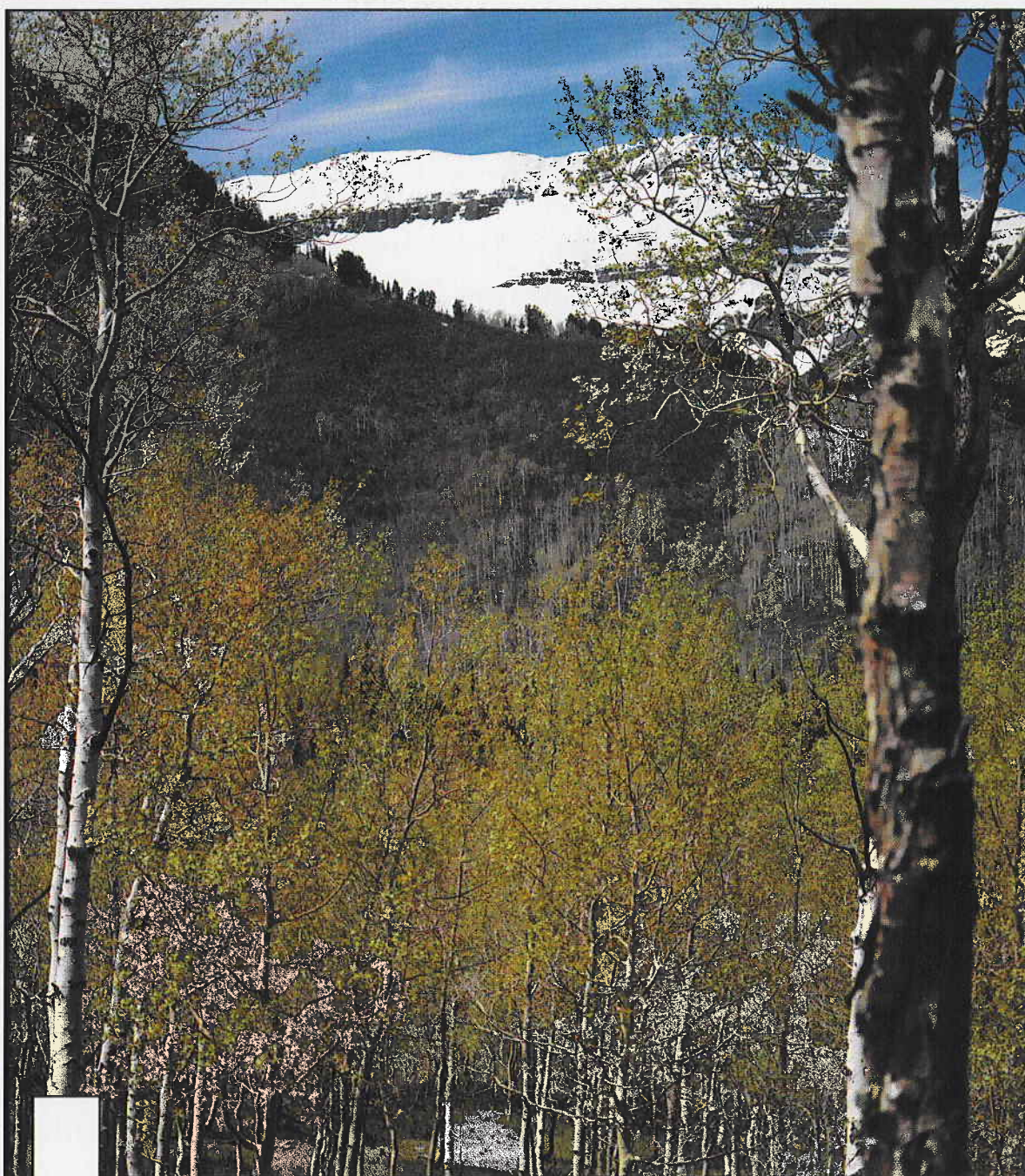


UTAH BAR JOURNAL

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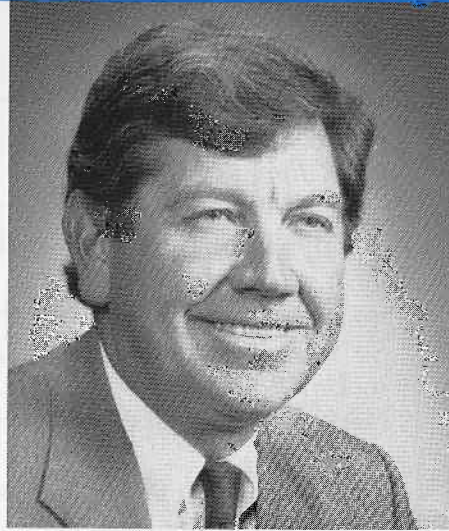
COVER: View of Mt. Timpanogos taken by Harry Caston, Esq. of McKay, Burton & Thurman.

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Our Legislature at "Work"

By H. James Clegg

The legislature recessed right on schedule, to the relief of some and to the disappointment of others. Democracy at work is sometimes frightening, and often an unpredictable, process.

The following bills were followed closely by the Bar:

JUDICIAL NOMINATING COMMISSIONS

As reported last month, Governor Leavitt feels the appointment of judges should not be apolitical. While we feel that the judicial appointments can, perhaps even should, reflect philosophies of a sitting governor, we fret over the possibility that merit selection will be compromised in favor of cronyism.

We were unable to persuade the governor to leave the system alone. Under the existing scheme, the Bar appoints two of the seven commissioners in each judicial district and two on the appellate commission; one lawyer is of the same political party as the governor and the other is not. The governor appoints four lay citizens, two from the governor's party and two who are not. The Chief Justice sits as a matter of right as chair and is a voting member.

Senator Beattie introduced a bill in the Senate which made the following changes: (1) the Chief Justice sits *ex officio*, without

a vote, (2) two lawyers appointed by the governor *after consultation with* the Bar, (3) up to two additional lawyers, one of whom could be a judge, (4) three or four lay citizens to make a panel of seven voting members.

This was unacceptable to the Bar Commission. It felt that a sham was created, giving the illusion but not the reality of a merit-selection system. The Bar felt that, under this scenario, its proper role was to be outside, free to comment on and, where needed, criticize the governor's appointments to the commissions, the commissions' nominations to the governor and the governor's ultimate appointments.

The bill was assigned to the Senate Judiciary Committee and was to be heard on Friday, February 18. The Bar was present and hoped to be heard. It appeared that a majority of the Committee members were sympathetic to our position and that the bill might not be voted out of committee.

No hearing was held; instead, we were told the bill had been pulled for amendments. Those amendments deleted the "consultation" language and substituted a plan whereby the Bar submits to the governor a list of six lawyers (four in Districts 1 and 5-8), three from the governor's party and three who aren't, from which the governor selects two members. The governor may reject a list and require a substitute.

It appeared to us that the members of the Judiciary Committee believed the amendments were a good compromise and would vote the bill out over our objections, if made.

While we do not believe this scheme is as good as the one it replaces, we feel it is better than being outside the process. Thus, the Bar supported the amended legislation. Arguments similar to those we had prepared were given by Common Cause, but the bill was voted out of Committee and passed by the Senate 18-9. Two-thirds was significant because, if the House also approved the bill by that fraction, it would become effective immediately. The House passed the bill, but not by two-thirds, so the act will become effective sixty days after the session's end.

This should allow sufficient time for considered nominations to be made by the Bar to the governor. If you have an interest in serving as a Judicial Nomination Commissioner, please advise the Bar Commission. There is additional information in this issue on this subject.

COLLECTION PRACTICE

As mentioned two months ago, the Collection Law Task Force has been very active. A committee of the Young Lawyers' Division prepared comprehen-

sive legislation to license and regulate collection agencies. However, the Task Force believed it was too late in the session to have much chance of passing, so it was decided to hold off until 1995. In the meantime, however, it believed that an existing but unenforced criminal statute should be amended to provide a penalty and encourage enforcement. Senator Barlow sponsored the bill believing, as we do, that it was a consumer-protection matter.

Although this seemed a small step to us, the collection agencies opposed the amendment vigorously, obtaining support in surprising places. One of our members, chairing the committee to which the bill was assigned, accused Senator Barlow of sponsoring a lawyer-protection bill. This in itself is noteworthy as Senator Barlow had never before been charged with being friendly to the Bar. This bill apparently did not pass.

JUDICIAL SALARIES

There was a bill to give all state employees, including judges, a salary

increase of, I believe, 4.5%. On the Friday before the session ended, the raise for judges was deleted. After a real effort against the clock, it was reinstated to the 3% level, consistent with the raises given elected officials.

INSURANCE FRAUD

While no one wants to support or advocate insurance fraud, lawyers were caught up in a wide-reaching bill. The bill as filed was innocuous, providing for civil and criminal penalties against folks who make fraudulent insurance claims. Nothing too bad about that concept. However, some amendments were added to make the lawyers who assist in the making of false or *incomplete claims* which adversely impact an insurer liable as a perpetrator. This would still not be too bad, so far as false claims go, provided the lawyer knew of the falsity. Incompleteness is another matter; how many claims are "completely complete" at the time of initial demand?

Further, the finding of fraud was to be made by the executive branch, taking prose-

cution of such matters out of the Office of Bar Counsel and out of the court system, at least until appealed into court from an adverse agency ruling.

Bar Counsel Steve Trost worked with Representative John Valentine in putting the bill on hold over a weekend and the bill was amended to be acceptable to the Bar. In one of those legislative upsets, the amendments were stripped on the floor of the House and the bill passed that body in its objectionable form.

The Senate passed the bill in its final amended form, and we are awaiting its printing to determine the potential impact.

ALTERNATIVE DISPUTE RESOLUTION

This bill, championed by Hardin Whitney and the Court Administrator's Office, to encourage ADR also passed. I'm not aware of any changes after Bar Commission endorsement. Din had to do a great deal of explaining (sometimes lobbying) himself. Great work, Din!

MEDICAL MALPRACTICE

CASE EVALUATION • EXPERT TESTIMONY

- Addiction Medicine
- Adolescent Medicine
- Allergy
- Anesthesiology
- Blood Banking
- Cardiology
- Cardiovascular Surgery
- Clinical Nutrition
- Colorectal Surgery
- Critical Care
- Cytology
- Dentistry
- Dermatology
- Dermatological Surgery
- Dermatopathology
- Dysmorphology
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- Emergency Medicine
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- Epidemiology
- Family Practice
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- Gastroenterology
- General Surgery
- Geriatric Medicine
- Gynecologic Oncology
- Gynecology
- Hand Surgery
- Hematology
- Immunology
- Infectious Diseases
- Internal Medicine
- Interventional Neuroradiology
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- Mammography
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- Medical Licensure
- Neonatology
- Nephrology
- Neurology
- Neuropsychology
- Neuroradiology
- Neurosurgery
- Neurotology
- Nursing
- Obstetrics
- Occupational Medicine
- Oncology
- Ophthalmology
- Orthodontics
- Orthopaedic Surgery
- Otolaryngology
- Otology
- Pain Management
- Pathology
- Pediatrics
- Pediatric Allergy
- Pediatric Anesthesiology
- Pediatric Cardiology
- Pediatric Critical Care
- Pediatric Emergency Medicine
- Pediatric Endocrinology
- Pediatric Gastroenterology
- Pediatric Hematology
- Pediatric Infectious Diseases
- Pediatric Immunology
- Pediatric Intensive Care
- Pediatric Nephrology
- Pediatric Neurology
- Pediatric Nutrition
- Pediatric Oncology
- Pediatric Otolaryngology
- Pediatric Rheumatology
- Pediatric Urology
- Pharmacy
- Pharmacology
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- Plastic Surgery
- Podiatric Surgery
- Psychiatry
- Psychopharmacology
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- Pulmonary Medicine
- Quality Assurance
- Radiation Oncology
- Radiology
- Reconstructive Surgery
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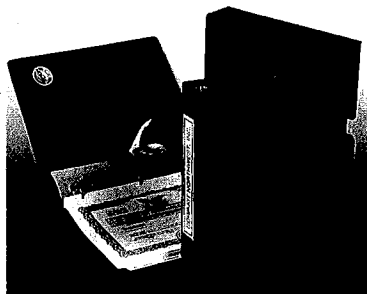
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COURTS COMPLEX

For a minute or two, it actually appeared possible that the legislature could bond \$64 million this year to build the entire complex in one step. The "professionals" argued that this is the perfect time to borrow for building construction in view of the state's highly favorable bond ratings and the low interest rates. This argument to include funding in the revenue bond appeared to sell in the committees and the Senate but not in the House and not with the governor. He would prefer to finance this project through surplus or the general obligation bond but not a revenue bond. There was a further argument: it is not customary and is poor policy to bond a project which has not been reduced to blueprints and detailed cost analysis.

However, a great step forward was achieved. Over \$3.75 million was appropriated for design and Governor Leavitt stated support in financing the project, for single-phased construction, in the 1995 session.

The downside for the Bar and our clients is that filing fees for civil and domestic matters will be increased. The Bar Commission, in a difficult decision, supported this increase, believing it essential to obtaining adequate facilities and liking even less the alternative of courtroom user fees.

SULLIVAN DOCTRINE

One of the hottest subjects of debate this session concerned the Supreme Court decision of *Sullivan v. Scoular Grain Co., et. al.* There it was held that the negligence of an employer and fellow employees should be apportioned by a jury, even though the employer is immune from further liability if workmen's compensation benefits were paid. The proportion of fault found is not chargeable against the non-immune defendants.

Competing bills were introduced, one by Senator Beattie to legislate the *Sullivan* rule with small modification and one by Senator Barlow to legislatively reverse *Sullivan*. Senator Barlow's followers were adamant that the decision did not reflect the legislative history of the 1986 Utah Liability Reform Act. Senator Beattie felt that, irrespective of that, the *Sullivan* result was the fair one, consistent with the principles of the Liability Reform Act.

The Barlow bill passed. Then the Beattie bill garnered support, even among those who had voted for the Barlow bill.

At almost the final day, Governor Leavitt

used his influence to broker a compromise. I have not seen the final language but understand that there is a threshold at 40%; if an employer's fault is less than 40% of the total, it is disregarded; if more, it is charged against the amount collectible from the remaining defendants.

I followed the debate on these bills with special interest. The Bar did not take a position favoring or opposing either of them. However, I had represented one of the defendants in the *Sullivan* case and was personally persuaded that it was "fair", that being a relative term and considering the alternative.

Further, Brent Wilcox was very involved in lobbying for the Barlow bill in behalf of the Utah Trial Lawyers Association and we discussed the possibility of a compromise along the same lines as ultimately occurred. At that time, Brent believed there was no sentiment to discover a middle ground. I'm pleased one was found and hope it works out in practice.

By the time you read this, the deadline for filing to run for the state legislature will have passed. I really hope that some of you have chosen to do so. We very much need law-trained legislators who understand, revere and can explain such concepts as due process, separation of church and state, "takings" and equal protection. The Office of Legislative Counsel does a fine job but my bet is that it joins in this hope of having a larger number of lawyers in next year's legislature.

Taking it a step further, I hope that lawyers will seriously consider contributing to the campaign efforts and finances of fellow lawyers, regardless of district or political party. The Bar cannot, of course, do so as an institution but this shouldn't discourage, indeed it should encourage, action by individuals.



