UTAH BAR JOURNAL

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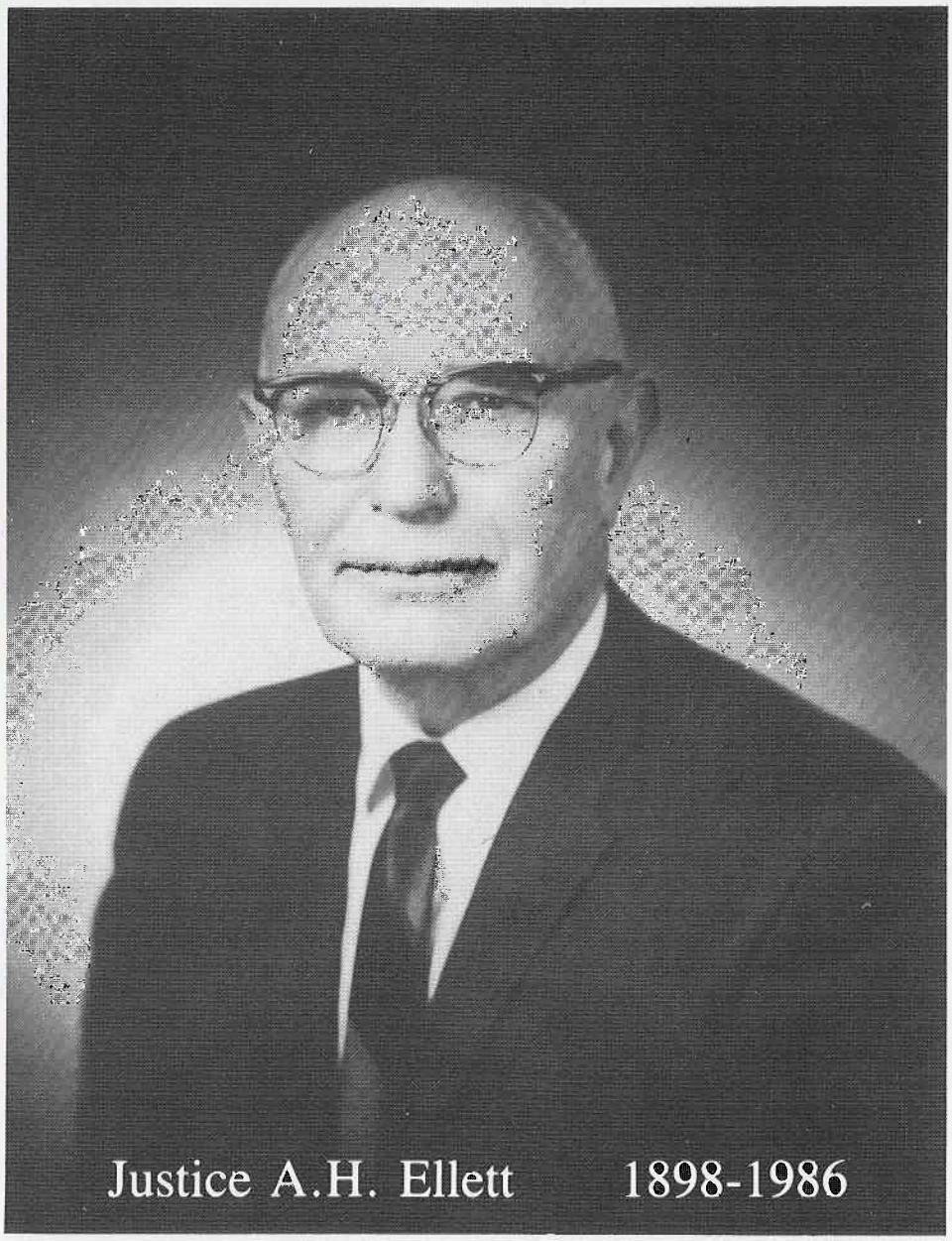

Justice A.H. Ellett 1898-1986

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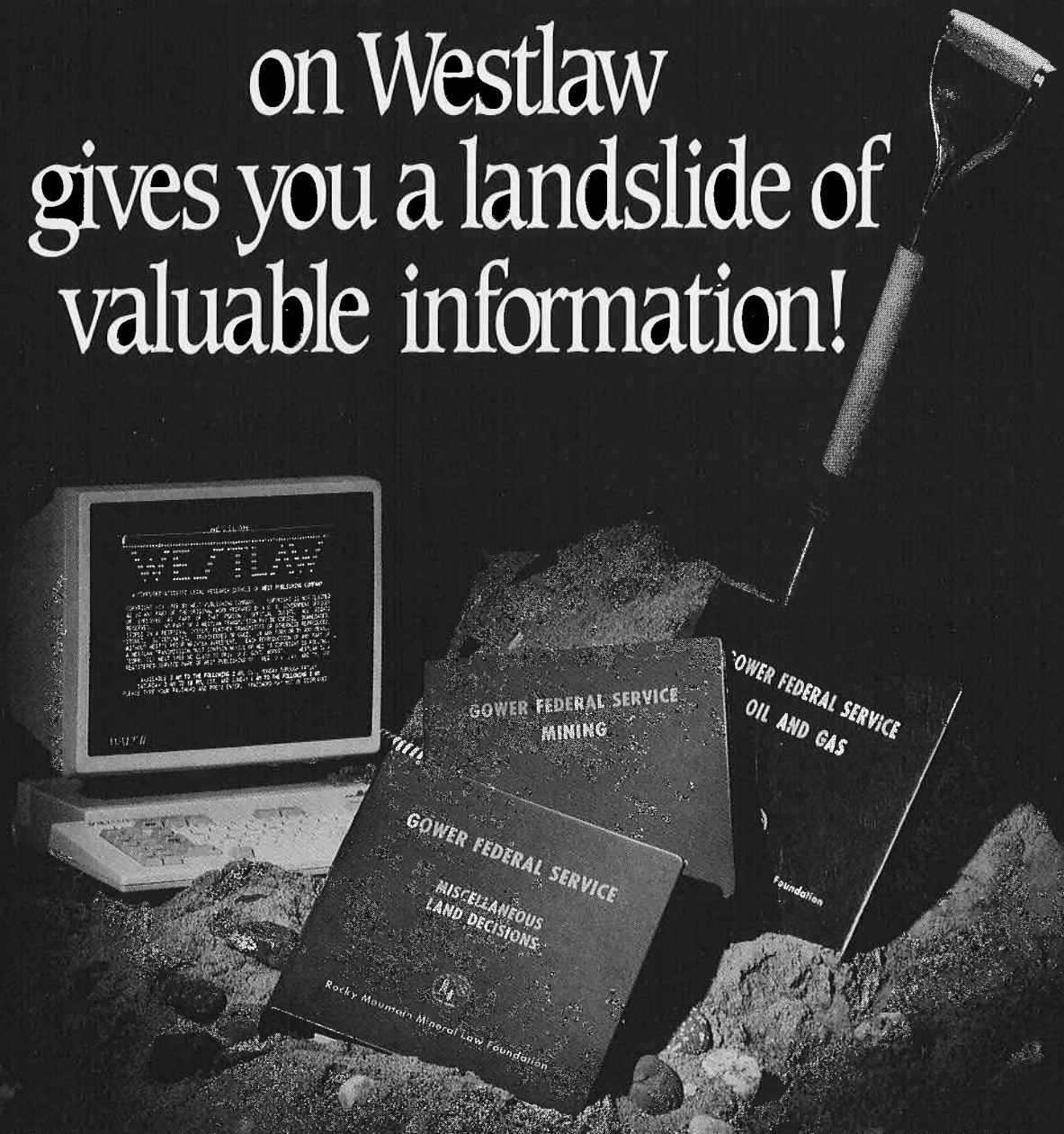

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Cover: Photograph of Utah Supreme Court Justice Albert H. Ellett, 1898-1986.

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QUESTION OF THE MONTH

By Nann Novinski-Durando

The *Utah Bar Journal* will periodically pose a "Question of the Month." Readers are invited to submit responses. Letters should be typed, double spaced, signed by the writer and mailed no later than one month after the question is published, all generally consistent with the letters to the editor guidelines outlined in the "Editor's Note," August/September, 1988 issue of the *Journal*.

A cross section of responses will be printed in a later issue. Not all letters received will be printed. Bar Journal editors will select responses that reflect differing views and offer meaningful insights into or possible solutions to the questions posed.

QUESTION FOR DISCUSSION THIS MONTH

Should the law be changed to allow the non-custodial parent to withhold, suspend, defer or cancel child support payments where the custodial parent unjustifiably frustrates or denies visitation to the non-custodial parent?

If so, why, when and/or how? What safeguards or standards should be instituted?

If not, why not? Are present procedures sufficient to protect and enforce the visitation rights of the non-custodial parent?

BACKGROUND INFORMATION ON THE QUESTION

This month's question focuses on a problem often overlooked in the on-going struggle to protect and enforce the rights of parties, including children, in divorce actions.

Because of its magnitude and serious consequences, the problem of the non-custodial parent who fails or refuses to make court-ordered child support payments often overshadows the problem of the non-custodial parent who does pay child support but is unjustifiably denied visitation rights by the custodial parent. The latter may be less pervasive but is no less serious in its consequences. Yet enforcement procedures are often ineffective or non-existent.

The custodial parent not receiving child support has available a variety of possible remedies and enforcement procedures—contempt proceedings, execution, attachment, garnishment, wage assignment, liens, criminal non-support actions. Whether enforcement and collection is successful in a given case depends on various facts and factors but, nevertheless, procedures are available and can be effective. The same cannot be said about enforcement procedures available to the non-custodial parent who is being unjustifiably denied visitation rights in violation of the terms of the divorce decree. Order-to-show-cause actions and contempt proceedings often do little more than result in another order for the custodial parent to ignore. The custodial parent who refuses to comply with the divorce decree is just as likely to ignore post-divorce orders; and so the cycle continues. This, in effect, leaves the non-custodial parent with no practical method of enforcing visitation rights.

The non-custodial parent in such cases may stop paying child support, feeling justified in refusing to support a child with whom he/she is denied contact, and then react with bitterness against a legal system that attempts to enforce the support obligation yet remains unable to enforce visitation rights. It is for these reasons that many see a need to link support and visitation, a need to permit child support payments to be withheld, deferred or suspended when visitation is unjustifiably denied or frustrated or where the custodial parent's conduct leads to a child's unjustifiable refusal to see the other parent.

Traditionally, courts have rejected using child support as a sword to enforce visitation rights. Support and visitation have been regarded as separate issues. Utah has been fairly traditional in its approach to such linkage. But as non-custodial parents have become more vocal and persevering in their attempts to secure and enforce their rights, recent Utah cases might be examined for cracks in the wall separating support and visitation. Two questions might then be addressed: Have cracks indeed been left for the non-custodial parent and, if so, should those cracks be widened by case law or statute and perhaps widened enough to crumble the wall.

In *Race v. Race*, 740 P.2d 253 (Utah 1987), the Utah Supreme Court rejected a trial court order for support payments that conditioned payment on development of a visitation schedule: "Child support is an obligation imposed for benefit of children . . . We find no circumstances here which justify the trial court in deferring support until visitation between the children and their father could be worked out." Did that language indicate that the court might find in another case circumstances that would justify the deferring of support payments? And if so, would unreasonable and unjustifiable interference with visitation rights be a circumstance that would be such a justification?

In an earlier case, *Hunter v. Hunter*, 669 P.2d 430 (Utah 1983), the custodial parent petitioned for nine years of back child support. After the divorce, she had gone into hiding, concealing herself from the child's father and thus completely denying him visitation rights. The trial court found that she had waived her right to collect and was estopped from collecting the back support. The Supreme Court reversed. Two dissenting justices found clear acts of waiver and estoppel (. . . "the appellant [mother] made it clear she wanted the respondent [father] out of her life completely. . . ") and would have upheld the lower court ruling. But the three-justice majority found the concealment justifiable and, hence, no conduct on the part of the mother that constituted acts of waiver or estoppel. This reasoning indicates that if the majority had found the concealment to be unjustified, then perhaps the withholding of back support would have been upheld. If so, one would argue that the unjustified denial or frustration of visitation rights either amounts to a waiver of child support or is conduct that should estop the custodial parent from collecting support.

The Utah Supreme Court partially departed from the traditional separation of visitation and support in *Rohr v. Rohr*, 709

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QUESTION OF THE MONTH

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P.2d 382 (Utah 1985). The lower court had set up a schedule that restricted visitation rights because of unpaid support and decreed that the restrictions could not be changed or modified until all back support had been paid. The Supreme Court rejected the conditioning of future modification (that is, the expansion of visitation by easing the restrictions) upon the father's compliance with the support order, a ruling in line with the separation of support orders and visitation rights. But the Court departed from this separation in approving the actual restrictions on the visitation. The court pointed out that where non-payment of support is willful and intentional, visitation rights may be reduced if the welfare of the child requires it. Applying this reasoning to the flip-side of the situation, one would argue that where denial or frustration of visitation is willful and intentional, support payments should be restricted (withheld, deferred, reduced) if the welfare of the child requires it.

Not all jurisdictions have been rigid in their search for solutions to the problem. New York is a state where support and visitation have been linked both statutorily and in case law.

Although the welfare of the child remains a paramount consideration, the principle that unjustified denial of visitation rights may suspend the non-custodial parent's obligation to pay child support to the custodial parent is well settled in New York case law. A comprehensive discussion of the relationship between visitation and support obligations in New York and of the numerous cases on the issue is found in McKinney's Cons. Laws of New York, Book 29A, Family Court Act, Practice Commentary to Sect. 447. The courts base this linkage on two considerations: the unfairness of requiring a parent to support a child he/she is not permitted to see and the use of the support order as a tool to enforce visitation orders.

The New York courts do not view visitation as something less important than support. "Thus it seems clear that the right of children to housing, clothing, etc.... does not have priority over the father's right of visitation." *Sandra B. v. Charles B.*, 380 N.Y.S.2d 861 (Fam.Ct. 1976), "The child must be viewed as the joint holder of two rights, visitation and support, of which the more crucial is the right of visitation... Thus, under certain circumstances the court may restrict the child's right to support from the non-custodial parent, an obligation which may be met from other sources, in an effort to enforce the child's more critically important right to visit the non-custodial parent." *South Carolina Department of Social Services v. James*, 464 N.Y.S.2d 942 (Fam.Ct. 1983).

New York finds interference with visitation to be more than a simple denial of the right of the non-custodial parent to visit the child. The custodial parent has a duty to encourage the child to see the non-custodial parent. *Wostl v. Wostl*, 429 N.Y.S.2d 328 (App.Div. 1980); *Goldstein v. Goldstein*, 385 N.Y.S.2d 140 (App.Div. 1976). And moving with the child to another jurisdiction without justification has been held to be a denial of visitation making suspension of support payments appropriate. *Courten v. Courten*, 459 N.Y.S.2d 464 (App.Div. 1983). In *Alexander v. Alexander*, 514 N.Y.S.2d 148 (App.Div. 1987), the court said a move from New York to California "effectively frustrated [the non-custodial parent's] visitation rights" and suspended the support obligation. See also *South Carolina Department of Social Services v. James*, supra, where support was suspended pending granting of visitation in a similar case.

Domestic Relations Law Sect. 241 explicitly gives the court power to suspend spousal support (alimony or maintenance) payments when there is a wrongful interference with visitation. Cases have held that this applies to child support as well as spousal support. In *Reilly v. Reilly*, 418 N.Y.S.2d 731 (Fam.Ct. 1979), the court pointed out that Sect. 241 did not provide "statutory authority to suspend child support payments....However, recent cases have concluded that when the non-custodial parent has been deprived of his visitation rights, the suspension of support payments applies to child support, as well as alimony. [Citations omitted.]" Later cases questioned this expansive interpretation and a 1986 amendment to Sect. 241 provides that the section cannot be used as a defense in an action to enforce child support or as grounds to cancel arrears in child support.

Family Court Act Sect. 451 also contains a restriction on the power of the court to cancel arrearages in child support for interference with visitation unless good cause is shown for the failure of the non-custodial parent to seek relief from a support order.

In effect, this modified case law that permitted a non-custodial parent to use interference with visitation as a shield in an action seeking child support arrearages. But this provision, like the amendment to Sect. 241, does not affect the use of interference as a sword in an affirmative action seeking relief from future support payments. Even so, Sect. 451 still allows the shield use in arrearage cases when the petitioner can show a good reason for not having sought affirmative relief. □

PRESIDENT'S MESSAGE

Professionalism—You Know It When You See It!

—Kent M. Kasting

My last President's Message outlined certain goals for the upcoming year, one of which was to let the public know the high standards of professionalism to which Utah lawyers adhere. Focus on professionalism and the law is a subject rapidly gaining national attention, and rightly so. Professionalism is an issue of extreme importance to all lawyers and to the clients and citizens whom they serve.

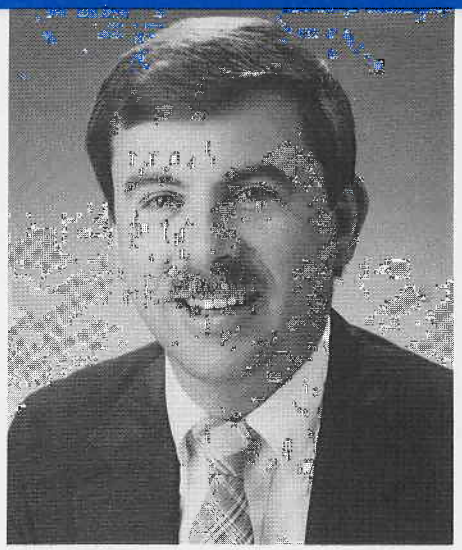
Recently, the United States Supreme Court in the case of *Shapero v. Kentucky Bar Association*, June 13, 1988, concluded by a vote of 6 to 3 that attorneys may not be categorically prohibited from direct mail solicitation.

Justice O'Connor dissented and, whether or not you agree with her opinion or the holding of the case, her comments and observations on "professionalism" deserve serious consideration.

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life.

As your president, I urge each of you to take a moment and contemplate the concept of "professionalism" and the role it plays in your practice.

Of course, "professionalism" means something different to every lawyer, but it necessarily has some common threads. To me, professionalism implies the highest degree of honesty, integrity and competence. It means respect for the courts and lawyers. It is loyalty and service to clients. It is congeniality, gentility and self-control. Most importantly, professionalism means acceptance of a commitment to a cause which supercedes our personal interests. True professionalism requires that the interests of the public and our clients must come before our own self-interest.



Kent Kasting

Professionalism can best be described in one simple word—"respect"—respect for courts and judges, respect for one another, respect for the poor, respect for clients and opposing litigants, and respect for our legal system.

Bar Associations throughout the country are recognizing the need to place more emphasis on professionalism and many have adopted or are in the process of adopting Guidelines for Professonal Courtesy and Creeds of Professionalism in an attempt to promote professionalism among lawyers. For example, the Dallas Bar Association has implemented its "Lawyer's Creed."

LAWYER'S CREED

1. I revere the Law, the System, and the Profession, and I pledge that in my private and professional life, and in my dealings with fellow members of the Bar, I will uphold the dignity and respect of each in my behavior toward others.

2. In all dealings with fellow members of the Bar, I will be guided by a fundamental sense of integrity and fair play; I know that effective advocacy does not mean hitting below the belt.

3. I will not abuse the System or the Profession by pursuing or opposing discovery through arbitrariness or for the purpose of harassment or undue delay.

4. I will not seek accommodation from a fellow member of the Bar for the rescheduling of any Court setting or discovery unless a legitimate need exists. I will not misrepresent conflicts, nor will I ask for accommodation for the purpose of tactical advantage or undue delay.

5. In my dealings with the Court and with fellow counsel, as well as others, my word is my bond.

6. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.

7. I recognize that my conduct is not governed solely by the Code of Professional Responsibility, but also by standards of fundamental decency and courtesy.

8. I will strive to be punctual in communications with others and in honoring scheduled appearances, and I recognize that neglect and tardiness are demeaning to me and to the Profession.

9. If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, I will not arbitrarily or unreasonably withhold consent.

10. I recognize that effective advocacy does not require antagonistic or obnoxious behavior, and as a member of the Bar, I pledge to adhere to the higher standard of conduct which we, our clients and the public may rightfully expect.

The ABA's Tort and Insurance Practice Section has also promulgated the Lawyers' Creed of Professionalism, which the ABA's House of Delegates approved in August. The House of Delegates also passed a resolution to recommend to state and local bar associations that they adopt a creed of professionalism.

In the spirit of that resolution, I think it's time the Utah Bar considered adopting its own creed of professionalism as a statement to all concerned that Utah lawyers are professionals in the truest sense of the word. We must further demonstrate that we are, in the words of Dean Roscoe Pound:

> . . . a group pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

We should let the public know that each of us strives to attain the high standards of professionalism, and our adoption of a creed of professionalism would certainly be an appropriate way to get that message out. I intend to pursue this proposal with the Bar Commission, and I welcome your comments and suggestions and input on this very important issue. □

Justice A.H. Ellett
1898-1986

By Justice J. Allen Crockett, Retired

Judges ought to be more learned than clever, more reasonable than plausible, more advised than confident; and above all, their essential virtue should be integrity.

—*Adapted from* Essay on Judicature *by Sir Francis Bacon.*

Upon his retirement from the Utah Supreme Court in January 1979, Justice A.H. (Albert Hayden) Ellett chose to title his autobiography "Forty-Four Years as a Redneck Judge." That is not by any means a fully accurate characterization, even if it be seen as one aspect of this exceptionally complex person, but it is typical of the Justice's always present and sometimes puckish sense of humor that he accepted that disparaging epithet as applicable to himself.

He was born February 4, 1898, near Huntsville, Ala., to Martha Catherine Green and Isaac William Ellett. While he was still a small boy, his parents moved from Alabama to Texas. As to his origins, the judge states:

> I was born in Alabama of parents who were impoverished by the Civil War and its after effects. . . I had been raised on an isolated farm in Texas. . . my father went to school for three months and my mother never was a student in any school. . . [but]. . . both parents were well read and quite intelligent people.

His narrative of his childhood in rural east Texas is sprinkled with unusual experiences and pranks indicating a bright mind, a vivacious spirit, and a burning ambition. There, and throughout his book above referred to, he tells of many bizarre happenings with such engaging candor, whether they reflect on him favorably or otherwise, as to bring to mind the declaration of Rousseau in his Confessions: "I hold that I have been as good and as bad as any man." For those interested in further detail, reference is made to Judge Ellett's book.

It is hoped that this memoir will not only include the basic facts about his life and career, but also reflect something of the color and qualities of his personality and of his purpose in life. It is thought that that objective will be aided by quite freely incorporating some of his own expressions.

He had no hesitancy in emphasizing the meagerness in material things in connection with his family's industrious eking their living from the soil. This fact, and his sense of humor, are illustrated, if a bit exaggerated, by one of his

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J. Allan Crockett was born in Smithfield, Utah, in 1906, the son of John Allan and Rachel Maretta Homer Crockett. He spent his early life in the north country and attended school in various towns in Cache Valley. The family moved to Salt Lake City in 1921 for reasons relating mostly to greater opportunity and economic advantage. There, Allan worked full-time late hours while he attended and graduated from East High School and from the University of Utah Law School, both with scholastic honors.

He was admitted to the bar in 1931. He later served as assistant to County Attorney Harold E. Wallace. In 1940, he was elected district judge of the Third Judicial District, where he served for 10 years until he was elected in the fall of 1950 to a 10-year term on the Utah Supreme Court and then was reelected to two more successive terms, a total of 30 years on that court, eight years of which he was chief justice. His judicial career is a matter of public record, which, together with his decisions, anyone further interested may read.

In addition to his judicial work, Justice Crockett engaged in numerous activities in public service and made significant contributions to civic as well as judicial affairs, including: on boards of directors of the Utah State Institute of Fine Arts, the Utah Symphony, Family Service Society, and the Legal Aid Society, serving as chairman of each board during his term thereon; and numerous other activities which can be spared delineation in this brief article. He initiated the project for the writing and publication of *Manual for Justices of the Peace* and for the compilation and publicaton of J.I.F.U. jury instructions.

JUSTICE A.H. ELLETT

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half-truth yarns: "I can't really say that I was raised in a log cabin—but my folks moved into one as soon as they could afford it."

At the age of 17, he qualified by examination, became a teacher and taught two years in a multiple grade grammar school; and later by the same process became a teacher in high school, where he taught a variety of subjects for another two years in Texas. In 1916, he followed members of his family in becoming a member of the LDS (Mormon) Church, and later moved to Utah. Here he taught in the small town school of Lake Shore in Utah County for two years.

There he met Florence Rowe, whom he married in 1924. They became the parents of four children: Kenneth, Walter, Jeanne, all now successful adults with their own families, and Ann, who was injured in the birth process and never fully recovered and adjusted therefrom. After an enfeebled childhood of intensive love and care by her parents, she died at age 9.

Florence died in January 1975; and a year later he married Miriam Parker, who became and remained his loyal and caring companion until he passed away November 30, 1986.

Consistent with his desire for learning and his ambition for advancement, while teaching school he studied accounting; and in 1923 he went to work as an accountant for the United States Smelting and Refining Company, where he worked for seven years. During that time, he took correspondence courses in law. He passed the Bar examination and was admitted to practice in 1930. In 1933, he was appointed a deputy Salt Lake County attorney and continued in that office until he was elected a Salt Lake City judge in 1934.

Neither was he shy in telling about the unusual way in which he obtained his education and training. He seemed either to have a sense of self-consciousness about being a correspondence-school lawyer, or to have an inverted pride in that fact. About that he wrote:

> You know me inside and out: so write anything you want, but heed Clarence Darrow's request of his wife: "When I pass on, get Judge Watson to talk at my service; he knows all about me, and has sense enough not to tell it." If you include the fact that I am a correspondence school lawyer, I am not of the regular run. I took courses from LaSalle Law School, and the American Law School, and I graduated and received my LL.B. from Blackstone Institute.

He saw the dangers of lack of learning, but was even more concerned with the illusion of learning, that is, assuming that one knows enough, which leads to stagnation. Due to his brightness of mind, his never-ending curiosity in all fields of inquiry, he continued for years to take correspondence and extension courses in widely diversified areas, such as physics, geology, astronomy, and Spanish. He reports that: "In addition to my law studies I have engaged in other educational pursuits, I have acquired about 500 hours of college credit, much of which was taken by extension and correspondence, so I am not ashamed of my education or training."

Though his education was acquired in a somewhat spotty and unusual way, it can be said with assurance that even if he did not concern himself much with academic credentials, it is likely that none other of our judges has had a wider or more thorough knowledge across the whole spectrum of learning. This all fits into the pattern of his life of extraordinary achievements, beginning with his becoming a certified school teacher at age 17, without ever having graduated from high school. He became a member of the Bar without having graduated from college; a judge, a Supreme Court justice; a chief justice, and an instructor in the National College of State Trial Judges without ever graduating from a resident law school.

A significant characteristic was his almost fierce determination to maintain his independence as a judge, free of control or interference by anyone.

As a city judge, he industriously devoted his superior abilities to keeping his own and the other judges' calendars up-to-date. A significant characteristic was his almost fierce determination to maintain his independence as a judge, free of control or interference by anyone. One of the significant consequences of this was his refusal to go along with an ongoing program of prearranged fines and forfeitures in vice cases. Conflicts over this led him to make some shrewd discoveries and suggestions, which in turn led to an investigation and exposure of corruption in the city police department, resulting in several convictions, including the then Chief of Police and the Mayor of Salt Lake City.

In 1940, Judge Ellett was elected to the district court. During his long tenure of 26 years there (1941 through 1966), he continued with resolute determination to improve the processes of justice. He was one of the pioneers in the use of pre-trials, and in the obligatory acceptance of indisputable facts or imposing penalities for refusing to do so. It can fairly be said that he has done more to eliminate nonessentials and to facilitate and expedite procedures than any other judge in our history.

Another aspect of his widely diversified interests focused on nature and the outdoors, including hiking, mountain climbing, river-running, astronomy, and photography. He took many colored slides, and it was a manifestation of the generosity of his nature and concern for others that he developed programs of them which he often presented for the entertainment of friends and groups.

Governor Calvin W. Rampton appointed Judge Ellett to the Utah Supreme Court to fill the vacancy caused by the death of Justice Roger I. McDonough, who passed away November 25, 1966. Justice Ellett was sworn in on January 5, 1967. In regard to his joining the Court, in character with his usual self-confidence, he writes:

> I thought I could set right all of the faults of the Court—what a disappointment it was. As a district judge, I had only to make up my own mind. Now, I had only one-fifth of a mind, four others to contend with. It was at times very worrisome and frustrating; but in general I enjoyed my association with the other justices and my work on the court.

He served the remaining two years of Justice McDonough's unexpired term and then was elected to a full term of 10 years. As his opinions in the books will show, he continued in his capable and industrious way to render a very creditable service until he retired in January 1979.

To a far higher degree than most people, he had a never failing insight into the humorous angles of most everything so that with him it was always so close to the surface that it was an important part of his personality, and he took such pleasure in using it to brighten the lives of others that no writing about him would adequately reflect this unique quality without some examples of his stories.

At Sunday service at the prison, following the LDS practice of audience participation, a prisoner in the audience was asked to offer the invocation. After appropriately addressing Diety, his prayer was in part thus:

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JUSTICE A.H. ELLETT

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> We thank Thee that so many of us are able to be here this morning under such safe and secure circumstances. We trust that others who ought to be here will be here next time; and that at the conclusion of this service, we may be permitted to return to our homes in safety.

He enjoyed "buttering up" others in a complimentary way, particulary the fair sex. He said, "It is not to be wondered at that the Creator fashioned man first and then woman. For, everyone knows that every great artist and craftsman first fashions a rough model, then creates his masterpiece. Anyway, He probably didn't want any advice on the project."

He had the rare quality of seeing and reporting humor when he was himself the butt of the joke. He reports of discussing with a state senator the comparative inadequacy of judges' salaries, wherein he told the senator, "Why I have men on probation who are making more than I am." To which the senator responded, "Well, Judge, maybe you better resign and go on probation."

In addition to his capable and effective services as a state judge and his worthwhile accomplishments therein, there is another outstanding aspect of his career: his determined and unrelenting attack upon the federal government and its courts. He states:

> My tenure on the Supreme Court gave me an opportunity to bring to the attention of the nation the encroachment of the federal judiciary into matters which belong solely to the states.

In view of the fact that he saw this as such an important part of his judicial career, it is deemed appropriate to state a summary of his views on that subject. The starting point is his emphasis on the fact that the founding fathers regarded each of their own colonies as a sovereign, and that they were willing to join in a union of a central government only if their own separate sovereignty was also preserved as a safeguard against a too strong and domineering government from which they had just freed themselves. For that reason, the 10th amendment to the United States Constitution expressly provided that all powers not delegated to the federal government are reserved to the states, or to the people; and the ninth amendment provided that the powers which are granted should not be construed to include others not so granted.

His thesis proceeds: Notwithstanding the precautions just referred to, there has been a definite, constant, and seemingly endless process of the federal government, more especially the federal courts, arrogating to themselves more and more of the powers, not only not granted, but expressly forbidden them. This usurpation has been accomplished largely through unjustified reliance on the 14th amendment, adopted in 1868 after the Civil War to provide all persons with equal protection of the laws and to prevent anyone from being deprived of life, liberty, or property without due process of law.

He makes an attack upon that amendment: that it was never lawfully adopted, because its inclusion in the Constituion was accomplished by duress and coercion of certain southern states, and by excluding others from their right to vote upon the amendment; and, in any event, it should not be regarded as conferring any new or different authority upon the federals in that regard, because the original fifth amendment contained the same "due process" language. Without going into further detail, if the facts as stated are accepted, he sets forth in his opinion *Dyett v. Turner*[1] what he regards as a very plausible argument in support of his contention. Perhaps it should be here noted that however plausible that argument may be, no other justice of the court concurred in that opinion. It fails to take into consideration the well-founded dictum of Justice Holmes that "The history of the common law has not been logic, but experience."

To a far higher degree than most people, he had a never failing insight into the humorous angles of most everything. . . and took such pleasure in using it to brighten the lives of others. . .

Justice Ellett undoubtedly had no realistic expectation that the 14th amendment would be declared invalid. Yet about his *Dyett* case, he wrote: "I feel so certain that the law set out in that opinion is correct that I have never receded . . . [but] have consistently reaffirmed that position." He states that he pointed the matter out to show what a tenuous ground the federals are on in intruding into the rights that should be reserved to the states and to the people.

It was his view that the federals, and particularly their courts, relied on and used their sheer unrestrained power, ignoring the express limitations thereon, to claim for themselves an unjustified concentration of power, thus leading toward the destruction of the controls and balance of power intended by the Framers, which is a clear vindication of the fears of too great centralization of power as uniformly expressed by them, particularly by Jefferson, Madison, and Hamilton.[2] In support of this, the Framers, after much discussion, debate, and consideration, carefully crafted our government with a balance of power between three co-equal branches, so that each could act as a check upon any uncontrolled power over the other; and also of the greatest importance that that was their reason for providing a further check and balance against uncontrollable power by reserving to the states all power not expressly granted to the federal government.

Moreover, also of grave significance, this was done in full awareness that reflection upon history plainly teaches that unrestrained power not only leads to the oppression of those subject to it, but of equal apprehension, it almost always feeds upon itself and leads to its own destruction.[3]

He averred that by their insatiable desire for power, resulting in judicial legislation above referred to, the federals unjustifiably and unwisely intruded into asserting control over numerous things in which they had no right to be concerned: the operation of the schools, busing of students, the running of prisons and hospitals, and an unending list of matters not within the scope of their authority. It was his thought that federal intrusion, impersonal and remote from local problems and governments, has resulted in evermore numerous, complex, and oppressive laws so that the protections the founding fathers intended for us are being "interpreted," i.e., being extrapolated, or so distorted in a one-sided manner in favor of the anti-social and criminally inclined, that they are assured ever greater protections from prosecution; and scoundrels are given license to prey on the honest and law-abiding citizenry without being brought to justice.

Closely related to the above, it was Justice Ellett's firm and often stated conviction that the evils above referred to are contributed to and intensified by the frictions between two judicial systems, state and federal, with their frequent overlapping and duplications, conflicts, sometimes endless delays, and the thwarting of justice. He was especially revolted by the lower federal court's issuing writs of habeas corpus, by the use of which, on practically any pretext of an issue under the federal constitution, they assumed the prerogative of reviewing the proceedings and decisions of the state courts,[4] all of

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JUSTICE A.H. ELLETT

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which interferes with and delays effective law enforcement, and contributes to public disrespect for the law and for the courts.

The keenness of his disagreement and scorn for some of the rulings of the United States Supreme Court is evidenced in his caustic attack set out in his case of *Salt Lake City v. Piepenburg*,[5] relating to pornography. He let "certain justices" of that high court have it with both barrels. He points out that their definition that subject matter should not be held obscene unless "when taken as a whole, [it] lacks serious literary, artistic, political, or scientific value" leaves room for inclusion of the subject matter of that case, which he characterizes as "shameful, sickening and disgusting..." He comments that "such an argument ought only to be advanced by depraved, mentally deficient, mind-warped queers;" and adds that "if those judges do not have the good sense and decency to resign ...they should be removed..."

He epitomizes his attack by this declamation: "God save the country; the Supreme Court of the United States is not going to do it."

It should be clearly understood that he was an individualist, who forthrightly expressed and firmly stood on his convictions. Indeed, the sometimes-quoted aphorism can aptly be applied to him: "He was not stubborn, just determined like a mule." He was neither discouraged nor dissuaded by advice that his efforts were but quixotic tilting at windmills. He had an abiding conviction that what he regarded as truth and righteousness are powerful weapons and that to keep hammering away with them in the most strident invective he could muster would join with others and have some effect and that, in any event, it is better to try in a noble cause, even though you fail, than to succeed in an ignoble one.

Arising out of and supported by his long years of judicial experience, Justice Ellett makes another thoughtfully considered and penetrating criticism and suggestion in regard to appellate courts; he thought that they spend much too large a portion of at least 90 percent of their time and efforts in writing opinions dealing with issues that have already been decided and written about, which amounts to little more than moving dead bones from one place to another, but less than 5 percent actually making any new and significant contributions to the law. Whereas, if they would reverse that time use and spend more time just deciding cases and less time writing useless opinions, they could, without sacrificing thoroughness or efficiency, greatly minimize delays in the processes of justice.

Whether one agrees with Justice Ellett or not, it can neither be denied nor ignored that he clearly and forcefully called attention to some important problems which many thoughtful people, including lawyers and judges, think are real hazards to a continuance of the good order and well-being of our country, and which need to be dealt with in a serious way.

It is not to be doubted that at some times, and about some matters, he seemed to be a bit feisty or even disposed to opposition or antagonism. This was undoubtedly because he was a restless inner-directed soul, sensitive to the basic anxieties of the whence, why, and whither of life. He was not content to accept things as they are but was constantly endeavoring to change them to what he thought they ought to be. His actions are reminiscent of the saying that "Life is never dull except to dull people." His life was never dull.

Those who knew him will agree that he was an intelligent, well-informed, especially capable, and truly dedicated judge whose main purpose in life was in harmony with the thought expressed by Chief Justice Earl Warren to the Conference of Chief Justices:

One who devotes his life and efforts to the cause of justice under law renders a service not only of great benefit to his fellow men, but also to himself in satisfaction and fulfillment.

—Chief Justice Earl Warren, to the Conference of Chief Justices.

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[1] *See Justice Ellett's extensive treatment in 20 Utah 2d 403, 439 P.2d 266 in which he adds "...how the Fourteenth Amendment was forced upon the nation, see articles in 11 S.C.L.Q. 484 and 28 Tul. L. Rev. 22."*

[2] *Excellent exposition thereon in* Miracle at Philadelphia, *by Katherine Drinker Bowen.*

[3] *See, e.g.,* The March of Folly, From Troy to Vietnam, *by Barbara Tuchman.*

[4] *This without criticism of the capable and honorable United States District Judges for Utah who were but following mandates of the United States Supreme Court.*

[5] *Utah, 571 P.2d 1299.*

Working Through Utah's Agency Disclosure Law

By David W. Johnson, Esq.

On July 1, 1987, the state of Utah, through its Department of Business Regulation, joined numerous states across the country in adopting an administrative rule requiring real estate sales agents and brokers to disclose who they represent in each real estate transaction. The premise of the rule is that the consumer who deals with a real estate agent is entitled to know who it is the agent represents. With the benefit of a one year history, it would be useful to comment on the genesis, implementation, and projected impact of the agency disclosure rule.

In early 1983, the National Association of Real Estate License Law Officials (NARELLO) and the National Association of Realtors (NAR) commenced a joint, comprehensive study of trends in agency law as applied to real estate sales agents and brokers. In early 1986, both organizations, in very clear terms, expressed their support for regulations requiring agency disclosure. That support was based on increasing attention given in case law to agency relationships in real estate transactions and the critical nature of adequate agency disclosure.

In view of the priority placed on agency disclosure by NAR and NARELLO, by October, 1987, some 28 states had adopted by legislation or through administrative rule, laws requiring real estate licensees to disclose their agency relationship(s) in every real estate transaction. Utah's agency disclosure law was implemented through administrative rule in mid-1987. The text of the rule is as follows:

> "AGENCY DISCLOSURE. In every real estate transaction involving a licensee, as agent or principal, the licensee must clearly disclose in writing to the buyer and seller, lessor and lessee, his agency relationship(s). The disclosure must be made prior to the buyer and seller, lessor and lessee entering into a binding agreement with each other and become part of the permanent file. When a binding agreement is signed, the prior agency disclosure must be confirmed in a separate provision incorporated in or attached to that agreement, which shall be as follows: AGENCY DISCLOSURE. At the signing of this Agreement the listing agent ____ represents ( ) Seller ( ) Buyer, and the selling agent _____ represents ( ) Seller ( ) Buyer. Buyer and Seller confirm that prior to signing this Agreement written disclosure of the agency relationship(s) was provided to him/her. ( ) ( ) Buyer's Initials ( ) ( ) Seller's Initials."
>
> History: Effective July 1, 1987
> Specific Authority—Administrative Rule 6.14
> General Authority—UCA 61-2-11(4)

The advantage of the rule to consumers is readily apparent. If prospective buyers understand that the agent who is showing them the property is, absent arrangements to the contrary, employed by the seller, and is being paid to assist the seller in getting the best terms and price for his property, then the buyers will be less likely to divulge their personal negotiating position on the mistaken belief that the agent is representing them. With a clear understanding of the agency relationship, the buyers can avoid the compromising position of telling the seller's agent, "Why don't you write up the offer at $75,000. We'll see what the seller does. If he doesn't accept it, we can always come up to $80,000 if we have to!"

The reverse is also true when a seller or listing office is negotiating with an agent who has contracted to represent the buyer. When each party to the transaction understands who is representing whom, the representation will be improved, the negotiating positions clarified, and the threat of lawsuits over this critical issue, minimized. It is long overdue that consumers more fully understand the function of real estate agents, the services they provide, and basic concepts of agency.

As stated, the advantage of the rule to the consumer is apparent. However, the advantages of agency disclosure to the real estate sales agent and broker are more subtle, and the issues are considerably more complex. In a general sense, one benefit of the disclosure requirement is that it has forced real estate sales agents and brokers to be far more conscious of their agency relationship(s). The complexity of agency disclosure emerges in the context of a new trend to "buyer-brokering" (representation of buyers) and the long-standing practice of "subagency" offered by membership in a Multiple Listing Service (MLS).

When a real estate brokerage wishes to advertise a new listing through the MLS, the brokerage submits the listing to the MLS. According to MLS bylaws, by placing a listing with the MLS, the listing brokerage automatically extends a blanket offer of subagency to all other brokerages that are members of the MLS (cooperating brokerages). On that basis, every member brokerage is inherently either a direct agent or subagent of the seller. The apparent purpose behind the blanket offer of subagency is to solicit the assistance of the cooperating brokerages in marketing the new listing. If the cooperating brokerage brings in a successful offer on the new listing, the listing brokerage agrees to share the

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Mr. David W. Johnson received his undergraduate and law degrees from the University of Utah. He has operated his own title insurance company and, for the past five years, has served as director of the Division of Real Estate, a division of the Utah Department of Business Regulation. He is affiliated with the National Association of Real Estate License Law Officials, and has been chairman of the Agency/Sub-Agency Committee of that organization. In 1988, Mr. Johnson received "the President's Award" from the Salt Lake Board of Realtors for unique contributions to the real estate industry in the State of Utah. A licensed real estate broker, Mr. Johnson is presently practicing law with the law firm of Woodbury, Bettilyon, Jensen, Kesler & Swinton. His practice is devoted exclusively to real estate and real estate brokerage law.

WORKING THROUGH UTAH'S AGENCY DISCLOSURE LAW

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brokerage commission with the cooperating brokerage.

The significance of this subagency relationship with the seller is, as a practical matter, rarely understood by sellers, and often overlooked by real estate sales agents and brokers. Up until recently, little serious attention has been given to the importance of this subagency relationship. With a specific requirement of agency disclosure and the accompanying increase in "agency consciousness" generally, subagency is ripe for careful scrutiny by all parties to a real estate transaction.

On December 30, 1986 a highly significant lawsuit was filed by the Sunnyvale Board of Realtors in Santa Clara County, California (*Sunnyvale Board of Realtors v. Dennis Moreno*—File #618897). The central issue in the lawsuit is whether a seller can list his property over the multiple listing service and not offer subagency. The outcome of the case could have dramatic implications for real estate practice involving an MLS.

The lawsuit involves a dispute between the Sunnyvale Board of Realtors and one of its member brokers, Dennis Moreno. Moreno wanted to place a listing with the MLS of the Sunnyvale Board. Moreno refused however, to offer subagency on this particular listing. That refusal was, as mentioned above, a position contrary to the requirements of the MLS bylaws. The Sunnyvale Board MLS, in turn, would not accept the listing unless Moreno agreed to offer subagency.

The Sunnyvale Board has taken the position that the offer of subagency is an inherent feature of their MLS. Therefore, all listings placed over the MLS must offer subagency. With increased attention being given nationally to the subject of agency and subagency, the Sunnyvale Board was aware that a solution was needed not only to Dennis Moreno's request, but to the many other Dennis Morenos who might raise a similar request. Accordingly, the Sunnvale Board chose to file suit seeking declaratory relief from the Superior Court of Santa Clara County. The court has been asked to render an opinion as to whether the board may lawfully refuse to accept a listing which does not offer subagency.

It should be noted that there is a critical difference between refusing to offer subagency and refusing to share commissions with other real estate brokerages. Moreno was willing to "cooperate" in terms of sharing the selling commission split with any office who brought in a successful offer on Moreno's listing. Moreno simply didn't want to offer subagency to the other real estate offices. The distinction is important.

Moreno had focused upon a critical concept associated with agency law. The theory is simple. A principal to a real estate transaction can be held liable for the acts of his agent and subagent. Mr. John Reilly, an attorney and nationally recognized real estate educator, in his recent text entitled, *Agency Relationships in Real Estate* states as follows:

> Although subagency increases the number of agents working on the seller's behalf, it also increases the seller's exposure to potential liability caused by the subagents. Sellers should be aware that they will be bound by and responsible for the conduct and representations of authorized subagents whom they have never met and over whom they have no practical control. *Reilly, John,* Agency Relationships in Real Estate, *Real Estate Education Company, 1987, p. 38.*

If prospective buyers understand that the agent is, absent arrangements to the contrary, employed by the seller, . . . then the buyers will be less likely to divulge their personal negotiating position on the mistaken belief that the agent is representing them.

To illustrate, if a subagent makes a misrepresentation regarding a property, however innocent, which proves to be material to a buyer's decision to purchase, that misrepresentation can be legally imputed to the seller because it was made by the seller's subagent. Such misrepresentations made by a subagent may be sufficient legal grounds to allow the buyer to void an otherwise binding purchase agreement.

That is why Moreno did not want to offer subagency when attempting to place the listing over the Sunnyvale Board MLS. Moreno was willing to share commissions with any brokerage who brought in the successful offer. But neither Moreno nor his seller wanted to be liable for any misconduct or misstatements engaged in, or made by, another real estate brokerage who would, absent the refusal to offer subagency, be treated as the subagent of Moreno and Moreno's client-seller.

The forthcoming decision in the Sunnyvale case is of interest to those engaged in real estate law practice and particularly so in those geographical areas where a Multiple Listing Service is used. It is anticipated that regardless of the outcome, appeals will be taken. It is an issue of national application and interest. If the court concludes that an MLS may refuse to accept listings which do not offer subagency, then sellers and listing brokerages will be forced to reevaluate the role of the subagent. It also follows that cooperating brokerages would need to become more conscious of their role as subagents, legally charged with a fiduciary duty to a seller whom they may never have met.

By contrast, should the court conclude that the MLS may not deny listings which do not offer subagency, the general presumption that all agents in an MLS are working for the seller may no longer be valid. Many sellers may choose to list their property over an MLS, agree to commission sharing, but not to an offer of subagency. Under such circumstances, it will be even more important that a cooperating brokerage and agent make a conscious decision regarding whom they will represent.

Very practical examples of why appropriate agency disclosure in a subagency environment is so critical are found in two cases recently addressed by the Colorado Supreme Court. In companion decisions, *Rohauer v. Little*, 736 P.2d

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403 (Colo. 1987) and *Stortroen v. Beneficial Finance Co.*, 736 P.2d 391 (Colo. 1987) the Colorado Supreme Court specifically treated the subject of subagency in two separate residential real estate transactions involving the local multiple listing service.

In Rohauer, the buyer had deposited $20,000 earnest money on a $425,000 purchase agreement. In the earnest money agreement the seller agreed to deliver a commitment for title insurance to the buyer "on or before July 10, 1981." The agreement also provided that "time is of the essence." The listing and selling agents each worked for the same real estate brokerage. The commitment for title insurance was delivered by the title insurance company to the listing agent on July 7, 1981, who, on that same date, notified the selling agent of receipt of the commitment. The buyer was not notified of the receipt by the brokerage. The commitment for title insurance arrived by mail at the buyer's home on July 15, 1981. The buyer decided not to close and was subsequently sued by the seller who was seeking to retain the $20,000 earnest money deposit as liquidated damages.

The central issue in Rohauer is whether the selling agent was a subagent of the seller, or alternatively, an agent of the buyer. If the selling agent was an agent of the buyer, delivery of the commitment for title insurance to the selling agent's office on July 7, would be legally imputed as delivery to the selling agent's client—the buyer. If, on the other hand, the selling agent was a subagent of the seller (as generally assumed in the multiple listing service context), delivery to the selling agent's brokerage, was only delivery to the brokerage. Delivery would not, under those circumstances, be imputed to the buyer. Depending on whom the selling agent was representing, the buyer may or may not have a claim to $20,000.

The Colorado Supreme Court held that there was nothing in the record to demonstrate that the selling agent had become the agent of the buyer. Therefore, under the MLS, the selling agent was a subagent of the seller. Accordingly, the buyer had not received the title commitment by July 10, because delivery to the brokerage on July 7 would not be legally imputed to the buyer.

The Stortroen case is related to Rohauer in a very interesting way. Again, the legal concept of subagency is central to the decision. In Stortroen, the buyer presented an offer through the selling agent to the seller. The seller countered the buyer's offer. The buyer reviewed the counter, accepted it, and communicated that acceptance to the selling agent. However, prior to the selling agent communicating the buyer's acceptance of the listing agent, the seller withdrew the counter and accepted a higher offer.

The issue is the same as in Rohauer. Who was the selling agent representing in the transaction? If the selling agent was a subagent of the seller—the buyer's notice of acceptance given to the seller's subagent, would be legally imputed as communication to the seller, e.g., communication to the seller's subagent was communication to the seller.

By way of contrast, if the selling agent was the agent of the buyer, then communication of the acceptance to the buyer's agent was only communication to the buyer's agent. The communication would not be imputed to the seller. In one instance, the seller was free to withdraw the counteroffer and accept a higher offer. In the other instance, the seller was bound to the contract because notice had been given that the buyer had accepted the counter offer. The Colorado Supreme Court held that the selling agent was the subagent of the seller and therefore the seller was not free to withdraw the counteroffer.

The Sunnyvale case and the Rohauer and Stortroen decisions illustrate in compelling fashion the significance of the agency/subagency relationships and the critical nature of understanding who it is the respective real estate agents are representing in the transaction. The cases also point out an unintended benefit of agency disclosure laws—real estate sales agents and brokers, in anticipation of disclosure, are forced to make a selection as to whom they are going to represent. Rohauer and Stortroen further support the need for agency disclosure early in the transaction, and for agency representation which is consistent with that disclosure.

For legal counsel practicing in the area of real estate, there are broad implications associated with the new disclosure rule. In terms of licensing law, agents and brokers who fail to comply with the new rule may be subject to suspension or revocation of license. In perhaps more practical terms, a failure to properly disclose an agency relationship, including a "dual agency," may result in loss of commission, rescission of the transaction, and damages. See *Property House, Inc. v. Kelley*, 715 P.2d 805 (Hawaii 1986). Consequently, in providing counsel to buyers, sellers, or agents and brokers, a threshold question should always focus on whether the agent clearly disclosed who he was representing in the transaction. □

The forthcoming decision in the Sunnyvale case is of interest to those engaged in real estate law practice and particularly so in those geographical areas where a Multiple Listing Service is used.

AMENDING UTAH'S IMMUNITY STATUTE

By David J. Schwendiman
and Creighton C. Horton II

The power to grant immunity in exchange for testimony or the production of evidence is a tool the prosecutor cannot do without.[1] It is a power that predates the Constitution.[2] It has become especially useful in complex cases. White collar crimes, investment fraud and racketeering, to name just a few, are, as Justice Powell observed, "offenses of such a character that the only persons capable of giving useful testimony are those implicated in the crime."[3] Successful prosecutions of those kinds of crimes often hinge on testimony or evidence obtained by the careful and judicious use of immunity grants.

Absent statutory or constitutional provisions to the contrary, however, prosecutors have no inherent power to grant immunity.[4] Where no authority exists, a promise not to prosecute may be enforced by a court as a concession to preserve the integrity of the state.[5] A court may, as the Utah Supreme Court did in *State v. Ward*, 571 P.2d 1343, 1345-1347 (Utah 1977), refuse to honor such a promise except to prohibit the state from using any testimony or evidence given by a person (who has been led to believe he is immune from prosecution) against that person in a criminal prosecution involving matters touched upon in his testimony or revealed by the evidence he had produced. By codifying the conditions under which immunity can be used and by defining the scope of the immunity that can be granted, immunity statutes bring order to the process of securing every man's evidence, while at the same time protecting against the abuse of certain fundamental personal rights.

Immunity statutes exist in two basic forms. Transactional immunity statutes permit a grant of immunity which precludes prosecution for any transaction or affair about which a witness testifies. Use and derivative use immunity statutes, by contrast, permit a grant of immunity that has limitations. Rather than barring a subsequent related prosecution altogether, a grant of use and derivative use immunity acts only to suppress the witness' testimony and evidence, as well as evidence derived directly or indirectly from that testimony or evidence, in any subsequent prosecution of the witness. Evidence obtained from sources wholly independent of the immunized testimony or evidence may serve as the basis for prosecuting the witness for activities and transactions including those covered in his own statements.[6] The burden is on the government to show that the source of its evidence in such a prosecution is, in fact, independent of the statements or evidence produced by the person being prosecuted.[7]

Any grant of immunity that is coextensive with a person's Fifth Amendment privilege against self-incrimination[8], and, in Utah, the privilege against being compelled to give evidence against himself,[9] is constitutionally sufficient.[10] Both transactional and use and derivative use immunity meet that test, but transactional immunity gives a witness much more than either the United States or the Utah Constitutions require.[11]

The privilege against self-incrimination:

> . . . has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being "forced to give testimony leading to the infliction of 'penalties affixed to . . . criminal acts.'" Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords

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Efforts are underway to change Utah's immunity statute from transactional immunity to use and derivative use immunity, adopting language taken from the federal immunity statutes as a model.

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this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.[12]

In that regard immunity is no more than the mirror image of the privilege against self-incrimination.[13] Immunity statutes have as their purpose not a gift of amnesty but securing testimony which because of privilege could not otherwise be procured.[14]

Utah Code Ann. section 77-23-3 allows the Attorney General or county attorney to "grant transactional immunity from prosecution to any person who is called or who is intended to be called as a witness [in any investigation or prosecution of a criminal case] whenever the Attorney General or county attorney deems that the testimony of such person is necessary to the investigation or prosecution of such a case." That power has now been extended to those acting as special counsel to county grand juries.[15] The authority to grant immunity as provided by statute is strictly limited to the Attorney General or county attorney or special counsel—it cannot be delegated.[16]

The effect of using Utah's transactional immunity statute in a prosecution or investigation is to forgive the crimes a person might have committed so long as he provides evidence or testifies about those crimes pursuant to a grant of immunity. This protection is granted even though the state may already have had independent evidence of his crime before he gave his immunized testimony or produced evidence pursuant to the grant of immunity, and regardless of whether evidence of his crime was acquired independently of the compelled testimony or evidentiary production. In either case, even though the state does not need the witness' compelled testimony or evidence to prove the crime against him, he cannot be prosecuted. Nothing in the United States Constitution or the Utah Constitution requires that result.[17] No right associated with the state or federal constitution guarantees any person safe haven for crimes he may have committed. Congress and 13 states have acknowledged by enacting use and derivative use immunity statutes that no compelling reasons exist in favor of transactional immunity.

Efforts are underway to change Utah's immunity statute from transactional immunity to use and derivative use immunity, adopting language taken from the federal immunity statutes as a model. These federal statutes have been interpreted numerous times and a rather large body of case law exists that can be referred to by Utah's courts.

In the past, efforts to enact use and derivative use immunity in Utah have been met with some resistance by those who believe the concept is an assault on personal liberty, notwithstanding the United States Supreme Court's validation of use and derivative use immunity as constitutional in *Kastigar v. United States, supra.* As a result of the concerns voiced by such critics, refinements have been made to the original draft of the legislation to incorporate additional procedural safeguards to protect an immunized witness who may thereafter be the subject of a criminal prosecution. In addition, the proposed bill includes specific procedures designed to provide safeguards against potential abuses and against improvident grants of immunity. The result of the efforts which have been made is that the most recent proposed draft provides more protection to a witness and is more extensive and detailed than is generally found in those states around the country that have enacted use and derivative use immunity statutes.

By codifying the conditions under which immunity can be used and by defining the scope of the immunity that can be granted, immunity statutes bring order to the process of securing every man's evidence while at the same time protecting against the abuse of certain fundamental personal rights.

Over the past several years, a number of murder cases in Utah have demonstrated the need for this legislation. They include the 1984 Valentine's Day triple murder in Cedar City wherein a guilty accomplice who participated in the armed robbery and who targeted the victims walked away with absolute transactional immunity, as well as the recent disturbing case of the murder and dismemberment of Sharon Sant in Millard County.

The proposed change in the law is needed to avert the kind of injustices which can occur under our present statute, and is consistent with state and federal constitutional requirements. The bill has been the subject of extensive study and revision over a period of nearly two years. The move to use and derivative use in immunity in Utah is overdue and has received the support of notable legal scholars such as University of Utah Law School Professor Ronald N. Boyce and Brigham Young University Law School Professor Michael Goldsmith. □

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[1] *See* State v. Ward, *571 P. 2d 1343, 1345 (Utah 1977)*

[2] Kastigar v. United States, *406 U.S. 441, 445, n.13, 446, n.14 (1972);* New Jersey v. Portash, *440 U.S. 450, 456 (1979).*

[3] Kastigar, supra, *446; see "Hitting the Mafia,"* Time, *September 29, 1986, pp. 16-24.*

[4] United States v. Ford, *99 U.S. 594 (1879); See also* Bowie v. State, *287 A.2d 782, 787 (Md. 1972);* Commonwealth v. Brown, *619 S.W.2d 699 (Ky. 1981);* Doyle v. Hofstader, *177 N.E. 495 (N.Y. 1931) (C.J. Cardozo).*

[5] Commonwealth v. Brown, supra.

[6] Wheeler v. District Court, *519 P.2d 327, 331 (Col. 1974);* Steinberger v. District Court, *596 P. 2d 755, 757-758 (Col. 1979);* State v. Ward, supra, *1347 (J. Wilkins, dissent).*

[7] Kastigar, supra, *460-461.*

[8] *"No person. . . shall be compelled in any criminal case to be a witness against himself. . . " Amendment V, Constitution of the United States.*

[9] *"In criminal prosecutions. . . [t]he accused shall not be compelled to give evidence against himself. . . " Article I, Section 12, Constitution of Utah.*

[10] Kastigar, supra, *453;* New Jersey v. Portash, supra, *456-458.*

[11] Kastigar, supra, *453.*

[12] Kastigar, supra, *453, citing* Ullman v. United States, *350 U.S. 422, 438-439 (1956).*

[13] Bowie v. State, supra, *782.*

[14] Id.

[15] *Section 77-11-9(8) (b), Utah Code Annotated, 1953 (amended 1986).*

[16] State v. Ward, supra.

[17] *See* Kastigar, supra.

Executive Director's Report

The opening of the Utah Law and Justice Center marks the beginning of a new era for the Utah State Bar. Even as planning for the Center began in 1983, the potential benefits of the Center for the Bar began to unfold. Our membership growth has been surpassed by increased demand for space and support services for disciplinary functions, continuing legal education programs, section and committee programs and community outreach.

Recently an inventory was taken of current and proposed activities of the Bar and of the Law and Justice Center entities. The list of responsibility areas currently number more than 30 for both entities. New responsibility areas to be added within the next year or so for both entities may total 20-25 or more, mostly to be funded and supported as Law and Justice Center programs. Among these new programs will be the Tuesday Night Bar, arbitration training and event scheduling, research activities and support for community outreach programs such as neighborhood dispute resolution. In each instance, programs will be part of a planning process involving the newly appointed Policy and Programs Advisory Committee of the Utah Law and Justice Center. The list of appointees to this committee is included elsewhere in this issue.

This breakthrough experience in the proud history of the Bar is possible only because of the level of dedication and volunteerism of our members and our nonlawyer volunteers. Our members, through the organizational structures of the Bar's 50 plus sections and committees, continually increase our programs and services in both number and quality. The result is, as stated by ABA leaders recently at their annual meetings in Toronto, that the Utah State Bar is at "the cutting edge" of bar programs and services most needed by lawyers, judges and the community.

With the expansion of programs and services come more opportunities for more members to become involved. New committees will be appointed and direct participation in new projects will be needed. Interested members should contact my office by mail and watch for further notices in the Bar Journal.

With the events now being booked for the various rooms within the Law and Justice Center, the project is already a great success and a tremendous achievement for Utah lawyers. Ahead of us now are the opportunities of service, education and outreach to the public and profession about which we previously dared not even dream. It is truly an exciting time to be a lawyer in Utah!

Thanks Extended to the Bar Examiners Committee and to the Bar Examiner Review Committee

The Board of Bar Commissioners and Staff of the Utah State Bar extend a heartfelt thanks to the many members of the Bar Examiners Committee and the Bar Examiner Review Committee for their commitment to the Bar Examination process. The Bar Examiners Committee is comprised of 54 attorneys and judges who write and grade two student examinations and four attorney examinations each year. The Bar Examiner Review Committee consists of 11 attorneys and judges who are responsible for reviewing and approving the questions and model answers submitted for the Bar Exam by the members of the Bar Examiners Committee.

For 13 members of the Bar Examiners Committee, the July Exam was their last exam after many years of service. Many of these 13 have served the Bar both writing and grading exams for over 10 years. On August 12, a short Appreciation Ceremony was held. President Kasting and Executive Director Hutchinson presented Certificates of Appreciation to Irving H. Biele, Thomas Christensen Jr., Michael L. Deamer, E. Barney Gesas, Narrvel E. Hall, Darwin C. Hansen, Roy G. Haslam, D. Miles Holman, Marlin K. Jensen, Honorable Boyd L. Park, Honorable Robert J. Sumsion, Stephen D. Swindle and Honorable David S. Young.

We would also like to welcome aboard Spencer E. Austin, Charles M. Bennett, James M. Dester, Ralph L. Jerman, Carolyn B. McHugh, Ralph H. Miller, Douglas M. Monson, Robert L. Moody, Ronald E. Nehring, Gregory G. Skordas, William A. Stegall Jr., and Robert H. Wilde.

Many thanks also to Peter W. Billings Sr., M. Byron Fisher, and Honorable Raymond M. Harding Sr. for providing such excellent service and expertise on the Bar Examiner Review Committee. We welcome aboard Kevin Anderson, Patricia M. Leith and David E. Leta.

Tenth Circuit Forms Advisory Committee on Rules

The U.S. Court of Appeals for the 10th Circuit has appointed Utah attorney Robert Campbell to its new Advisory Committee. This committee will review and advise the Court on possible changes to the local rules of practice and the rules of procedure. Utah lawyers having suggestions or proposed rule changes to be considered by the Committee should contact Mr. Campbell at 363-3300, or at 310 S. Main Street, 12th Floor, Salt Lake City, Utah 84101.

Utah Law and Justice Center Will Be Guided By Citizens' Policies and Programs Advisory Committee

September 7, 1988, marked a new era in Utah's legal history. It was the dedication of the Utah Law and Justice Center, in conjunction with the convening of the 10th Circuit Court, The Utah Supreme Court, the Bar, the Law and Justice Center Building and Finance Committee, and the American Bar Association recognized lawyers of Utah for their important achievement. Additionally, they called for programs to make the Center live up to its promise.

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STATE BAR NEWS

(continued from page 16)

The Utah Law and Justice Center represents a new era in Bar-sponsored and supported facilities dedicated to alternative means of resolving disputes.

Active planning for the Utah Law and Justice Center began in 1983 when the Board of Bar Commissioners determined the need for the facility was critical, and the opportunity to raise private funding was possible. From concept to drawings to construction, the Law and Justice Center became an actuality because of the financial contributions and dedication of time by many people and organizations.

Generous contributions from foundations, attorneys, Bar staff and others in the community have made the Utah Law and Justice Center possible.

The Utah Law and Justice Center provides facilities for all types of alternative dispute resolution, as well as meeting space for functions related to the Utah State Bar, its committees, and sections. Other law-related organizations are welcome and encouraged to use the Center.

The Utah Law and Justice Center is also home for the administrative offices of the Utah State Bar, the Utah Bar Foundation and the Utah office of the American Arbitration Association.

The Utah Law and Justice Center Policies and Programs Advisory Committee, a citizen advisory committee, will review the various alternatives of dispute resolution and recommend and implement those which show the greatest promise for the people of Utah. Alternative dispute resolution has the potential to make humane, efficient and economical adjudication available to individuals and groups that have not had access to the traditional adversary system because of its financial and emotional costs. Mediation, arbitration, and referral programs are among those which will likely find a home at the Center.

Members of the Policies and Programs Advisory Committee are: Jodie L. Bennion, Pastor France Davis, Sen. Frances Farley, Irene Fisher, Andrew L. Gallegos, Robert E. Gallegos, Rep. Haze Hunter, Jinnah Kelson, Hon. Tyrone Medley, Robert D. Merrill, John K. Morris, Gerald R. Williams, and Rev. Canon Bradley S. Wirth.

Sixty percent of the building is dedicated to provide meeting rooms for arbitration, mediation, conciliation, and for seminars and continuing legal education, as well as public use.

A full complement of services is available to support these activities, including audio-visual equipment and food service.

Arrangements to reserve facilities may be made through the Programs and Services Administrator.

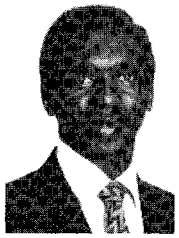
A critical link between the legal system and the public is the Lawyer Referral Service sponsored by the Utah State Bar. Each year, nearly 20,000 people request assistance and are referred to an attorney. Participating lawyers provide half-hour consultations without charge to clients referred through the service. There is a minimal referral fee of $15.

For those who cannot afford the service of an attorney and have a legal problem, they are referred to the appropriate legal services agency in their community.

A new program introduced in the Law and Justice Center is a legal assistance and referral program known as the Tuesday Night Bar. It is designed to reach a large segment of the public which does not have legal service readily available. It is patterned after successful programs in other states.

On a once each week basis, individuals may make an appointment to meet with an attorney or a law student under the supervision of an attorney for consultation, legal "first aid" and appropriate referral.

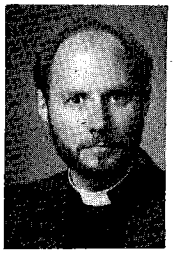
As more new programs are developed, they will be announced in the *Bar Journal*.



Pastor France Davis

Rep. Haze Hunter

Robert D. Merrill



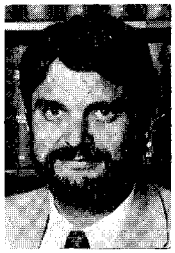
Rev. Canon Bradley S. Wirth

Jodie L. Bennion

Hon. Tyrone Medley

Robert E. Gallegos

Sen. Frances Farley

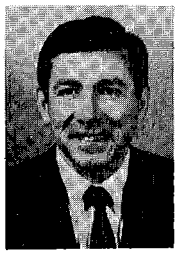


John K. Morris

Irene Fisher

Jinnah Kelson

Gerald R. Williams



Andrew L. Gallegos

(continued on page 18)

BAR COMMISSION HIGHLIGHTS

The Bar Commission met on July 21 under new President Kent Kasting. During the day-long meeting, the Commission:

—Appointed a committee as a joint policy committee of the Bar and the Utah Law and Justice Center to recommend guidelines and policies for space utilization and fees for events being scheduled in the Center.

—Appointed Commissioner Randy L. Dryer to the Judicial Oversight Committee.

—Authorized a letter to the Salt Lake County Commission urging continued funding for the Salt Lake County Law Library.

—Appointed a Bar Policies Review Committee.

—Added as an ex-officio member of the Bar Commission the ABA State Delegate for Utah.

—Appointed a committee to study the representational structure of the Bar Commission.

—Received report of the Executive Director on the completion of the Law and Justice Center, the moving plans for the Bar operations and the imminent closing of the sale of the Bar Center complex.

—Received report of the Associate Director on the successful Annual Meeting held in San Diego.

—Received report on discipline matters from the Acting Bar Counsel, acting on proposed private reprimands and adopting with modification, the findings of fact and conclusions of law on the recommended disbarment of Richard Crandall; approved the reinstatement petition of Jerry Strand and reviewed various administrative issues presented.

—Received the report of the Law and Justice Center Program Development Committee, which report carefully enumerated a variety of dispute resolution programs and community service activities to be coordinated with the Center along with recommended staffing and funding support needed for each.

—Received report on admissions, approving applicants for the July Bar Examination, granting certain MPRE waiver requests, denied a petition for waiver of the reinstatement fee, reviewed and referred to the Character and Fitness Committee for further investigation a petition for readmission.

—Received report from the Utah delegates to the ABA House of Delegates of matters to come before the House during its meetings in August, noting emphasis on new professionalism activities.

—Received report of Fee Arbitration Committee and agreed to amend the Fee Arbitration Rule to clarify the limited role of the Bar in enforcing arbitration awards.

—Received and approved the monthly financial report, approved as allocation from accumulated reserves toward the Bar share of ownership in the Law and Justice Center.

—Received and reviewed report on the status of pending litigation, appointed new members of the Comission's Litigation Oversight Committee.

—Interviewed finalists for the position of Bar Counsel, selected Christine Burdick as new Bar Counsel.

NOTE: Full version of all Bar Commission meetings and the agendas for each monthly meeting are available for inspection at the office of the Executive Director.

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RULE OF COURT FIRM SET TRIAL CALENDAR
RULE 17

PURPOSE:
To prevent abuse of firm set trial calendar and abolish fee for same.

APPLICABILITY:
This rule shall apply to the Second District Court, Weber County only.

STATEMENT OF THE RULE:
Any party requesting a trial on the firm set trial calendar shall make a formal motion, stating with specificity the reasons for requesting a firm set date, an accurate estimate as to the length of trial, and available dates for trial. The movant should then schedule the motion on a law and motion calendar, with appropriate notice to opposing counsel. No firm set trial date shall be given without the consent of a District Judge.

A firm set trial date shall not be continued without approval of the court.

No fee will be charged for a request for firm set trial date.

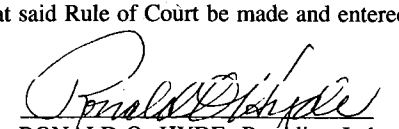
Enactment of this Rule of Court amends Rule 6 of the local Rules of Court.

Effective August 1, 1988
DATED this 1 day of August, 1988.

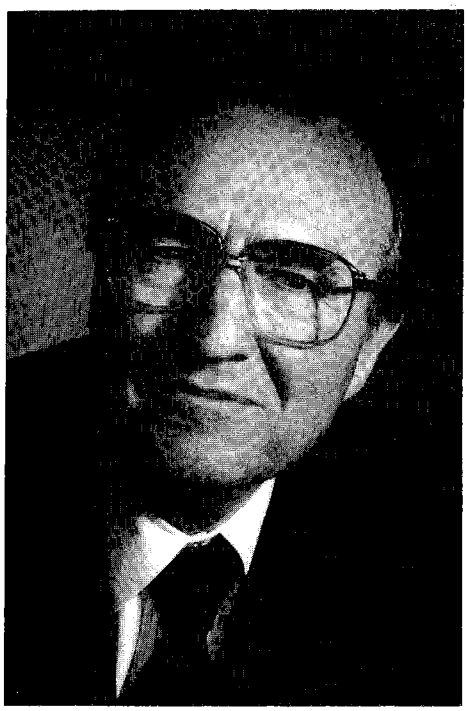
RONALD O. HYDE, Presiding Judge
Second Judicial District Court

CERTIFICATE
I, Ronald O. Hyde, Presiding Judge of the above District Court, do hereby certify that I have conferred with the other Judges of the District concerning the subject matter of the foregoing Rule of Court, and they concur that said Rule of Court be made and entered.

DATED this 1 day of August, 1988.



RONALD O. HYDE, Presiding Judge
Second Judicial District Court



Letter From ABA President

August 10, 1988

To the Members of the
Utah State Bar Association:

On behalf of the members of the American Bar Association, I offer my congratulations to you and everyone involved in the planning, construction and dedication of the Utah Law and Justice Center. This facility, the first of its kind in the United States, is an excellent demonstration of the Utah State Bar's commitment to our country's promise of equal access to justice.

I understand the idea for the Utah Law and Justice Center was born in 1983 when Stephen Anderson was President of the Utah State Bar. Mr. Anderson's innovative concept, to merge a facility offering a full-range of alternative dispute resolution services with the institutional stability of a state bar center, is exemplary. The continued leadership of successive Presidents of the Utah State Bar has made this dream a reality.

It is significant that much of the credit for the Center is shared with local civic groups and community foundations, such as the Michael Foundation and the Eccles Foundation. This community support helped launch the project and augurs well for its success. The strength of the partnership between the bar and the community is reflected in the more than $1.3 million raised from law firms and from solo practitioners. It is an outstanding achievement for a state bar of but slightly more than 4,000 lawyers.

By providing to attorneys training in the use of methods of alternative dispute resolution, the Center will promote access to the justice system for many years to come.

I feel very privileged to be part of the ceremonies marking the dedication of the Utah Law and Justice Center. I commend all those involved for their efforts in working for the development of the Center, and for serving as an example for all of our profession.

Sincerely,

Robert MacCrate

SALT LAKE ESTATE PLANNING COUNCIL
FALL INSTITUTE

October 21, 1988
Prospector Square, Park City, Utah

Meeting Schedule

8:00-8:45	Registration
8:45-9:00	Introduction: Carol Olson, President, Salt Lake Estate Planning Council
9:00-10:00	Steve Gabrielson Haynie & Co., Costa Mesa, California. "Estate and Income Tax Planning for Retirement Plan Distributions"
10:00-11:00	Bill Huff Partner Holme, Roberts & Owen, Denver, Colorado. "Irrevocable Life Insurance Trusts"
11:00-11:15	Refreshment Break Sponsored by First Security Bank of Utah
11:15-12:15	Johathan Blattmachr Milbank, Tweed, Hadley & McCoy, Los Angeles, California. "Choosing the Marital Deduction Formula/Economic Ramifications of the Use of the Martial Deduction and Related Issues"
12:15-1:30	Lunch (Speaker to be determined)
1:30-2:30	Walter S. Bristow Standard Insurance Company, Portland, Oregon. "Outside the Square: Creative Approaches to Charitable Giving"
2:30-2:45	Refreshment Break Sponsored by First Security Bank of Utah
2:45-3:45	Jonathan Blattmachr Milbank, Tweed, Hadley & McCoy, Los Angeles, California. "Estate Planning for the Client With a Short Life Expectancy/Post Mortem Estate Planning"
3:45	Panel Discussion by Speakers/ Questions and Answers

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REGISTRATION FORM SALT LAKE ESTATE PLANNING COUNCIL FALL INSTITUTE
CO-SPONSOR—PRIMARY CHILDREN'S MEDICAL CENTER

CONFERENCE TIME AND LOCATION: Prospector Square Hotel, Park City, Utah
8:00 a.m. to 4:00 p.m.—Friday, October 21, 1988

FIRM: _____
(Name) (Address)

NAME OF ATTENDEES: _____

_____

_____

COST: $80 for members of Salt Lake Estate Planning Council Cost includes lunch
$100 for nonmembers

TOTAL ENCLOSED $_____

MAKE CHECKS PAYABLE TO SALT LAKE ESTATE PLANNING COUNCIL

REGISTRATION DEADLINE: Friday, October 14, 1988

MAIL REGISTRATION TO: Salt Lake Estate Planning Council, c/o Annjanine F. Livsey, 50 S. Main, #1800, Salt Lake City, UT 84144. Phone (801) 328-4706

University of Utah College of Law

CALENDAR OF EVENTS

October

6 **The 23rd Annual Leary Lecture** will feature renowned political philosopher **Michael Sandel, Professor of Government at Harvard University.** The title of Professor Sandel's lecture is "Religious Liberty: Freedom of Conscience or Freedom of Choice?"

A reception will be held at the College of Law at 7:00 p.m. and the lecture will begin at 8:00 p.m. The event is sponsored by the Salt Lake City law firm of Ray, Quinney & Nebeker and the S.J. and Jessie E. Quinney Foundation. For more information, contact Holly Hale, 581-3153.

November

3 **The fifth annual court practice seminar** sponsored by the University of Utah College of Law Alumni Foundation will feature the **U.S. Bankruptcy Court** with Glen E. Clark, John H. Allen and Judith A. Bolden. The seminar is scheduled for 5:30 p.m. in the College of Law's Justice George Sutherland Moot Court Room. For more information, contact Holly Hale, 581-3153.

15 **Class of '68 Reunion**
Tailgate party, football game and dinner. For more information, contact Holly Hale, 581-3153.

17-19 **Nicholas DeB. Katzenbach,** former U.S. Attorney General and Under Secretary of State, and currently a member of the New Jersey law firm of Riker, Danzig, Scherer, Hyland & Perretti, will be the law school's third **Distinguished Lawyer in Residence.** The program, initiated to give law students and faculty the opportunity to meet and discuss important issues with eminent attorneys, is sponsored by the Salt Lake City firm of Van Cott, Bagley, Cornwall & McCarthy. For more information, call Amy McDevitt, 581-4640.

Estate Planning Newsletter Available

A free publication on estate planning is available from the American Institute for Cancer Research. The quarterly newsletter, *Estate Planner*, is designed for probate and trust attorneys, bank trust officers and others involved in estate planning.

Offered free with each issue are detailed booklets that focus on planning and drafting particular types of estate planning vehicles.

To subscribe, please write to Kathryn Ward, Vice President, American Institute for Cancer Research, 1759 R Street NW, Washington, D.C. 20009. Please indicate that you read about the *Estate Planner* in this publication.

Utah Tort Law —Annual Supplement

A concise supplement to Zillman's Utah Tort Law is now available from the University of Utah College of Law. The Supplement contains new state and federal court decisions and the work of the 1988 Utah Legislature relevant to tort law in Utah. The Supplement is current to June 15, 1988. EXISTING OWNERS of Utah Tort Law may receive a free copy of the Supplement by picking one up from Room 218 Law School or by sending a STAMPED RETURN ENVELOPE to Ms. Elizabeth Kirschen, College of Law, University of Utah, Salt Lake City, UT 84112. NEW SUBSCRIBERS can receive a Supplement with the purchase of Utah Tort Law for $32.50 from Ms. Kirschen. Please make check payable to College of Law. For more information, call 581-5880.

Association of Legal Administrators Offers Course

The Beehive (Utah) Chapter of the Association of Legal Administrators is now accepting registrations for the Financial Management II course which is scheduled to be taught from 6:00 p.m. to 8:30 p.m. on the following Wednesday evenings: October 5, 12, 19, 26 and November 2 and 9 at the Red Lion Hotel, Seminar Theater, second floor. The course will cost $250.00 per participant and is open to attorneys, administrators, controllers, office managers and bookkeepers in private law firms and corporate and government law offices. The course provides an advanced level discussion of financial management subjects such as budgeting and planning, performance measures, cost accounting and component profitability, cash flow and capitalization, expense management, management reporting, lease versus buy decisions, computerized financial systems, management and control of cash balances, etc.

If you have an interest in registering or receiving more information about the course, send your registration fee in the amount of $250 along with your name, firm name, address and telephone number to: Richard B. Turnbow, Kirton, McConkie & Bushnell, 330 S. 300 E., Salt Lake City, UT 84111-2599, (801) 521-3680 or (801) 321-4882 or contact Kay L. Mautz of the ALA's national office at 104 Wilmot Road, Suite 205, Deerfield, IL 60015-5195, or telephone (312) 940-9240 for further information.

The National Transportation Safety Board Bar Association

The NTSB Bar Association invites all attorneys who practice or are interested in Federal Aviation Administration enforcement proceedings, including those relating to pilot or operator certificate actions, civil penalties and medical certification, to join the association. The association has its headquarters in Washington, D.C. and a membership of over 250 from nearly every state. Efforts of the association are directed toward enhancing the professionalism and improving the practice of this area of law. Improvements in the Rules of Procedure, and Evidence Rules have been the subject of the association's committees, and a program of distribution of current NTSB Opinions is in practice. In addition to a newsletter, association meetings serve as a means of communication and notification of current matters. The dues are only $45/year. For further information, please contact the Association President, Michael J. Pangia, Esquire, Gilman, Olso & Pangia, Suite 600, 1815 H Street NW, Washington, D.C. 20006, telephone: (202) 466-5100 or Robert P. Smith, Esquire, 3333 Quebec Street, #10-D, Denver, CO 80207, telephone: (303) 321-5693.

Judge Greene Takes Seat on Board of Governors

U.S. District Court Judge J. Thomas Greene today was seated as member of the American Bar Association's Board of Governors. He has been the Utah State Delegate to the ABA House of

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STATE BAR NEWS

(continued from page 20)

Delegates since 1982 and was a delegate at large of the assembly for six years prior to that time.

The Board of Governors meets five times yearly to oversee the administration and management of the Association. Judge Greene will serve a three-year term that began at the close of the ABA's 1988 Annual Meeting in Toronto.

Judge Greene has served in many leadership capacities in the ABA. He has chaired the Professionalism Committee of the General Practice Section, the Standing Committee on Judicial Selection, Tenure and Compensation, and the Special Committee on Environmental Law. He has been a Council member of the Natural Resources and General Practice sessions.

Judge Greene was appointed to the bench in 1985. Previously, he was in private practice and Chairman of the Board of the firm of Greene, Callister and Nebeker. He is a former President of the Utah State Bar and is a trustee and former chairman of the Utah Bar Foundation. He is a Life Fellow of the American Bar Foundation and serves on the Advisory Committee on Restatement of Law Governing Lawyers of the American Law Institute.

He is a former Director for Utah of the American Judicature Society and has served on the Advisory Panel on Demonstration Projects of the National Legal Services Corporation. He is a former Regent of the Utah State Higher Education System.

Judge Greene is a 1955 graduate of the University of Utah Law School (Order of the Coif). He was graduated Magna Cum Laude in Political Science from the same university in 1952.

The 343,000-member ABA is the world's largest voluntary professional association.

Federal Medicare Legislation Update Luncheon Set

The Needs of the Elderly Committee is sponsoring a **brown bag luncheon** to be held on **Thursday, October 20, 1988** at noon in the downstairs cafeteria of Equitable Life & Casualty Insurance, 348 E. South Temple. Mr. Ken Surfass will give a short presentation and will answer questions regarding the **new federal Medicare legislation** signed into law by President Reagan on July 1, 1988, and legislative proposals regarding **long term care insurance**. The new law, which takes effect on January 1, 1989, drastically changes Medicare coverage. Mr. Surfass is corporate counsel for Equitable, and is on the Advisory Committees for Medicare Supplement Insurance and Long Term Care Insurances of the National Association of Insurance Commissioners.

Beverage provided. Free parking in the rear. Please RSVP to Brent Scott, 521-2500, by October 19, 1988.

Claim of the Month

Alleged Error or Omission

Plaintiffs alleged that the Insured (1) improperly advised them to forego enforcement of their $1.3 million judgment and thereby to accept a compromise settlement of $840,000 and (2) failed to advise each that a technical conflict of interest arose in distributing the settlement proceeds.

Resume of Legal Malpractice Claim

The Insured represented 14 individual plaintiffs and tried their case before a jury which entered individual awards. Those awards varied in amount and aggregated approximately $1.3 million. When the Insured attempted to execute on the judgments, judgment debtor threatened to declare bankruptcy. Although the judgment debtor probably had sufficient assets to satisfy the judgment, the Insured allegedly advised his clients to accept the compromise settlement of $840,000.

The Insured now had to decide how to divide the $840,000 in settlement money among his clients. In that situation, a technical conflict of interest arose because it was unlikely that each plaintiff would settle for the same amount or prorated amount of their judgments: here, some got more money, others less. His clients did not know the amounts of money received by the others. The Insured met privately with each client and persuaded each to settle his or her judgment for a fractional amount acceptable to that client. The Insured did not reveal the final settlement figures to his clients.

Claimants commenced an action against the Insureds, alleging various causes of action including negligence.

How Claim Might Have Been Avoided

A. Compromised Settlement

Insured should have conducted an exhaustive investigation into the financial worth of the judgment debtor. If that search revealed assets insufficient to satisfy the judgment, he should have advised his clients in writing of the options available to them. If the client wanted to forego further investigation of the judgment debtor's assets, clients should have been required to sign a letter to that effect..

B. Conflict of Interest

Before distributing the $840,000 in settlement proceeds, the Insured should have advised his clients that he could not represent each of them with undivided loyalty in advising them on distribution of settlement money. That is, the interests of each client become adversarial because proportionately more money for one necessarily means less for the others. Hence, to advocate the interests of one client necessarily requires the Insured to work against the others. Accordingly, the Insured should have advised his clients to seek other counsel.

If the clients refused to seek other counsel, the Insured should have obtained a signed writing wherein each client would acknowledge the conflict, waive his right to seek other counsel, and state that he wished to proceed with the Insured as his attorney despite the conflict.

Importantly, the Insured should have held an open meeting wherein all the clients could have discussed and decided how the settlement money should be equitably distributed.

Mark your calendar for the 1989 Mid-Year Meeting, March 16-18, in St. George, Utah.

CASE SUMMARIES

By William D. Holyoak and Clark R. Nielsen

MARSHALING OF PARTNERSHIP ASSETS

A partner of a general partnership complained to the Public Service Commission about Mountain Bell Telephone's attempt to collect from him personally a partnership debt before first seeking satisfaction of the debt from the partnership's assets. The Utah Supreme Court agreed with the partner's argument, stating:

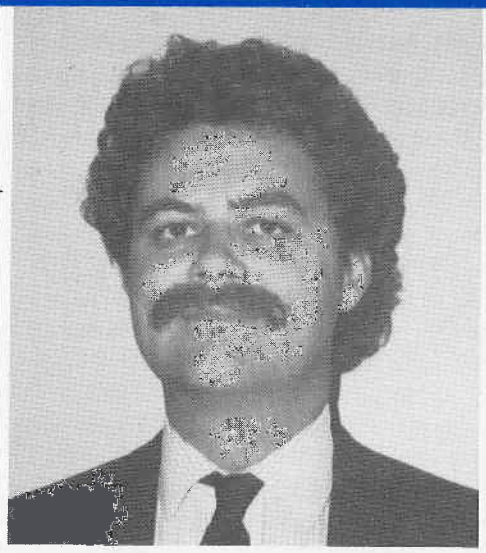
> The applicable general law is relatively clear. Under the Utah Uniform Partnership Act, partners are jointly, rather than jointly and severally, liable for all debts and obligations of the partnership not arising from tort or breach of trust. Utah Code Ann. Sect. 48-1-10, -11, -12 (1982) [other citations omitted]. If a debt is contractual in origin, common law requires that the partnership's assets be resorted to and exhausted before partnership creditors can reach the partners' individual assets [citations omitted]. The Utah courts have never determined whether this common law exhaustion-of-partnership-assets requirement survives under the Utah Uniform Partnership Act [citation omitted]. However, it appears to be generally accepted that the uniform act does not disturb this rule and may, in fact, embrace it.

(McCune & McCune v. Mountain Bell Telephone, 87 Utah Adv. Rep.9 (July 19, 1988).

VOIR DIRE CONCERNING RELIGIOUS AFFILIATION WHEN CHURCH IS PARTY TO LITIGATION

The LDS Church was a defendant in a personal injury action that resulted from a collision between the plaintiff, who was riding his motorcycle, and a cow that had escaped from an LDS Church welfare farm.

Plaintiff's attorney requested that the following questions be asked of prospective jurors at the time of voir dire:



William D. Holyoak

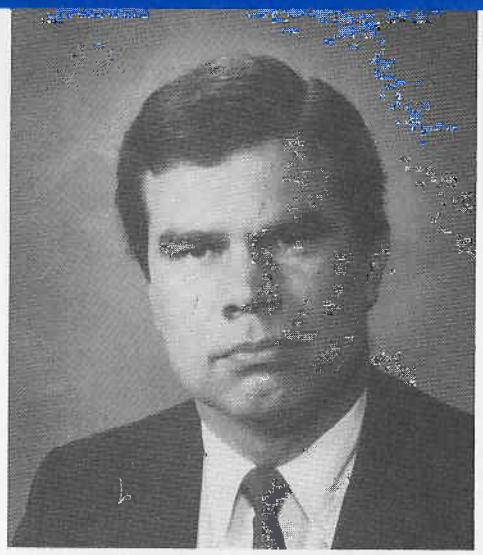
> Are any of you members of the LDS Church? Would that, in any way, affect your ability to evaluate the evidence in this case and render a fair decision for the plaintiff?
>
> Did any of you hold a position in the LDS Church such as Bishop or presiding officer or counselor?
>
> Which stake was that in? Where is that located?
>
> Would that position affect you in making a fair decision in this case?
>
> If the evidence were favorable to the plaintiff in this case, would you have a problem in awarding a judgment against the LDS Church?

The trial court refused to ask the proposed questions and instead asked a general question as to whether any prospective juror would have difficulty being an impartial juror because of feelings toward the LDS Church.

The Utah Court of Appeals ruled that the trial court's question to the jurors was sufficient to determine whether any prospective jurors should be disqualified for cause. The Court of Appeals concluded, however, that the trial court improperly limited plaintiff's ability to ask questions so that he could make an informed exercise of his peremptory challenges. The Court stated:

> Whenever a religious organization is a party to the litigation, voir dire regarding the jury panel's religious affiliations is proper [citations omitted].
>
> Substantial impairment of the right to informed exercise of peremptory challenges is reversible error [citations omitted]. In the instant case, the trial court abused its discretion in denying voir dire regarding prospective jurors' affiliation with the LDS Church. The scope of voir dire should be sufficiently broad to allow the parties to intelligently exercise their peremptory challenges. In so holding, we do not require the trial court to propound the precise questions proposed by [plaintiff].

(Hornsby v. Corporation of the Presiding Bishop, 87 Utah Adv. Rep. 23 (Ct. App. July 26, 1988).)



Clark R. Nielsen

USE OF PICTURE IN CAMPAIGN BROCHURE WITHOUT PERMISSION

While some people would be delighted to have their pictures appear with a United States Senator in his campaign materials, Sheila Ann Cox, Susan Keller and Susan Smith were not. A photograph of the three women and Senator Hatch was used in a political advertisement during Senator Hatch's 1982 senatorial campaign.

The three women were employees of the United States Postal Service and members

(continued on page 24)

CASE SUMMARIES

(continued from page 23)

of the American Postal Workers Union. They acknowledged that they agreed to the photographs, but argued they had not agreed to the manner in which they were used. One of the photographs was included in an eight-page political flyer entitled "Senator Orrin Hatch Labor Letter" which was distributed by the Senator's "Union Members for Hatch Committee."

Plaintiffs alleged three claims for relief: defamation, invasion of privacy and abuse of personal identity. The Utah Supreme Court, disagreeing with the trial court, ruled that there was no First Amendment privilege protecting Senator Hatch from a claim for defamation. The Court nevertheless affirmed the trial court's rejection of the defamation claim on the ground that the photograph could not be considered defamatory. The Supreme Court stated:

> [T]he photograph shows the plaintiffs with Senator Hatch in a work setting, and it appears in a political advertisement dealing with labor issues. At most, the photograph can be construed to imply that the plaintiffs are members of the Republican Party or that they supported Hatch's reelection. However, attribution of membership in a political party in the United States that is a mainstream party and not at odds with the fundamental social order is not defamatory [citation omitted], nor is attribution of support for a candidate from one of those parties.

The Court treated plaintiffs' invasion of privacy and abuse of personal identity claims together, and the Court concluded that a First Amendment privilege existed with respect to those claims. The Court stated:

> [W]e hold that pictures of public officials and candidates for public office taken in public or semi-public places with persons who either pose with them or who inadvertently appear in such pictures may not be made the basis for an invasion of privacy or abuse of personal identity action.

Even after finding a First Amendment privilege, the Supreme Court went on at some length to conclude that in the absence of a First Amendment privilege, plaintiffs' complaint nevertheless would fail to state a claim upon which relief could be granted on these claims. *(Cox v. Hatch*, 87 Utah Adv. Rep. 3 (July 18, 1988).)

PROBATE: UNDUE INFLUENCE BASED ON CONFIDENTIAL RELATIONSHIPS AND PRETERMITTED CHILDREN

Shortly before his death, Herbert Lee Jones executed a will drafted by his daughter, which stated in full as follows: "I, HERBERT LEE JONES grant power of ATTORNEY to my daughter; LINDA M. CAMERON, AND TO BE EXECUTOR [sic] AND SOLE BENEFICIARY TO MY ESTATE." Mr. Jones' only other surviving child, Robert Lee Jones, objected to the will on the ground of undue influence and claimed rights under the pretermitted child provisions of the Utah Probate Code. The Utah Court of Appeals noted:

> If a confidential relationship exists between two parties to a transaction, and if the superior party (in whom trust has been reposed) benefits from the transaction, a presumption of undue influence is raised.

The Court further pointed out that a few relationships are presumed to be confidential, such as that of attorney and client. Acknowledging conflicting precedent from the Utah Supreme Court, the Court of Appeals concluded that kinship does not create a presumption of a confidential relationship and affirmed the trial court's determination that no such confidential relationship existed.

At the time of Mr. Jones' death, the Utah Probate Code provided:

> (1) if a testator fails to provide in his will for any of his children or issue of a deceased child, the omitted child or issue receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:
> (a) It appears from the will that the omission was intentional[.]

Utah Code Sect. 75-2-302(1)(a). (This law was changed in 1988 to provide that only children who are born or adopted after the execution of a will can claim a share in a parent's estate as a pretermitted child.) The Court concluded that Mr. Jones' son was entitled to the benefit of the pretermitted child statute, reasoning as follows:

> The only relevant words appearing within the confines of Jones' terse will are those "granting" Cameron "to be sole beneficiary" of his estate. There is no mention of Robert by name or by class. Contrary to the conclusion reached by the trial court, we hold that this language is insufficient to rebut the statutory presumption that Jones unintentionally failed to provide for his son in his will. A testamentary disposition of the entire estate is alone insufficient to establish that the omission of a child from a will is intentional.

(In re Jones, 88 Utah Adv. Rep. 18 (Ct. App. August 8, 1988).)

RAPE CONVICTION
Definition of Offense

The Utah Supreme Court (J. Zimmerman) reversed a rape conviction based upon inadequate evidence of actual "sexual penetration," as required by Utah Code Ann. Sect. 76-5-407(2) (1985). Two counts of sodomy were affirmed. Chief Justice Hall concurred in affirming the sodomy convictions, but strongly dissented from the majority's view of the sufficiency of the evidence of sexual penetration. Additionally, the dissenting opinion argued that the majority's definition of "penetration" was unreasonably narrow and restrictive and would hamper future prosecution of rape suspects when the testimony of young children is critical. *(State v. Simmons*, 86 Utah Adv. Rep. 12 (July 5, 1988).)

AGGRAVATED SEXUAL ASSAULT
Effective Counsel, Confrontation of Witness, Admissibility of Former Testimony

Reviewing the defendant's convictions of aggravated sexual assault and kidnapping,

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the Supreme Court (J. Hall) affirmed the convictions. Several claims of ineffective assistance of counsel were rejected because the defendant did not satisfy his burden to show that his attorney performed below an "objective standard of reasonableness" *and* that, but for the assistance, the result would have been different. There was no affirmative showing that he was prejudiced.

Applying Rule of Evidence 804(b), the Court held admissible the preliminary hearing testimony of the complaining witness who was unavailable at trial because the victim had been previously subjected to a thorough cross-examination on the factual issue before the jury.

Finally, the Supreme Court expressly disavowed dictum in an earlier case from the Court of Appeals in *State v. Case*, 752 P.2d 356 (Utah App. 1987) on the issue of a defendant's right to confrontation at trial with a complainant witness. In order to carry "sufficient indicia of reliability" under *State v. Brooks*, 638 P.2d 537 (Utah 1981), prior testimony need not be corroborated to be admissible, particularly when the evidence is excepted from the hearsay rule under Utah R. Evid. 804(b)(1). Statements under oath, with an opportunity for cross-examination, are inherently reliable.

Justice Stewart concurred in the result only. *(State v. Lovell,* 86 Utah Adv. Rep. 19 (July 14, 1988).)

ILLEGAL STOP
Search and Seizure, Reasonable Suspicion, Voluntary Consent

The Court of Appeals (J. Billings) reversed the trial court's denial of a motion to suppress evidence obtained in an automobile search and remanded for a determination of the voluntariness of the consent given for the search. The defendant was stopped by a highway patrol officer on the freeway, and 31 pounds of cocaine were seized. The stop was held not to be based upon any articulable facts upon which the officer could reasonably suspect that Sierra was carrying drugs. Also, because a reasonable police officer would not have stopped Sierra for a traffic violation, traffic stop was held to be merely a pretext to allow the officer an opportunity to search the vehicle.

But, having concluded that the initial stop was illegal, the court remanded the case to the trial court for a factual determination of whether Sierra voluntarily consented to the search and if the consent was "sufficiently distinguishable" from the initial stop to remove the taint of its illegality. [*Note:* Upon remand, the trial court concluded that the consent given was inadequate to purge the taint of the illegal stop and the evidence was suppressed.] *(State v. Sierra*, 754 P.2d 972 (Utah App. 1988), 82 Utah Adv. Rep. 53 (Ct. App. May 18, 1988).)

Applying *Sierra*, the Court of Appeals (J. Greenwood) affirmed defendant's conviction of possession of marijuana with intent to distribute. The defendant alleged that the initial stop of his van by the highway patrol was without any articulable reasonable suspicion. Therefore, defendant argued, the subsequent search was fatally tainted. Assuming the illegality of the stop, the court held that defendant had consented to the search. Because his consent was voluntary and sufficiently distinguishable from the illegal stop, the taint of such illegality had been purged. *(State v. Aquilar*, 87 Utah Adv. Rep. 16 (Ct. App., July 18, 1988).)

NO CONTEST PLEAS; SEARCH AND SEIZURE
Sufficiency of Evidence—Reasonable Suspicion

A divided panel of the Court of Appeals reversed the denial of defendant's motion to suppress cocaine seized in an airport search of defendant's luggage.

Defendant's pretrial motion to suppress the evidence seized in the luggage search was denied by the trial judge. As a consequence, defendant entered a plea of "no contest," expressly preserving his right to appeal and to withdraw his plea if the appeal resulted in a ruling in his favor. The State claimed that he could not preserve his right of appeal by pleading no contest. The panel approved the practice of entering a "no contest plea," distinguishing this strategy from the general rule that a voluntary guilty plea is a waiver of the right to appeal non-jurisdictional issues. The express conditional nature of the plea preserved the right to appeal the refusal to suppress evidence. However, the conditional plea requires the approval of both parties and acceptance by the trial judge.

On the merits of the appeal, the panel (J. Jackson) concluded that a reasonable, objective view of the facts known to airport officers did not sufficiently support a reasonable suspicion so as to justify stopping defendant and searching his luggage at the airport. The individual characteristics relied upon by the prosecution were each inadequate in this case to reasonably suspect defendant of carrying drugs: defendant's nervousness, his arrival from Florida, traveling under an assumed name, an unpublished phone number and lack of identification.

In his dissent, J. Davidson argued that because a no contest plea has the same effect of a guilty plea, the right of appeal should have been waived by its entry. The dissent also disagreed with the majority's assessment of the facts surrounding the defendant's detention at the airport and the search of his luggage. *(State v. Sery*, 87 Utah Adv. Rep. 32 (Ct. App., July 27, 1988).) □

A Pretty Great Session

By Robin L. Riggs

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Although the Legislature meets in a general session each January, there are issues that arise between sessions that need immediate legislative attention. To deal with such "emergency" situations, the Utah Constitution allows the governor to call the Legislature into a special or "extraordinary" session. At least one special session has been called each year since 1980. For example, in 1986 two special sessions were held—the first spawned the creation and funding of the West Desert pumps and the second changed the law regarding the immunity of witnesses appearing before the Public Service Commission; in 1987 a special session was called to correct a $34 million mistake in the tax law made in the prior general session.

Unlike a general session, in which legislators may introduce bills to address any issue they choose, the governor sets the agenda for a special session. Once the governor has placed an issue on the agenda, the Legislature may deal with it in any way it wishes.

When a special session has been called, there is a temptation on the part of the governor and legislators to try to place other items on the agenda. These items may be "housekeeping" in nature, involving only the change of a word or sentence or even a misplaced comma that was overlooked at the last general session, or they may be issues that have been of concern to special interest groups that now seek to raise their concerns in the special session agenda where they won't have to compete with hundreds of other matters. In any case, the agenda of each special session tends to grow immediately after it is announced. In essence, the special session usually turns into a "mini" general session.

On July 5-6, 1988, a special session was held to consider possible resolutions of the insolvent thrift situation and to deal with an income tax surplus. By the time the Legislature adjourned, the following items had been passed:

1. Senate advise and consent of some 40 gubernatorial appointments.

2. Rebate of $80 million of income taxes, restoration of ⅓ of the deduction previously allowed for federal income taxes paid, and a 5 percent reduction in income tax rates.

3. Reconsideration of several bills that were not passed at the general session because of procedural mistakes or that contained minor technical errors, including bills concerning bidding procedures for in-state contractors, the code of military law, mineral production tax withholding, a ceiling on disability payments from the Employers' Reinsurance Fund, outdoor advertising, and a proposed constitutional amendment on the power to deny bail.

4. Exemption from PAC reporting requirements for corporations making political contributions of less than $750.

5. Staggering the terms of office of the newly revamped Board of State Lands and Forestry.

6. Requiring the governor's budget proposal to be based on current tax laws and rates rather than projected tax changes.

7. Increasing the number of school districts allowed to participate in the new block grant funding program from five to six.

8. Specifying the crimes to which the proposed constitutional amendment on denial of bail applies if it receives favorable voter approval in November.

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LEGISLATIVE REPORT

(continued from page 27)

9. Providing procedures for AIDS testing and reporting for the benefit of emergency medical services providers.

10. Codifying the amount of fees charged for certain court filings which had previously been set by court rules.

11. Appropriating additional money to education for textbooks and other one-time expenses.

The 1988 Special Session was a pretty, great session. Interestingly, the major issues (the income tax surplus and the thrifts) were dealt with in dramatically different ways. The income tax surplus commanded most of the debate, consuming several hours in both the Senate and the House (House Democrats came prepared for a lengthy discussion with at least 12 different amendments to the governor's plan). On the other hand, both the governor and the Legislature decided that pending negotiations should be completed before addressing the thrifts issue; accordingly, it never came up.

Less important items became the focus of heated debate. For example, one of the "housekeeping" bills simply restored a $1,000 ceiling on the amount of disability that could be paid by the Employers' Reinsurance Fund under certain circumstances. The issue turned into an inter-party struggle as Democrats tried to raise the limit to $5,000 while Republicans tried to keep it low. After several hours of debate, a compromise of $3,000 was reached. Also, there was considerable debate over an issue that was not even on the agenda—the purchase and renovation of the South High School property. Some legislators argued that the purchase through state bond proceeds was improper. Most did not agree, however, and the issue was not definitively resolved.

Underlying all of the debate was the feeling that the session may not have happened the way it did if it were not an election year. On the other hand, some of the items legitimately needed immediate attention, notwithstanding the political posturing. Like most special sessions, the pretty, great session of 1988 gets mixed reviews. And, like our new state slogan, at first glance you couldn't decide how you were supposed to feel about the special session. From one perspective, it made you feel sort of good and kind of proud. From another, you wondered if the money spent on the session couldn't have been better used. Or perhaps the comma made all the difference. □

CLE Registration Form

DATE	TITLE	LOCATION	FEE
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Registration and Cancellation Policies: Please register in advance. Those who register at the door are always welcome, but cannot always be guaranteed complete materials on seminar day.

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STATE BAR CLE CALENDAR

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With the petition now pending for MCLE, some rural Utah attorneys are concerned with availability of instructional offerings in their cities. The majority of CLE programming is currently presented in Salt Lake City.

In order to more fully respond to needs of its full membership, the Utah State Bar is instituting a program of regionalization. Such a program will be locating selected CLE programs in various geographical regions throughout the state. The courses offered in these cities will be carefully selected on the basis that they appeal to the greatest variety of types of practice. The majority of attorneys in the state continue to practice within a short distance of Salt Lake City, therefore, the highest concentration of continuing educational opportunities will remain focused in this area. Most of the regionalized programs will be in the form of videotape replays and will provide a moderator from the original seminar faculty. These regional videotape replays will include material supplements identical to the original programs and will supplement periodic live seminars to be held at the regional sites.

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PLACE: Utah Law and Justice Center
FEE: $35
TIME: 8:30 a.m. to 5:00 p.m.

ACCOUNTING FOR LAWYERS

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DATE: November 15, 1988
PLACE: Utah Law and Justice Center
FEE: $125
TIME: 8:00 a.m. to 3:00 p.m.

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DATE: December 13, 1988
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DATE: December 16, 1988
PLACE: Utah Law and Justice Center
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The Utah Attorney General's Office has an opening for an experienced litigator with specific background in Indian law. Applicants must have at least five years in practice, with litigation and appellate experience preferred. Interested persons should send resumé to the Attorney General's Office, % Beverly Brown, 236 State Capitol, Salt Lake City, UT 84114, telephone: 538-1130.

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Nine-lawyer downtown law firm with litigation and commercial law practice is seeking an associate with 2-5 years' experience. Send resumé to Utah State Bar, 645 South 200 East, P.O. Box H, Salt Lake City, UT 84111.

Gordon R. Hall, Chief Justice of the Utah Supreme Court, has announced the opening of the application period for a judicial vacancy in the Second Circuit Court. This vacancy will result from the appointment of Judge Stanton M. Taylor to the District Court bench. The Second Circuit includes Weber, Davis, and Morgan Counties. *Applications must be received no later than 5:00 p.m., November 14, 1988*, at the Office of the Court Administrator, 500 East 230 South, Suite 300, Salt Lake City, UT 84102. Those wishing to recommend possible candidates for judicial offices or those wishing to be considered for such office should promptly contact Susan H. Clawson, Personnel Manager, at the Office of the Court Administrator. Application packets will then be forwarded to prospective candidates and must be received no later than 5:00 p.m., November 14, 1988.

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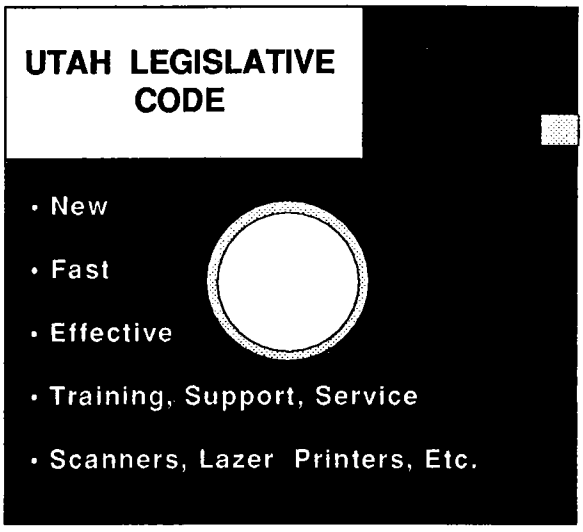

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