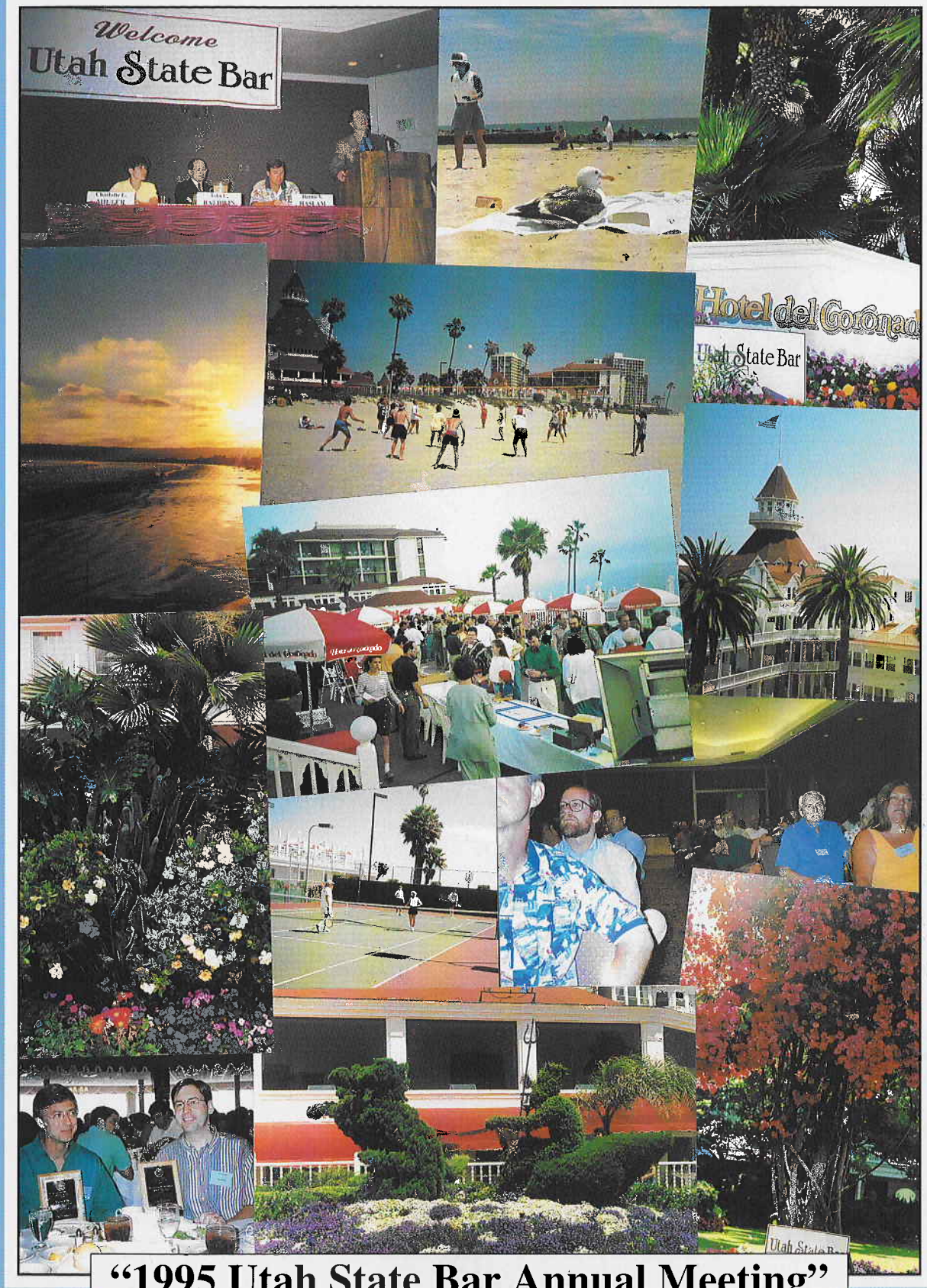
UTAH BAR JOURNAL

Vol. 8 No. 7 August/September 1995



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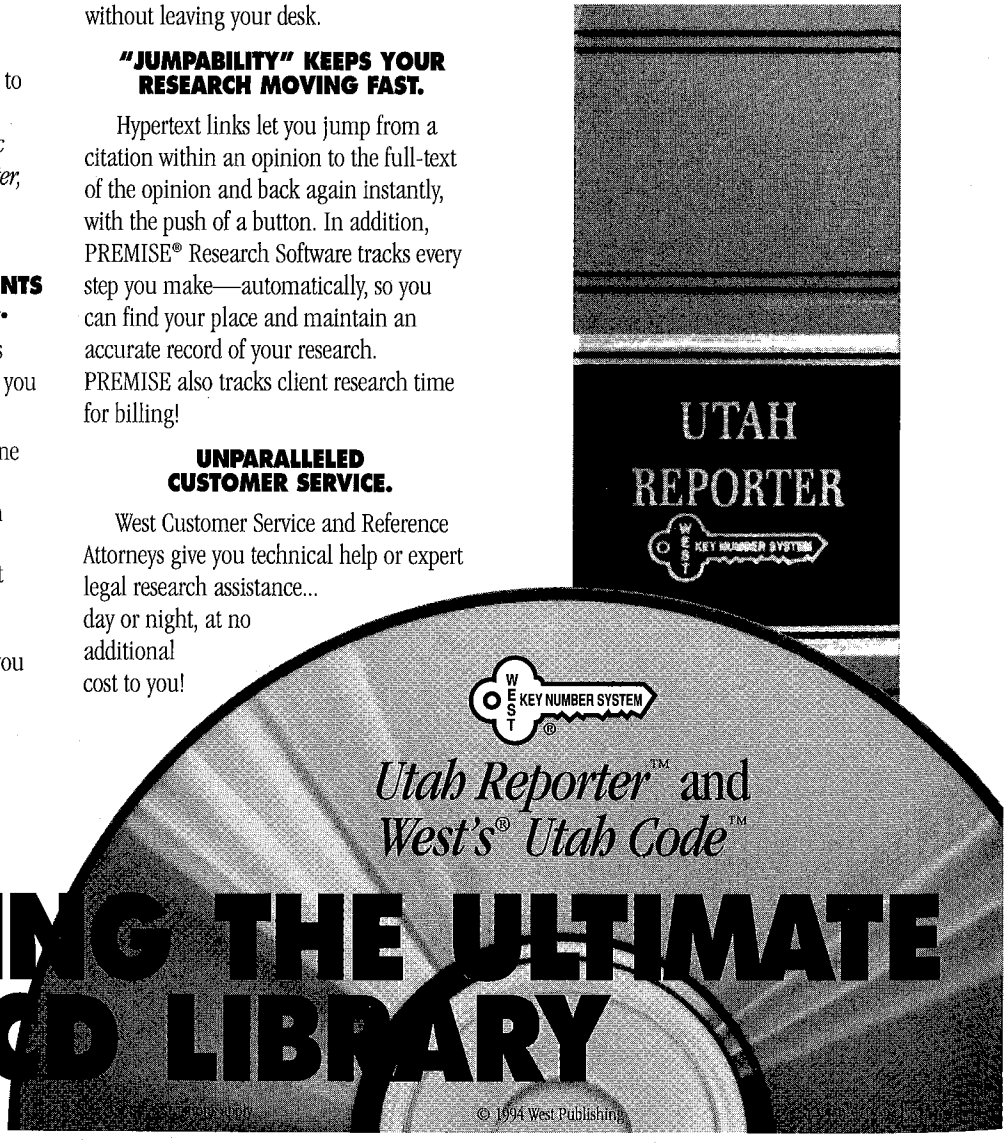

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COVER: Collage of people and sights at the 1995 Utah State Bar Annual Meeting in San Diego, California, by Patricia Thorpe.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes 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, transparency or print of each photograph you want to be considered.

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

Dear Editor:

This may only be my mid-life crisis talking, but Judge Page's article on the Simpson trial (Views from the Bench, Vol. 8, No. 6) touched a sympathetic nerve. I view with considerable alarm the state of the legal profession.

Lately I have come to the inescapable conclusion that our profession richly deserves all of the mistrust, contempt and ridicule that modern society can produce. Examples abound: as pointed out by Judge Page, the O.J. fiasco may well permanently destroy whatever credibility the criminal system ever enjoyed. The Baby Richard decision thoroughly eliminated any notion that juvenile justice works "in the best interests of the child." Attorneys of the Oklahoma City bombing victims will now seek restitution, not from the bomber, but from the fertilizer manufacturer, demonstrating that an acute sense of justice is not nearly so important as an acute sense of where the bucks are. On the local scene, D.U.I. defense attorneys applaud the double jeopardy problems of coupling criminal convictions with license revocation, ensuring that there will be more drunk drivers on the road, not less.

The problem these cases represent is that attorneys and judges are clueless about even the most basic concepts of and societal values regarding truth-seeking, responsibility and justice. Doubly disheartening is the fact that they (we) act out of the firm conviction that they (we) are upholding and advancing the best and noblest traditions of the legal profession. We should not be even vaguely surprised that the public considers us slime-sucking scumbags. To quote Pogo; "We have met the enemy and he is us."

Over the last several months I have come to regret my twenty-year investment in the law. If I had a nickel's worth of moral courage, I would bag it all, find an honorable profession and burn my Bar membership card on the steps of the Law and Justice Center (talk about your oxymorons).

Sincerely,
Gavin J. Anderson, Esq.

Medical Malpractice Prelitigation Panel Review Chairpersons Needed

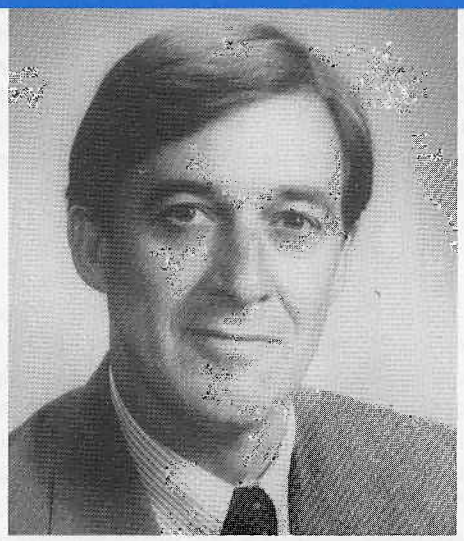
The Division of Occupational and Professional Licensing is seeking attorneys who are licensed and in good standing in Utah to serve as chairpersons of medical malpractice prelitigation review panels. Prelitigation review is a condition precendent to commencing litigation under the Utah Health Care Malpractice Act. Panels are composed of an attorney, who serves as the chairperson; a lay panelist; and a health care provider who is practicing and knowledgeable in the same specialty as each proposed defendant.

Chairpersons must be available to serve on 3-5 panel hearings per month, each of which are normally restricted to two hours in length. Chairpersons will initially be required to attend a training seminar scheduled as part of the Division's Annual Meeting of the Board on September 20, 1995. The seminar will be submitted for CLE approval. Chairpersons responsibilities include conducting the panel hearing and drafting a supplemental panel opinion following the hearing.

This is a perfect opportunity for attorneys interested in medical malpractice to learn the profession. This is not a paid employment position; however, chairpersons receive a standard State of Utah per diem and are reimbursed for travel and parking expenses. Interested attorneys should send a letter and resume to the Prelitigation Coordinator at P.O. Box 45805, 160 East 300 South, Salt Lake City, Utah 84145-0805. Letters and resumes must be received no later than August 31, 1995.

Bill of Rights Symposium

The J. Reuben Clark Law School's 1995 Bill of Rights Symposium is scheduled for Friday, October 27, 1995, from 8:30 am until 4:30 pm on the BYU Campus. This year's theme is "The Dilemma of American Federalism: Power to the People, the States, or the Central Government?" with Rex E. Lee as the keynote speaker. Other guest speakers include Governor Michael O. Leavitt; Judge Monroe McKay, 10th Circuit Court of Appeals; Judge J. Clifford Wallace, 9th Circuit Court of Appeals; Judge Dee Benson, U.S. District Court for Utah; Justice Frederick J. Martone, Arizona Supreme Court; Thomas B. McAffee, Southern Illinois College of Law; Cynthia C. Lebow, Department of Justice; Pace J. McConkie, Lawyers Committee for Civil Rights Under the Law; and Dr. Carlfred B. Broderick, University of Southern California. The Symposium will provide 6 hours of CLE, including 1 hour of ethics. Registration materials will be available after July 15th at the Law & Justice Center or you may call 378-7540 to request them.



First Column

By Dennis V. Haslam

The 1995-96 bar year began on July 1 in San Diego at the Annual Meeting. Over 455 people registered for the meeting, compared to 514 last year at Sun Valley. Evaluation summaries from those who attended tell us that the location could not have been better, even though it was a bit pricey. The featured speakers, CLE programs and break-out sessions were generally well received. However, next year there will likely be more emphasis on CLE for the general practitioner, transactional and business law and greater diversity among presenters. If you have ideas for next year's meeting in Sun Valley (July 4, 5 and 6), please let me know.

As we move into this year, the Bar Commission will undertake review of some existing programs, committee work and bar operations with an eye toward self-improvement and fine tuning. The following is a brief report on some of those projects:

CLIENT SECURITY FUND

The bar's client security fund was created for the purpose of allowing claimants to recover for losses caused by the dishonest conduct of lawyers licensed to practice law in Utah. The fund was established in 1977 and is maintained at a level of $100,000. Historically, the Bar Commission has authorized payments to injured clients such that the annual distribution is in the range of $20,000 to $40,000, in total. The maximum amount paid per claim cannot exceed $10,000. The total in any calendar year cannot exceed $25,000 with regard to an individual attorney. However, the Client Security Fund Committee has reported that, as you might expect, the process is slow, there are too many claims, and not enough money. The committee will re-evaluate the method of handling these claims to insure they are processed in a fair and timely manner.

FEE ARBITRATION

The Utah State Bar's fee arbitration dispute procedure allows a client to request arbitration of a claim against an attorney. The arbitration is to be conducted in accordance with rules adopted by the bar association. A lawyer must consent to the arbitration and it is not mandatory. For those lawyers or law firms who elect to arbitrate, and for clients, the process can be slow and cumbersome. Volunteer lawyers and judges sit on a panel comprised of three members to arbitrate these disputes. The Fee Arbitration Dispute Committee has had strong leadership and strong membership, but not enough hours in the day to provide the kind of service our membership deserves. Accordingly, the Bar Commission has asked the committee to review all of its rules and procedures and streamline them so that both small and large fee disputes can be reviewed and resolved expeditiously. It will likely become necessary to have a single, but qualified, arbitrator in these kinds of cases and it may be necessary to require the parties to contribute toward the cost of the arbitration.

UNAUTHORIZED PRACTICE OF LAW

The Unauthorized Practice of Law Committee has spent hours and hours reviewing and investigating claims of unauthorized practice of law. They involve persons holding themselves out as typists (of divorce complaints, for example), legal investigators, negotiators, facilitators, paralegals and business women and men. The subject matter generally involves domestic relations, real estate, estate planning and insurance claims. Over the last few years, several injunctions have been entered and a number of people have been put out of business.

During the last week of June, Gregory Sanders, as counsel for the bar, tried an unauthorized practice of law case to a jury

before Judge Leslie Lewis. Greg obtained a favorable result against an individual named Benton Peterson. He will be enjoined from preparing legal documents without direct attorney supervision, from advising persons of legal rights, claims and defenses, and from advertising legal services.

During the course of this coming year, the Commission will work closely with the Unauthorized Practice of Law Committee to target those areas where non-lawyers are providing legal services to those who become unknowing victims. The Bar Commission regularly hears from judges about pleadings in cases where parties report that a person has provided some sort of legal advice or legal services and the pleadings are not done correctly.

THE SPEAKER'S BUREAU

Judge James Z. Davis chairs the Utah State Bar Speaker's Bureau. This project was developed in order to improve the administration of justice by making lawyers available to the public to speak on legal topics and improve the public's understanding of the law and the legal system. The Speaker's Bureau, in conjunction with an organized public relations effort, should assist the bar in improving its public image. Stay tuned on this one.

QUALITY CONTROL AND PROFESSIONALISM

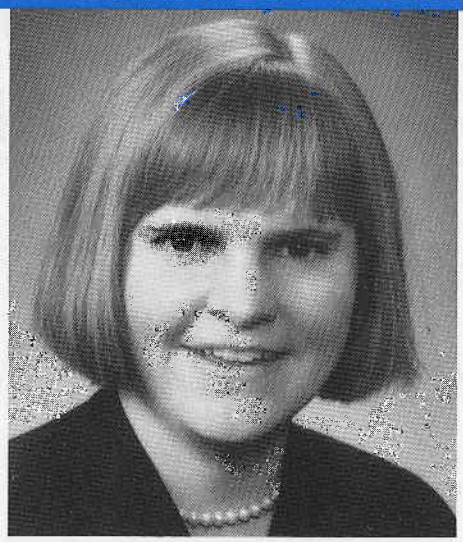
Past President Paul Moxley has agreed to chair a committee to analyze the results of a quality control conference held last spring at the Law & Justice Center. The goal is to improve the quality of practice and the quality of legal services provided to the public. Some say that new lawyers are not properly equipped to open a law office and begin providing services to the public the day after having been sworn in as a member of the bar. This subject is very difficult to get your arms around, but it is something that needs to be done. We may end up with some combination of law office management, new lawyer mentoring, solo/small firm practice, bridging the gap and civility in litigation.

PRO BONO COORDINATOR

It looks as though Congress' attack on Legal Services Corporation will result in a budget cut to Utah Legal Services of approximately 35%. Over 70% of its annual budget goes to salaries and personnel. An already tightened belt will get tighter. Toby Brown, the bar's pro bono coordinator, can find ways to connect you or your firm with Legal Services Corporation, Legal Aid Society and others.

CONCLUSION

These are a few of the things going on at the bar this year. Your comments and ideas on bar operations and the bar's involvement in the administration of justice are always welcome. Keep the cards and letters coming.



The Judicial Conduct Commission Comes of Age

By Denise A. Dragoo
Chair of the Judicial Conduct Commission, Bar Commissioner and shareholder, Van Cott, Bagley, Cornwall and McCarthy

The Judicial Conduct Commission plays an essential role in maintaining public confidence in the judiciary and in preserving the integrity of the state judicial process. This function has been challenged in recent years due to an unprecedented increase in the Commission's caseload. As the number of complaints against Utah's judges has increased, public concern has also intensified over the Commission's ability to perform its functions.[1] These concerns have focused on three main areas. First, the timeliness and effectiveness of the investigative process. Second, concerns that the investigation is confidential and therefore secretive. Third, concern that the Commission serves to protect the judiciary rather than the public at large. As the new Chair of the Commission, I find these public perceptions to be alarming and harmful to the integrity of the state judiciary. The Commission, with the help of the Utah Legislature, is taking immediate steps to address these concerns.

HISTORY OF THE COMMISSION

In 1977 the Legislature established the Commission as an independent agency to investigate and act on complaints of judicial misconduct or disability. The Commission consists of two public members appointed by the Governor, two members of the House of Representatives, two members of the Senate, three bar commissioners and one trial judge. The Commission's jurisdiction extends to Utah Supreme Court Justices, Court of Appeals Judges, District Court Judges, Justice Court Judges, Pro Tempore Judges and even retired judges called back into service.

Proceedings before the Commission are generally initiated by a verified complaint or statement. These complaints are initially screened by the Commission and its staff. Judges are advised of the complaints and provided with an opportunity to respond. After initial investigation, if the Commission finds probable cause of judicial misconduct or disability, it has a choice of remedies. The Commission may issue a private reprimand or file a formal complaint to be reviewed en banc or by a three-judge panel. After a hearing on the record, the Commission may recommend removal, suspension, involuntary retirement or reprimand. The Commission's findings and recommendations are subject to review by the Utah Supreme Court. All proceedings are confidential until review and decision by the Supreme Court.

EFFICIENCY IN HANDLING COMPLAINTS

The goal of the Commission is to treat all complaints thoroughly, fairly and swiftly. Historically, the Commission was able to meet this goal with a part time director and investigative staff on a relatively small budget. However, complaints against the judiciary have increased from 100 matters in 1989-1990 to 250 in 1992-1993 to a projected 450 complaints this year. The sheer volume of matters has resulted in the need for a full time staff to screen complaints, conduct preliminary investigations and assist the Commission in prosecuting formal complaints.

In response to this concern, the Legislature enacted House Bill No. 9 during the

1995 special session. The bill empowers the Commission to administer oaths, compel testimony and exercise contempt powers. The bill also authorizes permanent staffing for the Commission by a director, investigator and secretary. During the General Session, the Legislature appropriated monies to fund these positions and to house the staff in a permanent state office. This new funding has enabled the Commission to hire a new full time director effective August 1, 1995.

BALANCING THE NEED FOR CONFIDENTIALITY

Under Article VIII, Section 13, the Commission is required to keep its investigations confidential until review and decision by the Supreme Court. Due to the filing of large numbers of complaints which are unfounded, confidentiality, particularly in early stages of the investigation, enhances the integrity of the judiciary. In addition, confidentiality is essential to effecting a private reprimand of a judge. The Commission has the discretion to issue a private reprimand, with the consent of the affected judge, at any time prior to trial of the formal complaint. However, the confidential nature of investigations into judicial conduct has lead to criticism that complaints enter a "black hole" after being filed with the Commission.

To address this concern the new Executive Director will be asked to investigate procedures which will keep parties informed of the progress of the complaint through each stage of investigation. The constitutional requirement for confidentiality must be balanced against the public's need to know that a complaint is being fairly and timely prosecuted. If parties are kept informed, public confidence should be enhanced.

"As the number of complaints against Utah's judges has increased, public concern has also intensified over the Commission's ability to perform its functions."

UNDERSTANDING OF THE ROLE OF THE COMMISSION

The Commission and its staff are committed to serving both the public and the judiciary. The Commission seeks to apply the highest standards of conduct to the judiciary while according all parties due process and a fair hearing. The Commission makes a full inquiry into every complaint. However, it can only prosecute complaints involving a judge's professional or personal conduct based on allegations under Article VIII, Section 13 of the Utah Constitution. These grounds include willful misconduct in office; conviction of a felony; willful and persistent failure to perform judicial duties; disability which seriously interferes with judicial performance; and conduct prejudicial to the administration of justice which brings a judicial office into disrepute.

The scope of the Commission's authority is often misunderstood. The Commission cannot act as an appellate body or substitute its judgment for that of the judge on matters of law or fact. One of the primary reasons for dismissing a complaint filed before the Commission is that the matter involves an appealable issue. However, if a complaint is properly filed and is based on allegations of misconduct or disability, the matter will be vigorously prosecuted by the Commission. In addition, due to recent legislative changes under H.B. 9, a judge cannot ignore the matter or refuse to respond.

The new funding made available by the Utah Legislature will enable the Commission and staff to better educate the public on the role of the Commission. Greater awareness of the manner in which a complaint may be filed and prosecuted before the Commission should foster greater public trust. In turn, the new authority of the Commission to compel a judge to answer a complaint will also ensure a full and complete inquiry. New funding sources may also be used to provide training to promote a greater awareness of proper judicial conduct on the part of judges and the public they serve.

CONCLUSION

The Commission is currently addressing the largest case load of complaints pending against Utah's judiciary since its creation in 1977. The Legislature has responded to this challenge by its recent enactment of H.B. 9. This legislation enhances the power of the Commission to compel testimony to assist in its investigation. In addition, the Legislature has provided funding for full time staff support to the Commission. These new powers and funding sources should enable the Commission to conduct its affairs with greater efficiency. However, the Commission and its new staff face a considerable challenge to reinstill the confidence of a doubtful public in its investigative process.

[1]Sheila R. McCann, "Probes of Judges' Conduct Appear to go Nowhere", *The Salt Lake Tribune*, June 9, 1995.

Environmental Auditing in a Nutshell

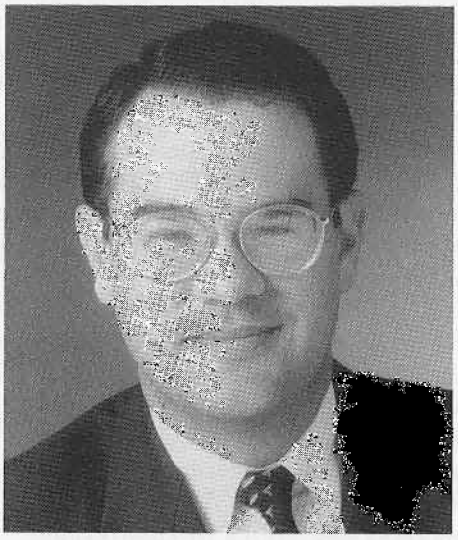
By Craig D. Galli

Over a dozen states, including Utah, have recently enacted statutory "self-auditing" privileges to protect the results of internal environmental audits from disclosure to state regulators and private parties.[1] This new legislation, along with increasing anxiety over potential exposure under environmental laws, has heightened corporate interest in performing environmental audits. Success in maintaining the confidentiality of an environmental audit usually turns on the attorney's effective participation in designing and performing the audit. In addition, as discussed below, the attorney can and should perform other important functions to assist the client in conducting environmental audits.

DETERMINING THE PURPOSE OF THE ENVIRONMENTAL AUDIT

Unlike financial audits, no established rules exist governing the design and performance of environmental audits. The attorney should discuss with the client the different types of environmental audits and their corresponding objectives. The most common — **environmental compliance audits** — typically attempt to determine the facility's environmental compliance at a particular snapshot in time. The daunting volume of environmental regulations imposed on industry and the possibility of inadvertent violations leading to civil and even criminal penalties provide ample motivation to conduct periodic environmental compliance audits.

Pre-acquisition audits often include elements of a compliance audit but primarily focus on determining the existence of contamination at a site. **Risk assessment audits,** in contrast, identify potential sources of liability and predict risk of exposure. Such audits normally address potential liability from both on-site and off-site activities, such as off-site disposal of hazardous wastes, waste oil, etc. **Management system audits** evaluate management preparedness, policies, procedures and communication for dealing with day-to-day environmental compliance as well as environmental incidents.



CRAIG D. GALLI was a Senior Trial Attorney in the Environment Division, U.S. Department of Justice, Washington, D.C., prior to joining Parsons Behle & Latimer in 1993 where he is a shareholder in the Environment Deparment. He is a graduate of Columbia University (J.D. 1987) and Brigham Young University (M.A. 1984, B.A. 1982).

Generally, most companies perform audits with a variety of these purposes in mind. Prior to designing the audit, the attorney must carefully discuss with both site managers and corporate management the audit's objectives to assure that the audit's results will satisfy the client's expectations.

UNDERSTANDING SENSITIVITY TO ENVIRONMENTAL AUDITS

Not all site managers welcome news that headquarters has commissioned an environmental audit of their operation. Indeed, some site managers greet environmental auditors with the same degree of apprehension and defensiveness one might feel if one's mother-in-law appeared at the front door to conduct a housekeeping audit, and where the results of such an audit could result in civil and criminal liability. On the other hand, site managers may welcome the audit because the audit results could motivate senior management to allocate funds for needed environmental projects or increased staffing. Attorneys must understand these sensitivities and allay concerns.

As a general rule, greater risk of corporate and individual liability arises where no effort is made to identify potential environmental violations or contamination at a site, which could later be discovered by regulatory authorities during random enforcement inspections or brought to the government's attention by whistle blowers. Viewed in this manner, environmental audits and follow-up measures serve to reduce risks to the corporation and its employees.

DESIGNING THE AUDIT

Most environmental audits consist of the following steps or phases.

Pre-Audit Meeting. The attorney meets with his client's upper management and site managers to clarify the objectives of the audit and alleviate concerns. The pre-audit meeting also addresses audit scope, procedures, schedules and time commitment needed of site personnel.

Retainer of Consultants. Unless the client has environmental auditors on staff (or if the client desires an "external" audit), the attorney retains consultants to form the audit team which gathers and evaluates technical information. The size and composition of the team depends largely on the size of the site to be audited, and scope of the audit. If consultants are used, each member of the audit team should execute a retainer agreement prepared by the attorney which includes a confidentiality provision.

Pre-Audit Questionnaire. To be effective, the audit team members must be

familiar with the relevant facts respecting past and present practices which may have environmental consequences. Prior to reviewing documents, interviewing personnel and conducting the site inspection, the attorney together with the audit team prepare a pre-audit questionnaire relating to the scope of environmental issues pertinent to the site, the identity of personnel involved in environmental compliance, and the location of files containing permits and other relevant documents. Site personnel complete the pre-audit questionnaire and return it to the attorney.

"Environmental audits should be designed to benefit from coverage under both the Utah statutory privilege and attorney-client provilege."

Review Documents. The audit team gathers, reviews and evaluates permits, correspondence with regulatory agencies, and internal corporate documents relating to environmental compliance. The audit sometimes includes review of agency files.

Site Personnel Interviews. The audit team leader normally interviews selected site personnel to pursue issues raised by the pre-audit questionnaire responses and by the audit team's review of documents. The interviews often include questions aimed at determining whether adequate environmental management systems exist to handle routine environmental compliance issues and environmental incidents, such as reporting and remedying accidental spills. The audit team leader sometimes conducts these interviews prior to reviewing the documents and preparing the pre-audit questionnaire.

Audit Checklists and Protocols. Based on the information gleaned from the pre-audit questionnaire, review of documents and interviews with site personnel, the attorney and audit team prepare checklists and protocols to be used by the audit team in conducting the site inspection. The checklists identify the federal, state and local legal requirements applicable to the site's operations, and requirements imposed by corporate policy. Checklists often divide these requirements into the following areas:

- Hazardous waste treatment, storage and disposal
- Solid waste disposal
- Wastewater and stormwater
- Air emissions
- Hazardous materials management (including asbestos, pesticides, PCBs)
- Accidental spill reporting and emergency response

Audit checklists sometimes include a separate category pertaining to worker health and safety requirements.

The protocol tie these requirements to each area and operation at the site, thereby providing a comprehensive guide for the auditor in performing the site inspection. The protocols generally include instructions to the auditor and provide a space in which comments can be recorded by the auditor during the site inspection. Protocols provide the ancillary benefit that they can be used in future audits to provide consistency and continuity.

Site Inspection. The audit team conducts the site inspection to observe current operations and site conditions and to identify potential non-compliance. Whether to take samples (i.e., soil, water, air) during the site inspection depends on the purpose of the audit. Except for pre-acquisition audits, most audit site inspections do not include sample collection.

Audit Report. Some audit teams prepare a draft audit report prior to leaving the site. In most cases, however, the audit team orally describes the results of the audit in an exit briefing to on-site management. Critical compliance problems should be identified at this time (or earlier) to avoid any delay in taking corrective measures. Most audit reports present written "findings" of non-compliance. Some also include recommendations. Site management generally prepares a response to the audit report and an action plan to correct the problems identified. The attorney should carefully limit the distribution of audit reports and related correspondence to maintain confidentiality and avoid unauthorized disclosure and waiver of applicable privileges.

Action Plan. Because the risk of criminal exposure is the highest where compliance problems have been identified and ignored, responses to the audit report and action plans should be expeditiously developed and implemented to correct

problems identified during the audit. The attorney should remain involved in this process to provide legal advice as necessary during the development of the action plan and to maintain the attorney-client privilege. Utilizing audit results to take corrective action while at the same time preserving confidentiality can raise complex issues requiring legal analysis.

MAINTAINING CONFIDENTIALITY

The Utah Legislature recently enacted the Self-Evaluation Act, S.B. 84, and Senate Joint Resolution, S.J.R. 6, which adds Rule 508 to the Utah Rules of Evidence to protect "environmental audit reports" from disclosure in state adjudicatory or judicial proceedings.[2] Any person seeking disclosure of an environmental audit report must request *in camera* review by the court to determine if all or part of the report satisfies the privilege's requirements. The party asserting the privilege must also proffer evidence that the requirements have been satisfied. The privilege under its terms does not apply where any of the following circumstances are present:

(1) The privilege has been waived.
(2) The privilege was asserted fraudulently.
(3) The audit report was prepared after an investigation or proceeding was underway and known to the person asserting the privilege.
(4) The information contained in the audit report must be disclosed to avoid danger to public health or the environment.
(5) The audit report demonstrates that the person was not in compliance and made no effort within a reasonable time to achieve compliance after the audit report was prepared.
(6) The information contained in the audit report must be disclosed to a regulatory agency pursuant to law.
(7) The information contained in the audit report was obtained by the Utah Department of Environmental quality through observation, sampling or monitoring.
(8) The information contained in the audit report was obtained through any source independent of the voluntary environmental self-evaluation.

Utah R. Evid. 508(d).

Any environmental audit performed in Utah should be designed so that the audit report falls within the protection of Utah R. Evid. 508. One significant advantage of the Utah statutory privilege over the attorney-client privilege is that the former applies to factual data (as well as to legal analysis/ advice).[3] Nevertheless, the protections afforded the Utah statutory self-auditing privilege alone are insufficient — the Utah statutory privilege cannot be asserted against the Department of Justice or federal agencies such as EPA.[4] Thus, environmental audits should be designed to benefit from coverage under both the Utah statutory privilege and attorney-client privilege.[5]

The main requirement for maintaining confidentiality afforded by the Utah self-audit privilege is to assure that corrective measures are taken within a reasonable time after issuance of the audit report. In addition, to satisfy the elements of the attorney-client privilege, the following steps are generally required:

(1) Document the client's retainer of the attorney to conduct an audit for the purpose of seeking legal advice on potential exposure under environmental laws.
(2) The attorney retains environmental consultants to gather and evaluate information. The consultants report to the attorney, rather than to the client.
(3) All reports and correspondence are labeled "Privileged and Confidential."
(4) The copying and circulation of correspondence and reports is strictly limited to those within the client's organization with a need to know. All documentation is maintained in a secure place.

At least one court has held that the environmental audit reports prepared in this manner are protected under the attorney-client privilege.[6]

Conducting environmental audits and taking steps to maintain the confidentiality of documents generated and information learned during the audit cannot guarantee that a company can escape liability under environmental laws. Nevertheless, a well designed and performed audit with participation and oversight by counsel, followed by corrective measures, can greatly reduce the risk of such liability.

[1]At least one court has applied the common law "self-critical analysis" privilege to environmental audits. *See Reichhold Chemicals, Inc. v. Textron, Inc.,* 157 F.R.D. 522 (N.D. Fla. 1994). The privilege is based on the public policy rationale of encouraging corporate self-evaluation and self-policing without creating evidence that could be used against the corporation. *Id.* at 524. Because the common law version of this privilege has not been widely recognized to date, it should not be considered a viable tool to protect the confidentiality of environmental audits.

[2]The term "environmental audit report" includes "any document, information, report, finding, communication, note, drawing, graph, chart, photograph, survey, suggestion, or opinion, whether in preliminary, draft or final form, prepared as a result of or in response to an environmental self evaluation." Utah R. Evid. 508(a)(3); Utah Code Ann. § 19-7-103(2). The term "environmental self-evaluation" means "a self-initiated assessment, audit, or review, not otherwise expressly required by an environmental law, that is performed to determine whether a person is in compliance with environmental laws." Utah R. Evid. 508(a)(5); Utah Code Ann. § 19-7-103-(4).

[3]The attorney-client privilege generally does not protect against disclosure of facts underlying the attorney-client communication. *See Upjohn Co. v. United States,* 449 U.S. 383, 396 (1981). Similarly, the attorney work product doctrine does not generally provide protection from disclosure of audit reports. It applies only where the document is prepared in anticipation of litigation. *See* Utah R. Civ. P. 26(b)(3); Fed. R. Civ. P. 26(b)(3).

[4]In response to those states that have adopted environmental self-auditing privileges, EPA has proposed an interim policy which offers reduced criminal penalties for voluntarily disclosed and promptly corrected violations discovered in connection with a voluntary environmental audit. The interim policy also proposes to limit criminal referrals for voluntary disclosure and correction of violations, provided that the violation does not involve (1) a prevalent corporate management philosophy or practice that concealed or condoned environmental violations, (2) a willful violation by high-level corporate officials, or (3) a serious actual harm to human health or the environment. EPA favors its interim policy over state self-auditing privileges and immunities that could be used, according to EPA, to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities. EPA has also threatened to scrutinize enforcement more closely in those states with audit privilege and/or penalty immunity laws. Many representatives of industry and state governments has expressed to EPA concern that its interim policy will actually discourage companies from performing audits.

[5]The attorney-client privilege protects communications between a client and attorney where (1) there is a **client,** (2) the communication is made to an attorney acting in his **capacity as an attorney,** (3) the communication is made in **confidence,** (4) the communication is made for the purpose of **securing legal advice,** and (5) the privilege is **not waived.** The seminal case generally cited by courts on the elements of the attorney-client privilege is *United States v. United Shoe Mach. Corp.,* 89 F. Supp. 357, 358-59 (D. Mass. 1950). Communications with consultants assisting the attorney for the purpose of gathering information relating to the legal advice also generally fall within the privilege. *See generally* Hunt & Wilkins, *Environmental Audits and Enforcement Policy,* 16 Harv. Envt'l L. Rev. 365, 377 (1992).

[6]*See Olen Properties Corp. v. Sheldahl, Inc.,* 38 Env't Rep. Cas. 1887, 1888 (C.D. Cal. 1994) ("[The consultant] prepared the documents to gather information for BMC's attorneys to assist the attorneys in evaluating compliance with relevant laws and regulations. The reports appear to have been prepared for the purpose of securing an opinion of law. [Citing *United Shoe Machinery Corp.*] The circumstances surrounding the preparation of the reports also appear to satisfy the other elements of the *United Shoe Machinery* test. The court therefore finds that Strohm's environmental audits are privileged and need not be produced").

Utah's 1995 Impact Fee Legislation

By David Nuffer

In its regular session, Utah's 1995 Legislature passed a bill significantly restricting impact fees, but the legislation was vetoed by Governor Michael Leavitt. In special session, after intensive study and negotiations, a substitute was passed which was signed into law by the Governor. The legislation codifies existing law and also enacts new principles. The ability of Utah's local political subdivisions to charge impact fees is dramatically affected.[1] In three parts, this article will:

1. Introduce impact fees;
2. Examine motivations for the present litigation; and
3. Analyze the law.

1. AN INTRODUCTION TO IMPACT FEES

Municipalities use impact fees to help ameliorate the cost of growth. The fees pay for the "impact" of growth on the community. Development changes the use of land by installing improvements on that land and it also creates demand for new offsite capital facilities, such as main roads, parks, and water systems. These offsite capital costs can be funded by impact fees.

Impact fees are different than *exactions*. Exactions are requirements made of a developer related to onsite improvements in a subdivision or development area. While subdivisions need internal improvements such as local neighborhood roads and sewer mains these requirements are distinct from impact fees. Impact fees contribute to the base of large offsite capital costs of a municipality, such as sewer treatment plants. The Act is intended to deal with fees charged to fund these "system improvements" which are public facilities providing service at large. The Act does not regulate charges for or requirements related to "project improvements" providing service to occupants of a specific development. Utah Code Ann. §11-36-102(9) and (15).

One justification for impact fees is that growth requires new capital facilities which should be funded by the new residents or businesses. Another conceptual justification is that existing residents and taxpayers have "equity" in the existing capital facilities within their community. To avoid diluting equity, new residents should be required to "buy in" just as new shareholders pay money to buy into a corporation.

The philosophical foundations of impact fees are debatable. Many developers and real estate brokers claim that growth is the natural result of a good community and that a good community should provide and facilitate growth from its general revenues. They claim user fees are a more equitable way to fund system costs, including capital items and operating expenses. While it is possible to fund a reasonable rate of growth on a large population and tax base, many of Utah's smaller communities are faced with significant growth rates on a relatively small tax and population base. They cannot fund the capital cost of growth from existing revenue sources. These municipalities use impact fees to build new roads, fire stations, parks, sewage disposal facilities, water treatment plants, etc., that are required by new growth. In particular, areas of high growth in Utah such as Summit and Washington Counties have been compelled to resort to impact fees as their populations have doubled in only short periods of time.

Utah's favorable rate of growth and the increase in cost of capital items have increased use of impact fees. In addition, regulatory requirements for improved quality of water treatment, sewer and solid waste disposal and highway standards have required municipalities to spend more for capital infrastructure.

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2. MOTIVATIONS FOR THE PRESENT LEGISLATION

The introduction of the impact fee legislation in the 1995 legislature was largely a surprise to municipalities. The strong voice of the real estate and development interests in the legislature who perceived abuse in impact fees led to the legislation.

In many documented incidents, impact fees were not based on actual costs, but were set arbitrarily. In other cases, impact fees were disguised and included with hook-up or building permit fees. Capital and infrastructure costs were being recovered under the pretext of charging for building inspection or permitting, or for connection to water or sewer systems. Wide variations among cities in their practices and amounts charged led to the inference that something must be wrong and needed to be remedied.

The high growth areas, particularly those with "high end" housing such as St.

George and Park City, performed extensive impact fee studies which revealed the true capital costs of growth. These areas imposed sizable impact fees. This also invited legislative attention.

A widespread distrust that funds collected were not used for the claimed purpose grew among developers and spread to the legislature. Accounting reports did not clearly disclose whether funds were diverted to other capital items or even to general operations.

Finally, there was great concern in the developer/real estate community about the propriety of the impact fees in the first place. Many felt that existing residents should fund the cost of new growth and that there was no reason to saddle growth with all its own capital costs. They reasoned that existing residents produce children and invite businesses and should justly bear or at least share the cost of development.

The first legislative attempt was a strong statement of the developer/real estate community concerns. The bill finally enacted balanced these concerns with operational needs of municipalities.

3. ANALYSIS OF THE LAW

Authority

The new law first sets out the authority for imposition of impact fees.[2] Utah's statute prohibits impact fees except as authorized by the Act. Under Utah's statute the following impact fees are permitted:

a. impact fees imposed by the Act's procedure, Utah Code Ann. §11-36-201(1)(b);
b. all existing[3] municipal impact fees may remain in place until July 1, 1995, Utah Code Ann. §11-36-201(1)(c);
c. existing impact fees for permitted public facilities may remain in effect without compliance with the procedures of the Act until July 1, 1997, Utah Code Ann. §11-36-201(1)(d);
d. municipalities currently imposing impact fees for fire trucks may continue to do so until July 1, 1997, Utah Code Ann. §11-36-202(7); and
e. any existing impact fees pledged as a source of revenues for a bonded indebtedness incurred before the date of the Act are protected for the duration of the bonded indebtedness. Utah Code Ann. §11-36-201(6).

Procedure

The Act outlines the three step procedure for municipalities to implement impact fees:

1. Develop a capital facilities plan;
2. Prepare an analysis of each impact fee; and
3. Enact an ordinance (or resolution, in the case of special districts) imposing the impact fee.

The wide scale planning and analysis process mandated by the Act may embrace improvements and planning outside the permissible subjects for charging impact fees. However, impact fees may be charged only for the capital facilities listed in the Act. These facilities must have a life expectancy of ten (10) or more years, be owned or operated by the local governmental entity, and fall within the following categories:

a. water rights and water supply, treatment and distribution facilities;
b. waste water collection and treatment facilities;
c. storm water, drainage and flood control facilities;
d. municipal power facilities;
e. roadway facilities;
f. park, recreation facilities, open space and trails; and
g. public safety facilities.

"The strong voice of the real estate and development interests in the legislature who perceived abuse in impact fees led to the legislation."

Two of the categories are further defined. "Public safety facilities" are buildings housing police, fire or other public safety entities, but not including jails, prisons or other places of incarceration. Utah Code Ann. §11-36-102(12). "Roadway facilities" does not mean federal or state roadways except to the extent that they are necessitated by new development and not funded by federal or state government. Utah Code Ann. §§11-36-102(13).

In addition, impact fees may be levied to fund habitat conservation plans required under the Endangered Species Act. Utah Code Ann. §§11-36-202(5). These fees must comply with some portions of the Act by July 1, 1995. Utah Code Ann. §11-36-202(6).

Capital Facilities Plan

A capital facilities plan identifies the demands placed upon existing public facilities by new development activity and the proposed means by which the municipality will meet those demands. Utah Code Ann. §11-36-201(2)(b). Municipalities with a population less than five thousand persons need not comply with the capital facility plan requirements of the Act but must have a "reasonable" plan. Utah Code Ann. §11-36-201(2)(e). The capital facilities plan may be part of the general plan if the general plan contains the elements required by the Act. Utah Code Ann. §11-36-201(2)(c). Whether the capital facilities plan is independent or included in the general plan, a copy of the plan must be made available to the public at least fourteen days before a required public hearing. Cities and counties must comply with the hearing and notice requirements of their respective planning and zoning acts. See references in Utah Code Ann. §11-36-201(2)(d)(ii) and (iii) to Utah Code Ann. §10-9-103(2) and 17-27-103(2).[4] Similar hearing notice requirements were enacted for special districts. Utah Code Ann. §17A-1-203.

The Act specifically charges the municipality to take a broad view of funding sources. In preparing the plan, the local political subdivision must consider all revenue sources, including impact fees, to finance the capital facilities. Impact fees may only be imposed when the plan establishes that impact fees are necessary to achieve an equitable allocation of costs borne in the past and to be borne in the future, in comparison to benefits already received and yet to be received. Utah Code Ann. §11-36-201(3) and (4).

Impact Fee Analysis

After adoption of the capital facilities plan, the municipality must prepare an analysis of each category of impact fee that is to be charged. To properly consider the improvements and their relationship to development the analysis must:

i. identify the impact of system improvements required by development activity;
ii. demonstrate how those impacts on system improvements are reasonably related to the development activity;

iii. estimate the proportionate share of the costs of impacts on system improvements that are reasonably related to the new development activity; and
iv. identify how the impact was calculated, based on those factors and the requirements of the Act.

Utah Code Ann. §11-36-201(5)(a).

Costs which may be considered in setting the eventual fee, which will be central in the analysis, are:

i. construction contract price;
ii. the cost of acquiring land and improvements, materials, fixtures;
iii. the costs of planning, surveying, and engineering fees for services provided for and directly relating to the construction of the system or improvements; and
iv. debt service charges, if revenue financing is to be used.

Utah Code Ann. §11-36-202(1)(c).

Public facility costs already incurred by the governmental entity may be included as impact fees to the extent that new growth and development will be served by the previously constructed improvement. Utah Code Ann. §11-36-202(3)(b). In this analysis the governmental entity must specifically evaluate the proportion of the costs which should be borne by new development. This requirement is set forth in Utah Code Ann. §11-36-201(5)(a). The statute recites the criteria from *Banberry Development Corp. v. South Jordan City,* 631 P.2d 899 (Utah 1981) which control the identification of costs to new development:

i. the cost of existing capital facilities;
ii. the manner of financing existing capital facilities, such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants;
iii. the relative extent that the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facility, by such means as user charges, special assessments, or payment for the proceeds of general taxes;
iv. the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future;
v. the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners, by contractual arrangement or otherwise, to provide common facilities, inside or outside the proposed development that have been provided by the municipality and financed through general taxation or other means, apart from user charges, in other parts of the municipality;
vi. extraordinary costs, if any, in servicing the newly developed properties; and
vii. the time price differential inherent in a fair comparison of amounts paid at different times.

Utah Code Ann. §11-36-201(5)(b)(i-vii).

This analysis is a comprehensive study of the financial and policy issues related to the specific impact fee under consideration.

Impact Fee Enactment

After preparation of the capital facilities plan (related to the capital improvements of the municipality as a whole) and the preparation of an impact fee analysis (related to the specific fee to be charged), the municipality must pass an impact fee enactment. Utah Code Ann. §11-36-202(1)(a). In the case of cities and counties this will be an ordinance, while in the case of special districts it will be a resolution. The impact fee imposed may be less than but may not exceed the fee established by the analysis. Utah Code Ann. §11-36-202(1)(b).

"Utah's 1995 Impact Fee legislation breaks significant new ground."

The impact fee ordinance or resolution *must contain*:

a. a definition of one or more service areas within which the fees apply;
b. a schedule of fees or a formula for calculation of fees;
c. a provision authorizing adjustment of fees in response to unusual circumstances, or to ensure fairness; and
d. a provision that permits adjustment for a particular development based on studies submitted by the developer.

Utah Code Ann. §11-36-202(2).

The meaning of this last requirement is unclear, as the provision is mandatory but the adjustment is permissive. Additionally, it refers only to developer studies as a basis for adjustment. Presumably, the municipality's studies are still relevant.

In addition, the impact fee enactment may include exceptions for low income housing, or allow a credit against impact fees for specific exactions. The exaction credit would apply to any dedicated improvements, or new construction for facilities that are identified in the capital facilities plan and required by the local governmental entity as a condition of approving the development activity. Utah Code Ann. §11-36-202(3).

The proposed ordinance or resolution must be made available at least fourteen days before a public hearing with the same notice requirements and protections that apply to the capital facilities plan. Utah Code Ann. §11-36-202(d).

Accounting, Expenditures and Refunds

The Act makes specific provision for accounting of impact fee receipts and requires expenditures be made on a timely basis. The municipality must establish a separate interest bearing ledger account for each type of fee which bears interest for the benefit of that account. At year end, a report on each account must show all sources and expenditures of funds. Utah Code Ann. §11-36-301.

Expenditures may only be made for system improvements identified in the capital facilities plan which are of the type for which the fee was collected. Utah Code Ann. §11-36-302(1). Receipts must be expended within six years unless the municipality identifies in writing an extraordinary and compelling reason for holding the fees longer establishing an absolute date that the fees will be expended. Utah Code Ann. §11-36-302(2).

A developer who has paid impact fees and later decides not to proceed with development may be entitled to a refund of the fees. If the developer files a written request and no impact has resulted and the fees are not yet spent or encumbered, the fees must be refunded. Utah Code Ann. §11-36-303.

Challenges and Appeals

The Act favors litigants by providing that any person prevailing in an action brought under it may receive an award of attorney's fees and costs. Utah Code Ann. §11-36-401(6). The Act provides for two types of actions:

1. A declaratory action; and
2. An action from an impact fee payor.

A declaratory action challenging the

validity of a fee may be filed by anyone residing or owning property in a service area or any organization representing the interests of those persons. Utah Code Ann. §11-36-401(1).

If there is no administrative procedure provided at the municipal level, then the district court is the first forum. An action challenging an impact fee must be filed by the payor within thirty days after payment of the fee. Utah Code Ann. §11-36-401(3)(b). The statute places no restriction on the court's ability to review the basis of the fee.

If the municipality has adopted an ordinance establishing an administrative appeals procedure, a request for information is a prerequisite to taking that procedure. Utah Code Ann. §11-36-401(3)(a). The request must be filed within thirty (30) days of paying the fee. The request for information must be answered within two weeks by a written analysis and other information relating to the impact fee. Utah Code Ann. §11-36-401(2).

The administrative appeal procedure, if established, must require that the municipality make its decision no later than thirty days after the challenge is filed. Utah Code Ann. §11-36-401(4)(b). A district court petition for review must be filed within ninety days of a decision upholding an impact fee or within one hundred twenty days after the date the challenge was filed, whichever is earlier Utah Code Ann. §11-36-401(5). In the district court review, the record, if adequate, will be the limit of the courts purview. Utah Code Ann. §11-36-401(5)(a)-(c). However, if the record is inadequate, the court may call witnesses and take evidence. Utah Code Ann. §11-36-401(5)(c)(ii). If the municipality's decision is supported by substantial evidence, it must be affirmed. Utah Code Ann. §11-36-401(5)(d).

CONCLUSION

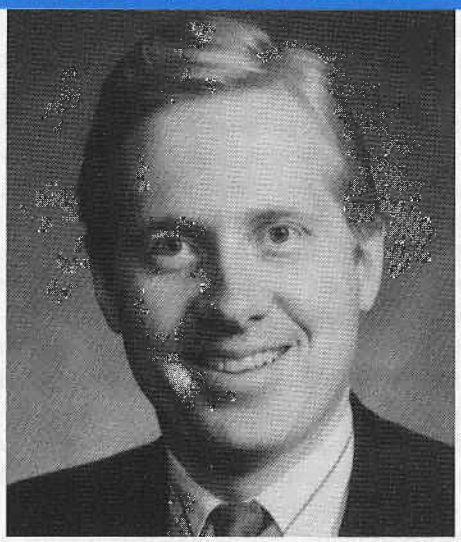
Utah's 1995 Impact Fee legislation breaks significant new ground. An entirely new capital planning process is mandated. Analysis formerly required by *Banberry* is now statutorily defined and expanded. The specific method of enactment is defined, and new remedies are established. The impact fee statute will undoubtedly be a focal point as Utah continues to experience growth and as the nature of growth changes.

[1]The Act applies to cities, counties and special districts. This article will refer to affected entities as "municipalities." Not examined in the Act or this article are issues relating to impact fees charged by school districts, largely prohibited (with some exceptions) by §53A-20-100.5 enacted by 1995 HB 32. See Utah Code Ann. §11-36-202(7).

[2]Authority for impact fees may certainly exist independent of acts such as this. An article examining impact fee legislation in other states observes that legislation such as Utah's may be adopted to enable or disable municipal imposition of impact fees. Martin L. Leittner and Susan P. Schoettle, "A Survey of State Impact Fee Enabling Legislation" 25 Urban Lawyer 491 (1993). Obviously, by prior practice, Utah's municipalities had the authority to impose impact fees. Utah's statute is a statute limiting the ability of municipalities.

[3]The effective date of the Act is June 19, 1995.

[4]A specific reference provides presumption of valid notice and that planning commission review of the capital facilities plan is not required. Utah Code Ann. §11-36-201(2)(d)(ii), (iii) and (v).



Effectively Collecting a Debt — Part II
Statutory Regulation of Debt Collection

by Jeffrey Weston Shields

In Part I of this article, we discussed basic debt collection procedure and tips for effective collection work. This part will address important statutory law governing debt collection practice.

A. Fair Debt Collection Practices Act. On September 20, 1977, Congress enacted the Federal Fair Debt Collection Practices Act, codified at 15 U.S.C. §1692 *et. seq.* ("Act"), and amended it in 1986.

1. Scope of the Act. Despite the statement by Congress of the broad purposes of the Act, the Act extends its protections only to certain persons, and applies its prohibitions only to certain debt transactions and to a limited category of persons or entities collecting debts.

a. The Act protects only "consumers." The protections of the Act extend only to "consumers." "Consumer" is defined as "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. §1692a(3). In other words, the protections of the Act do not extend to corporations, partnerships or other entities but include only natural persons.

b. The Act only applies to "consumer" debt. The only type of "debt" to which the Act applies is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are subject of the transaction are primarily for personal, family or household purposes, . . ." 15 U.S.C. §1692a(5). The Act does not apply to collection of business or commercial debt. See, e.g., *Munk v. Federal Land Bank of Witchita*, 791 F.2d 130 (10th Cir. 1986).[3]

c. The Act applies only to "debt collectors." The proscriptions of the Act apply only to a limited group of persons or entities which the Act labels "debt collectors." 15 U.S.C. §1692a(6). A "debt collector" is:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who *regularly collects* or attempts to collect, directly or indirectly, *debts owed* or due or asserted to be owed or due *to another.*

15 U.S.C. §1692a(6) (emphasis added). In other words, the Act applies only to those persons or entities to which a creditor assigns a debt for collection where the primary business of the assignee is the collection of debts for others, rather than for himself.[4] That Congress intended to target only third party collection agencies with the Act is explained by the statutory exceptions to the definition of "debt collector" in the Act which, in the 1977 version of 15 U.S.C. §1692a(6), included:

(A) Any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) Any person while acting as a debt collector for another person both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affili-

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ated and if the principal business of such person is not the collection of debts;

(C) Any officer or employee of the United States or any state to the extent that collecting or attempting to collect any debt is in the performance of his official duty;

(D) Any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) Any non-profit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors;

(F) Any attorney at law collecting a debt as an attorney on behalf of and in the name of a client; **(this exception was eliminated in the 1986 amendments — see discussion below);**

(G) Any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to extent such activity (1) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangements; (2) concern a debt which was originated by such person; (3) concerns a debt which was not in default at the time it was obtained by such person; or (4) concern a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor. 15 U.S.C. §1692a(6)(A)-(G) (1977).

"Congress intended to target only third party collection agencies with the [Fair Debt Collection Practice] Act."

In other words, the Act excludes from the definition of "debt collector" people or entities essentially collecting their *own* claim. For example, neither a bank that issued a credit card nor a related service corporation that attempted to collect a debt owed on the credit card was a "debt collector" subject to the Act and, therefore, holders of a credit card had no claim under the Act for alleged improprieties in the service corporation's collection attempts. *Meads v. CitiCorp Credit Services Inc.*, 686 F. Supp. 330 (S.D. Ga. 1988).

d. Lawyers Included as "Debt Collectors." On July 9, 1986, Congress amended §1692a(6) by simply eliminating subparagraph (F) of the original §1692a(6) which, prior to the 1986 amendment, provided an exception to the definition of the term "debt collector" for "any attorney at law collecting a debt as an attorney on behalf of and in the name of a client . . ." Other than the elimination of subsection (F) of §1692a(6) from the 1977 version by the 1986 amendment, §1692a remains essentially the same.

There has been some misunderstanding caused by this amendment with respect to whether lawyers are *always* "debt collectors" under the Act. The 1986 amendments merely eliminated the spe-

cific *exception* of lawyers from the definition of "debt collector;" it did not enact new language to the effect that lawyers are *always* "debt collectors" under coverage of the Act. The lawyer must still meet the requisites of §1692a(6) to be considered a "debt collector," *i.e.*, that the lawyer be someone *"who uses any instrumentality of interstate commerce or the mails in any business[,] the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly debts owed or due or asserted to be owed or due to another."* In other words, a lawyer who rarely performs debt collection services for clients will presumably not be included under the definition of "debt collector." However, case law interpreting the Act following the 1986 amendment requires lawyers, in my view, to *assume* that they fall under the definition of "debt collector" unless they provide collection services only on very rare occasions. For example, in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992), the court held that an attorney retained by a bank to represent the bankcard division in lawsuits based on delinquent credit card accounts was a "debt collector" under the Act despite the attorney's contention that he performed only legal work, since at least 70% of the attorney's legal fees were generated from collection of debts, the "principal purpose" of the work was collection of debt, and the filing of warrants constituted "indirect" means of a debt collection. In *Stojanobski v. Strobl and Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992), a law firm was held to be a person who "regularly" collected debts for purpose of the Act even though the firm's collection business was less than 4% of its total business; the court held that the law firm had an ongoing relationship with a corporate client with presumably many overdue accounts on its books. The District Court in Wisconsin reached an opposite result in *Mertes v. Devitt,* 734 F. Supp. 872 (W.D. Wis. 1990) when it held that an attorney did not regularly collect or attempt to collect debts of another and therefore was not a "debt collector" under the Act where the attorney averaged less than two collection matters per year and debt collection comprised less than one percent of his practice.

2. Specific Restrictions and Obligations of the Act. The Act prevents certain collection activities by "debt collectors" collecting or attempting to collect "consumer debts" against "consumers" and obligates "debt collectors" to make certain disclosures and provide certain information in the course of their activities.

3. Limitation on Acquisition of Location Information. Section 1692b of the Act requires that "any debt collector communicating with any person other than the consumer for a purpose of acquiring location information about the consumer *shall*"

a. Identify himself [or herself], state that he [or she] is confirming or correcting location information concerning the consumer and, only if expressly requested, identify his [or her] employer;[5]

b. Not state that the consumer owes any debt;

c. Not communicate with any such person more than once unless requested to do so by such person or unless the debt collector reasonably believes that the earlier response of such person is erroneous or incomplete and that such person now has correct or complete location information;

d. Not communicate by post card;[6]

"Case law . . . requires lawyers, in my view, to assume that they fall under the definition of debt collector unless they provide collection services only on very rare occasions."

e. Not use any language or symbol on any envelope or in the contents of any communication effected by the mails or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt.[7]

f. After the debt collector knows that the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable time to communication from the debt collector.[8]

4. Limitation on Communications With the Debtor and Certain Third Parties in Connection with Debt Collection. With respect to communication with the consumer concerning the debt, §1692c(a) of the Act restricts such communications in three ways:

First, the debt collector may not communicate with the consumer in connection with collection of the debt "at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer." Because such language is rather broad and uncertain, the Act provides, with respect to time and place, that "in the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with the consumer is after 8:00 a.m. and before 9:00 p.m. local time at the consumer's location."[9]

Second, "if the debt collector knows the consumer is represented by an attorney" then the communication must be with the attorney unless the attorney consents to the contrary.

Third, the debt collector may not communicate with the consumer at the consumer's place of *employment* if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.[10]

With respect to communicating about the debt itself, as opposed to mere location information, a debt collector, without a court order or consent of the consumer, may not communicate with any person *other than* the consumer himself, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney for the creditor, or the attorney for the debt collector. 15 U.S.C. §1692c(b). For example, the collector may communicate with the debtor's employer concerning the debtor's *location* but may not communicate with the debtor's employer concerning the collection matter itself.

The Act also provides that if the consumer notifies a debt collector in writing that the consumer refuses to pay the debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector is obligated to stop communicating with respect to the debt except:

a. "To advise the consumer that the debt collector's further efforts are

being terminated";

b. "To notify the consumer that the debt collector or creditor may invoke specific remedies which are ordinarily invoked by such debt collector or creditor; or

c. "Where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy." 15 U.S.C. §1692c(C) (1)-(3).

Under §1692c, the term "consumer" includes the consumer's *spouse* or the consumer's *parent* if the consumer is a minor, or the consumer's guardian, executor or administrator. For example, if the debtor makes a written communication that communications about the debt are to cease with the consumer, the collector may not then divert the calls to the debtor's spouse (or parent if debtor is a minor).

5. Prohibition Against Harassment or Abuse. Section 1692d of the Act specifically proscribes "any conduct the natural consequence of which is duress, oppression or abuse of any person in connection with the collection of a debt." It then goes on to provide examples, although not an exhaustive list, of prohibited practices:

a. "The use or threat of use of violence or other criminal means to harm the physical person, reputation or property of any person." In other words, do not be threatening to break someone's knee caps;

b. "The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." This would include, obviously, typical four letter words, but also includes racist, sexist or other offensive terminology;

c. "The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of §1681(a)(f) or §1681(b)(3) of this title." In short, this subsection prevents the publication and display of so-called "deadbeat lists."[11]

d. "The advertisement for sale of any debt to coerce payment of the debt;"[12]

e. "Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with the intent to annoy, abuse or harass any person at the called number."[13]

f. "Except as provided in §1692b the placement of telephone calls without meaningful disclosure of the caller's identity."

This section of the Act is troublesome to collectors from a practical standpoint because often what is obscene, profane or abusive is "in the ear of the beholder." The debt collection process often requires firm language and effective communication and is an inherently unpleasant process and certainly is not expected to be conducted by Emily Post's rules of etiquette. Courts have recognized that not all such communications, even though embarrassing and stressful to the consumer, violate the Act. For example, in *Dorsey v. Morgan,* 760 F. Supp. 509 (D. Md. 1991), the court held that an attorney's claim to a consumer that he would seek attorney's fees and costs if legal action was commenced was neither false nor oppressive and complied with the Act; the contract between the consumer buyer and seller provided for payment of attorney's fees and costs in the event of a collection action. In *Jeter v. Credit Bureau Inc.,* 760 F.2d 1168 (11th Cir. 1985), a debt collection agency's letters stating that the debtor

owed the specified creditor money, that the amount in question had not been paid, and that unless satisfactory arrangements were made within 5 days, the agency would recommend suit or subsequent action were held not to offend the Act's proscription on use of obscene or profane language. In *Masuda v. Thomas Richards and Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991), the court held that even if all of the alleged 48 letters sent to the debtor by the debt collector over a period of 8 months referred to the same debt, the mailing of six letters per month would *not* be considered "harassing."

6. Prohibition Against False or Misleading Representations. Section 1692e mandates that "a debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt." Without limiting the general application of this statement, §1692e lists 16 separate representations which it specifies as "false, deceptive or misleading:"

(1) The representation that the debt collector is vouched for, bonded by or affiliated with the United States or any state, including the use of any badge, uniform or facsimile thereof.

(2) The false representation of the character, amount or legal status of any debt or any services rendered or compensation which may be lawfully received by the debt collector for collection of the debt.

(3) The false representation or implication that an individual is an attorney or that any communication is from an attorney, (unless, of course, it *is* from an attorney).

(4) The representation or implication that non-payment of the debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken (in other words, don't make "idle threats").

(6) The false representation or implication that a sale, referral or other transfer of any interest in the debt shall cause the consumer to lose any claim or defense to payment or become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false including the failure to communicate that the disputed debt is [in fact] disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued or approved by any court, official or agency of the United States or any state which creates a false impression as to its source, authorization or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

"[The prohibition on use of certain language] is troublesome to collectors from a practical standpoint because often what is obscene, profane or abusive is 'in the ear of the beholder.'"

(11) Except as otherwise provided for communications to acquire location information under §1692b . . ., the failure to disclose clearly in *all* communications made to collect a debt or to obtain information about a consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose;[14]

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value;

(13) The false representation or implication that documents [constitute] legal process;

(14) The use of any business, company or organization name other than the true name of the debt collector's business, company or organization;

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer;[15]

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency (in other words, do not represent that you work for the Credit Bureau if you don't).

The Federal Trade Commission "Guides Against Debt Collection Deception" at 16 C.F.R. §237.0 provide guidance here as well.[16]

7. Prohibition Against "Unfair Practices." Section 1692f of the Act provides generally that "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." Like many parts of the Act, this provision is very general and subject to interpretation. However, §1692f, like its predecessor section, provides, without limiting the generality of the statement, several examples of the prohibited conduct:

(1) Collecting interest, fees, charges, or expenses beyond the principal obligation if such amount is not expressly authorized by the agreement with the debtor or permitted by law. In other words, a debt collector cannot simply add on costs which are not provided for either by statute or agreement. It is important to again emphasize here that under Utah law, attorney's fees may only be collected if provided specifically by a contract or provided by statute, such as the bad check law (Utah Code Annotated §7-15-1 *et. seq.*).

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by *more than five days* unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than 10 nor less than 3 business days prior to such deposit. In other words, if the debt collector accepts a postdated check from the debtor which is postdated more than five days, the debt collector must give the debtor notice of the debt collector's intent to deposit the check within 10 days but not less than 3 days prior to the deposit being made.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution. In other words, the debt collector cannot acquire a postdated check for the sole purpose of attempting to create a criminal remedy against the debtor.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date

on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any non-judicial action to effect "disposition or disablement of property" (*i.e.* repossession or seizure) if (a) there is no present right to possession of the property claimed as collateral through an enforceable security interest; (b) there is not a present intention to take possession of the property; or (c) the property is exempt by law from such disposition or disablement.

(7) Communicating with a consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope communicating with the consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business. In short, if you are in the debt collection business and your name indicates as such, simply put your box or street address in the return address and nothing more.

"The debt collector cannot acquire a postdated check for the sole purpose of attempting to create a criminal remedy against the debtor."

8. "Validation of Debts" Requirement – Notice Requirements Concerning Ability to Dispute Claim. Section 1692g of the Act, although being among the shortest subsections of the Act, raises the most traps for the unwary. This Section regulates the timing and content of notices to the debtor, provides that the debtor may require verification of or dispute the debt, and indicates what action may or may not be taken by the debt collector in the event the consumer exercises the remedy. The notice provision, §1692g(a) provides:

> Within *5* days after the *initial* communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the *initial* communication or the consumer has paid the debt, send the consumer a *written* notice containing —
>
> 1. The amount of the debt;
> 2. The name of the creditor to whom the debt is owed;
> 3. A statement that unless the consumer, within 30 days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;[17]
> 4. A statement that if the consumer notifies the debt collector in writing within the 30 day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the

consumer [if one exists] and a copy of such verification or judgment will be mailed to the consumer by the debt collector;[18]

5. A statement that, upon the consumer's written request within the 30 day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. (In other words, if a claim has been assigned, the debtor has a right to know who the assignors were).

With respect to constructing appropriate initial notices to the debtor, §1692g(a) is interactive with §1692e(11) which lists as a "false or misleading representation" "the failure to disclose clearly on all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." In other words, notices should contain a disclosure to this effect. This disclosure should also be contained in communications with third parties except as otherwise provided for communications used merely to acquire *location* information under §1692b of the Act.

Interestingly, although an initial notice to a consumer debtor may contain all of the necessary notice language required by §1692g(a), other language contained in such a letter and notice may effectively nullify the effect of the §1692g(a) notice, triggering a violation of the Act. To begin with, violations of the Act are judged from the perspective of the "least sophisticated consumer." See, e.g., *Jeter v. Credit Bureau Inc.,* 760 F.2d 1168 (11th Cir. 1985).[19] In *Graziano v. Harrison,* 950 F.2d 107 (3rd Cir. 1991), the court held that the statutory notice sent by the collection agency that the consumer has 30 days within which to dispute the debt was not effectively communicated to the debtor because the notice was also accompanied with a demand for payment within 10 days and the threat of immediate legal action if payment was not made within that time; there was a reasonable probability that the "least sophisticated consumer" when faced with a demand for payment within 10 days, would overlook the statutory right to dispute the debt within 30 days. Labeling such a situation "gross overshadowing," the court in *Anthes v. TransWorld Systems Inc.,* 765 F. Supp. 162 (D. Del. 1991), held that an otherwise adequate notice of the debtor's rights under the Act can nonetheless be inadequate if the notice is grossly overshadowed by language in the body of the letter; "gross overshadowing" occurs when language of the letter stands in threatening contradiction to the statutorily required notice so that the debtor would feel compelled to disregard the statutorily required notice. In *Rabideau v. Management Adjustment Bureau,* 805 F. Supp. 1086 (W.D.N.Y. 1992), the court, in holding that the collection agency's letter was inadequate, focused upon the layout and typestyle of the letter.[20]

"Utah has no consumer usury limits . . . . However, §70C-7-106 recognizes common law unconscionability as a limit although the statute makes no effort to quantify that term."

Conversely, in *Burns v. Accelerated Bureau of Collections of Virginia Inc.,* 825 F. Supp 475 (E.D. Mich. 1993), the Act was held not violated by the collection agency's letter stating that time was of the essence and that it was important that payment in full be made "today" where request for payment contained no time limit threat, and was immediately followed by two easily readable paragraphs of slightly smaller type discussing the debtor's right to dispute the debt; the payment requested did not overshadow or stand in threatening contradiction to the required notice. Another court held that the language "immediate settlement," "your account must be settled now" and "payment in full within 10 days will stop all recommended action" did not violate the Act because it merely encouraged payment of the debt and did not overshadow the consumer's rights under the Act to dispute the debt within 30 days of the initial communication. *Higgins v. Capitol Credit Service,* 762 F. Supp. 1128 (D. Del. 1991). Subsection (b) of §1692g describes what occurs if a consumer disputes the debt in writing within 30 days after receiving the initial notice:

(b) If the consumer notifies the debt collector in writing within the 30 day period described in subsection (a) of this section that the debt, or any part thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of judgment [if one exists] or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

However, must the debt collector wait and take no further action whatsoever during the 30 day period until and unless the debt collector receives a notice of dispute from the debtor? In other words, must the debt collector shut down all collection activity for 30 days until he hears from the debtor? The answer is "no." "[A]bsent such dispute or notification during the 30 day validation period, the debt collector *may continue* its collection efforts." *Rabideau,* 805 F. Supp. at 1092, *citing Smith v. Financial Collection Agencies,* 770 F. Supp. 232, 236 (D. Del. 1991) (emphasis added). Presumably, the debt collector may file suit against the debtor during the 30 day notification period, prior to receiving notice. However, "[w]hile continuing efforts to collect the debt may occur within the 30 day period provided under §1692g, those efforts must terminate for at least that period from the date such validation demand is received by the debt collector, within the 30 day period, until the date the information is provided to the debtor." *Rabideau* at 1094. An interesting procedural question is presented: If the debt collector, during the 30 day period, commences suit and serves process upon the debtor, and the debtor then disputes the debt and requests verification in writing, must the debt collector toll the running of the 20 day period to respond? The answer, keeping with the spirit of §1692g, is probably "yes." The notice containing the statutory language must be in writing; it is insufficient, for example, for the initial contact to invite the debtor to call a toll free number in order to obtain the statutory information. *See, Wookfolk v. Van Ru Credit Corp.,* 783 F. Supp. 724

(D. Conn. 1990).

Since lawyers can be construed to be "debt collectors" under the Act, the attorney must be certain whether he or she, after referral of the matter by the client, is the one making the "initial" contact with the debtor. For example, if the attorney's client is itself a "debt collector" under the Act and has communicated previously with the debtor and has provided the statutory notices, subsequent letters from the attorney need not contain the notices because they are not the "initial communication." However, note that the Act does not apply to persons trying to collect their *own* debts and it is as likely as not that the client referring the matter, prior contacts with the debtor notwithstanding, will not have been a statutory "debt collector" and will not have provided the statutory notices whereas the lawyer, once he or she gets the referral, then becomes a "debt collector" and must provide the notices. The moral to the story: provide all of the notices in your first communication.

9. Applying Payments Where Debtor Owes Multiple Debts. Section 1692h of the Act provides that if a consumer owes multiple debts, some of which have been disputed in accordance with §1692g, and

some of which have not, and the debtor makes a payment to the debt collector, the debt collector may not apply the payment to any of the *disputed* debts but only to the undisputed debt and in any event must apply the payment in accordance with the consumer's direction.

10. Prohibition Against Seeking Inconvenient Venues in Legal Actions. Section 1692i of the Act essentially prevents debt collectors from bringing legal actions against the debtor in inconvenient venues.

11. Prohibition Against Furnishing Deceptive Forms. Section 1692j provides liability as a "debt collector" to one who is using a deceptive form, even to collect his or her own debt. In fact, subsection (b) of §1692j provides that "[a]ny person who violates this section shall be liable to the same extent and in the same manner as a debt collector. . . ." In other words, if the holder of a claim sends out a letter to the consumer debtor stating that it is from "Hells Angels Collection Agency" when in fact it is the *creditor* promulgating the notice, the creditor will incur liability under the Act even though the creditor is attempting to collect on its own debt.

12. Civil Liability. Section 1692k of the Act provides for civil damages in favor of a consumer debtor against a debt collector violating any provision of the Act. An individual debtor may recover "(1) actual damages and (2) such additional damages as the court may allow, but not exceeding $1,000.00." Section 1692k(a)(1)(2)(A). The consumer debtor may also recover attorney's fees as a matter of statute. Conversely, if the court finds that the consumer has sued the debt collector in bad faith, the court may assess attorney's fees against the consumer in favor of the debt collector. Section 1692k also contains recovery limits for class actions. Section 1692k(a)(2)(B). Subsection (c) of §1692k provides a "innocent act" safe harbor for debt collectors:

> A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Actions under §1692k are brought in the United States District Court and are under "federal question" jurisdiction. The statute of limitations is *one year* from the date of the violation.

B. State Statutes Relating to Debt Collection. The Utah Uniform Consumer Credit Code, Utah Code Annotated §70C-1-101 *et. seq.*, and particularly the section entitled "Limitations on Creditor's Remedies" beginning at §70C-7-101 provides with respect to consumer transactions the following limitations and protections:

"An employer cannot fire an employee because the employee's earnings have been garnished in connection with any one judgement."

a. Limitation on deficiencies. If the seller repossesses or voluntarily accepts the surrender or return of goods which were the subject of a consumer credit sale and in which the seller has a security interest to secure a debt arising from the sale of goods or services or a combined sale of goods and services, and the cash *price* of the sale was *$3,000.00 or less*, any debt remaining from the sale shall be fully satisfied and the seller has no further obligation to the buyer with respect to the goods taken or accepted. This section does not apply if the goods which were the subject of the sale and which secured a debt arising from a consumer credit sale are damaged to a significant degree after the goods are delivered to the buyer through no fault of the creditor. Utah Code Ann. §70C-7-101(1)-(3).

b. No Pre-Judgment Wage Garnishments. In a consumer credit sale, pre-judgment writs of garnishment on the debtor's wages are not available. Utah Code Ann. §70C-7-102.

c. Limitations on Garnishment. Section 70C-7-103 of the Utah Uniform Consumer Credit Code provides the exemptions applicable to wage garnishments.

d. Protection of Employment. An employer cannot fire an employee because the employee's earnings have been garnished in connection with any one judgment. Utah Code Ann. §70C-7-104.

e. No Loan Sharking. Section 70C-7-105 renders unlawful extensions of credit where the debtor and creditor come to an understanding that failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person. If the court finds that such circumstances existed, the debt is, in essence, forgiven as a matter of law, because it is deemed "unenforceable through any judicial proceedings against the debtor."

f. Unconscionable Credit Terms. Utah has no consumer usury limits. Utah Code Ann. §70C-2-101. However, §70C-7-106 recognizes common law "unconscionability" as a limit although the statute makes no effort to quantify that term.

g. No Confessions of Judgment. In a consumer transaction, confessions of judgment or "cognovit" notes are not allowed in Utah. Utah Code Ann. §70C-2-201.

h. Limitation on Delinquency Charges. In consumer credit transactions in Utah, installment transaction delinquency charges for late payment or non-payment of a particular installment are limited to the greater of 5% of the installment or $20.00 and can only be assessed if the installment is more than 10 days past due. Utah Code Ann. §70C-2-102 (1991).

i. Notice of Negative Credit Report Requirement. In Utah, a creditor may submit a negative credit report to a credit reporting agency only if the creditor notifies the party whose credit record is the subject of the negative report. After providing this notice, a creditor may submit additional information to a credit reporting agency respecting the same transaction or extension of credit that gave rise to the original negative credit report without providing any additional notice. The notice must be in writing and shall be delivered in person or mailed first class, postage pre-paid, to the party's last known address *prior to* or *within* 30 days *after* the transmission of the negative credit report. The notice may be part of any notice of default, billing statement or other correspondence from the creditor to the party. According to statute, the notice is sufficient if it takes substantially the following form:

> As required by Utah law, you are hereby notified that a negative credit

report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.

A creditor who fails to provide notice as required by this section is liable to the injured party for actual damages. The prevailing party in such an action is entitled to costs and attorney's fees. In the event a willful violation by the creditor is found, the statute limits punitive damages to an amount not to exceed two times the amount of the actual damages. Like the Federal Fair Debt Collection Practices Act, Utah law with respect to this notice holds that a creditor is not liable for failure to provide the notice if he establishes by preponderance of the evidence that, at the time of his failure to give notice, he maintained reasonable procedures to comply with this section. Utah Code Ann. §70C-7-107.

j. Statute of Limitations. Actions under the Utah Uniform Consumer Credit Code generally must be brought within one year after the date of the occurrence of the violation; however this statute of limitation does not bar a person from asserting a violating of the Utah Consumer Credit Code more than one year after the date of the occurrence of the violation as a matter of defense by recoupment or set-off to the extent of the outstanding balance of the debt. Utah Code Ann. §70C-7-205.

k. Creditor "Safe Harbor" Defense. Section 70C-7-206 of the Utah Consumer Credit Code protects a creditor from liability under the Code *if* he proves by a preponderance of the evidence that the violation was unintentional or the result of a bona fide error; further, the creditor or the assignee has no liability under the Utah Uniform Consumer Credit Code for any failure to comply with any requirement imposed by the Code if within 60 days after discovering an error, and prior to the institution of an action or the receipt of written notice of error from the debtor, the creditor or assignee notifies the person concerned of the error and makes further adjustments in the appropriate account as necessary.

l. Uniform Commercial Code. The Utah Uniform Commercial Code regulates enforcement of security interests by self-help repossession and otherwise. Particular attention should be paid to §§70A-9-501, 502, 503, 504, 505, 506, and 507 of (Article IX) of the Commercial Code.

2. Utah Rules of Civil Procedure. Utah Rules of Civil Procedure control the issuance of post-judgment process. For example, Rule 69 concerns writs of execution; subsection (o) and (k) of Rule 69 regulate debtor exams or so-called "supplemental proceedings;" Rule 64D regulates writs of garnishment; Rule 64C regulates writs of attachment; Rule 58A(d) requires notice of entry of default judgment to be given to debtors; Rule 60 controls when judgments may be set aside.

C. Conclusion. Careful adherence to statutory requirements is essential to avoid liability and to preserve the effectiveness and integrity of the collection process. "Hardball" tactics in violation of statute in consumer cases will result in substantial risk of liability to the collector and must be avoided. Collection practice may be effectively pursued within the rules.

[3]The definition of a "consumer debt" has been narrowly construed by courts. In *Munk*, the Tenth Circuit held that a loan to farmers by the Federal Land Bank was not a consumer debt. In *Bloom v. I.C. Systems Inc.*, 972 F.2d 1067 (9th Cir. 1992), the court held that a loan between friends which was made so that the debtor could invest in a software company was a "business loan" and not a "consumer debt" and thus the Act did not apply; debtor's intended use of the funds could not be characterized as "primarily for personal, family or household purposes." Another court held that promissory notes used to pay for a portion of an investor's partnership interest in a tax shelter limited partnership were not "consumer debts" within the meaning of the Act. *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990). In short, debts incurred purely for business reasons are not covered by the Act. *Mendez v. Apple Bank for Savings of New York City*, 541 N.Y.S.2d 920 (1989).

[4]Congress also included within the definition of "debt collector" "any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." In other words, Congress extended the coverage of the Act to original creditors using a collection agency pseudonym.

[5]Frequently debt collectors use so-called "desk names" in conducting their collection activities. In other words, they use a name other than their own to protect them from possible retaliation by angry debtors. While this requirement that the collector "identify himself" seems to suggest that the practice of using "desk names" is unlawful, courts, recognizing the practical need for the use of desk names, have held that the use of desk names does not violate this provision. *See, e.g., Wright v. Credit Bureau of Georgia Inc.*, 548 F. Supp. 591 (D. Ga. 1982) (use of a desk name, an alias, by debt collector's employee, did not violate this section prohibiting placement of telephone calls without meaningful disclosure of the caller's identity); *Kleczy v. First Federal Credit Control Inc.*, 486 N.E.2d 204 (Ohio App. 1984) (use of alias or "desk name" by an individual debt collector who otherwise accurately discloses the name of her employer and the nature of its business and conceals no more than her real name does not constitute conduct prohibited by the Act).

[6]Obviously a post card mailed, for example, to someone's place of employment can be, and usually is, read by anyone that handles it. Use of post cards to communicate with third parties concerning a debtor were used prior to the Act as a surreptitious means of "shaming" debtors into paying the claim by exposing their debt collection problem with use of post cards.

[7]Like the prohibition against use of post cards, this provision is intended to protect the debtor from surreptitious or inadvertent disclosures to third persons that there is a debt collection action being taken against the debtor. In other words, the Act eliminates the ability of debt collectors to "shame" the debtor to third parties in this way.

[8]Interestingly, one debt collector was held not to have violated the Act by communicating directly with the consumer, even though the consumer had retained counsel to help him dispute the debt being collected, where the debt collector had no knowledge that the consumer was represented by counsel "with respect to such debt." *Graziano v. Harrison,* 950 F.2d 107 (3rd Cir. 1991).

[9]A trap for the unwary may exist where the debt collector is calling from a different time zone. For example, if a debt collector telephones a consumer debtor from Los Angeles at 6:35 p.m. and the consumer debtor is located in New York, local time in New York will be 9:35 p.m. and hence the call will be in violation of §1692c(a).

[10]Presumably the most common method by which the debt collector will acquire the information that the "consumer's employer prohibits the consumer from receiving such communication" at work will be if the consumer, when contacted there, says so. The safe practice would be to simply take the consumer's word for this situation. It is unlikely that many employers have specific policies against employees receiving consumer debt collection calls. More likely than not, the employer simply has policies regulating calls to or by employees not related to the employer's business.

[11]The Honorable Dee V. Benson of the United States District Court for the District of Utah in *Brown v. Child Protection Advocates,* Civil No. 878 F.Supp. 1451 (D. Utah 1994), decided that a debtor who owes delinquent *child support* is not protected by the Act because child support is not a "consumer debt" under the Act.

[12]Such advertisements are tantamount to the creation and publication of a "deadbeat list."

[13]This section is intended to protect consumer debtors against "hang up calls" and repetitive annoying call backs.

[14]Structuring of this notice will be treated under subsection 6 below.

[15]In other words, it is improper to lull the consumer into not answering a summons and complaint or not responding to a request for hearing on a writ of garnishment or execution.

[16]With respect to the prohibition against "[t]he false representation or implication that any individual is an attorney or that any communications are from an attorney," courts have held that where a letter goes out over an attorney's letterhead that the attorney has not first reviewed, that this provision is violated. In *Clomon v. Jackson*, 988 F.2d 1314 (2nd Cir. 1993), the court held that a computer generated form letter bearing the name and facsimile signature of an attorney who did not review the collection letter or the file of the debtor to whom letters were sent violated the Act provision prohibiting false representation or implication that the communication is from the attorney; the use of an attorney's letterhead and signature on collection letters was sufficient to give the least sophisticated consumer the impression that letters or communications were from an attorney and this impression was false and misleading because the attorney played virtually no day-to-day role in the debt collection process.

[17]Interestingly, subsection (c) of §1692g of the Act provides that "the failure of a consumer to dispute the validity of the debt under this section may *not* be construed by any court as an admission of liability by the consumer."

[18]The type of verification provided need only be reasonable in the circumstances. For example, in *Graziano v. Harrison*, 763 F. Supp. 1269 (D.N.J. 1991), the court held that the debt collector adequately provided verification of the debts by supplying computer printouts of the type routinely accepted by insurers to verify claims, where none of the clients of the collector had any hard copy of the past billing information, so that computer printout in one form or another was the only printed verification available. Conversely, a collection agency's failure to provide a debtor with written verification of a debt after receiving a letter from the debtor disputing the debt violated the Act even though the debtor may have had adequate prior notice or knowledge of the alleged debt, and the collection agency had not received verification or validation from the creditor that it can mail to the debtor. *Johnson v. Statewide Collections Inc.*, 778 P.2d 93 (Wyo. 1989).

[19]This standard is alternatively referred to as the "unsophisticated consumer" standard. *See, e.g., Smith v. Transworld Systems, Inc.,* 953 F.2d 1025 (6th Cir. 1992).

[20]The Western District of New York, in its opinion, reproduced the language of the letter and its typestyle.

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PREMIUM PROPOSAL REQUEST

Just give us a few facts about your firm, fax to us and we can provide you with a premium estimate. We'll need to see a completed application before we can determine if your firm is eligible for this program.

1. Please provide the number of attorneys and their years of experience:

# of Attorneys with:

5+Years____ 2 Years____
4 Years____ 1 Year____
3 Years____ >1Year____

Firm: _____
Contact Name: _____
Address: _____
City: _____ State: ____ Zip _____
Telephone: ( ) _____
FAX: ( ) _____

2. What percentage of ***TIME*** – ***not income*** – do you spend in the following practice specialties?

A.
_____ % ADMIRALTY – DEFENSE
_____ % BANKRUPTCY/COLLECTIONS
_____ % GENERAL/COMMERCIAL LITIGATION
_____ % CRIMINAL LAW
_____ % DEFENSE PERS. INJ.; WORKERS' COMP.
_____ % DEFENSE PRODUCTS LIABILITY
_____ % FAMILY LAW
_____ % IMMIGRATION
_____ % INTERNATIONAL LAW
_____ % MEDIATION
_____ % WILLS, ESTATE PLANNING, PROBATE

B.
_____ % CORPORATE FORMATION, MERGERS & ACQUISITIONS
_____ % ENTERTAINMENT/SPORTS
_____ % ENVIRONMENTAL
_____ % INVESTMENT COUNSELING
_____ % LABOR/ERISA OR EMPLOYEE BENEFITS
_____ % MUNICIPAL
_____ % OIL, GAS, MINING, UTILITIES
_____ % TAXATION – INDIVIDUAL
_____ % OTHER

C.
_____ % PATENT/COPYRIGHT/TRADEMARK
_____ % PLAINTIFF PERS. INJ.; WORKERS' COMP.
_____ % PLAINTIFF REP. IN PRODUCTS LIABILITY
_____ % REAL ESTATE
_____ % TAXATION – CORPORATE
_____ % TITLE/ABSTRACTING

D.
_____ % BANKING, SAVINGS & LOAN, OTHER FINANCIAL INSTITUTION SERVICES
_____ % BONDS, COMMERCIAL PAPER, LIMITED PARTNERSHIPS, OR STATE OR FEDERAL SECURITIES, BOTH EXEMPT AND NON-EXEMPT

Your Insurance History

4. Current Professional Liability Insurer _____
5. How long have you been continuously insured? _____
6. Current expiration date: _____
7. Current premium: _____
8. Current limits & deductible: _____

Your Claims History

3. Have you reported any Professional Liability claims in the last five years? ❑ Yes* ❑ No

*If yes:	One	Two	Three
Date Claim(s) Reported			
Amount Paid, including Defense Expenses (if closed)			
Reserve Amount (if open)			

Please attach additional claim information if available.

For more details, contact Sedgwick of Idaho, Inc.

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Commission Highlights

During its regularly scheduled meeting of April 28, 1995, held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the January 27, 1995 and March 2, 1995 meetings.
2. By secret ballot, the Board voted to nominate Steve Kaufman as president-elect for 1995-96 and to stand for retention election.
3. Paul Moxley reviewed the agenda for the business meeting scheduled for April 28 at noon as well as upcoming meeting dates.
4. The Board voted to approve creating a reference library for small firm practitioners and purchasing the suggested bibliography as recommended by the Small Firm & Solo Practitioners Committee.
5. Following an open discussion on the issue of ex officio membership on the Bar Commission, the Board voted to leave the Commission the way it is currently.
6. Baldwin reported that there are two attorney openings and one lay person opening on the Ethics & Discipline Committee hearing panels and he reminded the Board that the Supreme Court makes the appointments.
7. The Board voted to reappoint Rex Olsen and Helen Christian to the Child Support Advisory Guidelines Committee.
8. Baldwin indicated that two defense attorneys need to be appointed to the Criminal Defense Committee and that the Board would need to appoint a representative to the Commission on Criminal and Juvenile Justice. The Board suggested some names and requested Baldwin publicize these committee openings in an upcoming *Bar Journal* or mailing to solicit additional names.
9. Moxley reported that the Annual Meeting Awards Committee had met to make recommendations for annual awards to Bar members.
10. The Board voted to oppose S.B.3 "Federal Criminal Procedure Reform" and have the President of the Bar send a letter to Senator Hatch expressing opposition.
11. William Stilling, Legal/Health Care Committee Co-Chair, appeared to discuss the pre-litigation rules regulation. The Board voted to give approval to the committee to propose legislation.
12. Dennis Haslam indicated that the members of the Long-Range Planning Committee have been meeting with Bar staff to review program costs, goals and processes and will prepare a final report for review at the May Commission meeting.
13. Stephen Trost indicated that special counsel needs to be appointed for a formal suit and asked for the Board's approval. The Board voted to approve Frank Carney as special counsel.
14. John Baldwin referred to the Bar Programs Department Summary Report and indicated that 117 applicants sat for the February Bar Examination and that passing rate was 79.5%.
15. Baldwin reviewed the Mid-Year Meeting statistics and answered questions.
16. Baldwin introduced Toby Brown, Pro Bono Coordinator, to the Board and referred to Mr. Brown's report.
17. The Board voted to approve the list of passing applicants of the February 1995 Bar Exam.
18. The Board passed a resolution to support Legal Services Corporation.
19. Ray Westergard, Budget & Finance Committee Chair, reported on the March financial statements.
20. The Board approved Ethics Advisory Opinion Nos. 146A, 95-02, 95-03, and 95-04.
21. J. Michael Hansen reported on the recent Judicial Council.
22. Charlotte L. Miller gave a brief update on the Office of Attorney Discipline Review Committee work.

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

New Chief Disciplinary Counsel for the Utah State Bar

Stephen R. Cochell was appointed Chief Disciplinary Counsel for the Utah State Bar on June 28, 1995.

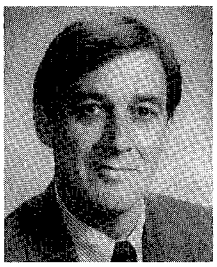
Steve has a broad and diverse educational and professional background that will assist him in his new duties as Chief Disciplinary Counsel.

Steven Cochell graduated from the University of Maryland in Political Science where he also received a Masters in Social Work. He attended the University of Baltimore School of Law while working at the Maryland House of Correction and a Community Arbitration Program as a Social Worker and Administrator. Mr. Cochell subsequently attended Georgetown University Law Center in Washington, D.C. where he received his LLM.

From 1979-1983, Mr. Cochell served as a Navy Judge Advocate in Pearl Harbor, Hawaii, Yokosuka, Japan and Washington, D.C., and performed duties as a criminal trial and appellate defense attorney. Mr. Cochell was appointed an Assistant United States Attorney in Detroit, Michigan and served in that capacity from 1983-1985. As an Assistant United States Attorney, Mr. Cochell was primarily involved in the investigation and prosecution of narcotics, tax and public corruption offenses. Most notably, Mr. Cochell was one of the federal prosecutors involved in the investigation of the Detroit Recorders Court, which resulted in the prosecution of four sitting judges.

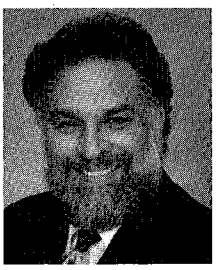
In 1985, Mr. Cochell joined the firm of Wise and Marsac, Detroit, Michigan, where his practice focused on employment and product liability defense. In 1990, he moved to Salt Lake City where he associated with the law firm of Hansen, Jones & Leta and was engaged in bankruptcy and commercial litigation. In 1992, Mr. Cochell joined the firm of Campbell, Maack & Sessions where he was primarily engaged in white collar criminal defense, employment defense and a broad range of commercial and business litigation including contract, unfair competition and trade secret litigation.

Utah State Bar Announces Officers and New Commissioners For 1995-1996



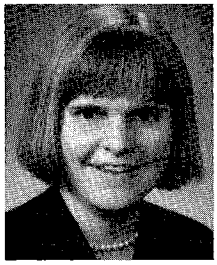
Dennis V. Haslam

The Board of Bar Commissioners has elected Salt Lake City attorney Dennis V. Haslam president of the Utah State Bar. Mr. Haslam is a founding member of the law firm of Winder & Haslam. He received his juris doctor from the University of Utah College of Law. He is a member of the Utah Sports Authority and the board of trustees of the University of Utah College of Law Alumni Association. He is chair of the Utah Judicial Performance Evaluation Committee. Mr. Haslam has been a member of the Utah State Bar Commission since 1990.



Steven M. Kaufman

The Commissioners elected Steven Michael Kaufman as president-elect for the 1995-96 term. Mr. Kaufman is senior managing partner in the Ogden firm of Farr, Kaufman, Sullivan, Gorman, Jensen, Medsker & Perkins. He received his juris doctor from Gonzaga University School of Law. He was first elected to the Bar Commission in 1992 and has served as president of the Weber County Bar.



Denise A. Dragoo

The members of the Utah State Bar have elected two Utah attorneys to three year terms on the Board of Bar Commissioners. Elected in the Third District from Salt Lake City are Denise Dragoo and Debra Moore.

Ms. Dragoo, a partner with the law firm of VanCott, Bagley, Salt Lake City, will be serving a second term as a Commissioner. She has served as president of Women Lawyers of Utah, Inc., and is a member of the Judicial Conduct Commission.

Debra Moore

Ms. Moore practices in the Civil Appeals Section of the Utah Attorney General's Office and teaches legal writing at the University of Utah. She is chair-elect of the Appellate Practice Section of the Bar and is past chair of the Litigation Section.

John Florez

The Supreme Court also appointed John Florez to serve a three year term as a public member of the Bar Commission. Mr. Florez was director of the President's Commission on Hispanic Education and was Deputy Assistant Secretary, U.S. Department of Labor.

Ex-officio members of the Commission include representatives from the Minority Bar Association, Young Lawyers Division, Women Lawyers Association, the deans of Utah's two law schools, two representatives to the American Bar Association, the Bar's appointment to the Utah Judicial Council, and the Immediate Past President of the Bar.

The commissioners serve on the Utah Bar Commission which licenses, disciplines, and provides continuing legal educational programs for Utah's 6,000 resident and non-resident attorneys.

Brian R. Florence Named Fellow of The American Bar Foundation

Chicago, May 24, 1995 — Brian R. Florence, of Ogden, Utah, was recently elected a Fellow of the American Bar Foundation. The Fellows is an honorary organization of attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession.

Established in 1955, Fellows encourages and supports the research program of the American Bar Foundation. The objective of the Foundation is the improvement of the legal system through research concerning the law, the administration of justice, and the legal profession.

Mr. Florence, partner of the firm Florence and Hutchison, Ogden, Utah, received a B.S. from Weber State College in 1965 and a J.D. from the University of Utah Law School in 1968. Upon graduating, he was admitted to the Utah Bar and joined the Utah State Bar Association and the Weber County Bar Association, where he served as President of both organizations in 1984 and 1979, respectively. He has also served as Interim Executive Director of the Utah State Bar and as an executive committee member of the Utah State Bar Commission.

Mr. Florence is a member of the National Association of Criminal Defense Lawyers, the American Board of Trial Advocates, the American Inn of Court VII, and the Academy of Family Mediators. He is a Fellow of the American College of Trial Lawyers and the American College of Matrimonial Lawyers. Mr. Florence is past Chairman of the Utah Mandatory Continuing Legal Education Board and is currently the Vice-Chairman and on the Board of Trustees of the Utah Law and Justice Center.

Election to fellows is limited to one third of one percent of lawyers licensed to practice in each jurisdiction.

Legal Aid Society of Salt Lake Announces 79% Success Rate With Domestic Violence Protective Orders and Notes Changes in the Law Effective July 1, 1995.

Seventy-nine percent of domestic violence victims reported "NO FURTHER ABUSE" after obtaining protective orders through Legal Aid Society of Salt Lake. Legal Aid clients reported these impressive figures in surveys sent to them at the end of their 120 day protective orders throughout 1994. Legal Aid Society provides free legal representation to victims of domestic violence in obtaining civil protective orders in Utah's Third District Court in Salt Lake County.

Stewart P. Ralphs, Legal Aid Society Executive Director, reported that the success rate of the protective orders is largely due to the cumulative support of the Third District Court judiciary and coordination with local city police departments and the Salt Lake County Sheriff. Mr. Ralphs noted that while protective orders are not always effective, a seventy-nine percent success rate for any social program is remarkable, and it shows that Legal Aid Society's Domestic Violence Victim Assistance Program is effective in combating domestic violence in our community.

In 1994, Legal Aid Society provided legal counsel to over 1,000 adult victims of domestic violence and obtained protective orders on behalf of 320 children who were the victims of either physical or sexual abuse. Legal Aid's Domestic Violence Program assists victims, regardless of their income, on a walk-in basis at its office located at 225 South 200 East, Suite 200, in Salt Lake City. In addition to domestic violence cases, Legal Aid represents low-income individuals in other family law cases such as divorce and paternity. Legal Aid Society of Salt Lake is a private, non-profit corporation which is primarily funded by contributions from the local community.

The 1995 Utah Legislature made substantial changes in the Cohabitant Abuse Act, which is the law that authorizes civil protective orders. The changes, effective July 1, 1995, expand the eligibility for petitioners, make it easier to obtain a protective order, and increase the penalties for protective order violations.

Patricia Frank, the Director of Legal Aid's Domestic Violence Program, notes that while changes in the law will increase the number of individuals who may now file for a protective order, the legal process involved in obtaining a protective order may be overwhelming to victims of domestic violence and it is important that they have someplace like Legal Aid Society to turn to for legal assistance in obtaining a needed protective order.

Highlights of the changes in the law effective July 1, 1995 include:

– Courts will no longer charge a filing fee for protective order petitions and county sheriffs will no longer charge fees for serving the petitions and protective orders.

– The previous statute required a showing of physical abuse or threats of physical violence. The new statute expands the definition of "domestic violence" to include offenses such as telephone harassment and stalking.

– The court can award temporary custody of minor children to the petitioner without notice to the other party. After notice and a hearing, the court can order that visitation be supervised or denied if necessary to protect the petitioner or the child.

– The court can prohibit the purchase, use, or possession of a firearm or other weapon.

– The statute requires mandatory arrest for protective order violations and electronic monitoring of the offender and makes a second violation a felony offense.

– Before, protective orders could last no longer than 120 days. The new statute allows protective orders to be indefinite in duration.

These changes in the law will undoubtedly add to the growing number of protective order filings in the state and put added pressure on Legal Aid Society to meet the demand for assistance. Even though the Domestic Violence Program assisted 30 percent more clients in 1994 than the previous year, because of limited staff and resources, Legal Aid was able to represent only 40% of the filings in Salt Lake County. Legal Aid is vigorously pursuing additional funding to increase staff but needs greater financial support from the community to meet the growing demand for services.

Park City Bar Association Elects Officers for 1995-96

The founding members of the recently formed Park City Bar Association, with over forty members, recently elected its five member Board of Trustees for the year beginning June 1, 1995; Thomas T. Billings (resident partner of the law firm Van Cott, Bagley, Cornwall & McCarthy, President of the Park City Performances, President of the National Ability Center and a Trustee of the Kimball Art Center); Wendy A. Faber (general counsel Deer Valley Resort); Janet A. Goldstein (private practitioner, Deer Valley Plaza, Executive Committee member of the Utah State Bar Litigation Section, Trustee of the Park City Education Foundation, and Park City Ambassador); David W. Johnson (senior partner, Johnson, Holbrook & Schifferli); and, Joseph E. Tesch (senior partner of Tesch, Thompson & Sonnenreich, L.C., President of the Historic Main Street Association, Park City Planning Commission member, ad Park City Board of Adjustment member). As officers for the year, the Board of Trustees elected Mr. Tesch as President, Ms. Goldstein as President elect, Mr. Billings as Secretary, Mr. Johnson as Treasurer, and Ms. Faber as Continuing Legal Education Officer. The purpose of the Park City Bar Association is to serve its members and the greater Park City community by providing programs for continuing legal education, providing liaison been the judiciary and the needs of the citizens of the Park City area, involving the association in worth and appropriate guests. Any attorney who has not yet joined may do so by calling Nancy Rosecrans at the law firm of Tesch, Thompson & Sonnenreich, L.C. (649-0077). Law students and paralegals are encouraged to join at reduced rates.

1995 Utah State Bar Annual Meeting in San Diego, California

Photos Courtesy of:
Linda Holyoak and Patricia Thorpe


Utah State Bar
Welcome
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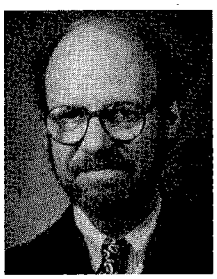
Gratefully Acknowledges
the Contribution of . . .
Welcome
Utah State Bar

Utah State Bar Presents Awards at 1995 Annual Meeting

The Utah State Bar annually recognizes distinguished service by individuals and committees. These awards were presented at the Bar's 65th Annual Meeting. The recipients are selected on the basis of achievement, professional service to clients, the public, courts, and the Bar, and exemplification of the highest standards of professionalism.

JUDGE OF THE YEAR
HON. J. THOMAS GREENE

Judge Greene was appointed to the U.S. District Court in 1985 following a 30 year legal career with the Salt Lake City firm of Greene, Callister & Nebeker. He has served as president of the Utah State Bar and the Utah Bar Foundation, and Member of the Board of Governors of the American Bar Association. Judge Greene received his juris doctor from the University of Utah College of Law.



DISTINGUISHED LAWYER OF THE YEAR
GORDON L. ROBERTS

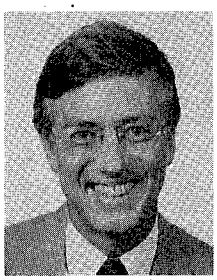
Mr. Roberts is a shareholder in the Salt Lake City law firm of Parsons Behle & Latimer. He was president of the Salt Lake County Bar and a Utah State Bar Commissioner. He was named Utah 1991 Trial Lawyer of the Year by the American Board of Trial Advocates. He is a Fellow in the American College of Trial Lawyers. Mr. Roberts received his juris doctor from the University of Utah College of Law.

DISTINGUISHED YOUNG LAWYER OF THE YEAR
HON. KIMBERLY K. HORNAK

Judge Hornak was appointed to the Third District Juvenile Court in 1994 where she serves Salt Lake, Summit and Tooele Counties. Prior to appointment to the Bench, she served as a Deputy Salt Lake County Attorney, and was previously a staff attorney with Utah Legal Services and the Legal Aid Society. Judge Hornak received her juris doctor from Gonzaga University College of Law.

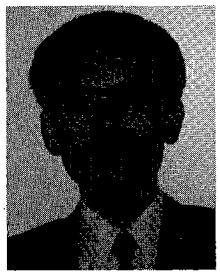
DISTINGUISHED COMMITTEE AWARD
DELIVERY OF LEGAL SERVICES COMMITTEE,
KEITH A. KELLY, CHAIR

A major undertaking of the Committee has been the promotion of pro bono legal services. It also created a Domestic Violence Clinic for Salt Lake County to provide representation for pro se litigants seeking protective orders. Committee chair is Keith A. Kelly, a shareholder of the Salt Lake City firm of Ray, Quinney & Nebeker.



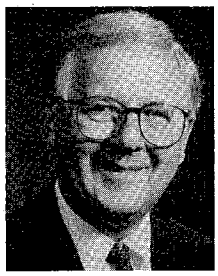
DISTINGUISHED SECTION AWARD
LITIGATION SECTION,
ROSS C. ANDERSON, CHAIR

The Section sponsored a seminar to enhance skills of its members, developed a reduced fee program for individuals who required litigation services but cannot afford the cost, and produced a new publication, *Voir Dire*. The committee also is currently updating the Model Utah Jury Instructions. Mr. Anderson, committee chair, is a shareholder in the Salt Lake City firm of Anderson & Karrenberg.



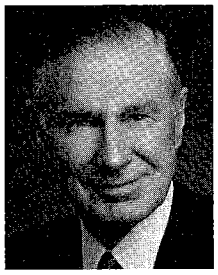
DISTINGUISHED PRO BONO LAWYER OF THE YEAR
VINH K. LY

Vinh Ly is a Deputy Weber County Attorney who has provided many hours of volunteer work for the Catholic Community Immigration Network, Utah Legal Services, Legal Aid Society of Salt Lake City, Layton City, and indigent individuals. Mr Ly says he has a personal belief in giving legal services to those in need. He received his juris doctor from the J. Reuben Clark School of Law, Brigham Young University.



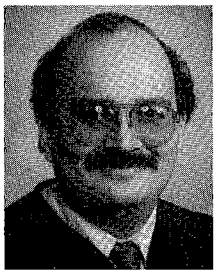
DISTINGUISHED LAWYER POSTHUMOUS AWARD
ROBERT D. MERRILL

Mr. Merrill had a distinguished career as member of the Salt Lake City firm of Van Cott, Bagley, Cornwall & McCarthy, practicing in the area of bankruptcy law. He was a board member of the Better Business Bureau, past president of Utah Legal Services, and chair of the Utah State Board of Mandatory Continuing Legal Education.



DISTINGUISHED LAWYER EMERITUS AWARD
JAMES E. FAUST

Elder Faust became Second Counselor in the First Presidency of the Church of Jesus Christ of Latter-day Saints in 1995. He received his juris doctor from the University of Utah College of Law. Elder Faust was a member of the Utah Legislature and served as president of the Utah State Bar. He was a member of the Utah State Constitutional Revision Commission and is chairman of the executive committee of the Deseret News Publishing Co.



ADVANCEMENT OF MINORITIES IN THE LAW AWARD
HON. WILLIAM A. THORNE, JR.

Judge Thorne was appointed to the Third District Court in 1994, and previously served on the Third Circuit Court. He was chair of the Utah Juvenile Justice Task Force of the Commission on Criminal and Justice and chair of the Bail

Bonding committee. He is president of the National Indian Justice Center and holds various Tribal Court assignments. He received his juris doctor from Stanford Law School.

ADVANCEMENT OF WOMEN IN THE LAW AWARD HON. CHRISTINE M. DURHAM

Justice Durham was appointed to the Supreme Court in 1982, and previously served on the Third District Court. She is a member of the Judicial Council, the Board of Directors of the National Center for State Courts, and the Council of American Law Institute. She is past president of the National Association of Women Judges. She is a trustee of Duke University where she received her law degree. She was recognized at the Bar's mid-year meeting.

UTAH TRIAL LAWYER OF THE YEAR CARMAN E. KIPP

The American Board of Trial Advocates presents an annual award to the Utah Trial Lawyer of the Year. The award for 1995 is presented to Salt Lake City attorney Carman E. Kipp, senior partner in the Salt Lake City firm of Kipp and Christian, P.C. Mr. Kipp was president of the Utah chapter of the American Board of Trial Advocates, president of the Utah State Bar and Chair of the Judicial Conduct Commission. He received his juris doctor from University of Utah College of Law.

Utah Bar Journal Committee Announces Selection of "Covers of the Year"

Photographers of "Covers of the Year" selections are pictured above from left to right: Professor David A. Thomas, A. Dennis Norton, John Preston Creer and Harry Caston. Other photographers of "Covers of the Year" who were not available for the photograph session are Chris Wangsgard and Kent Barry.

The *Utah Bar Journal* Committee is pleased to announce that it has selected the following Bar Journal covers for "Cover of the Year" awards.

Description & Photographer	Issue
Autumn Cottonwoods *by Chris Wangsgard*	November 1988
Antelope Island *by Chris Wangsgard*	November 1989
Freemont River *by Kent M. Barry*	October 1990
Big Cottonwood Canyon *by Harry Caston*	April 1991
Rainbow Bridge *by A. Dennis Norton*	May 1992
Snow in Devil's Garden *by Professor David A. Thomas*	January 1993
Quaking Aspens, Snyderville *by John Preston Creer*	October 1994

Photographs which appear on the cover of the *Utah Bar Journal* are taken by attorneys licensed to practice in the State of Utah. A great deal of interest has been generated by the beauty and uniqueness of the photographs. Since the first issue of the *Journal* under the current format, approximately twenty different attorneys have submitted photos which have been selected as cover material, with several of those attorneys having their photos selected on numerous occasions. For example, fourteen photographs submitted by Harry Caston have appeared on covers of the *Bar Journal.*

The Covers of the Year will be framed and hung in a display in the Utah Law and Justice Center.

Members of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should submit either a print or a slide of each photograph they want to be considered to Randall L. Romrell, Associate General Counsel, The Huntsman Group, Inc., 2000 Eagle Gate Tower, Salt Lake City, Utah 84111, 532-5200.

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics

Attorneys are needed to contribute two hours during the next 12 months to assist elderly persons in a legal clinic setting. The clinics provide elderly persons with the opportunity to ask questions about their legal and quasi-legal problems in the familiar and easily accessible surroundings of a Senior Center. Attorneys direct the person to appropriate legal or other services.

The Needs of the Elderly Committee supports the participating attorneys, by among other things, providing information on the various legal and other services available to the elderly. Since the attorney serves primarily a referral function, the attorney need not have a background in elder law. Participating attorneys are not expected to provide continuing legal representation to the elderly persons with whom they meet and are being asked to provide only two hours of time during the next 12 months.

The Needs of the Elderly Committee instituted the Senior Center Legal Clinics program to address the elderly's acute need for attorney help in locating available resources for resolving their legal or quasi-legal problems. Without this assistance, the elderly often unnecessarily endure confusion and anxiety over problems which an attorney could quickly address by simply directing the elderly person to the proper governmental agency or pro bono/low cost provider of legal services. Attorneys participating in the clinics are able to provide substantial comfort to the elderly, with only a two hour time commitment.

The Committee has conducted a number of these legal clinics during the last several months. Through these clinics, the Committee has obtained the experience to support participating attorneys in helping the elderly. Attorneys participating in these clinics have not needed specialized knowledge in elder law to provide real assistance.

To make these clinics a permanent service of the Bar, participation from individual Bar members is essential. Any attorneys interested in participating in this rewarding, yet truly worthwhile, program are encouraged to contact: John J. Borsos or Camille Elkington, 370 East South Temple, Suite 500, Salt Lake City, Utah 84111, (801) 533-8883; or Joseph T. Dunbeck, Jr., Parsons, Davies, Kinghorn & Peters, 310 South Main Street, Suite 1100, Salt Lake City, Utah 84101, (801) 363-4300.

THE DEAN AND FACULTY OF BRIGHAM YOUNG UNIVERSITY'S
J. REUBEN CLARK LAW SCHOOL ARE PLEASED TO ANNOUNCE:

Order of the Coif National Lecture

Charles F. Wilkinson

Moses Lasky Professor of Law
University of Colorado Law School

"The Hopis, Coal and Black Mesa: The Past and Future of Energy Development on the Colorado Plateau"

September 21st, 11:00 a.m.
Moot Court Room, 303 Law School Building
BYU Campus, Provo

All members of the bench, bar, and the general public are cordially invited.

Scott M. Matheson Award

The Law-Related Education and Law Day Committee of the Utah State Bar created the Scott M. Matheson Award in 1991 to commemorate the former governor of the State of Utah and to recognize a lawyer and law firm who have made outstanding contributions to law-related education in Utah. This year's recipients of the Scott M. Matheson Award are Gordon K. Jensen and the Utah Attorney General's Office. Both recipients' contributions to the law-related education of Utah's youth have been extensive. Mr. Jensen received the award as an individual and the Attorney General's Office for the many contributions of its lawyers.

Jensen, a partner in the law firm of Lehman, Jensen & Donahue, served the Law-Related Education and Law Day Committee of the Utah State Bar in several capacities before becoming co-chair in 1992. He became chair of that committee in 1994. He acts as Mock Trial Judge for several trials each year and this year was the principal writer of the Mock Trial Competition case "Scott Walker v. Tonya Brewster." He authored the Torts Section of the Utah Supplement to "Street Law," a text used throughout the country to teach law-related topics to junior high and high school students. For the last five years, he has personally pursued media attention for Law Day through radio, television, news papers, public school presentations and Law Day Fairs. Mr. Jensen is a member of the Speakers Bureau and, as such, speaks on a variety of law-related topics to junior and senior high students.

Jensen also served on the Executive Council of the Young Lawyers Section of the Utah State Bar and the Planning Board of the ABA Young Lawyers Division Career Issues Committee. In 1992, he received the Utah State Bar "Distinguished Young Lawyer of the Year Award". He practices in the areas of plaintiffs' personal injury and insurance law.

To the Law Day Committee, the degree of Jensen's commitment to law-related education and the success of Law Day is without equal, and he is more than a worthy recipient of the Scott M. Matheson Award. He not only chairs the organization of the events and promotes law-related education, but is an active participant.

The Attorney General's Office gave invaluable assistance in the Utah State Bar Association's Law-Related Education (LRE) Project's Conflict Management Program. Over three dozen attorneys and the Chief of Staff from the Attorney General's Office are sharing their conflict expertise with hundreds of nine and ten year olds throughout the Salt Lake area. Working in teams of two, these attorneys teach classes at nine different schools, as part of a mentorship program, which is an offshoot of the Conflict Manager Program established by the LRE in 1986. That original program targeted older students but, LRE director Kathy Dryer wanted to expand the program to target fourth and fifth grade students.

Late in 1994, Dryer approached Attorney General Jan Graham and her executive staff to solicit the help of AG staff-attorneys to volunteer as teachers for this pilot program. Graham and her staff responded enthusiastically because of the Attorney General's particular concern for women, children and domestic violence issues.

Attorney teams arrange their own schedules and determine the number of times they teach classes per month. They average one hour classes, two to four times a month. Each member of a team usually alternates roles as teacher and support. The attorneys teach their students to identify their feelings, acknowledge others' feelings and listen reflectively. Students are taught the value of "I, you" messages and to take ownership of and responsibility for their feelings and actions, instead of blaming others. The students learn to identify and work together to attack problems, not the person. The Law-Related Education and Law Day Committee of the Utah State Bar congratulates the Utah Attorney General's Office for this well-deserved award.

The presentation of the Scott M. Matheson Award to Mr. Jensen and the Attorney General's Office took place in a ceremony at Governor Leavitt's office, attended by Norma Matheson and others on April 19, 1995. Governor Leavitt offered remarks recognizing the recipients. The awards were presented by Paul T. Moxley, President of the Utah State Bar.

Pro Bono Volunteer Highlight

This month the Pro Bono Projects highlights the recipient of the Bar's 1995 Pro Bono Lawyer of the Year Award.

As a child, Vinh Ly entered the U.S. as a Vietnamese Refugee. In 1994 and 1995, as a young lawyer, Vinh volunteered his time with the Immigration Program at Catholic Community Service, offering legal assistance to other immigrants.

Vinh worked primarily with families seeking asylum. Among other accomplishments, his efforts resulted in the grant of asylum to a Moslem family from Bosnia, the prevention of separation of several families, the reunification of parents and children, and the granting of residence to spouses of American citizens.

Vinh received a special commendation from the federal Immigration Court for his service to Utah's low income immigrant community. In a complicated area of the law which requires a great deal of research and preparation, Vinh provided many hours of generous and much needed service.

Congratulations to Vinh Ly on a much deserved award!

Deadline for Founders' Circle Draws Near

The cut-off date for joining the Founders' Circle is fast approaching. Lawyers, law firms and legal departments that want to be a part of this program need to respond soon. The Founders' Circle is the kick-off campaign for the Bar's Pro Bono Project.

Lawyers, firms and legal groups that have 90% of their attorneys sign-up to volunteer for the Pro Bono Project by **9/9/95** will become members of the Circle. Benefits of membership are valuable. Members will receive the first public recognition on the Project, as a *Bar Journal* notice is planned as well as a press release to local print, radio and TV media.

To qualify for the Circle, have 90% of your attorneys volunteer and then report that to Toby Brown at the Bar (531-9095). Thank you for your participation in the Pro Bono Project.

American Bar Association Honors Four Lawyers, One Firm With 1995 Pro Bono Publico Award For Service to Poor

CHICAGO, July 21 — The American Bar Association will honor four lawyers and one law firm with 1995 Pro Bono Publico Awards, recognizing exceptional commitments to providing legal services to poor persons, at a luncheon Monday, Aug. 7, in Chicago.

Dennis Archer, Mayor of Detroit, will be the keynote speaker at the annual Pro Bono Publico Awards Luncheon, in the Hyatt Regency Chicago Hotel. Presenting the awards will be **James L. Baillie of Minneapolis,** chair of the ABA Standing Committee on Lawyers' Public Service Responsibility, sponsor of the awards. Assisting will be **Utah Court of Appeals Judge Judith M. Billings** of Salt Lake City, chair of the awards subcommittee.

The event is one of only two Assembly Luncheons attended by top association leaders and guest dignitaries attending the week-long ABA Annual Meeting.

"The winners of this year's awards offer enormous inspiration for all lawyers, many of whom work daily to fulfill a profound professional trust in meeting the legal needs of poor persons in our nation," said **ABA President George E. Bushnell** of Detroit. This year's award winners are:

- **Warren E. George,** a commercial litigator with the San Francisco firm of McCutchen, Doyle, Brown & Enerson, who litigates prisoner rights cases and defends poor individuals from unscrupulous debt collection practices, and won a ruling that execution by gas chamber is unconstitutionally cruel;
- **Amy J. Greer,** a litigation associate in the Pittsburgh firm of Eckert, Seamans, Cherin & Mailed, who is administrator of the firm's pro bono program;
- **David Schoen** of Montgomery, Ala., a sole practitioner who brings civil rights cases involving prisons, jails, foster care, police practices and election law;
- **Judge William A. Van Nortwick Jr.** of the First Appellate District of Florida in Tallahassee, who led a state initiative requiring lawyers to report their pro bono service, prompting a 36 percent increase in lawyer participation; and
- **Jenner & Block,** a major Chicago law firm with an extensive pro bono commitment, perhaps best known to the national public for its representation of the adoptive parents in the Illinois case known as Baby Richard.

Utah State Bar Approves Ethics Opinion

Ethics Advisory Opinion No. 95-06
Approved July 28, 1995

Issue: When an attorney has reason to believe a person who is not a client has abused a child and the information upon which the belief is based derives from the attorney's representation of a client, may the attorney report the suspected abuse over the client's objection if the attorney believes that making such a report is required by law?
Opinion: Yes.

Utah Law provides that any person having reason to believe that a child has been abused or neglected "shall immediately notify" certain officials. Thus, if an attorney believes a child has been abused or neglected, the attorney may notify certain officials of the attorney's belief without the Utah Rules of Professional Conduct..

This opinion does not address whether the child abuse-reporting law or other statutes mandating disclosure of certain information, may compel an attorney to reveal a client confidence in violation of the Utah Rules of Professional Conduct and the professional discretion recognized by those Rules. That issue requires determination of a legal duty, as opposed to an ethical duty. Its answer, therefore, lies beyond the purview of the Ethics Advisory Opinion Committee.

The Board of Bar Commissioners has adopted a policy whereby ethics opinions will be approved, pursuant to the recommendations of the Ethics Advisory Opinion Committee, pending a 60-day comment period following publication in the Bar Journal.

See entire opinion for a complete discussion of the opinion. The full text of these and other opinions may be obtained from Maud Thurman at the Utah State Bar, Office of Attorney Discipline, 645 South 200 East, Salt Lake City, Utah 84111.

Salt Lake Courts Complex

WHAT WILL THE COURTS COMPLEX OFFER?

The Salt Lake Courts Complex, an idea that began in 1987, will become a reality with its scheduled completion in January 1998.

Multiple locations presently occupied by the courts in the Salt Lake area will be consolidated within the Courts Complex. The Utah Supreme Court; the Utah Court of Appeals; the Third District, Circuit, and Juvenile Courts; the Administrative Office of the Courts; and the State Law Library will all be housed in the Complex.

In addition, there will be facilities available for public use, including conference rooms and a cafeteria.

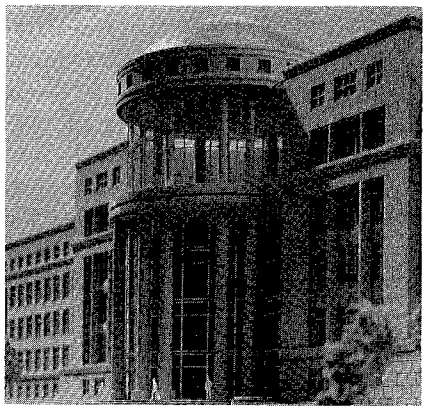
Plans call for the implementation of the latest technology to make the judicial process as efficient as possible. Equipment will be in place to allow trials to be video taped. Computer-aided transcription of court records will be utilized and eventually equipment will be in place so that attorneys and others at remote locations will be able to complete tasks such as filing cases and checking on the status of cases electronically. Measures will also be taken to improve security. Video arraignments and holding cells in the basement of the Complex will reduce the number of times prisoners must be transferred. Zonal separations between prisoners, judges and other court staff and the public, will further reduce the safety risk.

COURTS COMPLEX STATISTICS

Two local companies, MHTN Architects and Bid "D" Construction, were awarded the contract to design and build the Complex. HOK Architects from San Francisco, a nationally recognized firm on courthouse design, is also working on the project.

The five-story, 417,000 square foot complex will be located in the "Government District" of downtown Salt Lake City on Block 39, between Main Street and State Street and 400 South and 500 South. The building design has been developed to convey the proper dignity and solemnity of the judicial system. A glass-paneled rotunda entrance will fact State Street and be the focal point of the Complex.

The first floor of the complex will house the State Law Library; Juvenile, Circuit and District Court clerks offices for filings, fines and collections; jury assembly areas; conference areas for use by both the courts and the public; and a



cafeteria for the public and court employees.

The Juvenile Court, Guardian ad Litem Offices, the County Attorney's Juvenile Court Division, and a portion of the AOC will be located on the second floor.

The remaining portion of the AOC, along with District and Circuit Courts, will take up the third floor. The District Court and Circuit Courts will also occupy the fourth floor.

On the fifth floor, the Court of Appeals and the Supreme Court will be found.

Parking will be available in an underground parking facility. Parking capacity will be 650 to 750 stalls. There will also be a sally port for the transfer and temporary holding of prisoners. Delivery areas will also be located in the basement parking area.

SOME REASONS FOR COLLOCATION

In the *Programming and Planning Report on the Collocation of the Courts,* ten good reasons for collocation are identified:

1. Collocation **eliminates wasteful travel time** presumably required due to courts components being widely dispersed. Collocation permits necessary communication, sharing and interchange to happen conveniently and efficiently.

2. Collocation/consolidation of courts, court support functions and services in Salt Lake City, AOC and State Law Library, **provides convenient "one stop" access to users** of the courts.

3. Collocation **eliminates the need to duplicate court facilities** that can be shared such as Conference Center, Law Library, Service/Maintenance functions, etc. and common use facilities such as cafeteria, jury assembly spaces, etc.

4. Collocation of the Appellate Courts **allows consolidation of two clerks' offices** into a single appellate clerk's office with resultant improvement in efficiency and in cost savings.

5. Collocation of the Supreme Court and the Court of Appeals **allows both courts to share use of two courtrooms.** At separate locations two courtrooms for the Court of Appeals and one for the Supreme Court would be required.

6. Collocation to Block 39 of the Supreme Court and the Law Library **will vacate approximately 18,000 square feet in the Capitol** for occupancy by executive and legislative offices sorely in need of additional space.

7. Collocation of District and Juvenile Courts will enable **more efficient utilization of court facilities and greater flexibility** adapting to unforeseen but inevitable changes in courts operations and space requirements.

8. Collocation results in **substantial savings in staffing and operational costs.**

9. Collocation results in **substantial savings in square footage, construction costs and finance costs.**

10. Collocation **creates a significant courts complex** which symbolically and architecturally gives identity and visibility to the stature and importance of the Utah Judicial System.

The savings in construction, staffing and operational costs have been identified as follows:

a. A total of 41,000 total square feet and related construction costs will be saved by combining duplicated court spaces into one facility. $5.7 million will be saved in initial construction costs alone over building separate facilities for juvenile, trial, and appellate courts.

b. Approximately $39 million in court operating and staffing costs will be saved over a period of 25 years, according to an updated September 1994 economic analysis by the University of Utah Bureau of Economic and Business Research.

Additionally, the implementation of coordinated modern technology will be facilitated, including audio/visual arraignment and recording of court proceedings, electronic imaging, computer aided transcription and telecommunications networking with criminal justice agencies.

HISTORY

Some important dates when reviewing the history of the project include:

1987 – The *Statewide Court Facilities Master Plan was completed.* During this process, Salt Lake area courthouses were found to be inadequate.

1988 – The Regional Urban Design Assistance Team recommended a collocated courts complex in downtown Salt Lake.
1989 – The Utah Legislature approved a study to determine if Salt Lake Courts should be collocated. The study, reviewed by a 36 member Community Advisory Panel, recommended the Salt Lake trial, juvenile, appellate and Supreme courts be collocated in Salt Lake. Courts in Sandy, West Valley and Murray will not be affected.
1990 – Construction of the Third District Juvenile Court was delayed pending legislative action on the complex.
1991 – The Legislature approved $400,000 to program the Courts Complex, and $550,000 to acquire options on land acquisition. Legislative Auditor General Report 91-06 found collocation could generate large savings.
1992 – The Legislature approved $2.5 million to complete land acquisition. Salt Lake City provided $3 million for land. The following October, the Courts Complex Program was completed, with assistance from eight community ad hoc committees consisting of 150 representatives from the public and criminal justice communities.
1993 – The Courts Complex Program underwent additional scrutiny by the Judicial Council and DFCM. As a result, the project was reduced by 27,000 square feet.
1994 – The Legislative Auditor General reviewed the Salt Lake Courts Complex Program process and determined that the Program conclusions and planning process were sound.
1994 – The Legislature passed Senate Bill 275, raising miscellaneous civil court fees and authorizing funds to complete design of the complex.
1994 – The Legislature passed House Bill 442, requiring legislative review of the proposed design. It commenced with the August interim meeting of the Legislature.
1994 – DFCM and the courts selected a design/build approach for the design and construction of the complex to economize project costs.
June 1994 – A Courts Complex Design Selection Committee, consisting of representatives from private, business, government and court groups, conducted a design competition and selected an architect/contractor with a guaranteed design/construction cost of $4 million below budget.
February 1995 – The Legislature approved a revenue bond to construct the Courts Complex.
July 13, 1995 – A ground breaking ceremony is held for the Courts Complex.

New State Court Administrator Appointed

Offering Utahns two decades of experience in court administration, Daniel J. Becker, 43, the Deputy Director of North Carolina's state courts, has accepted the position as the new State Court Administrator for Utah.

Selected from a nationwide search which resulted in more than 150 applicants, Utah Supreme Court Chief Justice Michael D. Zimmerman says Becker has an impressive background in dealing with a wide variety of court issues and procedures.

"We started with a very qualified, large field of applicants. The final interviewees, in particular, were all very able. But the Supreme Court felt that Mr. Becker had a breadth of experience in both North Carolina and in Georgia that he could bring to the Utah Court System. This would enable him to hit the ground running in a rather unique way." said Zimmerman.

"The Court felt we were lucky to get him. We believe his willingness to accept this position reflects well on the progress of the Utah courts by showing that we can attract someone with his experience."

Becker will replace Utah Court of Appeals Judge Pamela T. Greenwood, who has been serving as Interim State Court Administrator since January. Becker will officially assume his new duties on Sept. 25. However, before that date, he will travel to Utah frequently to obtain background information on the state's court system and to participate in the Legislative planning sessions in August.

The new appointee's experience will benefit the Utah judiciary as it meets the challenges of caseload growth, consolidation of courts and the implementation of advanced technology in the courtroom. Becker has addressed similar issues as he assisted in directing North Carolina's state-funded, unified court system with over 5000 employees. During the past few years as deputy director of North Carolina's courts, Becker has worked with court and government officials to develop and fund changes in laws to enhance the quity of the administration of justice.

His accomplishments illustrate his commitment to progressive court management. For example, he introduced a pilot program of court-ordered arbitration and mediation in appropriate civil and domestic cases to facilitate settlement; the successful program was subsequently authorized for statewide implementation. He participated in the development of major automation initiatives to advance the handling of criminal, civil, estates, child support cases and to improve financial processing. Becker also initiated automated legal research and the use of video and electronic reporting systems in the courtroom. Establishing a microfilm quality control unit and streamlining records-keeping were additional accomplishments that improved the administration of justice under Becker's leadership.

Because North Carolina's court system is centralized, Becker's duties included working with personnel of the trial and appellate courts, the clerks of court, magistrates, prosecutors and defense counsel, juvenile court advisors and employees who served abused and neglected children. To promote fairness and professionalism among employees, Becker implemented diversity awareness and strategic-planning programs.

Prior to serving as duty director in North Carolina, Becker worked for four years as a court administrator in Atlanta, Georgia.

"My experience at the trial court level provided an important appreciation for how the decisions made at the state level result in actions which can — and do — reach individual citizens," said Becker.

Becker first became acquainted with Utah about four years ago when he, his wife and five children spent about a week traveling around the state as part of a cross-country vacation. "Utah appeared to be a fine environment in which to bring up our children, and my wife and I would very much like to learn more about the state and the Salt Lake area," he said

Throughout his career, Becker has attended numerous educational programs on judicial administration and has served on many law-related boards. In 1976, he received a master's degree of Public Administration from Florida Atlantic University and and 1974 earned a bachelor of arts degree in political science from F.A.U.

The ABCs of LLCs Highlighted in ABA Magazine

CHICAGO, June 5 — Physicians, lawyers, dentists, architects and many other professionals share the fear that they will face financial ruin if held personally liable for uninsured malpractice liability or excessive debts in their businesses.

In the quest to help clients start up businesses, many business lawyers are looking outside their typical arsenal of partnerships and corporations and choosing the relatively new limited liability corporation (LLC) structure for their clients.

An LLC is a company in which the owners, known as members, are not individual liable for the obligations of the organization. The members own an interest in the LLC and are parties to the contract, which is usually called an operating agreement.

A recent issue of *Business Law Today*, a bimonthly magazine of the American Bar Association Section of Business Law, acts as an LLC primer for business lawyers and owners.

The District of Columbia and 47 states have LLC legislation, and bills have been introduced in the other three.

Business Law Today outlines the advantages of LLCs — including their taxation as a partnership for federal income tax purposes and corporate liability protection for the owners — as well as the disadvantages — such as income tax regulations that are governed by a particularly complicated subchapter of the Internal Revenue Code, and the additional expenses associated with forming an LLC.

Annual subscriptions to *Business Law Today* are $14, and are included in the dues of the Business law Section. Individuals and institutions not eligible for membership in the *Business Law Section* may subscribe to Business Law Today for $28 ($40 outside the U.S.).

Individual issues are available for $7, plus $2 handling. Subscription or individual issue requests should be directed to the ABA Service Center, 541 North Fairbanks Court, Chicago, Ill. 60611, 312/988-5522.

William C. Vickrey, Administrative Director of the California Courts, receives 1995 Warren E. Burger Award

MAY 16, 1995 — WILLIAMSBURG, VA — The board of directors of the National Center for State Courts (NCSC) has announced that Williams C. Vickrey, Administrative Director of the California Courts, has been chosen to receive the 1995 Warren E. Burger Award. NCSC's Institute for Court Management has presented the award annually since 1974 to honor outstanding achievement in the field of court administration.

"William C. Vickrey has spent much of his career working for the betterment of the justice system." said Dr. Ingo Keilitz, vice-president of the National Center for State Courts and head of its Institute for Court Management. "In the two years he has been with the California courts, Vickrey has distinguished himself nationally by his proactive work with the judiciary, court managers, the California Judicial Council, the legislature, and the executive branch. Seemingly undaunted by the formidable challenges confronting the California courts, he has successfully championed major structural changes, advanced state trial court funding, moved the trial courts closer to judicial and administrative coordination, brought technology to the forefront of attention, and aggressively positioned the California courts for the future. His enthusiasm for improvement of the California courts is contagious, and has encouraged judges and administrators to keep moving in the right direction. As Utah's state court administrator, he implemented state funding of the courts; directed consolidation of state courts; developed new information, budgeting, and accounting systems; consolidated court offices and facilities; and managed a statewide automation conversion to personal computer. He is the quintessential public servant."

Vickrey has been administrative director of the California courts since 1992. Before joining the California courts, Vickrey spent 20 years in the Utah court system, serving as state court administrator from 1985 to 1992. His tenure with the Utah courts included positions as director of the Department of Adult Corrections, director of the Division of Youth Corrections, deputy director and administrative assistant of the Division of Corrections, hearing officer with the Board of Pardons, supervisor of Probation and Parole, institutional parole officer, and probation and parole agent.

Vickrey is a member of the board of directors of the Conference of State Court Administrators and a former member of the board of directors of the National Juvenile Justice Administrator's Association. He served on the Utah Governor's Judicial Article Task Force, which passed judiciary reforms including the establishment of a Court of Appeals. He also drafted legislation that established Utah's Commission on Criminal and Juvenile Justice. Vickrey is a coauthor of *Managing Transition in a Youth Corrections System* (University of Chicago) and "Utah Court of Appeals: Blueprint for Judicial Reform" (*Utah Bar Journal*).

Vickrey received the James Larson Award for Outstanding Contributions to Corrections from the Utah Corrections Association in 1984. He graduated from the University of Utah in 1969.

The National Center for State Courts and its Institute for Court Management were founded by Chief Justice Warren E. Burger and other court leaders nearly 25 years ago to serve as a central resource for the state courts. Today, the National Center for State Courts promotes justice by providing leadership and service to state courts. Activities include developing policies to enhance state courts, advancing state courts' interests within the federal government, fostering state court adaptation to future changes, securing sufficient resources for state courts, strengthening state court leadership, facilitating state court collaboration, providing assistance, solving problems through technology, creating knowledge, informing, educating, communicating state court interests, and supporting court organizations.

U.S. Magistrate Judge Ronald N. Boyce

By S.K. Christiansen

The criminal defendant who stood before Magistrate Judge Ronald Boyce tried in vain to excuse his late brief. "You were on vacation when I filed it," he told Judge Boyce.

Wrong argument.

"I haven't taken a vacation since 1963," Judge Boyce replied.

Now in his eleventh year as a United States Magistrate Judge for the District of Utah, Judge Boyce knows all about long hours and hard work. His rigorous schedule keeps him more than busy. And he enjoys every minute of it.

"Once I find something interesting that I like, I don't want to let go," he said.

Judge Boyce fills his day with "interesting" things — and he starts early. At 3:15 a.m., even most attorneys are asleep, unless they're finishing up a brief from the night before. But at 3:15 a.m., Judge Boyce's day is just beginning.

"I start with an early morning workout at home," Judge Boyce said. "Then I read. I make it to the University of Utah by about six o'clock." There, he prepares for his class in evidence or criminal law, teaches the class, and still makes it to the courthouse before most everyone else.

Judge Boyce is entering his fourth decade as a law professor at the university. Much of that time, he has served a dual role as a judge. He was a United States Commissioner, the forerunner of the magistrate judge for criminal matters, from 1966 to 1969. He took a half-time position as a magistrate judge in 1984. Since 1992, he has filled the magistrate judge position full time.

Under federal law, magistrate judges work alongside district judges to handle various aspects of a federal case, as designated by the district judge. A great deal of their time is spent on criminal and evidentiary matters, Judge Boyce's specialties.

To students and members of the bar, his knowledge of the law, especially in those areas, borders on the legendary.

"He'll cite cases by reporter number and page from memory," said one former student. Law clerks at the federal courthouse sometimes call Judge Boyce with an evidence question rather than spend time researching it.

U.S. Magistrate Judge Ronald N. Boyce

Education:	B.S.L., University of Utah, 1955
	J.D., University of Utah, 1957
Activities:	Law Clerk, Honorable A. Sherman Christensen, 1956-57
	Judge Advocate, U.S. Air Force, 1957-60
	Private Practice, 1960-66
	Utah Attorney General's Office, 1960-66
	Graduate Fellow, University of Utah, 1966
	Professor of Law, University of Utah, 1966-
	U.S. Commissioner, 1967-70
	Special Salt Lake County Attorney, 1970-74
	U.S. Air Force Reserve, Retired Colonel, 1981
	U.S. Magistrate Judge, 1984-

Besides reading essentially every Supreme Court and circuit court opinion that comes down, Judge Boyce also makes sure he reads significant federal district and state supreme court cases, as well as all major criminal cases from Australia, Canada, and England, along with some from France and other countries. Students in one of his classes several years ago still remember the time he answered a question by citing to the Tanzania Law Review.

Reading is an integral part of Judge Boyce's life. "I try to keep about six books going in my morning reading cycle," he said. (That's the time between his 3:15 a.m. exercise session and his 6 a.m. arrival at work.) "When I finish one, I replace it with another, and keep going." He supplements that reading with another book at lunch and three or four more in the evening. Visitors to his home and chambers find books and more books. One unconfirmed story said he used his dishwasher as a bookshelf for years when he ran out of shelf and floor space — until his wife finally retook possession.

What does he read?

"Everything," Judge Boyce said. "History, science, criminology, law — a lot of law." Much of what he reads keeps him abreast of developments for the numerous publications he authors, as well as for his work in the court.

As a result, he has an endless supply of stories to tell. One colleague said Judge Boyce is the only person he knows who regularly starts sentences with, "In the 19th century . . . ."

A lot has changed in the federal courts since his days as a law clerk to Judge Sherman Christensen in the mid 1950s. "The caseload today is significantly greater," Judge Boyce said. "Public respect for the courts has declined to a considerable degree. The relationship between judges is more harmonious and collegial than it used to be. And lawyers as a whole are better. But there is still a great deficiency in their knowledge of federal law and federal practice."

Judge Boyce explains that lawyers generally are more familiar with state practice and procedure. As a result, he sees them come into federal court underprepared for pertinent, uniquely federal issues. He advises lawyers who appear in his court to be familiar with federal law.

"We're only bound by the Supreme Court and the Tenth Circuit in this district," he said. "Too many attorneys tend to forget that."

After a long week of reading, studying,

teaching, expounding, and deciding legal questions, Judge Boyce enjoys . . . sitting down with a good law book.

"My idea of a perfect Friday evening is a bowl of popcorn, a large root beer, and an F.Supp. There's nothing better," he said, "except maybe an F.2d or F.3d."

Judge Boyce also spends "free time" with his dog Bobby and cares for his invalid mother every evening.

Judge Boyce was born and raised in Salt Lake City, attended East High School, and went on to the University of Utah, where he completed undergraduate work, law school, and a graduate fellowship. After clerking for Judge Christensen, he served in the Air Force JAG.

That experience introduced him to military life and military law, of which he has gained considerable experience. He stayed in the Air Force Reserve, eventually retiring as a colonel. His work as a magistrate judge often intersects military issues, including cases arising at Hill Air Force Base and other cases involving the Department of Defense.

Over the years, Judge Boyce's career has included private practice and work for local, state, and federal governments. He calls on that broad experience every day in his role as a magistrate judge. Lawyers in his court find him prepared, knowledgeable, and thorough. He urges attorneys who appear in his court to do the same.

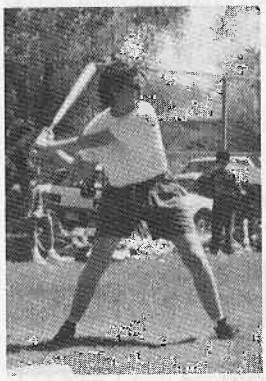
"Preparation is always critical," he said.

Good advice. You have to get up pretty early in the morning to match wits with Judge Boyce.

And don't ever accuse him of taking a vacation.

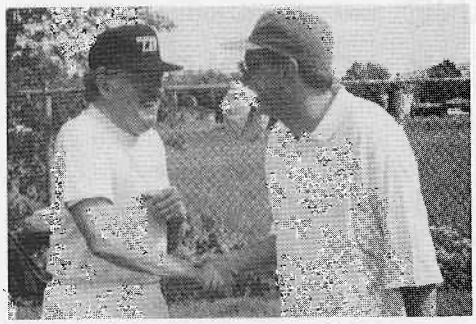
Young Lawyers Division Sponsors "Run, Steal & Cheat" Tournament to Benefit Legal Aid Society and Legal Services

by Marji Hanson



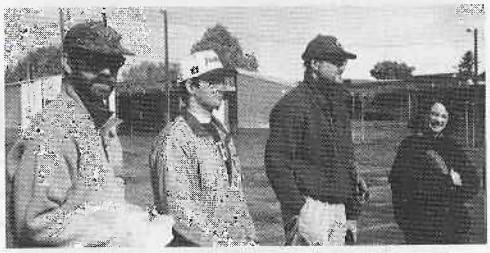
Elaine Monson (RQN)

Participants in the Fourth Annual "Run, Steal & Cheat" Softball Tournament raised $5,217.70 to benefit Utah Legal Services and Legal Aid Society of Salt Lake. This year's tournament proceeds represent an increase of nearly $2,000 over last year's event. Ray, Quinney & Nebeker ("RQN") won the tournament for the fourth year in a row. The defending champion RQN steam-rolled its way to exciting final round action against Van Cott, Bagley, Cornwall & McCarthy ("Van Cott").



(l-r) Bill Britt (TBR), Doug Tingey (Winder & Haslam)

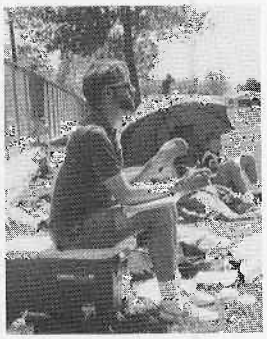
The phenomenal increase can be attributed in large part to the "win at all costs" attitude adopted by Bill Britt, team leader for Trask, Britt & Rossa ("TBR") and captain Robert Payne of Van Cott. The lavish and creative "cheating" of Britt and Payne forced RQN into a financially defensive posture. RQN is a team that has seemed to be unbeatable in past years based on talent alone. This year, however, the aggressive cheating of Britt and Payne compelled the talented RQN team to spend $675.00 to defend its title. TBR toppled Van Cott from its spot as top "cheater" with a donation of $685.00 although Van Cott was not far behind at $620.00. As a testament to Team TBR's winning attitude and willingness to sacrifice for a good cause, the large crowd of firm



(l-r) Shawn Ferrin, Ted Grandy, Alan Flake, Cherly Cohone (Parson, Behle & Latimer)

members, family and friends supported Britt's decision when he announced he was cancelling the firm Christmas party in order to buy his team's way into the fourth round.

The object of the Run, Steal & Cheat Tournament is to raise funds by promoting and sanctioning play that would ordinarily get a team kicked off the field. The tournament rules encourage over-ruling the umpire and buying extra outs, walks, home-runs, errors and time-outs. Now that the tournament is in its fourth year, team leaders are very adept in their use, both defensively and offensively, of the twisted rules.



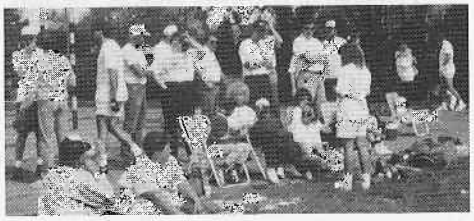
Robert Payne (VanCott)

Teams from Parsons Behle & Latimer,

(l-r) Jeff Hunt, Christian Rowley

Legal Aid Society/Legal Services, Winder & Haslam and Snow, Christensen & Martineau also participated in the tournament. Team members from Kimball, Parr, Waddoups, Brown & Gee experienced a rare, early morning mind-meld when they awakened at their respective homes to a down pour and with oneness of purpose, each individual independently concluded that the tournament must be cancelled and decided not to show up at the ball field. Although the morning of May 20 started out rainy, cold and unpromising, the storm soon blew over and provided the rugged and hardy participants with one of the only few fine spring days in May and perfect weather for softball.

(l-r) Hal Pos, Dave Mangum (Parsons Behle & Latimer)



Trask, Britt & Rossa contingent

The Pro Bono Committee of the Young Lawyers Division sponsors the Run, Steal & Cheat Tournament. Committee chairperson Jeffrey J. Hunt and tournament organizer Christian J. Rowley were pleased with the response to the tournament and the generosity of the participants. Jeff Hunt noted that the funds raised at the tournament provided support for two indispensable organizations and people seem to have a pretty good time playing softball with the contorted rules. If the consistent yearly increases in tournament proceeds are a good indicator, it appears that RQN will have a very costly title defense at next year's tournament.

Young Lawyer Profile
Jensie Anderson

by Michael Mower

An automobile crash was to play a significant role in the life of Jensie Anderson, now the staff attorney for the American Civil Liberties Union of Utah. Anderson and her husband, Robert Raysor, had left New York City and were headed to Seattle, Washington, where Anderson planned to continue her career as an actress. After a visit with friends in Salt Lake City, the couple was heading north on I-15 during a snow storm when they were broadsided by a semi-truck. While no one was injured, the car was totaled. The couple decided to return to Salt Lake City where they planned to work until they could earn enough money to purchase a new car and continue their trek to Seattle.

While working as the manager of the Park Cafe in Salt Lake City, Anderson decided to attend law school. "I was committed to pursuing my acting career, but as a member of Actor's Equity, the actor's union, I was unable to perform in any of the area's non-union theatres. It was time to reevaluate my career options." Because she had always had an interest in public interest law, Anderson took the LSAT, was accepted at the University of Utah College of Law, and began law school in the fall of 1990.

Anderson was not new to the Beehive State. She spent much of her youth in Logan, Utah. Anderson's father, a professor at Utah State University, taught English and dramatic literature and occasionally directed university and community theatre productions. Her mother handled public relations for the Utah State University Theatre Department and co-founded Logan's first community theatre. Following her junior year at Logan High, Anderson opted to continue her education at a high school for the performing arts in Louisville, Kentucky. "I was born with theatre in my blood," she noted. "The theatre was always an integral part of my family life." Not only were her parents involved in theatre, but her maternal grandfather, Victor Jory, had a long and successful career as a movie and television actor, including the role as Jonas Wilkerson, the heavy-handed overseer of

the Tara Plantation in *Gone With the Wind.*

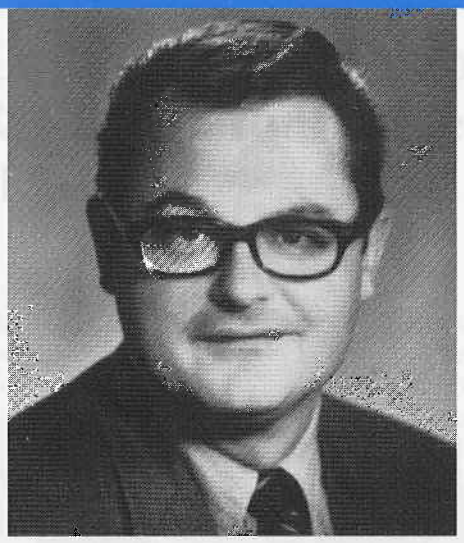
After completing high school in Kentucky, Anderson headed to Seattle where she studied theatre at the University of Washington. Later she moved to Salt Lake City and completed her B.F.A. in theatre performance at the University of Utah. From Utah, it was on to Houston, Texas where she completed an acting apprenticeship at the Alley Theatre. Anderson then moved to New York City where she appeared in her first film, *Nutrition and You*, a video that was shown in health classes nationwide. Anderson also acted both in New York theatre and in several regional theatres, and counts her roles in Shakespeare's plays among her favorite.

It was while living in New York that Anderson met her husband-to-be, chef Robert P. Raysor. Anderson and Raysor decided to relocate to Seattle, experiencing the auto accident along the way that dramatically altered their career plans.

Anderson generally enjoyed law school at the University of Utah. She was a semi-finalist in the Traynor Moot Court Competition; a Leary Scholar; and was active in the Women's Law Caucus and Utah Legal Services' Homeless Shelter and Support Program and Social Security Task Force. Following law school, Anderson was hired by the law firm of Holme, Roberts & Owen LLC as an associate. She also served as the supervising attorney of Utah Legal Service's homeless outreach project at the 4th South viaduct, a position she continues to hold. Each Sunday morning, Anderson sets up a small table and gives out free legal advice and information to Salt Lake's homeless population. She was recently awarded the University of Utah Business Department's Mitsi award for her work with the homeless.

The position as the ACLU attorney in Utah is often misunderstood, Anderson realizes. Despite the sometimes controversial nature of her job, Anderson is thrilled to be working for the ACLU "I have been a proud card-carrying member of the organization for as long as I can remember," she states, "and I come from a long line of ACLU supporters. My family couldn't be more excited about the outcome of my legal training." Despite her family support, Anderson holds no illusions about the challenges that are encompassed by her job with the ACLU. Anderson believes that the ACLU is facing a serious crisis in the next few years — a crisis she feels arises out of the growing perception that the civil liberties guaranteed by the constitution and protected by the legal system belong only to those who are part of the accepted majority. She is currently dealing primarily with governmental attacks on the First and Fourth Amendments to the United States Constitution. Not only does her position with the ACLU afford her the opportunity to attack the challenges created by the current social and political climate, but to educate the public on significant civil liberty issues and to provide access to the legal system to those who may not otherwise have that avenue of redress.

Anderson knows that she has accepted one of the least popular positions in Utah. Indeed, recently she introduced herself to a member of the state legislature who said "Ewwwwe" as soon as he learned that she was the ACLU attorney. Nevertheless, Anderson believes that her position with the ACLU is a role that suits her well. It combines her long-standing concern for the civil liberties of individuals and her desire to give a voice in the legal system to those who might not otherwise have one.



The Need for Cautious and Deliberate Reforms in the Civil Justice System

By Judge J. Thomas Greene

Talk by U.S. District Judge J. Thomas Greene at Annual Court Practice Seminar Sponsored by University of Utah College of Law and College of Law Alumni Association – U of U Fine Arts Auditorium – March 7, 1995

There is a strongly negative perception by the general public concerning lawyers, judges and the judicial system. Among the major problems with our civil justice system so perceived by the public are overuse of the courts, cost of lawsuits and delays. In a nationwide survey sometime ago conducted by Louis Harris & Associates, those concerns were underscored. The survey revealed that:

- Sixty-eight percent of Americans believe that more people bring lawsuits than should.
- Fifty-seven percent of Americans believe that the system fails to provide timely resolution of disputes without major delays.
- Fifty-four percent of Americans criticize the high overall cost of the system to society.

In this regard, the perception is that there are far too many lawyers, that lawyers and judges somehow interact to cause needless continuances and delays, and that the average American citizen simply cannot afford the kind of justice provided by the courts.

One group which seems to have more public dis-esteem is the media. In this regard, the question might be asked, "Why should lawyers love the press?" The answer: "Journalism is the only profession that makes lawyers look good."[1]

The low esteem of the broadcast and print media has resulted in part from often inaccurate, unfair, misleading or irresponsible reporting. Court proceedings of a sensational nature are presented as entertainment, rather than the pursuit of justice. In this regard, some elements of the press seem to be preoccupied with celebrity, money and rumors which are reported for the shock value without any real attempt to verify. An example of potentially injurious fallout from all of this is a disillusioned public perception that money, public press conferences and posturing before TV cameras, and even racial slurs, can be used to influence an ultimate jury verdict. Many think that the entire jury system in the country will be adversely affected as a result, and that the justice system will be the loser.[2]

Another unfortunate result may be the public expectation that all trials and persons charged with serious crimes should be given the same treatment as in high profile cases – such as protracted jury selection. That the ordinary case is not afforded such treatment will be perceived by many as unequal treatment and unfair. Some believe that public education and appreciation of the judicial system will result regardless of excesses by the press, but whether that could emerge as a positive from cases which are unrepresentative of the ordinary case is problematical. The biggest adverse result, however, it seems to me, is more distrust and cynicism about a judicial system which permits such excesses. The danger can be overreaction by lawmakers which could result in changes which worsen rather than improve. This brings me to the main purpose of my remarks, embodied in this central idea:

Although there is continued need for reform, the judicial system is basically sound, and changes should be made deliberately and cautiously.

First, let us acknowledge that there is a serious need for reform. In this regard,

recent studies by the Congressionally mandated Federal Courts Study Committee, the Rand Corporation, the Brookings Institution, the Senate Judiciary Committee and the President's Council on Competitiveness all have concluded that our present system is flawed and in need of serious reform. Many authors, law professors and others have been quick to seize upon elements of these studies and conclude that the system is almost fatally impaired. However, the problems are often overstated and misconceived. For instance, the assertion that the number of lawyers in America amounts to 70% of the lawyers in the whole world[3] has been proven to be a gross exaggeration. It is more like one-fourth to one-third.[4] The number of lawsuits filed annually is reported at about 18 million, or one for every ten adults,[5] which is misleading because non-contested cases and cases which require virtually no judicial time make up most of the total. About 2 1/2 million cases of substance, including tort and contract cases, indicate a ratio of one for every 75 or so adults.[6] In fact, there has been a national levelling off or decrease in case filings, including products liability cases, since 1989.[7] The "tort litigation explosion" widely predicted did not come about. The total cost of litigation, reported at $80 billion to $300 billion dollars, is really unknown. In a recent article, Professor Marc Galanter of the Wisconsin Law School pointed out the fallaciousness of several recent assaults on the civil justice system, and submitted this commentary concerning costs:

"The perception is that there are far too many lawyers, that lawyers and judges somehow interact to cause needless continuances and delays, and that the average American citizen simply cannot afford the kind of justice provided by the courts."

> . . . whatever the real figures, cost of litigation estimates suffer from two serious flaws: (1) they confuse costs with transfers, as if money paid by defendants to plaintiffs left the economy altogether; and (2) they fail to account for the benefits of enforcing such transfers, which afford vindication, induce investments in safety, and deter undesirable behavior.[8]

Congressional reaction to societal programs, such as crime, in some ways has exacerbated the problems. Take the matter of delay. In reacting to concerns about crime, Congress passed the Speedy Trial Act, the Sentencing Guideline Act and more recently national laws about crimes against women, guns in relationship to drugs, the Gun Free School Zones Act, and other laws which in effect federalize criminal matters ordinarily handled in state courts. The result of all of this has been to expand federal jurisdiction over these crimes.[9] Demands placed upon the federal system by the Sentencing Guideline Act have been massive. Between 1988 and 1992 there were 23,000 guidelines appeals, approximately half of all federal appellate cases.[10] The trial courts are confronted with hearings to determine appropriate guideline computation for such matters as whether a gun was con-

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structively "used" in connection with a drug offense, what "relevant conduct" should be taken into account in enhancement of sentences under a preponderance of the evidence rather than beyond a reasonable doubt standard, whether certain past criminal conduct should be excluded as not truly "serious," whether and to what degree cooperation by defendants with the government should justify reduction in sentences and to what level, and the necessity of hearings to determine the existence of evidence not revealed to the court or stipulated by counsel contrary to objective facts in determining appropriate sentences. These all represent trial type or evidentiary hearings *after* a plea or finding of guilt, most often matters which in effect result in mini trials after a criminal defendant has been extensively examined by the court to make sure that she knowingly desires to enter a plea of guilty.

The civil caseload is also seriously impacted by the popular but often misguided desire to curb crime by federalizing it. The number of federal crimes has now grown from the three mentioned in the Constitution to beyond 3,000 in number. Congressional requirements which mandate the use of judicial time on criminal matters on a priority basis raises havoc with the civil docket. In south Florida I have talked to federal judges who haven't tried a civil case in four or five years, since over 90% of the caseload is criminal cases. Drug cases make up 44% of the federal criminal caseload,[11] and federal trial judges as a whole spend about one third of their time on criminal matters. In Utah, the criminal filings are only about 10% of our caseload, but substantially more than 10% of our time is required to handle the criminal filings here largely because of the necessity for expenditure of judicial time in hearings after a guilty plea is taken. The perception of federal judges after all of this is that about 35% of the sentences mandated under the guidelines are "mostly inappropriate," and that disparity has increased rather than decreased.[12]

In addition to the federal guidelines phenomena which has spawned a veritable new area of case law and law review activity, and the tendency to increase the number and to mandate new federal crimes, we now face another Congressional initiative called the "Common Sense Legal Reform Act." This legislation would change the American rule of open access to courts with attorneys fees to the prevailing party in appropriate cases to the English so-called "loser pay" rule. This fee shifting proposal may have merit, but the impact upon access to the courts and other implications should be carefully studied and weighed. The proposed new legislation apparently would create major changes in the product liability and securities fields and would cap punitive damages in some cases. Without taking a position on this legislation, let me say that the proposals merit serious study, but they should not be embraced or discarded without a full and reasoned analysis. The Litigation Section of the American Bar Association has undertaken such an analysis, and a preliminary report suggests the need for caution and a weighing of the benefits of the presently existing system as compared with proposed changes.[13]

One of the areas of reform passed by Congress in 1990 actually seems to have been positive and helpful. Although as a member of the Board of Governors of the American Bar Association I opposed it as an unwarranted intrusion on the judiciary in violation of the doctrine of separation of powers and needless micro-management of courts by Congress, the Civil Justice Reform Act has had a positive impact, in my judgment. It has brought about an awareness of the need and power of judges to take more active charge of cases, placing limits on trial time, the number of witnesses, early settlement conferences and the role of alternative dispute resolution, including mediation and arbitration. As a member of the Judicial Conference's Court Administration and Case Management Committee, I had opportunity to monitor the experience nationwide of courts designated by Congress to experiment with differentiated case management and other innovative principles of case management.

Utah is a pilot district under the legislation, so we, like other pilot and demonstration districts, have been attempting to develop ways to speed up, shorten and make trials more understandable in order to address the evils which

plague every court system: excessive cost and delay. In this regard, I recently had a very large insurance case involving the sale of policies to pay for funeral expenses. Multiple parties were represented by competing insurance carriers, intervening carriers and the Utah Attorney General. The attorneys said that it would take six months or more to present the many witnesses and numerous exhibits. This was a situation which required active case management. We got a handle on the proposed number of witnesses, and restricted each party to, I believe, 15 fact witnesses to testify live, and four experts. We required submission of direct testimony for the live witnesses so as to expedite cross examination and manage the scope of testimony. Lawyers sponsoring such witnesses were permitted to read or have the witness read the direct testimony, or to elicit the substance of it so long as the scope was not exceeded. We permitted sworn summary testimony of a restricted number of non-live witnesses, and required summaries of the many depositions, thus eliminating much verbiage. A data base was developed accessible to all counsel concerning facts relevant to the thousands of insurance policies and other detailed exhibits. We required mostly stipulated jury instructions, including preliminary instructions to orient the jurors. Juror notebooks were made available to each juror containing the preliminary instructions and admonitions as well as key exhibits inserted from time to time as agreed upon. I permitted interim arguments by counsel at designated times prior to final arguments. Notetaking by the jurors was encouraged. The jurors were permitted to submit written questions at the close of each day, which I discussed with counsel. I made it clear that virtually all ordinary questions likely would be answered in the course of things, but occasionally a question was not answered and the process seemed to more fully involve the jury. The long and the short of it was an expedited trial which lasted less than one month without any prejudice to a realistic and reasonable presentation of the positions of all concerned.

In one case we experimented with catering lunch for the jurors in order to maximize actual trial time. In another case we conducted the trial from 8:30 a.m. or 9:00 a.m. to 1:30 p.m. or 2:00 p.m. with no break for lunch and two 15 minute breaks, leaving afternoons free for discussion of legal matters outside the presence of the jury so as to minimize delay. In both of those experiments we were able to put together as much actual trial time as in the case of 10:00 a.m. to 5:00 p.m. trials, with the usual two hour lunch and three or four recesses. The juries seemed happier, and certainly appreciated the role which I insisted upon in making bench conferences rare, and taking no breaks to discuss legal matters while the jury waits. All of that sort of thing was done before the proceedings start or after daily adjournment.

"There is really much to be appreciated in our judicial system. Ordinary people can use this system. It is not outside the reach of those aggrieved by the establishment."

In these and other trial experiments, I have tried to put into effect what Chief Judge Bertelsman of Kentucky has recently advocated in terms of time limits on civil as well as criminal trials for the public's sake. This is in the light of the new amended rules and in recognition of the inherent powers of the court. He said:

> A judge cannot rely on the attorneys to keep the time for trying a case within reasonable bounds. The perspectives of judge and attorneys differ markedly. A judge wants to reach a just result expeditiously and economically. Attorneys' primary concern is winning, but they often confuse quantity with quality. Therefore, judges must recognize that they, rather than the attorneys, have a more objective appreciation of the time a case requires when balancing its needs against the court docket.[14]

Incidentally, we are lucky in this state and district because cases move relatively quickly and with less expense here than in most other areas. This is equally true relative to the excellent state system which is here in place.

Let me conclude on an additional positive note. There is really much to be appreciated in our judicial system. Ordinary people can use this system. It is not outside the reach of those aggrieved by the establishment. It is apparent, however, that the bar, academia, the public and the courts must work together to respond to the truly significant problems which plague us. But we must stand up for and retain the positive aspects of our system. As for the courts, judges must think of themselves more as directors or conductors, rather than mere umpires.

[1]"A New Code for Journalists," article by Steven Brill in *The American Lawyer*, Dec. 1994.

[2]*See* Article by prominent plaintiff attorney, Gerry Spence, as reported by the Associated Press, January 20, 1995.

[3]In a speech before the House of Delegates of the American Bar Association at its annual meeting in 1991, then Vice President Dan Quayle asked, "Does America really need 70 percent of the world's lawyers?" *See Judicature*, Vol. 75 No. 5 (Feb-March 1992) – "Taking Aim at the American Legal System: The Council on Competitiveness' Agenda for Legal Reform."

[4]71 *Denver L. Rev.* 77 (1993): "News from Nowhere: The Debased Debate on Civil Justice," article by Prof. Marc Galanter. He concluded by use of international data that:

> American lawyers make up less than a third and probably somewhere in the range of one-quarter of the world's lawyers, using that term to refer to all those in jobs that Americans do (including judges, prosecutors, government lawyers and in-house corporate lawyers).

[5]The Council on Competitiveness cited "18 million new civil cases" as evidence of Americans' litigiousness.

[6]. . . this caseload (18 million new cases) includes millions of routine cases citizens are required to file under certain circumstances – for example, divorce cases and probate cases – and many small claims, a substantial fraction of which are collection cases. It is at best disingenuous to cite this figure as an indicator of Americans' "litigiousness."

Two types of cases, tort and contract suits, may better reflect tendencies to litigate disputes, because they reflect discretionary actions. No one knows the precise number of these cases filed annually, because not all states publish breakdowns of their caseloads. However, NCSC reports detailed case filings data for some courts. Extrapolating from these data to the nation, I estimate that roughly 2 1/2 million tort and contract cases were filed in general jurisdiction trial courts in 1989. This amounts to about one of these types of suits for every 75 adult Americans – suggesting that we are a good deal less litigious than the vice-president and the council would have us believe.

Judicature, Vol. 75, No. 5 at 245 (Feb-March 1992) article by Dr. Deborah R. Hensler.

[7]See State Court Statistics: Annual Report 1992 (National Center for State Courts, Court Statistics Project, 1994).

[8]71 *Denver L. Rev.* 77-79 (1993).

[9]See remarks of U.S. District Judge Jim R. Carrigan made in lecture to Martin P. Miller series at University of Denver, as reported in *Civil Justice Digest*, Vol. 1, No. 1 (Summer 1994).

[10]"Sentencing Overload Hits the Circuits: Appellate Judges Stagger Under Guideline Generated Appeals" – National Law Journal, April 5, 1993, at 1.

[11]1993 Annual Report, Administration Office of Federal Courts, at 55 (1994).

[12]*U.S. Sentencing Commission, The Federal Sentencing Guidelines:* A Report on the Operation of the Guidelines System and Short Term Impacts on Disparity in Sentencing, Use of Incarceration and Prosecutorial Discretion and Plea Bargaining – Executive Summary at 85 (1991).

[13]Report and Recommendation to American Bar Association House of Delegates by Section of Litigation, February 5, 1995.

[14]*Chambers to Chambers*, Vol. 9, No. 4, Dec. 1994 – The Federal Judicial Center.

CASE SUMMARIES

By Clark R. Nielsen and Scott Hagen

CRIMINAL LAW, EYEWITNESS IDENTIFICATION

In an eye witness identification case of aggravated kidnapping, a court of appeals panel held that "in the pasture" of *Pena* the trial court has a greater discretion to determine whether eye witness identification is reliable. This measure of discretion is given the trial court when applying the legal standard to a given set of facts. As a consequence, sufficiently careful review is necessary to assure that the purposes of eye witness identification and its reliability are served. The review is not a "de novo" review. The reliability of eye witness identification is highly fact dependent and is determined on a totality of the circumstances.

Under *State v. Rameriz* the Utah Constitution due process analysis to determine the reliability of eye witness identification is as stringent, if not more so than the federal constitutional analysis. The panel recited sufficient facts to show that the finding of the trial judge was not clearly erroneous and that under the totality of the circumstances the eye witness identification was reliable.

The panel also applied the "*Pena* pasture" to the review of trial court discretion in ruling on an ineffective assistance of counsel claim. Ineffectiveness of counsel falls on the end of the spectrum subject to "de novo review" of the ultimate legal question of whether the defendant had received ineffective assistance of counsel under the 6th Amendment. The court found that the record supported the trial court's conclusion that trial counsel's performance was not deficient and did not fall below an objective standard of reasonableness.

In the concurring opinion, Judge Bench opined that the ineffective assistance of counsel does not permit a *de novo* review. *Pena's* general rule is to give deference to trial court resolution of mixed questions of fact and law. He argues that under *Pena* the trial court's determination of effective assistance of counsel is entitled to broad discretion and not a *de novo* analysis. The concurring opinion questions that no one has ever articulated why some discretionary decisions are reviewed more searchingly than others or even whether that can ever be well articulated. Appellate courts should apply a standard of deference to the trial court's exercise of discretion and not engage in *de novo* review, of the facts in mixed questions.

State of Utah v. Clifford W. Perry, 268 Utah Adv. Rep. 13 (Ct. App. 7/15/95) (Judge Billings, with Judge Orme; Judge Bench, concurring and dissenting)

NEGLIGENCE, ASSUMPTION OF RISK, SPORTING EVENTS

The Utah Supreme Court affirmed a summary judgment in favor of the Salt Lake Trappers against a fan struck by a foul ball at a game. The Court refused to hold that the issue of breach of duty to provide reasonably safe care to be a factual question for the jury, and affirmed the application of the assumption of risk doctrine.

The owner of a baseball stadium has a duty to exercise reasonable care to protect spectators. The ball team has a duty and obligation to provide protective screening behind home plate, which was done. It has a secondary duty to provide protective seating for as many patrons as would normally request such seats on an ordinary occasion. Undisputably, the plaintiffs did not request screened seating when they purchased their tickets nor did they request to change seats after they saw that their assigned seats were unscreened. The Plaintiffs chose to sit in an area that would accommodate their group, even though there was no protection from foul balls. Being struck by a foul ball is one of the natural risks assumed by spectators attending professional baseball games. Because these facts were undisputed, assumption of risk controlled and there were no factual issues to try.

Lawson v. Salt Lake Trappers 268 Utah Adv. Rep. 11 (July 12 1995) (Justice Durham)

PERSONAL INJURY, COMPARATIVE NEGLIGENCE

Under comparative negligence, the plaintiff may not recover unless plaintiff's fault is less than the combined fault of all those contributing to the injury. The Supreme Court unanimously reversed the trial court's determination that because the jury found that the plaintiff's fault exceeded the fault of the defendant Salt Lake City Corporation, the plaintiff could not recover. The jury had apportioned the relative fault to the plaintiff (42%), Salt Lake City (29%) and Calhoon Maintenance (29%). The plaintiff's fault was still less than all others contributing to the injury, combined. Plaintiff was employed by Calhoon maintenance and had not sued his employer because of workers compensation. Salt Lake City and Calhoon were both found negligent for their failure to maintain equipment utilized by the plaintiff in his work, causing him injury. Under the Liability Reform Act, a plaintiff may recover as long as the plaintiff's fault is less than the combined fault of all others that contributed to the injury regardless of whether or not parties to the action.

Nixon v. Salt Lake City Corporation, 268 Utah Adv. Rep. 77 (July 7, 1995) (Chief Justice Zimmerman)

LIBEL AND SLANDER, STATUTE OF LIMITATIONS

A Rule 12(b)(6) motion to dismiss admits the facts alleged in the complaint. Based upon those alleged facts the Supreme Court agreed that the plaintiff's claim against the defendant publisher for libel was barred by the one-year statute of limitations. The court rejected the defendant's theory that the discovery rule does not operate to toll the statute of limitation in defamation, unless the definition is inherently undiscoverable, such as private communication. The court held that the defamatory statement was reasonably discoverable, as it was published in a newspaper of wide circulation in the area. If defamation is reasonably discoverable at the time it is first published and disseminated in a newspaper widely available to the public, then the discovery rule does not apply.

Russell v. The Standard Corporation, 268 Adv. Rep 5 (July 6, 1995) (Chief Justice Zimmerman)

PROBATE, JOINT TENANCY PROPERTIES

During their marriage, the appellant and her husband held title to various properties in joint tenancy. The trial court ruled that the decedent's estate included all the properties that were held by the decedent

and his spouse as joint tenants because the decedent had not intended a true joint tenancy. On appeal, the Court of Appeals concluded that the trial court erred by including joint tenancy properties in the estate properties for purposes of will and probate. The trial court's factual findings did not support its conclusion that defendant did not intend to create joint tenancy properties at the time they were created.

The court of appeals did affirm the trial court's ruling that the decedent's spouse, the personal representative, was not entitled to recover her attorney's fees from the estate, in that the establishment of the joint tenancy was not a proper administrative expense of the estate.

Estate of Astin, 267 Utah Adv. Rep. 59 (Ct. App. June 29, 1995) (Judge Bench)

DAMAGES, PREJUDGMENT INTEREST

The Supreme Court affirmed awarding damages for loss of plaintiff's cattle grazed by defendant under an agistment contract, but decreased the amount of judgment from the jury verdict. After one year of pasturing, the plaintiff's cattle were returned by defendant from his pasture with over 280 missing and the remainder were in poor condition. Plaintiff sued under the written pasture agreement and common law agistment. The jury awarded damages for 90 cows at $715 and 113 calves at $400 each, totaling $110,019.00.

An agistment contract is specific type of a bailment in which the bailee has a duty to care for the animals delivered by the bailor. Upon showing of loss or damage to the animal, a presumption arises as to the agistor's negligence and he has the burden of overcoming the presumptive nature of the evidence. The court rejected the defendant's claim that he did not have exclusive possession and control of the cattle. An agistment differs from a standard bailment because the bailed property in this case consists of animals, alive and mobile on public lands. consequently, possession and control does not require the agistor have the legal right to exclude all

others from the property where the cattle are kept or that access be absolutely "exclusive." Exclusive control of the animals was not contemplated by the parties in their contract and the court correctly refused to instruct the jury that exclusive control was required.

As for damages, the court indicated that it will uphold a jury's findings and calculates their damages so long as there is competent evidence to sustain it. The court agreed with the appellants' argument that the jury could not conclude damages based on evidence not in the record. For example, the evidence indicated that an unknown number of non-pregnant cows were expected. Because the jury's calculation of damages, in regards to the missing mature cows, was not supported by competent evidence, defendant was entitled to a remitter of approximately $10,000.00 The court also affirmed the refusal to award pre-judgment interest because the damages (value and number of cows) couldn't be calculated with mathematical accuracy until trial. Because there were significant issues as to the value of the cattle, their weights, market prices and pregnancy and mortality, plaintiffs could not establish that his damages were fixed and measured by facts and figures at the time of the loss or calculated with mathematical accuracy. Accordingly, pre-judgment interest was not appropriate.

Justice Durham dissented because the majority creates a new agistment rule for livestock grazing on public range lands. Grazing cattle on public range lands may be susceptible to loss and damage from many causes for which the agistor should not be held responsible. Because the plaintiffs had put forth no evidence of actual negligence by the defendant, the defendant should not have been held liable.

Cornia v. Wilcox, 267 Utah Adv. Rep. 40 (June 28, 1995) (Justice Howe, with Justices Durham and Russon dissenting)

HEALTH CARE PROVIDERS, MEDICAL MALPRACTICE

The Court of Appeals held that a substance abuse program is not a "health care provider" under the Utah Health Care Malpractice Act. Ut. Code Ann. §78-14-1. Consequently, the plaintiff's failure to comply with the procedural elements of the Act did not deprive the trial court of jurisdiction of plaintiff's claim of negligence and malpractice. The court found that the legislature did not intend to include a drug treatment day facility as a "health care provider."

Platts v. Parents Helping Parents, 267 Utah Adv. Rep. 33 (Ct. App. June 15, 1995) (Judge Wilkens, with Judges Orme and Greenwood)

SETTLEMENT AGREEMENT, CONTRACTS

Utah Supreme Court affirmed the trial court's refusal to enforce an alleged settlement agreement between the parties. The parties' correspondence demonstrated they had not reached an agreement as to essential terms of the settlement. The evidence merely established that the parties had engaged in preliminary negotiation for settlement agreement but never agreed on the essential terms. Settlement agreements are favored and may be summarily enforced when there is a binding settlement agreement and the excuse for non-performance is comparatively insubstantial. The court did not look to intrinsic evidence but relied merely upon the correspondence of the parties to determine whether or not an agreement had been reached.

Sackler v. Savin, 267 Utah Adv. Rep. 22 (June 16, 1995) (Justice Durham)

DIVORCE, FOREIGN DIVORCE DECREE, FULL FAITH AND CREDIT

A foreign divorce decree is entitled to full faith and credit in Utah. Foreign judgments are enforced only under the principle of comity and not under Utah's Foreign Judgment Act. Ut. Code Ann. §78-22a-1. Under the principle of comity, plaintiff was entitled to full faith and credit, in Utah, of a Japanese family court decree.

Mori v. Mori, 266 Utah Adv. Rep. 11 (Ct. App. 6/1/95) (Judge Bench with Judges Davis and Jackson)

DOUBLE JEOPARDY; SPEEDY TRIAL

For purposes of determining whether the government has violated the rule against double jeopardy, a defendant is not "in jeopardy" until a jury is impaneled and sworn, or in a bench trial, until the first witness is sworn. In addition, collateral estoppel may not be invoked in a criminal case to bar the relitigation of an issue by a separate sovereign. The only exception is where one prosecuting sovereign can be said to be acting as a tool of the other or where the second prosecution amounts to a sham and a cover for the first.

Prosecutorial delay implicates both the Sixth Amendment and the Due Process Clause. The Sixth Amendment governs delay between formal accusation and trial, while the Due Process Clause governs delay between the commission of an offense and the initiation of prosecution. Preindictment delay violates the Due Process Clause only where the defendant has been actually prejudiced by the delay and where the delay was purposefully designed to gain tactical advantage or to harass the defendant. However, delay for purposes of completing a criminal investigation does not violate the Due Process Clause.
State v. Burns, 268 Utah Adv. Rptr. 23 (July 13, 1995) (Judge Billings).

CONTRACT; BREACH OF FIDUCIARY DUTY

Court affirmed Rule 41 dismissal of breach of contract claim on grounds that the correspondence of the parties to the alleged contract did not demonstrate an agreement as to the "essential terms of the contract."

Even where claim of breach of fiduciary duty was dismissed as a matter of law, thus requiring an appellate standard of correctness of error, where the facts in the case are sufficiently "complex and varying," the appellate court will grant considerable discretion to the trial judge, who observed the witnesses.

Corporate officers and directors must act fairly and in good faith, and so long as they do so, they are not precluded from dealing or contracting with the corporation. In this case, the trial court did not err in holding that the directors breached no fiduciary duty in attempting to buy a subsidiary of the corporation.
C&Y Corporation v. General Biometrics, Inc., 265 Utah Adv. Rptr. 11 (May 18, 1995).

DOMESTIC LAW

In a case of first impression, the court upheld the constitutionality of Utah Code Ann. §30-5-2, which provides for rights of visitation for grandparents and other immediate family members where the court finds that such visitation would be in the best interest of the children. Case remanded for appropriate findings of fact as to whether the best interests of the child were served by more frequent visitation rights with the grandparents.
Campbell v. Campbell, 265 Utah Adv. Rptr. 17 (May 18, 1995).

INSURANCE

Under certain circumstances, a check may be considered proper consideration for an insurance contract even though it is subsequently dishonored. It depends on the intentions of the parties. In this case, the court held that the check was proper consideration and the policy was in force until canceled, because the insurer had countersigned the policy after receiving notice of the dishonored check. Furthermore, the insurer had issued a cancellation notice, showing that it recognized that the policy was in effect and needed to be canceled.
Phoenix Indemnity Insurance v. Estate of Justin Bell, 265 Utah Adv. Rptr. 26 (May 18, 1995).

SENTENCING

The sentencing enhancement found in Utah Code Ann. § 76-3-407 applies to third degree felonies, where the offense charged is attempt to commit a crime which would be a first or second degree felony. In addition, the prior felony offense need not be specifically set forth in the information charging the new offense. It is enough if (1) the prior felony has been charged and admitted or (2) it is found to be true.
State v. Martinez, 265 Utah Adv. Rptr. 29 (May 18, 1995).

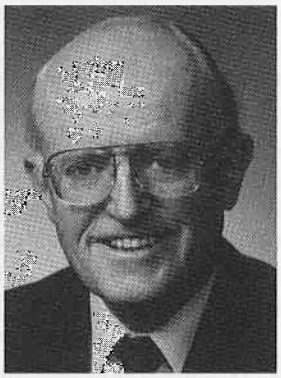
CHILD SUPPORT

Equitable estoppel may apply to bar liability for back child support where the ordinary elements of equitable estoppel are made out. Here, the trial court found that the mother of the child led the father to reasonably conclude that she wanted nothing to do with him and did not want any child support, that the father reasonably relied on her statements and actions, and that he changed his position by marrying and incurring additional expenses.
State of Utah v. Irizarry, 265 Utah Adv. Rptr. 35 (May 18, 1995).

RESTRICTIVE COVENANTS

A court may find that a restrictive covenant has been abandoned where existing violations are so significant that a reasonable person would conclude that the restriction has been abandoned. In this case, 23 out of 81 houses in the subdivision at issue had roofs that did not comply with the restrictive covenants. The court concluded that the violation of the restrictive covenant was sufficiently wide-spread that as a matter of law the restriction had been abandoned and was unenforceable.
Fink v. Miller, 265 Utah Adv. Rptr. 43 (May 18, 1995).

Utah Bar Foundation Elects Officers and Two Trustees



James B. Lee
President

Jane A. Marquardt
Vice-President

Stewart M. Hanson, Jr.
Secretary/Treasurer

H. James Clegg
Trustee

Salt Lake attorney James B. Lee, a shareholder in the law firm of Parsons Behle & Latimer, has been reelected President of the Utah Bar Foundation. Jane A. Marquardt, a partner in the Ogden law firm Marquardt Hasenyager & Custen, was elected Vice-President, and Stewart M. Hanson, Jr. was elected Secretary/Treasurer. H. James Clegg, member of the Salt Lake firm Snow Christensen & Martineau, was elected Trustee for a three-year term, and Jane A. Marquardt was elected to a second three-year term.

The continuing effort of the Board of Trustees is to attract more attorneys to participate in the IOLTA Program. In this way, the Foundation is able to provide needed financial support to many Utah organizations. Since 1985 the non-profit Bar Foundation has contributed more than $1.6 million to projects and causes which provide free or low-cost legal aid, legal education and other law-related services.

Utah Bar Foundation 1995 Grant Awards — $224,835

Legal Aid Society of Salt Lake
$70,000 to assist in providing no-cost legal counsel to low-income individuals with domestic relations cases and to all victims of domestic violence.

Utah Legal Services
$55,000 to provide civil legal services to low-income clients, to continue projects receiving IOLTA support, and to print "The Utah Renter's Handbook."

Utah Law-Related Education Project, Inc.
$35,000 to promote law-related and citizenship education of Utah's youth and communities through interactive educational experiences to create a citizenry that not only understands the law, the legal system and their rights and responsibilities as citizens, but is ready and able to govern itself.

Catholic Community Services – Immigration Program
$25,000 to subsidize its intern program, statewide outreach program, Ogden office and Salt Lake City office in an effort to provide immigration legal services to low-income persons.

Legal Center for People with Disabilities
$10,000 to support its outreach to ethnic minorities to determine needs and provide advocacy services in a culturally appropriate manner.

DNA People's Legal Services Inc.
$18,750 to continue to provide direct legal services to low-income people of all races who live in Southeastern Utah.

Utah Legal Services – Senior Lawyers Volunteer Project
$2,000 to support the recruitment, training and development of community outreach to senior lawyer volunteers for pro bono legal services to low-income Utah residents.

Women Lawyers of Utah
$2,181 to continue with distribution of video tapes on civil and criminal remedies for domestic violence.

Law Student Awards
$6,000 Community Service Scholarships – $904 Ethics Awards.

CLE CALENDAR

NLCLE: IMMIGRATION LAW

Date: Thursday, September 21, 1995
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Division Members
$30.00 for all others
add $10.00 for a door registration

WINNING NUMBERS: ACCOUNTING AND FINANCE FOR LAWYERS

Date: Friday, September 22, 1995
Time: 7:45 a.m. to 4:15 p.m.
Fee: $145.00 before September 12, 1995
$160.00 after September 12, 1995
CLE Credit: 7 HOURS

UTAH STATE BAR & UTAH MEDICAL ASSOCIATION JOINT LEGAL/MEDICAL SEMINAR

Date: Saturday, September 30, 1995
Time: 9:00 a.m. to 2:00 p.m.
(Tentative times)
Fee: $90
CLE Credit: 6 HOURS
Watch for a more detailed brochure to come in your mail!

NLCLE: DEPOSITIONS

Date: Thursday, October 19, 1995
Time: 5:30 p.m. to 8:30 p.m.
Place: Utah Law & Justice Center
Fee: $20.00 for Young Lawyer Division Members
$30.00 for all others
add $10.00 for a door registration

KEITH EVANS ADVANCED ADVOCACY TRAINING SEMINAR

Date: Friday, October 20, 1995
Time: To be determined
Place: Utah Law & Justice Center
Fee: To be determined

CASE MANAGEMENT FOR THE 90'S: EFFECTIVE AND EFFICIENT PRETRIAL PREPARATION

Date: Friday, November 3, 1995
Time: 9:00 a.m. to 4:30 p.m.
Fee: To be determined
CLE Credit: ~6 HOURS

Watch your mail for brochures and mailings on these and other upcoming seminars. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

I would like to thank all the members of the Bar Examiners Committee, Bar Examiners Review Committee and Character and Fitness Committee for a successful July Bar Examination that was given July 25th and 26th. You voluntary time for the bar examination was very much appreciated.

Thank you again,
Darla C. Murphy,
Admissions Administrator

CLE REGISTRATION FORM

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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 Policy: 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.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee*, will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.
NOTE: It is the responsibility of each attorney to maintain records of his or her attendance at seminars for purposes of the 2 year CLE reporting period required by the Utah Mandatory CLE Board.

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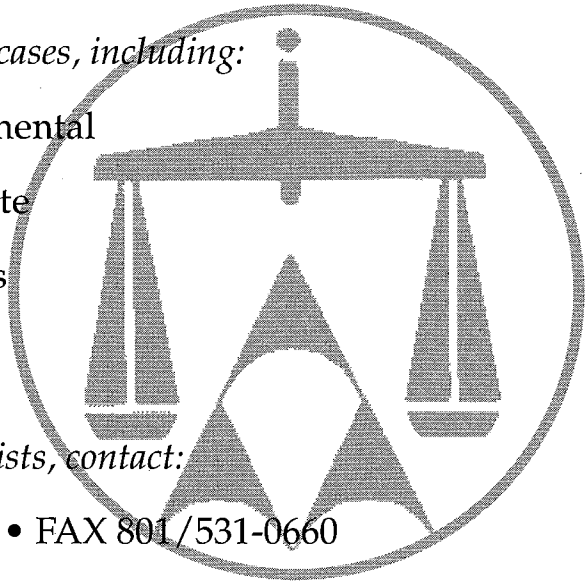

For a complete list of the specialized panelists, contact:

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Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 532-4949. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

Utah Bar Journal and the Utah State Bar Association do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

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 must be received with the advertisement.

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Utah Reports 1–78: Pac. Rep. 2d 1–to date. Am. Jur 2nd. Reply Box 288, Spanish Fork, UT 84660.

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POSITIONS SOUGHT

Attorney, 19 years in general practice, seeks affiliation with small or medium firm, or to take over practice of retiring attorney. Extensive litigation experience, especially in federal court. Excellent writing and communication skills. Willing to relocate. Reply in confidence to P.O. Box 11315, Salt Lake City, UT 84147.

Expert EMPLOYEE BENEFITS (ERISA) ATTORNEY, (labor and tax) for corporation or law firm. Seventeen years experience. Will relocate. Call (713) 937-8195.

LEGAL RESEARCH: Transplanted Montana attorney seeks research work while studying for Utah Bar. MT bar member since 1987. References & writing samples available. $30.00/hour. Gwendolyn Wilson @ (801) 553-8675.

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OFFICE SHARE Bamberger Mansion, 623 East 100 South, SLC, $400.00/mo. rent. Includes reception room, conference room plus 2 offices. Pay 1/3 of actual expenses. Fax, Copier, Receptionist, Etc. Call John @ (801) 363-9345.

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Office space for one attorney in remodeled downtown building. Main street location, across from federal courthouse. Office overlooks Main Street. Facilities include receptionist, fax, copier, conference room, library, telephone system. Share expenses with two other attorneys. Available July 1. Call Barbara @ (801) 363-0888.

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INFORMATION WANTED

The Family of **OREIAN NELS HANSON** is looking for a will. Decedent was born August 23, 1923; died June 11, 1992. Last known address was 1830 South 350 East Orem, UT. Anyone knowing the whereabouts of this document is asked to contact Kerry Jones @ (801) 571-7393, or 560-7784.

LOST WILL: Our records indicate that Parley E. Norseth and/or Theodore Bohn may have prepared a will for **HAZEL V. SMITH.** The will was executed in late 1950's-1960's, in the Ogden area. If you have inherited any of the files belonging to these attorney's, please review them for this will. Please contact Ralph C. Petty, Esq. @ (801) 531-6686 with any information.

CASE OF THE MONTH
The Buried File

A law firm was retained to advise an insurer whether the insurer had a duty to defend and/or indemnify a policyholder in several actions alleging false advertising.

The law firm assigned the file to an associate. The associate learned that the policyholder had hired its own attorney and that the cases were being defended. At the same time, the insurer was in the process of restructuring and the file was reassigned to a new office and a new adjuster.

Years later, the file surfaced and the insurer became aware that one of the cases was scheduled for trial in several weeks. The insurer contacted the law firm and demanded that it receive a coverage opinion immediately. The associate was in the middle of a lengthy jury trial and was not able to devote time to completing the research and writing the final opinion.

A partner, in reassigning the file to another associate, stating that they were "way late" in getting an opinion out and that they needed to "get something out" immediately to protect themselves. The associate researched the matter and prepared an opinion letter, advising the insurer that it had a duty to defend the policyholder and drafted a Reservation of Rights letter for the insurer to send. By this time, it was too late to change counsel as demanded by the insurer as trial was about to proceed.

A jury rendered a verdict against the policyholder for $9 million. The policy limit was $5 million. The policyholder assigned its rights under the policy and its bad faith claim against the insurer to the underlying plaintiff who sued the insurer. The insurer paid $7 million to end the dispute. The insurer now sued the law firm claiming it was prejudiced because of the lawyer's delay in rendering a coverage opinion.

CURRENT STATUS

There are many defenses available to the law firm. Mainly, the insurer had an independent duty to investigate, settle and monitor the underlying claim. Secondly, in this particular case, the insurer had a duty to defend and probably to indemnify anyway. The only damages which may be attributed to any delay would be the increase (if any) in defense costs due to the fact that the insurer's approved attorneys were not retained to defend the case.

The main problem is the memo from the partner to the associate which will be viewed extremely unfavorably. The law firm and individual attorneys, one of whom has left the law firm, are defendants. The case is in the early stages of discovery. The memo will be discoverable. The defendants are all acting in concert to settle the case before the memo has to be disclosed.

CLAIM AVOIDANCE

File documentation is extremely important. Often, when documentation is unclear or non-existent, claims against attorneys boil down to a "swearing match" between the attorney and the claimant regarding either the scope of the retention or whether the attorney actually did fully advise the client of the client's alternatives. In this situation, the claimants would not get any mileage out of the memo if the partner wrote the memo to the associate directing him to give the file immediate attention. Unfortunately, the memo went a step further and stated that the attorneys needed to "get something out" to protect themselves. Obviously, this statement alone creates an implication that even the attorneys believed that they may well have some exposure at this point. These types of gratuitous comments serve no purpose in any file and should always be avoided.

By Melissa Thomas, Claims Coordinator for the Lawyers Professional, Liability Program at Coregis, endorsed by the Utah State Bar Association, and administered in Utah by Rollins Hudig Hall of Utah, Inc.

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Professional Responsibility and Ethics **Required: a minimum of three (3) hours**

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Date of Activity CLE Hours Type of Activity**

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Program Title
_____
Date of Activity CLE Hours Type of Activity**

Continuing Legal Education **Required: a minimum of twenty-four (24) hours**

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

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

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

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

IF YOU HAVE MORE PROGRAM ENTRIES, COPY THIS FORM AND ATTACH AN EXTRA PAGE

**EXPLANATION OF TYPE OF ACTIVITY

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

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

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

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

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

Regulation 8-101 — Each attorney required to file a statement of compliance pursuant to these regulations shall pay a filing fee of $5.00 at the time of filing the statement with the Board.

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

DATE: _____ **SIGNATURE:** _____

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

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