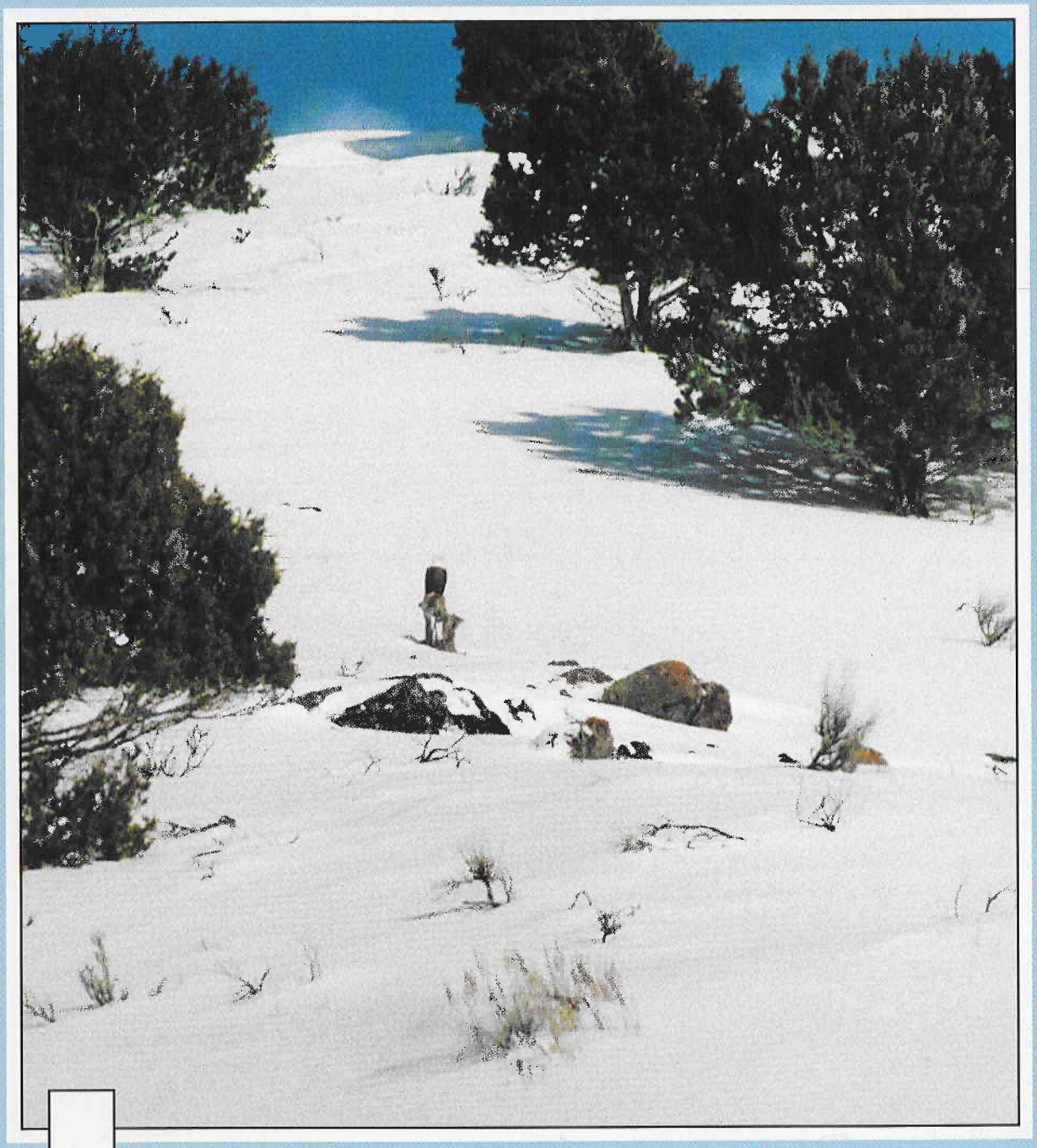
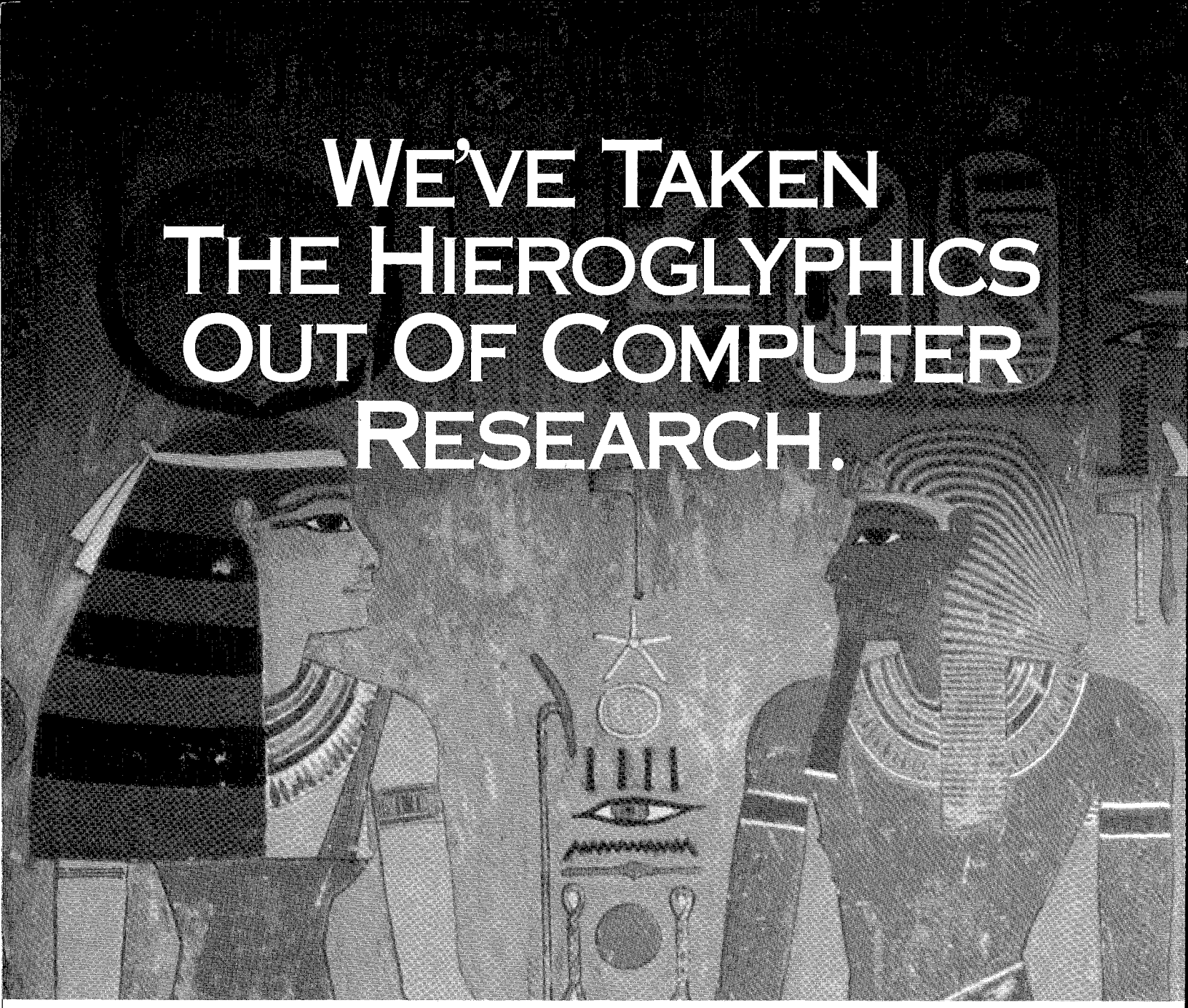
UTAH BAR JOURNAL

Vol. 7 No. 1 January 1994





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Published by The Utah State Bar
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Salt Lake City, Utah 84111
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UTAH BAR JOURNAL

Vol. 7 No. 1 January 1994

COVER: Winter North of Porcupine Reservoir, East of Avon, Utah (Note: bald eagle sitting on fence post in middle of picture), by Richard R. Medsker of Farr, Kaufman, Sullivan, Gorman, Jensen, Medsker & Perkins, Ogden, Utah.

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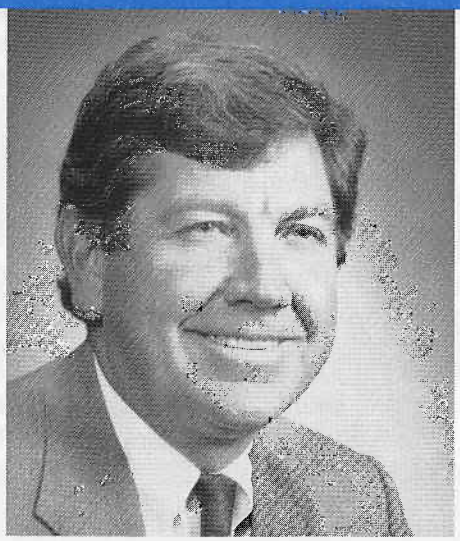
The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $30; single copies, $4.00. For information on advertising rates and space reservation, call or write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



Collection Law Task Force: Where Do We Go From Here?

By H. James Clegg

Responding to criticism of collection-law practice levelled by two circuit court judges, the Bar Commission determined to appoint a committee to study the practice. It was just in the formative stages, with Richard Carling accepting the position of chair. At that propitious moment, Channel 2 began a series of articles on its evening news spotlighting a lawsuit filed by a former staff attorney of a collection agency against that agency.

That suit, removed into federal court, includes charges of unauthorized practice of law by staff of a collection agency. The Bar was invited to join the suit as an intervenor or as amicus. It elected against doing so because this issue is only one in a very complex case; instead, it authorized Kipp & Christian to file a separate suit, limited to unauthorized practice, in Third District Court.

The "Carling Committee" quickly became the "Carling Task Force," with additional members, including Dave Challed of Legal Services and Jan Bergeson, Chairs of the Young Lawyers' Subcommittee on Consumer Debt Abuse. Both brought valuable insights, particularly respecting out-of-court practices.

The Task Force as finally comprised consists of collection lawyers Richard Carling, Richard Walker and Kirk Cullimore (who also is chair of the Collection Law Section), Chief Disciplinary Counsel Stephen Trost, Judges Roger Livingston and Roger Bean, David Challed and Jan Bergeson. Frank Wilkins sits as Bar Commission Liaison.

It is apparent that there has been an explosion of creditors' cases in the last ten years or so. Whether this is proportional to the growth in populace of borrowing age or relaxation of credit guidelines, or something else, or a combination of many factors, is not our task; clearing the obstacles to justice is.

So far as lawyers are concerned, the main problem seems to be permitting creditors to have direct access to debtors, without necessarily much involvement of lawyers and judges. Judges and lawyers, through training and ethics requirements, are held to standards of professionalism and regard for personal rights. It developed that, in some courts, judge is not physically present in the courthouse for collection calendars.

It quickly became apparent that the Bar could not solve the problems on its own; the Bench must take responsibility to effect a cure by, at the least, being available to handle disputes, place debtors under oath where necessary and enter orders commanding respect for the judicial system, including contempt orders.

The Task Force recommends that standards be enacted or modified to make it clear that the collection lawyer has a duty to the system as well as to the client. One change will clarify that, while a lawyer may own a collection agency, he may not represent it as counsel. Another is to forbid the borrowing or sharing of personnel between a lawyer and a creditor; when a matter goes into suit, the file will be physically transferred to the lawyer and staff for whose actions the lawyer is solely responsible. Questioning of debtors shall be substantively conducted by a lawyer although a secretary or legal assistant may assist with routine matters such as distributing and assisting with questionnaires, receiving money, and so forth.

Judge Livingston and Judge Bean provide helpful and constructive suggestions from the Bench's viewpoint. The system must accommodate with limited court facilities and personnel, so a practical result requires cooperation an dedication by the Bench and the Bar. Judges Livingston and Bean have pledged the judiciary's help in rectifying the situation.

On a more global scale, the Task Force perceives that greater involvement by lawyers and judges may not be enough. Thirty-two states have enacted regulatory statutes governing collection agencies. Ms. Bergeson and Mr. Challed believe that Utah should follow suit and are studying model legislation with the idea of submitting it to the 1994 legislature. While the Task Force has not submitted final recommendations, an educated guess is that enactment of such a statute will be recommended.

Topics which have not been resolved but are under discussion include whether the schedule of attorneys' fees enacted by the Judicial Council are serving their intended purpose. While such presumptively-correct fees lessen court time and lawyers' effort, they appear to have a chilling effect on pre-complaint settlement and may unnecessarily burden debtors who are making good-faith efforts to pay.

The Task Force has not conducted a witch hunt into rumors of kickbacks of attorneys' fees and constable fees to creditors. Those issues, if they truly are issues, may be handled in the courts in pending or threatened litigation. However, the Task Force has considered the possibility of such abuses and is framing its recommendations to stop or deter such occurrences.

As you can see, this controversy is moving relatively swiftly toward conclusion. If you have insights or suggestions which would be helpful, please write the Task Force, in care of Steve Trost, or contact any member of the Task Force to discuss your observations or concerns.

First, Let's Kiss All the Lawyers, Part 2

By Steven M. Kaufman

No, this is not a repeat of my last commissioner's report. Yes, it is the sequel, though. I pondered for the last year, well, maybe the last month, about what might be worthwhile subject matter for this New Year's article and after reading the article I wrote last year, concluded that possibly some of you did not take to heart what I wrote. Maybe, just maybe, you did not read it. Since you most probably did not save our *Bar Journal* from last year, and even if you did, you most certainly cannot find it. I did keep mine, one reason being that the forty copies I had were sent to relatives and out of state friends and old law school buddies, and another reason to see if I lost any weight or had more gray in my beard, and the answer was yes to both issues as I looked at the picture before you. I do not want to get too serious in this, my second report to you, because by the time you read this, if you do, the wonderful holiday season will have passed, and a new year will again be upon all of us, and you might be in a bad mood again. This is a new year to reflect on the past triumphs, challenges, wins and losses, good days and bad days, and other memories of our days from 1993 as members of this honorable profession. Alas, someone saying with full conviction, that we should be boisterous in our praise of our profession and the professionals we are. Surely, I am safe in suggesting that 99.9 percent of the lawyers I come into contact with daily are great people to be around, worthy of praise, and characteristic of a profession long steeped in helping its fellow person. I have, on many occasions over the last year, bit my tongue when I heard negative or ugly jokes about lawyers. I have, on many occasions over the last year, wished that I could stick a sponge in someone's mouth when that someone makes a generic negative statement about lawyers. I, for one, hopefully two, feel that most of you are great, and I think you think so too, so stand up and put your verbal money where your mouth is.

I spent almost an entire workday recently calling up my lawyer friends in Ogden. I can assure you that I really have a great many other things to do, but I was promoting a local Bar function, and I thought it would be wonderful to call these people for some other reason than to discuss a case or promote a client's cause. Rather, I just put my phone to work, and had one of the best working days of 1993. The lawyers I contacted were gracious, pleasant, and in spite of myself, seemingly pleased to hear from me. I told a couple of my partners what I was doing, that these were not billable hours, and they even thought the gesture was positive. Not only that, but the attorneys I phoned had a chance to talk something other than shop with a fellow attorney, and that was wonderful. Think about spending a few minutes out of your busy workday discussing whatever with some of the best friends you probably have, your in town, down the street, attorney pals, or your out of town, up the highway attorney buddies.

No one can imagine the stress we attorneys feel as we carry the burden of our clients' woes on our legal backs. No one but those of us who tend to do just that every workday of our lives. Don't get me wrong, as I am not complaining, but facts are facts. I talk to lawyers every day about just about everything, and I am confident that more can be received from sharing our war stories with our contemporaries than can be achieved by bickering and arguing to them. We can do that all we want or need to in the courtrooms and conference rooms of Utah. By the way, as long as I am printing my two cents worth, there is too much of that negativity going on also. Argument for argument's sake gets older by the day to me, and after almost seventeen years of hearing the same old argumentive lawyers, it is refreshing to spend a few precious moments a day enjoying my lawyer

friends conversation without that. Furthermore, I think that if we each would really try to be a little bit kinder to each other that the whole legal system would work a little bit better. Sound trite? I don't think so not when you see all the cranky litigants who make for cranky lawyers. Shame on us all.

I am often verbally beat up in the morning at my office because I really try to be cheerful at 7:30 in the morning. Can you imagine that? But, lately, I think it has rubbed off. Most of my office comrades smile and are collegial most of the time. I really think they really enjoy coming to work in our law office, if one has to work anyway. And as I walk the halls of our courthouses and talk to lawyers and judges alike, I see most as individuals who love what they do and are happy doing it. Those who don't, well, like I said in my first commissioner's report, sit down and rethink that position and try to get on track, or maybe try something else, so your bad days which appear to be most days, do not rub off on the rest of us. We like what we do and we should like each other. The system works better that way and so do I.

As a footnote, I was going to write an article this year with a great many quotes and show you that I had possibly changed, but no such luck. I love being a lawyer, and being a Bar Commissioner has been a joyful plus. And, I get this forum once a year to promote lawyers. So, one more time, let's kiss all the lawyers, because if we don't, who will? Next year, Part Three? Happy New Year!

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An Intellectual Property Primer: What Every Attorney Should Know About Patents, Trademarks and Copyrights

By Bryan A. Geurts

I. INTRODUCTION

A recent article in the American Bar Association's Journal comments on the tremendous upsurgence of that area of the law collectively known as intellectual property: "Intellectual property for the 1990s will be what deal-making was for the 1980s."[1] Accordingly, if you have not experienced it yet, chances are you soon will have an increased number of businesses and individuals, many from your existing client base, who call upon you to render information and/or advice regarding patents, trademarks and copyrights.

The scope of this article covers these three traditional aspects of the intellectual property field, although the field also includes many related doctrines protecting intellectual property, including trade secrets, franchising, misappropriation of undeveloped ideas, rights of privacy and of publicity, licensing, and unfair competition law. Space limitations require this restriction in scope. This article is not intended as comprehensive. Therefore, detailed questions and individual fact situations should be referred to experienced intellectual property practitioners.

Specifically, when a patent matter arises, a duly registered patent attorney (one who has been admitted to practice before the U.S. Patent and Trademark Office) should be consulted. Most registered patent attorneys practice all aspects of intellectual property law, although many non-registered attorneys are qualified to practice in the areas of trademarks and copyrights. In all instances, it is appropriate to question whether a practitioner has adequate experience and expertise to be of assistance in a particular case.

BRYAN A. GEURTS is of counsel to Snow, Christensen & Martineau, where his practice focuses exclusively on intellectual property matters. He is registered to practice before the U.S. Patent & Trademark Office. He was awarded a B.S. degree in Civil Engineering and a B.A. degree in German from the University of Utah, and received his J.D. degree from Brigham Young University.

II. PATENTS — THE PROTECTION OF INVENTIVE GENIUS

A. What is a Patent?

A patent is a grant issued by the United States Government giving an inventor the right to exclude all others from making, using or selling his or her invention within the United States, its territories and possessions for a set period of time. In general, patents fall into one of three categories: utility, design or plant. The most common of these categories is the utility patent, which serves the purpose of protecting the function of an invention. Since the original Patent Statute was passed by the First Congress in 1790, over five million utility patents have been issued by the Federal Government.

In contrast to the utility patent, a design patent protects a new, original and ornamental design, and a plant patent protects any distinct and new variety of plant, other than a tuberpropagated plant, which is asexually reproduced. For example, the athletic shoe company L.A. Gear was recently held to have infringed ornamental design patents held by competitor Avia Group International.[2] Both utility and plant patents have a 17 year effective life from the date of issuance, while a design patent has a 14 year term.

B. What may be Patented?

By statute, a utility patent may be granted on "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof."[3] The original intent of Congress in enacting this statute was to protect "anything under the sun made by man."[4] More recently, however, the Court of Customs and Patent Appeals, now the Court of Appeals for the Federal Circuit, has ruled that the utility patent statute applies to "any process machine, manufacture or composition *unless* it falls within a judicially determined exception."[5]

Some of the possible exceptions include abstractions, such as scientific principles, ideas and results; business plans; mathematical equations or formulas; natural phenomena; algorithms and mental steps; and things that do not work, i.e. perpetual motion machines. Among the currently debated issues arising under the heading of patentable subject matter are the patentability of living organisms, and the patentability of computer programs.

C. Standards of Patentability

Assuming an invention falls within the allowable parameters of patentable subject matter, the next question is whether the invention meets the required standards of novelty, usefulness and nonobviousness. Each of these standards is a term of art and has generated literally volumes of case law. Of these, novelty is perhaps easiest to define; here the essential question is whether anyone else has done identically the same thing before? In other words, is the invention found within the "store of common knowledge."[6]

Closely related to the question of novelty is the more complex question of obviousness. The statute reads in relevant part:

> A patent may not be obtained though the invention is not identically disclosed or described [i.e. the standard of novelty is met] . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.[7]

For example, mere shifting of a hinge plate from one side of a plow to the other side was held to be an obvious modification in the landmark case of *Graham v. John Deere Co.*, 383 U.S. 1 (1966).

". . . the . . . question is whether the invention meets the required standards of novelty, usefulness and nonobviousness."

Furthermore, simply rearranging old elements which still perform the same function has been held to be an obvious change, not worthy of patent protection.[8] While federal courts have attempted to provide guidelines in an effort to more precisely define obviousness, the question of whether an invention is obvious in light of the prior art remains the most intensely contested issue in the realm of patents.

The final standard of usefulness or utility presents some interesting contrasts in interpretation. For example, consider the case of the attempted patenting of a slot machine. After a denial by the Patent Office Examiner to patent the "one-armed bandit" on the basis that it was not useful because of its injurious effect on public morals, the inventor appealed. In overturning the Examiner's decision, the Board of Appeals stated that an invention is useful for patent purposes if it can be used, designed or adapted "to accomplish a good result, though in fact it is oftener used (or is as well or even better adapted to be used) to accomplish a bad one."[9]

Consider next the case of a chemical process, which, while an important scientific discovery, was denied a patent because it did not produce an immediately useful product. In the case of *Brenner v. Manson*,[10] the U.S. Supreme Court indicated:

> We [do not] mean to disparage the importance of contributions to the

fund of scientific information short of the invention of something 'useful,' or that we are blind to the prospect that what now seems without 'use' may tomorrow command the grateful attention of the public. But a patent is not a hunting license. It is not a reward for the search, but a compensation for its successful conclusion. 'A patent system must be related to the world of commerce rather than to the realm of philosophy.'[11]

As a general rule, the *Brenner* case notwithstanding, usefulness is a weak requirement. Courts merely require some minimal showing that the invention has some beneficial use. An inventor need not show that his invention is commercially successful or that it will accomplish all intended functions.

D. Preclusions to Patentability

In addition to the requirements mentioned above, the patent statutes enumerate other conditions which will bar the issuance of a patent on an invention. Of greatest practical consideration are the "on sale" and "public use" bars found in 35 U.S.C. § 102(b). That section states that an inventor shall be entitled to a patent on his invention unless "the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States."[12]

For an extreme example of what the Supreme Court has held to be public use, consider the following case, in which a woman complained to an inventor that the springs supporting her corset kept breaking. The inventor proceeded to invent springs which were flexible and elastic, yet powerful enough to withstand the stress placed upon them. The woman employed the springs for a long time, with success. She later married the inventor.

However, the inventor failed to apply for a patent within the statutory period, waiting eleven years. During this time, the woman wore the springs regularly. On one occasion, the inventor asked her to "go out" and remove the springs, which he later displayed to a witness. The Supreme Court held that the use of the springs was "public," activating the statutory bar, reasoning that the inventor had not "restricted" her from exhibiting the springs publicly.[13] A dissenting justice showed more self-restraint, arguing that the invention was "incapable of public use."[14]

The policy underlying both of these statutory bars is that an inventor ought not be able to test the commercial waters for un unduly long period of time prior to filing for a patent, since the net effect is to lengthen the effective life of the patent grant. Stated differently, a valuable property right should not be granted to someone who is dilatory in bringing his invention to the public in the form of a patent. Thus, these statutory time bars relative to a filing date goad inventors to get their inventions in the procedural mill of the Patent Office as promptly as possible.

One notable exception to the "public use" bar is when the invention is being

tested for performance. Here, however, the facts will be closely scrutinized to insure that "the inventor was testing the [invention], not the market.[15] Other significant statutory preclusions to patentability include instances where the invention is abandoned by the inventor and where the invention has been patented or described in a printed publication anywhere in the world more than one year prior to the date of application for patent.

E. The Patent Instrument

A patent application serves numerous functions. On the one hand, an application for patent should be designed to maximize the benefit to be enjoyed by the applicant. This includes not only successful prosecution in the Patent Office resulting in issuance of a patent, but also designing the patent to resist attack during litigation following infringement.

On the other hand, an application must be written and prosecuted to conform to strict Patent Office requirements to act in the utmost good faith. This includes disclosure of any and all prior art of which the inventor or anyone related to the invention is aware which might have a bearing on the Patent Examiner's determination of worthiness for a patent, even if such prior art would be detrimental to the applicant's case.[16] Also, an application must disclose the best mode contemplated by the inventor of making and using the invention at the time of the filing of the application.[17]

Other important functions of the patent application are to identify the inventor/applicant, to identify and define the invention, to define what patent rights are obtained once the patent issues and to provide a basis for licensing the invention.

II. TRADEMARKS — PROTECTION OF NAME RECOGNITION

A. Subject Matter.

A trademark includes any word, phrase, symbol, or design, or any combination thereof, which identifies and distinguishes the source of goods of one party from those of others.[18] The same definition applies for a service mark with the exception that a service mark is used in connection with services.[19] The availability of trademark protection depends on whether the mark is categorized as generic, descriptive, suggestive or arbitrary. A generic mark can never be given protection. Words such as "soap" and "handsoap" are examples of generic terms which cannot receive trademark protection.[20]

A mark which is merely descriptive of the goods or services with which it is used will not be granted protection unless it has acquired distinctiveness through demonstrated recognition. This recognition, called secondary meaning, is an acquired meaning created in the marketplace in which a less than distinctive mark becomes distinctive. It is accomplished when a mark becomes associated with the producer rather than the product itself. For example, the descriptive phrase "100% Pure Soap" could receive trademark protection only if people come to readily identify the phrase with a certain brand of soap.[21]

"A trademark includes any word, phrase, symbol or design . . . which identifies and distinguishes the source of goods . . . ."

A suggestive mark is usually inherently distinctive and therefore protectable. Such a mark requires something more than description; it requires thought or imagination which conjures up images of a product. Thus, the phrase "Ivory Soap"® is protectable as a suggestive mark.[22] A mark is almost always distinctive if it employs terms which are fanciful and arbitrary. Therefore, the phrase "Camay Soap" which employs the arbitrary and fanciful term "Camay" is an example of the most protected kind of mark, the arbitrary mark.[23]

Trademark doctrines may protect a product's shape or color, protect against deceptive advertising, and protect against misdescriptive advertising resulting in confusion, but do not protect functional features of a product. Thus, pink fiberglass is a recognized trademark of Owens-Corning Fiberglass Corporation[24], a synthetic seat cover may not receive a trademark under the name "Lovee Lamb,"[25] and the shape of the Fantastic Spray Bottle may be subject to trademark protection because of its distinctive shape which is not necessarily related to its function.[26]

B. Registration

Trademark rights arise essentially from actual use of a mark. Federal registration is not required. However, federal registration can secure benefits beyond the rights acquired by merely using the mark. For instance, the owner of a federal registration is presumed to be the owner of the mark for the goods and services specified in the registration, and is presumed to be entitled to use the mark nationwide. In fact, after five consecutive years of registration, a mark may achieve "incontestable" status, which provides a number of added benefits, for example a conclusive right to continue to use the mark.

If a trademark is not registered with the Patent and Trademark Office, common law trademark rights are available within the particular geographical areas in which the mark is used. Additionally, federal law protects against unfair competition. Hence, under federal law, false designation of the origin of a product and false description of a product are forbidden.[27]

In addition, most states provide a system for the registration of trademarks. Generally, state registration is desirable when a mark cannot be federally registered and, in some cases, as an interim measure until a mark can be federally registered.

C. Trademark Infringement and the Likelihood of Confusion

In general, a mark is infringed when two substantially similar marks are used to designate similar goods and/or services such that a likelihood of confusion results as to the source of those goods and/or services. Thus, in order to prevail in a trademark infringement action, the plaintiff must show: (1) the likelihood of confusion as a result of the use of the similar mark by another party with respect to their goods or services; (2) the exclusive right to use the mark with respect to their goods or services in a trading area; (3) prior and continuous use; and (4) the validity of the protectable mark.

For example, in 1975, the makers of the "Drizzler"® brand golf jacket attempted to enjoin the manufacturers of "Drizzle"® brand women's coats from distributing the coats under the Drizzle® name alleging trademark infringement.[28] The Second Circuit held that there was no likelihood of confusion, relying on the district court's conclusion that the "differences in appearance, style, function, fashion appeal, advertising orientation, and price [were]

'significant.'"[29]

The owner of a distinctive mark can also prevent others from using a substantially similar mark if use of the similar mark is likely to dilute the distinctiveness of the first mark.[30] For example, computer research mogul "Lexis" initially enjoined Toyota from using the name "Lexus" for its luxury automobiles, but the Second Circuit reversed the district court, reasoning that the two words are pronounced differently, that the "Lexus" mark had stylized, script-like lettering, and that the market for Lexis research is limited to accountants and attorneys, a sophisticated market which is likely to readily distinguish between the two marks.[31]

D. Duration

Unlike copyrights or patents, trademarks and service marks can last indefinitely if the owner continues to use the mark to identify its goods or services. The term of a federal registration is ten years, with ten-year renewal terms. However, between the fifth and sixth year after the date of initial registration, the registrant must file an affidavit setting forth that the mark is in continued use in commerce.[32] If no affidavit is filed, the registration will be canceled.

Genericide occurs when a previously distinctive mark takes on a generic meaning through public usage causing a failure to identify the mark with a specific brand, but with a type of product or service in general. Many marks have become unprotectable through genericide, including the following terms which are undoubtedly familiar: escalator, trampoline, raisin bran, yo yo, and kerosene. When genericide becomes a danger, a number of companies have launched aggressive advertising campaigns to preserve the distinctiveness of their marks. For instance, Johnson & Johnson now advertises "Band-Aid brand adhesive strips"® as opposed to merely "Band-Aids."® This highlights the distinction between Band-Aid® as a generic term for a product and Johnson & Johnson's protectable trademark.

III. COPYRIGHTS — PROTECTION OF CREATIVE EXPRESSION

A. Subject Matter

Fundamental to the law of copyright is the distinction between an idea and an expression of that idea; protection extends only to the expression of the idea and not to the idea itself. Copyright protection is not available for any procedure, process, system, method of operation, concept, principle, discovery or mere research and effort.

Therefore, the federal copyright statute only provides protection to original works of authorship fixed in **tangible** media of expression.[33] Works of authorship include the following categories:

(1) literary works;
(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works; and
(7) sound recordings.[34]

Thus, copyright protection may range from original works of art to computer software.

By way of illustration, while one may obtain a copyright on a poster advertising

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a circus,[35] the language in a business contract has been held to be non-copyrightable subject matter,[36] as has an author's research involved in writing a book based on a true story.[37] Furthermore, compilations of facts and directories are generally only copyrightable when the production involves "selection, creativity and judgment.[38] Thus, a listing of a baseball card collection which divided premium cards into common cards has been held to be copyrightable, while the U.S. Supreme Court recently held that the raw data in a phone book is not copyrightable.[39] Finally, while ledger sheets employing ruled lines and headings have been held not to be copyrightable,[40] the creative expressions of computer software are copyrightable.[41]

B. Notice

While affixation of a copyright notice on an original work of authorship continues to guarantee certain rights and remedies against potential infringement, notice is no longer required to preserve one's copyright in the United States if the work was published after March 1, 1989.[42] In other words, to determine whether a copyright notice is required for copyright protection, one must determine the date of publication of the work.[43]

Works published before January 1, 1978, not containing a proper copyright upon publication, have entered the public domain, from which there is no return.[44] Works published between January 1, 1978, and March 1, 1989, are required to have copyright notice, but defective notice can be cured if corrected within 5 years. Works published after March 1, 1989 are not required to contain a copyright notice to receive protection, but will receive some benefits from giving notice. Thus, the wise practitioner should no longer consider the absence of notice to be an invitation to copy, while she will place notice on all copies of a published work and will register the copyright with the copyright office.

A valid copyright notice must contain the following: (1) the symbol "©", the word "copyright" or the abbreviation "copr."; (2) the year copies of the work were first distributed to others; and (3) the name of the entity claiming copyright ownership.[45] Other terms such as "All rights reserved" may be added as desired, but are not necessary to provide statutory notice.

Registration is not a prerequisite for copyright protection, and so a copyright notice may and should be placed on virtually all creative works regardless of registration status. However, copyright registration is a prerequisite to the filing of a copyright infringement action.[46] Copyright registration must be performed within three months after publication of the work in order to receive the full advantages of all procedures and remedies provided by the Copyright Act.[47] The duration of a copyright interest in a work created on or after January 1, 1978 begins at its creation and continues for the lifetime of the author plus an additional fifty years.

"Genericide occurs when a previously distinctive mark takes on a generic meaning. . ."

C. Fair Use Exceptions

Although generally one may not directly copy or produce a substantially similar likeness of a copyrighted work, there are some statutory exceptions. The Copyright Act provides for "fair use" of copyrighted subject matter without being subject to liability for copyright infringement. Use of otherwise protectable expressions for the purposes of criticism, comment, news reporting, teaching, scholarship or research, for example, is not an infringement of the copyright. In determining whether a use is a "fair use" under the Act, the following factors are assessed:

(1) the nature of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the work used; and

(4) the effect of the use on the market.

In the seminal case of *Harper & Row, Publishers, Inc. v. Nation Enterprises*,[48] *the Nation* magazine published excerpts of President Gerald R. Ford's autobiography, the rights of which were held by Harper & Row. Although Harper & Row had planned to sell the excerpts to *Time* magazine, an undisclosed service "scooped" the article by giving the material to *the Nation.*

Holding that the use of the article was not fair, the Supreme Court resolved that *the Nation* had made commercial use of the excerpts; had gone beyond news reporting; had created a "news event" out of its unauthorized report; had published an otherwise unpublished work; had taken the key portions of the original work; and had had an actual negative effect on the market for the work.[49] Instances in which courts have found a use to be fair, however, include legitimate parodies and satires, and photocopies for classroom use.

D. Infringement

To prove infringement of a copyrighted work, the owner of a copyright must show that the defendant directly copied the owner's work and that the infringing copy is at least substantially similar to the original. Thus, posters for the Robin Williams movie "Moscow on the Hudson" were held to infringe a cover of the *New Yorker* Magazine when the poster's style was substantially similar to the style used on the magazine cover.[50]

However, the Bee Gees were not liable for copyright infringement for their song "How Deep Is Your Love" where there was no evidence that the Bee Gees had enjoyed access to the plaintiff's song.[51]

E. Common Law Copyright

In addition to federal copyright protection, common law doctrines exist, protecting works which are not fixed in a tangible medium. These doctrines include the right of privacy, the right of publicity and other state law doctrines. For example, when a portable toilet company named its wares "Here's Johnny" portable toilets, Johnny Carson successfully enjoined their use of his famous phrase based on his right of publicity in the phrase.[52]

F. Work Made for Hire

Generally, the person that created a work is deemed to be both the author of the work and the owner of the copyright in the work. An exception to this rule occurs under the "work made for hire" doctrine. A work is "made for hire" when it is prepared by an employee within the scope of employment. It may also occur when a person is hired to create a work pursuant to an agreement.

Under the "work made for hire" doctrine, the work is deemed to be authored by the person or entity that paid for or contracted for the work to be performed. That person or entity is also deemed to be the owner of the copyright in the work.

V. CONCLUSION

Tips for the Practitioner:

Practitioners, inventors, and all clients should be on their guard, watching out for intellectual property protection possibilities and potential infringement issues involved in the invention, use, manufacture and distribution of products. Whenever a client has created or manufactured a new product, or expects to do so in the future, the practitioner should ask two questions: (1) Does the device deserve patent protection? and (2) does the device infringe an existing patent?

When a client desires to advertise its goods or services, a name, logo or other form of mark associated with the client's products should be considered for trademark protection. When clients have written, drawn, or otherwise created anything constituting an expression in a tangible medium, copyright protection should be in the forefront of the practitioner's mind. Many other doctrines are also available to protect intellectual property, including trade secrets and unfair competition. A number of products, including interactive multimedia which promises to be the wave of the future, merit the protection afforded by patent, trademark, copyright and other intellectual property doctrines simultaneously.

Practitioners should expeditiously and diligently assist their clients in seeking expert advice to resolve these issues. The manner in which clients handle their intellectual property and whether they follow correct procedures can greatly impact the success of their business operations.

[1]Richard Reuben, What's New In Intellectual Property, A.B.A.J., Jan. 1993, at 72.

[2]*Avia Group International, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557 (Fed. Cir. 1988).

[3]35 U.S.C.A. § 101.

[4]*Diamond v. Chakrabarty*, citing S. Rep. No. 1979, 8 2d Cong. 2d Sess., 5 (1952); H.R. Rep. No. 1923, 8 2d Cong., 2d Sess., 6 (1952).

[5]*In re Pardo*, 684 F.2d 912, 916, 214 U.S.P.Q. 673, 677 (1982).

[6]*Dewey & Almay Chemical Co. v. Minex Co.*, 124 F.2d 986, 989 (2d Cir. 1942) (Learned Hand, J.).

[7]35 U.S.C.A. § 103.

[8]*Sakraida v. AG Pro Inc.*, 425 U.S. 273 (1976).

[9]*Ex Parte Murphy*, 200 USPQ 801 (Bd. App. 1977).

[10]383 U.S. 519 (1966).

[11]*Id.* at 536 (quoting Application of Ruschig), 343 F.2d 965, 970 (2nd Cir. 1965).

[12]35 U.S.C.A. § 102(b).

[13]*See Egbert v. Lippmann*, 104 U.S. 333 (1881).

[14]*Id.* at 339, Miller, J., dissenting.

[15]*TP Laboratories, Inc. v. Professional Positioners, Inc.*, 724 F.2d 965, 220 USPQ 577 (Fed. Cir. 1984).

[16]37 C.F.R. § 1.56.

[17]35 U.S.C.A. § 112.

[18]15 U.S.C.A. § 1127.

[19]*Id.*

[20]Paul Goldstein, *Copyright, Patent, Trademark, and Related State Doctrines* at 223 (3d ed. 1980).

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Owens-Corning Fiberglass Corp.*, 774 F.2d 1116 (Fed. Cir. 1985).

[25]*In Re Budge Manufacturing Co.*, 857 F.2d 773 (Fed. Cir. 1988).

[26]*In re Morton-Norwich Products, Inc.*, 671 F.2d 1332 (Fed. Cir. 1982).

[27]15 U.S.C.A. § 1125.

[28]*McGregor-Donigen, Inc. v. Drizzle, Inc.*, 599 F.2d 1126 (2nd Cir. 1979).

[29]Id. at 1134.

[30]*See, e.g., Mead Data Central, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026 (2nd Cir. 1989).

[31]*Id.*

[32]15 U.S.C.A. § 1058.

[33]17 U.S.C.A. § 102.

[34]*Id.*

[35]*Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

[36]*Donald v. Zack Meyons T.V. Sales & Service*, 426 F.2d 1027 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971).

[37]*Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981).

[38]*Eckes v. Card Prices Update*, 736 F.2d 859, 863 (2nd Cir. 1984).

[39]*Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S.Ct. 1282 (1991).

[40]*Baker v. Selden*, 101 U.S. 99 (1897).

[41]*Computer Associates International, Inc. v. Atari, Inc.*, 982 F.2d 693 (2nd Cir. 1992).

[42]2 Nimmer on Copyright § 7.02[c].

[43]*Id.*

[44]*Id.*

[45]17 U.S.C. § 302 *et. seq.*

[46]17 U.S.C. § 411.

[47]17 U.S.C. § 412.

[48]471 U.S. 539 (1985).

[49]*Id.* at 561-69.

[50]*Steinberg v. Columbia Picture Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987).

[51]*Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984).

[52]*Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).

Mechanic's Lien Basics

By Darrel J. Bostwick

Editor's Note: This is the first in a series of "HOW TO" articles that will become a regular feature in the Utah Bar Journal. *These articles will describe how to practice in specific areas of the law including basic principles, practice tips, and insights into how the system works. We hope that you will find them useful. The* Journal *needs "How To" articles for future issues. Because the focus is on reality rather than philosophy, these articles should be more easily written. If anyone is interested in submitting a how to article, please contact Patrick Hendrickson at 328-3600, Brad Betebenner at 531-1777, or David Hartvigsen at 532-1900.*

DARREL J. BOSTWICK is a shareholder in the Salt Lake City office of Walstad & Babcock. Mr. Bostwick has worked extensively in construction and has been a licensed Utah General Contractor. Walstad & Babcock and Mr. Bostwick represent clients involved in all aspects of the construction industry.

This article will review some of the basic requirements and considerations of the Utah mechanic's lien law, Utah Code Annotated § 38-1-1 *et seq.*

PRELIMINARY NOTICES AND NOTICES OF COMMENCEMENT

Generally, preliminary notices are required to be sent by certified mail to the general contractor as a means of preserving the claimant's right to file a mechanic's lien. A general contractor is defined as anyone having a direct contract with the owner for construction (referred to as an "original contractor" in the mechanic's lien statute). Preliminary notices can be sent at any time on a project. However, preliminary notices will cover only that labor and material furnished to a project within forty-five days prior to the preliminary notice and throughout the remainder of the project. Preliminary notices also preserve a claimant's right to file a claim against a payment bond, if one is provided. A preliminary notice must contain the following:

1) The name, address, and telephone number of the person furnishing the labor, service, equipment, or material;

2) The name and address of the person who contracted for the furnishing of the labor, service, equipment, or material; and

3) The address of the project or improvement or a drawing sufficient to describe the location of the project or improvement.

Currently, preliminary notices are required on all construction projects except for residential construction, which is defined as all single-family residences and multifamily residences up to and including fourplexes and work performed on land development for residential subdivisions. In addition, there are two other exceptions to the preliminary notice requirements. Persons performing labor for wages and first-tier subcontractors and suppliers (those having a contract with the general contractor) are not required to send preliminary notices on any project.

However, even if the preliminary notice requirements otherwise apply to a particular project or claimant, such requirements will be excused if the general contractor does not file a notice of commencement with the county recorder within thirty days after actual work at the project site commences. A notice of commencement must contain the following:

1) The name and address of the owner of the project or improvement;

2) The name and address of the original contractor;

3) The name and address of the surety providing any payment bond for the project or improvement or, if none exists, a statement that a payment bond was not required for the work being performed;

4) The name and address of the project; and

5) A legal description of the property on which the project is located.

Notices of commencement are indexed by the county recorder and kept on file for inspection by any interested party. If the general contractor fails to file the notice of commencement as required, even unknown claimants (those who may not have filed preliminary notices) can file a mechanic's lien against the owner's property or make a claim against the general contractor's payment bond, if one is provided.

PREPARING AND FILING A MECHANIC'S LIEN

If a claimant has preserved its mechanic's lien right by properly sending a preliminary notice, or if it is otherwise exempted from the requirements, and has not been paid for the work or materials furnished on a construction project, that claimant may file a mechanic's lien against the property to secure the debt. The notice of lien must be filed with the county recorder in the county where the property is located. The statutory requirements for the content and time for filing a mechanic's lien must be strictly followed. Although substantial compliance will sometimes suffice with regard to certain elements of the form of the mechanic's lien, the risks and cost of enforcing a disputed lien are too great. Further, there is no leeway in or tolling of the time for filing a mechanic's lien. If an amended lien is required to correct technical errors in the lien, the amendment must be filed within the original filing time. Currently, everyone furnishing labor, material, equipment or services on a construction project has 80 days from substantial completion of the entire project to file a notice of lien with the county recorder. The term "substantial completion" is commonly defined to mean the date on which a construction project can be used for its intended purpose. Substantial completion may or may not be accompanied by a certificate of substantial completion or the issuance of a punch-list, as is required on many construction projects. Also, care must be taken because an owner may or may not choose to use or occupy a project upon substantial completion. The practical reality of having substantial completion be the milestone from which the time for filing a mechanic's lien is measured is that a claimant must not wait until the last moment to file the lien. If it does, a costly dispute will certainly arise as to the date of substantial completion.

A notice of mechanic's lien must contain the following information:

1) Name of the lien claimant;

2) Although the statute does not require that an amount be stated, the lien should include the amount claimed;

3) Name of the reputed or record owner;

4) Name of the person who employed the claimant or to whom the claimant furnished materials;

5) The dates on which the first and last labor was performed or materials and equipment were furnished;

6) A description of the property against which the lien is claimed, sufficient for identification (a legal description should be used since no Utah case has addressed the issue of whether a lesser description is sufficient);

7) The signature of the lien claimant or his authorized agent; and

8) An acknowledgement is required with all documents recorded with the county recorder as required by Utah Code Annotated § 57-3-1 *et seq.*

"The statutory requirements for the content and time for filing a mechanic's lien must be strictly followed."

In addition to filing the notice of lien with the county recorder, the lien claimant should deliver or send by certified mail a copy of the notice of lien to the reputed or record owner within thirty days after filing the notice of lien. Failure to do so will preclude a claimant from recovering costs and attorney's fees in a mechanic's lien foreclosure action.

ENFORCING A MECHANIC'S LIEN

Currently, a claimant must file a mechanic's lien foreclosure action within twelve months after final completion of the contract between the owner and the general contractor; however, a claimant is allowed an additional thirty days if the work on the project is suspended before that contract is completed. In addition, the foreclosure action must be brought in the county where the property is located. If the claimant does not file the foreclosure within the twelve-month time period, the lien expires and cannot be revived, even with an amendment to the pleadings in a law suit which commenced before the twelve-month period lapsed. The Utah courts view the twelve-month time period as a "statute of duration" rather than a "statute of limitation." However, under Utah case law, a claimant may join other parties to the lien foreclosure action by way of amendment after the twelve-month period has lapsed as long as a mechanic's lien foreclosure action was commenced against an interested party before the twelve-month period lapsed and a *lis pendens* has been filed with the county recorder within the same twelve-month period.

The mechanic's lien statute requires a *lis pendens* to be filed with the county recorder in the county where the property is located and where the foreclosure action is commenced. If a claimant fails to file a *lis pendens*, the foreclosure action will not have any effect on persons who have an interest in the property and who are not joined in the foreclosure action and do not have actual knowledge of the foreclosure action. The *lis pendens* serves as notice to all the world that the title to the property is involved in a legal dispute. If a lien claimant is successful in the foreclosure action and is granted a judgment of foreclosure, the property can be sold at a sheriff's foreclosure sale and the lien claimant paid from the sale proceeds, including all costs and reasonable attorney's fees they are part of the judgment.

CONCLUSION

The basic elements of preliminary notices and mechanic's liens have been briefly discussed in this article; many judicial and statutory subtleties and nuances remain in the Utah mechanic's lien law which are beyond the scope of this article. In addition, there are changes to the Utah mechanic's lien statute almost every state legislative session. In fact, there will likely be major mechanic's lien changes proposed and debated during the upcoming legislative session in January, 1994. Care should be taken to assure that the legal advice and service given to clients is based upon the current statutes and cases.

Commission Highlights

During its regularly scheduled meeting of October 28, 1993, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board engaged in discussions on court consolidation with Hon. Michael Murphy, Third District Court; Tim Shea, Administrative Office of the Courts; Scott Daniels and Phil Fishler, Co-Chairs of the Bar's Courts & Judges Committee; and James B. Lee.
2. Jim Clegg presented Richard D. Burbidge with a resolution of appreciation and expressed thanks for his thoughtfulness and devotion in forging a renewed alliance between solo practitioners, small firm lawyers and the Utah State Bar. Burbidge had served as chair of the Utah State Bar Sole Practitioner/Small Firm Task Force from July 1992 through June 1993.
3. The Board approved the minutes of the September 23, 1993 meeting.
4. Jim Clegg reported on the meeting of the Delivery of the Legal Services Needs Assessment Advisory Board.
5. Clegg reported on the New Mexico Bar Annual meeting which he recently attended.
6. Jim Clegg reported on discussions related to possible changes in the judicial nominating process. The Board voted to give latitude to the Executive Committee to take action on the issue, if needed.
7. The Board discussed holding commission meetings outside Salt Lake City.
8. The Board voted to implement a policy of reciprocating the expenses the Bar would cover for visiting bar presidents to our annual meeting.
9. The Board voted to take a survey of non-resident Bar members to determine their level of interest in Bar matters.
10. John Baldwin referred to his written Executive Director's report and pointed out the recent licensing statistics. Baldwin directed attention to the increased building use by non-bar groups and referred to the listing of attorneys who have either resigned or been suspended for non-payment of licensing fees. Baldwin also indicated that the usual activity is continuing with the Utah Dispute Resolution program and referred to the monthly summary report.
11. Chair of the Judicial Council's Court Technology Committee, Judge Anne Stirba, appeared to report on the findings of the Committee. Judge Stirba answered questions indicating that the project is still in an input stage and is open for suggestions and comments.
12. Budget & Finance Committee Chair, J. Michael Hansen, reviewed the September financial statements.
13. Baldwin indicated the Bar is preparing a separate communication to be sent to Law & Justice Center donors along with a five-year report and building history which would be drafted in the next couple of months and mailed out to major contributors.
14. Jim Clegg indicated that he and John Baldwin have generally discussed creating a long-range planning committee. The Board voted to have Paul Moxley select a long-range planning committee.
15. The Board voted to authorize the Office of Attorney Discipline and private counsel to institute a suit in the Third District Court against CNA for unauthorized practice of law.
16. Judge James Z. Davis referred to his written Judicial Council report noting that the Judicial Council voted to increase the size of the council by one more justice of the peace. He also noted that the Court Complex Funding Committee report was well received by the Governor's office.
17. Young Lawyers Division President, Mark S. Webber, reported on current Division activities.
18. Salt Lake County Attorney, David Yocom, appeared to discuss a plan for a county justice center and the Board engaged in a general discussion regarding the court complex and the proposal for a Justice Center as presented by Yocom.
19. Professional Liability Committee Co-Chairs, Carman Kipp and Philip Fishler; Lawyer Benefits Committee Chair, Randon Wilson; and Don Roney and Rhela Moulding of Rollins Hudig Hall appeared to review the Status of the Professional Liability Insurance Program.

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

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

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

Applications for Board representation from rural districts outside the Wasatch front and women and minority attorneys are particularly encouraged. Bar members who wish to be considered for appointment must submit a letter of application including a resume. Applications are to be mailed to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East #310, Salt Lake City, UT 84111, and must be received no later than 5:00 p.m., on January 19, 1994.

NOTICE

The 12th annual State and Local Government Conference, sponsored by the Government and Politics Legal Society of the J. Reuben Clark Law School, will be held on Friday, March 18, 1994.

Further information will be forthcoming.

Discipline Corner

PRIVATE REPRIMAND:
(under old rules)

An attorney was privately reprimanded and placed on one year probation for violating Rules 1.1, COMPETENCE, 1.3, DILIGENCE, 1.4(a) COMMUNICATION, and 8.4(d) CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE. The attorney was employed as a prosecutor and neglected to prepare pleadings necessary to conclude several cases, failed to appear for two cases in Justice Court and failed to prepare certain civil documents requested by his client. In mitigation the attorney was substantially impaired by alcohol but has successfully completed an in-house alcohol rehabilitation program.

ADMONITIONS:

On September 21, 1993, an attorney was Admonished for violating Rule 1.4(b), COMMUNICATION, by failing to timely notify a client that the attorney had determined there was no merit to the case and the matter was not being pursued. The attorney was retained in or about October 1990 in connection with a wrongful termination action. In or about January, 1991, the attorney determined the client's case had no merit and took no further action. The attorney failed to notify the client of that decision.

SUSPENSIONS:

1. On November 9, 1993, Donald E. Elkins was suspended from the practice of law for one year by Judge Lynn W. Davis for violating Rule 1.4, COMMUNICATION, Rule 4.1(a), TRUTHFULNESS IN STATEMENTS TO OTHERS and Rule 8.4(c) (d), MISCONDUCT, of the Rules of Professional Conduct. He was also ordered to make restitution to his clients in the additional amount of $7,266.67, to pay the costs of the disciplinary action, and to pass an examination on professional responsibility as conditions precedent to reinstatement. Mr. Elkins was suspended for falsely representing to his clients that he had filed a civil suit on their behalf and that a judgment had been entered in their favor when in fact no suit had ever been filed. These misrepresentations were made to his clients to cover up the fact that he had provided no meaningful legal services on their case since being retained almost 3 years earlier.

2. On December 1, 1993, Judge Don V. Tibbs, pursuant to a Discipline by Consent, entered an Order of Suspension against Jim R. Scarth, Kane County Attorney. The Order suspends Mr. Scarth from the practice of law for the period of two years on each of two counts. However, the Order stays all but ninety days of each suspension provided Mr. Scarth serves, and successfully completes, two years of probation on each count with the terms of probation and suspension to run concurrently. If any of the terms are violated the remaining term of suspension will be reinstated and will run consecutively.

The terms of probation include in-patient treatment for alcohol abuse, no consumption of alcohol, resignation as Kane County Attorney, no attempts to become employed or elected as a prosecutor during the probation and other standard terms. Mr. Scarth was suspended for violating Rule 1.7(a) CONFLICT OF INTEREST, Rule 1.7(b) CONFLICT OF INTEREST, and Rule 8.4(b) and (d) MISCONDUCT (Two violations). Mr. Scarth was arrested and either pled guilty or was convicted three times for alcohol related offenses while acting as the Kane County Attorney. Mr. Scarth also assisted a close friend in defense of a prosecution for Driving Under the Influence of Alcohol. This assistance came after Mr. Scarth had recused himself from prosecuting the matter, due to the obvious conflict of interest, and after he had appointed another attorney to act as Kane County attorney in the prosecution. This action was in violation of Utah Code Ann. §17-18-1, et seq.

REINSTATEMENT

On November 15, 1993, Gary Anderson filed a Petition for Reinstatement to Practice Law. Mr. Anderson has been suspended since September 28, 1992. Persons desiring to file notice of their opposition or concurrence to his reinstatement should file such notice with the Fourth Judicial District Court within thirty (30) days of the date of this publication. It is requested that a copy of the notice of opposition or concurrence be sent to the Office of Attorney Discipline, 645 South 200 East, Salt Lake City, UT 84111.

PARALEGAL GUIDELINES

The Office of Attorney Discipline is frequently asked for guidelines related to the proper and ethical use of paralegals. The office has reviewed the National Association of Legal Assistants Guidelines for Utilizing Paralegals as well as the ABA Model Guidelines for Utilization of Legal Assistant Services and in an attempt to provide a safe harbor for those lawyers utilizing paralegals until the Supreme Court Advisory Committee on Discipline formally considers amending Rules 5.3 and 5.5(b) of the Rules of Professional Conduct, hereby, with the concurrence of the Board of Bar Commissioners, promulgates the following standards:

NALA STD. V — Legal assistants shall:

1. Disclose their status as legal assistants at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public;

2. Preserve the confidences and secrets of all clients; and

3. Understand the Rules of Professional Conduct, as amended and these guidelines in order to avoid any action which would involve the attorney in a violation of the Rules, or give the appearance of professional impropriety.

NALA STD. VI — Legal assistants shall not:

1. Establish attorney-client relationships; set legal fees, give legal opinions or advice; or represent a client before a court; nor

2. Engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law.

NALA STD. VII — Legal assistants may perform services for an attorney in the representation of a client, provided:

1. The services performed by the legal assistant do not require the exercise of independent professional legal judgment;

2. The attorney maintains a direct relationship with the client and maintains control of all client matters;

3. The attorney supervises the legal assistant;

4. The attorney remains professionally responsible for all work on behalf of the client, including any actions taken or not taken by the legal assistant in connection therewith; and

5. The services performed supplement, merge with and become the attorney's work product.

NALA STD. VIII — In the supervision of legal assistant, attorneys shall:

1. Design work assignments that correspond to the legal assistants' abilities, knowledge, train-

ing and experience.
2. Educate and train the legal assistant with respect to professional responsibility, local rules and practices, and firm policies;
3. Monitor the work and professional conduct of the legal assistant to ensure that the work is substantively correct and timely performed;
4. Provide continuing education for the legal assistant in substantive matters through courses, institutes, workshops, seminars and in-house training; and
5. Encourage and support membership and active participation in professional organizations.

NALA STD. IX — Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's Rules of Professional Conduct; and within the preceding parameters and proscriptions, a legal assistant may perform any function delegated by an attorney, including but not limited to the following:

1. Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the legal assistant, and the client contact is under the supervision of the attorney.
2. Locate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant.
3. Conduct investigations and statistical and documentary research for review by the attorney.
4. Draft legal documents for review by the attorney.
5. Draft correspondence and pleadings for review by and signature of the attorney.
6. Summarize depositions, interrogatories, and testimony for review by the attorney.
7. Attend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney.
8. Author and sign letters provided the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.

f) ABA STD. 9, as modified:

A lawyer may not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal business. A lawyer may compensate a legal assistant based on the quality of the legal assistant's work and value of that work to a law practice. A lawyer may not compensate a legal assistant based solely upon a quota of revenues generated for the firm by a legal assistant's work on a specific case or a group of cases within a certain prescribed time period, although a legal assistant may participate in a firm's profit sharing plan.

Guidelines tailored to a specific practice area may be promulgated from time to time to further guide the Bar in the proper utilization of paralegals subject to review by the Supreme Court Advisory Committee and the Utah Supreme Court.

ANNOUNCEMENT FROM THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

IN RE: STUDENT PRACTICE

GENERAL ORDER
Filed December 6, 1993

Before McKAY, Chief Judge, and LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL AND KELLY, Circuit Judges.

By this General Order, the court adopts the following provisions relating to student practice, which will become effective January 1, 1994:

A. Entry of Appearance on Written Consent of Party and Approval of Supervising Attorney. An eligible law student may enter an appearance in this Court on behalf of any party provided that the party on whose behalf the student appears has consented thereto in writing, and provided that a supervising lawyer who is a member in good standing of the bar of this Court has also indicated in writing approval of that appearance. The approval of the supervising attorney shall contain a certification by the supervising attorney that the student has satisfied the eligibility requirement of Paragraph C and it shall also include a copy of the law school certification required in Paragraph C(3). In each case, the written consent and approval shall be filed with the Clerk of the Court and shall be served on all other parties.

B. Appearance on Briefs and Participation in Oral Argument. A law student who has entered an appearance in a case pursuant to paragraph (A) may appear on the brief(s), provided the supervising attorney also appears on the brief(s), may participate in oral argument, provided the supervising attorney is present in court, and may take part in other activities in connection with the case, subject to the direction of the supervising attorney.

C. Law Student Eligibility. In order to be eligible to make an appearance pursuant to this Rule, the law student must: (1) be enrolled and in good standing in a law school accredited by the American Bar Association, or be a recent graduate of such a school awaiting the first sitting of the bar examination following the student's graduation or awaiting the result of such a state bar examination; (2) have completed legal studies amounting to at least four semesters, or the equivalent if the law school is on some basis other than a semester basis; (3) be certified, by either the Dean or a faculty member of the law school designated by the Dean, as being of good character and competent legal ability, and qualified to provide the legal representation permitted by this Rule; (4) have knowledge of and be familiar with the Federal Rules of Civil, Criminal, and Appellate Procedure and Evidence, the Code of Professional Responsibility, and the Rules of this Court.

D. Supervising Attorney. An attorney under whose supervision an eligible law student undertakes any activity permitted by this Rule shall: (1) be a member in good standing of the Bar of this Court; (2) assume personal professional responsibility for the quality of the student's work; (3) guide and assist the student in preparation to the extent necessary or appropriate under the circumstances; (4) sign all documents filed with the Court; the student may also sign such documents, but the signature of the attorney is necessary; (5) appear with the student in any oral presentations before this Court; (6) file with this Court the attorney's written consent to supervise the student; (7) be prepared to supplement any written or oral statement made by the student to this Court or opposing counsel.

During the pendency of this Order, the court invites interested parties to send comments to the clerk of court. After a reasonable period of experience and opportunity for comment, the court will decide whether the provisions of the Order should be made a Rule of Court.

Entered for the Court
Robert L. Hoecker, Clerk

Utah Law Firm Receives National First Amendment Award

The law firm of Kimball, Parr, Waddoups, Brown & Gee has been named one of three national recipients of the Society of Professional Journalists' 1993 First Amendment Awards.

Since April 1992, attorneys at the firm have been taking questions on a toll-free Freedom of Information Hotline from journalists throughout Utah. As a result, government policies have been changed, meetings have been opened and records released.

Along with the law firm, which was nominated by the Utah Headliners Chapter of the society, Linda Deutsch, an Associated Press special correspondent based in California, and Warren Olney, with KCRW-FM in Los Angeles, received the prestigious awards. The awards will be formally presented to the winners at SPJ's 1994 National Convention in Nashville. SPJ is the largest organization of journalists in the nation — including print and broadcast journalists and journalism educators.

During its first year the Utah Freedom of Information Hotline has logged a significant record. Some 109 calls were taken from 14 different news organizations. In particular, the hotline filled a critical need as reporters and public officials struggled to understand Utah's overhauled records law, the Government Records Access and Management Act. More than 60 percent of calls were for advice about records access.

The hotline also fielded 30 calls about open meetings, eight calls about court proceeding and seven about court records. When necessary, hotline attorneys, particularly lead attorney Jeff Hunt, have not only given advice, but also been active in calling public officials and writing letters.

All of this support to Utah journalists came at only a token cost to the cosponsor, the Utah Headliners Chapter. In all, Kimball, Parr, Waddoups, Brown & Gee donated $43,679 in time and hard costs to the hotline during its first year of operation.

"Such monetary and legal support show an unusual commitment to the First Amendment and its principles. Because of the firm's efforts, the public benefits by having a better understanding about how and what its government is doing." Dan Harrie, chapter president, said.

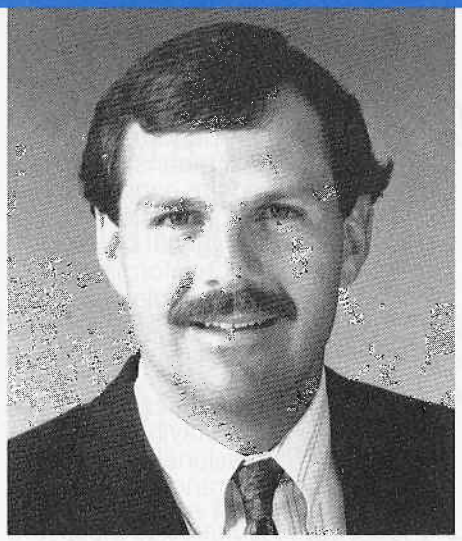
The hotline number, open to all working journalists, is 532-7840 in the Salt Lake City area or 1-800-574-4546 in other areas of the state.

Too Many Law Books? — Too Few Shelves? Outdated, Used or Surplus Legal Books Needed

Join the University of Utah and the University of Idaho in a book drive designed to help the people of Malawi, Africa. This African country has undergone many struggles over the past few years and several Malawi lawyers have taken great personal risks in trying to infuse the concepts of separation of powers, judicial review and basic human rights into Malawi's constitution. They are in need of donations of law books to assist them in drafting a new constitution. Please donate books and materials as soon as possible as they need to be shelved in the Malawi library before their election in May 1994, after which censorship of legal materials could be reinstituted. For more information, please contact Sandra Crosland at 392-2154 or 479-9860.

Members Needed to Serve on the Bar Examiner's Committee

Several positions are now open on the Bar Examiners Committee. Members are needed to draft questions in various content areas and grade the Utah essay portion of the Bar Examination, as well as, the Multistate Essay Examination. The positions are three-year terms and require a minimum of five years of practicing law and the commitment to spend on day in March and one day in August grading the Bar Examination at the Utah Law & Justice Center. If you are interested in serving on the Bar Examiners Committee or would like further information, please contact Darla C. Murphy, Admissions Administrator, at 531-9077.



Lawyers ≠ Procrastinators?

By Mark S. Webber
President, Young Lawyers Division

"If you plan to read this tomorrow, you had better read it today. Procrastination may be the answer to what is holding you back." A common complaint about lawyers is that we have a tendency to procrastinate. All of us have been guilty of it; some more so than others. When I was thinking about a topic for this article (two days after the due date), I decided that "procrastination" might be appropriate. As we begin a new year, many of us reflect on last year and set goals or New Year's resolutions in an attempt to improve. I hope this will be a friendly reminder for everyone, including me.

Almost everyone procrastinates. But some of us, the perpetual procrastinators, put off anything and everything that does not have to be done right away. Like Scarlet O'Hara, we think, "Tomorrow is another day."

The dictionary defines procrastination as "to put off something until a future time; to postpone or delay needlessly." Procrastination is commonly regarded as one of many character defects; however, chronic procrastination can lead to a destructive pattern of behavior.

To very simply illustrate procrastination, ask yourself this question: How long did you put off writing the last appellate brief you submitted? If you were like many lawyers, you waited until shortly before the deadline and ended up either frantically drafting your brief or requesting an extension.

Many lawyers put off a task that is difficult or long by rationalizing that tomorrow it may be easier to handle. With the numerous tasks to complete each day, most of us work on the short simple tasks first, hoping that we will be able to get to the larger more difficult tasks later. The problem is, later gets later and later until you are nose to nose with the deadline.

Despite the causes of procrastination, the solution to overcome the problem seems easy — just do it. A simple suggestion may be helpful. First, when faced with the task that may be difficult or require extensive time, break it down into smaller components so that the task becomes more bearable. For example, if you have a brief due in 30 days, one approach may be to break portions of the task down into four one-week segments. The first week you could outline your brief, the second week complete the research, the third week complete the arguments, and the fourth week finalize it. By breaking it down into separate parts, no single part seems overwhelming. Completing the outline in a week certainly seems easier and less time consuming than writing the entire brief in a week. By breaking the tasks down into smaller components and setting deadlines for each component, you not only are likely to complete the task on time, but also are likely to live a more normal lifestyle while preparing it. Rather than working all night the day before it is due, by breaking it down you will be able to complete the task early and leave plenty of time to make final changes and corrections. Certainly not having last minute briefs, articles, or other long or burdensome jobs hanging over our head would be refreshing.

We need to be aware that procrastination is a common complaint about lawyers, and try to improve. Procrastination is a self defeating behavior problem. It sneaks up on us and causes late nights and sweaty palms. Hopefully all of us can do as Ben Franklin said, and "Never put off till tomorrow chores that should be done today."

Community Services Subcommittee Sponsors Blood Drive

On December 3, 1993, the Community Services Subcommittee of the Young Lawyers Division sponsored a blood drive. The blood drive was held at the America Credit Union and approximately 45 people donated blood. These donations were critical in helping boost the blood supply which is typically dangerously low around the holiday season. Many thanks to all of the donors!

Holiday Season Brightened for the Homeless — Free Long Distance Phone Calls

The holiday season was brightened for many of Salt Lake City's homeless thanks to the help of the Community Services Subcommittee of the Young Lawyers Division. The Subcommittee solicited various telephone companies and was able to get them to donate free long distance time to the homeless during the holiday season.

Attorneys Needed to Conduct Mock Interviews

The Membership Support Network Committee of the Young Lawyers Division will be conducting "mock interviews" at the University of Utah and Brigham Young University. The primary purpose of a "mock interview" is to give law students feedback on their particular strengths and weaknesses in an interview in hopes of better preparing that individual for a "real" interview. The Subcommittee is looking for attorneys with one to five years experience to conduct the interviews. The interviews will be held late-January and early-February. Please contact Mark Jahne at 278-2317 if you are interested in participating.

Joseph E. Tesch
David B. Thompson
&
David N. Sonnenreich

are pleased to announce the formation of

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*From Park City call...***649-0077**
*From Salt Lake City call...***363-5111**
*Fax...***649-2561**

MEMBERS OF THE FIRM

JOSEPH E. TESCH: Mr. Tesch, a 1969 Graduate of Marquette University Law School, formerly Chief Deputy Attorney General for the State of Utah (1989-93), has 24 years trial experience in both criminal and civil matters in federal and state courts. He served as an Assistant U.S. Attorney and Lecturer of Law in Wisconsin. Mr. Tesch was the Wasatch County Attorney and director of statewide prosecutor training from 1983-86. He has extensive white collar defense experience and has been a lecturer for the National Association of District Attorneys. He currently is a member of the Park City Planning Commission and serves in various capacities in civil and political organizations. He concentrates his practice in real estate transactions, construction law, personal injury, environmental and governmental law, and civil and criminal litigation.

DAVID B. THOMPSON: Mr. Thompson graduated from the University of Utah College of Law in 1983 and joined the Governmental Affairs Division of the Utah Attorney General's Office, representing the State in criminal appeals and habeas litigation. He also served as counsel for the Utah Department of Public Safety. After leaving the Attorney General's Office in 1987 to pursue private practice, he returned to that office in 1989 to serve a four year term as Chief of the Appeals Division. He will concentrate his practice in the areas of appeals and general litigation, civil and criminal.

DAVID N. SONNENREICH: Mr. Sonnenreich attended the University of Utah College of Law, where he served on the Utah Law Review and interned with Justice I. Daniel Stewart. After graduating with the Order of the Coif in 1986, he became an associate with Jones, Waldo, Holbrook & McDonough. He joined the Utah Attorney General's Office in 1990 and became the Commerce Section Chief in 1991. He will concentrate his practice in the areas of white collar crime, commercial and securities litigation, business law, real estate, family law, administrative law and government relations.

Official Court Reporting:
A Proposal for Bar Members' Consideration and Response

By Judge Anne M. Stirba

In the world of technology there are two kinds of people: those that hate it and those that love it. Those that hate it long simply to turn something on, not program it. Those that love it think E-Mail is a godsend. As a judge, I see both kinds: lawyers for whom automation means carbon paper is no longer an indispensable part of their office inventory and lawyers who come to court armed with computer notebooks, laptops and telephones and offer the court their *diskettes* of proposed findings of fact and conclusions.

On occasion I fall into both camps. Yet despite this absence of clear direction on my part — and perhaps to some extent because of it — the Judicial Council appointed me to serve as chair of the Judicial Council's Court Technology Committee ("the Committee") in May 1993. It has turned out to be a fascinating task.

The Committee itself has been remarkable for two reasons. First, the level of dedication by Committee members has been extraordinarily high. Most often, Committee members spend hours between meetings going over material in order for the effort to move along effectively. Second, the Committee is made up of people who have held extremely divergent views of what ought to result from this effort. Having said this, I have come to the conclusion it has been this very conflict of opinion that has made the Committee unusually effective.

Currently serving on the committee are the following: the Honorable Richard C. Howe (newly appointed), the Honorable Russell W. Bench, the Honorable Richard H. Moffat (former chair of the Committee), the Honorable Guy Burningham, the Honorable W. Brent West, the Honorable Dennis M. Fuchs, Clark Sessions, Brooke Wells, a representative of the Utah Attorney General (newly appointed), Paul Sheffield, Creed Barker, Nora Worthen, Ronald W. Gibson, Myron March, Wade Watts, Holly Bullen and Rolen Yoshinaga.

JUDGE ANNE M. STIRBA graduated from the University of Utah College of Law in 1978. During law school, Judge Stirba was a teaching fellow at the University of Utah. Following graduation, Judge Stirba served as a research attorney for the Utah Supreme Court and an Assistant Attorney General for the State of Utah where she represented several different state agencies. She was then appointed as an administrative law judge for the Utah Public Service Commission and subsequently as an Assistant United States Attorney for the District of Utah. Judge Stirba was appointed by Governor Norman H. Bangerter to the Third Judicial District Court in 1991.

Judge Stirba was the first woman ever elected to the Utah State Board of Bar Commissioners and there served two terms. She has held numerous Bar positions, ranging from President of the Young Lawyers Section to being a member of the Judicial Conduct Commission.

In 1987, Judge Stirba was recognized by the Utah State Bar as the Outstanding Young Lawyer of the Year. The following year she was nominated for the Distinguished Woman Award by the Utah American Association of University Women. In 1993 she received the Par Excellence Award from the Young Alumni Association of the University of Utah.

In her "private" life, Judge Stirba has served as officer and board member of the Community Foundation for the Mentally Retarded and Physically Handicapped, officer and director of the American Cancer Society, Utah Division, Inc., for five years and as trustee of the Legal Aid Society of Salt Lake.

Judge Stirba and her husband, Peter Stirba, are the parents of two children.

The Committee benefits tremendously from the membership of Eric Leeson from the Court Administrator's Office. I have never worked with a staff person more committed to nor more knowledgeable about a project than is Eric. Whatever eventually results should be credited in large part to him.

In August 1993, the Committee submitted to the Judicial Council a report of the Committee work to date, presented a proposal for incorporating technology in the official court reporting, and requested that the Council approve the proposal in concept. The Council did approve the proposal in concept and authorized the Committee to begin the process of communicating the proposal to all interested persons, particularly Bar members, judges, court reporters, court administrators and other court personnel.

It is the hope of the Committee that Bar members who wish to have input will consider this proposal and communicate to the Committee all relevant concerns, suggestions and observations. This proposal is not by any means set in concrete; the Committee welcomes all views.

PROJECT HISTORY

The Committee was created in August 1991, in response to a recommendation of the Court Technology Subcommittee of the Utah Commission on Justice in the 21st Century to conduct separate pilot programs to evaluate technological enhancements or alternatives to produce the official court record. The charge was severalfold: to select vendors and pilot court locations, implement the projects, survey the reactions of the users of the technologies and report back to the Judicial Council by August 1993.

The project has consisted of the study of one alternative to traditional court record-making: namely, video recording, and one enhancement to traditional court reporting: namely, "real-time" reporting in

a computer-integrated courtroom ("CIC").[1] One of the key distinctions between these two technologies is that video recording replaces a court reporter, the CIC requires a court reporter.

Four courtrooms were designated as pilot courtrooms: video recording in the courtrooms of the Honorable Gordon J. Law, First Judicial District and the Honorable Richard H. Moffat, Third Judicial District; CIC in the courtrooms of the Honorable Ray M. Harding, Fourth Judicial District and the Honorable Leslie A. Lewis, Third Judicial District.

VIDEO RECORDING SYSTEM

The video recording system consists of several voice-activated cameras installed in the courtroom which are controlled by a customized audio switching device. These systems require no operator. When courtroom participants speak, the assigned microphone turns on and a camera is activated to record the speaker. Four high resolution video cassette recorders (VCR's) simultaneously capture courtroom proceedings. The judge's chambers is also equipped with a camera, microphone and monitor. An additional VCR is used to play back videotaped depositions or other evidence, and anything played back on that machine is automatically recorded onto the machines that make the official record.

A videotape of each day's court proceedings is available to counsel at the end of each day to assist in counsel's preparation for the next day's proceedings, to obtain a recording of the Court's ruling, for self-improvement and so forth. During the project the fee for obtaining a videotape at the end of each day was arbitrarily set at $15.00.[2]

COMPUTER-INTEGRATED COURTROOM (CIC)

Computer-aided transcription (CAT) is the core component of CIC. Using CAT, a court reporter's stenographic notes are translated instantaneously into readable English text. CIC then distributes this readable text to computers located at each counsel's table, the judge's bench and the reporter's workstation.

Each computer can also operate independently of the others, thus allowing access to word processing functions, WESTLAW or Utah Law on Disk, and yet preserve security of the data stored in each computer. Counsel can bring depositions or other electronic files to the courtroom on diskette for use at trial.

CIC is available in mobile units, which means that the CIC equipment could be brought in to a courtroom and set up within a few minutes.

A rough transcript of each day's court proceedings is available to counsel at the end of each day for uses similar to those for video recording. As with video, for the purpose of the project the cost of obtaining a rough transcript of the court proceedings was also arbitrarily set at $15.00.[3]

". . . [T]echnology should enhance the role of the court as a service institution."

COMMITTEE EVALUATION

The Committee evaluated these two technologies in light of the following criteria:

— The technology should foster greater access to the courts.

— The technology should enhance the role of the court as a service institution.

— The technology should improve the quality of justice.

— The technology should enhance the effective justice management by increasing efficiency.

— The technology should not be used as a substitute for the knowledge, skills and judgment of individuals, but should assist individuals in the proper utilization of their knowledge, skills, judgment and training.

— The technology should enhance productivity, reduce delay or otherwise be more cost effective than the system it replaces.

— The technology should improve the decision-making process of judicial managers by providing complete and accurate information.

— The technology should have a useful life.

— The technology should be acceptable and convenient to end users.

— The technology should accommodate the need for security, confidentiality and protection of privacy concerns.

THE PROJECT SURVEY AND OTHER RESPONSES

Last summer, the Committee developed a survey which was sent to various users of the two systems, including lawyers, judges, court reporters and court clerks. Based on the survey results, the Committee concluded the following: (1) users of the systems believe both technologies make an accurate and reliable court record; (2) generally speaking, the users of both technologies are receptive and positive about both video recording and CIC; (3) as a whole each of the pilot technologies rates higher than traditional court reporting methods; (4) individuals having experience with only one of the two pilot technologies tend to become supportive of that particular technology; and (5) lawyers having experience with both technologies tend to prefer CIC.

In addition to the survey responses, the Committee has received input from various Bar members, court personnel and court reporters. For the most part, to date Bar members have expressed support for CIC because of its perceived benefits for appellate review and access to transcripts (albeit rough transcripts) on a daily basis. The Committee has also received expressions of concern from Bar members about the use of video recording in trials in which there are several parties, that are likely to be appealed or have other special needs.

COST OF EACH TECHNOLOGY

The relative cost of the two technologies is difficult to ascertain. However, the Committee's best estimate of the relevant project costs, after taking into consideration all relevant factors, is that the costs of video recording per courtroom over a period of five years if $87,600, and the cost of CIC per courtroom over a period of five years is $242,036. The main reason for the difference in cost is that video recording does not require a court reporter and CIC does.

THE PROPOSAL[4]

After debating this matter extensively, the Committee arrived at a proposal which received the unanimous support of Committee members and has been approved in concept by the Judicial Council. The proposal is as follows.

In light of the foregoing, the Commit-

tee concluded that each system provides significant benefits to litigants, practitioners and the courts, and that each is capable of producing an accurate and reliable court record. The Committee further concluded it is neither necessary nor desirable to choose one kind of system to the exclusion of another and thereby get locked into one particular system for all purposes. Rather, the Committee determined there ought to be a coordinated approach to court reporting in Utah courts and specifically that there ought to be a mix of video recording, traditional reporting, CIC and, in appropriate circumstances, audio recording.[5]

The Committee further felt that because of the significant difference in the cost of the two systems, video technology should be installed in each district courtroom throughout the state and constitute the mainstay of the court reporting system.[6] However, because CIC provides important benefits to litigants, practitioners and the courts, in certain kinds of cases CIC should be automatically provided, provided at the option of either party, or provided at the discretion of the trial court.

This proposal would abolish the current reporter-per-judge assignment. Instead, in order to promote flexibility in meeting the needs of the judiciary, court reporters currently within the system would be grouped in regions throughout the state and assigned to courtrooms on an as-needed basis for operation of CIC or traditional reporting.

Existing reporters would do CIC and traditional reporting and be responsible for preparing the record in all cases on appeal. Existing reporters may also be used to prepare a typed transcript from video in cases where video recording was used and the case is appealed.

The proposal also calls for the creation of policies and procedures concerning the cases in which CIC would be automatically used, cases in which CIC would be made available at the option of either party, whether a charge would be assessed for the optional use of CIC and, if so, what the charge(s) ought to be, the extent of the trial court's discretion to order CIC and so forth.

The Committee identified that a separate effort needs to be made to study the impact of this proposal on existing official court reporters, including but not limited to recommending changes to reporters' job descriptions, determining CIC training necessary for reporters, and evaluating the extent to which changes should occur in reporters' overall compensation package, such as whether fees for producing a written record should continue to be collected by court reporters or whether fees for records should be paid into the court system and adjustments made to reporters' salaries if any such changes are made.

In addition to the proposal itself, the Committee is also working to make the Fourth Judicial District a pilot district for the coordinated approach to court reporting. The Fourth District was designated by the Judicial Council as a pilot district in order to help meet some particular critical needs of court reporting there and to assist in the further development of a final proposal.

Finally, the Judicial Council has requested the Committee to make recommendations as to what the official record on appeal should be.

REQUEST FOR INPUT

On behalf of the Committee, I invite each Bar member to consider and give input to the Committee about this proposal. It would be most helpful if comments, suggestions and criticisms be sent to me or Eric Leeson at the Court Administrator's Office. Either way, every response will be considered as the project evaluation continues.

[1]The Committee was not asked to consider the current use of audio technology in the courts. However, the Committee is aware of criticism received from Bar members when outdated audio equipment has been used for some purposes.

[2]The fees were set at the same rate so that cost was not a factor in the substantive evaluation of the two technologies.

[3]See footnote 2.

[4]The Committee made several specific recommendations to the Judicial Council. Included in this article is a summary of most of those recommendations. For a complete list of recommendations, please call Eric Leeson at the Court Administrator's Office, 578-3800.

[5]As stated previously, the Committee did not specifically study the use of audio recording. However, the Committee is aware that there have been substantial upgrades in audio recording and therefore believes that audio can be used effectively in some court proceedings.

[6]Exceptions to the installation of video technology in particular courtrooms may occur if it is determined that the amount of use of the courtroom would not justify the installation expense of video. For example, if it makes more sense to upgrade the audio technology in the Beaver County Courthouse and use CIC for some or all of the trials conducted there, then video would not be installed.

DNA – People's Legal Services Providing Legal Services in Southern Utah

DNA is a non-profit corporation and the largest Native American Legal Services program in the Nation. For over 25 years, DNA has served low income people living on or near the Navajo Nation and throughout San Juan County, New Mexico. DNA advocates on the behalf of disadvantaged individuals in the areas of basic domestic, consumer and government benefit law, in an attempt to maintain a decent standard of living for those living at or below the poverty level. A number of landmark cases in Indian, land and resource, and consumer law have been brought by DNA attorneys. In addition, to individual and impact litigation, DNA pursues community education, as a means of heading off potential litigation through knowledge of an individual's rights.

DNA's primary service area is the Navajo Nation, which extends into Arizona, New Mexico and Utah, including the poorest parts of the poorest counties in each of these three states. The central office is in Window Rock, Arizona, the capital of the Navajo Nation. DNA employs 25 attorneys and 18 tribal court advocates, who are admitted to either the Navajo or Hopi Bar.

San Juan County, the poorest county in the state, is located in the southeastern corner of Utah. DNA — People's Legal Services, Inc. has a field office in Halchita, a small community on the Navajo Nation, near Mexican Hat, Utah. This office is the only legal services office in San Juan County. It is currently staffed by one attorney, one tribal court advocate, and a legal secretary. The office has plans to add an additional attorney within the next month. The clients come from as far as Blanding, close to an hour and a half away, to seek legal assistance. There has recently been a significant increase in the number of clients requesting assistance from the northern parts of San Juan County.

Last year the Mexican Hat office, then staffed by two attorneys, two advocates, and two support staff, closed approximately 590 cases. So far this year, with half the staff, the office has closed over 530 cases. The Mexican Hat office provides services covering the standard areas of legal service practice such as domestic relations, including guardianships and adoptions, government benefits, such as Supplemental Security Income, and consumer transactions. However, because of the overall limitations on the availability of any professional legal assistance, the office also represents clients on probate and land disputes in the tribal courts.

Many potential clients, however, are unaware of the fact that they can obtain legal services in Mexican Hat. Through a grant from the IOLTA fund and the Utah Bar Foundation, DNA hopes to dramati-

cally change that situation. The primary thrust of DNA's plan will be, initially, concentrating on community education.

DNA hopes that through contact with the various Social Service departments, Senior Citizens groups, and other community based organizations, we can arrange for seminars and workshops to assist clients in their understanding of obligations and rights regarding government benefits, such as Social Security and Aid to Families with Dependent Children. We also hope to expand our services to individuals with common problems through the use of divorce clinics and advice to women in shelters.

Many elderly and disabled individuals are not receiving the full amount of potential benefits from the Social Security Administration, including the full range of medical benefits. Clients are unaware of the existence of the programs for which they are eligible or of how to properly apply for the benefits that exist. The problems can be resolved relatively easily through proper applications, timely appeals, and the necessary persistence. Aid to Families with Dependent Children is another program where a little knowledge will go a long way. Frequently, clients are unaware of the subtle permutations of the regulations that dictate when they are properly eligible for benefits and when they are not. Miscommunication between Social Service representatives and clients creates problems that, again, are easily resolved if individuals are aware of how the system functions.

San Juan Legal Services located in Farmington, New Mexico has a vital and successful referral system, which channels cases into the private sector for representation as pro bono, reduced fee, or full fee cases. Attorneys, who participate in the pro bono program, specify the types of cases they are interested in working on. No attorney is referred a case that is outside their stated area of practice. The referrals are made on a rotating basis with consideration for an attorney's work schedule at any particular time. The Mexican Hat office has made the initial steps in replicating that success in San Juan County, Utah. We hope to soon be contacting attorneys in private practice, who are interested in being added to our referral list for possible fee generating cases, but who are also willing to provide pro bono representation. With the decrease in our staff and resources we have been forced to decrease our accessibility to potential new clients. Hopefully, the pro bono program will allow us to expand the services we provide and the number of clients that we serve.

Many eligible clients have difficulty obtaining services because of lack of transportation, lack of time off work, or other impediments, which prevent them from traveling to Mexican Hat. As resources become available, DNA would like to open a satellite office in either Blanding or Monticello, which would be open for intake two to three days a week. The office would provide work space for an attorney to perform intake interviews, but it would be supported by the Mexican Hat office, where the attorney would work the remainder of the time.

As the only legal services organization serving the indigent population in San Juan County, DNA recognizes the tremendous need to serve a greater portion of this area of the state. The IOLTA grant from the Utah Bar Foundation has provided DNA with the initial means necessary to provide the essential legal services in San Juan County. DNA has every intention to expand those services as the resources and means to do so become available.

ROCKY MOUNTAIN MINERAL LAW FOUNDATION

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December 10, 1993

PRESS RELEASE

Special Institutes
on

ENVIRONMENTAL REGULATION OF THE OIL AND GAS INDUSTRY

CORPORATE ENVIRONMENTAL MANAGEMENT

Houston, Texas
February 10 & 11, 1994

The Rocky Mountain Mineral Law Foundation is sponsoring two environmental conferences in Houston, Texas, on February 10 & 11, 1994.

Environmental Regulation of the Oil and Gas Industry (Feb. 10) will examine the environmental laws that regulate oil and gas exploration, drilling, production, and abandonment operations on federal, state, tribal, and private lands in the United States. The program will analyze the environmental laws in a **chronological operations context**. The Institute is designed for all persons who must deal with environmental consequences of oil and gas operations. Registrants will be "walked through" the development process and instructed on the environmental requirements along the way. The instructors also will discuss how persons involved in oil and gas operations can effectively manage their environmental obligations and liabilities.

Corporate Environmental Management (Feb. 11) is a practical program aimed at those who need to find realistic management solutions to actual corporate environmental problems. In natural resources and other areas, large and small corporations face difficult tasks and hard choices as they attempt to comply with ever-expanding and more complex environmental regulation. Defining goals, organizing a management team, choosing staff, and motivating everyone within the corporation to address environmental concerns are formidable tasks. This Institute will examine these concerns in detail.

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

CLE CALENDAR

EFFECTIVE LAW OFFICE MANAGEMENT — NLCLE WORKSHOP

Trust account management, ethical obligations and practical advice. 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: January 20, 1994
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.

CALCULATION OF ECONOMIC DAMAGES IN COMMERCIAL LITIGATION CASES

Gain an understanding of relevant damage theory, measurement techniques, and trial presentation in complex commercial litigation matters through the use of actual case studies.

CLE Credit: 7 hours
Date: January 21, 1994
Place: Utah Law & Justice Center
Fee: $100.00 early registration, $125.00 after January 14, 1994.
Time: 9:00 a.m. to 5:00 p.m.

CIVIL RIGHTS — NLCLE WORKSHOP

Civil rights causes of action, including prisoner rights cases and 1983 claims. 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: February 17, 1994
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.

PROFESSIONAL LIABILITY SEMINAR

CLE Credit: 3.5 CLE hours in ETHICS
Date: February 25, 1994
Place: Utah Law & Justice Center
Fee: Pre-registration $60.00, registration at the door, $75.00.
Time: 9:00 a.m. to 12:30 p.m.

UTAH STATE BAR MID-YEAR MEETING

Watch for additional information coming in the mail.

CLE Credit: 8 hours of CLE, including 1 CLE hour in ETHICS

Date: March 10-12, 1994
Place: St. George Holiday Inn, St. George, Utah
Fee: Pre-registration $135.00, registration at the door, $160.00.
Time: Thursday, March 10th, reception from 6:00 p.m. to 8:00 p.m. Friday, March 11th, CLE meetings from 8:00 a.m. to 12:15 p.m. Saturday, March 12th, CLE meetings from 8:00 a.m. to 12:30 p.m.

PERSONAL INJURY — NLCLE WORKSHOP

From picking good cases to preparing for trial. 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: March 17, 1994
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.

APPELLATE PROCEDURE & JURISDICTION — NLCLE WORKSHOP

Effective appellate advocacy, avoiding common pitfalls. 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: May 19, 1994
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.

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

1. _____ _____

2. _____ _____

_____
Total Due

Make all checks payable to the Utah State Bar/CLE

_____
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.

CLAIM OF THE MONTH

ALLEGED ERROR OR OMISSION:

The seller alleged that the Insured improperly released escrow without the seller's authorization.

SYNOPSIS OF CLAIM:

The Insured represented both buyer and seller of a business. At closing, a certain sum was placed into the Insured's escrow account to protect both the buyer's and seller's interests due to contingencies not met prior to time of closing. After the contingencies were met, the Insured was permitted to release the escrow funds to the seller.

The Insured was advised by the buyer and the seller that the escrow could be released. The seller orally instructed the Insured to release a portion of the escrow to the real estate broker who had arranged the transaction and who was also a friend of the seller. The Insured followed the seller's verbal instructions. Sometime later, the seller requested payment from the escrow account and advised the Insured that he had never been authorized to make payments to the real estate broker. By this time, the broker no longer had the funds and was without the ability to repay the funds. The case was settled by the Insured's insurer for approximately 2/3 of the funds in question.

HOW THE CLAIM MIGHT HAVE BEEN AVOIDED:

The claim might have been avoided had the Insured confirmed the instructions in writing.

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

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!

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.

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OFFICE SHARING/ SPACE AVAILABLE

Choice office sharing space available for 1 or 2 attorneys with established law firm. Downtown location near courthouse with free parking. Complete facilities, including conference room, reception room, library, kitchen, telephone, fax, copier, etc. Secretarial services and word processing are available, or space for your own secretary. Please call (801) 355-2886.

Two offices available in Utah County; ground floor, high profile Main Street location with conference room, copy machine, laser printer to share, parking adjacent to building, $150/month each with additional for receptionist. If desired, call Mr. Phillips at (801) 489-6925 or fax to (801) 489-1116.

POSITIONS SOUGHT

POSITION ANNOUNCEMENT: The city of Logan, Utah is seeking qualified interested parties for the position of City Attorney. Salary $45,000 (Negotiable). This is a full-time benefitted position. Under the guidance and direction of the Mayor, the attorney will represent the legal interests of the city of Logan. The attorney will also assist in formulation of legal responses. The attorney will be responsible in overseeing daily actions and operations of the City Attorney's office. Will coordinate with city prosecutors, secretaries and outside agencies and provide highly responsible and complex legal and administrative support. Must be member of Utah State Bar. Submit resume to: City Personnel Office, P. O. Box 527, Logan, Utah 84321-0527 or fax (801) 752-3720. Deadline: **January 25, 1994.**

Excellent mid-size, Salt Lake City, Utah law firm, seeking attorney with 4-7 years experience in commercial litigation and bankruptcy. Very competitive salary and benefits. Send confidential resume by January 20, to P. O. Box 510008, Salt Lake City, Utah 84151.

SERVICES

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.

Don't jeopardize your case with evidence photography by the untrained. We guarantee high quality evidence photography and videography that will satisfy all the technical and legal requirements to be admitted into evidence and help you win your case. Member Evidence Photographers International Council. Call LEGAL PHOTOGRAPHY SERVICES at (801) 547-1358.

LEGAL ASSISTANTS — SAVING TIME, MAKING MONEY: Reap the benefits of legal assistant profitability. LAAU Job Bank, P.O. Box 112001, Salt Lake City, Utah 84111, or call (801) 531-0331. Resumes of legal assistants seeking full or part-time temporary or permanent employment on file with LAAU Job Bank are available on request.

NEED A TYPIST? Legal Secretary with 25 years experience. Will work out of my home with own equipment, including computer with Word Perfect 5.0, transcription equipment with micro/regular cassette; laser printer, fax and copy machine. Typing speed 140 w.p.m., shorthand. Will pick up and deliver. $15.00 per hour. Call Betty at (801) 582-6691.

Recently admitted attorney seeks contract/project work to supplement new practice. Call Kristen Jocums at (801) 359-8754 to discuss your project.

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)

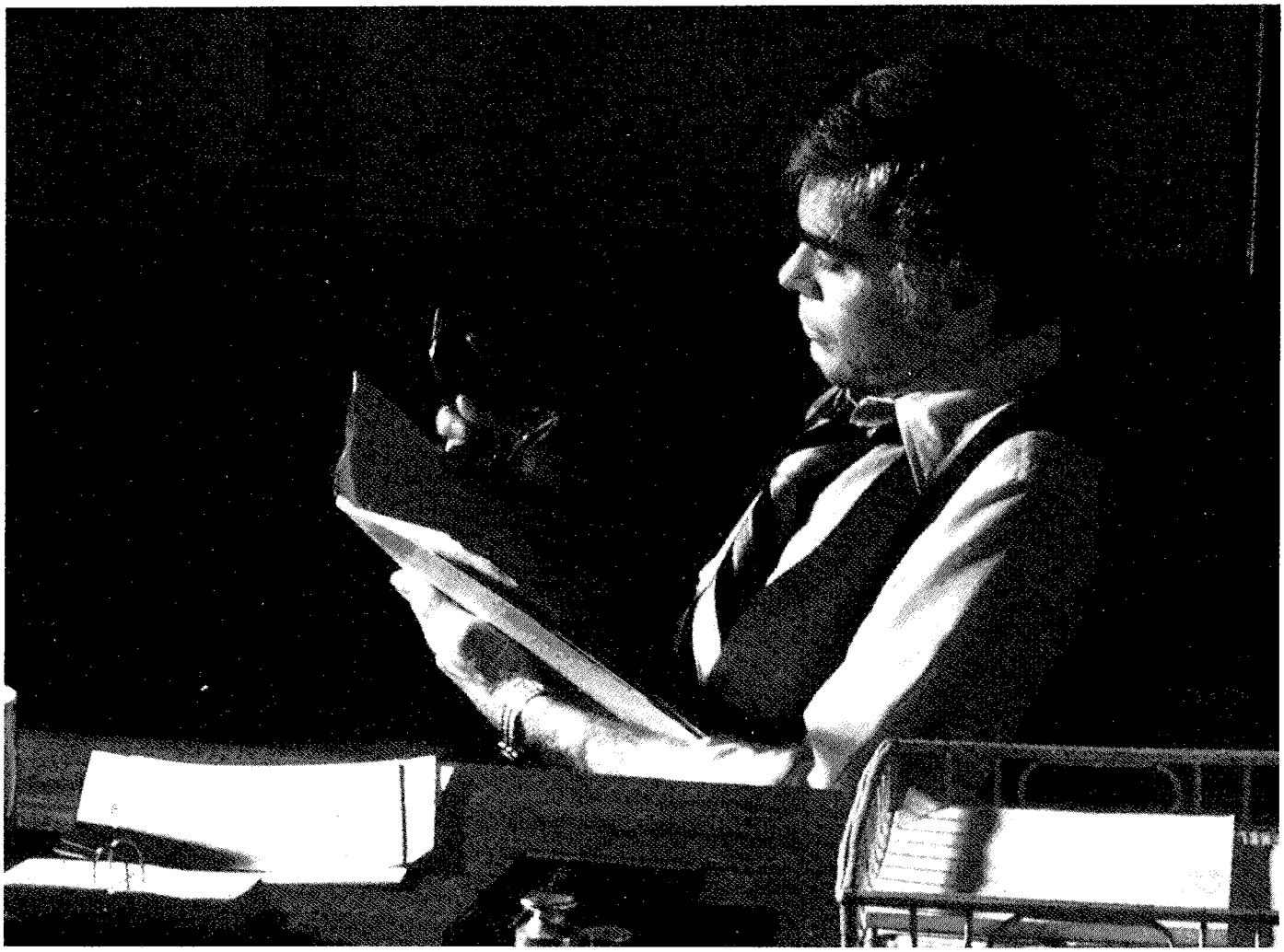
C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through 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.

We put our entire corporation behind your client's personal trust



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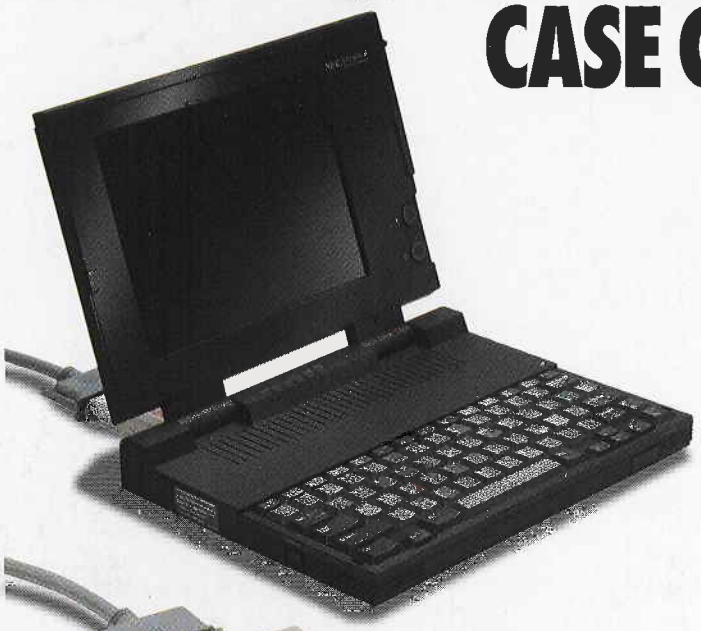

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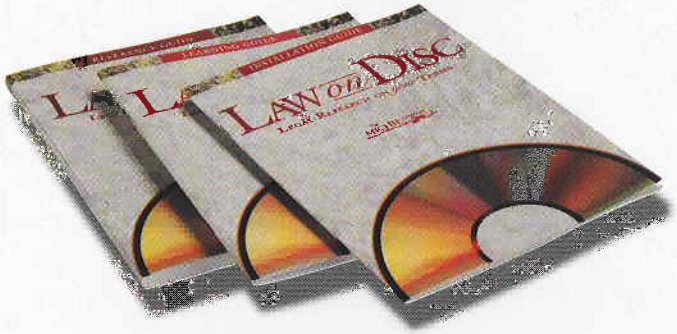

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