UTAH BAR JOURNAL

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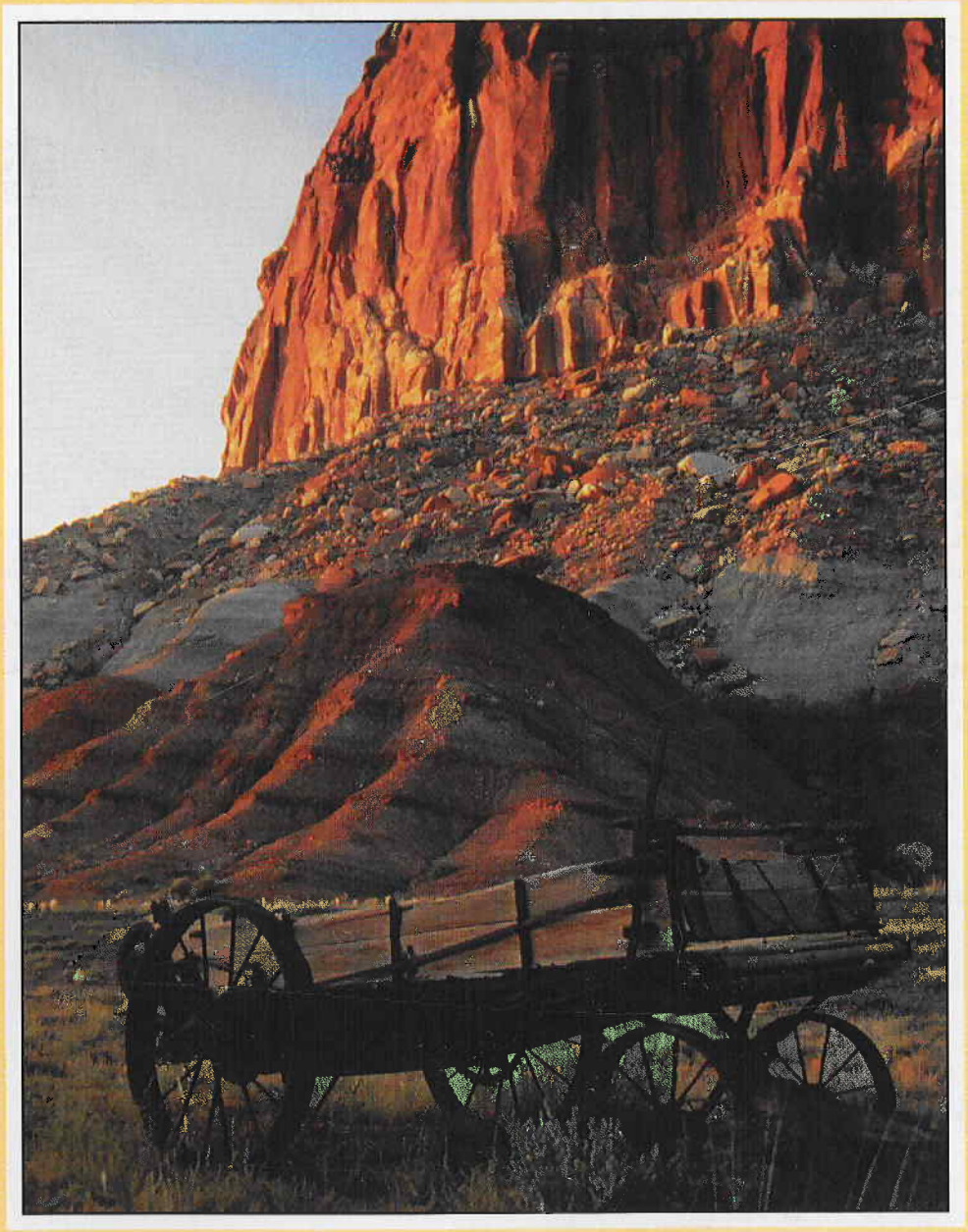

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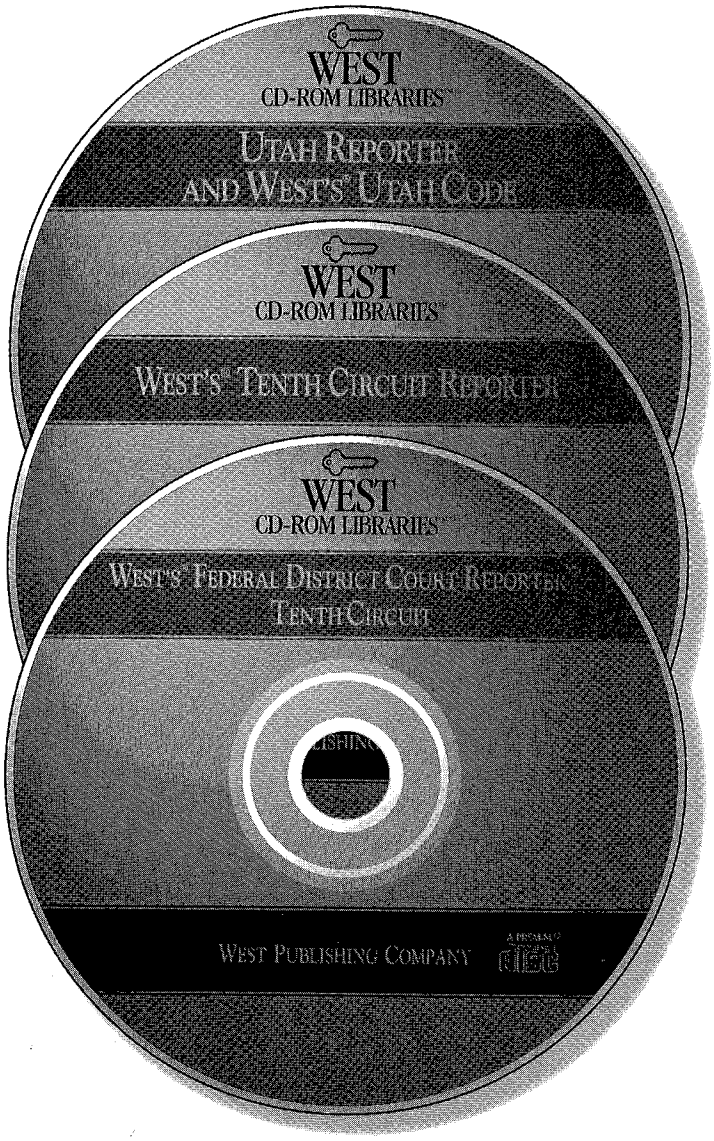

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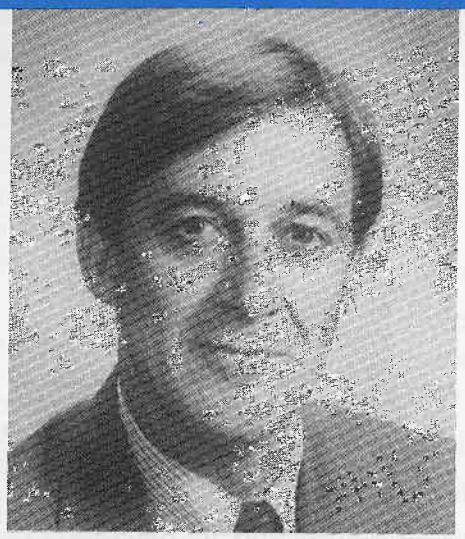
VISION OF THE BAR: To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.

MISSION OF THE BAR: To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.

COVER: Farm implement displayed in the orchards of Fruita, Capitol Reef National Park, by Kent M. Barry, Esq., Salt Lake City, Utah.

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, 2523 Arnett Drive, Salt Lake City, Utah, 84109, 278-8084. 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.



President's Message

By Dennis V. Haslam

As the Bar's fiscal year draws to a close, I want to report to you some of the more significant activities undertaken by the Bar Commission and Bar staff over the last year. This summary is not in any particular order of importance for, as you know, all Bar matters are important.

- **Youth Education Project.** In conjunction with the Bar's Speaker's bureau, the Law Day Committee, Law Related Education Committee and the Young Lawyers Division, the Bar Commission launched a project this past year for the purpose of educating our youth about the role of law in society. We have arranged for distribution through the state's high schools of a booklet published in conjunction with Utah Children entitled *Rights Responsibilities Relationships, Your Rights as a Young Person in Utah.* Over 56% of the high schools in the state have participated in this program by having lawyers teach law related classes in our schools. Lawyers bolster the image of the profession by engaging in programs that serve the public interest. This is one of those programs.
- **Access to Justice Task Force.** The Bar Commission has filed a petition with the Utah Supreme Court requesting the court to authorize the creation of an Access to Justice Task Force. As you know, funding for Legal Services Corporation has been drastically reduced by Congress, and many low income citizens in the state of Utah may go without legal services. Delivery of legal services to the poor has become a crisis in our state and throughout the country. The Board of Bar Commissioners has requested the Supreme Court to authorize the creation of the task force to evaluate the delivery of legal services to the poor and coordinate funding and volunteer efforts. Over 1,000 lawyers have offered their services to our pro bono effort. We need to match those lawyers with the clients who need them.
- **Unauthorized Practice of Law**. The Bar has been successful in prosecuting unauthorized practice of law cases during this past year. Those persons engaging in unauthorized practice pose a serious threat to the public and especially to those innocent clients who are duped into paying for legal services to a person unqualified to provide them. We will maintain a vigilant eye on unauthorized activities and pursue those cases where necessary.
- **Office of Attorney Discipline.** Last year, the Commission received a report containing an evaluation of the Office of Attorney Discipline. DUring this past year, the Commission hired Stephen Cochell as Chief Disciplinary Counsel. Under the leadership of Executive Director John Baldwin and Steve Cochell, the Commission has begun implementation of the recommendation from that report. Additionally, the Bar Commission has emphasized the need for the Office of Attorney Discipline to focus early on the serious cases, and go to trial whenever necessary. We must insure that the public is protected from attorneys who engage in unethical conduct. During this past year, the Office of Attorney Discipline has gone to trial on two very serious cases and obtained suspensions or disbarment. Chief Disciplinary Counsel will continue to vigorously pursue those lawyers who steal from their clients and who engage in fraudulent and unethical activities.
- **Legal Assistant's Division.** The Supreme Court has authorized the creation of a division of the Bar for voluntary membership by legal assistants. We believe there are over 300 legal assistants working in the state of Utah who would be interested in joining this division. It will create more cohesion in the profession, improve the quality of services provided to clients and insure that ethical standards are maintained.
- **Continuing Legal Education**. The Bar Commission and staff have sought to improve the quantity and quality of contin-

uing legal education provided through the Bar. The various sections of the Bar have cooperated by recruiting experienced presenters. Our staff strives to improve the programs presented. A concerted effort has been made to provide CLE programs to rural areas of the state.

• **Local Bar Meetings.** During the past year, the Commission has held its monthly meetings in Logan, Ogden, Provo, Salt Lake City and St. George. Bar members are always welcome to attend these meetings wherever they are held. Bar Commissioners value the opportunity to interact with members and to learn about professional problems associated with the practice of law. We need you input.

• **Internet Home Page.** Thanks to the efforts of the Bar Commissioner David Nuffer, and his committee, the Utah State Bar is now available to you on the World Wide Web. We have a Home Page on the Internet which contains information of interest to the public and to members of the Bar. Boot up and let us know if you like what you see.

• **Bar Membership.** There are currently 6,247 active and inactive lawyers on our roster. 210 were admitted last October and 98 were admitted this past May. Some complain that we have too many lawyers. Many complain that lawyers are too expensive. Low income and poverty level citizens think there are not enough lawyers. What to do?

• **Utah Centennial.** The Bar's Centennial Committee has helped coordinate the production of a play revolving around the polygamy and religious issues in the trial of George Q. Cannon. As you know, citizens in the Territory of Utah labored for 30 or 40 years before statehood was achieved. If you are interested in acting, contact bar staff for an audition.

• **Professional Liability Insurance.** The Bar Commission continues to endorse Coregis as its liability insurance carrier and the Continental Insurance Agency as the Bar's program administrator. There are significant benefits to bar members who insure with the Bar's endorsed carrier, including education, law office management and risk management. Coregis is committed to helping improve the quality of practice of Utah lawyers.

• **Finances.** Our financial condition is sound. We anticipate a cash surplus at the end of this fiscal year of approximately $800,000. We will likely receive more revenue than budgeted, and we should be under budget with respect to expenses.

Stephen Kaufman will become President of the Bar at this year's Annual Meeting in Sun Valley. Subject to a retention election amongst the entire Bar membership, Charlotte L. Miller will be President-Elect during the 1996-1997 Bar year. We have two fine leaders to carry the Bar's flag for the next year. I encourage you to support them and to share your views regarding the practice of law in Utah and the operation of your Bar.

It has been a great honor serving with you in the operation of the Bar's business during the last year. My partners will be grateful when I return to my day job. Thanks for having me.

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Introduction – Special Environmental and Natural Resources Law Issue

By Lucy B. Jenkins

The Energy, Natural Resources and Environmental Section of the Bar is pleased to publish this Special Issue which endeavors to present articles on environmental and natural resources law topics of general interest.

Virtually every type of real estate development and transaction has an environmental or natural resources component. In recognition of this consideration, four of the articles deal with current issues with which many lawyers may be faced in representing clients involved in developing real estate or real estate transactions. Mike Keller discusses federal and state permitting requirements for development of property which impacts waters or wetlands. John Martinez examines the takings issue which arises in contexts where government regulation, such as wetlands regulation, restricts development of real property. Elizabeth Jones explains the procedures for acquiring state and federally owned lands through land exchanges. Rosemary Beless offers her useful insights on obtaining an environmental site assessment.

LUCY B. JENKINS is a shareholder with the law firm of Parsons Behle & Latimer and the chair of the Energy, Natural Resources and Environmental Section of the Utah State Bar. She concentrates her practice in environmental law and mediation.

An issue which is receiving increasing attention nationally, including in Utah, is environmental crime. Craig Anderson addresses criminal enforcement of environmental laws at the local, state and federal levels in Utah.

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Wetlands and Section 404 Permitting

By H. Michael Keller

I. INTRODUCTION

The presence of waters and wetlands may limit permissible land use and seriously impair the ability to develop. Wetlands are federally protected under §404 of the Federal Water Pollution Control Act (also known as the "Clean Water Act"),[1] and §10 of the Rivers and Harbors Appropriations Act of 1899 ("Rivers and Harbors Act)".[2]

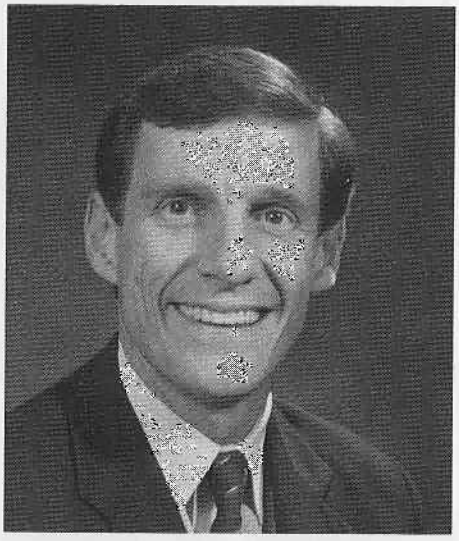
Section 404 of the CWA prohibits discharges of dredged or fill material into navigable waters without a permit issued by the Army Corps of Engineers ("Corps").[3] Section 10 of the Rivers and Harbors Act requires a permit from the Corps for construction, excavation, filling, or other activities that obstruct navigable waters.[4]

II. REGULATORY AGENCIES

The §10 program is administered by the Corps, whereas the §404 program is administered jointly by the Corps and the Environmental Protection Agency ("EPA"), with involvement of the Fish & Wildlife Service ("FWS"), the Soil Conservation Service ("SCS") and certain other federal agencies. The Corps is the primary permitting authority under §404, but both agencies have enforcement authority.

III. ORGANIZATION OF THE CORPS

The Corps is highly decentralized, with 36 district offices throughout the country. Most permitting and delineation decisions are handled at or under the direction of the District Engineer with input from local field offices. Each District is headed by a District Engineer and is located within one of nine Divisions, each headed by a Division Engineer. Utah is in the Sacramento District of the South Pacific Division. The District is headquartered in Sacramento, and the Division is headquartered in San Francisco. There is a local regulatory office in Woods Cross, Utah.



H. MICHAEL KELLER is a shareholder with the Salt Lake City law firm of Van Cott, Bagley, Cornwall & McCarthy, where he practices environmental and natural resources law and chairs the Firm's Natural Resources and Environmental Law Section. He received his bachelors and masters degrees in geology from Dartmouth College and his J.D. in 1978 from Duke University. His practice focuses on environmental permitting, compliance and enforcement, advising natural resources and other industrial clients under the air, water quality, and hazardous waste laws. He regularly represents clients on wetlands permitting and enforcement matters. Mr. Keller is a past Chairman of the Energy, Natural Resources and Environmental Law Section of the Utah State Bar. He serves as a trustee on the Board of the Legal Aid Society of Salt Lake, Inc. and as a trustee on the Board of Utah Law-Related Education, Inc.

IV. REGULATORY FRAMEWORK OF THE SECTION 404 PROGRAM

The 404 program is implemented through detailed regulations issued by the Corps[5] and by EPA.[6] In addition, there are regulatory guidance letters ("RGLs") issued from time to time by the Corps, and memoranda of understanding between the Corps and EPA articulating the position of the agencies on such matters as enforcement, jurisdiction, and mitigation. Questions concerning the program may be directed to a Corps District or field office or by calling EPA's toll-free Wetlands Hotline (800) 832-7828.

V. REGULATED WATERS

Jurisdiction under §10 is based on a concept of commercial navigability and extends to waters that are used, have been used, or may be susceptible for use to transport interstate or foreign commerce.[7] It only extends to the mean or ordinary high water line of non-tidal navigable waters.[8] It also extends to waters that are subject to the ebb and flow of the tide.[9]

Jurisdiction under the Clean Water Act is much broader. It extends beyond those "waters of the United States" that are commercially navigable and broadly encompasses tributaries of such waters, and all "other waters". . . "the use, degradation, or destruction of which could affect interstate of foreign commerce . . . ."[10]

Regulated tributaries may include non-perennial streams (*i.e.* ephemeral or intermittent streams) which are connected to navigable waters. Thus, discharges into, or excavation, construction or other activities within, normally dry arroyos or other tributary drainages that only flow in response to precipitation are subject to Clean Water Act jurisdiction.[11]

Under the interstate commerce test for "other waters", only a limited connection to interstate commerce is required. For example, EPA considers use by migratory waterfowl a sufficient connection with interstate commerce to bring isolated waters and wetlands within the jurisdiction of the Clean Water Act. In *Hoffman Homes Inc. v. EPA*, the Court agreed with EPA that jurisdiction extends to isolated wetlands where the only connection to interstate commerce is use by migratory waterfowl.[12]

Artificially created waters may also be subject to Clean Water Act jurisdiction if they meet the criteria of navigable waters. As stated in *Leslie Salt Co. v. United States:*

The Corp's jurisdiction does not

depend on how the property at issue became a water of the United States. Congress intended to regulate locate aquatic ecosystems regardless of their origin.[13]

VI. WETLANDS

The Corps and EPA define "wetlands" as: Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions . . . . Wetlands generally include swamps, marshes, bogs, and similar areas."[14]

The basic factors considered in evaluating the existence of wetlands are the type of soils, the type of vegetation, and the degree and frequency of inundation. The definition does not require "frequent" inundation in and of itself; rather, the basic requirement is sufficiency to support, and actual presence of, wetlands vegetation.[15]

The Corps delineates wetlands using technical criteria set forth in a guidance manual. The first such manual, issued in 1987 ("1987 Manual"), established technical criteria and field indicators for determining whether or not an area was a jurisdictional wetland. Through a series of events, the 1987 Manual was superseded an then reinstated by the Corps and is currently the manual being used by the Corps for wetland delineations. The 1987 Manual requires that wetland vegetation, hydric soils, and wetland hydrology all be present for a regulated wetland to exist.

"Altering an area by illegal filling does not alter its legal status as a regulated water or wetland under Section 404."

Altering an area by illegal filling does not alter its legal status as a regulated water or wetland under §404. Thus, jurisdictional waters or wetlands that were made "fast" land by illegal filling after implementation of the §404 program may remain jurisdictional waters under the Clean Water Act.

As a general rule, agricultural lands that exhibit wetlands characteristics are considered "farmed wetlands" and are subject to Section 404 jurisdiction.[16] However, wetlands that were converted prior to December 23, 1985, to croplands with "agricultural commodities" (including annual crops, such as wheat, corn, vegetables, etc., but not perennial crops, such as trees, apples, sod, cranberries, etc.) are considered "prior converted croplands" and subject to Section 404 jurisdiction if they no longer exhibit wetlands characteristics.[17] These provisions of the 404 program interplay with the Department of Agriculture's Swampbuster program under the Food Security Act of 1985, as amended by the Food, Agriculture, Conservation, and Trade Act of 1990, which is designed to discourage alteration of wetlands by withholding certain farm program benefits from farmers who convert or modify wetlands.[18]

Fill material deposited on wetlands prior to 1975 is considered "grandfathered"

under the 404 Program.[19] Fills that occurred after that date, but before applicable program implementation dates, may also be grandfathered.[20]

VII. REGULATED ACTIVITIES

The plain language of §404 prohibits "discharge" of "dredged or fill material" without a permit.[21] The Corps and EPA define "discharge of fill material" to mean "the addition of fill into waters of the United States,"[22] and the "discharge of dredged material" to mean any addition or redeposition of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, that destroys or degrades waters of the United States.[23] Fill material is defined as "material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."[24]

A few activities, such as normal farming or ranching activities, are granted express exemptions from Section 404 permitting.[25] These exemptions are subject to various statutory and regulatory conditions and limitations[26] and have been narrowly interpreted by the courts.[27]

VIII. PERMITS UNDER §404

The permits that may be issued under Section 404 include individual permits issued on a case-by-case basis following review of individual applications, general permits authorizing a category or categories of activity in a specific region or nationwide, and letters of permission issued through a shortened processing procedure without the need for individual public notice.[28]

Individual permit applications should be submitted to the District Engineer of the District in which the project is located. Typically, the application is referred by the District to the local regulatory office of the Corps for review and any field investigations.

Upon a determination that the applications is complete, the District Engineer is required to issue a public notice and solicit comments on the proposal.[29] A public hearing may be held to consider issues raised concerning an applications.[30]

In evaluating a permit application, the Corps is required to evaluate the probable impact, including cumulative impacts, on the public interest, and consider all factors which may be relevant, such as conservation, economics, aesthetics, general environmental concerns, historic properties, etc.[31] Issuance of an individual permit will usually trigger the Corps' obligation under the National Environmental Policy Act[32] to assess environmental impacts of the proposed development by preparing an environmental assessment or an environmental impact statement.[33]

The Corps may issue a permit if it determines that issuance would not be contrary to the public interest or the following EPA Guidelines:

- there is no practicable alternative,
- there will be no significant adverse impact on aquatic resources,
- all reasonable mitigation is employed, and
- there will be no statutory violations caused by the proposed discharge.[34]

A permit must be denied if there is a practicable alternative to the proposed discharge that involves less adverse impact. If a project does not require location in a water or wetland (*i.e.*, shopping center rather than a marina), it is not water dependent and, therefore, practicable alternatives are presumed to exist. The Corps considers an alternative to be practicable if it is "available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes."[35]

The EPA and the Corps require that there be no "overall net loss of wetlands values and functions."[36] Permittees can expect the Corps to impose changes in project design and require mitigation of unavoidable adverse and impacts to wetlands. The permittee may be required to provide compensatory mitigation through the creation of new wetlands or the restoration of existing wetlands to compensate for the wetlands values lost as a result of the project.

The Corps follows a sequencing process in considering mitigation during a project review. The applicant must first attempt to *avoid* adverse wetland impacts, then *mitigate* unavoidable impacts to the extent appropriate and practicable by altering project plans, and finally, *compensate* for lost aquatic resource values through compensatory mitigation. Providing compensatory mitigation can be expensive and time-consuming for a developer, particularly where lands for potential mitigation projects are not readily available.

The burden of providing mitigation has spawned interest in establishing mitigation banks which may be drawn upon to satisfy mitigation requirements. On November 28, 1995, the Corps, EPA and other agencies issued final guidance on the creation, use and operation of mitigation banks.[37] Mitigation banking involves the restoration, creation, enhancement, and, in exceptional circumstances, preservation of wetlands or other aquatic resources, to provide compensatory mitigation in advance of permitted impacts to similar resources. The chemical, physical and biological functions of the new resources are banked as mitigation "credits" which may be used by the bank sponsor or others to compensate for unavoidable adverse impacts to wetlands or other aquatic resources.

Section 401 of the Clean Water Act requires certification from the state that the proposed discharge will meet all applicable state water quality requirements.[38] How far a state may go in imposing conditions beyond those mandated by numerical water quality standards has been a subject of great debate, particularly in the arid west where there is increasing pressure to preserve the quantity of in-stream flow to protect water quality and aquatic species.

In *P.U.D. No. 1 of Jefferson County v. Washington Dept. of Ecology,* the United States Supreme Court evaluated a §401 certification issued by the State of Washington in connection with a minimum stream flow requirement imposed in a §404 permit application for a hydroelectric project on the Dosewallips River.[39] The Court held that §401 did not limit the state's conditions to numerical water quality limitations, but allowed the state to require that a minimum flow be left in the river as a condition of its certification for the project.[40] The Court also expressly recognized that water quantity is closely related to water quality and that reduced stream flow can constitute water pollution within the meaning of the Clean Water Act.[41]

Many activities may proceed more expeditiously, with minimal delay and paperwork, pursuant to a nationwide permit under the Corps' regulations in 33 C.F.R. Part 300. A nationwide permit is a general permit issued by regulation for a category of activities throughout the nation. A nationwide permit is valid only if its terms and conditions are met. There are currently 36 nationwide permits.[42] A 37th which would apply to single family homes, was proposed by the Corps on March 23, 1995.[43]

Some commonly used nationwide permits are: 3 (maintenance of approved fills), 12 (utility line backfill and bedding), 13 (bank stabilization), 14 (road crossing), 18 (minor discharge), and 26 (head waters and isolated waters discharges).

"Providing compensatory mitigation [for adverse wetland impacts] can be expensive and time consuming for a developer . . . ."

Nationwide Permit 26 is only applicable to fills of ten acres or less in isolated waters (and wetlands) or in non-tidal waters, including adjacent wetlands, that are located above the headwaters (i.e., the point at which the average annual flow is less than 5cfs 50 percent of the time).[44] The permit was not limited to ten acres until October 5, 1984.[45] It generally applies automatically to wetland fills of one acre or less, but requires thirty days prior written notification to the Corps for fills between one and ten acres. These acreage limits are absolute and cannot be avoided or increased by a mitigation plan. Moreover, nationwide permits *cannot be used twice* on the same project to increase the allowable acreage of a single permit, unless a linear project (such as a highway or pipeline) is involved.[46] Any real estate subdivision created after October 5, 1984, must be viewed in the aggregate and not on a lot-by-lot basis for purposes of the one and 10 acre limits of Nationwide Permit 26.

Parties relying on a nationwide permit must comply with notification and other conditions applicable to that permit, as well as any special management practices the agencies deem necessary to minimize damage to waters and wetlands.

Regional permits are a type of general permit that may be issued by a Division or District Engineer authorizing a category of activities within that Division or District.[47] Letters of permission may also be used to authorize certain activities without the need for individual public notice.

IX. APPEAL PROCESS

To date, there has been no administrative appeal process by which parties could contest regulatory actions by the Corps on delineations or permits. If a dispute with the Corps could not be resolved through negotiation, litigation in federal court provided the only recourse.

The Corps has proposed establishing an administrative appeal process.[48] Under the proposed rule, the Corps would provide permit applicants and landowners an opportunity to appeal permit denials and jurisdictional determinations in an administrative appeal process.

X. TAKINGS CLAIMS

Imposition of wetlands regulations may give rise to a taking of private property without compensation in violation of the Fifth Amendment to the U.S. Constitution. Recent court decisions have indicated a trend toward granting compensation when a party is deprived of the use of his or her land by the denial of a Section 404 permit.[49]

A taking may not be asserted until a permit has been sought and denied.[50] Moreover, assertion of a taking may not be raised as a defense to an enforcement action brought under the FWPCA. Rather, the proper procedure is to initiate a suit for compensation in the Court of Claims.[51] The

Court of Claims has sole jurisdiction for claims against the United States in excess of $10,000.[52]

XI. ENFORCEMENT

Under the Clean Water Act, the EPA has significant authority to conduct inspections and require dischargers to monitor and maintain records, make reports and provide information regarding their discharges.[53] Unpermitted discharges of dredged or fill material into waters or wetlands are subject to issuance of a cease and desist order, imposition of administrative penalties, or referral to the Department of Justice to seek civil or criminal penalties.[54]

The Clean Water Act grants both the EPA and the Corps authority to assess administrative penalties of up to $10,000 per day per violation, not to exceed $125,000.[55] Judicially-levied civil penalties of up to $25,000 per day per violation may be assessed for certain violations.[56]

Criminal liability, under the Clean Water Act, extends to *negligent,* as well as knowing violations.[57] Maximum criminal fines range from $10,000, imprisonment for up to two years, or both for lesser offenses, to $250,000, or 15 years, or both for individuals and $1,000,000 for corporations for violations involving knowing endangerment of other persons.[58] Repeat offenders are subject to double these penalties.[59] The Clean Water Act specifically provides that *responsible corporate officers* may be held criminally liable for acts of the corporation.[60]

There is no statute of limitations in the Clean Water Act. In *3M v. Browner,* the court held the general five-year statute of limitations in 28 U.S.C. §2462 applicable to enforcement actions under environmental statutes which do not contain a specific limitation.[61] The court also held that the five-year period runs from the date of the actual violation, and not from the date of the government's discovery of the violation. In *U.S. v. Telluride Company,* the court followed 3M and held that EPA's claims against a ski resort developer for unpermitted discharges of dredge and fill material that occurred more than five years before EPA filed its complaint were time-barred.[62] The court rejected EPA's argument that a discharge of fill material is a continuing violation for which the limitations period does not begin to run until the fill is removed.[63]

Section 2462 expressly applies to actions for penalties or fines, but is silent as to actions seeking equitable relief, such as an injunction or order to restore illegally filled wetlands. In the *Telluride* case, the court followed *U.S. v. Winward Properties,*[64] and held that where the government seeks both penalties and injunctive relief under the CWA, the five-year limitation period applies equally to both.

XII. UTAH REQUIREMENTS

Utah has no wetland regulatory program. However, Utah's water quality, water rights and wildlife protection laws and regulations should be carefully evaluated before undertaking any activities in or adjacent to waters or wetlands.

"Criminal liability under the Clean Water Act extends to negligent as well as knowing violations."

The Utah Water Quality Act prohibits pollution of the "waters of the state," and makes it unlawful to discharge pollutants without a permit or to "place or cause to be placed any wastes in a location where there is probable cause to believe it[sic] will cause pollution" of such waters.[65] To the extent dredged or fill material constitutes a pollutant or waste, its discharge to waters of the state or placement in a location where it would cause pollution of the waters of the state would be subject to regulation under Utah's Water Quality Act.

Utah water law requires written approval from the Utah State Engineer for relocation of any natural stream channel or alteration or change of the beds or banks of any natural stream.[66] The State Engineer must determine that the proposed action will not unreasonably or unnecessarily endanger aquatic wildlife. Such activities will likely also be subject to regulation under the §404 program. The Utah State Engineer and the Corps have developed a single application form that may be submitted to either the State Engineer or the Corps for approval. Stream relocation or alteration authorized by the State Engineer is covered by a regional general permit issued by the Corps in Utah to authorize discharges of dredged or fill material for projects in streams where a Utah stream alteration permit has been issued by the State Engineer.

Utah fish and wildlife laws protect most forms of fish and wildlife and provide special protection for aquatic insects and crustaceans that support trout and other game fish.[67]

[1]33 U.S.C.A. §1344 (West 1986 and Supp. 1995).

[2]33 U.S.C.A. §403 (West 1986).

[3]33 U.S.C.A. §1344 (West 1986 & Supp. 1995).

[4]33 U.S.C.A. §403 (West 1986).

[5]33 C.F.R. Parts 320-338 (1995).

[6]40 C.F.R. parts 230-233 (1995).

[7]*See,* 33 C.F.R. § 329.4 (1995).

[8]*See,* 33 C.F.R. §§329.11, 329.12 (1995).

[9]*Id.*

[10]33 C.F.R. §328.3(a) (1995); 40 C.F.R. §230.3(f) (1995). Navigable waters do not include groundwater, at least to the extent the affected groundwater is isolated and not in direct hydrologic connection with regulated surface waters. *See, Exxon v. Train,* 554 F.2d 1310, 1317 (5th Cir. 1977); *Village of Oconomowoc Lake v. Dayton Hudson Corp.,* 24 F.2d 962, 965-6 (7th Cir. 1994), *cert. den.,* 115 S. Ct. 332 (1994). *But cf, Sierra Club v. Colorado Refining Co.,* 883 F.2d 1428, 1434 (D. Colo. 1993); *Washington Wilderness Coalition v. Hecla Min. Co.,* 870 F. Supp. 983, 990-1 (E.D. Wash. 1994).

[11]*See, Quivira Mining Co. v. EAP,* 765 F.2d 126 (10th Cir. 1985), *cert denied,* 474 U.S. 1055 (1986); *United States v. Phelps Dodge Corp.,* 391 F. Supp. 1181 (D. Ariz. 1975).

[12]999 F.2d 256 (7th Cir. 1993). *See also, Leslie Salt Co. v. U.S.,* 55 F.3d 1388 (9th Cir. 1995), *cert. denied sub nom., Cargill Inc. v. U.S.,* 116 S. Ct. 407 (1995).

[13]896 F.2d 354, 358 (9th Cir. 1990), cert denied, 111 S. Ct. 1089 (1981).

[14]33 C.F.R. 328.3(b) (1995).

[15]*United States v. Larkins,* 852 F.2d 189 (6th Cir. 1988); *United States v. Cumberland Farms of Conn., Inc.,* 826 F.2d 1151, 1154 (1st Cir. 1987), *cert. denied,* 108 S. Ct. 1016 (1988).

[16]Normal farming activities on such lands would be exempt from §404 permitting. 33 C.F.R. §323.2(d)(3)(iv) (1995).

[17]RGL #90-07; 33 C.F.R. §328.3(8) (1995); 58 Fed. Reg. 45031-34 (August 25, 1993).

[18]16 U.S.C.A. §§3821-24 (West 1985) and Supp. 1996).

[19]*United States v. Southern Inv. Co.,* 876 F.2d 606 (8th Cir. 1989).

[20]33 C.F.R. §330.3 (1995).

[21]33 US.C.A. §1344(a) (West 1986).

[22]33 C.F.R. §323.2 (1995); 40 C.F.R. §232.2 (1995).

[23]58 Fed. Reg. 45008, 45009 (Aug. 25, 1993).

[24]33 C.F.R. §323.2(3) (1995).

[25]33 U.S.C.A. §1344(f) (West 1986).

[26]33 C.F.R. §323.4 (1995).

[27]*See e.g., United States v. Larkins,* 852 F.2d 189, 192 (6th Cir. 1988).

[28]33 C.F.R. §325.2(e)(1) (1995).

[29]33 C.F.R. §325.3 (1995).

[30]33 C.F.R. §327.4 (1995).

[31]33 C.F.R. §325.3(c) (1995).

[32]42 U.S.C.A. §§4321-4370d (West 1995).

[33]*See* 33 C.F.R. Part 325, App. B. (1995).

[34]40 C.F.R. §230.10 (1995).

[35]40 C.F.R. §230.10(a)(2) (1995).

[36]See, Memorandum of Agreement Concerning the Determination of Mitigation Under the Clean Water Act §404(b(1) Guidelines (February 26, 1990; 55 Fed. Reg. 9211 (March 12, 1990)).

[37]60 Fed. Reg. 58605.

continued on pg 44

A Framework for Addressing Takings Problems

By John Martinez

INTRODUCTION[1]

Police officers fired a dozen tear gas canisters into a convenience store where a fleeing felony suspect had sought refuge, causing over $275,000 in damage. Should the city pay for the harm?[2] A landfill company which applied for a landfill use permit was investigated for ties with organized crime and its business was allegedly seriously harmed when the report of the investigation was released to the press. Should the government pay for the harm to the company?[3] A cigarette vending company is prohibited from continuing to operate its vending machines by a new town ordinance. Can the company recover for the effect on its business?[4] Finally, the advent of deregulation prevents formerly regulated industries from recovering "stranded costs," which can no longer be passed on to ratepayers in a competitive environment.[5] Should such costs be recoverable from the government?

We can all venture a guess about how these situations should be resolved and we can think of reasons in support of the outcomes we suggest are right. And yet, like looking at a good painting, the more we linger, the more we see, and perhaps the less certain we are that our initial intuitions were correct.

The Takings Problem is about how the law resolves these kinds of situations. Takings law is about what we mean by "property"; it is about our conceptions of an ideal government and its interaction with private expectations; and most of all, it is about money. It deals with circumstances in which government has acted *other than through the conscious, purposeful exercise of the power of eminent domain,*[6] and caused an effect on property such that we must consider whether the costs should be borne by the public generally rather than by the property owner affected.

I will explain the basic structure of the Takings Problem, set out an analytical framework for takings claims, then describe Takings law under the Utah state constitution and under Utah's Private Property Protection Act.

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I. THE BASIC STRUCTURE OF THE TAKINGS PROBLEM

A. The Role of Conceptions of Property in Takings Jurisprudence

Since the Takings Problem is about protecting economic interests from governmental oppression, determining whether "property" is involved is the crucial threshold question. The natural rights/positive rights dichotomy offers a distorted and seductively easy way to resolve takings disputes. Natural rights advocates argue that property pre-exists government, and thus if property is affected by governmental action, then the government must either pay or desist.[7] In contrast, positivists contend that property is created by government, and that therefore the owner is at the mercy of majoritarian politics, so that the only relevant questions revolve around whether the purposes of property collectively defined have been advanced and whether proper procedures were used.[8]

But life is just not that simple. Takings law is a continuing struggle to develop analytical models that predictably and sensibly accommodate both individual and social concerns with respect to resources.

B. The Role of Standards of Judicial Review in Takings Analysis

The accepted manner for challenging governmental action in our society is by asking courts to come to our aid. Judicial review of governmental action may be generally defined as a court's appraisal of whether a governmental agency or official has acted properly. The *criteria* used by courts to evaluate such conduct are embodied in *standards of judicial review.*

Deferential standards of judicial review are characterized by a judicial tendency to accept the determination of the governmental entity whose conduct is questioned and to uphold the governmental conduct if it is in pursuance of "legitimate" governmental objectives in a "rational" way.[9] In contrast, activist standards of judicial review are characterized by a judicial tendency to second-guess the governmental entity involved and to uphold the government only if it demonstrates it is advancing "important" or "compelling" governmental objectives, and that the means being used are essential, if not indispensable, ways to achieve those objectives.

The accepted tradition is that governmental action which affects liberty concerns—either by infringing on fundamental rights such as freedom of speech or religion, or by distinguishing according to suspect classifications, such as race or gender—will usually trigger activist judicial

scrutiny. Equally accepted is that when merely economic interests are affected by governmental action, courts will apply deferential standards of judicial review. One of the emerging questions in takings law is whether—and the extent to which—takings law represents the application of activist judicial review for protection of economic concerns.

C. The Many Forms and Contexts of the Takings Problem

The takings problem has arisen most frequently when governments have exercised the power to zone.[10] The exercise of other governmental powers, however, may also give rise to takings issues. For example, in *Dames & Moore v. Regan,*[11] the plaintiff complained that the freezing of Iranian assets by the President under the power over foreign affairs improperly affected plaintiff's property.

The types of claims that can be brought against governmental action affecting property are equally varied.[12] They may arise under various clauses of federal or state constitutions and can be grouped into two broad categories: (1) actions based on clauses other than Just Compensation provisions, such as Due Process,[13] Equal Protection[14] and Contracts[15] Clauses, and (2) Just Compensation Clause[16] actions. This broad division is indicative of the evolution of takings doctrine. Judicial review of governmental action affecting property under claims in the first category has always been deferential, and for some time, it appeared that it would be equally deferential under Just Compensation Clauses as well. With recent development of stricter judicial review under Just Compensation Clauses, however, the other bases, although still important, are declining in significance.[17]

"One of the emerging questions in takings law is whether—and the extent to which—takings law represents the application of activist judicial review for protection of economic concerns."

II. ANALYTICAL FRAMEWORK FOR TAKINGS CLAIMS

The federal Just Compensation Clause is the usual basis for takings claims because it expressly refers to "takings" of property by governmental action and includes the requirement of compensation.[18] State just compensation clauses contain similar provisions and many also prohibit "damaging" of private property.[19]

As discussed above, the first question is whether "property" is involved at all. If "property" is indeed involved, then the "relevant" property, or "denominator of the equation," must be identified. This has proved troublesome for the Court.[20] One could conceive of the relevant property physically or conceptually and either broadly or narrowly. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.,*[21] New York authorized a private television cable company to install cables and relay boxes on the surface of Mrs. Loretto's apartment building. Construed physically and broadly, the relevant property could have been viewed as the entire apartment building and the land which it occupied. Physically and narrowly, the rel-

evant property could have been viewed as only the area which the cables and relay boxes occupied on the surface of the building. Construed conceptually and broadly, the relevant property could have been viewed as all the sticks in the bundle of rights, including the right to use, to exclude and to transfer. Conceptually and narrowly, the relevant property could have been restricted to the right to exclude. Since the effect on property is a central question in takings analysis, and since the smaller the denominator to begin with, the smaller the numerator needs to be to equal the denominator, it is not surprising that takings claimants will almost always seek to have the relevant property viewed narrowly, whereas government advocates will argue for broad relevant property definitions.

The relevant property defined, the next question is whether there has been a "taking" of it. As a threshold matter, the takings claimant would have to decide whether to challenge the governmental action "as applied" to his/her particular property or "on its face," contending instead that it was a taking in all cases. For "as applied" challenges, claimants must first satisfy the ripeness doctrine announced in *Williamson County Regional Planning Commission v. Hamilton Bank.*[22] The doctrine requires "finality" and "completeness." Whether a "taking" has occurred in regard to the application of a regulatory restriction to particular property cannot be determined until a claimant has obtained a "final" decision regarding the effect of governmental action on the claimant's property. In addition, a "taking" is not "complete"—and thus not ripe for adjudication—until available procedures for seeking just compensation have been utilized. Alternatively, the claimant may demonstrate that it would have been futile to seek further clarification or relief.[23]

In addition to ripeness considerations, the substantive standards for "on face" and "as applied" challenges may differ. In general, whether a taking has occurred involves consideration of the character of the governmental action, the economic impact on the owner and the effect on the owner's reasonable investment-backed expectations.[24] The Court has admitted that application of these factors is hopelessly *ad hoc.*[25] Thus, although the Court sometimes applies these three considerations directly,[26] Supreme Court takings jurispru-

dence is best understood in terms of the tests the Court has developed to implement these ideas.

The Court has applied one or more of the following tests to "as applied" challenges: (1) balancing the private cost against the public benefit, (2) determining whether the government is forcing the owner to confer a benefit on the public or is instead preventing the owner's imposition of a harm on the public, (3) determining whether a complete property deprivation or a mere diminution in value of property has occurred, and (4) determining whether a permanent physical occupation of property has occurred.[27] In contrast, in "on face" challenges, as more fully elaborated below, the tests are (1) whether the governmental action substantially advances a legitimate governmental objective or (2) whether the owner is deprived of economically viable use of property[28]. The sharpness of the divide between "as applied" and "on face" challenges has been severely blunted in recent cases, however.[29] As a result, the first two tests under "as applied" have been incorporated into the "not substantially advance a legitimate governmental objective," "on face" test, and the second two "as applied" tests have been similarly merged into the "depriving of economically viable use," "on face" test.

The "not substantially advance a legitimate governmental objective" test, in its most straightforward manifestation, asks whether there is a legitimate governmental objective and whether the means used to achieve the objective substantially advances it. The Tenth Circuit has held that this relatively uncluttered version applies in all but exaction settings[30]. In *Dolan v. City of Tigard,*[31] however, without restricting its applicability in that fashion, the Court held that the test required a twofold inquiry: (1) Is there an "essential nexus" between the means and the ends? and (2) Is there a "rough proportionality" between the means used and the extent and nature of the harm that might be imposed by the owner if not restricted in the manner in which the government seeks to do so? The "essential nexus" requirement is probably indistinguishable from the old "rational basis" test. The "rough proportionality" test, however, is decidedly more demanding. It seems to incorporate a "least restrictive alternative" dimension, whereby the government must show that the means selected is that which would be reasonably likely to achieve the objective, yet would impose the least restraints on the owner. At its most extreme, this would require the government to show a practical one-to-one correspondence between the means used and the harm sought to be prevented. Small wonder that the Tenth Circuit sought to restrict its applicability.

The "depriving of economically viable use" test, as elaborated in *Lucas v. South Carolina Coastal Council,*[32] asks whether the relevant property has been completely destroyed. This entails a threshold definition of the relevant property, or "denominator," for purposes of analysis, as discussed above. Even if the relevant property is completely destroyed, however, an unconstitutional taking has not occurred if the background principles of state property law did not authorize use of the property in the manner intended by the owner, if the owner's activity amounts to a common law nuisance, or if the matter was one of "actual necessity," requiring immediate action to avoid a threatened public harm.[33]

"If the governmental action is not otherwise improper, (such as situations in which there is no legitimate governmental objective), forced condemnation is also available."

If a taking has occurred, the remedial consequences are relatively straightforward. Invalidation of the governmental action and damages for the period of time when it was improperly in force are available remedies for takings.[34] If the governmental action is not otherwise improper, (such as situations in which there is no legitimate governmental objective), forced condemnation is also available.[35]

III. THE TAKINGS PROBLEM AND UTAH LAW

A. Utah State Constitution

Under Article I, Section 22 of the Utah state constitution, property may not be taken or damaged by government without payment of just compensation.[36] In 1987, the Utah legislature formally implemented Article I Section 22 through legislation.[37] Until its 1990 decision in *Colman v. Utah State Land Board,* the Utah Supreme Court had not definitively held that Article I Section 22 is in fact self-executing.[38] Under *Colman,* a takings action, denominated an inverse condemnation claim, may be brought under Article I Section 22, free of state statutory sovereign immunity provisions.[39]

If no "property" is involved, no action can be brought under Article I Section 22. For example, in *Bagford v. Ephraim City,*[40] a private garbage hauler alleged that a city ordinance providing for municipal garbage collection and requiring all residents to pay a fee, whether they used the city's garbage collection services or not, required compensation to the private garbage hauler for lost revenue under Article I Section 22. The court held that the expectation that the private hauler could continue to collect its customers' garbage was not a property right cognizable under Article I section 22.

In *Colman,* the Utah Supreme Court held that a "taking" under Article I Section 22 is "any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed."[41] The court went on to describe the circumstances when property is "damaged" under Article I Section 22 somewhat obliquely as "injuries that would be actionable at common law, or where there has been some physical disturbance of a right, either public or private, which the owner enjoys in connection with his property and which gives it additional value, and which causes him to sustain a special damage with respect to his property in excess of that sustained by the public generally; some physical interference with the property itself or with some easement which constitutes an appurtenance thereto; definite physical injury cognizable to the senses with a perceptible effect on the present market value; a permanent, continuous, or inevitably recurring interference with property rights, such as drying up wells and springs, destroying lateral supports, preventing surface waters from running off adjacent lands or running surface waters onto adjacent lands, or depositing of cinders and other foreign materials on neighboring lands by the permanent operation of the business or improvement established on the adjoining lands."[42]

Mr. Colman had operated and maintained an underwater brine canal in the Great Salt Lake from which he extracted minerals from deep lake brines. He alleged that the state's proposed breach of a causeway to reduce the level of the lake and prevent flooding would cause water from the south arm of the lake to flow through the breach under great pressure and cut through the canal banks, thus causing turbidity and sedimentation and making the use of the canal as a brine conduit impossible. The court concluded that Mr. Colman had alleged both a taking and damaging of his property for purposes of Article I Section 22.

In contrast, in *Farmers New World Insurance Company,*[43] the Utah Supreme Court held that water damage resulting from the city's rebuilding of a creek to improve its diversion capacity did not violate Article I Section 22 because recovery under that provision is limited to those injuries which are the direct and unavoidable consequence of the construction or use of the improvement. Other damages—presumably those that are indirect or avoidable—are *not* compensable, the court held, because they provide no benefit to the public.

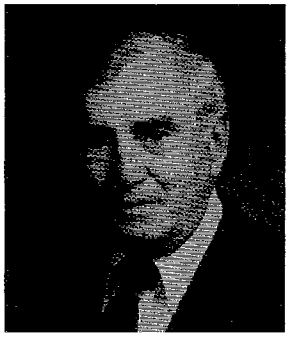
As *Colman* and *Farmers* illustrate, takings law under Article I Section 22 is in the early stages of development. Meanwhile, the Utah legislature has also made its contribution to the takings conundrum.

B. Utah Takings Statutes

Although United States Supreme Court takings jurisprudence has definitely tilted toward greater property rights protection in recent years, the untidy status of takings law has generated a movement toward legislative solutions. "Property Rights" bills have been introduced in most state legislatures and in Congress, and more than a few have been signed into law.[44]

The Utah Private Property Protection Act consists of two major components, one applicable to state agencies, adopted in 1993, and one applicable to local governments, adopted in 1994.[45] State agencies and local governments are required to consider potential takings issues that may arise as such agencies and governments go about the business of governing. Beyond that basic similarity, however, there are substantial differences between the requirements imposed on state agencies and those applicable to local governments. State agencies are required to adopt "takings impact assessments" (TIA's) which consider the takings implications of their proposed actions.[46] Local governments, however, need only "consider" locally established guidelines in identifying actions that may have takings implications.[47] State agency actions affecting *any* form of property are covered,[48] whereas only *physical actions or exactions* affecting *real property* by local governments are covered.[49] Before a state agency implements an action that has constitutional taking implications, it must submit a copy of the TIA to the governor and the Legislative Management Committee.[50] No such reporting requirement is imposed on local governments. Instead, appeal of actions having takings implications to the local legislative body are to be made available. However, such appeals must be made within 30 days of the initial action, and failure of the legislative body to hear such appeals within 14 days of their submittal

Dispute Resolution Services Award Established



The American Arbitration Association's Salt Lake City Regional Office and its Regional Advisory Council have recognized Peter W. Billings, Sr. for his long-standing contribution in the alternative dispute resolution field by establishing an annual service award in his name.

Billings, who received his law degree from Harvard in 1941 and who has practiced law in Utah for more than 50 years, was presented the first "Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award" on April 8, 1996.

Diane Abegglen, Regional Vice President for the American Arbitration Association, said Billings was instrumental in establishing the AAA's Sat Lake City office. He served as chair of Salt Lake City's regional advisory board from 1988 until March 1996. In addition to his work with the AAA, Billings was instrumental in drafting the rules for the use of ADR by the U.S. District Court of Utah, the statute authorizing court-annexed ADR in Utah State Courts, and the rules implementing the state statute.

The award named after Billings will be presented annually by the AAA to a person or organization with outstanding contributions in the field of ADR.

results in a presumption that the initial action was *not* a taking.[50]

As with other similar legislation across the country, the net effect of Utah's Private Property Protection legislation remains to be seen. If fully implemented, it may improve governmental decisionmaking affecting property by forcing government officials to consider the problem directly. In light of the difficulty which courts have had with the takings problem generally however, we can probably expect that administrative officials will find the problem just as intractable.

CONCLUSION

The takings problem is pervasive and perplexing. It is manageable, however, if approached systematically, through an examination of whether property is involved at all, what the relevant property is for purposes of analysis, whether a taking has occurred and what the appropriate remedy should be. Although it will be difficult to predict the outcome in many cases, the analytical approach suggested here points to the right questions.

[1]I have examined the takings problem in several publications, including: *Statutes Enacting Takings Law: Flying in the Face of Uncertainty,* 26 URBAN LAWYER 290 (1994); *Taking Time Seriously: The Federal Constitutional Right to be Free From "Startling" State Court Overrulings,* 11 HARV. J.L. & PUB. POL'Y 297 (1988); *Reconstructing Takings Doctrine by Redefining Property and Sovereignty,* 16 FORDHAM URB. L.J. 157 (1988); *A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases,* 1 HOFSTRA PROP. L.J. 39 (1988); 3 C. Dallas Sands & Michael E. Libonati, (now Michael E. Libonati & John Martinez) LOCAL GOVERNMENT LAW, Ch. 16 (Land Development Regulation), §§16.50 et seq. *See also* Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967); Joseph Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964); Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1 (1971).

[2]*Customer Company v. City of Sacramento,* 10 Cal. 4th 368, 895 P.2d 900, 41 Cal. Rptr. 2d 658 (1995) cert. denied ___ U.S. ___, 116 S.Ct 920, 133 L.Ed.2d 849 (1995) (denying recovery on grounds that benefit was conferred and that emergency existed).

[3]*WMX Technologies, Inc., v. Miller,* ___ F.3d ___, 1996 WL 159587, (9th Cir. 1996) (recovery denied because no property right in business reputation), distinguishing *Sorrano's Gasco, Inc. v. Morgan,* 874 F.2d 1310 (9th Cir. 1989), where letters describing investigation sent to individual customers advising them not to deal with claimant).

[4]*General Food Vending Inc. v. Town of Westfield,* 288 N.J. Super. 442, 672 A.2d 760 (1995) (denying recovery because the value of the vending machines was diminished, not destroyed, because cigarette sales is a highly regulated industry, and because the machines were not physically appropriate, but merely restricted in their use).

[5]J.Gregory Sidak, *When Competition Amounts to Taking,* National L.J., April 1, 1996, p.A19 (Mr. Sidak holds the Wyerhaeuser Chair in Law and Economics at the American Enterprise Institute).

[6]The Takings Problem, thus defined, does not deal with the comparatively straightforward situation, such as the condemnation of land for construction of a public road, in which the government purposefully intends to acquire property for public use and fully expects to pay for it.

[7]*See, e.g.,* Richard Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand,* 68 IND. L.J. 1 (1992).

[8]*See generally* Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy,* 53 IND. L.J. 145 (1977-1978); Charles Reich, *The New Property,* 73 YALE L.J. 733 (1964).

[9]Deferential judicial review provides very little protection against governmental action. *See, e.g. Hancock Industries v. Schaeffer,* 811 F.2d 225, 237-38 (3rd Cir. 1987) (court will presume there is a legitimate governmental objective that it is being rationally advanced).

[10]Zoning is a form of police power. *Euclid v. Ambler Realty Co.* 272 U.S. 365 (1926).

[11]453 U.S. 654, 688 (1981).

[12]An inverse condemnation claim is an assertion that the challenged governmental action is actually an exercise of the power of eminent domain for which the governmental entity has failed to commence direct condemnation proceedings. In addition to this "condemnation-forcing" strategy, inverse condemnation theory has also been used to recover damages for harm resulting from a public entity's improper maintenance or use of a public improvement. In contrast, a takings claim is usually an assertion that although the challenged action may advance a legitimate governmental objective, it has an excessive impact on private property to the point of constituting a taking for public use. *See generally* 3 C. Dallas Sands & Michael E. Libonati, (now Michael E. Libonati & John Martinez) LOCAL GOVERNMENT LAW, §21.26 (Inverse Condemnation).

[13]U.S. CONST. amend. XIV, Sec. 1. ("[N]or shall any State deprive any person of . . . property, without due process of law . . . .").

[14]U.S. CONST. amend. XIV ("[N]or shall any State . . . deny to any person . . . the equal protection of the laws.").

[15]U.S. CONST. art. I, Sec. 10 ("No state shall . . . pass any . . . law impairing the obligation of contracts . . . .").

[16]U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The prohibition applies to the states through the Fourteenth Amendment's Due Process Clause. Chicago, *B. & Q. R.R. v. Chicago,* 166 U.S. 226, 241 (1897).

[17]42 U.S.C. Section 1983 prohibits deprivations of federal rights under color of state law. 42 U.S.C. Section 1988 provides attorney's fees in Section 1983 actions. Takings claims against defendants acting under *state* authority are thus usually brought under Section 1983, whereas deprivations of federal rights by those acting under *federal* law are usually brought under the Tucker Act as federal tort claims and must ordinarily be pressed through the Claims Court in the first instance. *See e.g., Eversleigh v. United States,* 24 Cl. Ct. 357 (1991).

[18]*See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."). State and local government property is also protected from federal takings by the Clause. *U.S. v. 50 Acres of Land,* 469 U.S. 24 (1984).

[19]*See, e.g.,* CAL. CONST. art. I, Sec. 14 ("Private property shall not be taken or damaged for public use without just compensation . . . ."); UTAH CONST. art. I, Sec. 22 ("Private property shall not be taken or damaged for public use without just compensation.").

[20]*Lucas v. South Carolina Coastal Council,* at 2905 n.7 ("Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured.")

[21]458 U.S. 419 (1982).

[22]473 U.S. 172 (1972).

[23]*See generally* 3 C. Dallas Sands & Michael E. Libonati, (now Michael E. Libonati & John Martinez) LOCAL GOVERNMENT LAW, §16.53.10 (Procedural Barriers to Takings Claims).

[24]*Penn Central Transp. Co. v. New York,* 438 U.S. 104 (1978).

[25]*Id.* at 123-24. *See also Hodel v. Irving,* 481 U.S. 704, 713 (1987).

[26]*See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for S. Calif.,* 113 S. Ct. 2264, (1993) (pension plans).

[27]*See generally* 3 C. Dallas Sands & Michael E. Libonati, (now Michael E. Libonati & John Martinez) LOCAL GOVERNMENT LAW, §16.53.40 (takings standards).

[28]*Id.*

[29]*See Lucas V. South Carolina Coastal Council,* 112 S. Ct. 2886, 2905 (1992) (Blackman, J., dissenting).

[30]*Clajon Production Corp. v. Petera,* 70 F.3d 1566 (10th Cir. 1995) (Wyoming's two-license limit on supplemental hunting licenses for large landowners does not violate Takings or Equal Protection Clauses; "essential nexus" and "rough proportionality" tests apply only in development exaction setting or where there is a physical taking or its equivalent).

[31]114 S. Ct. 2309 (1994).

[32]112 S. Ct. 2886 (1992).

[33]*Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886, 2900 (1992); For an excellent treatment of these exceptions to takings, see Richard M. Frank, *Regulating Land Use Resources in the Post-Lucas Era: The Impact of California's Nuisance and Real Property Law,* LAND USE FORUM, Vol. 2, No. 1, p.44 (Winter, 1993).

[34]*Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *See, e.g., Corn v. City of Lauderdale Lakes,* 771 F. Supp. 1557 (S.D. Fla. 1991) (interim damages calculation); *Corn v. City of Lauderdale Lakes,* 794 F. Supp. 364 (S.D. Fla. 1992) (attorney's fees calculation); rev'd on other grounds and remanded by *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369 (11th Cir. 1993); rev'd on other grounds by *Corn v. City of Lauderdale Lakes,* 3 F.3d 442 (11th Cir. 1993).

[35]*See Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1992) (state ultimately purchased Mr. Lucas' two beachfront lots.)

[36]UTAH CONST. art. I, Sec. 22 ("Private property shall not be taken or damaged for public use without just compensation.").

[37]Utah Code Ann. Sec. 63-30-10.5, 1987 Utah Laws ch. 75, sec. 3 ("(1) Immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property without just compensation. (2) Compensation and damages shall be assessed according to the requirement of Chapter 34, Title 78.")

[38]795 P.2d 622 (1990).

[39]*See Colman v. Utah State Land Bd.,* at 630-35.

[40]904 P.2d 1095 (Utah 1995).

[41]*Colman,* supra at 625, quoting *State ex rel. State Road Commission v. District Court,* Fourth Judicial District, 94 Utah 384, 394, 78 P.2d 502, 506 (1937), quoting, in turn, *Stockdale v. Rio Grande Western Ry. Co.,* 28 Utah 201, 211, 77 P. 849, 852 (1904).

[42]*Colman,* at 626-27 (quoting numerous prior Utah cases).

[43]803 P.2d 1241 (Utah 1990).

[44]*See* John Martinez, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty,* 26 URBAN LAWYER 290 (1994) (reviewing trend).

[45]Utah Code Ann. Secs. 63-90-1--4 (state agencies), 63-90a-1--4 (local governments).

[46]Utah Code Ann. Sec. 63-90-4(1).

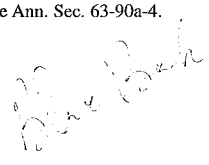
[47]Utah Code Ann. Section 63-90a-3(2).

[48]Utah Code Ann. Sec. 63-90-2(3) ("'Private property' means any school or institutional trust lands and any real or personal property in this state that is protected by either the Fifth or Fourteenth Amendment of the Constitution of the United States or Article I, Section 22 of the Utah Constitution.").

[49]Utah Code Ann. Sec. 63-90a-1(1) ("'Constitutional taking issues' means actions involving the physical taking or exaction of private real property by a political subdivision that might require compensation to a private real property owner because of: (a) the Fifth or Fourteenth Amendment of the Constitution of the United States; (b) Article I, Section 22 of the Utah Constitution; or (c) any recent court rulings governing the physical taking or exaction of private real property by a government entity.").

[50]Utah Code Ann. Sec. 63-90-4(4).

[51]*See* Utah Code Ann. Sec. 63-90a-4.



Acquiring Federal and State Land Through Land Exchanges

By Elizabeth Kitchens Jones

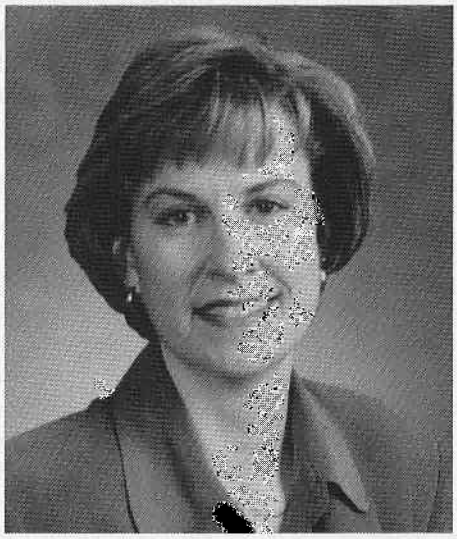
INTRODUCTION

On April 21st of this year, the Salt Lake Tribune published an article on a hotly contested land exchange proposal involving the U.S. Forest Service and Snowbasin ski resort. I was glad to see that the topic of land exchanges received media attention – hopefully, the Tribune story will produce additional interest in this article, as land exchanges can be useful to various parties, from the real estate developer to the conservationist. Furthermore, land exchanges present an opportunity for private parties and the government to work together to achieve better public land management.

As the title indicates, this article advises practitioners as to the means of acquiring federally-owned and state-owned land through land exchanges. The article initially notes the historical context of public land disposal and management which lead to the current federal land exchange laws. A summary of the current land exchange processes, federal and state, is then presented. Finally, examples of current land exchange proposals are briefly described.

HISTORICAL CONTEXT

As federal land holdings increased during the 19th century, the federal government strongly encouraged settlement and development of the public land. Pursuant to various statutes, thousands of pioneering and entrepreneurial spirits filed claims on federal land, and, by improving and developing the land, eventually acquired title, by land patent, from the federal government.[1] Gradually, as vast acres of federal land were patented, the government began to re-think its policies. In 1964, President Johnson created the Public Land Review Commission to study the existing public land laws and make recommendations regarding their modification. In 1970, the Commission submitted its report, *One-Third Of The Nation's Land,* to the President and Congress. Subsequently, Congress enacted the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.* FLPMA repealed virtually all of the public land disposal laws, largely extinguishing the historical means of acquiring public land.



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FLPMA AND FLEFA

The dominant policy of the federal government that was ushered in by FLPMA is that federal land is to be retained and managed, not conveyed away. FLPMA, however, does include limited provisions for the disposal of federal land by public sale and by exchange. Section 206 of FLPMA, 43 U.S.C. § 1716, provides that "[a] tract of public land or interests therein may be disposed of by exchange by the Secretary [of Interior] under this Act . . . where the Secretary . . . determines that the public interest will be well served by making that exchange."

In 1988, FLMPA was amended by the Federal Land Exchange Facilitation Act ("FLEFA"), Pub. L. No. 100-409, 102 Stat. 1086 (1988), to incorporate new provisions intended to simplify the land exchange process. Revised regulations implementing FLEFA were adopted in 1993 and appear at 43 C.F.R. Part 2200.[2] The Bureau of Land Management ("BLM") also re-wrote its chief guidance document, the BLM Exchange Handbook, to reflect the FLEFA amendments. The BLM regulations and handbook are the sources for the following summary of the land exchange process.

THE LAND EXCHANGE PROCESS

Obviously, all the nuances of the land exchange process are beyond this article's scope. The following discussion is intended merely to describe the primary aspects of the BLM's procedures and provide some guidance in navigating the bureaucratic maze. Initially, however, a caveat is in order. Land exchanges are purely discretionary actions on the part of the government. At any point in the process, the governmenty agency may reject or place the proposal on hold. Therefore, to increase the government's enthusiasm and the chances of closing the

exchange, it is crucial for the exchange proponent to present an attractive package of offered lands and shoulder most of the burden of coordinating the exchange process. Also, the exchange process is lengthy. Simple exchange proposals may take well over a year to complete; more complex proposals may take two or three years.

The BLM regulations state that an exchange may be proposed by the BLM, or by any person, state, or local government. An exchange proposal quite often arises from a situation where federal land is interspersed with private land and the private landowners must contend with a federal agency in their backyard. Such a situation may also create difficult regulatory issues for the federal agency managing the land. This is where a land exchange may be useful for both the federal and private landowner.

The first step is to identify the non-federal (offered) lands and federal (selected) lands to be exchanged. The offered and selected lands must all be located within the same state. (Interstate exchanges are possible, but require legislative approval by Congress.) Property that the BLM is willing to exchange is generally identified in the Resource Management Plan, or RMP, for the particular BLM resource area or district in which the lands are located. A copy of the RMP, or pertinent portions, may be obtained by contacting the BLM Realty Specialist for the appropriate BLM resource area or district.

The BLM's interest in a land exchange proposal certainly will be heightened if the non-federal land offered to the BLM is valuable for public recreation or wildlife and riparian habitat, particularly for endangered species. Also, it is virtually mandatory that the offered land be contiguous to existing federal land so that the exchange results in a larger federal land block, or consolidates isolated federal tracts and improves access. The federal government generally is not interested in acquiring land that is surrounded by private landowners because of potential access problems.

Anyone considering an exchange should request an informal meeting with the BLM Realty Specialist so that the BLM may assist in identifying the offered and selected lands. This informal meeting also provides an opportunity for the proponent to gain a better understanding of the processing steps and time frame for completing an exchange. This early communication prevents wasted time and effort on a proposal that the agency may reject out-of-hand for any number of reasons. For example, a staff shortage, or, more likely, a funding shortage, may prevent the BLM from being able to process a land exchange proposal.

After the offered and selected lands have been identified and the appropriate agency staff have been consulted, a formal land exchange proposal must be submitted by the proponent. This may be in the form of a letter with a full legal description of the offered and selected lands and a thorough explanation of the reasons for the exchange, with emphasis on the advantages to the federal government and the public.

". . . land exchanges present an opportunity for private parties and the government to work together to achieve better public land management."

FEASIBILITY REPORT

After the formal proposal is submitted, a Feasibility Report will be prepared by the BLM. Major elements of the Feasibility Report include (i) a brief description of the offered and selected lands; (ii) the major resource values involved; (iii) a determination of whether the proposal conforms to the BLM's existing land management plans; (iv) the future use of the lands to be acquired by the federal government; and (v) a discussion of conflicts or problems, such as anticipated public support or opposition and local government's position regarding the proposed exchange. An estimate of the processing costs of the exchange, which the proponent is expected to bear, is also included in the Report. The Feasibility Report represents the BLM's preliminary determination that the land exchange proposal is workable; however, the Report is not the BLM's final decision to complete the exchange. That decision is not made until much later.

EXCHANGE AGREEMENT AND PUBLIC NOTICE

After the Feasibility Report is prepared and approved by the BLM State Director, the BLM and the proponent will execute a non-binding Agreement to Initiate an Exchange.[3] The Agreement sets forth the responsibilities of the BLM and the proponent to prepare various reports on which the BLM will base its determination of whether or not to approve the exchange. For example, the BLM will prepare a mineral potential report on the offered and selected lands to determine if the lands have any value for oil, gas, locatable hard rock minerals, geothermal resources, or sand and gravel. The environmental analysis, discussed in more detail below, is the most crucial document in the process and the proponent will often be responsible for its preparation.

After the Agreement is signed, a Notice of Exchange Proposal, or NOEP, must be published in a local paper once a week for four consecutive weeks and distributed to

state and local governmental entities, the congressional delegation for the state, and authorized users of the federal selected lands, such as grazing permittees or right-of-way holders. Comments on the exchange proposal may be submitted to the BLM for a period of 45 days following the initial date of newspaper publication.

APPRAISAL

FLPMA requires that the offered and selected lands must be equal or approximately equal in value. The values of the properties to be exchanged are determined by an appraisal. The proponent will bear the cost of the appraisal, which must be prepared by a BLM-approved appraiser and conform to the Department of Justice *Uniform Appraisal Standards for Federal Land Acquisitions.* The market value estimate of the federal and non-federal property must be based upon a determination of the "highest and best use" of the property. "Highest and best use" is defined as the "most probable use" of the property, based on market evidence as of the date of valuation.

If the appraised property values are not equal, a cash equalization payment, in an amount not to exceed 25% of the total value of the federal land, may be made by either party. Typically, however, if the value of the non-federal offered lands exceeds that of the federal selected lands, parcels of the offered lands are dropped from the proposal or additional federal land selected to equalize values, rather than the federal government issuing a check to the proponent.

THE "PUBLIC INTEREST"

FLPMA authorizes exchanges only if "the public interest will be well served." Theoretically then, the public interest test is the most important substantive issue to be analyzed in the exchange process. The BLM regulations state that the public interest determination must give full consideration to achieving better federal land management, meeting the needs of state and local residents and economies and securing important public objectives, such as:

- Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values;
- Enhancement of recreation opportunities and public access;
- Consolidation of lands and/or interest in lands, such as mineral and timber interests, for more logical and efficient management and development;
- Consolidation of split mineral and surface estates;
- Expansion of communities;
- Accommodation of land use authorizations; and
- Promotion of multiple-use values.

". . . the public interest test is the most important substantive issue to be analyzed in the exchange process."

The BLM must determine that the resource values and public objectives that the non-federal lands might serve if acquired are more significant than the resource values and public objectives that the federal lands might serve if retained in federal ownership. This requires the BLM to balance the various uses of the public land under its management – whether or not an exchange proposal benefits the public interest may depend upon which of the multiple uses of public land is perceived as more valuable by the agency.

NEPA COMPLIANCE

All land exchange proposals are subject to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.,* therefore an environmental analysis in the form of an environmental assessment ("EA") or an environmental impact statement ("EIS") must be prepared.The environmental analysis must describe and analyze all reasonably foreseeable impacts of completing the exchange, considering the resource values to be lost and gained. For example, cultural resource inventories must be conducted on the non-federal and federal lands to determine the presence of sites that may be eligible for the National Register of Historic Places. Wildlife and botanical surveys must also be completed to determine whether the federal lands to be exchanged include threatened or endangered species habitat. The presence of extensive cultural resources or endangered species habitat on the federal selected lands would likely preclude completion of the exchange unless the specific purpose of the exchange is to preserve the area through private conservation efforts.

BLM'S FINAL DECISION AND PROTEST PERIOD

Once the environmental analysis is completed and approved by the BLM, and if the BLM finds that the exchange serves the public interest, the District Manager will issue a final decision authorizing completion of the exchange. The decision document must explain the agency's bases for approval, including a brief discussion of the environmental analysis and the public interests served.

Written protests to the BLM's final decision may be submitted for a period of 45 days after notice of the decision is published in a local newspaper. Notice of the decision is also distributed to the same parties that received the initial public notice, and any other parties deemed appropriate by the BLM, including those parties that submitted written comments on the proposal. Notice may be published in the Federal Register, at the discretion of the BLM. The EA or EIS is also available for public review during this period. Other federal agencies, such as the Fish and Wildlife Service, and any state agencies that were consulted during the environmental analysis also have the opportunity to review the BLM's final decision and the EA or EIS and to submit comments.

The BLM's decision to accept or reject a protest to the exchange is made by the State Director, whose decision may be appealed to the Interior Board of Land Appeals. A protest to the BLM's final decision may cause the exchange to be significantly delayed or, possibly, dropped altogether. Consequently, to reduce potential opposition to the exchange after the time and expense of preparing the EA or EIS, it is very important to properly distribute the initial public notice and to address all substantive concerns at the earliest stages of the exchange process.

LAND EXCHANGES INVOLVING STATE-OWNED LANDS

Land exchanges involving property owned by the State of Utah are authorized under Utah Code § 53C-4-301 with respect to school and institutional trust lands ("trust lands"), and § 65A-7-7 with respect

to all other state lands ("sovereign lands").[4] Implementing regulations can be found at Utah Administrative Rule §§ R850-90-100 - 1100 for trust lands, and §§ R652-80-100 - 800 for sovereign lands. In contrast to federal land exchanges where the government may have a variety of goals that it is seeking to achieve, the state generally has but one goal: to maximize income to the state. As a result, the criteria for a state exchange may be more demanding and more strictly applied.

The state regulations specify that an exchange of trust or sovereign lands must be for property of equal or greater value, as determined by appraisal, and must comply with the following requirements: (i) the exchange must clearly be in the best interests of the state; and (ii) the exchange may not result in an unmanageable and uneconomical parcel of state land, or eliminate access to a remnant holding, without appropriate compensation. Furthermore, if trust lands are involved, the record of decision must provide "reasonable assurance" that the property or assets being acquired by the state will result in increased income to the trust.

Competitive applications for exchange, sale or lease of the state land must be solicited by the state through publication when trust lands are involved in an exchange proposal. If additional applications are submitted, the state must select the application which is most likely to maximize income to the state trust, and the rules provide specific criteria for making that assessment. With respect to exchanges of sovereign lands, competitive applications may be solicited at the discretion of the administrative agency.

CURRENT EXAMPLES

Southwest Utah is the site of a unique land exchange proposal involving state, federal and private land. The purpose of the proposal, which involves a number of land exchanges, is to establish a federal habitat reserve for the endangered desert tortoise and other desert species. The main strategy for BLM acquisition of the reserve property is to exchange the private lands, and most of the state lands, within the proposed reserve area for federal lands elsewhere in the State of Utah. If the exchanges can be completed, the reserve may include several thousand acres of primarily federal land. The reserve will replace desert tortoise habitat that will be disturbed by various private development projects in Washington County.

A quick review of land exchange notices published in the Federal Register reflects that most land exchanges focus on consolidation of federal land blocks in areas where there are endangered or threatened species, wildlife and riparian habitat, or public recreation opportunities. The exchange proponents in most of these examples are intensive users of the federal land which they are attempting to acquire, such as mining and timber companies. For example, similar to the proposal in southwest Utah, the Forest Service in the northwest is considering a land exchange with the timber industry to preserve habitat for the northern spotted owl and to provide forest land for timber harvesting.

CONCLUSION

Land exchanges are probably the most viable means of obtaining title to federal and state lands under current law. As the examples indicate, land exchanges may provide resolution to the conflicts which arise from the multiple uses of public land, all of which, arguably, provide some public benefit. If the exchange proponent is willing to maneuver through the lengthy, somewhat frustrating, process, and if the agency and the proponent cooperate and coordinate, a land exchange generally represents a win-win situation for the proponent, the government, and, hopefully, the public.

[1]Such statutes included, among others, the Homestead Act (Act of May 20, 1862, 12 Stat. 392 (1862), which was amended and supplemented numerous times; the Stock Raising Homestead Act (Act of Dec. 29, 1916, 39 Stat. 862 (1916); and the Taylor Grazing Act (Act of June 28, 1934, 48 Stat. 1269 (1934)).

[2]This article addresses land exchanges involving federal land managed by the Bureau of Land Management, the federal agency within the Department of the Interior with management authority over most federal land. Exchange procedures of the U.S. Forest Service, the federal agency within the Department of Agriculture with management authority over federal forest land, are not discussed, although such procedures are very similar to those of the BLM. Furthermore, separate statutory authority and procedures exist for exchanges involving private land holdings within the National Parks and other federally managed conservation and preservation areas, and coal land exchanges.

[3]Although a legally binding agreement may be entered into at a later point in the process, the BLM ordinarily will not execute such an agreement without escape clauses which permit the agency to withdraw from the exchange if processing funds are lacking, or for more ambiguous reasons, such as if the exchange is not found to be in the public interest. Therefore, even the legally binding agreement may not provide much comfort to the proponent that the exchange will in fact be completed.

[4]School and institutional trust lands are those properties granted to the State of Utah by the United States in the Utah Enabling Act. These lands are held in trust by the state to be managed for the benefit of the state's public education system or other state institutions designated in the Enabling Act as beneficiaries of trust lands. The trust lands are administered by the School and Institutional Trust Lands Administration. All other lands owned by the state are administered by the Division of Sovereign Lands and Forestry. The following discussion is generally applicable to both agencies, however, specific requirements may vary.

Environmental Enforcement

By Craig W. Anderson

I. INTRODUCTION

A. Public Interest and Concern for the Environment

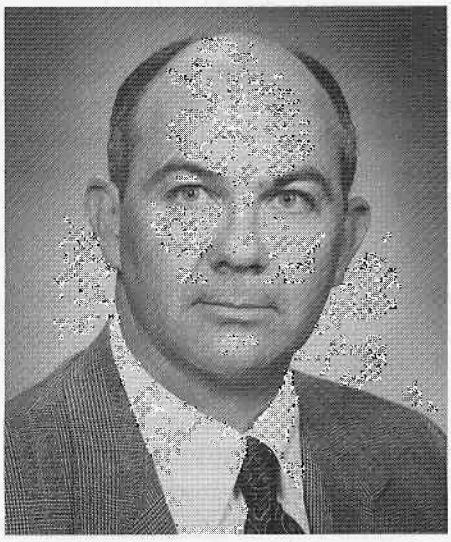
The recent publication of "Our Stolen Future"[1] has been touted by the press as the most significant call to environmental conscience since Rachel Carson published "Silent Spring" over thirty years ago. While Carson's book explored the cumulative effect of manmade pesticides on wildlife, "Our Stolen Future" examines evidence linking exposure to synthetic chemicals, which mimic natural hormones, to birth defects and other human disorders. These new findings have rekindled the debate surrounding the importance of environmental controls.

This continuing interest suggests that despite the recent regulatory downsizing, the fundamental goals of environmental regulation will likely remain. Recent opinion polls report continuing public support for the environment notwithstanding congressional action to reduce regulations. Budget cuts in federal enforcement may be offset by citizen suits authorized in most of the major federal statutes. The State and local enforcement role will also increase to replace reductions in federal prosecutions. Finally, high profile criminal prosecutions may be undertaken to encourage compliance by the regulated community.

B. What are Environmental Crimes?

Environmental crimes are essentially economic crimes. Testifying before the House Subcommittee on Crime and Criminal Justice in support of the Environmental Crimes Act of 1992, Professor Jonathan Turley described environmental crime as:

> [a]n especially vicious form of violent offense against society. Representing a narrow band of individuals and corporations, environmental felons have most of the characteristics of conventional violent offenders save one: environmental felons commit crimes that often continue to victimize long after the commission of the predicate offense. . . . Most environmental victims do not have the advantage of knowing the identity of their actor. Many environmental victims do not know they are victims. . . . Environmental crimes generally encompass more victims than a murder or other violent offense. Moreover, these are often violations that continue for long periods beyond the initial act. While a robbery is completed in an instant, an environmental violation can victimize generations through birth defects, immune deficiencies and countless other physiological reactions. Finally, while some crimes are committed in the heat of passion or without premeditation, environmental crimes are committed for only one reason: cold hard cash. The only difference between an environmental felon and a racketeer is purely cosmetic.[2]



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Environmental crimes shift the costs associated with the proper handling and disposal of pollutants and regulated materials from industry to the public. These externalized costs can include charges to properly clean up, treat or dispose of wastes, costs of restoring a damaged resource, and lost productivity. By externalizing these costs, a violator achieves a competitive advantage over other businesses which internalize the costs to comply with environmental regulations.

In *Branch v. Western Petroleum,* 657 P.2d 267 (Utah 1982), the Supreme Court acknowledged that a polluter should assume the costs of pollution as a cost of doing business, rather than charge the loss to a wholly innocent party. Under the facts in that case, oil formation water ponded on the defendant's property contaminated an underground water system which fed the plaintiff's culinary wells. The Court cited *Atlas Chemical Industries, Inc. v. Anderson,* Tex. Civ. App., 514 S.W. 2D 309 (1974), aff'd, 524 S.W. 2D 681 (1975) for the following proposition:

> We know of no acceptable rule of jurisprudence which permits those engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance. The cost of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers or shareholders, or both,

and not by the injured individual. Id. At 316.

The need to remove the economic benefit of operating a non-complying facility, the need to "even the playing field" within a particular industry, and the need to preserve the integrity of the regulatory system are all reasons to justify active environmental enforcement programs.

C. Environmental Permit Programs

Since the 1970s, permits have been used under the major federal environmental laws to regulate the discharge of pollutants into the air, water and soil. Substantial reductions in discharges from industrial sources have been achieved through these permit programs. The most significant regulatory challenge today is controlling the cumulative impact of low volume discharges produced by small businesses and individuals. In the past, small discharges seldom attracted the attention of state and federal regulatory agencies. An expanding population and high density urban development have, however, created significant environmental problems.[3]

Regulatory programs have also impacted local governments resulting in increased enforcement. For example, the storm water permit program under the Clean Water Act requires local governments to enforce compliance with regulatory standards and build new treatment plants if discharges are not controlled. Negligent and intentional discharges to the storm drains limit the capacity of the system. The costs of building and operating new treatment plants are passed on to the public in the form of higher taxes.

"Environmental crimes are essentially economic crimes which shift the costs associated with the proper handling and disposal of wastes to the public. By externalizing these costs, a violator achieves a competitive advantage."

II. ENVIRONMENTAL COMPLIANCE PROGRAMS

Most businesses face a range of environmental compliance requirements concerning air and water discharges, waste generation, disposal, and the handling of toxic substances and hazardous materials. The ultimate goal of these compliance programs is to ensure that the actions of the regulated community are consistent with acceptable standards for human health and the environment. How an agency pursues compliance is a function of policy and experience. Some agencies expect a business to know and understand its compliance responsibilities and enforce the laws strictly with sure and fast response to any violation. Other agencies view their role as one of support to assist the regulated community attain compliance.

Under the Clinton administration's efforts to move beyond a "one-size fits all" system, the Environmental Protection Agency ("EPA") is establishing four compliance assistance centers to provide small businesses with easy to use information on how to comply with federal environmental laws.[4] The Salt Lake City-County Health Department has developed an approach which combines education and enforcement. Workshops are developed for specific types of businesses (auto junkyards, mobile steam cleaners, cement batch plants, etc.) to provide information on the laws and how to comply with them. The workshops are followed by random inspections to determine if the businesses are in compliance.

Compliance cannot be achieved, however, solely by providing information and

assistance. Unfortunately, some businesses view the payment of administrative fines and civil penalties as a cost of doing business. Criminal enforcement is an essential component of any regulatory program because many businesses and individuals will not voluntarily comply unless there are unambiguous consequences for noncompliance.

Enforcement options include administrative, civil and criminal actions, allowing regulators the flexibility to respond to many different types of violations and circumstances. Administrative procedures have been developed to resolve notices of violations issued by an agency. These procedures involve hearings before a board or a hearing officer appointed by the board and provide for judicial and appellate review.[5] Civil actions are initiated to seek injunctive relief and recover the costs of abatement action. Civil actions may be based on a statute or a common law claim such as public nuisance.[6] The objective of criminal enforcement is to identify and eliminate systemic noncompliance problems which cannot be resolved any other way.

III. EMPHASIS ON ENFORCEMENT

A. Criminal Enforcement

In 1981, the United States Department of Justice ("DOJ") created an Environmental Enforcement Section ("EES") within its Environment and Natural Resources Division. EES provides litigation support to its client agencies to obtain compliance with environmental statutes, deter violations of those statutes, obtain monetary civil penalties for violations, and recoup federal funds spent to abate environmental contamination.[7] In the same year, the EPA established a new Office of Criminal Enforcement. Both units focus exclusively on the investigation and prosecution of environmental crime.

In October, 1990, Congress enacted the Pollution Prosecution Act ("PPROS")[8] to increase the number of criminal investigators. The Act established a National Enforcement Training Institute ("NETI") to provide specialized instruction to federal, state and local environmental enforcement agencies. EPA also created the National Enforcement Investigations Center ("NEIC") which is located in Denver, Colorado. The NEIC is staffed by approximately 170 employees, including more than 60 trained environmental crimes investigators. The exclusive mission of the NEIC is to uncover, obtain, and present evidence of criminal environmental violations and related crimes.[9]

The prosecution of environmental crime involves a knowledge of the law, public health and science. This mix of skills has created a need for regulatory specialists. Client agencies are also more frequently seeking criminal penalties for violations that were once handled through administrative or civil actions. For these reasons, State and local prosecutors in Utah are expanding their staffs to include environmental units. The Environment Division of the Attorney General's office includes an attorney and an investigator assigned to prosecute environmental crimes.

"Criminal enforcement is an essential component of any regulatory program because many businesses and individuals will not voluntarily comply unless there are unambiguous consequences for noncompliance."

In 1995, a natural resources and environment unit was created in the Salt Lake County Attorney's Office. The unit is currently staffed with an attorney and a full time investigator assigned to the City-County Health Department. In addition, three deputy county attorneys have been cross deputized as special district attorneys to prosecute violations of state statutes. The County has also created an environmental task force which includes representatives from other local governments, law enforcement, prosecutors and public safety agencies. The purpose of the task force is to facilitate an exchange of information to support the enforcement of environmental regulations.

Federal, state and local environmental laws provide for the imposition of substantial civil and criminal penalties for violations of operational standards and environmental reporting requirements. Each of the major environmental statutes now has felony provisions. Several contain "knowing endangerment" provisions, including the Resource Conservation and Recovery Act ("RCRA"), the Clean Water Act ("CWA") and the Clean Air Act ("CAA").

Utah environmental statutes typically authorize civil and criminal penalties ranging from $5,000 to $25,000 for each day of violation,[10] and regulators have become increasingly aggressive in seeking the maximum penalties.[11] Under the Utah Solid and Hazardous Waste Act, a knowing or reckless[12] endangerment can result in a felony prosecution with the potential of a 15 year prison sentence and a $250,000.00 fine for an individual and up to $1,000,000.00 in fines for a corporation.[13]

In addition to fines, agencies often seek costs for investigation, sampling and analysis, restoration, restitution, community service or a pollution prevention project. It should also be noted that Utah Code Ann., §63-63a-1 provides that an 85% surcharge *shall* be imposed by the court on all criminal fines, penalties and forfeitures. The purpose of the surcharge is to support the crime victim reparation trust fund.[14]

B. Other Potential Criminal Liability

Actions taken to avoid compliance with environmental laws can lead to sanctions in addition to substantive environmental penalties. Efforts to avoid disclosure of non-compliance by altering or falsifying inventory records, reports and manifests can lead to prosecution for fraud, conspiracy, aiding and abetting, forgery, and perjury. Other prohibitions contained in the Utah Criminal Code may also apply.[15]

The potential for criminal liability can extend to lawyers. In the *InFerGene* case,[16] a biotechnology firm, was evicted from its leased premises. The company later filed for bankruptcy. The landlord demanded that InFerGene remove hazardous, medical and radioactive wastes stored on the premises. The company's lawyer wrote the landlord informing him that his client could not remove the hazardous wastes it had left behind. The landlord notified the district attorney and a twenty-four count felony complaint was filed charging the company with illegally disposing of hazardous wastes. the law firm representing the company was named as a defendant based on the letter to the landlord and advise to the company regarding the abandonment of the waste. The charges against the law firm were later dismissed, but the case exemplifies the potential problems that exist for lawyers involved with environmental matters.

IV. CRITERIA IN EVALUATING CRIMINAL PROSECUTION

The primary objective of enforcement is to identify and eliminate systemic noncompliance. As previously noted, enforcement options include administrative, civil or criminal actions. Criminal penalties are generally considered appropriate when there has been a knowing or intentional violation of the law, criminal negligence, significant environmental damage or risk to human health. A prosecutor's decision to pursue a criminal case generally includes the following factors:

1. An intentional act involving an immediate threat or endangerment to human health or the environment.
2. A knowing violation to realize economic gain or avoid cost.
3. A pattern of conduct or plan and continuing illegal activity.
4. Repeated violations after attempts to gain compliance through civil or administrative proceedings.
5. An attempt to destroy or conceal evidence or unlawfully prevent a witness from testifying.

In addition to these general screening factors, the DOJ and EPA have adopted specific policies and guidance on criminal prosecution and penalties. To encourage self-auditing, self-policing and voluntary disclosure of environmental violations, in 1991 DOJ adopted a criminal enforcement policy.[17] The criteria described in the policy include: voluntary disclosure, cooperation, preventive measures and compliance programs. Other factors which may be relevant include: pervasiveness of noncompliance, internal disciplinary action and subsequent compliance efforts. This policy is internal guidance for use by DOJ attorneys are should not be relied on.

The DOJ policy to encourage voluntary disclosure led to the enactment of legislation in several states, including Utah,[18] creating a "self-audit" privilege. This legislation[19] creates a limited privilege for environmental audits and in some states, guarantees immunity from enforcement. In response, EPA issued a policy statement on December 22, 1995, entitled "Incentives for Self-Policing; Discovery, Disclosure, Correction and Prevention of Violations."[20] The policy identifies incentives EPA is creating to encourage regulated companies to conduct voluntary compliance evaluations, disclose deficiencies to the government, and correct any violations. The policy statement also identifies criteria for the exercise of enforcement discretion. The statement offers a conditional waiver of the "gravity" based component of an applicable penalty.[21]

The Utah Environmental Self Audit Act was amended in the 1996 General Session of the Utah Legislature. Senate Bill 149 authorizes[22] the Department of Environmental Quality to waive civil penalties where non-compliance is discovered through an environmental self-evaluation if the non-compliance is: (1) voluntarily disclosed to the department in writing within ten days after discovery; (2) remedied within sixty days after discovery; and (3) reasonable steps are taken to prevent a recurrence. The penalty may not be waived, however, if the non-compliance resulted from a lack of due diligence; is a recurrence of a similar violation; resulted from a reckless or willful disregard of the law; or fraud. No waiver is allowed if the

department had already initiated an investigation; the non-compliance was discovered pursuant to a legally mandated requirement; the non-compliance resulted in serious actual harm or imminent and substantial endangerment to human health or the environment. To the extent the non-compliance resulted in an economic benefit or competitive advantage over other similarly regulated entities that did achieve compliance, the department may seek a civil penalty to recover the monetary amount of the economic benefit or competitive advantage resulting from the non-compliance.

V. CIVIL LITIGATION AND CONSEQUENCES OF ENFORCEMENT ACTIONS

A criminal conviction may have consequences which are not readily apparent. A conviction may jeopardize permits and licenses necessary to operate a business. Most business licenses require compliance with "all applicable laws" as a condition of issuance or renewal.

Numerous toxic tort cases are filed each year by private parties seeking to recover damages from harm allegedly sustained from exposure to toxic substances. Increasingly, actions are also filed for diminution of value by owners of property adjoining contaminated sites. In some cases, the potential exists for a convergence between public and private actions. For example, an enforcement action may be filed under a statute for an illegal discharge which impacts an adjoining property. In the *Branch* case previously cited, the Court held that when the circumstances creating a nuisance violate a statutory prohibition, those circumstances constitute a "nuisance per se." The result, for all practical purposes, is the same as strict liability.

Recent case law illustrates the potential for civil damage awards arising out of violations of environmental regulations. In 1994, two plant managers were charged with knowing endangerment of human health under RCRA, based on their improper disposal of toluene, a regulated solvent, in an unlocked dumpster. Two young boys were overcome while playing in the dumpster and died from acute exposure to the toluene fumes. An enforcement action under RCRA resulted in federal prison sentences for the plant managers and the company was fined $1.5 million.[23] A civil action brought by one of the parents of the boys resulted in a jury verdict against the company of $500 million.[24] Another lawsuit is pending against the company for the death of the second boy.

CONCLUSION

An allegation of wrongdoing from a disgruntled employee, customer or investigator may ultimately lead to the issuance of a search warrant or subpoena to seize documents and compel testimony. An investigation can result in the filing of a criminal information or a grand jury proceeding. The costs and disruption associated with any type of criminal investigation can be substantial even if it does not result in a prosecution The devastating effect on an individual or a company and its employees of a criminal investigation, much less an indictment, trial, or conviction is enormous. Reputations, livelihoods, and individual freedoms are at stake.

"Enforcement is necessary to ensure compliance, equalize the playing field and protect the commitments made by responsible members . . . of the regulated community."

The costs of environmental regulation is at the heart of the current political debate on regulatory reform. Notwithstanding the penalties and disruption imposed by enforcement actions, the social cost of pollution are high and must also be considered. We all face a variety of risks in our every day lives. We have a certain amount of control, however, over most of the risks we agree to assume. By contrast, in an urban setting none of us have individual control over the quality of the air we breath, or the water we consume.

Once contaminated, the costs of restoring a resource are extraordinarily high. Often, it is impossible to completely restore or replace a damaged resource. Moreover, the increased risks of disease and the potential costs of diagnosis and medical treatment compound the problem. Unless pollution is controlled at the source, we all bear the increased social costs of non-compliance. Enforcement is necessary to ensure compliance, equalize the playing field and protect the investments and commitments made by responsible members of the regulated community.

[1]"Our Stolen Future," Theo Colborn, Dianne Dumanoski, John Peterson Myers, Dutton, 1996.

[2]*See,* testimony of Professor Jonathan Turley, George Washington University National Law Center, concerning H.R. 5305, the "Environmental Crimes Act of 1992," before the House Subcommittee on Crime and Criminal Justice (June 11, 1992).

[3]"S.L. County Zeroes In on Pollution", *Salt Lake Tribune,* Monday, December 4, 1995.

[4]Environment Reporter, Current Developments, April 5, 1996.

[5]Dept. of Environmental Quality Administrative Procedure, *See,* Utah Code Ann., §19-1-301; and the Utah Admin. Procedures Act, Utah Code Ann., §§63-46b-1 *et seq.*

[6]*See,* Utah Code Ann., §§76-10-801 *et seq.,* regarding public nuisance claims. It should be noted that various statutes specify activities which constitute a public nuisance. For example, §19-5-107(1)(b) of the Water Quality Act states that any violation of the prohibition on the pollution of waters of the state is a public nuisance.

[7]Practicing Law Institute, "Environmental Enforcement Program of the Department of Justice," John C. Crudent, Environmental Enforcement Program, Yew York City, March 29, 1993. *Note,* EES is now the largest litigating section in DOJ.

[8]Public Law No. 101-593, §201 (codified at 42 USC § 4321).

[9]Environmental Crimes, Christopher Harris, Raymond C. Marshall & Patrick O. Cavanaugh, 1992, Shepards-McGraw-Hill, Inc.

[10]Utah Department of Environmental Quality, Utah Code Ann., §19-1-303 (violations of any orders or rules); Clean Air Act, Utah Code Ann., §19-2-115; Radiation Control Act, Utah Code Ann., §§19-3-109 &110; Safe Drinking Water Act, Utah Code Ann., §19-4-109; Water Quality Act, Utah Code Ann., §19-5-115; Solid and Hazardous Waste Act, Utah Code Ann., §19-6-113; Underground Storage Tank Act, Utah Code Ann., §19-6-425; Lead Acid Battery Act, Utah Code Ann., §19-6-607; and Used Oil Management Act, Utah Code Ann., §§19-6-721 & 722.

[11]The Utah Air Quality Board recently rejected an appeal of a Notice of Violation by the Magnesium Crop. Of America, which charged the company of violating its emissions limit 23 times. The company could be fined $10,000.00 per incident. "Major Tooele Polluter Loses Appeal," Salt Lake Tribune, April 16, 1996.

[12]*See,* Utah Code Ann., §76-2-103 for the criminal code definitions of knowing or reckless endangerment.

[13]Utah Code Ann., Section 19-6-113.

[14]*See,* §63-63a-2 which refers to other victim reparation accounts provided for in Chapter 63a.

[15]*See,* Utah Code Ann., Title 76.

[16]*California v. Sullivan Roche & Johnson,* Calif. SuperCt. Solano Cnty., No. C-31529 (3-20-92).

[17]"Factors In Decisions On Criminal Prosecutions for Environmental Violations In the Context of Significant Voluntary Compliance or Disclosure By the Violator." July 1, 1991, Environment Reporter Administrative Documents, Bureau of National Affairs, Inc.

[18]Utah Code Ann., §§19-7-101 *et seq.*

[19]Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, South Dakota, Texas, Utah, Virginia, and Wyoming.

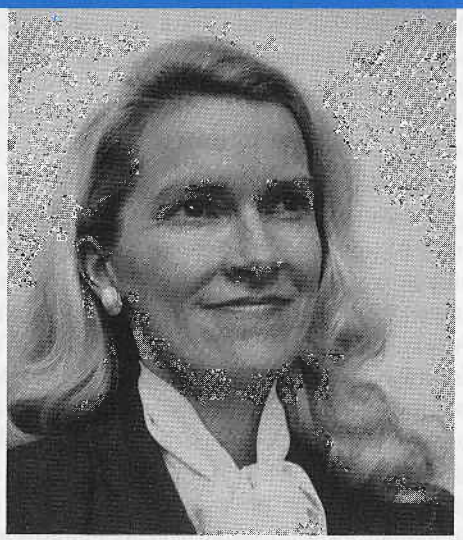
[20]"EPA Incentives for Self-Policing; Discovery, Disclosure, Correction and Prevention of Violations," 60 Federal Register 66706, December 22, 1995.

[21]The "gravity" component is described in the "ABLE" and "BEN" penalty models used by EPA.

[22]Senate Bill 149 enacts Utah Code Ann., §19-7-109.

[23]*U.S. v. Whitman,* No. 94-70-CRT-17B, DCM Fla, 1994.

[24]*Perez v. William Recht Co.,* Fla, Cir. Ct., Hillsborough Cnty., No. 92-8983-B (Sept. 28, 1995).



How To Obtain an Environmental Site Assessment (Or Ignorance Is Not Bliss – Unless You've Investigated)

By Rosemary J. Beless

A. THE INNOCENT LANDOWNER'S DEFENSE – AM I INNOCENT OR NAIVE?

In 1980, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) created a set of potentially responsible parties (PRP's) who could be liable for the cost of cleaning up hazardous waste sites. Among these PRP's was the current landowner, even if he had no involvement with the on-site wastes and was unaware of the existence of those wastes. 42 U.S.C. § 9607(a). Because cleanup costs often amount to millions of dollars, the financial risk of land ownership became enormous. This risk plainly discouraged those otherwise interested in purchasing and developing land.

When Congress amended CERCLA in 1986 with the Superfund Amendments and Reauthorization Act (SARA), Congress provided a defense for some such innocent landowners. However, establishing the "innocent landowner" defense is far from easy because of the strict conditions required to prove that a landowner is "innocent." In addition, the burden of proof for the defense is on the landowner, which makes it far more difficult to escape a trial.

In creating the innocent landowner defense, Congress grafted the innocent landowner provisions onto its preexisting third-party defense. The third-party defense of the original 1980 law required the defendant to establish that: (1) the release or threat of release of a hazardous substance was caused solely by a third party; (2) the defendant exercised due care with respect to the hazardous substance; (3) the defendant had taken precautions against foreseeable acts or omissions and foreseeable consequences of the third-party intervention; and (4) the involved third party had no contractual relationship with the defendant, direct or indirect. See 42 U.S.C. § 9607(b)(3). The vast majority of potentially responsible third parties had some contractual relationship with the defendant, thus, defeating the defense. In the case of landowners, the contractual relationship condition destroyed any ability to shift the cleanup burden to prior owners who were directly responsible for hazardous wastes at the site. *See, e.g., United States v. Northernaire Plating Co.*, 670 F.Supp. 742 (W.D. Mich. 1988); *United States v. Hooker Chemicals & Plastics Corp.*, 680 F.Supp. 546 (W.D. N.Y. 1988).

In the 1986 amendment, Congress modified the contractual relationship condition

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with the innocent landowner provisions. A landowner may escape liability, even in the presence of a contractual relationship, by demonstrating certain facts. First, the property must be purchased by the defendant/landowner "after the disposal or placement of the hazardous substance on, in, or at the facility. . . ." 42 U.S.C. § 9601(35)(A). Second, the defendant/landowner must establish one of the following three criteria: (1) at the time of purchase the defendant did not know and had no reason to know that any hazardous substance was disposed of on, in, or at the facility; (2) the defendant is a government entity which acquired the property by involuntary transfer, eminent domain, or escheat; or (3) the owner obtained the property by inheritance or bequest. 42 U.S.C. § 9601(35)(A)(i) – (iii). Finally, the defendant landowner must establish that he or she exercised due care with respect to the hazardous substances. 42 U.S.C. § 9607(b)(3).

The full scope of the innocent landowner defense has not yet been defined by the federal circuit courts; however, a number of decisions have begun to provide important guidance to future land purchasers. The availability of the innocent landowner defense has turned on two central questions: (1) did the defendant have reason to know of the hazardous substances at the time of acquisition; and (2) did the defendant exercise due care with respect to those substances?

"A landowner may escape liability, even in the presence of a contractual relationship, by demonstrating certain facts."

Whether a landowner had reason to know of hazardous substances at the time of purchase is dependent upon what pre-acquisition investigation the owner made. The statute gives some guidance as to the pre-acquisition investigation required of the innocent landowner. The defense requires that the owner "must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." 42 U.S.C. § 9601(35)(B). The statute continues by defining what factors a court should consider in determining whether the purchaser has made "all appropriate inquiry":

> For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

Id.

The criteria imposed by the statute provide that the standard for pre-acquisition

"appropriate inquiry" will vary considerably depending on the circumstances of the purchase. For example, a landowner who purchased contaminated property long ago would not be held to as stringent an environmental-assessment standard as would a current purchaser. *See e.g., United States v. Serafini,* 706 F.Supp. 346 (M.D. Pa. 1988) (court denied the government summary judgment because it failed to show that defendants' actions were "inconsistent with good commercial customary practices" although the defendant purchasers had made no inquiry into past or current uses of the landfill and waste disposal site when they bought it in 1969.) In addition, if an experienced land developer acquires land at an apparent discount price, the developer is on notice to make an especially extensive investigation. Commercial purchasers will be held to a very demanding standard of good practice, and good faith alone will not be sufficient to establish innocence. *See e.g., O'Neil v. Picillo,* 682 F.Supp. 706 (D.C.R.I. 1988).

For a commercial real estate purchaser, a full-scale environmental assessment of the property may well be required. However, conducting a pre-acquisition environmental assessment does not necessarily insulate the purchaser from CERCLA liability. The assessment itself will be scrutinized and, if conducted negligently or inadequately, the purchaser may still be liable. *LaSalle Nat'l Trust, N.A. v. Shaffner,* 1993 W.L. 499742 at 6 (N.D. Ill. 1993) (defendant's motion for summary judgment denied where it had filed suit against its environmental consultant alleging that an environmental audit conducted prior to defendant's purchase of subject property was not consistent with good commercial and customary practices.) The test for the defense is an objective one and contains no good faith safeguard for purchasers. In one case, the court observed that the defendant's claim of no knowledge of the presence of hazardous substances was "patently incredible" where the defendant had commissioned an environmental assessment of the subject site. Therefore, the defendant could not avail himself of the innocent landowner defense. *United States v. Shell Oil Co.,* 841 F. Supp. 962, 973 (C.D. Cal. 1993).

As the standards for pre-acquisition investigation rise, they could preclude the availability of the innocent landowner defense. A very thorough site investigation will turn up all but the most exceptional case of hazardous contamination or at least put the purchaser on notice that hazardous substances may be present. Thus, the purchaser will learn of the wastes and will be unable to acquire the site as an "innocent landowner." This fact does not, however, undermine the value of a thorough environmental site assessment. The prospective purchaser may decide not to purchase a site with substantial liability or may use this site information in contractual negotiations with the seller.

"For a commercial real estate purchaser, a full-scale environmental assessment of the property may well be required."

In addition to the pre-acquisition investigation, the purchaser must establish that he exercised due care with respect to any hazardous substances on the site. Of course, the question arises: how can one exercise due care with respect to hazardous substances that one does not know of? It may be that even if a purchaser conducted a thorough pre-acquisition inquiry, he may discover the waste only once he takes possession of the property. Once the hazardous substance is discovered, the landowner is required to exercise "due care" with respect to the hazardous substance, a relatively onerous requirement. 42 U.S.C. § 9607(b)(3). For example, one landowner lost the innocence defense because after he was notified by state officials, he "did not then effectively assess the status of the site, build fences, reinforce the berms, or take any other precautionary measures." *United States v. DiBiase Salem Realty Trust,* 1993 W.L. 729662 at 7 (D. Mass. 1993). Indeed, due care might even require a full-scale cleanup. If the innocent landowner defense is thereby preserved, the landowner might then bring a private action to recover all of its cleanup costs from other responsible parties.

The central issues regarding the innocent landowner defense are those of pre-acquisition investigation and due care. Nevertheless, the following factors must also be considered. First, the innocent landowner defense is unavailable if disposal of hazardous substances continued after the time of property acquisition. For instance, a court held that grandchildren may not avail themselves of the innocent landowner defense where land was placed in trust for their benefit by their grandfather before the release of hazardous substances occurred. *Steego Corp. v. Ravenal,* 830 F.Supp. 42, 52 (D. Mass. 1993). Likewise, under the third-party defense, an innocent landowner can only escape liability if another entity was the "sole cause" of the release. In *United States v. A&N Cleaners and Launderers,* 854 F.Supp. 229 (S.D.N.Y. 1994), the court rejected the owner's innocent landowner defense when the owner failed to prove the past tenants were the sole cause of the release of hazardous substances. The innocent landowner defense was denied because the owner failed to inquire into the disposal activities of a subtenant. Finally, an otherwise innocent landowner may lose the defense if its actions cause or contribute to the damages resulting from a hazardous substance release. For example, construction activity that inadvertently unearths and releases hazardous waste might negate the defense. *See, e.g., United States v. Wedzeb Enterprises, Inc.,* 809 F.Supp. 646 (S.D. Ind. 1992).

B. WHAT ARE ENVIRONMENTAL SITE ASSESSMENTS?

The steps required by the innocent landowner defense are ill-defined. Neither Congress nor the courts have provided a formula for purchasers of property to follow. Without standards, chances are that borrowers', landowners' and sellers' consultants may not see eye to eye on what constitutes an acceptable assessment. The result can be an expensive and wasteful dispute. Moreover, from a borrower's perspective, how can one compare the quality of competing environmental engineering firms without uniform assessment protocols? How can a lender and borrower agree on the development of environmental data when consultants approach the problem from different perspectives? The list of problems resulting from the absence of standards in the environmental assessment field is endless.

Therefore, in 1993, the American Society for Testing and Materials (ASTM) issued the final Standard for Environmental Assessments for Commercial Real Estate (Standard) for use in satisfaction of

the innocent landowner defense under the federal Superfund law. The ASTM Standard provides guidance on the extent and nature of the inquiry that should be conducted by a prospective landowner. While the ASTM Standard does not have the force of law, the site assessment standard was designed to fulfill the "appropriate inquiry" under the landowner defense. ASTM Standard, E 1527-93 § 1.1. Indeed, many standards developed by ASTM over the years have become accepted industry practice and have been recognized as such by the courts. *See also* U.S. Office of Management and Budget Circular No. A-119, 47 Fed. Reg. 49,496 (1982) (requiring that federal government rely on voluntary standards where possible).

The stated purpose of the ASTM Standard is to define "good commercial and customary practice in the United States of America for conducting an environmental site assessment of a parcel of commercial real estate with respect to the range of contaminants within the scope of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)" and the practice is intended to permit a user to satisfy one of the requirements to qualify for the innocent landowner defense to CERCLA liability. E 1527-93, E 1528-93. However, the Standard makes no implication that a person must use the Standard in order to be deemed to have conducted inquiry in a commercially prudent or reasonable manner. E 1527-93, § 4.1. Finally, the Standard is limited to commercial real estate and does not imply that it is customary practice for residential purchasers or tenants to conduct any environmental site assessment.

C. DO IT MYSELF OR HIRE A PROFESSIONAL?

The ASTM investigation includes two components: (1) the transaction screen process and (2) the Phase I environmental site assessment process. The transaction screen takes the form of a questionnaire and is designed for use by the lender/purchaser. The Phase I site assessment requires the expertise of an environmental professional. The potential purchaser's investigation can commence with a low level transaction screen and then move to

more intense investigation as information is discovered. During this process, ASTM provides for decision notes in which the purchaser can conclude that the property has been investigated sufficiently or that further inquiry is required.

The transaction screen is a question-answer process (including up to 23 questions) which consists of three stages of inquiry: (1) questioning owners or operators; (2) visiting the site; and (3) checking government records and historical sources. E 1528-93 § 5.1. The transaction screen is designed to be administered by a purchaser of the property and/or the lender, at little or no cost, other than their personal time. Three parties are necessary to complete the questionnaire: (1) the owner of the property (or a knowledgeable person within the owner's organization); (2) the operator of the property (again, a person knowledgeable of the operations of the property); and (3) the user of the transaction screen (the purchaser or the lender). The questions are designed to be answered "yes," "no," or "unknown." "Yes" or "unknown" answers create a presumption in favor of further inquiry and use of a Phase I environmental assessment. This presumption may be rebutted by the purchaser/lender in consideration of the circumstances of the transaction. For example, one of the questions is: "Are there currently, or to the best of your knowledge, have there been previously, any registered or unregistered storage tanks (above or underground) located on the property?" If the answer is "unknown," then it may be necessary to research fire insurance maps, fire inspection records, and building inspection records to come up with a "no" answer. If the answer is "yes," it may be necessary to research these same records as well as construction records to confirm that the tanks were removed and that no contamination was present, in order to justify not proceeding with a Phase I investigation.

After the questionnaire is completed, the purchaser/lender must visit the site to make a visual inspection. The final aspect of the transaction screen is a limited records search. The purchaser must check specified government records within a defined radius of the site, checking for listing under CERCLA, RCRA, and state laws. The review also contains a check of limited historical sources, involving a review of fire insurance maps and an interview with the local fire marshal.

The transaction screen works best when you can document fairly easily that the parcel in question was not subjected to any uses other than pasture or cultivation. In most other situations, there are going to be a lot of "unknown" or "yes" answers that will require the expert opinion of an environmental professional and a full Phase I environmental site assessment.

"While the ASTM Standard does not have the force of law, the site assessment standard was designed to fulfill the 'appropriate inquiry' under the landowner defense."

D. WHAT SHOULD THE ASSESSMENT SAY?

If the transaction screen indicates the possible presence of hazardous wastes on the property, then the purchaser moves on to a Phase I site assessment. The ASTM Standard provides that there are four components of a Phase I assessment: (1) a review of records; (2) a site reconnaissance, (3) interviews with current owners and operators; and (4) report preparation and evaluation. A Phase I assessment requires the use of an environmental professional and the purchaser/lender is required to cooperate with the professional and provide him or her with all relevant documents and specialized knowledge regarding the site.

Phase I commences with an extensive records review, checking government sources for a broader radius from the site and expanding the list of sources to include records of emergency release reports, contaminated wells, and local agencies, including fire and planning departments. This review is to be supplemented by a review of "standard physical setting sources," of the U.S. Geological Survey and the Soil Conservation Service. In addition, the environmental consultant is required to review federal and state environmental record sources. The following regulatory databases should be reviewed for the property and adjoining properties: Federal National Priorities List (1-mile radius); Federal CERCLIS List (0.5-mile radius); Federal RCRA TSD Facilities List (1-mile radius); Federal RCRA Generators List (subject/adjoining); State Landfill/Solid Waste Disposal Site List (0.5-mile radius); State Leaking Underground Storage Tank List (0.5-mile radius); and State Underground Storage Tank List (subject/adjoining properties and 0.5-mile radius).

The required historical review under the Phase I records review should include historical aerial photographs and maps, R.L. Polk City Directories, and Sanborn fire insurance maps. Other historical sources include United States Geological Survey topographical maps, along with zoning and land use records and property tax files.

The second step of a Phase I site assessment is site reconnaissance. In this step, the environmental consultant visits the property and visually observes the site, with particular focus on the structures. This step is aimed at ascertaining the condition of the site and any obvious signs of environmental releases (e.g., stains, spills, leaking containers). The environmental consultant may also be able to ascertain past property uses, adjoining property uses, geological conditions, identifiable containers or spills of hazardous substances, the state of vegetation on the property, wells or septic tanks, and signs of underground storage tanks.

The third step involves further interviews with the site owners and occupants about their knowledge of the uses and physical condition of the site. The interview is to include searches for helpful documents, past litigation, and related information. Interviews are also to be conducted with local government officials, such as the fire department, health agency, and hazardous waste disposal agency.

The fourth and most critical step of the Phase I environmental assessment is report preparation and evaluation of the information gathered by the environmental professional. ASTM sets forth guidelines for the contents of this report, including extensive requirements for documentation and source identification. A qualification statement also is to be included. The report is to culminate in a conclusion that states that the "assessment has revealed no evidence of recognized environmental conditions in connection with the property except for the following: . . . ." In the alternative, the conclusion may state that no recognized environmental conditions have been found on the property. ASTM defines

"recognized environmental conditions" as the presence or likely presence of hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release into structures, ground, groundwater or surface water on the subject property. The term is not intended to include *de minimis* conditions that generally do not present a material risk of harm to public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of the appropriate government agencies. The environmental professional may also address "other environmental conditions" which may include issues which either do not constitute a "recognized environmental condition" or are considered "non-scope" items by ASTM (e.g., asbestos-containing materials, wetlands, radon).

E. WHEN IS ENOUGH, ENOUGH?

While Phase I site assessment contains a large amount of information about the subject property, all of this information is non-intrusive. In other words, all of the information regarding the Phase I site assessment is obtained from records, visual inspection, and interviews with people regarding the property. No actual sampling or testing is performed under a Phase I site assessment.

A Phase II site assessment includes sampling and testing of the property. Phase II studies are conducted when the results of a Phase I site assessment reveal the possible existence of potential or actual site contamination, often signified by discolored soils or surface water. The more comprehensive studies are performed to verify Phase I findings and, if possible, to determine the level and extent of the contamination. The presence of abandoned underground storage tanks or locations with questionable site histories, such as former gasoline stations or petroleum facilities, may also warrant a Phase II study. A variety of testing methods are available to the consultant: they range from geophysical exploration to discover buried metallic objects, such as barrels or underground storage tanks, to the collection and laboratory analysis of soils, surface water, groundwater, or air samples. Since each location is unique, all Phase II sampling plans must be individually developed, factoring in that location's particular characteristics.

Although the consultant knows what tests are available, it is up to the client to recommend the types of testing to be undertaken on the property. The client also decides on the number of samples to be gathered, the location from which the samples are to be taken, and how specific and accurate the laboratory analysis should be. The limitation of a Phase II assessment is that samples can only be taken from specific locations on the property and, therefore, the client will only know that those specific locations are clean or contaminated, he will not be able to know the chemical character of the entire property. Nevertheless, the Phase II sampling and analysis provides actual, intrusive tests of the chemical character of the various media on the property and will provide a baseline for contamination at the time the property was sold. The Phase II site assessment may also provide a basis for negotiation of price and terms regarding the sale of the property.

A Phase III analysis of the property goes beyond mere assessment, sampling, and analysis of the property and addresses the actual remedial action for contamination on the property. The Phase III process will fully characterize the contamination, identify the potential remedial action alternatives, evaluate the feasibility of implementing these alternatives, and implement the most appropriate cleanup activities. Because of the high costs involved in a Phase III analysis, such a remedial action is not generally part of the pre-acquisition process.

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Commission Highlights

During its regular meeting on January 26, 1996, held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the December 1, 1995 meeting.
2. The Board voted not to grant the request to waive the MPRE Examination requirement for a foreign legal consultant applicant.
3. Dennis Haslam reviewed the status of the Youth Education Project. The Board voted to move forward with the Youth Education Project, purchase 5,000 books and to research the intellectual property issue.
4. Steve Kaufman reported that following the January 25th meeting of the Long-Range Planning Committee, the committee decided to change its perspective to be one more "visionary" and longer range.
5. Appeals Court Judge Michael Wilkins appeared to obtain the Bar's support on proposed legislation which would create a mediation and settlement program for matters on appeal before the Utah Court of Appeals. The Board voted to give the Bar's support on this legislation.
6. Dennis Haslam updated the Commission on the status of Legal Services Corporation funding, and talked about the bottleneck preventing the matching up of cases with the 1,000 plus pro bono attorneys recruited by the Bar's pro bono coordinator.
7. Budget & Finance Committee Chair, Ray Westergard reviewed the December financial reports.
8. John Baldwin reported that the Law & Justice Center is engaged in building out space on the first floor for lease to the Judicial Conduct Commission. Baldwin reviewed upcoming dates and indicated that the May 31 Commission meeting would be held in Logan so that the Commission could meet with the Cache and Box Elder County Bars.
9. John Baldwin distributed copies of the Monthly Department Activity report and reported that the Bar's new phone system and voice mail is in place.
10. David Nuffer discussed the Internet and the Bar's home page and displayed printouts of Bar information which will be made available on the Internet.
11. The Board voted to conditionally approve the students and attorneys to sit for the February bar examination pending a favorable recommendation of the Character & Fitness Committee.
12. Steve Cochell reported that the court decided in the Bar's favor on the Babilis and Walpole cases. He reviewed annual statistics on attorney discipline and noted that the number of written complaints has declined from 893 to 781 in 1995. The Board voted to approve the hiring of a new attorney in the Office of Attorney Discipline and a part-time general counsel. The Board voted to hire outside counsel on three UPL matters.
13. The Bar Commission met with the chairs of the Bar's Sections and Committees over lunch. Dennis Haslam requested all chairs to get a progress report on the year's activities to Richard Dibblee by May 1.
14. The Board voted to approve Ethics Opinion No. 95-02, which allows a law partner of a part-time justice judge to represent criminal defendants in the judicial district in which the justice of the peace sits. The Board also approved Ethics Opinion No. 95-05, which involves the issue of the relationship between Rule of Professional Conduct 4.2 and a U.S. Department of Justice regulation.
15. J. Michael Hansen reported on the recent Judicial Council meeting and indicated that judges planning to run for retention election were certified at the last meeting of the Judicial Council. He also indicated that the Judicial Council adopted the report on Electronic Access to Court Records.
16. Lisa-Michelle Church indicated that about a month ago she met with Dennis Haslam, Bea Peck, Charlotte Miller and others to discuss what the Bar or law firm leaders could do to eliminate the "glass ceiling" and address the issues and perceptions.
17. Legislative Affairs Committee Chair, David Bird reviewed the recommendations of his committee on current legislation. The Board voted to accept the recommendation of the Legislative Affairs Committee to support the following bills.
    SJR7 "Trial Jury Resolution"
    SB53 "Trial By Jury"
    HB38 "Fees for Write of Garnishment"
    SB96 "Judges Mandatory Retirement"
    HB175 "Judicial Conduct Commission Amendments"
    HB131 "Amendments to Homestead Exemptions Act"
    HB69 "Forfeiture of Water Rights
    The Board voted not to accept the recommendation of the Legislative Affairs Committee to support HB8 "Limitation of Civil Action" but to instead oppose HB8 and encourage the Committee to defeat the bill.
    The Board also voted to accept the recommendation of the Legislative Affairs Committee to oppose HB182 "Fully Informed Jury."

During its regular meeting of March 7, 1996, held in St. George, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Board approved the minutes of the January 26, 1996 meeting.
2. J. Michael Hansen, liaison to the Judicial Council, reported on the Judicial Council meeting concurrently taking place. He indicated that the Council would probably be voting on a proposal made by the district court judges that if a small claims matter is filed in the district court, it can be transferred at the option of the district court judge to the justice court for trial without the consent of either the parties or the justice court judge.
3. Dennis Haslam reported on the American Bar Association National Conference of Bar Presidents meeting he recently attended in Baltimore and indicated that there is a lot of good information to be collected. Haslam also reported on the Western States Bar Conference.
4. Haslam referred to Courts & Judges Committee Chair Scott Daniels' letter outlining the Committee's concerns

regarding court consolidation. Ron Gibson indicated that the legislature just passed the final court consolidation plan which included legislation on the management of judicial calendars.

5. John Baldwin reported on the Youth Education Project and reviewed the list of schools who have responded. He indicated staff would be following up with those schools who have not responded.
6. The Board voted to reject a petition from a Foreign Legal Consultant applicant to waive the MPRE requirement or change the rule to require the applicant to only successfully complete the Bar's Ethics School.
7. The Board voted to have a petition drafted to allow inactive attorneys to provide pro bono legal services.
8. John Baldwin took this opportunity to remind the Bar Commission that Reed Martineau is Chancellor this year of the Jack Rabbit Bar Meeting and Utah will host the meeting at the Stein Eriksen Lodge on June 7-8, 1996. ABA leaders are expected to be attending and Sen. Hatch has been invited to talk about the Senate Judiciary Committee.
9. John Baldwin reviewed the Bar department reports and indicated that 120 applicants are scheduled to take the February Bar examination. He indicated that since the new telephone system was installed on January 12 and until March 4, 29,000 calls came into the Law & Justice Center and 99% of those were picked up in 5 seconds and the balance were picked up in 30 seconds.
10. Baldwin reported that Speakers Bureau brochures were mailed to approximately 335 clubs and civic groups in the state advertising the Bar's Speakers Bureau. He also noted that approximately 270 attorneys are signed up as volunteers on the Speakers Bureau and that these volunteer speakers will be utilized in the Youth Education Project.
11. Baldwin summarized the Bar's liability insurance endorsement. Haslam noted that approximately 1,000 lawyers (25 percent of active) are insured with Coregis Insurance Company and that the Bar had chosen to endorse Coregis last year following a review of 5-6 insurance carriers by the Professional Liability Insurance Committee. The Board voted to have the Executive Committee proceed to select an insurance broker.
12. Chief Disciplinary Counsel Steve Cochell reported on department statistics for the months of January and February and noted that 44 complaints were dismissed in January and 32 in February.
13. Baldwin reviewed the financial reports for the month of January and indicated that expenses were less than budgeted and income higher than budgeted. He reported that budget forecasting will begin in March. The proposed budget would be presented to the Board at the May meeting and copies of the budget would be made available to interested Bar members.
14. Legislative Affairs Committee Chair Dave Bird presented a final report on the recent legislative session.
15. Paul Moxley reported that the Committee on Professionalism, consisting of Debra Moore, Charles Brown and himself, has met several times in the past few months and is putting together a list of recommendations for Bar Commission approval. The Committee has been looking at the following ideas: (1) activate the mentor program. It could be difficult to certify mentors, but volunteers could be used as they are in the Stewart Hansen Society; (2) institute a bridge-the-gap program similar to South Dakota's but broaden to include 50 hours and make it mandatory for new admittees. Moxley indicated he would be talking with the Litigation Section about seminars that could be part of the bridge-the-gap program; and (3) study models of professionalism courses which other law schools have in place.
16. Paul Moxley reported on the Centennial Committee and indicated that the centennial play performance is scheduled for September 19 at Kingsbury Hall. Tickets will be available at the Sun Valley meeting.
17. Steve Kaufman distributed a copy of Client Security Fund Committee Chair David Hamilton's February 28, 1996 letter which outlined the committee's recommendations following their February 23rd meeting. Considering meeting time constraints, the Board voted to pay Claim No. 2 and to present the balance of the claims for the Board's review at the next meeting.

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.

Discipline Corner

PUBLIC REPRIMAND

On or about April 25, 1996, the Honorable Leslie Lewis Third District Judge entered an order publicly reprimanding attorney Larry Long. The court also placed Mr. Long on six months' probation, ordered him to attend the next available Ethics School presented by the Office of Attorney Discipline and to issue written apologies to Judge Joanne L. Rigby and client Peggy Sue McHenry. This discipline arises out of Mr. Long's use of an *undated* letter that terminated his services. Mr. Long had clients sign these letters at the time of the initial intake in case he needed to withdraw and could not locate the client.

In this case, Mr. Long presented the termination letter signed by Peggy Sue McHenry to Judge Rigby in order to withdraw from Ms. McHenry's case. Trial had been set in the matter, but with the presentation of the termination letter, Judge Rigby allowed Mr. Long to withdraw. Mr. Long presented the termination letter along with an ex parte motion and order of withdrawal of counsel. This caused the court to believe that Ms. McHenry had just terminated Respondent's counsel. It was determined that Mr. Long did not intentionally mislead the court, but that his actions negligently allowed the court to believe that the termination had recently taken place. This matter was resolved through a discipline by consent and Mr. Long agreed to stop using undated termination letters. Mr. Long stipulated to negligent violations of Rule 1.16(b) (formerly Rule 1.14(b)) Declining or Termination Representation and Rule 3.3(a), Candor Toward the Tribunal.

ADMONITION

On or about April 25, 1996, the Chair of The Ethics and Discipline Committee of the Utah State Bar signed an order admonishing an attorney for the attorney's failure to act with reasonable diligence and promptness in settling a Worker's Compen-

sation matter. The attorney failed to deliver stipulations in a timely manner and, when challenged by opposing counsel, failed to make revisions or produce medical records within deadlines. This extended the time for resolving the matter substantially. Ultimately, the Client was forced to obtain another attorney. The Attorney was admonished for violating Rule 1.3 (Diligence), Rules of Professional Conduct of the Utah State Bar.

ADMONITION

On April 25, 1996, the Chair of the Ethics and Discipline Committee issued an Admonition to an attorney upon the recommendation of a Screening Panel.

The attorney was retained on January 11, 1995, and paid a fee of $300.00 to modify the amount of child support due a client. Thereafter, the attorney failed to provide any meaningful legal services and failed to refund the unearned fee upon request. Subsequently, the client filed a complaint with the Bar, however, the attorney failed to respond to two letters from the Office of Attorney Discipline requesting information about the complaint. The attorney was admonished for violating Rule 1.2(a), Scope of Representation; Rule 1.3, Diligence; Rule 1.4(b), Communication; and Rule 8.1(b), Failure to Cooperate with the Office of Attorney Discipline.

United States Bankruptcy Appellate Panel of the Tenth Circuit
Position Announcement

Position: Part-time law clerk to Tenth Circuit Bankruptcy Appellate Panel Judges Glen E. Clark and Judith A. Boulden.
Location: Salt Lake City, Utah.
Starting Date: July 1996.
Starting Salary: $29,119 (JSP 12) to $53,195 (JSP 14), depending on qualifications.

The Judicial Council of the Tenth Circuit has approved implementation of bankruptcy appellate panels (BAP) for an initial three-year period commencing July 1, 1996, and ending June 30, 1999. Each BAP judge is authorized to employ a one-third time law clerk. Judges Clark and Boulden intend to employ the same law clerk thereby enabling the court to employ one person to serve and be compensated at the level of two-thirds of a full-time law clerk.

POSITION DESCRIPTION: The Tenth Circuit Bankruptcy Appellate Panel will hear and determine appeals originating from appealable judgments, decrees, and orders of bankruptcy courts. The law clerk will be responsible for assisting the judges in all of their duties as panel members. Some travel within the Court will be required.

QUALIFICATIONS: Graduation with a Juris Doctor degree from an accredited law school and admission to practice before the highest court of a state, territory, commonwealth, or possession of the United States. The following qualifications may affect the selection of an applicant as well as determine the starting salary: progressively responsible experience in the practice of bankruptcy law, experience as a law clerk for a bankruptcy judge or as a law clerk or staff attorney for an appellate court.

APPLICATION PROCEDURE: Qualified persons are invited to submit a current comprehensive resume. The position is open until filled. **Applications will be considered beginning May 20, 1996.** ***Duplicate*** *applications should be directed to the Honorable Glen E. Clark, Chief Judge, United States Bankruptcy Court, Room 365 Frank E. Moss United States Courthouse, 350 South Main Street, Salt Lake City, Utah 84101.* Applicants selected for an interview will be notified.

THE COURT IS AN ACTIVE EQUAL OPPORTUNITY EMPLOYER

Benefits Summary

- Sick leave and annual leave on a prorated basis depending on the number of hours worked in a pay period, unless exempt from the Leave Act.
- Choice of federal health insurance programs.
- Ten paid holidays per year.

Equal Employment Opportunity

The court provides equal employment opportunity to all persons regardless of their race, sex, color, national origin, religion, age, or handicap.

Announcement

The Utah State Bar is now accepting applications for a position on the Ethics Advisory Opinion Committee for a three-year term beginning July 1, 1996. The Committee comprises 14 members who are appointed upon application to a Bar selection committee.

The charge of the Committee is to prepare written opinions concerning the ethical propriety of anticipated professional or personal conduct and to forward these opinions to the Board of Bar Commissioners for its approval.

Because the written opinions of the Committee have major and enduring significance to the Bar and the general public, the Board solicits the participation of lawyers and members of the judiciary who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience, interest in or ability to contribute to well-written, well-researched opinions. This should be a statement in the nature of what you can contribute to the Committee.

Appointments will be made to accomplish two general goals:

- Maintaining a Committee that is willing to dedicate the effort necessary to carry out the responsibilities of the Committee and is committed to the issuance of timely, well-reasoned, articulate opinions.
- Creation of a balanced Committee that incorporates as many diverse views and backgrounds as possible.

If you would like to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest to:

Ethics Advisory Committee
Selection Panel
Utah State Bar
640 South 200 East
Salt Lake City, Utah 84111

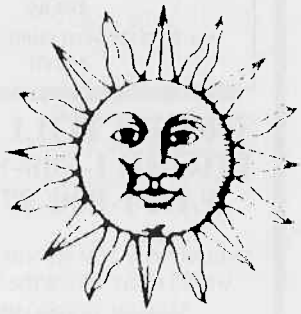
Applicants Sought for Bar's Representative to American Bar Association

The Board of Bar Commissioners is seeking applicants to serve a two-year term as the Bar's representative to the American Bar Association's House of Delegates. Each State Bar is entitled to one delegate. The term would begin at the conclusion of the ABA's Annual Meeting in August, and run through the August of 1998 Annual Meeting. Reed L. Martineau is currently serving as the Bar's delegate.

Please send your letter of application and resume to John C. Baldwin, Executive Director, Utah State Bar, 645 South 200 East #310, Salt Lake City, Utah 84111, no later than August 19, 1996.

Plan to attend the upcoming 1996 Utah State Bar Annual Meeting to be held July 3–6 in Sun Valley, Idaho

Hope to see you there!



Sun Valley

Teenage and adult volunteers needed for the Family Picnic and Carnival
at the 1996 Utah State Bar Annual Convention in Sun Valley, Idaho on July 4, 1996 at 6:30 p.m.
Call Phyllis Vetter at (801) 237-0271

Utah State Bar Approves Ethics Opinions

Ethics Advisory Opinion No. 95-08
Approved April 26, 1996

Issue No. 1: May the same Utah guardian ad litem represent the interests of siblings?
Opinion: There is no per se prohibition, and such representation is permissible where: (1) the interests of the siblings are not directly adverse, (2) the representation of one sibling will not materially limit the lawyer's representation of another sibling, and (3) it is not reasonably foreseeable that the lawyer will obtain confidential information relating to the representation of one sibling that might be used to the disadvantage of another sibling represented by the lawyer.
Issue No. 2: If the same attorney guardian may not represent siblings of a represented child, may other attorney guardians within the same office represent the siblings?
Opinion: No, except where (1) they have no opportunity to discuss the cases with each other, to access each other's files, or to share confidential information in other respects, and (2) they are not subject to common direction, planning, or supervision with respect to the conduct of the case.

Ethics Advisory Opinion No. 96-01
Approved April 26, 1996

Issue: May a lawyer representing a defendant in multiple lawsuits asserting similar claims initiate and conduct *ex parte* communications with former plaintiffs who have settled their claims?
Opinion: Yes, but only if the settling plaintiffs are not represented by counsel and only after appropriate disclosures have been made by the lawyer to the settling plaintiffs.

Ethics Advisory Opinion No. 96-02
Approved April 26, 1996

Issue: How long must an attorney retain a client's file after the attorney's representation of the client has been terminated?
Opinion: The Utah Rules of Professional Conduct require that an attorney retain or other wise dispose of a client's file so that all property is returned to its owner, the client's foreseeable interests are protected, and other legal and ethical requirements are met. The attorney's precise ethical obligations will vary depending upon several factors discussed below (see full opinion).

Ethics Advisory Opinion No. 96-03
Approved April 26, 1996

Issue: What are the ethical obligations of an attorney who has negotiated an agreement with medical providers on behalf of a personal injury client whose debts are subsequently discharged in bankruptcy?
Opinion: Absent dishonesty, fraud, deceit or misrepresentation, the attorney has no ethical obligation to honor personally the client's agreements to pay medical providers out of a settlement or judgment. Disputes resulting from the failure of an attorney to make payment for services rendered by the medical providers should be treated as questions of substantive law, including state and bankruptcy law, and should be examined under traditional contract, agency, and bankruptcy doctrines rather than as questions of the ethical propriety of the attorney's actions.

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, 645 South 200 East, Salt Lake City, Utah 84111.

NOTICE

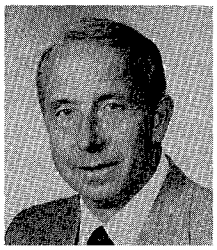
Watch for your 1996-97 licensing form in the mail during the first part of June. If you have changed your address or anticipate a change, it is important that you notify the Utah State Bar in writing at 645 South 200 East, SLC, Utah 84111, Attn: Licensing, or fax the change to (801) 531-0660. The Bar is particularly interested in receiving your firm name and E-mail address.

If you have questions call Arnold Birrell at (801) 297-7020.

Law Day Awards

By D. Frank Wilkins

On Law Day this year, May 1, 1996, The Utah State Bar honored six citizens and one law firm by presenting awards to them at a luncheon held at the Red Lion Hotel, in Salt Lake City, Utah.


Dean H. Reese Hansen

Dean H. Reese Hansen of the J. Ruben Clark Law School of Brigham Young University and Dean Lee E. Teitelbaum of the University of Utah College of Law were presented with the first awards for "Illustrious Civility in the Law", which say that these "Distinguished Deans" have: served as examples of elegant courtesy and politeness in their work as teachers and counselors of law, and this elevated civility, combined with their excellence of scholarship, professionalism, leadership and felicity of language, has infused Utah's Bar and Bench with uplift.


Dean Lee E. Teitelbaum

The Young Lawyer Division of the Bar annually honors a young lawyer who has made significant contributions in the legal or non-legal community. This year Kristin G. Brewer, Director of the Office of Guardian ad Litem, was chosen for her skill in managing programs that help children who are involved in cases of abuse and domestic disputes.

The Liberty Bell Award was presented to Non-Lawyer Dana L. Hayward, a paralegal with the legal Aid Society, who was selected for her leadership in assisting victims of domestic abuse needing protective orders.

The Scott M. Matheson awards for outstanding contributions to law-related education were presented to Kevin P. Sullivan of Ogden, a member of the law firm of Farr Kaufman Sullivan Gorman Jensen Medsker Nichols and Perkins, as well as the law firm of Richards Caine and Allen of Ogden.

Teacher Neil P. Harding, Grantsville High School, was honored as "Teacher of the Year" for his excellence in teaching and promoting legal issues and education.

Second Annual Chief Justice's Ethics Symposium
A Smashing Sucess

"What do you do when you receive a confidential fax intended for opposing counsel?"

With that question, Lawrence J. Fox, keynote speaker and moderator for the Second Annual Chief Justice's Ethics Symposium, began a morning of lively discussion centering on a series of thought-provoking hypotheticals.

The Spring program, which the Park City Bar presented for the second year at Deer Valley, was chaired by The Honorable Michael D. Zimmerman, Chief Justice of the Utah Supreme Court. The distinguished Mr. Fox, a Philadelphia litigator who is chair of the ABA Litigation Section and a member of the ABA Standing Committee on Ethics, clearly has a backup career as a stand-up comic. He kept everyone engaged and entertained, as well as informed, as he led a panel of Salt Lake litigators through increasingly murky ethical problems.

The panel consisted of Richard D. Burbidge of Burbidge & Mitchell; Thomas R. Karrenberg of Anderson & Karrenberg; Ellen Maycock of Kruse, Landa & Maycock; and Kathryn H. Snedaker of Van Cott, Bagley, Cornwall & McCarthy, all of whom shared more than a little knowledge and experience, and added some humor of their own to the general discussion. Chief Justice Zimmerman added his perspective on the issues, and contributed a few well-placed one-liners of his own.

Despite the view from the Bald Eagle Room (the kind of "bluebird day" some of us wait for all ski season), from the moment Larry Fox posed the first hypothetical, people in the room were sufficiently engaged that they actually ignored the conditions outside and joined enthusiastically in the discussion. Variations on the hypotheticals were provided by audience members who had found themselves in difficult situations (almost all of which had become humorous, after the fact). One lawyer described a situation in which she had tape-recorded a deposition, with full consent of all parties, but had forgotten to turn off the recorder when she and her client left the room, while opposing counsel remained to discuss privileged matters with his client. She apparently only discovered the problem when she went back to her office and listened to the tape. When asked how she handled the situation, she deadpanned, "We settled the case." After the laughter died down Mr. Fox opened a lively discussion on the incident with the quip that he really had not intended to provide a forum for dirty discovery tricks. At the end of the morning, all agreed that the symposium had raised real problems that actually, if (it is hoped) infrequently, arise in practice, and which present difficult ethical dilemmas that practitioners must deal with.

When the substantive part of the program ended, the slopes beckoned. Although the skiing conditions were perfect, people were unable to pass up Deer Valley's famous food before heading out to the mountain. As a compromise, most people ate outside on the deck before hitting the slopes. All reports indicate that the skiing was almost as good as the morning's session on ethics.

The day ended with an aprés ski reception for everyone, attended by Chief Justice Zimmerman, Larry Fox and the panel. Judging from the size of the crowd, very few felt compelled to return to their offices to squeeze in a couple of billables. People stayed and talked for several hours, although it is not entirely clear whether the primary topic at that point involved the ethical practice of law, or where to place one's weight on the ski in spring conditions. Undoubtedly, it was a good mix of both.

The Park City Bar Association wishes to thank everyone involved in the Symposium for their participation, their assistance, and their collegiality. "Although we have heard that this was the best ethics seminar people have attended — and probably the best seminar that ever was — we promise to outdo ourselves for the Third Annual Chief Justice's Ethics Symposium next spring," said Wendy Faber, CLE Director for the Park City Bar. "We have proven that CLE (especially ethics) does not have to emulate everyone's most boring law school class. We intend to continue our commitment to provide lively, interesting and informative CLE programs."

Ethics Opinions Available

The Ethics Advisory Opinion Committee of the Utah State Bar has compiled a compendium of Utah ethics opinions that are now available to members of the Bar for the cost of $5.00. Forty two opinions were approved by the Board of Bar Commissioners between January 1, 1988 and April 26, 1996. For an additional $2.00 ($7.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1996.

ETHICS OPINIONS ORDER FORM

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

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

Name _____

Address _____

City _____ State _____ Zip _____

Please allow 2-3 weeks for delivery.

IRS Address Changes

Non-bankruptcy Notice and Correspondence

When service on the Rocky Mountain District of the Internal Revenue Service, as an agency of the United States, is required by Rule 4(i) of the Federal Rules of Civil Procedure or by I.R.C. 7425 (c)(1) or any other non-bankruptcy provision, a copy of the summons and complaint should be sent by certified or registered mail to:

Internal Revenue Service
Rocky Mountain District
Attn: SPS Advisor
Stop 5020DEN
600 17th Street
Denver, CO 80202-2490

Bankruptcy Notices and Correspondence

The IRS will be retaining personnel in Salt Lake City to process Utah bankruptcy cases, so service under Rules 7004 and 9014 of the Federal Rules of Bankruptcy Procedure or serve for any other reason in a Utah bankruptcy case should be mailed to:

Until June 14, 1996
Internal Revenue Service
Rocky Mountain District
Stop 5021, SPS
Attn: Insolvency Director
463 South 400 East St.
Salt Lake City, UT 84111

After June 14, 1996
Internal Revenue Service
Rocky Mountain District
Stop 5021, SPS
Attn: Insolvency Director
50 South 200 East
Salt Lake City, UT 84111

Parsons Behle & Latimer Innovates a New Pro Bono Project

Parsons Behle & Latimer has created a brand new *pro bono* project in conjunction with the Legal Aid Society of Salt Lake. The Utah State Bar is pleased to announce this project.

The Legal Aid Society ("LAS"), due to its limited resources has been unable to conduct depositions in cases and has been unable to appeal worthwhile cases. Parsons Behle & Latimer will now be providing these services to LAS clients.

LAS clients will now have access to a broader range of legal services. This access to justice is what *pro bono* service is all about. Parsons Behle & Latimer is setting an excellent example with this project. They identified a pressing legal need, created an effective means for filling this need, and followed through on implementing a project.

With the depositions program in place, LAS clients will be able to garner more complete discovery information. An added feature of this program is that Eagle Reporting has graciously agreed to provide *pro bono* court reporters for these depositions. Now LAS clients will receive more extensive representation at the trial level.

The appeals portion of the project provides a valuable service as well. In addition to providing the option for appeals, the actual appeals decisions will help define law for indigent client cases. The precedence setting service will provide a valuable resources for LAS clients well into the future.

Once again, the Utah State Bar congratulates Parsons Behle & Latimer on their commitment to ensuring access to justice via their new and innovative *pro bono* project.

Two Utah Inductees in the College of Law Practice Management

The College of Law Practice Management, a non-profit corporation formed in 1993, inducted its third class of Honorary Fellows and Fellows at The Hotel Inter-Continental in Toronto, Ontario on April 20, 1996 following a full day of education experience.

Richard C. Reed of Bellevue, Washington, President of the College stated "The purpose of the College is to recognize leaders in the legal profession who have made outstanding contributions to law firm management over a period of not less than ten years, and to stimulate thought on future developments and techniques of practice management."

Those inducted were nominated and elected unanimously by the Trustees of the College after an extensive nomination process. Honorary Fellows from Utah include: Keith E. Taylor and Richard B. Turnbow.

A Call for Spanish Speaking Lawyers

The Governor's Office of Hispanic Affairs and the Tuesday Night Bar Program have come together to provide assistance to Spanish speaking members of our community. Lawyers who speak Spanish are needed to assist in this program so that Spanish speaking Hispanics can benefit from the Tuesday Night Bar Program. This program has been helping our community since March of 1995, and we need your help to continue. If you speak Spanish and are interested in participating in this program, please contact Kim Williams at 531-9077, Utah State Bar, or Lorena Riffo, Governor's Office of Hispanic Affairs at 531-8850.

2nd Annual Live CLE Broadcast From Cedar City and the Shakespeare Festival

The Utah State Bar will again sponsor a live broadcast seminar in August, originating in Cedar City in conjunction with the Shakespearean Festival. The seminar will be broadcast live to Logan, Ogden, Vernal, Roosevelt, Delta, Richfield, Moab and Salt Lake City. The program, entitled "Everything You Want to Know About Business Law, But Were Afraid to Ask", will be worth 4 hours of live CLE credit. Topics to be discussed include securities problems in business deals, choice of entity and non compete agreements, tax considerations and employer/employee issues. Look for a more detailed brochure in your mail. If you have any questions, please contact Monica Jergensen, CLE Administrator, at (801) 531-9095.

Prosecution of Unauthorized Practice of Law Cases in Utah

The Utah Supreme Court's recent decision in *Utah State Bar v. Summerhayes & Hayden* held that third-party adjusting, in which an adjuster represents a stranger to an insurance contract on a claim asserted against a tortfeasor, constitutes the unauthorized practice of law. See *Utah State Bar v. Summerhayes & Hayden,* No. 940375, 277 Utah Adv. Rep. 17 (Nov. 3, 1995). In this context, the Court discussed what is meant by the "practice of law:"

> The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent . . . . It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising and assisting others in connection with their legal rights, duties, and liabilities . . . . It also includes the preparation of contracts and other legal instruments by which legal rights and duties are fixed.

Id. at 13 (citations omitted). The Court concluded that the practice of third-party adjusting falls within the definition of "the practice of law" because the public adjuster represents injured clients in making a claim against an insurance company that insures or indemnifies a person who could be liable for the injury. Id. at 13-14. Such representation necessarily involves legal knowledge and skill, and the ability to apply complex, abstract legal principles. Finally, because neither the Court nor the Utah State Legislature has authorized third-party adjusters to practice law, the Court held that the practice of third-party adjusting is the unauthorized practice of law. *Id.* at 14-15.

Clearly, the unauthorized practice of law can take many forms. Consistent with the Court's view of the nature of "the practice of law," the Utah State Bar has prosecuted a number of cases, in a variety of contexts, that involved the unauthorized practice of law. Those cases are summarized as follows:

1. *Utah State Bar v. Benton Peterson*

The Hon. Leslie Lewis, Third District Judge, issued a permanent injunction on July 7, 1995, restraining Benton Peterson, a paralegal, from engaging in the unauthorized practice of law. A jury found that Mr. Peterson prepared divorce complaints and decrees of divorce on behalf of multiple individuals. Mr. Peterson has appealed the injunction. The case is pending before the Utah Supreme Court.

2. *Utah State Bar v. Lawrence Jacobson dba Administrative Specialists.*

The Hon. Kenneth Rigtrup, Third District Judge, issued a permanent injunction on April 5, 1996, restraining the unauthorized practice of law by Lawrence Jacobson, a paralegal doing business as Administrative Specialists, from providing legal advice to third parties on domestic law matters and defending traffic violations. The injunction also restrains Mr. Jacobson from drafting pleadings on behalf of third parties for filing in state district courts and from holding himself out as an attorney.

3. *Utah State Bar v. Gary T. Thompson and Emily Sutton dba Legal Access.*

The Hon. Tyrone Medley, Third District Judge, issued a permanent injunction on November 8, 1994, restraining the unauthorized practice of law by Gary Thompson and Emily Sutton who operated Legal Access, a divorce and bankruptcy clinic.

In July 1995, the court issued on Order to Show Cause for contempt against both defendants. On May 3, 1996, Emily Sutton agreed to entry of an order finding her in contempt of the Court's injunction order and stipulated to entry of a judgment for a portion of the fees incurred in the prosecution of the Order to Show Cause and restitution to a client-victim.

4. *Utah State Bar v. Tom Montez dba Eagle Paralegal*

On June 12, 1995, the Utah State Bar filed a complaint in Second District Court against Tom Montez, a paralegal, for practicing law without a license. Mr. Montez allegedly prepared pleadings on behalf of a couple seeking to adopt a child and accepted a retainer and represented to another individual that he would assist him in preparing an immigration application. The case is pending before the Hon. Pamela Heffernan.

5. *Utah State Bar v. Eugene Till*

On February 27, 1996, the Utah State Bar filed a complaint in Third District Court against Eugene Powell Till, the registered agent for a business trust entitled Great Southern, which is allegedly doing business as Plan Master.

The complaint alleges that Mr. Till (1) gave legal advice and drafted articles of incorporation for a non-profit organization and charged a fee for services; (2) drafted an estate plan on behalf of an elderly individual, which consisted of a trust, a will and durable power of attorney for health care. In addition, the complaint alleges that Mr. Till provided the client with legal advice regarding estate planning and how to transfer assets to fund the trust. The complaint alleges that the legal advice rendered was incomplete and would have resulted in injury to the client's estate. The case is pending before the Hon. Glenn Iwasaki.

6. *Utah State Bar v. Tom Wood*

On February 22, 1996, the Utah State Bar filed a complaint in Third District Court against Tom T. Wood, an attorney licensed to practice law in Missouri and previously licensed to practice law in Hawaii. He is not licensed or admitted to practice law in the State of Utah. Mr. Wood allegedly assisted an individual in preparing eviction documents. Mr. Wood allegedly also was operating out of the office of Cornelius Hyzer, a disbarred attorney, and signed pleading on behalf of Mr. Hyzer. The case is pending before the Honorable Frank Noel.

Bankruptcy Open House

All practitioners interested in occasional case-by-case employment by the District of Utah Panel of Chapter 7 Bankruptcy Trustees are invited to a Bankruptcy Open House to be held on June 25, 1996, from 2:00-5:00 p.m. at #9 Exchange Place, Suite 100, Salt Lake City, UT 84111, sponsored by the Office of the United States Trustee. A formal program discussing the types of professionals hired by trustees and the roles various professionals play in bankruptcy, will be held from 2:00-3:00 p.m. Between 3:00-5:00 p.m. interested professionals will be provided an opportunity to meet the Chapter 7 Trustees in an informal setting. For more information, please contact Laurie Crandall at 524-3031 or Peter Kuhn at 524-5105.

State of Patents in Utah

By V. Roland Smith

ROLAND SMITH serves as Chair of the 160-member Intellectual Property Law Section of the Utah State Bar. Mr. Smith also chairs the Patent, Trademark & Copyright Section of the National Lawyers Association; enjoys membership in the American Intellectual Property Law Association; is licensed to practice in all matters before the United States Patent and Trademark Office; and is admitted as an attorney and counselor of the United States Court of Appeals for the Federal Circuit.

The Utah bar is accomplishing great things. The efforts of the Intellectual Property Section are sometimes overshadowed by all of the important activity. The Patent bar is even a lesser portion of that. This obscure faction of a relatively obscure Section is really quite an important and dynamic group from a commercial perspective. I trust I always knew this, but recent experience provided a creschendoing perspective.

In February, the Licensing Executive Society, a diverse group of North American professionals interested in intellectual property, held its annual Winter meeting in Salt Lake. Two observations arose from my discussion with its members. First, those familiar with Utah's patent attorneys' reputation overwhelmed me with praise for the group. Second, those not so familiar with us, were surprised to learn that we are almost sixty strong.

After the proceedings I surveyed some facts relevant to my observations. I looked up patent attorney populations using the Martindale Hubbell Law Directory and compared those with general population statistics from a general reference work. The numbers were astonishing.

Salt Lake City enjoys the greatest number of patent attorneys of all cities between the Mississippi River and the West Coast, excepting only Dallas and Houston, Texas, which have vastly larger populations. Utah has more patent attorneys than fourteen Western States (Alaska, North and South Dakota, Wyoming, Hawaii, Idaho, Montana, Kansas, Arkansas, Nebraska, Nevada, New Mexico, Iowa, and Arizona) – combined! A national trade publication recently ranked two Utah firms on its list of top United States patent firms. Perhaps the most impressive fact is that Utah has the highest per capita concentration of patent attorneys of any Western state, and the third highest in the Nation, after New York, Minnesota, and Virginia (the physical location of the United States Patent and Trademark Office).

How did this come about? Credit must primarily go to Utah inventors, authors and programmers, and the enterprises who employ them. These people produce the commercially viable innovations and expressions that keep patent attorneys busy. All evidence shows that creative genius is alive and well in Utah. Karl Cannon, a local patent lawyer and columnist, recently estimated that Utah ranks 17th nationally in per capita patents issued. As a representative and member of the Utah patent law community, my hat is off, first and foremost, to the enterprises that support them.

A second contributing factor is the spirit, quality and dedication of Utah patent attorneys. This distinct community would not have developed without the repeat business and referrals of existing clientele. Business would not have thrived, as it did, if Utah patent attorneys had not consistently out performed East and West Coast competition. It speaks well that Utah patent attorneys attract business here from all over the World.

Some may say that it is unfortunate that Utah patent attorneys are losing our "best kept secret status." Ironically, the demand for services may threaten the customary high quality. Fortunately, however, the consumers of such services and their general business counsel have been shrewd enough to demand continuing qualified patent representation as the Utah patent bar grows.

Growth could not occur over-night. Becoming a patent lawyer requires: 1) admission to a state bar; 2) an in-depth scientific education equivalent to a bachelors degree in such as physics, chemistry or engineering; 3) otherwise demonstrating fitness to practice before the United States Patent and Trademark office; and, 4) passing a rigorous bar examination offered once per year (whose pass rate fluctuates in the 30-50% range).

It is imperative that patent, trademark and copyright work is only trusted to fully qualified and experienced counsel who maintain their skills and a full docket of such cases. Patent practice is not a simple affair. The body of relevant law is extensive. Complex governing statutory and case law have evolved over the entire history of our Nation, patent, trademark and copyright law has specialized case reports and a specialized Court. In 1983 the United States Court of Appeals for the Federal Circuit was instituted as a substantive court to hear appeals in these areas and to normalize circuit disharmony. There are several levels of administrative rules which govern conduct before the relevant agencies. The informal rules alone constitute about ten thousand pages of text.

My hat is off to those patent attorneys who provide uncompromisingly focussed, quality services; who make significant tangible and intangible contributions to the local economy; who keep pace with an ever changing and expanding body of law; and, who identify, train and employ new patent attorneys to keep up with the demand created by past successes.

One of my goals as Chair of the Intellectual Property Section, has been to bring home the message that patent law is thriving here. There is no need for Utah enterprises, authors, or inventors to look outside the borders of this State for intellectual property representation. This will continue to generate positive results: the Utah intellectual property community will increasingly import outside wealth into our economy; Utah's already positive image as a high-tech center will expand; the ancillary demand for general legal services will increase; and, perhaps most importantly, authors, inventors and their related enterprises will receive quality representation.

Another objective of the Intellectual Property Section is to promote understanding of the social value of patent, trademark and copyright law. Contemplate with me the impact of these systems on our quality of life. The founding fathers afforded constitutional status to patents and copyrights – "To promote the Progress of Science and the useful Arts." Time has proven that social systems which do not reward authors and inventors through progressive intellectual property law suffer from stagnation. I invite you to ponder whether the industrial revolution would have occurred without the respective patent systems of the United Kingdom and the United States. The coinciding geography and chronology are not merely coincidental.

This July we have an opportunity, in conjunction with the Annual Meeting of the Utah Bar, to hear and associate with three significant players in this arena: Judge Randall R. Rader, of the United States Court of Appeals for the Federal Circuit; Brian Farney, General Counsel for Micron Technology, Inc.; and, Ronald L. Lyons, director of Intellectual Property Law for Thiokol Corp. On behalf of the Intellectual Property Section, and the Bar at large, we invite all to attend.

Announcing the *New* Utah State Bar Legal Assistants Division

The Utah State Bar is pleased to announce the creation of a Legal Assistant Division. On March 26, 1996 the Utah Supreme Court authorized the Bar to create an affiliate status for legal assistants to foster a greater understanding of their role in providing legal services, to enhance the availability of public service opportunities, and to improve communications among lawyers and legal assistants.

There are some criteria to obtain affiliate status, such as having a sponsoring attorney and filing annual certifications. The first year's membership fee is only $15.00 and includes a certificate of membership in the division. For more information on affiliate membership criteria and to obtain certification forms, please contact Toby Brown at the Utah State Bar (297-7027).

We are now soliciting legal assistants to join this new division of the Bar. If you know of any legal assistants interested in joining this new division, please have them contact Toby Brown. Thanks!

Attorneys Needed to Assist the Elderly

Needs of the Elderly Committee Senior Center Legal Clinics

Attorneys are needed to contribute two hours during the next12 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, participating 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.

continued from pg 12

[38]33 U.S.C. §1341 (West 1986).

[39]114 S. Ct. 1900 (1994).

[40]Id. at 1909-10.

[41]Id. at 1912-13.

[42]33 C.F.R. Part 330, App. A (1995).

[43]60 Fed. Reg. 15440.

[44]33 C.F.R. §330.5(a)(26) (1995).

[45]*See* 49 Fed. Reg. 39484.

[46]RGL #88-06: Nationwide Permit Program. (June 27, 1988).

[47]33 C.F.R. §325.2(e)(2) (1995).

[48]60 Fed. Reg. 37280 (July 19, 1995).

[49]*See, e.g., Florida Rock Indus. v. U.S.,* 8 Cl. Ct. 160 (1985), *aff'd in part, vacated in part and remanded,* 791 F.2d 893 (Fed. Cir. 1986), *cert. denied,* 479 U.S. 1053, *on remand,* 21, Cl. Ct. 161 (1990); *Loveladies Harbor v. U.S.,* 21 Cl. Ct. 152 (1990).

[50]*See Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985).

[51]*Id.*

[52]*Bowles v. Army Corps of Eng'rs.,* 841 F.2d 112 (5th Cir. 1988).

[53]33 U.S.C.A. §1318 (West 1986 and Supp. 1995).

[54]33 U.S.C.A. §1319, 1344(s) (West 1986 and Supp. 1995).

[55]33 U.S.C.A. §1319(g) (West Supp. 1995).

[56]33 U.S.C.A. §1319(d) (West Supp. 1995).

[57]33 U.S.C.A. §1319(c) (West Supp. 1995).

[58]*Id.*

[59]*Id.*

[60]*Id.*

[61]*3M v. Browner,* 17 F.3d 1453 (D.C. Cir. 1994), applying §2462 to enforcement action under the Toxic Substances Control Act.

[62]884 F. Supp. 404, (D. Colo. 1995).

[63]*Id.* at 408. *Contra U.S. v. Reaves,* No. 94-925-Civ, 1996 WL 194788, at 4 (M.D. Fla. Feb. 22, 1996), holding that the five-year statute of limitations had not begun to run on an action for penalties or injunctive relief commenced thirteen years after the placement of fill, because an unpermitted discharge of dredge and fill material is a continuing violation for as long as the fill remains.

[64]821 F. Supp. 690 (N.D. Ga. 1993).

[65]Utah Code Ann. §19-5-107 (Michie 1995).

[66]Utah Code Ann. §73-3-29 (Michie Supp. 1995).

[67]*See, e.g.,* Utah Code Ann. §§23-15-3--7 (Michie 1995).

1996 Annual Convention Sponsors

The Annual Convention Committee extends its gratitude to the following sponsors for their contributions in making this year's convention successful and enjoyable. Please show your appreciation for their donation by supporting these firms and businesses:

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ANNOUNCEMENT OF
JUDICIAL VACANCY
June 12, 1996

ANNOUNCING:

That applications are now being accepted for the position of district court judge in the Third District and Fourth District.

The vacancy on the Third District bench is the result of the retirement of Judge Kenneth Rigtrup. The Fourth District Court vacancy is created by the retirement of Judge Boyd L. Park from the bench.

Completed application forms must be received by the Administrative Office of the Courts no later than 5:00 p.m., ***July 12, 1996.***

ELIGIBILITY REQUIREMENTS:

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

TO OBTAIN APPLICATION FORMS AND INSTRUCTIONS:

Copies of forms required in the application process and instructions are available from the Administrative Office of the Courts. Forms and instructions also are available in the following word processing formats: ASCII Text; WordPerfect 5.x; WordPerfect 6.x; Microsoft Word 5.x; Microsoft Word 6.x; Word for macintosh 5.x.

To obtain the forms and instructions in a word processing format, provide a return Internet E-Mail address or a 3.5" disk to Marilyn Smith at any of the following:

- Internet E-Mail: marilynsm@courtlink.utcourts.gov
- FAX: (801) 578-3843
- Administrative Office of the Courts
  Attention: Marilyn Smith
  230 South 500 East, Suite 300
  Salt Lake City, Utah 84102

When requesting forms and instructions in a word processing format, indicate the requested format. The applications form, waiver forms, and instructions are available in all of the above formats to subscribers of the Utah State Court Bulletin Board.

SELECTION PROCESS:

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

At its first meeting the Nominating Commission reviews written public comments. This meeting is open to the public. To comment upon the challenges facing Utah's courts in general, or the Third District Court or Fourth District Court, submit a written statement no later than Aug. 10, 1996, to the Administrative Office of the Courts, Attn: Third or Fourth Judicial District Nominating Commission.

TERMS OF EMPLOYMENT:

A. BENEFITS:

Salary as of July 1, 1996, is $89,550 annually. • 20 days paid vacation per year • 11 paid holidays • $18,000 term life insurance policy (with an option to purchase $200,00 more at group rates) • Choice of five Medical and Dental Plans. Some plans paid 100% by the state, others requiring a small employee contribution.

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

B. JUDICIAL RETENTION:

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

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

C. PERFORMANCE EVALUATION:

All sitting judges undergo a performance review after the first year in office and biennially thereafter. Judges not up for retention election can use the performance review results (which are confidential) as a guide for self-improvement. Judges up for retention election are subject to Certification Review by the Judicial Council. Prior to the election, the Council publishes in the voter information pamphlet and in a newspaper of general circulation in the judicial district whether the judge met or failed to meet the following evaluation criteria:

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

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

Mock Trial Thanks

From March 25 through April 30, one-hundred-nine (109) death penalty sentencing hearings for convicted murderer J.C. Davis were held in Utah courtrooms. At those hearings, one-hundred-eighty-six judges, attorneys, paralegals, and community representatives patiently listened to the testimony and arguments of more than 1,000 junior and senior high school students statewide. Sixty-two attorney coaches helped those students prepare their testimony and arguments.

The Utah Law-Related Education Project and the Utah State Bar recognize and sincerely thank these judges, attorneys, and community members who invested their time and talent in this enduring educational effort. These volunteers' significant contributions leverage an $11,000 cash investment into a program valued in excess of $250,000. THANK YOU!

1996 Mock Trial Attorney Coaches

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Jensie Anderson
Laura Arial
Tony Baird
Diane Banks
Hon. Bill Barrett
Emily Bean
Joseph Bean
Kevin Bennett
David Blackwell
Thomas Blonquist
Craig Bolt
Mike Bouwhuis
Richard Burbidge
Jeffery Burton
John Cawley
Mike Christensen
Martin Custen
Bruce Dibb
David Dillon
Susan Dunn
Craig Embley
Burce Embry
Bruce Evans
Danny Frazier
Steve Garside
Charles Hanna
Rein Heymering
Randall Holmgren
Miles Jensen
Kim Jones
Mike Keller
Margaret Lindsay
Rebecca Long
Kim Luhn
Julie Lund
Scott Marquardt
Brendan McCaullagh
Matt McNulty
Hon. John Memmot
Doug Neeley
John Neville
Ronald Perkins
Warren Peterson
Keith Pope
Brent Rose
Christina Schmutz
Tom Seiler
Greg Skordas
Lt. Col. Ret., R. Slipsky
Kevin Sullivan
Anthony Thurber
Bentley Tolk
Charles Thronson
Dave Tuckett
Ken Wallentine
David Weiskopf
Hon. Brent West
Hon. D. Frank Wilkins
Kent Winward
Scott Wyatt
Don Young

1996 Mock Trial Volunteer Judges

Robert Adkins
Steve Alder
John Allan
Bernie Allen
David Allred
Kari Allred
Stephanie Ames
Jensie Anderson
Hon. Lyle R. Anderson
Michael Anderson
Junior Baker
John Baldwin
Georgia Yardley-Barker
Paul Barton
David Berceau
Hon. Judith Billings
Stephanie Bird
Gary Blatter
Shirley Bleake
Mike Bouwhius
Lynn Bradak
David Broadbent
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John Caine
Merlin Calver
Joe Chambers
Ralph E. Chamness
Terry Christiansen
Kathleen Christy
Tom Clawson
Steve Combe
Glen A. Cook
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Burt Havas
Edward Havas
Melissa Hawkley
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Wanda Manning
Windy Manning
Mitch Maughan
Cheryll May
Patty McCracken
Kevin McGaha
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Sam McVey
Judy Mickelson
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Tom Mitchell
Eric Mittelstadt
John Morrison
Bob Morton
Jim Moses
John Musselman
Jennifer Nakai
Lori W. Nelson
Pam Nelson
Carolyn Nichols
Ron Nichols
JoAnn Nielsen
Mike Norman
Marilyn B. Noyes
Michael Olmstead
Kelli Olson
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Steve Owens
Kris Pace
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Steven Payton
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Randy Phillips
Sandra Powell
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Randall Richards
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Daniel Sam
Dean Saunders
Gayanne K. Schmid
Robert Schumacher
Mary Schwab
JoAnn Seghini
Brook Sessions
JoAnn Shields
Greg Skordas
Kevin Smith
Kent Snider
Ann Sosted
Ann Steele
Carolyn Stewart
Robert Stott
Mark K. Stringer
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Alex Walker
Virginia Ward
Deanna Lasker-Warden
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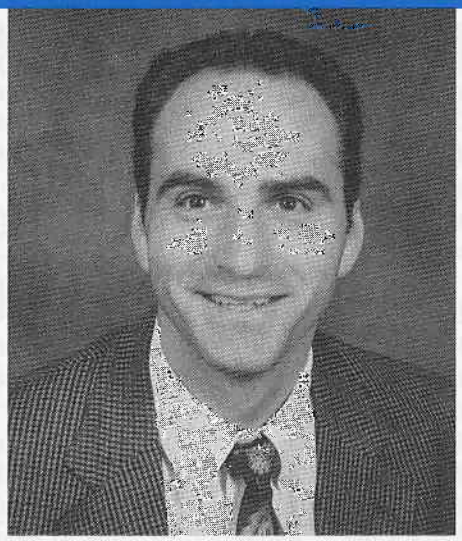


YLD Projects Benefit Community and Bar

By Dan Andresen

Each May 1 Law Day is celebrated throughout the country in a variety of ways by a variety of people. The Young Lawyers Division ("YLD") of the Utah State Bar sponsors two events that reach literally thousands of people, both lawyers and non-lawyers.

The annual Law Day Luncheon is an opportunity for lawyers, family, staff, and others to have lunch and listen to knowledgeable and entertaining speakers celebrate, explain and sometimes critique, our legal system. This year's speaker was the Honorable Lloyd George, Chief Judge for the District of Nevada. In addition to many other national committees, Chief Justice William Renquist appointed Judge George as an American representative to the International Judiciary Committee. In this capacity Judge George has traveled to many different countries to lecture on the U.S. Constitution and on the American Judicial System. Judge George also served on the drafting committee for the Tajikhistan Constitution. (Tajikhistan is a former Soviet Republic). Judge George has also been actively involved in assisting in the creation of judicial systems other former Soviet Republics.

Judge George's experience with the International Judiciary Committee, along with his many years experience as a practitioner and a judge, made him a perfect speaker on this year's Law Day theme "The U.S. Constitution – The Original American Dream". Judge George told of the numerous difficulties that the former Soviet Republics are having in their attempt to create constitutional democracies. While many countries wish to follow the example of the U.S. Constitution, Judge George said that the power structure that exists in the countries are unwilling to implement the strict separation of powers embodied in the U.S. Constitution. The court systems of the many countries are simply extensions of the executive branch of government. The judges in these systems are underpaid and directly subject to political pressure.

Judge George contrasted the state of affairs in those countries with the independent nature of the judicial system in this country. Judge George reaffirmed the importance of the role of the judicial system as a check on the power of the legislative and executive branches of government. He also stressed the importance of our role as attorneys as the champion of individual rights.

Also on May 1, the second annual YLD Call-A-Lawyer project was held. In conjunction with AT&T and Fox 13 Television, the YLD recruited approximately one hundred lawyer volunteers to take phone calls between 7:00 pm and 10:00 pm. Fox 13 Television advertised the event throughout its newscasts during the day and, during prime time, ran messages across the bottom of the screen that lawyers will be available to receive calls concerning access to the judicial system. While the numbers for this years Call-A-Lawyer Program were not available at the time this article was written, last year fifteen hundred calls were answered by forty attorneys and fifteen thousand calls were attempted.

In conjunction with the Call-A-Lawyer project YLD would like to thank the following law firms for their participation of this project. These law firms donated their space and phone lines to the volunteers so the calls could be received. Without the generous support of these law firms the Call-A-Lawyer project would not be possible. The law firms which donated phone lines and space are Holme Roberts & Owen, Snow Christensen & Martineau,

Kimball Parr Waddoups Brown & Gee, Ray Quinney & Nebeker, Kirton & McConkie, and Fabian & Clendenin.

While the Law Day activities have become the most visible of the YLD projects, the YLD organizes and runs a number of other projects throughout the year which are just as important as the Law Day activities. Although the list of YLD projects is too long to review each one in this article, I would like to review a few of them to give you an idea of the type and scope of the projects YLD runs each year.

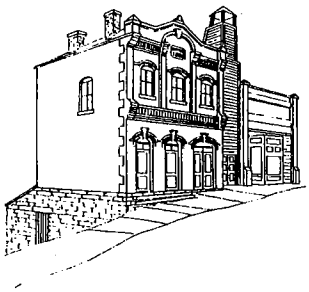
The YLD Needs of Children Committee has helped create a volunteer guardian ad litem project in conjunction with the Third District Court. The YLD has been instrumental in setting up the training program for volunteer guardians ad litem, who take on pro bono cases and represent the interests of minor children in custody, abuse, and neglect type cases. Thirty nine new guardians ad litem recently went through the training program and are now accepting cases.

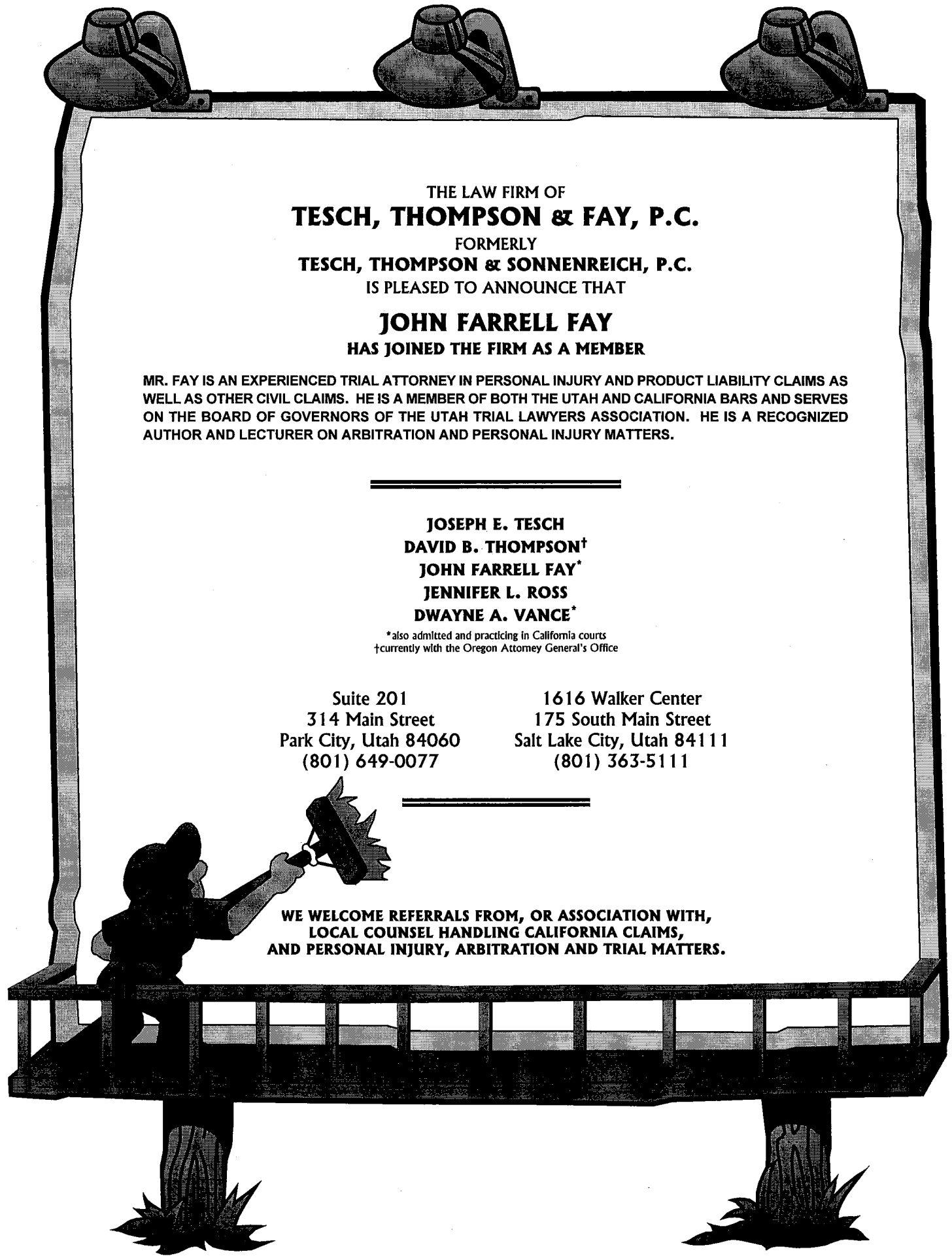
For years the YLD has sponsored the Tuesday Night Bar Program where six to eight YLD members are available each Tuesday night at the Utah Law & Justice Center to address the legal problems of individuals who are having trouble accessing the judicial system. This project assists approximately fifteen hundred (1500) citizens per year with no cost to any of the participants.

In April, the YLD sponsored a service project in conjunction with the YWCA Women's Shelter. Approximately forty to fifty YLD members and others participated in the service project over a four day period. With the help of the volunteers, the YLD was able to remodel the Women's Shelter portion of the YWCA, which includes nineteen separate rooms for women and children who are in difficult circumstances. The Women's Shelter assists hundreds of women and children each year. The YLD volunteers were able to repair walls, paint the entire floor, install additional lighting, remodel phone areas, as well as provide a thorough cleaning for the entire area of the building.

In addition to its community service type projects, the YLD is also actively involved in assisting its membership in the practice of law and the transition from law student to practitioner. Each year the YLD sponsors a social event for new admittees to the Bar. This is an opportunity for those individuals who have passed the Bar to come to the Law & Justice Center and be welcomed not only by the YLD, but also by officers of the Utah State Bar and Salt Lake County Bar. The YLD actively participates in the Bridge the Gap Program for new admittees to the Bar and also sponsors ongoing brown bag CLE sessions which target areas specifically relevant to young lawyers.

As you can see, the YLD has been active this past year and many YLD members have devoted a substantial amount of time in making these programs work. However, we always have a need for more people to participate in YLD programs. If you would like to participate in any of the YLD programs we would love to hear from you. You can contact me at #366-7471. I hope to hear from a number of you soon.





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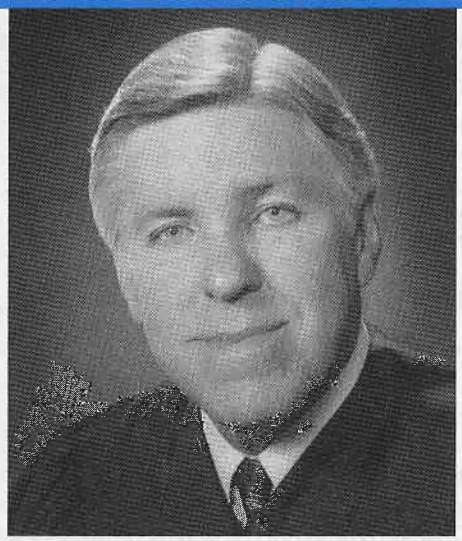

Some Resolutions of a New Judge

By Judge Robert K. Hilder

JUDGE HILDER was born and raised in Sydney, Australia, emigrating to Utah in 1977 where he attended the University of Utah (B.S. 1981, J.D. 1984). He was appointed to the Third District Court by Governor Mike Leavitt in August, 1995. Judge Hilder clerked for Christensen, Jensen & Powell (now Christensen & Jensen) during law school and joined the firm upon graduation. At the time of his appointment, Judge Hilder served as the firm's managing director. His practice stressed civil litigation, covering a wide range of specialties. He is presently assigned to the Third Circuit Court, Salt Lake Department.

I write this article reluctantly. One of my former partners warned me last year that if I had the effrontery to write a "view from the bench," before I could reasonably claim to develop a legitimate view, any remaining respect for me would evaporate. Nine months of judicial service will probably fail to satisfy him, but perhaps it is not too soon to make some commitments to the bar, the public, my colleagues on the bench, and perhaps most important, myself, about how I plan to conduct myself as a judge.

My first nine months have been spent primarily as a circuit court judge with an overwhelmingly criminal calendar. In that time I have probably handled eight to ten thousand matters in court – enough to remind me that the business of law is people. As Robert T. Noonan, Jr. stated: "No person itself, the law lives in persons."[1] Many of these people are in a courtroom for the first time. Their view of the law, and of courts, if any, is shaped by television, movies, and the media. They want "justice," but they are not at all sure the courts are designed to dispense justice, at least not to them. They are, for the most part, the less affluent, the less educated, the less influential, and they are conscious of their condition.

These people, in their hearts, might agree with Thucydides: "You know as well as we do that right, as the world goes, is only in question for equals in power; the strong do what they can, and the weak do what they must." I believe and am pledged to the notion that this is not the reality in our Utah courts, but the cynicism, or at least skepticism, about equality under the law prevails. Many believe that equality under the law goes only as far as Anatole France suggested: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges."

Clarence Darrow is supposed to have said that: "in reality there is no such thing as justice either in or out of court. In fact, the word cannot be defined." Conceding the difficulty of definition, and even conceding that many decisions a judge is bound to make fall short of anyone's ideal definition of justice (e.g. what would happen in Utopia so often invoked by my contracts' professor, Dean Walter Oberer), I resolve to advance the cause of justice as far as it is in my power to do so. I will approach the matter, I hope, more like Judge Learned Hand, who rather than defining the word, made the following practical observation:

> Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily on the judge.

Brown v. Walter, 62 F.2d 798, 800 (2nd Cir. 1933).

The following resolutions, therefore, concern some of the things I can do in the courtroom. The list is not complete, and further experience will no doubt suggest certain revisions, but this is where I stand from the lofty perspective of nine month's

experience. (Note: One study suggests that the socialization of a judge takes at least fifteen years.[2] Without disputing the study's findings, I can't help but wonder what happens to the unfortunate litigants during this prolonged process.)

1. Be conscious of the courtroom atmosphere.

The courtroom is my workplace. For the typical lawyer, it is a familiar environment, but for litigants, witnesses, and jurors, the courtroom can be a strange and forbidding place. A lesson in how not to put a witness at ease was provided by the King (acting as judge) in Lewis Carroll's *Alice's Adventures in Wonderland:* "Give me your evidence," said the King (to the Hatter), "and don't be nervous, or I'll have you executed on the spot."

The importance of a courteous and patient reception was recognized as long as 5,500 years ago. Ptah Hotep, an official of ancient Egypt, reportedly gave the following instruction:

> If thou be a leader, be gracious when thou hearkenest unto the speech of a suppliant. Let him not hesitate to deliver himself that which he hath thought to tell thee but be desirous of removing his injury. Let him speak freely that the thing for which he hath come may be done.[3]

Unfortunately, judges cannot remove, or even redress, every injury, but Ptah Hotep notes also the merit contained in the hearing itself: "Listen attentively to the petitioner, for a good hearing is a soothing to the soul."[4] I will, therefore, strive to provide the "good hearing," even though the outcome may not be all the petitioner desires.

2. Hear patiently and avoid hasty judgment.

John Bunyon recorded the following exchange:

> *Judge:* Thou runagate, heretic and traitor, hast thou heard what these honest gentlemen have witnessed against thee?
>
> *Faithful:* May I speak a few words in my own defense?
>
> *Judge:* Sirrah, sirrah, thou deservest to live no longer, but to be slain immediately upon the place; yet that all men may see our gentleness to thee let us hear what thou, vile runagate, hast to say.[5]

No judge wants to act with such haste, but the temptation does arise. After only a few weeks on the bench, I recall starting to state my decision after a preliminary hearing, when defense counsel said something like: "Your Honor, I apologize for interrupting, but would it be too much trouble if I made my argument before you finish your decision?" I was embarrassed and, I hope, instructed.

3. Communicate clearly.

The aim of every judge and lawyer should be to communicate effectively. It is harder than it seems. I thought I was doing fairly well, particularly when speaking directly to criminal defendants, but on a recent visit to the county jail I learned otherwise. I was at the jail participating in a rehabilitation class I often order. Coincidentally, four of the twelve inmates had been sentenced by me. They received me with courtesy and good humor, but as I left, one young man, who was sentenced three weeks earlier, approached me: "Judge, I don't want to be rude, and I am sure you were fair, but could you please explain what my sentence is; I really didn't understand you."

"I resolve, therefore, to follow the evidence and the law to the indicated conclusion, rather than to seek to shape the law to justify a desired conclusion."

I resolve, therefore, to do better, and particularly to ask questions of unrepresented parties to measure understanding. I will also strive for brevity, a hallmark of effective communication, but I doubt I will do as well as Justice Harold H. Burton, during a sentencing for murder:

> *Defendant:* "As God is my judge, I didn't do it. I'm not guilty."
>
> *Justice Burton:* "He isn't, I am, You did. You are."[6]

4. Act with integrity.

I have learned quickly that judges are not insulated from external pressures. Indeed, it is to be expected that citizen groups, the media, political entities, and even erstwhile friends, will seek to influence decisions. While it is the expected role of these groups and individuals to advance their causes however they legitimately can, it is the essence of the judge's role, and the measure of his or her integrity, to decide on the evidence. The task is complicated, however, by the realization that Lord MacMillan's comment, "in almost every case except the very plainest, it would be possible to decide the issue either way with reasonable justification,"[7] has more than a kernel of truth.

I resolve, therefore, to follow the evidence and the law to the indicated conclusion, rather than to seek to shape the law to justify a desired conclusion. By so doing, I hope to avoid the cruelty of which Sir Francis Bacon spoke:

> Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws.[8]

In the criminal law particularly, judges must understand their role if they are to fulfill their responsibilities with integrity and courage. As we are taught by our peers:

> Judges must remember why they are on the bench. They are not part of the police department, the prosecutor's or the public defender's office. They are there to do justice according to settled principles, not according to what is popular at the moment.[9]

5. Respect, as far as possible, the dignity and privacy of the individual.

Speaking of his wartime work as a writer of documentaries, John Mortimer (author of the Rumpole series) says: "I had the pretext, which the law has also given me, for talking to an endless variety of people and asking them impertinent questions."[10] That license can be abused. Not every impertinent question needs to be asked, and I resolve not to ask questions merely to satisfy my curiosity, or to allow lawyers to inquire unnecessarily.

When the questions must be asked, where possible I will limit the negative effect. For example, I have learned that "disorderly conduct" covers a wide range of human behavior, some merely foolish, some quite humiliating to confess. Now, when I take a guilty plea to disorderly conduct, I always have the defendant approach the bench to give those details I must have to fairly sentence.

6. Remember, I was once a lawyer.

Judges were lawyers once. Both lawyers and judges can forget this. The roles *are* different, and a judge cannot be effective if he or she identifies too closely with the advocate's role, but my lawyer origins should provide empathy for the difficulties

of the lawyer's role.

Accordingly, I resolve to remember that the courtroom is not my exclusive domain. The courtroom is also the lawyer's arena, and she belongs there at least as much as I do. I will also remember the crushing workload of most litigators. As a general rule, whatever preparation or additional work I may do outside the courtroom pales into insignificance when compared to the lawyer's task in preparation, as well as juggling numerous other matters while trying to attend to the matter in my court.

I will also remember the ever-present pressure of pleasing the client. Except in cases of egregious incompetence, I will seek to never embarrass a lawyer. To the contrary, I will try to follow the counsel of Sir Francis Bacon:

> There is due to the advocate come commendation and gracing, where causes are well handled and fair pleaded; especially towards the side which obtaineth not; for that upholds in the client the reputation of his counsel . . .[11]

CONCLUSION

These resolutions are probably both premature and idealistic. It is certainly foolhardy to share them with so many lawyers who will gladly point out to me (or, more likely, to others) each occasion where I violate my own canons. When this does occur, I only ask that you be kind.

[1]Robert T. Noonan, Jr., *Persons and Masks of the Law* (New York: Farrar, Straus and Giroux, 1976), p. 4.

[2]Alpert, Atkins and Ziller, "Becoming a Judge: The Transition From Advocate to Arbiter," 62 *Judicature* 325 (Feb.1979)

[3]Ptah Hotep (quoted in *The Judge's Book,* National Conference of State Trial Court Judges and The National Judicial College, Second Edition, 1994), p. 41.

[4]Ibid, p. 42.

[5]John Bunyon, quoted in Ephraim London, ed., *The Law in Literature* (New York: Simon and Schuster, 1970).

[6]Peter Hay, *The Book of Legal Anecdotes* (New York: Barnes and Noble, 1970), p. 205.

[7]London, *op. cit.*

[8]Francis Bacon, "Of Judicature," (quoted in *Law: A Treasury of Art and Literature,* Beaux Arts Edition, 1990), p, 105.

[9]*The Judge's Book,* p. 43.

[10]John Mortimer, *Clinging to the Wreckage: A Part of Life* (New York: Penguin Books, 1982) p. 71.

[11]*Law: A Treasury of Art and Literature,* 10.

Selected Cases in 1995-1996

By Clark R. Nielsen

On April 24, 1996, Justice Richard C. Howe and Utah Court of Appeals Judge Gregory K. Orme summarized at a Salt Lake County Bar Luncheon the cases they considered most significant from their courts in 1995. Their summaries are reprinted for all the Utah Bar. These case summaries are provided for the convenience of the reader, to identify what each case generally involves. They are not a definitive statement of the court's holding, nor can they substitute for a careful reading of the opinion.

TORTS

Cruz v. Middlekauff Lincoln-Mercury, 909 P.2d 1252 (1996): Plaintiffs sued car dealership after being injured by thief-driven car stolen from dealership lot. Trial court denied motion to dismiss. Affirmed. Plaintiffs alleged special circumstances, which if proved, could take this case out of general rule that owner is not liable for damage caused by thief when keys left in ignition. Here, dealership allegedly had long history of thefts; dealer customarily left keys in cars; no security to prevent cars from being stolen; unobstructed exit from car lot. Owner's negligence may be proximate cause if theft and subsequent negligent driving is reasonably foreseeable.

Jackson v. Brown, 904 P.2d 685 (1995): Abolishes cause of action for breach of promise to marry, but leaves open whether economic losses may be recovered. Also, tort of intentional infliction of emotional distress may lie if outrageous and deceitful conduct is proved.

Jackson v. Righter, 891 P.2d 1387 (1995): Supervisor's romantic involvement with worker was without scope of employment and thus employer not liable; employer's knowledge of relationship does not give employer sufficient knowledge to anticipate a claim for alienation of affections against an employee under its supervision.

Lawson v. Salt Lake Trappers, 901 P.2d 1013 (1995): Owner of ballpark did not breach duty to screen most dangerous part of stands and provide screened seats to as many patrons as may reasonably be expected. Parent has no cause of action for emotional distress from fear of injury when parent did not see foul ball.

Whipple v. American Fork Irrigation Co., 910 P.2d 1218 (1996): Plaintiff's husband drowned while rescuing child from canal; widow sues canal company. Trial court grants rule 12(b)(6) dismissal. Reversed. Plaintiff pleaded sufficient facts to raise issue of whether there was a "hidden trap" which might render canal company liable.

CRIMINAL LAW

State v. Herrera; State v. Sweezey, 895 P.2d 359 (1995): Utah's insanity defense statute is constitutional even though it exonerates criminal defendant only if he does not have the mental capacity to form the intent to kill.

State v. Troyer, 910 P.2d 1182 (1995): Where statement made by defendant was without benefit of *Miranda* warning, statement may not be used in state's case-in-chief, but may be used for impeachment purposes. If statement was not coerced and Fifth Amendment was not violated, fruits may be admissible in case-in-chief.

REAL PROPERTY

In re Knickerbocker Estate, 912 P.2d 969 (1996): Historically, joint tenant could only terminate the joint tenancy by destroying one of four unities essential to it – a unilateral self-conveyance was ineffective. However, the use of a straw man to sever joint tenancy would create lopsided body of law wherein property owners are required to perpetrate legal fictions for purpose of *severing* joint tenancy but not for *creating* a joint tenancy which can be done without a straw man under §57-1-5. Instead, the intent of the parties should govern.

Building Monitoring Systems v. Paxton, 906 P.2d 1215 (1995): Tenants complained to health department after landlord (LL) refused to make repairs. LL brought unlawful detainer action against tenants. While landlord may evict for any legal reason or for no reason at all, he is not free to evict in retaliation for his tenant's report of housing code violations to authorities. Once LL has made repairs, he may evict tenant, but he must give tenant reasonable opportunity to find other housing.

Richards v. Baum, 287 Utah Adv. Rep. 13 (3/28/96): Buyer under real estate contract brought suit to quiet title against seller. Seller counterclaimed and trial court quieted title in seller. Buyer appealed but failed to obtain a stay or post a supersedeas bond; seller sold land to a BFP while the appeal was pending. Dismissed because appeal is moot.

CONTRACTS

Ward v. Intermountain Farmers Ass'n, 907 P.2d 264 (1995): Plaintiff sued IFA, a Utah corporation, for damages caused to his Idaho field when IFA accidentally sprayed the field with fertilizer that had been contaminated with herbicide. Plaintiff had signed a release agreeing to "hold (IFA) harmless for any and all damages caused by the spraying of my approximate nineteen acres of safflower." Court may consider extrinsic evidence in determining whether a contract is ambiguous; the release agreement was ambiguous.

CONSTITUTIONAL LAW

Bagford v. Ephraim City, 904 P.2d 1095 (1995): Plaintiffs operated a garbage collection business and sued the city when it passed an ordinance requiring all city residents to pay the city for garbage collection, whether or not the residents were using the city's garbage collection service. Plaintiffs alleged a taking requiring compensation. Plaintiffs did not have a protectable property interest in avoiding the competitive disadvantage caused by the ordinance.

WORKERS' COMPENSATION

Savage v. Educators Mutual Ins. Co., 908 P.2d 862 (1995): Injured worker cannot assert a claim for lack of good faith and fair dealing against his employer's workers' compensation insurance carrier due to lack of contractual privity; must go through Industrial Commission.

CORPORATE

Steenblik v. Lichfield, 906 P.2d 872 (1995): Officer or director of suspended corporation is personally liable for unlawful acts committed by the entity unless that person proves the affirmative defense that he lacked knowledge of the acts.

GOVERNMENTAL IMMUNITY

Keegan v. State, 896 P.2d 618 (1995): Estate of deceased motorist sued the Utah Department of Transportation alleging that it negligently failed to raise the median barrier on an Interstate highway. A jury found for plaintiff. Reversed. UDOT immune under the Utah Governmental Immunity Act because its decision not to raise the median barrier was a discretionary act.

Cole v. Jordan School Dist., 899 P.2d 776 (1995): Utah Code Ann. § 63-30-11(4) which permits minor to extend time to submit notice of claim does not preclude application of general tolling provision which gives minor one year to submit claim after reaching age 18.

UNAUTHORIZED PRACTICE OF LAW

Utah State Bar v. Summerhays & Hayden, 910 P.2d 1227 (1996): Trial court enjoined defendants from engaging in the practice of third-party adjusting of insurance claims (representing a stranger to the insurance contract). Affirmed: third-party adjusting constitutes the unauthorized practice of law.

MISC.

Elks & Moose Lodges v. Dept. of Alcohol Beverage Control, 905 P.2d 1189 (1995): DABC has the authority to suspend the liquor licenses of organizations which violate the Utah Civil Rights Act. DABC correctly determined that petitioners' membership policies barring women violated the Act.

CIVIL CASES

4447 Assocs. v. First Security Fin., 889 P.2d 467 (Utah App. 1995) (J. Orme): Notice of assignment was imparted by unambiguous reference in financial statement. Notice imposed duty on creditor not to extinguish account for reasons not contemplated in underlying agreement.

BB&B Transportation v. Industrial Commission, 893 P.2d 611 (Utah App. 1995) (J. Jackson): An employer's right of control is the critical element in determining whether an employment relationship exists. For worker's compensation purposes, an employee may have two "employers" with "mixed control." Therefore, a truck owner is not relieved of his obligation to pay worker's compensation benefits to a truck driver by the fact that the truck's lessee, the driver's statutory employer, is also responsible for coverage.

Fink v. Miller, 896 P.2d 649 (Utah App. 1995) (J. Orme): Not all restrictive covenants are governed by *Crimmins v. Simonds,* 636 P.2d 478 (Utah 1981). Abandonment of covenants regarding building materials determined with references to objective "number, nature, and severity" test.

Gillmor v. Cummings, 904 P.2d 703 (Utah App. 1995) (J. Jackson), *cert. denied,* (Utah Jan. 9, 1996) (No. 950472): Attorney fees are recoverable as special damages when they are incurred to remove a cloud placed by a defendant on a property's title if the elements of slander of title have been proven.

Woodhaven Apts. v. Washington, 907 P.2d 271 (Utah App. 1995) (J. Wilkins): Liquidated damages provision in residential lease upheld.

Mead Corp. v. Dixon Paper Co., 907 P.2d 1179 (Utah App. 1995) (J. Greenwood): Dragnet clauses are not extended to cover future advances unless they are of the same kind and quality or relate to the same transaction as the principle obligation. The doctrine of equitable subrogation is not extended from guarantor law to context in which there is a letter of credit.

Salt Lake Knee & Sports Rehabilitation v. Salt Lake Knee and Sports Medicine, 909 P.2d 266 (Utah App. 1995) (J. Davis): Even though defendant partnership was a member of a new joint venture to which assets of a company were transferred, joint ventures are separate legal entities, and as such, the new joint venture is a "third party" for purposes of a contract between plaintiff and defendant requiring defendant to pay 1/3 of value of good will in the event of a sale of the company to a "third party."

Carrier v. Pro-Tech Restoration, 909 P.2d 271 (Utah App. 1995) (J. Orme): When several parties are on a single side in lawsuit, they must share peremptory challenges unless there is a "substantial controversy" between them, which ordinarily requires cross-claims premised on nonderivative theories.

Horrell v. Utah Farm Bureau, 909 P.2d 1279 (Utah App. 1996) (J. Davis): In an action to obtain insurance proceeds after the destruction of a residence by fire, the standard of proof for the defenses of arson and misrepresentation is preponderance of the evidence, not clear and convincing evidence.

Selvage v. J.J. Johnson & Assoc., 910 P.2d 1252 (Utah App. 1996) (J. Greenwood): The one-year time limit for the insider transfer cause of action in UFTA is a statute of limitation, not one of repose. Case clarifies the accepted test for determining if a time limit is a statute of repose or limitation. Further, discusses what qualifies as sufficient evidence under UFTA for intent to hinder, delay, or defraud. Finally, it limits recovery of attorney fees to those authorized by contract, refusing to adopt court-made rule that would allow recovery of all fees incurred in pursuing a fraudulent transfer action.

Thompson v. Community Nursing Services, 910 P.2d 1267 (Utah App. 1996) (per curiam): Administrative proceedings are "judicial proceedings" for purposes of applying the factors to be considered in determining whether an allegedly defamatory statement is absolutely privileged. Statements during the administrative investigation were found to be absolutely privileged.

Kilpatrick v. Wiley, Rein & Fielding, 909 P.2d 1283 (Utah App. 1996) (J. Jackson), *petition for cert. filed,* (Utah Feb. 5, 1996) (No. 960069): In a *legal malpractice case,* there are four elements for actions based on breach of fiduciary duty. Standard of causation for such actions is the same as actions sounding in negligence or breach of contract: clients must show that they would have benefitted had attorney adhered to standards of professional conduct and not breached fiduciary duties. Plaintiffs created genuine issues of material facts on the question of causation.

CRIMINAL CASES

State v. Davis, 903 P.2d 940 (Utah App. 1995) (J. Davis): Civil forfeiture action and criminal proceedings are separate proceedings for double jeopardy purposes. Further, forfeiture proceedings brought pursuant to Utah Code Ann. § 58-37-13 (1994) constitute punishment for double jeopardy purposes. Accordingly, the State's attempt to pursue criminal proceedings against defendant after he had already defended the civil forfeiture action is a violation of the Double

Jeopardy Clause of the Fifth Amendment to the United States Constitution.

State v. Blubaugh, 904 P.2d 688 (Utah App. 1995) (J. Davis), *cert. denied,* (Utah Feb. 6, 1996) (No. 950507): Court affirmed conviction of defendant for depraved indifference murder in a case in which, theoretically, another person could have committed the crime. The court ruled that, "the rules of circumstantial evidence do not require that the circumstances should to a moral certainty actually exclude every hypothesis that the act may have been committed by another person, but the hypothesis intended is a *reasonable* one consistent with the circumstances and facts proved."

State v. Hall, 905 P.2d 899 (Utah App. 1995) (per curiam): Utah Pyramid Scheme Act is not unconstitutionally vague or over broad.

State v. Houk, 906 P.2d 907 (Utah App. 1995) (per curiam): Trial court did not discriminate against defendant and impose a harsher sentence because he was white. Sentence was within legally prescribed limits.

State v. Winward, 909 P.2d 909 (Utah App. 1995) (J. Orme): Forgery requires specific intent to defraud someone. Unauthorized endorsement and intent to defraud have to be linked. The jury instructions must be precisely focused when evidence is not.

State v. Arbon, 909 P.2d 1270 (Utah App. 1995) (J. Jackson), *cert. denied,* (Utah April 4, 1996) (No. 960053): Driver's license suspensions do not constitute punishment for double jeopardy purposes. Instead, they are imposed to protect the public. The State may, for a single drunk driving violation, both suspend the driver's license and bring criminal charges.

In re J.D.W., 910 P.2d 1242 (Utah App.) (J. Bench), *cert. denied,* 910 P.2d 425 (Utah 1995): In a case where a juvenile was solicited to buy marijuana by an undercover narcotics officer, the court held that the defendant was not entrapped as a matter of law because the officer did not utilize improper methods, such as relying on a close personal relationship with defendant; offering a large quantity of marijuana for an extremely low price; or badgering defendant to buy the marijuana.

State v. Moreno, 910 P.2d 1245 (Utah App. 1996) (J. Bench): Cocaine was found by officers on the front seat of defendant's vehicle when defendant was arrested in a sting operation for soliciting prostitution. Search and seizure was upheld pursuant to the bright-line rule of *New York v. Belton,* 453 U.S. 454 (1981), which held that when an occupant of a vehicle is lawfully arrested, the police may make a contemporaneous search of the passenger compartment of the vehicle.

State v. Fife, 911 P.2d 989 (Utah App. 1996) (J. Greenwood): Trial court's denial of credit for time served in a state hospital pending a return to competency was upheld. There was no finding of violation of equal protection, due process, or double jeopardy guarantees.

FAMILY LAW CASES

Mori v. Mori, 896 P.2d 1237 (Utah App.) (J. Bench), *cert. granted,* 910 P.2d 425 (Utah 1995): Parties were married in Utah and divorced in Japan. Wife sought to "register" Japanese divorce decree in Utah as a foreign judgment. Utah Code Ann. § 78-22a-1, -8. However, judgments from foreign countries cannot be registered in Utah courts pursuant to Utah foreign judgment act. But the Japanese decree could be enforced in Utah court under principle of comity if properly pleaded. However, in this case, plaintiff asked that the Japanese decree be registered as foreign judgment. Since the decree could not be registered as a foreign judgment, plaintiff's complaint did not state a claim for which Utah courts could grant relief.

Liska v. Liska, 902 P.2d 644 (Utah App. 1995) (J. Orme): When commissioners and judges confer pursuant to UCCJA, a record – preferably verbatim – must be made. Under UCCJA, two states may have jurisdiction in theoretical sense but jurisdiction of decree state may nonetheless be primary.

Dow v. Gilroy, 910 P.2d 1249 (Utah App. 1996) (J. Greenwood): The four-year catch-all statute of limitation applies to actions to determine paternity but application of that provision is tolled by minority. This reconciles past precedent which had confused issue of existence of a statute of limitation for a determination of paternity.

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Date: Tuesday, June 18, 1996
Time: 10:00 a.m. to 2:00 p.m.
Place: Utah Law & Justice Center
Fee: $160.00 *(To register, please call 1-800-CLE-NEWS)*
CLE Credit: 4 HOURS

TRIAL ACADEMY PART III: DIRECT EXAMINATION

Date: Thursday, June 27, 1996
Time: 6:00 p.m. to 8:00 p.m. *(Registration begins at 5:30 p.m.)*
Place: To be determined
Fee: $20.00 for members of the Litigation Section
$30.00 for all others
CLE Credit: 2 HOURS (ALSO COUNTS AS 2 HOURS NLCLE CREDIT)

1996 ANNUAL CONVENTION

Date: July 3 – July 6, 1996
Place: Sun Valley Resort, Sun Valley, Idaho
Fee: $200.00 before June 7, 1996
$230.00 after June 7, 1996
CLE Credit: 16 HOURS, WHICH INCLUDES 4 IN ETHICS)

19TH ANNUAL SECURITIES SECTION WORKSHOP

Dates: August 16 & 17, 1996
Place: Sun Valley Resort, Sun Valley, Idaho
Fee: To be determined
CLE Credit: ~ 8 HOURS

TRIAL ACADEMY PART IV: CROSS EXAMINATION

Date: Thursday, August 29, 1996
Time: 6:00 p.m. to 8:00 p.m.
Place: To be determined
Fee: $20.00 for Litigation Section Members
$30.00 for Non-Section Members
CLE Credit: 2 HOURS (ALSO COUNTS AS 2 HOURS NLCLE CREDIT)

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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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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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STATE OF UTAH, Legal Counsel II, provide legal counsel to the Division of Air Quality. Provide legal analysis regarding Clean Air Act requirements. Review documents for compliance with regulatory/statutory requirements. Provide advice on legal sufficiency of enforcement documentation, penalties/negotiated settlements. Conduct negotiations, draf/review contracts, develop statutes and rules. Juris Doctorate, current Utah State Bar membership plus two years of paid professional related employment after obtaining Utah State Bar Membership. PREFERENCE MAY BE GIVEN FOR ENVIRONMENTAL LAW EXPERIENCE. For application information and assistance call Charlene Lamph, 536-4413. **POSITION CLOSES 5:00 P.M. July 15, 1996.**

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Date of Activity CLE Hours Type of Activity**

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**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 Regulations 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 of which the statement of compliance is filed, and shall be submitted to the board upon written request.

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111

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