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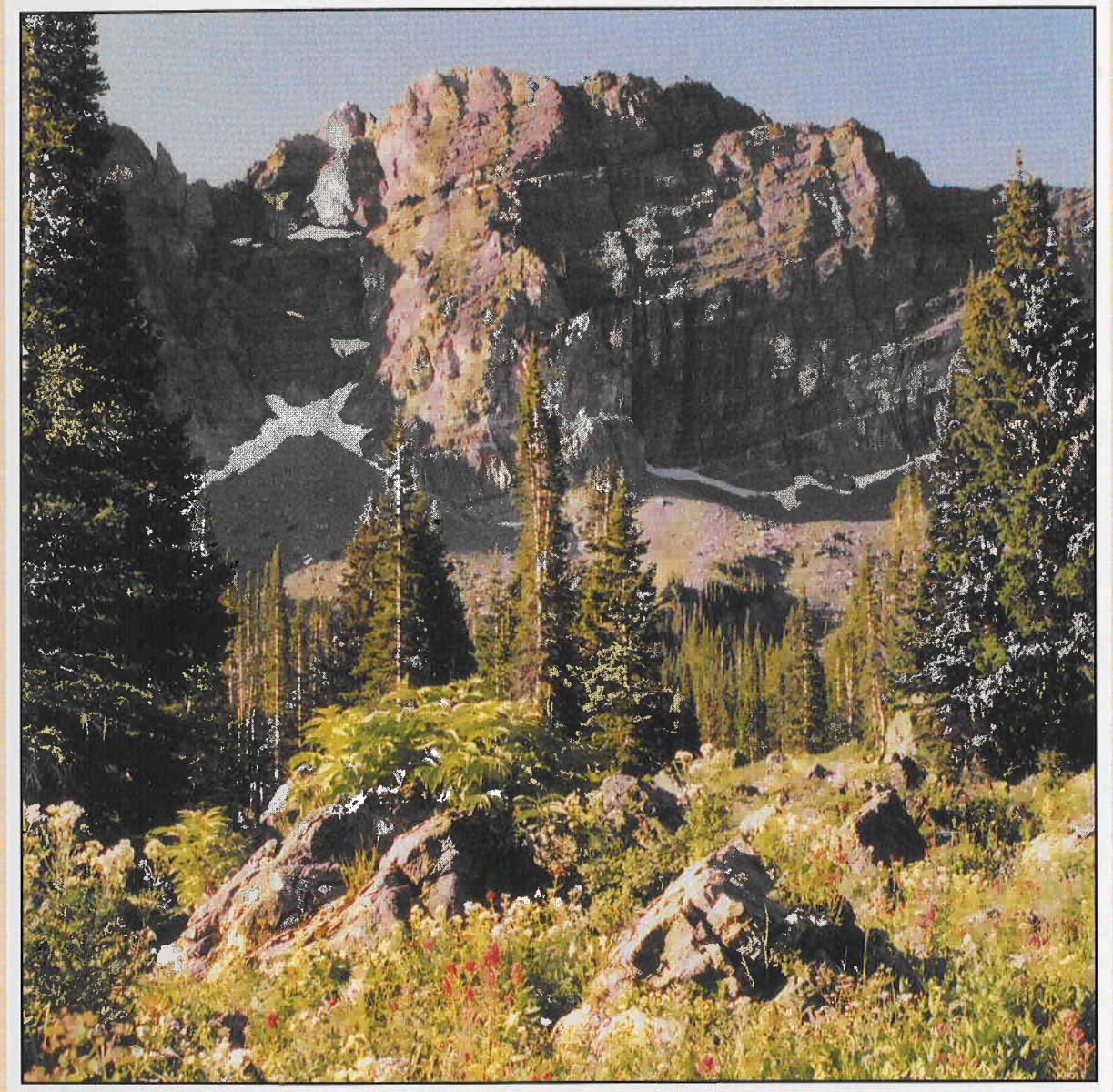

Special Environmental Law Issue

Utah BJ

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COVER: Alta, Utah, taken by Professor David A. Thomas, J. Reuben Clark Law School

Members of the Utah Bar who are interested in having their photographs 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, Utah, 84111, 532-5200. Send both the slide (or the transparency) and a print of each photograph you want to be considered. Artists who are interested in doing illustrations are also invited to make themselves known.

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $30; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.

LETTERS

The following outlines the background of an issue relating to the recent legislative action (or inaction) dealing with the environment, including wildlife and energy. A question is posed following the discussion — your input is sought.

ISSUE:

Some believe that the environment fared poorly in this Utah State legislative session. Although it is difficult to delineate which bills solely related to environmental concerns, as of the date this issue went to press, only two of 31 such bills, which were considered favorable, were passed by the Legislature. The "Cowboy Caucus," a group of mostly rural legislators, was also seemingly hard on wildlife in passing several bills allowing the killing of wildlife without a license. Additionally, the Sierra Club has publicly criticized the Private Protection Act as not being in the best interests of the environment.

Concerns have also been voiced that a shift was made with respect to the state's energy policy with little or no public input when, at the Governor's urging, the Legislature voted to eliminate the Division of Energy this legislative session. The Division of Energy, legislatively created by unanimous vote in the Senate only two years ago, is charged with developing, promoting and coordinating the implementation of the state's energy policy. The legislation decentralizes the state's energy policy making forces, placing the Conservation unit in the Department of Community and Economic Development and the Research and Planning unit in administration at the Department of Natural Resources.

QUESTION:

Was the environment and/or wildlife treated fairly in this past legislative session?

Dear Editor

January's Bar Journal presented a fair and reasoned discussion of continuing legal education.

I like CLE, but see no need or reason for *mandatory* CLE. The object — lawyers' continual improvement — is just as likely to be met by voluntary as by mandatory participation. Conscientious lawyers will continue to learn and improve, regardless; others cannot be made to learn, or even listen, though they grudgingly sit through any number of compulsory lectures. Also, some lawyers are relatively disadvantaged, in that they can less easily absorb (or bill) the time and other costs of mandatory classes.

Professor David Thomas is right. We should not have mandatory CLE.

Sincerely,
R. Douglas Credille

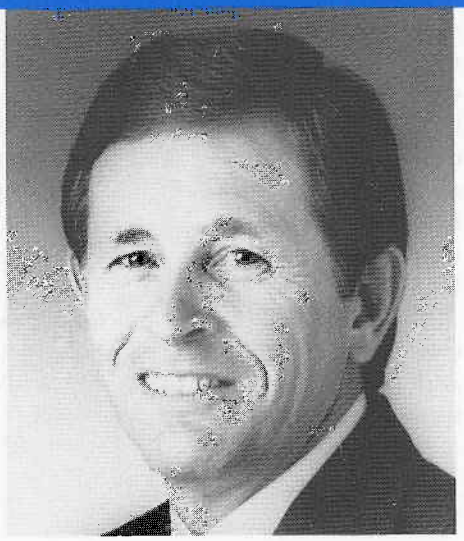
Dear Editor:

I read Mr. Jarrett Anderson's letter to the editor about the article you published in the January issue of the *Bar Journal* regarding the pros and cons of mandatory CLE credits. I must say from my experience that I agree with him and Professor Thomas. I am licensed in both Utah and Nevada, albeit on inactive status with Utah. However, the Nevada Bar requires mandatory CLE credits yearly.

I have attended many CLE seminars in Nevada and even some sponsored by California giving Nevada CLE credit and have not been impressed by the quality of these presentations. Granted, I have gleaned good things from them all, but have not received enough good information from any of them to justify the cost and the time spent. As Mr. Anderson alluded to, making CLE mandatory tends to dilute the effectiveness of the seminars since they are generally put together hastily by those who want to profit from the experience realizing the need of so many attorneys who procrastinate satisfying the requirement.

All too often these seminars are a good excuse for a vacation, not only for the participants, but also for the presenters. The time away from the office may not be all that bad for those of us who need to get away periodically, but making the credits mandatory is not the answer. Those of us who want to obtain further education in our chosen specialty will attend appropriate seminars whether they are mandatory or not. Those who do not take advantage of more educational opportunities do so at their own peril.

Sincerely,
Glade A. Myler



Wanted: A Few Good Men & Women

By Randy L. Dryer

100 HELP WANTED
Hard working, well-adjusted individuals needed to run multi-million dollar, 5400 member organization. Must be willing to take verbal abuse from constituents and have low need for appreciation from others. Must have clients and/or partners who will tolerate periodic absences from regular employment. Interested persons may apply at the Utah Law & Justice Center. Inquiries confidential.

One of my goals this year as President has been to encourage the involvement of lawyers who traditionally have not participated in Bar governance and activities — most notably the solo and small firm practitioner. I realize this may seem odd coming from someone who has always practiced in a large, Salt Lake City law firm. Nonetheless, I believe strongly that the success or failure of the organized Bar ultimately will depend on how well we involve all segments of the Bar in the organization. Even though all of us must belong to the Bar, if the leadership is truly to speak for the lawyers of Utah, there cannot be a significant segment of the Bar who feels isolated or distant from the decision making process.

In an effort to meaningfully involve solo practitioners in mainstream Bar activities, the Commission has taken several steps this year, including the creation of a Solo and Small Firm Task Force to study the unique needs of this segment of the Bar and the appointment of a solo practitioner to fill the vacancy on the Commission left by the resignation of Jan Graham after she was elected Utah Attorney General. Solo practitioners often tell me they would like to serve on the Bar Commission, but do not seek to do so because the financial cost of campaigning is a significant detriment. Most candidates for the Commission send out one or two mailings to the members of their district, which in the Second through Fourth Districts may require an expenditure of several hundred dollars for printing, and mailing. It is enough to lose billable hours by serving on the Commission, the argument goes, without also having to shell out actual dollars just for the privilege of running. Hold your horses — help is on the way!

While we on the Commission cannot realistically offer any relief on the amount of time required to serve on the Commission, we can address the cost of campaigning and, in fact, have recently done so.

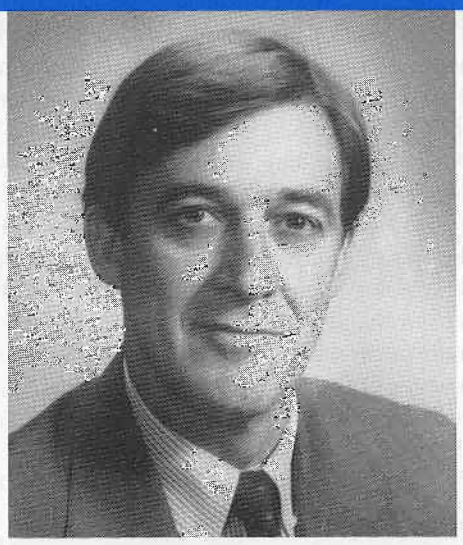
Beginning with this year's elections, the Commission has virtually eliminated the financial cost of campaigning for a position on the Bar Commission. The Bar will now provide, free of charge, space in the June/July issue of the Bar Journal (to be published around June 1) for a 200 word campaign message, plus a photograph. The space may be used for biographical information, platform statements or other election promotion. The campaign messages for the Bar Journal are due, along with the required nominating petitions, no later than April 30, 1993. In addition, the Bar will insert a one page letter from each candidate into the ballot mailer. Candidates are responsible for delivering to the Bar no later than May 7, 1993, enough letters for all attorneys in their district. Ballots will be mailed out mid-May. For those lawyers who still wish to send a personalized letter to the lawyers in their district, the Bar will now provide one set of mailing labels free of charge.

This action by the Commission is particularly commendable, given the fact that this new policy undoubtedly will increase the number of candidates for the Commission, some of whom may challenge incumbent Commissioners. This year there will be three open positions in the Third Division (with two incumbents who could seek re-election) and one position open in the First Division (with one incumbent). To their credit, all three of these incum-

bent Commissioners, Dennis Haslam, Charles Brown, and Jeff Thorne, supported these changes.

Serving on the Bar Commission is a tremendous commitment of time and energy, but results in a concomitant sense of satisfaction and contribution. Although there are a myriad of ways to contribute to the profession, none is more personally rewarding than serving on the Commission. In short, more of you should seriously consider running for the Commission. After all, who wouldn't like to (a) travel to exotic places like Price and Provo (no offense intended to those who practice in these areas); (b) attend insufferably long meetings in the Law & Justice Center; (c) interact with judges in non-courtroom settings and call them by their first names; (d) preside over the professional life and death of your colleagues who have run afoul of the ethical rules; (e) be a named defendant in countless suits by disgruntled clients and lawyers; (f) see your monthly billables take a nosedive; and bask in the undying admiration and respect of your associates, friends and neighbors.

If all of the above sounds interesting and challenging — the Commission's for you. At least you can no longer say you would like to serve, but it costs too much to run!



Remarks on a Few Bar Activities

By Dennis V. Haslam

A new lawyer recently asked me a few questions about the involvement of the Utah State Bar in certain activities. Some of these questions seemed important enough that I thought I might share them, and a few of my answers, with you.

Question No. 1. What is the Bar doing to help people who need legal services and cannot afford them?

The Utah State Bar Referral Service receives between 1,200 and 1,400 telephone calls per month. Most of them are from folks with questions about legal issues. Most do not know if they really need a lawyer. Our Bar Referral Service gives the names of one or more lawyers to the caller. Personal experience and comments from other lawyers lead me to believe that most Lawyer Referral Service clients do not need lawyers at all. They simply don't know it. My guess is that one or two in ten callers actually end up consulting with an attorney.

The Tuesday Night Bar program has been going on for several years now. It is a fairly relaxed atmosphere where folks can talk to a lawyer about their legal problems. Normally, six lawyers are available, four Tuesday nights per month, at the Utah Law and Justice Center. There are about 40 client appointments per night. Lawyers in Ogden have Tuesday Night Bar once a month and in Utah County, the Tuesday Night Bar program runs weekly. Sometimes free legal advice is given and sometimes clients are referred to another lawyer.

The Young Lawyer's Section is involved in all kinds of programs designed to provide legal advice and legal services, at no cost. Recently, the Young Lawyers have attended to the needs of the elderly by distributing information about legal issues facing them. That Needs of the Elderly Committee makes presentations at senior citizen centers using video tapes. The Young Lawyer's Section also has volunteers who provide consumer credit counseling and advice about HIV legal issues.

The American Bar Association has recently encouraged state bars to adopt ethical standards, presently on an aspirational basis only, obliging attorneys to provide 50 hours annually of pro bono work. I suspect that we will see lawyers responding to an apparent need for these kinds of services over the next few years.

Question No. 2. Is the Bar doing anything to strengthen the opportunities in the law for women and minorities?

Last summer, the Bar Commission created a position for a member of the Utah Minority Bar Association (a volunteer organization not affiliated directly with the Utah State Bar) to sit as an ex-officio commissioner of the Utah State Bar. Michael Martinez currently holds that position and has been very active in representing the interests of minority lawyers in Utah, most of whom are with small firms or solo practitioners. The needs and concerns of those attorneys are being voiced by Mike at Bar Commission meetings. Call him if you'd like to know what he's doing.

Women lawyers are playing an increasingly prominent role in the practice of law in the state of Utah and this trend will undoubtedly continue. For example, women comprise approximately 50% of the entering class at the University of Utah College of Law. Justice Christine Durham sits on the Utah Supreme Court; Judges Judith Billings and Pamela Greenwood sit on the Utah Court of Appeals; Anne Stirba and Leslie Lewis sit on the Third District bench; Diane Wilkins and Pam Heffernan sit on the Circuit Court bench in the Second District; Sharon P. McCully sits on the Juvenile Court bench in the Third District; and Sheila McCleve sits on the Third Circuit court.

Women lawyers have great opportunities in the state of Utah in private practice, as house counsel and in the government sector. They are also very active in the Utah State Bar. Judge Pamela Greenwood

held positions as Bar Counsel, Commissioner and President; Judge Anne Stirba sat on the Bar Commission; Denise Dragoo presently serves as Bar Commissioner from the Third District; and Jan Graham, a former Bar Commissioner, is our Attorney General. We've come a long way in the last 15 years and we will go a lot further in the next 15 years. Nevertheless, perhaps it is time for the Bar Commission to establish a program or standing committee, such as a committee on the Status of Women Lawyers, to promote the exchange of ideas and facilitate the practice of law for women. I would appreciate your input on what the Bar Commission should be doing on this important issue.

Question No. 3. How does one get appointed to a Bar Committee?

One volunteers. One calls one's elected Bar Commissioner, one calls the chair of any committee or section, one calls the Executive Director or the President of the Utah State Bar. If there is a lawyer willing to serve, the President of the Bar will find a place for that lawyer. There is no shortage of work to be done in the sections, on the committees, by the Bar Commission or for the public.

Question No. 4. In what ways is the Bar accountable to individual attorneys who may not agree with something the Bar has done?

The Commissioners of the Utah State Bar are elected by the attorneys in their respective districts. If a lawyer is unhappy with something that the Bar Commission has done, or with a position taken by the Commission, any lawyer can contact any Commissioner, the one elected from that lawyer's district, the Executive Director or the President. All are ready, willing and available to listen to the concerns you may have about the functioning of the Bar, the operation of the courts or any other matter dealing with the practice of law. Commissioners crave input from lawyers so that the best ideas are presented. There is no formality with respect to a lawyer's complaints or concerns. Send a letter or call your Commissioner on the telephone and share your ideas.

Question No. 5. Does the Bar have a service available to a lawyer who feels he or she may be in some kind of professional difficulty?

Yes. We have the Lawyers Helping Lawyers Committee and we have the Office of Bar Counsel. Steve Mikita chairs the Lawyers Helping Lawyers Committee and works with lawyers having substance abuse problems and helps them to get control of their lives. Lawyers must communicate with their clients and provide the services they agreed to provide. If they cannot do this because of temporary or other disability, we other lawyers need to help them. We do not have, but should have, a program to deal with lawyers who may be running afoul, in their practices, of ethical responsibilities to clients and the courts. It would be a good idea for us to investigate what is going on and consider development of a program to assist lawyers who are unable to cope with the demands and stresses of law practice and fulfill all of their ethical responsibilities. We can, and should, take care of our own.

Question No. 6 How does the Bar involve non-Salt Lake lawyers in its activities?

Well, Jeff Thorne is from Brigham City, Steve Kaufman is from Ogden, Gayle McKeachnie is from Vernal and Craig Snyder is from Provo. As Commissioners, they represent the lawyers in their districts and bring with them the opportunity for non-Salt Lake lawyers to be involved in Bar affairs. The Bar Commission has held Commission meetings in Ogden, Vernal, and St. George, where we have met with the Weber County, Uintah County and Southern Utah Bar Associations. The Commission will be meeting in Price in April and Provo in May and will get together with the Southeastern and Central Utah Bar Associations there.

Nevertheless, we need to strive to get non-Wasatch Front lawyers involved in Bar activities both in Salt Lake City and in rural communities. This has been happening to some degree in the court consolidation process. The difficulty is that it takes time to travel to Salt Lake City for committee meetings or Bar activities and time away from the office has a price. On the other hand, the Bar should take some of its activities on the road to insure that lawyers in all areas of the state can participate. At the Mid-Year Meeting in St. George this year, the Commission agreed to look into the possibility of taking continuing legal educational programs to areas outside of Ogden, Salt Lake and Provo. I thing we will be able to accomplish this in the near future.

If you have some ideas you'd like to share about the management of the Bar or the practice of our profession, please call a Commissioner.

Cost Recovery and Environmental Compliance Actions for Hazardous Substances and Petroleum Products

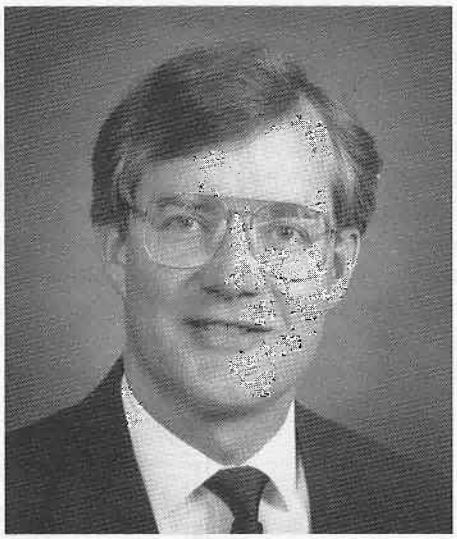
*By John A. Adams**

I. INTRODUCTION

We live in an era in which most departments of government are struggling to maintain the same level of services with fewer personnel and smaller budgets. In contrast to the downsizing and cutbacks occurring throughout most of our state government, one department is expanding significantly in terms of budget, personnel, public profile and enforcement activity. It is the Utah Department of Environmental Quality ("DEQ") — the most recent division of state government to attain department status. In the 15 months since DEQ became a department, it has already grown from 250 to over 300 employees. DEQ's budget for 1992 was approximately $27.5 million.[1]

The DEQ consists of six divisions: Solid and Hazardous Waste; Environmental Response and Remediation; Air Quality; Water Quality; Drinking Water; and Radiation Control. It is represented in administrative proceedings and in court by members of the Utah Attorney General's Office.

The increasing emphasis on both the state and national levels on environmental law presents additional business opportunities for some attorneys but creates tremendous exposure for others who may be advising clients and are not informed about potential pitfalls. Inasmuch as Utah is devoting substantial resources to environmental compliance and cost recovery matters, this article will focus exclusively on these two points as they relate to hazardous substances and petroleum products.[2]



JOHN A. ADAMS is a shareholder of the law firm of Ray, Quinney & Nebeker in Salt Lake City where he practices in the areas of general commercial litigation, insurance coverage, environmental litigation and appellate advocacy. Mr. Adams received his J.D. degree from Brigham Young University where he served as Editor-in-Chief of the BYU Law Review. Mr. Adams is a member of the Salt Lake County Bar where he is presently the Secretary and holds a seat on the Executive Committee.

II. ENVIRONMENTAL COMPLIANCE

Within the State of Utah, the United States Environmental Protection Agency ("EPA") has delegated enforcement authority for the majority of the federal environmental regulatory programs to DEQ. The terms of this delegation are set forth in a State Enforcement Agreement ("SEA"). Under the SEA, EPA retains the right to overfile, *i.e.*, commence its own compliance action, if DEQ's actions are "significantly" outside EPA enforcement guidelines and policies.

EPA's reservation of overfiling authority presents a dilemma for a person who is negotiating with DEQ to pay an administrative penalty for an alleged violation because the person wants finality and a definite cap on his exposure. The possibility of an EPA overfiling is leverage that DEQ and assistant attorneys general can use to good advantage to increase the amount of the penalty payment to which the alleged violator will voluntarily agree. However, once the alleged violator and assistant attorney general have agreed upon a penalty amount, certain assurances, usually oral, are given that EPA will not overfile. One notable exception to oral assurances only is the water pollution program where EPA has issued written assurances of its intention not to overfile.

To achieve delegation from EPA, Utah has adopted regulations that essentially mirror all the federal environmental regulations. Utah adopted regulations comparable to the federal regulations for air pollution beginning in the early 1970's for drinking water in the late 1970's, for water pollution in the mid-1980's and for hazardous waste beginning in 1980 with regular updates to keep the state's programs current with federal changes.

Increased efforts by DEQ and the Attorney General's Office have resulted in greater environmental compliance activity. From January 1, 1989 to November 1,

* *Special thanks to Craig W. Anderson, former Staff Attorney, Division of Environmental Response and Remediation, and Fred G. Nelson, Assistant Attorney General for furnishing specific information about the Department of Environmental Quality and the Environmental Section of the Attorney General's office as well as the regulatory and enforcement activities of their respective officers.*

1991, more than $2.5 million was collected as penalties under all environmental programs administered by the six divisions of DEQ. This sum represents a four-fold increase in penalties collected in comparison to the prior three years.[3]

The $2.5 million figure represents penalties in approximately 240 cases which means the average penalty case was in excess of $10,000. In terms of dollars, hazardous waste penalties topped the list, followed by air and then water penalties. In most instances, the state commenced administrative actions and the violators paid penalties without the filing of suit. In some instances, however, the state filed suits which resulted in the collection of penalties.

III. COST RECOVERY

This section discusses actions taken by the government to seek recovery of costs incurred to clean up hazardous substances and petroleum products. Basic to an understanding of cost recovery efforts for both hazardous substances and petroleum products is an understanding of the underlying statutory schemes. The Environmental Response and Remediation Division of DEQ is the state agency that oversees these areas. The division has both a CERCLA and an underground storage tank branch.

A. HAZARDOUS SUBSTANCES

1. CERCLA

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[4] to provide federal funding, through what is commonly referred to as "Superfund," to respond to releases of contaminants or pollutants into the air, water or land. CERCLA has retroactive application which permits it to be used to remedy current environmental violations as well environmental wrongs committed in the past. CERCLA was amended and reauthorized by the Superfund Amendments and Reauthorization Act of 1986 (SARA) which resulted in additional funding of nine billion dollars over five years. SARA introduced more stringent cleanup standards and created some new regulatory programs. Again in late 1990, Congress reauthorized CERCLA for another three years.

CERCLA establishes a system for identifying sites where hazardous substances have been released into the environment in the past or may be released in the future. Sites are identified as a result of notification (pursuant to CERCLA reporting requirements that carry criminal penalties for a failure to report a release), referrals from states or anonymous tips. The most seriously contaminated sites, as determined by a uniform scoring system, are placed on the National Priorities List (NPL) and may be cleaned up by the government with funds from Superfund if private parties do not undertake the cleanup. Listing on the NPL is not a prerequisite for CERCLA's liability provisions to apply. A cleanup (defined as a "response action" under CERCLA) includes both removal and remedial actions. A removal action consists of emergency steps taken to stop contamination while a remedial action is the long-term and permanent cleanup of a site. A CERCLA cleanup is triggered by a release of a hazardous substance into the environment. A "hazardous substance" is

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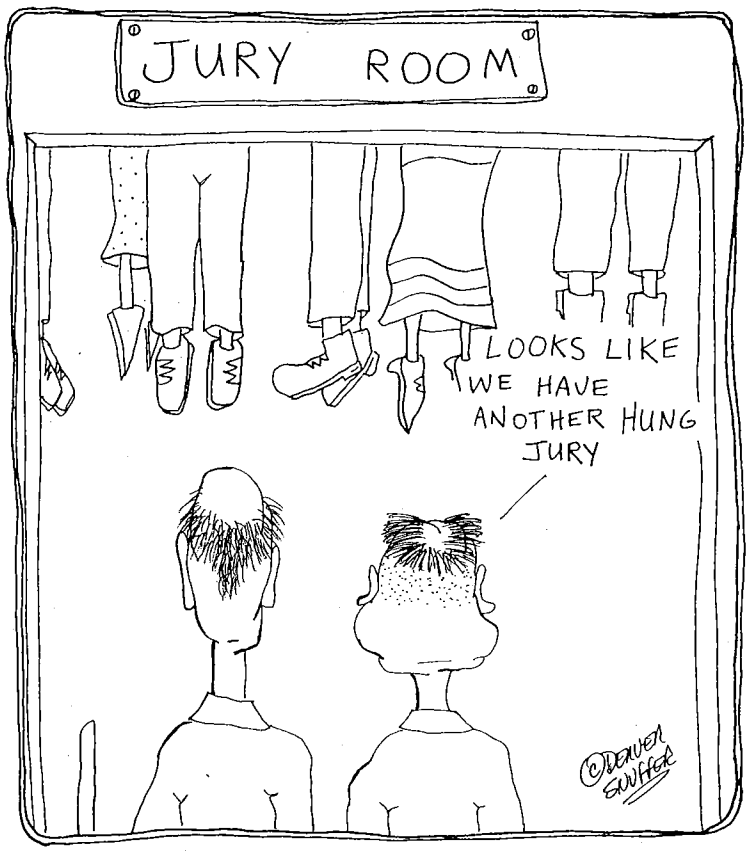

defined in relation to other environmental laws and CERCLA regulations. CERCLA specifically excludes petroleum and natural gas from its definition of hazardous substances.

Cleanups must be done in accordance with the National Contingency Plan (NCP), a set of EPA regulations and standards for proper site cleanup. A private party as a prerequisite to cost recovery must perform its cleanup "consistent" with the NCP. Prior to 1990 the majority of courts interpreted this requirement to mean meeting all applicable NCP requirements. In response to that strict interpretation, the EPA altered the NCP requirements so that a private party can recover if it "substantially complie(s)" with the NCP and performs a "CERCLA-quality" cleanup.[5]

Persons responsible for generating or transporting hazardous substances along with owners and operators of the property (both currently and at the time of disposal) are designated as potentially responsible parties (PRPs) and become liable for the cleanup.[6] PRPs face tough liability standards under CERCLA: strict liability which is joint and several and subject to only narrow defenses. The government and private parties which incur costs in response to a release are permitted to seek recovery of their costs. Between private parties there is a right of contribution.

Because liability under CERCLA government cost-recovery actions is joint and several, PRPs face the risk that they could get stuck with a much larger percentage of the costs than they actually caused. The most dramatic example of this is *O'Neil v. Picillo*,[7] a 1990 case decided by the First Circuit. Two companies that allegedly were responsible for only 0.5 percent of the total volume of hazardous waste were held liable for all of the cleanup costs. The First Circuit imposed joint and several liability because it reduced the EPA's litigation costs and was not unfair to the defendants since they could bring a contribution action against other PRPs for money paid in excess of their fair share.

In addition to its authority to recover its costs for a cleanup, the federal government is empowered with broad administrative powers to order PRPs to undertake certain action. The EPA may send an information requested — similar in form to an interrogatory — as authorized by section 104(e) of CERCLA. In a "104(e) request", EPA generally asks for records and information about the site, hazardous substances shipped to or disposed on the site, the identity of other PRPs and the financial ability of the PRP to pay for the cleanup. The party must respond to this section 104(e) request quickly and candidly. CERCLA authorizes a maximum fine of $25,000 for each day of inadequate compliance. In 1989, the Third Circuit upheld the imposition of a $142,000 penalty for inadequate compliance with a section 104(e) request.[8]

The EPA's next step most often will be to issue an administrative compliance order under section 106 of CERCLA, which commands the PRP to act. Section 106 orders are now a major element of the EPA's enforcement policy. It used to be that the EPA would request voluntary action by PRPs, and if none was taken the EPA would clean up the site itself and file a civil action for reimbursement under CERCLA section 107. Under section 106, however, the EPA has authority to order a party to take specific response action where there may be "imminent and substantial" danger to public health or the environment.

"The most seriously contaminated sites . . . are placed on the National Priorities List. . . ."

Severe penalties await parties refusing to comply with a section 106 order. In addition to fines up to $25,000 per day for "(a)ny person who, without sufficient cause, willfully violates, or fails or refuses to comply" with a section 106 order, a court can impose punitive damages under section 107(c) of up to three times the amount expended by the EPA in performing cleanup required by the section 106 order. For example, in *United States v. Parsons*,[9] a federal court in Georgia tripled the EPA's cleanup costs of $750,000 and imposed a total fine of over $2.25 million against a party that failed to comply with a section 106 order.

2. Coordination Between EPA and DEQ

Utah is one of six states that belong to Region VIII of EPA. The other states in the region are Wyoming, Colorado, North Dakota, South Dakota and Montana. Region VIII headquarters are located in Denver, Colorado. Region VIII has a staff of 850 people which is composed of engineers, scientists, administrative support personnel and approximately 55 attorneys.[10]

EPA has entered into a Superfund Memorandum of Agreement (SMOA) with Utah which creates an important partnership between the two in coordinating the cleanup of sites on the NPL. When a contaminated site becomes listed on the NPL, a site specific enforcement agreement, is entered into between EPA and DEQ and a decision is made as to which agency will be the "lead agency" to oversee and monitor the cleanup.

3. NPL Sites

The NPL currently includes over 1,200 sites. It is estimated that the average cost for a cleanup of a Superfund site is approximately $14 million. The cleanups on only about 62 Superfund sites have been completed since CERCLA went into effect. One of the major objectives of EPA is to place greater emphasis on completion of cleanups. EPA has set a target of 163 total cleanups to be completed by 1992, 200 by 1993 and 650 by the year 2,000. EPA intends to accelerate the number of sites cleaned up by implementing a proposed "Superfund accelerated cleanup model." Instead of designing a customized cleanup plan or remedial action for each specific site, EPA will encourage use of a model, sometimes referred to as a "presumptive remedy," for certain types of contamination that can be re-used at similar sites. Hence, the emphasis is shifting to expending fewer resources on remedial investigation and concentrating more on remedial action.

Utah currently has 12 sites on the NPL. A number of the names should be familiar because the problems associated with the sites tend to be substantial and receive considerable media exposure. The most recent addition (October, 1992) is the Ekotek/Petrochem facility which was recycling used oil that came from numerous sources in the state. Other Utah NPL sites include: Midvale Slag in Midvale (smelter heavy metals); Sharon Steel in Midvale (mill tailings); Wasatch Chemical in Salt Lake City (pesticides); Portland Cement in Salt Lake County (cement kiln dust); American Barrel in Salt Lake City (creosote and other chemicals); Rose Park Sludge Pit in North Salt Lake (solvents

and petro chemicals); two uranium mill sites in Monticello and three other federal facilities (Hill Air Force Base, Tooele Army Depot and Ogden Defense Depot). In the case of federal facilities, EPA, the state and the Department of Defense enter into federal facility agreements for voluntary cleanups.

4. CERCLIS Sites

In addition to sites on the NPL, EPA maintains a list of all potentially hazardous sites, known as the Comprehensive Environmental Response Compensation and Liability Information System (CERCLIS). The CERCLIS list includes more than 25,000 sites nationwide. In Utah the number of CERCLIS sites is between 100 and 125. CERCLIS sites are prioritized and then evaluated on an ongoing basis as sufficient funds become available. Each site is evaluated and scored. According to current guidelines, a score of 28.5 is required before a CERCLIS site is placed on the NPL. A variety of factors are used in the scoring, including the type of contaminants involved and the proximity of the site to populated areas. DEQ prepares the initial scoring package which is then reviewed and approved by EPA Region VIII and EPA headquarters.

As a practical matter, contaminated sites that fail to score sufficiently high to be placed upon the NPL will not likely be the subject of governmental cleanup action. However, problems remain for the owner of a CERCLIS site. The owner of a CERCLIS site is bound to have considerable difficulty in ever selling or conveying the land to another until cleanup has occurred.

5. HSMA

Utah has adopted its own little CERCLA statute which is titled the Hazardous Substances Mitigation Act.[11] Like CERCLA, the Utah statute establishes a mini-superfund that can be used to pay for emergency action taken in response to a hazardous materials release that presents a direct and immediate threat to the public health or the environment. The mini-superfund can also be used to implement remedial actions on a non-emergency basis at sites listed on the NPL.

At least five significant distinctions exist between CERCLA and HSMA. First, HSMA's definition of "hazardous materials" is broader than CERCLA's definition of "hazardous substances."[12] Second, HSMA only governs releases that occur after March 18, 1985.[13] Third, whereas CERCLA provides for joint and several liability, HSMA expressly disallows it. Fourth, HSMA does not provide for assessment of punitive or treble damages. Fifth, CERCLA provides for penalties of up to $25,000 per day for violation of administrative orders, whereas HSMA provides for penalties of up to $10,000 per day for violation of final orders or rules.

B. UNDERGROUND STORAGE TANKS

As noted above, petroleum products are specifically excluded from regulation under CERCLA. In 1984 regulation of underground storage tanks was added as part of the Resource Conservation and Recovery Act (RCRA).[14] RCRA permits states to be approved by the federal government to administer underground storage tank programs provided that the state requirements and standards are at least as stringent as those of the federal government. Once a state's program is approved, EPA enters into a cooperative agreement with the state setting forth the actions to be undertaken by the state.

RCRA established a leaking underground storage tank trust fund to be used in part to help states fund their duties under the cooperative agreements.

Utah's Underground Storage Tank Act (USTA)[15] became effective July 1, 1989 and is awaiting final approval from EPA. In the interim, DEQ operates the USTA program under a memorandum of agreement with EPA. In short, each owner or operator of an underground storage tank which is currently in use or which was closed after January 1, 1974 is required to register the tank with DEQ and obtain a tank tightness test. Owners and operators are assessed an annual registration fee as well as an annual petroleum storage tank fee. Owners and operators who register their tanks and pay the required fees are issued a certificate of compliance.

The annual registration fees and the annual petroleum storage tank fees, together with a one-half cent per gallon environmental surcharge on all petroleum products sold in the state, are deposited into a Petroleum Storage Tank Fund (Fund). The purpose of the Fund is to help offset the cost of cleanup of any releases from underground storage tanks that are properly certified. The responsible party pays the first $25,000 of the cleanup and then the Fund, to the extent monies are available, pays the next $475,000 or $975,000, depending upon the tank's use and average monthly volume of product.[16] DEQ may also use the Fund to pay to investigate a petroleum release or suspected release.

Utah Code Ann. § 19-6-409(5) provides that when the Fund balance exceeds $15 million, the Legislature may authorize DEQ to use the surplus monies to cover the costs of investigation, abatement and corrective action concerning releases not covered by the Fund. The amount of the Fund now exceeds $15 million; however, the Legislature in its just-completed session failed to authorize DEQ to begin using the surplus to address releases from tanks outside the program.

In the event of a release, DEQ seeks to identify the responsible parties and determine whether any of them are covered by the Fund. The executive secretary of the Solid and Hazardous Waste Board may then order the owner or operator to take abatement or corrective action, including the submission of a corrective action plan. If the owner or operator refuses, the executive secretary is empowered to use monies from the Fund to undertake the appropriate action, commence an enforcement proceeding or enter into an agreement with any responsible party concerning that party's proportionate share of liability or action to be undertaken by the party. Persons who violate any requirement of USTA or an order or rule of the executive secretary face a potential civil penalty of not more than $10,000 per day for each day of violation.

Each responsible party is strictly liable for its share of costs, but the statute prohibits imposition of joint and several liability. In 1992, the Legislature expressly declared that USTA is intended to have retroactive effect. The executive secretary may issue orders apportioning liability among responsible parties, institute cost recovery actions and seek civil penalties. Liability is to be apportioned according to the responsible parties' respective contributions to the release and equitable factors are to be considered. Finally, a party who bears costs in excess of his liability may seek contribution from other responsible parties in district court.

"Utah currently has 12 sites on the NPL."

A significant development from the 1993 legislative session is that the Legislature narrowed the definitions of "responsible party" under both HSMA and USTA. Although the definition under each act varies slightly in wording from the other, the new definitions exclude from liability any person who does not participate in the management of a facility and who holds indicia of ownership either (1) primarily to protect a security interest in the facility, or (2) as a fiduciary or custodian under the Uniform Probate Code or under an employee benefit plan.[17] Secured lenders and fiduciaries will want to become familiar with the full provisions of the new legislation.

DEQ as of May 1992, has identified as many as 13,690 petroleum tanks which may have existed at one time or another in the state. Approximately 5,800 tanks have been closed or removed from the ground, leaving a total of more than 7,700 tanks. Approximately 5,500 tanks have certificates of compliance in the UST program.[18] Since state law prohibits the operation of an underground storage tank unless the tank has a certificate of compliance, that leaves approximately 2,200 tanks that existed at one time in the state but are not regulated by the program.[19] Approximately 1,600 tanks are known to have leaked or involve some type of contamination. Owners or operators of 300-400 tanks have already undertaken voluntary cleanups. Just as owners of CERCLIS sites face substantial problems in selling or conveying properties that have not been cleaned up, the same is true for owners of land with petroleum storage tanks that are no longer in operation.

IV. CONCLUSION

Environmental compliance activity and cost recovery actions for hazardous substances and petroleum products will only increase in this decade. The wise practitioner will become acquainted with the general issues and learn to recognize when to seek further assistance. The pitfalls for the unwary can be numerous and costly.

[1]Interview with Craig W. Anderson.

[2]This article does not address other important developments in environmental regulation, such as the recent expansion of the Clean Air Act, permitting for storm water run-off under the Clean Water Act or enforcement of hazardous waste storage and disposal under the Resource Conservation and Recovery Act — all of which have significant implications for business owners, large or small.

[3]Interview with Fred G. Nelson.

[4]42 U.S.C. § 9601 *et seq.* (1980).

[5]40 C.F.R. § 300.700(c) (3) (i).

[6]CERCLA § 107(a), 42 U.S.C. § 9607(a) (1980).

[7]682 F. Supp. 706 (D.R.I. 1988), *aff'd*, 883 F.2d 176 (1st Cir. 1989), *cert. denied sub nom., American Cyanamid v. O'Neil*, 493 U.S. 1071 (1990).

[8]*United States v. Crown Roll Leaf, Inc.*, 29 E.R.C. 2018 (D.N.J. 1988), aff'd, 888 F.2d 1382 (3d Cir. 1989), *cert. denied*, 107 L. Ed. 2d 953 (1990).

[9]723 F. Supp. 757 (N.D. Ga. 1989), *vacated*, 936 F.2d 526, 529 (11th Cir. 1991) (the Eleventh Circuit vacated and remanded to allow the district court to award quadruple rather than treble damages, *i.e.*, the government's actual response costs plus up to three times the response costs).

[10]Interview with Craig W. Anderson.

[11]Utah Code Ann. §§ 19-6-301 *et seq.*

[12]Utah Code Ann. § 19-6-302(7) defines "hazardous materials" to include hazardous waste as defined in the Utah Hazardous Waste Management Regulations, PCBs, asbestos, dioxin and "hazardous substances" as defined in CERCLA.

[13]Utah Code Ann. § 19-6-309(1).

[14]42 U.S.C. §§ 6991a *et seq.*

[15]Utah Code Ann. §§ 19-6-401 *et seq.*

[16]Utah Code Ann. § 19-6-419(1).

[17]S.B. No. 120, 1993 General Session.

[18]Interview with Craig W. Anderson.

[19]Utah Code Ann. § 19-6-416 imposes a $500 penalty on

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Reporting Requirements for Accidental Releases of Pollutants

By Lucy B. Jenkins

An accidental release of pollutants into the environment may trigger numerous federal and state reporting requirements. Most of the reporting requirements mandate reporting immediately or within a certain number of hours to governmental authorities and many require a follow-up written report. Businesses experiencing accidental releases sometimes fail to satisfy all required reporting requirements, subjecting themselves to enforcement actions.[1] Businesses with the potential for accidental releases should understand all of the potentially applicable reporting requirements so that timely reports can be made upon the occurrence of an accidental release.

This article summarizes federal and Utah state reporting requirements which pertain to accidental releases of pollutants to the environment.[2]

Many of the reporting requirements apply to any type of release, including spills and leaks, into the environment. Other reporting requirements only apply to releases to a particular medium (air, soil, surface water or ground water). Some of the reporting requirements apply to virtually all types of pollutants and others only apply to certain pollutants.[3] For some of the requirements, reporting is only required if the release exceeds a threshold quantity and for others, criteria other than quantity apply.

In order to evaluate whether a report is required under the following reporting programs, the reporter should be attuned to the medium, the type and amount of pollutant, the type of operation and the extent of the release. Attention should be paid to the timing of the report, the governmental agency, whether an oral or written report is required and the required information.

The broadest accidental reporting requirements are found in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* ("CERCLA", also known as the Superfund Law) and the Emergency Planning and Community Right-to-Know-Act, *Id.* §§11001 *et seq.* ("EPCRA"). Reporting under CERCLA and EPCRA often satisfy other federal and state reporting requirements. In some cases, however, other federal laws and state laws may require additional reports or reports even though reports are not required under CERCLA and EPCRA.

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FEDERAL REPORTING REQUIREMENTS

1. CERCLA. CERCLA Section 103 requires any person in charge of a facility to notify the National Response Center ("NRC") as soon as he has knowledge of any release of a hazardous substance from a facility in reportable quantities.[4] The CERCLA list of hazardous substances is a comprehensive list of pollutants addressed by other federal environmental laws (Federal Water Pollution Control Act, Resource Conservation and Recovery Act, Clean Air Act and Toxic Substances Control Act). Petroleum is exempt from the definition of hazardous substances; consequently, petroleum releases are not subject to CERCLA reporting. Reporting is required if the total amount released over a 24-hour period is equal to or exceeds the reportable quantity.[5] A written report is not required. The following releases are exempt from CERCLA reporting: federally permitted releases[6], continuous releases[7], releases required to be reported or exempted from reporting under Subtitle C of the Resource Conservation and Recovery Act and applications of pesticides.

2. EPCRA. EPCRA Section 304 requires notification by the owner or operator of a facility at which a hazardous chemical[8] is produced, used or stored, upon the release of a reportable quantity of a hazardous substance or extremely hazardous substance[9] which results in exposure to persons outside the boundaries of the facility. Immediate oral notification is required to the local emergency planning committee[10] and the state emergency response program.[11] A written follow-up notice is required as soon as practicable.[12] Federally permitted releases[13] and continuous releases[14] are exempt from reporting. In contrast to the CERCLA reporting requirement, any release which results in exposure to persons solely within the boundaries of the facility is not required to be reported under EPCRA.

3. TSCA. Regulations promulgated under the Toxic Substances Control Act ("TSCA") require notification of spills of PCBs with a concentration of 50 ppm or

greater and in a quantity exceeding 10 pounds or in any quantity that directly contaminates surface water, sewers, drinking water supplies, grazing lands or vegetable gardens. Notification to the EPA Region VII Toxics Section is required by the owner of the PCB equipment or facility or a designated agent in the shortest possible time after discovery, but in no case later than 24 hours after discovery. No written follow-up notice is required.

TSCA has an additional reporting requirement that applies to all chemical substances or mixtures. Any person who manufactures, processes or distributes a chemical substance or mixture is required to immediately notify the EPA Regional Administrator upon obtaining information that a chemical substance or mixture presents a substantial risk of injury to human health or the environment (unless EPA has already been adequately informed of such information). EPA interprets this provision of TSCA to require reporting of emergency incidents of environmental contamination. However, reporting is not required under TSCA if the event has been reported to EPA under a mandatory reporting provision of another statute administered by EPA, such as CERCLA. A written follow-up notice is required within 15 days to the Washington, D.C. TSCA office.[15]

4. RCRA. Small quantity generators regulated under the Resource Conservation and Recovery Act ("RCRA") are required to immediately notify the NRC and the Utah Solid and Hazardous Waste Control Board of any fire, explosion or other release of hazardous waste[16] which could threaten human health outside the facility.[17] Notification is also required when the generator has knowledge that a spill has reached surface water. No written follow-up notice is required.

5. Clean Water Act. Reporting requirements under CERCLA and the Clean Water Act are identical, except that the Clean Water Act covers releases of oil. Immediate notification to the NRC is required for any discharge or oil to navigable waters of the United States in such quantities as may be harmful to the public health or welfare.

STATE REPORTING REQUIREMENTS

1. Utah Solid and Hazardous Waste Act. Regulations promulgated under the Utah Solid and Hazardous Waste Act, Utah Code Ann. §§19-6-101 to 122, address three different reporting requirements for releases of hazardous wastes.[18] First, facilities permitted by the state to treat, store or dispose hazardous wastes are required to notify the Utah Solid and Hazardous Waste Control Board within 24 hours of any permit non-compliance which may endanger health or the environment.[19] A written follow-up notice is required within 5 days.[20]

Second, facilities permitted by the state to store or treat hazardous waste using tank systems are required to notify the Utah Solid and Hazardous Waste Control Board within 24 hours of the detection of a release of more than one pound of hazardous waste to the environment (or one pound or less if not immediately contained and cleaned up). Notice is not required if the release has been reported under CERCLA. A written follow-up notice is required within 30 days.[21]

"Regulations promulgated under the Utah . . . Act . . . address three different reporting requirements for releases . . . ."

The third reporting requirement applies to all facilities, regardless of whether the facility is permitted to treat, store or dispose hazardous waste. The person responsible for the material at the time of a spill of one kilogram of acute hazardous waste,[22] one hundred kilograms of non-acute hazardous waste or lesser quantities which are a potential threat to human health or the environment is required to immediately notify the Utah Department of Environmental Quality.[23] A written follow-up notice is required to be submitted to the Utah Solid and Hazardous Waste Control Board within 15 days.[24]

2. Utah Water Quality Act. There are several reporting requirements under the Utah Water Quality Act, Utah Code Ann. §19-5-101 to 119, and the regulations promulgated thereunder.[25] The first applies to facilities with Utah Pollution Discharge Elimination System permits (surface water discharge permits). The permittee is required to report to the Water Quality Board any permit non-compliance which may endanger human health or the environment within 24 hours. A written follow-up report is required within five days.[26]

The second reporting requirement applies to facilities with ground water discharge permits. If a permittee discontinues a permitted ground water discharge due to an accidental release, the Division of Water Quality must be notified immediately and a written report must be submitted within five days.

The third reporting requirement applies to non-permitted facilities. Any person who spills or discharges oil or other harmful substances which may cause the pollution of ground or surface water is required to immediately notify the Water Quality Board of the spill or discharge, any containment procedures undertaken and a proposed procedure for cleanup and disposal.

3. Utah Air Conservation Act. Businesses with sources covered by a state air approval order are required to report any excess air emissions caused by an unavoidable breakdown for a period exceeding two hours. The Air Quality Board should be notified within three hours of the beginning of the breakdown, if reasonable, but in no case longer than 18 hours. A written follow-up report is required within 2 days.[27]

4. Utah Underground Storage Tank Act. Owners and operators of underground storage tanks are required to report suspected releases (such as leaks) and known spills and overfills of regulated substances.[28] Suspected releases are required to be reported to the Solid and Hazardous Waste Control Board within 24 hours. The owner or operator must immediately investigate and confirm within 7 days whether a release occurred. If a release is confirmed, additional reporting is required.

The following known spills and overfills of regulated substances to the environment are required to be reported to the Solid and Hazardous Waste Control Board within 24 hours: 25 gallons or more of petroleum or amount that causes a sheen on nearby surface water; an amount of hazardous substance that equals or exceeds the reportable quantity under CERCLA; and lesser amounts of petroleum or hazardous substances if the

spill or overfill cannot be contained and cleaned up within 24 hours. Additional reporting is required in connection with abatement and corrective actions.

Many of the reporting requirements summarized in this article are overlapping and thus one accidental release may trigger several reports, both oral and written, to different governmental agencies. Reporting requirements found in permits and local ordinances may also be triggered. Oral reporting is generally required either immediately or within 24 hours or less. When an accidental release of a serious nature occurs, the person responsible for reporting generally does not have the time to determine the applicable reporting requirements. Companies faced with an accidental release that are unsure of the applicable reporting requirements often either notify all potentially applicable governmental agencies or just one governmental agency. Reporting to all potentially applicable governmental agencies may not be wise because any unnecessary reports could prompt unjustified agency investigation. If a report is made to just one governmental agency and other governmental agencies should have been notified, enforcement actions may be pursued even though the one agency may have notified the other governmental agencies.[29]

In order to timely comply with the reporting requirements and to avoid making unnecessary reports, businesses with the potential for accidental spills should inventory substances that could potentially release to the environment and prepare a chart of reporting requirements. A chart could also be invaluable if an accidental release occurs when the person familiar with the reporting requirements is not available.

[1]Most of the reporting requirements discussed in this article carry a civil penalty of up to $25,000 per day of violation. Under some reporting requirements, the penalty amount increases for subsequent violations. Criminal penalties are provided in some of the reporting programs for knowing and willful violations.

[2]The scope of this article is limited to reporting requirements for accidental releases to the environment from "facilities" under federal and Utah state laws. For example, the article omits reporting requirements for transporters of hazardous materials under the Hazardous Materials Transportation Act, pesticide registrants under the Federal Insecticide, Fungicide and Rodenticide Act and employers under the Occupational Safety and Health Act.

[3]The terminology for pollutants and scope of the terminology varies with each of the reporting requirements. For example, reporting under the Comprehensive Environmental Response, Compensation and Liability Act applies to "hazardous substances" and reporting under the Resource Conservation and Recovery Act applies to "hazardous wastes."

[4]Hazardous substances and reportable quantities are listed at 40 C.F.R. Table 302.4.

[5]Information reported: owner of facility; location, quantity and type of release; response action taken; nature of damage and injuries; and whether state or local agency has been notified.

[6]"Federally permitted release" is defined by CERCLA to cover discharges which are in compliance with permits issued under certain federal environmental statutes. 42 U.S.C. §9601(10).

[7]CERCLA exempts releases that are continuous, stable in quantity and rate and (i) that are from a facility for which notification has been given under CERCLA Section 103(c); or (ii) for which notification has been given under CERCLA for a period sufficient to establish the continuity, quantity and regularity of such releases. 42 U.S.C.§9603(f)(2).

[8]"Hazardous chemical" is defined by reference to regulations promulgated by the Occupational Safety and Health Administration ("OSHA"). OSHA defines hazardous chemical broadly and does not publish a comprehensive list.

[9]Extremely hazardous substances are listed at 40 C.F.R. Part 355, Appendices A and B.

[10]Local emergency planning committees have been established for each of the counties in Utah and for Salt Lake City, Sandy and West Valley City.

[11]Information reported: chemical name or identity of substance; whether substance is an extremely hazardous substance; estimate of quantity of release; time and duration of release; medium or media into which the release occurred; any known or anticipated acute or chronic health risks; precautions to be taken; and name and telephone number of the facility contact.

[12]Information reported: an update of the oral report; actions taken to respond to and contain the release; any known or anticipated acute or chronic health risks; and medical attention taken or to be taken. 42 U.S.C. §11004.

[13]*See* footnote 6.

[14]*See* footnote 7.

[15]Information reported: statement that the notice is being submitted in accordance with TSCA Section 8(e); job title, name, address, telephone number and signature of the person reporting and the facility; chemical substance; summary of adverse effects, describing the nature and extent of the risk involved; and source of information. 15 U.S.C. §2607 (e); 40 C.F.R. §761.125 (a) (i).

[16]"Hazardous waste" is defined at 40 C.F.R. Part 261.

[17]Information reported: name, address, and U.S. EPA Identification Number of the generator; date, time, and type of incident; quantity and type of hazardous waste; extent of any injuries; and estimated quantity and disposition of recovered materials. 40 C.F. R. §262.34 (d) (5) (iv); Part 110.

[18]"Hazardous waste" is defined at Utah Admin. Code R315-2-1.

[19]Information reported: information concerning threat to public drinking water or threat to human health or the environment outside the facility; name, address and telephone number of owner or operator; name, address, and telephone number of the facility; name and quantity of materials involved; extent of injuries; an assessment of the actual or potential hazards to the environment and human health outside the facility; and the estimated quantity and disposition of recovered material.

[20]Information reported: description of non-compliance, including exact dates and times; if non-compliance is not corrected, anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate and prevent recurrence of non-compliance. Utah Admin. Code R-315-3-4 (6).

[21]Information reported: likely route of migration of the release; characteristics of the surrounding soil; results of any monitoring or sampling conducted (if not available within 30 days, these data must be submitted as soon as they are available); proximity to down gradient drinking water, surface water and populated areas; and description of response actions taken or planned.

[22]"Acute hazardous wastes" are listed at Utah Admin. Code R315-2.1.9(e).

[23]Information reported: name, telephone number and address of the person responsible for the spill; name, title and telephone number of the individual reporting; time and date of the spill; location of the spill; description and amount of the spill; causes of the spill; and emergency action taken.

[24]Information reported: person's name, telephone number and address; date, time, location and nature of the incident; name and quantity of material involved; extent of any injuries; an assessment of actual or potential hazards to human health or the environment; and the estimated quantity and disposition of recovered material that resulted from the incident. Utah Admin. Code R-315-8-10 (which incorporates the Federal Reg. at 40 C.F.R. §264.196 (d)).

[25]The following two reporting requirements are not discussed: industrial users subject to categorical pretreatment standards, Utah Admin. Code R314-8-8.10(6); and existing manufacturing, commercial, mining or silvicultural discharges, *Id.* R317-8-4.1(15)(a).

[26]Information reported: description of the non-compliance and its cause; the period of non-compliance, including exact dates and times, and if the non-compliance has not been corrected, the anticipated time it is expected to continue; steps taken or planned to reduce, eliminate and prevent recurrence of the non-compliance. Utah Admin. Code R-317-8.4.1 (12) (f).

[27]Information reported: cause and nature of the event; estimated quantity of pollutant (total and excess); time of emissions; and steps taken to control the emissions and to prevent recurrence. Utah Admin. Code R-307-1-4.7.1

[28]"Regulated substances" is defined to include hazardous substances under CERCLA (but not including hazardous wastes under RCRA) and petroleum. Utah Admin. Code R-311-202-1 (which incoporates 40 C.F.R. Part 280).

[29]In *All Regions Chemical Labs, Inc. v. EPA*, 932 F.2d 73 (1st Cir. 1991), the First Circuit Court upheld an EPA order imposing a penalty of $20,000 on a chemical company for failure to notify the NRC under CERCLA of two fires which caused the release of chlorine gas. A private citizen notified the NRC of the first fire and the state environmental agency (which the chemical company apparently notified) notified the NRC of the second fire.

CLAIM OF THE MONTH

Alleged Error or Omission

The Insured law firm allegedly committed fraud malpractice in the sale of real property on behalf of their client.

Resume of Claim

The Insureds represented the seller of a piece of commercial property. The Insureds had no contact or knowledge of their client prior to the sale of this property. A record search showed title of the property in question to be in the name of their client and the sale was closed without any unusual circumstances. Almost one year later, the true owner of the property, a man, sued the Insured and other parties to the transaction. The client of the Insured, a woman, had apparently successfully masqueraded as the male owner of the property so well as to deceive even her own attorneys.

How Claim May Have Been Avoided.

Attorneys are being held to greater due diligence responsibilities. In this case the attorneys may be held to the responsibility of seeking affirmative proof of the identity of the parties. The Insured might simply have requested proof of identity in the for of driver's license from the client.

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

The Duty to Defend Environmental Claims is not Unlimited

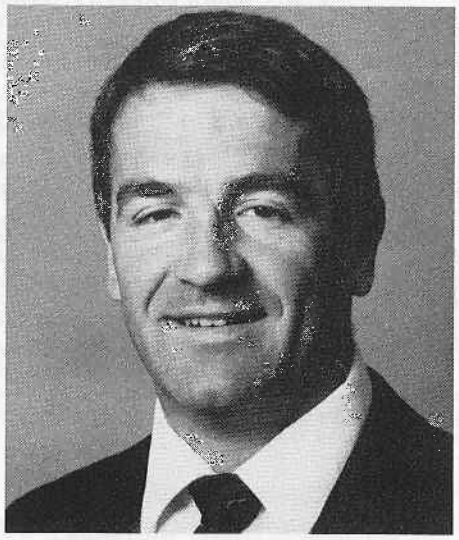
By Samuel D. McVey

Under what circumstances must an insurer defend its insured against speculative lawsuits and claims for environmental cleanups? Suppose you bought a farm in 1965. You sold the farm in 1969 to Acme Barrel Recycling. For the next eleven years, Acme purchased "empty" drums from various businesses, cleaned them with solvents at the property, and sold them as "reconditioned barrels." Of course, during the cleaning process chemicals ranging from cleaning solvents to the residue in the "empty" drums flowed from the rinsing area, onto the ground and made their way into the aquifer supplying drinking water to several households.

In 1980, Acme diversified into investment real estate and went bankrupt soon thereafter. A bank foreclosed on the barrel site in 1984. In 1986, several homeowners down-gradient of the site noticed evil-smelling water coming out of their taps. The County Health Department tested the water, found solvents and other hazardous substances in it, and called state and federal environmental authorities.

These authorities traced the substances origin to the barrel site and immediately found out who all the prior property owners were back to the approximate time when Mexico ceded what is now Utah. The authorities notified all prior owners still alive or operating, including you, that they were potentially responsible to clean up the site under environmental remediation statutes. In the government's view, these statutes generally make any owner or operator of hazardous waste property liable for the cost of cleaning up contamination that was there during their involvement with the property.

You are worried, but not too worried, because you are pretty sure that the chemicals described in the letter were not dumped while you owned the property. Also, you had liability insurance on your farm. You reason that you can't be liable for something you did not do and even if you are, you have an insurance policy that is supposed to protect you.



SAMUEL D. McVEY received his Juris Doctorate (magna cum laude) from the J. Reuben Clark Law School at Brigham Young University in 1983, and was admitted to the Utah State Bar in 1983. His practice emphasizes litigation, environmental law with concentration in hazardous substance and underground storage tank clean-up, management and permitting, land use and construction law. Mr. McVey is with the law firm of Kirton, McConkie Poelman in Salt Lake City, Utah.

The next thing you hear is that the bank who foreclosed on the property is suing you and other prior owners and users of the site in a declaratory action. The bank claims that prior owners and operators of the property are responsible to contribute to the pollution clean-up under federal statutes and state common law causes of action. The suit claims there was a release of hazardous substances while you owned the site.

You pull out your policy which covers most of the time you owned the farm and contains the following language:

> "The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: (a) Bodily injury and/or (b) Property damage to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damages, even if any of the allegations of the suit are groundless, false or fraudulent . . ."

This language is typical of most comprehensive general liability policies in the 1960's and 1970's. You also notice there is nothing in the policy which excludes environmental damage from coverage.

You submit a letter claim to the insurance company and attach copies of the federal and state agencies' notification, the bank's complaint, a copy of the government's investigation and your statement that you used paint thinner on the farm, but do not think any spilled on the ground. You ask the insurer to defend you from the government and bank claims.

The insurance company investigates. It concludes there was no way the contamination could have originated while you owned the farm. The insurer notifies you that your claim is not covered because there is no evidence of an "occurrence" during the policy period. In other words, nothing happened to cause pollution while you owned the property.

You agree nothing happened, but protest that you still must defend against the government claim and the bank suit. The government and bank are unwilling to drop their claims against you. You want the insurer to defend you because, after all, the policy provides for a defense "even

if any of the allegations of the suit are groundless, false or fraudulent . . ." Isn't the duty to defend determined by looking at the complaint? "No," says the insurer. "Our investigation shows nothing happened while you owned the property."

Is the insurer correct? Is the "duty to defend" under its policy limited in scope? Or is the duty an unlimited obligation determined solely by what is alleged in the complaint? The Utah Supreme Court in *Deseret Federal Savings v. U.S. Fidelity and Guarantee Co.*, 714 P.2d 1143 (Utah 1986), set out an interesting test which allows parties on both sides of the issue to cite it as supporting authority. In *Deseret Federal*, the Court cited a California case for the rule:

> "The duty to defend is broader than the duty to indemnify, but the insurer's obligation is not unlimited; the duty to defend is measured by the nature and kinds of risks covered by the policy and arises whenever the insurer ascertains facts which give rise to the potential of liability under the policy. *Gray v. Zurich Insurance Co.*, 65 Cal.2d 263, 275-77 . . ., 419 P.2d 168, 177 (1966)."

(*Deseret Federal, supra*, at 1146.) The Court also stated the insurer "must make a good faith determination based on all the facts known to it, or which by reasonable efforts could be discovered by it, that there is no potential liability under the policy." [(Cases omitted.)] (*Id.* at 1147).

From this language, insurers can argue that they have the right to investigate claims and reject those for which the inquiry shows no potential liability. Unfortunately, when the insurers do this the plaintiff and petitioners in the underlying actions continue to move forward with their suits against the insured. The insured has to pay for a defense or risk default.

Thus, the insured brings a declaratory action for coverage and points to other language in *Deseret Federal*:

> "[The insurers' good faith determination] means that there are no disputed facts which if proved by the plaintiff at trial would result in liability under the policy. However, this does not mean that the insurer can simply say, 'We don't believe that the plaintiff can prove what he is alleging.' The insurance contract includes the duty to defend even if the allegations in a suit are groundless, false, or fraudulent. The question is whether the allegations, if proved, could result in liability under the policy."

[Citations omitted.] *Id.*

From this language, the insured argues that any plaintiff's allegation of an occurrence during the policy period which could be proved at trial through speculation, metaphysics or otherwise triggers the duty to defend. Thus, if the present property owner alleges contamination occurred while the insured owned the property, the insurance company must defend against the allegation because if it is proven up at trial, there would be liability under the policy.

"Is the 'duty to defend' . . . limited in scope?"

Who is right — the insurance company or the insured party? The answer to this question is difficult to ascertain in claims for environmental damage because the claims develop over long periods of time and the time the damage occurred is generally not crystal clear.

There are, however, significant reasons for concluding that the insurance company's position is correct. If one accepts the insured's argument, the insurer would have no right in a declaratory judgment action to rely on facts developed through claims investigation in determining whether there is coverage. Further, the burden in summary judgment motions or otherwise would be shifted to the defendant insurer to prove a negative: to affirmatively disprove speculation that the alleged contamination may have resulted from a covered occurrence. The insured as the declaratory action plaintiff should be required to prove facts showing coverage.

Finally, the insurance contract does not appoint a third-party plaintiff as the magistrate of defense coverage. As stated in *Gray v. Zurich, supra*, a case relied upon by the Utah Supreme Court in *Deseret Federal*:

> "The insured probably would be surprised at the suggestion that defense coverage might turn on the pleading rules of the Court that a third party chose or how the third party's attorney decided to write the complaint . . . In light of the likely overstatement of the complaint and of the plasticity of modern pleading, we should hardly designate the third party as the arbiter of the policy's coverage."

Gray, supra at 175 n.14, 176 n.15.

This position does not give the insurer unfettered discretion. Insureds can still obtain defense costs by going beyond the four corners of the complaint and proving to the court that there are facts establishing a defense duty. They can prove the insurer wrong with facts outside the third party's complaint. Of course, breach of contract and bad faith remedies may also exist in such a case.

The duty to defend should not be transformed into some mega-contractual rule of law dependent upon a third party's overinclusive and underinvestigated complaint. A defense duty is not an unlimited obligation.

Commission Highlights

During its regularly scheduled meeting of February 25, 1993, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. After concluding all discipline matters all Staff and ex-officio members joined the meeting.
2. The Minutes from the meeting of January 21, 1993 were approved as corrected.
3. Dryer reported that the morning's Mini-Breakfast seminar on the Court of Appeals drew a good turnout, and he urge Board members to attend the March 23rd seminar.
4. Mike Hansen reported on the Minority Bar Association Annual Meeting and noted that the meeting was well organized and the number of dignitaries present was impressive as well as the selection of presentations.
5. The Board will be meeting with the Southeastern Bar Association in Price during the April Commission meeting.
6. Dryer reported that he, Ron Yengich and Judge David S. Young recently appeared on *KSL TV's Focus Show* to talk about the results of the recent judicial survey regarding attorneys.
7. The Board voted to approve funding for the the Dispute Resolution program.
8. Dryer noted as of December 1992, the CSF had a balance of $68,451.62 and that claims on hand exceeded $38,000.
9. James Z. Davis distributed copies of his memo summarizing a special meeting of the Judicial Council on February 11 called to address two specific issues: (1) Creation of an additional Second District judgeship in Davis County, and (2) Court consolidation in the 1st, 2nd, 3rd and 4th Judicial Districts.
10. The Board voted to approve the purchase of the Law & Justice Center, Inc.'s 50% joint tenancy interest in the building.
11. The Board voted to refer Ethics Opinion #106 and #110 to the Supreme Court Advisory Committee on discipline.
12. The Board voted to authorize the Executive Committee to appoint a special prosecutor.
13. The Board voted to approve the Ethics School concept and requested a status report by the April 22nd meeting on plans for implementation including schedules and how many private discipline candidates would be diverted into the program.
14. John T. Nielsen and Timothy Shea appeared and reported on legislation reviewed by the Legislative Affairs Committee at its final committee meeting.
15. The Board voted to accept the recommendation of the Legislation Affairs Committee to oppose **SB102 "Jury Information Act"** whereby a jury can disregard instructions given to the jury by a judge.
16. The Board voted to accept the recommendation of the Legislative Affairs Committee to oppose **SB190 "Recovery of Attorney's Fees in Civil Lawsuits."**
17. The Board voted to accept the recommendation of the Legislative Affairs Committee to oppose **SB166 "Payment of Attorney's Fees in Acquittal."**
18. The Board voted to accept the recommendation of the Legislative Affairs Committee to oppose **SB74 "Medical Malpractice Prelitigation Amendments."**
19. The Board agreed to strike **SB29 "Sanctions for Denial of Visitation"** for consideration.
20. The Board voted to accept the recommendation of the Legislative Affairs Committee to recommend that **HB196 "Recognition of Community Property"** be referred for internal study and be part of a larger task force study.
21. The Board voted to oppose the recommendation of the Legislative Affairs Committee to support **HB129 "Record of District Court Proceedings,"** which would discontinue the use of electronic recording devices in court, on the following grounds: (1) that decisions affecting the judiciary should not be made by the legislature; (2) outlying districts have gone to electronic recordings and have replaced court reporters; (3) a pilot project is currently underway to evaluate the value and use of video recordings in court; and (4) that HB129 is premature pending the outcome of the pilot study.
22. The Board voted to accept the recommendation of the Legislative Affairs Committee to support **SB183 "Holding a Court Plea in Abeyance"** which codifies and standardizes a practice that is already in place.
23. The Board voted to accept the recommendation of the Legislative Affairs Committee to oppose **HB323 "Statutory Authority of Appellate Court to Recall its Mandate"** and recommend that the bill be sent to internal study.
24. The Board voted to accept the recommendation of the Legislative Affairs Committee to oppose **HB330 "Judicial Department Amendments,"** which does away with Court Commissioners in juvenile and circuit courts and takes the federal magistrate system and puts it into operation in the federal court, and to refer the bill to interim study on the grounds that a transfer of system could have unknown effects.
25. The Board voted 6 For and 1 Opposed to the accept the recommendation of the Legislative Affairs Committee to take no position on **SB174 "Judicial Retention Election Information."**
26. The Board voted to accept the recommendation of the Legislative Affairs Committee to express the Bar's strong opposition to **HB205 "Financing for State Courts Complex."**
27. Executive Director John C. Baldwin referred to the Department Activity Summary report.
28. The Board voted to accept the recommendation of the Lawyer Benefit Committee to re-endorse Standard and UNUM for Disability Insurance programs for a two-year period.
29. Dennis Haslam, Admissions Committee liaison, reviewed the proposed Rule 3-2 for Foreign Law School Graduates.
30. Budget & Finance Committee Chair, J. Michael Hansen, referred to the financial statements and highlights in the agenda package and reviewed the January reports.

31. Young Lawyers Section President, Keith A. Kelly, reported that the Young Lawyers Section has been involved in a very successful program that raises money for sweatsuits, clothing packs and donations for rape crisis victims and credited Kim Hornak and Beth Lindsley with the program's success.

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

Scott M. Matheson Award

The Law-Related Education and Law Day Committee of the Utah State Bar presented the first annual Scott M. Matheson Award to Greg Skordas and the law firm of Van Cott, Bagley, Cornwall & McCarthy. The second annual award went to Barry Gomberg and the law firm of Fabian & Clendenan. Currently, the committee is accepting applications and nominations for the third annual Scott M. Matheson Award to be presented on Law Day, May 1, 1993.

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

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

1. Made significant contributions to law-related education in the State of Utah which are recognized at local and/or state levels.

2. Voluntarily given their time and resources in support of law-related education, such as serving on planning committees, reviewing or participating in the development of materials and programs and participating in law-related education programs such as the Mentor/Mid-Mentor Program, Mock Trial Program, Volunteer Outreach, Judge for a Day, or other court or classroom programs.

3. Participated in activities which encouraged effective law-related education programs in Utah schools and communities and which have increased communication and understanding between students, educators, and those involved professionally in the legal system.

APPLICATION PROCESS: Applications and/or nominations may be submitted to the:

Scott M. Matheson Award
Law-Related Education Committee
Utah Law and Justice Center
645 South 200 East
Salt Lake City, UT 84111

Included in the nomination should be a cover letter, a one page resume and a one page summary of the nominee's law-related activities. The nominee may also submit other related materials which demonstrate the nominee's contributions in the law-related education field. These materials may include a bibliography of law-related education materials written by the nominee, copies of news items, resolutions, or other citations which document the nominee's contribution or a maximum of two letters of recommendation. All materials submitted should be in a form which will allow for their easy reproduction for dissemination to members of the selection committee. Nominations must be postmarked no later than **April 15, 1993**.

Many Thanks To Our Sponsors!

The Utah State Bar Mid-Year Meeting Committee gratefully acknowledges the following sponsors for making the 1993 Mid-Year Meeting successful and enjoyable:

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Optronics
Northwest Pipeline
Williams Field Services
Associated Professional Reporters
Beehive Business & Leisure Travel

Discipline Corner

PRIVATE REPRIMAND

1. An attorney was privately reprimanded on January 28, 1993, for violating Rule 1.1, Competence, and Rule 8.1, Bar Admission and Disciplinary Matters. The attorney was appointed in February 1990 to appeal the client's criminal conviction for charges of D.U.I., assault on a police officer, possession of drug paraphernalia and failure to yield. Shortly thereafter, the attorney filed the Notice of Appeal but failed to file a docketing statement. Ultimately, on May 2, 1990, the appeal was dismissed. On March 4, 1992, the client filed a Bar Complaint. Initially, the attorney failed to respond to the Bar Counsel's request for information. Subsequently, the attorney appeared before the Screening Panel of the Ethics and Discipline committee and testified to the Committee that during the representation the client was extremely abusive. He also had an extensive criminal record which, initially, caused him to conclude that the appeal was futile and so instructed the attorney. Subsequently, he had a change of mind and instructed the attorney to file a notice of appeal.

In mitigation, the Committee considered the client's substantial abusive attitude which adversely affected the communication between the attorney and the client, the attorney's candidness at the hearing, and his genuine remorse over the entire incident.

2. An attorney was privately reprimanded on January 28, 1993, for violating Rule 1.1, Competence; Rule 1.2(a), Scope of Representation; Rule 1.4(a), Communication; Rule 1.5(a), Fees; and Rule 1.14(d), Declining or Terminating Representation. The attorney accepted a $400.00 retainer fee in September of 1991 to represent a client in a divorce action in which, due to the opposing party's prior history of sexual abuse of children and subsequent conviction therefore, the issues of custody and visitation were of serious concern to the client. The attorney failed to act upon the client's request to obtain a restraining order, making it necessary for the client to appear before the Juvenile Court pro se and obtain a protective order. During the period September 1991 through February 1992, the attorney failed to communicate with the client. Further, upon termination of the attorney-client relationship and substitution of counsel, the attorney failed to comply with the client's requests and provide the client file or a copy thereof to the client or the substitute counsel. Ultimately, in February of 1992, the matter went to trial. However, due to the attorney's failure to prepare an income declaration or a child support worksheet pursuant to the Uniform Child Support Guidelines the court had a difficult time determining the amount of child support.

In mitigation, the Committee considered the fact that due to the opposing party's criminal conviction and prior stipulation curtailing any contact with minor children, the failure to obtain a restraining order was in fact a moot issue. Further, the client's multiple, daily attempts at contacting the attorney's office and her expectation to receive daily calls in return were unreasonable. Also, in mitigation the Committee noted that the attorney is a recovering substance abuser with multiple personal problems. In aggravation, the Committee considered the attorney's two (2) prior formal complaints in 1988 and 1990 and two Private Reprimands in 1990.

3. An attorney was privately reprimanded on January 28, 1993, for violating Rule 1.3, Diligence; and Rule 1.4(a), Communication. The attorney was retained in May of 1991 to pursue a claim for property damages sustained in an automobile accident in 1989 in which the opposing driver, an employee of the United States Forest Service, was cited. On June 12, 1991, the U.S. Forest Service made an offer of settlement. The attorney failed to convey the offer to the client until April of 1992. In the interim, the attorney relocated and failed to notify the client. The attorney failed to release the settlement proceeds to the client until May 27, 1992, subsequent to the filing of the Bar complaint.

In mitigation, the Committee considered the fact that the settlement proceeds were received from the U.S. Forest Service on or about April 13, 1992, and were disbursed on or about May 27, 1992. Further, the Committee considered the attorney's representation that their office was updating its computer system which will reduce similar problems in the future. However, the Committee, in aggravation, considered the attorney's lack of concern regarding the failure to act diligently.

4. An attorney was privately reprimanded on February 12, 1993, for violating Rule 1.3, Diligence. The attorney was retained in January of 1983 to represent the client in a divorce action. At the time, the client agreed to waive five (5) years of child support in exchange for the opposing party's equity interest in the family home. Accordingly, the attorney was directed to prepare an order for the court's signature entitling the client to receive child support commencing in September of 1988. The attorney failed to do so.

In mitigation, the Committee considered the lapse of time from 1983 to 1988 and the fact that the attorney ultimately filed the order which became retroactive and thus minimized any actual financial losses to the client. In aggravation, the Committee considered the attorney's initial misrepresentation to the client claiming the order had been filed.

5. On January 28, 1993, the Board of Bar Commissioners entered an Order of Discipline for a Private Reprimand against an attorney for violating Rule 8.4(d), Conduct Prejudicial to the Administration of Justice, of the Rules of Professional Conduct. This stemmed from an incident where the attorney was representing a minor in an action in juvenile court. The court ruled the relief being sought by the minor and remanded the youth to the custody of the parents. The attorney, with the aid of an assistant, took the minor out of the courthouse through a rear door, placed the minor in an automobile and drove the minor back to the attorney's office. The minor exited the automobile and had no further contact with the attorney. The parents were unaware of the whereabouts of the minor for some period of time thereafter. This conduct by the attorney prevented the parents from exercising parental control over the minor and had the effect of frustrating the order of the court.

SUSPENSION

On February 11, 1993, the Utah Supreme Court entered an Order placing Richard S. Clark on suspension from the practice of law for one year. However, the period of suspension may be reduced to six months and one day provided restitution due clients is made within the first six months of suspension. This action was based upon two Formal Complaints wherein Mr. Clark was found to have violated Rule 1.3, Diligence, Rule 1.4(a),

Communication, Rule 1.5(c), Fees, and Rule 1.13(b), Safekeeping of Property, of the Rules of Professional Conduct of the Utah State Bar.

In the first Formal Complaint, Mr. Clark was paid $400 in February 1989 to represent a client in a domestic relations action that had already been initiated. Mr. Clark prepared and completed a Stipulation and Property Settlement Agreement but failed to have it executed by the parties. Subsequently, Mr. Clark was paid an additional $200.00 but failed to provide any legal services on behalf of his client. Thereafter, he failed to respond to requests for information and failed to refund any of the unearned fees.

In the second Formal Complaint, Mr. Clark was retained to represent a client in a personal injury action. When the case was settled Mr. Clark took his fee and remitted the balance to the client without paying existing medical bills. Mr. Clark agreed to pay his client $5,000.00 less any sums paid to medical providers. Thereafter, he failed to pay the medical providers or his client pursuant to their agreement.

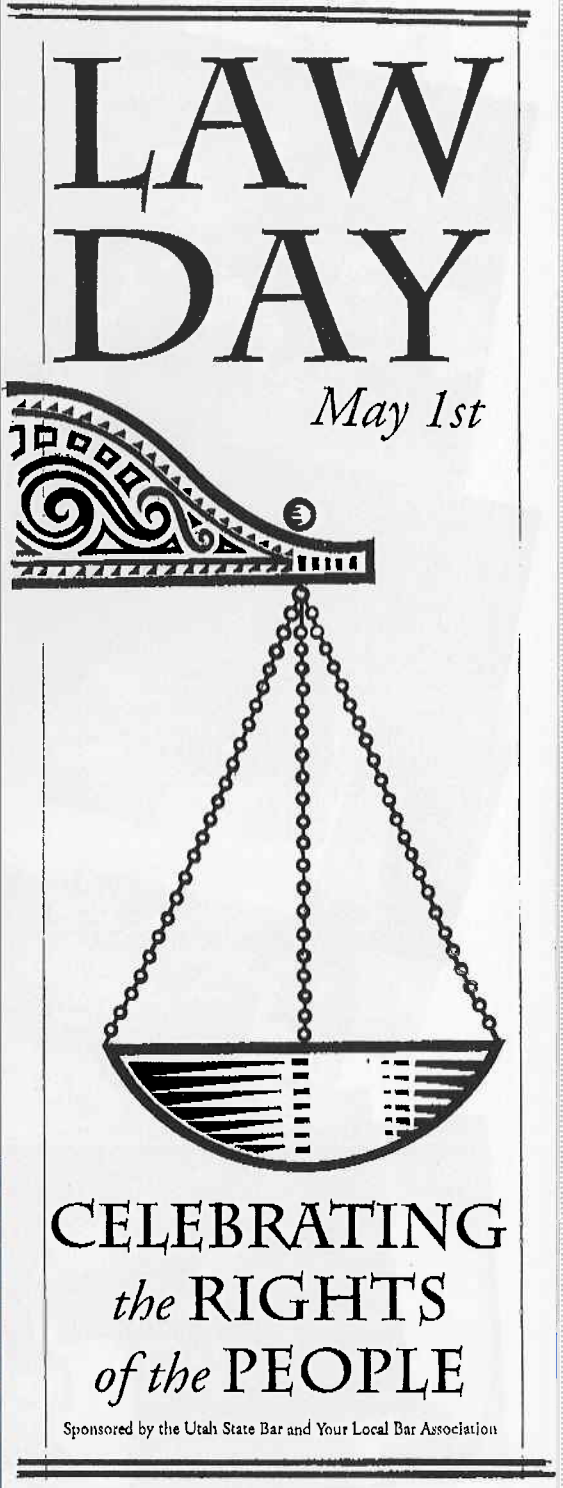
Seminar on Mental Health and Law to Be Held

The Second Annual Interdisciplinary Seminar on Mental Health, Law, Policy and Practice will be held May 7-8, 1993, at the College of Law, University of Utah. The seminar is jointly sponsored by the State of Utah Divisions of Mental Health and Services to the Handicapped, the Office of Courts Administration, Utah State Hospital, and the University of Utah's Department of Psychology and College of Law.

Presenters, representing a variety of mental health professionals, the judiciary, and prosecuting and defense attorneys, will address a variety of pre-trial evaluation and treatment issues. Registration fee for two-day seminar is $75. CLE credits applied for. For further details and registration materials, contact either Stephen L. Golding, Director of Clinical Training, University of Utah, 581-8028, or Sharon Angus, Division of Continuing Legal Education, 581-5809.

Thanks to the Mid-Year Meeting Committee for a well-planned and well-executed Utah State Bar Mid-Year Meeting.

Earl Jay Peck — Chair, Thomas B. Brunker, Elizabeth S. Conley, Robert P. Faust, Marilyn M. Henrikson, R. Clayton Huntsman, Maxwell A. Miller, Mark W. Nash, Carolyn Nichols, E. Jay Sheen, Gregory M. Simonsen, Peter Stirba, Ann Swensen, Thomas L. Willmore, H. James Clegg — Commission Liaison.



1993 Annual Meeting Awards

The Board of Bar Commissioners is seeking nominations for the 1993 Annual Meeting Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Kaesi Johansen, Convention Coordinator, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than **Wednesday, April 14, 1993**. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Young Lawyer of the Year
4. Distinguished Section/Committee
5. Distinguished Non-Lawyer for Service to the Profession
6. Distinguished Pro Bono Lawyer/Law Firm of the Year

Bob Miller Memorial Law Day Run

The 1993 Bob Miller Memorial Law Day Run is scheduled to begin Saturday morning, April 24, 1993 at 10:00 a.m. The 5-Kilometer race, now in its eleventh year, will again use the University of Utah College of Law as the staging area and finish line. The race will start at the Red Butte Gardens above the campus and will run a mostly downhill course. All law firms are encouraged to field teams and to enjoy the camaraderie of the race. Information about the race can be obtained from Howard C. Young of Parsons Behle & Latimer, 532-1234.

CORRECTION

The advertisement on page 15 of the March 1993 issue for Rollins Burdick Hunter was incorrect. The firm has changed its name to Rollins Hudig Hall of Utah. Their address and phone number remain the same. We apologize for any inconvenience this has caused.

Mid-Year Meeting People, Events, Scenes, Tournament Winners (and Losers)

Photos by Pat Thorpe

A Dozen Writing Tips For Lawyers

Journalism has been defined as literature in a hurry. Every word must count; duplication should be avoided. Aim for accuracy, brevity and clarity.

1. Make your point in the first paragraph. Don't lead up to it or save it for the last paragraph. In that respect, news writing is the reverse of an essay. Tracing the history of evolution before saying the dinosaur is now extinct will lose your reader and is considered "throat-clearing."

2. Use short sentences (about 20 words is maximum.) If this sounds strange, remember that readers — including in-house counsel — have little time and appreciate a fast read that makes its point quickly.

3. Use short paragraphs. Do not use long, essay-type transitions that repeat one point to lead to the next. Let the logic of your article lead from one point to the next.

4. Use strong verbs. Avoid using "is". It links but adds nothing and forces you to use more words to convey meaning.

5. Keep the language simple. Avoid words like "pursuant to." Write like you talk. When was the last time you heard someone use "perforce" in a conversation?

6. Be specific. Using concrete points instead of generalities makes writing more interesting. "He ate squid" is much more interesting than "He ate dinner."

7. Don't overwrite. Why say *canis familiaris* or domesticated carnivorous mammal with a leg on each corner when you can say "dog"?

8. Make points directly. *Wrong:* "This article is going to be about the different ways you can louse up a trial." *Right:* "The beginning practitioner can louse up a trial 10 ways." In other words, don't announce what you are going to say: just say it.

9. Avoid repetition. Make a point and move on. Say it clearly the first time, and you won't need to repeat. You don't need a concluding paragraph. If it seems logical, use one. If not, don't force it.

10. Delete extra words. Tips? Don't start sentences with "it" or "there." Use active not passive construction. ("The client stiffed the lawyer," not "the lawyer was stiffed by the client.") Avoid redundancies ("as to whether or not" is "whether"). For further points, see Strunk and White, "Elements of Style".

11. Combine points to tighten writing. *Long way:* The EPA has issued a new regulation. This new regulation, which the EPA announced in April, concerns the removal of underground ashtrays. *Short way:* An EPA regulation issued in April concerns removing underground ashtrays. (10 words instead of 22.)

12. Don't use footnotes. Cite your sources or cases briefly within the body of the article.

Legal Assistants Association of Utah

The National Association of Legal Assistants (NALA) and the Legal Assistants Association of Utah (LAAU) will be presenting the Third Annual NALA Region VII Symposium Friday, June 25, 1993, at the Quality Inn Convention Center in Salt Lake City, Utah. Gubernatorial candidate Stewart Hanson is scheduled to give the keynote address.

Educational sessions will cover a wide range of topics, including the CF&I decision, compliance with the Clean Air and Americans with Disabilities Acts, the Freedom of Information Act, title insurance, managing disclosure for growing companies, and evidence. NALA will also be sending a representative to provide an ethics update for legal assistants. Continuing legal education (CLE and CLAE) credits will be offered.

The Symposium is open to all legal assistants currently working in the legal profession and to students in legal assistant training programs. This is an excellent opportunity to update skills and to meet others in the field.

Registration and cost information may be obtained by writing: LAAU — Region VII Symposium, P.O. Box 112001, Salt Lake City, Utah 84147-2001.

Fourth Annual Intermountain Medical Ethics Conference

On Friday, June 4, 1993 the LDS Hospital's and University of Utah's Division of Medical Ethics will present the Fourth Annual Intermountain Medical Ethics Conference. The conference this year centers on "The Doctor-Patient Relationship: Changing Expectations." The conference goals are to have participants: 1) recognize the historical shift in medicine's most important virtue from beneficence to competence, 2) understand the tension between medicine's ability to extend, but not necessarily improve life, and some patients' wishes to forego extended life and hasten death, and 3) consider the consequences of a relationship in which knowledge, power, and responsibility are unevenly distributed but subject to change. Featured speakers include Timothy E. Quill, M.D., author of *Death and Dignity: Making Choices and Taking Charge* and Albert R. Jonsen, Ph.D., author of *The New Medicine and the Old Ethics.* Attorneys may be especially interested in aspects of the conference which will focus on the duty of the physician to the patient, the questions of physician-assisted suicide and euthanasia, and the process of decision-making which affects dying and particularly elderly patients.

The conference will be held at the Education Center at LDS Hospital, Salt Lake City, Utah. The registration fee for the all day conference is $50. For more information call The Division of Medical Ethics at 321-1135.

Federal Bar Association Luncheon

Speaker:	Congressman Bill Orton
Topic:	"Everything you want to know and more about the new budget proposal and tax reforms."
Date:	April 23, 1993
Time:	12:00 noon
Location:	Little America Ballroom C
Cost:	$15.00
RSVP:	Dolores (801) 355-3431

* One Hour CLE credit

The Inner Workings of the Utah Court of Appeals

By John W. Steiger

The February seminar of the mini-breakfast series featured Judge Pamela Greenwood and Mary Noonan, Clerk of the Court, speaking on "The Inner Workings of the Utah Court of Appeals, or How Are Decisions Made Up There Anyway?" This, the fifth seminar in the series, was held on February 25th at the Utah Law and Justice Center.

Judge Greenwood and Ms. Noonan first gave a general description of the court's organization and decision-making procedures. The seven judges of the court of appeals sit in three-member panels for three months, at the end of which new panels are created by random assignment. Two weeks before oral argument, practitioners may call the court to find out which judges are assigned to the panel hearing a particular case and the judge who will be chairing the panel. The monthly calendar for oral argument — what cases will be heard when — is usually set six weeks in advance according to the court's priority rules, which rank 15 categories of disputes.

Oral argument is held during the third and fourth weeks of each month of the year except for December and July. Before oral argument, one judge of the panel is tentatively assigned to write the opinion of the court for each case. Each judge has four "Calendar A" cases per month for which he or she is responsible. Calendar A cases are those anticipated to result in a published opinion.

After oral argument, the judges confer to decide the case. This conference may result in a different judge being assigned to write the opinion. Back in chambers, the judge will attempt to have the opinion drafted and circulated to other members of the panel within 90 days. Currently, the average time from argument to circulation is 73 days. In general, opinions are first drafted by one of the judge's two law clerks with close guidance from the judge. After the judge finalizes the opinion, it "goes blue," which means it is circulated to the other participating chambers.

The other panel members have seven days to act on the opinion. In addition to joining or dissenting, they may concur conditionally and attempt to convince the authoring judge to modify the draft opinion. After the draft opinion has been voted on and any necessary changes made, the opinion "goes pink." (The references to "blue" and "pink" indicate the color of paper the opinion is printed on.) At this point, the opinion is circulated to the other four, non-participating judges, all 14 law clerks, and the three central staff attorneys for review. The opinion is issued seven days after this thorough proofreading process.

In addition to the panels constituted to hear Calendar A cases, a panel is formed to hear "rule 31" cases and another is formed to sit for "law and motion." Rule 31 cases are those that meet the requirements of Rule 31 of the Utah Rules of Appellate Procedure. In general, the issues they present have little potential for creating precedent. Consequently, the court is authorized by Rule 31 to dispose of them summarily and without a published opinion. The law and motion panel primarily responds to the various motions authorized by the Utah Rules of Appellate Procedure.

A key part of the court is the central staff. These experienced attorneys perform many tasks for the court, including making the preliminary determination whether a case qualifies for Rule 31 disposition, screening motions and making recommendations, and identifying cases that may be written per curiam. Typically, a per curiam opinion is researched and written by a central staff attorney under direction of the law and motion panel. The clerk of the court is also an attorney. In addition to court administration, the clerk screens motions, handles administrative dispositions, and makes recommendations regarding court rules, policies, and procedures. Filling out the Court of Appeals are legal secretaries and deputy clerks, all of whom perform important functions.

After giving this general description, Judge Greenwood and Ms. Noonan entertained questions. Much of the discussion surrounded the Court of Appeal's relationship with the Supreme Court. Regarding the "pour over" process — the procedure by which the Supreme Court decides which cases to send to the court of appeals — Judge Greenwood noted that the supreme court is still experimenting with the process, but that we should expect to see greater use of the Supreme Court's pour-over power. One reason is that the court of appeals can add more judges, something the supreme court cannot do easily, and thus handle more cases. In fact, Judge Greenwood commented, "We will probably do that in the next few years." Ms. Noonan added that Chief Justice Hall, in recent remarks to the legislature, said that the presumption of the Supreme Court is that cases will be poured over to the court of appeals rather than retained.

Several questions dealt with the court of appeals' adherence to supreme court precedent and whether one panel of the court of appeals is bound by the decision of another. Judge Greenwood said that these issues largely are settled by *State v. Thurman*, 203 Utah Adv. Rep. 18 (1993), in which the Supreme Court discussed stare decisis and held that the doctrine applies between different panels of the court of appeals. However, the court of appeals is exploring alternatives to the blind application of stare decisis, such as pursuing a rule allowing the court of appeals to ask the Supreme Court to take certiorari or a statute allowing the court of appeals to consider issues en banc.

Most of the remaining discussion was about practicing before the court of appeals. Judge Greenwood said that too many practitioners waive oral argument, "usually when I have some burning questions." Just because the appellant has waived oral argument, does not mean the appellee should. Also, just because a case is scheduled under Rule 31, attorneys

should not presume that oral argument will be a waste of time. "You often win or lose cases at oral argument," concluded Judge Greenwood. Two other common problems among practitioners are the failure to choose carefully issues with substantive merit and the failure to be flexible enough during oral argument to respond to any question from the bench. Regarding the use of graphic aids at oral argument, Judge Greenwood said that the court has not developed any particular guidelines, but that if a graphic aid would be helpful, the lawyer should call the court and arrange for its use before argument.

Ms. Noonan responded to several questions about the appellate rules. In regard to the Rule 26(c), which governs the dismissal of appeals for untimeliness of briefing, Ms. Noonan said that if a brief is less than seven days late, the court usually will not dismiss the case. Otherwise, the dismissed party will only file a motion for reinstatement, which results in the appeal resuming. However, if the brief is later than seven days, the court will be "quite aggressive" in dismissing the appeal. Ms. Noonan also commented that the court is now rigorously enforcing Rule 22, which sets forth the criteria for extending the time for filing briefs.

In sum, Judge Greenwood and Ms. Noonan were very candid and the discussion — of which only a small part is described here — provided a good deal of insight into the court's "inner workings." We thank them for their participation.

ATTENTION: New CLE Tracking Procedure!

Beginning April 1, 1993, and on a quarterly basis thereafter, the Utah State Bar will be printing CLE information on the mailing labels affixed to the Bar Journals. The Utah State Bar and the Utah State Board of Continuing Legal Education will track CLE hours for programs which have been previously approved and reported to the Utah State Board of CLE. This information will also be accessible by contacting the Utah State Board of CLE, located in the Utah Law & Justice Center. The hours listed on the mailing label are for hours reported after January 1, 1993.

Unpublished Local Rules

The Local Rules Subcommittee of the Utah State Bar Courts and Judges Committee has recently focused on the proliferation of unpublished local rules. Members of the Courts and Judges Committee have expressed concern about the implementation of court procedures without adequate advance notice being provided to the Bar. The Local Rules Subcommittee invites input from members of the Bar regarding any unpublished local rules of which they may be aware. Information about such unpublished local rules may be forwarded to Don Winder at Winder & Haslam in Salt Lake City or Michael Skolnick at Kipp and Christian in Salt Lake City. After the various rules are compiled the Courts and Judges Committee will address either eliminating such rules or making them known to members of the Bar.

Notice of Group Benefit Policy

For many years now, the Utah State Bar has negotiated with various group benefit programs to provide discounted rates to Utah lawyers. The Bar has traditionally endorsed discount programs including health, malpractice, disability and term life insurance, credit cards, rental cars, office equipment and computerized legal research. These programs have been administered with little staff support and are budgeted to result in no net cost to the Bar.

The Bar currently endorses Group Health Insurance through **Blue Cross Blue Shield**, Life and Disability through **Standard Insurance Company and UNUM**, Errors & Omissions Insurance through **The Home Insurance Company**, legal computerized research through **LEXIS**, and a **MBNA Credit Card**.

The Bar has also recently endorsed the discount overnight delivery services of **Airborne Express** and group discount travel services through **Vantage Travel Services**. The Bar Commission has also recently reaffirmed its policy on the types of programs it will endorse and has directed the Lawyer Benefits Committee to review and recommend traditional association benefit programs such as health, life, disability, dental and professional liability insurance as well as other programs, such as discount purchasing programs, which have potential benefit to Bar members and which could be provided with little or no cost to the Bar or with potential revenue to the Bar which is disclosed generally to Bar members.

Please contact the Bar's Lawyer Benefits Committee for additional information.

Law Day Approaching

The Law Related Education and Law Day Committee will present its Law Day Fair on Friday, April 30, 1993, between 11:00 a.m. and 2:00 p.m. at Washington Square City and County Building. Law Day is an annual nationwide celebration of the rule of law. There will be information booths set up by community organizations, law-related games and presentations, music, and food. Around noon, an awards presentation will take place in the auditorium at the Salt Lake City Public Library. Participants in the judge for a day and mentor partnership programs will be recognized. Winners of the state wide mock trial competition will be announced. The 1993 Liberty Bell Award and Scott M. Matheson Award will be presented. Everyone is invited.

Mark Your Calendars Now for the

UTAH STATE BAR

1993 Annual Meeting

SUN VALLEY, IDAHO
June 30-July 3

Hope to see you in Sun Valley!

Announcement
of
JUDICIAL VACANCIES

Announcing:

That applications are now being accepted for 2 positions of judge of the Fourth District Court.

These positions result from the reallocation by the Legislature of two circuit court positions to the Fourth District Court. The Fourth District Court and the Fourth Circuit Court will consolidate between 1996 and 1998. During the transition to a consolidated District Court, one of the persons appointed as a result of this process will primarily execute the duties of a Circuit Judge. The other appointee will execute duties now required of both District and Circuit Court judges, and under specific circumstances, may also be required to act as a Juvenile Court Judge. Frequent travel to sites throughout the district may be required. Upon consolidation of the courts, both appointees will assume the duties and cases of a judge of the consolidated District Court.

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., April 30, 1993.

Eligibility Requirements:

Applicants must be 25 years of age or older, citizens of the United States, Utah residents for three years prior to selection and admitted to practice law in Utah. After appointment, the judge must reside within the geographic boundaries of the court, which are Utah, Wasatch, Juab and Millard counties.

Selection Process:

Utah law requires the Judicial Nominating Commission to submit three nominees to the Governor within 45 days of its first meeting. The Governor has 30 days in which to make a selection. The Utah State Senate has 60 days in which to approve or reject the Governor's selection. To obtain the procedures of Judicial Nominating Commissions and the names of Commission members call (801) 578-3800.

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's Courts in general, or the Fourth District Court in particular, submit a written statement no later than April 30, 1993, to the Administrative Office of the Courts, Attn: Fourth Judicial District Nominating Commission.

Announcing:

That applications are now being accepted for the position of judge of the Third District Court.

This position results from the appointment of Judge Tyrone Medley to the Third District Court and the reallocation by the Legislature of Judge Medley's circuit court position to the Third District Court. The Third District Court and the Third Circuit Court will consolidate between 1996 and 1998. In order to complete the judicial business of the circuit court during the transition to a consolidated district court, the person appointed to this position will primarily execute the duties of a circuit judge between the date of appointment and consolidation of the courts. Upon the consolidation of the courts, the judge will assume the duties and cases of a judge of the consolidated district court, which for an indeterminate period of time will be substantially those of a circuit court judge. The person appointed to this position will have the rights of seniority of a district court judge from the date of appointment.

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., April 30, 1993.

Eligibility Requirements:

Applicants must be 25 years of age or older, citizens of the United States, Utah residents for three years prior to selection and admitted to practice law in Utah. After appointment, the judge must reside within the geographic boundaries of the court, which are Salt Lake, Summit, and Tooele counties.

Selection Process:

Utah law requires the Judicial Nominating Commission to submit three nominees to the Governor within 45 days of its first meeting. The Governor has 30 days in which to make a selection. The Utah State Senate has 60 days in which to approve or reject the Governor's selection. To obtain the procedures of Judicial Nominating Commissions and the names of Commission members call (801) 578-3800.

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's Courts in general, or the Third District Court in particular, submit a written statement no later than April 30, 1993, to the Administrative Office of the Courts, Attn: Third Judicial District Nominating Commission.

To obtain an application form contact:

Administrative office of the courts
230 South 500 East, Suite 300 • Salt Lake City, Utah 84102
(801) 578-3800

Announcement
of
JUDICIAL VACANCIES

Announcing:

That applications are now being accepted for the position of judge of the Third District Juvenile Court.

This position results from the reallocation by the Legislature of a circuit court positions to the Third District Juvenile Court.

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., April 30, 1993.

Eligibility Requirements:

Applicants must be 25 years of age or older, citizens of the United States, Utah residents for three years prior to selection and admitted to practice law in Utah. After appointment, the judge must reside within the geographic boundaries of the court, which are Salt Lake, Summit, and Tooele counties.

Selection Process:

Utah law requires the Judicial Nominating Commission to submit three nominees to the Governor within 45 days of its first meeting. The Governor has 30 days in which to make a selection. The Utah State Senate has 60 days in which to approve or reject the Governor's selection. To obtain the procedures of Judicial Nominating Commissions and the names of Commission members call (801) 578-3800.

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's Courts in general, or the Third District Court in particular, submit a written statement no later than April 30, 1993, to the Administrative Office of the Courts, Attn: Third Judicial District Nominating Commission.

TERMS OF EMPLOYMENT

A. Benefits:

Salary as of January 1, 1993, is $80,000 annually. • 20 days paid vacation per year • 11 paid holidays • $18,000 term life insurance policy (with an option to purchase $200,000 more at group rates) • Choice of five Medical and Dental Plans. Some plans paid 100% by the State, other requiring a small employee contribution.

Retirement Program: The state contributes an amount equal to 10.32% of judge's salaries toward the retirement system. A percentage of court fees also goes toward the system. Two percent of a judge's salary is deducted as their share of the retirement system costs. Judges are able to retire at any age with 25 yrs. service; at age 62 with 10 years service; or at age 70 with 6 years service. Retirement amount is calculated on the basis of years of service and an average of the last 2 years of salary. Judges receive 5% of their final average salary for each of their first 10 years of service, 2.25% of their average salary for each year from 11 to 20 years of service, and 1% of their final average salary for each year beyond 20 years to a maximum of 75%.

B. Judicial Retention:

Each judge is subject to an unopposed, non-partisan retention election at the first general election held more than 3 years after the appointment. To be retained, a judge must receive a majority of affirmative votes cast. This means that newly appointed judges will serve at least 3 years, but not more than 5 years prior to standing for their first retention election. Judges appointed between Oct. 1992 and Nov. 1993 will appear for the first time on the retention election ballot in 1996.

Following the first retention election, trial court and appellate judges appear on the retention ballot every 6 years. Supreme Court Justices stand for retention every 10 years.

C. Performance Evaluation:

All sitting judges undergo a performance review every two years. Judges not up for retention election can use the performance review results (which are confidential) as a guide for self-improvement. Judges up for retention election are subject to Certification Review by the Judicial Council. Prior to the election, the Council announces those judges who have and (if applicable) have not been certified as meeting the following evaluation criteria:

- *Compliance with case delay reduction standards.*
- *No formal sanctions (and not more than 1 informal sanction) by the Judicial Conduct Commission.*
- *Completion of 30 hours of approved judicial education each year.*
- *Self Certification that a judge is physically and mentally able to serve, and complies with the Codes of Judicial Conduct and Administration.*
- *A satisfactory score on the certification portion of the Council's Survey of the Bar.*
  (Judge's pass/fail scores on the certification section of the bar survey are released to the press with the Council's certification report).

Those wishing to recommend possible candidates for judicial office or those wishing to be considered for such office should promptly contact the Human Resources Division in the Administrative Office of the Courts, 230 South 500 East, Suite 300, Salt Lake City, Utah, 84102. (801) 578-3800. Application packets will be forwarded to prospective candidates.

Administrative office of the courts
230 South 500 East, Suite 300 • Salt Lake City, Utah 84102
(801) 578-3800

Profile of Justice Christine M. Durham

By Elizabeth D. Winter

I. BACKGROUND

Five days before she was to start law school, Justice Durham, her husband and their ten-day-old daughter left Phoenix, Arizona to drive to Boston, Massachusetts. Because it was only a four-day trip they thought they would make it in plenty of time. They didn't plan on the clutch going out on their 1966 Toyota Corolla in Heber, Arizona. Justice Durham ended up missing the first day of school. She found law school to be "a very disorienting experience . . . I kept thinking," she says, "that I was the only one who was disoriented — that someone must have said something that first day to make it all make sense." She didn't realize until years later that there really wasn't a secret that she had missed that first day — everyone else was as disoriented as she was.

Justice Durham's legal practice before she was appointed to Utah's Third District Court was incredibly varied. The variety of Justice Durham's practice experiences was partly due to personal reasons, she says, as she and her physician husband were trying to accommodate their small children and coordinate their careers. When she graduated from law school in Durham, North Carolina, for example, most private law firms would interview female law graduates only for secretarial positions. Rather than commute one to two hours to a larger city, she started her own private practice, accepting criminal defense clients by public appointment, personal injury cases and domestic matters. She remarks now that this was a "terrifying and very educational experience." In addition to her private practice, Justice Durham also taught a legal medicine course at Duke University Medical School and developed a manual on the legal rights of the elderly — a version of which is still in use.

After she moved to Salt Lake City in 1974, Justice Durham developed and taught a course entitled "Medical Jurisprudence" for the University of Utah College of Medicine. She was an adjunct professor at BYU teaching family law and a course on sexual discrimination and the Equal Rights Amendment — pretty progressive for BYU in 1975. In 1974, Justice Durham joined the firm of Johnson, Parsons & Kruse, later to become Johnson, Durham & Moxley, where she practiced general business litigation with an emphasis on securities litigation. "I had always assumed securities fraud cases would be dull and boring," she says, but in practice she says "I discovered that complex and interesting human stories lie beneath the securities-related disputes of small companies."

Justice Durham has loved every type of law that she has practiced. Early on in her career this bothered her — she thought she really ought to be making choices to narrow her focus and become an "expert" in one type of law. What she realized when she decided to seek a position on the bench, however, was that the diverse nature of her practice in law was very beneficial. She says being a judge "is the quintessential law job — judges are the last of the generalists."

Justice Christine M. Durham
Utah Supreme Court

Law Degree:	1971, Duke University School of Law
Appointed:	Third District Court, 1978 Utah Supreme Court, 1982
Experience:	Private practice, Durham, North Carolina, 1971-73; Legal Consultant, Older Americans Resources and Services Program, Duke University, 1971-73; Research Associate and Instructor of Legal Medicine, Duke University Medical Center, 1971-73; Teaching Assistant, Legal Research and Writing, J. Reuben Clark Law School, Brigham Young University, 1973-74; Instructor of Legal Medicine, University of Utah Medical Center, 1974-76; Private practice with Johnson, Durham & Moxley, Salt Lake City, 1974-78; Adjunct Professor J. Reuben Clark Law School, Brigham Young University
Judicial Activities:	Faculty Member, Leadership Institute for Judicial Education (State Justice Institute-funded program for adult development and judicial education) (1990-present); Adjunct Professor, College of Law, University of Utah (Course taught: State Constitutional Law); Member, Council of the American Law Institute; Fellow, American Bar Association; Member Emeritus, Duke Law School Board of Visitors; Member, Education Committee, Appellate Judges Conference, A.B.A. Judicial Administration Division; Member, Utah Judicial Council; Member, Board of Directors, National Center for State Courts

II. VIEWS ON THE LEGAL SYSTEM

The greatest strength of our legal system, according to Justice Durham, is the fact that "citizens and the other branches of government in this country recognize that we have a system of rules and laws and are willing to accept the authority of the courts for nonviolent resolution of disputes." "The legal system keeps arguments out of the streets" she says. The value of this respect for the judicial system became apparent to Justice Durham several years ago when she met with a delegation of legislators from the Soviet Union. Members of this delegation explained to her how in Russia party officials call judges and dictate how they must decide cases pending before them, a system they described as "telephone justice". Unlike the United States system, the Soviet legal system, at that time, had no independent source of power.

The increasing complexity of lawsuits and the complexity of the legal system, according to Justice Durham, are our sys-

tem's greatest weaknesses. Trying a case is so expensive that few "ordinary" people have access to the courts. Justice Durham does not want our legal system to become merely a "dispute resolution system for the wealthy."

Justice Durham acknowledges that several recent cases from the Utah Supreme Court have made it easier for successful plaintiffs to receive attorneys' fees in addition to traditional damages. This trend, she says, "recognizes the reality that access to the legal system requires professional assistance, and that professional assistance is very expensive." Although she does not see Utah moving toward the English system, where the losing party pays regardless of whether that party is the plaintiff or the defendant, she thinks there is a trend to implement rules that allow more people greater access to the courts.

Another problem she sees with our current legal system is that women and minorities are still so under represented. "We are coming to understand," she says, "that education, class, race, gender and background impact the substance of laws." To ensure that laws reflect society, then, "our legal institutions, including our courts, must contain a diverse mix of people."

Justice Durham has a great deal of respect for the judicial system. State court judges have a unique opportunity to develop the common law — particularly in the areas of property and tort. She finds this both exhilarating and challenging. The least appealing aspect of this job, she says, is the isolation from the day-to-day practice of law. On the trial bench she saw hundreds of cases every week so she always had a pretty good sense of what was going on in practice. She tries to combat the risk of becoming so removed from practice that she becomes isolated in her own thinking by staying involved in formal bar and judicial activities.

III. STRATEGY FOR SUCCESS BEFORE JUSTICE DURHAM

When arguing a case to the Utah Supreme Court, Justice Durham advises that you consider it an opportunity for a conversation and discussion about your case. The greatest mistake she sees is lawyers who have prepared a twenty-minute presentation and become flustered or even upset when they are interrupted with questions from the bench.

"Look at oral argument as an opportunity for teaching — with the judges as your students," she advises. Because the judge knows much less about the case than the lawyer does, the job of the advocate is to bring the judge up to speed. Justice Durham often asks about the law and policy considerations of a particular issue. She may ask a question because she suspects one of her colleagues is hostile to a certain position and she wants the best ammunition counsel has to combat that hostile position when the judges meet to discuss the case.

Another pet peeve — lawyers who talk past the red light. When the red light comes on . . . YOUR TIME IS UP!

Justice Durham is surprised by trial lawyers arguing their first appellate case without having reviewed the rules of appellate procedure. After reading the rules, Justice Durham says lawyers should always feel free to call Geoffrey Butler, the Clerk of the Court, with procedural questions. The staff in the front office of the Supreme Court is also very knowledgeable and available to answer procedural questions.

V. OUTSIDE INTERESTS

Justice Durham admits that she is "not very good at playing." She likes to travel, she says, because being away from home "makes it easier to let go and relax." Her outside interests currently revolve to a great extent around her husband and five children. Married twenty-six years, she and her husband still ask each other when they will get to spend more time together. She says she has met many interesting people and has had wonderful opportunities because of her involvement with her children. Involvement with one daughter who has Downs Syndrome, for example, led to her appointment during her law practice years to the Board of Trustees for the Legal Services for the Developmentally Disabled.

Justice Durham says she has a new love in her life — an English springer spaniel. She bought it for her daughter, although Justice Durham is now the one who takes it on daily walks and has enrolled in "puppy kindergarten." Sounds familiar.

Justice Durham also loves to read. Although she says she will "read anything," she prefers good mysteries and novels as well as biography and social science. I wonder if she has read "No Bad Dogs." She may discover it soon.

All You Ever Wanted to Know About the Judicial Council and Then Some . . .

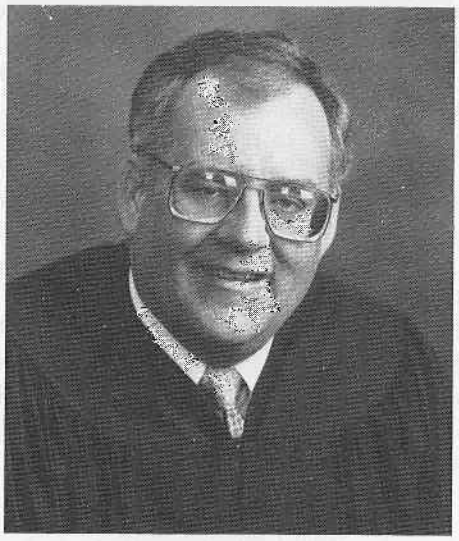
By Judge W. Brent West

Without a doubt, the most interesting aspect of my eight and one half years as a Judge has been my fourteen month tenure on the Utah Judicial Council. It is an exciting, challenging and extremely interesting responsibility. On the other hand, there are times when I wouldn't recommend the job to anybody. The hours are long and the decisions are hard. Trying to represent the best interests of the entire Utah Judiciary can be next to impossible. If it sounds like I'm beginning to develop a split personality, that's probably not far from the truth.

For those who aren't familiar with the Judicial Council, it is the governing body of the Utah Judiciary. It adopts rules that deal with the administration of the courts. It reviews and comments on legislation that effects the Judiciary. It sets policies and gives direction for the Judicial Branch of government. It sets the Judiciary's budget and oversees the day to day operations of the Judiciary.

For history buffs, the Judicial Council was created in 1973. In 1985, the Revised Judicial Article of the State Constitution made the Council a constitutional body with the responsibility to adopt uniform rules for the administration of all the courts in the State of Utah.

The Council consists of thirteen members. All Council members are selected by the various levels of court. The methods of selection vary. The Chief Justice of the Supreme Court presides over the Council. The Appellate Courts have two representatives, one from the Supreme Court and one representative from the Court of Appeals. The District Court has three representatives. The Juvenile, Circuit and Justice Courts have two representatives each. In addition, the Bar Association currently has one ex-officio member on the Council. However, at its December 21, 1992 meeting, the Council voted to propose legislation that would give the Utah Bar Association one full-fledged voting member on Council. That proposed change will go to the legislature this year.



JUDGE W. BRENT WEST was born in Salt Lake City, Utah on May 17, 1951. He was raised in Ogden, Utah. He is married to the former Judy Hill. They have two children.

He graduated from the University of Utah in 1973 with a B.S. in Political Science. In 1975, he graduated with his Juris Doctorate from Southern Methodist University in Dallas, Texas. Upon graduation from law school, he spent 2 years in private practice. He was an assistant Ogden Prosecutor for Ogden City for three years. He was appointed to the Circuit Court Bench in April, 1984 by Governor Scott Matheson.

Judge West is a member of both the Utah State and Weber County Bar Associations. He serves on the Audio-Video Technology Evaluation Committee and the Statewide Transition Committee. He is currently a member of the Utah Judicial Council and serves on the Management Committee.

He was chosen as Circuit Court Judge of the Year for 1989.

He enjoys golf, bridge and softball.

Council members serve three year terms and the terms are staggered. The current Council consists of the following members: Chief Justice Gordon R. Hall, Justice Christine Durham of the Supreme Court, and Judge Pamela T. Greenwood from the Court of Appeals. The District Court representatives are Judge J. Phillip Eves from the 5th District, Judge Ray M. Harding from the 4th District and Judge David S. Young from the 3rd District. The Juvenile Court representatives are Judge Joseph E. Jackson from the 5th District and Judge Leslie D. Brown from the 4th District. Judge William A. Thorne from the 3rd District and myself from the Second District represent the Circuit Court. Judges Jerald L. Jensen and Ken Nielsen represent the Justice Courts. Finally, the Bar Representative is James Z. Davis. State Court Administrator Ronald W. Gibson and his staff act as Secretariat for the Council. It's a lively group, to say the least.

Organizationally, the Council has three Executive Sub-committees. They are the Management Committee, the Policy and Planning Committee and the Liaison Committee. Each Council member is assigned to one of the subcommittees.

The Management Committee receives reports from the various Boards of Judges, standing committees, Council members, judges, outside agencies, etc. The committee approves the Council's agenda and requests to appear before the Council. The committee schedules the Council's meetings during the year. Finally, the Management committee acts on behalf of the Council when necessary; in emergencies, between regularly scheduled Council meetings, etc.

The Policy and Planning Committee coordinates the Council's planning activities. It also promulgates and publicizes the Council's rules and practices.

The Liaison Committee coordinates relations with the Executive Branch, Legislative Branch, State Bar, public, media, etc. It also reviews any legislation that may affect the Judiciary.

The Council also has six standing committees. These include the Information,

Automation and Records Committee, the Uniform Bail Schedule Committee, the Performance Evaluation Committee, the Ethics Advisory Committee, the Justice Court Standards Committee and the Education Committee.

In addition, the Council has and will establish ad hoc committees, advisory committees, task forces, and study groups, to address individual issues that are of concern to the Council. Invaluable information, as well as input, is received from the five different Boards of Judges.

As a general rule, the Council meets monthly, usually for one full day. However, there are times when two or three days are necessary. One example of the need for a multiple day meeting is the Council's planning session held in August of every year. It takes time to develop and review long term plans for the Judiciary. In addition, the budget review process is time consuming.

Meetings are open to the public. Occasionally, the Council will go into Executive Session to discuss "sensitive" issues.

One of the most confusing and misunderstood powers of the Judicial Council deals with its rule-making authority. As of late, the Council's involvement on rule making has generated some controversy. As previously mentioned, the Council is charged with adopting rules for the administration of the Courts of the State of Utah. In adopting these rules, there is a constant friction between rules that are procedural in nature and rules that may have some substantive effect. It is also difficult to generate rules that deal only with the administration of the Courts and don't impact other branches of government or outside agencies.

The Council's ongoing efforts to develop a rule establishing the authority of Court Commissioners is a prime example. How far can the Judicial Council go in developing a rule that regulates the duties and responsibilities of its own employees and yet not invade the province of the Legislature or the Governor? The debate continues!

Admittedly, flow charts and colored graphs would be helpful in illustrating the Council's rule-making process. However, in this article, I'm limited to the written word. I'll try to simplify the rule-making process. Proposed rules are either submit-

ted to the Council or proposed by the Council itself. Proposed rules can come from almost anywhere. The Council receives proposals from the various Board of Judges, individual judges, the administrative staff, and outside agencies. Actually the list of sources is endless.

Once a proposed rule is presented, the Council makes an initial decision to adopt or reject the rule. If the proposed rule is rejected, that's usually the end of the line. However, some proposals may be deferred for further study and then ressurected at a later time. If the Council adopts the proposed rule, the rule is sent out for comment. The comment period is forty five days. The proposed rule is distributed to the Board of Judges, the Governor's Judidicial Liaison, Legislative Research and General Counsel, the Chair of each Supreme Court Advisory Committee, the State Bar Commission, the proponent of the rule and any other interested or appropriate person or group. Once comments are received, then the Council considers them and makes any modifications. If no modifications are made, the Council decides to either adopt the rule or not. If the rule is adopted, an effective date is established. The rule is then published. If the Council makes modifications from the comments it receives, it then decides to either send the modified rule out for further comment or to adopt it with the modifications. The Council can also utilize its emergency powers to adopt a rule immediately if absolutely necessary.

Even though the process is time consuming and sometimes seems endless, it is a deliberate but effective decision making system. Although not perfect, it allows maximum exposure and thoughtful discussion of the proposed rules. One drawback I've noticed, however, is the sheer number of different rules that have to be considered. Since the Council is relatively young, and the Judiciary relatively large, there are numerous topics that have to be considered. With time, the number of rules considered by the Council should decrease. As the Council establishes rules that work and are accepted, the need for new rules and modifications should decline.

In closing, it is important to note that although representatives are selected by their various levels of court, the Council has developed an attitude that Council members have a duty and responsibility to look at the Judiciary as a whole. They are encouraged to see the "big picture."

This approach results in many situations where what is in the best interests of the Judiciary as a whole is not necessarily in the best interests of a particular judge or even a level of court. The current court consolidation process is an excellent example. With the substantial impact that court consolidation has on various levels of court, as well as individual judges or people, we can't lose sight of the "big picture."

Although the approaches may differ, and the methods may vary, all the Council members seem to have the same objective. Everyone wants to create a better Judiciary for the people of the State of Utah. Hopefully, this Council and future Councils will continue to exercise, wisely, the powers and authority entrusted to it to achieve this goal.

Well, enough said. You've probably learned more about Utah's Judicial Council and its workings than you care to — I hope that's the case. It's an excellent institution, even if it does have a tendency to split my personality.

LEXIS® MAXIMUM VALUE PRODUCTS (MVP) FOR SMALL FIRMS OFFERS FLAT MONTHLY RATE

Sole practitioners and small law firms now can conduct unlimited searches in their LEXIS® state law library for one flat monthly rate.

A law office can have a LEXIS® subscription for $135 a month, plus applicable subscription fees, for up to three attorneys. The LEXIS® Maximum Value Products (MVP) program costs $45 a month for each additional attorney.

An MVP subscriber can search all state case law, statutes and the administrative code. Online materials are continuously updated.

Depending on availability in each state, legislative bill tracking, secretary of state corporation filings, tax decisions and law reviews, also may be included in the MVP program.

In addition, MVP subscribers will be able to choose a $45-a-month option for up to three attorneys for unlimited online printing of MVP documents. Another option available is a $30-a-month flat rate for up to three attorneys to search U.S. District Court and applicable U.S. Circuit Court of Appeals cases.

For a limited time only, an introductory offer of $50 for one month's unlimited use is available to all new subscribers.

Mead Data Central, the provider of the LEXIS® service, said the MVP program contains the materials most needed by smaller law offices, as confirmed in a recent survey it conducted.

The survey found that, overall, a typical attorney in a firm of five or fewer lawyers conducts more than six hours of legal research a week, almost 90 percent of it in state materials.

"These research patterns were uppermost in our minds when we developed the MVP program," said G.M. "Mert" McGill, vice president of sales and marketing for Legal Information Services at Mead Data Central.

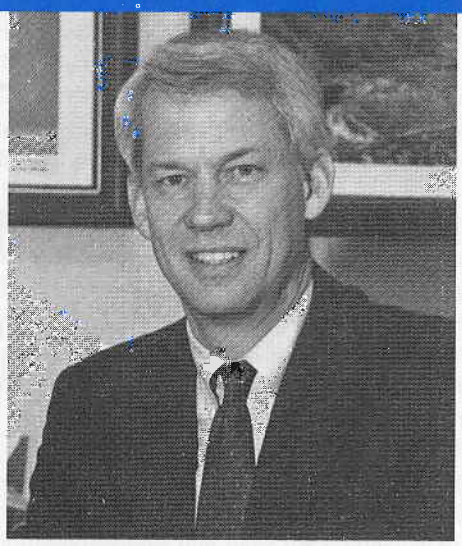
McGill said the MVP program provides a more efficient, cost-effective way to conduct legal research by giving equal access to extensive state law materials.

Complete and current state statutes and codes are the most important legal resource, said the attorneys surveyed.

Currentness is a key attribute of online research and was considered very important to those surveyed when they were asked what types of materials they research.

Although it varies by state, 75 to 90 percent of those questioned said they have access to a personal computer, most often in their office. That means the online service should save a trip to the law library.

To find out more about the MVP program, contact Teri Ekstrom at the Utah State Bar, 531-9095.



1993 General Legislative Session Report

The Cowboy Caucus — Are These Guys For Real?

By John T. Nielsen

In an otherwise somewhat routine legislative session, one of the more intriguing aspects was the emergence of what has now been termed the "Cowboy Caucus." As Representative Met Johnson, Republican from Iron County mused, "We didn't plan this. It just sort of fell together."

What has "fallen together" is a formidable alliance of rural Utah legislators that are tired of Wasatch Front legislators and special interest lobbyists dictating what goes on in rural Utah. With issues such as land use, hunting and opposition to radioactive waste siting, the "Cowboy Caucus" made its influence known.

The past several years at the legislature have been characterized by a flurry of hazardous waste and environment legislation. Although the pace slowed some in the 1993 Session, some issues respecting the environment and waste were addressed by the legislature.

Perhaps as an indication as to how the "new" legislature will react to such issues in the future was action respecting House Bill 191 an attempt by a California waste company to increase fees on the importation of hazardous waste. Not only was the bill rejected, but attempts to amend another essentially consensus bill on hazardous waste was soundly defeated by the House of Representatives.

Nonetheless, there were several matters involving environmental legislation passed by the recent session. They include the following:

HB 53 Indoor Clean Air Task Force. Created a task force to study issues regarding environmental tobacco smoke and to recommend state action regarding those issues.

HB 213 Used Tire Management Amendments. Amended the Waste Tire Recycling Act by amending the amount reimbursed for recycling waste tires and allowing the accumulated fund monies to be used to clean up existing tire piles.

SB 247 Clean Fuel Vehicles. Expanded the loan eligibility to clean fuel vehicle purchases and vehicle refueling equipment.

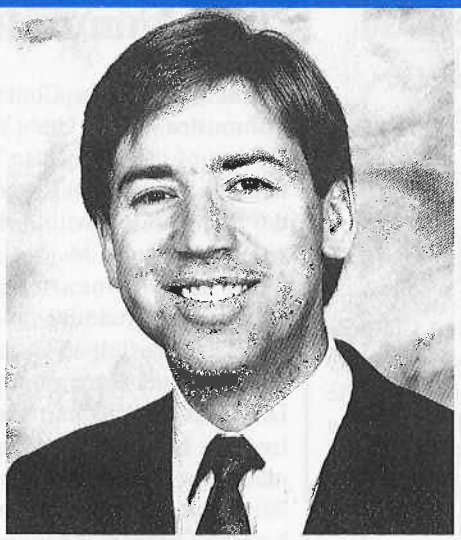
SCR 12 Resolution on Sharron Steel Tailings. The Legislature expressed opposition to any plan to cap the Sharron Steel tailings on site.

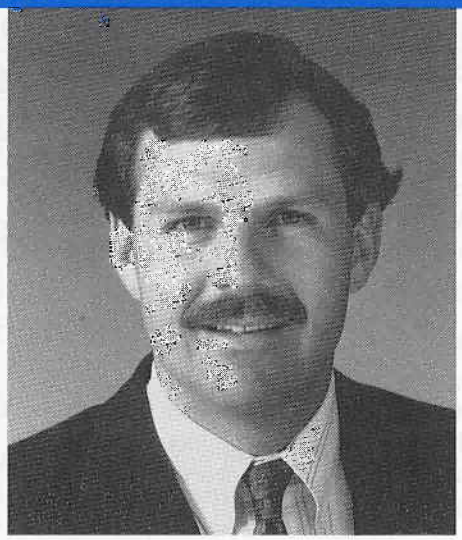
SB 12 Used Oil Management. Revised provisions regarding the management of used oil including the collection of household used oil.

SB 96 Amendments to Hazardous Fees. Amended hazardous waste fee provisions to make such provisions compatible with recent United States Supreme Court pronouncements.

SB 120 Environmental Impairment Financial Remedies. Provided that certain persons holding a security interest in contaminated property are not considered responsible parties.

In summary, rural Utah has finally found its voice and will be a force to be reckoned within the next few years. Environmental and public land special interests can no longer depend upon the Wasatch Front power base to push without significant opposition their interests affecting rural Utah.





A Word of Appreciation

By Keith A. Kelly and Mark S. Webber
President and President-Elect

Recently we had the opportunity of attending the national Young Lawyers' Bar Leadership Development Conference, which is held annually in conjunction with the ABA Mid-Year Meeting. In addition to providing training on how to lead a young lawyer's section, these conferences provide section leaders from around the country the opportunity to discuss successful programs in their sections. We left the conference with feelings of pride about the significant accomplishments of the Utah Young Lawyer's Section and of appreciation for all those young lawyers who have put in hours of volunteer time and effort to boost our Section to the level where it is today.

The Utah Young Lawyers' Section is recognized nationally as a hard working group of lawyers who have been innovative and creative in developing successful programs. This reputation is not based solely upon the efforts of the Section this year, but is based upon the excellent leadership and dedication the Section has had in the past several years. In an effort to recognize a few committees for their excellent work this year (at the risk of offending other committees that have worked equally hard), we would like to highlight some of the significant programs of the Section so far this year.

Needs of the Elderly Committee

This committee is chaired by John McKinley of Richards, Brandt, Miller & Nelson. It has developed and recently distributed throughout the state a legal information videotape series discussing legal issues facing senior citizens. The committee has begun a series of presentations to senior citizen's centers using the videotapes.

Needs of the Children Committee

This committee is chaired by Coleen Larkin Bell who is in-house counsel with Questar Corporation. Within the last year, the committee has developed and distributed throughout the state two pamphlets entitled "Reporting Child Abuse," one is a guide for Utah teachers and the other is a guide for Utah day-care providers. The committee is working on distributing public service announcements dealing with the shaken baby syndrome. In addition, the committee has also sponsored a Salt Lake Golden Eagles hockey night for children participating with the Big Brothers/Big Sisters program.

Membership Support Network

This committee is chaired by Brian King of King & Isaacson. It has sponsored a mock interview program and career fair for Utah law students. The committee has also sponsored a series of outstanding brown bag luncheons.

Law Related Education

This committee is chaired by Bobby Wright of Richards, Brandt, Miller & Nelson. The committee has put on the "People's Law Seminar," a six-week course on various practical aspects of the law that is a part of the Salt Lake adult education program. Also, the committee is continuing the "Law School for Non-Lawyers" program, a lecture series on the law being held at various libraries in Utah. The committee is also continuing a high school guest lecture program, which provides attorney-volunteers as guest lectures in Utah high schools from Ogden to Provo.

HIV Legal Issues

This committee is chaired by Scott Monson of the the RKS Financial Group. Recognized nationally by the Young Lawyers Division of the ABA, the committee has put on a town hall meeting

addressing legal issues facing persons with HIV. The committee has also assembled a panel of volunteers to fill the legal needs of people who are HIV positive.

Rape Crisis

This committee is chaired by Beth Lindsley of the Salt Lake County Attorney's Office. Working with the Salt Lake Rape Crisis Center, this committee has obtained and is distributing sweatsuits and other clothing to be worn home by rape victims after their clothing is taken into evidence during the course of a hospital Code R examination. Also, the committee is preparing a legal-information pamphlet for rape victims, explaining court proceedings and services available to them.

New Lawyers CLE

Chaired by Mark Bettilyon of Ray Quinney & Nebeker, the New Lawyers CLE program has produced and staffed the CLE program for new lawyers in Utah.

Pro Bono

This committee is chaired by Shannon Clark of Dart, Adamson & Kasting. The committee staffs the Tuesday Night Bar program at the Law & Justice Center, a weekly drop-in legal assistance program. Th committee has also engaged in fund raising programs for Salt Lake Legal Aid and Utah Legal Services.

The preceding list describes only part of the work done by members of the Young Lawyers Section. As should be obvious, young lawyers in Utah have made time for many important service projects.

To all young-lawyer volunteers: We appreciate your work!

Softball Enthusiasts

The Pro Bono Committee of the Young Lawyers Section of the Utah State Bar will present the Second Annual **RUN, CHEAT AND STEAL SOFTBALL TOURNAMENT** to benefit Utah Legal Services and The Legal Aid Society of Salt Lake.

Tentatively scheduled for May 22, 1993.

Watch for upcoming details or call Shannon Clark at 521-6383.

Needs of Children Committee Sponsor Night of Golden Eagle Hockey for Big Brothers/ Big Sisters Kids

On Tuesday, January 19, 1993 the Young Lawyers' Section Needs of Children Committee sponsored a "Group Activity Program" (GAP) in association with the Salt Lake Chapter of the Big Brothers/Big Sisters' organization. The idea behind a GAP is for an organization to sponsor and coordinate an activity for young children new to Big Brothers/Big Sisters. The Needs of Children Committee brought 24 children and an equal number of attorney-chaperons together for a night of Golden Eagle hockey fun. The Golden Eagles generously donated the tickets for the game and the needs of Children Committee paid for refreshments for the kids.

Each child was paired with a single attorney for the evening ensuring that each youngster received individual attention. The kids responded enthusiastically (and at times loudly) to the event and walked away with souvenirs such as hockey pucks, miniature sticks and pennants, as well as photos of the children taken with "Icy," the Golden Eagles' mascot.

The most widely consumed food of the night was the ever-popular "sour patch candies" (and not just among the kids, a number of attorney-chaperons were seen scarfing down the confectioneries as well). Topics of discussion ranged from comic books to law practice. Excerpt:

Child: are you a professional hockey player?
Attorney: no, I'm just an attorney.
Child: oh . . . are you any good?
Attorney: I'd like to think so.

There are many children throughout the Salt Lake area who desire the companionship offered by Big Brothers/Big Sisters. If you are interested in participating or learning more about Big Brothers/Big Sisters, you may call them at 265-1818. If you would like to learn more about the Young Lawyers' Section you may contact Colleen Larkin Bell (534-5556), Thom Horgas (536-6653) or Mike Tomko (536-6718).

Community Services Committee

The Chair of the Community Services Committee of the Utah Young Lawyers Section of the Utah State Bar, would like to invite any and all of those members of the Bar who fall within the definition of "young lawyer" to join this extremely worthwhile committee. Projects have included maintaining (and encouraging) the Bar's participation in the Tribune's Sub-for-Santa Program and IHC's Blood Drive, as well as participation in Judge Lewis' Literacy Program. There are numerous programs the Committee would like to pursue, such as providing meals at homeless shelters. These programs have at least two major benefits: (1) they have nothing to do with law; and (2) they provide direct and tangible help to those who are in need. All interested people should contact Harry Caston, at 521-4135.

Young Lawyers Section Sponsors Law Day Information Fairs

In connection with Law Day, which will be held on May 1, the Young Lawyers Section is sponsoring legal information fairs at three malls in Salt Lake County and at malls located in Logan, Ogden, Provo and St. George. At those Law Day Fairs, members of the public will have a chance to meet with Young Lawyers to discuss their legal problems at no cost, and to obtain brochures and other information about common legal problems and issues. The Young Lawyers will also provide information regarding the availability of legal resources in the community, including free legal services and the Utah State Bar Association's lawyer referral services.

If you have any questions concerning the Law Day Legal Information Fairs, contact David W. Steffensen, Chairman of the Young Lawyers Section Law Day Committee, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84111, Telephone (801) 521-9000.

Services to Rape Victims Committee

The Services to Rape Victims Committee is just one of the many projects the Young Lawyer's Section is involved in. The committee's main goal last year was to provide sweatsuits to rape victims at the hospital after their clothing had been taken from them for evidence. Generous donations from Jones, Waldo, Holbrook & McDonough, Shopko, Walmart, ZCMI, Smith's and private attorneys were received. The goal of 250 sweatsuits was reached after Pam Wall, owner of JamSey, Inc., contacted one of the committee members. JamSey alone donated six cartons of clothing. Donations to this worthy project were greatly appreciated.

This year, a pamphlet will be published and placed with each sweatsuit. The pamphlet will explain necessary court proceedings after a person is raped, and will also include a list of counselors who provide services to victims. Additional clothing provided to the victims include underwear and slippers, as well as the sweatsuits. The project has also expanded beyond Salt Lake County. Cathy Kelly, a law student at Brigham Young University, has worked hard at establishing a similar program in Utah County.

Monetary contributions and sweatsuits from the community continue to be received. Unfortunately, sexual assaults are occurring with greater frequency and the need for sweatsuits increases each year. It is, however, a great comfort to the victim to be able to wear something clean and new home from the hospital.

The following advertisement is the corrected version of the one now running in the 1993 Capitol Legal Directory

SALT LAKE LEGAL SECRETARIES ASSOCIATION
A Chapter of the National Association of Legal Secretaries (NALS)

SLLSA
Salt Lake Legal Secretaries Association

Legal Support Staff committed to the delivery of quality legal services through continuing education and increased professionalism.

Professionalism + Education = Excellence

For information regarding continuing legal education, certification programs, and membership benefits, please contact:

Alexa S. Baxter, Certified PLS	532-1234(Days)
Marsha L. Gibler, Certified PLS	250-7283 (Evenings)
Dawn M. Hales, Certified PLS	322-2516(Days)
Cathy M. Winkelman, Certified PLS	943-7292(Evenings)

Please note a correction in the Directory on page 27 under County Attorney's. The Davis County Attorney's correct phone number is 451-4300. The address is 800 W. State Street, Farmington - 84025.

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $5.00. Fourteen opinions were approved by the Board of Bar Commissioners between January 1, 1988 and March 11, 1993. For an additional $2.00 ($7.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1993.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($5.00 each set)
	Ethics Opinions/Subscription list	_____ ($7.00)

Please make all checks payable to the Utah State Bar. Mail to: Utah State Bar Ethics Opinions, ATTN: Leslee Ron, 645 South 200 East #310, Salt Lake City, Utah 84111.

Name (please print) _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

Book Review

Earth in the Balance

By Senator Al Gore
385 pages

Reviewed by Betsy L. Ross

I was skeptical (okay, call it supercilious) that a politician could write anything worth reading, anything that would have a soul to it at all (sure as I was that any politician's soul has already been promised, like Faust, to the devil). But then Senator, now Vice-President, Al Gore's "Earth in the Balance" is not only worth reading, but exudes a deeper understanding of the balance of things than one might find in some religious discourses. I was captivated by jewels of sentences like this:

> Now, in midlife, as I search through layers of received knowledge and intuited truth woven into my life, I can't help but notice similar layers of artifice and authenticity running through the civilization of which I am a part.

This book is a plea for your understanding and mine, for your conversion and mine, and ultimately for your action and mine. Gore quotes from W.H. Murray:

> Until one is committed there is hesitancy, the chance to draw back, always ineffectiveness. Concerning all acts of initiative . . . there is one elementary truth, the ignorance of which kills countless ideas and splendid plans: that the moment one definitely commits oneself, then providence moves too.

Gore's own words deserve all of the space of this brief review. I could neither improve nor adequately or as eloquently comment upon them. Witness his trenchant description of why we are tempted to ignore the environmental destruction we witness daily:

> If the problem portrayed . . . is one whose solution appears to involve more effort or sacrifice than we think we can readily imagine . . . we are tempted to sever the link between stimulus and moral response. Then, once a response is deemed impossible, the image that briefly caused us to consider responding becomes not just startling but painful. At that point, we begin to react not to the image but to the pain it now produces, thus severing a more basic link in our relationship to the world: the link between our senses and our emotions. Our eyes glaze over as our hearts close. We look but we don't see. We hear but refuse to listen.

This book is not a liberal's bastion of environmental purity, issuing the beacon that all technology must cease, staking an extreme camp and thereby forcing others into an opposing camp. Gore recognizes the naivete of that approach, as he writes: "Others hold that only a drastic reduction of our reliance on technology can improve the conditions of life — a simplistic notion at best." Gore advocates, rather, thought and balance above all else — balance in self and in the earth.

"Earth in the Balance" explores the major environmental dangers of today — global warming, ozone depletion, the loss of living species, deforestation, the greenhouse effect — explaining them in a very understandable, lucid fashion. Gore has researched the area extensively over the past fifteen years as he as led the fight in Congress to bring attention to the global environment. The bibliography is extensive and varied, from the philosopher Merleau-Ponty's *Phenomenology of Perception*, to environmentalist/historian Marc Reisner's *Cadillac Desert: The American West and its Disappearing Water*, to Pope John Paul II's "The Ecological Crisis a Common Responsibility," a message given by the Pope for the Cele-

bration of the World Day of Peace, January 1, 1990.

Earth in the Balance explains the issues, but ultimately it is important reading for its proffer of an environmental Marshall Plan. Gore suggests five strategic goals and discusses each in depth, including a separate action for each on the U.S. role. The goals are (1) the stabilizing of world population, (2) the rapid creation and development of environmentally appropriate technologies, (3) a comprehensive and ubiquitous change in the economic rules of the road by which we measure the impact of our decisions on the environment, (4) the negotiation and approval of a new generation of international agreements, and (5) the establishment of a cooperative plan for educating the world's citizens about our global environment.

The warnings of this book are prescient here in Utah, where, acting in accordance with an unknown agenda, the governor urged the dismantling of the Utah Division of Energy in this year's legislative session. The division of Energy, given legislative approval only two years ago, and hailed as one of the most efficient and well-managed agencies in state government, has succumbed to political bartering and special interests much like Gore describes with regard to the issue of global warming:

> Twelve years later, as a young congressman, I invited Professor Revelle to be lead-off witness at the first congressional hearing on global warming. Remembering the power of his warning, I assumed that if he just laid out the facts as clearly as he had back in that college class my colleagues and everybody else in the hearing room would be just as shocked as I had been — and thus galvanized into action. Instead, I was the one who was shocked. Not by the evidence: it was even more troubling than I had remembered it. This time I was startled by the reaction on the part of some smart people who I thought should know better. But the unrestrained burning of cheap fossil fuels has many ferocious defenders, and this was my first encounter, though hardly the last, with the powerful and determined opposition to the dangerous truth about what we are doing to the earth.

Here in Utah is an example of the poverty of spirit to which Gore alludes our future is being held ransom.

Let me end with Gore's own words — a warning:

> Too often we are unwilling to look beyond ourselves to see the effect of our actions today on our children and grandchildren. I am convinced that many people have lost their faith in the future, because in virtually every facet of our civilization we are beginning to act as if our future is now so much in doubt it makes more sense to focus exclusively on our current needs and short term problems. This growing tendency to discount the value of investments made for the long term — whether of wealth, effort, or caution — may have begun with the realization that nuclear weaponry had introduced a new genesis, our willingness to ignore the consequences of our actions has combined with our belief that we are separate from nature to produce a genuine crisis in the way we relate to the world around us.

Foundation Funds at Work

Utah Legal Services

Grant Recipient Profile

Anne Milne
Director

Before the Bar Foundation began the IOLTA program there were no Utah Legal Services office in Price. ULS has received IOLTA funds from the Bar Foundation since 1985 to support a paralegal in Price who serves low-income persons living in Carbon, Emery, and Grand counties.

ULS provides civil services to low-income clients statewide, focusing on assisting persons who have problems with "safety net" programs which provide their only income and health care, as well as landlord/tenant, family law and consumer problems. Because of the nature of the public entitlement programs, ULS specializes in providing representation in administrative forums such as Social Security hearings and fair hearings in the state social services system for programs including Medicaid, unemployment compensation, AFDC and Food Stamps.

Many people in Southeastern Utah have legal problems obtaining and maintaining these public entitlements. It was impossible to open a new office to serve these low-income clients without additional funding. The Bar Foundation was asked to use IOLTA funds to meet this need by funding a paralegal who could represent clients in administrative forums under the supervision of a staff attorney.

The paralegal, Chon Kandaris, has focused on assisting clients with public entitlement matters. The majority of her cases during the last year have involved the pursuit of Social Security or Supplemental Security Income disability benefits for residents of Southeastern Utah who are too disabled to work and lack any other means of self support. She has represented clients during the last year in appearances before Social Security Administration Office of Hearings and Appeals in both Grand Junction, Colorado, and Salt Lake City, traveling 3,000 miles to attend hearings.

Chon Kandaris, Utah Legal Services Paralegal in Price, Utah

As a result of Chon's work last year a disabled woman was finally awarded Social Security benefits four years after her application was filed. Chon is currently preparing for a hearing for a 10 month old hemophiliac child who has twice been denied SSI benefits, but many of her clients are older persons who have become disabled after working for many years.

The need for and support of the client community for this service is demonstrated in the increasing numbers of calls for assistance she receives each month. She consulted with 300 clients during the last year. ULS has the donated services of students from the College of Eastern Utah through the Turning Point program and participants in the Emergency Work Program. These programs help single parents prepare for entry into the job market, and have also provided contacts with a portion of the client community most in need of legal services.

Chon refers cases which are not public entitlements to the lawyer referral program of the Utah State Bar, staff attorneys of ULS or attorneys who have volunteered their services pro bono.

Chon Kandaris (right) and Michael Daniel, trainee in the Emergency Work Program

CLE CALENDAR

BANKRUPTCY PRACTICE — NLCLE WORKSHOP

This is another seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: April 15, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

ETHICS & PROFESSIONALISM FOR THE PRACTICING LAWYER

CLE Credit: 6 CLE hours of Ethics credit
Date: April 15, 1993
Place: Utah Law & Justice Center
Fee: $190 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

1993 PENSION PRACTICE UPDATE & REVIEW OF CURRENT REGULATIONS

CLE Credit: 4 hours
Date: April 29, 1993
Place: Utah Law & Justice Center
Fee: $145 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

ANNUAL CORPORATE COUNSEL SECTION SEMINAR

CLE Credit: 4 hours
Date: May 6, 1993
Place: Utah Law & Justice Center
Fee: Corporate Counsel Section Members, $40.00 – after April 29, 1993, $50.00. Nonmembers, $50.00 – after April 29, 1993, $60.00.
Time: 7:30 a.m. to 12:00 noon

DIRECTORS' AND OFFICERS' LIABILITY

CLE Credit: 4 hours
Date: May 6, 1993
Place: Utah Law & Justice Center
Fee: $160 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

JOINT TRUSTS VS. SEPARATE TRUSTS

CLE Credit: 1 hour
Date: May 11, 1993
Place: Utah Law & Justice Center
Fee: $7 – Call to RSVP
Time: 12 noon to 1:00 p.m.

HAZARDOUS WASTE AND SUPERFUND 1993: THE LATEST DIRECTIONS FROM A NEW ADMINISTRATION

CLE Credit: 4 hours
Date: May 13, 1993
Place: Utah Law & Justice Center
Fee: $150 plus $6 MCLE Fee
Time: 9:30 a.m. to 2:00 p.m.

SIXTH ANNUAL ROCKY MOUNTAIN TAX PLANNING INSTITUTE

CLE Credit: 12 hours
Date: May 13 & 14, 1993
Place: Utah Law & Justice Center
Fee: $195 Early registration by April 23, 1993
$225 Late registration after April 23, 1993
Time: 8:00 a.m. to 5:00 p.m., May 13,
8:00 a.m. to 12:00 noon, May 14

PROBATE — NLCLE WORKSHOP

This is another seminar designed for those new to the practice and those looking to refresh their practice skills. No prior notice will be provided to early registrants, please call the Bar if you have any questions about your registration. Please provide the Bar 24 hour cancellation notice if unable to attend.

CLE Credit: 3 hours
Date: May 20, 1993
Place: Utah Law & Justice Center
Fee: $30
Time: 5:30 p.m. to 8:30 p.m.

FAMILY LAW SECTION MAY SEMINAR: "OTHER PEOPLE'S MONEY" – INCOME (YOURS & THEIRS ISSUES IN FAMILY LAW

CLE Credit: 6.5 hours CLE credit, including 1.5 in ETHICS
Date: May 27, 1993
Place: Utah Law & Justice Center
Fee: $110 Early registration by May 20, 1993
$125 Late registration after May 20, 1993
Time: 8:00 a.m. to 4:30 p.m.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

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

Name Phone

Address City, State, ZIP

Bar Number American Express/MasterCard/VISA Exp. Date

Signature

Please send in your registration with payment to: **Utah State Bar, CLE Dept., 645 S. 200 E., S.L.C., Utah 84111.** The Bar and the Continuing Legal Education Department are working with Sections to provide a full complement of live seminars. Please watch for brochure mailings on these.

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 lease 48 hours in advance. Returned checks will be charged a $15.00 service charge

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

CLASSIFIED ADS

For information regarding classified advertising, please contact (801) 531-9077. Rates for advertising are as follows: 1-50 words — $10.00; 51-100 words — $20.00; confidential box numbers for positions available $10.00 in addition to advertisement.

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment which is not received with the advertisement will not be published. No exceptions!

INFORMATION WANTED

LOST WILL: Myrtle B. Carey died on January 16, 1993. The conservator, West One Bank, has in its possession a copy of a will drafted for Mrs. Carey in approximately 1957. If you know of the whereabouts of the original of this will, or any other will made for Myrtle B. Carey, please contact S. Robert Bradley, Esq., Van Cott, Bagley, Cornwall & McCarthy, P. O. Box 45340, Salt Lake City, Utah 84145, telephone number (801) 532-3333.

BOOKS FOR SALE

USED LAW BOOKS — Bought, sold and appraised. Save on all your law book and library needs. Complete Law Library acquisition and liquidation service. John C. Teskey, Law Books/Library Services. Portland (503) 644-8481, Denver (303) 825-0826 or Seattle (206) 325-1331.

CORPUS JURIS SECUNDUM — Complete current set with all Supps and Updates. For more information please call (801) 531-8300.

OFFICE EQUIPMENT

EXECUTIVE DESK $700.00 (New cost $1,400). Will trade for trial services of new admittee or beginning practitioner. Call (801) 355-5696.

OFFICE SHARING/SPACE AVAILABLE

Deluxe office space at 7821 South 700 East, Sandy. Space for two (2) attorneys and staff. Includes two spacious offices, large reception area, conference room/library, file storage, convenient parking adjacent to building. Call (801) 272-1013.

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

ATTRACTIVE OFFICE SPACE — Union Park area (1200 East 7000 South), next to Holiday Spa. Office sharing with five other attorneys. Secretarial or word-processing services available, or space for your own secretary. Copier, telephone, fax and conference room. Close freeway access to entire valley. Contact Wynn at (801) 566-3688.

Large corner office with a lovely view available at 310 South Main Street, Suite 1330, with 8 other attorneys. Office has secretarial pace for your own secretary, receptionist, reception area copier, telephone, fax machine, library and conference rooms available. Contact Sharon at Dart, Adamson & Donovan (801) 521-6383.

POSITIONS SOUGHT

Utah Native, graduating in top half of his class from the University of Idaho College of Law, is looking for an associate's position in Utah. Experience doing civil and misdemeanor criminal cases under a limited license to practice in Idaho. Please contact Todd Cannon at (208) 882-5441.

Ex-Utah resident practicing in Washington, D.C. area, seeks position in Salt Lake/Utah County area. Eight years Food and Drug law experience. Served as Associate Chief Counsel for U.S. Food and Drug Administration (FDA) through December 1986, then entered private practice specializing in Food and Drug Law related areas (drugs, devices, supplements etc.). Practice included serving as FDA liaison (submissions and enforcement issues), consulting clients on FDA regulatory compliance, government relations and legislative initiatives on Capitol Hill. Licensed in Utah since 1979. Please reply to Utah State Bar, Box V-4, 645 South 200 East #310, Salt Lake City, Utah 84111.

SERVICES

CLOSING ARGUMENTS WIN CASES. Enjoy the benefit of an experienced writer. Most attorney's lack the time to prepare that special heart-felt human appeal that juries respond to. References available. Rates: $15.00 per hour. Call Janice Hubbard (801) 467-2117.

PART-TIME/CONTRACT WORK in writing/research sought by attorney with excellent credentials (Moot Court, law review, Order of the Coif, Phi Kappa Phi) and background in civil litigation and civil/criminal appellate work. For discovery, motions, research, or brief writing, call M. Boudreau at (801) 466-6531.

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Up until now legal research included using expensive on-line services or searching scores of legal indexes and case reference materials. Now LegaSearch brings to you the power of the "on-line" services for the price of printed text.

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Say good-bye to incomplete, and cumbersome indexes. With LegaSearch every word is indexed and can be accessed in seconds. LegaSearch consistently delivers fast, reliable answers to your legal research questions.

LegaSearch contains more law and legal research features on one single CD than any other CD-ROM publisher. What's more, LegaSearch is hundreds less than the Utah CD-ROM competition. Now, not only can you search your state law in one pass, but an entire region of law as well!

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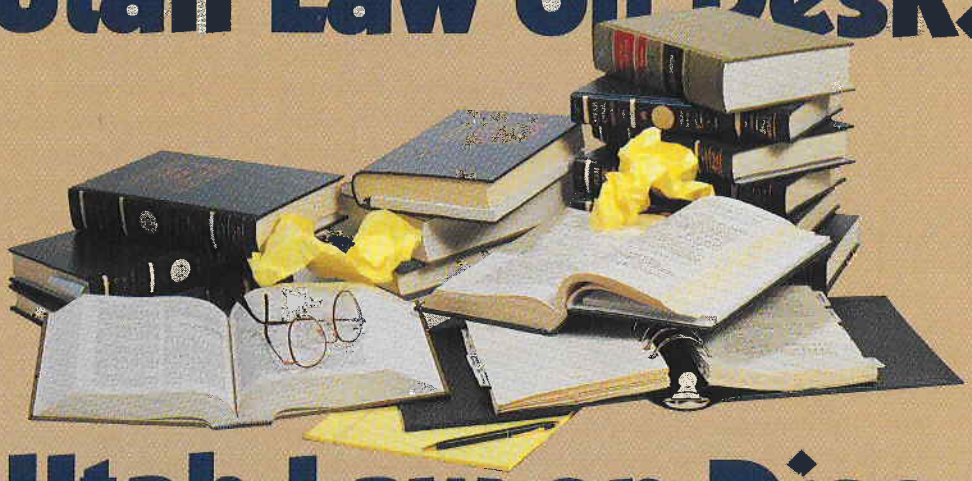

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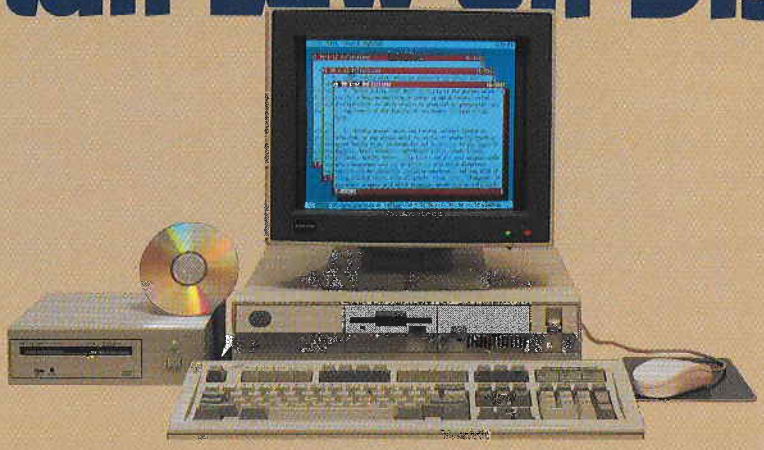

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