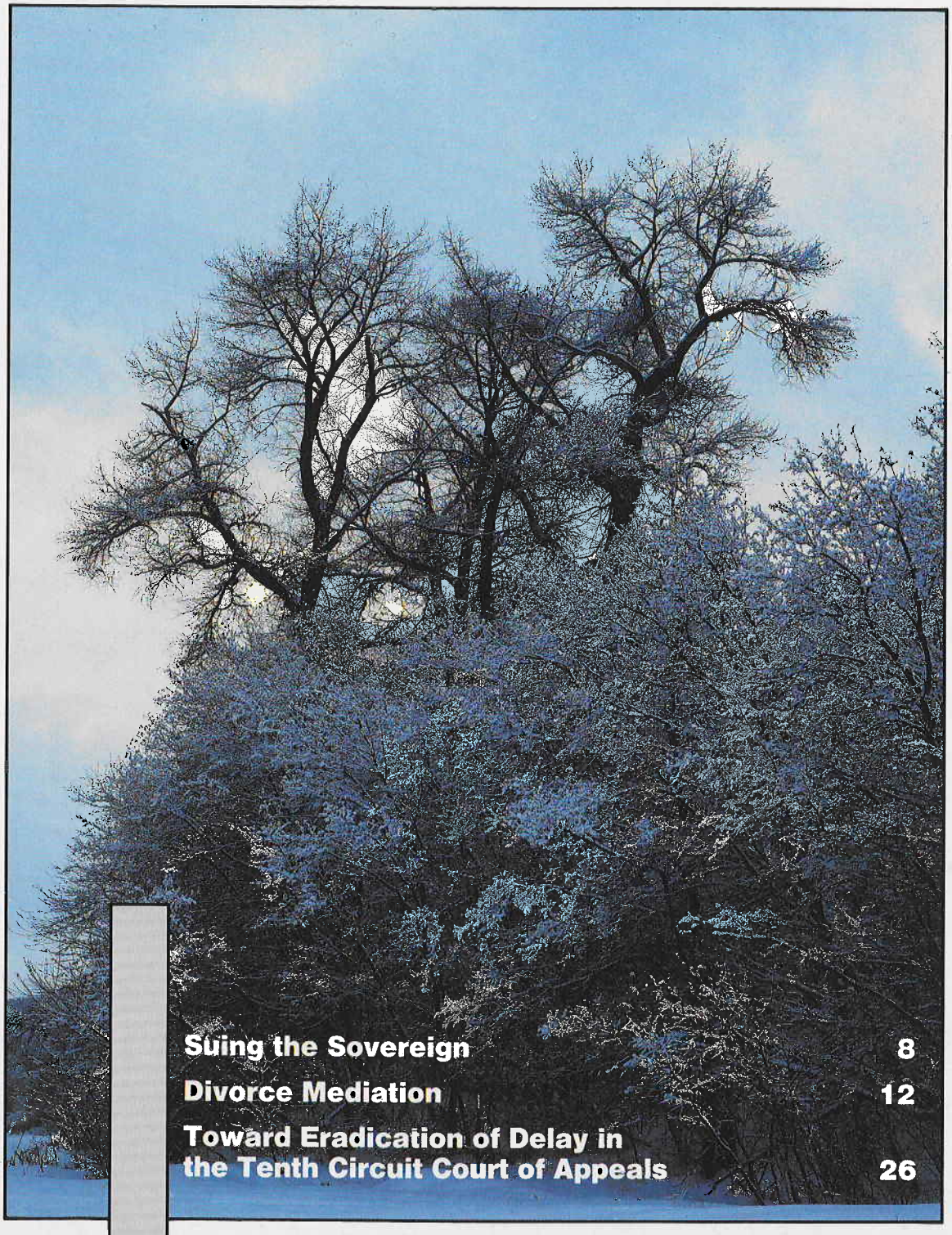
UTAH BAR JOURNAL

Vol. 3, No. 10 December 1990



BRIAN HEAD ENTERPRISES, INC.

the owner and operator of a Southern Utah ski resort, has received confirmation of its

REORGANIZATION PLAN

and has been dismissed from its

CHAPTER 11 BANKRUPTCY CASE

We rendered a valuation opinion to the Trustee of Brian Head Enterprises, Inc. as to the value of the ski resort assets.

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Published by
The Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077

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COVER: A winter scene in Cache National Forest, Utah, by Chris P. Wangsgard, a partner in the firm of VanCott, Bagley, Cornwall & McCarthy.

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.

■

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $25; single copies, $2.50; second-class postage paid at Salt Lake City, Utah. For information on advertising rates and space reservation, call or write Utah State Bar offices.

Submission Requirements and Deadlines

The following information about submission of articles, letters, etc., is reprinted from an earlier issue of the Bar Journal.

DEADLINES IN GENERAL

Each issue of the *Utah Bar Journal* usually hits the stands (so to speak) the first part of the month. However, the articles, materials and ads in that issue were in the office from five to six weeks earlier. The period between the deadline for materials and their appearance in print is unfortunately, but unavoidably, long and has created some confusion among our readers.

In order for material to appear in the *Utah Bar Journal*, the deadlines must be met. It should also be remembered that the *Journal* is not published in July or August.

ARTICLES, LETTERS

The deadline for articles, stories, letters, pictures, etc., is six weeks before the beginning of the month of publication. For example, articles and other stories for the September issue should be in the hands of the *Journal* staff by the 15th of July.

Anyone who is planning to submit an article, however, should keep in mind that submission by the deadline does not guarantee publication. *Journal* staff members often discuss upcoming articles several months in advance and may not have space for an unexpected (but welcome) submission on the 15th. Therefore, anyone planning to submit an article for which timing of publication is critical should discuss it with the editor, Calvin E. Thorpe, or one of the articles editors, Leland S. McCullough Jr. or Glen W. Roberts.

CLASSIFIED ADS

Classified ads should be submitted at least four weeks before the month of publication. Taking the example of the September issue again: the deadline for classified ads would be the end of July.

Classified ads should be submitted to Kelli Suitter, Utah State Bar Offices, 645 S. 200 E., Salt Lake City, UT 84111. Ms. Suitter should also be contacted for rate information.

DISPLAY ADS, LAW FIRM ANNOUNCEMENTS

Space reservations for ads that are camera ready must be made by the fifth of the month prior to the month of publication. (For example, August 5 for the September issue.)

For rate and additional deadline information about lawyer and law firm announcements, please contact Kelli Suitter at the Bar Offices, (801) 531-9077.

SUBMISSION OF ARTICLES

The *Bar Journal* is always anxious to receive articles from readers. All articles submitted will receive serious consideration for publication.

Articles should be on topics of general interest. Because the staff works on issues several months in advance, as pointed out above, authors are encouraged to discuss their work with the editor and/or the articles editors to make sure it would not be a duplication of something already submitted or planned.

Manuscripts should be typed, double spaced and accompanied by brief biographical information and a photograph of the author (preferably 3-by-5 inch, black and white). The length of articles must be reasonable and appropriate for the topic. Brief articles, as well as humorous ones, are welcome. Articles may be cut by the *Journal* editors, but cuts that are substantial or which could affect the overall impact of the article will not be made before the author is consulted. Punctuation, spelling and style will be edited by the *Journal* staff as needed.

If an article has been previously published elsewhere, the submission must be accompanied by a statement that includes the name and type of publication it was in, when it was published and any other information that would affect the editor's decision concerning publication in the *Utah Bar Journal*.

CLE credit may be obtained for articles published in the *Bar Journal*.

LETTERS TO THE EDITOR

The Board of Bar Commissioners has adopted a policy concerning publication of letters to the editor.

In brief, the policy requires letters to be typed, double spaced, signed by the author and not more than 200 words in length. Letters may not be obscene, defamatory, advocate or oppose a candidate for office, solicit business or subject the Bar to civil or criminal liability. Letters will be published in the order in which they are received. No one person shall have more than one letter published every six months.

The policy was published in its entirety in the August/September 1988 issue of the *Journal*. Additional information is also available from the Bar Office or the *Journal* editor.

COVER ART

Journal readers are also invited to submit artwork for *Journal* covers. Both photographs and drawings will be considered.

Submission of work that has intrinsic value or is one-of-a-kind should be discussed with the editor prior to submission.

EDITOR: What are the advantages of a mandatory integrated bar over a voluntary bar association?

Is a mandatory integrated bar necessary?

Why not have the essential functions of the Bar—admissions, discipline, regulation and prevention of the unauthorized practice of law, handled by committees of the Utah Supreme Court and financed through mandatory dues. Utah attorneys would thus continue to be self-regulating.

All other current functions of the Utah State Bar would then be delegated to a voluntary association which would have to justify its existence and provide only the programs wanted by members and supported by their voluntary dues.

Might the Utah Bar Commissioners see fit to use the pages of this *Journal* to publicly address some of these issues and suggestions?

Brian M. Barnard
Attorney at Law

PRESIDENT'S MESSAGE

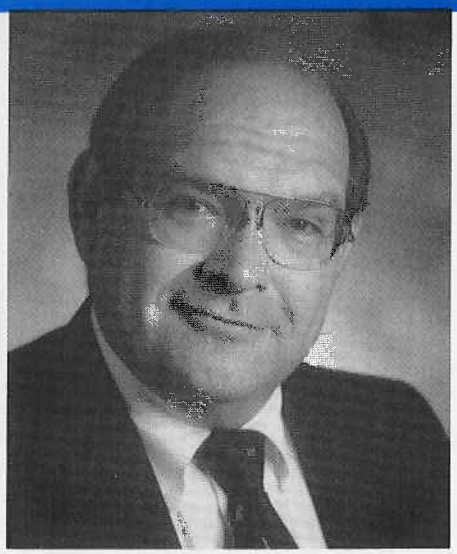
By Hon. Pamela T. Greenwood

Early in October, the Supreme Court announced members of the special Task Force on the Management and Regulation of the Practice of Law. The Task Force is chaired by Peter W. Billings Sr. and includes the following members: Kenneth Bresin, Wendy Faber, David Nuffer, David Thompson, Dayle Jeffs, Hardin Whitney Jr., Greta Spendlove, Rosalind J. McGee (citizen member), Jinnah Kelson (citizen member), Lyle Campbell (citizen member), Gayle McKeachnie, James Clegg and James Davis. Staff support for the Task Force will be provided by William Vickrey and Brian Florence. The Task Force is charged with the broad mandate of reviewing issues related to the management and regulation of the practice of law, including addressing whether there are alternative means other than an integrated bar to provide regulatory services; determining what bar services/programs are essential; defining the relationship between the Supreme Court and the Bar; and deciding how the Bar should be structurally organized. As Bar Commissioners and staff, we will do our best to provide needed information to the Task Force and assist them in accomplishing their assignment. It is my belief that these issues are most timely and deserve a thorough examination. I hope that those of you who are interested will also provide input to the Task Force.

While the Task Force is addressing its duties, we are simultaneously tackling other portions of the Supreme Court's order and needs of the Bar, as we see them. In the accounting area, we have upgraded and improved our format and software programs, enabling us to retrieve information quickly and accurately. We are well into our audit process for 1989-90 and hope to have that completed soon. In addition, we are working with the accounting firm Grant Thornton on a continual basis. They have been extremely helpful in advising us on available technology and how to improve our operations. The Bar Commission and Bar staff are concentrating our efforts right now on financial and management issues, an extremely time-consuming and demanding process. Despite this situation, however, the Bar's sections and committees continue, for the most part, to operate smoothly and provide needed services as usual. This is possible only because of the volunteer efforts of Bar members and the hundreds of donated hours of work. I am most grateful for that service which benefits Bar members, the justice system and the public.

On a different subject, as the holiday season approaches I extend to each of you my best wishes for happy and meaningful times with your families and friends. It seems to me that most of us become so busy at this time of year with getting ready to have fun that we run out of both the time and energy to really experience the fruits of our labors. While it's important to get your work done, to amass those billable hours, to buy a present for Aunt Matilda, it's at least equally important to participate in your children's growing up process, to maintain a rewarding relationship with your spouse, and to spend time with your friends and to be a friend. In this season of giving, we ought to also remember our obligation as citizens and members of the legal community, to share our good fortune with others. We can do so by participating in projects such as Sub for Santa or by providing pro bono legal services, drawing on our special training. To paraphrase—of those to whom much is given, much is expected.

COMMISSIONER'S REPORT



By James Z. Davis

On October 15, 1990, the Utah Supreme Court appointed its special Task Force on the Management and Regulation of the Practice of Law.

It is important to be aware of the fact that, since the 1985 revision to the Judicial Article of the State Constitution clearly gave the Supreme Court authority to govern the practice of law, including admissions and discipline, the Court, in exercising its leadership role, has heretofore determined to examine the Rules of Integration of the Utah State Bar and related matters. The creation of the Task Force, although a part of the Court's ruling on the Bar's petition for an increase in licensing fees, had its genesis in the modification of the Judicial Article and was not a reaction by the Court to the various issues that arose in the context of the petition.

In addition to establishing "a management vehicle that is efficient in providing regulatory services, responsive to members of the Bar, clear and understandable as related to lines of authority and processes of decision-making, open to communication from all lawyers and segments of the public, and effective in improving the fair administration of justice to the public whom the Courts and Bar serve," the Task Force was given the following specific charges:

> What alternative means exists [sic] for providing the regulatory services for the legal profession in Utah? Is an integrated Bar the most effective and efficient approach?
>
> What services/programs can members of the Bar and public expect from any Bar management organization or structure and what are "essential" versus elective or "nice to have" functions that fall within the province of governing the practice of law?
>
> What relationship should exist between the Supreme Court and an integrated Bar? Specifically, what should the grant of authority be to a Bar organization to manage and oversee those functions or activities deemed as mandatory to the governance and regulation of a practice of law? What, if any, authority should exist to conduct or initiate discretionary, non-mandatory functions or programs? What communication relationship and decision-making process should exist between the State Bar organization and the Supreme Court; and between the Bar organization and its members?
>
> Structurally, how should a State Bar organization be established? What should be the membership of the governing body and how should that membership be selected? What requirements should exist for the means of conducting business by the Bar organization and what responsibility should exist for communication with members of the Bar?

It is obvious from the Court's charge to the Task Force that the Court is desirous of examining virtually every aspect of the practice of law in the state of Utah, and that it is the intention of the Court to start with a clean slate. Thus, the importance of the work of the Task Force to the practicing lawyer in Utah cannot be overestimated.

Perhaps the most critical aspect of the Supreme Court's charge to the Task Force is the fact that the Court has set May 15, 1991, as the deadline for the Task Force to provide it what amounts to a total redraft of the current Rules of Integration. In order to meet that deadline, members of the Task Force need the support and input of members of the Bar.

Following this message is a list of the names, addresses and phone numbers of the Task Force members and staff. I hope all lawyers in Utah agree that the work of the Task Force will set the pattern for the practice of law in Utah for many years to come. Accordingly, I would urge each and every one of you to contact a Task Force member with any input you may have which may assist the Task Force in meeting the charge of the Court.

The Supreme Court's

SPECIAL TASK FORCE ON THE MANAGEMENT AND REGULATION OF THE PRACTICE OF LAW

Appointments by the Utah Supreme Court

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Suing the Sovereign[1]

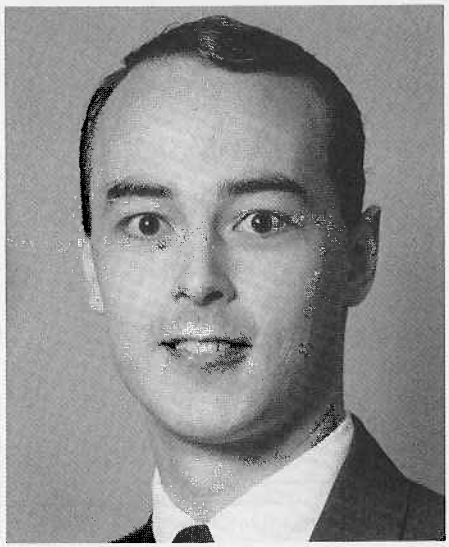
By James E. Ellsworth

INTRODUCTION[2]

In 1982, Congress dissolved the then existing United States Court of Claims and the Court of Customs and Patent Appeals and, from those courts, created the United States Claims Court and the United States Court of Appeals for the Federal Circuit.[3]

The Claims Court was created as an Article I court.[4] Its charter provides for 16 judges to be appointed by the President and confirmed by the Senate to serve 15-year terms.[5] The Court is unique from other federal district courts in that its jurisdiction extends nationwide and trial may be conducted anywhere in the United States.[6] Most often, trial is held in the city of plaintiff's choice.

The principal jurisdictional statute of the United States Claims Court is known as the Tucker Act, 28 U.S.C. §1491 (1982). This statute enables the Claims Court to hear any suit for liquidated or unliquidated damages against the United States, which does not sound in tort, and which is founded upon "the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States."[7] For claimants to establish that their suit is founded upon the Constitution, statute, Executive Order, or regulation for a sum-certain money judgment, the claimant must show that it either seeks a refund of money actually paid to the government or that a provision of the Constitution, statute, Executive Order, or other regulation expressly or implicitly mandates the payment of money.[8] Within these parameters, United States district courts possess concurrent jurisdiction with the Claims Court in cases against the government for claims not exceeding $10,000.[9] However, the Claims Court's jurisdiction differs from that of other federal district courts in that it generally may not issue injunctions or declaratory judgments unless specifically authorized by statute.[10] For example, the Claims Court's jurisdiction to award injunctive relief is limited to bid protest actions instituted by bidders or offerers on government contracts who contend that the government is about to award a contract to another bidder unlawfully.[11]



JAMES E. ELLSWORTH has a B.A. in International Relations with a specialization in Finland and the Finnish language from Brigham Young University; J.D. from the J. Reuben Clark Law School, Articles Editor on the Brigham Young University Law Review; *Former Law Clerk to Hon. Moody R. Tidwell III in the United States Claims Court, Washington, D.C.; Associate in Kirton, McConkie & Poelman, Salt Lake City, Utah.*

Procedurally, all appeals from the United State Claims Court go to the United States Court of Appeals for the Federal Circuit. The Federal Circuit likewise possesses exclusive jurisdiction for appeals from the United States district courts for claims against the government not exceeding $10,000. Also of interest is the fact that in the Claims Court, in most instances, the costs of litigation and attorney's fees are awarded to the prevailing party.[12]

In application, the Claims Court hears essentially seven different types of claims: (1) express or implied contract claims; (2) tax refund claims; (3) fifth amendment takings claims; (4) civilian and military pay claims; (5) patent and copyright claims; (6) Indian claims; and (7) congressional reference claims.[13]

I. EXPRESS OR IMPLIED CONTRACT CLAIMS

The majority of claims based upon an express contract with the government arise from construction contracts with a branch of the United States military or some other governmental agency. For these types of claims, the Contract Disputes Act of 1978, 41 U.S.C. §§601-613 (1982), sets forth basic jurisdictional prerequisites. First, the contractor must submit its claim to the contracting officer and either actually receive a final decision from the contracting officer on that claim or be deemed to have received a final decision upon the passing of 60 days with no response from the contracting officer. Second, the contractor must certify any claim it may have against the government for more than $50,000.[14] Further, contract claims based on the Contract Disputes Act must be brought within one year of the denial of the claim by the contracting officer.[15] There are also express contracts with the government which are not governed by the Contract Disputes Act.[16] Those express contracts are brought in the Claims Court under the general parameters of the Tucker Act.[17]

The general jurisdictional parameters of the Tucker Act also encompass claims based upon implied contracts with the United States. This type of Tucker Act jurisdiction has been limited only to contracts implied-in-fact, and not contracts implied-in-law.[18] The requirements of a contract implied-in-fact are identical to those of an express contract. There must be mutuality of intent and lack of ambiguity in the offer and acceptance.[19] Likewise, the contract must be supported by consideration.[20] In addition, the officer contracting on behalf of the government must have authority to so con-

tract for the government.[21] And finally, the parties must actually enter into an agreement; "Extensive negotiations in which the parties demonstrate hope and intent to reach an agreement are not sufficient in themselves to establish a contract implied in fact."[22]

The general statute of limitations for contract claims, whether express or implied, against the government under the Tucker Act is six years.[23]

II. TAX RETURN CLAIMS

The broad declaration under the Tucker Act "to render judgment upon any claims against the United States founded . . . upon . . . any Act of Congress . . ."[24] has been interpreted to encompass suits for the refund of taxes. This jurisdiction is concurrent with the jurisdiction of the United States district courts over tax refund suits.[25]

The jurisdictional prerequisites for tax refund suits in the Claims Court are identical to those required by the district courts: First, the taxpayer must file a claim for refund with the Internal Revenue Service within three years from the filing of its return or two years from paying the tax, whichever is later.[26] Second, the complaint must be filed with the clerk of the court no sooner than six months after filing a claim with the Internal Revenue Service (unless, of course, the claim is denied by the Internal Revenue Service within that six-month period of time) and no later than two years after either the date the Internal Revenue Service mailed notice of disallowance or the date the waiver of the notice of disallowance was filed.[27] The one exception to the period of time within which a complaint must be filed is when no notice of disallowance is ever given.[28] Under that circumstance, the time period is tolled.[29] Thirdly, the tax assessment must be fully paid, whether it is an assessment for income, estate, or gift taxes.[30]

III. FIFTH AMENDMENT TAKING CLAIMS

The fifth amendment states in relevant part: "No person shall . . . be deprived of property, without due process of law; nor shall private property be taken for public use without just compensation." Thus, an individual may sue the United States when the government has taken an individual's property and failed to pay compensation for that property taken. Any real and substantial governmental interference with use and enjoyment of property is sufficient to constitute a taking under the fifth amendment.

There are eight basic requirements in order to assert a takings claim in the Claims Court. First, the claim for compensation must be made within six years of the accrual of that claim.[31] Second, the claim for compensation must be brought by the owner of the property or the one vested with the property interest taken.[32] Third, though a claimant does not need to establish a governmental intent to take the property at issue, he or she must demonstrate that the governmental act which resulted in the taking was authorized by Congress.[33] Fourth, the governmental action challenged must, in fact, be an action performed by the United States government and not merely the action of a local authority, an internal organization, or private agency.[34] Fifth, the interference with use and enjoyment of the property constituting the taking must be "directly attributable" to the action of the government.[35] Though this requirement seems obvious, it becomes justiciable where the government is charged with not operating in as an efficient capacity as possible, thus resulting in a loss.[36] Sixth, the governmental action constituting the taking must be final in nature.[37] This requirement specifically precludes claims for legislatively authorized actions that would result in a taking but which are not yet implemented.[38] Seventh, the claimant must likewise demonstrate that its property was, in fact, taken for a public purpose.[39] Eighth, the alleged claim for compensation must be premised upon a taking of property and not upon a violation of some other right, i.e., due process or otherwise.[40] In other words, the government must have allegedly acted lawfully in taking the property, but merely failed to pay the compensation. In this vein, it is important to note that the Claims Court's jurisdiction extends only to federal takings cases not sounding in tort. Tort claims are specifically excluded under the Tucker Act.[41] Therefore, when asserting a government taking, one must be clear to challenge the alleged taking as a proper exercise of the power of eminent domain and not as an improper tortious act.[42]

"Fifth amendment takings occur in different ways. The two most prevalent ways are physical takings and regulatory takings."

Fifth amendment takings occur in different ways. The two most prevalent ways are physical takings and regulatory takings. A physical taking most often occurs when there is a permanent physical occupation of private property.[43] Regulatory takings, on the other hand, focus on a three-part test: (1) the economic impact of the regulation or resultant governmental action upon the claimant; (2) the extent to which the regulation or action interferes with the investment backed expectations of the claimant; and (3) the character of the governmental action.[44] Therefore, when a regulation denies a property owner of the economically viable use of his or her property, a taking can be deemed to have occurred. However, a mere diminution in value, as opposed to actual destruction of the economically viable use, will not constitute a regulatory taking.

IV. CIVILIAN AND MILITARY PAY CLAIMS

Under certain conditions, federal employees may file claims in the Claims Court for money allegedly due them arising out of their employment relationship with the United States government.[45] To prevail on such a claim, the terms and conditions of the employment, as specified by statutes and regulations, must mandate the payment of money which the federal employee is rightfully entitled, yet has not received.[46] Therefore, there are two basic requirements: (1) federal employees must establish that they are actually entitled to the amount they are claiming; and (2) federal employees must establish that they would have received the amount they are claiming but for some illegal action.[47] Accordingly, federal employees may base a claim against the government on compensation for basic pay, overtime pay, allowances, or otherwise.[48] However, federal employees only have legitimate claims for compensation due in the position to which they have specifically been appointed;[49] the Tucker Act, by itself, is insufficient to provide jurisdiction for suits seeking promotions, reclassifications, or pay increases. Most salary determinations are deemed to be wholly within each individual agency's discretion.[50]

Claims typically reviewed in the Claims Court under this grant of jurisdiction are personnel separations, non-judicial punishment proceedings, and claims for military disability compensation. Like most other actions brought against the government in the Claims Court, the statute of limitations is six years from the date of accrual for civilian and military pay claims. The date of accrual is when the federal employee is deprived of the pay to which he or she claims an entitlement.

V. PATENT AND COPYRIGHT CLAIMS

Whenever the United States uses or manufactures an invention covered by a valid patent without permission of the patent owner, the patent owner may sue the "United States in the United States Claims Court for the recovery of his reasonable and entire compensation for such use and manufacture."[51] On the other hand, where the United States has not used, consented to the use of, or authorized the use of the patented invention, the patent owner's sole claim is against the one inappropriately using the patent information and the Claims Court does not have jurisdiction over that claim. The damages available for an improper use of a patented invention by the government are limited to 28 U.S.C. §1498's "reasonable and entire compensation" standard. The "reasonable and entire compensation" language is also included in the fifth amendment to the Constitution and, therefore, the damages standard is identical.

Likewise, when the United States or any person, firm, or corporation acting for or on behalf of the United States infringes the copyright of any work, the copyright owner may bring an "action against the United States in the Claims Court for the recovery of his reasonable and entire compensation. . . ."[52] For an infringement of a copyright, however, the statute of limitations is limited to three years from the date of the infringement.[53] Damages available for a copyright infringement are measured under the same standard as used to determine damages for governmental patent infringements and takings.

VI. INDIAN CLAIMS

The Claims Court has also been given jurisdiction over claims against the United States by "any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court. . . if the claimant were not an Indian tribe, band or group."[54] Therefore, Indians may sue the United States in the name of the tribe or band under 28 U.S.C. §1505 or as individual Indians under 28 U.S.C. §1491 within the same parameters as other private individuals.[55] This governmental waiver of immunity only applies where there is an independent source of substantive law which can be fairly interpreted as mandating compensation for money damages actually sustained.[56] For example, it has been held that the mere existence of a breach of a general trust relationship with individual Indians or an Indian tribe does not, in and of itself, establish a claim for money within the meaning of 28 U.S.C. §§1491 or 1505.[57] In order to find a trust responsibility that mandates compensation by the United States, the individual Indians or Indian tribe must demonstrate that a pervasive or comprehensive statutory or regulatory scheme exists which places the United States in a fiduciary relationship to manage the economic assets of individual Indians or an Indian tribe.[58] Thus far, the United States Supreme Court has found such a comprehensive and pervasive statutory and regulatory scheme only in the managing and harvesting of Indian timberlands.[59]

Putting aside plausible Indian claims existing under a continuing wrong theory, the statute of limitations for bringing Indian claims under 28 U.S.C. §§1491 or 1505 is the Claims Court's general six-year period.

VII. CONGRESSIONAL REFERENCE CLAIMS

Unlike other federal district courts, the Claims Court was created under Article I of the Constitution and, therefore, is not limited to hearing only actual cases and controversies but may render advisory opinions. Accordingly, either house of

Congress may refer bills for private relief to the chief judge of the Claims Court for an advisory opinion.[60] Private bills for relief are most often sent to the Claims Court because they either require an adversary proceeding to establish relevant facts or they are matters for which no technical legal right to recovery exists. Once received by the chief judge of the Claims Court, the congressional reference case is assigned to one of the 16 Claims Court judges. For purposes of the case, the judge so assigned is designated as a Hearing Officer whose findings are subject to review by a panel of three other Claims Court judges designated as a Review Panel. The decision of the Review Panel as to whether the claimant has a legal or equitable claim against the United States is forwarded to the chief judge who then directs that decision to the appropriate house of Congress.[61]

CONCLUSION

There are many plausible wrongs that individuals, companies, or corporations would like to assert against the United States government. However, Congress has waived immunity for only a few such wrongs. These allowable claims, for the most part, must be brought in the United States Claims Court. Though the Claims Court's organization, rules, and procedures are somewhat unique, the court is competently able to award relief.

[1] This article attempts to set forth merely the basic scope of Claims Court jurisdiction and in no way attempts to cover the many intricate nuances of that jurisdiction.

[2] The author would like to express appreciation to James E. Hicks, Attorney Advisor in the civil section of the United States DEA Office of Chief Counsel, Washington, D.C., for his insightful comments and suggestions.

[3] Federal Courts Improvement Act, Public Law #97-164 §105(a), 96 Statute 27, 28 (1982).

[4] 28 U.S.C. §171 (1982).

[5] *See* 28 U.S.C. §§171(a), 172 (1982).

[6] 28 U.S.C. §2505 (1982).

[7] 28 U.S.C. §1491 (1982).

[8] *United States v. Testan*, 424 U.S. 392 (1976); *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967).

[9] 28 U.S.C. §1346(a)(2) (1982).

[10] *See United States v. King*, 395 U.S. 1 (1969).

[11] 28 U.S.C. §1491(a)(3) (1982); *see United States v. John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983).

[12] Rules of United States Claims Court 54(d); *see* 28 U.S.C. §2412 (1982); 26 U.S.C. §7430 (1987); 5 U.S.C. §5596 (1982).

[13] Among the realm of additional claims against the United States government which are brought in the United States Claims Court, there are two of particular interest. First, under 33 U.S.C. §1321, the United States has waived immunity for claims of reimbursement for costs incurred by a private party in removing oil that was discharged into or upon navigable waters if that discharge was caused by an act of God, an act of war, negligence on the part of the United States, or an act or omission of a third party. Second, under 42 U.S.C. §§300aa-1 to 300aa-25, the United States government has also waived immunity for individuals who have been injured or suffered death from vaccines administered in the childhood immunization program.

[14] 41 U.S.C. §605(c)(a) (1982).

[15] 41 U.S.C. §609(a)(3) (1982).

[16] *E.g.*, 41 U.S.C. §602(a) (1982).

[17] *See L'Enfant Plaza Properties, Inc. v. United States*, 654 F.2d 886 (1981).

[18] *See, e.g., United States v. Mitchell*, 463 U.S. 206 (1983); *Aetna Casualty and Sur. Co. v. United States*, 655 F.2d 1047 (Ct. Cl. 1981).

[19] *E.g., Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970).

[20] *E.g., Somali Dev. Bank v. United States*, 508 F.2d 817, 822 (Ct. Cl. 1974).

[21] *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Pacific Gas and Elec. v. United States*, 3 Cl. Ct. 329, 339 (1983), *aff'd*, 738 F.2d 452 (Fed. Cir. 1984).

[22] *Pacific Gas and Elec.*, 3 Cl. Ct. at 339.

[23] 28 U.S.C. §2501 (1982).

[24] 28 U.S.C. §1491(a)(1) (1982).

[25] 28 U.S.C. §1346(a)(1) (1982). The Claims Court's jurisdiction extends also to declaratory judgment actions for the qualification of an entity as a charitable organization, private foundation or private operating foundation. 26 U.S.C. §7248 (1982); 28 U.S.C. §1507 (1982); 26 U.S.C. §§6226, 6228(a) (1982).

[26] *See* 26 U.S.C. §§6511, 7422(a) (1982).

[27] The "timely mailing" rule, which is applicable to many matters arising under the Internal Revenue Code, does not apply to filing documents in the Claims Court. *See* 26 U.S.C. §7502(d)(1) (1982).

[28] *See Consolidated Edison Co. of N.Y. v. United States*, 135 F. Supp. 881 (Ct. Cl. 1955), *cert. denied*, 351 U.S. 909 (1956).

[29] *Id.*

[30] *Flora v. United States*, 357 U.S. 63, 75 (1958). The full payment rule does not apply to certain divisible taxes. *E.g., Steele v. United States*, 280 F.2d 89 (8th Cir. 1960).

[31] 28 U.S.C. §2501 (1982). Accrual takes place when all the elements necessary to give rise to liability have occurred. *Japanese War Notes Claimants Ass'n. v. United States*, 373 F.2d 356, 358 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1971 (1968).

[32] *E.g., Lacey v. United States*, 595 F.2d 614, 619 (Ct. Cl. 1979).

[33] *See, e.g., Barnes v. United States*, 538 F.2d 865, 871 (Ct. Cl. 1976).

[34] *See De-Tom Enters. v. United States*, 552 F.2d 337, 339-40 (Ct. Cl. 1977); *Hartwig v. United States*, 485 F.2d 615, 619 (Ct. Cl. 1973); *Erosion Victims of Lake Superior v. United States*, 12 Cl. Ct. 68, 72 (1987).

[35] *Hartwig*, 485 F.2d at 619.

[36] *See Id.* Courts generally will not award compensation for this type of inefficiency regardless of its prevalence in governmental bureaucracy.

[37] *See Agins v. City of Tiburon*, 447 U.S. 255, 262-63 (1980).

[38] *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 105 S. Ct. 3108, 3117 (1985); *MacDonald, Sommer and Frates v. Yolo County*, 106 S. Ct. 2561, 2566-68 (1986).

[39] *See Shanghai Power Co. v. United States*, 4 Cl. Ct. 237, *aff'd*, 765 F.2d 159 (Fed. Cir. 1983).

[40] *United States v. Connolly*, 716 F.2d 882, 887 (Fed. Cir. 1983), *cert. denied*, 104 S. Ct. 141 (1984).

[41] 28 U.S.C. §1491 (1982).

[42] *See Clark v. United States*, 8 Cl. Ct. 649 (1985).

[43] Physical takings, however, have also been deemed to have occurred when a governmental action results in a governmental use of the claimant's property even though the use does not completely and permanently take the claimant's property. For example, this occurred in *United States v. Causby*, 328 U.S. 256 (1946), where the government was required to compensate the claimant for the low and frequent flights of its airplanes over plaintiff's property.

[44] *Connolly v. Pension Guar. Benefit Corp.*, 106 S.Ct. 1018, 1026 (1986).

[45] *See, e.g., United States v. Wickersham*, 201 U.S. 390 (1906).

[46] *See Kania v. United States*, 650 F.2d 264 (Ct. Cl.), *cert. denied*, 454 U.S. 895 (1981); 5 U.S.C. ch. 53 (mandating the payment of money to federal employees).

[47] *United States v. Testan*, 424 U.S. 392, 407 (1976).

[48] *E.g., 5* U.S.C. §§5542, 5546 (1982); 29 U.S.C. §207 (1982).

[49] *United States v. Testan*, 424 U.S. 392 (1976).

[50] *See Holder v. United States*, 670 P.2d 1007, 1011 (Ct. Cl. 1982). Accordingly, the Claims Court will not order promotions, extend to service members enlistment, or award relief where the claimant voluntarily retired. *See, e.g. Alford v. United States*, 3 Cl. Ct. 229 (1983); *Thompson v. United States*, 221 Ct. Cl. 983 (1973); *Sammt v. United States*, 780 F.2d 31 (Fed. Cir. 1985).

[51] 28 U.S.C. §1498 (1982). A patent owner might also be able to sue in the United States Claims Court under 35 U.S.C. §183 (1982), 10 U.S.C. §2273 (1982), or 22 U.S.C. §2356 (1982).

[52] 28 U.S.C. §1498(b) (1982).

[53] 28 U.S.C. §1498 (1982).

[54] 28 U.S.C. §1505 (1982). This grant of jurisdiction originally came about from the appeals jurisdiction of the Court of Claims over appeals from the Indian Claims Commission, 25 U.S.C. §70s (1976), and subsequent transfer of the Indian Claims Commission jurisdiction when that commission expired in 1978, 25 U.S.C. §70v (1976). In addition to the Tucker Act's jurisdictional grant over Indian claims, it is cognizable that some tribal claims may still obtain jurisdiction in the Claim Court under the old Indian Claims Commission Act. *See* 25 U.S.C. §§70a, 70k (1976).

[55] *United States v. Mitchell*, 463 U.S. 206, 212 n.8 (1983).

[56] *Id.* at 216; *United States v. Testan*, 424 U.S. 392, 400 (1976).

[57] *United States v. Mitchell*, 445 U.S. 535, 542-44 (1980).

[58] *Mitchell*, 463 U.S. at 224; *Grey v. United States*, slip op. No. 588-84L (Cl. Ct. August 9, 1990).

[59] *Mitchell*, 463 U.S. at 222.

[60] 28 U.S.C. §§1491, 2509 (1982).

[61] 28 U.S.C. §2509 (1982).

Divorce Mediation

By Elizabeth A. Dalton

Recently, a Dan Jones Poll revealed that 87 percent of Utahns would prefer alternatives other than court for handling divorce cases.[1] In many states, including California, Colorado, and various Eastern states, divorce mediation is commonplace. In California, Illinois, Maine, and Oregon, state law requires couples to try mediation in regard to contested issues of child custody and visitation.[2]

Mediation attracts those enlightened couples who want to avoid the expense, delay and emotional trauma of divorce litigation. As more and more Utahns choose to resolve the issues of their divorce with the assistance of a mediator rather than in a courtroom, divorce mediation will become commonplace in Utah.

WHAT IS DIVORCE MEDIATION?

Divorce mediation is a voluntary settlement process that enables a divorcing couple to sit together at the same bargaining table and design a settlement agreement with the assistance of a neutral, third party. A divorce mediator acts as an impartial referee who is specially trained to assist a couple in making practical, informed decisions resolving the issues confronting them in the context of a separation or divorce.

Most lawyers and judges freely acknowledge that the adversarial process of our judicial system is not the best means of resolving issues pertaining to a divorce.[3] Nevertheless, a couple must use the legal system to obtain a divorce or modification of a divorce decree.

Divorce mediation is designed to work within the legal system without depriving the parties of the protections afforded by the adversarial process. Divorce mediation can supplement the adversarial process to achieve better results for the parties and their children. The primary difference between a mediated divorce and a litigated divorce is the manner in which disputes are resolved.

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When a divorce is litigated, each party hires an attorney to represent his or her position in an adversarial manner. Because the context of litigation is a win-lose proposition, parties and their attorneys become territorial and often emotionally charged. Settlements are reached by a process of position-based bargaining. Compromises and concessions are made by the attorneys on behalf of the parties. If a settlement cannot be reached between the attorneys, a judge decides what the resolution will be. The parties participate in the settlement or resolution of the issues in an indirect manner and must rely on their attorneys and/or a judge to resolve issues relating to their children and their property.

When a couple chooses to mediate their divorce, they act as the decision-makers.[4] Because the couple knows their situation better than any attorney or judge, the couple can usually best design a resolution that enables them to end their marriage in an amicable manner and satisfy the best interests of their children. In mediation, a mediator encourages the couple to design a settlement agreement using interest-based negotiation techniques. Interest-based bargaining is a negotiation strategy that tries to satisfy as many interests or needs as possible for the parties and their children. It seeks an integrative solution rather than distributing rewards in a win-lose manner.

WHAT ROLE DOES THE MEDIATOR PLAY?

In divorce mediation, the mediator assumes the role of a neutral, third party and assists the divorcing couple in designing a fair and practical plan for dissolving their marriage and, if children are involved, a plan for continuing their parenting relationship. Divorce mediation is a problem-solving exercise. Divorce mediation is not therapy aimed at reconciliation or toward working out a couple's emotional issues. A mediator will not mediate a divorce unless the couple has accepted the reality that the marriage is over.

The mediator's primary task is to ensure that each party can make a fair and reasonable agreement that he or she will be satisfied with over time. The mediator ensures that each party has access to reliable information, legal advice, and emotional support to enable that party to make informed and rational decisions during the mediation pro-

cess. A mediator must ensure that the parties have adequate resources available to them so they can each negotiate a settlement on equal footing. A mediator must be sensitive to the emotional issues that arise during a divorce and assist the parties in dealing with their emotional issues in a manner that does not affect their ability to problem-solve as parents or adults.

In order to provide necessary support during the mediation process, the mediator must refer his or her clients to consulting attorneys, therapists, accountants, and other experts. Because mediation initially involves the gathering of information and legal advice, the mediator should require each party to consult with an attorney of his or her choice and receive legal advice concerning his or her rights and obligations. Further, it is helpful for the mediator to involve an impartial accountant to assist the couple in understanding financial information and maximizing tax benefits. After pertinent information, such as budgets, business records, tax returns, and property valuations are gathered and advice obtained from experts, the parties can make informed decisions affecting their future.

During a mediation session, the mediator will not take sides or advocate positions. Instead, the mediator will ensure that both parties have sufficient information and legal advice from consulting attorneys and other experts to make informed agreements.

WHO CAN ACT AS A MEDIATOR?

Unfortunately for the public, anyone can advertise as a mediator. Typically, mediators have a professional background in law, social work, mental health, education or the clergy and are specially trained in mediation techniques, negotiation theories, and in communication and counseling skills. Because mediation is not regulated by the state of Utah, particular care should be given to choosing a mediator.

The best mediators are those who have a background in both family law and counseling. A divorce is a legal process and requires the mediator to be knowledgeable of family law issues. Because family law in Utah is constantly changing, due to legislative amendments and new case law from the Utah Supreme Court and the Utah Court of Appeals, a competent mediator must stay current on family law developments. During the mediation process, the mediator must understand Utah divorce law in order to frame the issues and discussion during mediation and to point out to the parties when legal advice is required prior to their entering into an agreement.

Further, many mediated cases require the mediator to oversee the dissolution of a marriage partnership that closely resembles a complex business. Consequently, a competent mediator must have a working knowledge of business organizations, real estate transactions, and accounting procedures. In a complex dissolution, a competent mediator must have an accessible network of experts that can assist the couple in valuing and dividing assets, rendering tax advice, and providing other specialized advice.

Moreover, a mediator must have basic counseling skills to assist couples in putting aside their personal emotional issues and in focusing them on problem-solving objectives. A competent mediator must be able to identify what therapeutic interventions may be appropriate and provide referrals in order to provide emotional support to a family. In addition, a good mediator will have knowledge and experience in identifying when a person is not emotionally able to make rational and fair agreements, due to a personality disorder or depression.

"Unfortunately for the public, anyone can advertise as a mediator. . . .Because mediation is not regulated by the state of Utah, particular care should be given to choosing a mediator."

A competent mediator will have the following minimum qualifications. A well-qualified divorce mediator will have at least 40 hours of divorce mediation training from a training program approved by the Academy of Family Mediators. The Academy of Family Mediators is the largest national professional organization of family mediators.[5] The best family mediators are associated with the Academy of Family Mediators or another national organization and continue to update their mediation training on a regular basis. Furthermore, the best family mediators are typically lawyers or therapists with a graduate level of training.

From an ethical standpoint, a mediator should be a disinterested party who has had no previous relationship with the couple, particularly in the capacity as an attorney or therapist. An attorney-mediator cannot act as a mediator and also represent one or both of the parties before the court.

WHAT HAPPENS IN DIVORCE MEDIATION?

After a couple contacts a mediator, the mediator meets one on one which each party to obtain background information and to determine whether mediation is the best option for the parties. The mediator educates the parties regarding the benefits and risks of mediation and discloses that mediation is a voluntary settlement process that is only binding on the parties after a settlement agreement and divorce decree are prepared by legal counsel, executed by the parties, and approved by the court. The mediator advises each party to consult with an attorney during the mediation process for the purpose of becoming fully informed regarding his or her rights and interests. Once the mediator ascertains that each party is willing to try mediation, an appointment for the first mediation session is set.

Prior to the first mediation session, the mediator will request the parties to consult with an attorney and to gather pertinent information, including budgets, financial statements, inventory lists of assets and valuations, appraisals, tax returns, and information on debts and obligations. If children are involved, the mediator may request the parties to complete a parenting questionnaire to assist them in resolving issues concerning their children.

During each mediation session, the mediator meets in a conference room with the parties without their respective attorneys. With the assistance of the mediator, the parties set an agenda, review gathered information, discuss legal advice received from attorneys, and resolve issues in an orderly fashion.

The mediator directs the parties in identifying needs and interests and identifying possible solutions that meet as many of the needs and interests of the parties as possible. The mediator discourages the parties from taking adversarial positions and seeking win-lose solutions. Once legitimate needs and interests are identified and verified, the mediator assists the parties in creatively designing a resolution to disputes concerning child custody, visitation, the amount and duration of alimony, child support, property division, debt allocation, and all other issues that may arise in a divorce or post-divorce context.

If appropriate, the mediator can co-mediate a session with an impartial expert, such as an accountant or therapist, that is chosen by the parties, for the purpose of resolving a particular issue. For example, a session with an accountant is helpful to discuss ways to maximize the tax benefits and minimize the adverse tax consequences of a dissolution in a manner that is fair and

agreeable to both parties. A co-mediation session with a child psychologist or mental health professional can be helpful in formulating a visitation schedule that is appropriate in meeting the emotional needs of children at their particular emotional stage of development.

At the conclusion of mediation, the mediator summarizes the terms of the parties' agreement in a document called a "Memorandum of Understanding." The Memorandum is reviewed by each party's attorney for any necessary changes. The substance of the Memorandum is incorporated by an attorney into a formal stipulation and a divorce decree.

Some divorcing parents desire to enter into a Parenting Agreement which memorializes agreements regarding their post-divorce relationship as parents. A Parenting Agreement can be a separate agreement or can be incorporated into a Memorandum of Understanding. Parenting Agreements address procedures for visitation; communication; the sharing of school information; long-distance parenting; the sharing of special expenses, such as summer camp, private school, cars, and college tuition; emergency medical treatment; and procedures for resolving post-divorce conflicts. Parenting Agreements state the principles chosen by the parents to guide them in meeting the best interests of their children.

A mediation of all the issues in a divorce will usually take between six and eight mediation sessions, each lasting approximately two hours. If there is a special need to quicken the pace of mediation, the sessions can be made longer or held within a shorter time span.

THE BENEFITS OF DIVORCE MEDIATION

Many couples are attracted to mediation because of the emotional benefit that comes from taking and keeping control of their divorce. These couples prefer to make the decisions regarding the terms of their dissolution and their future relationships with their children.

No divorce is easy, but the process of dissolving a marriage in a non-adversarial and cooperative problem-solving manner makes the divorce process easier to bear and leaves fewer scars on the divorcing couple and their children. Psychologist Judith S. Wallerstein is best known for her research concerning the long-term effects of divorce upon our society. She has concluded after reviewing the results of a long-term study of divorced couples and their children: "It would be hard to find any other group of children—except, perhaps, the victims of a natural disaster—who suffered such a rate of sudden serious psychological problems."[6] Nevertheless, Dr. Wallerstein has found that "Children tended to do well if their mothers and fathers, whether or not they remarried, resumed their parenting roles, managed to put their differences aside, and allowed the children a continuing relationship with both parents."[7]

The primary benefit of divorce mediation for divorcing parents is that the process enables a couple to put their differences aside and end their marriage without traumatizing themselves or their children through the divorce process. Mediation further provides parents an opportunity to improve their communication and cooperation skills. It becomes a precedent for problem-solving in the future. Divorce mediation encourages parents to end their marriage in an amicable fashion and build a new, working relationship as parents for the emotional benefit of their children.

Research has been done on the merits of mediation versus the traditional, adversarial divorce. Research has shown that compliance with mediated agreements is higher in comparison to imposed judgments. In addition, couples who mediate tend to agree to more generous time-sharing arrangements for the benefit of their children and tend to develop better relations with each other.[8]

Although the benefits of mediation far outweigh its disadvantages, mediation receives negative reactions in circumstances where one spouse comes to mediation disadvantaged in terms of bargaining strength, education, and financial sophistication. In such cases, mediators are trained to support such a spouse in improving his or her bargaining strength. Not surprisingly, research has shown that mediation can have an empowering effect upon such disadvantaged spouses.[9] For example, the mediation process will require a homemaker who is legally and financially unsophisticated to learn about her legal rights, her financial condition, to prepare a budget, and to make financial choices. Because she must educate herself and develop new skills, she can emerge from the process as a stronger, more informed person with higher self-esteem. Nevertheless, a mediator will terminate mediation if it appears that one spouse is too overwhelmed by the process and lacks the personal abilities and strength to represent him or herself.

Mediation also gives an economically dependent spouse the opportunity to dissolve a marriage in a setting that is more likely to produce a fair settlement agreement. Recently, the Utah Task Force on Gender and Justice published its report to the Utah Judicial Council and concluded that men and women do not have equal access to the courts to resolve domestic disputes. The barriers to court access are primarily financial and usually affect women who are economically dependent upon their husbands. In such cases, economically dependent spouses often agree to be represented by their spouse's attorney because their spouse will pay the cost of legal services. Often, these economic dependent spouses are not aware of the inherent conflict and agree to unfavorable court orders.[10]

Mediation of domestic disputes gives men and women an opportunity to solve disputes in a context where the financial barrier disadvantaging one spouse is eliminated. In mediation, both spouses are given an equal opportunity to disclose their interests and needs and to gain sufficient information upon which to make fair agreements.

One of the most celebrated benefits of divorce mediation is that the cost of divorce mediation is less than litigating a traditional divorce. A mediator's hourly fee will range between $70 to $100. Typically, a mediator will require payment of mediation fees prior to each session. Mediators tend to refer their clients to consulting attorneys who agree to charge on an hourly basis and who do not require a retainer.

In addition, divorce mediation is strictly confidential. The mediator is obligated by ethical codes of conduct to keep everything revealed in a mediation session strictly confidential. If a couple is successful in mediating a settlement, the couple's divorce case will not end up in a public court proceeding. If mediation is unsuccessful, neither party can subpoena the mediator to testify in court or disclose notes or other documentation prepared during the mediation process.

WHAT ARE THE RISKS OF MEDIATION?

Mediation is only appropriate in cases where the parties are able to negotiate a fair settlement between them. The mediator is trained to ensure that both parties have access to resources to assist them in making informed decisions and will assist the parties to find a solution to the issues in dispute. However, it is possible that the parties can strike a deal that is unfair to one spouse.

Divorce mediators are sensitive to the fact that power imbalances exist in many marriages and are trained in techniques that serve to minimize these imbalances. Divorce mediation provides two important safeguards that serve to protect a weaker spouse.

First, the mediator has a duty to intervene and protect one spouse from entering into an unfair agreement. The American Bar Association has implemented professional standards for divorce mediation which direct mediators to intervene in settlements in order to ensure fairness. The ABA's Standards of Practice for Lawyer Mediators in Family Disputes states that "The mediator has a duty to suspend or terminate mediation whenever continuation of the process would harm one or more of the participants."[11] Furthermore, these standards state that "The mediator has a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge."[12]

Second, a good mediator will set up a conservative mediation practice that will require both parties to consult with attorneys during the mediation process. Having each party's attorney review the Memorandum of Understanding and participate in drafting the divorce pleadings adds a double layer of protection for both parties.

WHEN IS MEDIATION NOT APPROPRIATE?

Divorce mediation is not appropriate in three types of cases. A mediator should not mediate a dispute where one of the parties cannot make rational agreements because he or she is severely depressed or otherwise psychologically impaired. Further, a mediator should not mediate a dispute where it appears that one spouse is pathologically angry and is motivated to "get even" with the other spouse. Finally, unless the mediator is specially trained, the mediator should not mediate a dispute where there has occurred long-term physical or severe emotional abuse in the marriage.

In my mediation practice, I usually can tell if one or both of the spouses are unsuited for mediation during my initial one-on-one consultation or during the first half-hour of a mediation session. Because I have structured my mediation practice in a conservative manner, I intervene immediately and terminate mediation if I feel mediation is not the best alternative for the couple in dissolving their marriage. Occasionally, a couple can successfully mediate child custody, visitation, and child support issues, keeping the best interests of their children in mind, but cannot mediate issues concerning alimony and marital property distribution because of intense hostility. In such cases, I will mediate issues concerning the couple's children but will refer the couple to attorneys to finish the battle.

WHEN IS DIVORCE MEDIATION APPROPRIATE?

Divorce mediation is the best alternative to resolving a domestic dispute when both parties are committed to the concept of mediation and are willing to try it. Such enlightened couples usually desire to mediate their dispute because they have an interest in amicably working out their differences and, if they have children, desire to develop a working relationship as parents.

If a couple desires to implement a joint custody arrangement, mediation is the best forum for establishing ground rules and procedures for implementing the arrangement. My experience has convinced me that joint custody arrangements have a better chance for success if mediation occurs between the parties. If a couple mediates their joint custody and time-sharing arrangement, they establish procedures for communication and for modifying time-sharing and other agreements on their own without the necessity of retaining attorneys.

HOW SUCCESSFUL IS DIVORCE MEDIATION?

Based upon available studies, mediation appears to be a successful problem-solving exercise for most couples during their divorce process, especially when children are involved. However, research confirms that mediation does not work for everyone. According to a recent California study, 76 percent of couples entering mediation were able to resolve all or some of the issues arising in their divorce. This study noted, however, that 26 percent of couples entering mediation were not able to resolve anything through mediation.[13] Other research has concluded that couples can resolve almost 70 percent of child-related disputes when such disputes are assigned to mediation by the court.[14]

SHOULD COURTS IN UTAH IMPLEMENT A MEDIATION PROGRAM?

More and more courts throughout the nation are implementing court programs that refer divorcing couples or parents with post-divorce conflicts to mandatory mediation. Such programs recognize that mediation can supplement the adversarial process and achieve better long-term results for the parties and their children. In my opinion, a mandatory mediation program for the resolution of issues involving children, such as child custody and visitation, would provide assistance to state court judges and domestic relations commissioners in resolving these contested issues and reducing the acrimony between parents.

The domestic relations commissioner system in Utah has reduced the expense and delay of resolving domestic issues and has been a welcome improvement to the adversarial system. However, a domestic relations commissioner functions as an arbitrator[15] within an adversarial system. The commissioner system does not provide a forum for the parties to learn how to problem-solve with each other as parents outside the adversarial process. At the present time, the courts of Utah only provide solutions to domestic disputes within an adversarial system.

Courts in other states have established mediation programs to assist couples in learning how to work together as parents. Because virtually all divorcing couples lack the ability to work together, the mediation experience becomes essential to teaching these couples new relationship skills as parents and problem-solving techniques.

In January 1990, the Fourth Judicial District Court for Ada County in Boise, Idaho implemented a mandatory mediation program at the pre-trial and post-trial stages in cases where children were involved. As of July 23, 1990, the court's office of mediation recorded 77 mediations which involved child custody and visitation matters. Of those mediations, 51 percent of the cases had been settled and 25 percent of the cases were still in the mediation process on July 23, 1990.[16]

In a front page article, the *Houston Post* recently reported on the success of Dallas County's court-sponsored mediation program in Dallas, Texas.[17] According to the *Houston Post* article, the Dallas County courts credit mediation with clearing dockets, saving county tax dollars, and sparing the parties' children from the trauma of divorce litigation.[18] At the present time, Houston, Texas does not have a court-sponsored mediation program. The *Houston Post* quoted Judge Hartman, a Dallas County judge, who wished to give a message to the Harris County judiciary in Houston: "Mediation is effective, it will settle most of your custody cases and you will be personally responsible for protecting numerous children from a life of distress. It's a risk, but it's the right thing to do."[19]

CONCLUSION

Divorce mediation is becoming an increasingly attractive alternative to litigation. Based on current public sentiment, divorce mediation will probably become as common in Utah as it is in other areas of the country. Because Utah has one of the highest rates of divorce in the United States, divorce mediation will likely become commonplace in Utah within the next five years.

Because of divorce mediation's increasing popularity, it is important for attorneys and judges to understand the mediation pro-

cess as well as its risks and advantages. Until mediators are regulated by the state of Utah, attorneys must carefully screen mediators before referring one to a client. Divorce mediation can result in a significant emotional benefit to a divorcing couple and their children and thereby reduce the traumatizing effects of divorce in our community.

[1] *Deseret News*, June 17, 1990, at B2, col. 1.

[2] Cal. Civ. Code. §4607 (West 1983); Ill. Ann. Stat. ch. 37 para. 851-856 (Smith-Hurd); Me. Rev. Stat. Ann. 18 §636 (1990 Supp.); Or. Rev. Stat. §107.755-785 (1989).

[3] A recent Dan Jones Poll commissioned by the Doing Justice Project revealed that 82 percent of 300 attorneys favored alternatives to courts handling divorce cases.

[4] Although mediation affords the parties an opportunity to have more hands-on control of their settlement, attorneys must be involved in providing legal advice and in preparing legal documents for filing with the court. Certain issues, such as the amount of child support, must be resolved pursuant to state law mandates. The level of child support is determined in Utah according to the Uniform Civil Liability for Support Act contained in Utah Code Ann. §§78-45-1 to -78-45-9 (1987, as amended).

[5] The Academy of Family Mediators provides support, training and guidance for practicing mediators and provides information about mediation to the public. The Academy provides a free referral service to the public. The Academy's address is P.O. Box 10501, Eugene, OR 97440 and telephone number is (503) 345-1205.

[6] Judith S. Wallerstein, "Children After Divorce," *New York Times Magazine*, January 22, 1989, p. 20.

[7] *Id.*

[8] In 1988, the New Hampshire Mediation Program studied a group of divorced couples, half of whom mediated their divorce and the other half of whom had litigated their divorce. The groups were comparable in terms of income, age, and education. Thirty-one percent of the traditional group returned to court to relitigate custody and support issues within five years after the divorce; only 12 percent of the mediation group returned for modification. Fourteen percent of the traditional group reported some late child support payments and 20 percent never received any payments; of the mediation group, fewer than 1 percent experienced late payments and none had missed a payment. Forty-one percent of the traditional group reported "cordial" relationships between divorced couples as compared to 71 percent of the mediation group. *See* ADR Report, vol. 2, September 1, 1988, p. 305.

[9] Joan B. Kelly and Lynn Gigy, "Divorce Mediation: Characteristics of Clients and Outcomes," in K. Kressel and D. Pruitt, *Mediation Research: The Process and Effectiveness of Third-Party Intervention*, (Jossey-Bass, San Francisco, 1989), p.25 [hereinafter referred to as "Characteristics"].

[10] Utah Task Force on Gender and Justice, Report to the Utah Judicial Counsel, March 1990, p. 11.

[11] "Standards of Practice for Lawyer Mediators in Family Disputes," *Summary of the Actions of the House of Delegates, Reports of §§22-23*, American Bar Association, 1984, Standard V.

[12] *Id.* Standard IV

[13] Kelly and Gigy, "Characteristics," pp. 17, 19, 20, 26.

[14] C. Camplair and A. Stolberg, "Benefits of Court-Sponsored Divorce Mediation: A Study of Outcomes and Influences of Success," *Mediation Quarterly*, Vol. 7 (Spring 1990), p. 208.

[15] From a theoretical standpoint, arbitration and mediation differ significantly in their respective approaches. Arbitration is usually a mandatory process that involves the submission of a dispute to a quasi-judicial official or impartial arbitrator in an evidentiary hearing for a "win-lose" type of decision. Arbitrators function as judges in litigation—their primary function is to make decisions about disputes, based on evidence presented to them by the parties' attorneys, and render an award to one party as against the other. In contrast, in mediation the parties are the decision-makers. Mediators serve primarily to assist the parties in negotiating a "win-win" solution. Mediators may suggest solutions to the parties during a mediation, but they are never the decision-makers.

[16] These statistics were provided by the Director of Mediation Services, Ada County Courthouse, Boise, Idaho.

[17] The *Houston Post*, October 14, 1990, at A1 and A14.

[18] *Id.* at A14, col. 1.

[19] The *Houston Post*, October 14, 1990, A14, col. 4.

Commission Highlights

During its regularly scheduled meeting of September 28, 1990, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the two July meetings and the August meeting were approved.

2. Jim Swenson, of the Member Benefits Committee, reported on the AutoNet program which had previously been conceptually approved by the Commission. The Commission voted to decline undertaking the program, due to the fact that the timing would not be beneficial to the Bar right now.

3. President Greenwood reported that the Client Security Fund Committee has reviewed and approved the new Rules for the Fund and is now awaiting the Commission's approval.

4. President-Elect Davis distributed the proposed FY-91 budget to the Commission. Former Interim Executive Director Florence explained account numbers on the budget. Mr. Florence indicated that in accordance with the Supreme Court order to pay off the short-term debt, all aspects of the budget must be closely examined and watched. He reported that it would be possible that much of the short-term debt could be paid back after the next dues collection. Mr. Florence also suggested to the Commission that the operating agreement between the Law and Justice Center and Utah State Bar should possibly be amended.

5. The Commission moved into Executive Session for the discussion of staff salaries.

6. The Bar Commission discussed in detail the budget as proposed by the Executive Committee. After lengthy discussion, the Commission made several changes and authorized the Executive Committee to send the proposed budget to the membership.

7. The Commission discussed the Litigation Report and an appearance was made by Robert Rees.

During its regularly scheduled meeting of October 26, 1990, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the September 28, 1990 meeting were approved.

2. David R. Hamilton, Client Security Fund Committee Chair reported on the Client Security Fund Committee's last meeting. He reported on the claims that were considered and gave the Committee's recommendations to the Commission. After having reviewed the Committee's recommendations of claims, the Commission approved payments of 19 claims, totalling $13,373.25.

3. Bar Counsel Trost reported on recently concluded litigation. Mr. Trost expressed a concern with the increasing numbers of formal complaints that are filed with the Office of Bar Counsel and indicated that there will be a rewrite of the Rules of Professional Conduct.

4. To provide special accommodations to handicapped applicants, the Commission approved the assessment of a flat rate of $25 on all new Bar Exam applicants.

5. The Commission reviewed and made minor changes to the Client Security Fund Rules.

6. President Greenwood reported on the 1990 Annual Meeting expenses, stating that the Bar ultimately made a small profit.

7. President Greenwood also reported that the Law and Justice Center received a grant from the Utah Bar Foundation.

8. President Greenwood reported on the Supreme Court Task Force on the Management and Regulation of the Practice of Law. She indicated that on November 16, 1990 the Bar will be making a presentation on Bar programs and services.

9. Commissioner Randy Dryer was reappointed to the Judicial Performance Evaluation Committee.

10. The Commission moved to charge attorneys who are speakers or panelists at the Annual or Mid-Year Meetings half of the registration fee instead of granting full waivers as had been the informal practice in the past.

11. Executive Director Baldwin reported on the current Grant Thornton audit and the Bar's commitment to implement their recommendations.

12. President-Elect Davis distributed the new chart of budget accounts for the Commission's review.

13. Kim Luhn and Bryan Larson, Law Day Committee Chairs, reported on their program. Mr. Larson presented an award to the Bar from the American Bar Association for public service and notable achievement in sponsoring Law Day U.S.A. programs.

14. Past President Chamberlain reported on the consideration of the proposed legislative Judicial Reform package.

A full copy of the minutes of these and other meetings of the Board of Bar Commissioners is available for inspection by members of the Bar and the public at the Office of the Executive Director.

Discipline Corner

DECEMBER 1990
(Discipline for September 1990)

PRIVATE REPRIMANDS

For violating Rule 8.1(b) an attorney was privately reprimanded for knowingly failing to respond to the Office of Bar Counsel and the Screening Panel of the Ethics and Discipline Committee in connection with a disciplinary matter. The attorney failed to appear before the Screening Panel and the Panel at that time voted to subpoena the attorney. The attorney failed to respond to the subpoena. After approximately 10 months, the attorney provided documentation to the Screening Panel which responded adequately to the substantive allegations of the complaint.

For violating Rule 8.1(b) an attorney was privately reprimanded for failing to respond to the disciplinary process. Over a period of 12 months, the Office of Bar Counsel, by written correspondence, requested on numerous occasions that the attorney respond to the disciplinary process. On each occasion the attorney failed to respond. After considering the matter, the Screening Panel requested that the attorney submit monthly status reports regarding the underlying complaint. The attorney failed to submit the monthly status reports.

For violating Canon 6, DR 6-101(A)(3) and Canon 7, DR 7-101(A)(1) and Rules 1.3 and 1.4(a) an attorney was privately reprimanded for agreeing in November of 1987 to represent his client in a Petition to Modify a Decree of Divorce regarding child support, failing to file the petition until February of 1988 and subsequently failing to appear at the Order to Show Cause hearing in April of 1988. The attorney failed to schedule a second Order to Show Cause hearing until September of 1988 after which hearing, the attorney failed to respond to his client's numerous requests for information resulting in the complaint against the attorney in April of 1989. Trial in the child support issue was finally set for June of 1990.

Bar Will Hold Mid-Year Meeting March 14 to 16 in St. George

The 1991 Mid-Year Meeting of the Bar will return to St. George, Thursday, March 14 through Saturday, March 16. According to Ogden attorney Dave Hamilton, Chairman of the 1991 meeting, the major thrust will be to provide useful continuing legal education for Utah attorneys.

"Our primary focus in this meeting will be to offer varied, interesting CLE. We have asked several of the Bar's sections to participate on the committee as we plan our agenda so that Bar members will have timely, practical presentations in St. George to help them fulfill their MCLE obligations," Mr. Hamilton said.

In addition to the educational component, the Mid-Year Meeting in St. George, headquartered at the Holiday Inn, will offer a full array of activities, including golf, tennis and socials. The Holiday Inn has been recently expanded, with additional guest rooms and meeting facilities.

Registration materials will be mailed to Bar Members after the first of the year.

Mark Your Calendars for the
1991 Meetings of the Utah State Bar
Mid-Year in St. George
March 14 to 16
Annual Meeting in Sun Valley July 3 to 6

Claim of the Month

Lawyers Professional Liability

ALLEGED ERROR AND OMISSION

The Insured neglected to obtain certified copies of the signed findings within a reasonable period after the judgment.

RESUME OF CLAIM

Insured attorney successfully defended his client in a Bench only trial. The court's final judgement referred to the "signed findings of fact and conclusions of law in file." Several months later the presiding judge died. In preparing his appeal, the plaintiff attorney discovered there were no signed findings in the court file. The judge assigned to the case refused to sign the deceased judge's findings and ultimately the judgment was vacated. The Insured attorney again represented his client in a re-trial, this time before a jury, and the plaintiff won a verdict in excess of $1,000,000.

HOW CLAIM MAY HAVE BEEN AVOIDED

The Insured should have obtained a complete copy of the judgment, including the signed findings, soon after verdict. In the real world, parts of complete judgments may not be instantaneously available. Thus, insureds should make written requests to clerk for those papers. Had this Insured done so, they may have discovered the findings were unsigned and the problem could have been corrected by the trial judge.

HOW THE DAMAGE COULD HAVE BEEN MINIMIZED

The Insured, having discovered that no signed findings existed and that the judge was now deceased, should have withdrawn from the case and advised his carrier of the potential for a claim against him. Insured and carrier could then have monitored the ongoing litigation and, in particular, any settlement offers from plaintiff. The Insured and the carrier would then have had the option of offering to fund a settlement. If their former client refused such an offer, the Insured would have been in a strong position to argue that their liability, if any, in the malpractice suit was limited to the amount at which the underlying case could have settled.

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

Upcoming Meetings of the Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law

Date: Friday, December 7, 1990
Time: 12:00 to 3:00 p.m.
Place: Administrative Office of the Courts

Date: Friday, January 4, 1991
Time: 12:00 to 3:00 p.m.
Place: Administrative Office of the Courts

Date: Friday, January 18, 1991
Time: 12:00 to 3:00 p.m.
Place: Administrative Office of the Courts

The Administrative Office of the Courts is located at 230 S. 500 E., Suite 300, Salt Lake City, Utah.

Attorney General's Office to Present CLE Program

The Utah Attorney General's Office is presenting a CLE program entitled "The Utah Constitution" on Thursday, December 13, 1990, at 9:00 a.m. at the Utah Law and Justice Center. The three-hour program will feature Jody Burnett of Snow, Christensen and Martineau, who will discuss governmental immunity; Ron Boyce of the University of Utah College of Law, who will address confessions and search and seizure law; and Eugene Jacobs of the BYU Law School, who will discuss the relationship between state and local governments. MCLE approval is being sought. For more details and to register for the program please call Shauna Herrera at the Attorney General's Office, 538-1016, by December 11, 1990.

SCOTT M. MATHESON AWARD

In remembrance and appreciation of his significant contribution to Law-Related Education in the state of Utah, the Utah State Bar Committee on Law-Related Education and Law Day has created a Scott M. Matheson Award to be given annually on Law Day to an individual who typifies everything Scott represented—an active, concerned, contributing citizen.

Lawyers, Secretaries and Court Personnel Food and Clothing Drive

The Utah Bar Association is conducting a food and clothing drive for the homeless with an intended drop of donated food and clothing at the Law and Justice Center on December 14, 1990. All lawyers will be receiving a "flier" with more particulars. Your support is greatly needed. Those interested in helping, please call any of the following:

Leonard W. Burningham, Esq., 363-7411
Paul T. Moxley, Esq., 537-5555
Denise A. Dragoo, Esq., 531-8900
Martha M. Pierce, Esq., 533-6800
Jane R. Conard, Esq., 530-3433
Daniel T. Ditto, Esq., 521-3680
Penny Dixon, 359-0999
Ron Gibson, 533-6371
Kaesi G. Johansen, 531-9077

Salt Lake Law Firm Leads Trade Mission to USSR

A private business trade mission comprised of 10 business professionals will leave Monday, December 5, for Soviet Georgia from Salt Lake City.

The idea for the trade mission was born after separate parties in the U.S. and USSR learned of each other's business initiatives. In the U.S., Woodbury, Jensen, Kesler & Swinton, P.C., a Salt Lake City law firm, had begun efforts to sponsor a Soviet lawyer exchange to Utah. At the same time, the business arm of the USSR Georgian Academy of Sciences (Ikalto) had initiated similar efforts. As a result, the law firm agreed to sponsor the trade mission with Ikalto as its host.

"The focus of our exchange is to explore business options and to conduct preliminary discussions," said James U. Jensen, chairman of Woodbury, Jensen, Kesler & Swinton. "We hope to engage in negotiations for purchasing and joint venture propositions, as well as our development of business relations and contacts for further trade and investment opportunities in the republic of Georgia."

Unlike many foreign exchanges, Jensen said, this one is not sponsored by any government entity. The mission is funded through private partners and businesses, including Amirani Corp., a Utah-based trading company, Ikalto, and Woodbury, Jensen, Kesler & Swinton.

"Our country is efficiently developing in the field of shares and exchange business," said Dr. Teimuraz V. Gamtsemlidze, president of Ikalto. "My association has already set up several joint stock societies, and now a Stock Exchange Bank is being organized."

The Georgian republic, a bastion of free thinking and business trading in the Soviet Union, is active in establishing an independent economic course with respect to private property, banking support provisions and promotion of free markets.

The trade mission agenda includes Soviet-led lectures and discussion on infrastructures for Georgian and Soviet business practices. In turn, U.S. professionals will present their expertise in high-tech businesses, market research, cost accounting, joint ventures, and payment alternatives for trade with a non-convertible currency.

For additional information, interested parties can contact Jensen (upon his return), or the law firm's chairman of its International Section, Dwight B. Williams, at Woodbury, Jensen, Kesler & Swinton, P.C., 265 E. First S., Suite #300, Salt Lake City, UT 84111, or by calling (801) 364-4649.

The law practice of Woodbury, Jensen, Kesler & Swinton, P.C. emphasizes international commerce, corporate, technology, real property, litigation, bankruptcy and privacy law. The firm has offices in Salt Lake City and Ogden, Utah, and Washington, D.C.

The Utah Volunteer Lawyers Project

The UVLP provides legal assistance in areas other than family law, addressing such basic survival needs as shelter, income maintenance programs, and health care. In addition, lawyers have volunteered to provide assistance with consumer, insurance, and tort defense cases. If you do not practice in any of these areas, Utah Legal Services provides CLE training, co-counsel assistance and practice manuals. A need also exists for community education presentations throughout the state.

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

Wendell P. Ables
John A. Adams
Stanley S. Adams
Michael Adkins
Michelle Ahlmen
Samuel Alba
Andrea C. Alcabes
Steven F. Alder
Jane Allen
Dudley M. Amoss
David S. Andersen
David C. Anderson
John R. Anderson
John W. Anderson
Kevin E. Anderson
Lyle R. Anderson
Mark H. Anderson
Robert M. Anderson
Ross C. Anderson
David J. Angerhofer
Val R. Antczak
Jeffrey W. Appel
David K. Armstrong
Frank Armstrong
Jan W. Arrington
Blake S. Atkin
Robert D. Atwood
Lois A. Baar
Bruce E. Babcock
James H. Backman
Wesley M. Baden
P. Bruce Badger
J. Michael Bailey
Steven R. Bailey
S. Junior Baker
Spencer Ball
Judy D. Barking
Brian M. Barnard
Edwin C. Barnes
Gary L. Barnett
W. Scott Barrett
Wynn Bartholomew
Paul J. Barton
Douglas F. Bates
Wendy G. Bates
W. Cullen Battle
Sidney G. Baucom
Weston L. Bayles
G. Rand Beacham
John C. Beaslin
Dean H. Becker
Sue Bellman
Paul M. Belnap
Robert A. Bentley
David J. Berceau
Daniel L. Berman
Edwin H. Beus
Terri C. Bingham
David J. Bird
David L. Bird
Richard L. Bird
Nelda Bishop
Willard R. Bishop
David O. Black
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Brent A. Bohman
Mikel M. Boley
Joseph H. Bottum
Bradley W. Bowen
David R. Bowen
Laura L. Boyer
Theodore Boyer Jr.
R. William Bradford
Edward K. Brass
Robert B. Breeze
Elizabeth King Brennan
David K. Broadbent
James R. Brown
Marilyn M. Brown
Olga A. Bruno
J. Scott Buehler
Walter F. Bugden
Herschel Bullen
Alice R. Burns
Dana D. Burrows
Rex B. Bushman
Cass Butler
Don L. Bybee
John M. Bybee
Martha C. Byrnes
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Randall J. Call
Cynthia Campbell
Richard W. Campbell
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T. Quentin Cannon
Kelly Cardon
Michael R. Carlston
Francis J. Carney

Taylor D. Carr
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Patrick T. Casey
Cynthia K. Cassell
Donn E. Cassity
David J. Castleton
Glen T. Cella
Thomas E. Cerruti
Ken Chamberlain
Richard K. Chamberlain
Sam F. Chamberlain
Joseph M. Chambers
R. Steven Chambers
Michael L. Chidester
Brent R. Chipman
James L. Christensen
M. Kay Christensen
Patricia W. Christensen
Scott W. Christensen
Tom Christensen
Val John Christensen
Helen E. Christian
Gary L. Chrystler
Howard Chuntz
Lynn J. Clark
Scott W. Clark
Maureen L. Cleary
Sue W. Click
Craig Coburn
Kent H. Collins
Hugh W. Colton
Rand L. Cook
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Jeffery Cottle
Terry M. Crellin
Michael W. Crippen
Stephen Crockett
Legrand R. Curtis
Martin W. Custen
L.G. Cutler
Ronny L. Cutshall
Virginius Dabney
Robert Dahle
Christopher Daines
Suzanne M. Dallimore
Donald L. Dalton
Daniel Darger
Bert L. Dart
David H. Day
Michael Deamer
Kathryn Denholm
Harold J. Dent
David Dillon
Amy Dishell
Graham Dodd
Gary A. Dodge
Sharon A. Donovan
Dale M. Dorius
Joy Douglas
William W. Downes
Carolyn Driscoll
Mary Duffin
Clifford V. Dunn
James M. Dunn
Laura B. Dupaix
Teri Eales
David Eckersley
Keith E. Eddington
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James M. Elegante
Stephen B. Elggren
Dean Ellis
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Les F. England
Peter M. Ennenga
Maria H. Eppich
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Fred D. Essig
John T. Evans
Michael Evans
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James H. Faust
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O. Brenton Rowe
Stephanie Saperstein
Harry Souvall
Mark Stringer
C. Van Drunen
Lamar J. Winward
Steven E. Wright

WANTED
MULTITALENTED
ATTORNEYS

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

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

NAME _____

ADDRESS _____

TELEPHONE #s _____

AREA OF OUTSIDE EXPERTISE _____

_____

_____

_____

HOW EXPERTISE WAS GAINED AND/OR UTILIZED _____

_____

_____

_____

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

Notification From the Department of Financial Institutions

The Bar has been notified by the Utah Department of Financial Institutions that it has been receiving inquiries about the legality of lawyers providing financing and charging interest on unpaid billings. The Department has informed those inquiring that the practice is allowed provided the party granting credit has met the notification requirements set forth in the Utah Consumer Credit Code.

The Department of Financial Institutions has requested the Bar to advise our members that pursuant to Utah Code Annotated, §70C-8-201 et seq., notification is required if a party is extending credit to Utah citizens for personal, family or household purposes on an installment basis and/or is charging interest. Interest would include service or carrying charges.

Questions concerning this matter may be referred to the Utah Department of Financial Institutions at 538-8834.

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2 · 5 · 7
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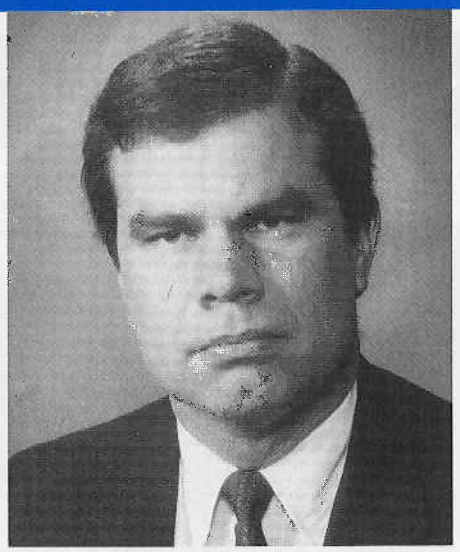
CASE SUMMARIES



By Clark R. Nielsen

STRICT LIABILITY—PRODUCT SALE

Imposition of strict liability requires the sale of a product which creates an unreasonably dangerous situation for the user. Defendant's sale and installation of a spray-ball to clean the inside of a milk tank was not defective so as to cause plaintiff's injuries. Defendant merely sold and installed the spray device. Defendant did not design an entire cleaning system that might require the additional design of safety features not part of the non-defective product but involved in plaintiff's use of the product.

Conger v. Tel Tech, Inc., 143 Utah Adv. Rep. 21 (Utah Ct. App., Sept. 12, 1990) (J. Garff).

ORAL MOTION TO AMEND—ADMIN. RULE 4-501

The trial court erred in amending a four-year-old finding when the issue was first raised at a post judgment hearing. An oral motion in open court to amend a formal finding, made without prior notice, fails to comply with Utah R. of Jud. Admin. 4-501. The purpose of Rule 4-501 is to assure timely notice of the nature of the issues before the court and thereby provide both parties with timely, adequate notice and an opportunity to be heard in a meaningful way.

Cornish Town v. Koller, 143 Utah Adv. Rep. 3 (Utah, Sept. 19, 1990) (C. J. Hall).

CHILD SUPPORT MODIFICATION

Absent a finding of material change of circumstance, the court may not modify child support payments that were originally based upon a stipulation adopted by the court prior to July 1, 1989. (Interpreting child support guideline statute U.C.A. §78-45-7.2(1) (1990)). The trial court improperly limited husband's applicable earnings to his nine-month teaching contract while at the same time criticizing his wife for not supplementing her nine-month income with a second summertime job. The appellate court also refused to sanction husband's unilateral decision to reduce his child support payments from the stipulated amount incorporated into the initial decree. The court of appeals reversed the trial court's modification of child support. Also, note that an untimely motion for summary judgment may still be considered in the appellate court's discretion.

Bailey v. Adams, 143 Utah Adv. Rep. 39 (Utah Ct. App., Sept. 11, 1990) (Per Curiam); *see also Durfee v. Durfee*, 140 Utah Adv. Rep. 42 (Utah Ct. App., Aug. 9, 1990) (discussing child support guidelines).

COSTS AND ATTORNEY FEE AWARDS

When wife's first appeal was deemed frivolous the court of appeals remanded for an award of double costs. Upon remand, the trial court improperly equated an award of double costs as an award of double attorney fees. The trial court's award to husband of $6,600 for double attorneys fees was reversed. This *per curiam* opinion clarifies the current Utah R. App. P. 33(a) and 34 that costs do not include an award of attorneys fees.

Barker v. Barker, Utah Ct. App. (Sept. 19, 1990) (Per Curiam unpublished).

PARENTAL RIGHTS, TERMINATION

Failure to prevent stepmother's abuse of daughter may constitute a sufficient basis to terminate the father's parental rights for unfitness. The stepmother had "picked on" and abused the youngest of appellant's children over several years. On several occasions the father was made aware of the mother's physical and emotional abuse through neglect complaints, state intervention and counseling sessions. Father had adequate notice of his parenting deficiency in failing to halt his wife's abusive pattern. Adequate notification need not be formal.

To terminate parental rights for unfitness, the conduct must substantially depart from the norm and the unfit parent must consistently refuse to render proper parental care. For its part, the state is not required to attempt rehabilitation when there is a consistent pattern of physical abuse or neglect and when rehabilitation efforts appear futile. Father had no standing on grounds of social worker-client privilege to object to the testimony of the worker regarding his inter-

views with the stepmother.

State in re L.D.S., 142 Utah Adv. Rep. 31 (Utah Ct. App., Aug. 31, 1990) (J. Greenwood).

ADMINISTRATIVE LAW—INDUSTRIAL COMMISSION

In hearing worker compensation claims, the Industrial Commission has implied power to dismiss a claim "without prejudice" for failure of the claimant to respond to Commission requests or directives. The statutory language of U.C.A. §63-46b-3(3)(d) [U.A.P.A. §3(3)] permits the commission to notify a claimant that further proceedings are required to determine the claim. The appeals court panel held that subsection allowed for dismissal without prejudice. J. Bench dissented, claiming that the majority's interpretation of U.A.P.A. §3 was too strained and contrary to *Olympus Oil v. Harrison*, 778 P.2d 1008, 1010 (Utah Ct. App. 1989). This decision, allowing dismissal without prejudice, appears to be premised more upon a concern for the efficiency and practicalities in administrative proceedings, and not so much upon the legislative intent of §63-46b-3(3).

Doubletree, Inc. v. Industrial Comm'n., Utah Ct. of Appeals, No. 89 0534-6-CA (Aug. 31, 1990) (J. Orme, with J. Bench dissenting).

RULE 26(b)—DISCOVERY AND WORK-PRODUCT PRIVILEGE

Defendant could not object to the use of internal office memoranda as discovery tools when the memoranda had been in plaintiff's possession for over a year and had been used in five separate depositions without objection. Defendant was dilatory in asserting a "work-product" privilege to the comments.

The memoranda by defendant mining company engineers in response to a company management request are not "work product in anticipation of litigation" because there was no attorney involvement in their preparation. Although Rule 26(b)(3) U.R. Civ. P. does not expressly require an attorney's involvement, that factor should be weighed in determining whether the questioned document was written "to assist in pending or impending litigation." An inquiry to determine whether a document was prepared in anticipation of litigation should focus on the "primary motivating purpose behind the creation of the document."

Reviewing conflicting federal/state authorities of the necessity of "attorney involvement" in balancing a claim of "work-product privilege," the court concluded that attorney involvement is only a factor to be weighed. Consequently, the absence of an attorney's involvement is "strongly persuasive" that the discovery material was not prepared in anticipation of litigation. The work-product privilege should be distinguished from the attorney-client privilege. However, either privilege may be waived by inadvertent disclosure to the adverse party. Suppression of the documents was reversed.

Gold Standard, Inc. v. American Barrick Resources Corp., 144 Utah Adv. Rep. 3 (Utah, Sept. 21, 1990) (J. Stewart).

CHILD CUSTODY

(1) A husband, who is not the natural father of a child born to the wife during the marriage, is entitled to a hearing regarding the child's custody as to whether, in the child's best interest, the husband may be awarded custody. (2) The presumption that the husband is also the natural father of a child born during the marriage is rebuttable.

In Re J.W.F., Schoolcraft, 145 Utah Adv. Rep. 17 (Oct. 19, 1990) (J. Zimmerman) (Reversing Ct. Appeals, 763 P.2d 1217).

JUDGMENTS, BANKRUPTCY STAY

The issuance of an automatic stay in bankruptcy does not preclude the renewal of a judgment. The renewal of judgment is not an attempt to collect or enforce a judgment but only an effort to maintain the status quo.

Barber v. The Emporium Partnership, 145 Utah Adv. Rep. 10 (Oct. 16, 1990) (J. Durham).

CRIMINAL—THEFT

The defendant's failure to comply with his contractual obligation by failing to pay first mortgage payments does not amount to criminal theft.

State v,. Burton, 145 Utah Adv. Rep. 37 (Utah Ct. App., Oct. 16, 1990) (J. Orme).

CRIMINAL—CONDITIONAL GUILTY PLEA

A "conditional guilty plea," entered preserving the right of appeal, preserves for appeal only that issue specifically reserved and acknowledged by the court and parties at the time the plea is entered. A defendant may not "reserve" his right to appeal a specific issue and then raise other issues not similarly preserved. *State v. Brassell*, Utah Ct. App., No. 890305-CA (Oct. 10, 1990) (J. Orme-Unpublished).

Toward Eradication of Delay in the Tenth Circuit Court of Appeals

By Stephen H. Anderson
U.S. Circuit Judge

Suicide is a preferred alternative to the law's delay, among other "fardels" which mortals bear, Shakespeare wrote in Hamlet's soliloquy. Four hundred years later the law's delay still seems to be among "the thousand natural shocks that flesh is heir to," although talk of suicide seems to have tapered off. More likely nowadays it's talk of legislation, administration and, in some instances, of doing something really satisfying and Shakespearean to a judge or two (or lawyer or two).

Thus, in 1975 Congress passed the Speedy Trial Act, requiring defendants to be tried within 70 days, with certain exceptions. 18 U.S.C. 3161(h). That worthy edict has indeed reduced delay in criminal prosecutions. It has also resulted in a mandatory back seat for civil litigation in the federal courts. Now, Congress has heard the cry of pain from civil litigants and has just passed the Civil Justice Reform Act which modestly demands the elimination of delay and reduction of cost in federal civil litigation in district courts. It all starts with experiments in designated pilot districts. The goals are worthy and applauded by all the judges I know, although a certain amount of bated breath awaits the intersection collision between the Speedy Trial Act, Civil Justice Reform Act, and volume of filings.

All this talk, legislation and preoccupation with the subject of court delay prompts me to serve up some fact vs. myth analysis of the relevant state of affairs in the Tenth Circuit. Frankly, I don't know how delay was measured in Shakespeare's time. Perhaps from Assize to Assize, whatever period it was. Lacking an absolute baseline, I have explored whether appeal processing time in the Tenth Circuit has increased in the past 20 or 30 years. The answer is yes, some, but things are a lot brighter now than they were two, three or four years ago. They are almost dazzling when comparative caseloads and judicial productivity are taken into account.

Filings in this circuit increased around 1,000 percent in the past 30 years, from 234 in 1960, to 2,233 in the 1990 statistical year. However, authorized judgeships—from six in 1961 to 10 now—have not increased anywhere near proportionately. Moreover, in the mid-1980s several judicial positions remained vacant for various periods, one for three years. As one might surmise, a case backlog developed and delay increased. Thus, in 1960 the median time for filing a notice of appeal in the district court to disposition of the appeal in this court was approximately nine months. Now, it is approximately 13 months. That is the bad news. The good news is that the 13 months is a *reduction* from a median disposition time of 22 months two years ago. And, the time is still decreasing.

The story here is one of productivity, not paralysis, in the circuit. Comparative figures make the point. In 1961 the court terminated 47 cases per active judge ("active" judges are all judges on the court except those who have retired or taken senior status). By 1975, with seven active judges, there were 120 terminations per judge. In the 1990 statistical year, with 10 active judges, the court terminated 2,580 cases, or 258 per active judge. Since cases are normally handled by panels of three judges, that burden expands to 774 cases, as compared to 141 in 1960. This is substantially higher than national workload standards for circuit judges set by the Judicial Conference.

The intense effort illustrated by these statistics has not only resulted in speedier handling of appeals, it has accomplished an almost 500 case decrease in the court's backlog over the past two years. The court is now at a point where criminal appeals are calendared for oral argument within a very short time of the case coming at issue (transcript, briefs and record all prepared and on

JUDGE STEPHEN H. ANDERSON was appointed in 1985 to the United States Court of Appeals for the Tenth Circuit. He served as a Bar Commissioner from 1978 to 1984 and as President of the Utah State Bar Association from 1983-84.

Judge Anderson is a 1960 graduate of the University of Utah Law School where he served as Editor in Chief of the law review. After graduation, he practiced law for four years with the U.S. Department of Justice and for 21 years with the law firm of Ray, Quinney and Nebeker in Salt Lake City.

file). Civil appeals are not far behind, keeping in mind that full argument calendars are set every other month and normal scheduling can easily include a minimum four month lag time. Civil cases continue to suffer somewhat on appeal by virtue of the fact that criminal cases constitute an even larger proportion of the court's business—about double the amount in 1960. Sixty percent of the criminal cases, incidentally, are drug-related.

Once cases are actually argued or otherwise submitted to a panel for decision, there is actually less delay now than 30 years ago. In the last year the median time for submission to disposition was 1.6 months, compared to 1.8 months in 1960. Further, as of June 30, 1990, less than 1 percent of pending cases had been under submission for more than 90 days, compared to 2.5 percent at the end of 1975. The delay—and the backlog—have been mostly occurring between the time cases come "at issue" (about half the appeals at any one time are in the process of submission of briefs, records, etc.), and assignment to a panel for oral argument or disposition on the briefs.

The court not only has been working harder, but also has been working smarter to achieve "current" status. An important part of the "smarter" aspect of the equation includes a new screening system which, at the earliest possible date, identifies a larger number of cases in which oral argument would not materially assist the court in deciding the case. Since last year every appeal which progresses to "at issue" status is randomly assigned to a screening panel of three judges. This panel determines whether to grant oral argument on a regular or short argument calendar, or decide the case immediately, or assign it to a later conference calendar for disposition without oral argument. Cases designated for immediate decision because the issues are not difficult, have opinions or orders and judgments written and voted on by the screening panel, usually within two months of submission for screening. The results of this early evaluation and classification system show up somewhat dramatically in the figures. In 1975 only 9 percent of all terminations or 18 percent of merits terminations occurred after submission on the briefs; whereas, in 1990 the percentages rose to 42 percent and 63 percent, respectively. The court is also saving time by issuing far more decisions than previously as orders and judgments, rather than as full published opinions.

This winter, the court will initiate a system for encouraging settlement of civil cases on appeal to further serve the litigants, bring an early conclusion to the appellate process, and reduce case load. The court is using every available tool, from computer assisted research and case management, to law clerks and central staff. Computer research alone has accomplished efficiencies impossible not just in 1960, but up to the recent past. When I came on the court more than five years ago, that "luxury" was unavailable in my chambers, and was only partly available elsewhere. In 1979 circuit judges were allowed a third law clerk, and a second secretary. Those additions were estimated to bring a 10 percent increase in productivity—which has turned out to be about right. Congress also authorized central staff attorneys in 1982, formalizing and expanding on a practice which had existed for some years. Some increase in that group has occurred since.

All of which compels a digression from the subject of production to that of quality. Quality of justice is as important to the court as quantity. Three judge panels result in cases being aired fully, and the judges themselves *always* decide the cases. In the process, the judges are not shy about expressing their views or disagreeing with one another, case by case, on both small and large points.

The bottom line is that the exceptional productivity of the court must be attributed to an extraordinary commitment of time, energy and creativity by the judges themselves, supported by the entire court staff.

But how long can the court continue to operate above capacity? Not indefinitely, I think. Congress has just authorized two new judgeships for this circuit (one less than justified by caseload, according to Judicial Conference guidelines). While the court looks forward to that additional capacity, structural reforms such as a continuing examination of diversity jurisdiction and some other changes recommended by the Federal Courts Study Committee must continue to be considered. The dilemma is that while appellate caseloads continue to increase, many believe that expanding the federal appellate judiciary significantly above present levels is undesirable.

In any event, the situation at present is that delay in the Tenth Circuit is not one of the slings and arrows of outrageous fortune—at least comparatively. The overall numbers have improved dramatically and the court is deeply dedicated to timely justice. Please do not deluge me with anecdotal horror stories of individual appeals hung up forever. We have been crossing the proverbial stream averaging six inches deep here. What I can tell you is that we have installed new computer tracking systems so that we are aware on a monthly reporting basis of the age of all matters, and aging is a topic of review, discussion and concern. The point is that we not only aim to do better, we are doing better.

One final note, my office receives a number of calls regarding practice in the circuit, from the form of briefs to rules governing time periods and page lengths. It is easy to practice in the circuit. As the saying goes, the answer to all these questions and much, much more can be found in the "Practitioner's Guide to the United States Court of Appeals for the Tenth Circuit," available by mail from the clerk's office in Denver, for a nominal fee. Please use it. Effective presentation of appeals—good lawyering—assists the goals of just and speedy resolution of appeals (I leave the inexpensive part to you). In other words, when lawyers do their job, it makes it easier for us to do ours, and to reduce delay. Working together we might just be able to eliminate part of Hamlet's soliloquy.

Young Lawyers Section Officer's Message
The Spirit of Liberty: Access to the Law

By Larry R. Laycock

In 1770 Boston, a revolutionary war was smoldering. Royal officials, believing that anarchy existed in Boston, crowded the Eastern seaport with nearly 4,000 Redcoats. Naturally, the presence of a standing army resulted in a charged atmosphere of tense relations between townspeople and soldiers. Conflict between the British government and the colonists exploded into flames of open rebellion and bloodshed on March 5, 1770, when a group of British soldiers fired on a threatening crowd of Bostonians, killing five civilians.

In an attempt to define and preserve a spirit of liberty in the colonies during those troubled times, Lord Barrington, secretary of war to Gov. Bernard, wrote: "There is the most urgent reason to do what is right, and immediately, but what is that right and who is to do it?"

The spirit of liberty which serves to define "that right" was demonstrated by a courageous Boston lawyer when he chose to defend the British soldiers who were responsible for what has come to be known as the Boston Massacre. Rather than allow the angry emotion of a mob to determine the fate of the British soldiers, attorney John Adams stepped forward and devoted more than a year to the defense of the British case. In the words of William T. Gossett:

> What motivated Adams was a principle that lies at the very foundations of the law in a free society. That principal is the simple truth that justice may be called justice only if it is denied to no man, however unpopular his cause, however reduced his circumstances and however heinous the charges against him. But like the simple truths, it is one that can be easily forgotten. And if it ever is forgotten, I put it to you bluntly that the blame will lie with the legal profession itself. We are here today because we recognize a responsibility to extend the benefit of our laws and legal institutions to all our people.

Gossett, *Access to Justice,* A.B.A.J. 111 (Feb. 1954).

Justice Learned Hand eloquently defined this same spirit of liberty as follows:

> What then is the spirit of liberty? I cannot define it; I can only tell you my own faith. The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interest against its own without bias; the spirit of liberty remembers that not even a sparrow falls to earth unheeded; the spirit of liberty is the spirit of Him who nearly 2,000 years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest.

In an effort to achieve "that right" and to create an environment where the least shall be heard and considered side by side with the greatest, we, as attorneys, bear the responsibility to assure access to justice. Although we are not confronted with an undesirable task such as that undertaken by John Adams 200 years ago, there are means by which the members of the Young Lawyers Section and the senior Bar can assure access to justice.

It is my wish that we as members of the Young Lawyers Section will demonstrate our commitment to the spirit of liberty by volunteering our time and efforts to assure access to the law for all through programs such as the Tuesday Night Bar, the Salt Lake County Bar Domestic Relations Project, the AIDS Related Legal Services Project and other pro bono service implemented through the Young Lawyers Section Pro Bono Committee.

For additional information on how you can preserve the spirit of liberty by assuring all persons access to the law through participation in Pro Bono Committee projects, please contact Committee Chairperson Betsy L. Ross at (801) 531-7840 or Vice Chairperson Kristin G. Brewer at (801) 532-1036.

Young Lawyers Section Utah State Bar Annual "Sub-for-Santa" Project

For the 13th straight year, the Utah State Bar YOUNG LAWYERS SECTION will actively participate in the *Salt Lake Tribune* "Sub-for-Santa" program. "It is important for those who have enjoyed good fortune to share with those less fortunate," declares Salt Lake attorney and Project Coordinator Brian M. Barnard.

Acting as a clearinghouse, *The Tribune* program matches those willing to share at Christmas time with families needing help. *The Tribune* has thus been serving needy children in the Salt Lake area at Christmas time for almost 60 years. "The attorneys of Utah have supported the Sub-for-Santa program for many years, and this year will be no different," explains Mr. Barnard. He adds that the Sub-for-Santa program "provides an avenue for law firms and individual attorneys to become directly involved with families in need. After all, a child helped is really what Christmas is all about."

Interested law firms are urged to designate a person to coordinate the project and work with the YOUNG LAWYERS SECTION and *The Tribune* to select a family, purchase gifts and groceries and deliver them before Christmas.

Mr. Barnard proudly notes that last year, several firms directly sponsored three or four families. Those unable to support an entire family may still help by contributing monetary gifts payable to "Sub-for-Santa," to the Young Lawyer Section, Attn: Brian M. Barnard, 214 E. 500 S., Salt Lake City, UT 84111-3204.

The YOUNG LAWYERS SECTION will be contacting Salt Lake attorneys to answer questions regarding the program, and to encourage them to call *The Tribune* Sub-for-Santa program (237-2830). Or, questions regarding this YOUNG LAWYERS SECTION project may be referred directly to Mr. Barnard, 328-9532.

"Last year, *The Tribune* helped more than 2,000 children enjoy Christmas. This year, with the help and generosity of the legal community, we hope to reach even more children and families. You just can't imagine the great feeling you get from helping a neighbor at Christmas time," says Mr. Barnard.

New Trust Account and IOLTA Guidelines Distributed

The Utah Bar Foundation is pleased to announce the printing and distribution of the Trust Account and IOLTA Guidelines booklet. This booklet is designed to provide attorneys with information on how to handle their Trust Accounts. In the four year period from 1984-1988, 44 percent of all the disbarments which occurred in the state of Utah were the result of violations of the rules governing trust accounts.

The booklet addresses many of the common problems or questions which arise when dealing with trust accounts. For example the booklet addresses the problems with retainers.

Q. What about retainers?

A. There are two types of retainers and it is essential that both the attorney and client are in agreement about the type of retainer being used. A retainer in the truest sense is a payment by the client for the reservation of the exclusive services of the attorney which by agreement of the parties is non-refundable upon discharge of the attorney. This type of retainer is the property of the attorney upon receipt and should not be kept in a trust account. The more typical retainer is a deposit by the client of an advance payment of a fee to be billed on an hourly basis. This is not a payment to the attorney and should be held in a trust account until the money is earned. It is important to remember when dealing with the second type of retainer that a check from the trust account may be paid to the attorney who performed services only for the amount of services rendered. The attorney is then free to deposit this check into the general firm account and use it for whatever is appropriate. It is not proper to write a check from the trust account for any of the lawyer's needs, regardless of whether the money paid to others could be paid to the attorney. It is very important for attorneys to keep trust funds and general firm funds completely separate.

Other questions that the booklet answers include:

—Commingling of funds
—Records
—How to set up a trust account
—Is it ever appropriate to refuse to surrender a client's property?

The booklet also describes the Interest On Lawyer's Trust Account program for the state of Utah. IOLTA programs have now been authorized in all 50 states plus Puerto Rico and many Canadian Provinces. The booklet also answers common questions about the IOLTA program and provides an enrollment form.

Copies of the booklet should have arrived or will be arriving in the near future. If you have not received a booklet or would like additional copies, please contact the Foundation's office at 531-9077 or write to: Utah Bar Foundation, 645 S. 200 E., Salt Lake City, UT 84111.

CLE CALENDAR

ADVANCED EVIDENCE TECHNIQUES

A live via satellite program. This seminar is being presented by the Association of Trial Lawyers of America, National College of Advocacy.

Use of demonstrative evidence in the courtroom has changed dramatically in recent years. It has become an increasingly effective tool for the trial lawyer, limited only by one's imagination, creativity and basic rules for admissibility of evidence. This program will provide a comprehensive look at the state-of-the-art technology available to produce effective demonstrative evidence as well as methods for planning and using it.

CLE Credit: 6.5 hours
Date: December 4, 1990
Place Utah Law and Justice Center
Fee $165 (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. The key to successful depositions lies in proper preparation by the attorney and of the deponent. Proper questioning technique for both lay and expert witnesses are essential components explored in the program. The deposition function is clarified through a unique storytelling framework which provides an important and rarely considered approach to discovery and trial preparation.

This program teaches NOT only through lecture, but through simulations of a witness preparation and a deposition. A professional actor serves as the deponent, which provides a realistic setting for the viewers to see enacted the concepts discussed by the expert faculty.

CLE Credit: 6.5 hours
Date: December 5, 1990
Place Utah Law and Justice Center
Fee $165 (plus $9.75 MCLE fee)
Time 8:00 a.m. to 3:00 p.m.

BANKRUPTCY SEMINAR

U.S. Bankruptcy Judge John H. Allen will be presenting for this program.

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.

TAKING CONTROL AND TURNING AROUND CHAPTER 11 COMPANIES

A live via satellite program. This seminar is designed for corporate, litigation and bankruptcy lawyers and for bankers, accountants, investment bankers, and workout and turnaround specialists who are involved in Chapter 11 business cases of all sizes. This carefully structured program will provide the current state of the law in the hot areas of Chapter 11 and emerging trends in practice and procedure. The expert panelists will provide practice points and strategy for the persons representing the many parties in interest in a Chapter 11 case.

CLE Credit: 6.5 hours
Date: December 11, 1990
Place Utah Law and Justice Center
Fee $165 (plus $9.75 MCLE fee)
Time 8:00 a.m. to 3:00 p.m.

POLLUTION LIABILITY

A live via satellite seminar. More information will be available on this program at a later date.

CLE Credit: 4 hours
Date: January 17, 1991
Place Utah Law and Justice Center
Fee $140 (plus $6 MCLE fee)
Time 10:00 a.m. to 2:00 p.m.

THE S & L CRISIS— HOW LAWYERS CAN HELP

A live via satellite program. This seminar will focus on the legal issues involved in the failure of S&Ls, pro active advice, investigation and preparation for litigation related to and arising from the failure, analysis of claims against and transactions involving a failed S&L, and an overview of legislative initiatives which will affect the industry and address this unprecedented situation. These issues will be approached from a multitude of perspectives, so any lawyers involved in this type of work would find this program interesting and helpful.

CLE Credit: 6.5 hours
Date: January 22, 1991
Place Utah Law and Justice Center
Fee $165 (plus $9.75 MCLE fee)
Time 8:00 a.m. to 3:00 p.m.

WORDPERFECT UPDATE

A live via satellite program. This year's program explores the new opportunities the most recent release of WordPerfect 5.0 offers lawyers and their staffs. The course includes a demonstration of the Generic Law Practice System and how you can use it to automate routine legal tasks such as collections, estate administrations and corporate functions. Document assembly demonstrations will challenge you with all new ways to create a lawyer-driven, two-fingered interrogatory builder plus a sophisticated deed creation system. You will pick up important, late-breaking facts about subjects designed to help chart your firm's future automation course.

CLE Credit: NONE
Date: January 29, 1991
Place Utah Law and Justice Center
Fee $165
Time 8:00 a.m. to 3:00 p.m.

DEVELOPMENTS AND CURRENT STRATEGIES TO LIMIT LENDER LIABILITY

A live via satellite seminar. This program will review recent legislative and judicial developments of lender liability with a special emphasis on loan workouts, bankruptcies, and environmental issues affecting real estate transactions. The faculty will offer practical suggestions on loan documentation and loan administration practices that minimize lender liability risk and avoid litigation. Attention will also be given to lenders' potential liability to third parties and lender liability problems issues which may be encountered during the administration of a loan workout.

CLE Credit: 4 hours
Date: January 31, 1991
Place Utah Law and Justice Center
Fee $150 (plus $6 MCLE fee)
Time 10:00 a.m. 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, 1991
Place Park City, Olympia Hotel

INSURANCE LITIGATION DEFENSE STRATEGIES AND INNOVATIONS

A live via satellite program. More information will be forthcoming at a later date.

CLE Credit: 6.5 hours
Date: February 26, 1991
Place Utah Law and Justice Center
Fee $165 (plus $9.75 MCLE fee)
Time 8:00 a.m. to 3:00 p.m.

THE USE, OVERUSE AND ABUSE OF EXPERT WITNESSES

A live via satellite program. More information will be forthcoming at a later date.

CLE Credit: 6.5 hours
Date: February 27, 1991
Place Utah Law and Justice Center
Fee $165 (plus $9.75 MCLE fee)
Time 8:00 a.m. to 3:00 p.m.

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 1991. Again, further details on this program will be published as they are available.

DATE: March 14 & 15, 1991
PLACE: Park City, Olympia Hotel

IN APPRECIATION

The CLE Department of the Utah State Bar would like to express its sincere gratitude for all of the volunteer efforts made this year in producing seminars. Many long hours were spent in planning and preparing the seminars and programs this department produces. So, to all of you who made the extra efforts, thank you. Your continuing support means quality CLE programs for the entire Bar membership.

To everyone, Merry Christmas and Happy Holidays from Monica and Toby in the CLE Department at the Utah State Bar.

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 luncheon CLEs, 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	
Jan. 17	FDIC, RTC & 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:	
	Health Insurance—COBRA	1 hour
	Custody Valuations—Confidentiality and Privilege	1 hour
	Rule 4-501—"The Domestic Stepchild"	1 hour
	Ethical Considerations	1 hour
	REAL PROPERTY SECTION	
Dec.	Personal Computer Applications in Real Estate Transactions	1 hour
	TAX SECTION	
Jan. 30	Divorce Taxation	1 hour
Feb. 27	Creative Charitable Gifting Strategies	1 hour
March 27	How to Succeed in Dealing With the IRS	1 hour
April 24	Utah Legislative Update	1 hour
May 29	Utah State Tax Issues	1 hour

The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars in 1990 and 1991. 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.

CLE REGISTRATION FORM

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CLASSIFIED ADS

For information regarding classified advertising, contact Kelli Suitter at 531-9095.

BOOKS FOR SALE

Complete updated sets of Utah Code Annotated available for $250. Contact Diane at the Sale Lake Legal Defender Association, (801) 532-5444.

Utah Code Set. Complete full-size and current set of Utah Code, including 1990 Cumulative Supplements, $500 or best offer, contact (801) 723-3404.

FOR SALE. Pacific Reporter, Pacific Reporter II, Entire Pacific Digest II, ALR Federal, ALR II Anno, ALR Later Case Service, ALR III, ALR Digest, U.S. Supreme Court Reports and Digest. Also included bookshelves. Call Linda at (801) 627-1870.

OFFICE SPACE AVAILABLE

Attractive office space available at prime location: 530 E. 500 S., Suite 10. Single office complete with reception service, conference room, telephone, FAX machine, copier and library. For more information, please call (801) 328-4207.

Attractive, functional offices for one or two attorneys with local law firm. Downtown Salt Lake near Courthouse, free parking. Complete facilities, conference/library room, break room, reception area, copier, telephones, FAX, etc. Secretarial and word processing service or space for your own secretary. Some overflow work. Please call (801) 355-2886.

Quality downtown office space available for office sharing with three other attorneys (two window offices, one interior office, secretarial space). Office equipment and reception services included. Secretarial help available. Excellent opportunity for start-up or existing solo practice. Please contact Todd Richardson at (801) 328-8111.

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

New and tastefully finished office space available, away from the downtown congestion. 900 E. 7026 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

Small downtown Salt Lake City firm specializing in business litigation seeks to associate another attorney with his own practice. Beautiful offices. Low overhead. Call Mike or Steve at (801) 531-0441.

Entry-level tax and estate planning attorney needed. LLM degree or CPA certificate a plus, but not required. Please send reply in care of the Utah State Bar, Box B, 645 S. 200 E., Salt Lake City, UT 84111.

POSITION SOUGHT

Experienced attorney in taxation (13 years IRS National and Regional Offices). Utah practice in taxation, personal injury, general litigation, probate, criminal defense, family law and estate planning. Member Utah, Texas and Virginia Bars. Seeking Corporate Counsel or law firm position. Please reply to Utah State Bar, Box C, 645 S. 200 E., Salt Lake City, UT 84111.

Position Wanted: California Trial Lawyer with over 18 years' experience seeks position in Provo or Salt Lake City area. Experience includes 70 jury trials (felony and misdemeanor), appellate work, juvenile court, child support collection and civil asset forfeiture work. The past 16 years' work includes all phases of criminal law and limited civil work as an assistant district attorney for Santa Cruz County. First two and a half years of practice were spent as an assistant public defender in San Jose, Calif. Assignments have included: managing felony and misdemeanor trial teams; felony preliminary hearings; sanity hearings; drug enforcement task force attorney prosecuting drug dealers and asset forfeiture of cash, cars and real estate; filing deputy issuing complaints on thousands of cases; research attorney handling all types of motions including but not limited to motions to suppress, motions to change venue and motions to dismiss. Have worked with federal agents (DEA, FBI and Customs) and appeared in Federal Court. Contact Robert W. Noonan at (801) 654-3917 in Heber City, Utah. (Not a licensed member of the Utah State Bar.)

SERVICES AVAILABLE

Experienced legal secretary available to type in my home. I have my own computer and printer. Experienced in bankruptcy, probate, litigation, divorce and basic typing jobs. Five years' experience, one year previous experience in my home. Salary is negotiable. Call Tracie Denney at (801) 277-2707.

SPECIAL OFFER

COZY CABIN for rent by day or week. Breathtaking view of Brighton Bowl and Solitude at top of Big Cottonwood Canyon. Ideal for weekend getaway or small professional conference. Great hiking, mountain biking, skiing and relaxing. $75/day. Call (801) 583-7217 or ask for Steve at 566-1561, extension 204.

New Address or Phone?

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

Please use this coupon and mail.

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