. Utah R. App. P. 9(5), 24(a)(5). Consequently, the proper standard of review applicable to investigatory stops is of critical concern to practitioners. Recently, determining the applicable standard of review for investigatory stop cases has become more difficult due to some conflicting opinions from the appellate courts. *See* Figure 1.

A suppression motion challenging the legality of an investigatory stop involves many Fourth Amendment issues, and requires the court to make a series of factually intensive and related inquiries in order to reach a determination. The main inquiries concern the legality of the initial stop, the legality of a level two seizure, if any, and the legality of a subsequent search.

Determining the applicable standard of review is important because the standard of review "apportion[s] power and condequently responsibility between trial and appellate courts for determining an issue or class of issues." *State v. Thurman*, 203 Utah Adv. Rep 18, 23 (Utah 1993). Although numerous issues may arise dur-

STANDARD OF REVIEW	ISSUE	CASES
CLEAR ERROR The trial court's factual determinations, including ultimate conclusions are reviewed under a clearly erroneous standard.	PRETEXT STOP & REASONABLE SUSPICION	*State v. Mendoza*, 748 P.2d 181 (Utah 1987); *State v. Marshall*, 791 P.2d 880 (Utah App. 1990) (Davidson, Billings, Jackson); *State v. Leonard*, 825 P.2d 664 (Utah App. 1991) (Jackson, Orme, Russon); *State v. Castner*, 825 P.2d 699 (Utah App. 1992) (Billings, Jackson, Orme); *State v. Sykes*, 840 P.2d 825 (Utah App. 1992) (Bench, Greenwood, Jackson).
	VOLUNTARY CONSENT	*State v. Arroyo*, 796 P.2d 684 (Utah 1990); *State v. Griffen*, 626 P.2d 478 (Utah 1981); *State v. Carter*, 812 P.2d 460 (Utah App. 1991) (Billings, Garff, Orme); *State v. Sterger*, 808 P.2d 122 (Utah App. 1991); *State v. Webb* 790 P.2d 65 (Utah App. 1990) (Bench, Jackson, Bullock)
BIFURCATED The trial court's underlying factual determinations are reviewed under a clearly erroneous standard, ultimate conclusions are reviewed under a correction of error standard.	PRETEXT STOPS & REASONABLE SUSPICION	*State v. Lopez*, 831 P.2d 1040 (Utah App. 1992) (Billings, Orme, Russon); *State v. Stewart*, 806 P.2d 213 (Utah App. 1991); *State v. Johnson*, 771 P.2d 326 (Utah App. 1989); *State v. Carter*, 812 P.2d 460, n. 3, 6 (Utah App. 1991) (Billings, Garff, Orme)
	VOLUNTARY CONSENT	*State v. Thurman*, 203 Utah Adv. Rep. 18 (Utah 1993); *State v. Vigil*, 815 P.2d 1296 (Utah App. 1991) (Bench Greenwood, Orme); *State v. Hargraves*, 806 P.2d 228 (Utah App. 1991) (Bench, Billings, Greenwood); *State v. Bobo*, 803 P.2d 1268 (Utah App. 1990) (Greenwood, Jackson, Orme)

Fig 1. Case Law Summary on Standard of Review

ing a suppression hearing, two areas are frequently reviewed: initial stop/level two seizure, and voluntary consent.

A. Initial Stop/Level Two Seizure

A threshold issue is the legality of the initial stop, including a determination of whether the stop was pretextual.[15] Closely related is the trial court's determination of a level two seizure and the legality of that seizure including whether reasonable suspicion exists.

Historically, trial court determinations concerning the initial stop, and level two seizures have been considered questions of fact to be reviewed under a "clearly erroneous" standard. *State v. Mendoza*, 748 P.2d 181, 183-84 (Utah 1987) (reasonable suspicion/pretext stop); *State v. Sykes*, 840 P.2d 825 (Utah App. 1992) (reasonable suspicion); *State v. Castner*, 825 P.2d 699, 702 (Utah App. 1992) (scope of traffic stop/reasonable suspicion/voluntary consent); *State v. Leonard*, 825 P.2d 664 (Utah App. 1991) (reasonable suspicion/probable cause for warrantless arrest and search incident to arrest); *State v. Marshall*, 791 P.2d 880, 882 (Utah App. 1990) (reasonable suspicion/pretext stop). In *Marshall*, the court articulated the "clearly erroneous" standard as follows: "We will not disturb the trial court's factual evaluation underlying its decision to grant or deny a motion to suppress unless it is clearly erroneous. Further, the trial court's finding is clearly erroneous only if it is against the clear weight of the evidence or if the appellate court reaches a definite and firm conviction that a mistake has been made." *State v. Marshall*, 791 P.2d at 882.

However, certain panels of the Utah Court of Appeals have stated that a bifurcated standard of review applies. *State v. Lopez*, 831 P.2d 1040, 1043 (Utah App. 1992); *State v. Carter*, 812 P.2d 460, 465-468 n. 3,6,8 (Utah App. 1991); *State v. Stewart*, 806 P.2d 213, 215 (Utah App. 1991); *State v. Johnson*, 771 P.2d 326 (Utah App. 1989). In stating the standard of review applicable to pretext stops and reasonable suspicion, the *Lopez* court stated: "In considering a motion to suppress, we review a trial court's underlying factual findings under a 'clearly erroneous' standard. However, we review the trial court's ultimate legal conclusions flowing from these factual findings under a 'correctness' standard." *State v. Lopez*, 831 P.2d at 1043 (citations omitted). The Supreme Court has defined the "correctness" standard applicable to questions of law as according the trial court's decision "no particular deference." *Oates v. Chavez*, 749 P.2d 658 (Utah 1988).

"On January 7, 1993, the Utah Supreme Court addressed the split in the Court of Appeals concerning the standard of review applicable to voluntary consent determinations."

B. Voluntary Consent

As issues dealing with the legality of the initial stop and any resulting level two seizure, determinations of the legality of a subsequent search have been historically treated as questions of fact to be reviewed under a clearly erroneous standard. *State v. Castner*, 825 P.2d at 702; *State v. Leonard*, 825 P.2d at 667; *State v. Carter*, 812 P.2d at 468, n. 8; *State v. Sterger*, 808 P.2d 122, 126-27 (Utah App. 1991); *State v. Arroyo*, 796 P.2d 684 (Utah 1990); *State v. Webb*, 790 P.2d 65, 82 (Utah App. 1990). In *Webb*, the court clearly explained the clearly erroneous standard, as extending deference to the trial court's factual determinations, but still requiring a close examination by the reviewing court.

> A finding is clearly erroneous if it is against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made. However, in evaluating whether a finding of voluntary consent is clearly erroneous, we are not unmindful of the analysis in which a reviewing court must engage to insure that the State has met its burden of proof on this issue: (1) There must be clear and positive testimony that the consent was unequivocal and specific and freely and intelligently given; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived.

Webb, 790 P.2d at 82 (citations omitted).

Yet other panels of the Utah Court of Appeals have held that the standard of review applicable to determination of voluntary consent is a bifurcated standard, where underlying factual determinations are reviewed under a "clear error standard" and legal conclusions based on the underlying factual determinations are reviewed under a "correctness" standard. *State v. Vigil*, 815 P.2d 1296, 1298-1300 ((Utah App. 1991); *State v. Hargraves*, 806 P.2d 228, 231 (Utah App. 1991); *State v. Bobo*, 803 P.2d 1268, 1271-1272 (Utah App. 1990); *State v. Arroyo*, 770 P.2d 153, 154-55 (Utah App. 1989). In *Vigil*, the court reasoned that "[t]he soundness of [a bifurcated approach] is demonstrated by considering the core functions of trial and appellate courts, the need for some semblence of consistency in the law, the reason for insisting on detailed findings, and the analytical deficiency inherent in treating ultimate issues as matters of fact."

On January 7, 1993, the Utah Supreme Court addressed the split in the Court of Appeals concerning the standard of review applicable to voluntary consent determinations. *See, State v. Thurman*, 203 Utah Adv. Rep. 18, 21-26 (Utah 1993). The Supreme Court held that "the trial court's ultimate conclusion that a consent was voluntary or involuntary is to be reviewed for correctness. The trial court's underlying factual findings will not be set aside unless they are found to be clearly erroneous." *Thurman* explicitly adopted the reasoning presented in *Vigil*. *Thurman*, 203 Utah Adv. Rep. at 25-26 (citations omitted). *See State v. Vigil*, at 1298-1301.

C. Impact of *Thurman*

While *Thurman* has clarified the standard of review applicable to voluntary consent determinations, difficulties still remain in determining the appropriate standard of review in other investigatory stop issues.

The appellate divergence concerning the applicable standard of review for pretext stop and/or reasonable suspicion issues continues. *Thurman* is silent on whether the court's holding applies to other Fourth Amendment, investigatory stop inquiries. A narrow reading of *Thurman* would limit the application of a bifurcated standard of review to voluntary

consent issues or even more narrowly, to *Arroyo*-type settings. But arguably, the analysis applied in *Thurman* and *Vigil* applies to equally fact-bound determinations such as reasonable suspicion and pretext stops. In *Vigil*, the court defined a mixed question of law and fact as "one in which the historic facts are admitted or established, the rule of law is undisputed, and the issue is whether the rule of law as applied to the established facts is or is not violated." *Vigil*, 815 P.2d at 1299 (citations omitted, ellipses omitted). If the Utah Supreme Court has adopted wholesale the reasoning of *Vigil*, then arguably, this definition of mixed law and fact applies to other investigatory stop issues.[16]

Additionally, in *Thurman*, the court reasoned that past decisions which applied a clearly erroneous standard to voluntary consent determinations had simply assumed a federal standard of review. The court went on to state: "Moreover, upon close examination, in most of these cases we appear not to have actually applied the clearly erroneous standard, but to have engaged in an independent consideration of the facts to determine whether the trial court's ultimate conclusion that the consent was voluntary was correct." *Thurman*, at 24.[17] The Supreme Court has left the door wide open for application of the same analysis to the court's decision in *Mendoza* and the pretext and reasonable suspicion standard of review.

Another concern voiced over application of a bifurcated standard of review is the erosion of the trial court's discretion in fact finding. *State v. Sykes*, 840 P.2d 825 (Utah App 1992) (Jackson, J., concurring). Judge Jackson suggests that appellate courts have tended to determine the applicable standard of review by labeling the issue in question and then applying a corresponding standard.[18] Judge Jackson's concern is that by labeling issues appellate courts have failed to make the essential inquiry into competing policy considerations inherent in reviewing trial court decisions.

> [D]o the concerns of judicial administration favor the trial court or do they favor the appellate court? To put it another way — if efficiency, accuracy and precendential weight make it more appropriate for a trial judge to determine whether established facts fall within the relevant legal definition, we should defer. However, if the same concerns favor the appellate court, we should not defer.

Id at 830. Judge Jackson argues that such labeling allows appellate courts to review the factual findings of the trial court under a clearly erroneous standard and then again review the facts and any 'conclusions' under a correctness standard. The Utah Supreme Court addressed Judge Jackson's concerns in footnote eleven of *Thurman* with an extensive discussion of footnote three of *Ramirez*. *See Thurman*, 203 Utah Adv. Rep. at 29, n. 11.

"Recently, . . . Judge Orme offered several practical suggestions for anyone considering an innovative state constitutional argument."

All investigatory stop issues are fact intensive. The bifurcated approach announced in *Thurman* clearly mandates heightened appellate scrutiny of a trial court's ultimate conclusions. This heightened scrutiny should be offset by an increased deference to the trial court's underlying factual determinations, including the trial court's determination of credibility of witnesses and resolution of conflicting evidence. Otherwise, appellate review may well render the trial court's role "meaningless." *Sykes*, 840 P.2d at 838 (Jackson, J., concurring).

V. STATE CONSTITUTIONAL CONSIDERATIONS

An article of this length cannot faithfully address Utah State constitutional analysis based on Article I, Section 14. The Utah Supreme Court has frequently invited practitioners to include independent state constitutional arguments in their briefs. This encouragement bore fruit in *State v. Larocco*, 794 P.2d 460 (Utah 1990).

Prior to *Larocco*, the Utah Supreme Court dealt with search and seizure cases by generally following the federal interpretation of the Fourth Amendment issues. Unfortunately, the federal interpretation of Fourth Amendment protections as applied to automobile searches has been anything but consistent. Rather, the United States Supreme Court has alternatively used two different approaches to warrantless automobile searches. *Larocco* presented the Utah Supreme Court with an opportunity to diverge from the federal case law and attempt to simplify search and seizure issues.

The standard set forth in *Larocco* allows warrantless searches only "where they satisfy their traditional justification, namely, to protect the safety of police or the public or to prevent the destruction of evidence." *Id.* at 469-70. The court emphasized that the imposition of the standard will hopefully promote "predictability and precision in judicial review" and "protection of the individual rights of [Utah's] citizens." *Id.*

Counsel must continue to advance arguments premised on independent state constitutional grounds. While the court has frequently called for state constitutional arguments, many advocates are left wondering just exactly what the court is seeking. The cases that address the issue of briefing requirements have generally stated that a brief is inadequate, rather than giving specific positive guidelines.

We may conclude from Utah case law:

1. A nominal invocation of the state constitution is generally insufficient to embark on a state constitutional analysis.
2. State constitutional arguments must be qualitatively briefed at both trial and appellate court stages.
3. A separate state constitutional analysis must set forth reasoned arguments why the Utah constitution yields a different result than its federal counterpart.

Recently, in *State v. Bobo*, 803 P.2d 1268 (Utah App. 1990), Judge Orme offered several practical suggestions for anyone considering an innovative state constitutional argument. He suggested that practitioners should do the following:

1. Consider the unique circumstances of Utah's constitutional development.[19]
2. Establish the propriety of state courts to interpret similar state constitutional provisions differently from similar interpretation of federal provisions.[20]
3. Use a "sibling state" analysis, paying particular attention to states with similar constitution provisions and constitutions which served as models for Utah constitutional provisions.[21]

These observations are worthy of seri-

ous consideration. The format suggested in *Bobo* might prevent briefing errors which have been highlighted by the court in the past. There are also several scholarly articles which should be studied by anyone contemplating advancing or deflecting arguments premised on Article I, Section 14 of the Utah constitution.[22]

Where the evolution of applying Article I, Section 14 principles will lead us is uncertain at best. It is fair to say that practitioners have heeded the call for thoughtfully briefed state constitutional arguments. Conversely, appellate response has been unresponsively barren. For present purposes, law enforcement officers involved in investigatory stops in Utah should conclude that they must perform these stops with a dedicated awareness of both state and federal constitutional requirements in mind.

VI. TRENDS TOWARD INCREASED COMPLEXITY: JURISPRUDENTIAL FOOTNOTING

Search and seizure jurisprudence is becoming increasingly complex in Utah. One index of that trend is the increased footnoting in appellate cases.

Granted, footnoting can be instructive. Footnotes can present background information, additional source material, and further explanation or clarification. Additionally, they can be used for tedious string cites and tangential or diversionary arguments, preserving the flow and readability of the text of the opinion.[23]

They are, however, inappropriate for important judicial announcements. Discussion of substantive, ground-breaking law should not be consigned to the dubious status of a footnote. They should be concise, not free-standing mini-briefs. An example of extensive footnoting containing important judicial announcements can be found in *State v. Ramirez*, 817 P.2d 774 (Utah 1991) and *State v. Carter*, 812 P.2d 460 (Utah App. 1991).

Furthermore, footnotes should not be so complicated that the reader must make an outline to understand them. For example, the Utah Supreme Court in footnote eleven of *State v. Thurman*, 203 Utah Adv. Rep. at 29, attempts to explain footnote three of *State v. Ramirez*, 817 P.2d 774, 781-82. Some practitioners have already declared that they anxiously await the arrival of the next generation of interpretive footnotes which most likely will attempt to explain footnote eleven in *Thurman*.

Practitioners and trial courts alike are confused as to what precedential weight to give a footnote, particularly when the footnote concerns the holding in the text of the opinion. Holdings and dicta become obscured. Often, the appellate courts seem to use footnotes to engage in a "conversation" of sorts without regard to the effect this conversation is having on trial courts and practitioners. As a result, rather than clarifying the applicable legal standard the appellate courts have created more confusion.

VII. CONCLUSION AND CAUTION

Litigators and trial court judges must carefully read each investigatory stop opinion. There is no substitution for examination and knowledge of the case law including the voices of dissent and footnotes. But one must to be cautious in interpretation and application of these decisions. It is essential to note that the Utah Supreme Court has not yet resolved critical issues addressed by the Court of Appeals. For example, the Utah Supreme Court has neither discussed nor adopted the hypothetical reasonable officer standard.

"Discussion of substantive, ground-breaking law should not be consigned to the dubious status of a footnote."

Utah's appellate courts have long encouraged the trial court judges to carefully fashion findings of fact, either in writing or on the record. Cynical finders of fact, in light of the *Thurman* decision, might be tempted to abandon detailed findings because of the court's proclivity to review findings of fact for "correctness." Appellate "fact tinkering" may result in diminished deference for the trial bench. An abandonment of detailed trial court findings would simply be wrong. The higher road is for trial judges to carefully draft findings of fact and to simply allow the appellate chips to fall where they may. Perhaps as the trial court bench continues to respond to the heightened expectations of the appellate bench, that the appellate bench will in turn give heightened deference.

Unfortunately, practitioners cannot, and perhaps should not, expect bright-line, litmus tests in Fourth Amendment jurisprudence. The application of the "totality of the circumstances" doctrine does not allow for concrete rules and formulae. It is a field which demands exceptional briefing at both the trial and appellate levels and that briefing must include careful attention to the facts.

Utah's appellate courts, like practitioners and trial judges, continue to struggle with definitions, distinctions, inconsistent federal and state analysis, cloudy theories and complex interpretations in the field of Fourth Amendment jurisprudence. An abundance of precedent suggests that it may always remain an area of uncertainty. But the formidable task of making sense of the case law is at least interesting. On occasion, readers are forced to diagram their way through the lengthy diatribes of endemic dicta. Unless the bar protests, lawyers will endure by acquiescence. Aside from those boring episodes, the task is a continuing adventure as one reads each new chapter of an interesting jurisprudential saga.

[1]In 1989, the *Utah Bar Journal* published an article entitled "Investigatory Stops: Exploring the Dimensions of the 'Reasonable Suspicion' Standard." This article examines Utah appellate court investigatory stop/reasonable suspicion cases announced since that publication and comments on developments in Utah's search and seizure jurisprudence.

[2]I would like to thank Helene Kepas-Brown, Esq. who worked extensively on this paper. In addition to drafting section IV of this paper, Helene provided helpful editing and research. I would also like to acknowledge the efforts of Jeffrey Hunt.

[3]It is probable that even during the preparation and editing of this article that additional investigatory stop cases will be decided. The reader is referred to the Utah Advance Reports for enlightenment and to compare the conclusions of this article with the most recent appellate pronouncements.

[4]This, of course, assumes that there exists within our legal community a "phantom hypothetical reasonable defense counsel or prosecutor" who properly frames the issues, briefs the case and presents an undisputed fact scenario.

[5]In *State v. Dietman*, 739 P.2d 616, 617-18 (Utah 1987) (per curiam), the Supreme Court recognized three levels of encounters, and the circumstances under which each is constitutionally permissible:

> (1) an officer may approach a citizen at anytime and pose questions so long as the citizen is not detained against his will;
>
> (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop";
>
> (3) an officer may arrest a suspect if the officer has probable cause to believe an offense is being committed.

Id. (quoting *United States v. Merritt*, 736 F.2d 223, 230 (5th Cir. 1984)).

Under this framework, a "level one" encounter occurs when an officer approaches an individual and poses questions, and the individual remains free to disregard the

questions and walk away. *State v. Jackson*, 805 P.2d 765, 767 (Utah App. 1990). As long as the individual remains free to disregard the police, the encounter is consensual, no seizure has occurred, and no reasonable suspicion is required. *Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991). A "level two" encounter, or seizure occurs when a reasonable person, based upon the totality of the circumstances, remains because he or she believes he or she is not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *State v. Trujillo*, 739 P.2d 85, 87 (Utah App. 1987). "In other words, seizure occurs where an officer restricts the liberty of an individual." *State v. Carter*, 812 P.2d 460, 463 (Utah App. 1991) (citations omitted). Seizures that are not brief and not justified by the circumstances violate the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968).

[6]The cases which have acknowledged or applied the hypothetical reasonable officer standard are as follows: *State v. Lopez*, 831 P.2d 1040 (Utah App. 1992); *State v. Lovegren*, 183 Utah Adv. Rep. 81 (Utah App. 1992); *State v. Figueroa-Solorio*, 830 P.2d 276 (Utah App. 1992); *State v. Davis*, 821 P.2d 9 (Utah App. 1991); *State v. Carter*, 812 P.2d 460 (Utah App. 1991); *State v. Lovegren*, 798 P.2d 767 (Utah App. 1990); *State v. Robinson*, 797 P.2d 431 (Utah App. 1990); *State v. Talbot*, 792 P.2d 489 (Utah App. 1990); *State v. Marshall*, 791 P.2d 880 (Utah App. 1990); *State v. Smith*, 781 P.2d 879 (Utah App. 1989); *State v. Holmes*, 774 P.2d 506 (Utah App. 1989).

[7]While Judge Leonard H. Russon authored the majority opinion, Judge Gregory K. Orme's concurring opinion, in which Judge Judith M. Billings joined, represents the opinion of the court as to the application of the pretext stop analysis.

[8]Judge Russon elaborated on other difficulties in implementing the *Sierra* hypothetical reasonable officer standard such as a separation of powers problem by permitting the police or the courts to decide what laws are reasonable enough to enforce.

[9]Recently, the Utah Supreme Court announced in *State v. Thurman*, 203 Utah Adv. Rep. 18 (Utah 1993) that the doctrine of stare decisis applies to the Court of Appeals. "Although the doctrine is typically thought of when a single-panel appellate court is faced with a prior decision from the same court, stare decisis has an equal application when one panel of a multi-panel appellate court is faced with a prior decision of a different panel." *Id.* at 25.

[10]The Court of Appeals previously relied upon the *Carson* analysis in *State v. Sierra*, 754 P.2d 972 (Utah App. 1988).

[11]The "and its occupants" language, directly attributable to *Prouse*, has been quoted in several cases. *See State v. Johnson*, 805 P.2d 761, 763 (Utah 1991); *State v. Schlosser*, 774 P.2d 1132, 1135 (Utah 1989).

[12]Cases where the stop was allegedly based upon a traffic violation include *State v. Johnson*, 805 P.2d 761 (Utah 1991); *State v. Arroyo*, 796 P.2d 684 (Utah 1990); *State v. Marshall*, 791 P.2d 880, 883 (Utah App. 1990); *State v. Schlosser*, 774 P.2d 1132, 1135 (Utah App. 1989); *State v. Sierra*, 754 P.2d 972, 975 (Utah App. 1988); and *State v. Cole*, 674 P.2d 119, 123 (Utah 1983). Cases where the stop was allegedly based upon a suspicion of illegal activity include *State v. Godina-Luna*, 826 P.2d 652 (Utah App. 1992); *State v. Lovegren*, 183 Utah Adv. Rep. 81, 82 (Utah App. 1991); *State v. Steward*, 805 P.2d 213, 215 (Utah App. 1991); *State v. Talbot*, 792 P.2d 489, 491 (Utah App. 1990); *State v. Holmes*, 774 P.2d 506, 507 (Utah App. 1989); and *State v. Baird*, 763 P.2d 1214, 1216 (Utah App. 1988).

[13]Several of the points made by the court in this case were first articulated in a dissenting opinion in *State v. Lopez*, 831 P.2d 1040 (Utah App. 1992).

[14]*Figueroa-Solorio* cites *State v. Robinson*, 797 P.2d 431 (Utah App. 1990) as precedent that a computer check may be conducted during the course of a traffic stop. However, as *Figueroa-Solorio* points out, *Robinson* did not specifically address the question of whether a warrants check was permissible. *See Figueroa-Solorio*, 830 P.2d t 280; *Robinson*, 797 P.2d at 435. Similarly, in *State v. Johnson*, 805 P.2d 761 (Utah 1991), the Supreme Court did not specifically address the question of whether a warrants check was part of a routine traffic stop, but held that under the specific facts available to the officer in question, running a warrants check on the passenger in the vehicle stopped violated the Fourth Amendment. *Id.* at 764. In *State v. Munsen*, 821 P.2d 13 (Utah App. 1991), while the majority reversed the trial court's denial of a motion to suppress on a lack-of-reasonable-suspicion grounds, Judge Jackson filed a concurring opinion which indicated he found a warrants check to be outside the scope of a level two detention. *Id.* at 16-17.

[15]Determining the level of encounter is key in many investigatory stop issues. As noted earlier, Utah courts recognize three levels of encounters. *See supra* at note 4.

[16]In addition to Fourth Amendment determinations, the Supreme Court has also applied the "correctness" standard to all evidentiary decisions. See *State v. Thurman*, 203 Utah Adv. Rep 18, 25-26 n. 11 (Utah 1993); *State v. Ramirez*, 817 P.2d 774 781-82 n. 3.

[17]Prior Utah Supreme Court cases include: *State v. Arroyo*, 796 P.2d at 687; *State v. Griffin*, 626 P.2d 478, 480 (Utah 1981); *State v. Durand*, 569 P.2d 1107, 1108-09 (Utah 1977); *State v. Tuttle*, 16 Utah 2d 288, 292, 399 P.2d P.2d 580, 582, *cert. denied*, 382 U.S. 872 (1965); *State v. Louden*, 15 Utah 2d 64, 67, 387 P.2d 240, 242 (1963).

[18]A "question of fact" corresponds with a "clearly erroneous" standard, a "question of law" corresponds with a "correctness" standard, and a mixed question of law and fact corresponds with a bifurcated standard.

[19]A practitioner may want to engage in historical analysis of Utah constitutional framer's original intent which would support applying a different standard from the federal case law interpreting similar passages of the U.S. Constitution. *See* Bradley, *Hide and Seek: Children on the Underground*, 51 Utah Hist.Q. 133, 142 (1983); Flynn, *Federalism and the Viable State Government*, 1966 Utah L.Rev. 311; Crawley, *The Constitution of the State of Deseret*, 29 B.Y.U. Studies 7 (1989).

[20]*See State v. Watts*, 750 P.2d 1219, 1222 n.8 (Utah 1988) ("[C]hoosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating the state's citizens from the vagaries of inconsistent interpretations given to the Fourth Amendment by the federal courts."); *People v. Brisendine*, 13 Cal. 3d 528, 550 (1975) ("It is a fiction too long accepted that provisions in state constitutins textually indentical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: The Bill of Rights was based upon corresponding provisions of the first constitutions, rather than the reverse." *See generally State v. Hygh*, 711 P.2d 264, 272-73 (Utah 1985); *State v. Brooks*, 683 P.2d 51 (1974); *see also State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975).

[21]*See State v. Jewett*, 146 Vt. 221, 500 A.2d 233 (1985). *Jewett* has been cited with approval in *State v. Earl*, 716 P.2d 803, 806 (Utah 1986). *See*, M. Hickman, *Utah Constitutional Law*, 42-43 (1954) for information on states whose constitutions served as models for the Utah Constitution.

[22]Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence under the Utah Constitution, Article 1, Section 14*, 17 Utah J.Contemp. L. 267 (1991); Paul Cassell, *Search and Seizure and the Utah Constitution: Has the Utah Supreme Court Gone Too Far in Creating a State Exclusionary Rule*," Utah L.Rev. (in press).

[23]The American Heritage Dictionary of the English Language defines the word footnote as follows: "A note placed at the bottom of a page of a book or manuscript that comments on or cites a reference for a designated part of the text. . . . Something said or done after the more important work has been completed; an afterthought. . . . To add further support or evidence for."

Reflections on the Constitutionality of the Motor Vehicle Seat Belt Act

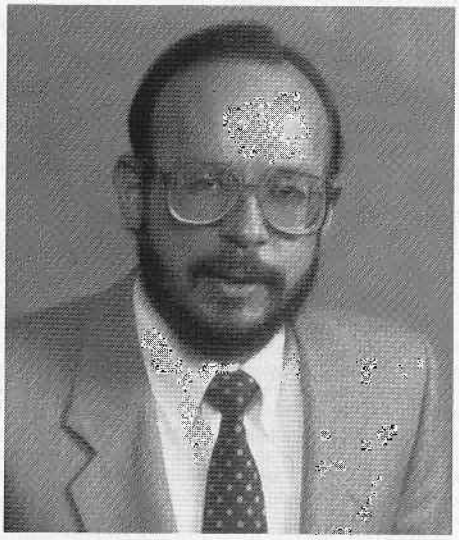
By Gary L. Johnson

> The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.[1]

There are two competing interpretative principles in Utah constitutional jurisprudence. The first principle is that our State Constitution is in no fashion a mere grant of power to the Legislature, rather it operates solely as a limitation of last resort on that assembly. The Legislature has plenary power to perform any act or execute any function not prohibited by our Constitution.[2]

The second principle recognizes that the purpose of our Constitution is to provide an orderly foundation for our government and to serve as a constraint on the exercise of legislative power. This principle emphasizes that legislative prerogative must be exercised within the framework of the State Constitution. If a statutory enactment contravenes any provision of the Utah Constitution, that statute is invalid.[3]

It is the contention of this author that §41-6-186 of the Motor Vehicle Seat Belt Act[4], concerning the inadmissibility of evidence of the failure to wear seat belts, violates Article IV, Section I and Article VIII, Section IV of the Utah Constitution and is invalid.[5] Within the interpretative parameters set forth above, this analysis will present a state constitutional framework for assessing the constitutionality of the Motor Vehicle Seat Belt Act (hereinafter "Seat Belt Act"). The role of the Legislature, the separation of powers doctrine and the power of judiciary as it relates to court procedure and evidence will be examined and compared. After cataloging the constitutional infirmities of § 41-6-186, the analysis will address considerations relating to the admissibility of evidence of the failure to wear seat belts.



GARY L. JOHNSON is a shareholder with the law firm of Richards, Brandt, Miller & Nelson. He concentrates his practice in complex civil litigation, insurance and corporate law.

THE LEGISLATURE AS SOVEREIGN

Article I, Section II of the Utah Constitution expresses a fundamental principle essential to every democracy: "All political power is inherent in the people. . . ." Under the Utah Constitution, the Legislature, representing the people, has all of the original power of the sovereign to enact laws of general applicability, to provide normative standards of conduct for society and to provide for the organization and operation of the government.[6] A statute enacted by the Utah Legislature carries with it the presumption that it is valid, and that the words and phrases were chosen advisedly to express legislative intent.[7]

It is not the prerogative of the courts of our state on their own initiative to strike down statutes as unconstitutional, regardless of the effect of the statute or the court's own personal proclivities. Like their federal cousins, our judges must wait for litigants to come forth and challenge the offending legislation.[8] Further, it is a universal rule of constitutional interpretation that when there is more than one alternative to the interpretation of a statute, the court is obligated to adopt any reasonable construction of a statute that will assure its constitutionality in preference to any construction that would render its constitutionality doubtful.

A statute enacted by the Utah Legislature should not be declared unconstitutional "unless it is so unclear or confused as to be wholly beyond reason, or inoperable, or it contravenes some basic constitutional right."[9] However, the Utah courts, for all the presumptive validity of legislation, cannot shirk their duty to find a statute unconstitutional when it conflicts with a provision of the Utah Constitution.[10] Further, the legislature cannot narrow or otherwise alter a constitutional provision by legislation.[11]

Section 41-6-186 of the Seat Belt Act, stating that evidence of the failure to wear seat belts is inadmissible, contravenes two provisions of the Utah Constitution: Article V, Section I, which provides for the separation of powers of the three branches of government, and Article VIII, Section IV, which provides a constitutional mandate for the Utah Supreme Court to establish and implement rules of evidence.

THE SEPARATION OF POWERS

Article V, Section I of the Utah Constitution provides as follows:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these depart-

ments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Under the Utah Constitution, the doctrine of separation of powers is explicitly set forth, unlike the federal constitution where it is left to be deduced from the general structure of that document. The historical purpose behind the separation of powers provision is to ensure the "independence of each of the branches of state government so that no one branch becomes a depository for a concentration of governmental powers."[12]

The separation of powers provision in Article V is a cornerstone of the Utah Constitution. As Justice Stewart noted in his concurring opinion in *Matheson v. Ferry*: "The framers of the Constitution considered the principle embodied in Article V, Section I to be of such importance that they wrote that provision to prevent its erosion by implication, strained constructions, or any means which would have the effect of enfeebling that great, over-arching principle of constitutional government."[13] Exceptions, however, to the general principle, are allowed in cases "expressly directed" or "permitted" by the Constitution itself.

POWERS OF THE JUDICIARY

Article VIII, Section IV of the Utah Constitution provides in pertinent part:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the legislature.

The power of the Utah Supreme Court to enact rules of evidence and the power of the legislature to amend rules of evidence, but not create rules of evidence, has been addressed by the high court under several different circumstances since the Utah Constitution was amended in 1985.

Pursuant to its constitutional power in Article VIII, Section IV of the Utah Constitution, in September 1985, the Utah Supreme Court formally adopted all statutory rules of evidence not inconsistent with the Court's rules.[14] In January of 1989, the Utah Supreme Court adopted all existing statutory rules of procedure and evidence contained in Utah Code Annotated §§ 77-35-1 through 33 that were not inconsistent with or superseded by rules of procedure and evidence already adopted by the court.[15] In *Marakis v. State Farm Fire & Casualty Co.*,[16] however, the Utah Supreme Court discussed, albeit in dictum, the applicability of a rule of evidence drafted by the legislature, not the court.

"Section 41-6-186 of the Seat Belt Act, stating that evidence of the failure to wear seat belts is inadmissible, contravenes two provisions of the Utah Constitution . . . ."

In *Marakis*, an insured brought an action against an uninsured motorist carrier for damages suffered in a one-car accident allegedly caused by a non-contact "hit-and-run" driver. The insurance carrier argued that a recent change in Utah Code Annotated § 31A-22-305(5) (1987) which provided that the existence of the unidentified vehicle in a hit-and-run situation must be established by "clear and convincing evidence," required proof of something more than the testimony of the insured. Because the statute became effective after the date of the accident at issue and the statute was not retroactive, the court decided the case on other grounds. In its discussion of the evidentiary standard in the statute, however, the court had this to say:

> In deciding this case, because the issue is not before us, we do not address the constitutionality and/or legal applicability of this statute as it regards this Court's constitutional mandate and responsibility to establish and implement rules of evidence. *See* Utah Const. Art. VIII, Sec. IV (1985).[17]

As a private citizen, the day-to-day decisions and choices this author makes are bound generally not by our State Constitution, but by his conscience. Utah state legislators, acting in their official capacity, do not always have that luxury. They must exercise their judgment and carry out their functions within the bounds of the Utah Constitution and within the bounds of the separation of powers doctrine. When the Legislature promulgates rules of evidence or amends a rule of evidence with less than two-thirds vote of both houses of the Legislature concurring, that act is unconstitutional. It would appear from the Supreme Court's comments in *Marakis*, that the encroachments of the Utah Legislature upon judicial power have not gone totally unnoticed.

THE SEAT BELT ACT

Our Seat Belt Act can be found at Utah Code Annotated § 41-6-181 *et seq*. It provides generally that adults who are passengers in the front seat of a motor vehicle operated on the streets and highways of Utah shall wear a seat belt. There is a cross-reference to the statute for children under five years of age and specific provisions for children five through eighteen years of age, along with some common sense exceptions. The penalty for the violation of this statute is minimal, consisting of a $10 fine.

The last provision of the Seat Belt Act is Utah Code Annotated § 41-6-186, which states:

> The failure to wear a seat belt does not constitute contributory or comparative negligence, and may not be introduced as evidence in any civil litigation on the issue of injuries or on the issue of mitigation of damages.

That provision is unconstitutional. It is the enactment by the Utah Legislature of a rule of evidence in direct violation of Article VIII, Section IV of the Utah Constitution. Further, the usurpation of judicial powers by the Legislature violates Article V, Section I of the Utah Constitution. There is no construction of § 41-6-186 that renders it constitutional.

In *Whitehead v. American Motors Sales Corp.*,[18] plaintiffs brought an action for personal injuries against another driver and the manufacturer of the vehicle in which they were riding. At trial, defendant sought to introduce evidence of plaintiffs' failure to wear seat belts. Although the court cited generally to case law rejecting admissibility of that evidence, it stated that the one persuasive reason not to admit testimony on seat belts is the passage of Utah Code Annotated § 41-6-186. The majority

opinion states:

> Although this statute was passed subsequent to the litigation *sub judice* and was therefore not controlling at trial, we nonetheless decline to place ourselves in the awkward position of adopting a stance that is in direct contravention of express legislation. We therefore find that the trial court did not err in excluding evidence that the failure to use seat belts constituted contributory negligence or failure to mitigate damages.[19]

The author assumes the constitutionality of § 41-6-186 was not raised before the Court. Express legislation or not, the Court cannot shirk from its responsibility to strike down a statute that is in direct contravention of express provisions in the Utah Constitution.

In *State v. Hansen*,[20] the Utah Supreme Court stated that it was within the prerogative of the legislature to enact rules of evidence and it was the duty of the court to give them effect. That statement, however, appeared before the 1985 amendments to the Utah Constitution that specifically empower the Utah Supreme Court to enact rules of evidence. Adopting a construction of the statute that assumes constitutionality, i.e., that § 41-6-186 is only an "amendment" to a rule of evidence and not an enactment of a rule of evidence, does not save the provision. A cursory review of only one house of the Utah Legislature, the Senate, reveals that the Seat Belt Act passed the Senate on February 13, 1986, on a vote of seventeen "yes," ten "no" and two "absent."[21] The vote is a bare majority, not the two-thirds required by the Utah Constitution.

The remainder of the Seat Belt Act, however, is constitutional. As the Utah Supreme Court noted in *Berry v. Beech Aircraft Corp.*, severability is primarily a matter of legislative intent "which generally is determined by whether the remaining portions of the act can stand alone and serve a legitimate legislative purpose."[22] With the offending provisions severed, the Act can achieve the purpose of encouraging our citizens to wear seat belts and thus minimize the unquestioned social costs from the failure to wear seat belts. Sections 41-6-181 through 185 stand on their merits and remain constitutional.

ADMISSIBILITY OF EVIDENCE CONCERNING THE FAILURE OF A LITIGANT TO WEAR SEAT BELTS

The Seat Belt Act, shorn of the unconstitutional Section 186, provides that drivers and front seat passengers "shall wear" seat belts. It is a general rule in Utah that the violation of a standard of safety set by a statute or ordinance is prima facie evidence of negligence.[23] Therefore, the failure of a driver or front seat passenger to wear seat belts should be considered as prima facie evidence of comparative negligence if either of those parties are involved in an automobile accident resulting in personal injury litigation.

"[T]he failure of a driver or front seat passenger to wear seat belts should be considered as prima facie evidence of comparative negligence."

Support for this contention is found not only in Utah case law, but in the language of the Utah Comparative Negligence Act.[24] Utah Code Annotated § 78-27-37(2) defines "fault" for the purposes of comparative negligence as:

> [A]ny actionable breach of legal duty, act, or omission proximately causing or contributing to injury *or damages sustained by a person seeking recovery*, including, but not limited to, negligence in all its degrees, contributory negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification or abuse of a product.

The broad definition of fault in the Comparative Negligence Act provides additional support for the proposition that the failure to wear seat belts is prima facie evidence of negligence in personal injury litigation arising out of automobile accidents. It is an omission that causes or contributes to the damages sustained by a person seeking recovery. Arguably, however, the failure to wear seat belts is as much an issue of avoidable consequences as it is an issue of comparative negligence. In other words, although the failure to wear seat belts may not "cause" the accident, it does "cause" the injuries.

Justice Oaks in his concurring opinion in *Acculog, Inc. v. Peterson*,[25] provided guidelines for how a trial judge should handle the issue of apportionment of damages in cases where the negligence of the recovering plaintiff did not, in fact, contribute to the cause of the accident, but did contribute to the damages incurred. Justice Oaks cited Restatement (Second) of Torts, § 465, comment c in support of his analysis.

In *Acculog*, the plaintiff's van, equipped with special geologic equipment, caught fire and was destroyed on the same day that the defendant Peterson had installed a new fuel filter to correct overheating in the engine. The plaintiff claimed substantial damages as a result of the destruction of the van and the special equipment in the van, as well as lost profits. Apparently, the plaintiff did not carry a fire extinguisher in its van.

A special verdict containing five interrogatories was submitted to the jury. The jury determined that the plaintiff was responsible for the damages to its vehicle because it failed to carry a fire extinguisher, notwithstanding the defendant's evident responsibility for the cause of the fire. The Utah Supreme Court reversed and remanded to the trial court and specifically held that the trial court had committed prejudicial error in submitting to the jury the question of the plaintiff's comparative negligence. However, the high court expressly did not address the issue of mitigation of damages or what is sometimes called the "doctrine of avoidable consequences." In his concurring opinion, Justice Oaks, as noted above, set out a scheme for determining how the trial judge should handle the issue of apportionment of damages at the new trial.

Justice Oaks noted that first the negligence of both the plaintiff and the defendant, which resulted in the actual accident itself were to be compared in a fashion consistent with the Comparative Negligence Act. The trier-of-fact was to determine what damages the plaintiff would be allowed to recover, diminished in an amount proportional to the amount of negligence attributable to the plaintiff. In other words, the jury was to determine as to the cause of the accident the respective percentage of negligence on the part

of the plaintiff and on the part of the defendant.

Next, Justice Oaks said that the jury would need to determine whether or not the plaintiff negligently failed to mitigate or avoid the damages incurred because of the accident. If the plaintiff failed to mitigate or avoid such damages, then the plaintiff's award should be reduced by the amount of damages that the plaintiff would not have suffered if the plaintiff had not acted negligently in failing to avoid the consequences of the original accident.

Application of the guidelines set forth in the concurring opinion in *Acculog* to the situation where a litigant fails to wear his or her seat belts is both reasonable and consonant with our new comparative negligence statute. Further, the broad language in the statute referencing injury or damages seems to mandate such an approach. The failure to wear seat belts is itself prima facie evidence of negligence that falls within the definition of "fault" in the statute, and the breach of the legal duty to wear the seat belt also causes or contributes to the injuries or damages sustained by the person seeking recovery.[26]

CONCLUSION

Utah Code Annotated § 41-6-186, providing that the failure of a litigant to wear a seat belt may not be introduced as evidence in any civil litigation on the issue of injuries or on the issue of mitigation of damages, is the promulgation by the Utah Legislature of a rule of evidence and is unconstitutional. The offending section of the Seat Belt Act, however, is severable and the statutory mandate that drivers and passengers wear seat belts is constitutional and should remain in force and effect. The failure to wear seat belts imposes a huge social cost on the citizens of the State of Utah. Whether you want to analyze the problem as one of comparative negligence in a causation context or as avoidable consequences within the damages context, the failure of the litigant to wear seat belts should be admissible as evidence in the courts of Utah.

[1]*Youngstown Sheet & Tube Company v. Sawyer*, 347 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

[2]*Spence v. Utah State Agricultural College*, 119 Utah 104, 225 P.2d 18, 23 (1951); *Wood v. Budge*, 13 Utah 2d 359, 363, 374 P.2d 516 (1962).

[3]*Dean v. Rampton*, 556 P.2d 205, 206-07 (Utah 1976); *State v. Bentensen*, 14 Utah 2d 121, 124 378 P.2d 669 (1963); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

[4]Utah Code Annotated § 41-6-181, *et seq.* (1986). The author asserts that this legislation is unconstitutional for reasons unique to the Utah Constitution. For a general discussion of Utah state constitutional issues, see Durham, *Employing the Utah Constitution in the Utah Courts*, 2 Utah Bar J. 25 (November, 1989); Note, *The Utah Supreme Court and the Utah Constitution* 1986 Utah L. Rev. 319 (1986).

[5]The author believes that Utah Code Annotated § 31A-22-305 (5) (1987) and the Utah Code Annotated § 78-18-1(1) may also be unconstitutional under the analysis set forth here. Whether the three statutes also violate Art. I. §§ 11 and 24, is beyond the scope of this study.

[6]*Matheson v. Ferry*, 641 P.2d 674, 686 (Utah 1982) (Stewart, J., concurring); *Wood v. Budge*, 13 Utah 2d 359, 363, 374 P.2d 516 (1962).

[7]*Gord v. Salt Lake City*, 20 Utah 2d 138, 140, 434 P.2d 449 (1967); *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 819 (Utah 1991) (Legislative enactments presumed to be constitutional); *State v. Hoffman*, 733 P.2d 502, 505 (Utah 1987) (Legislative enactments are accorded a presumption of validity).

[8]*Baird v. State*, 574 P.2d 713, 717 (Utah 1978).

[9]*Gord v. Salt Lake City, supra*, 20 Utah 2d at 140-141. *See also Store v. Department of Registration*, 567 P.2d 1115, 1117 (Utah 1977) (Court should not declare statute unconstitutional unless determined to be so beyond a reasonable doubt).

[10]*Matheson v. Ferry, supra*, 641 P.2d 680; *Allen v. Rampton*, 23 Utah 2d 336, 345, 463 P.2d 7 (1969).

[11]*Salt Lake County v. Tax Comm'n*, 780 P.2d 1231, 1233 (Utah 1989).

[12]*Matheson v. Ferry, supra*, 641 P.2d at 681 (Howe, Jr., concurring).

[13]*Id.* at 689-90. *See also Hurst v. Cook*, 777 P.2d 1029, 1033 (Utah 1989) ("[T]he separation of power provision, Article V, Section I of the Utah Constitution, requires, and the Open Courts Provision of the Declaration of Rights, Article I, Section II, presupposes, a judicial department armed with process sufficient to fulfill its role as the third branch of government."); *Woodworth v. Utah National Guard*, 793 P.2d 383, 386 (Utah 1990) (Durham, J., dissenting).

[14]*Layton City v. Bennett*, 741 P.2d 965, 967-68 (Utah App. 1987).

[15]99 Utah Adv. Rep. 3 (Utah January 13, 1989).

[16]765 P.2d 882 (Utah 1988).

[17]*Id.* at 883 n. 2; *see also Carter v. Utah Power & Light Co.*, 800 P.2d 1095, 1097 n. 4 (Utah 1990) (noting constitutional limitation on legislature's ability to alter rules of procedure).

[18]801 P.2d 920 (Utah 1990).

[19]*Id.* at 928. *See also Hillier v. Lamborn*, 740 P.2d 300, 303-04 (Utah App. 1987) (evidence of failure to wear seat belts inadmissible under law existing prior to Seat Belt Act).

[20]588 P.2d 164, 167 (Utah 1978).

[21]Senate Journal, 1986 General Session of the Forty-Sixth Legislature, p. 607.

[22]717 P.2d 670, 686 (Utah 1985).

[23]*Hall v. Warren*, 632 P.2d 848, 850-51 (Utah 1981); *Little America Refining Company v. Leyba*, 641 P.2d 112, 114 n. 3 (Utah 1982).

[24]Utah Code Annotated §§ 78-27-37 through 43 (1986).

[25]692 P.2d 728, 732-33 (Utah 1984).

[26]*See generally Potts v. Benjamin*, 882 F.2d 1320 (8th Cir. 1989) (applying Arkansas law and finding that failure to use seat belt may constitute comparative negligence); *Cappadona v. State*, 546 N.Y.S. 2d 124 (App. Div. 1989) (evidence of a causal connection between alleged non-use of available seat belt and injuries sustained is sufficient to require the court as fact finder to consider evidence in mitigation of damages) *Insurance Company of North America v. Paskarnis*, 451 So. 2d 447 (Fla. 1984) (evidence of failure to wear seat belts may be considered by a jury in assessing plaintiff's damages) *McCoy v. Hollywood Quaries, Inc.*, 44 So. 2d 274 (Fla. App. 1989) (failure to wear seat belts permits defendant to mitigate damages in wrongful death action to the extent that the decedent's injuries were attributable to the non-use of the seat belt).

Commission Highlights

During its regularly scheduled meeting of March 11, 1993, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Iron County Attorney Scott Burns, Parowan City Manager Jim Burns, Parowan City Attorney Michael Park, and Cedar City Chief of Police Pete Hanson appeared to review the current status of judicial records in Iron County.
2. Colin Winchester, General Counsel to the Administrative Office of the Courts, was invited into the meeting to discuss the Court Administrator's approach to records consolidations.
3. Randy Dryer indicated that he had received a report from David Bird, Chairman of the Bar's Legislative Affairs Committee, regarding the Bar's involvement during the last legislative session and that it was consistent with the recommendations which had been made by the Commission based upon proposals from the Committee.
4. Craig Snyder referred to a list of bills of interest which included information that the Small Claims Court limit had been increased to $5,000, that all of the nine bills which the Bar had opposed were either defeated or referred to interim committee, and that judicial salaries would see only a modest 1.5% increase after some very strong initial indication that no raises would be forthcoming.
5. Snyder also indicated the following: HB45 "Child Support Orders" would require direct deduction from paychecks after January 1994 whether or not the payor is in arrears; HB130 would restrict medical malpractice liability and provide immunity for charitable cases involving other than simple negligence or indigent patients; HB137 repeals the liability of officers and directors based on common negligence to require gross negligence or recklessness; SB279 amends the interest rates on judgement to be 2% over the federal judgement rate and SB11 created the Judicial Rules Review Committee.
5. John Baldwin reported on the significant increase in registration for the Mid-Year meeting which has reached an all-time Mid-Year Meeting high of 473 registrants; the significant increase in the number of Bar sections, committees and related groups who are using the Law & Justice Center building; and the increasing staff support given to the committees and the increased attention being given to the CLE Department.
6. Dryer reiterated that he had had discussions with the Southern Utah Bar regarding CLE in outlying areas and that he had committed to providing more services to the rural areas.
7. John Baldwin referred to notices which had been placed in the *Bar Journal* announcing that CLE hours would be printed on a quarterly basis on mailing labels affixed to *Bar Journals* and that April's journal would include a notice of the Commission's policy regarding member benefits.
8. Baldwin indicated that the Public Forum would be held to discuss the delivery of legal services in the domestic relations area on April 29, 1993 in conjunction with Law Day and that the Officers & Directors Conference which was being prepared by the Business Law and Corporate Counsel sections.
9. The Board voted to hold the '95 and '96 Mid-Year Meetings in St. George.
10. Dryer requested Steve Trost, Denise Dragoo and Paul Moxley to serve on a panel to review the Legal Assistants Association of Utah proposed Guidelines for the Utilization of Legal Assistants.
11. Baldwin distributed a copy of the revised *Interprofessional Code* recently completed by the Bar's Legal/Health Care Committee.
12. Keith Kelly distributed a plan for the prevention of child abuse which he indicated that the Young Lawyers Section would be endorsing. He also indicated that the Domestic Violence video tape was being produced in conjunction with the Women Lawyers of Utah and the State Department of Public Safety.
13. Steve Trost reported on behalf of the sub-committee, which had been appointed by Randy Dryer to review the Client Security Fund enabling rule and procedures.
14. The Board voted to adopt Ethics Opinion #129 which deals with certain lawyer communications and actions, with respect to third persons and interprets Rule 4.4 of the Rule of Professional Conduct.
15. After concluding all discipline matters, all Staff and ex-officio members rejoined the meeting.
16. The Board voted to appoint a special prosecutor.
17. The Board voted to petition the Supreme Court for an admissions rule change for foreign law school graduates.
18. The Board voted to formally appoint Jim Davis under the terms of the statute passed providing the Bar Commission with a voting member of the Judicial Council.

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

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 1993, and ends June 30, 1994. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 1993 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at the Law & Justice Center after May 24, 1993. You may pick up a copy from the receptionist.

Please call or write John Baldwin at the Bar office with your questions or comments.

Discipline Corner

PRIVATE REPRIMAND

1. An attorney was privately reprimanded on February 12, 1993, for violating Rule 1.3, Diligence. The attorney was retained in January 1983 to represent the client in the original divorce action which provided for joint custody of the parties' minor child, with no provision for child support by either party to the other. In September 1983, pursuant to the client's request, the attorney filed a petition to modify the Decree of Divorce and further requested child support. However, the parties agreed to trade assets in lieu of child support for the first five (5) years with monthly support commencing in October 1988. Thereafter, the attorney failed to prepare and file the order reflecting the parties' stipulation.

Upon failure to receive the stated child support in October 1988, the client contacted the court and learned, for the first time, that the attorney had not filed the order with the court. Thereafter, the client contacted the attorney and was assured that the order would be filed. From October 1988 until January 1992, the attorney failed to prepare and file the order modifying the Decree. On February 7, 1992, the client notified the Bar Counsel's Office. On February 12, 1992, the attorney filed the order modifying the Decree of Divorce. In mitigation, the Screening Panel considered the fact that the attorney ultimately completed the work. Further, due to the lapse of time and the long periods of non-communication, a greater sanction seemed unwarranted. In aggravation, the Screening Panel considered the attorney's misrepresentation to the client concerning the filing of the order.

2. An attorney was privately reprimanded on March 8, 1993, for violating Rules 1.3, Diligence, and 1.4(a), Communication. The attorney accepted a $590.00 retainer on February 20, 1991 to represent a client in a divorce action. The attorney filed the complaint for divorce on or about February 21, 1991. Thereafter, the attorney failed to prepare and file a motion for temporary relief or prepare a stipulation as directed by the client. Further, the attorney failed to return the client's numerous telephone messages or otherwise communicate the status of the case to the client. Ultimately, on March 11, 1992, the client retained substitute counsel and learned, for the first time, that there had been an Order to Show Cause hearing on February 11, 1992, for dismissal of the action for failure to prosecute.

3. An attorney was privately reprimanded on March 24, 1993, and placed on one (1) year supervised probation for violating Rules 1.1, Competence; 1.2(a), Scope of Representation; 1.4(a), Communication; 1.14(d), Declining or Terminating Representation; and 8.1(b), Bar Admission and Disciplinary Matters. In January 1992 the attorney accepted a $600.00 retainer to represent the clients in a landlord-tenant dispute. The tenants sued for "Quiet Enjoyment." The attorney filed a Counterclaim for Unlawful Detainer and scheduled a hearing without giving the required five (5) day notice to the opposing counsel in violation of the Rules of Civil Procedure. The opposing counsel moved for the dismissal of the Counterclaim and sanctions. The attorney moved to amend the Counterclaim. The matter was set for a hearing for March 17, 1992. The attorney failed to appear until the client contacted her. The attorney ultimately did appear, unprepared, one and a half hours later. The client was sanctioned and ordered to pay $100.00 in attorney fees to the opposing party. The attorney, in court and on the record, accepted the liability for the sanction and subsequently failed to pay the $100.00 which failure resulted in a lien being placed on the client's property. Upon receipt of the Bar complaint, the Office of the Bar Counsel contacted the attorney who failed to respond to the Bar Counsel's request for information.

In aggravation, the Screening Panel considered the attorney's discipline history and failure to follow through with the Panel's earlier recommendation and to take adequate measures to become familiar with the Utah Rules of Civil Procedure. In mitigation, the Panel considered the attorney's lack of experience; the attorney has been in practice for five (5) years as a solo practitioner.

4. An attorney was privately reprimanded on March 24, 1993, and placed on one (1) year supervised probation for violating Rules 1.1, Competence; 1.3, Diligence and 8.1(b), Bar Admission and Disciplinary Matters. In July 1990, the attorney accepted a $400.00 retainer fee to draft a "sales agreement" which among other provisions was intended to protect the client (seller) in the event the buyer defaulted on the construction loan and hold the buyer responsible for the attorney fees and costs related to the enforcement of the sales agreement. The sales agreement which the attorney drafted failed to comport with the client's objectives. Thereafter, the buyer defaulted, the client paid the attorney an additional $500.00 to commence a civil action against the buyer. With the exception of a demand letter, the attorney failed to provide any meaningful legal service to the client. The client then hired substitute counsel and eventually prevailed in the civil suit. However, because the sales agreement did not provide for attorney's fees, the client was unable to recover the $11,000.00 fees and costs incurred in the enforcement of the sales agreement. Upon retaining substitute counsel, the client asked for a refund of the unused portion of the $500.00 or in the alternative asked the attorney to draft a simple will. The attorney failed to prepare the will or refund the unused portion of the $500.00 retainer. Upon receipt of the Bar complaint, the Office of Bar Counsel contacted the attorney who failed to respond to the Bar Counsel's request for information.

In aggravation, the Screening Panel considered the attorney's discipline history, failure to follow through with the Panel's earlier recommendation. In mitigation, the Panel considered the attorney's lack of experience; the attorney has been in practice for five (5) years as a solo practitioner.

5. An attorney was privately reprimanded on March 24, 1993, and placed on one (1) year supervised probation for violating Rules 1.3, Diligence and 1.13(b), Safekeeping Property. In May of 1991 the client, whose pro se workers compensation action had been dismissed, retained the attorney to pursue the matter. On June 19, 1991, the attorney, in a letter, asked the treating physician for a diagnostic report and agreed to pay for the costs related thereto. The attorney received the diagnostic report and a statement for $110.00 representing the cost of providing the requested information. Thereafter, the attorney received monthly billings from the Physician's Billing Services for the outstanding bill of $110.00. The attorney failed to pay the bill. In November 1991 the Billing Services notified the client of the unpaid balance and made threats to take legal action against the client. In

August 1992 the client paid the unpaid balance and filed a Bar complaint. On November 4, 1992, four months after the Bar complaint was filed, the attorney paid the $110.00.

6. On March 8, 1993, the Board of Bar Commissioners approved a private reprimand for violating Rule 1.3 of the Rules of Professional Conduct. The attorney was retained to represent a client in the United States District Court of California in a civil rights action. The attorney drafted and filed a Complaint that was subsequently dismissed for failing to state a claim upon which relief could be granted and for failing to timely respond to a defense Motion to Dismiss. The attorney drafted and filed First and Second Amended complaints which were likewise dismissed for failure to state a claim upon which relief could be granted. During the course of this litigation the attorney filed a complaint on behalf of this same client in a domestic relations matter and failed to appear at the scheduled hearing. The private reprimand for this conduct was recommended by a Screening Panel of the Ethics and Discipline Committee.

7. On March 27, 1993, the Board of Bar Commissioners approved a private reprimand, and restitution in the amount of $1,500.00, for an attorney who accepted a fee for legal services on or about October 14, 1987, and failed thereafter to provide all of the legal services for which the fee was paid. On that date, the attorney received $3,500.00, a portion of which was for attorney's fees and the remainder was to be used to negotiate a settlement with the opposing party. No settlement was negotiated, however, the complainant agreed that the value of the services provided by the attorney was approximately $2,000.00. This discipline was entered pursuant to agreement between the attorney and the Office of Bar Counsel.

SUSPENSION

8. On March 1, 1993, the Utah Supreme Court entered an Order placing Ray S. Stoddard on suspension from the practice of law for a period of one (1) year. Thereafter, Mr. Stoddard will be placed on supervised probation for six (6) months. This action was based upon Mr. Stoddard's failure to comply with a prior order of discipline entered on April 18, 1988 which suspended him from the practice of law for six (6) months, the suspension being stayed with Mr. Stoddard placed on a nine (9) month supervised probation. Thereafter, Mr. Stoddard failed to cooperate with the supervising attorney. The Office of Bar Counsel moved for the revocation of the probation and the reinstatement of the original suspension. Upon completion of the six month suspension, Mr. Stoddard was reinstated pursuant to motion and placed under six months supervised probation. Again, Mr. Stoddard failed to cooperate with the supervising attorney. The Office of Bar Counsel filed a Motion for Order to Show Cause. The matter came before the Special Master, the Honorable Dean Conder presiding. Judge Conder's alternate recommendation was approved by the Supreme Court placing Mr. Stoddard on a one (1) year suspension. Upon reinstatement, Mr. Stoddard will again be on supervised probation for six months with the same conditions as stated in the Order of Reinstatement dated March 6, 1991.

Judicial Council Seeks Attorneys to Serve onAlternative Dispute Resolution Committee

The Judicial Council is seeking qualified applicants to serve on a committee to study and propose rules and legislation to implement alternative dispute resolution procedures in this state. The committee will report to the Judicial Council and the Utah Supreme Court. Interested attorneys should submit a letter indicating their interest and outlining their qualifications to: Alternative Dispute Resolution Committee, c/o Administrative Office of the Courts, 230 South 500 East #300, Salt Lake City, Utah 84102. Letters of interest must be received no later than May 28, 1993. Questions regarding committee service may be directed to Colin R. Winchester at (801) 578-3800.

Beehive Chapter of ALA Elects New Officers

The Beehive Chapter of the Association of Legal Administrators (ALA) recently elected new officers to serve during the Chapter's 1993-1994 fiscal year.

The officers elected include Julie A. Carlisle, Office Administrator for Moyle & Draper, P.C., as President; Suzanne P. Wadsworth, Branch Office Administrator for Holme, Roberts & Owen, as Vice-President; Michael J. Easton, Firm Administrator for Callister Duncan & Nebeker, as Secretary/Treasurer; and Debbie H. Stone, Director of Personnel for Show Christensen & Martineau as Program Director. The outgoing President of the Chapter is C. Peyton Smith, Manager for Human Resources and Facilities for VanCott, Bagley, Cornwall and McCarthy.

The primary purpose of the Chapter is to promote the exchange of information regarding the administrative and management problems relating to legal organizations including not only private law firms but also corporate legal departments, government legal and judicial organizations, and public service legal groups.

In support of its purpose, the Chapter holds monthly meetings during which speakers address topics relating to law firm management. The Chapter also sponsors educational courses from time to time and annually conducts a salary and benefits survey relating to law firm staff employees.

While regular members of the organization must be law firm administrators or equivalent, associate membership is available for practicing lawyers involved in law firm management, and both full-time teachers and students at institutions of higher learning.

Further information about the Chapter and its activities can be obtained by contacting Julie A. Carlisle at 521-0250.

1993-1994 Utah State Bar
Request for Committee Assignment

DEADLINE - MAY 30, 1993

When the Utah Supreme Court organized the Bar to regulate and manage the legal profession in Utah, it defined our mission to include regulating admissions and discipline and fostering integrity, learning, competence, public service and high standards of conduct. The Bar has 27 standing and special committees dedicated to fulfilling this mission. Hundreds of lawyers spend literally thousands of hours in volunteer service on these committees.

Many committee appointments are set to expire July 1, 1993. If you are currently serving on a committee, please check your appointment letter to verify your term expiration date. If your term expires July 1, 1993 and we do not hear from you, we will assume that you do not want to be reappointed, and we will appoint someone to take your place. If your term expires in 1994 or 1995, you do not need to reapply until then. If you are not currently serving on a committee and wish to become involved, please complete this form. See reverse side for a brief explanation of each Committee.

COMMITTEE SELECTION

Applicant Information

Name _____

Office Address _____

Office Telephone _____

Choice	Committee Name	Past Service On This Committee?	Length of Service On this Committee?
1st Choice	_____	Yes/No	1, 2, 3, 3+ yrs.
2nd Choice	_____	Yes/No	1, 2, 3, 3+ yrs.
3rd Choice	_____	Yes/No	1, 2, 3, 3+ yrs.

ADDITIONAL COMMENTS (to include qualifications, reason for serving and other past committee affiliation):

_____

_____

_____

For over 60 years, the Utah State Bar has relied on its members to volunteer time and resources to advance the legal profession, improve the administration of justice, and to serve the general public. The Bar has many outstanding people whose talents have never been tapped. Many of you have never served on a Bar committee. I urge you to do so.

Sincerely,

H. James Clegg, President-Elect

DETACH & RETURN to H. James Clegg, President-Elect, c/o 645 South 200 East, Suite 310, Salt Lake City, UT 84111-3834.

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside Salt Lake are encouraged to participate in committee work.

Committees

1. Advertising. Makes recommendations to the Office of Bar Counsel regarding violations of professional conduct and reviews procedures for resolving related offenses.

2. Alternative Dispute Resolution. Recommends involvement and monitors developments in the various forms of alternative dispute resolution programs.

3. Annual Meeting. Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.

4. Bar Examiner Review. Drafts and grades essay questions for the February and July Bar Examinations.

5. Bar Examiner Committee. Reviews essay questions for the February and July Bar Exams to ensure that they are fair, accurate and consistent with federal and local laws.

6. Bar Journal. Annually publishes ten monthly editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.

7. Character & Fitness. Reviews applicants for the Bar Examinations to make recommendations on their character and fitness for admission to the Utah State Bar.

8. Client Security Fund. Considers claims made against the Client Security Fund and recommends appropriate payouts for approval by the Bar Commission.

9. Continuing Legal Education. Reviews the educational programs provided by the Bar to assure variety, quality and conformance with mandatory CLE requirements.

10. Courts and Judges. Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.

11. Delivery of Legal Services. Explores and recommends appropriate means of providing access to legal services for indigent and low income people.

12. Disciplinary Hearing Panel. Hears formal proceedings brought to determine violations of Rules of Professional Conduct and makes recommendations to Bar Commission for appropriate sanctions.

13. Ethics Advisory Opinion. Prepares advisory opinions in response to requests by members of the Bar interpreting Rules of Professional Conduct.

14. Ethics and Discipline. Screens complaints made against members of the Bar to determine violations of Rules of Professional Conduct and issues either non-public sanctions or formal complaints.

15. Fee Arbitration. Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.

16. Law Related Education and Law Day. Helps organize and promote law related education and the annual Law Day including mock trial competitions.

17. Lawyer Benefits. Reviews requests for sponsorship and involvement in various group benefit programs, including health, malpractice, disability, term life insurance and other potentially beneficial group activities.

18. Lawyers Helping Lawyers. Provides assistance to lawyers with substance abuse or other various impairments and make appropriate referral for rehabilitation or dependency help.

19. Legal/Health Care. Assists in defining and clarifying the relationship between the medical and legal professions.

20. Legislative Affairs. Monitors pending or proposed legislation which falls within the Bar's legislative policy and makes recommendations for appropriate action.

21. Mid-Year Meeting. Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.

22. Needs of Children. Raises awareness among Bar members about legal issues affecting children and formulates positions on children's issues.

23. Needs of the Elderly. Assists in formulating positions on issues involving the elderly and recommending appropriate legislative action.

24. New Lawyers CLE. Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New Lawyer CLE requirements.

25. Professional Liability. Monitors the Bar's continuous liability insurance program with carriers under a fully standard policy form.

26. Securities Advisory Committee. Provides input to the Utah Securities Division on issues regarding the regulation of the securities marketplace.

27. Unauthorized Practice of Law. Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

Forms\Commit.93

Supreme Court Seeks Attorneys to Serve on Advisory Committees

Article VIII of the Utah Constitution grants the Utah Supreme Court the authority to adopt rules of procedure, rules of evidence, and rules governing the practice of law. To assist it in its rulemaking responsibilities, the Court has established the following advisory committees: Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Juvenile Procedure, Rules of Appellate Procedure, Rules of Evidence, and Rules of Professional Conduct.

The Court is seeking qualified applicants to serve four year terms on each of the above committees. Interested attorneys should submit a letter indicating the committee(s) they would like to serve on and outlining their qualifications to: Supreme Court Advisory Committees, c/o Administrative Office of the Courts, 230 South 500 East #300, Salt Lake City, Utah 84102. Letters of interest must be received no later than May 28, 1993. Questions regarding committee service may be directed to Colin R. Winchester at (801) 578-3800.

MCLE Reminder

Attorneys who are required to comply with the odd year compliance cycle, will be required to submit a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by December 31, 1993. In general the MCLE requirements are as follows: 24 hours of CLE credit per two year period plus 3 hours in ETHICS, for a combined 27 hour total. Be advised that attorneys are required to maintain their own records as to the number of hours accumulated. Your "Certificate of Compliance" should list all programs that you have attended that satisfy the CLE requirements, unless you are exempt from MCLE requirements. If you have any questions concerning the MCLE requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator at (801) 531-9077.

ATTENTION: New CLE Tracking Procedure!

Beginning April 1, 1993, and on a monthly basis thereafter, the Utah State Bar will be printing CLE information on the mailing labels affixed to the Bar Journals. The Utah State Bar and the Utah State Board of Continuing Legal Education will track CLE hours for programs which have been previously approved and reported to the Utah State Board of CLE. This information will also be accessible by contacting the Utah State Board of CLE, which is located in the Utah Law & Justice Center. **Each attorney will still be required to keep track of his or her CLE hours. This service is being provided as a courtesy to Bar members and doesn't release them of their responsibility to keep records of their own.** Regulation 5-103 (1) of the Utah State Board of Continuing Legal Education states the following: Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the Board upon written request.

Softball Enthusiasts

The Second Annual Lawyers League Pre-Season softball tournament to benefit Utah Legal Services and the Legal Aid Society of Salt Lake will be held Saturday, May 22, 1993 from 8:00 a.m. – 1:00 p.m. at Riley School field, 1431 South 900 West, and Parkview School field, Mead Avenue (980 South 1250 West). If your law firm or governmental agency would like to field a team but has not yet registered, please contact Shannon Clark at 521-6383. If your law firm cannot field a team but you would like to participate, please also contact Shannon Clark. Prizes awarded for several categories.

Supreme Court Seeks Attorneys to Serve on MCLE Board

The Utah Supreme Court is seeking five attorneys to serve three-year terms on the Utah State Board of Continuing Legal Education. Interested attorneys should submit a letter indicating their interest and outlining their qualifications to: Utah State Board of Continuing Legal Education, Utah Law & Justice Center, 645 South 200 East, Salt Lake City, UT 84111-3834. Letters of interest must be received no later than May 28, 1993. Questions regarding committee service may be directed to Sydnie W. Kuhre at (801) 531-9077.

Applicants Sought for Bar Appointments to Utah Legal Services Board of Directors

The Board of Bar Commissioners is seeking applications from Bar members for appointments to serve two-year terms on the Board of Directors of Utah Legal Services, Inc. The Board sets policies and establishes budgets for Utah Legal Services, which is a state-wide provider of legal representation to low income people in civil judicial matters.

Applications for Board representation from rural districts outside the Wasatch front are particularly encouraged. Bar members who wish to be considered for appointment over the next six months must submit a letter of application including a resume. Applications are to be mailed to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East #310, Salt Lake City, UT 84111, and must be received no later than 5:00 p.m. on May 31, 1993.

Notice of Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director, John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

ROCKY MOUNTAIN MINERAL LAW FOUNDATION

Porter Administration Bldg.
7039 East 18th Ave.
Denver, CO 80220
Telephone (303) 321-8100
Telecopier (303) 321-7657

PRESS RELEASE

39th Annual ROCKY MOUNTAIN MINERAL LAW INSTITUTE

Vail, Colorado
July 22-24, 1993

The Rocky Mountain Mineral Law Foundation is sponsoring the 39th Annual Rocky Mountain Mineral Law Institute in Vail, Colorado, on July 22-24, 1993. All meetings will be held at the Radisson Resort Vail.

The 39th Annual Institute offers the combined expertise of 28 outstanding and experienced natural resources law practitioners. Presentations will address a variety of practical legal and land problems associated with the exploration for and development of oil and gas, hard minerals, and water on both public and private lands.

The Institute will open with a day-long General Session, with subsequent days split between Mining, Oil and Gas, Landmen's, and Water Sections. The entire Landmen's Program will center on "How to Conduct Due Diligence Operations." Papers focusing on environmental, public lands, and international topics are interwoven throughout the program.

The Institute will be of interest to lawyers and landmen, as well as to corporate management, government representatives, and university faculty.

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

As a nonprofit educational organization, the Foundation would appreciate any publicity you can provide for this Institute, including notices in magazines, professional journals, newsletters, and calendars of events. A brochure is attached for your convenience. For additional information, contact the Foundation at (303) 321-8100. Thank you.

Profile of Judge Homer F. Wilkinson

By Terry E. Welch

BACKGROUND

Judge Wilkinson is a genuine local product. Born in Cedar City and educated in Salt Lake, he strives to help maintain the pleasant atmosphere he so thoroughly enjoyed as a youth. Wilkinson attended Wasatch Elementary, Bryant Junior and East High Schools. He also stayed around for college -- receiving both Bachelor of Science and Juris Doctorate degrees from the University of Utah.

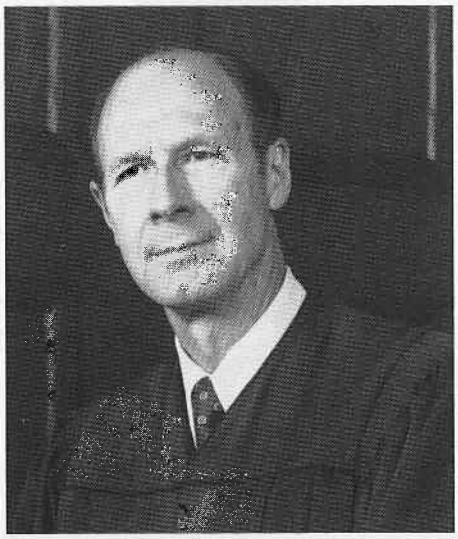
Wilkinson finds judging "a very sobering experience," particularly when the lives of individuals will be dramatically impacted from particular decisions. While he very much likes being on the bench, he finds many of his duties particularly painful. Dealing with "real world" problems as the breakdown of families and marriages is among his least pleasurable responsibilities. Particularly agonizing to Wilkinson is his repeated observation of the unfortunate hatred and bitterness that often accompany domestic disputes. Disputes regarding the lack of integrity in the business community also are troubling. As is likely true of any judge, Wilkinson's notes, he now holds a heightened awareness of the problems inherent in many peoples' lives — an awareness that is not always pleasant.

Life as a judge, however, is by no means unsatisfying. Judge Wilkinson most enjoys seeing justice done to both parties. While he explains that the heartache often felt by the "losing party" is difficult to observe, in most cases — he believes justice is served.

While he has been a judge for over a decade, Wilkinson remains sensitive to the pressures and constraints inherent in practicing law. In fact, he states that if anything he has become more empathetic to attorneys since becoming a judge. He has increased appreciation for the time restraints within which they operate.

VIEWS ON LEGAL SYSTEM

Judge Wilkinson gives our system an "A" for overall design and theory. Even in practice, Wilkinson grades the system only slightly lower -- perhaps a B+/A-. Simply put, says Wilkinson, the system is the best ever implemented anywhere in the world. Wilkinson views the independence of the judiciary as the system's greatest strength. The jury system is an added strength in his view — and one that sets our system apart from many others. While, at times, problems may arise within the system, Wilkinson believes they are most often caused by improper use or misuse of the system and not by a flaw in the underlying system itself. In fact, when asked what changes he would make to our legal system, he responds simply: "Limit the numbers of appeals in a case." Delays in the appellate process and numerous appeals — two of the most glaring misuses of the system in Wilkinson's view — are the result of a good idea gone awry through poor application of underlying principles.



Judge Homer F. Wilkinson
District Judge
Third District Court

Elected:	1979
Law Degree:	1955, University of Utah
Practice:	Real property, business law and personal injury litigation
Law Related Activities:	Elected to five terms of Utah State Legislature — 1966 to 1976: Minority Whip — 39th Legislature; Chair — House Judiciary Committee; Vice Chair — Judiciary Appropriations Committee. Assistant Attorney General — 1956-1962; Utah State Bar Legislative Committee; Instructor of Law — Camp Williams Police Academy; Instructor of Business Law — Stevens Henager Business College, Utah Technical College, and Brigham Young University Salt Lake Campus.

STRATEGY FOR SUCCESS BEFORE JUDGE WILKINSON

Among Judge Wilkinson's "pet peeves" is the frequently encountered habit of some attorneys to unnecessarily repeat certain points, both in written memoranda and during oral argument. Wilkinson finds unnecessary footnotes and citations in briefs particularly bothersome. Wilkinson also dislikes calls for unneeded continuances. He prefers to get a case set for trial as soon as reasonably possible.

As a point of practical advice, Wilkinson urges lawyers to always cooperate with opposing counsel. Whenever a problem can be worked out with a phone call, unnecessary motions should be avoided. In short, cut down the paper work when it is not necessary. "This would include the elimination of courtesy copies to the Court unless absolutely necessary," he adds.

Wilkinson is a strong advocate of the "Commandments of Getting Along With Fellow Lawyers," a draft of which was published several years ago in the *Bar Bulletin*. These "commandments" are summarized as follows:

1. Never mislead another lawyer.
2. Don't take advantage of opposing counsel on technicalities that are not *truly* designed to "protect your client's rights."
3. Never force opposing counsel to do the hard way that which can be done informally.
4. Promptly return all telephone

calls of other lawyers.

5. Accommodate schedules wherever reasonably possible.

6. Try to work out discovery disputes informally without resorting to motions unnecessarily.

7. Practice law so that you need few favors, but so that when you need a favor, opposing counsel will not refuse.

8. Avoid militant stances and unnecessarily abrasive letters.

9. Don't bad-mouth other lawyers.

10. Always be willing to give advice to other lawyers when asked.

Wilkinson is convinced that adherence to these simple rules will greatly increase one's reputation among fellow practitioners and will result in a more pleasant and rewarding practice.

Wilkinson has an "open-door" policy and encourages all *appropriate* contact with his clerk or himself to discuss procedure. He encourages attorneys to call his clerk first, but if she cannot provide sufficient guidance Wilkinson is happy to respond personally. Wilkinson states that attorneys "can call or come into the office at any time."

OUTSIDE ACTIVITIES

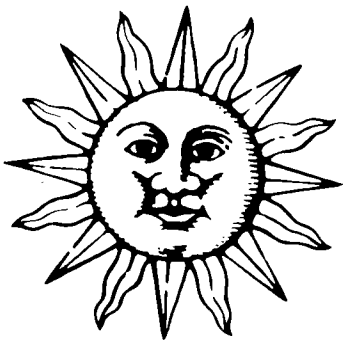
Judge Wilkinson continues to play handball "3 times a week." Wilkinson took up the sport as a "healthy diversion" in 1958 and has never quit. Wilkinson also enjoys boating and water skiing at Lake Tahoe and relaxing in St. George. He lists "Chariots of Fire" as his favorite movie and Justice Ellett's book "A Redneck Judge" as a favorite book. Wilkinson also relishes the time he spends with his family and grandchildren.

UTAH STATE BAR

1993 Annual Meeting

SUN VALLEY, IDAHO
June 30-July 3

Hope to see you there!



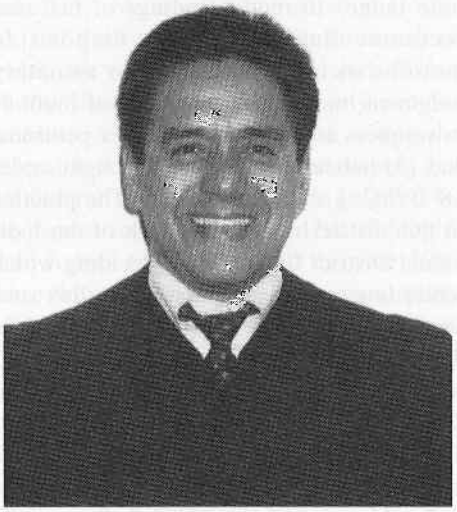
United States Magistrate Judges in Utah

By Judge Samuel Alba

On October 16, 1992, I was appointed full-time magistrate judge for the District of Utah. This appointment was made when the Judicial Conference of the United States approved the conversion of one part-time magistrate judge position to full-time status in April, 1992. A public notice of the vacancy was advertised and a merit selection panel comprised of seven members including the chairperson was established to screen, interview and recommend applicants to the District Court.[1] Five names were submitted to the active members of the Court and the final selection was made by a majority vote of the judges.

I joined Ronald N. Boyce as the second full-time magistrate judge in the District of Utah. Currently there are also three part-time magistrate judges in the District, Patrick H. Fenton in Cedar City, Ray E. Nash in Vernal, and F. Bennion Redd in Monticello.

Since assuming the bench the most commonly asked questions by both members of the bar and lay persons has been "What do magistrate judges do?", usually followed by, "Where is your courtroom?" This article will attempt to answer these questions by looking at the statutory scheme giving rise to the position, and the jurisdiction and powers entrusted to magistrate judges in both criminal and civil matters.



SAMUEL ALBA graduated from Utah State University in 1969. He received his Juris Doctorate from Arizona State University in 1972. Judge Alba was admitted to the Arizona Bar in 1972 and the Utah bar in 1980. He began his career in Arizona as a Deputy Federal Public Defender. He worked in the District of Arizona for five years and then entered private practice for three years with Gama, Iniquez & Alba. He moved to Utah in 1980, where he was an Assistant United States Attorney for seven years. In 1987, he joined Prince, Yeates & Geldzahler where he remained until his appointment to the United States Magistrate's office.

UNITED STATES MAGISTRATE JUDGES

Twenty five years ago the position of United States Magistrate Judge was created by Congress when it enacted the Federal Magistrate Act of 1968.[2] Since its inception the magistrate judges' primary role has been to support United States District Court Judges as they deem it appropriate. This support has evolved to where magistrate judges now play an important role in virtually every aspect of federal court litigation. During 1992 magistrate judges in the District of Utah handled 3,068 matters in civil and criminal cases before United States District Courts.

Magistrate judges serve for fixed terms and their salaries are set by the Judicial Conference pursuant to statute.[3] Full-time magistrate judges are appointed for eight year terms and part-time magistrate judges for four year terms. Full-time magistrate judges may not engage in the practice of law or "other business, occupation, or employment inconsistent with the expeditious, proper and impartial performance of their duties as judicial officers."[4] Part-time magistrate judges, however, may engage in the practice of law or other employment. Once appointed, a magistrate judge may only be removed from office prior to the expiration of his term, for "incompetency, misconduct, neglect of duty, or physical or mental disability."[5] Title 28 U.S.C. § 631 contains other information regarding appointment and tenure.

In the District of Utah, Ronald N. Boyce was appointed as part-time United States Magistrate Judge on January 1, 1984. He served in that position until February 8, 1992, at which time he was appointed as a full-time magistrate judge to replace the retiring Calvin Gould. Patrick H. Fenton has been continuously serving as a part-time magistrate judge in Cedar City since May 3, 1979. Ray E. Nash was initially appointed to serve as a part-time magistrate judge on May 3, 1979. F. Bennion Redd was appointed as part-time magistrate judge on March 29, 1979.

CIVIL JURISDICTION

Magistrate judges handle a wide range of matters. The principal statute setting forth the jurisdiction of magistrate judges is Title 28, United States Code, Section 636. The statute generally provides for the handling of pretrial matters and motions in both civil and criminal cases. Pretrial matters in civil cases include initial scheduling conferences pursuant to Federal Rules of Civil Procedure 16. The practice in this district is that four of the district judges currently handling cases refer matters to the full-time magistrate judges usually 60 days after the first answer or dispositive or jurisdictional motion has been filed in a civil case. Rule 204-1 of the Rules of Practice for the United States District Court for the District of Utah provides further direction on what is handled at the initial scheduling conference. Subdivision (a) (1) of the Rule

lists the specific items that are to be addressed. The two full-time magistrate judges routinely handle these conferences and establish dates, including final pretrial conference and trial dates before the district court judges. These conferences are held pursuant to Rule 204-1 subdivision c, which specifically provides that "the court may designate a United States Magistrate Judge to hold initial scheduling or discovery conferences or any pretrial conference."

Litigants should be aware that under 28 U.S.C. § 636 (b) (1), a magistrate judge's authority to handle pretrial motions depends on the specific reference made under the statute by the individual District Judge. Under 28 U.S.C. § 636 (b) (1) (A) magistrate judges may hear and decide any non-dispositive pretrial motion in a civil or criminal case. Usually this involves any motion which through its resolution will not dispose of a parties' claims. In this district procedural and discovery motions,[6] scheduling conferences, and settlement conferences are routinely referred pursuant to this subdivision. Litigants should be aware that a district judge who refers the matter to the magistrate judge may reconsider the magistrate judge's determination. To prevail, however, the ruling must be shown to be "clearly erroneous or contrary to law."[7] Rule 72(a) of the Federal Rules of Civil Procedure provides that within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order.

Section 636 (b) (1) (B) authorizes magistrate judges to report findings of fact and recommendations on (1) dispositive motions including motions for summary judgment, motions to dismiss, and motions to suppress evidence; (2) prisoner petitions; and (3) habeas corpus cases brought under 18 U.S.C. § 2254 and §2255. The practice in this district varies with each of the individual District Court Judges deciding which motions are assigned pursuant to this subsection. Motions for summary judgment, to dismiss, and to suppress evidence in criminal cases have been referred to the full-time magistrate judges for consideration. Virtually all prisoner petitions and habeas corpus cases are routinely referred under this subsection to the full-time magistrate judges. During 1992 a total of 301 prisoner cases were finalized by report and recommendation of the magistrate judges after referral from district judges.

Section 636(b) (1) (C) as well as Federal Rules of Civil Procedure 72(b) provide that the magistrate judges shall record all evidentiary proceedings and promptly conduct any hearings as required relative to dispositive motions in prisoner petitions. Once these have been held, the magistrate judge is required to file a report and recommendation with the court and mail copies to all parties. Either party may object within 10 days after being served with a copy of the recommended disposition through the filing of written objections with the district court. The district judge then makes a *de novo* review of the finding and recommendation to which any objection is made. If no objection is filed by either party, the district judge may adopt the report and recommendation or modify it as he deems appropriate.

Federal Rules of Civil Procedure 53 provides for the appointment of special masters in cases that include complicated issues or exceptional circumstances. 28 U.S.C. § 636(b) (2) authorizes the appointment of magistrate judges, when designated by a district judge, to serve as special masters. It is important to note, however, that the statute authorizes the appointment of the magistrate judges without regard to whether the case includes complicated issues or exceptional circumstances. A few special master references have been made to United States Magistrate Judges in this district.

Magistrate judges in the District of Utah pursuant to § 636(b) (3) have been assigned additional duties. These include the conduct of arraignments in felony cases; supplemental proceedings regarding judgment debtor or examinations in accordance with Federal Rules of Civil Procedure 69 and Rule 119(b) and (c) of the Rules of Practice for the United States District Court for the District of Utah; and reviewing administrative determinations under the Social Security Act.

Title 28 U.S.C. § 636(c) provides that full-time magistrate judges may conduct all proceedings in a civil case including trial and entry of judgment upon the consent of all parties. Federal Rules of Civil Procedure 73 through 76 also provide a further description of the civil jurisdiction which is proffered to full-time United States Magistrate Judges. Litigants who anticipate consenting to such jurisdiction are encouraged to review the statute and the rules to become familiar with the relatively simple procedure involved.[8]

Section 636(c) was amended in 1990 specifically to provide that either a district judge or a magistrate judge may advise the parties of the availability of a magistrate judge to exercise this jurisdiction. The parties' consent is a voluntary act without any adverse consequences. Section 636(c) (6) provides that a district judge may vacate a reference of a civil case to a magistrate judge for good cause or upon motion by any party showing extraordinary circumstances. Therefore, even if consent has been executed by the parties, they could upon motion request that the matter be heard by a United States District Court Judge.

If the parties agree and consent to the jurisdiction of the magistrate judge the case proceeds as any case before the district court. The magistrate judge can order the completion of pretrial discovery, rule on any dispositive motions, hold the final pretrial conference, and have the case proceed to a jury or a non-jury trial. The practice before magistrate judges in the District of Utah is to use electronic record-

ing equipment rather than court reporters to record all proceedings in court. Section 636(c) (7) provides: "The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means."

Section 636(c) (3), (4) provides for two alternative methods of appeal once judgment has been rendered in any case. Subsection 3 provides for a direct appeal of the magistrate's judgment to the appropriate circuit court. Under subsection 4 the parties may consent to appeal on the record to a judge of the district court "in the same manner as an appeal from a judgment of the district court to a court of appeals." Under this subsection the district judge sits as an appeals court and does not review *de novo* the magistrate judge's decision. Federal Rules of Civil Procedure 74 through 76 further defines the method to be used of appeals from magistrate judge's decisions to the district court.

Though the civil consent jurisdiction under the above mentioned statute and rules has been extensively utilized in a number of districts, this has not been the case in the District of Utah. Only a limited number of litigants in the district have taken advantage of the provisions of 28 U.S.C. § 636(c). This section provides litigants an additional opportunity to obtain prompt adjudication on their claims.

CRIMINAL JURISDICTION

Magistrate Judges conduct preliminary proceedings in criminal cases. These proceedings include accepting criminal complaints, issuing search warrants, conducting initial appearances, conducting preliminary hearings, setting initial bail and bail hearings, detention hearings, removal hearings in cases involving defendants charged in other districts, and extradition hearings. Pursuant to § 636(b) (1) a number of motions to suppress evidence have also been referred in the District of Utah for review and conduct by magistrate judges. After conducting the evidentiary hearings relative to the motions to suppress evidence, a report and recommendation is prepared and submitted to the district judge.

The vast majority of cases handled by both full-time and part-time United States Magistrate Judges deal with the conduct of jury or non-jury trials of misdemeanor and petty offense cases. The District of Utah has within its territorial boundaries Hill Air Force Base, Tooele Army Depot, Dugway Proving Grounds, national parks, federal lands under supervision of the Bureau of Land Management, and forest lands. There are also several installations including the Internal Revenue Service Center in Ogden, federal buildings in both Ogden and Salt Lake City, Veterans Administration Hospital, and the United States Courthouse all of which are within the exclusive jurisdiction of the United States. When any misdemeanors or petty offenses arise within the federal installations mentioned above, and the federal lands, all have been referred by the district court to the United States Magistrate Judges for handling. In the year 1992 there were 1,946 misdemeanor and petty offenses handled by the magistrate judges in the District of Utah.

Title 18 U.S.C. § 3401 (1988) and Federal Rules of Criminal Procedure 58 include the procedures to be followed in the handling of misdemeanor and other petty offenses. Rule 58(b) (3) (A) provides that only upon the signing of a written consent by the defendant can magistrate judges handle misdemeanor and petty offense trials. The rule further provides that once the defendant has signed the consent he may plead "not guilty, guilty, or with the consent of the magistrate, nolo contendere."

Rule 58(g) sets forth the criteria to be followed in appeals both on interlocutory orders and appeals from conviction or sentence. These appeals are to a district judge and the "scope of the appeal shall be the same as an appeal from a judgment of a district court to a court of appeals." Federal Rules of Criminal Procedure 58(g) (2) (D).

In the District of Utah misdemeanor and petty offense cases are automatically referred by the district court to magistrate judges for disposition upon consent of the accused. The part-time magistrate judges in Cedar City, Vernal and Monticello are generally assigned the cases arising within their geographical area. The rest of the cases are referred to Salt Lake City where the two full-time magistrate judges handle them. Judge Fenton normally holds court at 154 North Main, Cedar City, Utah. Judge Nash holds court at 319 West 100 South, Suite A, Vernal, Utah. Judge Redd holds court at 81 North Main, Monticello, Utah. Judge Boyce's courtroom is located in Room 477, Frank E. Moss United States Courthouse, 350 South Main Street, Salt Lake City, and I have been assigned the courtroom located at Room 248 in the same courthouse.

CONCLUSION

The office of the United State Magistrate Judge in the District of Utah offers litigants and counsel attractive alternatives to the handling of their civil disputes. In the criminal arena practitioners are encouraged to familiarize themselves with the available rules for the conduct of misdemeanor and petty offense cases. Magistrate judges, through the handling of the preliminary criminal proceedings, seriously impact bail or detention status of defendants. Attorneys are encouraged to always be prepared in their appearances before United States Magistrate Judges.

[1]28 USC § 631 sets forth the general qualifications and requirements for the appointment of United States Magistrate Judges.

[2]Codified at 28 USC §§ 631 through 639 and 18 USC §§ 3401 through 3402.

[3]28 USC § 634(a) (1988).

[4]28 USC § 632(a) (1988).

[5]28 USC § 631(i) (1988).

[6]Rule 204-1, Rules of Practice for the United States District Court for the District of Utah, subsection (h) provides that: "Motions to compel discovery under Fed. R. Civ. P. 37(a) may be referred to a magistrate judge for hearing or disposition. The magistrate judge shall have full authority to enter appropriate orders granting such motions and compelling discovery. In addition, the magistrate judge may make such protective order as the court would have been empowered to make on any motion pursuant to Fed. R. Civ. P. 26(c). The magistrate judge, however, shall not enter any order which is dispositive of a substantive issue in the case except as permitted by 28 U.S.C. § 636(b) (1) (B) and (C) or § 636(b) (3). The magistrate judge may award expenses, costs, and attorney's fees pursuant to a motion under Fed. R. Civ. P. 37(a). (The provisions of 28 U.S.C. § 636(b) (1) (A) cover review of magistrate judges' orders)." March 1993.

[7]28 USC § 636(b) (1) (A) (1988).

[8]Three forms currently used have been amended and the amendments are before the United States Supreme Court for consideration. Form 33 is the notice provision of availability of United States Magistrate Judges. Form 34 is the consent to jurisdiction of United States Magistrate Judges and Form 34A is an order of reference.

Equity in Employment: The Affirmative Action Controversy

By Glinda Ware Langston, YLS Treasurer

Black males serve as both Secretary of Agriculture and Veteran Affairs in the President's cabinet, while a Black female serves as Secretary of Energy. A Black physicist heads the National Science Foundation, while a Black military officer presides as Chairman of the Joint Chiefs of Staff. The Ford Foundation has had a Black president for over a dozen years. A Black man also heads the College Board, the nation's principal testing agency. Black women are the chief officers at Planned Parenthood and several colleges and universities.

The preceding, certainly, is the good news. At the same time, it is apparent that all the organizations just cited are governmental or in public service. However, the private sector has been less welcoming. During the last decade, only three Black names have been among the 791 on *Forbes* magazine's lists of the richest Americans. And *Business Week's* 1991 roster of the chief executives of America's 1,000 largest corporations had only one Black chairman. Unfortunately, there are no serious signs that the other 999 firms are grooming Black executives for eventual top jobs.

Yet with employment, interests and emotions can cloud discussions of "affirmative action." Simply hearing it mentioned causes individuals to raise defensive bulwarks, as if the most vital of principles are at stake.

Most simply, affirmative action in employment proposes or requires changes in hiring or promotion policies. It aims at bringing more of certain categories of people into an organization, and then ensuring their representation at various levels. The intended beneficiaries may be women or persons with certain attributes or origins. However, the cases drawing the greatest attention have been those that focus on race.

Affirmative action is by no means new. It began in 1941, when President Franklin D. Roosevelt signed an Executive Order ordering defense plants to show that they were opening jobs to Black workers. The Kennedy administration coined the actual phrase "affirmative action." Title VII of the Civil Rights Act of 1964, banned employment discrimination that might be based on race, religion, sex, or national origin. President Lyndon Johnson, shortly after signing the law, illustrated the thinking that led to racial preferences. Speaking at Howard University in 1965, he said:

> You do not take a person who for years has been hobbled by chains, and liberate him up to the starting line, and then say, "You are free to compete with all the others."

Martin Luther King, Jr., stated the position in similar terms, when he remarked that one cannot ask people who don't have boots to pull themselves up by their own bootstraps. By 1972, Congress had amended Title VII so that courts could require affirmative action measures as a way of compensating for discriminatory practices.

The purpose of affirmative action is not simply to avow good intentions, but to register results. Showing you have tried to find qualified people will not suffice. Rather, its aim is to achieve a visible increase in the number of Black men or women at various levels on the nation's payrolls.

Suppose we discover that a law firm with fifty attorneys has not even one Black associate. Its senior partners may insist that they have been looking, but they have

yet to find Black candidates who have the qualities they look for in colleagues. If that is their reply, they are issuing a very disturbing statement, since they are suggesting that not a single one of the Black law graduates they have encountered has measured up to the standards they invariably set. While everyone supports standards associated with "quality," the term can also conceal vested interests and biases. In actual fact, many job requirements are artificial or overly rigid, and bar people of real talent from professions where they could do a lot of good.

One justification for affirmative action is that Blacks should figure disproportionately in hiring and promotions to compensate for past policies that excluded them from employment or allowed them entry only in token numbers. In these cases, those being hired will not necessarily be the same person who suffered from discrimination in the past. So one presumption of affirmative action is that an entire race can deserve redress for unjust treatment. On this premise, at least some of the beneficiaries may come from later generations. An analogy might be that if a family's property was unfairly confiscated, restoration can go to descendants who were not even alive when the expropriation occurred. But not everyone accepts this view. Recent decisions by more conservative judges have declared that only specific individuals who can show that they were not hired or promoted due to racial bias can claim jobs or promotions or recover financial damages.

Another rationale for affirmative action suggests a broader basis for increasing the number of lawyers, physicians and professors, as well as structural metal workers and firefighters. Our society will be a better place if it has fairer representation in these and other occupations. There will be role models for youngsters: living evidence that hard work can be rewarded. If a country wants to vouchsafe that it has overcome discrimination and prejudice, visible evidence is necessary. Two hundred years ago, Alexander Hamilton said that the promise of America was to allow every individual to "find his proper element and call into activity the whole vigor of his nature." To make good on this principle would not require that the membership of all professions precisely mirror the population as a whole. Not everyone will want to go into every field or specialty. Affirmative action merely seeks to redistribute status and rewards with more concern for racial equity.

A further justification for preferential policies relates to the "hobbles" Lyndon Johnson mentioned in his Harvard speech. If Black people are to have a fair chance in the nation's economic competitions, they must amass enough training and experience to vie on an equal footing. To reach a higher status you must first get to the step immediately below. America will not have Black chief executives unless contenders can learn the ropes at vice presidential levels. In this view, affirmative action promotions are temporary expedients, which may lapse once Black representation becomes evident in all sectors of the system.

One concern cited against affirmative action is that colleagues, patients and clients will wonder whether people promoted under these programs made it on their merits, or if they got where they are due to race-based preferences. How, it is asked, can people go through life, knowing that they have been hired not on their inherent talents, but to fill some quota or to satisfy appearances?

There is little evidence that those who have been aided by affirmative action feel many doubts or misgivings. For one thing, most believe they are entitled to whatever opportunities that they have received. Nor should it be forgotten that feelings of unworthiness seldom plague White Americans who have profited from more traditional forms of preference. For years, so-called selective colleges have set less demanding standards for admitting children of alumni. (This by itself should show that affirmative action has a venerable history.) These privileged offspring know full well that other applicants with better records were rejected. Yet few of them are seen slouching around campus, their heads bowed in shame.

What has been the effect of affirmative action policies? At this point, no one can say for sure how many White Americans have been displaced or bypassed because preference was given to Blacks. However, it is known that Whites have not lost ground in medicine and college teaching, despite considerable efforts to open up those fields. Still, it would be disingenuous to deny that some White men and perhaps even some White women did not get jobs that, in the absence of affirmative action, might otherwise have gone to them. But given the disappointments that so often accompany having a black skin, it could be argued that Whites could give just a little.

To Nominate or Not to Nominate . . . Just Do It

By Hakeem Ishola

In attempting to write a provocative and well-written article about an upcoming award to be presented by the Young Lawyers Section, I drew a complete blank. So, I sit pondering, which only heightens in intensity like an incurable itch while I mull over different story options which might catch attention and inspire the audience. For example, I could write something so incredibly witty that it would prompt you to drop everything and submit a nomination or two for the award. A great angle but for the fact I lack such imaginative talent. On the other hand, I could use a common guilt technique which would continue to nag at your conscience until you submit a nomination or two for the award. However, the submission of a nomination should be based on a positive motive and not simply to assuage a guilty mind. So, what's left?

The direct approach. The purpose of bestowing an award is to honor an individual who deserves recognition for something she or he has done. The Young Lawyers Section presents an annual award simply for that purpose. At the Utah State Bar's Annual Meeting, June 30 – July 3, 1993, a lawyer will be honored for her or his contribution to the legal and/or the community at large. All members of the Bar aged 36 or less and/or admitted to the Bar for less than three years are members of the Young Lawyers Section and are eligible for the award. The Section expects nominators to be creative, listing the qualities and contributions of nominees who deserve recognition.

Nominations must be submitted by June 1, 1993, to Lorrie Lima, Utah Attorney General's Office, 330 South 300 East, Salt Lake City, Utah 84111. For more information, contact Lorrie Lima at 575-1628 or Sharon Eblen at 530-6018.

Low Cost CLE Available Here!

Shortly after the Utah State Bar adopted mandatory CLE, the Bar determined that lawyers, during their first two years of practice, should participate in special CLE requirements designed to aid in the transition from law school to law practice. In response to these special requirements, the Bar now sponsors a series of workshops with a basic, practical emphasis. Although these workshops were designed with new lawyers in mind, any lawyer wanting an overview of an unfamiliar practice area would benefit by attending. Each workshop is approved for CLE credit for all Bar members — and as the headline suggests, the workshops are among the least expensive CLE credits available. Only $30.00 for three hours of credit. Young Lawyer Section members pay only $20.00.

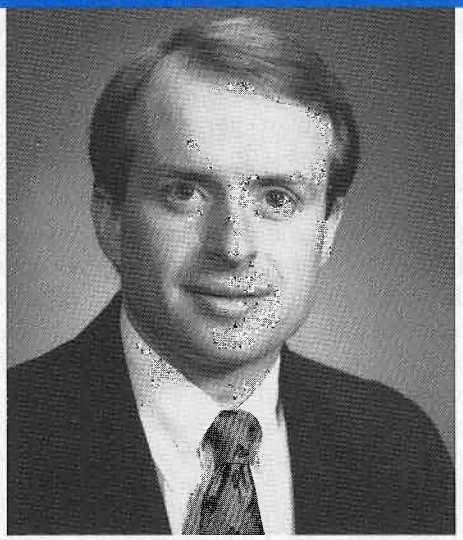
Each workshop covers a specific area or subject matter. The focus of each workshop is practical, useful information. Instructors are encouraged to provide forms and practical tips. Topics which have been covered include bankruptcy law, probate and estate planning and criminal procedure. All lawyers, young, old and in between, may obtain CLE credit by attending the workshops. The workshops are valuable for all with an interest in the topic covered — regardless of the length of time the lawyer has been practicing law.

All workshops are taught at the Law & Justice Center, from 5:30 to 8:30 in the evening (for three hours of CLE credit). RSVP in advance (if possible) to David Brickey or Monica Jergensen, 531-9077. Workshops cost only $30.00; $20.00 for Young Lawyer Section members.

For questions about this article contact Mark Bettilyon, Ray Quinney & Nebeker, 79 South Main Street, P. O. Box 45385, Salt Lake City, Utah 84145-0385, telephone: 532-1500.

Workshop Topic	Date	Instructor
Probate and Estate Planning	5/20/93	Michael D. Blackburn
Criminal Procedure	6/17/93	Edward K. Brass
Real Property	8/19/93	To Be Announced
Civil Litigation I: Pre-Action Investigation, Pleading and Discovery	9/16/93	To Be Announced
Civil Litigation II: Evidence	10/21/93	To Be Announced
Civil Litigation III: Enforcement and Collection of Judgements	11/18/93	To Be Announced

CASE SUMMARIES



By Scott A. Hagen

The following case summaries were prepared by Judge Pamela T. Greenwood of the Utah Court of Appeals and Associate Chief Justice Richard C. Howe of the Utah Supreme Court and represents selected significant decisions by each court in 1992. These are the cases which Judge Greenwood and Justice Howe felt were important decisions from their respective courts in 1992. These case summaries are provided as a suggestion of the main holding in each case and are not a definitive statement of the case holdings, nor are they intended as a substitute for an actual reading of the case. The cases were discussed by the judges in the Salt Lake County Bar luncheon on January 13, 1993. The case summaries are reprinted here with the judge's permission for the benefit of all members of the Bar. Many of these cases have been summarized and reviewed in the Utah Bar Journal during the past year.

SELECTED CASES — 1992 UTAH COURT OF APPEALS

Prepared by Judge Pamela T. Greenwood

Civil

Druffner v. Mrs. Fields, Inc., 828 P.2d 1075 (Utah App. 1992). Waivers of Fair Labor Standard Act rights in a release agreement which are neither administratively supervised nor judicially approved are not enforceable to bar a cause of action for unpaid overtime compensation.

Gridley Assoc. v. Transamerica, 828 P.2d 524 (Utah App. 1992). Defines the terms "sudden and accidental" as found in pollution exclusion clauses in insurance policies. The discharge of gasoline from an underground line which caused an immediate spill into the ground was "sudden" even though it remained undiscovered for some months. The costs for the gasoline spill cleanup were covered under the insurance policy.

DeBry v. Valley Mortgage Co., 835 P.2d 1000 (Utah App. 1992). A construction lender owed no duty to a third party purchaser for construction defects. Where there is no contractual or fiduciary relationship between the lender and the third party, courts will not extend a duty unless the lender involvement goes beyond a traditional lender role or the lender misrepresents material facts to third parties.

Turner v. General Adjustment Bureau, Inc., 832 P.2d 62 (Utah App. 1992). Emotional distress damages are not recoverable in a suit for fraud.

Hatton-Ward v. Salt Lake City Corp., 828 P.2d 1071 (Utah App. 1992). Plaintiffs may file directly in state court when pursuing damages pursuant to whistle-blower statute (Utah Code Ann. §76-21-1 (1989)). It is unnecessary to exhaust administrative remedies when not seeking reinstatement.

Prince v. Tooele County Housing Authority, 834 P.2d 602 (Utah App. 1992). Section 1988 attorney fees are awardable to the prevailing party in a statutory, non-civil rights claim. Fees were awarded even when prevailing party was represented at no cost by public interest attorney.

Town of Alta v. Ben Hame Corp., 190 Utah Adv. Rep. 29 (Utah App. 1992). The granting of an injunction prohibiting Ben Hame from conducting short-term rentals of its residence in an area zoned for single family dwellings was upheld. The majority opinion rejected Ben Hame's claim that the short-term rental activity was a valid nonconforming use under Alta's zoning ordinance because it was a valid accessory use to a single family dwelling under the county ordinance prior to the subdivision's annexation to Alta. The court also rejected Ben Hame's contention that equitable estoppel prevents Alta from enforcing the zoning ordinance and that the zoning plan was illegal spot zoning. A dissenting opinion labeled the short-term rental use a valid nonconforming use and felt that Ben Hame had raised a genuine issue of material fact concerning the spot zoning issue.

Brown v. Richards, 194 Utah Adv. Rep. 34 (Utah App. 1992). Contains a discussion of what constitutes a prevailing party for purposes of an attorneys fee award under a contract; findings for a fee award must be as complete as other findings.

Berrett v. Denver Rio Grande, 830 P.2d 291 (Utah App. 1992) (cert. denied). Expert witnesses may not be excluded as a sanction where the trial court failed to set clear deadlines for witness disclosure.

Campbell v. State Farm, 193 Utah Adv. Rep. 19 (Utah App. 1992) (cert. denied). The trial court's grant of summary judgment in favor of the insurer was reversed. Held: An insurer's eventual payment of an excess judgment did not necessarily vitiate the insured's cause of action for breach of the duty to act in good faith. The subsequent payment for the excess judgment may mitigate the damages flowing from the insurer's alleged bad faith conduct, but it does not nullify the bad faith cause of action.

Lounsbury v. Capel, 191 Utah Adv. Rep. 40 (Utah App. 1992) (cert. denied). Informed consent statutes do not preclude a cause of action for battery in medical malpractice cases. The temporary incapacity of the patient does not justify obtaining consent from the patient's spouse if there was reasonable opportunity to obtain consent from the patient.

Family Law

Grover v. Grover, 198 Utah Adv. Rep. 24 (Utah App. 1992). A divorce decree providing that child support would be automatically adjusted by the parties to reflect changes in the father's income contravenes the requirement that there be a material change in circumstances.

Allred v. Allred, 835 P.2d 974 (Utah App.

1992). The court may order a custodial parent to release the dependency exemption to the noncustodial parent only where (1) the noncustodial parent has a higher income; (2) the noncustodial parent provides the majority of support for the child; and (3) release of the exemption is in the best interest of the child and parties. Step three usually results in increased support to the child.

Rimensburger v. Rimensburger, 196 Utah Adv. Rep. 22 (Utah App. 1992). Absent leave of the original court, a divorce decree cannot be modified in a county different from the one in which the original action was pursued.

Strollo v. Strollo, 828 P.2d 532 (Utah App. 1992). The Cohabitant Abuse Act permits a cohabitant to seek a protective order if the past abuse is coupled with a present threat of future abuse.

Roberts v. Roberts, 835 P.2d 193 (Utah App. 1992). Husband appealed a divorce decree awarding custody of minor children to wife, despite a court-ordered custody evaluation recommending custody go to husband. The case was remanded for more detailed findings on the moral conduct of the parties, the husband's credibility, and the relative parenting skills.

Holm v. Smilowitz, 840 P.2d 157 (Utah App. 1992). The trial court had jurisdiction over a child custody dispute pursuant to UCCJA. The mother's due process rights were violated when the commissioner and trial court refused her request for a hearing prior to enforcement of an undomesticated Ohio order changing custody of the parties' child from mother to father. The commissioner exceeded her authority by attempting to exercise ultimate judicial power in: (1) deciding the mother's motion for Utah to assume jurisdiction; (2) informing the mother's attorney that it was her order that the Ohio change of custody order had been enforced that night; (3) ordering the police to enforce the undomesticated order; and (4) denying the request for a hearing in regard to the Ohio order. These errors could not be cured through ratification by the trial court.

Criminal

State v. Cox, 826 P.2d 656 (Utah App. 1992). A juror's ability to be impartial was questionable where the prosecutor acted as her attorney one month earlier and her brother-in-law served as chief of police for one of the primary municipalities in the county where the crime occurred. The trial court had a duty to either excuse her or further question her in order to determine whether she could act impartially.

State v. Brooks, 833 P.2d 362 (Utah App. 1992). The trial court bears no affirmative duty sua sponte to engage in an on-the-record colloquy with defendant at the time of trial to ensure a valid waiver of the right to testify. The court made a factual determination that defendant concurred with counsel in deciding not to testify.

State v. Christensen, 201 Utah Adv. Rep. 68 (Utah App. 1992). On defendant's death, the judgment against him, including the restitution order, abated *in toto*.

Provo City v. Warden, 202 Utah Adv. Rep. 25 (Utah App. 1992). Test for community caretaker automobile stop in Utah: (1) Did Fourth Amendment seizure occur? (2) Was seizure in pursuit of bona fide community caretaker function? (3) Were circumstances such that there was a reasonable belief that there was imminent danger to life or limb?

State v. Magee, 194 Utah Adv. Rep. 66 (Utah App. 1992). Represents the first Utah case utilizing the "battered child syndrome" to affirm a conviction of child abuse.

State v. Castner, 825 P.2d 699 (Utah App. 1992). The trial court's denial of a motion to suppress was affirmed. An analysis under *State v. Arroyo* was applied: Defendant's consent to the vehicle search was sufficiently attenuated from the earlier illegal search of the car doorpost for the VIN that the taint had dissipated.

State v. Larsen, 834 P.2d 586 (Utah App. 1992) (cert. denied). A business partner may be convicted of theft for exercising unauthorized control over partnership property.

State v. Vincent, 202 Utah Adv. Rep. 31 (Utah App. 1992). The trial court may impute income to an appellant and consider income from an ex-wife when deciding on the appellant's impecuniosity. Even considering these factors, the appellant was entitled to court-appointed appellate counsel and free transcripts.

State v. Lopez, 831 P.2d 1040 (Utah App. 1992) (cert. granted). Comprehensive discussion of pretext traffic stop doctrine. The issue of whether the stop was a pretext stop is answered by asking the objective question of whether a reasonable officer would have made the stop under the same circumstances absent an illegal motivation.

Administrative Law

Luckau v. Board of Review, 198 Utah Adv. Rep. 30. (Utah App. 1992). The Occupational Disease and Disability Act does not expressly grant the Industrial Commission discretion to interpret the 1988 Last Injurious Exposure Rule, therefore, a correction of error standard applies in reviewing the Commission's interpretation of this statute. The 1988 statute encompasses all situations involving employee exposure which contributed to the illness causing the employee's death. The exposure is an amount sufficient to have caused or contributed to any degree to the employee's condition.

Bonded Bicycle Couriers v. Department of Employment Security, No. 920621 (Utah App. December 4, 1992). Petitioners have thirty days from the date on which an agency order is *issued* to appeal the agency action.

Crosland v. Board of Review, 828 P.2d 528 (Utah App. 1992). Plaintiff could receive full compensation for the injury resulting from an industrial accident which aggravated his preexisting back condition, when both legal and medical causation were undisputed, even though the preexisting condition contributed to half of the injury.

Velarde v. Board of Review, 831 P.2d 123 (Utah App. 1993). Section 35-2-13 (b) (3) (a) of the Utah Occupational Disease Act is an unconstitutional statute of repose, in violation of the Utah Constitution's open courts provision. The statute allowed death benefits to a surviving dependent only if the employee's death from silicosis occurred either within three years of the last day of employment or if the employee had received disability compensation under the statute.

SELECTED CASES — 1992 UTAH SUPREME COURT

Prepared by Associate Chief Justice Richard C. Howe

Criminal Law

In Re $102,000 in U.S. Currency (Hurdley Evans), 823 P.2d 468. Where no controlled substances were found in van or on person of any occupants, but "drug dog" alerted on money, element of cause of action for forfeiture set out in § 58-37-131 (1) (g) was missing, as State made no attempt to prove that money came from or was intended to be used in drug transaction in this state, and no criminal charges were filed against any person.

Sims v. Utah Tax Commission, 10/22/92. Illegal drug stamp tax act seeks to punish and deter those in possession of illegal drugs, and proceedings under act are quasi-criminal in nature where proof of criminal activity must be shown, so that exclusionary rule is applicable to proceedings of this nature before the tax commission.

Zissi v. State Tax Commission, 10/26/92. Although by its plain terms Stamp Act is facially unconstitutional under both state and federal constitutions, review court has power to save statute from unconstitutionality by imposing limiting construction, reading statute to preclude prosecutors from using any information gained as a result of stamp purchaser's compliance with tax statute to establish link in chain of evidence and construing scope of resulting immunity as broad enough to satisfy requirements of fifth amendment.

State v. Perank, 7/17/92. Unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 "Order of Restoration" are not within the present boundaries of the Uintah-Ouray Reservation, so that state district court adjudicating crime committed in Myton, Utah, had jurisdiction over the crime, and 18 U.S.C. § 1152 did not preclude the exercise of state jurisdiction over crimes committed by Indians.

State v. Brown, 11/30/92. Where court-appointed defense counsel was employed as part-time prosecutor, vital interests of the criminal justice system were jeopardized, and supreme court held that as a matter of public policy and pursuant to its inherent supervisory power over courts, counsel with concurrent prosecutorial obligations may not be appointed to defend indigent persons, and conviction was therefore reversed and new trial ordered, and henceforth review court announced per se rule of reversal for such dual representation so as to prevent its occurrence.

State v. Emmett, 839 P.2d 784. Defendant is entitled to immediate ruling on sufficiency of prosecution's case at close of its case, and judge should rule promptly upon motion so that defendant may decide whether to proceed with evidence in his defense, and purpose of rule is to avoid forcing a defendant into going forward when state's case is insufficient.

Real Property

Shelledy v. Lore, 836 P.2d 786. Where purchaser from SBA was on record notice of rival claim to property by virtue of 1984 tax deed, purchaser lacked standing to assert SBA's constitutional rights and defense.

Garland v. Fleischmann, 831 P.2d 107. Judgment creditor's argument that under recording act, § 57-3-3, buyers had no interest in real property against her as subsequent purchaser if purchaser bought in good faith and for valuable consideration is unavailing because judgment creditor is not bona fide purchaser, and judgment lien is subordinate and inferior to deed which predated it though deed may have been recorded after judgment was docketed or was not recorded at all.

Kelley v. Leucadia Financial Corporation, 12/31/92. Paragraphs in earnest money agreement dealing with defects and title insurance do not purport to be exclusive remedies nor limit on traditional common law or equitable remedies, but are designed to give buyers right to walk away from contract and obtain refund of earnest money without having to obtain judicial redress, and remedies are for sole benefit of buyer.

Domestic Relations

Sorenson v. Sorenson, 3/27/92. Where defendant dentist did not sell his sole practice upon divorce from plaintiff, goodwill was nothing more than his reputation for competency, and court of appeals erred in dividing with plaintiff the value of that reputation, but division would be "double counting" instead.

Judicial Ethics

Regional Sales Agency v. Reichert, 830 P.2d 252. Court of appeals judge's participation on panel was improper, as she was related to shareholders of firm who represented plaintiff. Supreme Court vacated decision and remanded case for rehearing before a panel that did not include her.

Under Canon 3 of Code of Judicial Conduct, judges must disqualify themselves when their impartiality might reasonably be questioned, including third-degree consanguinity or affinity, but disqualification is contingent on existence of interest that could be substantially affected by outcome.

Torts

Hansen v. Sea Ray Boats, 830 P.2d 236. Under this court's adoption of "zone of danger" theory of recovery for negligent infliction of emotional distress set out in § 313 of Restatement (Second) of Torts, only "victims", not "bystanders", i.e. only those placed in actual peril, are allowed recovery. Bystanders may not recover for witnessing injury of others.

Atwood v. Sturm, Ruger & Company, 823 P.2d 1064. Where plaintiff learned of the existence of a potential legal cause of action against gun manufacturer in the spring of 1988, several months before the expiration of the statute of limitations governing product liability cases, and did not file action until October of that year, after the statute of limitations had expired, discovery rule did not apply, and case was barred.

Duncan v. Union Pacific Railroad Company, 4/2/92. Determination by UDOT not to install further crossings warnings was discretionary function for which immunity has been reserved, § 63-30-10 (1) (a), and not operational decision, as UDOT utilizes evaluation of hazards level and assignment of priorities to crossings with greatest hazards.

Warren v. Provo City, 838 P.2d 1125. Discovery rule applies in three circumstances, where discovery rule is mandated by statute; where plaintiff does not become aware of cause of action because of defendant's concealment or misleading conduct; and where case presents exceptional circumstances and application of general rule would be irrational or unjust.

Trujillo v. Jenkins, 10/20/92. Provisions of § 73-1-15 do not negate duty of landlords to keep safe premises and do not keep landlords from fencing ditches in order to

safeguard premises, as statute merely prohibits placing obstruction along ditch or changing water flow.

Contracts

Kasco Services v. Benson, 831 P.2d 86. Where employee's wife was stranger to non-competitive covenant, she could nonetheless be enjoined from aiding and assisting the covenantor in violating his contract or receiving benefits therefrom, and Rule 65A (d) of the Rules of Civil Procedure, which allows injunction of persons in active concert or participation with parties to be enjoined, so long as they receive personal service of notice of order.

Allen v. Prudential Property and Casualty, 839 P.2d 798. Fact that homeowner's policy is adhesion contract is no reason, in itself, to enforce what might be found to be reasonable expectations of insured when expectations conflict with plain terms of policy.

Estate Landscape v. Mountain States Tel & Tel, 12/17/92. Doctrine of accord and satisfaction does not require subjective intent to discharge obligation, provided parties' actions give rise to reasonable inference that they accepted altered performance of contract, and where check was tendered under condition that negotiation would constitute full settlement, mere negotiation of check constituted accord, regardless of payee's efforts or intent to negate condition by initiating litigation.

Whether contract is divisible depends on intent of parties at time they enter contract and determining intent poses question of law.

Cobabe v. Stanger, 12/2/92. Trustee's rejection of executory contract, without more, does not terminate a personal services contract that debtor is otherwise ready, willing, and able to perform, and contract continues unaffected by bankruptcy, because rights and obligations of both parties are governed before and after bankruptcy by applicable state law, so that trial court's summary judgment in favor of non-debtors was error.

Employment

Peterson v. Browning, 832 P.2d 1280. Duty at issue in actions for wrongful termination in violation of public policy does not arise out of employment contract but is imposed by law and thus properly conceptualized as a tort.

Hodgson v. Bunzl Utah, 12/21/92. Where handbook contained disclaimer that regardless of actions of managers, all employment was at will, employee could not reasonably have concluded that oral remarks concerning disciplinary procedures were modification, because only conduct that meets standards of unilateral offer and acceptance may be interpreted to create implied-in-fact contract modifying at-will employment.

Appeals Dismissed Because Taken From Non-Final Judgment

See Rule 54 (b) Utah Rules of Civil Procedure.

Bennion v. Pennzoil Co., 826 P.2d 137.

American Savings v. Gibson, 839 P.2d 797.

FMA Leasing Co. v. Citizens Bank, 823 P.2d 1065.

See generally, Kennecott Copper Co. v. Utah Tax Comm., 814 P.2d 1099 (Utah 1991).

ABA Publishes Updated Dispute Resolution Legislation Publication

WASHINGTON, D.C. — More than 100 new laws were passed by state legislatures during 1990 and 1991 to expand the use of dispute resolution as an alternative to formal court proceedings in 25 new subject areas.

Additional information concerning these new laws and how they are working is contained in the 1990-91 Addendum to the ABA Section on Dispute Resolution's 1989 Federal and State Dispute Resolution Legislation monograph.

The addendum contains citations for each state's legislation, identifies the subject matter of the law, and provides a brief summary of each law. Also included is a topical cross reference index which categorizes each law by subject matter, and a legislative growth chart which profiles the number of laws passed each year over the lst decade.

The addendum also provides citations for and a summary of the dispute resolution laws introduced during the 102nd Congress.

The addendum is available for $20 and can be purchased from either of the following offices: ABA Section on Dispute Resolution, 1800 M Street, NW, 2nd Floor, South Lobby, Washington, D.C. 20036, Frederick E. Woods, (202) 331-2258 or 2664 or ABA Order Fulfillment, 750 North Lake Shore Drive, Chicago, Ill. 60611, 312/988-5555.

ABA Trial Manual Gives Advice to Clients

CHICAGO — Although TV shows such as L.A. Law, Crime and Punishment and Law and Order may make appearing in court look easy, in reality, most clients are fearful and apprehensive because they don't know what to expect.

The American Bar Association Section of General Practice recently published a trial manual for clients that takes some of the mystery out of the litigation process. The special issue of *The Compleat Lawyer* magazine is written by lawyers for clients going to trial, specifying the responsibilities of each. Included in the publication are articles and checklists covering how much it will cost; the client's role on the litigation team; the importance of honesty, candor and trust; pretrial discovery; how to handle the deposition; what to expect in court; the expert's role at trial; what the verdict means and whether or not you should appeal.

Not understanding "legal jargon" is a familiar complaint of clients going to trial. This new trial manual features a glossary of common legal terms with easy to understand descriptions of each entry.

The manual is authored by 10 attorneys, many of whom are members of the American Bar Association General Practice Section. It was developed to enhance communication between the lawyer and client and to answer questions clients have about how the justice system works.

The Compleat Lawyer is published quarterly by the ABA Press for members of the American Bar Association General Practice Section. Review copies of this special issue of *The Compleat Lawyer* are available by contacting Deborah Eisel, Editor, at 312/988-6069.

Lawyers and the American Dream*

By Stuart Speiser

Reviewed by Betsy L. Ross

It was Socrates who said the unexamined life is not worth living. I suppose at some point, however, the overly-examined life could prove wearisome. Nevertheless, I subjected myself, and now you, to *Lawyers and the American Dream*, a book that examines the role of the lawyer in society — more specifically, the role of the "Equalizer." (The movie version of the book will star Steven Seagal.)

The Equalizer, according to Speiser, author of this book, tort lawyer, and author of 43 volumes on law and economics, including the 1980 book *Lawsuit*, acts in our system of law to balance the scales of justice that might otherwise be weighted against underdogs.

Speiser first undertakes a definition of the "american dream" and then explains how lawyers can achieve it for themselves. His definition, peremptorily treated, includes the following elements:

1. A BETTER LIFE FOR ALL. Richer, happier. Wealth, material success, recognition. Loving and being loved. Owning your home.

2. ACHIEVING THIS ON YOUR OWN. Excellence. Self-made success. Individualism. Self-reliance. Self-initiative. Self-esteem. Drive for self-betterment. Education. Personal responsibility. Independence. Entrepreneurship. Hard work. Know-how. No reliance on help from government or institutions. Control of your own destiny.

3. HUMANITARIAN CONCERN FOR OTHERS. Doing well by doing good. Seeking the rainbow as well as the pot of gold.

4. FREEDOM FOR ALL. Freedom of choice. Freedom to do your best. Freedom from prejudice. Freedom from obstacles. Spirit of the Founding Fathers.

5. LIBERTY AND JUSTICE FOR ALL. Equality. Social justice. Equal justice under law.

6. OPPORTUNITY FOR ALL. Rags to riches. Empowerment of the weak and the underdog.

7. MELTING POT. Fulfilling the dreams of people from all parts of the globe.

8. HAPPY ENDING.

The epitome of Speiser's Equalizer is the tort lawyer (no self-congratulation going on here). While he considers other types of lawyers whom one might naturally recognize as at least doing good, e.g. civil rights lawyers and criminal defense lawyers, he distinguishes their activity from what he recognizes as the financially-oriented american dream because, in the former case, they typically are doing good for its own sake — not attaining the number one component of the american dream, and in the latter case, because they also typically do not achieve number one, and if they do, they do it representing "mobsters and other characters who do not fit into the American Dream."

Speiser explains that this book is about tort lawyers because "they clearly fit the description of doing well by doing good through their own efforts, unsubsidized by government or other well-heeled supporters."

Following his explanation of why tort lawyers qualify as Equalizers, Speiser launches into the rest of his book — studies of large tort cases beginning with the Yankee Clipper crash of 1943 and subsequent tort case in which he participated, representing Jane Froman, a surviving victim of the crash. This story is presented as pre-Equalizer, representing a time when compensation or accountability were difficult to attain. Speiser posits that a different result would have obtained had this case

been tried in the 1990s. His reason: "the development of the Equalizers into a force that can hold the establishment accountable for its mistakes and transgressions."

To explain this evolution, Speiser describes a set of cases, beginning with the lawsuit against Aristotle Onassis on behalf of Donald McCusker for injuries McCusker received while test piloting one of Onassis' planes. Speiser was the attorney for McCusker.

If Speiser's decision to take this case was indeed as he described it, it is at the very least troubling. He acknowledged the difficulties in bringing an action — Onassis was dead, five years had passed since the accident, statutes of limitations for the physical injury claim and defamation had passed, and the $65,000 settlement offer from the Greek government might be withdrawn — yet determined to bring, in order to have "another chance as an Equalizer." He had, as it turns out, attempted to sue Onassis before and failed because of Onassis' wealth and power.

The remainder of the book is no less self-indulgent, self-congratulatory or self-nauseating (that is, myself) than what has already been described. Perhaps most disturbing is the fact that Speiser treats some very complicated issues in a very lackadaisical manner. He raises issues: e.g. statutory limits on recovery for wrongful death, equal treatment for personal as for property rights, and the limitation of punitive damages. It is, however, as though, one is reading the "Reader's Digest" version of *War and Peace*. Much of his discussion of these issues is glib and trite.

Speiser presents entertainment — at least, I suppose that's what his chapters on L.A. Law and a spoof of the "Maltese Falcon" were intended to be — at the expense of serious discussion. I can't recommend this book for your serious reading attention. However, it may at least deserve the same treatment given the "Reader's Digest"; in my home that would make it bathroom reading.

*There, I've fulfilled my commitment to my editors that every third review shall contain a version of the word "law" in the title.

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The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $5.00. Fourteen opinions were approved by the Board of Bar Commissioners between January 1, 1988 and March 11, 1993. For an additional $2.00 ($7.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1993.

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Matthews, Elaine M.
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Mickelson, James D.
Miner, Robert C.
Mitchell, Scott B.
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STOEL, RIVES, BOLEY, JONES & GREY
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SUITTER, AXLAND, ARMSTRONG & HANSON
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Uresk, Roland F.
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Wilde, Robert H.
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WILSON & WILSON
WINDER & HASLAM
WOODBURY & KESLER
Wootton, Noall T.
WORKMAN, NYDEGGER & JENSEN

Zager, Mitchel
ZOLLINGER & ATWOOD

Grant Application Deadline

The Utah Bar Foundation will be accepting grant applications until *5:00 p.m. Monday, May 31, 1993* for the following purposes:

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

For grant application forms or additional information, contact Zoe Brown (531-9077). Mail or deliver applications to the Utah Bar Foundation, 645 South 200 East #204, Salt Lake City, Utah 84111.

Reminder

Ballots to vote for three trustees to the Board of Trustees of the Utah Bar Foundation will be mailed to you in May.

REMEMBER TO TAKE THE TIME TO VOTE!

Issues of Past Bar Journals on Sale

There are a large number of *Utah Bar Journals* left from previous months. If you are desirous of completing your set, or just want a spare copy, you may obtain them by placing your request in writing along with a check or money order for $2.00 per issue made payable to the Utah State Bar, ATTN: Leslee Ron, 645 South 200 East #310, Salt Lake City, Utah 84111. The months that remain are as follows:

August/September 1988
October 1988
November 1988
January 1989
April 1989
May 1989
June 1989
August/September 1989
October 1989
February 1990
March 1990
May 1990
June/July 1990
November 1990
December 1990
January 1991
February 1991
March 1991
April 1991
May 1991
June/July 1991
August/September 1991
October 1991
November 1991
December 1991
January 1992
February 1992
March 1992
April 1992
May 1992
August/September 1992
October 1992
November 1992
December 1992

CLE CALENDAR

ANNUAL CORPORATE COUNSEL SECTION SEMINAR

Topics that will be covered include: "New dimensions in labor union issues," "Officer & director liability," and "Understanding the business crime environment in Utah."

CLE Credit: 4 hours
Date: May 6, 1993
Place: Utah Law & Justice Center
Fee: Corporate Counsel Section Members, $40.00 – after April 29, 1993, $50.00. Nonmembers, $50.00 – after April 29, 1993, $60.00.
Time: 7:30 a.m. to 12:00 Noon

DIRECTORS' AND OFFICERS' LIABILITY

CLE Credit: 4 hours
Date: May 6, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

JOINT TRUSTS VS. SEPARATE TRUSTS

CLE Credit: 1 hour
Date: May 11, 1993
Place: Utah Law & Justice Center
Fee: $7 – Call to RSVP
Time: 12:00 noon to 1:00 p.m.

UTAH REAL PROPERTY SEMINAR

CLE Credit: Information not available at time of printing, please call the Utah Bar for more information and details.
Date: May 12, 1993
Place: Utah Law & Justice Center
Fee: Information not available at time of printing, please call the Utah Bar for more information and details.
Time: 8:00 a.m. to 12:00 Noon.

POSTPONED

HAZARDOUS WASTE AND SUPERFUND 1993: THE LATEST DIRECTIONS FROM A NEW ADMINISTRATION

CLE Credit: 4 hours
Date: May 13, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

SIXTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

This year's Rocky Mountain Tax Planning Institute will offer a comprehensive review of changes in state and federal tax landscape, including a detailed examination of President Clinton's tax bill.

CLE Credit: 12 hours
Date: May 13 & 14, 1993
Place: Utah Law & Justice Center
Fee: $195 Early registration by April 23, 1993
$225 Late registration after April 23, 1993
Time: 8:00 a.m. to 5:00 p.m., May 13,
8:00 a.m. to 12:00 Noon, May 14

PROBATE — NLCLE WORKSHOP

This is another seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: May 20, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

SUING AND DEFENDING BANKS

CLE Credit: 4 hours
Date: May 20, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

DOCTORS AND LAWYERS: LET'S TALK ETHICS — THE ETHICAL ISSUES AND DILEMMAS FACING TODAY'S PROFESSIONALS.

CLE Credit: 3 hours ETHICS
Date: May 26, 1993
Place: Utah Law & Justice Center
Fee: Early registration $50.00 Registration after May 21, 1993, $60.00.
Time: 11:30 a.m. to 2:30 p.m.

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.

FAMILY LAW SECTION MAY SEMINAR: "OTHER PEOPLE'S MONEY" — INCOME (YOURS & THEIRS) ISSUES IN FAMILY LAW

This seminar is designed to provide information to the family law practitioner regarding difficult income cases. The seminar will deal especially with self-employed parties and small business owners.

CLE Credit: 6.5 hours CLE credit, including 1.5 in ETHICS.
Date: May 27, 1993
Place: Utah Law & Justice Center
Fee: $110 Early registration by May 20, 1993
$125 Late registration after May 20, 1993
Time: 8:00 a.m. to 4:30 p.m.

UTAH WATER LAW SEMINAR

CLE Credit: 3 hours
Date: May 27, 1993
Place: Utah Law & Justice Center
Fee: Early registration $40.00. Registration after May 24, 1993, $50.00.
Time: 8:00 a.m. to 12:00 Noon.

SECURITIES LAW FOR NON-SECURITIES LAWYERS

Every lawyer in Utah should know what securities are and what to do if the deal you are working on involves a security. By attending this program you will recognize the presence of a securities law problem, and know how to ethically deal with it in order to protect the client and the lawyer.

CLE Credit: 4 hours CLE Credit, including .5 in ETHICS.
Date: May 28, 1993
Place: Utah Law & Justice Center
Fee: Early registration $100.00. Registration after May 21, 1993, $125.00
Time: 8:00 a.m. to 1:30 p.m.

FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA

CLE Credit: 4 hours
Date: June 3, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

FINANCING LONG-TERM CARE FOR THE ELDERLY

CLE Credit: 4 hours
Date: June 10, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

CRIMINAL LAW — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: June 17, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

THE 63RD UTAH STATE BAR ANNUAL MEETING

This program will include a speech by retiring U.S. Supreme Court Associate Justice Byron R. White. Other featured speakers include: Charles J. Ogletree, Jr., James J. Brosnahan, Michael J. Gerhardt, Senator Orrin G. Hatch, Dean Kristine Strachan, R. William Ide III, Sandy Gilmour and A. Richard Barros. With thirty-five (35!) breakout sessions planned, there is something for every practice of law. Don't miss out on the fun, debates, discussions or Fred & Toby's famous *"Fourth Annual Walking Bar Tour"* of Ketchum, Idaho. This year's Tour theme: "What's the House Shooter?" Please note that the *Tour* is NOT a Bar sponsored activity and may not be suitable for all members of the family or Bar.

CLE Credit: 14 hours with 2 hours in ETHICS
Date: June 30 through July 3, 1993
Place: Sun Valley Resort, Sun Valley, Idaho
Fee: Early registration $195 by June 11, 1993.
$225 after June 11, 1993.

For more information on meetings and activities watch for your brochure arriving in the mail very soon, or call (801) 531-9077 for more information. (Attention: 1993 is a CLE reporting year.)

REAL PROPERTY — NLCLE WORKSHOP, Rescheduled date!

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: August 19, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

CIVIL LITIGATION I: PRE-ACTION INVESTIGATION, PLEADING & DISCOVERY — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: September 16, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

CIVIL LITIGATION II: EVIDENCE — NLCLE WORKSHOP

This is another basics seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: October 21, 1993
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Section members. $30.00 for non-members.
Time: 5:30 p.m. to 8:30 p.m.

CLASSIFIED ADS

For information regarding classified advertising, please contact (801) 531-9077. Rates for advertising are as follows: 1-50 words — $10.00; 51-100 words — $20.00; confidential box numbers for positions available $10.00 in addition to advertisement.

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 WANTED

LOST WILL: Myrtle B. Carey died on January 16, 1993. The conservator, West One Bank, has in its possession a copy of a WILL drafted for Mrs. Carey in approximately 1957. If you know of the whereabouts of the original of this WILL, or any other WILL made for Myrtle B. Carey, please contact S. Robert Bradley, Esq., Van Cott, Bagley, Cornwall & McCarthy, P. O. Box 45340, Salt Lake City, Utah 84145, telephone number (801) 532-3333.

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.

USED LAW BOOKS — AmJur Trials; Federal Practice & Procedure 2d; Wharton's Criminal Law 14th Edition Vol. 1-4; Wharton's Criminal Evidence 13th ed. Vol 1-4; and Wharton's Criminal Procedure 12th and 13th both Vol. 1-4. Call Sterling or Mitchell at (801) 486-9636.

Couch on Insurance 2d, new condition, current supplements, unmarked. Cost $2,900.00 new, will sell for half price. Contact Gary (801) 484-3434.

For Sale — Pacific Reporter, includes First and Second through Volume 723. Excellent condition. Make offer. Call (801) 538-2344.

OFFICE SHARING/SPACE AVAILABLE

Deluxe office space at 7821 South 700 East, Sandy. Space for two (2) attorneys and staff. Includes two spacious offices, large reception area, conference room/library, file storage, convenient parking adjacent to building. Call (801) 272-1013.

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

Attractive legal offices available at prime location. Close to court and downtown, located at 320 South 500 East. 1-3 offices are available. Access to conference room and law library. Please contact Judy Garrett at (801) 521-4145.

ATTRACTIVE OFFICE SPACE — Union Park area (1200 East 7000 South), next to Holiday Spa. Office sharing with five other attorneys. Secretarial or word-processing services available, or space for your own secretary. Copier, telephone, fax and conference room. Close freeway access to entire valley. Contact Wynn at (801) 566-3688.

POSITIONS AVAILABLE

Small Salt Lake City firm seeks associate. Primarily domestic practice. Prefer candidate with two or more years domestic experience. Please send resume to: Utah State Bar, Box C-5, 645 South 200 East #310, Salt Lake City, Utah 84111.

EXPERIENCED IN INDIAN TRIBAL PROCEDURES? I need a competent, experienced attorney to enforce a substantial judgment against the Business Committee of the Utah Indian Tribe of the Uintah and Ouray Reservation. For details contact: George E. Mangan, 1111 Cherrywood Drive, Bardstown, KY 40004 or call (502) 348-7625.

Grand Junction law firm seeks associate attorney with 1-3 years general practice experience; emphasis on general business, taxation, domestic relations, and workers' compensation helpful. Send resume, law school transcript, and writing sample to: Doehling & Slater, P.C., 744 Horizon Court #360, Grand Junction, CO 81506.

SALT LAKE LEGAL DEFENDER ASSOCIATION is currently accepting resumes to update its trial and appellate attorney roster. Interested attorneys should submit their application to F. John Hill, Director, 424 East 500 South #300, Salt Lake City, Utah 84111 or call (801) 532-5444.

ATTORNEY-COLLECTION: A progressive auto finance company is seeking attorney(s) with experience in collection and bankruptcy law to handle its case load on a retainer basis in Utah. Please send resume to GCI, P. O. Box 225A, Royal Oak, MI 48068.

POSITIONS SOUGHT

Attorney with Masters in Tax and Big Six accounting firm experience seeks position in a law firm with a practice in the tax area or contract work in the tax or domestic relations areas. Admitted in Utah and California. Call Brent at (801) 392-6046.

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TWO EXPERIENCED ATTORNEYS SEEK OVERFLOW/PROJECT WORK. Former law review editor and federal judicial clerk. Eight years of federal and state trial and appellate practice. From family and criminal matters to commercial and environmental law. Court appearances, discovery, pleadings, motions, research and briefs. Reasonable rates. Call (801) 575-1954.

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Complete in-office copy center, 200 copies per minute, less than $20,000.00. 50 copy per minute copiers $4,995.00. Laser copiers only $4,500.00. Call ALPINE COPIER SERVICE at (801) 484-5822.

The **International Society of Family Law** announces
The North America Conference
on

FAMILY RESTRUCTURING AT THE END OF THE 20TH CENTURY

June 10 - 12, 1993 at **Jackson Lake Lodge, Wyoming**
in the majestic Grand Tetons National Park

Family law scholars, practitioners, judges, counselors, and other professionals are invited to attend.

TOPICS include

Reducing formalism in dissolution proceedings; **Restructured families**; **Economic consequences** of dissolution and family restructuring; **Custody** and the **rights of children and parents** in dissolution and upon restructuring; **New proposals** concerning dissolution and family restructuring.

PLANNERS, REVIEWERS, and PARTICIPANTS include

Anders Agell; Carol Bruch; Ira Mark Ellman; Sanford Katz; Sheila B. Kamerman; Robert J. Levy; Justice Claire L'Heureux-Dubé; Don J. MacDougall; Frances Elisabeth Olsen; Sarah H. Ramsey; Carl Schneider; Lynn Wardle.

REGISTRATION FEE••

The registration fee includes the Thursday conference dinner, and Friday conference luncheon.

$ 95 (US) ISFL members; $130 (US) nonmembers; Send registration letter and check payable to:

"**ISFL North America Conference on Family Restructuring**" to either:

Professor Lynn D. Wardle
ISFL North American Conference
518 JRCB, Brigham Young University
Provo, Utah 84602

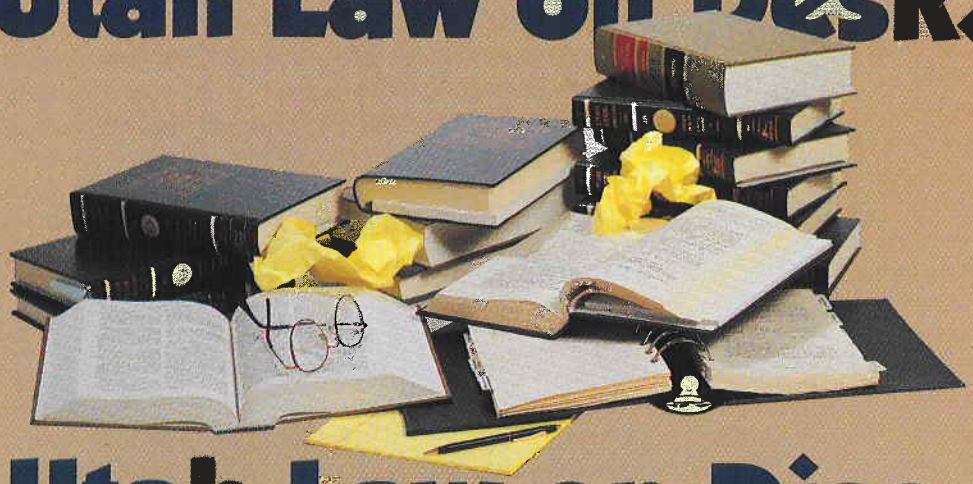
or

Professor Don J. MacDougall
ISFL North American Conference
Co-registrar University of British Columbia
Faculty of Law, 1822 East Mall
Vancouver, British Columbia V6T 1Z1

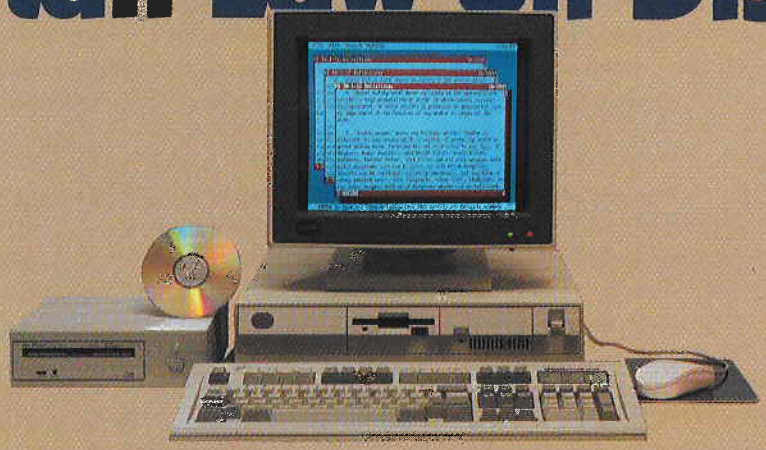
••<u>SPECIAL RESERVATION SERVICES</u> have been arranged through Murdock Travel. The Group Division at Murdock can make lodging arrangements, airline reservations and handle conference registration. **Ask for the Group Division** (Carol, Liz or Scott).

☎Call (800) 365-7747 (in the continental US)
☎Call (801) 521-7850 (outside the continental US)

Utah Law on Desk.



Utah Law on Disc.



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