UTAH BAR JOURNAL

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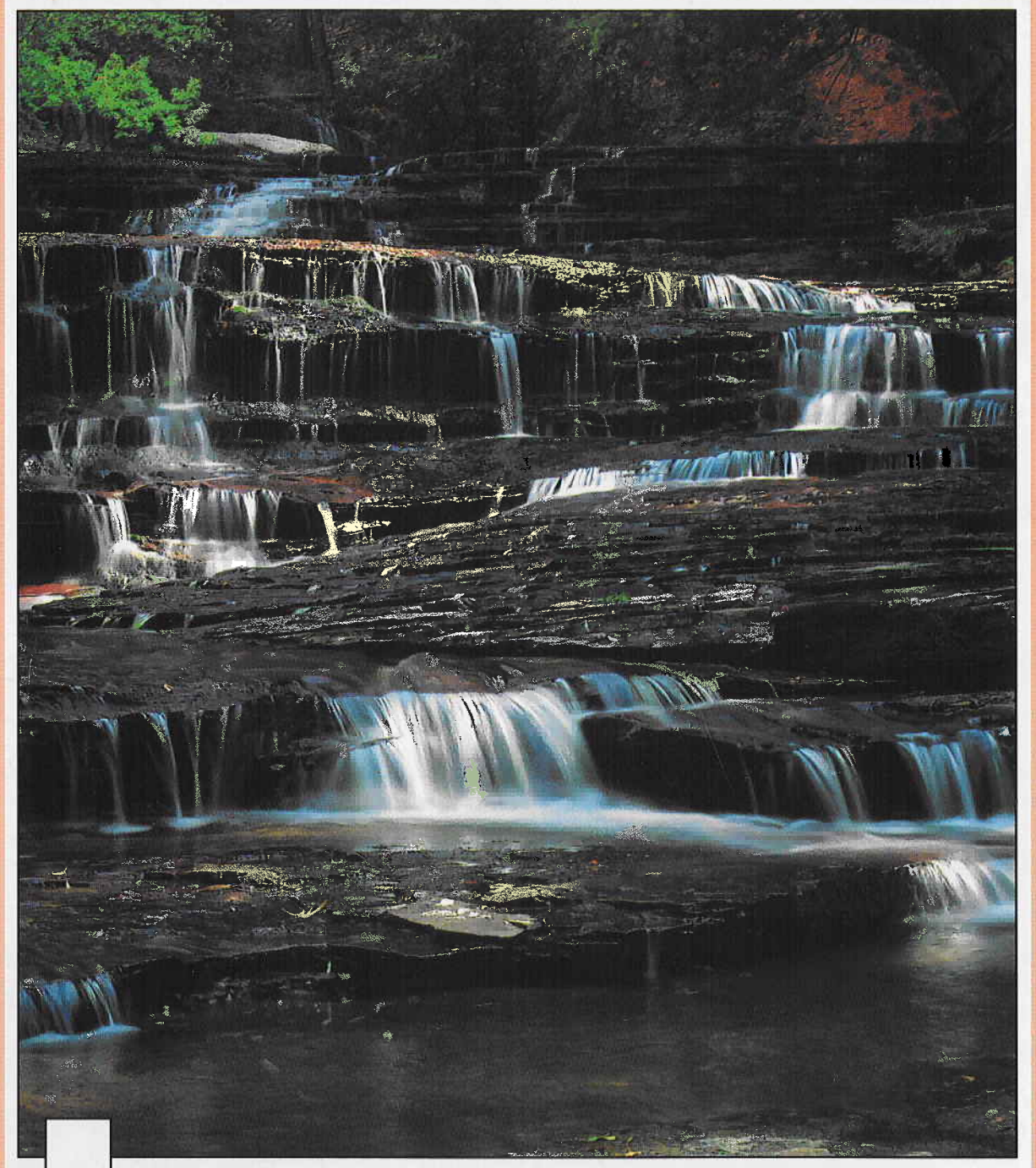

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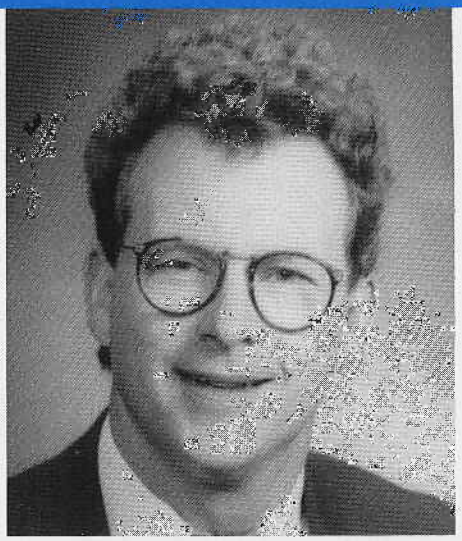
COVER: Great West Canyon, below "the Subway," Zions National Park, Utah, by Kent M. Barry, Esq., Assistant Attorney General.

Members of the Utah Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should contact Randall L. Romrell, Associate General Counsel, Huntsman Chemical Corporation, 2000 Eagle Gate Tower, Salt Lake City, Utah, 84111, 532-5200. Send both the slide, transparency or print of each photograph you want to be considered.

The *Utah Bar Journal* is published monthly, except July and August, by the Utah State Bar. One copy of each issue is furnished to members as part of their State Bar dues. Subscription price to others, $30; single copies, $4.00. For information on advertising rates and space reservation, call or write Utah State Bar offices.



The First Shot!

By Paul T. Moxley

When Clegg handed me the gavel in Sun Valley he looked relieved and has now reached the pinnacle, (according to him), the immediate past-president of the bar. Jim served tirelessly as a bar leader. We found him to be thoughtful, energetic, seasoned and full of warm humor.

Things look much better now than when I started with the Bar Commission some five years ago. Many good people have come and gone in the interim. Fran Wilkstrom, last year's President of the Salt Lake County Bar, is new on the Board and David Nuffer is now representing the Fifth Division (all are areas of the state contiguous with Utah, Arizona, Colorado, Wyoming and Nevada) and he is well prepared inasmuch as he served on the Task Force with Jim Clegg, Jim Davis, Gayle McKeachnie, Pam Greenwood and others. Craig Snyder was also reelected for another term from Utah County and continues to represent all lawyers vigorously. The Commission is also getting along well with the two non-lawyers Ray Westergard and John Florez.

As things now stand, this year looks like clear sailing. Dennis Haslam, our new president-elect, and Steve Kaufman are on the executive committee and Charlotte Miller is chairing a committee which will study the workings of our discipline system. We recognize that discipline is not popular with many and over the years it has been the philosophy to err in that office on the side of "process" because a belief that persons who file complaints should have a full hearing on their grievances. As many of you know, the number of complaints against lawyers have gone up geometrically. There are now four lawyers, two paralegals in the office and business is booming. We are going to study the entire process and we invite your input on this. The cost of operating this part of the bar is going up rapidly. From the standpoint of staff salaries alone, the increase has been over 300% since 1987 and over 100% since 1990. If we continue at this rate, little money will remain.

The mortgage on the Law and Justice Center has been paid off. Pam Greenwood burned the mortgage papers in the presence of Past-Presidents in Sun Valley and this is a significant event in bar history. We appreciate the support of bar members and the Supreme Court which resulted in this occurrence. The "double bill" exacted its toll from us all and mostly on those dedicated lawyers who pledged generously toward the project and then paid the "double bill". The Stephen H. Anderson dream for a Law & Justice Building is now a paid for reality because of the efforts of Bar Commissioners, staff, lawyers and non-lawyers who donated to the effort of the Justice Center. We have a unique building and have every right to be proud of it.

A committee was formed last year which is engaged in long range planning and it will be making recommendations to the Board shortly on its views about future bar commitments to programs and operations. According to projections from the budget & finance committee, no dues increasing should be necessary until 2002. A variety of matters are being considered including funding a program for Pro Bono which would promote the ability of the Bar in assisting lay persons in meeting their unmet legal needs. A debate is occurring in some states about mandatory pro bono, but we have rejected that approach because of a belief that most Utah lawyers who are already donating significant pro bono time would oppose a requirement of providing such services.

The Long-Range Planning Committee defined the Bar's mission as:

> Representing lawyers in Utah and to serve the public and the profession by promoting justice, professional excellence and respect for the law.

Its goals are:

To promote the administration of justice.

To uphold and elevate the standards of courtesy, ethics, competence, professionalism, public service and collegiality in the legal progression.

To provide improved access to legal services for the public.

To educate the public about the rule of law and their responsibilities under the law and to increase public understanding of the role of the legal profession within the system of justice.

To provide service to the public and to the judicial systems.

To provide services and benefits to lawyers.

To diversify participation of all lawyers in Bar activities.

We all recognize that there are many challenges for lawyers these days. We are studying a wide array of issues that effect all lawyers including the unauthorized practice of law, regulation of legal assistants, ethical issues, legislative changes, continuing legal education, discipline matters, admissions, running a facility and maintaining Bar programs that are consistent with our mission, meeting the needs of the public, quality control for lawyers, etc., etc. At the same time because of the increase in the number of lawyers and the more diverse nature of our members, we find it more of a challenge to find consensus on matters and to complete our process in some sort of reasonable time frame. Regardless, we are happy to be making our contribution and are desirous of hearing from you concerning any and all Bar matters.

I look forward to my year as President and am happy to become better acquainted with you.

UTAH LEGAL SERVICES, INC. PRESENTS MONDAY BROWNBAG SEMINARS

Utah Legal Services, Inc. announces that each Monday it will conduct free brownbag seminars on various legal topics. These topics will be published each month in the *Utah Bar Journal*. The seminars will begin promptly at noon and end at 1:00 p.m. The Utah State Bar has donated the space in the Utah Law and Justice Center (645 South 200 East) so seating is limited. All those who desire to attend must contact Len Koprowski at 328-8891 or 1-800-662-4245 one week in advance. One hour CLE credit. (Topics are subject to change without notice.)

The topics for August, September and October are:

AUGUST

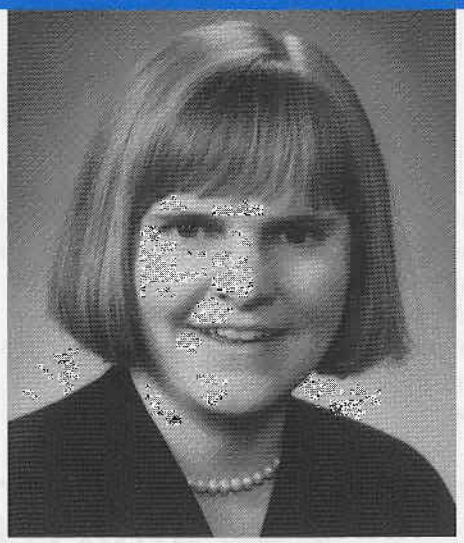
August 1 – Bankruptcy Overview for the Unknowledgeable
August 8 – Utah Mobile Home Park Act
August 15 – Old Age Survivor Benefits & SSA Overpayments
August 22 – Overview of a Social Security Disability Case
August 29 – Legal Rights of Students Attending Public Schools

SEPTEMBER

September 5 – Holiday – Labor Day
September 12 – Ethics: Unethical Fees – Rule 1.5
September 19 – Divorce Overview/Annulment/Separate Maintenance
September 26 – Paternity

OCTOBER

October 3 – Application of Attorney Fees on V.A. Cases/ New Court of Veteran's Appeals
October 10 – Holiday – Columbus Day
October 17 – Juvenile Court Parental Rights Termination Case
October 24 – Common Law and Other Legal Asepcts of Non-Marital Cohabitation/Separation
October 31 – Custody



The Bar Response to Domestic Violence

By Denise A. Dragoo

The O.J. Simpson affair brought domestic violence to center stage when the "system" failed Nicole Brown Simpson. However, her death, the broadcast of her 911 call and the arrest of O.J. have impacted countless others. The Simpson case has motivated abuse victims to seek legal assistance in unprecedented numbers. During the first week of July, the Second District Court in Weber County, Utah reported filing 16 protective orders in one day.[1] The legal community in Utah is ready to meet this need.

Well before this issue achieved celebrity status, the Utah Judicial Council directed our attention to the urgent needs of victims of domestic violence. The March, 1990 *Report of the Utah Task Force on Gender and Justice* estimated that 34,600 women were abused in Utah yearly and only 1 in 10 cases of abuse was reported. Police, prosecutors and judges were found to routinely minimize domestic violence. Both victims and law enforcement personnel were confused as to legal remedies. The Task Force challenged the Bar, the judiciary, the legislature, police and social services to respond to these needs.

The Utah Legislature responded in 1991 by enacting the Cohabitant Abuse Act authorizing the issuance of civil protective orders to victims of abuse. Utah's criminal statute was also reenacted in 1991 as the Cohabitant Abuse Procedures Act. This Act now requires the arrest of an abuser if: (1) there is probable cause of continued violence; (2) the abuser has caused the victim recent, serious bodily injury; or (3) the abuser used a dangerous weapon in the offense. The police must arrange for the victim's transportation for medical treatment or to a shelter or place of safety.

The Administrative Office of the Courts has also responded to make the courts more accessible to victims of domestic violence.[2] A uniform set of instructions has been developed to assist victims filing for protective orders. Effective July 15, 1994, these forms are available statewide from each district and juvenile court. Court clerks have been trained to help in the filing of *pro se* protective orders. The Legal Aid Society, local domestic violence coalitions and the district court will train advocates to walk victims through procedures to obtain a protective order.

A number of educational videotapes have been developed to assist the victims of domestic violence. Women Lawyers of Utah and the Diversity Committee of the Utah State Bar have produced two videotapes, financed primarily by a grant from the Utah Bar Foundation.

1. **Domestic Violence: Civil Rights,** explains the procedures for filing a civil protective order and walks a victim through the process of filling out forms, having them executed before a judge and going to hearing.
2. **Domestic Violence: Criminal Remedies,** provides a dramatization which shows police officers responding to a victim's call and making an arrest. The video describes situations in which abusers may be arrested or issued a citation and shows a prosecutor preparing a victim to testify and a portion of a criminal hearing.

The videotapes are distributed free of charge to women's shelters, rape crisis centers, public libraries, medical facilities and video outlets. Copies of the videotape may be obtained through the Domestic Violence Information Line at 1-800-897-LINK (1-800-897-5465).

The Utah Attorney General's Office is taking a proactive approach to domestic violence with the "Safe At Home" project. Attorney General Jan Graham has set the goal of introducing this program to every major employer in the State of Utah. The Attorney General uses two videotapes: one

produced by the City of Lakewood, California, entitled "The Savage Cycle," and a shorter video produced by the Victoria, British Columbia, Woman's Transition House, entitled "One Hit Leads to Another." Both videos depict the cycle of abuse which beings with mounting tension, escalating to physical or emotional abuse, followed by a honeymoon period, another buildup in tension and a repeated cycle of violence. The Attorney General is working with the Division of Family Services to provide information on services available, such as counseling (for both victims and perpetrators), the availability of safe houses and shelters and legal assistance.

Legal services and training to respond to domestic violence issues is provided by both the Legal Aid Society, Utah Attorney General, the Utah State Bar and Women Lawyers of Utah, Inc. The Legal Aid Society will respond to domestic violence referrals, regardless of income level. The Young Lawyers Division sponsors the Tuesday Night Bar at the Utah Law & Justice Center and is seeking volunteers to respond to domestic violence matters. Women Lawyers of Utah has a pro bono program for providing legal services to women's shelters. The Attorney General's Office, through its Prosecution Council, sponsors an annual conference on domestic violence participates in the State Domestic Violence Council and assists with regional training of police and prosecutors.

In sum, the Bar and judiciary have recognized the urgent needs of victims of domestic violence. **Resources are now available to respond to these needs.** Attorneys and judges alike need to be alert to victims who may need medical attention, shelters, counseling services as well as legal protection from domestic abuse. In addition, attorneys must be willing to reach out to assist domestic violence programs of the Bar, the judiciary and the Utah Attorney General's Office. Following is a list of domestic violence resources in Utah:

Statewide Toll-Free Information Line for Domestic Violence
1-800-897-LINK

Legal Resources:
Legal Aid Society:
Salt Lake: (801) 328-8849
Legal center for Victims of Domestic Violence:
Provo: (801) 375-1031

Shelters and Safe Houses:
Salt Lake City YWCA,
Women in Jeopardy: (801) 355-2804
Outside of Salt Lake City:
1-800-897-LINK

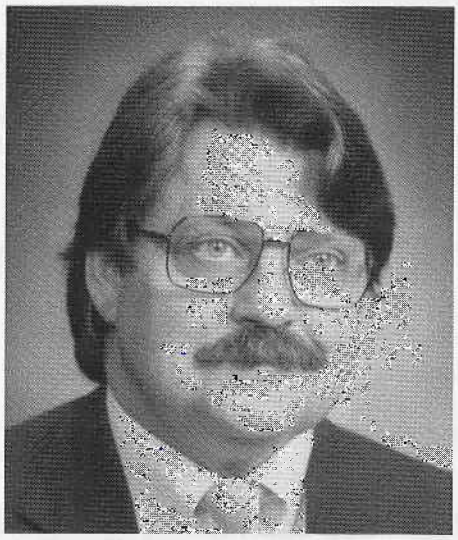
Counseling:
Consult Division of Family Services
120 North 200 West
Salt Lake City, Utah 84103
(801) 538-4100

[1]"Abused Women Now Finding Less Legalese," Sheila R. McCann, *The Salt Lake Tribune*, July 10, 1994.

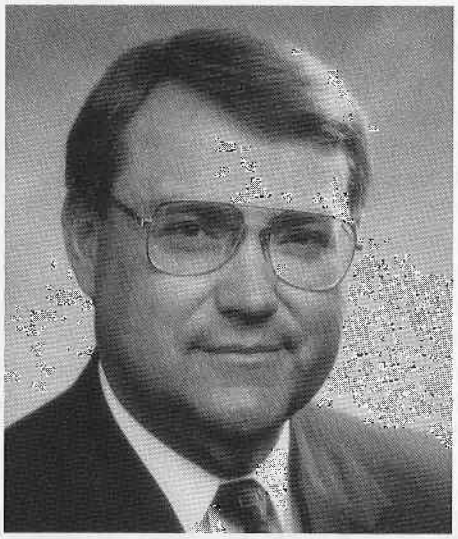
[2]"Report in *Tribune* Gets Action to Better Aid Abuse Victims," Sheila R. McCann, *The Salt Lake Tribune*, April 26, 1994.

Significant Changes in Comparative Fault and Workers' Compensation Reimbursement

By Tim Dalton Dunn and W. Brent Wilcox



TIM DALTON DUNN has been the senior partner/trial lawyer of Dunn & Dunn since it's inception on January 1, 1988. Prior to starting his own law firm, Mr. Dunn was senior partner/managing partner/trial lawyer from 1983 to December 1987 of the Salt Lake City law firm of Hanson, Dunn, Epperson, & Smith. He has authored numerous papers on insurance law and the tort system and has drafted a number of Utah insurance and torts laws. He has also participated as a speaker in several seminars on trial related practice and has tried cases in California, Utah, Arizona and Hawaii. He is a member of the Utah Supreme Court's Advisory Committee on the Rules of Evidence and a board member of the Utah State Bar's Board of Mandatory Continuing Legal Education. He is also a past president of the Utah Chapter of the American Defense Trial Lawyers Association and past president of the Utah Chapter of the American Board of Trial Advocates.



W. BRENT WILCOX, a shareholder in the plaintiff's personal injury law firm of Wilcox, Dewsnup & King in Salt Lake City, got his law degree from the University of Utah and was admitted to the bar in 1966. He is the current President of the Utah Trial Lawyers Association. In addition to his involvement in these organizations, he is also a Master of the Bench in the American Inns of Court VII and a member of the American Board of Trial Advocates, the Utah Supreme Court Rules of Evidence Advisory Committee, the Utah Governmental Immunity Task Force, and a technical advisory member of the Utah Health Policy Commission.

I. Background

In the waning hours of the 1994 Utah Legislative Session, Senate Bill No. 224, a compromise engineered by the Governor, was passed unanimously by both legislative bodies. It was named the "Workers' Compensation and Liability Reform Act Amendments 1994." What resulted was a change in how workplace injury and wrongful death cases are handled where an immune entity is involved.

The law describes itself as an "an act relating to judicial code; permitting reduction of reimbursement of workers' compensation payments because of fault attributable to the employer; defining persons immune from suit; providing the conduct of persons immune from suit may be considered in allocating fault attributable to defendants; prohibiting persons immune from suit being joined as defendant; permitting immune parties to intervene in an action; and making technical corrections."

We believe it does all that and more.

The flurry of activity that took place during the 1994 session concerning

comparative fault of an immune entity was generated by the Supreme Court's decision and Justice Stewart's dissenting opinion in *Sullivan v. Scoular Grain Company of Utah*, 853 P.2d 619. The *Sullivan* decision held that the purpose and intent of the Liability Reform Act of 1986 was to require a jury in a special verdict form to account for the relative proportion of fault of a plaintiff's employer that may have caused or contributed to the accident, even though the employer is immune from suit. The effect of that holding is to place a percentage of fault on a party that cannot be recovered against. Thus the plaintiff in those situations loses the opportunity to be compensated for the negligence of an immune entity (except for workers' compensation benefits.) Justice Stewart took the position that the decision of the court would necessarily result in the entire amount of an immune person's fault being deducted from the plaintiff's damages. He argued that the court's opinion created a blatant inequity which is "especially acute" when the immune employer's "insurance company claims all or part of a plaintiff's recovery" as a result of workers' compensation reimbursement. The final sentence of Justice Stewart's dissenting opinion states: "This is not only unjust and inequitable, but might well be unconstitutional." With this language and other arguments, the Workers' Compensation Fund of Utah and the plaintiff's bar approached the legislature with a proposal which they argued would reinstate the original intent of the 1986 legislature underlying the Liability Reform Act, i.e., to disallow allocation of fault to immune entities, and to overrule *Sullivan v. Scoular Grain of Utah.*

"The flurry of activity. . . concerning comparative fault of an immune entity was generated by the Supreme Court's decision. . . ."

One of the most intense and divisive conflicts at the legislature ensued. The business community was drawn into the debate, the Governor's office was reportedly besieged, and the governor's intervention resulted in this law.

Tort law will now go forward under the Liability Reform Act of 1986 with the amendments of 1994.

II. Scope of the Act.

The scope of the act will involve all cases where an employee is injured on the job and he seeks a liability recovery against a third-party tort feasor. It will also involve all cases where an immune governmental entity or employer is alleged to have contributed to a plaintiff's damages. It will also affect cases where a worker's compensation provider is seeking reimbursement from the tortfeasor through the efforts of the plaintiff.

III. Important Provisions.

While the exclusiveness of the remedy provided to employees against their employers remains firmly in place, the employers or their insurance carriers will not be able to obtain full reimbursement of their statutory workers' compensation lien if their percentage of contribution of fault towards the accident resulting in the plain-

comparative fault of an immune entity was generated by the Supreme Court's decision and Justice Stewart's dissenting opinion in *Sullivan v. Scoular Grain Company of Utah*, 853 P.2d 619. The *Sullivan* decision held that the purpose and intent of the Liability Reform Act of 1986 was to require a jury in a special verdict form to account for the relative proportion of fault of a plaintiff's employer that may have caused or contributed to the accident, even though the employer is immune from suit. The effect of that holding is to place a percentage of fault on a party that cannot be recovered against. Thus the plaintiff in those situations loses the opportunity to be compensated for the negligence of an immune entity (except for workers' compensation benefits.) Justice Stewart took the position that the decision of the court would necessarily result in the entire amount of an immune person's fault being deducted from the plaintiff's damages. He argued that the court's opinion created a blatant inequity which is "especially acute" when the immune employer's "insurance company claims all or part of a plaintiff's recovery" as a result of workers' compensation reimbursement. The final sentence of Justice Stewart's dissenting opinion states: "This is not only unjust and inequitable, but might well be unconstitutional." With this language and other arguments, the Workers' Compensation Fund of Utah and the plaintiff's bar approached the legislature with a proposal which they argued would reinstate the original intent of the 1986 legislature underlying the Liability Reform Act, i.e., to disallow allocation of fault to immune entities, and to overrule *Sullivan v. Scoular Grain of Utah.*

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III. Important Provisions.

While the exclusiveness of the remedy provided to employees against their employers remains firmly in place, the employers or their insurance carriers will not be able to obtain full reimbursement of their statutory workers' compensation lien if their percentage of contribution of fault towards the accident resulting in the plain-

tiff's injuries is determined to be 40% or more. If the employer's contribution of fault is determined in the special verdict form to be 39% or less, it is redistributed proportionally to the plaintiff and other defendants in the lawsuit in accordance with their fault.

A plaintiff *must* give written notice to the worker's compensation carrier or other entity obligated to pay for worker's compensation benefits of any attempt to attribute fault to the employer in a settlement negotiation or in a proceeding brought by the injured employee or his heirs. (§ 35-1-62(3)(b).)

The entity responsible for the compensation payments "shall be reimbursed less the proportionate share of costs and attorneys fees" without reduction if the combined percentages of fault attributable to "persons immune from suit is determined to be less than 50% prior to any reallocation of fault" (§ 35-1-62(5)(b)(1)) or less the amount of payments made multiplied by the percentage of fault attributable to the employer if the combined percentages of fault attributable "to persons immune from suit is determined to be 40% or more prior to any reallocation. . . ."

The act defines "persons immune from suit" as the employer (as per Title 35, Chapter one or two) and governmental entities or employees immune from suit pursuant to Title 63, Chapter 30. A "person immune from suit," notably the employer, cannot be forced to join the suit, but they may intervene. (§ 78-27-41(2) and (3).)

To understand this amendment, we have some observations from both the plaintiff's and defense perspective.

IV. Observations from the Plaintiff's Perspective.

For the reader to understand the pros and cons of the legislative amendments, one must understand the context in which these amendments occurred. The Worker's Compensation Fund of Utah drafted a bill which was sponsored on the House side by Speaker of the House Rob Bishop and on the Senate side by Senator Haven Barlow. Senator Barlow is the original sponsor of the Liability Reform Act of 1986. He believed that the Supreme Court in *Sullivan v. Scoular Grain* misconstrued the legislative intent in regard to immune entities. The Utah Trial Lawyers Association and other concerned persons and groups supported the Fund's bills. These bills were intended to overrule the *Sullivan* decision and restate the intent of the 1986 legislature; that is, that immune entities were not to be included in the fault allocation. Had one of these bills been passed, an immune entity would not have been included in a fault allocation; the employer or its worker's compensation carrier would not have been required to defend the action because its lien would not have been affected by the outcome.

"An agreement was reached. . . on a compromise. . . includ[ing] the 40% threshold. . . ."

The opposing forces rallied around a bill sponsored by the Manufacturer's Association, insurance interests, and various large corporations who apparently had determined that they would be willing to take an increase in worker's compensation premiums in return for having less third party tort liability. They introduced a bill through Senator Lane Beattie that would have left the *Sullivan* decision intact except for one provision that would have reduced the worker's compensation lien in accordance with the fault attributed to the employer. The two bills sponsored by the Worker's Compensation Fund of Utah were passed by their respective legislative bodies, which included a one vote victory in the Senate. It appeared to its supporters that Senator Barlow's bill would be passed in the House on February 28 and that the Beattie bill, which had passed the Senate after a reconsideration vote, would fail in the House. Before this vote occurred, Governor Leavitt intervened in the process which prevented the vote and resulted in a compromise meeting on March 2, the last day of the session. During that entire day, proponents of the Barlow bill, which included representatives of the Worker's Compensation Fund of Utah and the Utah Trial Lawyers Association, met with representatives of the Governor's office, the legislature, and proponents of the Beattie bill composed of lawyers for Kennecott, Union Pacific Railroad, IHC, and other business and insurance interests. An agreement was reached early in the afternoon on a compromise which included the 40% threshold and other amendments. The Beattie bill number was used as the vehicle for the compromise.

The effort of the Utah Trial Lawyers in the legislature in support of the Fund's bill was meant to assist most employers as well as the claimants. It was our belief that, under *Sullivan* and the Beattie bill, worker's compensation premiums would increase due to the fact that the employers would have to defend every case and would receive less in reimbursements. The compromise bill which is now law still requires the employer to defend those cases where it believes it may have some exposure of having fault in excess of 40%, but it would not have to defend cases where it believes it is below the threshold or it is willing to rely upon the plaintiff's case as its defense. Likewise, the employer's worker's compensation carrier may receive less in reimbursements than it did before *Sullivan* but, again, those won't occur unless the threshold is met. Thus the typical employer and worker's compensation carrier will come out better under the amendment than they would have under the Beattie bill. On the other hand, the claimant, while still facing the possibility of reduction of the verdict due to the negligence of an employer if it exceeds 39%, will have the benefit of no such reduction if the employer's negligence is below the threshold. It was our belief in reaching the compromise that it was a good middle ground to ameliorate the harshness that resulted from the *Sullivan* decision.

Detractors now argue that the 40% is arbitrary and will be held unconstitutional. The 40% threshold is no different than the 50% threshold that exists under our comparative negligence law which satisfied constitutional scrutiny. We believe the 40% threshold will also pass such scrutiny.

From a plaintiff attorney's perspective and as one who was involved in the 1986 legislation and in workplace litigation, the amendment is a good compromise and will facilitate settlement of cases because all parties will know the threshold risks that they face at trial and they can evaluate their position easier than they could under the *Sullivan* decision. As is the case with the 50% threshold in comparative negli-

gence, all parties will have to evaluate whether or not they will be above or below the 40% threshold. Because of the risks all parties, including the worker's compensation carrier, face due to the threshold, they will be more likely to reach a settlement than they would under the *Sullivan* decision. Under *Sullivan*, the defendant had the decided advantage and had little to lose from trying the case and attempting to attribute as much fault as possible upon an immune entity.

V. Observations from the Defendant's Perspective.

From the perspective of a defense lawyer this bill seems to improve the plaintiff's position. Joint and several liability to a limited extent has been re-adopted. Defendants will, all other things being equal, pay more in these cases.

Employers seem to be the big losers here. First, if they want to hang on to their full right of reimbursement, they are going to have to fight for it. They have the right to intervene in these cases and where there is a chance their percentage of fault could exceed 39%, and the stakes are high enough, it would certainly be in their best interest to do so. This would, of course, cost money. Lawyers would have to be hired. This might be ameliorated, however, if the courts construe the statute provisions found in § 35-1-62(5) where it says that, "the reasonable expense of the action, including attorneys fees, shall be paid and charged *proportionately against the parties as their interest may appear*" as a basis for the attorneys fees in these cases going to counsel for the workman's compensation carrier rather than counsel for the plaintiff. "As their interests may appear" certainly ought to take into consideration the level of activity required from counsel for the workman's compensation payor. It should also be noted that, there now appears to be the requirement of a conflict evaluation to determine whether or not the same attorney can represent the injured employee and the interests of the entity entitled to reimbursement.

Secondly, the employers workman's compensation carrier will, in fact, be able to recover less by way of worker's compensation reimbursement where the employer's fault is found to exceed 39%. This will also affect the amounts that employers have to pay for worker's compensation coverages.

The unit rule has been left in place; i.e., the provision which combines the fault of all defendants before it is compared to the fault of the plaintiff. But now the fault of the "persons immune from suit" is also added to the fault of the defendants. (Section 78-27-38(2)) As a result, plaintiffs will be able to recover against defendants in a larger range of employer included fault determinations.

The law apparently answers the question as to whether or not any one else should be included in the special verdict form listing of possible fault contributors. Section 78-27-38(4) seems to require the inclusion of the consideration of the conduct of any person who contributed to the alleged injury.

One thing this case does do for defense lawyers, and most likely for plaintiff's lawyers as well, is that it makes it more difficult to advise their clients as to what to expect out of the eventual outcome of the case. It is certainly easier to evaluate what your client's possible contribution of fault is than it is to determine what your client's possible contribution of fault is together with the amount which might be ascribed to your client as their "fault responsibility" after that has in turn been determined by calculating the fault of all of the other parties to the action and the employer's or state agency's fault, keeping in mind the watershed percentage of 40%. By and large, of course, parties with small contributions of fault will be ascribed correspondingly smaller additional "fault responsibilities."

Under § 78-27-39(2)(c) the jury may, oddly enough, be advised that fault attributable to persons immune from suit may reduce the award of the plaintiff; but the jury may *not* be advised of the effect of reallocated fault of the "persons immune from suit" (employer or governmental) to the other parties in proportion to the percentage or proportion of fault initially attributed to each party even though this may well result in the defendants having to pay more than their percentage of fault would otherwise provide.

VI. Conclusion.

If you are to competently advise your clients and friends about the comparative fault laws or worker's compensation laws of the State of Utah, you must, become familiar with the Liability Reform Act of 1986 and the amendments of 1994.

An Introduction To Land Trust and Conservation Easements

By David Nuffer

Utah and its cities are appearing on lists of the most desirable places to live and work. According to 1993 Census figures Utah's growth rate is tied with Arizona as fourth fastest in the nation. The neighboring states of Nevada, Idaho and Colorado rank 1, 2 and 3. Having long touted quality of life as a great attraction, Utahns are now concerned about preserving that quality of life. Land trusts and conservation easements may be part of the answer.

INTRODUCTION TO LAND TRUSTS

America's first land trust was formed in 1891. A century later, there were nearly 900 land trusts, spread through all states except Arkansas and Oklahoma. Utah has the fewest land trusts of any western state. *Rocky Mountain Divide — Selling and Saving the West*, by John B. Wright (University of Texas Press) castigates Utah for its relative lack of environmental concern, using the absence of land trusts as a prime indicator. Utah will likely have more land trusts due to Growth pressures.

A land trust can hold title to land or conservation easements on land to provide for the preservation of open space and related functions, such as trails, river ways, hillsides, agricultural land and wildlife areas. Land trusts also are typically involved in planning and education to encourage the community sense of need for open lands.

Utah's two land trusts are in Park City (Summit County) and St. George (Washington County). Cache Valley has beginnings of an agricultural preservation movement. These are areas of rapid urbanization on a rural landscape. Because the sense of potential loss is heightened in these areas, they have been the first to implement the land trust mechanism. Salt Lake and Utah Valleys are more accustomed to urbanization.

DAVID NUFFER was admitted to the Utah State Bar in 1978. He is a member of the St. George law firm Snow, Nuffer, Engstrom & Drake and focuses his practice in the areas of real estate and natural resources law. In addition to being a member of the Utah State Bar, he is also a member of the Southern Utah Bar Association and the Arizona State Bar. During 1990-91, Mr. Nuffer served on the Utah Supreme Court Special Task Force on the Management and Regulation of the Practice of Law. Mr. Nuffer also serves as a mediation panel member of the American Arbitration Association.

Land trusts are non profit organizations, usually incorporated. Some associations and governmental bodies function as if they were corporate land trusts. The generic phrase "land trust" arises because these organizations hold title to easements or property for the benefit of others, but they are not legally "trust" organizations. In Utah, land trusts may not use the word "trust" in their legal name, because it is statutorily used reserved for financial institutions. Utah Code Ann. §§ 7-1-701 and 7-5-4.

While land trusts are significant tools in open lands planning and preservation of geographic and environmental quality of life, they are not the only tool or a panacea. Governmental regulations and planning designations retain significant roles in controlling and locating development.

As governmental actions regulate and impose involuntary restraint, land trusts serve as cooperative mediators and facilitators of land preservation. Land trusts may work with governmental entities in achieving an open lands program. Land trusts may serve as receptacles for developed or donated properties or conservation easements on land, title to which is owned by municipalities. The intervention of a land trust as a title holder may be more palatable for (and trustworthy than) deeding land to a governmental entity.

Apart from working in the governmental arena, land trusts often negotiate conservation plans with land owners to fulfill mutual objectives. These may satisfy desires to see land retain a 'natural' state or preserve an agricultural district.

Because land trusts usually qualify as 501(c)(3) corporations, they can offer tax deductions. Land and easement donors have the direct tax deduction for their contributions, and financial donors can receive deductions for their funds which enable the purchase of land from land owners unwilling to donate. In essence, foregone federal tax dollars help in the preservation of open lands.

INTRODUCTION TO CONSERVATION EASEMENTS

Conservation easements are one of the most important tools a land trust has in preserving lands. Because the conservation easement qualifies for a tax deduction for the grantor, while at the

same time enabling the grantor (or his heirs and assigns) to reserve certain uses of the land, and retain title, the concept finds great appeal.

The conservation easement is particularly helpful in agricultural settings. An agricultural land owner may grant an easement prohibiting all uses except agricultural uses (and perhaps retain selected sites for future development) but gives up the general right to develop the land. The land owner receives a tax deduction based on the value of the conservation easement. The value of that conservation easement is generally equivalent to the difference in property value for purely agricultural land as compared to land with development potential.

In addition to obtaining the income tax deduction, the easement grantor also may succeed in reducing the value of his property for property tax purposes and in reducing the value of the estate for estate tax purposes.

Motivations vary for granting agricultural easements. Land owners in developing rural areas may desire that their land retain its traditional use, out of love for the land. Joint action by adjoining land owners can preserve the agricultural nature of an area, avoiding nuisance claims from new developments, the difficulties of moving farm machinery on roads also served by subdivisions, and the disruption of irrigation water delivery.

"Utah enacted a specific statute dealing with conservation easements in 1985."

THE UTAH LAND CONSERVATION ACT

Utah enacted a specific statute dealing with conservation easements in 1985. The "Land Conservation Easement Act" (Utah Code Ann. §57-18-1) codifies and substantially clarifies the law of conservation easements. The common law on real covenants, equitable servitutes and easements can be somewhat confusing. The legislation provides substantial certainty in defining enforcement remedies. And, more significantly, conservation easements which qualify under the Act are immunized against the states power of eminent domain. Utah Code Ann. §57-18-7. When drafting conservation easements, which intend to provide in perpetuity for the protection of lands, the statutory requirements should be met to achieve more permanent protection.

Utah law defines "conservation easement" broadly enough to include "an easement, covenant, restriction, or condition in a deed, will or other instrument, this embracing the federal concept of "qualified interests" Utah Code Ann. §57-18-2(1). The Utah statute contains helpful instructions that the easement "shall be in writing and shall be recorded" and shall "identify and describe the land subject to the conservation easement by legal description, specify the purpose for which the easement is created, and include a termination date or a statement that the easement continue in perpetuity." Utah Code Ann. §57-18-4(2) and (3). The act also recites that conservation easements may be terminated just as all other easements may be terminated. Utah Code Ann. §57-18-5.

In order for a conservation easement to qualify under Utah's act, the easement must be

> for the purpose of preserving and maintaining land or water areas predominantly in a natural, scenic, or open condition, or for recreational, agricultural, cultural, wildlife habitat or other use or condition consistent with the protection of open land. Utah Code Ann. §57-18-2.

The *purposes* outlined under the Utah statute are somewhat similar to those which qualify under federal tax law, which is treated below. There may, however, be easements which would qualify under Utah statute for protection which would not qualify for federal tax purposes.

The Utah conservation easement act does not protect easements granted for historical purposes. The Utah Historical Preservation Act (Utah Code Ann. §9-8-501 et. seq.) allows for preservation easements (Utah Code Ann. §9-8-503 and 504) but these historical preservation easements are not "conservation easements" under Utah law and thus are not protected from the power of eminent domain.

The Utah act requires that an easement be held by a 501(c)(3) corporation or a governmental entity. Utah Code Ann. §57-18-3.

The Act restates the expected remedies for breach of conservation easements. Injunctive relief and damages are recognized. Utah Code Ann. §57-18-6. A right of access is provided to a conservation easement holder to ensure compliance. Utah Code Ann. §57-18-6(3).

While most of the Land Conservation Easement Act appears to adopt existing common law for conservation easements, the grantee of such an easement should be sure to comply with advance notice requirements under the act in order to ensure that the insulation from eminent domain is provided. Utah Code Ann. §57-18-4(4) requires that disclosure be made to the easement grantor three days prior to its execution about "the types of conservation easements available, the legal effect of each easement, and that the grantor should contact an attorney concerning any possible legal and tax implications of granting a conservation easement." This requirement could be satisfied by general information on those subjects provided in a written form to prospective grantors. It would certainly be wise practice to retain a countersigned copy of the disclosure statement and include an recital in the easement itself of this compliance.

INCOME TAX TREATMENT OF CONSERVATION EASEMENTS

Recognizing the significance of conservation easements, the Internal Revenue Service has adopted extensive regulations governing the tax deductibility of conservation easements. The regulations were drafted to follow typical "high level" conservation criteria after a series of court decisions and statutory enactments laid the groundwork. The tax deductibility guidelines serve not only for guidance on tax issues, but also to guide land trusts and other organizations in their general policies regarding conservation easements.

"Successful land trusts have made significant contributions in the quality of life in their communities."

The general rule denies a charitable contribution deduction for a grant of any interest of property less than a fee simple interest. Treas. Reg. § 1.170A-14(a). A qualified conservation contribution that is deductible under I.R.C. § 170(f)(3)(B)(iii) is defined in § 170(h)(1) as a contribution of a *qualified real property interest* to a *qualified organization* exclusively *for conservation purposes.*

Perpetual conservation restrictions such as easements, covenants or servitude will qualify as a *qualified real property interest.* Treas. Reg. § 1.170A-14(b)(2).

The donation must be to a *qualified organization* (I.R.C. § 170(h)(3)), which includes a federal, state or local government unit (I.R.C. § 170(b)(1)(A) or (vi)) or a charitable organization (I.R.C. § 501(c)(3)) that is a public charity or controlled by a government unit (I.R.C. § 504(a)(2) or 509(a)(3)).

The most critical part of qualification of a conservation easement for the federal income tax deduction is ensuring that the grant is for a conservation purpose. I.R.C. § 170(h)(4) and Treas. Reg. § 1.170A-14(d)(1). A *conservation purpose* must fit into one of four categories to qualify:

1. Preservation of land area for outdoor recreation by or education of the general public. I.R.C. § 170(h)(4)(A)(i) and Treas. Reg. § 1.170A-14(d)(2).
2. Protection of a relatively natural habitat for fish, wildlife or plants or a similar ecosystem. I.R.C. § 170(h)(4)(A)(ii) and Treas. Reg. § 1.170A-14(d)(3).
3. Preservation of open space including farm or forest land where the preservation is:
   a. for the scenic enjoyment of the general public or
   b. pursuant to a clearly delineated federal, state or local government conservation policy and which will yield a significant public benefit.

   I.R.C. § 170(h)(4)(A)(iii) and Treas. Reg. § 1.170A-14(d)(4).
4. Preservation of a historically important land area or certified historic structure. IRS § 170(h)(4)(A)(iv) and Treas. Reg. 1.70A-14(d)(5).

Examination of the various types of land which might be acquired by a land trust illuminates the possible ways to satisfy the *conservation purpose* requirement. (All cases assume that the grant is of a qualified interest to a qualified organization.)

In riparian areas, the "recreational or educational purpose" category could apply, so long as the general public has access. If the public does not have access, it may be that the area could qualify as "habitat." If there is a substantial public benefit, with a clearly delineated governmental policy for conservation of riverside areas, the "open space" category might be satisfied as well.

Entry corridor areas to municipalities would most likely qualify as preservation of open space for the scenic enjoyment of the general public with a significant public benefit. Hillside and ridgetop lands might similarly qualify.

Agricultural land would most likely qualify under the "open space" category if there is a strong governmental policy. It could also qualify as preservation of open space for the scenic enjoyment of the general public with a significant public benefit. Some wetlands areas contained within farming properties might qualify as habitat.

ATTORNEYS AND LAND TRUSTS

Attorneys involved in the formation of land trusts would do well to consult *Forming, Operating and Obtaining Tax Exemption for Utah Non-Profit Corporations*, an outline with forms for the creation of non-profit corporations, available from the Utah Arts Council and a project of Utah Lawyers for the Arts, and *Starting a Land Trust*, available from the Land Trust Alliance.

After the corporation is formed, 501(c)(3) status is obtained by filing Form 1023 Application for Recognition of Exemption, Form 872-C Consent Fixing Period of Limitation, and Form 8718 User Fee for Exempt Organization Determination Letter Request, with the aid of Publication 557 Tax Exempt Status for Your Organization, from the Internal Revenue Service. Form SS-4, Application for Employer Identification Number must also be filed. State income tax and sales tax exemptions are available by filing Form TC-190 with the State Tax Commission.

Prior to fundraising, the organization should comply with the Utah Charitable Solicitations Act, registering with the Division of Consumer Protection of the Utah Department of Commerce, by filing the Charitable Organization Permit Application Form.

A land trust may also desire to obtain a non-profit Bulk Mail Permit using PS Form 3624 Application to Mail at Special Bulk Third-Class rates from the U.S. Post Office. Direct Mail Manual Section E371 deals with this non-profit permit application.

Generally, the State Tax Commission, Post Office and Department of Commerce all like to see the 501(c)(3) letter from the Internal Revenue Service prior to making their final determinations. It is therefore important to make the 501(c)(3) application shortly after incorporation. It may take 6 months or more to receive the 501(c)(3) letter from the Internal Revenue Service.

Attorneys assisting land trusts in conservation easement issues should consult the *Conservation Easement Handbook*, *Appraising Conservation Easements* and the *Federal Tax Law of Conservation Easements*, all available from the Land Trust Alliance.

Successful land trusts have made significant contributions in the quality of life in their communities. Lawyers in Utah in their professional roles and as concerned citizens have and will provide similar benefits to future Utahns.

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Utah's Land Trusts

Summit Land Preservation Association
P.O. Box 680921
Park City, UT 84068
801 649 0220

Virgin River Land Preservation Association
P.O. Box 1804
St. George, Utah 84771-1804
801 674 1074

Ten Tips for Effective Negotiation

By Patricia A. O'Rorke

1. UNDERSTAND THE CLIENT'S OBJECTIVES.

Defining the client's objectives is the first step to effective negotiation. This involves more than simply asking a client what the client wants or pursuing the relief prayed for in a complaint.

First, the attorney must understand the client's business thoroughly. This may require background research, study of the corporate records, and discussions with the client's accountants and employees. If the attorney knows the business well enough to think about it the same way the client does, she can help the client identify proposals that are truly valuable to the business.

Second, the attorney should discuss all possible solutions with the client. In preparing for negotiation, both attorney and client should analyze all of the disputes between the parties, identify and separate the issues, and frame the issues for resolution. Negotiation need not be limited to litigation issues and remedies. Licenses and other business arrangements can be proposed. In addition, non-monetary considerations like an apology, a confidentiality agreement, or a joint press release can be extremely valuable to a client.

PATRICIA A. O'RORKE has practiced law since 1976. She concentrates her practice in civil litigation and appeals, specializing in the resolution of complex disputes involving commercial, intellectual property and antitrust issues. She is a member of the AAA National Panel of Arbitrators, a Director of the Central Utah Project, and the President of Patricia A. O'Rorke & Associates at 6995 Union Park Center.

Third, the attorney should have a frank discussion with the client concerning the services the client expects her to perform. Some clients want to be actively involved in the discussions, with the attorney acting strictly as a legal advisor. Other clients want the attorney to conduct the negotiation, and may or may not want to be consulted in the process. The personalities and relationships of the client and the other parties to the negotiation may make it advantageous or disadvantageous for the client to participate personally.

If the negotiation involves tax, securities or other complex issues, it may be helpful for the client's accountant, chief financial officer, or an outside expert to participate. Of course, the inclusion of additional personnel on one side will probably prompt the other parties to bring their own experts to the bargaining table. It is important to think through and discuss the effect that each alternative will have on the negotiating process, and to obtain a clear understanding of the client's expectations before discussions begin.

Fourth, the attorney should fully understand the scope of her authority before initiating the negotiation. The client, not the lawyer, should define the bottom line — the point where continued litigation or the status quo is an acceptable alternative to a negotiated agreement. At some point, litigation is preferable to settlement, and no deal is preferable to the available deal. This is a decision only the client should make.

Finally, it is essential to keep the client fully informed. The client should approve each proposal before it is communicated to the other parties, and each proposal made by the opposing party should be conveyed to the client. Understanding the client's objectives is not only the first step to successful negotiating, it is essential to effective and continuing representation.

DO:

- Analyze all possible solutions with the client

- Get a clear agreement on your role and the scope of your authority

DON'T:

- Initiate negotiations or make or reject proposals without consulting the client
- Limit negotiations to litigation issues and remedies

2. FIND OUT WHAT THE OTHER PARTIES WANT

It is amazing how often lawyers will make settlement proposals without even asking what the other parties want. This information is usually not difficult to discover. The attorney can call opposing counsel and ask what the other parties want, or the client can ask the opposing parties directly or through a mutual contact. The opposing parties may not respond immediately, but the question will inevitably prompt positive thinking about a negotiated resolution.

It is, of course, important to listen when the other parties disclose their objectives. By listening carefully to their statements and proposals, an effective attorney can learn what the disputants hope to accomplish through the negotiation.

The objectives of each party are not the subject of the negotiation; they are only a beginning point. Once the attorney knows the other parties' objectives, the next step is to craft a proposal that satisfies the expressed needs of all parties to the extent possible.

DO:

- Ask what the other parties want
- Listen when they tell you

DON'T:

- Fear that you will lose face if you raise the possibility of settlement
- Argue about the other parties' objectives

3. BE PREPARED.

An attorney should never begin negotiating until she thoroughly understands her client's objectives, the role her client expects her to play, and the information required for effective negotiation. At that point, the attorney can contact opposing counsel to inquire about the other parties' objectives and interest in negotiation.

If the disputants are willing to negotiate, a few ground rules should be established. A written confirmation that the negotiation will remain confidential and inadmissible should be obtained, and the authority of the persons who will negotiate for the other parties should be determined. An attorney should never attend a negotiating session without knowing in advance who will attend on behalf of the other parties and what authority they will have to negotiate or enter an agreement.

Preliminary discussions about how the other parties want to conduct the negotiation and what they want to accomplish can be very informative. If, for example, the opposing parties want to bring tax advisors to the first meeting, they are probably concerned about tax issues.

If opposing counsel refuses to meet at your office opposing counsel may be overly concerned with image and positioning. Rather than engaging in a tug-of-war about the location of the negotiation, an effective attorney moves forward and uses the information the other side conveys in scheduling the meeting to prepare for it.

"Don't [n]egotiate with someone who lacks authority."

DO:

- Understand the client's objectives and your role and authority
- Establish the ground rules on confidentiality, inadmissibility and authority

DON'T:

- Negotiate with someone who lacks authority
- Get stuck on preliminary details

4. MAINTAIN A PROFESSIONAL DEMEANOR.

Many attorneys who have no trouble maintaining a professional demeanor in court proceedings find it difficult to do so in negotiation. Some are rude and aggressive, others too friendly and talkative.

Negotiation is neither a war nor a social occasion. It is just part of a lawyer's job. The more prepared the attorney is for the negotiation, the less trouble there will be in maintaining a professional demeanor.

Power in negotiation lies not in personalities but in preparation, knowledge, communication, commitment and credibility. A relaxed, confident demeanor and sense of humor are much more powerful

negotiating tools than rudeness or obsequiousness.

An effective attorney will use clear, neutral language in speaking and writing. She will insist that courtesy and respect be extended to every person involved in the negotiation, including those who are not present. Deprecation of any party should not be tolerated. Certainly, an attorney should never permit her client to be disparaged in her presence.

Conversations about specific issues may become heated, but they do not need to become personal. If emotions rise, there is no need to respond in kind. A break or another meeting with a different format will relieve the tension and provide further time for preparation and consultation with the client.

An attorney should avoid mannerisms that convey a sense of weakness. Some people have a tendency to use apologetic words that can be construed as admissions of weakness. When the other parties make a point or asks for something, the thing to do is to respond directly and without apology.

An attorney should never discuss her own shortcomings or lack of experience. If the attorney is only a first-year associate or has little experience on the subject of the negotiation, there is certainly no reason for her to mention it. Lack of experience will not matter as long as one is prepared and does not make it an issue.

"[L]istening is a skill that few attorneys master."

No matter how stressful a negotiation may become, an effective attorney will always maintain a professional demeanor for her client's benefit. A relaxed and confident demeanor helps to maintain the client's confidence. The client will be relying on the attorney for guidance through the process of negotiation. If the client perceives that the attorney is unable to handle the pressure of a long negotiation, the client's confidence in the attorney will break down and the attorney's ability to act as an effective negotiator will disappear.

If the negotiation becomes protracted, the attorney should make appropriate arrangements for food and rest. It is rarely necessary to make important decisions under pressure.

DO:

- Use clear, neutral language
- Insist on courtesy and respect

DON'T:

- Apologize
- Let yourself or your client be pressured

5. MAKE SPECIFIC PROPOSALS.

The quickest path to a clear agreement is a clear proposal. Making a specific proposal that the client is willing to accept as a final settlement of the matter will focus the discussion on possible solutions rather than the underlying problems.

An opening offer is not the bottom line and the other parties will surely know that. But once a specific proposal is made, the burden shifts to them to respond with a counterproposal or rejection. Specifying a time when the offer will expire puts the burden squarely on the offerees.

If the other parties do not make a counteroffer within a reasonable time, then it is probably a waste of time to continue negotiating. The client must decide when litigation or other alternatives to negotiation are more palatable than settlement, but it is rarely advisable to bargain against yourself with repeated offers if the other parties do not present a reasonable counteroffer.

DO:

- Make a specific proposal that your client will accept

DON'T

- Bargain against yourself

6. LISTEN ACTIVELY.

A two-way flow of communication can only occur if the parties listen to each other. But listening is a skill that few attorneys master.

An attorney who comes to a negotiating session with the intent of listening more than talking will serve the client well. Listening is not a passive process. It requires close attention to the verbal and non-verbal messages the other parties are trying to convey. An effective negotiator will limit distractions and create an environment for two-way communication. It is usually helpful to confirm your understanding of the other parties' position by repeating or paraphrasing their points. This will increase their commitment to the negotiating process.

It is helpful to take notes of important points, but excessive record keeping interferes with active listening. Non-verbal messages are as important as words.

Many attorneys are argumentative listeners. They listen not to understand, but to rebut. Rather than listening to the entire message, they only listen to the part they disagree with. Then they shift all their attention to their own rebuttal.

Interruptions can be very annoying to someone who is trying to be understood. The goal is not to argue with everything the other parties say, but to listen, understand, and then respond.

DO:

- Listen actively
- Confirm your understanding by repeating or paraphrasing the other parties' points

DON'T:

- Interrupt
- Argue with everything the opposing parties say

7. GET A CLEAR AGREEMENT.

It is always a mistake to sidestep difficult issues or gloss over areas of dispute.

When agreement is reached on one point or the entire dispute, an effective attorney will spell out the areas of agreement and disagreement. Sweeping issues under the rug only leads to trouble later.

Preparing a letter agreement for signature sometimes reveals issues that have not been fully resolved. When this happens, a frank discussion of the unresolved issues is essential. Until there is a signed agreement in writing, the negotiation is not over.

DO:

- Spell out the areas of agreement and disagreement
- Prepare a letter agreement for signature

DON'T:

- Sidestep difficult issues
- Gloss over areas of dispute

8. CONTROL THE DOCUMENTS.

An effective attorney will draft the final documents reflecting the settlement or transaction. The documents should state the terms of the agreement clearly and accurately. They should spell out unambiguously what each party is obligated to do, the time for each party's performance and the consequences for each party's failure to perform. The terms should not be any more complex than the settlement requires. The parties should have no doubt when they read and sign the documents what they are required to do and what will happen if they don't.

It is worth the time and expense required for careful drafting. Ambiguous or sloppy draftsmanship can jeopardize the entire agreement.

Overreaching is a cardinal sin. The documents should never contain any provision on which the parties did not expressly agree during the negotiation. If new issues come to light in the course of drafting the documents, the attorney should consult with her client and then contact the other parties to the negotiation to work out those details. This will take a little more time, but it will preserve the attorney's credibility and the parties' commitment to perform the agreement.

In addition to being precise, the documents should be timely. Even agreements reached in good faith can be sabotaged by seller's remorse and buyer's heebie-jeebies. Changing circumstances and advice from third parties may cause a party to renege on the deal. Once there is a clear agreement, the papers should be drafted and executed as quickly as possible.

DO:

- Draft the final documents promptly
- Define what each party must do, the time for each party's performance, and the consequences of non-performance

DON'T:

- Let sloppy or ambiguous drafting jeopardize the entire agreement
- Include any provision on which the parties did not expressly agree

9. CLOSE THE DEAL

Just as a used car salesman is trained to get the buyer into the car and have him drive it off the lot, an effective attorney will train herself to get the full consideration promised to her client. It does no good for an attorney to litigate and negotiate with consummate skill unless the client obtains the benefit of the bargain. It is crucial for the attorney to follow up to be sure the deal is closed.

A "to do" list should be prepared when the final agreement is executed. When possible, a closing can be scheduled and the parties can exchange the necessary payments and documents simultaneously. The closing or other dates for performance of a negotiated agreement should be docketed and observed in the same manner as court hearings and deadlines for filing briefs.

When the deal is truly "closed", the attorney should review the negotiation and agreement with the client to confirm that her representation met the client's objectives and expectations. This is also an appropriate time to discuss continuing representation of this client.

DO:

- Prepare a "to do" list
- Follow up to be sure both parties perform the agreement
- Review the representation with your client

DON'T:

- Put the file away until the deal is closed.

10. REMEMBER THE NEGOTIATION IS NOT ABOUT YOU.

The ability to identify and separate one's personal values from the issues being negotiated is essential to the professional representation of a client in the negotiation process. Whether the negotiation is conducted in the context of deal making or dispute resolution, the objective is to obtain an agreement that is in the client's best interest, not to prove the attorney's personal worth. Attorneys get what they negotiate, not what they deserve.

Negotiation is part of the job of being a lawyer. It requires professional skill and training to identify and resolve issues and draft an enforceable agreement.

Lawyers who believe that the object of negotiation is to display their aggressiveness or other personality traits or to win new friends and admirers are poor negotiators. Their personal insecurity inevitably hampers their ability to listen and communicate.

In comparison, attorneys who focus on understanding the client's objectives, finding out what the other parties want, preparing and presenting specific proposals, and reaching clear agreements are effective negotiators.

DO:

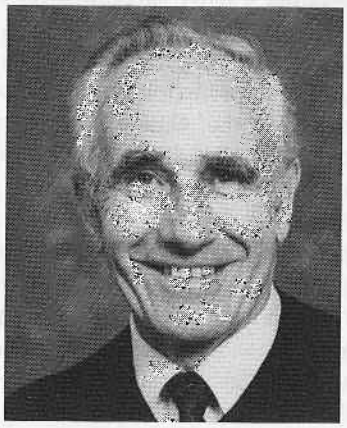
- Focus on the client's objectives
- Separate your personal values from the issues being negotiated

DON'T

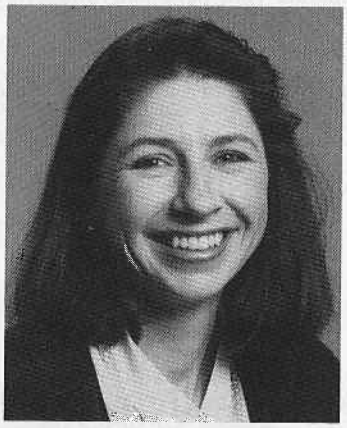
- Get involved in a personality contest

1994 Annual Awards

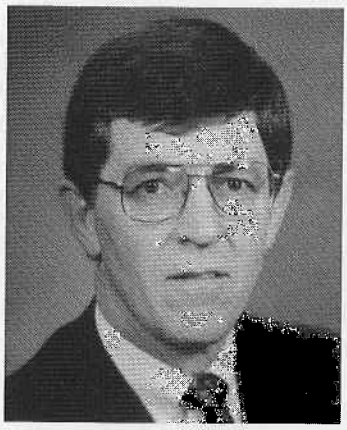
The Annual Awards of the Utah State Bar are presented by the Board of Bar Commissioners on behalf of the entire Bar membership. Recipients are selected on the basis of achievement; professional service to clients, the public, courts, and the Bar; and exemplification of the highest standards of professionalism to which all judges and lawyers aspire



Hon. John A. Rokich
Judge of the Year



Colleen Larkin Bell
Distinguished Young Lawyer of the Year



Ray O. Westergard, CPA
Distinguished Non-Lawyer for Service to the Profession

Stephen B. Nebeker
Utah Trial Lawyer of the Year

Joseph Novak
Distinguished Lawyer of the Year

Nelda M. Bishop
Distinguished Pro Bono Lawyer of the Year

Ethics Advisory Opinion Committee, Chair Gary G. Sackett
Distinguished Committee

Discipline Corner

ADMONITIONS

On May 5, 1994, an attorney was Admonished for violating Rules 1.3, DILIGENCE, and 3.2, EXPEDITING LITIGATION. A domestic relations case was settled in March, 1993. It was the duty of the Respondent to prepare the proposed Findings of Fact, Conclusions of Law or Decree of Divorce. However, the Respondent never prepared the documents. Consequently, the client retained new counsel who completed the work in August, 1993.

An attorney was Admonished pursuant to a Discipline by Consent based upon a conviction of two class B misdemeanors. The attorney also agreed to perform 200 hours of pro bono legal services. The offenses were unrelated to the practice of law and did not involve a client or the Respondent's status as an attorney or in any other way reflect upon the attorney's fitness to practice law.

On June 24, 1994, an attorney was Admonished, based upon the recommendation of a Screening Panel of the Ethics and Discipline Committee, for violating Rules 1.8(a) and 8.4(d) (CONFLICT OF INTEREST) of the Rules of Professional Conduct. The panel found that the lawyer borrowed a portion of the settlement proceeds from his client in a personal injury case, without advising the client of his right to have a disinterested attorney review the transaction, and without obtaining the client's written consent to that transaction. Thereafter, the lawyer has failed to repay that loan to the client. The client then obtained judgment against the lawyer for the amount of the loan, which the lawyer failed to satisfy. In mitigation, the panel found that the lawyer had vigorously represented the client and members of the client's family in other, unrelated actions, performing a significant amount of work in excess of the amount for which the lawyer billed those clients.

An attorney was Admonished by a Screening Panel for lack of diligence in violation of Rule 1.3 (DILIGENCE) of the Rules of Professional Conduct for failing to exercise reasonable diligence in the representation of a client in two civil cases and one criminal matter. In one case the attorney failed to file a motion to dismiss, in another the attorney failed to file an Answer, and in the criminal case the attorney failed to pursue a habeas corpus petition as requested by the client. However, the attorney rectified all of the problems without further cost to the clients.

A Screening Panel of the Ethics and Discipline Committee voted to Admonish an attorney for violating Rule 1.3 (DILIGENCE) and Rule 1.4 (COMMUNICATION). The attorney was consulted by the client in January 1991, regarding a tort action on a contingency fee basis. Thereafter, the attorney failed to provide any meaningful legal services or notify the client that the attorney had decided not to accept the case. The attorney also failed to return the client's phone calls.

PUBLIC REPRIMAND

On May 18, 1994, the Utah Supreme Court approved the recommendation of the Hearing Panel of the Ethics and Discipline Committee that Donn E. Cassity be publicly reprimanded, placed on probation for six months, and that he make restitution to his clients in the amount of $20,000.00 for violating Rule 8.4(c) (MISCONDUCT), of the Rules of Professional Conduct. The substance of the misconduct was that Mr. Cassity unilaterally abrogated a fee agreement after his clients' case had been settled and during which time he had custody of the funds from the settlement. The initial agreement was that Mr. Cassity and the clients would share equally in the proceeds. However, Mr. Cassity, having previously forgiven a sizeable fee, elected to apply the entire amount recovered on behalf of his clients toward his fee previously forgiven.

DISBARMENTS

On May 24, 1994, The Third District Court entered an Order disbarring Gerald R. Hansen. Mr. Hansen was disbarred for multiple violations of Rules 1.3, 1.4(a), 1.5(a), 8.1(b), 8.4(c) and 8.4(d). The Court found that Mr. Hansen repeatedly accepted fees from clients and then performed no significant legal work. He also misrepresented the status of cases to the client to avoid complaints. The Court also ordered Hansen to pay restitution.

On or about June 22, 1994, the Third District Court entered an Order, effective May 11, 1994, disbarring Dale R. Kent. Mr. Kent was disbarred for violations of RULE 1.13(a), 8.4(a), 8.4(b) (two counts), and 8.4(c). The Court found that Mr. Kent had misappropriated client funds (approximately $160,000) to his own use over an extended period of time. Mr. Kent also pled guilty to one count of Bank Fraud and one count of Filing a False Tax Return. The Court also ordered Kent to pay the Bar's costs incurred in prosecuting this matter.

Clerk's Office of the U.S. Court of Appeals to Move

The Office of the Clerk, United States Court of Appeals for the Tenth Circuit, will move to new quarters June 27, 1994. It is moving from offices in the Byron Rogers United States Courthouse, 1929 Stout Street, to facilities in the former main branch of the downtown United States Post Office.

The new address for the clerk's office will be:

United States Court of Appeals for the Tenth Circuit
Office of the Clerk
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Mail sent to the clerk's office should be addressed to the new location beginning June 27. The telephone number for the clerk's office will remain the same — 303/844-3157.

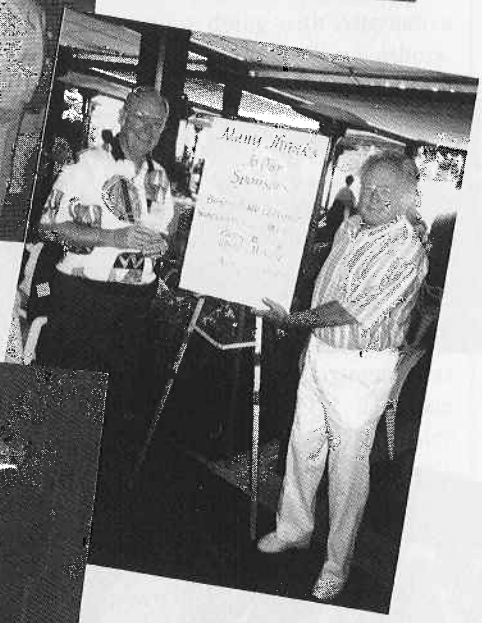
Jewelry Found

Found at the Admissions Ceremony held at the Federal Court House on May 17, 1994 a piece of jewelry. Call Kathleen at 524-5211 and identify.

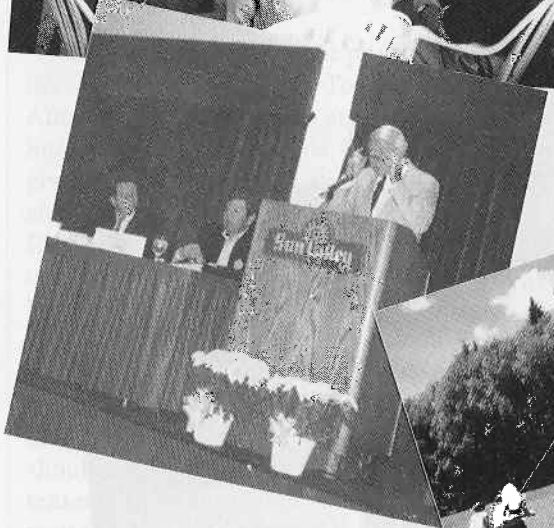
1994 Utah State Bar Annual Meeting in Sun Valley


Sun Valley


Utah State Bar




Sun Valley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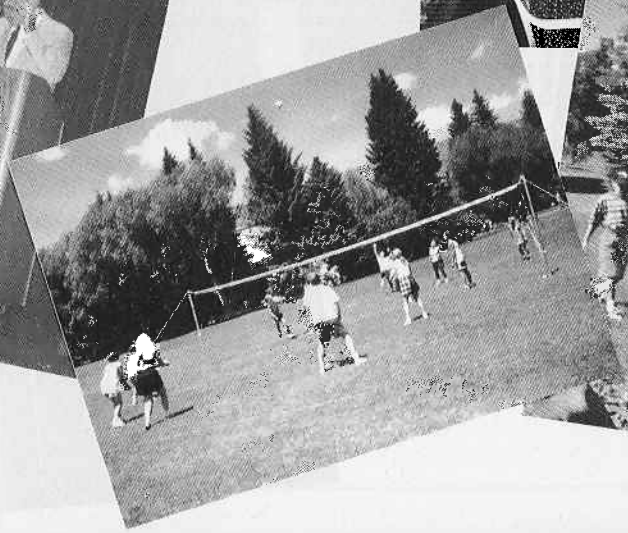

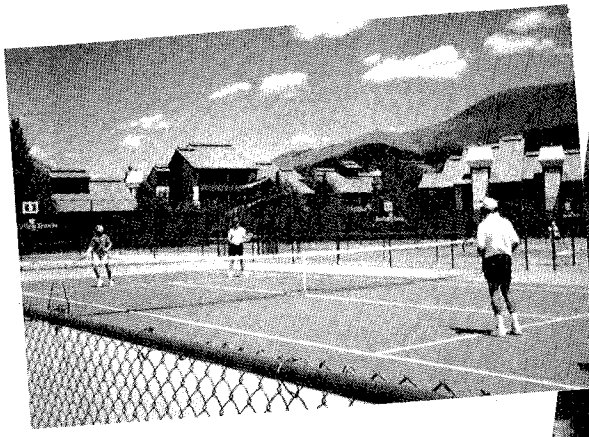


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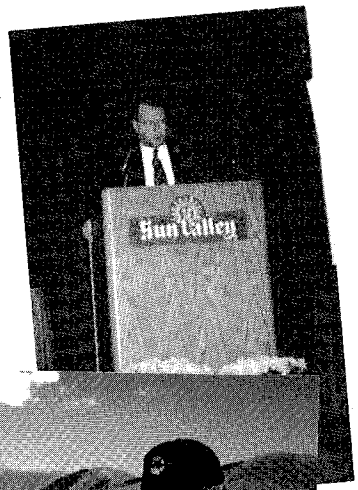
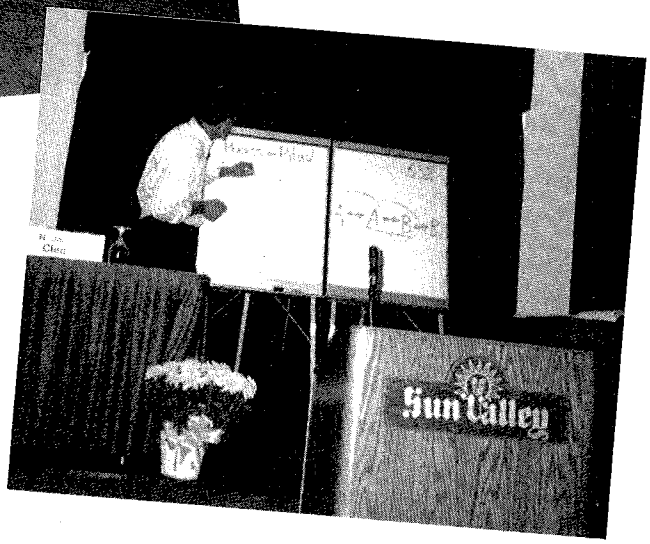

Sun Valley


Snow, Christensen & Martineau


Sun Valley

Former Chief Justice of Utah Supreme Court Heads ADR Practice Group

Gordon Hall, Former Chief Justice of the Utah Supreme Court is taking a kinder, gentler approach to the law. Mr. Hall was recently named to direct the new Alternative Dispute Resolution Practice Group at Snow, Christensen & Martineau, one of Utah's oldest and largest law firms. In making the announcement, Senior Partner Harold G. Christensen said, "There is a growing need for all kinds of clients to find alternatives to the time, expense and emotional stress of the litigation system."

"The courts should be used as a last resort," says Hall, "No matter how fair a court's decision might be, there are often bad feelings on one side or the other. Obviously there are situations where a court's decision is the only practical answer such as in criminal cases and constitutional issues, but in most civil matters such as divorce, collections, contract disputes and others, negotiation and mediation is the sensible way to go."

Hall, a 17-year veteran justice of the Utah Supreme Court says, "Arbitration, negotiation and mediation have always been part of a lawyer's job. The difference with the new Alternative Dispute Resolution Practice Group at Snow, Christensen & Martineau is that we are formalizing the process. The new practice group provides a forum with highly qualified and experienced lawyers where all kinds of clients can talk things out first, hopefully avoiding the expense and strain of a court proceeding."

"Mr. Hall's experience in private practice, as a prosecutor and as Tooele County Attorney, as a trial judge and as a Utah Supreme Court Justice and Chief Justice give him unique qualifications to render an invaluable service to our clients," said Christensen. In addition to Hall, three other Snow, Christensen & Martineau lawyers will participate in the new practice group, Harold Christensen, David W. Slaughter and Scott Daniels. "We strongly encourage negotiation and mediation as an alternative." We think more law firms should do the same," added Mr. Christensen, "Alternative Dispute Resolution may facilitate earlier and less costly resolutions to more than 18 million civil cases filed in state courts annually."

"After a divorce is over, you still have to live with yourself, what's inside of you and what you know is inside someone else." Former Chief Justice Hall says, "Couples that follow through the legal process to a bitter divorce often never get over it. It affects so many people . . . especially the members of their immediate families. Business disputes can also be devastating. The fact is, our business associations are still pretty close in Utah. We run into those people all the time. Chances are, if you're in business, you're still going to have to do business with the same people you were in court with. When you gravely need a fan . . . . and it turns out to be one of your old enemies from court . . . it's not too good."

"If what we are doing with Alternative Dispute Resolution rubs off on others, sobeit! We're happy about that. We're going to carry the message to other firms and the general public," says Hall. The new Alternative Dispute Resolution Practice Group at Snow, Christensen & Martineau plans on dealing with several areas of practice including commercial disputes, leasing, property, real estate, construction, and contracts of all kinds.

Snow, Christensen & Martineau was organized in 1886 by Samuel R. Thurman who, like Gordon Hall, served as Justice on the Utah Supreme Court. The firm's 50-plus lawyers handle a wide variety of law practice areas. The firm is located in the historic Newhouse Building on Exchange Place in Salt Lake City.

Job Announcement

TRIAL COURT EXECUTIVE, Utah State Courts. Duties: Provides administrative support to judges in the 3rd Judicial District. Directs support operations of courts. Liaison with government agencies, the legislature, the state bar, and the news media. Represents the judicial district on administrative task forces. Qualifications: Graduate degree in administration or law plus four years of related experience or equivalent combination of education and experience. Salary: $35,913 to $43,430; above $43,430 subject to exceptional qualifications. Generous benefits. Closing Date: August 30, 1994. For complete job description and application contact: Administrative Office of the Courts; 230 So. 500 E. #300; SLC 84102. Phone: 578-3800. The Utah State Courts is an equal opportunity employer.

ANNOUNCEMENT

A position for an attorney member of the Judicial Performance Evaluation Standing Committee of the Utah Judicial Council will be vacant in October, 1994. The committee is responsible for developing the components of the judicial performance evaluation program used for the self-improvement of judges and certification for retention election. Attorneys interested in serving on the committee should contact Tim Shea, Administrative Office of the Courts, 230 South 500 East, Suite 300, Salt Lake City, Utah 84102 (578-3808) by August 26, 1994.

Pet Overpopulation and Animal Cruelty in Utah

Wasatch Humane Sets First Conference to Address the Issues

Pet overpopulation and animal cruelty are persistent yet often overlooked tragedies facing our rapidly growing state. The state's 20+ public and private animal shelters euthanize more than 50,000 healthy cats, dogs, kittens and puppies each year, at the expense of taxpayers and charitable donors. To address these and related issues, Wasatch Humane will sponsor the state's first annual "Companion Animals in Crisis Conference" on September 17, from 8:30 to 4:30 at the Sugarhouse Garden Center.

Companion Animals in Crisis is a one-day conference focusing on the tragic consequences of overbreeding and the impact of pet overpopulation on the animals, taxpayers, and shelter workers, and what Utahns can do to be part of the solution here in our own communities.

In addition to children, animals are the most vulnerable victims of neglect and cruelty. Studies document the correlation between animal abuse and child abuse. Yet animal abuse cases often are simply treated as misdemeanors. There has never been a conviction of an offender in our state. Speakers at this conference will therefore suggest that incidents of animal abuse not be summarily dismissed by parents, teachers, and law enforcers.

Scheduled panel topics and speakers include:

"Where Puppies and Kittens Come From and Who Pays?"
–Wasatch Humane
–Ogden Animal Control
–Salt Lake County Animal Services
–Salt Lake County Commissioner

"Animal Cruelty in Utah: Its Prevalence and the Link to Child Abuse"
–Frank Ascione, Ph.D., Psychology Dept., Utah State University

"Defining Cruelty to Animals and What Citizens Can Do"
–John Fox, Principle Cruelty Investigator, Humane Society of Utah

"The Obligation of the Veterinarian in Reducing Pet Overpopulation
–John Martin, DVM, Bountiful Small Animal Hospital
–Eric Belnap, DVM, Sugar House Veterinary Hospital
–Richard Allen, DVM, Pet Stop

"My Talk with a Moose: A Case for Animal Rights"
–Ed Firmage of the University of Utah College of Law

"Reversing the Tragic Trend: Various Solutions"
"Fix Them or Kill Them"
–Mary Hirro, Las Vegas Animal Foundation
"A Responsible Breeding Ordinance"
–Mitchell Fox, Progressive Animal Welfare Society, King County, WA

Everyone is invited: all who are concerned about the protection of companion animals, the impacts of pet overpopulation, and learning how to solve the problem. Cost is $10 if registration is received by August 10; $15 after August 10. Lunch is included.

Wasatch Humane is a Utah non-profit organization dedicated to promoting humane attitudes, awareness and actions toward all species through education. Throughout its 10 years, its volunteer educators have offered free, fun lessons in Utah classrooms, reaching thousands of Utah school children with the message, "Be Kind to Animals." Additionally, Wasatch Humane has rescued hundreds of homeless, starving and injured pets at its shelter in Bountiful. Space is limited to only those animals that need special care and rehabilitation or those rescued from hardship and emergency situations. Volunteers then work to place these pets through its successful adoption program at the various PETsMART stores. WH also offers low-cost spaying and neutering services through participating veterinarians, as we know that spaying/neutering is the only reasonable and effective solution to solving the pet overpopulation problem and thereby saving tax dollars currently spent by all Utahns to control the problem. Importantly, Wasatch Humane does not euthanize healthy animals.

Call Wasatch Humane at 299-8508 or 486-6210 for more information, to make reservations for the conference, to volunteer or donate.

PUBLIC NOTICE

The Fifth District Court and the Fifth District Juvenile Court located at the Cedar City Hall of Justice, 40 North 100 East, Cedar City, Utah will be moving on July 1, 1994 to a different location. The courts will move temporarily to the Utah Department of Transportation, District Five Headquarters at 1470 Airport Road, Cedar City, Utah. The courts will remain at the temporary facility for about one year while remodeling takes place at the Hall of Justice.

United States District Court for the District of Utah

Public Notice

Reappointment of Incumbent Part-Time Magistrate Judge

The current terms of the following part-time magistrate judges serving the United States District Court for the District of Utah will expire as indicated: *Patrick H. Fenton, Cedar City, Utah, May 2, 1995, and Ray E. Nash, Vernal/Roosevelt, Utah, May 2, 1995.* The Court is required by law to establish a panel of citizens to consider the reappointment of each magistrate judge to a new four-year term or such other term as provided by law.

The duties of a part-time magistrate judge include the conduct of preliminary proceedings in criminal cases, the trial and disposition of certain misdemeanor cases, and the conduct of various pre-trial matters as directed by the Court.

Comments from members of the Bar and the public are invited as to whether the panel should recommend to the court that these two incumbent part-time magistrate judges be reappointed. All comments will be held in confidence and should be directed to:

Markus B. Zimmer
Clerk of Court
United States District Court
for the District of Utah
120 Frank E. Moss U.S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101

Comments must be received no later than Friday, October 21, 1994.

Needs of Children Committee Produces Book

The Needs of Children Committee announces the publication of *Your Rights and Responsibilities as a Young Person in Utah.* The Needs of Children Committee, along with the group, Utah Children, spent two years planning, researching, drafting and editing this book.

The book, written on a junior high school reading level, is designed to inform young people about their legal rights. The book includes sections on a young person's rights in the community, in foster care, in institutional care, in the courts, in the family and in school.

The book will be published in September and will be available in local bookstores and libraries as well as at agencies and centers serving young people.

In the Third Judicial District Court Salt Lake County, State of Utah

In accordance with Rule 6-401, Code of Judicial Administration, it is hereby ordered, effective immediately, that parties seeking to intervene in a domestic relations case for the sole purpose of collecting delinquent child support on behalf of the custodial parent shall present Motions for Joinder or Intervention directly to the assigned judge. These matters are not to be noticed for hearing before the Domestic Relations Commissioners.

Dated this 27th day of July, 1994.

Bar Member Pace McConkie Honored by NAACP

The National Association for the Advancement of Colored People, through its Legal Department, recently honored Pace Jefferson McConkie as the NAACP staff attorney of the year with the presentation of an award at the 85th NAACP National Convention earlier this month in Chicago, Illinois. The award was presented to Mr. McConkie at the Clarence M. Mitchell, Jr. Memorial Lecture Luncheon by NAACP General Counsel Dennis Courtland Hayes in appreciation for outstanding legal services rendered on behalf of the NAACP and the advancement of NAACP objectives through legal processes.

Mr. McConkie joined the NAACP Legal Department in 1991 and serves as an assistant general counsel. He is primarily responsible for the public education cases on the NAACP legal docket and represents the NAACP in numerous school desegregation and equal educational opportunity cases across the country. Over the past year, he has led NAACP legal efforts to eliminate the remaining vestiges of discrimination and segregation in prior segregated school systems, initiated cases to remedy educational programs and practices which have an adverse or discriminatory impact on minority students, and challenged states whose school funding practices have a disparate racial impact. His cases are in state and federal courts in such jurisdictions as Florida, Delaware, Michigan, Maryland, Massachusetts and New York.

In addition to litigation, Mr. McConkie advises NAACP branches and state conferences on issue regarding public education and civil rights and acts as counsel for the NAACP's southwest region. He is a 1984 graduate of the University of Utah and obtained his J.D. from the University of Arkansas at Little Rock in 1987. Prior to joining the NAACP Legal Department, he practiced with a law firm in the Washington, DC area. He also served a two-year judicial clerkship with Justice Richard C. Howe of the Utah Supreme Court.

Lawyers Run, Steal & Cheat to Benefit Utah Legal Services and Legal Aid Society

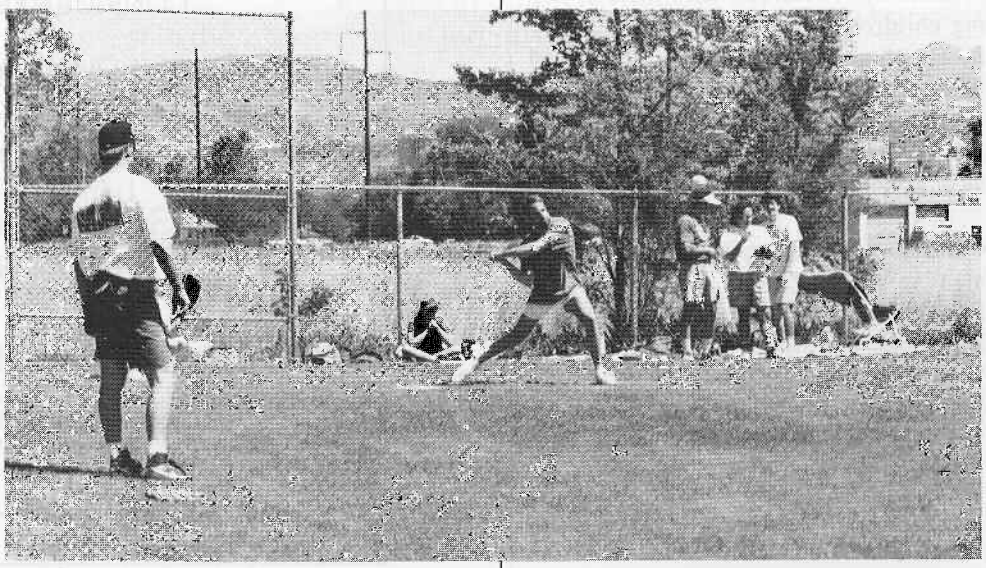
Participants in the Third Annual Run, Steal & Cheat Softball Tournament raised $3,243.50 to benefit Utah Legal Services and Legal Aid Society of Salt Lake. Due to a scheduling innovation new to this year's tournament, three "tri-champions" were named at the May 21, 1994, event. (Although a real crowd pleaser, the special innovation will not be incorporated in next year's tournament plans.) The three winning teams were first time participants Trask, Britt & Rossa ("TBR"), defending champions Ray, Quinney & Nebeker ("RQN") and lawyer league powerhouse, the Office of the Attorney General. The money raised at the tournament funds the student intern program and other vital programs offered by Utah Legal Services and Legal Aid Society.

The object of the Run, Steal & Cheat Tournament is to raise funds by sanctioning play that would ordinarily fall outside regulation softball rules. Teams are encouraged to buy extra home runs, walks, outs, errors and time-outs. In a game against RQN, Bill Britt, a stand-up player for Team TBR, proved that a game could not be extended indefinitely by cheating, but came close to the goal. In an expensive effort to keep a ball in play, TBR explored the limits of game extension through a clever combination of purchases. Using strategy worthy of a major league general manager, Britt and Team TBR used a combination of every cheating method allowed within one inning to keep a ball in play and extend TBR's turn at bat. TBR's eventual victory over RQN can be attributed to heads-up ball playing or the ten extra runs purchased at a price of $100.00 before the game even started.

Van Cott, Bagley, Cornwall & McCarthy retained the distinction for the third consecutive year as the team that cheats the most lavishly without actually winning. Teams from Parsons Behle & Latimer, Utah Legal Services, Legal Aid Society and Kimball, Parr, Waddoups Brown & Gee also participated in the tournament. Jeffrey J. Hunt and Robert W. Payne, team captains of the Kimball Parr and Van Cott teams, respectively, also proved themselves to be especially imaginative and adroit "cheaters."

The Pro Bono Committee of the Young Lawyers Division sponsors the Run, Steal & Cheat tournament. Many participating teams utilize the tournament as a pre-season practice and warm-up for the lawyers' league summer softball season. Proceeds from the tournament consistently increase each year as participants develop more inventive applications for the "cheating" rules and expand their "cheating" budgets in an attempt to guarantee victory. As Kimball Parr team captain Jeff Hunt aptly commented, "who needs talent when you have a checkbook?"

The following sponsors contributed goods and services which were raffled to tournament participants: Anatomy Academy, Brackman Brothers Bagel Bakery, King's English Book Shop, Peery Pub Cafe, Squatters and Swire Pacific Holding, a regional Coca-Cola bottler. Many thanks to all who participated and contributed to the success of this year's tournament.



Colleen Bell
Young Lawyer of the Year

The Executive Council of the Young Lawyers Division recently named Colleen Bell as the recipient of the Young Lawyer award. The Young Lawyer of the Year award is presented annually to an attorney who has excelled in the legal profession while providing extensive service to the community. Ms. Bell, a 1988 graduate of the University of Utah College of Law, is currently serving as chair of the Division Needs of Children Committee of the YLD.

During the past year Ms. Bell has organized and directed various activities for the Needs of Children Committee. In conjunction with the Ogden Prevention of Child Abuse Council, the committee has worked on a "Don't Shake Babies and Children Campaign." The goal of this campaign is to educate the public on issues involving child abuse by airing television and radio public service announcements. The committee, working with the Court Administrators Office, has also trained volunteer attorneys to act as guardian ad-litems for divorces where there have been no allegations of abuse. In addition to these ongoing projects, the committee has undertaken several short-term projects for children of the community. These activities include taking children from the Big Brothers/Big Sisters organization to hockey games and hikes (with an upcoming Buzz game in the works). The committee has also sponsored a dinner for sick children residing at the local Ronald McDonald house.

In addition to chairing the Needs of Children Committee, Ms. Bell is also a member of the Administrative Practice, Bankruptcy, Energy and Natural Resources, and Litigation sections of the Utah State Bar. Ms. Bell is currently a staff attorney at Questar Corporation.

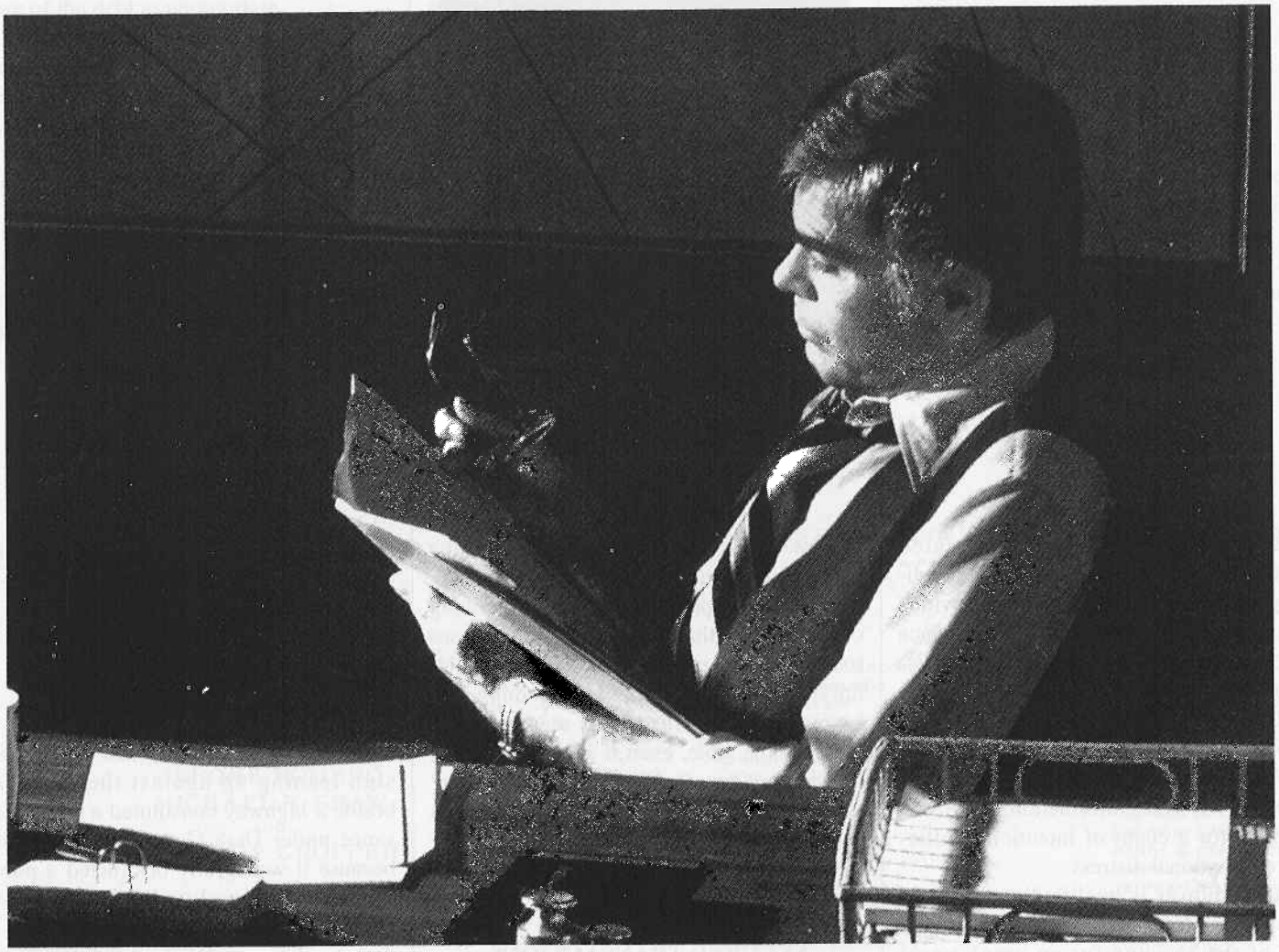
Congratulations Colleen!

Young Lawyers Division Sponsors Negotiation Workshop at Annual Bar Meeting

For more than twenty years Professor Gerald R. Williams, J. Reuben Clark Law School, has been studying the art of negotiating. He recently enlightened members of the Bar on his studies at the annual Bar meeting in Sun Valley, Idaho. Speaking before approximately 200 fellow Bar members, Professor Williams described the negotiating process as a ritual. He shared personal, and quite often humorous, experiences of the ritual aspects of negotiation. He also emphasized that as attorneys, it is important to recognize that negotiation occurs on two fronts. A lawyer negotiates with his own clients as well as opposing counsel. Professor Williams referred to this process as a "war on two fronts."

With more than 90% of both civil and criminal cases being settled before going to court, it is important for a lawyer to have strong negotiating skills. According to Professor Williams, becoming a "mature negotiator" is part of a life-time learning process. Hopefully, Professor Williams assisted those in attendance in taking their first step to becoming mature negotiators!

We put our entire corporation behind your client's personal trust



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We offer a complete range of trust services including personal, corporate, and testamentary trustee, custodian or agent and personal representative. For professional trust services of the largest trust department in Utah, we're right where you want us to be.

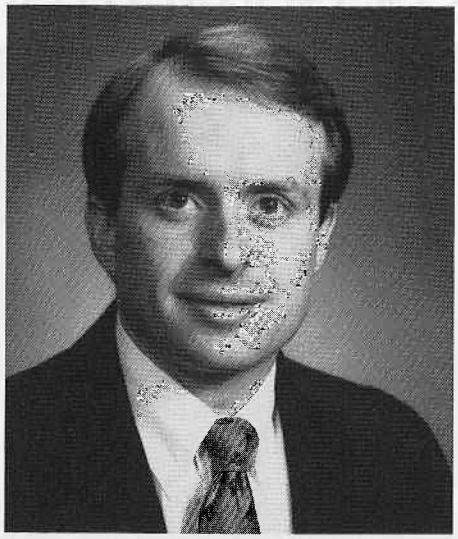
First Security Trust Division

We're right where you want us to be

Salt Lake	Provo	Ogden	St. George
Trust Department	Trust Department	Trust Department	Trust Department
David Halladay	Jeff Kahn	Gary Peterson	Gary Cutler
350-5859	379-2105	626-9557	628-2831

CASE SUMMARIES

By Scott Hagen



EMPLOYMENT LAW

Employee handbook that stated employees would be discharged immediately for certain infractions, but provided no investigatory procedures or grievance procedures, allowed the employer to discharge the employee if the employer *believed*, even erroneously, that the employee had committed such an infraction.

Furthermore, even if the discharge was based on incorrect information, there was no basis for a claim of intentional infliction of emotional distress.

An employer is qualifiedly privileged to tell employees and other interested parties of the reasons for an employee's discharge. The privilege is overcome only if the employer made defamatory statements with common law malice, i.e., spite or ill will.

Dubois v. Grand Central, 237 Utah Adv. Rep. 18 (April 13, 1994) (Judge Garff)

INSURANCE

Absent an express agreement to the contrary, a tenant is presumed to be a coinsured of the landlord for purposes of coverage of the leased premises. Consequently, the insurer may not pursue a subrogation action against the tenant based on the tenant's negligently causing damage to the leased premises.

GNS Partnership v. Fullmer, 237 (Utah Adv. Rep. 32 (April 18, 1994) (Judge Billings).

SEARCH AND SEIZURE

Law enforcement officers, while in the process of executing a valid search warrant, may search the personal property or clothing of persons not then residing at the premises so long as those persons are not actually holding or wearing the property or clothing. For example, police officers may search a purse lying on the table, even if it is owned by a transient visitor. If the visitor is "wearing" the purse, however, it is part of her person and beyond the scope of the search warrant.

State v. Jackson, 237 Utah Adv. Rep. 38 (April 19, 1994) (Judge Bench)

SECURED TRANSACTIONS

A seven-year lease agreement not subject to termination by the lessee and providing the lessee with an option to purchase for a nominal consideration at the conclusion of the lease is a secured transaction and thus governed by Article 9 of the Uniform Commercial Code.

McMahan v. Dees, 237 Utah Adv. Rep. 42 (April 20, 1994) (Judge Greenwood)

CRIMINAL LAW

Defense counsel will be found ineffective for failing to challenge a juror only in the extreme case where counsel's actions "could not conceivably constitute legitimate trial tactics."

The trial court did not err in allowing the adult victim of the rape to remain in the courtroom during the entire trial, even though she was a victim. *See* Utah R. Evid. 615. Furthermore, there was no error in allowing the victim's mother to testify concerning the victim's behavior following the rape.

State v. Cosey, 237 Utah Adv. Rep. 46 (April 21, 1994) (Judge Orme)

NUISANCE

Defendant's leaving a road construction sign leaning up against the guardrail beside a highway constituted a public nuisance under Utah Code Ann. 76-10-803 because it wrongfully obstructed a public road without legal authorization. However, the plaintiff was not entitled to damages because (1) the conduct was not specifically prohibited by statute and therefore was not "nuisance per se," and (2) defendant's conduct was not unreasonable because it was not "intentional, negligent, reckless or ultrahazardous."

Erickson v. Sorensen, Craig F. Construction, Inc., 237 Utah Adv. Rep. 50 (April 22, 1994) (Judge Orme)

INSURANCE

An injured worker may not bring a claim for lack of good faith and fair dealing against his or her employer's workers' compensation insurance carrier because there is no contractual privity between the insurer and the worker.

Savage v. Educators Insurance Co., 237 Utah Adv. Rep. 58 (April 25, 1994) (Judge Greenwood)

DIVORCE

Trial court erred in affirming husband's unilateral use of the marital estate's liquid assets to pay a marital debt. The court should have equally distributed the liquid assets and allowed the parties to pay their share of the debt as appropriate.

Trial court also erred in ordering parties to quit-claim a lot to a third party, because the third party was not a party to the action.

Finlayson v. Finlayson, 237 Utah Adv. Rep. 22 (April 13, 1994) (Judge Davis)

CRIMINAL LAW; SECURITIES

Conviction for securities fraud in violation of section 61-1-1 may be based on any fraud with a "sufficiently close relationship to the purchase or sale of the security to make it actionable." Thus, a securities representative's fraudulent failure to report sales of a security to his broker-dealer may itself be a violation, even though the broker-dealer was not a purchaser of the security.

State v. Harry, 237 Utah Adv. Rep. 27 (April 14, 1994) (Judge Davis)

CRIMINAL LAW

Trial court did not err in conditioning appointment of criminal investigator for indigent defendant on defendant's exhausting investigative material provided by the government.

A conviction of aggravated sexual assault and an acquittal of rape are not inconsistent verdicts because the two offenses require different elements. Furthermore, mere inconsistency in a jury verdict is insufficient to overturn a conviction.

State v. Hancock, 238 Utah Adv. Rep. 11 (April 28, 1994) (Judge Jackson)

INEFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel's failure to raise the statutory defense to criminal trespass was objectively deficient because from the record it appeared that the statutory defense applied and that there was not discernible tactical advantage in not raising it.

Salt Lake City v. Grotepas, 238 Utah Adv. Rep. 13 (April 29, 1994) (Judge Greenwood)

A Map of the World

By Jane Hamilton

Reviewed by Betsy L. Ross

Physical abuse has been the darling topic of the news media of late. It's not that it doesn't deserve attention, but I, like many, am rankled by the fact that abuse has been somehow "glamorized" by the extreme spotlight, and perhaps even become less emotionally accessible as it becomes more common to us. Jane Hamilton's "A Map of the World" presents a snapshot of abuse, B.S. (Before Simpson), but more importantly, lays bare the emotions, not just of abuse, but of relationships generally.

In Ms. Hamilton's story, the map by which we navigate our lives can be altered in an instant, with devastating results. And so it is with the Goodwin family. Living a bucolic life on a dairy farm in the Midwest, their lives unalterably change when their neighbor's two-year-old drowns in their pond while Alice Goodwin is tending her. The novel transcends the simple and attempts to explore the human condition, to explore love, grief, abuse and sadness. Upon the death of Lizzie, her mother Theresa confronts the deep grief of having lost a child, of being left with the yearning to see her graduate from high school, to marry, to have children of her own. Yet she learns a lesson about grief. A friend asks Theresa to describe the little two-year Lizzie's life in detail. In that exercise she learns to focus not on what she wouldn't have, but on the gift of what she had had in Lizzie.

The death of Lizzie was not the only test for Alice Goodwin. An even greater test of her mettle and of her family's strength occurs in Alice's arrest for sexual abuse of a child while she was acting as school nurse in the small Midwest town neighboring the dairy farm. Alice spends three months in jail before her husband Howard sells the farm in order to raise the $100,000 bail money. Alice's time in jail has permanent effects upon her and on her husband and two young children. And of course, the selling of the farm has unalterable effects on the family. Each of these changes is described by Ms. Hamilton with great detail and insight. The relationship between Alice and Howard is a focal point of the novel. At one point, while Alice is in jail, Howard explores the nature of love:

I felt very tired. I didn't know if I had ever loved anything. I guess I couldn't have said what it meant to love someone. We had a life together. Alice was my wife. Those things suggested an illusion and implied love.

There is much sadness in the novel. Sadness over the changes, over the loss of the good that existed. Yet there is a sense of evolution mixed with that sadness. And there is the recognition that sadness, too, can be sweet. So Howard bemoans the fact that sadness might be lost at the moment that he is sharing its intimacy with Theresa — sadness over the loss of Lizzie and his over the loss of Alice and both over the loss of the innocent, simple lives previously led:

Theresa and I had wept until we were finished. I had held her, wondering if it was true that a sorrow like hers, like ours, could eventually fade. I think I hoped that it wouldn't. I hoped that we would always be able to walk onto the porch, just the two of us, when everyone else was conveniently absent. I hoped that we would always be able to dip into that current of sadness.

The strength of the novel is its authentic approach to issues to which we may have become desensitized as a result of over-exposure or simple neglect. It is as difficult to uncover authentic emotions about sexual abuse as it is about love, grief, and relationships generally. Yet Hamilton attempts and does not fall into kitsch. It is so authentic, in fact, that I stopped to cry so often during my reading of the book I reminded myself of a lovelorn teenager.

The added bonus of this novel for the lawyer is its treatment of the case against Alice for sexual abuse. From a legal standpoint, the strategies and actual trial were also very authentic and interesting. I will not give away the result (I, myself, could not take the tension, and peeked ahead). Suffice to say the result is not ultimately important to the theme of exploration of change and the emotions of change.

At the end of the novel, I was left with the understanding that nothing in relationships is static. That life is about change, about events acting upon us and about our altered understanding of ourselves as a result of those polishing events. But the novel is clear that change is not always positive. Change can erase the good that existed along with the bad. Change can also hurt. Pain is very clearly expressed in the book. The title "A Map of the World" is a reference to the escape from pain. In jail, Alice retreats to "her own country," describing how the security she found as a child, having lost her mother and living with a distant father, she still seeks:

. . . I felt little different . . . than I had when I was nine years old, up in my bedroom at home, with the tray of colored pencils and the sheaf of papers at my side, at work on my map of the world. All those years ago I used to curl up, secure in my own country, an old stoic in a young body, sure that if I feigned indifference out beyond my bedroom door, I would not be hurt.

In dealing with very difficult and complex issues, Hamilton acknowledges the human longing for security without ignoring the uncertainty and change that is life. Writing for Hamilton must be, as reading this book was for me, a way to keep from floating through life without touching it. It is in attention to detail of emotions that we escape resignation and desensitization, that we treat serious topics seriously. Hamilton provides those details.

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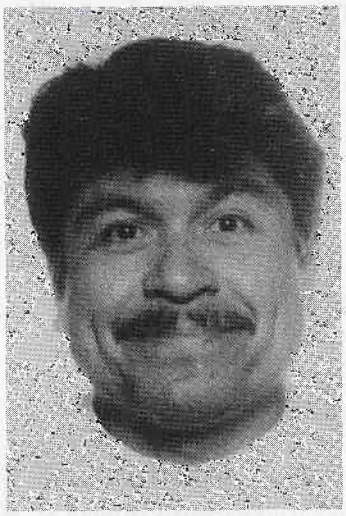
Utah Bar Foundation Recognizes Four Law Students For Ethical Standards and Commitment to Public Service



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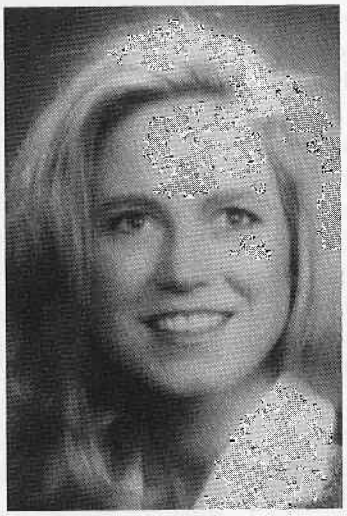
Jennifer Ann Turley



Alison D. Johnson

Barbara W. Sharp

Four awards to law students at the University of Utah and Brigham Young University have been granted by the Utah Bar Foundation. In presenting the awards, Ellen Maycock, 1993-94 Foundation President, said the four students exemplify the highest academic and ethical standards.

The Foundation's scholarships of $3,000 each, were awarded to John M. Renteria at the J. Reuben Clark Law School, Brigham Young University, and Jennifer Ann Turley at the University of Utah College of Law. The scholarship recipients were selected from a large field of applicants and selected primarily for their demonstrated commitment to public service.

Mr. Renteria is a law student who has a professional career of assisting minorities. He was director of the Institute of Human Resource Development where he aided migrant farm workers, and was director of Centro Civico Mexicano in the early 1980s. Since 1984, Mr. Renteria has served as a member of the board of Utah Legal Services. He expects to obtain his juris doctor next year.

Ms. Turley has served as a member of the national board of directors of Foodchain, a network of more than 300 food distribution programs. She helped organize the Utah Emergency Food Distribution System for the Utah Food Bank, and has been a family shelter monitor for the Travelers Aid Community Shelter and Resource Center. She is a juris doctor candidate for May 1996.

The Utah Bar Foundation also annually presents two Ethics Awards to students selected by the law schools. These graduating students who received an engraved pen & pencil set and a cash award of $250 are: Alison D. Johnson, who received her juris doctor from the University of Utah College of Law in May, and Barbara W. Sharp, who received her juris doctor from J. Reuben Clark Law School at Brigham Young University in April.

Ms. Johnson was managing editor of the *Utah Law Review*, and a William H. Leary Scholar. She was named the National Association of Women Lawyers Outstanding Woman Graduate from the University of Utah.

Ms. Sharp was executive editor of the *Journal of Public Law* and received merit scholarships for two years at BYU. She also served on the Student Legal Services Board and studied law for one summer at Oxford University, England.

Over the years, the Utah Bar Foundation has provided more than $1.45 million in grants and charitable contributions to Utah individuals, agencies and programs which provide free or low-cost legal aid, legal education, and other law-related services.

Case Profiles for Successful Mediation

By Marcella Keck, Esq.
Director of Mediation Services, Accord Mediation

An increasingly frequent question for mediators and attorneys is "How do I know when mediation is appropriate?" The easy answer is that there is no easy answer. It is simplistic and unrealistic to say that mediation will resolve every dispute and that it is an appropriate tool for every client. However, there are three variables which, when objectively evaluated, become good indicators for, or against, mediation. These are the legal nature of the dispute, the mindset of the client, and the "ripeness" of the case.

Legal Nature of the Dispute. First, evaluate whether the case is one which can be resolved through settlement or whether it is a case which necessitates a ruling from the Court. Disputes about the definition or scope of fundamental constitutional issues are often so rooted in principles that these disputes are often unable to be resolved through negotiation (for example, the legality of abortion rights, gay rights, or gun control legislation). The very nature of the definition of the dispute precludes either side's ability to voluntarily move from their positions.

Client Mindset. Second, from the client's perspective, s/he must be ready to settle, or must be willing to get to that point. The critical factor to consider is primarily the client's emotional status. Rarely does a client, or opposing party, fall cleanly within the categories described below. For most, the mediation process itself and the assistance and support of the parties attorneys helps them to emotionally prepare for and accept a settlement.

Mediation is most successful when clients:

– Have a desire to end the conflict. People must want to resolve the dispute in order to agree to a settlement. If the continuation of the conflict is desirable to the client, there is no incentive to compromise and therefore negotiation generally and mediation specifically will not work.

– Have a moderate or low hostility level. The client must be willing to let go of enough anger to address their own underlying needs and interests.

– Are willing to compromise/negotiate. Some movement is usually essential from both parties. On occasion one party will "roll over" after seeing the other party's rigid stance, but that is very rare and not to be expected.

– Are able to think rationally. In order for the parties to identify their true interests, evaluate their options and assess which of those options will meet their needs, they need to be able to think rationally. Some level of rationality is essential to any decision making process.

– Are able to communicate to some degree. The parties need to be able to exchange concerns and ideas. The mediator can facilitate communication between the parties and can make the process flow more smoothly, but the client must be able to communicate with at least the mediator.

– Are willing to accept the assistance of a third party. The clients must be willing to have the intervention of another person into their dispute. Usually, by the time the parties involve attorneys, this is not a problem. However, privacy issues are very important to many people and willingness to trust a third party neutral is not to be taken for granted.

– Have some pressure to settle. Cases often settle where there is some pressure to do so — the courthouse steps, for example. A trial date, pending vacation, upcoming relocation or potential contract are all pressure points.

Mediation is rarely successful when clients:

– Have serious psychological problems. Where people have serious psychological problems, they are often unable to think logically, free of undue pressure, and make thoughtful decisions. Seriously depressed clients may enter agreements which are inappropriate and delusional clients may enter agreements which they are not understanding or may fail to enter agreements because of concerns or problems which do not exist.

– Refuse to give up any control over the negotiation. If parties cannot negotiate, they are wasting their own, the opposing party's, and their own investment in the process. A party must be willing to submit to the mediator's process and be willing to look at options and move from their original position.

– Have consciously contributed to the parent alienation syndrome in their children (in divorce and child custody disputes). If a parent is consciously willing and intending to harm their child's relationship with the other parent, they are unwilling to give up sufficient control to negotiate and reach agreement. These clients usually must go to trial.

– Receive meaningful benefits through continuing the conflict. If the client is benefitting from the conflict, they are unlikely to resolve the conflict willingly. Some examples of benefit may include publicity, continued contact with the opposing party, and psychological support from family and friends.

– Have a history of chronic physical or severe psychological abuse between them. This, too, is an indicator of the client's ability to let go of sufficient control to negotiate. Where there is chronic physical or psychological abuse, the abuser's goal is control of the other party and they are most always unable to voluntarily give something to the other party.

The critical factors are whether each party can emotionally let go of their rigid positions long enough to talk to the other party and whether they enter into the negotiations in good faith. For mediation to be successful, each party must be willing to look at the other person's needs and be willing to accommodate those needs to some degree. An agreement will not be

reached if one party feels that their needs are not being met. If the client's goal in the dispute is a fishing expedition, harassment, vengeance or vindication, mediation will rarely, if ever, be successful.

"Ripeness" The "ripeness" of the case refers to whether the case is at a point where negotiation between the parties would be helpful. In tort cases, the question is often one of complete discovery. Have the parties exchanged the factual information necessary for them to make a decision. In divorce and child custody cases, the question is often whether the parties have both agreed or accepted that a certain course of action will follow, e.g. separation, divorce, modification, etc. In most divorce mediations, and in many other kinds of conflicts as well, the parties agree in the mediation process how they will go about accumulating data and sharing relevant information so the completing of discovery is not a prerequisite for participation in the process. However, in all mediation processes, the exchange of all relevant information is essential to the parties' being able to reach a resolution.

In conclusion, the selection of a case for mediation depends on whether the parties can resolve the dispute without judicial input, whether the clients are ready and able to negotiate, and whether the dispute is in a posture to move forward. There is no cookie-cutter formula for identifying which cases will be helped by the process and which will not. Often, it is a question of timing and the attorney can influence whether the process will be successful or not by exploring creative settlement options with the client prior to mediation.

CLE CALENDAR

17TH ANNUAL SECURITIES SECTION WORKSHOP

Date: August 19–20, 1994
Place: Sun Valley, Idaho
Time: Friday, August 19 — 8:30 a.m. to 1:00 p.m.
Saturday, August 20 — 8:30 a.m. to 12:30 p.m.
Fee: $125.00 for section members
$140.00 for non-section members
Registrations after August 8, 1994 add $20.00
Events: Scramble format golf tournament — $75.00
Info: A block of rooms has been reserved at the Sun Valley Resort in Sun Valley, Idaho. Please call 1-800-786-8259 to make your reservations. Please indicate you are with the Utah State Bar Securities Seminar when making your reservations.
CLE Credit: 8.5 hours CLE, including 1 in ethics

NLCLE WORKSHOP: EMPLOYMENT LAW PART 1 — TERMINATION, DISCRIMINATION AND TITLE 7 CAUSES OF ACTION

Date: Thursday, September 15, 1994
Place: Utah Law & Justice Center
Time: 5:30 p.m. – 8:30 p.m.
Fee: $20.00 for Young Lawyer Division members
$30.00 for all others
CLE Credit: 3 hours CLE

THE COMMON SENSE RULES OF TRIAL ADVOCACY — FEATURING KEITH EVANS

Date: Friday, October 14, 1994
Place: Utah law & Justice Center
Time: 9:00 a.m. – 4:30 p.m.
Registration at 8:30 a.m.
Fee: $165.00 pre-registration
$180.00 after September 30, 1994
CLE Credit: 6 hours CLE

NLCLE WORKSHOP: EMPLOYMENT LAW PART II — WORKERS COMPENSATION, UNEMPLOYMENT COMPENSATION AND SOCIAL SECURITY

Date: Thursday, October 20, 1994
Place: Utah Law & Justice Center
Time: 5:30 p.m. – 8:30 p.m.
Fee: $20.00 for Young Lawyer Division members
$30.00 for all others
CLE Credit: 3 hours CLE

DEPOSITIONS: TECHNIQUE, STRATEGY AND CONTROL — FEATURING PAUL LISNEK

Date: Friday, October 28, 1994
Place: Utah Law & Justice Center
Time: 9:00 a.m. – 4:30 p.m.
Registration at 8:30 a.m.
Fee: $150.00 pre-registration
$175.00 after October 14, 1994

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

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

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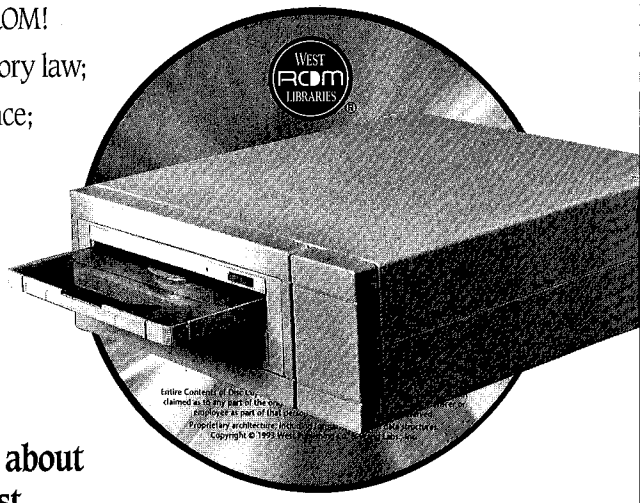

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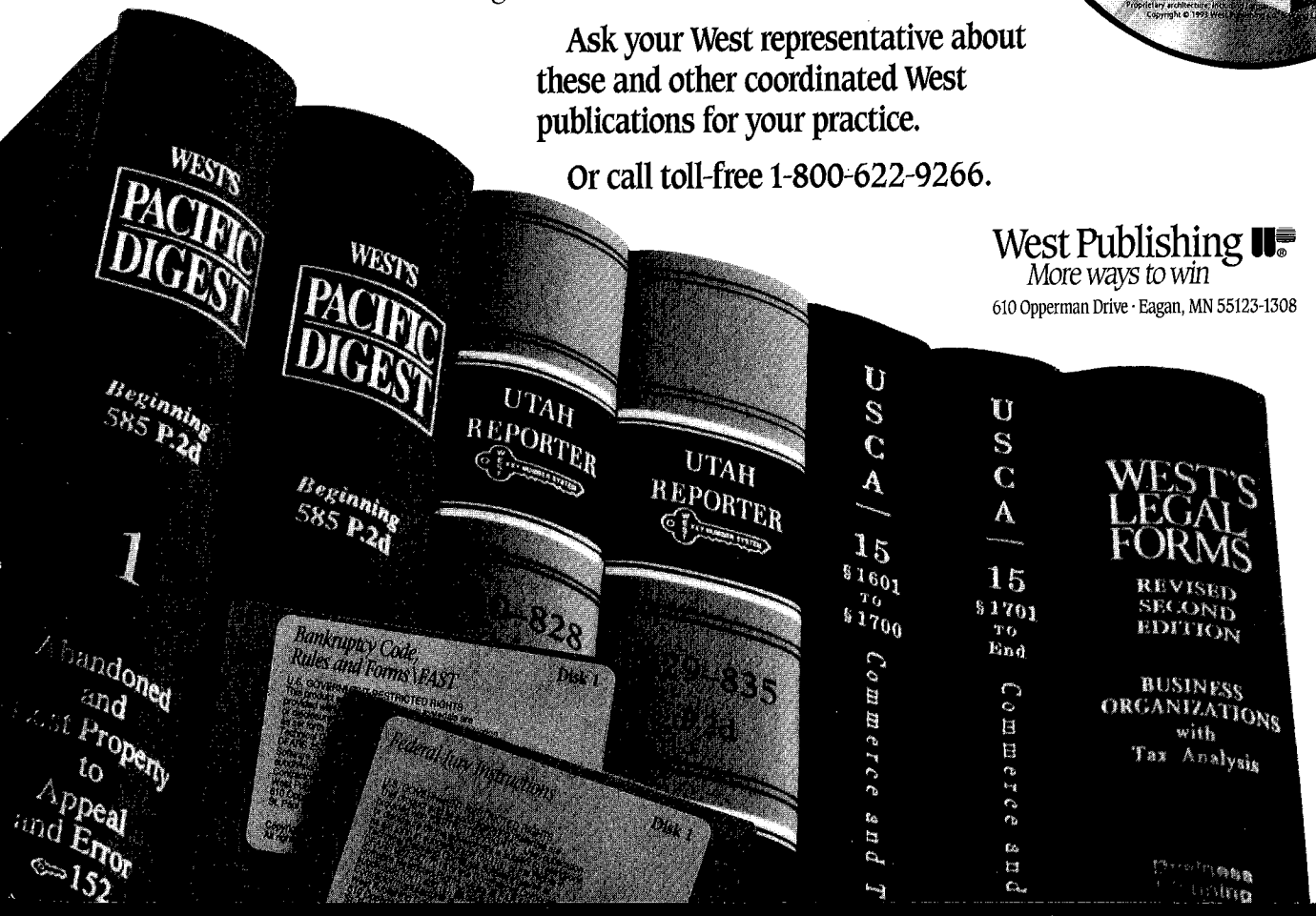

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Reg Cr 0      Ethics Cr 0          80*
Mr. William Holyoak
201 South Main Street #1800
P.O. Box 11898
Salt Lake City UT 84147
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