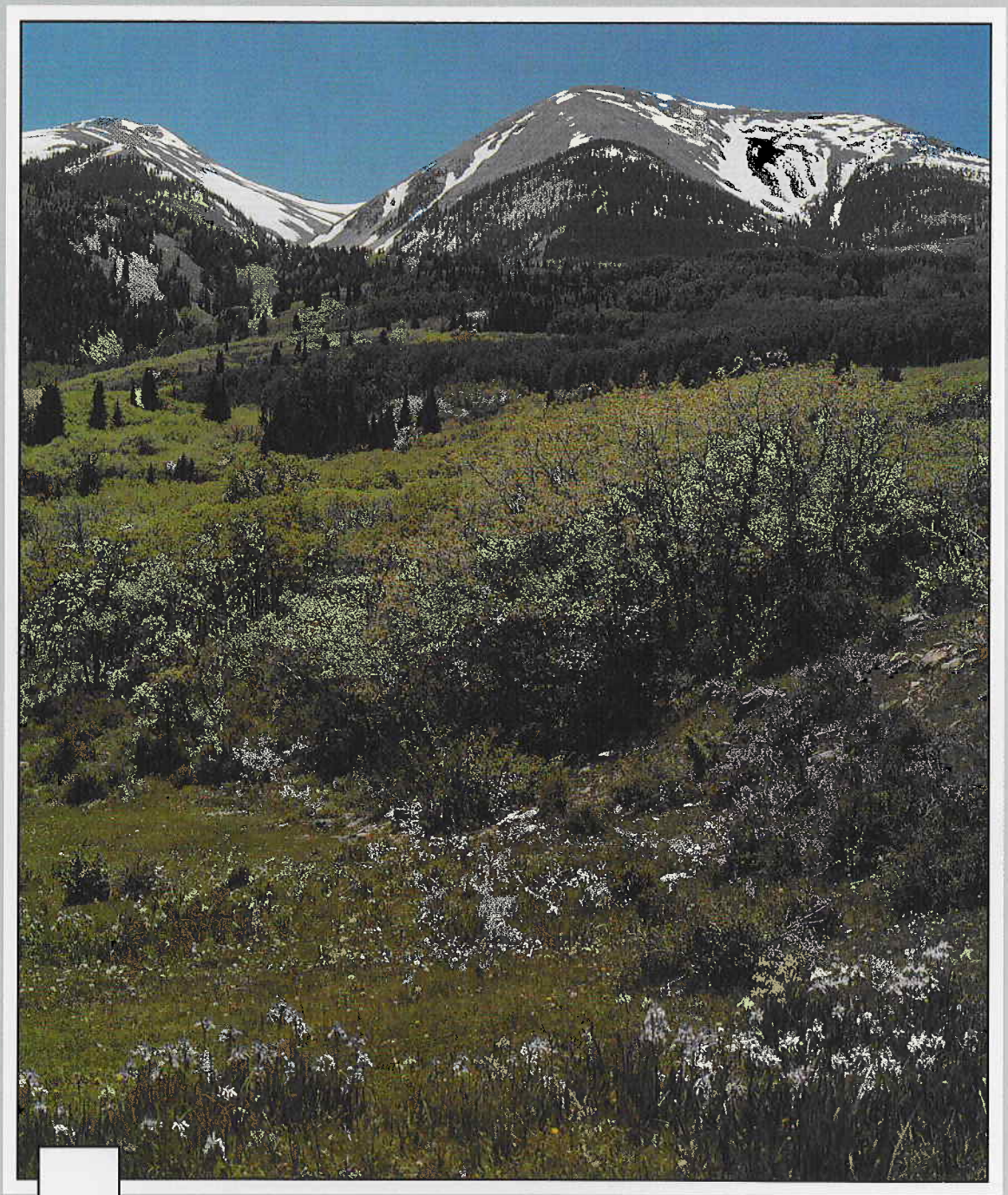
# UTAH BAR JOURNAL

Vol. 9 No. 5 May 1996

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# UTAH BAR JOURNAL

Vol. 9 No. 5 May 1996

**VISION OF THE BAR:** To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

**MISSION OF THE BAR:** To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.



COVER: High Uintahs, by Harry Caston, Esq., Salt Lake City, Utah.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah, 84111, 532-5200. Send both the slide, transparency or print of each photograph you want to be considered.

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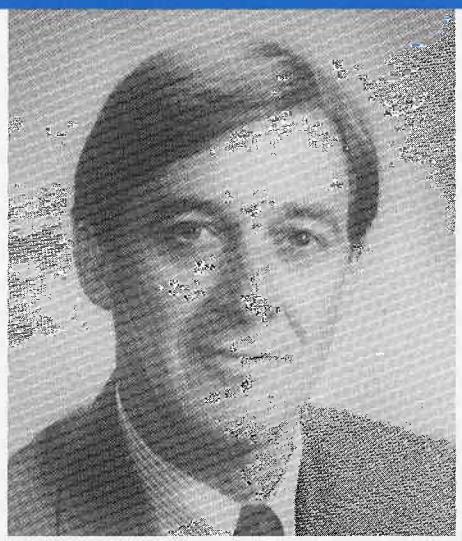
# LETTERS

Dear Editor:

This is in reply to the article by Rick Knuth regarding the use of the word "Esquire" as a greeting for attorneys. Mr. Knuth's comments are interesting, but not particularly relevant. The abbreviation "Esq." is widely used to refer to an attorney of either sex. I object to any attempt to eliminate this term of professional respect.

If Mr. Knuth wants to become more a "man of the people" he might try doing more work for average people, in areas like divorce and criminal defense. Unfortunately, there already seems to be a lack of respect for the bar. Anything done to diminish that respect further is counterproductive at best.

Sincerely yours,
W. Andrew McCullough



# Lawyers' Public Service Responsibility

*By Dennis V. Haslam*

Last month I attended the 1996 ABA Pro Bono Conference sponsored by the ABA's Standing Committee on Lawyers' Public Service Responsibility. Our own Judge Judith M. Billings of the Utah Court of Appeals sits on that committee.

I attended this particular conference because of our Bar's special concerns with respect to access to justice by Utah's impoverished citizens and the delivery of legal services to those persons. The Bar commission recently announced its intention to respond to these needs by hiring a lawyer experienced in poverty law issues to help screen and assess poverty law cases and, to match clients in need with volunteer lawyers. This person also would contact volunteer lawyers and educate them to ensure appropriate competency.

The conference agenda was quite interesting, as a listing of a few of the workshops shows:

- The Role of Bar Associations and Courts in developing Pro Bono Efforts.
- Recent Activities in New Directions at the Legal Services Corporation.
- The Impact of Substantive Law Changes on the Poor.
- Community Based Needs Assessments.
- State-wide Planning Efforts: Strategies and Results.
- Streamlining and Integrating Intake and Case Placement.
- Using ADR to Meet Low-Income Client Needs.
- Telephone Hotlines.
- Models for Pro Se Support.
- Building Partnerships Between Law Firms and Pro Bono Programs.
- Pro Bono Reporting: Mandatory, Voluntary or Not at All?
- Utilizing Volunteers to Meet Clients; Critical Legal Needs.

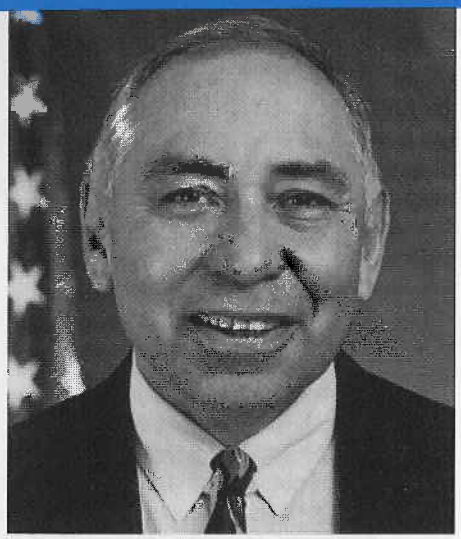
Attending this conference gave me the opportunity to better understand the practical and logistical problems associated with the delivery of legal services to the poor, at least in the civil arena. In the past, the Legal Aid Society has assisted Salt Lake-area low income clients in family law cases. There has never been enough money nor enough legal help. Utah Legal Services Corporation, for the most part, has provided legal services to the poor throughout the rest of the State. Its funding likely will be reduced by one-third this year. More cuts are expected in the future and there will be severe restrictions on the kinds of services to be performed by its attorneys.

The changes at Utah Legal Services will have a profound effect on the delivery of legal services to the poor in Utah. Important public policy issues have been raised that will required long-range planning. I have proposed to the Board of Bar Commissioners that we file a petition with the Utah Supreme Court requesting the creation of the Equal Access to Justice Board. The Board should be charged with the responsibility of evaluating the legal needs of low-income and indigent persons in Utah, and Utah's ability to provide legal services to meet those needs in civil cases. This is not just a problem for the Utah State Bar to solve through pro bono services; it is an issue that requires involvement of all Utahns because of the important social and constitutional implications. Access to the courts is a constitutional right. If Utah's lawyers do not take the lead on these important issues, then nothing may get done.

The Equal Access to Justice Board should be comprised of members of the judicial branch, the executive branch, the legislative branch, legal providers and recipients. Public hearings should be held to ensure that all interested parties have an opportunity to participate in this important endeavor.

Because this will be a new program for our Bar, and will undoubtedly necessitate the expenditure of additional funds, it is important that the Bar Commission receive

*continued on pg 28*



# Leadership: Go Ask Alice

*By John Florez*

### THE VISION THING

Little seven year old Alice was sitting at her school desk drawing when her teacher asked: "Alice, what are you drawing?" Alice replied, "A picture of God." "But no one knows what God looks like," said the teacher. To which Alice replied, "They will when I get through." Alice's approach dramatically contrasts with myriad of meetings I have sat in over the years with professionals, including lawyers, where their instinctive reaction to ideas: "That's the way we've always done it – what do 'they say' – that's regulation – they won't let us – we better wait to see what happens – that might set a precedent," or the lawyers' favorites: "let's wait till we see what the court says," or "what are the other states doing?"

Each profession has its own set of excuses for doing nothing, but the reasons are the same – the fear of risking. The people we respect most are those who have moved things, inspired us, and accomplished things in spite of the ridicule and criticism, especially from their colleagues. Each had the qualities of a leader: a vision, the conviction, and the persistence – in spite of all odds – to make it a reality. Only later do we call them leaders. John W. Gardner calls the lack of leadership a failure of confidence:

> Another of the maladies of leadership is a failure of confidence. Anyone who accomplishes anything of significance has more confidence than the facts would justify . . . .
>
> Lacking such confidence, too many leaders add ingenious new twists to the modern art which I call "How to reach a decision without really deciding" . . . . a series of clearances within the organization . . . . opinion polls . . . . hoping that out of them will come unassailable support for one course of action rather than another.

### THE INFORMATION REVOLUTION

With the rapid change brought about by the information revolution, our social institutions are quickly becoming relics of past good intentions – not the least of which is our justice system. As a consequence, our citizens are crying for solutions and searching for leaders who can solve the problems now confronting us. In the past, we relied on professionals "who knew best" (and they kept reminding us they did know best) what needed to be done in their respective fields, and we believed them. That trust ended with Vietnam and the information revolution. Those events made us weary of leaders and experts. They couldn't be trusted; and, besides, now we had access to the same information as they did. Today, we question our political leaders, our physicians and our lawyers because we have access to the same information and the new revolution made it so.

### THE LAWYERS' DILEMMA

For the legal profession, the problem becomes compounded and places lawyers in a dilemma. On the one hand, the public is looking to them for change and their oath of office requires that they improve the administration of justice. On the other hand, the lawyer, by training and code of ethics, requires that he/she work solely in the client's interest and be guided by precedent, tradition, and separation of powers, rather than forging new public policy. This includes practicing attorneys, as well as judges, who often are criticized for making legislation rather than interpreting the law. By tradition and practice, lawyers become preoccupied with their client and focus on detail and process. As a consequence, they often fail to exercise the skill of looking at the big picture to see how to improve the justice system.

On first blush, it is easy to say that lawyers lack the characteristics of leaders:

vision, commitment, persistence and the ability to influence people. Yet, upon close examination, they practice those skills with vigor in defense of their clients. To see this, just walk in any court room, or ask any judge, how creative lawyers can be in interpreting the law and how persistent and zealous they are in persuading others of the virtues of their client. They can make their client look like Mother Teresa.

### FINDING ALICE

If we reflect back on our youth, we all had the confidence that little Alice had – we were innocent enough to have dreams and the confidence we could do anything. When we entered our professional schools, we knew when we got out we would be the best, change the world, save people; and, we vowed we were not going to be like the old professionals who were pessimists stuck on old ideas. We were going to change the world. What happened to us? Where along the way did we stop dreaming, stop risking and start looking to the "other guy" to do it, or to tell us what to do. Who took the "Alice" out of us?

The reality is that no one can take away our dreams except ourselves.

At a time when our justice system is in need of renewal (though there are those who say "if it ain't broke, don't fix it) we need visionaries who can tell us what it "ought" to look like as we move in to the 21st Century. Where are those who vowed to change the world and would never be pessimists like the old professionals they ridiculed? How many have now fallen victim to the same malady that afflicted the past generation: denial, professional myopia and a failure of confidence. Unfortunately, many lawyers are still falling back on time worn answers: let's wait and see what happens, or let's see what others are doing. Somehow we expect someone else to take care of us and give us the ultimate solution. If we wait long enough surely someone will come along and lawyers will not like what they did. Change will take place and the question will be whether the legal profession will give it direction or sit back and criticize while absolving itself of any blame.

### THE MEANS FOR CHANGE

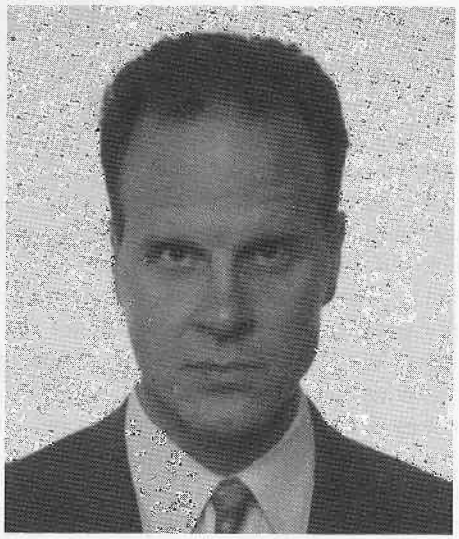
While attorneys in the daily practice of the law must adhere to tradition and established procedures and policies of the justice system, they have every right, duty and responsibility to take action in improving the administration of justice; furthermore, they have the vehicle in which to do it – their professional association – the Bar. For those committed to their profession, the Bar becomes the means by which they can exercise their leadership to improve our legal system. They should not wait to be asked. They should step forward with their ideas and with the persistence they demonstrate every day on behalf of their clients.

The sole-searching question for each member of the Bar is: to what extent am I willing to make a commitment to my profession, lend my creativity, integrity, and persuasive power to have a vision of what kind of justice system we should have for the 21st century; and, do I have the persistence to make it a reality? It means risking and reawakening the "Alice" that is within each of us.

# Utah Construction Law: Recovery For Nonpayment

*By Michael W. Homer and David J. Burns*

*MICHAEL W. HOMER is a trial attorney specializing in real property and construction litigation and is a partner at Suitter Axland & Hanson in Salt Lake City.*



*DAVID J. BURNS is a litigation associate at Suitter Axland & Hanson.*

## I. INTRODUCTION

"Construction" can be a towering new building by I.M. Pei or a more modest project to replace a roof. Whatever the scale of a project, however, "construction law" is most concerned with the relationships created to complete it. The relationships extend from the owner of the property to the financial institution(s) advancing money for purchase of the property or for construction, the architects, engineers and consultants advising the owner, the general contractor, subcontractor, the suppliers and their sales representatives, and the sureties that bond the contractors. Construction law governs each of these relationships, and for this reason it is not a discrete area of the law but rather a hybrid drawn from many sources.

The principal source of construction law is the parties' agreement. The most common standard form contracts often used in place of customized construction contracts are prepared by the American Institute of Architects (AIA) and the Associated General Contractors (AGC). Statutory sources include the Utah Uniform Commercial Code (U.C.A. § 70A-1-101, *et seq.*), Occupations and Professions provisions (U.C.A. § 58-1-101, *et seq.*), Lien provisions (U.C.A. § 38-1-1, *et seq.*), Contractor's Bonds (U.C.A. § 14-2-1, *et seq.*, Private Contracts; U.C.A. § 63-56-36, *et seq.*, Public Procurement), and federal enactments such as the Miller Act (40 U.S.C.A. § 270a-d). Case law is also a source of construction law. This body of law is notable for its practical approach to the construction enterprise. Mindful of the courts' approach, we review the following construction law issue: What do you do if you don't get paid for construction work?

## II. RECOVERY FOR NONPAYMENT

### A. Right to Stop Work

When a contractor has a right to progress payments as opposed to a right to payment only upon completion or substantial completion of the project, the contractor may stop work for nonpayment. If the contract is based on the AIA's General Conditions of the Contract for Construction ("GCCC")[1] or fails to provide for a stop work right and the architect refuses to issue a certificate of payment, then the contractor may stop work until the amount owed is received but only after the contractor provides written notice allowing the owner to bring current the amount owing. GCCC § 9.7.1.[2] The contract time is extended and the contract sum increased by the amount of the contractor's reasonable costs of shut-down, delay, and start-up. However, if the contractor stops work when he is not entitled to payment, then it will be liable for any resulting damages. *Id.* The owner may also stop work if the contractor fails to correct any deficiencies provided for in the contract. GCCC § 2.3.1.

### B. Mechanics' and Materialmens' Liens:

The Utah Mechanics' Liens statute, Utah Code Ann. § 38-1-1, *et seq.*, protects mechanics (laborers) or materialmen (sup-

pliers) "performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner. . . ." U.C.A. § 38-1-3.[3] The statute is designed to prevent an owner from benefitting from an increase in the value of her property at the expense of a mechanic or materialman.[4]

Mechanics or materialmen may lien the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively.[5] U.C.A. § 38-1-3. The amount of the lien attaches only to such interest as the owner may have in the property. U.C.A. § 38-1-3. Nevertheless, they may not lien "any public building, structure or improvement." U.C.A. § 38-1-1.

The mechanics' liens statute includes a relation back provision. All liens filed on a project "shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement." U.C.A. § 38-1-5. All liens thus relate back to the first work performed on the ground for any given project.

All mechanics' liens filed for "work and labor done or material furnished" are upon "an equal footing, regardless of date of filing the notice and claim of lien and regardless of the time of performing such work and labor or furnishing such material." U.C.A. § 38-1-10. The equal footing doctrine is a natural outgrowth of the relation back doctrine. As a result, the last contractor on a construction project performing punch list items enjoys the same priority as the excavator.

Should "the commencement to do work or furnish materials on the ground for the structure or improvement" occur before a lending institution records its mortgage or deed of trust, all the mechanics' liens have priority over the lender. This is true even if the deed of trust or mortgage was executed prior to the commencement of work but "was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground." U.C.A. § 38-1-5. Visible evidence of work on the property and the presence of building material is sufficient constructive notice to any interested party that work has commenced.[6] Moreover, the constructive notice provided by a mechanic's lien defeats a claim for equitable subrogation.[7]

The mechanics' liens statute provides only two bases for establishing the priority of competing lien claims: (1) commencement to do work, or (2) delivery of materials. U.C.A. § 38-1-5.[8] Actual notice does not establish priority under the statute.[9] The test of what is commencement of work sufficient to impart notice is "whether the improvements are of such a nature that they would present an actual beginning of improvement on the ground, they must be visible to the extent that a person using reasonable diligence in examining the premises would be able to see it and be on notice that lienable work was underway."[10] Instances of "visible" on-site improvements sufficient to establish priority included excavating a foundation[11] and laying a foundation.[12] In other instances, surveying, staking and soil core sampling on the land were found insufficient.[13]

*"All liens filed on a project 'shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement.'"*

The following steps must be taken to file and foreclose a Utah mechanic's lien:

**1. Notice of Commencement.**

The original contractor (the contractor having an express or implied contract with the owner, see Utah Code Ann. § 38-1-2) must record a notice of commencement of the project or improvement with the county recorder for the county or counties where the project is located within thirty days after the commencement of the project. U.C.A. § 38-1-27(10). The notice of commencement must contain a statement setting forth certain information. U.C.A. § 38-1-27(10)(a)-(e).[14]

**2. Preliminary Notice.**

Before a notice of lien may be filed, some subcontractors must first file with the original contractor a preliminary notice of their intent to claim a mechanic's lien. *See* U.C.A. § 38-1-27. The preliminary notice must be filed in writing and may be given at any time during the course of the project. U.C.A. § 38-1-27(3). However, the preliminary notice may not be filed for "any labor, service, equipment, or material which was provided more than 45 days prior to the date the preliminary notice is given." U.C.A. § 38-1-27(6).

Only one preliminary notice is required for each project. U.C.A. § 38-1-27 (4). More than one preliminary notice, however, must be filed if the subcontractor filing the notice has more than one contract with more than one subcontractor or original contractor. U.C.A. § 38-1-27(5).

The preliminary notice may be sent by mail, certified or registered, return receipt requested and is complete upon deposit of the certified or registered mail. The preliminary notice may be addressed to the original contractor at his place of business or his business as shown on the notice of commencement on record with the county recorder. U.C.A. § 38-1-27. The preliminary notice must contain a statement setting forth certain information. U.C.A. § 38-1-27(7).

The preliminary notice requirement does not apply to, among others, residential construction; subcontractors who are in privity of contract with an original contractor; and persons performing labor for wages. U.C.A. §§ 38-1-27(1) and (2).

**3. Notice of Lien.**

Each lien claimant must file a notice of lien within 90 days from the date (1) the person last performed labor or furnished material or (2) of final completion of an original contract not including a residence. U.C.A. § 38-1-7(1). The filing period begins to run when the work has been "substantially completed," leaving only minimal or trivial work to be accomplished, and "has been accepted by the owner."[15] The notice of lien must contain a statement setting forth certain information. *Id.*

**4. Delivery of the Notice of Lien.**

A mechanic or materialman must cause the notice of lien to be delivered or mailed by certified mail to either the reputed owner or record owner of the property within thirty days after he files the notice of lien. U.C.A. § 38-1-7(3). In the event a lien claimant does not mail the notice of lien he will be precluded from an award of costs and attorney's fees against the reputed owner or record owner in an action

to enforce the lien. U.C.A. § 38-1-7(3).

**5. Filing Foreclosure Action and Lis Pendens.**

The deadline for commencing foreclosure of a notice of lien depends on the type of property involved. A lien claimant must file suit to enforce the lien within "twelve months from the date of final completion of the original contract not involving a residence" or "180 days from the date the lien claimant last performed labor and services or last furnished equipment or material for a residence." U.C.A. §§ 38-1-11(1)(a) and (b). Thus, commercial subcontractors may have longer than twelve months after the completion of their contracts to foreclose their liens. The statutory period for a mechanic's lien foreclosure may be extended if the contractor performs "non-trivial" work or supplies material "after the majority of the contract is performed."[16]

A contractor or subcontractor must file a lis pendens, or a notice of pendency of the action, within either twelve months of the substantial completion of the original contract or twelve months of the suspension of work for a period of 30 days.[17] In the event a lien claimant fails to timely file this lis pendens, "the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show, such actual knowledge." U.C.A. § 38-1-11(2)(a).

**6. General Contract Theories.**

If the mechanic's lien is found to be defective or waived, common law theories such as mistake or accord and satisfaction may still provide a basis for recovery for nonpayment.[18]

**C. The Residence Lien Restriction and Lien Recovery Fund Act**

Although in most instances a person can file a mechanic's lien to recover the cost of providing materials and services that enhance the value of a structure or real property, an exception exists for residential properties. The "Residence Lien Restriction and Lien Recovery Fund Act," Utah Code Ann. § 38-11-101, *et seq.* (1995),[19] bars most mechanics' liens on an "owner-occupied residence and the real property associated with that residence" after January 1, 1995. U.C.A. § 38-11-107. Instead, a lien claimant – now called a "qualified beneficiary" – must file a claim against the "Residence Lien Recovery Fund," for up to $75,000 per residence and $500,000 over the qualified beneficiary's lifetime. U.C.A. § 38-11-203(4). The Fund is supported by contractors', subcontractors' and laborers' fees, subrogation collections, civil fines and interest on the Fund. U.C.A. § 38-11-202. However, if a residence is constructed under conditions that do not implicate the residence lien restrictions, then that residence and the real property associated with it are subject to an ordinary mechanic's lien. U.C.A. § 38-11-107(2).

**D. Stop-Notice to Construction Lenders**

A few states, by statute, enable unpaid subcontractors, suppliers and laborers to send a "stop notice" to a construction lender or owner. The existence of the "stop notice" alternative is tacit recognition that mechanics are not always protected by lien and bond laws. The lender or owner, upon receipt of the stop notice, becomes obligated to either withhold a portion of the construction loan disbursements due the general contractor in an amount equal to the subcontractor's claim, or to disburse directly to the subcontractor the amount claimed. Whichever option is used, the unpaid mechanic does not have to rely upon a mechanic's lien or a payment bond for security for nonpayment. Utah, however, does not have a stop-notice provision.

*"If the mechanic's lien is found to be defective or waived, common law theories such as mistake or accord and satisfaction may still provide a basis for recovery for nonpayment."*

**E. Private Payment Bonds**

Utah contractors and/or developers must deliver to the private property owner a payment bond for the protection of mechanics and materialmen. Thus, "[b]efore any contract exceeding $2,000 in amount for the construction, alteration, or repair of any building, structure, or improvement upon land is awarded to any contractor, the owner shall obtain from the contractor a payment bond. . . . The bond shall become binding upon the award of the contract to the contractor." U.C.A. § 14-2-1(2). The private payment bond "shall be with a surety or sureties satisfactory to the owner for the protection of all persons supplying labor, services, equipment, or material in the prosecution of the work provided for in the contract in a sum equal to the contract price." U.C.A. § 14-2-1(3).

Bond coverage attaches when a mechanic or materialman has not been paid in full within 90 days after the last day on which he performed the labor or service or supplied the equipment or material for which the claim is made. U.C.A. § 14-2-1(4).[20] The foreclosure action must be commenced "within one year after the last day on which the claimant performed the labor or service or supplied the equipment or material on which the claim is based." U.C.A. § 14-2-1(5). In any action upon a bond, the court may award reasonable attorneys' fees to the prevailing party. U.C.A. §§ 14-2-1(5). In any action upon a payment bond, the court must award reasonable attorneys' fees to the prevailing party. *Id.* at (7).[21]

A private property owner who fails to obtain a payment bond is ordinarily "liable to each person who performed labor or service or supplied equipment or materials under the contract for the reasonable value of the labor or service performed or the equipment or materials furnished up to but not exceeding the contract price." U.C.A. § 14-2-2(1). Such an action must also be commenced prior to the expiration of one year after the day on which the last labor or service was performed or the equipment or material was supplied by the person. U.C.A. § 14-2-2(2).

The statute requires all persons seeking recovery under the payment bond to provide preliminary notice to the payment bond principal under the same circumstances and conditions as a mechanic or materialman under the mechanic's lien law. U.C.A. § 14-2-5. The preliminary notice requirement is strictly enforced. *Id.*

**F. Bonds on Public Works Projects**

Payment bonds on public works projects are ordinarily required by the Federal Government and by each state. The federal requirement is known as "The Miller Act" and applies to all persons furnishing materials or performing labor on federal projects. *See* 40 U.S.C.A. § 270(c)-(d). The Utah equivalent of The Miller Act is the "Utah Procurement Act," Utah Code Ann. § 63-56-38, *et seq.*[22] The bond require-

ments are meant to replace the protections afforded by the mechanics' liens statute, which applies only to private contracts, because absent consent sovereign immunity precludes attachment of public or quasi-public property. U.C.A. § 38-1-1.

**1. The Utah Procurement Act.**

The Utah Procurement Act requires a general contractor on public works projects with the State of Utah or its political subdivisions as defined in Utah Code Ann. § 14-1-18 to deliver a payment bond to the public entity to protect persons performing on the project. A person may bring an action on the bond if he has furnished materials or labor and has not been paid in full within 90 days after the completion of his last performance. U.C.A. § 63-56-38(3). Materials do not include rental equipment and rental charges incurred on a public project.[23] A laborer or materialman has a direct cause of action against the state or its political subdivision if it fails to obtain a payment bond on a project subject to Utah Code Ann. § 14-1-18. U.C.A. § 14-1-19.

The Procurement Act does not protect third-tier suppliers performing on state projects.[24] Bond coverage is limited to contractors, their subcontractors and the next tier of suppliers.[25] The foreclosure action must be commenced within one year after the last day on which the person performed the service or supplied the material. U.C.A. § 63-56-38(4). The Procurement Act incorporates by reference the preliminary notice requirements of the mechanics' liens statute. U.C.A. § 14-2-7.

**2. The Miller Act.**

The Miller Act protects persons furnishing materials or performing labor on federal projects.[26] A surety bond must be delivered by contractors who bid to construct, alter or repair a public building or public work for contracts worth in excess of $25,000. U.S.C.A. § 270a(a). The contractor must deliver to the government a performance bond to protect the government and a payment bond to protect subcontractors and materialmen. U.S.C.A. § 270a(a)(1) and (2). A surety guarantees payment where the subcontractor or materialman has no enforceable rights against the government.

The Miller Act like the Procurement Act does not protect third-tier claimants.[27] Delay damages, a recurring problem on federal projects, are not generally available in the Tenth Circuit.[28]

**G. Retainage on Public Works Projects**

Most public entities retain a specified percentage (5% to 10%) or each payment made to the contractor. Retainage (or retention) is intended to provide security to the owner that all the work contemplated in the general contract will be completed and that the contractor will pay its subcontractors and materialmen.

In Utah, state contracts and most county and municipal contracts contain retainage provisions. In the event a subcontractor or materialman is not paid, it should make a claim directly to the owner. Similarly, general contractors often retain the same percentage from their progress payments to subcontractors as the owner retains from the general contractor. This provides the general contractor with the same protection as the owner with respect to materialmen and sub-subcontractors who may not be paid by subcontractors. Unlike in some states, Utah does not require that retained funds be placed in an interest bearing account until disbursed.

[1]The GCCC are industry-wide standards used to interpret construction contracts in much the same way as the UCC, for example, is used to interpret commercial contracts.

[2]*See also, Darrell J. Didericksen & Sons v. Magna Water,* 613 P.2d 1116 (Utah 1980).

[3]*But see, infra,* discussion of the recently enacted "Residence Lien Restriction and Lien Recovery Fund Act," Utah Code Ann. § 38-11-101 *et seq.* (1995), which prevents certain persons from liening an owner-occupied residence and instead requires them to draw upon a state-maintained fund for nonpayment.

[4]*Projects Unlimited v. Copper State Thrift,* 798 P.2d 738, 743 (Utah 1990).

[5]If the contractor or subcontractor does not have a valid contractor's license pursuant to U.C.A. § 58-55-17, then it may not maintain an action for a mechanic's lien. *A.J. Mackay Co. v. Okland Constr. Co.,* 817 P.2d 323, 324 (Utah 1991).

[6]*Richards v. Security Pac. Nat'l Bank,* 849 P.2d 606, 611 (Utah Ct. App. 1993).

[7]*Id.* at 611-12.

[8]The Utah Legislature has rejected a record notice system for mechanics' liens. *E.W. Allen & Assoc's v. FDIC,* 776 F. Supp. 1504, 1507 (D. Utah 1991).

[9]*Id.* at 1507-08 *(citing Ketchum, Konkel, Barrett, Nickel and Austin, Inc. v. Heritage Mountain Dev. Co.,* 784 P.2d 1217, 1224 (Utah Ct. App. 1989), *cert. denied,* 795 P.2d 1138 (Utah 1990)).

[10]*Id.* at 1509.

[11]*Davis-Wellcome Mortgage Co. v. Long-Bell Lumber Co.,* 336 P.2d 463, 466 (Kansas 1959).

[12]*Scott v. Goldinhorst,* 123 Ind. 268, 24 N.E. 333, 334 (1890).

[13]*Ketchum, supra,* at 1227, including exhaustive citations of improvements that did not establish priority.

[14]Note that failure to file a notice of commencement estops an original contractor from asserting as a defense in an action to foreclose a mechanic's lien a subcontractor's failure to file a preliminary notice.

[15]*Interiors Contracting, Inc. v. Smith, Halander & Smith,* 827 P.2d 963, 967 (Utah Ct. App. 1992) (citing cases). *See For-Shor v. Early,* 828 P.2d 1080 (Utah Ct. App. 1992) for discussion of the problems associated with the *Interiors* test.

[16]*Govert Copier Painting v. Van Leeuwen,* 801 P.2d 163, 173 (Utah Ct. App. 1990) *(citing Tortorica v. Thomas,* 397 P.2d 984 (Utah 1965)).

[17]*For-Shor, supra,* at 1083-84.

[18]*See Neiderhauser Bldrs. v. Campbell,* 824 P.2d 1193, 1196-98 (Utah Ct. App. 1992). *See also, Govert, supra,* at 168-69.

[19]*See also,* Utah Admin. Code § R156-38 *et seq.*

[20]*See also, Graco Fishing v. Ironwood Exploration,* 766 P.2d 1074 (Utah 1988).

[21]*See Bailey-Allen Co. v. Kurzet,* 876 P.2d 421 (Utah Ct. App. 1994).

[22]*See Western Coating, Inc. v. Gibbons & Reed,* 788 P.2d 503, 505 (Utah 1990).

[23]*Johnson v. Gallegos Constr. Co.,* 785 P.2d 1109 (Utah 1990).

[24]*Western Coating, Inc. v. Gibbons & Reed,* 788 P.2d 503 (Utah 1990) *(citing Clifford F. Macevoy Co. v. U.S.,* 322 U.S. 102, 64 S.Ct. 898 (1944)).

[25]*Id.* at 506.

[26]*U.S. for Use and Benefit of Wulff v. CMA, Inc.,* 890 F.2d 1070 (9th Cir. 1989).

[27]*See MacEvoy, supra.*

[28]*L.P. Friestedt Co. v. U.S. Fireproofing Co.,* 125 F.2d 1010 (10th Cir. 1942).

# Practicing Law in the Utah Territory: A Historical Sketch

*By David Epperson*

I have developed an appreciation for all of the early practitioners of the bar who endured completing a legal education and who attempted to practice law in the territory before Utah's Statehood. During 1996, as Utah celebrates its Statehood Centennial, it seems particularly appropriate to look back a century and to remember those early lawyers who survived the difficult political and economic climate of the 1880s and 1890s.

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## LEGAL AND ECONOMIC SETTING OF THE 1880s AND 1890s

Those decades were perhaps the most turbulent in Utah's history as national public sentiment against the practice of polygamy led to congressional approval of the Edmunds Act of 1882. The act made it impossible for anyone practicing polygamy to serve on a jury, or to hold public office. It also declared vacant all offices in the Territory of Utah connected with registration and election duties. This caused total chaos for most of the bench and bar.

In 1885, the court struck down the Mormon's argument that the Edmunds law was an ex-post-facto law and therefore unconstitutional. Following this ruling, Mormon president John Taylor preached his last public sermon indignant at what he considered judicial outrage and disappeared from public view. Meanwhile, the economic depression deepened in the Utah territory.

When John Taylor died on July 25, 1887, the Edmund-Tucker Act of 1887 was being passed. This act officially dissolved the Church of Jesus Christ of Latter-Day Saints as a legal corporation and required the church to forfeit to the United States all property in excess of $50,000. The territorial militia was disbanded, women's suffrage was abolished, and no one could vote, serve on a jury or hold public office without signing an oath pledging obedience and support to anti-polygamy laws.

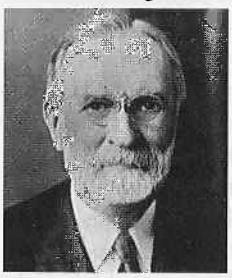
Finally, after three more years of economic recession in the territory, church President Wilford Woodruff on October 6, 1890 at a General Conference asked church members to approve a "Manifesto" or official church declaration discontinuing the practice of plural marriage. But the nationwide depression of the 1890s and delayed return of church assets – personal property in 1894 and real estate after statehood in 1896 – caused continued financial distress for most of Utah's citizens.

## OBTAINING A LEGAL EDUCATION FOR UTAH'S LAWYERS

Despite this adverse financial and political environment of the 1880s and 1890s, a number of individuals travelled out of state to secure a legal education and then returned home and attempted to set up an economically viable law practice. Perhaps the most prominent of those early lawyers was George Sutherland.

George Sutherland was born in 1862 in Buckinghamshire, England and moved to Utah with his family in 1863. He was one of the first graduates of Brigham Young Academy and attended law school at the University of Michigan at Ann Arbor where he graduated in 1883. He returned to Utah and began the practice of law in Provo that year.

Sutherland was active in preparing Utah for Statehood, and when it came in 1896, he was elected a member of the first state legislature on the Republican ticket. In 1900, he was a delegate to the Republican National Convention which nominated William McKinley and Theodore Roosevelt. He was elected to the U.S. Senate in 1904 and re-elected in 1910. During 1916-1917 Sutherland served as president of the American Bar Association, gaining national recognition.



*George Sutherland*

George Sutherland is the only Utahn to have the distinction of serving as an Associate Justice of the Supreme Court of the United States. He served as a Justice from 1922 to 1938, or for 16 years between ages 60 and 76. He died in 1942 at the age of 80, and has often been regarded as Utah's leading jurist.

## THE UTAH CONNECTION AT THE UNIVERSITY OF MICHIGAN LAW SCHOOL

Prior to the turn of the century, many other Utahns followed George Sutherland to the University of Michigan Law School at Ann Arbor; including James H. Moyle (1885); Oscar W. Moyle (1892); Samuel W. Stewart (1892); Charles B. Stewart (1893); Barnard J. Stewart and Jesse R.S. Budge (1900). The Moyle brothers and the Stewart brothers established law firms that continued for more than a century.

Jesse Budge and Charles Stewart wrote about this law school experience providing a glimpse of those hard times. Both were sons of prominent Mormon polygamous bishops – which caused them to be acutely aware of the legal and political climate affecting Utah. Jesse Budge noted,

In the fall of 1897, I left for Ann Arbor to enter the law department of the University of Michigan. To save railroad fare, I arranged with a sheepman . . . to accompany as caretaker a train load of sheep to the Omaha market. When I desired to register in the law department I was informed by the registrar that such credits as I had . . . were insufficient. However, as I had travelled so far in order to attend the law school, I would be admitted, if in addition to carrying my law studies, I would at the end of the first semester . . . pass an examination. I was appalled and almost discouraged but I could not return home a failure. During my first year in Ann Arbor, I paid $10.00 per month for my room and $2.00 per week for my board, and it was scarcely worth that amount, and I had no overcoat . . . Many a boy waited on tables for his board and washed dishes for his room. . . . My dear sister Annie provided from her meager earnings, the funds for me while I was in school . . . My entire expense the first year, from the time I left home until I returned was a little less than $350.00, about $375.00 the second and $425.00 the third. To avoid buying books, I did much studying in the law library.

Charles Stewart in his Journal provided glimpses of his legal education. He wrote:

*September 6, 1891.* I decided that I would go to Ann Arbor, Michigan and study law. [His brother Samuel had already completed his first year there.]

*September 8, 1891.* Went to the Gardo house and talked with President Wilford Woodruff and George Q. Cannon on going east to school; they released me from going on the mission and had no objections to my studying law, and gave me some excellent advice.

*September 22, 1891.* Packed my trunk. Sold my sheep to get money.

*September 24, 1891.* Arose early and bid my dear mother goodbye.

*September 29, 1891.* Train for Ann Arbor arrived at 6:20 p.m. Took a walk with Samuel and Rideout of the university campus. Paid my entrance fee $60 to the University. Secured boarding place with Rideout.

*October 1, 1891.* Attended a lecture in law building by Dean J. C. Knowlton. Our law class is the largest in America. Commenced to study hard.

*October 2, 1891.* Admitted to the Junior class. Attended lecture on Fixtures and Easements by Thompson.

*October 23, 1891.* Went to my first quiz in Blackstone, answered perfect and went home happy.

*December 17, 1891.* We had our usual lecture by Professor Conley . . . Three long months of hard work are gone . . . but success has crowned our efforts . . . now for the first time in my life I am to spend Christmas away from home and in the circle of the Great Lakes. During the holiday vacation I spent my time in the library and took occasional walks to the woods.

*January 9, 1892.* Saw a female body dissected for the benefit of our law class.

*January 12, 1892.* Had our last quiz in Blackstone, and how glad we all were.

*January 22, 1892.* Attended a lecture "From the Pulpit to the Bar" by the Reverend Sam Small.

*February 10, 1892.* Sore eyes and tired brains, but still must continue to study, study, study.

*March 1, 1892.* Finished Common Law Pleading and Practice.

*March 26, 1892.* Passed on my record in Anson on Contracts.

*March 31, 1892.* Completed Pleading and Practice.

*April 23, 1892.* Took walk around town with Samuel, Rideout, Shipp, Moyle, and several others.

*May 4, 1892.* Passed off Agency.

*May 12, 1892.* Passed on my record in Equity Pleading and Practice.

*May 17, 1892.* Passed Bills and Notes on my record.

*May 19, 1892.* Passed in Personal Property and Carriers.

*May 20, 1892.* Passed off Land – Landlord Tenant, Torts, and Partnership. How happy I am after passing off all my junior year studies. My first year's work is done.

*May 21, 1892.* My last day in Ann Arbor. Went out walking with Isaac and Samuel, and took the 10:27 p.m. train for home. All the Utah people to station to see us go.

*May 27, 1892.* Arrived at Ogden at 3:00 a.m. . . . arrived in my country home (Draper) at 5:00 p.m.

*October 1892.* Attended the territorial convention at Provo where J. L. Rawlins was chosen as nominee. . . . Once or twice I decided that I could not go back and finish my law course that year, but later did so.

*November 8, 1892.* Went to Ann Arbor Michigan to finish my law course.

*December 1892.* Had a mock trial in the Utah club court.

*January 14, 1893.* Took my last quiz in code pleading.

*January 26, 1893.* Visited the dissecting room at Ann Arbor where I saw over a dozen bodies and about four dozen students at work dissecting them.

*January 30, 1893.* Usual lecture and quiz. How the time rolls on. I scarce can believe it, night comes so soon, morning passes away, days fly by, weeks go and soon the months are gone. Sorry will I be when college days are over, though freed from hard and earnest toil in future days I oft will long for college life.

*February 22, 1893.* Listened to a lecture on "The Right Man In the Right Place" by Steven A. Douglas.

*March 2, 1893.* Joined President Angell's class on Treatise.

*March 3, 1893.* Joined Professor Adams' class on Science of Finance. Law class picture taken.

As a senior law student, Charles Stewart was known to be the son of a polygamous bishop made "illegitimate" by what he felt to be an "ex post facto law". The faculty gave him an unusual legal project. He wrote:

*March 24, 1893.* I belong to the senate of the University of Michigan and the question of the admission of Utah as a state of the Union came up before the assembly. I was asked to introduce the bill, and upon doing so, I made in substance, the following speech:

Gentlemen of the Senate: Should Utah be admitted into the Union as a state? This question has been asked for over 40 years. It was first answered in 1850, by giving the people a governor and a territorial form of government. From that time until today our people have made repeated efforts to be one of the envied stars, but their efforts have been in vain.

Time will not permit the many past litigations to be again revived which are filled with prejudice and hate.

* * *

I would tell it to you in that same proud, patriotic spirit that my now deceased father told it to me; when in youth he reminded me that I was an American, that my grandfather fought eight long years for liberty and the flag, and helped forge that golden band of strength that made a nation free, its sons all kings.

* * *

Gentlemen, I too have a pride for my mountain home though her people receive the frown of our nation and the censure of its leaders, and for over 60 years they have been driven, mobbed, imprisoned, and killed; have been accused of heresy, theft, exclusiveness, disloyalty and rebellion. They were driven from their homes as religious exiles and were forced to launch out into the wilderness. On their march across the western plains, the government called upon them for 500 men to fight the battle of Mexico. On their march they celebrated the 4th of July, and when they arrived in that dreary wilderness of a home, they climbed the highest peak and planted the Stars and Stripes on Mexican soil. Does this look as though they had forgotten that they were Americans? They laid out a city and in its first charter they made a provision for public schools. Three years after they arrived they incorporated the University of Deseret, from whose walls hundreds of students have graduated and many have come to this renowned institution to finish their education.

* * *

This was the character of those pioneers of western civilization. The first American paper published in California was issued from a Mormon press. The first gold discovered in California was dug by Mormons. They were the first Anglo-Saxons who have successfully practiced irrigation.

Low and scrupulous officials were sent into their territory to govern them, and by their immoral and indecent conduct were forced to resign, and in doing so, they branded their crimes on the citizens they tried to wrong, and then misrepresented their condition to the Executive in Congress, and thus turned the whole nation against a few law-abiding citizens which caused an army to go to their humble homes with the intention of butchering men and innocent women and children. The news of such contemplated acts reached them while they were celebrating the 10th anniversary of the entrance to those lonely valleys. They had gathered in one of those beautiful canyons, and from many a pine tree top waived the stars and stripes. The Declaration of Independence was read and the Constitution eulogized, while shouts from a thousand throats echoed up the glens, "May it live forever." And while thus glorying in the love of liberty, and manifesting their loyalty to that government, whose great Executive had sent an army to wipe them from existence, a messenger came in the midst of their happiness bringing the sad news of the approach of the great army.

Gentlemen, place yourselves in their position. They were 2000 miles from civilization . . . the grasshoppers had destroyed crops and they were just merging from starvation, and now the army of their nation was upon them. What could they do . . . This exploit of the government cost the nation twenty millions of dollars, and the Mormon's untold pain and suffering. The Indians were aroused by the influence of the men who were prejudiced against this people . . . and many lives were lost in the defense of their homes from the Indians.

I shall not reiterate the many scenes of suffering endured by this people. I shall but state that for the past five years, nearly a thousand of our fathers have been sentenced to the state prison, others have left their homes and gone to Mexico, while many were in hiding and wandered through the streets at midnight, for even that was more pleasant than suffering the penalty imposed under an ex-post-facto law.

But forgetting the past, we will look at the present condition of Utah and her prosperous commonwealth. She now has a population of 225,000 people, or according to the last census, 207,905 which is 15,041 more than the combined population of Montana and Wyoming, and 17,054 more than the combined population of the adjoining states Nevada, Idaho and Wyoming, and 34,004 more than are required under the census of 1890 for a representative in Congress.

* * *

She has 10,754 farms . . . 3,000 miles of irrigating canals. Nearly 3,000,000 sheep feeding on her 10,000 hills, whose annual output of wool is 13,500,000 pounds, 1,000,000 pounds is manufactured into cloths by Utah Woolen Mills. The territory abounds in coal, copper, gold, lead, silver, mountains of sulphur, iron and salt. . . . We have now established a sugar factory, one of the largest in the United States. . . .

Utah has an excellent free school system supported by taxation and compulsory education. Only 5% of the people are illiterate. Utah is above 41 states, all the territories, and on the equal with the three best states in education. Polygamy has been exterminated, and the people have pledged their good faith and have issued a manifesto showing their sincerity. President Harrison has granted amnesty to them. The people have divided on party lines and now vote the Democratic and Republican tickets. In 1878 there were 13 counties without a saloon, brothel, or gambling house in Utah.

* * *

Mr. Chairman, and gentlemen of the senate, having submitted these few statements for your candid consideration, I ask what more can a people do? You will not dispute that she is prepared to enter the Union on every ground, save it be her moral status. Can you in justice say her people are not sincere in their renunciation of polygamy? How can they renounce more solemnly, before the nation and before God? They have not only felt that they were outcasts of the nation, but they have grieved that the blood of their kindred should

have been so ungraciously shed. Millions of dollars of their property has been unjustly confiscated, and they have not only been driven from their hard earned homes, and many of them disfranchised, but a thousand of their number have marched to prison walls in convicts chains, in execution of retrospective laws; and this under the graceful folds of the American flag.

This people have received a pardon from the President of the nation which has been concurred in by the governor and judges who now fully understand the character of the people. We now say let the dead past bury its dead, let the laws of the nation be upheld; let the constitution live forever and serve as a shield for protection, and as it guides our ship of state to a perpetual harbor, there to be loved and honored and revered by the millions of America's sons that are to follow. As sons of the patriot fathers, as loyal Americans, we ask that our earnest appeal be accepted, in the name of justice guaranteed by the Constitution, in the name of liberty and freedom, we ask for statehood for Utah.

* * *

Charles noted that at the close of this Bill Presentation "several warm replies were given" but finally the bill was passed with but two dissenting votes. Little did Charles know at the time that it would yet take three additional years of economic hardship in the Utah territory before Statehood would be granted.

Glimpses of the remainder of his senior law school year included:

*April 12, 1893.* Heard Thomas M. Cooley lecture on the annexation of the Hawaiian Islands. His idea that it could not be done.

*April 25, 1893.* School commences for the last time to struggle before we take our sheep skins and retire to battle with the elements and win success.

*May 2, 1893.* Our good old Professor Thompson delivered to us his last lecture forever, on The Duty of a Lawyer, and it was good advice.

*May 13, 1893.* Studied on my moot court case. Paid my diploma fee of $10.00 and began to see some signs of success.

*May 22, 1893.* Had my moot court case. We tried it before the Dean J. Knowlton.

*May 29, 1893.* Professor Griffin gave us a final lecture on the necessity of being honorable lawyers.

*June 5, 1893.* Filed my application and paid $25.00 for admission to the bar.

*June 7, 1893.* Listened to a lecture on admiralty law by Mr. Brown, justice of the Supreme Court of the United States.

*Saturday, June 10, 1893.* I am admitted to the bar, the Supreme Court of Michigan and the Circuit Court of the County of Washtenaw. No one knows how happy I am.

*June 14, 1893.* Our last quizzes ended, and my college days are over.

*June 15, 1893.* We listened to our last lecture of the course, and each professor who lectured, warned us of the many difficulties we would encounter, and the necessity of living honest lives, keeping our temper when in a case, and being always of good cheer and not get discouraged because of the slow approach of busi-

ness, above all, keep your Good Name.

*Thursday, June 29, 1893.* I received my diploma, and had conferred on me the degree of LLB by President Angell who handed me my sheepskin. It was the largest class that ever graduated in America. In the afternoon I packed my trunk, bid farewell to all the boys, and retired to rest for the last time in the beautiful little town of Ann Arbor, my college home.

## ESTABLISHING A LAW PRACTICE IN THE TERRITORY

When Charles B. Stewart returned from Ann Arbor law school in July of 1893, he was in debt $750. In order to pay off those debts, he was engaged to teach school in Draper at $70.00 per month. He continued to work there until June of 1895.

*Samuel W. Stewart (l) and Charles B. Stewart (r) in McCornick Bldg. office.*

Charles's brother Samuel had been attempting to make a living practicing law since his return from the University of Michigan Law School in the summer of 1892. His office was located in the McCornick building located on the corner of Main Street and First South in Salt Lake City. Charles, having paid off his school debts and having completed two years teaching school was determined to make a success at the practice of law. He recorded on May 31, 1895 that he "went into S. W. Stewart's law office and read law;" and on June 1, 1895 he recorded that he "went in partners with Samuel at 612 McCornick Block, Salt Lake City, Utah. Terms share half and pay expenses equally." His journal states that when he "commenced the practice of law with Samuel W. Stewart in the McCornick Block, we had one desk for both and 20 volumes of law books."

During these hard economic times, Charles went out on his "wheel" or bicycle to find business. At first it was difficult for Charles to make more than $10 a month, a significant decrease over his $70 per month job teaching school. He described the difficult economic times in the following entries:

*September 22, 1895:* Received $20 for our first divorce suit. You may guess how happy we were at getting so much money all at once out of the law.

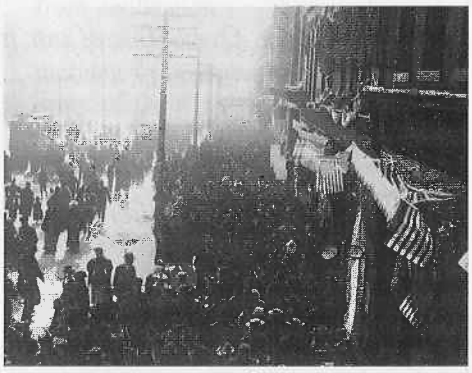
*October 7, 1895.* Removed our office to 317 McCornick Block.

*November 1, 1895.* Everything was quiet and we were feeling a little gloomy when a big country man came in, Robert Beckstead, and gave us a suit.

*December 17, 1895.* . . . Times are hard, and day after day I sit in my office and but little business comes in. I do not realize enough out of my profession to pay my office rent and board, let alone my honest debts. . . . If I would stoop to things low and unjust, I could build up a quicker practice, but that would be wrong, and I would be upon a weak foundation. My motto has always been that Honor and Justice, shall be my star and guide. I would rather starve than lower my standard of Right.

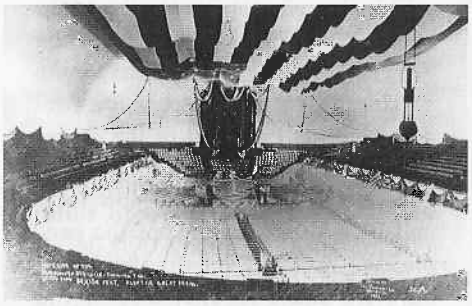
## UTAH STATEHOOD

On January 4, 1896, Charles Stewart proudly wrote:



*Statehood Celebration, 1896*

UTAH IS A STATE AT LAST. It was proclaimed a state in Washington at noon today. Forty-nine years our fathers have been in serfdom and vassalage, have been persecuted and driven, but today, AT LAST, we enjoy the freedom of true Americans. We enjoy the freedom designed by our great Creator to be the lot of every child beneath the blue sky. Great God, we praise thy name in so moving the minds of men to secure our liberty. Happy indeed are we, with beating hearts of gratitude and joy. All the whistles are blowing, the bells ringing, guns firing, and the people are blowing trumpets and shouting loud for joy. My sweet girl Kate, and I walked up and across City Creek and thence downtown to see the throngs of people wild with delight.



*Tabernacle, Statehood Celebration, 1896*

*January 6, 1896.* Everybody from all over the State here celebrating the admission of Utah to the Union. Great procession downtown, and services in the Tabernacle amid flags, bunting, flowers, etc. A flag hung from the ceiling 128 by 150 feet. Needless to say I thought of the past efforts to gain statehood and of my father telling me of the prospects to obtain it. [Charles no doubt also thought of his law school speech a few years earlier presenting a Senate Bill for Utah to obtain statehood.]

With Utah statehood, the economic depression slowly began to dissipate. The courts began to function more smoothly and the Stewart brothers, like other Utah lawyers, began to find work and to prosper.

By July 20, 1897, Charles could write in his journal: "My 27th birthday. Brigham Young Monument is unveiled, and W.J. Bryan, candidate for the U.S. President delivered an oration. The town is having a great jubilee in honor of the pioneers – Great time for Utah."

*Unveiling of Brigham Young Monument, 1897*

In May of 1898, Charles was appointed assistant city attorney. His brother Samuel had the unprecedented distinction at age 34 to be elected District Judge of the Third Judicial District for a four year term, where he presided in the newly constructed City and County Building.

## PRESERVING THE HISTORY OF THE UTAH BENCH AND BAR

It is unfortunate that so little early Utah bench and bar history has been preserved. Today, we can view with curiosity those men whose photographs were taken by photographer C.R. Savage (Utah's preeminent early photographer) in the BENCH AND BAR OF UTAH-1903. Those photographs have been displayed for decades in the Salt Lake County and Weber County courthouses. A pristine copy of that photograph has been located at the Utah Historical Society and copies are now available through that society. The Utah Law and Justice Center is now obtaining a copy of that work for display on its premises.

The earliest written history of Utah's lawyers was published in 1913 and was titled History of the Bench and Bar of Utah. The preface to this bar history by C.C. Goodwin is particularly fitting to this centennial year:

*1903 Utah Bench and Bar*

"THE BENCH AND THE BAR" That is a great theme for a book, because the story fully told will include, besides the physical history of the weary years through which Utah struggled up from the naked breast of the desert into glorious Statehood, the history of another transformation that was made here.

The government at first was a pure theocracy. To cause that to change to the forms prescribed by the fathers has been the work of the bench and the bar. Could it be represented in moving pictures, it would be a panorama of enchantment, for through the earthly pictures would shine out the majestic statues of Truth, of Liberty, of Faith of Justice and of Mercy all in tears but with the dissolving view at the close all would be smiling.

Throughout all would be seen stately forms of devoted men, in the courts of the bench and the bar, and Progress would be seen waiting and trembling at times; at other times advancing and jubilant and the closing scene would be one of peace and full enlightenment.

One of the most interesting features would be young men as they have joined the ranks of the bar and many of whom have advanced with high honors to the bench and to other high places. A State is measured by the administration of the laws and by that rule Utah will bear comparison with any other State in the Union. The bench and bar must always be of deepest concernment to the people . . .

As members of the Utah Bar, during this Centennial year we should do what we can to gather records, photographs and histories that will preserve the history of the Utah Bar and Bench. John Baldwin as executive director of the Utah State Bar has agreed to accept, organize and make those materials available to interested members of the Bar at the Utah Law and Justice Center.

# Strike the Unsigned Minute Entry!

*By Michael A. Jensen*

This article is a call for action. It is intended to stir the Bar and those responsible for rule-making. Specifically, the author seeks changes to the Rules[1] so that unsigned minute entries are a thing of the past. The article first examines the character of a minute entry; the distinction between signed and unsigned minute entries; and then explores ways to eliminate this distinction.

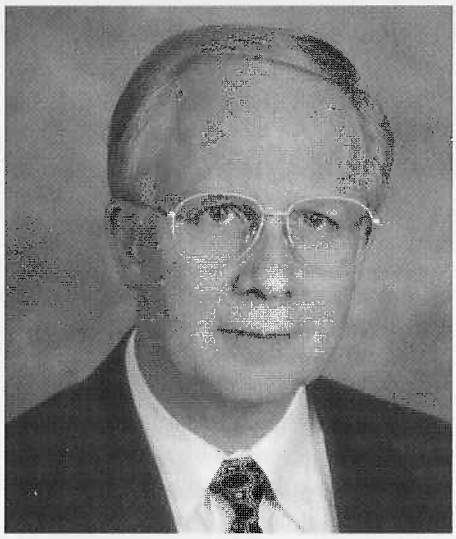
## THE MINUTE ENTRY

A minute entry is merely an articulation of a judicial ruling, decision, or order that is rendered by a judge or panel of judges. It is nothing more. A minute entry has the force of law with respect to the issue or issues on which it derives its existence — whether signed or unsigned.

The minute entry is not a creation of Utah's Rules of Civil Procedure and only minor references to the term are found in other court Rules.[2] Although the author found no definition of "Minute Entry," references to a "minute entry" can be found in federal court decisions at least as far back as 1857 and back to at least 1946 in Utah court decisions.[3] The purpose of this article is not to present a detailed historical perspective on minute entries. Therefore, the origin of the Minute Entry is best left to historians and another article.

Although the statutes and rules fail to define or require the use of minute entries as such, the term "minute entry" is probably as good as any other term to describe the court's actions. Moreover, despite its rarity in the rules and statutes, the Minute Entry has become a powerful force in Utah's judicial system.

Though a Minute Entry is an administrative device which conveys the court's decision on a given matter, the parties and their attorneys are bound by the order or decree contained within it. Whether signed or unsigned, a Minute Entry implements the court's order in the proceedings. However, the validity or "strength" of the Minute Entry is not dependent on whether it is signed.



*MICHAEL A. JENSEN practices as a solo practitioner in Salt Lake City, Utah. His areas of practice are Business Law, including Civil Litigation; Corporate, Tax, including Estate Planning and Estate Taxes; and Elder Law. Mike returned to Utah in 1995 after living in the Northeast for many years. He earned his J.D. from Boston College Law School; his M.B.A. from Harvard; and his B.S. in Physics from the University of Utah. During his extensive business career, Mike created and successfully sold two businesses in Massachusetts. Between those two ventures, he was Director of Marketing & Technology for Corning, Inc. in Corning, New York. He also was a Sr. Geophysicist for Shell Oil Company when he first left Utah.*

## THE UNSIGNED MINUTE ENTRY

Notwithstanding its force, the unsigned minute entry is inferior to a signed minute entry in one important respect. While a signed Minute Entry may be appealed,[4] the unsigned minute entry is not deemed a final order and is therefore not appealable.[5] Thus, the mere signature of a judicial authority can transform an unappealable minute entry into an appealable order.[6]

In a recent case, the court issued an unsigned minute entry denying the defendant a hearing on the plaintiff's motion to dismiss the defendant's counterclaim.[7] The court's unsigned minute entry withheld from the defendant his right to a hearing.[8]

In the same case, the judge also issued another unsigned minute entry which denied from consideration any further motions by the defendant until he paid attorney sanctions to the other side.[9] During the six-week period which followed, the defendant was without any recourse.[10] He could not appeal the judge's decision, and the judge refused to consider any motions from the defendant.

Moreover, whether or not the judge enters a signed order reflecting the unsigned minute entry is solely at the judge's discretion. As a result, a judge could deny a party substantial justice without recourse by the party against whom the minute entry is issued. This gives rise to serious constitutional questions of lack of due process under Utah's Constitution and denial of access to Utah's courts.[11]

In the above case, the unsigned minute entry was equal in force with a signed Minute Entry. The only difference between them was the appealability of the court's decision. This dichotomy, however, has no useful purpose and ought to be eliminated.

Moreover, the dichotomy between signed and unsigned minute entries does not stem from Utah's Code or Utah's Rules.[12] The distinction has arisen exclusively from case law.[13] Yet, the case law generally finds its roots in the 1967 *Steadman* case which focused more on the lack of "findings, conclusions or decree" than it did on the fact that the minute entry was unsigned.[14] Though these roots are now questionable, more recent cases routinely pronounce that "it is well settled that an unsigned minute entry does not constitute an entry of judgment, nor is it a final judg-

ment for the purposes of appeal."[15]

### ELIMINATE THE DICHOTOMY

There are at least two approaches to cure this dichotomy. First, the Utah Supreme Court could discard the distinction between signed and unsigned minute entries. The Supreme Court could merely rely on the existing requirement that an order be "final" before it can be appealed.[16] This approach equalizes among court orders the criteria for determining whether a lower court's ruling is ripe for appeal.

However, challenging *stare decisis* is an uphill struggle. Equally important, changing a Supreme Court precedent would take substantial time. We would have to wait for just the right case to come along and then be fortunate enough to be granted *certiorari* by the Court.

A second approach is to modify the Rules to require all minute entries to be signed.[17] This can be accomplished in two ways: (1) expressly require judges to sign all minute entries; or (2) bring judges and minute entries under Rule 11 of Utah's Rules of Civil Procedure. The author believes that the second, indirect way is the better reasoned approach.

### HOLD JUDGES TO THE SAME STANDARD AS ATTORNEYS

Under Rule 11, unsigned motions, pleadings, and other papers are to be stricken.[18] The mere absence of a signature results in the harsh sanction of striking the unsigned document. Despite the harshness, attorneys and *pro se* parties regularly comply with this rule.

By requiring a signature, Rule 11 assures the document is authentic and also holds the person whose signature is on the document accountable. Hence, Rule 11 serves two valuable purposes.

If these two purposes are truly worthwhile, why not require judges to sign their own minute entries? As it is now, if a judge fails to apply his or her signature to a ruling, there is no possible appeal and there is no accountability. Worse still, if the Minute Entry does not accurately represent the judge's intent and it is unsigned, neither party in the action can appeal that ruling. That result is not only foolish, it jars our judicial sensibilities.

On the other hand, bringing minute entries and judges under Rule 11 would merely hold judges to the same standard as lawyers while not imposing any particular hardship on judges. More importantly, it would equalize the duty of each participant in the litigation process. If a judge fails to sign a Minute Entry, it should be stricken in the same manner as any unsigned document is now stricken under Rule 11. Judges have no reason to complain that adding their signature to their rulings, or in particular, minute entries, is too burdensome. Attorneys submit far more documents to the court than do judges. Yet, attorneys are routinely required to apply their signature to all of their documents.

Requiring a signature also provides a check and balance between the Judge and the Judge's clerk. When applying his or her signature, the Judge can take that opportunity to read the typed Minute Entry to make sure it conforms to the Judge's intended decision or order.[19] This small but important additional step should eliminate any errors in communication between the Judge and the Clerk.

*"[I]f there be valid reasons for keeping the "Unsigned Minute Entry," then let us modify the Rules to articulate the necessity for the Unsigned Minute Entry and to make clear the distinction between a Signed Minute Entry and an Unsigned Minute Entry."*

### OPPOSITION

Since natural law requires opposition in all things, there will be some members of the Bar or the Judiciary who will oppose the author's recommended changes. However, if there be such opposition, let it be soundly based on valid legal reasoning and not mere inconvenience or an offensive reaction to the imposition of applying equal standards to judges and lawyers.

Moreover, if there be valid reasons for keeping the "Unsigned Minute Entry," then let us modify the Rules to articulate the necessity for the Unsigned Minute Entry and to make clear the distinction between a Signed Minute Entry and an Unsigned Minute Entry. In essence, if the Unsigned

Minute Entry is a good thing, then we should be willing and able to formulate rules accordingly.

## CONCLUSION

A signature on a Minute Entry ensures that the Judge has personally approved the Minute Entry's wording. The net result of this change is that no dichotomy would exist between signed and unsigned minute entries because unsigned minute entries would no longer exist — they would be stricken!

[1]The author uses the term "Rules" to refer to all court rules: civil, criminal, appellate, and those in Utah's Code of Judicial Administration.

[2]In an electronic search of Utah's rules, the majority of references to "Minute Entry" arise from annotated case citations. Only three other references were found: Rule 32 of Utah's Rules of Criminal Procedure, Rule 46 of Utah's Rules of Appellate Procedure, and Rule 4-105 of Utah's Code of Judicial Administration. None of the references define or create the term.

[3]*See Alfred Ingraham v. Dawson,* 61 U.S. 486 (1857) (the United States Supreme Court referred to an "entry in minutes" of the lower court as a Minute Entry); s*ee also Foreman v. Foreman,* 176 P.2d 144 (Utah 1946). The use of the term "Minute Entry" may exist before 1946, but the electronic databases of WESTLAW and MICHIE only contain cases from 1945.

[4]*Swenson Assoc. Architects, P.C. v. State of Utah,* 889 P.2d 415 (Utah 1994); *Dove v. Cude,* 710 P.2d 170, 171 n.1 (Utah 1985).

[5]*Ron Shepherd Insurance, Inc. v. Shields,* 882 P.2d 650 (Utah 1994); *Wilson v. Manning,* 645 P.2d 655, 655 (Utah 1982).

[6]The world "appealable" has a dual meaning and both are appropriate here: (1) the order cannot be appealed; and (2) the order is not "appealing," or, it is not desirable.

[7]*See* Minute Entry dated 11/1/95 in civil No. 940905231 in Third District Court, Salt Lake County.

[8]Rule 4-501(3)(b), Code of Judicial Administration permits either party to request a hearing on dispositive matters;dismissing a defendant's counterclaim should be considered dispositive although the Rules are silent on what constitutes a dispositive motion.

[9]*See supra* Minute Entry dated 11/22/95 in Civil No. 940905231.

[10]A signed order of the court subsequently implemented the unsigned Minute Entry. At that point the unsigned Minute Entry became moot, but in that "gap," the unsigned Minute Entry enforced the judge's ruling and it could not be appealed.

[11]*See* Article I, Sections 7 and 11 of Utah's Constitution for "due process" and "access" claims.

[12]Except as discussed above in Footnote 1, the term "minute entry," "unsigned minute entry," or equivalent terms are not found in any of the court's rules or in Utah's Code. Therefore, it logically follows that no distinction between signed and unsigned minute entries exists.

[13]*See e.g., Ron Shepherd Insurance, Inc. v. Shields,* 882 P.2d 650 (Utah 1994); *Wilson v. Manning,* 645 P.2d 655, 655 (Utah 1982); *Steadman v. Lake Hills,* 433 P.2d 1 (Utah 1967).

[14]*See Steadman v. Lake Hills,* 433 P.2d 1 (Utah 1967) ("There being no entry of findings, conclusions or decree there was no final decision of the court").

[15]*See e.g., Ron Shepherd Insurance, Inc. v. Shields,* 882 P.2d 650 (Utah 1994); *Wilson v. Manning,* 645 P.2d 655,655 (Utah 1982).

[16]For a discussion of "finality" and also nonfinal orders, *see Tyler v. Dept. Human Services,* 874 P.2d 119 (Utah 1994); *Kennecott Corp. v. State, Tax Comm'n,* 814 P.2d 1099 (Utah 1991); *Pate v. Marathon Steel Co.,* 692 P.2d 765 (Utah 1984).

[17]The author could not determine whether minute entries were ever routinely signed or not. However, at least some minute entries in Utah were signed as far back as 1949. *See Holbrook v. Holbrook,* 208 P.2d 1113 (Utah 1949) ("The following minute entry appears in the record, *signed by the Judge* of the Trial Court, apparently to stand for the findings of fact and order:") (emphasis added).

[18]There is no discretion under Rule 11. "If a pleading, motion, or other paper is not signed, *it shall be stricken* unless it is signed promptly after the omission is called to the attention of the pleader or movant." Rule 11, Utah R. Civ. P. (emphasis added).

[19]While there is no assurance that a judge will in fact read the minute entry being signed, it does encourage such diligence because the judge's personal signature is being applied.

# Utah Office of Guardian Ad Litem

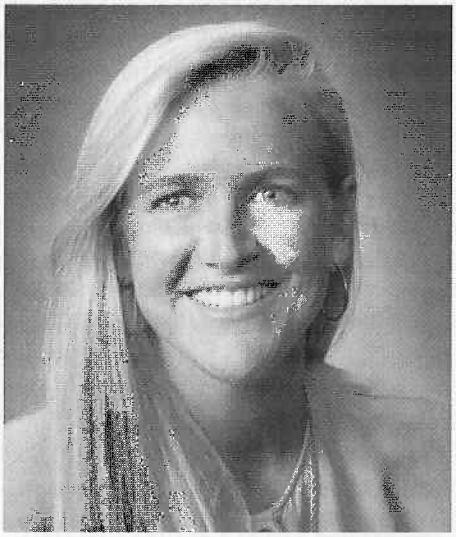
*Kristin G. Brewer*

This past year and a half, over 3, 763 cases came into Utah's court system which involved children whose custody was at issue because they had allegedly been abused, neglected or abandoned. These children need legal representation before the court and coordinated assistance to make sure their needs are met. On July 1, 1994, guardian ad litem attorneys began representing abused and neglected children under specific statutory guidelines to ensure representation for each child.

The creation of the Office of Guardian ad Litem and the Child Welfare Reform Act is part of a bigger movement to change the way the child welfare system responds, in particular, to children in foster care. The guardian ad litem is also appointed to represent children in custody actions where there are allegations of abuse or neglect, in protective order proceedings and in some criminal actions in the district and circuit courts. During the first year and a half of our existence, the interests of over 4,000 Utah children have been represented by the Statewide Office of the Guardian ad Litem.

Because of the great number of children in need of guardian ad litem representation, we have greatly increased the use of Court Appointed Special Advocates (CASAs), who are trained volunteers working with the guardian ad litem attorneys. The CASA volunteer is asked to handle only one case at a time so that intense time may be spent with the child to obtain factual information to assist the guardian ad litem to represent the children's best interests. We now have CASA volunteers in most judicial districts, with over 340 CASA volunteers throughout the state. These volunteers spend an average of 8 hours per month on each case that they have been assigned, with some volunteers spending as much as 30 hours in a given month. I applaud the contributions of our dedicated CASA volunteers.

Perhaps the most important change that has occurred in the past year is that there has been a four fold increase in the time guardian ad litem attorneys actually spent with the children as well as a huge increase in the amount of time spent working on each case gathering information, interviewing fact witnesses, consulting with foster parents and attending court and administrative reviews. These improvements are a product of statutory authority, a strong administrative structure under the Administrative Office of the Courts, and dedicated staff, attorneys and volunteers.



*KRISTIN G. BREWER is the director of the Office of Guardian ad Litem. Currently she chairs the American Bar Association, Young Lawyers Division, Children and the Law Committee and is a former co-chair of the Utah State Bar Needs of Children Committee. She also serves on many committees dealing with children, including the Child Protection Team, the Child Fatality Review Committee, and the Child Abuse Neglect Council, the Children's Justice Center Statewide Advisory Board and the Salt Lake County Commission on Youth. She is a member of the National Association of Council for Children and American Professional Society on Child Abuse (APSAC). Outside of work she enjoys gardening and her German shepherd.*

While we have come a long way, there is still much that needs to be done to adequately serve the many children in need of representation. We are currently finalizing a computer program to assist in tracking our cases and monitoring progress and needs of the children that we represent. We are also continually working to increase the number of CASA volunteers to work with our clients. Additionally, we are beginning to focus on the systemic abuse children suffer as witnesses and victims and to assure that victim rights are granted to children who must testify in court.

## THE MISSION OF THE UTAH STATE OFFICE OF THE GUARDIAN AD LITEM

The Office of the Guardian ad Litem is a state office within the Judicial Branch of government which advocates for the best interest of abused and neglected children within the court system. The guardian ad litem and CASA volunteers work in collaboration with key agencies and community resources to serve as the child's advocate and represent what is in the best interest of the child in the court. The Office of the Guardian ad Litem promotes the policies of the Child Welfare Reform Act: that children in foster care not remain in limbo, that their cases are monitored, and that children not remain in foster care for more than 12 months without a permanency decision. The Office of Guardian ad Litem also strives to assure adequate representation for each child for whom the office is appointed whether or not that child is in foster care.

The goal of the Office of the Guardian ad Litem is to represent to the court what is in the best interest of the child and to assist the court by assuring that the court has complete information on which to base a decision. Because of the high number of cases in the juvenile court, we can not ade-

quately represent all of these children without CASA volunteers. While attorney guardians ad litem have high caseloads, a trained CASA volunteer is asked to work on one case.

The attorneys in the Office of the Guardian ad Litem collaborate with many others, including the assistant attorney general, Division of Family Services, doctors, nurses, therapists, local inter-agency councils, prosecutors, the Child Protection Team, the Fatality Review Board, the Children's Justice Centers, the Utah Chapter of the National Association to Prevent Child Abuse, to name a few. Our attorneys assist in staffing several of these committees. In addition, we are members of the National Association of Counsel for Children, the Utah State Bar Needs of Children Committees, and the American Bar Association, Children and the Law Committee. All of these people and agencies help us gather research and important instruction on how to effectively represent our clients.

In Utah, the child is considered a party to civil proceedings concerning custody or abuse/neglect allegations. This means that the guardian ad litem can call and cross-examine witnesses, conduct discovery, file motions and participate to the same extent as the attorneys for the parents and the state. It is very important that children have competent legal representation. As stated by the Utah Court of Appeals in *J W F v. Schoolcraft,* 763 P.2d 1217 (Utah App. 1988),

*"[W]hen a child needs a guardian ad litem, he needs an advocate – someone who will plead his cause as forcefully as the attorneys for each competing custody claimant plead theirs."*

[w]hen a child needs a guardian ad litem, he needs an advocate – someone who will plead his cause as forcefully as the attorneys for each competing custody claimant plead theirs. The basic premise of the adversary system is that the best decision will be reached if each interested person has his case presented by counsel of unquestionably undivided loyalty. *There is no person more interested in a child custody dispute than the child.* His representative should act accordingly.

*Schoolcraft,* 763 P.2d at 1122.

## HISTORY OF CASA

CASA began three years after passage of P.L. 96-272, the Child Abuse Prevention and Treatment Act which mandated appointment of a guardian ad litem for all abused and neglected children appearing in the juvenile court. In 1977, Juvenile Court Judge David Sokup of Seattle, Washington first recruited community volunteers to work as CASAs to speak for abused and neglected children in the court. He was concerned that he was not receiving enough information about the children who had petitions pending in his court. He wanted to assure that he received adequate information upon which to base his decision. CASA volunteers have proven to be an effective way to help represent the best interest of children. Today, across the country 30,000 people serve as Court Appointed Special Advocates – CASA volunteers.

## THE NEED FOR CASAS

Over the past year and a half in Utah, over 4,000 children had 3,763 cases pending in the courts regarding their abuse or neglect. These children have committed no crime, but are simply victims; children who have been abused, neglected or abandoned. A judge will decide the fate of a child, appearing in the courtroom.

A CASA volunteer is a member of the community who is assigned to work with a guardian ad litem to represent the best interest of a child whose case is before the court. CASAs work primarily on cases in the juvenile court. A CASA volunteer serves as the eyes and ears of the Office of the Guardian ad Litem and the court, gathering relevant information about the child, the family, and most importantly, getting to know the child. The child about whom all these decisions will be made.

CASA volunteers have been used in Salt Lake, Weber and Morgan Counties for many years. CASA is new to most other areas of the state. The Guardian ad Litem Legislation in 1994 mandates the use of CASAs throughout the state to ensure adequate representation of these children.

We are very excited about the expansion

of CASA volunteers in Utah and the new statewide CASA coordination. Susan McNulty previously served as the Third Judicial District CASA Coordinator, where her efforts increased the number of active CASA volunteers from less than 20 active volunteers to over 100 in the Third Judicial District. Ms. McNulty now works supervising the CASA coordinators in the other districts and assisting in training and recruiting statewide. Currently, there are over 340 CASA volunteers statewide.

CASA volunteerism is a success. In the past year our Utah CASA Program received recognition as follows: 1) The Third Judicial District CASA Program was nominated for the Governor's Silver Bowl Award; 2) Darlene Hare, a volunteer in the Fourth Judicial District Program received the Governor's Silver Bowl Award; 3) The Fourth District CASA Program was honored by the Utah Child Abuse Prevention Council for outstanding work with at-risk children; 4) Third District volunteer Margaret Cowan was featured in the National CASA Magazine *Speak Up!* in December 1995; and 5) The Statewide CASA Coordinator, Susan McNulty, received the Utah State Bar's Liberty Bell Award. This award is given annually by the Young Lawyers Division to a non-lawyer who provided outstanding community service. Susan McNulty was instrumental in producing a joint project with the Office of the Guardian ad Litem and the Young Lawyers Division of the Utah State Bar to refurbish the children's shelter in Salt Lake County.

**ATTORNEY AND VOLUNTEER TRAINING**

The initial training for attorneys was an intensive 27 hour training program. On an array of topics: the Child Welfare Reform Act and its background; Mental Health; Children's Justice Center; Interviewing Children; Division of Family Services Child Welfare Manual; Child Protective Services; Adoption; Child Development; Petitions to Terminate Parental Rights; Documentation; Trial Skills; Indian Child Welfare Act; Child Abuse and Neglect; CASA Volunteers; Children's Educational Rights, Children with Disabilities; Obtaining Psychological Opinion Relating to the Best Interest of the Child.

We continue to have on-going quarterly training for our attorneys and volunteers. Here is a list of the speakers and topics that we have had speak to us: Janet Dean from the National Association of Council for Children spoke on working with families and the importance of home visits to observe even the very youngest infants – they do communicate; Janet Ward, Child Placement Consultant on evaluation of out of home placement, kinship care and the ethics of placement evaluations; Dean Lee E. Teitelbaum of the University of Utah College of Law spoke to us about ethical dilemmas in representation of children under *Utah Code Ann.* §78-3a-44.5; and James E.B. Myers, J.D. who wrote *Evidence in Child Abuse and Neglect Cases,* who spoke on sexual abuse and psychological maltreatment of children.

The CASA volunteer training curriculum is similar to that used for the attorneys and follows the curriculum set by the National Court Appointed Special Advocate Association. CASA volunteers go through 15 hours minimum of training prior to taking any cases. They also are subject to a criminal background check. CASA volunteers continue to meet monthly for on-going training.

**PRO BONO GUARDIAN AD LITEM PROJECT**

In February of 1994 the director of the Office of Guardian ad Litem in conjunction with the Needs of Children Young Lawyers Section of the Bar and members of the Senior Bar Needs of Children Committee, put together the Pro Bono Guardian Ad Litem Project. This project involved training of attorneys who were willing to volunteer as the guardian ad litem in one custody case. These would be cases where there were not allegations of abuse or neglect, but where custody and visitation are being disputed and the court would like to appoint a guardian ad litem, but that appointment does not fit under *Utah Code Ann.* §78-7-9. The staff attorneys at the Office of the Guardian ad Litem are unable to handle those cases. The pro bono attorneys have handled these cases instead. Two years later, the project has been successful and we are planning to replicate the training this spring.

I would like to thank Colleen Bell and Dena Sarandos who assisted in establishing the project as well as the following attorneys who have handled numerous cases as pro bono guardian ad litem: Brenda L. Flanders; Neal G. Hart; Jeff L. Hollingworth; Carolyn McHugh; Lori Nelson; Martin O. Olsen; Dena C. Sarandos; John B. Wilson; Mary Jane Ciccerello; Marc Beauchemin; and David Zimmerman.

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April 15, 1996

# Commission Highlights

During its regular meeting of November 3, 1995, held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the September 22, 1995 meeting with corrections.
2. Chief Justice Zimmerman addressed concerns regarding the judicial nominating commission process in the rural districts. He also took this opportunity to introduce Dan Becker, the new State Court Administrator.
3. Dennis Haslam reviewed the schedule of events for the luncheon with the Chamber of Commerce Board of Directors.
4. Dennis Haslam indicated that it would be a good idea to once again have a Bar Commission liaison assigned to every committee of the Bar so that communication lines are expanded to all areas of the Bar and he asked Commissioners to sign up.
5. John Becker gave a status report on the public education campaign being planned for the spring in conjunction with Law Day activities.
6. Haslam also reported on a discussion he had with Scott Matheson regarding the Ethics Advisory Opinion Committee's review of Rule 4.2.
7. Haslam reported that the Executive Committee met with Unauthorized Practice of Law Committee Chair, Steve Sullivan, to ask his committee to assist the Bar in preparing its definition of the practice of law as it pertains to legal assistants.
8. Charlotte Miller reported on the purpose of the Equal Administration of Justice Committee and explained that it is intended to explore the impact of race and ethnicity in the legal system and explore ways to eradicate those barriers to create a more fair system.
9. David Nuffer referred to the Internet Committee's recommendations, summarized the available services, answered questions and distributed a handout with sample Web pages. The Board voted to approve the expenditure for E-Mail and the Internet gateway.
10. J. Michael Hansen, Judicial Council Liaison, reported on the October 23, 1995 Judicial Council meeting.
11. John C. Baldwin reviewed the activities of the Bar department report in the agenda. He reported that representatives from the Bar and judiciary had met with Chief Justice Zimmerman to discuss general concerns regarding Legal Services Corporation.
12. Stephen R. Cochell distributed a report on the caseload statistics for the month of October.
13. Fred Janzen of the University of Utah, reviewed the results of the Bar's member needs assessment survey.
14. Marty Olsen reported on the recent Young Lawyers Division welcoming reception and indicated the division is working with NIKE on a campaign "Soles for Soles" to get tennis shoes for inner city students.
15. Budget & Finance Committee Chair, Ray Westergard, reviewed the financial statements for September and the 10-Year Cash Flow and answered questions.

During its regular meeting of December 1, 1995, held in Ogden, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board voted to approve the minutes of the November 3, 1995 meeting.
2. The Board voted to fund the next two issues of Voir Dire to all active members of the Bar and to discuss any further funding during next year's budget discussions.
3. Budget & Finance Committee Chair Ray Westergard reviewed the financial statements and highlights for October and answered questions.
4. The Bar Commission met with the Weber & Davis County Bars and Steve Cochell delivered an ethics presentation during lunch.
5. The Board approved the Client Security Fund Committee recommendations from the committee's October 13, 1995 meeting with exceptions.
6. Baldwin reviewed the monthly Bar Programs.
7. The Board approved upgrading the telephone system at the Bar offices.
8. Ethics Advisory Opinion Committee Chair, Gary Sackett, appeared to review proposed new Rule of Procedure for the committee. The Board approved the amended procedures for the Ethics Advisory Opinion Committee.
9. Dean Lee E. Teitelbaum reported on the University of Utah's Wallace Stegner Center for Land, Resources & the Environment Interdisciplinary degree programs.
10. Equal Administration of Justice Committee Co-Chair Debra Moore gave a status report on the committees activities.
11. The Board voted to approve execution of the Xmission agreement to contract for Internet services for the Bar.

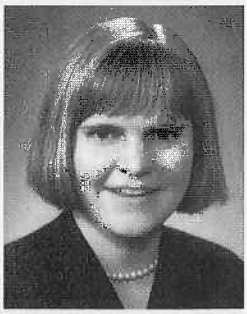
A full text of the minutes of these and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

# NOTICE

Watch for your 1996-97 licensing form in the mail during the first part of June. If you have changed your address or anticipate a change, it is important that you notify the Utah State Bar in writing at 645 South 200 East, SLC, Utah 84111, Attn: Licensing, or fax the change to (801) 531-0660. The Bar is particularly interested in receiving your firm name and E-mail address.

If you have questions call Arnold Birrell at (801) 297-7020.

# Candidates for Utah State Bar President-Elect



## DENISE A. DRAGOO

Dear Colleagues:

This is a first! I am pleased to present my "platform" for president-elect of the Utah State Bar. You may be surprised to learn that this is the first time that the campaign (although not the vote) for president-elect has been open to Bar members. As president-elect, my goal would be to encourage open communication and responsiveness to Bar members. I believe this could be achieved as follows:

**1. Direct Election of President-Elect:** Currently, the president-elect "politics" for votes from the Bar Commission, rather than the membership at large. I believe the members should directly elect the president and that this one change alone would do much to attune the Commission to the needs of its members.

**2. Bar Discipline.** Screening panels should be allowed greater discretion to impose tougher sanctions in disciplining attorneys who violate the Code of Ethics. Currently, the panels push disciplinary matters into district court because sanctions which they can administer are inadequate. Increasing the authority of screening panels would reduce the backlog in district court and help promote a more timely resolution of complaints. In addition, the Commission needs to set clear priorities for the Office of Attorney Discipline to move first on those matters which are the most egregious.

**3. Client Security Fund Increase.** The Client Security Fund was established twenty years ago to provide reimbursement to clients who had been injured by a lawyer's dishonest act. The Fund has not kept pace with the growth of the profession and should be increased both per claim and in total dollars. Reimbursement of the Fund should be an absolute prerequisite to an attorney's readmission to practice.

**4. Democratization of the Commission**. Past efforts to eliminate *ex officio* members of the Commission has alienated Commissioners and the organizations they represent. All Bar members should be encouraged to participate on an equal footing, including elected members, public members and *ex officio* members. The Executive Committee should be reduced in size and responsibility. The entire Commission should be involved in the decision making process by advance circulation of Executive Committee meeting agendas and minutes. Unless confidential, meetings should be open to interested Bar members.

**5. Communications with Committees and Sections.** Our committees and sections are excellent bodies to foster high quality performance of attorney members. Commissioner liaisons with these entities should be strengthened. Sections should be encouraged to help the Bar present less expensive CLE sessions. The Commission should be open to requests for specialization standards proposed by these sections. We should reinstitute our Bar leadership retreat and call on section heads to suggest ways to improve communication between the sections and the Commission. We must continue to promote diversity in committee appointments.

**6. Communication with Bar Members.** The Commission should seek to improve communications with its members through existing means, including the *Bar Journal,* and through new vehicles such as the Internet. The *Voir Dire* shows that bar members will read a journal with a little *pizazz.* Member surveys, such as those prepared for the Commission retreat, should be used to target the needs and interests of our members.

**7. Communications with the Public.** The public has a negative perception of the legal profession. In this regard, we need assistance with public relations from our public Commissioners as well as public relations professionals. For instance, a short press release from the Bar could be attached to disciplinary matters released to the public. Negative editorials regarding the Bar or the judiciary should evoke a prompt and strong response from the Commission. Bilingual presentations to the public, such as those initiated by the Tuesday Night Bar, should be encouraged.

**8. Communications with the Judiciary.** As officers of the Court, the Bar and the Bar Commission are, to a large degree, creations of the Supreme Court. The original rules of integration were enacted by the Court. In response to the Supreme Court Task Force Report in 1991, the Commission was restructured. The Court now appoints public members to the Commission and will decide whether to incorporate a new paralegal division within the Bar. To assure that the Commission and the Court are in accord, we must communicate the need for major changes carefully and only after the Commission has reached consensus.

This is truly an exciting time to be a member of the Commission! I would appreciate your support in the upcoming election and ask you to call your Commissioner and express your support for me.

Very truly yours,
Denise A. Dragoo

## CHARLOTTE L. MILLER

The Utah State Board of Bar Commissioners will elect the next president-elect of the Bar on May 31, 1996. If approved by the Bar membership in a retention election, this person will serve as president-elect in 1996-97 and as president of the Bar during 1997-1998. The thirteen Bar Commissioners are responsible for selecting the president-elect. The election procedure has changed somewhat to encourage input from Bar members to the Commissioners before the selection, and to allow Bar members to ratify the Commission's selection prior to the president-elect taking office.

I have submitted my name as a candidate for president-elect of the Bar. Therefore, I am providing you with the following information so that you may be better informed about me.

I graduated from the University of Utah College of Law after working as a high school English teacher and a legal assistant. I have had the opportunity to practice in a variety of settings – small firm, large firm, corporate, very small firm – and in a variety of areas. I have enjoyed each type of practice in each setting. Although there are certainly advantages in sticking with one place of employment and one type of practice I feel fortunate that I have been able to experience a variety of practices.

I enjoy the practice of law and being an

ambassador for Utah and the Utah legal profession. In both my law practice and my association with the Utah State Bar, I have had opportunities to meet and talk with individuals all over the country. I am proud of the legal profession in Utah, and I like to continually seek new ways for us to improve the practice of law in Utah.

The growth in Utah and in the Utah legal profession will present challenges to all of us. The Utah State Bar needs leaders who look toward the future and who question what the Utah State Bar members will need in the future to continue to provide valuable service and maintain and create a dynamic legal practice. The Bar Commission has become more proactive about the profession. We need to continue to be proactive and plan for the long-term future.

I am willing to make the commitment of time and energy to serve as president-elect and president of the Bar. During the years I have served as Bar Commissioner I have attempted to consider the needs of all Bar members. I enjoy talking with lawyers in a variety of practices all over the state to hear what they want and need from their Bar.

The following are some of the law-related activities in which I have participated over the past thirteen years.

- Salary Survey of Utah lawyers
- Chair of first Pro Bono Committee of Young Lawyers Division
- Director of Tuesday Night Bar in Salt Lake and organizer of similar program in Ogden
- *Utah Bar Journal* Committee
- Young Lawyers Division/Salt Lake County Bar Domestic Relations Pro Bono Project
- Development of New Lawyer CLE program to replace the Bridge-the-Gap program
- President, Young Lawyers Division
- Presenter at national ABA meetings on Utah Bar programs
- Chair of regional ABA meeting in Park City for Young Lawyers – focusing on how to serve clients
- Chair, Utah State Bar Annual Meeting
- Mentor program, University of Utah College of Law
- Mock Trial Coach
- Law Day Committee
- Chair, Committee to Review the Office of Attorney Discipline
- Current member of Executive Committee of Utah Bar Commission (assists in responding to day-to-day management issues of Bar)
- Long Range Planning Committee of Utah Bar Commission
- Co-chair, Committee for the Equal Administration of Justice

I currently serve as Senior Vice President and General Counsel for Summit Family Restaurants Inc., operator of restaurant facilities in 9 western states with about 4,500 employees. As with most attorneys, my job is to solve problems for my client. I would like to bring my experiences as a problem solver, a business person and a lawyer to serve the Utah Bar members as their president.

I encourage you to contact any of the Bar Commissioners about the election.

# Pro Bono Recognition Dinner

The Utah Supreme Court, the Utah Court of Appeals and the Utah State Bar are pleased to announce the First Annual Pro Bono Recognition Dinner.

This event will recognize the many contributions made by *pro bono* attorneys in Utah. The Courts and the Bar will recognize the growing need and importance of *pro bono* services and are sponsoring this event to demonstrate appreciation for those providing services.

All members of the Utah State Bar are invited to attend, especially those involved in or interested in *pro bono* services. This event provides an excellent opportunity to meet with members of the judiciary and with Bar leaders and will prove to be a memorable evening. We hope you can attend!

The Pro Bono Recognition Dinner is set for:

June 4, 1996
At the Capitol Rotunda
5:30 p.m. Social Reception
6:00 p.m. Recognition Comments & Dinner
Cost $20.00 per person

For more information or to register, please contact Toby Brown at the Bar, 297-7027. Please register by 5:00 p.m., May 24, 1996.

*Law firms please note: You may wish to sponsor a full table at the event. Program Sponsors will be recognized as well.*

# MEMBERSHIP CORNER

## CHANGE OF ADDRESS FORM

Please change my name, address, and/or telephone and fax number on the membership records:

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-Mail _____

All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell. Fax Number (801) 531-0660.

# Trial Academy 1996 Continues: Session III Set for June 27 "Direct Examination of Witnesses"

Part II of the Litigation Section's Trial Academy 1996 was held on April 25 in Judge Dee Benson's courtroom. Judge Benson was joined on the bench by Judge Pat Brian for opening statements in the mock wrongful death of *O'Reilly v. Bounder Transportation.*

Plaintiff's counsel were David Jordan (Stoel, Rives, Boley, Jones & Grey) and Gordon Campbell (lately of the United States Attorney's Office). The defendant was represented by Richard Burbidge (Burbidge and Mitchell) and Scott Daniels (Snow, Christensen & Martineau). Keeping things moving was Francis Carney (Suitter, Axland & Hanson). All aspects of opening statements in a civil case were demonstrated in this entertaining two-hour seminar.

Part III of the Trial Academy will be held on Thursday, June 27, at 6:00 p.m. It is *not* necessary for the registrant to have attended Parts I or II. The faculty and location will be announced.

Experienced local trial attorneys will demonstrate the art of direct examination of witnesses and explore the laws and procedures governing it. As with all segments of the Trial Academy, the program is designed to acquaint the novice practitioner with the basic skills of the trial lawyer and provide some insights into the peculiarities of local practice.

The remaining segments of the Trial Academy 1996 are:

June 27, 1996: Direct Examination
August 29, 1996: Cross Examination
October 24, 1996: Exhibits
December 19, 1996: Summation

The cost is $20 per session for Litigation Section members and $30 for non-members. (Section membership is $35 a year and includes many other benefits and discounts.) Students may also enroll for all of the remaining four sessions of the Trial Academy at a cost of $60 for Section members and $100 for non-members. Students will receive two hours of CLE credit for each segment attended.

To preserve the "courtroom" atmosphere, enrollment for the June 27 session will be limited. Given that the prior sessions were rapidly sold out, interested lawyers should register *immediately* for Part III by calling Monica Jergensen at the Utah State Bar at 531-9077. Questions on the seminar should be addressed to Francis Carney at Suitter, Axland & Hanson, 532-7300.

# United States Court of Appeals for the Tenth Circuit

**Byron White • United States Courthouse**
**1823 Stout Street • Denver, Colorado 80294**
**Telephone: (303) 844-6017 • Facsimile: (303) 844-6437**
**Circuit Mediator**

The United States Court of Appeals for the Tenth Circuit in Denver, Colorado seeks an attorney for its appellate mediation program.

Applicants should have knowledge of federal civil practice and procedure; should have litigation, mediation, or judicial experience; and should present evidence of exceptional aptitude and skills for problem solving and consensus building. Graduation from accredited law school and admission to highest court of a state/territory of the United States are required.

Send resume and supporting information to:

David W. Aemmer
United States Court of Appeals
1823 Stout Street
Denver, Colorado 80257

Starting salary is $58,942 to $73,694 depending upon experience. Deadline: June 14, 1996. No telephone calls please. The court is unable to offer for relocation expenses.

Equal opportunity employer.

# "The Trial"

*By Paul Larsen*

The Utah State Bar is proud to be sponsoring the Lawyers' Centennial Event – an original play written for the occasion entitled "The Raid – The Trial of George Q. Cannon." The play – which will be presented at an elegant premiere event on September 19 in Kingsbury Hall – is a thought-provoking look at a polygamy prosecution which occurred around the time of Utah statehood. The trial of LDS leader George Q. Cannon becomes the centerpiece for a discussion of some of the most controversial legal issues in Utah history – religious freedom, separation of church and state, individual liberties and the role of the federal government.

The play was written at the Bar's request by Paul Larsen and will be directed by Marilyn Holt, of the University of Utah Theater Department. It is a dramatic interpretation of historical events which will capture your imagination. This play is the perfect way for Utah's legal community to explore centennial legal history in an entertaining way – while stimulating discussion of issues which are still being debated on today's front pages.

We are now involved in casting this exciting event, and we would like to encourage any lawyers who have acting experience and want to be part of this production to contact Lisa-Michele Church, drama event committee chair, or one of her committee members.

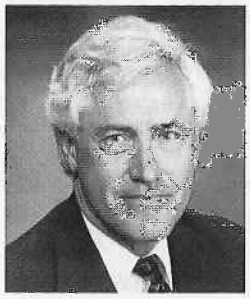
Mark the date of September 19 on your calendars to watch "The Trial!"

*continued from pg 5*

input from its membership regarding the program. It is important that the Supreme Court be petitioned so as to ensure that our judicial branch of government and the Utah Bar work together on this important project. If you have comments or suggestions, please send them to me by the end of May, 1996.

## Fellows of the American College of Trial Lawyers

*James S. Jardine*



*Alan L. Sullivan*

James S. Jardine and Alan L. Sullivan have been named Fellows of the American College of Trial Lawyers. Created in 1950 to recognize excellence in trial lawyers, the College includes members from every segment of the civil and criminal trial bar of the United States and Canada. Its purpose, in addition to identifying and recognizing outstanding trial lawyers, is to improve the standards of trial practice, the administration of justice and the ethics of the profession. Invitation to membership is extended by the Board of Regents, the governing body of the College, only after careful examination of the nominee's experience, skill, ability and ethical standards.

The induction ceremony at which Mr. Jardine and Mr. Sullivan became Fellows took place March 9, 1996 during the Spring Meeting of the College in Tucson, Arizona. More than 875 persons were in attendance at this meeting.

Mr. Jardine is a partner and President of the law firm Ray Quinney & Nebeker. Mr. Sullivan is a partner and Chair of the Litigation Section of the law firm Van Cott, Bagley, Cornwall & McCarthy. Both have been practicing in Salt Lake for over twenty years.

## Northern Utah American Inn of Court

Honorable James Z. Davis, Utah Court of Appeals, and Ogden Attorney Scott Marriott Hadley, with the law firm of Van Cott, Bagley, Cornwall & McCarthy, have co-founded the Northern Utah American Inn of Court. The Northern Utah Inn is chartered by the American Inns of Court, originally founded by United States Supreme Court Chief Justice, Warren E. Burger, in 1980. The Inn is dedicated to improving ethics, civility and professionalism within the legal profession. It helps lawyers sharpen their ethical awareness and improve their skills by enabling them to learn, side-by-side, with experienced judges and attorneys. Inn members range from third-year law students to judges, attorneys, and law professors with decades of legal experience. For further information about the Northern Utah Inn of the American Inns of Court, contact Scott Hadley in Ogden, Utah at (801) 394-5783.

## NOTICE OF LEGISLATIVE REBATE

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

## Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 1996 and ends June 30, 1997. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its July 3, 1996 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment and the Law & Justice Center after May 31, 1996. You may pick up a copy from the receptionist.

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

# 1996-1997 Utah State Bar Request for Committee Assignment
# DEADLINE – May 31, 1996

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

Many committee appointments are set to expire July 1, 1996. If you are currently serving on a committee, please check your appointment letter to verify your term expiration date. If your term expires July 1, 1996 and we do not hear from you, we will assume you do not want to be reappointed, and we will appoint someone to take your place. If your term expires in 1997 or 1998, you do not need to reapply until then. If you are not currently serving on a committee and wish to become involved, please complete this form. See bottom of this page for a brief explanation of each Committee.

## COMMITTEE SELECTION

**Applicant Information**

Name _____

Office Address _____ Telephone _____

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

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

_____

_____

_____

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

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

### COMMITTEES

1. **Advertising.** Makes recommendations to the Office of Bar Counsel regarding violations of professional conduct and reviews procedures for resolving related offenses.
2. **Alternative Dispute Resolution.** Recommends involvement and monitors developments in the various forms of alternative dispute resolution programs.
3. **Annual Meeting.** Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.
4. **Bar Examiner Committee.** Drafts and grades essay questions for the February and July Bar Examinations.
5. **Bar Examiner Review.** Reviews essay questions for the February and July Bar Exams to ensure that they are fair, accurate and consistent with federal and local laws.
6. **Bar Journal.** Annually publishes ten monthly editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.
7. **Character & Fitness.** Reviews applicants for the Bar Examination to make recommendations on their character and fitness for admission to the Utah State Bar.
8. **Continuing Legal Education.** Reviews the educational programs provided by the Bar to assure variety, quality and conformance with mandatory CLE requirements.
9. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
10. **Delivery of Legal Services.** Explores and recommends appropriate means of providing access to legal services for indigent and low income people.
11. **Fee Arbitration.** Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.
12. **Law Related Education and Law Day.** Helps organize and promote law related education and the annual Law Day including mock trial competitions.
13. **Law & Technology.** Creates a network for the exchange of information and acts as a resource to Bar members about new and emerging technologies and the implementation of these technologies.
14. **Lawyer Benefits.** Review requests for sponsorship and involvement in various group benefit programs, including health, malpractice, disability, term life insurance and other potentially beneficial group activities.
15. **Lawyers Helping Lawyers.** Provides assistance to lawyers with substance abuse or other various impairments and makes appropriate referral for rehabilitation or dependency help.
16. **Legal/Health Care.** Assists in defining and clarifying the relationship between the medical and legal professions.
17. **Legislative Affairs.** Monitors pending or proposed legislation which falls within the Bar's legislative policy and makes recommendations for appropriate action.
18. **Mid-Year Meeting.** Selects and coordinates CLE program topics, panelists and speakers, and organizes appropriate social and sporting events.
19. **Needs of Children.** Raises awareness among Bar members about legal issues affecting children and formulates positions on children's issues.
20. **Needs of the Elderly.** Assists in formulating positions on issues involving the elderly and recommending appropriate legislative action.
21. **New Lawyers CLE.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New Lawyer CLE requirements.
22. **Professional Liability.** Monitors the Bar's continuous liability insurance program with carriers under a fully standard policy form.
23. **Small Firm and Solo Practitioners.** Assesses the needs and requirements of solo/small firm practitioners and develops recommendations and programs to meet those needs.
24. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

DETACH & RETURN to Steven M. Kaufman, President-Elect, 645 South 200 East, Salt Lake City. UT 84111-3834.

# Attorneys Needed to Assist the Elderly

## Needs of the Elderly Committee
## Senior Center Legal Clinics

Attorneys are needed to contribute two hours during the next 12 months to assist elderly persons in a legal clinic setting. The clinics provide elderly persons with the opportunity to ask questions about their legal and quasi-legal problems in the familiar and easily accessible surroundings of a Senior Center. Attorneys direct the person to appropriate legal or other services.

The Needs of the Elderly Committee supports the participating attorneys, by among other things, providing information on the various legal and other services available to the elderly. Since the attorney serves primarily a referral function, the attorney need not have a background in elder law. Participating attorneys are not expected to provide continuing legal representation to the elderly persons with whom they meet and are being asked to provide only two hours of time during the next 12 months.

The Needs of the Elderly Committee instituted the Senior Center Legal Clinics program to address the elderly's acute need for attorney help in locating available resources for resolving their legal or quasi-legal problems. Without this assistance, the elderly often unnecessarily endure confusion and anxiety over problems which an attorney could quickly address by simply directing the elderly person to the proper governmental agency or pro bono/low cost provider of legal services. Attorneys participating in the clinics are able to provide substantial comfort to the elderly, with only a two hour time commitment.

The Committee has conducted a number of these legal clinics during the last several months. Through these clinics, the Committee has obtained the experience to support participating attorneys in helping the elderly. Attorneys participating in these clinics have not needed specialized knowledge in elder law to provide real assistance.

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Any attorneys interested in participating in this rewarding, yet truly worthwhile, program are encouraged to contact: John J. Borsos or Camille Elkington, 370 East South Temple, Suite 500, Salt Lake City, Utah 84111, (801) 533-8883; or Joseph T. Dunbeck, Jr., Parsons, Davies, Kinghorn & Peters, 310 South Main Street, Suite 1100, Salt Lake City, Utah 84101, (801) 363-4300.



# Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $5.00. Thirty eight opinions were approved by the Board of Bar Commissioners between January 1, 1988 and January 26, 1996. For an additional $2.00 ($7.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1996.

**ETHICS OPINIONS ORDER FORM**

| Quantity | | Amount Remitted |
|---|---|---|
| _____ | Utah State Bar Ethics Opinions | _____ ($5.00 each set) |
| _____ | Ethics Opinions/ Subscription list | _____ ($7.00) |

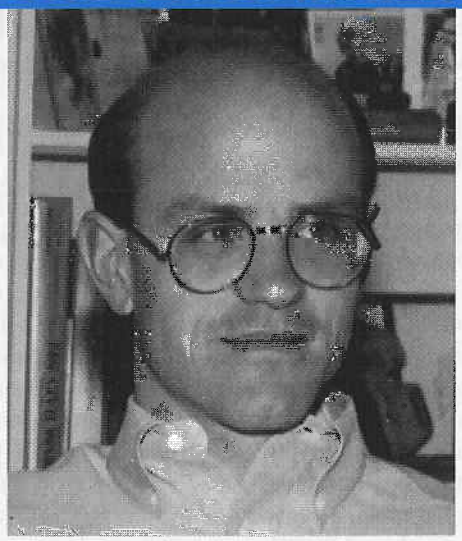
Please make all checks payable to the Utah State Bar
Mail to: Utah State Bar Ethics Opinions, ATTN: Maud Thurman
645 South 200 East #310, Salt Lake City, Utah 84111.

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.



# Young Attorney Profile
# Hugh Matheson

*By Robert O. Rice*

"Go to law school, see the world," could be Hugh Matheson's motto.

Hugh, a 1993 University of Utah College of Law graduate, took his JD to South Africa, where the thirty-six-year-old Kirton & McConkie lawyer is Africa Area General Counsel for the Church of Jesus Christ of Latter-day Saints. He oversees legal services in forty-seven sub-Saharan countries, of which Hugh has already visited nineteen, since arriving in Africa last year.

His relocation to Africa did not surprise friends and colleagues. In law school, Hugh occasionally donned a Masai-warrior blanket and sometimes punctuated conversations with Swahili expressions.

Hugh's fondness for South Africa developed after the Utah native served a 1979 LDS Church Mission in South Africa and Zimbabwe.

"Since then," Hugh wrote in a recent E-mail from South Africa, "I've been interested in the Church's expansion into some of these challenging international environments and it's fun to now be watching things from the front lines."

Hugh, his wife Marcie, and four children, now including newborn, Emma, left for South Africa in the Summer of 1995, to take part in Kirton & McKonkie's growing international law team.

He takes with him litigation experience from Fabian and Clendenin and a background in municipal bonds from Ballard, Spahr, Adrews and Ingersoll.

Now, Hugh's practice includes overseeing all land acquisition, construction, leasing, vehicle operations, human resources and other issues in the Church's Area office.

"I'm essentially the in-house counsel for these operations. We have local counsel in each country that do the actual legal work. We seek out the top firms and attorneys in each country. My role is to administer and supervise the legal work done by local counsel . . . ."

Hugh also is responsible for maintaining the LDS Church's registration with various government ministries and coordinating the odd litigation matter, which Hugh describes as challenging.

"I won't get into the details, but Utah lawyers should be grateful for the level playing field afforded by the existence of an independent judiciary that gets regular paychecks from the government," he reported.

Law practice aside, Hugh says Africa is an intriguing and varied destination.

"Africa gets in your blood. Despite the problems inherent in being the world's poorest continent, it is a huge, fascinating and diverse place."

For instance, Hugh's business trips are the stuff of which Isaac Dennison novels are made.

"Ballard, Spahr used to send me to San Francisco to close municipal bond deals, but in this job I got to live through a coup attempt, witness a fragile cease-fire in a civil war, and walk in the footsteps of Ras Tafari, all in one trip," Hugh said.

Hugh has also observed South Africa settling into its new place in history.

"Look, South Africa still has a long way to go. But what has happened here in the last few years is acknowledged by South Africans of all races as nothing short of a miracle. And the miracle worker is Nelson Mandela. The man came to the presidency with overwhelming moral authority resulting from the dignity with which he bore his imprisonment and the forgiveness he offered his former oppressors. It's been exhilarating to watch him unite the new South Africa," Hugh wrote.

Though not without challenges, Hugh reports that the experience has been good for his family. His wife, Marcie, and

friends have become involved in sponsoring a preschool in a black township. Sons Dan and Patrick are thriving at an international school and have adopted rugby and cricket as their sports of choice. Hanna, three, attends preschool and is developing an interesting mix of South African and Utah accents. Finally, baby Emma spends at least an hour each day strapped to the back of her "second mother," the Matheson's domestic assistant, Flora.

Before law school, Hugh developed a resume no doubt as eclectic as his visa is now. Hugh was Utah Democratic Party Executive Director and also worked for the LDS Church's public affairs department. During law school, he was campaign manager for Utah Citizens Against Paramutuel Gambling. Hugh also served as Issues Coordinator for Kem Gardner's 1984 gubernatorial campaign and was advisor to Karen Shepard's congressional campaigns.

Now, Hugh reports that he's found a new niche.

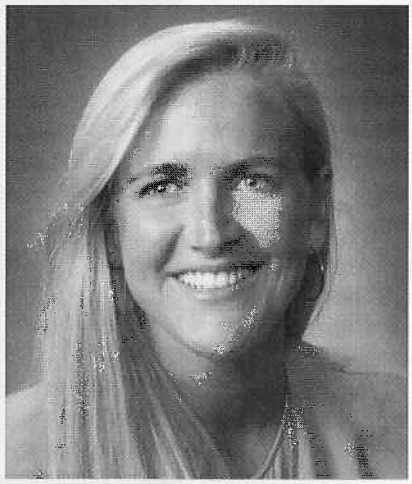
"I joined Kirton & McKonkie specifically to take this assignment, but it's been fun working with them. They are the West's undiscovered international legal resource. Not only do they have guys like me stationed around the world who have developed a network of the best attorneys in each country in their regions, they also have a mini-UN in Salt Lake City.

"I can fax a proclamation in Portuguese from the Mozambique minister of justice or a purchase agreement in French from a vendor in Madagascar, and twenty-four hours later have an English translation and analysis back on my desk in Johanesburgh. Those kinds of capabilities are important in today's increasingly global economy."



# Young Lawyers Select Kristin G. Brewer as Young Lawyer of the Year

*By Marty Olsen*



The Young Lawyers Division of the Utah State Bar has selected Kristin G. Brewer as Young Lawyer of the Year. Ms. Brewer has been active in the Young Lawyers Division for several years and currently works closely with the YLD Needs of Children Committee. As a member of that committee, Ms. Brewer established the pro bono Guardian ad Litem program in Third District Court and has been instrumental in implementing a low cost visitation center for court ordered supervised visitation.

Ms. Brewer is the director of the Office of Guardian ad Litem. Currently, she chairs the American Bar Association, Young Lawyers Division, Children and the Law Committee and is a former co-chair of the Utah State Bar Needs of Children Committee. Prior to that, she chaired the Pro Bono Committee of the Young Lawyers Section. She also serves on many committees dealing with children, including the Supreme Court Advisory Committee on Rules of Juvenile Procedure, Child Protection Team, the Child Fatality Review Committee, the F.A.C.T. Steering Committee, the Child Abuse Neglect Council, the Children's Justice Center Statewide Advisory Board and the Salt Lake County Commission on Youth. She is a member of the National Association of Council for Children and American Professional Society on Child Abuse (APSAC).

Ms. Brewer is overwhelmed with the success of the pro bono Guardian ad Litem program. Currently, fifty attorneys are undergoing training to serve as volunteer GALs in the Third District. She expresses her appreciation for the support of the members of the Bar and their response to the needs of children in Utah.

# PLEASE DONATE!
# Book and Clothing Drive for Needy Children of Salt Lake

**Please bring new or slightly used children's books or clothing (for ages 0-12) to the Law and Justice Center on Thursday May 30, 1996.**

Volunteers are needed to take the responsibility of reminding people in their firms about the drop date and to distribute literature regarding the drive.

Sponsored by the Young Lawyers Division Needs of Children Committee.
For more information about the drive contact
Anne Morgan at 532-1234 or Jeff Hollingworth at 531-8400.

# Dana L. Hayward — Liberty Bell Award

*By Michael O. Zabriskie*

Each year the Young Lawyer Division of the Utah State Bar recognizes a non-lawyer for their contributions to the legal profession. This year the YLD selected Dana L. Hayward for this honor. Dana is a paralegal at the Legal Aid Society of Salt Lake, and works in the Domestic Violence Victims Assistance (DVVA) program. When Dana started at Legal Aid 12 years ago, there was no separate program to assist victims of Domestic Abuse. Commissioner Michael S. Evans, was then the Director of Legal Aid and initiated the program under the name SAVA (Spouse Abuse Victims Assistance). Dana became one of the first paralegals in the new domestic violence program and has worked there ever since. There have been numerous changes to the program in the last decade culminating in a State-wide uniform Protective Order System. Dana has been personally involved in literally thousands of protective Orders, as well as the evolution of the uniform documents that are now being used in all the District Courts.

The DVVA program provides legal representation to victims of Domestic Abuse on a walk-in, same day service basis. Service is provided free of charge regardless of the victims' income, however, 95% of the clients are at or below the poverty level. Dana is currently one of four paralegals who interview victims and determine eligibility for a Protective Order. She then prepares the documents and the victim is escorted to Court where the documents are filed and a hearing is set. At the subsequent hearing, the abuser is present and a Legal Aid attorney acts as advocate for the victim to obtain the Protective Order. State law provides that Protective Orders can be obtained pro se, however, the process can be overwhelming for traumatized victims especially if they are illiterate or semi-literate. The victims must complete seven pages of instructions and documents and file them with the Court clerk. Then the documents must be taken to the Judge for signature and then taken to the Sheriff's office for service. At the hearing the victims must represent themselves against the abuser. The personal touch of a trained professional helps to minimize the distress on these victims.

Dana is one of the best at listening and empathizing with victims. She is able to explain the process and reassure them that there is help available. "Dana is the resident expert of Protective Orders" states a former Legal Aid attorney, "she is concise and knows exactly how to provide the information to the Judge, saving both the client and the Court a lot of valuable time." Many victims are unwilling or hesitant to open up and reveal the details of their abuse to a stranger. Dana's cheerful smile and genuine concern enables her to break through many of the barriers and get people to communicate with her. Dana often works late in order to finish with a client and puts considerable effort into each case. With her years of experience, Dana sometimes wonders if she has seen it all, then a victim will come in with a new lamentable encounter and she is forced to comprehend anew, the scope of domestic abuse. Often asked how she deals with the situations day in and day out; Dana responds with that is her job and her responsibility. She does so with enthusiasm and concern.

Dana has been the one constant in the DVVA program for the last decade. She is the daughter of former County Sheriff Pete Hayward. Her ties to law enforcement have benefited both sides. After Dana started at Legal Aid, there was a series of bomb threats. The response time was "astounding" with several sheriffs officers responding and releasing the building after a careful search. Dana personally knows many of the law enforcement officers and never hesitates to call and seek their knowledge and information about a case. Dana has also taken part in training law enforcement officers in dealing with Domestic Abuse and enforcement of Protective Orders. Most officers admit that domestic violence is one of the most difficult situations to respond to. By providing insight as to the victims' traumatization, officers are better able to understand and comprehend these situations.

Dana worked for the State Division of Wildlife Resources before working at Legal Aid. Her outside passions include her nieces and nephews, gardening and shopping. Her mother says Dana always wanted to be an attorney when she grew up. So far, she has not realized that dream, however, Dana has made a considerable impact on the legal profession in a meaningful and significant manner.

# Justice Court Growth

*By Judge John L. Sandberg*

1995 was a year of many accomplishments and changes for Utah's local courts. Justice Courts made progress in five major areas: justice courts created a master strategic plan, several test sites were established accessing information on the state wide area computer network, Judicial Performance Evaluation for Justice Court Judges came closer to implementation, and the state's municipal justice courts were recertified. The Administrative Office of the Courts offered a program of more than sixty hours of continuing education for Justice Court Judges.

*JOHN L. SANDBERG is a full time justice court judge in Weber and Davis Counties. He earned a Juris Doctor from J. Reuben Clark Law School in 1978 and a B.S. in communications and political science from Weber State University in 1975. Judge Sandberg is currently president of the Utah Justice Court Association. He has been a member of the Utah Judicial Council Standing Committee on Judicial Performance Evaluation for six years. Judge Sandberg has served on the Justice Court Board of Judges for six years and is currently chairman of that board. In 1993 he was honored as Utah Justice Court Judge of the Year and in 1989 as Law Trained Justice Court Judge of the Year. He is currently pursuing a Masters of Judicial Studies from the University of Nevada, Reno and the National Judicial College.*

## RECERTIFICATION

During the past year Utah's municipal justice courts completed the recertification process. All justice courts must complete this process every four years to insure each court satisfies the standards. The Justice Court Standards Committee, chaired by Judge Lynn Payne, certified ninety-five municipal justice courts as meeting the minimum requirement for staffing, physical facilities and support materials for the court. Each municipal judge was also certified as to continuing education and health requirements.

Three municipalities decided to close justice courts. Utah now has 123 justice courts, twenty-eight of which are county or precinct courts. About fifty justice courts have closed over the last ten years. There are about 105 judges because several judges sit in more than one court.

## INFORMATION ACCESS

Six justice courts are test sites for access to the state wide area network. The Utah Bureau of Criminal Identification and the Task Force on Criminal and Juvenile Justice have cooperated with these courts in testing a method that allows justice courts to obtain criminal histories, driving records, warrant information and vehicle registration information. The goal is to have this information, with Utah Law on Disc®, available on the bench. This allows a court appearance to be more productive and reduces return appearances.

## EDUCATION

In 1990 the Justice Court Board became the first Utah court board to develop a core curriculum. The curriculum covers information a justice court judge would need to function on the bench. The board designed this curriculum to have a five-year cycle in which to teach and review essentials. Some subjects would be offered annually, but most courses would be offered once or twice through the educational cycle.

The goal is to annually offer sufficient opportunity so each judge can easily satisfy the yearly thirty hour continuing education requirement. Three primary educational programs were offered this year. The topics ranged from computer use to

records retention. Special emphasis was placed on statutory and appellate changes in the law, evidence and criminal procedure.

Our education committee is in the midst of a year long process to evaluate and revise the core curriculum. They are addressing the need for additional education about domestic violence and the ever shifting ground around DUI cases.

Another major goal is the creation of a Legal Institute for non-law trained justice court judges. Although some need in this area is more perceived than real, establishment of this institute would provide an avenue to continue improvement in justice court competency and proficiency.

The Legal Institute would be loosely based upon the first year of law school. Judges would study criminal law and procedure, evidence, contract law and torts, constitutional law and civil procedure. A combination of study at a law school and home study through video or audio tapes could also be used and materials focused upon Utah law within the subject matter jurisdiction of justice courts.

**JUDICIAL PERFORMANCE**

Over the last few years the Standing Committee on Judicial Performance Evaluation has been struggling with a methodology to include justice courts in performance evaluation. A primary difficulty arises from the attorney survey used for courts of record. The attorney survey is the primary tool to evaluate state court judges, but creates a problem because so few attorneys regularly appear in justice courts.

The JPE committee emulated a process that several other states have successfully used to gather data on judges. In addition to the typical attorney survey, parties and jurors were surveyed in exit polls. All parties to the action, jurors, and other support staff, such as adult probation and parole and police officers were asked questions about the judges' performance. Experience in other states shows no statistical difference between these sources and the attorney survey. The results were very encouraging, both because the system seemed to work and because of the very high approval rating of local courts and their judges.

*"While Utah's local courts have accomplished much in the past year, one important issue remains to be examined, retention elections for municipal justice court judges."*

The survey showed an overwhelming vote of confidence in the justice court judge. However, after they reviewed the process, the committee recommended another pilot project. Two things will change in this modified test plan. First, there will be an attempt to get at least 90 percent of the attorneys to complete the information. Telephone interviews if necessary will complete the questionnaire. Second, survey managers will implement a method of randomly questioning parties. This is necessary to avoid the self selection that was inherently included in the survey just completed.

**PLANNING**

The creation of a justice court master plan was one of the most ambitious and potentially beneficial tasks completed in the last year. The justice courts were the first court level in Utah to complete a strategic master plan. There have been varying degrees of concern about the future of justice courts. The Justice Court Board intends the strategic plan created over the last few months to answer this question.

As part of the master plan a mission statement was created for justice courts, to wit: "Justice courts provide a fair, impartial and efficient forum for local adjudication of issues, in an approachable and proficient manner." Goals in eight specific areas followed, specifically: Judicial Independence, Jurisdiction, Training, Technology, Administration, Funding, Public Relations, and Unity and Teamwork.

These goals are the justice court areas of concern for the next ten to fifteen years. The Justice Court Board has developed objectives that are specific applications of the goals in two to five year ranges. A final phase is in progress. The Justice Court Board is creating action steps for each objective to be completed in the next one to two years.

While Utah's local courts have accomplished much in the past year, one important issue remains to be examined, retention elections for municipal justice court judges. All other judges in Utah are subject to retention elections after their initial appointment. The mayor with approval of the city council still reappoints a municipal judge every four years. The issue of retention elections for Justice Courts has been a concern for the Judicial Council, and needs to be further addressed in coming legislative sessions.

Although actual cases of undue pressure or failure to reappoint a qualified judge are rare, extending retention elections to all judges should improve this situation in Utah. The Judicial Council has been very supportive of this issue in the current legislative session.

Our Justice Courts in Utah have greatly improved since the days of the Justice of the Peace holding court while plowing his field. Major strides have been made in judicial education, competency, court facilities and service to the public. The Justice Court Board and the vast majority of justice court judges are committed to continuing these improvements for the bench, the Bar and the public.

# CASE SUMMARIES

*By Clark R. Nielsen*

## REAL PROPERTY, MERGER

The provisions of a prior purchase contract are merged into the warranty deed. A buyer may not sue the seller for breach of contract after the buyer has accepted and recorded the deed. Consequently, the attorney fee provision in the contract does not permit an award of attorneys' fees in defending an action for breach of contract, negligent misrepresentation and fraud after merger. The buyers sought to recover damages from the seller after the buyers accepted a warranty deed with a different property description than in the earnest money contract. Before closing the sale, the sellers notified buyers that the sale would not include certain property which the buyers thought they were obtaining. A written statement by the buyers at closing, purporting to reserve their rights under the contract, was not sufficient to overcome merger when the warranty deed was accepted and recorded. Merger of the seller's contractual obligations into the warranty deed cannot be avoided by a mere unilateral declaration by the purchaser.

A warranty deed is tantamount to a final real estate agreement and abrogates any preliminary earnest money agreement with inconsistent terms. Merger does not apply when there is (1) mutual mistake, (2) ambiguity, (3) existing collateral rights, or (4) fraud. The "reservation" in the buyers closing instructions did not preclude the application of merger, as the reservation did not fall within these exceptions. The buyers' reservation was simply a unilateral statement. The court does not discuss whether both parties can waive the merger by a mutually agreed contract. In this case, merger could not be avoided by a unilateral attempt to change the terms of the transaction.

The merger doctrine also abrogates the sellers' claim to attorneys' fees under the terms of the earnest money contract. The abrogation rule applies equally to the sellers as to the buyers. Therefore, the sellers were not entitled to recover a reasonable attorney fee under the contract provisions.

*Maynard v. Wharton,* Utah Court of Appeals, 950204-CA (2/23/96) (Judge Jackson, w. Js. Orme and Bench)

## DAMAGES, CONTRACTS

The plaintiff sued the defendant Winchester for damages for the defendant's use of the plaintiff's one-third interest in the defendant's water system. Winchester counterclaimed for a return of the plaintiff's one-third interest and a transfer of water and for attorneys' fees for the defending the plaintiff's claims. The various claims were tried to a jury and at the close of the case of the evidence, the trial court granted both parties' motions for directed verdict on the claims of the other. The issue of damages and attorneys' fees on other claims were submitted to the jury. The jury found that the plaintiff had damaged Winchester as a result of the plaintiff's unauthorized use of Winchester's water and that plaintiff was responsible for attorneys' fees under the "third party attorney fees rule". That rule, as articulated in *South Sanpitch Co. v. Pack,* 765 P.2d 1279 (Ut. App. 1988) provides that when the natural consequences of one's negligence is another's involvement in a legal dispute the fees in that dispute are recoverable as an element of damages. The court affirmed the attorney fee award because the plaintiff failed to preserve his argument at the trial by not objecting to the instruction or proposing a proper jury instruction, and failed to make its argument in any motion to the court.

On the cross appeal, the court also affirmed the trial court's directed verdict that the plaintiff did not owe Winchester 25 acre feet of water based upon separation of business relation. When the parties separated and terminated their business relationship, they entered into a "water and settlement agreement." The court enforced the provisions of that agreement. In discussing the paucity of argument, the court panel observed that the mere mention of an issue without introducing supporting evidence or relevant legal authority did not adequately preserve the issue for appeal. The mixed judgment by the District Court was affirmed.

*Tolman v. Winchester Hills Water Company, Inc.,* Utah Ct. of Appeals, 930761 CA (2/23/96) (J. Billings, w. Js. Jackson and Wilkins)

## 1993 CIVIL RIGHTS ACTION, SEXUAL HARASSMENT

The U.S. 10th Circuit Court of Appeals held that sexual abuse and harassment by a teacher against a student was not actionable under §1983 and did not constitute sufficient psychological harassment to create a cause of action for deprivation of due process. The teacher in the defendant school district called the 9-year old plaintiff a "prostitute" on several occasions and derided the child openly in the school class. Although the teacher's conduct was reprehensible in every respect, the panel concluded that there was not sufficient physical injury to constitute a civil rights claim under §1983.

*Abeyta v. Chama Valley Independent School District,* 10th Circuit Ct. App., Docket No. 94-2283 (February, 1996) (Judge Logan)

## ATTORNEY, CONTEMPT

Salt Lake City appealed a sanction imposed by the circuit court judge for the failure of the Salt Lake City prosecutor to appear, pursuant to a court order. The City filed a criminal information against the defendant and the defendant moved to dismiss on various constitutional grounds. At a pre-trial conference, the court commissioner ordered the city prosecutor to personally appear and defend the motion to dismiss at the scheduled hearing. The Prosecutor did not appear at the hearing but was represented by her deputy who was unprepared at the hearing and had not filed a response to the motion. The commissioner granted the defendant's motion to dismiss. On re-hearing, the commissioner reversed the dismissal but, as a sanction, dismissed the information because the prosecutor had violated the court's order that she be in attendance.

Without oral argument on appeal, the Utah Court of Appeals reversed the sanction order because the order was not sufficiently clear and unambiguous to be enforceable and subject to contempt for failure to obey. This conclusion was based upon the transcript of the hearing wherein it appeared that the court expected the prosecutor to be present but not specifi-

cally order that she do so. In dictum, the majority opinion concludes that dismissal of a criminal information as a sanction against a prosecutor is rarely appropriate, even when the prosecutor is in contempt of court, which was not the case in the instant matter.

*Salt Lake City v. Dorman-Ligh,* 950166 CA (Ct. App. 2/23/96) (Judge Wilkins, with Js. Davis and Bench)

**JOINT TENANCY PROPERTY**

The wishes of a mother, dying from cancer at the time of her divorce, to preserve her assets for her children were vindicated on appeal. The decedent had taken steps prior to her death to sever her joint tenancy interests with her estranged husband and to appoint her brother as her attorney-in-fact to change the beneficiaries of her life insurance in the days immediately preceding her death.

A joint tenancy may be severed and the parties' interests converted to a tenancy in common by one joint tenant conveying to himself or herself and immediately recording the conveyance. It is no longer necessary in the State of Utah to use a "straw man" to sever a joint tenancy. The decision emasculates the common law approach requiring a "straw man" in *Nelson v. Davis,* 592 P.2d 594 (Utah 1979), although the court does not expressly overrule *Nelson.* The court declares the *Knickerbocker* case to be distinguishable, yet adopts the modern trend that abolishes the need to convey to a "straw man" in order to sever a joint tenancy. Severance may be accomplished by a unilateral self conveyance that sufficiently demonstrates an intent to sever joint tenancy. Also, mere severance of the joint tenancy did not place the property beyond the jurisdiction of the divorce court so as to violate a restraining order entered to prevent the disposing of any assets. It only changed the matter in which the parties held title, but did not affect their title insofar as the divorce court's power was concerned.

The court also held that the decedent's brother, as the attorney in fact, was successful in changing the beneficiary of the decedent's life insurance policy immediately prior to her death, even though the notice of change of beneficiary was not delivered to the insurance company until after the decedent's death. The brother acted under a properly executed power of attorney and signed, executed and delivered to her attorney the change of beneficiary form prior to her death. This was all that the decedent needed to do to legally affect the change, even though the insurance company was not informed until later. A beneficiary to an insurance policy has a mere expectancy and cannot interfere with the owner's right to change that beneficiary.

With respect to a separate claim of conversion, the court held that an owner whose property is converted is entitled to interest as a matter of law on the value of the property converted and remanded for determination of that interest.

*Estate of Christine Cannon Knickerbocker,* Utah Supreme Court, 940206 (2/23/96) (Justice Howe)

**APPEALS, TIMELINESS, POST-JUDGMENT MOTIONS**

A notice of appeal filed before the final disposition of a specified post-judgment motion has no effect, based upon the specific language of Rule 4(b), Utah Rules of Appellate Procedure.

*Kay v. Summit Systems, Inc.,* 284 Utah Adv. Rep. 3 (2/9/96) (per curiam)

**APPEALS, TIMELINESS, EXTENSION OF TIME**

In an extension of the rule discussed in *Kay v. Summit Systems* and *Swenson Associates Architects v. State,* an appellant's failure to file a notice of appeal after the disposition of a post judgment motion was avoided when the trial court granted a motion to extend the time in which to file under Rule 4(e), Utah R. App. Proc.

The trial court entered summary judgment in favor of Todd Crosland, but not Jeff Crosland. The Court of Appeals reversed the summary judgment in favor of Todd Crosland and remanded for trial. On certiorari to the Supreme Court, Todd claimed that the Court of Appeals lacked jurisdiction to hear the plaintiff's appeal because the notice of appeal from the trial court was not timely filed.

Under the *Kay* rule, the notice of appeal was not timely filed. However, the trial court on showing of excusable neglect or good cause under Appellate Rule 4(e) extended the time to file the appeal. Todd claimed that the extension could only be made before the expiration of the 30 day appeal period and not after. Therefore, the extension could not make the appeal timely.

The Utah Supreme Court refused to adopt the analysis of the federal circuit courts and an "outdated" advisory committee note. The Utah court, instead, adopted the plain language of Rule 4(e) that "good cause" and "excusable neglect" were not limited, but were appropriate grounds for an extension of the time to appeal after the initial 30 day period had expired. The appeal was timely because the trial court found good cause to extend the time for appeal and extended the appeal time. The Court also affirmed the Court of Appeals' ruling that persons who purport to act as a corporation without authority to do so were joint and severally liable for the debts and liabilities incurred. This again imposes personal liability of officers and directors of a corporation and destroys the corporate shield. When the defendants continued to conduct business as usual while the corporation's corporate status was suspended, the defendants became personally liable for the corporate judgments. The decision of the Court of Appeals was affirmed and the case remanded to the trial court for trial. *Murphy v. Crosland,* 284 Utah Adv. Rep. 7 (2/12/96) (Justice Durham)

**GOVERNMENTAL IMMUNITY**

The plaintiff's failure to timely file a notice of claim required under the Governmental Immunity Act required reversal. Strict compliance with the Act is jurisdictional. The requirement that a notice of a claim be served upon the governing body of Salt Lake City did not allow the plaintiff to merely provide notice upon the Salt Lake City attorney. Dismissal on summary judgment was affirmed.

*Bellonio v. Salt Lake City Corp.*, 284 Utah Adv. Rep. 27 (Ct. App. 2/15/96) (Judge Greewood w/Js. Orme and Davis)

# Barry Goldwater

*By Robert Alan Goldberg*

*Reviewed by Betsy Ross*

Dr. Robert Goldberg's course on Social Movements in America is a favorite at the University of Utah. He recently received an outstanding teacher award at the University, and now, with *Barry Goldwater*, Goldberg is receiving equivalent acclaim for his scholarship. Along with receiving positive reviews in the *New York Times Book Review*, the *New York Review of Books,* the *Chicago Tribune* and the *Washington Post,* Goldberg's biography of Barry Goldwater has been nominated for the Pulitzer Prize.

Heady stuff for a University of Utah history professor who once went to law school fearing a denial of tenure in the History Department? In Utah parlance, "heck, no," they don't come more down-to-earth or congenial than Bob Goldberg. (Fortunately for the University and all of us, by the way, Bob lasted one semester in law school before discovering it wasn't for him.)

The biography of Goldwater is a pleasure to read, flowing more like fiction than the sometimes tedium of facts and figures in which many biographies wallow. Even more fun, however, was hearing stories of Goldwater and those who knew him – including Ronald and Nancy Reagan, Pat Buchanan, and Goldwater's family members – directly from Goldberg.

Sitting in his office at the University of Utah (just next door to the U of U law school at Carlson Hall), Goldberg had me entranced with stories like his interview with Ronald Reagan. Upon being introduced to Reagan in 1991 at the appointed time for the interview, the consummate gentleman Reagan warmly thanked Goldberg for taking the time to interview him. Goldberg admits he was thoroughly charmed by Reagan, and indicated he would happily invite Reagan to his house for dinner – and in a display of preferences educated by his own research, also indicated that although he would also have Barry Goldwater to dinner, he would not have had Richard Nixon, Lyndon Johnson, or *Nancy* Reagan.

Goldberg met with Barry Goldwater personally several times, most recently in February of this year. Commensurate both with his 90 plus years and a personality that always tended toward bluntness, Goldberg said that Goldwater was "cranky." In fact, it would not be uncommon to hear Goldwater say something like "I gave Pat [Buchanan] his first job, and now he's a kook." Or, as Goldberg writes in the biography, when Dan Quayle made a stop while on the campaign trail for George Bush in Phoenix, Goldwater's home, Goldwater "barked a rebuke" concerning Bush's "flagwaving and exploitation of the social issue thrusts against Willie Horton" and "Harvard boutique liberals," saying "I hope you take this kindly, but I want you to go back and tell George Bush to start talking about the issues, OK?'"

This complaint reflects the disdain Goldwater developed in his later years toward the "new conservatives" of the Republican party – the Pat Buchanans, Pat Robertsons and Phyllis Schlaflys. Although himself termed "Mr. Conservative" by President Reagan as a tribute to Goldwater's influence on American conservatism, Goldwater found himself opposed in his later years to many "conservative" positions – particularly the movement of conservatives into the "moral" arena.

Having followed, myself, closely the "morality play" of our most recent legislative session, in which abortion restrictions were strengthened, and broad-based bans on teachers' free speech rights imposed in an attempt to address the issue of gay and lesbian clubs in our high schools, I asked

Goldberg how Goldwater would react to Utah's Republican party. "Goldwater wouldn't understand our legislature," Goldberg conceded. Goldwater did not believe in the interplay of religion with the law. Individual responsibility was a theme to which Goldwater would return time and time again. That, combined with the fact that the ultimate principle of Goldwater's conservatism was limited government would make the Utah foray into the moral lives of its citizens abhorrent to Goldwater.

As an example, early in Goldwater's career, he opposed legislation in Arizona that would have restricted the sale of alcohol within 500 yards of a school because such issues were not the government's responsibility, but the responsibility of the family. He might have said, as he did concerning community opposition to a merchant's request for a license to sell beer and wine, that it is the minor who has to get the beer, "'[n]obody is going to pour it down their throats. I think the churches that protest and the homes that protest . . . should look to their own children.'"

And, referring to laws addressing discrimination, Goldwater said, "'I am unalterably opposed to . . . discrimination, but I know that [the federal] government can provide no lasting solution. No law can make one person like another if he doesn't want to . . . . The ultimate solution lies in the hearts of men."

I also asked Goldberg what Goldwater's reaction to the biography was. Goldwater was not an erudite individual, and chances are, has not read beyond the first chapter. He did read the first chapter, however, which is about Goldwater's Jewish roots, and wrote a letter to Goldberg thanking him for teaching him about his Jewish heritage. The biography is very thorough in detailing what made Goldwater who he is, both in terms of intricate facts about his own family, and illuminating details about the times through which Goldwater lived, all of which reads like a psychological novel.

Goldwater lived through a fascinating time in our history, and truly can be credited with molding twentieth century conservatism. Yet today, he finds himself at odds with many conservatives, as the "moral majority" asserts a larger and larger influence on politics today, and government intrusion is sanctioned in the name of religion. At the same time that Goldberg's biography teaches about the life of an important historical figure, it also chronicles the evolution of conservatism, toward an unknown conclusion. Goldberg ends with Goldwater's own words about the future. "'I don't know what's going to happen to all of us in this country, and while I shouldn't say it, in a way, I'm glad I'm getting so damned old. I probably won't be here to see the disaster that's heading our way. Can it be stopped? Yes, but I don't know where they are going to find the guts to do it.'"

# Calvin A. Behle

## His History, Accomplishments, Contributions And the Beginning of the Bar Foundation

One of the founders of the Utah Bar Foundation was Calvin A. Behle. Mr. Behle and his late wife, Hope Eccles Behle, gave a sizable bequest to the Foundation for the preparation of a history on each of the Utah Supreme Court justices. That project is presently underway. In addition, their bequest provided for the publication of a recent issue of the *Utah Historical Quarterly* covering stories about Utah's courts, judges, and lawyers. Because of the contributions made by Calvin and his wife, the Board of Trustees desired that a short history about Calvin be published in the *Utah Bar Journal.*

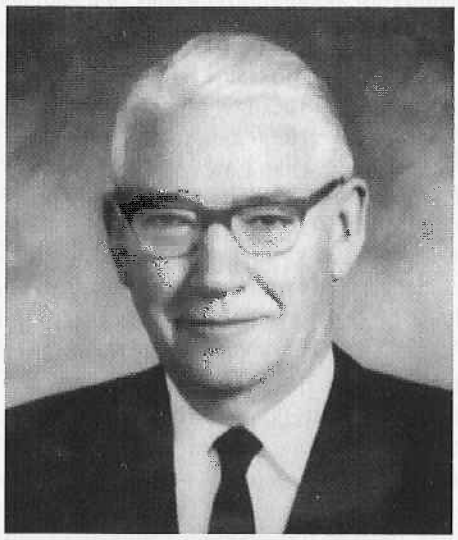
Calvin was born on March 16, 1907, at Salt Lake City, Utah. His father was a prominent physician associated with St. Mark's Hospital.

He attended public school in Salt Lake City and graduated from East High in its last four-year class. He did his undergraduate work at Stanford University, where he obtained a Bachelor of Arts degree in 1928, majoring in journalism with a minor in history.

Calvin was encouraged to become a lawyer by A. C. Ellis, Jr., a partner in Dickson, Ellis, Parsons & McCrea. Ellis told him he could either study law with his firm or, to go the then-becoming popular route, attend law school. Calvin decided on the latter course and graduated from the Utah Law School with honors in 1931.

Initially, Calvin practiced law with Mahlone E. Wilson and Henry D. Moyle. He later joined the firm of Stephens, Brayton and Lowe. Dean Brayton of that firm organized the Utah State Bar and had become its first president. Under Brayton's guidance, Calvin organized the Junior Bar section of the Utah State Bar, was instrumental in organizing the Salt Lake County Bar Association, and served as president of both.

He practiced law with the Brayton firm for five years, and then served five years in the law department of Utah Power & Light Company.



Shortly thereafter, at request of Secretary of War, Calvin joined the Army Procurement Division during the time the Army was gearing up in preparation for World War II. Initially, he was stationed at Fort Douglas, but soon thereafter joined the Judge Advocate General Corps on a top secret assignment which caused his transfer, first to Washington, D.C., and then to London, England, where he served under General Tom White.

When Calvin arrived in London, he learned that his assignment was to prepare to become a prosecutor in one of a series of war crimes trials being planned to commence immediately after the conclusion of World War II. At the conclusion of the war, he was transferred to Nuremberg, Germany, where he participated in the Nuremberg war trials.

After the conclusion of the Nuremberg trials, Calvin returned to Salt Lake City and resumed his employment with Utah Power & Light Company. After a short tour with Utah Power & Light, he joined the firm of Dickson, Ellis, Parsons & McCrea, Mr. Parsons being then the only remaining partner. Mr. Parsons decided he no longer wished to continue with his trial practice and employed Calvin to handle that portion of the firm's practice. Calvin remained with that firm until his retirement in 1971.

Four of Calvin's principal clients were Kennecott Copper Corporation, United States Steel Corporation, Hercules Powder Company, and Tracy Collins Bank & Trust.

Calvin was always involved in the American Bar Association activities and served both in the House of Delegates and as a member of the Board of Governors, where he was chairman of the Operations Committee of the Board.

At one point in his career, after arguing a case before Justice David W. Moffat, Justice Moffat called Calvin into his chambers and suggested that the Utah State Bar should have a charitable arm so that more members could contribute funds to causes that aided the improvement of the justice system. Under Justice Moffat's encouragement, he joined with James E. Faust, Earl D. Tanner, Sr., Junius Romney, and Charles Welch, Jr. to form the Utah Bar Foundation, with which he continued to be associated until the date of his retirement.

## REMINDER

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

REMEMBER TO TAKE TIME TO MAIL YOUR BALLOT.

# CLE CALENDAR

**ALI-ABA SATELLITE SEMINAR: HAZARDOUS WASTE & SUPERFUND 1996**

Date: Thursday, May 9, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

**NLCLE WORKSHOP: LAW OFFICE MANAGEMENT**

Date: May 16, 1996
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyer Division Members
$60.00 for all others
CLE Credit: 3 HOURS

**ANNUAL FAMILY LAW SECTION SEMINAR**

Date: Friday, May 17, 1996
Time: ~8:00 a.m. to 5:00 p.m.
Place: Utah Law & Justice Center
Fee: To be determined
CLE Credit: ~6 HOURS

**ENVIRONMENTAL SCIENCE FOR ATTORNEYS**

Date: Thursday, May 30, 1996
Time: 8:00 a.m. to 5:30 p.m.
Place: Utah Law & Justice Center
Fee: $75.00 for Law Students
$125.00 ENREL Section Members
$150.00 General Registration
CLE Credit: 9 HOURS

**ALI-ABA SATELLITE SEMINAR: LEGAL ISSUES FOR NON-PROFITS**

Date: Thursday, May 30, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

**ALI-ABA SATELLITE SEMINAR: FIDUCIARY RESPONSIBILITY ISSUES UNDER ERISA**

Date: Thursday, June 6, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

**ALI-ABA SATELLITE SEMINAR: DRAFTING LICENSING AGREEMENTS**

Date: Thursday, June 13, 1996
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 *(To register, please call 1-800-CLE NEWS)*
CLE Credit: 6 HOURS

**ALI-ABA SATELLITE SEMINAR: PARTNERSHIPS REVISITED**

Date: Tuesday, June 18, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE NEWS)*
CLE Credit: 4 HOURS

**TRIAL ACADEMY PART III: DIRECT EXAMINATION**

Date: Thursday, June 27, 1996
Time: 6:00 p.m. to 8:00 p.m.
(Registration begins at 5:30 p.m.)
Place: To be determined
Fee: $20.00 for members of the Litigation Section
$30.00 for all others
CLE Credit: 2 HOURS

**SECOND ANNUAL NATIVE AMERICAN LAW SYMPOSIUM: ARCHEOLOGICAL, RELIGIOUS, AND REPATRIATION IMPLICATIONS FOR LAND USE AND OWNERSHIP**

Date: October 25, 1996
Time 9:00 a.m. to 5:00 p.m.
Place: University of Utah College of Law
Fee: To be determined
CLE Credit: To be determined

*Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 531-9095, for further details.*

*Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.*

## CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

_____

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

_____

Name Phone

_____

Credit Card Billing 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 Policy:** 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.

**Cancellation Policy:** Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee*, will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.
**NOTE:** It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

# CLASSIFIED ADS

## RATES & DEADLINES

**Utah Bar Member Rates:** 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please contact (801) 531-9077.

**Classified Advertising Policy:** No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 532-4949. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

*Utah Bar Journal* and the Utah State Bar Association do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

**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 must be received with the advertisement.

## BOOKS FOR SALE

ALL CURRENTLY UPDATED – LIKE NEW:

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AmJur Legal Forms .....725.00
AmJur Pleading & Practice Forms . . .825.00
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A.L.R.3d .....600.00
A.L.R.4th .....600.00
A.L.R.5th .....700.00
A.L.R. Federal .....3,300.00
U.S.Led2nd (Supreme Ct. Rep.) . .1,467.00
S.S.C.S. .....600.00

All offers will be considered. Call (307) 352-1538

## POSITIONS AVAILABLE

**Staff Attorney:** American Stores Company has an immediate opening in its Salt Lake City legal department for a staff attorney with five to ten years experience in general corporate law. The ideal candidate will have substantial experience in a wide variety of transactional work with primary emphasis in negotiating and drafting information technology contracts. Position reports to a Deputy General Counsel. Salary commensurate with experience. Excellent benefits. Qualified applicants should send resumes and salary requirements to: Human Resources, P.O. Box 27447, Salt Lake City, Utah 84127-0447. **NO** phone calls please.

**Position:** Executive Director of Legal Center for People with Disabilities: **Responsibilities:** Executive Director responsible for overall operation of Center's programs. Duties include implementing board policies and program priorities, providing leadership and direction to programs' advocacy, developing annual budget, expanding Center's financial base and monitoring financial transactions and status. **Qualifications:** Advanced degree in law, public administration, social work or business. Three to five years' experience, preferably in disability area. Demonstrated leadership, management, advocacy, development and communication skills. **Salary/Benefits:** Salary D.O.E.; benefits. **Applications:** Application deadline May 25. Position begins summer of 1996. Send letter and resume to: Susan Gorey Deisley, chair, Search Committee: Legal Center for People with Disabilities, 455 East 400 South, Salt Lake City, Utah 84111.

Mid-size Denver, Colorado law firm seeks associate with 2-3 years of water law and environmental experience. Must have strong academic credentials. Nonsmoking office. Send resume and writing sample to: Hiring Director, Dufford & Brown, P.C., 1700 Broadway, Suite 1700, Denver, Colorado 80290.

Dynamic downtown Salt Lake City litigation firm seeks energetic, talented associate with 1-4 years of good legal training. Excellent salary and benefits. All resumes received in confidence. Send to Michael R. Roussin, @ Anderson & Karrenberg, 700 Bank One Tower, 50 West Broadway, Salt Lake City, UT 84101-2006.

## POSITIONS SOUGHT

I am admitted in both **CALIFORNIA AND UTAH** and based in Sacramento. I will make appearances anywhere in California, or help in any other way I can. $60.00 per hour + travel expenses. Contact John Palley @ (916) 455-6785 or Palleyj@aol.com.

**ATTORNEY:** Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar. **LAHERTY & ASSOCIATES,** 9 Exchange Place, Suite #400, Salt Lake City, UT 84111. Call @ (801) 583-0206 or (801) 359-8003.

Legal researcher and/or librarian, part or full time. J.D. and 23 years experience. Last seven years chief researcher of over a 1000 cases and in charge of library for a firm. Very reasonable, negotiable salary. References available. Toni Marotz, 1182 Foothill Drive #534, Salt Lake City, Utah 84108. (801) 581-1451

## OFFICE SPACE/SHARING

PRIME OFFICE SPACE: Layton Barnes Bank Building. One or two attorney turn key operation. Already one attorney on site. Call (801) 546-1100. Ask for Erik.

LAW FIRM AT 39 EXCHANGE PLACE has office space for lease with secretarial area, includes receptionist, conference room, fax, copier, library, parking and kitchen. Also available in this historical building is a 844 sq. foot suite, which includes small conference room and reception area, or a 440 sq. foot suite on the main floor. Contact Joanne Brooks @ (801) 534-0909.

**OFFICE SHARING SPACE AVAILABLE IN MURRAY** with established PI/Real Estate/Business attorney at 6400 South State (Meridian Title/Perry Home Bldg.) Room for two additional attorneys. Shared copier, fax, conference room. Rent estimated at $650 per month/per attorney. Available first week of May. Call Denise or Bryan @ (801) 262-8900.

## SERVICES

**UTAH VALLEY LEGAL ASSISTANT JOB BANK:** Resumes of legal assistants for full, part-time, or intern work from our graduating classes are available upon request. Contact: Kathryn Bybee, UVSC

# CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

**Utah State Board of**
**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

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

**Professional Responsibility and Ethics** **Required: a minimum of three (3) hours**

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

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

**Continuing Legal Education** **Required: a minimum of twenty-four (24) hours**

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

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

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

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

**IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE**

## **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 three 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 $5.00 at the time of filing the statement with the Board.**

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 Regulations 5-103(1).

**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 of which the statement of compliance is filed, and shall be submitted to the board upon written request.

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

REG CR: 43 ETHICS CR: 8.5
MR. WILLIAM HOLYOAK
201 SOUTH MAIN STREET
P. O. BOX 45898
SALT LAKE CITY UT 84145



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