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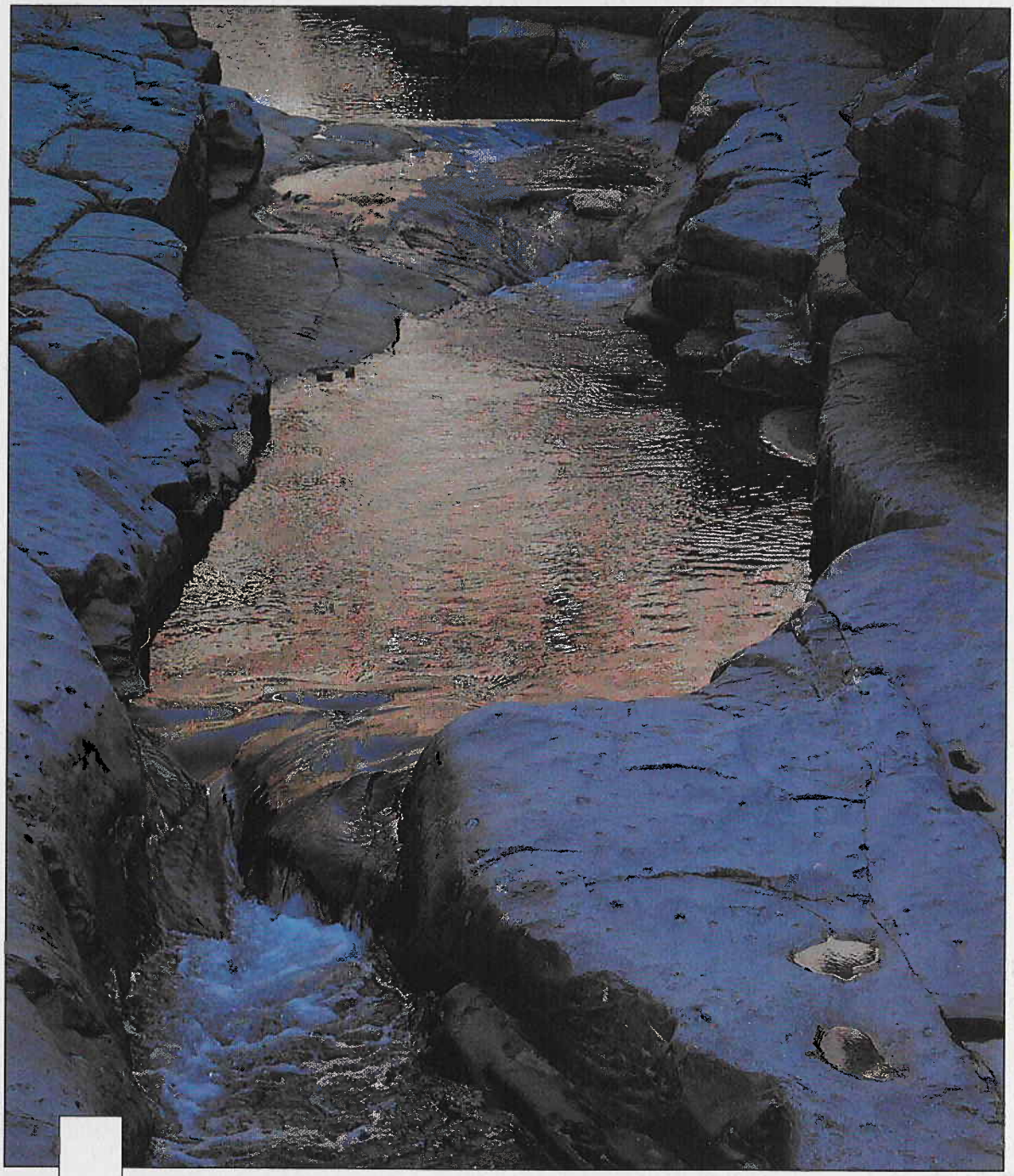

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COVER: Dark Canyon, Utah, by Chris P. Wangsgard, a partner in the firm of VanCott Bagley Cornwall & McCarthy.

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.

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A Consultant is a Consultant is a Consultant

By Hon. Pamela T. Greenwood

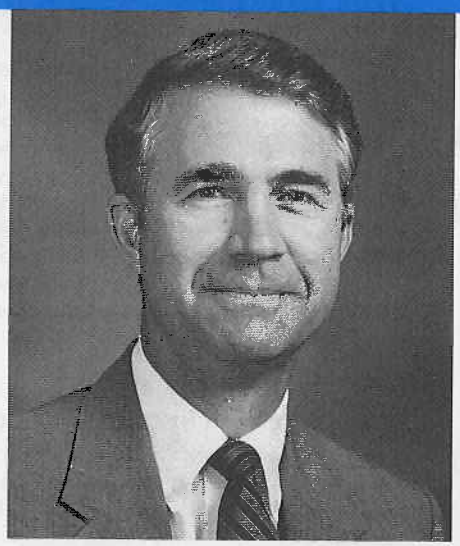
Your State Bar is a very busy place lately. As part of our efforts to improve operations, we have had several consultants working with us over the last several months. First, a CPA has spent about six weeks reviewing our financial procedures and organization. He has made a number of suggestions which will have been implemented by the time this message is published. He is also helping us through a transition period occasioned by the resignation of Lois Muir, long-time Bar financial department head. Our financial department has been hard-pressed this last year to implement changes in the budgeting and accounting format, account for the new dues schedule and collections, assist outside auditors, and keep up with the "normal" flow of Bar business. Our outside auditors, Deloitte, Haskins & Sells, recently completed the Bar's audit for 1989-90, and the Bar Commission will have reviewed the audit at its February 15 meeting.

We have also engaged a consultant to assist us in assessing our hardware and software computer needs. We have just about maxed-out our hardware capability and have inadequate word processing capacity at the Bar. John Baldwin, in conjunction with the consultant, has put together a plan to cover the next 18 months or so, to gradually meet our needs in this area. They are also examining our options for financial and membership data software packages. I, like many of you, am overwhelmed by the complexity and potential of the computer world, and have appreciated the help which the consultant has provided. His suggestions are consistent with what we had previously been told by Grant Thornton Associates, as well as others. Our budget for this year anticipated expenditures to upgrade our computer systems.

In addition, we have been working closely with Grant Thornton Associates, because of their assignment from the Supreme Court, to perform quarterly reviews of progress in meeting the goals outlined in their earlier review of the Bar and the Court's 1990 minute entry of last August. A bonus for us of that review process has been the willingness of Grant Thornton personnel to sit down with us and discuss steps we are contemplating and give us constructive feedback. As an example, in November the Bar Commisssion decided to pay off our existing line of credit in order to save interest expenses. This resulted in a greater reduction of short-term debt than we had budgeted or than that which was required by the Court's minute entry, but seemed to be financially responsible. Grant Thornton concurred in that assessment and the line was paid off as a small equipment loan.

Lastly, we have continued to work with the Supreme Court's Task Force on the management of the Bar. The Task Force meets frequently and for long periods of time. They are doing an admirable job of gathering and assimilating information needed to discharge their responsibilities. Each member of the Task Force, particularly the non-lawyer members, should be commended for their devotion and hard work.

Self-examination is certainly a laudable endeavor. However, it seems somewhat intense this year at the Bar. I am convinced, though, that we will be a more efficient, more responsive entity as a result. In the meantime, we continue to effectively run operations of the Bar which have received little public attention lately—Bar admissions, continuing legal education, discipline, ethics advice, lawyer referral, committees and sections, Tuesday Night Bar, support of law related education, etc., etc. Those activities continue to operate, and to operate well, because of dedicated, talented staff; willing Bar members who are committed to professionalism and public service; and interested, principled members of the public.



A Thought About Our Future

By Gayle F. McKeachnie

A few comments about some forces in our society that, in my opinion, have greater impact on the day-to-day practice of law than any decision made by the Bar Commission, the Supreme Court Task Force on the Regulation and Management of the Practice of Law or the Supreme Court. Present trends, noted by those who predict the future, include such things as an extreme profit squeeze, a maturing marketplace and a declining public image for lawyers. Several things are occurring in the professions which suggest that to deal with those trends, those who survive as successful lawyers and law firms will do so by dealing with separate but connected issues of how we bill our clients and how we use improving technology. These two factors are closely related to the profitability of lawyers in the future, how we market our services and our public image.

When I graduated from law school 20 years ago, I started studying what is called "Law Office Economics." I was taught that lawyers who keep time records and who bill from those records make more money than those who do not. Since that time, a generation of lawyers has grown up with the idea that billings are generated by the number of hours one works multiplied by the billing rate of the particular lawyer or paralegal.

We have painted ourselves into a corner. We are only lately recognizing that to value a lawyer's services to a client based primarily on the hours spent ignores the true worth of the lawyer's services and rewards incompetence. It is unfair to both the client and the lawyer.

Several months ago, I attended a seminar where a Canadian attorney pointed out that in Canada it may be considered unethical to enter into a fee agreement with a client where the sole basis of compensation for services rendered is the time involved. The rules of professional responsibility in the United States as well as Canada require that we take into account factors other than time in determining the amount of our charges for services to our clients.

Enter technology and the use of computers. One of the things lawyers struggle with is that the more efficient we become, the less we bill if our fee is based only on the time involved. I take an example from an article written by James W. McRae, published in the September 1989 issue of *Legal Economics*. He points out that with a computer and state-of-the-art software, a lawyer can quickly input a few basic bits of information and within five minutes can have a complete set of closing documents for the purchase and financing of an apartment building, including closing statements, truth in lending disclosure statements and every other document needed to close the transaction. Another lawyer who is just as knowledgeable and just as capable as the first lawyer, but who does not have a computerized system, may spend five hours preparing the same set of documents. If both lawyers charge their fees on a time basis, the result would be, if they have billing rates of $100 an hour, the computerized lawyer would receive a fee of $8.33 and the non-computerized lawyer would receive a fee of $500 for the very same end product. To add insult to injury, the computerized lawyer would have the problem of higher overhead costs (the computer system).

Nearly every issue of legal, governmental and business-oriented magazines contains at least one article about how to shrink attorneys' fees. Committees of the American Bar Association and others have for several years focused on alternatives to hourly billing. I suggest that as lawyers our focus in meeting the future profit squeeze, the maturing marketplace and the declining public image is in part going to be resolved on how we charge our clients for our services. How we calculate our

fees influences how we pay our associates. Lawyer compensation based exclusively on billable hours is a bad idea. Bad for the lawyer, bad for the client and bad for the profession and its public image. The Courts will also have a role in the process of improving the profession as they approve attorneys' fees based on value provided rather than time spent.

One further thought. Not long ago, I saw a computer put together documents in final form, ready for signature, with the human involvement being only the answering of a series of questions. Document assembly programs are now readily available at affordable prices. I recently heard about a bank which replaced its law firm with a computer, its document assembly and expert systems program, and one lawyer to operate it. "Expert systems" are progressing to the point where they provide what some might consider legal opinions. Now people know how to teach a machine to make available to a young associate the wisdom and experience of a senior partner and provide answers to legal questions and solve legal problems, which only senior partners formerly dealt with.

I think I am safe in saying that the future of law practice will be very different from today. Law practice has changed dramatically in the last 10 to 15 years and will continue to do so. The secret to future law practice success and profitability will be to anticipate changes, plan for them and take advantage of them rather than have the future take us by surprise. An emphasis on the management of the practice of law will be a key to survival and success in the future.

RICO and the Prime: Taking a Bite Out of Crime?

by Kenneth R. Wallentine

Introduction

Two of the trial attorney's darlings are more frequently crossing paths these days as lender liability plaintiffs add RICO[1] claims to their complaints. RICO entices plaintiffs with the benefits of potential attorney fees,[2] treble damages,[3] generous venue provisions,[4] nationwide service of process,[5] broad injunctive relief,[6] and the coercive weapon of gangster stigmatization, a label that strikes fear in the heart of banks' marketing gurus. While federal courts have generally taken a hostile approach to aggressive RICO actions, many pitfalls await the careless lender. RICO reform legislation has been considered in the past few Congresses, particularly aimed at eliminating treble damages;[7] however, business interests have made little headway in achieving their agendas.

RICO suits brought against financial institutions have been far-reaching and varied. One major type of RICO suits brought against lenders is based on "prime rate fraud," where a lender promises to extend credit to a customer at the prime rate and the customer later discovers that "below-prime" loans have been extended to other borrowers.[8] At least one federal court has found that prime rate fraud claims may be certified as class actions, perhaps opening the door to colossal damage awards.[9] This category of RICO claim is obviously unique to lenders and provides the focus of the remainder of this article.

Other RICO actions against lenders are styled as complaints of unlawful efforts to collect or protect security on existing debts.[10] Plaintiffs may allege that the lender misrepresented assets, inducing a third party to purchase a borrower's business,[11] or that the lender wrongfully converted funds to satisfy a guarantee.[12] Claims may also arise in the context of failure to fulfill loan commitments.[13] A lender may be alleged to be a facilitating participant in a fraudulent investment scheme, leading to RICO liability.[14]

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Lenders occasionally fall prey to RICO as innocent third party victims when the government brings a complaint under RICO's criminal forfeiture provisions against a bank customer.[15] Any property derived from racketeering activity is subject to forfeiture. Title vests in the government at the time the predicate act[16] is committed.[17] When the lender has a perfected security interest in the debtor's property, the interest may be destroyed through relation-back of the title vesting provisions. While various constitutional and equitable defenses may be raised against forfeiture, the forfeiture statute is tightly worded to give every advantage to the government.[18] The Supreme Court has recently demonstrated its willingness to strictly apply criminal forfeitures, even in light of sound fifth and sixth amendment challenges.[19]

Part I of this article presents an synopsis of the complicated RICO statute and the requisite elements of a RICO offense. Part II discusses application of these elements to prime rate fraud actions. Part III examines potential defenses to prime rate fraud allegations. Finally, the Conclusion offers practical suggestions to aid lenders in avoiding RICO claims through careful drafting of loan documents and communication with the borrower.

I. RICO

RICO is a penalty-enhancement statute,[20] and does not make any act illegal that is not already prohibited under another statute.[21] Rather, certain federal and state felonies are defined as RICO predicate acts.[22] Commission of two predicate acts within a 10-year period potentially subjects one to criminal[23] or civil[24] liability under RICO. RICO is based on the concept of "enterprise" criminality.[25] A RICO defendant must invest income derived from a "pattern of racketeering activity,"[26] acquire an interest in an enterprise through a pattern of racketeering activity,[27] participate in or operate an enterprise through a pattern of racketeering activity,[28] or conspire to commit any of these acts to be subject to RICO liability.[29] While RICO opponents often claim that the statute was not aimed at legitimate enterprises, such as banks and businesses,[30] courts have disagreed with equal consistency.[31] RICO was enacted with the specific legislative

directive to interpret the "provisions of this title. . .liberally to effectuate its remedial purposes."[32]

To prevail in a RICO suit, the plaintiff must offer proof of the following elements, in addition to evidence of predicate acts: first, the conduct of an enterprise which affects interstate or foreign commerce;[33] second, the operation of the enterprise must be through a pattern of racketeering activity;[34] third, by a "person;"[35] and fourth, that the violation caused injury to the plaintiff's business or property.[36] A minimum of two predicate offenses must have been committed within 10 years.[37]

II. Prime Rate Fraud & RICO

A. AN OVERVIEW OF PRIME RATE FRAUD

The "prime rate" is the rate of interest which a lender charges its most creditworthy commercial borrowers, usually for short-term loans.[38] The prime rate has been a key financial indicator since the Depression era.[39] Residential mortgagees monitor the prime carefully, retreating from new commitments when the prime rate remains high.[40] Government agencies use the *Wall Street Journal* daily prime rate listings as a basis for official lending programs.[41] The announced prime rate forms the basis for competition among lenders seeking to woo large borrowers. Therefore an honest posting of the prime rate is vital to a free economy.

Discounted prime loans and lawsuits related to them are not recent developments; lenders have been sued under similar theories since the beginning of this century.[42] Undergirding these actions is a social policy of promoting competition and deterring the economically harmful effects of unreliable reports of the cost of borrowing. Prime rate interest fraud cases acquired new glamour in 1980 when Jackie Kliener, a business law professor, began a plan to sue lenders on a "bank of the month" club plan under RICO.[43] Kliener, dissatisfied with his bank's lending practices, brought a class action prime rate fraud suit against the First National Bank of Atlanta.[44]

B. RICO ELEMENTS APPLIED TO PRIME RATE FRAUD

The first, and formerly most difficult, hurdle that the RICO plaintiff must traverse is the requirement that his injury resulted from a "pattern of racketeering activity."[45] Until the summer of 1989, the pattern element puzzled both courts and counsel, as the Supreme Court had not spoken directly to the issue.[46] In *H.J., Inc. v. Northwestern Bell Telephone Co.*,[47] the Court addressed the standard for a RICO pattern. The Court rejected a "separate schemes"[48] test in favor of a "separate acts" test, so that two or more predicate acts within a single scheme could support a RICO complaint.[49]

In endorsing the single scheme, separate acts standard, the Court stated that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity."[50] Nonetheless, the Court offered few guidelines regarding the type of requisite relationship between the predicate acts.[51] The Court also noted that continuity could be shown in a variety of fashions, stating that the inquiry was fact-specific.[52] The Court's vagueness left abundant discretion for lower courts to develop conflicting definitions of pattern. Justice Scalia stated that while the pattern element requires something more than two bare predicate acts, "what that something more is, is beyond me. As I have suggested, it is also beyond the Court."[53]

"The coercive weapon of gangster stigmatization . . . strikes fear in the heart of banks' marketing gurus."

The predicate acts which underlie prime rate fraud actions are generally claims of mail fraud,[54] which merely requires that a fraudulent scheme be advanced through the mails.[55] The defendant lender sends interest and billing statements through the mail to the plaintiff borrower. Assuming that the prime rate fraud causes a loss to the plaintiff, it is a simple matter for the plaintiff to show that the mailing of statements furthered the fraudulent scheme by giving notice of the fraudulent interest payments due.

The plaintiff must next demonstrate the existence of an "enterprise."[56] There is no requirement that the enterprise be criminal in character; the enterprise may be a legitimate business,[57] such as a bank or a bank holding company. Indeed, even the office of state governor has been found to be an enterprise subject to RICO.[58] Nor must the enterprise be formally organized; it may be an "association-in-fact."[59] The enterprise may be the perpetrator, instrument, victim or prize of the fraud.[60] The enterprise must be distinguished from the pattern of racketeering activity.[61] Notwithstanding, the same evidence may be used to establish both the pattern and the existence of the enterprise.[62]

Under 1962 the plaintiff has available three non-exclusive alternative theories of relief. Section 1962(a) proscribes the use of money derived from the operation of the enterprise. A plaintiff may easily allege that the bank is both the person operating the racketeering activity through the fraudulent prime rate scheme, and the enterprise into which the profits of the scheme are poured.[63] Section 1962(b) prohibits a person from controlling or acquiring any enterprise through a pattern of racketeering activity. Again, the bank may be alleged to be the person controlling itself, the enterprise bank. Finally, 1962(c) requires that the person be associated with or employed by the enterprise. Only under this last section is there an express requirement that the person be distinct from the enterprise.[64] The plaintiff may allege that the bank loan officer was the person, with the bank being the enterprise.[65] If the bank is held by a parent corporation, the parent may be alleged to be the enterprise, with the bank as the person.[66]

Lastly, the plaintiff must show that defendant's violation of 1962 resulted in an injury to her business or property.[67] Thus far, courts have not allowed recovery for personal injury, emotional distress or medical expenses resulting from the business injury.[68] While an appropriate fact pattern might defeat the trend, such as where a fashion model whose income depends primarily upon personal appearance is physically injured in the commission of a predicate act, legitimate lenders generally do not conduct loan transactions by means of physical violence.

III. Potential Defenses to Prime Rate Fraud

One of the more common defenses to fraud is based on Rule 9(b) of the Federal Rules of Procedure, which requires that allegations of fraud be alleged with particularity.[69] Because the plaintiff may not use the discovery process to obtain information required to be included in the RICO fraud complaint,[70] lenders file summary judgment motions claiming that the requirement of pleading fraud with particu-

larity has not been met.[71] However, a recent decision casts doubt on the continued viability of this tactic. In *Michaels Building Co. v. Ameritrust Co.*,[72] the court stated that claims of fraud which were alleged with particularity in all respects except the identification of borrowers who received discounted prime rate loans were sufficient to state a RICO fraud claim.[73]

Although RICO authorizes treble damages,[74] there must be some damage element for the court to triple. The plaintiff must show that she could have obtained credit at a lower cost from some other source. If the defendant can demonstrate to the court that the plaintiff received the most favorable rate of interest available for the plaintiff's type of loan and in the plaintiff's circumstances, the plaintiff will not likely be able to show actual damages.

If the defendant is not able to muster conclusive proof that there was no credit available at a better rate, the defendant may still argue that the borrower had no right to expect that the prime rate would be the absolute lowest rate of interest extended to any borrower. In *Blount Financial Services, Inc. v. Walter E. Heller & Co.*,[75] the lender successfully argued that the borrower was a sophisticated business and was equally able to determine the basis for establishing the prime rate, and knew that the prime rate was not the rock-bottom interest rate offered.[76] Another court reached a similar result where the plaintiff had not asked for an explanation of the prime rate and how it was determined by the defendant bank.[77]

The lender should also present evidence of the common practice of discounted interest rates, seeking to show the court that it is generally known to the business community that the prime rate is an artificial statement of the best rate. In a major congressional study, it was found that over half of commercial loans are made below the publicly announced prime rate.[78] Of course, this tactic will probably not be successful where a small personal or home loan is involved and may well backfire as the jury views the unwashed borrower falling victim to the powerful bank with full commercial sophistication.

In the exacerbated case of *Haroco, Inc. v. American Nat'l Bank & Trust Co.*,[79] the lender defended on the grounds that only a relatively small number of sub-prime loans had been extended, and each situation warranted a sub-prime rate of interest to the particular borrower, while the plaintiff's circumstances did not merit a sub-prime rate.[80] Notwithstanding the success in this case, a lender should not risk that other courts will be as sympathetic. It may well be that the district court employed the "rule of right result" in a case that had wound up and down the appeals route for several years.

Conclusion

Even though the pleasant alliteration of lender liability is relatively new to the trial arena, RICO has already added incisors to the bite taken against imprudent, and sometimes just plain unlucky, lenders. This need not be, however. Lenders have little to lose by explaining to a prime rate borrower that discounted loans are offered by all lending institutions. A savvy loan officer certainly can style this disclosure in such a fashion as to enhance customer loyalty. Similarly, a lender may avoid claims of fraud by drafting either a formula for calculating the "prime rate" applicable to the particular loan, or by including a clause stating that the loan will be based on the "announced prime rate."

Lenders should judiciously avoid defining the prime rate as that which is available to its best commercial borrowers, or as the best rate available. Whenever possible, a stated rate of interest should be used in making the loan, avoiding entirely the prime rate fluctuations. These simple steps may prevent the lender from becoming a victim of its own "crime." In the event that a lender's counsel faces RICO litigation and it is unplowed ground for the attorney, take no hesitation in associating with a RICO expert, lest the multifarious nature of RICO compound matters. Navigating through a RICO action without the appropriate experience and expertise is fatally treacherous at best.

[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-1968 (1988).
[2] 18 U.S.C. 1964(c) (1988).
[3] 18 U.S.C. 1964(c) (1988).
[4] 18 U.S.C. 1965(c) (1988).
[5] 18 U.S.C. 1965(B) (1988).
[6] 18 U.S.C. 1964(A) (1988).
[7] *See* Wallentine, *A Leash Upon Labor: Labor Trusteeships Under RICO*, 7 Hofstra Lab. L. J. 341, 356 n. 160-65 and accompanying text (1990) (discussing reform attempts); Goldsmith & Keith, *Civil RICO Abuse: The Allegations in Context*, 1986 BYU L. Rev. 55 (refuting claims of abuse). In the 100th Congress alone, five bills were introduced with a provision removing treble damages. S. 1523, H. 2983, H. 4920, H. 4923 (all 100th Cong., First and Second Sess.). Several similarly worded bills have also been introduced in the 101st Congress, although none have yet met with success. *See, e.g.*, S. 1523, 101st Cong. First Sess. The only RICO "reform" measures to have succeeded added more teeth to the statute. Additional predicate acts and enhanced criminal penalties were placed in the RICO quiver by P.L. 100-690,—Stat.—(1989).
[8] *See, e.g., Kleiner v. First Nat'l Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981) (the first prime rate fraud decision). A brief survey of prime rate fraud claims brought under RICO indicates that plaintiffs are achieving some success. *See Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (Ninth Cir. 1987); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir.), *cert. denied*, 107 S. Ct. 3276 (1987); *Warren v. Manufacturers Nat'l Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985); *Morosani v. First Nat'l Bank*, 703 F.2d 1220 (11th Cir. 1983) (per curiam). However, lenders have not been without their victories. *See Walters v. First Tennessee Bank*, 855 F.2d 267, (Sixth Cir. 1988), *cert. denied*, 109 S. Ct. 1344 (1989); *NCNB Nat'l Bank of North Carolina v. Tiller*, 814 F.2d 931 (Fourth Cir. 1987); *Grant v. Union Bank*, 653 F. Supp. 699 (D. Utah 1986). The cases seem to be slightly weighted toward success for the plaintiffs. As one might expect, no published information is available regarding settlements.
[9] *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 121 F.R.D. 151, 152 (N.D. Ill. 1988). Haroco has already wound its way up the litigation ladder to the Supreme Court and back down again. *See* 747 F.2d 384 (Seventh Cir. 1984).
[10] *Volckmann V. Edwards*, 642 F. Supp. 109 (N.D. Cal. 1986).
[11] *Kaushal v. State Bank of India*, 556 F. Supp. 576 (N.D. Ill. 1983); *see also Lipin Enter., Inc. v. Lee*, 803 F.2d 322 (Seventh Cir. 1986); *Banowitz v. State Exchange Bank*, 600 F. Supp. 1466 (N.D. Ill. 1985) (bank misrepresented that finance company selling notes was solvent at the time of sale).
[12] *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397 (Seventh Cir. 1986).
[13] *LSC Associates v. Lomas & Nettleton Financial Corp.*, 629 F. Supp. 979 (E.D. Pa. 1986); *Technology Exchange Corp. of America, Inc. v. Grant County State Bank*, 646 F. Supp. 179 (D. Colo. 1986).
[14] *Morgan v. Bank of Waukegan*, 804 F.2d 970 (Seventh Cir. 1986). RICO has also been used to bolster control-theory lender liability actions. *See Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176 (E.D.N.Y. 1985), *aff'd*, 794 F.2d 843 (Second Cir.), *cert. denied*, 479 U.S. 987 (1986).
[15] 18 U.S.C. 1963(a) (1988).
[16] Certain acts, referred to as predicate acts, are defined as racketeering activities in 18 U.S.C. 1961(1) (1988). Lenders are primarily concerned with mail fraud or wire fraud. *See infra*, notes 54 and 55.
[17] 18 U.S.C. 1963(c) (1988).
[18] For a thorough discussion of third-party involvement in forfeiture actions, and a general introduction to RICO forfeiture, *see* Goldsmith & Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 Duke L.J. 1254.
[19] *U.S. v. Caplin & Drysdale, Ctd.*, 109 S. Ct. 2646 (1989); *U.S. v. Monsanto*, 109 S. Ct. 2657 (1989). While these cases actually arose under the Drug Abuse Prevention and Control Act of 1970, they are very persuasive precedent for RICO forfeiture claims since the RICO forfeiture provisions are nearly identical and were enacted as part of the same legislative package. For a discussion of how a lender might avoid and possibly defeat forfeiture obstacles, *see Lender Liability Law Report*, Feb. 1989 at 2-4; Nov. 1989 at 4-6.
[20] 18 U.S.C. 1962 (1988).
[21] RICO is a complex statute, replete with terms of art. Only the most basic discussion of RICO terms and provisions is appropriate here. For a detailed analysis of the RICO statute, *see* Blakey & Goldstock, *On the Waterfront: RICO and Labor Racketeering*, 18 Am. Crim. L. Rev. 341, 348-62 (1980). Professor Robert Blakey was the principal author of the RICO statute.
[22] A full catalogue of the over 30 RICO predicate offenses is found in 18 U.S.C. 1961(1) (1988). At this juncture it must also be noted that over half the states have enacted their own versions of RICO. Utah is among these states. *See* Utah Code Ann. 76-10-1601 (1990). The Utah law substantially follows the federal RICO statute, allowing for treble damages, attorney fees, injunctive relief, forfeiture and requires similar elements of conduct.
[23] 18 U.S.C. 1961 (1988).
[24] 18 U.S.C. 1964(c) (1988).
[25] Enterprise is defined to include "any individual, partnership, corporation, association, or other legal entity, in any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1964(1) (1988). *See generally United States v. Turkette*, 452 U.S. 576, 580 (1981).
[26] 18 U.S.C. 1962(a) (1988). The definition of "pattern" is elusive. The Supreme Court left open the question in *Sedima, S.P.R.L. v. Imprex Co., Inc.*, 473 U.S. 479 (1985), suggesting in an ambiguous footnote that civil RICO be limited through a narrow interpretation of pattern. Lower court decisions add little to the confusion. A working definition of pattern must include the "continuity plus relationship" factor, *see id.* at 495 n.14, and should demonstrate two or more distinctive predicate acts which are connected by common purpose, methods, results, perpetrators or targets. For decisions of the 10th Circuit Court on this subject, *see Pitts v. Turner & Boisseau, Ctd.*, 850 F.2d 650, 652 (10th Cir. 1988); *Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212, 214 (10th Cir. 1987); *Condict v. Condict*, 815 F.2d 579, 582 (10th Cir. 1987).

For a complete analysis of the pattern issue in RICO, *see* Goldsmith, *RICO and Pattern*, 73 Corn. L.J. 971 (1988). Perhaps the finest judicial elucidation on the intricacies of the pattern requirement is found in *Morgan v. Bank of Waukegan*, 804 F.2d 970, 973-77 (Seventh Cir. 1986). In *Morgan*, the seventh circuit followed a test requiring separate acts, rather than separate and distinct schemes to form a pattern of racketeering. While there was a division in the circuits, *see, e.g., Superior Oil Co. v. Fulmer*, 785 F.2d 252 (Eighth Cir. 1986), the holding in *Morgan* was eventually adopted by the Supreme Court. See *infra*, notes 48-51 and accompanying text.

"Racketeering activity" is broadly defined in 18 U.S.C. 1961(1) (1988), and includes acts of violence, labor union corruption, public official corruption, provisions of contraband goods and services, commission of fraud, gambling, interstate theft and other offenses commonly associated with organized crime.
[27] 18 U.S.C. 1962(b) (1988).
[28] 18 U.S.C. 1962(c) (1988).
[29] 18 U.S.C. 1962(d) (1988).
[30] The principal argument is founded on the very origin of the statute. RICO was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified fragmentally in 18 U.S.C.). However, this argument is quickly defeated as one views the drafting history, *see* Blakey & Goldstock, *supra* note 20, and by a review of the legislative history of the Act. Representative Robert McCory, a principal co-sponsor of RICO noted that "every effort. . .(was) made (in the drafting process) to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with all who might be affected by. . ." (RICO)—whether part of a crime syndicate or not. 116 Cong. Rec. 35,204 (1970). *See also* Ray J. Groves, Statement to Criminal Justice Subcommittee of the House Committee on the Judiciary, June 12, 1985 at 6,7. *See generally* Blakey & Cessar, *Equitable Relief Under Civil RICO: Reflection on Religious Technology Center v. Wollersheim—Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 Notre Dame L. Rev. 526 (1987).
[31] *See Sedima, S.P.R.L. v. Imprex Co., Inc.*, 473 U.S. 479, 495-99 (1985); *Plains Resources, Inc. v. Gable*, 782 F.2d 883 (10th Cir. 1986) (citing cases); *State v. Thompson*, 751 P.2d 805, 815 (Utah App.), *cert. granted*, 765 P.2d 1277 (Utah 1988). *See also*, Blakey & Goldstock, *supra* note 21.
[32] Organized Crime Control Act, Pub. L. No. 91-452 904, 84 Stat. 922 (1970).
[33] 18 U.S.C. 1962(c) (1988); see also 18 U.S.C. 1961(4) (1988).
[34] 18 U.S.C. 1962(b) (1988).
[35] 18 U.S.C. 1962(c) (1988); *see also* 18 U.S.C. 1961(3) (1988) ("person" is any "individual or entity capable of holding a legal or beneficial interest in property").
[36] 18 U.S.C. 1964(c) (1988). Claims for personal physical injury are not included within the scope of RICO, nor are claims of mental distress. *Grogan v. Platt*, 835 F.2d 844 (11th Cir. 1988). The author believes that the appropriate fact pattern may well arise that would bring a reversal of this position. *See infra* note 70 and accompanying test.
[37] 18 U.S.C. 1961 (5) (1988). The statute of limitations for RICO actions was recently determined to be four years. *Agency Holding Co. v. Malley-Duff & Associates, Inc.*, 107 S. Ct. 2759, 2767 (1987). This holding has been applied retroactively. *Lund v. Shearson-Lehman American Express, Inc.*, 852 F.2d 182, 183-85 (Sixth Cir. 1988). The limitations period for continuing predicate acts within the pattern alleged runs from the date of the last offense. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1983). *See also Keystone Insurance Co. v. Houghton*, 863 F.2d 1125, 1126 (Third Cir. 1989).
[38] House Comm. on Banking, Finance and Urban Affairs, 97th Cong., First Sess., An analysis of Prime Rate Lending Practices at the 10 Largest United States Banks 1 (1981) (hereinafter House Analysis); *Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019, 1020-21 (N.D. Ga. 1981).
[39] Fitt, *Prime Rate Litigation: Beyond RICO*, 103 Bank. L.J. 450, 452 (1986).
[40] House Analysis, *supra* note 38 at 5.
[41] House Analysis, *supra* note 38 at 7.
[42] *See generally*, Fitt, *supra* note 39.
[43] Harrigan, "Lawyer Turns War Against Prime Rate Into Cottage Industry," *Wall Street Journal*, July 7, 1981.
[44] *Kliener v. First Nat'l Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981).
[45] 18 U.S.C. 1962(c) (1988).

[46] *See Sedima, S.P.R.L. v. Imprex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985) (while two acts are necessary they may not be sufficient). In this footnote, the Court suggests that a restrictive view of pattern might be employed to stem the flow of RICO litigation. However, the Court did not elaborate on how pattern might be interpreted. Many courts viewed the decision as suggesting a nexus of "continuity plus relationship" test for finding a pattern. Few post-*Sedima* decisions failed to mention this footnote. See *Furman v. Cirrito*, 828 F.2d 898, 908 (Second Cir. 1987) (Pratt, J. dissenting) (post-*Sedima* interpretations of pattern have focused on note 14 and produced "sheer bedlam" in judicial definitions).

[47] 109 S. Ct. 2863 (1989).

[48] The multiple schemes test requires proof of similar separate and distinct fraudulent endeavors committed in the past and isolated in time from one another. See *H.J., Inc.*, 109 S. Ct. at 2901.

[49] *Id.* at 2899.

[50] *Id.* at 2900.

[51] The Court cited 18 U.S.C. 3575(e) (1988), stating that the predicates need only to have "similar purposes, results, participants, victims, methods of commission, or otherwise are interrelated." 109 S. Ct. at 2900.

[52] 109 S. Ct. at 2901.

[53] 109 S. Ct. at 2908 (Scalia, J., concurring).

[54] *See, e.g., Abell v. Potomac Ins. Co.*, 858 F.2d 1104, *rhrg. denied*, 863 F.2d 882 (Fifth Cir. 1988); *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983).

[55] 18 U.S.C.A. 1341 (Supp. 1990), provides, in part: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses; representations, or promises, or to sell, dispose of, loan...places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service...shall be fined not more than $1,000 or imprisoned not more than five years or both. *See also* 18 U.S.C.A. 1343 (Supp. 1990) (similar provisions for wire fraud). *See generally Survey of the Law of Mail Fraud*, 1975 U. Ill. L.J. 237, 248-49 (1975).

[56] 18 U.S.C. 1962 (1988).

[57] *United States v. Weisman*, 624 F.2d 1118, 1120 (Second Cir.), *cert. denied*, 457 U.S. 1106 (1980).

[58] *United States v. Thompson*, 685 F.2d 993 (Sixth Cir.), *cert. denied*, 459 U.S. 1072 (1982).

[59] *United States v. Turkette*, 452 U.S. 576, 580 (1981).

[60] Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L.R. 237, 306-25 (1983).

[61] *Turkette*, 452 U.S. at 583.

[62] *Id.*

[63] *Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397 (Seventh Cir. 1985). The "person-enterprise distinction" is yet another subject of debate in the RICO arena. Some courts have held that the "person" cannot also be the "enterprise," *Yellow Bus Lines, Inc. v. Local 639*, 839 F.2d 782 (Third Cir. 1988), *remanded on other grounds*, 109 S. Ct. 3235 (1989), while others recognize no such rigid requirement. *Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (Seventh Cir. 1987). *See also Garbade v. Great Divide Mining & Milling Corp.*, 831 F.2d 212 (10th Cir. 1987).

[64] *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (Ninth Cir. 1987), *but cf. United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982, *cert. denied*, 459 U.S. 1170 (1983) (no person/enterprise distinction required in criminal cases).

[65] However, this alternative is made less attractive by the view that there may be no *respondeat superior* liability under 1962(c), a topic of continued debate in the courts. *See D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964 (Seventh Cir.), *cert. denied*, 108 S. Ct. 2833 (1988); *Saporito v. Combustion Engineering*, 843 F. 2d 666 (Third Cir. 1988); *cf. Liquid Air Corp. v. Rogers*, 834 F.2d 1297 (Seventh Cir. 1987). A venturesome plaintiff might seek liability under agency law. *See generally*, Dwyer & Kiely, *Vicarious Civil Liability Under RICO*, 21 Cal. W. L. Rev. 324 (1985).

[66] A bank would meet both the definition of person or enterprise under the statute. 18 U.S.C. 1961(3), (4) 1988), provides: "(3) Person' includes any individual or entity capable of holding a legal or beneficial interest in property. (4) Enterprise' includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *See also, Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 834 (Seventh Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

[67] 18 U.S.C. 1964(c) (1988). Losses due to decrease of stock, *Wilkinson v. Paine, Webber, Jackson & Curtis, Inc.*, 585 F. Supp. 23 (D.C. Ga. 1983), and lost opportunity costs, *Ferleger v. First American Mortgage Co.*, 662 F. Supp. 584 (N.D. Ill. 1987), have been held to be compensable injuries under RICO.

[68] *Fleischhauer v. Feltner*, 879 F.2d 1290 (Sixth Cir. 1989); *Zimmermann v. HBO Affiliate Group*, 834 F.2d 1163 (Third Cir. 1987).

[69] Fed. R. Civ. P. 9(b) requires that "(i)n all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity."

[70] *Bennett v. Berg*, 685 F.2d 1053 (Eighth Cir. 1982). *See also, Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (Seventh Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (Fed. R. Civ. P. 9(b) applies to RICO fraud pleadings).

[71] *See Blount Financial Services, Inc. v. Walter E. Heller & Co.*, 819 F.2d 151 (Sixth Cir. 1987); *Bennett v. Berg*, 685 F.2d 1053 (Eighth Cir. 1982).

[72] 848 F.2d 674 (Sixth Cir. 1988); *but cf. Walters v. First Tennessee Bank*, 855 F.2d 267 (Sixth Cir. 1988), *cert. denied*, 109 S. Ct. 1344 (1989) (borrower's failure to cite evidence that other customers received a lower rate of interest warranted directed verdict for the bank).

[73] *Id.* at 679.

[74] 18 U.S.C. 1964(c) (1988).

[75] 819 F.2d 151 (Sixth Cir. 1987).

[76] *Blount* actually involved a compaint concerning a third-party lender. However, the court appeared to place great weight on the business acumen of the borrower, a quality which may not be common to prime rate fraud plaintiffs.

[77] *Pappas v. NCNB Nat'l Bank of N. Carolina*, 653 F. Supp. 699 (M.D.N.C. 1987); *see also Grant v. Union Bank*, 653 F. Supp. 699 (D. Utah 1986) (no fraud where the bank did not state that the prime rate was the lowest rate and the borrower made no inquiry).

[78] *See* House Analysis, *supra* note 38 at 9. See also, "The Prime is Anything But Prime," *Time*, May 18, 1981 at 65.

[79] 662 F. Sup. 590 (N.D. Ill. 1987), *on remand from* 473 U.S. 606 (1985), *affirming* 747 F.2d 384 (Seventh Cir. 1984).

[80] Only eight of 529 loans were given sub-prime rates.

Tax Traps in Funding Buy-Sell Agreements

TRADITIONAL TAX-FREE BENEFITS OF INSURANCE MAY NOW BE TAXED

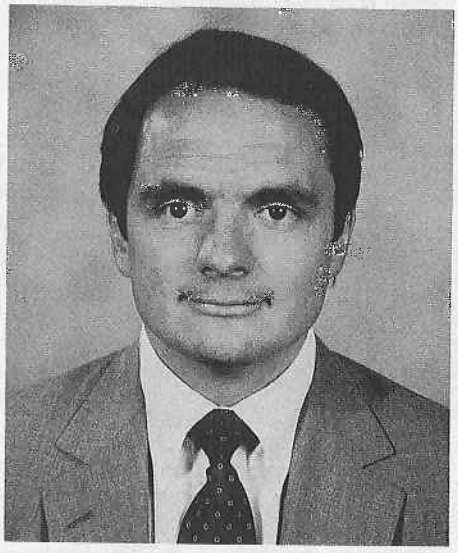
By David K. Armstrong

One of the most common strategies used today by attorneys for protecting clients' interests in their closely held corporations is the buy-sell agreement. A buy-sell agreement is a standard device which can be used for a number of reasons, including improving estate liquidity, assuring a ready market for the corporation stock at a stockholder's death, establishing restrictions on stock transfer and establishing a value of the closely held stock for estate tax purposes. The most common way to finance a buy-sell agreement is through the use of life insurance. Typically, corporate ownership of a life insurance policy has had minimal tax consequences. However, under recently released regulations, the longtime tax-free nature of corporate-owned life insurance policies may be in danger.

There are basically three types of buy-sell agreements used today:

a. REDEMPTION AGREEMENT. In the redemption agreement, the corporation agrees to purchase the shares of a deceased, disabled or otherwise terminated shareholder.
b. CROSS-PURCHASE AGREEMENT. In the cross-purchase agreement, two or more shareholders agree to purchase the stock of a deceased, disabled or otherwise terminated shareholder.
c. HYBRID. The hybrid method is a combination of the two methods described above, wherein the corporation is given an option to redeem the stock, and if it declines to do so, the remaining shareholders have a right to purchase such stock.

The focus of this article is on the tax consequences surrounding the use of life insurance to fund a redemption or hybrid buy-sell agreement wherein the corporation is the owner of a life insurance policy.



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DEDUCTIBILITY OF PREMIUMS

Typically, when an insurance policy is used to finance a buy-sell agreement, the corporation will make premium payments. Under 264(a)(1) of the Internal Revenue Code, these premiums will not be deductible due to the fact that the corporation is a beneficiary under the policy.

RECEIPT OF INSURANCE PROCEEDS

Generally, any insurance proceeds received by the corporation are not included in regular taxable income.[1] Many practitioners feel that since the insurance proceeds are excluded from gross income for regular income tax purposes, there is basically no difference in the tax consequences between a redemption buy-sell agreement wherein the corporation owns the insurance policy or a cross-purchase buy-sell agreement wherein the shareholders own the insurance policy. What is often overlooked, however, are recent changes set forth in the 1986 tax act regarding corporate alternative minimum tax.

BEWARE OF CORPORATE ALTERNATIVE MINIMUM TAX

The tax reform act of 1986 established for the first time an alternative minimum tax on corporate taxpayers.[2] The adjusted current earnings adjustment ("ACE adjustment") provisions under the corporate alternative minimum tax rules, which only recently became effective, require insurance proceeds and cash value buildup of insurance policies to be included in the calculation of the corporate alternative minimum tax. To determine the corporation's alternative minimum tax, the corporation starts with its taxable income, adds back certain deductions and increases such amount by certain preferences.[3] Once the corporation's alternative minimum taxable income is determined, it is multiplied by a 20 percent tax rate. If this produces a tax which is in excess of the corporation's regular tax, then the corporation must pay the additional amount.

One of the tax preference items added back to the alternative minimum taxable income is the ACE adjustment, which applies to taxable years beginning after 1989. Under the ACE adjustment, a corporation's alternative minimum taxable income is increased by 75 percent of the excess of the corporation's adjusted current earnings over its alternative minimum taxable income.[4]

The ACE adjustment is based on income tax principles governing the computation of earnings and profits. In other words, if the corporation's earnings and profits are in excess of the corporation's alternative minimum taxable income, then 75 percent of such excess must be added as an additional preference item to the alternative taxable income in computing the alternative minimum tax.

On May 3, 1990, the Treasury published proposed regulations providing guidance to corporations in determining the ACE adjustment.[5]

Section 1.56(a)-1(2)(5) of these regulations describes that two traditionally tax-free benefits of insurance policies, (a) inside buildup of insurance policies, and (b) death benefits of insurance policies, may now be subject to the alternative minimum tax.

INSIDE CASH VALUE BUILDUP OF LIFE INSURANCE POLICIES

In the past, inside cash value buildup of life insurance policies has been ignored by the taxing authorities. Under the new alternative minimum tax rules, however, this once protected area has become fair game for tax revenues. The new regulations state that income on a life insurance contract is to be included in adjusted current earnings for each taxable year.[6] The sole exception is that income on a life insurance contract will not be included in adjusted current earnings for any taxable year in which the insured dies or the contract is completely surrendered for its entire net surrender value. If the income on the contract is a negative amount, income on the contract is not included in adjusted current earnings and no deduction from adjusted current earnings is allowed for such negative amount.

TREATMENT OF DEATH BENEFITS

Of all of the new changes, the inclusion of insurance death benefits in the ACE adjustment clearly has the potential to inflict the most substantial damage to an unsuspecting corporation. The regulations[7] provide that the excess of the contractual death benefit of a life insurance contract over the taxpayer's adjusted basis in the contract is included in adjusted current earnings. The amount of the death benefit that is taken into account for adjusted earnings includes the amount of any outstanding policy loan treated as forgiven or discharged by the insurance company upon the death of the insured.[8]

EXAMPLES: The following examples illustrate how the calculations are made. Assume Corporation X has taxable income of $200,000. After the adjustments set forth in 55-58 for alternative minimum tax purposes, the Corporation has an alternative minimum taxable income of $210,000, which would produce an alternative minimum tax of $42,000. Since this amount is less than the Corporation's regular tax of $60,000, there would be no additional taxes that would need to be paid. However, now assume that the Corporation has a buy-sell redemption agreement in place which was funded in 1987 by a $1 million life insurance policy on each of the two shareholders. The premiums on the policy are paid on an annual basis and buildup the cash value of the policy. If one of the shareholders dies, the corporation will receive $1 million which it will use to redeem the shareholder's stock. The table below sets forth the annual premiums, cumulative premiums, year-end net surrender value and death benefit.

Year	Annual Premium	Cumulative Premiums Paid	Year-End Net Surrender Value	Death Benefit
1987	$22,000	$ 22,000	$ 24,200	$1,000,000
1988	$22,000	$ 44,000	$ 50,820	$1,000,000
1989	$22,000	$ 66,000	$ 80,100	$1,000,000
1990	$22,000	$ 88,000	$112,310	$1,000,000
1991	$22,000	$110,000	$147,740	$1,000,000

Under the regulations, X must include $10,210 in adjusted current earnings for 1990.[9] The inclusion is computed by subtracting from the net surrender value of the contract at the end of the taxable year ($112,310) the sum of the net surrender value of the contract at the end of the preceding taxable year ($80,100) plus the premiums paid during the taxable year ($22,000).[10] Seventy-five percent of this amount would be added to the $210,000 alternative minimum taxable income which would increase the alternative minimum tax from $42,000 to $43,532, which is still less than the regular corporate tax. For purposes of determining adjusted current earnings, X's adjusted basis in the contract would be increased at the end of 1990 from $88,000 to $98,210 to reflect the $10,210 inclusion.[11]

For 1991, the income on the contract included in adjusted current earnings is determined in the same manner as the preceding year, and there is a corresponding increase in X's adjusted basis in the contract. Thus, for 1991, the income on the contract is $13,430, which is determined by subtracting from the net surrender value of the contract at the end of the taxable year ($147,740) the sum of the net surrender value at the end of the preceding taxable year ($112,310) plus the premiums paid during the taxable year ($22,000). At the end of 1991, X's adjusted basis in the contract for adjusted current earnings is $133,640, which reflects the basis of the contract at the beginning of 1991, increased by the premium paid during the year ($22,000) and the income on the contract that has been included in adjusted current earnings for the taxable year ($13,430).

Now, however, assume that after the payment of the premium for 1991, the insured dies and X receives the $1 million death benefit under the contract. No amount is included in adjusted current earnings for income on the contract for the taxable year in which the insured dies.[12] Instead, X must include in adjusted current earnings for 1991 $879,790 which is the excess of the death benefit ($1 million) over the adjusted basis in the contract for purposes of computing adjusted current earnings at the time of the insured's death ($120,210). The basis equals X's adjusted basis in the contract at the end of 1990 ($98,210), increased by X's premium payment for 1991 ($22,000).[13] This would add $659,843 ($879,790 x 75 percent) to the alternative minimum taxable income, increasing the alternative minimum tax to $173,969. Since this amount is greater than the $60,000 regular corporate tax, the company would be required to pay the higher amount. What makes this matter worse is that the $1 million in proceeds may be used entirely to buy out the deceased shareholder, thus the additional tax must be paid solely out of corporate funds.

AVOIDING ALTERNATIVE MINIMUM TAX

There are two strategies that can be used to avoid the taxation of insurance policies as set forth above. The first is to make an S corporation election. The alternative minimum tax does not apply to S corporations.[14] Therefore, if an S corporation is involved, or if S corporation status can be elected, no additional tax consequences will result from corporate-owned life insurance.

The second strategy to avoid corporate taxation from insurance policies is to use

cross-purchase buy-sell agreements between the individual shareholders rather than redemption buy-sell agreements between a corporation and its shareholders. Typically, redemption buy-sell agreements are easier to administer and monitor; however, in view of the negative tax consequences which may result, it may be more advisable in many cases to use the cross-purchase buy-sell agreement and avoid the additional tax exposure.

The fact that additional taxes may occur should not be determinative of whether or not to use a redemption buy-sell agreement vs. a cross-purchase buy-sell agreement. However, the potential tax exposure is clearly a factor that should be examined prior to making a decision with regard to the most appropriate type of buy-sell agreement to use.

[1] *IRC 101(a).*
[2] *IRC 55-58 as amended by 701(a) of the Tax Reform Act of 1986, P.A. 99-514.*
[3] *IRC 55(b)(2).*
[4] *IRC 56(g)(1).*
[5] *55 Federal Register 1866.*
[6] *Regulation 1.56(9)-1(c)(5)(ii).*
[7] *Regulation 1.56(g)-1(c)(5)(v).*
[8] *Id.*
[9] *Regulation 1.56(g)-1(c)(5)(ii).*
[10] *Regulation 1.56(g)-1(c)(5)(iii).*
[11] *Regulation 1.56(g)-1(c)(5)(ii).*
[12] *Id*
[13] *Regulation 1.56(g)-1(c)(5)(v).*
[14] *Regulation 1.56(g)-1(c)(5)(iv).*

Additional Reflections on Cross-Examination

By Kenneth R. Brown

I read with interest Fred Metos' article in the November 1990 *Bar Journal* regarding cross-examination.

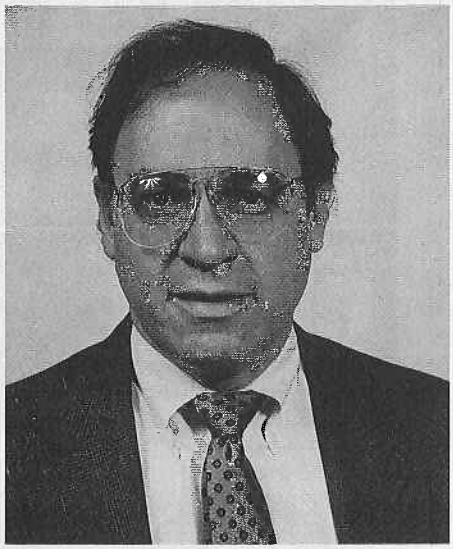
Mr. Metos makes two statements with which I disagree: No. 1, "Cross-examination is not a truth-seeking process," and No. 2, "Another misconception about cross-examination is the notion that it is an art."

I. CROSS-EXAMINATION IS A TRUTH-SEEKING PROCESS

I must admit that I have heard the phrase "this trial is a search for truth" more often than I wish to recall. Usually, this is from prosecutors, either during their opening statements or closing arguments. Although I generally disagree with most of what prosecutors say during trial, this statement, I believe, is correct. If a trial is not a truth-seeking exercise, then what is it?

Take the following example: The information (complaint) alleges that I shot a man in Texas at sundown. The matter is scheduled for trial. Isn't the jury charged with the duty of determining the truth of that statement beyond a reasonable doubt?

In support of the allegation, the State calls a witness who reports, "I watched Brown shoot the victim at sundown in Texas." Obviously, if that statement is believed beyond a reasonable doubt by the jury, we all go home early. The lawyer's function, through cross-examination, is to make sure that the jury has all of the information necessary and admissible involving the truth of that allegation. I list a few of the many possible areas of cross-examination which could help the jury: The witness is the victim's lover; the witness is Brown's lover with whom he had a recent fight; the witness is a friend of someone who recently threatened the victim in a barroom brawl; the witness is someone with whom Brown recently had a confrontation; the witness was blind, distracted, insane or a convicted felon; the witness was stupid, a paid informant, a courthouse gadfly or a bearer of false witness.



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What is the lawyer about when she cross-examines if she is not attempting to give the jury more information from which to assess the truth of that witness' assertion? Don't we assume that the more relevant information the jury has, the more likely they will be able to make a correct decision?

It is true we recognize that in some areas the societal cost, in terms of presenting certain evidence, outweighs the truth-finding function of a trial. Because of those reasons, we develop rules regarding privilege and the nature and quality of the evidence presented. But generally, we operate on the assumption that correct decisions are made with more information, rather than less. We are not simply attempting to raise a "reasonable doubt" through hiding the truth, because a finding of reasonable doubt may be a correct decision based on more information.

To suggest that cross-examination is not a truth-seeking function, but merely part of a lawyer's presentation of a case, begs the question. The lawyer's presentation of a case commences with the empaneling of the jury and ends with closing argument. To suggest that the purpose of cross-examination is not truth-finding is to suggest that the function of the trial is not to find the truth.

II. IS CROSS-EXAMINATION AN ART FORM?

Mr. Metos suggests that cross-examination is not an art form. All one need do is learn certain rudimentary rules involving cross-examination which have been passed down from lawyer to lawyer over time. If one applies those rules, he or she can then become an effective cross-examiner. I disagree with that statement.

For example, Michael Jordan bounces the basketball high, takes large steps and jumps high. These are the rudimentary rules under which Michael Jordan operates. I, likewise, bounce the ball high, take large steps and jump. To suggest that because I follow the same rules which Michael Jordan does makes me equally proficient is, I assure you, incorrect.

I've always been dismayed by a litany of rules involving the do's and don'ts of cross-examination. I, too, have heard the hackneyed phrases, such as, "When you strike oil, quit." I only espouse allegiance

to one rule in the area of cross-examination: Don't be afraid to say, "I have no questions of this witness." But if you do rise to cross-examination a witness, make certain that you have prepared thoroughly for that task.

With this preparation, the trial lawyer knows when to apply the rules. On some occasions, the rules involving cross-examination should be broken. The trick is knowing when. For example, one should not lose one's temper during cross-examination. However, based upon the lawyer's professional feelings involving the case, the progress of the case, the jury's view of the case at the time of the cross-examination, and just plain, ordinary gut instinct, a little emotion may be appropriate during the course of cross-examination. Cross-examination is first and foremost, cross. You must convey to the jury that a reasonable person would conclude that this witness may be mistaken. You don't have to call him a liar to convey that message. But if the statement, "I watched Brown shoot a man in Texas at sundown," is believed beyond a reasonable doubt by the jury, then what's the point? The jury must be convinced by the lawyer that *he* disagrees with that statement. In fact, I think it's appropriate during closing argument to draw the jury's attention to the truth-finding function of cross-examination. I ask them to reflect upon the lack of effective cross-examination of a key defense witness as an indication that the defense witness was telling the truth, or at least raised a reasonable doubt as to whether the State's witnesses were correct.

III. THE ROLE OF TRAINING

I was trying a case out of state several years ago with an older lawyer who made this statement: "Trial lawyers are not trained, they're born." Since then, I have thought about that statement and have struggled with it. I have sat too often through cross-examination by opposing counsel who were trained to ask, "What happened next?" and beyond that are mystified by the entire trial process.

I believe my friend's statement is more correct than incorrect. That is not to say that training does not help. In fact, it is essential (and now required). But any amount of training heaped upon the back of someone who, quite frankly, should not be trying cases will not convert that person into an effective cross-examiner. Such rules as never turn your back on a jury, never turn your back on a witness, never approach the judge from the left, don't look at a prosecutor out of the right eye, always pick up exhibits with the left hand, are simply meaningless without the ability to know when to apply them.

IV. RULES I WOULD APPLY

I think the effort to develop more rudimentary rules of cross-examination is a meaningless exercise in futility. That being said, let me provide a few of my own rules.

My list would begin with preparation through the use of a trial book. In important cases, the witness' statements should almost be memorized. In other cases, they should be diagrammed and outlined, and only when this is accomplished should the task of cross-examination of those witnesses be contemplated.

Cross-examination should always be consistent with the defense theory. If you don't have a defense theory, you don't have a case. Save your time, your client's money, get the best deal and get out.

"The first question in cross-examination should be the toughest question, . . . (it) should focus the jury's attention to the contested issue in the case, . . ."

Cross-examination should be natural. If this means that you sometimes turn your back on everybody in the courtroom or pick up exhibits with the wrong hand, do it. But above all, be natural.

Cross-examination should focus on leading questions and the boxing in theory, but one should not be afraid to ask non-leading questions if they can't hurt you or they emphasize a point. I remember the cross-examination of a particularly unprepared police investigator in connection with a homicide investigation. I elicited "yes" responses from a series of questions involving other investigative tools that could have been used to eliminate suspects. I then broke all rules and asked the "why" question: "Why didn't you do all this?" There was no response that could hurt my case. Either he would say, "I felt like we had our man," or some such rot, in which event you go through the series of questions again, or it was going to be, "I was too busy or lazy." The forbidden question emphasized the point that a thorough investigation had not been accomplished, and there were a lot more potential defendants out there than the one seated next to me.

Cross-examination should begin with the premise that police can't hurt you. If possible, fit your theory within the officer's version of the events. If your theory does not fit the officer's investigation, the use of hypothetical questions works well. Police officers seem to have a hard time saying, "I don't know."

The first question in cross-examination should be the toughest question. I have sat in many a courtroom and heard many prosecutors ask the series of "what happened next" questions in plodding through the State's theory of the case. By the time you have a chance to cross-examine the witness, most of the jurors are asleep (and maybe you are, too, if you're not careful). Your first question should focus the jury's attention to the contested issue in the case, if possible, or focus the jury's attention on the fact that this particular witness may be mistaken or lying and that he is not to be believed. The lawyer has more power during cross to influence the "truth" found by the jury than at any other stage of the trial.

Cross-examination should be fun. What other people do for fun is up to them. Maybe accountants get a kick out of running through balance sheets. Trial lawyers should get a kick out of cross-examination. We do it a lot. If it's not fun, we ought not do it.

Cross-examination should be free-flowing and generate movement in the courtroom. If the judge will let you, move around. The jury must be convinced that the defendant has equal setting in the courtroom with the State. I like to say that the courtroom is owned by the defense, not the State. To do that, you have to move around. If the judge won't let you move around, make a record and abide by his rules. Some judges still haven't learned who owns the courtroom. Good judges have and usually won't interfere.

CONCLUSION

In my opinion, the art of cross-examination is the essence of being a lawyer. Cross-examination is designed to aid the jury in finding the truth. One should read books on the art of cross-examination and take classes on effective cross-examination, but recognize that in any particular case, most rules are made to be broken at some point in time. Thorough preparation will allow the lawyer to know when.

Commission Highlights

During its regularly scheduled meeting of January 25, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the December 14, 1990, meeting were approved.
2. Tobin Brown, CLE Administrator, reported on the New Lawyer CLE program for which there will be 10 workshops per year and revenue will be divided between the Bar and the Young Lawyers Section.
3. President Greenwood reported on the January 4, 1991, Task Force meeting. She commented that representatives from various Bar programs made presentations and indicated that a major topic of discussion continues to be the discipline process.
4. President Greenwood informed the Commission that Ray Westergard from Grant Thornton will appear at the February 1, 1991, Task Force meeting and that on April 19, 1991, the Commission will have the opportunity to appear and provide additional input.
5. Rex Olson was appointed to fill the vacancy on the Child Support Guideline Advisory Committee due to the resignation of Darwin Hansen.
6. The March Bar Commission meeting date, which had originally been scheduled for March 22, was changed to coincide with the Mid-Year Meeting and will be held on March 14, 1991, at 2:00 p.m. in St. George.
7. Executive Director Baldwin presented several different mortgage refinancing options to the Commission in order to satisfy the Supreme Court's order to refinance the loan on the building. The Commission voted to refinance the loan with Utah Bank and Trust pursuant to their offer.
8. Mr. Baldwin reported on the Utah Law and Justice Center lease agreements and advised the Commission that he still hopes to begin implementing the new data processing system at the beginning of the fiscal year.
9. Scott Reed and Kent Collins were appointed to the Bar Examiners Committee.
10. The February 1991 Bar Exam applicant list was approved.
11. Character and Fitness recommendations were approved.
12. An applicant who had requested special testing accommodations was allowed to take the next Bar Exam, and a study of the issue of allowing extra time for "language handicaps" was requested before any other special testing accommodations will be allowed again for the same concern.
13. The Commission voted to deny an applicant's request to be admitted by petition rather than examination, due to injury and inability to write, and suggested that applicant make the request to the Supreme Court.
14. The Commission approved Ethics Advisory Opinion No. 108 to allow a Utah lawyer who is also a certified public accountant to include a CPA designation on professional law office letterhead.
15. The Commission reviewed the litigation report.
16. The Commission voted to have the Utah State Bar present and support their position that the Bar should remain integrated and the Office of Bar Counsel should remain part of the Bar.
17. Executive Director Baldwin gave a summary of late license fee revenue. He explained that only 65 of 902 members who had originally failed to make their October 15 payments would ultimately be suspended.
18. The Commission discussed the cash revenue and expense projections and the income and expenses, year to date. The Commission requested a corrected month-to-month report on budget comparisons and revenue projections to be discussed at the February meeting.
19. The Bar's accounting consultant, Paul Beard, reported that he had reviewed the accounting systems and distributed an outline of areas that could be improved in the accounting department. He indicated that there are not any serious problems, mainly a few weaknesses which can be readily resolved.
20. Justice Michael Zimmerman, Judge David Roth and Court Administrator Bill Vickrey outlined the Judicial Council sponsored bills being presented in the 1991 legislative session.
21. The Commission approved the New Lawyer CLE program regulations.
22. Legislative Affairs Committee Chair, James Lee, distributed a Legislative Affairs Committee report making recommendations to the Commission on which bills the Committee supports or opposes.
23. The Commission failed to accept the Committee's recommendation to support House Bill 7, Right to Legal Action, four in favor, three opposed. President Greenwood did not vote.
24. The Commission voted to accept the Committee's recommendation to support House Bill 28, Criminal Appeals Amendment. President Greenwood did not vote.
25. The Commission voted to accept the Committee's recommendation to support House Bill 36, Influencing a Juror. President Greenwood did not vote.
26. The Commission voted to accept the Committee's recommendation to support House Bill 125, Credit Obligations of Spouses. President Greenwood did not vote.
27. The Commission voted to accept the Committee's recommendation to support the proposed Judicial Council Bills.
28. The Commission failed to support the Court Reorganization Bill, six in favor, two opposed. The Commission voted to reconsider its support after review by the Committee and following a phone poll to those Commissioners absent.
29. The Commission voted to accept the Committee's recommendation to support the Judicial Compensation Bill. President Greenwood did not vote.
30. The Commission voted to accept the Committee's recommendation to oppose House Bill 1, Attorney's Fees, and suggest amendments. President Greenwood did not vote.
31. The Commission voted to take no position on House Bill 75, Alternative Dispute Resolution. President Greenwood did not vote.
32. The Commission voted to accept the Committee's recommendation to oppose House Bill 137, Conducting Business Under an Assumed Name. President Greenwood did not vote.
33. The Commission moved into Executive Session from 12:00 to 1:00 p.m.

A full text of the minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Notice to Bar Members

THIRD, FOURTH AND FIFTH DIVISIONS

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for two members from the Third Division, one three-year term and one one-year term to fill the unexpired term of president Greenwood, one member from the Fourth Division for a three year term and one member from the Fifth Division.

Applicants must be nominated by written petition of 10 or more members of the State Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar Office on or after March 15 and completed petitions must be received no later than April 12. Ballots will be mailed on or about May 3 with balloting to be completed and ballots received by the Bar Office by 5:00 p.m. on May 31.

If you have questions concerning this procedure, please contact John C. Baldwin at the Bar Office (531-9077).

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rules 1.1 and 1.3 by failing to pursue a Temporary Restraining Order against his client's ex-husband's wasting of marital assets. The attorney had also failed to respond to his client's numerous requests for information in violation of Rule 1.4.

2. An attorney was admonished for violating Canon 6, DR 6-101(A)(3) by failing to timely respond to his client's requests for information regarding a recommendation from the Domestic Relations Commissioner. The attorney failed to respond to the client's daily telephone calls for approximately one month.

3. An attorney was admonished for violating Rule 1.4(a) by failing to respond to his client's numerous telephone calls regarding the status of the action. The Screening Panel found that the attorney had failed to adequately respond to his client for a period of two years.

4. An attorney was admonished for violating Rule 1.4(a) by failing to respond to his client's numerous requests for information and failing to inform his client of the cancellation of court dates and failing to explain clearly the fee agreement. The attorney failed to respond to his client's requests for information for a period of approximately three months.

5. An attorney was admonished for violating Canon 9, DR 9-102(b)(1), (3) and (4) and Rule 1.13(b) by failing to remit to his client sums held in his trust account for a period of six months. The attorney failed to timely return approximately $280 which was the remainder of the settlement of a lawsuit.

SUSPENSIONS

On September 5, 1990, Kenn Martin Hanson was suspended for 15 months for violating Rules 1.3, 1.4(a), 1.13(b), 1.14(d) and 8.1(b). In addition, Mr. Hanson is required to complete six hours of continuing education in ethics and pay the sum of $8,000 in restitution to another attorney for completing Mr. Hanson's cases. In June 1988, Mr. Hanson relocated to the state of Arizona. He failed to apprise several of his active clients that he was leaving his practice in Utah. Mr. Hanson "assigned" several of his active clients' cases to other attorneys without advising or consulting the clients. He had accepted lump sum fees from several clients for whom he failed to complete the matter and failed thereafter to return the legal fees. Further, Mr. Hanson applied for membership in the Arizona State Bar and failed to disclose certain required information to the Arizona Bar authorities pursuant to his application.

Scott M. Matheson Award

The Law-Related Education and Law Day Committee of the Utah State Bar is accepting applications and nominations for the First Annual Scott M. Matheson Award to be presented on Law Day, May 1, 1991.

PURPOSE:

To recognize those lawyers and law firms who have made an outstanding contribution to law-related education in the state of Utah.

CRITERIA:

Nominations and applications will be accepted on behalf of individuals or law firms who have:

1. Made significant contributions to law-related education in the state of Utah which are recognized at local and/or state levels.
2. Voluntarily given their time and resources in support of law-related education, such as serving on planning committees, reviewing or participating in the development of materials and programs, and participating in law-related education programs such as the Mentor/Mid-Mentor Program, Mock Trial Program, Volunteer Outreach, Judge for a Day, or other court or classroom programs.
3. Participated in activities which encourage effective law-related education programs in Utah schools and communities and which have increased communication and understanding between students, educators and those involved professionally in the legal system.

APPLICATION PROCESS:

Applications and/or nominations may be submitted to the:

Scott M. Matheson Award
Law-Related Education Committee
Utah Law and Justice Center
Box A
645 S. 200 E.
Salt Lake City, UT 84111

Included in the nomination should be a cover letter, a one-page resume and a one-page summary of the nominee's law-related activities. The nominee may also submit other related materials which demonstrate the nominee's contributions in the law-related education field. This material may include a bibliography of law- related education materials written by the nominee, copies of news items, resolutions or other citations which document the nominee's contribution or a maximum of two letters of recommendation. All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Nominations must be postmarked no later than April 15, 1991.

Utah Trout Foundation

Founded in 1989, the Utah Trout Foundation is dedicated to reclaiming, enhancing and conserving Utah's cold-water fisheries and riparian habitat. Unlike many conservation organizations, the Foundation's all-volunteer staff works quietly within "the system," using science and business to achieve its objectives.

For its first project, the Foundation co-sponsored the Rocky Mountain Regional In-Stream Flow Conference in Jackson in October 1989. Participants in the Conference, which will be a bi-or tri-annual event, included nationally and regionally recognized experts and leaders in water law, use and politics. In 1990, the Foundation developed and implemented the initial phases of its Preliminary Master Plan for what was once one of Utah's premier wild trout streams. The project, which the Foundation hopes to disclose shortly, involves the establishment of a publicly accessible conservation easement along some 23 miles of stream in cooperation with landowners and government agencies. The cornerstone of this and similar projects in the future will be the formal establishment of a Conservancy managed by the Foundation and other participants. Just recently, the Foundation helped organize and staff a volunteer project to help re-establish the brown trout population in central Utah's Diamond Fork, recently decimated by the treatment of Strawberry Reservoir. For 1991, the Foundation hopes to add a fencing project on the lower Provo River to mitigate livestock damage to the River's fragile blue-ribbon fishery and riparian system.

The Utah Trout Foundation would like your help. To make a contribution, volunteer or learn more, call or write:

Utah Trout Foundation
P.O. Box 581131
Salt Lake City, UT 84158-1131
(801) 521-6424

Be sure to visit the Foundation's booth at the 1991 ToRo Sportsmen's Show, Wednesday through Sunday, March 20 to 25, at the Salt Palace.

(The Utah Trout Foundation is a qualified 501(c)(3) organization under the Internal Revenue Code.)

Utah State Bar 1991 Annual Meeting

SUN VALLEY, IDAHO
July 3 through July 6, 1991

Make your reservations early for a great CLE vacation!

Sun Valley

SUPREME COURT'S SPECIAL TASK FORCE ON THE MANAGEMENT AND REGULATION OF THE PRACTICE OF LAW

Information regarding upcoming meetings of the Supreme Court's Special Task Force on the Management and Regulation of the Practice of Law can be obtained from Colin R. Winchester, Administrative Office of the Courts, 230 S. 500 E., #300, Salt Lake City, UT 84102. Summaries of the Task Force's activities are published in each issue of the *Utah Advance Reports*. If you do not have ready access to UAR and would like copies of the summaries mailed directly to you, please contact Mr. Winchester at (801) 533-6371.

Legal Assistants Association of Utah Elects Officers

The Legal Assistants Association of Utah (the "LAAU") elected officers to serve for the calendar year 1991 at a business meeting at the Utah Law and Justice Center.

Michele Rehermann, CLA, was elected to the office of President of the non-profit organization which was organized to support the professional and educational interests of legal assistants in the state of Utah. Ms. Rehermann is a legal assistant with the law firm of Kruse, Landa & Maycock, Salt Lake City.

Elected to the office of Vice President was Ralph Smith, who is employed by the law firm Ray, Quinney & Nebeker. Patty Clarke, employed by IHC Risk Management, will serve as LAAU's Secretary, and Marie Smith, CLA, an employee of U.S. West Communications, will serve as the Treasurer.

The LAAU operates through various committees whose elected chairs include Marilu Peterson, CLA, of the firm of Jensen & Lewis (Education); Brent R. Scott of Equitable Life and Casualty Insurance Company (Public Relations); Mary Mark of Mary N. Mark & Associates (Ethics); and Susan K. White, CLA, of U.S. West Communications (Membership).

Notice To Attorneys

1991 JUDICIAL CONFERENCE OF THE TENTH CIRCUIT

July 17 to 19
Sedona, Arizona

What better way to spend mid-July than relaxing at 4,500 feet amid the picturesque red rocks, valley and creek of art-filled Sedona, Ariz. You will hear from Justice Sandra Day O'Connor, Justice Byron R. White, Clarence Darrow, and other nationally prominent speakers, judges and practitioners, on the Bill of Rights, Professionalism and Ethical Issues, and a review of recent significant cases decided by the Supreme Court and the Tenth Circuit. You will be awarded CLE credits by your states.

A special evening exhibit of representative paintings and sculpture shown by important artists will whet your appetite for further exploration of the many studios and galleries in the area. Bring the family with you and make the trip a family vacation. A learning program on the Bill of Rights will be offered for spouses and children. An optional bus tour to Grand Canyon (120 miles away) on the day following the conference is being arranged. Visit other nearby scenic wonders, such as Lake Powell, Mesa Verde, Canyon de Chelly, Petrified Forest, Bryce Canyon, and Zion National Park. Even continue farther west to Las Vegas, Disneyland or San Diego's Seaworld and Zoo.

Mark your calendar and plan for an enjoyable family vacation to Sedona. Fly to Phoenix and rent a car for the two-hour scenic drive to Sedona, or drive your own car. For more information, write or call Circuit Executive's Office, U.S. Courthouse, Denver, CO 80294, (303) 844-4118.

Litigation Report and Update

JANUARY 15, 1991

The August/September 1990 issue of the *Utah Bar Journal* contained a Litigation Report published for the purpose of informing our members as to what litigation had been filed against your Association, its staff, officers and Commissioners. Your Bar Commission believes it to be most important to keep members informed of the status of any such pending litigation on a regular basis. The following information is intended to update you as to additional developments which have occurred in relation to individual cases and to inform you of new litigation filed against the Bar. Similar updated reports using the same format will appear on a regular basis in future issues of the *Utah Bar Journal.*

SUMMARY OF LITIGATION

PLAINTIFF (COUNSEL) AND DATE OF FILING	CAUSE OF ACTION	COURT/ JUDGE	COUNSEL FOR BAR	CURRENT STATUS
1. Brian Barnard (pro se) Fld. 2/8/88.	Disclosure of Bar staff salaries and a declaration that the USB is a state agency; injunction relief and $100 to $1,000 exemplary damages, attorneys fees and costs.	Third Dist. Ct. J. Wilkinson, C-88-0578 and S. Ct.	C. Kipp, R. Rees, R. Burbidge, S. Trost	Summary Judgment granted in favor of P Reversed by Ut. S. Ct. on 1/9/91. Held, USB not a "state agency" as defined in the Records Act and Writings Act. Petition for Reconsideration pending.
2. Brian Barnard (pro se) Fld. 2/16/88.	Action for injunctive and declaratory relief to prevent USB from suspending P for refusing to provide certain information on the licensing form which P alleges is "private" information. Also seeks a declaration that the USB is a state agency, injunctive relief and $100 to $1,000 exemplary damages, attorney's fees and costs.	Third Dist. Ct. J. Brian, C-88-0801.	C. Kipp, R. Rees, R. Burbidge, S. Trost	Discovery and P's Motion for Judgment on the Pleadings and/or Motion for Summary Judgment pending without date; $2,311.30 paid toward insurance deductible; on 6/14/89 Motion to Stay granted, awaiting decision by S. Ct.
3. Brian Barnard, Brad Parker (pro se) Fld. 5/1/88.	Attempt to re-open the lawsuit settled approximately 1 1/2 years ago re: publishing letters to the editor in the Bar Letter; current action seeks declaratory relief for deprivation of First Amendment rights for failure of the State Bar to publish a recent proposed letter to the editor from P. Action was bought pursuant to 41 USC 1983 seeking a declaration that the USB is a state agency, $10,000 plus compensatory damages, $5,000 punitive damages against each defendant, attorney's fees and costs.	U.S. Dist. Ct. J. Sam, C-88-02395 and Tenth Cir.	G. Hanni	6/3/88-Judge Sam granted USB's Motion for Summary Judgment dismissing the complaint and holding that USB Bar Letter was not a designated public forum and access not protected by First Amendment. Affirmed by Tenth Circuit on 3/9/90. $5,000 paid toward insurance deductible. CASE CLOSED
4. Brian Barnard, Brad Parker (pro se) Fld. 5/1/88.	Civil rights action challenges use of mandatory dues for non- essential bar functions as violations of First and 14th Amendments. P. seeks injunctive and declaratory relief, attorney's fees and costs.	U.S. Dist. Ct. J. Greene, C-88-379A. Case reassigned to J. Burciaga, U.S. Dist. Ct. (New Mexico).	C. Kipp, R. Rees	Parties stipulated to dismissal with prejudice with neither P admitting claims lacked merit nor D admitting liability. D stipulated as part of settlement to pay $12,500 for attorney's fees and costs. USB's insurance carrier elected to settle for cost of defense over objection of Commission. CASE CLOSED

PLAINTIFF (COUNSEL) AND DATE OF FILING	CAUSE OF ACTION	COURT/ JUDGE	COUNSEL FOR BAR	CURRENT STATUS
5. Ernest and Sharon Baily (S. Rowe) Fld. 12/16/87.	USB's alleged breach of fiduciary duty for failure to discipline Richard Calder seeking Writ of Mandamus and $800,000 in damages, a "state agency" declaration, attorney's fees and costs.	Third Dist. Ct. J. Wilkinson, C-87-8124.	C. Kipp, R. Rees	Order granting D's Motion to Dismiss entered 2/7/90. Notice of Appeal filed. All Briefs filed, awaiting Oral Argument.
6. Dennis and Reta Job (pro se) Fld. 12/17/87.	USB's alleged breach of fiduciary duty for failure to discipline Richard Calder seeking Writ of Mandamus and $500,000 in damages, a "state agency" declaration, attorney's fees and costs.	Third Dist. Ct. J. Rokich, C-87-08173	C. Kipp, R. Rees	Order granting D's Motion to Dismiss entered 5/18/90. No Notice of Appeal filed as of 1/15/91. CASE CLOSED
7. Ronald O. Neerings (Brian Barnard) Fld. 6/9/88.	February 1988 unsuccessful Bar Exam applicant's Ct. action against USB for releasing Bar examination information, seeking a "state agency" declaration, injunctive relief, $10,000 plus compensatory damages, $100 to $1,000 in punitive damages, attorney's fees and costs.	Third Dist. Ct. J. Sawaya, C-88-3807	C. Kipp, R. Rees	D's Motion for Summary Judgment for Dismissal with Prejudice granted. D's request for costs granted; N of appeal filed with Utah S. Ct.; $5,000 paid in insurance deductible. All Briefs filed, awaiting Oral Argument.
8. L.R.T. (real name not disclosed) (Brian Barnard) Fld. 12/8/88.	A 1983 civil rights action alleging deprivation of substantive and procedural due process in USB's 1986 denial of admission to practice law resulting from P's felony conviction.	U.S. Dist. Ct. J. Jenkins, 88-C-1141W	C. Kipp, R. Rees, S. Trost	In discovery; $5,000 insurance deductible paid.
9. Brian Barnard (pro se) Fld. 8/2/89.	Action for injunctive relief against Toni M. Sutliff, Assoc. Bar Counsel, to enjoin disciplinary process for failure to provide P with certain requested information prior to the time such information was available to Assoc. Bar Counsel for release to P.	Third Dist. Ct. J. Hansen Ut. S. Ct.	C. Kipp, R. Rees, S. Trost	D's Motion to Dismiss filed; P filed Voluntary Dismissal and refiled in S. Ct. On 12/13/89 S. Ct. orders all discipline at Screening Panel level be by consent. D's Motion for Sanctions granted. $4,381 awarded to D. P's Motion for Summary Reversal denied. Appeal pending.
10. Richard Crandall (Brian Barnard) Fld. 7/21/89.	1983 civil rights action against USB and Bar Commissioners alleging improper conduct for failing to reinstate Crandall after suspension for failure to timely pay Bar dues; seeks declaratory relief and damages of at least $250,000.	Fed. Dist. Ct. J. Sam	T. Kay, S. Trost	D's Motion to Dismiss granted 8/31/90. P files Notice of Appeal, pro se 10/2/90.
11. Brian Barnard (pro se) Fld. 3/8/90.	Declaratory relief sought to determine jurisdiction of Dist. Ct. in matters relating to Bar policies, rules and practices.	Third Dist. Ct. J. Sawaya	C. Kipp, R. Rees, S. Trost	Order granting D's Motion to Dismiss entered 7/9/90. P has not filed Notice of Appeal as of 1/15/91. CASE CLOSED

PLAINTIFF (COUNSEL) AND DATE OF FILING	CAUSE OF ACTION	COURT/ JUDGE	COUNSEL FOR BAR	CURRENT STATUS
PETITIONS PENDING AS OF 1/15/91				
12. In re: Amendments to the Rules of Integration. Fld. 11/6/89. Petitioner: B. Barnard C-89-0467	Seeks Rule changes prohibiting USB from using member fees in performing non-essential functions.	S. Ct.	C. Kipp, R. Rees, S. Trost	Petition denied 9/5/90. Petitioner directed to refer issues to Task Force. CASE CLOSED
13. In re: Procedures of Discipline Fld. 9/27/89 Petitioner: B. Barnard	Petitioner seeks amendment to Rule XVI to allow actions in equity against Bar Counsel and a new Rule for assignment of cases to Screening Panel.	S. Ct.	T. Sutliff, S. Trost	Referred to S. Ct. advisory Committee on Ethics and Procedures of Discipline, 3/5/90.
14. In re: Bar Counsel and Commissioners Fld. 7/21/89 Petitioner: B. Barnard C-89-0341	Petitioner seeks Prohibition of Bar Counsel from prosecuting discipline cases before Bar Commission and representing Commission as general counsel.	S. Ct.	T. Sutliff, S. Trost	Petition denied 9/5/90. CASE CLOSED
15. In re: USB Assoc. Fld. 7/2/90 Petitioner: R. Crandall, R. Norton	Petition to Establish Client Security Fund Rules, Retraction in *Bar Journal* and other relief.	S. Ct.	S. Trost	Response filed 8/13/90. USB voluntarily published Retraction. Awaiting decision.
16. In re: Ethics and Discipline Committee of the USB Fld. 12/31/90 Petition	Petition for an Interim Rule deleting "three time loser" Rule, adding certain procedural safeguards at Screening Panel level of Discipline and authorizing Screening Panel to impose Private Discipline.	S. Ct.	S. Trost	Objection filed by B. Barnard 1/7/91. Oral Argument heard 1/9/91. Petition granted with further modification requiring verification of complaints. CASE CLOSED

1991-1992
Utah State Bar
Request for Committee Assignment

I. Instructions to Applicants: All applicants for committee assignment will be assigned to a committee, with every effort made to assign according to choices indicated. Service on Bar committee includes the expectation that members will regularly attend meetings of the committee. Meeting frequency varies by committee, but averages one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday. Members from outside the Salt Lake area are encouraged to participate in committee work. Many committees can accommodate to travel or telephone conference needs and much committee work is handled through correspondence, so it is rarely necessary for such members to have to expend large amounts of time traveling to and from meetings. Any questions may be directed to: Kelli Suitter, Bar Programs Administrator, at 531-9095.

II. Applicant Information

Name _____

Address _____

_____

Telephone _____

Most Recent Committee Assignments _____

_____

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

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

Please return this form to Kelli Suitter, Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111 by April 1, 1991.

CASE SUMMARIES

By Clark R. Nielsen

ATTORNEY DISCIPLINE

The Utah Supreme Court has constitutional and inherent power to administer attorney discipline. The recommendations and finding from the Board of Bar Commissioners is advisory and non-binding upon the court. The court assumes the Board's findings are correct. However, if the evidence so warrants, the court will make an independent judgment regarding the evidence and impose appropriate discipline. The suspension and restitution order was affirmed for dishonest conduct under DR1-102(A)(4) by knowingly converting a client's funds to pay the debt of another client. Respondent used one client's trust funds to pay Respondent's own fees owed by another. J. Zimmerman, with J. Howe, concurring and dissenting, opined that the period in which to pay restitution should only be 30 days.

In Re Benjamin Knowlton, 146 Utah Adv. Rep. 16 (October 30, 1990) (J. Stewart).

UTAH BAR ASSOCIATION

The Utah State Bar Association is not a "state agency" for purposes of the Records and Writing Acts, Utah Code Ann. 63-2-59 to 89, 78-26-1 to 8. Accordingly, the Bar Association is not required *by these statutes* to disclose detailed salary information to a Bar member. In view of the organizational history and function of the Bar Association (which the court details), the association is not a court or state "institute" or "agent" under the statutes. The court reiterated the Utah Constitution authority to regulate the practice of law under Article VIII, 4. The Bar Association is a non-governmental, non-public association that is *sui generis* (of its own creation). The court refused to state that the legislature may not assert authority over or power to control the Bar or the practice of law.

Barnard v. Utah State Bar, 151 Utah Adv. Rep. 12 (January 9, 1991) (J. Stewart).

TAX LAWS, IGNORANCE OF LAW

Albeit that ignorance or mistake of the law is no defense to criminal prosecution, the proliferation of statutes and regulations now makes it difficult for the average citizen to comprehend and know the extent of tax obligations imposed. Consequently, many criminal tax laws require a "willful" violation, e.g., "a voluntary, intentional violation of a known legal duty." In this case, tax petitioner successfully argued that a misunderstanding or ignorance need not be objectively reasonable. However, petitioner's knowledge of the law or obligation is sufficient to show willfulness. A studied, informed claim that certain provisions of the complex tax laws are invalid could arise only from a knowledge and understanding of its provisions, thereby indicating a willful violation.

Cheek v. U.S., U.S. Supreme Court, 59 L.W. 4049 (January 8, 1991) (J. White).

BANKRUPTCY, STANDARD OF PROOF

The standard of proof for fraud in a 523(a) exception to bankruptcy discharge is preponderance of evidence and not clear and convincing evidence. Although the scant legislative history, and the Code's silence, as to burden of proof may suggest that Congress did not intend to change prior law, a preponderance standard imposes a uniform bankruptcy standard across all states that have differing fraud laws and properly balances interests of creditor and debtor.

Grogan v. Garner, U.S. Supreme Court, 59 L.W. 4072 (January 15, 1991) (J. Stevens).

FIRST AMENDMENT, RELIGION IN PUBLIC SCHOOLS

A school district's order that a schoolteacher not read the Bible during her fifth grade silent reading period did not violate either the Establishment or Free Exercise Classes of the First Amendment. The Tenth Circuit Court of Appeals applied the *Lemon* Test to the teacher's "Establishment" claim: The order neither advanced or inhibited religion, had a clear secular purpose to avoid the appearance of teaching religion, and created no entanglement. The evidence demonstrated that the teacher's Bible reading and other activities were prompted by a religious purpose.

Roberts v. Madigan, F.2d , (10th Cir., December 17, 1990) (J.M. McKay).

SEARCH AND SEIZURE, CONSENT

An alleged "kidnap victim," held two months in defendant's home, possessed sufficient common authority over the premises and an expectation of privacy to give effective consent for a search of the mobile home premises.

U.S. v. McAlpine, F.2d (10th Cir., November 27, 1990).

FELONY MURDER, GREATER-LESSER OFFENSES, LEGISLATIVE INTENT

Defendant McCovey's felony murder and aggravated robbery were affirmed in a 3-2 decision, split on whether the felony murder statute precludes a conviction of both murder and the underlying felony. Justice Hall, with Justices Howe and Stewart concurring, held that the aggravated robbery, upon which the felony murder was premised, was not a lesser-included offense of the murder charge and did not violate the Double Jeopardy Clause of the Fifth Amendment.

Aggravated robbery is one of the predicate offenses necessary for felony murder and proof of all the robbery elements at trial is necessary to prove the felony murder charge. However, despite the fact that under the analysis of *State v. Hill* aggravated robbery should be a lesser-included offense of felony murder, the majority concludes that the relationship is more similar to that of an "enhancement" rather than "greater-lesser" statute. Without providing historical background of any legislative intent, the majority concludes that the legislature did not intend to create a greater-lesser relationship between felony murder and the predicate felony. The deterrent purpose of the felony murder statute would be frustrated if the underlying predicate offense was treated as a lesser offense.

Both Justices Durham and Zimmerman, dissenting, argue that the majority overrides the plain language of 76-1-402(3) and the greater-lesser offense analysis in prior cases. Regardless of a subjective analysis of legislative intent, the statutory language is clear and should be followed. It is just as plausible to conclude that "the legislature was entirely unaware of the unique conceptual problems presented by the offense when it passed the criminal code."

State v. McCovey, 150 Utah Adv. Rep. 5 (December 18, 1990) (J. Hall).

WARRANTLESS SEARCH, UNREASONABLE, X-RAY

The warrantless X-ray of defendant's stomach to find a swallowed ring was an unjustified search because there was no exigent circumstance that would deviate obtaining a warrant. Under *State v. Larocco*, 794 P.2d 460, 470 (Utah 1990), there was no showing that, by procuring a warrant, the safety of officers would be imperiled or the evidence was likely to be lost. Officers had time to obtain a warrant.

State v. Palmer, 147 Utah Adv. Rep. 42 (Ct. App., November 14, 1990) (J. Bench).

Claim of the Month

LAWYERS PROFESSIONAL LIABILITY

ALLEGED ERROR AND OMISSION

Insured attorney allegedly failed to utilize expert testimony in an Order to Show Cause hearing regarding the fair market rental value of the home of a divorced client.

RESUME OF CLAIM

The Insured represented the wife in divorce proceedings. Wife argued the market value of home for rental purposes was far less than the value as presented by husband's expert. The judge ruled that the market value was equal to that value represented by the opposition's experts.

The Insured argued he had an expert who had already given an opinion on the *sale* value of the home and that he would have had trouble finding an expert to counter opposition.

HOW CLAIM MAY HAVE BEEN AVOIDED

Instead of relying on "seat of the pants evaluations" or the "sheer logic of ideas," the Insured should have countered his adversary's presentation of expert testimony with his expert or, if expert was not available, counsel should have reformed his position and advice. At the very least, counsel should have written client a letter describing the difficulty he was having in substantiating her position.

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

Court Technology

By Judge Gordon J. Low

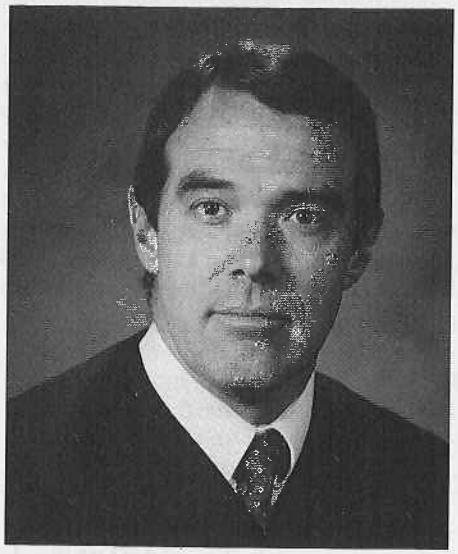
At a recent State judicial conference, the Honorable Bruce Jenkins observed that courts, by their very nature and design, are conservative. They move slowly, with purpose and caution that allows time to consider and reflect. In so doing, they provide an anchor in the swift currents of society.

The benefits of stability, consistency, reliability and soundness, however, have their downside in delay caused by antiquated methods and technology. Without the aid of new technology, such as is being applied by both the private sector and other branches of government, the courts will be unable to provide the benefits for which they are designed.

The number of technologies which could be helpful to the function of the courts far exceeds not only the abilities to adapt them, but the willingness and finances to accommodate the same. Further, the enthusiasm with which new technologies are viewed by different judges throughout the State covers a wide spectrum from almost absolute rejection to wild enthusiasm.

The problems of Courts and technology is an area of study by the Utah Commission on Justice in the 21st Century. In November 1990, a subcommittee ably chaired by Attorney Randy L. Dryer submitted its report on court technology to the Commission. The report, as reflected in the letter of delivery by Chairman Dryer, was a product of "countless hours of thought, investigation, and preparation" by a subcommittee comprised of a variety of individuals from different fields, all concentrating on the status of the court technology, current and future needs and availability of solutions to those needs.

The report has been hailed by a number of state courts from around the country and will be a focal point for study by the National Center for State Courts and a working paper to the National Court Technology Conference to be held next year in Dallas. When formally released, I recommend its reading by each member of the Bar. Without here repeating the entire contents of the same, some extracts and thoughts may be beneficial.



JUDGE GORDON J. LOW was appointed to the First District Court bench in 1987 by Governor Norman H. Bangerter. He graduated from the Arizona State University College of Law in 1973, and practiced law in Logan until his appointment to the bench. He is a former Utah State Bar Commissioner and former member of the Utah State Board of Parks and Recreation. In 1985, he served on the Governor's Judicial Article Task Force. He is currently a member of the Supreme Court Advisory Committee on Evidence, the Commission on Justice in the 21st Century and the Board of District Court Judges.

The subcommittee's report identified 10 fundamental principles to govern the consideration of technologies. Without taking the space or time here to provide for the reported comments to each, the principles are that:

1. Technology should foster greater access to the courts.
2. Technology should enhance the role of the court as a service institution.
3. Technology should improve the quality of justice.
4. Technology should enhance the effective management of the justice system by increasing efficiency.
5. Technology should not be used as a substitute for the knowledge, skills and judgment of individuals, but should assist individuals in the proper utilization of their knowledge, skill, judgment and training.
6. Technology should enhance productivity, reduce delay or otherwise be more cost effective than the system it replaces.
7. Technology should improve the decision-making process of judicial managers by providing complete and accurate information.
8. Technology should have a useful life.
9. Technology should be acceptable and convenient to end users.
10. Technology should accommodate the need for security, confidentiality and protection of privacy concerns.

The smorgasbord of whiz-bang, bells, whistles and Buck Rogers stuff available is amazing, if not frightening. An analysis of the currently available technology includes: Touch Screens, Computer-Aided Transcription (CAT), Electronic Filing, Video Input, Voice Recognition, Bar Coding, Facsimile Transmission, Electronic Access, Voice Synthesis, Electronic Mail, Voice Mail, Video Arraignment, Video Conferencing, Computer Networking, Distributed Data Base, Imaging, Legal Research Data Base, Enhanced Data Base (Fourth Generation Relational Data Base Environment), Artificial Intelligence/ Expert System (and others with even more esoteric names). Each of the above technologies is currently available. Each was analyzed with the needs of the courts, and the advantages and disadvantages considered. (The report contains a full analysis.)

With their 10 principles in mind and some awareness of the needs and analysis of the technology available, the committee

made specific recommendations in the form of goals: IMMEDIATE (one year), SHORT TERM (one to five years), and LONG TERM (six to 10 years). Those goals are:

IMMEDIATE GOALS

(one year)

1. Full utilization of electronic mail and voice mail in all courts statewide.
2. Establish a touch screen pilot project for small claims proceedings in selected Circuit Courts.
3. Creation of a permanent technology committee to make ongoing recommendations regarding the application of future technology and to devise a mechanism to ensure that adequate funding is secured for those technologies.
4. Implementation of various "convenience" technologies presently available to the public in the private sector. These include payment of fines and fees by credit card, both in person by telephone, electronic fund transfers, interactive voice technology and facsimile filing of documents.
5. Establishment of two separate pilot programs to evaluate both videotape and realtime computer-aided transcription as the means of making official court record.
6. Commencement of a systematic review of existing state statutes, rules and regulations which may conflict with the implementation of technologies in this report.
7. The Judicial Council should, while considering the recommendations made in the already adopted *1990-1999 Data Processing Master Plan*, develop a specific plan to implement the technological changes recommended in this report.

SHORT-TERM GOALS

(one to five years)

1. The Judicial Council, in consultation with related criminal justice agencies, should adopt minimum standards for the construction of new facilities as it relates to the use of video equipment and other technologies.
2. Using criteria set by the Judicial Council, video arraignment equipment should be installed in courts and jails on a statewide basis.
3. The courts should permit initiation of any case by electronic filing from remote locations.
4. Courts and other criminal justice agencies should set standards for accessing each other's data bases and exchanging information electronically.
5. Statewide implementation of the preferred technology as demonstrated by results of the video and computer-aided transcription pilot programs.
6. Implementation of the provisions of the American Bar Association's *Standards Relating to Court Organization* dealing with automated information systems, where not inconsistent with this report.
7. Pilot video-conferencing facilities should be established between the centralized user location in Salt Lake City, such as the Law and Justice Center, and one or more court facilities outside Salt Lake County.
8. Shared data base technology should be implemented as soon as it is available.
9. All software applications should be converted to the fourth relational data base environment.

LONG-TERM GOALS

(six to 10 years)

1. Records in all courts should be automated and should be electronically retrievable by the Bar, other governmental agencies, the public and the media from remote locations, subject to appropriate protections for privacy, confidentiality and security interests in keeping with existing constitutional and statutory requirements.
2. Imaging systems should replace or supplement present filing systems in all courts of record.
3. The judicial systems should move to an essentially "paperless" court.

The two most often asked questions relate to the third long-term goal of "paperless" courts and the fifth short-term goal of video reporting. With respect to the latter, certainly a trial period will be revealing. Studies were made of other court systems around the country which have adopted the video reporting, and the advantages and disadvantages of that system were critically analyzed. As to the first question about a paperless court—Mr. Eric Leeson of the State Court Administrator's Office and the chief engineer of the subcommittee study and the report responded as follows: "It is doubtful the Court systems will completely eliminate paper, but depending on paper as a primary source should be greatly reduced."

What will ultimately be done at this point is conjecture. It will be a function of acceptance, funding, further new technology advances and who knows what else, but the need for implementation of new available technology is apparent. As an example, the past unanticipated growth in the case numbers and complexity is phenomenal. Between 1980 and 1989, the records reflect that in Juvenile Court, a 32 percent increase in filings has occurred; in adult criminal cases, a 39 percent increase; and a jump of 45 percent in civil cases. The projections are that in the current decade the population of the State will increase by approximately 10 percent, case filings by 32 percent. The costs and needs in all areas will be for new judges, new facilities, new staff, and ancillary personnel, storage retrieval, access, etc.

The need for speed and accuracy is critical. Maintenance of the status quo of doing court business will be not only insufficient, but tragic. This sentiment is apparently felt not only by those working in the system and employed in the courts, but by the public as a whole. In a recent poll conducted for the Commission on Justice in the 21st Century by Dan Jones and Associates, the results showed that too much delay and costs of litigation were considered as very/somewhat serious problems by 88 percent and 86 percent of those polled respectively. Other results in the same poll indicated real and deep concern by the public over efficiency of the courts, alternatives available, the hassle and intimidation, hours of business, and the like.

More courts, more judges, more personnel and more storage will not meet the needs or solve the problems. New ways must be identified and developed to better handle court work. Technology promises to be a partial solution. Without the implementation of new technology, the time of the court will be used in processing and handling, rather than consideration, thought and reflection. The end product will suffer enormously.

The entire subcommittee in preparation of the report echoes the comment of Chairman Dryer, "We commend the Judicial Council for its foresight in creating the Justice Commission. We hope we have met the Council's hopes and expectations and that this report will better equip the Judiciary to meet the challenges of the future."

A copy of the full report is available from the Office of the Court Administrator upon request.

Officer's Message

By Richard A. Van Wagoner
Young Lawyers Section President

This message constitutes the mid-year report to young lawyers of the activities of the Young Lawyers Section. As you know, the Young Lawyers Section exists to provide attorneys in all areas of practice means to discharge society's moral obligations to people who have real need. The Section works to improve the profession and the Bar, and their image, through the extensive public education projects, pro bono programs and non-legal services, listed below. The Section also exists to assist the newer members of the Bar in assimilating to law practice and maintaining the highest standards of professionalism. I am pleased to report that through the voluntary efforts of many young lawyers, the Section goals and commitments of service to the public and membership are being accomplished. Personally and on behalf of the Section, I express gratitude to the young lawyers and the Section's benefactors for their contributions to enhancing the availability of quality services.

Utah's Young Lawyers Section has developed a national presence and has been recognized nationally for its service efforts. Several Utah young lawyers currently serve on influential ABA/YLD committees. Under the direction of Jerry Fenn in 1989, the Section received the ABA/YLD First Place award for public service in the "Comprehensive" category for sections of its size. Under the direction of Jon Butler and Betsy Lynn Ross in 1990, the Section was awarded the ABA/YLD First Place award for public service in the "Single Project" category for sections of its size (Domestic Relations Pro Bono Project). Moreover, in the spirit of expanding services to the public and to young lawyers, the Section has assisted other young lawyers sections throughout the country by presenting ideas for service programs at national conferences. The Section has also benefited from its attendance at these conferences by learning and then implementing many innovative ideas for expanding public services at low cost. The Section's credibility at the national level and national presence have also increased its ability to obtain the needed grant monies for its projects.

The only real restriction to expanding our service is financial. The Bar has borne some of the costs, while individuals and law firms have subsidized other costs. The Section does not impose a separate dues on its membership, but has had success in implementing many projects which do not require extensive financial commitment, and in obtaining grant monies which are earmarked for specific public service projects the Section proposes. We are awaiting announcements concerning other grant requests. Of course, the provision of some of the proposed services depends on the Section's ability to garner sufficient funds.

The following is a current list of the ongoing Section committees, programs and projects:

BILL OF RIGHTS COMMEMORATION COMMITTEE
- Bill of Rights Roundtable Programs
- Bill of Rights Public Education Programs
- Bill of Rights Essay Contest
- Bill of Rights Newspaper Article Series
- Bill of Rights Concert Sponsored by Utah Symphony (proposed)
- United States Constitution/Annual Commemoration
- Various Media Presentations Concerning the Bill of Rights
- Drug/Substance Abuse Program in the Schools
- Homeless Shelter Dinners
- Blood Drive
- Sub for Santa
- Law for the Clergy Project
- Pamphlet on Legal Issues for the Clergy
- Seminars/Conferences on Legal Issues for the Clergy
- Participation in Clergy Symposia

DIVERSITY IN THE LEGAL PROFESSION COMMITTEE
- Implementation of Gender and Justice Task Force Recommendations
- Education Project for Abused Spouses

LAW DAY COMMITTEE
- Law Day Fair in Logan, St. George, Provo, Ogden and Salt Lake City
- Public Television and Radio Programs During Law Week
- School Lectures/Presentations
- Regional Law Day Programs
- Assist Bill of Rights Commemoration Committee

LAW RELATED EDUCATION COMMITTEE
- Classroom Programs on the Law—Elementary, Junior High and High Schools
- Law School for Non-Lawyers: Library Lecture Series on the Law in Salt Lake, Ogden and Provo
- People's Law Community Education Program
- Stepping Out: A Pamphlet for Graduating High School Seniors/Additional Distribution and Lecture Presentations
- Expansion of Law School for Non-Lawyer Library Series to Utah County
- Fund-raising Solicitation Program to Corporations, Law Firms and School Districts to Fund Additional Publication of "Stepping Out" Pamphlet
- Assist Bill of Rights Commemoration Committee

LEGAL BRIEFS COMMITTEE
- Weekly Radio Program Addressing Current Legal Issues of Interest

MEMBERSHIP SUPPORT NETWORK COMMITTEE (MSN)
- Law Student/Law Firm Employment Fair
- Law Student Mock Interview Program
- Lawyers Compensation Project
- Brown Bag Luncheons
- CLEs at Annual State Bar Meetings
- Substance Abuse Lecture Program
- Bridge the Gap/New Lawyer Continuing Legal Education Project
- Special Projects

NEEDS OF THE CHILDREN COMMITTEE

- Educate Teachers About Child Abuse Program: Their Rights and Responsibilities in re Kids Pamphlet Distribution and Presentations
- Presentations on Children's Rights to Community Groups

NEEDS OF THE ELDERLY COMMITTEE

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

PRO BONO COMMITTEE

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

PUBLICATIONS/PUBLICITY COMMITTEE

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

If anyone is interested in becoming involved in the Section or has questions regarding any aspect of the Section, please contact me at 521-9000.

Legal Briefs

The following is a schedule of topics which will be presented on KSL Radio's Legal Briefs program. This program is aired on the dates indicated at 11:30 a.m.

We congratulate and thank the Young Lawyers Legal Briefs Committee for this successful program.

DATE: March 11, 1991
TOPIC: Hiring Practices

DATE: March 25, 1991
TOPIC: New Legislation—covering last session

DATE: April 8, 1991
TOPIC: Environmental Effects of the Olympics

DATE: April 22, 1991
TOPIC: Being a Judge in Utah

DATE: May 6, 1991
TOPIC: Immigration Law (New Act)

DATE: May 20, 1991
TOPIC: Alternatives to Jail

DATE: June 10, 1991
TOPIC: Consumer Protection Laws

DATE: June 24, 1991
TOPIC: How to Find and Pick a Lawyer

DATE: July 15, 1991
TOPIC: Spouse Rape

DATE: July 29, 1991
TOPIC: Everything You Wanted to Know But Were Afraid to Ask About Franchising

Successful Mobile Blood Draw

A mobile blood draw on Friday, January 11, 1991, kicked off the Winter Blood Drive of the Young Lawyers Section. The draw at Eagle Gate Tower, conducted by IHC Blood Service, netted 50 units of blood. Another nine donors were deferred because of temporary medical problems.

This on-site drawing targeted major law firms in the northern area of downtown Salt Lake City. "We were very pleased with the turnout for this initial mobile draw. We hope to have similar draws every six months in the downtown area," stated Brian M. Barnard, Chair, Young Lawyers Section Blood Drive.

At the first of each year and during the summer months, blood donations decrease and need increases. Thus, the Young Lawyers Section conducts semiannual drives in January and July.

Blood donors become members of the IHC Blood Assurance Program one year after their donation. Under the Assurance Program, if the need arises, donors and their families can receive blood at no cost.

Attorneys willing to serve as recruiters within their law firms and law firms interested in helping to sponsor a future on-site blood draw should contact Jim Haisley, 328-6000, or Brian M. Barnard, 328-9532.

Young Lawyers Section Brown Bags Continue the Tradition of Success

As in years past, the 1991 Brown Bag Series, which is sponsored by the Utah State Bar Young Lawyers Section, has been well received by members of the State Bar organization. In January, the Honorable David Sam kicked off the monthly Brown Bag luncheons by hosting and addressing members of the Bar in his courtroom. Judge Sam's topic, "The Moral Ethic and Effective Litigation," was not only timely, but also enlightening to all in attendance.

The February Brown Bag was likewise very informative and entertaining. Colin P. King, a well-known member of the Utah Bar, discussed "Trends in Personal Injury Practice" in Utah. The Young Lawyers Section wishes to express appreciation to these fine speakers on behalf of all attending the Brown Bag luncheons.

For information on future monthly Brown Bag dates and times, please contact the Law and Justice Center or the Young Lawyers Section. One hour of CLE credit is provided for these programs at no cost.

Volunteer for Law Day Activities

The Young Lawyers Section will once again sponsor its annual Law Day Fair on May 3, 1991. We currently plan to sponsor Law Day Fairs in five cities: Logan, Ogden, Provo, Salt Lake and St. George. If you are interested in volunteering, please contact the attorney in your city chairing the Law Day activities. If you are interested in expanding Law Day activities to a community not listed, contact Mark Bettilyon at 532-1234.

City	Chair	Phone
Logan	Greg N. Skabelund	752-9437
Ogden	Ted K. Godfrey	394-5526
Provo	Brent H. Bartholomew	374-6766
Salt Lake	Mark M. Bettilyon	532-1234
St. George	Michael R. Shaw	628-1627

Pro Bono Domestic Relations Project

YOUNG LAWYERS SECTION CONTINUES TO HELP

The Utah State Bar Young Lawyers Section, the Salt Lake County Bar, and the Legal Aid Society of Utah continue to collaborate in providing legal assistance in domestic relations cases. The second sign-up period is now under way for those wanting to volunteer.

Please contact the Legal Aid Society if you want to assist in this valuable program. Since this program has been in operation, the waiting list at Legal Aid has dropped from six months to three months. This is a step in the right direction, but people are still waiting for legal help.

The Domestic Relations Training Manual is in its second publication and is available upon request at the Legal Aid Society of Utah.

Young Lawyers Participate in Dinner at Family Shelter

The Community Services Committee of the Young Lawyers Section of the Bar prepared and served dinner to the families at the Family Shelter on Tuesday, January 15, 1991. Approximately 100 children and adults were served a ham dinner with all the trimmings. The Committee enjoyed the opportunity to help those people in the shelter and encouraged other lawyers to do the same.

The Grant Application Process

In 1990, the Utah Bar Foundation received approximately $200,000 through the IOLTA (Interest On Lawyers' Trust Accounts) Program. Those funds, and IOLTA funds received each year, will eventually be distributed to various organizations as grants for the following purposes:

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

(2) To assist in providing legal services to the disadvantaged.

(3) To improve the administration of justice.

(4) To serve other worthwhile law-related public purposes.

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

The Bar Foundation Trustees decide which organizations seeking grants receive funds and determine the amount to be disbursed. The current trustees are Richard C. Cahoon, Judge Norman H. Jackson, Ellen Maycock, Stephen B. Nebeker, Bert L. Dart, and James B. Lee. Usually, the Trustees review and consider grant applications in June of each year. The deadline for submitting grant applications is May 31.

The Trustees may consider grant requests that are not made as part of the yearly grant cycle, but only in the most urgent circumstances. However, the Trustees prefer to consider all grant applications together in June of each year, so that the funds available may be equitably allocated among the many deserving organizations.

Organizations seeking grants may obtain application forms from Ms. Zoe Brown, Executive Director, at the Utah Bar Foundation office in the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, UT, or telephone 531-9077. The application is simple, consisting of a cover sheet and a financial budget form, supported by a narrative proposal not to exceed 10 pages in length. The Trustees prefer grant applications which are specific about the purpose of the grant and how the funds will be used if the grant is approved. The Trustees require grant recipients to report on the use of the grant funds.

Recipients of large grants in recent years include Legal Aid Society, Utah Legal Services, Law Related Education Project, and Legal Center for People with Disabilities. Smaller grants have gone to such organizations as American Inns of Court, Snow College for a criminal law library, Young Lawyers, and Utah Children.

CLE CALENDAR

ENVIRONMENTAL SCIENCE FOR LAWYERS SEMINAR SERIES

This is the fifth program in the series. Its subject is "DETECTION, MONITORING AND SAMPLING." This session will provide an overview of technical issues relating to sampling and monitoring environmental conditions. The purposes for sampling and sources of existing environmental data will be discussed, along with techniques and equipment used for sampling groundwater, soil and ambient air. Compliance monitoring under environmental statutes will also be covered.

CLE Credit: 2 hours (14 for the series)
Date: March 12, 1991
Place: Utah Law and Justice Center
Fee: $140 for the series
Time: 4:00 to 6:00 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 '91. This two-day advanced course is designed to offer the experienced corporate lawyer an overview of some of the more sophisticated strategies and techniques, as well as the latest developments, in the field of corporate mergers and acquisitions. The program covers (i) tax considerations in structuring the acquisition; (ii) methods of formulating the purchase price; (iii) issues that should be considered by both purchaser's and seller's counsel in negotiating the acquisition of a closely held company (or a subsidiary or division of a publicly held company); and (iv) special problems that should be considered when acquiring divisions and subsidiaries.

CLE Credit: 12.5 hours
Date: March 14 and 15, 1991
Place: Park City, Olympia Hotel
Fee: $485 (plus $15 MCLE fee)
Time: 14th—8:00 a.m. to 4:30 p.m.; 15th—8:30 a.m. to 4:00 p.m.

UTAH STATE BAR MID-YEAR MEETING

This year's Mid-Year Meeting will feature Juanita R. Brooks, a nationally known trial lawyer. Ms. Books was co-counsel for John DeLorean in his embezzlement prosecution and also represented one of the individuals accused of the kidnap and murder of DEA Agent Enrique Camerena. Her presentation is titled "Using and Abusing Expert Witnesses." In addition to Ms. Brooks, there is a full slate of CLE topics. This includes a panel of State Court judges discussing "Improving Motion Practice"; a presentation on "Utah's Open and Public Meetings Act"; and an hour of ETHICS credit with Stephen Trost, Bar Counsel, presenting "Avoiding Ethical Pitfalls." Sunny, warm St. George is the site for this convention, so plan on enjoying plenty of fun activities in the sun after attending the seminars. Check the brochure mailing for details on how to register or call the Bar Offices at 531-9077.

CLE Credit: 8 hours (with one in ETHICS)
Date: March 14 to 16, 1991
Place: St. George, Holiday Inn
Fee: $125 (after February 15)

ENVIRONMENTAL SCIENCE FOR LAWYERS SEMINAR SERIES

This is the sixth program in the series. Its subject is "RISK ASSESSMENT/ TOXICOLOGY." The major principles of risk assessment and toxicology will be outlined in this session, including exposure assessment, fate and transport evaluations, chemical toxicity and the quantitative prediction of health risks from chemical exposure. A case history of a complex waste site will be presented to emphasize the practical application of the information outlined in the presentation.

CLE Credit: 2 hours (14 for the series)
Date: March 19, 1991
Place: Utah Law and Justice Center
Fee: $140 for the series
Time: 4:00 to 6:00 p.m.

BASICS IN BANKRUPTCY

This program is being presented by the Young Lawyers Section of the Bar. It will focus on basic bankruptcy practice issues. It is directed at practitioners new to this area of practice and those who need a refresher in the basics. Sign up now for this informative seminar.

CLE Credit: 3 hours
Date: March 29,1991
Place: Utah Law and Justice Center
Fee: $40.00
Time: 12:00 to 3:00 p.m.

ENVIRONMENTAL SCIENCE FOR LAWYERS SEMINAR SERIES

This is the seventh and last program in the series. Its subject is "REMEDIAL AND WASTE TREATMENT TECHNOLOGIES." This session will describe and evaluate different remedial technologies for control of air, soil, surface and groundwater pollution. Case studies in the context of CERCLA, RCRA and UST cleanups will be presented.

CLE Credit: 2 hours (14 for the series)
Date: April 2, 1991
Place: Utah Law and Justice Center
Fee: $140 for the series
Time: 4:00 to 6:00 p.m.

WHAT ARE YOUR CLIENT'S EMPLOYMENT PRACTICES?

A Compliance Guide Seminar

A live via satellite seminar. Federal and state labor, employment and workplace laws are constantly changing, and compliance with one area of law will not necessarily protect the employer from violation of another. Therefore, it is important that the employer's employment practices and procedures be examined for compliance with the law from time to time. Using the vehicle of an internal employment compliance audit, this program examines some of the problems and discusses how they may be avoided or minimized regardless of the size of the employer's work force or type of business.

CLE Credit: 6.5 hours
Date: April 9, 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 CONTAMINATED PROPERTY TRANSACTION

A live via satellite seminar.

CLE Credit: 4 hours
Date: April 11, 1991
Place: Utah Law and Justice Center
Fee: $140 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

ETHICAL CONSIDERATIONS IN INTERNATIONAL BUSINESS TRANSACTIONS

This two-hour program is being presented by the International Law Section of the Bar. The seminar will provide an overview of statutory and regulatory issues on ethics in international business transactions, perspectives from corporate counsel, and analysis of ethical perspectives from other jurisdictions likely to be encountered in international transactions. The program will conclude with a question and answer period.

CLE Credit: 2 hours in ETHICS
Date: April 12, 1991
Place: Utah Law and Justice Center
Fee: $30
Time: 12:00 to 2:00 p.m.

BANKRUPTCY SEMINAR

CLE Credit: 2 hours
Date: April 18, 1991
Place: Utah Law and Justice Center
Fee: $30 (includes sandwich lunch)
Time: 12:00 to 2:00 p.m.

REAL PROPERTY SECTION'S ANNUAL SEMINAR

This half-day program will feature prominent local speakers on topics relevant to today's real property law issues. More informa-

tion on this program will be provided later. Watch for mailings on it.
CLE Credit: 5 hours
Date: April 25, 1991
Place: Utah Law and Justice Center
Fee: TBD
Time: 8:00 a.m. to 1:00 p.m.

TRANSFER OF WEALTH CONSIDERATIONS: IS ESTATE PLANNING STILL POSSIBLE?

A live via satellite seminar. Over the last 15 years, there have been a multitude of tax acts and, most recently, the Revenue Reconciliation Act of 1990, all of which have impacted dramatically on the rules and options regarding the availability of estate planning. This program will focus on the myriad of estate, gift and generation skipping transfer tax changes enacted in recent years. The speakers will discuss tax planning options and techniques currently available.
CLE Credit: 6.5 hours
Date: April 23, 1991
Place: Utah Law and Justice Center
Fee: $175 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

WHAT TO WORRY ABOUT IN FORMING AND DISSOLVING A LAW PRACTICE PARTNERSHIP

A live via satellite seminar. How big does a firm have to be to attain "critical mass?" Is merger the best response to today's economic conditions? How can you obtain market penetration in new locations and specialties and achieve peak efficiency if not by merger? Five nationally known experts will answer these questions and many others in this important presentation. Participants will learn how to effect a successful merger, how to achieve management goals without merger, and what to do if it does not work out. Particular attention will be given to the special concerns of small and medium firms.
CLE Credit: 6.5 hours
Date: April 24, 1991
Place: Utah Law and Justice Center
Fee: $165 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

TAX AND ESTATE PLANNING FOR LIFESTYLES OF THE '90s

A live via satellite seminar. America's new lifestyles call for more creative, better informed estate planning. Attitudes, negative and positive health developments, communications, international relationships and the economy are all changing rapidly. This seminar will help you in dealing with your clients' tax and estate planning issues as these variables change.
CLE Credit: 6.5 hours
Date: May 7, 1991
Place: Utah Law and Justice Center
Time: 8:00 a.m. to 3:00 p.m.
Call (801) 531-9095 for registration information.

EQUIPMENT LEASING

A live via satellite seminar. This seminar is of benefit to practitioners who need an overview of the structure of leasing law, or want an understanding of the "new, improved" version of Article 2A of the Uniform Commercial Code. Practitioners involved with structuring or restructuring transactions in the coming years will require a thorough understanding of the rights and remedies for lessors and lessees in default situations.
CLE Credit: 6.5 hours
Date: May 14, 1991
Place: Utah Law and Justice Center
Fee: $165 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

Jim McElhaney's "Winning Before Trial Effective Pre-Trial Practice"

The decisions you make before trial are critical to your success in court—yet the skills and techniques required to make the right decisions are too often taken for granted. This program will give you a springboard of ideas, practical tools and strategies to put you in a winning posture before trial ever starts. In each area of pretrial preparation, McElhaney will examine the alternatives, stressing the importance of clearly defined goals. He shows you a system that makes the discovery plan work for you.

By attending, you will learn to: Use interrogatories effectively; evaluate your client as a potential witness; protect yourself on the cases you send away; and cut through the snarls of modern procedure and discovery.

James McElhaney is North America's most widely read author on the art of trial advocacy. As one of the country's premier lecturers on evidence and trial practice, he is consistently applauded for his creative, energetic and effective teaching style.

Call the Bar offices now for more information and how to sign up for this informative, entertaining seminar. This program is scheduled for May 3, 1991, at the Marriott Hotel in Salt Lake and is being sponsored by the Litigation Section of the Bar.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

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

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Please send in your registration with payment to: Utah State Bar, CLE Department, 645 S. 200 E., Salt Lake City, Utah 84111.

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

NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2-year CLE reporting period required by the Utah Mandatory CLE Board.

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POSITIONS AVAILABLE

Position: Law Clerk to the Honorable Judith A. Boulden, United States Bankruptcy Judge. Starting Salary: $25,717 to $52,406, depending on experience. Starting Date: Approximately September 16, 1991. Application Deadline: March 16, 1991. Experience: One year's experience in the practice of law, in legal research, legal administration, or equivalent experience received after graduation from law school. Substantial legal activities while in military service may be credited on a month-to-month basis whether before or after graduation. Substitution: A law graduate is eligible as Associate Law Clerk provided the applicant has: (1) graduated within the upper third of his/her class from a law school on the approved list of the ABA or the AALS; or (2) served on the editorial board of the law review of such a school or other comparable academic achievement. Appointment: The selection and appointment will be made by the United States Bankruptcy Judge. Send Resume To: Judge Judith A. Boulden, United States Bankruptcy Court, 350 S. Main Street, Room 330, Salt Lake City, UT 84101. Equal Opportunity Employer.

PROPOSALS SOUGHT

The Utah Association of Realtors is considering the establishment of a statewide legal hot line to provide "on-the-spot" answers to members' questions which arise relating to transactions in the course of their brokerage activity. The Association is therefore soliciting proposals from law firms and individual attorneys throughout the state who may be interested in being engaged to provide such a service. Among the considerations which should be addressed are: (1) length of engagement; (2) commencement date; (3) mechanics of communication; (4) hours of availability; (5) staffing and qualifications; (6) reporting and accountability; and (7) cost. Please submit all proposals in writing for receipt no later than 5:00 p.m., May 1, 1991, Utah Association of Realtors, Attention: Risk Reduction Committee, 5710 S. Green Street, Murray, UT 84123.

SERVICES AVAILABLE

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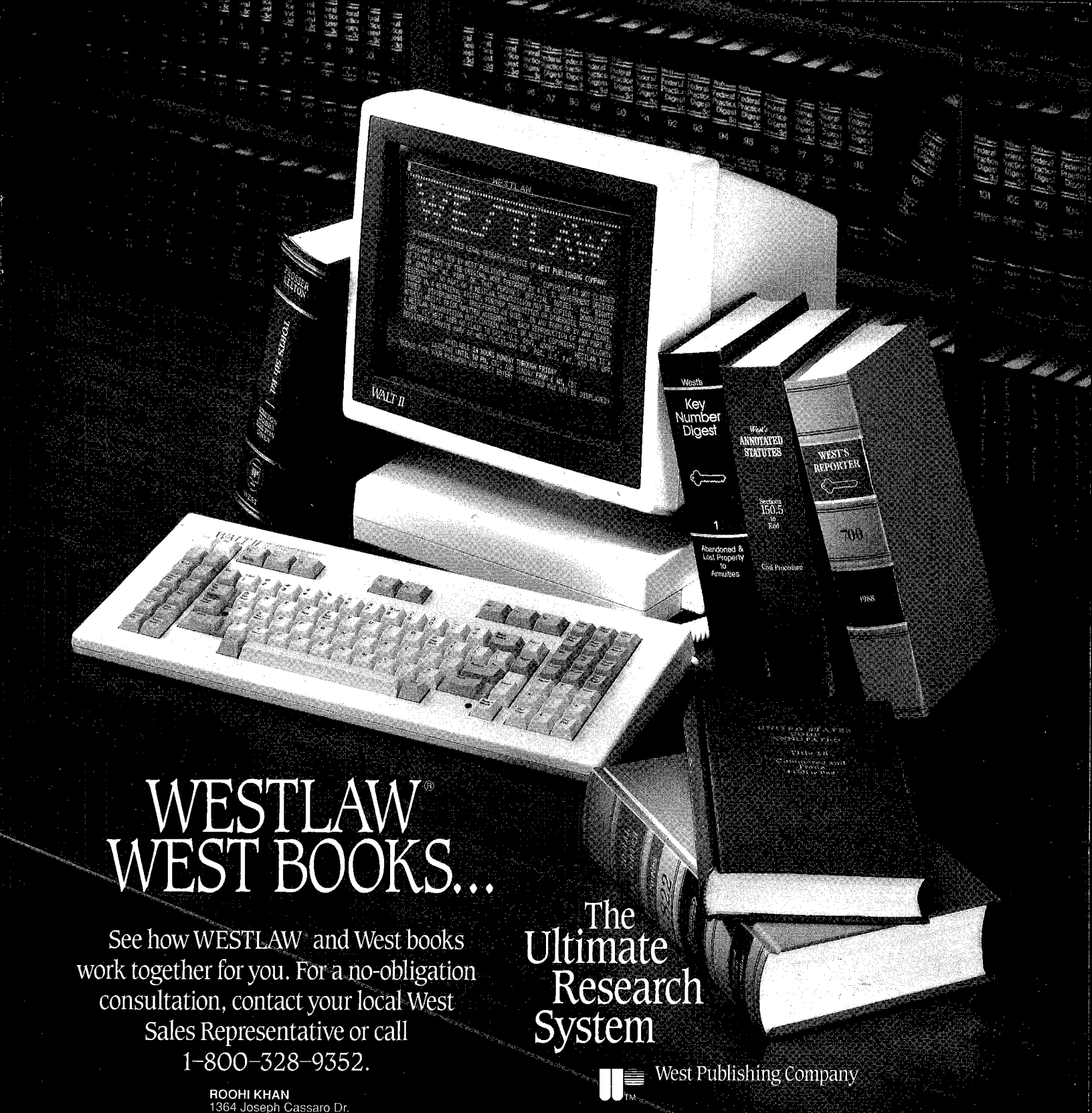

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