UTAH BAR JOURNAL

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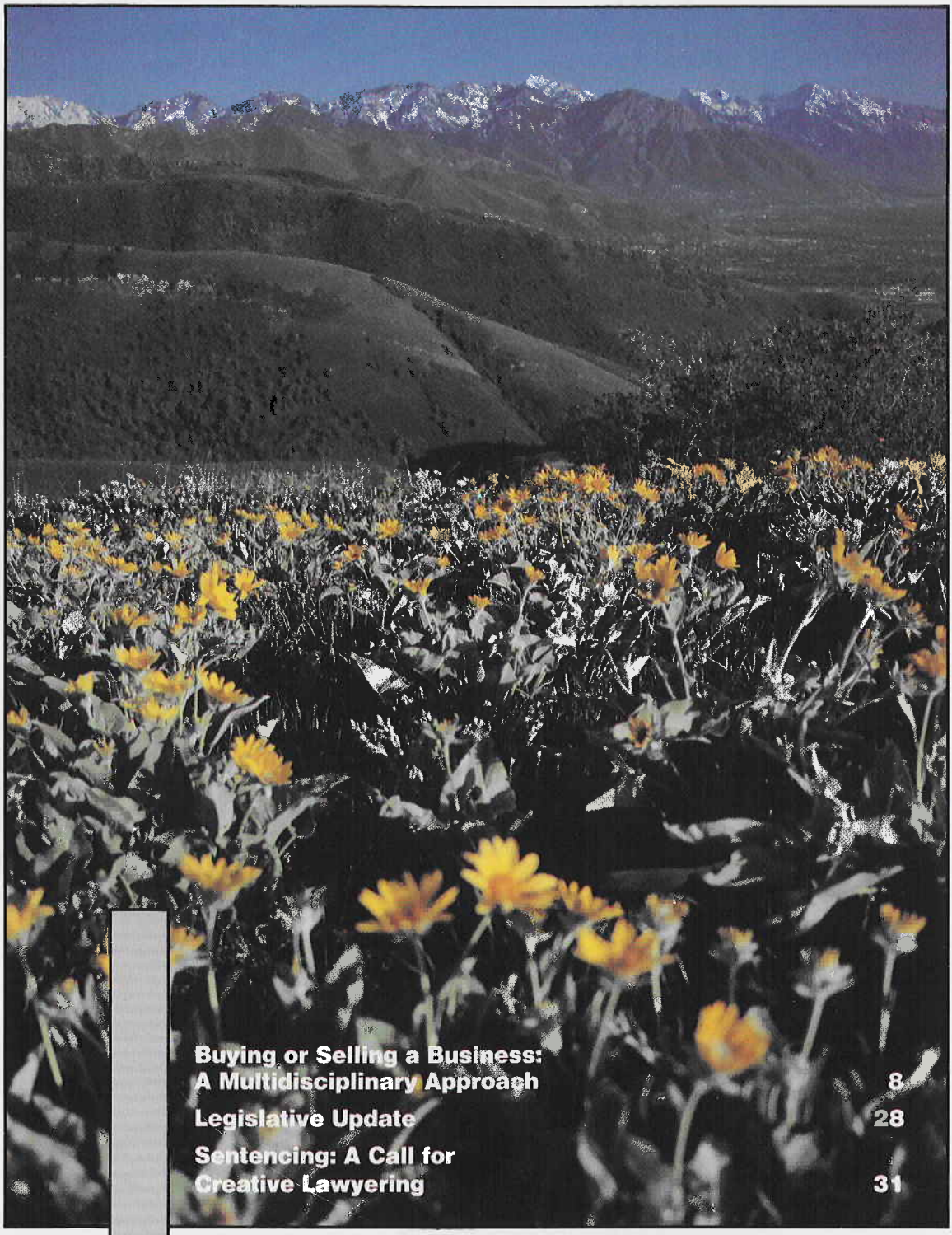

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COVER: Our thanks to Harry Caston of McKay, Burton & Thurman for the cover photograph: Mount Olympus and other peaks in May.

Members of the Utah Bar who are interested in having their color slides published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, Salt Lake City, UT 84111, 532-5200.

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LETTERS

Editor:

A YOUNG LAWYER'S RESPONSE TO JACKSON HOWARD'S "BEING A LAWYER IS NOT FOR EVERYONE"

Jackson Howard apparently believes that a "lawyer" is an issue-resolver who uses science, history and philosophy to be a "true advocate." His "lawyer" is not a rule-interpreting litigator, a data-overloaded technician, a simple practitioner or a "legal engineer."

Jackson laments the fact that "far too many graduates of law school are not qualified to be lawyers." He's right. But graduates of law school are not truly *qualified* to be much of anything. They are prepared, however, to be taught to become lawyers, if only someone would teach them. However, law firms no longer teach "lawyering" and the system simply does not allow it.

Jackson and his contemporaries may be "lawyers," but the associates in their firms are not. These associates are rule-interpreting litigators and legal technicians; the "lawyers" in the firms need them desperately. The system that these senior "lawyers" have allowed to develop over the last 25 years needs these worker-drones in order to operate and be profitable.

Graduates entering the profession hoping to become a "lawyer" quickly see their hopes choked by overwhelming interrogatories, rule-oriented maneuvering and technicalities—all orchestrated by the senior partners in their own firm or by the opposite side of the dispute. These associates are taught and trained by their firms or by the system to become legal engineers. Problem-solving takes a back seat (if it is lucky enough to ride) to winning at any cost and learning the technical skills to outmaneuver the opposition in a war of attrition.

If Jackson and his contemporaries lament the loss of true lawyering in the younger generation, and if they really seek the source of that loss, they must look in a mirror. There they will find part of the answer staring back at them. The profession has changed, and most of those changes occurred while they were on watch.

I am leaving the practice because I cannot survive as a technician. I find no satisfaction in being a legal engineer. I wanted to be a "lawyer," but there was little opportunity to become one when I was an associate in a large firm, and I have recently learned that fierce competition and business demands on the sole practitioner and small firm simply do not allow an attorney the luxury.

So, Jackson was right. Being a lawyer is not for everyone. Unfortunately, being a "lawyer" may no longer be possible for anyone. There may be certain isolated elements of the old lawyering that can be preserved. As for me, however, and possibly for others, I do not have the stamina, patience or discipline to wait 15 or 20 years to become a "lawyer"; nor do I have any real hope that I can actually beat the system to become one.

Christopher C. Fuller

Editor:

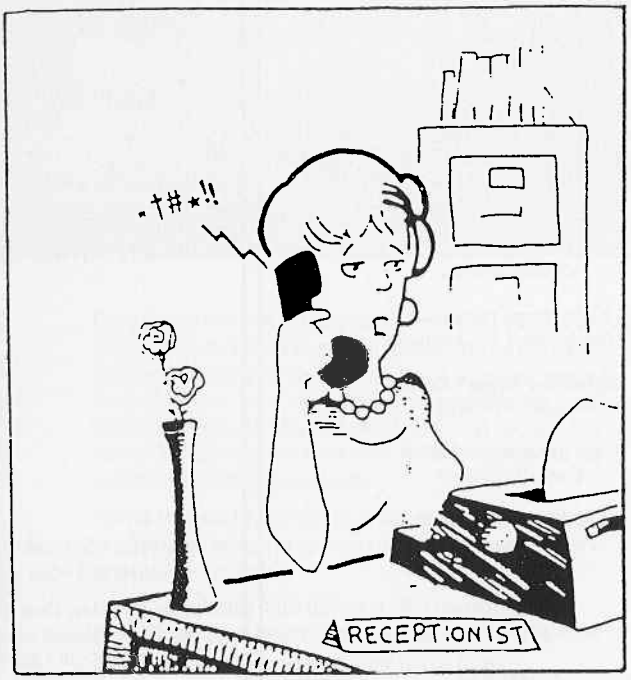
Shouldn't operations of a quasi-government agency like the Utah State Bar be subject to public scrutiny. Shouldn't Bar Commission meetings be open? Shouldn't Bar records be routinely available to members of the Bar?

More than a year ago, a request submitted to the Utah Bar Commission asked that the Bar adopt and be governed by the same standards as government agencies under Utah's Open Meetings Act, Public Writing Act and Information Practices Act. The Commission has declined to act on that request.

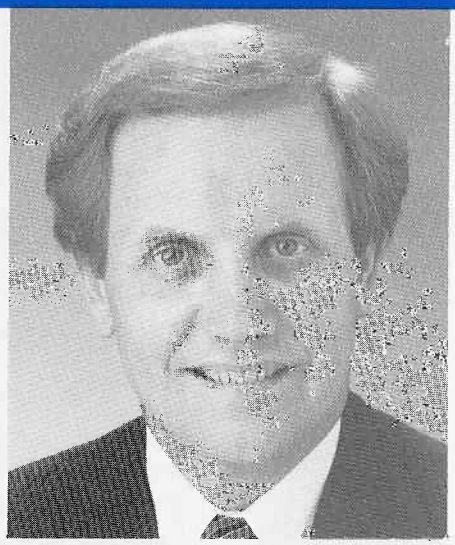
In the meantime, the Commission has become more secretive. Commission meetings are punctuated with more secret "executive sessions," held off the record and out of public view. Getting access to Bar records has been more difficult. The Bar continues to fight public revelation of the salaries of employees.

The demise of law as a self-regulating profession in Utah will occur not because of lawyers in general; that end will come because of the actions and attitudes of Utah Bar Commissioners and staff. That ignoble end appears inevitable unless change occurs soon.

Brian M. Barnard
Attorney at Law



"If we hand deliver your missing newsletter, refund your dues and shoot the Executive Director, will that be satisfactory?"



Benefits of the Annual Meeting

By Hans Q. Chamberlain

In approximately 1974 or 1975 (long before I became very active in the Bar Association), mostly out of curiosity and the need to get away from the office grind with my family, my wife and I decided to pile our children in our yellow and white Suburban (that the neighborhood children commonly referred to as the "school bus"—referred to by me as my "BMW—Big Mormon Wagon"), and traveled from Cedar City to Sun Valley for our first Annual Meeting. Frankly, we did not know what to expect, knew very little about Sun Valley and the surrounding area, so in that sense, it was somewhat of an adventure for us.

Much to our surprise, everything went well, our lodging was more than satisfactory, and the CLE Program very worthwhile. Our children fell in love with Sun Valley and now look forward to each Annual Meeting as a new adventure.

At my first Annual Meeting, two or three of the older members put their arm around me, welcomed me to this annual affair, and I think the President back then even went out of his way to make me feel welcome, which I sincerely appreciated.

I am sure you realize by now that I became a believer in regular attendance at Annual Meetings of the Bar, and simply have no regrets from my fairly regular attendance at the Annual Meeting over the past 15 years. I sincerely believe that the CLE events I attended at each Annual Meeting have made me a better lawyer and, hopefully, a better person. I know my wife and children better understand what lawyering is all about by reason of their attendance and participation at the Annual Meetings that we have always attended as a family.

Because the Annual Meeting this year is being held at Beaver Creek, Colorado, I see this as a chance for a new adventure, improving my skills as a lawyer, socializing with people I like and respect, and a chance to be with my family. I have never been to Beaver Creek, Colorado, but its alpine village setting, its reasonable room rates, a Robert Trent Jones Golf Course and summer sun sound rather enticing as I wind down my year.

By now, you will have received information on the Annual Meeting, and I simply want to encourage you to attend this annual event from June 27, 1990, through July 1, 1990. The Annual Meeting Committee, chaired by Carolyn Nichols, has gone to a great deal of work in planning this event, and CLE events have been scheduled to allow as much free time for relaxation as possible. I have very much appreciated Carolyn and her committee's efforts in undertaking this project. Every time we decide to hold our Annual Meeting at a different place, a substantial amount of effort is required, and I want to personally thank Carolyn and her committee members for going the extra mile.

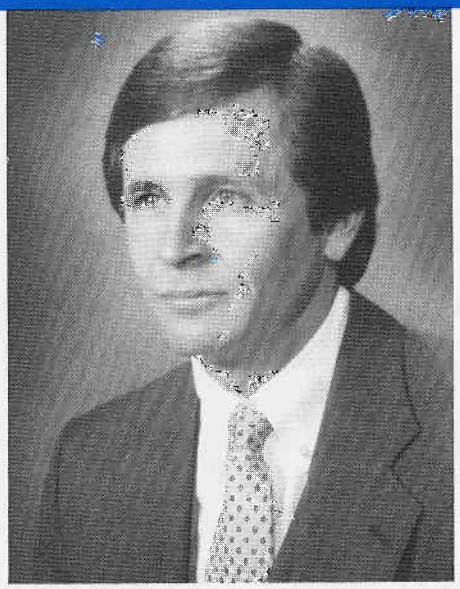
By attending, you can obtain 13 hours of MCLE credit while enjoying the beautiful Colorado Rockies. You will be able to hear from speakers including New York City Comptroller and former U.S. Representative Elizabeth Holtzman, the Hon. Robert R. Merhige Jr., U.S. District Judge, Eastern District of Virginia, and the Hon. Jim R. Carrigan, U.S. District Judge, Colorado.

When the Bar Commission selected Beaver Creek, we intentionally tried to select a site that was within driving distance for most Bar members to minimize expense and provide an opportunity for a family outing. From almost any point in Utah, you can drive to Beaver Creek in one day, and as I understand it, the drive is really quite beautiful.

Many lawyers ask why we hold our Annual Meetings and most of our Mid-Year Meetings out of the Wasatch Front area. The answer is simple. Lawyers don't attend them if they are within an hour's driving distance from their office. For example, our Mid-Year Meeting held in Salt Lake this past January drew approximately one-half of the number that attended the Mid-Year Meeting a year ago in St. George. The last time we held an Annual Meeting near Salt Lake in Park City, we had less than 100 lawyers sign up, about 50 percent of those attended the events, and the Bar lost money. When we held the Annual Meeting in San Diego a couple of years ago, we drew the largest number in the history of the Bar, even larger than the number in attendance at the Sun Valley meeting last summer.

If you haven't taken time to read the brochure on the Annual Meeting, please take time to do so. More importantly, take it home, review it with your spouse and family, and make a commitment early on to visit the Rockies this summer.

I hope to see you there.



Utah's Commission on Justice in the 21st Century

By Randy L. Dryer

Like the nation and the world, Utah is changing. Recent developments in technology, communications and other fields are transforming the way Utahns think, work and live. We must prepare ourselves for a dazzling array of demographic, economic, environmental, political and societal changes. These changes will challenge the conventional operation of every branch of government, including the Judiciary. Indeed, the Judiciary will be called upon to resolve many of the controversies that inevitably accompany change. The Judiciary itself must also change in order to better meet the challenges of an increasingly complex society. Unfortunately, one of the positive attributes of our judicial system, its reverence for tradition and precedent, does not allow change easily. The Judiciary has never been in the forefront of long-range planning. A good example is the fact that Utah's judiciary has only recently moved from a hand-processed paper system to a computerized data storage and retrieval system.

What does the Judiciary need to do in the coming years to meet the challenges of the '90s and beyond? What should our court structure look like in the year 2000? How will the system handle the expected escalating caseload? Can we maintain the high quality of our judges and preserve the art of judging? Will access to our civil courts be limited to the monied few? These are all questions, among others, that will be addressed by the recently formed Commission on Justice in the 21st century. It is my pleasure to serve as the Bar Commission's representative on this Commission. The Commission, which reports to the Utah Judicial Council, is charged with progressively guiding Utah's Judicial System into the coming decades. The 26-member Commission is comprised of educators, business leaders, law enforcement officers, legislators, judges and attorneys. Funded by a major grant from the State Justice Institute and supported through a related education program sponsored by KSL-TV and the *Deseret News*, the Commission intends to engage in a year-long data-gathering effort which will culminate in the issuance of a report with specific recommendations as to how our Judicial system should be structured and operated in the coming decades. The Commission intends to survey public opinion, including the Bar, regarding the justice system and assess the demographic, economic and other changes that will impact justice policy in the coming years. The Commission is also charged with establishing a long-term framework for securing public input and developing a strategic planning process for the justice system.

After about six months of study, the Commission will draft a preliminary report recommending any changes it believes might be warranted in the state judicial system. The draft report will be discussed at the Annual Judicial Conference in September (to which about 100 Bar Leaders from throughout the state will be invited), and in town meetings held the same month in each of Utah's eight judicial districts. In October and November, the Commission will revise the report to incorporate the feedback learned from the Judicial Conference, the town meetings and from the public response elicited through its public education efforts coordinated by the media sponsors. A final report will be presented in December to the Judicial Council, the Legislature and the Governor.

The Commission's activities will proceed in tandem with an ambitious educational program coordinated by KSL and the *Deseret News* which is designed to raise the level of public awareness and understanding of the issues facing Utah's judicial system. The media participants have committed to cover the activities of the Commission and, in addition, will engage in an extensive multimedia effort to sensitize the public to the operations and problems of the Judiciary. The effort will include a series of newspaper feature stories, television and radio

interviews, public service anouncements, news coverage when the Commission generates newsworthy items and three prime-time television specials on justice issues focused upon by the Commission. KSL and the *Deseret News* will also publish and distribute study guides and articles for use in the public schools relating to the major issues investigated by the Commission. This is a unique marriage between the news media and a state bureaucratic undertaking.

As lawyers, we have much at stake in the design and operation of our judicial system. I urge all members of the Bar to actively involve themselves in this process either through participation in the anticipated town meetings or through passing on your thoughts and ideas to the members of the Commission. The lawyer members include Paul Boyden, Salt Lake Deputy County Attorney; Senator Kay Cornaby of Jones, Waldo, Holbrook & McDonough; Sharon Donovan of Dart, Adamson & Kasting; Janet Graham, Solicitor General, State of Utah; Professor Carl Hawkins, BYU Law School; James B. Lee, Parsons, Behle & Latimer and Vice Chairman of the Commission; Representative Frank R. Pignanelli; and Ned Spurgeon, U of U College of Law. In addition, the Judicial Members of the Commission include Justice Christine Durham, Utah Supreme Court; Judge Pamela Heffernan, Second Circuit Court; Judge Paul C. Keller, Seventh District Juvenile Court; Judge Gordon Low, First District Court; Judge Michael Murphy, Third District Court; Judge Gregory Orme, Utah Court of Appeals; and Judge JoAnne L. Rigby, Salt Lake County Justice Court.

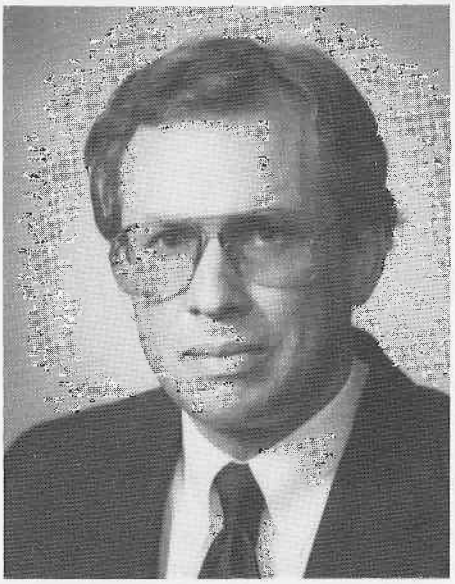
A few other states have established similar commissions. In May 1989, Virginia's Commission issued its report and many of its recommendations are being presently implemented. This effort reflects the Judiciary's awareness that as an institution, the Judicial branch must have a long-range vision and must be willing to actively position itself to best deal with the rapidly changing world in which we live. The recent Constitutional revisions have given Utah's Judiciary the power to direct its own course. The establishment of the Commission indicates the Judiciary intends to exercise that power with thought, planning and foresight.

Buying or Selling a Business: A Multidisciplinary Approach

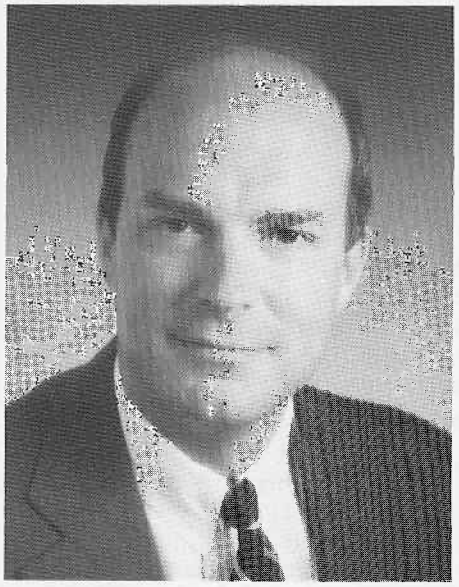
The Utah State Bar Real Property Section sponsored a panel discussion on transfers of businesses at the Mid-Year Bar Meeting in January. The panel included specialists from various fields—John Morris on corporation law, Dick Johns on environmental law, Brent Maxfield on tax considerations, Tom Cerruti on real estate law, and Bill Fowler on bankruptcy law.

Gretta Spendlove, chair of the Real Property Section, moderated the panel and, with panelists' input, prepared the written article from the panelists' outlines and oral presentations.

WILLIAM G. FOWLER received B.A. and J.D. degrees from the University of Utah in 1949 and 1952, respectively. He is a member of the Banking, Finance and Creditors Rights Section of the law firm of Van Cott, Bagley, Cornwall & McCarthy.



W. BRENT MAXFIELD received a B.S. in accounting at the University of Utah in 1965 and an M.B.A. at the University of Utah in 1966. He is Partner in Charge of the Salt Lake City Tax Department of KPMG Peat Marwick.



THOMAS E.K. CERRUTI graduated from Claremont McKenna College, in 1974 and graduated from University of California Hastings College of the Law, San Francisco, California, in 1977. He is a retired director and shareholder of Jones, Waldo, Holbrook & McDonough.

Part of the excitement and challenge of buying and selling businesses arises from the multiple legal disciplines involved. Corporate, tax, environmental, real estate and bankruptcy issues are present in nearly every purchase or sale.

This article will consider a business transfer from the vantage point of the above five disciplines. The first section will deal with general considerations which a corporate lawyer might consider.

Corporate Considerations

The roles of the corporate lawyer in a typical business acquisition may be those of deal maker, task master and/or defender. It is important to reach an understanding with the client, going into the transaction, as to the role he expects the attorney to play. Below are some general considerations.

Documents relating to the transaction should be organized as the transaction progresses, since, with the due diligence which must be done, the materials can become voluminous. Some attorneys prefer to organize the materials in binders.

Attorneys must do their own due diligence and make sure the client does his. Neither client nor attorney can act responsibly or begin to structure the acquisition until there is a thorough understanding of the business to be acquired.

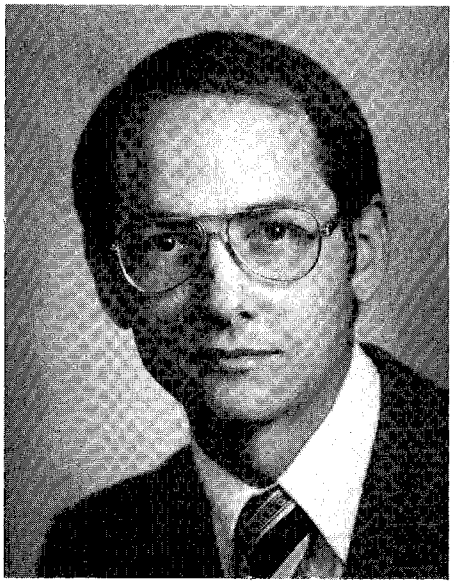
LETTERS OF INTENT

Letters of intent should always be signed as part of a business acquisition. A letter of intent should be signed between buyer and seller and a commitment letter should be obtained from the lender. The contents of the letter between buyer and seller should include the type of acquisition, a statement of the consideration and how it is to be paid, and, if the consideration includes stock, a statement of the preferences and limitations. The letter should also include key conditions to closing, such as completion of due diligence or more complete documentation, as well as a statement as to the binding effect of the letter.

Executing a letter of intent helps to avoid a loss of memory on any side of the transaction—lender, seller or buyer may actually or conveniently forget a provision which was originally agreed to. It also helps to avoid a bidding war between potential purchasers. Careful drafting of the letter of intent is required, and in spite of careful drafting there may nevertheless be litigation.

PREPARING FOR FINANCING

Both buyer and seller should always look toward the financing and consider what a



RICHARD B. JOHNS graduated from Arizona State University in 1968, and received his law degree from the University of Arizona in 1971. He also obtained an M.B.A. from Boston University in 1975. He is a senior environmental lawyer with Motorola, Inc.

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GRETTA C. SPENDLOVE received her B.A. in English from the University of Utah in 1978 and her J.D. degree from University of Arizona Law School, Tucson, Arizona, in 1978. She was the chairman of the Real Property Section of the Utah State Bar during 1989-90 and is presently Associate General Counsel and Assistant Secretary for Bonneville Pacific Corporation.

potential lender will require. It is particularly important for the buyer to be aware of its lender's concerns and be prepared to deal with them. These concerns are not usually imaginary, but derive from litigation brought by borrowers, trustees and other creditors in deals gone bad. For instance, the lender will probably require protection against fraudulent transfers. It is important for the buyer to prepare the seller for such eventualities as having to subordinate both its debt and the financing stream to both the original debt to a lender and to substitute financing. It is important to anticipate approvals and consents, representations and warranties.

ADVISING THE CLIENT OF POTENTIAL RISKS

A corporate lawyer should help the client realize the ultimate potential downside of a transaction and also protect himself, as the transaction progresses, against potential malpractice claims. In this connection it is important to understand what the client expects, for instance sharing of due diligence responsibilities, coordinating with experts or specialists, and business advice. The lawyer-client relationship demands constant communication. Because of the interconnections of legal and business concerns, there is an ethical obligation to both advise of legal risks and advise regarding the consequences of those risks on the value of the business. In short, the attorney is not just a scribe.

One useful tactic is to ask the client to project the absolute worst case scenario, ask how much he would lose under that scenario, and if he can afford that loss. If he cannot afford it, he perhaps should not take on the risks of the transaction. The buyer's attorney should also look carefully at the solvency issues. If the selling entity is insolvent, the buyer probably should not buy, the lender will not lend and, in any event, no corporate attorney should opine as to solvency.

REPRESENTATIONS AND WARRANTIES

Corporate attorneys should take special care with representations, warranties and indemnities. Representations and warranties should be tailored to the business—beware of forms and boilerplate language. The lender will want representations and warranties from the buyer and the buyer will want them as a basis for indemnification from the seller if anything goes wrong. A way to enforce representations and warranties should be preserved, such as reduction of payments up front rather than against principal. Problems resulting from inaccurate representations and warranties, such as undisclosed liabilities, will probably impact on cash flow. Another alternative for enforcement may be guaranties or reduction of stock options and warrants.

Common representations to be given in the purchase of a business include the following: (1) corporate organization in good standing; (2) ownership of assets; (3) no undisclosed liabilities; (4) absence of changes or adverse events; (5) litigation; (6) full blown environmental and ERISA representations where circumstances require; (7) extensive schedules.

It is also important to consider whether representations, warranties and indemnifications survive in the transactions. They almost never survive in the acquisition of publicly held corporations, but almost always survive in the case of privately held corporations. The seller typically wants no survival and the buyer wants perpetual survival. A good compromise is survival of two to three years, a structure which will pick up at least two audit periods. It is also possible to set different survival periods for different indemnifications or representations, for instance litigation, tax liability or environmental liability.

In drafting representations and warranties, each seller should be included in the representations and warranties, in the case of multiple sellers. From the buyer's perspective, representations and warranties should be made as broad as possible. The burden should be on the seller to explain why it cannot make a particular representation or why the buyer should not be asking for it. The buyer's attorney may wish to look for short cuts, such as the seller making representations as to the correctness of reports, financials, and schedules, rather than having those all examined in the due diligence process. The buyer should be aware of materiality limitations—any exceptions or limitations create a cushion for the seller. In the aggregate, a lot of "immaterial" misrepresentations can be materially damaging. Also, the buyer should not bet on avoiding

liability which it does not assume in an asset acquisition. The buyer may escape tort but not product liability arising prior to the acquisition.

One familiar battleground in negotiating representations and warranties is the standard to place on the representations. The seller may want to limit representations to material matters or to matters known to it, but representations limited by knowledge should not be allowed where the seller should have knowledge or where the seller should bear the risk of the inaccuracy of the representation, such as undisclosed liabilities. Other battlegrounds are caps, offsets, tax effects and defense. The purchase and sale agreement should provide that the purchaser will only complete the sale if matters are as represented by the seller. The seller typically does not want to be drawn back into the business once it is sold and does not want to be harassed.

It is wise to involve specialists in the purchase and sale of a business, such as business appraisers, environmental audit companies and, of course, accountants.

It is important to be realistic in any transaction and to let the documentation fit the deal. Balance the due diligence against the risk, but only with the understanding and consent of the client.

No deal should close before its time. A buyer, in its anxiety to close a deal, may put considerable pressure on its attorney to overlook matters which should not be overlooked.

An attorney is wise to keep all notes and work papers, since those may be invaluable in later determining the intention of the parties.

Tax Planning Strategies

INTRODUCTION

The structuring of a corporate acquisition can have a material impact on the tax situation of the acquired corporation, the acquiring corporation and the respective shareholders. Generally, the overall business considerations will dictate the ultimate structure to be used in an acquisition. However, a factor that must always be considered in conjunction with the analysis is the tax result to all parties.

The following analysis highlights certain planning strategies that should be considered in connection with structuring an acquisition. The following analysis is by no means all inclusive. In any acquisition, the tax implications to all parties must be carefully scrutinized.

GENERAL CONSIDERATIONS

A starting point in structuring any acquisition is the determination of whether the transaction is to be taxable or tax-free to the shareholders of the target corporation. This determination will also have a material impact to the acquiring corporation. The following items are issues to be addressed in both taxable and tax-free acquisitions.

When the target corporation has net operating loss and credit carryovers, the ability to use those carryovers subsequent to the acquisition may be severely limited when there has been a greater than 50 percent change in ownership of the target. When a greater than 50 percent change in ownership occurs, an annual limitation is created as follows:

FAIR MARKET VALUE OF TARGET**

multiplied by

IRS PROVIDED TAX EXEMPT INTEREST RATE

ANNUAL LIMITATION OF PRE-CHANGE LOSSES

ALLOWED TO OFFSET POST-ACQUISITION GAINS

**Fair market value prior to ownership change.

PLANNING CONSIDERATIONS

Ownership change computation is based on value. Accordingly, the type of stock issued in connection with an acquisition may have a material impact in determining whether an ownership change has occurred.

Stock options must be treated as outstanding stock if such treatment would trigger an ownership change. Items that are similar to an option must be treated as such, including: (1) convertible debt instruments; (2) contracts to sell stock; (3) warrants; (4) put and call arrangements.

Agreement by both boards of directors may trigger an ownership change under a contract to sell stock, prior to the closing of the transaction. If the transaction is closed within 120 days of the original agreement, an election is available to defer the change date until the closing date. Such timing considerations associated with negotiating the transaction can therefore have a material impact on the tax attributes.

Even if the acquisition itself does not appear to trigger a change in ownership, the above items must also be considered. The analysis of such items must encompass the testing period, which is generally a three-year period.

Ownership attribution rules apply in determining whether an ownership change has occurred. These rules can be traps for the unwary and can be planning tools in other circumstances.

Any transaction that might affect the equity structure of a corporation must be considered, for example: (1) private placements; (2) public offerings; (3) share for share exchanges with another corporation; (4) stock purchase by another corporation; (5) refinancing transactions (for example, involving convertible debt or options).

STATE CONSIDERATIONS

In recent years the state tax burden of many corporations has become a significant percentage of overall tax liabilities. Accordingly, state considerations associated with acquisitions should not be overlooked. The issues can be of most importance where, either before or after the acquisitions, multistate filings are required.

General state planning considerations may include: (1) determine if the states involved follow the federal tax treatment of the acquisition; (2) benefits through the creation of a holding company; (3) placement of acquisition debt within a group of corporations; (4) unemployment tax rates (the movement of personnel in connection with an acquisition can have a material impact on the unemployment tax rate; affirmative action by a corporation can actually reduce such rates in certain circumstances); (5) filing methods of various states (unitary, combined, separate).

TAXABLE ACQUISITIONS—STOCK VERSUS ASSET ACQUISITIONS

The alternative selected will impact the ultimate tax cost to the selling shareholders and will impact the tax basis of the underlying assets that are acquired. An election is available to treat a stock purchase as an asset acquisition. However, as a result of the Tax Reform Act of 1986, such an election is usually only beneficial where: (1) net operating loss carryovers of the target are expected to otherwise expire, or (2) the target is being acquired from a consolidated tax return group and both the selling and acquiring corporations consent to the election. If such an election is to be made, this should be specified in the acquisition agreement.

ASSET ACQUISITIONS—PURCHASE PRICE ALLOCATIONS

Where assets that constitute a trade or business are acquired, both the selling and acquiring parties must disclose the allocation of purchase price on their respective tax returns. Such allocations should be specified in the acquisition agreement.

Congress has adopted a residual method for allocating tax basis. The intent is that any excess purchase price over the fair market value of the "hard" assets be allocated to goodwill (which is non-deductible and non-amortizable for tax purposes). The ordering of the allocations is as follows: (1) cash, demand deposits and like accounts in banks, savings and loan associations, etc.; (2) certificates of deposit, U.S. government securities, readily marketable stock and securities, foreign currency and other similar items; (3) assets not included in categories 1, 2 or 4 (such assets include tangible and intangible assets such as furniture, fixtures, land, buildings, leases, contracts, equipment, accounts receivable and covenants not to compete); (4) intangible assets in the nature of goodwill and going concern.

The residual allocation methodology allocates any excess purchase price to non-deductible category 4 assets. Planning considerations to minimize this result may include: (1) covenants not to compete and employment contracts; (2) favorable leases and contracts; and (3) patents and non-patented technology.

If a capital gain rate differential is reinstituted by Congress, covenants not to compete may not be as attractive to the sellers. To justify a covenant not to compete and thus to prevent recharacterization of such consideration as goodwill, consider the following factors: (1) The seller should represent a competitive threat to the buyer; thus, the covenant should address true economic concerns; (2) The covenant should be negotiated as a separate item. Thus, specific value should be identified for the covenant and detailed provisions should be included, such as length of time encompassed by the agreement, geographic coverage of the agreement, and remedies for breach of contract.

To justify employment agreements, certain planning steps should be followed to support the legitimacy of such an agreement: (1) The terms and provisions of the employment agreement should be separately negotiated and summarized in a separate agreement; and (2) The seller should be obligated to spend a minimum number of hours in the buyer's business (such as a weekly amount).

The ultimate benefit to the acquiring corporation is to receive a tax deduction for such amounts, rather than having such portions of the consideration simply allocated to goodwill.

Favorable leases and contracts should be identified. Where the acquirer assumes favorable leases and contracts, there may be significant opportunity to assign value that would otherwise go to goodwill. The Tax Court has previously approved the valuation and amortization of such intangible assets.

Patents and non-patented technology is an area that warrants significant review. Often this may be the driving force in certain acquisitions. Allocation to such items may again allow for less allocation to goodwill. For non-patented technology, additional focus must especially be given to the determination of a useful life.

ACQUISITION EXPENSES

Acquisition expenses incurred by an acquiring corporation when purchasing the stock of another corporation must be capitalized as part of the overall purchase price. However, the treatment of such expense incurred by the target corporation is not as clear.

The Internal Revenue Service recently won a court case where it was determined that the acquisition of Nation Starch by Unilever would create a "synergy" between the two corporations. The court thus concluded that the acquisition expenses incurred by National Starch were non-deductible.

> "Congress has recognized that certain transactions involving corporate acquisitions should not be taxable where the shareholders of the target corporation have a continuing interest in the acquiring corporation subsequent to the transaction."

However, in hostile takeover situations it would seem that such logic might not apply. Furthermore, in certain Leveraged Buy Out (LBO) situations, one could also argue no additional synergy is created (especially where done by current management).

Accordingly, in some circumstances there may be a tax position available to treat such expenses as deductible by the target. Thus, for planning purposes consider: (1) allocating as much acquisition expense to the target as possible; and (2) beware of placing acquisition debt in the target corporation. Such treatment can recharacterize the expenses into "redemption" expenses. Redemption expenses are non-deductible in accordance with the Tax Reform Act of 1986. For example, the merger of an acquisition corporation into a target corporation may be partially characterized to be a redemption when acquisition debt is assumed by the target.

TAX-FREE ACQUISITIONS

Congress has recognized that certain transactions involving corporate acquisitions should not be taxable where the shareholders of the target corporation have a continuing interest in the acquiring corporation subsequent to the transaction. However, due to concern of potential abuses, the provisions allowing for tax-free reorganizations are very formalistic and must be carefully followed. Certain judicial concepts have been developed over time that must be considered in tax-free reorganizations.

As indicated above, the target shareholders must have a continuing ownership interest in the acquiring corporation subsequent to the acquisition. In certain transactions, the target shareholders may be able to receive a combination of stock and "boot" (cash or other property).

In other structures the target shareholders may receive only stock of the acquiring corporation. Accordingly, the desire of the target shareholders to receive some cash in the transaction may have a material impact in structuring the acquisition.

A sample of factors to be considered with respect to this requirement include:

1. **Future Intent of the Parties.** If it is the intent of the parties to subsequently "cash out" the target shareholders, the original transaction may be fully taxable. For example, if a potentially tax-free merger is undertaken, but the parties intend to cash out the target shareholders in the near future, the merger will most likely be taxable.

Documents that the Internal Revenue Service may review in connection with this issue could include: (1) letters of intent; (2) Board of Directors minutes; (3) acquisition documents. For example, the existence of call or put arrangements may trigger this issue. A binding commitment for a later disposal of stock will most certainly violate the continuity of interest principle.

2. **Escrow and/or Contingent Stock Arrangements.** Certain guidelines are provided regarding the terms and amount of stock issued in the transaction that can be subject to escrow or contingent stock arrangements. For example, if over 50 percent of the stock to be issued to the target shareholders is subject to such arrangements, the transaction may be wholly taxable.

3. **Transaction Subsequent to the Acquisition.** Once an acquisition takes place, any other transaction close in time (such as mergers within a group of companies) must be scrutinized to determine if the two transactions are interrelated. Such treatment under the "step transaction doctrine" can

have material impact on the tax treatment of both transactions.

CONTINUITY OF BUSINESS ENTERPRISE

The acquiring corporation must continue the historic business of the target, or must use a significant portion of the target's historic business assets in a business. Generally, when an operating company is acquired and its operations will be continued subsequent to the acquisition, this requirement should be met.

BUSINESS PURPOSE

There must be a corporate business purpose for the acquisition. For example, if the only reason for the acquisition is tax motivated (such as the acquisition of net operating loss carryovers), this requirement can be met as long as there is a general business purpose (such as corporate expansion or diversification).

Real Estate Considerations

The initial analysis in buying or selling real estate as part of the transfer of a business involves determining exactly what interest is being bought or sold, i.e. fee, leasehold or some combination of the same, such as a ground lease. The question, "Where is the value?" will determine the emphasis during due diligence. The value may be in the land, the improvements, the income stream (in which case credit of the tenant will be important), or unique characteristics of the operation of the business (for instance, land for satellite uplink, or riverside property for shipping business).

CONSTRAINTS ON MAXIMIZING VALUE

The buyer's attorney must analyze constraints on maximizing the value of the property or operating the property as it is. If it is fee property, there may be governmental restrictions, such as zoning or historical designations. There may also be private restrictions, such as restrictive covenants. Leasehold property will have the same type of constraints as fee property, but in addition will have constraints imposed by the terms of the lease, including length of term, use and rent.

THE CONTRACT OF SALE

The contract of sale forms the road map to closing the transaction, inasmuch as it typically specifies the warranties and representations that will be given, the type and form of opinion letters, the personal property that will be transferred with the real property, the manner in which payment will be made and the manner in which costs of the transaction will be allocated.

Warranties and representations made as part of the transaction are a primary consideration. If the seller is strong enough and is willing to give warranties and representations, they may decrease the need for due diligence investigation. Warranties and representations which are typically given include the following: (1) no defaults under leases and other agreements; (2) complete documents; (3) no liens; (4) no conflict in regard to other agreements; (5) corporate power to complete the transaction; (6) good standing; (7) no conflict with laws; (8) no pending or threatened litigation; (9) that the property is in a certain condition (although a number of transactions are closed on an "as is" basis); (10) title, zoning etc. Comfort for the purchaser may also be obtained by other means, including title insurance, title endorsements, legal opinions or due diligence.

The contract of sale should specify the particular opinion letters that will be required in connection with the closing and what they will basically contain.

"A commitment for title insurance should be obtained as soon as the contract of sale is executed.... The title commitment will identify encumbrances against the property. It is important to review the underlying documentation for such encumbrances."

It is also important to agree upon what is being sold with the property. The sale may include such appurtenances as water rights. It may include personal property, permits and licenses, and contracts pertaining to the property. Contracts transferred with the property may relate to (1) maintenance of real estate; (2) equipment maintenance, such as elevators; (3) equipment leases; (4) security; (5) management. Intangibles may also be an important part of the value of the property, including names, such as "Flat Iron Building," and telephone numbers. In addition, books and records relating to the property may be of great value.

The contract of sale should designate the purchase price and how it will be paid. It is also important to designate the allocation which will be made of the purchase price under §1060 of the Internal Revenue Code and Form 8594.

The contract of sale should allocate costs of the transaction. Typical costs in transactions include (1) surveys; (2) title insurance premiums; (3) title transfer taxes; (4) sales taxes; (5) recording of escrow fees; (6) environmental audit; (7) general inspection report; and (8) permit and license transfers. States vary considerably on the types and amounts of taxes which affect real estate transfers.

The contract of sale should designate how prorations will be made. Items which are typically prorated are (1) rent (basic and percentage); (2) personal property tax; (3) real property tax and assessments; and (4) prepaid expenses. The contract of sale should also deal with risk of loss, including determining what happens if condemnation or casualty occurs before closing. Options include the seller rebuilding, the seller providing to the buyer some portion of insurance proceeds and/or the condemnation award, and termination of the agreement.

DUE DILIGENCE

Due diligence is vital prior to transferring real property, just as it is prior to transferring other assets of a business. The general categories of due diligence include physical examination, survey and title. The physical examination includes consideration of hazardous materials which may be on the property, which is discussed in more detail in another section of this paper. It also includes a structural examination, consideration of the general condition and age of any improvements, examination of easements, and determination of the entity which is in possession. The buyer's attorney must be aware of the diversity in types of surveys. An ALTA survey may be required by lenders, but is more detailed and expensive than some sellers are willing to provide. Surveys differ in the types of certifications they include, and in their manner of dealing with encroachments.

TITLE INSURANCE

A commitment for title insurance should be obtained as soon as the contract of sale is executed. Title policies can be obtained on both fee and leasehold properties. The title commitment will identify encumbrances against the property. It is important to review the underlying documentation for such encumbrances. Encumbrances include any of the following: (1) mortgages and mechanics liens; (2) restrictions and covenants; (3) options; (4) rights of first refusal; (5) easements and rights of way. The buyer must determine whether it needs standard or extended title insurance coverage. Typically, the seller pays for standard coverage

for the buyer, but if the buyer wants extended coverage, it pays the difference in the cost of the policy. Extended coverage provides protection against mechanics liens, problems which would be shown on a survey, rights of parties in possession, and related matters. In Utah, the extended policy costs approximately twice what a standard policy costs.

There are many title endorsements available, including the following: (1) zoning; (2) easements; (3) encroachments; (4) continuity; (5) address.

In Utah, if a lender's title policy is simultaneously issued with an owner's policy, the premium on the lender's policy is cheaper. It is wise for the buyer to inquire as to all discounts which are available on title policies because there are often many.

LEASES AND CONTRACTS

The buyer's attorney should review all leases relating to the property, particularly including assignability provisions and use restrictions. Priority of leases should be determined, including review of issues relating to subordination, attornment and nondisturbance. Estoppel certificates should be obtained. A decision should be made as to whether a memorandum of lease will be recorded and a determination should be made as to whether the landlord has a right to terminate for any reasons relating to the new tenants' use of the property.

Operating contracts should be reviewed for content and assignability. The buyer's attorney should determine what permits and licenses are needed to operate the property and whether such permits and licenses are transferable.

Zoning statutes and ordinances should be reviewed, and consideration should be made of the purchase of a zoning endorsement to the title policy. Sometimes it is useful to obtain a letter from the planning commission and to review conditional use permits.

DEEDS AND OTHER TRANSFER DOCUMENTS

As part of any purchase of real property, the parties must decide on the type of deed to be given. The ideal situation, from the buyer's viewpoint, is to obtain a general warranty deed. Often, in commercial transactions, only a grant or special warranty deed will be given. That type of deed limits the warranties of title to the grantor's own chain of title. A quitclaim gives no warranties whatsoever and also does not convey after acquired title. Assignments of leases should include indemnification and assumption of liability provisions. Buyers' and sellers' attorneys must negotiate the types of warranties to be given in bills of sale. Some bills of sale are given without any warranties whatsoever.

FINANCING

In sales of real property, financing is always an issue. The question is whether the real estate will secure the loan. If so, the analysis must include such lender issues as (1) loan documentation; (2) legal opinions; (3) title insurance; (4) hazardous materials; (5) the transaction in general.

MISCELLANEOUS

Section 1445 of the Internal Revenue Code now requires an FIRPTA affidavit to be prepared in connection with the sale of real property. Indemnifications are often requested from one party to the other regarding brokerage fees. It is also possible to do a tax-free exchange under §1031 of the Internal Revenue Code, which may include agreements to cooperate and agreements to indemnify. There may be employment issues which come up as a result of the sale of real property, including questions of who will manage the property or whether notices must be given of a closing.

"The innocent landowner defense includes, as elements, that at the time of acquisition the buyer did not know and had no reason to know that a hazardous substance had been disposed of at the facility."

Environmental Issues

GENERAL CONSIDERATIONS

Environmental issues must be considered in any purchase or sale of a business. Federal and state environmental laws and regulations are increasing, and the cost of environmental problems can be great. Under the federal laws, environmental liability is strict, and is joint and several. Liability does not depend upon negligence or causation. The statute most frequently applied is the Comprehensive Environmental Response, Compensation, and Liability Act, CERCLA, or "Superfund," 42 U.S.C. §9601 et. seq., but CERCLA does not regulate petroleum products. The Resource Conservation and Recovery Act, or RCRA, 42 U.S.C. §6901 et. seq., does cover petroleum products, including underground storage tanks for petroleum.

There is no requirement under CERCLA to apportion liability. A current "owner or operator" will be liable for all environmental costs attributable to past activities. The basic problem with environmental costs is that they are difficult to predict and may include any or all of the following: (1) cleanup costs; (2) Department of Justice or EPA payroll and travel costs; (3) prejudgment interest on EPA expenditures; (4) state response and supervision costs; (5) costs of alternative water supplies; (6) costs of population evacuation and relocation; (7) damages to natural resources; (8) third party tort claims for property damage or personal injury. The average CERCLA cleanup cost is now $40 million, so if there are environmental problems, cleanup costs may be extremely expensive.

DEFENSES

The few defenses to CERCLA liability include act of God, act of war, or act of a third party not in a contractual relationship. However, in order to assert such defenses, an owner or operator must exercise due care and take necessary precautions against foreseeable events in its care and maintenance of property.

The federal government has recently enacted an innocent landowner defense as part of the Superfund Amendments and Reauthorization Act of 1986, or SARA, Pub. L. 99-499 (1986). The innocent landowner defense includes, as elements, that at the time of acquisition the buyer did not know and had no reason to know that a hazardous substance had been disposed of at the facility. To meet this test, the buyer must have undertaken all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practices.

Five factors determine whether a buyer meets the innocent landowner defense under SARA: (1) the buyer's specialized knowledge and experience; (2) relationship of the purchase price to the value of the property if uncontaminated; (3) reasonably ascertainable information regarding the property; (4) obviousness of the likely presence of contamination; (5) the ability to detect contamination by appropriate inspection.

The innocent landowner defense only protects against contamination not discovered during a due diligence examination. Once a potential buyer receives a seller's disclosure that the property is con-

taminated, or discovers contamination during an environmental audit, the buyer no longer qualifies as an innocent landowner. If the buyer consummates the transaction, he will have primary, joint and several liability with prior owners and operators.

It is unclear whether tenants may successfully invoke the innocent landowner defense. In order for secured lenders to utilize the defense, they may have to conduct environmental assessments (1) before the loan is granted, or (2) before foreclosure, or (3) at both times.

Although case law is developing, it is difficult to predict how the "innocent landowner" defense will be applied. Site-specific and factual-specific decisions are likely.

ENVIRONMENTAL AUDITS AND OTHER PRECAUTIONS

In transactions of virtually any significant size, it is important to do an environmental audit in order to quantify risk. At the present time there is not a certification procedure for environmental auditing firms and so it is sometimes difficult to locate a qualified auditing firm.

Environmental audits can basically be broken down into Phase I and Phase II audits. Typically, Phase I audits include a physical inspection, records inspection, and interviews. The records inspection includes review of facility records, agency records, chain of title, and aerial photographs. Interviews are typically done with employees, neighbors and tenants. Sometimes environmental audit firms will give reports after the Phase I audits are completed indicating that there are no likely environmental problems. Sometimes they will recommend that a Phase II audit be completed.

Phase II audits consist of sampling air, soil and water. Although Phase I audits can be completed for anywhere between $1,000 and $4,000, Phase II audits are usually significantly more expensive, depending on the types of air, soil and water tests which are necessary.

It is useful for the purchaser of land to have a questionnaire filled out by the seller regarding environmental issues. The questionnaire may give the buyer a possible cause of action for fraud or failure to disclose if the information is false.

It is important in environmental matters for a business to protect the confidentiality of any inspections which it obtains. Whereas it may be difficult for a company to keep factual data which it obtains confidential, it may be possible to keep information confidential if that information is delivered to an attorney. Inside counsel may wish to obtain outside counsel and have environmental audits prepared for those outside counsel, so that the audits can be protected as attorney work product. Any legal opinions based on the audits might be protected by the attorney-client privilege.

The parties must consider who pays for the audit and who is entitled to rely on the audit report. The question of payment is typically addressed in the purchase and sale agreement. The environmental auditing firm will often try to limit the entities who can rely on the audit report. If a seller purchases the audit report and the buyer intends to rely on it, it is important for the buyer to have the environmental report reflect that it is being prepared for the buyer.

Important contractual provisions relating to environmental audits include the following: (1) indemnities (often the consultant wants indemnities from the entity requesting the audit); (2) releases and limits on liability; (3) insurance; (4) standard of care; (5) scope of work; (6) cost; (7) timing; (8) confidentiality and reporting to enforcement agencies; (9) access to past and present employees; (10) site access.

"Environmental audits can basically be broken down into Phase I and Phase II audits. Typically, Phase I audits include a physical inspection, records inspection, and interviews.... Phase II audits consist of sampling air, soil and water."

The audit should clearly identify the entities to whom audit information may be disclosed. Parties to whom disclosure requirements may apply would be regulatory agencies, the SEC, lenders and auditors.

ENVIRONMENTAL PERMITTING CONSIDERATIONS

It is possible that the seller or present operator of property being sold may be conducting operations without appropriate permits. Permits which are frequently needed are NPDES, air quality, and dredge and fill permits. Existing operations may have to be modified to qualify for permits or prior agency consent may be needed for assignment of permits. Structural deficiencies of the facility may prevent permit acquisition.

The buyer's attorney should make sure that all necessary permits have been obtained and are being complied with, inasmuch as daily penalties for permit violations may be as high as $10,000 to $25,000. There is also potential criminal liability for a "knowing" violation of permit requirements. The buyer's attorney should be aware that permits may be revocable for cause, including violation of their terms. A cease and desist order may result from failure to comply with permit requirements, which order may require businesses to shut down operations. Emission limitations in existing permits may limit a facility's hours of operation or production rate. Existing permits may not allow expansion or modification of facilities, and permits may have to be renewed periodically, requiring additional cost. Permits may contain conditions or requirements for future, costly remedial action. Every level of government may have separate permit requirements, which a buyer's attorney should check. Towns and cities are becoming more active in this regard.

Clearly, in light of the above factors, it is very important, in purchasing a business, to examine the types of permits which are necessary and which have been obtained.

RESTRICTIONS ON USE OF PROPERTY

Facilities may be subject to site-specific restrictions other than those contained in permits, which may have environmental implications. Those restrictions may include: (1) zoning ordinances or conditional use requirements; (2) conditions contained in business licenses for environmentally sensitive businesses; (3) building permit requirements; (4) process licensing agreements; (5) restrictive covenants running with the land; (6) restrictions by financing sources.

REPORTING REQUIREMENTS

Environmental laws typically include self-implementing notification, reporting, and record keeping requirements. Once a property owner learns of an environmental problem, he must usually report it. Failure to report is itself subject to significant penalties. Part of the due diligence work of the buyer's attorney should be to inform the buyer of continuing notification, reporting, and record keeping requirements he may have after he purchases the property.

ALLOCATION OF LIABILITIES

Environmental laws allow parties to contractually allocate environmental liabilities. Such private arrangements do not, however,

affect any party's liability to governmental authorities.

Any person may seek contribution from any other person who is liable or potentially liable for environmental costs. Courts may allocate response costs using such equitable factors as the court may determine are appropriate.

Contractual risk allocation provisions should address the following general matters: (1) the buyer's license to enter the property prior to closing to conduct environmental investigations; (2) the buyer's right of access to the seller's records, files, permits, correspondence, and employees; (3) the scope, management, payment for and confidentiality of environmental audits or reports; (4) the seller's representations and warranties; (5) the seller's indemnities; (6) financial allocation between buyer and seller for costs of remediation; (7) collateral to secure obligations, i.e., letters of credit, surety bonds, escrow arrangements, adjustment of purchase price; (8) releases from environmental claims; (9) post-closing covenants regarding cleanup; (10) covenants regarding ongoing environmental liabilities; (11) a post-closing license for the seller to re-enter the property for environmental monitoring and/or cleanup; (12) possible deed restrictions; (13) special covenants arising from the specific use of the property.

RESCISSION

The landowner of a business may want to rescind the transaction if unforeseen environmental liabilities arise after closing. If the landowner has taken title, however, he may become liable under federal environmental laws even if he held the title for a very short period of time.

POSSIBLE GROUNDS FOR ENVIRONMENTAL LIABILITY

The theories under which environmental liability may be asserted include the following: (1) contractual claims; (2) public nuisance; (3) private nuisance; (4) misrepresentation and/or fraud; (5) de facto merger; (6) mere continuation of business doctrine; (7) tort liability or negligence; (8) trespass; (9) strict liability due to abnormally hazardous activities; (10) strict liability under environmental statutes; (11) Unfair Trade Practices Act.

FORM OF TRANSACTION

The landowner of a business can sometimes avoid environmental liabilities by the way he structures the transaction. Basically, in an asset sale, liabilities are not assumed. Thus, the buyer would have liability only for matters relating to the particular assets he obtained through the sale. In a stock sale, liabilities traditionally are assumed by the buyer. The landowner of a business through a stock sale may even assume liabilities relating to land formerly but no longer owned by the seller. However, the courts are starting to disregard the form of transaction. Courts are beginning to use the same theories for extending liability to landowners of assets which have been used in product liability cases, namely continuity of enterprise and product line.

Assets distributed to shareholders or a trust fund may be available for creditors' claims, including environmental liabilities. Directors have a fiduciary duty to creditors, and may be liable for the value of assets distributed to shareholders in the face of environmental claims.

OTHER ISSUES

It is always well for the landowner or seller of a business which may have environmental liabilities to check insurance policies. Old policies don't have pollution exclusions and a successful claim may sometimes be made under them for environmental problems.

> "The landowner of a business can sometimes avoid environmental liabilities by the way he structures the transaction. . . . However, courts are starting to disregard the form of transaction."

Many states have reporting and cleanup laws which purchasing entities from another state may not be aware of. States such as New Jersey, Connecticut, and Illinois have intricate and comprehensive statutes. Such statutes may apply to sales of stock if the corporation owns the offending facility. Some states have deed notice laws, including California, Kentucky, North Carolina, Massachusetts, Minnesota, Pennsylvania and West Virginia.

It is important to remember that the landlord or tenant may have responsibilities relating to environmental liabilities under a lease, and that all leases as well as leased properties should be inspected in connection with a sale of a business.

The buyer of property with environmental problems may be able to make a claim against the real estate broker from whom he purchased the property if information available to the broker was not properly disclosed.

Bankruptcy Considerations

GENERAL CONSIDERATIONS

Unmanageable debt frequently is the driving force in the sale of a business and Chapter 11 of the Bankruptcy Code is the most common medium to facilitate the purchaser's acquisition of a distressed business entity. Utilizing the jurisdiction of the Bankruptcy Court to facilitate the sale, restructuring or recapitalization of a business has its advantages and disadvantages.

Regardless of the Chapter under which relief may be sought, the omnipresent "automatic stay" becomes operative upon filing, and the tug-of-war begins between the creditors and the debtor. Prefiling cooperation with creditors, or those participating in the acquisition of the business, will ease the process and relax confrontational tensions. Chapter 7 cases not particularly relevant here have simple solutions, generally turning on valuation, liquidation and usually result either in abandonment of assets or reaffirmation of debt, whichever is best suited to the "fresh start" granted the debtor.

Chapter 11 is significantly different, because its goal keeps the players in place playing the reorganization, or debt restructuring game, and has endless varieties of defenses, moves and strategies all complicated by the following: (i) whether the creditors are amiable and cooperative, (ii) whether a secured asset is the sole asset of the debtor; (iii) whether there is any basis for a successful reorganization within a reasonable time; (iv) whether rents or income produced by the secured assets are essential to continued operations or a plan of reorganization; (v) whether relief from the stay or failure to get relief is truly significant; (vi) whether optional relief, *e.g.* abstention, dismissal or conversion, appointment of an examiner or trustee, is available; (vii) whether a creditors' plan might emerge as a consequence of debtor's inability to effectuate its plan; and (viii) how the secured claimant priorities stand. Many acquisitions can only be accomplished by resort to Chapter 11 where a "breather" is necessary, books and records are unauditable, debts uncertain, and where business operations ought to be preserved.

CHAPTER 11 AS THE REORGANIZATION MEDIUM

Financially troubled businesses will attempt to work out their problems with credi-

tors outside of bankruptcy. But when an out-of-court arrangement fails to give the business the time and relief it needs to preserve its assets, the business may look to the reorganization process available under Chapter 11.

Likewise, purchasers of a business having some need for financial relief or debt restructuring may insist that the entity file for relief under Chapter 11 in order to purchase the business or selected assets free and clear from liens or participate in the plan process and acquire the company with a new equity and/or debt structure.

The basic purpose of a reorganization under Chapter 11 of the Bankruptcy Code is to restructure the business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its equity security holders. The premise of a business reorganization is that it is more economically efficient to reorganize than to liquidate, because it maintains the going-concern value of the business and preserves jobs and assets.

The procedure under Chapter 11 is relatively simple in its basic outlines. When a petition is filed, all creditor actions against the debtor and its assets are automatically stayed. The automatic stay gives the debtor a "breathing spell" during which to bring its creditors together for discussion, explanation of its financial problems, and negotiation. Creditors are prevented from acting unilaterally to gain an advantage over other creditors or to pressure the debtor into action.

Normally, the management of a Chapter 11 debtor is left in possession to operate the business. But the Bankruptcy Court is permitted to order the appointment of a trustee upon request of a party if the protection afforded by a trustee is needed. A trustee would be needed, for example, in cases where the current management of the debtor has been fraudulent or dishonest, or has grossly mismanaged the business. If a trustee is appointed, the management is ousted and the trustee is put completely in control of the business.

The Bankruptcy Judge who presides over the Chapter 11 case is not involved in the day-to-day administration of the business, but acts only in a judicial capacity to resolve any controversies which arise. The new nationwide United States Trustee system is designed to monitor and administer Chapter 11 cases. The United States Trustee requires the debtor to submit monthly financial reports and other periodic reports concerning progress and developments in the case.

Importantly, the business of the debtor continues to operate. Most transactions conducted in the ordinary course of business do not require court approval. The discretion to act with regard to ordinary business matters without prior court approval is at the heart of the administrative powers of the debtor in possession. As one Court has stated, "[t]he touchstone of ordinariness [under §363(c)(1)] is thus the interested parties' reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business. So long as the transactions conducted are consistent with these expectations, creditors have no right to notice and hearing. . . ." *In re James A. Phillips, Inc.*, 29 B.R. 391, 394 (S.D.N.Y. 1983). But matters not in the ordinary course of business, such as incurring secured debt or the sale of substantial assets, require authorization from the Bankruptcy Court after notice to creditors.

A business reorganization case under Chapter 11 contemplates the formulation of a plan of reorganization for the debtor. The plan determines how much creditors will be paid, and in what form (*i.e.*, cash, property, or securities), whether the stockholders will continue to retain any interest in the company, and in what form the business will continue. The plan may propose to alter the legal, equitable, or contractual rights of both secured and unsecured creditors. Usually a plan is the product of lengthy negotiations with creditors through a Creditors' Committee.

> "[P]urchasers of a business having some need for financial relief or debt restructuring may insist that the entity file for relief under Chapter 11 in order to purchase the business or selected assets free and clear from liens. . . ."

The Bankruptcy Code requires that the plan be accepted by a certain percentage of the creditors and equity security holders before it may be confirmed and put into operation. Before creditors are allowed to vote on the plan, however, a disclosure statement must be approved by the Bankruptcy Court as containing information of a kind and in sufficient detail to enable creditors to make an informed decision whether to accept or reject the plan.

FILING THE PETITION

A voluntary case is commenced by filing a petition. Cases suggest that a corporate officer may not take action to initiate a Chapter 11 filing on his own, since filing a petition is quite beyond the conduct of ordinary business. Specific authorization of a majority of the board of directors is the standard by which the validity of authorization is tested. It is customary to annex the resolution of the board to the original petition.

An involuntary petition may be filed against an entity which may be a debtor under the Chapter in which the case is commenced. Generally if a debtor is not paying its debts as they become due, an involuntary case can be commenced by three or more entities holding non-contingent claims aggregating at least $5,000 more than the value of liens on the property of the debtor. Where a debtor has fewer than 12 creditors, a single creditor holding the claim in an aggregate of at least $5,000 is entitled to commence an involuntary case.

EFFECT OF DEBTOR'S FILING

A. *Automatic Stay.* No section of the Bankruptcy Code has had more judicial interpretation than 11 U.S.C. §362, which enjoins and prevents the initiation or continuation of any act, action or proceeding against the debtor or his property. The automatic stay of §362(a) is a self-executing, pervasive statutory injunction that operates nationwide, without notice, the moment the debtor files a bankruptcy petition. Actions taken in violation of the stay are generally void, or at the very least, may be avoided.

Section 362 sets forth exceptions to the automatic stay: The exceptions to the automatic effect of the stay are not intended to be construed as a limitation upon the power of the court under 11 U.S.C. §105 to enjoin other actions in an appropriate case.

The debtor's basic remedy for a creditor's violation of the automatic stay is the civil contempt sanction, the purpose of which is to compensate the debtor for injuries suffered at the hands of the creditor who disregards the stay and takes actions against the debtor or his property.

Under the 1984 Amendments, Congress enacted a new subsection (h) to §362, which provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages."

The automatic stay of an act against property of the estate continues until such prop-

erty is no longer property of the estate. The stay of any other act under subsection (a) of §362 continues until the earliest of the discharge, dismissal or closure of the case. On request of a party in interest and after notice and hearing, the court shall grant relief from the stay, such as by terminating, annulling, modifying or conditioning such stay (i) for cause, including the lack of "adequate protection" of an interest in property of such party in interest or (ii) with respect to a stay of an action against property if the debtor does not have any equity in such property and such property is not necessary to an effective reorganization.

B. *Adequate Protection.* Nowhere in the Bankruptcy Code is the term "adequate protection" explicitly defined. Section 361 instead provides that where adequate protection is required it may be provided by:

1. periodic cash payments;
2. providing an additional or replacement lien to the extent that the subject stay results in the decrease of value of creditor's interest in the property; or
3. granting such other relief as will allow the creditor the "indubitable equivalent" of its interest in the collateral.

A secured creditor is entitled to protection from diminution in value of its secured claim only if the value of its collateral is depreciating as a result of the automatic stay. Section 361 contains two crucial elements. First, adequate protection is not necessary solely because there is a secured party, mortgages or similar creditor involved. Generally, adequate protection is required only when the debtor in possession or trustee engages in some activity which interferes with a protected property interest of such secured party, mortgagee or other creditor. Second, whenever adequate protection is required under §§362, 363 or 364, it may be provided through several methods. The examples include (i) cash payments, (ii) an additional or replacement lien, or (iii) granting of additional compensation other than administrative expense status.

The Bankruptcy Code allows a court to terminate, annul, modify or condition the automatic stay if "with respect to an act against property, . . . (A) the debtor does not have equity in such property; and (B) such property is not necessary to an effective reorganization."

C. *Drop Dead Agreements.* Frequently, litigation between a secured creditor and a Chapter 11 debtor respecting relief from the automatic stay and adequate protection will be resolved by a stipulation and settlement agreement, approved by the court, which provides that in the event the agreement is breached by the debtor, the automatic stay is terminated without further order of the court or notice to the debtor.

USE OF CASH COLLATERAL

The Bankruptcy Code at §363(a) explicitly defines cash collateral, but the trustee may not use, sell or lease cash collateral under paragraph (1) of this subsection unless (a) each entity that has an interest in such cash collateral consents; or (b) the court, after notice and a hearing, authorizes such use, sale or lease in accordance with the provisions of this section. 11 U.S.C. §363(c)(2).

SALES FREE AND CLEAR OF LIENS

Section 363(b) of the Bankruptcy Code provides that the debtor in possession or trustee may use, sell or lease property of the estate other than in the ordinary course of business after notice and a hearing. A sale of property other than in the ordinary course of business or pursuant to a plan must be in the best interest of the estate and its creditors. The following factors are often relevant to the court's inquiry: (1) the proportionate value of the asset to the estate as a whole; (2) the amount of time that has elapsed since the filing; (3) the likelihood that a plan of reorganization will be proposed and confirmed in the near future; (4) the effect of the proposed disposition on future plans of reorganization; (5) the proceeds to be obtained from the disposition compared to the appraised value of the property; and (6) whether the asset is increasing or decreasing in value.

"Chapter 11 has as its primary goal the filing of a plan of reorganization. With few exceptions, a plan is required to either reorganize or restructure debt and/or equity or in cases where the debtor desires to liquidate the assets in an orderly manner."

Courts have held that the sale of all or substantially all of the debtor's Chapter 11 assets is authorized under the Bankruptcy Code even in the absence of a disclosure statement, plan and vote of creditors, provided reasonable notice is given to all interested parties, the proposed use, lease or sale is economically reasonable, taking into consideration the value of the asset and the terms and condition of contract or agreement under which such use, lease or sale is proposed, and whether the objector or objectors at the hearing could defeat a plan of reorganization which contains such a provision.

PLAN OF REORGANIZATION PROCESS

Chapter 11 has as its primary goal the filing of a plan of reorganization. With few exceptions, a plan is required to either reorganize or restructure debt and/or equity or in cases where the debtor desires to liquidate its assets in an orderly manner. However, although most cases may get to the point of filing a plan, many never reach that stage and are either dismissed, converted to Chapter 7, or assets sold without the benefit of the plan.

A plan must be preceded by a disclosure statement intended to "enable a hypothetically reasonable investor typical of holders of claims or interests of the relevant class to make their informed judgment about the plan. . . ." 11 U.S.C. §1125(a). No acceptance or rejection of plan may be solicited after the commencement of a case unless before such solicitation there is transmitted to the claimant, the plan and a written disclosure statement approved, after notice and hearing by the court, as containing adequate information.

The debtor may file a plan with an original petition for relief, or as otherwise provided in §1121. The Debtor has the exclusive right to file a plan until after 120 days after the order for relief. Where the debtor files the plan within the 120-day period no other party may file a plan for 180 days from the date of the filing of the order for relief, which gives the debtor the sole opportunity to obtain acceptance of its Plan. For good cause shown, any party in interest may request the court, after notice and hearing, to reduce or increase the 120-day or 180-day period. If a trustee is appointed, any party in interest may file a plan. 11 U.S.C. §1121(c)(1). After expiration of the exclusive period, multiple plans may be submitted and frequently a secured creditor or an unsecured Creditors' Committee will move aggressively to prepare and file a proposed Plan of Reorganization.

CONDITIONS AND CONTENTS OF THE PLAN

Section 1122(a) provides that the Plan may place a claim or an interest in a particular class only if such claim or interest is

substantially similar to the other claims or interests of such class, but provides as an exception that a Plan may designate a separate class of claims consisting of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable or necessary for administrative convenience. As a general proposition creditors of equal rank with claims against identical assets should be provided for within the same class. On the other hand, creditors with different rank or creditors with the same rank, but holding claims against separate properties may be placed in different classifications.

Secured claims generally are separately classified because their legal rights are not substantially similar. Equity interests, *e.g.* common stock and preferred stock, must be separately classified in accordance with the rights, as vested and further subordinated, among shareholder interests.

The plan must specify the classes which are impaired. In the event a creditor is not impaired then the claim holder is not affected by the plan and his acceptance is immaterial. The plan must specify the treatment of any impaired claims or interests. This is the essence of the Plan of Reorganization in that the treatment of classes must be thoroughly revealed in order that affected claimants may fully understand the debtor's proposals with respect to the equal treatment.

Each claim or interest of a particular class must be treated equally unless the holder of a particular claim or interest agrees to less favorable or other non-discriminatory treatment.

The plan must provide adequate means for its execution, and in that regard requires that there is sufficient assurance that there will be no need for further reorganization. The articles of incorporation of the reorganized debtor must have provisions which prohibit the issuance of non-voting equity securities, make equitable provisions for voting power, and for the selection of officers, directors and trustees.

The inclusion of optional provisions in addition to those required under §1123(a), may include the assumption, rejection or assignment of executory contracts and unexpired leases, may provide for the settlement or adjustment of claims belonging to the estate or retention of such claims by the debtor or its successor, and may provide for the sale of substantially all of the assets of the estate, including any other appropriate provisions not inconsistent with Chapter 11. A plan provision which releases creditors' claims against non-debtor guarantors and other non-debtor third parties may not be effective. A plan should make reference to its "effective date."

DISCLOSURE AND SOLICITATION

The acceptance or rejection of a plan may not be solicited from a holder of a claim or interest after the commencement of the case unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and hearing, as containing adequate information.

The contents of each disclosure statement must be measured, on a case-by-case basis, with due regard to the basic purpose of a disclosure statement which is to inform parties in interest, as fully as possible, about the financial consequences of acceptance or rejection of the plan, with the caveat that no disclosure statement is an infallible guide to the ability of the reorganized debtor to successfully consummate the plan. At the very least the disclosure statement should include (i) the financial history of the debtor and other factors which lead to the filing of the petition, (ii) historical financial information, including a balance sheet and income statement for a reasonable pre-petition period, (iii) analysis of prospective business activities, including modifications, restraints or changes in business which would bear upon the ability of the reorganized debtor to succeed, (iv) reasonable projections, forecasts, budgets respecting income, expenses and anticipated profits from operations, (v) disclaimers respecting the analysis of the information included in the statement, (vi) financial information respecting the debtor's operations under Chapter 11, (vii) a summary of claims and interests by class, (viii) a liquidation analysis, (ix) disclosure respecting future management and salaries of the reorganized debtor's management, and (x) a summary of the plan.

"The Plan must specify the treatment of any impaired claims or interests. This is the essence of the Plan of Reorganization in that the treatment of classes must be thoroughly revealed in order that affected claimants may fully understand the debtor's proposals with respect to the equal treatment."

SECURITIES LAW CONSIDERATIONS

Section 1125(d) of the Code provides that the adequacy of a disclosure statement is not governed by federal or state securities laws. Inadequate disclosures, however, in the public interest, can prompt the appearance by the Securities and Exchange Commission and any other regulatory agency, who are afforded the absolute right to appear and be heard on the adequacy of the disclosure statement.

Section 1125(e) of the Bankruptcy Code contains the "safe harbor" provision for those who solicit acceptances or rejections to proposed plans in good faith with the use of a court approved disclosure statement. Absent the safe harbor provision, the solicitation of acceptances or rejections could impose liability under securities laws designed to protect against fraud.

ACCEPTANCES OF THE PLAN

Each holder of a claim or interest allowed under §502 may accept or reject a plan. A creditor whose claim is partially secured and partially unsecured may vote in both capacities on the plan.

Voting is by class of claim or interest, as specified in the plan. With respect to creditors, a plan is accepted by a class of creditors if it has been accepted by at least two-thirds in amount and more than one-half in number of all holders that actually vote on the plan. 11 U.S.C. §1126(c). A plan is accepted by a class of interest holders if such plan is accepted by at least two-thirds in amount of the allowed interest holders that vote on the plan. 11 U.S.C. §1126(d).

Upon request of a party in interest and following notice and hearing, the court may designate any entity whose acceptance or rejection of such plan was not in good faith or was not solicited or procured in good faith or in accordance with the provisions of the Code, thereby disqualifying such vote. An unimpaired class is conclusively presumed to have accepted the plan, and a class for which no provision is made is deemed to have rejected the plan.

CONFIRMATION

The court shall, in accordance with 11 U.S.C. §1129 confirm a plan if (i) the plan complies with the applicable provisions of Title 11, including §§1122 and 1123 concerning classification and contents of the plan; (ii) a proponent of the plan has likewise complied with the applicable provisions of Title 11, including adequate disclosure and proper solicitation; (iii) the plan must be proposed in good faith and not by any means forbidden by law; (iv) any payments made or to be made by a proponent, by the debtor or any person

issuing any securities or receiving property under the plan, for costs and expenses in connection with the case or the plan must have been approved by the court as reasonable, or are subject to approval; (v) the plan must have fully disclosed the identity and affiliations and compensation of personnel to serve as directors, officers or voting trustees of the reorganized debtor or any insider that will be retained by the reorganized debtor; (vi) any regulatory commission with jurisdiction over rates of the debtor has approved such rate changes as might be proposed by the plan; (vii) each holder of a claim or interest in an impaired class must receive property of a value, as of the effective date of the plan, that is not less than what such holder would receive if the debtor were liquidated; (viii) that each class of claims or interests must have either accepted the plan or be unimpaired (failing acceptances by all impaired classes, the "cram down" provision of §1129(b) may still permit confirmation); (ix) the plan must provide for the satisfaction of administrative and priority claims by the means and within the time set forth in 11 U.S.C. §1129(a); (x) one impaired class must accept the plan; and (xi) confirmation is not likely to be followed by the liquidation or the need for further financial reorganization of the debtor (feasibility test).

"CRAM DOWN"

Provided that all of the requirements for confirmation set forth in §1129(a) have been met, excepting those set forth in §1129(a)(8), the "cram down" provisions of §1129(b) may be invoked. On request of a plan proponent, the court shall confirm the plan notwithstanding the provision of subparagraph (8), if the plan does not discriminate unfairly, and is fair and equitable with respect to each claim or class of interests that is impaired, and has not accepted the plan.

THE BINDING EFFECT OF CONFIRMATION

The provisions of a confirmed plan bind the debtor, any entity issuing securities or acquiring property under the plan, and any creditor, equity security holder or general partner of the debtor. 11 U.S.C. §1141(a). The foregoing is true regardless of whether the particular creditor or equity security holder voted to accept the plan or is impaired by it. A confirmation order has the same legal effect and significance as a federal court judgment.

The confirmed plan essentially is a new and binding contract, sanctioned by the Bankruptcy Court, between the debtor and the preconfirmation creditors and equity security holders. Except as otherwise provided in the plan, or in the Order confirming the plan, confirmation vests all property of the estate of the debtor. As a result of vesting all property in the debtor and giving rise to a discharge, confirmation also terminates the automatic stay.

MODIFICATION OR AMENDMENT OF PLAN

A plan proponent may modify its plan so long as the modified plan meets the requirements of §§1122 and 1123. The plan as modified then becomes the plan. Under §1129(b), a plan proponent or the reorganized debtor may modify the plan at any time after confirmation if the original plan has not been substantially consummated so long as the plan as modified meets the requirements of §§1122 and 1123, the circumstances warrant such modification and the court, after notice and hearing, determines that the modified plan meets the standards for confirmation enunciated in §1129.

> "Provided that all of the requirements for confirmation . . . have been met, the 'cram down' provisions . . . may be invoked . . . . The court shall confirm the plan . . . if the plan does not discriminate unfairly and is fair and equitable with respect to each claim or class of interests that is impaired, and has not accepted the plan."

MISCELLANEOUS CONSIDERATIONS

The absolute priority rule remains a benchmark under the Bankruptcy Code. The Code requires that for a cram down plan to be "fair and equitable" the holder of claims junior to the holders of unsecured claims "will not receive or retain under the plan on account of such junior claim or interest any property." An exception to this requirement will permit equity holders to retain an interest in the reorganized debtor if they invest new capital reasonably equivalent in value to the retained interest.

GETTING THE CASE OUT OF BANKRUPTCY: APPOINTMENT OF A TRUSTEE OR EXAMINER, CONVERSION AND DISMISSAL

A. *Appointment of a Trustee.* Section 1104(a) of the Bankruptcy Code provides for the appointment of a trustee in a Chapter 11 proceeding, at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and hearing, for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case or similar cause, if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

Creditors are entitled to know what property has passed through the debtor's hands during the period prior to its bankruptcy. The successful functioning of bankruptcy proceedings hinges both upon the debtor's veracity and its willingness to make a full disclosure of assets, liabilities and financial transactions. Where a debtor fails to provide full and truthful disclosure of its financial condition, it may be necessary to appoint a trustee so that the court and creditors can become fully informed.

In view of the strong presumption in favor of continuing a debtor in possession in control and management of its estate, the movant under §1104 may have to establish cause for the appointment of a trustee by clear and convincing evidence. But, when "cause" is shown, the court *must* appoint a trustee under §1104(a)(1).

B. *The Examiner Alternative.* If the court does not appoint a trustee, it has the alternative option to appoint an examiner, with the functions, duties, and powers as set forth in 11 U.S.C. §1106(b), to conduct an investigation of the debtor, including any allegations of fraud, dishonesty, incompetence, misconduct or mismanagement, by current or former management of the debtor.

C. *Conversion or Dismissal Under §1112(b).* Section 1112(b) of the Bankruptcy Code, provides that the court may convert a case under Chapter 11 to a case under Chapter 7 of the Bankruptcy Code or may dismiss the case under Chapter 11 for cause, including continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; inability to effectuate a plan; unreasonable delay by the debtor that is prejudicial to creditors; failure to propose a plan under §1121 of this title within any time fixed by the court; denial of confirmation of every proposed plan and denial of a request made for additional time for filing another plan or modification of a plan; revocation of an order of confirmation under §1144 of this title, and denial of confirmation of another plan or a modified plan under §1129 of this

title; inability to effectuate substantial consummation of a confirmed plan; material default by the debtor with respect to a confirmed plan; termination of a plan by reason of the occurrence of a condition specified in the plan; or non-payment of any fees or charges required under Chapter 123 of title 28.

Case law under the Code generally recognizes that it is appropriate to dismiss a Chapter 11 case for "cause" under §1112(b) if it appears that the petition was filed in bad faith.

The legislative history of Chapter 11 states that the purpose of a business reorganization case is to restructure the business's finances so that it may (i) continue to operate, (ii) provide its employees with jobs, (iii) pay its creditors, and (iv) produce a return for its equity security holders. Cases dealing with the issue of good faith under the Bankruptcy Code disclose a common theme: abuse of the bankruptcy process.

OFFICERS' AND DIRECTORS' LIABILITY

The law imposes "fiduciary duties" on corporate officers and directors. For example, the Delaware corporate law imposes on directors and officers three duties: obedience, care and loyalty.

The duty of care requires a director to exercise the degree of care "which ordinarily prudent men would exercise under the same or similar circumstances in the conduct of their own affairs." Loyalty requires the director to refrain from engaging in activities that would result in an improper personal benefit from his relationship to the corporation. Other views have discussed the question of fiduciary relationship in terms of the duty owed by officers and directors to their shareholders and, certainly after the initiation of Chapter 11 proceedings, the duty owed to creditors.

Once a case has been initiated under Chapter 11, and in the absence of the appointment of a trustee, the debtor represents the estate, and if the debtor is a corporation, the duties upon the officers and directors remain the same. Thus, breach of any duty of obedience, care and loyalty would be actionable.

ROLE OF COMMITTEES

Under the new U.S. Trustee system, it is the duty of the United States Trustee to appoint a Committee under the provisions of §1102 of the Bankruptcy Code. The membership ordinarily is selected from among the largest unsecured creditors, and consists of seven members, although the membership can be enlarged upon request of a party in interest. Section 1102(b)(1) authorizes the appointment of a committee where the committee was in existence before the commencement of the case if the committee "was fairly chosen and is representative of the different kinds of claims to be represented.

Section 1103 provides that a creditors' committee, or any committee appointed under §1102 of the Code, may consult with the trustee or debtor in possession concerning the case, investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business, the desirability of the continuance of the business, participate in the formulation of the plan, collect and file acceptances and rejections of the plan, request the appointment of a trustee or examiner and perform such other duties as are in the best interest of the estate. Committees are authorized to employ professional persons, including attorneys and accountants, upon application and approval by the court.

EQUITABLE SUBORDINATION

The United States Supreme Court has said that "the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in the administration of the bankrupt estate." The usual application of the doctrine involves subordination of

claims of insiders, that is, officers, directors or controlling shareholders, which persons occupy a fiduciary relationship with the debtor. Transactions between fiduciaries and the debtor are subject to very careful scrutiny by the court to determine if they are transactions made at arm's length rather than fraudulent, overreaching or self-dealing. If overreaching or unfair dealing is found, the claim can be subordinated to the extent the creditors are injured.

SELECTED EMERGING PROBLEMS

A. *Environmental Cleanup and Liens.* The application of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as to who has responsibility and the assertion of third party liability can apply in a bankruptcy case when a trustee sells property of a debtor's estate that contains a hazardous substance. The cases make it clear that parties who purchase from the estate must examine the property and make an independent determination of whether the site contains hazardous wastes.

The 1986 amendments to CERCLA gave the Environmental Protection Agency a lien power to secure the costs of environmental cleanup. The lien does not have priority over prior perfected liens or security interests in the same property, nor does it upset the normal system of bankruptcy distribution priorities and does not impose a secret restraint on the sale or alienation of the property.

B. *Sales and Use Taxes.* The Supreme Court of the United States recently held that the liquidation sale of property of a bankruptcy estate, even if held by a bankruptcy trustee, is subject to taxation by state and municipal authorities.

C. *Worker Adjustment Retraining Notification Act.* WARN was enacted by Congress and became effective on February 4, 1989, and pursuant to the act, employers, under certain circumstances, are required to provide at least 60 days' notice to employees of a proposed plant shutdown.

This act presents a new hurdle for the distressed business employer who is already nervous about his precarious financial position when a potential plant closing or layoff looms and he is negotiating a new financial package with his lender or seeking a purchaser for the business. Certain exemptions of the full 60-day notice of shutdown of an employment site need not be given if the employer was actively seeking "working capital" or "business" and reasonably believed giving 60 days' notice would have precluded the employer from receiving the capital or business. Substantial penalties and costs can be assessed against employers who fail to comply with the act.

D. *Expanded Preference for Non-Insider Claims.* In *V.N. Deprizio Construction Co.*, 874 F.2d 1186 (7th Cir. 1989), the court interpreted §§101, 547 and 550 of the Code and concluded that payments made outside of the 90-day period to a non-insider may be preferential if the non-insider has obtained a guarantee from the insider. The trustee has only 90 days to recover such payments if they are for delinquent taxes or are made to pension funds.

B. *Class Proof of Claims.* In *In re American Reserve Corp.*, 840 F.2d 47 (7th Cir. 1988), the Seventh Circuit Court became the first court of appeals to approve the filing of a class proof of claim in the face of numerous cases holding to the contrary, including the Tenth Circuit decision in *In re Standard Metals Corp.*, 817 F.2d 625 (10th Cir. 1987). The Tenth Circuit Court held that a class representative could not be considered the authorized agent of all the creditors in the putative class, but did acknowledge that class action procedures might be appropriate when there are a large number of creditors who have filed identical claims. This dispute among the circuits will doubtless reach the Supreme Court of the United States.

Bar Commission Highlights

At its March 16 meeting, the Board of Bar Commissioners received the following reports and took the actions indicated:

1. Approved Rules and Regulations for the New Lawyer CLE program, subject to final comment prior to March 23 meeting.
2. Reviewed proposed changes in the Lawyer Referral Service.
3. Reviewed proposed rules for the Client Security Fund Committee.
4. Received the Discipline Report, acting on pending public and private discipline matters as reported elsewhere in this issue. Authorized litigation in an unauthorized practice of law matter.
5. Received the Admissions Report, acting on routine petitions.
6. Received the report of the Budget and Finance Committee, acting to approve certain budget reductions. Authorized renewal of line of credit. Approved adoption of new dues schedule subject to Supreme Court approval. Approved response to complaint concerning the Client Security Fund.
7. Approved the minutes of the February 16 meeting.
8. Approved Joint Occupancy, Use and Services Agreement between the Bar and the Utah Law and Justice Center, Inc.
9. Authorized fund-raising by Young Lawyers Section in conjunction with Bill of Rights Bicentennial Project, and grants for the Pro Bono Project.
10. Reviewed pending litigation.
11. Received management reports from the Executive Director and Associate Director.
12. Received from the Salt Lake County Bar two copies of the new training program for habeas corpus counsel appointees.

At the March 23 special meeting, the Board of Bar Commissioners:

1. Gave final approval for the New Lawyers CLE regulations.
2. Continued reviewing proposed rules for the Client Security Fund Committee.
3. Approved results of the February Bar Examination.
4. Discussed the arrangements for member comment and input regarding the dues increase petition.

The full text of the minutes of these and other meetings of the Bar Commission are available for inspection at the office of the Executive Director.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 1.9(a) by representing one brother in a conservatorship action and subsequently representing another brother seeking the removal of the first as conservator. The conflict was exacerbated by the attorney's later representing the first brother in filing an objection to the second brother's petition to probate the estate.

2. An attorney was admonished for violating Rule 1.9(a) by representing a client in regard to real property transactions and enforcement contracts and five years later representing a second party in negotiations against the prior client in regard to the same real estate transactions and contracts.

PRIVATE REPRIMANDS

1. An attorney was privately reprimanded for violation of Canon 6, DR 6-101(A)(3) and Canon 1, DR 1-102(A)(5) by failing to respond to inquiries and Orders of the Tenth Circuit Court of Appeals. After having filed a Notice of Appeal, the attorney received notice from the Tenth Circuit Court of Appeals that he was not listed as licensed to practice before that Court. Subsequently, the Court issued a second notice. Respondent failed to respond to either of these inquiries. The Court then issued an Order to Show Cause and again Respondent failed to respond. The Court then appointed another lawyer to represent the client on appeal. The Court ultimately suspended the attorney for sixty (60) days from the practice of law before that Court.

RULES REVIEW

The Office of Bar Counsel has recently received several inquiries regarding paid attorney referral services. Attorneys are advised to review Rule 7.2(c) of the Rules of Professional Conduct prior to purchasing these services.

Report of the Legislative Affairs Committee

I. *Introduction.* The Legislative Affairs Committee believes that this report represents a highly successful Legislative Session. The Legislative Committee met regularly, pursued its review of filed legislation with diligence and care and took positions only on matters of overriding concern to the profession.

II. *The following represents a status report on all of those bills upon which the Board of Bar Commissioners had taken a position:*

A. In Opposition

1. Senate Bill No. 32 Pace
Fee Limitation on Trust Deeds—passed the Senate but failed in House rules.

2. Senate Bill No. 77 Leavitt
Contingent Attorneys' Fees—referred to interim study.

3. Senate Bill No. 180 McMullin
Divorced Parent Compliance with Residential Provision Per Child—failed in House.

4. House Bill 150 Frandsen
Review and Modification of Child Support Orders (opposed specific language)—signed 3/13.

5. House Bill 282 Young
Increasing Small Claim Court Limit—died in House rules.

B. In Support

1. Senate Bill No. 64 Cornaby
Judges' Retirement Benefit Enhancements—signed 3/7.

2. Senate Bill No. 150 Finlinson
Uniform Commercial Code-Leases—

signed 3/12.

3. Senate Bill No. 161 Finlinson Uniform Foreign Money Claim Act—signed 3/12.

4. Senate Bill No. 191 Finlinson Uniform Commercial Code Amendments—signed 3/13.

5. House Bill No. 391 Valentine Court Commissioner Amendments—signed 3/12.

6. House Bill No. 26 Valentine Uniform Transfers to Minors Act—signed 3/13.

7. House Bill No. 58 Harward Rules of Criminal Procedure Revision—signed 2/14.

8. House Bill No. 107 Lyon Revised Uniform Limited Partnership Act—signed 3/12.

9. House Bill No. 199 Evans Child Guardian Ad Litem Appointment—signed 3/8.

10. House Bill No. 209 Moody Number of Juvenile Court Judges—signed 3/7.

11. House Bill No. 281 Bodily Judicial Conduct Commission Amendments—signed 3/8.

12. Co-location of Court's Facilities Appropriation—this initiative failed in the Courts and Corrections sub-appropriation hearings but may be studied further.

13. Utah Attorney General Appropriation Request.

C. In Support With Amendment

1. Senate Bill No. 103 Cornaby Judicial Amendments/amended as proposed—signed 3/7.

D. No Position

1. Senate Bill No. 27 Hillyard Grand Jury Reform—signed 3/9.

2. Senate Bill No. 68 McAllister Product Manufacturer's Liability—failed in Senate rules.

3. Senate Bill No. 69 McAllister Product Liability Defenses—passed Senate, failed in House rules.

4. Senate Bill No. 70 McAllister Product Sellers Liability—passed Senate, failed in House rules.

5. Senate Bill No. 106 Hillyard Conflicts of Interest—failed in Senate rules.

6. Senate Bill No. 227 Steele Adoption Restrictions (advised sponsor of defects)—passed Senate, failed in House Rules.

7. House Bill No. 55 Rush Itemization of Fees for Adoption—signed 2/14.

8. House Bill No. 56 Rush Adoption Act Amendments—signed 3/12.

9. House Bill No. 296 Jensen Payment of Attorneys' Fees—referred to interim study.

10. House Bill No. 353 Valentine Utah Rules of Civil Procedure Amendment (Rule 63—proposed to allow change of judge upon motion)—failed in House rules.

11. House Bill No. 390 Harward Supreme Court Rulemaking—passed House, failed in Senate rules.

E. Authorized Section to Lobby

1. House Bill No. 344 Lewis Probate Code Amendments—failed in Senate rules.

American Bar Association Resolution Adopted by the House of Delegates

AUGUST 8-9, 1989
REPORT NO. 124B

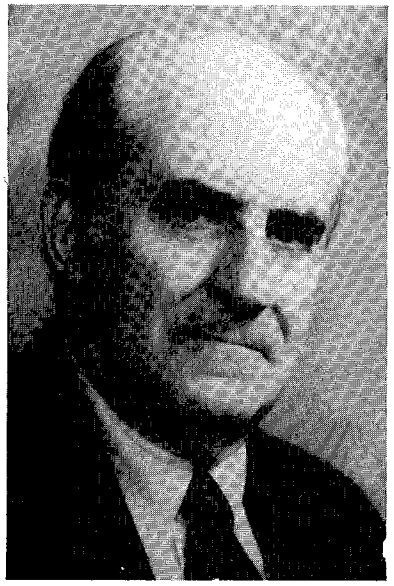
BE IT RESOLVED, that the American Bar Association urges all lawyers to register and vote;

That all lawyers encourage and assist employees of their offices or firms to participate in the election process by disseminating information about registration and voting in local, state and national elections, and providing necessary leave to register and vote.

Report of Bar Activity in 1990 Legislative Session

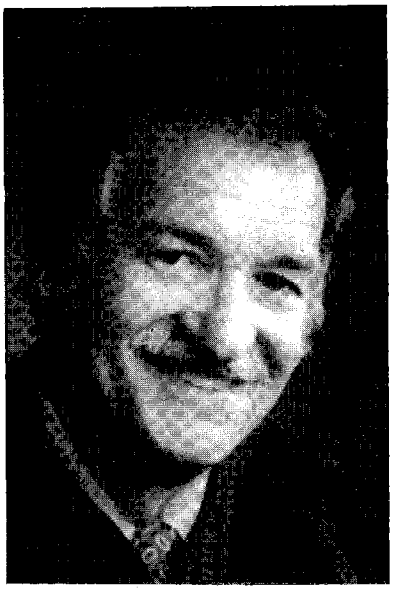
Pursuant to the Bar's lobbying policy, this report discloses all of the legislative activity of the Bar Commission, Legislative Affairs Committee, sections and committees (as authorized by the Bar Commission), our legislative representative (John T. Nielsen) and staff for the 1990 legislative session. Bar members wishing to obtain a partial rebate of their Bar dues representing expenditures for this activity may do so by requesting the same in writing to the Executive Director.

The Utah State Bar Annual Meeting Will Be at Beaver Creek, Colorado June 27 to July 1, 1990



Hon. Robert R. Merhige Jr.

Hon. Elizabeth Holtzman



Hon. Jim R. Carrigan

The alpine village setting of Beaver Creek, Colorado, is the location for our 1990 Annual Meeting. Your Committee has planned a schedule which will provide you with 13 hours of MCLE credit. The meeting is an exceptional value for getting MCLE credit. The program will also give you maximum time to enjoy tennis, golf, swimming, fishing and dining.

According to Meeting Chair Carolyn Nichols, Continuing Legal Education seminars alone should make this meeting "a must" for many Utah attorneys. Exceptional speakers will participate in the meeting this year, including New York City Comptroller and former U.S. Representative Elizabeth Holtzman, The Hon. Robert R. Merhige Jr., U.S. District Judge, Eastern District of Virginia, and The Hon. Jim R. Carrigan, U.S. District Judge, Colorado.

Elizabeth Holtzman was elected in 1989 as Comptroller of New York City, the first woman to be elected to this position. Her experience in city government goes back to 1981 when she was elected District Attorney of Kings County (Brooklyn). She was re-elected in 1985 and ran a department with a staff of more than 900. In this position she revolutionized the treatment of child sex abuse victims in New York. She is also known for fighting to eliminate racial discrimination in jury selection. Ms. Holtzman gained national recognition as a member of the U.S. House of Representatives for eight years beginning in 1973. She graduated magna cum laude from Radcliffe College and received her law degree from Harvard Law School.

Hon. Robert R. Merhige Jr. is a United States District Judge for the Eastern District of Virginia, first appointed in 1967. Before his appointment, he practiced law in Richmond. He gained national prominence as the Judge in the A.H. Robins case. He has also participated in many forums where the topic of complex litigation has been the topic, and he is known for his ability to mix wit and humor in otherwise technical discussions. Judge Merhige received his law degree from the T.C. Williams School of Law at the University of Richmond. He has been an active participant in professional organizations, an author, and lecturer. In 1988 he was the Ewald Distinguished Visiting Professor of Law at the University of Virginia.

Hon. Jim R. Carrigan is a U.S. District Judge for Colorado. Prior to his appointment in 1979, he was a Justice on the Colorado Supreme Court where he served for three years. In addition to his earlier practice as a trial lawyer in Denver and Boulder, he was a full-time law faculty member at the Universities of Colorado, Washington, Denver and New York University. Judge Carrigan was Chairman of the Board of Trustees for the National Institute for Trial Advocacy from 1986 to 1989. He was a charter member and a member of the Executive Committee of the National Board of Trial Advocacy. He received his law degree from the University of North Dakota. He has a reputation for his ability to put professionalism into perspective.

Beaver Creek is a new and exciting location for the meetings. By scheduling the Bar's meetings at the Hyatt during its first summer season, room rates are secured at significant discounts.

Delta Air Lines will give a 5 percent discount on any fare you are able to obtain. Restrictions apply. When making reservations, call 1-800-221-1212 and ask for "Special Meetings Department." Use reference number U 27015. You can receive up to 40 percent off round-trip coach fares purchased seven days in advance. If you fly to Denver, you'll have a 110-mile drive west on I-70 to Beaver Creek. You can rent a car at Stapleton Airport or take a bus. An individual shuttle seat, one-way per person from Denver Stapleton Airport to Hyatt at Beaver Creek, is $24. Ground transportation arrangements can be made through Colorado Mountain Express at 1-800-525-6363.

If you choose to drive from Utah, it is approximately 415 miles if you approach Beaver Creek on I-70 via Grand Junction. Or, you can drive there on U.S. 40 through Vernal.

Hyatt has just completed a new hotel

adding a significant number of rooms to the resort, which previously relied upon homes and condominiums. Bar members will have their choice of luxury accommodations at much reduced rates, because this is one of the first major meetings held at Beaver Creek.

There is plenty to keep everyone busy, from golf and tennis, to mountain-biking and fishing. Shoppers will find the boutiques in Beaver Creek and neighboring Vail extremely tempting.

Hotel rooms have been blocked at Beaver Creek's new Hyatt for members of the Bar. Special discounted rates are $90 plus tax nightly for single or double accommodations. Regular summer rates are $150 nightly and $180 nightly on weekends. Children under 18 may stay free with parents. Rollaway beds are $15 nightly and cribs are free. Check-in is 3:00 p.m., check-out is noon.

For those preferring condominiums, several properties adjacent to the Hyatt have been blocked for Bar members. Rates range from $85 to $290 nightly, depending on the number of bedrooms. Vail Associates will provide information and handle central reservations for the Hyatt Hotel and the condos.

CALL BY MAY 15 TO MAKE YOUR HYATT HOTEL OR CONDOMINIUM RESERVATIONS: 1-800-525-2257.

Additional lower cost rooms are available at the Comfort Inn in Avon, just a mile from Beaver Creek on I-70 at Exit 167. Nightly rates at the Inn are $49 plus tax for weekdays and $59 on weekends, single or double occupancy. Children under 18 stay free with parents. Rollaway beds are $10 nightly and cribs are free. Shuttle service between hotels is free.

CALL BY MAY 15 TO MAKE YOUR COMFORT INN RESERVATIONS: 1-800-423-4374.

Room blocks at all properties will be released after May 15, 1990, and reservations at Bar rates will be accepted on a space available basis.

Summary Report of Client Security Fund Claims

At the January 16, 1990, meeting of the Board of Bar Commissioners, David R. Hamilton, Chair of the Client Security Fund, relayed the recommendations of the Client Security Fund Committee with regards to individual claims. The Commission, acting upon the recommendations, made the following decisions:

Claimant:
Attorney: Robert Ryberg
Status: Disbarred

Robert Ryberg was hired to probate an estate. The assets of the estate consisted of several bank certificates in the name of the deceased. Ryberg was required to obtain out-of-state counsel to assist, and appropriated $6,605.23 from the estate while claiming a specific fee of $626.80.

DECISION: The claimant should be compensated in the sum of $5,978.43 representing appropriated sums less the legitimate attorney's fees.

Claimant:
Attorney: Katheryn Schindelar
Status: Voluntary Resignation

Schindelar was retained to represent claimant in a domestic matter and received a $1,000 fee. Apparently, few services were rendered.

DECISION: The claimant was awarded $250.

Claimant:
Attorney: Stanley Baliff
Status: Disbarred

Baliff received a $100 cost retainer and undertook no services on behalf of the claimant.

DECISION: Claimant was awarded $100.

Claimant:
Attorney: Stanley Baliff
Status: Disbarred

Baliff was retained to represent claimant on a personal injury matter. Baliff obtained a settlement check in the sum of $12,000, forged claimant's name on the check and on the release and retained the entire $12,000 for his own use.

DECISION: The claimant was awarded $8,000, reducing the claim by one-third, the agreed upon fee.

Claimant:
Attorney: Richard K. Crandall
Status: Disciplinary matter remitted to the Office of Bar Counsel for further proceedings, in accordance with Court's ruling.

Crandall was retained to represent claimant in a domestic matter and paid $650. The claimant was not advised of the disposition of the matter in the Courts and, in fact, received misinformation from the attorney that hearings were pending.

DECISION: No meaningful services were provided for the $650. The claimant was awarded the $650.

Claimant:
Attorney: Richard K. Crandall
Status: Disciplinary matter remitted to the Office of Bar Counsel for further proceedings, in accordance with Court's ruling.

Crandall was retained to represent claimant in a matter concerning back wages. Claimant forwarded $150 as a retainer fee and no services were rendered.

DECISION: The claimant was awarded $150.

Additional Matters: As to active practicing attorneys, matters were deferred until their respective disciplinary status is resolved.

"Art Basics"

Utah Lawyers for the Arts and the Salt Lake Art Center are pleased to co-sponsor "Art Basics," a series of six 60-minute lectures outlining the history of contemporary American art (late 19th and 20th century) within the context of social and political changes.

The lectures, beginning in June, will be held at the Salt Lake Art Center, will be open to the public, and will be free. Utah Lawyers for the Arts members may order brown bag lunches one day in advance of the lectures through Utah Lawyers for the Arts.

The lectures will cover the following topics:

1. *American Academic Tradition and the Armory Show (1870-1920s)*—Dr. Robert S. Olpin.

Academic, Salon-style painting—the impact of European impressionism on American painters. Impact of the Industrial Revolution in America. Armory Show—first attempt to trace the evolution/progression of art toward "modernism." Introduction of cubism and early abstraction to American audiences. New York Dada—Stieglitz and 291 Gallery.

2. *Surrealism/Abstract Expressionism (1930-'50s)*—Dr. Mary Francey.

Influence of World War II, Freudian and Jungian analysis and the preoccupation with "depths of self."

Dream-inspired imagery/disconnected from reality. Jackson Pollock, Willem de Kooning. "Automatism"—let expression spill out. Man Ray and photographers.

3. *WPA/Social Realism/Regionalists (1930-'50s)*—Dr. Robert S. Olpin.

WPA artists and programs across the U.S. Celebration of "common imagery" muralists, regional movements. Farm Security Administration and photographers' documentation of the way Americans lived during and after World War II.

4. *Pop/Op/Modernism (1960-'70s)*—David Sucec.

The rise of popular imagery and subject matter in art—i.e., cartoon characters, TV images, advertising, etc. The impact of mass media, multiple media and instant access travel and communication. Warhol, Stella, Lichtenstein.

5. *Post-modernism (1980s)*—Henry Barendse.

The rearticulation of the forms and "isms" which came before..."appropriation," "neo-" everything, public art, photography. The search for unique expression. Public reaction, censorship issues.

6. *New Forms (1980s to the present)*—Dr. Angelika Pagel.

The intent to break with tradition to find new forms of expression. Multimedia, performance art, installations, non-static work, earthworks, collaborations, films and video.

Running simultaneously with "Art Basics" will be "Law Basics for Artists," a series of lectures on aspects of law relating to art. The series will address First Amendment issues, moral rights of artists (e.g., the right not to have someone alter one's art), contracts, copyright, trademark and licensing, and non-profit organizations. These are areas of law often addressed by members of Utah Lawyers for the Arts, who provide free legal services to qualifying artists and arts organizations.

For more information on Utah Lawyers for the Arts, Art Basics, or Law Basics for Artists, please call 482-5373.

Environmental Law

AN UPDATE FOR THE BUSY NATURAL RESOURCES PRACTITIONER

The Rocky Mountain Mineral Law Foundation will be sponsoring a two-day Special Institute on Environmental Law geared toward the natural resources practitioner. The Institute will take place in Reno, Nevada, on May 21 and 22, 1990, at John Ascuaga's Nugget Hotel.

Coverage during the first day of the program will include: new developments under the Clean Air Act, acid rain, regulation of toxic pollution under the Clean Water Act, wetlands and non-point source controls, an update on RCRA, and criminal liability. Presentations on the second day will focus on mining, and will encompass environmental programs in Nevada and other western states, bird kills at heap leach mining operations, community right to know and reporting, tribal environmental law programs, natural resources damages, and settlement of CERCLA suits.

For additional information, contact the Foundation at (303) 321-8100.

Notice of Creation of Indian Law Committee

An Indian Law Committee in the Natural Resources Section of the Utah State Bar Association has been created. Harold A. Ranquist of the firm of Wheatley & Ranquist has accepted the position of chairman of that committee.

All persons in the community, interested members of the Utah State Bar Association, and others having an interest in building a bridge for communication and discourse on Indian law issues of all kinds are encouraged to contact Mr. Ranquist, as follows:

Harold A. Ranquist
Wheatley & Ranquist
60 E. South Temple, #1225
Salt Lake City, UT 84111-1004
Telephone (801) 237-1700
FAX (801) 237-1701

Those interested in assuming positions of responsibility to establish the content of the first of a series of seminars and open meetings for the exchange of views and information, please contact Mr. Ranquist. The first organization meeting will be held at the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, Utah, at noon on May 9, 1990. Please RSVP (801) 531-9077.

WANTED
MULTITALENTED
ATTORNEYS

Did you have a life before law school? Do you have an expertise in addition to your legal preparation?

If you would be willing to share (not necessarily for free) your talents with the Bar, please add your name to a resource list to be shared with the bench and other legal groups who need foreign language interpreting, medical, psychosocial, etc., expertise. Please complete and return the following:

NAME _____

ADDRESS _____

TELEPHONE #s _____

AREA OF OUTSIDE EXPERTISE _____

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HOW EXPERTISE WAS GAINED AND/OR UTILIZED _____

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Please return to Paige Stevens, Bar Programs Administrator, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111.

1990 Utah State Legislature Annual General Session

By John L. Fellows
Associate General Counsel
and
Robin L. Riggs
Associate General Counsel
Office of Legislative Research and General Counsel

The second annual general session of Utah's 48th legislature concluded at midnight on February 21, 1990. Breaking all previous records for the number of bills and resolutions requested, introduced and passed, the session was tumultuous and highly political. Utah's state senators and representatives requested 1,209 bills and resolutions to be drafted for the 1990 session. After review by the legislators, 890 bills and resolutions were ultimately introduced. Of the 331 bills that passed both houses of the legislature, three were vetoed by the governor. The legislature also passed 83 resolutions.

In this article, we have attempted to highlight some of the 328 bills that became law that might be of interest to Utah's lawyers.

LANDLORD/TENANT

Attorneys involved in landlord/tenant relations should be aware of H.B. 43, Utah Fit Premises Act. It requires owners of residential rental properties to maintain them in a condition "fit for human habitation," in accordance with local ordinances and the rules of the board of health having jurisdiction in the area in which the residential unit is located. The bill also requires owners to provide each unit with electrical systems, heating, plumbing, and hot and cold water and prohibits owners from renting a unit unless it is "safe, sanitary and fit for human occupancy."

The bill requires renters to comply with the local rules of the appropriate board of health that "materially affect physical health and safety," maintain the premises in a clean and safe condition, dispose of all garbage in a clean and safe manner, use all facilities in a "reasonable" manner, be current on all payments required by the rental agreement, and compy with all other "appropriate" requirements of the rental agreement.

The bill allows a renter to bring a cause of action in the circuit or district court if an owner fails to comply with the health and safety standards required under the act. In order to do so, however, a renter must first be in compliance with the renter's requirements of health and safety under the act and then serve a written notice to the owner of the owner's non-compliance. The owner must then correct the condition within a "reasonable" time after receipt of this notice or, if the unit is "unfit for occupancy," may terminate the rental agreement and refund the balance of any rent paid. If the condition is not corrected after a "reasonable" time has elapsed, the renter may serve a "notice to repair or correct condition" citing the number of days since the previous notice was served. This period then constitutes the "reasonable" time allowed the owner to correct the condition. Upon a showing to the court of an "unjustified refusal to correct the failure or to use due diligence to correct a condition," the renter is entitled to damages and injunctive relief as determined by the court. The prevailing party shall be awarded attorneys' fees. However, an owner is not liable for claims for "mental suffering or anguish." The bill also provides that any unpaid charges owed to a water or sewer district by a renter are payable by the renter and do not constitute a lien on the rental property. The act takes effect on April 23, 1990.

ENVIRONMENTAL LAW

Attorneys with clients owning underground petroleum storage tanks may wish to review S.B. 26, Underground Storage Tank Amendments. The bill amends last session's Underground Storage Tank Act, Utah Code Ann. §26-14e-101 through 26-14e-702 (1989), which was enacted in response to federal requirements. S.B. 26 revises the requirements that a tank owner must meet in order to be eligible for payments from the state's petroleum storage tank fund for damages resulting from releases from a petroleum storage tank. It sets annual aggregate limits for coverage under the fund and revises the statute defining the circumstances under which fund monies can be spent.

Environmental lawyers, as well as attorneys representing counties and municipalities, will probably find S.B. 255, Waste Management Amendments, relevant to their practices. That bill provides that proposed facilities for disposal of solid,

radioactive or hazardous waste must meet comprehensive regulatory requirements, including certain siting requirments, submission of construction plans for disposal facilities, and payment of annual fees. The bill also requires cities and counties to develop solid waste management plans.

LABOR LAW

Labor lawyers should be familiar with H.B. 65, Revisions to Labor Code, which establishes a minimum wage for adults at $3.80 per hour beginning April 1, 1990, and gives the Industrial Commission the authority, beginning July 1, 1990, to establish the state minimum wage at a level not to exceed the federal minimum wage. The new law also allows the Industrial Commission to provide a separate minimum wage for minors that may be lower than that of adults. The bill provides for exemptions for the minimum wage for immediate family members, companionship service, domestics, seasonal employees, harvest laborers, students employed by their schools, prisoners, and seasonal hourly employees employed by a seasonal "amusement establishment." It also clarifies employment standards for minors, provides for criminal penalties for "repeated violations" of the minimum wage of both adults and minors, allows civil actions to be brought by both to enforce the right to a minimum wage, and gives the commission the authority to enforce the act, investigate for compliance and impose administrative penalties. The act took effect on February 14, 1990.

ADMINISTRATIVE LAW

For attorneys involved in an administrative practice, S.B. 273, Judicial Review of Administrative Rule, provides a procedure and standards for challenging state agency rules in court. The bill establishes exceptions to the general "exhaustion of administrative remedies" doctrine, provides for the contents of the complaint, and defines the district courts' options for relief upon administrative rules complaints. The bill also revises definitions and establishes the Court of Appeals as the appellate court for actions challenging administrative rules.

CRIMINAL LAW

Several bills affect lawyers practicing criminal law. H.B. 145, Privileged Communications Amendments, modifies the spousal privilege by allowing evidence of privileged communications between a husband and wife to be introduced in criminal proceedings charging child abuse or neglect. S.B. 11, Fourth Amendment Enforcement Act Repeal, conforms state law with the Utah Supreme Court's decision in *Utah v. Mendoza,* 748 P.2d 181 (Utah 1987), and revises Utah's "good faith" exception to the exclusionary rule. S.B. 27, Grand Jury Reform, replaces Utah's existing grand jury statutes with language establishing a statewide grand jury and authorizing special prosecutors. The problem of group or "gang" criminal activity is addressed in S.B. 52, Group Criminal Activity Penalties, which enhances penalties for specified crimes if the defendant and two or more other persons are criminally liable for the offense, even if the other parties are unavailable for prosecution. Finally, S.B. 143, Pardons and Paroles Amendments, increases the Board of Pardons from three to five and revises the board's operating procedures.

FAMILY LAW

Family law practitioners should review H.B. 56, Adoption Act Amendments, which establishes strict requirements for notice to and consent of putative fathers before an adoption may occur, as well as revising and clarifying adoption procedures generally.

"H.B. 145, Privileged Communications Amendments, modifies the spousal privilege by allowing evidence of privileged communications between a husband and wife to be introduced in criminal proceedings charging child abuse or neglect."

CIVIL LITIGATION

Civil litigators will probably wish to familiarize themselves with H.B. 145, Privileged Communications Amendments, which modifies the spousal privilege by allowing evidence of privileged communications between a husband and wife to be introduced in civil proceedings alleging child abuse or neglect. Also of interest is S.B. 194, Governmental Immunity for Damages of Police Pursued Vehicle, which retains governmental immunity for damages to property or injury resulting from collision of a vehicle pursued by a peace officer.

ALCOHOLIC BEVERAGE CONTROL

Of general interest to many was the passage of S.B. 141, Alcoholic Beverage Laws Revisions. The bill provided a comprehensive overhaul of all the alcoholic beverage laws of the state. The bill's highlights:

1. Prohibits "brown-bagging" in licensed restaurants, airport lounges, private clubs and beer taverns, but allows cork-finished wines to be brown-bagged into restaurants and private clubs with the consent of the licensee. No brown-bagging is allowed in unlicensed establishments, but brown-bagging is allowed at privately hosted functions that are not open to the general public.
2. Doubles the number of restaurant liquor licenses and increases the number of private club licenses by 40. This increase in licensed establishments is intended to offset the loss in total number of establishments where liquor is served caused by the elimination of brown-bagging.
3. Expands the hours of sale of liquor in restaurants from 4:00 to 1:00 p.m. on weekdays and from 4:00 to 12:00 p.m. on weekends.
4. Replaces mini-bottles with one-ounce drinks dispensed by calibrated metered dispensing devices. No double may be served and no "happy hours" are allowed under the new law. However, wine may be served by the glass in 5-ounce quantities. The only mini-bottles allowed will be those authorized by the Alcoholic Beverage Control Commission for higher priced varieties.

The bill also prohibits advertising in sports arenas, but allows limited recognition for sponsorship of events, allows licensed establishments to identify themselves as state liquor licensees, requires malt beverages to be identified as alcoholic beverages in stores, eliminates the retail sale of beer kegs, requires minors who sell beer in stores to be supervised by an adult, requires state licensure of beer taverns, and provides for liquor lounges at the Salt Lake International Airport.

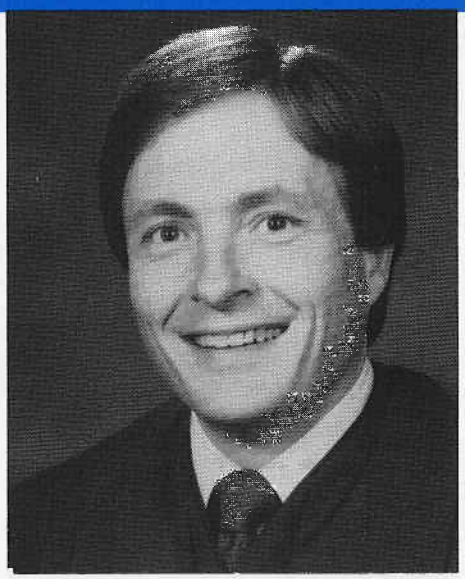
In addition, the new law allows brown-bagging in limousines if the driver is separated from the passenger and passengers are not required to drive after the trip, and on chartered buses if an employee other than the driver is present to monitor over-consumption.

Finally, the bill requires licensees to show proof of dramshop liability of a minimum amount of $100,000 per occurrence and $300,000 in the aggregate in order to obtain or renew a liquor license. The bill takes effect in different stages up to July 1, 1991.

The bills discussed in this article represent our selection of bills likely to interest practicing attorneys. Copies of these bills, or any other bill passed by the legislature in

the 1990 General Session, may be obtained at the Capitol. House bills may be obtained from the offices of the House of Representatives in room 318, and Senate bills may be obtained from the offices of the Senate in room 319. Specific questions concerning the substance of the bills, or the legislative or political history, can be obtained from the sponsor or by contacting the drafting attorney in the Office of Legislative Research and General Counsel.

The Utah Legislature continues to debate and formulate public policy when not in annual or special session. Beginning in April, the Legislature's 15 interim committees and 13 special subject task forces will begin meeting at least monthly. Participation in the interim process is an effective means to assist in developing and formulating public policy. Interim committees will review and propose legislation on some of the 266 items assigned to them, while task forces will discuss and prepare legislation governing such diverse topics as handicapped services, special taxing districts, environmental quality, abortion, public education governance, alcoholic beverages, information practices, wilderness, transportation, and development of the Bear River. Persons interested in participating in or monitoring the interim committee or task force process can obtain information or be placed upon the mailing list by contacting the Office of Legislative Research and General Counsel.



Sentencing: A Call for Creative Lawyering

By Judge Roger A. Livingston

JUDGE ROGER A. LIVINGSTON received his Bachelor of Science degree in political science in 1972 from the University of Utah and his Juris Doctor degree in 1975 from the University of Utah College of Law. He was appointed to the Third Circuit Court bench in 1988. Prior to his appointment, he served as Chief Deputy, Salt Lake County Attorney and two terms in the Utah State Legislature.

In December 1989, Judge Robert Sweet of the District Court in Manhattan created a controversy of sorts by becoming the nation's first Federal Judge to publicly join the relatively small—albeit growing—number of academics and public officials calling for legalization of drugs, including heroin, cocaine and crack.

With all due respect to the learned jurist from New York, I vigorously dissent. It is simply not true that the so called "war on drugs" is failing. Indeed, total illegal drug use in this country has been reduced by 37 percent since 1985, and use among 18 to 25 year olds is down 53 percent for marijuana and 52 percent for cocaine since 1977. Efforts should be enhanced in education, treatment, interdiction of importation and production of illegal drugs, and yes, criminal prosecution of both the supplier and user. This is hardly the time to run up the white flag and surrender!

The point I wish to develop is not to argue against the decriminalization of drugs, but rather to discuss an issue that may be at the heart of Judge Sweet's comments, and that is the failure of the criminal justice system in many instances to adequately deal with the problem in terms of sanctions.

Those who support legalization of drugs are really saying, at least in part, that simply imposing fines and/or incarceration is not a good enough solution. Dealing daily with the proverbial revolving door could certainly lead one—more out of an overwhelming sense of frustration than thoughtful analysis—to throw up his arms and cry out for the radical step of legalization. I prefer to propose a much more modest measure: More creative and effective sentencing options.

Not only in the area of drug cases, but in virtually every area of the criminal practice, prosecutors and defense attorneys need to be more assertive, bold and innovative in presenting to the courts sentencing alternatives that go to the very heart of the problem and deal in a constructive way in both protecting societal interests and the rights of the accused.

It is my observation that the most skilled and able attorneys and those who best represent the interests of their clients in criminal matters are those attorneys who are keenly aware of and involved in the sentencing process. They come to court armed with information and prepared with specific sentencing proposals. Similarly, prosecutors need to realize that only part of their task is completed with a conviction is obtained. The vast majority of criminal cases running through the courts of this state are resolved through plea negotiation, and at sentencing, regrettably, the defense attorney only makes a plea for either limited or no incarceration, and the prosecutor simply says, "We'll submit it." It's enough to cause a judge to feel like a blind man who has been given a hammer and nails! Even in those instances in which a pre-sentence report is prepared by Adult Probation and Parole, County Alcohol or a private provider, often there is no substantial input from the attorneys for either side. While the pre-sentence report is generally helpful in terms of providing personal information about the defendant including his background, education and criminal history, typically there is little, if any, participation by the attorneys. The problem may partly result from the incorrect perception that sentencing is a process between the court and the agency preparing the report.

The sort of information which would be of value to the sentencing court would include: What of restitution to the victim? What specifically is the defendant able and willing to do to make the victim whole or to pay back the community generally? What counseling or educational program is actually available to deal with the core issues and underlying problems? What can and ought to be done to reasonably ensure no further violations? Attorney input in these areas representing the unique perspective of prosecutor and defender is vital, and I believe cannot be replicated by a third party.

To defense attorneys, may I suggest that you ought to be at least as vigorous in your preparation regarding sentencing as you are in negotiating the plea resolution? Rather than merely state that incarceration is not appropriate, you should consider suggesting what sanctions and specific conditions of probation will ensure that your client's behavior will, in the future, not be violative of the law. Rather than merely asking the court to impose a lesser fine because of lack of income, why not suggest that the court require as a condition of probation that the defendant complete a high school equivalency or get job training and that the cost of the education be offset, at least in part, against the fine? The key is having a specific plan for the court that is tailored to the needs and situation of the defendant. Not only is the client far better served by actually dealing with the real problems (problems such as substance abuse and addiction, lack of education and marketable skills, emotional illness, and personal and family disorders are among the most common), but also the community and taxpayers are benefited more, for instance, by an offender completing high school, getting specific job training, receiving substance abuse counseling, and verifying his non-usage of drugs through random urinalysis than by simply imposing a period of incarceration and fine.

To prosecutors, I would urge you to also be more pro-active and creative in sentencing recommendations. You, after all, represent the community and ought to speak for those interests. Perhaps out of an abundance of caution not to tread too far in the territory of the court, prosecutors are hesitant to make sentencing recommendations. It is, after all, an adversarial system, but too often prosecutors cease to be advocates and say nothing—provide no input whatsoever—in the sentencing phase. In fact, it is rather commonplace for the prosecutor to state at sentencing the government has agreed as part of the plea negotiation to remain silent at sentencing. What is that supposed to mean? Is the government then agreeing with the defendant in a plea for leniency, or in fact, does the government oppose that request but won't say so for some unspoken reason? That is not the kind of input that the court finds particularly helpful. I don't know of a judge in this state who doesn't want and would not welcome input from the prosecutor speaking on behalf of the people. It matters not whether the suggested sanctions are made orally in open court or through the vehicle of a pre-sentence report, but they need to be made. They may be wholly adversary (if the interests of justice require substantial incarceration, then say so—and say why!) or they may be a matter of mutual agreement as a consequence of plea negotiation. A prosecutor is also the appropriate mouthpiece to present the victim's view and police perspective. I would urge you to use your best efforts to fashion and then advocate sentences that realistically deal in a profound and fundamental way with the core problem.

At the risk of being somewhat presumtuous, may I attempt to make order from these ramblings and propose five suggestions that attorneys and others ought to consider with respect to sentencing:

1. **Don't End Negotiations When the Bargain is Struck.** Once a negotiated plea is agreed upon, it is possible that the sentencing hearing can be less confrontational. The prosecutor and defense attorney should seek to identify areas of common agreement and, to the extent possible, elevate the dialogue to the level of real problem solving.

"My concern is that often both sides quit too soon—before the most critical juncture. By focusing more attention on the lawyer's role in the sentencing process, I believe that the criminal justice system can, in fact, make significant improvements in its capacity to alter human behavior and its ability to confront and solve root problems."

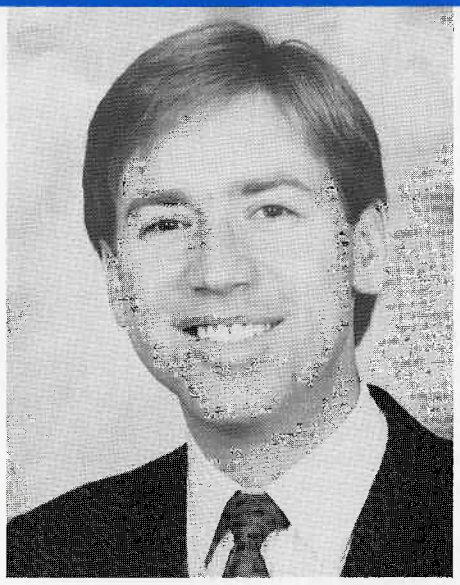
2. **Use a Pre-Sentence Report as an Aid, Not as a Substitution for Advocacy.** Consider a pre-sentence report an additional vehicle for the attorneys to utilize as advocates. When the court calls for the preparation of a pre-sentence report, do not view that as a signal that the attorneys' duty has diminished. A pre-sentence report, even with its matrix and attendant recommendations, is only an aid which should be crafted with the assistance of attorneys and then used by them to fashion a resolution to the problem.

3. **Identify Specific Programs and Providers.** Rather than merely suggesting that the defendant ought to enter some treatment program in lieu of or after some shortened period of incarceration, carefully select the program best suited for the defendant and the situation. Make tentative arrangements (including cost considerations) with that provider. A word of caution: do not be limited to only institutional solutions. Tell the court why the proposed treatment or program is the best solution.

4. **Expanded Education and Training.** Both the Bar and bench, in the context of continuing education, ought to place some emphasis on exploring the issues involved with sentencing options. There needs to be ongoing reflection and study concerning alternative sanctions. We need serious minds to focus on how we should use the tools we have in the most effective way. The subject of sentencing options is wide open for discussion, research and serious thinking on both the theoretical and the practical level.

5. **Commit Resources to the Sentencing Process.** Prosecutor and defender offices ought to shift resources to a limited extent to allow their attorneys sufficient time to be more active in sentencing. Similarly, courts should allocate sufficient time in their schedules and calendars to allow needed input and thoughtful reflection. Perhaps legislators and other policy makers ought to re-examine adding surcharges to sentences as if defendants were never-ending sources of revenue. Rather than simply providing funding for government programs, more emphasis should be placed on defendants paying for the costs associated with their personalized treatment program.

The attorneys of this state who practice in the criminal courts, I believe, are by and large outstanding practitioners who represent their clients and the state very well. My concern is that often both sides quit too soon—before the most critical juncture. By focusing more attention on the lawyers' role in the sentencing process, I believe that the criminal justice system can, in fact, make significant improvements in its capacity to alter human behavior and its ability to confront and solve root problems.



Officer's Message
The Reality of Reciprocity

By Keith A. Kelly
Treasurer, Utah Young Lawyers Section

A lunch in Washington, D.C., introduced me to the reality of reciprocity. It was fall of 1983, and I was hoping to get a summer clerkship with a D.C. law firm. I had just finished a morning of interviews, and two senior partners took me to lunch to size me as a potential associate.

One partner was describing his firm's sophisticated antitrust practice. Then, for some reason, he started a story: "I remember when my opponent and I went several years without a real vacation."

"How did that happen?" I responded.

"Well, I was litigating a large antitrust case with opposing counsel who was trying to annoy me," he explained. "So, when I made plans to take time off with my family, he filed a motion specifically designed to make me cut my vacation short."

"Couldn't someone else at your firm have handled the motion?" I asked.

"No, my client wanted me to handle such matters." Then he continued: "So, upon returning, I called my opponent and told him that he would never be able to take an uninterrupted vacation as long as we were litigating that case." Then the senior partner explained that he had made good on his threat. Neither let the other take a vacation while the large case was pending. The opponent eventually called and asked for a "truce." But the partner explained that he would not relent, because the opponent had struck the first blow.

After law school, I chose Utah over Washington, D.C. Since coming to Utah, I have never lost vacation time because of a spiteful opponent. But I have recognized that reciprocity is a reality here, as much as it is in D.C. It comes in the form of returning phone calls, seeking client approval for helpful opponent extensions, and being courteous despite heated litigation. It is based upon a recognition that, while a good advocate fights hard in the arena, he or she recognizes the other as an officer of the court who is worthy of respect and fair treatment.

Those who ignore the reality of reciprocity face consequences. When faced with a spiteful opponent, I (like most young litigators I know) try to respond by not being a jerk in return, but by working harder and preparing better—so the spiteful opponent will not benefit by his or her misconduct.

At the same time, the consequences go beyond a particular case. A senior member of the Bar tells of the time his friend was appointed to the bench. Within a few days of her appointment, she received over 100 phone calls and notes. One in particular came from opposing counsel who had been extremely difficult to deal with in litigation. One never knows where opposing counsel will be in a few months or years.

Reciprocity for our profession. The reality of reciprocity extends beyond intra-lawyer relationships. As a profession, I believe that we owe a duty of reciprocity arising from our privileged position in society.

We are privileged because, as a practical matter, we hold the keys to the legal system. Persons who want to effectively protect their rights must work through us. They must come to us to effectively obtain compensation for their injuries, protection of their constitutional rights, custody of their children after divorce, and disposition of their assets after death.

We are also privileged because of our educational backgrounds. Our profession not only requires seven years of college, but it keeps us abreast of our ever-changing legal system. If you want to find someone who understands how power is dispensed in our society, it is usually best to ask a lawyer.

Because of our privileged position, we are typically well-compensated for our work.

Thus, I believe our position creates two basic obligations of reciprocity. First, we should work to ensure that basic legal knowledge is available to the public. And second, we should try to ensure justice is available for all, even for those whose incomes are low.

Despite time and financial constraints, we should each make efforts to carry out these obligations by doing pro bono and community service work. If we don't act as a bar, no one else will take our place. Quite simply, no other group holds the keys to our legal system.

YLS to Sponsor Program to Fill the Empty Bookshelves of Three School Libraries

The Young Lawyers Section Needs of the Children Committee has undertaken a project to help fill the empty bookshelves of three school libraries in the Granite School District. The three schools are Thomas Jefferson Junior High School, 5850 S. 5600 W., Kearns; Hunter Junior High School, 6131 W. 3785 S., West Valley City; and Taylorsville Elementary School, 2010 W. 4230 S., West Valley City. These three schools are relatively new and have no available funds for acquiring adequate library collections. Ironic as it is, the brand-new libraries in these schools are virtually useless to students who need to learn research skills and whose exposure to the world of books is limited. The district's allotment for purchasing library books falls well below the national average and so does the number of books per student at these schools. Each school averages fewer than five books per student. For a "low" national average, schools should average at least 19 books per student.

The cost of filling the empty shelves at these libraries is prohibitive when these schools receive only diminutive portions of the district's budget. Yet, denying children access to books, in of all places, their schools, is outrageous!

The Young Lawyers Section Needs of the Children Committee has approached the Utah State Bar Commission with a proposal to contact local law firms, corporations, publishing companies and individuals to encourage them to "adopt" a book or an empty shelf in one of these three school libraries. Student-designed bookplates and shelfplates will be placed with every book or shelf that is adopted.

For more information on "adopting" a library book or an empty bookshelf, please contact Sandra Sjogren, Chairperson of the YLS Needs of the Children Committee, at 538-1021 or Colleen Larkin Bell, YLS Chairperson of the subcommittee, School Libraries Project, at 534-5534.

Mock Interviews Held at Law Schools for First Year Students

The Membership Support Committee of the Young Lawyers Section of the Utah State Bar recently sponsored mock interviews for first-year law students at the University of Utah College of Law and J. Reuben Clark Law School at Brigham Young University. Matthew C. Barneck of Campbell, Maack & Sessions was in charge of the University of Utah interviews, and David J. Crapo of Holme Roberts & Owens was in charge of the Brigham Young University interviews. The purpose of the program was to help first-year law students get a head start on proper interview techniques.

At the University of Utah, approximately 40 students and 21 attorneys participated on the evenings of February 15 and 20, 1990. Each student was given three interviews with a different pair of young lawyers acting as hypothetical employers in each interview. At the end of each interview, the students were given comments designed to help them sharpen their interviewing skills.

At Brigham Young University, approximately 85 students and 20 attorneys participated on the evening of February 15, 1990. Each student was given two interviews with a different individual interviewer. Attorneys completed critique and evaluation forms on each student. At the end of the evening, a panel discussion was held with the attorneys to answer general questions of the students and to give advice on good interviewing techniques.

Both Francine F. Curran, Director of Placement at the University of Utah College of Law, and Kathy Pullins, Director of Placement at J. Reuben Clark Law School, believed the program to be a great success and expressed a desire to continue the program next fall.

Law for Clergy Handbook Available

The Utah Law for Clergy Handbook, compiled by the Law for the Clergy Project of the Young Lawyers Section of the Utah State Bar, is now available to the public. The handbook is a guide to law and programs that affect clergy. Copies may be obtained from Blake Ostler, Chairperson for the Law for the Clergy Project, at Kirton, McConkie & Poelman, at 321-4893. If a request is made by mail, please include a self-addressed postage prepaid envelope.

Lawyers Available to Speak on Issues Affecting Clergy

The Law for the Clergy Project of the Young Lawyers Section of the Utah State Bar is sponsoring a program which offers the services of lawyers who will discuss and inform groups regarding issues affecting the clergy. Discussions could include topics such as First Amendment Rights, priest/penitent privilege, and tax laws as they relate to clergy and churches. For more information, contact either Blake Ostler at Kirton, McConkie & Poelman, at 321-4998, or Mark Swan at Richer, Swan & Overholt, at 539-8632.

New Address or Phone?

Please contact the Utah State Bar when your address or phone number changes. This will ensure accurate information for Bar records and for the Annual Bar Directory.

Call (801) 531-9077 or toll-free from outside Salt Lake City 1-800-662-9054, or use this coupon and mail.

Name _____

Bar Number _____

Old Telephone _____

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Old Address _____

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Mail to: **The Utah State Bar**
645 South 200 East
Salt Lake City, Utah 84111

UTAH BAR FOUNDATION

Utah Bar Foundation Helps Utah Judges Continue Their Education

Over the last few years, the Utah Bar Foundation has awarded grants to the National Judicial College to pay tuition of Utah judges attending educational programs at the college. In 1989, the Utah Bar Foundation awarded a $5,000 grant to the college for such purposes. The college was founded in 1963 under the leadership of U.S. Supreme Court Justice Tom C. Clark to improve the administration of justice by increasing the effectiveness of our nation's state trial judges through continuing education and training. The college is the nation's leading judicial education and training institution. Located in Reno, Nevada, the college conducts education and training courses for judges of all jurisdictions from all states, commonwealths, territories, and possessions. The college offers general courses providing newer judges with a comprehensive overview of judicial authority, duties and responsibilities. The college also provides advanced and special courses which emphasize special judicial skills and better court management techniques.

During 1989, the college presented seminars, symposia and programs for 2,351 judges and court personnel from around the nation. Over 60 Utah judges attended programs in 1989, on such varied subjects as jurisdiction, legal ethics, the decision-making process, special problems in criminal evidence, search and seizure, trial management, judicial writing, employment discrimination, drugs, bioethical issues, and computers in the court. The Utah Bar Foundation is pleased to participate in assisting the continuing education and training of Utah judges to keep them current on new trends and developments.

Reminder

Ballots to vote for trustees for the Bar Foundation have arrived or will be arriving soon. Take the time to vote.

Notice of Acceptance of Grant Applications

The Utah Bar Foundation is now accepting applications for grants. Grants are made 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.

For grant application forms or additional information, contact Kay Krivanec at 531-9077. All grant applications must be received by the Foundation before 5:00 p.m., May 31, 1990, at the Foundation's office at 645 S. 200 E., Salt Lake City, UT 84111.

CLE CALENDAR

DISCIPLINE AND DISCHARGE

The American Arbitration Association and the Labor and Employment Section of the Utah State Bar are pleased to announce a two-day seminar on Discipline and Discharge. The seminar will provide an overview of discipline issues in the office, shop and factory, a legal update and the current arbitral view on such critical issues as drugs, alcohol and harassment and provide skills training by allowing participants to dissect and analyze several discipline cases in small groups with the guidance of an experienced labor arbitrator. Instructors and participants will also analyze and evaluate the "just cause" and "due process" standards in discipline cases.

The seminar will be led by experienced labor and management practitioners who will examine fundamental concepts of equitable discipline, explore alternative approaches to common discipline problems, and discuss how to use the grievance procedure for resolving discipline issues. Keynote speakers and instructors for Day One include attorney Arthur Sandack and National Semi-Conductor Human Resource Manager John J. Campbell. Day Two will be led by well-known labor arbitrators William E. Renfro of Boulder, Colorado and David A. Concepcion of Berkeley, California.

Labor and management advocates in both the private and public sectors who are involved in the negotiation, policy setting, handling, advocacy or resolution of employee discipline issues will want to participate in this seminar.

CLE Credit:	16.5 hours
Date:	May 3 and 4, 1990
Place:	Salt Lake Hilton Hotel
Fee:	$395 standard fee $295 for Utah Bar Members
Time:	8:30 a.m. to 5:00 p.m.

FAMILY LAW SEMINAR ON TRIAL AND EVIDENCE

This day-and-a-half seminar presented by the Family Law Section will include a presentation of direct and cross-examination of experts in areas of custody and visitation, estate and business valuation, and real property valuation. The format of the program will be direct and cross-examination of the same experts by four attorneys in each of these areas to give participants an overview of the different approaches available. The examinations will be followed by a panel discussion of judges, experts and attorneys. There will also be a one-hour overview of current developments in case law affecting Family Law to conclude the seminar.

CLE Credit:	10 hours
Date:	May 10 and 11, 1990
Place:	Utah Law and Justice Center
Fee:	$125, $110 for section members
Time:	May 10, 8:00 a.m. to 5:00 p.m. May 11, 8:00 a.m. to 12:00 p.m.

CORPORATE COUNSEL SECTION SEMINAR

The "Professional Liability of In-House Counsel" will be the lead topic of a half-day seminar presented by the Utah State Bar Coporate Counsel Section. The seminar will focus on three different topics addressing the ethical and practical concerns of malpractice for in-house counsel. The program is recommended for all attorneys working for or representing corporations. Ethics credit is pending for this program.

CLE Credit:	4 hours
Date:	May 16, 1990
Place:	Utah Law and Justice Center
Fee:	$50
Time	7:30 a.m. to 12:00 p.m.

ENERGY, NATURAL RESOURCES AND ENVIRONMENTAL LAW SECTION'S ANNUAL UPDATE LUNCHEON

CLE Credit:	1 hour
Date:	May 16, 1990
Place:	Utah Law and Justice Center
Fee:	None (cost of lunch) Register by RSVP to Bar Reservations; 531-9095
Time:	12:00 to 1:30 p.m.

CRIMINAL LAW ISSUES AND TRIAL PRACTICE

The Criminal Law Section of the Utah State Bar will be sponsoring a seminar May 4 and 5, 1990. On May 4, the program will involve three hours of criminal law issues. There will be presentations relating to search and seizure, confessions and sentencing. The focus will be to update criminal tactics and procedures. On May 5, there will be a six-hour trial practice program. Subjects will include: developing a theory of the case, new developments in evidence, using demonstrative evidence, preparation of and cross-examination for expert witnesses, opening and closing arguments, and creative ways to present your case to a jury.

The trial practice seminar is intended to be applicable to both civil and criminal litigation. Registrants may enroll in the criminal law or trial practice programs separately. Discounted registration fees will be available to public defenders, attorneys who have local public defender contracts and prosecutors including city attorneys, deputy county attorneys, assistant attorney generals and assistant United States attorneys. Discounted room rates at the Cliff Lodge are available for all registrants.

CLE Credit:	9 hours
Date:	May 4 and 5, 1990
Place:	Cliff Lodge at Snowbird
Fee:	Standard full package: $160 Fri. $70, Sat. $120 Discount full package: $140 Fri. $60, Sat. $110
Time:	May 4, 1:30 to 4:30 p.m. May 5, 9:00 a.m. to 4:30 p.m.

HOSTILE CORPORATE TAKEOVERS

A live via satellite program. The United States Supreme Court in its opinion in the CTS case and its denial of certiorari in the Amanda case has tipped the balance toward corporate governance through state takeover legislation, and Congress, the SEC and the Administration are still not responding. Lower courts are regularly validating increasingly tough state takeover statutes and poison pills. Some of the older techniques (such as proxy contests to remove an entire board) as well as non-stockholder "constituencies" legislation are re-emerging with enhanced vitality. This seminar addresses these dynamic and continuing changes from the varying perspectives of the major players: raiders, target companies, investment bankers, and institutional investors as well as the Courts and State Legislatures.

CLE Credit:	6.5 hours
Date:	May 8, 1990
Place:	Utah Law and Justice Center
Fee:	$175 plus $19.50 MCLE fee
Time:	8:00 a.m. to 3:00 p.m.

MILITARY LAW SECTION LUNCHEON

This course consists of a discussion of the Federal Ethics program with specific guidance on the application of that program to members of the Bar. The program will discuss existing statutory and regulatory law with emphasis on recent changes in those laws. There will be a discussion of recent case law as it applies to the topic.

CLE Credit:	1 hour (ethics)
Date:	May 8, 1990
Place:	Utah Law and Justice Center
Fee:	None (cost of lunch)
Time:	12:00 to 1:00 p.m.

HAZARDOUS WASTE AND SUPERFUND 1990

A tape-delay seminar. This seminar will present in-depth coverage with key EPA and Justice Department officials of EPA's latest policies under the Superfund program and the Resourse Conservation and Recovery Act. The program will feature interviews and detailed discussions about EPA's directions in these programs. Emerging hazardous waste policy and legislative issues also will be discussed, including EPA's final "third-third" land ban regulations, which will be issued only two days before the teleconference.

CLE Credit:	4 hours
Date:	May 17, 1990
Place:	Utah Law and Justice Center
Fee:	$135 (plus $12 MCLE Fee)
Time:	10:00 a.m. to 2:00 p.m.

RECENT DEVELOPMENTS IN REAL PROPERTY LAW

This half-day seminar will include presentations covering a review of recent case law and legislation relating to real property issues, a discussion of the liability of guarantors and zoning issues from the perspective of the real estate developer and the municipality.

CLE Credit:	4 hours
Date:	May 18, 1990
Place:	Utah Law and Justice Center
Fee:	$45
Time:	9:00 a.m. to 12:30 p.m.

AUTOMATING THE DRAFTING OF WILLS AND TRUST AGREEMENTS

A live via satellite seminar. The techniques which will be discussed range from the very basic to the most sophisticated. The concepts will apply to simple "mom and pop" wills, but will also work with complex three trust (marital deduction, exempt generation-skipping and non-exempt generation-skipping trusts) estate planning documents. The word processing examples from WordPerfect may be helpful to you in other substantive areas as well. The introduction to the demonstration of a document assembly engine will give you a look into the future. Whether you use a manual system, a word processing system or are ready to move to a document assembly system, the principles discussed in this seminar should help you meet your drafting challenges in a more efficient and effective way.

CLE Credit: 6.5 hours
Date: May 22, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $19.50 MCLE Fee)
Time: 8:00 a.m. to 3:00 p.m.

ESOPs: THE NEXT GENERATION

The 1989 tax law changes, while important, have not significantly detracted from the capability of ESOPs to provide a tax efficient means of raising corporate capital, a ready market for the interest of departing shareholders, a valuable benefit and incentive to employees, and a substantial deterrent to unwanted suitors. Following close on the heels of these tax law changes, the Emerging Issues Task Force of the Financial Accounting Standards Board announced a series of new rules on company accounting for ESOPs. These rules will have a major impact on the way ESOP liabilities and expenses are reflected in the corporate financial statements.

This seminar will bring practitioners up to date on these important changes, help them assess the impact on potential ESOP companies and transactions, and learn about responses being devised by experts in the area.

CLE Credit: 4 hours
Date: May 31, 1990
Place: Utah Law and Justice Center
Fee: $135 (plus $12 MCLE Fee)
Time: 10:00 a.m. to 2:00 p.m.

REPRESENTING REAL ESTATE INTERESTS IN BANKRUPTCY REORGANIZATIONS

A live via satellite seminar. This program explores bankruptcy and real estate issues from two different but related perspectives. This live telecast will consider the representational issues that are raised when your client's real estate venture goes sour and faces the prospect of bankruptcy reorganization. In addition, the telecast also will consider the practice issues raised when the users of your client's real property enter the reorganization process. A panel of experts will explore practical strategies and proven techniques which maximize the protections afforded your client's real estate interest during the pre-bankruptcy work-out phase or the actual reorganization. Along with the impact of reorganization upon traditional forms of real estate interests, the program will consider the more exotic real estate arrangements such as reciprocal easement agreements, condominiums, time-shares and sale-leasebacks.

CLE Credit: 4 hours
Date: June 7, 1990
Place: Utah Law and Justice Center
Fee: $135 (plus $12 MCLE Fee)
Time: 10:00 a.m. to 2:00 p.m.

BANKRUPTCY SECTION LUNCHEON

CLE Credit: 2 hours
Date: June 14, 1990
Place: Utah Law and Justice Center
Fee: $30 (includes lunch)
Time: 12:00 to 2:00 p.m.

ANNUAL TELECONFERENCE ON SECURITIES REGULATION

A live via satellite seminar, this teleconference will explore the securities issues that are of current importance to corporate and securities practitioners and to in-house counsel in this rapidly changing financial, corporate and regulatory climate. The seminar will examine current problem areas in securities disclosure. The discussion will concentrate on those disclosures which cause the greatest difficulties for practitioners, including the timing of disclosures, and when and what "bad" information must be disclosed. The panel will also examine the responsibility of counsel and client, where the disclosure of government investigations is at issue. This program will also focus on handling SEC investigations and enforcement actions.

CLE Credit: 4 hours
Date: June 21, 1990
Place: Utah Law and Justice Center
Fee: $135 (plust $12 MCLE Fee)
Time: 10:00 a.m. to 2:00 p.m.

TRANSFER OF TECHNOLOGY FROM UNIVERSITIES TO INDUSTRY AND THE PRIVATE SECTOR

The Utah State Bar and other sponsors are pleased to announce a conference examining the transfer of technology from universities to private businesses. Valuable and diverse technologies have been created, and continue to be created, within the universities of our state. These technologies are available for commercialization by the private sector.

The Conference will address legal and business issues relevant to the transfer of technology from universities to the private sector. The Conference will also provide an opportunity to meet the officials of Utah's major universities who are responsible for technology transfer.

CLE Credit: 4 hours
Date: June 8, 1990
Place: Utah Law and Justice Center
Fee: To be announced
Time: 9:00 a.m. to 1:30 p.m.

UTAH STATE BAR ANNUAL MEETING

This year's Annual Meeting will be held in Beaver Creek, Colorado. CLE topics include: Family Law Panel, Litigation Support, Civil, Corporate and Criminal Law Clinics, Gender Issues, Governmental Immunity, Tort Litigation, ADR, Securities Law, Employment Law, Depositions, and a two-hour ethics panel on Rule 11 and the Rules of Professional Conduct. A total of 13 Utah CLE credits are possible for attending this program, including two hours of ethics credit. This is an excellent opportunity to help fulfill the new mandatory CLE requirements. Watch for future mailings with registration information. For further information on CLE portions of the meeting, contact Tobin Brown at (801) 531-9095.

CLE REGISTRATION FORM

DATE	TITLE	LOCATION	FEE
May 3-4	Discipline and Discharge	S.L. Hilton	$395 $295 (For Bar Members)
May 4-5	Criminal Law Issues and Trial Practice	Cliff Lodge	$155 (See above)
May 8	Hostile Corporate Takeovers	L&J Center	$175
May 10-11	Family Law Seminar	L&J Center	$125
May 16	Corporate Counsel Seminar	L&J Center	$50
May 16	Energy and Natural Resources Lunch	L&J Center	None
May 17	Hazardous Waste and Superfund 1990	L&J Center	$135
May 18	Recent Developments in Real Property Law	L&J Center	$45
May 22	Automating the Drafting of Wills and Trust Agreements	L&J Center	$175
May 31	ESOPs: The Next Generation	L&J Center	$135
June 7	Representing Real Estate Interests in Bankruptcy Reorganizations	L&J Center	$135
June 14	Bankruptcy Luncheon Seminar	L&J Center	$30
June 21	Annual Teleconference on Securities Regulation	L&J Center	$135
June 27-30	Annual Meeting	Beaver Creek, Colo.	

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1990. Watch for future mailings.

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

Bar Number American Express, MasterCard/VISA Expiration Date

CLASSIFIED ADS

For information concerning classified ads, contact Kelli Suitter or Paige Stevens at 531-9095.

POSITIONS AVAILABLE

ASSOCIATE GENERAL COUNSEL: Work with General Counsel in providing legal assistance to the Judiciary; provide legal representation in judicial and administrative proceedings; assist Judicial Council and Supreme Court Advisory Committees in development of court policy and rules on procedure; other legal responsibilities. QUALIFICATIONS: JD degree, member Utah State Bar; one-year experience desirable. SALARY: $28,968 to $35,612. CLOSING DATE: May 31, 1990. Complete information and applications may be obtained by contacting Joan Tegt at the Court Administrator's Office, 230 S. 500 E., #300, Salt Lake City, UT 84102. Phone 533-6371.

CHIEF COUNSEL. Sinclair Oil Corporation, an integrated oil company, seeks a mature, seasoned attorney to head its corporate legal department in Salt Lake City. The ideal candidate will have 10 years' broad legal experience in the petroleum industry and in general corporate practice.

ENVIRONMENTAL ATTORNEY. This new position at Sinclair will also be located in Salt Lake City. We seek an individual with a technical undergraduate degree and two years' experience in environmental legal affairs.

Interested individuals should forward a current resume in confidence to W.C. White, Human Resources Director, Sinclair Oil Corporation, P.O. Box 30825, Salt Lake City, UT 84130-0825. An Equal Opportunity Employer.

ASSOCIATE ATTORNEY—SACRAMENTO, CALIFORNIA. Downey, Brand, Seymour & Rohwer, a large, well-established and aggressive Sacramento firm, is offering a highly competitive salary and benefits package to an individual with superior qualifications in the area of Oil and Gas. We are seeking an associate with one to three years' experience to work in an expanding oil and gas practice. The position emphasizes title, natural gas transportation and related litigation issues. Qualified applicants should send resumes in confidence to: Stephen J. Meyer, DOWNEY, BRAND, SEYMOUR & ROHWER, 555 Capitol Mall, Tenth Floor, Sacramento, CA 95814. **No phone calls please.**

POSITION SOUGHT

25-year member, last 10 with a corporation, seeks a full-time associate position with a small- to medium-sized firm, or comparable position. Experience in Litigation, Domestic Relations and Real Property Law. Please reply to Utah State Bar, Box B, 645 S. 200 E., Salt Lake City, UT 84111.

ATTORNEY SERVICES NEEDED

ATTORNEYS NEEDED FOR LEGAL REFERRALS—Free attorney enrollment but attorneys must provide free initial consultations and 10 percent off their usual fees. For more information, call (206) 682-4581.

OFFICE SPACE AVAILABLE

One or two beautiful window offices in professionally decorated suite available for sublease from small law firm. Complete facilities, including FAX, telephone, conference room, library, kitchen. Reception service provided. Gorgeous building featuring center six-story atrium with fountain. Please call 269-0200.

OFFICE SHARE ASSOCIATE: Established firm overlooking Sugarhouse Park. Excellent freeway access. Attractive suite, large individual office with fine view. Call 486-3751.

Attractive office and location in Salt Lake City with well-established practitioners. $440 per month includes phones, reception services, photocopying, conference room and parking. Secretarial, FAX and telex services are available, if desired. Call us at 487-7834.

Special Notice
Court Commissioner
Third District Court

DUTIES: Holds domestic pre-trial settlement conferences and order to show cause hearings, makes recommendations to judge. Holds domestic violence hearings and competency hearings for civil commitments; other legal duties.

LOCATION:Salt Lake City. QUALIFICATIONS: JD, Membership in Utah Bar, five years domestic relations legal experience. SALARY: $57,275 per year. APPLICATIONS AND INFORMATION: Juan Benavidez at Court Administrator's Office, 230 S. 500 E., Suite 300, Salt Lake City 84102. Phone 533-6371. Closing Date: June 1, 1990. Estimated Start Date: July 15 to August 1, 1990.

NOTICE:
1989-1990 BAR DIRECTORIES

Copies of the 1989-1990 Bar Directories are now available for less than half the regular price. The Directories will be sold at the following discounted prices: **Utah State Bar Members, $6; Non-Members, $10.** A mailing charge of $1.50 per copy must be added, unless you choose to pick up your directory in person.

If you would like to order extra copies, please contact Blake Karrington at the Utah State Bar, 531-9077.

BOOKS FOR SALE

Complete updated sets of Utah Code Annotated available for $250. Contact Beth Pope at Salt Lake Legal Defender Association, 532-5444.

WEST'S FEDERAL PRACTICE AND PROCEDURE, with all current supplements (33 volumes). $600. UTAH CODE ANNOTATED, MICHIE EDITION, with all current supplements. $275. Call Bruce Maak, 532-7840.

The following services are current through March 1990; please make offer: ALR 2d; ALR 3d; ALR 4th; ALR Digest, 3rd and 4th; ALR 2d Later Case Service; ALR Index to Annotations; AmJur Pleading and Practice Forms; AmJur Proof of Facts and POF 2d; AmJur Trials; Federal Procedure; Federal Procedural Forms; Goldstein Trial Technique, 3d Ed.; Nichols on Eminent Domain (17 vols.); Anderson Uniform Commercial Code (16 vols.); Utah Code Ann. Contact George Harmond at (801) 637-1542.

FOR SALE—36-Volume "COURTROOM MEDICINE" (Matthew-Bender). Updated through 1989. Excellent condition. Contact Helen at (801) 524-1000.

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