Utah Bar JOURNAL

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

COVER: Snow covered pine branches in Payson, Utah, by Bret Hicken, Hicken & Hatch, Spanish Fork, Utah.

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Letters to the Editor

Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Code of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author or each letter if and when a letter is rejected.

Interested in Writing an Article for the *Bar Journal*?

The editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine.

If you have an article idea or would be interested in writing on a particular topic, contact the editor at 566-6633 or write, *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

The Utah Bar Journal

A Call For Action

by James C. Jenkins

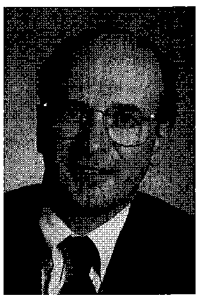
This month the Utah legislature convenes for its 1999 session. During the 45 days of the general session, many legal and political issues will be debated, and several new laws will be enacted. The Utah State Bar has historically taken an active interest in the Legislature's functions. Without attempting to address all of the important matters which likely may be presented in this year's session, I think one controversy ought to be addressed here because of the significant impact it may have, both philosophically and practically, upon our profession and our judicial system.

In July, the Utah Supreme Court ruled that the membership of the Utah Judicial Conduct Commission, a constitutionally mandated agency under Article VIII, violated the separation of powers clause of Article V, because the legislature has been appointing four members of the legislature to the Conduct Commission. (See *In Re Young*, File No. 970032[1])

Some members of the Legislature quickly responded to the Court's opinion by questioning the constitutionality of the entire Commission as well as suggesting a multitude of remedies, including election of judges, periodic judicial retention and reconfirmation proceedings, and implementation of impeachment proceedings against judges. Everyone should agree that judicial accountability is as important as judicial independence, but there must be a workable balance found to accommodate both objectives. This controversy ought not to be a battle between the judicial and legislative branches of government, but rather an opportunity for the branches to cooperatively resolve disparity and enhance our government's ability to insure that an adequate measure of judicial independence will assure impartial judgments while holding judges, as public officers, accountable to proper standards of judicial decorum and behavior.

The Judicial Conduct Commission exists to police the conduct of Utah's judges. I know from personal experience of the high level of dedication provided by each member of the Conduct Commission to fulfill their constitutional mandate. Despite the ruling of unconstitutionality by the Supreme Court, having members of the Legislature on the Conduct Commission had significant benefits. Legislators provided a unique and important perspective to cases under consideration. They also contributed to the public's and the Legislature's confidence in the Commission and its operations, much of which is mandatorily conducted in confidential proceedings. Having legislative members also facilitated budgetary confidence in the needs and expenses of the Commission.

Now that it is clear that the legislative branch cannot, under present constitutional language, appoint nor have membership on the Conduct Commission, a solution is in order. I suggest that the solution ought to be balanced, rational, and legally consistent with the beneficial objectives of the constitutionally mandated creation of the Conduct Commission. Shortly after the *Young* decision, the Conduct Commission responsibly, in a public meeting, prepared a draft proposal for corrective legislation. The proposed bill has legislative support and sponsorship[2]. It proposes that the composition of the Conduct Commission include four persons who are not judges, lawyers, or legislators, who are appointed to the Conduct Commission by the Governor after considering a list of nominees from the Legislature. The remaining membership will be composed, as is presently the case, of three members of the Board of Bar Commissioners, two public members of different political affiliation appointed by the Governor, and one judge and one alternate judge selected by the non-judicial members of the Conduct Commission. The bill also proposes that the Conduct Commission make a report of its activities at least annually to the Legislature.



I urge the support and adoption of this, or a similar bill, as a responsible stop-gap or housekeeping resolution to the present controversy. However, I also suggest that the Legislature consider a constitutional amendment which will specifically provide for the composition of the Judicial Conduct Commission to address both the need

for judicial accountability and judicial independence. A constitutional provision which encourages a balanced participation of the Bar and each of the three branches of government on the Conduct Commission will assure judicial accountability, public confidence, and maintenance of the high standards of judicial conduct and membership, which our state has enjoyed since Article VIII was amended in 1984 establishing the Judicial Conduct Commission as a constitutionally created entity.

As members of the Utah State Bar, we have a unique opportunity to influence the preservation and refinement of our judicial system. We have more than 5,000 members residing throughout the state, each of whom has a state senator and representative in his or her residential district who will be serving in the general session to commence this month. I urge each lawyer to become familiar with the issues of the Judicial Conduct Commission composition and the legislation proposed to address those issues. I urge you to contact your state senator and representative and emphasize the great importance of having a healthy independent judiciary able to make impartial decisions regardless of the popularity of their official judgments, and without political repercussions; yet accountable and responsible for individual good behavior. I also urge each of you to support the efforts of the Bar's Governmental Affairs Committee and the Bar Commission as we monitor the proceedings of this year's legislative session. As a service to our membership and the public, the Governmental Affairs Committee and the Bar Commission will meet at least weekly during the general session to evaluate proposed and pending legislative activity. I urge you to follow these activities which will be reported on the Bar's website at *www.utahbar.org* and our links to the Utah Legislature off of the Bar's website.

The mission of the Utah State Bar is to represent lawyers in the State of Utah and to serve the public and legal profession by promoting justice, professional excellence, civility, ethics, and respect for and understanding of the law. Please let your legislators know how important it is to have balance of power in government and to have a government which operates by the rule of law. I welcome your questions or comments. Please write, call, or e-mail me at *jjenkins@n1.net*.

[1]The *Young* decision has not yet been published, although the Court's Memorandum Decision is a matter of public record. Recently, the Court, on its own motion, ordered that the formal publication of the decision be suspended. At the time of this writing, the Court is considering petitions for reconsideration of its opinion. Although certain points of the opinion may be clarified by subsequent proceedings, it is unlikely that its fundamental premise regarding separation of powers will change.

[2]Purpose of Proposed Amendment: "The Judicial Conduct Commission (Commission) is currently comprised of eleven members (four legislators, three lawyers, two public members, one trial judge, and one alternate trial judge). Six Commissioners constitute a quorum of the Commission. In *In Re David S. Young*, Case No. 970032, filed July 10, 1998, the Utah Supreme Court held that the Commission, as currently constituted, violates the separation-of-powers provisions of Article V, Section 1, of the Utah Constitution. The purpose of this amendment is to establish the Commission so that its composition does not violate Article V, Section 1, Article VI, Section 6, or any other provision of the Utah Constitution. The amendment also requires the Judicial Conduct Commission to report to the Legislature at least annually concerning the activities of the Commission."

Gordon K. Jensen Memorial Fund

The legal community has lost an exceptional attorney and good friend. On October 30, 1998, Gordon K. Jensen passed away in his sleep from a heart attack.

Gordon loved the law and in particular teaching it to others. He participated in many career development programs for both potential and actual law students. Gordon chaired the law related Education Committee. He coordinated the People's Law Program, Law School for Non-Lawyers, and the High School Guest Lecture program. He also served as a delegate to the American Bar Association National Convention. He was awarded Distinguished Young Lawyer of the Year in 1992 for recognition of distinguished service and the Scott Matheson award in 1995 for his contribution to Law related education in the State of Utah. Gordon served in multiple capacities for the Young Lawyers section of the Utah State Bar and the planning board of the ABA Young Lawyers. He was on the Board of Directors of the Utah Trial Lawyers Association and was a member of the American Trial Lawyers Association. At the time of his death, he was a partner in the Salt Lake firm of Lehman, Jensen & Donahue.

Gordon graduated from the University of Utah College of Law in 1984 as a Leary Scholar. In honor of his memory, the Gordon K. Jensen Memorial Fund has been established at the Law School to provide an annual gift for the benefit of the students of the Law School. Donations to the fund may be sent to The University of Utah College of Law, 332 South 1400 East, Salt Lake City, Utah 84112-0730.

Taming the Takings Tiger

by John Martinez and Nick J. Colessides

INTRODUCTION[1]

> *Three of four Utah residents place growth – as defined by road snarls, overpopulation, rapid development and worries about the 2002 Winter Olympics – among the top three issues [facing Utah today].*[2]

"Growth" is bad if it means one's formerly pristine view over someone else's land will be spoiled by the construction of houses.[3] "Growth" is good, however, if it means one can sell a non-productive family farm for subdivision development and pass on the benefits of the appreciation of the land to one's children.[4] Public officials are faced with the task of reconciling these profoundly conflicting demands. On one hand, preservation of land as open space can be achieved through the purchase of land by the public. Alternatively, it can be achieved through prohibiting or severely restricting land development. When choosing between imposing the costs on government coffers, or instead, on private property owners, budget-conscious local zoning officials will usually opt to impose greater and greater restrictions on land development, until all the owner retains is the right to pay taxes.

Takings doctrine embodies the principles that courts use to mediate between the public desire to maintain open space or otherwise restrict private property, and the private owner's right to use property as he or she sees fit. What those principles are, what institutions should apply them, and in what manner, however, is a tiger not easily tamed.

"Takings" are situations in which government has acted, *other than through the conscious, purposeful exercise of the power of eminent domain,*[5] to cause an effect on property such that the owner seeks a remedy. Takings claims contain three distinct elements: (1) the definition of the "relevant property,"[6] (2) whether a "taking" has occurred, and (3) what remedy, if any, should be provided. Such claims may be brought under state or federal constitutional provisions, and may arise under Just Compensation,[7] Due Process,[8] Equal Protection,[9] Contracts,[10] or other constitutional clauses.[11]

In a 1996 article in the *Utah Bar Journal*,[12] Professor Martinez described the fundamental nature and structure of the takings problem. In the present article, the authors identify several nagging questions that persist in the takings area, and suggest how they might be addressed.

I. 3-FACTOR INQUIRY? TWO-PART TEST? ROTE RELATIONAL QUESTION? OR "ESSENTIAL NEXUS" + "ROUGH PROPORTIONALITY"?

Takings analysis includes examination of three factors: (1) the nature of the governmental action, (2) the impact on the property owner, and (3) the effect on the owner's reasonable investment-backed expectations.[13] The Supreme Court has at times applied these factors directly.[14] On other occasions, however, the Court has interpreted these factors as being embodied in a two-part test: a "taking" may occur if *either* the property owner is "deprived of economically viable use" *or* the means

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Nick J. Colessides is a 1970 graduate of the University of Utah College of Law and practices extensively in the field of real estate development. He was formerly the Chief Deputy Attorney for Salt Lake County and has also served as deputy city attorney in the cities of West Jordan and Park City, Utah.

used by the government do not "substantially advance" the ends sought to be achieved.[15] The "deprivation of economically viable use" inquiry depends almost entirely on the definition of the "relevant property" or "denominator" for purposes of analysis, but unfortunately, the Court has not been precise about how that determination is made.[16]

The "not substantially advance a legitimate governmental objective" branch of the two-part test may have two different meanings: First, one may consider the rote relational connection: As a matter of fact and experience, is the means substantially likely to achieve the end?[17] Second, one may instead apply the standard developed by the Court in *Dolan v. City of Tigard*,[18] breaking out two sub-tests: (a) there must be an essential nexus between the means and the end and (b) the burden of the means imposed on the owner must be "roughly proportional" to the potential harm that would have resulted if the owner had been allowed to proceed without such restriction.[19]

The Supreme Court may soon clear up at least some of this confusion. The Court has agreed to review *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*,[20] in which the Ninth Circuit held that the *Dolan* standard applies to the denial of a development permit where, unlike in *Dolan*, the city did not seek to impose a condition that the owner convey an easement in order to obtain the permit.

"Dolan . . . *requires governments to act deliberately and to keep accurate and complete records of their actions.*"

The problem of the applicable standard implicates some of the most profound aspects of the nature of government and the nature of property in this country. If *Dolan* applies, then the city must explain and justify its action, subject to being second-guessed by a judge or a jury. On the other hand, if *Dolan* does not apply, then in order to prevail, the owner must make a particularly strong showing that the city acted irrationally. The implication that *Dolan* applies is that an owner is "entitled" to a permit to develop, just as such owner is "entitled" to retain an easement over its property; the implication that *Dolan* is inapplicable is that the city may deny permission to develop land without too much of an explanation for such denial.

Dolan should apply. It requires governments to act deliberately and to keep accurate and complete records of their actions. Although more litigation may result, cases may be disposed at the summary judgment stage if the government is able to produce a record which shows the evidence, findings and conclusions – and the links among them – which led to its determinations.[21] Since 1993, Utah state agencies have been required to conduct "takings impact assessments" which impose requirements very similar to those imposed by *Dolan*.[22] In 1997, however, the state legislature gave state agencies a five-year extension, until January 1, 1999, to adopt regulations to implement such requirements.[23] Local Utah governments, moreover, have never been required to make such findings.[24]

II. JURY OR JUDGE QUESTIONS?

Whether the takings question is one of law, fact, or both, has confounded the courts.[25] In *Del Monte Dunes*, the Ninth Circuit held that a property owner has a right to have a jury decide whether a "taking" has occurred. The jury was allowed to consider whether the city's denial of a permit for the development of a 190-unit condominium development denied the owner economically viable use or failed to substantially advance a legitimate governmental objective. The jury found a taking, and awarded $1.45 million dollars to the owner. The Supreme Court will determine whether the jury should have been allowed to decide the takings question.

The nature of the takings inquiry indicates that it is a mixed question of law and fact. The inquiry proceeds as follows:

1. What did the government do or fail to do? (ie: What is the "means" involved?)
2. What impact did it have on the owner?
   a. Did the owner have any protectable "property" interest at all?
   b. How was that interest affected: Was it diminished or was the owner "deprived of economically viable use"?
3. Did the government seek to implement a legitimate governmental objective? (ie: What is the "end" involved?)
4. What is the relation between the means and the end? (ie: Did the means substantially advance the end?)

The innumerable foundational facts that can be the subject of proof and experience include: whether the applicant applied for a permit or failed to do so, whether the government considered the permit and denied it, whether the owner has any market value or use remaining in the property, whether the government was trying to protect the environment or instead merely depriving the owner of economically viable use, and whether there are studies indicating that the governmental action in the circumstances is not reasonably likely to achieve the objective involved. Such matters can and should be submitted to a jury.

The ultimate question whether the sum of the foundational facts add up to a taking in the circumstances, however, would appear

to be a question of law. This is because attribution of legal consequences to the foundational facts ultimately requires a delicate balancing between state and federal authority if a federal forum is involved (federalism), between the role of courts and the role of regulators (separation of powers), and between individual owners' preferences and the desires of the public with respect to private property.[26]

III. STATE OR FEDERAL COURT?

Federal and state constitutional takings claims may be brought in state courts, and at least in theory, such claims also may be brought in federal courts under federal question and pendent jurisdiction. It would seem elementary, therefore, that a takings claimant has the option of choosing a state or federal forum, but that may not be true at all.

The right to a federal forum for litigating federal rights is a well-established principle of federal law.[27] It has been expressed as "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[28] Pendent state law claims can also be adjudicated by a federal court under its supplemental jurisdiction.[29]

"If a reasonable, certain and adequate procedure for seeking just compensation is provided, takings claimants must utilize that procedure and be denied 'just compensation' before a court can consider the claim."

In *Bateman v. City of West Bountiful*,[30] however, the 10th Circuit held that a claimant must file a takings action in state court under state law and pursue such action to final judgment before the federal takings claims are ripe for adjudication by a federal trial court. The court in *Bateman* relied on *Williamson County Regional Planning Comm. v. Hamilton Bank*,[31] which establishes a "ripeness" doctrine comprised of several parts. The first, "subject matter jurisdiction" part, requires that disputes must be "cases or controversies" within Article III of the U.S. Constitution. Such "jurisdictional" consideration, of course, concerns the power of the court to adjudicate claims, and its absence mandates dismissal.[32]

In addition, however, there are three "prudential" components to the ripeness doctrine under *Williamson County* which are addressed to a court's discretion:[33] (1) *Finality Requirement* Takings claimants must obtain a "final" determination from the government regarding what the claimants can and cannot do with their property under the circumstances so that a court can decide whether governmental conduct "goes too far" and constitutes a "taking;"[34] (2) *Denial of Compensation Requirement* If a reasonable, certain and adequate procedure for seeking just compensation is provided, takings claimants must utilize that procedure and be denied "just compensation" before a court can consider the claim.[35] (3) *Futility Exception* If further application–whether for "finality" or "denial of compensation" purposes–would be futile or pointless, takings claims are ripe for judicial review without such applications.[36]

Bateman's conclusion that *Williamson County's* ripeness doctrine is solely jurisdictional is inconsistent with the more recent United States Supreme Court decision in *Suitum*. Moreover, there is also reason to doubt the *Bateman* decision's conclusion that a state takings action in state court under state law is what the United States Supreme Court *Williamson County* intended under the second, "denial of compensation" component. Neither the language of *Williamson County*, nor the purpose of providing a federal forum for federal claims supports such an interpretation.

In *Williamson County*, the takings claimant complained about oppressive land use regulation. The Supreme Court assumed ex arguendo that the land use decision was both "final" and a "taking," and went on to conclude that since Tennessee law allowed the owner to bring an action for inverse condemnation under state law, the owner had to bring such action before the matter was ripe for review. Since the "finality" ground alone supported the Court's decision, the "denial of compensation" discussion was dictum. In addition, the Court emphasized that the owner had "not shown that the inverse condemnation procedure [was] unavailable or inadequate . . . ."[37] Thus, the claimant never challenged the "reasonableness," "certainty," or "adequacy" of the available state procedure.

The purpose of the "denial of compensation" requirement is to assure a court that a claimant has asked for–and been denied–compensation for a taking, since "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation."[38] The requirement thus assures that a court is not wasting its time adjudicating a case which could have been resolved if only the claimant had asked for compensation from the offending governmental entity. A "reasonable, certain and adequate" procedure, therefore, is one which is relatively straightforward and allows a claimant to receive a fairly quick "thumbs up" or "thumbs down" on its request for compensation. Most states have such a procedure in their notice of claim provisions for government tort liability.[39]

The *Bateman* court's conclusion that a state's court system and the adjudication of state takings claims therein constitute a "procedure" in that sense, therefore, is plainly wrong. The state's court system is not a "procedure" at all, but a judicial system for adjudication of disputes of all kinds. It is thus not reasonably accessible nor likely to be expeditious. Essentially, the *Bateman* court tells takings claimants to go away and litigate in state courts. This is completely contrary to any sense of a right to a federal forum for adjudication of federal claims, and which the Supreme Court has carefully protected in the civil rights arena.[40]

But there is another, more insidious reason why the *Bateman* court is wrong. Requiring takings claimants to sue in state court under state law ultimately deprives takings claimants of a federal trial forum for adjudication of federal takings claims altogether. Under 28 U.S.C. §1738, federal courts are required to give the same conclusive effect to a state court's judgment as the courts of the state from which the judgment arose.[41] Thus, if a takings claimant loses in state court, then the doctrines of claim and issue preclusion prevent the subsequent litigation of state and federal claims in a federal trial court.[42]

A better approach would achieve the purpose of *Williamson County's* "denial of compensation" requirement and allow takings claimants the option of a federal forum. Thus, claimants should be allowed to ask for compensation via the state's notice of claim procedures and thereafter to proceed *either* to state or federal court for adjudication of all their claims, both state and federal.[43] Congress may ultimately decide the question by modifying federal court subject matter jurisdiction.[44]

"[C]laimants should be allowed to ask for compensation via the state's notice of claim procedures and thereafter to proceed either to state or federal court for adjudication of all their claims, both state and federal."

IV. DOES A TAKINGS CLAIM "RUN WITH THE LAND" TO SUBSEQUENT PURCHASERS?

Whether a takings claim survives a transfer of the land involved, or whether instead the government essentially gets away with the taking, is almost as important as whether a compensable taking has occurred at all. That the right to sue for the taking survives in favor of the new owner of the land, even without contractual provision for it, was implicitly approved by the United States Supreme Court in *Nollan v. California Coastal Commission*.[45] However, the Supreme Court has not confronted the issue squarely. Some state courts hold that only the original owner may sue.[46] Other courts hold that if an express assignment of the right to sue is included in the documents transferring the land, the new owner *may* sue, on the assumption that the price paid by the new owners with notice of the takings problem is presumed to have reflected the diminished value of the land, as well as the risks and costs of litigating the takings claims.[47] The Utah courts have not addressed the issue.

In the face of such legal uncertainty, it is best to assign the rights expressly. Such agreements may thereby reliably reflect the allocation of the cost of pressing the suit, as well as both the risk of losing and the possibility of recovery, among the parties to the transaction. The worst result, it would seem, is for the government to receive a windfall through the destruction of the right to sue for excessive governmental regulation.

V. ABSOLUTE OR QUALIFIED IMMUNITY FROM PERSONAL LIABILITY FOR INDIVIDUAL GOVERNMENTAL DEFENDANTS?

Governmental entities are usually the defendants in takings litigation because they are the only deep pockets typically available. Since governmental officials are thus ordinarily not concerned about the possibility of personal liability, their primary fiscal concern when engaged in potential takings-causing regulation is the possible liability that might be imposed on the public entity. And such concern may not amount to much in flush times, since by definition, the costs of entity liability will be spread over the entire tax base. Accordingly, public officials may be inclined to over-regulate in the interest of appealing to their constituents' interest in "preservation of the environment" or "stopping developers to protect the character of neighborhoods." In such circumstances, there is nothing more sobering to a governmental official than the prospect of personal liability.

The doctrine of governmental officials' personal liability, however, has become more intricate. In *Bogan v. Scott-Harris*,[48] plaintiff Scott-Harris alleged that the city by ordinance eliminated her position in order to retaliate against her for exercising her First Amendment rights in filing a complaint against one of her subordinates who had made racial and ethnic slurs about colleagues. She sued both the city entity and the city officials personally. The jury returned a verdict for all defendants on her racial discrimination claim, but decided in her favor on her First Amendment claim against the city, as well as against the Mayor and the Vice President of the City Council. The

First Circuit Court of Appeals reversed the judgment against the city, but upheld the judgment against the individual defendants.[49] The United States Supreme Court reversed the judgment against the individual defendants, however, and held that the subjective intent of local government officials cannot be used to determine whether their conduct is *legislative* – for which such officials are absolutely immune from personal liability for civil rights violations under 42 U.S.C. §1983 – or non-legislative – for which such officials enjoy only qualified immunity. Instead, the Court held, only the *nature of their acts* can be used as evidence to determine whether such conduct is legislative or non-legislative.

The Court explained that in order to determine the nature of government officials' acts, one must examine the *form* and the *substance* of their actions. Voting for an ordinance, introducing a budget and signing an ordinance into law which eliminated the position of plaintiff Scott-Harris, showed that the conduct was legislative in form. The Court hinted that it might treat the form of local governmental official conduct as dispositive, but it also noted that the challenged conduct was discretionary, and thus legislative in *substance*. The Court emphasized that policy-making decisions implicating the budgetary priorities of the city and the services the city provides to its constituents, such as the elimination of a city position in order to deal with a budgetary shortfall, was evidence of conduct that was legislative in substance. Unlike the hiring or firing of a particular employee, such actions might have prospective implications reaching well beyond the particular occupant of the office, and were in a field where legislators traditionally have power to act.

After *Bogan*, takings claimants can conduct discovery to ascertain the "nature" of the acts involved, both in form and in substance. With such information in hand, a court can summarily determine whether the conduct in question entitles the individual defendants to absolute immunity, or whether only qualified immunity is available. Qualified immunity shields local government officials performing executive or administrative functions from personal liability for civil damages as long as their conduct is objectively reasonable. "Objective reasonableness" is measured by whether the official conduct in question violates "clearly established statutory or constitutional rights of which a reasonable person would have known.[50]

CONCLUSION

The takings tiger is not easily tamed. With the right analytical equipment, however, it can be made to serve both private and public needs.

[1]Professor Martinez has written extensively on the takings problem. *See e.g., A Framework for Addressing Takings Problems*, 9 UTAH BAR J. 13 (June/July 1996); *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 URBAN LAWYER 290 (1994); *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297 (1988); *Reconstructing Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988); *A Critical Analysis of the 1987 Takings Trilogy: The* Keystone, Nollan *and* First English *Cases*, 1 HOFSTRA PROP. L.J. 39 (1988); 3 G. Dallas Sands & Michael E. Libonati, (now Michael E. Libonati & John Martinez) LOCAL GOVERNMENT LAW, Ch. 16 (Land Development Regulation), §§16.50 et seq. [hereinafter Libonati & Martinez, LOCAL GOVERNMENT LAW]. *See also* Daniel R. Mandelker, *Takings Legislation-Including the Potential Effect of H.R. 1534 on Federal Court Jurisdiction*, SC43 ALI-ABA 451 (1998); Richard A. Epstein, *Pennsylvania Coal V. Mahon: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875 (1998); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[2]"State's Changes a Growing Concern For Most Utahns, Both New and Old, Voters fear future of bumper-to-bumper traffic and booming subdivisions", *Salt Lake Tribune*, Sunday, September 20, 1998, UTAH section, page A-1, col. 2.

[3]*Id.*, at page A-8, cols. 1-2.

[4]*Id.*, at page A-8, col. 2.

[5]The "takings problem," as discussed here, does not deal with the comparatively straightforward "direct condemnation" situation, such as the condemnation of land for construction of a public road, in which the government purposefully intends to acquire property for public use and fully expects to pay for it. *See generally* 3 Libonati & Martinez, LOCAL GOVERNMENT LAW, Ch. 21 (Property).

[6]For the latest on this issue, see *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1998 WL 309070 (1998) (interest earned on client funds on deposit in lawyers' trust accounts (IOLTA programs) is "property" and such property belongs to the client; case remanded for determination whether such property has been "taken" without "just compensation").

[7]*See* U.S. CONST. amend. V("[N]or shall private property be taken for public use, without just compensation."). State and local government property is also protected from federal takings by the Clause. U.S. v. 50 Acres of Land, 469 U.S. 24 (1984); UTAH CONST. art. I, §22 ("Private property shall not be taken or damaged for public use without just compensation.").

[8]U.S. CONST. amend. XIV, §1.("[N]or shall any State deprive any person of . . . property, without due process of law . . . ."); UTAH CONST. art. I, §7(similar provision).

[9]U.S. CONST. amend. XIV("[N]or shall any State...deny to any person...the equal protection of the laws."); *see also* UTAH CONST. art. I, §24(Uniform Laws Requirement); UTAH CONST. art. VI, §26(Special Laws Prohibition).

[10]U.S. CONST. art. I, §10("No state shall...pass any...law impairing the obligation of contracts... ."); UTAH CONST. art. I, §18("No ... law impairing the obligation of contracts shall be passed.").

[11]*See, e.g.*, UTAH CONST. art. I, §11 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay . . . ."); UTAH CONST. art. I, §25("This enumeration of rights shall not be construed to impair or deny others retained by the people."); *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995) (recognizing "a property owner's common-law right to unrestricted use of his or her property"); *Brown v. Sandy City Bd. of Adjustment*, 339 Utah Adv. Rep. 13, 16 (Utah Ct. App. 1998) (Bench, J., concurring in result, and rejecting the proposition that the right to use property is created by zoning ordinances).

[12]John Martinez, *A Framework for Addressing Takings Problems*, 9 UTAH BAR J. 13 (June/July 1996).

[13]*Penn Central Transp. Co. v. New York*, 438 U.S. 104, 117 (1978).

[14]*See, e.g., See Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2149, 141 L. Ed. 2d 451 (1998) (federal Coal Industry Retiree Health Benefits Act of 1992, assessing an annual

premium of $5 million, and that was estimated would result in total payments of $50-$100 million over the life of the assessment, retroactive to employees of the company over 30 years before, was an "as applied" taking because it (1)imposed severe retroactive liability (2)on a limited class of parties that could not have anticipated the liability, and (3)the extent of the liability was substantially disproportionate to the parties' experience); *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for S. Calif.*, 113 S. Ct. 2264, (1993) (pension plans requirements held reasonable requirements, ergo not takings); *see also Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995) (hunting license regulation held not taking).

[15]*See* John Martinez, *Trees in the Forest: A Reply to Professor Laitos' "The Public Use Paradox and the Takings Clause; A Critique of the Lucas Takings Doctrine"*, 13 J. ENERGY & NAT. RES. 51 (1993) (discussing the two types of takings).

[16]*See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured."). For definitions of the relevant property which resulted in takings determinations under the "deprivation of economically viable use" branch of the analytic, *see Florida Rock Industries, Inc. v. United States*, 21 Cl.Ct. 161, 169-71 (1990), *vacated and remanded on other grounds*, 18 F.3d 1560 (Fed.Cir.1994); *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153, 156-59 (1990).

[17]*See, e.g., Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn App 1996).

[18]512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994).

[19]For an excellent discussion of "essential nexus" and "rough proportionality," see *Grogan v. Zoning Bd of Appeals of Town of East Hampton*, 221 App. Div. 2d 441, 633 N.Y.S.2d 809 (1995); *Clark v. City of Albany*, 137 Or. App. 293, 904 P.2d 185 (1995).

[20]*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 95 F.3d 1422 (9th Cir. 1996), *cert. granted in* 118 S. Ct. 1359, 140 L.Ed.2d 509, 66 USLW 3509 (March 30, 1998).

[21]*See Topanga Ass'n v. County of Los Angeles*, 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 (1974) (explaining findings requirement); *see also Daro Realty, Inc. v. District of Columbia Zoning Commission*, 581 A2d 295 (D.C. App. 1990); 3 Libonati & Martinez, LOCAL GOVERNMENT LAW, §16.29.50 (findings "bridge the analytic gap" between raw evidence and ultimate conclusions).

[22]Utah Code Ann. §§63-90-1–4.

[23]Utah Code Ann. §§63-90-3(3).

[24]Utah Code Ann.§§63-90a-1–4.

[25]*See e.g., Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) (mixed question, but properly submitted to jury); *Layne v. City of Mandeville*, 633 So 2d 608 (La. App. 1993) (question of fact); *Underwood v. State ex rel. Department of Transportation*, 849 P.2d 1113 (Okla App 1993) (question of fact). The arguments are presented in the briefs of the parties and amici: *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 118 S. Ct. 1359, 140 L. Ed. 2d 509, 66 U.S.L.W. 3509 (1998).

[26]For a discussion of these ideas, see John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings*, 11 HARV. J.L. & PUB. POL'Y 297 (1988); John Martinez, *Reconstructing Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988).

[27]*England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

[28]*Colorado River Conservation Dist. v. U.S.*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976); England, 375 U.S. at 415, 84 S.Ct. at 464-465(" 'When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction' ") (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40, 29 S.Ct. 192, 195, 53 L.Ed. 382 (1909)); *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not").

[29]42 U.S.C. §§1981, 1982, 1983, 1985, 1988; 28 U.S.C. §§1331 and 1343.

[30]89 F.3d 704, 706 (10th Cir. 1996) .

[31]473 U.S. 172 (1985).

[32]*Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1664-65, n.7 (1997)

[33]*See also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1013 (1992) (prudential concerns are not jurisdictional bar to federal court adjudication of takings cases).

[34]*Suitum*, 117 S. Ct. at 1665 (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348(1986) ("[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes")).

[35]*Suitum*, 117 S. Ct. at 1665; *Williamson County*, 473 U.S. at 194 (what is required is state procedure establishing "reasonable, certain and adequate provision for obtaining compensation" which was in existence at the time of the taking).

[36]*See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992) (if claimant's further application would be "pointless," claimant's takings claim is ripe).

[37]*Williamson County*, 473 U.S. at 196-97.

[38]*Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 297 n.40, 101 S.Ct. 2352, 2371 n.40, 69 L.Ed.2d 1 (1981).

[39]*See generally* 4 Libonati & Martinez, LOCAL GOVERNMENT LAW, Section 27.27 (Notice of Claim).

[40]There is no requirement that a claimant exhaust administrative remedies in actions under 42 U.S.C. §1983. *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982).

[41]*Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883, (1982); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, (1980).

[42]This may not occur if the claimant expressly preserves its federal claims in state court for subsequent litigation in federal court, and if state and federal takings protections are different for claim preclusion purposes. State takings protections, however, are arguably broader than federal takings provisions, and moreover, issue preclusion would still apply. *See Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1994).

[43]For a case examining the combined effect of *Williamson County's* "denial of compensation" requirement and the claim preclusion rules, see *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1994) ("denial of compensation" requirement does not require that landowners present their federal taking claim in state court before seeking relief in federal court); *see also Wilkinson v. Pitkin County Bd. of County Com'rs*, 142 F.3d 1319, 1325 n.4 (10th Cir. 1998) (acknowledging problems). *See generally* 3 Libonati & Martinez, LOCAL GOVERNMENT LAW, Section 16.53.10 (–Procedural barriers: Supreme Court abstention in takings cases).

[44]*See* Daniel R. Mandelker, *Takings Legislation-Including the Potential Effect of H.R. 1534 on Federal Court Jurisdiction*, SC43 ALI-ABA 451, 477 (1998) (suggesting, however, that a claimant has no similar right to adjudication of pendent state claims by a federal court).

[45]483 U.S. 825, 833 n.2, 107 S. Ct. 3141, 3146 n.2 (1987):

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

[46]*Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1382 (Fla.1981); *Maine Land Use Regulation Comm'n v. White*, 521 A.2d 710 (Me.1987); *Claridge v. New Hampshire Wetlands Board*, 485 A.2d 287(N.H.1984). *See also* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law"*, 42 N.Y.LAW SCHOOL L. REV. 345 (1998) (discussing New York rule preventing the successor from suing).

[47]*See, e.g., Hoover v. Pierce County*, 79 Wash. App. 427, 903 P.2d 464 (1995).

[48]118 S. Ct. 966 (1998).

[49]*Scott-Harris v. City of Fall River*, 134 F.3d 427, 36 Fed R. Serv. 3d 1150, 1997 WL 9102 (1st Cir. 1997) (action not attributable to the city entity; individual defendants had targeted plaintiff).

[50]*See* 4 Libonati & Martinez, LOCAL GOVERNMENT LAW, §27.11.50(discussing qualified immunity).

Murder Most Fowl

A Meditation on Intestacy. Past, Present and Future

by Lawrence R. Barusch

It was a dark and stormy night in Drakevale, a place with laws like Utah's, except that traditional *per stirpes* governs intestacy. Old Scrooge, a creature of immense wealth, lay dying in his rambling mansion. He had been suffering from dementia for many years and now tossed and turned on his bed. Occasionally, he would sit straight up, open his eyes wide, screech "no new taxes, no new taxes," and collapse. Scrooge detested lawyers and had no will.

Scrooge's relatives had gathered to comfort him in his final hours and to be present for the division of his wealth. Scrooge had never married, feeling that a spouse was only a drain on his resources. Nor did he have children, customs in Drakevale differing somewhat from those in Washington D.C. His parents had long since passed away. He had but one sibling, a sister. She, in turn, had a son and daughter. Scrooge's nephew had no children and was lost at sea many years ago. Scrooge's niece had three sons, Huey, Dewey, and Louis. Huey had one son, Tiny Tim. Dewey had eight children, who were so much alike they were referred to as "the Eight." Louis had a daughter, named Little Nell. While visiting Utah one October, Scrooge's sister and niece, along with Huey and Dewey, had been killed in a hunting mishap.

Louis, Tiny Tim, the Eight and Little Nell were preparing for bed at Scrooge's mansion. Little Nell came running from her father's bedroom, tears streaming down her face and announced that her father, Louis, was dead. A wood stake had been driven through his heart. The police were sent for and shortly Inspector Canard arrived. He examined the Scrooge residence and interviewed the family. The he summoned an officer and had the Eight arrested, transported to the police station, booked and jailed.

"Why would the eight children of Dewey murder my father?" asked Little Nell.

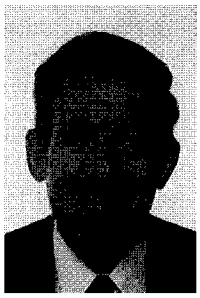
"Elementary," said Inspector Canard. "Since Scrooge has no will and no longer has the capacity to make one, his wealth will pass by intestacy. Since he has no spouse, issue or parents his wealth will pass to the issue of his parents under our law which is similar to Utah.[1] However, Drakevale looks to the first generation of the descendants of Scrooge's parents where there is at least one person who survives Scrooge. Had Louis lived, that would have been his generation. Scrooge's estate would have been divided into as many shares as there were living members of that generation, in this case one for Louis, and members who were dead leaving living issues, in this case two, Huey and Dewey. Thus, the estate would have been divided into thirds. Louis would have received one-third. Huey's one-third would have passed to his son, Tiny Tim. Dewey's one-third would have passed to the Eight, each getting 1/24th. That is the rule of *per stirpes*, which is unlike Utah's law. However, since no member of Louis's generation survived. we look to the next generation, Tiny Tim, Little Nell and the Eight. Each gets 1/10. By this murder each of the Eight more than doubles his take."

"Those dastardly eight cousins of mine shall not profit by this deed," said Tiny Tim who practiced law in a county adjacent to Drakevale famous for its fresh water lake. "A killer is treated as predeceasing."

"I'm sorry" said Inspector Canard, "but under our law, which is the same as Utah's[2] a killer is treated as predeceasing with respect to inheritance from his victim. The murder of Louis will not affect the rights of the Eight to inherit from Scrooge. That being the case, Tim, your interest is reduced now from 1/3 to 1/10. I am afraid you've lost 70% of your inheritance."

"God bless us everyone," said Tiny Tim and fainted.

"Oh, if only Uncle Scrooge were domiciled in Utah" said Little Nell who practiced law with a big firm in a big building in downtown Drakevale. "Then, none of this would ever have happened."



Larry Barusch is a shareholder in the Corporate, Securities and Tax Department in Parsons Behle & Latimer where his practice includes estate planning, income taxation, and taxation of international transactions. He was Chairman of the Tax Section of the Utah State Bar and is currently a member of the committees on Taxation of Foreigners and Foreign Investment of the Tax Section of the American Bar Association.

"Well" said Inspector Canard, "had Scrooge died intestate in Utah prior to July 1,1998 you would be right. Utah used to use the principle of representation.[3] Scrooge's estate would have been divided into three parts, one for Huey, one for Dewey and one for Louis whether or not any survived. One-third would have gone to Tiny Tim, one-third would have gone to Louis (or Nell if he were dead) and 1/24th would have gone to each of the Eight. However, Utah has changed its law. The legislature seemed bent on eliminating the notion of *per stirpes* altogether by defining it to mean by right of representation.[4] Then the Utah legislature decided that intestacy should no longer be governed by representation, but by a principle known as 'per capita in each generation.' Under this principle you look to the oldest generation with at least one survivor and initially divide the estate into the number of shares equal to the number of living members of that generation and deceased members with then living issue. Thus in Utah, just as in Drakevale, you, Tiny Tim and each of the Eight would get 1/10. Had Louis survived, he would have had his 1/3, just as in Drakevale. However the remaining 2/3 would be divided by a second application of per capita per generation. Thus each of Tiny Tim and the Eight would get 2/3 times 1/9, or 2/27. Even in Utah the Eight would have had quite an incentive to murder Louis, thereby increasing the share of each from 7.4% to 10%."

Inspector Canard was interrupted by a loud rapping on the front door. Startled, Scrooge, sat straight up, squawked "no new taxes, no new taxes," and fell of his bed. Inspector Canard went to his aid.

"I'm sorry," said Inspector Canard, "he's dead."

The front door slowly swung open, creaking on its hinges. In the darkness only the dripping outline of a stranger could be seen. A thunder clap shook the house. Lightening flashed behind the bedraggled visitor revealing a tattered blue sailor's suit.

"Good grief," said Little Nell, "it's Uncle Donald!"

Who will take Scrooge's estate? What would have been the result had Scrooge died in Utah before or after July 1, 1998? What would have happened if Louis had survived Scrooge?

[1]Utah Probate Code §75-2-103.

[2]Utah Probate Code §75-2-803.

[3]Old Utah Probate Code §§75-2-103 and 75-2-106.

[4]Utah Probate Code §75-2-709.

MOCK TRIAL TRAINING

The Criminal Case

MARCH 5, 1999

12:00 pm - 2:00 pm (Lunch will be served)

Utah Law & Justice Center • Salt Lake City

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General Information

This program is sponsored by the Law-Related Education ("LRE") Project, Inc., and the Administrative Office of the Courts to provide training on the criminal case that will be used in the LRE project's Twentieth Annual Utah Mock Trial Program.

Attendance is limited. Preference will be given to attorneys who 1) return the registration form, *and* 2) schedule to judge on or more mock trials, or commit to coach one or more mock trial team. Registration will be confirmed upon receipt of the mock trial scheduling/Coaching form that registering attorneys will be sent.

Attorneys whose registration is confirmed, and who cannot attend the live presentation, may view a videotape of the Mock Trial Training Workshop that will be sent to them. (Cost of the video tape is approximately $15.)

Agenda

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Virginia Lee, Mock Trial Coordinator, Law Related Education Project, Inc.

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Rules of Evidence

Issues Regarding State of Mind

Hon. Robert Hilder, Third District Court; Gregory Skordas, Esq., Watkiss, Dunning & Skordas

Issues to Consider in Training or Judging a Mock Trial Team

Gregory Skordas, Esq. Watkiss, Dunning & Skordas

Registration Form

YES, Please register me for the Mock Trial Training Workshop:

Name: _____

Address: _____

Phone: _____ Fax: _____ Email: _____

Registration Deadline is **JANUARY 15TH**

Please mail this registration form to:
Kelly Mullen, Administrative Office of the Courts
PO Box 140241, Salt Lake City, Utah 84114-0241
FAX: (801) 578-3843

Upon receipt of this registration form, you will be sent a mock trial scheduling/coaching form that should be returned before February 5th.

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Prepared by Mary M. Black, CIA

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DEPOSITIONS

DISCOVERY - SEE ALSO EVIDENCE

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Notice of Election of Bar Commissioners

First and Third Divisions

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for one member from the First Division and three members from the Third Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar office on or after January 10, and **completed petitions must be received no later than February 10.** Ballots will be mailed on or about March 1 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. on March 31. Ballots will be counted on April 1.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1) Space for up to a 200-word campaign message plus a photograph in the March issue of the *Utah Bar Journal.* The space may be used for biographical information, platform or other election promotion. Campaign messages for the March *Bar Journal* publication are due along with completed petitions, two photographs, and a short biographical sketch **no later than February 10.**

2) A set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division.

3) The Bar will insert a one-page letter from the candidates into the ballot mailer. Candidates would be responsible for delivering to the Bar no later than February 20 enough copies of letters for all attorneys in their division. (Call Bar office for count in your respective division.)

If you have any questions concerning this procedure, please contact John C. Baldwin, at the Bar office, 531-9077.

NOTE: According to the Rules of Integration and Management, residence is interpreted to the the mailing address according to the Bar's records.

Discipline Corner

RESIGNATION WITH DISCIPLINE PENDING

On November 3, 1998, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline in the matter of Michael R. Mueller. In the Petition for Resignation with Discipline Pending, Mueller admitted that he violated Rules 1.4 (Communication), 1.15(b) (Safekeeping Property), 8.4(a), (b), (c) and (d) (Misconduct) of the Rules of Professional Conduct.

In the spring of 1992, a couple retained Mueller to initiate a medical malpractice suit in Guam on behalf of the wife for claims arising from the maltreatment of the injuries she sustained in an automobile accident. The couple had independently initiated negotiations with the negligent driver's insurance carrier. The couple, with the assistance from Mueller, ultimately settled with the negligent driver's insurance carrier, and the carrier issued the check to both the couple and Mueller in December of 1992. Thereafter, on the couple's request and by mutual agreement, Mueller kept the settlement proceeds in his account to finance the medical malpractice lawsuit in Guam.

During the period of 1992 through 1997, the medical malpractice lawsuit in Guam faced two serious problems: (1) difficulties associating local counsel; (2) lack of evidence from collateral sources to support the couple's medical malpractices claims. In February 1997, frustrated and dissatisfied with the lack of progress in the wife's medical malpractice lawsuit in Guam, the couple demanded from Mueller a full accounting for the insurance settlement proceeds in his possession. On March 18, 1998, Mueller sent a letter to the wife which gave a full accounting for the disbursement of the settlement which included a check from Mueller for a portion, made out to the wife, which represented the remaining balance of her share of the settlement proceeds. Approximately two years prior to the couple's letter, Mueller had released the husband's share of the settlement proceeds directly to him, pursuant to his request. Before returning the funds to his clients, Mueller utilized a portion for his own use and benefit.

In March 1997 a client retained Mueller to represent him and negotiate a settlement on his behalf with an insurance company for personal injuries and property damage following an automobile accident. Mueller negotiated a settlement, deposited the proceeds in his trust account, and pursuant to an agreement with the client, withheld disbursement pending negotiation with the health care providers for the reduction of the client's medical bills. After approximately eight weeks of unsuccessful negotiation with the health care providers, and in response to the client's several telephone calls and written demand and intervention of counsel, Mueller released the entire balance to the client. During the eight week period the funds were in Mueller's trust account, Mueller utilized a portion for his personal use and benefit.

SUSPENSION

On October 28, 1998, the Honorable Tyrone E. Medley, Third Judicial District Court, entered an Order of Suspension suspending Rex B. Bushman from the practice of law for twelve months for violation of Rule 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.16(d) (Declining or Terminating Representation), 3.1 (Meritorious Claims and Contentions), 3.3 (Candor Toward the Tribunal), 3.5(a), (c), and (d) (Impartiality and Decorum of the Tribunal), 4.4 (Respect for Rights of Third Persons), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. The suspension was stayed and Bushman was placed on a twenty-four month supervised probation. In addition to other conditions, Bushman is required to attend the Utah State Bar Ethics School. The Order was based on a Stipulation for Discipline by Consent entered into by Bushman and the Office of Professional Conduct ("OPC").

Bushman has been diagnosed with a medical condition, which is controlled with medication. During a medically unsupervised period, Bushman's medication was not properly regulated and this causally contributed to misconduct with regard to his practice of law. During the noted period, Bushman filed frivolous Bar disciplinary complaints and lawsuits against his fellow attorneys only to harass or embarrass the attorneys. In each of these matters it was determined that there were no factual or legal grounds for the filings and they were determined to be without merit.

Additionally, Bushman failed to appear at hearings, misinformed clients regarding certain issues, threatened a judge regarding an order, and filed inaccurate pleadings.

In accordance with Rule 6.3(i) (Aggravation and Mitigation) of the Standards for Imposing Lawyer Sanctions, the OPC weighed Bushman's medical condition as a mitigating factor. Bushman has responded to his medication and as part of the stayed suspension/probation, will be monitored by a care provider to ensure that he continues to take his medication and that it is effective.

ADMONITION

On November 5, 1998, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct. The Order was based on a stipulation entered into by the attorney and the Office of Professional Conduct ("OPC").

A client retained the attorney in April 1992 to obtain the expungement of the client's criminal record. The client paid the attorney a retainer. Thereafter, the attorney determined that an insufficient period had elapsed since the client's conviction and an expungement was therefore not available. The attorney failed to adequately communicate with his client regarding the facts and circumstances of the denial of the expungement. The attorney failed to follow up on this matter and failed to timely proceed with a second expungement request after the appropriate time had elapsed. As a result of the attorney's inaction, the client later completed the expungement on his own with the help of court clerks. The fees paid to the attorney were earned, as the attorney made a good faith effort to expunge the client's record when he was first retained, and paid costs.

The attorney failed to cooperate with the OPC's investigation and failed to attend the screening panel hearing on the matter. By failing to respond to requests for information, the attorney was in violation of his duty to cooperate with the OPC.

Notice of Petition for Readmission

On October 2, 1997, Richard C. Landerman filed a Verified Petition for Readmission to the Bar, Civil Number 970907099, the Honorable William B. Bohling, Third Judicial District Court, presiding. Pursuant to Rule 25 (Reinstatement Following a Suspension of More Than Six Months; Readmission) of the Rules of Lawyer Discipline and Disability, the Office of Professional Conduct ("OPC") hereby gives notice of the petition. Any individuals wishing to express opposition or concurrence of the petition should file notice of their opposition or concurrence with the District Court within thirty days of the date of this publication.

On April 2, 1997, the Utah Supreme Court entered an Order Accepting the Petition of Richard S. Landerman for Resignation Pending Discipline. On November 30, 1990, Landerman was convicted of Conspiracy in violation of 18 U.S.C. §371, Assisting in the Preparation of False Tax Return in violation of 26 U.S.C. §7206(2), and Filing a False Tax Return in violation of 26 U.S.C. §7206(1). As a result of his conviction, Landerman was sentenced to two years imprisonment and five years probation. The Court placed Landerman on interim suspension on February 13, 1992. Pursuant to Rule 25, Rules of Lawyer Discipline and Disability, Landerman received credit from the date of his interim suspension.

Utah State Bar Mailing Lists

The Bar's roster of licensed lawyers is available for sale to third parties. Any lawyer who wishes to make his or her name unavailable, may do so by submitting a written request to Arnold Birrell @ Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834; Fax 531-0660.

Environmental Law Committee Brown Bag Lunch

Date: January 14, 1998 at 12:00 p.m.

Location: Kirton & McConkie
60 East South Temple, #1800
Salt Lake City, Utah

Topic: Environmental Law Committee
Brown Bag Planning Meeting

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the bar for the cost of $20.00. Seventy-seven opinions were approved by the Board of Bar Commissioners between January 1, 1988 and October 30, 1998. For an additional $10.00 ($30.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1998.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($20.00 each set)
_____	Ethics Opinions/ Subscription list	_____ ($30.00 both)

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

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Utah Legal Services seeking for Trustees

Utah Legal Services is seeking attorneys interested in serving as Trustees. ULS is the non-profit statewide provider of civil legal services to the poor with offices in Cedar City, Monticello, Ogden, Provo and Salt Lake City. Throughout the state ULS staff and volunteers concentrate on issues crucial to the survival needs of clients: maintaining safe housing; solving family conflicts and helping victims of domestic violence; and assisting disabled individuals and families to access financial support and health care. ULS has special programs to aid senior citizens, American Indians and migrant farmworkers with a variety of legal problems. If you are interested please contact Terry L. Catheart 380 North 200 West, #103, Bountiful, Utah 84010, 295-2391.

UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

- **You must provide a street address for your business and a street address for your residence.**
- **The address of your business is public information. The address of your residence is confidential and will not be disclosed to the public if it is different from the business address.**
- **If your residence is your place of business it is public information as your place of business.**
- **You may designate either your business, residence or a post office box for mailing purposes.**

***PLEASE PRINT**

1. Name _____ **Bar No.** _____ **Effective Date** _____

2. Business Address – Public Information

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

3. Residence Address – Private Information

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

4. Mailing Address – Which address do you want used for mailings? (Check one) (If P.O. Box, please fill out)

_____ Business _____ Residence

_____ P.O. Box Number _____ City _____ Zip _____

Signature _____

How is Utah's Current Judicial Selection Process Working? Some Opinions from Within and Without the Bar

by Brett J. DelPorto

Deputy Salt Lake County Attorney Paul G. Maughan is not one to take "no" for an answer.

In fact, he received a number of polite rejections – nine, to be exact – before he was selected in October by Governor Mike Leavitt to fill one of two vacancies on the Third District Court bench.

His advice to the aspiring judge? Be persistent. Work hard. And try not to get discouraged. "It's difficult emotionally because you feel somewhat on line," Maughan recalls. "I used to ask: 'What could I do differently?' But one of the commission members told me at one interview, 'You're not one bit better person if you're selected than if you're not.' And I think that's true . . . Being selected as a judge is kind of like being hit by lightning: You have to be in the right place at the right time. There just isn't any formula."

SOME APPLICANT'S REACTION TO THE JUDICIAL SELECTION PROCESS

Other applicants agree that the process is grueling, but still fair and worthwhile.

"It's a painful process to go through," said Randall N. Skanchy, finalist for the Third District Court vacancy who has applied four times previously, "and yet as I thought about it, I'm not sure there is any other way that would make it any less painful and yet get the kind of information the nominating commission needs to have. And when putting together the application, I realized I have accomplished a few things in life. So while the process is daunting, it is good to have an opportunity to reflect on what you've accomplished and where you need to go."

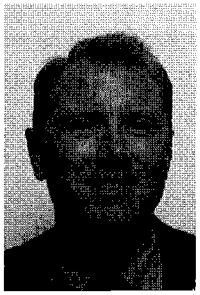
"It's a tense situation," said Elizabeth T. Dunning, a finalist for the recent Third District Court vacancy who has applied once previously. "The commission members are sitting in a semi-circle around a table, and you're in the hot seat. But they did an excellent job of putting me at ease . . . When I finished the interview process, I felt they had a sense of who I am. They asked questions designed to elicit what I had to offer as a trial judge, why I was interested in the work and what I think makes an excellent trial judge."

However, not all applicants are quite so sanguine about the experience.

"I think it's very frustrating," said one recent candidate who has unsuccessfully applied for a half-dozen judicial openings. "I don't know if I'll ever do it again. But it's hard to say it's unfair. I just don't know what they're looking for. I've interviewed with the governor several times, and the feedback is always good and positive. I wish he would just say he's going to appoint good friends; that would be easier because I'd know it's not me. But I don't think it's that blatantly political. I just don't see what he wants."

THE GOVERNOR'S INPUT INTO THE JUDICIAL NOMINATION PROCESS

What does it take to be selected for a state court judgeship? If the above comments are any indication, there are few hard and fast rules. Nonetheless, through interviews with commission members, applicants for judicial vacancies and the governor, it may be possible to distill a few general guidelines for those who may have their sights set on a judgeship.



Brett J. DelPorto, is an associate at the Salt Lake City law firm of Watkiss, Dunning & Skordas. He graduated from the University of Utah College of Law in 1994. Following graduation, he was a law clerk for the Honorable Pamela T. Greenwood, Utah Court of Appeals. In a previous life , he worked as a reporter and editor at the Deseret News.

But first, it is probably a good idea to address the common belief, or at least suspicion, that the selection process has more to do with politics than with merit. Is it true that the only way to be selected for a judgeship is to be in tight with the governor or members of the commission?

"I can honestly say I don't think that's true," said Carol McConkie, an elementary school secretary who is one of three non-lawyer members of the Third District Nominating commission. "The group of names we have sent up have been as diverse as they possibly can be, in terms of politics and experience. They are not all white and male. We send women, men, minorities, liberals, conservatives."

Charlotte Miller, a lawyer and member of the Third District Court Nominating Commission, says that in her experience the process has been thorough, fair and without any indication of manipulation by Leavitt or anyone else.

"I don't feel constrained at all," Miller said. "And my experience on the judicial nominating commission hasn't made me feel the group feels constrained."

"Governor Leavitt does not do a lot of lobbying." said H.E. "Budd" Scruggs, who is Leavitt's appointee as chairman of the Third District Nominating Commission. "Part of the reason he appointed me and others is he knows us well enough to trust our judgments. He's not a lawyer and has not spent a lot of time around the legal process. And I think that he understands that if he sets himself up as someone who does lobbying, he will be buried by avalanches of would-be judges."

Robin Riggs, Leavitt's former legal counsel and current commission member, agrees.

"There may be a time when the governor will have a really strong preference, but that hasn't been the case," said Riggs. "I want to do what Mike would want me to do - we're friends and we think alike - but he has never called me and said, 'I want this guy.'"

Of course, the governor did, in effect, say "I want this guy" recently with his reappointment of Third District Judge William Thorne. When Thorne inadvertently missed the filing deadline for the upcoming retention election, the governor stated publicly that he supported Thorne and would reappoint him if he reapplied and was nominated by the commission. Because Thorne is a well-respected judge, the governor's statement of support and ultimate reappointment of Thorne was not controversial. Nonetheless, it does indicate that the governor has the ability to get what he wants from the commission, at least under some circumstances.

"He (Leavitt) clearly wanted Bill Thorne," said Scruggs. "He said so publicly. Even with that, the commission took its responsibility very seriously. If we had gone through his (Thorne's) application and found a problem, I think the commission would have felt like they could have done something different. But Judge Thorne is so well-regarded that we had no problem" recommending him.

The governor also says that he has never pressured the commission to select a certain candidate and has no intention of doing so.

"A couple of times, I have expressed that I had high regard for a candidate and I hoped they will interview [him or her]," the governor said. "And the commission is interested in my views so they don't keep sending people who" won't ever be appointed. But "I don't recall any situation where I have campaigned hard to get someone before me."

"[I]n 1994, the governor proposed legislation . . . allowing the governor to appoint all commissioners and name a chairman."

RECENT CHANGES TO THE JUDICIAL SELECTION PROCESS

The concern that the commission is subject to manipulation by the governor dates back to 1994 when the process for selecting commissioners and judges was revised in a way to give the governor greater control over the nominating process. Prior to that time, the nominating commission was composed of the Chief Justice of the Utah Supreme Court, who acted as chairman; four commissioners appointed by the governor, none of whom could be lawyers and no more than two of whom could be of the same political party; and two commissioners appointed by the Utah State Bar, each from different political parties.[1]

According to newspaper accounts,[2] the governor became frustrated with the process because he believed the judiciary wielded too much power by virtue of the participation of the Chief Justice and the Bar, who overwhelmed the non-lawyer commissioners appointed by the governor. Thus, in 1994, the governor proposed legislation, which was approved by the Legislature, allowing the governor to appoint all commissioners and name a chairman. Under the new plan, the Chief Justice became a non-voting member of the commission who serves only to ensure the commission follows the rules promulgated by the Judicial Council. The governor has expansive discretion, limited only by the statutory requirements that he appoint no

more than four members of the same political party; that there be no more than four lawyers on the commission; and that two of those selected come from a list submitted by the Bar.[3]

SOME REACTION TO THE CHANGES TO THE PROCESS

The change was criticized by some, including Gordon R. Hall, then-Chief Justice of the Utah Supreme Court, who was quoted in newspaper accounts as saying that the governor's changes would politicize a process that had worked well since its adoption in 1969.[4]

"The selection of judges has always been an effort to avoid the political implications that apply to other kinds of elections," Hall said.

Hall, who has since retired from the bench, says he has had no experience with the new system and has no sense of how well it works. However, he stated that two key changes - removal of the chief justice as a voting member and requiring the commission to submit five names instead of three — "couldn't help but have an effect upon the process."

"When you expand the number of nominees, it makes a difference. The reason for expanding the number of nominees is that there were names that would not reach the governor's office that were the ones he wants." The new system, says Hall, "harkens back to old days when the governor simply made the selection of judges."

Miller said that although she believes the nominating process has worked well, the former process had the advantage of at least appearing to be less political.

"I probably favored the other system," she said. "Because the governor directly appoints all of the commissioners, some people may have the perception that the governor just tells the commission what to do. It's not the case, but that's the perception, and it may have a chilling effect on those interested in applying for judgeships. It can detract from the system being as good as it can be."

Perceptions aside, however, Miller says there has never been, to her knowledge, a "ringer" among the applicants, although there are always rumors that a certain candidate is the governor's choice. "It's kind of humorous when we send a list to the governor, and I hear there are three different people who are going to get appointed."

So, if becoming a judge is not simply a matter of being on the governor's Christmas list, then what does it take? Again, although there are no formulas, the following are suggestions gleaned from interviews with the governor, commission members and applicants.

GENERAL CRITERIA USED IN THE SELECTION PROCESS

1. Be good lawyer. It is, of course, axiomatic that those selected by the commission and the governor tend to be people with many years of experience practicing law in a variety of areas.

"Most of the candidates that apply are in their early 40s to early 50s who have had 15-20 years of active practice," said Leavitt. "To me, the fact that people have distinguished themselves as a good lawyer, in whatever role, public or private, is the most important criteria."

The governor says his decision also depends to some extent on the seat to be filled. "I tend to see selections to appellate and trial bench as based on different criteria," he said, "For the appellate court, ideology is somewhat more important. Most of it's revealed in their backgrounds - in the positions they've taken on behalf of clients. I try to ascertain to what extent they are an advocate and to what extent they buy into the positions they've advocated."

"It is . . . axiomatic that those selected by the commission and the governor tend to be people with many years of experience practicing law in a variety of areas."

Trial experience is also a plus, but those who are not litigators should not feel they are automatically ruled out.

"There are some members of the commission who prefer someone with more trial experience," said Riggs. "I think it's important to point, but not the overriding determining factor, although I wouldn't send someone who's been out of law school a couple of years." The bottom line is a candidate must be qualified, he said. "I wouldn't push for someone who wasn't qualified regardless of the preference of the governor."

Miller said she looks for candidates who enjoy the practice of law and she prefers candidates who have practiced at least 10 years. She said it is helpful for a candidate to have had significant exposure to trial practice, either in civil cases or criminal, although she notes that every candidate will have some gaps.

"Everybody's going to have to learn something," she said. "You won't find someone who has all those experiences. What you look for is someone who can learn quickly, understands their limitations and enjoys the legal process, because they're going to have to learn how every aspect of the process works."

Maughan, the recent Third District Court appointee, agrees. "Nobody can try enough cases in every area of law to become expert" in each area. "That's why they must look for the temperament and disposition that judges need."

2. Emphasize diversity in background. Although experience and success in practicing law are essential, it is also important to have a diverse background that includes pro bono legal work or other community service.

"In terms of qualities that make a good judge, I look for lots of common sense, lots of understanding and appreciation of the law," says Miller. "But I also look for experiences, not just experiences as a lawyer, but life experiences, which I think give a person good judgment. I always ask how they got to where they are and list what they consider the important aspects" of their careers. "If the most important thing they did is to be number one in their law school class, they're maybe not the best person to sit in judgment of others."

3. Get recommendations from respected lawyers or others who know you well. Miller says commission members get phone calls and letters from friends and colleagues of the applicants, which she sees as extremely helpful in selecting candidates.

"Although experience and success in practicing law are essential, it is also important to have a diverse background that includes pro bono legal work or other community service."

"I encourage bar members to give information to the commission," she said. "It's very helpful to get information from someone who has known a candidate for 20 years. I ask why they think this person would make a good judge; how they are a good lawyer; whether they're good with clients and opposing counsel."

Some candidates say they feel uncomfortable with soliciting support from friends and colleagues, but agree that it helps.

"I've heard that some people really play that card heavily and I'm uncomfortable doing it at all so I didn't do it much," recalls Maughan. Still, "I did have 2 or 3 people who knew members of committee write a letter."

4. Understand the process and prepare thoroughly. When a vacancy occurs, the commission must meet "as soon as practicable" to begin the selection process.[5] The commission then has 45 days during which to review applications, interview candidates (usually about 10 per seat) and send a list of five names per seat to the governor.

"We all get huge binders of material before we ever meet," according to Miller. "When we have our first meeting, we hear from the presiding Third District judge about what the judge perceives as the qualities of a good judge. We talk about how the process will go forward. Then we go through each applicant – there are usually 30-35 of them – and decide who will be interviewed."

Then comes the winnowing process.

"There are basically four categories of people," says Scruggs. "The first category are people who you don't have any idea why they applied. There's just nothing in their record to commend them for it. The second category is people who look sharp and capable, but don't have a lot of years of experience. The third category is the long list of people with 15-plus years of litigation or other very relevant experience and are highly recommended. Finally, there are usually one or two super-stars in every batch."

If you get an interview, it is important to think through the kinds of questions the commission members may ask. Miller advises interviewees to be especially mindful of things that may show up on background checks and credit reports.

"Think through ahead of time what they are going to talk about," she said. "Make sure you know who's on the commission so that you know who the audience is. And talk to others who are interviewed to get a feel for what questions were asked."

5. Don't overanalyze questions from commission members. Although preparation is important, it is possible to go too far.

"Ultimately, you need to be yourself and ought not be trying too hard to be something you're not," says Skanchy. For example, he said, during one of his first appearances before the commission, family court was purported to be the hot topic. "So, I read the justice task force report and had overanalyzed everything. And it turned out that all the questions they asked were just questions trying to elicit information about you and get you to talk about yourself."

Miller agrees. "Answer questions very honestly and sincerely because the commision can sense insincerity."

6. Don't be a jerk. The application form for those interested in becoming judges requires listing names of attorneys with whom you have associated as well as those with whom you have had an adversarial relationship. For that reason, the attorney

who has always practiced "guerilla-style" law may have a harsh realization when he or she decides to apply for a judgeship.

"What I've come away with is that the most important thing in getting favorably received by the nominating commission is to have appropriate relations with the court and with those who are your adversaries," said Skanchy. "At the end of trial or litigation, it matters that people can say that a lawyer represented his or her client well - competently, professionally and civilly."

7. Be persistent. Most of those who ultimately are appointed to judgeships have applied more than once. So try not to get discouraged.

"There are worse things than not being nominated," said Maughan. "But it is discouraging. It caused me to evaluate how much I really wanted to be a judge. But persistence and hard work are part of the process."

[1]Utah Code Ann. ß 20-1-7.3 (1993) (repealed).

[2]*See, e.g.*, "Leavitt Delays Plan to Seek Changes on Judicial Panel," *Deseret News*, October 12, 1993 (Deseret News Archives — hhtp://www.desnews.com/cgi-bin/libstory_plus?dn_all &9310120169).

[3]Utah Code Ann. §20A-12-103 (1998).

[4]*See, e.g., supra* note 2.

[5]Utah Code Ann. §20A-12-105 (1998).

A High Profile Year for the Bar Foundation

Until this year, the Utah Bar Foundation, like most other bar foundations across the country, has gone about its business quietly. Collecting revenue generated by voluntary designations of interest on lawyers' trust accounts, the Utah Bar Foundation this year distributed over $325,000 to organizations providing legal services to the disadvantaged, improving the administration of justice, and educating young citizens about the law. All of this was done with little, if any, fanfare.

Then, last June, along came *Phillips v. Washington Legal Foundation,* 1998 U.S. LEXIS 4003. In *Phillips,* the United States Supreme Court considered the IOLTA program adopted by the Texas Supreme Court. The sole issue presented was whether interest earned on client funds held in IOLTA accounts is "private property" of the client for purposes of the "takings" clause of the Fifth Amendment of the federal Constitution. While the Supreme Court held in a sharply divided 5-4 opinion that the interest earned was the private property of the client, it did not consider whether the Texas IOLTA program constituted a "taking" by the state nor the amount of "just compensation," if any, due to the client.

In the wake of *Phillips*, and after several states obtained legal opinions on the effect of the decision of their IOLTA programs, the Conference of Chief Justices issued a resolution voicing unanimous support for the continued operation of IOLTA programs across the country. Essentially, until the two constitutional issues under the takings clause are finally decided, the recommendation is that no change need be made to existing IOLTA programs.

So, what next? The case has now been remanded from the United States Supreme Court to the Fifth Circuit Court of Appeals to the U.S. District Court for the Western District of Texas, Austin Division. For the district court to find a Fifth Amendment violation and to enjoin the operation of the Texas or any other IOLTA program, it must answer both the "taking" and "just compensation" questions in the affirmative. In mid-September, the district court ordered additional briefing from the parties on these issues. Plaintiffs have since filed a motion for summary judgment, and defendants have filed and were granted a motion for extension of time to file their response and to reopen discovery. At this writing, discovery will close on January 4th, and defendants' responsive pleadings will be due two weeks later.

Here in Utah, Chief Justice Howe has urged strong continued support by members of the Bar for the IOLTA program. Recognizing that without the revenue generated by IOLTA, many organizations devoted to providing direct legal services to the disadvantaged would be unable to serve their clients, the Bar Foundation also urges your continued support of IOLTA. With your commitment, the Foundation will persevere in its mission, continuing to provide a significant source of income for organizations assisting those who would otherwise be unable to afford legal assistance.

Potential Issues for the 1999 General Session Utah State Legislature

Prepared by Jane Peterson
Information Coordinator, at the Office of Legislative Research and General Counsel.

ADMINISTRATIVE RULES

Administrative Rules Reauthorization – Each year the Administrative Rules Review Committee sponsors legislation to reauthorize the rules of the state. This legislation also repeals any rules the legislature determines should be repealed.

BUSINESS, LABOR, AND ECONOMIC DEVELOPMENT

Economic Development – A number of issues relating to economic development and growth have been raised by the committee. For example, the Department of Community and Economic Development (DCED) recently announced its plan to merge the Economic Development Corporation of Utah (a non-profit independent organization) with DCED's business recruiting division to create the Utah Business Development Partnership. Issues relating to residential development and housing have also been examined. Potential legislation may address landlords' rights when unlawful activities occur on their premises. The committee also reviewed impact fees for both single family dwellings as well as apartment buildings. The committee approved legislation, which would allow parties to request arbitration when an impact fee is challenged.

Financial Institutions – The committee studied a variety of issues raised by financial institutions ranging from credit unions to consumer credit. In light of recent state and federal litigation involving banks and credit unions, the legislature may consider legislation involving aspects of these financial institutions, including potential initiative petition language. The committee reviewed consumer credit issues and the need, if any, for legislative change; and encouraged the continued study of ways to maintain a business-friendly atmosphere which may also lead to potential legislation.

Occupational and Professional Licensure Sunrise Task Force – This task force was organized to study whether to create a review procedure for licensing new occupations and professions. The task force proposed implementation of a review procedure and is in the process of determining the specifics of the procedure. A final report, including proposed legislation, was presented to the Business, Labor, and Economic Development Interim Committee and the Legislative Management Committee.

Olympic Winter Games of 2002 – The legislature may examine the appropriate role of the state as a host during the Olympic Winter Games of 2002 and the security of the monies owed to the state and local governments by the Salt Lake Olympic Organizing Committee. Other issues may include what role, if any, state government should have in promoting or supporting winter sports in the state after the Olympic Winter Games of 2002.

Quasi-governmental Entities – The Business, Labor, and Economic Development Interim Committee studied quasi-governmental entities, with a focus on the Utah Technology Finance Corporation (UTFC). Potential legislation may address the nature of UTFC, one of at least ten quasi-governmental entities operating in Utah. The committee reviewed a legislative audit concerning UTFC and heard the results of a UTFC study prepared by a task force created by the Department of Community and Economic Development. Potential legislation will also address the Utah Science Center Authority, another quasi-governmental entity, which is planning to turn its operations over to Utah State University.

CONSTITUTIONAL REVISION

Local Government Amendments – The Constitutional Revision Commission conducted an ongoing study of the local government article and will suggest possible amendments to the 1999 Legislature.

Changing State Election Cycle – The commission recommended to amend the Utah Constitution to change the election cycle for state executive department officers to coincide with the national election cycle, effective in year 2004.

EDUCATION

Early Childhood Literacy – The Child Care Task Force is addressing legislation to activate the governor's initiative to enhance early childhood literacy throughout the state. The initiative suggests that every family understand the importance of a quality home environment, adequate child care, and a strong learning environment. Post-secondary educational programs can train individuals to become mentors, who in turn will train others. Mentors will play a key role with child care facilitators including child care providers and parents, the Head Start program, local PTAs, and educators in elementary schools. This concept was developed through the Child Care Task Force.

Middle School Reform – H.B. 182 from the 1998 General Session provided a $9 million appropriation to public education to reduce class size in grades 7 and 8. Legislation will be introduced in 1999 to reduce the size of classes in these two grades by two additional students. Recommendations for better teacher preparation in both inservice and preservice education are expected as well as a clear policy statement that student outcomes remain high.

Professional Teacher Development – The current law on teacher recertification was changed nearly two decades ago because the course criteria required then did not meaningfully enhance teacher professionalism. Proposed legislation requires the State Board of Education to establish rules which require individual teacher assessment and development of a training program to expose each teacher to a balanced agenda of college course work, inservice programs, workshops, site based research projects, participation in professional organizations, and leadership responsibilities. This concept was developed by a broad-based task force.

Textbooks in Public Schools – School fees burden the Utah educational system and adversely affect many Utah families. School employees administer monthly payment plans that many families are forced to use, and schools are often financially encumbered by subsidizing school fee waivers. Potential legislation provides $50 per student annually to eliminate textbook fees completely. The Education Interim Committee reviewed data demonstrating the impact of this proposed legislation on each school district and the ability of the state to provide $11 million to fund the cost of eliminating textbook fees.

GOVERNMENT OPERATIONS

Debt Collection – The state has a significant amount of outstanding accounts receivable. The committee studied several issues regarding the state's collection of debts (specifically the role and powers of the Office of State Debt Collection) and the issue of collecting court account receivables. This study is likely to result in two proposed pieces of legislation: one focusing on the collection of court account receivables and another addressing the powers and duties of the Office of State Debt Collection.

GRAMA – Voter Registration Form Amendments – The committee approved legislation clarifying which information is public, which is protected, and how fees for access to this information are to be set. The committee discussed this issue at its May, June, and July meetings.

Political Party Amendments – The committee reviewed this issue and recommended legislation titled "Political Party Amendments." The legislation requires county political parties to certify that the state political party's constitution and bylaws govern its organization and procedures or file a copy of its own constitution and bylaws. It also requires that political party bylaws include a process for resolving grievances against the political party, and that advance written notice of proposed changes to bylaws be given to candidates and delegates.

HEALTH AND HUMAN SERVICES

Genetic Testing Privacy – As a follow-up on legislation considered during the 1998 General Session, the Health and Human Services Interim Committee received extensive testimony and devoted considerable time to the consideration of legislation that would regulate the collection and use of genetic information. The legislation has the potential to affect individuals, employers, insurers, researchers, and others.

Local Mental Health Authority Reform – The Health and Human Services Interim Committee spent considerable time during the interim reviewing legislation that would clarify the roles and responsibilities of local mental health authorities and the state's Division of Mental Health with respect to private mental health providers.

INFORMATION TECHNOLOGY

Information Technology Budgeting Process – The commission is statutorily required to review information technology plans and budgets statewide for the purpose of making recommendations to the Executive Appropriations Committee. The commission, in conjunction with the reporting parties, is developing a new uniform reporting process. The intent of this project is to provide the Executive Appropriations Committee and legislature with a more uniform information technology budget.

Information Technology Infrastructure – During the 1998 General Session, legislation passed that reorganized the chief information office and required the chief information officer (CIO) to conduct a six-month study of how information technology is organized in state government and provide recommendations for improvement. The CIO's report included eight recommendations. Several of the recommendations, such as creating an Information Technology Investment Board and changing the organizational relationship between the CIO and the Division of Information Technology, will require legislative approval. The commission studied these recommendations which will likely result in legislation for the 1999 General Session.

Privacy – Two major privacy issues nationwide are theft of identity and access to medical records. Theft of identity is the illegal use of another individual's personal information such as date of birth or social security number for criminal purposes usually involving fraud. Access to medical records focuses on a patient's right to access or obtain a copy of their medical records. Most states provide patients with statutory access to their records; Utah does not. Currently, Utah's statutory access to a patient's medical records is restricted to the patient's attorney. Administrative rules governing patients' records indicate that physicians and hospitals should provide patient access, but a number of cases relating to access to medical records indicate the rules are not always understood or followed. Legislation for the 1999 General Session is being considered for both theft of identity and access to medical records.

Year 2000 – This issue involves the failure of computers to correctly read the date in the Year 2000 (Y2K). Because most computers have been programmed to read only two date digits, such as 99, when the year 1999 turns over to the year 2000, testing has revealed that computers will likely indicate the date as 00 or 1900. Because this issue potentially affects all computers statewide and could lead to some system failures, the commission scheduled monthly Y2K reviews of all aspects of state government. The commission's intent was to gain a full understanding of the problem, how the state is remediating suspected computer systems, and what contingency plans have been instituted. Legislation providing limited governmental immunity is being prepared to address those systems which fail despite the state's best efforts to correct the problems.

JUDICIARY

Judicial Conduct Commission – A recent Supreme Court decision prevents legislators from serving on the judicial conduct commission. The Judiciary Interim Committee reviewed legislation reestablishing the membership of the commission.

Statute of Limitations – The Judiciary Interim Committee reviewed proposed legislation to amend statutes of limitations and repose for improvements to real property. They discussed reducing the statute of limitations for a cause of action from five years to two years commencing on the earlier of the date of discovery or the date on which a cause of action should have been discovered through reasonable diligence.

LAW ENFORCEMENT AND CRIMINAL JUSTICE

Correctional Officer Compensation – The Law Enforcement and Criminal Justice Interim committee requested the governor to address in his proposed budget the disparity in correctional officers' salaries for the Department of Corrections. The committee recommended legislation, which will appropriate $10 million to the Department of Corrections to increase the salaries of correctional officers.

Jail Contracting and Reimbursement – The committee supported legislation titled "Sentencing of Convicted Felons." This legislation will require convicted felons to be sentenced to the Department of Corrections when their sentence is for probation which includes serving time in a county jail. This procedure will allow funding for these sentences to be handled by the Department of Corrections through jail contracting, rather than by the current jail reimbursement program.

Prison Privatization – The Department of Corrections is in the process of finalizing the Request for Proposals for a private correctional facility in Utah. There may be legislation created to support some of the requirements outlined in a private prison contract.

NATIVE AMERICAN LEGISLATIVE LIAISON COMMITTEE

Native American Remains – The committee considered policy issues regarding the protection of Indian remains. Legislation may be proposed to clarify statutes concerning abuse or desecration of a dead human body as they apply to historical human remains and include provisions strengthening state criminal penalties for disturbing Native American archeo-

logical sites.

Division of Indian Affairs – The committee reviewed the operations of the Division of Indian Affairs and considered legislation to revise the statutory purposes, duties, and responsibilities of the division.

NATURAL RESOURCES, AGRICULTURE AND ENVIRONMENT

Wildlife Licenses – The Natural Resources, Agriculture and Environment Interim Committee approved two bills relating to wildlife licensing. "Wildlife License Fee" allows individuals with certain handicaps or disabilities to receive free fishing licenses. "Registration Requirements for Falconry" requires a resident to obtain a certification of registration to possess a falcon and engage in the sport of falconry. The certificate of registration will be concurrent with the falconer's three-year federal license. The requirement to obtain a state falconry license is repealed.

Water Development – The State Water Development Commission, which is responsible to advise the governor and the legislature on how the water needs of the state will be met, is scheduled to terminate this year. The Natural Resources, Agriculture and Environment Interim Committee approved a bill to reauthorize the commission and expand its duties by allowing it to consider any water issue of statewide importance.

POLITICAL SUBDIVISIONS

County Government Amendments – Draft legislation was discussed that would include: 1) repealing the 60-day absence provision in Subsection 17-16-1(3), UCA; 2) clarifying absence allowable if it does not substantially impair the performance of official duties; 3) providing the reassignment of duties between elected county officials by ordinance of the governing body with the consent of the elected offices or by a majority vote of the county electorate; and 4) providing the creation of interlocal districts by the county governing bodies for other county functions besides prosecution districts such as assessment districts, highway districts, collection districts, auditing, and others.

Private Property Ombudsman – Draft legislation was discussed that would delay lawsuits while the ombudsman attempts to resolve disputes arising out of local government land use decisions or condemnation actions. The provision would only apply if the private property owner desires arbitration. The provision would not delay the effect of a local land use decision.

School Inspections – Legislation was discussed to 1) provide that a county or municipality may provide for the inspection of school construction if a school district is unable to provide its own qualified inspector; and 2) provide for the development and distribution of a school building construction and inspection resource manual by the State Board of Education; and 3) require the board to develop a process for the verification of school building inspections by qualified inspectors.

PUBLIC UTILITIES AND TECHNOLOGY

Electrical Deregulation – The Electrical Deregulation and Customer Choice Task Force completed the second year of a two-year study on whether to allow competition in the generation of retail electrical power. The task force reported on its study to the Business, Labor, and Economic Development and the Public Utilities and Technology Interim Committees. The task force was repealed November 30, 1998.

Revisiting the 1995 Telecommunications Reform Act – The 1995 Utah Telecommunications Reform Act created a process for the incumbent local exchange carrier to provide backbone access to competitive entries in exchange for moving from rate-of-return regulation to a less controlled price-listing based model. Some of the main reasons for change included more choice, higher quality, and lower costs. However, after three years of intensive negotiations, many of the original parties to the agreement believe that some additional changes are necessary for the 1995 act to be fully implemented. The Public Utilities and Technology Interim Committee has been a forum for a discussion of the issues and provided an opportunity to share any potential legislation being considered for the 1999 General Session.

Slamming, Cramming, Spamming, and Telemarketing – One possible side effect of governmental telephone deregulation has been an increase in certain industry practices, such as slamming (changing an individual's long distance telephone provider without their knowledge and consent), cramming (unauthorized billing of good and services on an individual's telephone bill), spamming (a form of electronic junk mail that is intended to cause the recipient discomfort or harm), and telemarketing (contact by solicitors via the telephone or computer for the purpose of selling goods or services) , which have unfairly burdened consumers, businesses, and local exchange carriers with inappropriate charges. Given the testimony from a number of affected parties, it is likely that legislation at both the federal and state levels will be forthcoming.

REVENUE AND TAXATION

Income Tax Credit for Sales Tax Paid on Food – Proposed legislation provides for a refundable Individual Income Tax Credit of $20 for each personal exemption claimed by the taxpayer to assist in meeting the burden of paying sales and use taxes levied on food.

Individual Income Tax Reform – Some changes to the state's individual income tax system that may be considered by the legislature include: 1) eliminating "marriage penalties" by increasing the amount of adjusted gross income at which the retirement income deduction and the personal retirement exemption are reduced; 2) increasing the amount of federal income taxes that may be deducted from state income taxes; 3) increasing the state personal exemption; and 4) indexing the tax brackets for future inflation.

Long-Term Care Amendments – Proposed legislation creates an Individual Income Tax deduction for long-term care insurance premiums and allows the use of medical savings accounts for long-term care insurance.

Manufacturing Sales and Use Tax Exemption – The committee discussed modifying the manufacturing exemption to retain a 100% exemption for normal operating replacements.

Research Tax Credit Modifications – Proposed legislation modifies the Individual Income Tax and Corporate Income Tax credits for research activities conducted in the state to allow certain taxpayers an irrevocable election to be treated as a start up company for purposes of calculating the base amount and provides that a taxpayer must use the machinery or equipment for at least 12 months in qualified research for the credit to be claimed.

Sales and Use Tax Exemption for Pollution Control Facilities – The current sales and use tax exemption for pollution control facilities is scheduled to expire on July 1, 1999. The legislature will consider legislation extending this sales and use tax exemption through June 30, 2004.

TRANSPORTATION

Driver Training and Licensing – Traffic accidents among teenage drivers are proportionately higher than any other group. Driving inexperience, lack of driving skills, and poor judgment among teenage drivers are major contributors to this problem. Potential legislation may address how teenage drivers can receive more supervised behind-the-wheel driving experience prior to obtaining a driver license.

Highway Jurisdiction and Funding – S.B. 176, "Highway Jurisdiction and Funding Study," which passed during the 1998 General Session required the Transportation Interim Committee to review and make recommendations during the 1998 interim on the allocation of highways and the distribution of funding between state and local jurisdictions. The municipalities, counties, and the Utah Department of Transportation have provided significant input and assistance to the committee. The highways which should be transferred and funding charges that should accompany any transfers remain under study.

Seat Belt and Child Restraint Devices – Current Utah law does not cover back seat passengers older than ten years of age, and the law may only be enforced as a secondary offense. In 1996, an estimated 128 people involved in Utah traffic accidents would not have died if they had been wearing seat belts. The Traffic Safety Task Force endorsed draft legislation to require all vehicle occupants to wear seat belts or child restraint devices, allow enforcement as a primary offense, and increase the fines for not wearing seat belts.

WORKFORCE SERVICES

Welfare Reform – The Workforce Services Interim Committee continued to monitor the implementation of state and federal welfare reform legislation and may submit legislation to modify state law if adjustments are needed. Possible legislation includes public assistance eligibility, child literacy programs, child care provider criminal background check amendments, and credit for contributions to child care.

Landlord – Tenant Possession Bonds

Free* 1 Hour CLE Training

***Free for attorneys who agree to volunteer once a month in the Possession Bond Project in the next year. $50 for everyone else.**

Law & Justice Center, 645 S. 200 E.

Tuesday, January 26, 5:30 - 6:30 pm

Learn about this important part of the eviction process. Debuting a new comprehensive possession bond form to ensure you use the best practices available.

Register with Mary at 328-8891, x.304 by Friday, January 15, 1999.

Sponsored by: Salt Lake County Bar Association, Utah Legal Services, Utah State Bar Possession Bond Project

CLE Calendar

FOR AN UPDATED CLE CALENDAR ACCESS THE BAR'S WEBSITE AT www.utahbar.org

LAW AND ECONOMIC SOCIETY: MAXIMIZING THE VALUE OF INTELLECTUAL PROPERTY – RICHARD HOFFMAN, PRICEWATERHOUSECOOPERS

Date: Thursday, January 7, 1999
Time: 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 includes lunch
CLE Credit: 1 HOUR

ALI-ABA SATELLITE SEMINAR: "TWO MERGERS & ACQUISITIONS MINI-COURSES; 1) PROTECTING THE M&A DEAL: NEGOTIATING 'WALK RIGHTS,' 'LOCKUPS,' AND OTHER DEALS, AND 2) FINANCIAL AND ACCOUNTING PROVISIONS IN ACQUISITION AGREEMENTS"

Date: Thursday, January 28, 1999
Time: 10:00 a.m. to 11:30 a.m. and 12:00 p.m. to 1:30 p.m.
Place: Utah Law & Justice Center
Fee: $125.00 per program or $195 for both
65/95 for government employees
$25/40 for students
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 1.5 HOURS per program

NLCLE WORKSHOP: BANKRUPTCY

Date: Thursday, January 28, 1999
Time: 5:30 p.m. to 8:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 for Young Lawyer Members
$60.00 for non members
CLE Credit: 3.0 HOURS NLCLE

ALI-ABA SATELLITE SEMINAR: ANNUAL WINTER ESTATE PLANNING PRACTICE UPDATE

Date: Wednesday, February 3, 1999
Time: 10:00 a.m. to 1:15 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 per program; $125 for government employees; $50 for students
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 3.0 HOURS

253-6397

ALI-ABA SATELLITE SEMINAR: EMPLOYEE BENEFITS CHANGES FOR 1999

Date: Thursday, February 11, 1999
Time: 10:00 a.m. to 1:15 p.m.
Place: Utah Law & Justice Center
Fee: $165.00 per program; $125 for government employees; $50 for students
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 1.5 HOURS per program

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

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

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

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2. _____ _____

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

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Address City, State, Zip

Bar Number American Express/MasterCard/VISA Exp. Date

Credit Card Billing Address City, State, ZIP

Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee,* will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

LAW AND ECONOMIC SOCIETY: THE LAW AND ECONOMICS OF CONSTRUCTION CLAIM DAMAGES – PAUL FICCA, ARTHUR ANDERSON

Date: Thursday, March 11, 1999
Time: 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $35.00 includes lunch
CLE Credit: 1 HOUR

ALI-ABA SATELLITE SEMINAR: COPYRIGHT & TRADEMARK LAW FOR THE NONSPECIALIST

Date: Thursday, April 8, 1999
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00 per program
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 6.0 HOURS

NEW LAWYERS MANDATORY SEMINAR

Date: Friday, June 6, 1999
Time: 8:30 a.m. to 12:00 p.m.
Place: Utah Law & Justice Center
Fee: $40.00
(To register, please send in your registration to the Utah State Bar with your name and bar number.) All New Lawyers in Utah are required to attend one Mandatory Seminar during their first compliance period.
CLE Credit: *Fulfills New Lawyer Ethics Requirements*

Watch for a mailer on upcoming NLCLE Workshops for 1999

Nominations Sought For 1999 ABA Section of Business Law Public Service Awards

Nominations are now being accepted by the American Bar Association Section of Business Law for its National Public Service Award. The award recognizes significant pro bono services rendered to the poor in a business context, and the achievements resulting from the public service work for the clients and the client groups represented.

The award is an outgrowth of the section program "A Businesses Commitment (ABC)," which is designed to match business lawyers and their areas of expertise with those unable to afford a lawyers. Separate awards will be given in both individual and firm/organization categories.

Nominees must fulfill one of the following criteria:

- Demonstrated dedication to the development and delivery of legal services to the poor through a pro bono program;
- Contributed to developing innovative approaches to delivery of volunteer legal services;
- Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population;
- Provided sustained counsel to poor or underserved individuals or organizations.

Nominees may *not* include either individuals who provide legal services to the poor for a fee or organizations that predominantly serve the poor.

The winners of the 1998 Section of Business Law National Public Service award were Marion A. Cowell Jr., of Charlotte, N.C., and the Boston law firm of Goulston & Storrs.

Nominations must be received by Feb. 12, 1999. Submissions must include name, firm name, address and phone number for both nominee and nominator; the nominee's resume (no longer than three pages) including practice area, service contributions, educational background and bar association activities; a description of how the nominee meets the nomination criteria, the nature of the pro bono work, and any documentation of the work including articles or brochures, and references. Letters of support from other individuals and organizations may be included.

All nominations will be considered by the section's Pro Bono Committee, and the winner and nominator will be notified by March 15, 1999. The award will be presented at the 1999 Spring Meeting of the ABA's Business Law Section. For more information or to submit a nomination contact Sue Daly, ABA Section of Business Law, ABC National Public Service Award, 750 North Lake Shore Drive, Chicago, Ill. 60611, 312/988-6244.

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words – $20.00 / 51-100 words – $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please call (801) 297-7022.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 486-9095. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

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

CAVEAT – The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

POSITIONS AVAILABLE

Busy, conservative natural resources law firm is looking for full time attorney. Prefer 1 to 3 years litigation experience, proven academic record and strong research and writing skills. Interest in natural resource issues, administrative law and public speaking useful. Send resume, law school transcript, writing sample and references to Budd-Falen Law Offices, P.C. 300 East 18th Street, (82001) Post Office Box 346, Cheyenne, Wyoming 82003. Questions can be directed to Frank Falen, Partner @ (307) 632-5105.

Northern Utah law Firm with main office in Brigham City, Utah, is accepting applications from qualified applicants for an associate position in its Brigham City office. Broad general, civil practice background helpful. Please send resume to P.O. Box 876, Brigham City, Utah 84302..

Salt Lake City business and estate planning firm seeks attorney with 2-3 years business and estate planning experience. Position involves significant client contact and excellent written and verbal communication skills are required. Inquiries will be kept confidential. Please send resume and references to: Christine Critchley, Utah State Bar, 645 South 200 East, Confidential Box #60, Salt Lake City, Utah 84111.

Small firm seeks associate for family law practice. Benefits, salary negotiable. Respond with resume to Corporon and Williams, Attn. Tracie, 808 East South Temple, Salt Lake City, Utah 84102.

Attorney/Legal Assistant: Salt Lake Attorney seeks associate attorney with or without experience and legal assistant with minimum one year experience. Interest in real estate and collection important. Send resume and transcript to: Christine Critchley, Utah State Bar, 645 South 200 East, Confidential Box #61, Salt Lake City, Utah 84111.

POSITIONS SOUGHT

CONTRACT WORK; Ease your workload and let us help you. Small firm with civil and criminal experience is available for contract work at reasonable rates. Services include research, document drafting, appeals, and court appearances. Overson, Bray & Hanseen, L.L.C., 1366 Murray-Holladay Road, Salt Lake City, Utah 84117 (801) 277-0325.

"Attorney licensed in GA., 10 years experience, relocated to Salt Lake seeking free lance research, writing, investigation, etc., very familiar with law library, clerked for state court judge. Expertise in personal injury, criminal, bankruptcy and family law. Contact me at : P.O. Box 522206, Salt Lake City, Utah 84152-2206."

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Small law firm downtown with deluxe office space for one attorney. Facilities include private office, receptionist, conference room, limited library, fax, copier, telephone system, kitchen facilities. Call Lori @ (801) 532-7858.

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Deluxe office space for one attorney. Share with three other attorney's. Includes large private office, reception area, parking immediately adjacent to building, computer networking capability, law on disc, fax, copier, telephone system. Easy access in the heart of Holladay. Must see to appreciate. 4212 Highland Drive. Call: (801) 272-1013.

ATTRACTIVE OFFICE SPACE is available at prime downtown location, in the McIntyre Building, 68 South Main Street. 1-15 elegant offices in different sizes, complete with reception service, secretary space, conference room, telephone, parking, fax machine, copier and library available. For additional information, please call (8010 531-8300.

Deluxe office space available for one or two attorneys in Broadway Centre downtown. Share with three other attorneys. Facilities include receptionist, conference room, fax, copier, telephone system, free gym facilities, close proximity to courts, secretarial station and storage. Overflow work available. Call 375-7100.

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Attorney office sharing with conference room, receptionist, good off-street parking, copier and fax. Close to courts and law library. Call (801) 355-5300.

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The Utah Antidiscrimination and Labor Division is compiling a list of attorneys willing to represent plaintiffs in cases where the Division has determined that unlawful employment discrimination has occurred. The list will be provided to plaintiffs when the Division's determination has been appealed and plaintiffs are preparing for a hearing before an Administrative Law Judge. Attorneys who wish to be included on this list should contact Marlo Fresques, 536-7922, at the Division.

Get To Know Your Bar Staff

KATIE BOWERS

Katie was born and raised in Salt Lake City. She is the fourth of five girls. She attended Hillcrest High School and graduated in 1995. She then attended Salt Lake Community College for two years, and is now attending the University of Utah where she hopes to graduate in Speech Pathology.

Before coming to work for the Bar, Katie worked as a receptionist for Valley Mental Health. She currently works for the Office of Professional Conduct as the receptionist.

Katie enjoys spending time with her husband, Shad and their families. She also enjoys; reading, making crafts, camping, and playing sports.

DAVID V. PENA

Dave was raised in Los Angeles. He moved to Utah to attend Southern Utah University (then South Utah State College). While attending SUU he met his future bride.

Dave earned a Bachelor of Science degree in Political Science from SUU and enrolled in the University of Utah College of Law where he earned his Juris Doctorate Degree in 1994. He was a staff member and Managing Editor of the *Journal of Contemporary Law* and interned for Utah Supreme Court Justice Christine M. Durham and the United States Department of Justice, Civil Rights Division, Special Litigation Section, in Washington, D.C.

Upon graduation from law school in 1994, he was hired by the Department of Justice and assigned to the Civil Rights Division, Employment Litigation Section in Washington, where he investigated and prosecuted claims of employment discrimination under Title VII of the Civil Rights Act of 1964. In 1997 he returned to Utah and rejoined his soon to be wife and the Utah State Bar's Office of Professional Conduct where he serves as Assistant Counsel. He was married on January 3, 1998 and he and his wife, Karen, are expecting their first child in April.

While with the Justice Department, Dave practiced primarily in Louisiana, Mississippi, Wisconsin and Southern California. Dave says his experience practicing law in other states has given him a great appreciation for his colleagues here in Utah. "The attorneys I deal with, including respondents and opposing counsel, are for the most part incredibly civil and professional. Even though most of my interaction with other attorneys in Utah occurs under very difficult circumstances, I have never been subject to the type of hostility and unprofessional behavior I regularly encountered in other states."

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297-7035

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REMINDER
Mandatory Continuing Legal Education Compliance

Pursuant to Rule 5 Rules And Regulations Governing Mandatory Continuing Legal Education attorneys who are on the even year compliance cycle are required to file a "Certificate of Compliance" with the Utah State Board of Continuing Legal Education by January 31, 1999. The "Certificate of Compliance" shall include the completion of all accredited continuing legal education ending with the preceding 31st day of December.

The general Mandatory Continuing Legal Education requirement is twenty-four (24) credit hours of approved Continuing Legal Education per two-year period. plus three (3) credit hours of approved ETHICS, for a combined twenty-seven (27) hour total.

New Lawyers are required to complete the following: a) a one day New Lawyers Continuing Legal Education seminar which is given annually; b) twelve (12) credit hours of approved live NLCLE workshops that are sponsored by the Utah State Bar; and c) twelve (12) credit hours of approved continuing legal education.

Attorneys are required to maintain their own records as to the number of hours accumulated. The attached "Certificate of Compliance" shall include all programs that have been attended that satisfy the Continuing Legal Education requirement, unless you have received an exemption from the Utah State Board of Continuing Legal Education.

Should you have questions regarding the legal education requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator, at (801) 531-9077.

CERTIFICATE OF COMPLIANCE

For Years 19_____ and 19_____

Utah State Board of
Continuing Legal Education
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 • FAX (801) 531-0660

Name:_____ Utah State Bar Number:_____

Address:_____ Telephone Number:_____

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

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

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through self-study with audio and video tapes. See Regulation 4(d)-101(a).

B. Writing and Publishing an Article. Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least sixty days prior to reporting the activity for credit. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. See Regulation 4(d)-101(b).

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive three hours of credit for each hour spent in lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. See Regulation 4(d)-101(c).

D. CLE Program. There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at an accredited legal education program. However, a minimum of one-third of the credit hour requirement must be obtained through attendance at live continuing legal education programs.

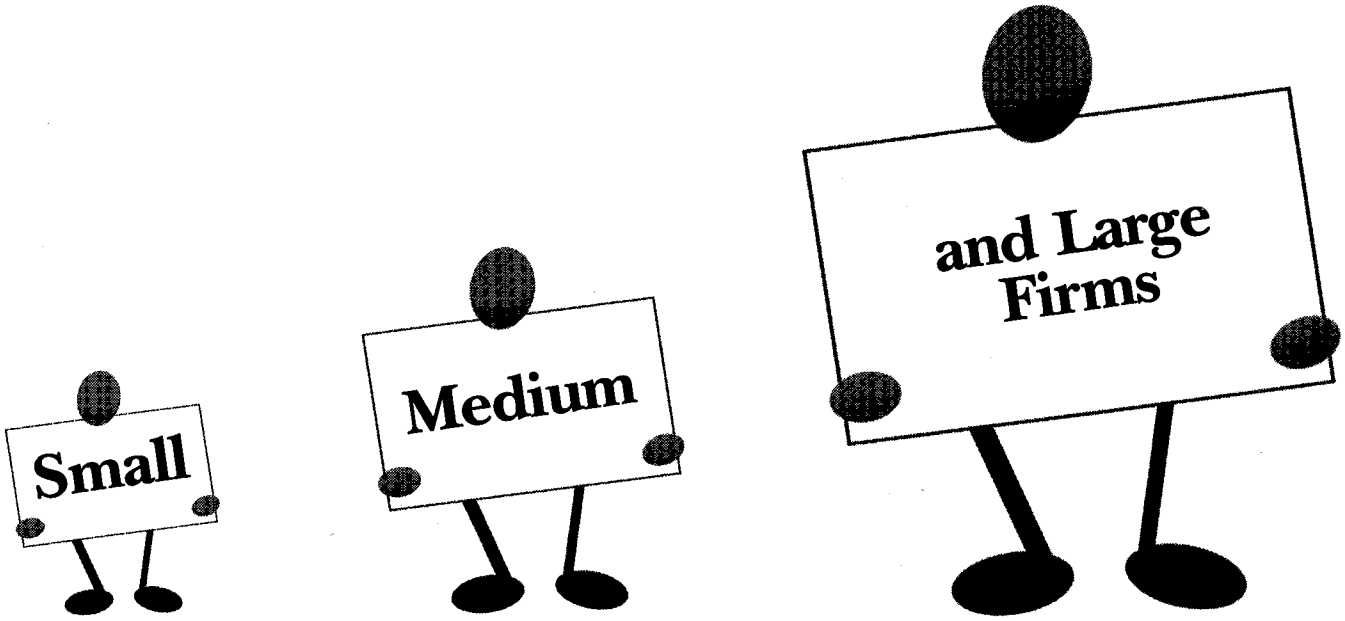
THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 5-102 – In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a **$50.00** late fee.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulations 5-103(1).

DATE:_____ **SIGNATURE:** _____

Regulation 5-103(1) – Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. This proof shall be retained by the attorney for a period of four years from the end of the period of which the statement of compliance is filed, and shall be submitted to the board upon written request.



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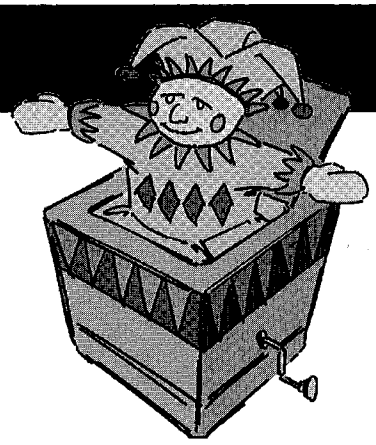

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