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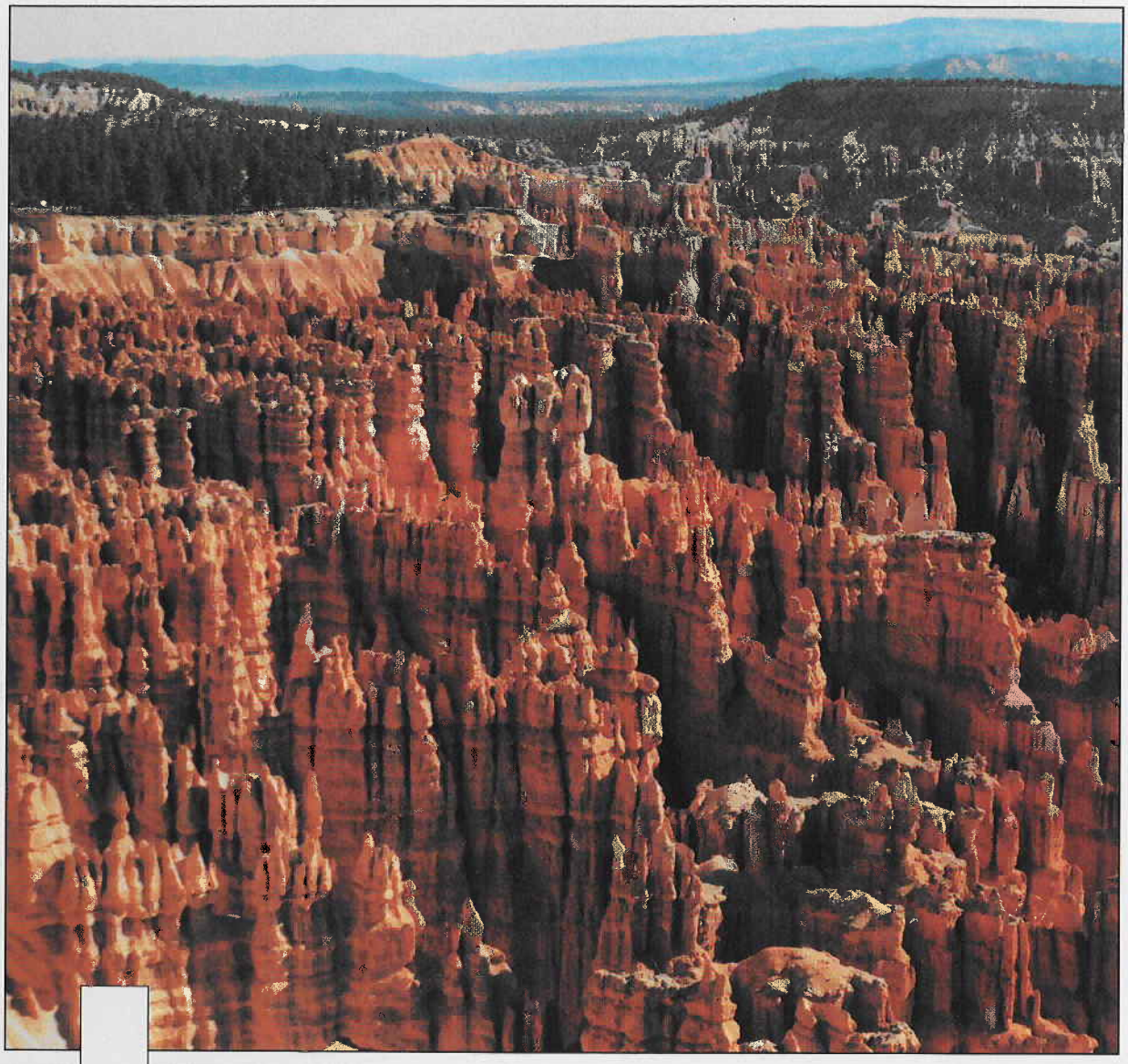

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COVER: Inspiration Point, Bryce Canyon, Utah, by Reid Tateoka of McKay, Burton & Thurman.

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. A horizontal view is preferred. Send both the transparency and a print of each photograph you want to be considered.

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Is Lawyer Professionalism Alive and Well in Utah?

By Hon. Pamela T. Greenwood

We are all aware of the traditionally low esteem of the legal profession in the minds of the public. Lawyer jokes and cynical views of motivation in the legal system are ubiquitous. A poll taken last year for the judiciary confirmed that the public views the legal system as just one step above used car salespeople. I am convinced that the public perception is erroneous—that lawyers are persons of high integrity and public spiritedness—but there is a continuing problem of how to get this message to the public. One method is to demonstrate by our acts, our commitment to the profession of law, in its most time-honored aspects. Dean Roscoe Pound described our profession as "a group pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose."

There are a number of factors pitted against practicing law as a profession rather than a business with the bottom line the only consideration. Both the law and methods of lawyering have changed considerably during recent years. Law used to be primarily a result of development of the common law—a process which was gradual and relatively slow. That has changed with proliferation of statutory and regulatory enactments. A recent article in *Judicature* by Arlin M. Adams (August/September 1990) noted concomitant growth in government law, primarily administrative law, and new causes of action. As a result, the law now changes and develops much more rapidly than previously. This has all had a drastic effect on the nature of the practice. Lawyers as generalists, competent to practice in all areas of the law, are now largely extinct. Large law firms and mega national firms now comprise an increasingly large segment of the practice. Lawyering has become, in many instances, impersonal and distant. Professionalism has been replaced by commercialism. Adams describes the problem created as follows:

> The profession occupies a key role in a democratically organized society. Americans tend to divide the dimensions of public life into two general spheres. One half is the business or economic realm. An economy based on capitalism and the institution of private property is the source of this culture. Economic freedom, efficiency, and material reward are its basic values. The other half of what constitutes our public affairs is the political or civil culture. The highest virtues there are political freedom, equality and justice. Its institutional foundations are the free-functioning political process and the unbiased administration of justice.

When Kent Kasting was Bar President, he proposed the following oath be adopted by each of us to remind us of our commitment to professionalism. With Kent's permission, I think it merits reprinting.

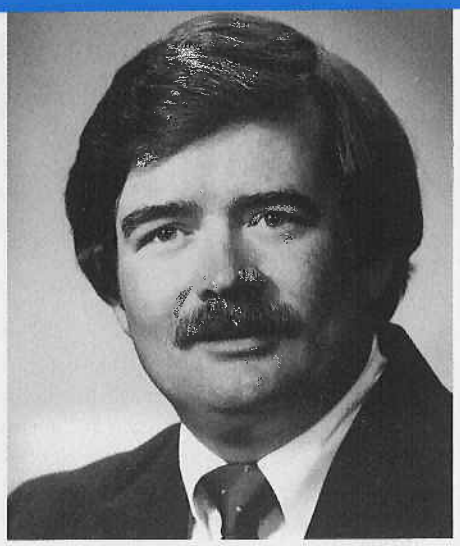
I do solemnly swear:

1. I will recognize and adhere to our basic constitutional principles that individuals are presumed to be innocent until proven guilty and that every citizen is entitled to the procedural rights and protections provided in our constitution.
2. I will serve faithfully each of my clients, advise them carefully and tend to the matters entrusted to me with care, common sense and speed. In other words, I will return telephone calls, I will meet deadlines, I will do what I say I'm going to do in an expeditious manner, and I will look out for my

client's long-term as well as short-term interest.

3. I will always act in a dignified and respectful manner when appearing before any court or administrative body so that no one can ever say that I have nothing but the utmost regard for our judicial system.
4. If I am a judge, I will recognize that lawyers, too, are officers of the court and deserve the same respect that they are required to give the court.
5. I will work to solve my client's problem in as speedy and economical way as possible.
6. I will not file an answer to a complaint if I know my client has no defenses.
7. I will not pursue a client's claim if I know that it has no merit, but might be settled for nuisance value.
8. I will not counsel a client to hide or secrete assets.
9. I will not tolerate a client who indicates he is going to lie or distort the truth.
10. I will always speak the whole truth when dealing with the courts without exaggerating or underemphasizing.
11. I will never discuss a client's case unless required to do so in the course of representing the client and will carefully guard all of the information conveyed to me by the client.
12. I will not talk about causes or matters at home, at social functions or anywhere else, except in the line of my duty.
13. I will charge a fair fee.
14. I will never "pad hours" or perform unnecessary tasks which might increase the bill but not benefit the client.
15. I will not disparage or castigate another party or counsel.
16. I will refrain from "mudslinging," name calling and being self-righteous.
17. I will try to solve my client's problems with the least amount of pain being imposed on parties, witnesses and counsel.
18. I will help the poor with their legal problems.
19. I will not turn away cases simply because my retainer cannot be met.
20. I will never tolerate improper motives by clients.

I urge your consideration of this oath. Let us renew our dedication to high standards of professionalism and encourage its growth in our peers and new members of this justly honored profession.



Public Answers to Private Questions

By J. Michael Hansen

This month, I would like to answer, in a larger forum, questions I am commonly asked by members of the Bar. The questions do not appear in any particular order.

Given the recent dues increase, what steps, if any, have been taken to cut expenses?

The Commission has cut, and continues to attempt to cut, expenses in every possible area. Any of you who have served on special committees of the Bar are aware of the fact that for the last two years lunches have not been provided to committee members. Bar Commission meetings are held once a month beginning at 8:30 a.m. and usually continue until 4:00 p.m. or later. Lunch is brought in so that we can work through lunch. For the privilege of being a Bar Commissioner, I have the opportunity to pay $5 to $6 a month for my lunches. In addition, the travel line item of the budget has been drastically cut. The Bar Commission used to hold meetings with local bar associations throughout the State. Given budget constraints, these meetings have not been held for the past two years. Benefits provided to employees of the Bar have been reduced and several vacant staff positions have not been filled. Salary increases for Bar staff have been held to a minimum. Unfortunately, this has resulted in the loss of many excellent employees, including, most recently, Michele Roberts, Admissions Administrator, and Toni Sutliff, Associate Bar Counsel, to higher paying positions outside of the Bar. Thankfully, the Bar staff has pulled together and we are providing the same services to members of the Bar and public with a much reduced Bar staff.

In addition, the Commission has not established any new Bar standing committees and has sought wherever possible to reduce maintenance expenses for the Law and Justice Center. The mid-year Bar meetings are now self-supporting and only a minimal subsidy is required for the Annual Meeting.

What are you doing with all of the money from the recent dues increase?

Prior to July 1, 1990, debt service payments were being made by the Law and Justice Center, Inc. As of July 1, 1990, monthly debt service payments became the responsibility of the Utah State Bar. Payments in the amount of $16,600 per month now are being made. In approving the dues increase, the Supreme Court required that all short-term debt (approximately $500,000) be retired within two years and that the Bar incur no additional short-term debt. In December, the outstanding balance on the Line of Credit in the amount of $230,000 was retired and additional short-term debt of $20,000 was repaid. It is currently projected that we will end the fiscal year with additional cash available of approximately $150,000 which can be utilized to pay on the remaining short-term debt. In short, it is anticipated that at least 75 percent of the short-term debt will be paid in one year. Next year we will be in a position to rebuild necessary reserves for unexpected contingencies.

What is the Bar doing to improve its accounting system?

With the assistance of outside consultants, both paid and volunteer, the Bar has implemented a new chart of accounts which will allow us to better track income and expenses. A computer software package is being implemented which will allow us to better project future income and expenses. In addition, given the recent resignation of Lois Muir, after many years of long and faithful service, we have hired a new Financial Administrator, Arnold Birrell. Arnold comes to the Bar after having

worked as a Controller in the private sector and as a senior accountant for Alexander Grant & Company. With his wide-ranging background, we feel confident that Arnold brings the necessary experience and expertise to provide timely and accurate financial information to the Commission and members of the Bar.

Why is it that the Bar is run by the big law firms?

Although the question is often asked, the makeup of the Bar Commission reflects that it is based on a false assumption. Pam Greenwood, President of the Bar, is, as all of you know, a judge on the Court of Appeals. Hans Chamberlain, our immediate past President, is the senior partner in a small law firm, Chamberlain & Higbee, in Cedar City. Jackson Howard of Howard, Lewis & Peterson in Provo is from an 11-person law firm. Jeff Thorne practices with two other lawyers in Brigham City. Gayle McKeachnie practices with two other lawyers in Vernal. Dennis Haslam practices with nine other lawyers, two of whom are "of counsel." The perception that the Bar Commission is dominated by the "big firms" or a "big firm" mentality is, from my experience, not the case.

Why would anyone in their right mind want to be a Bar Commissioner?

Aha—now that's the most difficult question yet. The last two years have made me feel like I walk around with a target painted on my back. However, notwithstanding frequent scud missile attacks, it has been a pleasure working with and getting to know the other Bar Commissioners and meeting with attorneys in other than an adversary setting. While the challenges have, at times, been daunting, it has been a great opportunity to attempt to serve the profession. I encourage anyone who has a willingness to serve to run for the Commission.

Chapter 11 of the Bankruptcy Code: An Overview for the General Practitioner

(This is Part I of a two-part article—Part II will appear in a later issue.)

By Ronald W. Goss

Part I: Commencement of the Case

INTRODUCTION

On November 6, 1978, President Carter signed into law the Bankruptcy Reform Act, commonly referred to as the Bankruptcy Code. The objective of the Code was to modernize the nation's bankruptcy laws. Prior to enactment of the Code, the substantive law of bankruptcy was grounded in the 1898 Bankruptcy Act, which had last been revised in 1938. The impact of the Bankruptcy Code, and Chapter 11 in particular, has been widespread.

Chapter 11 of the Code contained major substantive and procedural changes in reorganization law. The fundamental purpose of Chapter 11 is to enable a distressed business operation to reorganize its affairs in order to prevent loss of jobs and economic waste that result from unnecessary litigation and disposing of assets at their liquidation value.[1] Congress determined that it is more economically efficient for a business to reorganize and use assets for the purpose for which they were designed, rather than to sell those assets for scrap.[2]

Almost everyone is familiar with the Chapter 11 "mega-bankruptcies" of Texaco, A.H. Robins, and Johns-Manville. But in Utah, as in the rest of the nation, enactment of the Code was followed by an unprecedented growth in business reorganization cases. Statistical data provided by the clerk of the court indicate that in the years prior to 1979, the average number of reorganization cases was fewer than 20 per year. In the 1980s, the average number of Chapter 11 cases filed each year in Utah exceeded 300. After thousands of cases and more than a decade of experience, the fundamentals of Chapter 11 practice in Utah can be distilled and some guidance given to the non-specialist.

RONALD W. GOSS graduated from Colorado State University in 1975 with a bachelor of arts degree, and from the University of Utah College of Law in 1982. He served as Law Clerk to the Honorable Glen E. Clerk, Chief United States Bankruptcy Judge, District of Utah, from 1984-1986. Mr. Goss is a shareholder with Van Cott, Bagley, Cornwall & McCarthy. His law practice is exclusively devoted to bankruptcy matters.

This article discusses the basics of Chapter 11, from the filing of a petition through confirmation of a plan of reorganization, and various post-confirmation matters. Part I covers the requirements for filing a Chapter 11 case, the debtor's duties after filing, employment of attorneys and payment of their fees, the automatic stay, and the role of the U.S. Trustee and the unsecured creditors' committee. Part II will discuss post-petition financing and operations of a business in Chapter 11, executory contracts and unexpired leases, appointment of a trustee or examiner, preparation of a disclosure statement and plan of reorganization, confirmation of the plan, and post-confirmation issues.

COMMENCEMENT OF THE CASE

A Chapter 11 case begins with the filing of a petition in the bankruptcy court. The filing creates a bankruptcy estate comprised of all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held.[3] The bankruptcy court's jurisdiction over property of the estate and over the reorganization case is exclusive.[4]

Chapter 11 is primarily utilized by corporations and partnerships, but business trusts and individuals engaged in business may also file petitions under that chapter.[5] Even a dissolved corporation may reorganize under Chapter 11.[6] However, the authority to file a bankruptcy petition must be evidenced by a corporate resolution or other appropriate document.[7]

A large body of case law has emerged holding that "good faith" also is a prerequisite to the filing or continuation of a Chapter 11 case.[8] While there is no statutory requirement of good faith, the lack of good faith constitutes "cause" for conversion or dismissal of the case under §1112(b), or for relief from the automatic stay under §362(d) of the Code.

There is a shifting burden of proof on the issue of good faith. Initially, the creditor must introduce sufficient evidence to call the debtor's good faith into question. Then the debtor bears the burden of proving that the Chapter 11 petition was filed in good faith.

In reaching a determination of whether a case has been filed in bad faith, courts have considered numerous factors, including the following:

1. Whether the debtor has no ongoing business or employees.
2. Whether the petition effectively enables the debtor to evade court orders.
3. Whether the debtor has few assets, or a single asset that is threatened with foreclosure.
4. Whether the debtor's income is not sufficient to operate its business.
5. Whether the petition was filed on the eve of foreclosure.
6. Whether the debtor has few or no unsecured creditors.
7. Whether the debtor is attempting to use Chapter 11 to create a new business.
8. Whether the sole purpose of filing is to reject an executory contract.
9. Whether there is no possibility of reorganization.
10. Whether the debtor filed solely to create the automatic stay.
11. Whether the primary purpose of the filing was to give the bankruptcy court jurisdiction over a dispute.
12. Whether the filing was precipitated primarily by a dispute between the debtor and one other party.
13. Whether a corporate debtor was formed and received title to its major assets immediately before the petition and for the purpose of filing bankruptcy.
14. Whether the filing was a substitute for obtaining a supersedeas bond to stay execution of a judgment pending appeal.

A debtor who invokes the protection afforded by Chapter 11 must also assume certain responsibilities under the Bankruptcy Code and Rules. All debtors must file a list of creditors on an approved matrix form, a schedule of assets and liabilities, a statement of financial affairs, a schedule of current income and current expenditures, a statement of executory contracts, a list of creditors that hold the 20 largest unsecured claims, and a list of equity security holders.[9]

Both the debtor and its attorney must attend a meeting of creditors held pursuant to §341 of the Bankruptcy Code. The meeting is held on 20 days' notice to all creditors and not later than 40 days after the petition is filed.[10] The purpose of the meeting is to enable creditors to examine the debtor under oath respecting the existence and condition of assets, the operation of the debtor's business, the desirability of the continuation of such business, and any other matter relevant to the case or to the formulation of a plan.[11] If the debtor is a corporation, its president or other executive officer must attend and submit to examination; if the debtor is a partnership, a general partner must appear.[12]

Under §305(a) of the Bankruptcy Code, the court may dismiss or suspend proceedings in the case if the interests of creditors and the debtor would be better served by such dismissal or suspension. An example of a situation in which dismissal under §305(a) is appropriate would be where the debtor and its creditors have entered into a comprehensive, non-bankruptcy workout.[13]

EMPLOYMENT OF ATTORNEYS

Attorneys representing debtors in Chapter 11 cases must have their employment approved by the bankruptcy court.[14] Section 327(a) of the Bankruptcy Code and Bankruptcy Rule 2014(a) establish the following procedure for appointment: the debtor must file an application with the court setting forth facts demonstrating the necessity for employment, why the particular attorney was selected, what services will be rendered, and the connections of the attorney with the debtor, creditors and other parties in interest.

An attorney may not be compensated for representing a debtor in a Chapter 11 case unless he is first appointed by order of the court. Where circumstances justify, the bankruptcy court has the equitable power to enter a *nunc pro tunc* order for retroactive approval of an attorney's employment.[15] Under appropriate circumstances, the Utah bankruptcy court will retroactively appoint attorneys who fail to obtain prior approval of employment. The better practice, of course, is to file the petition and the employment application concurrently. Since attorneys representing Chapter 11 debtors are charged with knowledge of the Bankruptcy Code, their failure to seek approval of employment should not be condoned.

Attorneys must disclose to the court actual or potential conflicts of interest which may bear on their eligibility for employment.[16] The court will not appoint an attorney until it determines that no conflict exists. Non-disclosure of conflicts may justify the denial of *all* fees earned in the case. The relevant inquiries concerning conflicts are whether the attorney represents interests adverse to the estate, and whether the attorney is disinterested.[17]

If an attorney holds a claim for prepetition services not related to the bankruptcy case, she holds an interest adverse to the estate and is ineligible to represent the debtor.[18] On the other hand, where the conflict is merely potential, as in the case of simultaneous representation of a debtor corporation and its principals, or representation of two insolvent Chapter 11 limited partnerships with a common general partner, the facts "must strongly show the appearance of impropriety" to warrant disqualification.[19]

Section 331 of the Bankruptcy Code authorizes attorneys to apply to the court every 120 days for an interim allowance of compensation and reimbursement of expenses. At least 20 days' notice by mail must be given to all creditors of hearings on fee applications. Bankruptcy Rule 2016 specifies that the application must contain a detailed statement of 1. The services rendered; 2. Time expended; 3. Expenses incurred, 4. Amounts requested; and 5. What payments have previously been made or promised, and whether any fee-sharing agreement exists. The application must also be accompanied by accurate, detailed time records sufficient to enable the court to make an informed judgment about the specific tasks and hours allotted. Failure to provide sufficient documentation may result in a reduction of the fees allowed.[20]

THE AUTOMATIC STAY AND ADEQUATE PROTECTION

One of the fundamental protections afforded a debtor in bankruptcy is the automatic stay provision of 11 U.S.C. §362. The automatic stay is a pervasive statutory injunction which provides that no action may be continued or commenced against the debtor or its property unless the creditor first obtains permission from the bankruptcy court. The stay is designed to protect the debtor from lawsuits and other actions against its assets while it attempts to reorganize.

Generally, actions taken by creditors in violation of the automatic stay are void and without effect.[21] Violations of the stay may also subject the violator to appropriate sanctions. The civil contempt power is most often used by bankruptcy judges to assess compensatory damages and attorneys' fees for stay violations.[22] Punitive damages may also be imposed for willful violations of the stay.[23]

Section 362(d)(1) provides for relief from the automatic stay "for cause." The only specific cause described in subsection

(d)(1) is lack of adequate protection. The Bankruptcy Code does not define "adequate protection," but the concept is central to the treatment of secured creditors during the pendency of a Chapter 11 case. Adequate protection is the protection of the value of a creditor's security from any decrease due to the automatic stay.[24] The secured creditor's right to adequate protection is not self-executing. If a creditor does not request that its collateral be adequately protected, it is not entitled to such protection.[25]

Section 361 gives three examples of acceptable means of providing adequate protection: 1. Making periodic cash payments to the creditor; 2. Giving the creditor an additional or replacement lien in other property of the debtor; or 3. Any other means which will provide the creditor sufficient protection until a plan can be presented. The most common form of adequate protection is periodic payments to the secured creditor for any diminution in the value of its collateral as a result of use, depreciation, destruction or other reduction in value.

It should be emphasized that adequate protection is a "Band-Aid" measure designed only to protect the status quo of a creditor's secured position. The real question in any Chapter 11 is not whether the debtor can preserve the status quo, which typically is insolvency, but whether there exists a reasonable possibility for a successful reorganization.

Cause for relief from the stay may also exist whenever the harm to the creditor due to the imposition of the stay substantially outweighs the harm to the debtor if the stay is lifted. One example of such cause is given in the legislative history, which refers to a probate proceeding in which the debtor is the executor of another's estate as the kind of proceeding which should not be stayed.[26] Under appropriate circumstances, relief may also be granted to allow pre-petition litigation pending against the debtor to proceed to judgment.[27]

The continuance of the automatic stay contemplates a debtor that is reorganizable and that is actively pursuing that objective. Section 362(d)(2) entitles a secured creditor to obtain relief from the stay in order to foreclose on its collateral when the debtor does not have an equity in such collateral, and the collateral is not necessary to an effective reorganization. If no reorganization of the debtor is possible, then no property of the debtor can be necessary to that end.

In *United Savings Ass'n of Texas* v.*Timbers of Inwood Forest Associates, Ltd.*, 108 S. Ct. 626 (1988), the United States Supreme Court, in dicta, noted that in order for property to be necessary for an effective reorganization, it must be demonstrated that an effective reorganization is possible within a reasonable time. The determination of this question will usually depend upon the nature of the debtor's business, the general market aspects for that business, the relationship of the particular asset to the business and to other assets, the debtor's prospective future earnings, its ability to obtain new financing, and the like.

THE U.S. TRUSTEE AND UNSECURED CREDITORS' COMMITTEES

One of the major objectives of the Bankruptcy Code was to remove bankruptcy judges from administrative functions in the administration of cases and from the supervision of trustees.[28] During the legislative process, the House of Representatives proposed that the administrative functions be lodged in a new government agency, a system of U.S. Trustees modeled after the U.S. Attorney system. The Senate bill contained no such provision, and as a result of compromise a U.S. Trustee pilot program was set up in 10 regions on an experimental basis. The district of Utah was not in the pilot program. Following an evaluation of the pilot program, Congress enacted the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, which expanded the U.S. Trustee system nationwide.

"The real question is not whether the debtor can preserve the status quo . . . but whether there is a reasonable possibility for successful reorganization."

Generally, the U.S. Trustee serves as a watchdog to prevent overreaching, fraud and dishonesty in the administration of bankruptcy cases. The U.S. Trustee or a member of his staff usually meets with the debtor and its attorney shortly after the filing to discuss the case and advise the debtor of its responsibilities as a debtor in possession.

The United States Trustee has promulgated operating guidelines for Chapter 11 cases, which require the following actions by the debtor:

1. The debtor must close all pre-petition bank accounts and open new "debtor-in-possession" bank accounts.
2. The debtor must maintain without interruption all insurance customarily carried in the debtor's line of business or required by law or regulation.
3. The debtor must remain current on all post-petition federal, state and local taxes, and file all tax returns on a timely basis.
4. The debtor must pay quarterly fees as required by 28 U.S.C. §1930(a)(6).
5. The debtor must file monthly financial reports with the court and the U.S. Trustee.

The U.S. Trustee presides at the meeting of creditors in Chapter 11 cases and appoints the unsecured creditors' committee. The U.S. Trustee receives and reviews financial and operating reports from the debtor in possession and monitors all Chapter 11 cases to ensure adequate progress. The U.S. Trustee also receives, reviews and makes recommendations on the adequacy of disclosure statements, the reasonableness of fee applications, and the feasibility of plans of reorganization.[29] Whenever the debtor's actions deviate from the standards prescribed by the Code or the case becomes inactive, the U.S. Trustee has standing to move the court for appropriate remedies, including appointment of a trustee or examiner or conversion or dismissal of the case. When appropriate, the U.S. Trustee may refer matters to the U.S. Attorney and assist in prosecuting bankruptcy crimes.

Under §1102(a)(1) of the Bankruptcy Code, the U.S. Trustee appoints the unsecured creditors' committee or committees as he deems appropriate. A creditors' committee ordinarily is composed of the seven largest unsecured creditors who are willing to serve.[30] The functions of a creditors' committee, as set forth in §1103, include investigation of the debtor's financial affairs, consultation with the debtor concerning the administration of the case, and participation in the formulation of a plan. Usually, the committee is the primary negotiating body for the plan of reorganization.[31]

A creditors' committee is a separate entity distinct from the specific creditors

who serve on the committee.[32] The committee owes a fiduciary duty to all unsecured creditors and must guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors.[33] If the committee is not representative, the court has the power to direct the U.S. Trustee to change the membership or size of the committee, or appoint additional committees.[34] However, in deciding whether to appoint additional committees, courts are mindful of the increased expense to the estate.[35] In practice, multiple creditors' committees are extremely rare.

In addition to negotiating with the debtor respecting the plan, the committee has standing to investigate the affairs of the debtor and its prospects for a successful reorganization. To aid in its investigation, the creditors' committee may conduct an examination of the debtor under Bankruptcy Rule 2004. Bankruptcy Rule 2004 is a discovery device in bankruptcy cases which allows for a more extensive examination of the debtor than the brief examination usually allowed at the meeting of creditors.[36] A Rule 2004 examination usually is conducted before a certified shorthand reporter in the same manner as a deposition. The primary purpose of the examination is to show the condition of the estate, the extent and location of its assets, and any other matter relevant to the case or the formulation of a plan.[37]

Generally, neither an individual creditor nor the creditors' committee has standing to prosecute lawsuits on behalf of the estate to recover assets and property held by third parties. It is typically the trustee or debtor in possession who must weigh the merits of the action, the cost involved, and the ultimate benefit to the estate. However, in some circumstances the debtor's failure to pursue claims may justify allowing a creditors' committee to file suit on behalf of the estate to recover property.[38]

[1] *See NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984).
[2] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 220 (1978).
[3] 11 U.S.C. §541(a)(1).
[4] 28 U.S.C. §1334(a), (d).
[5] 11 U.S.C. §§109(a), 101(35), 101(8). *See, e.g., Wamsganz v. Boatmen's Bank of De Soto*, 804 F.2d 503 (8th Cir. 1986); *In re Universal Clearing House Co.*, 60 Bankr. 985, 991-93 (D. Utah 1986).
[6] *In re Cedar Tide Corp.*, 859 F.2d 1127 (2d Cir. 1988). *But cf. Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120 (1937) (dissolved Illinois corporation which was without corporate capacity to initiate any legal proceeding could not reorganize under §77B of the Bankruptcy Act).
[7] *Matter of Park Towers Corp.*, 387 F.2d 948 (2d Cir. 1967); *In re Cresent Beach Inn, Inc.*, 22 Bankr. 155 (Bankr. D. Me. 1982); *In re Al-Wyn Food Distributors, Inc.*, 8 Bankr. 42 (Bankr. M.D. Fla. 1980).
[8] At least three decisions from the Utah district court have specifically addressed the good faith requirement. *See In re Independent Clearing House Co.*, 77 Bankr. 843, 850 (D. Utah 1987) (en banc); *In re Universal Clearing House Co.*, 60 B.R. 985, 993- 94 (D. Utah 1986); *In re Ralsu, Inc.* No. C-85-1410A, memorandum decision (D. Utah September 30, 1986) (per Anderson, J.).
[9] *See* 11 U.S.C. §521(1); Bankruptcy Rule 1007; *In re Walker*, 91 Bankr. 968, 977 (Bankr. D. Utah 1988), *aff'd*, 103 Bankr. 281 (D. Utah 1989).
[10] Bankruptcy Rule 2002(a)(1); Bankruptcy Rule X-1006(a). *See Rushton v. Holy Land Christian Mission*, No. 90-C-688J, memorandum opinion and order (D. Utah November 7, 1989) (per Jenkins, J.)
[11] *See* Bankruptcy Rule 2004(b). *See generally*, Goss, *Meetings of Creditors Under §341 of the Bankruptcy Code: A Primer*, 17 J. Contemp. L. (1991).
[12] Bankruptcy Rule 9001(5). *See* Official Form No. 16.
[13] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977). *See In re Colonial Ford, Inc.*, 24 Bankr. 1014 (Bankr. D. Utah 1982).
[14] 11 U.S.C. §327(a); Bankruptcy Rule 2014(a).
[15] *See, e.g., Matter of Arkansas Co., Inc.* 798 F.2d 645 (3d Cir. 1986) (retroactive approval should be granted only under extraordinary circumstances); *In re Triangle Chemicals, Inc.*, 697 F.2d 1280, 1289 (5th Cir. 1983); *In re Twinton Properties Partnership*, 27 Bankr. 817, 819-20 (Bankr. M.D. Tenn. 1983) (oft- cited case setting forth nine criteria for retroactive approval).
[16] *In re Roberts*, 75 Bankr. 402, 410 (D. Utah 1987) (en banc), citing *Matter of Arlan's Dept. Stores, Inc.*, 615 F.2d 925 (2d Cir. 1979).
[17] 11 U.S.C. §327(a); *In re Vanderbilt Associates, Ltd.*, 117 Bankr. 678, 680 (D. Utah 1990). *See also In re Jensen-Farley Pictures, Inc.*, 47 Bankr. 557, 580 (Bankr. D. Utah 1985).
[18] *In re Roberts*, 75 Bankr. at 402.
[19] *Id.*, at 405; *Vanderbilt Associates*, 117 Bankr. at 681-82.
[20] *See generally, Jensen-Farley Pictures*, 47 Bankr. at 580-88.
[21] *In re Shamblin*, 878 F.2d 324, 327 (9th Cir. 1989); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982).
[22] *See, e.g., In re Skinner*, 917 F.2d 444 (10th Cir. 1990); *In re Sweetwater*, appeal No. C-84-547J, memorandum opinion (D. Utah February 28, 1985) (per Jenkins, J.); *In re Reed*, 11 Bankr. 258, 276 (Bankr. D. Utah 1981).
[23] 11 U.S.C. §362(h).
[24] *In re Alyucan Interstate Corp.*, 12 Bankr. 803, 806-09 (Bankr. D. Utah 1981).
[25] *See In re Hinckley*, 40 Bankr. 679, 681-82 (Bankr. D. Utah 1984) (creditor first became entitled to adequate protection on depreciating vehicle when request was made at creditors' meeting).
[26] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 343-44 (1977).
[27] *See, In re Curtis*, 40 Bankr. 795 (Bankr. D. Utah 1984). *See also In re Cornerstone Leisure Industries, Inc.*, No. 90B-07722, memorandum decision and order (Bankr. D. Utah February 20, 1991) (per Boulden, J.).
[28] *See In re Curlew Valley Associates*, 14 Bankr. 506 (Bankr. D. Utah 1981).
[29] *See* 28 U.S.C. §586(a)(3).
[30] 11 U.S.C. §1102(b).
[31] *See In re Penn-Dixie Industries, Inc.*, 9 Bankr. 941, 944 (Bankr. S.D.N.Y. 1981).
[32] *See In re Saxon Industries, Inc.*, 29 Bankr. 320, 321 (Bankr. S.D.N.Y. 1983); *In re Proof of the Pudding, Inc.*, 3 Bankr. 645, 648 (Bankr. S.D.N.Y. 1980).
[33] *Bohack Corp. v. Gulf & Western Industries, Inc.*, 607 F.2d 258, 262 n. 4 (2d Cir. 1979) citing *Woods v. City Nat'l Bank & Trust Co.*, 312 U.S. 262 (1941).
[34] *In re Sharon Steel Corp.*, 100 Bankr. 767 (Bankr. W.D. Pa. 1989); *In re First Republic Bank Corp.*, 95 Bankr. 58 (Bankr. N.D. Tex. 1988); *In re Texaco, Inc.*, 79 Bankr. 560 (Bankr. S.D.N.Y. 1987).
[35] *See In re Orfa Corp. of Philadelphia*, 121 Bankr. 294, 299 (Bankr. E.D. Pa. 1990; *In re Saxon Industries, Inc.*, 39 Bankr. 945, 947 (Bankr. S.D.N.Y. 1984).
[36] *See generally*, Vian, *Discovery in Bankruptcy Cases*, 17 U.C.C. L.J. 22 (1984).
[37] *See In re Wilcher*, 56 Bankr. 428, 433 (Bankr. N.D. Ill. 1985); *In re GHR Energy Corp.*, 35 Bankr. 534, 536-37 (Bankr. D. Mass. 1983); Bankruptcy Rule 2004(b).
[38] *See In re Louisiana World Exposition, Inc.*, 832 F.2d 1391, 1397 (5th Cir. 1987); *Matter of Milam*, 37 Bankr. 865 (Bankr. N.D. Ga. 1984).

Utah Bankruptcy Lawyers Forum

By Hon. Judith A. Boulden
United States Bankruptcy Judge

The purpose of the Utah Bankruptcy Lawyers Forum is to provide a vehicle to improve the trial advocacy skills of bankruptcy lawyers, and to prepare practitioners to deal with the pressures of bankruptcy practice. The practice of law can exact a severe toll from practitioners, and the pace and pressure of this specific trial practice is particularly demanding. Traditional methods of training lawyers utilized by law schools and firms have been inadequate in dealing with the stress of practice in this area of the law.

The practice of bankruptcy law is inherently difficult. There is a wide spectrum of substantive law that a bankruptcy lawyer is required to understand. It ranges from the issues arising in a Chapter 7 (habitually and incorrectly referred to as simple bankruptcy) to those integral to a complex reorganization case. It also requires constant adaptation to changing circumstances. The practitioner must deal with innovative statutory revisions,[1] evaluation of case law,[2] and economic repercussion,[3] as well as acquire the compassion necessary to calm a client's fears of economic instability.

The sociological difficulties vary from the corporate client traumatized by financial disaster so as to be incapable of constructive assistance to counsel, to representation of that segment of society illiterate, disenfranchised and adrift from the economic mainstream. The bankruptcy practitioner must also serve as an officer of the court, while managing the ethical issues inherent in dealing with a variety of entities having a fiduciary status.

The judiciary is often critical of the trial skills of lawyers, but because of its circumscribed role as adjudicator, has limited opportunity to provide constructive suggestions to improve skills. Criticism of attorney conduct would be more effective if an opportunity existed to improve behavior viewed as improper. The Utah Bankruptcy Lawyers Forum provides a positive approach to upgrading substantive attorney skills as well as offering insight in coping with the demands of practice, rather than relying on a punitive approach to correct inappropriate behavior. The methodology employed is to draw on the collective strength of local practitioners to educate their colleagues in the nuances of the practice.

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Upon graduation, she served as law clerk for A. Sherman Christensen, Senior United States District Judge for the District of Utah. Judge Boulden served as a Chapter 7 panel trustee for the United States Bankruptcy Court for the District of Utah from 1976- 1981, the standing Chapter 13 trustee from 1979 through 1987 and stand Chapter 12 trustee during 1987. She has been associated with the law firms of Roe & Fowler and McKay, Burton, Thurman and Condie. She was a partner in the law firm of Boulden & Gillman prior to assuming the bench on January 5, 1988.

Judge Boulden is a member and past chair of the National Conference of Bankruptcy Judges' Liaison Committee with the National Association of Chapter 13 Trustees and is currently serving as President of the Utah Bankruptcy Lawyers Forum.

The Forum meets on the third Tuesday of each month in the courtrooms of the United States courthouse. The 112 bankruptcy lawyers and four law students participating in the Forum represent a variety of years in practice, client representation, firm size and geographic location. A common problem was drafted to use as an instrument to illustrate challenging, yet frequent legal and ethical problems that arise in the practice. The members are divided into two districts containing seven teams, and each team is comprised of seven to eight members.[4] Each team resolves a portion of the problem through a demonstration presented to the remainder of the membership at the monthly meeting. The demonstration may take the form of a litigation sequence, client conference, lecture, or combination of the above.

Those members with more experience were initially given the titles of counselors and advocates to distinguish them from their less knowledgeable colleagues, but that distinction soon blurred as the groups melded into working units tackling a common problem. Those participants who were less gifted were introduced to the methodology of more skilled practitioners. Conversely, those smug in their craft have learned compassion for those colleagues not favored with regular cash flow who practice their profession with limited resources.

The expected result was the transference of technical knowledge, practice tips, coping techniques, and friendship from member to member. The unexpected dividend was the display of pride, competition, excellence, and theatrical skill—all the choicest traits of attorneys. The future holds great promise for the membership of the Forum and for the improvement of justice in our courts. The continuation of the Utah Bankruptcy Lawyers Forum will enhance the level of competency for all members and improve the caliber of advocacy in the bankruptcy field.

[1] The 101st Congress significantly altered the discharge provisions of the Bankruptcy Code by making obligations for student loans, restitution, damages as a result of driving while intoxicated, and debts incurred while in a fiduciary capacity to a savings and loan non-dischargeable. Many of those debts had previously been dischargeable in a Chapter 13.

[2] *Grogan v. Garner*, 111 S. Ct. 654 (1991), modified the standard of persuasion in dischargeability cases brought under 11 U.S.C. §523 from a clear and convincing standard to a preponderance of evidence standard.

[3] Utah ranks seventh in the nation for filings per 1,000 persons. Tennessee, Georgia, Alabama, Nevada, Colorado and Arizona rank ahead of Utah. 3 *Credit Card Bankruptcies No. 1* 5.

[4] The tireless efforts of the board of trustees brought the concept to reality. They are, in alphabetical order, Anna W. Drake, William G. Fowler, Duane H. Gillman, David E. Leta, Mona Lyman, Herschel J. Saperstein, and George H. Speciale. Professor Richard I. Aaron assisted with the problem for the course, and Danny C. Kelly and Robert S. Prince served as district leaders for the two groups of lawyers. David E. Smoot and Alan W. Barnes clarified the goals of the Forum. Team leaders charged with organizing each presentation were Kevin R. Anderson, Douglas B. Cannon, Andres' Diaz, Weston L. Harris, Vernon L. Hopkinson, Noel S. Hyde, J. Scott Lundberg, Joel T. Marker, William G. Marsden, Robert D. Merrill, Carolyn Montgomery, Roger G. Segal, William Thomas Thurman, and Steven T. Waterman. Judges Glen E. Clark and John H. Allen lent their assistance to the project.

New SEC Short-Swing Profit Rules—Heightened Scrutiny of Insiders

By Ronald S. Poelman

On January 10, 1991, the United States Securities and Exchange Commission (the "SEC") adopted the long-awaited changes to the short-swing profit rules that apply to directors, officers, and major shareholders of most companies with publicly traded stock.[1] These new rules were adopted pursuant to §16 of the Securities Exchange Act of 1934 (the "Exchange Act").[2] These changes constitute a comprehensive revision of the prior rules. The new rules are clearer and more coherent than the old rules, but they are also significantly more complex. They became effective on May 1, 1991.[3]

SIGNIFICANT CHANGES

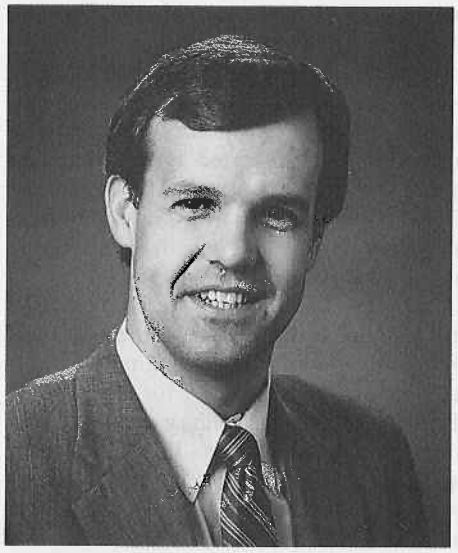
The highlights of these §16 rule changes are as follows:

Who Must File. The new rules clarify who must file, especially who is an "officer" and what constitutes "ownership" for the purpose of determining who is a more-than-10-percent shareholder.

What Stock Must Be Reported as "Beneficially Owned." The new rules adopt a new "pecuniary interest" definition for determining when stock is "beneficially owned" and thus reportable under §16. This standard is broader than the standard under the prior rules.

New Form 5. The new rules adopt a new Form 5 to be filed annually, in addition to the current Forms 3 and 4. The information required by Forms 3 and 4 has also been expanded.

Public Disclosure of Delinquent Filers. The new rules require companies to disclose the names of delinquent filers in their Form 10-K Annual Reports to the SEC and in their proxy statements to shareholders.



RONALD S. POELMAN received a juris doctorate degree in 1981 from the Boalt Hall School of Law at the University of California at Berkeley. In 1981, he began practicing corporate and securities law at Fenwick, Davis & West (now Fenwick & West) in Palo Alto, California. In 1986, Mr. Poelman joined the Salt Lake City office of the law firm of LeBoeuf, Lamb, Leiby & MacRae. In 1989, he joined the law firm of Parsons Behle & Latimer. He is currently continuing his corporate and securities law practice there in a full-time of counsel position.

Reversal of Treatment of Options, Etc. In what is probably the most significant change of all, the new rules reverse the treatment of stock options and other so-called "derivative securities." For the purpose of determining short-swing profits, the grant of an option, etc., is now a §16 "purchase" and the exercise of the option is not.

Rules for Employee Benefit Plans. The rules relating to the special exemptions for certain transactions under qualifying employee benefit plans have been revised.

SECTION 16 GENERALLY

Application. Section 16 applies to any person who is the direct or indirect owner of any class of equity security that is registered pursuant to §12 of the Exchange Act and to every director and officer of a company that has a class of equity securities so registered.[4] This encompasses almost every company with publicly traded stock.[5] For the purposes of this article, such directors, officers, and more-than-10-percent shareholders of such companies are collectively referred to as "insiders."[6]

Short-Swing Profits. Section 16(b) prohibits insiders from making any purchase and sale (or any sale and purchase) of such stock within a six-month period.[7] The rationale of this prohibition is that such trades by insiders within six months are likely to be based on material, non-public information. Accordingly, §16 makes all "profits" from such transactions illegal and repayable to the company. "Profits" are basically the largest price spread between any matchable purchase and sale.[8] Section 16(b) gives a right of action for recovery of these illegal profits both to the company and to its stockholders in a derivative suit. In fact, however, it is plaintiffs' attorneys who most often initiate such suits.[9] Their incentive is attorneys' fees.[10]

Reporting Obligation. As a monitoring device, §16(a) requires all insiders to file beneficial ownership reports with the SEC that publicly disclose the initial extent of the insider's beneficial ownership of the company's stock (Form 3) and that dis-

close any subsequent changes in such ownership (Form 4).[11]

WHO MUST FILE

Directors. The definition of a "director" is unchanged under the new rules. The definition contained in §3(a)(7) of the Exchange Act will thus continue to apply.[12] This definition includes any director or a person who performs similar functions. The SEC has now made clear that §16 will apply only to directors who perform policy-making functions.[13] Accordingly, §16 does not apply to honorary, emeritus, or advisory directors. This is in accord with prior judicial interpretations.[14]

Officers. The new rules make clear that §16 applies only to officers who perform a policy-making function.[15] This may include an officer of a parent or subsidiary corporation if such person performs a policy-making function for the company. Officer titles are not determinative, except that the persons holding the following titles are presumed to perform policy-making functions: the president, the principal financial officer, the principal accounting officer or controller, and any vice president in charge of a principal business unit, division, or function (such as sales, administration, or finance). This definition is patterned after the existing definition of an "executive officer" in Rule 3b-7 under the Exchange Act.[16] Notably, all "executive officers" whom the company includes in its management disclosure pursuant to Item 401(b) of Regulation S-K[17] are now presumed by the SEC to be subject to §16.[18]

Transactions Before Becoming a Director or Officer. The old rules required a person who became a director or officer to report all transactions that occurred within six months of such election.[19] New Rule 16a-2 now eliminates this requirement, with one exception.[20]of the company registering a class of stock under §12 of the Exchange Act.[21]

Transactions After Ceasing to Be a Director or Officer. No change has been made in the treatment of §16 transactions that occur after a person ceases to be a director or officer. New Rule 16a-2(b) states that such trades must still be reported and will be subject to short-swing profit liability.[22]

More-Than-10-Percent Shareholders. The new rules adopt a "voting/investment power" definition of ownership for the purpose of determining who is a more-than-10-percent shareholder under §16.[23] This test is adopted from the rules already existing under §13(d) of the Exchange Act.[24] Specifically, these rules state that any direct or indirect power to vote and/or dispose of the securities constitutes ownership. Notably, this "voting/investment power" test for determining whether a shareholder is a §16 insider is different from the "pecuniary interest" test described in the next section for determining what transactions must be reported under §16.

WHAT STOCK MUST BE REPORTED AS "BENEFICIALLY OWNED"

Pecuniary Interest. The new §16 rules require that an insider (as determined above) report any transaction in which such insider has a "pecuniary interest."[25] A "pecuniary interest" is defined as "the opportunity, directly or indirectly, to profit or share in any profit derived from a transaction in the subject securities."[26] This opportunity may arise from "any contract, arrangement, understanding, relationship, or otherwise."[27] Notably, this "pecuniary interest" test for determining when a transaction must be reported is different and perhaps broader than the "voting/investment power" test described above for determining whether a person is a more-than-10-percent shareholder.

Indirect Pecuniary Interests. The SEC has defined in large part in the new §16 rules what constitutes an "indirect pecuniary interest."[28] An insider, for example, is deemed to have a pecuniary interest in the stock held by the insider's family members who share the same household.[29] A general partner is deemed to have a pecuniary interest in the portfolio securities held by the partnership to the greater extent of such general partner's capital account or profit interest.[30] A shareholder is deemed to have a pecuniary interest in the portfolio securities of the corporation, but only if such shareholder is a controlling shareholder and has investment authority over such securities.[31] Attribution rules also exist for the trustee, settlor, or beneficiary of a trust, if such person has investment authority over the trust's portfolio securities.[32] Other rules exclude certain remote interests.[33]

THE NEW REPORTING SYSTEM

Form 3. Form 3 is the Initial Statement of Beneficial Ownership that must be filed by the insider within 10 days of the date on which a person assumes the status as an insider.[34] The information on Form 3 has been expanded under the new rules.

Form 4. Form 4 is the Statement of Changes in Beneficial Ownership that must be filed by the insider within the first 10 days of any month following a month in which a reportable transaction has taken place.[35] The information required on Form 4 has been expanded under the new rules. With one significant exception, transactions that are exempt from short-swing profit liability, such as gifts, do not need to be reported on Form 4, but rather are now to be reported on the annual Form 5 described below.[36] The significant exception to this rule is the exercise of stock options and other "derivative securities," which, although exempt from liability, are nevertheless required to be reported on the next Form 4 (or Form 5).[37] All stock options and other "derivative securities" that have not been reported to the SEC prior to the effective date of the new rules must be filed on the first Form 4 (or Form 5) otherwise required to be filed after May 1, 1991.[38]

Form 5. Form 5 is the new Annual Statement of Changes in Beneficial Ownership that must be filed by an insider within 45 days of the end of the company's fiscal year.[39] Form 5 includes a description of all exempt transactions that have occurred during the prior fiscal year, as well as a description of all transactions that should have been reported on Form 4 but were not.[40] No Form 5 need be filed if there are no reportable transactions on such Form.[41]

Filing Deadline and Procedure. The filing deadline for these reports means the day on which the reports must be *received by the SEC.*[42] If this day falls on a weekend or on a holiday, the deadline is extended to the next business day.[43] There is no grace period in these deadlines, although the SEC has provided in the new rules that a report will be considered to be timely filed if it is delivered by the insider to the post office or a private courier for timely delivery, even though the report in fact arrives late.[44] The insider should obtain a receipt to evidence that the Form was in fact sent in such manner. Every insider, upon filing a Form 3, 4, or 5, must simultaneously deliver a copy of such Form to the company[45] and to the exchange on which the company's stock is listed for trading, if any.[46]

DELINQUENT FILERS

Public Disclosure. In order to improve the compliance rate in filing these §16 beneficial ownership reports, the SEC will now require that the names of all delinquent filers, together with the number of late or non-filed reports, be publicly disclosed by companies in their Form 10-K

Annual Reports to the SEC and in their proxy statements to their shareholders.[47] The cover page of the Form 10-K Annual Report to the SEC has even been amended to add a box that will be checked by reporting companies only if there are no delinquent filers reported in the Form 10-K.[48] In making this disclosure, companies can rely solely on the copies of the Forms 3, 4, and 5 delivered by the insider to the company as described above,[49] although companies should not withhold any actual knowledge they may have from another source concerning filing delinquencies. Any delinquent filing need be disclosed only once.[50]

Commencement of Disclosure Requirement. Although the effective date of the new rules is May 1, 1991, the requirement for the public disclosure of delinquent filers applies only to companies whose fiscal year ends after *November 1,* 1991.[51] At that time, however, all delinquent filings for that fiscal year and for any prior fiscal year must be disclosed.[52]

Other Possible Penalties. Beside being subjected to the embarrassment of public disclosure, it is also now possible that a delinquent filer will be subjected to *administrative* fines and injunctions by the SEC. These possible penalties are not a part of the new §16 rule changes, but rather are part of the broad administrative enforcement authority recently granted by Congress to the SEC in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990.[53] The SEC was previously required to go to court to enforce §16 and other provisions of the Exchange Act. Now, however, the SEC can impose administrative fines and injunctions on its own. Given this new authority and the new §16 rule changes, the SEC is likely to heighten its enforcement efforts, especially against persistently delinquent §16 filers.

REVERSAL OF TREATMENT OF STOCK OPTIONS, ETC.

"Derivative Securities." The reversal in the treatment of stock options, etc., is probably the most significant change in the new short-swing profit rules. It is the most significant change because it entirely reverses how short-swing profit liability is determined for stock options, warrants, convertible securities, stock appreciation rights, and other so-called "derivative securities."[54]

The Old Scheme. Under the old scheme, the *grant* of a stock option or other derivative security, although reportable on Forms 3 and 4, was irrelevant for the purpose of determining short-swing profit liability. The *exercise* of the option, instead, was considered a "purchase" and was matched against any subsequent "sale" in order to determine any illegal "profits." Because the grant of the option, not its exercise, is the moment when the insider is able to fix the purchase price, this approach failed to encompass all possible short-swing profit transactions and, ironically, imposed unnecessary restrictions on transactions in which there was no potential for abuse of material, inside information.

The New Scheme. Now, under the new §16 rules, the treatment of options and other derivative securities is reversed. The *grant* of the option or other derivative security is considered a "purchase" under new Rule 16a-6 for the purpose of determining short-swing profit liability, and the subsequent exercise is not.[55] This means that, under the new rules, an insider is now able to exercise an option and immediately sell the option shares with impunity under §16. Notably, however, because the grant of an option is considered to be a "purchase" under the new rules, an insider is not able to exercise an option *and immediately sell the option shares* within the first six months from the date of the option grant. If the insider does this, the grant (or "purchase") of the option is matched with the subsequent "sale" of the option shares, and the result is illegal §16 "profits." In light of this new rule, it may be advisable for companies to place a six-month waiting period on the exercise of all stock option grants to insiders. Companies will also want to avoid making annual stock option grants to insiders because this will preclude the insider from ever selling any stock without violating §16(b). Alternatively, companies should consider qualifying their employee benefit plans for the special exemptions allowed by new Rule 16b-3 that are discussed in the following section, so that the grant of options too will be exempt from short-swing profit liability.

". . . publicly owned companies should take an active role in assisting their directors and officers with compliance."

SPECIAL EXEMPTIONS FOR QUALIFYING EMPLOYEE BENEFIT PLANS

New Combined Rule. Former Rule 16b-3 provided special exemptions from short-swing profit liability for directors and officers who effected certain transactions pursuant to an employee benefit plan that met certain qualifications.[56] Former Rule 16a-8 also exempted certain intra-plan transactions.[57] The purpose of these rules was to give directors and officers some flexibility in their stock transactions under these plans, without allowing too much room for speculative use of material, nonpublic information. These concepts have now been combined into one rule, new Rule 16b-3.[58] The effective date of this rule has been postponed until September 1, 1992 to allow companies ample time to comply with its provisions, especially the shareholder approval requirement.[59] With some exceptions, the new qualifications for the exemptions are more strict than under the old rules. The significance of meeting these qualifications is that certain transactions, such as the grant of a stock option or the election to participate in an ESOP, for example, can be exempted from short-swing profit liability. The result is greater flexibility for the directors and officers who receive stock awards pursuant to such plans.

General Plan Qualifications. A qualifying plan under new Rule 16b-3 must meet the following three requirements: (i) it must be in writing and must specify who is eligible to participate and the method by which the price and amount of the awards are to be determined;[60] (ii) it must provide that awards are non-transferable, except upon death or pursuant to a qualified domestic relations order;[61] and (iii) the plan (except for broad-based pension and retirement plans and certain other plans) and any material amendments thereto must be approved by the company's shareholders.[62]

Requirements for Exempted Grants. All grants of stock options, stock appreciation rights, and even bonus stock will not be considered to be a "purchase" under §16(b)[63] if the grant is made pursuant to a qualifying plan as described above and such grant meets the following two conditions: (i) the amount of the award must be fixed in the plan, or the plan under which the grant is made must be administered by

at least two "disinterested" directors;[64] and (ii) a six-month holding period must be met.[65] "Disinterested" directors are directors who have not received a stock award under any stock plan of the company for a period of one year.[66] The six-month holding period applies both to derivative securities and to non-derivative securities. For a derivative security, such as a stock option, the new rule requires that the stock obtained upon exercise of the option not be sold for six months from the date the option was granted. For a non-derivative security, such as a stock bonus, the new rule requires that the stock be held for at least six months before it is sold. If this six-month holding period is violated, the exemption for the grant is retroactively extinguished, resulting in potential short-swing profit liability.

Participant-Directed Transactions. Insiders often have the opportunity to direct the acquisition or disposition of the company's securities for their own account under ESOPs, 401(k) plans, retirement plans, and under certain stock purchase plans. The new rules establish strict qualifications for such transaction to be considered exempt from short-swing profit liability.[67] First, the transaction must be made under a plan that meets the general qualifications for Rule 16b-3 plans described above. Beyond this, a transaction will be exempt if it either involves a six-month delay between the election and the execution[68] or it is incident to an employee's termination, retirement, disablement, or death.[69] New Rule 16b-3 also contains certain other exemptive rules that apply only to thrift, stock purchase, and similar stock acquisition plans.[70] These rules exempt an insider's election to participate in such a plan, to change the level of participation, or to cease participating only if the plan allows for broad-based employee participation and only if certain six-month waiting or holding periods are met.[71] These rules also exempt intra-plan transfers if certain conditions are me.[72]

SUMMARY AND RECOMMENDATIONS

Summary. The new §16 rules constitute a massive overhaul of the prior regulations. Under the new rules, "officers" who must file §16 reports are now clearly only those officers who perform policy-making functions. Also, a more-than-10-percent shareholder is now clearly a person who has voting/investment power over more than 10 percent of the stock. In contrast to this standard, however, all transactions must now be reported in which the insider has a "pecuniary interest." To report these interests, new annual Form 5 will usually need to be filed, in addition to the existing and expanded Forms 3 and 4. If these forms are filed late, the names of delinquent filers will now be required to be disclosed in the company's Form 10-K Annual Report to the SEC and in the proxy statements to shareholders. Significantly, in a reversal of the prior rules, the *grant* of a stock option, etc., is now considered a "purchase" for the purpose of determining short-swing profit liability, whereas the exercise of the option is not. Finally, the rules relating to the special exemptions for certain transactions under qualifying employee benefit plans have been revised.

Recommendations. Although the responsibility for filing these §16 beneficial ownership reports rests only with the insiders, publicly owned companies should take an active role in assisting their directors and officers with compliance. Companies should first determine which officers are truly policy-making "officers" under the new §16 standard, and should perhaps even adopt an annual resolution naming all §16 directors and officers. Moreover, companies should establish a compliance program, with a designated coordinator, to send monthly reminders to the insiders and to assist them in filing their §16 reports. Companies may even choose to establish a pre-clearance requirement for all trades by insiders in order to avoid not only §16 violations, but violations of the rules regarding restricted securities and insider trading as well. Finally, companies may want to consider amending their current employee stock plans or adopting new plans both to comply with the new rules, if necessary, and to take advantage of the special exemptions for transactions under qualifying employee benefit plans. These efforts will serve to avoid any embarrassing public disclosure of delinquent filers and, most importantly, will serve to avoid any inadvertent short-swing profit violations.

[1] SEC Release No. 34-28869, 56 Fed. Reg. 7242 (February 21, 1991) ("Adopting Release"). These changes were originally proposed in SEC Release No. 34-26333, 53 Fed. Reg. 49997 (December 2, 1988) and were reproposed in SEC Release No. 34-27148, 54 Fed. Reg. 35667 (August 18, 1989).

[2] 15 U.S.C. 78p.

[3] Adopting Release §VII(A), *supra* note 1, at 7260. Despite the general May 1, 1991 effective date, certain provisions of the new rules become effective at various times through September 1, 1992.

[4] 15 U.S.C. 781. Section 16 also applies to securities of closed-end investment companies that are subject to §30(f) of the Investment Company Act, 15 U.S.C. 80a-29(f), and public utility holding companies subject to §17 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79q.

[5] It is possible for a company to develop a public market for its stock and become an SEC reporting company, but also not have a class of its stock registered pursuant to §12 of the Exchange Act, 15 U.S.C. 781. In such instance, §16 would not apply to its insiders. Significantly, however, all stock that is listed for trading on an exchange must be registered pursuant to §12(b) of the Exchange Act, 15 U.S.C. 781(b), and, furthermore, the National Association of Securities Dealers, Inc. ("NASD") requires all stock included in the National Market System ("NMS") of its automated quotation system (the "NASDAQ System") to be so registered. NASD Bylaws, Schedule D, Part III(3). Also, the NASD will consider for initial inclusion in the NASDAQ System only stock that is so registered, unless such stock is being distributed in connection with an initial public offering. NASD Bylaws, Schedule D, Part II(1)(a). Consequently, §16 applies to all major publicly owned corporations.

[6] The insiders of a closed-end investment company also include the advisor and any affiliated person of the advisor. §2(a) of the Investment Company Act, 15 U.S.C. 80a-2(a)(3).

[7] 15 U.S.C. 78p(b).

[8] *Smolowe v. Delendo Corp.*, 136 F.2d 231, 239 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

[9] The three most prominent attorneys who specialize in §16 short-swing profit actions are Morris Levy of New York, David Lopez of New York, and Jerrold Shapiro of Chicago.

[10] The first §16(b) case awarded attorneys' fees to plaintiff's counsel and recognized that "in many cases . . . the possibility of recovering attorney's fees will provide the sole stimulus for the enforcement of §16(b)." *Smolowe v. Delendo Corp.*, 136 F.2d 231, 241 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943).

[11] 15 U.S.C. 78p(a).

[12] 15 U.S.C. §78c(a)(7).

[13] Adopting Release §II(A)(1), *supra* note 1, at 7244.

[14] *See, e.g., Blau v. Lehman*, 368 U.S. 403 (1962); *Feder v. Martin Marietta*, 406 F.2d 260 (2d Cir. 1969).

[15] 17 C.F.R. 240.16a-1(f).

[16] 17 C.F.R. 240.3b-7.

[17] 17 C.F.R. 229.401(b).

[18] *See* "Note" following text of "officer" definition in 17 C.F.R. 240.16a-1(f).

[19] Former Rule 16a-1(d), 17 C.F.R. 240.16a-1(d) (1990).

[20] 17 C.F.R. 240.16a-2.

[21] *See* note 5, *supra*, and accompanying text for a discussion of the applicability of §16 of the Exchange Act upon registration of a class of stock under §12.

[22] 17 C.F.R. 240.16a-2(b).

[23] 17 C.F.R. 240.16a-1(a)(1). Certain banks, insurance companies, and other institutional holders, as well as employee benefit plans that are subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1001 *et seq.*, are not considered to own securities for the purpose of §16 if such securities are held in customer or fiduciary accounts in the ordinary course of business and such securities are not acquired with the purpose or effect of changing or influencing control of the issuing company.

[24] 17 U.S.C. 78m(d) and 17 C.F.R. 240.13d-3.

[25] 17 C.F.R. 240.16a-1(a)(2).

[26] 17 C.F.R. 240.16a-1(a)(2)(i).

[27] 17 C.F.R. 240.16a-1(a)(2).

[28] 17 C.F.R. 240.16(a)(2)(ii).

[29] 17 C.F.R. 240.16a-1(a)(2)(ii)(A).

[30] 17 C.F.R. 240.16a-1(a)(2)(ii)(B).

[31] 17 C.F.R. 240.16a-1(a)(2)(iii).

[32] 17 C.F.R. 240.16a-1(a)(2)(ii)(E) and 240.16a-8(b).

[33] 17 C.F.R. 240.16a-1(a)(2)(ii).

[34] Adopting Release §XIV, *supra* note 1, at 7275-7278.

[35] Adopting Release §XIV, *supra* note 1, at 7278-7281.

[36] 17 C.F.R. 240.16a-3(1)(a). At the option of the insider, transactions that are otherwise reportable on the annual Form 5 may be reported earlier on Form 4. 17 C.F.R. 240.16a-3(g)(3).

[37] 17 C.F.R. 240.16a-3(g).

[38] Adopting Release §VII(B), *supra* note 1, at 7261.

[39] Adopting Release §XIV, *supra* note 1, at 7281-7285.

[40] 17 C.F.R. 240.16a-3(f)(1). The first Form 5 that is filed by the insider must report transactions occurring within the company's last two fiscal years. 17 C.F.R. 240.16a-3(f)(1)(3).

[41] 17 C.F.R. 240.16a-3(f)(2).

[42] 17 C.F.R. 240.16a-3(h).

[43] 17 C.F.R. 240.0-3(a).

[44] 17 C.F.R. 240.16a-3(h).

[45] 17 C.F.R. 240.16a-3(e).

[46] 17 U.S.C. 78p(a).

[47] The SEC has added new Item 405 to Regulation S-K, 17 C.F.R. 229.405, that describes the required disclosure concerning delinquent filers generally. The SEC has also amended the proxy statement Schedule 14A, 17 C.F.R. 240.14a-101 Schedule 14A, and Item 10 of Form 10-K, Adopting Release §XIII (§249.103), *supra* note 1, at 7274, to require the disclosure as described in Item 405 of Regulation S-K. Delinquent filings that were corrected prior to May 1, 1991, the effective date of the new §16 rules are not required to be disclosed in the Form 10-K or proxy statement. Adopting Release §VI(B), *supra* note 1, at 7260.

[48] Adopting Release §XIII (§249.103), *supra* note 1, at 7274.

[49] 17 C.F.R. 229.405(a).

[50] *See* "Note" following the text of 17 C.F.R. 240.405(a).

[51] Adopting Release §VII(A), *supra* note 1, at 7260.

[52] 17 C.F.R. 229.405(a)(1).

[53] Pub. L. 101-429, 104 Stat. 931.

[54] With certain exceptions, Rule 16a-1(c) defines a "derivative security" as "any option, warrant convertible security, stock appreciation right, or similar right with an exercise price or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security." 17 C.F.R. 240.16a-1(c).

[55] 17 C.F.R. 240.16a-6. Despite this general rule, the exercise of so-called "out-of-the-money" options will not be exempt from short-swing profit liability. The reason for this is that an insider who would engage in such a losing transaction is likely to be speculating with material, non-public information. Adopting Release §III(D), *supra* note 1, at 7253.

[56] Former 17 C.F.R. 240.16b-3 (1990).

[57] Former 17 C.F.R. 240.16b-3.

[58] 17 C.F.R. 240.16b-3.

[59] Adopting Release §VII(c), *supra* note 1, at 7261.

[60] 17 C.F.R. 240.16b-3(a)(1).

[61] 17 C.F.R. 240.16b-3(a)(2).

[62] 17 C.F.R. 240.16b-3(b).

[63] 17 C.F.R. 240.16b-3(c).

[64] 17 C.F.R. 240.16b-3(c)(2).

[65] 17 C.F.R. 240.16b-3(c)(1).

[66] 17 C.F.R. 240.16b-3(c)(2)(i).

[67] 17 C.F.R. 240.16b-3(d).

[68] 17 C.F.R. 240.16b-3(d)(1)(i).

[69] 17 C.F.R. 240.16b-3(d)(1)(ii).

[70] 17 C.F.R. 240.16b-3(d)(2).

[71] 17 C.F.R. 240.16b-3(d)(2)(i).

[72] 17 C.F.R. 240.16b-3(d)(2)(ii).

Commission Highlights

During its regularly scheduled meeting of March 14, 1991, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The minutes of the February 15, 1991, meeting were reviewed and minor changes were made.
2. The Commission reviewed the Supreme Court minute entry which requires that all Bar programs and services that are not self-supporting be justified and retained only after membership comment and approval by the Court. The Commission approved the list of current programs and services and determined to review the Lawyer Referral Service, Public Information Program, Bar Directory, Legal Economics Committee, Legal/Medical Committee and LEXIS program.
3. The Board adopted a statement of policy that the Utah State Bar should continue to operate Bar discipline and related responsibilities rather than transferring those duties to another entity.
4. The Board also adopted a statement of policy that the Bar should maintain the present disciplinary system.
5. Based upon the support and endorsement of the Patent, Trademark and Copyright Section, the Board voted to endorse Allen Jensen to be appointed to the United States Court of Appeals for the Federal Circuit in Washington, D.C.
6. The Board voted to appoint Helen Christian and reappoint Rex Olson to the Child Support Guidelines Advisory Committee.
7. The Board voted to appoint Francis Wikstrom and Peter Stirba as its representatives on the Appellate Court Judicial Nominating Commission and John Paul Kennedy and Michael Martinez as alternate Commissioners.
8. The Board reviewed the final report of the Legislative Affairs Committee, which indicated that of the 438 bills that were considered, only 78 fit within Bar criteria for discussion and action.
9. The Board voted to submit a petition to the Supreme Court to appoint eight attorneys and four lay members to hearing panels, due to an increasing number of complaints and the large amount of formal complaints.
10. Anthony Schofield and Jeff Paoletti were appointed to the Supervising Attorneys Committee.
11. Stephen Trost reviewed the litigation report.
12. The Commission reviewed a proposed policy and guideline for testing disabled applicants, determined that the issue required further study, and deferred action until the April meeting.
13. The Board approved a policy that 50-minute MEE question on the Bar Exam are to be scored with double weight as recommended by the National Conference of Bar Examiners.
14. The Board also approved a policy that the MBE and Essay portions of the Bar Examination are to be weighted on a 1/1 ratio in the score combining process.
15. The Board voted to release Bar Exam raw essay scores to all applicants upon request.
16. Adoption of a new Bar Examination Review and Appeal Procedure was deferred until the April meeting.
17. The Board adopted a Character and Fitness Committee recommendation that an applicant not be approved for membership in the Utah State Bar.
18. Paul Moxley distributed a report in response to the *Keller* decision concerning issues pertinent to the Utah State Bar.
19. John Baldwin reviewed current cash flow projections and indicated that January financial information was available for review. He also reviewed a current staff member list.
20. Mr. Baldwin informed the Commission that the errors and omission insurance policy would soon expire and he had received renewal rates and coverage proposals.
21. Mr. Baldwin also distributed a Lawyer Referral Service report and a report of legal fees and costs billed on behalf of the Utah State Bar.
22. After a conference call with Leslie Francis, Ethics Advisory Opinions Committee Chair, the Board approved Ethics Advisory Opinion No. 113 which concludes that Rule 4.2 of the Rules of Professional Conduct does not prohibit certain communications made by lawyers with Indian Tribal Councils and without the consent of the Tribe's lawyers.

University of Utah Law Library Plans Remodeling

Many Utah attorneys use the resources of the University of Utah Law Library for legal research projects and in locating legal information. Often, law firms will employ U of U law students for research projects; many others send runners or paralegals to the library to copy or check out materials.

This summer, the normal tempo of legal study and research will be interrupted as we undertake some major remodeling on the main floor of the library building. The remodeling will include expansion and refurbishing of the reference room, installation of moveable compact shelving all along the west wall, and recarpeting of the entire main floor of the library. The remodeling is necessary because the reference room has grown uncomfortably crowded with computer research stations and patrons requiring reference assistance, and the book stacks in the library have reached capacity, and the original carpet has become dangerously worn. Funding for these projects is substantially underwritten by a generous grant from the George S. and Delores D. Eccles Foundation, with additional support from other library development funds and University funds for the new carpet. In the course of rearranging the collection on the shelving, virtually every book in the library will be moved.

As we plan for these summer projects, we have kept the research needs of our library users in mind. We intend to remain open throughout the summer, except Memorial Day weekend following graduation ceremonies, the July 4th weekend and the July 24th holiday. Reference assistance will be available from 9:00 a.m. until 5:00 p.m. weekdays, and most of the collection will be accessible. At various times during construction and installation, however, the noise and disruption may reach levels that are not conducive to legal research. Photocopy facilities will still be available and many texts can be checked out for a period of two weeks.

By late August, when the law students return for the 1991-92 academic year, we hope that our new facilities will be in place. We think that all Law Library users will be pleased by the improvements.

Discipline Corner

ADMONITIONS

1. An attorney was admonished for violating Rule 1.14(d) by failing to forward his client's file to the client's new attorney for a period of approximately five months.

2. An attorney was admonished for violating Rule 8.4(d) by accepting a $1,500 retainer and describing it as a "flat fee" retained in order to protect it from his client's creditors when the attorney had no intention that the $1,500 would in fact be a fixed fee.

PRIVATE REPRIMANDS

1. An attorney was privately reprimanded for violating Rule 1.3 by failing to commence a lawsuit for approximately two years after the date of retainer. In addition, the complaint was dismissed without prejudice based on the attorney's failure to serve the Defendant within three months of filing the action.

2. An attorney was privately reprimanded for violating Canon 6, DR 6-101(A)(3), Rules 1.3, 1.4(a) and 8.1(b) of Rules of Professional Conduct by failing to inform his client that her action had been dismissed based on his failure to appear at a pre-trial. In addition, the attorney failed to respond to the Notice of Complaint issued by the Office of Bar Counsel. The attorney filed the action on behalf of a husband and wife and subsequently the clients divorced. The attorney informed the husband, but failed to inform the wife.

3. An attorney was privately reprimanded for violating Rules 1.3, 1.4(a), 1.14(d) and 8.1(b) of the Rules of Professional Conduct, by failing to move forward on his client's divorce action and failing to respond to his client's repeated requests for information. In addition, the attorney failed to respond to the Notice of Complaint issued by the Office of Bar Counsel.

4. An attorney was privately reprimanded for violating Rules 1.3, 1.4(a), 1.14(d) and 8.1(b) of the Rules of Professional Conduct, by failing to move forward on his client's action and failing to respond to repeated requests for information from his clients and failing to forward the client file to another attorney after being terminated by his clients. In addition, the attorney failed to respond to a Notice of Complaint issued by the Office of Bar Counsel.

SUSPENSIONS

1. On March 21, 1991, El Ray F. Baird was suspended from the practice of law for a period of one year. Ten months of the suspension is stayed pending successful completion of probation. To complete his probation, Mr. Baird, must work with a supervising attorney who will analyze his case management and office management systems. Mr. Baird must also send monthly status reports to his clients and continue to meet with his counselor. In addition, Mr. Baird must pay the Complainant the sum of $650 as restitution. Mr. Baird had agreed to act as attorney for his client pursuant to her divorce in 1987. Subsequent to filing the complaint, Mr. Baird failed to perform any legal services on her behalf. The Defendant in that action obtained a Decree of Divorce by Default based on Mr. Baird's failure to respond to interrogatories. In addition, Mr. Baird failed to respond to his client's repeated requests for information throughout the period of representation.

This discipline was aggravated by Respondent's pattern of misconduct. Mr. Baird received a public reprimand in 1987 and two private reprimands in 1989 all based on neglect.

2. On March 21, 1991, Robert A. Bentley was suspended from the practice of law for a period of one year. Mr. Bentley may apply for reinstatement after three months of the suspension if he is able to find an attorney who will associate with him as co-counsel and provide the Bar evidence from a medical practitioner certifying that he has overcome his depression. In addition, Mr. Bentley is to repay restitution in the amount of $750 to one client and $300 to another client. Mr. Bentley must also repay the Utah State Bar $303 for the cost of prosecuting the matter. One of Mr. Bentley's clients retained him in 1987 and thereafter attempted repeatedly to contact Mr. Bentley without success. Based on the complaint filed with the Office of Bar Counsel, the Screening Panel voted to dismiss the case against Mr. Bentley, based on his representation that he would follow through on her action. Thereafter, Mr. Bentley failed again to act on her behalf.

Another client retained Mr. Bentley in 1987 to act as his attorney in an anti-discrimination suit. Mr. Bentley failed to file the appropriate documents to initiate the suit. For a period of approximately two years, his client attempted to contact him without adequate success.

Mr. Bentley violated Rule 1.4(a) by failing to respond to his client's repeated requests for information and failing to keep his clients apprised of the status of their actions. Mr. Bentley violated Canon 6, DR6-101(A)(3) and Rule 1.3 by failing to file the complaints as he had represented to his clients.

In mitigation, the Hearing Panel, based on information supplied by a medical practitioner, determined that Mr. Bentley suffered from depression and had difficulties with alcoholism during the pertinent time periods.

3. On March 21, 1991, A. Paul Schwenke was suspended from the practice of law for a period of one year. As a condition of reinstatement, Mr. Schwenke must complete 15 hours of continuing legal education dealing with criminal and civil procedures, no less than five of these hours must be courses dealing in ethics. In addition, Mr. Schwenke must repay the Office of Bar Counsel the sum of $50 in costs for prosecuting the matter.

On March 19, 1986, Mr. Schwenke agreed to purchase from his client certain real properties. On the same date the sale was consummated, Mr. Schwenke filed Chapter 11 Bankruptcy Petition on behalf of his client. Mr. Schwenke filed the bankruptcy to prevent a foreclosure in an effort to benefit himself and his partner. In addition, during the course of the first meeting of the creditors, Mr. Schwenke misrepresented the ownership of the properties to the bankruptcy court.

Mr. Schwenke violated Canon 1, DR1-102(A)(4) by initiating the bankruptcy on behalf of his client in order to prevent a foreclosure on the sale of the property in an effort to benefit himself and his partner. Mr. Schwenke violated Canon 1, DR1-102(A)(5) by misrepresenting the status of the ownership of those properties to the bankruptcy court. Mr. Schwenke violated Canon 5, DR5-101(A) by purchasing the properties from his client and subsequently filing bankruptcy on behalf of his client to protect his own interest. Mr. Schwenke violated Canon 5, DR5-103(A) by acquiring a property interest in the cause of action. Mr. Schwenke violated Canon 7, DR7-102(A)(3) by misrepresenting the status of the ownership of the properties. Mr. Schwenke violated Canon 7, DR7-102(A)(5) by his misrepresentation of the

status of the ownership of the properties. Mr. Schwenke violated Canon 7, DR7-102(A)(7) by assisting his client in misrepresenting the ownership of the properties. This sanction was aggravated by Mr. Schwenke's prior disciplinary history in that he was suspended from the practice of law at the time the decision was made in this disciplinary matter. The sanction was also aggravated by Mr. Schwenke's self-serving dishonest motive, and his obstruction of the disciplinary process by failing to comply with discovery after numerous requests, motions and orders compelling compliance. In addition, Mr. Schwenke refused to acknowledge the wrongful nature of his conduct. The sanction was partially mitigated, however, in that at the time of the misconduct, Mr. Schwenke had been in practice for only three years and his lack of experience and competence contributed to the misconduct.

REINSTATEMENTS

On March 6, 1991, Ray S. Stoddard was reinstated to the practice of law in the State of Utah subject to a six-month period of probation under the direction of a supervising attorney licensed to practice in the State of Utah.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 1991, and ends June 30, 1992. The process being followed includes review by the Commission's Executive Committee, and the Bar's Budget and Finance Committee, prior to adoption of the final budget by the Bar Commission at its July 1991 meeting.

The Commission is interested in assuring that the process include as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at the Law and Justice Center after May 20, 1991. You may pick up a copy from the receptionist.

Please call or write John Baldwin at the Bar office with your questions or comments.

Sun Valley

Utah State Bar 61st Annual Meeting

July 3 to 6, 1991
Sun Valley, Idaho
Business Meeting - Thursday, July 4, 1991
8:30 - 9:30 A.M.

Approved for 13 Hours of CLE Credit
This Includes Four Hours in Ethics

The 1991 Annual Meeting of the Utah State Bar will once again take place in the beautiful resort of Sun Valley, Idaho. The planning committee has spent considerable time, hoping to create a program that will be both educational and fun. We have been fortunate in arranging very knowledgeable and interesting speakers involving a variety of timely and, we believe, intriguing issues. Keynote speakers for the meeting include Hon. J. Clifford Wallace, United States Ninth Circuit Court of Appeals, and Jack Anderson, syndicated columnist. Judge Wallace will be speaking on "Challenges Facing the Courts in the '90s" and will be appearing on a panel to further discuss the future of the courts and our justice system. Mr. Anderson will be speaking at a luncheon on "Freedom of the Press and the Bill of Rights." He will share his wealth of experience and charged opinions with you in a dynamic fashion.

Along with our keynote speakers, we will have many other distinguished speakers discussing a number of interesting topics such as: How to Manage the Small Firm, Litigation Tactics, Truth, Justice and Professional Responsibility, a Family Law Judicial Panel, Corporate Criminal Liability, Director and Officer Liability, Pre-Trial Practice and a two-hour Ethics Workshop. These exciting topics offer an informative and entertaining way for you to meet your mandatory CLE requirements.

In addition to the variety of CLE courses, the Annual Meeting is designed to catch the attention of spouses and/or significant others. This includes a program designed to simplify wills and trusts, tennis clinics and an art gallery tour. You won't want to miss the social events either. We have also attempted to include a variety of activities for children and day-care is also available.

Those of you who are golfers should take special note of the prizes that will be awarded. There are other activities such as tennis, fly fishing, croquet and other sports so that everyone can participate and enjoy the beautiful scenic Sun Valley area.

We have already seen a considerable demand for reservations for this meeting. We believe that you should plan early in order to obtain suitable accommodations.

Don't miss this fun and exciting opportunity to meet your CLE requirements in a warm, relaxing atmosphere.

See you in Sun Valley.

New Address or Phone?

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

Call (801) 531-9077 or use this coupon and mail.

Name _____
Bar Number _____
Old Telephone _____
New Telephone _____
Old Address _____
_____
New Address _____
_____

Mail to: The Utah State Bar, 645 S. 200 E., Salt Lake City, UT 84111

LAAU

The Legal Assistants Association of Utah (LAAU) is pleased to announce three open forum discussions entertaining issues concerning paralegal utilization, program building and economics. Introductory remarks and materials will be provided by host legal assistant participants who will encourage discussion on the relevant topics. Practitioners of all types should benefit from the information that will be provided. A schedule of dates, times and locations follows:

UTILIZATION OF PARALEGALS (May 16, 1991, at 5:30 p.m.)

Overview and discussion of traditional and expanded roles within the law firm environment. Additional emphasis on career paths. Location: US West Pioneer Room, 250 E. 200 S., Bell Plaza, Lower Level.

DEVELOPING AN IN-HOUSE PARALEGAL PROGRAM (July 18, 1991, at 5:30 p.m.)

Development of organizational structures, section specific specializations and team building will be discussed. Location: Suitter, Axland, Armstrong & Hanson, 175 S. West Temple, Suite 700.

ECONOMIC ADVANTAGES OF PARALEGALS (September 19, 1991, at 5:30 p.m.)

Components of economic realities relating to leveraging paralegal contributions and profitability. Location: Ray, Quinney & Nebeker, 79 S. Main Street, Suite 400.

Please note that the presentations and materials provided at the foregoing will also be available upon request for those individuals and law firm representatives not able to attend on the aforementioned dates. For further information and to confirm attendance, please contact:

Ralph J. Smith
RAY, QUINNEY & NEBEKER
79 S. Main Street, Suite 400
Salt Lake City, Utah 84111
532-1500

CLAIM OF THE MONTH

Lawyers Professional Liability

ALLEGED ERROR AND OMISSION

The Insured allowed a real estate closing to go forward even though he was aware the seller did not have title to the property.

RESUME OF CLAIM

The Insured was scheduled to conduct a real estate closing. As part of his responsibilities, he hired someone to search the title. The title report claimed the seller did not own the property. The Insured had done a lot of work for the real estate agent and trusted the agent implicitly. The agent advised the Insured that the seller was a "straw man" and would be finalizing the purchase of the property. Two days after the initial closing date, the Insured conducted the closing and misdated all the papers. The purported sale to the "straw man" never took place. After the buyer wired the funds, those funds and the real estate agent disappeared.

HOW CLAIM MAY HAVE BEEN AVOIDED

1. Once the Insured found out about the defect in title, he should have postponed the closing until the seller had clear title.
2. The Insured should have immediately advised the buyer that there was a defect in the title.
3. If the Insured wanted to conduct the closing anyway, it should have been done in escrow until the buyer had clear title.

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

MCLE Reminder—245 Days Remain

On May 1, 1991, there will remain 245 days to meet your Mandatory Continuing Legal Education requirements for the first reporting period. In general, the MCLE requirements are a follows: 24 hours of CLE credit per two-year period *plus* 3 hours in ETHICS, for a 27-hour total. Be advised that attorneys are required to maintain their *own* records as to the number of hours accumulated. The first reporting period ends December 31, 1991, at which time *each* attorney *must* file a Certificate of Compliance with the Utah State Board of CLE. Your Certificate of Compliance should list programs you have attended to meet the requirements, unless you are exempt from MCLE requirements. Following is a Certificate of Compliance for your use. If you have questions concerning the MCLE requirements, please contact Sydnie Kuhre, Mandatory CLE Administrator, at (801) 531-9077.

UTAH STATE BAR

Energy, Natural Resources and Environmental Law Section

Annual Update Luncheon

The Energy, Natural Resources and Environmental Law Section of the Utah State Bar will hold its Annual Update Luncheon on May 15, 1991, 12:00 noon, at the Utah Law and Justice Center, 645 S. 200 E., Salt Lake City, Utah. Committee reports will be available to all section members. The update luncheon and committee reports are geared at advising members of recent developments in natural resources and environmental law. All members of the Bar are invited and encouraged to attend. Seating is limited. To register for the luncheon, contact Kelli Suitter at the Utah State Bar, 531-9095, on or before May 10, 1991.

CONTINUING LEGAL EDUCATION

Utah Law and Justice Center

645 South 200 East • Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

NAME: _____ UTAH STATE BAR NO.: _____
ADDRESS: _____ TELEPHONE: _____

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

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

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

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

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

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

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

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

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

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

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

Date: _____ _____
(signature)

TEAR OUT SECTION

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

EXPLANATION OF TYPE OF ACTIVITY

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

B. **Writing and Publishing an Article.** Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. An application for accreditation of the article must be submitted at least 60 days prior to reporting the activity for credit. No more than one-half of the credit hour requirement may be obtained through the writing and publication of an article or articles. **See Regulation 4(d)-101(b)**

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

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

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

TEAR OUT SECTION

U.S. Marshals Service Schedule of Fees and Commissions For Private Litigants

Legal Process
For *Each Item* Served by Mail, *or*
Forwarded for Service in Another Judicial District $3

For *Each Item* Served (or Service Attempted) in Person:

Within two hours, *commencing during* published duty hours $40
and, if necessary, for *each associated* additional hour, or portion thereof $20

Within two hours, *commencing after* published duty hours $50
and, if necessary, for *each associated* additional hour, or portion thereof $25

Plus:

Actual, associated round-trip mileage (at Federal Travel Regulation rates) and out-of-pocket expenses, e.g., tolls, parking, keeper's fees, insurance premiums, advertising costs.

Commissions

On the first $1,000 collected, or portion thereof 3%
On the amount in excess of $1,000 ..... 1.5%

Except that the **minimum** commission collectible is **$100**, and the **maximum** commission collectible is **$50,000**.

Notice to Family Law Practitioners

The judges of the Third District Court have resolved to require strict adherence to the financial verification provisions of the statutory child support guidelines. The pertinent statutory provisions are as follows:

1. Section 78-45-7.5(5)(b):
   Each parent shall provide suitable documentation of current earnings, *including year-to-date pay stubs or employer statements. Each parent shall supplement documentation of current earnings with copies of tax returns from at least the most recent year* to provide verification of earnings over time and shall document income from non-earned sources according to the source. Verification of income from records maintained by the Office of Employment Security may be substituted for employer statements and income tax returns. (Emphasis added.)
2. Section 78-45-7.3:
   (1) In a default or uncontested proceeding, the moving party shall submit:
   (a) a completed child support worksheet;
   (b) *the financial verification required by Subsection 78-45- 7.5(5);* and
   (c) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines.
   (2)(a) *If the documentation of income required under Subsection (1) is not available, a verified representation of the defaulting party's income by the moving party, based on the best evidence available, may be submitted.*
   (b) *The evidence shall be in affidavit form and may only be offered after a copy has been provided to the defaulting party* in accordance with Utah Rules of Civil Procedure or Chapter 46b, Title 63, the Administrative Procedures Act, in an administrative proceeding.
   (3)(a) In a stipulated proceeding, one of the moving parties shall submit:
   (i) a completed child support worksheet;
   (ii) *the financial verification required by Subsection 78-45- 7.5(5);* and
   (iii) a written statement indicating whether or not the amount of child support requested is consistent with the guidelines. (Emphasis added.)

The §78-45-7.5(5)(b) requirement of supplementation with a tax return may be satisfied by providing the tax return at a hearing before the assigned judge or commissioner. In lieu of including the tax return in the court file, a party may prepare an appropriate pleading indicating the return was provided and considered. The tax return may then be withdrawn.

NOTICE

1991 JUDICIAL CONFERENCE OF THE TENTH CIRCUIT

A first! Your children will enjoy their own special program at the Judicial Conference in Sedona, Ariz., July 17 to 19, 1991. Breakfast, story hour and creative movement class (ages 3 to 7), Visitor from Outer Space on our Bill of Rights (ages 8 to 12), the Triangle (role playing of press, government and public on Bill of Rights issues, ages 12 to 16). For you and your spouse, hear the latest from Justices Byron White and Sandra O'Connor, see Clarence Darrow come alive, feel the experiential words of best-selling author Rabbi Kushner, *When Bad Things Happen to Good People, When All You've Ever Wanted Isn't Enough*, directed specifically to the real-life needs of lawyers and judges. Learn from other outstanding scholars, judges and lawyers about recent cases, the Bill of Rights, Professionalism and Ethical Issues.

Come to Sedona with your entire family. Satisfy your professional needs and gain CLE credit, including ethics, spend time with your spouse and children, enjoy one of the most scenic and art-filled locations in America. Visit Grand Canyon, Lake Powell, Mesa Verde, Canyon de Chelly, and other premier national attractions in the Southwest. For information, call Office of the Circuit Executive, (303) 844-4118, or write the Office at 529 U.S. Courthouse, Denver, CO 80294.

CASE SUMMARIES

By Clark R. Nielsen

IDENTIFICATION EVIDENCE UNDER UTAH CONSTITUTION: STOP AND SEIZURE

Defendant was convicted of the first-degree felony of aggravated robbery. He was stopped and searched by a police officer on his routine, late-night patrol. Later that night, defendant was identified by only one of three robbery victims in an on-the-scene show-up. Defendant moved to suppress evidence of the out-of-court and in-court identifications, also challenging the constitutionality of his stop and seizure by the officer. The Utah Supreme Court (J. Zimmerman) applied the Utah State Constitution to the in-court identification and concluded, on the whole, that there was no due process denial. The court does find that defendant's stop and seizure lacked any reasonable suspicion and reversed the conviction, remanding for a new trial.

The burden of showing the admissibility of challenged identification evidence is upon the prosecution. Under the Utah State Constitution, Article I, §7, the appellate court reviews the record and determines from a "totality of the circumstances" whether admission of the identification denies the due process guarantee. "Abuse of discretion" terminology is inappropriate under a "correction of law" standard. On appellate review, the court determines from a totality of circumstances whether admission of the identification is consistent with the due process guaranty of §7. This review standard is *not* "abuse of discretion," as suggested in prior cases. A standard of abuse of discretion in some evidentiary issues (i.e., measured discretion in trial judge after balancing interests) is compared with general correctness of legal error standard.

The Utah court disagrees with the federal due process standard applied to eyewitness identifications. Under federal due process, an eyewitness identification of the accused must be shown to be sufficiently reliable to be admissible. A court must consider all the circumstances surrounding the identification in light of criteria announced in *Neil v. Biggers*, 409 U.S. 188, 199 (1972). Under the Utah State Constitution, a more in-depth, stringent appraisal of the identification's reliability is required, similar to *State v. Long*, 721 P.2d 483, 493-4 (Utah 1986). This appraisal more fully allows the trial court to consider the "totality" of the circumstances surrounding the identification.

In reviewing the factors in *Long* with facts of Ramirez's identification, the court found an "extremely close case." The "blatent suggestiveness of the show-up is troublesome." However, on the whole, the trial court did not err by admitting the identification.

Under an analysis of the constitutionality of stops and seizures, the court applied the standards of *Terry v. Ohio*, 392 U.S. 1 (1968) and *U.S. v. Mendenhall*, 466 U.S. 544 (1980). A need for specific, articulable facts showing reasonable suspicion does not arise in a casual encounter between police and a citizen, even when some questioning is involved. However, when a seizure occurs, as in this case, the police must point to specific and articulable facts to justify that seizure and avoid the exclusionary rule.

The evidence of defendant's identification must be suppressed if his initial seizure was illegal. In this case, the trial court failed to rule or make findings on defendant's motions to suppress. The motion, and a decision thereon, was critical and the absence of findings leaves unresolved many ambiguities in the evidence. The court finds the stop and seizure unsupported by the necessary evidence.

Although no findings were made by the trial court, the appellate panel refused to remand for findings. An appellate court should not automatically remand a case for findings when no findings have been made. "To ask the trial court to address the admissibility question now would be to tempt it to reach a post hoc rationalization for the admission of this pivotal evidence." The Supreme Court does not remand for findings to justify trial judge's action, but reverses defendant's conviction and remands for a new trial.

State v. Ramirez, Utah Sup. Ct., 880425, 156 Utah Adv. Rep. , (March 21, 1991) (J. Zimmerman; Justice Stewart dissenting).

BANK RECORDS— SEARCH AND SEIZURE, STATE CONSTITUTION

Under the federal constitution, a bank customer has no legitimate expectation of privacy in bank records and may not challenge their seizure. However, a bank customer has a right under the Utah Constitution, Article 1, §14, to be secure against *unreasonable* searches and seizure of bank accounts, statements, and related bank documents which the customer has confidentially supplied to the bank to facilitate the conduct of financial affairs.

A subpoena duces tecum, lawfully issued to the bank, may not be constitutionally challenged by the bank's customer. However, bank records obtained as a result of an illegal subpoena must be suppressed where challenged by the customer. Any "good-faith" exception to the exclusionary rule is not applicable in this case because a subpoena issued at the instance of the attorney general is not the equivalent of a search warrant issued upon the assessment of a neutral magistrate. Therefore, the attorney general cannot act in "good faith" when he acts unconstitutionally under an unconstitutional subpoena power statute. Defendant's convictions were reversed and a new trial was ordered after suppressing any evidence seized as a result of illegal subpoenas.

Justice Zimmerman, with J. Durham (concurring in Justice Howe's main opinion), stated expressly that the Utah court is not obliged to follow restrictive federal case law regarding a customer's standing to challenge a bank subpoena. The concurring opinion suggests that the Utah courts' approach to standing should be more liberal so as not to place illegal law enforcement activities beyond constitutional scrutiny of the courts.

State v. Thompson, Utah Sup. Ct., No. 880181, 156 U.A.R. (March 21, 1991), *reversing State v. Thompson*, 751 P.2d 805 (Utah Ct. App. 1988) (J. Howe, with C.J. Hall concurring; concurring opinion by J. Zimmerman with J. Durham; J. Stewart dissenting).

PAROLE BOARD HEARINGS: DUE PROCESS, STATE CONSTITUTION

Utah administrative Parole Board hearings and proceedings may not deprive a prison inmate of procedural due process under the Utah Constitution, Article I, §7. Although the federal due process clause does not afford a prisoner an expectation of parole or a protected liberty interest in a parole release, Utah's parole statutes and administrative board action may not be construed so as to preclude all judicial review of alleged constitutional due process violations. Under Utah Code Ann. §77-27-5(3), the Board of Pardon's administrative actions are not allowed the constitutional right of appeal. However, this section does allow review of alleged constitutional violations by means of extraordinary civil writs.

The Supreme Court granted the prisoner's request for extraordinary relief and referred the original petition to the district court for further proceedings there on the merits of his claims.

Foote v. Utah Board of Pardons, Utah Sup. Ct., No. 900132 (March 14, 1991) (C.J. Hall).

INVESTIGATORY ROADBLOCKS, UTAH STATE CONSTITUTION

The court of appeals held invalid police roadblocks in two separate cases. An investigatory I-15 roadblock to interdict drug traffic was invalidated under the Utah State Constitution in *State v. Sims*, Utah Ct. of App., 890463-CA, 156 Utah Adv. Rep. (March 15, 1991) (J. Greenwood).

Another I-15 roadblock, conducted as "classroom training" for county and municipal law enforcement, was invalidated under *Michigan Dept. of State Police v. Sitz*, 110 S. Ct. 2481 (1990), and *Brown v. Texas*, 443 U.S. 47 (1979). The roadblock was not conducted pursuant to an explicit, neutral plan by a neutral body. There was no judicial finding that the roadblock advanced the public's interest or accomplished any purpose for which it was conducted. *State v. Kitchen*, Utah Ct. App., 900307-CA (March 28, 1991) (J. Russon).

STATUTORY INTERPRETATION: LOCAL ASSESSMENTS AND IMPACT FEE

A Salt Lake County flood control fee is not a "local assessment" which Granite School District is prohibited by statute from paying. A "local assessment" is a fee imposed on property within a limited area for the payment of local improvements designed to enhance the value of the property within that area. By contrast, an "impact fee" is a county fee imposed upon new, developing real estate in order to generate revenue for the capital funding necessitated by the new development. By statute, an assessing entity cannot collect a "local assessment" from an exempt school board by the simple expedient of calling the assessment by another name (i.e., "impact fee"). Because the legislature states that an "impact fee" is not to be considered a "local assessment," the school board is not exempted from payment in this case. The school board is required to pay the county's flood fee as an "impact" charge. The court declines to adopt a California test that the assessment constitutes a "local assessment" if actually used to fund a capital improvement.

Salt Lake Co. v. Board of Ed., Utah Supreme Court, No. 880077, 156 Utah Adv. Rep. March 18, 1991 (J. Howe).

Needs of the Children Committee

RECEIVES ABA GRANT MONEY

The Needs of the Children Committee of the Young Lawyers Section of the Utah State Bar received an $1,800 grant from the ABA to be used in the publication of a pamphlet on child abuse.

The pamphlet is written directly to teachers in the state of Utah. It informs teachers as to their duty to report child abuse under Utah law and how to report abuse. It clarifies that teachers are entitled to immunity for reporting. It also explains the legal system briefly, the Utah statute which requires reporting, and the impact and effect of reporting in protecting the child. Additionally, the pamphlet describes indicators of abuse to aid a teacher in identifying the abused child.

The grant money should be adequate to provide every teacher in the state with the pamphlet.

Utah NAACP Calls for Volunteers

The Utah Chapter of the NAACP is seeking volunteer attorneys to serve on the Legal Redress Committee. The committee reviews complaints of racial discrimination and then channels that information to the appropriate resolution agencies. Young lawyers are encouraged to volunteer. If interested, please contact Ken Wallentine at the Utah Court of Appeals, 533-6800.

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: 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 Choose 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

Brown Bag Lecture Presented By Bob Campbell

On March 21, 1991, Robert S. Campbell Jr., of Campbell, Maack & Sessions, spoke on the topic, "Tactical Use and Abuse of the Discovery Process and Trends in Discovery." His commentary was based on personal experience and proved to be very interesting.

The Brown Bag Series is sponsored by the Young Lawyers Section of the Utah State Bar and held at the Law and Justice Center during the noon hour once a month. Please come. One CLE credit is provided per attendance at this program at no cost.

Miniature Golf-a-Thon

A PRO BONO SUCCESS

On February 20, 1991, the Pro Bono Committee of the Young Lawyers Section of the Utah State Bar held its Second Annual Miniature Golf-a-Thon. Putters and yippers met at the 49th Street Galleria and played miniature golf for the financial benefit of Utah Legal Services and Utah Legal Aid.

The fund-raiser was a great success. Scott Layden, Director of Player Personnel for the Utah Jazz, participated as a celebrity guest. Special thanks to Kristin Brewer, Young Lawyers Section, and Peggy Gentiles, President, University of Utah Student Bar. This event is an annual one, and plans for next year's golf-a-thon are already under way.

Law School for Non-Lawyers

The "Law School for Non-Lawyers" program was presented at the downtown Salt Lake Public Library from January through April. Lisa- Michele Church coordinated the program, which consisted of a series of free lectures to the public on various legal topics. Speakers included David Blaisdell, Gordon Jensen and Ray Beck.

The People's Law Seminar was held at Bryant Junior High and the Tyler Library from January to March. Mark Gaylord was in charge of the program, which involved classroom instruction to the public on legal topics from consumer law and estate planning to landlord-tenant law and divorce. Instructors included Mark Gaylord, Mark Bettilyon, Michael Drake, Shawn McGarry, Stanford Fitts, Bryan Davis, Nolan Taylor, Gary Henrie, Mark Webber, Lawrence Dingivan, Elizabeth Dalton and Helen Christian.

Members of the Law Related Education Committee arranged for lawyers to speak in elementary and secondary schools statewide to help teachers educate their students on the Bill of Rights.

UTAH BAR FOUNDATION

COMMUNITY SERVICE SCHOLARSHIPS

The Utah Bar Foundation has announced the creation of two Community Service Scholarships this spring—one to be awarded to a BYU law student and one to a University of Utah law student. Students applying for these scholarships must have participated in, and made a significant contribution to, the community by performing pro bono services in such organizations and agencies as: Legal Aid, Legal Services, Travelers Aid, Salt Lake Community Shelter and Resource Center, United Way, The Children's Center, The Family Support Center, Guadalupe School, Salt Lake Detention Center, Odyssey, Bennion Center, Law Related Education or other similar organizations. The recipients will be chosen soon and announced in a future issue of the *Bar Journal*.

GRANT APPLICATION DEADLINE

All grant applications must be received by the Foundation before 5:00 p.m., May 31, 1991, at the Foundation's office at 645 S. 200 E., Salt Lake City, UT 84111.

Grants are made for the following purposes:

1. To promote legal education and increase knowledge and awareness of the law in the community.
2. To assist in providing legal services to the disadvantaged.
3. To improve the administration of justice.
4. To serve other worthwhile law-related public purposes.

REMINDER

Ballots to vote for two trustees of the Bar Foundation Board of Trustees will be mailed to you in May. REMEMBER TO TAKE THE TIME TO VOTE.

ACHIEVEMENT AWARDS PRESENTED

The Bar Foundation presented two Achievement Awards at the March meeting of its Board of Trustees. President Richard C. Cahoon presented an award to James E. Faust for his participation as a Trustee of the Bar Foundation from 1963 to 1966 (photo at top). H. Michael Keller received an award as a former Trustee and for serving as the secretary-treasurer of the Foundation from 1982 to 1990 (photo at bottom). President Cahoon expressed the Foundation's deep appreciation to Mr. Faust and Mr. Keller for their work and effort to further the Bar Foundation.

CLE CALENDAR

1991 PENSION PRACTICE UPDATE

A live via satellite seminar presented by the A.S.P.A.

CLE Credit: 4 hours
Date: May 2, 1991
Place: Utah Law and Justice Center
Fee: $135 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

WINNING AT TRIAL— FEATURING JAMES McELHANEY

The Litigation Section is pleased to announce the return of James McElhaney to persent this year on "Winning Before Trial." From recognizing a winning case and scheduling depositions, through settlement techniques that emphasize the strength of your case— you will find James McElhaney's presentation entertaining and substantive. His "demonstration discussions" combine showing and telling so you understand why as well as how it is done. This program will give you a springboard of ideas, practical tools, and strategies to put you in a winning posture before trial ever starts.

Take this opportunity now to learn from one of the nation's premier trial advocacy lecturers.

CLE Credit: 7 hours
Date: May 3, 1991
Place: Marriott Hotel in Salt Lake
Fee: $150 ($140 for Litigation Section members)
Time: 8:00 a.m. to 5:00 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. This seminar will help you in dealing with your clients' tax and estate planning issues as the variables for this change.

CLE Credit: 6.5 hours
Date: May 7, 1991
Place: Utah Law and Justice Center
Fee: $165 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

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.

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.

HAZARDOUS WASTE AND SUPERFUND 1991: THE LATEST DIRECTION AT EPA

A tape-delay presentation. This conference continues the successful annual ABA series covering up-to-date developments in EPA's hazardous waste programs. Key EPA and Justice Department officials discuss the latest legislative and regulatory developments, EPA enforcement policies and settlement strategies under RCRA and Superfund.

CLE Credit: 4 hours
Date: May 15, 1991
Place: Utah Law and Justice Center
Fee: $140
Time: 10:00 a.m. to 2:00 p.m.

ANNUAL FAMILY LAW SECTION SEMINAR

This annual presentation covers some exciting topics for the family law practitioner. The newest aspect of family law, divorce mediation, will be covered, examining its relationship to lawyers and their clients. Also included in the program will be a look at the future of family law practice, appellate procedure, a case law update, and ethics as they apply specifically to the practice of family law. This informative program should fill up quickly, so register early.

CLE Credit: 7 hours (with 1 in ETHICS)
Date: May 17, 1991
Place: Utah Law and Justice Center
Fee: $80 (before May 10)
Time: 8:30 a.m. to 4:30 p.m.

ANNUAL CORPORATE COUNSEL SECTION SEMINAR

This annual program will cover a variety of topics of interest for those who serve as corporate counsel or attorneys who have corporate clients. Topics to be included are: recent developments, litigation and management techniques, securities with a focus on Section 16 developments and a fourth topic on trademark law. Included with this four-hour informative seminar will be a buffet breakfast.

CLE Credit: 4 hours
Date: May 23, 1991
Place: Utah Law and Justice Center
Fee: $45.00
Time: 7:30 a.m. to 12:00 p.m.

FOURTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

During the last few years, we have experienced an onslaught of new tax acts. The new legislation, coupled with the multitude of new rulings, regulations and case law, has substantially added to the complexity of advising owners and managers of closely held businesses.

This year's Rocky Mountain Tax Planning Institute will offer a comprehensive review of the key income tax planning opportunities and strategies available to closely held businesses. The faculty will focus on many of the more troublesome issues affecting the closely held business and present sophisticated planning techniques that will be of substantial help to practitioners in dealing with such issues.

This year's faculty includes experienced tax veterans from government, academia and private practice. This seminar is a must for attorneys and CPAs who work with and advise closely held businesses.

CLE Credit: 12 hours
Date: May 30 and 31, 1991
Place: Utah Law and Justice Center
Fee: $195
Time: May 30, 8:00 a.m. to 4:30 p.m.
May 31, 8:00 a.m. to 12:15 p.m.

ANNUAL SPRING PENSION LAW AND PRACTICE UPDATE

A live via satellite seminar. The ALI-ABA Video Law Review's annual spring update on pension law and practice covers the most timely and important topics of interest to tax attorneys, accountants, actuaries and other professionals experienced in the design, drafting or administration of pension and profit sharing plans.

CLE Credit: 4 hours
Date: June 5, 1991
Place: Utah Law and Justice Center
Fee: $140
Time: 10:00 a.m. to 2:00 p.m.

DOING BUSINESS WITH A TROUBLED COMPANY

A live via satellite seminar. This program is designed for the lawyer who is only occasionally involved in a bankruptcy or reorganization case, but needs to have a checklist and basic understanding of issues that will commonly arise. Strategies, tactics and techniques to deal with the pre- or post-filing debtor and his expert counsel will be explored.

CLE Credit: 4 hours
Date: June 6, 1991
Place: Utah Law and Justice Center
Fee: $150 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

THE BANKRUPTCY LAWYER: CROSSROADS OR CRISIS?

A live via satellite seminar.
CLE Credit: 6.5 hours
Date: June 11, 1991
Place: Utah Law and Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

ESTATE PLANNING UNDER NEW CHAPTER 14 AND THE PROPOSED REGULATIONS

A live via satellite seminar.
CLE Credit: 4 hours
Date: June 13, 1991
Place: Utah Law and Justice Center
Fee: $140 (plus $6 MCLE fee)
Time: 10:00 a.m. to 2:00 p.m.

ESCAPE FROM SUBCHAPTER C

A live via satellite seminar. This course will cover the fundamental tax issues facing the owners, managers and their counsel of closely held businesses.

CLE Credit: 6.5 hours
Date: June 18, 1991
Place: Utah Law and Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 3:00 p.m.

WHAT EVERY LAWYER SHOULD KNOW ABOUT ELDER LAW

A live via satellite seminar. This seminar will be of interest to lawyers with clients over 50. The issues faced when representing these clients will be discussed.

CLE Credit: 6.5 hours
Date: June 19, 1991
Place: Utah Law and Justice Center
Fee: $185 (plus $9.75 MCLE fee)
Time: 8:00 a.m. to 5:00 p.m.

ERISA ENFORCEMENT

A live via satellite seminar.
Date: June 25, 1991
Place: Utah Law and Justice Center

THE MILD TO MODERATE BRAIN INJURY CASE: WHAT THE ATTORNEY NEEDS TO KNOW

Date: Nov. 7 and 8, 1991
Place: Utah Law and Justice Center

CLE REGISTRATION FORM

TITLE OF PROGRAM — FEE

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Make all checks payable to the Utah State Bar/CLE

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Signature

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

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

Registration and Cancellation Policies: Please register in advance, as registrations are taken on a space-available basis. 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 two-year CLE reporting period required by the Utah Mandatory CLE Board.

CLASSIFIED ADS

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

BOOKS FOR SALE

UNITED STATES Supreme Court Reports, United States Supreme Court Digest, Federal Procedural Forms, Bankruptcy Service, ALR Federal. Law office reducing the size of its library. Willing to sell books. Please contact Bill at (801) 373-8848.

FOR SALE: U.S. Supreme Court Reports, Law Edition Second, complete, volumes 1-103, current with advance sheets. Call (801) 789-1666.

BOOKS SOUGHT

PACIFIC REPORTER and Digest wanted. Call Paul at (801) 544-9930.

COMPUTER FOR SALE

WANG OIS 105 and Wang 115 for sale. Work stations, Dot Matrix and Daisy printers, twin sheet feeders and ribbons also available. Please contact Bill at (801) 373-8848.

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OAK CONFERENCE TABLE with eight chairs (light gray tweed). Excellent condition. $1,800. Call Paul at (801) 263-5555.

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BEAUTIFUL OFFICE SPACE available within suite occupied by existing law firm in the Brickyard Tower (3130 S. 1245 E.). Support available including reception, secretarial, copy, FAX, telephone and library. Ten minutes from state and federal courts. For more information, please contact Mary at (801) 484-3000.

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CHOICE OFFICE SHARING space for rent in beautiful, historic building in Ogden, Utah. Several offices available. For information. Call (801) 621-1384.

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ASSOCIATE POSITION AVAILABLE. Established, progressive Western Colorado firm seeks associate with two to four years' experience. Excellent academic credentials and writing skills are required. We offer an attractive compensation package, including excellent benefits, and the opportunity to live in a community of approximately 85,000, enhanced by spectacular scenery and superb outdoor recreational activities. Send resume and writing sample to Nelson Hoskin & Farina, Professional Corporation, P.O. Box 40, Grand Junction, CO 81502.

UTAH LEGAL SERVICES seeks attorney for Salt Lake office to specialize 50 percent family law/50 percent landlord-tenant disputes and provide community education. Applicants must be licensed to practice in Utah or another state by June. Experience in poverty law and interest or background in the low-income community is important; ability to speak Spanish preferred. Final application deadline will be May 15, 1991. Salary, $19,864. Good fringe benefits. ULS is an equal opportunity/affirmative action employer. Submit resume, references and two legal writing samples to: David Challed, Managing Attorney, Utah Legal Services, 124 S. 400 E., Suite 400, Salt Lake City, UT 84103.

JUDICIAL LAW CLERK Positions available. Applications are currently being accepted at the Utah Court of Appeals for five judicial law clerk positions. Beginning date: Jan. 1, 1992. Apply by submitting a resume, law school transcript and writing sample to the individual judges.
Utah Court of Appeals judges:
Judge Regnal W. Garff
Judge Pamela T. Greenwood
Judge Norman H. Jackson
Judge Gregory K. Orme
Judge Leonard H. Russon
Address: Utah Court of Appeals, 230 S. 500 E., Suite 400, Salt Lake City, UT 84102

POSITIONS SOUGHT

ATTORNEY (FIVE YEARS) recently admitted to Utah State Bar seeks appropriate position.

Has personally handled a number of jury and bench trials and has extensive deposition and motion practice experience.

Experienced in insurance defense/personal injury litigation including, among others, premises liability, products liability, motor vehicle, false imprisonment, assault and battery, animal, coverage question and workers' compensation cases. Has also handled media law, public interest and Indian law cases. Is willing to develop expertise in other areas of law.

Attorney is committed to producing high-quality work product and is committed to the highest ethical standards.

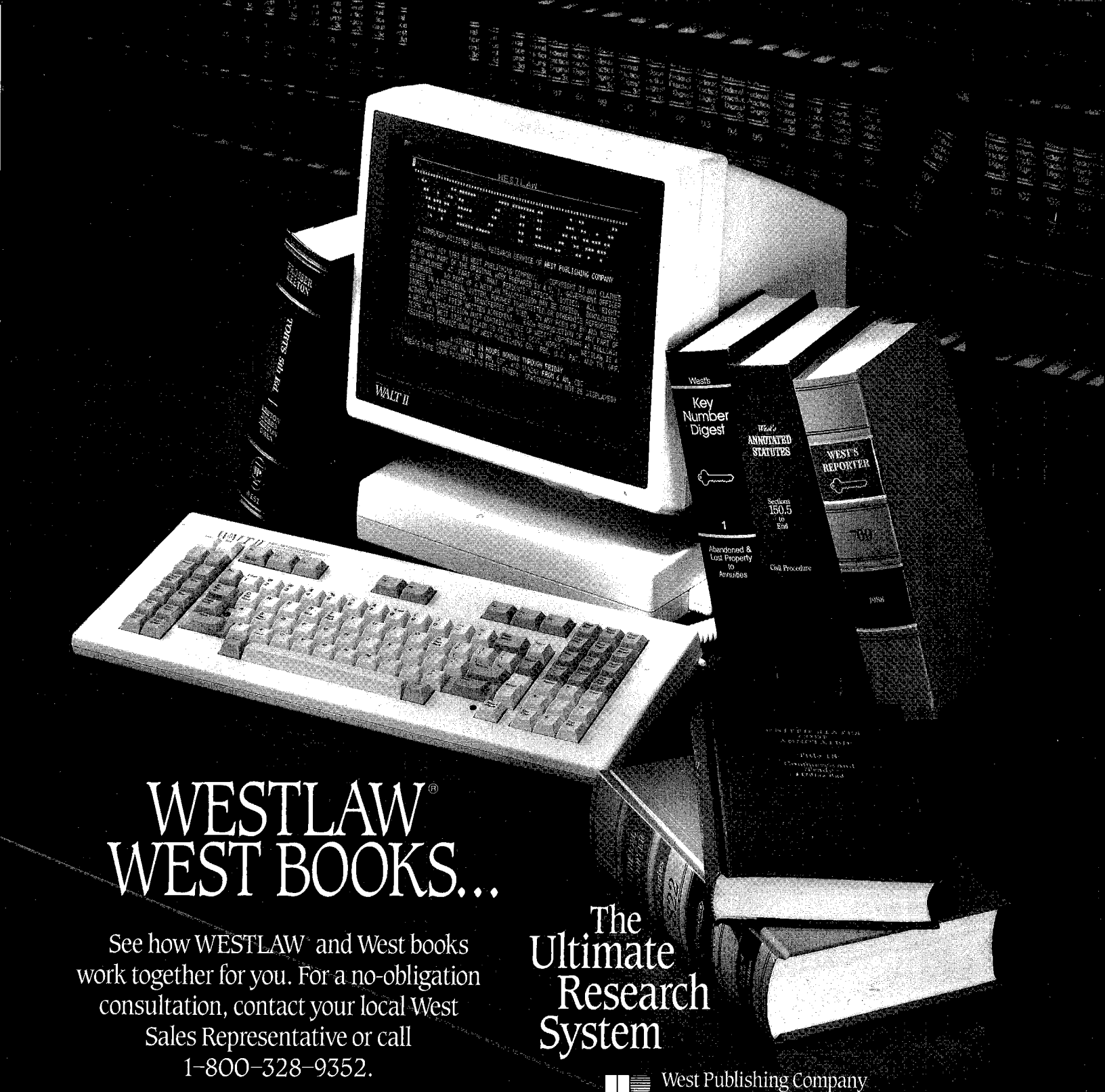
Reply to: Philip S. Lott, 507 Buenaway, Toppenish, WA 98948, (509) 865-4865.

SERVICES AVAILABLE

The Legal Assistants Association of Utah (LAAU) has an employment referral service which without charge provides the metro legal community with a source for posting employment needs and opportunities.

Contact LAAU's Job Bank whenever you need a full - or part-time legal assistant in your office. Complimentary copies of resumes of legal assistants currently seeking employment will be forwarded to your attention.

Joy Nunn, Coordinator, LAAU Job Bank, P.O. Box 112001, Salt Lake City, UT 84111, (801) 521-3200.



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