

# Utah Bar Journal

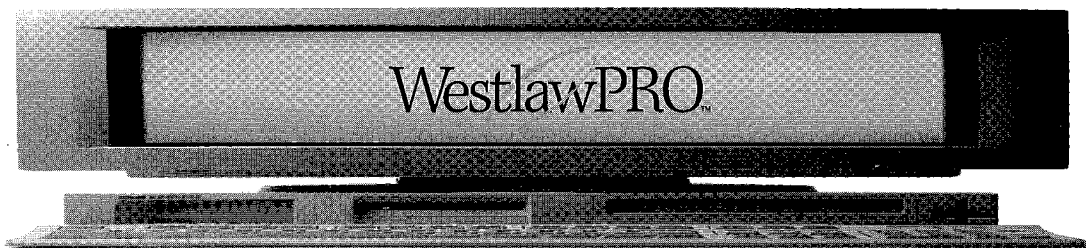
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# Table of Contents

President's Message	
A Call For Action by James C. Jenkins	5
Taming the Takings Tiger by John Martinez and Nick J. Colessides	7
Murder Most Fowl by Lawrence R. Barusch	14
Subject Index – January 1994 – December 1998	17
State Bar News	37
The Young Lawyer	41
Utah Bar Foundation	46
Legislative Report	47
CLE Calendar	54
Classified Ads	56

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## The Utah Bar Journal

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### A Call For Action

by James C. Jenkins

**T**his 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<sup>1</sup>)

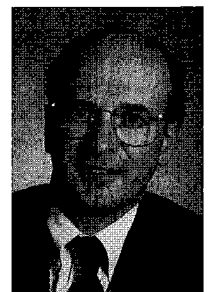
Some members of the Legislature quickly responded to the Court's opinion by questioning the constitutionality of the entire Commission as well as suggesting a multitude of remedies, including election of judges, periodic judicial retention and reconfirmation proceedings, and implementation of impeachment 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<sup>2</sup>. 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 Com-

mission 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](http://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](mailto:jjenkins@n1.net).

<sup>1</sup>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.

<sup>2</sup>**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<sup>1</sup>

*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].<sup>2</sup>*

"Growth" is bad if it means one's formerly pristine view over someone else's land will be spoiled by the construction of houses.<sup>3</sup> "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.<sup>4</sup> 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.

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*property, real estate finance and development, and state and local government law. He is author of LOCAL GOVERNMENT LAW, a 4-volume treatise published by WestGroup. He also consults extensively on the takings problem.*



"Takings" are situations in which government has acted, *other than through the conscious, purposeful exercise of the power of eminent domain*,<sup>5</sup> 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,"<sup>6</sup> (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,<sup>7</sup> Due Process,<sup>8</sup> Equal Protection,<sup>9</sup> Contracts,<sup>10</sup> or other constitutional clauses.<sup>11</sup>

In a 1996 article in the *Utah Bar Journal*,<sup>12</sup> 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.<sup>13</sup> The Supreme Court has at times applied these factors directly.<sup>14</sup> 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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used by the government do not "substantially advance" the ends sought to be achieved.<sup>15</sup> 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.<sup>16</sup>

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?<sup>17</sup> Second, one may instead apply the standard developed by the Court in *Dolan v. City of Tigard*,<sup>18</sup> 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.<sup>19</sup>

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*,<sup>20</sup> 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.

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.<sup>21</sup> Since 1993, Utah state agencies have been required to conduct

"takings impact assessments" which impose requirements very similar to those imposed by *Dolan*.<sup>22</sup> In 1997, however, the state legislature gave state agencies a five-year extension, until January 1, 1999, to adopt regulations to implement such requirements.<sup>23</sup> Local Utah governments, moreover, have never been required to make such findings.<sup>24</sup>

## II. JURY OR JUDGE QUESTIONS?

Whether the takings question is one of law, fact, or both, has confounded the courts.<sup>25</sup> 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

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



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.<sup>26</sup>

### 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.<sup>27</sup> It has been expressed as "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."<sup>28</sup>

Pendent state law claims can also be adjudicated by a federal court under its supplemental jurisdiction.<sup>29</sup>

In *Bateman v. City of West Bountiful*,<sup>30</sup> 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*,<sup>31</sup> 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.<sup>32</sup>

In addition, however, there are three "prudential" components to the ripeness doctrine under *Williamson County* which are addressed to a court's discretion.<sup>33</sup> (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;"<sup>34</sup> (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.<sup>35</sup> (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.<sup>36</sup>

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

*"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."*

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 . . . ."<sup>37</sup> 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."<sup>38</sup> 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.<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup> Congress may ultimately decide the question by modifying federal court subject matter jurisdiction.<sup>44</sup>

#### 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*.<sup>45</sup> However, the Supreme Court has not confronted the issue squarely. Some state courts hold that only the original owner may sue.<sup>46</sup> 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.<sup>47</sup> 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*,<sup>48</sup> 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

*"[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."*

First Circuit Court of Appeals reversed the judgment against the city, but upheld the judgment against the individual defendants.<sup>49</sup> 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."<sup>50</sup>

## 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.

<sup>1</sup>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 C. 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).

<sup>2</sup>"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.

<sup>3</sup>*Id.*, at page A-8, cols. 1-2.

<sup>4</sup>*Id.*, at page A-8, col. 2.

<sup>5</sup>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).

<sup>6</sup>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").

<sup>7</sup>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").

<sup>8</sup>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).

<sup>9</sup>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).

<sup>10</sup>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").

<sup>11</sup>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).

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

<sup>13</sup>*Penn Central Transp. Co. v. New York*, 438 U.S. 104, 117 (1978).

<sup>14</sup>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).

<sup>15</sup>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).

<sup>16</sup>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).

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

<sup>18</sup>512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994).

<sup>19</sup>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).

<sup>20</sup>*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).

<sup>21</sup>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 A.2d 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).

<sup>22</sup>Utah Code Ann. §§63-90-1-4.

<sup>23</sup>Utah Code Ann. §§63-90-3(3).

<sup>24</sup>Utah Code Ann. §§63-90a-1-4.

<sup>25</sup>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).

<sup>26</sup>For a discussion of these ideas, see John Martinez, *Taking Time Seriously: The Federal Constitutional Right to be Free From "Starring" 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).

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

<sup>28</sup>*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)); *Cobens 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").

<sup>29</sup>42 U.S.C. §§1981, 1982, 1983, 1985, 1988; 28 U.S.C. §§1331 and 1343.

<sup>30</sup>89 F.3d 704, 706 (10th Cir. 1996).

<sup>31</sup>473 U.S. 172 (1985).

<sup>32</sup>*Suitum v. Taboe Regional Planning Agency*, 117 S. Ct. 1659, 1664-65, n.7 (1997)

<sup>33</sup>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).

<sup>34</sup>*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")).

<sup>35</sup>*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).

<sup>36</sup>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).

<sup>37</sup>*Williamson County*, 473 U.S. at 196-97.

<sup>38</sup>*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).

<sup>39</sup>See generally 4 Libonati & Martinez, LOCAL GOVERNMENT LAW, Section 27.27 (Notice of Claim).

<sup>40</sup>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).

<sup>41</sup>*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).

<sup>42</sup>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).

<sup>43</sup>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).

<sup>44</sup>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).

<sup>45</sup>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."

<sup>46</sup>*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).

<sup>47</sup>See, e.g., *Hoover v. Pierce County*, 79 Wash. App. 427, 903 P.2d 464 (1995).

<sup>48</sup>118 S. Ct. 966 (1998).

<sup>49</sup>*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).

<sup>50</sup>See 4 Libonati & Martinez, LOCAL GOVERNMENT LAW, §27.11.50 (discussing qualified immunity).



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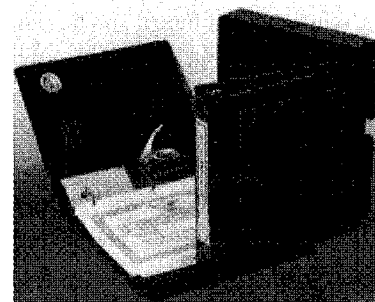
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# ***Murder Most Fowl***

## ***A Meditation on Intestacy. Past, Present and Future***

*by Lawrence R. Barusch*

**I**t 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.<sup>1</sup> 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<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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 off 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?*

<sup>1</sup>Utah Probate Code §75-2-103.

<sup>2</sup>Utah Probate Code §75-2-803.

<sup>3</sup>Old Utah Probate Code §§75-2-103 and 75-2-106.

<sup>4</sup>Utah Probate Code §75-2-709.

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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

Welcome

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

Rules of Criminal Procedure

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.

# ***Subject Index***

## ***Utah Bar Journal – January 1994 – December 1998***

*Prepared by Mary M. Black, CLA*

### **ADOPTION**

- "Basic Procedure of a Step-Parent Adoption,"  
Jeannine P. Timothy March 94 at 16

### **ALCOHOLISM**

- "There Was Something Wrong in My Life: One Alcoholic's Story,"  
Anonymous March 94 at 9

### **ALIMONY**

- "Recent Twists and Turns in the Evolution of Alimony,"  
David S. Dolowitz Jun/Jul 94 at 6

### **ALTERNATIVE DISPUTE RESOLUTION**

- "1994 State of the Judiciary,"  
Chief Justice Michael D. Zimmerman March 94 at 6

- "Our Legislature at 'Work',"  
H. James Clegg Apr 94 at 5

- "Former Chief Justice of Utah Supreme Court Heads ADR  
Practice Group" Aug/Sep 94 at 25

- "Case Profiles for Successful Mediation,"  
Marcella Keck Aug/Sep 94 at 37

- "Alternative Dispute Resolution in the U.S. District Court,"  
Markus B. Zimmer & Laura M. Gray Nov 94 at 12

- "Effective Lawyer Preparation and Participation in Mediation:  
From a Mediator's Perspective,"  
James R. Holbrook Dec 94 at 16

- "Court-Annexed Mediation: Thirteen Questions,"  
Judge William B. Bohling Dec 94 at 31

- "Informational Potpourri,"  
Craig M. Snyder Jan 95 at 7

- "Utah Dispute Resolution: A Community Mediation Program,"  
Marlene W. Lehtinen Feb 95 at 15

- "Checklist for Utah State Court-Annexed Arbitration,"  
James R. Holbrook Apr 95 at 19

- "ADR and Access to the Courts,"  
Peter W. Billings, Sr. Dec 95 at 12

- "Alternative Dispute Resolution and the Courts,"  
Chief Justice Michael Zimmerman Apr 96 at 11

- "Utah Dispute Resolution,"  
Jane Semmel Nov 97 at 38

- "Utah's Appellate Mediation Office Opens January 1998/A New  
Option for Case Resolution at the Utah Court of Appeals,"  
Judge Michael J. Wilkins & Karen S. Hobbs Dec 97 at 25

- "New Requirement for Mediation in All Civil Cases, The,"  
Thomas Arnett & Hedi Nestel VoirDire Sum 98 at 29

### **AMERICANS WITH DISABILITIES ACT (ADA)**

- "Can State Prisoners Sue Under Federal Disabilities Law?"  
D. Kyle Sampson Sep 98 at 17

### **ANTI-TRUST**

- "Cutting Edge Antitrust Issues Involving Utah Companies,"  
J. Flynn, M. Glick, J. Hafen, J. Kearl, C. Waddoups Sep 98 at 7

### **ANTIQUITIES ACT**

- "Grand Staircase-Escalante National Monument: Protection of  
Antiquities or Preservationist Assault?"  
William Perry Pendley Oct 97 at 8

### **APPELLATE PRACTICE**

- "Utah Standards of Appellate Review,"  
Judge Norman H. Jackson Oct 94 at 9

- "Appellate Operations Task Force Reports to The Supreme  
Court and the Judicial Council, The,"  
Alan Sullivan Dec 94 at 20

- "Court of Appeals Responds to Appellate Operations Task Force  
Report Recommendations,"  
Marilyn M. Branch Dec 94 at 21

- "Appellate Rules Committee to Consider Presumption Against  
Oral Argument and Issuance of Published Opinions"  
May 95 at 28

- "A New View from the Utah Court of Appeals,"  
Judge Michael J. Wilkins May 95 at 37



- "How to Commence an Appeal: Steps (and Missteps) in Commencing an Appeal,"  
Merrill E. Nelson Oct 95 at 17
- "Tenth Anniversary of the Utah Court of Appeals,"  
Judge Norman H. Jackson March 97 at 19
- "Writing a Winning Appellate Brief,"  
Justice Christine M. Durham Oct 97 at 34
- "Utah's Appellate Mediation Office Opens January 1998/A New Option for Case Resolution at the Utah Court of Appeals,"  
Judge Michael J. Wilkins & Karen S. Hobbs Dec 97 at 25
- "Trying Your Case to Win on Appeal,"  
Debra J. Moore Dec 98

**ARBITRATION** SEE ALTERNATIVE DISPUTE RESOLUTION

**ATTORNEY DISCIPLINE** SEE ETHICS

**ATTORNEY GENERAL**

- "The Powers That Be,"  
Betsy L. Ross May 94 at 8

**ATTORNEY WORK PRODUCT**

- "Developments in Federal Court Practice: Rule 26(b) (3) and Attorney Work Product,"  
Robert S. Clark Oct 98 at 9

**AUDITORS' REQUESTS**

- "Who Will Tell What - The Lawyer's Responses to Auditors' Requests for Information,"  
Michael L. Deamer Aug 97 at 9

**BAD FAITH DOCTRINE**

- "Bad Faith Dialogue,"  
David A. Westerby Nov 94 at 8

**BANKING**

- "Mystique of 'Going Offshore', The,"  
David D. Beazer Dec 96 at 19
- "NSF Check/Overdraft Notification: Implementation Guidelines for Attorneys,"  
Stephen R. Cochell Dec 96 at 25
- "Disclosure Rules and Remedies Under the Truth in Lending Act,"  
Brian W. Jones Nov 97 at 13

**BANKRUPTCY PRACTICE**

- "Highlights of the Bankruptcy Reform Act of 1994, Part I,"  
David E. Leta March 95 at 11
- "Highlights of the Bankruptcy Reform Act of 1994, Part II,"  
David E. Leta Apr 95 at 7
- "Protect a Claim in Bankruptcy,"  
Steven E. Allred Dec 95 at 22
- "Are Income Taxes Dischargeable in Bankruptcy?"  
Rex B. Bushman June 97 at 12
- "Bankruptcy and the Bad Faith Filing,"  
William Thomas Thurman & Brett P. Johnson Dec 97 at 12

**BAR ASSOCIATION, UTAH**

- "Mid-term Plus Report,"  
Paul T. Moxley Feb 95 at 5
- "Some Thoughts on the Bar's Election Procedures,"  
Craig Snyder Jan 96 at 5
- "President's Message,"  
Dennis V. Haslam Jun/Jul 96 at 4
- "State of Our Bar - (What You Want to Know but Were Too Busy to Ask),"  
Steven M. Kaufman Oct 96 at 5
- "What Does the Bar Do for Me?"  
James C. Jenkins Oct 96 at 7

**BILLING METHODS/FEE ISSUES**

- "Pricing Your Legal Products: Alternative Billing Strategies and How to Get There - Part I,"  
Toby Brown & Michele Roberts Jun/Jul 95 at 18
- "Pricing Your Legal Products: Alternative Billing Strategies and How to Get There - Part II,"  
Toby Brown & Michele Roberts Dec 95 at 16
- "Recovery of Attorney Fees in Utah: A Procedural Primer for Practitioners - Part I, The,"  
James E. Magleby Dec 96 at 10
- "Recovery of Attorney Fees in Utah: A Procedural Primer for Practitioners - Part II, The,"  
James E. Magleby Feb 97 at 10

**BOOK REVIEWS**

- "*Unto the Soul* by A. Apelfeld,"  
rev. by Betsy L. Ross March 94 at 38

"*Utah Civil Practice* by David A. Thomas,"  
rev. by Brian J. Romriell May 94 at 34

"*A Map of the World* by Jane Hamilton,"  
rev. by Betsy L. Ross Aug/Sep 94 at 34

"*To Kill a Mockingbird* by Harper Lee,"  
rev. by Betsy L. Ross May 95 at 42

"*Trial Handbook for Utah Lawyers* by David W. Scofield; *Products Liability: 50 State Handbook* by Kuhnke & Price;  
*Stress Management for Lawyers* by Amirum Elwork Ph.D.,"  
rev. by Betsy Ross Jun/Jul 95 at 48

"*The Software Legal Book* by Paul S. Hoffman,"  
rev. by David W. O'Bryant Oct 95 at 36

"*Strange Justice: The Selling of Clarence Thomas* by Jane Moyer & Jill Abramson,"  
rev. by Betsy Ross Dec 95 at 39

"*White Man's Grave* by Richard Dooling,"  
rev. by Betsy Ross Feb 96 at 48

"*Stress Management for Lawyers* by Amiram Elwork, Ph.D."  
rev. by Cherie P. Shaneau March 96 at 31

"*Praise for a Splendid Anthology [Safire's Lend Me Your Ears]*,"  
D. Frank Wilkins Apr 96 at 6

"*Barry Goldwater* by Robert Alan Goldberg,"  
rev. by Betsy Ross May 96 at 39

"*John Mortimer*,"  
Ronald J. Yengich VoirDire Win 97 at 34

"*Resisting Cynicism While Reading Grisham*,"  
Francis M. Wikstrom May 97 at 7

"*Life Work* by Donald Hall,"  
rev. by Betsy Ross Oct 97 at 38

"*The Mahatma (Great Soul)*,"  
D. Frank Wilkins Dec 97 at 11

"*Captive Mind, The*, by Czeslaw Milosz,"  
rev. by Betsy Ross Dec 97 at 43

"*Independent People* by Halldor Laxness,"  
rev. by Betsy L. Ross Apr 98 at 54

"*About Schmidt* by Louise Begley,"  
rev. by Betsy Ross June 98 at 54

"*Scottsboro, A Tragedy of the American South* by Dan T. Carter,"  
rev. by Scott Daniels Aug 98 at 52

## CHILD ABUSE

SEE ALSO DOMESTIC VIOLENCE

"Young Lawyers Division Publishes Pamphlet on Child Abuse"  
March 94 at 28

"*State v. Teuscher*: The 'Exception' Swallows the Rule,"  
Gary W. Pendleton Oct 95 at 13

"Response to '*State v. Teuscher*: The "Exception" Swallows the Rule',"  
Robert N. Parrish March 96 at 8

"Preparing Child Sexual Assault Victims to Testify,"  
Robert N. Parrish VoirDire Win 97 at 18

"State in Interest of E.K. and the Protection of Children: Expanding the Grounds for State Intervention,"  
John Warren May VoirDire Win 97 at 26

"Ethical Dilemma Posed by the Child Abuse Reporting Statute, The,"  
David V. Pena VoirDire Sum 98 at 12

"Cohabitant Abuse Protective Orders,"  
Lisa A. Jones VoirDire Sum 98 at 15

## CHILD CUSTODY/VISITATION/SUPPORT

SEE ALSO DIVORCE; DOMESTIC RELATIONS

"Child Support in Utah,"  
Helen E. Christian Jun/Jul 94 at 18

"Custody and Visitation Rights in Utah,"  
Harry Caston Dec 94 at 8

"Jurisdiction Issues in Child Custody, Visitation and Support Cases,"  
David S. Dolowitz Oct 96 at 10

"Welfare Reform Act: Finding Your Way Through the Construction Zone,"  
Karma Dixon & Renee M. Jimenez June 97 at 16

"Protective Orders in Domestic Cases: The Need to Alter the Process,"  
Mary Corporon VoirDire Sum 98 at 16

"Race to Fatherhood: Concerns About Utah's Voluntary Declaration of Paternity Act, The,"  
Len R. Eldridge VoirDire Sum 98 at 21

## CHILDREN'S RIGHTS

"Whose Children Are These? A Primer for Juvenile Court Practice,"  
Judge Stephen A. Van Dyke March 94 at 31

"Utah Office of Guardian Ad Litem,"  
Kristin G. Brewer May 96 at 21

- "Child Welfare Reform Act of 1994: Is the Cure Worse than the Problem?"  
Judge Arthur G. Christean June 97 at 31
- "Child Witness: An Ever-Increasing Fact of Life in Utah Courts, The"  
Judge Donald J. Eyre, Jr. Feb 98 at 38

#### **CIVIL PRACTICE**

- "*Utah Civil Practice* by David A. Thomas,"  
rev. by Brian J. Romriell May 94 at 34
- "Ethical Considerations Under the Amended Federal Rules of Civil Procedure,"  
Phillip S. Ferguson Feb 96 at 10
- "Civil Litigation: Abstaining from Offensive Personality,"  
Peter C. Appleby VoirDire Win 97 at 9
- "Civil Litigation: The Bar's Proscription Against Engaging in Offensive Personality,"  
Charles A. Gruber VoirDire Win 98 at 9
- "Changes in Federal Discovery Rules: A Legacy of Chaos, Ineffectiveness, and Diversion from Real Solutions,"  
Ross C. Anderson VoirDire Win 98 at 11
- "New Federal Discovery Rules: 26(a)(1) & (2) - A Big Step in the Right Direction,"  
Mag. Judge Ronald N. Boyce VoirDire Win 98 at 16

#### **CLERGY**

- "Young Lawyers Division Publishes Pamphlet on Child Abuse"  
March 94 at 28

#### **CLIENT RELATIONS**

SEE LEGAL PRACTICE

#### **CLIENT SECURITY FUND**

- "Client Security Fund,"  
Charles R. Brown Oct 97 at 6

#### **COLLECTION LAW**

- "Collection Law Task Force: Where Do We Go From Here?"  
H. James Clegg Jan 94 at 4
- "Our Legislature at 'Work',"  
H. James Clegg Apr 94 at 4
- "Effectively Collect a Debt - Part I; Checklist for Developing Definitive Strategies,"  
Jeffrey Weston Shields May 95 at 21

- "Effectively Collect a Debt - Part II; Statutory Regulation of Debt Collection,"  
Jeffrey Weston Shields Aug/Sep 95 at 16

#### **COMPARATIVE FAULT**

- "Significant Changes in Comparative Fault and Workers' Compensation Reimbursement,"  
Tim Dalton Dunn & W. Brent Wilcox Aug/Sep 94 at 8

#### **COMPUTER INTEGRATED COURTROOM**

SEE COURTROOM REPORTING

#### **COMPUTER TECHNOLOGY**

- "Do I Need a Compact Disk Reader for My Computer?"  
David O. Nuffer Apr 94 at 32
- "Second Computer Revolution, The,"  
David Nuffer Dec 94 at 34
- "How Document Assembly Will Benefit Your Law Practice,"  
Mark J. Morrise Jan 95 at 14
- "Surfing (the Net) in the Desert,"  
David Nuffer Oct 95 at 6
- "*The Software Legal Book* by Paul S. Hoffman,"  
rev. by David W. O'Bryant Oct 95 at 36
- "Electronic Evidence: A Guide to Courtroom Use of New Technologies"  
Nov 95 at 51
- "E-Mail for the Office and the World,"  
David Nuffer March 96 at 12
- "ABA TechShow'96 - The Convergence of Law and Technology,"  
David Nuffer Aug/Sep 96 at 6
- "Many Utah Firms are Adding CD-ROMs to Their Research Arsenal - Are They For You?"  
Kristin B. Gerdy & Kory D. Staheli Aug/Sep 96 at 18
- "Imaging for Attorneys,"  
David Nuffer Oct 96 at 18
- "Workflow and Group Ware,"  
David Nuffer Dec 96 at 35
- "Is Electronic Court Filing in Your Future?"  
R. Yoshinaga, E. Leeson & D. Nuffer Apr 97 at 15
- "Legal Economics: From Paper to Electronic,"  
Toby Brown Apr 97 at 18
- "Video Trial Exhibits,"  
John F. Fay March 98 at 10

"Practicing Law on the Internet," Toby Brown	May 98 at 8	"Drafting Distribution and License Agreements (What You Don't Know Can Hurt You)," C. Jeffrey Thompson	Jun/Jul 95 at 23
"Year 2000 For the Computer Challenged," Toby Brown & Blake Miller	Oct 98 at 13	"Choice of Business Entity in Utah," Randy K. Johnson	Dec 95 at 7
"Beauties of Mechanization, The," Lawrence R. Peterson	Nov 98 at 11	"What To Do If a Federal Search Warrant is Served on Your Corporate Client," Steven G. Johnson	April 97 at 11
"Legislative Web Pages," Tani Pack Downing	Nov 98 at 14	<b>COURT CONSOLIDATION</b>	
"Utah Digital Signature Act Executive Summary," Ken Allen	Nov 98 at 15	"Evolution of Court Consolidation, The," Harold G. Christensen	Feb 94 at 9
"Status of Utah's Electronic Filing Project," Rolen Yoshinaga	Nov 98 at 18	"1994 State of the Judiciary," Chief Justice Michael D. Zimmerman	March 94 at 6
"Salt Lake County Recorder POLARIS System," Dustin Butler	Nov 98 at 21	"Our Legislature at 'Work'," H. James Clegg	Apr 94 at 6
"Report on the Utah Electronic Law & Commerce Partnership," Toby Brown	Nov 98 at 22	"Informational Potpourri," Craig M. Snyder	Jan 95 at 7
"Ensuring Your Business Clients Survive the Year 2000 and Beyond," R. Parrish Freeman, Jr.	Nov 98 at 24	"Salt Lake Courts Complex"	Aug/Sep 95 at 37
"Review of Dragon NaturallySpeaking, Ver.1.0," E. Jay Sheen	Nov 98 at 29	<b>COURT INTERPRETERS</b>	
<b>CONSERVATION</b>		"Justicia Para Todos: Ensuring Equal Access to the Courts for Linguistic Minorities," Michael Gardner & Judge Lynn W. Davis	Feb 96 at 25
"An Introduction to Land Trust and Conservation Easements," David Nuffer	Aug/Sep 94 at 12	<b>COURT REPORTING</b>	
<b>CONSTITUTION OF UNITED STATES</b>		"Official Court Reporting: A Proposal for Bar Members' Consid- eration and Response," Judge Anne M. Stirba	Jan 94 at 24
"With Liberty and Justice for All," Chief Judge David Sam	Apr 98 at 10	"Change in Process for Requesting Transcripts," Timothy M. Shea	Nov 97 at 27
<b>CONTRACTS</b>		<b>COURTS</b>	SEE ALSO JUDICIARY
"Changes in Health Care Will Impact Every Lawyer, Ready or Not," Don B. Allen	Jun/Jul 95 at 6	"Court-Annexed Mediation: Thirteen Questions," Judge William B. Bohling	Dec 94 at 31
"Declaratory Relief Under the CDA: Post Garrett," Paul A. Reynolds	June 98 at 28	"Professionalism Before the Courts," Justice Richard C. Howe	Feb 95 at 31
<b>CORPORATE LAW - SEE ALSO ANTITRUST</b>		"O.J. Simpson Trial and the Public's View of Our Judicial Sys- tem, The," Judge Rodney S. Page	Jun/Jul 95 at 46
"The LLC Revolution Continues Under the New IRS Guidelines," Brent R. Armstrong	Apr 95 at 13	"Need for Cautious and Deliberate Reforms in the Civil Justice System," Judge J. Thomas Greene	Aug/Sep 95 at 44
"Franchising Your Client's Business," Jeffrey C. Swinton	May 95 at 10		



"ADR and Access to the Courts,"	Peter W. Billings, Sr.	Dec 95 at 12
"Alternative Dispute Resolution and the Courts,"	Chief Justice Michael Zimmerman	Apr 96 at 11
"Toward a Better System of Justice,"	Debra J. Moore	VoirDire Win 97 at 9
"Tenth Anniversary of the Utah Court of Appeals,"	Judge Norman H. Jackson	March 97 at 19
"Evaluating the Court System,"	Charlotte L. Miller	Sep 97 at 5
"Negotiating the Amended Federal Court Local Rules of Practice,"	Markus B. Zimmer & Louise S. York	Sep 97 at 37
"Act Well Thy Part,"	Judge Joseph W. Anderson	June 98 at 50
"Court in the Canyon Lands,"	Judge Lyle R. Anderson	Sep 98 at 33
<b>CRIME/CRIMINAL PRACTICE</b>		
"What to Do When You Receive a Call From Jail at 1:00 a.m.,"	Gregory G. Skordas	Jun/Jul 94 at 27
" <i>State v. Teuscher</i> : The 'Exception' Swallows the Rule,"	Gary W. Pendleton	Oct 95 at 13
"Response to ' <i>State v. Teuscher</i> : The "Exception" Swallows the Rule',"	Robert N. Parrish	March 96 at 8
"Another Vietnam: Salt Lake's War on Crime,"	Judge Michael L. Hutchings	Nov 96 at 32
"What To Do If a Federal Search Warrant is Served on Your Corporate Client,"	Steven G. Johnson	April 97 at 11
"Of Convictions and Removal: The Impact of New Immigration Law on Criminal Aliens,"	Hakeem Ishola	Aug 97 at 18
"Drug Court in the Third District,"	Judge Stephen L. Henriod	Aug 97 at 35
"Summit on Crime - We Came Together for Utah's Future, The,"	Sen. Orrin G. Hatch	Sep 97 at 8
"Utah: State of Alert,"	Gov. Michael O. Leavitt	Sep 97 at 10

"Highlights from 'A Summit on Crime...,'"	Paul G. Cassell	Sep 97 at 15
"Good, the Bad, and the Ugly: Crime and Punishment in Utah,"	Judge Michael L. Hutchings and Prof. Gerald W. Smith	Sep 97 at 18
"Use Immunity: A Major Change in Utah Criminal Law,"	Creighton C. Horton	Nov 97 at 8
"Can State Prisoners Sue Under Federal Disabilities Law?"	D. Kyle Sampson	Sep 98 at 17
"Getting Smart as Well as Tough on Crime,"	Judge K.L. McIlff	Nov 98 at 41

## **CUSTODY/VISITATION**

SEE CHILD CUSTODY/VISITATION/SUPPORT

## **DAMAGES**

"Punitive Damages: A Suggestion for Change,"	Stephen Russell	Apr 94 at 7
"Law and Economics of Tort Damages, The,"	Mark A. Glick	Aug/Sep 96 at 8
"Law and Economics of Patent Infringement Damages, The,"	Mark A. Glick	March 97 at 11
"Understanding Legal Malpractice,"	Michael F. Skolnick & Richard Masson	Feb 98 at 15
"Tracking Damages from a Personal Injury,"	Mark J. Gregersen & James A. Shore	March 98 at 17

## **DEPOSITIONS**

"Utah Deposition Primer - Part I,"	David K. Isom	Apr 94 at 11
"Utah Deposition Primer - Part II,"	David K. Isom	May 94 at 15
"Utah Deposition Primer - Part III,"	David K. Isom	Jun/Jul 94 at 23
"Abusive Deposition Objections and Tactics - In Search of a Standing Order,"	Robert B. Sykes	Aug 98 at 8

## **DISCOVERY - SEE ALSO EVIDENCE**

"How Document Assembly Will Benefit Your Law Practice,"	Mark J. Morrisse	Jan 95 at 14
---	------------------	--------------

"Reconsidering Celotex: What is the Burden of Production When a Defendant Moves for Summary Judgment on the Ground that the Plaintiff Lacks Evidence?"  
Adam Price May 98 at 14

## DISCRIMINATION IN WORKPLACE

"Checklist for Improving the Workplace Environment (or Dissolving the Glass Ceiling),"  
Charlotte L. Miller Feb 96 at 6

## DIVERSITY/CULTURAL

"DNA - People's Legal Services Providing Legal Services in Southern Utah,"  
Utah Bar Foundation Jan 94 at 27

"Checklist for Improving the Workplace Environment (or Dissolving the Glass Ceiling),"  
Charlotte L. Miller Feb 96 at 6

"Justicia Para Todos: Ensuring Equal Access to the Courts for Linguistic Minorities,"  
Michael Gardner & Judge Lynn W. Davis Feb 96 at 25

"Thank You, Albert Krieger,"  
Steven M. Kaufman Nov 96 at 5

"Toward a Better System of Justice,"  
Debra J. Moore VoirDire Win 97 at 9

"Diversity Revisited,"  
Charles R. Brown March 97 at 9

"Utah Task Force on Racial and Ethnic Fairness in the Legal System,"  
Judge Tyrone E. Medley May 98 at 38

"DNA: Those Who Advocate to Revitalize the People's Way of Life,"  
Asa Begaye June 98 at 56

"Tribal Courts - Justice on Utah's Reservations,"  
Christopher B. Chaney Aug 98 at 26

## DIVORCE SEE ALSO ALIMONY; CHILD SUPPORT; CUSTODY/VISITATION; DOMESTIC RELATIONS

"X,Y,Z's of a Divorce, or What You Need to Submit to the Court to Finalize a Divorce, The,"  
Judge Judith S.H. Atherton Apr 96 at 32

"Conundrum of Gifted, Inherited and Premarital Property in Divorce, The,"  
David S. Dolowitz Apr 98 at 16

"Source of Funds Rules - Equitably Classifying Separate and Marital Property,"  
Judge Michael D. Lyon Aug 98 at 45

## DOMESTIC RELATIONS SEE ALSO ALIMONY; CHILD SUPPORT; CUSTODY/VISITATION; DIVORCE

"Informational Potpourri,"  
Craig M. Snyder Jan 95 at 7

"Young Lawyers Discuss Domestic Issues,"  
Mike Mower March 95 at 34

"Finding the Facts in a Domestic Bench Trial,"  
Judge Steven L. Hansen May 97 at 32

"Thirteen Survival Skills for the Family Law Practitioner,"  
Stephen R. Cochell June 97 at 24

"Final Report of the Utah Family Court Task Force: Summary of Principal Recommendations,"  
Tim Shea VoirDire Sum 98 at 5

"Unified Family Courts: Therapeutic Power and Judicial Authority,"  
Stephen J. Cribari VoirDire Sum 98 at 7

"Protective Orders in Domestic Cases: The Need to Alter the Process,"  
Mary Corporon VoirDire Sum 98 at 16

"The Commissioners Speak" VoirDire Sum 98 at 24

"'Strange Case of Utah' - Common Law Marriage, The,"  
Cameron S. Denning VoirDire Sum 98 at 31

"Resources and Checklists for Lawyers Unfamiliar with Domestic Practice,"  
C.S. Denning, B.L. Dart,  
S.A. Donovan, L.W. Nelson VoirDire Sum 98 at 35

## DOMESTIC VIOLENCE SEE ALSO SEX OFFENDERS

"Breaking the Cycle of Domestic Violence,"  
Keith A. Kelly Feb 94 at 26

"Domestic Violence,"  
Judge Roger S. Dutson Jun/Jul 94 at 42

"The Bar Response to Domestic Violence,"  
Denise A. Dragoo Aug/Sep 94 at 6

"*A Map of the World* by Jane Hamilton,"  
rev. by Betsy L. Ross Aug/Sep 94 at 34

"Young Lawyers Discuss Domestic Issues,"  
Mike Mower March 95 at 34

"Legal Aid Society of Salt Lake Announces 79% Success Rate  
with Domestic Violence Protective Orders and Notes  
Changes..." Aug/Sep 95 at 29

"Cohabitant Abuse Protective Orders,"  
Lisa A. Jones VoirDire Sum 98 at 15

**DOPL** SEE UTAH DIVISION OF OCCUPATIONAL  
AND PROFESSIONAL LICENSING

# **DUTY OF CARE**

"Understanding Legal Malpractice,"  
Michael F. Skolnick & Richard Masson Feb 98 at 14

# **ELECTRONIC FILING/DIGITAL SIGNATURE**

"Utah Digital Signature Act Executive Summary,"  
Ken Allen Nov 98 at 15

"Status of Utah's Electronic Filing Project,"  
Rolen Yoshinaga Nov 98 at 18

"Report on the Utah Electronic Law & Commerce Partnership,"  
Toby Brown Nov 98 at 22

# **EMINENT DOMAIN**

"Framework for Addressing Takings Problems,"  
John Martinez Jun/Jul 96 at 13

# **EMPLOYMENT LAW** SEE ALSO WORKERS COMP

"Checklist for Improving the Workplace Environment (or Dis-  
solving the Glass Ceiling),"  
Charlotte L. Miller Feb 96 at 6

"Fundamentals of Wage and Hour Law in Utah,"  
Brian C. Johnson & Gayanne K. Schmid Feb 97 at 17

"Employment Law Dilemmas: What to do When the Law Forbids  
Compliance,"  
Steven C. Bednar Dec 98

# **ENVIRONMENTAL LAW**

"Thinking About *Daubert*,"  
Judge Bruce S. Jenkins Apr 94 at 28

"Environmental Auditing in a Nutshell,"  
Craig D. Galli Aug/Sep 95 at 9

"Wetlands and Section 404 Permitting,"  
H. Michael Keller Jun/Jul 96 at 8

"Environmental Enforcement,"  
Craig W. Anderson Jun/Jul 96 at 23

"How to Obtain an Environmental Site Assessment (Or Igno-  
rance Is Not Bliss - Unless You've Investigated),"  
Rosemary J. Beless Jun/Jul 96 at 28

"ISO 14000 and Environmental Management Systems in a  
Nutshell,"  
Craig D. Galli Dec 96 at 15

"Grand Staircase-Escalante National Monument: Protection of  
Antiquities or Preservationist Assault?"  
William Perry Pendley Oct 97 at 8

"Grand Staircase-Escalante National Monument: Presidential  
Discretion Plus Congressional Acquiescence Equals a New  
National Monument,"  
David L. Negri Dec 97 at 20

"Should the City be Lead Agency at Superfund Sites? One City's  
Experience,"  
H. Craig Hall May 98 at 18

# **ESTATE PLANNING**

"Wills v. Trusts,"  
Earl D. Tanner, Jr. Oct 97 at 18

"Planning for an Optimum Estate Tax Discount,"  
L.S. McCullough & Lee S. McCullough III June 98 at 10

# **ETHICS**

"*Unto the Soul* by A. Apelfeld,"  
reviewed by Betsy I. Ross March 94 at 38

"The Court, The Law School or The Bar: Just Who is Responsi-  
ble for Lawyer Competency,"  
Paul T. Moxley Oct 94 at 4

"Why We Take an Oath,"  
Wendell K. Smith Jan 95 at 12

"Review of the Office of Attorney Discipline,"  
Charlotte L. Miller March 95 at 9

"How Professional Are We?"  
Paul T. Moxley Apr 95 at 4

"Commentary on Physician-Assisted Suicide, A,"  
Catherine M. Larson Jan 96 at 8

"Response to Commentary on Physician-Assisted Suicide -  
Killing Isn't Caring,"  
David B. Erickson Jan 96 at 12

"Ethical Considerations Under the Amended Federal Rules of Civil Procedure,"  
Phillip S. Ferguson Feb 96 at 10

"A Pop-Quiz on Ethics,"  
Judge Fred D. Howard Feb 96 at 38

"Avoiding the Unauthorized Practice of Law,"  
Katherine A. Fox & Carol A. Stewart VoirDire Sum 97 at 22

"Ethical Dilemma Posed by the Child Abuse Reporting Statute, The,"  
David V. Pena VoirDire Sum 98 at 12

#### **ETHNIC MINORITIES** SEE DIVERSITY

**EVIDENCE** SEE ALSO DEPOSITIONS; TRIAL PRACTICE  
"Salt Lake City v. Garcia: A Scientific Evidence Decision Built Upon Sand,"  
Ralph Dellapiana VoirDire Sum 97 at 24

"Reconsidering *Celotex*: What is the Burden of Production When a Defendant Moves for Summary Judgment on the Ground that the Plaintiff Lacks Evidence?"  
Adam Price May 98 at 14

**EXPERT WITNESSES** SEE ALSO TRIAL PRACTICE  
"Plaintiff's Experts: Finding, Preparing and Presenting an Expert Witness,"  
W. Brent Wilcox Nov 95 at 38

"Defense Experts: Defendant's Examination of Experts,"  
Harold G. Christensen Nov 95 at 41

"Understanding Legal Malpractice,"  
Michael F. Skolnick & Richard Masson Feb 98 at 15

#### **FAMILY LAW** SEE DOMESTIC RELATIONS LAW

#### **FEDERAL RULES**

"Ethical Considerations Under the Amended Federal Rules of Civil Procedure,"  
Phillip S. Ferguson Feb 96 at 10

"Negotiating the Amended Federal Court Local Rules of Practice,"  
Markus B. Zimmer & Louise S. York Sep 97 at 37

"Changes in Federal Discovery Rules: A Legacy of Chaos, Ineffectiveness, and Diversion from Real Solutions,"  
Ross C. Anderson VoirDire Win 98 at 11

"New Federal Discovery Rules: 26(a) (1) & (2)- A Big Step in the right Direction,"  
Mag. Judge Ronald N. Boyce VoirDire Win 98 at 16

"Developments in Federal Court Practice: Rule 26(b) (3) and Attorney Work Product,"  
Robert S. Clark Oct 98 at 9

#### **FEDERAL TRADE COMMISSION (FTC)**

"Drafting Distribution and License Agreements (What You Don't Know Can Hurt You),"  
C. Jeffrey Thompson Jun/Jul 95 at 23

#### **FORECLOSURES**

"Trust Deed Foreclosures in Utah,"  
Rolf H. Berger Nov 94 at 20

#### **HAZING**

"No More Hazing: Eradication Through Law and Education,"  
David S. Doty Nov 97 at 18

#### **HEALTH CARE** SEE ALSO MEDICAL MALPRACTICE

"Changes in Health Care Will Impact Every Lawyer, Ready or Not,"  
Don B. Allen Jun/Jul 95 at 6

"Commentary on Physician-Assisted Suicide,"  
Catherine M. Larson Jan 96 at 8

"Response to Commentary on Physician-Assisted Suicide - Killing Isn't Caring,"  
David B. Erickson Jan 96 at 12

#### **HISTORY/LEGAL/UTAH** SEE ALSO JUDICIARY

"So You Like Legal History,"  
David V. Stivison Apr 94 at 9

"Practicing Law in the Utah Territory: A Historical Sketch,"  
David Epperson May 96 at 12

"In Memoriam: Charles S. Zane 1831-1915,"  
Ret. Justice J. Allan Crockett March 94 at 12

"Vignettes of the Late Chief Judge Willis W. Ritter,"  
William T. Thurman, Sr. Dec 94 at 12

"Calvin A. Behle: His History, Accomplishments..."  
May 96 at 41

"Judiciary and the Common Law in Utah: A Centennial Celebration,"  
Michael W. Homer Aug/Sep 96 at 13

"In Memoriam: W. Brent Wilcox,"  
Colin P. King & Alan W. Mortensen VoirDire Win 97 at 30

"In Memoriam: Wayne L. Black,"  
Fred R. Silvester VoirDire Sum 97 at 31

"In Memoriam: David K. Watkiss," Jeffrey D. Watkiss	VoirDire Sum 97 at 31
"Boosting the Bootleg," Henchel J. Saperstein	VoirDire Sum 97 at 34
"Judge Ritter Revisited," Glen E. Fuller	VoirDire Sum 97 at 35
"In Memoriam: Judge Aldon Anderson," Judge Bruce S. Jenkins	VoirDire Win 97 at 29
"From Zane to Zimmerman," Pamela T. Greenwood	Oct 97 at 41
"In Memoriam: J. Allan Crockett 1906-1994," Judge J. Thomas Greene	Dec 97 at 28
"In Memoriam: Peter W. Billings," P. Bruce Badger	VoirDire Win 98 at 37
"A Credit to the Profession: Gordon L. Roberts" VoirDire Win 98 at 38	
<b>HOMELESS</b>	
"Homeless in Utah - Reflections from a New Bar Member," Sandra Langley	Dec 97 at 36
<b>IMMIGRATION LAW</b>	
"Of Convictions and Removal: The Impact of New Immigration Law on Criminal Aliens," Hakeem Ishola	Aug 97 at 18
<b>INSURANCE FRAUD</b>	
"Our Legislature at 'Work'," H. James Clegg	Apr 94 at 5
<b>INSURANCE PRACTICE</b>	
"Bad Faith Dialogue," David A. Westerby	Nov 94 at 8
"Understanding Legal Malpractice," Michael F. Skolnick & Richard Masson	Feb 98 at 14
<b>INTELLECTUAL PROPERTY</b>	
"An Intellectual Property Primer: What Every Attorney Should Know About Patents, Trademarks and Copyrights," B.A. Geurts, P. Evans, D. Dellenbach	Jan 94 at 8
"Franchising Your Client's Business," Jeffrey C. Swinton	May 95 at 10
"State of Patents in Utah," V. Roland Smith	Jun/Jul 96 at 43

"Law and Economics of Patent Infringement Damages, The," Mark A. Glick	March 97 at 11
<b>INTERPRETERS</b>	SEE COURT INTERPRETERS
<b>JUDICIARY</b>	SEE ALSO APPELLATE PRACTICE; COURTS; HISTORY/LEGAL/UTAH; TRIAL PRACTICE; "VIEWS FROM THE BENCH"
"Utah's Merit-Selection of Judges," H. James Clegg	Feb 94 at 5
"The Judiciary's Perspective - The Merits of Merit Selection," Kay S. Cornaby and Ronald W. Gibson	Feb 94 at 15
"One Legislator's Perspective - More Executive, Less Judicial," S.K. Christiansen	Feb 94 at 16
"Perspective of the Governor - Modify, Not Abandon, The Process," Gov. Michael Leavitt	Feb 94 at 17
"What Do I Know?" Judge Glenn K. Iwasaki	Feb 94 at 28
"Utah Bar Foundation Honors Retiring Chief Justice Gordon R. Hall"	Feb 94 at 32
"Bar and the Legislature: One Differing Opinion After Another, The," H. James Clegg	March 94 at 4
"1994 State of the Judiciary," Chief Justice Michael D. Zimmerman	March 94 at 6
"Our Legislature at 'Work'," H. James Clegg	Apr 94 at 4
"The Judicial Wordsmith," [Judge Bruce Jenkins], D. Frank Wilkins	May 94 at 6
"Judging the Judges - Some Observations," Judge Pamela G. Heffernan	May 94 at 31
"In Defense of the Bench," James C. Jenkins	Nov 94 at 7
"Vignettes of the Late Chief Judge Willis W. Ritter," William T. Thurman, Sr.	Dec 94 at 12
"Profile of J. Philip Eves," Derek P. Pullan	Dec 94 at 29
"Informational Potpourri," Craig M. Snyder	Jan 95 at 8
"Profile of Michael R. Murphy," Marnie Funk	Apr 95 at 27



"Profile of Glen R. Dawson," Marnie Funk May 95 at 34	"Judge Robin W. Reese," David L. Pinkston Aug 97 at 37
"Judicial Conduct Commission Comes of Age, The," Denise A. Dragoo Aug/Sep 95 at 7	"Evaluating the Court System," Charlotte L. Miller Sep 97 at 5
"U.S. Magistrate Judge Ronald N. Boyce," S.K. Christiansen Aug/Sep 95 at 40	"Advise to Young Lawyers: A Judicial Survey," Mark C. Quinn Oct 97 at 32
"U.S. District Court Judge Tena Campbell," S.K. Christiansen Dec 95 at 29	"Judge Ronald Nehring," Jennifer L. Ross & Jerry T. Amberger Dec 97 at 41
" <i>Strange Justice: The Selling of Clarence Thomas</i> by Jane Moyer & Jill Abramson," rev. by Betsy Ross Dec 95 at 39	"Remarks from Justice Ginsburg," Justice Ruth Bader Ginsburg VoiDire Win 98 at 33
"State of the Judiciary, The," Chief Justice Michael D. Zimmerman March 96 at 27	"Pick up the Phone," James C. Jenkins VoiDire Win 98 at 34
"Strike the Unsigned Minute Entry!," Michael A. Jensen May 96 at 18	"Evening with the Third District Court," Janet Goldstein VoiDire Win 98 at 35
"Justice Court Growth," Judge John L. Sandberg May 96 at 35	"Where We Have Been and Where We May Be Headed; Some Thoughts on the Progress of the Utah Judiciary," Chief Justice Michael D. Zimmerman Feb 98 at 18
"Some Resolutions of a New Judge," Judge Robert K. Hilder Jun/Jul 96 at 52	"Dear Access to Justice Task Force," Gary G. Sackett Feb 98 at 22
"Observations of a Sitting Judge," Judge Ronald Nehring Dec 96 at 39	"Judge G. Rand Beacham," Kim S. Colton Feb 98 at 49
"Keep Judicial Conduct Commission Proceedings Confidential," Tim Shea VoiDire Win 97 at 11	"State of the Judiciary," Chief Justice Michael D. Zimmerman Apr 98 at 49
"Public Should Have Access to Judicial Disciplinary Proceedings and Records Before The Utah Supreme Court, The," Jeffrey J. Hunt VoiDire Win 97 at 14	"Judge Hans Q. Chamberlain," Kim S. Colton Aug 98 at 50
"Judicial Review of Arbitration Awards is Limited," Peter W. Billings, Sr. Feb 97 at 15	"Ben H. Hadfield, District Court Judge," Kevin McGaba Oct 98 at 27
"Of Courtroom Conduct and Performance Evaluations," Judge Ben H. Hadfield Feb 97 at 39	"Commissioner David S. Dillon" Dec 98
"State of the Judiciary," Chief Justice Michael D. Zimmerman March 97 at 35	<b>JURIES</b> SEE TRIAL PRACTICE
"Judge Fred D. Howard," Derek P. Pullan March 97 at 39	<b>JUVENILE CRIME/COURT</b> "Whose Children Are These? A Primer for Juvenile Court Practice," Judge Stephen A. Van Dyke March 94 at 31
"Judicial Conduct and Confidentiality," Denise A. Dragoo June 97 at 9	"Challenges of the Youth in the 1990's," Judge Andrew Valdez Apr 95 at 31
"A Credit to the Profession: Judge David Winder," Gordon W. Campbell VoiDire Sum 97 at 33	"View From the Juvenile Court Bench, A," Judge Kimberly K. Hornak Oct 95 at 31
	"Juvenile Court Practice," Judge J. Mark Andrus Oct 95 at 33

"Serious Juvenile Offence, The,"	
Judge Frederic M. Oddone	Oct 95 at 34
"Juvenile Court,"	
Judge Sterling B. Sainsbury	Oct 95 at 35
"Utah Juvenile Justice System Isn't Broken,"	
Judge Scott N. Johansen	Aug/Sep 96 at 42
"This is Not 'Kiddie' Court,"	
Judge Joseph W. Anderson	VoirDire Win 97 at 20
"Summit on Crime - We Came Together for Utah's Future, The,"	
Sen. Orrin G. Hatch	Sep 97 at 8
"Utah: State of Alert,"	
Gov. Michael O. Leavitt	Sep 97 at 10
"Highlights from 'A Summit on Crime...',"	
Paul G. Cassell	Sep 97 at 15
"Good, the Bad, and the Ugly: Crime and Punishment in Utah,"	
Judge Michael L. Hutchings and Prof. Gerald W. Smith	Sep 97 at 24
"No More Hazing: Eradication Through Law and Education,"	
David S. Doty	Nov 97 at 18
"What's New in the Juvenile Court?"	
Judge Hans Q. Chamberlain	Dec 97 at 38

#### **LAND** SEE ALSO ENVIRONMENTAL LAW; ZONING

"An Introduction to Land Trust and Conservation Easements,"	
David Nuffer	Aug/Sep 94 at 12
"Acquiring Federal and State Land Through Land Exchanges,"	
Elizabeth Kitchens Jones	Jun/Jul 96 at 19

#### **LAW DAY**

"God, Family and the Second Amendment: A Celebration of Law Day,"	
Michael L. Mower	April 96 at 25

#### **LAW LIBRARIES**

"Utilizing Your Support Staff: Law Librarians and the Legal Community,"	
Marsha C. Thomas	May 95 at 15
"BYU Law School Dedicates Howard W. Hunter Law Library,"	
Constance K. Lundberg	May 97 at 14

#### **LEGAL AID SOCIETY**

"Legal Aid Society of Salt Lake Announces 79% Success Rate with Domestic Violence Protective Orders and Notes Changes..."	Aug/Sep 95 at 29
---	------------------

#### **LEGAL HISTORY**

SEE HISTORY/LEGAL/UTAH

#### **LEGAL MALPRACTICE**

SEE LEGAL PRACTICE

#### **LEGAL PRACTICE**

"Lawyers [Do Not Equal] Procrastinators?"	
Mark S. Webber	Jan 94 at 21
"Clients: They Aren't Always Right But They Are the Customer,"	
Charlotte L. Miller	Feb 94 at 7
"Law - A Pretty, Great Profession,"	
Jathan W. Janove	May 94 at 10
"Interview with Randy Dryer, Past State Bar President, Chair- man, Utah Sports Authority"	May 94 at 12
"Ten Tips for Effective Negotiation,"	
Patricia A. O'Rourke	Aug/Sep 94 at 16
"The Court, The Law School or The Bar: Just Who is Responsi- ble for Lawyer Competency,"	
Paul T. Moxley	Oct 94 at 4
"Non-Lawyer Legal Technicians,"	
David Nuffer	Oct 94 at 6
"Bar Commission Recommends Two New Programs,"	
Paul T. Moxley	Nov 94 at 4
"Attorney-Legislators: An Interview with the Candidates,"	
Derek P. Pullan	Nov 94 at 17
"When Are We Going to Face It - We're All In This Together,"	
Marty Olsen	Dec 94 at 36
"Potpourri of Issues!, A,"	
Paul T. Moxley	Jan 95 at 5
"Why We Take an Oath,"	
Wendell K. Smith	Jan 95 at 12
"Mid-term Plus Report,"	
Paul T. Moxley	Feb 95 at 5
"First Let's Kiss All the Lawyers, Part 3,"	
Steven M. Kaufman	Feb 95 at 7
"In Search of Exhibit 'A',"	
Brent R. Armstrong	Feb 95 at 9

"More About the Image of the Bar and More,"	Paul T. Moxley	March 95 at 5	"Civil Litigation: Abstaining from Offensive Personality,"	Peter C. Appleby	VoirDire Win 97 at 9
"How Professional are We?"	Paul T. Moxley	Apr 95 at 4	"A Prayer for the Professions,"	Scott Daniels	Feb 97 at 9
"Some Brief Thoughts on Lawyer Jokes,"	D. Frank Wilkins	Apr 95 at 6	"Take a Number and Get in Line,"	Steven M. Kaufman	March 97 at 7
"Second to Last Shot!"	Paul T. Moxley	May 95 at 5	"Characteristics of Successful Law Firms,"	Ezra Tom Clerk, Jr.	March 97 at 23
"Some of My Best Friends are Lawyers,"	John Florez	May 95 at 7	"Seven Surprising Signs of Highly Successful Litigators, The,"	David Nuffer	Aug 97 at 7
"Pricing Your Legal Products: Alternative Billing Strategies and How to Get There - Part I,"	Toby Brown & Michele Roberts	Jun/Jul 95 at 18	"Will the Real Lawyer Please Stand Up,"	Charlotte L. Miller	Nov 97 at 5
"Case of the Month: The Buried File,"	Melissa Thomas	Aug/Sep 95 at 56	"Ten Tips for New Attorneys,"	Judge G. Rand Beacham	Nov 97 at 34
"National Conference of Bar Presidents Meeting,"	Dennis V. Haslam	Oct 95 at 5	"Understanding Legal Malpractice,"	Michael F. Skolnick & Richard Masson	Feb 98 at 13
"Public Image of Lawyers, The,"	James C. Jenkins	Nov 95 at 5	"Easy Steps to Avoid Bar Complaints and Malpractice,"	Charles A. Gruber	Feb 98 at 36
"Diversity Is Our Business,"	Charles R. Brown	Dec 95 at 5	"Provisional License for New Bar Admittees Not the Answer,"	Stephen W. Owens	March 98 at 15
"How to be Effective and Contented in the Practice of Law,"	Judge J. Thomas Greene	Dec 95 at 32	"Remarks of Chief Justice Michael D. Zimmerman Before First 100 Dinner..."		March 98 at 27
"Lawyers Serving Their Clients and the Public,"	Dennis V. Haslam	Feb 96 at 5	"Balancing Family Life with the Practice of Law,"	Mark L. Fishbein	Apr 98 at 14
"A Report on <i>Consumer Reports</i> ,"	Dennis V. Haslam	March 96 at 5	"Customer Service from the Client's Perspective,"	Charlotte L. Miller	June 98 at 6
"Modest Proposal Concerning 'Esquire,' A,"	Rick L. Knuth	March 96 at 10	"Are Lawyers the Railroad of the Future?"	David Nuffer	Nov 98 at 7
"Leadership: Go Ask Alice,"	John Florez	May 96 at 6	"Ensuring Your Business Clients Survive the Year 2000 and Beyond,"	R. Parrish Freeman, Jr.	Nov 98 at 24
"Babies and Lawyers,"	Daniel Andersen	Aug/Sep 96 at 38	"Candor and Conveying a True Impression,"	John A. Adams	Dec 98
"Thank You, Albert Krieger,"	Steven M. Kaufman	Nov 96 at 5	<b>LEGISLATURE</b>		
"Thoughts on the Justice System and Lawyers,"	Pres. James E. Faust	Nov 96 at 12	"Bar and the Legislature: One Differing Opinion After Another, The,"	H. James Clegg	March 94 at 4
"Two Kinds of Litigators: The Delphic Truth in Stereotype,"	David A. Anderson	Nov 96 at 21	"Our Legislature at 'Work',"	H. James Clegg	Apr 94 at 4

"A Review of the 1994 General Session,"

Gretchen C. Lee Apr 94 at 26

"Attorney-Legislators: An Interview with the Candidates,"

Derek P. Pullan Nov 94 at 17

"Finding Utah Legislative Intent,"

James G. McLaren Feb 95 at 11

"Potential Issues for the 1995 Annual General Session of the  
Utah State Legislature,"

Jane Peterson & Lisa Watts Baskin March 95 at 43

"Selected Highlights of the 1995 Legislative Session"

Apr 95 at 32

"Utah's 1995 Impact Fee Legislation,"

David Nuffer Aug/Sep 95 at 12

"Potential Issues for the 1996 Annual General Session of the  
Utah States Legislature,"

Jane Peterson & Lisa Watts Baskin Feb 96 at 42

"Selected Major Legislation—1996 General Session,"

Jane Peterson & Lisa Watts Baskin Apr 96 at 35

"Potential Issues for the 1997 Utah Legislative General Session,"

Jane Peterson & Lisa Watts Baskin VoirDire Win 97 at 40

"Selected Major Legislation 1997 General Session,"

Jane Peterson & Lisa Watts Baskin May 97 at 35

"Lawyers Needed in the State Legislative Process,"

Rep. Patrice M. Arent Oct 97 at 24

#### **LICENSE AGREEMENTS**

"Drafting Distribution and License Agreements (What You Don't  
Know Can Hurt You),"

C. Jeffrey Thompson Jun/Jul 95 at 23

**LICENSING** SEE UTAH DIVISION OF OCCUPATIONAL AND  
PROFESSIONAL LICENSING

#### **LIMITED LIABILITY COMPANIES (LLCS)**

SEE ALSO CORPORATE LAW

"The LLC Revolution Continues Under the New IRS Guidelines,"

Brent R. Armstrong Apr 95 at 13

#### **"LOSS OF CHANCE" DOCTRINE**

"'Loss of Chance' in Utah?"

Daniel J. Andersen Nov 96 at 8

"Loss of Change Recovery after *Seale v. Gowans*,"

D. Matthew Mason VoirDire Win 98 at 30

#### **MECHANICS'/MATERIALMEN'S LIENS**

"Mechanic's Liens Basics,"

by Darrel J. Bostwick Jan 94 at 15

"Utah Construction Law: Recovery for Nonpayment,"

Michael W. Homer & David J. Burns May 96 at 8

#### **MEDIA**

"How to Win Reporters and Influence the Media,"

Marnie Funk Jan 95 at 9

**MEDIATION** SEE ALTERNATIVE DISPUTE RESOLUTION

#### **MEDICAL MALPRACTICE**

"'Loss of Chance' in Utah?"

Daniel J. Andersen Nov 96 at 8

"Loss of Chance Recovery after *Seale v. Gowans*,"

D. Matthew Mason VoirDire Win 98 at 30

#### **MENTAL DISABILITY**

"Representing Persons with Mental Disabilities,"

Linda V. Priebe VoirDire Win 98 at 20

#### **MERIT SELECTION**

"Utah's Merit-Selection of Judges,"

H. James Clegg Feb 94 at 5

"The Judiciary's Perspective - The Merits of Merit Selection,"

Kay S. Cornaby and Ronald W. Gibson Feb 94 at 15

"One Legislator's Perspective - More Executive, Less Judicial,"

S.K. Christiansen Feb 94 at 16

"Perspective of the Governor - Modify, Not Abandon, The Process,"

Gov. Michael Leavitt Feb 94 at 17

#### **MORTGAGES**

"Consumer Real Estate Lending in Utah - A Roadmap to Entry  
and Compliance...,"

Yan M. Ross Oct 95 at 8

#### **MUNICIPALITIES**

"Utah's 1995 Impact Fee Legislation,"

David Nuffer Aug/Sep 95 at 12

#### **NATIVE AMERICANS**

SEE DIVERSITY

#### **NEGOTIATION**

"Ten Tips for Effective Negotiation,"

Patricia A. O'Rourke Aug/Sep 94 at 16

## NOTARIES PUBLIC

- "Nitty About Notaries, or Time Well Spent: Notary Workshop,"  
Mary H. Black Dec 98

## PARALEGALS

- "Paralegal Guidelines" Jan 94 at 18  
"Non-Lawyer Legal Technicians,"  
David Nuffer Oct 94 at 6  
"Bar Commission Recommends Two New Programs,"  
Paul T. Moxley Nov 94 at 4  
"Prosecution of Unauthorized Practice of Law Cases in Utah"  
Jun/Jul 96 at 42  
"Case for Licensing Paralegals, The,"  
Shelly A. Sisam VoirDire Win 98 at 25  
"A Second Look at Licensing Paralegals,"  
Betty C. Porter & Karra J. Porter VoirDire Win 98 at 27

## PATENTS

SEE INTELLECTUAL PROPERTY

## PATERNITY

- "Race to Fatherhood: Concerns About Utah's Voluntary Declaration of Paternity Act, The,"  
Len R. Eldridge VoirDire Sum 98 at 21

## PERSONAL INJURY

- "Enforceability of Exculpatory Clauses in Hazardous Recreational Activities,"  
Gary L. Johnson Feb 98 at 8  
"Tracking Damages from a Personal Injury,"  
Mark J. Gregersen & James A. Shore March 98 at 17  
"How to Prepare Your Personal Injury Case for Trial,"  
Rex Bush June 98 at 30

## PREVENTIVE LAW

- "Preventive Law: A Personal Essay,"  
Scott E. Isaacson Oct 96 at 14

## PRISON

SEE CRIME/CRIMINAL PRACTICE

## PRO BONO

- "Making Pro Bono Easy,"  
Keith A. Kelly Jun/Jul 94 at 37  
"Bar Commission Recommends Two New Programs,"  
Paul T. Moxley Nov 94 at 4

## "Making a Difference,"

Lisa M. Rischer March 95 at 33

- "Senior Lawyer Volunteer Project 1994 IOLTA Grant Recipient,"  
Mary Jane Ciccarello Apr 95 at 37

- "Pro Bono Publico: Bar's Responsibility in Meeting the Legal Needs of Our Poor,"  
Toby Brown Jan 96 at 21

- "Acknowledging Our Responsibility to Foster the Public Good,"  
Lisa M. Rischer Jan 96 at 23

- "Lawyers' Public Service Responsibility,"  
Dennis V. Haslam May 96 at 5

- "CEELI: A Pro Bono Project of the ABA,"  
Paul Moxley Dec 96 at 27

- "From Our Perspective" VoirDire Win 97 at 7

- "Common Questions About Pro Bono,"  
Toby Brown May 97 at 21

- "Mandatory Reporting of Pro Bono Service: Why It Is an Issue,"  
Chief Justice Michael D. Zimmerman VoirDire Sum 97 at 13

- "Mandatory Reporting of Pro Bono Service: A Reasonable Response to a Public Need,"  
Dennis V. Haslam VoirDire Sum 97 at 15

- "Mandatory Reporting Requirement: 'The Way Things Are,'"  
Glen M. Richman VoirDire Sum 97 at 16

- "Are Lawyers Responsible to Provide Access to Justice for the Poor?—An Update on the Access to Justice Task Force,"  
Charlotte L. Miller Dec 97 at 6

- "Pro Bono - For the Good,"  
James C. Jenkins Apr 98 at 12

- "Mandatory Pro Bono Reporting: A Step in the Right Direction,"  
Jensie L. Anderson May 98 at 34

- "That Thing Called Pro Bono,"  
Judge Judith Billings Sep 98 at 23

- "Democratic Process and Rule 6.1, The,"  
Charles R. Brown Oct 98 at 7

## PRODUCT LIABILITY

- "*Trial Handbook for Utah Lawyers* by David W. Scofield; *Products Liability: 50 State Handbook* by Kuhnke & Price; *Stress Management for Lawyers* by Amirum Elwork Ph.D., rev. by Betsy Ross Jun/Jul 95 at 48



**PUNITIVE DAMAGES**

SEE DAMAGES

**QUALITY CONTROL COMMITTEE**

"Mid-term Plus Report,"

Paul T. Moxley

Feb 95 at 5

**REAL ESTATE PRACTICE**

"An Introduction to Land Trust and Conservation Easements,"

David Nuffer

Aug/Sep 94 at 12

"Trust Deed Foreclosures in Utah,"

Rolf H. Berger

Nov 94 at 20

"Utah Zoning Enabling Acts; Suggestions for Change, The,"

Richard S. Dalebout

March 95 at 20

"Consumer Real Estate Lending in Utah - A Roadmap to Entry and Compliance...,"

Yan M. Ross

Oct 95 at 8

"Bar Related Title Insurance in Utah,"

Brian A. Coleman

May 97 at 38

**RECORDER, COUNTY**

"Salt Lake County Recorder POLARIS System,"

Dustin Butler

Nov 98 at 21

**SECURITIES/INVESTMENTS**

"Derivatives: What They Are, What They Cause, What's the Law,"

Judge R. L. Gottsfeld, M.R. Lopez, W.A. Hicks

Nov 96 at 15

**SEX OFFENDERS**

"Utah's New Sex-Offender Registry Statute,"

Brian R. Allen

VoirDire Win 97 at 32

**STRESS MANAGEMENT**"*Trial Handbook for Utah Lawyers* by David W. Scofield; *Products Liability: 50 State Handbook* by Kuhnke & Price;"*Stress Management for Lawyers* by Amiram Elwork Ph.D.,"

rev. by Betsy Ross

Jun/Jul 95 at 48

"*Stress Management for Lawyers* by Amiram Elwork, Ph.D."

rev. by Cherie P. Shaneau

March 96 at 31

**STUDENT PRACTICE**

"Announcement from the United States Court of Appeals Tenth Circuit RE: Student Practice" General Order dated 12/6/93

Jan 94 at 19

**SUPPORT STAFF**SEE ALSO LEGAL PRACTICE;  
PARALEGALS; NOTARIES PUBLIC

"Utilizing Your Support Staff: Law Librarians and the Legal Community,"

Marsha C. Thomas

May 95 at 15

"View From the Other Side"

VoirDire Sum 97 at 30

**TAKINGS LAW**

SEE EMINENT DOMAIN

**TAXES/TAX LAW**

"An Introduction to Land Trust and Conservation Easements,"

David Nuffer

Aug/Sep 94 at 14

"The LLC Revolution Continues Under the New IRS Guidelines,"

Brent R. Armstrong

Apr 95 at 13

"Reach Out and Tax Someone: State Taxation of Income from the Sale of Intangibles,"

Maxwell A. Miller &amp; Randy M. Grimshaw

Jun/Jul 95 at 12

"Should a Nonlawyer Not Admitted to Practice Before the Tax Court Be Allowed to Act For or Represent Another in the Tax court,"

K. Jay Holdsworth

Jan 96 at 16

"Mystique of 'Going Offshore', The,"

David D. Beazer

Dec 96 at 19

"Tax Exempt Organizations Law - Barometer of Public Policy,"

Edwin H. Beus

Apr 97 at 19

"Are Income Taxes Dischargeable in Bankruptcy?"

Rex B. Bushman

June 97 at 12

**TORT LAW/REFORM**SEE ALSO UTAH  
LIABILITY REFORM LAW

"'Loser Pays' — Justice for the Poorest and the Richest, Others Need Not Apply,"

Francis J. Carney

May 95 at 18

"Law and Economics of Tort Damages, The,"

Mark A. Glick

Aug/Sep 96 at 8

"Plaintiff's Lawyer Picks the 10 Best and 10 Worst Changes in Utah Tort Law,"

David E. West

Aug/Sep 96 at 21

**TRADEMARKS**

SEE INTELLECTUAL PROPERTY

## TRIAL PRACTICE

*"Trial Handbook for Utah Lawyers* by David W. Scofield; *Products Liability: 50 State Handbook* by Kuhnke & Price; *Stress Management for Lawyers* by Amirum Elwork Ph.D., rev. by Betsy Ross Jun/Jul 95 at 48

"Overview of the Trial Practice Seminar,"

Robert D. Maack Nov 95 at 7

"Motions in Limine - Plaintiff's Motions,"

Philip R. Fishler Nov 95 at 8

"Motions in Limine - Defendant's Motions,"

P. Keith Nelson Nov 95 at 10

"Jury Selection,"

Gordon L. Roberts & Hon. Timothy R. Hanson Nov 95 at 14

"Demonstrative Evidence: Seeing May Not Be Believing But it Beats Not Seeing at All,"

E. Scott Savage Nov 95 at 17

"Plaintiff's Opening Statement,"

Daniel L. Berman Nov 95 at 20

"Defendant's Opening Statement,"

Carman E. Kipp Nov 95 at 21

"Trial Objections,"

Stephen B. Nebeker Nov 95 at 25

"Direct Examination,"

Ray R. Christensen Nov 95 at 32

"Cross Examination,"

Robert S. Campbell, Jr. Nov 95 at 35

"Plaintiff's Experts: Finding, Preparing and Presenting an Expert Witness,"

W. Brent Wilcox Nov 95 at 38

"Defense Experts: Defendant's Examination of Experts,"

Harold G. Christensen Nov 95 at 41

"Plaintiff's Closing Statement,"

Richard W. Giauque Nov 95 at 43

"Defendant's Closing Statement,"

David K. Watkiss Nov 95 at 46

"Post-Trial Motions,"

H. James Clegg Nov 95 at 48

"Bar President's Message,"

Dennis V. Haslam Jan 96 at 4

"Objectionable Jury Argument,"

Francis J. Carney VoirDire Win 97 at 23

"Visual Communications in Court - Adopting Some Surprising Technologies,"

Douglas Filter & Brent Johnson May 97 at 11

"Jurors and Justice,"

Stephen Trimble June 97 at 11

"Motions at Trial - and After,"

Francis J. Carney VoirDire Sum 97 at 17

"Attorney Voir Dire and Jury Questionnaire: Time for a Change,"

Robert B. Sykes & Francis J. Carney Aug 97 at 13

"Video Trial Exhibits,"

John F. Fay March 98 at 10

"Motions for Summary Judgment Where There is a Motive to Deny,"

Robert B. Sykes & Ron J. Kramer June 98 at 20

## TRUST DEEDS

"Trust Deed Foreclosures in Utah,"

Rolf H. Berger Nov 94 at 20

## UNAUTHORIZED PRACTICE OF LAW

"Prosecution of Unauthorized Practice of Law Cases in Utah"

Jul/Jul 96 at 42

"Avoiding the Unauthorized Practice of Law,"

Katherine A. Fox & Carol A. Stewart VoirDire Sum 97 at 22

## UTAH DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING

"Are You Misinforming Your Clients?"

Lauri Arensmeyer Oct 98 at 16

## UTAH LIABILITY REFORM ACT

"Our Legislature at 'Work',"

H. James Clegg Apr 94 at 6

## VIDEO

"Visual Communications in Court - Adopting Some Surprising Technologies,"

Douglas Filter & Brent Johnson May 97 at 11

"Video Trial Exhibits,"

John F. Fay March 98 at 10

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COURTS; JUDICIARY; TRIAL PRACTICE;  
HISTORY/LEGAL/UTAH

"Official Court Reporting: A Proposal for Bar Members' Consideration and Response,"	Judge Anne M. Stirba	Jan 94 at 24
"What Do I Know?"	Judge Glenn K. Iwasaki	Feb 94 at 28
"Whose Children Are These? A Primer for Juvenile Court Practice,"	Judge Stephen A. Van Dyke	March 94 at 31
"Thinking About <i>Daubert</i> ,"	Judge Bruce S. Jenkins	Apr 94 at 28
"Judging the Judges - Some Observations,"	Judge Pamela G. Heffernan	May 94 at 31
"Domestic Violence,"	Judge Roger S. Dutson	Jun/Jul 94 at 42
"Court-Annexed Mediation: Thirteen Questions,"	Judge William B. Bohling	Dec 94 at 31
"Professionalism Before the Courts,"	Justice Richard C. Howe	Feb 95 at 31
"Maybe We Should Write That Spot Down,"	Judge Michael Burton	March 95 at 39
"Challenges of the Youth in the 1990's,"	Judge Andrew Valdez	Apr 95 at 31
"A New View from the Utah Court of Appeals,"	Judge Michael J. Wilkins	May 95 at 37
"O.J. Simpson Trial and the Public's View of Our Judicial System, The,"	Judge Rodney S. Page	Jun/Jul 95 at 46
"Need for Cautious and Deliberate Reforms in the Civil Justice System,"	Judge J. Thomas Greene	Aug/Sep 95 at 44
"View From the Juvenile Court Bench, A,"	Judge Kimberly K. Hornak	Oct 95 at 31
"How to be Effective and Contented in the Practice of Law,"	Judge J. Thomas Greene	Dec 95 at 32
"A Pop-Quiz on Ethics,"	Judge Fred D. Howard	Feb 96 at 38
"State of the Judiciary, The,"	Chief Justice Michael D. Zimmerman	March 96 at 27

"X,Y,Z's of a Divorce, or What You Need to Submit to the Court to Finalize a Divorce, The,"	Judge Judith S.H. Atherton	Apr 96 at 32
"Justice Court Growth,"	Judge John L. Sandberg	May 96 at 35
"Some Resolutions of a New Judge,"	Judge Robert K. Hilder	Jun/Jul 96 at 52
"Utah Juvenile Justice System Isn't Broken,"	Judge Scott N. Johansen	Aug/Sep 96 at 42
"Report of the Circuit Court,"	Judge John Backlund	Oct 96 at 36
"Another Vietnam: Salt Lake's War on Crime,"	Judge Michael L. Hutchings	Nov 96 at 32
"Observations of a Sitting Judge,"	Judge Ronald Nehring	Dec 96 at 39
"Of Courtroom Conduct and Performance Evaluations,"	Judge Ben H. Hadfield	Feb 97 at 39
"State of the Judiciary,"	Chief Justice Michael D. Zimmerman	March 97 at 35
"What Are Jails For?"	Judge James L. Shumate	Apr 97 at 38
"Finding the Facts in a Domestic Bench Trial,"	Judge Steven L. Hansen	May 97 at 32
"Child Welfare Reform Act of 1994: Is the Cure Worse than the Problem?"	Judge Arthur G. Christean	June 97 at 31
"Drug Court in the Third District,"	Judge Stephen L. Henriod	Aug 97 at 35
"Writing a Winning Appellate Brief,"	Justice Christine M. Durham	Oct 97 at 34
"Ten Tips for New Attorneys,"	Judge G. Rand Beacham	Nov 97 at 34
"What's New in the Juvenile Court?"	Judge Hans Q. Chamberlain	Dec 97 at 38
"Child Witness: An Ever-Increasing Fact of Life in Utah Courts, The"	Judge Donald J. Eyre, Jr.	Feb 98 at 38
"State of the Judiciary,"	Chief Justice Michael D. Zimmerman	Apr 98 at 49

"Act Well Thy Part," Judge Joseph W. Anderson	June 98 at 50	"Andrew 'Guss' Guaring," Michael O. Zabriskie	Oct 95 at 29
"Source of Funds Rules - Equitably Classifying Separate and Marital Property," Judge Michael D. Lyon	Aug 98 at 45	"Alex Dahl, Judicial Clerk Par Excellence," S.K. Christiansen	Jan 96 at 24
"Court in the Canyon Lands," Judge Lyle R. Anderson	Sep 98 at 33	"David & Chelom Leavitt," Michael Mower	Feb 96 at 36
"Getting Smart as Well as Tough on Crime," Judge K.L. McIff	Nov 98 at 41	"Dave Doty," Mark E. Burns	March 96 at 25
"Be the Best You Can Be," Hon. J. Thomas Greene	Dec 98 at 45	"Maximo R. Guerra," Michael O. Zabriskie	Apr 96 at 28
<b>WATER LAW</b>		"Hugh Matheson," Robert O. Rice	May 96 at 32
"Basic Utah Water Law," J. Craig Smith	Feb 94 at 19	"Lynda Faldmo," Brett J. DePorto	Aug/Sep 96 at 40
<b>WELFARE REFORM</b>		"Valerie Longmire," Erik A. Christiansen	Oct 96 at 33
"Welfare Reform Act: Finding Your Way Through the Construction Zone," Karma Dixon & Renee M. Jimenez	June 97 at 16	"Todd A. Utzinger," Heather J. Miller	Nov 96 at 31
"Child Welfare Reform Act of 1994: Is the Cure Worse than the Problem?" Judge Arthur G. Christean	June 97 at 31	"Reyes Aguilar," Erik A. Christiansen	Dec 96 at 33
<b>WORKERS COMPENSATION</b>		"Kristine Rogers," Cathy Roberts	March 97 at 32
"Our Legislature at 'Work'," H. James Clegg [ <i>Sullivan Doctrine</i> ]	Apr 94 at 6	"Marty Olsen," Erick Anthony Christiansen	May 97 at 30
"Significant Changes in Comparative Fault and Workers' Compensation Reimbursement," Tim Dalton Dunn & W. Brent Wilcox	Aug/Sep 94 at 8	"Michael O. Zabriskie," Mark Burns	Aug 97 at 33
<b>YOUNG LAWYERS PROFILES</b>		"John L. Baxter," Heather J. Dunn	March 98 at 47
"Narda Beas-Nordell," Michael L. Mower	Apr 95 at 29	"John Bowen," Peggy E. Stone	Apr 98 at 46
"Kristen B. Jocums," Michael O. Zabriskie	March 95 at 36	"Laura Gray," Reagan L. Brenneman	June 98 at 48
"Stewart P. Ralphs," Michael L. Mower	May 95 at 35	"Michael Mower," Mark Quinn	Aug 98 at 43
"Young Lawyer of the Year Award: Kimberly K. Hornak" Jun/Jul 95 at 43		"Augustus Chin," Sandra Langley	Oct 98 at 25
"Jensie Anderson," Michael Mower	Aug/Sep 95 at 43	<b>ZONING</b>	SEE ALSO LAND
		"Utah Zoning Enabling Acts; Suggestions for Change, The," Richard S. Dalebout	March 95 at 20

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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 malpractice 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 auto-

mobile 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(l) (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.

## **UTAH LAWYERS CONCERNED ABOUT LAWYERS**

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UTAH STATE BAR**

*\*See Rule 8.3(d), Utah Code of Professional Conduct*

## ***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.

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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. Cathart 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.<sup>1</sup>

According to newspaper accounts,<sup>2</sup> 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.<sup>3</sup>

### **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.<sup>4</sup>

"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."

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

*"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."*

"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.

"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.<sup>5</sup> 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 commission 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

*"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."*

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."

<sup>1</sup>Utah Code Ann. § 20-1-7.3 (1993) (repealed).

<sup>2</sup>See, e.g., "Leavitt Delays Plan to Seek Changes on Judicial Panel," *Deseret News*, October 12, 1993 (Deseret News Archives — [http://www.desnews.com/cgi-bin/lib-story\\_plus?dn\\_all&9310120169](http://www.desnews.com/cgi-bin/lib-story_plus?dn_all&9310120169)).

<sup>3</sup>Utah Code Ann. § 20A-12-103 (1998).

<sup>4</sup>See, e.g., *supra* note 2.

<sup>5</sup>Utah Code Ann. § 20A-12-105 (1998).

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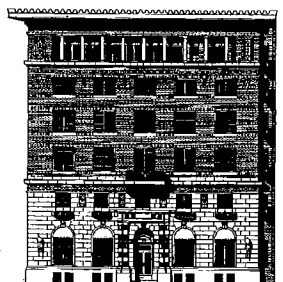
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# A High Profile Year for the Bar Foundation

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.

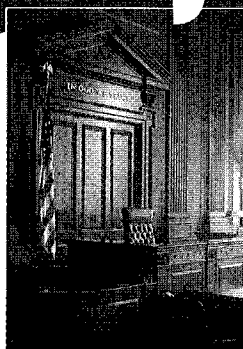
In the wake of *Phillips*, and after several states obtained legal opinions on the effect of the decision of their IOLTA programs, the Conference of Chief Justices issued a resolution voicing unanimous support for the continued operation of IOLTA programs across the country. Essentially, until the two 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.

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# *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.

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## 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 devel-

oping 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

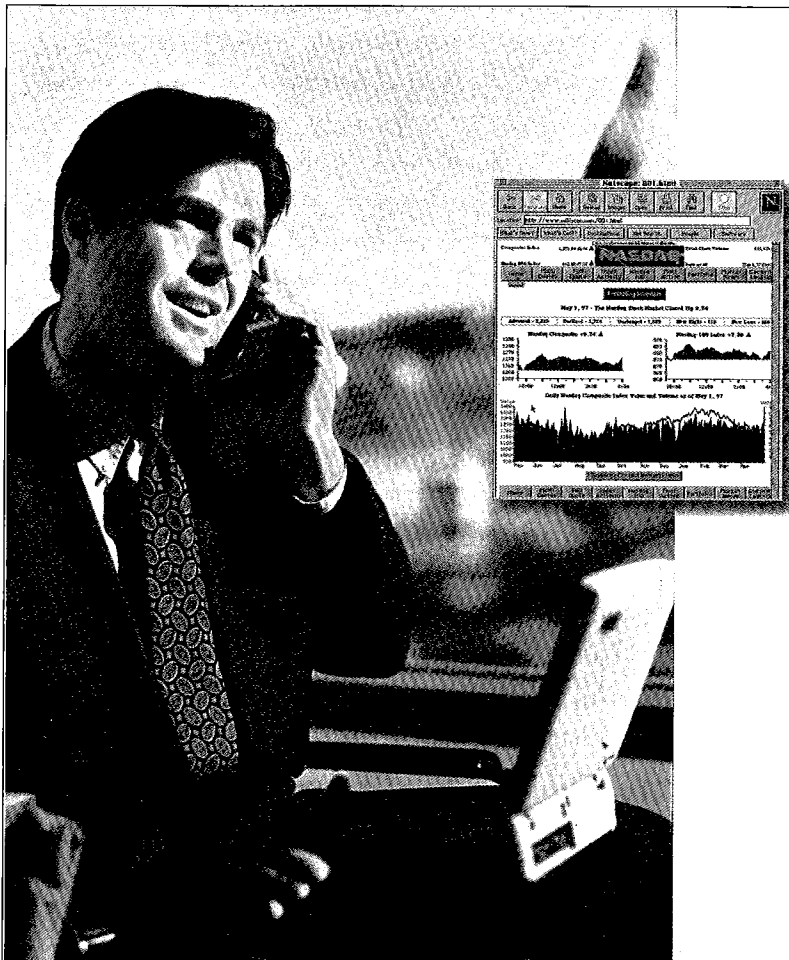
**Correctional Officer Compensation** – The Law Enforcement and Criminal Justice Interim committee requested the governor to address in his proposed budget the disparity in correctional officers' salaries for the Department of Corrections. The committee recommended legislation, which will appropriate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



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**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 goods 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.

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Utah Legal Services, Utah State Bar Possession Bond Project*

## FOR AN UPDATED CLE CALENDAR ACCESS THE BAR'S WEBSITE AT [www.utahbar.org](http://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

### 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

1. \_\_\_\_\_

2. \_\_\_\_\_

Make all checks payable to the  
Utah State Bar/CLE

Total Due \_\_\_\_\_

Name \_\_\_\_\_ Phone \_\_\_\_\_

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.

253-6397

**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 & TRADE-MARK 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."

## OFFICE SPACE / SHARING

**Exchange Place Historical Bldg.,** located half block from new courts complex, has 844 sq. ft. office space, includes reception area, small conference room for \$975.00 a month, and a 480 sq. ft. space for \$750.00 a month, and 350 sq. ft. space for \$380.00. Receptionist, conference room, fax, copier and library are negotiable. Parking available. Contact Joanne Brooks @ (801) 534-0909.

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.

**Restored mansion 174 East South Temple:** available for lease two offices (272 square feet and 160 square feet) with conference room, reception, work room (total 414 square feet), lavatory, kitchen, storage, off-street parking. Fireplaces, hardwood floors, stained glass, antique woodwork and appointments. Call (801) 539-8515.

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 (801) 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.

Professional office space available. 500 square, 1/2 block from courthouse. Access to law library. \$675 per month. Call Michelle @ (435) 673-4892 or leave a voice message @ (888) 544-499.

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

**ATTORNEY/PROFESSIONAL: SHARE DOWNTOWN OFFICE SPACE** with two established attorneys. Rent includes receptionist, parking, conference room, copier, fax, kitchen and library. Inquiries call: (801) 579-0600.

#### SERVICES

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#### APPRAISALS: CERTIFIED PERSONAL PROPERTY

APPRAISALS/COURT RECOGNIZED – Estate Work, Divorce, Antiques, Insurance, Fine Furniture, Bankruptcy, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Twenty years experience. Immediate service available, Robert Olson C.A.G.A. (801) 580-0418.

**SEXUAL ABUSE-CHILD ABUSE/DEFENSE: IMPEACH** child's out-of-court testimony. **IDENTIFY** sources of error with interviewer questioning, bias, props, and procedures. **ASSESS** statement reliability and contamination. **DETERMINE** origin of allegations and alternative hypotheses. Bruce Giffen, M.Sc. Evidence Specialist. American Psychology-Law Society. (801) 485-4011.

**SKIP TRACING/LOCATOR:** Need to find someone? **Will locate the person or no charge and no minimum fee for basic locate.** 87% success rate. Nationwide. Confidential. Other attorney needed searches/records/reports/information services in many areas from our extensive databases. Tell us what you need. **Verify USA. (888) 2- Verify.**

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.

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Serving Salt Lake City  
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# 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.

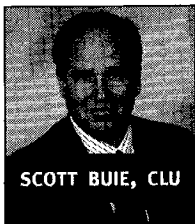
Dave earned a Bachelor of Science degree in Political Science from SUU and enrolled

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."



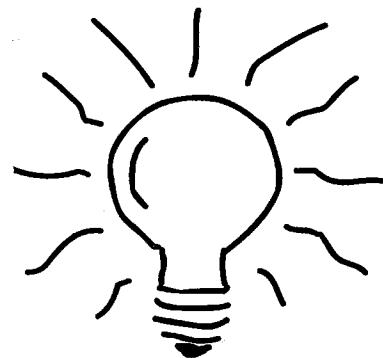
## Insurance agent makes the MOST WANTED list.

Scott Buie, CLU, is wanted for providing needed income protection to members of the Utah Bar Association. Scott knows that an unexpected illness or disability can

disrupt, even destroy your family's lifestyle. He can help you protect what you've earned with a disability income insurance policy from Standard Insurance Company. Contact him today for more information.

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## Great idea.

Advertising in the *Utah Bar Journal* is a really great idea. Reasonable rates and a circulation of approximately 6,000! Call for more information.

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*Executive Director*  
Tel: 297-7028

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*Administrator*  
Tel: 297-7027

*Pro Bono Coordinator*  
Tel: 297-7049

## Continuing Legal Education Department

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*Administrator*  
Tel: 297-7027

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*CLE Coordinator*  
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Marie Gochmour  
*Section Support*  
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**Consumer Assistance Coordinator**  
Jeannine Timothy  
Tel: 297-7056

**Lawyers Helping Lawyers**  
Tel: 297-7029

**Receptionist**  
Marie Van Roosendaal (Mon., Tues. & Thurs.)  
Kim L. Williams (Wed. & Fri.)  
Tel: 531-9077

## Other Telephone Numbers & E-mail Addresses Not Listed Above

Bar Information Line: 297-7055  
Web Site: www.utahbar.org

Mandatory CLE Board:  
Sydney W. Kuhre  
*MCLE Administrator*  
297-7035

Member Benefits: 297-7025  
E-mail: ben@utahbar.org

**Office of Professional Conduct**  
Tel: 531-9110 • Fax: 531-9912  
E-mail: oad@utahbar.org

Billy L. Walker  
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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.

## **Winning Brain Injury Cases:**

**Medical & Legal Issues • A 2-day CLE Seminar**

Presented by the Utah Trial Lawyers Association and the Brain Injury Assn. of Utah

***Plan Now To Attend • A Registration Packet  
Featuring the Names of Nationally-Recognized Medical and  
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# **January 28-29, 1999**

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**For Early Registration  
Call 801-531-7514**

**18 CLE  
Hours**

## 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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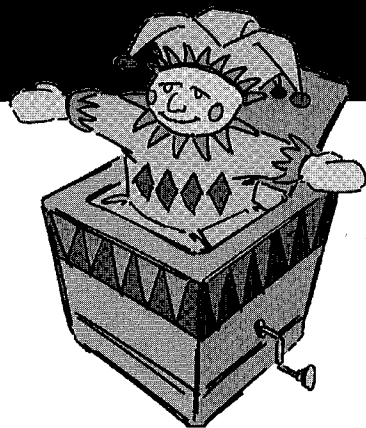
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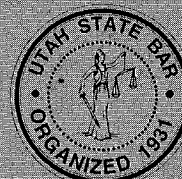
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