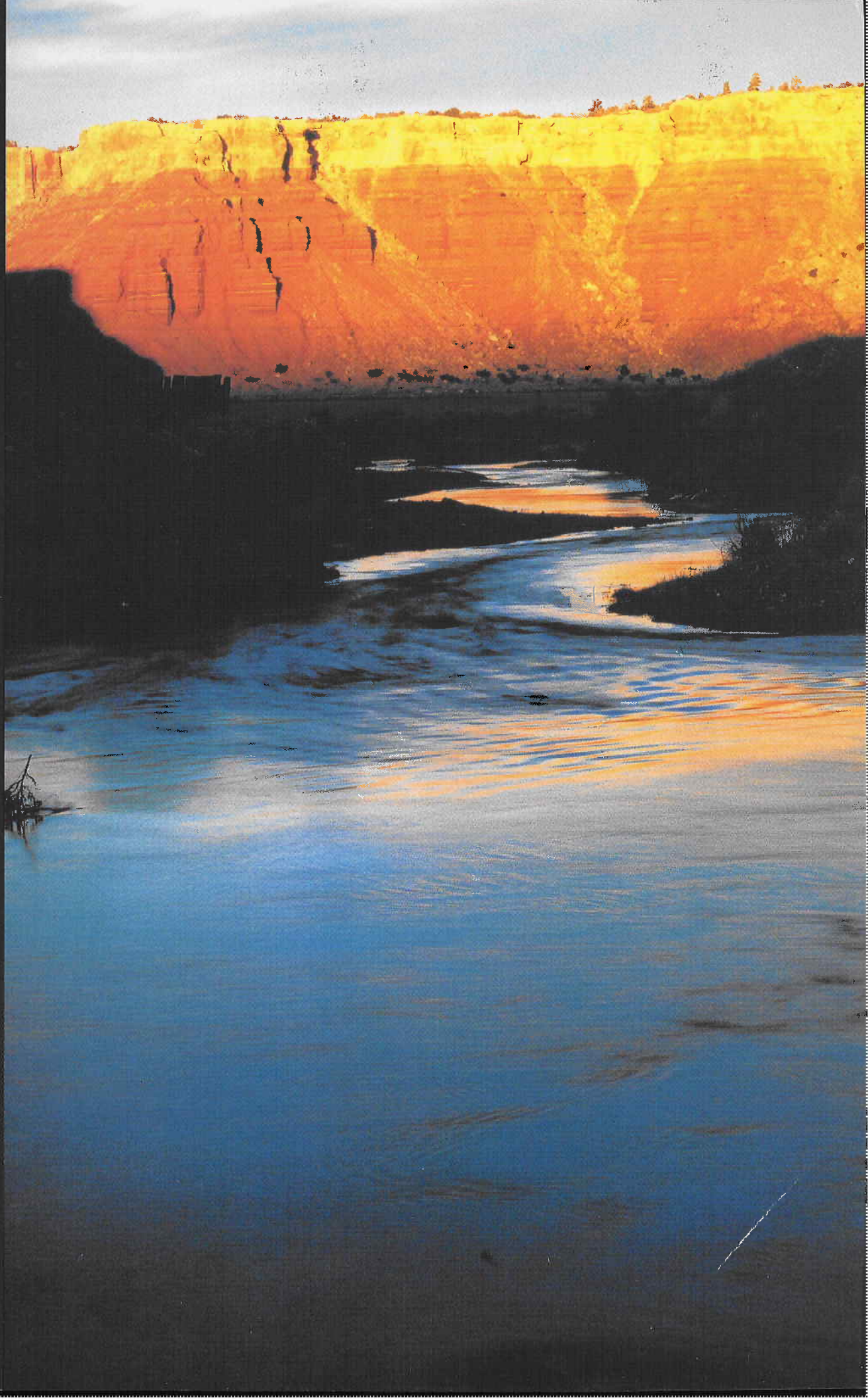
Utah Bar JOURNAL



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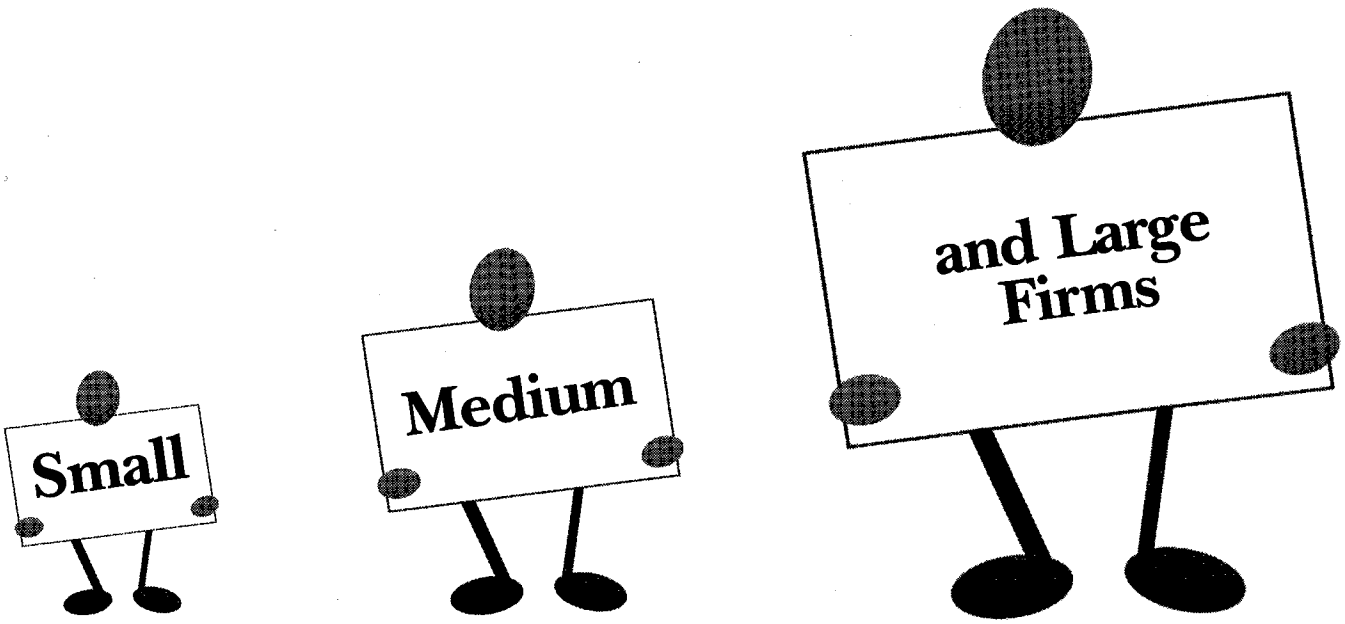

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VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.*

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: Freemont River's "Golden Glow" near Bicknell, Wayne County, Utah, by Kent M. Barry.

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, Randle, Deamer, Zarr, Romrell & Lee, P.C., 139 East South Temple, Suite 330, Salt Lake City, UT, 84111-1169, 531-0441. Send a print, transparency or slide of each scene you want to be considered.

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Utah Bar JOURNAL

Volume 11 No. 6
August 1998

Letters to the Editor

Dear Editor:

The Law of Summary Judgment discussed by Messrs. Sykes and Kramer in the June 1998 *Utah Bar Journal* though purporting to be an objective evaluation of the law is quite one-sided. The discussion fails to recognize several valid objectives served by summary judgment including the three discussed here.

First, as recently recognized by Justice Russon in *Morton v. Continental Baking Co.*, 938 P.2d 271, 275 (Utah 1997), there are two sides to every action and defendants as well as plaintiffs are entitled to fair treatment.

Second, summary judgment is not a procedural shortcut but a proper means of resolving issues, permitting the trial court to "isolate and dispose of factually unsupported claims or defenses." *Celotex Corporation v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2458, 2555, 91 L.Ed.2d 265 (1986). Fairness dictates that if a party's pre-complaint investigation and pre-trial discovery fail to reveal facts which establish the elements of its claim, summary judgment is appropriate and should be entered.

Third, facts related to summary judgment must be material. It is common among parties objecting to summary judgment to generate a smokescreen of "facts" with the objective of persuading the trial judge to believe that where there is smoke there must be fire. To be material, a fact must affect the outcome of the suit under the governing law. *State v. Schreuder*, 712 P.2d 264, 275 (Utah 1985); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 1986. If the facts which are material to a party's case do not support its claims, summary judgment is clearly appropriate.

It is unfortunate that *Utah Bar Journal* articles are not subjected to some peer review to assure that the information provided is even-handed and a fair reflection of the law.

L. Paul Palmer

Dear Editor:

Rule 6.1 should be retained in its present form. The proposed amendment to Rule 6.1 is too narrow and will have the effect of discouraging free services now provided by attorneys.

For example:

a. Serving as pro tem judges in small claims court,
b. Legal assistance to public service organizations in areas unrelated to persons of limited means,
c. Pro bono service to cities and counties,
d. Assistance to persons who, though not defined as "persons of limited means," can ill afford an attorney, and
e. Pro Bono assistance to the Office of Professional Conduct.

The proposal fixates on services to people of "limited means." Pro Bono service is broader than that.

The reporting requirements appear to be superfluous. The information is a waste of money and resources, unless the information gathered requires specific action. This proposal has no action requirement. The information will not be accurate because attorneys may report zero if they feel charitable work

should be kept private. Rules of professional conduct should not be changed for mere public relations purposes.

Although we have been assured by the bar leadership that the mandatory reporting requirement will never evolve into mandatory service, we have little faith in such promises. The parable of the camel who only wanted his nose in the tent applies. We remember too well the "non-mandatory" CLE's suggested by the bar only a few years ago.

The proposed option of "buying out" of pro bono service by paying money to the Bar is inappropriate. Bar members must be free to decide where their charitable contributions go.

Such fundamental changes ought to be voted upon. While a vote would not be binding on the Supreme Court, it would provide a better indication of member convictions.

Michael W. Crippon
Larry L. Whyte
Todd D. Gardner
Russell A. Cline
Chris L. Schmutz
Bryan A. Geurts

To whom it may concern:

Enclosed please find my certificates of CLE attendance and your financial exactions. I am sending these because you have threatened my right to earn a livelihood. I desire, however, to complain.

I object to this requirement for the following reasons:

1. The CLE requirement is based upon the presumption that merely attending a time-consuming, expensive and frequently boring presentation dealing with some dark corner of the law will magically make attorneys more competent. I reject this presumption.
2. The CLE requirement serves no purpose except Public Relations for the Bar and the creation and maintenance of an industry the sole purpose of which is to put on CLE presentations.
3. The CLE requirement discriminates against members who practice in rural areas, since nearly all of the programs offered are in urbanized areas. The necessity of hours of travel, and sometimes lodging, adds to the required expenditure in time and money for such members, and thus imposes an unfair penalty upon them for choosing to live and work where they do.
4. The CLE requirement perpetuates the myth that lawyers can or should know All of the Law, All of the Time. This is manifestly impossible and ignores the fact that we spend vast amounts of time and money to build libraries and to do research to determine the state of the law applicable to the cases we work on. CLE does not reduce the need for these things.
5. For me personally, this requirement is a nuisance. I have rheumatoid arthritis which is aggravated by driving long distances and changes in altitude and weather. This is one occasion for pain and exhaustion I could easily do without.

For an organization which pays so much lip service to the availability of legal services to demand that its members take time away from their practices and pay exorbitant fees for the privilege, is, in my humble opinion, hypocritical and short-sighted.

Allen S. Thorpe

Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Code of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author or each letter if and when a letter is rejected.

Unexpected Rewards

by James C. Jenkins

Most of us entered our profession anticipating better-than-average working conditions and income. Some of us sought the benefits of independence and others the opportunity to engage in social change. I feel very fortunate. Over the years I have enjoyed all the rewards I expected would come from practicing law. However, it is the unexpected experiences which have truly enriched my career.

Several years ago I was assigned to prosecute a very difficult and ugly criminal case. The defendant, a very selfish and abusive man, had sexually assaulted his step-daughter over a number of years since she was about 9 years old. When I first met this young victim, she was broken and reclusive, overwhelmed by embarrassment, degradation and confusion. Each time we met thereafter to discuss the procedure of litigation or review her sad testimony, she would conclude by saying, "I'm so sorry." She had concluded that the sexual abuse and her mother's resulting divorce and the criminal prosecution was her fault. She desperately needed someone to assure her that it was not her fault. I determined that I would be the one who would work to build her confidence and self-esteem. The case took several months to conclude and while maintaining the duty and position I held as prosecutor, I also took the opportunity to encourage and strengthen her delicate self-worth. We talked about her performance at school, about her friends, and other things that she had accomplished. Time passed and I would sometimes think of my little friend. Then recently I saw her at a church function. As I watched her walk across the room to greet me, I knew she was a changed person. I was so pleased to learn that she was enrolled in college, she had a part-time job to help her pay for her education, she had definite plans for her future, good friends, activity in church, and a special boyfriend. She was a different person. I take no credit for her transformation. It was simply my fortune to witness it.

Not too long ago, a client scheduled an appointment to discuss a confidential matter. When we met he explained that he knew of a couple who lived in an adjoining community. He told me that they had taken several children into their home because the children had nowhere else to go. The mother of the children had been killed by their father in a domestic altercation and the father was now in prison. He said, "They are good people and I know they could use some help, but they also have their dignity, and I am afraid if they knew who was helping they might not accept." He then handed me $5,000.00 and instructed me to deliver the money to this couple without disclosing the source of the assistance. That evening I went to the modest home of that family and presented my client's gift. They did not know me, and I only knew them from my client. They sat together on the living room couch and opened the envelope containing the money. Their eyes filled with tears as they simply asked me to express their gratitude to their anonymous benefactor. My role in this sweet experience was minimal, the reward far exceeded any contribution on my part.

Occasionally I read reports that some attorneys would leave their profession if they could. For some reason they have become disillusioned. But I for one know there are more than enough opportunities to be successful and fulfilled in this profession, and every once in a while you enjoy the bonus of an unexpected reward.

Abusive Deposition Objections and Tactics – In Search of a Standing Order

by Robert B. Sykes

INTRODUCTION

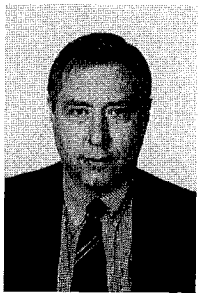
It was toward the end of a long day of depositions on a tense, hard-fought medical malpractice case, with a crucial witness being interrogated. Plaintiff alleged that the family practitioner defendant had failed to recognize and treat pre-heart attack symptoms, which resulted in a severe, non-fatal heart attack. The witness was a non-defendant, treating doctor who was friendly with the defendant, and therefore somewhat evasive. He was unrepresented at the deposition.

The good doctor had just dropped a "bombshell" of sorts. The defendant had ordered and supervised an ETT (exercise treadmill test) at a local hospital. Right after the test, defendant told plaintiff that it was completely *normal,* which the defendant *now denies.* The next day, another doctor, our deponent, reads the test as *abnormal* (i.e., positive), meaning that it showed the presence of a pre-heart attack condition known as ischemia. The deponent's bombshell was the heretofore unknown revelation that the *defendant usually did a written interpretation of the test,* which our deponent would then "over-read."

The "usual" written interpretation by the defendant was nowhere to be found in the medical chart. This was significant because it could prove that the defendant truly did render an erroneous interpretation of the ETT test, as well as suggesting possible spoilation of evidence if something which should have been in the file was not there. The following colloquy ensued:

> Q: In your experience, does [Defendant] *usually write a preliminary interpretation?*
> A: I don't keep track.
> Q: Well, just from memory.
> DEF ATTY: Argumentative and asked and answered.
> Q (PLTF ATTY): Go ahead. Isn't your best recollection, Doctor, that he generally writes a report?
> DEF ATTY: Objection. Argumentative and asked and answered.
> THE WITNESS: It's really *quite variable,* and *I don't keep track.*
> Q (PLTF ATTY): You don't have any recollection of that at all, what his general practice is?
> DEF ATTY: Objection. Asked and answered. Argumentative.
> THE WITNESS: Again, I'm not sure what the intent of the question is.
> PLTF ATTY: The nice thing about it is you don't even have to think about that. All you have to do is answer honestly under oath.
> DEF ATTY: And he has two questions back.
> THE WITNESS: I just answered the question. I said that *there is usually, not always. There's no procedure or policy* set but that the primary care physician supervising physician, writes a preliminary report, and that's a general comment for all of the physicians, including Dr. [Defendant].
> PLTF ATTY: Read my last question, please.
> (Pending question read.)
> Q: Now, I'm not asking you is it variable. I'm asking you a very specific question, Doctor. Does Dr. [Defendant] *usually write a preliminary interpretation* in your experience?
> DEF ATTY: Objection. Asked and answered and harassing the witness. I don't care what the witness says about harassing. The reason you keep asking the same question is you're attempting to intimidate the witness. He's already answered that question twice.
> (emphasis added)

Plaintiff was trying to find out if the defendant doctor usually wrote a preliminary interpretation of the ETT. The deponent was evasive: "I don't keep track," or "it varies." Defense counsel makes 12 objections (nine in the colloquy above). After four



Robert B. Sykes is a shareholder in the Salt Lake City law firm of Sykes & Vilos, P.C. The firm practices personal injury law with an emphasis on brain and spinal cord injury cases. Mr. Sykes has been a frequent lecturer at brain injury conferences for attorneys on such topics as Demonstrative Evidence, Cross Examination, Presentation of Expert Testimony, *etc. He has also authored several articles and book chapters dealing with brain injury litigation. Mr. Sykes is a graduate of the University of Utah and the University of Utah College of Law. He also served for six years in the Utah Legislature.*

pages of difficult examination and many objections, the deponent doctor finally answered unequivocally that the defendant "usually, not always" writes a report. The defense attorney's struggle to compel acceptance of the initial, evasive answer (i.e., "I don't keep track") failed, but only after a great deal of wasted time.

We have reflected many times on the appropriateness of common deposition objections. For example, how many times have you heard opposing counsel make the suggestive "if you remember" or "if you know" interjection prior to the witness answering? Can anybody seriously question that such an interjection is generally designed to suggest to the witness that he/she does not, or should not, remember the subject matter of the question? In the colloquy above, is defense counsel on solid ground in making the "asked and answered" objection when plaintiff's counsel was trying to probe a recalcitrant, evasive witness on a crucial issue? If it is a proper objection, can defending counsel "suggest" the appropriate answer in the objection, or instruct a non-party witness not to answer this question?

It seems we learn how to make deposition objections by watching other lawyers. If our initial "mentors" are doing it wrong, we learn inappropriate deposition conduct. Many of the objections at depositions are probably improper, particularly with respect to speaking objections. Depending on the quality and experience of opposing counsel, "jungle rules" often prevail at depositions, with many invalid, coaching-type objections generally being made. One commentator gave the following definition of coaching:

> "Coaching" encompasses many different forms of behavior at deposition, including improper objections, improper instructions, and repeated off-the-record conferences with the deponent . . . . The "coach," of course, is the defending lawyer who subtly – or not so subtly – attempts to manipulate the deponent's answers.

Effective Depositions, Henry L. Hecht, American Bar Association, 1997, Chapter 16, "Problem Counsel, Problem Witnesses," Jeffrey S. White and Eve T. Saltman, p. 456. Improper objections and tactics are rarely litigated because of the cost in time and money and the reluctance of trial judges to hear disputes over depositions, absent unusual circumstances. However, abusive tactics hinder the search for truth. Hence, there is a need for a standing order on deposition conduct.

"Many of the objections at depositions are probably improper, particularly with respect to speaking objections."

I. THE NECESSITY OF OBJECTIONS

The Rules contain three highly instructive provisions on the propriety of objections in depositions. First, Rule 30(c) provides that the examination "of witnesses may proceed as permitted at the trial" under the Rules of Evidence.[1] This clearly means that one should not make an objection at a deposition that would not or could not be made at trial. For example, how many judges would tolerate counsel interjecting "if you remember" before the witness answers a question at trial? And surely, no judge at trial would tolerate suggestive speaking objections, which we frequently see at depositions.

Second, the Utah and Federal Rules contain this identical language:

> *Objections* to the competency of a witness or to the competency, relevancy, or materiality of testimony *are not waived* by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Rule 32(c)(3)(A), Utah R. Civ. P., and Rule 32(d)(3)(A), Fed. R. Civ. P. (emphasis added). Additionally, Rule 32(b) provides:

> Subject to the provisions of Rule 28(b) and Subdivision (d)(3) [(c)(3)] of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Rule 32(b), Utah R. Civ. P.[2]

Basically, all objections are preserved until trial (or hearing), unless they go to form or foundation. One commentator observed:

> Therefore, the only objections you need be concerned about are as to *form* (e.g., leading) and *foundation* (e.g., that the witness is not in a position to know the facts which he or she needs in order to testify) because you won't be able to correct [i.e. assert] them later. . . . Objections to form or foundation include: *"Assumes facts not in evidence;" "Argumentative;" "Leading;" "Misleading;" "Compound question;" "No foundation;" and the venerable "object to form."*

Civil Practice and Litigation in Federal and State Courts, 7th Ed., Sol Schreiber, Editor, "Depositions, Techniques, Problem Areas and Special Situations," Gregory P. Joseph, 1996, p. E2, 18 (emphasis added). In *Redevelopment Agency v. Barrutia,* 526 P.2d 47, 50 (Utah 1974), the Utah Supreme Court affirmed the principle that most deposition objections are not waived by failure to object at the deposition, and can be asserted at trial.

The implication of these rules is clear: many of the objections we commonly hear are either inappropriate or totally unnecessary because they are preserved until trial. Many of these objections simply hinder the truth-finding process. The purpose of this article is to critically examine deposition tactics and objections in Utah and to suggest that the time has come for a standing court order to govern deposition conduct and remedy abuses.

II. DEPOSITIONS – A SEARCH FOR TRUTH

More than 50 years ago, the United States Supreme Court forever changed the legal landscape on discovery with *Hickman v. Taylor,* 329 U.S. 495 (1947). Prior to *Hickman,* litigation was often governed by the "sporting theory of justice," where the outcome of your case depended upon your wits, cunning and chance availability of evidence. *Full Disclosure: Combating Stonewalling and Other Discovery Abuses,* Frances H. Hare, Jr., et al., ATLA Press, 1994, p. 3. Obviously, litigation under this regime was more of "a battle of wits rather than a search for the truth."[3]

"Modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blind-man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent."

Hickman[4] changed the basic philosophy of discovery from "hide the ball" to full disclosure of relevant information. As noted in *Hickman,* " . . . civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before the trial." *Hickman,* 329 U.S. at 501. A few years later, the U.S. Supreme Court reaffirmed the disclosure intent of *Hickman:*

> Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor*. . . . They together with pretrial procedures make a trial less a game of blind-man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent.

United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958).

In the last analysis, the discovery rules provide access to the truth and a means to ascertain the truth. Mr. Hare, et al. expressed the relationship between liberal discovery and the truth as follows:

> The discovery procedures established by Rules 26 through 37 may be the most important provisions of the Federal Rules of Civil Procedure. Embodied in these rules are philosophical implications essential to the broad objective of the American civil justice system: to provide for the meaningful expression of a citizen's right to redress for wrongs done to person or property. These rules were founded on the premise that *access to knowledge is necessary to ascertain the truth.*

Hare, supra at 4 (citations omitted; emphasis added). The "access to knowledge" philosophy is embodied in Rule 26, which provides that a party may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26, Utah R. Civ. P.

The U.S. Supreme Court has consistently upheld the broad nature of Rule 26 discovery, observing:

> The key phrase in this [Rule 26] definition - "relevant to the subject matter involved in the pending action" - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. Consistently with the notice-pleading system established by the Rules, *discovery is not limited to issues raised by the pleadings,* for discovery itself is designed to help define and clarify the issues. *Nor is discovery limited to the merits of a case,* for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (emphasis added; citations omitted).

Depositions are a crucial, powerful discovery tool. Judge Gawthorp, in a much-cited federal case, has noted:

> One of the purposes of the discovery rules in general, and the deposition rules in particular, is to *elicit the facts* of

a case before trial. Another purpose is to *even the playing field* somewhat by allowing all parties access to the same information, thereby tending to *prevent trial by surprise.* Depositions serve another purpose as well: the memorialization, the *freezing, of a witness's testimony* at an early stage of the proceedings, before that witness's recollection of the events at issue either has faded or has been altered by intervening events, other discovery, or the helpful suggestions of lawyers.

Hall v. Clifton Precision, 150 F.R.D. 525, 528 (E.D. Pa. 1993) (emphasis added).[5] The *Hall* court commented on how improper lawyer conduct can hinder the truth-finding process:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did – what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. *There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.* The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, *with lawyers coaching or bending the witness's words to mold a legally convenient record.* It is the witness – not the lawyer – who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. *But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.*

Hall, 150 F.R.D. at 528 (emphasis added).

In *Damaj v. Farmers Insurance Co., Inc.,* 164 F.R.D. 559 (N.D. Okla. 1995), an insightful and knowledgeable judge observed that deposition abuse is, as a practical matter, "final," and therefore very harmful to truth-finding in the civil justice system. He first noted that "suggestive objections by counsel can tend to obscure or alter the facts of the case *and consequently frustrate the entire civil justice system's attempt to find the truth."* *Damaj*, 164 F.R.D. at 560 (emphasis added). He then observed:

> This court is particularly concerned about this *truth altering aspect of the problem* because the vast majority of the civil cases in this country are decided by way of settlements which are reached on the basis of "facts" developed during discovery, particularly oral depositions. *If the truth finding function of discovery has been obstructed by improper conduct of the attorneys, then the settlement will not reflect a just result based upon the truth.*

Id. (emphasis added; footnotes omitted)

III. THE UTAH PERSPECTIVE

Candid responses to discovery questions are critical in litigation and help accomplish the underlying purpose of discovery, which is to elicit relevant facts of the case before trial. *Ellis v. Gilbert,* 429 P.2d 39, 40 (Utah 1967) (the earlier and easier the factual matters of a dispute can be determined, the better for all concerned). Chief Justice Crockett eloquently expressed this philosophy many years ago:

> We are not unaware of the arguments against disclosure, but in weighing them against the various considerations hereinabove discussed in favor of disclosure we have concluded that the ruling of the trial court is correct in *unmasking the truth,* at least to the attorneys and to the court, so *that the proceedings can be carried on with candor and honesty and without cunning and deception.* This serves the desired objective of encouraging informed and enlightened procedure in accordance with the hereinabove stated purpose of our rules, "to secure the just, speedy, and inexpensive determination of every action."

Id. at 42 (emphasis added).

"[S]uggestive objections by counsel can tend to obscure or alter the facts of the case and consequently frustrate the entire civil justice system's attempt to find the truth."

Rule 30 of both the Utah and Federal Rules of Civil Procedure govern deposition conduct. However, the content of the Rules is quite different, since Utah never adopted Federal Rule 30(d)(1) and (2). Rule 30(d), Utah R. Civ. P. reads:

> (d) *Motion to terminate or limit examination.* At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the

examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Federal Rule 30(d) is much more specific about possible deposition abuse:

(1) Any objection to evidence during a deposition shall be stated concisely and *in a non-argumentative and non-suggestive manner.* A party may instruct a deponent *not to answer only when necessary to preserve a privilege,* to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party *impedes or delays the examination.* If the court finds such *an impediment, delay, or other conduct that has frustrated the fair examination of the deponent,* it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

Basically, the Federal Rule contains proscriptive rules regarding improper deposition objections and conduct that "impedes or delays the examination."

Presumably, the Utah version of the Rule, together with Rule 30(c), Utah R. Civ. P., would generally prohibit the same kind of conduct under the "examination is being conducted in bad faith" language. Advisory Committee Notes to Rule 30 state: "In general, counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer." *See also, Damaj,* 164 F.R.D. at 560; Rule 30(c) Utah R. Civ. P. (examination of witnesses should be conducted under the same rules as at trial). Thus, once a witness sits down to give his or her testimony, that witness must necessarily be on his/her own. *Hall,* 150 F.R.D. at 528.

Unfortunately, without judicial restraint on the parties, there is an increased likelihood that depositions will not be conducted properly. The court in *Damaj* recognized this and stated: "It is no stretch to conclude that the objections interposed at the deposition would not have occurred had the testimony been taken before a judge and jury at trial." *Damaj,* 164 F.R.D. at 560. Thus, while it is impractical to have the court oversee all depositions, a carefully-drawn order which specifies proper deposition behavior may serve to accomplish essentially the same purpose.

IV. IMPROPER OBJECTIONS AND TACTICS

A. Preface.

We all, hopefully, believe in the integrity of the truth-finding process in civil litigation. Improper deposition objections and tactics frustrate this process. The "better lawyer" in us recognizes this. Hopefully, our duty to find the truth in the civil justice system should not conflict with our duty to zealously represent our clients within the bounds of the law. However, we recognize that these two concepts can result in friction. Accordingly, one purpose of this article is to help us recognize proper and improper deposition objections and tactics. Another purpose is to advocate for early court intervention by way of a *standing order* to give counsel the benefit of ground rules in this most important area of the civil justice truth-finding process.

"Hopefully, our duty to find the truth in the civil justice system should not conflict with our duty to zealously represent our clients within the bounds of the law."

The most common objectionable conduct encountered in depositions centers around improper instructions not to answer questions; suggestive or frivolous coaching or interjections; and objections designed to harass, annoy and withhold information. We would like to explore some of the common objections that we hear and comment on their validity or invalidity.

B. Coaching.

Coaching or attempted coaching of a witness is always objectionable. As noted, Federal Rule 30(d)(1) flat-out prohibits coaching, but a prohibition against coaching is clearly the common law in all states, even those which have not adopted Federal Rule 30(d)(1). Coaching frustrates the search for truth. As noted by Judge Gawthorp in *Hall:*

As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favor-

able and creative arguments of law. *But the lawyer is not entitled to be creative with the facts.* Rather, a lawyer must accept the facts as they develop.

Hall, 150 F.R.D. at 528 (emphasis added).

The Advisory Committee notes to Federal Rule 30 recognize that the quest for truth is frustrated by coaching:

> [Rule 30(d)(1)] provides that any objections during a deposition must be made concisely and in a non-argumentative and non-suggestive manner. *Depositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond.* (emphassis added)

Other courts have strongly condemned the many and varied forms of coaching. *See, Damaj,* 164 F.R.D. at 560 ("suggestive objections by counsel can tend to obscure or alter the facts of the case and consequently frustrate the entire civil justice system's attempt to find the truth."); *Frazier v. Southeastern Pennsylvania Trans. Auth.,* 161 F.R.D. 309, 314 (E.D. Pa. 1995) (court criticizes counsel who "improperly suggested answers, coached the witness, and prevented his client from responding to proper questions"); *Eggleston v. Chicago Journeymen Plumbers, et al.,* 657 F.2d 890, 901-02 (7th Cir. 1981) (court condemns 127 "off-the-record conferences" between party and counsel, noting "[i]t is too late once the ball has been snapped for the coach to send in a different play"); *Johnson v. Wayne Manor Apts.,* 152 F.R.D. 56, 59 (E.D. Pa. 1993) (court condemned objections as to form of question followed "by either suggesting what he [counsel] apparently believed to be an appropriate answer to his client or himself testifying"); and *Langston Corp. v. Standard Register Co.,* 95 F.R.D. 386, 390 (N.D. Ga. 1982) ("deponents' counsel should refrain from making comments to the witness calculated to direct him in his response to questions").

C. Instructions Not to Answer.

As noted, Rule 30(d)(1), Federal R. Civ. P., prohibits instructing a witness not to answer, except to preserve a privilege or for other narrow exceptions. However, this prohibition has always been the common law of depositions:

> It [has long been] settled that counsel should never instruct a witness not to answer a question during a deposition unless the question seeks privileged information or unless counsel wishes to adjourn the deposition for the purpose of seeking a protective order from what he or she believes is annoying, embarrassing, oppressive, or bad faith conduct by opposing counsel.

First Tennessee Bank v. Federal Deposit Ins. Corp., 108 F.R.D. 640, 640 (E. D. Tenn. 1985).[6] The Advisory Committee Notes to Federal Rule 30(d)(1) capture the policy behind this destructive conduct:

> Directions to a deponent not to answer questions *can be even more disruptive than improper objections.* [Subparagraph] (1) of Rule 30(d) prohibits such directions except in the three circumstances indicated . . . . (emphasis added)

Accord, *Nutmeg Ins. Co. v. Atwell Vogel and Sterling,* 120 F.R.D. 504, 508 (W.D. La. 1988) ("In the absence of a showing some serious harm [is] likely to result from responding to any given question, the policies behind Rule 30 require answers to be given.") In Utah, it is clear that a witness' counsel has no authority to make independent rulings on matters of relevancy, materiality, competency or other grounds of admissibility. *Clayton v. Ogden State Bank,* 26 P.2d 545 (Utah 1933). These types of admissibility issues are decided by the court, not the litigants. *Id.* One court has noted:

"Directions to a deponent not to answer questions can be even more disruptive than improper objections."

> It is not the prerogative of counsel, but of the court, to rule on objections. Indeed, if counsel were to rule on the propriety of questions, oral examinations would be quickly reduced to an exasperating cycle of answerless inquiries and court orders.

Shapiro v. Freeman, 38 F.R.D. 308, 311 (S.D. N.Y. 1965). *See also, Eggleston,* 657 F.2d at 902. And as discussed above, Rule 32(c)(3)(A), Utah R. Civ. P., does not require counsel to object on relevancy grounds, much less instruct the witness not to answer. *See also, Int'l Union of Elec., Radio & Machine Workers, AFL-CIO v. Westinghouse Electric Corp.,* 91 F.R.D. 277, 280 (D. D.C. 1981).

The rationale behind requiring a deposition witness to answer questions is compelling. Deposition objections are treated differently than trial objections because the testimony continues subject to the objections, and the objections are preserved for trial. See Rules 30(c) and 32(d)(2), (3) Fed. R. Civ. P. One commentator explains:

> [A] deposition witness is usually required to answer a question when an objection is made. The logic here is obvious. Because no judge is present, no ruling on the objection can be made. *If the witness were not required to answer, the deposition would be constantly halted to wait for a ruling.* In addition, because a deposition is not a trial, there is no reason to exclude the answer because of concerns about admissibility of evidence. . . . There is another reason a witness is usually required to answer a question despite an objection. The primary purpose of a deposition is discovery, and the *scope of that discovery is far broader than the scope of the admissibility* standards used at trial. . . . Thus, requiring an answer, subject to objections, allows for open questioning leading to discoverable information, whether or not this information will ultimately be admitted at trial.

Effective Depositions, Henry L. Hecht, American Bar Association, 1997, Chapter 14, "Defending at a Deposition," by Stuart W. Gold and Henry L. Hecht, p. 354 (emphasis added) (hereafter, "Gold and Hecht").

A court has condemned an attorney's instruction to a non-client witness not to answer:

> He [a party's attorney] had no right whatever to impose silence or to instruct the witnesses not to answer, especially so when the witnesses were not even his clients.

Shapiro, 38 F.R.D. at 312.

D. Instructing Experts Not to Answer Opinion Questions. Instructing experts not to answer opinion questions is a frequently-encountered problem, particularly in medical malpractice cases. In a recent series of depositions of independent treating doctors in a medical malpractice case (see Introduction, *supra*), defense counsel instructed unrepresented treating doctors not to answer opinion questions regarding the doctors' treatment.[7] This is not a valid deposition (or trial) objection. The opinions of treating doctors are merely factual inquiries that are discoverable. In *Delcastor, Inc. v. Vail Assoc.,* Inc., 108 F.R.D. 405 (D. Colo. 1985), the court noted:

> Moreover, if we assume that Dr. Lampiris is now merely a "fact witness," *his opinions are properly discoverable*

under ordinary discovery practices because those opinions appear reasonably calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b). The protections afforded by 26(b)(4)(B) were never intended to shield a witness from full and fair examination.

Id. at 408 (emphasis added). Another court noted:

> Traditionally, treating physicians have been permitted to express their opinions of causation and prognosis derived from the ordinary treatment of the patient.

Hall v. Sykes, 164 F.R.D. 46, 48 (E.D. Va. 1995).[8]

Treating physicians can clearly be deposed as to their opinions on the cause of plaintiff's injuries, which they know only through their expertise. In *Shapardon v. West Beach Estates,* 172 F.R.D. 415 (D. Haw. 1997), the issue of the treating physician status arose in the context of an accident in which plaintiff was injured when a defendant employee spilled hot coffee onto her. The defendant moved to exclude the plaintiff's "experts" because a report pursuant to a federal rule (which Utah does not follow) had not been prepared. The court analyzed the "two types of experts," including those who are *not* specifically employed as experts, like treating physicians, and those who are specifically employed. Regarding treating physicians, the court noted:

> Treating physicians commonly consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis and the extent of disability, if any, caused by the condition or injury. *Opinions as to these matters are encompassed in the ordinary care of a patient and do not subject the treating physician to the report requirement of Rule 26(a)(2)(B).*

Shapardon, 172 F.R.D. at 416-17 (emphasis added). *See also, Bockweg v. Anderson,* 117 F.R.D. 563, 563 (M.D. N.C. 1987) (court rejected claim that experts could only be asked "non-privileged facts known or opinions held by the expert[s] relevant to the subject matter of the lawsuit. . . .").

E. Objections By Counsel for a Non-Party Witness.
Occasionally, a non-party deponent will bring his/her own attorney to a deposition. May that attorney make objections for the non-party deponent? We believe the answer is "no" for several reasons. First of all, the examination must "proceed as permitted at the trial," under the Rules of Evidence. The Utah and Federal Rules of Evidence provide the court "shall exercise reasonable control over the mode and order of interrogating witnesses . . . so as to . . . make the interrogation and presentation effective for the ascertainment of the truth." See Rule 611.

Second, it is hard to imagine a trial judge allowing an independent witness to bring his own counsel to trial and make objections. We have only seen this attempted once, in a 1996 wrongful death trial in federal court before the Honorable Tena Campbell. The decedent was killed in an on-the-job accident, and plaintiff's counsel called an Industrial Commission investigator as a witness. The Industrial Commission was concerned about its investigators being called as witnesses in general, so the witness appeared at trial with an Industrial Commission attorney who announced, when the witness was called, that she was going to sit at counsel table and intended to make objections if necessary. Judge Campbell shot back, "Oh, no, you're not," and proceeded to explain that an independent witness could have counsel present in the courtroom, but that counsel absolutely did not have the right to make objections or participate in the proceedings.

"[T]he court shall exercise reasonable control over the mode and order of interrogating witneses . . . so as to . . . make the interrogation and presentation effective for the ascertainment of truth."

Perhaps there are some circumstances where courts have allowed this, but it would seem on the surface to be very confusing for the jury, disruptive to the proceedings, and unfair to the examining attorney, to have two attorneys making objections. Our position is that if it couldn't or shouldn't happen at trial, it shouldn't happen at a deposition.

F. Interjections and Interruptions in General.
One commentator described the conduct at many depositions as follows:

> It is not uncommon, however, for the depositions to be interrupted by near-constant objections and colloquy. Such disruptions contaminate the proceeding and deprive the examiner of his right to a "fair opportunity to make discovery." *Unique Concepts, Inc. v. Brown,* 115 F.R.D. 292, 294 (S.D.N.Y. 1987) (personal insults and invective against opposing counsel); *Wright v. Firestone Tire & Rubber Co.,* 93 F.R.D. 491, 493 (W.D. Ky. 1982) (repeated objections by the lawyer that the questions were unclear, notwithstanding the witness's understanding of them); *See, United States v. National Medical Center, Inc.,* 792 F.2d 906, 909-10 (9th Cir. 1986)

(lawyer chastised for interfering with a non-party deponent's willingness to retrieve a document from his file for the examiner).

Civil Practice and Litigation in Federal and State Courts, supra, "Recent Developments in Deposition Practice and Document Discovery," Steve Morris, p. 4. Interjections and interruptions, particularly if frequent, can so disrupt a deposition as to make it essentially useless. A federal court in Iowa strongly condemned this practice noting:

> There was no justification for Mr. Barrett to monopolize 20% of his client's deposition. The "objections" made were for the most part groundless, *and were only disputatious grandstanding.*

Van Pilsum v. Iowa State Univ. of Science & Technology, 152 F.R.D. 179, 181 (S.D. Iowa 1993) (emphasis added).

Interjections and interruptions can be abusive to the point where sanctions are warranted under a federal statute:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so *multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.*

28 U.S.C. § 1927 (1998) (emphasis added). This statute has been used by several courts under their inherent authority to hold attorneys for costs incurred due to discovery abuse. *See Unique Concepts,* 115 F.R.D. at 293-94, and cases cited therein.

"Interjections and interruptions, particularly if frequent, can so disrupt a deposition as to make it essentially useless."

G. "I Don't Understand Your Question."

This obnoxious little objection is common. Unless the question is really unintelligible (which sometimes happens), the real purpose of this objection is to coach the witness and/or mold a convenient record. Consider the following example from a case where a thief stole a key-in-ignition vehicle from an open service area after the service area had closed but the dealership remained open.[9] The witness was being questioned about the lack of security in the service area on the day of the theft:

> Q: Just so I am clear about this I asked you whether there was a camera in the service area that night. Was there *any other type of security or surveillance equipment installed in the service area* on the day of 5/16/92?
>
> DEF ATTY: *What do you mean by security* or surveillance equipment? Locking doors? *Would you include people* who were there on the lot?
>
> PLTF ATTY: I'll bet your wife never wins an argument with you. I am not talking about a locked door. I am talking about installed security or surveillance equipment.
>
> DEF ATTY: You are talking about electronics; right?
>
> PLTF ATTY: Electronic. Maybe you set up a shotgun with a rubber band to blow people away. Any type of security device?
>
> DEF ATTY: *As opposed to people?*
>
> PLTF ATTY: Yeah.
>
> DEF ATTY: As opposed to the locking doors?
>
> Q (PLTF ATTY): Was that a no?
>
> A: In regards to electronic equipment? (emphasis added)

Basically, defense counsel claimed not to understand the question in order to suggest to the witness that the witness should answer the question about security by pointing out that "people" remaining on the lot constituted the "security."

The attorney's "I don't understand . . ." technique is merely subtle (or not so subtle) coaching. As noted by one court:

> However, her counsel, Mr. Barrett, repeatedly took it upon himself *to restate defendants' counsel's questions in order to "clarify"* them for the plaintiff. Mr. Barrett consistently interrupted Mr. Young and the witness, interposing "objections" which were *thinly veiled instructions to the witness,* who would then incorporate Mr. Barrett's language into her answer.

Van Pilsum, 152 F.R.D. at 180 (emphasis added). This technique has been strongly condemned by many courts. Frequently – in fact, usually – the witness doesn't even claim that the questions are unclear:

> Further, counsel for plaintiff repeatedly interjected inquiries into the meaning of defendant's questions *despite any indication from the witness that the questions were unclear.* Repeated interchanges of this nature between counsel are not within the spirit of discovery as embodied in the Federal Rules of Civil Procedure.

Wright v. Firestone Tire & Rubber Co., 93 F.R.D. at 493 (emphasis added). In *Hall v. Clifton Precision,* the court first noted that "[t]here is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions . . ." *Hall,* 150 F.R.D. at 528. The court then specifically condemned

this pernicious objection, noting that clarification should come from the deposing lawyer:

> I also note that a favorite objection or interjection of lawyers is, "I don't understand the question; therefore the witness doesn't understand the question." This is not a proper objection. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition. In addition, counsel are not permitted to state on the record their interpretations of questions, since those interpretations are irrelevant and often suggestive of a particularly desired answer.

Hall, 150 F.R.D. at 530, fn. 10 (emphasis added).

H. "If You Know, . . . If You Remember."

This frequent interjection was strongly condemned in *Sinclair v. KMart Corp.,* 1996 U.S. Dist. LEXIS 19661 (D. Kan. 1996), where the court commented on its destructive effect:

> [T]he repeated interjections instruct Schnell [the witness] to answer Mr. Focht's questions *"if you recall"* or *"if you remember"* or *"if you know."* Subsequent to these interjections, Schnell in many instances *proceeds to respond that he does not recall or know the answer.* There are also repeated interruptions by Schnell's personal counsel suggesting that Schnell review documents to refresh his recollection, and questions seeking clarification of questions. Eventually the deposition was terminated by plaintiff's counsel. The court finds the deposition of Schnell was unfairly impeded by comments of counsel and will grant Sinclair's request for the renewed deposition. . . . The types of repeated interjections shown in the transcript of the deposition are not justified and are prohibited.

Id. at 19-20 (emphasis added). This objection is widely regarded by the courts for the sham that it is, an attempt to coach the witness that he/she should not remember something.

I. "Don't Speculate, Don't Guess."

"Don't speculate" is another frequently heard objection at depositions. Sometimes, counsel instruct clients not to answer questions at all if the answer is allegedly based upon "speculation." Typically, counsel will state right on the record, before any answer is given to the question, "Don't guess." Of course, this objection is often subterfuge to do a little coaching, subtly suggesting to the witness that any contemplated answer really is a guess or speculative, and probably shouldn't be given.

However, the objection is improper, regardless of counsel's motives. This is a discovery deposition, and a witness's "speculation" could well lead to the discovery of admissible evidence. One commentator has noted:

> A well-prepared witness will have been told not to speculate and will heed this instruction from his or her counsel (usually by saying something like "I could only speculate"). . . . *You want, and are entitled to, incompetent evidence (including hearsay and speculation) that appears reasonably calculated to lead to the discovery of admissible evidence.* Fed. R. Civ. P. 26(b)(1).

Gregory P. Joseph, *supra* at 19 (emphasis added).

Another commentator gives a different perspective on this objection:

> This objection is proper when a question seeks information not ing the witness's personal knowledge. An example would be a question calling for a witness's opinion about what someone else was thinking or for testimony about events at which the witness was not present. Sometimes this objection takes the form of an objection that there is no foundation that the witness has knowledge about this subject under inquiry. The objection can also be used for questions calling for an improper lay conclusion or improper expert conclusion.

"[A] witness' 'speculation' could well lead to the discovery of admissible evidence."

Effective Depositions, Gold and Hecht, p. 361. However, it is pretty obvious that what Messrs. Gold and Hecht are calling a speculation objection is actually a foundational objection.

J. "Asked and Answered."

We frequently hear the objection "asked and answered," sometimes followed by an instruction not to answer any further questions regarding the subject area. This objection may occasionally have merit if the nature of the questioning is truly – and abusively – repetitive, i.e., the same question is being asked over and over again for purposes of harassment rather than legitimate discovery. However, one commentator summarizes why this is generally an invalid objection:

> No rule of evidence prohibits a taker from asking the same question more than once. Therefore, this objection is often inappropriate. It is valid only when the same question is asked so often that it becomes cumulative, burdensome,

or repetitious, such that the witness is being harassed.

Effective Depositions, Gold and Hecht, 361. This objection is usually invalid because it is more an effort to compel the interrogating counsel to accept a vague, ambiguous and/or evasive answer. See example in Introduction. Then the objection simply becomes a control mechanism designed to prevent probing and mold a convenient record, and is improper. Consider the following colloquy from the car theft case:

> Q: Did you give *any specific employee training* to your employees of your service department about how to prevent thefts?
> DEF ATTY: *Other than what he's already identified?*
> PLTF ATTY: Right.
> DEF ATTY: *Other than what he's already discussed?*
> Q (PLTF ATTY): Well; let me just start over. Did you give any employee training at all to service department personnel about how to prevent thefts?
> DEF ATTY: I am going to object on the grounds of being *asked and answered. He's already identified memoranda, discussions he had with them, meetings.*
> PLTF ATTY: I object to your coaching.
> DEF ATTY: I am not coaching. It's been asked and answered.
> PLTF ATTY: Go ahead and answer the question.
> DEF ATTY: *I don't think he needs to answer it again. If you want him to answer as to things he hadn't already talked about he can talk about that.*
> Q (PLTF ATTY): What I need to know is if you have given any specific employee training to members of the service department about how to prevent thefts.
> DEF ATTY: *If there's anything in addition to what you have already talked about tell him about that.*[10] (emphasis added)

In this colloquy, the deponent's counsel simply used "asked and answered" as an excuse to coach the witness that he should refer to certain memoranda, discussions and meetings.

In actual cross-examination at trial, most courts will allow considerable latitude in questioning an adverse or evasive witness. Why should counsel be compelled to accept an evasive answer at deposition just because it is the first answer? Also, repeated interjections by counsel often create an atmosphere where some repetition is inevitable. As noted by one court:

> We must agree in part with plaintiff's counsel's assertion that some of the defendant's questioning was repetitive, although upon some occasions this may have been due to the problem of maintaining continuity despite unwarranted interruptions by plaintiff's counsel.

Wright, 93 F.R.D. at 493.

K. "Assumes Facts Not in Evidence".

This objection may be either valid or invalid depending on the circumstances. Certainly, the deposing lawyer is not permitted to ask a question in such a way as to assume that unproven facts are true. The lawyer defending the deposition, likewise, does not have the right to object to discovery of information that might lead to the discovery of admissible evidence, just because the information is "not yet in evidence." Gold and Hecht commented on this objection as follows:

> Faced with this objection, a taker will often respond by arguing that no testimony or item is "in evidence" at a deposition. If as a defender you make this objection, expect an experienced taker to frame the same question carefully as a hypothetical to allow each element to be established at trial. Often the better objection is lack of foundation.

Effective Depositions, Gold and Hecht, 361-62. However, if the tenor of this objection goes to the "impermissible nature of the testimony sought," as opposed to the nature in which the question was asked, then the focus is admissibility of the testimony at trial and the objection is preserved until trial. *Id.* at 362. However, Messrs. Gold and Hecht offer this caution:

> Too many lawyers believe that they need to object only as to the form of a question, and all objections regarding the question's substance are preserved. That is incorrect. Any defect that goes to the substance of the question (or the competency of the witness) and that can be cured must be met with an objection also; otherwise it is waived.

Id.

"Where a question is truly argumentative, it is improper in form and should be objected to at the deposition."

L. "Argumentative."

Where a question is truly argumentative, it is improper in form and should be objected to at the deposition. *Id.* at 359. An argumentative question is simply one which challenges the witness's memory or senses (sight, hearing, etc.). For example, if a witness testifies that he overheard a conversation, the question "you couldn't really overhear that conversation when you were ten feet away, could you?" is argumentative. There are certainly legitimate, non-argumentative ways to probe the wit-

ness's perception, memory, etc. As with other objections that are valid, this objection can be abused. See Part IV.F above, "Interjections and Interruptions in General."

The importance of making timely "argumentative" objections, and other objections which might be obviated during the deposition if promptly presented, is highlighted by the case of *Kirschner v. Broadhead,* 671 F.2d 1034 (7th Cir. 1982). The case arose out of an assault and battery between two professionals at a resort.[11] In this case, the deponent was unavailable for trial, which necessitated the introduction of deposition testimony. The court observed:

> The deponent had been asked a number of argumentative questions by plaintiff's counsel without objection by defendant. The trial court sustained several of defense counsel's objections to the form of deposition questions. On appeal, the Sixth Circuit held that *the district court erred in sustaining the objections because defendant had not raised them during the deposition.* We find the Sixth Circuit's reasoning persuasive and worth repeating: if the objection could have been obviated or removed if made at the time of the taking of deposition, but was not made, then that objection is waived. The focus of the Rule is on the necessity of making the objection at a point in the proceedings where it will still be of some value in curing the alleged error in the deposition. When a party waits until trial to object to testimony in the deposition, the only manner in which to cure the deposition is to bar the objectionable portions from the trial. It is important that objections be made during the process of taking the deposition, so that the deposition retains some use at the time of trial; otherwise counsel would be encouraged to wait until trial before making any objections, with the hope that the testimony, although relevant, would be excluded altogether because of the manner in which it was elicited. (citing *Bahamas Agricultural Industries,* 526 F.2d 1174, 1180-81 (6th Cir. 1975))

Id. at 1037-38 (emphasis added).

M. "Mischaracterization."

This is another objection that may be appropriate but is often inappropriate, or a thinly-veiled attempt to coach the witness. The objection is clearly appropriate if the examiner prefaces the question with a brief summary of prior testimony which is inaccurate. Gold and Hecht give this example: "So after the chairperson reviewed your memorandum, he told you to contact the Vice President of Marketing at Company Y, and what did you do?" *Effective Depositions,* Gold and Hecht, 360-61. This question would be objectionable based on mischaracterization if the witness had testified that the memorandum was only sent to the chairperson, but "gave no testimony about his reviewing the memorandum or being asked to contact the Vice President of Marketing." *Id.* at 361.

This objection is also often used abusively. In the example above, we have seen attorneys make this objection when the question is simply "Did you then contact the Vice President of Marketing?" The implication by opposing counsel is somehow that the mere question itself, which implies a different answer or an additional answer, mischaracterizes the prior testimony. This is obviously not so. Consider the following example from the car theft case referred to previously. The deponent was the dealership employee charged with securing the service area at closing time. While five years earlier he had told police that it was the practice to leave a large garage door open, he now asserts that he always closed the door when he left. The following colloquy ensued:

> Q. How is it that you remember that particular day? It's been almost five years. Do you have –
>
> A. I would never steer away from the process. Yes, it is the process, and I would never steer away from it. It is my responsibility before I leave to make sure that the area to the service department are secured.
>
> Q. Are secure. All the doors locked?
>
> A. Yes.
>
> Q. Would that include the pedestrian doors?
>
> A. Yes.
>
> Q. That didn't really answer my question. It was the process. By that you mean a practice to do it; right?
>
> A. Yes.
>
> Q. Customary practice?
>
> A. Yes.
>
> Q. Is your testimony then that on the 16th of May you probably would have - ?
>
> DEF. ATTY: *You are misstating his testimony. He said he never deviated from that. He said he never steered away from that.*
>
> PLTF. ATTY: Make your objections if you need to. Let me finish the question. Is it your recollection that you think you would have followed your practice that night, or do you actually have independent recollection of doing it that night?
>
> DEF. ATTY: *Again, you are misstating his testimony. His testimony was a third alternative. He said he never deviated from that practice. He never steered away from that practice. I have the same objection of misstating his testimony. He testified he never steered away from that practice.*

Here, defense counsel misuses the "mischaracterization" objection to mold the record and prevent the deposing attorney from probing the deponent's answer.

Obviously, counsel has the right to probe the witness' knowledge and motives, particularly where the witness is hostile or evasive. This doesn't mean that deposing counsel must accept a witness's first, evasive answer, just because it is first. It is therefore hard to see how a follow-up question, by itself, can "mischaracterize prior testimony" when it is not characterizing testimony at all. It is simply asking about the same matter from a different perspective, perhaps one that is unhelpful to opposing counsel's case.

"[C]ounsel has the right to probe the witness' knowledge and motives, particularly where the witness is hostile or evasive."

N. "Vague and Ambiguous."

This is an objection to the form of the question and must be made at the deposition or it is waived. A genuinely ambiguous question uses terms which are undefined, subject to different interpretations, and/or unfamiliar to the witness. However, the objection is often abused by defending counsel who take the position that virtually every word in the English language is vague or ambiguous. We have seen this objection used in a way to simply disrupt the deposition. See Part IV.F above, "Interjections and Interruptions in General."

O. "Compound Question."

A compound question combines two or more elements into one question, so the witness can't possibly know which part to answer, or may be confused and mean to answer only one part affirmatively. For example: "Did you stop the car, go into the house and talk to Mr. X?" Answer: "Yes." Perhaps the witness meant to answer "yes" to all three parts of that question, but

perhaps not. Perhaps the witness stopped the car, but Mr. X came out and talked to him at the car.

Compound questions are objectionable, and it is important to register that objection at the deposition, which usually results in curing the basis of the objection.

P. "Leading."

A leading question suggests the answer, and is improper in form unless the witness is the adverse party or a hostile witness. For example, asking your own client's wife in a personal injury case "Didn't Client continue to have problems with pain in his back for two years after the accident?" clearly suggests the answer. Leading questions often suggest or call for a "yes" or "no" response. *Effective Depositions,* Gold and Hecht, 360. Rule 611(c), Utah R. Civ. P., provides:

> Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

"Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony."

Thus, if your deponent witness is an adverse party or hostile witness, leading questions are appropriate. Since "leading" goes to the form of the question, the objection must be made at the deposition or it is waived.

Not unfrequently, there is controversy about whether or not a witness is truly identified with a hostile party, or is truly hostile. Under such conditions, this objection can become abusive. For example, in the medical malpractice case referenced above, the "leading" objection would have been improper if it were made (which it was not) in the depositions of the treating doctors because they were clearly friendly with the defendant doctor, who referred them business. If the objection becomes abusive, it is simply treated like any other improper interjection. See Part IV.F above. However, leading questions are appropriate for all witnesses, hostile or not, if they merely go to preliminary or foundational matters.

Q. "Calls for a Narrative Response."

Occasionally, you hear the objection that a question "calls for a narrative response," implying that it is somehow improper. Gold and Hecht have this observation:

> The objection is somewhat puzzling, particularly when used at a deposition. There is no rule of evidence that prohibits narratives; evidence rules are concerned with the admissibility of evidence at trial. Most takers will argue correctly that this objection is inappropriate at a deposition because admissibility is not in issue. Therefore, if this objection is made, expect the examiner to persist in seeking a response.

Effective Depositions, Gold and Hecht, 361. The practical danger of allowing a lengthy narrative answer, however, is evident when you consider that such answers frequently go far off the mark of the original question. Thus, even though a brief narrative may not be inappropriate, an "unresponsive" answer is inappropriate. The experienced defender may follow a lengthy narrative with the objection that the answer was "non-responsive" and move to strike. This objection is probably appropriate because it goes to the form of the original question and is an objection that could lead to the curing of the problem at the deposition.

R. "Harassment."

"Harassment" is one of the objections that can be both proper and improper. Rule 30(d), Utah R. Civ. P., and Rule 30(d)(3), Fed. R. Civ. P., provide that at any time during the taking of the deposition, a party may move for a protective order if the deposition is "being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party. . . ." Obviously, this implies rather strongly that "harassment," if it is really occurring, is a valid deposition objection, even if the deposition is not terminated and there is no immediate motion made.

However, this objection is often abused. In a broad sense, it is "harassment" if the deposition results in difficult or unpleasant information being dragged out of a reluctant, evasive witness, who is very unhappy about it. However, that is not a proper basis upon which to make the objection. In our experience, more often than not, the real basis of the objection is, indeed, harassment, but not of the witness. It is intended to interrupt and disrupt the opposing attorney's deposition by creating confusion and inducing lack of continuity. We have seldom seen "real McCoy" examples of an attorney harassing a deponent. We have, however, seen many instances of the deponent's attorney harassing the examining attorney. When this occurs, the law of abusive interjections and interruptions applies, as set forth in Part IV.F above.

S. Conferring With Counsel During Deposition or Deposition Breaks.

In *Hall v. Clifton Precision,* the court stated: "During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. . . . The same is true at a deposition." *Hall,* 150 F.R.D. at 528 (footnotes omitted). The *Hall* court gave its reasoning for limiting attorney-deponent conferences: "The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth." *Id.* The court then issued an order forbidding conferences between a witness and his or her counsel during breaks or recesses, except for the purpose of asserting a privilege. *Id.* at 531-32. The court added that should a conference be held, the deposing attorney is given free reign to inquire into the substance of the conversation. *Id.* at 529, fn 7 ("conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what."). In stating its reasons for limiting conferences during breaks, the court opined: "A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences." *Id.* at 529.

Most courts have rejected the *Hall* reasoning on this point. *The Deposition Handbook, Second Edition,* Dennis R. Suplee and Diana S. Donaldson, John Wiley & Sons, Inc. (New York 1996), p. 27-36. Obviously, counsel could confer with the client during a break at trial; the same should be permitted at deposition. Additionally, although some courts allow inquiry into conferences between the attorney and client at depositions, that conclusion is controversial, and seemingly implicates the attorney-client privilege.

V. TOWARD A STANDING ORDER

An order at an early stage of discovery will help streamline the deposition process, minimize the unnecessary and inappropriate conduct, and move litigation along expeditiously. As stated in the *Manual for Complex Litigation:*

> The likelihood of problematic conduct will be greatly reduced *if the court informs counsel at the outset of the litigation* of its expectations with respect to the conduct of depositions, including speaking and argumentative objections, instructions not to answer, coaching of witnesses (including restrictions during recesses in the deposition), and evasive or obstructive conduct by witnesses.

Manual for Complex Litigation, Third § 21.456 at 89 (1995) (emphasis added).

Standing orders of various kinds find precedent in the law and have the salutary effect of bringing lawyers to remembrance of our duties. For example, members of the Bar are currently required to sign a certificate affirming that they segregate trust monies from general account monies in the appropriate manner. This does not suggest that we are all dishonest. We are all required to certify biannually that we have 27 hours of continuing legal education. This doesn't mean that we are all ignorant. Rule 4-510, State Rules of Judicial Administration, is a standing order providing for mandatory alternative dispute resolution. It doesn't mean that we lawyers as a group have no interest in settling our cases. There is a standing order in federal court prohibiting cellular phones from being brought into the courthouse, although most lawyers have the sense to turn them off before they actually enter a courtroom. Standing orders simply guide, direct and encourage – and only occasionally punish – conduct. Standing orders on discovery are in effect in several federal district courts in the nation, and probably a number of state courts also. We see this request for a standing order "more as a guide for positive conduct," rather than a punishment for negative conduct. But it is a guide whose beneficent influence will be most welcome in civil litigation.

[1]The above quoted language is identical in the Utah and Federal Rules.

[2]The Federal version of the Rule is almost identical.

[3]8 *Wright & Miller*, Section 2001, at 14 (1970) and Supp. (1992), cited in *Full Disclosure,* p. 3.

[4]The pervasive effect of *Hickman* on the law is evident when we consider that as of April, 1998, according to Shepard's, the case had been cited in 2,943 other cases.

[5]*Hall* appears to be the leading case on the subject of discovery abuse and is cited in recent cases treating this subject. *See Damaj v. Farmers Insurance Co., Inc.*, 164 F.R.D. 559, 560 (N.D. Okla. 1995) ("The Court's research produced the case of *Hall* . . . which the Court finds to be particularly instructive."); *Sinclair v. KMart Corp.,* 1996 U.S. Dist. LEXIS 19661, 6 (D. Kan. 1996) (renewed deposition to be conducted according to the provisions in *Hall*).

[6]Federal Rule 30(d) was amended in 1993 to specifically proscribe instructing a witness not to answer. However, as noted by this 1985 Tennessee case, the Rule simply codified the existing common law.

[7]The objected-to questions did not require these doctors to comment upon whether the defendant met the standard of care.

[8]This case dealt with which type of physician experts are required to prepare an expert written report under the Federal Rules, which is not at issue here. However, the case is still relevant for the point that the opinions of treating physicians are discoverable.

[9]*See Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252 (Utah 1996).

[10]Because of this and other abusive tactics, the court ordered this entire deposition to be retaken.

[11]See the somewhat humorous recount of the escalating facts which led up to the fight in *Kirschner,* 671 F.2d at 1035-37.

Proposed Standing Order Governing Deposition Conduct

Based upon consideration of the briefs and oral argument, and good cause otherwise appearing, the court grants plaintiff's motion for a standing discovery order governing the conduct of depositions, and sets the following specific provisions:

1. UNCLEAR QUESTIONS. At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness's own counsel, for clarification, definition, or explanation of any words, questions or documents presented during the course of the deposition. The defending counsel shall not attempt to "restate the question," or interrupt with "clarifying" comments. The witness shall abide by these instructions.

2. NECESSITY OF MAKING OBJECTIONS. All objections, except those which would be waived if not made at the deposition under Utah R. Civ. P. § 32(c)(3)(B), and those necessary to assert a privilege, to enforce a limitation on evidence directed by the court, or to present a motion pursuant to Utah R. Civ. P. § 30(d), shall be preserved. Therefore, those objections need not and shall not be made during the course of depositions.

3. DIRECTING WITNESS NOT TO ANSWER QUESTIONS. Counsel shall not direct or request that a witness not answer a question, unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the court.

4. NO SUGGESTIVE OBJECTIONS. Counsel shall not make objections or statements which might suggest an answer to a witness. For example, counsel shall not make suggestive interjections such as "if you remember" when a question is pending. Counsels' statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more. If the form of the question is objectionable, counsel should say nothing other than "object to the form of the question," followed by a brief indication of the legal basis of the objection, without suggestive comments.

5. SHOWING DOCUMENTS TO WITNESS. Deposing counsel shall provide to the witness' counsel a copy of all documents shown to the witness during the deposition. The copies shall be provided either before the deposition begins or contemporaneously with the showing of each document to the witness. The witness and the witness' counsel do not have the right to discuss documents privately before the witness answers questions about them.

6. OFF-THE-RECORD CONFERENCES. Counsel shall not interrupt an examination for an off-the-record conference between counsel and the witness regarding a pending question, except for the purpose of determining whether to assert a privilege. Any discussions during a recess may be a subject for inquiry by opposing counsel, to the extent it is not privileged.

7. NON-PARTY DEPONENTS. An attorney for a party at a deposition of a non-party deponent shall not engage in a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. Nor shall a party's attorney instruct a non-party deponent not to answer questions. If the non-party brings his/her own counsel to the deposition, that attorney shall not make objections except to assert a privilege or some matter permitted under Rule 30(d) (examination being conducted in bad faith, to embarrass or oppress a deponent, etc.). Said counsel for the non-party shall abide by all other applicable provisions of this order.

8. EXHIBIT NUMBERING. Exhibits shall be consecutively numbered throughout all depositions, with each exhibit's number being maintained throughout the discovery period. In other words, regardless of who introduces the exhibit, it shall receive the next available number. Thus, there shall only be one "Exhibit No. One" throughout all depositions, not a No. 1 for each deposition.

DATED this _____ day of _____, 1998.

BY THE COURT:

_____

District Judge

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Tribal Courts – Justice on Utah's Reservations

by Christopher B. Chaney

Before the arrival of the Latter-Day Saint pioneers and other predominately non-Indian populations, Native American people were the inhabitants of the area now known as the State of Utah. As the non-Indian population began to grow, these new residents began to establish formal legal systems in their communities. These legal systems quickly developed into the system of federal and state courts that most attorneys in Utah are now familiar with. However, most attorneys may have little or no familiarity with Utah's other judicial system - the tribal courts. Tribal courts are the modern manifestation of the legal systems that existed prior to the federal and state court systems. The purpose of this article is to introduce law practitioners to Utah's tribal courts so that they may be better able to represent their clients. Knowledge of tribal court systems is necessary for the modern lawyer because every year an increasing number of clients (and potential clients) reside, travel through, or do business within Utah Indian country.[1]

Originally, Indian tribes were the sole source of sovereign governmental authority in what is now the United States. Decisions regarding regulation of human conduct and resolution of disputes were handled in the context of the tribe. As non-Indian populations came into contact with tribal populations, the writers of the U.S. Constitution found fit to recognize that Indian tribes should be recognized as possessing a special sovereign status.[2] The special sovereign status of Indian tribes was refined in a trilogy of opinions written by U.S. Supreme Court Chief Justice John Marshall.[3] Over the last 150 years the basic tenets of the Marshall cases have been somewhat eroded by various Congressional enactments and federal court decisions, but the sovereign authority of tribes to govern their own lands is still a viable legal principle today.

Inherent with the sovereign authority of federal and state government in the United States is the ability to provide for courts to punish inappropriate human conduct (criminal law) and to resolve disputes between parties (civil law). Certain limits excepted, tribal governments may also establish courts to handle criminal and civil matters. Although most tribal courts are currently prohibited from exercising felony jurisdiction[4] or from exercising criminal jurisdiction over non-Indians,[5] tribal courts have criminal jurisdiction over misdemeanors committed by Indians within the tribe's territory. Tribal courts also have extensive civil authority, including jurisdiction over many disputes involving non-Indian parties.[6] Tribal courts also exercise jurisdiction over domestic relations matters, some probate matters, etc. What follows in this article is a brief description of each of the eight tribes in Utah and their respective judicial systems.

THE NAVAJO NATION

The Navajo Nation has the largest Indian reservation in the United States. Roughly the size of West Virginia, the reservation covers almost 27,000 square miles and has a resident population of over 157,000 people. The reservation covers parts of Utah, Arizona, and New Mexico. In Utah, the reservation covers over 550,000 acres all of which are in San Juan County.[7] The Utah portion of the Navajo reservation was created through a series of Congressional enactments beginning in 1933.

The Navajo Nation is widely regarded as having the most developed tribal court system in the United States. Criminal and civil matters are handled by the District Courts while domestic and juvenile matters are handled by the Family Courts; venue is divided into seven judicial districts. Appeals go to the Supreme Court of the Navajo Nation in Window Rock, Arizona; the Supreme Court consists of a panel of three justices. In addition to the tribal courts, there are also several Navajo tribal administrative agencies that many parties seek counsel for representation before. Administrative forums include the Navajo

Christopher B. Chaney is a member of the Seneca-Cayuga Tribe of Oklahoma. He is a graduate of the University of Oklahoma (B.A. 1984) and Brigham Young University's J. Reuben Clark Law School (J.D. 1992). Mr. Chaney is employed as an Assistant United States Attorney in Salt Lake City, Utah where he handles Indian country crimes and prosecutes other federal criminal offenses. He is admitted to practice law in Utah (federal and state), New Mexico (federal and state), the federal Tenth Circuit Court of Appeals, and in numerous tribal courts.

Housing Authority, hearings before tribal land committees, and hearings regarding tribal employee grievances.

The Navajo Nation does not currently conduct court within Utah; Navajo tribal court venue in Utah is divided between two judicial districts. Venue for cases involving the eastern area (including the communities of Hatch, Aneth, and Montezuma Creek) lies in Shiprock, New Mexico. Venue for cases involving the western area (including the communities of Halchita, Monument Valley, Oljato and Navajo Mountain) lies in Kayenta, Arizona.

The courts of the Navajo Nation must interpret and enforce a complex set of laws. Most statutory laws are contained within the Navajo Nation Code which was issued in 1995. Copies of recent decisions of the Supreme Court of the Navajo Nation are available to the public upon request; older decisions can be found in the Navajo Reporter. Rights of parties before the courts are governed by the statutory Navajo Nation Bill of Rights and by the federal Indian Civil Rights Act (ICRA).[8] There are various sets of court rules including rules for civil procedure, criminal procedure, civil appeals, criminal appeals, evidence, probate, small claims, and repossession. Many of the tribal administrative agencies which conduct hearings on the reservation, such as the Navajo Housing Authority, also have their own sets of procedural rules.

Admission to practice before the courts and administrative agencies of the Navajo Nation is handled by the Navajo Nation Bar Association (NNBA). The NNBA works much like a state bar association. Attorneys licensed to practice law in Utah are eligible to apply for admission. There is a formal application process, an application fee, and a bar exam which is offered twice a year. Bar review classes are offered periodically. Once admitted, attorneys must take a course on Navajo culture, pay yearly dues, and meet a yearly CLE requirement. Pro bono service is required; for attorneys located near the reservation this is usually accomplished through occasional criminal defense or guardian ad litem appointments. For attorneys located away from the reservation, pro bono service can be accomplished by means of alternative projects which must be approved by the Supreme Court of the Navajo Nation.

UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION

The capital of the Ute Tribe is located in Fort Duchesne, Utah. Three bands of Utes from Utah and Colorado were located to the reservation in the mid 1800's. These bands (Uintah, White-river, and Uncompahgre) were essentially consolidated into the entity known today as the Ute Indian Tribe of the Uintah & Ouray Reservation.

The reservation originally consisted of approximately 4,000,000 acres in Wasatch, Duchesne, Uintah and Grand counties. After heavy immigration of non-Indians to the area in the early part of this century, much of the land was converted into private non-Indian owned status. Recently, years of litigation concerning the jurisdictional status of lands within the original reservation boundaries has ended. The parties have accepted the 1997 decision of the Tenth Circuit of Appeals set forth in *Ute Indian Tribe v. Utah.*[9] In that decision, the Court determined which lands within the original reservation boundaries are still Indian country subject to tribal and federal law. The Tribe and the State are now in the process of mapping which parcels are now legally Indian country and which areas are not. The Tribe and the State have also recently signed a Letter of Intent to resolve jurisdictional and taxation issues by way of formal agreement instead of by renewed litigation.[10]

The tribal court for the Ute Tribe has a Chief Judge, Associate Judge, and a Juvenile Court judge. The court enforces the provisions of a tribal code. The court has issued a pamphlet which contains the court rules which are in effect. The code has not been kept current so practitioners should be aware that there are subsequent enactments governing juvenile curfew, landlord-tenant law, elections, and claims against the Tribe. In addition to the federal constitutional protections contained in the federal ICRA, the tribal court is bound by the provisions of the tribe's Constitution.

Admission to practice law before the Ute tribal court is by Motion and Order. Attorneys licensed to practice law in Utah are eligible to apply for admission. Applicants are required to take the Oath of Attorney, pay a $50.00 per year license fee, and must be approved by the Chief Judge. The Court is open Monday through Thursday and is located in Fort Duchesne (near Roosevelt).

WHITE MESA RESERVATION

The White Mesa reservation is located between Blanding and Bluff on U.S. 191. The White Mesa reservation is an outlying community of the Ute Mountain Ute Tribe. The Ute Mountain Ute

Tribe has its capital in Towaoc, Colorado. The Ute Mountain Ute Tribe is the successor of the Weeminuche band of the Ute Indians which were moved to the current reservation (which lies primarily in Colorado) in the late 1800's.

The court for the Ute Mountain Ute Tribe (including the White Mesa reservation) is technically not a tribal court. Rather it is a federal "Court of Indian Offenses" administered by the U.S. Bureau of Indian Affairs. Because the court operates under 25 C.F.R. Part 11, it is commonly called a "CFR" court. The CFR court has authority to hear criminal matters, civil disputes and other types of actions. In addition to applying laws contained in the CFR, it interprets and applies various tribal enactments including a children's code and various family law provisions.

Admission to practice before the CFR court is by Motion and Order. Attorneys in good standing in Utah are eligible to apply for admission. There are no bar dues. Although the court usually sits in Towaoc, Colorado, hearings are held monthly in White Mesa, Utah.

SKULL VALLEY BAND OF GOSHUTE INDIANS

The Skull Valley reservation lies in Tooele County between the Great Salt Lake and Dugway Proving Grounds. The Goshute people are indigenous to Utah's west desert area. The reservation was established by Presidential Executive Orders in 1917 and 1918. The reservation is sparsely populated. The tribe maintains offices on the reservation and in Salt Lake City.

Because of the sparse population on the reservation, legal disputes are rare and judicial proceedings are not held on a regular basis. Adjudication is handled by a tribal court for criminal and civil matters and by a tribal tax court for taxation matters. Both courts are convened (and judges appointed) on an "as needed" basis. The tax court requires that all parties be represented by counsel. Attorneys licensed to practice law in Utah are eligible to represent parties in both courts.

CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

The Confederated Tribes of the Goshute Reservation straddle the Utah-Nevada border. The Utah portion of the reservation lies in Juab and Tooele counties. The Tribes' administrative capitol lies in Ibapah, Utah. The reservation was established in 1914 by presidential Executive Order. Tribal members are of Goshute, Pauite and Bannock descent.

The judiciary for the Goshute reservation is in an exciting period of change. Judicial services had been provided by a federal CFR court, however, in January 1998 a true tribal court was established. The tribal council has adopted much of the CFR code for use as tribal law until more customized laws are adopted. A tribal criminal code has been drafted and is currently before the tribal council for consideration. The court has adopted federal court rules for use until formal tribal court rules are created. The new tribal court meets every other month in Ibapah, Utah.

Admission is automatic upon payment of a $50.00 fee. Members of the Utah Bar are eligible for admission.

OTHER TRIBES IN UTAH

The Paiute Indian Tribe of Utah has five federal reservations: Shivwits (in Washington County), Cedar City and Indian Peaks (in Iron County), Kanosh (in Millard County), and Koosharem (in Sevier County). The Paiute Tribe was "terminated" as a legal entity by Congress in 1954. However in 1980, Congress restored the tribe to its legal status as a federally recognized Indian tribe. However in restoring the Paiute Tribe, Congress provided that judicial services would be provided by the State of Utah.[11] This type of transfer of governmental power is not absolute[12] and in April 1998 the tribe passed Resolution 98-16 in its efforts to establish a tribal administrative commission to hear cases arising under the federal Indian Child Welfare Act[13] and similar matters affecting Paiute children. The commission is in its infancy and jurisdiction, policies, and procedures have not yet been determined.[14] Admission to practice before the commission has not yet been determined either.

The San Juan Southern Paiute Tribe (not to be confused with the Paiute Indian Tribe of Utah) is a federally recognized tribe located in San Juan County, Utah.[15] The tribe's population centers around the Piute Farms area on the Navajo Nation reservation. At this time, the tribe has no separate land of its own. Criminal and civil matters are handled by the Navajo Nation courts in Kayenta, Arizona.

The Northwestern Band of the Shoshoni Nation is a federally recognized Indian tribe that holds various scattered parcels of land in Box Elder County. The tribe maintains an office in Brigham City, Utah.[16] Few, if any, tribal members actually live on the Indian country parcels, therefore the opportunities for the tribe to exercise criminal or civil adjudicatory jurisdiction are minimal. However, the tribe does possess off-reservation treaty hunting and fishing rights.[17] The tribe regulates exercise of these treaty rights and issues hunting permits to tribal members. While Article VII of the tribal constitution vests judicial authority with a tribal court, hearings are rarely held.

CONCLUSION

Utah attorneys need to be aware of the existence of tribal courts, how they operate, and what laws they apply. Attorneys who take the time to learn about tribal courts will be better equipped to provide effective legal advice to their clients both on and off the reservation. What follows is a resource of contacts for Utah's tribal courts.

I. NAVAJO NATION

A. NAVAJO NATION DISTRICT COURT
P.O. Box 1148
Shiprock, NM 87420
Phone: (505) 368-1270 • Fax: (505) 368-1288
District Judge: T.J. Holgate
District Judge: Raymond Begaye
Family Judge: Marilou Begay
Court Administrator: Ethel Laughing

B. NAVAJO NATION DISTRICT COURT
P.O. Box 1248
Kayenta, AZ 86003
Phone: (520) 697-5541 • Fax: (520) 697-5546
District/Family Judge: Manuel Watchman
Court Administrator: Lavonne Yazzie

C. SUPREME COURT OF THE NAVAJO NATION
P.O. Box 520
Window Rock, AZ 86515
Phone: (520) 871-6763 • Fax: (520) 871-7016
Chief Justice: Robert Yazzie
Associate Justice: Raymond Austin
Associate Justice: Wayne Cadman
Court Clerk: Benjenita Bates

D. NAVAJO NATION BAR ASSOCIATION
P.O. Box 690
Window Rock, AZ 86515
Phone: (520) 871-2211 • Fax: (520) 871-2229
President: Levon Henry

II. UTE INDIAN TRIBE OF THE UINTAH & OURAY RESERVATION

TRIBAL COURT
P.O. Box 190
Fort Duchesne, UT 84026
Phone: (435) 722-3633 • Fax: (435) 722-3637
Chief Judge: George Tah-Bone, Jr.
Associate Judge: Leon Prank
Juvenile Court Judge: Debra Ridley
Court Administrator: Jacqueline Rivers

III. WHITE MESA RESERVATION

CFR COURT - UTE MOUNTAIN UTE AGENCY
P.O. Box KK
Towaoc, CO 81334
Phone: (970) 565-8471 • Fax: (970) 565-8906
U.S. Magistrate: Leigh Meigs
Court Administrator: Priscilla Blackhawk

IV. SKULL VALLEY BAND OF GOSHUTE INDIANS

TRIBAL COURT
c/o Danny Quintana, Attorney at Law
50 West Broadway
Salt Lake City, UT 84101
Phone: (801) 363-7726 • Fax: (801) 521-4625

V. CONFEDERATED TRIBES OF THE GOSHUTE RESERVATION

TRIBAL COURT
P.O. Box 6104
Ibapah, UT 84034
Phone: (435) 234-1137 • Fax: (435) 234-1162
Judge: James Underwood, Jr.
Clerk: Mary Pete

[1]"Indian country" is defined for criminal jurisdictional purposes at 18 U.S.C. 1151; this definition has also been adopted for civil jurisdictional purposes, *DeCoteau v. District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

[2]See notably, U.S. Const., Art. I, sec. 8., identifying Indian tribes as something different than federal, state, or foreign sovereigns.

[3]*Johnson v. McIntosh,* 21 U.S. (8 Wheat.) 543 (1823) - acknowledging the right of tribes to occupy the lands of the United States; *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831) - defining the special sovereign status of Indian tribes as "domestic dependent nations"; and *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) - holding that state law does not apply in Indian country.

[4]25 USC 1302(7).

[5]*Oliphant v. Suquamish Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

[6]*Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); but see, *Strate v. A-1 Contractors,* __ U.S. __, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), holding no tribal court jurisdiction for particular dispute between two non-Indians.

[7]Tiller, *Tiller's Guide To Indian Country*, 214 (1996); this and virtually all general and statistical information in this article came from this source.

[8]The federal Indian Civil Rights Act is codified at 25 U.S.C. 1302. It provides parties in tribal courts with virtually all of the same protections that the federal Bill of Rights provides for parties in federal court. All tribal courts in the U.S. are bound by this provision.

[9]114 F.3d 1513 (10th Cir. 1997), *cert. den., Duchesne County v. Ute Indian Tribe,* __ U.S. __, 118 S.Ct. 1034, __ L.Ed.2d __, (1998); applying the decision of *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), *reh. den.,* 511 U.S. 1047, 114 S.Ct. 1580, 128 L.Ed.2d 222 (1994).

[10]The State of Colorado and the Southern Ute Tribe have amicably handled similar jurisdictional problems by way of a carefully crafted bill which was approved by Congress in 1984; it can be found at Pub.L. 98-290; 98 Stat. 201.

[11]25 USC 766(b) applied "Public Law 280" to the Tribe meaning that criminal and civil jurisdiction would be transferred to the state as set forth respectively in 18 USC 1162(a) and 28 USC 1360(a).

[12]See for example, *Bryan v. Itasca County,* 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976).

[13]The Indian Child Welfare Act is codified at 25 USC 1901, *et seq.,* and governs adoption, termination of parental rights, and foster care.

[14]For more information regarding the Paiute child welfare commission contact: Social Services Director Randy Hoyt, Paiute Indian Tribe of Utah, 440 North Paiute Drive, Cedar City, UT 84720; phone: (435) 586-1112, ext. 17; fax: (435) 586-7388.

[15]For more information, contact: Chairperson Evelyn James, San Juan Southern Paiute Tribe, P.O. Box 2656, Tuba City, AZ 86045; phone: (520) 283-4587; fax: (520) 283-5761.

[16]For more information, contact: Acting Chairman Tommy Pacheco, Northwestern Band of the Shoshoni Nation, 695 South Main Street, Suite 6, Brigham City, UT 84302; phone: (435) 734-2286; fax: (435) 734-0424.

[17]*See, State v. Tinno*, 497 P.2d 1386 (Id. 1972).

Announcement

The Navajo Nation Bar Association announces its August NNBA bar examination scheduled for Saturday August 22, 1998. You can obtain an application packet from the Navajo Nation Bar Association office for $10.00. Please send check or money order payable to the Navajo Nation Bar Association, P.O. Box 690, Window Rock, Arizona.

The Navajo Nation Bar review course is scheduled for July 13, 14 & 15, 1998, Window Rock, Arizona.

NNBA CLE CREDITS WILL BE OFFERED.

For further information, please contact Andrea Becenti, Executive Director NNBA, at (520) 871-2211, or FAX: (520) 871-2229.

People and Scenes of the 1998 Annual Meeting

Photos courtesy of Patricia Thorpe and Jennifer Ross

Discipline Corner

DISBARMENT

On May 26, 1998, the Honorable Kenneth Rigtrup, Third Judicial District Court entered an Order of Disbarment disbarring Robert L. Wood from the practice of law for violation of Rules 8.4(a), (b) and (c) (Misconduct) of the Rules of Professional Conduct. The Order was based on a Stipulation to Discipline By Consent: Disbarment, entered into by Wood and the Office of Professional Conduct.

On July 22, 1986, Wood on behalf of Bonneville Pacific Corporation ("BPC") made an initial public offering of its securities and filed a registration for the sale of debt securities with SEC. The registration statement made disclosures that were false, fraudulent, and misleading.

The Information further alleged that on April 15, 1986, Wood willfully signed and verified, by a written declaration under penalties of perjury, a 1985 joint U.S. Tax Return, on behalf of himself and his spouse, wherein Wood reported $162,500 in stock sales which he knew were worth substantially less, all in violation of Title 26, U.S.C. §7206(1) (False Tax Return).

On October 15, 1996, Wood pled guilty to a two felony count Information which charged him with a violation of 15 U.S.C. §77q(a) and 77(x) (Securities Fraud – Offer and Sale) and 26 U.S.C. §7206(1) (False Tax Return). Wood was sentenced to twelve months and one day in prison and placed on Interim Suspension on November 5, 1996.

DISBARMENT

On June 26, 1998, the Utah Supreme Court reversed the Seventh Judicial District Court's suspension of Mark H. Tanner. The Court stated that disbarment is the appropriate sanction for Tanner's violation of Rules 8.4(a), (b), and (c) (Misconduct) of the Rules of Professional Conduct.

The Utah State Bar appealed an order suspending Tanner from the practice of law for three years. Tanner accepted a settlement without authorization from his client, forged his client's signature, forged and back-dated a Special Power of Attorney, convinced his wife to falsely notarize the Special Power of Attorney, converted the client's settlement funds for his own use, and lied to a federal agent regarding the Special Power of Attorney. Although the District Court found that Tanner committed serious violations of the Rules of Professional Conduct, it entered an order sanctioning Tanner with a suspension. On appeal, the Bar asserted that the trial court should have disbarred Tanner.

The Supreme Court found that although the trial court correctly concluded that the presumptively appropriate sanction was disbarment, it incorrectly weighed the aggravating and mitigating circumstances. The Supreme Court concluded that:

> . . . the multiple aggravating factors in this case – a record of misconduct, taking advantage of a vulnerable client, absence of mental, emotional, or financial difficulties and lack of remorse prior to exposure – would in fact justify an increase in the degree of discipline imposed.

The Supreme Court also considered Tanner's deception of the federal agent while he held a public office, and noted that public officials are generally held to a higher ethical standard because they must act in the best interest of the public.

Whereas the trial court considered as mitigating circumstances Tanner's inexperience in the practice of a law, his good character and reputation, the remorse he showed at trial, and the lack of a pattern, the Supreme Court noted that "With regard to all mitigating factors, courts must consider them in light of the particular misconduct, not in isolation."

Moreover, the Supreme Court stated that Tanner's inexperience in the practice of law could not be considered mitigating because, "All citizens, lawyers or otherwise, should know that the law forbids forging and back-dating documents." This, combined with the fact that Tanner had already been warned regarding the proper use of a notary, demonstrated that additional experience in the practice of law would not have taught Tanner anything he did not know. The Supreme Court further stated that the fact that Tanner was able to conceal his "weak character" from the public should not weigh in his favor. Finally, the Supreme Court noted that Tanner's remorse was irrelevant, as it was not displayed until after he was caught and was going through trial.

RESIGNATION WITH DISCIPLINE PENDING

On June 22, 1998, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation Pending Discipline in the matter of Nick H. Porterfield. In the Petition for Resignation with Discipline Pending, Porterfield admitted that he violated Rules 1.1 (Competence), 1.3 (Diligence), 1.16(d) (Declining or Terminating Representation), 8.1 (Bar Admission and Disciplinary Matters), and 8.4(a), (b), (c) and (d) (Misconduct) of the Utah Rules of Professional Conduct.

Upon a motion submitted by the Office of Professional Conduct, in the Third Judicial District Court, Porterfield was placed on interim suspension for abandonment of his practice. The OPC later filed a Formal Complaint in the Third District Court based on information contained in approximately thirty-five informal complaints, most from former clients, alleging misconduct by Porterfield. Since the Complaint was filed, the Office of Professional Conduct has received approximately twenty-six additional informal complaints against Porterfield.

In his representation of many of the clients who filed informal complaints, Porterfield failed to appear at hearings, took additional fees to complete work which he never completed, failed to file documents, failed to communicate with his clients, and failed to return client fees.

In addition to the numerous client complaints against Porterfield, were three criminal incidents that warranted discipline. The most recent occurred in Texas in 1996 when, while on suspension from the practice of law in Utah, Porterfield held himself out as an attorney in Texas in violation of the Utah court's Order of Interim Suspension. Additionally, on June 3, 1996, Porterfield pled guilty to Credit Card Abuse, a State Jail Felony, in Tarrant County, Texas. He received a sentence of Deferred Adjudication and was placed on probation for two years. Finally, on October 6, 1978, Porterfield was arrested in Fort Worth, Texas on charges of felony theft. The case was later dismissed. Porterfield failed to report his incident on his application to the Utah State Bar, although the application specifically asks for such information.

RESIGNATION WITH DISCIPLINE PENDING

On June 2, 1998, the Honorable Richard C. Howe, Chief Justice, Utah Supreme Court, executed an Order Accepting Resignation with Discipline Pending in the matter of Duane R. Smith. The Order took effect on July 15, 1998. In the Petition for Resignation with Discipline Pending Smith admitted that he violated Rules 8.4(a), (b), and (c) (Misconduct) of the Rules of Professional Conduct.

In May 1990, Smith began renting office space from a law firm and began to work at the firm on various cases. This arrangement continued until April 1, 1994, when Smith was suspended from the practice of law for one year for forging his wife's signature and a notary's signature on an acceptance of service and waiver stemming from a divorce action he initiated. Smith continued to work at the firm as a law clerk during his disciplinary suspension.

When Smith's suspension ended on March 1, 1995, Smith resumed his relationship with the firm and entered into another agreement with the firm. Under the agreement, Smith would be recognized as a member of the firm, receive a portion of the hourly amount he billed and collected, have his work billed through the firm, and be responsible for twenty-five percent of the overhead. Sometime after January 15, 1996, at Smith's request, the agreement was changed to provide him with a greater portion of the amount billed and collected.

On May 9, 1997, a partner in the firm discovered that Smith had been receiving payments from clients and cashing them or depositing them into his own account without apportioning any percentage to the firm. Smith first routed client payments into his own account on September 25, 1995. From the date through April 7, 1997, Smith failed at least twenty-four times to apportion payments to the firm. The total amount Smith failed to apportion totaled $15,969.25.

On May 19, 1997, the firm informed the Office of Professional Conduct of Smith's conduct, as required by Rule 8.3(a) (Reporting Professional Misconduct) of the Rules of Professional Conduct.

INTERIM SUSPENSION

On July 6, 1998, the Honorable Boyd Bunnell, Senior District Court Judge, presiding in the Fifth Judicial District Court, entered a Ruling on the Bar's Motion for Interim Suspension suspending Gary Pendleton from the practice of law pending final disposition of the disciplinary proceeding.

The Office of Professional Conduct asked the Court for an order placing Pendleton on Interim Suspension from the Practice of Law, pursuant to the provision of Rule 19, Rules of Lawyer Discipline and Disability. Rule 19(c) states: "The district court shall place a respondent on interim suspension upon proof that respondent has been convicted of a crime which reflects adversely

on the respondent's honesty, trustworthiness or fitness as a lawyer in other respects, regardless of the pendency of an appeal."

On March 13, 1998, the Honorable David E. Roth, Fifth Judicial District, executed a Judgment, Stay of Imposition of Sentence, and Order of Probation. The Judgment of Conviction stated that Pendleton "is guilty of the offense of possession or use of a controlled substance, to wit: methamphetamine, which is a third degree felony . . . ." The Order sentenced Pendleton to a term not to exceed five years in the Utah State Prison, but stayed the sentence and placed Pendleton on supervised probation for thirty-six months. Additionally, Pendleton was fined $4,995, ordered to complete three hundred twenty hours of community service, and ordered to undergo a substance abuse evaluation and treatment program.

The Office of Professional Conduct argued to Judge Bunnell that in accordance with Rule 19(e) Rules of Lawyer Discipline and Disability, the Bar's submission of a certified copy of the Judgment justified the granting of their motion.

The Court determined that the only question is whether or not Pendleton's felony conviction for the use and possession of an illegal controlled substance adversely reflects on his honesty, trustworthiness, or fitness as a lawyer in other aspects. The Court found:

> The conviction of respondent of the crime for which he was charged requires the proving beyond a reasonable doubt that he intentionally and knowingly violated the felony controlled substance laws. It is inconceivable to the Court that an attorney sentenced to prison on a felony drug charge can continue to appear as an officer of the Court and defend clients similarly charged or to otherwise represent and advise clients on legal matters without adverse reflection on his honesty, trustworthiness, or fitness as a lawyer.

ADMONITION

On June 9, 1998, Judge Pat B. Brian, Third District Court, admonished an attorney for violation of Rule 1.7 (Conflict of Interest) and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

Between May 1991 and September 1991, the attorney acted as legal counsel and provided legal services for a partnership controlled by a woman and comprised of members of her immediate family, including her husband, who, along with her, was a general partner. During this time a judgment creditor in California, obtained a judgment against her husband in the amount of $2,500,000. The attorney recommended to her that the partnership file a suit and obtain a judgment against her husband to prevent the company from attaching the assets of the partnership. The woman declined to follow that advice. Thereafter, while representing another client, the attorney did file a suit against the husband. In that suit, it was alleged that the husband assigned all of the partnership's assets to a trust without the knowledge of the woman, as one of the partnership's general partners. The company filed the suit for the purpose of putting the partnership's claims on equal footing, if not prior in time, to the company's claims.

In his common representation of these parties, the Respondent violated Rule 1.7 "Conflict of Interest" of the Rules of Professional Conduct, in that, the Respondent's common representation of the clients described herein and the Complaint was directly adverse, and no lawyer could reasonably believe that the common representation would not adversely affect his relation with the other client.

In a second incident, previous to 1994, the subject attorney and another attorney were involved in litigation involving the partnership and a company. The other attorney represented another party in that matter and the subject attorney represented the partnership. The subject attorney withdrew from representation of the partnership, which then became represented by other counsel. During the course of their representation of their respective clients, the subject attorney and the other attorney each alleged that the other's conduct was unprofessional. The other attorney filed a complaint with the OPC alleging among other things, that the Respondent had been rude and unprofessional and had filed papers in the case that lacked merit. The subject attorney filed a response to the complaint denying all allegations and alleging the other attorney had been unprofessional. The subject attorney stipulated to the matter being included in the admonition, and acknowledges that his conduct towards opposing counsel and the opposing party could have been handled in a more professional manner and his conduct was, to some degree, prejudicial to the administration of justice.

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 $20.00. Sixty-nine opinions were approved by the Board of Bar Commissioners between January 1, 1988 and April 17, 1998. For an additional $10.00 ($30.00 total) members will be placed on a subscription list to receive new opinions as they become available during 1998.

ETHICS OPINIONS ORDER FORM

Quantity		Amount Remitted
_____	Utah State Bar Ethics Opinions	_____ ($20.00 each set)
_____	Ethics Opinions/ Subscription list	_____ ($30.00 both)

Please make all check 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.

Committee Vacancy

Two vacancies exist on the Supreme Court Advisory Committee on Rules of Civil Procedure. The Committee researches, writes, and recommends amendments to the Utah Rules of Civil Procedure. The Committee chair is Alan Sullivan. The Committee meets from 4:00 to 6:00 p.m. on the fourth Wednesday of the month from September through May. The Committee is especially interested in attorneys practicing outside Salt Lake County. Attorneys interested in serving on the Committee should submit a resume and a letter of interest not later than October 15 to Timothy M. Shea / Administrative Office of the Courts / P.O. Box 140241 / Salt Lake City, Utah 84114-0241.

CLE Discussion Groups Sponsored by Solo, Small Firm & Rural Practice Section

Aug 20	Title Insurance
Sept 17	Social Security & Elderly Law
Oct 15	Bankruptcy
Nov 19	Foreclosure – Judicial & Non-judicial
Dec 17	Workman's Compensation Claims & Defenses

Reservations in advance to Amy (USB) (801) 297-7033.

Membership Corner

CHANGE OF ADDRESS FORM

Please change my name, address, and/or telephone and fax number on the membership records:

Name (please print) _____ Bar No. _____

Firm _____

Address _____

City/State/Zip _____

Phone _____ Fax _____ E-mail _____

All changes of address must be made in writing and NAME changes must be verified by a legal document. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834; Attention: Arnold Birrell, Fax Number (801) 531-0660.

Professor Gerald R. Williams Receives the 1998 Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award

Gerald R. Williams, a professor at the J. Reuben Clark Law School at Brigham Young University, has been awarded the Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award by the Salt Lake City regional office of the American Arbitration Association (AAA).

Professor Williams, a member of the BYU law faculty since 1973, is recognized as an international leader in the field of alternative dispute resolution (ADR). He has taught negotiation seminars and conflict resolution courses around the world, written extensively on the subject, and was instrumental in the development of the dispute resolution curriculum at the BYU law school.

Williams has been a member of the Society of Professionals in Dispute Resolution since 1987 and has been a member of the AAA Arbitration Panel since 1986. He has served on the National Board of Directors of the American Arbitration Association and has also served on the American Bar Association's Standing Committee on Dispute Resolution.

In 1984-85, at a time when ADR was not a popular concept for discussion within law schools, Williams served as a founding member and chair of the Association of American Law Schools' Section on Dispute Resolution. Williams also served from 1988-91 as chair of the ADR Policies and Programs Advisory Committee at the Utah Law and Justice Center. Williams's reputation and stature within the legal and academic communities have lent credibility to ADR concepts and practices worldwide.

The American Arbitration Association established the annual service award in 1996 to honor Peter W. Billings, Sr.'s long-standing contributions to the field of ADR. The award is given by the Association to the organization or individual who has done the most to further dispute resolution in the states served by the Salt Lake City office.

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications for the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare formal written opinions concerning the ethical aspects of lawyers' 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 bar 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 and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibilities to consider ethical questions and issue timely, well-reasoned, articulate opinions.

- Involves diverse views, experience and backgrounds from the members of the practicing bar.

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 Opinion Committee
Gary G. Sackett, Chair
180 East First South Street
P.O. Box 45433
Salt Lake City, Utah 84145

1998 Annual Awards

JUDGE OF THE YEAR
Hon. Tyrone E. Medley

Judge Medley was appointed to the Third District Court in 1992 by Gov. Norman H. Bangerter and to the Third Circuit Court in 1984 by Gov. Scott M. Matheson. He received his law degree from the University of Utah College of Law in 1977. Prior to his appointment to the bench, he was a Research Attorney for the Third District Court and Deputy Attorney for Salt Lake County. Judge Medley has exemplified the highest standards of judicial conduct and is well respected for his integrity and character both within and outside of the legal community. His judicial decisions are made independent of concern about public opinion. He consistently applies the law as well as rules and procedures, while allowing the parties adequate opportunity to present their case. Judge Medley strives to be courteous and patient with all those who enter his court. His respect for members of the Bar is evident in the manner in which he conducts his court proceedings. He is also a strong advocate for the administration of justice to all people. He currently serves as Co-Chair of the Task Force on Racial and Ethnic Fairness.

DISTINGUISHED LAWYER OF THE YEAR
Leonard J. Lewis

Mr. Lewis was admitted to the Utah State Bar in 1950. He received his B.S. from the University of Utah in 1947 and his J.D. from Stanford University in 1950. While attending law school, he won Stanford's Moot Court Competition and then the Moot Court Award for the State of California. Following his admission to the Utah State Bar, Mr. Lewis joined the law firm of VanCott, Bagley, Cornwall & McCarthy where he worked until 1997. He continues to practice law with his two sons and a daughter. He has been admired for his high standards, professionalism and preparedness in the legal community. Mr. Lewis has always helped the less fortunate in a variety of legal matters, and he has urged those with whom he has been associated to work hard, to serve others and to love the law. He has served as a member of the Board of Trustees for the University of Utah since 1985; former chairman, Committee on Health Science Affairs; former chairman, Utah State Building Board. He is a member of the American College of Real Estate Lawyers, the Salt Lake County Bar Association as well as the American and International Bar Associations.

DISTINGUISHED COMMITTEE OF THE YEAR
Courts & Judges Committee
Brent V. Manning, Chair

Mr. Manning has served as chair of the Utah State Bar's Courts and Judges Committee since 1996. Over the past two years the Committee has been involved in several significant projects. Some of these projects include: preparation and submission of guidelines and draft responses to guide the Utah State Bar Commission in responding to unjustified criticism of courts and judges; gathering information and discussing issues regarding the planning, implementation and difficulties of the move to the new court complex; researching and commenting on the proposed revision to Judicial Canon 5C(2) concerning conduct of judicial retention elections; researching and commenting on the proposed Informal Opinion 97-7 concerning informal contact between judges and lawyers; consideration and comment upon the formation of a task force to consider jury reform; suggesting revisions to the jury questionnaire now being used by some trial court judges in the Third Judicial District; and commenting on public and press access to video recorded trial court records.

DISTINGUISHED DIVISION OF THE YEAR
Legal Assistants Division
Peggi Lowden, Chair

The Legal Assistants Division (LAD) was created by the Bar in 1996. Ms. Lowden, Certified Legal Assistant with Strong & Hanni, was elected as the initial chair of the Division. Numerous volunteers have stepped forward to organize the LAD beginning with adoption of a purpose statement and bylaws, to its first election of directors held during June of 1997. LAD members have become involved in the needs of the Utah State Bar, with many LAD members serving on various Bar committees and projects. Most recently, the Licensing Sub-Committee of the LAD submitted an initial model for the licensing of legal assistants in the state of Utah to the Board of Bar Commissioners. The LAD promotes the knowledge and understanding of the roles of a legal assistant in the delivery of legal services; education for the effective utilization of legal assistants; professional competence and excellence for legal assistants; protection of the public from persons engaging in the unauthorized practice of law; increasing the availability of low-

cost legal services through increased utilization of legal assistants; and improving quality and efficiency of the practice of law.

PRO BONO LAWYER OF THE YEAR
Herm Olsen

Mr. Olsen is a partner in the law firm of Hillyard, Anderson & Olsen. He has been with the firm since 1980 and has concentrated his practice on personal injury, criminal defense and municipal law. Mr. Olsen was admitted to the Utah State Bar in 1976, the Navajo Nation Bar in 1977 and the District of Columbia Bar in 1979. During 1979-1980, he served as Appropriations Committeeman for Congressman K. Gunn McKay in the House of Representatives. He also served as Chief Legislative Counsel and Head of the Legislative Staff for Congressman McKay from 1977-1980. In 1976, Mr. Olsen served as a staff attorney in the Navajo Legal Department for the Navajo Nation. For several years, Mr. Olsen has been a devoted volunteer to the Navajo people who are in need of legal services. He has spent countless hours driving from his home in Logan to outlying places across the state to provide free legal help to Navajos. At least four times each year, Mr. Olsen puts his knowledge of the Navajo language and the law to use on behalf of the Indians. For many people on the reservation, he is their only connection to legal justice.

PRO BONO LAW FIRM OF THE YEAR
Snow & Jensen, P.C.

Attorneys from the St. George law firm of Snow & Jensen are ready and willing to talk on the third Thursday evening of each month. Recognizing an unmet need, the firm's pro bono committee proposed the "Talk-to-a-Lawyer" program at Snow & Jensen's 1997 annual retreat. Since November 1997, lawyers from this firm have met with local residents once a month at the Washington County Library to answer questions and provide direction toward legal resources. Appointments are scheduled for fifteen minutes and the client is advised that the lawyer will not represent them beyond an initial consultation, and Snow & Jensen will not take their case. Those who need an attorney are directed to the Utah State Bar's Lawyer Referral Service or other services for which they qualify. In addition, Snow & Jensen accepts applications from local residents for pro bono representation. The firm's pro bono committee reviews those applications based on need, type of matter and the potential resolution. The firm's belief that it can serve the community better as a firm rather than as individual lawyers holds true whether its service is for profit or pro bono.

DISTINGUISHED SERVICE AWARD
Dean Lee E. Teitelbaum

Since 1990, Lee Teitelbaum has served as the Dean of the University of Utah College of Law. Prior to assuming his current position, he served as Associate Dean for Academic Affairs, Acting Dean and a Professor at the University of Utah College of Law. He has served as a Professor of Law at several universities across the country including the University of New Mexico Law School, Indiana University Law School, and State University of New York at Buffalo. He has authored several books and articles, many of them focusing on juvenile justice and domestic law. Dean Teitelbaum has also been the recipient of several awards and honors including the Alfred C. Emery Professorship of Law; Fellow, American Bar Foundation; and the Utah Minority Bar Association Award. He has held positions on several committees including the Executive Committee, Association of American Law Schools; Board of Trustees, Law School Admission Council; Board of Editors, Law and Policy; Board of Editors, Journal of Legal Education; and Chair, Association of American Law Schools, Planning Committee for Workshop on Family and Juvenile Law. He currently serves as an ex-officio member of the Utah State Bar Board of Bar Commissioners.

SPECIAL ACHIEVEMENT AWARD
Hon. Lynn W. Davis

Judge Davis was appointed to the Circuit Court in 1987, and to the District Court in 1992. During his career on the bench he has devoted significant efforts, in Utah and nationally, to equal access to the courts for minorities, particularly linguistic minorities. His tireless efforts for over ten years have resulted in the development of a certification program for court interpreters in Spanish; translation of various documents for all courts in Utah; teaching workshops for nearly all judges in Utah; coordination of efforts with the National Center for State Courts, graduate schools and professionals across the country; learning of Spanish to better acquaint himself with the culture; and the State of Utah being recognized at the national forefront in this field. He has authored several journal and law review articles across the country and is a frequent guest speaker at civic organizations, schools and new judge orientations. Over the years he has invited thousands of students to his court and he facilitates

drug panels in junior high and high schools. He judges and coaches local high school students for the National Bicentennial Competition on the Constitution and Bill of Rights and has judged the finals in Washington, D.C.

YOUNG LAWYER OF THE YEAR
Martin N. Olsen

Mr. Olsen is currently a partner with the law firm of Olsen & Olsen in Salt Lake City. He received his J.D. from the University of Utah College of Law in 1991. His areas of concentration are juvenile law (abuse and neglect cases), family law and civil litigation. He is active in children's advocacy on both a state and national level. Currently Mr. Olsen serves as a pro bono guardian ad litem representing children in contested divorce and/or custody cases. For the past six years he has volunteered at Primary Children's Hospital working with sick and terminally ill children. He also serves as a Mentor in the Village Project, providing guidance to youths involved in the juvenile justice system. During his tenure as President-Elect of the Young Lawyers Division, he spear-headed an effort to restore the Salt Lake County Children's shelter, and as President of the Division, coordinated an effort to restore the Y.W.C.A. Battered Women and Children's Center. He is currently a member of the ABA Steering Committee on the Unmet Legal Needs of Children; a regional coordinator for the ABA Aspiring Youth Program; a member of the Utah State Bar Needs of Children Committee; and a member of the Utah Kids Coalition. He was recently awarded the 1998 ABA Child Advocate Award. His award for Young Lawyer of the Year was presented at the 1998 Law Day Luncheon held May 1, 1998.

DISTINGUISHED NON-LAWYER FOR SERVICE TO THE PROFESSION
John Florez

Mr. Florez is recognized for his conscientious commitment to the legal community. He was born and educated in Salt Lake City and holds an MSW degree and an honorary Ph.D. In 1993, Mr. Florez was appointed by the Utah Supreme Court to serve as one of two public members on the Utah State Bar's Board of Bar Commissioners. In addition, he has held numerous national and local posts. His national positions include: Deputy Assistant Secretary, U.S. Department of Labor; Director, President's Commission on Hispanic Education; Staff to Senator Orrin Hatch, U.S. Senate Labor and Human Resources Committee; Member, President's Commission on Juvenile Justice; and Field Director, National Urban Coalition. In Utah his positions have included: Commissioner, Utah State Industrial Commission; Director, Office for Equal Opportunity, University of Utah; Chair, Utah State Committee, U.S. Commission on Civil Rights. Mr. Florez has also served on over 40 community boards including the Salt Lake City Judicial Nominating Committee and Governor Rampton's Citizens' Committee on Utah Courts.

NOTICE TO ALL INTERESTED LAWYERS

The Corporate Counsel Section is looking for one or more persons or firms to sponsor the Corporate Counsel Section Directory. The directory will be circulated to all section members this fall for the 1998-99 year. The section eagerly solicits your proposals. All proposals need to be ready for submittal to the section officers by September 10th. Inquiries may be directed to the section chairman, Steve Newton, at 944-5255.

Legal Aid Society Names New Members for Board of Trustees

Legal Aid Society's Executive Director, Stewart P. Ralphs announced that Legal Aid Society has appointed a new Executive Committee and in addition has named new members of the Board of Trustees to serve three year terms.

Lois A. Baar, an employment lawyer at Parsons Behle & Latimer, has been appointed as the new Board President. Steve Michel, Assistant Vice-President of Human Resources with Intermountain Health Care, will serve as Vice-President. Gil Miller, a FAS partner at PricewaterhouseCoopers, will continue to serve as Secretary-Treasurer.

The following have been named as new members of the Board of Trustees for Legal Aid Society: Peter Billings, Jr., an attorney with Fabian & Clendenin; Sharon Donovan, an attorney with Dart, Adamson, Donovan & Hanson; Deno G. Himonas, an attorney with Jones, Waldo, Holbrook & McDonough; and Janet Hugie Smith, an attorney with Ray, Quinney & Nebeker. "We are delighted to have such talented members of the community joining our Board of Trustees and leading our organization into the 21st century" states Executive Director, Stewart P. Ralphs.

Legal Aid Society was established in 1922 to provide free legal services to low-income individuals with family law cases. Legal Aid Society also assists adults and children who are victims of domestic violence in obtaining a protective order from the court. In 1997, Legal Aid Society assisted more than 4,000 individuals.

Young Lawyer Profile – Michael Mower

by Mark Quinn

Unlike most people who attend law school, Mike Mower always knew exactly what he wanted to do with his law degree, and it didn't involve trying cases.

A political junkie from the earliest ages of his life, this Alex Keaton clone remembers being emotionally shattered in grade school, not by any school-yard tussle, but by news of Richard Nixon's resignation. Also troubling to young Mike was the fact that his bedroom wallpaper which depicted the presidents of the United States, did not line them up in the correct order. Mike worked on his first national political campaign (for Ronald Reagan) at the age of eight.

Mike has recently ended his term as president of the Young Lawyers Division of the bar. He is happy to head into the figurative sunset as past president, and looks back on a hectic but successful term. If his past is any indication, however, any breather will be short-lived.

Mike grew up in the small farming community of Ferron, Utah and attended Emery County High School, where, as one might expect, he was elected Student Body President. He worked on a dairy farm as a youth, an activity that solidified his suspicion that there must be a better living to be made somewhere else. This conclusion propelled him to Provo where he attended Brigham Young University, pursuing studies in communications and international relations. Mike also served as editor of the *Student Review*, an off-campus and, at times, controversial student newspaper. Somewhat surprisingly, Mike was able to continue his bent as a figure of the alternative media while simultaneously serving a Spanish-speaking LDS Mission in Oregon. Apparently, Mike was quickly transferred from his assigned area when it was discovered by mission officials that he was hosting his own community-access cable talk show.

Following graduation from BYU, Mike landed a position as a legislative assistant for Congressman Howard Nielsen, who was at the time the Representative from Utah's third congressional district. Mike decided to enter law school in the fall of 1990 when the Congressman chose not to seek re-election.

In law school at the University of Utah College of Law, Mike is remembered for two significant achievements: serving as Student Bar Association president, and marrying Sheri Mower, who is universally acknowledged to be the smarter of the two. "I met Mike in a moment of weakness," Sheri admits, "I think it must have been just before finals." Sheri is currently an associate at Wood Crapo in Salt Lake City, and says that hers is the only household she knows where election day is treated with the same fervor as Christmas. "Mike will sit in front of the television with a map and color it in as the results come in." She says, "It's like a religious experience."

Mike and Sheri currently have three children and live in Rose Park, where they have resided since their marriage in Mike's final year of law school. They are in the process of moving to Sandy, but will miss Rose Park, where Mike served for two years on the community council. Mike describes Rose Park as a "terrific neighborhood" with a nagging public relations problem which he strove to overcome in his work on the community council. Others remember Mike's work with the less fortunate members of the neighborhood. "There is a large contingent of octogenarian widows who will positively pine for Mike when he moves to Sandy," says colleague Steve Taggart.

Following graduation from law school in 1993, Mike practiced family law with the Legal Aid Society of Salt Lake, but after 18 months took a leave of absence when, as one might expect, politics came calling again. Mike was asked to manage the campaign of Chris Cannon who was just entering the race for the third district seat against incumbent Bill Orton.

Chris Cannon and Michael Mower at the 1996 GOP Convention in San Diego.

As most now know, Mike managed Cannon's campaign to an upset victory over Orton. Mike's most memorable public moment of the campaign was when he had to step in and debate Orton on television when Cannon was out campaigning. Sheri describes the campaign as a roller coaster ride: "It was up and down every minute, but we never seemed to be getting ahead," she says.

After the campaign was over, Mike was offered the job as the Congressman's District Director, working out of the district office in Provo. Mike describes the job as a "dream opportunity" for a young lawyer like him who "likes politics and loves people." Mike is the Congressman's representative to the local government officials in the district and to the local media during those times when the Congressman is occupied in Washington. Taggart credits Mike as the architect of the bill sponsored by Cannon to expand Arches National Park by 3,140 acres. Mike recognizes his good fortune at being able to get paid to do something he loves, and wishes more lawyers could experience the perspective he enjoys in what he describes as his "front row seat on the law-making end of the legal process." Congressman Cannon describes Mike as "bright, articulate and focused," but Taggart actually professes to be disappointed in Mike's current job status, "I just assumed he would be elected to office himself by now," he says, "I guess he's off to kind of a slow start."

In looking to the future, however, Mike has no current plans beyond his present position. "I would like to continue in this job for a few more terms," he says, "then I'll just want to go back into practicing family law and raising my kids." One can only assume he means until the next time politics comes knocking.

Young Lawyers Team Up With T.J. the Clown for a Successful Community Service Picnic

On May 30, 1998, the Young Lawyer's Division of the Bar, with the help of Catholic Community Services Refugee Resettlement Program and Hands-On Salt Lake City, sponsored a community service picnic and games at Liberty Park. The picnic and games were for refugee families, but the YLD was able to include members of the general public in the fun, food, and festivities. YLD members organized, planned, and staffed the event. The Division paid for the food and prizes for the games. Several local merchants donated food items and entertainment. The children were captivated by T.J.'s magic show and balloon sculptures. The young lawyers present wished that they could make their cases disappear with the same ease that T.J. made the rabbit disappear!

After a scrumptious picnic, it was hard to tell who was enjoying the day more – the parents watching their excited children or the children playing the games, particularly fishing for prizes at the fish pond. The fun was contagious and the young lawyers invited other children in the park to join in the festivities.

The young lawyers donated any food left to the Salvation Army's kitchen. They were delighted to have the all ready prepared food for their Saturday night dinner for the homeless. It was a great opportunity for the refugee families to see that attorneys are not people that they need to fear or distrust. It was also a chance for the young lawyers to get involved in the community.

The Source of Funds Rule – Equitably Classifying Separate and Marital Property

by Judge Michael D. Lyon

Most district court judges and family law lawyers have handled a case similar to the following example: Wife has a house with a mortgage when the parties are married; the title stays in her name and the parties pay on the mortgage with marital funds. How, then, at the time of the divorce is the equity or value in the house divided? More specifically, how is Wife's separate interest protected while assuring that the marital contribution to the value of the home is respected? The salient objective of this article is to share with the bar and bench the source of funds rule, a tool which provides an equitable and systematic method of classifying separate and marital property.[1]

1. UTAH LAW ON THE CLASSIFICATION OF PROPERTY

The analysis of a property division incident to a divorce begins with section 30-3-5 of the Utah Code, which ostensibly gives a trial court broad power to equitably divide all property owned by the parties, regardless of when or how it was acquired: "When a decree of divorce is rendered, the court may include in it equitable orders relating to the children, property, debts or obligations, and parties." U.C.A. § 30-3-5 (1997). Indeed, facially it creates an *all property system:* namely, that all property owned by the parties may be equitably apportioned between them, regardless of ownership or whenever acquired.

Historically, the Utah Supreme Court was reluctant to go beyond the broad language of the statute and provide hard and fast rules for property division, holding instead that a grant of broad discretion to the trial court would better ensure an equitable result. Consequently, the Utah high court found no abuse of discretion when premarital property, or separate gifts and inheritance, were liberally divided between the divorcing parties. *See Newmeyer v. Newmeyer,* 745 P.2d 1276 (Utah 1987); *Bushell v. Bushell,* 649 P.2d 85 (Utah 1982); *Dubois v. Dubois,* 504 P.2d 1380 (1973). Likewise, it affirmed trial courts on the other end of the spectrum who concluded that each party should, in general, receive the real and personal property he or she brought into the marriage. *See Preston v. Preston,* 646 P.2d 705 (Utah 1982); *Georgedes v. Georgedes,* 627 P.2d 44 (Utah 1981); *Jesperson v. Jesperson,* 610 P.2d 326 (Utah 1980); *Humphreys v. Humphreys,* 520 P.2d 193 (Utah 1974).

In the past decade our appellate courts have recognized the value of adopting and consistently applying some general rules and have created an analytical framework for the treatment and division of separate and marital property. In *Mortensen v. Mortensen,* 760 P.2d 304 (Utah 1988), Justice Howe articulated what has become the general rule in the division of separate or inherited property.

> [T]rial courts making "equitable" property division pursuant to section 30-3-5 should, in accordance with the rule prevailing in most other jurisdictions and with the division made in many of our own cases, generally award property acquired by one spouse by gift and inheritance during the marriage (or property acquired in exchange thereof) to that spouse, together with any appreciation or enhancement of its value, unless (1) the

Judge Michael D. Lyon was appointed to the Second District Court in July 1992 by Governor Norman H. Bangerter. He serves as chair of the Board of District Judges and he recently served as presiding judge of the Second District Court. He is a member and past president of Rex E. Lee American Inn of Court. Prior to his judicial appointment, he practiced in general litigation with the law firm of Lyon, Helgesen, Waterfall & Jones in Ogden, Utah. Judge Lyon received his B.S. degree, cum laude, *from Weber State College and his J.D. degree from the University of Utah College of Law in 1971. His is married and the father of six children.*

other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse.

Id. at 308 (citations omitted).

Mortensen is a seminal decision because it not only provides a more definite statement upon which practitioners and trial courts can rely, it shifts the analysis in Utah from an *all property system to a modified dual classification system,* where property is first categorized as either separate or marital and then, presumptively, the separate property is given to the owner spouse and the marital property is divided equitably. The presumption that separate property is given to the owner spouse may be rebutted, however, if there are just and equitable reasons to do otherwise. Thus, the dual classification system that is absolute in some states is a *modified* system in Utah because equity might require the trial court to invade separate property in fashioning an equitable result.

Since *Mortensen,* apparently in the interest of promoting more predictability and encouraging more consistent results, the Utah Court of Appeals has restricted a trial court's ability to divide separate property between the parties to situations involving "extraordinary circumstances," *Burt v. Burt,* 799 P.2d 1166 (Utah App. 1990), or "unique circumstances," *Walters v. Walters,* 812 P.2d 64 (Utah App. 1991). The court of appeals has been more proactive in monitoring the trial court's divisions, emphasizing that property division should be done in a "fair, systematic fashion." *Hall v. Hall,* 858 P.2d 1018 (Utah App. 1993). Specifically, the court of appeals requires detailed findings as to the classification of property before it is divided. *See Haumont v. Haumont,* 793 P.2d 421 (Utah App. 1990) (remanded for findings as to the source of the disputed properties); *Rappleye v. Rappleye,* 855 P.2d 260 (Utah App. 1993) (similar result); *Burt v. Burt,* 799 P.2d 1166 (Utah App. 1990) (similar result). Thus, it is critical for trial courts and lawyers representing divorcing litigants to be conversant with a consistent approach for classifying and dividing separate property.

2. THE SOURCE OF FUNDS RULE

A. Importance of Equitable Classification

This current emphasis on property classification highlights a hole in Utah case law. Although Utah law is now fairly clear as to the analysis a trial court and litigants must follow once property has been classified, there have not been any Utah cases that have clearly defined *how* to determine if an asset is marital or separate property. The source of funds rule therefore fits cleanly and logically into the backdrop of existing Utah law because it is purely a rule of classification that provides a definition of marital property. Indeed, as discussed in more detail below, although Utah has not formally adopted the source of funds as a method of classification, many Utah cases apply source of funds principles. I recommend to the reader Brett R. Turner's treatise, *Equitable Distribution of Property,* from which came many of the ideas and formulas used in this article.

Classification of property as either separate or marital must focus on when and how the property was *acquired.* The theory of the source of funds rule begins with the premise that property is acquired by the parties when its real economic value is created. For example, a party may hold legal title to a house upon purchase, but will actually only "acquire" equity in the property as the mortgage is reduced or paid off. Thus, in the opening example, although Wife holds title to the house upon marriage, if the actual value of the home is created during the marriage through marital mortgage payments, the source of funds rule would define the home as marital property because its value was acquired during the marriage.

"Classification of property as either separate or marital must focus on when and how the property was acquired."

The above example also illustrates that the acquisition of an asset may be a continuing process of making payments for the acquired property and, at the time of the divorce, there may be both a separate and a marital component in the value of the property. (This example is not to be confused with a situation where a separate asset has been commingled with marital assets or has been gifted to the marital estate such that the asset has lost its separate classification. When a separate asset is commingled, it should be classified as marital property and divided between the parties. *Mortensen,* 760 P.2d at 308.) Consider these further details to the above example: Wife owns a house with a fair market value of $100,000 at the time of the marriage and at that time the house carries an $80,000 mortgage. The house remains in her separate name and the parties use marital funds to pay down the mortgage. At the time of the divorce, the

fair market value is still $100,000 but the mortgage is now $60,000. A trial court using the source of funds approach would classify $20,000 of the $40,000 of acquired value in the home as separate property and the remaining $20,000 as marital property.

Obviously, a practitioner or a trial judge will rarely be faced with dividing property that has not either appreciated or depreciated in value. Typically, the trial judge and the litigants are faced with the difficult proposition of classifying appreciation caused by forces outside the parties' control, such as inflation or market forces. I have found in several cases I have decided, that it is in these situations that the source of funds rule and accompanying formulas are most helpful. The source of funds rule dictates that this kind of appreciation be given the same character as the underlying asset. Accordingly, if the asset has been acquired by separate funds, all of the appreciation is separate. Likewise, if the asset has been acquired with separate and marital funds, which is the typical situation, the appreciation is allocated between the marital and separate estates proportionally. Brett R. Turner, *Equitable Distribution of Property* 163 (2d ed. 1994). Giving appreciation the same classification as the asset that produced the appreciation is supported by a line of Utah cases. *See Mortensen,* 760 P.2d at 308 (holding that separate property should be awarded to the owner spouse "together with any appreciation or enhancement of its value"); *Dunn v. Dunn,* 802 P.2d 1314 (Utah App. 1990) (affirming award to plaintiff of retirement benefits accumulated prior to marriage, together with all interest attributable to those premarital contributions); *Preston v. Preston,* 646 P.2d 705 (Utah 1982) (remanding to the trial court for an award to defendant of separate property together with the proportion of appreciation in value attributable thereto).

"When a separate interest in property is simply returned at the end of a marriage without any attributable interest, the property has inequitably been used as an interest-free loan."

Although allocating appreciation proportionally may force members of the bar and bench from their comfort zones to perform mathematical exercises, I believe failure to award a litigant who has separate funds in an asset a proportionate share of the appreciation of the asset is not only inequitable, but constitutes plain error. When a separate interest in property is simply returned at the end of a marriage without any attributable interest, the property has inequitably been used as an interest-free loan. Absent compelling equitable reasons to the contrary, no one could argue persuasively that this approach should be adopted, and yet litigants routinely bypass a more complicated analysis by simply backing out the separate interest, giving it to the owner spouse, and then dividing the remaining property equally.

The facts and outcome of *Hall v. Hall,* 858 P.2d 1018 (Utah App. 1993), illustrate the inequities of this routine approach. In *Hall,* the trial court found that the wife had contributed $21,000 into a marital home, and so it divided the equity in the home equally and then took $21,000 out of the husband's marital share and gave it to the wife. The court of appeals held that, in order for an allocation of property to be done in "a fair, systematic fashion," the trial court should first classify property as separate or marital, then award the wife her separate contribution (absent "extraordinary circumstances"), and then divide the marital equity in the home equally between the parties.

Following these instructions, if the trial court found no extraordinary circumstances on remand, the wife's initial investment of $21,000 was returned to her without a proportionate share of the interest. Her $21,000 investment in the home was therefore treated as an interest-free loan to the marriage. Mr. Turner, in commenting on the *Hall* case, points out that had the value of the home dropped, it would clearly have been improper for the court to reimburse petitioner for her separate contributions, leaving the marital estate to bear the entire loss. "If the separate estate must share the loss, however, it is only fair to allow it to share the gain. When marital and separate contributions are made to a single asset, the respective marital and separate interests should be treated as percentages and not as absolute amounts." Turner, *supra,* at 388, app. A.

I believe that given the court of appeals' preference for a systematic, fair approach, had the wife objected to the trial court's failure to provide more than mere reimbursement of the separate investment, the court of appeals would have approved awarding the wife a proportionate share of the interest. However, since the parties did not raise the amount of reimbursement on appeal, the court of appeals appropriately did not address the issue. Clearly, then, to ensure that a spouse's separate property is fully and equitably restored with a proportionate share of the interest, it is essential for practitioners and trial court judges to understand and consistently apply the sometimes difficult source of funds formulas.[2]

B. The Source of Funds Formulas

As stated above, when a property's appreciation is caused by forces outside the parties' control, such as inflation or market forces, the appreciation should be given the same classification as the underlying property. If, therefore, the parties have contributed to the property $10,000 in separate funds and $20,000 in marital funds, the appreciation should be classified proportionally, or one-third as separate and two-thirds as marital. In Mr. Turner's mathematical formulas, this translates as follows:

Value (or net equity) = separate contributions + marital contributions + appreciation
Marital interest = value(marital contributions/total contributions)
Separate interest = value(separate contributions/total contributions)

Application of the formula is clearer through use of our example, with additional details: Wife owns a house with a fair market value of $100,000 at the time of the marriage and at the time of the marriage the house carries an $80,000 mortgage. The house remains in her separate name and the parties use marital funds to pay down the mortgage. At the time of the divorce, the fair market value has increased to $160,000, due to market forces, and the mortgage is now $40,000. The numbers would plug into the formulas as follows:

Value (or net equity) = separate contributions + marital contributions + appreciation
separate contributions = FMV at marriage - mortgage at marriage
= $100,000 - $80,000 = $20,000
marital contributions = Mortgage at marriage - mortgage at divorce
= $80,000 - $40,000 = $40,000
Value = $20,000 + $40,000 + $60,000 = $120,000 in net equity
separate interest = value(sep. contribution/total contribution)
separate interest = $120,000($20,000/$60,000)
= $40,000
marital interest = value(mar. contribution/total contribution)
marital interest = $120,000($40,000/$60,000)
= $80,000

Therefore, under the source of funds rule, the $120,000 of equity is classified $40,000 as Wife's separate interest and $80,000 as marital interest. Wife would therefore be entitled, absent extraordinary circumstances, to $80,000 in equity ($40,000 separate interest plus one-half of the marital interest). She receives back her separate contribution of $20,000 plus the portion of appreciation that is attributable thereto; she receives a return on her investment. Typically, if the court determines a division of property should be consistent with this classification, the home is either sold or awarded to the owner spouse, who also assumes responsibility for the mortgage payments and must pay her former spouse his equity. In our example, Wife would receive the home, worth $160,000, assume payments on the $40,000 mortgage, and be forced to buy out Husband's $40,000 of equity. Thus, even though she is awarded the home, she receives no more than her share of the equity.

The above example assumes all of the appreciation on the home is a result of market forces or inflation. When, however, appreciation results from specific contributions of marital funds or efforts, the resulting appreciation assumes the character of the funds or efforts. Turner, *supra,* at 162. This classification of appreciation from capital improvements is in accordance with Utah case law that when a spouse has by his or her efforts and expense contributed to the enhancement, maintenance, or protection of the property, he or she has acquired an equitable interest in it. *Mortensen,* 760 P.2d at 308.

To illustrate how a court could classify appreciation that may be in part due to capital improvements, assume this final variation of my example: Wife owns a house with a fair market value of $100,000 and an $80,000 mortgage at the time of the marriage. The house remains in her separate name, and the parties pay down the mortgage using marital funds and, using $20,000 of marital funds, finish off the basement. At the time of the divorce, the fair market value of the house has increased to $160,000 and the mortgage is $40,000. I believe that the most equitable approach is to add the value of the marital funds expended on the home, or $20,000, to the amount of marital contributions and the amount of total contributions, as shown below:

Value (or net equity) = separate contributions + marital contributions + appreciation
separate contributions = FMV at marriage - mortgage at marriage
= $100,000 - $80,000 = $20,000
marital contributions = [Mortgage at marriage - mortgage at divorce] + marital funds spent on capital improvements
= [$80,000 - $40,000] + $20,000
= $60,000

Value = $20,000 + $60,000 + $40,000 = $120,000 in net equity

separate interest = value(sep. contribution/total contribution)

separate interest = $120,000($20,000/$80,000)
= $30,000

marital interest = value(mar. contribution/total contribution)

marital interest = $120,000($60,000/$80,000)
= $90,000

Therefore Wife would be entitled (absent extraordinary equitable circumstances) to $30,000 as a separate interest in the home and the $90,000 marital interest would be divided equally between the parties.[3] It should be noted that there may be times when evidence is presented as to the amount of appreciation directly resulting from the improvement. When a trial court is presented with this kind of evidence, it seems equitable that the appreciation resulting directly from the capital improvement be backed out of the total appreciation and classified as marital. The remaining appreciation should then be apportioned between the separate and marital contributions using the formulas and, because the appreciation due to the capital improvement has already been allocated, the marital funds spent on the capital improvement should not be included in either the numerator (marital contributions) or the denominator (total contributions) of the working fractions.

C. Evidence

As is illustrated by *Hall*, appellate courts cannot rule on the appropriateness of allocating appreciation proportionally through the source of funds rule without detailed findings from the trial court judge. Similarly a trial court cannot properly apply the source of funds formulas if the litigants do not present detailed evidence as to the value of the property. To ensure litigants do provide the necessary data, I use a pretrial order, specifically advising the parties that the allocation of separate property seems to be at issue, and that the parties should be prepared to present evidence as to the following:

1. The home's fair market value and mortgage amount at the time of the trial;
2. The amount of the parties' marital contribution to the equity (or the amount the parties have paid on the mortgage during the marriage and, separately, any capital contributions); and
3. The amount of the premarital equity interest in the home.[4]

3. CONCLUSION

David S. Dolowitz, in the April 1998 edition of the *Utah Bar Journal,* criticizes the appellate courts for, among other things, being inconsistent and sometime inequitable in their treatment of appreciation on separate property. David S. Dolowitz, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce,* 11 Utah B. J. 3 at 16 (1998). His comments may well indicate the growing level of frustration among members of the bar who are left without definite, equitable guidance in this area.

I have found the source of funds rule to be practical in its direction as to the classification of separate and marital property, and equitable in its result. By focusing the inquiry narrowly on the value of the property and when that property was acquired and by providing formulas that may be consistently applied, its adoption would help eliminate some of the apparent frustration among members of the bench and bar by providing clear direction, thereby fostering more negotiated settlements and ensuring more uniform, equitable trial court decisions. Members of the bench and bar should move beyond occasional application of source of funds principles to wholesale adoption of the source of funds rule. Mr. Turner notes that, "[e]quitable distribution decisions defining the time at which property is acquired fall into two classes: those which adopt the source of funds rule, and those which avoid the issue." Turner, *supra,* at 354, app. A.

Acknowledgment

I thank Lindsey P. Gustafson, a law clerk for the Second District Court, for her valuable assistance in preparing this article.

[1]"Property" is not defined in the Utah Code. "Separate property" as used in this article includes all property either owned by one spouse prior to marriage, or received by a spouse individually by gift or inheritance during marriage.

[2]At least two other recent court of appeals' cases have had similar inequitable results: *Schaumberg v. Schaumberg,* 875 P.2d 598 (Utah App. 1994) (affirming division of appreciation on real property equally when separate funds used as down payment and marital funds used to augment the asset); *Moon v. Moon,* 790 P.2d 52 (Utah App. 1990) (affirming division of value of marital home equally, after value of land given as separate gift to husband is backed out).

[3]There may be situations, such as when a capital improvement is made right before the divorce, when it is more equitable to apply the source of funds formula annually, thus distributing the yearly appreciation according to the contributions made up to that point. Other jurisdictions applying the formulas have held, however, that in the typical case such an approach is unnecessarily time-consuming and tedious. Turner, *Equitable Distribution of Property* (Supp. 1997).

[4]This amount can be readily ascertained by knowing the fair market value of the property and the mortgage amount at the time of the marriage. If necessary, a qualified appraiser can extrapolate the fair market value of the home on the date of the marriage.

Judge Hans Q. Chamberlain

by Kim S. Colton

After twenty-five years of practice in District Court, Hans Q. Chamberlain was appointed a Juvenile Court Judge. Judge Chamberlain sought his appointment to the Juvenile bench because he hoped to have more direct influence on the lives of children and families. After almost three years on the bench, Chamberlain's hope has been realized repeatedly.

He says, "In the Juvenile Court, I have seen a great deal of success as families have been reunited, as kids have made changes in their lives, and as neglected or abused children have found healing and nurturing homes." As a Juvenile Judge, Chamberlain believes his influence is more immediate, and he can go home knowing that he and the resources of the Juvenile Court have made a difference in people's lives that day.

Although his influence may be more immediate now, Chamberlain has long been influential on the practice of law and the community generally in southern Utah. He graduated from the University of Utah College of Law in 1969. After a brief stint in the U.S. Army J.A.G. Corps, Chamberlain returned to Cedar City to practice law in 1970. About six months later, he was appointed Iron County Attorney and then was twice elected to the position before declining to run again in 1978.

He began full-time private practice in 1979 and continued to build the Cedar City firm of Chamberlain & Higbee until his appointment to the bench in the summer of 1995. During those years, Chamberlain served as President of the Southern Utah Bar Association, Utah State Bar Commissioner, Member of the Southern Utah University Board of Trustees, Member of the Utah State Board of Regents, and as the 1989-1990 Utah State Bar President. Chamberlain's service has been recognized by many organizations and individuals throughout southern Utah. He currently chairs the Board of Juvenile Court Judges and the Standing Committee on Court Facilities and Planning.

Chamberlain joined Judge Joseph Jackson as the second Juvenile Judge in the Fifth District. Chamberlain has primary responsibility for Washington County. He laments that his biggest frustrations center on limited resources to address unlimited problems. He also says that repeated offenses are always frustrating. However, Chamberlain is pleased that repeat offenders are the exception rather than the rule in Juvenile Court. In fact, more than eighty percent of juvenile offenders appear only once in Juvenile Court.

The majority of truancy, tobacco, and curfew violations that Chamberlain disposes of are first-and-only-time offenders. Chamberlain explains, "Most of the kids I see, I see only once. Their trip to Juvenile Court is a life-changing experience, and it usually puts them back on the right track." The Judge, however, is troubled by the increase in violent juvenile crime. "We have our share of gangs and violent criminals even in Washington County. About three percent of the cases I hear could be characterized as violent crimes. That's not as bad as some news reports would have you believe, but it is still three percent too many." Chamberlain prefers to focus on the success of Juvenile Justice in Utah. He says, "Utah has been a national leader in Juvenile Justice. Our legislature has had the wisdom to make Juvenile Justice a priority. The Juvenile Justice Task Force has, for the most part, offered tremendous support. It continues to address the unique issues we face in Juvenile Court. I think it has provided us with excellent recommendations and has collected valuable data." Chamberlain sees the Juvenile Court as a vital specialty court. He says, "I believe the Juvenile system does more to change lives and has a greater impact on society than the rest of the judiciary because it focuses on protecting children and preventing youth violence." According to Chamberlain, the Juvenile Court is one of the best success stories in the history of the Utah Judiciary and something that deserves continued support.

When asked about the future of the Juvenile Court and the possibility of creating a Family Court, Chamberlain responded: "I look forward to a very open and thorough discussion about the proposals for a Fam-

ily Court. There is a nice ring to the idea of one judge for one family. However, my initial concern is that merging current Juvenile Court jurisdiction with domestic and other family matters weakens the Juvenile Court's focus on protecting children and deterring youth offenders. Juvenile judges are already specialists. If specialization is the goal, then it seems the Juvenile Court should retain its current jurisdiction rather than broaden the types of matters it addresses." Nevertheless, Chamberlain says the Family Court proposals are extremely important and deserve the best thinking of the entire bench and bar.

When talking about lawyers, Chamberlain grows nostalgic. He misses the collegiality of practice, particularly in the Fifth District. He says there is a civility among the attorneys in southern Utah that makes practicing law enjoyable. He thinks lawyers in Utah genuinely care about their clients and are dedicated to their profession. He says, "Good lawyers make it easy to be a good judge." Lawyers are generally well prepared and make helpful and thoughtful presentations in his court.

Notwithstanding the opportunity for influence and success that Judge Chamberlain has experienced during his three years on the Juvenile bench, he views his real success as his family. He talks about his wife Mary and their four daughters with enthusiasm and pride. His son-in-law, Matthew Graff, a third-year law student at Williamette University, reports that in his spare time the Judge recently achieved his second hole-in-one on the golf course, with a stunning eagle on number 11 at Cedar Ridge. The Chamberlains enjoy spending time together and take pride in each other's accomplishments. Judge Chamberlain loves his family first and loves his job second.

Judge Chamberlain feels he can make a difference in people's lives in the Juvenile Court every day. His influence seems immediate and direct. He appreciates the opportunity to work with families, youth, and children. He says, "Those three things are the State's greatest and most valuable resource."

Scottsboro, A Tragedy of the American South

by Dan T. Carter

Reviewed by Scott Daniels

Many of the turning points in the history of America have happened in the courtroom. The trials of Nicola Sacco, Bartolomeo Vanzetti, Joe Hill and Orenthal J. Simpson have all reflected, and created tears in the fabric of, our society. Dan Carter's telling of the story of the rape trials of nine black teenagers in 1930's Alabama is not just a study in the evolution of our society, but is also proof that sometimes the truth is better than fiction, and curling up with a book (even a history book) is the most enjoyable way to spend an evening.

On March 25, 1931 police found nine black men, ranging in age from 13 to 20 stealing a ride on a freight train. They also found two white women who told them that the blacks had gang raped them in plain daylight as the train moved through the Alabama countryside. Trial for the capital offense was set for 11 days later. The Judge appointed all seven members of the Scottsboro bar to represent the defendants (later known as the "Scottsboro boys") but each lawyer had a reason why he couldn't serve. Finally, the Interdenominational Colored Minister's Association of Chattanooga was able to raise $50.08 to retain an otherwise unemployed Chattanooga attorney to represent the boys, and with no preparation and less than half an hour interview, three of the nine defendants went on trial for their lives. The first trial lasted one day and a half. The second trial began immediately, and the first jury returned a guilty verdict with a sentence of death before the first witness in the second trial was finished testifying.

The story of the trials, the appeals, the re-trials and the pleas for clemency and parole is full of details that may be unbelievable to lawyers familiar only with modern procedure. It's hard to imagine the trials taking place with several thousand people gathered on the lawn, held in check with National Guard machine guns. Or the Scottsboro Hosiery Mill Band playing military marches and the National Anthem outside the jury room. Or the appeal argued by the Attorney General, whose father served as a Justice on the Alabama Supreme Court, and who wrote the opinion affirming the convictions.

Most of us have some familiarity with the Scottsboro case through the reported decision of *Powell v. Alabama*, where Utah's Justice Sutherland broke with his conservative colleagues and wrote the opinion which held that in at least some circumstances the Constitution requires that defendants have counsel. But the *Scottsboro* case is a spellbinding story and study of society, interesting far beyond the legal principles. There are heroes and villains, of real flesh and blood: heroes who are not always heroes, and villains who believe in the rightness of their actions and their cause. There are the "victims", Victoria Price, who stuck by her story of rape even though it was contradictory, illogical, and not supported by the medical evidence; and Ruby Bates, who initially testified that she had been raped, but later recanted and became a celebrity by leading protest marches and raising money for the Scottsboro defense. There are the lawyers who stuck through the trials, the appeals, the re-trials, the pleas to the governor and the parole hearings with little compensation, and on several occasions in danger of being lynched themselves. And there was a lawyer who refused the defense because "he didn't care whether the defendants were innocent or guilty", the fact that they were found on the train with two white women was enough for him. There was the judge who instructed the jury that if they believed that the defendants had intercourse with either of the women, that was enough evidence to convict because of the strong presumption that a white woman would not consent to intercourse with a Negro. There was the lawyer who argued to the jury that they must convict in order to show that "Alabama justice cannot be bought and sold with Jew money from New York." And there were the nine young defendants, often forgotten and seldom consulted in their defense.

One of the most poignant characters in the drama is Judge James E. Horton who presided over the first of the re-trials after remand from the United States Supreme

Court. In the first trial of Haywood Patterson, the prosecution called two medical witnesses who had examined the women shortly after they had been taken from the train. At the second trial, the prosecutor told Judge Horton that he would not call Dr. Marvin Lynch, the second doctor who had examined the women, because the testimony would be cumulative. Judge Horton agreed, but Dr. Lynch asked to meet with Judge Horton privately, and the judge agreed.

The two men met in the men's room of the court house, with the bailiff standing guard. The doctor told Judge Horton his examination found that Victoria Price's vagina contained semen, indicating that she did have intercourse prior to the exam. The amount of semen was very small, however, which was inconsistent with intercourse with several healthy young men. Also the semen was not motile, indicating that it had likely been present at least 12 hours. There was no evidence of tearing, bruising or even redness. Dr. Lynch told Judge Horton that although he had testified in the first trial that these facts did not rule out the possibility of rape, he had changed his mind, and that if he were called to testify, his testimony would be that he did not believe Victoria Price was raped. He told Judge Horton that he had disclosed this to the prosecutor, who had then decided not to call him. He also told Judge Horton that he did not want to testify because he had only been out of medical school four years and that if he did testify it would destroy his practice in Scottsboro.

What's a judge to do? Judge Horton chose to excuse Dr. Lynch and not require his testimony. What's a Judge to do as he listens to the evidence that is contradictory, insubstantial and in some points obviously fabricated? What is he to do when the jury comes back with a guilty verdict and a sentence of death against a man who is almost certainly not guilty?

Judge Horton was an elected judge, near the end of his second term. He knew that if he granted a Motion for a New Trial, his judicial career was over. He also knew that Patterson would be re-tried before a different Judge and, without doubt, be found guilty again.

On June 22, 1933 Judge Horton granted the Motion for a New Trial. That summer, Attorney General Thomas Knight announced that the state would re-try Patterson, announcing almost simultaneously his candidacy for Lt. Governor. In October, the Alabama Supreme Court asked Judge Horton to recuse himself from Patterson's retrial. In December, Patterson was re-tried and again found guilty but to everyone's surprise sentenced to 75 years in prison, rather than death. In the election of 1934, Thomas Knight was elected to the office of Lt. Governor. Judge Horton lost his re-election bid and returned to private practice and his plantation. None of the Scottsboro boys were ever executed, but they served over 100 years in prison collectively. Haywood Patterson left the Alabama Penitentiary by escape in 1948.

Dan Carter is a great story-teller and the Scottsboro saga is a great story. I recommend it.

ATTENTION

LITIGATION SECTION MEMBERS:

The 1998 Annual Litigation Section Meeting and BBQ

Date: September 12th
Place: Park City City Park, South End

Mark your calendar now and watch for the upcoming mailing. See you there!

Case Summaries

by J. Craig Smith

First American Title Ins. Co. v. J. B. Ranch, Inc., 343 Utah Adv. Rep. 6 (May 12, 1998)

J. B. Ranch had sought reimbursement from its title insurer for $279,878 in attorneys fees expended in defending a claim that certain roads through the ranch were public roads. The Ranch's title insurer, First American, declined coverage, and brought a declaratory judgment action that it had no duty to provide coverage. In affirming Summary Judgment, the Utah Supreme Court held that absent ambiguity, an insurance policy is construed according to its plain meaning. In rejecting the Ranch's claim that road ways on file in the County Clerk's office were public records, triggering coverage under the title policy, the Court also limited the scope of public records to those on file in the County Recorder's office.

Hall v. Walmart Stores, Inc., 343 Utah Adv. Rep. 18 (May 12, 1998)

In affirming an award of $25,000 of punitive damages, the Utah Supreme Court held that punitive damages could be awarded without evidence of the relative wealth of Walmart. The Court distinguished this case from a number of previous holdings where relative wealth was held to be a necessary element where the amount of the punitive damage award was challenged. However, if the amount of the award is attacked as excessive, relative wealth would be a necessary factor. Justice Russon dissented and Justice Howe concurred in the dissent.

Meadowbrook, LLC v. Flower, 343 Utah Adv. Rep. 27 (May 19, 1998)

After successfully defending an eviction suit, defendants sought attorneys fees under the lease after the jury verdict, but before entry of judgment. Defendants had not preserved any claim for attorneys fees prior to the jury verdict. The trial court denied attorneys fees on the grounds that the request was untimely. The Utah Supreme Court reversed, holding that attorneys fees could be sought up to the entry of judgment. However, the prevailing party must be prepared to present evidence of attorneys fees at the Court's convenience and better practice would be to preserve the attorneys fee claim prior to resting.

State v. Thomas, 343 Utah Adv. Rep. 32 (May 22, 1998)

On certiorari, the Supreme Court reversed the Court of Appeals and held that issuance of search warrants is a core judicial function. Under Utah law, Court Commissioners lack the power to perform core judicial functions as commissioners are not judges. Accordingly, a Court Commissioner issued search warrant was held invalid. The Court also stated that any attempt to statutorily confer the power to issue search warrants on Commissioners would be null and void as a violation of Article VIII of the Utah Constitution.

National Conference of Appellate Court Clerks to Meet at Skamania Lodge, Columbia River Gorge Scenic Area

Clerks of appellate courts from around the nation will meet at the Skamania Lodge in the Columbia River Gorge August 8-14, 1998. The conference, which meets annually to improve the skill and knowledge of its members, to promote and improve the contribution of its members within the area of effective court administration, and to exchange information and ideas regarding the operation of the offices of appellate court clerks, celebrates its 25th Anniversary at this meeting.

This year's educational program includes a wide range of topics including sessions on courts as learning organizations, diversity awareness - ending bias, court technology, death penalty cases, and services and stewardship in our courts for the next millennium.

The organization's president is Keith Richardson, Clerk, Iowa Supreme Court & Court of Appeals. The host for this year's meeting is Scott Crampton, Director of Management Services, Oregon Supreme Court. For more information, call (804) 259-1841.

Fifth Annual Domestic Violence Treatment Provider's Conference

"Domestic Assault: Cultural or Pathological?"

August 31, September 1 & 2, 1998
Yarrow Hotel, Park City, UT

Co-sponsored by the Utah Domestic Violence Advisory Council & the Division of Child & Family Services

Monday, August 31, 1998

8:00-9:00	Registration, Continental Breakfast
9:00-9:30	"Research on Effective Components of Batterers' Treatment.", Richard M. Tolman
11:45-1:00	Lunch provided
1:00-4:00	Breakout Sessions - will be repeated
1:00-2:45	"Dating Violence", Richard M. Tolman
	"Integrating Drug/Alcohol Treatment with Batterer Intervention", Michael M.R. Jackson, and Rick Liska
2:45-3:00	Break
3:00-4:30	Repeat of previous sessions

Tuesday, September 1, 1998

8:00-9:00	Registration, Continental Breakfast
9:00-11:30	"Accountability Model of Batterer Intervention", Michael M.R. Jackson, and Rick Liska
11:45-1:00	Lunch provided - Special Entertainment - Steve James
1:00-3:30	"Predicts Risks", Rick D. Hawks

Wednesday, September 2, 1998

8:30-10:00 Rick D. Hawks, Certification (additional fee)

General Conference Information

Fee: $70 total; $35 day; Additional charge for certification.
CEU credit available.

For those desiring an exhibit booth, please call (801) 538-4405 by August 10, 1998.

Hotel Accommodations

To ensure the reduced rate, please inform the hotel that you are attending this conference when you book your reservations. Yarrow Hotel, Park City, Utah (435) 649-7000 or (800) 927-7694.

Other Information

In compliance with the American Disability Act, individuals attending training who need accommodations (including auxiliary communicative aids and services) should notify T.A.S.K., 538-4405.

Utah Bankruptcy Lawyers' Forum
presents:

CURRENT DEVELOPMENTS IN CONSUMER BANKRUPTCY LEGISLATION

Presented by
Ralph R. Mabey, Esq. and
Prof. Kenneth N. Klee

2 hours CLE Seminar
Tuesday, September 8, 1998, 4:00 p.m.
Utah Law & Justice Center
645 South 200 East
R.S.V.P. to Eva, 363-4300

The $50.00 fee for non-UBLF members includes light refreshments.
No charge to UBLF members.
Please pay at the door by check payable to UBLF

John Cannon Stringham, a registered patent attorney and shareholder of the intellectual property law firm of Workman Nydegger and Seeley, is the newly elected Vice Chair of the Intellectual Property Law Section of the Utah State Bar.

Utah Bar Foundation (A Non-Profit Organization) Statements of Financial Position December 31, 1997 and 1996

ASSETS	1997	1996
CURRENT ASSETS		
Cash and cash equivalents	$ 146,601	$ 107,331
Short-term investments	78,000	45,000
IOLTA receivable	14,866	17,843
Other receivable	765	158
TOTAL CURRENT ASSETS	240,232	170,332
Long-term investments	645,513	650,658
Equipment	2,927	738
TOTAL ASSETS	$ 888,672	$ 821,728
LIABILITIES AND NET ASSETS		
CURRENT LIABILITIES		
Accounts payable	$ 221	$ 737
Accrued liabilities	1,343	829
Grants payable	68,445	40,000
TOTAL CURRENT LIABILITIES	70,009	41,566
NET ASSETS		
Unrestricted	813,601	766,534
Permanently restricted	5,062	13,628
TOTAL NET ASSETS	818,663	780,162
TOTAL LIABILITIES AND NET ASSETS	$ 888,672	$ 821,728

Copies of complete audit available on request 297-7046

Utah Bar Foundation (A Non-Profit Organization) Statements of Activities Years Ended December 31, 1997 and 1996

UNRESTRICTED NET ASSETS	1997	1996
REVENUE AND SUPPORT		
Interest on lawyers' trust accounts	$ 344,922	$ 305,938
Interest and dividend income	53,318	46,681
Member contributions	705	1,675
TOTAL REVENUE AND SUPPORT	398,945	354,294
EXPENSES		
Grants of funds	313,904	285,600
Salaries and payroll taxes	19,466	18,237
Office	3,614	3,856
Rent	2,928	2,928
Depreciation	257	249
Administrative	3,868	4,100
Travel	2,233	882
Professional fees	4,075	3,885
Public relations	1,533	953
TOTAL EXPENSES	351,878	320,690
Excess of revenue and support over expenses	47,067	33,604
Unrealized gain (loss) on investments	–	(650)
INCREASE IN UNRESTRICTED NET ASSETS	47,067	32,954
PERMANENTLY RESTRICTED NET ASSETS		
REVENUE AND SUPPORT		
Interest and dividend income	$ 278	$ 319
Book sale income	80	65
TOTAL REVENUE AND SUPPORT	358	384
EXPENSES		
History writing project	8,924	5,396
Excess (deficit) of revenue and support over expenses	(8,566)	(5,012)
Gain on investment	–	3,731
DECREASE IN PERMANENTLY RESTRICTED NET ASSETS	$ (8,566)	$ (1,281)
INCREASE IN NET ASSETS	$ 38,501	$ 31,673

Certain 1996 items have been reclassified to conform to the 1997 presentation

CLE Calendar

4TH ANNUAL SHAKESPEARE & CLE SERIES: EVERYTHING YOU'VE WANTED TO KNOW ABOUT LITIGATION BUT WERE AFRAID TO ASK

Date: Friday, August 14, 1998
Time: 2:00 p.m. to 5:00 p.m.
(Registration begins at 1:30 p.m. at each site)
Place: Broadcast live from Southern Utah University to several sites around the state! *(Please watch your mail for a more detailed brochure.)*
Fee: $80.00 before July 31, 1998
$95.00 after July 31, 1998
CLE Credit: 3 HOURS

21ST ANNUAL SECURITIES SECTION WORKSHOP

Date: Friday, August 21 – Saturday, August 22, 1998
Place: Sun Valley Resort, Sun Valley, Idaho
Fee: $140.00 for Securities Section Members
$160.00 for Non-section Members
CLE Credit: 8.5 HOURS which includes 1 in ETHICS
(Please watch your mail for a more detailed brochure.)

NLCLE: DOMESTIC LAW

Date: Thursday, September 17, 1998
Time: 5:30 p.m. to 8:30 p.m.
(Registration begins at 5:00 p.m.)
Place: Utah Law & Justice Center
Fee: $30.00 for Young Lawyers Division Members
$60.00 for all others
CLE Credit: 3 HOURS

ALI-ABA SATELLITE SEMINAR: DRAFTING CORPORATE AGREEMENTS – CONVERTING THE DEAL INTO AN EFFECTIVE CONTRACT

Date: Thursday, September 17, 1998
Time: 9:00 a.m. to 4:00 p.m.
Place: Utah Law & Justice Center
Fee: $249.00
(To register, please call 1-800-CLE-NEWS)
CLE Credit: 6 HOURS

Those attorneys who need to comply with the New Lawyer CLE requirements, and who live outside the Wasatch Front, may satisfy their NLCLE requirements by videotape. Please contact the CLE Department (801) 531-9095, for further details.

Seminar fees and times are subject to change. Please watch your mail for brochures and mailings on these and other upcoming seminars for final information. Questions regarding any Utah State Bar CLE seminar should be directed to Monica Jergensen, CLE Administrator, at (801) 531-9095.

CLE REGISTRATION FORM

TITLE OF PROGRAM FEE

1. _____ _____

2. _____ _____

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

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Bar Number American Express/MasterCard/VISA Exp. Date

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Credit Card Billing Address City, State, ZIP

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Signature

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

Registration Policy: Please register in advance as registrations are taken on a space available basis. Those who register at the door are welcome but cannot always be guaranteed entrance or materials on the seminar day.

Cancellation Policy: Cancellations must be confirmed by letter at least 48 hours prior to the seminar date. Registration fees, minus a *$20 nonrefundable fee,* will be returned to those registrants who cancel at least 48 hours prior to the seminar date. No refunds will be given for cancellations made after that time.

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

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words — $20.00 / 51-100 words — $35.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please call (801) 297-7022.

Classified Advertising Policy: No commercial advertising is allowed in the classified advertising section of the Journal. For display advertising rates and information, please call (801) 486-9095. It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification or discrimination based on color, handicap, religion, sex, national origin or age.

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

CAVEAT — The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

POSITIONS AVAILABLE

Salt Lake Firm seeking full time Tax Attorney, recent law school graduate. Send a resume to Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #45, Salt Lake City, Utah 84111.

CEDAR CITY – Thriving Southern Utah Law Firm with main office in Cedar City, Utah, is accepting applications from qualified applicants for an associate position in its Cedar City office. Broad General, civil practice background helpful, but particularly interested in strong tax and estate planning background, although not a pre-requisite. Please send resume to Higbee, Macfarlane & Jensen, P.O. Box 726, Cedar City, Utah 84721.

ASSOCIATE: Litigation firm with emphasis in employment and civil right litigation seeks associate with trial experience. With resume include list of cases tried including case name, court, and docket number. Must be a current member of the Utah State Bar. Send resume to: Maud Thurman, Utah State Bar, 645 South 200 East, Confidential Box #52, Salt Lake City, Utah 84111.

Large Salt Lake City law firm seeks ERISA attorney for associate position. Must have 3-5 years of pension and welfare benefits experience, including plan drafting and qualification; research and writing skills; and significant client contact. This position will provide an opportunity to work with all types and sizes of defined benefit plans. We feel this opening provides an excellent career opportunity. Inquiries will be kept strictly confidential. Send resumes to Confidential Box #53, Attention: Maud Thurman, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111.

Salt Lake City business and estate planning firm seeks attorney with 2-3 years business and estate planning experience. Position involves significant client contact and excellent written and verbal communication skills are required. Inquiries will be kept confidential. Please send resume and references to: Maud C. Thurman, Utah State Bar, 645 South 200 East, Confidential Box #49, Salt Lake City, UT 84111.

Lawyer with 0-3 years experience and with excellent academic and writing skills needed for small firm with burgeoning practice in business, property, family law and civil litigation. Send resume to D. Doucette, 6965 Union Park Center, Suite 450, Midvale, Utah 84047.

POSITIONS SOUGHT

ENTERTAINMENT LAW: Denver-based attorney licensed in Colorado and California available for consultant or of-counsel services. All aspects of entertainment law, including contracts, copyright and trademark law. Call Ira C. Selkowitz @ (800) 550-0058.

ATTORNEY: Former Assistant Bar Counsel. Experienced in attorney discipline matters. Familiar with the disciplinary proceedings of the Utah State Bar. Reasonable rates. Call Nayer H. Honarvar, 39 Exchange Place, Suite #100, Salt Lake City, UT 84111. Call (801) 583-0206 or (801) 534-0909.

CALIFORNIA/UTAH ATTORNEY: Attorney has offices in both Southern California and Salt Lake City. Available for court appearances and other work in California. Call George L. Wright @ (801) 322-3000.

BAR COMPLAINT DEFENSE ATTORNEY: Representation in all Bar disciplinary proceedings. Let me assist you in preparing your response to that Bar Complaint. Five years as Assistant Disciplinary Counsel, Utah State Bar. Wendell K. Smith, 275 East 850 South, Richmond, UT 84333, (435) 258-0011.

OFFICE SPACE / SHARING

LARGE CORNER OFFICE available. Small downtown estate planning firm located in classic landmark building. Excellent decor, including wood floors and large windows. Digital phones, fax, copier, small and large conference rooms and receptionist available. Also, free exercise facilities with showers. Prefer attorney or CPA. Call (801) 366-9966.

Deluxe office space for one attorney. Share with three other attorney's Includes large private office, reception area, parking immediately adjacent to building, computer networking capability, law on disc available fax, copier, telephone system. Easy access in the heart of Holladay. Must see to appreciate. 4212 Highland Drive. Call (801) 272-1013.

Restored Mansion 174 East South Temple: available for lease two offices (272 square feet and 160 square feet) with conference room, reception, work room (total 414 square feet), lavatory, kitchen, storage, off-street parking. Fireplaces, hardwood floors, stained glass, antique woodwork and appointments. $1100 per month. Call 539-8515.

PRIME office space available in beautiful Broadway Center with established small firm for one or two attorneys or CPA's. Facilities include receptionist, telephone system, secretarial station, fax, copier, conference room, free exercise facility with shower and close proximity to courthouse. Please call (801) 575-7100.

Ideal law firm office suites available from 1,800 - 11,00 square feet. Located in the beautifully restored Judge Building downtown. Suites offer a great location within walking distance of State and Federal Courts, free exercise facilities, on site storage and management, and very competitive lease rates. Call (801) 596-9003.

Small law firm downtown with deluxe office space for one attorney. Facilities include private office, receptionist, conference room, limited library, fax, copier, telephone system, kitchen facilities. Call Lori @ (801) 532-7858.

"Established association of five attorneys has an opening for another attorney. Completely furnished office, including law on disk and bound Utah Reports from Vol. 1. Close to courthouse. Low overhead. Call (801) 355-5300."

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SEX CRIMES/MURDER/CHILD ABUSE: Complete forensic assessment of child and adult statement evidence of witnessed criminal events. Identify weakness of investigations and areas of contamination. Bruce Giffen, M.Sc. Evidence Specialist/Trial Consultant. American Psychology-Law Society. (801) 485-4011.

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APPRAISALS: CERTIFIED PERSONAL PROPERTY APPRAISALS/COURT RECOGNIZED – Estate Work, divorce, Antiques, Insurance, Fine Furniture, Bankruptcy, Expert Witness, National Instructor for the Certified Appraisers Guild of America. Twenty years experience. Immediate service available, Robert Olson C.A.G.A. (801) 580-0418.

Electronic trials, arbitrations, mediations [$500 / day + expenses]; Discovery Managements & Litigation Support: Scanning, OCR, Indexing, Documents to CD-ROM [approx. $1 /pg]. David Pancoast, Esq. d/b/a DataBasics. (702) 647-1947 or (702) 647-3757. http://www.cddocs.com.

Salt Lake Legal Defender Association is currently updating its trial and appellate attorney roster. If you are interested in submitting an application, please contact F. John Hill, Director, for an appointment @ (801) 532-5444.

Registered Nurse Reviewer: Available for research, medical record review and consultation. Several years of experience in pediatric ICU', medical-surgical nursing, home health and managed care. Very familiar with state and federal Medicare and Medicaid guidelines. References available upon request. K. Charon, RN (801) 268-9713.

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Richard M. Dibblee
Assistant Executive Director
Tel: 297-7029

Mary A. Munzert
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Tel: 297-7031

Katherine A. Fox
General Counsel
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Access to Justice Program
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Access to Justice Coordinator & Programs Administrator
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Admissions Department
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Tel: 531-9077

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297-7035

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Tel: 531-9110 • Fax: 531-9912
E-mail: oad@utahbar.org

Billy L. Walker
Senior Counsel
Tel: 297-7039

Carol A. Stewart
Deputy Counsel
Tel: 297-7038

Charles A. Gruber
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Tel: 297-7040

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For Years 19_____ and 19_____

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Continuing Legal Education
Utah Law and Justice Center
645 South 200 East
Salt Lake City, Utah 84111-3834
Telephone (801) 531-9077 FAX (801) 531-0660

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Address:_____ Telephone Number:_____

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Date of Activity CLE Hours Type of Activity**

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

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

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

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

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

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

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

**EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video Tapes. No more than one-half of the credit hour requirement may be obtained through self-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 twelve hours of credit may be obtained through writing and publishing 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 twelve hours of credit 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 5-102 — In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a **$50.00** late fee.

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.

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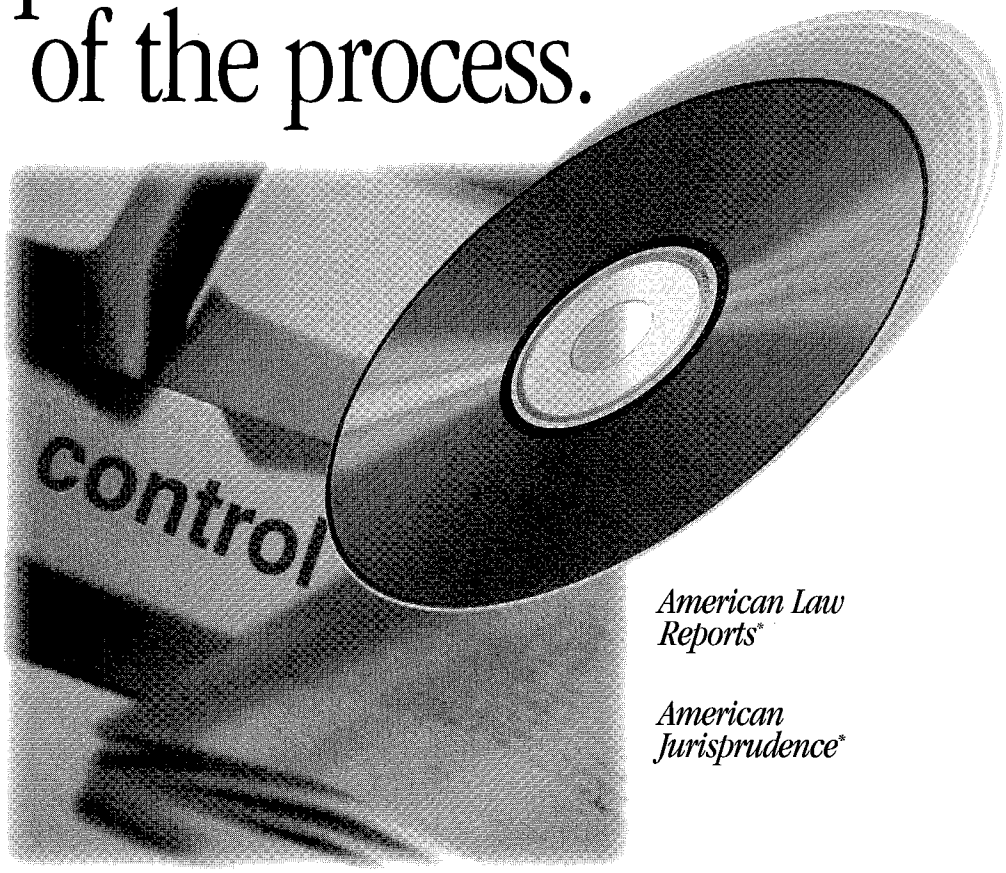

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