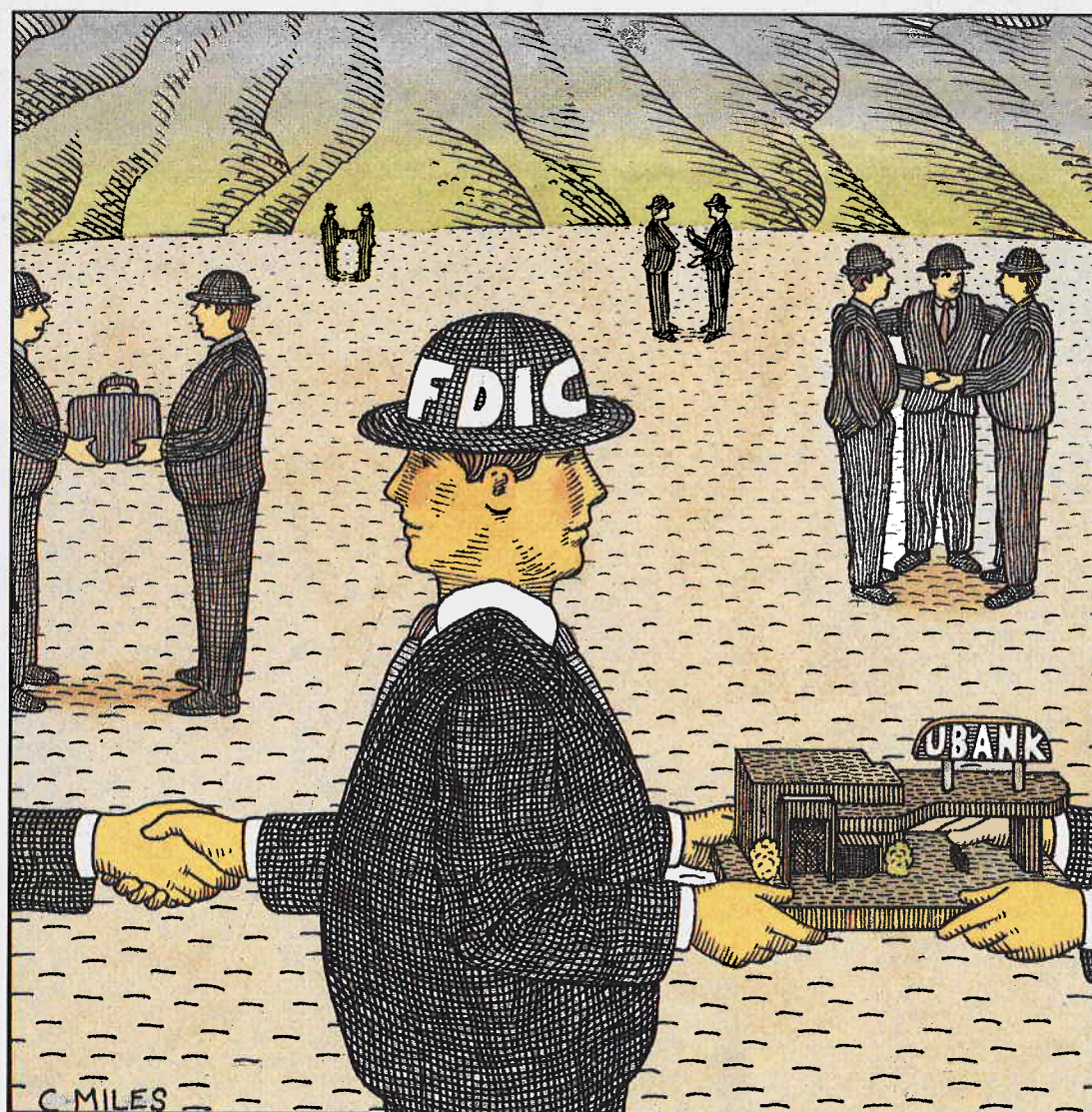


UTAH BAR JOURNAL

Vol. 2, No. 2

February 1989



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It is Time to Revise JIFU

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A Plea for Bargaining—and Justice

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The Utah State Bar 1989 Mid-Year Meeting

March 16 to 18, 1989

Pack your shamrocks and shillelagh for St. Patrick's Day shenanigans in conjunction with the Mid-Year Meeting of the Utah State Bar. We're not sure if St. Patrick ever met St. George, but nonetheless, they'll be getting things together this March when Utah lawyers gather under the warm spring sun in St. George, Utah.

The program includes updates on the legislature and case law, and a judicial panel which will respond to questions and pet peeves from attorneys. A full complement of continuing legal education sessions will cover the topics of jury research and the art of negotiation.

There will be plenty of time to enjoy the desert sun while participating in planned outdoor activities or by enjoying the St. George climate on your own.

The meetings will be held at the Holiday Inn where a block of rooms has been reserved for Bar members. Last year there were more registrations than expected, so an additional block of rooms is being held at the Hilton Inn.

Registration materials were mailed to Utah attorneys during the first week of January. Questions regarding the program or meeting arrangements can be answered by committee members or the Bar staff.

The opening reception and registration is Thursday, March 16. Meetings begin on Friday, March 17, and conclude with an awards luncheon on Saturday afternoon featuring Daniel R. White, a lawyer, author and legal humorist. His frequent speaking engagements and writing leave time for the occasional practice of law. He has written *The Official Lawyer's Handbook*, *White's Law Dictionary* and most recently *What Lawyers Do... And How to Make Them Work For You*, which was a Book of the Month Club selection.

Thursday, March 16, 1989

6:00 p.m. to 8:00 p.m. Registration and Reception
Holiday Inn Sabra Room

Friday, March 17, 1989—

WEAR YOUR GREEN

8:00 a.m. Registration—Holiday Inn Lobby
Continental Breakfast—Sabra Room
GENERAL SESSION—Sabra Room
Welcome and Announcements
Kent M. Kasting, President
Paul T. Moxley, Co-chair
LaMar Winward, Co-chair

8:15 a.m. The Art of Negotiation
Professor Gerald R. Williams

9:45 a.m. Case Law Update
Justice Michael D. Zimmerman
Judge Gregory K. Orme

10:15 a.m. Legislative Update
Roger D. Sandack

10:45 a.m. How to Avoid Being a Target of an Ethics Complaint
or Malpractice Claim
Carman Kipp, Moderator
Paul S. Felt
Virginia ("Ginger") Smith
Don J. Roney
Christine A. Burdick

11:30 a.m. Review of the Dan Jones Survey on Lawyer Attitudes
and Expectations
Kathleen Barrett

12:00 Noon Casual Poolside Luncheon

1:00 p.m. **SPORTING EVENTS**
Golf Tournament at Red Hills Golf Course
Tennis Tournament at Vic Braden's
Tennis Camp at Green Valley
Trap Shooting at Green Valley

6:00 p.m. **ST. PATRICK'S DAY PARTY—Holiday Inn.**
Join in a night of delicious Irish delights and dancing.
Green clothing will be the order of the evening along
with green beverages. Green T-shirts with the meeting
logo will be available from the registration desk for \$8.

Saturday, March 18, 1989

7:30 a.m. Sunrise 5-K run

8:00 a.m.

CONCURRENT BREAKOUT SESSIONS

A. Psychological Strategies of Juror Persuasion—
Cinema 1

Dr. Dan Gallipeau

B. The Utah Administrative Procedures Act: Three
Different Assessments After 15 Months of
Experience—Cinema 2

Henry Chai

Steven Eklund

Judge Russell Bench

9:00 a.m.

GENERAL SESSION—Cinema 1

How is the Business of the Court? Lawyers' Concerns
About the Administration of Justice by the Courts—A
Panel. Questions should be submitted to Doug Parry
prior to the beginning of the session.

Douglas J. Parry, Moderator

Judge Pamela T. Greenwood

Judge Scott Daniels

Judge Leonard H. Russon

Judge Don V. Tibbs

Judge Rodney S. Page

Scott M. Matheson

Robert Van Sciver

Bert L. Dart

H. James Clegg

James R. Holbrook

Nancy Sue Bergeson

10:30 a.m.

Break

10:45 a.m.

CONCURRENT BREAKOUT SESSIONS

A. Innovative Techniques in Courtroom Exhibits—
Cinema 1

Dr. Dan Gallipeau

B. Substance Abuse

Rita Baden

Spencer E. Austin

Mark E. Kleinfeld

12:00 p.m.

Awards Luncheon
Holiday Inn Sabra Room
Dan R. White

MID-YEAR MEETING PROGRAM COMMITTEE

Paul T. Moxley and LaMar J. Windward, co-chairmen, Jan C. Graham, Stephen J. Mikita, Hon. Michael R. Murphy, Carolyn Nichols, Douglas J. Parry, Hon. John A. Rokich, Joanne C. Slotnik, Hans Q. Chamberlain, commission liaison, Stephen F. Hutchinson and Barbara R. Bassett.

■

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COVER: Our thanks to Chris Miles, an art major at the University of Utah, for the cover artwork which depicts the dual role oftentimes played by the FDIC in winding up the affairs of a failed state bank. Chris has also had illustrations published in the *Logan Herald Journal* and *Parent Express* magazine.

■

The Utah Bar Journal is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, \$20; Single copies, \$2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

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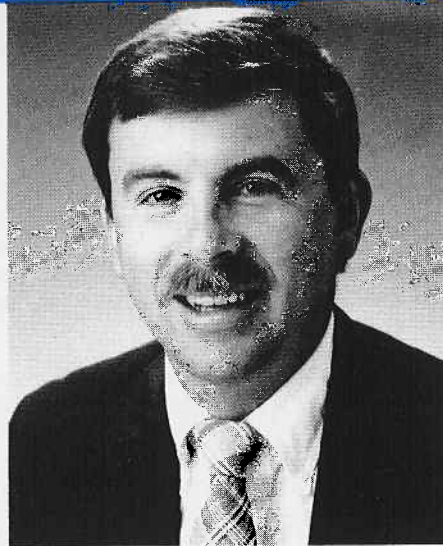
Overhead—You Know It When You Pay It!

(Perhaps You Don't When You Don't)

This President's Message is being written about that debilitating, sometimes terminal, ailment often unaffectionately referred to as "overhead"—what the lawyer has to pay before he or she gets paid! I hope that what I say below is also informative and useful to lawyers and judges who have the good fortune of not having direct responsibility to pay all of those monthly bills, assessments, premiums, fees and costs that rise up and demand immediate and substantive response in the form of reduction in bank account balances each month.

Once in a while, we read in the papers or hear on the radio one of those stories about the lawyer or lawyers who have "hit it big" and received fees perceived by many to be adequate enough to support immediate retirement and at least monthly sojourns to Tahiti, the Virgin Islands, the French Riviera or other exotic places where the rich congregate to play. By and large, however, the usual cases lawyers handle rarely qualify as the "bonanza case." In reality, lawyers, as private practitioners, are principally engaged in attempting to solve the problems of people and businesses as quickly and painlessly as possible for a fee usually based on the hours it takes to adequately and competently respond to the client's needs. Simply put, the vast majority of lawyers charge by the hour and, hopefully, get paid by the hour. Getting paid is not often as easy as it sounds, and as one sage practitioner once said, "A good lawyer works 12 hours, bills six hours and collects three hours a day." That may be somewhat exaggerated, but as all of us who have been in the practice know, billing a fee is far different than collecting a fee.

Now, to the point of the story: attorneys' fees vis-à-vis overhead. The legal practice in the United States today is far different than what it was 20, 15 or even 10 years ago. Our society has geometrically grown in terms of complexity of relationships, behavioral requirements and conflicting needs



Kent Kasting

and demands. Necessarily, the legal service, in response to those changes, has had to become more extensive more detailed and more involved—all of which requires the expenditure of more time and costs to ensure that the courses of our clients are safely charted through those hazardous seas which have more sand bars and hidden reefs than ever before.

Whether we like it or not, society has told the private practitioner that carbon paper and tissue copies no longer are acceptable; that "FAX machines" are "in"; that simply having a copy of the *Utah Code* won't get you by; that your expert had better have charts, graphs, models and all other sorts of gimmicks to talk about in addition to that learned treatise that was once so often the foundation for his opinion; and that to get things done, you've got to have a phone system which will allow great numbers of lawyers, judges and parties to participate in that critical conference call. And the bottom line is all of these new developments and devices result in increased overhead, newer and greater costs, and the expenditure of large sums of money to keep the law office operational, effective and competitive.

So, the next time you hear about or consider the amounts charged by lawyers, please also remember what it now costs to do business. Perhaps a few facts and figures bring what I'm trying to say into clearer focus. Some of the examples below are based on my own firm's experience with nine lawyers, but I believe them to be fairly representative of the costs Utah lawyers incur in the practice of law, and of course the amount of overhead increases in proportion to the number of lawyers in the firm. A normal lawyer or law firm's overhead runs around 50 percent to 60 percent. At

\$100 per hour, that means \$50 to \$60 goes to overhead.

In our shop, we pay over \$5,000 per month for rent. Average office space in Salt Lake goes for about \$1 per square foot per month. We pay about \$2,000 per year per lawyer for malpractice insurance. Our telephone bill, excluding long distance, runs about \$1,200 per month. That voracious postage meter which some firms lease consumes about \$750 in postage every two weeks. The copier we have is mid-line, costs about \$14,000 to buy, or \$425 per month to lease, and that doesn't include annual maintenance, contract costs, paper, toner, the new drum and everything else it takes to make the thing dependable.

And then there are the salaries for the receptionist, the runner, the legal secretary, the paralegal and the associates. Legal secretaries' salaries range from \$1,500 to \$2,000 per month, and the starting salaries for associates in Salt Lake are about \$30,000 per year. Salaries, plus the 7.51 percent FICA employer contribution, health and life insurance premiums, vacation and pension benefits, are most expensive, but most necessary to ensure that the lawyer has top quality people serving the client.

Oh, and don't forget about the library. A new *Utah Code* costs \$600 to buy and about \$250 to \$300 per year to keep current. But in order to practice law today, you need more than a *Code* and legal encyclopedia to get you by, and it seems like each set of books you have in your library costs \$400 to \$600 per year to keep current. And that doesn't include what it costs to buy them. And there's Lexis and Westlaw, both of which a few years ago were novelties, but now seem to be necessities.

Then there are office supplies, equipment lease payments, including those computers that are constantly in need of upgrading, in spite of the salesman's promise that his system will meet your needs for at least a decade. There are the personal property taxes, the accountant's fees, the fire and hazard insurance, the magazine subscriptions, the Bar dues, the CLE fees, the *Martindale-Hubbel* listing (this year our one page cost about \$1,300), monthly parking (we pay about \$400 to \$500 per month,) the deposition costs—many of which are never collected—and a myriad other incidental expenses which we all continually, but unsuccessfully, try to escape or at least minimize.

The lawyers' plague of overhead is further complicated and compounded by another distasteful facet of the practice called

"accounts receivable"—what the lawyer pays up front in terms of overhead and expenditure of time in anticipation that his bill will be paid in a timely fashion by an ever-so-grateful client. Many times that client is either not able to pay the bill or, in retrospect, concludes that he or she could have achieved a better and quicker result without the assistance of a lawyer. Like it or not, accounts receivable are a major problem and concern of most law firms and writing off accounts entirely or discounting them substantially is not an uncommon practice. When you consider the fact that the overhead goes on whether or not the client pays you, you can more readily understand many of the frustrations the private prac-

itioner experiences in trying to run a law office and earn a reasonably acceptable salary.

The purpose of this message is not to cry "sour grapes" about the private practice of law. Rather, I thought it appropriate for all members of the legal profession in Utah to at least be updated on what it costs to practice law these days and to remember that when an attorney sends his or her bill, the work has already been done and the expenses have already been paid. It was also intended to dispell the notion that may exist that attorneys take home whatever fees they may receive or be awarded. To the contrary, 50 percent to 60 percent goes to office overhead—a law firm's chronic ailment.

DIRECTORY UPDATE AND CORRECTIONS

In our recently distributed Utah State Bar Directory Supplement, Robert G. Wright was inadvertently omitted from the Supplement. Below are the names and addresses of both Robert G. Wright and W. Robert Wright.

Robert G. Wright

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Salt Lake City, UT 84110
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COMMISSIONER'S REPORT



H. James Clegg

I had hoped to entitle this article something majestic like "The Vision from the Summit." Unfortunately, the best I can do is "A View From the Foothills Through Thinning Fog."

I have now been a member of your Bar Commission for about six most interesting months. It is not quite what I expected. The "ups" have been great; the "downs" pretty discouraging. The greatest up is seeing lawyers and judges put in so much time and effort to keep the legal system working. It really doesn't just happen by itself. The completion and occupancy of the Law and Justice Center has been a very exhilarating event, attracting national attention and spotlighting our Bar. More needs to be done to fulfill the vision to use the concrete, steel and pleasant decor to fulfill societal needs, but everyone is enthusiastic.

The hardest personal "down" has been review of some appealed disciplinary matters. Those involving dishonesty or breach of fiduciary duty are easy; some involve issues which are not so black-and-white. The responsibility to protect the public from unethical practices requires different considerations than the customary presumptions of innocence, guilt beyond a reasonable doubt and right against self-incrimination. I've probably proved what I instinctively knew: I agonize too much to be a good judge.

A most interesting challenge is serving with Jackson Howard, Brian Florence and Paul Durham on a committee to study the organization of the Utah State Bar and make recommendations for changes. I am still struggling to learn how our system works and, at the same time, we are studying the structures of other bars. Suggestions so far go all the way from adjusting the size of districts to provide a more uniform number of voters per commission-seat to adding a fairly large parliamentary body of lawyers, perhaps 50 to 100, between the membership and the Commission in the hope of having better communication with and direction from the members of the Bar.

On November 2, 1988, Jackson and I drove to Price to meet with the Eastern Utah Bar Association to elicit the views of its membership. Jackson and Paul had already gone to a similar meeting involving the Uintah Basin Bar Association at Vernal. We appreciated the views and sentiments received concerning structure and ideas for improvement.

One of the least enjoyable facets is the depleted treasury. There is no money for

frills, not even payment for mileage for our trip to Price, for example. Jackson and I don't begrudge the time required but it would be nice to have a bit of expense money around.

I have reviewed the expenditures and am dismayed only at the costs of legal defense and malpractice insurance. The State Bar's costs and budget reflect, in some measure at least, the claims made. While I am pretty ignorant about claims which preceded my service on the Commission, I am not particularly impressed with those presently pending. My review of the allegations and defenses makes me sure that I would have done about the same thing as my predecessors. Moreover, I am just about as confident that most, if not all, Utah lawyers would have done the same thing and that I would have supported them in it. So why is it that a very few of our number can so affect the goals, sentiments and desires of the vast majority and impoverish the exchequer in the process? Perhaps it's time to see if some sort of Alternative Dispute Resolution would not be preferable.

Anyway, it's a real education and, on balance, I'm enjoying it!

The FDIC and Failed State Banks

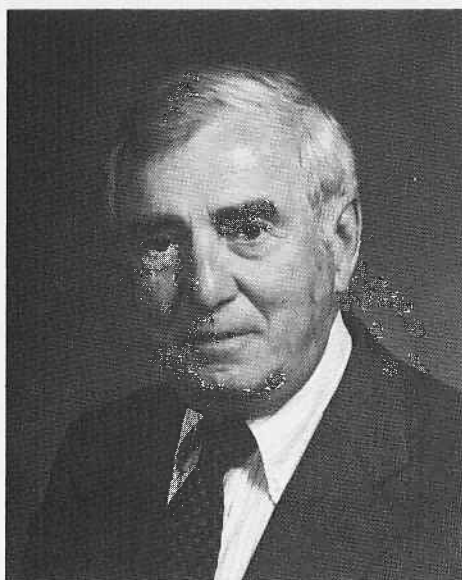
By Peter W. Billings Sr.

While the media was busy reporting on the problems of the state of Utah with the depositors of the so-called thrifts (financial institutions whose deposit liabilities were "guaranteed" up to \$15,000 by the ILGC), the Utah Commissioner of Financial Institutions between 1985 and 1988 closed as insolvent 11 state-chartered banks.

The minimal publicity about these actions was primarily due to the fact that no depositor in these banks suffered a loss and had access to his deposits the next business day after the bank was closed. This result was achieved, even though the maximum insurance provided by the FDIC was only \$100,000 on each depositor's account or accounts, by astute use of their supervisory powers by the Utah Commissioner of Financial Institutions in cooperation with the FDIC, not only as insurer of the deposits but in applying the broad powers granted it by Congress to preserve the integrity of the banking system.

All Utah chartered banks are required to obtain and maintain insurance of their deposit liabilities by the FDIC. Both the Utah Department of Financial Institutions and the FDIC, usually jointly, periodically examine the books and records of a bank to determine that the bank is complying with applicable laws and regulations, that it is so managed as to be in a safe and sound condition and that the quality of its assets meet banking standards. As part of the examination, the bank's unsatisfactory loans are classified as substandard, doubtful or loss. Management is required to give particular attention to substandard loans, write off 50 percent of the book value of doubtful loans and 100 percent of loss classified loans. A copy of the report of examination is submitted to the bank's board of directors, who are required to certify they have read it and are familiar with its contents.

In its efforts to protect depositors and shareholders from loss and preserve the integrity of the banking system, the FDIC may require the bank to increase its capital in light of the risks inherent in the bank's



PETER W. BILLINGS SR. is a Salt Lake City native and was educated public schools. He received a B.A. from the University of Utah in 1938, and his JD from Harvard Law School in 1941. He is a member of the Utah State Bar, California State Bar, American Bar Association, American Judicature Society and American Law Institute. He is chairman of the Utah Chapter American Bar Foundation and chairman of the Utah Advisory Council American Arbitration Association. Mr. Billings was admitted to the U.S. Supreme Court, 9th, 10th and D.C. Circuit Courts of Appeal. He served in the U.S. Army, 1942-46, Major, Chief, Legal Division Office Chief of Transportation. Fabian & Clendenin since 1946. Mr. Billings was chairman of the Utah Coordinating Council of Higher Education, 1965-69; and chairman, State Board of Regents, 1969-73. He has been on the Utah Counsel FDIC since 1985, and he is the author of numerous articles and other materials on banking laws and regulations.

Views in this article are his, not necessarily those of FDIC.

assets in relation to its deposit and other liabilities, may issue cease and desist orders to the board of directors or executive officers of the bank, may impose civil monetary penalties against officers or directors who fail to comply with such orders, may require removal of officers or directors responsible for the bank's unsound condition and ultimately, if all else fails, revoke the deposit

insurance. (12 U.S.C. Sect. 1818).

The Utah Commissioner possesses similar powers¹ and upon a finding that despite the exercise of his powers the bank is in such condition that it is or is about to become insolvent, may take possession and close the bank or arrange a merger with a sound bank, including banks located outside the state of Utah. (Sect. 7-2-1(2) and Title 7 Chapter 19, UCA).

The Utah Commissioner has authority to appoint, and usually does, the FDIC as receiver or liquidator of the closed institution (Sect. 7-2-9, UCA). As receiver as well as insurer of the bank's deposit liabilities, the FDIC has statutory power (12 U.S.C. Sect. 1819 and Sect. 7-2-9(2)(b)) to enter into a purchase and assumption agreement with another solvent bank, whereby the solvent bank assumes all the deposit liabilities of the closed bank and purchases from the receiver the acceptable assets of the closed bank. The receiver then sells the remaining "unacceptable" assets to the FDIC in its corporate capacity for an amount representing the difference between the liabilities assumed and assets purchased by the assuming bank.²

The bank closing usually takes place on a Friday immediately after normal closing hours, and the assuming bank opens for business the following Monday. The assuming bank is selected by a bidding process conducted in camera by the FDIC a day or so before the closing occurs. The bank bidding the highest sum for the goodwill of the insolvent bank as a premium for the opportunity to assume the deposit liabilities and purchase the good assets of the closed bank is the successful bidder. Only banks in a sound financial condition are invited to bid.

Petitions to approve the takeover of the bank, to appoint the FDIC as receiver and to approve the purchase and assumption transaction are submitted to the district court for the district in which the principal office of the insolvent bank is located.³ That court retains jurisdiction over all matters involving the receivership (Sect. 7-2-2). The

closed institution has 10 days within which to apply to that court to enjoin further proceedings. After a hearing on the petition, the court may direct the Commissioner to surrender possession only if it finds the taking to be arbitrary, capricious, an abuse of discretion or otherwise contrary to law (Sect. 7-2-3). Out of the 11 closings since 1985, only two such petitions were filed, and both were dismissed with prejudice.

The receiver is required to publish notice as to the filing of claims against the closed bank and mail such notice to depositors and other creditors whose names appear on the books and records of the closed institution (Sect. 7-2-6(2)). Sect. 7-2-7 of the Utah Code also stays all judicial proceedings against the closed institution or its property. Claimants whose claims are disallowed by the receiver may appeal to the district court having jurisdiction of the receivership within 30 days after service of notice of disallowance (Sect. 7-2-6(9)). This procedure is designed to allow the receiver adequate time in which to determine the validity of claims without being involved in litigation.

To preserve the effectiveness of the state statutory procedure for receivership of state banks and handling claims against the closed bank, the FDIC as receiver of a state-chartered bank is not subject to suit in the federal courts (12 U.S.C. Sect. 1819, fourth), and litigation in state court is stayed (Sect. 7-2-7, UCA). As receiver of a state bank appointed under state law, the rights, duties and obligations of the FDIC are governed by state law (12 U.S.C. Sect. 1821(e), Sections 7-2-9(1) and 7-2-12, UCA). As a state agent, it is protected from tort liability under the Utah Governmental Immunity Act and as a federal agency by the Federal Tort Claims Act.

To facilitate the use of a purchase and assumption transaction, which requires the FDIC to rely on and act quickly in a review of the failed bank's books and records to estimate which assets will be considered unacceptable by the assuming bank and which of those assets ultimately will be collectable, thus estimating the cost of the purchase and assumption and comparing that to the expected loss to the FDIC from straight liquidation, Congress, by statute,⁴ and the federal courts, by establishing a federal common law, have given the FDIC, in its corporate capacity, broad protection against most defenses asserted against efforts by the FDIC to realize on the assets it acquired in a purchase and assumption transaction.

In 1987, the application of Sect. 1823(e) came before the United States Supreme Court.⁵ The court held that the statute pre-

cluded not only undisclosed fraud defenses, but also applied to a wide range of other undisclosed defenses asserting a contract is avoidable, such as certain kinds of mistakes and innocent but material misrepresentations. The court also held the policy of the statute made knowledge of the FDIC of the facts on which a defense was based immaterial.

In its analysis of the statute, the court found Sect. 1823(e) serves two purposes. One is to allow the FDIC to rely on a bank's records in deciding whether to liquidate a failed bank or to provide financing for purchase of its assets and assumption of its liabilities by another bank. The court noted particularly the speed in which such a valuation must be made by the FDIC, usually overnight, in order to preserve the going concern value of the failed bank and to avoid interruption in banking services. The other purpose the court stated was to:

The courts have given credit to the benefits of a purchase and assumption agreement for the protection of depositors and maintaining the integrity of the banking system.

"Ensure mature consideration of unusual loan transactions by senior bank officials, and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure."
98 L.Ed. 2d 340 at 347.

It found both purposes required the broad meaning it gave to the word "agreement" in the statute.

The federal common law concepts are derived from an earlier United States Supreme Court decision⁶ which rejected a defense based on a "secret agreement" between the bank and the maker of a note that the note would not be called for payment. Since *D'Oench Duhme*, the federal common law has been expanded to cover most anything that might affect the collectability or enforceability of the assets acquired by the FDIC pursuant to a transaction.

A most recent example is a September 1988 decision of the Tenth Circuit.⁷ In that

case, the FDIC brought suit against the issuer bank on a letter of credit the FDIC had acquired as part of a transaction involving a closed Colorado state bank. The issuer bank defended on the basis that Colorado state law (a section of the UCC) provided that a beneficiary of a letter of credit could not transfer it unless the letter of credit is expressly designated as transferable or assignable. After analyzing at length the purpose and nature of a transaction, the Tenth Circuit determined that federal common law was applicable to the rights of the FDIC, and held that despite the Colorado statute,

"We conclude that a rule allowing FDIC/corporation to purchase and acquire otherwise non-transferable assets in a P&A is appropriate and necessary to give effect to FDIC/corporation's statutory authorization to finance and facilitate the implementation of P&As. FDIC/corporation is properly proceeding in its corporate capacity, not as receiver, and can enforce the letter of credit in its own right and bring suit against Bank of Boulder in federal court pursuant to 12 U.S.C. Sect. 1819 (fourth)." 858 F.2d at 602.

Normally, under a transaction, the FDIC in its corporate capacity acquires non-book assets of the closed bank such as claims against the bank's officers and directors for breach of their fiduciary duties, claims on fiduciary bonds relating to misconduct of bank employees, rights of the bank to rescind fraudulent or illegal transactions involving bank assets and actions against auditors or attorneys of the bank for malpractice. Unless such a suit is brought as subrogee of depositors or other creditors of the closed state bank, to which state law applies (12 U.S.C. Sect. 1821 (g)), federal law would be applicable to efforts of the FDIC/corporate to recover on such claims, whether the closed bank was a national or state-chartered bank. Under this analysis, the federal common law principles would make state laws limiting the liability of bank officers, directors or auditors inapplicable to the FDIC/corporate in pursuing such claims on its own behalf.

Usually a transaction would leave the receiver without assets to pay claims of creditors whose claims were not assumed by the assuming bank. This result would not be a preferential transfer unless claims having a priority under Sect. 7-2-15 of the Utah Code over the liabilities assumed by the assuming bank were not provided for in the transaction. Because of the high priority afforded claims of depositors under Sect. 7-2-15, this is normally not a problem in Utah. It may

arise in other states where state law requires all claims be treated equally. This is the law in California, and courts applying California law have required that an agreement treat all claims against the bank equally.

To the extent the FDIC recovers on the assets it acquires under the transaction, less its costs of collection and the amount it advanced under the agreement, with interest thereon, any excess is returned to the receiver to be applied to allowed claims as provided in Sect. 7-2-6 under the priorities set forth in Sect. 7-2-15. This inchoate interest of the receiver in bank assets being liquidated by the FDIC/corporate would bring into play the provisions of the Utah statutes such as 7-2-6 for the disposition of claims against the bank asserted as an affirmative defense or a counterclaim against the FDIC/corporate and the application of the Sect. 7-2-7 stay of proceedings against bank assets in the hands of the FDIC/corporate pursuant to a P&A transaction.

If the FDIC is unable to find another bank to enter into a transaction, it would pay the deposit insurance liabilities of the closed bank, up to \$100,000 on each account, and to that extent be subrogated to the depositors' priority rights under Sect. 7-2-15. As receiver, the FDIC in liquidating a closed state bank's assets, would be governed by

state law and not entitled to the protection of Sect. 12 U.S.C. Sect. 1823(e) or the federal common law. The receiver may pay interim ratable dividends to such persons in such amount as may be directed by the court (Sect. 7-2-16), subject to the priorities established pursuant to Sect. 7-2-15.

The courts have given credit to the benefits of a purchase and assumption agreement for the protection of depositors and maintaining the integrity of the banking system. The court decisions recognize that in a transaction, the FDIC as receiver, and the FDIC in its corporate capacity, are participating as two different entities in a three-party agreement, the other party being the assuming bank. Congress has also recognized the distinction in the FDIC acting in its two different capacities. In its corporate capacity, the FDIC may sue and be sued in the federal court, but federal courts do not have subject matter jurisdiction of claims against the FDIC as receiver of a state bank in litigation which involves only the rights or obligations of depositors, creditors, stockholders and such state bank under state

law (12 U.S.C. Sect. 1819, fourth). This concept that the FDIC may be wearing two hats and that different law applies, depending on which hat it wears, has been difficult to understand, but as the number of cases have proliferated with the recent substantial increase in the number of bank failures and the use of agreements, the concept is now well-established.

¹ Sections 7-1-307, 308 and 313, Utah Code Ann.

² Effecting Purchase and Assumption Agreements or similar arrangements on the 11 closed Utah banks has required the FDIC to put out over \$100,000,000.

³ Because publicity might engender a premature run on the insolvent bank, the Utah statute (Sect. 7-2-2) authorizes the Commissioner to close the bank before commencing the judicial proceedings for approval of his actions, but he must do so within a reasonable time.

⁴ Section 12 U.S.C. Sect. 1823(e) provides:

"No agreement which tends to diminish or defeat the right, title or interest of the corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement (1) shall be in writing; (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank; (3) shall have been approved by the board of directors or its loan committee, which approval shall be reflected in the minutes of said board or committee; and (4) shall have been continuously from the time of its execution and official record of the bank."

⁵ Langley v. FDIC, 484 U.S. , 98 L. Ed. 2d 340.

⁶ D'Oench Duhme & Co. v. FDIC, 315 U.S. 447 (1942).

⁷ FDIC v. Bank of Boulder, 858 F.2d 594.

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It is Time to Revise JIFU

By Gary L. Johnson

For the last 30 years, attorneys in Utah preparing jury instructions for trial have relied upon a book titled *Jury Instruction Forms for Utah* ("JIFU"). In the office of almost every trial lawyer in our state, one can find a dog-eared, well-worn copy of JIFU. Today, however, there is a serious question as to the utility and reliability of JIFU.

The inaccuracies in JIFU are now legion. One can find instructions which completely misstate current law, instructions which are incomplete statements of current law and a total lack of instructions on many modern areas of civil practice. A brief overview of those problem areas should suffice to convert the reader into an adherent of this author's position: a new edition of JIFU is needed.

MISSTATEMENTS OF LAW

JIFU 17.1 is titled "Assumption of Risk Doctrine Defined." The instruction sets forth a definition of assumption of the risk, and in the last paragraph provides that one who thus assumes a risk "is not entitled to recover for damage . . . which results from the dangerous condition or conduct to which [he] thus exposed [himself]." That statement is no longer an accurate reflection of Utah law. A finding by a jury that a plaintiff has assumed a risk is not a complete bar to recovery.

In *Jacobsen Constr. v. Structo-Lite Eng'g*, 619 P.2d 306 (Utah 1980), the Utah Supreme Court held that under our comparative negligence statute, the phrase "assumption of the risk" was no longer appropriate to describe the concepts embodied in that doctrine and assumption of the risk had to be treated as a form of contributory negligence. 619 P.2d at 312. What Utah lawyers practicing today need is an instruction that accurately reflects the holding of *Jacobsen Constr.* and its progeny.

JIFU 17.20 is a "last clear chance" instruction. In Utah there is no longer a distinct doctrine of last clear chance. See



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Dixon v. Stewart, 658 P.2d 591 (Utah 1982). Last clear chance, like assumption of the risk, is now considered a form of comparative negligence and may be argued by an attorney in closing arguments, but it cannot be articulated in a separate jury instruction.

Chapter 34 of JIFU contains 10 separate instructions concerning the Utah Guest Statute, *Utah Code Ann. Sect. 41-9-1 et seq.* (repealed 1988). Although the author is certain that every practicing attorney in our state is aware that the Utah Supreme Court declared the guest statute unconstitutional in *Malan v. Lewis*, 693 P.2d 661 (Utah 1984), it is still disconcerting to see an entire chapter devoted to the subject in Utah's only jury instruction form book. Many other instructions, such as the one for "loss of consortium," are subject to the same criticism.

INCOMPLETE STATEMENTS OF LAW

In addition to inaccurate statements of Utah law, JIFU contains numerous incomplete statements of our law. JIFU 36.1 defines a joint venture as follows:

Joint venture is herein referred to as a relationship between two or more persons, similar to a partnership; it involves a mutual agreement [express] or [implied] to pursue a joint enterprise in which they are engaged, with both acting in pursuit of that common purpose, so that each is acting for both in furthering it.

Utah courts, however, require an additional element for establishing a joint venture beyond those set forth in JIFU 36.1. Under Utah law, the joint enterprise or venture must be for the purpose of making a profit and the parties must have a right to share in the profits. *Bassett v. Baker*, 530 P.2d 1, 2 (Utah 1974). The instruction is an incomplete statement of the law.

JIFU 16.20 addresses the inference that arises from the violation of a statute or ordinance by a plaintiff. The instruction states that if the plaintiff violates a statute or ordinance, then such a violation would constitute negligence as a matter of law. Contemporary Utah case law, however, draws a distinction between the violation of a narrow class of statutes which constitutes negligence per se and the violation of statutes which results in a prima facie case of negligence. In *Hall v. Warren*, 632 P.2d 848 (Utah 1981), the Utah Supreme Court noted that violation of a statutory provision is prima facie evidence of negligence in cases dealing with non-dangerous instrumentalities, whereas the negligence per se rule applies only to cases concerning dangerous instrumentalities. See also *Little America Refining Co. v. Leyba*, 641 P.2d 112, 114 n. 3 (Utah 1982).

Another incomplete statement of Utah law can be found in JIFU 16.15, which attempts to define when a child can be contributorily negligent. The instruction

provides that a child is only required to exercise that degree of care which ordinarily would be exercised by children of the same age, intelligence and experience, and that there is no precise age at which, as a matter of law, a child comes to be held accountable for his or her actions. That standard has been modified by the Utah Supreme Court in *Kilpack v. Wignall*, 604 P.2d 462 (Utah 1979). In that case, the Utah Supreme Court held as a matter of law that a 7-year-old was not contributorily negligent. The court cited with approval the old common law rule that a child 7 years of age and under is conclusively presumed not guilty of contributory negligence, that there is a presumption that children between the ages of 7 and 14 are incapable of contributory negligence, and a presumption that children 14 and older are charged with the same degree of care as an adult. 604 P.2d at 466.

NO INSTRUCTIONS FOR NEW AREAS OF PRACTICE

The need to revise JIFU arises not only from its inaccurate and incomplete statements of Utah law, but also from its failure to address entire areas of practice. The Utah Supreme Court judicially created a cause of action for strict products liability when it adopted the Restatement (Second) of Torts Sect. 402A in *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152 (Utah 1979). The Court has gone on to refine and further delineate the application of strict products liability law, yet we have no standardized jury instructions to apply in product cases in our state courts.

The lack of jury instructions, however, is particularly acute in the commercial area of practice. One of the rapidly expanding areas of practice is commercial or business tort litigation. JIFU contains no instructions relating to the inducement to breach of contract or tortious interference with prospective economic relations, although the Utah Supreme Court specifically recognized the latter cause of action in *Leigh Furniture & Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982). Also, we have no standardized instructions for what are now such common commercial claims as injurious falsehood or unfair competition.

In recent years, the Utah legislature has passed numerous statutes which create private causes of action for which no standard jury instructions exist. Two salient examples are the Pattern of Unlawful Activity Act, *Utah Code Ann.* Sect. 76-10-1601, *et seq.*, and the Communications Fraud Act, *Utah Code Ann.* Sect. 76-10-1801. In fact, we have no instructions in JIFU for common law fraud or negligent misrepresentation, despite the fact that the latter claim for relief was adopted in Utah over 20 years ago. See *Jardine v. Brunswick*, 18 Utah 2d 378, 423 P.2d 659 (1967).

There are no standardized jury instructions for cases involving lender liability, insurance coverage issues or broker liability. This author is not advocating a set of jury instructions for every area of practice. However, in those troublesome areas where litigation frequently occurs, trial judges and trial lawyers can use a basic set of standardized instructions.

THE TASK OF REVISING JIFU

Although those who will labor on a new edition of JIFU have a formidable task ahead, they will not be writing on an empty slate. Many of the instructions in the original JIFU are still good, clear statements of Utah law. In addition, the local chapter of the Federal Bar Association has worked hard and diligently to prepare some "basic" civil jury instructions to be used here in the District of Utah. Many of those instructions could be adapted to serve state court needs. A new edition of JIFU could also draw upon the model jury instructions for business tort litigation published by the Section of Litigation of the American Bar Association.

A new edition of JIFU will demand a considerable amount of time and resources from the Bench and Bar. But we really do not have a choice. JIFU is outdated, incomplete and can be misleading to the new practitioner.

My grandfather once told me that a craftsman was generally as good as the quality of the tools he used. I have had the opportunity to practice with attorneys from many other states and I would put our trial bar up against any in the country. To maintain the level of excellence we have achieved, however, it is necessary to have quality tools upon which the practitioner can rely with confidence. It is time to revise JIFU.

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A Plea for Bargaining—and Justice

By Clayton R. Huntsman

EDITOR'S NOTE: The following article was written in response to "The Case Against Plea Bargaining" by Ninth Circuit Court Judge Robert F. Owens in the November 1988 issue of the *Utah Bar Journal*.

R. Clayton Huntsman, the author, practices law in St. George. He received his A.B. from Stanford University in 1969 and his J.D. from the University of Utah in 1977. He serves on the Board of Governors of the Utah Trial Lawyer's Association.

The views of the author are personal and do not necessarily reflect the views of the *Utah Bar Journal* or the Utah State Bar.

Honorable Robert F. Owens' "Case Against Plea Bargaining" raises far more questions about judicial temperament and unjustifiably suspicious world views than it does about plea bargaining itself.

After reading Judge Owens' article, one gets the impression that plea bargaining is either illegal, unconscionable or against public policy, and is a subversive plot perpetrated by inept prosecutors, spineless judges and cunning, unethical defense attorneys who are hell-bent to fill our streets with muggers and rapists at any cost. (How can attorneys be so "cunning" and yet "inept" at the same time?)

Perhaps the system is corrupt, and perhaps plea bargains are motivated more by afternoon tee-off times, as the Judge suggests, than by genuine professional desire to reach appropriate justice and fulfill our respective roles properly. But justice abridgment for golf is not my experience, at least not with the overworked prosecutors and defenders in Judge Owens' domain. However, I am aware of cases reportedly rushed along and pressure put on witnesses to be "brief" in order to accommodate the judge's personal calendar.

I find it interesting that Judge Owens claims plea bargaining would not overload courts to a "serious or permanent" extent. If this is really so, then why, just a few days

before the last judicial retention election (November 8, 1988), did Judge Owens write in the *Color Country Spectrum* that he expects *another* circuit court judge to be placed in St. George within the next few years.

Plea bargaining is *more* just than is autocratic and totalitarian judicial control. Plea bargaining involves more "checks and balances." The system should be looked at in total, including practice as well as theory, especially in courts where eccentricities may abound, successful appeal may flourish and complaints may be made about judicial lack of "due process."

Based on Judge Owens' articles and other statistics, I have some questions:

1. Is justice well served when police officers steer cases into a particular court, knowing their citations will not be permitted review by the elected prosecutor nor subject to any modification or remedy in the event the *officer* insists on a full, but ill-advised prosecution?

2. How does the Judge "know for a fact" that "some attorneys have advised their clients otherwise" (for lenient sentencing if they plead guilty)? Does he accept at face value what defendants say? If the Judge would tell us how he "knows" what he knows, that in itself would be worth knowing.

3. Is justice well served by removing all risk-assessment considerations from the state as well as defense, forcing a defendant to choose between full personal disaster on the one hand or to totally "beat the rap" on an all-or-nothing roll of the dice with a jury? Should justice always be on the fringes, at the extremes? Is true justice not usually "in the middle somewhere," where settlement ("plea bargains") usually end up anyway, cheaply and often quickly?

4. Is the Judge aware of experiences in Southern California and elsewhere where plea-bargaining abolitionists had their way for a few weeks until such a backlog developed that Los Angeles County was

forced to either hire several times the prosecutors and judges or else let cases settle appropriately and reasonably?

5. Are the *majority* of criminal defendants *really* sociopathic, as Judge Owens suggests? Does this include DUIs and the "solid citizens" the Judge writes about who "need to be punished" more?

6. Does the Judge see any valid objective in the criminal system besides punishment and deterrence? How about rehabilitation "public service" alternatives to two days in jail for DUIs? Should a judge's real concern be about justice or in just making sure the guilty suspect gets what's coming to her or him?

7. Is it cast in concrete that the jury system is or should be the *only* means of doing justice in the criminal environment? Cannot "alternative dispute resolution" (ADR) be *apropos* there as well?

8. Why should criminal defendants, who are presumed innocent and who are involuntarily involved in the court process in the first place, be subjected to *more* expense, anxiety, risk and rigidity than the civil defendant, who has ADR, and policies *encouraging* settlement as an alternative to costly jury trials? Isn't the Judge's rigid position going against the worthy trend of discouraging unnecessary litigation?

9. Should criminal trials be justified just so attorney "ineptness" will be disclosed to a gleeful public, as the Judge suggests, or does the accused, perhaps, have an overriding interest in real justice, however derived, *early* and after everyone really knows the relative strengths and weaknesses of their positions? Is it justice to always force an experienced prosecutor and a rookie public defender, or *vice versa*, to let their relative trial skills be the sole determinants of ultimate justice when an actual person's liberty, reputation and property are at stake? Is justice *always* something best done in a public arena, like a Roman Circus, or can simple *public* appearances for entry of plea do good as well?

10. Isn't it a cheap shot at attorneys who do try to reach fair and early and inexpensive settlements to compare them with "insurance adjusters with a few weeks' training?" If one cannot deal with discretion and compromise, then why not take the human element and all discretion out altogether? Why not just hook up defendants to a computer—or lie detector—and do away with *everyone* in the system?

11. Why can't we accept that fair, honorable and competent methods, procedures and participants exist in the justice system other than police officers or judges or juries? Prosecutors have a statutory duty not to "score convictions," but to *do justice*. Let them. We should not encourage over-authoritarian judges to tie their hands or to hold them in contempt of court for *not* bringing more serious charges against someone presumed innocent than are fair and supportable.

12. Finally, why should defendants, especially those charged by *police, not prosecutors*, be forced to choose probable

conviction at bench trial or spontaneous guilty pleas, as the sole alternative to lengthy, harassing and expensive jury trials? Judge Owens, for example, requires *four separate* appearances for misdemeanor defendants, not counting sentencing. Surely the Judge must realize the inconvenience—and resulting pressures—on accused citizens to succumb to unjust guilty pleas to avoid this inconvenience and expense. Plea bargaining can mitigate much inherent unfairness, particularly if evidence is unclear and the outcome is uncertain.

There's much more in the article which the thoughtful and fair-minded reader might object to, or at least question, including the Judge's attacks on rural prosecutors and on one of his opponents who has objected to his "methods" and on the district court judge, and others. In juxtaposing the Judge's written word with the realities of court practice, however, a better case could be made that *more* cases, maybe even *all* criminal cases, should be resolved by plea bargains. In any

system, this is usually the best result, especially if both sides do their job well. While judges would still have power to disapprove plea bargains, such power should not be used unreasonably.

Prosecutors could prosecute, defense counselors could defend and judges could—hopefully—*judge*.

Most judges act responsibly and fairly. Some, however, may go on crusades or try to resolve personal problems through abuse of the great power society entrusts them with. If we allow judges to blatantly abuse their power over the people, then the people may rebel.

I note in this regard a quote from Bertold Brecht, who spent his last years in East Berlin writing propaganda plays for the regime which put up the famous Wall, and whom Judge Owens cites as literary support in his argument. Brecht also wrote, in *The Caucasian Chalkcircle*, Act IV:

First Ironshirt: "...This morning they strung up the city judge..."

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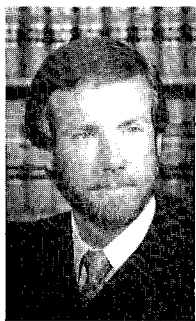
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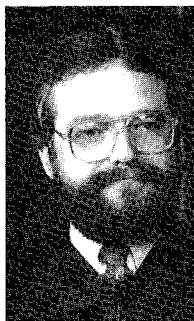
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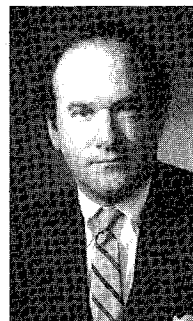
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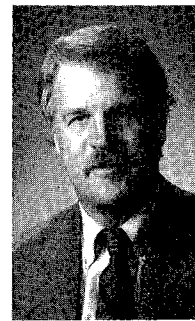
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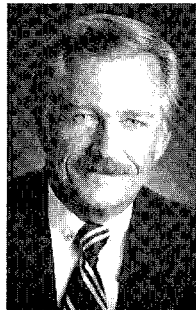
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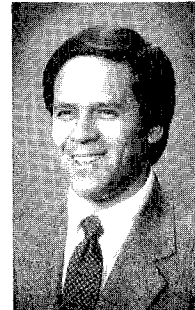
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November Bar Commission Meeting Highlights

The Bar Commission met on November 18 at the Law and Justice Center. They received reports and took actions as follows:

- Welcomed Gary Spaeth, president-elect of the Montana State Bar, as a guest for the meeting.

- Approved with amendment the Minutes of the October 28 meeting.

- Received the report of President Kastig on various matters, including the growing utilization of the Law and Justice Center, the successful hosting of the U.S. Constitutional Bicentennial Leadership workshop, the need for better documentation of the tremendous volume of volunteer time contributed to Bar service activities and community service by Utah lawyers, a committee to explore the concept of a code of professional courtesy, the organization of the Bar-Law School Relations Committee, the proposed training program for lawyers assigned to handle habeas corpus matters, and the status of this year's Mid-Year and Annual Meetings.

- Received a report and appearance of representatives of the Law Related Education Committee, including a proposal for allocating space for the project's office needs within the Law and Justice Center.

- Received a report and appearance of the chairman of the Delivery of Legal Services Committee, including a proposal for administrative space and support for the

proposed legal services to the homeless project. Approved in part the filing of a grant application for funding of the project.

- Received a report of the Legislative Affairs Committee, with appearances related to the judicial compensation package, and an update on the Tort and Insurance Law Reform Task Force.

- Received a report and appearance of the chairman of the Lawyers Helping Lawyers Committee to discuss a proposed rule on confidentiality.

- Received Admissions Report, approving results of October's Attorney Bar Exam, and reviewing then denying a petition for a proposed rule change on the examination grading system.

- Received Executive Director's Report, noting considerable diversion of staff time in responding to discovery requests in pending litigation, the successful implementation of the Tuesday Night Bar Program, the plans to host ABA President-Elect Stanley Chauvin in early December, Associate Director Bassett's participation in an ABA evaluation of the Iowa State Bar, the implementation of a weekly Bar radio show on KSL Radio, and the finalization of leases for the Utah Bar Foundation and American Arbitration Association.

- Held a joint luncheon meeting with the trustees of the Utah Bar Foundation with

cross reporting of the activities and concerns of each entity.

- Received report of Grievance Hearing Panel, approving recommendation to grant limited discovery request.

- Accepted the resignation of Commissioner Gordon J. Low with profound regret, reviewed all applications received and appointed Jeff Thorne to fill the vacancy and to represent Division One.

- Reviewed various litigation matters, including a petition for rule change regarding lobbying activities.

- Received report of Young Lawyers Section, authorized two grant proposals to be submitted.

- Approved a resolution to be forwarded to the Federal Judges Association calling for increases in compensation for federal judges.

- Received report on completion of construction of the Law and Justice Center, authorized release of retention funds.

- Reviewed conceptual work on Supreme Court rule making.

- Reviewed follow-up strategy on the recent Dan Jones & Associates survey, with publication of articles to be scheduled in *Utah Bar Journal*.

- Received monthly Budget and Finance Committee report and approved implementation of line of credit.

Artists Wanted

In conjunction with the Law Day activities sponsored by the Young Lawyers Section, the Law-Related Education and Law Day Committee and Utah Lawyers for the Arts are soliciting artwork of all kinds from Utah attorneys, judges, paralegals and legal secretaries for display or performance. The Committee would like to exhibit visual arts such as paintings, sculpture, photography and graphic art, and would like to schedule performances of music or dance, poetry or other readings, and other types of performing arts. The exhibits and performances will be scheduled to coincide with the Young Lawyers' Law Day Fair scheduled for the ZCMI Mall in Salt Lake City on April 28 or 29, 1989, and will provide public exposure for Utah artists with a legal connection. Please contact Dawn Hales at 322-2516 for further information.

Mid-Year Meeting Substance Abuse Session

None of us in the legal profession is immune from the threat of alcoholism and chemical abuse. In recognition of that fact, the Bar association, three years ago, created the Lawyers Helping Lawyers Committee (LHLC). The purpose of this session is to introduce the general Bar membership to this relatively young, yet increasingly vital committee. Alcoholism and drug abuse are, reportedly, major contributing factors in disciplinary actions involving both lawyers and judges.

This session is designed to inform all lawyers and judges of the types of infor-

mation and assistance which are available through this unique committee of lawyers and mental health professionals who have experience in chemical dependency problems. The discussion will focus on the symptoms and signs of addiction, denial, treatment costs and resources, and what each of us can do to assist our colleagues who may be suffering from these career ending and life threatening problems. The critical issue of confidentiality will also be covered. The LHLC can help your firm, could protect your practice, or might ultimately save your life. This session promises to provide us with a mesmerizing look at our profession.

Litigation Section Offers Two New Videotape Series

The Litigation Section continues to offer excellent training materials to Section members at no charge and to non-Section members for a small fee. The Section is pleased to announce the acquisition of two excellent videotape series.

The National Institute for Trial Advocacy (NITA) produced both of the newly acquired series: **WINNING AT TRIAL** (1986) (nine videocassettes (color) averaging approximately 55 minutes per cassette) and **MASTERING THE ART OF CROSS-EXAMINATION** (1986) (11 videocassettes (color) averaging approximately 45 minutes per cassette). **WINNING AT TRIAL** covers all aspects of trial work from jury selection through closing argument and convincing the jury. **MASTERING THE ART OF CROSS-EXAMINATION** covers the most common problems in cross-examination and includes individual tapes on various kinds of experts and on lay witnesses such as child witnesses and witnesses of the opposite sex.

The tapes are organized into a combination of lecture, demonstrations and question and answer sessions. The demonstration programs are conducted by such notable attorneys as Howard Weitzman, JoAnne Wolfson and Philip Corboy. Copies of the reviews are available at the Bar Office. The Tape Committee of the Section has reviewed these tapes and recommends them highly. For more information, please contact Paige Holtry at 531-9077.

Law and Justice Center Usage Continues to Grow

Utilization of conference and meeting space within the Law and Justice Center is building rapidly, according to Kaesi Johansen, Programs and Services administrator. During November alone, more than 1,500 persons participated in approximately 70 events in the center. Sections, committees, local and specialty Bar associations, arbitration providers and educational programs are professionally and efficiently accommodated in the new center.

For information on reserving space in the Law and Justice Center, please contact Kaesi Johansen at 531-9077.

Results of Litigation Section Survey

The Litigation Section recently conducted a survey of its members. About 150 of the Section's 550 members responded. Here are the results:

- Most are in practice groups larger than 20.
- Most are in the metropolitan Salt Lake City area.
- Most devote 80 percent or more of their time to litigation.
- Business and commercial litigation is the largest segment of practice, followed by personal injury.
- Few are significantly involved in criminal, domestic or juvenile litigation practice.
- The Section's highest priority should be (1) CLE seminars, (2) practice guides and aids, (3) videotape rental on litigation topics and (4) development and refinement of practice rules.

As a result of the survey, the Litigation Section has recruited from its ranks to create several active committees, including:

- Programs Committee (luncheon CLE events, major evidence CLE program in the spring and Annual Meeting program).
- Practice Aids Committee (*Utah Bar Journal* articles and possible JIFU revision).
- Tape Committee (reviewing and cataloging all tapes in the Section's rental library).
- Rules and Legislation Committee (review of legislation affecting litigation and refinement of court rules).
- Public Awareness Committee (correcting public misperceptions about the justice system).
- Statewide Committee (involving lawyers away from the Salt Lake Valley).

David A. Westerby, chair of the Litigation Section, reports that many Section members are actively donating their time to help these committees bring Section members what they need.

Meeting and Conference Rooms Designed For You

Members of the Utah State Bar, Law Firms, and Law-Related Organizations are invited to use the meeting and conference rooms at the new Law and Justice Center. They are available daytime and evenings, and are ideal for

- client meetings and consultations
- firm events and meetings
- settlement conferences
- continuing legal education
- depositions
- conferences
- arbitration
- business receptions

The staff of the Law and Justice Center will make all arrangements for you, including room set-up for groups of up to 300 people, food and beverage service, and video and audio equipment.

The costs for use of the Law and Justice Center are significantly less than similar facilities in a hotel . . . and specifically designed for your use. Adjacent free parking is one more advantage, making this an ideal location for your event.

For information and reservations for the Utah Law and Justice Center, contact Kaesi Johansen, 531-9077.

Utah Bar Foundation

Interest on Lawyers' Trust Accounts Program

By its decision of October 25, 1983, the Utah Supreme Court approved the petition of the Utah Bar Foundation to implement an Interest on Lawyer Trust Account Program ("IOLTA Program") in Utah. A copy of that decision is enclosed herewith. The Utah Bar Foundation ("Foundation") now invites you to participate in this program.

I. PROGRAM ADMINISTRATION— THE FOUNDATION

The Foundation is a non-profit Utah corporation qualified as an IRC Sect. 501(c)(3) charitable organization. Every lawyer licensed to practice law in the state of Utah is a member of the Foundation.

The Foundation is governed by a Board of Trustees elected by the membership. The board consists of Richard C. Cahoon, president; Hon. Norman H. Jackson, vice president; H. Michael Keller, secretary-treasurer; David S. Kunz, trustee; Ellen M. Maycock, trustee; Stephen B. Nebeker, trustee; and David E. Salisbury, trustee.

II. DESCRIPTION OF THE PROGRAM

Attorneys routinely receive funds to be placed in trust for future use. If these funds are sufficiently large or long term to justify placement in a separate account, the attorney customarily deposits these monies in an interest-bearing account for the benefit of the client. However, those deposits in attorney's trust accounts which are nominal or short term often make it impracticable for the attorney or financial institution to establish separate interest-bearing accounts that would result in any interest accruing to

individual clients. Utah attorneys have typically placed these nominal or short-term trust deposits in commingled checking accounts which do not bear interest.

The concept of an interest-bearing trust account program is quite simple. It allows attorneys to invest small or short-term deposits so that these otherwise idle funds may be pooled to generate interest that is channelled into a charitable organization, such as the Foundation, for ultimate use in law-related public interest programs. To the extent that interest on client funds should accrue for the client, the program does not alter the long-standing trust accounting practices of the legal profession. The program presents an excellent opportunity for lawyers to aid in financing worthwhile law-related public projects.

III. GRANT APPLICATIONS AND AWARDS

The interest generated from the trust funds of participating attorneys is paid by the attorneys' depository institutions to the Foundation, which administers the funds and accepts applications for grants. Applications are considered annually by the Foundation's Board of Trustees and must be received on or before May 31 for consideration in July of that year. Application forms are available from the Foundation's secretary.

The Foundation awards grants for the following purposes:

1. To promote legal education and increase knowledge and awareness of the law in the community.

2. To assist in providing legal services to the disadvantaged.
3. To improve the administration of justice.
4. To serve other worthwhile law-related public purposes.

No single purpose is intended to be fostered to the total exclusion of any other purpose.

IV. VOLUNTARY PARTICIPATION BY ATTORNEYS

Participation in the program would involve signing your licensing form indicating your election to participate in the IOLTA program, the location of your trust account and the trust account number, or you may execute a Notice to Depository Institution. Either method directs your trust account to be transferred from a non-interest-bearing account to an interest-bearing account with interest paid to the Foundation.

V. SUCCESSFUL PROGRAMS IN OTHER JURISDICTIONS

The Utah program is not the first of its kind. The concept has enjoyed years of success in a number of Australian and Canadian jurisdictions. Florida pioneered the idea in the United States. Programs have now been approved and implemented by legislation or court order in over 48 states.

UTAH BAR FOUNDATION

Notice to Depository Institution

TO: _____
Name of Depository

Address _____

City, State & Zip _____

The undersigned in order to comply with the decision of the Utah Supreme Court dated October 25, 1983, hereby directs you to transfer (my/our) law firm _____

Account No. _____

at our depository institution from a non-interest bearing account to an interest bearing account. We will continue to use the same checks we have used in the past and all signatures on our present account will remain the same, unless you request us to open a new account.

Interest accrued on the account should be remitted to the Utah Bar Foundation, P.O. Box 45003, Salt Lake City, Utah 84110. The Utah Bar Foundation Tax Identification No. is 87-6124936, and all interest income (IRS Form 1099) should reflect the Utah Bar Foundation as recipient.

Date _____

Law Firm/Lawyer _____

Address _____

City, State & Zip _____

If an account requires two signatures, then two signatures should authorize this "notice."

By _____

By _____

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
OFFICE OF THE CLERK
NOTICE TO THE BAR AND THE PUBLIC**

**ADMINISTRATIVE FEE ASSESSMENT FOR COURT
REGISTRY FUNDS PLACED IN INTEREST-BEARING ACCOUNTS**

As a result of new appropriation authority from the Congress, and with the approval of the Judicial Conference of the United States—the policy-making body for the Judicial Branch of the United States Government—the Director of the Administrative Office of the U.S. Courts has established an assessment for funds that are placed in a United States Court's registry and that are invested in an interest-bearing account. The rate of the assessment has been established at an annual 1.5 percent of the amount held in each case, and the charge is to be paid from interest earnings in accordance with a detailed schedule to be issued by the Director.

The purpose of the assessment is to cover the costs to the Federal Judiciary of handling registry funds placed in interest-bearing accounts. The fee shall apply to all monies and, if applicable, property held in the court registry and invested in interest-bearing accounts, except unclaimed monies held in accounts for individuals or persons whose whereabouts are unknown. The fee will be computed at the time of withdrawal from the date of receipt into the registry through the date of withdrawal based on the average daily balance in the account. Payment of the fee will be deducted from the balance on deposit at the time of distribution.

Assessment of this fee will commence on all applicable funds in the court's registry that are withdrawn on or after December 1, 1988. To minimize the retroactive impact of this assessment, funds that were placed in the custody of a Federal Court prior to September 30, 1988, will be assessed only for the time they are held after that date, September 30, 1988, to the actual date of withdrawal. Thus, for example, if funds were invested by the court on July 30, 1979, and withdrawn on January 3, 1989, the assessment would apply only to the period of October 1, 1988, to January 3, 1989.

For additional information, please contact the Office of the Clerk.

Federal Bar Seminar

The Federal Bar Association will present a seminar on Federal Criminal Law on February 10, 1989, at the Little America Hotel in Salt Lake City. The registration fee is \$90 for Federal Bar members and \$125 for non-members.

The program will feature a luncheon address by the Hon. Bruce S. Jenkins. Other topics in the day-long seminar include "Survey and Impact of Recent Tenth Circuit Criminal Law Decisions" by Hon. Ronald N. Boyce, "The Ethics of Fees-Forfeiture and Reporting" by G. Fred Metos, "Bail Reform Act" by Edward K. Brass, "Grand Jury Representation for the Uninitiated" by Samuel Alba, "Recent Developments in Narcotic Cases" by Michael Stephanian, "Tax Fraud" by Stewart C. Walz, "RICO" by Michael Goldsmith, "Search and Seizure Profiles" by Stephen R. McCaughey, "Defense Contractor Fraud" by Gregory C. Diamond, "Sentencing Guidelines" (if applicable) and "Pitfalls of Criminal Trial" by Judges Greene, Winder, Anderson and Sam.

For further information, contact C.F. Soltis at 364-6474.

Mineral Development on Indian Lands

The Rocky Mountain Mineral Law Foundation and the A.B.A. Committee on Native American Natural Resources Law are co-sponsoring a three-day Special Institute on Mineral Development on Indian Lands. The institute will take place on February 15 to 17, 1989, at the downtown Marriott Hotel in Albuquerque, N.M.

This institute is designed to bring together the legal and land management issues and concerns of Indian tribes, industry, government officials, corporate counsel and private practitioners relative to the future course of natural resources development on Indian lands. The presentations will provide comprehensive, balanced and objective practical and legal analyses of current topics of concern to all parties. This straightforward consideration of the unique concerns of the tribes, industry and government over the development of Indian mineral resources will be of mutual advantage to all registrants and participants.

For additional information, contact the Rocky Mountain Mineral Law Foundation at (303) 321-8100.

Discipline Corner

ADMONITIONS:

1. An attorney was admonished for violating DR 6-101(A)(3) and Rule 1.3 for neglect of a client's probate matter for a period of over four years.

2. For neglect in failing to appropriately investigate and researching a client's prior bankruptcies so as to be able to properly advise him, and for failure to appear before the Screening Panel to discuss the matter with them, an attorney was admonished for violating DR 6-101(A)(3) and Rule 1.3.

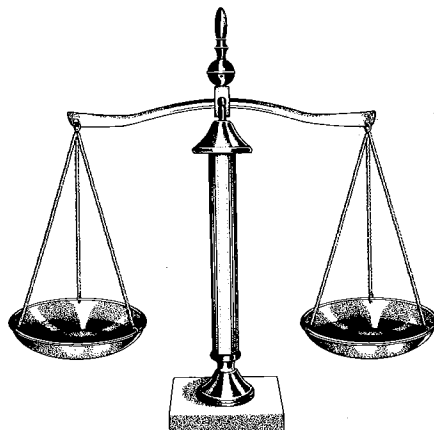
PUBLIC REPRIMAND:

1. Roland Uresk was publicly reprimanded for neglect of a legal matter entrusted to him in violation of DR 6-101(A)(3), by failing to take steps for a client to secure money owed to her by her ex-husband by failing to attach a portion of

the ex-husband's equity in real estate prior to its sale.

REINSTATEMENT:

1. Effective December 13, 1988, the Utah Supreme Court reinstated Phil L. Hansen to the practice of law from his prior Interim Suspension.



1989 Mock Trial Competition

Team preparations for the Tenth Annual Utah Statewide Mock Trial Competition get underway on February 28, 1989. Sixty attorney coaches are needed for the estimated 60 junior and senior high school teams from throughout the State of Utah that will participate in the competition. Teachers teach the case, rules of evidence and procedure to each 10-member team. An attorney coach helps a local team polish its performance for the playoffs which begin April 3, 1989. Training for attorney coaches will be provided at the Law and Justice Center in Salt Lake City on Friday, February 24, 1989, from 3:00 to 4:30 p.m. If you enjoy working with intelligent, motivated junior or senior high school persons and are willing to spend two to five hours per week for three to five weeks in March coaching a team, please complete the form below. You will be contacted.

Attorneys are also needed to judge playoff rounds running from April 3 to 21, 1989. Playoff rounds are held throughout the state in actual courtrooms. An attorney judge is provided a case handbook to read before judging; reading and judging require about five hours' time, two to read and two to three to judge. If you would like to receive more information about dates, times and locations of playoff rounds, please complete and return the following form.

American Arbitration Association Salt Lake City Office Holds Open House

New York, New York-based American Arbitration Association (AAA), a national public-service, not-for-profit organization offering a broad range of dispute resolution services, has opened its 34th office at the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, Utah. These services include the administration of dispute resolution methods such as arbitration, mediation, minitrials, elections and other voluntary settlement procedures. The Open House will be held on March 2, 1989, from 4:30 to 6:30 p.m. at the above address. Members of the Bar who are interested in learning more about alternative dispute resolution (ADR) or AAA services are welcome and encouraged to attend.

"Merging a facility offering dispute resolution services with the institutional stability of a state bar is a unique judicial experiment, an experiment in which the American Arbitration Association is proud to play a part," said Kimberly L. Curtis, AAA Utah director. "Lawyers are still the gatekeepers of dispute resolution. With the support of the Bar, both the dispute resolution process and, ultimately, the public benefit."

Founded in 1926, the AAA has steadily grown. It administered more than 57,000 disputes last year and has on its panels more than 60,000 impartial experts to hear and

decide cases. In using the AAA's administrative services, parties can select neutrals with expertise in the matter in dispute. In addition, the AAA serves as a center for education and training, issues specialized publications and conducts research on all forms of out-of-court dispute settlement.

The American Arbitration Association is a leading advocate of alternative dispute resolution. Many specialized rules and procedures have been developed by the AAA in cooperation with interested organizations and industries. The Association offers procedures for settling disputes relating to business, construction, insurance, securities, labor-management, international trade, real estate valuation, computers, and community and family relationships, among others.

Members of the Association's Utah Advisory Council are: Robert Scott Adams, Don B. Allen, Robert F. Babcock, Deborah Bayle, Peter W. Billings Sr., Ann Marie Boyden, Leland D. Ford, Karlne Grief, Margaret R. Hunt, Stephen F. Hutchinson, Norman S. Johnson, Frank Layden, Linda Lundgren, Hon. Scott M. Matheson, Peter M.A. Moyes, Professor Richard Riche, Karen Suzuki-Hashimoto, Ronald F. Sysak and Richard Thorn.

Name _____

Firm _____

Address _____

Telephone _____

☐ I would like to coach a junior/senior high school mock trial team in my area in March 1989.

☐ I would like to judge a mock trial playoff in my area in April 1989.
Please send me a schedule of dates, times and locations.

Return to:

Virginia Curtis Lee, Mock Trial Coordinator
Utah Law Related and Citizenship Education Program Office
College of Law
University of Utah
Salt Lake City, UT 84112

The Law Related Education and Law Day Committee of the Utah State Bar and the Law Related and Citizenship Education Project of the Utah Office of Education wish to thank the more than 150 members of the Utah State Bar who generously gave of their time and talent in making the 1988 Mock Trial Competition a success. Your support of the competition will be greatly appreciated by the 700-plus students who will compete in the 1989 program.

1989-1990 Utah State Bar Request for Committee Assignment

I. Instructions to Applicants: All applicants for committee assignment will be assigned to a committee, with every effort made to assign according to choices indicated. Service on a Bar committee includes the expectation that members will regularly attend meetings of the committee. Meeting frequency varies by committee, but averages one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside the Salt Lake area are encouraged to participate in committee work. Many committees can accommodate to travel or telephone conference needs and much committee work is handled through correspondence, so it is rarely necessary for such members to have to expend large amounts of time traveling to and from meetings. Any questions may be directed to: Paige Holtry, Bar Programs Administrator, at 531-9077.

II. Applicant Information

Name _____

Address _____

Telephone _____

Most Recent Committee Assignments _____

For each committee requested, please indicate whether it is your first, second or third choice and/or whether it is for reappointment (R). For example:

2 **Bar Journal**
1 R **Character and Fitness**

- | | |
|--------------------------------------|--|
| _____ Advertising | _____ Law Related Education |
| _____ Alternative Dispute Resolution | _____ Lawyer Benefits |
| _____ Bar Examiner Review | _____ Lawyer Referral Service |
| _____ Bar Examiners | _____ Lawyers Helping Lawyers |
| _____ Bar Journal | _____ Legal Economics |
| _____ Character and Fitness | _____ Legal/Medical |
| _____ Client Security Fund | _____ Legal Net |
| _____ Continuing Legal Education | _____ Legislative Affairs |
| _____ Courts and Judges | _____ Needs of Children |
| _____ Delivery of Legal Services | _____ Needs of the Elderly |
| _____ Disciplinary Hearing Panel | _____ Needs of Women and Minorities |
| _____ Ethics Advisory Opinion | _____ State Securities Advisory |
| _____ Ethics and Discipline | _____ Unauthorized Practice of Law |
| _____ Fee Arbitration | _____ Professional Liability Insurance |
| | _____ Tuesday Night Bar |

Please return this form to Paige Holtry, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111 by March 15, 1989

Education Law Section Sponsors Seminar

The Education Law Section will be holding its seventh annual seminar on Friday, March 3, 1989, from 9:00 a.m. to 1:30 p.m. at the Salt Lake Airport Hilton. The cost of the seminar is \$25 (includes lunch).

Attorneys and educators are invited to join together in discussing the 1989 Legislature's impact on secondary and higher education. The following lists of proposed bills have already been filed:

BILL REQUESTS FOR 1989 LEGISLATIVE SESSION

- A. Public Education
 1. Local Option Income Surtax for Public Education HB 2 (Karras)
 2. Prohibiting Corporal Punishment in Schools HB 19 (B. Evans)
 3. Curriculum in the Public Schools HB 20 (Protzman)
 4. School District Reorganization Amendments SB 16 (Barlow)
 5. School District Remediation Programs Amendments SB 19 (McMullin)
 6. School Finance Amendments (S. Pace)
 7. Driver's Education and Licensing Written Examination (S. Steele)
 8. Driving Privileges for Minors (S. Steele)
 9. School Transportation Agency (S. Pace)
 10. School Food Services Agency (S. Pace)
 11. State Building Board Authority Over School Buildings (S. Pace)
 12. Public Education Delivery System Amendments (S. McMullin)
 13. Extracurricular School Activities (R.G. Brown)
 14. Authority of Local School Boards (R. Bishop)
 15. Local School District's Sidewalk Construction (S. McMullin)

B. Higher Education

1. Revenue from Fines/Forfeitures on Campus Property (R. Goodfellow)
 2. College Savings Bonds (R. Bradshaw)
 3. Higher Education Personnel Management Act
 4. Legal Counsel for Institutions of Higher Education
 5. Early Graduation Incentives (S. McMullin)
 6. Concurrent Enrollment Credit Modifications (S. McMullin)
 7. Membership on Higher Education Institutional Councils (R. Rush)
-
- C. Interim Committee Studies
 1. Mentor Teachers
 2. Differentiated Staffing
 3. Choice in Education
 4. Assessment—Student Testing
 5. Performance-Based Salary Programs
 6. School Building Occupancy Law
 7. State and Local School Boards
 8. Curriculum in Education
 9. Character Education
 10. Market Driven Education
 11. Super Districts
 12. Technology in Education
 13. Mission Statement for Public Education
 14. Administrative Role of the Principal
 15. Statewide Library Study
 16. College Tuition Prepayments
 17. Educational Delivery Systems

Other topics to be discussed include sexual harassment; school-sponsored extracurricular activities; due process when teachers/administrators serve as judges; and handicapped student rights.

Reservations must be made by February 20, 1989. You may send your \$25 registration payment to:

Penny Brooke, RN, JD
University of Utah College of Nursing
25 S. Medical Drive
Salt Lake City, UT 84112

Checks should be made payable to the Utah Bar Education Law Section.

Claim of the Month

ALLEGED ERROR AND OMISSION

Plaintiff alleges failure of insured law firm to offer release into court record at trial.

RESUME OF CLAIM

On behalf of insurance company, the insured represented defendant driver in personal injury case stemming from an automobile accident.

Prior to commencement of suit, the insurance company adjuster obtained what was termed a general release but was in actuality a joint tortfeasor release on behalf of his insured. Subsequently, injured passenger brought suit against owner of truck involved in collision who then instituted third party action against defendant driver. In responsive pleadings, insured pled the release and eventually submitted motion for judgment on pleadings asserting delivery of release. Motion was not decided before trial.

During the trial, before the new judge, insured raised the release in the off-the-record conferences. Insured never entered the release into the record as evidence and the jury was not charged on the issue of the release. While the insured believed the question of the release was a matter of law for the judge to decide, the jury returned a six-figure verdict against the defendants finding insured's client more than 50 percent liable. All appeals of verdict have failed.

HOW CLAIM MIGHT HAVE BEEN AVOIDED

Insured should have pursued relief prior to trial when no ruling was made on his motion for judgment on the pleadings. The simplest way to have avoided this claim would be to have had the court focus on the release during the motion phase of the litigation and prior to trial.

Since the insured was unable to obtain a decision on his motion, it was then incumbent upon the insured to offer the release into the record during the trial. Additionally, the insured could have requested the court to make a determination of the validity of the release and its effect in the case.

The insured relied upon understandings reached by attorneys in off-the-record conferences. This reliance ultimately worked to the detriment of his client.

LEXIS MEMBERSHIP PROGRAM SPRING PROMOTION

Sign up between February 1, 1989, and March 31, 1989; get trained by April 30, 1989, and receive:

- FREE Training (regularly \$75/person)
- FREE Software (regularly \$25/disk)
- FREE USE in May!
- \$100 credit on first invoice with proof of purchase of modem

For more information, contact Paige Holtry at the Bar Office, 531-9077.

ABA Seeking Pro Bono Award Nominees

Nominations are open for the 1989 Pro Bono Publico Awards, which were created in 1984 to recognize the public service contributions of thousands of lawyers across the nation. Eligibility is restricted to lawyers who do not make their living delivering legal services to poor persons, but who either directly provide such services on a volunteer basis or create or organize systematic improvements that increase access to justice for poor persons. Nominations will be accepted until March 1, 1989. Both individual lawyers and law firms may be nominated. Questions or nominations should be addressed to Dorothy Jackson, staff assistant, ABA Standing Committee on Lawyers' Public Service Responsibility, 750 N. Lake Shore Drive, Chicago, IL 60611, (312) 988-5766, ABA/net id: ABA413.

Child Sexual Abuse Complaints Not Falsified, Study Claims

Allegations of child sexual abuse are not epidemic in custody disputes, and when they do occur they usually are made in good faith and at least half the time are true, according to a study published in *Judges' Journal*. Author Nancy Thoennes reports on two years of research just completed by the Research Unit of the Association of Family and Conciliation Courts (AFCC), of which she is the director, and the ABA. The project analyzed 169 cases from 12 states as custody-visitation disputes alleging sexual abuse, and surveyed members of the National Council of Juvenile and Family Court Judges and the AFCC from all 50 states, and 25 representatives of the nation's largest domestic relations courts. *Judges' Journal* is published quarterly for members of the ABA Judicial Administration Division.



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Utah State Bar 1989 MID-YEAR MEETING March 16-18 St. George, Utah



The Lawyer's Duty to Help Improve the Civil Justice System

By J. Thomas Greene
United States District Judge for Utah

PUBLIC PERCEPTION OF DEFECTS

Among the major problems with our civil justice system as perceived by the public are overuse of the courts, cost of lawsuits and delays. In a recent nationwide survey conducted by Louis Harris & Associates, those concerns were underscored. The survey revealed that:

Sixty-eight percent of Americans believe that more people bring lawsuits than should.

Fifty-seven percent of Americans believe that the system fails to provide timely resolution of disputes without major delays.

Fifty-four percent of Americans criticize the high overall cost of the system to society.

The problems are considered so severe that many Americans seek and want radical changes in our system. Others think that moderate change would suffice. The Harris survey revealed that

About half of the American public believes either that the civil justice system needs to be rebuilt completely because so much is wrong with it (14 percent), or that it has some major problems which can be corrected only through fundamental changes (34 percent). On the other hand, 43 percent of those surveyed believe the

JUSTICE J. THOMAS GREENE has served as a United States District Court Judge for the District of Utah since 1985. He graduated Order of the Coif from the University of Utah in 1955 and served one year as a law clerk for Utah Supreme Court Justice J. Allan Crockett. Judge Greene was Chairman of the Board of the law firm of Greene, Callister & Nebeker prior to his appointment to the bench. He has served in numerous capacities in the Utah State Bar and the American Bar Association. He is currently the chairman of the Post Law School Training Committee of the Utah State Bar and is a member of the Board of Governors of the American Bar Association.

system works pretty well, and that its problems can be corrected through minor changes. A tiny minority (5 percent) express complete satisfaction with the status quo, and believe that no changes are necessary. Only 4 percent have no opinion.

A phenomenon developing in certain urban centers of our country is the incipient growth of a competing justice system—private litigation before a rented judge paid for by the litigants, with an understanding that the decision of the private judge will be final with no recourse or access to the courts by way of review or otherwise. This was commented upon by American Bar Association President Robert Raven in a recent edition of the *ABA Journal*. He observed:

A decrease in the ability of the public system to deliver effective jus-

tice may affect the perceptions of those both within and without the system. Public servants, rather than meeting the challenge posed by private judging, may be less concerned about alleviating delay, knowing that the litigants can hire a private judge. And public courts, like public schools and other public institutions, may become the alternative only for those without alternatives.

NEED FOR IMPROVEMENT

We need to answer these challenges to the civil justice system by discouraging frivolous and unfounded lawsuits, by reducing the cost of litigation and by providing speedy justice with minimal delay. As to frivolous lawsuits, lawyers are becoming acutely aware of Rule 11 and other recent amendments of the Rules of Civil Procedure under which severe sanctions can be imposed for making allegations without adequate factual foundation and prior investigation. The days of fishing expeditions are over. As to litigation costs, the advent of paraprofessionals and improved methods has helped, but we need to seek more ways of lowering basic costs and at the same time allowing for a fair rate of return for legal services. As to delays, lawyers truly need to be ready to proceed in a timely fashion and avoid requests for con-

tinuances, and the courts must assume a more active role in the management of cases. In regard to the phenomenon of a developing and competing private justice system, Utah is at the forefront of a managed and compatible solution with the dedication last September of our new Law and Justice Center. This will provide a means of handling many problems—alternative dispute resolution—outside the courts, but under the umbrella of the organized Bar and in an orderly and appropriate manner.

THE ROLE AND RESPONSIBILITY OF LAWYERS

There has been a recent nationwide movement calling for more emphasis upon professionalism and less upon the business aspects of the practice of law. In this regard, several state bars have adopted model Codes of Professionalism, basically in response to the recommendations of the ABA Commission on Professionalism which were promulgated in August 1986. In connection with various abuses, both in litigation and office practice, such as a "win at any cost" mentality and "playing hard ball," the Commission urged the Bar to

Place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice. Lawyers should exercise independent judgment as to how to pursue legal matters. They have a duty to make the system of justice work properly.

Relative to the need to improve our civil justice system, the ABA Tort & Insurance Practice Section (TIPS) proposed a lawyer's Creed of Professionalism which was endorsed as a guide in August 1988 by the House of Delegates at the ABA Annual Meeting. As to the concerns of overuse of the courts, excessive litigation costs and unreasonable delays, that model creed speaks to the following aspirational goals of lawyer professionalism as pertains to clients, opposing parties and counsel, the courts and the public:

With respect to clients:

In appropriate cases, I will counsel my client with respect to mediation, arbitration and other alternative methods of resolving disputes;

I will advise my client against pursuing litigation (or any other course of action) that is without merit and against insisting on tactics which are intended to delay resolution of the matter or to harass or drain the financial resources of the opposing party;

I will advise my client that civility and courtesy are not to be equated with weakness.

With respect to opposing parties and their counsel:

I will endeavor to be courteous and civil, both in oral and in written communications;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

I will refrain from utilizing delaying tactics;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and re-

"We need to be as concerned with what is the right thing to do as we are with what we have a right to do."

frain from engaging in acts of rudeness or disrespect.

With respect to courts and other tribunals:

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit or are superfluous;

I will refrain from filing frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

In civil matters, I will stipulate to facts as to which there is no genuine dispute.

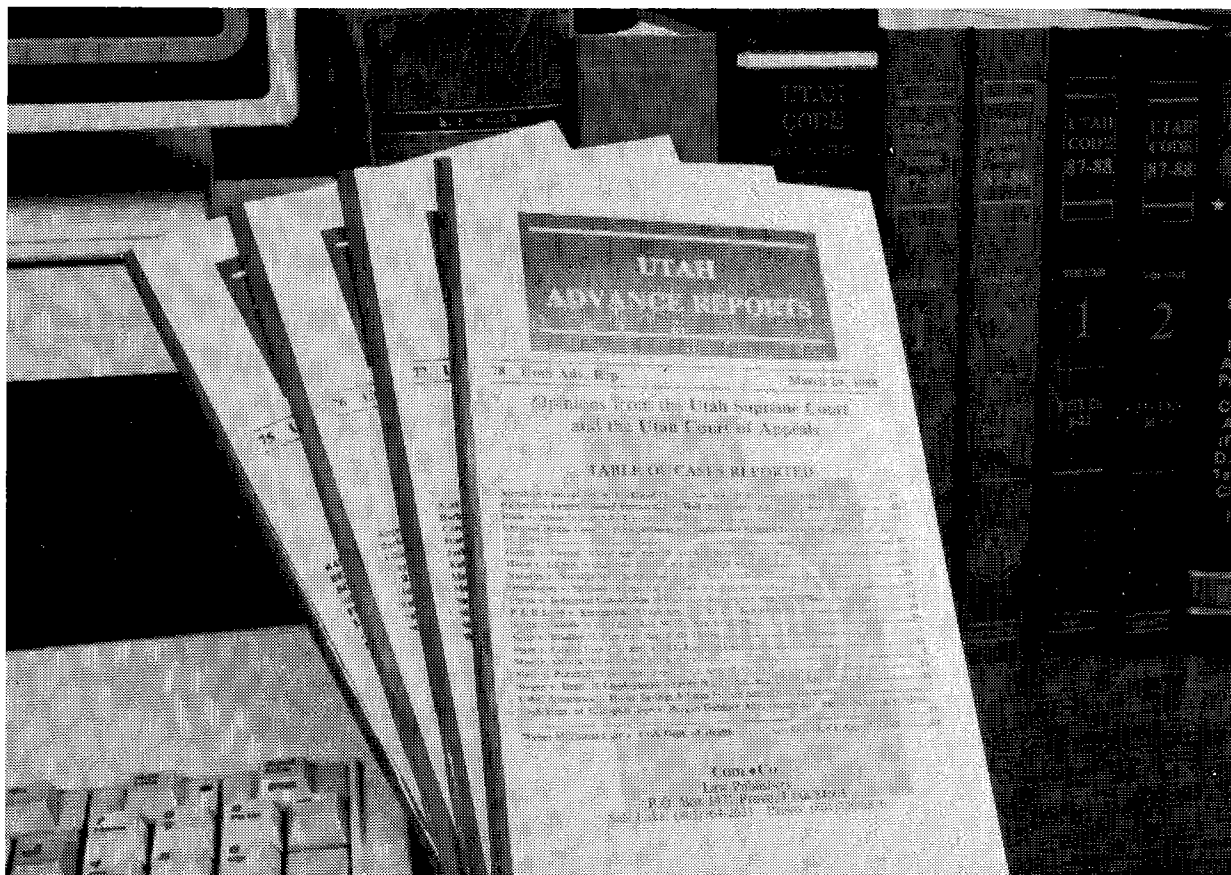
With respect to the public:

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good.

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance.

These lofty but achievable ideals should be incorporated into our lives as lawyers. They represent standards of voluntary conduct which would make us all true professionals. These standards represent conduct above minimums established by the Rules of Professional Conduct, i.e., truly ethical and moral behavior which is more than is required of us and less than what we have the right to do.

A good part of the negative perception of our civil justice system is due to the fact that the public is grossly uninformed or misinformed about the judicial system, including the role of courts and judges. Public education is not the whole answer, however, because we do need to improve the system and to raise our own level of professional conduct. If we don't like the image which the public has of lawyers, of judges, of the system as a whole—if we tend to agree with the public perception that our civil justice system is failing because of overuse, excessive costs and unreasonable delays—we should wake up and come to grips with these concerns and not merely ignore the situation. We should work for improvements in our system directly, and by maximizing our professionalism. We need to be as much concerned with what is the right thing to do as we are with what we have a right to do. In short, we should strive to achieve the goal of increased professionalism as well as greater proficiency in advocacy. This will also help us to find ways of improving our much maligned, but ever venerable, civil justice system.



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CASE SUMMARIES

By William D. Holyoak
and Clark R. Nielsen

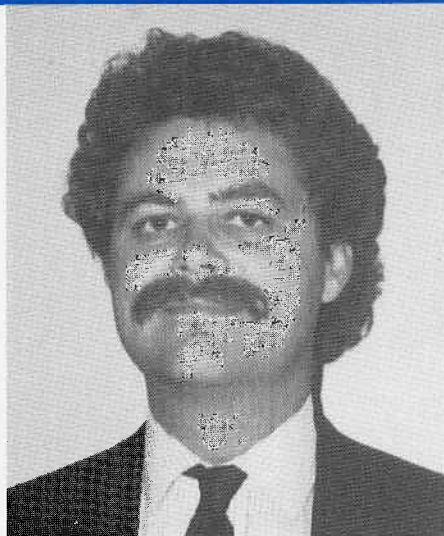
DRAM SHOP LIABILITY FOR SALE OF LIGHT BEER

After consuming approximately six light beers (as defined in the Utah Code, "light beer" is beer with an alcohol content of less than 3.2 percent, to be distinguished from light beer that has made slogans such as "Less Filling—Tastes Great" famous) at the Clearfield American Legion, a man got into a car accident with the plaintiff and severely injured her. The man's blood alcohol content at the time of the accident was .14 percent. The victim brought an action against the American Legion under the Utah Dram Shop Act. The American Legion moved to dismiss on the ground that providers of light beer were not covered by the Dram Shop Act, which applied to "intoxicating liquor." The trial court disagreed and denied the American Legion's motion to dismiss.

On appeal, the Utah Supreme Court agreed with the American Legion and held that the Utah Dram Shop Act, as in effect at the time of the accident, did not apply to providers of light beer, since light beer was specifically excluded from the definition of intoxicating liquor. (The Utah Dram Shop Act was amended in 1986 to impose liability for all providers of alcoholic beverages, which is defined to include light beer.) Justices Zimmerman and Durham dissented, arguing that the interpretation of the Dram Shop Act was not as simple as the majority suggested. *Allisen v. American Legion Post No. 134*, 94 Utah Adv. Rep. 13 (October 28, 1988).

EXECUTION UPON SHARES OF A PROFESSIONAL CORPORATION

One of the three shareholders of a medical professional corporation fell upon difficult economic times and filed bankruptcy in 1976. The bankrupt doctor owned 1,000 shares of the corporation's stock. The articles of incorporation permitted transfer of the stock to other members of the medical profession only. In addition, the shareholders of the corporation had entered into a stock redemption agreement, which also restricted the transfer of stock and gave the corporation a right of first refusal in the event of any sale by a shareholder and the option to repurchase the stock at par in the event of a shareholder's death or termination of employment.

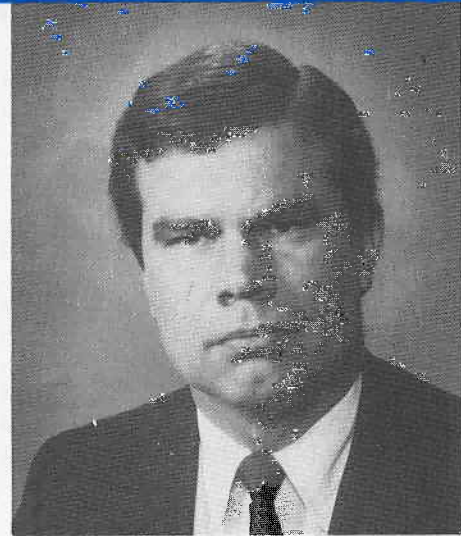


William D. Holyoak

The bankruptcy trustee requested permission from the bankruptcy court for authorization to sell the bankrupt doctor's shares for their par value, \$1,000, to another of the corporation's shareholders. A judgment creditor of the bankrupt doctor objected and requested that the court dissolve the corporation so that the bankrupt estate could receive its proportionate share of the corporation's assets. The bankruptcy court did neither. Instead, it authorized an auction of the insolvent doctor's stock. The judgment creditor outbid a shareholder of the corporation at the sale and acquired the stock for \$2,600.

The corporation then tendered \$1,000 to the judgment creditor as full consideration under the stock redemption agreement. The judgment creditor rejected the tender and demanded that the corporation issue to him 1,000 shares and redeem them for their fair market value. Upon the corporation's refusal to comply with his demands, the creditor sued in district court pursuant to Sect. 16-11-13 of the Utah Code, which provides that, absent a redemption provision to the contrary, a professional corporation has 90 days within which to purchase the shares of a disqualified shareholder at their "reasonable fair value." Absent such purchase, an action may be filed to obtain the reasonable fair value of the shares or liquidation of the corporation. The trial court concluded that under the circumstances, liquidation was the appropriate remedy. The Court of Appeals affirmed, stating:

Although the statute, the articles and the agreement prohibit the transfer of stock to anyone who is not a member of the medical profession, these prohibitions did not preclude the



Clark R. Nielsen

transfer in this case. Restrictions on the sale of corporate stock are held to apply only to "voluntary" transfers. *Riche v. North Ogden Professional Corp.*, 94 Utah Adv. Rep. 35 (Ct. App. October 27, 1988).

ABILITY OF PARTNERSHIP TO SUE IN ITS OWN NAME

In 1961, Sidney M. Horman leased for 20 years space to be used as a bowling alley at the Cottonwood Mall to SW Pugsley. In 1979, Wesley F. Sine was considering the purchase of all the outstanding stock of a corporation controlled by Pugsley's son, which operated the bowling lanes. Sine's real estate agents approached Horman to discover whether he would be willing to renew the lease that was scheduled to expire in 1981. Thereafter, Sine purchased the stock of the corporation for a substantial sum, took an assignment of the lease and began operating the bowling alley. Negotiations to extend the lease failed and the Cottonwood Mall Company, a joint venture and presumably the successor in interest to Mr. Horman's interest in the real property, brought an action to recover possession.

Defendant's initial attack upon plaintiff's complaint was that a joint venture was not capable of suing in its own name. Rule 17(d) of the Utah Rules of Civil Procedure states that a partnership may be sued in its common name, but is silent as to whether the partnership may sue as a plaintiff in a similar manner. A joint venture is a particular form of a general partnership. The Supreme Court, noting that Judge Winder recently concluded in a federal case that under Utah law a joint venture could probably bring suit in its common name and that a recent Mon-

tana case had arrived at the same result, ruled that a joint venture may bring suit in its common name, without joining the individual partners of the partnership as additional plaintiffs. *Cottonwood Mall Co. v. Sine*, 95 Utah Adv. Rep. 11 (November 17, 1988).

ENFORCEMENT OF PROMISE TO PAY FOR PAST SERVICES

Jack Tallas was a Greek immigrant who lived in Salt Lake City for nearly 70 years. During the last 14 years of his life, he had a close friend named Peter Dementas. In 1983, Tallas met with Dementas and dictated a memorandum to him in Greek. The English version of the memorandum, as translated and revised by Tallas, reads as follows:

PETER K. DEMENTAS is my best friend I have in this country and since he came to the United States he treats me like a father and I think of him as my own son.

I visit his house and have dinner with his family twice a week. He takes me in his car grocery shopping. He drives me to the doctor and has also takes me every week to Bingham to pick up my mail, collect the rents and manage my properties.

For all the services Peter has given me all these years, for the use of his automobile, for the money he spent on gasoline and his time, I owe to him the amount of \$50,000 (Fifty Thousand Dollars.) I have already mentioned Peter in my will for all the services and love he has offered me during all these years and I will shortly change my will to include him as my heir.

Salt Lake City, Utah

December 18, 1982

Jack G. Tallas

Upon Mr. Tallas' death in 1983, Dementas filed a timely claim for \$50,000 with his estate, which was substantial. The estate denied the claim and Dementas brought an action to recover \$50,000.

Although Dementas put forth several theories to support his claim, the central issue in the case was whether there was consideration to support Tallas' promise to pay Dementas \$50,000. In that regard, the court resolved the issues as follows:

Even though the testimony showed the Dementas rendered at least some services for Tallas, the subsequent promise by Tallas to pay \$50,000 for services *already performed* by Dementas is not a promise supported by a legal consideration. Events which occur prior to the making of promise

and not with the purpose of inducing the promise in exchange are viewed as "past consideration" and are the legal equivalent of "no consideration." 1 A. Corbin, Corbin On Contracts Sect. 210 (1963). This is so because "[t]he promisor is making his promise because those events occurred, but he is not making his promise in order to get them. There is no 'bargaining'; no saying that if you will do this for me I will do that for you." *Id.*

The court further noted that even if the so-called "moral obligation" exception to the consideration requirement applied in Utah, there could be no recovery since the trial court found that the services Dementas performed were rendered without the expectation of payment. *Dementas v. Estate of Tallas*, 95 Utah Adv. Rep. 28 (Ct. App. November 17, 1988).

CONSTRUING VOTING RIGHTS IN RESTRICTIVE COVENANTS

Restrictive covenants governing the Bloomington Ranches No. 4 subdivision contained the following provision under a section titled "Architectural Committee":

When all lots in said tract have been sold by Grantor, said plans and specifications shall be approved by an architectural committee approved by a majority of owners of lots in the property herein described and only owners of said lots shall be privileged to vote for said architectural committee.

In 1983, an election was held in which owners of 18 of the 20 subdivision lots approved the architectural control committee. Each lot was permitted a single vote, regardless of how it was owned. The committee later approved plans and specifications for the commercial development of one of the lots for a gas station and convenience store. The restrictive covenants did not prohibit commercial development; they did limit, however, the use of lots to those purposes approved by the architectural committee.

An owner of a town house located on one of the lots challenged the approval of the commercial development on the ground that the architectural committee had been improperly approved. The town house owner owned one of 14 town houses located on a single subdivision lot. Her argument was that she was an "owner" of a "lot" entitled to cast a vote and that each owner could cast one vote for the committee, regardless of the number of lots owned or whether only a portion of a lot was owned. The trial court interpreted the restrictive covenant to mean

that the owner (or owners) of each of the 20 subdivision lots was entitled to cast one vote. Based on that construction, the court concluded that the architectural committee was properly constituted.

Interpreting the restrictive covenants as a whole, the Court of Appeals concluded that the covenants supported a construction of the voting rights provision that allotted one vote per lot, regardless of the number of owners per lot or the number of lots owned by one owner. Accordingly, the Court of Appeals affirmed the trial court's decision. *Cecala v. Thorley*, 96 Utah Adv. Rep. 15 (Ct. App. November 18, 1988).

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President's Report

Members of the Section may be interested in being apprised of the public service activities carried out by members of the Young Lawyers Section in the past few months. I would like to highlight the activities of just a few of the Section's committees. Although space limitations prohibit a full account of the activities of each of the Section's committees, the report that follows is illustrative of the great work being done by the dedicated participants in the Section's many public and bar service projects.

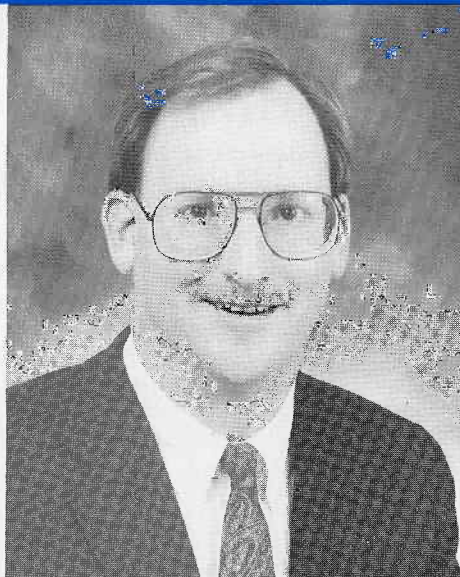
The Law Related Education Committee recently completed a revision of the supplement to *Street Law*, a high school textbook used by the Utah State Board of Education. This supplement titled *Practical Law in Utah* will be used by high school students in legal education classes and provides a broad range of information on the legal system. Committee members spent many hours writing and editing to prepare this excellent product which will be used throughout the state.

The Law Related Education Committee has also been inundated with requests by high schools for guest speakers in civics, social studies and other classes. The topics have run the gamut of legal issues that high school students are interested in and many members of the Section have enjoyed participating in these classroom presentations.

The committee is also almost finished preparing a legal information pamphlet for graduating high school seniors. This pamphlet contains excellent information for those reaching the age of majority including information on contracts, consumer credit, landlord/tenant law, legal requirements for getting married, etc. This pamphlet will be distributed to high school seniors graduating this spring.

This committee is also sponsoring a library lecture series on law-related issues in Ogden and Salt Lake beginning in January and running through April. Last year the committee had about 50 people attend this series held at the Salt Lake Public Library. This year the committee has expanded its lecture series to Ogden.

The Community Services Committee held a voter registration drive at the University of Utah Law School resulting in numerous new registrations. The committee once again held a "Sub-for-Santa" Project in con-



Jerry D. Fenn
President
Young Lawyers Section

junction with the *Salt Lake Tribune*. The Committee arranged for Christmas for numerous families through the sponsorship of lawyers and law firms participating in this project.

The Community Services Committee also was recently recognized by Inter-mountain Health Care for its participation in the IHC Blood Drive. In addition to organizing and conducting regular blood drives, the committee has arranged to have the Young Lawyers Section co-sponsor an annual high school blood drive program. The Section is about half way to its goal of raising \$2,000 to endow a scholarship fund. The high school that donates the most blood during a year receives a scholarship given, at the school's discretion, to a student who participated in the program.

The Needs of the Elderly Committee, in addition to distributing its *Senior Citizens' Handbook*, has been actively engaged in making presentations to senior citizens on legal issues affecting them. Approximately 15 such presentations have been made at senior citizens centers in the last three months.

These are just a few of the ongoing activities of the Young Lawyers Section. Because of space limitations, I have not mentioned by name the scores of volunteers participating in these projects, but their efforts are greatly appreciated. In addition to these and other public service projects, the Section is conducting numerous projects that benefit members of the Bar. In a future report, I will highlight some of these projects. We appreciate the efforts and com-

mitment of members of the Section who give of their valuable time to participate in the projects of the Section. I believe that you make a significant contribution to the public and to the Bar.

As always, the officers of the Section would like to hear from you. If you want to get more involved in public service and/or Bar service projects, please let us know. If for some reason you have indicated an interest in participating in a project or committee in the past but have not been contacted, please give me a telephone call.

Consolidation of *Barrister* and *Utah Bar Journal*

This issue of the *Utah Bar Journal* includes for the second time a dedicated segment for Young Lawyers titled the *Barrister*. This portion of the *Utah Bar Journal* replaces the separate publication of the Young Lawyers Section also titled the *Barrister*, which has been published four or five times a year. The *Barrister* has been consolidated with the *Utah Bar Journal* in response to the Bar's desire to merge all Bar publications into a single, high-quality publication.

The *Utah Bar Journal* will include on a regular basis a dedicated section titled the *Barrister* devoted to the activities and interests of Utah young lawyers. The *Barrister* will also feature articles of special interest to young lawyers as well as the Bar in general.

The officers of the Young Lawyers Section would like to express their appreciation for the efforts and service of the *Barrister* editorial staff during the past year. The *Barrister* publication was considered to be one of the best publications in the country by young lawyer organizations. In particular, the officers would like to thank Guy P. Kroesche, editor-in-chief for 1987-1988, and Wayne D. Swan, managing editor, for their tremendous efforts and accomplishments. The officers would also like to thank associate editors Barbara K. Berrett, David R. Black, T. Patrick Casey, William D. Holyoak, Cheryl Keith, Mark J. Morris and Sue Vogel and photographer Michael K. Stagg for their service.

The *Barrister* editorial staff and Young Lawyers Publications Committee for 1988-89 is Stanford P. Fitts, chairman and editor, Nolan Taylor, vice chairman and managing editor, and committee members Jim Butler, Mark Griffin, Pat Henrickson and Eugene C. Miller Jr. Larry Laycock will also be involved in his capacity as chairman of the Young Lawyers Publicity Committee.

Practical Skills Training as a Necessary Component in the Practice of Law

*(Talk by Judge J. Thomas Greene to law graduates
being admitted to practice law in the state and
federal courts of Utah—May 3, 1988)*

There are two to three prerequisites in order to be adequately prepared for the practice of law. The good news is that you have completed two of the three. The bad news: you must still deal with and master the third. The three components of which I speak are 1. general education; 2. theoretical knowledge of the law; and 3. practical training. The goal and focal point of these three components is to prepare the student adequately for the practice of law.

I wish to talk to you for a few minutes about that third component and your need for practical training. At one time in this country—prior to the coming of the organized bar in 1878 and subsequent developments flowing from the creation of the ABA Committee for Continuing Legal Education—legal training generally was by apprenticeship, with the student reading the law and working under the direction of an established practitioner. There was great emphasis upon the practical day-to-day tasks of lawyering. With the coming of the law schools, the emphasis changed to the theoretical, with an absence of, at least little attention given to, practical training. The practicing lawyer was still relied upon to provide practical application of the acquired theoretical knowledge. There developed a significant gap to be bridged between the entry of the neophyte lawyer into the practice and the effective practice of law by that fledgling lawyer. This was certainly the state of things when my classmates and I who graduated in the mid-50s were turned loose on the public and given licenses to practice law. In the early '60s came the call for "clinical lawyer schools" to provide practical training for the would-be lawyer. This has resulted in the offering of optional courses in the curriculum of many law schools to help students bridge the gap in preparing to assume the duties which lawyers must discharge to clients, as advocates, counselors, negotiators and facilitators, as well as duties to the courts and to the public. The much needed trend toward practical skills training in law schools has been only

moderately successful, and falls far short of the training everyone needs to be adequately ready to practice law.

The question continues to be: Whose responsibility is it to provide practical skills training for those who will practice law? It would appear that this responsibility may be beyond the mission—and certainly is beyond the presently intended reach—of almost all law schools. Apart from that, however, I suggest that the responsibility for such training does not rest with the law schools alone. It is a shared responsibility with the organized bar and the individual members of our profession. Also, it is the personal and continuing responsibility of each individual newly graduated law student. For you who are about to embark upon the practice of law, the stark reality is that you must forthwith translate your vast store of acquired theoretical knowledge into a nuts and bolts world of practice. I'm talking about such things as developing techniques for meeting and dealing with clients; recognizing conflicts of interest; providing practical advice in matters of seemingly small magnitude; preparing documents such as employment agreements, deeds, wills and other contracts; learning how a law office operates in terms of overhead, assignment of cases, billings and things of that nature; understanding judges and developing proper decorum in courtrooms; and practicing civility with fellow lawyers. These are just a few of the non-textbook practical necessities of the practice of law. Not only that, you must translate theory to practice at a time when the legal profession is undergoing vast changes in the delivery of legal services. All of this in the context of large overhead expenses, changing needs of clients, increased complexity in the practice and legitimate client demand for reduced costs and speedier justice.

The Utah State Bar is embarking this summer on an experimental program aimed at helping a few new law graduates who will participate as volunteers in the conduct of pilot practical skills training programs over

a three-month period starting this August. The purpose is to explore ways of sharing the responsibility of bridging the gap and providing much needed practical skills training for new law graduates. The program has the backing of prominent lawyers and leaders of the Bar. Depending upon a positive evaluation of the program, it could become a more widespread vehicle in helping to provide much needed practical skills legal training.

Enough said about so-called apprenticeship training. Perhaps you are saying to yourself: "I am already there—I have arrived—I am here to be sworn in, rather than to embark upon still more education." Don't kid yourself. One thing is abundantly clear. None of us ever "arrive" in the practice of law; it is a continuing journey. We lawyers, including law professors and judges, will always be on the way. We will always have need for continuing legal education.

One final word—the only direct advice I will offer. In your entry into the practice, take time to talk to and listen to older lawyers. You will find that they will be more than willing to share their techniques, their experiences, their practical knowledge. This is not so-called "billable" time, but you will find it to be invaluable time. Let established lawyers share with you the responsibility of providing practical training in bridging the gap to the meaningful practice of law. Also, place emphasis upon the quality of your life as well as the amount of work and quantity of time you may spend. Don't become so enmeshed in the pursuit of immediate remuneration, or the perceived necessity to meet a quota of billable hours, that you feel guilty in taking time to participate in Bar activities and service projects, and to participate in civic affairs and enriching non-legal matters.

Welcome to each of you, and good luck and success as you embark upon the practice of law.

Client Development— What's in it for Young Lawyers

By Wayne D. Swan

Scott Matheson's message to the Young Lawyers at the May 1988 Brown Bag Luncheon was clear: There are too many lawyers in Utah; success will come only to those young lawyers who constantly and aggressively seek new clients. For the sole practitioner or a young attorney in a small firm, Matheson's advice is nothing new. For them, client development is second nature; it is a matter of survival. For attorneys like myself, young lawyers associated with larger, older, established firms, it may be more difficult to make client development a high priority item. Law firms talk about how their young associates should be involved in non-billable, extracurricular activities, which enhance the firm's reputation and, hopefully, will lead to new clients, but rewards for doing so may be lacking. For the associate at a larger firm, rewards more predictably come from hours billed than from hours spent in non-billable activities that *might* attract new clients to the firm. If larger firms truly want to encourage client development, they must change. They must convince their young lawyers that, as far as time spent in client development is concerned, there really is something in it for the young lawyer.

Larger firms have the advantage of having an established client base. And associates who do quality work for these clients, enticing the clients to stay with the firm, are indeed engaged in an important form of client development. But will it be enough in the future for the large firm to hire five or six new associates each year, pay them well and use them to draft memoranda and documents but not require them to develop new clients? According to Matheson, without the constant influx of new clients, even large firms may die. If Matheson is correct, each firm must spell out for its attorneys, including its young lawyers, specific client development responsibilities.

This is difficult for a large firm to do. Through the "billable hour budget" system used by most, if not all larger firms, firms have convinced young lawyers that their value to the firm is measured primarily in terms of hours billed at the standard billing rate. Firm management smiles upon billable hours. They should. Billable hours mean more money for the firm. Billable hours

usually mean partnership offers for associates.

Is it any wonder, then, that a young lawyer may feel guilt, pressure and frustration when he enters his office each morning, and is faced with the choice of spending a morning billing four hours of time to a paying client or devoting that same time to non-billable, community or business development activities, such as preparing reports in connection with Bar committee assignments, outlining presentations for upcoming CLE Seminars or writing editorials for the *Utah Bar Journal*? Billable time always seems more valuable to the associate in the short term, even though in his heart he agrees with Matheson that effective client development begins with public service.

My point is not that employers do not appreciate young lawyers who engage in such non-billable activities. They clearly do. Firm management seems to be aware of those attorneys who are contributing to the stature of the firm in non-billable ways. My point is, the firm that is serious about a client development program and increased public exposure must find ways to assure young lawyers that their legitimate client development efforts will not go unrewarded. To actively engage in client development, a young lawyer does not necessarily need a reduced budget in terms of billable hours (although Matheson tells of a unique situation in his firm where an attorney's quota for billable hours was reduced long enough for the attorney to get involved in the Salt Lake community on the various committees and boards and task forces pertaining to his area of specialization). What is needed, and may be lacking in some larger firms, is confidence among the young lawyers that their true client-development efforts will not go unnoticed or unrewarded. If a young lawyer's extracurricular work and associations call attention to him and his firm, he should be told. If Bar involvement, pro bono work, seminar presentations or papers presented are not factors in establishing salaries, but *are* factors in determining year-end bonuses, they should be real factors and the bonuses should be adjusted accordingly.

At the same time, associates should not become discouraged by the billable/non-billable stress syndrome and their inability, early on, to bring valuable clients to the firm. Writing papers, contributing to journals, serving on Bar committees and the like do not translate immediately into clients. In fact, the key is not even necessarily law-related community exposure and involvement. There may well be "client development value" in less direct efforts, even efforts not intentionally geared toward client development. There is potential for

client development each time the young lawyer opens his mouth, whether in or out of the law office. What attracts and impresses outsiders to come to the attorney is his confidence, competence, reasonableness and charisma. These qualities can be discovered by others in a variety of settings, at civic and church meetings, at neighborhood socials, even on the basketball court—but only if we open up and speak out. Quiet smugness is too often the hallmark of young attorneys in settings where it is appropriate to speak out and let feelings and opinions be known.

This is what young lawyers can do. Their firms can aid and encourage their client-development efforts by rewarding the kind of extracurricular efforts that eventually lead to community respect and client referrals for the attorney and his firm, but may not, in the short run, translate into billable hours.

Young Lawyers Give Legal Education Lectures to Senior Citizens

During 1988, young lawyers gave over 35 legal education lectures at senior citizen centers located throughout Utah. The lectures focused on consumer issues and included a discussion of scams that often prey on the elderly. Most lectures included question and answer sessions on legal problems. As part of their presentations, the young lawyers provided to senior citizens copies of the *Utah Senior Citizens' Handbook*, a guide to laws and programs affecting Utah's elderly.

The *Handbook* is authored by the Young Lawyers Section Needs of the Elderly Committee. It was published through major funding provided by the Utah Bar Foundation as well as other funding provided by the American Bar Association and by Utah law firms.

The Needs of the Elderly Committee coordinated the lecture series with help from the Utah Area Agencies on Aging and the Better Business Bureau. Rick Hoggard, Lisa Yerkovich, Jeffery Cottle and others on the committee spent many hours arranging the presentations. The Needs of the Elderly Committee wishes to thank all who volunteered their time to offer the lectures.

The lectures were so successful that the Needs of the Elderly Committee plans to continue offering similar presentations to senior citizen organizations.

1988 LAWYER COMPENSATION SURVEY

Please take a few minutes to complete the following questions to assist in providing an accurate Lawyer Compensation Survey for 1988. When completed, please return to *Utah State Bar, % Compensation Survey, 645 S. 200 E., Salt Lake City, UT 84111*. The questionnaires are anonymous and are not provided to anyone other than those who compile the results. Thank you for your assistance.

Age _____

Sex _____

Race _____

Type of Practice: _____ Years of Practice: _____

- ☐ Self-Employed
- ☐ Small firm (less than 15 attorneys)
- ☐ Medium firm (15 to 35 attorneys)
- ☐ Large firm (more than 35 attorneys)
- ☐ Corporate
- ☐ Government (include organizations that are government funded)

Primary areas of practice (specialty):

1. _____ 2. _____

Hours worked per week: _____

Hours billed per week: _____

Hourly billable rate: _____

Gross pay for 1988: _____

(Include auto allowance, but not bonus.) Self-employed attorneys should deduct from their gross pay any amount they contribute to provide benefits for themselves, such as health insurance.

Bonus for 1988: _____

Does your employer provide any portion of the following benefits? Self-employed attorneys should indicate if they provide the benefit.

- ☐ Health
- ☐ Disability
- ☐ Dental
- ☐ Bar dues
- ☐ Life

Describe the parental and/or maternity benefits provided by your employer:

Self-Employed Attorneys:

Gross annual receivables actually collected _____

Annual overhead expenses _____

Attorneys Employed With Firms:

Are the following hours considered for compensation?

- ☐ Recruiting
- ☐ Client relations
- ☐ Pro bono
- ☐ Bar activities

Comments:

Law School for Non-Lawyers

The Young Lawyers Law Related Education Committee is continuing, for its second year, the Law School for Non-Lawyers. A number of legal topics of general interest and application will be presented by lawyers in monthly meetings at various libraries in the Salt Lake and Ogden areas.

The Ogden Library Series will be held at the Weber County Library on the third Wednesday of each month beginning in January and running through April 1989. Each session will begin at 7:00 p.m. The following topics will be presented in the Ogden schedule:

January 18	Small Claims and Consumer Law
February 15	Wills, Estates and Trusts
March 15	Child Custody and Divorce
April 19	Landlord/Tenant and Property Law

The Salt Lake Series will be held the fourth Wednesday of each month beginning in January and running through April 1989. Each session will begin at 7:00 p.m. The Salt Lake Series will be held at a different library each month according to the following schedule:

January 25	Small Claims and Consumer Law Salt Lake Library Main Branch, 209 E. Fifth S., Salt Lake City
February 22	Wills, Estates and Trusts Sprague Branch, 2131 S. 11th E., Salt Lake City
March 22	Child Custody and Divorce Rose Park Branch, 1185 W. 10th N., Salt Lake City
April 26	Landlord/Tenant Chapman Branch, 577 S. Ninth W., Salt Lake City

Outstanding Young Lawyer of the Year Award

The Young Lawyers Section of the Utah State Bar is soliciting applications for its

Outstanding Young Lawyer of the Year Award. To qualify for the award, an attorney must be a member of the Young Lawyers Section, that is, under 36 years old or admitted to practice law for less than six years. The following criteria will be considered in making the award:

1. The nature and extent of service to the profession including involvement in Bar activities and other efforts on behalf of fellow young lawyers.
2. The degree of achievement or high professional competence and ability.
3. The extent to which the young lawyer has demonstrated professional integrity and high ethical standards.
4. The nature and extent of community service, both as a lawyer and as a citizen.

All nominations must be submitted in writing no later than April 1, 1989, to:

Joann Shields
United States Courthouse
350 S. Main, Suite 148
Salt Lake City, UT 84101-2180
524-5568

Liberty Bell Award

The Young Lawyers Section of the Bar is seeking applications for the Liberty Bell Award to be presented on Law Day, May 1, 1989. The criteria for the award are:

1. The applicant must be a non-lawyer.
2. Promote a better understanding of the Constitution and the Bill of Rights.
3. Stimulate a deeper sense of individual responsibility, encouraging citizens to recognize their duties as well as their rights.
4. Contribute to the effective functioning of our government.
5. Foster a better understanding and appreciation of our laws.

All nominations must be submitted in writing no later than April 1, 1989, to:

Joann Shields
United States Courthouse
350 S. Main, Suite 148
Salt Lake City, UT 84101-2180
524-5568

Young Lawyers Oversee Revision of Utah Supplement of High School Law Text

The Utah Young Lawyers Section, Law Related Education Committee has overseen

the revision of the Third Edition of the Utah supplement to *Street Law*, a text used in high schools for legal instruction. Rick Van Wagoner, chairman of the Law Related Education Committee, noted that the supplement, *Practical Law in Utah*, has been prepared and revised for use in conjunction with high school legal education classes and for law school programs providing instruction to high schools.

Street Law includes helpful information in a broad scope of subjects, ranging from introduction to the legal system, criminal and civil litigation, real estate, consumer law, juvenile law and domestic relations. The text also includes lists of helpful government and private agencies, along with instructions on how to find a lawyer.

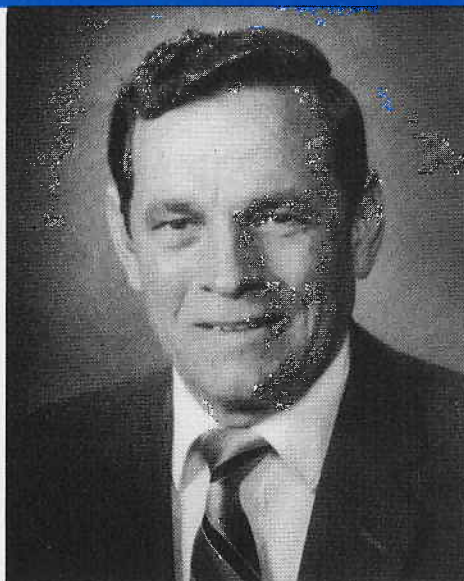
The Young Lawyers Section congratulates the Law Related Education Committee on their efforts in revising this text and thanks the committee members and those who assisted the revision effort for their dedicated service to our communities.

Election of Section Officers

Despite the thrilling and chilling elections of 1988 on both the state and national levels, you have yet another voting decision to make. The election of the 1989-90 officers of the Young Lawyers Section of the Utah State Bar is coming all too quickly. Nominations for president-elect, secretary, treasurer and ABA/YLD district representative will be accepted from March 20, 1989, to March 27, 1989. The election schedule includes the following important dates:

Nominations Open:	March 20, 1989
Nominations Close:	March 27, 1989
Platform Statement of Candidates Filed:	March 28, 1989
Platform Statements and Ballots Mailed:	March 31, 1989
Election Ballots Received:	April 1, 1989 to April 17, 1989
Election Results Announced:	April 18, 1989

All nominations must be received no later than 5:00 p.m. on March 27, 1989. Nominations should be sent to Jerry Fenn at 10 Exchange Place, 11th Floor, P.O. Box 45000, Salt Lake City, UT 84145, 521-9000. You may obtain a copy of the Election Handbook of the Utah State Bar Young Lawyers Section by writing or calling Larry Laycock at 10 Exchange Place, 11th Floor, P.O. Box 45000, Salt Lake City, UT 84145, 521-9000.



President's Message

By Reed L. Martineau

Viewed from a number of perspectives, the year just past was a truly exciting and historic one for the Utah State Bar. That is not to say the year passed without significant problems and difficulties or that many of these as well as others do not remain for future resolution. However, in terms of membership involvement, the Bar has never before been as active. In terms of Bar services, the staff has never before been as busy or effective. In terms of its responsibility for oversight and policy, the Bar Commission has never before been as significantly involved with as many important issues. In terms of direction, the Bar has never before been as well prepared to meet the challenges and opportunities of the future. In terms of facilities and staff, the Bar, very fortunately, has never before been as well situated to provide the many important services required by its charter.

Some of the highlights of the past year are worth mentioning in this year-end report.

1. It was an outstanding year for our 32 sections and 24 committees. The very significant increases in membership involvement in these sections and committees reflect well on the overall health and vitality of the Bar.

2. Although the percentage of attendance at our Bar meetings falls well below that of some other western states, it was very pleasing to me that both the Annual Meeting in San Diego and the Mid-Winter Meeting at St. George set records well above previous attendance figures for those meetings. Each

of those meetings was a huge success.

3. Judge Greene's committee on Post Law School Practical Training has almost completed its three-year task and an apprentice program for new lawyers began in August of this year. This program is the first of its kind in the nation and will be closely watched by other states.

4. A proposed rule for Mandatory Continuing Legal Education drafted by the Continuing Legal Education Committee under the co-chairmanship of Ellen Maycock and Don Zillman, and supported by the Bar Commission, is now being reviewed by the Supreme Court. The Supreme Court during the year also approved and implemented revised rules of Professional Conduct and revised Rules of Discipline.

5. Extensive and effective work was done by the Legislative Committee under the able chairmanship of past President Norm Johnson. An overdue judicial salary increase was passed, a task force to study tort and insurance reform was created by the legislature, a proposal to impose a sales tax on legal services, strongly opposed by the Bar, was not pursued (but will likely come up again) and a bill providing for unification of the district courts with their staffs was passed.

6. Both the Women Lawyers of Utah and the Young Lawyers Section gained increased stature and deserved recognition for their very significant contributions to Bar programs and activities.

7. Throughout the year our valuable contacts with bars in other states, particularly other western states, and with the American Bar Association were maintained and improved. These contacts demonstrate that in many of our activities and services we are among the leaders in the nation and are recognized as such.

8. Undoubtedly the most significant single project ever undertaken by the Utah Bar, or any other bar of comparable size, is the new Law and Justice Center. Ground was broken for the center in October 1987, and it was dedicated this past September. Wholly voluntary contributions of some \$1,200,000 from some 1,800 individual members of the Bar and nearly \$900,000 in contributions from charitable foundations and individuals, together with literally thousands of hours of volunteer time donated by Bar members all attest to the strength and quality of the commitment of Bar members and the community to this historic project. The center, which has already attracted national attention, will significantly change and add to the activities and programs of the

Bar. Alternative dispute resolution is a concept whose time has come, and the Bar is in a position to lead this new avenue for settling disputes outside of the courts.

Looking back on the events of this year, I simply must express sincere appreciation to Bar staff for their willing and capable service to the Bar. I want to especially thank Steve Hutchinson and Barbara Bassett, who make the Bar and all of its activities and programs run smoothly and effectively. During the year each of them gave generously of their time and talents in connection with the layout, interior design and construction of the new center. The completed center reflects most favorably on the initiative and style of each of them.

Special commendation should go to each member of the Bar Commission for their outstanding contributions and selfless service to the Bar, its policies, programs and activities. Service on the Bar Commission takes hundreds of hours by each commissioner in the course of each year. The Bar is indeed fortunate to have such uniformly conscientious, public-minded, able and farsighted Bar members to fill these elected positions.

I also want to give a special thanks to the hundreds and hundreds of our members from all across the state for their enthusiastic support of and participation in the many Bar activities and projects.

On a concluding note, the dominant impression I have of the Bar, gained from nearly 28 years as a member—most of them as a member of various sections, committees and commissions, is one of an organization and its members who are thoroughly committed to "service"—service to clients, service to the courts and the justice system, service to Bar members and service to the public. That includes countless hours of voluntary, selfless and valuable service rendered not only by members of various Bar organizations but by the Bar membership as a whole. No other organization in the state is able or willing to provide the broad range of expertise in as many areas as that provided by the Bar. No other organization comes even close to providing the kind or amount of voluntary service which the Bar provides to so many segments of our communities. We certainly can and should be proud of the outstanding contributions made by our profession to the orderly, efficient and just operation of our society.

I am most grateful and appreciative of the opportunity I have had to serve as your president.



Executive Director's Reflections on 1987-1988

By Stephen Hutchinson

The year just passed will long remain in the hearts and memories of Bar members and bar leaders as the turning point for the Utah State Bar. It provided a dramatic demarcation line in our historical timeline. Between the early 1950s and mid-1980s the Utah State Bar grew in numbers, scope of operation and professional stature to become known as one of the most active and successful bar associations of its size in the nation. With the dedication of the Law and Justice Center and inauguration of the plethora of dispute resolution programs, public and professional service programs and educational services it makes possible, the Bar truly has moved into a new era.

As your Executive Director, I am continually inspired by the willingness of busy lawyers to commit their considerable talent and valuable time to voluntary service. The creative energy and quality performance represented in our committee and section activities truly set the Bar apart from other professional groups or trades. Looking forward, we can enthusiastically anticipate new models of service programs and opportunities for professional development, all of which is made possible by the solid foundations formed in the past.

In this issue we note the particular achievements of the Bar and its sections and committees during 1987-1988 under the exceptional leadership and tireless service of President Reed Martineau. His particular

skill and endless hours of extraordinary service during the design and construction of the Law and Justice Center truly made the difference, bringing the overall project in under budget and on time.

On the subject of the center, I would be remiss if I did not also acknowledge the tremendous effort and talent provided by our associate director, Barbara Bassett, in developing with Life Designs the interior design work. Due to their efforts, our costs were actually less than one-half the cost of comparable interiors in this area. Our fine architect for this innovative project was MHT Architects and our general contractor was Okland Construction Company. This

was a truly collaborative effort, however, with excellent suggestions along the way from the Bar Commission, Building and Finance Committee, Bar Foundation and Bar staff.

I urge Bar members who read the very abbreviated highlights of the committee and section activities to complete and return the committee volunteer form we have included in this issue. All volunteers will be placed on one or more committees, with a sincere effort to place members on their first or second choice assignment.

Thank you all for your generous and thoughtful support for me and the staff this year.

Highlights From Annual Reports of Sections and Committees

ADMINISTRATION PRACTICE SECTION

A. Robert Thorup, chair

Studied the use of non-lawyers before agencies as requested by the Bar.

Assisted legislature with amendments to Utah Administrative Procedure Act.

Published and distributed Utah Administrative Law News to over 200 subscribers; published complete text and comments pamphlets for Utah Administrative Procedures Act.

Formed task force to study a central panel on administrative law judges in Utah.

BANKING AND FINANCE SECTION

Robert Gross, chair

Featured business meeting address by George Sutton, Utah Commissioner of Financial Institutions, on "The Status of Banking in Utah."

Sponsored participation of U.S. Supreme Court Justice Scalia at the Annual Meeting.

CORPORATE COUNSEL SECTION

Robert H. Lovell, chair

Held a fall section breakfast featuring Alan Rindlesbacher, economic director of the Salt Lake Area Chamber of Commerce, who spoke on "Utah Economy: The Real Story."

Sponsored a luncheon CLE seminar on Corporate Audits.

Sponsored an annual seminar featuring "Mergers and Acquisitions" and "Corporate Counsel Compensation; Ethics."

CRIMINAL LAW SECTION

Rick MacDougall, chair

Jointly sponsored a workshop on child abuse.

Participated in committee review of Rule 65(B) of the Rules of Civil Procedure concerning extraordinary writs.

Sponsored a CLE seminar on criminal law and procedure.

ENERGY AND NATURAL RESOURCES SECTION

Fred G. Nelson, chair

Membership increased to approximately 200 attorneys. There are six active committees within the section: 1. Environmental Committee, 2. Water Committee, 3. Mining Committee, 4. Oil and Gas Committee, 5. Public Lands Committee and 6. Title Standards Committee. Major section activities for the past year included:

Presented a Bar CLE, "Natural Resources on Indian Lands," in Park City.

Supported passage of title standards legislation drafted through section activities.

Conducted quarterly luncheons, the most important being an "Update Luncheon" in which each committee distributed a written update of legal developments for the previous year.

Held monthly brown bag luncheons on specific developments in natural resources law.

Sponsored a lawyer-law student reception for students from BYU and U of U law schools interested in natural resources law.

Supported The Western Energy Law Bulletin published by the University of Utah Law School.

INTERNATIONAL LAW SECTION

K.R. Pinegar, chair

Jointly sponsored a meeting with the U of U Law School on arbitration in Sweden.

Held joint meeting with "INTERLAW" directors on international practice in Utah.

LITIGATION SECTION

Francis J. Carney, chair

Was a major co-sponsor of the KUED-7 televised panel discussed entitled "Issues of Life and Death," moderated by Professor Arthur Miller.

Sponsored and produced two afternoon presentations at the San Diego Annual Meeting. The first, "Expert Evidence in a Criminal Case: The Mark Hoffman Trial," featured Judge Scott Daniels and attorneys Ron Yengich and Bob Stott. The second, entitled "Experts: Evidence and the Mind—Psychological Testimony," featured psychologist Dr. Samuel Goldstein.

At the Mid-Year Meeting in St. George, the section sponsored a viewing of the documentary entitled "Inside the Jury Room" with a panel discussion thereafter featuring prominent criminal law attorneys discussing the issues of jury nullification.

Sponsored its first annual law school writing competition between second-year students from the J. Reuben Clark Law School and the University of Utah Law School.

MILITARY LAW SECTION

Robert L. Schmid, chair

Held bimonthly luncheon-speaker meetings. (Various topics and speakers.)

"Utah Military Law Bulletin" published occasionally, edited by Professor-Magistrate Ronald N. Boyce and C. Jeffry Paoletti.

PATENT SECTION

Jon Christiansen, chair

Met to review the Utah Technology Finance Corporation.

PROBATE AND ESTATE PLANNING SECTION

Allen L. Orr, chair

Legislation submitted by the section became law that changed the surviving spouse's intestate share, presumptions on pretermitted children issue, homestead allowance, exempt property allowance, disclaimers and provisions regarding claims against estate.

Debated specialization for the section and decided to recommend that probate and estate planning be included in the tax specialization.

Worked on the revised probate forms.
Held luncheon CLE meetings.

SECURITIES SECTION

Ray Ridge, chair

Sponsored Securities Practice Workshop.
Established legislative liaison to monitor state legislation on securities.

Polled members to determine need and advisability of a spring seminar and other activities—responsive to membership.

TAX SECTION

Dennis M. Astill, chair

Co-sponsored Rocky Mountain Tax Conference.

Co-sponsored conference regarding tax consequences of divorce.

Held monthly meetings with pertinent tax topics.

Assisted Bar in the legislative process through utilization of Tax Section members.

YOUNG LAWYERS SECTION

Stuart W. Hinckley, president

The *Barrister* merged with the *Utah Bar Journal*, marking the end of an award-winning publication that has been recognized for its excellence by the American Bar Association's Young Lawyers Division.

The Membership Support Network Committee sponsored significant CLE programs, including a seminar on alternative dispute resolution at the San Diego Annual Meeting.

The Bridge the Gap Committee participated in the final drafting of the Bar's proposal for mandatory "Bridge the Gap" training program.

The Long-Range Planning Committee contributed to the standardization and fairness of the section's contested elections by drafting an Election Handbook.

The section was active in providing community services, for example, the Bicentennial of the Constitution Committee assisted in the community's commemoration of the Constitution by making available to schools and civic groups the professionally produced videotape entitled "Forgotten Freedoms."

The Child Advocacy Committee sponsored an outstanding program entitled "In Re: Kids," which is a seminar designed for groups that are interested in children's rights.

The Community Services Committee continued to sponsor the Section's Sub-for-Santa project, blood drive and initiated a tutoring program.

The Immigration Committee gave legal assistance through federally recognized organizations to immigrants covered by the

Immigration Reform and Control Act of 1986.

The Law Day Committee co-sponsored three days of information fairs in Ogden and Salt Lake City.

The Law Related Education Committee presented a mock trial demonstration at the Treasure Mountain Middle School, published a law-related pamphlet for high school seniors, and sponsored library lectures designed to educate lay people in basic areas of the law.

The Needs of the Elderly Committee reprinted the *Senior Citizens' Handbook*. The section is coordinating with several senior citizen organizations, hospitals, nursing homes and law firms within Utah to distribute the handbook. Over 3,000 of the handbooks have already been distributed.

The Awards Committee coordinated the Liberty Bell and Outstanding Young Lawyer Awards. The Publicity Committee supported efforts to involve more young lawyers in section activities.

The officers of the section appreciated the participation of the three committee coordinators on the executive council—namely, Merrill Nelson, Sandi Sjogren and Judge Michael Hutchings. This is the first time that a member of the judiciary has been on the executive council, and Judge Hutchings' unique perspective was welcomed at our meetings.

ADVERTISING COMMITTEE

G. Randall Klimt, chair

At the request of Counsel for the Utah Bar, the chairman responded to all inquiries from Bar members concerning what was and was not permissible in proposed ads. The committee also reviewed and made recommendations as to action concerning all complaints on advertising matters that came to the attention of the Bar.

ALTERNATIVE DISPUTE RESOLUTION COMMITTEE

Hon. Michael R. Murphy, chair

Two committee members served on the Judicial Council's Task Force on ADR, which completed its report in 1988.

Studied and recommended to the Bar Commission creation of a neighborhood dispute resolution program.

BAR EXAMINER COMMITTEE

Hon. David K. Winder, chair

Wrote essay questions and model answers for two student bar examinations and two additional attorney bar examinations. Graded all papers for all examinations and certified results to the Bar Commission.

BAR JOURNAL COMMITTEE

Cal Thorpe, chair

Organized editorial board for and began publication of the *Utah Bar Journal* on a monthly basis—all of which enables publication of these section and committee reports.

CLIENTS' SECURITY FUND COMMITTEE

Thomas L. Monson, chair

Received testimony from 15 persons claiming losses aggregating some \$150,886. Three claims totaling \$97,405 were found not to have been misappropriated by theft by the attorneys. Two claims, representing \$20,463, were continued. In the remaining claims, the committee found approximately \$33,000 was validly claimed by 10 claimants by reason of the theft of the clients' funds by four attorneys, all of whom are now disbarred or suspended. The committee recommended awards to these claimants totaling \$20,765, leaving a balance in the Clients' Security Fund of \$93,829.

CLE ADVISORY COMMITTEE

Ellen Maycock and Don Zillman, co-chairpersons

Proposed rule for mandatory CLE; published rule and nine solicited comments from members of Bar—pro and con statements. Forwarded comments to Supreme Court for Supreme Court's consideration.

COURTS AND JUDGES COMMITTEE

Thomas N. Arnett Jr., chair

Provided input to the Judicial Council on the need for uniformity and comments concerning the proposed rules of practice.

Provided comment on proposed amendments to the Utah Rules of Civil Procedure.

Reviewed and provided comment on proposed amendments to the Code of Judicial Conduct.

Reviewed and provided comment regarding proposed revisions to the Judicial Nominating Procedures.

DELIVERY OF LEGAL SERVICES COMMITTEE

Karl G. Perry, chair

Investigated aspects and considerations of a reduced fee panel to be operated in the Law and Justice Center and designed a model program to be implemented.

Considered Bar assistance with the homeless shelter.

FEE ARBITRATION COMMITTEE

W. Jeffery Fillmore, chair

Committee consisted of 11 attorneys, six judges (from the Court of Appeals, District Court and Circuit Court) and six lay persons. The committee membership has recently increased to 16 attorney members. For the period July 1, 1987, to June 30, 1988, the committee was assigned to arbitrate 18 fee dispute matters.

Each matter was handled by the assigned hearing panel consisting of an attorney, a judge and a lay person. Committee's guidelines suggest having a hearing within 30 days of the assignment of the case based upon the parties' schedules with a prompt decision to follow the hearing. All cases were handled within these guidelines.

Three of the assigned cases were handled by the attorney, the panel chairman, without committee members because the disputes were under \$1,000, as permitted under the arbitration rules. One other matter was settled during the proceeding and another matter was withdrawn by the parties. All other cases were heard by the assigned hearing panels and decisions were rendered. (At the present time, the committee has five assigned matters which are awaiting hearings.)

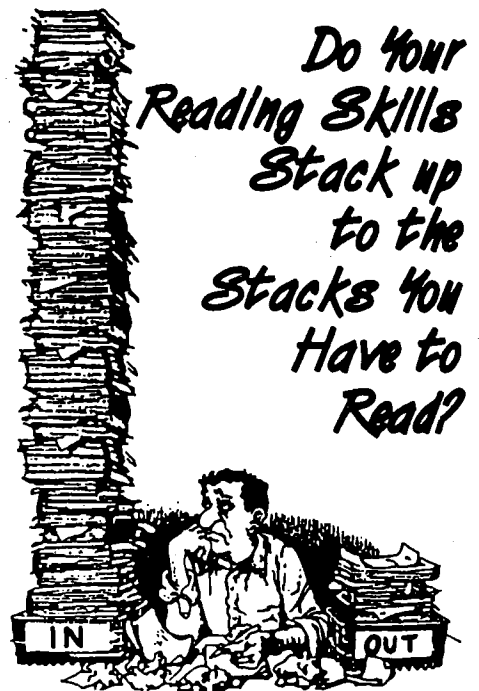
The committee membership has greatly expanded during the last two years, which has had the effect of spreading the assigned cases among the increased membership of the committee. The burden on the individual committee participants, particularly judges and lay persons, has been reduced by having the larger committee.

LAWYER BENEFITS COMMITTEE

Michael J. Mazuran, chair

Professional Liability Insurance. There continues to be a marked increase in the number of malpractice claims filed against Utah lawyers. This disturbing trend indicates the necessity of each practicing attorney becoming more aware of what constitutes malpractice and taking affirmative action to avoid committing malpractice. Significant areas of error or misconduct included failure to know or properly apply the law, failure to obtain client's consent or to inform client, conflict of interest, failure to file documents, etc. The Lawyer Benefits Committee has recommended to the Bar Commission that some discussion of ethics and malpractice prevention be included on a regular basis at least annually, if not more often, as part of the Bar's regular meetings and that malpractice prevention information be continually provided to members of the Bar through Bar publications.

Bar's Group Medical Plan. The committee received indications from Blue Cross



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OBJECTIVE: increase reading rate and comprehension in technical materials by a factor of at least 100 percent.

This Utah State Bar class is legal reading specific, but the skills learned and the materials you take with you may be one of the best overall investments of time and a little money that you will ever make.

CONTACT: Sydnie Kuhre
Law and Justice Center, 531-9077.
SPACE IS LIMITED.

and Blue Shield that the company was not going to continue offering the Bar's group medical plan. This information came shortly before the renewal period in May 1988. Pursuant to directions from the Bar Commission, the committee negotiated with Blue Cross and Blue Shield to continue the plan, although a number of modifications were made in order to retain coverage. Some of the significant benefit changes involved maternity benefits, mental and nervous disorder coverage, including maximums on outpatient and inpatient coverage. The committee has expended considerable effort during the last year to introduce new and younger members of the Bar to the group plan in order to stabilize the same and provide a more solid future for coverage for members of the Bar.

LAWYERS HELPING LAWYERS COMMITTEE

Michael Heyrend, chair

Made motion to amend petition filed with Utah Supreme Court which would add language to Rule 1.6 of the Rules of Professional Conduct which would essentially extend lawyer/client privilege to those law-

yers who contact or are contacted by members of the LHL Committee. To date, the court has not ruled on the motion.

Hosted an orientation session to educate members of the committee on the manifestations of substance and alcohol abuse. We were taught by mental health experts who are members of the committee and whose expertise governs our approach and support to our colleagues who are suffering from these impairments.

NEEDS OF CHILDREN COMMITTEE

Jane Reister Conard, chair

Co-sponsored a child abuse teleconference viewed throughout Utah on "Protecting Society's Children," featuring Howard Davidson, director of the ABA office of Child Protection and Advocacy.

Reviewed and monitored legislation affecting children, including, but not limited to, matters relating to child abuse, adoption, joint legal custody, and drug and alcohol treatment for minors.

Reviewed, analyzed and participated in supporting the Child Support Guidelines developed by the Judicial Council's Task Force on Child Support.

SECURITIES ADVISORY COMMITTEE

Arthur B. Ralph, chair

Consulted with and advised Gov. Bangert and John Baldwin, director of the Securities Division, with respect to: 1. The Budget for the Securities Division. 2. Personnel staffing for the Securities Division. 3. Proposed legislation and rules.

UNAUTHORIZED PRACTICE OF LAW COMMITTEE

Gary G. Sackett, chair

Opened 31 new cases involving complaints/inquiries. Thirty-one cases were disposed of by consolidation with other cases, a finding of no unauthorized practice or insufficient cause to take further action. Four actions for judicial relief were filed in Third District Court by Bar Counsel on committee recommendation and were pending on June 30, 1988.

A joint subcommittee was formed with Alternative Dispute Resolution Committee to analyze unauthorized practice considerations in the non-judicial treatment of legal disputes.

MIDYEAR MEETING SPEAKERS

(continued from page 13)



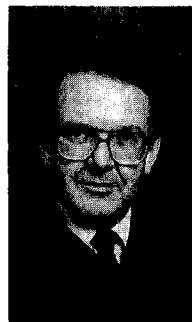
Judge Russell Bench



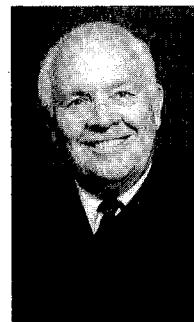
Judge Pamela T. Greenwood



Judge Scott Daniels



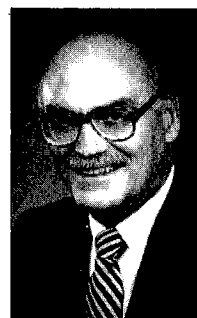
Judge Leonard H. Russon



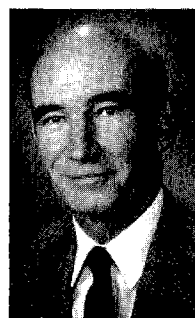
Judge Don V. Tibbs



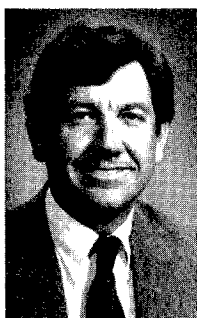
Judge Rodney S. Page



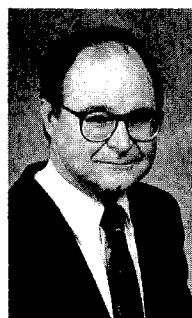
Scott M. Matheson



Bert L. Dart



H. James Clegg



James R. Holbrook



Nancy Sue Bergeson



Daniel R. White

STATE BAR CLE CALENDAR

WHAT YOU NEED TO KNOW ABOUT THE NEW TAXPAYER BILL OF RIGHTS

A live via satellite program on the new Omnibus Taxpayer Bill of Rights, passed by Congress at the end of October 1988 in response to a broadly held view that some additional protections were needed for taxpayers in our federal tax system. This new law will have a substantial impact on taxpayers, practitioners, Internal Revenue Service employees and accountants as well.

Date: February 2, 1989
Place: Utah Law and Justice Center
Fee: \$135
Time: 10:00 a.m. to 2:00 p.m.

JOINT VENTURES

A live via satellite course covering essential drafting techniques and counseling considerations for handling joint ventures successfully. Cover all the bases and avoid potential malpractice claims with the information and techniques discussed in this course.

Date: February 9, 1989
Place: Utah Law and Justice Center
Fee: \$135
Time: 10:00 a.m. to 2:00 p.m.

MERGERS AND ACQUISITIONS: TECHNIQUES AND STRATEGIES

A live via satellite program covering the practical and technical problems of structuring mergers and acquisitions. This program is designed for corporate finance lawyers, financing professionals and business executives.

Date: February 14, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

DESIGN AND CONSTRUCTION CONTRACTS

A live via satellite program covering case law and litigation strategies in construction contract cases. Contract interpretation, party identification, development and use of documentary evidence and expert witnesses will be featured.

Date: February 23, 1989
Place: Utah Law and Justice Center
Fee: \$135
Time: 10:00 a.m. to 2:00 p.m.

RECENT DEVELOPMENTS IN COMMERCIAL LAW

A live via satellite program covering a thorough update on UCC developments. This will be especially for practitioners who have not had occasion to handle UCC matters in recent years and involves an article analysis and application of the UCC for today's practitioners.

Date: February 28, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

SEVENTH ANNUAL EDUCATION LAW SEMINAR

Sponsored by the Education Law Section

Topics to be Discussed

- The 1989 Legislative Impact on Secondary and Higher Education
- Sexual Harassment
- Fairness/Due Process When Administrators/Faculty Serve as the Judge
- Handicapped Student Programs and Issues
- School-Sponsored Extracurricular Activities

Date: March 3, 1989
Place: Salt Lake City Airport Hilton
5151 Wiley Post Way
Fee: \$25 (includes lunch). Registrations must be received by February 20, 1989.
Time: 9:00 a.m. to 1:30 p.m.
For further information, please contact Penny S. Brooke at 581-3414.

VEHICLE COLLISION LITIGATION

A live via satellite seminar. Vehicle collision cases continue to comprise the largest component of personal injury litigation in the United States. Most trial lawyers are called upon at some time to advise or represent clients in connection with an auto accident. The panelists will discuss all aspects of the trial of an auto accident case and provide insight into insurer evaluation for settlement and trial. The impact of insurance coverage disputes upon the defense of an auto accident case and emerging trends in related areas such as the seat belt defense and the imposition of punitive damages will also be topics of discussion.

Date: March 30, 1989
Place: Utah Law and Justice Center
Fee: \$135
Time: 10:00 a.m. to 2:00 p.m.

THE ART OF JURY PERSUASION: INSIGHT AND IMAGINATION IN CREATING AND PRESENTING THE THEORY OF THE CASE

Watch for detailed information in the March *Bar Journal*.

Date: April 4, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

WORKOUTS, CHAPTER 11 REORGANIZATIONS AND BANK LIQUIDATIONS: THE HOW AND WHY OF TAX ASPECTS

Watch for detailed information in the March *Bar Journal*.

Date: April 18, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

COMPUTER LAW

Watch for detailed information in the March *Bar Journal*.

Date: May 9, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

COUNSELING BUSINESS CLIENTS ON COMPLEX INSURANCE ISSUES

Watch for detailed information in the March *Bar Journal*.

Date: May 23, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

REPRESENTING FAMILY-OWNED BUSINESSES

Watch for detailed information in the March *Bar Journal*.

Date: June 6, 1989
Place: Utah Law and Justice Center
Fee: \$160
Time: 8:00 a.m. to 3:00 p.m.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
<input type="checkbox"/> Feb. 2	What You Need to Know About the New Taxpayer Bill of Rights	L & J Center	\$135
<input type="checkbox"/> Feb. 9	Joint Ventures	L & J Center	\$135
<input type="checkbox"/> Feb. 14	Mergers and Acquisitions	L & J Center	\$160
<input type="checkbox"/> Feb. 23	Design and Construction Contracts	L & J Center	\$135
<input type="checkbox"/> Feb. 28	Recent Developments in Commercial Law	L & J Center	\$160
<input type="checkbox"/> March 3	Seventh Annual Education Law Seminar	Airport Hilton	\$25
<input type="checkbox"/> March 30	Vehicle Collision Litigation	L & J Center	\$135
<input type="checkbox"/> April 4	The Art of Jury Persuasion: Insight and Imagination in Creating and Presenting the Theory of the Case	L & J Center	\$160
<input type="checkbox"/> April 18	Workouts, Chapter 11 Reorganizations and Bank Liquidations: The How and Why of Tax Aspects	L & J Center	\$160
<input type="checkbox"/> May 9	Computer Law	L & J Center	\$160
<input type="checkbox"/> May 23	Counseling Business Clients on Complex Insurance Issues	L & J Center	\$160
<input type="checkbox"/> June 6	Representing Family-Owned Businesses	L & J Center	\$160

Registration and Cancellation Policies: Please register in advance. Those who register at the door are always welcome, but cannot always be guaranteed complete materials on seminar day.

If you cannot attend a seminar for which you have registered, please contact the Bar as far in advance as possible. For most seminars, refunds can be arranged if you cancel at least 24 hours in advance. No refunds can be made for live programs unless notification of cancellation is received at least 48 hours in advance.

Total fee(s) enclosed \$ _____

Make all checks payable to the Utah State Bar/CLE

Name _____ Phone _____ Firm or Company _____

Address _____ City, State and ZIP _____

American Express,
MasterCard/VISA
Expiration Date _____

CLASSIFIED ADS

For information concerning classified ads, please contact Paige Holtry at the Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111, or phone 531-9077.

POSITIONS SOUGHT

For fast, hourly paralegal work, call Ronald Rowley at 255-6252. Certified paralegal capable and dependable. Very reasonable fees. Located in Salt Lake County, but able to accept work from all areas of the state.

Experienced, private practitioner, admitted 1983, extensive criminal and civil experience including trial and appellate work, desires to relocate to Park City—Salt Lake City area ASAP: Will consider governmental position and any reasonable opportunity. Phone Richard Bode (605) 224-0377 and leave message—thank you.

POSITIONS AVAILABLE

Downtown Salt Lake City firm with established business-oriented practice seeks an associate lawyer with one to three years' experience for commercial, corporate and general civil litigation and related transactional work. Interested parties may submit resume to: Utah State Bar, Box X, 645 S. 200 E., Salt Lake City, UT 84111. All inquiries will be kept confidential.

Wanted: lawyer with oil and mining exploration background to join Utah Company as officer and director. Opportunity to share in company profits plus shares and overriding royalties. Contact George Allen, president, Black Gold Exploration, Inc., 89 W. 1200 S., Bountiful, UT 84010, (801) 295-3189.

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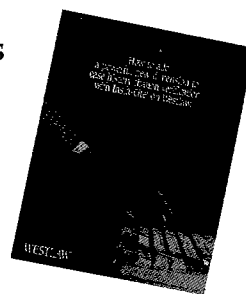
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