

1998

Mark Graham v. Davis County Solid Waste Management, Energy Recovery Special Service District, The District's Administrative Control Board, and LeGrand Bitter : Reply Brief of Cross-Appellants

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jeffrey J. Hunt; Parr Waddoups Brown Gee & Loveless; Attorneys for Appellant/Cross Appellee/Plaintiff.

Larry S. Jenkins; Susuan J. Mueller; Wood Crapo LLC; Attorneys for Appellees/Cross-Appellants/Defendants.

Recommended Citation

Reply Brief, *Graham v. Davis County Solid Waste Management*, No. 980218 (Utah Court of Appeals, 1998).
https://digitalcommons.law.byu.edu/byu_ca2/1483

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

COPY

IN THE UTAH COURT OF APPEALS

MARK GRAHAM,)

Appellant/Cross-Appellee/Plaintiff,)

v.)

DAVIS COUNTY SOLID WASTE)

MANAGEMENT AND ENERGY)

RECOVERY SPECIAL SERVICE)

DISTRICT, THE DISTRICT'S)

ADMINISTRATIVE CONTROL)

BOARD and LeGRAND BITTER, THE)

DISTRICT'S EXECUTIVE DIRECTOR,)

Appellees/Cross-Appellants/)

Defendants.)

Case No. 980218-CA

Priority No. 15

**UTAH COURT OF APPEALS
BRIEF**

**UTAH
DOCUMENT
K F U**

50

.A10

DOCKET NO. 980218-CA

REPLY BRIEF OF CROSS-APPELLANTS

**On Appeal from a Judgment of the
Second Judicial District Court of Davis County, State of Utah,
Honorable Jon M. Memmott, District Judge**

Jeffrey J. Hunt (#5855)
PARR WADDOUPS BROWN
GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 532-7840

Attorneys for Appellant/Cross-
Appellee/Plaintiff

Larry S. Jenkins (#4854)
Susan J. Mueller (#7263)
WOOD CRAPO LLC
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 366-6060

Attorneys for Appellees/Cross-
Appellants/Defendants

FILED

Utah Court of Appeals

DEC 23 1998

**Julia D'Alesandro
Clerk of the Court**

IN THE UTAH COURT OF APPEALS

MARK GRAHAM,)	
)	
<i>Appellant/Cross-Appellee/Plaintiff,</i>)	
)	
v.)	
)	
DAVIS COUNTY SOLID WASTE)	Case No. 980218-CA
MANAGEMENT AND ENERGY)	
RECOVERY SPECIAL SERVICE)	Priority No. 15
DISTRICT, THE DISTRICT'S)	
ADMINISTRATIVE CONTROL)	
BOARD and LeGRAND BITTER, THE)	
DISTRICT'S EXECUTIVE DIRECTOR,)	
)	
<i>Appellees/Cross-Appellants/</i>)	
<i>Defendants.</i>)	

REPLY BRIEF OF CROSS-APPELLANTS

**On Appeal from a Judgment of the
Second Judicial District Court of Davis County, State of Utah,
Honorable Jon M. Memmott, District Judge**

Jeffrey J. Hunt (#5855)
PARR WADDOUPS BROWN
GEE & LOVELESS
185 South State Street, Suite 1300
Salt Lake City, UT 84111
Telephone: (801) 532-7840

Attorneys for Appellant/Cross-
Appellee/Plaintiff

Larry S. Jenkins (#4854)
Susan J. Mueller (#7263)
WOOD CRAPO LLC
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
Telephone: (801) 366-6060

Attorneys for Appellees/Cross-
Appellants/Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THE COURT LACKS JURISDICTION TO HEAR THIS CASE	1
A. <u>The Clear Air Committee’s Complaint Seeking Judicial Review Was Void</u>	2
B. <u>The District Court Lacked Jurisdiction Over the Amended Complaint Because It Was Not Timely</u>	5
CONCLUSION	8

ADDENDUM TABLE OF CONTENTS

Utah Code Ann. § 42-2-5 (1997)	
Utah Code Ann. § 42-2-10 (1997)	
Utah Code Ann. § 63-2-404 (1997)	
Utah Code Ann. § 78-51-40 (1997)	

TABLE OF AUTHORITIES

CASES

<i>Bernstein v. Sullivan</i> , 914 F.2d 1395 (10 th Cir. 1990)	5
<i>Brendle v. City of Draper</i> , 937 P.2d 1044 (Utah Ct. App. 1997)	6
<i>Herr v. Salt Lake County</i> , 525 P.2d 728 (Utah 1974)	6
<i>Mick v. Brewer</i> , 923 F. Supp. 181 (D. Kan. 1996)	5
<i>Paradise v. Nowlin</i> , 195 P.2d 867 (Cal. Dist. Ct. App. 1948)	2, 8
<i>Queen Uno Ltd. Partnership v. Coeur D’Alene Mines Corp.</i> , 2 F. Supp.2d 1345 (D. Colo. 1998)	5
<i>Salt Lake City Corp. v. Leahy</i> , 848 P.2d 179 (Utah Ct. App. 1993)	1
<i>Staker v. Huntington Cleveland Irrigation Co.</i> , 664 P.2d 1188 (Utah 1983)	5
<i>Tracy-Burke Assoc. v. Department of Employment Sec.</i> , 699 P.2d 687 (Utah 1985)	2, 3
<i>Tuttle v. Hi-Land Dairyman’s Ass’n</i> , 350 P.2d 616 (Utah 1960)	2, 3
<i>United Resources 1988-I Drilling & Completion Program, L.P. v. Morris</i> , 125 F.3d 864 (10 th Cir. 1997)	5
<i>Utah Dep’t of Bus. Regulation, Div. of Public Utilities, Bus. Tel. Sys.</i> <i>v. Public Service Comm’n</i> , 602 P.2d 696 (Utah 1979)	5, 6

STATUTES

Utah Code Ann. § 42-2-5 (1997)	3, 4
Utah Code Ann. § 42-2-10 (1997)	3, 4
Utah Code Ann. § 63-2-404	7

Utah Code Ann. § 63-2-404(2)(a) (1997)	7
Utah Code Ann. § 63-2-404(2)(b)(i) (1997)	6
Utah Code Ann. § 78-51-40 (1997)	2

OTHER AUTHORITIES

<i>Webster's New World Dictionary</i> 192 (2d College ed. 1980)	4
---	---

ARGUMENT

I.

THE COURT LACKS JURISDICTION TO HEAR THIS CASE

"`[T]he initial inquiry of any court should always be to determine whether the requested action is within its jurisdiction. When a matter is outside the court's jurisdiction, it retains only the authority to dismiss the action.'" *Salt Lake City Corp. v. Leahy*, 848 P.2d 179, 180 (Utah Ct. App. 1993) (citations omitted). The Court lacks jurisdiction because the filing of the original Complaint in the district court by the Residents of Davis County Clear Air Committee (the "Clear Air Committee") was a void filing, and no valid filing seeking judicial review was made before the expiration of the statutory period for seeking judicial review.¹

The filing of the original Complaint was void because it was filed *pro se* by a member of Clear Air Committee on behalf of the Clear Air Committee, even though the Clear Air Committee, as an entity, cannot represent itself in Utah's courts. The filing is also void because the Clear Air Committee failed to register its assumed name with the Division of Corporations and Commercial Code, which failure bars the committee's access to the courts. Mark Graham's ("Graham's") substitution as plaintiff was improper because he lacks standing to seek judicial review on a records request

¹ As the District indicated in its opening brief, it would prefer a resolution on the merits. The District raises the jurisdictional issue because it is a real issue in this case and the integrity of the system requires addressing it.

made by the Clear Air Committee. In any event, his substitution commenced a new, untimely action that did not relate back to the original filing.

A. The Clear Air Committee's Complaint Seeking Judicial Review Was Void

The Clear Air Committee requested records from the District.² R. 3, 23, 246-47. The Clear Air Committee, representing itself *pro se* through Graham, filed a Complaint in the trial court seeking judicial review of the District's Administrative Control Board's decision concerning its records request. R. 1, 6, 247. Graham was not an elected official of the Clear Air Committee, but only one of a number of members. R. 67. Graham was not licensed to practice as an attorney in Utah. R. 146.

As an alleged "non-profit organization dedicated to minimizing air pollution in Davis County," R. 1, the Clear Air Committee is an artificial entity, is forbidden to practice law in Utah, and had to be represented in court by a licensed attorney. *Tracy-Burke Assoc. v. Department of Employment Sec.*, 699 P.2d 687, 688 (Utah 1985); *Tuttle v. Hi-Land Dairyman's Ass'n*, 350 P.2d 616, 618 (Utah 1960); Utah Code Ann. § 78-51-40 (1997). Therefore, the Complaint filed by the Clear Air Committee was "void by reason of the [committee's] lack of power to represent itself in an action in court." *Paradise v. Nowlin*, 195 P.2d 867, 867 (Cal. Dist. Ct. App. 1948)

² The "District" means collectively defendants, appellees, and cross-appellants Davis County Solid Waste Management and Energy Recovery Special Service District, the District's Administrative Control Board, and LeGrand Bitter, the District's Executive Director.

(cited with approval in *Tracy-Burke*, 699 P.2d at 688 and *Tuttle*, 350 P.2d at 618)
(emphasis added).

Contrary to Graham's arguments, *Tracy-Burke* controls this case. In each case, the complaining party was an artificial entity. In *Tracy-Burke*, the entity was a corporation registered in Utah; here, the entity was a voluntary association. Each sought judicial review of an administrative agency's decision. In *Tracy-Burke*, the administrative proceedings were before the Industrial Commission, and in this case they were before the District's Administrative Control Board. The cases are different in that the person pursuing the litigation for the corporation in *Tracy-Burke* was the president of the corporation, while Graham is not an officer of the Clear Air Committee, but only one of a number of members. In *Tracy-Burke*, when it was established that the petitioner was "a corporation not represented by a licensed attorney," its petition for review was dismissed by the Supreme Court for lack of jurisdiction. *Tracy-Burke*, 699 P.2d at 688. The district court similarly lacked jurisdiction over this case because it was initiated by an organization that purported to represent itself without a licensed attorney. The case was void when it was filed.

The Clear Air Committee was also subject to Utah's Assumed Name Statute, and its failure to comply therewith precluded its access to Utah's courts. Under the Assumed Name Statute, any "individual, **association**, partnership, corporation, or otherwise" that "carries on, conducts, or transacts business in this state

under an assumed name" is prohibited from appearing in Utah's courts unless it registers its name with the Division of Corporations and Commercial Code. Utah Code Ann. §§ 42-2-5, -10 (1997) (emphasis added).

"Business" is defined broadly as "one's work, occupation, or profession; **a special task, duty, or function; rightful concern or responsibility (no one's business but his own); a matter, affair, activity, etc.** (the *business* of packing for a trip); the buying and selling of commodities and services; commerce; trade" *Webster's New World Dictionary* 192 (2d College ed. 1980) (emphasis added). The Clear Air Committee acted as a "non-profit organization dedicated to minimizing air pollution in Davis County," R. 1, and "lobb[ied] elected officials in order to influence the County's solid waste management policy." R. 130. Accordingly, the Clear Air Committee engaged in activities that constituted "business" and was subject to the requirements of Utah's Assumed Name Statute.

The Clear Air Committee failed to file an assumed name registration before the 30-day period following the District Administrative Control Board's denial of its GRAMA appeal, which was the time limit for seeking judicial review. R. 93-96. As such, the Clear Air Committee was barred from access to the courts, and its suit, when brought, was void and should have been dismissed.

B. The District Court Lacked Jurisdiction Over the Amended Complaint Because It Was Not Timely

It is essential that the Court keep in mind that this matter came to the district court as an action seeking judicial review of an administrative decision, not as a brand new action. The Utah Supreme Court has held that in the context of seeking judicial review of an administrative decision,

[w]here the time limit passes without the application being made, the right of the court to take cognizance of the party's grievance is cut off by operation of law. Such a limitation of the right of a court to hear an appeal from an administrative decision has been commonly held to be **jurisdictional in nature.**

Utah Dep't of Bus. Regulation, Div. of Public Utilities, Bus. Tel. Sys. v. Public Service Comm'n, 602 P.2d 696, 699-700 (Utah 1979) (emphasis added). Unlike a statute of limitations defense, which can be waived by a party's failure to assert the statute as an affirmative defense, *Staker v. Huntington Cleveland Irrigation Co.*, 664 P.2d 1188 (Utah 1983), or which can be tolled by an agreement of the parties,³ "a court's lack of jurisdiction over the subject matter of a dispute may not be waived by the parties." *Utah Dept' of Bus. Regulation*, 602 P.2d at 699.

³ See *United Resources 1988-I Drilling & Completion Program, L.P. v. Morris*, 125 F.3d 864, 864 n.1 (10th Cir. 1997) (recognizing tolling agreement); *accord Bernstein v. Sullivan*, 914 F.2d 1395, 1398 (10th Cir. 1990); *Queen Uno Ltd. Partnership v. Coeur D'Alene Mines Corp.*, 2 F. Supp.2d 1345, 1360 (D. Colo. 1998); *Mick v. Brewer*, 923 F. Supp. 181, 186 (D. Kan. 1996).

In *Brendle v. City of Draper*, 937 P.2d 1044 (Utah Ct. App. 1997), this Court addressed whether the Draper City Council had jurisdiction over an appeal from a decision of the city's planning commission permitting certain lot owners to build a house. In interpreting the applicable appeal ordinance, this Court noted that the word "shall" mandated that an appeal be filed within 14 days of the planning commission's decision. *Id.* at 1047-48 (citing *Herr v. Salt Lake County*, 525 P.2d 728, 729 (Utah 1974)). Neighboring landowners appealed the planning commission's decision to the city council after 14 days expired. The lot owners objected based on a lack of jurisdiction. This Court explained that "if Draper City wishes to set time limits for appeals of the Draper City Planning Commission's decisions that allow some flexibility for considerations of equity, it is free to do so . . . [however] it must so state." *Id.* at 1048. The Court concluded that the city council lacked jurisdiction over the late-filed appeal because the time period was jurisdictional, not advisory, and **not subject to equity considerations**. *Id.* at 1047-48.

In this case, statutory terms command that "[t]he requestor **shall** file a petition no later than . . . 30 days after the governmental entity has responded to the records request by either providing the requested records or denying the request in whole or in part." Utah Code Ann. § 63-2-404(2)(b)(i) (1997) (emphasis added). Like the time period in *Brendle*, this period is jurisdictional, not advisory, and **not subject to equity considerations**. *Accord Utah Dep't Bus. Regulation*, 602 P.2d at 699-700.

Where the original Complaint was void when it was filed by the Clear Air Committee and the jurisdictional 30-day period for seeking judicial review passed shortly thereafter without a valid complaint being filed, the district court lacked jurisdiction over the case.

It is irrelevant whether Graham allegedly "filed his motion [to amend] promptly after learning that the Committee was not the proper party to seek review of the records decision" or that Graham named the committee as plaintiff based on an alleged "lack of procedural knowledge." Aplt.'s Res. Br. at 2. The critical fact is whether the filing was within the time prescribed by statute. It was not.

Moreover, the district court erred when it concluded that Graham's substitution as plaintiff on November 18, 1997 could relate back to the date of the original filing. By statute, judicial review of a decision on a records request can only be sought by the "requestor" of the record. Utah Code Ann. § 63-2-404(2)(a) (1997) ("A **requestor** may petition for judicial review by the district court . . .") (emphasis added).⁴ Here, the Clear Air Committee was the requestor and the party that appealed to the District's Administrative Control Board. R. 3-4, 6. As such, the right to judicial review belonged to the committee. Graham was not the alter ego of the Clear Air Committee and lacked standing to seek judicial review. He admitted that he was

⁴ The District's GRAMA ordinance provides that judicial review of a decision of the District's Administrative Control Board shall be governed by Utah Code Ann. § 63-2-404. R. 103.

only one member, not an elected official, and had no authority to represent the committee. R. 67, 146. Whether Graham was "personally responsible for the records request" is immaterial because a corporation, association, or any other artificial entity created by law always acts in its affairs through individuals, but those individuals retain separate identities from the entity. *Appl.'s Resp. Br.* at 3; *see also Paradise*, 195 P.2d at 867 (explaining that out of court an artificial entity must act through its representatives).

Thus, Graham was erroneously allowed to be substituted as plaintiff because he was not the requestor of the records and lacked standing to seek judicial review. At best, his substitution as plaintiff commenced an entirely new action that began long after the jurisdictional 30-day time period for seeking judicial review. Thus, the district court lacked—and this Court lacks—jurisdiction over Graham's claims.

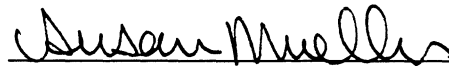
CONCLUSION

The filing of the original Complaint by the Clear Air Committee was void because it was brought in a Utah court *pro se* by an artificial entity that was not represented by an attorney. Utah's Assumed Name Statute also barred the committee's access to the courts during the jurisdictional 30-day time period for seeking judicial review because the committee had not registered its name. Because the original Complaint was void, this Court lacks jurisdiction over this matter because a valid

complaint was not filed within the time period required for seeking judicial review of a decision on a records request. Graham's substitution as plaintiff did not relate back to the original filing because he is not the Clear Air Committee and lacks standing to seek judicial review. At best, his substitution as plaintiff created a new action that was untimely. This appeal should be dismissed.

DATED this 23 day of December, 1998.

WOOD CRAPO LLC

A handwritten signature in cursive script, appearing to read "Susan Mueller", is written over a horizontal line.

Larry S. Jenkins

Susan J. Mueller

Attorneys for

Appellees/Cross-Appellants/Defendants

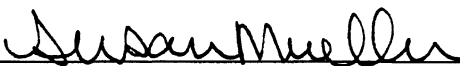
CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of December, 1998, I caused to be mailed in the U.S. mail, postage prepaid, two true and correct copies of the foregoing

Reply Brief of Cross-Appellants to the following:

Jeffrey J. Hunt
Parr Waddoups Brown Gee & Loveless
185 South State Street, Suite 1300
Salt Lake City, Utah 84111

Attorneys for Mark Graham



H:\WPDATA\PLEADING\APPELLEESREPLYBRIEF.WES.GRAHAM.wpd

ADDENDUM

42-1-2. Notice of hearing — Order of change.

The court shall order what, if any, notice shall be given of the hearing, and after the giving of such notice, if any, may order the change of name as requested, upon proof in open court of the allegations of the petition and that there exists proper cause for granting the same.

1953

42-1-3. Effect of proceedings.

Such proceedings shall in no manner affect any legal action or proceeding then pending, or any right, title or interest whatsoever.

1953

CHAPTER 2**CONDUCTING BUSINESS UNDER ASSUMED NAME****Section**

42-2-1 to 42-2-4. Repealed.

42-2-5. Certificate of assumed and of true name — Contents — Execution — Filing.

42-2-6. Change in persons transacting business under assumed name.

42-2-6.5. Repealed.

42-2-6.6. Assumed name.

42-2-7. Index — Fees — Evidence.

42-2-8. Expiration of filing — Notice — Removal from active index.

42-2-9. Corporate names, limited liability company names, and trademark, service mark, and trade name rights not affected.

42-2-10. Penalties.

42-2-11. Persons doing business under assumed name to have registered office and registered agent — Penalties — Presumption of registered agent.

42-2-1 to 42-2-4. Repealed.

1963

42-2-5. Certificate of assumed and of true name — Contents — Execution — Filing.

(1) Every person who carries on, conducts, or transacts business in this state under an assumed name, whether that business is carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall file with the Division of Corporations and Commercial Code a certificate setting forth:

(a) the name under which the business is, or is to be carried on, conducted, or transacted, and the full true name, or names, of the person owning, and the person carrying on, conducting, or transacting the business;

(b) the location of the principal place of business, and the street address of the person.

(2) The certificate shall be executed by the person owning, and the person carrying on, conducting, or transacting the business, and shall be filed not later than 30 days after the time of commencing to carry on, conduct, or transact the business.

(3) "Filed" means the Division of Corporations and Commercial Code has received and approved, as to form, a document submitted under the provisions of this chapter, and has marked on the face of the document a stamp or seal indicating the time of day and date of approval, the name of the division, the division director's signature and division seal, or facsimiles of the signature or seal.

1990

42-2-6. Change in persons transacting business under assumed name.

An amended certificate shall be filed with the Division of Corporations and Commercial Code not later than 30 days after any change in the person or persons owning, carrying on, conducting, or transacting such business or a change in the

registered agent or office of the business or in any information required to be filed with the Division of Corporations and Commercial Code under this act.

1

42-2-6.5. Repealed.

1

42-2-6.6. Assumed name.

(1) The assumed name:

(a) may not contain any word or phrase that indicates or implies that the business is organized for any purpose other than one or more of the purposes contained in application;

(b) shall be distinguishable from any registered name or trademark of record in the offices of the Division of Corporations and Commercial Code, as defined in Subsection 16-10a-401(5), except as authorized by the Division of Corporations and Commercial Code pursuant to Subsection (2); and

(c) may not, without the written consent of the United States Olympic Committee, contain the words "Olympic," "Olympiad," or "Citius Altius Fortius."

(2) The Division of Corporations and Commercial Code shall authorize the use of the name applied for if the name is distinguishable from one or more of the names and trademarks that are on the division's records, or if the applicant delivers to the division a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use the name applied for in this state.

(3) The assumed name, for purposes of recordation, shall either be translated into English or transliterated into letters of the English alphabet if it is not in English.

(4) The Division of Corporations and Commercial Code may not approve an application for an assumed name to any person violating the provisions of this section.

(5) The director of the Division of Corporations and Commercial Code shall have the power and authority reasonably necessary to interpret and efficiently administer this section and to perform the duties herein imposed upon the division by this section.

(6) A name which implies by any word in the name that it is an agency of the state or of any of its political subdivisions, if it is not actually such a legally established agency, may not be approved for filing by the Division of Corporations and Commercial Code.

(7) The provisions of Section 16-10a-403 apply to this chapter.

19

42-2-7. Index — Fees — Evidence.

(1) The Division of Corporations and Commercial Code shall:

(a) keep an active alphabetical index of all persons filing the certificates provided for in this chapter; and

(b) collect the required indexing and filing fees.

(2) A copy of any such certificate certified by the Division of Corporations and Commercial Code shall be presumptive evidence of the facts contained in the certificate.

19

42-2-8. Expiration of filing — Notice — Removal from active index.

A filing under this chapter shall be effective for a period of three years from the date of filing. At the expiration of the period, if no new filing is made by or on behalf of the person who made the original filing, the Division of Corporations and Commercial Code shall send a notice by regular mail, postage prepaid, to the address shown in the filing indicating that the filing has expired. If no new filing is made within 30 days after the date of mailing the notice, the Division of Corporations and Commercial Code shall remove the name from the active alphabetical index, and place it on a permanent inactive alphabetical index.

199

42-2-9. Corporate names, limited liability company names, and trademark, service mark, and trade name rights not affected.

(1) This chapter does not affect or apply to any corporation organized under the laws of any state if it does business under its true corporate name.

(2) This chapter does not affect the statutory or common law trademark, service mark, or trade name rights granted by state or federal statute.

(3) This chapter does not affect or apply to any limited liability company doing business in this state under its true name. 1992

42-2-10. Penalties.

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

(1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state; and

(2) may be subject to a penalty in the form of a late filing fee determined by the division director in an amount not to exceed three times the fees charged under Section 42-2-7 and established under Section 63-38-3.2. 1994

42-2-11. Persons doing business under assumed name to have registered office and registered agent — Penalties — Presumption of registered agent.

(1) (a) Any person conducting or transacting business in this state under an assumed name under this chapter shall, for service of process purposes, comply with and be subject to Sections 16-10a-501 through 16-10a-504, as though he were a corporation.

(b) If the person conducting business or transacting business in this state under an assumed name under this chapter is a foreign corporation, it must be qualified to conduct or transact business under the provisions of Sections 16-10a-1501 through 16-10a-1511.

(2) If a person fails to maintain a registered office or registered agent as required by Sections 16-10a-501 and 16-10a-502, the Division of Corporations and Commercial Code shall mail a notice to him that the filing will be canceled if a registered office and registered agent are not designated. If the registered office and registered agent are not designated within 30 days after the date of mailing the notice, the Division of Corporations and Commercial Code shall remove the name from the alphabetical index, place it on a permanent inactive alphabetical index, and mail a notice to the applicant that the filing has been canceled.

(3) The person filing a certificate under Section 42-2-5 shall be presumed to be the registered agent if the person is a resident of this state, and the person's Utah address shall be presumed to be the registered office for purposes of this chapter. 1992

CHAPTER 3

REGISTRATION OF FARM NAMES

Section

- 42-3-1. Commissioner of agriculture and food to register names.
- 42-3-2. Recording fee.
- 42-3-3. Transfer of name.
- 42-3-4. Cancellation by owner — Fee.
- 42-3-5. Use of name by another — Penalty.

42-3-1. Commissioner of agriculture and food to register names.

Any owner of a farm in this state may have the name of his farm, together with a brief description of his lands to which such name applies, recorded in a register kept for the purpose in the office of the commissioner of agriculture and food, and the commissioner of agriculture and food shall furnish to such landowner a proper certificate setting forth such name and a brief description of such lands. When any name shall have been so recorded it shall not be recorded as the name of any other farm. 1997

42-3-2. Recording fee.

Any person having the name of his farm so recorded shall first pay to the commissioner of agriculture and food a fee determined by the commissioner pursuant to Section 63-38-3.2. This fee shall be transmitted to the General Fund. 1997

42-3-3. Transfer of name.

When any owner of a farm, the name of which has been recorded as provided in this chapter, transfers by deed or otherwise the whole of such farm, the transfer may include the registered name thereof; but, if the owner shall transfer only a portion of such farm, the registered name thereof shall not be deemed transferred, unless so stated in the conveyance. 1953

42-3-4. Cancellation by owner — Fee.

When any owner of a registered farm desires to cancel its registered name, he shall write on the back of the certificate the following: "This name is canceled, and I hereby release all rights thereunder," and shall sign such statement in the presence of a witness and file the same in the office of the commissioner of agriculture and food. For such filing the commissioner of agriculture and food shall charge a fee determined by the commissioner pursuant to Section 63-38-3.2, which shall be paid to the General Fund. The commissioner of agriculture and food shall, when such certificate so endorsed has been filed in his office, write on the margin of the register of such name the word "canceled." 1997

42-3-5. Use of name by another — Penalty.

It is a misdemeanor for any person other than the person in whose name a farm is registered to use such registered name for any other farm. 1953

TITLE 43

NEGOTIABLE CERTIFICATES

Chapter

- 1. General Provisions.

CHAPTER 1

GENERAL PROVISIONS

Section

- 43-1-1. "Security receipt," "equipment trust certificate" defined.
- 43-1-2. Transfer — By delivery — By endorsement — Rights of transferee.
- 43-1-3. Restrictive construction of title — Effective date.

43-1-1. "Security receipt," "equipment trust certificate" defined.

For the purpose of this title:

The term "security receipt" means any writing in and by which the signer sets forth that the person named therein or the bearer, is entitled to receive a specified principal

- (b) 45 days after the original request for records if:
 - (i) the circumstances described in Subsection 63-2-401(1)(b) occur; and
 - (ii) the chief administrative officer failed to make a determination under Section 63-2-401.
- (2) The notice of appeal shall contain the following information:
 - (a) the petitioner's name, mailing address, and daytime telephone number;
 - (b) a copy of any denial of the records request; and
 - (c) the relief sought.
- (3) The petitioner may file a short statement of facts, reasons, and legal authority in support of the appeal.
- (4) No later than three business days after receiving a notice of appeal, the executive secretary of the records committee shall:
 - (a) schedule a hearing for the records committee to discuss the appeal at the next regularly scheduled committee meeting falling at least 14 days after the date the notice of appeal is filed but no longer than 45 days after the date the notice of appeal was filed provided, however, the records committee may schedule an expedited hearing upon application of the petitioner and good cause shown;
 - (b) send a copy of the notice of hearing to the petitioner; and
 - (c) send a copy of the notice of appeal, supporting statement, and a notice of hearing to:
 - (i) each member of the records committee;
 - (ii) the records officer and the chief administrative officer of the governmental entity from which the appeal originated;
 - (iii) any person who made a business confidentiality claim under Section 63-2-308 for a record that is the subject of the appeal; and
 - (iv) all persons who participated in the proceedings before the governmental entity's chief administrative officer.
- (5) (a) A written statement of facts, reasons, and legal authority in support of the governmental entity's position must be submitted to the executive secretary of the records committee not later than five business days before the hearing.
 - (b) The governmental entity shall send a copy of the written statement to the petitioner by first class mail, postage prepaid. The executive secretary shall forward a copy of the written statement to each member of the records committee.
- (6) No later than ten business days after the notice of appeal is sent by the executive secretary, a person whose legal interests may be substantially affected by the proceeding may file a request for intervention before the records committee. Any written statement of facts, reasons, and legal authority in support of the intervenor's position shall be filed with the request for intervention. The person seeking intervention shall provide copies of the statement to all parties to the proceedings before the records committee.
- (7) The records committee shall hold a hearing within the period of time described in Subsection (4).
- (8) At the hearing, the records committee shall allow the parties to testify, present evidence, and comment on the issues. The records committee may allow other interested persons to comment on the issues.
- (9) (a) The records committee may review the disputed records. However, if the committee is weighing the various interests under Subsection (11), the committee must review the disputed records. The review shall be in camera.
 - (b) Members of the records committee may not disclose any information or record reviewed by the committee in

camera unless the disclosure is otherwise authorized by this chapter.

- (10) (a) Discovery is prohibited, but the records committee may issue subpoenas or other orders to compel production of necessary evidence.
 - (b) The records committee's review shall be de novo.
- (11) (a) No later than three business days after the hearing, the records committee shall issue a signed order either granting the petition in whole or in part or upholding the determination of the governmental entity in whole or in part.
 - (b) The records committee may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the public interest favoring access outweighs the interest favoring restriction of access.
 - (c) In making a determination under Subsection (b), the records committee shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect privacy interests in the case of private or controlled records, business confidentiality interests in the case of records protected under Subsections 63-2-304(1) and (2), and privacy interests or the public interest in the case of other protected records.
- (12) The order of the records committee shall include:
 - (a) a statement of reasons for the decision, including citations to this chapter, court rule or order, another state statute, federal statute, or federal regulation that governs disclosure of the record, provided that the citations do not disclose private, controlled, or protected information;
 - (b) a description of the record or portions of the record to which access was ordered or denied, provided that the description does not disclose private, controlled, or protected information or information exempt from disclosure under Subsection 63-2-201(3)(b);
 - (c) a statement that any party to the proceeding before the records committee may appeal the records committee's decision to district court; and
 - (d) a brief summary of the appeals process, the time limits for filing an appeal, and a notice that in order to protect its rights on appeal, the party may wish to seek advice from an attorney.
- (13) If the records committee fails to issue a decision within 35 days of the filing of the notice of appeal, that failure shall be considered the equivalent of an order denying the appeal. The petitioner shall notify the records committee in writing if he considers the appeal denied.

199

63-2-404. Judicial review.

- (1) (a) Any party to a proceeding before the records committee may petition for judicial review by the district court of the records committee's order.
 - (b) The petition shall be filed no later than 30 days after the date of the records committee's order.
 - (c) The records committee is a necessary party to the petition for judicial review.
 - (d) The executive secretary of the records committee shall be served with notice of the petition in accordance with the Utah Rules of Civil Procedure.
- (2) (a) A requester may petition for judicial review by the district court of a governmental entity's determination as specified in Subsection 63-2-402 (1)(b).
 - (b) The requester shall file a petition no later than:
 - (i) 30 days after the governmental entity has responded to the records request by either providing the requested records or denying the request in whole or in part;

- (ii) 35 days after the original request if the governmental entity failed to respond to the request; or
- (iii) 45 days after the original request for records if:

- (A) the circumstances described in Subsection 63-2-401(1)(b) occur; and

- (B) the chief administrative officer failed to make a determination under Section 63-2-401.

(3) The petition for judicial review shall be a complaint governed by the Utah Rules of Civil Procedure and shall contain:

- (a) the petitioner's name and mailing address;
- (b) a copy of the records committee order from which the appeal is taken, if the petitioner brought a prior appeal to the records committee;
- (c) the name and mailing address of the governmental entity that issued the initial determination with a copy of that determination;
- (d) a request for relief specifying the type and extent of relief requested; and
- (e) a statement of the reasons why the petitioner is entitled to relief.

(4) If the appeal is based on the denial of access to a protected record, the court shall allow the claimant of business confidentiality to provide to the court the reasons for the claim of business confidentiality.

(5) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(6) The district court may review the disputed records. The review shall be in camera.

(7) The court shall:

- (a) make its decision de novo, but allow introduction of evidence presented to the records committee;
- (b) determine all questions of fact and law without a jury; and
- (c) decide the issue at the earliest practical opportunity.

(8) (a) The court may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the interest favoring access outweighs the interest favoring restriction of access.

(b) The court shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect privacy interests in the case of private or controlled records, business confidentiality interests in the case of records protected under Subsections 63-2-304(1) and (2), and privacy interests or the public interest in the case of other protected records. 1995

63-2-405. Confidential treatment of records for which no exemption applies.

(1) A court may, on appeal or in a declaratory or other action, order the confidential treatment of records for which no exemption from disclosure applies if:

- (a) there are compelling interests favoring restriction of access to the record; and
- (b) the interests favoring restriction of access clearly outweigh the interests favoring access.

(2) If a governmental entity requests a court to restrict access to a record under this section, the court shall require the governmental entity to pay the reasonable attorneys' fees incurred by the lead party in opposing the governmental entity's request, if:

- (a) the court finds that no statutory or constitutional exemption from disclosure could reasonably apply to the record in question; and
- (b) the court denies confidential treatment under this section.

(3) This section does not apply to records that are specifically required to be public under statutory provisions outside of this chapter or under Section 63-2-301, except as provided in Subsection (4).

(4) (a) Access to drafts and empirical data in drafts may be limited under this section, but the court may consider, in its evaluation of interests favoring restriction of access, only those interests that relate to the underlying information, and not to the deliberative nature of the records.

(b) Access to original data in a computer program may be limited under this section, but the court may consider in its evaluation of interests favoring restriction of access only those interests that relate to the underlying information, and not to the status of that data as part of a computer program. 19

PART 5

STATE RECORDS COMMITTEE

63-2-501. State Records Committee created — Membership — Expenses.

(1) There is created the State Records Committee within the Department of Administrative Services to consist of the following seven individuals:

- (a) an individual in the private sector whose profession requires him to create or manage records that if created by a governmental entity would be private or controlled;
- (b) the state auditor or the auditor's designee;
- (c) the director of the Division of State History;
- (d) the governor or the governor's designee;
- (e) one citizen member;
- (f) one elected official representing political subdivisions; and
- (g) one individual representing the news media.

(2) The members specified in Subsections (1)(a), (e), (f), or (g) shall be appointed by the governor with the advice and consent of the Senate.

(3) (a) Except as required by Subsection (b), as terms of current committee members expire, the governor shall appoint each new member or reappointed member to a four-year term.

(b) Notwithstanding the requirements of Subsection (a), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of committee members are staggered so that approximately half of the committee is appointed every two years.

(c) Each appointed member is eligible for reappointment for one additional term.

(4) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.

(5) (a) (i) Members who are not government employees shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) Members may decline to receive per diem and expenses for their service.

(b) (i) State government officer and employee members who do not receive salary, per diem, or expenses for their agency for their service may receive per diem and expenses incurred in the performance of their official duties from the committee at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(2) upon the order of the court or judge thereof upon the application of the client, after notice to the attorney.

1953

78-51-35. Effect — Notice of change.

When an attorney is changed as provided in Section 78-51-34, written notice of the change and of the substitution of a new attorney or of the appearance of the party in person must be given to the adverse party; until then he must recognize the former attorney.

1995

78-51-36. Notice to appoint successor.

When an attorney dies or is removed or suspended, or ceases to act as such, a party to an action or proceeding for whom he was acting as attorney must, before any further proceedings are had against him be required by the adverse party, by written notice, to appoint another attorney or to appear in person.

1953

78-51-37. Conviction of crime — Judgment of disbarment — Duty of clerks of court.

Upon conviction of an attorney and counselor of felony, or misdemeanor involving moral turpitude, the judgment of the Supreme Court must be that the name of the accused be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; upon conviction in other cases, the judgment of the court may be, according to the gravity of the offense charged, deprivation of the right to practice as an attorney or counselor in the courts of this state permanently or for a limited period. The clerk of the court in which any such conviction is had must within thirty days thereafter transmit to the Supreme Court a certified copy of the record of conviction, which shall be conclusive evidence thereof.

1953

78-51-38. Suretyship — Attorney forbidden to assume.

No practicing attorney and counselor shall become a surety in any civil or criminal action or proceeding in which he is engaged as attorney.

1953

78-51-39. Certain officials not to practice law.

Sheriffs, clerks of courts and constables, and their deputies, are prohibited from practicing law or acting as attorneys and counselors, or from having as a partner an attorney and counselor or anyone who acts as such.

1953

78-51-40. Corporations and associations forbidden to practice — Exceptions.

It shall be unlawful for any corporation or voluntary association, except such as are organized for benevolent or charitable purposes, or organizations approved by the Supreme Court and formed for the purpose of assisting persons without means in the pursuit of civil remedies, to hold itself out to the public by advertisement or otherwise as being entitled to practice law or to furnish attorneys or counselors, or to render legal services or advice of any kind in any action or proceeding, or to solicit directly or indirectly any claim or demand for the purpose of bringing action thereon. Any corporation or voluntary association violating any of the provisions of this section is liable to a fine of not more than \$5,000; and every officer, agent or employee of such corporation or voluntary association who directly or indirectly engages on behalf of such corporation or voluntary association in any of the acts herein prohibited, or assists such corporation or voluntary association to do such prohibited acts, is guilty of a misdemeanor. The fact that such officer, agent or employee is a duly and regularly licensed attorney at law shall not be held to permit or allow any such corporation or voluntary association to do the acts prohibited herein, nor shall such fact be a defense upon the trial of any of the persons mentioned herein for a violation of the provisions of this section.

1953

78-51-41. Compensation — Lien.

The compensation of an attorney and counselor for service is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action, the service of an answer containing a counterclaim or at the time that the attorney and client enter into a written or oral employment agreement, the attorney who is so employed has a lien upon the client's cause of action or counterclaim, which attaches to any settlement, verdict, report, decision, or judgment in the client's favor and to the proceeds thereof whosoever hands they may come, and cannot be affected by any settlement between the parties before or after judgment. Any written employment agreement shall contain a statement that the attorney has a lien upon the client's cause of action or counterclaim.

1995

78-51-42. Refusing to pay over money — Penalty.

An attorney and counselor who receives money or property of his client in the course of his professional business and who refuses to pay or deliver the same to the person entitled thereto within a reasonable time after demand is guilty of a misdemeanor.

1995

78-51-43. Exception — Demand for bond.

When an attorney and counselor claims to be entitled to a lien upon money or property of his client in his possession he is not liable to the penalty of Section 78-51-42, unless he neglects or refuses to pay or deliver such money or property to the person entitled thereto upon such person giving a bond with sufficient surety, to be approved by the clerk of the district court, conditioned for the payment of the amount of such attorney's claim when legally established.

1995

78-51-44. Exception on giving bond.

Nor shall the attorney and counselor be liable as aforesaid if he shall give a sufficient bond, to be approved by the clerk of the district court, conditioned that he will pay or deliver the whole or any portion of such money or property to the claimant in the event such claimant shall finally establish his right thereto.

1953

CHAPTERS 52 TO 55

RESERVED

PART VII

COURT REPORTERS AND STENOGRAPHERS

CHAPTER 56

GENERAL PROVISIONS [EFFECTIVE UNTIL JANUARY 1, 1998]

Section	Repealed.
78-56-1.	Record of district court proceedings [Effective until January 1, 1998].
78-56-1.1.	Duties of shorthand reporter [Repealed effective January 1, 1998].
78-56-2.	Duties of shorthand reporter [Repealed effective January 1, 1998].
78-56-3.	Compensation — Traveling expenses — Frequency of payment [Effective until January 1, 1998].
78-56-4.	Compensation — Transcripts and copies [Effective until January 1, 1998].
78-56-5.	Assistant reporters — Duties — Compensation [Repealed effective January 1, 1998].
78-56-6.	Certified transcripts prima facie correct [Effective until January 1, 1998].
78-56-7.	Oath — Bond — Action on bond [Repealed effective January 1, 1998].