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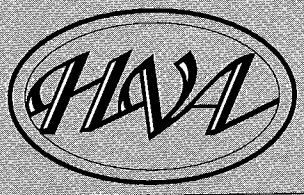

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645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

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COVER: Our thanks to Judge Robert T. Braithwaite, Fifth Circuit Court, for the cover photograph—Guardian Angel and West Rim Trail Overlook of Great West Canyon.

Members of the Utah Bar who are interested in having their color slides or other art form published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, UT 84111, 532-5200.

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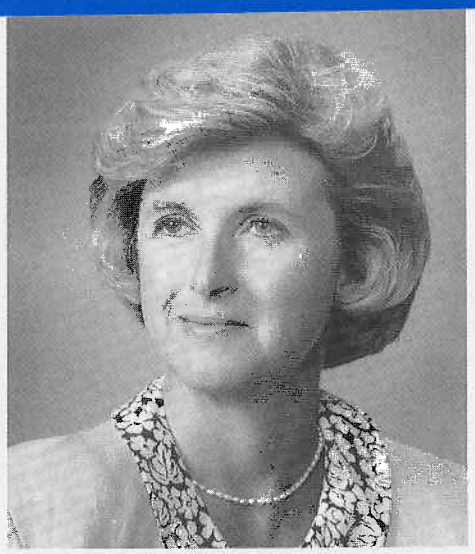
PRESIDENT'S MESSAGE



By Hon. Pamela T. Greenwood

As this is my first president's message for my term of office, I would like to start by saying how honored I am to be in this position. I have great respect and affection for the Bar and the legal profession, and hope to be able to give something back in appreciation for the great benefits I have enjoyed. Candidly, I am also pleased to be the first woman to serve as the Utah Bar president, and hope that this will provide encouragement to other non-traditional members of the Bar.

Some might say my timing could not be worse. This year begins with some of the most significant problems the Bar has ever faced. As I write this article, the dues increase petition is still pending and the outside consultant report is just now available. That report, in part, confirms what we have come to know over the past year or so. That is, we must modernize and improve our financial affairs, including both methods of record keeping and planning for the future. We have initiated steps to do both, including requesting reports on upgrading our computer system and on operating the Law and Justice Center in a manner to maximize the financial return and still fulfill the purposes for which it was established. Once the Supreme Court determines the outcome of the dues petition, we will move forward as quickly as possible to prepare our budget for this year, with long-term planning also. We have proposed a budget process which includes an opportunity for input from Bar members before finalization.

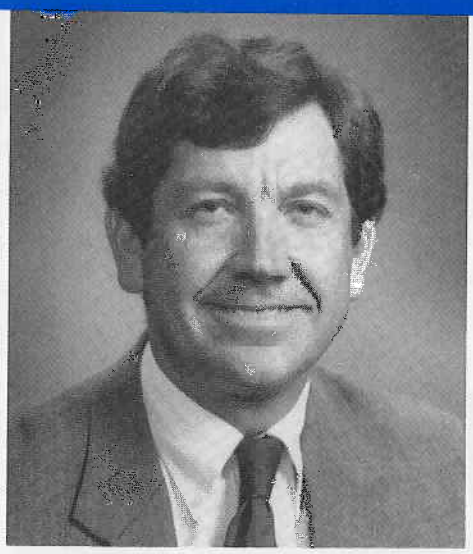
Clearly, the main focus of this next year for the Bar will be resolution of the Bar's financial problems, with long-term planning to deal with the Bar's debt and operating costs. I intend to advise Bar members of all actions taken or proposed in this process, and invite you to ask questions and/or attend meetings if you are interested.

While finances will be the primary area of concern, I would also like to devote attention this year to furthering joint consideration by the Bar and the judiciary of problems pertinent to both. These areas might include subjects such as delays in the judicial process, promotion of professionalism and courtesy in the courts, and availability of legal services. In addition, I would like to see the Bar analyze the recommendations of the Gender and Justice Task Force which were addressed specifically to the Bar. Because I served as a member of the Task Force, I have some special interest in its product and believe it essential that our justice system not operate on the basis of assumptions which have no basis in fact and which may deprive individuals of equal access to justice.

Finally, I would like to pay special tribute to Hans Chamberlain for the great contributions he made during his tenure as president. There wasn't much in the way of fanfare or optimistic planning during this last year. Hans provided stalwart and steady leadership, countless hours and energy, and unfailing dignity and integrity in addressing the problems of the Bar. No matter how unpleasant the problems, Hans never turned his back, but kept plugging away to try to identify and deal with the issues facing the Bar. In the long run, I believe that we will be a stronger and better Bar, and much will be owed to Hans Chamberlain. Thank you, Hans, and we wish you the very best life has to offer.

If you have questions or suggestions about how the Bar is operating during this next year, please contact me. I will do my best to respond or find someone who can.

COMMISSIONER'S REPORT



By H. James Clegg

Well, by the time you read this, we should all have many more answers and many fewer questions about the financial health (or lack thereof) of the organized Bar in Utah. As I pen these words, a week after the Beaver Creek festivities, much is still unknown.

I have completed the second year of my three-year term. Many of you have asked about the experience of serving, as you considered applying for the positions vacated by Anne Stirba, Jim Holbrook and Hans Chamberlain. I have been forthright with you in saying that it is a great experience to serve one's profession; however, it does not come without some pain. Gordon Roberts put it best: "Clegg, why do you want to be a Bar Commissioner when you could sit in the privacy of your own living room and hit your head with a hammer?"

As Commissioners, we have been hostage to a very fine building—and the associated debt and staffing expense that it has entailed. True, we are getting the use of one of Utah's finest structures for half price, the other half having been paid by foundations and contributors upon the promise that the Bar put it to worthwhile use, such as advancing ADR and *pro bono* programs, which we do. True, every one who studies it agrees that it is a bargain even at the price as the cost of comparable rental space would be prohibitive if available. True, it has put Utah and its Bar in the national limelight and set a new standard. True, the ones who have given the most are those who complain the least; indeed, they are the ones who, even now, are most willing to do the necessary to make the project succeed.

However, it has created a cash crunch (expected) which has not solved itself (unexpected). Commissioners are chagrined that we (or our predecessors) could not see the future more clearly; that we (they) banked on pledges as being 100 percent good. Most were or are, but there have been some disappointments, too.

So, our monthly meetings are devoted mostly to budget studies and belt-tightening programs. There is a real opportunity cost—we would prefer to be spending this time in working on your programs, those which bring out the best in the profession and make the practice more affordable for consumers of legal services. Hearing Jay Mason, president of the New Mexico Bar, explain the file-access program, which brings almost all court- and agency-files to the practitioner's desk if he has a PC and pays his phone bill, makes my mouth water. Promoting that type of program seems easy, fun and eminently satisfying, especially when compared with trimming programs and finding funds and analyzing what went wrong, when and why.

One who has given the most is Stephen F. Hutchinson, our longtime Executive Director. Steve resigned because the budget needs seemed to insist on it. His contribution to our Bar has been enormous—and enormously understated because of the press of other worries. We are looking for a replacement and have decided that our management needs require someone with a financial/accounting background. Steve wasn't trained in that field, nor were those qualifications especially important when he signed on. I hope that all works out for him and his family; they are wonderful folks and deserve better than this last year has permitted. A word of appreciation from you might help him feel better.

Well, enough belly-aching. Complaining does no good and probably just adds to the blues. Thanks to those of you who have sacrificed, in time and money, to bring the dream about. I really think it's going to come true.

Rights and Remedies of Depositors and Other Creditors of Failed Federally Insured Depository Institutions

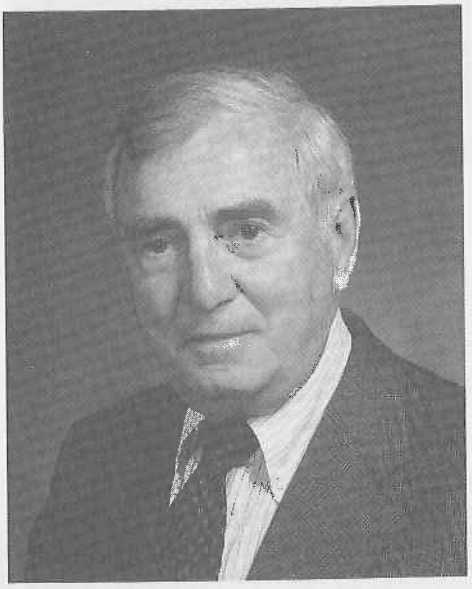
By Peter W. Billings Sr.

Between 1984 and 1990, 12 state chartered banks were closed by the Utah Department of Financial Institutions and four Utah based savings and loan associations, both state and federally chartered, were also closed or a conservator appointed.

Prior to 1989, the rights and remedies of depositors and other creditors of financial institutions whose deposits were insured by a federal agency depended on whether the institution was state or federally chartered and whether it was a bank or a savings and loan association. If a national bank, the National Bank Act applied and all creditors shared pro rata in the distribution of the failed bank's assets. If a state chartered bank, state law governed, and in Utah, §7-2-15 Utah Code Ann. gave priority to claims of depositors before those of other creditors. Section 7-2-6 of the Utah Code provides for administrative determination of claims against a failed institution, subject to court review under §7-2-2.

As to a failed savings and loan association, the Federal Savings and Loan Insurance Corporation ("FSLIC"), as insurer of its deposits, took the position that rights of creditors were to be determined by FSLIC, under regulations issued by the Federal Home Loan Bank Board, with appeal to that Board and judicial review under the Federal Administrative Procedure Act. (5 U.S.C. 704 et seq.) This position was upheld by the Fifth Circuit in *North Mississippi Savings & Loan Association v. Hudspeth,* 756 F.2d 1096 (1985). In 1987, the Ninth Circuit, in *Morrison-Knudsen v. C.H.G. International, Inc.*, 811 F.2d 1209, refused to follow *Hudspeth,* but remanded the matter to the district court to determine if the doctrine of exhaustion of administrative remedies would be appropriate.

This conflict[1] between the Fifth and Ninth Circuits was resolved by the Supreme Court of the United States in March 1989 in *Coit Independent Joint Venture v. FSLIC,* 489 U.S. _____,103 L.Ed. 2d 602. The *Coit* case arose as a lender liability action by Coit against a savings and loan association. When the savings and loan association was declared insolvent and FSLIC named as its receiver, FSLIC was substituted as defendant and it removed the case to the federal district court, which followed the *Hudspeth* doctrine and dismissed the case for lack of subject matter jurisdiction. In an opinion by Justice O'Conner, the Supreme Court held that Congress had not granted FSLIC adjudicatory powers and that creditors of the insolvent savings and loan association were entitled to de novo consideration of their claims in federal court.



PETER W. BILLINGS SR. is presently of counsel to the Salt Lake City firm of Fabian & Clendenin. He and the firm have represented the FDIC for several years on Utah matters and are presently also representing the RTC on matters involving savings and loan associations doing business in Utah. The opinions expressed in this article are solely those of the author.

The Supreme Court further rejected the exhaustion of administrative remedies argument on the ground the Federal Home Loan Bank Board regulations did not place a clear and reasonable time limit within which FSLIC must act on a creditor's claim; so *Coit* could not be required to exhaust the FSLIC administrative procedures.[2]

As matters stood in mid-1989, there was no statute or regulation determining creditors' rights against failed savings and loan associations. The FDIC's duties, rights and obligations as receiver of state chartered banks was governed by state law, with only such federal law exceptions as the use of a purchase and assumption arrangement with another bank to assume deposit liabilities, the use of a bridge bank for similar purposes, defenses pursuant to 12 U.S.C. §1823(e)[3] and the Federal Common Law *D'Oench* Doctrine, resort to federal jurisdiction under 12 U.S.C. §1819 and the protection provided by the Federal Tort Claims Act.

In that background and with the increasing economic problems resulting from the savings and loan "crisis," Congress enacted and the President signed the "Financial Institutions Reform, Recovery and Enforcement Act" on August 9, 1989. This Act is better known by its acronym, FIRREA. With respect to the handling of claims of depositors and other creditors of both banks and savings and loan associations, the important aspects of FIRREA are the substantial amendments to §§11, 12 and 13 of the Federal Deposit Insurance Act (12 U.S.C. §§1821, 1822 and 1823) and the application of those provisions to the Resolution Trust Corporation[4] [hereinafter RTC], the newly created substitute for FSLIC as receiver or conservator of savings and loan associations failing between January 1, 1989, and August 9, 1992.[5]

I. CLAIMS PROCEDURE UNDER FIRREA

FIRREA amended 12 U.S.C. §1821 to provide an exclusive procedure for determination of claims against an insolvent federally insured bank or savings and loan association and corrected the defects the Supreme Court found in *Coit.* A new statu-

tory claims procedure was established that must be followed before resort to the courts, pending actions against the institution are stayed, no attachment or execution may issue against any assets in the possession of the receiver, and no court has jurisdiction over any claim against the institution or its assets, except as provided in the new statute.

Payment of insured deposits[6] is treated under FIRREA separately from claims of other creditors of the institution and is governed by subsection (f) of §1821. It applies whether deposits are paid in cash or by assumption of the deposit liability by another insured depository institution. Payment of the insured portion of the deposit liability is to be made by the FDIC as insurer "as soon as possible" and upon such payment, the FDIC is subrogated to the rights of the depositor against the institution and its assets. (12 U.S.C. §1821(g)(1)).

The FDIC is authorized to establish procedure for the determination of disputed deposit claims, with judicial review of the FDIC's determination under the Administrative Procedure Act by the Court of Appeals for the District of Columbia or the Court of Appeals for the Circuit in which the principal place of business of the depository institution is located. Such review must be sought within sixty (60) days after final determination by the FDIC as insurer. If the receiver has been appointed by the state supervisory authority, the rights of depositors and other creditors are to be determined in accordance with state law. The statute (§1821(g)(4)) is not clear whether the reference to state law is substantive or procedural as well. In either event, §7-2-15 of the Utah Code would apply as to the priority of deposit liabilities.

The procedure on claims of other creditors of the closed institution is set forth in subsection (d) of §1821.[7] The receiver must promptly publish Notice to creditors to present claims within ninety (90) days after publication. Publication must be three (3) times in monthly intervals. The receiver must also mail a similar Notice to all creditors shown on the institution's book and records.

The FDIC is authorized to prescribe regulations meeting the statutory requirements regarding the allowance or disallowance of claims. The claim must be allowed to disallowed within one hundred eighty (180) days of receipt of the claim. In the event of disallowance, the notice to the claimant must state each reason for disallowance and the procedures for agency review or judicial determination of the claim.

No court may review the receiver's determination to disallow a claim [§1821(d)(5)(E)]. Instead, the claimant may sue on the claim in a de novo proceeding in the United States District Court for the District of Columbia or the United States District Court where the institution's principal place of business is located.[8] The claimant has the alternative to seek further administrative review of the claim if the FDIC agrees. Such further administrative determination is subject to court review under the Administrative Procedure Act.

FIRREA also authorizes the FDIC to establish alternative dispute resolution processes for claims filed with the receiver.[9] No such procedure has yet been established by either the FDIC or the RTC.

FIRREA also requires the FDIC to establish an expedited review procedure when the claimant alleges a valid security interest in an asset held by the receiver and that irreparable injury would result if the routine one hundred eighty (180) day procedure is followed. The expedited procedure requires determination by the receiver to allow or disallow the claim within ninety (90) days from the date the claim is filed. Different provisions for suit against a receiver apply to the expedited claims procedure under §1821(d)(8) from those applicable to the regular administrative claims procedures under §1821(d)(6). In the latter situation, the claimant may only sue or continue a pending action instituted before the receiver was appointed in specific federal district courts after the claim has been denied by the receiver. Under the expedited procedure, the claimant has thirty (30) days from the earlier of the date the claim is denied or expiration of the ninety (90) day period for FDIC action has expired in which to file suit or continue a suit filed before the appointment of the receiver. Section 1821(d)(8)(C) is silent as to where such suit must be filed and subsection 1821(d)(8)(E) provides that, subject to the statutory stay, "the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the reciever." It would appear that a secured creditor could continue a suit filed before the appointment of the receiver, wherever originally filed, and the FDIC could not remove to federal court if the nature of the case meets the exceptions to federal jurisdiction under 12 U.S.C. §1819 as discussed in Part III hereof.

> Payment of the insured portion of the deposit liability is to be made by the FDIC as insurer "as soon as possible"...

Section 12 U.S.C. 1825(b) was also added by FIRREA. That subsection provides that no property of the FDIC as receiver shall be subject to levy garnishment, foreclosure or sale, nor shall any involuntary lien attach to such property. That section would appear to limit ability of judgment creditors of the institution to proceed against such property and prevent those claiming a prior lien on such property from foreclosing such lien. Use of the word "property" rather than "asset" leaves unresolved whether the prohibitions apply to situations where the receiver's interest in the asset is ownership in property or is a security interest in that property. *See* e.g. §1821(d)(13).

Section 1821(d)(9) provides that any agreement that does not meet the requirements of §12 U.S.C. 1823(e) shall not form the basis of, or substantially comprise a claim against the receiver or the FDIC in its corporate capacity. This new provision resolves the issue as to whether §1823(e) applies to claims against the receiver as well as to defenses asserted against claims by the receiver to realize on assets of the closed institution.

Section 1823(e) was also amended by FIRREA to read as follows:

> (e) **Agreements against interests of Corporation**
>
> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or §1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (1) is in writing,
>
> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquistion of the asset by the depository institution,
>
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and[10]
>
> (4) has been, continuously, from the time of its execution, an official

record of the depository institution.

Prior to FIRREA some courts had held §1823(e) inapplicable to FSLIC as receiver for a federally insured savings and loan association as §1823(e) was part of the Federal Deposit Insurance Act. As heretofore noted, §1821(d)(9) is made applicable to RTC as receiver of a savings and loan association. The FIRREA amendments to §1823(e) also make it clear that the section applies to the FDIC, both as receiver and in its corporate capacity.

In *Castleglen, Inc. v. Commonwealth Savings Association,* 728 F. Supp. 656 (decided December 26, 1989), Judge David K. Winder of the United States District Court for the District of Utah held that §1823(e), as amended by FIRREA, applied to claims against the RTC as the receiver of a savings and loan association closed before August 9, 1989. Judge Winder also applied the Federal Common Law rule known as the *D'Oench* doctrine. The doctrine bars claims against a receiver and defenses to claims by the receiver based on "secret agreements," i.e., those not reflected in bank records. Other earlier cases had extended the *D'Oench* doctrine to FSLIC and the assignees of closed depository institutions' assets.

Another new provision of §1821 enacted by FIRREA in subsection (i), which limits the liability of the receiver on claims against the closed institution to the amount the claimant would have received if the receiver had merely liquidated the assets of the institution and distributed the proceeds among the creditors, pro rata. Judge Winder, in the *Castleglen* case, also applied that section to defeat the plaintiff's claims on the basis of a finding by the Federal Home Loan Bank Board that on the date of closing, the savings and loan association had no assets to satisfy unsecured creditors and such unsecured claims were worthless.

The Utah Legislature at the 1990 regular session adopted a similar provision as subsection (g) of §7-2-6. The new subsection provides:

> The Commissioner or any receiver appointed by him may disallow a claim that seeks a dollar amount if it is determined by the court having jurisdiction under §7-2-2 that the Commissioner or receiver or conservator would not have any assets with which to pay said claim under the priorities established by §7-2-15.

The principal purpose of that amendment and §1821(i) is to eliminate the cost of litigating claims against the insolvent institution when no assets are available to pay the claim if allowed.

In *Tri-land Holding Co. v. Sunbelt Service Corp.*, 884 F.2d 205, a decision of the Fifth Circuit issued on September 28, 1989, the court held the FIRREA amendments to §12 U.S.C. 1819 gave the federal court subject matter jurisdiction. However, without referring to §1821(i), as enacted by FIRREA, the court refused to dismiss the case as moot on the representation of the receiver that there were no assets of the savings and loan association with which to pay the claim. The case was remanded to the district court to determine if there will *never* be any possibility of satisfying a favorable judgment. Presumably, the district court, on remand, should apply §1821(i).

II. RETROACTIVE APPLICATION OF FIRREA

That case and the *Castleglen* case raise the issue as to the application of FIRREA amendments to cases pending at the date of its enactment.

The Eighth Circuit in *In re Resolution Trust Company,* 888 F.2d 57, decided in October 1989, applied FIRREA provisions as to removal of actions of the federal court. The court stated:

> In general, cases are to be decided in accordance with the law as it exists at the time of the decision. New statutes are usually interpreted not to apply retroactively, but the general rule is otherwise with respect to new enactments changing procedural or jurisdictional rules. If a case is still pending when the new statute is passed, new procedural or jurisdictional rules will usually be applied to it.

In *Castleglen,* the district court applied §1823(e), as amended by FIRREA, and §1821(i), as enacted by FIRREA. Implicitly, the court also applied §1821(d)(9) proscribing claims based on agreements that do not meet the requirements of §1823(e). Those sections have elements of substantive law as well as remedial or procedural attributes.

> The [*D'Oench*] doctrine bars claims against a receiver and defenses to claims by the receiver based on "secret agreements," i.e., those not reflected in bank records.

The United States Supreme Court in *Bradley v. School Board of City of Richmond,* 416 U.S. 696 (1974), has stated that a court is "to apply the law in effect at the time it reaches its decision unless doing so would result in substantial manifest injustice or there is a statutory directive or legislative history to the contrary."

Section 1823(e) and its companion *D'Oench* doctrine had been in effect for many years before the enactment of FIRREA. Creditors of and borrows from federally insured depository institutions presumably should have been aware of their requirements. It would not appear to be a "manifest injustice" to apply these principles to the FDIC both as receiver and in its corporate capacity or to the RTC as receiver of a savings and loan association as the *D'Oench* doctrine had been applied pre-FIRREA when FSLIC was the receiver.

Similarly, the concepts of §1821(i) and §7-2-6(4)(g) of the Utah Code were factors before 1989 in decisions of the receiver of a closed depository institution as to whether to adopt a purchase and assumption method of handling assets and liabilities of the institution or to proceed to liquidate, either of which procedures could produce a result where there were no funds to pay claims of lower rated classes of creditors.[11]

Utah has adopted similar tests for application of changes in the law to actions accrued or pending at the time the changes were enacted. *Pilcher v. State Dept. of Social Services,* 663 P.2d 450 (1983). In that case, the Utah Supreme Court noted that while retrospective operation of statutes is not favored where such application would "modify vested rights or interests" a contrary rule applies when the statute changes only procedural law and does not enlarge, eliminate or destroy vested or contractual rights. Those criteria would be applicable to the 1990 amendments to §7-2-6 and §7-2-9 dealing with claims against a closed state chartered depository institution and the powers and duties of receivers of such institutions. No change was made in the priority provisions of §7-2-15, which is still applicable to receiverships of both state chartered banks and savings and loan associations.

By subsection (e) of §1821, FIRREA codifies and clarifies well-established Federal Common Law rights of the FDIC as receiver (also the RTC in that capacity) to disaffirm or repudiate burdensome contracts and leases to which the insolvent institution was a party before the appointment of a receiver. The receiver must make a deter-

mination, within "a reasonable period" following its appointment, that the contract or lease is burdensome and that such disaffirmance or repudiation will promote the orderly administration of the institution's affairs. Section 1821(j) probably prohibits any court from taking any action to restrain or affect the exercise of these powers by the receiver.

Liability of the receiver for such disaffirmance or repudiation is limited to "actual direct compensatory damages" and §1821(e)(3)(B) expressly excludes punitive or exemplary damages, damages for lost profits or opportunity, and damages for pain and suffering.

On leases under which the institution was lessee, the lessor, upon repudiation, is entitled to the contractual rent accruing up to the later of the notice of disaffirmance or the effective date of such dissaffirmance. When the institution was the lessor, the lessee may treat the lease as terminated or remain in possession for the balance of the term of the lease if it continues to pay the contractual rent.

Repudiation of a contract for services creates a claim as of the date of appointment of the receiver to be paid under the regular claims procedure. If services are performed for the receiver before any determination to disaffirm, that party must be paid the contractual amount for such services and payment therefore is to be treated as an expense of administration of the receivership. Acceptance of such services by the receiver does not affect the right of the receiver to repudiate the service contract at any time after that performance.

By subsection (e)(11) of §1821, the right to disaffirm or repudiate does not extend to legally enforceable or perfected security interests in any asset of the institution, unless the interest was taken in contemplation of insolvency of the institution or with intent to hinder, delay or defraud the institution or its creditors.

As the receiver's rights to disaffirm burdensome contracts existed before FIRREA, its codification in §1821(e) should be allowed retroactive effect. *See Union Bank v. FSLIC,* 724 F. Supp. 468 (1989).

Another FIRREA provision that has raised unresolved questions is §1821(d)(14) dealing with the statute of limitations for actions brought by the receiver. That section provides as to contract claims, the longer of a six (6) year period beginning on the date the claim accrues or the period applicable under state law. For tort claims, it is a three (3) year period or applicable state law. Subsection (B) of §1821(d)(14) states the date on which the statute of limitations begins to run is the *later* of the date of appointment of the FDIC as receiver or the date on which the cause of action accrues.

On causes of action that the receiver has acquired from the institution, does a new statute of limitations period begin to run under FIRREA, whether or not the applicable state statute had run as to the institution before the receiver was appointed? Does the new Act apply retroactively so as to raise the "manifest injustice" test as to the constitutionality of the new statute of limitations provision?

That issue, now being litigated, is framed on the concept that Congress intended, because of the FDIC's role as insurer of deposits and its special obligations and responsibilities in carrying out national policy under FIRREA, that the FDIC should be treated more favorably than an ordinary commercial plaintiff in realizing on assets of insolvent depository institutions. That issue may well be resolved on a case-by-case basis as it is often the potential defendent who was in control of the institution before the receiver was appointed, or the relationship between the institution and the class of potential defendants referred to in §1821(1)—i.e., "director, officer, employee, agent, attorney, accountant, appraiser or any other party employed by or providing services to an insured depository institution" was such that the institution allowed the statute of limitations to run before the receiver was appointed.

Would manifest injustice result if the facts upon which a cause of action is based were not revealed until the receiver was appointed? It would appear that the policy on which §1823(e) and the *D'Oench* doctrine are based should answer that question.

Would manifest injustice result if the facts upon which a cause of action is based were not revealed until the receiver was appointed? It would appear that the policy on which §1823(e) and the *D'Oench* doctrine are based should answer that question.

These issues have been addressed in two recent decisions of federal courts, without reference to the FIRREA policy argument.

The Tenth Circuit, in a decision issued in May 1990, *Farmers & Merchants National Bank and FDIC as Receiver v. Bryan,* without reference to FIRREA, held that Federal Common Law determined when a cause of action against bank officers and directors accrued and whether the statute of limitations was tolled.

The Circuit Court found that when the existence of a cause of action was actively concealed, time did not begin to run until actual discovery of the facts and that "adverse domination" of the bank, tolled the running of the statute when outside directors knew or should have known of the possible liability but could not or would not have induced the bank to bring suit. The Court also sustained admission of reports of examination by the applicable supervisory authority on the issue of the outside director's knowledge of the unsound lending practices of the bank's officers.

The Tenth Circuit did not refer either to its earlier opinion under pre-FIRREA law that the statute of limitations began to run on a claim assigned to the FDIC when the cause of action accrued in the hands of the assignor, *FDIC v. Peterson,* 770 F.2d 141 (1985) or to a contrary 1989 decision of the Ninth Circuit, *FDIC v. Former Officers and Directors of Metropolitan Bank,* 884 F.2d 1304. The Ninth Circuit held in that case that if the applicable state statute of limitations had not run when the FDIC acquired the claim, the pre-FIRREA federal statute of limitations (28 U.S.C. §§1415, 1416) did not begin to run as to the FDIC until it was appointed as receiver.

In another May 1990 decision, the United States District Court for the Southern District of Texas in *FDIC v. Howse,* applied the adverse domination rule to conclude that the Texas statute of limitations was tolled and had not run when the FDIC acquired the cause of action. The Court then applied 12 U.S.C. §1821(d)(14)(B), as amended by FIRREA, to conclude that the statute of limitations on the cause of action did not begin to run as to the FDIC until the receiver was appointed, even though that date was before the enactment of FIRREA. The Court applied the FIRREA amendments retroactively on the principle that statutes of limitations are procedural or remedial rather than substantive and are not to be immediately applicable to pending cases.

In the *Howse* case, the FDIC in its corporate capacity had acquired the cause of action from FSLIC, the receiver for the insolvent savings and loan. The Court found that the FIRREA amendments to 12 U.S.C. §1823(d) made §1821(d)(14)(B) applicable to the FDIC in its corporate capacity even though the express language of §1821(d)(14)(B) refers to actions brought by the FDIC as conservator or receiver.

There should be no question as to the

application of §1821(d)(14) to claims of the FDIC in its own right as insurer of deposit liabilities against those whose pre-receivership conduct caused the losses to the FDIC in such capacity.

While much of the publicity about FIRREA has dealt with the cost of the savings and loan bail-out and the new criteria for capital, investments and management of federally insured depository institutions, a substantial body of litigation that is likely to ensue in the next few years will be dealing with what happened or did not happen before August 9, 1989.

III. FEDERAL COURT JURISDICTION

Under 12 U.S.C. §1441a(1), as enacted by FIRREA, the RTC is authorized to sue and be sued in any court of competent jurisdiction. Any action to which the RTC is a party "shall be deemed to arise under the laws of the United States, and United States District Courts shall have original jurisdiction over such action."

FIRREA also extensively amends 12 U.S.C. §1819 dealing with federal court jurisdiction of suits involving the FDIC. With one limited exception, all suits involving the FDIC, in any capacity, are deemed to arise under the laws of the United States and may be filed in federal court or removed by the FDIC to federal court without posting a bond or payment of filing fees. Both FDIC and the RTC may appeal remand orders of a federal district court and both may remove cases pending before a state appellate court.

The exception to federal court jurisdiction under §1819 in only where *all* of the following criteria exist: (a) the FDIC is not a plaintiff; (b) it is acting as receiver of a failed state chartered bank or savings and loan association; (c) it was appointed as receiver by state authority; (d) the action involves *only* the preclosing rights of depositors and other creditors or shareholders against the failed institution; (e) *only* the interpretation of the law of "such state" is necessary; and (f) the institution could not have invoked federal jurisdiction.

In light of §1823(e), the *D'Oench* doctrine, and the jurisdictional provisions of §1821, it is probable that actions where the FDIC is a defendant will rarely involve *only* the interpretation of the law of "such state."

A question not clearly resolved by FIRREA is whether the §1819 limitation of federal jurisdiction applies to suits by a claimant whose claim has been disallowed by the FDIC as receiver under §1821(d)(5). Subsection (d)(6) allows a claimant, in the event of disallowance of a claim, to "file suit on such claim (or continue an action commenced before the appointment of the receiver)" in the federal district court for the District of Columbia or the federal district court where the principal place of business of the institution is located. If the suit commenced before the appointment of the FDIC as receiver was in a state court and meets all the criteria of the exception to federal jurisdiction provided by §1819, do the federal jurisdiction provisions of §1821(d)(6) require that the claimant continue the pending action only in a federal court? In such event, may the receiver remove that pending action from state court to the federal court designated in subsection (d)(6)?

It should also be noted that while §1819 provides that the FDIC may be sued in any court, state or federal, §1821 places a number of restrictions as to where and for what the FDIC may be sued.

Section 1821(d)(6) allows a claimant whose claim has been denied to file suit on the claim, but that is a de novo action as §1821(d)(5)(E) provides "no court may review the Corporation's determination to disallow a claim." Subsection (d)(6)(A) also places restrictions on where a claimant's suit may be filed.

Section 1821(d)(13)(C) provides "no attachment or execution may issue by any court upon assets in the possession of the receiver."

Section 1821(d)(13)(D) provides:

> D. **Limitation on judicial review**
> Except as otherwise provided in this subsection, no court shall have jurisdiction over—
>
> (i) any claim or action for payment from, or any action seeking the determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or
>
> (ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

With respect to depositors' claims, any dispute is to be determined in accordance with regulations issued by the FDIC, with judicial review under the Administrative Procedure Act. An appeal from a final determination by the FDIC must be filed in the appropriate Federal District Court not later than sixty (60) days after such determination is made. [§1821(f)(5)].

Finally, §1821(j) provides:

> **Limitation on court action**
> Except as provided in this section, no court may take any action, except at the request of the board of directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver.

Thus, it may be concluded that the FDIC, with respect to claims of depositors and other creditors, may be sued only as §1821 expressly provides.

IV. CONCLUSION

Subject to the exceptions and unresolved questions noted above, rights and remedies of depositors and other creditors of a failed federally insured depository institution, whether the institution was closed as insolvent before or after August 9, 1989, are subject to the provisions of 12 U.S.C. §1821 as amended by FIRREA, with resort to the courts, state or federal, only as allowed by that section.

[1] That conflict between the Circuits did not dispute the priority of depositors' claims to the extent of federal deposit insurance with FSLIC as insurer subrogated to those rights to the extent deposit liabilities were paid from its insurance fund.

[2] Compare §7-2-6(4) of the Utah Code which places a time limit within which the Commissioner of Financial Institutions or a receiver appointed by him must act on a timely filed claim of a creditor against the closed institution.

[3] The United States Supreme Court in *Langley v. FDIC*, 484 U.S. 86, 98 L.Ed. 2d 340 (1987), expanded the meaning of "agreement" in §1823(e) to claims or defenses asserted against the FDIC and eliminated any secrecy requirement to its application as distinguished from the *D'Oench* doctrine.

[4] 12 U.S.C. §1441a(b)(4) as enacted by §501 of FIRREA.

[5] Unless the context indicates otherwise, reference to the FDIC in this paper also includes the RTC.

[6] The term "deposit" as defined in §1813 of the Federal Deposit Insurance Act was not amended by FIRREA, so existing FDIC regulations and court decisions will govern as to what is an insured deposit. For example, *see FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 90 L.Ed. 2d 428 (1986), holding that a stand-by letter of credit backed by a contingent promissory note is not an insured deposit. That decision was based primarily on a long-standing FDIC interpretation of the statutory definition.

[7] Under §1821(d)(12) the receiver may obtain a ninety (90) day stay of any judicial proceeding to which the insolvent institution is or becomes a party. Section 7-2-7 of the Utah Code imposes an automatic stay, not only of judicial proceedings, but also of enforcement of judgments against the institution and any act to create, perfect or enforce a lien against a property of the institution. This section would be applicable where the Utah Commissioner of Financial Institutions has appointed the FDIC as receiver of a state chartered, federally insured depository institution.

[8] Section 1821(d)(6)(A) also allows a claimant to "continue an action commenced before the appointment of the receiver." Presumabley that action must be in the appropriate federal court.

[9] The FDIC is directed to "strive for procedures which are expeditious, fair, independent, and low cost."

[10] The word "and" means that all four criteria must be met for the "agreement" to be valid.

[11] This result is common in Utah where §7-2-15 sets priorities for payment of nine (9) classes of claimants.

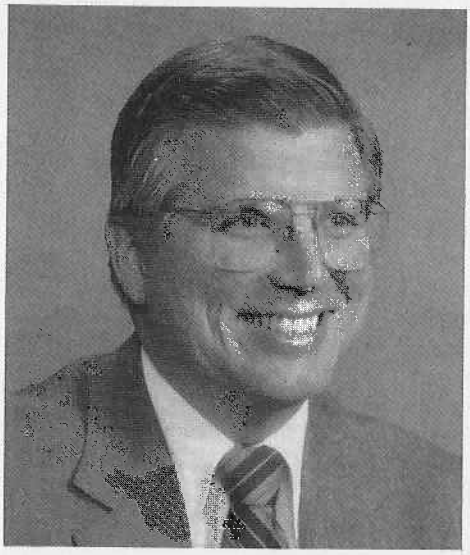
The Evolution of Real Estate Development Exactions in Utah

By Michael J. Mazuran

In an effort to fund the capital needs for infrastructure, counties, cities and towns throughout the nation are requiring development exactions from real estate developers. Development exactions of several kinds have been widely used by local governments throughout Utah to provide funds for roads, water supplies, sewer systems and parks. For the most part, these exactions have proved successful as a means of providing infrastructure and community facilities necessitated by development.

For purposes of this discussion, development exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval. For many years, local governments have required the dedication of land for both on-site improvements and off-site improvements such as roads, sidewalks, curb and gutter, water and sewer easements. In recent years, local governments have also required the developer to dedicate land for parks and other purposes or pay a fee-in-lieu of such land dedications. Local governments have also adopted impact fees to pay for infrastructure needed as a result of new development.

In the last decade, local governments throughout Utah have been faced with two significant burdens: rising costs for capital improvements; and continuous and extensive growth. Local officials have attempted to be fair in allocating responsibility for new facilities between existing users and new development which necessitates these improvements. This has resulted in allocation of a portion of the costs of new infrastructure to the developers. To no one's surprise, the imposition of such exactions has not gone unchallenged. In Utah, as with other states, developers have attacked ordinances and regulations seeking to impose exactions. Appellate decisions in this area have generated a body of law that provides guidance to both developers and local governments regarding the proper use of exactions.



MICHAEL J. MAZURAN received his B.S. degree from Utah State University, his Master's in Public Administration from the University of Southern California, and his J.D. degree from the University of Utah. Mr. Mazuran is a shareholder in the law firm of Mazuran, Verhaaren & Hayes, P.C. He is a member of the Salt Lake County and American Bar associations, and has served as Chairman and a member of several committees of the Utah State Bar. Mr. Mazuran currently maintains a law practice with a substantial emphasis in municipal and local government law. He regularly consults with cities and special districts in connection with legal matters including land use regulations.

Since the late 1970s, a "rational nexus" test has been widely used by various state courts in scrutinizing the imposition of exactions. As already noted, Utah courts have been actively involved in this field in recent years.

In order to evaluate the validity of a development exaction, courts initially examine whether or not there is a legal justification for imposition of the exaction. Local governments must have authority to enact development exaction legislation. If the court determines that the local government is authorized to require the exaction, the court will then typically examine the reasonableness of that exaction and its relationship with the development to be charged.

An important case in Utah is *Call v. City of West Jordan*[1]. In *Call*, the city had adopted an ordinance which required developers to donate to the city 7 percent of the land located within the developer's proposed subdivision, or to pay the equivalent of that value in cash to be used for flood control and/or park and recreation facilities. The developers challenged the validity of the ordinance, contending that the exaction was invalid because it was not within the city's granted powers; the land or money required was not for the benefit of the developer's subdivision but rather for the city as a whole; that the exaction was an attempt by the city to take the developer's property without paying just compensation; and, finally, that the exaction constituted an unlawfully imposed tax.

The Utah Supreme Court found that the ordinance in question was within the scope of the city's authority and responsibility to promote the health, safety, morals and general welfare of the community. In reaching this decision, the Court observed that to the extent development creates a need for services and facilities, it is both fair and essential that the developer be required to contribute to the costs of providing those services and facilities. The Supreme Court also indicated that the exaction need not solely benefit the individual development but could fairly redound to the benefit of the whole community. Finally, upon rehearing, the Court held that the city ordinance was not unconstitutional on its face but could not be applied without the developer being given the opportunity to present evidence to show that the exaction requirements had no reasonable relationship to the needs created by the development.

IMPACT FEES

One of the newer development exactions that has evolved is the impact fee. Many municipalities and communities in Utah have been confronted with the problem of providing their fast-growing areas with adequate services for sewer, water, recreation and other related improvements. Significant growth imposes a tremendous burden and impact on the financial and personnel resources of local governments. Substantial burdens are placed on existing capital facilities. Services must be maintained for existing residents while expansion is provided for new ones. Impact fees are designed to meet these demands. Generally, impact fees are fixed by a measurable formula (as opposed to being negotiated) and are payable at the time of the subdivision approval and/or issuance of a building permit. Impact fees must be reasonable.

The Utah Supreme Court has provided specific guidance as to how to determine the reasonableness of an exaction. In *Banberry Development Corp. v. South Jordan City*,[2] the developer attacked a city-imposed park improvement fee and water connection fee alleging that the fees constituted an unlawful tax; an unconstitutional taking of property without due process; and that the fees were discriminatory. The Supreme Court ruled that the fees in question were legally authorized but raised the question of whether the fees were reasonable.

The Supreme Court indicated that the reasonableness must be resolved based upon the facts of each particular case. In order to meet the constitutional standard of reasonableness, the Court stated that newly developed properties must not be required to bear more than their fair share of the capital costs in relationship to the benefits conferred. Accordingly, local governments should be prepared to show a demonstrable benefit to the development from which the exaction is required. To determine the equitable share of the capital costs to be borne by newly developed properties, local governments should determine the relative burdens previously borne and yet to be borne by the proposed developments in comparison with other properties located within the local government's boundaries as a whole. Under *Banberry*, there are seven factors to be considered in determining the reasonableness of the fees:

1. The cost of existing capital facilities;
2. The manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants);
3. The relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment of the proceeds of general taxes);
4. The relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future;
5. The extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or their owners (by contractual arrangement or otherwise) to provide common facilities (inside or ouside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality;
6. Extraordinary costs, if any, in servicing the newly developed properties; and,
7. The time-price differential inherent in fair comparisons of amounts paid at different times.

A general impact fee for raising revenue can be an illegal tax.

Problems of recoupment (requiring the new development to buy into the equity value of the existing capital system) and double contribution problems (where a development will be paying through more than one revenue source for the same service or facility, i.e., taxes) are all addressed in the seven *Banberry* factors. Under present law in Utah, in order for an exaction to pass judicial scrutiny, all seven *Banberry* factors must be considered. *Lafferty v. Payson City*[3] and *Patterson v. Alpine City*[4]

Where impact fees are assessed, there must also be a reasonable relationship between the use of the funds and the benefits which accrue to the development. In *Lafferty*, the Supreme Court determined that a building permit "impact fee" of $1,000 per family dwelling unit was an illegal tax. In that case, the city had enacted an ordinance requiring the payment of an impact fee of $1,000 per dwelling unit prior to the issuance of any building permit. The fee was in addition to all other municipal fees and was imposed on the basis that the city needed revenue to offset costs because of an emergency situation created by property development within the city limits. Notably, the fee was deposited in the city's general revenue account. The Court observed that fees imposed to finance specific municipal services or capital expenditures are permissible whereas a general fee that amounts to a revenue measure is not. To satisfy these requirements, it is appropriate to segregate the impact fees and provide that they be used only for the facilities and services for which they are collected. Adoption of a capital improvements plan by the local government entity should provide valid evidence that the exacted funds are to be used for facilities and services for which such fees are initially collected. Commingling of impact fees with general funds of the local government most certainly will cause problems.

CONSTITUTIONAL REQUIREMENTS

Development exactions have been attacked on constitutional grounds. Developers have argued that exaction violates the due process clause of the Fourteenth Amendment; the equal protection clause of the Fourteenth Amendment; and the taking clause of the Fifth Amendment as applied to the states through the Fourteenth Amendment.

In enacting ordinances requiring exactions, procedural due process is required. In *Call*, the developers alleged that the city failed to follow the statutory requirements in enacting its exaction ordinance. Inasmuch as advance notice to the public was not provided, the ordinance being considered had not yet been drafted, and the public was not afforded an opportunity to express their views, the Supreme Court held that the City had not met the requirements of the applicable statute. Accordingly, the Court determined that the ordinance was invalid and void *ab initio*.

Under the equal protection clause, various courts have subjected development regulations to a "rational basis" analysis, and have also required that the regulation have a substantial relationship to a legitimate state interest.

An overreaching regulation may con-

stitute a taking and/or a denial of equal protection. In the case of *Parks v. Watson*,[5] the United States Court of Appeals for the Ninth Circuit utilized a reasonable, rational relationship test in scrutinizing an exaction requirement for donation of a geothermal well to a city as a condition to the developer's obtaining a desired street vacation from the city. In *Parks*, the city conditioned its approval of the developer's request to vacate certain platted streets upon a dedication of land containing geothermal wells by the developer to the City. The court ruled that this requirement violated the equal protection clause since the distinction drawn between the developer and others securing vacations was not rationally related to any cognizable governmental interest in vacation.

Development exactions have successfully withstood challenges in Utah under the takings clause in both *Call* and *Banberry*. In *Call*, the Utah Supreme Court found that the city's requirement that the developer dedicate 7 percent of the proposed subdivision land or its equivalent in cash to the city for parks and recreation facilities did not constitute a taking. The Court determined that no proceeding had been initiated by the city to acquire the property and that the city had not indicated an intention to compel the developers to subdivide their property but that the city was entitled to impose reasonable regulations on the creation of the subdivision if the developers desired to subdivide.

LAND DEDICATION

For three or four decades, land dedication to local governmental entities has been utilized in Utah as one of the most common methods of obtaining development exactions. Typically, Utah subdividers are required to dedicate streets within their subdivisions to cities or towns which thereafter assume the continuing maintenance of those improvements. The dedication of land for on-site improvements appears to make sense from the viewpoint of both developers and local governments. The next step of requiring dedications of lands for off-site improvements such as sidewalks, streets, sewer and water easements has also been acceptable to most developers. Additional exaction demands that land be dedicated by developers for parks, schools and other public uses have met with some resistance.

Nollan v. California Coastal Commission,[6] is the first case in which the United States Supreme Court has addressed the issue of development exactions. In that case, the Court addressed issues of land dedication requirements in light of the takings clause of the United States Constitution.

The Nollans owned a beachfront lot. A public park and beach was located to the north of their property and another public beach area was located south of their lot. The Nollans desired to replace a small bungalow located on their property with a larger house. The bungalow had fallen into disrepair and could no longer be rented out. The terms of their purchase agreement also required them to demolish the bungalow. Pursuant to statute, the Nollans were required to obtain a permit from the California Coastal Commission in order to destroy the bungalow and replace it with a three-bedroom home similar to other homes located in the neighborhood. The California Coastal Commission granted the permit subject to the Nollans recording a deed restriction granting an easement to allow the public to pass across the beach portion of their property to gain access to the adjoining public beaches.

The Nollans objected to the permit requirement and filed a petition for mandamus asking the trial court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed development would have a direct adverse impact on public access to the beach. The trial court remanded the matter to the Coastal Commission for public hearing. After that hearing, the Commission found that the new house would increase blockage of the view of the ocean and would prevent the public "psychologically... from realizing a stretch of coastline exists nearby that they have every right to visit." The Commission determined that the new house would also increase private use of the shore front and determined that these effects of the construction of the house, along with other area development, would burden the public's ability to traverse along the shore front. Therefore, the Commission determined that it could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches adjoining their property. The Nollans returned to the trial court and filed a supplemental petition for mandamus in which they argued that the imposition of the access condition violated the takings clause of the Fifth Amendment, as incorporated against the states by the Fourteenth Amendment. The trial court ruled in their favor on statutory grounds in part to avoid "issues of constitutionality." The trial court determined that the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea.

The Commission then appealed to the California Court of Appeals. That Court reversed the trial court. It disagreed with the trial court's interpretation of the statute and ruled that the permit requirement did not violate the Constitution based on earlier California decisions and that the Nollans taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. The Nollans then appealed to the United States Supreme Court raising only the constitutional question.

A divided 5-4 Court found that the California Coastal Commission's requirement for a lateral access easement to the beach as a condition to the issuance of a construction permit for a home was an unconstitutional taking. The Court emphasized the need for a close relationship between land use regulations such as development exactions and the purposes for which they are enacted. The Court utilized a test requiring that the development exaction "substantially advances a legitimate state interest."

It is certain that additional cases will attempt to more fully define the words "substantially" and "legitimate" in conjunction with this test. Many commentators believe that the standard created by the Court in *Nollan* may be more stringent than the rational basis test typically used under equal protection and due process analysis. Notably, the opinion of the four dissenting Justices disagreed with the use of this more stringent standard.

In *Schneiter Enterprises, Ltd. v. Sandy City*,[7] the United States District Court for the Central District of Utah ruled in a partial summary judgment that the city board of adjustment's decision to uphold the city planning commission's conditional use (exaction) requirement was arbitrary and capricious. Sandy City had imposed a requirement that an adjacent street be dedicated to the city and improved by the developer to a 53-foot half-width including curb, gutter, sidewalk and streetscape (including 2-inch caliper street trees, 30-foot on center). The Court found that the exaction imposed upon the developer under the facts of the case to be arbitrary and capricious. The condition imposed on the developer was too onerous. In arriving at its decision, the Court focused on the percentage of increased traffic on the street in question which was attributable to the developer's proposed development.

In the wake of *Nollan* and *Schneiter*, it is important that local governments be able to substantiate the purpose for and amounts of the exactions they require. Officials should be prepared to provide good justification for their exaction requests. One of the most effective ways that this can be accomplished is through building a good data base which supports the required exactions. Expert witnesses can and should be used to supply

such data where needed. Flat percentages which fail to relate the exaction costs to the need created may not meet the *Nollan* standard.

SUMMARY

The law in Utah seems to offer wide support for development exactions for a broad range of purposes provided that the exaction is based upon a need for services or facilities created to some degree by the proposed development, that the amount of the exaction is reasonable and designed to bear its fair share of solving that need, and that the exaction, when received by the governmental entity, is used to alleviate the need.

[1] 606 P.2d 217 (Utah 1979), remanded 614 P.2d 1257 (Utah 1980), reversed on other grounds, 727 P.2d 180 (Utah 1986), and affirmed on various grounds by the Utah Court of Appeals, 129 UAR 38 (Utah 1990).
[2] 631 P.2d 899 (Utah 1981).
[3] 642 P.2d 376 (Utah 1982).
[4] 663 P.2d 95 (Utah 1983).
[5] 716 F.2d 646 (Oregon 1983).
[6] 107 S.Ct. 3141 (1987).
[7] Memorandum Ruling, United States District Court for the District of Utah, Central Division, Civil No. 89-C-545-S (Utah 1990).

Commission Highlights

During a special meeting of June 29, 1990, the Board of Bar Commissioners received the following reports and took the actions indicated:

President Chamberlain expressed his appreciation to the Commission for their support and service to the Bar during his term of office. He also expressed his confidence in Judge Pamela Greenwood in accepting her position as President of the Bar acknowledging the fact that she is the first woman to be in this position.

President Chamberlain was then presented a plaque on behalf of the Bar Commission acknowledging his leadership and service as President.

James Z. Davis was unanimously voted in as President-Elect of the Utah State Bar. It was also announced by Judge Greenwood that the Executive Committee would consist of herself as President, President-Elect Davis and Commissioner Randy Dryer.

The following ex-officio members of the Bar Commission were appointed: Norman S. Johnson, ABA Delegate; Reed L. Martineau, State Delegate to the ABA; Dean H. Reese Hansen, BYU; Dean Lee Teitelbaum, U of U; and Richard A. Van Wagoner, Young Lawyers Section President.

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.

Utah Tort Law—Annual Supplement

A concise supplement to Zillman's Utah Tort Law is available from the University of Utah College of Law. The Supplement contains new state and federal court decisions and the work of the 1990 Utah Legislature relevant to tort law in Utah. The Supplement is current to June 15, 1990.

EXISTING OWNERS of Utah Tort Law may receive a free copy of the Supplement by picking one up from Room 218 Law School or by sending a STAMPED, ADDRESSED ENVELOPE to Ms. Elizabeth Kirschen, College of Law, University of Utah, Salt Lake City, UT 84112.

NEW SUBSCRIBERS may receive a Supplement with the purchase of Utah Tort Law for $32.50 from Ms. Kirschen. Please make check payable to College of Law. For more information, call (801) 581-5880.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 1.7(b) by agreeing to represent a client when the lawyer knew that he could not pursue action against all possible defendants due to his friendship with one of the possible defendants.

2. An attorney was admonished for violating Rule 1.13(b) by dispersing $70.26 to his clients when that sum had been ordered to be placed in trust for another party.

PRIVATE REPRIMANDS

1. For violating Rule 1.4(a) and Rule 1.4(b), an attorney was privately reprimanded for failing to adequately communicate with his client over a period of several months by failing to return telephone calls and written correspondence and failing to return the client's file upon request.

2. For violating Rule 1.7(a) and Rule 1.7(b), an attorney was privately reprimanded for agreeing to represent a client against one of the attorney's former clients whom the attorney had represented for several years. Before agreeing to represent the client, the attorney had previously become familiar with the issues by speaking with the former client regarding the action.

PUBLIC REPRIMANDS

1. On May 25, 1990, Gerald R. Hansen was publicly reprimanded for violating Canon 6, DR 6-101(A)(3) and Rule 1.3. In 1987, Mr. Hansen agreed to represent his client regarding an ongoing custody dispute. In 1989, the opposing party initiated an action with the court requesting the return of custody and Mr. Hansen failed to timely file a response resulting in his client's loss of custody. Mr. Hansen also failed to communicate the status of the case to his clients after reasonable requests to do so.

2. On May 25, 1990, Joseph F. Fox was publicly reprimanded for violating Rule 1.3, Rule 1.4(a) and Rule 8.4(c) by failing to appear at a court hearing resulting in a denial of his client's petition for bankruptcy and representing to his client that he would again file the bankruptcy petition and failing to do so. During the disciplinary process, Mr. Fox also represented to the Screening Panel that he would re-file his client's petition for bankruptcy and thereafter failed to do so.

SUSPENSIONS

On May 21, 1990, Ray S. Stoddard was suspended for a period of six months for a violation of the terms of his probation pursuant to a prior disciplinary order by failing to timely remit the required restitution and failing to comply with the monitoring requirements of the probation.

2. On May 18, 1990, A. Paul Schwenke was suspended for a period of 30 days for failing to remit restitution as required by a prior disciplinary order. Mr. Schwenke's reinstatement is conditioned upon his payment of the restitution to the client and costs to the Office of Bar Counsel.

Utah State Bar Concludes Successful Annual Meeting

The Bar held its 1990 Annual Meeting in the alpine village setting of Beaver Creek, Colorado. Under the direction of President Hans Q. Chamberlain and Committee Chair Carolyn Nichols, who planned much of the meeting from the hospital prior to her delivery of triplets, the Annual Meeting Committee planned a very interesting and diverse program which provided 13 hours of MCLE credit. Nearly all of the 300 registrants took full advantage of the excellent CLE. Anyone who did not receive a certificate for the CLE attended in Beaver Creek should contact Tobin Brown at the Bar Office, 531-9077.

The agenda was packed with interesting programs, but still left plenty of time to enjoy tennis, golf, swimming, fishing, and dining in this new Colorado resort community which is receiving accolades from Utah lawyers and spouses who attended the meetings.

On the agenda in Beaver Creek were 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.

Preliminary plans for the 1991 Annual Meeting of the Utah State Bar are being formulated. Tentatively, Sun Valley will be the location for the meeting July 3 to July 6.

Claim of the Month

ALLEGED ERROR AND OMISSION

The Insured allegedly failed to bring the plaintiff's personal injury suit in the proper jurisdiction and then failed to oppose motion to dismiss.

RESUME OF CLAIM

In the underlying action, the defendants' vehicle struck the plaintiff's vehicle in the rear while it was stopped with its flashers on. The plaintiff's vehicle was positioned at the curbside mailbox and the plaintiff was seated in the driver's seat, wearing a seat belt. The Insured commenced the action in a state where there existed no basis for a state court to secure *in personam* jurisdiction over the defendants. The action should have properly been commenced either in Federal District Court or the courts of the defendants' home state. After the statutes of limitations had run, the defendants made a motion to dismiss which was unopposed by the Insured and granted by the court. No appeal was taken.

HOW CLAIM MAY HAVE BEEN AVOIDED

At the time the answer was served, the Insured should have perceived potential jurisdictional problems. Had the Insured investigated the issue earlier, he would have had time to bring the action in the correct jurisdiction. Lastly, by not opposing the motion to dismiss, the Insured gave up any chance that his client may have had to pursue the original defendants. Further, by consulting with outside counsel expert in jurisdictional matters and plaintiffs suits, the Insured may have afforded himself with proper advice.

"Claim of the Month" is furnished by Rollins Burdick Hunter of Utah, Administrator of the Bar sponsored Lawyers' Professional Liability Insurance Program.

Attorney General's Office to Present CLE Program

The Utah Attorney General's Office is presenting a CLE program entitled "Ethics for Government Lawyers" on September 11, 1990, at 9:30 a.m. at the Utah Law and Justice Center. The 1½-hour program will focus on the particular problems facing government attorneys in their various roles. Attorney General Paul Van Dam will open the program which will include Stephen A. Trost, Bar Counsel, and Harold G. Christensen, Assistant Attorney General and Litigation Division Chief. MCLE approval is being sought. For more details and to register for the program, please call Brenda Stubbs at the Attorney General's Office, 538-1021, by September 7.

Indian Affairs Committee to Sponsor Brown Bag Luncheon

The Indian Affairs Committee of the Natural Resources Section of the Utah State Bar Association announces a brown bag lunch. Our featured speaker on September 12, 1990, will be the Honorable Bill Thorne, who will address the topic of tribal courts. The Brown Bag Lunch will be held at Snow, Christensen & Martineau, 10 Exchange Place, 11th Floor Conference Room, Salt Lake City, Utah, at 12 noon. Members of the Indian Affairs Committee and all other interested parties are invited to attend.

Salt Lake Legal Secretaries Association Offers Course on Legal Procedures

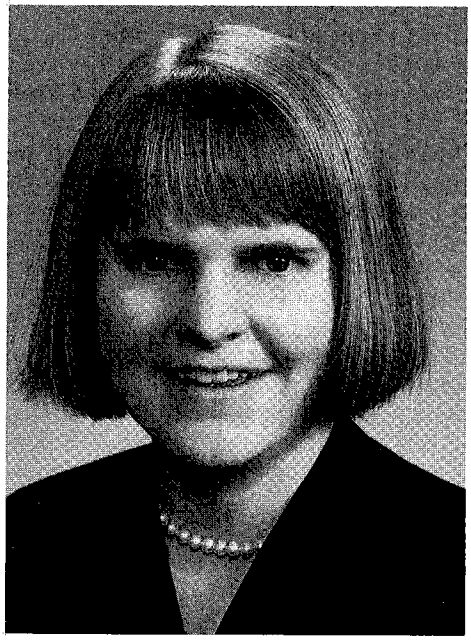
The National Association of Legal Secretaries' Legal Training Course on Law Office Procedure will be taught fall quarter at the University of Utah College of Law. The 11-week course is sponsored by the Salt Lake Legal Secretaries Association.

The course will begin September 26, 1990, and continue through December 12, 1990. Classes will be held at the College of Law at the University of Utah on Wednesday evenings from 6:15 p.m. until 9:15 p.m. Payment of the $98 registration fee may be mailed to the Salt Lake Legal Secretaries Association, P.O. Box 25, Salt Lake City, UT 84110-0025.

The course will include ethics, preparation of legal documents, written communications, state and federal court systems, civil procedure, corporate procedures, domestic relations, and an introduction to citations.

An NALS' Certificate of Completion will be awarded to students who meet all course requirements. Contact Alexa S. Baxter at 532-1234 for further information.

Women Lawyers Name President



Denise A. Dragoo, a shareholder with the law firm of Fabian & Clendenin in Salt Lake City, has been named president of the executive board of Women Lawyers of Utah, Inc.

Ms. Dragoo is a 1976 graduate of the University of Utah College of Law and received a Master of Laws from the University of Washington School of Law in 1977. Her practice at Fabian & Clendenin focuses on environmental and natural resources issues.

Women Lawyers of Utah, Inc. is an organization incorporated to assist in the professional development of women lawyers. The focus of this year's activities will be to assist in implementing the recommendations of the Utah Judicial Council's Task Force on Gender and Justice.

National Lawyers Guild Offers CLEs at its Annual Regional Meeting

The National Lawyers Guild (NLG) will hold its annual regional meeting from Saturday, September 1, through Monday September 3, 1990, at beautiful and rustic Camp Tuttle, located just below Brighton Ski Area in Big Cottonwood Canyon. The NLG will be applying for CLE certification for several of the planned programs. The meeting will complement the Joe Hill Commemoration concert and celebration to be held at Sugarhouse Park, Salt Lake City, Saturday afternoon, September 1, 1990. Many lawyers and law students from the Intermountain West are expected to attend.

Programs offered at the meeting will address:

- Recent changes in labor law.
- The political struggles of Native Americans, with emphasis on Indian voting rights in Southern Utah.
- Defending "SLAP suits," where corporations file defamation claims to silence private citizens who have exercised their First Amendment right to criticize corporate irresponsibility (in this the bicentennial year of the Bill of Rights!).
- The burdens on *workers* caused by U.S. immigration policies.
- The side of the Palestinian struggle not often covered by the mainstream press.
- The recent court victory for the "Hercules Three" who successfully convinced a court and jury to recognize and enforce international law, right here in West Valley City, Utah.
- "Redwood Summer," a movement dedicated to protecting old-growth forests, which is embroiled in controversy as evidence emerges that it has been infiltrated in much the same way as were civil rights groups by the FBI during the 1960s to be held during a special Sunday night session.

Program faculty will include local and regional attorneys, as well as professors from the University of Utah College of Law.

Local practitioners and law students are especially invited to attend. Registration costs will be calculated on a sliding scale. For more details and information, contact Mary Woodhead, at (801) 363-3300.

Rules and Regulations Governing Mandatory Continuing Legal Education

Some Questions and Some Answers

By Robert D. Merrill, Chairman
Board of Continuing Legal Education

The rules and regulations[1] governing mandatory continuing legal education for Utah attorneys have been in effect since January 1, 1990. Since that time the Board of Mandatory Continuing Legal Education ("MCLE") appointed by the Utah Supreme Court has dealt with a myriad of questions concerning the implementation of these rules and has formulated policies in an attempt to ensure uniformity of application. This article summarizes these policies for the practitioners who must live with MCLE.

1. *What is MCLE?*

On December 19, 1988, the Utah Supreme Court granted the petition of the Utah State Bar seeking the establishment of the requirement that active practitioners in the State of Utah be subject to a program for mandatory continuing legal education. MCLE became effective on January 1, 1990, after the Supreme Court had appointed a state board. (MCLE Rule 2.) Thereafter, the Board made recommendations to the Supreme Court for the adoption of rules and regulations governing the administration of the program. These rules and regulations were fashioned after rules and regulations adopted by other states having MCLE and took into consideration guidelines from the Supreme Court and comments from members of the Bar.

2. *Does the Bar administer MCLE?*

No. The MCLE Board is created by and reports to the Utah Supreme Court. The rules and regulations are promulgated by the Utah Supreme Court and administered by the MCLE Board. The Board consists of 15 members of the Utah State Bar, each appointed for staggered three-year terms so that one-third of the members shall be appointed each year with each yearly class including at least one member residing outside of Salt Lake County. No person may serve more than two consecutive terms as a member of the Board. (MCLE Rule 2.)

3. *Who has to pay fees for MCLE and what are the fees used for?*

The MCLE Board incurs expenses in administering the program. These expenses include the salary for the administrator, Sydnie Kuhre, part-time clerical help in setting up files, rent for office space at the Law and Justice Center, office equipment and supplies, and miscellaneous expenses. The Board will prepare periodic budgets to be submitted to the Utah Supreme Court. These budgets will be available for review by interested parties. The MCLE Board obtains no contributions from the Utah State Bar although the Bar has advanced a limited amount of funds to get MCLE started. The Bar is being reimbursed by the MCLE Board. MCLE is intended to be entirely self-supporting. Its only source of revenue

is from fees and expenses. Each member of the Bar is required to pay a fee of $5 at the time he or she files the certificate of compliance (every other year). In addition, all sponsors of continuing legal education programs offered in Utah *for a fee* are required to pay the Board, within 30 days of presenting the course, the fee of $1.50 for each credit hour per Utah attendee, not to exceed a maximum of $15 per Utah attendee. (MCLE Rule 8 and MCLE Reg. 8-101. MCLE Reg. 8-101(2) recently was amended by the Supreme Court to reduce the sponsor fees to these amounts.)

4. *How does the MCLE Board determine which sponsors must pay a fee?*

At the time the MCLE Board approves a sponsor for presentation of a program in Utah, if there is a fee charged for the course, the sponsor is advised of the fee and instructed as to how payment must be made. The administrative officer of the MCLE Board follows up to ensure that fees are paid as appropriate. Some organizations are granted exemptions from paying the fees if they can establish to the Board's satisfaction that no program fees are charged to attendees. For example, the Salt Lake County Bar luncheon programs do not include an MCLE fee because the fee charged by the county bar covers only the cost of the meal. The MCLE Board understands that members of the Salt Lake County Bar Association can attend the program without cost if they do not order lunch.

5. *How does a member of the Bar determine if an out-of-state program qualifies for MCLE Credit?*

The MCLE Board has established a list of those state bars having continuing legal education requirements which are consistent with Utah's requirements. If you have a question concerning the qualification of a program, please contact the MCLE Board Administrator. Courses offered outside of Utah which are accredited by those states are entitled to presumptive accommodation for the benefit of Utah lawyers. The Board periodically reviews this list and has the authority to audit the programs offered by any sponsor having presumptive approval in order to ensure that the standards established by the MCLE rules and regulations are satisfied.

6. *Does "in-house" CLE qualify for credit?*

Individual course approval is governed by MCLE Reg. 4(b)-102. Most in-house programs do not satisfy MCLE Reg. 4(b)-102(g) which requires that the program be made available to attorneys throughout the state unless the sponsor is able to demonstrate to the satisfaction of the Board that there is good reason to limit the availability of the program. The MCLE Board has approved some in-house programs. For example, some state and federal agencies offer courses to staff attorneys on a statewide or regional basis which are high-quality programs but limited to state or federal employees or other attorneys with a direct connection with the agency. Also, some specialized organizations of attorneys in the state, such as insurance or criminal defense counsel, have sought and obtained approval of their programs. On the other hand, the Board has not approved law firm associate training or CLE programs because it is felt that these programs are part of an employee training program or informal training in basic legal principles. However, the MCLE Board does not intend to do anything to discourage firms from developing programs which would qualify for MCLE credit and continues to consider carefully any requests for accreditation from these sources.

7. *Do Bar or Court Committee assignments qualify for MCLE?*

No. many attorneys are called upon to serve on special Bar committees or are appointed by the court to serve on committees. Such committee service is vital because it assists the Bar in performing its duties and assists the courts in reviewing and updating rules and procedures. Each attorney has a duty to perform public service and it is the understanding of the MCLE Board that this service, like any other public service, is separate and apart from MCLE.

8. *Has the MCLE Board developed a uniform manner for attorneys to keep track of MCLE credits?*

No. However, the MCLE Board recommends that each attorney maintain a file in his or her office containing documentation and backup for all MCLE courses attended so that when the necessary hours have been accumulated the attorney can submit the certificate of compliance. The MCLE Board suggests that the file contain a "working copy" of the certificate of compliance which will serve as a guideline for the information needed. Again, once the minimum hours have been accumulated, *the report can be submitted immediately*. Only the certificate need be submitted to the MCLE Board—not the backup materials. The certificate of compliance form will be available at the Law and Justice Center and will be reprinted in a future edition of the *Utah Bar Journal*.

9. *Is there any problem with attending a MCLE program outside of my area of practice specialty?*

No. The subject matter is not relevant with respect to obtaining MCLE credit.

10. *What about audio/videotape training?*

MCLE Reg. 4(d)-101 allows credit for "Board accredited audio and videotapes." The State Bar has an extensive library of such tapes and the MCLE Board has a list of approved tapes. If you desire to obtain MCLE credit for an audio or videotape presentation, such a presentation must be made at the Law and Justice Center or simultaneously to at least three members of the Bar, one of whom shall be designated as leader and who shall be responsible to document attendance at the presentation.

CONCLUSION

The MCLE Board needs your comments and suggestions with respect to the successful implementation of this program and you are urged to contact the MCLE Administrator or any member of the Board concerning any problems or questions you may have.

Remember, these Board members are on the Board as a public service and receive no MCLE credit.

[1] These rules and regulations were published as a pull-out to the January 1990 issue of the *Utah Bar Journal*. Copies are available at the MCLE office at the Law and Justice Center. In this article the rules will be cited as "MCLE Rule " and the regulations will be cited as MCLE Reg. ."

The Utah Volunteer Lawyers Project

The UVLP was nominated for a Utah Council of Volunteers' Helping Hands Award. This is an annual award given to non-profit agencies that use volunteers, and to businesses for their community service to volunteer agencies. The Utah Council of Volunteers, with Colleen Bangerter as Honorary Chairman, is a private organization established by the Governor's office in 1980 to serve as a statewide catalyst and advocate for volunteerism. It seeks to improve the quality of life for Utah citizens by encouraging the use of volunteer service where opportunities exist. The UVLP was not selected for this year's award, but was commended for its contribution to the community and its support of volunteerism.

The UVLP receives support and assistance from the American Bar Association and this year's ABA Pro Bono Conference was held at Snowbird, May 10-12. The Honorable Judith M. Billings was the keynote speaker at the annual meeting of the National Association of Pro Bono Coordinators.

The work done by the UVLP is exceptional and deserves recognition. The following is a continuation of the membership list appearing in April's *Journal*. The people who have been helped by these volunteers would otherwise not have had access to the legal system. For more information about the Project, please contact Mary Nielsen, Project Coordinator, Utah Legal Services, 328-8891 or 1-800-662-4245.

Michael R. Shaw
Stephen M. Tumblin
John W. Palmer
Dwight C. Packard
Lorin N. Pace
Langdon T. Owen Jr.
George Mortimer
Roger J. McDonough
John H. McDonald
Carol B. Olson
Kenneth Okazaki
Keith F. Oehler
Patrick J. O'Hara
Joyce Nunn
Rick Norton
John T. Nielsen
Carolyn Nichols
Ann H. Nevers
John L. Miles
James D. Mickelson
William G. Marsden
Ira A. Huggins
I. Gordon Huggins
Thomas Howard
Jackson Howard
James F. Housley
Frank J. Houser
Carl E. Malouf
Douglas R. Malan
Richard P. Makoff
Heinz J. Mahler
Michael D. Lyon
Steven H. Lybbert
Ronald E. Nehring
Robert L. Neeley
Richard H. Nebeker
Ray E. Nash
John P. Mullen
Michael R. Mueller
Robert F. Orton
Robert Orehoski
Kevin Ontiveros
Andrew M. Morse
S. Baird Morgan
Roy B. Moore
Michael K. Mohrman
Roger A. Moffit
Thomas Mitchell
Michele Mitchell
Maxwell A. Miller
Charlotte L. Miller
Milo S. Marsden Jr.
J. David Nelson
Jane Marquardt
Joel T. Marker
Brent V. Manning
Max K. Mangum
D. Karl Mangum
Raymond N. Malouf Jr.
Marcella L. Keck
Thomas L. Kay
Brian Katz
Kent M. Kasting

Neil Kaplan
Michael S. Junk
Phillip D. Judd
Richard Medsker
James B. Medlin
David Meadows
Lynn C. McMurray
Gayle McKeachnie
JoEllen Lind McGuigan
Paul W. Mortensen
Douglas G. Mortensen
Harry E. McCoy
Stephen R. McCaughey
E. Craig McAllister
L.S. McCullough
Blaine P. McBride
Michael J. Mazuran
Stuart T. Matheson
Michael G. Martin
Douglas G. Martensen
Richard S. Nemelka
Margaret R. Nelson
Jay A. Meservy
James W. Kennicott
Walker Kennedy III
Kathryn D. Kendall
Keith A. Kelly
Danny C. Kelly
Daniel C. Keller
Timothy C. Houpt
Vern Hopkinson
Roger H. Hoole
William D. Holyoak
Miles D. Holman
Floyd W. Holm
J. Kent Holland
Eric Pfost
Joyce Maughan
Craig H. Hall
Gregory B. Hadley
Scott A. Gubler
Thomas R. Grisley
Martin V. Gravis
Mark H. Gould
Michael J. Glasmann
Cyndi W. Gilbert
Joseph H. Gallegos
A. Howard Lundgren
John Lund
Michael R. Loveridge
D. Michael Jorgensen
Lyle W. Hillyard
Robert K. Hilder
Richard Higgins
Michael F. Heyrend
Lynn P. Heward
Stephen L. Henriod
Joseph L. Henriod
C.R. Henriksen Sr.
Kent B. Linebaugh
Miles Lignell
Stephen W. Jewell
Julian D. Jensen

Jay E. Jensen
Russell Jenkins
R. Bret Jenkins
Michael Jenkins
David Jeffs
Leo A. Jardine Jr.
Jathan Janove
Larry Jacobsen
Hon. Norman H. Jackson
Dennis Haslam
James Haskins
David R. Hartwig
Orval C. Harrison
Michael Harrison
Milton T. Harmon
Louise Knauer
Thomas R. King
Scott W. King
Felshaw King
Brian King
Douglas Kinateder
Dale Kimball
Randy S. Kester
Don E. Olsen
Merrill G. Hansen
Glen Hale
Robert W. Gutke
Robert C. Gross
Ronald E. Griffin
Randall E. Grant
Ronald H. Goodman
Herbert W. Gillespie
Mark R. Gaylord
Randall Gaither
Dennis L. Judd
Joseph J. Joyce
Elizabeth Joseph
Richard K. Hincks
David D. Loreman
Robert L. Lord
Steven G. Loosle
S. Dee Long
Larry Long
John C. Long
David Lloyd
Randy Lish
John K. Johnson
Gary L. Johnson
Jan N. Henrie
Alan L. Hennebold
J. Keith Henderson
Read R. Hellewell
Timothy W. Healy
Gregory P. Hawkins
Boyd J. Hawkins
Edward B. Havas
David Havas
Joseph Hatch
Elizabeth M. Haslam
C. Dean Larsen
Wesley M. Lang
David Lambert
Paul T. Kunz

Steven Kuhnhausen
Gary Kuhlmann
Richard Hutchins
Royal K. Hunt
Lawrence H. Hunt
Quinn D. Hunsaker
L. Rich Humpherys
Nathan Hult
Philip R. Hughes
Michael D. Hughes
Grant W. Morrison
Douglas T. Hall
James Reed Haisley
Frank J. Gustin
James M. Grizzard
Frederick N. Green
Paul Graf
Ted K. Godfrey
L. Zane Gill
Max C. Gardner
Boyd M. Fullmer
Rick B. Hoggard
L. Brent Hogan
Barbara G. Hjelle
Scott W. Loveless
David J. Jordan
Ken P. Jones
David Jones
Bradley R. Jones
Stephen L. Johnston
Steven G. Johnson
Robert A. Johnson
Orlano K. Johnson
Richard Henriksen Jr.
Reid E. Lewis
Leonard J. Lewis
James C. Lewis
David Leta
Gale M. Lemmon
Virginia C. Lee
Scott W. Lee
James B. Lee
Victor Lawrence
Robert D. Lawrence
Barry Lawrence
A.W. Lauritzen
Kevin Jackson
James R. Ivins
David Isom
Nathan R. Hyde
Stephen F. Hutchinson
William J. Hansen
Royal Hansen
R.B. Hansen
John E. Hansen
Eugene W. Hansen
Charles Hanna
George Handy
David R. Hamilton
Narvell Hall

Litigation Report and Update
July 15, 1990

The December 1989 issue of the *Utah State Bar Journal* contained a Litigation Report published for the purpose of informing our members as to what litigation had been filed against your Association, its staff, officers and Commissioners. Your Bar Commission believes it to be most important to keep members informed of the status of any such pending litigation on a regular basis. The following information is intended to update you as to additional developments which have occurred in relation to individual cases and to inform you of new litigation filed against the Bar. Similar updated reports using the same formal will appear on a regular basis in future issues of the *Utah Bar Journal.*

SUMMARY OF LITIGATION

PLAINTIFF (COUNSEL) AND DATE OF FILING	CAUSE OF ACTION	COURT/JUDGE	COUNSEL FOR BAR	CURRENT STATUS
1. Wendy W. Krogh (Brian Barnard) Fld. 1/25/88).	Plaintiff's challenge to the extent of continuing insurance coverage under COBRA alleging that the USB is a state agency, $10,000 plus compensatory damages and $10,000 plus punitive damages, attorney's fees and costs.	U.S. Dist. Ct. J. Winder, C-88-52-W	C. Kipp, R. Rees, S. Trost	USB's Motion for Summary Judgment granted 3/10/89. Judgment for USB entered 8/16/89.
2. Brian Barnard (Pro se) Fld. 2/8/88.	Disclosure of Bar staff salaries under the *Utah Information and Practices Act* seeking a declaration that the USB is a state agency, injunction relief and $100 to $1,000 exemplary damages, and attorney's fees and costs.	Third Dist. Ct. J. Wilkinson, C-88-0578 and S. Crt.	C. Kipp, R. Rees, R. Burbidge, S. Trost	Summary Judgment granted in favor of P requiring specific salary information to be disclosed, denying damages and attorney's fee claims and declaring USB to be a state agency; cross appeals filed and USB's Motion to Stay Execution on the Judgment granted on 5/20/88; all appeal briefs filed; oral argument heard 12/5/89, awaiting decision by S. Ct. $10,367.59 paid in general attorney's fees to USB attorneys, $5,000 paid on insurance deductible.
3. Brian Barnard (Pro se) Fld. 2/16/88.	Action for injunctive and declaratory relief to prevent USB from suspending P for refusing to provide certain information on the licensing form and to determine whether certain licensing form information is "private" information. Also seeks a declaration that the USB is a state agency, injunctive relief and $100 to $1,000 exemplary damages, attorney's fees and costs.	Third Dist. Ct. J. Brian, C-88-0801	C. Kipp, R. Rees, R. Burbidge, S. Trost	Discovery and P's Motion for Judgment on the Pleadings and/or Motion for Summary Judgment pending without date; $2,311.30 paid toward insurance deductible; on 6/14/89 Motion to Stay granted, awaiting decision by S. Ct. on action No. 2 above.
4. Brian Barnard (Pro se) Fld. 3/21/88.	Attempt to re-open the lawsuit settled approximately 1 year ago re: publishing letters to the editor in the Bar Letter; current action seeks declaratory relief for deprivation of First Amendment rights for failure of the State Bar to publish a recent proposed letter to the editor from P. Action was brought pursuant to 42 USC 1983 seeking a declaration that the USB is a state agency, $10,000 plus compensatory damages, $5,000 punitive damages against each defendant, attorney's fees and costs.	U.S. Dist. Ct. J. Sam, C-88-02395 and Tenth Cir.	G. Hanni	6/3/88—Judge Sam granted USB's Motion for summary Judgment dismissing the complaint and holding that USB Bar Letter was not a designated public format and access not protected by First Amendment. Affirmed by Tenth Circuit on 3/9/90. $5,000 paid toward insurance deductible.
5. Brian Barnard, Brad Parker (Pro se) Fld. 5/1/88.	Civil rights action challenging use of mandatory dues for non-essential bar functions as violations of First and 14th Amendments. P seeks injunctive and declaratory relief, attorney's fees and costs.	U.S. Dist. Ct. J. Greene, C-88-379A. Case reassigned to J. Burciaga, U.S. Dist. Ct. (New Mexico.).	C. Kipp, R. Rees	U.S. S. Ct. on 6/4/90 upheld constitutionality of unified bar in *Keller v. State Bar of Calif.* $5,000 paid on insurance deductible.
6. Ernest and Sharon Baily (S. Rowe) Fld. 12/16/87.	USB's alleged breach of fiduciary duty for failure to discipline Richard Calder seeking Writ of Mandamus and $800,000 in damages, a "state agency" declaration, attorney's fees and costs.	Third Dist. Ct. J. Wilkinson, C-87-8124	C. Kipp, R. Rees	Order granting D's Motion to Dismiss entered 2/7/90. Notice of Appeal filed. D's Brief due 8/6/90.

SUMMARY OF LITIGATION

PLAINTIFF (COUNSEL) AND DATE OF FILING	CAUSE OF ACTION	COURT/JUDGE	COUNSEL FOR BAR	CURRENT STATUS
7. Dennis and Reta Job (Pro se) Fld. 12/17/87.	USB's alleged breach of fiduciary duty for failure to discipline Richard Calder seeking Writ of Mandamus and $500,000 in damages, a "state agency" declaration, attorney's fees and costs.	Third Dist. Ct. J. Rokich, C-87-08173	C. Kipp, R. Rees	Order granting D's Motion to Dismiss entered 5/18/90. No Notice of Appeal filed as of 7/13/90.
8. Ronald O. Neerings (Brian Barnard) Fld. 6/9/88.	Feb. 1988 unsuccessful Bar Exam applicant's Ct. action against USB for releasing Bar examination information, seeking a "state agency" declaration, injunctive relief, $10,000 plus compensatory damages, $100 to $1,000 in punitive damages, attorney fees and costs.	Third Dist. Ct. J. Sawaya, C-88-3807	C. Kipp, R. Rees	D's Motion for Summary Judgment for Dismissal with prejudice granted. D's request for costs granted; N of appeal filed with Utah S. Ct.; Appellee's Brief filed 7/11/90; $5,000 paid in insurance deductible.
9. L.R.T. (real name not disclosed) (Brian Barnard) Fld. 12/8/88.	A 1983 civil rights action alleging deprivation of substantive and procedural due process in USB's 1986 denial of admission to practice law resulting from P's felony conviction.	U.S. Dist. Ct. J. Jenkins, 88-C-1141W	C. Kipp, R. Rees, S. Trost	Answer filed 1/6/89; P's Motion to Not Disclose P's Actual Name granted; USB's Motion for Protective Order re: admission file granted; Discovery cutoff 10/1/90; $5,000 paid on insurance deductible.
10. Brian Barnard (pro se) Fld. 8/2/89.	Action for injunctive relief against Toni M. Sutliff, Assoc. Bar Counsel, to enjoin disciplinary process for failure to provide P with certain requested information prior to the time such information was available to Assoc. Bar Counsel for release to P.	Third Dist. Ct. J. Hansen Ut. S. Ct.	C. Kipp R. Rees, S. Trost	D's Motion to Dismiss filed; P filed Voluntary Dismissal; and refiled in S. Ct. on 12/13/89. S. Ct. orders all discipline at Screening Panel level be by consent. Motion for Sanctions granted. $4,381 awarded to D. P.'s Motion for Summary Reversal denied. Appeal pending.
11. Richard Crandall (Brian Barnard) Fld. 7/21/89.	1983 civil rights action against USB and Bar Commissioners alleging improper conduct for failing to reinstate Crandall, after suspension for failure to timely pay Bar dues in the face of several pending formal complaints with serious discipline under consideration; seeking declaratory relief and money damages of at least $250,000.	Fed. Dist. Ct. J. Sam	T. Kay, S. Trost	5/3/90 Magist. Boyce Recommends D's Motion to Dismiss be granted. P files objection to Recommendation on 5/14/90.
12. Brian Barnard (Pro se) Fld. 3/8/90.	Declaratory relief sought to determine jurisdiction of dist. ct. in matters relating to Bar policies, rules and practices.	Third Dist. Ct. J. Sawaya	C. Kipp, R. Rees, S. Trost	Order granting D's Motion to Dismiss entered 7/9/90.

PETITIONS PENDING AS OF 7/15/90

13. In re: USB. Fld. 3/29/90. Petitioner: Board of Bar Commissioners.	Petition for Approval of Increase in Licensing Fees.	S. Ct.	S. Trost	Petition granted with certain restrictions 8/10/90.
14. In re: Amendments to Rules of Integration. Fld. 11/6/89. Petitioner: B. Barnard.	Seeks Rule changes prohibiting USB from using member fees in performing non-essential functions.	S. Ct.	C. Kipp, R. Rees, S. Trost	USB's Response filed 2/28/90. R's position supported by U.S. S. Ct. decision in *Keller v. State Bar of Calif.* upholding constitutionality of unified bars.
15. In re: Procedures of Discipline. Fld. 9/27/89. Petitioner: B. Barnard.	Petitioner seeks amendment to Rule XVI to allow actions in equity against Bar Counsel and a new Rule for assignment of cases to Screening Panels.	S. Ct.	T. Sutliff, S. Trost	Referred to S. Ct. advisory Committee on Ethics and Procedures of Discipline, 3/5/90.
16. In re: Bar Counsel and Commissioners. Fld. 7/21/89. Petitioner: B. Barnard.	Petitioner seeks Prohibition of Bar Counsel from prosecuting discipline cases before Bar Commission and representing Commission as general counsel.	S. Ct.	T. Sutliff, S. Trost	Response filed 2/28/90.

1990 Legislative Retrospective

By John T. Nielsen
Legislative Editor

The 1990 General Session of the Utah Legislature concluded its deliberations some four months ago and by now many of those legislative enactments have become Utah law.

As expected, already some have been the subject of ongoing debate and it is likely that many bills will be revisited during the interim and most assuredly when the 1991 Session begins in January.

Additionally, legislative sessions are frequently more interesting with respect to what did not pass than what actually became law. Like those bills that will require revision in the 1991 General Session, we can expect to see several of the bills that failed by considered during the interim and re-introduced in 1991. Some of those bills are of considerable interest to the legal profession and should be followed closely with respect to their potential impact upon the practice of law.

This article will give my perspective on certain areas of current and potential legislative initiatives which should be of interest to the profession.

ATTORNEY'S FEES

The legal profession is generally always the subject of legislation, some of which can drastically alter the way we do business. Two bills that were introduced in the 1990 Session were intended to change the way in which attorney's fees would be awarded in civil cases.

Senate Bill 77 sponsored by Senator Dixie Leavitt concerned contingent fee awards. This bill provided that when an attorney undertakes a contingent fee representation, if that attorney does not prevail, he (the attorney, not the client) would be liable to the prevailing party for the same percentage of any attorney's fees accessed against his client as the percentage of the recovery the attorney would have received if he prevailed in the case. The Bar Commission took a position in opposition to this legislation on the basis that it would have a chilling effect upon legitimate access to courts. The bill was referred to interim study for further consideration, but the philosophy upon which the bill was originally drafted and introduced is instructive.

There is a general perception that attorneys abuse the contingent fee process and that cases are routinely filed having no merit and with the intention of being compromised as a nuisance settlement. While I do not believe empirical evidence suggests that the contingent fee is abused in Utah, it is nonetheless clearly a perception, and the sponsor has made it very clear that he desires evidence that the profession has and will be serious in its attempts to regulate and discipline attorneys who file vexatious or non-meritorious lawsuits. This bill has not yet been placed on the agenda for interim consideration, but it is my judgment that if the sponsor is not convinced that we in the profession are serious about evaluating our claims, he will likely pursue the bill again. Such legislation would have considerable appeal to many legislators whose opinion of lawyers is anything but complimentary.

A second bill, House Bill 296, dealing with the award of attorney's fees was also briefly considered and referred to interim study. During the Interim Judiciary Committee hearings in June, this bill was considered and passed unanimously from interim study. There is no question but what it will be introduced in the 1991 Session. In a general sense, this bill requires the court in any civil action commenced or appealed to award as part of the judgment reasonable attorney's fees to the prevailing party. Attorney's fees are construed to be in addition to any other costs that may be assessed in the judgment. The bill also allows the judge discretion to apportion fees under certain limited circumstances, and would allow for a negotiated fee settlement between the parties. Additionally, the bill provides that the court may find a litigant who defeats a claim of great potential liability to be the prevailing party even though the opposing party receives an affirmative recovery.

Representative Jerrold Jensen, a member of the Bar, is the sponsor of this bill and solicits comments from members of the Bar respecting its provisions.

CIVIL PROCEDURE

Representative John Valentine introduced House Bill 353 which was an amendment to the Utah Rules of Civil Procedure. This bill would have allowed parties a change of judge by motion similar to the pre-emptive challenges available for jurors. While the Bar Commission took no position on this bill, there were many who believed that its provisions would have created havoc in smaller jurisdictions respecting the logistical problems of bringing judges from other judicial districts in to hear cases. Ironically, the bill was intended to benefit lawyers who practice in jurisdictions where there is only one judge available and where there may be animosity between the lawyer and that particular judge.

While this bill may not reappear in the 1991 Session, there have been suggestions that Rule 63 of the Rules of Civil Procedure should be changed to allow the same thing the legislation proposed to do. Litigators in particular should be aware of these developments and be prepared to offer productive input irrespective of the forum in which such a proposal may arise.

ALTERNATIVE DISPUTE RESOLUTION

Although no bill was introduced in the 1990 General Session of the Legislature, this subject has been discussed with frequency in the past and has recently resurfaced in the Interim Judiciary Committee. The Committee reviewed whether or not there is a need to license public alternative dispute resolution providers. Draft legislation was presented to the Committee which would create an Alternative Dispute Resolution Providers Licensing Board. The bill also provides for licensure of those persons who engage in alternative dispute resolution and provides certain exemptions for those who can practice without having previously obtained state licensure. The bill also provides qualifications for licensure and grounds for denial and discipline.

Aside from the proposed legislation, there was considerable discussion about the subject and philosophy of alternative dispute resolution. It is apparent that there is considerable sentiment that this method of resolving disputes is not being utilized to the extent that he could and should be. Testimony was given that up to a certain dollar figure it is simply not cost effective to pursue litigation and that alternative dispute resolution provides an acceptable and efficient forum for resolving matters of relative minor consequence. There was also a feeling that the facilities of the Law and Justice Center are not being utilized to their fullest potential for alternative dispute resolution and arbitration matters.

It would be my judgment that this subject will be discussed at least one more time during the interim and it is very likely that legislation will be proposed in the 1991 Session.

PARALEGALS

The use of paralegals has been viewed by most as a positive development in assisting lawyers to accomplish their work and in making legal work more economical for clients. However, the use of paralegals has created an atmosphere where many believe a considerable amount of work currently being done by practicing attorneys could be done with equal skill and at a considerably less cost by qualified paralegals working without attorney supervision.

The subject of paralegals and the extent to which they should be allowed to participate in the legal process was also discussed during the Interim Judiciary Committee.

There is no proposed legislation available at the present time, but it was suggested that a study being undertaken in California would be a good pattern to follow in Utah. This subject will also be revisited later in the summer by the Judicial Interim Committee and it is quite probable that legislation may be proposed to allow and license paralegals to do a limited amount of actual law practice in the area of bankruptcy, domestic relations, real estate and some litigation related matters.

This is an area of complex considerations and there would need to be established clear definitions as to what is or is not the unauthorized practice of law and a clear distinction between the roles of paralegals who work independently and those who work under the direction of an attorney.

ENVIRONMENTAL REGULATIONS

Legislatures in all states have been fertile ground for proponents of environmental regulations. Utah has certainly not escaped the fervor to improve the environment and recently there has been a trend to enhance the ability of the regulators to enforce environmental regulations and provide them the civil and criminal tools to get the job done.

The Utah Legislature has been active for the past few years in environmental matter and the 1990 Session saw significant legislation passed which signals Utah's willingness to be serious about environmental regulations and the violations of those regulations.

Senate Bill 255 dealing with waste management amendments is a comprehensive piece of legislation dealing with solid waste management. The bill requires counties to establish solid waste management plans and provides a means to fund the development of those plans. Additionally, it establishes siting requirements for radioactive treatment and disposal facilities as well as for the constructing of non-hazardous solid waste facilities. This bill was likely precipitated by the requirements of Subtitle D of the Resource Conservation and Recovery Act but perhaps more directly by the Governor's initiative to create a Bureau of Environmental Quality.

The establishment of such a bureau signals a clear intent of the current administration to give substantial priority to environmental regulations. No longer would the various agencies that deal with the environment be part of the Utah State Department of Health but would be elevated to separate department status. This would put those agencies on equal footing in terms of administrative importance and funding with other major departments of state government. If such a measure passes, Utah industry and business will have to begin paying increased attention to environmental matters.

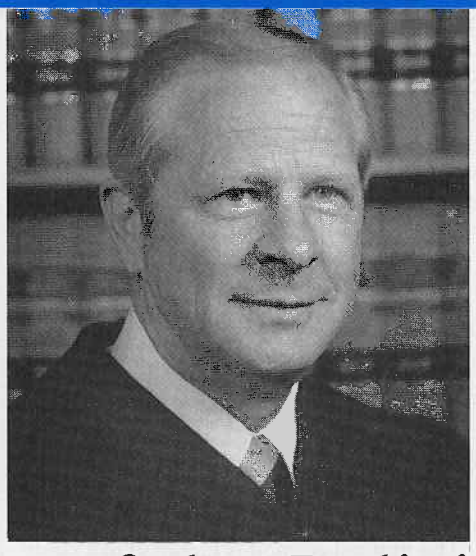
Of less profile but of more sobering potential was the enactment of Senate Bill 170 which enhanced many of the penalties for the violation of certain environmental regulations to felonies. This enactment is in line with the Justice Department and Environmental Protection Agency trend of the increasing use of criminal sanctions against environmental polluters. Utah State Attorney General Paul Van Dam has made it clear that his office intends to vigorously prosecute those who offend criminal provisions of environmental regulations. There is already pending in a Utah federal court one major criminal environmental prosecution and it is likely that more will follow both in federal and state courts.

Because of the potential liability of not just the corporate entity but its officers and employees, business and industry must make certain that their businesses are operated with environmental integrity and that their managers and employees are properly trained and adequately supervised in areas where there is potential for liability exposure.

Additionally, environmental matters are not strictly the province of highly specialized legal environmentalists. Environmental regulations and their implications cross all legal boundaries, and every attorney needs to be aware of the potential ramifications of environmental concerns and regulation as they advise their clients.

In summary, this article is intended to provide insight into some of the subjects we can likely and logically expect to see in future legislative sessions. Some of these matters will have profound effect upon how we practice law and how we advise clients.

As these issues develop throughout the year, I will report their progress in subsequent *Bar Journal* articles.



State of the Judiciary

Presented By Chief Justice Gordon R. Hall

Annual Meeting of the Utah State Bar
Beaver Creek, Colo.
June 28, 1990

CHIEF JUSTICE GORDON R. HALL was appointed to the Supreme Court in January 1977 by Gov. Scott M. Matheson. He was a judge in the Third District Court from 1969 until his appointment to the Supreme Court. Prior to his appointment to the bench, Chief Justice Hall was a town attorney for Wendover and Stockton, a city attorney for Grantsville and Tooele County Attorney. He served as an attorney-advisor for the Tooele Army Depot from 1953 to 1958. He is the chairman of the Utah Judicial Council, past president of the Conference of Chief Justices and former chairman of the board of directors of the National Center for State Courts. He graduated from the University of Utah College of Law in 1951. He received the Judicial Council's Distinguished Jurist Award in 1988.

President Chamberlain, distinguished members of the Bar, and special guests:

I have looked forward to the presentation of this report with much greater anticipation than in prior years. This is so by reason of the fact that a number of years of careful planning have culminated in making our judicial system more efficient and accessible than ever before. During 1989, we substantially achieved the goals contemplated by the 1985 revision of the judicial article of the Utah Constitution.

To the extent that a strong, independent judiciary exemplifies our commitment to liberty, no state has demonstrated more of a commitment to this ideal than has Utah. Our courts have enjoyed strong direction and support from the Legislature and from the governor. Bar members and lay citizens have volunteered thousands of hours to strengthen our court system, and individual judges have assumed direct responsibility for implementing needed improvements.

COURT DELAY

A brief review of a few areas reflects our progress. By 1986, despite the fact that the Utah Supreme Court was one of the four most productive courts in the nation, appellate delay had reached intolerable levels. Some cases were taking nearly four years to resolve on appeal. Projections indicated that by 1990, appellate delay in Utah would exceed seven years. In response to this crisis, legislation was sought to permit the establishment of a court of appeals. The admittedly optimistic goal was to ensure that by the end of 1990, all cases could be resolved on appeal in an average of one year instead of the projected seven years.

The pressing question was, could the Supreme Court and the court of appeals in just three years work through an oppressive appellate backlog and be on track with a one-year case resolution schedule?

I am most pleased to report that both courts have met this goal. In the face of an extremely heavy caseload, the court of appeals schedules cases for oral argument within four months of readiness, and final decisions are published within three or four months of argument. In addition to the speed of handling appeals, this new court's scholarly opinions are providing clarification of many disputed areas of Utah common law.

Consistent with the court of appeals' excellent work, the Supreme Court has nearly eliminated its accrued backlog.

—The January 1987 total of 210 cases under advisement has been trimmed to just 80 today.

—The 477 cases awaiting oral argument in 1987 have been cut to only 52, now at issue.

Because of the efforts of all parties, Utah has turned the corner on appellate delay. This progress will be maintained.

At the trial court level, Utah's record continues to be impressive. The trial court work load has grown at projected levels, but improved calendaring practices continue to allow the district courts to hear cases within 90 days of readiness for trial. No Utah trial court suffers from the delays of one or two years that many states experience.

In two areas, caseload growth has been so rapid that the efficiency of the system has been jeopardized. The juvenile court has experienced a 50 percent increase in filings in the last several years. The increase reflects the same growth seen in the teenage population generally. But no juvenile judges have been added in the past four years. Of all areas, court delay in dealing with our children is the least acceptable. An audit by the National Center for State Courts confirmed the need for an additional judge in the Weber, Davis and Morgan County

areas, and in the Legislative session just passed, the Legislature did indeed authorize a new judgeship. We expect to fill the position in September.

Circuit court filing have also grown substantially. The primary impact has been felt in the clerk's offices. The judicial council is proposing both staffing level changes and changes in the qualifications for clerks.

In our courts not-of-record, the justice courts, changes are also being made to improve public access.

JUDICIAL ADMINISTRATION

Modernization of judicial administration was a key objective in the revision of the judicial article. Courts and judges tend to have strong allegiance to tradition and a conservative approach to change. The qualities help ensure continuity and predictability in our justice system. But we all recognize the need for the courts to keep pace with a quickly changing society by establishing effective and efficient means of administering the judiciary.

Under the judicial council's leadership, many important initiatives are being pursued. I would like to discuss several of these initiatives with you.

—As recently as 1985, automation was almost unheard of in the courts.

—Today, our juvenile court is nationally recognized for its information system.

—99 percent of the circuit court caseload is automated, and only

—Six months after the transfer from the county, 90 percent of the district court caseload became automated.

—The two appellate courts will automate their operations beginning next month.

With adequate support, Utah is now within two years of being able to provide automated access to court calendars and files for law firms, the press, and other businesses, such as title companies. Judges will be able to access criminal and driver's license files during court hearings, avoiding weeks of delay.

This year, the courts will implement a pilot audio-video arraignment program. This offers the potential of significantly reducing transportation costs while improving court security.

In an effort to better utilize facilities and staff, Utah has adopted a policy of co-locating courts. Historically, we have built individual facilities for each level of court, which has resulted in duplication of expensive support space, higher staff overhead, and specialized courtrooms which have prohibited shared use by several court levels. The results of initial efforts to consolidate some court facilities in various districts have been encouraging. More important than the initial savings in capital costs has been the increased efficiency in the utilization of judges and staff.

Last year, a study was completed of the feasibility of co-locating appellate and trial courts in Salt Lake City. This study was overseen by lay citizens, building board representatives, legislators, lawyers, judges, and city officials.

It indicates that co-location will result:

—In a savings of 40,000 square feet of space.

—In reduced staffing costs.

—In improved access for the public.

—And in improved ability to manage future growth and existing resources.

Funding is, of course, the key to such a project, and hopefully the Legislature will see fit to include it in its building plan in the not too distant future.

The judicial council is engaged in a study of the organization of the circuit court and the allocation of jurisdiction in all trial courts. This study was prompted by the concern that the current circuit court structure may result in a proliferation of one- or two-judge court facilities which are expensive to build and operate. Concern had also been voiced about the projected need for additional trial judges. The council intends to present a detailed analysis of these issues and recommendations by the fall of this year.

Current studies on the highly important role of court clerks are also in process. Proposed modifications will recognize the impact of automation and the need for shared services between all levels of court. There is also progress in the reclassification of court clerks with a view toward proper recognition of their professional status.

JUDICIAL PERFORMANCE

Utah is recognized as a national leader in the establishment of judicial performance evaluation programs. Judges will now receive subjective and objective feedback on their performance every two years. The primary purpose of this program is the self-improvement of judges individually and the judiciary as a whole. A secondary purpose is to increase the level of information available to the public at the time of judicial elections.

Judges undergo an extensive screening process prior to appointment and confirmation. Their decisions are continually scrutinized through appellate review. Additionally, Utah has an independent conduct commission to review any complaints of violations of the code of judicial conduct. Because of this rigorous process established by our constitution, some have expressed concern that additional performance review may jeopardize judicial independence. This concern is well-founded.

Judicial independence is the heart of our justice system. If a judge is placed in the position of requiring popular approval for decisions or needing the approval of an individual or small groups for continued service, the constitutional framework of our system will be lost. Recognizing this, the council feels that the proper balance can be preserved by providing individual judges with valuable and confidential feedback. Ongoing evaluations of the program will be maintained to ensure that judicial independence is not sacrificed.

GENDER AND JUSTICE

For the past two years, a diversified citizens committee has been examining the impact of gender on justice. They have examined the entire scope of our justice system. This subtle-but-significant issue is probably present in every institution of government. But the judicial council feels that it is especially critical that the courts be sensitive to any issue, however subtle or unintentional, which may affect the fair administration of justice. Therefore, the council chose to undertake this critical self-examination with a commitment to address all issues identified. This report was released in April and is now in the process of review and implementation.

FUTURE OF THE COURTS

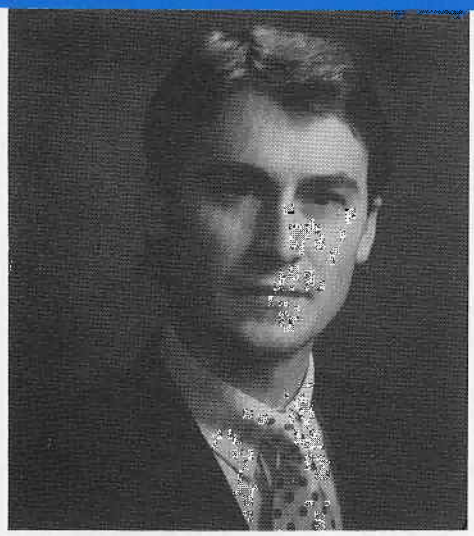
The judicial council, with the support of the state justice institute, is undertaking an extensive strategic planning effort on the future of Utah courts. It is hoped that this important endeavor will be modeled after and coordinated with the strategic planning process established by this Legislature.

A task force is in place, chaired by Roy Simmons and composed of members from all segments of society, including members of the judiciary.

CONCLUSION

The progress and initiatives I have outlined have not occurred by accident. They are the product of purposeful design of all members of the judiciary. The foundation of this design is a recognition that our personal freedoms are directly tied to making constitutionalism work. Our government requires three stong and separate but interdependent branches—three branches which respect the need for tension and cooperation and the fact that the vitality of one branch is dependent on the strength and vitality of the other branches.

On behalf of the judiciary, I extend my appreciation to each of you for ensuring that Utah has such an independent judicial process.



Participate in the Young Lawyers Section

By Rick Van Wagoner
Young Lawyers Section President

The Young Lawyers Section is committed to public service and service to the newer members of the Bar. Through the various committees and projects listed below, young lawyers have unselfishly given thousands of hours of needed service. On behalf of the Young Lawyers Section, I thank every person who has donated time and services to improve our communities, assist those in need of legal services and education, and improve the image of lawyers. I also thank the Section's benefactors, whose funds have made many of the projects and services possible.

The Section is in the process of restaffing its standing committees and creating additional committees to address new areas of service to the public and the Bar. The following is a list of the committees and committee projects. I encourage you to review the list, find an area of interest to which you could commit a limited amount of time, and participate in these satisfying and worthwhile areas.

BILL OF RIGHTS COMMEMORATION COMMITTEE

Bill of Rights Roundtable Programs
Bill of Rights Public Education Programs
Bill of Rights Essay Contest
Bill of Rights Newspaper Article Series
Bill of Rights Concert Sponsored by Utah Symphony (proposed)
United States Constitution/Annual Commemoration

COMMUNITY SERVICES COMMITTEE

Drug/Substance Abuse Program
Homeless Shelter Dinners
Blood Drive
Sub for Santa
Tutoring Program in Schools
Law for the Clergy Project
- Pamphlet on Legal Issues for the Clergy
- Seminars/Conferences on Legal Issues for the Clergy
- Participation in Clergy Symposium

DIVERSITY IN THE LEGAL PROFESSION COMMITTEE

LAW DAY COMMITTEE

Law Day Fair in Logan, St. George, Provo, Ogden and Salt Lake City
Public Television and Radio Programs During Law Week
School Lectures/Presentations
Regional Law Day Programs

LAW RELATED EDUCATION COMMITTEE

Classroom Programs on the Law—Elementary, Junior High and High Schools
Law School for Non-Lawyers: Library Lecture Series on the Law
People's Law Community Education Program
Stepping Out: A Pamphlet for Graduating High School Seniors
Additional Distribution and Lecture Presentations
Expansion of Law School for Non-Lawyer Library Series to Utah County
Fund-Raising Solicitation Program to Corporations, Law Firms and School Districts to Fund Additional Publication of "Stepping Out" Pamphlet

LEGAL BRIEFS COMMITTEE

LONG-RANGE PLANNING COMMITTEE

YLS Long-Range Plan

MEMBERSHIP SUPPORT NETWORK COMMITTEE (MSN)

Law Student/Law Firm Employment Fair
Law Student Mock Interview Program
Lawyers Compensation Project
Brown Bag Luncheons
CLEs at Midyear/Annual State Bar Meetings
Bar Governance Survey Project
Substance Abuse Lecture Program
Bridge the Gap/New Lawyer Continuing Legal Education Project
Special Projects

NEEDS OF THE CHILDREN COMMITTEE

Education Teachings About Child Abuse Program: Their Rights and Responsibilities
In re Kids Pamphlet Distribution and Presentations
Presentations on Children's Rights to Community Groups

NEEDS OF THE ELDERLY COMMITTEE

Columns in Senior Citizen Newsletters on Senior Citizen Rights
Presentations in Senior Citizen Centers, etc., on Legal Rights
Senior Citizens Handbook—Continued Update and Distribution

PRO BONO COMMITTEE

Tuesday Night Bar Legal Intake Services at the Law and Justice Center in Salt Lake City and Ogden
Domestic Relations Pro Bono Project
Legal Services Fund-Raiser
Legal Services for AIDS Victims

PUBLICATIONS/PUBLICITY COMMITTEE

Barrister Segment of *Utah Bar Journal*
Press Releases
Publicity for Events and Projects

Thank you for your participation. Service in these committees and projects will provide a very satisfying dimension to your practice and career. Please contact any of the Section officers to specify your preference or to request additional information. This year's officers are:

President
Richard A. Van Wagoner
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84111
521-9000

President-Elect
Charlotte L. Miller
310 S. Main, #1200
Salt Lake City, Utah 84101
363-3300

Secretary
Larry R. Laycock
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84111
521-9000

Treasurer
James C. Hyde
185 S. State, #70
Salt Lake City, Utah 84111
532-1234

Pro Bono Efforts Recognized by Utah Supreme Court

The Supreme Court of Utah recognized Debra J. Moore and Carolyn Cox, both Young Lawyers, along with David B. Watkiss, for their *pro bono* efforts on behalf of a Utah State prison inmate, Robert Dunn, in *Dunn v. Cook*, 131 Utah Adv. Rep. 9 (April 2, 1990). The Court held that defendant had received ineffective assistance of counsel on his direct appeal and that the direct appeal was not a bar to defendant's habeas corpus petition. The Court remanded the case for further proceedings on the merits of the petition. Justice Stewart's majority opinion expressed "gratitude to appointed counsel for their excellent work on this case." *Id.* at 12. "Their *pro bono* efforts are but one example of a fine tradition in the legal profession that too seldom receives the recognition it deserves." *Id.* at 13 (Zimmerman, J., concurring in the result).

CLE—"Taking and Defending Depositions" As Entertaining as It Was Informative

On June 29, 1990, the Young Lawyers Section sponsored "Taking and Defending Depositions," a program both popular and successful, at the Utah State Bar Annual Meeting.

The program featured videotaped presentations of mock depositions and a panel discussion. The videos featured the theatrics of attorneys Francis Wikstrom, Evan Schmutz, Sheldon Smith and Kelly Nash. Judge Michael R. Murphy led an informative panel discussion on this subject with attorneys Schmutz, Wikstrom and Elliott Williams. Combining their recognized expertise and experience in criminal and civil litigation, the four panelists presented and discussed such difficult issues as dealing with obstructive objections, coaching objections, witness preparation, cross-examination of an expert and successful use of judicial assistance in the discovery process. The YLS Membership Support Committee extends thanks to all of the participants and attendees.

Attendance at the program was standing-room only. Those who were unable to attend and would like to review the program can do so by contacting the Law and Justice Center. The Young Lawyers encourage all Bar members to attend next year's annual meeting.

Young Lawyers Are Invited to Participate in Back-to-Back Bike Trek for Kids' Sake

Big Brothers/Big Sisters of Greater Salt Lake is hosting its second Back-to-Back Bike Trek for Kids' Sake on September 8 and 9, 1990, at Crystal Springs, Utah. This fund-raising tour will be held in Utah's scenic Cache Valley and historic Golden Spike country.

Both mountain and road cyclists will be challenged by two days of 50- or 100-kilometer tours.

Registration deadline is August 20, 1990. Riders are asked to solicit pledges per kilometer (minimum total pledge is $150) to raise money to support Big Brothers/Big Sisters of Greater Salt Lake. The money raised will go to support services to children from single-parent families who are matched with adult volunteer role models. Last year's Back-to-Back Bike Tour raised $34,000 in pledges and corporate sponsorships, many of which came from lawyers and law firms.

This is a good opportunity for young lawyers to experience Utah's mountain and desert cycling at its finest, plus involve themselves in a worthwhile community service by supporting Big Brothers/Big Sisters. For more information, please contact Molly Gorman at 487-8101.

Beyond the Merits

This humorous excerpt is reprinted with permission of *Beyond the Merits*, a student publication of the University of Utah College of Law.

KEY TO READING LEGAL BRIEFS

What is said...	**What is meant...**
Typical of the cases in this area are...	The best cases in this area are...
It would be a great injustice not to allow the plaintiff to recover...	If the plaintiff doesn't win, I don't get my contingent fee...
The case cited by opposing counsel is clearly distinguishable...	Since the case cited doesn't support my position, it must be distinguishable...
With all due respect...	So you'll think I'm civil...
Opposing counsel has completely missed the point of my argument...	I can't understand opposing counsel's argument...
We concede opposing counsel's argument on this point...	Even we don't have the gall to try and weasel our way out of this one...
In all fairness and equity...	The law is against us, so let's talk equity...
Obviously...clearly...certainly...	Don't think about it too carefully...
It is common knowledge...	I haven't bothered to look up the cite...
The general rule is...	I found one case that says...

Thursday Night Bar Begins in Ogden

The Pro Bono Committee of the Young Lawyers Section of the Utah State Bar began its first night of business for the Thursday Night Bar in Ogden on July 19, 1990. Thanks to all for hours of dedication in opening this project, especially to John W. Andrews and Kathryn D. Kendell, members of the Pro Bono Committee. The Thursday Night Bar will operate every third Thursday. If you are interested in participating, please call Kathy or John.

For Young Lawyers interested in serving on the Pro Bono Committee, the planning meeting for the year's projects will be September 13, 1990. Call Betsy L. Ross, chairperson, or Kristin A. Brewer, vice chairperson, or any committee member for more information.

Committee as presently constituted:

Steve Aeschbacher	532-1500
John Andrews	532-3333
Brad Betebenner	531-1777
Kristin Brewer	532-1036
Brenda Flanders	532-1036
Mark Hirata	533-8383
Michael Jones	328-0645
Kathryn Kendell	532-3333
Betsy Ross	538-1077
Teresa Silcox	584-7051

CLE CALENDAR

IMMIGRATION LAW SEMINAR

The Immigration Reform Control Act of 1986 imposes upon employers civil and criminal sanctions for hiring individuals not authorized to be employed in the United States. Employers must maintain certain paperwork to verify the immigration status of employees. The Act also contains provisions to prevent discrimination against U.S. workers of foreign appearance.

This CLE will review the employer's obligation to complete and maintain the I-9 Form, the employer's responsibilities when faced with an I-9 audit by the Immigration Service, the scope of the government's investigation powers, the nature of the administration procedures to enforce the Act, the antidiscrimination provisions of the Act, case law which has developed in administration of the Act, the criteria for assessment of penalties, and the employer's defenses.

CLE Credit: 2 hours
Date: September 11, 1990
Place: Utah Law and Justice Center
Fee: $20
Time: 4:00 to 7:00 p.m.

ADMINISTRATIVE PRACTICE CLE LUNCHEON

This program will be presented by Hon. Gregory Orme, Utah Court of Appeals, on the topic, "New Developments in Appellate Review Under the Utah Administrative Procedures Act."

CLE Credit: 1 hour
Date: September 13, 1990
Place: Utah Law and Justice Center
Fee: Cost of lunch
Time: 12:00 to 1:00 p.m.

NUTS AND BOLTS OF GUARDIANSHIP

This program, presented by the Probate and Estate Planning Section of the Bar and the Needs of the Elderly Committee of the Bar, will present the nuts and bolts of guardianship after recent changes to the statute. The panel members will include court clerks, practitioners and judges.

CLE Credit: 3 hours
Date: September 20, 1990
Place: Utah Law and Justice Center
Fee: $25
Time: 4:00 to 7:00 p.m.

TITLE INSURANCE FOR ATTORNEYS

First American Title Company of Utah and First American Title Insurance Company, in conjunction with the Utah State Bar, are pleased to announce a seminar entitled: Title Insurance for Attorneys. This free five-hour seminar is structured to provide a broad range of information on title insurance, ranging from understanding commitments to the latest form of endorsements. Interspaced throughout the program will be discussions on basic forms of title policies, underwriting concerns, and coverage issues.

CLE Credit: 5 hours
Date: September 25, 1990
Place: Utah Law and Justice Center
Fee: FREE
Time: 8:00 a.m. to 1:00 p.m.

PRIVATE PLACEMENTS AFTER RULE 144A

A live via satellite program. The enactment of rule 144A by the SEC is expected to change and expand the already huge market for private placements, and at the same time alter the methods by which foreign companies raise capital in the United States. This teleconference will explore the pitfalls and opportunities in dealing with the greatly expanded market in private securities that will result from the adoption of rule 144A.

This timely satellite program will explore the impact these changes will have on issuers and investors in private transactions and the attorneys and others advising them in these private transactions. The opportunities for issuers, dealers, underwriters and institutions and the interaction of rule 144A, Regulation S and other operative registration exemptions and requirements will be examined.

CLE Credit: 4 hours
Date: September 27, 1990
Place: Utah Law and Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

EDUCATION LAW SEMINAR

State and federal courts are playing an ever-increasing role in public and higher education. The Utah State Bar and the Education Law Section are pleased to announce a half-day seminar examining education law issues facing Utah school districts and institutions of higher education.

The seminar will be geared toward attorneys representing educational institutions, their employees and their students. The seminar will focus on (1) the current status of graduation prayer cases in the United States; (2) recent developments in higher education tenure and promotion; (3) the Supreme Court's recent decision regarding the Equal Access Act—*Board of Education v. Mergens;* and (4) recent developments regarding Section 1983 and 1988 as they relate to actions by public employees and students.

CLE Credit: 4 hours
Date: September 29, 1990
Place: Park City, Olympia Hotel
Fee: $35
Time: 8:00 a.m. to 12:30 p.m.

CORPORATE ACQUISITIONS. REORGANIZATIONS AND RESTRUCTURING

A tape-delay presentation. The program will analyze taxable and non-taxable corporate acquisitions from the seller's and buyer's perspectives; corporate asset and stock transactions; the section 338 election and allocation of purchase price.

Acquisitive and divisive tax-free domestic and international reoganizations and joint ventures will be discussed, along with business proposed rules, new consolidated return restrictions in losses from the transfer of a group member, pre- and post-transaction shareholder sales, spin-offs. The payment of dividends and other distributions and redemptions of stock. Opportunities and pitfalls presented to troubled corporations will be given special attention.

CLE Credit: 6.5 hours
Date: October 9, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 p.m.

TAXATION OF FINANCIALLY TROUBLED BUSINESSES

A tape-delay presentation. This program will provide insight into the federal income tax considerations involved in restructuring a financially troubled company. The program will include a general discussion of the consequences of debt for debt exchange and an in-depth analysis of the limitations that corporate debtors face when seeking to utilize the "stock-for-debt" exception to avoid recognition of cancellation of indebtedness income. Consideration will also be given to an analysis of the largely uncharted waters confronted by tax planners seeking to structure workouts and reorganizations involving partnership debtors.

The principle focus of the balance of the session will be on the considerations pertinent to preservation of corporate debtor's net operating losses and other tax attributes. The complexities of applying the rules of Section 382 in both the separate and consolidated return contexts will be considered. Finally, consideration will be given to the special federal income tax provisions governing the reorganization of troubled thrift institutions.

CLE Credit: 6.5 hours
Date: October 10, 1990
Place: Utah Law and Justice Center
Fee: $175
Time: 8:00 a.m. to 3:00 p.m.

WATER LAW IN THE 1990s

This Water Law CLE will present a comprehensive full-day seminar geared for anyone with an interest in learning or reviewing the basics of Utah water law. The seminar will also feature well-qualified speakers who will give presentations on some critical and significant water law issues of the 1990s.

Topics will include such subjects as the basic rudiments of Utah water law; acquiring and conveying water rights; and the laws relating to losing a water right by abandonment, forfeiture and lapsing.

Administrative practice before the State Engineer and a Utah Supreme Court case update will also be discussed. Other topics include Utah groundwater law, Colorado river issues, federal reserved water rights, water trading and marketing, instream flow rights in Utah, and the effects of environmental laws and regulations on Utah water rights.

CLE Credit: 8 hours
Date: October 10, 1990
Place: Utah Law and Justice Center
Fee: Call for fees
Time: 8:00 a.m. to 4:30 p.m.

BANKRUPTCY SEMINAR

Russel Vetter will speak on the topic, "Real Estate in Bankruptcy and Motions to Lift the Stay."

CLE Credit: 2 hours
Date: October 11, 1990
Place: Utah Law and Justice Center
Fee: $30
Time: 12:00 to 2:00 p.m.

ANNUAL SECURITIES SECTION SEMINAR

This seminar is designed to provide a detailed analysis of relatively narrow subject areas in an informal setting with discussions between speakers and the audience. Speakers presume participants have a basic understanding of federal and state securities laws.

CLE Credit: 8.5 hours
Date: October 12 and 13, 1990
Place: St. George, Utah
Fee: TBA
Time: 12th—8:00 a.m. to Noon
13th—8:30 a.m. to 12:30 p.m.

NEGOTIATING SETTLEMENT IN DIVORCE: SUCCESSFUL APPROACHES, TACTICS, AND STRATEGIES

A live via satellite program. Negotiating a settlement is the essence of what a successful matrimonial lawyer does well. But rarely is the negotiating process itself addressed. This course will teach you how to strengthen the skills that are keys to success in negotiating matrimonial settlements.

This course will teach you how to best achieve settlement, how to prioritize your client's goals, how to

persuade opposing counsel and client to work with you and not against you, how to work with your client toward settlement, how to break or avoid serious impasse, and how to manage and supervise clients, associates, staff and others to maximize their usefulness in the settlement process. If you handle matrimonial cases, whether exclusively or only occasionally, you will benefit from this program.

CLE Credit: 6.5 hours
Date: October 16, 1990
Place: Utah Law and Justice Center
Fee: $165 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

INSURER INSOLVENCY

A live via satellite program. In the last several years, many large multinational insurance companies have been declared insolvent. The capacity of state guaranty funds has become strained, and litigation relating to insolvencies has become widespread. Interpretations of liquidation statutes are before the courts across the nation. Congress is taking a comprehensive look into the management of insolvency proceedings as well. The management and daily operations of insolvent insurers require particular skills and expertise, with increasing needs for highly experienced employees and consultants.

This special seminar telecast will explore the past and look into the near future of the law and practice of insurance companies' insolvencies. A panel of national experts will deliver up-to-date information on the topic and be available for questions through toll free lines.

CLE Credit: 4 hours
Date: October 25, 1990
Place: Utah Law and Justice Center
Fee: $140 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

DIVORCE TAXATION

This program is sponsored by the Tax and Family Law Sections along with the Bar. The program is taught by Marjorie O'Connell, a principle in the law firm of O'Connell & Associates, which specializes in the taxation and retirement benefit aspects of divorce. She has authored numerous articles, is frequently quoted in the national press and has been a featured guest on many radio and television programs. Ms. O'Connell was the only practitioner invited to testify about divorce tax provisions of the 1984 Domestic Relations Tax Reform Act, the Retirement Equity Act of 1984 and the 1986 Tax Act. She is now working with the IRS to shape final DRTRA regulations.

Topics for the program include: the Domestic Relations Tax Reform Act, Alimony Payments, Dependency Exemptions, Trusts in Divorce and Separation, Property Transfers, Gift & Estate Taxes, Separate Returns, Innocent Spouse Treatment on Joint Returns, and Current Tax Developments. Registration for the program includes the Divorce Taxation Course Book. This book is a must for anyone who plans financial settlements or prepares tax returns for divorced individuals. It includes the latest information on final DRTRA regulations.

CLE Credit: 5.5 hours
Date: October 26, 1990
Place: Utah Law and Justice Center
Fee: $195
Time: 10:00 a.m. to 5:00 p.m.

FALL INSTITUTE ON ESTATE PLANNING

This program is sponsored by the Probate and Estate Planning Section of the Bar and the Salt Lake Estate Planning Council. The day-long program brings together in-state and out-of-state speakers who are experts on their topics. Topics include: Common Estate Planning Mistakes, Qualified Retirement Plans and IRAs, Tax Planning with Trusts, and Life Insurance and Accounting and Small Business. The program will conclude with a question and answer session.

CLE Credit: 7.5 hours
Date: October 26, 1990
Place: Marriott Hotel, Salt Lake
Fee: TBA
Time: 8:00 a.m. to 5:00 p.m.

SIGNIFICANT ISSUES IN CURRENT ESTATE PLANNING

A live via satellite program. No two estate plans are alike. Particular circumstances necessitate specialized planning for an individual and perhaps for his or her family. Nevertheless, estate planners have always been able to rely on some basic strategies that can be applied to the vast number of cases; for example, coordinating a husband's and wife's estate plan to take full advantage of the unified credit in combination with the unlimited marital deduction. Recent legislation, however, has required practitioners to rethink some of these long-standing techniques. This program will focus on the changes wrought by such legislation and the estate planning pitfalls and opportunities resulting therefrom.

CLE Credit: 6.5 hours
Date: October 30, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

THE HEAD INJURY CASE

The Utah Head Injury Association, in conjunction with the Utah State Bar, is pleased to announce the second annual seminar entitled "The Head Injury Case." This is a two-day course designed to increase the knowledge and competency of attorneys who litigate brain injury cases. The program is structured to provide significant help for the "novice," who may have only had one case, as well as more experienced counsel who have litigated many cases. The conference faculty includes some of the nation's foremost medical experts, including Richard Restak, M.D., a Washington, D.C., neurologist who has authored several best selling books including *The Mind* and *The Brain*; Dr. Frank Benson, M.D., a UCLA neurologist who will speak on the frontal lobes; Lawrence Marshall, M.D., a San Diego neurosurgeon with vast experience in brain injury; Catherine Mateer, Ph.D., a Seattle neuropsychologist and author; and many other local physicians and psychologists with considerable expertise in brain injury cases. Attorneys on the faculty include well-known plaintiff and defense attorneys from Massachusetts, Colorado and Utah.

The format of the program includes major addresses by many of the speakers, as well as break-out sessions with opportunity for questions and participation. Some of the medical topics are: "Damage to the Frontal Lobes: Impact on Personality and Emotions"; "The Biomechanics of Brain Injury"; "The Role of the Neuropsychologist"; "A Neurosurgeon Looks at Mild to Moderate Brain Injury: Myth or Reality?"; "The Physician and Psychologist as Expert Witnesses"; "The Role of Therapists"; "Rehabilitation Needs"; and "Pediatric Head Injury: Major and Subtle Differences." The legal topics will deal with such areas as: "Getting the Case Started"; "Anatomy of a Brain Injury Trial: Discovery to Verdict" (discussion of actual successful plaintiff and defense cases); "Deposing Expert Witnesses"; Plaintiff and Defense Tactics in TBI Cases"; "Evidentiary Considerations"; "Presenting the Testimony of Neuropsychologists and Neurologists"; and "The Judge's Perspective: What Plaintiff and Defense Counsel Do Right and Wrong in Personal Injury Cases."

CLE Credit: 16 hours
Date: November 1 and 2, 1990
Place: Little America Hotel, Salt Lake
Fee: $345
Time: 8:30 a.m. to 5:30 p.m.

16th ANNUAL TAX SYMPOSIUM

In the ever-changing avenue of taxation, you need to stay informed of all events which impact you and your clients. Be aware of the most current and effective tax applications and solutions available to you from experts in the field. This seminar, presented by the UACPA and the Tax Section of the Utah State Bar, provides the latest information on tax law changes with technical updates and practical information for tax planners and preparers.

The Tax Symposium is a very popular conference and advance registration is required. **No** registrations will be accepted at the door. Registration will be handled by the UACPA office located at 455 E. 400 S., #202, Salt Lake City, Utah 84111, 359-3533. Participants may also register by FAX with a VISA or MasterCard only. The FAX number is 359-3534.

CLE Credit: 16 hours
Date: November 1 and 2, 1990
Place: Salt Lake Hilton
Fee: $220
Time: 8:00 a.m. to 5:00 p.m. each day

RULE-BASED DOCUMENT PREPARATION IN THE LAW OFFICE

A live via satellite program. Document assembly systems incorporate several technologies: expert systems, database retrieval, hypertext, word processing and decision analysis. Properly implemented, document assembly software can help lawyers attract clients, bond existing clients to the firm, and allow you to focus on the intellectual challenges of law practice.

Six of the country's leading authorities in this application will share their expertise with you. The program will give you: live demonstrations and critiques of leading document assembly packages, sophisticated advice on where and how these programs should be introduced to law firms and departments, and insight into the long-term implications of this important class of substantive legal software.

CLE Credit: 6.5 hours
Date: November 6, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

ETHICS AND PROFESSIONAL RESPONSIBILITY

This program will cover the following topics: Business Relationships With Clients; Soliciting Business—The Theory and the Reality; Conflicts of Interest—New, Possible, Current and Former Clients; Waivers of Conflicts; and Disqualification. The program is of a general nature and should appeal to all practitioners. This is an excellent opportunity to meet your entire three hours of ethics credit.

CLE Credit: 3 hours—ETHICS
Date: November 7, 1990
Place: Moot Court Room, U of U College of Law
Fee: TBA
Time: 6:00 to 9:30 p.m.

COMPLYING WITH THE AMERICANS WITH DISABILITIES ACT

A live via satellite seminar. The enactment of the Americans with Disabilities Act will require a far-reaching response by employers in the way they hire, "accommodate," report, and provide benefits for employees. This program will examine which employers are covered, and how and on what grounds exemptions will be permitted, while concentrating on the actions employers must take to be in compliance with the ADA in the hiring of new employees and the "accommodation" of persons already employed.

This program will be of interest to attorneys, in-house counsel, human resource personnel, corporate planners and all those who advise employers in their hiring, employment, benefits, and workplace practices.

CLE Credit: 4 hours
Date: November 8, 1990
Place: Utah Law and Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

BANKRUPTCY SEMINAR

CLE Credit: 2 hours
Date: December 6, 1990
Place: Utah Law and Justice Center
Fee: $30 (includes lunch)
Time: 12:00 to 2:00 p.m.

CLE REGISTRATION

DATE	TITLE	LOCATION	FEE
☐ Sept. 11	Immigration Law Seminar	L&J Center	$20
☐ Sept. 13	Administrative Practice	L&J Center	FREE
☐ Sept. 20	Elderly Law Seminar	L&J Center	$25
☐ Sept. 25	Title Insurance for Attorneys	L&J Center	FREE
☐ Sept. 27	Private Placements after Rule 144A	L&J	$156
☐ Sept. 29	Education Law Seminar	Park City	$35
☐ Oct. 9	Structuring and Restructuring C Corporations	L&J Center	$175
☐ Oct 10	Tax Aspects of. . .Financially Troubled Businesses	L&J Center	$175
☐ Oct. 10	Water Law Seminar	L&J Center	TBA
☐ Oct. 11	Bankruptcy Seminar	L&J Center	$30
☐ Oct. 12-13	Securities Law Seminar	St. George	TBA
☐ Oct. 16	Settlement and Negotiation of the Heavy Matrimonial Case	L&J Center	$174.75
☐ Oct. 25	Insurer Insolvency	L&J Center	$146
☐ Oct. 26	Divorce Taxation	L&J Center	$195
☐ Nov. 1-2	The Head Injury Case	Little America	$345
☐ Nov. 6	Ruled-Based Document Preparation	L&J Center	$184.75
☐ Nov. 7	Ethics Seminar	U of U	TBA
☐ Nov. 27	Environmental Implications of Real Estate Transactions	L&J Center	$184.75
☐ Dec. 4	Demonstrative Evidence	L&J Center	$184.75
☐ Dec. 5	Deposition, Procedure, Technique and Strategy	L&J Center	$184.75
☐ Dec. 6	Bankruptcy Seminar	L&J Center	$30
☐ Dec. 11	Taking Control and Turning Around Chapter 11 Companies	L&J Center	$184.75

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1990 and '91. Watch for future mailings.

Registration and Cancellation Policies: Please register in advance. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the 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 $ _____
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CLASSIFIED ADS

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

OFFICE SPACE AVAILABLE

Attractive office space is available at prime downtown location, in the McIntyre Building at 68 S. Main Street. Single offices complete with reception service, conference room, telephone, FAX machine, copier, library and word processing available. For more information, please call (801) 531-8300.

Law office sharing in downtown Salt Lake City law firm. Facilities include: shared secretarial and word processing, office equipment, furniture, common area. Excellent location. Call (801) 521-8288.

One or two offices available with established attorney in Sandy, Utah. Facilities include telephones, FAX services, photocopying, library, kitchen and parking. Reception and secretarial services or space is available if desired. Sublease for either a limited or long-term period, rent negotiable. Call (801) 566-4000.

Ogden attorney with established practice looking for person to share office. Wants attorney who specializes in Business Law, Taxation, Estate Planning and Bankruptcy. Excellent downtown location. Close to courthouse. Call (801) 621-2911.

OFFICE SHARING: Share one of three new large offices and new large secretarial and waiting areas with two other established attorneys, a business established since January 1971. Rent—$375 per month. Other expenses—one-third of all other expenses including utilities, supplies, secretarial costs, not including filing fees and court costs. Substantial spin-off from other attorneys. Exclusive rights to all criminal, personal injury, estate planning cases. No bankruptcy cases available to prospective tenant. Location—Kaysville, Utah, midway between Salt Lake City and Ogden courts. Approximately 25 minutes to each. Ten minutes to Davis County Court. Telephone calls are local from North Ogden to Midvale. Call (801) 544-3741 or (801) 546-3874.

Suite available in established office-sharing arrangement of nine attorneys. Excellent library, conference room, receptionist, FAX and other amenities in near new building. Walking distance to state and federal courts. Call 531-6600.

Office building for sale or lease located at 340 E. 400 S., Salt Lake City, Utah, near downtown courthouses. Office was previously used as a law office and has library facilities within. Two stories of office space with ample parking included. Contact Chris or Gary at (801) 566-2181.

OFFICE FURNITURE FOR SALE

Executive office furniture. Large teak desk and credenza with matching side table and lighted shelving with four-drawer filing system. $5,500. Call Tom at (801) 538-1017 or Noreen at (801) 532-3399.

INVENTORY FOR SALE—TOP CONDITION, PRICED LOW, BETTER THAN LEASING!!! Unique oak 8-foot, boat-shaped conference table. Four matching captain chairs, leather, brass studs. Six straight back client chairs, leather, brass studs. Two secretarial desks, custom designed, oak. One executive desk. One Rico copier (needs minor adjustment). Contact Hugh C. Garner, Esq., Nielsen & Senior, (801) 532-1900.

BOOKS FOR SALE

THE FOLLOWING IS AN INVENTORY OF LAW BOOKS IN MINT CONDITION FOR SALE. . . Most, if not all, are current to 1989. Amjur 2nd, 86 volumes. Amjur 2nd Index, 4 volumes. Amjur 2nd Pleading & Practices, 27 volumes. Amjur 2nd Legal Forms/Index, 26 volumes. Federal Practice Forms, 18 volumes plus index. Moore's Federal Practice, 13 volumes. A.L.R. 1st Series, 175 volumes. A.L.R. Desk Book, 4 volumes. A.L.R. Perm. Digest, 12 volumes. A.L.R. Blue Book of Supp. Dec., 5 volumes. A.L.R. 2nd Series, 100 volumes. A.L.R. 2nd Digest, 7 volumes. A.L.R. Word Index, 3 volumes. A.L.R. Letter Case Service, 28 volumes. Current Legal Forms Ribkin & Johnson, 18 volumes. United States Code Service, 155 volumes. United States Code Service Ad. Law Act & Court Rules, 17 volumes. United States Code Service Index, 7 volumes. For information, contact Hugh C. Garner, Esq., Nielsen & Senior, (801) 532-1900.

West's Legal Forms (2nd ed.) complete and up to date. Like new. $1,000 or best offer. Will ship free. Steve Coontz, 32222 Camino Capistrano, Suite A, San Juan Capistrano, CA 97267. Telephone (714) 831-5222.

FOR SALE: Uniform Commercial Code Reporting Service. Current. Please contact Jay Sheen at (801) 521-0250.

POSITIONS AVAILABLE

Small Salt Lake City firm with strong commercial and securities practice seeking experienced attorneys in the areas of litigation, estate planning, or commercial law with which to associate in office-sharing or more formal arrangement. Send inquiries and resumes to P.O. Box 510586, Salt Lake City, UT 84151-0586.

Small Ogden firm with established practice looking to associate with attorneys on a percentage basis. Excellent downtown location in newly redecorated historical mansion. All inquiries held in strict confidence. Please reply to Utah State Bar, Box W, 645 S. 200 E., Salt Lake City, UT 84111.

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, UT 84102. Phone (801) 533-6371. Closing Date: November 1, 1990. Estimated Start Date: January 1, 1991. Applicants for the Third District Court Commission vacancy that closed June 1, 1990, need only submit a letter of interest to be considered for the current position.

JUDICIAL VACANCY
ANNOUNCEMENTS

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for a judicial vacancy in the Utah Court of Appeals. This position results from the resignation of Judge Richard C. Davidson. **Applications must be received no later than 5:00 p.m., September 28, 1990,** at the Office of the Court Administrator, 230 S. 500 E., Suite 300, Salt Lake City, UT 84102.

Applicants must be 25 years of age or older, U.S. citizens, Utah residents for three years prior to selection and admitted to practice law in Utah. In addition, judges must be willing to reside within the geographic jurisdiction of the court.

Article VIII of the Utah Constitution and state law provides that the nominating commission shall submit to the Governor three to five nominees within 45 days of its first meeting. The Governor must make his selection within 30 days of receipt of the

names and the Senate must confirm or reject the Governor's selection within 30 days. The judiciary has adopted procedural guidelines for nominating commissions, copies of which may be obtained from Juan J. Benavidez, Personnel Manager, by calling (801) 533-6371.

The nominating commission is chaired by Chief Justice Hall, or his designee from the Supreme Court, and is composed of two members appointed by the State Bar and four non-lawyers appointed by the Governor. At the first meeting of each nominating commission, a portion of the agenda is dedicated to a review of meeting procedures, time schedules and a review of written public comments. This portion of the meeting is open to the public. Those individuals wishing to provide written public comments on the challenges facing Utah's courts in general, or the Appellate Court in particular, must submit written testimony no later than October 1, 1990, to the Office of the Court Administrator, Attn: Judicial Nominating Commission for the Appellate Court. No comments on present or past sitting judges or current applicants for judicial position will be considered.

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact Juan J. Benavidez, Personnel Manager, Office of the Court Administrator, 500 E. 230 S., Suite 300, Salt Lake City, UT 84102, (801) 533-6371. Application packets will then be forwarded to prospective candidates and must be received no later than 5:00 p.m., September 28, 1990.

Gordon R. Hall, Chief Justice of the Utah Supreme Court, announced the opening of the application period for a judicial vacancy in the Third District Court. This position results from the retirement of Judge Raymond Uno. The Third District includes Salt Lake, Tooele and Summitt Counties. **Applications must be received no later than 5:00 p.m., September 28, 1990,** at the Office of the Court Administrator, 500 E. 230 S., Suite 300, Salt Lake City, UT 84102.

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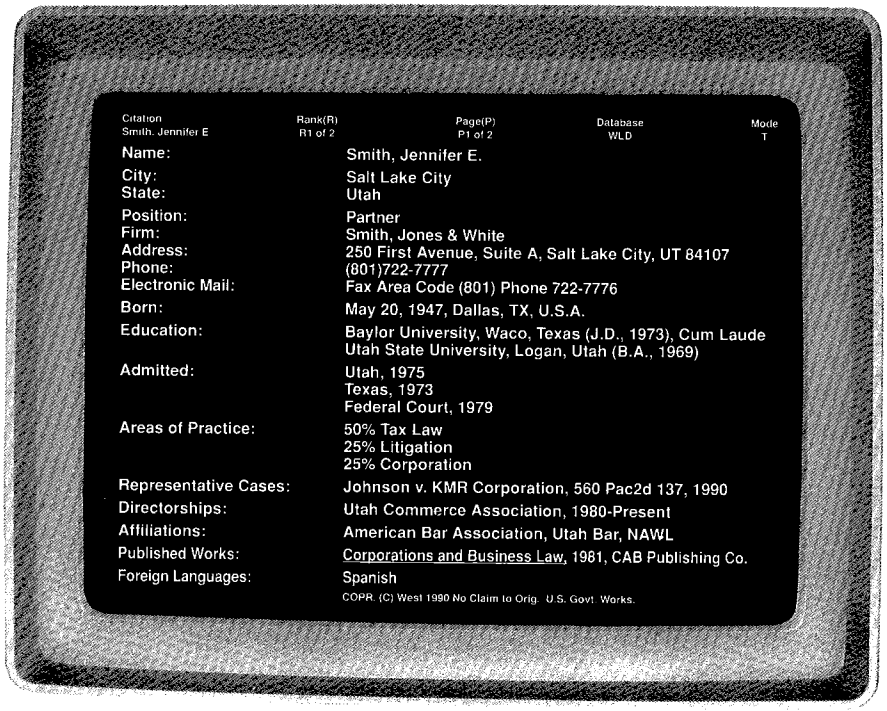

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