

1989

# In Re: v. : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

890491

FOR THE SUPREME COURT OF UTAH

In Re:

Appeal of the Determination of  
Board of Bar Commissioners  
of the Utah State Bar

Case No. 890491

BRIEF OF APPELLANT

APPEAL FROM THE DETERMINATION OF THE BOARD OF  
BAR COMMISSIONERS OF THE UTAH STATE BAR

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FILED

ARGUMENT PRIORITY CLASSIFICATION: 5

APR 9 1990

Clerk, Supreme Court, Utah

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LIST OF ALL PARTIES

APPELLANT:

The Honorable Pat B. Brian, District Court Judge of  
the Third Judicial District Court in and for Salt  
Lake County, State of Utah.

RESPONDENT:

Board of Bar Commissioners of the Utah State Bar.

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### JURISDICTIONAL STATEMENT AND CASE HISTORY

Jurisdiction in the Utah Supreme Court is proper pursuant to Article VIII, § 3 of the Utah Constitution, giving the Supreme Court appellate jurisdiction as provided by statute; Article VIII, § 13 of the Utah Constitution giving the Supreme Court power of review over matters pertaining to the Judicial Conduct Commission; U.C.A. § 78-2-2(3)(c) (1989) granting the Supreme Court appellate jurisdiction over matters involving discipline of lawyers; and U.C.A. § 78-2-4(3) (1986), granting the Supreme Court supervisory powers over the practice of law including the conduct and discipline of persons admitted to the practice of law.

This is an action originating from a determination of jurisdiction rendered by the Board of Bar Commissioners of the Utah State Bar. Pursuant to written notice from Stephen Hutchinson, Executive Director of the Utah State Bar, dated October 24, 1989, the Board of Bar Commissioners announced its determination that the Utah State Bar Ethics and Discipline Committee has jurisdiction and authority to investigate and adjudicate disciplinary matters regarding alleged misconduct of sitting judges, which allegedly occurred prior to their appointment to the Judiciary.

A Notice of Appeal for review of the determination of the Board of Bar Commissioners dated November 22, 1989, was duly filed with the Clerk of the Supreme Court on or about November 22, 1989.



### STATEMENT OF ISSUES PRESENTED ON APPEAL

Does the Ethics and Discipline Committee of the Utah State Bar have jurisdiction to investigate and adjudicate a complaint of alleged misconduct of a sitting judge in the District Court of Utah where the alleged misconduct occurred prior to the time the judge was appointed to the bench, but where the complaint was not filed until the judge was appointed to the bench?

### CONSTITUTIONAL AND STATUTORY PROVISIONS, ORDINANCES AND RULES

The following constitutional provisions, statutes, and promulgated rules serve as the basis of dispute in this case:

- A. Utah Constitution, Article VIII, § 13 [Judicial Conduct Commission] (see Appendix A for full text).
- B. Utah Constitution, Article VIII, § 4 [Regulation of Practice of Law] (see Appendix B for full text).
- C. Utah Supreme Court Rules for Integration and Management of the Utah State Bar, Rules 12 and 13 (see Appendix C for full text).
- D. Utah Judicial Code § 78-7-27, 78-7-28, 78-7-30, Utah Code Ann. (1988, as amended) (see Appendix D for full text).
- E. Judicial Conduct Commission Amendments (1990 General Session, House Bill No. 281 (see Appendix E for full text).

### STATEMENT OF THE CASE

This action arises from a determination by the Board of Bar Commissioners of the Utah State Bar that its Ethics and Discipline Committee has jurisdiction and is empowered to investigate and adjudicate claims asserted against a sitting district court judge involving conduct which occurred prior to the time such judge was

appointed to the bench. The Appellant, an active Third Judicial District Court Judge, asserts that exclusive jurisdiction rests with the Supreme Court and the Judicial Conduct Commission as mandated by Article VIII, § 13 of the Utah Constitution and Utah Code Ann. §§ 78-7-27 and § 78-7-28 (1988). Inasmuch as existing statutes,

constitutional provisions and promulgated rules appear in conflict or otherwise fail expressly to address issues pertaining to exclusive or concurrent jurisdiction, immediate review by the Supreme Court has been requested.

#### STATEMENT OF FACTS

On or about December 2, 1988, Steven and Kristi Davis filed a Complaint with the office of the Utah State Bar Counsel alleging certain misconduct on the part of Judge Pat B. Brian, former attorney for Mr. and Mrs. Davis. Such misconduct is alleged to have occurred in the year prior to Judge Brian's appointment to the District Court bench.

Pursuant to the Office of Bar Counsel's position that the Utah State Bar has concurrent jurisdiction with the Judicial Conduct Commission to discipline a sitting judge, and practice of the Office of the Bar Counsel to defer jurisdiction to the Judicial Conduct Commission, the Complaint was forwarded to the Judicial Conduct Commission.

On or about November 29, 1988, the Office of Bar counsel received a letter from Dean Sheffield ("Sheffield Letter"), Executive Director of the Judicial Conduct Commission indicating

that the only matters the Judicial Conduct Commission "can or will consider" are matters alleged to have occurred after a judge takes the bench.

After receiving the Sheffield letter, the Complaint was referred to the Screening Panel of the Ethics and Discipline Committee for determination of factual disputes. Pursuant to such referral, Appellant challenged the jurisdiction and authority of the Utah State Bar to hear and determine the validity of the Complaint, by filing of a Petition of Review with the Board of Bar Commissioners of the Utah State Bar.

Upon consideration of the Petition of Review and a memorandum filed by Bar Counsel, and after oral argument, the Board of Bar Commissioners determined that the Screening Panel of the Ethics and Discipline Committee of the Bar does have jurisdiction and authority to investigate and adjudicate the Davis Complaint. As set forth in its letter to Appellant dated October 24, 1989 (Appendix E), the Board specifically found that Rule XVI [sic] of the Rules of Integration and Management of the Utah State Bar is dispositive of the issue of jurisdiction. (Appellant believes that the Board of Commissioners misstated the dispositive Rule and properly intended to identify Rule 13 of the Rules of Integration and Management of the Utah State Bar as the dispositive rule).

Upon receiving notification of the decision of the Board of Commissioners, Appellant filed a Notice of Appeal with the Clerk of the Supreme Court on November 22, 1989.

### SUMMARY OF ARGUMENTS

The instant dispute involves two constitutional provisions which affect or collaterally involve the discipline of those practicing law in the State of Utah. While Article VIII, § 13 and Article VIII, § 4 are, facially consistent, subsequent rules promulgated pursuant to Article VIII, § 4 are in obvious conflict. Promulgated rules must not only have constitutional origin, they must remain consistent with other constitutional mandates. Consequently, express constitutional provisions are preemptory of subsequent promulgated rule inconsistent therewith.

Sound principles of public policy and judicial administration require that discipline of the judiciary be vested in the Judicial Conduct Commission and not in the Utah State Bar. Inherent conflicts and potential long-term ramifications, including allegations of favoritism or reprisal, strongly argue for adjudication by the Commission. Utah should follow other jurisdictions, consistent with recommendations by the American Bar Association in the enlightened vesting of exclusive jurisdiction with the Commission over judicial discipline.

### ARGUMENT

A. Preeminent Constitutional Law Reserves Jurisdiction of Complaints Against Active Judges to the Judicial Conduct Commission.

It is an axiomatic principle of law that the Constitution constitutes supreme and paramount law, since it emanates directly from the people. The Constitution is the expression of the

people's will, as adopted by them. In Dean v. Rampton, 556 P.2d 205, 206-207 (Utah 1976), this court stated:

[I]t should be acknowledged that under our system the legislature, representing the people, indeed has all of the fundamental power of the sovereign to make whatever laws it deems proper for the general welfare. [Footnote omitted]. But even that power is not without limit. The purpose of a constitution is to provide an orderly foundation for government and to keep even the sovereign (as applicable here, the people through their legislature) within its bounds. Therefore, the legislative power itself must be exercised within the framework of the constitution. Accordingly, it has been so long established and universally recognized, as to be hardly necessary to state, that if a statutory enactment contravenes any provision of the constitution, the latter governs. Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60; State v. Betensen, 14 Utah 2d 121, 378 P.2d 669.

Moreover, it is elementary that when a statute is thus in contravention of a constitutional provision, it is invalid. State v. Betensen, 378 P.2d 669, 671 (Utah 1963). However, this Court has further held that in seeking correct application of statutes and constitutional provisions, this Court shall also look to the circumstances which brought them in to being and the purposes sought to be accomplished thereby. Utah Farm Bureau Insurance Company v. Utah Insurance Guaranty Association, 564 P.2d 751 (Utah 1977).

1. Constitutional Law Establishing Judicial Conduct Commission.

Article VIII, § 13, the controlling constitutional law herein in pertinent part states: "A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge."

(Emphasis added; see Appendix A for full text of Article VIII, § 13).

The constitutional mandate of the Commission's establishment and purpose is, on its face, unequivocal and unambiguous. The Commission is directed to investigate complaints against justices and judges, without mention of or regard to the chronology of events forming the basis of the complaints. Hence, due to such constitutional clarity, statutes enacted and rules promulgated pursuant thereto should be viewed consistently with the constitutional charge insofar as possible.

U.C.A. 78-7-27, et seq. which embodies the purposes of Article VIII, § 13, was promulgated to give procedure and substance to constitutional mandate. (See Appendix D). Therein, Commission panel consistency, grounds and procedures for removal, suspension, censure, retirement, and public or private reprimand of a justice, judge or justice of the peace are set forth with particularity. By providing guidelines for scrutiny of complaints against justices and judges without regard to chronology of events or possibilities of concurrent jurisdictions, such statutory provisions are wholly consistent with Article VIII, § 13.

Consequently, such direct and pointed constitutional provisions, clearly on point, should control and be dispositive of any jurisdictional conflict or dispute.

2. The Article VIII § 4 Broad Grant of Supervisory Powers Over Utah's Practice of Law Fails to Supersede the Specificity of Article VIII, § 13.

In apparent contradiction to the harmonious constitutional and Judicial Code provisions regarding the establishment and scope of the Judicial Conduct Commission are statutes and rules promulgated pursuant to the Article VIII § 4 such constitutional provision charges the Supreme Court with supervision of the practice of law in the State of Utah, including the conduct and discipline of persons admitted to practice law. (See Appendix B, Article VIII, § 4).

Pursuant to such constitutional provision, the Supreme Court has promulgated the Rules for Integration and Management of the Utah State Bar (see Appendix C). Therein, the Supreme Court has charged the Board to "investigate and consider and pass upon unethicial, questionable or improper conduct of persons admitted to the practice of law, including members of the Bar holding judicial office." (Appendix C, Rules for Integration and Management of the Utah State Bar, Rule 12). Moreover, Rule 13 of such Rules states:

13. Board of Commissioners, Powers, Conduct of Members of Bar-Holding Judicial Office. The Board shall also have the power to make or cause to be made an investigation into and upon all unethicial, questionable or improper conduct of members of the Bar holding judicial office and to make recommendations to the Supreme Court or other appropriate body with respect thereto.

(See Appendix C).

Consequently, although the broad supervisory authority granted to the Supreme Court by Article VIII, § 4 does not in and of itself conflict with the narrow scope of authority vested in the Judicial Conduct Commission, the aforementioned rules created to structure and carry out supervisory functions violate the constitutionally mandated scope of authority of the Judicial Conduct Commission.

3. Constitutionally-Mandated Jurisdiction Should Control Over Judicially-Created Jurisdiction.

The mandated jurisdiction of the Judicial Conduct Commission as set forth in Article VIII, § 13 should be read, wherever possible, to be consistent with the broad supervisory power over the practice of law as set forth in Article VIII, § 4. However, any subsequent statute or rule promulgated pursuant to either constitutional provision must harmonize with all constitutional provisions in order to retain its constitutionality. It is insufficient to merely assert that the creation of a rule is constitutionally authorized, while ignoring its conflict with other specific constitutional mandates. Moreover, where narrowly tailored subject matters are specifically addressed and parameterized by specific constitutional provisions, other generalized and broad grants of authority cannot swallow up or obliterate the narrowly tailored exceptions. Such a result would serve only to defeat the purposefully and carefully created exceptions.



Inasmuch as the Constitution has specifically reserved to the Judicial Conduct Commission jurisdiction of complaints against any justice or judge, without regard to the timing of events complained of, such constitutional mandate should preeminate and control over administrative rules promulgated pursuant to a more general supervisory constitutional charge. The specificity and origin of jurisdiction to investigate complaints against individual members of the judiciary mandates that such provision preeminate over conflicting administrative rule, regardless of the rule's origin in other general constitutional charges. Since the priority of jurisdiction is expressly set forth in the Constitution, which is the controlling law of the sovereign and the law from which all other statutes and rules are derived, this Court should determine as a matter of law that any discrepancy between administrative rule and constitutional mandate should be resolved by deference to the latter. Consequently, exclusive jurisdiction herein should be found to rest with the Judicial Conduct Commission.

B. Sound Public Policy and Judicial Administration Require that Exclusive Jurisdiction Over Judicial Discipline be Vested with the Judicial Conduct Commission.

The Judicial Conduct Commission must also have exclusive jurisdiction over complaints against judges for reasons of public policy and judicial administration.

1. History of Judicial Discipline.

A brief history of judicial discipline may assist the Court in assessing the public policy and judicial administration issues involved in this appeal. Prior to 1960, various methods employed by the states in administering judicial discipline for conduct unbecoming members of the judiciary ranged from action by the executive branch of government to impeachment by the legislature and recall by popular vote. Schoanbaum, A Historical Look at Judicial Discipline, 54 Chicago-Kent Law Review pp. 2-19. Commencing in California in 1960, permanent judicial conduct organizations or commissions were established by constitutional referendum or legislative enactment for discipline of the judiciary. Tesitor & Sinks, Judicial Conduct Organizations 2d Ed., p. 2; American Judicature Society 1980, p. 2; 54 Chicago-Kent Law Review. pp. 20-21; Shaman, State Judicial Conduct Organizations, 76 Kentucky Law Journal p. 811.

Following California's lead, virtually all states have now established judicial qualifications or conduct commissions to investigate and adjudicate complaints against sitting judges. Tesitor and Sinks, supra, at pp. 12-18. These commissions are not, however, uniform in their structure and operation. See Cohn, Comparing One- and Two-Tier Systems, Judicature Vol. 63, No. 5, November 1979, pp. 244-48; 76 Kentucky Law Journal p. 851. Indeed, decisions vary with respect to the jurisdictional claims of judicial disciplinary commissions. State Bar of California v. Superior Court in and for Los Angeles County, 207 Cal. 323, 278 P. 432 (1929); Cf. In re Mills, 539 S.W.2d 447 (Mo. 1976).

In 1929, the California Supreme Court held that members of the California Judiciary were not members of the State Bar Association and consequently, the State Bar Disciplinary Committee had no jurisdiction over them. State Bar of California v. Superior Court in and for Los Angeles County, 278 P. 432, 207 Cal 323 (1929). In 1960, the California Commission on Judicial Qualifications (now called the Commission on Judicial Performance) was created by constitutional amendment as the oversight committee for the California judiciary. Members of the California Bar Association who obtain judicial office are still deemed, during their tenure in that office, not to be members of the Bar Association. All disciplinary jurisdiction over them is reserved to the Commission on Judicial Performance.

Other reported cases have held that members of the judiciary are subject to commission or judiciary court jurisdiction, even where the conduct in question predates their appointment to the bench. See, in the Matter of Samford, 352 S.2d 1126, 1129 (Ala. 1978); In re Speiser, 445 S.2d 343 (Fla. 1984) (Cf. Florida Bar v. McCain, 330 S.2d 712 (Fla. 1976)); In re Greenberg, 442 Pa. 411, 280 A.2d 370 (Pen. 1971) (Cf. Office of Disciplinary Counsel v. Surrick, 521 Pa. 264, 555 A.2d 883 (Penn. 1989)).

## 2. The Enlightened Approach.

The approach of states such as California, Florida, Pennsylvania, and Alabama addresses more effectively the inherent conflict presented when members of the State Bar Association, representing practicing attorneys, undertakes to discipline a

sitting judge. The conflicts so encountered present the judge, as well as the Bar and its members, with the untenable probability of accusation, allegation and recusal of the judge in any case presented to that judge for adjudication by any member of the disciplinary committee or that member's associate, irrespective of the decision of the committee.

For example, if the committee determines to discipline the judge in any manner, future cases brought before that judge by any member of the disciplinary committee or anyone affiliated with such a member would be ripe for accusations and allegations of unfair treatment or prejudice by the committee member, the member's associates or their clients. Conversely, a determination of no action, or a failure to take action against the judge would raise accusations or allegations of favoritism by the judge in any future cases in favor of the committee member, the member's associates, or their clients. The resulting no-win scenario for the judge, the judiciary generally, and the bar itself will inevitably affect the performance and public perception of all three. Surely, such a result is not sound public policy.

Moreover, where there currently exists a Judicial Conduct Committee constitutionally created for the purpose of investigating complaints against the judiciary, such conflict of interest and potential endangerment to judicial integrity can be easily avoided. Sound public policy mandates that this Court exercise extreme caution and affirmatively preserve judicial integrity by protecting against any likelihood of the prejudicial administration of justice.

In response to the inherent conflicts arising from the above-presented scenario, in February, 1978, the American Bar Association House of Delegates adopted Standards Relating to Judicial Discipline and Disability Retirement. Standard 3, paragraph 3.1, "Jurisdiction and Grounds for Discipline," provides for the jurisdiction of the Judicial Disciplinary Commission as follows:

Jurisdiction Over Sitting Judge. Other than jurisdiction through impeachment, the commission should have exclusive jurisdiction over investigations and recommendations regarding the discipline and retirement arising out of the conduct of all active judges, including part-time judges. This jurisdiction should include conduct that occurred prior to a judge's assuming judicial office.

Standards Relating to Judicial Discipline and Disability Retirement, American Bar Association, paragraph 3.1. (Emphasis added).

The comments to paragraph 3.1 state as follows:

It is to the benefit of the public and necessary for the independence of the judicial office that questions regarding the propriety of conduct of an active judge should be within the exclusive jurisdiction of the commission. This is true whether the conduct occurred prior to or while holding judicial office.

Jurisdictional uncertainties between the commission and a lawyer disciplinary board about the conduct of judges who are also lawyers impede the judicial and the lawyer disciplinary processes. Judicial and lawyer discipline processes differ as to tribunal, standards of conduct, and the public office involved. Rules specifying which body has jurisdiction and when that jurisdiction attaches should be promulgated by the court. Failure to resolve these conflicts will leave both disciplinary processes open to the uncertainties of res judicata and collateral estoppel, and may subject the judge whose conduct is in

question to multiple proceedings. The public should be aware that both agencies exist and of the function of each.

Commentary, Standards Relating to Judicial Discipline and Disability Retirement, paragraph 3.1. (Emphasis added).

The approaches of California and similar jurisdictions are more enlightened in view of the foregoing policy conflicts and articulated standards. Having fully discussed and studied the conflicts and competing policy concerns, the ABA House of Delegates recommends that exclusive jurisdiction rest with a separate commission, irrespective of the chronology of the conduct involved.

In Utah, where the Judicial Conduct Commission has been established by constitutional amendment and enabled through legislative enactment, the Commission should investigate and adjudicate all complaints relating to sitting judges, whether the conduct which is the subject of the complaint occurred prior to or after the assumption of judicial office. Only in this manner can the inevitable conflicts and their ramifications be avoided.

In the case before this court, the conduct complained of clearly occurred prior to Appellant's appointment to the bench. Moreover, the conduct complained of occurred two years prior to the filing of the complaint, and twenty months after appointment to judicial office. Allowing proceedings on this matter before the Disciplinary Committee of the Utah State Bar, rather than the Judicial Conduct Commission, will potentially cause Appellant and all members of the Ethics and Discipline Committee, endless future conflicts, questions, and potential accusations and recusal.

In this matter, Appellant does not argue that the Davis Complaint should not be fully adjudicated, as the Office of the Bar Counsel may contend. As with all such complaints, a complete investigation and hearing of the issues is essential to the maintenance of public confidence in the judiciary. In this aspect, the concerns of public confidence and professional competence are similar to those of the Bar generally. The issue presented to this Court, however, is one of the proper forum in which to adjudicate the underlying dispute. In light of the public policy and judicial administration conflicts presented, the proper forum for all complaints against justices and judges, including the specific complaint involved here, is the Judicial Conduct Commission. As noted in Section A above, such a determination would be in harmony with the clear, mandatory language of Article VIII, § 13 of the Utah Constitution.

Sound principles of public policy and effective judicial administration mandate that this matter be investigated, heard and adjudicated by the Judicial Conduct Commission.

#### CONCLUSION

Case at bar presents issues of public policy and constitutional jurisdiction regarding the investigation and discipline of sitting judges. Such constitutional issues should be resolved by direct reference to the express provisions of Article VIII, § 13 of the Utah Constitution which expressly grants to the Judicial Conduct Commission the authority to investigate all complaints against justices and judges. Any apparent conflict

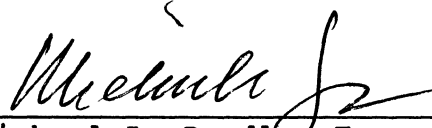
created by rules promulgated pursuant to the constitution's broad grant of supervisory authority over the practice of law is resolved by the supreme and paramount origin of the Judicial Conduct Commission's specific and direct constitutional grant of authority.

Moreover, public policy regarding the preservation of judicial integrity and avoidance of procedure prejudicial to the administration of justice also mandates a finding that exclusive jurisdiction is vested with the Judicial Conduct Commission. Such exclusivity of jurisdiction avoids placing attorneys in a judgmental capacity over a sitting judge before whom they may continue to practice law. Attorneys and judges alike necessarily must avoid claims or potential claims of prejudice and undue influence. A determination consistent with Article VIII, § 13's grant of authority to the Judicial Conduct Commission circumspectly avoids undesirable and untenable conflict, while preserving public policy by direct reliance upon the Utah Constitution.

For the foregoing reasons, Appellant respectfully requests that this Court determine that exclusive jurisdiction of complaints against sitting judges, regardless of the chronology of conduct, rests with the Judicial Conduct Commission.

DATED this 9<sup>th</sup> day of April, 1990.

ALLEN NELSON HARDY & EVANS

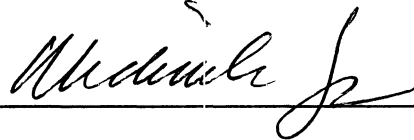
  
\_\_\_\_\_  
Michael L. Dowdle, Esq.  
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Robert L. Payne, Esq.  
Attorneys for Appellant



CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 9th day of April, 1990, I caused to be hand delivered a true and correct copy of the foregoing document to the following:

Stephen F. Hutchinson  
Executive Director  
UTAH STATE BAR  
645 South 200 East  
Salt Lake City, Utah 84111-3834

A handwritten signature in dark ink, appearing to read "Stephen F. Hutchinson", is written over a horizontal line.

## APPENDIX A

officer for the courts and shall implement the rules adopted by the Judicial Council. 1985

**Sec. 13. [Judicial Conduct Commission.]**

A Judicial Conduct Commission is established which shall investigate and conduct confidential hearings regarding complaints against any justice or judge. Following its investigations and hearings, the Judicial Conduct Commission may order the reprimand, censure, suspension, removal, or involuntary retirement of any justice or judge for the following:

- (1) action which constitutes willful misconduct in office;
- (2) final conviction of a crime punishable as a felony under state or federal law;
- (3) willful and persistent failure to perform judicial duties;
- (4) disability that seriously interferes with the performance of judicial duties; or
- (5) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

Prior to the implementation of any commission order, the supreme court shall review the commission's proceedings as to both law and fact. The court may also permit the introduction of additional evidence. After its review, the supreme court shall, as it finds just and proper, issue its order implementing, rejecting, or modifying the commission's order. The Legislature by statute shall provide for the composition and procedures of the Judicial Conduct Commission.

1985

**Sec. 14. [Compensation of justices and judges.]**

The Legislature shall provide for the compensation of all justices and judges. The salaries of justices and judges shall not be diminished during their terms of office.

1985

**Sec. 15. [Mandatory retirement.]**

The Legislature may provide standards for the mandatory retirement of justices and judges from office.

1985

**Sec. 16. [Public prosecutors.]**

The Legislature shall provide for a system of public prosecutors who shall have primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah and shall perform such other duties as may be provided by statute. Public prosecutors shall be elected in a manner provided by

The Senate shall consist of a member who shall not exceed twenty-nine in number, and representatives shall never be less than three times the number of senators.

**Sec. 3. [Renumbered as Section 13.]**

**Sec. 4. [Repealed.]**

**ARTICLE X**

**EDUCATION**

**Section**

1. [Free nonsectarian schools.]
2. [Defining what shall constitute a public education system.]
3. [State Board of Education.]
4. [Control of higher education system. Rights and immunities.]
5. [State School Fund and Uniform Establishment and Use.]
6. [Repealed.]
7. [Proceeds of land grants constitute a fund.]
8. [No religious or partisan tests in public schools.]
9. [Public aid to church schools forbidden.]
10. [Repealed.]
11. [Repealed.]
12. [Renumbered.]
13. [Renumbered.]

**Section 1. [Free nonsectarian schools.]**

The Legislature shall provide for the establishment and maintenance of the state's education system including: (a) a public education system open to all children of the state; and (b) a nonsectarian education system. Both systems shall be under public control.

**Sec. 2. [Defining what shall constitute a public school system.]**

The public education system shall include all public elementary and secondary schools and programs as the Legislature may provide. The higher education system shall include public universities and colleges and

## APPENDIX B

**Sec. 3. [Jurisdiction of supreme court.]**

The supreme court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The supreme court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the supreme court's jurisdiction or the complete determination of any cause.

**Repeals and Reenactments.** — See the Compiler's Note following the analysis at the beginning of this article. See former Art. VIII,

Sec. 4 in the bound volume for the former provisions comparable to this section

**DECISIONS UNDER FORMER PROVISIONS****ANALYSIS**

Appellate jurisdiction.

Certified questions

Certiorari

Habeas corpus

**Appellate jurisdiction.**

Appellate jurisdiction connotes review of the action of an inferior court. Federal courts are not inferior courts to the Utah supreme court and supreme court's answer to certified questions in a case that originated in or is to be adjudicated in a federal court is not an exercise of appellate jurisdiction within the meaning of this section. *Holden v. N.L. Indus., Inc.*, 629 P.2d 428 (Utah 1981).

**Certified questions.**

Supreme court of Utah does not have jurisdiction to answer questions of state law certified to it by the federal courts in cases that are to be adjudicated or originate in the federal courts; therefore, supreme court's certification rule was withdrawn. *Holden v. N.L. Indus., Inc.*, 629 P.2d 428 (Utah 1981).

**Certiorari.**

Where, due to untimeliness, a criminal conviction was no longer subject to review by the

statutory remedy of appeal, and a habeas corpus proceeding, which was properly before the supreme court on appeal, held that defendant had been deprived of his constitutional right to an appeal, and the alleged error could not have been corrected on appeal and the defendant had taken the initiative to seek an appeal before the time for appeal had passed, supreme court exercised its discretion to issue the common law writ of certiorari to allow defendant a direct review in the supreme court of the alleged errors in his trial. *Bogges v. Morris*, 635 P.2d 39 (Utah 1981).

**Habeas corpus.**

Matters which have been or could have been raised on appeal cannot be brought before the court by habeas corpus. Habeas corpus is a civil matter and the findings of the trial court are presumed to be proper unless there is no substantial evidence to sustain them. *Schad v. Turner*, 27 Utah 2d 345, 496 P.2d 263 (1972), *Wilson v. Turner*, 27 Utah 2d 368, 496 P.2d 711 (1972), *Leggroan v. Turner*, 27 Utah 2d 403, 497 P.2d 17 (1972), *Zumbrunnen v. Turner*, 27 Utah 2d 428, 497 P.2d 34 (1972).

**Law Reviews.** — *Judicial Socialization. An Empirical Study*, 11 J. Contemp. L. 423 (1985).

**Sec. 4. [Rule-making power of supreme court — Judges pro tempore — Regulation of practice of law.]**

The supreme court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The legislature may amend the rules of procedure and evidence adopted by the supreme court upon a vote of two-thirds of all members of both houses of the legislature. Except as otherwise provided by this constitution, the supreme court by rule may authorize retired justices and judges and judges pro tempore to perform any judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah. The supreme court by rule shall govern the practice of law, including admission to

practice law and the conduct and discipline of persons admitted to practice law.

**Repeals and Reenactments.** — See the Compiler's Note following the analysis at the beginning of this article. Former Article VIII contains no comparable provisions.

**Cross-References.** — Supreme Court rule-

making process, Rule 11-101, Code of Judicial Administration

Cited in *Stewart v Coffman*, 748 P 2d 579 (Utah Ct App 1988)

#### DECISIONS UNDER FORMER PROVISIONS

##### ANALYSIS

Judge pro tempore  
Regulation of practice of law

##### **Judge pro tempore.**

Appointment of a judge pro tempore to hear and decide a divorce action does not violate the provisions of § 30-3-4, since a properly appointed pro tempore judge becomes the equal in every respect to the regular judge. *Harward v Harward*, 526 P 2d 1183 (Utah 1974)

Circuit judge appointed by state court ad-

ministrator to serve temporarily as a district judge pursuant to § 78-3-24 and former § 78-4-15 was not a judge pro tempore and was not subject to the legal restrictions pertaining to that status. *Cahoon v Cahoon*, 641 P 2d 140 (Utah 1982)

##### **Regulation of practice of law.**

Inherent in the judicial power conferred on the Supreme Court by former Article VIII, sec 1, of the Utah Constitution is the power to regulate the practice of law. *In re Utah State Bar Petition*, 647 P 2d 991 (Utah 1982)

### Sec. 5. [Jurisdiction of district court and other courts — Right of appeal.]

The district court shall have original jurisdiction in all matters except as limited by this constitution or by statute, and power to issue all extraordinary writs. The district court shall have appellate jurisdiction as provided by statute. The jurisdiction of all other courts, both original and appellate, shall be provided by statute. Except for matters filed originally with the supreme court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.

**Repeals and Reenactments.** — See the Compiler's Note following the analysis at the beginning of this article. See former Art VIII, Secs 7, 8 and 9 in the bound volume for the former provisions comparable to this section.

##### ANALYSIS

Summary appellate disposition  
Cited

##### **Summary appellate disposition.**

Summary affirmance under Rule 10, Ct App R, is a determination of the appeal on its

merits, after a full and adequate opportunity has been afforded all parties to present their arguments, and does not deny an appellant his right of appeal. *Hernandez v Hayward*, 764 P 2d 993 (Utah Ct App 1988)

Cited in *Heninger v Ninth Circuit Court*, 739 P 2d 1108 (Utah (1987)), *DeBry v Salt Lake County Bd of Appeals*, 764 P 2d 627 (Utah Ct App 1988)

**A.L.R.** — Place where claim or cause of action "arose" under state venue statute, 53 A L R 4th 1104

#### DECISIONS UNDER FORMER PROVISIONS

##### ANALYSIS

Appeal to Supreme Court by the state in criminal cases  
Appeal to Supreme Court where case origi-

nated in circuit court  
Appeal to Supreme Court where case originated in justice or city court  
Defendant's right to appeal  
Divorce decree

## APPENDIX C

# Rules for Integration and Management of the Utah State Bar

## (A) Organization of the Utah State Bar

1 In order to advance the administration of justice according to law, to aid the courts in carrying on the administration of justice, to provide for and regulate the admission of persons seeking to engage in the practice of law, to provide for the regulation and discipline of persons engaged in the practice of law, to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service, and high standards of conduct, to provide forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform, to carry on a continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereon, to encourage practices that will advance and improve the honor and dignity of the legal profession, and to the end that the responsibility of the legal profession and the individual members thereof may be more effectively and efficiently discharged in the public interest, and acting with the powers vested in it by the Constitution of this State and its inherent power over members of the legal profession as officers of the Court, the Supreme Court of Utah does hereby perpetuate, create and continue under the direction and control of this Court an organization known as the Utah State Bar. All persons now or hereafter licensed in this State to engage in the practice of law shall be members of the Utah State Bar, in accordance with the rules of this Court. The Utah State Bar may sue and be sued, may enter into contracts and acquire, hold, encumber, dispose of real and personal property, and promote and further the same, as set forth in these Rules. All property, real and personal and all monies of the Utah State Bar presently belonging to the Utah State Bar, shall be perpetuated and continued in such ownership.

2 The qualifications of attorneys for admission to practice before the courts of this State, the duties, obligations and certain of the grounds of discipline of members, and the method of establishing such grounds, subject to the right of this Court to discipline a member when it is satisfied that such member is not mentally or morally qualified to practice law even though none of the specific grounds for discipline set forth in these Rules exist, shall be prescribed in these Rules pertaining to admission and discipline of attorneys.

3 No person shall practice law in this State or hold himself out as one who may practice law in this State unless he is an active member of the Utah State Bar, and no suspended or disbarred member shall practice law in this State or hold himself out as one who may practice law in this State while suspended or disbarred.

(B) Definitions. Unless the context otherwise requires, the following definitions shall apply to the interpretation of these Rules relating to admission and discipline of attorneys:

1 "Board" means Board of Commissioners of the Utah State Bar.

2 "Discipline" means disbarment, suspension, probation, public reprimand or private reprimand.

3 "Member" means member of the Utah State Bar, the classifications of which are to be set forth hereinafter.

4 "Bar" means the Utah State Bar perpetuated, created and continued by rules of this Court.

5 "Non-Member" means a person licensed to practice law in a state, territory or possession of the United States, who is not a member of the Utah State Bar.

6 "Supreme Court" means the Utah Supreme Court.

(C) Rules of Organization and Management of the Bar

1 Qualification for Membership. All persons who have been admitted to the bar of the Supreme Court of this State, and who are not the subject of an order of the Supreme Court which terminates, suspends or restricts the right to practice law in this State, are qualified to become members of the Bar, subject to the provisions of these Rules.

2. Board of Commissioners, Number, Term and Vacancies. There shall be a Board of Commissioners of the Bar consisting of eleven members. Except as otherwise provided, the term of office of each commissioner shall be three years and until his successor is elected and qualified. In the event of vacancy in the Board, the remaining commissioners shall appoint a successor from among the practicing members of the Bar of the division from which such commissioner was elected, who shall serve until the following annual election.

3 Territorial Divisions. For the purposes of these Rules, the first judicial district shall be known as the first division, the second judicial district shall be known as the second division, the third judicial district shall be known as the third division; and the fourth judicial district shall be known as the fourth division, and the fifth, sixth and seventh judicial districts shall be known as the fifth division.

4. Number of Commissioners from each Division. There shall be one member of the Board from each of the divisions, except the third division from which there shall be seven commissioners. No more than one commissioner from any division, except from the third division, and

no more than seven commissioners from the third division, shall serve on such Board at the same time.

5 Nomination and eligibility of Commissioners. Attorneys in one division shall alone have the right to nominate persons for the office of commissioner from that division. To be eligible for the office of commissioner in a division, the nominee's mailing address must be in that Division as shown by the records of the Bar. Nomination to the office of commissioner shall be by written petition of ten or more of the members of the Bar in good standing. Any number of candidates may be nominated on a single petition. Nominating petitions shall be mailed to the secretary of the Bar within a period to be fixed by the rules made by the Board.

6 Election of Commissioners. The Board shall be elected by the vote of the resident active members of the Bar as follows: In the year 1983 and every third year thereafter, one member from the second division and three members from the third division, except that in the year 1983 only, there shall be four members elected from the third division, in the year 1984 and every third year thereafter, one member from the first division and two members from the third division, in the year 1985 and every third year thereafter, two members from the third division and one each from the fourth and fifth divisions. The candidate from any division, and the three or two candidates from the third division, receiving the greatest number of votes of that division shall be the commissioner from such division. For the year 1983, the candidate from the third division receiving the fourth greatest number of votes shall be the commissioner for a two year term. An attorney is limited to voting for candidates for commissioner from the division in which his mailing address is located as shown by the records of the Bar. The ballots shall be deposited in person or by mail with the secretary of the Board, or such other officer as it may designate. There shall be an annual election by the resident active members of the Bar for the purpose of filling vacancies. The Board shall fix the time for holding the annual election and prescribe rules and regulations in regard thereto, not in conflict with the provisions of these Rules. The Board shall, in accordance with its rules, give at least ninety days notice by mail of the time for holding the election each year.

Those persons holding office as commissioners at the time of the adoption of these Rules or who were elected under the existing statute will continue in office for the period of time elected to serve.

7 Organization of Board. After each election, the Board shall organize by the election of a president-elect and a president of the Bar. The president-elect shall be chosen from among the members of the Board whose terms of office will not expire for two years or more. The president-elect for the previous year shall be elected president. The president and the president-elect shall hold office until their successors are elected following the next succeeding annual election. A secretary and such other assistants as the Board may require may be selected from within or without the Board to hold office during the pleasure of the Board and to be paid such compensation as the Board shall determine.

8 Meeting, Annual and Special - Notice. There shall be an annual meeting of the Bar, presided over by the president of the Bar, open to all members in good standing, and held at such time and place as the Board may designate, for the discussion of the affairs of the Bar and the administration of justice. Special meetings of the Bar may be held at such times and places as the Board may designate. Notice of all meetings shall be given by mail to all members of the Bar not less than fifteen days prior to the date of such meeting.

9 By-laws. The Board shall have power to adopt by-laws, not in conflict with any of the terms of these Rules, concerning the selection and tenure of its officers and committees and their powers and duties, and generally for the control and regulation of the business of the Board and of the Bar.

10 Admission to Practice Law, Qualifications, Enrollment, Oath, Fees.

(a) The Board shall have power to determine the qualifications and requirements for admission to the practice of law, and to conduct examinations of applicants, and it shall from time to time certify to the Supreme Court those applicants found to be qualified. Qualifications and requirements for admission to the practice of law shall be as set forth in the Revised Rules of the Utah State Bar for Admission to the Utah State Bar. The approval by the Supreme Court of any person certified for membership in accordance with such Rules shall entitle him to be enrolled in the Bar upon his taking an oath to support the Constitution of the United States and of this State and to discharge faithfully the duties of an attorney to the best of his knowledge and ability, and the payment of the fee fixed by the Board of the Bar with the approval of the Supreme Court, and thereafter, to practice law upon payment of the license fees herein provided, subject to the provisions of these Rules.

(b) Upon receiving certification by the Board and approval from the Supreme Court, the applicant shall pay fifty dollars to the Clerk of the Supreme Court for a Certificate of Admission, thirty-five dollars of which



retained by the State Treasurer as a special fund for the benefit of the Library, to be expended by the Board of Control

**Roll of Attorneys** The Clerk of the Supreme Court must keep a roll of attorneys admitted to practice, which must be signed by each attorney admitted before he is enrolled and receives his Certificate of Admission to the Bar

**Conduct of Attorneys, Conduct of Judicial Officers, Investigations, Discipline, Taking Testimony** The Board shall formulate rules governing the conduct of all persons admitted to the Bar and shall investigate and consider and pass upon unethical, unbecoming or improper conduct of persons admitted to the practice of law including members of the Bar holding judicial office. The Board shall formulate rules governing procedures in cases involving alleged misconduct of members of the Bar, including those holding judicial office, create committees for the purpose of investigating complaints, and committees may be empowered to administer discipline, including recommendation of suspension or disbarment from the practice of law in the same manner as the Board itself, but no recommendation for suspension or disbarment of a member shall be final until approved by the Board. The Board or any such committee may designate any officer, and by law to take depositions, to take testimony under oath in any investigations

**Board of Commissioners, Powers, Conduct of Members of Bar** The Board shall also have the power to make or cause to be made an investigation into and upon all unethical, unbecoming, or improper conduct of members of the Bar holding judicial office and to make recommendations to the Supreme Court or other appropriate body with respect thereto

**Rules and Regulations, Supreme Court to Approve** All rules and regulations formulated by the Board shall be submitted to and approved by the Supreme Court

**Studies and Recommendations by the Bar** The Governor, the Supreme Court and the Legislature may request of the Board an investigation and study of any recommendations upon any matter relating to the administration of justice, and thereupon it shall be the duty of the Board to cause such investigation and study to be made, to report on an annual meeting of the Bar, and, after the action of said meeting, to report the same to the officer or body making the request. The Board may, without such request, cause an investigation and study upon the same subject matters, and, after a report thereon to the annual meeting of the Bar, report the same and the action of said meeting to the Governor, the Supreme Court, or the Legislature

**Annual License, Fees, Disbursements of Funds** Every person practicing law within this state, or holding himself out as practicing law within this state, or carrying on the business of a person qualified to practice or carry on the business of an attorney within this state shall prior to the first day of March of each year, pay to the Bar a license fee in an amount to be fixed by the Board of the Bar with the approval of the Supreme Court to effectuate the purposes of these Rules. These funds shall be administered by the Bar

**Issuance of License, Form** The Secretary of the Bar shall issue a license to any person paying said license fee, if such person shall have been admitted to practice law in this state by the Supreme Court and not disbarred or then under suspension, a license in such form as the Board may prescribe, for the year for which fees were paid, and shall deliver such license to the person entitled thereto

**Powers of the Board Respecting Funds** For the purpose of carrying out the objects of these Rules, and in the exercise of the powers conferred, the Board shall have power to make orders concerning the management and disbursement of said funds

**Active and Inactive Members of the Bar** Any member of the Bar who has retired from the practice of law, or who is not engaged in the practice of law, upon written request, may be enrolled as an inactive member. There shall be no rebate of any license fee upon transfer from active membership after August 1, of the year in which the member was first admitted. An inactive member may attend the annual and special meetings and participate in any debates or discussions at such meetings, but shall not be entitled to vote at any election or upon any question. An inactive member may be appointed by the Board to special committees, and committees for examination of qualification for admission to the Bar and disciplinary committees, and may be employed in a clerical capacity by the Bar. The annual membership fee for an inactive member shall be payable before the first day of March of each year, in an amount to be fixed by the Board of the Bar with the approval of the Supreme Court to carry out the purposes of this Rule. An inactive member, if in good standing, upon his written request to the Board, may be enrolled as an

active member. Upon the filing of such request and the payment of the full annual license fee for the current calendar year, less any membership fee paid as an inactive member for such year, the applicant shall be immediately transferred from the inactive roll to the active roll

**20 Practicing without a license prohibited** Action or proceedings to enforce. Exception. No person who is not duly admitted and licensed to practice law within this state nor any person whose right or license to so practice has terminated either by disbarment, suspension, failure to pay his license fee or otherwise, shall practice or assume to act or hold himself out to the public as person qualified to practice law or to carry on the calling of an attorney within the state. Such practice, or assumption to act or holding out, by any such unlicensed or disbarred or suspended person shall not constitute a crime, but this prohibition against the practice of law by any such person shall be enforced by such civil action or proceedings, including writ, contempt or injunctive proceedings, as may be necessary and appropriate, which action or which proceedings shall be instituted by the Board of the Bar

Nothing in this section shall prohibit a person who is unlicensed as an attorney from personally representing his own interests in a cause to which he is a party in his own right and not as assignee

**21 Duties of attorneys and counselors** It is the duty of an attorney and counselor

a To support the Constitution and the laws of the United States and of this state,

b To maintain the respect due to the courts of justice and judicial officers,

c To counsel or maintain no action, proceeding or defense other than that which appears to him legal and just excepting the defense of a person charged with a public offense,

d To employ for the purposes of maintaining the causes confided to him such means only as are consistent with trust, and never to seek to mislead the judges by any artifice or false statement of fact or law,

e To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which he is charged

f Not to encourage either the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest,

g Never to reject for any consideration personal to himself the cause of the defenseless or the oppressed, and,

h To comply with the Revised Rules of Professional Conduct of the Utah State Bar and all other duly approved rules and regulations prescribed by the Board and to pay the fees provided by law

i In case of conflict with the Code of Professional Responsibility approved by the Utah Supreme Court, February 19, 1971, with amendments December 5, 1977, May 4, 1978, March 17, 1980, and May 1982 the latter shall govern

**22 Authority of attorneys** An attorney has authority

a To execute in the name of his client a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding or final judgment rendered therein

b To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the Court

c To receive money claimed by his client in an action or proceeding during the pendency thereof or after judgment, unless a revocation of his authority is filed and, upon payment thereof and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment

**23 Conviction of crime Judgment of disbarment** Duty of clerks of court. Except for good cause shown, upon conviction of an attorney of a crime involving moral turpitude by any court, the Supreme Court will enter a Judgment of Disbarment against the accused and will order that the name of the accused be stricken from the roll of attorneys of the court, and that he be precluded from practicing as such attorney in all the courts of this state. The clerk of a Utah state 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. An attorney so disbarred shall not be entitled to readmission until he satisfies the requirements set forth in the Procedures of Discipline of the Utah State Bar

**24 Suretyship** Attorney forbidden to assume. No practicing attorney shall become a surety in any civil or criminal action or proceeding in which he is engaged as attorney

The effective date of this rule shall be July 1, 1981

Approved as amended effective September 25, 1985

## APPENDIX D

**78-7-22. English language for proceedings.**

Judicial proceedings shall be conducted in the English language.

**History:** L. 1951, ch. 58, § 1; C. 1943, Supp., 104-7-22; L. 1988, ch. 248, § 45.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, rewrote the section which had read "Every written proceeding

in a court of justice shall be in the English language, and judicial proceedings shall be conducted, preserved and published in no other "

**78-7-24. Courts of justice — Authority.**

(1) All courts of justice have the authority necessary to exercise their jurisdiction.

(2) If a procedure for an action is not established, a process may be adopted that conforms with the apparent intent of the statute or rule of procedure.

**History:** C. 1953, 78-7-24, enacted by L. 1988, ch. 248, § 46.

**Repeals and Reenactments.** — Laws 1988, ch. 248, § 46 repeals former § 78-7-24, Utah

Code Annotated 1953, relating to procedure when statutory provisions are insufficient, and enacts the present section, effective April 25, 1988

**78-7-25. Decisions to be rendered within sixty days — Procedures for decisions not rendered.**

(1) A judge of a trial court shall decide all matters submitted for final determination within 60 days of submission, unless circumstances causing the delay are beyond the judge's personal control.

(2) The Judicial Council shall establish reporting procedures for all matters not decided within 60 days of final submission.

**History:** L. 1969, ch. 249, § 1; 1977, ch. 77, § 67; 1988, ch. 248, § 47.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, subdivided and rewrote the section which had read "No judge of the circuit court or district court shall keep

in his possession any matter in controversy not decided by him which has been finally submitted for his consideration and determination beyond a sixty-day period unless circumstances causing such delay are beyond his personal control "

**78-7-26. Repealed.**

**Repeals.** — Laws 1988, ch. 248, § 50 repeals § 78-7-26, as last amended by Laws 1977, ch

77, § 68, relating to monthly reports of undecided matters, effective April 25, 1988

**78-7-27. Judicial Conduct Commission — Creation — Members — Terms — Vacancies — Majority concurrence — Expenses.**

(1) The membership of the Judicial Conduct Commission established by Article VIII, Sec. 13 of the Utah Constitution consists of:

(a) two members of the House of Representatives to be appointed by the speaker of the House of Representatives for a two-year term, not more than one of whom may be of the same political party as the speaker;

(b) two members of the Senate to be appointed by the president of the Senate for a two-year term, not more than one of whom may be of the same political party as the president;

(c) three members from the board of commissioners of the Utah State Bar, who shall be appointed by the board of commissioners of the Utah State Bar for a four-year term;

(d) two persons not members of the Utah State Bar, who shall be appointed by the governor for two-year terms, not more than one of whom may be of the same political party as the governor; and

(e) one judge of a trial court of record, to be selected by the Judicial Conduct Commission for a two-year term.

(2) If the judge serving on the commission is disqualified from participating in any proceeding, the Judicial Conduct Commission shall select a substitute judge of a trial court of record.

(3) The Judicial Conduct Commission shall establish guidelines and procedures for the disqualification of any member from consideration of any matter.

(4) When a member resigns, dies, or ceases to be either a member of the board of commissioners of the Utah State Bar, or a member of the House of Representatives or Senate, the appointing authority shall appoint a successor for the unexpired term. If the appointing authority fails to appoint a successor, the commissioners who have been appointed may act as a commission under all the provisions of this act.

(5) No act of the commission is valid unless concurred in by majority of its members. The commission shall select one of its members to serve as chairman.

(6) All members of the commission shall be allowed their actual and necessary expenses for travel, board, and lodging incurred in the performance of commission duties. The chairman shall be allowed the actual expenses of secretarial services and the expenses of services for either a court reporter or a transcriber of electronic tape recordings, and other necessary administrative expenses incurred in the performance of the duties of the commission.

**History:** C. 1953, 78-7-27, enacted by L. 1977, ch. 146, § 1; 1983, ch. 157, § 3; 1986, ch. 47, § 78; 1988, ch. 101, § 6.

**Amendment Notes.** — The 1988 amendment, effective April 25, 1988, deleted the former first sentence of Subsection (4) which read "On June 30th following the effective date of this act the terms of office of the present members of the Judicial Conduct Commission expire, and members shall be appointed to the commission as provided for in Subsection (1), their respective terms of office to commence on

July 1, 1977"; substituted "a successor" for "the commissioners authorized by this act" in the last sentence in Subsection (4); substituted "services and the expenses of services for either a court reporter or a transcriber of electronic tape recordings" for "and court reporter services" in the second sentence in Subsection (6); and made minor stylistic changes

**Cross-References.** — Code of Judicial Conduct, Chapter 12, Code of Judicial Administration.

**78-7-28. Grounds for removal, suspension, censure, involuntary retirement, or reprimand of justice, judge, or justice of peace — Reinstatement.**

(1) A justice, judge, or justice of the peace of any court of this state in accordance with the procedure prescribed in this section, may be removed from office, suspended, censured, involuntarily retired, or reprimanded for:

- (a) willful misconduct in office;
- (b) final conviction of a crime punishable as a felony under state or federal law;
- (c) willful and persistent failure to perform judicial duties;
- (d) disability that seriously interferes with the performance of judicial duties;
- (e) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

(2) In addition to the reasons specified in Subsection (1), justices of the peace may be removed from office, suspended, censured, involuntarily retired, or reprimanded for failure to obtain and maintain certification from the Judicial Council for attendance at required judicial training courses.

(3) The Judicial Conduct Commission or the Supreme Court on its own motions, may suspend a justice, judge, or justice of the peace from office without salary or compensation if he pleads guilty, no contest to, or is found guilty of a crime punishable as a felony under state or federal law. If, after pleading guilty or no contest, he is not convicted; or if his conviction is reversed, his suspension shall terminate and he shall be paid his salary or compensation for the period of suspension.

**History:** C. 1953, 78-7-28, enacted by L. 1977, ch. 146, § 2; L. 1983, ch. 157, § 4; 1985, ch. 17, § 1.

**Amendment Notes.** — The 1983 amendment inserted Subsections (1)(e) and (1)(f); and substituted "The commission on judicial conduct or the Supreme Court on their own motions" for "On recommendation of the commission on judicial qualifications, or on its own motion, the Supreme Court" in the first sentence of Subsection (3).

The 1985 amendment inserted "involuntarily retired" in Subsection (1), deleted "in any term of office subsequent to the enactment of this section" at the end of Subsection (1)(a), inserted "willful and" at the beginning of Sub-

section (1)(c); substituted "judicial" for "his" in Subsection (1)(c); deleted Subsection (1)(d), relating to the habitual use of alcohol or drugs; redesignated former Subsections (1)(e) and (1)(f) as Subsections (1)(d) and (1)(e); deleted "of this section" before "justices" in Subsection (2), inserted "involuntarily retired" in Subsection (2); substituted "Judicial Conduct Commission" for "Commission on Judicial Conduct" in Subsection (3); and made minor changes in phraseology.

**Cross-References.** — Establishment of Judicial Conduct Commission, Utah Const., Art. VIII, Sec. 13.

Required annual training of justices of peace, § 78-5-25.

**78-7-29. Disability retirement of justice, judge or justice of peace.**

(1) A justice, judge, or justice of the peace of any court of this state, in accordance with the procedure prescribed in this act, may be retired for a disability seriously interfering with the performance of his duties and which is, or is likely to become, of a permanent character. Any justice, judge, or justice of the peace desiring to retire on grounds of disability shall certify to

the commission his request for retirement and the nature of his disability. The commission may order a medical examination and report.

(2) Action of the Judicial Conduct Commission in approving or disapproving an application for disability retirement shall be based upon the evaluation and recommendations submitted by one or more medical examiners or physicians, including an examination of essential statements submitted by either bar or judicial associations or committees certifying that:

(a) the justice, judge, or justice of the peace is mentally or physically disabled and totally incapacitated for the further performance of his assigned job; and

(b) his incapacity is likely to continue and be permanent and that he should be retired.

**History:** C. 1953, 78-7-29, enacted by L. 1977, ch. 146, § 3; L. 1983, ch. 157, § 5; 1986, ch. 47, § 79.

**Amendment Notes.** — The 1983 amendment substituted "commission on judicial conduct" for "commission on judicial qualifications" in Subsection (2).

The 1986 amendment substituted "Judicial Conduct Commission" for "commission on judicial conduct" in Subsection (2) and made stylistic changes throughout the section.

**Meaning of "this act".** — See note under same catchline following § 78-7-27.

**Severability Clauses.** — Laws 1986, ch. 47, § 81 provided: "If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act is given effect without the invalid provision or application."

**Cross-References.** — Establishment of Judicial Conduct Commission, Utah Const., Art. VIII, Sec. 13.

Justices' courts, Chapter 5 of this title.

### **78-7-30. Procedure for removal, suspension, censure, reprimand, or involuntary retirement.**

(1) The Judicial Conduct Commission may, after an investigation, order a hearing to be held before it concerning the removal, suspension, censure, reprimand, or involuntary retirement of a justice, judge, or justice of the peace. Alternatively, the commission may appoint three special masters, who shall be justices or judges of courts of record, to hear and take evidence in the matter and to report to the commission. If, after this hearing or after considering the record and report of the masters, the commission finds good cause therefor, it shall order the removal, suspension, censure, reprimand, or involuntary retirement, of the justice, judge, or justice of the peace. The commission may disclose any order it makes under this section prior to review by the Supreme Court, and subject to the provisions of Subsection (3).

(2) Prior to the implementation of any commission order, the Supreme Court shall review the record of the proceedings on the law and facts and may permit the introduction of additional evidence. The Supreme Court shall enter its order implementing, modifying, or rejecting the commission's order. Upon an order for retirement, the justice, judge, or justice of the peace retires with the same rights and privileges as if he retired pursuant to statute. Upon an order for removal, the justice, judge, or justice of the peace shall be removed from office, and his salary or compensation ceases from the date of the order. Upon an order for suspension from office, the justice, judge, or justice of the peace shall perform no judicial functions and shall receive no salary for the period of suspension.

(3) The transmission, production, or disclosure of any complaints, papers, or testimony in the course of proceedings before the Judicial Conduct Commis-

sion, the masters appointed under this section, or the Supreme Court, are privileged in any civil action. No complaints, papers, or testimony may be disclosed by the commission, masters, or any court until the Supreme Court has entered its final order in accordance with this section except:

(a) In a judicial proceeding challenging any act or proceedings of a judicial officer on grounds of judicial misconduct, the matter shall be produced when required by subpoena and, subject to rules governing admissibility, may be introduced in evidence; and

(b) Public records may be disclosed as required by §§ 78-26-2 and 78-26-3 if, six months after the date a complaint is filed with the commission:

(i) The justice, judge, or justice of the peace complained of has not resigned or retired; and

(ii) No order has been made by the commission or the Supreme Court.

(4) The Judicial Conduct Commission shall by rule provide for procedures before it and the masters it appoints. A justice, judge, or justice of the peace who is a member of the commission or Supreme Court may not participate in any proceedings involving his own removal or retirement.

(5) Retirement for disability or involuntary retirement as provided by §§ 78-7-28 through 78-7-30 shall be processed through the Utah State Retirement Office, and the judge retiring shall meet the requirements for retirement as specified in §§ 78-7-28 through 78-7-30.

**History:** C. 1953, 78-7-30, enacted by L. 1977, ch. 146, § 4; L. 1983, ch. 157, § 6; 1985, ch. 17, § 2; 1986, ch. 160, § 1.

**Amendment Notes.** — The 1983 amendment substituted "commission on judicial conduct" for "commission on judicial qualifications" in Subsections (1), (3), and (4); substituted "order" for "recommend to the Supreme Court" in the second sentence of Subsection (1), substituted references to commission orders for references to commission recommendations throughout the section, inserted "prior to the implementation of any commission order" in the first sentence of Subsection (2), and rewrote Subsection (3)(b)(ii) which read "No recommendation has been made to the Supreme Court by the commission"

The 1985 amendment substituted "Judicial Conduct Commission" for "Commission on Judicial Conduct" throughout the section, deleted "as the commission deems necessary" after "investigation" in the first sentence of Subsection (1), substituted "suspension, censure, reprimand, or involuntary retirement" for "or retirement" in the first sentence of Subsection (1), divided the first sentence of Subsection (1) into the first and second sentences, inserting "Alternatively" at the beginning of the second sentence; deleted "in its discretion request the supreme court to" before "appoint" in the second sentence of Subsection (1); substituted "involuntary retirement" for "retirement, as the case may be" in the last sentence of Subsection

(1); deleted "If the commission orders removal, suspension, censure, reprimand, or retirement" at the beginning of Subsection (2), deleted "in its discretion" before "may permit" in the first sentence of Subsection (2), divided the first sentence of Subsection (2) into the first and second sentences, substituting "The Supreme Court" for "and" at the beginning of the second sentence, substituted "implementing, modifying, or rejecting the commission's order" for "implementing the commission's order or modifying or wholly rejecting the order, as it finds just and proper" in the second sentence of Subsection (2), substituted "may" for "shall" in the second sentence of Subsection (3); rewrote Subsection (3)(b); substituted "The Judicial Conduct Commission" for "The Supreme Court" at the beginning of Subsection (4); deleted "under this act" after "procedures" in the first sentence of Subsection (4); substituted "it appoints" for "and the Supreme Court" in the first sentence of Subsection (4); inserted "or involuntary retirement" in Subsection (5); substituted "§§ 78-7-28 through 78-7-30" for "this act" in two places in Subsection (5); and made minor changes in phraseology

The 1986 amendment added the last sentence of Subsection (1), substituted "retires" for "shall retire" in the third sentence of Subsection (2), substituted "the" for "such" preceding "matter" and deleted "a valid" preceding "subpoena" in Subsection (3)(a), substituted "it" for "the Judicial Conduct Commission" in the first

sentence of Subsection (4) and "may" for "shall" in the second sentence of that subsection, and deleted "service" preceding "disability" in Subsection (5).

**Cross-References.** — Establishment of Ju-

dicial Conduct Commission, Utah Const., Art. VIII, Sec. 13.

Justices' courts, Chapter 5 of this title.

Utah State Retirement Office, Chapter 9 of Title 49.

## CHAPTERS 8 TO 10 RESERVED

### PART II

## ACTIONS, VENUE, LIMITATION OF ACTIONS

### CHAPTER 11

## ACTIONS — RIGHT TO SUE AND BE SUED

Section		Section	
78-11-1.	Married woman.		cused mentally ill — Notice —
78-11-2.	Husband and wife sued together — Either may defend.		Return to accused — Reim-
78-11-3.	Deserted spouse.		bursement for legal defense of
78-11-4.	Seduction — Unmarried individ- ual under 18 may sue.	78-11-13.	indigent accused.
78-11-5.	Seduction of child — Suit by par- ent or guardian.	78-11-14.	Construction of statute.
78-11-6.	Injury or death of child — Suit by parent or guardian.	78-11-15.	Shoplifting — Definitions.
78-11-7.	Death of adult — Suit by heir or personal representative.	78-11-16.	Civil liability of adult for shoplift- ing — Damages.
78-11-8.	Successive actions on same con- tract.	78-11-17.	Joint liability of minor and parent or guardian for minor's shoplift- ing — Exception.
78-11-9.	Repealed.	78-11-18.	Merchant's right to request cus- tomer to hold merchandise in
78-11-10.	Actions against officers — Costs and attorneys' fees.	78-11-19.	full view.
78-11-11.	Submitting controversy without action.	78-11-20.	Merchant's authority to detain.
78-11-12.	Survival of action for injury to person or death upon death of wrongdoer or injured person — Exception and restriction to out-of-pocket expenses.	78-11-21.	Criminal conviction for shoplift- ing prerequisite to civil action under chapter — Liability of parent or guardian.
78-11-12.5.	Proceeds received by criminals as result of crime — Delivery to Division of Finance — Trust fund — Distribution to crime victims — Custody and control — Sale of real property and se- curities — Definitions — Ac-	78-11-22.	Property damage caused by minor — Liability of parent or guard- ian.
		78-11-23.	Property damage caused by minor — When parent or guardian not liable.
		78-11-24.	Good Samaritan Act.
		78-11-25.	Right to life — State policy.
			Act or omission preventing abor- tion not actionable.
			Failure or refusal to prevent birth not a defense.



## APPENDIX E

JUDICIAL CONDUCT COMMISSION AMENDMENTS

1990

GENERAL SESSION

Enrolled Copy

H. B. No. 281

By Stephen M. Bodily

AN ACT RELATING TO THE JUDICIAL CODE; AMENDING PROCEDURES AND DISCLOSURE  
PROVISIONS REGARDING FUNCTIONS OF THE JUDICIAL CONDUCT COMMISSION.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

78-7-28, AS LAST AMENDED BY CHAPTER 17, LAWS OF UTAH 1985

78-7-30, AS LAST AMENDED BY CHAPTER 160, LAWS OF UTAH 1986

Be it enacted by the Legislature of the state of Utah:

Section 1. Section 78-7-28, Utah Code Annotated 1953, as last amended by Chapter 17, Laws of Utah 1985, is amended to read:

78-7-28. Grounds for removal, suspension, censure, involuntary retirement, or reprimand of justice or judge -- Reinstatement.

(1) A justice[;] or judge[;--or-justice-of-the-peace] of any court of this state in accordance with the procedure prescribed in this section, may be removed from office, suspended, censured, involuntarily retired, or publicly or privately reprimanded for:

- (a) willful misconduct in office;
- (b) final conviction of a crime punishable as a felony under state or federal law;
- (c) willful and persistent failure to perform judicial duties;
- (d) disability that seriously interferes with the performance of judicial duties;

(e) conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

(2) In addition to the reasons specified in Subsection (1), ~~[justices--of-the-peace]~~ justice court judges may be removed from office, suspended, censured, involuntarily retired, or publicly or privately reprimanded for failure to obtain and maintain certification from the Judicial Council for attendance at required judicial training courses or for failure to meet the minimum requirements for office, including residency.

(3) The ~~[Judicial-Conduct-Commission-or-the]~~ Supreme Court on its own ~~[motions]~~ motion, may suspend a justice~~[;]~~ or judge~~[;--or-justice-of-the-peace]~~ from office without salary or compensation if he pleads guilty, no contest to, or is found guilty of a crime punishable as a felony under state or federal law. If~~[;--after--pleading--guilty--or--no contest;--he--is--not--convicted;--or--if--his]~~ he is not convicted or if the conviction is reversed, his suspension [shalt--terminate] is terminated and he shall be paid his salary or compensation for the period of suspension.

Section 2. Section 78-7-30, Utah Code Annotated 1953, as last amended by Chapter 160, Laws of Utah 1986, is amended to read:

78-7-30. Procedure for removal, suspension, censure, reprimand, or involuntary retirement.

(1) (a) The Judicial Conduct Commission may~~[;]~~ after an investigation~~[;]~~ order a hearing to be held before it concerning the

removal, suspension, censure, public or private reprimand, or involuntary retirement of a justice[;] or judge[;--or-justice-of-the-peace].

(b) The justice or judge shall be provided with all information necessary to prepare an adequate response or defense, which may include the identity of the complainant.

(2) Alternatively, the commission may appoint three special masters, who [~~shall--be~~] are justices or judges of courts of record, to hear and take evidence in the matter and to report to the commission. If[;] after this hearing or after considering the record and report of the masters[;] the commission finds good cause [~~therefor~~], it shall order the removal, suspension, censure, reprimand, or involuntary retirement[;] of the justice[;] or judge[;--or-justice-of-the-peace].

~~[The commission may disclose any order it makes under this section prior to review by the Supreme Court, and subject to the provisions of Subsection (3).]~~

(3) The commission shall establish procedures governing the issuance of private reprimands, including procedures for disclosing the information to the Judicial Council. A private reprimand may be issued only if a formal hearing is not conducted regarding this matter.

~~[(2)]~~ (4) Prior to the implementation of any commission order under Subsection (1) or (2), the Supreme Court shall review the record of the proceedings on the law and facts and may permit the introduction of additional evidence. The Supreme Court shall enter its order implementing, modifying, or rejecting the commission's order. Upon an order for retirement, the justice[;] or judge[;--or-justice-of-the-peace]

retires with the same rights and privileges as if he retired pursuant to statute. Upon an order for removal[;] the justice[;] or judge[;--or justice-of-the-peace] shall be removed from office[;] and his salary or compensation ceases from the date of the order. Upon an order for suspension from office[;] the justice[;] or judge[;--or--justice--of--the peace--shall] may perform no judicial functions and' [shall] may not receive [no] his salary for the period of suspension.

[{3}] (5) The transmission, production, or disclosure of any complaints, papers, or testimony in the course of proceedings before the Judicial Conduct Commission, the masters appointed under this section, or the Supreme Court[;] are privileged in any civil action. No complaints, papers, or testimony may be disclosed by the commission, masters, or any court until the Supreme Court has entered its final order in accordance with this section, except:

(a) [~~in--a-judicial-proceeding-challenging-any-act-or-proceedings-of a-judicial-officer-on-grounds-of-judicial-misconduct;--the-matter-shall-be produced-when-required--by--subpoena--and;--subject--to--rules--governing admissibility;--may--be--introduced--in--evidence;--and~~] upon order of the Supreme Court; or

(b) [~~public-records-may-be-disclosed-as-required-by-Sections-78-26-2 and-78-26-3-if;--six-months-after-the-date-a-complaint-is-filed--with--the commission;~~] upon the request of the judge or justice who is the subject of the complaint.

[~~(i)--the-justice;--judge;--or-justice-of-the-peace-complained--of--has not-resigned-or-retired;--and~~]

~~[(ii)--no--order--has--been--made--by--the--commission--or--the--Supreme Court--]~~

~~[(4)]~~ (6) The Judicial Conduct Commission shall ~~[by--rule--provide--for procedures]~~ promulgate and make public the procedures to be followed before it and the masters it appoints. A justice~~;~~ or judge~~;~~~~-or justice-of-the-peace]~~ who is a member of the commission or Supreme Court may not participate in any proceedings involving his own removal or retirement.

~~[(5)]~~ (7) Retirement for disability or involuntary retirement as provided by Sections 78-7-28 through 78-7-30 shall be processed through the Utah State Retirement Office, and the judge retiring shall meet the requirements for retirement as specified in Sections 78-7-28 through 78-7-30.

## APPENDIX F



# Utah State Bar

645 South 200 East • Salt Lake City Utah 84111-3834  
Telephone (801) 531-9077 • (WATS) 1-800-662-9054  
ABA/Net ABA 1152 FAX (801) 531-0660

F Hutchinson  
irector  
R Bassett  
irector

October 24, 1989

## PERSONAL AND CONFIDENTIAL

The Honorable Pat B. Brian  
Third District Court  
451 South 200 East  
Salt Lake City, Utah 84111

Re: Steven & Kristi Davis vs. The Honorable Pat B. Brian

Dear Judge Brian:

The Board of Bar Commissioners of the Utah State Bar, having reviewed the petition and response filed in this matter and having heard oral argument in the same, has found that the screening panel of the Ethics and Discipline Committee does have jurisdiction and authority to investigate and adjudicate this matter. The Board specifically found that Rule XVI of the Rules of Integration and Management of the Utah State Bar is dispositive of the issue of jurisdiction.

Should you wish to appeal this finding, I refer you to the Procedures of Discipline of the Utah State Bar, specifically Rule XIV thereof.

Very truly yours,

Stephen F. Hutchinson  
Executive Director

Commissioners  
hamberlain

ela T Greenwood  
ect  
Clegg  
Davis  
Dryer  
Hansen  
Holbrook  
, Howard  
xley  
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SFH:wj