UTAH BAR JOURNAL

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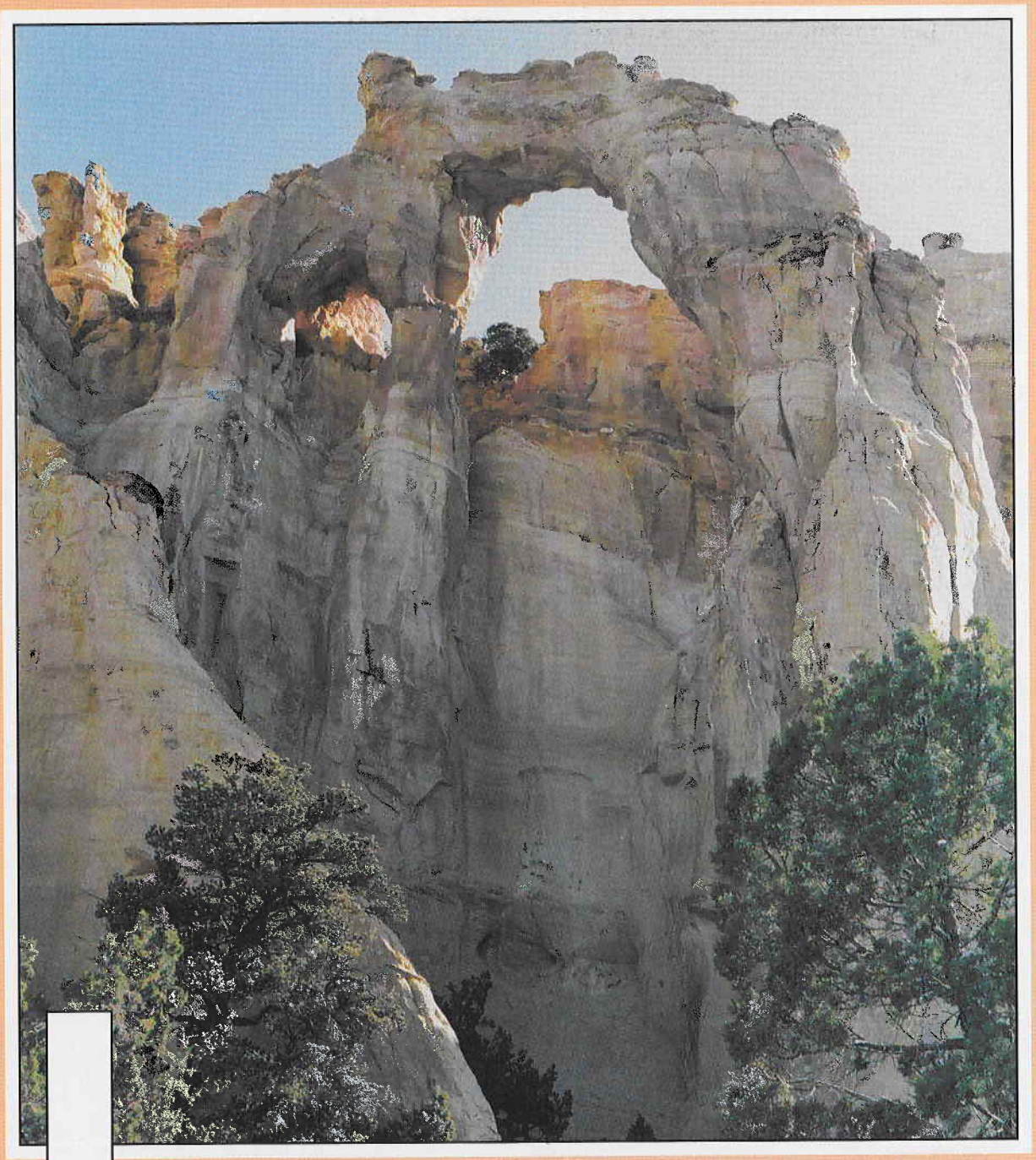

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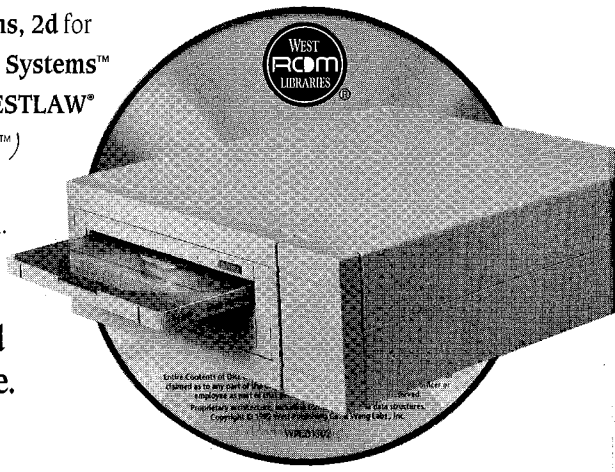

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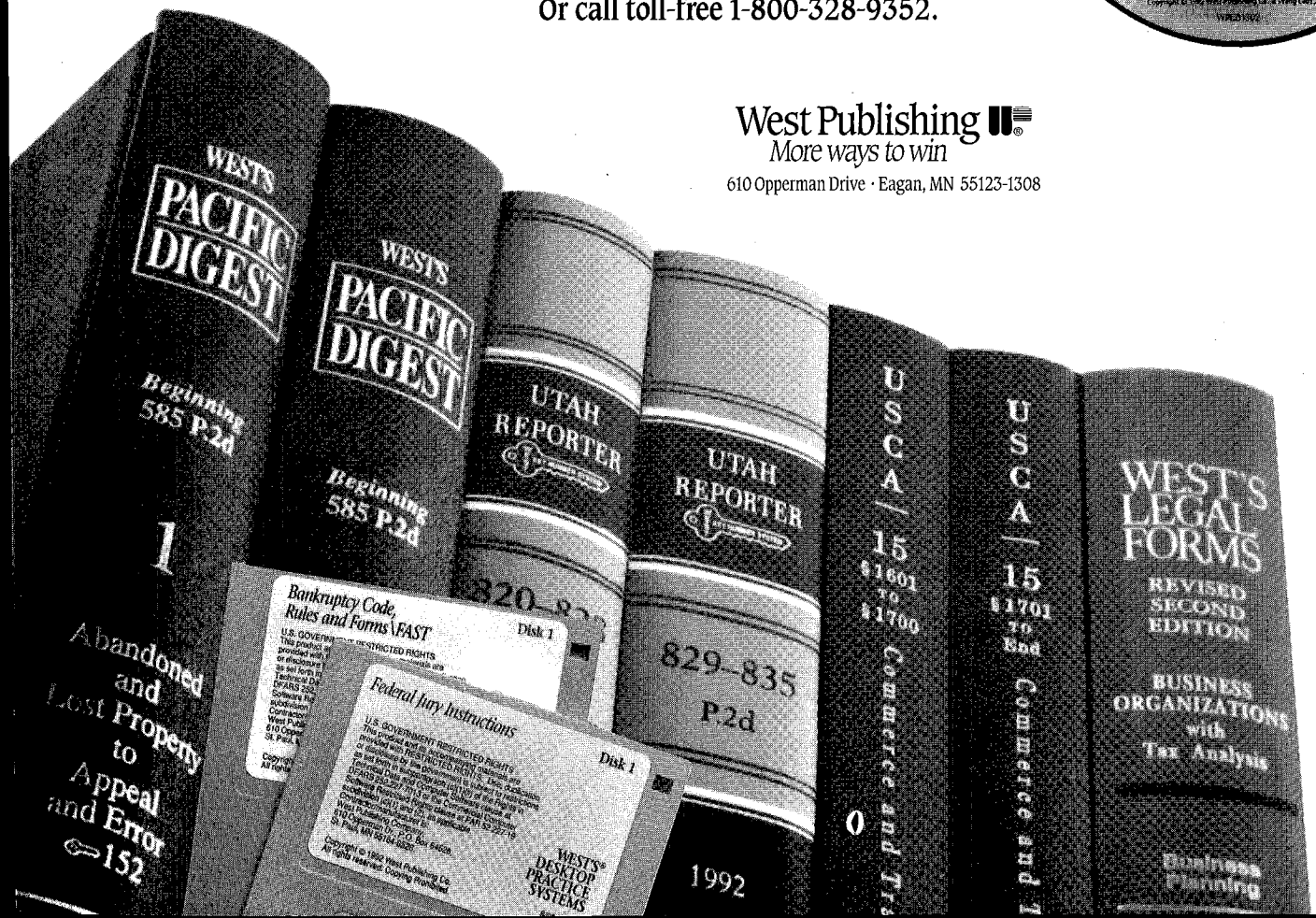

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COVER: Grosvenor Arch, near Cannonville, Kane County, Utah, taken by Prof. David A. Thomas, J. Reuben Clark Law School, Brigham Young University.

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

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $30; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

Results of Bar Journal Survey of Readers

In the May 1993 *Bar Journal*, a readership survey was published. Just under 60 survey responses were received. The *Bar Journal* thanks those who took time to fill out the surveys.

Leslee Ron of the Bar Journal Committee spent numerous hours compiling the results of the survey. Some highlights from the survey are set forth below.

In an effort to implement your suggestions and recommendations, the *Bar Journal* will institute a new section which will contain "how to" articles on various fundamental and practical aspects of the law, e.g., how to prepare a simple will, how to handle an uncontested divorce, how to do a Chapter 7 bankruptcy filing, etc.

The survey results indicated that a majority of the respondents read more than half of the *Bar Journal* and take anywhere from 10 to 30 minutes to peruse the *Journal.*

The most frequently read sections of the Journal are the Case Summaries, State Bar News, President's Message, Commissioners Report and Letters. The format of the *Journal* was overall rated fair to very good. All respondents found the *Journal* either very useful or somewhat useful.

The respondents were split as to whether an index of *Journal* articles would be useful. When finished with the *Journal*, most respondents either save the entire issue, save specific articles or discard the issue. A plurality of respondents have adapted a new procedure or initiated a new program based on information read in *Journal* articles.

Nearly half of the respondents desire the focus of the *Journal* to remain as is. However, some respondents want the principal focus to be practical and would like to see "how to" articles on specific areas of practice.

Several respondents would also like to see articles on the following topics in future issues of the *Journal*: legal ethics and lawyer discipline; judicial selection and polls; legal trends impacting bar associations; computerization and technology; CLE programs; trends, fees, salaries, etc. in the practice of law; and personal information about selected lawyers, among others.

The *Bar Journal* invites submission of articles on these specific topics, other topics of general interest and practical "how to" articles in all areas of practice.

Dear Editor:

After over 40 years of the practice of law I finally decided to attend a State Bar meeting. I do not know how the meetings have been done in the last 40 years but if this year's meeting is any criteria all I can say is "I have missed a lot".

I have contemplated why I never attended and missed so much. I came out of law school, started my own practice with a wife and 5 children and just didn't have the money. The time yes, but not the money. Not knowing what I was missing when I got the money, my habits had become too ingrained and besides now I was busy (a poor excuse when one realizes the benefits). The following are some observations that I made at the meeting:

There were very few new admittees and young attorneys present. This should be corrected. I believe it could be done through the Foundation which has over $600,000.00 sitting in the bank. If not the Foundation why not have some of us older attorneys who have made a couple of bucks sponsor a newly admitted attorney (especially those in private practice) for his or her registration fee and possibly a couple nights lodging. There seemed to be a lot of talk about the new attorneys coming into the profession. Let's cut out the scholarships and help the new admittees more. Start them out right so they won't do as I have done and missed a great part of the profession I love so much. Get them in the right habit.

Regarding the concern for all the lawyers coming into an overloaded profession, it might be wise to send to all the applicants for law school a copy of the study "Eye on the Future." What a wonderful piece of work!

Finally, if the CLE Program is not a placebo for people to attend then why not give the instructors sufficient time to really cover their topic. The courses I attended were exceptionally well prepared, but the speakers were just not given enough time.

I WISH TO THANK ALL THOSE WHO WORKED SO HARD TO PUT THE ANNUAL MEETING TOGETHER, ESPECIALLY THE SPEAKERS. THEY TAUGHT ME A LOT.

Richard L. Tretheway,
Attorney at Law

Dear Editor:

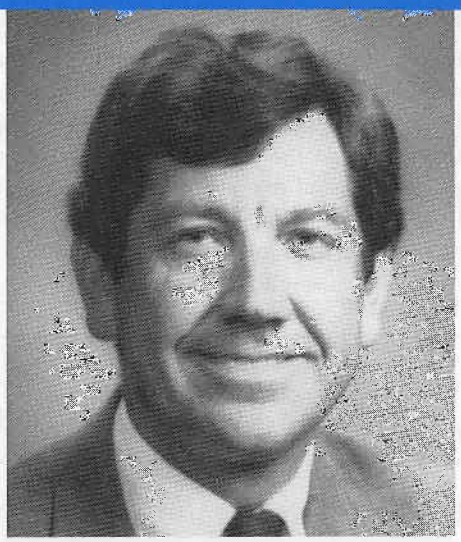
In the May 1993 issue, the only instance where a pronoun was used to refer to a privately reprimanded attorney, thus identifying said attorney's sex, the pronoun was "her." I found myself thinking, "Gee, they also identify her as to size of practice, number of years practicing, and the same narrow area of law that I used to practice. Everyone will think that it's I." It wasn't, but somehow I still feel unduly burdened by the descriptive commentary.

To make sure that I wasn't mistaken about the single use of a sex-identifying pronoun for possibly the only woman attorney to be reprimanded, I re-read the whole depressing feature. Seven attorneys were privately reprimanded. Only one was identified by sex and that was a woman. Considering that women are still a minority in the Bar, how many women of the size of firm identified are in the Bar practicing that kind of law who have practiced that number of years? In other words, the use of a gender-identifying pronoun here compromises the privacy of the reprimand, and unfairly burdens *all* attorneys who fall into that limited class.

It also seems too much of a coincidence that a pronoun was used only for the woman attorney. Consider the sentence: "The attorney failed to appear until the client contacted *her.*" (Emphasis added). How hard would it have been to state: "The attorney failed to appear until contacted by the client."? Consider a similar juxtaposition in another reprimand: ". . . the attorney had not filed the order with the court. Thereafter, the client contacted *the attorney* . . ." (Emphasis added).

I propose that the private reprimands be preserved as gender neutral to protect the sexual minority of the Bar who may be unfairly singled out for suspicion and distrust.

Jerri Hill,
Attorney at Law



First President's Message

By H. James Clegg

Last New Year's Day I penned my last Commissioner's Message and reported the national euphoria building up to President Clinton's inauguration. I was so cynical as to suggest that a president's honeymoon is necessarily short-lived, noting

> You'll be reading these lines well into the New Year, perhaps when the new fabric can already be seen as threadbare and the new silver is becoming tarnished. Such is the way of a new year.

While I did not foresee the precise issues which have troubled the Presidency, nor, probably, did the President, the complicated and diverse nature of our citizenry, their needs and conflicting goals and values guarantee that frictions will develop promptly and regularly. By the time this note reaches you, we will be well into the new Bar year. We will not have taken a position, or promised one, on treatment of gays in the military or military intervention in Bosnia; nevertheless, some of our actions will affect your lives and well-being, hopefully for the better.

Starting a year as your president certainly gives some pause. Our Bar is complex, its members are diverse and they have conflicting values and expectations. While neither the president nor staff nor Commission can satisfy everyone all the time, we do pledge openness and receptiveness to expressed suggestions and thoughts. We will try to be responsive, pro-active even, in seeking to resolve problems and frictions.

The Bar is in good shape in its finances and facilities. We have a physical plant which is the envy of the western world — or, at least, the members of the Western State bars with whom we have the most exchange. The courts, at least in Salt Lake County, have inadequate and awkwardly-situated facilities and the Bar should be a partner in solving those difficulties.

While it is too soon to know whether it will be a *good* year for lawyers, it will almost certainly be an *interesting* one. Far-reaching changes in tax laws will open new crises — and opportunities — for tax and business lawyers. The new rules of discovery and the evolution of the rules on sanctions should keep trial lawyers on edge. Criminal lawyers should remain tuned for developments, at least locally, in search/seizure/entrapment definitions and proofs. Clients will continue to insist on cost-cutting and budget controls on both in-house and out-of-house counsel.

Litigators and parties will see more and more of the judicial business handled by commissioners due to the continuing financial pressure on state government and perceived potential to save money on judicial salaries and judicial staffing. The Bar will try not to be overly negative as attempts continue to broaden the jurisdiction and authority, vertically and horizontally, of commissioners. However, the Bar Commission leadership has been concerned that the independence of the judicial branch may be compromised by the practice of hiring (and firing) judicial officers as opposed to the tried-and-true selection/appointment/retention-election system of the fairly recent past.

The popularity of law school curricula and the dreams of practice-nirvana continue to crowd the law schools and occupy the Bar examiner, admissions and bridge-the-gap committees. The fallout will necessarily be a crowded marketplace for legal wares with anticipated competitive pressures, leading to risk-taking, embezzlement and other strains on the discipline system. We are already experiencing these downsides. Last year, we hired an extra lawyer on Bar Counsel staff specifically to better address the unauthorized-practice issues; his time was quickly consumed by the significant increase in discipline complaints and we are yet to design a meaningful system to cope with UPL matters.

Bar Counsel look forward to profound changes as we move from in-house, gener-

ally unpublicized, regulation of attorneys to public trials in open court. There are many perceived advantages, perhaps greatest being the avoidance of the "cover up" perception the public has of the old system as verbalized by the ABA's McKay Commission.

The Bar Commission welcomes its first two lay members, John Florez and Ray Westergard. While few of us know John well yet, we have enjoyed our relationship with Ray when he, as a principal of Grant Thornton and on behalf of the Supreme Court, studied the Bar's organization and management in tandem with the Supreme Court's Task Force on the Management and Operation of the Bar. Ray has excellent accounting and management skills and we look forward to his participation and advice as we strive to improve the Bar.

We have a good Bar, reflective of the skills, energy and volunteerism of its members. You will all be called upon during the year to participate in Bar functions and activities. We hope you will become engaged and enjoy the friendships available to you, along with the reward of pushing the wheel along a bit.

Good luck to all of us!

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What Has Happened to the Responsibilities of Directors of Utah Corporations?

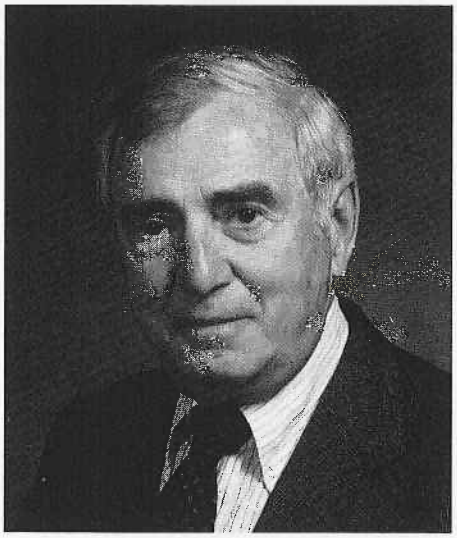
By Peter W. Billings, Sr.

The rash of failures of federally-insured depository institutions (banks and savings and loan associations) has resulted in losses to the federal government and, consequently, has placed a financial burden on federal taxpayers, measured in many billions of dollars. These failures have created concern in Congress, the media, and the general public as to who has been at fault and from whom recovery of the losses may be obtained. High on the list have been officers and directors of the failed institutions, from Charles Keating to prominent political figures, including the son of President Bush.

In Utah, since 1984, the Commissioner of Financial Institutions has closed 12 Utah chartered banks. Five Utah-based savings and loan associations, both state and federally chartered, have also been closed. In addition, Utah has had the problem of the industrial loan corporations, beginning with Murray First Thrift, whose deposit protection by the Industrial Loan Guaranty Corporation proved to be worthless.

What the future may hold for Utah is, of course, a matter of conjecture. The viability of Utah-based depository institutions will depend not only on the state of the economy and the quality of their loans and investments, but also on an institution's ability to meet higher capital adequacy standards and maintain appropriate reserves for loan losses. The quality of management and the standard of care exercised by boards of directors, as well as the effectiveness of the supervisory agencies, will be critical factors.

This article deals with the standard of care Utah law places on directors of all Utah business corporations, including financial institutions that hold and invest the deposits of the public, as well as the investments of their shareholders. It focuses on developments in 1992-93 and the changes made in Utah law from the long-standing basic principle that "directors were not intended to be mere figureheads without duty or responsibility."[1]



PETER W. BILLINGS Sr. is presently of counsel to the Salt Lake City firm of Fabian & Clendenin. He and the firm have represented the FDIC for several years on Utah matters and are presently also representing the RTC on matters involving savings and loan associations doing business in Utah.

1992 proved to be a significant year in the area of the responsibility of corporate directors. Perhaps the most significant aspect was the outside directors of such major corporations as General Motors, IBM, Sears, Westinghouse, American Express, and Kodak (all part of the Dow-Jones industrial corporation average) began doing what the principles of corporate governance require them to do — make management shape up from the lethargy that had brought these giants close to disaster. What should be "good for GM" should be good for other corporations.

Whether that exercise of their responsibilities came from pressure from stockholders — pension plans and mutual investment funds hold large blocks of stock in these corporations and thus have more clout than individual stockholders — or from fear of liability generated by suits against directors of insolvent depository institutions by the FDIC, or from pricks of their own conscience, is not known. But the result has been for the benefit of these corporations, their shareholders, and the American economy.

The principles of corporate governance that have generated these significant developments in the management of corporate America are also principles of law, developed over the years by each state for corporations chartered under its laws. The need for uniformity in those principles has been long recognized and, by coincidence, also in 1992, the American Law Institute approved the results of its research and approved its Principles of Corporate Governance for implementation throughout the country, in the same manner as its Restatements of the Law on torts, contracts, and other legal principles have been adopted and followed by courts throughout the United States. The ALI Principles of Corporate Governance have sought to define the accommodations between often competing values "on the one hand, freedom of enterprise; on the other, accountability under the law" as stated in its foreword.

Recognizing that directors are "necessarily fallible," the ALI Principles have established a standard of care that is normally applied after the fact when the circumstances are reviewed before a court. Section 4.01(a) of the ALI Principles provides:

> (a) A director or officer has a duty to the corporation to perform the director's or officer's functions in good faith, in a manner that he or she reasonably believes to be in the best interests of the corporation, and

with the care that an ordinarily prudent person would reasonably be expected to exercise in a like position and under similar circumstances.

These principles also provide that the duty includes the obligation to make or cause to be made an "inquiry" when the circumstances would alert a reasonable director to the need therefore and affords to a director the protection from liability for a "business judgment" made in good faith and based on information the director reasonably believes to be appropriate under the circumstances.

In short, a director has a duty to do more than merely attend meetings, collect a director's fee, and ratify the actions of management. But a director satisfies his or her obligations if he or she acts reasonably under the circumstances, including making such inquiry as is necessary to make an informed judgment as to what is in the best interests of the corporation. The key words are "prudent," "circumstances," "reasonable," and "informed." A director is not required to have infallible judgment, but an outside director, to be prudent and act reasonably, must make such inquiry under the circumstances as to be sufficiently informed to make a rational decision. The ALI comments on § 4.01 suggests that only the language of subsection (a), quoted above, be made statutorily and the other aspects of the ALI Principles on a director's responsibilities would be better implemented by case law than legislative codification.

In Utah, prior to 1992, there was no statutory provision as to the duty of care of a corporate director. Section 16-10-33, as part of the Business Corporation Act, merely provided: "The business and affairs of a corporation shall be managed by the board of directors." What responsibilities that management entailed were governed by an 1899 decision of the Supreme Court of Utah, *Warren v. Robinson*, 57 P. 287.

That case arose as an action on behalf of all shareholders and creditors of Citizens Bank which had been organized in 1890 and failed in 1893. The action was for damages alleged to have been caused by mismanagement of the bank by the defendant directors and officers. At a bench trial, the district court dismissed the action at the conclusion of the plaintiff's evidence, at which point plaintiffs appealed.[2]

The Utah Supreme Court affirmed the judgment as to certain of the defendants, but reversed and remanded for trial of claims against the balance of the defendants. In so doing, the court engaged in a lengthy discussion of the duties and responsibilities of bank directors, and concluded:

> The directors, however, ought not to be held to the highest degree of care and diligence, for that might prevent men, whose unspotted reputations and good business judgment would give character and stability to the institution, from accepting such positions; nor should they be held to the slightest degree, for that would have a tendency to destroy public confidence, and few men would be willing to deposit their money with the bank. The rule most in harmony with the character and well-being of such an institution appears to be that the directors, in administering its affairs, must exercise ordinary care, skill, and diligence. *Under this rule, it is necessary for them to give the business in their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is therefore incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution, and to supervise and direct its operations.*[3]

Seventy-three years later, in *FMA Acceptance Co. v. Leatherby Ins. Co.*,[4] the Utah Supreme Court reaffirmed the rule set forth in *Warren* and applied it to a general business corporation, in this case an insurance agency.[5]

"[A] director has a duty to do more than merely attend meetings, collect a director's fee, and ratify the actions of management."

By coincidence with the actions of the directors of some of the country's largest corporations and the adoption of the ALI Principles of Corporate Governance, the 1992 Utah Legislature, in enacting the Utah Revised Business Corporation Act, for the first time stated in statutory form the general standards of conduct for directors and officers of Utah business corporations. The new statute provides that a director shall discharge his duties as a director: "(a) in good faith; (b) with the care an *ordinarily prudent person in a like position* would exercise *under similar circumstances*; and (c) in a manner the director or officer reasonably believes to be in the best interest of the corporation."[6]

The similarity with the ALI Principles is obvious, and it is also clear that the new statutory standard was not a departure from the *Warren v. Robinson* standard which had been in effect for over 50 years. As the Utah Supreme Court noted in 1899, the *Warren v. Robinson* standard would not "prevent men, whose unspotted reputations and good business judgment would give character and stability to the institution from accepting such positions."

But in 1992, another event occurred. The *Warren v. Robinson* standard was threatened to be applied to the directors of Tracy Collins Bank & Trust Company, which the Utah Commissioner of Financial Institutions in 1988 had determined was in danger of failure. The bank sought FDIC assistance to effect the acquisition of certain of its assets and assumption of its deposit liabilities by Continental Bank. That assistance included acquisition by the FDIC of Tracy Collins' rights against its officers and directors for mismanagement of the institution. Subsequently, the FDIC brought an action against Tracy Collins' officers and directors based on failure to meet the requirements of State law — the *Warren v. Robinson* standard of care.

The Federal District Court for Utah, Judge Sam, granted the defendant's motion to dismiss, holding that 12 U.S.C. § 1821(k)[7] preempted Utah law and allowed suit only for "gross negligence."[8] On appeal, the original panel of the Tenth Circuit reversed that decision in February 1992. Later, a rehearing en banc was granted. After rebriefing and reargument, the court, by a seven to two decision (the Utah members not participating) held the original panel decision was correct, and the *Warren v. Robinson* standard would be applicable.[9]

The case was settled before trial, but its threat apparently alarmed Utah bankers, despite the Utah Supreme Court's 1899

statement that the standard of care it pronounced should not discourage persons of unspotted reputation and good business judgment from serving as directors. In 1993, the Utah Bankers Association, according to an article in the *Salt Lake Tribune* on March 21, 1993, "led lobbying" for a bill before the Utah Legislature to limit the effect of the 1992 standard of care set forth in § 16-10a-840.

That bill, H.B. 137, sponsored by Representative John L. Valentine, was passed by the Legislature on March 3, 1993, and signed by the Governor on March 22, 1993. It is apparent he was not concerned by the *Tribune* article. The provisions of H.B. 137 became effective on May 3, 1993. H.B. 137 did not change the standard of care set forth in §§ 16-10a-840(1) and (2), but amended the liability provisions in subparagraph 4 of that section. That paragraph, when adopted in 1992, provided:

> (4) A director or officer is not liable for any action taken, or failure to take any action as an officer or director, as the case may be, if the duties of the office have been performed in compliance with this section.

Thus, a director was liable *only* if the director's performance did not meet the standards that had been in effect in Utah since 1899 and which were also those stated in the ALI Principles.

As amended by H.B. 137, subparagraph 4 of § 840 now reads:

> A director or officer is not liable to the corporation, its shareholders, or any conservator or receiver, or any assignee or successor in interest thereof, for any action taken, or any failure to take action, as an officer or director, as the case may be, unless: (a) the director or officer has breached or failed to perform the duties of the office in compliance with this section; and (b) the breach or failure to perform constitutes *gross negligence*, willful misconduct or intentional infliction of harm on the corporation or the shareholders. (emphasis supplied)

Two aspects of the changed language should be noted. The original version provided a director "is not liable," without placing any restriction as to whom that liability was eliminated. The *Salt Lake Tribune* article indicated the sponsor and the lobbyists were concerned about liability of directors to the FDIC as threatened by the Tracy Collins case. But the amendment does not mention depositors, and the FDIC is subrogated to their rights when it pays its deposit insurance liability.[10] It is those billions of taxpayers' money that the FDIC has spent and seeks to recover from directors whose failure to meet their duty of care in corporate management caused the bank's failure. It brings such suits, not as "conservator or receiver," the words the bankers apparently thought would close the door, but in its corporate capacity as deposit insurer.

"Utah's 'tarnished image as a sham capital' has been reinforced. That image should be of more concern to the Utah legislature than the pocketbooks of honorary directors.'"

The second aspect is the language in subparagraph 4(b) as enacted by H.B. 137 that there is no liability for breach of the standard of care set forth in §§ 840(1) and (2), unless such failure "constitutes gross negligence." It should be noted that § 840, as originally adopted in 1992, the *Warren v. Robinson* standard adopted in 1899, and the 1992 ALI Principles, do not use the word "negligence" or any qualifying adjective such as "simple" or "gross" in defining the duty of care. There would be no need for a court to use those words in its jury instructions in a suit alleging breach of those standards.

Nor does H.B. 137 attempt to define what constitutes "gross negligence" with respect to the standards set forth in § 840. How should a court instruct a jury under the H.B. 137 changes? What failure to act in good faith and with the care a normally prudent person in a like position would exercise under similar circumstances and in a manner the director or officer reasonably believes to be in the best interests of the corporation is "gross"? Obviously, it is something less than "willful misconduct," but how much more than a "simple mistake"?

In Delaware, whose law is significant because it is the situs of many major corporations, the ALI Reporter on the Principles of Corporate Governance reported its law to be "in the corporate area, gross negligence would appear to mean, 'reckless indifference to or deliberate disregard of the stockholders . . . or actions which are 'without the bounds of reason.'"[11]

Is that the criteria by which the Utah legislature wishes directors of Utah corporations be judged? Is that criteria in the best interests of Utah corporations, their shareholders, or the Utah economy? What kind of accountability for the management of Utah corporations does H.B. 137 leave?

Perhaps a more honest amendment to paragraph (4) of § 840 would have been to use the language of the spokesman for the Utah Bankers Association as quoted in the *Tribune* article of March 21 as to his concerns about "liability for simple negligence based on hindsight." The provisions of paragraph 4 would then read:

> A director or officer is not liable for any action taken or failure to take action which, in hindsight, was only a simple mistake.

Sitting in hindsight, a judge or a jury need only determine whether the failure to meet the standard of care of §§ 840(1) and (2) had been established and whether such failure resulted only in a simple mistake. Fallibility would be recognized but accountability would be preserved.

If the Utah legislature were truly concerned only with simple mistake, they overlook the fact that the business judgment rule, as stated in the ALI Principles in § 4.01(c), provides the protection they purport to desire. That provision reads:

> (c) A director or officer who makes a business judgment in good faith fulfills the duty under this Section if the director or officer:
>
> (1) is not interested [§ 1.23] in the subject of the business judgment;
>
> (2) is informed with respect to the subject of the business judgment to the extent the director or officer reasonably believes to be appropriate under the circumstances; and
>
> (3) rationally believes that the business judgment is in the best

interests of the corporation.

The reporter for that provision described the rule as "a judicial gloss on duty of care standards that sharply reduces exposure to liability" and pointed out that the judgment of a director "will pass muster" if the director believes it to be in the best interests of the corporation, and that belief is rational.[12]

No director should object to a requirement that in making a judgment the director be reasonably informed and not be "interested" in the subject of judgment. "Interested," as used in the ALI Principles, means that the director not be a party to the transaction or have a business, financial, or familial relationship to a party. In other words, the judgment must be objective and not influenced by a director's personal interests.

As a "judicial gloss," the protection for "simple mistakes" would be effective under the business judgment rule without such a broad immunity grant as is provided by H.B. 137.

No one should rationally believe that service as a corporate director is a sinecure, lending one's name and reputation to the corporation's public relations in return for a director's fee. The Supreme Court noted back in 1899 that directors were not intended to be mere figureheads without duty or responsibility. If being a figurehead is how corporate managers in Utah regard the function of outside directors, perhaps a new classification of "honorary director" should be created so those investing or dealing with the corporation would know such directors are a facade and have no responsibility for the conduct of the corporation's affairs, and the "honorary" directors would not fear their pocketbooks would be exposed to litigation over "simple mistakes."

The "honorary director" solution to the concerns of Utah bankers is available without further legislation. Under § 841 of the 1992 Business Corporation Act, any corporation, by action of its shareholders, may "eliminate or limit" the liability of a director for monetary damages for any action taken or failure to take any action with exceptions far broader than "gross negligence." Under paragraph 5 of § 841, a depository institution may include in such elimination or limitation liability to depositors to the extent the deposits are insured by the FDIC, a protection not included in H.B. 137.

The ALI Principles in § 7.19 deal with limitations on liability but not elimination as is included in the Utah statute. The comments on § 7.19 suggest that provisions for such limitation can be justified on the basis the potential amount of liability might be excessive in relation to the nature of the actual culpability of the director.

Under § 16-10a-841 of the Utah Act, a corporation by shareholder action, could eliminate liability for "simple mistake" or even go as far as H.B. 137 and eliminate liability, except for "gross negligence," or

eliminate liability entirely for honorary directors — an approach more honest with respect to the public supposition that directors are of high character, of integrity, of reasonably sound judgment, and of such good business sense as is necessary to conduct the affairs of the corporation wisely and with reasonable safety.[13]

CONCLUSION

Obviously, H.B. 137 goes too far. The purported objectives of the Utah legislature could be achieved under the judicial gloss of the business judgment rule or by exercise of authority under § 841 to limit or eliminate liability by corporate articles or bylaws. Under the requirements of § 16-10a-841(3), the shareholders of the corporation would have a voice in determining any limitation on the liability of their directors. Under H.B. 137, all Utah shareholders can hope for is that the fallibility of their directors is limited to simple mistakes.

The constitutionality of H.B. 137 which limits the rights of corporate shareholders which they have enjoyed in Utah since at least 1899, by raising, without the consent of the shareholders, the threshold of liability to "gross negligence" is a subject for another day. The value of their investments has been adversely affected by limiting the accountability of Utah corporate directors who are charged with its management, but are now only responsible for conduct which is "without the bounds of reason" or with "reckless indifference" to the best interests of the corporation. Utah's "tarnished image as a sham capital"[14] has been reinforced. That image should be of more concern to the Utah legislature than the pocketbooks of "honorary directors."

[1] *Warren v. Robinson*, 57 P. 287 at 289 (Utah 1899).

[2] The facts are taken from the Court's opinion in *Warren*. After remand the directors were exonerated from liability — a result affirmed by the Supreme Court. 70 P. 989 (Utah 1902).

[3] *Id.* at 289-95 (emphasis added).

[4] 594 P.2d 1332 (Utah 1972).

[5] *Id.* at 1333-36.

[6] Utah Code Ann. § 16-10a-840 (1992) (emphasis added).

[7] That Section of federal law was part of an Act (FIRREA) adopted by Congress in 1989 to improve the powers of federal agencies over financial institutions whose deposits were federally insured.

[8] *FDIC v. Canfield*, 763 F. Supp. 533 (D. Utah 1991).

[9] *FDIC v. Canfield*, 967 F.2d 443 (10th Cir. 1992).

[10] 12 U.S.C. § 1821(g) 1989. The rights include not only payment to depositors but also sums advanced to obtain the assumption of deposit liabilities by another institution — the situation at Tracy Collins.

[11] Report, p. 238.

[12] ALI Report, pp. 184-85.

[13] *Warren v. Robinson, supra* at 290.

[14] *Salt Lake Tribune* article, March 21, 1993.

Extraordinary Collection Procedures — Part II

By Bryan W. Cannon

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OTHER SPECIAL COLLECTION STATUTES AFFECTING CONSTRUCTION

Interest and Prompt Payment Laws

Section 15-6-1 *et seq.* contains the provisions of the Utah Prompt Payment Act. This law provides for prompt payment to be made by state agencies to contractors as well as prompt payment by public contractors to subcontractors.

Any agency of the State of Utah contracting for property or services is required to pay for the same within 60 days after receipt of the invoice for such items unless stated otherwise in the contract between the agency and the contractor. This also applies to contracts for the rental of real or personal property. Interest accrues against the state agency and is charged on all payments at the rate of 15.5% per annum beginning on the day after the payment is due. Any interest remaining unpaid at the end of the 60 day period (or other contractual period for payment) is added to the principal amount of the debt and thereafter accumulates interest (§15-6-2).

Under §15-6-4, if an agency's failure to timely pay interest as required by §15-6-3 is the result of the dispute over the amount due or over compliance with the contract, the provisions of the Prompt Payment Act do not apply. The provisions of the Prompt Payment Act also do not apply in the event when the failure of the state agency to pay the amount due on time is the result of a dispute between the agency and the contractor over the amount due or over the compliance with the contract.

Public contractors shall make payment to their subcontractors or suppliers within 30 days after payment from the state agency pursuant to §15-6-5. Interest accrues at the rate of 15.5% per annum

from the 31st day if unpaid.

In 1989, the legislature added §15-6-6 to the Prompt Payment Act. This has far reaching effects. The law provides that this chapter does not apply to contracts that involve disbursement of federal funds, or state and federal funds, by the State or its agencies. The effect of this provision appears to be that State construction projects involving federal funds or other federal financial participation may exclude the application of the Prompt Payment Act to that project.

Section 58-15-16 explains that when a contractor receives any construction funds from an owner or another contractor for work performed and billed, he is required to pay each of his subcontractors and suppliers in proportion to the percentage of the work they performed under that billing, unless otherwise agreed by contract. A contractor's failure to make such payment without reasonable cause or unless otherwise agreed in the contract, within thirty consecutive days after receiving the construction funds from the owner when such payment is due under the terms of the contract, results in the accrual of interest at the rate of 1% per month and an award of reasonable costs of any collection, including attorney's fees. Section 58-5-16(3) makes these provisions applicable to any subcontractor receiving any construction payment.

Retention Funds on Construction Contracts

Provisions in construction contracts for retention of a certain percentage of contract payments until satisfactory completion of the work are common, particularly on public construction projects. Retentions are for the protection and security of the owner. The retention amounts are designed to secure the owner against the contractor's abandonment of the work and to insure successful completion of the job. Retention funds are also designed to secure the payment of laborers and materialmen on the project.

Some jurisdictions have held that even in the absence of provisions for retention, public authorities are entitled to reserve money due to the contractor in order to pay the laborers and materialman whom the contractor fails to pay.

The question as to how long the retention funds are to be retained by the owner is governed by the terms and provisions of the contract. It has also been held that a surety providing a payment or insurance bond on a public construction project has an interest in the retention funds. Such funds are as much for the indemnity of the surety as they are for the owner of the project.

An extensive amendment to legislation regarding public contracts has created a right in contractors and subcontractors for interest on retainage. Various laws in titles 10 through 73 of the Utah Code specify that retained funds shall be placed in an interest bearing account and interest shall accrue for the benefit of the contractor and subcontractors that are to be paid on the

public project. It is the responsibility of the contractor to insure that any interest accrued on the retainage be distributed to the contractor and subcontractors on a pro rata basis.

Miller Act

40 U.S.C. §270A requires a bond on federal construction projects exceeding $2,000 in cost. The payment bond is required "for the protection of all the persons supplying labor and material in the work provided for in said contract for the use of each such person."

A purpose of the Miller Act requirement of a payment bond is to give subcontractors on federal construction projects a security interest similar to that which they would have through mechanics' lien on a private project. *United States use of Heller Electric Co. v. William F. Klingensimth, Inc.*, 670 F.2d 1227 (D.C. Cir. 1982).

The Miller Act does not grant subcontractors a substantive right to directly sue the United States for compensation owed by a prime contractor. *Four Star Constr. Corp. v. United States*, 6 Cl.Ct. 271 (1984); *W.F. Magann Corp. v. Diamond Mfg. Co.*, 580 F.Supp. 1289 (D.C. 1984). A subcontractor's sole remedy is to bring an action against the government contractor or its surety in the name of the United States under the Miller Act. *Id.* Similarly, the United States is not liable to an unpaid contractor for failure to require a payment bond or for approving an unqualified surety. *Baudier Marine Elec. Sales & Srv., Inc. v. United States*, 6 Cl. Crt. 246 (1984).

"[The Utah Prompt Payment Act] provides for prompt payment to be made by state agencies to contractors. . . ."

40 U.S.C. §270b states that subcontractors furnishing labor and material in the prosecution of a federal construction project have a right to sue on the payment bond for the amount due where the subcontractor has not been paid in full within ninety days after the last labor or material was performed or furnished. However, subcontractors having no direct contractual relationship with the prime contractor furnishing payment bond must provide notice to the contractor within ninety days of the last work performed or materials supplied. The notice to the prime contractor must state with substantial accuracy the amount claimed and the name of the party to whom the material or labor was furnished. The notice must be served by registered mail to the contractor's office or residence. The notice may also be served on the United States Marshall in the manner provided by law for service of a summons.

Under §270b(b), every action on a payment bond under the Miller Act must be brought in the name of the United States for the use of the plaintiff. The action must be filed in the United States District Court for the district in which the project was to

be performed and be commenced within one year after the last work was performed or materials supplied to the project.

The venue provision requiring Miller Act actions to be brought in the United States District Court for the district where the project was to be performed can be waived if a timely objection is not made. *Texas Constr. Co. v. United States*, 236 F.2d 138 (5th Cir. 1956); *United States use of Michell Bros. Truck Lines v. Jenmar Constr. Co.*, 223 F. Supp. 646 (Ore. 1963); *United States use of Angell Bros., Inc. v. Cave Constr., Inc.*, 250 F.Supp. 873 (Mont 1966); *Fireman's Fund Ins. v. Frank Briscoe Co.*, 462 F.Supp. 114 (La. 1978); *Caswell Equip. Co. v. Fidelity & Deposit Co.*, 494 F. Supp. 354 (Minn. 1980). An action filed in the wrong district may either be dismissed without prejudice to allow a new action in the proper district or transferred to the proper venue. *United States v. Bero Constr. Corp.*, 140 F.Supp. 295 (NY 1957); *Griners & Shaw, Inc. v. Federal Ins. Co.*, 234 F.Supp. 753 (D.C. 1964).

A right of action on a payment bond under the Miller Act is limited to subcontractors of the prime contractor or its subcontractors. In other words, third tier subcontractors are not entitled to a Miller Act claim. *Fidelity & Deposit Co. v. Harris*, 360 F.2d 402 (9th Cir. 1966). In order to assert a Miller Act claim on a payment bond, the claimant must have a direct contractual relationship with either the prime contractor or one of its first tier subcontractors. *Id.*

UNLAWFUL DETAINER

Unlawful detainer by a tenant of a term less than life is governed by Utah Code Annotated, §78-36-3 et seq. A person is guilty of unlawful detainer under the following circumstances:

1. When a tenant continues in possession after the expiration of a specified period of tenancy which is terminated without notice upon the expiration of the specified term;

2. When there is an unspecified lease period and the tenant continues in possession of the property after the end of any month or period when the tenant was served fifteen days or more prior to the end of that monthly period with a notice requiring the tenant to quit the premises at the end of the month or period or, in cases of tenancies at will, where the tenant remains in possession of the premises after the expiration of a notice to quit of not less than five days;

3. When the tenant continues in possession after the default in the payment of any rent and after receiving notice in writing requiring, in the alternative, the payment of rent or surrender of the premises if the rent is not paid within three days after the notice (the notice can be served at any time after the rent becomes due);

4. When the tenant assigns or subleases the leased premises contrary to the covenants of the lease or commits or permits waste on the premises or sets up and carries on an unlawful business on the premises or permits or maintains the premises as a nuisance;

5. When the tenant continues in possession after breach of a condition of the lease, and after notice in writing requiring the alternative of the performance of the lease condition within three days after service or vacating of the property.

"[A] fraudulent conveyance is one where a debtor has meant to defraud a creditor or has acted in a reckless way by transferring property without adequate consideration."

The form of the notice generally is dictated by one of two events. First, under a lease, a tenant failed to pay rent. Therefore, the notice to quit is a three day notice to pay rent or quit.

Second, after the completion of a real estate foreclosure, the prior owner of the property will often wait for a notice to quit before vacating. As a tenant at will, the proper form of notice is a five day notice to quit. There is no alternative given the tenant for payment of rent.

A notice to quit may be served by delivering a copy to the tenant personally, by sending a copy by registered or certified mail at the address of the tenant, by leaving a copy with a person of suitable age and discretion at the place of residence and mailing a copy to the tenant at his place of residence or, if a person of suitable age and discretion cannot be found at the place of residence, service can be made by affixing a copy of the notice to quit to a conspicuous place on the property.

In the event that a tenant does not vacate the premises after the term of the notice to quit has expired, a lawsuit for eviction can be commenced. The defendant will have twenty days from the date of service to respond to the complaint, unless ordered otherwise. However, courts will order a shorter time for an answer to the complaint (three to five days) upon a proper motion and request, accompanied by evidence of service of the notice to quit.

If the defendant answers and denies the allegations of the complaint, the plaintiff may take an alternate route of filing a possession bond under Utah Code Annotated §78-36-8.5. The filing of a bond by the landlord in an amount approved by the court, with notice served upon the defendant in the same manner as the service of a summons, will give the defendant the following alternatives:

1. The defendant, within three days, can pay accrued rent, utilities, late charges and any other costs, including attorney's fees as provided in the rental agreement;

2. The defendant can file a counter bond within three days in an amount approved by the court;

3. The defendant may be granted a hearing prior to the expiration of the three days on the issue of possession of the premises;

4. The defendant can vacate the premises.

If the defendant does not follow one of the above alternative remedies in three days, the plaintiff is entitled to an order of restitution of the premises and a constable or sheriff shall return the possession of the property to the plaintiff.

A judgment in an eviction proceeding may be entered after a hearing or trial on the merits or upon defendant's default in the answering of the complaint. A judgment entered in favor of the plaintiff shall include an order for restitution of the premises and such other damages and awards as are appropriate in the particular case. This may include an award of treble damages resulting from the defendant's unlawful detainer. (Utah Code Annotated §78-36-10)

If, after the issuance of a Writ of Restitution, the defendant is still uncooperative

in removing himself from the premises, it is advisable to obtain a Writ of Assistance which directs the constable or sheriff to go upon the premises and remove the defendant, by reasonable force if necessary.

Either the plaintiff or defendant may appeal a judgment rendered in an unlawful detainer action within ten days after judgment (Utah Code Annotated §78-36-11).

FOREIGN JUDGMENTS & NON-RESIDENT DEBTORS

Judgments from other states can be docketed in Utah. The procedures are fairly simple and are set forth in Utah Code Annotated, §78-22(a)-1 *et seq.* A copy of a foreign judgment, authenticated in accordance with appropriate act of Congress or an appropriate act of Utah, may be filed with the clerk of any district court in the State of Utah. The clerk of that district court shall then treat the foreign judgment in all respects as a judgment and as though the judgment had been entered within the State of Utah. Any foreign judgment so filed is subject to the same procedures, defenses, enforcement, satisfaction and proceedings for reopening, vacating, setting aside or staying that a new action would face.

The judgment creditor or an attorney for the creditor shall file an affidavit with the clerk of the court at the time of the filing of the foreign judgment stating the last known address of the judgment debtor and the judgment creditor. The clerk of the court then gives notice to the judgment debtor that the judgment has been filed. Said notice is sent to the address stated in the affidavit.

Other states will give deference to judgments entered in Utah under the Full Faith and Credit Clause of the Constitution. Upon the issuance of a judgment, an exemplified copy of the judgment should be obtained. This exemplified copy is then sent to the foreign jurisdiction for filing in accordance with their procedures. It is advised that counsel familiar with those procedures in the foreign state be used since procedures for docketing foreign judgments vary somewhat from state to state.

FRAUDULENT CONVEYANCES

A fraudulent conveyance of a debtor is one where a debtor, confronting the possibility of the seizure of property to satisfy the claims of a creditor, conveys his property to relatives or acquaintances for little or no consideration or with the understanding that the debtor can continue to use the property. Essentially, a fraudulent conveyance is one where a debtor has meant to defraud a creditor or has acted in a reckless way by transferring property without adequate consideration.

The Uniform Fraudulent Conveyance Act as approved in 1918 by the National Conference of Commissioners on Uniform State Laws, has been adopted in Utah under the form found in Title 25, Chapter 6 of Utah Code under the designation "Uniform Fraudulent Transfer Act". A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer with (a) actual intent to hinder, delay or defraud any creditor of the debtor, or (b) without receiving a reasonably equivalent value in exchange for the

transfer while the debtor was either engaged in a business or a transaction for which the remaining assets of the debtor were reasonably small or, the exchange was intended, believed or reasonably should have been believed that it would cause the debtor to incur debts beyond his ability to pay when the same became due. (Utah Code Annotated §25-6-5)

"[I]t is advised that all loans secured by real estate have title insurance issued."

The code provides the following list of factors ("badges of fraud") to consider in determining the actual intent to defraud:

a. the transfer or obligation was to an insider;

b. the debtor retained possession or control of the property transferred after the transfer;

c. the transfer or obligation was disclosed or concealed;

d. before the transfer was made or obligation was incurred the debtor had been sued or threatened with suit;

e. the transfer was of substantially all the debtor's assets;

f. the debtor absconded;

g. the debtor removed or concealed assets;

h. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

j. the transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Utah Code Annotated §25-6-5.

The code also includes a definition of "fraudulent transfer" which reads as follows:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

(a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

The above definition of fraudulent transfer under the Utah Code is similar to a fraudulent transfer as defined in the Bankruptcy Court under 11 U.S.C. §548.

Actual Intent to Defraud

The "badges of fraud" mentioned above can be used to help prove the following necessary elements of fraud:

a. that a representation was made;

b. concerning a presently material existing fact;

c. which was false;

d. which the representor either (1) knew to be false or, (2) made recklessly, knowing that he had insufficient knowledge upon which to base such representation;

e. for the purpose of inducing the other party to act upon it;

f. that the other party, acting reasonably and in ignorance of its falsity;

g. did in fact rely upon;

h. and was thereby induced to act;

i. to his injury and damage.

Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1952).

Fair Consideration/Reasonably Equivalent Value

Fair equivalent consideration has been found to be a price that a capable and diligent businessman could presently obtain for the property. *Utah Assets Crop. v. Dually Bros. Ass'n*, 92 Utah 577, 584, 70 P.2d 738, 741 (1937). Generally, when a statute requires that fair cash value of property on a certain date be ascertained, it refers to the actual opinion of the public, as expressed in the price which someone will pay, not what the court may think at a later time would have been a better price. *Id.* Fair consideration may consist of the satisfaction and cancellation of an antecedent or contingent debt if the property conveyed is a fair equivalent in value to the debt satisfied. 37 Am Jur 2d *Fraudulent Conveyances* §21 (1968).

Insolvency

There are two basic approaches to insolvency. The balance sheet approach is commonly used in bankruptcy court — that the debtor's debts exceed the debtor's assets. The equity definition of insolvency is the inability to pay one's debts as they become due. Under the Utah Fraudulent Transfer Act, insolvency has been defined to include either the bankruptcy or the equity definition of insolvency (see Utah Code Annotated §25-6-3).

Transfer in Anticipation of Suit

Transfer of all or a substantial amount of one's property immediately prior to an anticipated litigation is an indication of fraudulent intent. Where the grantor was heavily indebted at the time of his execution of a voluntary conveyance, the inference is that the conveyance was fraudulently made for the purpose of hindering and delaying the grantor's creditors. *Ogden State Bank v. Parker*, 12 Utah 13, 22, 40 P.2d 765, 767 (1985).

Conveyance to Relatives

It is general law that a transfer or mortgage of property between relatives, which is calculated to prevent a creditor from realizing on its claim against the grantor, is subject to a strict scrutiny. The transfer of mortgaged property will only be upheld if it is shown that the debt is genuine and that the grantor and grantee acted in an

The Sixth Annual

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honest and good faith manner. The burden is generally on the relative grantee to show the good faith of the transaction. *Paxton v. Paxton*, 80 Utah 540, 553, 15 P.2d 1051, 1056 (1932).

Remedies of Creditors

A creditor may avoid a fraudulent transfer to the extent necessary to satisfy the creditor's claim. The remedy may include an attachment in accordance with the procedure of the Utah Rules of Civil Procedure, an injunction against further disposition of the property, an appointment of a receiver to take charge of the assets, execution on the assets or the proceeds, or other relief as the circumstances may require. (See Utah Code Annotated §25-6-8). However, pursuant to Utah Code Annotated §25-6-9, a transfer is not voidable against a person who is a bona fide purchaser (who took in good faith and for a reasonably equivalent value) or against any subsequent transferee or obligee. Other special rules regarding restrictions on the avoidability of a transfer are contained in Utah Code Annotated §25-6-9, but are not discussed here because of their narrow application.

Statute of Limitations

Pursuant to Utah Code Annotated §25-6-10, the statute of limitations for bringing an action on a fraudulent transfer is generally to be within four (4) years after the transfer was made. The following are the exceptions to the four year rule:

a. If the action is brought pursuant to §25-6-5(1) (a) (transfer made with actual intent to hinder, delay or defraud any creditor of debtor), the action must be brought within four years after the transfer was made or the obligation was incurred or within one year after the transfer or obligation was or could reasonably have been discovered by the claimant, whichever is later. A similar provision for tolling a cause of action until discovery of the claim is found in §548 of the Bankruptcy Code.

b. Under §25-6-6(2) (creditor's claim arose before the transfer was made and transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent), the action must be brought within one year after the transfer was made or the obligation was incurred.

CLAIMS ON TITLE INSURANCE

Whenever there is a lender's loss pending in connection with real estate, it is important to determine whether or not a claim should be made on title insurance. For this reason, it is advised that all loans secured by real estate have title insurance issued. It is not uncommon to have a forgery by one of the makers of the trust deed, errors in description of the property or errors by title companies in the list of encumbrances attached to the real estate. Under all of these circumstances, a title insurance policy will protect the lender to some extent. The title policy itself provides the instructions on making claim on the policy. The notice is sent to the specified address for the underwriter of the policy. You also could send a copy of the notice of claim to the local title company that issued the policy for the underwriter. Reference should be made to the case number and the policy number when making the claim.

The insurer has the option to use an attorney of their choice to try to remedy the claim. They may choose to pay money for the claim instead of trying to remedy the problem.

The following are some examples of claims that the author has made under policies on behalf of lenders:

a. A claim was made for 1/2 of the amount of the loan when it was learned that the wife of the maker had in fact not signed the trust deed (his girlfriend had signed it);

b. Defense of a claim of a divorce lien was requested because the divorce was not listed on the title policy insuring the client;

c. A claim was made for loss of security by reason of an error in the description provided by the title company;

d. A claim for pay off of a prior lien and encumbrance was made because said lien was not listed on the title policy;

e. A error in the pay off quote obtained by a title company for purpose of refinance on a loan when the said pay off was insufficient to actually pay off the prior lien and encumbrance resulted in a claim for pay off of the balance of the loan.

Remarks By J. Thomas Greene to Newly Admitted Members of the Utah State Bar

May 11, 1993

Welcome to the real world. You and your loved ones have worked hard and long and have dedicated much to arrive at this point. Some think you have arrived at the wrong time, in an atmosphere in which there is an unusually low public perception of esteem for lawyers, an over abundance of attorneys, and a climate of extreme competitiveness which has reduced the practice of law from a learned profession to just another business. Do not despair and be not discouraged. There is, and always will be, a great need for excellence. Also, there are plenty of legal problems to go around. One only has to look at the business section of both of last Sunday's newspapers to perceive that our economy locally is on the move. Complex society has created complex legal problems which need to be solved. Congress has enacted and no doubt will pass more and more legislation which will need to be interpreted, and large segments of society continue to have a very great unmet need for legal services.

So I disagree with the prophets of doom and gloom. I also disagree with the advice given by Rodney Dangerfield, an improbable commencement speaker at a graduation exercise staged in one of his movies. His advice, after reviewing the difficulties of coping with the dog eat dog post graduate world, was "Don't Go." To the contrary, the advice should be, "Do Go." Take a deep breath and start your new life. As Teddy Roosevelt said, climb into the arena, don't be on the sidelines.

I recently had an opportunity to reflect on the contributions one person can make to the administration of justice. The occasion: a meeting to honor retired Justice J. Allan Crockett, a jurist who for longer than anyone else in Utah history, for 30 years, sat as a Justice of the Supreme Court of Utah. He was Chief Justice for 8 years. The occasion was to commemorate his 87th birthday, at a dinner given by his 84 law clerks, of which I was one. Justice Crockett spoke of many things of great meaningfulness, from poetry to philosophy. His life has been one of service and dedication, an inspiration to his many law clerks. As I became reacquainted with the men and women who served as Justice Crockett's clerks, I reflected on the careers and lives dedicated to the practice of law over the past 40 years. It was poignant to reflect upon the many challenges, uncertainties, and ups and downs we all faced from then until now. For law graduates twenty-five to forty years ago, expectations of monetary gain from the practice of law were rather low. We all knew that the law is a jealous mistress, but our reasons for choosing law as our profession were mostly non monetary. Law offices were rather austere establishments in those days — no plush carpets, fine furniture or spiral staircases. Overhead (as well as revenue) was much lower than today. There was no public defender system, but attorneys very willingly responded to the call of judges to serve without pay in defense of the down trodden. Demand for lawyers was low, and it was unusual to be sought after by law firms. But the point is that those young law clerks of Justice Crockett made it. Likewise, in the climate of today, you can all make it.

May I offer some suggestions to new lawyers which in the long and even short run of your practice in the real world may help you to face the challenges which will present themselves. What I am about to say is not new, but somehow it addresses concerns and principles which never grow old. These are some miscellaneous guidelines of behavior which if followed, I believe, will lead to success in the practice of law and in all aspects of life:

1. Individuality — Each of us is a person with unique qualities. In some respect,

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each is superior to everyone else. So be yourself. Make an inventory of your best attributes and work to emphasize and make your strong qualities even stronger. Observe carefully the best trial lawyers, and take careful note of what makes that person effective. But don't try to copy a particular lawyer's style. Remember that your greatest strength will come from being yourself.

2. Do the Right Thing — In your practice and dealings with the public, including your clients and other lawyers, be governed not so much on what you have a right to do, but what is the right thing to do. Don't practice on the fringes or try to test the limits of the ethical propriety of your own conduct. Remember that the rules of ethics set only minimum standards. In this regard, conduct and practice may not be violative of an ethical rule even though such conduct is not admirable, or praiseworthy. Just as all law is not necessarily morally correct, bare technical compliance with the ethical standards is not necessarily professionally correct. The area of conduct above mandated ethical compliance is the area of conduct which embraces the best of lawyering. This is the area of professional unmandated conduct, such as civility with other lawyers and courtesy. You will want to conduct yourself above mere ethical standards, and become truly professional in your conduct. Not only will this make your life more pleasant, but you will reap benefits of greater success — with your clients, with juries, with judges and with other lawyers.

"In your practice and dealings with the public, including your clients and other lawyers, be governed not so much on what you have a right to do, but what is the right thing to do."

3. Sense of Humor — Don't be flippant or too much of a clown. Remember that in court proceedings the matter is likely to be of great seriousness to your client and to all parties. This may be his or her one and only day in court in a lifetime. So, you need to temper yourself to avoid levity.

On the other hand, don't take yourself too seriously. Whether in or out of court, it is your own perception of things that matters. I just passed my eighth anniversary as a judge. At the time I was appointed and sworn in, not anointed as I am often reminded, I lamented that now I will never know whether my jokes are funny because whatever a judge regards as humorous necessarily evokes laughter. Judge Jenkins, not missing a beat, told me not to worry because my jokes never were funny.

The point is, don't forget to look on the light side and to remember that there is humor and mirth in almost every situation.

4. Openmindedness — There are two sides to almost every question. It is galling to be confronted with categorical and broad generalizations and overstatements. Present your arguments effectively and honestly, but do not be so presumptuous as to suppose that there could be no contrary authority or point of view. Resist the temptation to overstate a point, and remember that answers to most questions are not virtually automatically arrived at regardless of this computer world we live in.

5. Use plain speech — The name of the game is communication. Over the years lawyers have created a strange, hard-to-understand language, sometimes referred to as legalese. Many examples of such language abound. One such example is this oft referred to preamble to many contracts:

> In consideration of the Agreements herein contained, the parties hereto hereby agree . . . etc., etc.

In plain understandable English, this language could be reduced simply to, "We agree." To demonstrate the absurdity of too much professionally condoned verbosity, rather than simply giving a person an orange as a layman would do, a lawyer might well embellish the transaction thusly:

> I hereby give and convey to you, all and singular, all my estate, right, title, and interest in and to said orange, together with its rind, skin, juice, pulp and pips, and including all rights and advantages therein, to wit the full power to bite such or otherwise to cut, slice, or eat the same, or to give the same away, with or without consideration, and

with or without the rind, skin, juice, pulp, or pips, anything hereinbefore or hereinafter to the contrary notwithstanding.

The bottom line is that language should be plain and simple. Members of juries certainly appreciate such language. Judges delight in reading such language. The public appreciates such language.

6. Clarity and Brevity — In addition to the use of plain and simple understandable language, the best arguments are short and sweet. Do not obscure your main and crucial argument with several subsidiary and alternative positions. Rather, present the best argument you have upfront, clearly and simply stated. Don't embellish, repeat and prolong the argument. Brevity is highly to be desired.

An exercise each of you might try when you get your first case to present to a jury is to rehearse your proposed argument giving yourself one hour to present the matter. Then do the same thing again in not more than one-half hour. Finally, after excruciating elimination of duplicative points and verbosity, do the job in 15 minutes. If you can do this, you will be on the path of great advocacy.

7. Experience of others — The one thing about young lawyers those of us "old heads" or "gray hairs" as we are sometimes called cannot forgive is your youth. But secretly we admire and applaud your entrance onto the scene. Let us hear your dreams and aspirations in exchange for our experience. Existing lawyers want to share and be helpful. How much time can be saved, and how much can be added to a young lawyer's view of things, by contact with older attorneys. There is opportunity for this in bar work, in the American Inns of Court experience, through classes in continuing legal education and on many occasions such as bar luncheons and other meetings, as well as lectures at the law school. Pick up the telephone and call an experienced lawyer if you need help or advice. You will be surprised how willingly your older brothers and sisters at the bar will want to share their past experience with you.

8. Compassion — Finally, avoid mean spiritedness. Avoid sarcasm and personal or ad hominem attacks on fellow lawyers. Employ civility. Have regard for your fellow professional attorneys. Pay due respect to the courts. Show something other than hostility for opposing litigants. Remember that forbearance and restraint are in the highest realms of fine legal tradition.

In showing compassion and true empathy for others, one cannot be phoney or tinsel like. You must feel compassion. Show concern.

Someone has said that practicing lawyers spend their whole life practicing and never quite reach the point of actually doing it. That's not quite true, because the practice is the doing. So, in embarking on your journey into this new life of the practice of law, remember that you will never arrive at a destination. It is the journey and the practice that counts.

I have no doubt that exciting challenges and great experiences await you. Good luck and we'll see you in court.

Tribute to the Late Honorable William H. Folland

By Judge J. Allan Crockett

Freedom of thought is the greatest of liberties. It can see the sometimes error and sham in accepted creeds and ideas and can be careless of the so-called wisdom of the ages. It can be scornful and defiant of selfish greed. It can see and appreciate the beauty and miracles of life. It can pierce the expanses of the universe or look into the pit of hell and be neither dismayed nor afraid. It is aware that the areas in which we have knowledge are far less than those in which we do not. Yet thought proceeds fearlessly on, seeking more facts to discover and more fields to conquer. It is the light of the world, the chief glory of man.

The foregoing, rooted in ideas in the writings of Bertrand Russell, is aptly illustrative of the extent of learning and the depth of wisdom of William H. Folland.

He was born December 5, 1877, in Salt Lake City, a son of Eli A. and Rachel A. Lewis. He was educated in the grade and high schools of Salt Lake, later attended the L.D.S. Academy and Business College, and then went to the University of Utah. During the time he was attending college, he worked as a court reporter in the Third Judicial District. He graduated from the law school and was admitted to the Bar in 1909.

Having been born of L.D.S. parents, he took some interest in and participated in activities in the L.D.S. Church. He served as a missionary in Wales from 1900 to 1903. However, he was a firm believer in the principle of separation of church and state, which principle he scrupulously adhered to in the conduct of his duties.

By his superior qualities of learning, experience, and integrity, he was a complement to the enlightenment and security of society and engaged in numerous activities: in social work in the community, including the Red Cross, for which he served as chairman for Salt Lake County.

J. ALLAN CROCKETT was born in Smithfield, Utah, in 1906, the son of John Allan and Rachel Maretta Homer Crockett. He spent his early life in the north country and attended school in various towns in Cache Valley. The family moved to Salt Lake City in 1921 for reasons relating mostly to greater opportunity and economic advantage. There, Allan worked full-time late hours while he attended and graduated from East High School and from the University of Utah Law School, both with scholastic honors.

He was admitted to the bar in 1931. He later served as assistant to County Attorney Harold E. Wallace. In 1940, he was elected district judge of the Third Judicial District, where he served for 10 years until he was elected in the fall of 1950 to a 10-year term on the Utah Supreme Court and then was reelected to two more successive terms, a total of 30 years on that court, eight years of which he was chief justice. His judicial career is a matter of public record, which, together with his decisions, anyone further interested may read.

In addition to his judicial work, Justice Crockett engaged in numerous activities in public service and made significant contributions to civic as well as judicial affairs, including: on boards of directors of the Utah State Institute of Fine Arts, the Utah Symphony, Family Service Society, and the Legal Aid Society, serving as chairman of each board during his term thereon; and numerous other activities which can be spared delineation in the brief article. He initiated the project for the writing and publication of Manual for Justices of the Peace *and for the compilation and publication of J.I.F.U. jury instructions.*

He married Grace Freeze in 1909, the same year he was admitted to the Bar. They became the parents of three sons, Harold (who died in 1992), Edward, and Donald, each of whom married and had families, all respected and well-thought-of members of their respective communities.

After his graduation, he became associated in the firm of Evans, Evans and Folland. In 1913, he left that firm and accepted a position as Assistant City Attorney for Salt Lake and in 1917 was named City Attorney. He served in that position until 1928, when he was elected to the Utah Supreme Court.

In his address to the law school class at the University, he expressed his general view of the practice of law: that it should be looked upon as something more than a game wherein one seeks success in a cause by wily devices and stratagems, but should be regarded as an inquiry by the court and the attorneys, as officers of the court, for the purpose of determining the facts and administering justice and that the intangible rewards of private and public confidence and a consciousness of duty well done may prove of greater satisfaction than mere material gain.

He had inordinate pride in his Americanism and extolled its democratic form of government, particularly the rule of law as enforced by the judiciary, as the finest that has ever been created. He placed great emphasis on the idea of the separation of powers into three departments, the executive, the legislative, and the judicial. He quoted James Madison, "If there is any principle in our constitution more sacred than any other it is that which separated the executive, the legislative, and the judicial departments."

His writings make it amply clear that he firmly believed in and strictly adhered to the idea that the Constitution established a representative system of

government, and as he stated, not a pure democracy, but a republic in which representatives chosen by the people operate the government but the great reservoir of power is finally with the people themselves. He wrote that one of the fundamental principles of our government is that the federal government has and may exercise only such powers as have been expressly given to it and that all powers not expressly delegated to the federal government by the Constitution, or prohibited by it, are reserved to the states, or to the people, as clearly stated in the Eighth and Tenth Amendments.

He was committed to the idea that it is the proper function of the court to faithfully apply the law as it has been established, and does not include the power to amend or distort it according to one's personal views as to what he thinks it ought to be.

His opinions show that he was acutely aware that there is a conflict between the declaration that we are a *sovereign* nation of *sovereign* states and of the controversies that this has caused, and that they will continue to go on.

He had a brightness of mind capable of seeing through and analyzing difficult problems. He approached every controversy in an impersonal and impartial manner. Those who knew him best and worked with him would affirm that he was a kind, friendly, and generous companion, always willing to freely discuss ideas and change his position when that appeared to be the reasonable thing to do. He strove for simplicity; he wrote in plain understandable language, never in fancy or flowery phrases to invite attention of quotation.

The desirability of brevity in this biography mandates the omission of detail. But there are two matters so representative of Justice Folland's nature and his qualities as a judge that it seems advisable to include them.

Justice A. H. Ellett was then a Salt Lake City judge. In a misdemeanor case, he sentenced the defendant to pay a fine of $150. Deeming this to be excessive, the defendant's counsel appealed to the district court. Judge P. C. Evans imposed a fine of only $15. This so incensed Judge Ellett that he announced from the bench that he would change his policy in imposing fines and for minor misdemeanors imposed fines of 15 cents and 25 cents.

This controversy in the judiciary was news, and the press made the most of it. It was reported that the Bar Commission was threatening to discipline Judge Ellett and scheduled a hearing thereon. But Chief Justice Folland intervened. He requested that Judge Ellett come and discuss the matter. (Judge Ellett requested that I accompany him.) Justice Folland welcomed us politely in his gentle and gracious way. He merely mentioned the controversy and proceeded to discuss the privilege it is and the pride we should have in being members of the judiciary and our responsibility to merit public respect by getting along in peace and harmony. This mollified Judge Ellett to the extent that he discontinued his spiteful actions, and peace and goodwill were restored.

The other matter illustrates his recognition that the law should adapt to the exigencies of circumstances. He had the resourcefulness of mind and courage to innovate and accomplish a desired objective. Having served as a city attorney for many years, he was well aware of how vital is a city's need for water.

The Utah Constitution places limits upon the power of taxation by government agencies, the state, cities, and counties. In order to accomplish the purpose of getting more water, in the case of *Lehi City v. Meiling*, 87 Utah 237, 48 P.2d 530, he devised a plan whereby such a governmental agency could make itself into a separate legal entity known as a special improvement district. This enabled it to sell bonds and levy taxes to pay for them. This was literally a creative revolution in our law, which has been followed and has provided a foundation for many different worthwhile public improvement projects in our state.

He also stressed the fact that the United States Constitution is not a static instrument but was purposely stated in general language with the realization that there would be extrapolation and change. History has shown that it is necessary for governments to grow and adjust themselves to keep abreast of the constantly increasing need for changes in the law to meet new and different conditions which arise, but nevertheless they must not depart from fundamental principles.

He stated his realization that while we have brought into being the world's greatest political democracy, there is great disparity and inequality in the distribution of wealth, and there is much to be done on that problem.

He was realistic and perceptive enough to see that experienced, wise, and competent judges are often removed from office without regard to merit because they were tied to the blowing of political winds, of which he himself was a victim at the conclusion of his term in 1938.

His manner of living was a sermon on his belief in the great importance of the rule of law to the structure of society: that where people can live in peace and harmony and pursue their aspirations, as contrasted to where force is resorted to, which results in brutalities, cruelties, bloodshed, and war, and that he must not only live in rectitude, but so that there could be no possible suspicion of his being otherwise.

All men are alike in a general way, but among the mass of humanity born upon the earth, there are a few special ones who rise above the rest and radiate a pleasant influence to all about them and make a significant and enduring contribution in the lives and welfare of their fellowmen and leave an emptiness when they are gone. Such a one was William H. Folland.

The people of Utah are indebted to him, and as time goes on will appreciate the important service he has given to their state and their laws.

After suffering heart troubles for about two years, he passed away on June 4, 1941.

Discipline Corner

ADMONITIONS

1. On May 6, 1993, a Screening Panel of the Ethics and Discipline Committee of the Utah State Bar voted to admonish an attorney for the attorney's failure to properly supervise a legal assistant who contacted a Creditor and stated that the attorney represented certain parties, had filed a Chapter 13 Bankruptcy on their behalf, and the Creditor should not expect to receive the next payment due. The information given was incorrect and the Screening Panel found that the lack of supervision by the attorney was the cause.

2. An attorney was admonished by a Screening Panel pursuant to Rule VII(f) of the Procedures of Discipline for violating Rule 1.5(c), FEES. The attorney initially entered into a written hourly fee agreement to represent the client in a civil action. Subsequently, due to the client's failure to remain current with the monthly statements, the attorney had a telephone discussion with the client, purporting to change the fee agreement to include an additional 15% contingency fee. The attorney detailed the proposed change in a letter to the client soliciting the client's acknowledgement. The client did not respond. Upon settlement of the case, the attorney, in addition to the hourly fees, deducted 15% from the settlement proceeds. The client disputed the additional attorney fees, denied having had any discussion with the attorney regarding the change in the fee structure and reported the matter to the Bar.

PRIVATE REPRIMANDS

3. On June 1, 1993, the Board of Bar Commissioners approved a Discipline by Consent which Privately Reprimanded an attorney for violating Rules 1.2(a), SCOPE OF REPRESENTATION, 1.3, COMMUNICATION, 1.4(a), COMMUNICATION, 1.13(b), SAFEKEEPING OF PROPERTY, and Rule 8.4(d), MISCONDUCT.

In or about August 1990, an attorney was retained to obtain child and spousal support on behalf of a client who was separated from her husband. Between November 1990, and April 1991, the attorney failed to provide any assistance to the client even though she was in dire financial circumstances. In April 1990, the attorney failed to file an objection to an Order to Show Cause as to why the client's case should not be dismissed for failure to prosecute. This ultimately led to a reduction in the amount of support due the client. Between November 1990 and April 1991, the attorney failed to keep the client informed as to the status of the case and to respond to requests for information. Subsequently, the attorney failed to take timely action to prevent the client's husband from liquidating marital property. The attorney also lost evidence entrusted to the attorney by the client. During this period of time the attorney was not receiving any fees. However, instead of withdrawing as counsel the attorney limited the quality and quantity of services to the detriment of the client.

4. On April 30, 1993, the Board of Bar Commissioners upheld the decision of a Screening Panel of the Ethics and Discipline Committee privately reprimanding an attorney for violating Rule 4.4, RESPECT FOR RIGHTS OF THIRD PERSONS. The attorney violated this Rule by writing to the ecclesiastical authorities of opposing counsel's church wherein the attorney suggested opposing counsel was violating the tenets of his faith by representing a client who would not willingly pay child support.

5. On April 30, 1993, the Board of Bar Commissioners upheld the decisions of a Screening Panel privately reprimanding an attorney for violating Rule 1.3, DILIGENCE, and Rule 1.4(a), COMMUNICATION, by undertaking to represent clients in a bankruptcy case and failing, thereafter, to provide any meaningful legal services for a period of thirteen months at which time the services were terminated by the clients. Additionally, the attorney failed to keep the clients informed as to the status of their case.

6. On April 30, 1993, an attorney was privately reprimanded pursuant to the terms of a Discipline by Consent for violating Rule 1.3, DILIGENCE. The attorney failed to calendar a follow-up date with the clients who were to furnish information with which to respond to pending discovery requests. A timely response to discovery was not submitted. Subsequently, a summary judgment was entered against the attorney's clients, not on the basis of the attorney's failure to timely file a response to requests for discovery, but rather the inadequate nature of some of the responses and the attorney's failure to designate experts. The inadequate responses were the consequence of failing to diligently seek the information necessary to adequately respond to discovery.

7. An attorney was privately reprimanded by a Screening Panel on June 24, 1993, for violating Rules 8.4(c) MISREPRESENTATION and 8.4(d), MISCONDUCT. On or about July 16, 1991, the attorney subpoenaed an expert witness to testify on behalf of the attorney's client at a deposition on July 17, 1991. The expert was retained to conduct a child custody evaluation. Previously, the attorney had sent the witness a letter agreeing to pay the witness for the extra time that had been involved in two previously postponed depositions and the time to be expended at the deposition on July 17, 1991. The expert witness complied with the attorney's request to send copies of the materials to designated people.

The witness contacted the attorney several times about the bill and the attorney did not dispute that the payment was owed. The expert witness routinely works with attorneys and the court in child custody matters and testified that, if the attorney's attitude was to prevail, expert witnesses would not testify when asked. In mitigation, the attorney paid restitution within the time designated by the Screening Panel to avoid a formal complaint. In aggravation, the attorney received the service and represented in writing that payment would be made. The witness' allegations were factually documented and the witness had a right to expect compensation unless some other arrangement was clearly made by counsel.

8. An attorney was privately reprimanded on June 24, 1993, by a Screening Panel for violating Rule 1.4(a), COMMUNICATION. On or about March 12, 1992, the attorney was retained to represent the client in a divorce action. The attorney failed to answer several phone calls and several letters from the client between March 12, 1992 and June 29, 1992. The attorney continued to send billing information and letters regarding court

appearances to the wrong address from March 29, 1992 through June 15, 1992, even though a correct address had been provided on three occasions.

The client appeared in court on June 29, 1992 without the attorney because the attorney had been called out of town. The judge granted the default divorce and signed the Decree of Divorce on June 29, 1992 even though the attorney was not present. The client did not receive a letter from the attorney explaining that a continuance was necessary until several days after the Decree of Divorce was signed, even though the letter was dated June 25, 1992. The Screening Panel found that there were no mitigating facts. In aggravation, the Screening Panel found the attorney's failure to effectively communicate the need to continue the hearing caused great distress to the client which could have been avoided.

PUBLIC REPRIMAND

9. On June 28, 1993, Anthony M. Thurber was publicly reprimanded by the Utah Supreme Court pursuant to a Discipline by Consent for violating Rule 1.4, COMMUNICATION. The basis of this action was that on May 11, 1990, Mr. Thurber settled his client's personal injury case in the amount of $50,000.00. On or about June 7, 1990, Mr. Thurber executed the settlement documents on behalf of his client. Prior to executing the settlement documents Mr. Thurber failed to communicate with his client to confirm that she had in fact executed a Power of Attorney to facilitate the settlement. The client disagreed with the net recovery and initially refused to accept her share of the settlement proceedings.

10. On June 28, 1993, Donn E. Cassity was publicly reprimanded by the Supreme Court for violating Rules 1.5(a) FEES, Rule 1.3, DILIGENCE, Rule 1.4(b), COMMUNICATION, and Rule 5.3(a), SUPERVISION OF NONLAWYER ASSISTANTS. This was done pursuant to a Discipline by Consent which resolved two Formal Complaints. In the matter involving the fee violation, Mr. Cassity was retained by the seller of real property to resolve a dispute with the purchaser. During the course of that representation Respondent included $4,100.00 in fees that had already been paid to Respondent by the seller. He also generated additional fees to the seller in the amount of $11,713.88 to collect on an outstanding debt to the seller in the amount of $1,990.00.

In the case involving the failure to supervise nonlawyer assistants, Mr. Cassity permitted a paralegal in his office to meet with a client and provide advice to the client regarding the differences between Chapter 7 and Chapter 13 bankruptcies. This resulted in an election being made as to which Chapter to file without the benefit of advice from an attorney. Thereafter, Mr. Cassity did not meet with or explain to the client his rights under the various bankruptcy chapters prior to the filing of the petition. Further, there was inadequate communication between Mr. Cassity and the client which resulted in the client failing to obtain proof of insurance on his automobile. This resulted in the loss of the automobile in the bankruptcy proceedings. Inadequate communication and lack of diligence were also exhibited when Mr. Cassity sent the client to attend a hearing by himself on a Motion to Lift the Automatic Stay. The client could not find the location of the hearing and, therefore, the hearing was not attended by either Mr. Cassity or his client and the Automatic Stay was lifted. Thereafter, Mr. Cassity attempted to regain his client's automobile but was not successful.

SUSPENSIONS/SUPERVISED PROBATIONS

11. On June 29, 1993, the Utah Supreme Court entered two orders placing Evan Hurst on suspension for one (1) year each, to run consecutively. The suspensions were stayed so long as Mr. Hurst satisfactorily completed supervised probation for two periods of one (1) year each to run concurrently. The discipline was imposed for violating Rule 1.3 DILIGENCE, 1.4(a) COMMUNICATION and 8.1(b) BAR ADMISSION AND DISCIPLINARY MATTERS. In both instances, Mr. Hurst failed to perform any meaningful services on behalf of the clients after having been retained to represent them and having been paid a fee. He further failed to respond to requests for information by the clients, failed to keep them informed as to the status of their cases and failed to respond to requests for information from the Office of Bar Counsel.

12. On June 28, 1993, Steven R. Angerbauer was suspended from the practice of law for violating Rule 8.4(b), MISCONDUCT, for a period of 6 months followed by supervised probation for one year pursuant to the terms of a Discipline by Consent. The basis of this action was the issuing of a sizable bad check. The check was not associated with the practice of law or client funds and the conduct did not involve moral turpitude.

13. On June 28, 1993, attorney John M. Bybee entered into a Discipline by Consent with the Office of Bar Counsel agreeing to a nine (9) month suspension starting October 1, 1993, for violating Rules 1.3, DILIGENCE; 1.13(c), SAFEKEEPING PROPERTY; and 8.4(c), MISCONDUCT related to representing a client in a custody dispute and personal injury action pending in the State of California. Mr. Bybee accepted representation in late April 1992 knowing that a hearing had been scheduled for May 5, 1992. Thereafter, he attempted, unsuccessfully, to continue the hearing. Notwithstanding his failure to obtain a continuance, he failed to appear at the custody hearing which resulted in a change of custody from Mr. Bybee's client to the opposing party. Subsequently, the client retained local counsel in California and was able to regain custody. Six (6) months of Mr. Bybee's suspension shall be stayed upon his successful completion of an actual three (3) months suspension. Upon his reinstatement, Mr. Bybee shall be placed on a two (2) year supervised probation, shall pay the registration fee and successfully complete the six (6) hour Utah State Bar Ethics School and make restitution in the amount of $276.92 to his former client. In the event that Mr. Bybee violates any of the terms of his Suspension/Probation or any of the Rules of Professional Conduct, he shall serve the entire period of his suspension.

14. On June 28, 1993, attorney D. Richard Smith entered into a Discipline by Consent with the Office of Bar Counsel agreeing to a six (6) months and one (1) day suspension starting August 1, 1993 for violating Rules 1.1, COMPETENCE; 1.2(a), SCOPE OF REPRESENTATION; 1.3, DILIGENCE; 1.4(a), COMMUNICATION; 1.5(c), FEES; 1.14(d), DECLINING OR TERMINATING REPRESENTATION; 5.3(c), RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS; 8.1, BAR ADMISSIONS AND DISCIPLINARY MATTERS; and 8.4(a, b, & c), MISCONDUCT. Four (4) months and one (1) day of Mr. Smith's suspension shall be

stayed upon his successful completion of two (2) months suspension. Thereafter, Mr. Smith shall be placed on a one (1) year supervised probation consecutive to his supervised probation in a prior disciplinary matter. Mr. Smith is also required to pay the registration fee and successfully complete the six (6) hour Utah State Bar Ethics School. In mitigation, the Office of Bar Counsel considered Mr. Smith's decision to sever all affiliation with the law firm of Morris & Morris. In the event that Mr. Smith violates any of the terms of his Suspension/Probation or any of the Rules of Professional Conduct, he shall serve the entire period of his suspension.

15. On June 28, 1993, attorney Dean H. Becker entered into a Discipline by Consent with the Office of Bar Counsel and was placed on a one (1) year suspension starting August 1, 1993, for violating Rules 1.1, COMPETENCE; 1.3, DILIGENCE; 1.4, COMMUNICATION; 1.13(b), SAFEKEEPING PROPERTY; 1.14(d), DECLINING OR TERMINATING REPRESENTATION; 3.2, EXPEDITING LITIGATION; 8.1(b), BAR ADMISSIONS AND DISCIPLINARY MATTERS; and 8.4(c) MISCONDUCT. In one of the legal matters entrusted to Mr. Becker, he failed to file a complaint or engage in negotiations with the opposing party on behalf of his client for nearly three (3) years. Notwithstanding said failure, Mr. Becker continued to misrepresent to his client that he was engaged in ongoing negotiation with the opposing party's insurance carrier and had received offers of settlement. In another matter, Mr. Becker was retained in 1988 to defend a client in a civil dispute. After filing an answer and a counterclaim, he failed to pursue his client's counterclaim and the matter was ultimately dismissed for failure to prosecute. Mr. Becker also neglected to complete a will and trust for which he was retained in November of 1991. Nine (9) months of Mr. Becker's suspension shall be stayed upon his successful completion of an actual sixty (60) day suspension. Thereafter, Mr. Becker shall be placed on a two (2) year supervised probation and shall make restitution of $3,802.50 to four of his former clients, submit to a binding fee arbitration with another former client, pay the registration fee and successfully complete the six (6) hour Utah State Bar Ethics School. In the event that Mr. Becker violates any of the terms of his Suspension/ Probation or any of the Rules of Professional Conduct, he shall serve the entire period of his suspension.

16. On June 28, 1993, attorney Aric Cramer entered into a Discipline by Consent with the Office of Bar Counsel and was given a ninety (90) day suspension for violating Rules 1.1, COMPETENCE; 1.4, COMMUNICATION; and 1.13(b), SAFEKEEPING PROPERTY in representing two clients in bankruptcy proceedings. Mr. Cramer filed two Chapter 13 petitions without meeting with the clients and establishing an attorney-client relationship. Thereafter, he failed to appear at the creditor's meetings resulting in the dismissal of the petitions. After the dismissal, Mr. Cramer prepared and filed for the second time two (2) Chapter 13 petitions which he knew or should have known could not be confirmed, considering the totality of his clients' circumstances. Upon denial of the petitions and the trustee's return of the clients' funds, Mr. Cramer endorsed the checks by signing the clients' names pursuant to a power of attorney which he obtained without disclosing to the client the significance and the consequences of the same. Thereafter, Mr. Cramer negotiated the checks and kept the funds as his fees. Mr. Cramer's suspension was stayed and he was placed on a two (2) year supervised probation, ordered to pay $1,800.00 in restitution to his former clients, pay the registration fee and successfully complete the six (6) hour Utah State Bar Ethics School. In the event that Mr. Cramer violates any of the terms of his Suspension/ Probation or any of the Rules of Professional Conduct, he shall serve the entire period of his suspension.

17. Clayne I. Corey was placed on interim suspension from the practice of law on December 28, 1992. On June 29, 1993, pursuant to the terms of a Discipline by Consent, his interim suspension was extended to October 1, 1993. As a condition precedent to reinstatement Mr. Corey must make restitution of unearned fees to twelve clients. Upon being reinstated to practice law he will be placed on supervised probation for one year. Further, any future violations of the Rules of Professional Conduct will result in his suspension from the practice of law for the remainder of the probationary period. This action was taken for violating Rule 1.3, DILIGENCE, Rule 1.4(a), COMMUNICATION, Rule 1.5(a), FEES, and Rule 1.13(b), SAFEKEEPING PROPERTY by accepting fees from clients and failing, thereafter, to provide any meaningful legal services.

18. On May 24, 1993, the Utah Supreme Court granted attorney C. DeMont Judd's Petition for Suspension for Disability disposing of certain formal and informal discipline matters against Mr. Judd. Mr. Judd will not be eligible for readmission until June of 1998, and then only upon a showing of his recovery from his disabilities.

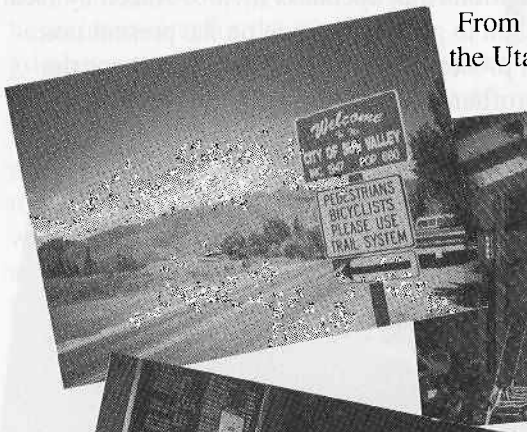
RESIGNATION WITH DISCIPLINE PENDING

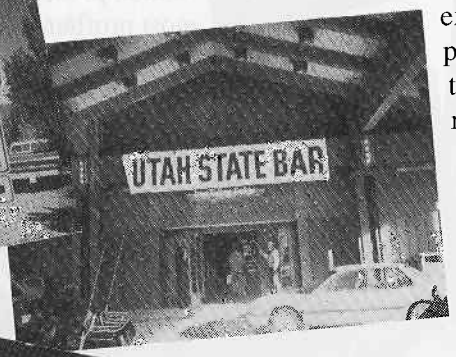
19. On June 28, 1993, attorney Lorin Pace Resigned with Discipline Pending under Rule VII(k), and agreed to refrain from the practice of law for a minimum of five (5) years for violating Rules 1.3, DILIGENCE; 1.4(a), COMMUNICATION; 1.13(b), SAFEKEEPING PROPERTY; 1.14(d), DECLINING OR TERMINATING REPRESENTATION; and 8.1(b), BAR ADMISSION, in representing two clients in a contract dispute and a probate matter. In the case involving a contract dispute, Mr. Pace failed to file a response to a motion for summary judgment which resulted in a judgment being entered against his client. As a condition precedent to his readmission, Mr. Pace is required to make restitution to his former client. In the probate matter, Mr. Pace collected the proceeds of a $60,000.00 life insurance policy and deducted approximately $26,000.00 as costs and fees. Further, he failed to deliver to his client the balance of the life insurance policy for over two (2) years. In addition, Mr. Pace was unable to locate and return to his client some original documents given to him during the course of his representation. In mitigation Mr. Pace has agreed to submit to a binding fee arbitration. The Board of Bar Commissioners considered Mr. Pace's long record of service (28 years) to the organized Bar and the injuries he sustained in a fall in 1990 which continues to interfere with his ability to practice law.

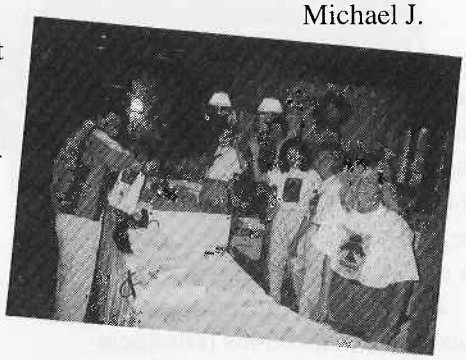
Report and Images of the Utah State Bar Annual Meeting

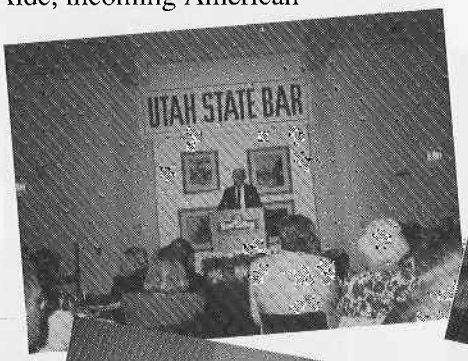
From larva to pupa to imago. The United States Supreme Court took center stage at the Utah Bar Convention in Sun Valley this year as the life cycle of the Court was explored. In three separate sessions, convention participants heard a panel discussion concerning the process of choosing a justice, heard from a retiring justice, and heard about a deceased justice.

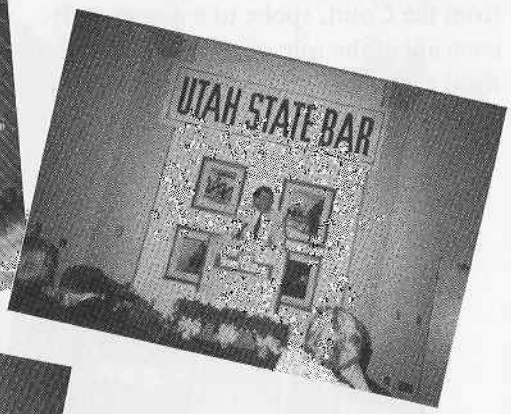
Kristine Strachan moderated the panel discussion in which a hypothetical nominee was placed before members of the panel who themselves took on roles of individuals involved in the nominating process. Professor Michael J. Gerhardt from Marshall-Wythe School of Law at William and Mary played White House advisor to President Clinton, Professor Charles F. Ogletree played White House "handler," while Sandy Gilmour, news reporter in Washington, D.C., Bill Aide, incoming American Bar Association president and Orrin Hatch, Utah Senator played themselves. In an enlightening discussion, Senator Hatch indicated that what

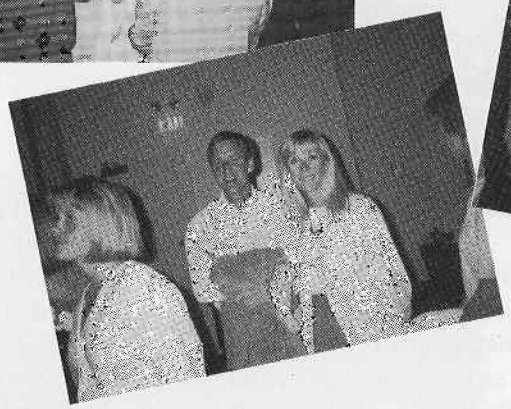


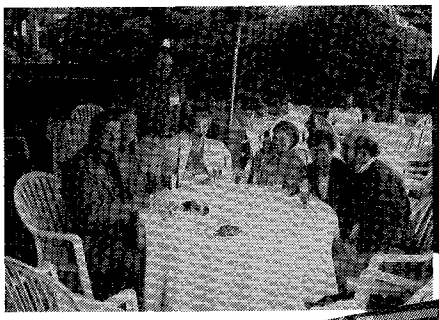
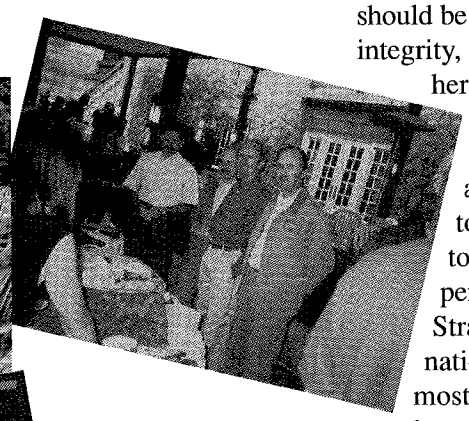


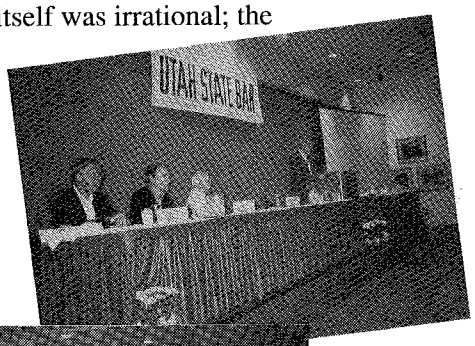




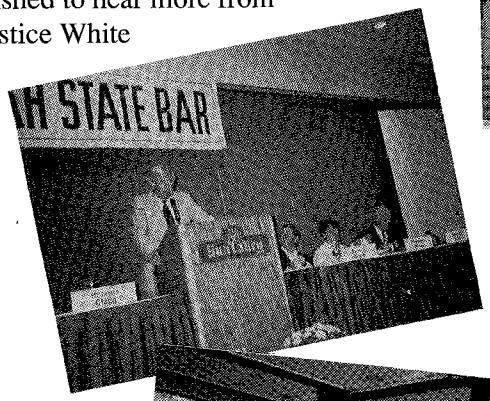







should be most important to the senators is the candidate's integrity, that no "litmus test" should be used, and that her ideology (the hypothetical candidate was a woman from Utah) should not play a role. The discussion settled into a focus on the advantages and pitfalls of an open process, and to what extent the process should be reformed to eliminate live testimony and the negative perceptions that openness invites. Asked by Dean Strachan to give an opinion on the present nomination process, Judge Jenkins gave perhaps the most profound statement of the day: he stated that the process itself was irrational; the principal questions should be focused upon, and everything else should be subordinate. In other words, he stated, what is needed is a return to rationality.

Justice White, recently having announced his retirement from the Court, spoke to a dinner audience about the role of attorneys in the legal system. While many may have wished to hear more from Justice White concerning the many years he has sat on the Supreme Court, and the many presidents and other historic individuals he has come to know over the years, Justice White focused on the role of the attorney in order partially to justify the past 40 years of his life, so he said. His speech encouraged the attendees to value their contributions as lawyers, and to ensure that each one

was immune from the prevailing criticisms about attorneys in society today.

Finally, in the life cycle of the Court, Charles F. Ogletree, Jr. spoke about Thurgood Marshall. He spoke of him as a "social engineer." He said that Marshall followed the admonition that one should be a mouthpiece for the weak, a sentinel against wrong, and that he must be an interpreter for the races' rights, grievances and aspirations. Ogletree spoke of some of the many accomplishments of Marshall, but most interesting were the private stories he told. He told one of a time when Justice Marshall was litigating in the south, and was aware of the policy of the hotels that blacks and Jews were not allowed. Justice Marshall, upon making a telephone reservation with a prestigious hotel, asked about the policy. The reservationist said, "Well Mr. Marshall, you're not Jewish, are you?" Upon confirming that he was not, the reservationist responded, "Well, then, there's no problem." Justice Marshall answered, "There will be when you see me tomorrow." All that was missing from this presentation was time to hear more about Justice Marshall and his legacy.

Utah State Bar Commission Approves Ethics Opinions

Opinion No. 131
Approved April 22, 1993

Issue: May a Utah lawyer include on his letterhead the name of a non-lawyer employee with an indication that he is a certified public accountant (CPA)?

Opinion: An employee non-lawyer, such as a CPA, may be listed on the letterhead of a solo practitioner, partnership or firm so long as the designation is not false or misleading and contains a clear indication of the non-lawyer's status.[1]

The full text of this opinion may be obtained from the Utah State Bar, Office of Bar Counsel, 645 South 200 East, Salt Lake City, Utah 84111.

Opinion No. 115
Approved May 20, 1993

Issue: Under what circumstances may a lawyer who represents a private party contact the employees of a government agency if the private party is involved in litigation against the agency?

Opinion: Because the Utah and United States Constitutions guarantee all private citizens access to government, all communication, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted. Thus, a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts a government employee about pending litigation, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel and (b) about his representation of a private party in that litigation.

The full text of this opinion may be obtained from the Utah State Bar, Office of Bar Counsel, 645 South 200 East, Salt Lake City, Utah 84111.

[1]This opinion addresses and is confined solely to situations involving full-time employees or those employees having no outside employment or private practice.

Parsons Behle & Latimer Creates a Scholarship at U. Law School

The Salt Lake City law firm of Parsons Behle & Latimer has established the Parsons Behle & Latimer Merit Scholarship at the University of Utah College of Law. The $5,000 scholarship will be awarded to an entering student this year whose character exhibits high standards of integrity and ethical judgment and who has demonstrated outstanding academic achievement and strong leadership skills.

"We are grateful for the generosity of Parsons Behle & Latimer," said Dean Lee E. Teitelbaum. "The quality of a law school, and its contributions to the legal community, depend greatly on the quality of its students. This scholarship assures that we can continue to compete successfully for the most able students in the country."

The scholarship, which is equivalent to resident tuition and books for the entire academic year, is the first of its kind sponsored by a law firm at the College of Law. It is renewable for the second and third years of law school assuming satisfactory academic progress.

Volunteer Attorneys Needed for Guardian Ad Litem Program

The Needs of Children Committee of the Young Lawyer's Section of the Utah State Bar is looking for attorneys willing to serve as a pro bono guardian ad litem in District Court divorce cases where custody and visitation are at issue. These cases will not involve instances where there are allegations of abuse and neglect. (These cases are covered by a separate contract.) Attorneys should be familiar or willing to become familiar with domestic law issues, including familiarity with custody evaluations. Interested applicants should contact Colleen L. Bell, 534-5556, Dena C. Sarandos, 355-3839, Kristin Brewer, Ct. Adm., 578-3800, or Mike J. Tomko, 532-1234 by September 1, 1993.

Supreme Court Adopts New Procedures for Lawyer Discipline and Disability Cases

The Supreme Court has adopted new rules governing procedures in lawyer discipline and disability matters. The new procedures, effective July 1, 1993, replace the Procedures of Discipline of the Utah State Bar. Most notably, the new procedures move formal discipline cases from the Bar Hearing Panels to the state district courts, generally treating formal discipline cases like other civil cases. District court orders imposing discipline may be appealed directly to the Supreme Court.

The full text of the new procedures has been reprinted in *Utah Advance Reports.* The new rules may also be obtained by calling the Administrative Office of the Courts at (801) 578-3800.

Legal Assistants Association of Utah Announces New Officers

The Legal Assistants Association of Utah (LAAU) announces its newly elected officers as follows: President: Marilu Peterson, CLA-S, Jensen & Lewis, P.C.; First Vice President: Suzanne Addison, CLA, NPS Pharmaceuticals; Second Vice President: Lisa Ann McGeary, Corbridge, Baird & Christensen; Secretary: Lauri K. Poulsen, Chapman & Cutler; Treasurer: Carol A. Lynn, CLA, Jardine, Linebaugh, Brown & Dunn.

Model Utah Jury Instructions, 1993 Edition

Final Report

On behalf of the Litigation Section of the Utah State Bar and the Standing Committee on the *Model Utah Jury Instructions*, I am happy [relieved] to report that the first edition of Model Utah Jury Instructions [MUJI] has now been published by The Michie Company. I am also pleased to announce that the Board of District Court Judges has adopted a resolution approving *Model Utah Jury Instructions* for use throughout the District Courts of the State of Utah, effective October 1, 1993.

The Litigation Section of the Utah State Bar formed the Model Utah Jury Instruction Committee in 1989, in an effort to begin the revision and updating of *Jury Instructions For Utah* [JIFU]. Thanks to the thousands of hours of effort by the Drafting Committee and editing by members of the Executive Committee of the Litigation Section, a draft of MUJI was submitted to the Bench and Bar for critical review and comment on April 15, 1991. After receipt of substantial comment, criticism and suggestions from members of the Utah State Bar, the Utah Trial Lawyers Association and the Utah Chapter of Defense Research Institute, the final revisions of the instructions were completed.

Our purpose in preparing *Model Utah Jury Instructions* has been the same as the authors of *Jury Instructions for Utah*. It is prepared in "an effort to provide the Bench and Bar of the State of Utah with a set of patterns for jury instructions that may be looked upon with some degree of assurance as to their accuracy and conformity with current Utah law."

From the beginning of this project, it has been the intent of the committee to provide instructions that are couched in simple, clear and brief language that will be understandable to the jury. We tried to use short sentences and omit unnecessary words. In our attempt to use "plain language," we tried, where possible, to avoid the use of statutory and appellate court language because it tends to be confusing when quoted in the context of a jury instruction. However, simplification of statutory and decisional law inherently carries with it the risk of misstatement. Consequently, the committee makes no pretense of infallibility of the instructions.

In an effort to maintain jury instructions that are reflective of current Utah law, a Standing Committee on *Model Utah Jury Instructions* has been established by the Litigation Section. The purpose to the Standing Committee will be to periodically publish updated model jury instructions. Comment, criticism and suggested changes are the best means of continuing this process. We encourage the members of the Bar and the Judges of the State of Utah to submit such criticism and suggestions. Without continued effort to maintain current instructions, the thousands of hours of volunteer time spent in preparing these instructions will have been wasted.

I wish to again acknowledge the thousands of hours of volunteer effort put into the preparation of these instructions by the drafting committee.

THE MODEL UTAH JURY INSTRUCTION COMMITTEE

Ross C. Anderson
Brad R. Baldwin
William W. Barrett
W. Cullen Battle, Jr.
John A. Beckstead
Charles M. Bennett
James R. Black
William B. Bohling
Francis J. Carney
Joy L. Clegg
Ralph L. Dewsnup
Curtis J. Drake
Warren M. Driggs
Randy L. Dryer
M. David Eckersley
Mark H. Egan
Dennis C. Farley
Paul S. Felt
Philip R. Fishler
Larry A. Gantenbein
Bruce R. Garner
Robert G. Gilchrist
Steve H. Gunn
Edward B. Havas
Robert H. Henderson
James R. Holbrook
D. Miles Holman
Roger H. Hoole
Timothy C. Houpt
L. Rich Humpherys
Nathan R. Hyde
Craig T. Jacobsen
Gary L. Johnson
Russell C. Kearl
Colin P. King
D. David Lambert
Allan L. Larson
Craig R. Mariger
Debra J. Moore
Aaron A. Nelson
Christian W. Nelson
Patrick J. O'Hara
R. Willis Orton
Jeffrey R. Oritt
Brett F. Paulsen
Bruce M. Plenk
E. Scott Savage
Jeffrey L. Silvestrini
David W. Slagle
John A. Snow
Erik Strindberg
Earl D. Tanner, Jr.
Chris P. Wangsgard
David A. Westerby
J. Clare Williams
Elliott J. Williams
Kim R. Wilson
David R. Wright
Robert G. Wright
Michael P. Zaccheo

Finally, there are three members of the Utah State Bar, the present and immediate past officers of the Litigation Section, who deserve the appreciation of the Bench and the Bar of the State of Utah. Without the remarkable efforts of editing the instructions performed by Ross C. Anderson, W. Cullen Battle and William B. Bohling, the 1993 Edition of MUJI would not have been possible.

John L. Young, Chairman

NOTICE

When the 1992-1993 Annual Report to the Utah Supreme Court and the Bar Membership was printed and mailed in July, we failed to give proper credit to the individual providing our cover photo. That individual is Tom Till and we thank him.

Board of District Court Judges for the State of Utah

WHEREAS, the *Jury Instruction Forms for Utah* ["JIFU"] were prepared in 1957, have not been revised since publication, and are now largely obsolete and outdated; and

WHEREAS, it is highly desirable, for both the bench and the bar, to have a set of model jury instructions that may be relied upon with some assurance as to accuracy and that will eliminate much work on the part of the bench and the bar; and

WHEREAS, the almost universal use of model jury instructions in the state and federal courts of this country has been responsible for a simpler, more uniform and speedier administration of justice, and has reduced the number of new trials by reason of erroneous instructions; and

WHEREAS, this Board, recognizing the extraordinary effort required to create jury instructions that are legally accurate under statutory and decisional law, while couched in simple and understandable language, has encouraged the Utah State Bar to undertake the preparation of a new set of model jury instructions for use in the district courts of this state; and

WHEREAS, the Utah State Bar, through a committee of its Litigation Section, chaired by John L. Young, has undertaken this substantial project and devoted thousands of lawyer-hours to researching, drafting and revising the instructions published herewith, referred to as the *Model Utah Jury Instructions* ["MUJI"]; and

WHEREAS, the committee, consisting of lawyers of varied interests and practices, has subjected *Model Utah Jury Instructions* to full and open critical appraisal, and on April 15, 1991, submitted the same to the bench and bar generally for review, criticism and comment and, in response to such comment, has revised and refined the model instructions; and

WHEREAS, *Model Utah Jury Instructions* has received the committee's final approval and is now ready for publication; and

WHEREAS, a standing committee, consisting of members of the Litigation Section of the Utah State Bar and the trial bench, has been established for the purpose of annual review, revision and modification of *Model Utah Jury Instructions* in order to supplement, revise and maintain the reliability of the instructions; and

WHEREAS, *Model Utah Jury Instructions* is, nevertheless, recognized as neither infallible for a final expression of Utah law, but open to criticism, suggestion and development from the bench and bar to assure continuing progress in this important aspect of trial procedure;

IT IS HEREBY RESOLVED, subject to the foregoing limitations, that this Board of District Court Judges for the State of Utah hereby approves *Model Utah Jury Instructions* for use throughout the district courts of the State of Utah, effective October 1, 1993.

DATED this 16th day of April, 1993.

Litigation Section Announces Two New Projects

The Litigation Section has undertaken two important new projects to improve the quality of litigation practice in Utah. This month the first edition of the *Model Utah Jury Instructions* ("MUJI"), a comprehensive set of pattern jury instructions, was published by the Michie Company. [See related articles.] Copies of MUJI are available from The Michie Company, (800) 942-5575 or (801) 771-8708.

The second project is a series of trial advocacy training seminars co-sponsored by the National Institute for Trial Advocacy ("NITA") and the Litigation Section. Our first program covers direct and cross examination of witnesses and will be held on October 22 and 23, 1993. The program will be open to 48 student participants, who will perform exercises in direct and cross examination, the introduction and use of evidence, impeachment and rehabilitation, and examination of problem witnesses. The program will follow NITA's learning-by-doing format. Judge William Meyer, from Denver, Colorado, is a certified NITA instructor and will lead the program. A distinguished group of local trial lawyers have agreed to serve as the faculty. For further information, please contact W. Cullen Battle at 531-8900 or David Brickey at 531-9095.

Thanks to "Run, Steal, Cheat" Pro Bono Softball Tournament Participants

The Pro Bono Committee of the Young Lawyers Section of the Utah State Bar expresses its thanks to the participants of the second annual Run, Steal and Cheat lawyers' league benefit tournament for Utah Legal Services and Legal Aid Society held on May 22, 1993. This half-day tournament raised approximately $2,000 for the vital programs offered by the Utah Legal Services and Legal Aid Society. Teams from the following firms/offices participated and/or contributed: Van Cott Bagley, Cornwall & McCarthy; Snow, Christensen & Martineau; Kimball, Parr, Waddoups, Brown & Gee; Ray, Quinney & Nebeker; Parsons Behle & Latimer; Legal Aid and Legal Services.

The law firm of Ray, Quinney & Nebeker won the tournament for the second year, despite extensive purchases of strikes, runs, and outs by second place finisher Van Cott Bagley. Van Cott Bagley's purchases did give the firm the team tournament prize including bats, balls, bases and scorebook for having raised the largest amount of funds in addition to its entry fee. The following sponsors made contributions which were donated to raffle winners: Anatomy Academy, Brackman Brothers Bagel Bakery, Kings English Book Shop, the Peery Pub, Squatters and Swire Pacific Holdings. Many thanks to all who participated and/or contributed.

Order Amending Rules for Integration and Management of the Utah State Bar

This matter originally came before the Court in a petition filed by the Board of Bar Commissioners (Board) on September 30, 1977 for approval and adoption of a "Rule for Integration of the Utah State Bar" subsequently consolidated with a Petition filed in May of 1979 by certain members of the Bar to "Adopt a Rule to Govern the Right to Practice Law in Utah Without Compulsory Integration" followed by the Legislative General Counsel filing a brief in opposition to both and asserting the Legislature's interest.

On June 30, 1981 this Court issued a PER CURIAM opinion granting the Board's petition integrating the Bar[1]. Thereafter the authority of the Court to govern the practice of law by adopting appropriate rules was incorporated in 1985 in Art. VIII, Sec. 4 of the Utah Constitution.

Exercising its ultimate authority to govern the practice of law without engaging in the daily management and operations of the Bar, the Court has continued to meet with the Board to develop a revised mission statement consistent with Recommendation No. 2 of the Final Report of the Utah Supreme Court's Special Task Force (Task Force), dated November 1, 1992 and to express the delegation of authority by the Court to the Board consistent with Recommendation No. 3 of the Task Force Report, and being now fully advised in the premises, hereby,

SUA SPONTE ORDERS

1. Section (A) 1. of the Rules for Integration And Management of the Utah State Bar adopted on July 1, 1981 is hereby repealed and amended as follows:

SECTION (A) ORGANIZATION OF THE UTAH STATE BAR

1. Under the power vested to it by the Constitution and laws of the State of Utah, the Utah Supreme Court hereby creates and perpetuates under its direction and control an organization known as the Utah State Bar. All persons licensed in Utah to practice shall be members of the Utah State Bar, in accordance with the rules of the Court. The Utah State Bar, a sui generis entity, may organize in any form legally recognized under the laws of Utah and may sue and be sued, may enter into contracts, and may hold property in its own name. The purposes, duties and responsibilities of the Utah State Bar include, but are not limited to, the following:

(a) To advance the administration of justice according to law;

(b) To aid the courts in carrying on the administration of justice;

(c) To regulate the admission of persons seeking to practice law;

(d) To regulate and to discipline persons practicing law;

(e) To foster and to maintain integrity, competence and public service among those practicing law;

(f) To represent the Bar before legislative, administrative and judicial bodies;

(g) To prevent the unauthorized practice of law;

(h) To promote professionalism, competence and excellence in those practicing law through continuing legal education and by other means;

(i) To provide service to the public, to the judicial system and to members of the Bar;

(j) To educate the public about the rule of law and their responsibilities under the law; and

(k) To assist members of the Bar in improving the quality and efficiency of their practice.

2. Section (C) 2. of the Rules for Integration And Management of the Utah State Bar adopted on July 1, 1981 is hereby repealed and amended as follows:

SECTION (C) 2. Board of Commissioners, Number, Term and Vacancies, Powers and Duties.

There shall be a Board of Commissioners of the Bar consisting of thirteen voting members, eleven elected lawyers and two non-lawyers members appointed by the Court. Except as otherwise provided, the term of office of each commissioner shall be three years and until a successor is elected and qualified. In the event of a lawyer vacancy in the Board, the remaining commissioners shall appoint a successor from among the practicing members of the Bar of the division from which such commissioner was elected, who shall serve until the following annual election.

The Board is granted and may exercise all powers necessary and proper to carry out the duties and responsibilities of the Utah State Bar and the purposes of these rules and shall have all authority which is not specifically reserved to the Court. The Court specifically reserves the authority to: (1) approve Bar admission and licensure fees; (2) approve all rules and regulations formulated by the Board for admissions, professional conduct, client security fund, fee arbitration, procedures of discipline, legislative activities, unauthorized practice of law, and bar examination review and appeals; (3) review all appeals from the findings of the Board on formal disciplinary matters; and (4) establish appropriate rules and regulations governing mandatory continuing legal education.

DATED this 27th day of May, 1993.

UTAH SUPREME COURT

Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Michael D. Zimmerman, Justice
Christine M. Durham, Justice

[1] *In re Integration And Governance of the Utah State Bar,* 632 P. 2d 845 (Utah 1981).

Supplemental Order to Petition For Approval Of Increase in Licensing Fees

This matter came before the Court on the Petition for a dues increase filed by the Utah State Bar on November 6, 1989 and was subsequently amended on March 29, 1990. After reviewing the petition, supporting documentation, comments by members of the Bar and the Board of Bar Commissioners (Board) and the report of the Court's independent management consultant, Grant Thorton, the Court entered its Minute Entry Order dated August 10, 1990 granting the petition in part, denying in part and appointing a Task Force to address various organizational, management and operational issues pursuant to the Court's administrative authority over the Bar (Art. VIII, §4, Ut. Const.; Rule (a)1, Rules of Integration).

The Task Force conducted twelve hearings from October 1990 through May 1991 hearing from past and present Bar officers, members of the Bar, citizens, and officials from other states' bar associations. Following these hearings the Task Force held three deliberative sessions in May and June of 1991. After reviewing the testimony, exhibits and considering comments from members of the Bar following publication of its preliminary report, the Task Force issued its Final Report on November 1, 1991 with twenty-one (21) specific recommendations.

The Court and the Board of Bar Commissioners (Board) have engaged in a continuing dialogue since the issuance of the Final Report and the Court and the Board have reached an accord on all recommendations which recommendations have been handled administratively with the exception of Recommendation No. 11 wherein the Task Force recommended appointment of a non-lawyer voting member to the Board, and Recommendation No. 12 wherein the Task Force recommended that the President-elect continue to be selected by the Board subject to a retention ballot that could negate the Board's choice if 20% or more of the licensed active lawyers voted to reject the President-elect.

Certain other recommendations creating a Review Board and related jurisdiction will be disposed of by the Court's order in the newly proposed Amended Rules of Lawyer Discipline and Disability submitted by the Supreme Court Advisory Committee on the Rules of Professional Conduct dated March 30, 1993 presently under advisement.

NOW THEREFORE THE COURT BEING FULLY ADVISED IN THE PREMISES, ORDERS

1. Commencing July 1, 1993 the Court shall appoint two non lawyer voting members to the Board. For the initial appointments, one member shall serve until December 31, 1994 and the other until June 30, 1996. All appointments following the initial appointments shall be for a term of three (3) years.

2. The President-elect shall be chosen by the Board subject to a retention ballot submitted to all active members of the Bar. The Board shall choose another President-elect in the event that a majority of all licensed active members of the Bar vote to reject the President-elect. This procedure shall commence with the selection of the President-elect in 1994.

3. This Order supersedes the Minute Entry Orders of June 24, 1991 and July 23, 1991 regarding continuation of subsidies to certain non-essential programs.

DATED this 27th day of May, 1993.

UTAH SUPREME COURT
Gordon R. Hall, Chief Justice
Richard C. Howe, Associate Chief Justice
I. Daniel Stewart, Justice
Michael D. Zimmerman, Justice
Christine M. Durham, Justice

Recent Amendments to Code of Judicial Administration

Over the last several months, the Judicial Council and the Supreme Court have amended or adopted several rules of judicial administration using their respective emergency rulemaking powers. The full text of the rules may be obtained from, and written comments may be submitted to, the Administrative Office of the Courts, 230 South 500 East #300, Salt Lake City, Utah 84102, no later than September 10, 1993. The rules which affect the practice of law are:

Rule 3-407. Amendment effective March 11, 1993.

The provisions governing interest bearing trust accounts (for funds deposited with the clerk of the court) have been amended to require the court, upon distribution of the funds, to designate the person or entity to whom the earned interest is awarded.

Rules 4-202.1 through 4-202.9. New rules effective September 15, 1992 and October 26, 1992.

This series of rules was adopted in response to the Government Records Access and Management Act (GRAMA). The rules classify records created and maintained by the judicial branch, specify the persons who may access each classification of records, and establish the process for requesting records and appealing denials of records requests. The rules will be supplemented by additional rules establishing appropriate fees and governing the sharing of records among government entities.

Rule 4-610. Amendment effective March 11, 1993.

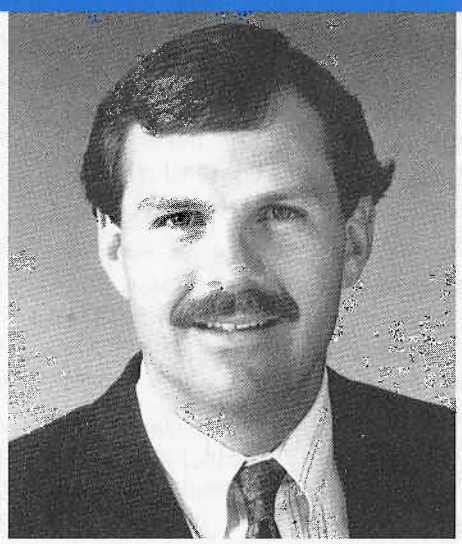
Establishes the criteria by which justice court judges may conduct (in felony cases) first appearances, preliminary hearings, and arraignments.

Rule 4-909. New rule effective January 1, 1993.

Implements the mandatory divorce mediation pilot program in the Fourth District.

Rule 11-202. Amendment effective April 29, 1993.

Provides that persons employed by the courts who serve as judges pro tempore may not receive additional compensation for their service as judges pro tempore.



Young Lawyers Division Launches Into New Year

By Mark S. Webber
President, Young Lawyers Division

The new officers of the Young Lawyers Division have named an outstanding Executive Council for the coming year. The Council consists of chairs, co-chairs and vice chairs of the committees. Each committee organizes and follows through with various programs throughout the year. The committees provide young lawyers an opportunity to not only give service to the community, but to meet other young lawyers and to become involved in the Utah State Bar.

This year, in addition to providing public service, the Division intends to emphasize education and training to help us become more effective lawyers. Many of our programs will be centered around training and practical tips. We have scheduled an opening social for October 7 at the Utah Law and Justice Center for new admittees to the Bar. New lawyers will have an opportunity to tour the Utah Law and Justice Center, meet the staff and Bar Counsel, and become more familiar with the Bar. We have scheduled several brown bag luncheons. Some of the topics include practice tips by judges and experienced lawyers, as well as ethics and avoiding disciplinary action by Bar Counsel. We will continue to sponsor the New Lawyer Continuing Legal Education and the Employment Fair.

We encourage all young lawyers from all areas of the state to get involved with the Division. With approximately 12 committees and several more programs, there are ample opportunities. Working on a committee can be rewarding and requires only as much time as you are able to offer. We are actively looking for committee members, so please contact an officer or any member of the Executive Council, or fill out the following form and send it to the Utah Law and Justice Center.

Membership Support:
Programs include the new lawyer CLE, student/law firm employment fair, and the law student mock interviews.

Community Services:
Programs include rape crisis clothing program, blood drives, dinners at the homeless shelter, sub-for-Santa and drug/substance abuse lectures.

Pro Bono:
Programs include Tuesday Night Bar, Legal Services Fundraiser, and the downwinder information program.

Publications, Publicity and Awards:
Programs include articles for Bar Journal, publicity for special projects and choosing young lawyer awards.

HIV Legal Issues:
Programs include HIV workshops and brochures, as well as providing legal services to HIV victims.

Needs of Elderly:
Programs include presentations in senior citizen centers, handbooks, informational videotapes and newsletters.

Needs of Children:
Programs include educational teachings about child abuse and shaking baby syndrome.

Law Related Education:
Programs include law day, library lecture series, high school lecture series, community education series, and handbooks for graduating high school seniors.

Family Law:
Program includes completion and presentation of spousal abuse informational videotape.

Consumer Credit Consulting:
Program includes counseling to people who have overextended themselves financially.

If you are interested in serving on a Committee of the Young Lawyers Division, check the areas of interest and send to:

Young Lawyers Division
Utah State Bar
Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834

_____ New Lawyer Continuing Legal Education

_____ Bar Member Support

_____ Community Services

_____ Pro Bono Committee

_____ Publications, Publicity and Awards

_____ HIV Legal Issues

_____ Needs of the Elderly

_____ Needs of the Children

_____ Law Related Education

_____ Law Day

_____ Diversity in the Legal Profession

_____ Consumer Credit Counseling

Name: _____

Address: _____

_____

_____

Telephone: _____

OFFICERS
1993-1994

President
Mark S. Webber
Parsons Behle & Latimer
201 South Main Street
Suite 1800
Salt Lake City, Ut 84111
532-1234

President-Elect
David J. Crapo
Holme Roberts & Owen
111 East Broadway
Suite 1100
Salt Lake City, Ut 84111
521-5800

Treasurer
David W. Zimmerman
Parsons Behle & Latimer
201 South Main Street
Suite 1800
Salt Lake City, Ut 84111
532-1234

Secretary
Robert G. Wright
Richards Brandt Miller & Nelson
50 South Main
Suite 1100
Salt Lake City, Ut 84144
531-1777

EXECUTIVE COUNCIL
1993-1994

Bar Journal/Awards
Sheri Mower, *Co-Chair*
Holme Roberts & Owen
111 East Broadway #1100
Salt Lake City, Ut 84111
521-5800

Gretchen C. Lee, *Co-Chair*
436 State Capitol
Salt Lake City, Ut 84114
538-1032

Diversity in the Legal Profession
Mary Woodhead, *Co-Chair*
Watkiss, Dunning & Watkiss
111 East Broadway #1100
Salt Lake City, Ut 84111
530-1500

Leshia Lee Dixon, *Co-Chair*
West Valley City Prosecutor
3600 South Constitution Blvd.
West Valley City, Utah 84119
963-3331

HIV Legal Issues
Scott Monson, *Chair*
RKS Financial Group
9 Exchange Place, #710
Salt Lake City, Ut 84111
534-1576

Kyle Treadway, *Vice Chair*
Kenworth
1764 South 300 West
Salt Lake City, Ut 84115
487-4161

MSN
Mark Jahne, *Chair*
Morris & Morris
4001 South 700 East, #240
Salt Lake City, Ut 84107
261-5297

Alan Flake, *Co-Chair, Programs*
Parsons Behle & Latimer
201 South Main Street
Suite 1800
Salt Lake City, Ut 84111
532-1234

New Lawyer CLE
Hakeem Ishola, *Co-Chair*
Yengich, RIch & Xaiz
175 East 400 South, #400
Salt Lake City, Ut 84111

Terry Welch, *Co-Chair*
Kimball, Parr, Waddoups, Brown & Gee
185 South State, #1300
Salt Lake City, Ut 84111

Community Services
Glinda Ware Langston, *Chair*
Assistant Attorney General
120 North 200 West
Salt Lake City, Ut 84111
538-4660

Vice Chair To Be Announced

Law Related Education
Michael Smith, *Chair*
Parsons Behle & Latimer
201 South Main Street
Suite 1800
Salt Lake CIiy, Ut 84111
532-1234

Scott Ryther, *Co-Chair, Programs*
Kimball, Parr, Waddoups, Brown & Gee
185 South State, #1300
Salt Lake City, Ut 84111
532-7840

Jeff B. Skoubye, *Co-Chair, Law Day*
Kirton, McConkie & Poelman
60 East South Temple
Suite 1800
Salt Lake City, Ut 84111
328-3600

Needs of Elderly
John McKinley, *Chair*
Richards Brandt Miller & Nelson
50 South Main, #700
Salt Lake City, Ut 84144
531-1777

Karen Thomas, *Vice Chair*
2091 East 4800 South
Salt Lake City, Ut 84117
277-6731

Pro Bono
Marji Hanson, *Chair*
Law Clerk
Judge Boulden
350 South Main, #361
Salt Lake City, Ut 84101
524-5851

Jeffery J. Hunt, *Vice Chair*
Kimball, Parr, Waddoups, Brown & Gee
185 South State, #1300
Salt Lake City, Ut 84111
532-7840

Needs of Children
Colleen Larkin Bell, *Chair*
Questar Corporation
180 East 100 South
Salt Lake City, Ut 84139
534-5021

Dena Sarandos, *Vice Chair*
Flanders & Associates
56 East Broadway #400
Salt Lake City, Ut 84111
355-3839

Michael J. Tomko, *Vice Chair*
Parsons Behle & Latimer
201 South Main Street
Suite 1800
Salt Lake City, Ut 84111
532-1234

Consumer Credit Counseling
Jan Bergeson, *Chair*
Callister, Duncan & Nebeker
10 East South Temple
Suite 800

Vice Chair To Be Announced

Area Representatives

Ogden Representative
Tricia Judge
Warner & Phillips
505 27th Street
Ogden, Ut 84403
621-6540

Northern Utah Representative
Scott Wyatt
Barrett Daines & Wyatt
108 North Main, #200
Logan, Ut 84321
753-4000

Provo Representative
F. Richard Smith, III
Howard Lewis & Peterson
120 East 300 North
Provo, Ut 84606
373-6345

Southern Utah Representative
Michael Day
Thompson, Hughes & Reber
148 East Tabernacle
St. George, Ut 84770
673-4892

CASE SUMMARIES

By Clark R. Nielsen

RELEASE

A release is to be construed according to ordinary principles of general contract interpretation. The court declined to adopt for all purposes the "four corners rule," which provides that a general release always applies to parties not specifically named, or the "specific identity rule," which provides that the release of one party does not discharge others unless the others are named in the release or are specifically identifiable from the face of the release. The court also declined to adopt the "intent" rule, which provides that the release is dependent on the intent of the parties that negotiated the release. Instead, these rules apply in various circumstances depending on ordinary contract principles. The court concluded that where the release is unambiguous as a matter of law, the "four corners role" is applied. However, where the release is ambiguous, the court must construe the contract consistently with the intent of the parties thereto, thus applying the "intent" rule.

In this case, the court held the release was ambiguous. The court also held that no evidence credited by the jury either supported or contradicted the jury verdict that the release was intended to cover the Utah Department of Transportation. Consequently, the court concluded that UDOT had failed to meet its burden of proof that it was an intended beneficiary of the release.

Krauss v. Utah State Dept. of Transportation, 211 Utah Adv. Rep. 25 (April 19, 1993) (Judge Orme)

SALES TAX

The court of appeals affirmed the decision of the Utah State Tax Commission that the sale of "modular housing units," prior to their permanent attachment to real property, was a taxable sale because the units were tangible personal property subject to sales tax. Citing *BJ-Titan Services v. State Tax Comm'n*, 842 P.2d 822, 828 (Utah 1992), for the appropriate standard of review, the court affirmed the decision because it was neither unreasonable nor arbitrary.

Valgardson Housing Systems, Inc. v. State Tax Commission, 210 Utah Adv. Rep. 55 (March 12, 1993) (Judge Greenwood)

FORGERY

Construing Utah Code Ann. §76-6-501(3) & (4) (1990), the court held that forgery of a receipt for payment does not represent "an interest in or claim against property, or a pecuniary interest in or claim against any person or enterprise." §76-6-501(3). Consequently, forgery of a receipt is a class A misdemeanor, not a felony of the second degree.

State v. Masciantonio, 210 Utah Adv. Rep. 38 (April 1, 1993) (Judge Greenwood)

JUDGE; AFFIDAVIT OF PREJUDICE

Under Utah Rule of Civil Procedure 63(b), where an affidavit is filed alleging that the judge is biased or prejudiced against a party or attorney, the judge has only two alternative courses of action. The judge must either recuse himself, or, if he questions the legal sufficiency of the affidavit, certify the matter to another named judge for a ruling on its legal sufficiency.

In this case, the judge erred by characterizing the affidavit as a motion to disqualify and by referencing his own prior disqualification decisions in his order referring the affidavit to another judge for an assessment of its legal sufficiency.

Barnard v. Murphy, 212 Utah Adv. Rep. 19 (April 29, 1993) (per curiam)

DAMAGES; PROFESSIONAL CORPORATIONS

In a question of first impression in the state of Utah, the court of appeals held that in calculating the income of a professional corporation for the purpose of determining its damages for breach of contract, compensation paid to the employed professionals of the corporation is counted as income of the corporation, not as an expense.

Anesthesiologists Associates v. St. Benedict's Hospital, 212 Utah Adv. Rep. 28 (May 7, 1993) (Judge Orme)

WORKERS' COMPENSATION; STATUTE OF LIMITATIONS

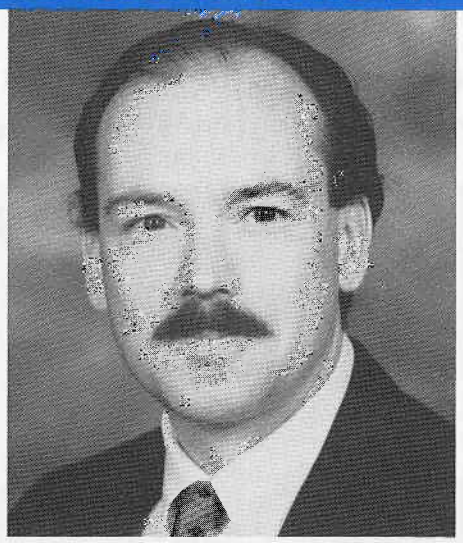
Utah Code Ann. §35-1-68(2) (1979), providing for a 6-year period of limitations for death benefits under Utah's workers' compensation laws, is a statute of repose which violates the Utah Constitution. A statute of repose is a period of limitations that "prevents suit a statutorily specified number of years after a particular event occurs, without regard to when the cause of action accrues." (quoting *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 672 (Utah 1985)).

Hales v. Industrial Commission, 211 Utah Adv. Rep. 51 (April 23, 1993) (Judge Orme)

FAILURE TO PROSECUTE, DISMISSAL

The trial court properly dismissed for failure to prosecute plaintiff's petition for review of a decision by the Department of Health. The court evaluated the dismissal for failure to prosecute under the principles in *Westinghouse Electric v. Paul Larson Contractor*, 544 P.2d 876 and *Maxfield v. Rushton*, 779 P.2d 237. Five factors which deserve consideration are: the conduct of the parties, the opportunity each party has to move the case forward, what each party has done to move the case forward, the amount of difficulty or prejudice caused to the other side, and the injustice which may result from dismissal. These factors must be evaluated in considering the totality of the circumstances to determine whether delay is a ground for dismissal of an action. Plaintiff's nonaction for over five years indicates that the district court did not act unreasonably or arbitrarily in dismissing the action when plaintiffs had an opportunity to be heard and to do justice and did nothing for over five years to advance the action.

Country Meadows Convalescent Center v. Utah Dept. of Health, Utah Ct. App., Case No. 920302-CA (April 21, 1993) (J. Greenwood, with Js. Garff and Orme)



Wallace Stegner's American West

By Richard L. King

Book Review Editor's Note:
I received a phone call after the publication of last month's book review on Stegner's "Crossing to Safety" and "Spectator Bird" from an attorney questioning why in the world I had written about Stegner in a legal publication and excluded Stegner's fine collection of essays entitled "The American West as Living Space," which were initially given as a series of lectures at the University of Michigan College of Law. I pleaded variously temporary senility, that I had loaned my copy of the essays to a friend and so did not have them on hand at the time of writing the review, that my kids had fed my copy to the next-door neighbor's german shepherd . . . But the fact is that it was an omission begging correction, and so I invited Mr. King to publicly upbraid me and provide for the Journal *his correction of my grievous, and ultimately inexplicable error. The following is his response.*

On a crisp Autumn day in 1985, a group of us who had recently passed the Bar examination gathered in the Capitol rotunda to take our oath and to become the newest members of the Bar. There were several speeches at the ceremony, but the one I remember most was a short address Judge Bruce Jenkins gave that day. He spoke of intellectual "balance" and how crucial such balance is to a lawyer. Judge Jenkins encouraged us to avoid limiting our reading to cases, treatises, and legal memoranda. A good lawyer, he claimed, must have knowledge of a vast panorama of subjects — a well-rounded intellect is essential to good lawyering.

At the time of Judge Jenkins's address, I was incredulous. What the Judge said may be great in theory, I thought, but as a practical matter most of us simply do not have the time to become the type of "renaissance" lawyer that Thomas Jefferson embodied. I was beginning to realize that the demands of the typical law practice on a lawyer's time and energy are enormous. To me it seemed difficult enough to find the time to exercise and pursue other personal interests and meaningful relationships with family and friends without trying to read Plato's Dialogues into the early hours of the morning.

But Judge Jenkins was right. A lawyer does benefit from outside reading. Indeed, members of the Bar would be better off if allowed to engage in continuing *liberal* education rather than the current CLE required by the Bar — after all, most of us get plenty of CLE by doing legal research on a daily basis. Unfortunately, my initial impression of the practice of law was also correct. It *is* difficult for a lawyer to find time to read.

Nonetheless, if Betsy Ross's fine book reviews for the *Utah Bar Journal* are any indication, some of us do manage to read something other than dusty legal tomes. Ms. Ross's essay, "Wallace Stegner: A Tribute," in the June/July 1993 issue of the *Journal*, suggests the wealth of literature that the late Wallace Stegner left behind. As Ms. Ross indicates, the American West was one of Stegner's favorite subjects. And as lawyers practicing in the heart of the West, Stegner's insight can offer us some of the balance and perspective that Judge Jenkins thought so important for a lawyer.

Moreover, Stegner offers hope for those who would like to gain perspective about the West but have difficulty finding the time to read his numerous works. In October 1986, Stegner delivered a series of three William W. Cook Lectures at the Law School of the University of Michigan in Ann Arbor. Stegner succinctly describes the lectures: "The subject to be discussed was the West." He called his lectures, "Living Dry," "Striking the Rock," and "Variations on a Theme by Crevecoer." The University of Michigan Press subsequently published essay versions of these lectures as *The American West as Living Space* (1987). The Cook

Lectures were so popular that Stegner included them in his last collection of essays, *Where the Bluebird Sings to the Lemonade Springs: Living and Writing in the West* (Random House, 1992). After two decades of reading about the history, geography, and culture of the West, I have found the eighty-seven small pages of the *American West As Living Space* to contain the finest available overview of our region.

It may sound doubtful that Stegner could cover such an elephantine subject as "the West" in such a short space. But concision is the genius of the Cook Lectures. Stegner struggled with his subject, and thought that a "sensible way to discuss it would be to select some manageable aspect of it and focus on that . . ." He considered focusing on one of several subjects: on western geography, history, mythology, economy, or sociology. In rejecting that approach, Stegner said:

> That would have been orderly. It would also have been the way the blind men approached the elephant. I decided that I would rather risk superficiality and try to leave an impression of the region in all its manifestations, to try a holistic portrait, a look at the gestalt, the whole shebang, than settle for a clear impression of some treelike, spearlike, or ropelike part . . . I have painted with a broad brush because there was no space to do more; and in the end I have concluded that the space limitation was salutary: it made me concentrate upon the essentials and kept me from getting tangled up in detail. And I have been personal because the West is not only a region but a state of mind, and both the region and the state of mind are my native habitat.

Stegner's approach is salutary indeed, for he paints a masterly portrait of the West. His concise description of the West is too good. When I was in private practice I bought a dozen copies of *The American West as Living Space* to give to clients from the Midwest and the East. It was especially helpful to clients with environmental matters.

Stegner's portrait of the West is also helpful to those of us who live and work in the West. Any "western" lawyer would benefit from the few hours it takes to read it. Whether you agree or disagree with Stegner's observations, his Cook Lectures will enrich your understanding of the West. And by reading them, perhaps we can begin to avoid the intellectual "tunnel vision" that I think Judge Jenkins was warning us about on that Autumn day in 1985.

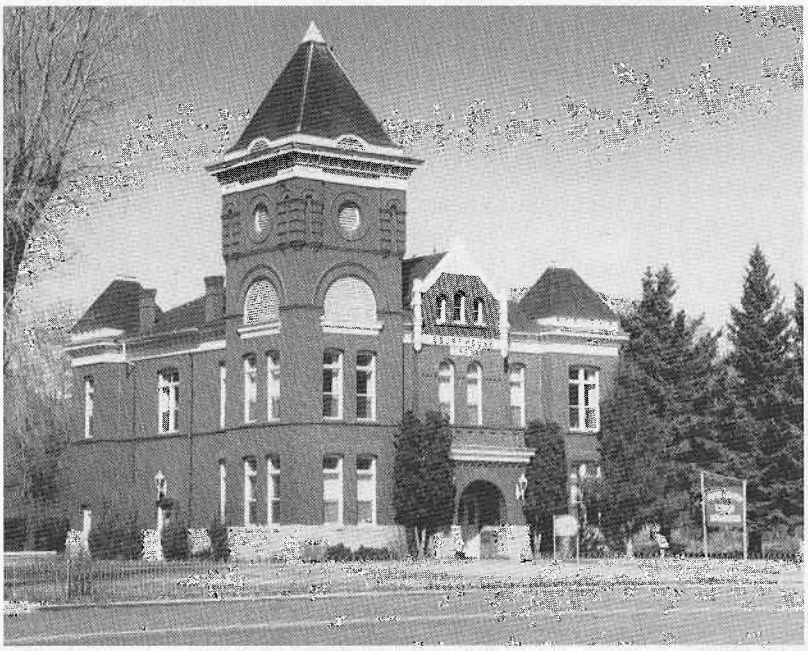
Utah Bar Foundation/Utah State Historical Society Writing Project Finished

Through the efforts of a committee comprised of the Honorable Norman H. Jackson, Ellen Maycock and Carman E. Kipp, a joint publication with the Utah Historical Society is forthcoming and will probably hit the streets in about September.

This special edition of the *Utah Historical Quarterly* is best described by the following excerpts entitled "In This Issue".

Desiring to promote the history of Utah Law and courthouses, the Utah Bar Foundation approached the Utah State Historical Society last year and proposed a joint effort in the production of a special issue of *Utah Historical Quarterly*. Working together in the call for and refereeing of papers, the two agencies gathered a half-dozen articles that represented the diversity, complexity, and significance of the legal experience in Utah.

A detailed look at the role of women in shaping the state's legal institutions, a judge's light-hearted personal reminiscence, a photo essay on National Register courthouses, two biographical sketches, and an analysis of the juvenile court's evolution were among the topics finally selected.



Piute County Courthouse *Photo Credit: State Historical Society*

The Utah Bar Foundation was incorporated December 13, 1963, as a nonprofit corporation. Every attorney licensed to practice law in the state is a member. It uses income from gifts, donations, bequests, devises, membership contributions, and interest on lawyer trust accounts to further its many public-service goals. These include projects related to public education regarding the law, legal services to the public including those who might not otherwise be able to obtain professional representations, programs at institutions of higher learning, and charitable and other worthy causes.

Calvin A. Behle, one of the original founders of the Foundation, and his wife, Hope Behle, contributed funds to pay for some nice aesthetic touches for this publication, including the full-color cover and a special over-run of 500 cloth-bound copies. As the Utah Bar Foundation approaches its thirtieth anniversary, the Behles and other members can point with special pride to this issue as another entry in their catalog of notable achievements.

Special thanks are given to Stan Layton of the Utah Historical Society and Mike Korologos of Evans Communications for making completion of this project possible.

The following awards were made for best submissions:

First Place – The Honorable Regnal Garff
Second Place – Carol Cornwall Madsen
Third Place (Tie) – Justice J. Allan Crockett and Judge Don V. Tibbs

Utah Bar Foundation Contributes $25,000 to U. Law School Program for Graduates in Public Practice

Funding for the Jefferson B. and Rita E. Fordham Loan Repayment Assistance program grew by $25,000 with a recent grant from the Utah Bar Foundation, announced Lee E. Teitelbaum, Dean at the College of Law.

The Utah Bar Foundation makes annual grants to programs and organizations who serve law-related public purposes such as providing legal services to the disadvantaged. Funding for the grants comes from the Interest on Lawyers Trust Accounts (IOLTA) program.

The law school's loan repayment assistance program, established in 1991, facilitates the entrance of lawyers into low-paying public service jobs by providing graduates up to $3,000 annually to help them repay their educational loans. Eligible graduates can receive as much as $30,000 over ten years if they remain employed in the public sector. The average education debt burden of recent law graduates at the U. is nearly $30,000.

The loan repayment assistance program is named after Jefferson Fordham, distinguished professor of law at the U. and former Dean of the University of Pennsylvania Law school, and his wife, Rita. The Fordhams made a significant donation to the program a year ago.

CLE CALENDAR

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.

16TH ANNUAL SECURITIES SECTION WORKSHOP

This is the annual presentation of this workshop. This year's locale will be in Laughlin, Nevada. Participants can look forward to a lively program with many discussions on current securities law topics. Additional information will be mailed directly to Bar members. Don't miss out on this opportunity to have a nice weekend away from the office and update your securities practice skills

CLE Credit: 9.5 hours, including 2 hours in ETHICS
Date: September 10-11, 1993
Place: Harrah's Casino Hotel, Laughlin, Nevada
Fee: $100.00 for members of Securities Section,
$115.00 for Non-members.
Time: Friday: 8:30 a.m. to 6:00 p.m.
Saturday: 9:00 a.m. to 2:00 p.m.

EDUCATION LAW SEMINAR

This is the annual presentation of the Education Law Section. Once again this seminar will be held in beautiful Park City. Come up and enjoy the autumn-aloft festival and update your practice skills in this area. Look for additional information to be mailed directly to Utah Bar members.

CLE Credit: 4 hours
Date: September 10 & 11, 1993
Place: Olympia Hotel, Park City, Utah
Fee: Call
Time: 9:00 a.m. to 1:00 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.

QUALIFIED RETIREMENT PLANS — FINAL NONDISCRIMINATION RULES

CLE Credit: 4 hours
Date: September 23, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

3RD ANNUAL ETHICS AND GOLF TOURNAMENT — PROFESSIONALISM MADE PRACTICAL

This annual program stresses professional behavior in practical situations. The idea is to present ethics topics that have a direct practice implication. Come up the night before and enjoy an evening in the Wasatch Mountains while staying at the Olympia Hotel. There will also be a golf tournament Saturday afternoon. Take this opportunity to get ethics hours during this reporting year and enjoy the surroundings of Park City.

CLE Credit: 3 hours in ETHICS
Date: September 24 & 25, 1993
Place: Olympia Hotel, Park City, Utah
Fee: CLE $50.00,
Golf cost to be determined
Time: CLE — 9:00 a.m. to 12:00 p.m.,
Golf Tournament — 1:00 p.m.

RAINMAKING: FROM PROSPECTS TO PAYING CLIENTS

This course is designed for attorneys, in sole, small & large firm practices, who want the most powerful strategies and

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.

techniques available in order to maximize their ability to attract clients and keep them.
CLE Credit: 8 hours
Date: October 1, 1993
Place: Utah Law & Justice Center
Fee: $115.00,
Door registration $145.00
Time: 8:00 a.m. to 5:30 p.m.

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

STRESS MANAGEMENT: SURVIVING IN TODAY'S LEGAL ARENA

This program will help every member of your office, staff and family. In today's high stress legal market, we should all learn how to leave "work" at the office. Join the professional staff of Jenkins, Hogue & Associates as they bring their secrets of stress management to the Utah Bar.
CLE Credit: 8 hours
Date: September 30, 1993
Place: Utah Law & Justice Center
Fee: $115.00,
Door registration $145.00
Time: 8:00 a.m. to 5:30 p.m.

TURNING RECYCLABLE INTO PRODUCTS — GROWING BUSINESS OPPORTUNITIES
CLE Credit: 4 hours
Date: October 5, 1993
Place: Utah Law & Justice Center
Fee: $100 plus $6 MCLE Fee,
$125 after September 15, 1993
Time: 10:30 a.m. to 2:30 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 1, 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.

LITIGATION CASE MANAGEMENT FOR LEGAL ASSISTANTS
CLE Credit: 4 hours
Date: October 21, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

TAX LAW FOR NON-TAX LAWYERS
CLE Credit: 4 hours
Date: October 28, 1993
Place: The "new" Joseph Smith Building, Wasatch Room, 10th floor.
Fee: Please Call the Utah State Bar
Time: 8:00 a.m. to 1:30 p.m.

HOW TO DETERMINE THE ASSETS NECESSARY TO RETIRE: A SURVIVAL GUIDE FOR LAWYERS, ACCOUNTANTS, & THEIR CLIENTS
CLE Credit: 4 hours
Date: October 28, 1993
Place: Utah Law & Justice Center
Fee: $155 plus $6 MCLE Fee
Time: 10:00 a.m. to 2:00 p.m.

CIVIL LITIGATION III: ENFORCEMENT & COLLECTION OF JUDGMENTS — 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: November 18, 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.

SNUFFER COUNTY BAR

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

Information concerning the whereabouts of a will or trust for Judy McKean Whitlock. Ms. Whitlock died on May 1, 1993. Any attorney having information about Ms. Whitlock's will or estate is asked to contact James Vernieu at 3000 Polk #321, Ogden, Utah 84403.

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.

FOR SALE: Pacific Reporter, leather bound Volumes 1-154; Pacific Reporter Volumes 172-300; Pacific Reporter 2d Volumes 1-835; ALR 4th Volumes 1-45; AMJUR Trials Volumes 1-32; Proof of Facts Volumes 1-30; Proof of Facts 2d Volumes 1-44; Numerous other publications available. Make offer. Call (801) 968-3501.

BOOKS FOR SALE: Decennial Digests 3-9, $2000; Federal Rules of Evidence Service and Digest, $25; Corpus Juris Secundum $999; Public Utilities Reports V.43 N.S. — PUR 4th V.98 $999; Collier on Bankruptcy, first series cases $50. Good condition. Call Margo Markowski (801) 521-3200.

OFFICE EQUIPMENT

Beautiful eight-foot oblong walnut conference table with glass — like new; Konica 280 fax machine — like new; Ricoh copy machine. Best offer. Call Stephen Brinton at (801) 566-3688 or David Patterson at (801) 359-2093.

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.

For Lease: Premier Attorney offices available. 68 South Main Street, Fifth Floor. High visibility downtown location, full time receptionist, conference room, law library, fax and copier services available. Walking distance to all downtown services, shops and restaurants. $200-600 per month. Call Tim Anker (801) 521-4238.

Full service firm has space available for established attorney. Legasearch. Complete Utah Reports. Fax machine. 1300 East near I-80 exit. Contact (801) 486-3751.

Prestigious Office Sharing space available. Beautiful completely furnished office space is available at a prime downtown location — KEY BANK TOWER. Four to five offices, secretary stations and work-file room. Reception service and kitchen available. Call Don Maughan at (801) 322-1100.

Top floor of the New York Building is available for lease. 8,200 handsomely improved square feet, free on site parking, and building signage available. Contact Wesley T. Cornelison (801) 278-5884.

Office space available in downtown Provo area for 1-3 attorneys. Office share with 1 other attorney. Space includes reception area, secretarial space, conference room with limited library, receptionist services and other office support. Parking adjacent to building for staff and clients. Call Jim or Tanya at (801) 375-6092.

Downtown window office space available. 3 offices, receptionist, fax, copier, conference rooms, all shared amenities. Beneficial Life Tower. Call (801) 363-1800.

Experienced mature attorney looking for an office sharing arrangement immediately to assist in re-establishment of a private practice. Would be interested in overflow and/or co-counsel work. Call (801) 550-0781 (mobile) or (801) 292-8311.

POSITIONS SOUGHT

Attorney with 13 years experience as Registered Nurse and Physicians Assistant, seeks position in a law firm with a practice in medical malpractice/personal injury. Cum laude law school graduate and Law Review staff writer. Admitted to Utah State Bar. Call Linette at (801) 467-8754.

Paralegal with B.S. degree and paralegal certificate seeking employment in the Salt Lake City area with a small to medium sized law firm. Call Leslee (801) 531-9077 at State Bar Offices for further information on applicant.

Employment needed: Attorney with criminal and civil law experience seeks employment with Utah Law Firm. Member Utah Bar. Major areas of practice in Bankruptcy, Real Estate and Criminal Law. Call (801) 292-8311 or (801) 550-0781.

SERVICES

Paralegal available. Prepare all documents, scheduling, court filings. Hourly fee. (801) 355-7930.

Affordable business plans written for clients. Quality work, special packaging. Excellent references available. Call (801) 537-5044.

ATTENTION ATTORNEYS! Do you need help with voluminous medical records? Would you like the most current standards of care on your case? Do you have immediate access to Expert Witnesses in all fields? A Legal Nurse Consultant can help you save time and money. Call SHOAF AND ASSOCIATES at (801) 944-4232.

TWO EXPERIENCED ATTORNEYS SEEK CONTRACT WORK. Former law review editor and federal judicial clerk. Eight years of federal and state trial 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.

Utah Attorney with excellent research and writing skills seeks project or contract work on a full or part-time basis. Can provide valuable assistance in all phases of civil or criminal matters. Credentials and references available upon request. Call (801) 583-1538.

SEMINARS

La Pier & Associates presents "Role of the Expert Witness in DUI Cases." This program will be presented September 10, 1993 at the Utah Law and Justice Center in Salt Lake City. The course will focus on the Standardized Field Sobriety Tests (Horizontal Gaze Nystagmus, Walk & Turn, One-Leg-Stand), Direct Breath Testing and how they relate to Effective DUI defense and prosecution. For more information and registration call 1-800-257-4643.

CONTINUING LEGAL EDUCATION

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

CERTIFICATE OF COMPLIANCE
For Years 19_____ and 19_____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

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

1. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

2. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

3. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

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

1. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

2. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

3. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

4. _____
Program name _____
Provider/Sponsor Date of Activity CLE Credit Hours Type**

* Attach additional sheets if needed.

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

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

Date: _____ _____
(signature)

Regulation 5-103(1) Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the board upon written request.

EXPLANATION OF TYPE OF ACTIVITY

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

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

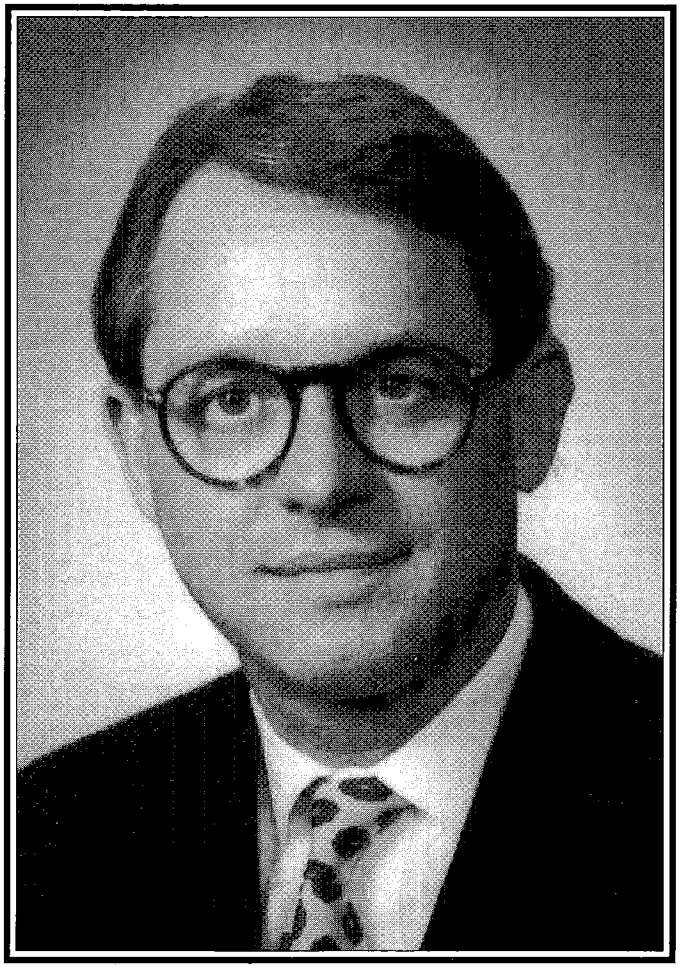
C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through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

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

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

Regulation 8-101 — Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5 at the time of filing the statement with the Board.

Greg Gunn, SIOR



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