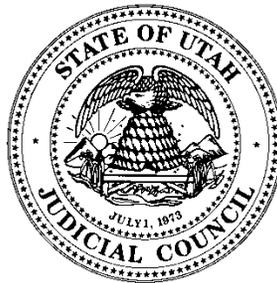


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# Training Manual for Small Claims Judges Pro Tempore

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Updated

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Small Claims Judges' Web Page:

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## **(1) Substantive Law**

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### **(a) Introduction**

Small Claims Court is truly the people's court. On any given night, a judge pro tempore may hear collection cases, garnishment hearings, landlord - tenant disputes, automobile accident cases, auto repair disputes, contract disputes, construction claims, disputes between neighbors, family disputes and interpleader claims. Several motions, supplemental order hearings, and trials will occur in a one- to- two-hour time period, and the judge must be able to listen, ask questions, apply the appropriate legal and evidentiary principles, and make decisions quickly, fairly and efficiently.

No survey of the law could anticipate every legal problem that will confront the judge. These materials simply highlight some of the more common areas of Utah law that the judge may need to interpret and apply.

### **(b) The Nature of a Small Claims Action**

Utah Code Section 78A-8-102 defines the nature of a small claims action as a civil action:

- 1) for the recovery of money where the amount claimed does not exceed the jurisdictional limit; and
- 2) involving interpleader of funds, under Rule 22 of the Utah Rules of Civil Procedure.

No injunctive or other extraordinary relief may be granted. No claim maybe maintained by an assignee. For example, collection agencies are prohibited from filing actions if the debt originally belonged to someone else.

Natural persons or business entities may litigate actions in person, through lawyers, through authorized employees and through unpaid representatives.

A Small Claims Court proceeding has the sole object of dispensing speedy justice between the parties.

The prevailing party in any small claims action is entitled to costs of the action as well as costs of execution upon any judgment.

Garnishment and execution may issue to enforce a judgment upon payment of the applicable fees.

Either party may appeal the judgment by filing a notice of appeal in the original trial court within thirty days after entry of judgment or order, or after denial of a motion to set aside the judgment or order, whichever is later. The appeal is a trial de novo in the district court, conducted pursuant to small claims court procedures, but the trial de novo is conducted by a district court judge or senior judge.

The decision of the trial de novo may not be appealed unless the court rules on the constitutionality of a statute or ordinance.

### **(c) Simplified Procedures Applicable in Small Claims Actions**

Simplified rules of procedure and evidence apply in small claims proceedings.

- 1) No answer is required to the affidavit or counter-affidavit. All allegations are deemed denied.
- 2) No discovery may be conducted but the parties are encouraged to exchange information prior to trial.
- 3) Written motions and responses may be filed prior to trial, and motions may be made orally or in writing at the beginning of trial, but no motions will be heard prior to trial.
- 4) All parties must bring to the trial all documents related to the controversy, regardless of whose position they support.
- 5) The parties may have witnesses testify at trial and bring documents with them. To require the attendance of witnesses, the parties, through their attorney or the clerk of the court, may issue subpoenas pursuant to Rule 45 of the Utah Rules of Civil Procedure.
- 6) The parties have the right to present their evidence by traditional question and answer. The parties may also proffer evidence if the witness supporting the proffer attends the trial. The judge may question the witnesses.
- 7) The rules of evidence do not strictly apply, and the judge may allow hearsay evidence that is probative, trustworthy and credible and other evidence commonly relied upon by reasonably prudent persons in the conduct of their business affairs.
- 8) After trial, the judge decides the case and directs the entry of judgment. No written findings are required.

### **(d) Collection Actions**

Probably the most common small claims cases are collection actions brought by companies who sell, lease, or loan money to other companies or consumers. A number of Utah statutes govern such transactions:

- 1) The Uniform Commercial Code - Sales Article - Utah Code Section 70A-2-101, et seq., governs commercial transactions involving the sale of goods.
- 2) The Uniform Commercial Code- Lease Article- Utah Code Section 70A-2a-101, et seq., governs commercial transactions for the lease of goods;

- 3) The Utah Consumer Credit Code - Utah Code Section 70C-1-101, et seq., governs consumer credit transactions; i.e., credit offered or extended by a creditor to an individual person primarily for personal, family or household purposes.
- 4) The Utah Consumer Sales Practices Act - Utah Code Section 13-11-1, et seq.

In addition, these statutes are supplemented by other principles of law and equity, including the law relative to capacity to contract, principals and agents, estoppel, fraud, misrepresentation, duress, coercion, mistake, and bankruptcy.

### **(i) Contracts**

#### **(A) Minors and Contracts**

In Utah, the age of majority is eighteen. Until a person reaches the age of eighteen, he may disaffirm, or refuse to honor contracts he made other than for necessities such as food, clothing and housing.

#### **(B) Unenforceable Contracts**

Certain contracts are called “unconscionable.” These are contracts that are unfair or one-sided. Courts generally will refuse to enforce such contracts. Whether or not all or part of the contract is unconscionable depends upon the circumstances surrounding the making of the contract. It is not enough that the contract seems or even is unfair. A Utah case, *Lundstrom v. Radio Corporation of America*, 405 P.2d 339 (Utah 1965) illustrates this concept. In *Lundstrom*, buyers paid an average of \$200 more for color television sets than the manufacturer’s suggested retail price. The Court pointed out that no one had forced the buyers who were trying to get out of the contracts, to sign the contracts. The excessive price of the sets had nothing to do with the legality of the contract. Just because the contract after the fact does not seem fair, the parties may still be obligated under its terms.

#### **(C) Written and Oral Contracts**

In Utah, certain types of contracts must be in writing before they can be enforced by the courts. The purpose of this law is to prevent fraud and perjury. If the terms of a contract are written down, there is less likelihood of a disagreement. Under Utah law, contracts for the sale or lease of land, contracts for the purchase of goods costing over \$500, contracts where someone agrees to pay a debt for someone else, and contracts which will not be completed within one year must all be in writing. For example, if a minor purchases a car but has trouble making payments, his father may promise to make the payments if he fails to do so. Because the father would be assuming responsibility for his son’s debts, his promise to pay must be in writing before it can be enforced.

### **(ii) Consumer Credit Transactions**

Take special care to review the terms of the contract before entering judgment on a consumer credit transaction. Under the Utah Consumer Credit Code, the parties to a consumer credit arrangement may contract for payment by the debtor of any finance charge and other charges and fees. Utah Code, Section 70C-2-101. Consequently,

some of these consumer credit claims and/or agreements include every imaginable kind of fee:

- 1) finance charges;
- 2) fees for participation in the credit plan;
- 3) transaction fees;
- 4) service charges;
- 5) delinquency fees;
- 6) deferral fees;
- 7) fees for exceeding a designated credit limit;
- 8) late payment fees;
- 9) fees for return of dishonored checks; and
- 10) stop payment fees.

All of these finance charges and fees are considered interest under Utah law. Utah Code Section 70C-1-106. However, under Section 15-1-1, the parties to a lawful contract “may agree upon any rate of interest. There are no usury laws governing consumer transactions in Utah. Unless the parties specify a different rate of interest, the “legal rate” of interest under Utah law is 10% per annum. Utah Code Section 15-1-1(2).

As a consequence, some consumer credit providers operating in Utah and attempting to enforce their contracts are demanding judgments on debts that include interest and other finance charges which are many times the principal amount of the credit originally extended, plus collection costs and attorneys fees. For example, it is not uncommon to have a creditor asserting a collection claim for several thousand dollars on an original consumer purchase or loan of \$100 or less, payable under the contract at \$20 per month over several years.

Under Section 70C-7-106 of the Utah Consumer Credit Code, enforcement may be denied for unconscionability. Specifically, Section 70C-7-106(1) provides that:

With respect to a consumer credit agreement, if the court finds the agreement or any part of the agreement to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or it may enforce the remainder of the agreement without the unconscionable clause if that will avoid any unconscionable result.

If it appears to the Court that a consumer credit agreement or any part of it may be unconscionable, the parties must be afforded a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making the determination. Utah Code Section 70C-7-106(2).

If the court finds that a consumer credit agreement or any part of the agreement is unconscionable, then in addition to non-enforcement of the agreement, or the unconscionable provisions of the agreement, the court may impose a penalty on the creditor in an amount not less than \$100 nor more than \$5000, plus the cost of the action and a reasonable attorney’s fee.

In addition, if a seller repossesses or voluntarily accepts the surrender or return of goods which were the subject of a consumer credit sale and in which the seller has a security interest to secure a debt arising from the sale of goods or services, and the

cash price of the sale was \$3000 or less, any debt remaining from the sale shall be fully satisfied and the buyer has no further obligation to the seller with respect to the goods taken or accepted. Utah Code Section 70C-7-101.

### **(iii) Consumer Sales Practices**

#### **(A) Home Solicitation Sales**

Similarly, scrutinize the circumstances surrounding consumer sales transactions. For example, special rules govern “home solicitation sales,” Utah Code Section 70C-5-101, et seq., which include consumer sales of goods or services in which the seller engages in a face-to-face solicitation of the sale at a residence or place of employment of the buyer. In such transactions, the buyer has the right to cancel the purchase until midnight of the third business day after the day on which the buyer signs a purchase agreement; Utah Code Section 70C-5-102; and the buyer is entitled to notice of that right at the time of agreement. Utah Code Section 70C-5-103.

Within ten days after a home solicitation sale has been canceled or an offer to purchase revoked, the seller must tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness. If the down payment included goods traded in, the goods must be returned to the purchaser, or the buyer may recover an amount equal to the trade-in allowance stated in the agreement. Until the seller has complied with its obligations, the buyer may retain possession of goods delivered by the seller in connection with the transaction, and the buyer has a lien on the goods for any recovery to which the buyer is entitled. Utah Code Section 70C-5-104.

Once the seller has fulfilled its obligations, the buyer must tender, on demand, any goods delivered by the seller in connection with the transaction, but the buyer is not obligated to tender the goods at any place other than his residence or place of employment. If the seller fails to demand possession of the goods within a reasonable period of time (defined as 40 days) after cancellation or revocation, the goods become the property of the buyer without obligation to pay for them. Utah Code Section 70C-5-105.

#### **(B) Deceptive Sales Practices.**

The Utah Consumer Sales Practices Act, Utah Code Section 13-11-1, et seq., is also designed to protect consumers from suppliers who commit deceptive and unconscionable practices before, during or after a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services or other property, both tangible and intangible, such as:

- 1) indicating that the subject of the transaction has sponsorship, approval, performance characteristics, accessories, uses or benefits it does not have;
- 2) indicating that the subject of the transaction is of a particular standard, quality, grade, style, or model, if it is not;
- 3) indicating that the subject of a transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;
- 4) indicating that the subject of the transaction is available to the consumer for a reason that does not exist;

- 5) indicating that the subject of the transaction has been supplied in accordance with a previous representation, if it has not;
- 6) indicating that the subject of a transaction will be supplied in greater quantity than the supplier intends;
- 7) indicating that repair or replacement is needed, if it is not;
- 8) indicating that a specific price advantage exists, if it does not;
- 9) indicating that the supplier has a sponsorship, approval, or affiliation the supplier does not have;
- 10) indicating that the transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;
- 11) indicating that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;
- 12) failing to ship goods or furnish services within the time advertised, promised or otherwise represented, without providing the buyer the option to either cancel the transaction and receive a refund or accept an alternative shipping date;
- 13) failing to give the consumer statutory notice of the right to cancel a home solicitation sale within three business days;
- 14) promoting, offering or granting participation in a pyramid scheme;
- 15) making false representations regarding funds or property conveyed in response to a charitable solicitation;
- 16) making auto repairs for insured losses without complying with statutory disclosure and other requirements;
- 17) including in a contract a confession of judgment or waiver of rights to which the consumer is entitled under law; or
- 18) charging a consumer for a transaction to which the consumer has not previously agreed.

Utah Code Section 13-11-4.

While the rights and protections granted under this statute may be enforced on behalf of consumers by the Division of Consumer Protection of the Department of Commerce, consumers also may sue for actual damages or \$2000, whichever is greater; Utah Code Section 13-11-19; or may assert such deceptive or unconscionable conduct in defense of an action on a debt arising out of the transaction.

#### **(e) Landlord – Tenant Disputes**

The second most common disputes are landlord-tenant disputes involving the failure of landlords to maintain rented premises or return security deposits, and damage to rented premises by tenants. Two Utah statutes provide guidance to the Court in handling such matters:

- 1) The Utah Fit Premises Act, Utah Code Section 57-22-1, et seq.; and
- 2) The Residential Renters' Deposit Act, Utah Code Section 57-17-1, et. seq.

### **(i) The Utah Fit Premises Act**

Under the Utah Fit Premises Act, the owner or leasing agent for a residential rental unit is required to maintain that unit in a condition fit for human habitation and in accordance with local ordinances and the rules of the Board of Health having jurisdiction in the area. Specifically, each residential rental unit must have electrical systems, heating, plumbing, and hot and cold water. Utah Code Section 57-22-3. In addition, the owner must:

- 1) not rent the premises unless they are safe, sanitary, and fit for human occupancy;
- 2) maintain common areas in a safe and sanitary condition;
- 3) maintain electrical systems, plumbing, heating, and hot and cold water;
- 4) maintain other appliances and facilities as specifically contracted in the lease agreement; and
- 5) provide and maintain appropriate receptacles for garbage and other waste, and arrange for its removal, except to the extent that renters and owners otherwise agree.

Utah Code Section 57-22-4.

Similarly, each tenant is required to cooperate in maintaining his unit. Specifically, the tenant must:

- 1) comply with the rules of the Board of Health;
- 2) maintain the premises in a clean and safe condition and not unreasonably burden any common area;
- 3) dispose of all garbage and other waste in a clean and safe manner;
- 4) maintain all plumbing fixtures in as sanitary a condition as the fixtures permit;
- 5) use all electrical, plumbing, sanitary, heating and other facilities and appliances in a reasonable manner;
- 6) occupy the rental unit in the manner for which it was designed;
- 7) not increase the number of occupants above that specified in the rental agreement without written permission of the owner;
- 8) be current on all payments required by the rental agreement; and
- 9) comply with all appropriate requirements of the rental agreement, which may include prohibitions on pets or smoking tobacco products on the premises.

In addition, the renter may not:

- 1) intentionally or negligently destroy, deface, damage, impair, or remove any part of the rental unit or permit any other person to do so;
- 2) interfere with the peaceful enjoyment of the rental unit of another tenant; or
- 3) unreasonably deny access to, refuse entry to, or withhold consent to enter the unit to the owner, agent, or manager for the purpose of making repairs to the

Utah Code Section 57-22-5.

If the tenant is in compliance with the renters' duties and responsibilities under the statute, and the landlord fails to fulfill his duties and responsibilities, the tenant may give written notice of noncompliance to the landlord pursuant to the statute, and the landlord is required to commence action to correct the condition of the rental unit, unless the condition was caused by the tenant, the tenant's family, guests or invitees, by inappropriate use or misuse of the property. In the alternative, if the unit is unfit for occupancy, the landlord may terminate the rental agreement and refund the balance of any rental payments, plus the tenant's deposit. Utah Code Section 57-22-4.

If the landlord still fails to correct the problems within a reasonable time, the tenant must give a second statutory "notice to repair or correct condition," and if the landlord still fails to use due diligence to correct the conditions, the tenant may sue for damages, including rent improperly retained or collected and the security deposit, plus attorneys' fees.

If the landlord gives notice of intent to terminate the lease, the tenant is entitled to receive the balance of the rent due and the security deposit within ten days of the date the agreement is terminated. No tenant may be required to move sooner than ten days after the date of the notice.

### **(ii) Residential Renters' Deposits Act**

Under the Residential Renters' Deposits Act, the landlord is required to return deposits paid by tenants at the termination of the tenancy or provide the renter with written notice explaining why any deposit refundable under the terms of the lease is being retained. Utah Code Section 57-17-1. Any non-refundable portion of a deposit must be clearly identified in writing at the time the deposit is taken. Utah Code Section 57-17-2.

Upon termination of the tenancy, property or money held as a deposit may be applied, at the owner's option, to the payment of accrued rent, damages to the premises beyond reasonable wear and tear, other costs provided for in the contract, and cleaning of the unit. The balance of any deposit and prepaid rent, and a written itemization of any deductions, and the reasons, must be delivered or mailed to the tenant within 30 days after termination of the tenancy or within 15 days after receipt of the renter's new mailing address, whichever is later. Utah Code Section 57-17-3.

If the landlord fails to provide the refund and/or written itemization of deductions and reasons within the time permitted, the renter is entitled to recover the full deposit, a civil penalty of \$100, and court costs. Utah Code Section 57-17-5.

### **(iii) Mobile Homes in Mobile Home Parks**

In the past, mobile home owners who rented spaces in parks were subject to the same landlord/tenant laws as people who rented apartments. However, renting a space to put your dwelling on is very different and has very different problems from renting a dwelling to live in. Moving a mobile home is very expensive; it can cost thousands of dollars. It entails disconnections from all utilities and reconnections at the new location, as well as taking down and putting up awnings and skirting. All these things are time consuming and costly. Renters of mobile home spaces became concerned because they could be given a 15-day no-cause eviction notice. Park rules and regulations were

often changed and compliance with the changes could cost money. Often there were no leases, and with the separate rules, the leases offered little protection anyway. So park residents got together and, by working with the park owners, got legislation passed in 1981 that effected significant changes.

The new mobile home law does not allow no-cause evictions in parks. The only evictions allowed are for nonpayment, noncompliance with lease terms and rules, or for creating a nuisance or danger in the park. The residents must now be given 60-day notice of changes to rules as well as increases in rent.

However, if a resident gets behind in his/her rent, a 3 business day notice can be served and then the rest of the eviction process followed. Other than the different causes for eviction, the legal process followed after the notice is the same. It is more difficult to “evict” a mobile home than an individual. Therefore, the process, though the same, often takes longer. Park owners with the proper court authorization can have a mobile home moved out of the park. If it were taken to another park and set up, the home owner would be responsible for the cost. If the mobile home were taken and left in a lot somewhere, the cost would be added to the judgment against the owner of the mobile home.

#### **(f) Automobile Accident Disputes**

Disputes with respect to automobile accidents are also frequently brought as small claims actions, especially when the accidents have occurred on private property and no police report or investigation has been conducted. Unfortunately, these cases are often hotly contested, include counterclaims, and involve one driver’s word against another, without any corroborating evidence on either side. In those instances, judge must carefully weigh the evidence to determine whether either party has carried the burden of proof by a preponderance of the evidence.

Where the facts are reasonably clear or undisputed, the Traffic Rules and Regulations found in the Motor Vehicle Code, Utah Code Section 41-6-1, et seq., provide guidance.

#### **(g) Automobile Repair Disputes**

Some of the most difficult disputes involve automobile repair cases. Routinely, the automobile owner has taken a car in for repair, paid the repair shop charges, then subsequently experienced problems with the automobile, which the claimant attributes to negligence, incompetence, or dishonesty on the part of the repair shop. The parties bring their mechanics, neighbors, big brothers and friends to testify as “experts” on their behalf, making these cases especially challenging. The credibility, reliability, fit, and helpfulness of these “expert” opinions is often difficult to evaluate, and the “experts” frequently have widely varying opinions on what happened, why it happened, and why the opposing “expert’s” explanation is incorrect.

The fact finding is the hard part in these cases. Evaluate the credibility, reliability and fit of the expert testimony to the extent that you can under the circumstances, review the contract or work order, and then ask yourself whether the claimant has carried the burden of proof by a preponderance of the evidence. If not, the case should be dismissed.

If it appears by a preponderance of the evidence that the repair shop has failed to fulfill its contractual obligations or breached express or implied warranties, contract remedies are appropriate.

If it appears by a preponderance of the evidence that the repair shop was negligent in the performance of its repair services, but only economic damages are claimed, i.e., no personal injuries have occurred, the claimant is still limited to contract remedies.

However, if it appears by a preponderance of the evidence that the repair shop has engaged in deceptive practices, such as those described above, the claimant maybe entitled to actual damages or \$2000, whichever is greater, pursuant to the provisions of the Utah Consumer Sales Practices Act. Utah Code Section 13-11-19.

#### **(h) Interpleader**

The small claims court has jurisdiction over interpleader actions in which the amount at issue does not exceed the jurisdictional limit. In a typical interpleader action, the plaintiff holds assets claimed by rival claimants. The plaintiff may deposit the assets in court and require the rival claimants to come into the action as defendants, resolve their claims in favor of one or the other, and when distribution is made to the successful claimant, the plaintiff is then freed of any possible future claim from the unsuccessful claimant. These actions must be filed by the original holders of claims, and not by any assignee.

In small claims court, interpleader cases usually arise when real estate brokers are holding an earnest money deposit on a real estate purchase contract. Unless a claim is brought against the broker holding the deposit, only the buyer or seller are the proper defendants. The action may be either contested or may simply be an action to merely release the money. Interpleader actions are governed by Utah Rules of Civil Procedure 22.

#### **(i) Unlicensed Contractors**

An unlicensed contractor may be barred from taking any action to get paid due to a provision in the contractor's licensing laws, Utah Code Section 58-55-604.

One exemption from the licensing requirement is commonly referred to as the "handyman exemption." In summary, it allows repairs or work to be done as long as the work does not exceed \$1000 in labor and materials. Utah Code Section 58-55-305 governs exemptions.

The following is a summary of the law as it relates to the need of a contractor to be licensed in order to pursue compensation.

#### **(i) Pre-1981 Common Law**

Prior to March 12, 1981, there was no statutory prohibition to an unlicensed contractor suing to recover monies owed for work that required a contractor's license. However, over the years, the Utah Supreme Court developed a common law prohibition to an unlicensed contractor recovering for services rendered. Exceptions to this common law rule, allowing recovery, were also developed. These exceptions are discussed in more detail below. In developing this common law prohibition to recovery, the courts would primarily invoke the rule when the case involved a person who, in the

court's eyes, was a part of the class of people the contractor's licensing laws were designed to protect, although this principle may have been expanded in recent years.

In performing its common law analysis, a court would determine whether the party dealing with the unlicensed contractor was within a protected class. In other words, the court would determine whether the person dealing with the contractor needed the licensing statute to be protected against inept and financially irresponsible contractors or whether the protection was in fact afforded by other means. Courts considered whether there was an inadvertent lapse in the license such that restoration of licensed status involved no new demonstration of qualification but only payment of a fee. Further, courts considered any professional relationships between the parties prior to the contract to determine the degree of reliance upon representations of competence and expertise by the unlicensed contractor. Courts also considered what performance or payment bonds or other types of assurance were made to ensure adequate and complete performance, without financial exposure beyond the contract price.

### **(ii) 1981 Statutory Enactment**

In addition to the common law rules noted above, in 1981, new licensing laws became effective including one provision specifically dealing with the prohibition to recovery by an unlicensed contractor. The relevant statute states:

No contractor may act as agent or commence or maintain any action in any court of the state for collection of compensation for the performance of any act for which a license is required-by this chapter without alleging and proving that he was a properly licensed contractor when the contract sued upon was entered into and when the alleged cause of action arose.

Utah Code Section 58-55-604 .

One unlicensed contractor case since the enactment of the statutory prohibition which applied the statute is *Wilderness Building Systems Inc. v. Chapman* 699 P.2d 766 (Utah 1985). The Utah Supreme Court also commented on the new law in another early case, *Loader v. Scott Construction Corporation*, 681 P.2d 1227 (Utah 1984). That case involved the pre-amendment licensing laws but stated that the amendments prohibited "a contractor not only from recovering for services, but also from suing for collection of compensation for the performance of any act for which a licensee is required. . . ." *Id.* This seemed to indicate the court's intent to strictly apply the new provision by refusing to allow an unlicensed contractor to maintain any action for recovery. The apparent effect of this language would be to prevent the unlicensed contractor from being able to take advantage of the many exceptions to the general common law rule of non-recovery.

The *Wilderness Building Systems* case, however, left some doubt as to how strictly the language of the 1981 statute would be applied. In that case a seller of a "log cabin kit" contracted with the buyers to furnish additional materials and labor to erect the cabin. During erection, the buyers became dissatisfied with the seller's work, terminated the contract and filed a complaint with the Department of Business Regulation. Upon filing the complaint, the buyers learned that the seller was not a licensed contractor. The seller brought an action to recover for his material and services under the erection

contract and the trial court found for the buyers. The Utah Supreme Court affirmed by holding that the seller's claims were barred by the operation of Utah Code Section 58-50-11 (now codified at Utah Code Section 58-55-604).

Even though the Wilderness Building Systems Court applied the 1981 statute, it did not deal directly with the issue of whether the exceptions to the common law rule against recovery (mentioned briefly above) still apply to the statutory prohibition to recovery. Some dicta in the court's opinion briefly discussed the exceptions. However the most recent case involving unlicensed contracting firmly establishes the applicability of the common law exceptions to the statutory prohibition to recovery.

In the case of A.K. &R. Whipple Plumbing and Heating v. Aspen Construction, 977 P.2d 518 (Utah Ct. App. 1999) (affirmed at 47 P.3d 92 (Utah Ct. App. 2002)), a subcontractor was attempting to recover from a general contractor for unlicensed HVAC work. After reviewing the common law exceptions to the prohibition to recovery, the court found that none of the exceptions applied to the subcontractor and held that the subcontractor was not entitled to recovery under the statutory prohibition to recovery by an unlicensed contractor. The case is also interesting since the prohibition to recovery by an unlicensed contractor was expanded to cover a general contractor, if the general contractor had no expertise in the field of the subcontractor's work. Prior to Whipple Plumbing, it was assumed that the prohibition would be applied only to protect an unsophisticated owner.

### **(iii) Common Law Exceptions**

Since the common law exceptions to the rule against recovery still apply, the remainder of this section will be devoted to exploring the common law exceptions to the prohibition to recovery by an unlicensed contractor.

The Utah Supreme Court had the occasion to rule upon the application of the pre-amendment rule in an action to enforce a mechanic's lien. The pre-amendment rule prohibited unlicensed contractors only from recovering monies due rather than prohibiting bringing suit at all. In *George v. Oren Limited & Associates*, 672 P.2d 732 (Utah 1983), a person who had been acting as a general contractor on a subdivision development sued the developer to foreclose a mechanic's lien for failure to pay for completed work. Although he was licensed previously, the person acting as the general contractor had willfully and purposefully refused to obtain a contractor's license as required by Utah law. During that time, he had been working and holding himself out as a contractor.

The unlicensed contractor brought suit to enforce the mechanic's lien he had obtained by timely filing a Notice of Lien and to otherwise collect the sums due. The trial court entered judgment in favor of the unlicensed contractor and the defendant developer appealed. The Utah Supreme Court reversed the judgment and remanded the case to the trial court for dismissal of the unlicensed contractor's complaint. The court quoted *Fillmore Products, Inc. v. Western States Paving, Inc.*, 561 P.2d 687, 689 (Utah 1977) stating that:

[T]he general rule in this State is that the party who does not obtain a license, but is required to do so, cannot obtain relief to enforce the terms

of his contract-including payment thereunder - even though there are other penalties imposed against him expressly by statute including criminal sanctions ....

George, at 672 P.2d 735. Applying the general rule, the court barred the unlicensed contractor from enforcing his lien. The case was a bit extreme (and, therefore, the holding may have been extreme) in that the contractor's failure to become licensed during an eleven year period between 1969 and 1980 was not attributable to inadvertence or neglect but rather to willful disregard of the state's licensing requirements.

While applied to most situations, the general rule quoted above is not always applied in cases where an unlicensed contractor is seeking to judicially enforce his rights. For example, the George court cited two cases where an unlicensed contractor was allowed to proceed. These cases are *Fillmore Products, Inc, v. Western States Paving, Inc.*, 561 P.2d 687 (Utah 1977) and *Lignell v. Berg*, 593 P.2d 800 (Utah 1979). The Fillmore case turns on the court's determination that the person the unlicensed contractor was suing was not part of the class of individuals which the statute was designed to protect.

In the Fillmore case, the unlicensed contractor was a subcontractor and the person being sued was a general contractor. The court said, therefore, the public would be protected from inept workmanship and financially irresponsible subcontractors by the supervision of the general contractor.

[A] licensed contractor by obtaining his license is, in the eyes of the law, held to expertise in the contracting business and is therefore informed of the necessity for licensing therein and the purpose behind licensing, viz., the protection of the public. The licensed contractor consequently cannot invoke application of the general rule of denying relief to an unlicensed contractor solely because of the latter's non-licensing when a contract for construction is struck between them.

Fillmore at 690; See also *Loader v. Scott Construction Corporation*, 681 P.2d 1227 (Utah 1984). However, as mentioned above, the exception allowing a subcontractor to recover against a general contractor may have been diluted by the holding of *A.K. & R. Whipple Plumbing and Heating v. Aspen Construction*, 977 P.2d 518 (Utah Ct. App. 1999) (affirmed at 47 P.3d 92 (Utah Ct. App. 2002)) .

In addition to the exceptions to the general rule where the person is not a member of the class of people whom the licensing statute was designed to protect, the Utah courts have sometimes refused to apply the general rule against recovery even when the person seeking protection falls within the protected class. In *Lignell v. Berg*, 593 P.2d 800 (Utah 1979), an unlicensed general contractor was successful on a counterclaim for breach of contract against the owners of a project regardless of the contractor's unlicensed status. The court reasoned that since the contractor's license had only lapsed through inadvertence and could be restored simply by paying a fee, it had not failed to meet the technical or financial requirements for a license. In addition, since the owners had previously worked with the general contractor, they did not rely upon the contractor's license to determine his qualifications but rather they relied upon their own

experience. Also, the general contractor had provided payment and performance bonds which protected the owners' interests.

The Lignell Court stated that "A litigant is not a member of that [protected] class if the required protection (i.e., against inept and financially irresponsible builders) is in fact afforded by other means." *Id.* at 805. The court further stated that "The Owners were infinitely better assured of adequate and complete performance without financial exposure beyond the contract price than they would have been by [the contractor's] mere compliance with the statute." *Id.*; see also *Motivated Management International v. Finney*, 604 P.2d 467 (Utah 1979).

## **(2) Small Claims Process**

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### **(a) General Procedures**

#### **(i) In Chambers**

Review docket for conflicts/names you know/jurisdictional problems

Review each file for proper service

Review each file for unusual facts or unfamiliar causes of action to research before taking the bench

#### **(ii) Welcome**

Sample in benchbook

Give your name and who are you

By what authority are you empowered to judge

Limit of court authority: Money damages only up to \$ current limit

Ask about conflicts

SHOW YOU ARE LISTENING and CARE (#1 reason for appeals)

#### **(iii) Explain Order**

Calendar

Swearing In

Defaults/Law and Motion

Trials

Save explaining the trial procedure until after Law and Motion/Defaults completed

Appeals (parties not listening later) 30 days/ \$ current fee

#### **(iv) Call Calendar**

Slight delay from calendared commencement

Go all the way through

Ask if anyone not called (may be in wrong courtroom)

### **(v) Swearing In**

(Faster if you swear everyone in at once, but that is your choice)

Explain who is to be sworn in plaintiff, defendant and witnesses “anyone who will address court”

### **(vi) Defaults**

Send out to check the hall for other party

Servicemember’s Civil Relief Act Affidavit

Explain they have already won. You don’t need to hear the whole story, but they must justify dollar amount

### **(vii) Law and Motion**

(See next session)

### **(viii) Trials**

2 parts: prove event occurred or cause of action; THEN prove damages

Plaintiff goes first, then defendant, then plaintiff, then defendant

Explain Burdens of proof: one’s word against other not usually enough; preponderance of the evidence 50/50; NOT beyond reasonable doubt

Briefly explain evidence, hearsay and objections and that you will watch this

Witnesses: proffered testimony versus direct examination

Questions

Controlling case

Keeping on track

End of Case

Direct specific questions to losing side (missed elements/poor articulation)

Explain your problem with their side of the case and give them chance to clarify

Your explaining ruling does not mean they get to argue with you

### **(ix) Rulings**

From the Bench

Be certain your Order is within the limits of the Prayer for Relief

Start with right of Appeal

Substantial filing fee: \$ current fee

Must be filed with the Clerk of the Court within (30) days

Appeal will be a Trial De Novo (explain that this not a court of record)

Taken Under Advisement

## TRY TO AVOID

Ruling must be written and detailed in explanation and copies set to all parties and the original to the Court.

### **(b) Law and Motion**

#### **(i) Supplemental Orders**

Swear in

Explain process

Go out in hall

Answer all questions

Still under oath

If plaintiff not satisfied, can make defendant come in and orally respond to questions on stand in front of everyone

Contempt available (\$1000/incarceration) or Summary Ruling against them with note on Judgment for the Appeal

No Shows

Personal service: bench warrant

Non-Personal Service: Order to Show Cause first time and then bench warrant each time thereafter

#### **(ii) Bench Warrants**

Funds collected from bench warrants go to creditors

Usually \$100 increase per event

Be careful not to exceed judgment amount and costs

Clerk will provide you with order to release funds to plaintiff

If funds held by court are sufficient to satisfy judgment, tell plaintiff file a Satisfaction of Judgment

#### **(iii) Garnishments**

URCP Rule 64D

Not common because of abstractions for benefits of District Court

#### **(iv) Pretrial Motions**

Motion to Continue

Only one per side

Motion to Reinstate

At discretion

Hear trial then if possible

## Motion to Set Aside

Review URCP 60(b)

A party may request that the default judgment or dismissal be set aside by filing a motion to set aside within 15 calendar days after entry of the judgment or dismissal. URSCP 10)

If both parties are present and ready, simply re-hear it.

## Motion to Remove

Plaintiff's Complaint CANNOT be removed by a Counterclaim Affidavit over the jurisdictional amount. Defendant must file that claim in district court under the URCP

### **(v) Interpleader**

Usually real estate earnest monies

Ask if there is a challenge to release of earnest monies

Yes: hear with trials

No: Hear with Law and Motion calendar

### **(3) Ethics**

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#### **(a) Code of Judicial Conduct (Excerpts)**

##### **(i) Terminology.**

....

“Judge Pro Tempore.” A judge pro tempore is a lawyer who is serving as a specially appointed judge pro tempore pursuant to Utah Code Ann. § 78A-8-108 or Article VIII, § 4 of the Utah Constitution.

....

##### **(ii) Applicability.**

....

B. Judges pro tempore. A judge pro tempore shall comply with Canons 1, 2A, 3B, 3E, and 3F. A judge pro tempore appointed pursuant to § 78A-8-108 shall not practice law in the same small claims division in which the judge serves.

....

##### **(iii) Canon 1. A judge shall uphold the integrity and independence of the judiciary.**

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

##### **(iv) Canon 2. A judge shall avoid impropriety and the appearance of impropriety in all activities.**

A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.

....

##### **(v) Canon 3. A judge shall perform the duties of the office impartially and diligently.**

....

B. Adjudicative responsibilities.

B.(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.

B.(2) A judge shall apply the law and maintain professional competence. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

B.(3) A judge should maintain order and decorum in proceedings before the judge.

B.(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.

B.(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and should not permit, and shall use all reasonable efforts to deter, staff, court officials and others subject to judicial direction and control from doing so. A judge should be alert to avoid behavior that may be perceived as prejudicial.

B.(6) A judge should require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

B.(7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the record, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

B.(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

B.(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with

a fair trial or hearing. A judge should require similar abstention on the part of court personnel subject to judicial direction and control. This Canon does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court. This Canon does not apply to proceedings in which a judge is a litigant in a personal capacity.

B.(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

B.(11) A judge shall not disclose or use, for purposes unrelated to judicial duties, information acquired in a judicial capacity that is not available to the public.

....

#### E. Disqualification.

E.(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

E.(1)(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

E.(1)(b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

E.(1)(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimis interest that could be substantially affected by the proceeding;

E.(1)(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

E.(1)(d)(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(1)(d)(ii) is acting as a lawyer in the proceeding;

(1)(d)(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(1)(d)(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

E.(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and should make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of disqualification. A judge disqualified by the terms of Canon 3E may disclose the basis of the judge's disqualification and ask the parties and their lawyers to

consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge need not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be entered on the record, or if written, filed in the case file.

**(b) Rule 3-109. Ethics Advisory Committee.**

Intent:

To establish the Ethics Advisory Committee as a resource for judges to request advice on the interpretation and application of the Code of Judicial Conduct.

To establish a process for recording and disseminating opinions on judicial ethics.

Applicability:

This rule shall apply to all employees of the judicial branch of government who are subject to the Code of Judicial Conduct.

Statement of the Rule:

(1) The Ethics Advisory Committee is responsible for providing opinions on the interpretation and application of the Code of Judicial Conduct to specific factual situations.

(2) The Administrative Office shall provide staff support through the Office of General Counsel and shall distribute opinions in accordance with this rule.

(3) Duties of the committee.

(3)(A) Preparation of opinions.

(3)(A)(i) The Ethics Advisory Committee shall, in appropriate cases, prepare and publish written opinions concerning the ethical propriety of professional or personal conduct when requested to do so by the Judicial Council, the Boards of Judges, judicial officers and employees, judges pro tempore or candidates for judicial office.

(3)(A)(ii) The Committee shall respond to an inquiry into the conduct of others only if

(3)(A)(ii)(a) the inquiry is made by the Judicial Council or a Board of Judges; and

(3)(A)(ii)(b) the inquiry is limited to matters of general interest to the judiciary or a particular court level.

(3)(A)(iii) The Committee shall not answer requests for legal opinions or inquiries concerning conduct which has already taken place, unless it is of an ongoing nature.

(3)(B) The Committee may receive proposals from the Judicial Council, the Boards of Judges, and judicial officers and employees or initiate its own proposals for necessary or advisable changes in the Code of Judicial Conduct and shall submit appropriate recommendations to the Supreme Court for consideration.

(3)(C) The Committee shall develop and provide educational programs to assist judicial officers and employees in their understanding of the Code of Judicial Conduct

and the roles of the Judicial Conduct Commission, the Judicial Council and the Supreme Court in issues of professional conduct.

(4) Submission of requests.

(4)(A) Requests for advisory opinions shall be in writing addressed to the Chair of the Committee, through General Counsel, and shall include the following:

(4)(A)(i) A brief statement of the contemplated conduct.

(4)(A)(ii) Reference to the relevant section(s) of the Code of Judicial Conduct.

(4)(A)(iii) Citation to any relevant ethics opinions or other authority, if known.

(4)(B) The request for an opinion and the identity of the requesting party is confidential unless waived in writing by the requesting party.

(5) Consideration of requests.

(5)(A) As used in these rules, the term “informal opinion” refers to an opinion which has been prepared and released by the Committee. The term “formal opinion” refers to an opinion which has been considered and released by the Judicial Council. “Formal opinions” will usually be reserved for situations of substantial and general interest to the public or the judiciary.

(5)(B) Upon receipt of a request for an advisory opinion, General Counsel shall research the issue and prepare a preliminary recommendation for the Committee’s consideration. The opinion request, preliminary recommendation and supporting authorities shall be distributed to the Committee members within 15 days of receipt of the request.

(5)(C) The Committee members shall review the request and recommendation and submit comments to General Counsel within 10 days of their receipt of the request and preliminary recommendation.

(5)(D) General Counsel shall review the comments submitted by the Committee members and, within 10 days of receipt of the comments, prepare a responsive informal opinion in writing which shall be distributed to the Committee members for approval.

(5)(E) A majority vote of the Committee members is required for issuance of an opinion and may be obtained by telephone or, upon the request of a Committee member, the Chair may continue the vote until the next meeting of the Committee.

(5)(F) Informal opinions shall be released to the requesting party within 45 days of receipt of the request unless the opinion is contrary to previous opinions of the Committee or the matter is referred to the Judicial Council.

(5)(G) Upon the written request of a party and for good cause, the Committee may issue a response to a request within a shorter period of time than provided for in these rules. The requesting party has the responsibility of establishing that the request is of an emergency nature and requires an abbreviated response time.

(6) Referral to judicial council. Upon an affirmative vote of a majority of the Committee members, a motion of the requesting party, or a motion by the Judicial Council, an opinion request and Committee recommendation shall be referred to the

Judicial Council for consideration. Within 60 days of receipt of the referral, the Council shall consider the request and recommendation and take the following action:

(6)(A) Approve or modify the opinion and direct the Committee to release the opinion, as initially drafted or modified, to the requesting party as an informal opinion of the Committee, or

(6)(B) Approve or modify the opinion and release the opinion as a formal opinion of the Council.

(7) Reconsideration of opinions.

(7)(A) Within 10 days of the issuance of an opinion, the requesting party or a Committee member may request reconsideration. Requests for reconsideration of informal opinions must be made in the first instance to the Committee and then to the Judicial Council. Requests for reconsideration of formal opinions shall be made to the Judicial Council. Requests for reconsideration shall be in writing addressed to the Chair of the Committee or the Presiding Officer of the Council, through General Counsel, and shall include the following:

(7)(A)(i) A brief statement explaining the reasons for reconsideration.

(7)(A)(ii) Identification of any new facts or authorities not previously submitted or considered.

(7)(B) The Committee or Council shall consider the request as soon as practicable and may take the following action:

(7)(B)(i) Approve the request for reconsideration and modify the opinion;

(7)(B)(ii) Approve the request for reconsideration and approve the opinion as originally published; or

(7)(B)(iii) Deny the request.

(7)(C) The Committee shall be kept advised of the status of any request to reconsider an opinion.

(8) Recusal. Circumstances which require recusal of a judge shall require recusal of a Committee member from participation in Committee action. If the chair is recused, a majority of the remaining members shall select a chair pro tempore. If a member is recused, the chair may appoint a judge of the same court and if applicable the same geographic division or a lawyer to assist the Committee with its deliberations. Preference should be given to former members of the Committee.

(9) Publication. All opinions of the Committee and the Judicial Council shall be numbered upon issuance, compiled annually and published periodically in a publication approved by the Judicial Council. No published opinion rendered by the Committee or the Council shall identify the requesting party whose conduct is the subject of the opinion unless confidentiality of the requesting party is waived in writing.

(10) Legal effect. Compliance with an informal opinion shall be considered evidence of good faith compliance with the Code of Judicial Conduct. Formal opinions shall constitute a binding interpretation of the Code of Judicial Conduct.

## **(c) Primary Issues for Small Claims Judges**

### **(i) Disqualification**

A judge must enter disqualification in any case in which the judge's impartiality might reasonably be questioned. The circumstances requiring disqualification generally involve the following areas: 1) professional relationships; 2) social relationships; 3) familial relationships; 4) financial or economic interest in the case; and 5) personal bias concerning a party or attorney.

Scenarios: Do the following situations require disqualification?

1. Appearance by the judge's law firm.
2. Appearance by a former client.
3. The judge's first cousin is a party to the case.
4. The judge's bowling partner is a party.
5. The judge owns stock in the plaintiff corporation.
6. A party who the judge had previously held in contempt is a party.
7. The judge's son-in-law's law firm represents a party.
8. A member of the judge's church is a party.

### **(ii) Demeanor.**

A judge must be patient, dignified and courteous.

Problem areas (with examples of conduct for which judges have been sanctioned):

#### **(A) Single, egregious outburst**

A judge was sanctioned for calling a defendant a "liar," "cheat," and "deadbeat." *McCartney v. Commission on Judicial Qualifications*, 526 P.2d 268.

A judge was sanctioned for yelling at a law enforcement officer. *In re Cox*, 532 A.2d 1017.

#### **(B) Pattern of conduct**

A judge was sanctioned for repeated demeaning comments such as: your case is stupid . . . plain stupid. *In the Matter of Breitenbach*, 482 N.W.2d 591.

A judge was sanctioned for insensitive remarks directed to litigants who were Mexican, Japanese, Jewish or African-American. *Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372.

### **(iii) Ex parte communications.**

A judge may not engage in ex parte communications while a proceeding is pending or impending. A case is pending until the appeal has been exhausted or time for filing has expired.

A judge must also avoid the appearance of ex parte communications. A judge was sanctioned for allowing parties to visit in chambers before they appeared before the judge, even though facts of the cases were not discussed. Kennick.

Judges sometimes find themselves subject to unwanted ex parte communications. These communications can sometimes be “cured” by disclosing the substance of the communications to the other parties.