UTAH BAR JOURNAL

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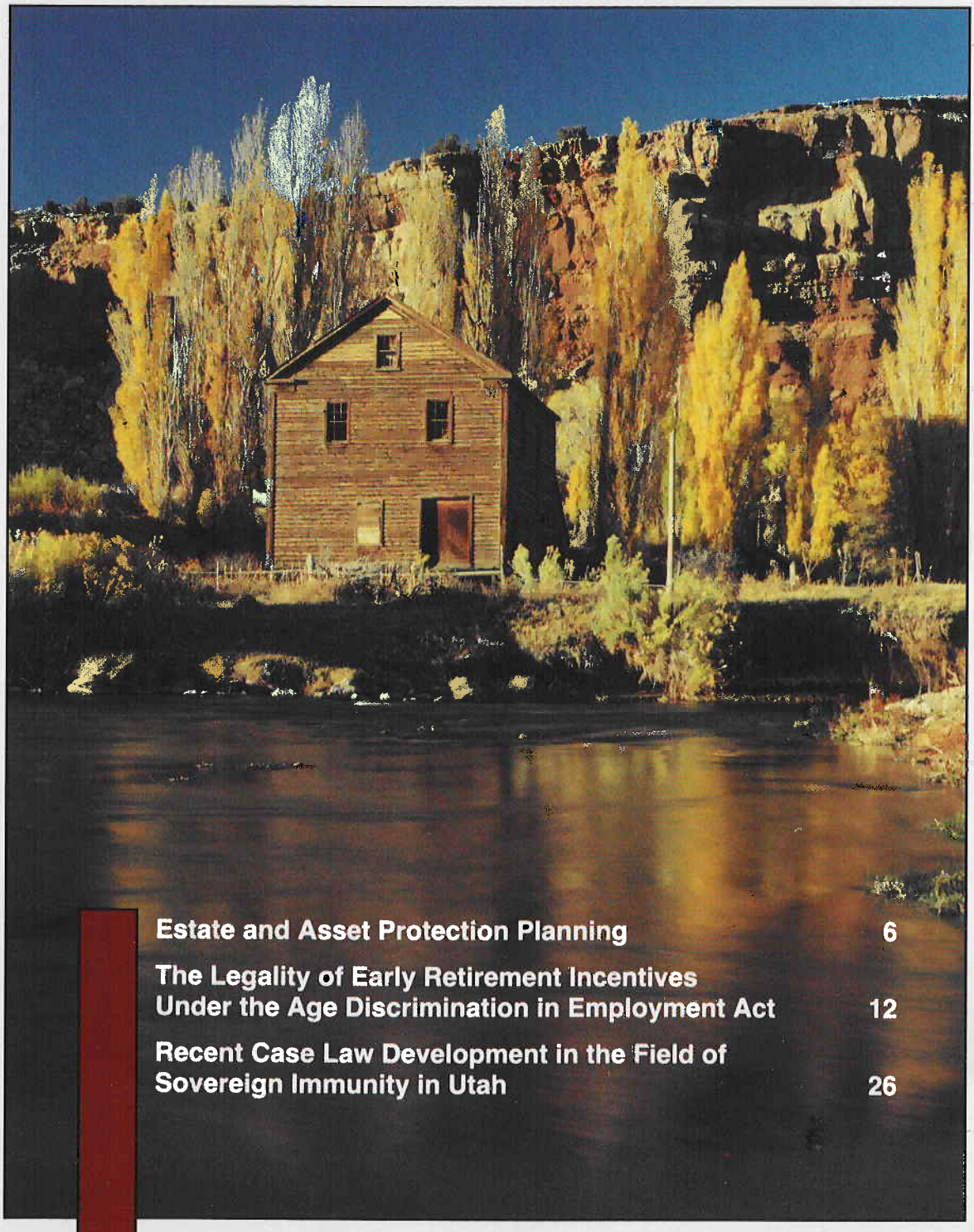

THE BONNEVILLE PACIFIC CORPORATION
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purchased common shares of

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in a leveraged ESOP transaction

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COVER: Our thanks to Kent M. Barry, who is with the Education Division of the Utah Attorney General's Office, for our cover photograph—Fremont River near Torrey, Utah.

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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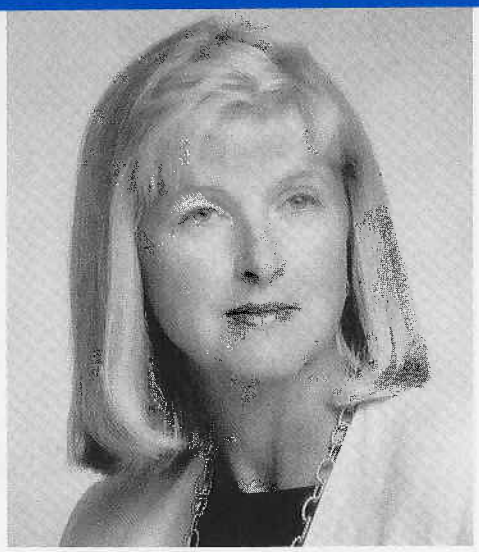
PRESIDENT'S MESSAGE



By Hon. Pamela T. Greenwood

I would like to bring you up to date on some recent changes at the Bar offices. First, we are sorry to have lost two long-time and loyal members of our staff. Barbara Bassett announced her resignation in August, after 14 years of service with the Bar. Barbara has been the recipient of numerous offers over the years, to pursue other professional opportunities and has nurtured an interest in the arts. She felt this was the opportune time to develop those interests and talents, and will be engaged in several different artistic enterprises. Barbara has been the glue holding the Bar together during her tenure and will be sorely missed by all of us. Her responsibilities as associate director have included the annual and mid-year meetings, personnel matters, and general office management, among others. She has performed those duties with high professionalism and skill. In addition, she has been a good friend to me and others on the commission and staff. While she will be missed at the Bar offices, we wish Barbara success and happiness in her new endeavors.

Paige Stevens, a 10-year veteran of Bar work, is also leaving to pursue other opportunities. Paige has faithfully and competently been in charge of "Bar programs." This has included working with almost all of the Bar committees and sections, to facilitate their meetings and activities, as well as numerous other responsibilities. We will miss Paige and also wish her well.

On the other side of the Bar staff ledger, we have a new executive director for the Bar, John Baldwin. John, a lawyer, was most recently director of the State Securities Division. He received high accolades from all who worked with him in that capacity, for doing much to improve Utah's reputation in the world of securities, and managing his staff efficiently and effectively. I look forward to working with John during the remainder of this year and afterward. I believe that John has the skills and temperament to help lead the Bar into the future.

I would also like to inform you of several Bar Commissioner assignments made during the last couple of months. These include the following:

Admissions Liaison, Dennis Haslam; Litigation, Jim Clegg; Chair, Jackson Howard; Budget and Finance, Jim Davis, Randy Dryer and Dennis Haslam; Discipline, Paul Moxley; Legislative Affairs, Mike Hansen; Revision of Bylaws and Policies and Procedures, Jeff Thorne; Salt Lake County Bar, Mike Hansen; Bar Staff Benefits, Dennis Haslam; Law and Justice Center Operations, Mike Hansen; U.S. S. Ct. *Keller* Decision Analysis, Paul Moxley, Jim Morton and Steve Trost; Judicial Evaluation Commission, Hans Chamberlain, Jackson Howard and Jim Davis; Supreme Court Task Force, Jim Davis, Jim Clegg and Gayle McKeachnie.

Avoiding Malpractice Claims

By Jeff R. Thorne

The cost of legal malpractice insurance isn't cheap. A typical attorney in Utah with a $1,000,000 liability limit and a $5,000 deductible paid a premium of approximately $2,800 for coverage in 1990. One way attorneys can protect themselves from escalating legal malpractice premiums is to reduce malpractice claims.

A policy of qualifying clients before accepting retainers can help to avoid frivolous malpractice claims. Attorneys, who have had malpractice claims filed, often feel they could have avoided the claim had they given more thought to the client, or to the case before agreeing to representation. To qualify potential clients, the following "client categories" need to be carefully scrutinized:

1. The client who poses a potential conflict of interest. Legal malpractice claims based upon conflicts of interest continue to escalate both in number and in damages sought. Attorneys need to have a working conflict of interest avoidance system. As a minimum the system should be able to ascertain whether conflicts exist between past and present clients and individuals with interests in business entities represented by the firm.

2. The client with a matter outside your area of expertise. Studies of professional liability claims indicate that lawyers most often get into trouble when they venture into areas of the law in which they have little or no experience. Unless you are prepared to spend the many hours required to master a new area, you shouldn't take a case in a field of law you don't already know.

3. The client with a matter that is too big for your practice. It may be that a client's problem is just too complex. Avoid letting your decision be guided by the possibility of a large fee. If the new matter becomes too consuming, you may find yourself ignoring the needs of your other clients.

4. The client who cannot be satisfied. Some clients will always be dissatisfied with their lawyers. And there are others who have been disillusioned by bad experiences with the legal system.

You should ask whether the potential client has had previous representation. How does he feel about those experiences? What, if anything, caused him dissatisfaction? Does he have a history of changing counsel? The answers may indicate that you should, in writing, decline the representation.

5. The client who does not understand your billing procedures. Clients want to know how much you charge; however, many will hesitate to bring up this important subject. Therefore, you should encourage a detailed discussion of your fee whether a potential client is fee shopping or likely to cause problems if your final statement exceeds the anticipated amount. When accepting representation of a client, written fee agreements are preferred. (*See* Stern, A.B.A. J., July 1, 1987, at 54).

Cover your bases. Another valuable tool in avoiding malpractice is a closing letter that confirms what you advised your client during your final meeting. The advice may contain the admonition to seek additional representation if certain events occur, or if the client has trouble satisfying subsequent requirements.

Experience teaches that it may be unrealistic to expect that premiums for professional liability insurance will decrease. However, if the number of claims filed can be reduced, we may be able to prevent premiums from rising as rapidly as they have in the past.

Estate and Asset Protection Planning

By L.S. McCullough Jr.

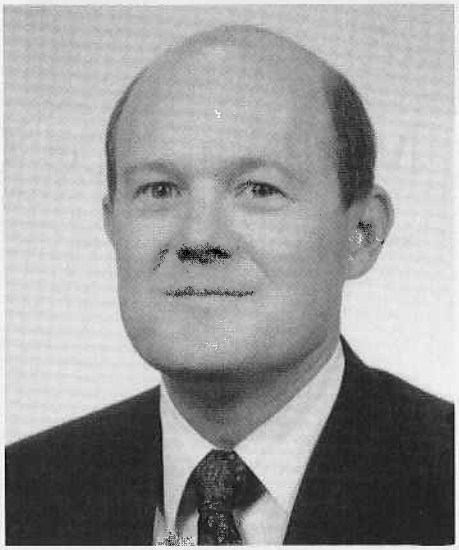
ESTATE AND ASSET PROTECTION PLANNING—WHAT IS IT?

For many people, the phrase "estate planning" is recognized as planning for the orderly disposition of wealth on death. In fact, estate planning also encompasses planning for the accumulation, preservation, protection and management of wealth during life. When properly done, a plan should take into account all the client's income tax, estate tax and asset protection strategies in order to ensure that one area of planning does not interfere with the others and to ensure that all the client's estate needs are met. For purposes of this discussion, when reference is made to "estate planning," it shall be deemed to encompass income tax, estate tax and asset protection planning. The main emphasis of this outline will be to focus on one element in estate planning, asset protection strategies.

FRAUDULENT CONVEYANCE AND BANKRUPTCY LAWS

In order to do effective estate planning for a client, knowledge of the laws that protect creditors is necessary. Many of these laws are found in the bankruptcy and fraudulent conveyance laws of the United States and each individual state. Using the fraudulent conveyance laws and bankruptcy laws, creditors may attempt to set aside a transfer of assets, even if that transfer was not intended to be fraudulent.

The Federal Bankruptcy Code is contained in Title 28 and Title 11 of the United States Code. Chapter 5 of the Bankruptcy Code (11 U.S.C. 501 et seq.) covers the bankruptcy trustee's powers to set aside voidable preferences. Voidable preferences are basically transfers which are not for fair and full value. These transfers can be set aside if they occur within one year of the commencement of any bankruptcy proceeding. Transfers may also be set aside if made within one year of filing bankruptcy and the transfer is to insiders such as relatives, officers, directors, or partners. Chapter 5 also gives the trustee in bankruptcy the authority to set aside fraudulent conveyances. 11 U.S.C. 548.



L.S. (LEE) McCULLOUGH JR. received his law degree from the University of Utah in 1973 and was admitted to the Utah State Bar in 1973. He is a member of the Mountain States Pension Conference, the Utah State Bar, the American Bar Association, the Utah State Bar's Tax Section, and the American Bar Association's Tax Section. He is a past member of the Advisory Council on Employee Welfare and Pension Benefit plans for the U.S. Department of Labor, having been appointed to said Board by former President Reagan. He is President of Callister, Duncan & Nebeker, a law firm which specializes in banking, corporate, tax and commercial law. His areas of practice include tax, ERISA, asset and estate planning, partnership, and general corporate law. He is past Chairman of the Board of a federal savings and loan association and a member of the Board of Trustees for various college and hospital foundations.

FRAUDULENT CONVEYANCE STATUTES

Policy. The policy behind fraudulent conveyance statutes is to avoid the depletion of the debtor's assets. Fraudulent conveyance statutes are meant to protect the debtor's unsecured creditors by preserving assets of the debtor's estate. Under §548 of the Bankruptcy Code, a bankruptcy trustee has authority to bring fraudulent conveyance actions.

Under the Uniform Fraudulent Transfer Act (UFTA), as approved by the National Conference of Commissioners on Uniform State Laws in 1984, if actual intent to defraud cannot be proven, only a creditor whose claim arose before the transfer (i.e., a present creditor) has the requisite status to bring avoiding actions as to transfers made without reasonably equivalent value by an insolvent debtor. UFTA §4. Both present creditors and future creditors (creditors whose claims arose after the transfer) have standing to bring avoiding actions as to transfers made with "actual fraudulent intent," or transfers made without reasonably equivalent value by a debtor with unreasonably small capital or with an intent to incur debt beyond the debtor's ability to pay. UFTA §4.

Voidable Transfers. Both the Bankruptcy Code and Uniform Fraudulent Transfer Act provide for the avoidance of two general types of fraudulent transfers: (1) Transfers made with "actual intent" to hinder, delay or defraud creditors, and (2) Constructively fraudulent transfers (transfers made without actual intent but deemed to be unfair to creditors because of other indicia). 11 U.S.C. 548(a).

Actual Intent. "Actual intent" to hinder, delay, or defraud creditors is rarely subject to direct proof. UFTA §4 looks to certain non-exclusive "badges of fraud" in order to prove actual intent. These "badges of fraud" are as follows:

(i) Whether the transfer was to an insider;

(ii) Whether the debtor retained possession or control of the property transferred after the transfer;

(iii) Whether the transfer was disclosed or concealed;

(iv) Whether before the transfer was

made or the obligation was incurred, the debtor had been sued or threatened with suit;

(v) Whether the transfer was of substantially all of the debtor's assets;

(vi) Whether the debtor absconded;

(vii) Whether the debtor removed or concealed assets;

(viii) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(ix) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(x) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(xi) Whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Burden of Proof. Many courts hold that once a *prima facie* case is shown of inadequate consideration or lack of reasonably equivalent value, the burden of proof then shifts to the transferee to establish the lack of fraudulent intent. *Commonwealth Trust Co. v. Reconstruction Finance*, 120 F.2d 254; *Adams v. Deem*, 16 N.E. 2d 817; *Boggs v. Fleming*, 66 F.2d 859; *Hutchenson v. Savings Bank of Richmond*, 106 S.E. 677.

Constructively Fraudulent Transfers. A common requirement for proving a constructively fraudulent transfer is that the debtor did not receive reasonably equivalent value. Under §548(d)(2) of the Bankruptcy Code, "Value means property, or the satisfaction or securing of a present or antecedent debt of the debtor. . ." In addition to the showing of lack of reasonably equivalent value, a party seeking to set aside a constructively fraudulent transfer must also prove one of three circumstances regarding the debtor's financial condition:

(i) The debtor was insolvent on the date of the transfer or was rendered insolvent by the transfer; or

(ii) The debtor engaged or was about to engage in a business or a transaction for which the debtor's remaining capital or assets were unreasonably small in relation to the business or transaction; or

(iii) The debtor intended to incur or believed he would incur debts beyond the debtor's ability to repay them as they became due. 11 U.S.C. 548(a)(2)(B)(i)(ii)(iii).

Insolvency. Under the Bankruptcy Code, insolvency is determined by a balance sheet test. Under the Fraudulent Conveyance Statutes, in addition to the balance sheet test, insolvency can also be presumed if the debtor is not paying his debts as they become due. For a thorough review of Uniform Fraudulent Transfer Act, see *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, Volume 1985 University of Illinois Law Review.

STATUTE OF LIMITATIONS

Each state has differing statutes of limitation for challenging fraudulent transfers. These statutes of limitation can vary from one to 10 years. The Federal Bankruptcy Code has a one-year statute of limitations from the date of the transfer. 11 U.S.C. §548(a).

Many courts have held that the beginning date for the running of the statute of limitations is the date on which the transfer was made or, if later, the date that the creditor should have discovered the transfer. See *Texas Life Insurance Co. v. Goldberg*, 165 S.W. 2d 790.

"One way to protect assets would be to advise a debtor who may have to declare bankruptcy to purchase exempt assets."

Because of the statute of limitations, and the fact that creditors are becoming increasingly sophisticated in attacking potentially fraudulent transfers, it is critical that clients be informed that the earlier they implement their estate planning the more secure that planning will be if a problem arises in the future. Four years is generally a safe harbor time limit.

STATE AND FEDERAL EXEMPTIONS

Choice of Exemptions. Under the Federal Bankruptcy Code, as well as most state exemption statutes, there are certain types of properties which are exempt from attachment by creditors. The state exemptions are somewhat different from the federal bankruptcy exemptions. Under the Federal Bankruptcy Law (11 U.S.C. §522(b)), a person is entitled to elect either the state exemptions or the federal exemptions. If no election is made, then it is presumed the federal exemptions were elected. In planning, it is important to make sure that both the federal and state exemptions are carefully reviewed. In Texas, for example, the state exemption for homes and qualified plan assets is very broad, whereas the equivalent federal exemption is quite restrictive. (5 Texas Code Ann. 41.00).

Federal Exemptions. The Federal exemptions are: (11 U.S.C. §522(d))

1. Personal residence up to $7,500 in equity;
2. Motor vehicle up to $1,200;
3. Household furnishings and clothing up to $4,000 in the aggregate, and up to $200 for a particular item;
4. Jewelry up to $500;
5. Implements and tools of trade up to $750;
6. Certain interests in insurance policies;
7. Health aids;
8. Right to receive unemployment, disability, social security, and pension payments, to the extent those are reasonably necessary for the support and maintenance of the individual; and
9. Personal injury awards subject to a $7,500 maximum limit.

Planning. One way to protect assets would be to advise a debtor who may have to declare bankruptcy to purchase exempt assets. Legislative history seems to indicate, at least for Federal bankruptcy purposes, that conversion of non-exempt property into exempt property will not necessarily be deemed fraudulent. (HR Rep. No. 595, 95th Congress, 2d Session 361 (1977)).

CONSIDERATIONS IN THE TITLING OF ASSETS

Joint Tenancy. By definition joint tenancy means each joint tenant owns 100 percent of the asset. Therefore, if property is held in joint tenancy, the presumption is it is owned by all joint tenants and is subject to the creditors of any joint tenant. *Mangus v. Miller*, 317 U.S. 178 (1943).

Presumption. For federal and most state law purposes, there is a presumption that jointly held assets are 100 percent includable in the estate of each joint tenant. I.R.C. §2040(a). The exception to this has to do with married persons, where only half the jointly held assets are included in the estate of each spouse. I.R.C. §2040(b).

Uniform Probate Code. Uniform Probate Code §6-107 states, "No multiparty account will be effective against an estate of a deceased party to transfer to a survivor sums needed to pay debts, taxes, and expenses of administration. . . if other assets of the estate are insufficient." So, under the Uniform Probate Code §6-107, assets titled jointly cannot be reached by creditors until other

assets of the deceased debtor have been exhausted.

Attachment of Jointly Held Assets. The Internal Revenue Service presumes assets held in joint tenancy to be owned 100 percent by each joint tenant and such assets are thus subject to attachment and seizure by the IRS to satisfy debts of any joint tenant. *United States v. National Bank of Commerce*, 472 U.S. 713 (1985).

Planning. Valuable assets should not be titled in joint tenancy since they may be subject to the creditors of any of the joint tenants. It may be better to dissolve joint tenancy and separate title and ownership.

OTHER TITLING FORMS

Tenancy in Common. Each tenant in common is deemed to own only a certain undivided portion of the property, not all of it. Utah Code Ann. 57-1-5. Therefore from both an estate tax and a creditor point-of-view, the percentage of the asset owned by each tenant in common is all that is included in the estate or subject to attachment by creditors. The disadvantage with tenancy in common is that creditors may end up becoming unwanted tenants in common, and could force partition of the assets which are held in tenancy in common.

Separate Ownership. Owned by the party whose name is on the title, or who holds possession. This form of outright ownership clearly exposes assets to creditor attachment and subjects the assets to estate tax.

Community Property. Deemed to be owned 50 percent by each spouse, but it is subject to the debts of either spouse (see discussion below).

Planning. When changing title or taking title to any asset or group of assets, consider the following issues: Has there been a completed gift? Have all proper transfer documents been executed? Was there adequate consideration for the transfer? If not, will sufficient time elapse after the date of the transfer to avoid any later argument that the transfer had fraudulent purposes?

Tenancy by Entirety. Some states still recognize tenancies by the entirety. In these states creditors of one spouse cannot break the tenancy by the entirety.

Under federal estate tax law, many transfers made prior to death are brought back into the estate (creditors may be able to use the same arguments):

(i) retention, possession or enjoyment of the property transferred, I.R.C. §2036;

(ii) reversionary interests retained for life, I.R.C. §2037;

(iii) revocable transfers, I.R.C. §2038;

(iv) transfers without sufficient consideration, I.R.C. §2043.

Establish a Reason for the Transfer. Because of the Uniform Fraudulent Conveyance Act and the Federal Bankruptcy Code, it is imperative that clients understand that planning which involves transferring assets out of their name to one or more persons must be done years in advance of any potential problems. In addition, all transfers must be made under circumstances which show that the transfer was not made for fraudulent purposes, or to avoid creditors. Transfers of assets therefore need to make sense from an income tax and/or an estate tax point-of-view. In addition, it is critical that correspondence between the practitioner and client, billing statements, and conversations between client and practitioner not be geared toward asset protection but rather toward overall estate planning. As stated earlier, transfers completed years before a creditor problem arises may still be set aside if the creditor can prove that the purpose of the transfer was to avoid paying off a debt. If the transferee is aware of fraudulent intent, the transfer could be set aside. *Jahner v. Jacob*, 252 N.W. 2d 1 (N.D. 1977); *U.S. v. 58th Street Plaza Theatre, Inc.*, 287 F.Supp. 475; *Elliott v. Elliott*, 365 F.Supp. 450; *Millard v. Epsteen*, 137 P.2d 717.

> "[I]t is imperative that clients understand that planning which involves transferring assets out of their name to one or more persons must be done years in advance of any problems."

Transfers entered into prior to engaging in an activity which could produce liability and which are entered into with the intent to protect certain property can sometimes be set aside. *Sikes v. First State Bank Decateur*, 197 S.W. 227 (Tex. App. Ct. Ft. Wrth 1917); *State Ex Rel v. Nashville Trust Co.*, 190 S.W. 2d 785. Most courts, when reviewing a transfer which was made prior to the time debt was incurred, will insist that the intent of the debtor to avoid paying future creditors must be proved before the transfer will be set aside. *Tates v. Clark*, 24 S.W. 2d 450 (Texas, Civil App. Ft. Wrth 1930); *Palumbo v. Palumbo*, 284 N.Y. 2d 884.

MARITAL PROPERTY AND TRANSFERS BETWEEN SPOUSES

Separate Property. In most non-community property jurisdictions, the separate property of each spouse is not subject to the liabilities of the other spouse, except for certain types of marital obligations, such as food, clothing, rent and medical expenses. Utah Code Ann. 30-2-5.

Community Property. Community property may be subject to the debts of either spouse whether the liability is tortious or otherwise. Arizona Revised Statutes 25-215; *Garrett v. Shannon*, 476 P.2d 538 (1970); *Hansen v. Bleving*, 367 P.2d 758 (19652). In community property states, it may therefore be wise to sever the community nature of the property and convert it to separate property. Spouses must make sure that the separate property is not thereafter commingled.

Burden of Proof. In both non-community and community property jurisdictions, if a married couple cannot prove which spouse owns the assets, then assets may be subject to the liabilities of either spouse. This is particularly the case for assets held in joint tenancy, since the burden of proof would be on the debtors to prove that the value was not all contributed by the spouse who is liable.

Planning. Husband and wife should consider equalizing their estates by dividing the marital property so that it is not all owned by one spouse, thus subjecting all property to that spouse's creditors. Reasons for equalizing estates are:

1. *Step Up Tax Base.* To ensure that in non-community property states there is a step up in income tax base on the death of the first spouse for the portion of the property owned by the deceased spouse. I.R.C. §1014(a). In community property states there is allowed a step up in income tax base on all community property. I.R.C. §1014(b)(6).

2. *Separate Ownership.* Married couples could divide property titles between them so they each own separate property, to ensure that creditors of one spouse cannot attach the assets of the other spouse, unless for some reason they are jointly and severally liable. *Peterson v. Peterson*, 571 P.2d 1360 (1977).

3. *Use of Trusts.* If the estates have been equalized, then on the death of the first spouse assets of that spouse could be placed in trust for the benefit of the surviving spouse. If this is done properly, assets of the first spouse to die will be kept out of the surviving spouse's estate from a creditor's point-of-view, and, possibly, from an estate tax point-of-view.

4. *Prepare Separate Financial State-*

ments. If a married couple is going to claim they own separate property they should prepare separate financial statements.

5. *Avoid Joint Contractual Liabilities.* Whenever one spouse enters into a contractual liability, he or she should make sure that the contract specifies that the creditor can only look to that spouse. There is significant case law to the effect that a creditor may not look beyond the separate assets of the contracting spouse, particularly where the non-contracting spouse does not agree to assume or guarantee the debt. *Humphrey v. Taylor*, 673 S.W. 2d 1954 (Tex. App. Ct. Tyler/1984, no writ).

6. *Partition Agreements.* Married couples could enter into partition agreements, thus agreeing to divide their assets and specifically designate which spouse owns which assets.

7. *Establish Revocable Trusts.* Each spouse could establish a separate revocable trust in which they would place title to their assets. Each spouse could then provide that upon their death, the assets in their trust would continue to be held in trust for the life of the surviving spouse. This procedure may ensure that creditors of the surviving spouse cannot attach the assets held in the deceased spouse's trust.

8. *Establish Q-tip and Irrevocable Trusts.* One planning technique is for a spouse who is transferring assets to his/her spouse to transfer those assets instead into an irrevocable, lifetime Q-tip trust rather than outright to the spouse. By doing this, they may protect the assets from creditors of both the transferor spouse and the transferee spouse.

9. Do not commingle assets.

10. Do not allow both spouses to guarantee each other's debts.

11. Track titling of assets and how they were acquired.

Caveat. In using any or all of the above ideas, caution must be exercised, as creditors may try to argue that the transfer was done for fraudulent purposes. *Cole v. Terrell*, 9 S.W. 668 (Tex. App. Ct. 1888).

RETIREMENT PLAN ASSETS

Federal and State Exemptions. As was mentioned previously in this outline, retirement plan assets in most states and under the federal bankruptcy exemptions are protected, but only to the extent that retirement plan assets are reasonably necessary for support. A number of states have specifically passed statutes exempting retirement assets from attachment by creditors. They are as follows:

Utah:	Utah Code Ann. 78-23-9(j)
Arizona:	33-1126 Arizona Revised Statutes
Texas:	1-42-0021
Hawaii:	Hawaii Revised Statutes §1, Chapter 651
Kansas:	K.S.A. 60-2308-1
Florida:	87-375-222.21 Florida Statutes
New York:	S. 2391-B

A thorough review should be made of each particular state's bankruptcy exemptions as they relate to retirement plan assets to understand how each particular state's law will affect your client's planning. Some states protect all qualified plan assets, including Individual Retirement Account assets, while other states only protect qualified retirement account assets and not IRAs. The majority of states follow the federal bankruptcy exemption, discussed earlier.

USE OF GRANTOR TRUSTS

Revocable Trusts. If a grantor establishes a revocable trust, puts into it grantor's assets, and retains the right to revoke the trust, the power of revocation will taint the trust sufficiently to allow creditors of the grantor to attach the assets of the trust. Restatement of Trust §156; *State Street Bank & Trust Co. v. Riser*, 389 N.E. 2d 768 (Mass-App-Ct. 1979). If the grantor retains the power to revoke and not the power to receive income or principal, but the trust allows the trustee to invade principal, subject to standards, then state courts appear to be evenly split as to whether or not creditors of the grantor can invade trust assets. The trend is leaning more and more in favor of allowing creditors to attach assets held in revocable trusts.

"Whenever one spouse enters into a contractual liability, he or she should make sure that the contract specifies that the creditor can only look to that spouse."

Irrevocable Grantor Trusts. Most courts tend to support the proposition that even an irrevocable trust established for the benefit of the grantor, by the grantor, can be reached by creditors. In a case entitled *Leach v. Anderson*, 535 P.2d 1241 (Utah 1975), the Utah Supreme Court held that assets in a trust which was established by the grantor, for the grantor, were reachable by the grantor's creditors, notwithstanding the fact that the trust was irrevocable and the trustee could decide, in its sole discretion, whether or not to invade the income or principal of the trust. Public policy will not permit a grantor to establish a spendthrift trust for himself. Most of the court spendthrift trust rulings also follow federal tax court rulings in regard to the estate area. Where a grantor creates a trust and retains the right to receive income from the trust, tax courts generally hold that the entire trust property is includable in the grantor's taxable estate. I.R.C. §2036. *In-Re-Uhl's Estate*, 241 F.2d 867 (7th Cir. 1957); *Wedrem Estate*, T.C. §12,756(m). See also Utah Code Ann. *25-1-11* which holds same as above.

Income or Invasion Rights. Any income or invasion of principal rights retained by the grantor will most likely be exercisable by the grantor's creditors. Therefore, grantor should retain no right to invade income or principal, but those rights should remain with the trustee. Even better, other family members should be made beneficiaries of the trust in addition to the grantor.

TRUSTS ESTABLISHED FOR DEBTOR BY THIRD PARTIES (NON-GRANTOR TRUSTS)

Marital Trusts. In this outline we have already discussed the usefulness of Q-tip trusts and other irrevocable trusts established by one spouse for the benefit of the other spouse. It appears that if such trusts are not established for fraudulent purposes, are set up so that the beneficiary has no right to invade the principal or income for himself, and utilize an independent trustee, then such trusts will probably protect the assets held in trust from the creditors of the beneficiaries. *Watterson v. Edgarley*, 388 A. 2d 934 (Md. App. 1978). Section 541(c)(2) of the Bankruptcy Code specifically recognizes the validity of spendthrift trusts. In one case the court held that the Internal Revenue Service was not permitted to reach assets in a spendthrift trust where invasion of income and principal were subject to the trustee's sole discretion. The IRS could only attach what the trustee elected to distribute. *First North Western Trust Co. v. Internal Revenue Service*, 622 F.2d 387 (8th Cir. 1980).

Spendthrift Trusts. A spendthrift trust, properly established, where the beneficiary is not the trustee and not the settlor, and where the beneficiary has no right to invade principal or income, will stop the creditor from invading the trust to satisfy debts of the beneficiary. *In Re Lackmonn Estate*, 320 P.2d 186; *Alborne v. Alborne*, 128 A.2d 910; *United Mine Workers of America v. Boyle*, 418 F.Supp. 406 (D.C. DC 1976). It would be unwise to have the beneficiary as the sole trustee. *Clarke v. Clark*, 46 S.W. 2d 658 (Tex. 1932).

Children's Trusts. Parents could create irrevocable inter-vivos trusts for children. These trusts, if they comply with state spendthrift laws, and provide that the trustee will not be the beneficiary, will apparently protect the trust assets from the beneficiary's creditors. Parents could also provide in their estates that a testamentary trust, or a revocable trust which becomes irrevocable on the death of the grantor, be established for children. Such trusts may keep the assets in the trust out of the child's estate from a creditor point-of-view, and to some extent out of the child's taxable estate, subject to the generation skipping tax.

The major disadvantage of an irrevocable trust is that grantor has to part with all dominion and control of the assets that are placed into the trust. Many clients would rather take the risk of losing the assets to their creditor's than give the dominion and control to children, or to the trustee of an irrevocable trust over which they have no control or right. Consider instead using a limited partnership in conjunction with a trust. (See below).

LIFE INSURANCE

State Law. Under most state law, life insurance proceeds payable on death of a debtor insured are not subject to creditors of the deceased debtor if the insurance proceeds are payable to someone other than debtor's estate. Utah Code Ann. 78-23-5.

Federal Exemptions. The Federal Bankruptcy Code exemption for life insurance provides that a whole life insurance contract with cash value of less than $4,000 is exempt from creditors. 11 U.S.C. §5.2(b)(7) and 522(b)(8).

State Exemptions. State bankruptcy statutes have somewhat different exemptions covering the cash surrender value of life insurance. Said exemptions vary from zero, to all of the cash value, to the cash value which has been in force for more than two years.

Premiums. There are cases which have permitted creditors to attach cash in a life insurance policy where it can be proven that the premiums were made in an attempt to defraud the creditor. *Bennett v. Rosborough*, 116 S.E. 788 (Ga. 1923); *Greenberg v. Goodman*, 15 A.2d 633.

PLANNING WITH INSURANCE

Term Insurance. The insured could own term insurance only.

Ownership. The insured could see that his insurance is purchased, owned and has as beneficiaries persons other than the insured or his estate.

Split Dollar. A split dollar life insurance contract could be purchased in which that the cash value is not owned by the debtor.

Irrevocable Life Insurance Trust. The insured or a child of the insured could establish an irrevocable life insurance trust. Assuming that the trust is set up sufficiently in advance so as to avoid any fraudulent conveyance argument, and assuming that the insured has no ownership rights over the policy and no control, direct or indirect, over the trust, the cash values and the proceeds of the life insurance policies should not be attachable by the insured's creditors. In addition, the beneficiary may be protected because the proceeds of the insurance policy would be owned by the trust and payable to the trust. When the insured dies, the insurance policy proceeds will go into the trust. Assuming the trust is set up to qualify as a spendthrift trust for state law purposes, creditors of the beneficiary should not be able to attach the assets of the trust.

Taxable Estate. Transfers of insurance policies within three years of death are includable in the taxable estate of the insured. I.R.C. §2035.

"In many states the individual shareholders of a professional corporation are not liable for the malpractice of the other shareholders."

CORPORATIONS

Use of Corporations. Avoiding personal liability for business debts may be the best reason to incorporate.

Shareholder Protection. Under most state law shareholders are not liable for debts of a corporation if the corporation is properly established. In order to help ensure that creditors cannot pierce the corporate veil and seek judgment against the individual shareholders make sure that the corporation has done the following: a) adopted bylaws; b) adopted articles of incorporation; c) up-to-date minute book; d) separate books of account; e) holds title to its assets; f) has not commingled its assets with those of the shareholders; g) separate bank accounts; h) issue stock; i) regular board meetings with all directors. *Shaw v. Bailey-McCune Co.*, 11 Utah 93, 355 P.2d 321 (1960); Utah Code Ann. 16-10-23.

Piercing the Corporate Veil. If corporate assets are not commingled with those of the shareholders, then debts of the corporation should not become liabilities of the shareholders. *Dockstader v. Walker*, 510 P.2d 526, 19 Utah 2d 370 (1973).

Professional Corporations. In many states the individual shareholders of a professional corporation are not liable for the malpractice of the other shareholders. *Marlin L. Stewart, et al. v. Aldine J. Coffman, Jr., et al.*, 748 P.2d 579 (Utah App. 1988).

Exceptions to shareholder protection:

(i) Federal and state withholding and sales taxes carry personal liability to those responsible I.R.C. §6672;

(ii) Federal bank rules making directors and shareholders liable to disposition.

Protection of Corporate Assets. Creditors of a shareholder may be able to attach the stock owned by the shareholder, but not the assets of the corporation, unless the corporation permits, or unless the creditor obtains enough stock to vote for liquidation of the corporation. In most states it takes a vote of 66.66 percent of the stock to dissolve a corporation. Utah Code Ann. 16-10-79.

PLANNING WITH CORPORATIONS

Minority Ownership. Have client own a minority ownership in the corporation, i.e., less than 50 percent. If the client gets into trouble and creditors attach his stock, the creditors will not control enough stock to liquidate the corporation.

Family Members. Client could give stock to his or her spouse, parents or children and by doing so dilute the stock ownership so that no one person owns a majority of the stock.

Trusts. If client is reluctant to part with total control, stock that would have been given outright to spouse, parents or children could be given to irrevocable spendthrift trusts set up for family members. If the trustee is friendly to the donor, indirect control of the stock is possible. For example, client may keep 30 percent of the stock, give 30 percent to spouse in a Q-tip trust, and give the rest to children in a series of spendthrift trusts. Assuming the trustee of the Q-tip trust and spendthrift trust are friendly, client will be able to indirectly control the corporation.

PARTNERSHIPS

Partner Liability.

General Partnership. In a general partnership, all general partners are liable for recourse debts.

Limited Partnership. General partners are liable for the debts of the partnerships. Lim-

ited partners are only liable to extent of their investment in partnership, unless found to have become involved in managing the business. Utah Code Ann. 48-2-7.

PROTECTION OF PARTNERSHIP ASSETS

Drafting Partnership Documents. Creditors of a partner (and not of the partnership) succeed to the rights of the partner when the partner's interest is attached. Therefore, care in drafting of the partnership is important to ensure that creditors of a partner cannot attach a partner's interest and then force liquidation of the partnership. Do not give partners right to liquidate or dissolve or demand distributions.

Charging Order. Most states permit creditors of a partner to obtain a charging order which requires the partnership to make all distributions to the creditor rather than to the debtor partner. Creditors holding charging orders can only obtain that which the debtor partner is entitled to. Utah Code Ann. 48-2-22.

Planning. Consider the following ideas in adopting a partnership form to protect assets:

1. *Transfer Valuable Assets Into Limited Partnership.* Donor could transfer valuable assets to a limited partnership. Donor could be general partner and keep a limited partnership interest as well. It is from the limited partner interests of donor that gifts could be made to spouse and children. Assuming no fraudulent transfer arguments, the interests in the partnership, which are given to donor's family, would be excluable from donor's estate and not subject to attachment by donor's future creditors.

2. *Donor As General Partner.* If general partner's interest is attached, this interest would cease to carry general partner status and creditors would only hold partner's interest as an assignee, *not* as a partner.

3. *Use of Trusts.* Donor could give limited partnership interests to irrevocable spendthrift trusts established for the benefit of family members. Donor can exercise some control over the interest given away by appointing a friendly trustee.

CONCLUSION

The estate planning techniques discussed in this paper must be used with prudence, must be used in such a way so as to accomplish client objectives, and must be established at a time when they will not be held to be fraudulent transfers. The wise client will plan years in advance and must be able to show that the planning was done for valid estate and income tax purposes aside from asset protection.

The Legality of Early Retirement Incentives Under the Age Discrimination in Employment Act

By Brian E. Neuffer

Increasing numbers of employers are using early retirement incentives to reduce their work forces.[1] This practice allows for a restructuring of the work force without the ill effects of a mass involuntary layoff.[2] Early retirement incentives can make room for affirmative action programs and provide promotional opportunities for younger employees.[3] Early retirement incentives are often viewed as genuine benefits to older workers.[4]

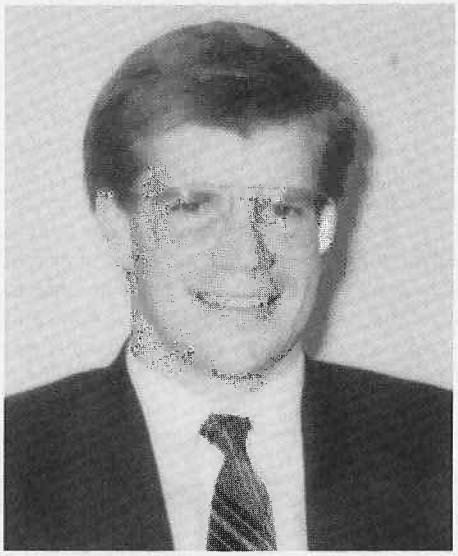
Despite the advantages of voluntary early retirement programs, there have been challenges to their legality under the Age Discrimination in Employment Act (ADEA).[5] The stated purpose of the ADEA is to promote the employment of older persons based on their ability rather than age, and prohibit arbitrary age discrimination in the workplace.[6] Certain employer practices can be struck down if they are shown to be a "subterfuge" to evade the purposes of the ADEA.[7]

It has been said that the "proper treatment of early retirement programs is the most difficult question under the Age Discrimination in Employment Act."[8] This article seeks to elucidate this difficult question. Section I introduces arguments on both sides as to whether early retirement incentives should be prohibited under the ADEA, and § II summarizes the current state of the law which allows early retirement incentives so long as they are voluntarily agreed to.

I. THE DEBATE OVER THE LEGALITY OF EARLY RETIREMENT INCENTIVES

A. *The Argument Favoring Legality*

Historically, there has been a presumption that age-based early retirement incentives are lawful.[9] They have been regarded as a beneficial option to employees and a useful tool for employers for staff reduction.[10] This view holds that early retirement incentives are an added benefit to employees, the sort of thing many people would pay to receive.[11] Further, the ADEA does not forbid treating older workers *more* generously than others.[12]



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From the employer's perspective, if the employer has no choice but to reduce its work force, an early retirement incentive seems more humane than a mass layoff where young people having no pensions to fall back on would lose their jobs.[13] From an economic standpoint, if older workers are being paid higher salaries, and such workers can be voluntarily replaced by younger employees being paid less, employers will be able to operate more profitably. This may benefit the economy as a whole.

Another argument is that early retirement incentives allow room for affirmative action programs.[14] Older workers tend to be disproportionately white and male.[15] Employers seeking to employ more women or minorities in order to avoid Title VII liability,[16] and employers seeking to avoid laying off younger workers who might be women or minorities will find an early retirement program an effective alternative.

Finally, it can be argued that the ADEA itself does not expressly forbid early retirement incentives. In the 1970s, it was common for employers to impose mandatory early retirement plans.[17] In 1978, Congress amended the ADEA[18] to forbid mandatory early retirement. However, Congress included nothing that would forbid *voluntary* early retirement. By not forbidding voluntary plans along with mandatory retirement plans, it may be argued that Congress has silently affirmed the practice of early retirement incentives.

B. *The Argument Against Legality*

One of the paramount goals of the ADEA is to keep older people in the work force.[19] A basic premise underlying enactment of the ADEA was that a tragic waste occurs when older workers leave the work force. A valuable resource—"the talent and experience accumulated by our older workers over the course of decades"—is lost.[20] It has been determined that age discrimination has an adverse effect on "the economic system as a whole" because it "wastes a wealth of human resources."[21] Since early retirement incentives tend to move older workers out of the work force before they would otherwise retire, they arguably are contrary to the purposes of the ADEA.

Further, it has been argued that early retirement incentives violate the ADEA because they harm older people individually and as a group.[22] This view contends that an early retirement incentive is a "wolf in sheep's clothing—it may seem like a lovely fringe benefit at first, but ultimately it may harm the individuals who accept it by dim-

inishing the length and quality of their lives."[23] Further, early retirement incentives perpetuate ageist stereotypes. "The ADEA is designed to eradicate both conscious and unconscious stereotypes about the abilities of older workers."[24] Since early retirement incentives are typically targeted at older workers, they are arguably based on an ageist stereotype that older persons are competent to do nothing but retire.[25]

Another argument is that early retirement incentives are not really voluntary. Employers may engage in coercive tactics to gain an employee's acceptance of the retirement incentive.[26] Similarly, the employee may have the choice of either accepting early retirement or being laid off without any severance bonus.[27] Further, inherent in an early retirement offer is the message that the employee is no longer needed or wanted.[28] It has been said that a "tempting carrot can compromise voluntariness just as much as can a threatening stick."[29]

Finally, the ADEA itself could be construed as forbidding early retirement incentives. Section 623(f)(2)[30] allows an employer to defend a charge of age discrimination if the employer can show that it acted in observance of a "bona fide" plan that is not a "subterfuge to evade the purposes" of the ADEA, and that the plan does not "require or permit involuntary retirement" because of age.[31] The "subterfuge clause" appears to be a catch-all phrase designed to prohibit employee benefit plans which are schemes or attempts to evade the purposes of the ADEA. The statute seems to require an analysis as to whether the early retirement plan thwarts the purposes of the ADEA. Anything less would be to practically read the subterfuge clause out of the statute.[32]

II. CURRENT STATE OF THE LAW

A. *EEOC Regulations*

As of the early 1980s, the Equal Employment Opportunity Commission (EEOC) has taken the position that early retirement incentives themselves do not establish prima facie evidence of age discrimination. The EEOC stated that "[n]either §4(f)(2) [29 U.S.C. §623(f)(2)] nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option."[33] Thus, the EEOC views favorably early retirement programs which are voluntary.

In 1987, the EEOC interpreted the subterfuge clause in §623(f)(2) as applying in situations where employee benefit plans prescribe lower benefits for older workers. If fringe benefits paid to older workers cost more than the same benefits to younger workers, the employer may be allowed to reduce the benefit levels of older workers "to the extent necessary to achieve approximate equivalency in cost for older and younger workers."[34] Applicable regulations state that

> [i]n order for a bona fide employee benefit plan which prescribes lower benefits for older employees on account of age to be within the §4(f)(2) exception, it must not be "a subterfuge" to evade the purposes of [the] Act. In general, a plan...which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of §4(f)(2), *provided that the lower level of benefits is justified by age-related cost considerations.*[35]

According to the EEOC, if older workers are treated less favorably under benefit or retirement plans, the subterfuge clause is brought into play. Such plans may still be allowed if they can be "cost justified." The rationale is that by allowing employers to give older workers lesser benefits when cost requires, the purposes of the ADEA are furthered. Employers may be able to continue employing older workers whom they might otherwise be unable to afford, due to the rising costs of benefit plans to older workers.[36]

"Since early retirement incentives are typically targeted at older workers, they are arguably based on an ageist stereotype that older persons are competent to do nothing but retire."

In summary, the EEOC has taken the position that employers can offer older workers early retirement incentives without violating the ADEA, if those incentives are voluntary. However, if older workers are treated less favorably than their younger co-workers, the employer will be required to "cost justify" any age-based distinctions.

B. *Recent Case Law*

The case law seems settled that early retirement incentives are presumptively lawful if voluntarily accepted by employees.[37] In the leading case of *Henn v. National Geographic Society*,[38] the National Geographic Society decided to reduce the number of employees selling advertisements. Salespeople over age 55 were offered early retirement, and were given two months to make their decision. The Society offered them severance pay, retirement benefits, continued medical coverage, and life insurance.[39] Several employees who accepted early retirement later sued claiming their separation violated the ADEA.

The Seventh Circuit held that "the 'prima facie case' in the law of discrimination is a shorthand for the constellation of events that raises a suspicion of discrimination—enough so to require the employer to explain his conduct."[40] According to the court, the mere offering of an early retirement incentive does not satisfy the plaintiff's prima facie case.[41] The court stated that an early retirement option is a valuable perquisite to an older employee. The court further held §623(f)(2) is an affirmative defense to the employer, and the employer need not defend its actions under §623(f)(2) until the plaintiff has made out its prima facie case.

Shortly after *Henn*, the Second Circuit handed down its decision in *Paolillo v. Dresser Industries, Inc.*[42] In *Paolillo*, the Second Circuit was faced with facts similar to those in *Henn*. The Second Circuit restricted its inquiry to whether the employees had voluntarily accepted early retirement, thus implicitly agreeing with *Henn* that early retirement incentives do not establish a prima facie case of age discrimination.

The Fifth Circuit followed *Henn* in *Bodnar v. Synpol, Inc.*[43] The *Bodnar* court held that the ADEA does not forbid treating older persons more generously than others. The court adhered to the view that an early retirement option is a valuable perquisite to an older employee, and that an employer's adoption of an early retirement plan does not create a prima facie case of age discrimination.[44] Thus, the courts seem to agree with the EEOC that merely offering an early retirement incentive does not constitute unlawful discrimination.

Until recently, court decisions were consistent with the EEOC regulations in requiring employers to "cost justify" their plans when older employees were receiving reduced benefits based on age. For instance, in *EEOC v. City of Mt. Lebanon*,[45] the EEOC brought an action against the City of Mt. Lebanon which had a benefit plan that terminated disability benefits when an employee reached normal retirement age.[46] At trial, the City raised the 623(f) defense. The Third Circuit held that by invoking the 623(f)(2) defense, the employer bears the burden of establishing that it acted in ob-

servance of a bona fide plan, and that the plan was not a subterfuge to evade the purposes of the ADEA.[47] Since the City's plan reduced disability benefits for older workers, the employer was required to "cost justify" the plan.[48]

The approach of placing the burden of "cost justification" upon the employers was also followed in *Karlen v. City Colleges of Chicago.*[49]

However, the recent Supreme Court case of *Public Employees Retirement System of Ohio v. Betts*[50] invalidated the "cost justification" requirement of the EEOC and the appellate courts.[51] In *Betts*, the employee became unable to perform her job due to medical problems, and the employer offered her either early retirement or further medical testing which would qualify her for unpaid medical leave. The employee chose retirement. However, under the employer's benefit plan, which was adopted prior to enactment of the ADEA, the employee was too old for disability benefits, and had to settle for less lucrative "age-in-service" benefits.[52] The employee sued claiming the employer's refusal to grant disability benefits violated the ADEA.

The Supreme Court, relying on its previous decision in *United Airlines, Inc. v. McMann*,[53] held that "an employee benefit plan adopted prior to enactment of the ADEA cannot be a subterfuge."[54] Finding no statutory basis for the EEOC's cost justification rule, the Court held it to be invalid.[55] The Court then construed §623(f)(2) as being inapplicable to "fringe benefit-plans," reasoning that "Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries and other non-fringe-benefit terms and conditions of employment."[56] Thus, employers may now have age-based distinctions in retirement plans without having to provide business or cost justifications, "so long as the plan is not a method of discriminating in other non-fringe-benefit aspects of the employment relationship."[57] The Court described the plaintiff's prima facie case as follows:

> Thus, when an employee seeks to challenge a benefit plan provision as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discrimination in some non-fringe-benefit aspect of the employment relation.[58]

CONCLUSION

The current standard is fairly clear. Early retirement incentives are presumptively lawful so long as they are voluntarily agreed to by employees. However, due to the *Betts* case, employers no longer need to "cost justify" age-based distinctions in employee benefit plans which treat older workers less favorably. The burden is now on the plaintiff to prove the discriminatory plan was intended to discriminate in a non-fringe-benefit aspect of employment.

[1] Freund & Prager, *Is an Early Retirement Incentive a Benefit—or a "Gilded Shove"?*, **Nat'l L.J.** Sept. 14, 1987, at 28.
For purposes of this paper, an early retirement incentive is a one-time lump sum payment of money or benefits offered to an employee if he or she agrees to retire early.
[2] *Id.*
[3] Kass, *Early Retirement Incentives and the Age Discrimination in Employment Act*, 4 **Hofstra Lab. L.J.**, 63 (1986).
[4] Freund & Prager, *supra* note 1, at 28.
[5] 29 U.S.C. §§621-634 (1982).
[6] 29 U.S.C. §621(b) (1982).
[7] *See* 29 U.S.C. §623(f)(2) (1982). "Subterfuge" is defined as a scheme, plan, stratagem or artifice of evasion. United Airlines, Inc. v. McMann, 434 U.S. 192, 203 (1977).
[8] Karlen v. City Colleges of Chicago, 837 F.2d 314, 317 (7th Cir. 1988).
[9] *See* Freund & Prager, *supra* note 1, at 28.
[10] *Id.* at 31.
[11] Henn v. National Geographic Soc., 819 F.2d 824, 826-27 (7th Cir. 1987).
[12] Bodnar v. Synpol, Inc., 843 F.2d 190 (5th Cir. 1988).
[13] Kass, *supra* note 3, at 67.
[14] Kass, *supra* note 3, at 105.
[15] *Id.*
[16] *See* 42 U.S.C. §2000(e) (1982).
[17] Kass, *supra* note 3, at 64.
[18] Pub. L. No. 95-226 §2(a), 92 Stat. 189 (1978) (codified as 29 U.S.C. §623(f)(2) (1982).
[19] 29 U.S.C. §621(b).
[20] Kass, *supra* note 3, at 69. (quoting **S. Rep. No.** 732, 90th Cong., 1st Sess. 4 (1976) (individual views of Mr. Javits)).
[21] Kass, *supra* note 3, at 69 (quoting *The Older American Worker: Age Discrimination in Employment: report of Secretary of Labor to the Congress under §715 of the Civil Rights Act of 1964*, 2, 5 (1965)).
[22] Kass, *supra* note 3, at 66.
[23] *Id. See also* Kass at 77, n.62.
[24] *Id.* at 71-72 (quoting Kelly v. American Standard, Inc., 640 F.2d 974, 980 n.9 (9th Cir. 1981).
[25] Kass, *supra* note 3, at 72.
[26] *Id.* at 80.
[27] *Id.* at 81.
[28] *Id.* at 80-81.
[29] *Id.* at 81-82.
[30] *See* 29 U.S.C. §623(f)(2) (1982).
[31] *Id.*
[32] *See* Cipriano v. Board of Educ. of City School Dist., 758 F.2d 51, 56 (2nd Cir. 1986) (requiring parties to show that plan was not a subterfuge to evade the purposes of ADEA, and stating "[w]ithout further guidance from the EEOC, however, we hesitate to go so far as practically to read the subterfuge clause out of the statute.")

[33] 46 Fed. Reg. 47,728 (Sept. 29, 1981) (codified at 29 C.F.R. 1625.9(d) (1989)).
[34] 29 C.F.R. 1625.10(a)(1) (1989).
[35] 29 C.F.R. 1625.10(d) (1989) (emphasis added).
[36] *See* Kass, *supra* note 3, at 93-97.
[37] *See* Freund & Prager, *supra* note 1, at 31.
[38] 819 F.2d 824 (7th Cir. 1987).
[39] *Id.* at 826.
[40] *Henn*, 819 F.2d at 828.
[41] *Id.* at 827.
[42] 821 F.2d 81 (2nd Cir. 1987).
[43] 843 F.2d 190 (5th Cir. 1988).
[44] *Id.*
[45] 842 F.2d 1480 (3rd Cir. 1988).
[46] *Id.* at 1483.
[47] *Id.* at 1488.
[48] *Id.* at 1492.
[49] 837 F.2d 314 (7th Cir. 1988). In *Karlen*, teachers who accepted early retirement sued under the ADEA because older retirees were not treated as favorably as younger retirees. The Seventh Circuit stated

> [if] the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of §[623](f)(2).

The *Karlen* court concluded that this approach was consistent with the principle purposes of the ADEA: "withhold[ing] benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the [ADEA] is aimed." *See also*, Cipriano v. Board of Ed. of North Tonawanda School Dist., 785 F.2d 51 (2nd Cir. 1986).
[50] 109 S.Ct. 2854 (1989).
[51] *Id.* at 2865.
[52] *Id* at 2859.
[53] 434 U.S. 192 (1977).
[54] *Betts*, 109 S.Ct. at 2861. However, this did not end the inquiry because some aspects of the employer's plan had been modified after the ADEA was enacted.
[55] *Id.* at 2865.
[56] *Id.* at 2866.
[57] *Id.* at 2866.
[58] *Id.* at 2868.

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Commission Highlights

During its regularly scheduled meeting of July 17, the Board of Bar Commissioners received the following reports and took the actions indicated:

1. Approved the minutes of the June 27, 1990, and June 19, 1990, Bar Commission meetings.

2. Discussed possible amendments to paragraph 2.4 of the Policies and Procedures. Approved reimbursement for Hans Chamberlain's travel expenses in connection with meeting.

3. Received a report from President Greenwood noting appointment of Jeff Thorne to chair a committee to review Bar bylaws and policies and procedures; appointment of Paul Moxley, James Morton and Stephen Trost to analyze the Supreme Court's *Keller* decision in relationship to Bar activities; appointment of Dennis Haslam to review all staff fringe benefits; decision to provide a Bar Directory supplement for insertion in *Bar Journal* in lieu of publishing Directory this year, in order to save approximately $15,000.

4. Received a preliminary year-end budget statement and audit review statement for 1989 from Lois Muir, financial director. Commission directed Ms. Muir to expand Bar's chart of accounts, as recommended by outside consultant.

5. Received a report from Interim Director Brian Florence regarding status of search for new executive director.

6. Appearance and report by Joe Call of Deloitte & Touche regarding computer needs of Bar and projected costs of various options.

7. Received report from Lawyer Benefits Committee chair, Randon Wilson, regarding a private network long distance program. Action deferred pending gathering of further information.

8. Received a report from Barbara Bassett, Associate Director. She reported that David Hamilton will chair mid-year meeting which will be held in St. George, March 14-16.

9. Received the Admissions Report, acting on various petitions for accommodations at July exam, and other matters.

10. Considered letters from persons wishing to fill unexpired term of Han Chamberlain as commissioner from the fifth division. After discussion, Gayle McKeachnie was selected to fill the position. A motion was carried to draft a provision in the bylaws regarding procedures for replacing commissioners who resign.

11. Received a CLE report, rejected a proposal to provide a discount for "public sector" lawyers because of the problem of not providing a similar discount for others who might have similar financial problems, and approved a proposal allowing a surcharge for "door registrations."

12. Approved Ethics Advisory Opinion No. 100.

13. Received the Discipline Report and acted on pending public and private discipline matters. Approved the filing of an unauthorized practice of law action, based on the report of the Unauthorized Practice of Law Committee. Discussed pending litigation matters.

14. Appointed Jackson Howard, Hans Chamberlain and James Davis to serve on the Judicial Conduct Commission.

15. Appointed Reed Martineau to serve an additional term as State ABA delegate. Motion carried to review procedures to fill this position, referred to Policy and Procedure Committee chaired by Jeff Thorne.

At a special commission meeting held August 24, 1990, the Commission received the following reports and took the actions indicated:

1. Received and discussed the Supreme Court's minute entry regarding the petition for Bar dues increase. President Greenwood reported appointment to the Task Force created by the minute entry of Jim Davis, Jim Clegg and Gayle McKeachnie. Interim Director Brian Florence reported that dues notices would be mailed later in the week.

2. Interim Director Florence further reported that the Search Committee had narrowed applicants for the executive director position and that the finalists would be interviewed by the Commission as a whole.

3. A motion was adopted that no hiring of Bar staff, including temporary help, take place without prior approval of the executive director and Bar Commission, with exception of temporary help for logistical support of meetings in the Law and Justice Center.

Supreme Court Approves Bar's Petition for Dues Increase and Cycle Change

The Utah State Bar's petition for dues increase and change of dues cycle was approved August 10, 1990, by the Utah Supreme Court. Bar President Pamela T. Greenwood said the Bar Commission is very pleased with the Court's action. "In my opinion, the Court's approval of our petition, largely without change, indicates their support of a strong and viable Bar association," she said.

"The Court has taken a strong leadership position in their order and we are grateful for the speedy and thorough manner in which they responded. The Bar has worked closely with the Court and its independent consultants to provide information regarding the petition. We are pleased many of the steps we've already begun to implement with respect to cost and debt reduction were suggested by the Court. We acknowledge the need for improved financial planning and management, and will see to the immediate establishment of the remaining needed steps," President Greenwood said.

The dues paid to the Bar by Utah lawyers cover all administrative, admission and regulatory costs, as well as supporting many public service programs. Unlike most other professions, no tax dollars are used to regulate attorneys in Utah.

Annual dues for Bar members will be $350 for active lawyers with three or more years of experience. Dues will be paid each year in July rather than January.

President Greenwood said the Bar Commission believes the Court's approval of the dues increase and cycle change and the recommendations which will be offered by a Court-appointed task force renew the strength of the Utah State Bar.

"Our interest and that of the Court is to ensure a responsive and accessible system of justice for the people of Utah. The Court's order today helps us to secure this for the future," she said.

Correction of Errors in Client Security Fund Report Re: Richard K. Crandall and Retraction

In the May 1990 issue of the *Utah Bar Journal*, it was reported that the Bar Commission approved the recommendation of the Client Security Fund Committee and authorized payment of two awards in the sum of $650 and $150 resulting from two disciplinary actions against Richard K. Crandall. The Committee and the Commission's action was in error for the following reasons: (1) the underlying recommendation of discipline upon which the $650 award was based had previously been rejected by the Utah Supreme Court in its decision in *In Re: Crandall*, 784 P.2d 1193 (Utah 1989); and (2) there, in fact, was no underlying disciplinary action taken with respect to the $150 award.

Further, through an administrative error, Mr. Crandall was not given notice of the client security fund claims. **RICHARD K. CRANDALL IS A MEMBER IN GOOD STANDING OF THE UTAH BAR AND WAS SUCH AT THE TIME OF THE ERRONEOUS PUBLICATION.** The Commission regrets these errors.

Gayle F. McKeachnie Appointed to Utah State Bar Commission

The Utah State Bar Board of Bar Commissioners has appointed Gayle F. McKeachnie to the Board to fill the unexpired term of Hans Q. Chamberlain, Cedar City.

Mr. McKeachnie is a member of the law firm of McKeachnie, Allred & Bunnell with offices in Vernal and Roosevelt. His practice focuses on estate planning, business, governmental, natural resources and environmental matters.

He received his Juris Doctor in 1970 from the University of Utah College of Law. He served four terms in the Utah State House of Representatives, being first elected in 1978.

Mr. McKeachnie is a past president of the Vernal Area Chamber of Commerce and the Vernal Kiwanis Club. He is presently chairman of the Utah Constitutional Revision Commission.

Claim of the Month

ALLEGED ERROR AND OMISSION

Insured timely filed and served a personal injury/products liability lawsuit on behalf of his client, but failed to prosecute the suit within California's five-year dismissal statute.

RESUME OF CLAIM

The Insured was retained by a taxi driver who had become seriously injured while at work. It appears the claimant was injured while standing behind his vehicle. The Insured filed suit against the cab company and the manufacturer of the car.

Just before the five-year dismissal statute was set to expire, the Insured began writing the client to tell him that his case was difficult, if not impossible, to prove. The Insured recommended the client/claimant drop his case. The client/claimant refused to do so. The Insured was forced to file motions attempting to set a trial date within statute period. The court denied the Insured's motion and ultimately dismissed the case.

HOW CLAIM MAY HAVE BEEN AVOIDED

The Insured should have calendared the statutory deadlines. The Insured should also have calendared dates at least nine months before each of these dates for the purpose of maintaining the case on court docket.

The standard for review under the discretionary statutes is "due diligence" of the Insured in prosecuting the action. Therefore, the Insured should have been conducting discovery and settlement negotiations on the plaintiff's behalf.

If the Insured had truly believed claim was impossible, he should have put his opinion in writing to the client early in the course of the case and given some options: 1) get a new attorney to evaluate the case; 2) have the Insured pursue the case in spite of the difficulties; or 3) seek co-counsel expert in statutory motions for limitation of actions. The Insured should then have had the plaintiff "sign off" on whatever course he decided.

Finally, the Insured should have made regular communication with the plaintiff, in writing or by telephone, confirming the call, to keep him apprised of the status of the case.

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

Rules and Regulations Governing Mandatory Continuing Legal Education

Some Questions and Some Answers

1. *How should we calculate time in determining total MCLE credit?*

The total minutes of actual instruction, within a single program, *excluding* non-educational matters, such as breaks, meals, opening and closing remarks, shall be divided by 50 minutes rounded down to the nearest one-half hour after the first 50 minutes. (MCLE Rule 4(a).) Hence, an MCLE program of instruction lasting 90 minutes would be given credit for one and one-half hours and an MCLE program consisting of 100 minutes would receive credit of two hours. The MCLE Board advises sponsors of the amount of time qualifying for credit, and it is expected that sponsors will pass on this information to attendees. **However, members of the Bar in filing their certificates of compliance will be expected to set forth actual hours of attendance rather than a sponsor's projected time.**

2. *Why are ethics credits counted separately?*

The Utah Supreme Court has established the requirement that each member of the Bar receive at least three hours of instruction on ethics or professional responsibility during each two-year period. (MCLE Rule 3.) While it is recognized that all MCLE programs should include some component of ethics or professional responsibility, it is appropriate that the subject matter of professional responsibility and ethics be covered separately. Credit for this portion of the MCLE requirement shall only be granted for those portions of programs separately identified as dealing with ethics or professional responsibility. These programs need to contain at least 50 minutes of instruction to qualify in calculating the appropriate time. For example, if an MCLE program contains less than 50 minutes of presentation devoted separately to ethics or professional responsibility, no credit for the ethics requirement can be given. However, this time may be included as part of the total program so that the attendee can receive MCLE credit in satisfaction of the non-ethics portion of the requirement.

3. *When should annual reports be submitted?*

The first reports shall be due on or before December 31, 1991. (MCLE Rule 5.) *However, an attorney may submit his or her report to the MCLE Board as soon as the requirements have been satisfied.* Each attorney admitted to practice in this state shall make a written report to the Board concerning the attorney's completion of accredited continuing legal education for each two calendar years. A total of 27 hours must be completed for each two years, including three hours for ethics. This report shall include the title of programs attended, the sponsoring agency, the number of hours of actual attendance at each such program, and such other information as the Board shall require as set forth on the form adopted by the MCLE Board. No supporting materials will be submitted with the report. Rather, each attorney is expected to maintain supporting documentation to substantiate compliance with the requirement. This proof shall be retained by the attorney for a period of four years from the end of the period for which the statement of compliance is filed and shall be submitted to the Board upon written request. (MCLE Reg. 5-103(3).) For example, materials evidencing compliance of MCLE for the period between January 1, 1990, through December 31, 1991, shall be retained by the attorney until December 31, 1995.

4. *Will the MCLE Board review all statements of compliance?*

The MCLE Board will review all statements to ensure that attorneys submitting the reports have included required information. If a report is incomplete, the attorney concerned will be requested to supplement the report. This does not mean that the MCLE Board will require supporting documentation. In addition, the Board will ask a limited number of members to submit supporting documentation. This will be done so that the Board can give assurance to the Utah Supreme Court that its rules and regulations are being properly monitored and to assist members of the Bar in understanding the requirements and procedures for complying with MCLE. There is no reason for the MCLE Board to do anything other than to assist members of the Bar in complying with these requirements and nothing will be done to make these requirements a greater burden upon practitioners.

Public Utility Law Committee Formed

The Public Utility Law Committee has been organized and is currently functioning as part of the Administrative Practice Section. The Committee Chairman is James A. Holtkamp of Davis, Graham & Stubbs, Suite 1600-87 Eagle Gate Tower, 60 E. South Temple, Salt Lake City, Utah 84111-1006, (801) 328-6000. The Committee consists of practitioners before state and federal utilities commissions and others interested in utility regulation. The committee is interested in participation from lawyers involved in all aspects of utility regulation, including transportation, telecommunications, natural gas, and electricity.

If you are interested, please contact Mr. Holtkamp at the above address or telephone number.

CONTINUING LEGAL EDUCATION
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

CERTIFICATE OF COMPLIANCE
For Years 19 _____ and 19 _____

NAME: _____ UTAH STATE BAR NO. _____

ADDRESS: _____ TELEPHONE: _____

Professional Responsibility and Ethics* **(Required: 3 hours)**

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

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

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

Continuing Legal Education* **(Required: 24 hours) (See Reverse)**

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

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

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

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

* Attach additional sheets if needed.

** (A) audio/video tapes; (B) writing and publishing an article; (C) lecturing; (D) law school faculty teaching or lecturing outside your school at an approved CLE program; (E) CLE program--list each course, workshop or seminar separately. NOTE: **No credit is allowed for self-study programs.**

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

Date: _____ _____
(signature)

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

EXPLANATION OF TYPE OF ACTIVITY

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

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

C. Lecturing. Lecturers in an accredited continuing legal education program and part-time teachers who are practitioners in an ABA approved law school may receive 3 hours of credit for each hour spent in lecturing or teaching. No more than one-half of the credit hour requirement may be obtained through lecturing and part-time teaching. No lecturing or teaching credit is available for participation in a panel discussion. **See Regulation 4(d)-101(c)**

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

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

1990 BYU Law School Alumni Banquet Announced

"The alumni of the J. Reuben Clark School of Law at Brigham Young University will hold their 1990 Alumni Banquet at 7:00 p.m. on Friday, October 26, 1990 at the Marriott Hotel in Salt Lake City," according to Judge Michael L. Hutchings, Banquet Chairman. Graduates of all 15 classes, all present and former faculty members and friends of the Law School are invited to attend.

This year's featured speaker is Dallin H. Oaks, formerly president of BYU, member of the law school faculty and Justice of the Utah Supreme Court. Presently, Elder Oaks is a member of the Quorum of the Twelve Apostles of the Church of Jesus Christ of Latter-day Saints.

Banquets tickets cost $25 per person and may be obtained by contacting Assistant Dean, Kathy Pullins, at the J. Reuben Clark Law School, Brigham Young University, Provo, Utah 84602 or by calling (801) 378-5516. Early reservations are suggested for this event.

The Quotable and the Not So Quotable

By Michele G. Roberts
Admissions Administrator

Every March and August a group of 50 plus Bar Examiners meet together to grade the Utah Bar Examination essay answers. As these Examiners check for analytic reasoning, issue identification, appropriate remedies, proper procedure, ethical obligation, etc., an occasional quip will reach out from the answer and grab the Examiner. We hope you will enjoy a few of these quotes as much as we did. So sit back and turn up the smile barometer.

In the category of: "Could this really be unethical?"

"*Charging an unreasonable fee*. . . an attorney is not supposed to starve."

"An attorney is under an obligation not to threaten the filing of a law suit."

"An attorney may not threaten criminal prosecution for any reason, much less to force an opponent into settlement negotiations."

In the category of: "Things I learned in law school!"

"Only wine is supposed to age, not client's cases."

"Unfortunately, that insolvency makes this contractual provision less than effective as you can't get blood from a stone."

[Referring to a perjured affidavit] "In Utah, this is referred to as lying and cheating."

"A lawyer has a duty to terminate nicely."

"Lawyers shouldn't commit crimes."

"Everyone knows law school grades don't mean anything anyway!"

In the category of: "After law school reality."

". . . there may be a cause of action for misrepresentation because Dealer relied on the intentional statement of Developer that the check is in the mail. (That's an old line I'm now using with my creditors as to my student loans)."

"It might appear that Wacky's failure to appeal within 30 days under the Act constituted a waiver and that he is subject to the final judgment. However, there are some exceptions to the general exhaustion rule (felt by Bar Applicants everywhere)."

When you don't know the answer it's usually a good idea to tell the Bar Examiner that you recognize your lack of information with statements like:

"First of all I would associate myself with another attorney who had some idea what to do here. . ."

"There may be a required time limit for filing, but I would, as a competent attorney, look this up in the rules."

"I assume there may be special rules regarding [the subject of the exam question] and of course I would want to acquaint myself with them before taking any action."

"I remember this very case from my criminal case book. I didn't understand then, nor do I now."

[At the end of a one-page answer:] "clueless otherwise"

"Trust me, I'll get to the answer eventually."

"Note. . . ." [followed by a blank page]

Court Observance Week For Legal Secretaries

The week of October 8-12, 1990, has been proclaimed as Court Observance Week for Legal Secretaries by Governor Norman H. Bangerter. The purpose of this special event, being observed by the Salt Lake Legal Secretaries Association, is to give law office employees and the general public an opportunity to visit courts, observe trials in progress, and gain firsthand knowledge of the functions of various departments connected with the judicial system.

Highlight of the week's activities will be the annual Day in Court program scheduled for Thursday, October 11, 1990, at the Fort Douglas Military Club, 49 Fort Douglas Boulevard, Salt Lake City. The Honorable Raymond S. Uno, Third Judicial District Court Judge of Salt Lake County, will speak to the secretaries on "Courts in the Nineties." All interested persons are invited to join the association members at the Military Club at 6:00 p.m.

For further information, contact DeAnn Heath, Day in Court Chairman, at 972-4873 or 487-6206 after 6:00 p.m.

"Wait a minute."

"TIME"

And of course stating the obvious always helps the Bar Examiner in grading:

"This transaction is in deep trouble."

"Well that is a stupid argument."

"The first issue that is raised by the fact situation is the fact that the attorney is an idiot."

For next tax season if you have any question as to your share versus the IRS's share, just follow your instinct like this examinee did:

"A very instinctive guess is . . . the IRS takes whatever they want—like the proverbial 300-pound gorilla."

One Examiner wondered if this examinee had been to court with some of his or her nameless colleagues:

"The plaintiff can proceed to trial and get a default judgment against the defendant."

And for all those who wondered what the "true" test for summary judgment is:

"The test for summary judgment is—reasonable minds could not base a decision upon this evidence."

Attorney work product often refers to confidential or privileged information relative to a specific case. This examinee recognized the real meaning of attorney work product. When asked to construct a memo identifying the issues raised by the fact scenario of the question, the examinee responded:

"If this were a real memo, I wouldn't write it in less than 40 minutes, *and* I would have it typed."

The examinees often interpret certain procedures and case precedents in a way that may add fresh insight to the Utah Code:

"The constitution of Utah states that the courts are *always* open."

"Plaintiff's filing default six weeks later may be deemed a *bait and switch* to the court."

"The court usually finds that when the wife remarries or cohabitates with another individual of the *same* sex, the right to alimony is terminated."

Perhaps someone should explain the concept of the "birds and the bees" to this examinee:

"For a common law marriage to result, a man and a woman must hold themselves out as being husband and wife. They typically do so by cohabitating with each other. Sexual interaction is not a prerequisite, however the cohabitation must be of such a degree that children would be *expected.*"

And here is a novel solution to the increase in the number of debtors today:

"Bring back debtor prisons or hang them in the courtyard at the Federal Court."

With hunting season upon us, the following quote merits some contemplation:

[On an illegal after-hours hunting charge] "An equal protection argument exists in that Utah allows blind hunters to hunt, but doesn't allow other hunters to hunt in the dark."

And on the *menu* of legal remedies:

"Once he defaults, Dealer should sue for the whole *enchilada.*"

"Dealer's best pre-judgment remedy appears to hindsight and regret."

These examinees really took to heart the chapters on "The Art of Negotiation and Persuasion" and "The Best of Modern Psychology" in law school:

"Dealer should call developer and *sweet talk* him."

"This corporation appears to be the *ultra-ego* of Fred."

When cutting up the "pie" who gets the first slice of the assets?

"Instead of selling it [the assets] and paying creditors, they will sell it and pay their lawyers."

On the contracts question involving lay persons drafting the first right of refusal in one paragraph contradicted immediately in the next paragraph with an option at a firm price, the examinee begins first sentence of his or her answer with:

"All of the terms of the contract appear to be clear."

On corporations:

"To dissolve the corporation is not as easy as a partnership."

"If shareholders could sue to dissolve corporations every time they were unhappy, there wouldn't be any left."

"The state may revoke a certificate of incorporation for failure to hold meetings though the more normal course is a fine of up to $5,000."

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CONSOLIDATED REALTY GROUP
COMMERCIAL BROKERAGE SERVICES

Ethics Advisory Opinion Committee
Opinion No. 100
Effective Date: 07/27/90

ISSUE

The Utah State Bar has been asked for an ethics advisory opinion on the propriety of an arrangement whereby a collection agency retains and pays a lawyer a flat monthly fee to handle all of its collection litigation while seeking and recovering attorneys' fees from the debtor based upon higher market rates.[1]

OPINION

If a collection agency recovers attorneys' fees from a debtor which exceed the actual cost of legal services for a particular matter, the agency profits from the services of the attorney. Such an arrangement violates Rule 5.4 of the Rules of Professional Conduct which prohibits lawyers from sharing fees for legal services with non-lawyers.[2]

RATIONALE

Rule 5.4 of the Rules of Professional Conduct prohibits lawyers from sharing fees for legal services with non-lawyers, "to protect a lawyer's professional independence of judgment." Comment to Rule 5.4. We perceive no difference between "sharing" fees for legal services and "profiting" from them. In either case, a non-lawyer has the potential power to wield influence over the handling of the legal matter which is inconsistent with the lawyer's obligation to exercise independent professional judgment.

This conclusion is supported by *National Treasury Employees' Union v. United States Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981), in which the court was confronted with a factual situation very similar to the arrangement under consideration here. Two salaried lawyers employed full time by the Union provided legal services to a Union member under a prepaid plan. The Union member prevailed, and the Union sought recovery of its attorneys' fees based upon the market value of the legal services rendered rather than the actual cost of legal services incurred by the Union. The Union admitted, however, that the fees would be paid to the Union, not to its attorneys.

The Court refused to award the Union more than the actual cost of legal services, concluding that the Union could not profit from the provision of legal services, under the ABA version of Utah's Rule 5.4. *National Treasury Employees' Union v. United States Department of Treasury*, 656 F.2d at 852. The Court stated, however, that there would be no objection if the market value fees were paid to the attorneys directly, in which case the lawyers would be free to donate some or all of their fees to charity, or even to their employer, "just as they may spend their other monies as they please." *Id.* at 852-53.

The holding of the Court is, therefore, quite narrow: A lay person paying for legal services may recover only the actual cost of those services to the lay person. An attorney, however, may recover more than the actual cost of the legal services if the market value of those services is greater than their actual cost.[3]

This opinion is also consistent with ethics advisory opinions of other jurisdictions. In 1986, Idaho considered the retention of attorneys' fees by collection agencies and concluded that a lawyer could not contract with a collection agency to accept only a retainer fee allowing the agency to keep any attorneys' fees awarded by the court in excess of the retainer. Opinion No. 117 (1986). Arizona has decreed that there "may not be, under any guise, any division of fees between a lawyer and a collection agency. Whatever is charged for legal services must go to the lawyer." Opinion No. 81-23 (1981). A Philadelphia opinion concluded that since the collection service is comprised of non-lawyers, an arrangement pursuant to which a lawyer received a percentage of the Agency's contingency fee violated the Code's prohibition against sharing legal fees with a non-lawyer. Opinion No. 87-3 (1987). Similarly, a Kansas advisory opinion discussed a practice pursuant to which both the collection agency and the lawyer charged contingency fees, finding the practice valid as long as there was no division of fees with the collection agency for legal services rendered. Opinion No. 83-5 (1983).

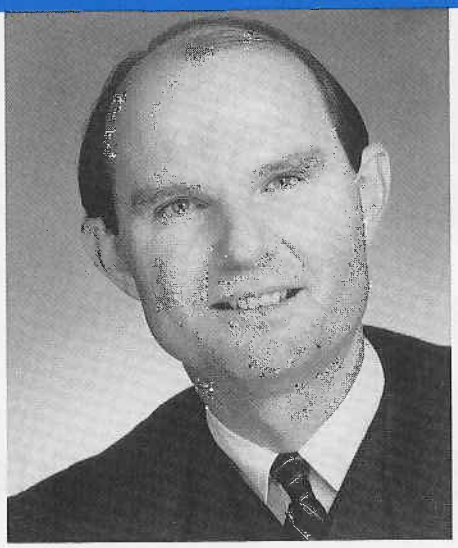
If an attorney is paid a monthly retainer, then the actual cost of services for a particular matter must be calculated and only that amount, including expenses ordinarily associated with legal services, are recoverable by the agency as an attorneys' fee.

[1] The Bar is not concerned with the relationship between the collection agency and the creditor. The Rules of Professional Conduct do not apply to the conduct of lay persons.

[2] *See also*, Formal Opinion 294 (1958); Formal Opinion 180 (1938).

[3] *See also* Rule 4-505 of the Utah Code of Judicial Administration which governs the award of attorneys' fees in the trial courts of the State of Utah, and provides in pertinent part as follows:

> (1) Affidavits in support of an award of attorneys' fees must be filed with the court and set forth specifically the legal basis for the award, the nature of the work performed by the attorney, the number of hours spent to prosecute the claim to judgment, or the time spent in pursuing the matter to the stage for which attorneys' fees are claimed, and affirm the reasonableness of the fees for comparable legal services...



Recent Case Law Developments in the Field of Sovereign Immunity in Utah

By Judge Lynn W. Davis
Fourth Circuit Court

JUDGE LYNN W. DAVIS serves as a Fourth Circuit Judge in Provo, Utah. He is a member of the Utah Supreme Court Advisory Committee on the Code of Professional Responsibility, chairs the Criminal Section of the Bar Examiner Committee, and chairs the State Court's Interpreter and Translation Committee. He graduated from the J. Reuben Clark Law School in 1976.

I. INTRODUCTION

The Utah Governmental Immunity Act was passed in 1965.[1] The Act substituted a statutory framework for the common law doctrine of sovereign immunity existing prior thereto "to be interpreted by the Courts and reshaped by the legislature as necessary from time to time.[2] Utah's Governmental Immunity Act "shields sovereign policy-making and discretion from state-law damage claims by generally precluding (money) damage liability for performance of a governmental function, subject to certain statutorily enumerated waivers."[3]

This substantive area of the law has been the focus of a number of significant recent changes, both judicially and legislatively. From January 1, 1989, through July 31, 1990, the Utah Supreme Court was very active in deciding cases interpreting the Utah Governmental Immunity Act. The Utah Court of Appeals also added two decisions. This paper examines 16 reported cases and their influence on the established law in the field of governmental immunity. These cases treated a wide range of claims resulting from flood-related governmental activities,[4] torts committed by a prisoner or detainee,[5] and torts committed by government employees.[6] In addition two cases addressed the government's duty to inspect or regulate financial institutions[7] and one very important case involved the constitutionality of recovery limits as applied to a university hospital.[8] The most recent case concerned the adequacy of safety improvements at a railroad crossing and the applicability of immunity under the discretionary function exception.[9]

It is always difficult to predict what test or standard a court may rely upon in a governmental immunity case. It is equally difficult to designate trends from the 16 recent decisions. Nonetheless, certainly one can readily identify important judicial announcements, key concepts and "brightline" standards from these decisions. Several cases have been both significant and pathbreaking in the development of the law of sovereign governmental immunity. With complete acknowledgment of subjectivity and caprice, consider the following.

II. TRENDS, OBSERVATIONS AND DEVELOPMENTS

A. *ALTERNATIVE THEORIES AND ARGUMENTS AND ORDER OF ANALYSIS*

Counsel must now be prepared to argue and brief duty of care and absence of duty of care theories in governmental negligence cases. The Utah Supreme Court recently decided a case involving alleged governmental negligence without ever reaching questions raised by the doctrine of sovereign immunity.

In 1982, Dean Ferre was brutally bludgeoned to death by a detainee on weekend release from a community corrections facility. His widow and surviving child initiated a wrongful death action against the state of Utah relying upon various negligence theories. In *Ferree v. State*,[10] the Court reasoned that governmental immunity "conceptually arises subsequent to the question of whether there is tort liability in the first place." The Court addressed liability by applying and analyzing negligence concepts before deciding issues of governmental immunity.

The Court held that the state officials had no duty of due care to the victim apart from their general duty to the public at large. Because the Court found no individualized duty, it affirmed the dismissal of the wrongful death action, never reaching the questions raised by the doctrine of sovereign immunity.[11] The Court concluded that "sovereign immunity . . . is an affirmative defense and conceptually arises subsequent to the question of whether there is tort liability in the first instance." The Court further

stated that "deciding an immunity question first may lead to unwarranted assumptions and confusion about undecided duty problems."[12]

The Utah Court of Appeals, in sorting out these same issues in *Kirk v. State*,[13] acknowledged this "duty of care" approach, but ultimately decided the case on the governmental immunity theory relied upon by the trial court. Kirk, an unarmed bailiff, was shot and seriously wounded by an inmate in transport to attend court proceedings. The Court held that either the inmate had totally escaped the control of the prison and was thus acting on his own so the prison was not responsible for him or "he was still under the control of the prison authorities . . . in which latter instance the prison (was) immune from suit under the statute.[14]

The Court may feel more comfortable in looking to a duty of care standard rather than engaging in the difficult governmental function analysis. In fact, the Court emphasized in *Ferree v. State*[15] that this order of analysis "will avoid in some instances having to make more difficult decisions with respect to the difficult discretionary exception doctrine in sovereign immunity cases."

From the above language and the holding in *Ferree*, a practitioner might be persuaded that a governmental immunity argument is subordinate in the order of analysis to a duty of due care argument where applicable. That presumption is worthy of further inquiry.

In *Gillman v. Department of Financial Institutions*[16] both duty of care and governmental immunity issues were well-briefed and argued. The Court announced a decision based solely upon governmental immunity considerations. *Gillman* does not seem to entirely square with the *Ferre* analysis.

Even more recently, the Utah Court of Appeals, in *Duncan v. Union Pacific R. Co.*[17] acknowledged the *Ferree* and *Kirk* analysis. *Duncan* was a wrongful death action arising out of a train-automobile collision where plaintiff claimed that the safety improvements at the railroad crossing were inadequate. The court, consistent with *Ferree*, ruled that it would not "reach the affirmative defense of governmental immunity without first determining or presuming that a plaintiff has established a prima facie case."[18] The court affirmed summary judgment solely upon governmental immunity grounds presuming, but not holding, that the plaintiff had stated a prima facie case of negligence against the defendant. For reasons set forth in *First Nat'l Bank v. National Am. Title Ins. Co.*,[19] the Court was reluctant to delve into the "prima facie claim issue" where the trial court had not expressly ruled.

What can be concluded from these cases respecting order of analysis? While Utah's courts are not prone to reach the affirmative defense of governmental immunity without first determining or presuming a prima facie case in tort, there exists no definitive analytical priority. In the absence of more illuminating guidelines respecting order of analysis, counsel are urged to argue and brief all applicable theories at every stage of the case.[20]

B. *FLOOD WATER MANAGEMENT ISSUES*

The Utah Supreme Court has decided a significant number of flooding cases in the last year, resulting from the unprecedented flooding along the Wasatch Front during the spring of 1983. There are six concepts to be observed:

1. Flood cases are fact-specific, and the decisions depend upon the nature of the activity. It is important to note that all recent flood cases have been remanded to the trial court, many to resolve genuine issues of material fact. In light of the number of reversals and remands, counsel must seriously consider under what circumstances a summary judgment mo-

tion is appropriate in a complex flood case and, where appropriate, counsel must establish a sufficient record.

2. At issue in several recent cases is whether the grant of immunity for flood control activities mentioned in the second paragraph is subject to the exceptions mentioned in the first paragraph of §63-30-3.

Section 63-30-3 provides:

> Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.
>
> The management of flood waters and other natural disasters and the construction, repair, and operation of flood and storm systems by governmental entities are considered to be governmental functions and their officers and employees are immune from suit for any injury or damage resulting from those activities.

The Utah Supreme Court has recently held in *Hansen v. Salt Lake City*,[21] *Hamblin v. City of Clearfield*,[22] and *Provo City v. State of Utah*,[23] that the second paragraph of §63-30-3 does not grant absolute immunity The Court has concluded that §63-30-3 is only a clarification of previously existing law that flood control activities are governmental functions. Therefore, the various exceptions to immunity that are invoked by the first paragraph of §63-30-3 are equally available for claims arising out of flood control activities.[24]

Government attorneys may not be pleased with the Court's decisions. Nevertheless, it is clear that the Court reached these conclusions only after a detailed historical analysis of the Act, a thorough examination of the legislative history of the amendment, a consideration of various interpretations and their concomitant constitutional ramifications, and after applying sound and well-recognized statutory construction principles.

3. The Court announced that it would not reconsider the retroactivity of §63-30-3. The Court stated in *Irvine v. Salt Lake County*,[25] that "it is well established that a statute or an amendment to a statute will not be applied retroactively to deprive a party of substantive rights or to impose on a party a greater liability." The Court restated that position in *Rocky Mt. Thrift Stores v. Salt Lake County*,[26] citing §68-3-3 which provides: "[n]o part of these revised statutes is retroactive, unless expressly so declared." That general principle is sound, but except for flooding cases still pending before the court arising from pre-1984 flood activity, the specific announcement has no current application.

4. "Discretionary" activity, as it relates to flooding and flood control management must be top level planning, design and management, not "operation" level activity.[27]

5. The term "government function," for the purpose of §63-30-3 includes actions undertaken by governmental entities that have the responsibility to protect the general public through the "management of flood waters" and the "construction, repair, and operation of flood and storm systems" when those actions are undertaken in furtherance of the discharge of those responsibilities.[28] Section 63-30-3 was passed to immunize police power measures taken to protect both public and private property from natural disasters.[29]

Both *Branam v. Provo School District*[30] and *Williams v. Carbon County Board of Education*[31] stand for the proposition that not all activities engaged in by a governmental entity are contemplated in the statute providing immunity to governmental entities for "management of flood waters." The government's reliance on the second paragraph of §63-30-3 has often been misplaced even prior to the Court's determination that it confers only qualified immunity.

6. "Governmental immunity cannot apply to prohibit suit or recovery under an inverse condemnation theory."[32] Plaintiffs can now assert a claim for a taking or damaging of property under Article I, §22 of the Utah Constitution.[33] This important decision is treated in greater detail in the "state constitution" subsection.

C. *GOVERNMENTAL FUNCTION*

In 1980 the Utah Supreme Court jettisoned the inadequate governmental/proprietary function test as being completely unworkable, in favor of a new test announced in *Standiford v. Salt Lake County*.[34] The Court held that the test for determining a governmental function for governmental immunity purposes is "whether the activity under consideration is of such a unique nature that it can only be performed by a governmental agency or that it is essential to the core of governmental activity."[35]

A year later the Court refined that test in the case of *Johnson v. Salt Lake City Corporation*,[36] stating that the *Standiford* test "does not refer to what government *may* do, but what government *must* do" and includes "activities not unique to themselves . . . but essential to the performance of those activities that are uniquely governmental."[37] In 1987 the Legislature enacted §63-30-2(4)(a) broadening the scope of "governmental function." That definition has not yet been the direct subject of judicial challenge.[38] The *Standiford-Johnson* test has been relied upon in several recent cases and remains intact and undisturbed.[39]

D. *INCREASED RELIANCE ON STATE CONSTITUTION*

1. Article I, §22 of the Utah Constitution provides: "Private property shall not be taken or damaged for public use without just compensation." The Utah Supreme Court requested supplemental briefing in *Branam v. Provo School District*,[40] *Williams v. Carbon County Board of Education*,[41] and *Irvine v. Salt Lake County*,[42] to explore the applicability of Article I, §22 of the Utah Constitution where property damage results from negligence of governmental entities. Akin to that issue was whether certain provisions of the Utah Governmental Immunity Act violated Article I, §22 and whether Article I, §22 is self-executing.[43] The frequency of the court's request for briefing and inquiry into this area should have been sufficient to alert all practitioners as to the Court's interest.

That interest culminated in the decision of *Colman v. Utah State Land Board*[44] where the Utah Supreme Court held that Article I, §22 is self-executing; the provision requires no ancillary legislative enactment to be enforced in the courts. That decision overruled *Fairclough v. Salt Lake City*[45] and other long-standing precedent. Sovereign immunity no longer protects governmental entities in the state of Utah from suits brought for the purpose of obtaining compensation for the taking or damaging of private property for public use.

Relying upon *Colman*,[46] the Court in another governmental flood activity case, *Hansen v. Salt Lake County*,[47] held that "governmental immunity cannot apply to prohibit suit or recovery under an inverse condemnation theory." The court reached the same result in the most recent flooding case. *Hamblin v. City of Clearfield*.[48]

2. In *Condemarin v. University Hospital*,[49] the Court addressed the constitutionality of recovery limits as applied to the hospital. The case reached the Utah Supreme Court on an interlocutory appeal from the denial of plaintiff's motion for summary judgment striking certain recovery limits and other provisions of the Utah Governmental Immunity Act as unconstitutional.

The plurality, made up of Justice Durham in her main opinion, and Justice Zimmerman and Justice Stewart in separate concurring (in part) opinions, held that those

statutes which limited the amount of recovery from a government entity were unconstitutional as applied to the hospital. In that inquiry the plurality relied upon various provisions of the Utah Constitution: Article I, §7; Article I, §11; as well as Article I, §24. It is most critical that the practitioner recognize the diverse standards of judicial review adopted by individual members of the Court in considering the constitutionality of the subject statutes.[50]

E. *EXPANDED GOVERNMENTAL ACCOUNTABILITY*

Relying not upon empirical data evidencing increased reversals and remands against government, but upon a decade of reading governmental immunity cases, this author is persuaded that there is a general trend to exact increased governmental accountability. Maybe some conscientious scholar will take up the charge, hit the "stacks," and prove or disprove this observation.

The Utah Supreme Court, in narrowing the scope of "government function" in *Standiford*,[51] expressly recognized that it was expanding the scope of government liability under the Act. Two recent cases may also significantly increase governmental liability. Both *Colman* and *Condemarin* emphasize a state constitutional analysis and how that development runs its course is most critical. Liability would increase should the Court, in reading the "or damaged" language in Article I, §22, expand what it views as protected property interests beyond the protections afforded by the federal constitution equivalent. As pointed out by Justice Zimmerman in his concurring opinion in *Colman*, the "precise limits of a taking or damaging have yet to be carefully or consistently spelled out by (the Utah Supreme) court."[52] Similarly, liability may be expanded if a majority of the Court eventually adopts a heightened standard of judicial review in a "*Condemarin*-type-case" context.

F. *FIELD OF SPECIALIZATION*

The field of governmental immunity is fast becoming an area of increased specialization requiring exceptional briefing and argument, both from a plaintiff and defendant perspective. It is no longer an area of practice for the casual, cavalier or tenderfoot practitioner. The decisions are complex. *Condemarin*, for example, reads like a lengthy legal treatise or hypertechnical law review article, with significant attention being given to semantical and theoretical differences in the state and federal analysis of judicial review. But that is also why it is such a challenging field. As one seasoned practitioner recently observed, "it is a continuing adventure."

Practitioners, particularly government lawyers, must become knowledgeable with broader tort law theories.[53] The municipal or county attorney can no longer hide behind the shield of governmental immunity because that shield keeps getting smaller and smaller. Practitioners must also reacquaint themselves with the Utah Constitution as well as with the proceedings of the Utah Constitutional Convention.[54] While there is no independent body of state constitutional law in this field, the door is open.

A paper of this length cannot possibly treat each recent case other than in a cursory fashion. Those who practice in this complex field ought to read every governmental immunity case very closely and they should follow each case upon remand and/or where writs of certiorari are filed. They must also read every opinion issued by Utah's Appellate Courts because of the possibility of cross-over issues. A "title glance" at *Forsman v. Forsman*, or *Duncan v. Pacific R. Co.*, for example, would not alert the reader that important sovereign immunity issues are discussed.

III.
CONCLUSIONS AND A CALL FOR REFORM

The Utah Governmental Immunity Act first grants immunity to governmental entities from suit (§63-30-3), then expressly waives immunity through extensive provisions (§63-30-5 through 63-30-10, plus 63-30-10.5), and then finally restores immunity by setting forth exceptions to the waiver of immunity (§63-30-10(1) through 63-30-10(11); 63-30-7, emergency vehicle exception; 63-30-9, immunity not waived for latent defective conditions). That statutory procedure is convoluted, at best. The Court in *Madsen v. Brothwick*[55] recognized that the Act would be interpreted by the courts and reshaped by the Legislature "as necessary from time to time." The interpreting and reshaping have been perpetual.

While the legislature is to be commended for its timely attention to governmental immunity issues and critical problems, a piecemeal statutory development will only add to the complexity of the Act. Its development has been largely reactionary, influenced by court decisions and factors as remote as the weather. For example the flood provision amendments to §63-30-3 were passed as a result of historical flooding problems in 1983;[56] the legislature added "government-owned health care facilities" to §63-30-3, as a consequence of the Utah Supreme Court decision in *Greenhalgh v. Payson City*[57]; the liability caps found in §63-30-29 and 34 at issue in *Condemarin* were responsive to a perceived insurance crises several years ago; and Utah's Legislature "attempted to reconcile the tension between the Governmental Immunity Act and Article I, §22 of the Utah Constitution by enacting §63-30-10.5 in 1987."[58] Section 63-30-10.5 may have also been enacted as a response to the *Fairclough v. Salt Lake County* decision which has now been overruled by the Court in *Colman*. Many of the most troubling provisions have been adopted ad hoc and after the fact on a yearly amendment basis. Experience demonstrates that amendments to the Act must be drafted with exactness in order to ensure internal consistency with the section, broader internal consistency with the Act, and compatibility with provisions of the Utah Constitution.

Without dedicated attention, the Act will continue to develop piece-meal. I suppose legislation is now pending which will address the *Condemarin* decision. If it is, it just proves the point of a piece-meal, reactionary evolution which has produced a nightmare maze of rules and exceptions and concomitantly, an almost unworkable and unpredictable body of law.

Perhaps now is the time to re-examine the Utah Governmental Immunity Act as a whole, with a very broad, long lasting comprehensive perspective.[59] The goal should be to retain the substantive law, but at the same time to provide simplicity and clarity.

[1] Section 63-30-3, as enacted in 1965, read: Section 3. General Immunity in Exercise of Governmental Functions. Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function. 1965 Utah Laws ch. 139, §, at 391.

[2] *Madsen v. Borthick*, 658 P.2d 627, 629-630 (Utah 1983); Utah Code Ann. 63-30-10 (1989).

[3] *Duncan v. Union Pacific R. Co.*, 790 P.2d 595, 600 (Utah App. 1990).

[4] Eight cases involved flooding issues: *Branam v. Provo School District*, 780 P.2d 810 (Utah 1989). *Williams v. Carbon County Board of Educ.*, 780 P.2d 816 (Utah 1989). *Irvine v. Salt Lake County*, 785 P.2d 411 (Utah 1989). *Rocky Mt. Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1989). *Colman v. Utah State Land Board*, 132 Utah Adv. Rep. 3. *Hansen v. Salt Lake County* 136 Utah Adv. Rep. 26. *Provo City Corporation v. State of Utah*, 137 Utah Adv. Rep. 8. *Hamblin v. City of Clearfield*, 139 Utah Adv. Rep. 3.

[5] Two cases involved torts committed by a prisoner or by a wrongfully released prisoner from a rehabilitation center: *Ferre v. State of Utah*, 784 P.2d 149 (Utah 1989). *Kirk v. State of Utah*, 784 P.2d 1255 (Utah App. 1989).

[6] One case addressed the applicability of estoppel arguments where the plaintiff failed to comply with notice requirements: *Forsman v. Forsman*, 779 P.2d 218 (Utah 1989).

One case concerned torts committed by an employee of a government-owned mental health clinic: *Birkner v. Salt Lake County*, 771 P.2d 1053 (Utah 1989).

[7] Two cases involved the government's duty to inspect or regulate financial institutions: *Gillman v. Dept. of Financial Instit.*, 782 P.2d 506 (Utah 1989). *Hilton v. Borthick*, 791 P.2d 504 (Utah 1989).

[8] *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989).

[9] One case concerned the adequacy of safety improvements at a railroad crossing: *Duncan v. Union Pacific R. Co.*, 790 P.2d 595 (Utah App. 1990).

[10] 784 P.2d 149, 153, (Utah 1989); See also *Kelson v. Salt Lake County*, 784 P.2d 1152, for an example of a wrongful death action where governmental immunity issues were never reached. Practitioners will also want to carefully read *Doe v. Arguelles*, 716 P.2d 279 (Utah 1985) and attempt to harmonize *Arguelles* with *Ferree*.

[11] *Id.* at 152.

[12] *Id.*

[13] 784 P.2d 1255 (Utah App. 1989).

[14] *Id.* at 1257 relying upon *Epting v. State*, 546 P.2d 242 (Utah 1976).

[15] *Id.* at 153.

[16] 782 P.2d 506 (Utah 1989).

[17] 790 P.2d 595 (Utah App. 1990). A petition for Writ of Certiorari has been filed in *Duncan v. Union Pacific R. Co.* on May 14, 1990, 134 Ut. Adv. Rep. 37.

[18] *Id.* at 600 Note, #14.

[19] 749 P.2d 651, 654 (Utah 1988); *Duncan* at 600.

[20] It can be effectively argued, but not concluded, that Utah Appellate Courts may presume a prima facie case under the reasoning of *Duncan*. Similarly, where both duty of care and governmental immunity defenses are articulated and applicable, as in the cases of *Ferre*, *Kirk* and *Gillman*, Utah Appellate Courts may simply fit the facts to a theory and follow the clearest analysis.

[21] *Hansen v. Salt Lake County*, 136 Utah Adv. Rep. at 27.

[22] *Hamblin v. City of Clearfield*, 139 Utah Adv. Rep. 3.

[23] *Provo City Corporation v. State of Utah*, 137 Utah Adv. Rep. 8.

[24] *Id.* Defining the management of flood waters as a "governmental function" brings into play the full operation of §63-30-5 through §63-30-10.5. Utah Code Ann. Section 63-30-3 (first paragraph); *Frank v. State*, 613 P.2d 517, 519 (Utah 1980) (immunity subject to operation of other sections of the act).

[25] *Irvine v. Salt Lake County*, 785 P.2d 411, 412 (Utah 1989).

[26] 784 P.2d 459 (Utah 1989).

[27] *Branam v. Provo School District*, 780 P.2d 810, 812-813 (Utah 1989); *Williams v. Carbon County Board of Education*, 780 P.2d 816, 818 (Utah 1989); *Irvine v. Salt Lake County*, 785 P.2d 411 (Utah 1989); *Rocky Mountain Thrift Stores v. Salt Lake City Corp.*, at 463.

[28] *Branam* at 812-813.

[29] *Id.* at 812.

[30] *Id.*

[31] *Williams* at 819.

[32] *Hansen v. Salt Lake County* at 31.

[33] *Id.*

[34] 605 P.2d 1230 (Utah 1980).

[35] *Id.* at 1236-1237.

[36] 629 P.2d 432, 434 (Utah 1981).

[37] *Id.* (emphasis in original)

[38] This definition has not been relied upon by the courts and it remains untested. Some question its constitutionality. See also *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989).

[39] *Rocky Mountain Thrift Stores* at 19; *Condemarin* at 349-50.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] The Court's reliance upon Article I, §22 was central to the defeat of the plaintiff's claim of "taking" in *Rocky Mountain Thrift Stores v. Salt Lake City Corporation. Id.*

[44] 132 Utah Adv. Rep. 3.

[45] 354 P.2d 105 (1960). The Court in *Fairclough* held that "Art. I, §22 of

(Utah's) Constitution is not self-executing, nor does it give consent to be sued, implied or otherwise and to secure such consent is a legislative matter..."

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 775 P.2d 348 (Utah 1989)

[50] Justice Durham advances a heightened standard of judicial review in her due process approach and she is joined in that analysis by Justice Zimmerman. Justice Stewart relies on a state equal protection analysis based upon article I, §24 of the Utah Constitution, Utah's equal protection provision. Only Justices Hall and Howe, in their separate dissenting opinions, apply a traditional rational basis, equal protection approach in considering the constitutionality of the subject statutes.

[51] *Id.*; *Hansen v. Salt Lake County*, at 29.

[52] *Colman* at 11-12.

[53] If the trend toward "alternative order of analysis" holds true and/or the state constitution emphasis develops further, government counsel will need to refamiliarize themselves with non-governmental immunity tort law principles. Justice Durham, for example in *Condemarin*, relies heavily upon principles announced in *Frank v. State*, 613 P.2d 517 (Utah 1980); *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984); *Mountain Fuel Supply Co. v. Salt Lake City Corp.*, 752 P.2d 884 (Utah 1908); and especially *Berry ex rel. Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 675 (Utah 1985).

In addition, practitioners will want to follow very closely those cases reported herein which have been remanded to the trial court, most significantly *Condemarin v. University Hospital*, 75 P.2d 348 and *Rocky Mountain Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459. Rep. 17. In light of the *Colman* decision and its progeny government practitioners may wish to carefully re-read *Three D Corp. v. Salt Lake City*, 752 P.2d 1321 (Utah App. 1988), and *Carpet Barn v. State of Utah*, 127 Utah Adv. Rep. 15 (Utah App. 1990).

[54] Practitioners may consider the Proceedings and Debates of the Constitution Convention in determining the proper construction of a constitutional provision and the meaning of terms used. *Cooper v. Utah Light and Ry. Co.*, 35 Utah 570, 102 P.202, 208 (1909). Further, the court noted in *State ex rel. Salt Lake City v. Eldredge*, 27 Utah 477,76 P.337, 339 (1904), that "(t)he intention of the framers of the Constitution, whatever language may have been employed to express it, must prevail."

[55] *Id.*

[56] Utah Code Ann. §63-30-3; 1984 Utah Laws Ch. 33, §1, at 148; The Court noted in *Provo City v. State of Utah*, at 11, that "because of *Standiford* and the lack of precedent on this specific issue, the legislature in 1984 could not be certain whether the management of flood waters would be considered a 'government function' by the courts."

[57] 530 P.2d 799, 801 (Utah 1975).

[58] *Provo City Corporation v. State of Utah* at 12. Has §63-30-10.5 been rendered moot by the *Colman* decision?

[59] Some have proposed a Utah version of a Federal Tort Claims Act approach as a reasonable alternative.

Abstract of Sovereign Immunity Cases

Decided January 1, 1989 to July 31, 1990

These abstracts do not always address every issue treated by the court. The reader is respectfully referred to the full text where interest dictates.

Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989); *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989); *Forsman v. Forsman*, 779 P.2d 218 (Utah 1989); *Branam v. Provo School District*, 780 P.2d 810 (Utah 1989); *Williams v. Carbon County Board of Education*, 780 P.2d 816 (Utah 1989); *Gillman v. Department of Financial Institutions of the State of Utah*, 782 P.2d 506 (Utah 1989); *Hilton v. Borthick*, 791 P.2d 504 (Utah 1989); *Ferree v. State of Utah*, 784 P.2d 149 (Utah 1989); *Irvine v. Salt Lake County*, 785 P.2d 411 (Utah 1989); *Rocky Mountain Thrift Stores v. Salt Lake Corporation*, 784 P.2d 459 (Utah 1989); *Kirk v. State of Utah*, 784 P.2d 1255 (Utah App. 1989); *Duncan v. Union Pacific R. Co.*, 790 P.2d 595 (Utah App. 1990); *Colman v. Utah State Land Board*, 132 Utah Adv. Rep. 3; *Hansen v. Salt Lake County*, 136 Utah Adv. Rep. 26; *Provo City Corporation v. State of Utah*, 137 Utah Adv. Rep. 8; *Hamblin v. City of Clearfield*, 139 Utah Adv. Rep. 3.

Birkner v. Salt Lake County, 104 Utah Adv. Rep. 18, 771 P.2d 1053 (Utah 1989). Decided 3/22/1989.

Facts: Birkner sought help from Salt Lake County's Intensive Treatment Unit, a county mental health facility. Defendant, a licensed social worker, engaged in inappropriate sexual behavior with plaintiff during therapy sessions. Defendant admitted that his conduct fell below the standard of care exercised by social workers in the community. The jury found the County, social worker and Birkner negligent and awarded Birkner $13,999.83 less 10 percent for her negligence.

The Trial Court denied the County's motion for a directed verdict under a theory of respondeat superior. Trial Court granted employee's summary judgment claim for indemnification and denied county's judgment notwithstanding the verdict.

Issues and Holding: 1) The Court held that the sexual misconduct of the county employee involving an individual seeking counseling was not attributable to the County because the sexual contacts were not within the scope of employment.

2) The Court found sufficient evidence to assess liability for the County's negligent supervision of employee.

3) The Court reversed the trial court, holding that since employee did not act within the scope of employment, he was not entitled to indemnification. Indemnification was barred.

Discussion: The Court focused on three criteria for determining when the conduct of an employee falls within the scope of employment: (1) an employee's conduct must be of the general kind the employee is employed to perform; (2) the employee's conduct must occur within the hours of the employee's work and the ordinary spatial boundaries of employment; (3) the employee's conduct must be motivated, at least in part, by the purpose of serving the employer's interest. (Citation omitted.)

Condemarin v. University Hospital, 107 Utah Adv. Rep. 5, 775 P.2d 348 (Utah 1989). Decided May 1, 1989.

Facts: Plaintiff, Leonel Condemarin, was born at the University Hospital with severe neurological damage including impairments of hearing, sight, and ability to be fed, as well as a seizure disorder and spasticity. Attending physicians concluded that his condition resulted from fetal distress of severe asphyxiation at birth.

The case reached the Utah Supreme Court on an *interlocutory appeal* from the denial of plaintiff's motion for summary judgment striking certain provisions of the Utah Governmental Immunity Act as unconstitutional (63-30-3 and 4; 63-30-29 and 34, recovery limits statutes).

Holding: Statutes which limited the amount of recovery from a governmental entity were held unconstitutional as applied to a state owned hospital.

Discussion: The holding in this case is very narrow. Nevertheless it is the most significant governmental immunity case to be decided since *Standiford v. Salt Lake City Corp.*, 605 P.2d 1230 (Utah 1980), where the Court jettisoned the inadequate governmental/proprietary function test. Practitioners must read this opinion very carefully. Most critical is the standard of review the Court applies.

The plurality, made up of Justice Durham in her main opinion, and Justice Zimmerman and Justice Stewart in separate concurring (in part) opinions, concluded that the limitation on recovery statutes are unconstitutional. Justice Hall, joined by Justice Howe applied a traditional rational basis test standard of review and concludes that the statutes are constitutional.

Justice Durham rejects a traditional rational basis, equal protection approach in considering the constitutionality of the subject statutes and advances a due process approach. In assessing the reasonableness of a legislative expansion of governmental immunity against the degree of intrusion on rights protected by the Utah Constitution (Utah Const. Art I, §7 and §11) she has advanced a heightened standard of judicial review. Justice Durham advances a new analytical framework to more fully balance the weight of the governmental interest at stake against the countervailing importance of the individual rights being compromised.

Justice Zimmerman joins in adopting the

due process balancing approach when considering Article I, §11 questions. "Because the interests at stake are specifically protected by the constitution, the presumption of validity that normally attaches to legislative action must be reversed once it is shown that the enactment under scrutiny does, in fact, infringe upon the interests enumerated in Article I, §11." If it appears that legislation infringes or abridges interests protected by Article I, §11, then the burden of demonstrating the constitutionality of the statute shifts to the government.

Justice Stewart identifies the issues before the court as follows:

1. Does the Legislature's abrogation of the common law right of action for negligence against employees of a governmentally owned health care facility violate constitutional provisions guaranteeing *equal protection* under the law?

2. Does the damage limitation provision of the Utah Governmental Immunity Act, when applied to a governmentally owned health care facility, violate the equal protection provisions of the Utah or United States Constitution?

Both issues arise under the equal protection provisions of the United States and Utah constitutions. Justice Stewart agrees that the damages limitation is unconstitutional, *but only as applied to the University Hospital.* (emphasis added). Justice Stewart relies upon Utah's equal protection provision, Article I, §24 of the Utah Constitution and rejects the Article I, §11 due process analysis relied upon by Justice Durham. He also points out that a due process analysis has never been raised by the litigants. Justice Stewart concludes that "the damage limitation, which operates only on those most seriously and severally injured, is an intrusion on a constitutional right that is not justifiable whatever marginal enhancement of the legislative purpose flows from the statute." Section 63-30-34 is violative of Article I, §24 of the Utah Constitution when applied to the University Hospital. Whether that section may be constitutional as applied to municipal hospitals and other health care facilities is a question left for another day. Section 63-30-4, in his view, is not unconstitutional.

Hall, Chief Justice (dissenting). Justice Hall identifies the issues akin to those identified by Justice Stewart and applies the traditional rational basis standard of review in assessing the constitutionality of the Utah Governmental Immunity Act. He stresses the legal principle that legislative acts are presumed constitutional, that a heavy burden rests on those challenging the legislative action on constitutional grounds, and that if any doubt exists, it must be resolved in favor of the constitutionality of the statute(s). He applies the principle of prudent judicial restraint.

Justice Hall concludes "that the challenged provisions of the Utah Governmental Immunity Act clearly relate to a permissible legislative objective and are neither discriminatory, arbitrary, nor oppressive in their application. The Act does not violate plaintiff's equal protection rights or their access to the courts. It provides a fair means of recovery against governmental entities for the negligent acts of their employees and officials."

Forsman v. Forsman, 111 Utah Adv. Rep. 6, 779 P.2d, 218, (Utah 1989). Decided 6/20/89.

Facts: Plantiff and defendant, husband and wife, were involved in an accident with a Utah State employee driving a state-owned vehicle. Plaintiff failed to file a claim against the government within one year pursuant to Utah Code Ann. Section 63-30-12 (1986, Supp. 1988). The governmental immunity issue is only collateral to the major issue in the case; whether the law of the domicile or law of situs of the tort governs the applicability of the doctrine of interspousal immunity.

Issues and Holding: (as to governmental immunity issue) The case was remanded because a genuine issue of material fact remained to be resolved, namely, whether the state is estopped from asserting lack of time by notice of claim. Plaintiff is allowed to present evidence of her claim of estoppel.*

* For another non-governmental immunity case involving the doctrines of estoppel where a city is a party, see *Terry v. Price Municipal Corporation*, 122 Utah Adv. Rep. 24.

Branam v. Provo School District, 117 Utah Adv. Rep. 3, 780 P.2d 810, (Utah 1989). Decided 9/14/89.

Facts: Plaintiff appealed from a summary judgment dismissing her negligence action which claimed that the school removed percolating ground water from its basement in such a way as to cause flooding of her home. The trial court held that the suit was barred by governmental immunity, Utah Code Ann. §63-30-3 (1986).

Issues and Holding: The District enjoys no immunity from suit under §63-30-3 of the Code. The removal of water from the school's basement does not constitute the "management of flood waters" by a government entity so as to confer immunity upon it. The activity of the District does not fall within the intentment of the statute; it was not charged with the responsibility to deal with flood waters or to construct flood or storm systems, and the school did not act to protect the public at large from flood waters.

Discussion: The Court did not reach the retroactivity issue nor did it address the constitutionality of 63-30-3 as being violative of Article I, §22 of the Utah Constitution which provides that "(p)rivate property shall not be taken or damaged for public use without just compensation."

I believe it important to note that the court requested supplemental briefing on the issue of whether the second paragraph of §63-30-3 of the Utah Governmental Immunity Act violates Article I, §22 of the Utah Constituion.

Williams v. Carbon County Board of Education, 118 Utah Adv. Rep. 3, 780 P.2d 816 (Utah 1989). Decided 9/22/89.

Facts: Landowner brought this action against the County Board of Education, seeking damages to property allegedly caused by school's negligent construction and resurfacing of a parking lot, which allegedly resulted in the flooding of the landowner's property.

Issues and Holding: The Trial Court erred in granting summary judgment in favor of defendant based on the governmental immunity provisions of §63-30-3. The Court held that:

1. Defendant's activities did not come within contemplation of statute providing immunity to governmental entities for "management of flood waters," and

2. Any immunity conferred under the general governmental immunity provision (U.C.A. 1953, 63-30-3) was waived under statute waiving immunity for injury caused by a "public improvement" (U.C.A. 1953, 63-30-9).

Gillman v. Department of Financial Institutions of the State of Utah, 120 Utah Adv. Rep. 3, 782 P.2d 506 (Utah 1989). Decided 10/25/89.

Facts: Plaintiff is the trustee of the bankruptcy estates of West America Credit Corporation and West America Thrift and Loan. He brought this negligence action against the State of Utah, claiming that the Department of Financial Institutions failed to properly regulate the lender and thrift, resulting in the investors losing their investments. At the trial level the Department's motion for summary judgment was granted.

Issues and Holding: The court held that all claims asserted by the trustee were based

in the Department's alleged negligence in failing to suspend or revoke the institutions' licenses, and thus were subject to governmental immunity (U.C.A. 1953, 63-30-10(3)(1982)).

Plaintiff apparently framed his negligence action in an attempt to take advantage of the waiver of immunity for certain injuries "proximately caused by a negligent act or omission of an employee committed with the scope of employment..." Utah Code Ann. §63-30-10 (1978) (amended 1982 and 1985). The legislature restored immunity in §63-30-10(1) through 63-30-10(11) (1978). The court found that the injury necessarily arose out of the licensing decision and §63-30-10(3) barred all negligence actions arising out of any licensing decision.

Hilton v. Borthick, 121 Utah Adv. Rep. 11. 791 P.2d 504 (Utah 1989). Decided 11/16/1989.

Facts: This case is a consolidation of three separate actions filed by investors in an insolvent finance company taken over in 1980 by the Utah State Department of Financial Institutions. Plaintiff appeals from a summary judgment granted on the ground of governmental immunity in favor of defendants.

It was the position of plaintiffs that the Department had the statutory duty to examine the finance company periodically to determine its solvency and that Department failed to do so.

Issues and Holding: The Court determined, relying upon *Gillman v. Department of Financial Institutions,* 120 Utah Adv. Rep. 3 (October 25, 1989), that the Department of Financial Institutions was immune from suit for any failure to properly inspect or regulate pursuant to law. The Court stated "...the only sanction the Department can impose on a licensed financial institution for misconduct of any kind is to suspend or revoke the financial institution's operating license." The defendants are protected by subsection 63-30-10(3) of the Utah Governmental Immunity Act.

Ferree v. State of Utah, 123 Utah Adv. Rep. 3. 784 P.2d 149 (Utah 1989). Decided 12/4/1989.

The plaintiffs brought this wrongful death action. Ferree was brutally bludgeoned to death by Ferguson on a weekend release from a community corrections center. The plaintiffs allege that the State, through its corrections officers, was reckless, negligent or grossly negligent in the supervision and release of Ferguson. The Trial Court entered summary judgment against the plaintiffs on the grounds that the defendants owed no duty of care to the deceased and that the action was barred by sovereign immunity.

Issues and Holding: For a governmental agency and its agents to be liable for negligently caused injury suffered by a member of the public, the plaintiff must show a breach of duty owed to him as an individual, not merely the breach of an obligation owed to the general public at large by the government official. The officials herein had no duty of due care to the victim apart from their general duty to the public at large. Dismissal of the wrongful death action was affirmed.

Discussion: Because the Court found no *individualized duty*, it never reached the questions raised by the doctrine of sovereign immunity. The Court stated that "sovereign immunity...is an affirmative defense and conceptually arises subsequent to the question of whether there is tort liability in the first instance....Deciding an immunity question first may lead to unwarranted assumptions and confusion about undecided duty problems."

Irvine v. Salt Lake County, 123 Utah Adv. Rep. 11. 785 P.2d 411 (Utah 1989). Decided 12/11/1989.

Facts: An employee of defendant, while dredging a creek with a backhoe in Little Cottonwood Canyon, struck and damaged Irvine's water line under the creek bed. The employee was acting pursuant to a regular program of dredging stream channels in anticipation of the runoff in the Spring of 1983.

Issues and Holding: The 1984 flood control amendment to Utah Code Ann. §63-30-3 cannot be applied retroactively to bar a valid cause of action that had already arisen when the amendment went into effect. The Court then applied the law of governmental immunity as it existed in March of 1983.

The Court held that this action is not barred by the amendment of 63-30-3, and the discretionary function exception of 63-30-10(1)(a) does not apply. Case reversed and remanded.

Discussion: The ruling in this case respecting the issue of the "discretionary function" relies upon *Frank v. State*, 713 P.2d 517 (Utah 1980). In *Frank* the Court stated that the discretionary exception to immunity for negligent governmental acts was intended to provide immunity for policy-making decisions rather than for policy implementation or operation acts. The reader is referred to the text to review the four-element test adopted by the Court to determine "discretionary function."

Rocky Mountain Thrift Stores v. Salt Lake City Corporation, 123 Utah Adv. Rep. 17. 784 P.2d 459 (Utah 1989). Decided 12/14/89.

Facts: Plaintiffs are owners and proprietors of commercial properties on three city blocks abutting North Temple Street in Salt Lake City, Utah. They brought this action against defendant governmental entities for damages caused their businesses by defendants' alleged negligent mismanagement of flood waters during the 1983 spring runoff and for compensation for inverse condemnation of their property rights of ingress and egress. Plaintiff's properties were never damaged by flood waters.

Issues and Holding I: The 1984 flood control amendment, the second paragraph of §63-30-3, became effective March 29, 1984. The Court refused to apply that provision retroactively to bar an action which arose in 1983.

The Court limited its initial governmental immunity analysis to paragraph one of §63-30-3. The Court held that the construction, operation, and maintenance of the drainage system was and is a governmental function under the tests of *Standiford* and *Johnson* and that all defendants' flood control activities in the instant case are covered by the Governmental Immunity Act.

Next the Court considered whether immunity had been expressly waived for defendants' alleged negligence and mismanagement of the City Creek drainage system. They analyzed Utah Code Ann. 63-30-10(1)(a) and (d) (Supp. 1983, amended 1989) to determine whether the "discretionary function" exception applied. The Court applied its four-part test announced in *Little v. Utah State Division of Family Services*, 667 P.2d 49, 51 (Utah 1983). The Court concluded that the design, capacity, and construction of the drainage system were discretionary functions, and immunity has not been waived for defendants' alleged negligence in regard thereto.

Next, the Court analyzed the waiver of immunity provisions of 63-30-9, particularly as to "defective conditions" and "latent defects." "The Court remanded the case to the Trial Court to develop an adequate record to separate "policy" from "operational" decisions and to have each allegation examined in determining the applicability of 63-30-10(1)(d) and further to precisely determine latent defect issues.

Issues and Holding II: The Court further found plaintiff's right to compensation for alleged adverse taking to be without merit.

Discussion: This case is a position paper on governmental immunity, setting forth various theories and standards adopted by the Court, including but not limited to: a proper analytical framework, the *Standiford-Johnson* tests for determining governmental function, the four-tier test announced in *Little v. Utah State Department of Family Services,* 667 P.2d 49, 51 (Utah 1983) adopted to determine "discretionary function," retroactivity issues, and finally, Article I, §22 issues.

Kirk v. State of Utah, 124 Utah Adv. Rep. 66. 784 P.2d 1255 (Utah App. 1989). Decided 12/27/89.

Facts: Plaintiff's complaint stems from an injury he received while working as an unarmed bailiff. Plaintiff was shot and seriously wounded by an inmate in transport to attend court proceedings. Plaintiff appealed from the trial court's summary judgment in favor of the state. Plaintiff did not dispute the Court's finding that the transportation of inmates from prison to the courthouse is a function unique to government.

Issues and Holding: The judgment of the District Court was affirmed. Either the inmate had totally escaped the control of the prison and was thus acting on his own so the prison was not responsible for him "or he was still under the control of the prison authorities...in which latter instance the prison is immune from suit under the statute." The Court relied upon the case of *Epting v. State*, 546 P.2d 243 (Utah 1976) as controlling.

Discussion: The Court refused to adopt by judicial fiat the "modern trend" in holding governments accountable for the negligent handling of prisoners.

Duncan v. Union Pacific R. Co., 790 P.2d 595 (Utah App. 1990).

Plaintiffs appealed from a summary judgment dismissing their wrongful death action arising out of a train-automobile collision. The bulk of the case addresses the plaintiffs' claims against Union Pacific which involved no governmental immunity concerns. But the heirs also sued the state claiming that the safety improvements at the railroad crossing were inadequate.

Holding: The Court held the state immune and affirmed the summary judgment. The Court concluded that as long as warning or control signage of a clear hazard is in existence and maintained enough to give it minimal effectiveness, the government is not liable in tort for its failure to better maintain or to enhance the signage. The Court further concluded that if the signage has some cognizable effect in warning or controlling traffic at a clear hazard, its maintenance and improvement are governmental functions for which the government is immune from suite in Utah courts. The Court was sensitive to the fiscal effects of ruling otherwise. The concurring opinion of Judge Jackson is worthy of every reader's close attention.

Colman v. Utah State Land Board, 132 Utah Adv. Rep. 3.

This case arose out of the breach of the Great Salt Lake. The brine canal was used in Colman's business of extracting minerals. The trial court dismissed the complaint and Colman appealed.

The Court concluded that Colman had alleged a permanent or recurring interference with property rights; sufficient facts to constitute a "taking" or "damage" under Article I, §22. That conclusion required a reversal of the trial court's dismissal and a remand of the case to the taking of Colman's property, whether the rising water level constituted an "extraordinary flood," whether there were otherwise circumstances of overwhelming necessity giving rise to the emergency exception, whether Colman's canal would have been in danger without the breach, and to determine the applicability of the public trust doctrine in this case.

Most importantly, the Court addressed the issue of whether an inverse condemnation claim under Article I, §22 of the Utah Constitution is subject to the limitations found in the Governmental Immunity Act. The Court concluded that Article I, §22 is self-executing; the provision requires no legislative enactment to be enforced in the Courts. The Court held that the state was not immune. *Colman* effectively overruled *Fairclough v. Salt Lake County*, 354 P.2d 105 (1960).

Hansen v. Salt Lake County, 136 Utah Adv. Rep. 26.

Hansen filed suit alleging that the County damaged or destroyed his property near the Big Cottonwood streambed. The County admitted the damage but since it occurred during implementation of its flood control program, it claimed immunity under the Utah Governmental Immunity Act. The trial court granted defendant's motions to dismiss. Hansen appealed and the court reversed and remanded.

Issues and Discussion: The Court construed the second paragraph of §63-30-3, the 1984 amendment which arguably granted absolute immunity from flood control activities, as being subject to the waivers applicable to the remainder of the section. The Court thereby concluded that the section confers only qualified immunity. Having so found, the Court next addressed the applicability of the "discretionary function" exception. The Court could not determine as a matter of law whether all the acts were discretionary and properly remanded the case to the trial court to make that determination.

Lastly, the Court, consistent with its recent *Colman* decision, remanded the case for further proceedings on Hansen's claim for inverse condemnation based on Article I, §22 of the Utah Constitution. The Court held that governmental immunity cannot apply to prohibit suit or recovery under an inverse condemnation theory.

Provo City Corporation v. State of Utah, 137 Utah Adv. Rep. 8.

This case was decided as a companion case with *Hansen v. Salt Lake County*, 136 Utah Adv. Rep. 26 (1990). This is another in a series of flood control activity cases and the reader is referred to the text for the lengthy facts. The Court reversed the summary judgment.

Holding: As in *Hansen v. Salt Lake County*, the Court held that in amending §63-30-3 in 1984, the legislature only intended to clarify flood control activities as governmental functions, thus bringing those activities within the Governmental Immunity Act. The second paragraph of §63-30-3 is subject to the waiver provisions found in the Governmental Immunity Act.

Hamblin v. City of Clearfield, 139 Utah Adv. Rep. 3.

Plaintiffs initiated this suit to recover cleanup costs and compensation for flood damage to their home. The damages were allegedly caused by changes in surface water drainage that resulted from the construction of a nearby subdivision authorized by the City, as well as from inadequate measures undertaken by the City to handle the changes in drainage. The trial court granted the City summary judgment reasoning that the government immunity provisions of the Utah Code barred the action.

The trial court also concluded that the "taking" or "damaging" provision of the Utah Constitution, Article I, §22, did not provide an independent cause of action against the City. Plaintiff appealed and the Court reversed on several grounds and remanded for further proceedings.

Holding: The District Court erred in ruling that the plaintiffs' action concerned only damage acruing after October 1984. The Court further held that §63-30-3 grants only qualified immunity, not blanket immunity to governmental entities for certain activities related to flood control. This provided a serparate basis for reversing the District Court's ruling. The Court next addressed the retroactivity of the 63-30-3 issue which has now essentially been disposed of by *Hansen* and *Rocky Mountain Thrift Stores.* The Court also held that plaintiffs could assert a claim for a taking or a damaging under Article I, §22 of the Utah Constitution and the District Court erred in ruling otherwise.

Report of Independent Certified Public Accountants Grant Thornton

We have audited the accompanying balance sheets of the Utah Bar Foundation (the Foundation) as of December 31, 1989 and 1988, and the related statements of revenues and support, expenses, and changes in fund balance for the years then ended. These financial statements are the responsibility of the Foundation's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of the Utah Bar Foundation as of December 31, 1989 and 1988, and the results of its operations and changes in its fund balance for the years then ended, in conformity with generally accepted accounting principles.

Our audit for the year ended December 31, 1989, was made for the purpose of forming an opinion on the basic financial statements of the Foundation taken as a whole. The supplemental information presented on pages 11 and 12 is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the audit procedures applied in the audit of the basic financial statements and, in our opinion is fairly stated, in all material respects, in relation to the basic financial statements taken as a whole.

FINANCIAL STATEMENTS
Utah Bar Foundation
BALANCE SHEETS
December 31
ASSETS

	1989	1988
Cash and cash equivalents	$252,325	$102,655
Time certificates of deposit (Note B)	212,936	159,482
IOLTA receivable	11,018	4,935
Accrued interest receivable	5,842	1,593
Member contributions receivable	1,989	2,131
Furniture and equipment, net of accumulated depreciation of $2,355 in 1989 and $415 in 1988 (Note E)	8,341	7,885
Land held for resale	2,770	2,770
Marketable securities	3,031	3,031
	$498,252	$284,482
LIABILITIES AND FUND BALANCE		
Accounts payable	$ 1,081	$ -
Accrued liabilities	-	1,189
Commitments (Notes C and F)	-	-
Fund balance	497,171	283,293
	$498,252	$284,482

The accompanying notes are an integral part of these statements.

Utah Bar Foundation
NOTES TO FINANCIAL STATEMENTS
December 31, 1989 and 1988

NOTE A—SUMMARY OF ACCOUNTING POLICIES

A summary of the significant accounting policies consistently applied in the preparation of the accompanying financial statements follows.

1. *Activity*

The Utah Bar Foundation (Foundation) was organized in 1963 as a nonprofit corporation to advance the science of jurisprudence, to promote improvements in the administration of justice and uniformity of judicial proceeding and decisions, to provide training courses for lawyers, to elevate judicial standards, to advance professional ethics, to improve relations between members of the Utah State Bar Association (Bar), the judiciary and the public, and the preservation of the American constitutional form of government, exclusively through education, research, and publicity.

Under the interest on lawyers' trust accounts (IOLTA) program, implemented in 1984, the Foundation receives interest on member lawyers' trust accounts from the deposit of client funds that are nominal in amount or that are expected to be held for only a short period of time. The Foundation awards grants of these funds to promote legal education and increase knowledge and awareness of the law in the community, to assist in providing legal services to the disadvantaged, to improve the administration of justice, and to serve other worthwhile, law-related public purposes.

2. *Furniture and Equipment*

Certain items of furniture and equipment have been received by the Foundation as donations. Donated furniture and equipment have been recorded at their fair market value at the date of the gift. Depreciation is provided over the estimated useful lives of five years on a straight-line basis.

3. *Income Taxes*

The Foundation is a nonprofit organization and is exempt from income taxes under §501(c)(3) of the Internal Revenue Code.

4. *Fund Accounting*

The accounts of the Foundation are maintained in six self-balancing funds according to their nature and purpose as follows:

IOLTA Fund—The IOLTA Fund is used to account for interest received on member lawyers' trust accounts and the awarding of grants of these funds.

Judicial History Fund—The Judicial History Fund is used to account for donations and expenses relating to the judicial history of the State of Utah.

Office Furniture and Equipment Fund—The Office Furniture and Equipment Fund is used to account for fixed assets owned by the Foundation.

Administrative Fund—The Administrative Fund is used to receive 5 percent of the annual IOLTA funds, the interest on the IOLTA funds prior to allocation, and to pay the general and administrative expenditures.

Perpetual Endowment Fund—IOLTA—The Perpetual Endowment Fund is used to receive 10 percent of the annual IOLTA funds in order to accumulate a reserve to be held for future projects consistent with the purposes specified in the IOLTA program.

Perpetual Endowment Fund—Non IOLTA—This fund is used to receive all non IOLTA contributions and interest earned on those funds to be held for future projects consistent with the purposes specified in the Articles of Incorporation.

NOTE B
TIME CERTIFICATES OF DEPOSIT

At December 31, 1989, the Foundation holds eight time certificates of deposit as follows:

Amount	Interest Rate	Maturity Date
$ 21,772	9.25%	January 18, 1990
20,824	7.58	January 27, 1990
62,984	7.50	February 22, 1990
7,367	8.00	February 26, 1990
18,302	7.80	March 6, 1990
5,000	7.50	May 21, 1990
34,639	7.60	June 16, 1990
42.048	8.50	July 29, 1990
$212,936		

NOTE C
AWARD OF FUNDS

As of December 31, 1989, the Board of Trustees has approved awards for the following beneficiaries:

Utah Legal Services	$12,500
Legal Center for the Handicapped	5,000
U.S.B. Young Lawyer Section	1,000
	$18,500

Utah Bar Foundation
STATEMENTS OF REVENUES AND SUPPORT, EXPENSES, AND CHANGES IN FUND BALANCE
Year ended December 31

	1989	1988
Revenues and support		
Interest on lawyers' trust accounts	$224,053	$183,021
Interest and dividend income	22,426	11,617
Member contributions	2,036	3,331
Other contributions (Note E)	2,647	9,990
Proceeds from liquidation of Prepaid Legal Services Corporation (Note G)	115,993	-
	367,155	207,959
Expenses		
Awards of IOLTA funds (Note D)	126,164	142,972
Postage and printing	2,875	16,185
Wages	10,895	4,701
Travel	701	118
Office and administrative	3,646	3,510
Rent (Note F)	4,755	1,189
Membership dues	150	600
Depreciation expense	1,940	415
Public relations	2,151	-
	153,277	169,690
Excess of revenue and support over expenses	213,878	38,269
Fund balance at beginning of year	283,293	245,024
Fund balance at end of year	$497,171	$283,293

The accompanying notes are an integral part of these statements.

NOTE D
AWARDS OF IOLTA FUNDS

IOLTA funds were used for grants to:

	1989	1988
Legal Aid Society	$ 40,000	$25,000
Law-related Education	25,000	-
Utah Law and Justice Center (Alternative Dispute Resolution)	21,800	25,000
Utah Legal Services	12,500	29,000
Utah Law-Related and Citizenship Education Project	8,333	25,000
Legal Center for the Handicapped	5,000	10,000
Administrative Office of the Court	5,000	-
Young Lawyers Pamphlet	4,000	-
Utah Children	2,900	-
Snow College—Criminal Law Library	1,500	-
Brigham Young University Law School Award	131	132
KUED	-	7,500
Utah State University College of Family Life	-	7,500
University of Utah CLEO Program	-	5,500
Committee on Needs of Women and Minorities	-	3,000
Snow College—Prison Library Fund	-	2,500
Utah Forum	-	2,000
American Inn of Court No. 7	-	500
Federal Courts Prisoner's Rights Library	-	340
	$126,164	$142,972

NOTE E
OTHER CONTRIBUTIONS

During 1988, furniture and equipment that had been donated to the Foundation in the past was placed in service. The fair market value on the date the furniture was donated was $8,300.

The Foundation funded the publishing of the "Federal Judiciary in Utah." During 1989, the Foundation received $408 as contributions from the sale of this publication ($1,690 in 1988).

NOTE F
RENT

In October 1988, the Foundation began renting office space in the Law and Justice Center under an operating lease with monthly payments of $396. The lease will expire in September 1991 unless the Foundation exercises its option to renew the lease for another three-year term. The future minimum lease payments associated with this lease are as follows:

1990	$4,752
1991	3,564
	$8,316

NOTE G
PROCEEDS FROM LIQUIDATION OF PREPAID LEGAL SERVICES CORPORATION

During 1989, the Utah Bar Foundation received $115,993 from the liquidation of Prepaid Legal Services Corporation (a nonprofit corporation). All nonprofit corporations name a beneficiary in the event of liquidation. Prepaid Legal Services Corporation provided liability insurance to lawyers. Utah law was changed which disallowed this type of operation. The Foundation, being the named beneficiary, received the net assets in liquidation.

SUPPLEMENTAL INFORMATION

Utah Bar Foundation
SUPPLEMENTARY BALANCE SHEET BY FUND
December 31, 1989

ASSETS	IOLTA Fund	Judicial History Fund
Cash and cash equivalents	$ 67,317	$ 7,946
Time certificates of deposit	104,878	5,231
IOLTA receivable	11,018	-
Accrued interest receivable	2,938	-
Member contributions receivable	-	-
Furniture and equipment, net of accumulated depreciation of $2,355	-	-
Land held for resale	-	-
Marketable securities	-	3,031
	$186,151	$16,208
LIABILITIES AND FUND BALANCE		
Accounts payable	$ -	$ -
Fund balance	186,151	16,208
	$186,151	$16,208

Office Furniture and Equipment Fund	Administrative Fund	Perpetual ENndowment Fund—IOLTA	Perpetual Endowment Fund Non IOLTA	Total All Funds
$ -	$16,456	$ 21,890	$138,716	$252,325
-	-	81,286	21,541	212,936
-	-	-	-	11,018
-	-	2,904	-	5,842
-	-	-	1,989	1,989
8,341	-	-	-	8,341
-	-	-	2,770	2,770
-	-	-	-	3,031
$8,341	$16,456	$106,080	$165,016	$498,252
$ -	$ 1,081	$ -	$ -	$ 1,081
$8,341	15,375	106,080	165,016	497,171
$8,341	$16,456	$106,080	$165,406	$498,252

Office Furniture and Equipment Fund	Administrative Fund	Perpetual Endowment Fund—IOLTA	Perpetual Endowment Fund Non IOLTA	Total All Funds
$ -	$ -	$ -	$ -	$224,053
-	14,376	4,537	2,666	22,426
-	-	-	2,036	2,036
-	-	-	-	2,647
-	-	-	115,993	115,993
-	14,376	4,537	120,695	367,155
-	-	-	-	126,164
-	2,875	-	-	2,875
-	10,495	-	-	10,895
-	701	-	-	701
-	3,646	-	-	3,646
-	4,755	-	-	4,755
-	150	-	-	150
1,940	-	-	-	1,940
-	2,151	-	-	2,151
1,940	24,773	-	-	153,277
(1,940)	(10,397)	4,537	120,695	213,878
7,885	14,569	79,138	44,321	283,293
2,396	11,203	22,405	-	-
$ 8,341	$15,375	$106,080	$165,016	$497,171

Utah Bar Foundation
SUPPLEMENTARY STATEMENT OF REVENUES AND SUPPORT, EXPENSES, AND CHANGES IN FUND BALANCE BY FUND
Year Ended December 31, 1989

	IOLTA Fund	Judicial History Fund
Revenues and support		
Interest on lawyers' trust accounts	$224,053	$ -
Interest and dividend income	-	847
Member contributions	-	-
Other contributions	-	2,647
Proceeds from liquidation of Prepaid Legal Services Corporation	-	-
	224,053	3,494
Expenses		
Awards of IOLTA funds	126,164	-
Postage and printing	-	-
Wages	-	400
Travel	-	-
Office and administrative	-	-
Rent	-	-
Membership dues	-	-
Depreciation expense	-	-
Public relations	-	-
	126,164	400
Excess (deficit) of revenue and support over expenses	97,889	3,094
Fund balance at beginning of year	124,266	13,114
Add (deduct) transfers	(36,004)	-
Fund balance at end of year	$186,151	$16,208

CLE CALENDAR

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.

UTAH 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: $95
Time: 8:00 a.m. to 4:30 p.m.

Russel Vetter will speak on the topic, "Recent Developments in Real Property and Environmental Issues in Bankruptcy."

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: $125
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. 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. 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: $165 (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.

EFFECTIVE UTILIZATION OF LEGAL ASSISTANTS IN LITIGATION PRACTICE

This seminar will examine the effective use of legal assistants in both the pretrial and actual trial phases. Presentations will be made by attorney/legal assistant teams. Any litigating attorney or legal assistant would benefit greatly from this program.

CLE Credit: 5 hours
Date: November 9, 1990
Place: Utah Law and Justice Center
Fee: TBA
Time: 8:00 a.m. to 1:00 p.m.

NEGOTIATING MAJOR COMMERCIAL LEASES IN A DIFFICULT REAL ESTATE MARKET

A live via satellite program. This seminar is designed for the active real estate practitioner who engages in lease negotiations and is interested in seeing how a major transaction is negotiated by a panel of experts. Although the lease to be negotiated covers office space, the program will include many topics that are of concern on other types of leases as well, such as retail and commercial. Among the matters to be discussed in this program are: rents and escalations. Landlord's services. Options to renew and take additional space. Construction of tenant's space. Assignment and subletting. Subordination and non-disturbance. Particular concerns of a headquarters tenant. Lease takeovers. Dealing with highly leveraged tenants and hard-pressed landlords.

CLE Credit: 4 hours
Date: November 15, 1990
Place: Utah Law and Justice Center
Fee: $140 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

ENVIRONMENTAL IMPLICATIONS OF REAL ESTATE TRANSACTIONS

A live via satellite program. This seminar will teach you: The latest legislative and judicial developments. Sources of professional liability. How to favorably resolve the environmental issues unique to each party to the transaction. How to minimize your client's risk of liability through smart drafting. What to advise your client about environmental assessments and audits. How to enhance your practice through increased awareness of environmental issues. If you represent buyers or sellers of real estate, lenders or lessees, transporters, brokers or exchange accommodators, this seminar could be critical to your practice.

CLE Credit: 6.5 hours
Date: November 27, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

DEMONSTRATIVE EVIDENCE

A live via satellite program. Information on this program will be available at a later date.

CLE Credit: 6.5 hours
Date: December 4, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

DEPOSITION, PROCEDURE, TECHNIQUE AND STRATEGY

A live via satellite program. Information on this program will be available at a later date.

CLE Credit: 6.5 hours
Date: December 5, 1990
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

BANKRUPTCY SEMINAR

Judge Glen E. Clark of the U.S. Bankruptcy Court in Utah will be presenting on a selected topic.

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.

BASIC ESTATE AND GIFT TAXATION

This program is the annual presentation prepared by ALI-ABA. Park City was chosen as this year's site and the Utah State Bar will be co-sponsoring this seminar. Further details on this program will be published as they are available.

Date: February 13-15, 1990
Place: Park City, Olympia Hotel

CORPORATE MERGERS AND ACQUISITIONS

This is another ALI-ABA annual program. It was held in Park City last year and was such a success that it is being held here again in '91. Again, further details on this program will be published as they are available.

Date: March 14 and 15, 1990
Place: Park City, Olympia Hotel

SECTIONS CLE LUNCHEONS

Listed below are luncheons put on by Bar Sections which will qualify for CLE credit. Not all sections plan their meetings far enough in advance to make this calendar, so watch for section mailings on those and other programs. Typically these meetings qualify for ONE HOUR of CLE credit and attendance is for cost of lunch only (lunch need not be purchased). To register for these CLE luncheons, call the Utah State Bar Reservations desk at 531-9095 at least one week prior to the date of the program. Dates and topics listed are subject to change.

DATE	TITLE	CREDIT
	BANKING AND FINANCE SECTION	
Oct. 18	Rules of the Utah Dept. of Financial Institutions	2 hours
Nov. 15	1991 Utah Legislative Session-Preparation	1 hour
Jan. 17	FDIC, RTC and OTS after FIRREA	2 hours
Feb. 21	Sex, Fraud and Data Processing Tapes	1 hour
	EDUCATION LAW SECTION	
Dec. 7	Review of Pending Legislation Affecting Education	1 hour
Feb. 8	The Americans With Disabilities Act	1 hour
	FAMILY LAW SECTION	
	UPCOMING TOPICS:	1 hour
	O.R.S.-Rules and Procedures	
	Health Insurance—COBRA	1 hour
	Custody Valuations—Confidentiality and Privilege	1 hour
	Rule 4-501—"The Domestic Stepchild"	1 hour
	Ethical Considerations	1 hour
	INTERNATIONAL LAW SECTION	
Oct. 24	Current Legal Climate in China	1 hour
	PATENT, TRADEMARK AND COPYRIGHT SECTION	
Nov.	Ethical Issues in Patent, etc...Work	1 hour
	REAL PROPERTY SECTION	
Oct.	Role of Redevelopment Agencies in Econ. Development	1 hour
Nov.	Real Estate Closings	1 hour
Dec.	Personal Computer Applications in Real Estate Transactions	1 hour
	TAX SECTION	
Oct. 31	Tax Planning for Highly Paid Execs in Closely Helds	1 hour
Nov. 28	Business Valuation Techniques	1 hour
Jan. 30	Divorce Taxation	1 hour
Feb. 27	Creative Charitable Gifting Strategies	1 hour
Mar. 27	How to Succeed in Dealing With the IRS	1 hour
Apr. 24	Utah Legislative Update	1 hour
May 29	Utah State Tax Issues	1 hour

CLE REGISTRATION FORM

TITLE OF PROGRAM **FEE**

1. _____ _____

2. _____ _____

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

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Name Phone

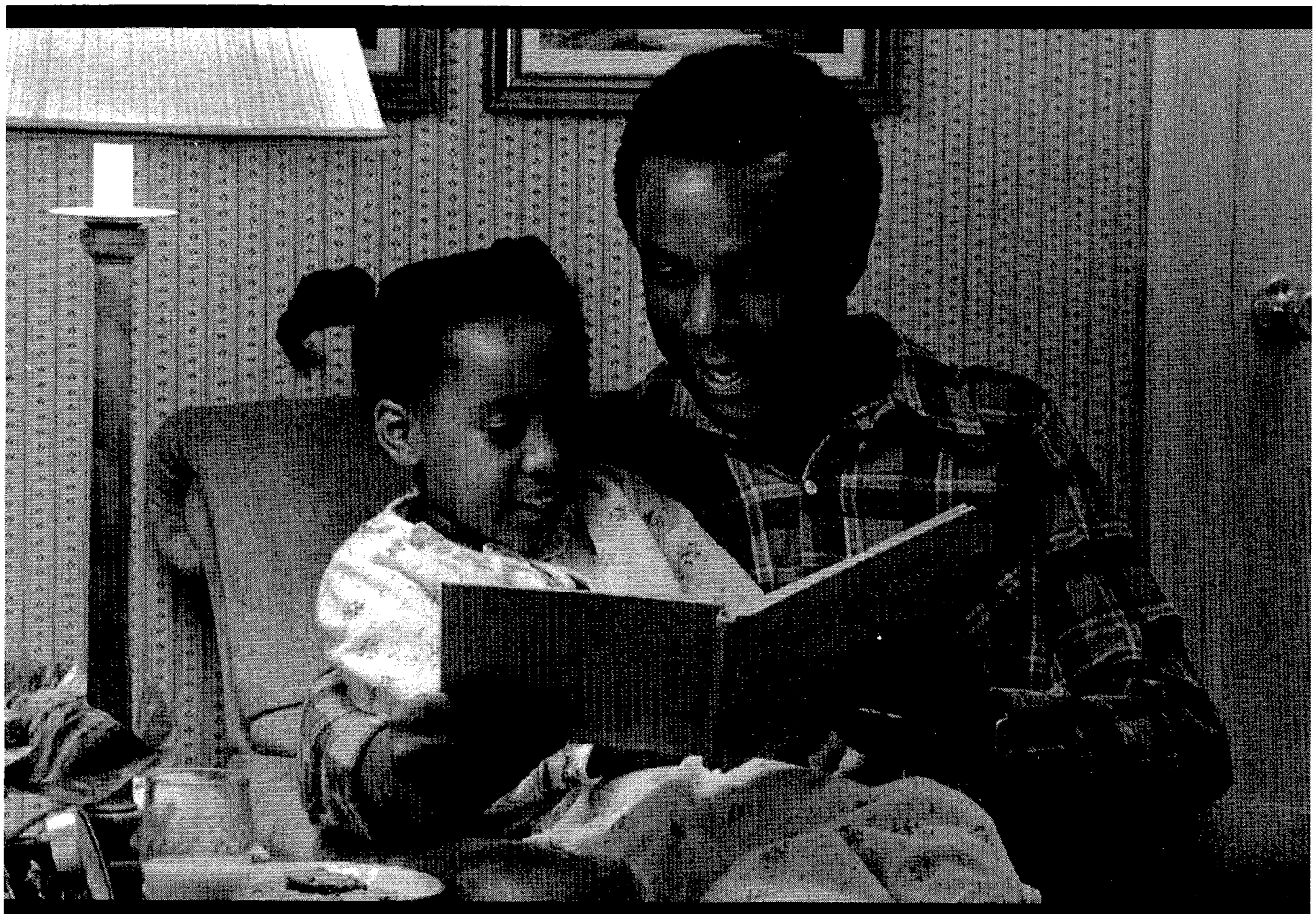
_____
Address City, State & ZIP

_____
Bar Number American Express Mastercard/VISA Exp. Date

_____
Signature

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. No refunds will be made for live programs unless notification of cancellation is received at least 48 hours in advance.



To 27 million Americans, this scene is a fairy tale.

That's because 27 million American adults can't read a child's bedtime story, can't read a street sign, can't read...period.

Functional illiteracy has become an epidemic, an epidemic that has reached 1 out of 5 American adults. It robs them of a decent living, it robs them of self-respect, it robs them of the simplest of human pleasures...like reading a letter from a friend or a fairy-tale to their children.

Tragic as that is, it's not the worst part. Because people like this could be taught to read, if we had more tutors to teach them. Sadly, we don't. Today, the waiting period for a tutor can be up to a year.

You can change that by joining the fight against illiteracy yourself. It takes no special qualifications. If you can read, you can tutor or help us in countless other ways. You'll be trained to work in programs right in your own community. And you'll experience the greatest satisfaction of all...the satisfaction of helping people discover whole new lives.

So join the effort. Call the Coalition for Literacy at toll-free **1-800-228-8813.** Helping takes so little. And illiteracy robs people of so much.

Volunteer Against Illiteracy. The only degree you need is a degree of caring.

Ad Council

Coalition for Literacy

CLASSIFIED ADS

OFFICE SPACE AVAILABLE

Office sharing space for rent in beautiful, historic building in Ogden, Utah. Rent includes receptionist, photo copying, and access to deposition/conference room. For information, contact (801) 621-1384.

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 work processing available. For more information, please call (801) 531-8300.

Beautiful and unique executive office space. Downtown location. Space available from 353 to 2,600 square feet. Award winning design. Full service with lots of free parking. Best deal in town. Call Beverley at (801) 531-9125.

New and tastefully finished office space available, away from the downtown congestion. 900 E. and 7200 S. location. Convenient parking immediately adjacent to building for both you and your clients. Must see to appreciate. For more information, please call (801) 272-1013.

POSITION AVAILABLE

Downey, Brand, Seymour & Rohwer, a large, well-established and aggressive Sacramento firm, is offering a highly competitive salary and benefits package to an individual with superior qualifications in the area of **OIL AND GAS.** We are seeking an associate with one to three years experience to work in an expanding oil and gas practice. The position emphasizes title, natural gas transportation and related issues.

Qualified applicants should send resumes in confidence to: Stephen J. Meyer, DOWNEY, BRAND, SEYMOUR & ROHWER, 555 Capitol Mall, 10th Floor, Sacramento, CA 95814. *No phone calls please.*

POSITIONS SOUGHT

Member of Bar with 15 years' experience seeks full- or part-time associates position. Excellent writing and editing skills. Experienced in commercial, construction, real estate and litigation. Contact Utah State Bar, Box L, 645 S. 200 E., Salt Lake City, UT 84111.

Temporary work wanted. Attorney licensed in Utah and Idaho desires temporary work until beginning an LL.M. program in January 1991.

Six years of practice includes personal injury and business litigation, general business including bankruptcy and natural resources.

Prefers full-time position for the three month period but will accept part-time, contract or project work.

Contact Scott Lee, 3379-B S. 2410 E., Salt Lake City, UT 84109 or call (801) 486-2518.

OFFICE EQUIPMENT FOR SALE

For Sale: One new Lanier model 1100AG FAX machine. Lists for $1,995, asking $1,200. One Diablo D80IF Daisy wheel printer. Dual feed bin, 80 CPS, recently rebuilt paper path. New $2,500, asking $500 with extra ribbons. Call (801) 255-7600.

AT&T Merlin Phone System, Model 820, with package 2 for sale. It handles up to 15 lines. Call Craig Carman at (801) 531-6600.

OFFICE FURNITURE FOR SALE

Office furniture for sale: Conference table (approximately 6 by 3½ feet). Four large side chairs and one executive chair. All in excellent condition. Call Craig Carman at (801) 531-6600.

Oak conference table with eight chairs (light gray tweed), excellent condition, $1,800. Call Paul at (801) 263-5555.

SERVICES AVAILABLE

S & A Legal Typing Service has moved from California to Salt Lake City. We offer complete legal services—plus delivery of all work upon completion.

Qualifications: 7½ years' experience in civil proceedings; legal/medical malpractice appeals; and wills and trusts. ALL WORK is confidential.

Programs Used: WordPerfect 4.2-5.1; Multimate Advantage II-4.0.

Services Offered: Complete tape transcription; setting up of original complaints; maintaining customer mailing lists; form letters. Will train your employees on WordPerfect 5.1 (Table of Authorities and Contents).

Contact: Mr. Rick at (801) 265-9297 or leave message. References and price list upon request.

WILL INFORMATION REQUESTED

Urgently request law firm that processed will for Earl H. Ellis between 1970 and 1986 in the Provo-Orem area. Contact A.W. Goddard, 320 N. 2050 W., Space 23, Provo, UT 84601. Phone (801) 225-3275.

I am seeking information about a will or wills of two deceased persons from Weber County. Their names are Wilber Floyd and Mattie D. Jones (maiden name White-Davis). Their last address was 1055 28th Street, Ogden, they are longtime residents of Ogden, but may have gone to a nursing home in Davis County, anytime after August 1988.

Mrs. Jones died in May 1989 and Mr. Jones died in November 1989.

I would like information on any wills, single or joint, that may have been written between 1955-1989, including Davis County. I also need information about obtaining copies of said wills, and the names of any law firms, banks and attorneys involved. Please send reply to: Jeanne Molacek, 1935 S. Eighth Street, Lincoln, NE 68502. Phone (402) 475-7594.

For information concerning classified ads, contact Kelli Suitter at 531-9077.

HERE COMES THE JUDGE...

The American Cancer Society is looking for some good-humored and enterprising volunteer attorneys to be judges in its sixth annual Jail-A-Thon, October 30 through November 2.

Citizens are arrested by off-duty police officers and taken to one of the mock jails located in the Cottonwood Mall, Valley Fair Mall, Crossroads Plaza, Fashion Place Mall, South Towne Mall and Foothill Village. The arrest begins with volunteers and the public requesting the apprehension of their boss, spouse, politician, employees, co-workers, and/or neighbors and friends. Charges range from "indecent exposure from the neck up" to "unfair labor practices."

When placed behind bars, jailbirds are asked to raise bail in pledges to the American Cancer Society. Funds raised will support the research, cancer prevention education, and service to cancer patients.

Judges are asked to work shifts from 8:00 a.m. to 1:00 p.m., or 1:00 to 5:00 p.m. The judges will arraign the suspects, set their bails, and send them to jail! It's going to be a fun and incarcerating experience. To get involved, call Ralph Smith of Ray Quinney & Nebeker at 532-1500, or Joel Kasparian with the American Cancer Society at 322-0431.

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